



Financial Markets Law Committee (“FMLC”)

Asset Management Scoping Forum

Date: Thursday 6 September

Time: 1.30pm to 3.00pm

Location: Katten Muchin Rosenman UK LLP, Paternoster House, 65 St Paul's Churchyard, London EC4M 8AB

In Attendance:

Neil Robson (Chair)	Katten Muchin Rosenman UK LLP
Matthew Baker	Bryan Cave Leighton Paisner LLP
Philip Bartram	Travers Smith LLP
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Henrietta de Salis	Willkie Farr & Gallagher (UK) LLP
David Gasperow	Orbis Investment Advisory Limited
Jonathan Gilmour	Travers Smith LLP
Jon May	Marshall Wace LLP
Tom Taylor	British Private Equity & Venture Capital Association
Ezra Zahabi	Akin Gump Strauss Hauer & Feld LLP

Omotola Ariyo	FMLC
Virgilio Diniz	FMLC
Thomas Willett	FMLC

Guest Speaker:

Jonathan Benson	Allen & Overy LLP
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Regrets:

Richard Chapman	AB Trading Advisors
Iain Cullen	Simmons & Simmons LLP
Christopher Dearie	MJ Hudson
Monica Gogna	Dechert LLP
Laura Houët	CMS Cameron McKenna Nabarro Olswang LLP
Matthew Huggett	Allen & Overy LLP
Michael James	Cleary Gottlieb Steen & Hamilton LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP

Registered Charity Number: 1164902.

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Jíří Król
Owen Lysak
Michelle Moran
Palvi Shah

The Alternative Investment Management Association
Clifford Chance LLP
K&L Gates LLP
J.P. Morgan Asset Management

Minutes:

1. Introductions

1.1. Neil Robson opened the meeting.

2. Administration: Scoping Exercise—Statutory Instruments under the Withdrawal Act (Virgilio Diniz)¹

2.1. Virgilio Diniz described to members the way in which the FMLC is conducting work on the draft statutory instruments (“SIs”) under the European Union (Withdrawal) Act 2018 in relation to the financial services. In addition to the FMLC resolving to meet on an *ad hoc* basis should the volume of draft SIs and gravity of the legal complexities require the Committee’s full attention, the Secretariat will also write to an existing Working Group or Scoping Forum on the topic of the SI to ask for their assistance and expertise in identifying any drafting inconsistencies or logical discrepancies.²

3. FCA Discussion Paper (DP18/5) on a duty of care and potential alternative approaches (Matthew Baker)

3.1. Matthew Baker began his talk by providing background to the Discussion Paper. He noted that in their Mission Statement 2017, the Financial Conduct Authority (“FCA”) committed to producing a Discussion Paper to explore the potential merits of a new duty of care (“New Duty”) as part of the FCA’s review of their Handbook.³ By doing so, this will help the FCA understand what outcomes a New Duty could achieve and what a New Duty for firms in financial services could do to enhance behaviour in the financial services market.

¹ Please see Appendix I below.

² Should you identify an issue of legal uncertainty in a statutory instrument before receiving correspondence from the Secretariat, please contact Venessa Parekh at: research@fmlc.org.

³ FCA, *Our Mission 2017, How we regulate financial services*, available at: <https://www.fca.org.uk/publication/corporate/our-mission-2017.pdf>.

- 3.2. Members discussed the concerns from some stakeholders that the current regulatory framework does not provide adequate protection for customers and that gaps are evident in the existing Principles which do not remove conflicts of interest; in particular, Principle 8 on conflicts of interest and Principle 9 on customers: relationships of trust, were highlighted by participants.
- 3.3. Next, members highlighted that for a breach of the Principles, the FCA currently do not allow consumers a right of action against a firm. It was mentioned that the Discussion Paper considers whether a breach of any New Duty should give rise to a right of action for damages in court.
- 3.4. The participants concluded the discussion by agreeing that, on the basis that the FCA was not proposing any Handbook changes in the Discussion Paper, no legal uncertainty was evident at this time. Instead the members decided to create a watching brief for when responses to the Discussion Paper and/or any resulting Consultation Paper are published.
4. **Allen & Overy LLP briefing on the U.K. Sanctions and AML regimes after Brexit (Jonathan Benson)**
 - 4.1. Mr Benson opened his talk by stating that the Sanctions and Anti-Money Laundering Act 2018 (**“the Act”**) received Royal Assent on 23 May 2018. The Act provides powers enabling the U.K. to comply with any future international sanctions or anti-money laundering obligations and to impose its own sanctions and anti-money laundering measures following the U.K.’s withdrawal from the E.U. (**“Brexit”**).
 - 4.2. Mr Benson explained that, while the Act does not require any immediate action or create an immediate legal uncertainty, the risk of divergence between the E.U. and U.K. regimes could create legal uncertainties in the future. First, there could be policy divergence which would create significant legal differences between E.U. Member States and the U.K., as the U.K. and the E.U.’s sanctions policies may not be fully aligned in the future if their foreign policy goals diverge. Secondly, the U.K. is unlikely to be able to influence the drafting of future E.U. sanctions laws on a granular level once it is no longer an E.U. Member State and the U.K.’s domestic legislation made under the Act will not be identical with E.U. sanctions law in the future. Potential issues with the E.U.’s sanctions listings were also identified as the E.U. may no longer benefit from U.K. intelligence that underpins such listings, so the E.U. and U.K. listing may diverge. Lastly, as U.K. domestic courts will no longer be strictly bound to follow the jurisprudence of the European Court of Justice, this is likely to result in a divergence between the E.U. and U.K. sanctions law. .

4.3. When given the opportunity for questions, one member queried the scope for divergence for anti-money laundering regimes. Queries regarding the U.K.'s relationship with the Financial Action Task Force (“FATF”) and the extent that the E.U.'s requirements go beyond those of FATF were also raised.

5. Plenary discussion on recent developments and legal uncertainties in the Asset Management industry (Neil Robson)

5.1. The members held a discussion concerning contingency planning in the event of a hard Brexit. Some participants expressed the difficulty in giving coherent advice to their clients on the matter.

5.2. Concerns over the E.U.'s “delegation” regime were also raised by a member. The regime allows funds to be domiciled and regulated in another E.U. country, primarily Dublin or Luxemburg, while being managed from London. The member explained that tightened delegation rules following Brexit would limit access for British-based fund managers to Dublin and Luxemburg. It was also stressed that if the memorandum of understanding (“MoU”) process was not resolved, this might result in firms having to move their fund managers out of London.

5.3. A discussion on Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the “**STS regulation**”) was also held. The participants queried the extent to which U.K. securitisations are likely to qualify as STS securitisations after the U.K.'s withdrawal from the E.U.

6. Any other business

6.1. Forum members noted that the next meeting of the Insurance Scoping Forum will be held on Thursday 29 November between 1.30pm and 3.00pm.

Scoping Exercise—Statutory Instruments under the Withdrawal Act



Virgilio Diniz, Project Manager

Registered Charity Number: 1164902.

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Recent Developments ...

- The European Union (Withdrawal) Act 2018 (“**Withdrawal Act**”) will repeal the European Communities Act 1972 as of Exit Day, copy into the domestic framework all directly applicable E.U. law which is in operation on Exit Day, and give HM Government the ability to modify and adapt this “retained” law as necessary to resolve any deficiencies. This last stated aim of the Withdrawal Act will be fulfilled by means of statutory instruments (“**SIs**”) published by relevant ministries.
- HM Treasury has announced it will approximately 70 pieces of secondary legislation under the European Union (Withdrawal) Act 2018 in relation to the financial services. As the end of the Article 50 notice period rapidly approaches, the timeline for any comment or consultation on these drafts is likely to be compressed.

The FMLC's Response



- In its meeting on 31 May 2018, the FMLC resolved to meet on an *ad hoc* basis—in addition to its scheduled bimonthly meetings—should the volume of the draft statutory instruments and gravity of the legal complexities require the Committee's full attention.
- The Secretariat organised meetings on 29 June 2018 and 3 August 2018 amongst leading organisations in the City to discuss a coordinated response to HM Treasury's announcement.
- As the statutory instruments are published, the FMLC hopes to be able to rely on and amplify its Radar function to identify legal uncertainties arising from the them.

FMLC radar function

- Currently, the FMLC identifies relevant issues of uncertainty through the radar function.
- 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 and Stakeholder relationship calls with members of the Secretariat.
- For the purposes of analysing the raft of secondary “reception” instruments, however, the Secretariat proposes to expand its Radar function by reaching out to pre-existing working groups and scoping forums on an *ad hoc* basis to request their assistance in assessing legal risks, identifying priorities and selecting issues in relation to the draft SIs.



Next Steps ...

- Once an SI is published, the Secretariat will write to an existing Working Group on the topic of the SI or, where such a group does not exist or where the SI covers a significant piece of financial markets legislation, to the relevant Scoping Forum to ask for their help and expertise in identifying any drafting inconsistencies or logical discrepancies.
- Scoping Forum members are requested to indicate any areas of uncertainty on which they think the FMLC might usefully contribute.
- Owing to the shorter timescale for review, the Secretariat would be grateful to receive quick bullet points if that is easier.
- Needless to say, if you don't hear from us but spot a legal uncertainty in an SI, please do get in touch anyway!

Points to note

Any work the FMLC undertakes on the SIs will continue to follow the principles and processes set out in its constitution. These include:

- The FMLC does not comment on or seek to influence matters of policy. Issues relating to policy rather than solely to legal uncertainty will not be examined.
- The FMLC is dedicated to impartial consensus
- 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.
- Any response on the SIs will be submitted to the entire Committee for review to ensure accuracy, objectivity and impartiality.

Draft 2019 forward schedule

Thursday 21 March

2.00pm to 3.30pm

Thursday 20 June

2.00pm to 3.30pm

Thursday 19 September

2.00pm to 3.30pm

Thursday 12 December

2.00pm to 3.30pm

