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

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
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)**

   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**”). 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

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1 Please see Appendix I below.

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. 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. 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.

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Lifecycle of a Project
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 interpretations by U.K. courts of autonomous EU legal concepts which appear as received EU legislation as it is incorporated into U.K. law.

1.2. An overview of HMG 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

2.1. 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 fulfill 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 guidance for a new relationship between domestic law and U.K. law.

2.2. 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 date defined in the Withdrawal Bill as the day the U.K. leaves the E.U.), except as far as relevant to the interpretation, disapplication or invalidity of 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.

3. Interpretation of referred 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 so to do (emphasis added).

4. 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

1 The FMLC has previously considered, for instance, the effect of the UNIDroit Model Law on Cross-Border Insolvency (1995) in the incorporation of cross-border insolvency proceedings provisions. The Working Group’s research was repeated upon exit day.
The issue is presented to the Committee

The Committee considers the issue

The issue is adopted

Only a limited number of uncertainties are identified, or it is a reiteration of comments the FMLC has made previously

The Committee delegates to the Secretariat responsibility for undertaking research and drafting of the publication

The issue does not fall within the remit of the FMLC e.g. too political in nature, not an issue of legal uncertainty etc. and is benched

The issues of uncertainty are complex and numerous

The Committee resolves to establish a working group to conduct an in-depth analysis which will lead to a publication
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.
### Examples of recent projects suggested by Scoping Fora

<table>
<thead>
<tr>
<th>Category</th>
<th>Project</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Asset Management</strong></td>
<td>• <a href="#">Letter</a> to Financial Conduct Authority: Asset Management Review: February 2017</td>
</tr>
<tr>
<td><strong>Banking</strong></td>
<td>• <a href="#">Report</a>: Analysis of the Proposal to Amend Moratorium Powers: April 2018</td>
</tr>
<tr>
<td><strong>Brexit Advisory Group</strong></td>
<td>• <a href="#">Letter</a> to Ministry of Justice: Clause 6 of the Withdrawal Bill: March 2018</td>
</tr>
<tr>
<td><strong>Finance and Technology</strong></td>
<td>• <a href="#">Report</a>: Distributed Ledger Technology and Governing Law: March 2018</td>
</tr>
<tr>
<td><strong>Infrastructure</strong></td>
<td>• <a href="#">Report</a>: EMIR: the European Commission's Legislative Proposal to Amend Procedures for recognition of Third Country Central Counterparties: July 2018</td>
</tr>
<tr>
<td><strong>Insurance</strong></td>
<td>• <a href="#">Report</a>: Establishment of an E.U. Insurer in Another Member State: July 2018</td>
</tr>
<tr>
<td><strong>Sovereign Debt</strong></td>
<td>• <a href="#">Report</a>: <em>Pari Passu</em> Clauses in Sovereign Debt Obligations: April 2015</td>
</tr>
</tbody>
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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.