



Financial Markets Law Committee (“FMLC”)

Finance and Technology Scoping Forum

Date: Thursday 9 August 2018

Time: 2.00pm to 3.25pm

Location: The Law Society's Hall, 113 Chancery Lane, London WC2A 1PL

In Attendance:

Catrin Lewis (Chair)	The Law Society
Nikita Aggarwal	University of Oxford
Cat Dankos	Herbert Smith Freehills LLP
Jonathan Gilmour	Travers Smith LLP
Monica Gogna	Dechert LLP
Joel Harrison	Milbank Tweed Hadley & McCloy LLP
Tessa Jones	FIA
Suhail Khawaja	Wilmington Trust
Helen McGrath	Stripe
John Taylor	Queen Mary University of London
Virgilio Diniz	FMLC
Joanna Perkins	FMLC
Thomas Willett	FMLC

Guest Speakers:

Kyle DuPont	Ohalo Limited
Timothy Spangler (dial in)	Dechert LLP

Regrets:

Antony Beaves	Bank of England
John Casanova	Sidley Austin LLP
Maya Chilaeva	
Simon Evers	Crowell & Moring
Andrew Harvey	Global Financial Markets Association (“ GFMA ”)
Richard Hay	Linklaters LLP
Carolyn Jackson	Katten Muchin Rosenman LLP
Lorraine Johnston	Ashurst LLP

Registered Charity Number: 1164902.

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Siân Jones	Gibraltar Financial Services Commission
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Ben Kingsley	Slaughter and May
Lewis Lee	CLS Services Ltd
Sarah Lewis	Cleary Gottlieb Steen & Hamilton LLP
Oliver Linch	Shearman & Sterling (London) LLP
Philippa List	Societe Generale
Fiona Maclean	Latham & Watkins
Ciarán McGonagle	International Swaps and Derivatives Association, Inc. (“ ISDA ”)
Simon Puleston Jones	FIA
Deborah Sabalot	Deborah A. Sabalot Regulatory Consulting
Nicole Sandler	Barclays Bank Plc
John Salmon	Hogan Lovells International LLP
Michael Sholem	Davis Polk & Wardwell London LLP
Ian Stevens	CMS Cameron McKenna Nabarro Olswang LLP
Simon Toms	Allen & Overy LLP

Minutes:

1. Introductions

- 1.1. Catrin Lewis opened the meeting and delivered a brief introduction.

2. Administration: Lifecycle of a Project (Joanna Perkins)¹

- 2.1. Joanna Perkins described to the members how new issues of legal uncertainty on which the FMLC can undertake work are raised. She elaborated on the Committee’s process of adopting new projects, how working groups operate, the publication drafting process and the profile of past FMLC publications.
- 2.2. One member mentioned that August is a difficult time to hold working group meetings, owing to summer holidays.
- 2.3. Another participant asked if the FMLC holds public sessions where new publications can be discussed in an open forum. In response, Dr Perkins mentioned that she is tasked with raising the profile of the FMLC publications in various speeches and presentations she is

¹ Please see Appendix I below.

invited to deliver throughout the year which sometimes give rise to a discussion about the analysis offered in the FMLC's reports.² The participant suggested that academic institutions might be willing to lend help in holding public sessions to discuss new FMLC publications.

3. Evolution of U.S. regulatory position on digital assets (e.g. cryptocurrency) and its impact globally (Timothy Spangler)

3.1. Timothy Spangler delivered an outline of the U.S. regulatory position on digital assets and its global impact on the use of finance technology ("**FinTech**").

3.2. He began by providing an overview of the developing position of the U.S. Securities and Exchange Commission ("**SEC**") on cryptocurrencies, initial coin offerings ("**ICOs**") and blockchain since Chairman Jay Clayton's December 2017 Statement.³ The Chairman's interview in June 2018 was then cited in which he expressed the view that Bitcoins are not a security, but instead act as a replacement for sovereign currencies. Mr Spangler described this as real progress and a commitment by the regulators to understand the technology.

3.3. Mr Spangler explained that with greater understanding of the technology, different digital assets are now more defined and can be categorised into three "regulatory baskets" whereby: (i) virtual currencies are seen as a means of exchange; (ii) security tokens are defined as an investment contract as a way of raising money to build networks in the anticipation of future profits; and (iii) utility tokens are viewed to be issued once a network has been built and can be used in the future to purchase a good or service offered by the issuer.

3.4. With these definitions, it was suggested that a digital asset in January could be classed as a security, but with time and the decentralisation of the network, the asset may no longer be classified as a security in December. Mr Spangler elaborated further by stating that for a decentralised network to run, a digital asset needs to move around the network. If all digital assets are classified as securities, this could destroy the notion of the technology.

3.5. Concluding his remarks, Mr Spangler noted that there is a responsibility to categorise cryptocurrencies. Yet, when faced with the question whether bitcoin is a security, commodity or currency, it is better to think of it as just software. You could, for example, take the code of a PowerPoint presentation and turn it into a security under the Howey Test. Understanding the technology of the software is the key to classifying and regulating digital

² A comprehensive list of speeches delivered by Joanna Perkins can be found here: <http://fmlc.org/Content/presentations/>.

³ Clayton, J. (2017) "Statement on Cryptocurrencies and Initial Coin Offerings", available at: <https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11>.

assets. Mr Spangler ended his talk by conveying his optimism for the transformation of regulation over the next few years.

3.6. When given the opportunity for questions one Forum member asked if Mr Spangler could elaborate on his remarks that Bitcoin is just “software”, and queried how code is not the same as a record or ledger. Mr Spangler explained that in actuality, what we refer to as Bitcoin is lines of code running simultaneously on thousands of computers using blockchain protocols as an organisational principle and communicating with each other regularly to confirm consensus on their ledgers. The software runs a ledger, comparable to running a record keeping device, and whatever assets are owned are kept track on the ledger. Code can be made into anything we want, for example, the terms of a bond or loan, but when looking at a basic decentralised network, looking at assets being moved around it is important to think of them as software.

3.7. Another participant asked if there has been any cross-jurisdictional coordination on the regulation of digital assets. Mr Spangler stated that he has not seen any evidence of a global coordination effort. Networks are, however, still being built, with Mr Spangler emphasising the need for regulators to keep up with the developing technology.

4. The Rise of the Cloud and How to Stay Dry (Kyle DuPont)⁴

4.1. Kyle DuPont began his presentation on cloud computing by detailing the history of computers, from the first mechanical computer that could do basic mathematical calculations to the 1970s and 80s when networking resulted in the ability to send data from one machine to another and reference that information from a program.

4.2. Mr DuPont then addressed the arrival of cloud computing in 2000 and stated that whereas the internet democratised access to information, the cloud allows anyone to have access to computing resources that only large corporations and governments were able to build previously. The cloud was defined as standardised computer services that are not necessarily owned by the user, this helps to reduce costs and brings more security by scale. Now, cloud computing is a mature technology that is widely used.

4.3. Data, however, can be a security risk when it is everywhere; Mr DuPont stressed that storing and managing such data needs to be considered.

⁴ Please see Appendix II below.

- 4.4. Turning to the future, metadata was identified as the next wave of computing. Metadata was defined as context, which could be as simple as attaching the concept of a “name” around a word. Currently, Mr DuPont explained, there are exabytes of data that very few companies can access or understand owing to the lack of context. The next wave of computing was described as democratising access to data comprehension and will be reliant on technologies such as artificial intelligence (“AI”) and blockchain.
- 4.5. Concluding his presentation, Mr DuPont posed the following questions: (i) is privacy of data a right; and (ii) how should legal systems work in this context.
- 4.6. When the members were given the opportunity to ask questions, one participant asked Mr DuPont why he thinks that data which identifies the data subject is personal data when all data that has been given to an individual has been done so because it relates to him or her. The participant highlighted that Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (“**General Data Protection Regulation**” or the “**GDPR**”) adopts a wide definition of personal data. Mr DuPont responded by acknowledging the difficulty of drawing definitional boundaries around data ownership.
- 4.7. The regulation of initial coin offerings (“**ICOs**”) and blockchain was then discussed by members. Who should regulate these technologies was considered, along with whether there should be convergence between more than one authority on regulation and whether blockchain should be regulated at all.
- 4.8. Lastly, the adoption of AI technology was discussed. A participant suggested that there is much discussion over the use of AI but that adoption of the technology has been limited to date.
5. **Plenary discussion on recent developments and legal uncertainties concerning finance and technology (led by Catrin Lewis)**
 - 5.1. The European Banking Authority (“**EBA**”) consultation on its draft Guidelines on outsourcing was mentioned, along with the topic of smart contracts.
6. **Any other business**
 - 6.1. Forum members noted that the next meeting of the Finance and Technology Scoping Forum will be held on Thursday 8 November between 9.00am and 10.30am.

Lifecycle of a Project

Joanna Perkins, FMLC CEO

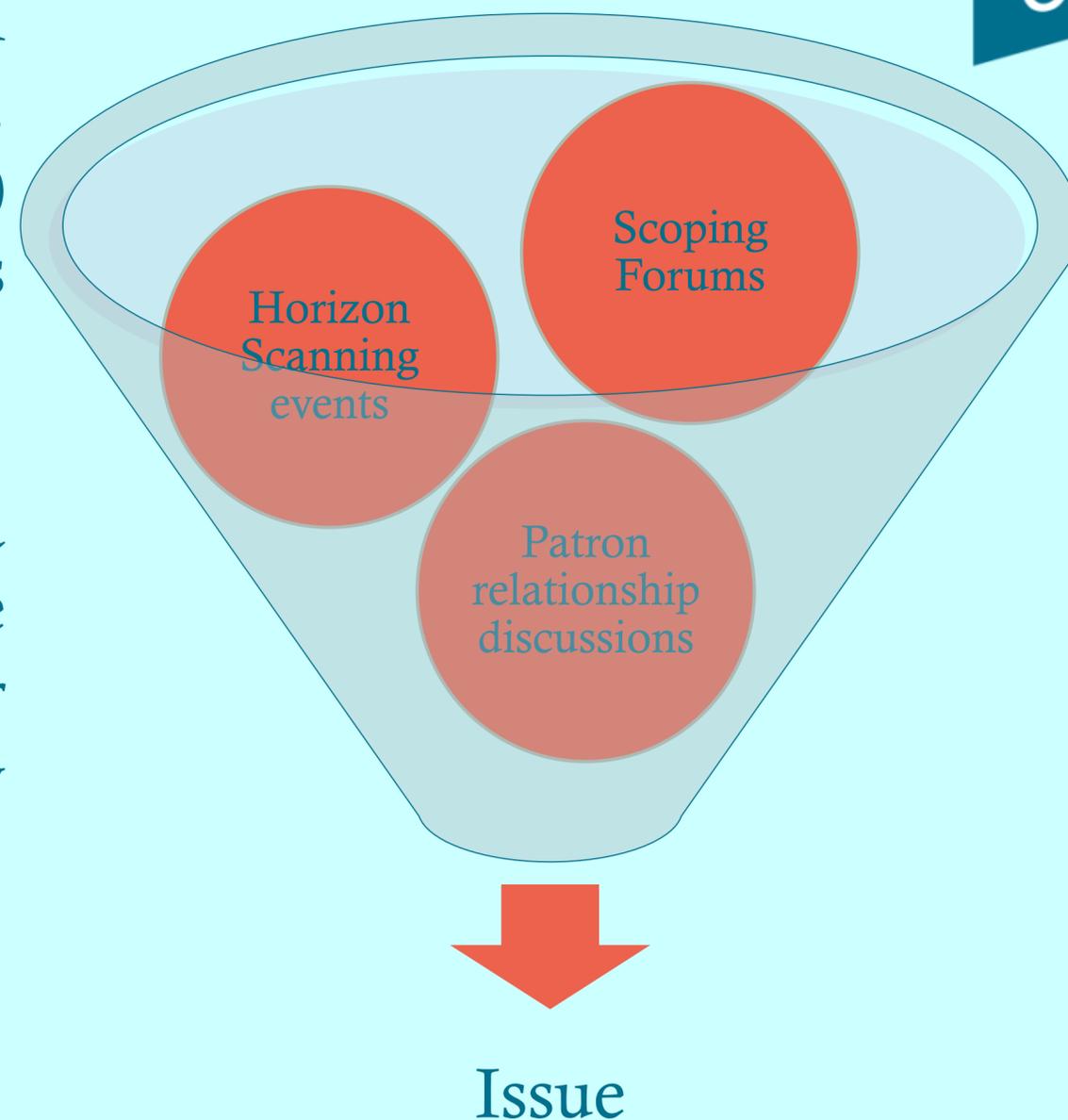


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How an issue of legal uncertainty is raised

- New issues of legal uncertainty on which the FMLC can undertake work are raised in Scoping Forum meetings, bilateral radar meetings with Joanna Perkins (FMLC CEO) and during monthly Patron relationship calls with members of the Secretariat.
- Once an issue is raised, the Secretariat usually asks for a briefing note to be prepared by the person(s) making the recommendation. This is then put before the Committee for their consideration. (The FMLC Secretariat will normally offer formatting and other assistance in preparing the brief.)



The brief

FINANCIAL MARKETS LAW COMMITTEE (“FMLC”)

Briefing Note: Issues of Legal Uncertainty on Brexit and Judicial Interpretation



1. Introduction

1.1. Following the referendum in June 2016, in which the U.K. voted to withdraw from the European Union, the FMLC established a High Level Advisory Group (“HLAG”) of experts to give direction to the Committee’s work relating to Brexit. At a meeting of the HLAG in December 2017, members of HLAG recommended that the FMLC establish a Working Group to identify potential legal uncertainties arising from the interpretation by U.K. courts of autonomous E.U. legal concepts which appear in received E.U. legislation as it is incorporated into U.K. law

1.2. An overview of HM Government’s proposal to incorporate E.U. law into the U.K. and the various legal complexities relating to the interpretation of autonomous E.U. terms are set out below.

2. The European Union (Withdrawal) Bill—and domestic preparations for Brexit so far

1.1. In the run up to the referendum, those who campaigned for withdrawal from the E.U. argued for an end to the principle of the supremacy of E.U. law and judgments of the European Court of Justice (“ECJ”). The European Union (Withdrawal) Bill (the “Withdrawal Bill”), introduced into the House of Commons on 13 July, aims to fulfil this purpose by: (i) repealing the European Communities Act 1972 on the day the U.K. leaves the E.U.; and (ii) incorporating E.U. law as it stands into domestic law. The Withdrawal Bill also provides guidelines for a new relationship between domestic law and U.K. law.

2.1. Clause 5 of the Withdrawal Bill states that the principle of the supremacy of E.U. law will not apply to any enactment or law passed or made on or after Exit Day (i.e., the term defined in the Withdrawal Bill as the day the U.K. leaves the E.U., except so far as relevant to the interpretation, disapplication or nullifying any enactment or law passed or made before exit day.¹ Clause 6, quoted below, provides guidance on the relationship between courts in the U.K. and the ECJ.

Interpretation of retained EU law

(1) A court or tribunal—

(a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and

(b) cannot refer any matter to the European Court on or after exit day.

(2) A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but *may do so if it considers it appropriate to do so* (emphasis added).

3. Relevant Issues of Legal Uncertainty

3.1. As a consequence, where the meaning of an autonomous E.U. term or concept is defined before Exit Day, the U.K. will follow that interpretation. Where the meaning of terms, which may appear in the

¹ See clauses 5(1) and (2) of the Withdrawal Bill.

incorporated *acquis* of E.U. law, is not fixed by Exit Day—or their interpretation is discussed and adjudicated upon by the ECJ post-Brexit—there remains ambiguity as to how U.K. courts should proceed. Following the publication of the Withdrawal Bill, the former President of the Supreme Court, Lord Neuberger, remarked in the media that judges would require guidance from HM Government on how U.K. courts should interpret European concepts and judgments post-Brexit.

3.2. Referring to this, members of the HLAG also highlighted the importance of interpretational equivalence between the U.K. and E.U. in preventing legal uncertainty in the context of negotiations for a future trade agreement, or in the event the U.K. applies for “equivalence” under the E.U.’s Third Country regimes, where regulatory coordination might be deemed important.

3.3. The questions before HM Government and U.K. judges (and for this Working Group to study and attempt to address) begin with a consideration of whether, and in what circumstances, U.K. courts might follow the ECJ’s judgments in so far as they settle, after Brexit, the meaning of terms in E.U. legislation previously received into U.K. law.

3.4. In the event that the U.K. courts choose not to abide by the ECJ’s interpretation, questions of legal complexity arise in relation to other aides to interpretation on which judges in the U.K. might rely. One such aide might be found, it has been suggested, in the Model conventions and laws proposed and signed under the auspices of the United Nations. The Model Conventions are not, however, signed by a majority of E.U. Member States, which elicits further questions as to their authority and comprehensiveness.²

3.5. A final area of legal uncertainty which requires consideration is the basis for judicial interpretation in the event it is agreed that international conventions and existing aides do not provide sufficient guidance. In such a scenario, Lord Neuberger’s call on Parliament for direction becomes more relevant. The Working Group might wish to reflect upon the overarching principles which might facilitate Parliament’s determination of its guidance to judges on the interpretation of E.U. law and ECJ judgments post-Brexit.

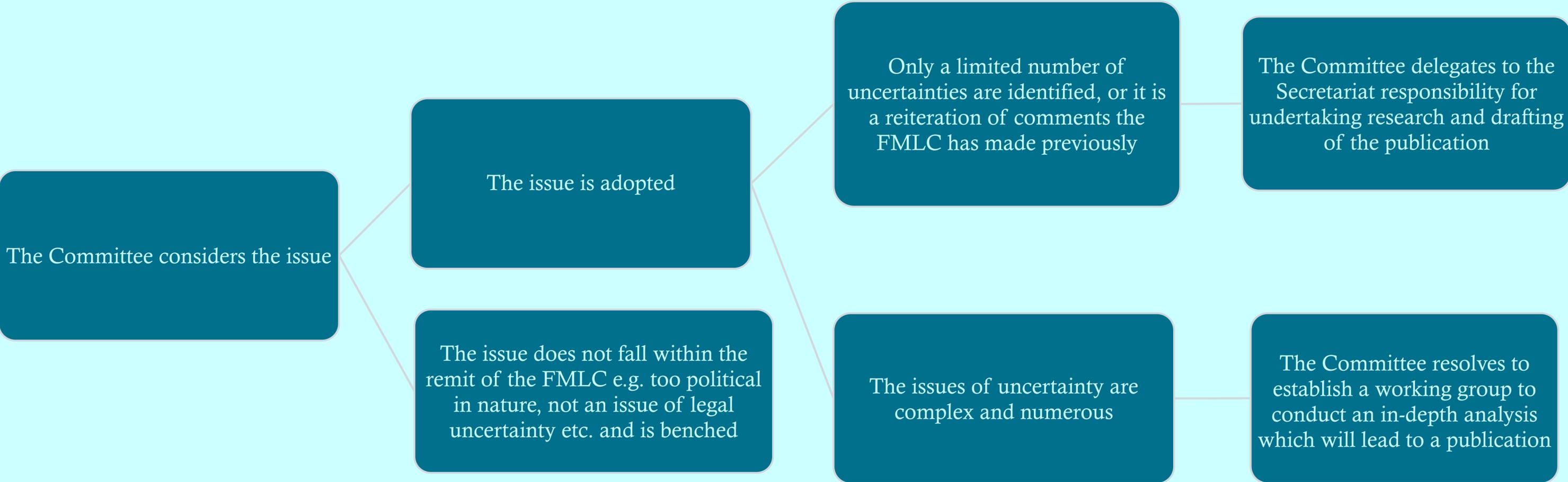
4. Working Group—Brief

4.1. The Working Group is invited to examine in general the legal issues surrounding the judicial interpretation of autonomous legal terms post-Brexit and to document the results of their inquiry into a paper. As a guide, the paper should address the subject according to the following outline: (i) summary and introduction; (ii) legislative background; (iii) legal issue analysis; (iv) market impact or potential impact of the issue(s); (v) proposed solutions and mitigants; and (vi) conclusion.

4.2. More detail about drafting a paper for the FMLC can be found in the FMLC Contributors’ Guidelines.

² The FMLC has previously considered, for instance, the efficacy of the UNCITRAL Model Law on Cross-Border Insolvency (1997) in the recognition of cross-border insolvency proceedings post-Brexit. This Working Group’s research would expand upon such work.

The issue is presented to the Committee



Working Group membership, conduct of business



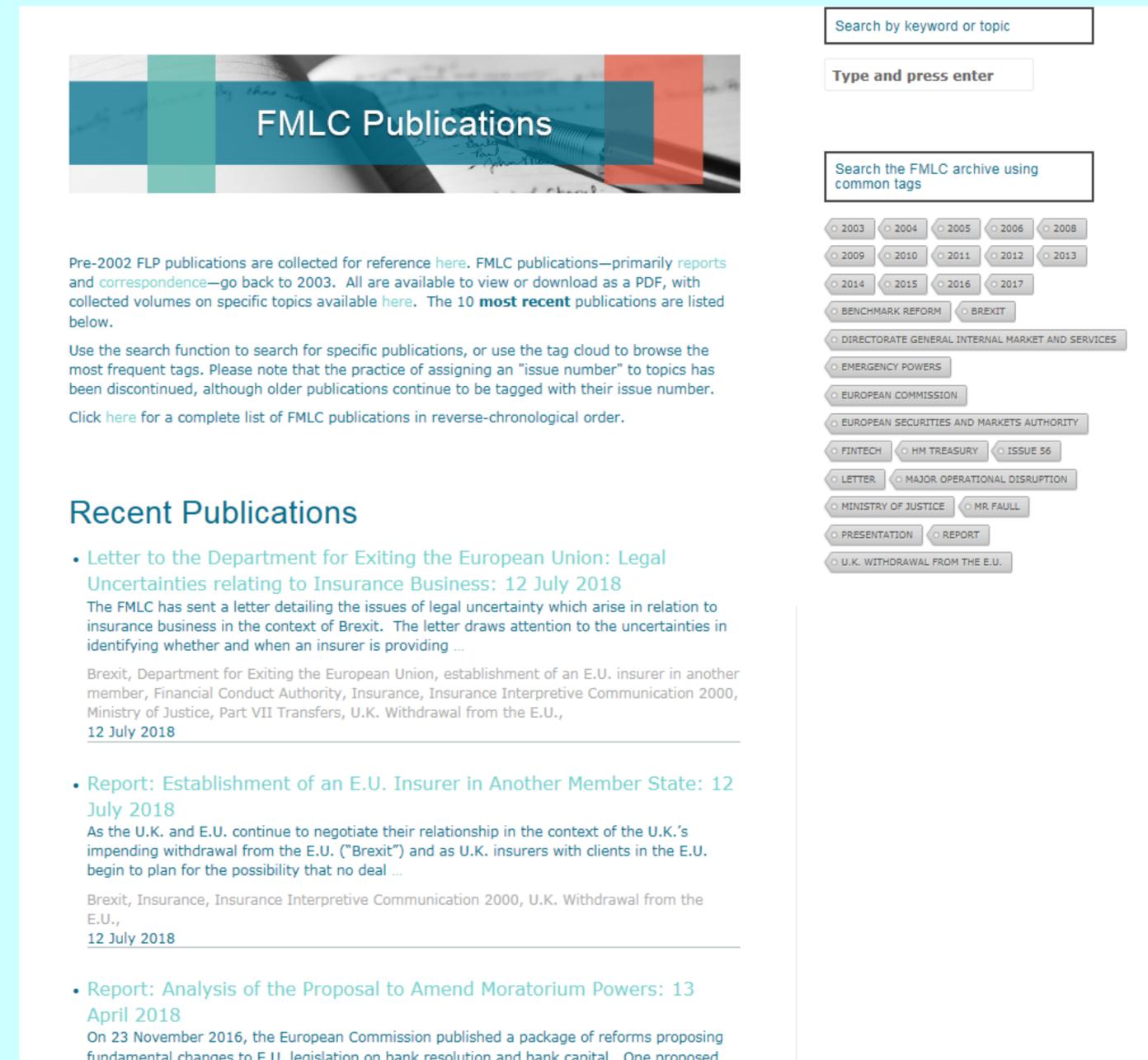
- Members of the relevant Scoping Fora as well as academics, experts and other FMLC stakeholders are invited to join working groups.
- Working groups are convened under Terms of Reference, including conduct of business guidelines. These include the following:
 1. participation is limited to one member per organisation;
 2. alternates are not permitted to attend meetings; and
 3. working group meetings are to be attended in person, where possible. Dial-in details are only provided to members who are permanently based abroad.

Working Group meetings

- Working groups typically meet between two and five times to identify relevant issues of legal uncertainty, make decisions as to any work product (i.e., a paper or a letter), and review draft contributions. Working group members volunteer to draft sections of the paper.
- The Secretariat will support the Chair and the working group during meetings and manage Group-related communications. The Secretariat will help draft and circulate meeting agenda and related documents and take minutes.
- On completion of a publication, the Working Group is likely to shut down.

Review process and publication

- For publications drafted by the Secretariat, draft copies will be circulated to the individual(s) who raised the issue for comment and then to the Committee for their review before being finalised. In these cases, the Scoping Forum, as the Committee's pool of experts on the general area of financial services law, will be asked if they have any feedback.
- For working groups, members who committed to writing sections of a paper will send their drafts to the Secretariat, who will align it to FMLC house-style as defined in the contributors' guidelines and collate the sections into one document. Working group members will have the opportunity to comment on the draft publication before it is sent to the Committee.
- Once approved by the Committee, the publications will be uploaded to the [FMLC website](#) and circulated to relevant stakeholders and authorities.



The screenshot shows the FMLC Publications website. At the top, there is a header with the text "FMLC Publications" over a background image of a pen and paper. Below the header, there is a search bar with the text "Search by keyword or topic" and a button "Type and press enter". To the right of the search bar, there is a section titled "Search the FMLC archive using common tags" with a list of tags including years (2003-2017), "BENCHMARK REFORM", "BREXIT", "DIRECTORATE GENERAL INTERNAL MARKET AND SERVICES", "EMERGENCY POWERS", "EUROPEAN COMMISSION", "EUROPEAN SECURITIES AND MARKETS AUTHORITY", "FINTECH", "HM TREASURY", "ISSUE 56", "LETTER", "MAJOR OPERATIONAL DISRUPTION", "MINISTRY OF JUSTICE", "MR FAULL", "PRESENTATION", "REPORT", and "U.K. WITHDRAWAL FROM THE E.U.". Below the search bar, there is a section titled "Recent Publications" with three entries:

- [Letter to the Department for Exiting the European Union: Legal Uncertainties relating to Insurance Business: 12 July 2018](#)
The FMLC has sent a letter detailing the issues of legal uncertainty which arise in relation to insurance business in the context of Brexit. The letter draws attention to the uncertainties in identifying whether and when an insurer is providing ...
Brexit, Department for Exiting the European Union, establishment of an E.U. insurer in another member, Financial Conduct Authority, Insurance, Insurance Interpretive Communication 2000, Ministry of Justice, Part VII Transfers, U.K. Withdrawal from the E.U., 12 July 2018
- [Report: Establishment of an E.U. Insurer in Another Member State: 12 July 2018](#)
As the U.K. and E.U. continue to negotiate their relationship in the context of the U.K.'s impending withdrawal from the E.U. ("Brexit") and as U.K. insurers with clients in the E.U. begin to plan for the possibility that no deal ...
Brexit, Insurance, Insurance Interpretive Communication 2000, U.K. Withdrawal from the E.U., 12 July 2018
- [Report: Analysis of the Proposal to Amend Moratorium Powers: 13 April 2018](#)
On 23 November 2016, the European Commission published a package of reforms proposing fundamental changes to E.U. legislation on bank resolution and bank capital. One proposed

Examples of recent projects suggested by Scoping Fora



Asset Management

- [Letter](#) to Financial Conduct Authority: Asset Management Review: 20 February 2017

Banking

- [Report](#): Analysis of the Proposal to Amend Moratorium Powers: 13 April 2018

Brexit Advisory Group

- [Letter](#) to Ministry of Justice: Clause 6 of the Withdrawal Bill: 19 March 2018

Finance and Technology

- [Report](#): Distributed Ledger Technology and Governing Law: 27 March 2018

Infrastructure

- [Report](#): EMIR: the European Commission's Legislative Proposal to Amend Procedures for recognition of Third Country Central Counterparties: July 2018

Insurance

- [Report](#): Establishment of an E.U. Insurer in Another Member State: 12 July 2018

Sovereign Debt

- [Report](#): *Pari Passu* Clauses in Sovereign Debt Obligations: 13 April 2015

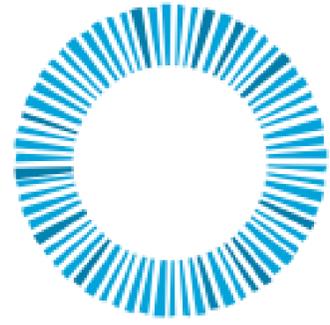
Achievements and impact



Professor Hugh Beale (University of Warwick) and Simon Firth (Linklaters LLP) gave evidence to the House of Lords E.U. Financial Affairs Sub-Committee on the topic of post-Brexit contractual continuity as an extension of work conducted by the FMLC Working Group on Brexit—Robustness of Financial Contracts.

In response to the FMLC paper exploring uncertainties as to the financial instruments that fall within the scope of MAR, the FMLC received a letter from the FCA stating that the paper was circulated to the FCA policy team who worked with ESMA to develop the MAR guidance materials. Subsequent ESMA Q&A's on MAR were updated to include questions on market soundings.

In response to the FMLC paper on issues of uncertainty arising from the European Commission's proposed directive and regulation on data protection, the FMLC was asked by the Commission to conduct further work. Subsequently, draft texts of the regulation were closely aligned with changes proposed by the FMLC.



OHALO

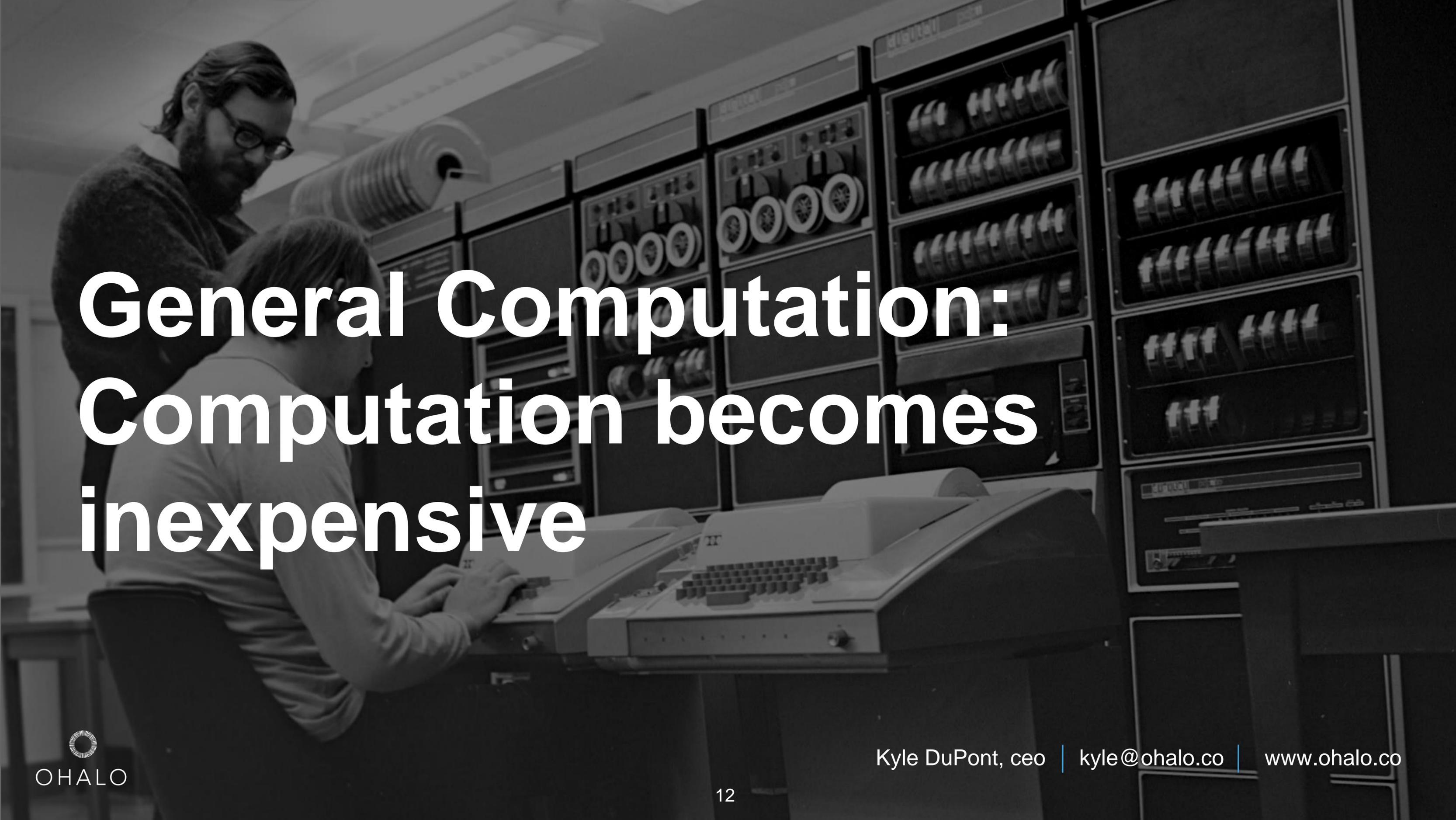
The Rise of the Cloud and How to Stay Dry

Financial Markets Law Committee

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<https://www.ohalo.co>

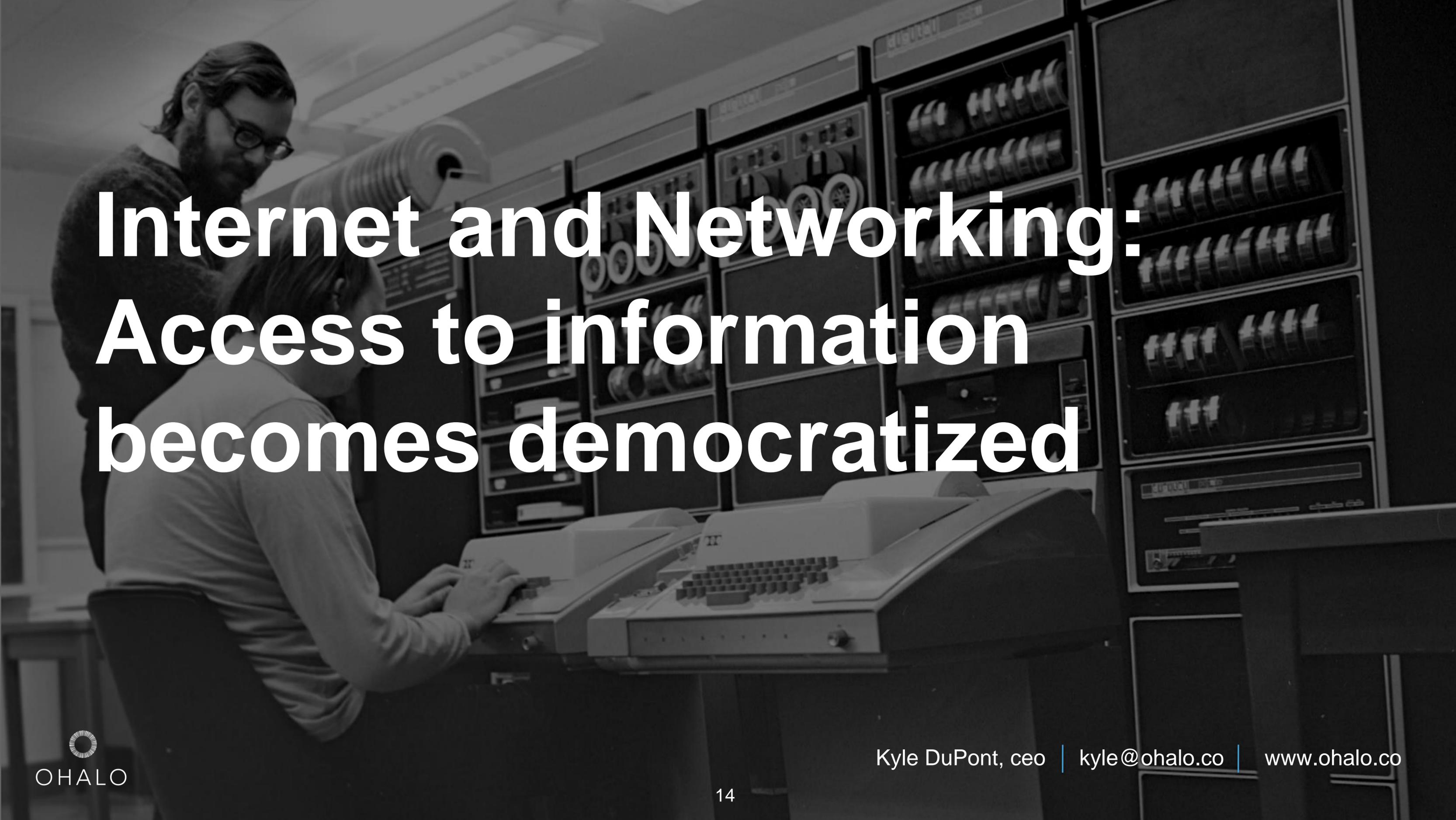
The first computers



General Computation: Computation becomes inexpensive



Databases: Data retrieval becomes inexpensive



Internet and Networking: Access to information becomes democratized



Cloud: Hardware becomes unnecessary

A silhouette of an oil pumpjack is shown against a sunset sky. The sun is low on the horizon, creating a warm orange and yellow glow. The pumpjack's long arm is extended upwards, and the sky is filled with soft, wispy clouds.

Data is the new oil.

The background of the slide is a photograph of an oil pumpjack in silhouette against a sunset sky. The sun is a bright, glowing orb near the horizon, casting a warm orange and yellow light across the scene. The pumpjack's long, dark arm extends diagonally across the upper half of the frame. The sky is filled with soft, wispy clouds, and the overall atmosphere is one of quiet industry at the end of the day.

**Data is the new oil.
Until it's not.**

2,500,000,000,
000,000,000

bytes of data created every day

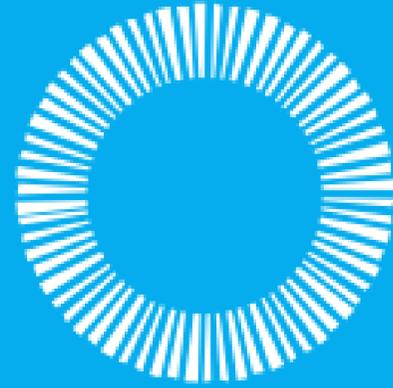
The future is context around data

The future is metadata

Artificial Intelligence

Blockchain

Regulation



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