



Financial Markets Law Committee (“FMLC”)

Asset Management Scoping Forum

Date: Thursday 24 May 2018

Time: 1.30pm to 3.00pm

Location: Clifford Chance LLP, 4 Coleman St, London EC2R 5JJ

In Attendance:

Owen Lysak (Chair)	Clifford Chance LLP
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Richard Chapman	AB Trading Advisors
Iain Cullen	Simmons & Simmons LLP
Monica Gogna	Dechert LLP
Jacqueline Jones	Clifford Chance LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Jon May	Marshall Wace LLP
Michelle Moran	K&L Gates LLP
Neil Robson	Katten Muchin Rosenman UK LLP
Palvi Shah	J.P. Morgan Asset Management
Ezra Zahabi	Akin Gump LLP
Virgilio Diniz	FMLC
Thomas Willett	FMLC

Regrets:

Matthew Baker	Bryan Cave Leighton Paisner LLP
Philip Bartram	Travers Smith LLP
Julian Eustace	Schroders Investment Management Ltd
Martin Ferreiro Subi	BlackRock
David Gasperow	Orbis Investments
Atholl Wilton	CQS (U.K.) LLP

Registered Charity Number: 1164902.

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Minutes:

1. Introduction.

1.1. Owen Lysak opened the meeting and delivered a brief introduction.

2. Administration: the FMLC—a charity (Virgilio Diniz)¹

2.1. Virgilio Diniz described to the members the FMLC’s transition from an independent body established by the Bank of England to its current status as a registered charity under the Charity Commission. He elaborated on the ways in which the FMLC’s charitable remit has an impact on its work and conduct, including very closely-guarded requirements to be transparent and impartial.²

2.2. One member noted that without the FMLC facilitating radar groups such as the Asset Management Scoping Forum, experts would not have a space to meet and discuss issues of legal uncertainty. To this, another participant mentioned that Britain’s secession from the European Union (“**Brexit**”) is a key issue where this and other FMLC Scoping Fora could add value.

2.3. Concerning the ways in which the FMLC can better amplify its message and serve its charitable remit, members identified seminars as the most effective medium to engage audiences.

2.4. One member also suggested the possibility of a round table discussion with the FMLC Finance and Technology Scoping Forum to discuss related issues of legal uncertainty.

3. Financial Conduct Authority (“FCA”) Asset Management Market Study recent [policy statement on part of the package remedies \(PS18/8\)](#), and a [second consultation paper relating to the rest of the package of remedies \(CP18/9\)](#) (Monica Gogna)

3.1. Monica Gogna delivered an overview of the recent policy statement (“**the statement**”) and second consultation paper on the FCA Asset Management Market Study.

3.2. Ms Gogna explained that the policies in the statement contribute to a wider package to improve competition in the asset management industry for consumers. After providing a brief overview of the policy statement, Ms Gogna highlighted that rather than using the term “value for money” the final rules have been redrafted to clarify that fund charges should be

¹ Please see Appendix I below.

² For further information as to how you can support the work of the FMLC, please contact Thomas Willett at forums@fmlc.org.

assessed in the context of the overall service and value delivered. Communicating and making these well-known were identified as potential challenges. Issues concerning the broad scope of the statement, the lack of granular detail and what “comparable market rates” translate to in practice were also noted by Ms Gogna.

3.3. Ms Gogna also mentioned that the statement applies to authorised fund managers (“AFMs”) in the U.K. and that they appear to be superimposing U.K. rules across jurisdictions and queried if this was intended.

3.4. The proposed rules requiring AFMs to appoint independent directors to their board was also discussed. One member communicated their clients’ concern in where to find such directors and training them, so as to deal with details.

3.5. It was agreed that the Forum should keep a watchful eye on any developments arising from the statement.

3.6. The consultation paper was addressed next which proposes changes to the FCA’s rules and guidance for AFMs. Ms Gogna specifically mentioned the proposed rules that require AFMs to explain in a fund’s prospectus why they have set one or more benchmarks as a constraint, target or comparator for a fund.

3.7. The members queried the status of such guidance and where this leaves firms in terms of uncertainty. In response, a participant highlighted the difficulty for clients to navigate between strict rules and statuses, emphasising the difficulty in deciding what approach they should take and what status this follows. Members agreed that it might not do well to query these uncertainties, as they allow for greater flexibility when navigating guidance.

3.8. Another member mentioned the jurisdictional issue for cross-border clients and if they are required to update their global policy in light of new guidance and rules, and to comply with the U.K. rules.

3.9. Despite the evidence of uncertainties, the members ultimately agreed that the FMLC might not be the best body to raise these questions with.

4. Customer due diligence under Regulation 28(10) of the Money laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017

4.1. In the absence of Phil Bartram, Mr Lysak led this discussion.

- 4.2. Following the introduction to this topic by Mr Bartram at the previous meeting, Mr Lysak explained the uncertainty in whether the regulation requires a firm to verify the identity of authorised signatories in every case.³
- 4.3. The scope of this regulation was brought into question in the context of a U.K. asset manager managing a fund in Luxembourg or Ireland. One member queried whether the regulations for customer due diligence in Luxembourg or Ireland would take effect, rather than U.K. regulation.
- 4.4. Mr Lysak suggested that the conclusion reached is that it depends on the business relationship definition. Therefore, when a firm is dealing directly with a corporate customer, no other person/entity is acting on behalf of that corporate customer and therefore does not make sense to make a distinction between an individual signing “on behalf of” or “by” the company. In any case, the client would still be the fund.

5. Delegation under MiFID II (Mark Kalderon)

- 5.1. Following Mark Kalderon’s presentation on unresolved issues under Directive 2014/65/EU on markets in financial instruments (“**MiFID II**”) at the Q1 meeting, he returned to expand upon issues of uncertainty regarding delegation under MiFID II.⁴
- 5.2. To begin, Mr Kalderon identified the Article 31(1) of the Commission Delegated Regulation (EU) supplementing Directive 2014/65/EU (the “**MiFID II delegated regulation**”) on outsourcing critical or important operational functions as a starting point. He outlined questions which arise in the context of outsourcing to non-European Economic Area (“**E.E.A.**”) service providers; primarily whether they are required to comply with MiFID II and if they need to impose equivalent contractual obligations to contractors. He highlighted the issue of delegation and suggested that it needs to be reviewed at the E.U. level (it is centralised and not dependent on national Member States). He explained that and the uncertainty surrounds the concept of the equivalence of contractual obligations, whether it should be a broadly substantial equivalence or a very narrow equivalence when it comes to Third Countries.
- 5.3. Mr Kalderon then touched upon the European Commission Question and Answer (“**Q&A**”) on MiFID I, where a question has been asked about the application of MiFID when outsourcing of portfolio management to third country investment firms.

³ This topic was introduced under item six at the Q1 2018 Asset Management Scoping Forum meeting, minutes of which can be located here: <http://fmlc.org/asset-management-scoping-forum-meeting-22-february-2018/>.

⁴ *Ibid*, item five.

- 5.4. Next, Mr Kalderon mentioned the correspondence between the Alternative Investment Management Association (“**AIMA**”) and the FCA. Through their communication, the FCA explained that Article 31 does not give rise to apply MiFID where there is delegation to a Third Country firm as long as the firm takes steps to ensure the outsourced service provides substantively equivalent outcomes for its clients as they would expect to receive from relevant investor protection provisions in MiFID II. Further to this, the views of The City of London Law Society (“**CLLS**”), as reflected in correspondence with the FCA, were similar in that they concluded a delegate is not necessarily contractually required to comply with MiFID obligations, provided that the investment firm is satisfied equivalent outcome is achieved for the client. The Forum members agreed that further clarity from the FCA would be helpful.
- 6. European Commission's proposed directive amending the existing regimes relating to the cross-border marketing of AIFs and UCITS (the “Amending Directive”) and a new regulation seeking to standardise national requirements relating to the cross-border distribution of funds within the E.U. (the “Amending Regulation”) (Owen Lysak)**
- 6.1. Mr Lysak highlighted the main points deriving from the proposed directive amending the existing regimes relating to the cross-border marketing of alternative investment funds (“**AIFs**”) and undertakings for collective investments in transferable securities (“**UCITS**”) and the new regulation seeking to standardise national requirements relating to the cross-border distribution of funds within the E.U. These were noted as:
- i. The attempt to introduce a definition of pre-marketing and re-introducing the concept of whether a fund actually exists;
 - ii. Enhanced requirements for marketing communication to ensure a level playing field and the same level of investor protection across Member States, specifically presenting the risk and rewards for purchasing units or shares of AIFs and UCITS in an equally prominent manner; and
 - iii. Removing the imposition for firms to establish local facilities in each Member State where marketing activities are carried out, electronic or other means of distance communications with investors is proposed.
- 6.2. While the Forum members did not identify any issues of legal uncertainty, they did agree to note these proposals for future discussion.

7. Any other business

- 7.1. Forum members noted that the next meeting of the Asset Management Scoping Forum will be held on Thursday 6 September between 1.30pm and 3.00pm.

Financial Markets Law Committee: a charity (And what that really means)



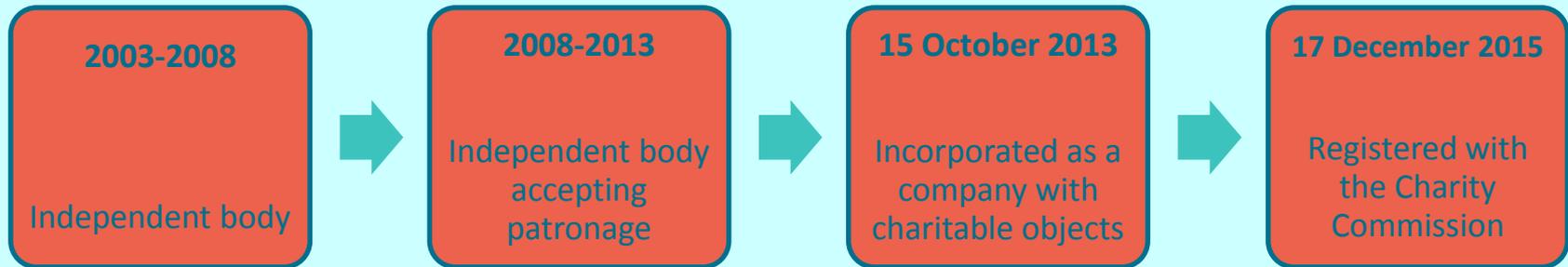
Virgilio Diniz, Project Manager

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The road to incorporation

- In **2003** the Bank of England established the FMLC as an independent organisation solely responsible for its own recommendations.
- In **2008**, the FMLC took a step towards greater independence by accepting funding from patrons.
- In **October 2013** the FMLC achieved structural self-sufficiency by **incorporating under charitable articles of association**.
- In **December 2015** the Charity Commission accepted the FMLC's application to **register as a charity**.



The FMLC's charitable remit



According to the charitable remit, the FMLC has a tripartite mission:

- to *identify* relevant issues (the **radar** function);
- to *consider* such issues (the **research** function); and
- to *address* such issues (the **public education** function).

Reduced legal uncertainty and risk is in the public good; the *radar* and *research* functions are somewhat self-explanatory in this regard. The *public education* function is a key aspect of the FMLC's status as a charity, and is addressed in the following ways:

- All FMLC papers, presentations/speeches and correspondence are freely available via the FMLC website.
- The FMLC seeks to raise the profile of its research with those who are best positioned to implement solutions.□This is achieved primarily through correspondence: the FMLC maintains active correspondence with regulatory and legislative groups around the world, particularly HM Treasury and the European Commission.
- Most FMLC events (with the exception of Patrons' events) are free to attend by members of the public.
- The FMLC also acts as a bridge to the judiciary, a task it carries out primarily by organising seminars to brief senior members of the judiciary on aspects of wholesale financial markets practice.

Transparency...

The FMLC follows the Charity Commission's guidance with the aim of maximising transparency. To this end, the FMLC:

- is registered with—and submits financial data to—the European Transparency Register;
- publishes full lists of both Patrons and Members on its website;
- is regularly audited by an independent accountancy firm;
- provides funding/expenditure breakdowns on request;
- publishes the minutes of Committee meetings to its website;
- publishes the agendas/minutes of every Scoping Forum meeting on its website;
- maintains policies governing conflict of interest, risk management and volunteer management; and
- remains independent from the Bank of England, government or legislative bodies and the financial sector itself..



...and impartiality



Since its creation the FMLC has been an independent body solely responsible for its own views and research. The Bank of England does not guide or submit input to the FMLC's reports. Anyone—including members of the general public—can raise issues of legal uncertainty for the Committee to investigate.

The FMLC does not comment on or seek to influence matters of policy. Issues relating to policy rather than solely to legal uncertainty are rejected.

The FMLC is dedicated to impartial consensus; for this reason the absolute maximum number of members from a single organisation is two individuals for a Scoping Forum, and one for a Working Group.

Scoping Forums have no *vires* to initiate projects or pass resolutions affecting the FMLC. Substantive issues of legal uncertainty are proposed by the Secretariat to the FMLC as a topic which may require further action.

Papers drafted by Working Groups are submitted to the entire Committee for review to ensure accuracy, objectivity and impartiality.

The FMLC is supported entirely by patronage. Patronage relates to funding only, there are no further contribution expectations or requirements and no special treatment for Patrons apart from seasonal social events.

Future endeavours/ can you help?

The FMLC's educational remit is theoretically endless: there are always more financial markets participants, regulatory/government bodies and members of the public to keep informed of our work.

To that end, the FMLC is currently researching or pursuing the following:

- A full revamp of the website, focusing on accessibility and greater sharing of materials.
- Boosting attendance of FMLC events by members of the general public.

The FMLC is also considering new ways to disseminate its research, and in future may investigate:

- Recording/broadcasting solutions for events to allow greater access.
- Summarising and disseminating the FMLC's work in easily digestible media formats such as short videos or podcasts.

The FMLC is grateful for suggestions on how to amplify its message, better to serve its charitable function and the general public. Can you help?