



Financial Markets Law Committee (“FMLC”)

Infrastructure Scoping Forum

Date: Thursday 6 December 2018

Time: 2.00pm to 3.30pm

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

In Attendance:

Alex Rutter (Chair)	Tradeweb
Thomas Donegan	Shearman & Sterling LLP
Emma Dwyer	Allen & Overy LLP
John Ewan	
Nathaniel Lalone	Katten Muchin Rosenman UK LLP
Iona Levine	Minerva Chambers
Rachel Pearson	ICE
Michael Sholem	Davis Polk & Wardwell LLP
Mitja Siraj	FIA
Virgilio Diniz	FMLC
Thomas Willett	FMLC

Guest Speaker

Annabelle Whitby-Smith	Allen & Overy LLP
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Regrets:

Antony Beaves	Bank of England
Nick Carew-Hunt	
Adam Eades	Cboe Europe
Mark Evans	Travers Smith LLP
Hannah Meakin	Norton Rose Fulbright LLP
Martin Sandler	PricewaterhouseCoopers LLP
Arun Srivastava	Paul Hastings, LLP
Christopher Twemlow	Euroclear UK and Ireland
Paul Watkins	Blue Nile Training

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Minutes:

1. Introductions

1.1. Alex Rutter opened the meeting.

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

2.1. Virgilio Diniz described to the members how new issues of legal uncertainty on which the FMLC can undertake work are raised. He 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. Updated ESMA Q&As on the Benchmarks Regulation (Annabelle Whitby-Smith)

3.1. Annabelle Whitby-Smith delivered a talk on the updated European Securities and Markets Authority ("ESMA") Questions and Answers on Regulation (EU) 2016/1011 of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the "Benchmarks Regulation" or the "BMR").² She began by considering Q5.8: When are financial instruments traded on a systematic internaliser in scope of the BMR? Ms Whitby-Smith highlighted the significant uncertainty concerning the scope of over the counter ("OTC") derivatives that would fall within the definition of "financial instrument" under the BMR; in particular, which OTC derivatives would be considered traded via a systematic internaliser under the BMR definition of "financial instrument". She explained that the BMR's definition of "financial instrument" under Article 3.1.(16) is narrower compared to that of Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments ("MiFID II") definition of "financial instrument". Industry therefore lobbied that limbs (i) and (ii) of the BMR definition of "financial instrument" should not cover OTC derivatives, arguing that OTC derivatives should only fall within Scope of the BMR under limb (iii) only, i.e. "traded via a systematic internaliser" and that OTC derivatives not trade by a systematic internaliser should not be covered by the BMR. Ms

¹ Please see Appendix I below.

² ESMA, (2018), *Questions and Answers On the Benchmarks Regulations (BMR)*, available at: https://www.esma.europa.eu/sites/default/files/library/esma70-145-114_qas_on_bmr.pdf.

Whitby-Smith observed that the answers given by EMSA at A5.8 still lacks in clarity, emphasising that the language is not as clear as it could be.

- 3.2. Next, Ms Whitby-Smith spoke to Q5.9 on the use of benchmarks in certificates: When are banks issuing certificates “users of benchmarks”? She explained that there is uncertainty as to when a financial instrument with a basket/reference portfolio/reference index of underlying components would be a “benchmark” for BMR purposes. The Q&A clarifies that if the BMR definition of “index” is satisfied and the index is used in an in-scope “financial instrument” then there will be a BMR “benchmark”.
- 3.3. Q5.11 on the use of benchmarks: Bilateral agreement on exchanged collateral was discussed next. Ms Whitby-Smith highlighted that the answer provided with regards to whether a reference to an index in a bilateral agreement on the interested to be paid on exchanged collateral under various OTC derivatives amount to “use of a benchmark” lacks technicality.
- 3.4. Uncertainties regarding written plans under Article 28(2) were then addressed by Ms Whitby-Smith. Examining the answer to Q8.2: When are written plans robust, the following questions were identified as still needing clarification:
 - i. do you need a separate document containing your written plan that you then reflect in the contractual relationship with clients or is it enough to have fallbacks in the contractual document;
 - ii. what are “adequate” fallbacks; and
 - iii. if written plans are operational internal documents why does the Q&A say they should be “legally effective under Member State Law”?

Despite these unanswered questions, Ms Whitby-Smith suggested that many people have taken a view on what is sufficiently robust for now and what form written plans should take. She suggested that any further guidance from ESMA would be unhelpful as people are comfortable.

- 3.5. Finally, Ms Whitby-Smith identified other uncertainties regarding the BMR, including: (i) the definition of “supervised entity”; and (ii) when are “using” in the European Union – non-E.U. branches.

4. ESMA Public Statement on managing risks of a no-deal Brexit in the area of central clearing (Nathanial Lalone)

- 4.1. Nathaniel Lalone delivered a brief talk on the ESMA Public Statement on managing risks of a no-deal Brexit in the area of central clearing.³ He explained that the Public Statement conveys the support from the ESMA Board of Supervisors to continue access to U.K. central counterparty clearing houses (“CCPs”) in order to limit the risk of disruption in central clearing and to avoid negatively impacting E.U. financial market stability.
- 4.2. This Public Statement, however, provides no further clarity for potential uncertainty a hard-Brexit could bring that could cause large systemic risk. Still, Mr Lalone mentioned that most trading venues are advancing on their hard-Brexit contingency plans.
- 5. Plenary discussion on recent developments and legal uncertainties concerning financial market infrastructures (Alex Rutter)**
- 5.1. The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018: draft statutory instrument (the “EMIR SI”) concerning pension schemes arrangements was raised by one member.⁴ She emphasised that pension schemes have benefitted from exemptions contracted within EMIR concerning clearing obligations and other requirements. The member queried whether, under the onshored EMIR, the benefit of a forbearance statement will still remain. The member agreed to send further information on this uncertainty to the Secretariat.
- 6. Any other business**
- 6.1. No other business was raised.

³ ESMA, (2018), *Managing risks of a no-deal Brexit in the area of central clearing*, available at: <https://www.esma.europa.eu/press-news/esma-news/managing-risks-no-deal-brexit-in-area-central-clearing>.

⁴ Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018: draft statutory instrument, available at: <https://www.gov.uk/government/publications/draft-over-the-counter-derivatives-central-counterparties-and-trade-repositories-amendment-etc-and-transitional-provision-eu-exit-regulations>.

Lifecycle of a Project

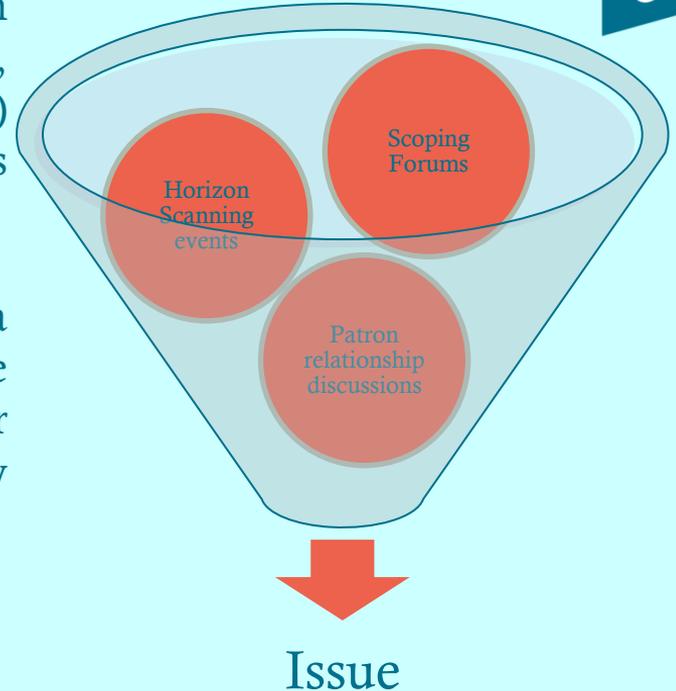


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How an issue of legal uncertainty is raised

- 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

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

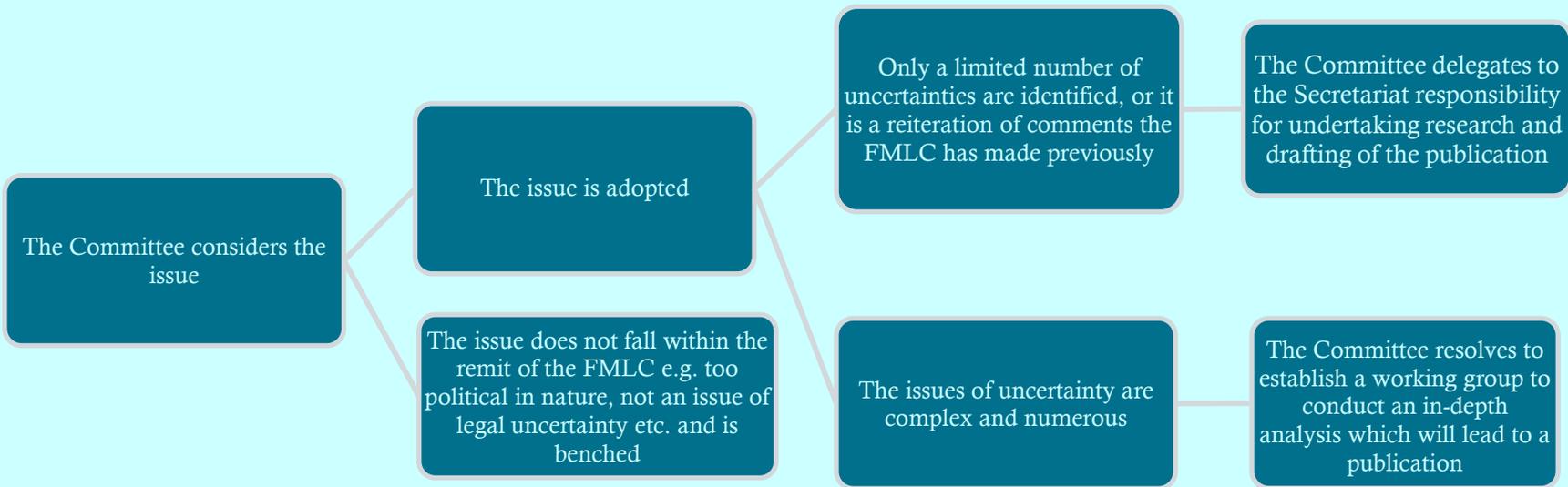
4.1. The Working Group is invited to examine in general the legal issues surrounding the judicial interpretation of autonomous legal terms post-Brexit and to document the results of their inquiry into a paper. As a guide, the paper should address the subject according to the following outline: (i) summary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

FMLC Publications

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 ◀ U.K. WITHDRAWAL FROM THE E.U.

Pre-2002 FLP publications are collected for reference [here](#). FMLC publications—primarily reports and correspondence—go back to 2003. All are available to view or download as a PDF, with collected volumes on specific topics available [here](#). The 10 **most recent** publications are listed below.

Use the search function to search for specific publications, or use the tag cloud to browse the most frequent tags. Please note that the practice of assigning an “issue number” to topics has been discontinued, although older publications continue to be tagged with their issue number. Click [here](#) for a complete list of FMLC publications in reverse-chronological order.

Recent Publications

- **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.