



Financial Markets Law Committee (“FMLC”)

Brexit—Advisory Group

Date: Thursday 14 June 2018

Time: 9.30am to 11.15am

Location: Bank of England, 20 Moorgate, London EC2R 6DA

In Attendance:

Joanna Perkins (Chair)	FMLC
Caroline Boon	Barclays
Thomas Donegan	Shearman & Sterling LLP
Paul Double	City of London Corporation
Jonathan Gilmour	Travers Smith LLP
Monica Gogna	Dechert LLP
Professor Trevor Hartley	London School of Economics
Alexander Hewitt	Dentons LLP
Jim Ho	Cleary Gottlieb Steen & Hamilton LLP
Ian Jameson	Sumitomo Mitsui Banking Corporation Europe Limited
Rasphal Kaul	Rabobank International
Geraldine Levy	Lloyd’s Banking Group
Anne MacPherson	Gibson Dunn & Crutcher LLP
John McGrath	Sidley Austin LLP
Sinead Meany	Bank of England
Michelle Moran	K&L Gates LLP
Ed Murray	Allen & Overy LLP
Richard Parlour	Financial Markets Law International
Jan Putnis	Slaughter and May
Marke Raines	Raines & Co
Professor Arad Reisberg	Brunel University London
Martin Sandler	PricewaterhouseCoopers LLP
Andrew Seager	Taylor Wessing LLP
Martin Thomas	Altima Partners LLP
Rachel Toon	FMLC
Thomas Willett	FMLC

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Minutes:

1. Introduction.

1.1. Joanna Perkins opened the meeting and delivered a brief introduction.

2. Update on amendments to the Withdrawal Bill (Paul Double)

2.1. Paul Double gave a brief overview of the proceedings related to amendments to the European Union (Withdrawal) Bill (the “**Withdrawal Bill**”) during the last two days in Parliament (12 and 13 June 2018), where all the amendments proposed by the House of Lords were reversed, some with government amendments in lieu. He highlighted the following three points as being most relevant to the work of the FMLC:

- i. The meaningful vote requirement inserted by the House of Lords was replaced with a government amendment setting out an approval mechanism based on a “neutral motion” agreed by Mr Speaker. If the motion is not accepted by Parliament, a minister will be required to make a statement within 28 days setting out how the government “proposes to proceed”;
- ii. On Northern Ireland, the Lords’ clause preventing the establishment of new border arrangements was replaced by a clause preventing the establishment of physical infrastructure including border posts, checks and controls in a context of preserving the co-operation enshrined in the Belfast Agreement; and
- iii. The Lords’ amendment preventing the repeal of the European Communities Act 1972 until a government statement had been laid in Parliament on the steps taken to negotiate the U.K.’s participation in a customs union was replaced by a government amendment requiring a parliamentary statement on the steps taken to negotiate a “customs arrangement” with the EU.

2.2. Mr Double noted that among the most productive efforts to raise awareness of the need for amendments to the Withdrawal Bill had included matters raised by the FMLC’s work on interpretation. A letter on the use of official materials lodged by the Solicitor General had been particularly welcome and the government had undertaken to consult on ‘ambulatory references’.

- 2.3. Mr Double referred to a further bill dealing with the Withdrawal Agreement and its implementation. This was anticipated for the autumn and ought to provide further opportunities to raise points related to legal certainty.
- 2.4. Mr Double also drew attention to the meeting of the House of Lords E.U. Financial Affairs Subcommittee at which the Chair of the FMLC's Working Group on Robustness of Financial Contracts, Professor Hugh Beale, and FMLC Member, Simon Firth, gave evidence on contractual continuity post-Brexit.¹
- 2.5. Dr Perkins briefly mentioned additional provisions under the Withdrawal Bill in the form of the statutory instruments are expected shortly. Dr Perkins also mentioned that, in April 2018, HM Treasury had published a draft statutory instrument entitled the *Financial Regulators' Powers (Technical Standards) (Amendment etc) (E.U. exit) Regulations 2018* together with a covering note.² Finally Dr Perkins drew attention to the recent publication by HM Government setting out the framework for the future U.K./E.U. civil judicial partnerships, focusing on the U.K.'s proposals for continued civil judicial cooperation.³

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

- 3.1. Dr Perkins noted that there are currently four projects in the later stages of preparation. These consider the impact of Brexit on (i) Retained Law; (ii) Emissions Allowances; (iii) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the “**Bank Recovery and Resolution Directive**” or the “**BRRD**”) and Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (the “**CIWUD**”); and (iv) Robustness of Financial Contracts.
- 3.2. The Secretariat is also focusing on preparation for a coordination exercise between organisations in the City for when the large volume of statutory instruments under the

¹ The full transcript of this meeting is available here: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-financial-affairs-subcommittee/contractual-continuity-post-brexit/oral/83363.html>.

² The draft statutory instrument and covering note is available here:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700714/180418_DRAFT_Financial_Regulators_Powers_Technical_Standards_Amendment_etc_EU_Exit_Regulations_2018.pdf
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700713/Covering_note_for_draft_Financial_Technical_Standards_SI.pdf

³ Department for Exiting the European Union, *Framework for the UK-EU partnership Civil judicial cooperation*, (13 June 2018), available at: <https://www.gov.uk/government/publications/framework-for-the-uk-eu-partnership-judicial-civil-cooperation>

Withdrawal Bill are published. The coordination exercise is in place to minimise overlap of work and the Secretariat has written to the International Regulatory Strategy Group (“**IRSG**”), the City of London Law Society (“**CLLS**”) and Brexit Law Committee to arrange a meeting to discuss each organisation’s role.

4. Plenary discussion on recent Brexit-related developments

- 4.1. When opened to discussion, one participant asked whether different versions of the statutory instruments have been created to accommodate the alternative scenarios of a hard or soft Brexit. Another member noted that planning for every eventuality would be a vast undertaking and, in the limited time available before the exit date, there is unlikely to be enough time to create multiple versions of the instruments.
- 4.2. One member asked for an update on the FMLC’s work on contractual continuity and when the paper is expected to be published. Dr Perkins explained that the Chair of the working group, Professor Beale, had returned his comments on the paper and that FMLC Research Manager, Venessa Parekh, will be working to formalise the final draft to present to the Committee. Once this paper has been published, Dr Perkins mentioned that the Committee have resolved to focus on other questions concerning contractual continuity after Brexit, including the possible use of human rights law.
- 4.3. A participant mentioned that the International Swaps and Derivatives Association (“**ISDA**”) is in the process of preparing its own paper on contractual continuity. The participant suggested the possibility of liaising with ISDA to coordinate the conclusion of the papers and the publication date in order to cultivate a greater engagement with the authorities.
- 4.4. Another member cited the issue of the enforceability of English law contracts when passporting rights are withdrawn following Brexit. It was emphasised that clarity on this issue would be a significant step forward.