



## Financial Markets Law Committee (“FMLC”)

### Infrastructure Scoping Forum

Date: Thursday 13 September

Time: 2.00pm to 3.00pm

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

#### **In Attendance:**

Paul Watkins (Chair)	Blue Nile Training
Antony Beaves	Bank of England
Thomas Donegan	Shearman & Sterling (London) LLP
Emma Dwyer	Allen & Overy LLP
Adam Eades	Cboe Europe
John Ewan	
Nathaniel Lalone	Katten Muchin Rosenman UK LLP
Alex Rutter	Tradeweb Europe Limited
Virgilio Diniz	FMLC
Thomas Willett	FMLC

#### **Regrets:**

Nick Carew Hunt	
Mark Evans	Travers Smith LLP
Iona Levine	Minerva Chambers
Charles Lindsay	ICE
Hannah Meakin	Norton Rose Fulbright LLP
Rachel Pearson	ICE
Barnabas Reynolds	Shearman & Sterling (London) LLP
Martin Sandler	PricewaterhouseCoopers LLP
Arun Srivastava	Paul Hastings LLP
Christopher Twemlow	Euroclear UK and Ireland

**Registered Charity Number: 1164902.**

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## Minutes:

### 1. Introductions

1.1. Paul Watkins opened the meeting.

### 2. Administration: Scoping Exercise—Statutory Instruments under the Withdrawal Act (Virgilio Diniz)<sup>1</sup>

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.<sup>2</sup>

### 3. The Draft Payments and electronic money (Amendment) (EU Exit) Regulations (Arun Srivastava)

3.1. Owing to the absence of the speaker, this agenda item was not discussed.

### 4. The Draft Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 (Paul Watkins)<sup>3</sup>

4.1. Mr Watkins began the discussion on the draft Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 (the “**draft SI**”) by referencing the Bank of England’s Dear CEO Letter to non-U.K. clearing counterparties (“**CCPs**”).<sup>4</sup> In summarising the letter, Mr Watkins highlighted the Bank of England’s expectations that U.K. domestic law requirements for recognition of non-U.K. CCPs will in essence be the same as the current requirements under Article 25 of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (“**EMIR**”).

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<sup>1</sup> Please see Appendix I below.

<sup>2</sup> 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](mailto:research@fmlc.org).

<sup>3</sup> Please see Appendix II below.

<sup>4</sup> Bank of England, Dear CEO Letter to non-U.K. CCPS, 20 December 2017, available at: <https://www.bankofengland.co.uk/-/media/boe/files/letter/2017/letter-to-ccps.pdf>.

- 4.2. Next, Mr Watkins outlined some of the functions of the draft SI, whereby: (i) Part 2 of the draft SI looks to pass on the functions of Third Country CCP recognition from the European Securities and Markets Authority (“ESMA”) to the Bank of England; (ii) Part 3 amends Article 25 of EMIR for the Bank of England to recognise non-U.K. CCPS; and (iii) Part 6 deals with Transitional Provisions: Deemed Recognition and Temporary Deemed Recognition.
- 4.3. Mr Watkins then directed the discussion towards the amendments to Article 25 of EMIR. He noted the insertion that the decision granting recognition must specify the services or activities which the CCP is recognised to provide or perform, corresponding to same provision at Article 14 of EMIR. It was, however, noted that on the Bank of England website the specification of “services and activities” only sets out the instruments which the CCP is authorised to clear.
- 4.4. Members also discussed the provision at paragraph six of Article 25, where HM Treasury should determine equivalence, but decided that it was a political issue, concluding that there was no issue of legal uncertainty.
- 4.5. A probable typing error at paragraph 2(d) of Article 25 was noted by Mr Watkins.

## **5. Plenary discussion on recent developments and legal uncertainties concerning financial market infrastructure (Paul Watkins)**

- 5.1. One member mentioned the difficulty in determining when the timeframes are formally triggered and how they are assessed when a request to access a CCP by a trading venue under Title VI Article 35 of Regulation (EU) No 600/2014 on markets in financial instruments (“MiFIR”) has been made. A member mentioned that the ESMA guidelines could help to solve this lack of clarity.
- 5.2. Following previous discussions on multilateral systems as past Scoping Forum meetings, a participant mentioned the Financial Conduct Authority’s (“FCA’s”) statement on the operation of a multilateral system as a multilateral trading facility (“MTF”) or organised trading facility (“OTF”).<sup>5</sup> It was discussed that the FCA are returning to their previous definitions of multilateral systems. Another member highlighted the breadth of the definition and queried whether it covers all forms of arranging.

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<sup>5</sup> FCA, (September 2018), “Operation of a multilateral system as an MTF or OTF”, available at: <https://www.handbook.fca.org.uk/handbook/MAR/5AA.pdf>.

**6. Any other business**

- 6.1. Forum members noted that the next meeting of the Infrastructure Scoping Forum will be held on Thursday 6 December between 2.00pm and 3.30pm.

Appendix I

# Scoping Exercise—Statutory Instruments under the Withdrawal Act

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Virgilio Diniz, Project Manager

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# Recent Developments ...

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- 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 (“**SI**s”) 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

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- 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

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- 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 ...

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- 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

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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

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Thursday 7 February

2.00pm to 3.30pm

Thursday 9 May

2.00pm to 3.30pm

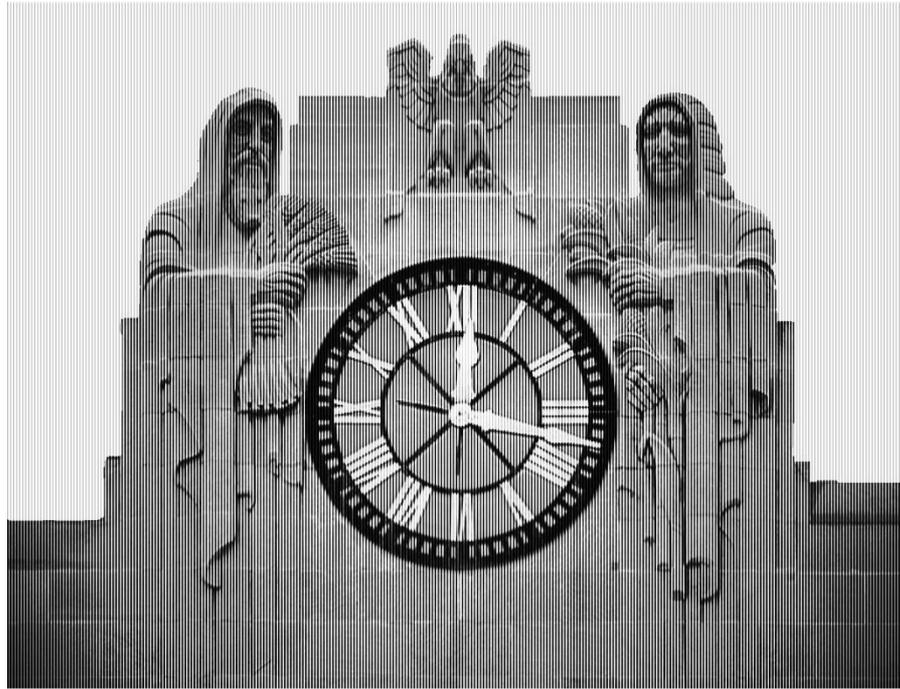
Thursday 8 August

2.00pm to 3.30pm

Thursday 7 November

2.00pm to 3.30pm





The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit)  
Regulations 2018

FMLC Infrastructure Scoping Forum

13 September 2018



# BoE Dear CEO Letter - 20 Dec 2017

## - to non-UK CCPs

“We expect a non-UK CCP will need to apply for UK recognition if it intends to do any of the following after the UK’s withdrawal from the EU:

- provide clearing services to clearing members or trading venues established in the UK;
- be used by market participants to satisfy any mandatory clearing obligations that apply under UK domestic law; or
- be deemed a ‘Qualifying CCP’ under UK domestic law for certain capital requirements purposes”

# BoE Dear CEO Letter - 20 Dec 2017

We anticipate that the UK Government will propose that, immediately following the UK's withdrawal from the EU, UK domestic law requirements for recognition of non-UK CCPs will **in essence be the same as the current requirements under Article 25 of EMIR.**

Our objective, in using Article 25, is to give certainty to non-UK CCPs and their users for the period immediately following EU withdrawal. The intention is that if the relevant criteria under Article 25 are satisfied a non-UK CCP will be recognised and able to operate in the UK **without discontinuity of service.** In due course, following the UK's withdrawal from the EU, and in light of developments internationally, the Bank intends to review this framework.

The Bank also welcomes the Government's announcement today regarding its intention to provide the means to the Bank, should it consider it necessary, to create a **temporary regime for non-UK CCPs.** The Bank encourages **non-UK CCPs to begin preparing for recognition in line with the approach set out today, and will consider use of the temporary regime only as a fall-back.**

# Swapclear G4 IRS UK members

(20 of 104)

Abbey National Treasury Services plc

Barclays Bank plc

Citadel Securities (Europe) Limited

Citigroup Global Markets Ltd

Credit Suisse International

FirstRand Securities Ltd

Goldman Sachs International

HSBC Bank plc

JPMorgan Securities plc

Lloyds Bank PLC

MUFG Securities EMEA plc

Merrill Lynch International

Mizuho Capital Markets (UK) Limited

Mizuho International plc

Morgan Stanley & Co International plc

Nomura International plc

Societe Generale Newedge UK Limited

Standard Chartered Bank

The Royal Bank of Scotland plc

UBS Limited



# Swapclear G4 IRS non-UK members

- 84 of 104 include:

BNP Paribas	FR
Banca IMI S.p.A	IT
Deutsche Bank AG	DE
The Toronto-Dominion Bank	CA
UniCredit S.p.A	IT
Wells Fargo Bank N.A.	US

# CCPs authorised under EMIR

Nasdaq OMX Clearing AB	Sweden	Finansinspektionen
CCP Austria	Austria	Austrian Financial Market Authority (FMA)
LCH SA	France	Autorité de Contrôle Prudentiel et de Résolution (ACPR)
Eurex Clearing AG	Germany	Bundesanstalt für Finanzdienstleistungs aufsicht (Bafin)
European Commodity Clearing	Germany	Bundesanstalt für Finanzdienstleistungs aufsicht (Bafin)
Athens Exchange Clearing House (Athex Clear)	Greece	Hellenic Capital Market Commission
Keler CCP	Hungary	Central Bank of Hungary (MNB)
Cassa di Compensazione e Garanzia S.p.A. (CCG)	Italy	Banca d'Italia
European Central Counterparty N.V.	Netherlands	De Nederlandsche Bank (DNB)
ICE Clear Netherlands B.V. <sup>2</sup>	Netherlands	De Nederlandsche Bank (DNB)
KDPW_CCP	Poland	Komisja Nadzoru Finansowego (KNF)
OMIClear - C.C., S.A.	Portugal	Comissão do Mercado de Valores Mobiliários (CMVM)
BME Clearing	Spain	Comisión Nacional del Mercado de Valores (CNMV)
LCH Ltd	United Kingdom	Bank of England
LME Clear Ltd	United Kingdom	Bank of England
ICE Clear Europe Limited (ICE Clear Europe)	United Kingdom	Bank of England

# Exit Day: DexEU White Paper

Legislating for the Withdrawal Agreement  
between the United Kingdom and the European Union

Para 60: “On exit day (29 March 2019) the EU (Withdrawal) Act 2018 will repeal the ECA [European Communities Act]. **It will be necessary, however, to ensure that EU law continues to apply in the UK during the implementation period.** This will be achieved by way of transitional provision, in which the Bill will amend the EU (Withdrawal) Act 2018 so that the effect of the ECA is saved for the time-limited implementation period. Exit day, as defined in the EU (Withdrawal) Act 2018, will remain 29 March 2019. This approach will provide legal certainty to businesses and individuals during the implementation period by ensuring that there is continuity in the effect that EU law has in the UK during this time. The Bill will make provision to end this saving of the effect of the ECA on 31 December 2020.”

# The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018

- Part 2: ESMA 3C CCP Recognition functions passed to BoE : - amending FSMA 2000 Pt 18
- Part 3: A25 EMIR amended for BoE to recognise non-UK CCPs
- Part 6 Transitional Provision: Deemed Recognition (application) and Temporary Deemed Recognition (notification)
  - Under Temporary Deemed Recognition, CCPs deemed recognised to provide clearing services in UK for 3 years max (extendable by HMT in 12 month increments)
  - Under TDR, notifying deemed recognised CCP must apply within 6 months of Exit Day.

## Application for deemed recognition pursuant to Article 25 of the EMIR Regulation

- **12.—(1)** A central counterparty established in a third country may apply to be recognised by the Bank of England where it intends to provide clearing services as a central counterparty in the United Kingdom on and after exit day.
- The application must—
  - be submitted before exit day;
  - be made in such manner as the Bank of England may direct;
  - specify the services or activities linked to clearing which the applicant intends to provide and the classes of financial instrument in respect of which the applicant wishes to be recognised; and
  - be accompanied by such other information as the Bank of England may direct.
- The Bank of England must confirm promptly receipt of the application to the person making it.
- The applicant may withdraw the application by giving notice to the Bank of England at anytime before the application is determined.

Where the application has not been determined by the Bank of England before exit day, the application is to be treated on exit day as if it had been made on that day under Article 25.4 of the EMIR Regulation.

## Deemed recognition pursuant to Article 25 of the EMIR Regulation

- **13.**—(1) The Bank of England may before exit day determine that the applicant is to be taken, on and after exit day, to be recognised pursuant to Article 25 of the EMIR Regulation if each of the following conditions are met.
- The first condition is that the Treasury has made regulations in respect of the country in which the applicant is established in accordance with regulation 14.
- The second condition is that the applicant is—
  - authorised in the country in which it is established, and
  - subject to effective supervision and enforcement ensuring full compliance with the prudential requirements applicable in that country.
- The third condition is that the Bank of England has established co-operation arrangements with the competent authority responsible for supervising the applicant in accordance with regulation 16.
- The fourth condition is that the applicant is not established or authorised in a country that is considered, by the Commission in accordance with Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing(a), as having strategic deficiencies in its national anti-money laundering and counter financing of terrorism regime that poses significant threats to the financial system of the European Union.
- A determination under paragraph (1) must only be made in respect of the services or activities linked to clearing and must specify the services or activities which the applicant is to be taken to be recognised to provide or perform including the classes of financial instruments in respect of which the applicant is to be taken to be recognised.
- Where the Bank of England makes a determination under paragraph (1), the applicant in respect of which the determination is made **is to be taken to be recognised pursuant to Article 25 of the EMIR Regulation** in accordance with that decision.

## **Power to make regulations in respect of third countries' regulatory frameworks before exit day**

**14.**—(1) The Treasury may before exit day by regulations specify that—

- the legal and supervisory arrangements of a third country ensure that central counterparties authorised in that country comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of the EMIR Regulation, as it has effect in EU law as amended from time to time;
  - central counterparties authorised in that country are subject to effective supervision and enforcement on an ongoing basis; and
  - the legal framework of that country provides for an effective equivalent system for the recognition of central counterparties authorised under the legal regimes of other countries.
- (2) On and after exit day, regulations under paragraph (1) have effect as if made under Article 25.6 of the EMIR Regulation.

## **Bank's power to advise Treasury on regulatory equivalence of central counterparties**

**15.**—(1) The Bank of England may before exit day provide advice to the Treasury in connection with any regulations made or to be made by the Treasury under regulation 14.

- (2) On and after exit day, advice provided under this regulation is to be treated as having been provided in accordance with Article 25.6A of the EMIR Regulation.

## Eligibility for temporary deemed recognition

17.—(1) This regulation applies to a central counterparty established in a third country ('A') if—  
immediately before exit day the central counterparty is—

- authorised in accordance with Article 17 of the EMIR Regulation as it then has effect;
- recognised in accordance with Article 25 of the EMIR Regulation as it then has effect; or
- a central counterparty to which Article 89.4 of the EMIR Regulation as it then has effect applies;

the central counterparty **has notified** the Bank of England in accordance with paragraph

(2) that it intends to provide clearing services as a central counterparty in the United Kingdom on and after exit day;  
and

where the central counterparty has submitted an application under regulation 12, that application has not been determined by the Bank of England.

For the purposes of paragraph (1)(b), the notification must—

- be made before exit day,
- be made in such manner as the Bank of England may direct, and
- contain, or be accompanied by, such information as the Bank of England may direct.

The Bank of England must confirm promptly receipt of the notification to the person making it.

(17 Contd)

During the temporary recognition period determined under regulation 18, A is to be taken to be recognised by the Bank of England pursuant to Article 25 of the EMIR Regulation in respect of the services, activities and classes of financial instrument mentioned in paragraph (5).

The services, activities and classes of financial instrument in respect of which A is to be taken to be recognised are those which meet the following conditions—

- the first condition is that the service, activity and class of financial instrument is one which immediately before exit day A is—
  - authorised to provide or perform under Article 17 of the EMIR Regulation as it then has effect;
  - recognised to provide or perform under Article 25 of the EMIR Regulation as it then has effect; or
  - in the case of a central counterparty to which Article 89.4 of the EMIR Regulation as it then has effect applies, authorised or recognised to provide or perform in a member State in accordance with that Article; and
- the second condition is that where A has submitted an application under regulation 12, the service, activity or class of financial instrument is specified in A's application.

The Bank of England must publish on its website a list of central counterparties that are taken to be recognised by the Bank of England pursuant to Article 25 of the EMIR Regulation by virtue of this regulation.

**Article 25.5 of the EMIR Regulation does not apply to a central counterparty which is taken to be recognised by the Bank of England pursuant to Article 25 of the EMIR Regulation by virtue of this regulation.**

## Cessation of temporary deemed recognition

**19.—(1)** A central counterparty is, on or after exit day, to cease to be taken to be recognised pursuant to Article 25 of the EMIR Regulation in accordance with regulation 17 where any of the following conditions are met.

The first condition is that the central counterparty ceases to be—

- authorised in accordance with Article 17 of the EMIR Regulation;
- recognised in accordance with Article 25 of the EMIR Regulation; or
- a central counterparty to which Article 89.4 of the EMIR Regulation applies, unless that central counterparty has been subsequently recognised in accordance with Article 25 of the EMIR Regulation.

In paragraph (2), references to the “EMIR Regulation” are to be read as references to that regulation as it has effect in EU law as amended from time to time.

**(4) The second condition is that the Bank of England directs that the central counterparty is to cease to be taken to be recognised pursuant to Article 25 of the EMIR Regulation in accordance with regulation 17.**

The third condition is that, in the case of a central counterparty who has submitted an application under regulation 12 or Article 25.4 of the EMIR Regulation—

- the central counterparty withdraws their application; or
- the application is determined by the Bank of England.

(18 contd)

- The fourth condition is that, in the case of a central counterparty which has not submitted an application under regulation 12, **the period of 6 months beginning with exit day expires without the central counterparty having submitted an application** under Article 25.4 of the EMIR Regulation during that period.
- A direction may only be given under paragraph (4) where—
  - the Bank of England considers that there would otherwise be an **adverse effect on financial stability** in the United Kingdom;
  - the central counterparty has **not made use of the recognition** within the period of twelve months beginning with exit day, has expressly renounced the recognition or has provided no services or performed no activity for the preceding six months; or
  - in the case of a central counterparty who has submitted an application under regulation 12 or Article 25.4 of the EMIR Regulation, the central counterparty has made false statements in relation to the application or has sought to obtain recognition by any other irregular means.

# Article 25 Redraft

See attached

# Article 25: Services & Activities

New Provision:

Recognition under this Article must be granted only for **services or activities linked to clearing** and the decision granting recognition **must specify** the services or activities which the CCP is recognised to provide or perform, including the classes of financial instruments covered by the recognition.

# CCP “Open Access”

## B. Reynolds: A Blueprint for Brexit

“The market structure requirements in MiFIR seek to challenge the so-called vertical models for exchange and clearing businesses, where an exchange is connected through ownership with a clearing house. Investigations by both the UK Office of Fair Trading and the European Commission have not identified any significant competition issues with such structures. The current optionality over market structures has resulted in flawless management of risk within cleared markets in all past financial stress periods. The vertical model has propelled huge amounts of financial and product innovation in the financial markets, most notably in contrast to the alternative, horizontal model. The new rules distort competitive market behaviours and discourage investment.”

But Open Access is UK initiative – EU unlikely to take forward, as incumbent CCPs.

UK - home of disruptors

Query future for the idea?