



**Financial Markets Law Committee (“FMLC”)
Banking Scoping Forum**

Date: Tuesday 18 September 2018

Time: 2.00pm to 3.00pm

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

In Attendance:

Dorothy Livingston (Chair)	Herbert Smith Freehills LLP
Thomas Donegan	Shearman & Sterling (London) LLP
Ian Jameson	Sumitomo Mitsui Banking Corporation Europe Limited
Monica Sah	Clifford Chance LLP
Jeremy Stokeld	Linklaters LLP
Virgilio Diniz	FMLC
Chhavi Sinha	FMLC
Thomas Willett	FMLC

Regrets:

Alexander Biles	Ashurst LLP
James Bresslaw	Simmons & Simmons LLP
Clare Dawson	Loan Market Association
Leland Goss	International Capital Market Association (“ICMA”)
Suhail Khawaja	Wilmington Trust
Jons Lehman	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Amy Kennedy	Gibson, Dunn & Crutcher LLP
Oliver Moullin	AFME
Julia Smithers Excell	J.P. Morgan

Registered Charity Number: 1164902.

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Minutes:

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

- 1.1. 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 statutory instruments 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.¹

2. **Introduction**

- 2.1. Dorothy Livingston opened the meeting and delivered a brief introduction.

3. **CRR Amending Regulation—[ECON draft report](#)**

- 3.1. Forum members held a brief discussion on the draft report. Ms Livingston commented that translating these regulations into English law once the U.K. has withdrawn from the E.U. could create an underlying issue of legal uncertainty. It was decided, however, that members would return to this topic at the next meeting and the Secretariat would invite a transactional lawyer to speak on the implication of covered bonds on transactions.

4. **[No-Deal Brexit Technical Notice](#) on the effect on banking, insurance and other financial services.**

- 4.1. Ms Livingston summarised that No-Deal Brexit Technical Notice and highlighted that in the event the U.K. leaves the E.U. without an agreement, U.K. firms’ position in relation to the E.U. would be determined by the relevant Member State rules and any E.U. rules that are applicable to Third Countries. She also mentioned that the government has committed to legislation to ensure contractual obligations between European Economic Area (“EEA”) and U.K.-based customers can continue to be met.

- 4.2. The members then held a short discussion concerning the temporary permissions regime, which will enable U.K.-based customers who access financial services with EEA firms currently passporting into the U.K. the ability to continue providing services to U.K.

¹ 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.

customers for up to three years after exit. Participants noted that regulators will be consulting on arrangements for continuing the coverage provided by the Financial Services Compensation Scheme (“FSCS”) that protects customers of U.K.-authorised firms who have eligible products in the case of firm failures, including products with EEA firms.

- 4.3. Ms Livingston emphasised that these legislations should be studied separately to identify discrepancies. She was of the opinion, however, that any issues that arise from the No-deal notice are commercial rather than technical and therefore do not constitute a matter of legal uncertainty.
- 4.4. One of the members asked if there was a gap in the law in relation to persons or firms which would be working under the temporary regime and applying for authorisation with respect to equity derivatives. The Chair said that the No-deal notice clearly talks about the continuity of contracts, which should mean there will be no gap—or hiatus. Another member pointed to the FMLC’s recent work on The Robustness of Financial Contracts after Brexit.²

5. General discussion

- 5.1. Members then discussed the Draft EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 and the joint discussion paper published by the Bank of England, Prudential Regulation Authority and the Financial Conduct Authority on the Operational Resilience of U.K. Financial Services Sector took place.³ Members agreed that no immediate issues of legal uncertainty arose in relation to either topic.
- 5.2. A discussion concerning bank resolution and insolvency in the context of Brexit took place. Members identified a concern in relation to bank resolution proceedings that start between now and exit day and whether they would continue to be recognised once the U.K. has left the E.U. One participant suggested that a new bail-in clause should be put in contracts to mitigate any uncertainties with cross-border resolution.

² FMLC. (2018) *U.K. Withdrawal from the E.U.: Issues of Legal Uncertainty Arising in the Context of the Robustness of Financial Contracts*, available at: <http://fmlc.org/wp-content/uploads/2018/08/Report-Robustness-of-Financial-Contracts.pdf>.

³ Draft Statutory Instruments, 2018 No.0000, The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018, available at: <https://www.legislation.gov.uk/ukdsi/2018/9780111172421>.

Bank of England, FCA, PRA (July 2018), *Building the UK financial sector’s operational resilience*, available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/discussion-paper/2018/dp118.pdf?la=en&hash=4238F3B14D839EBE6BEFBD6B5E5634FB95197D8A>

5.3. Ms Livingston asked the members to keep a watching brief for the SIs on financial collateral and Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the “**BRRD**”) so that they could perhaps be discussed at the next meeting.

6. Any other business

6.1. Forum members noted that the next meeting of the Banking Scoping Forum will be held on Tuesday 11 December between 2.00pm and 3.30pm.

Scoping Exercise—Statutory Instruments under the Withdrawal Act



Venessa Parekh, Research Manager

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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 (“**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



- 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.