



Financial Markets Law Committee (“FMLC”)

Banking Scoping Forum

Date: Tuesday 11 December

Time: 2.00pm to 3.30pm

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

In Attendance:

Clare Dawson (Chair)

Alex Biles

Thomas Donegan

Charles Gray (dial in)

Ian Jameson

Jons Lehmann

Dorothy Livingston

John McGrath

Monica Sah

Jeremy Stokeld

Loan Market Association

Ashurst LLP

Shearman & Sterling (London) LLP

Sullivan & Cromwell LLP

Sumitomo Mitsui Banking Corporation Europe Limited

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

Herbert Smith Freehills LLP

Sidley Austin LLP

Clifford Chance LLP

Linklaters LLP

Venessa Parekh

Thomas Willett

FMLC

FMLC

Guest Speaker

Timothy Cleary

Clifford Chance LLP

Regrets:

James Bresslaw

Mark Kalderon

Amy Kennedy

Suhail Khawaja

Knox McIlwain

Oliver Moullin

Jan Putnis

Mitja Siraj

Julia Smithers Excell

Stuart Willey

Simmons & Simmons LLP

Freshfields Bruckhaus Deringer LLP

Gibson, Dunn & Crutcher UK LLP

Wilmington Trust

Cleary Gottlieb Steen & Hamilton

The Association for Financial Markets in Europe (“AFME”)

Slaughter and May

FIA

White & Case LLP

White & Case LLP

Registered Charity Number: 1164902.

"The FMLC" and "The Financial Markets Law Committee" are terms used to describe a committee appointed by Financial Markets Law Committee, a limited company ("FMLC" or "the Company"). Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales. Company Registration Number: 8733443.

Minutes:

1. Introductions

1.1. Clare Dawson opened the meeting.

2. Administration: Scoping Exercise – Lifecycle of a Project and confirmation of the 2019 Forward Schedule (Venessa Parekh)¹

2.1. Venessa Parekh 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. Attendees did not raise any issues in relation to the draft Forward Schedule of meetings for 2019. These meetings dates were therefore confirmed.

3. Update on the phasing out of LIBOR (Clare Dawson)

3.1. Clare Dawson led a discussion on the phasing out of the London Inter-bank Offered Rate ("LIBOR"). She began by mentioning recent developments with regards to consultations including: (i) the preliminary results of a consultation by the International Swaps and Derivatives Association on certain aspects of fallbacks for derivatives referencing GBP LIBOR, CHF LIBOR, JPY LIBOR, TIBOR, Euroyen TIBOR and BBSW; and (ii) *Alternative Reference Rates Committee Consultations on Fallback Contract Language for Bilateral Business Loans and Securitizations for Public Feedback*.

3.2. Ms Dawson then explained that the derivatives market is relatively comfortable with moving to an overnight rate; the cash market, on the other hand, is finding the transition more difficult. She highlighted that some issues include practical concerns with the bank loans systems and bonds systems, as well as what methodology to use for calculating an overnight rate instead of a forward looking term rates in term structures. Members agreed that there needs to be a reasonable degree of market consensus regarding the methodology.

3.3. With regards to cash products, Ms Dawson explained that there is no protocol mechanism for those contracts that reference LIBOR to provide a fallback reference rate. She mentioned that it will be difficult to amend large numbers of deals without having to amend each contract.

¹ Please see Appendix I below.

3.4. One member raised an uncertainty regarding the adjustment spread and the worry that it might not prevent a transfer of economics when LIBOR is to be phased out. Ms Dawson agreed that this was one of the most challenging areas to be considered; she did stress, however, that with increasing derivative activity of risk free rates the more the industry will become comfortable with using them.

3.5. Another member mentioned currency divergence, with some such as sterling moving quicker than others to replace LIBOR. Members agreed that this creates problems with regards to transitioning away from referencing LIBOR.

4. **CRR Amending Regulation – ECON draft report (Timothy Cleary)**

4.1. Timothy Cleary delivered a presentation on the draft European Parliament legislative resolution amending Regulation (EU) No 575/2013 as regards exposures in the form of covered bonds (the “**legislative proposal**”). He explained the regulation being amended establishes a common standard for a covered bond and sets out basic requirements.

4.2. Mr Cleary explained that the legislative proposal aims to:

- i. reinforce and complement the requirements for the preferential capital treatment of covered bonds through proposed amendments to Article 129 of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (the “**Capital Requirements Regulation**” or the “**CRR**”);
- ii. provide a definition of covered bonds that is intended to replace the definition in Article 52(4) of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (“**UCITS**”); and
- iii. establish a common set of characteristics and structural features that a debt instrument must satisfy in order to be recognised as a covered bond under E.U. law.

4.3. Mr Cleary also emphasised the proposed additional requirements for covered bonds which will enable banks to benefit from preferential capital treatment by reference to the definition, governance and transparency provisions in the new Covered Bonds Directive. In particular, the legislative proposal suggests that a new requirement on a minimum level of over-collateralisation would be introduced.

5. Plenary discussion on recent development and legal uncertainties concerning banking (Clare Dawson)

5.1. A discussion was held of the U.S. sanctions against Iran with emphasis on the conflict of laws between the blocking regulations. Ms Parekh mentioned the FMLC has established a working group to analyse legal uncertainties concerning the U.S. sanctions and asked members to get in contact should they like further information.

5.2. The proposed Directive on credit servicers, credit purchasers and the recovery of collateral was also raised by a member. Ms Dawson mentioned that the Loan Market Association have continued to hold discussions with regards to the proposed Directive. Forum members agreed to keep a watching brief for any developments.

6. Any other business

6.1. No other business was raised.

Lifecycle of a Project

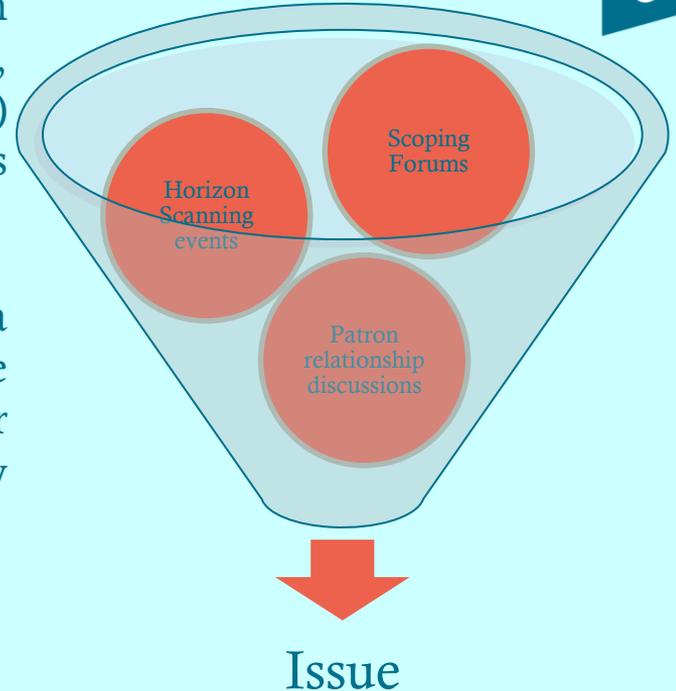


Registered Charity Number: 1164902.

"The FMLC" and "The Financial Markets Law Committee" are terms used to describe a committee appointed by Financial Markets Law Committee, a limited company ("FMLC" or "the Company"). Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales. Company Registration Number: 8733443.

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

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

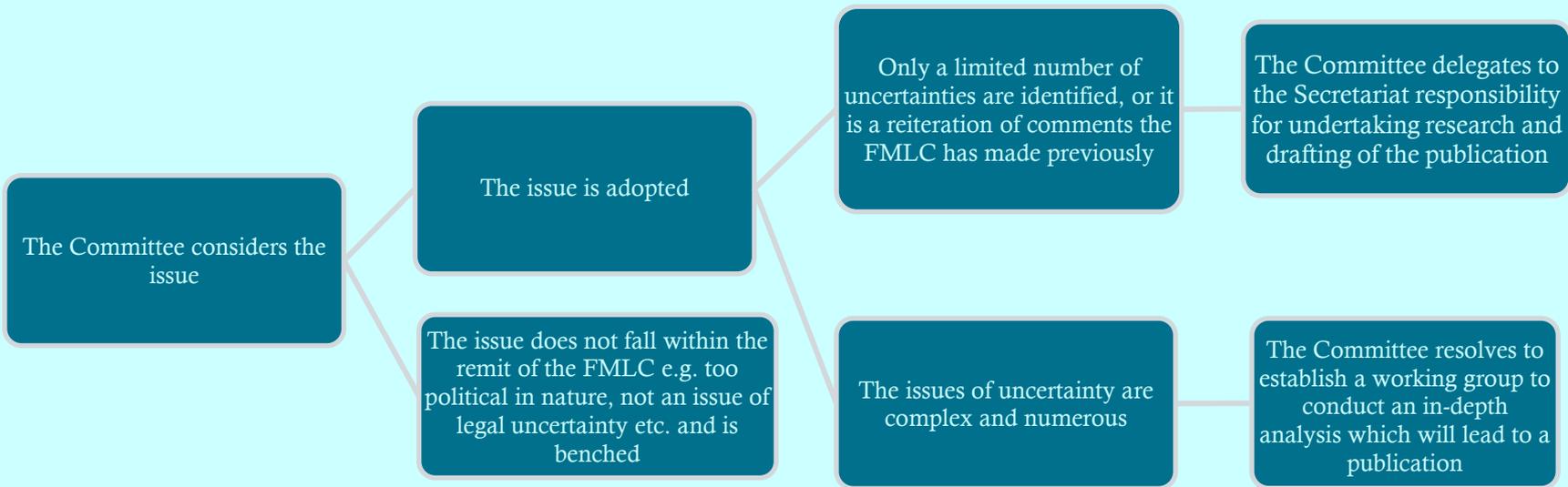
4.1. The Working Group is invited to examine in general the legal issues surrounding the judicial interpretation of autonomous legal terms post-Brexit and to document the results of their inquiry into a paper. As a guide, the paper should address the subject according to the following outline: (i) summary 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.

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

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" and a background image of a person writing. 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 REPORT", "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 FAILL", "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: February 2017

Banking

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

Brexit Advisory Group

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

Finance and Technology

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

Sovereign Debt

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