Addendum to Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the U.K. from the E.U.—the Provision and Application of Third Country Regimes in E.U. Legislation

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Financial Markets Law Committee[1]

This paper has been prepared by the FMLC Secretariat.[2]

1 In view of the role of the Bank of England, the Financial Conduct Authority and HM Treasury in the preparations relating to the withdrawal by the U.K. from the E.U, Sinead Meany, Sean Martin and Peter King took no part in the preparation of this paper and the views expressed should not be taken to be those of the Bank of England, the FCA and HM Treasury.

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1. PREFACE AND INTRODUCTION

Preface

1.1. The role of the Financial Markets Law Committee (the "**FMLC**" or the "**Committee**") is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

1.2. In June 2016, the U.K. voted by way of an in/out referendum to withdraw from the E.U. (known colloquially and in this paper as "**Brexit**"). Following the result of the referendum, the FMLC announced that it would work with experts in law and financial services to identify, analyse and address legal uncertainties relating to Brexit and it has since established a Brexit Advisory Group (formerly the High Level Advisory Group on Brexit) to give direction to the Committee's work in this field.[3]

1.3. The FMLC published a report titled "Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the U.K. from the E.U.–the Provision and Application of Third Country Regimes in E.U. Legislation" on 13 July 2017 (the "**2017 Report**").[4] The 2017 Report focused on issues of legal uncertainty specific to the application of E.U. legislation to U.K.-based financial services providers in the event that the U.K. withdraws from the E.U. without retaining access to the single market under any other legal provision.

1.4. This paper is an addendum to the 2017 Report and sets out some key updates to the 2017 Report since its publication. The key updates are in respect of the specified examples of financial industry sectors—which were given by way of illustration—set out in the 2017 Report.[5]

1.5. It is not for the FMLC to comment on matters of policy or the form that future regulatory approaches, if any, should take and this paper should not be understood to constitute comments thereon.

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3 Further details of the FMLC's work in this area are available at: http://fmlc.org/content-scopingforums-brexitadvisorygroup/.

4 This report is available at: http://fmlc.org/report-u-k-withdrawal-from-the-e-u-13-july-2017/.

5 Any area which has not been considered or which has not been considered in detail in the 2017 Report is therefore not specifically covered in this paper.

Introduction

1.6. After the results of the E.U. referendum, HM Government took, on 29 March 2017, the first step in the withdrawal process and officially served notice to the E.U. of the U.K.'s withdrawal under Section 50 of the Treaty on European Union, beginning a two-year "notice" and negotiation period, and setting the date on which the U.K. was to withdraw from the E.U. ("**Exit Day**") as 29 March 2019. HM Government subsequently requested three extensions from the E.U. to the Article 50 notice period and a new Exit Day of 31 January 2020 (at 11 p.m. GMT) was agreed. The Exit Day could occur prior to 31 January 2020 if a "deal" between the U.K. and the E.U. is ratified. During the period since the serving of the Article 50 notice, negotiations for such a "deal" has progressed. This culminated in agreement in principle between the U.K. and the E.U. on 17 October 2019 on the terms of a Withdrawal Agreement and an accompanying Political Declaration.[6]

1.7. The Withdrawal Agreement covered only certain areas of political focus such as citizens' rights, financial settlement and border arrangements. Details of a future relationship between the U.K. and the E.U. regarding financial services are not covered. Although the Political Declaration provides for the E.U. and the U.K. committing, in the context of financial services, to preserve financial stability, market integrity, investor and consumer protection and fair competition, these are only statements of intention and the Political Declaration is non-binding. The Political Declaration is therefore intended only as a starting point for negotiations to follow during the transitional period

6 Note that the Withdrawal Agreement and the Political Declaration were first agreed between the U.K. and the E.U. in November 2018. They were subsequently revised in October 2019.

See the *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, (19 October 2019), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf.

See the *Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom*, (19 October 2019), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840656/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf.

and reflects the E.U.'s position that substantive negotiations on the future relationship would only take place once the Withdrawal Agreement has been finalised.[7]

1.8. The Withdrawal Agreement will need to be put to, and ratified by, both the U.K. and the European Parliament. In a series of votes on 22 October 2019, the U.K. Parliament indicated support for the Withdrawal Agreement but rejected the tight timetable put forward by the Prime Minister to pass this into law.[8] If, by 31 January 2020, the Withdrawal Agreement is not ratified, or there is no further extension of the Article 50 period and there is no revocation of Article 50, the U.K. will leave the E.U. on that day without a deal. This is commonly known as a "no-deal" or a "cliff-edge" scenario. In the case of "no-deal", the U.K. will immediately lose the benefits of membership of the E.U. and will become, from the perspective of E.U. law, a Third Country from 1 February 2020.

1.9. The ratification of the Withdrawal Agreement is, however, not a long-term solution. The Withdrawal Agreement does not contain a comprehensive agreement between the U.K. and the E.U. as to their future relationship.[9] It might also be worth noting that although the Withdrawal Agreement includes the terms of a transitional period—during which the U.K. would be treated for most purposes as if it were still an E.U. Member State and therefore most of E.U. law will continue to apply to the U.K. during this period—there will come a time when the transitional period will end and E.U. law will no longer be of application to, or in, the U.K. Therefore, any "no-deal" Brexit issue will still be an issue at the end of the transitional period unless an agreement to address it has been reached between the U.K. and the E.U. before the expiry of the transitional period.[10]

1.10. As at the time of writing, a general election in the U.K. has been set for 12 December 2019. The uncertainties posed by the election and other potential political changes that

7 That the process of reaching a decision on the application of Third Country regimes to the U.K. will only begin, in all likelihood, once the U.K. has withdrawn from the E.U. is a point made in the 2017 Report (see para 1.10 of the 2017 Report).

8 The European Union (Withdrawal Agreement) Bill 2019-20 that is needed to be passed to implement the Withdrawal Agreement is currently on hold.

9 *Supra*, para 1.7.

10 The Withdrawal Agreement provides for a transitional period which will end on 31 December 2020 unless extended prior to 1 July 2020 for up to one or two years. The end date for the transitional period did not get extended in light of the Article 50 extensions. Note that the "transitional period" is sometimes also known as the "implementation period".

might take place over the next three months could mean that "no-deal" Brexit remains a possibility at the end of January 2020.

1.11. It is against this backdrop of events that this paper considers in the sections below the key contingency measures that the E.U. and the U.K. have put in place in the last two years or so and, if, there has been, or will be, any clarity on the issues of legal uncertainty previously identified in the 2017 Report.

2. KEY 2017 REPORT UPDATES

2.1. European Commission's "no-deal" Contingency Planning

Limited measures taken by the E.U.

2.1.1. Since the publication of the 2017 Report, the E.U. has taken limited measures to mitigate cliff-edge risks arising from a "no-deal" Brexit in the financial sector and has repeatedly stated that individual businesses and E.U. Member States are responsible for ensuring they take the necessary precautions to prepare for a "no-deal" outcome and that firms engaged in financial services should take steps to mitigate risks and ensure that clients continue to be served. The European Commission subsequently noted for example that many insurance firms have already taken action—including transferring contracts, setting up branches and subsidiaries or merging with EU27 firms—to be in a position to continue providing services to their clients.[11]

2.1.2. The European Commission also noted that a lot of preparation has been undertaken by financial services firms to relocate their activities from the U.K. to the EU27 ahead of the U.K. losing the E.U. financial services passport.[12]

2.1.3. After examining the risks linked to a "no-deal" scenario in the financial sector, and taking into account the views of the European Central Bank and the ESAs, the European Commission concluded that only a limited number of contingency measures

11 See the European Commission's second Brexit preparedness communication, Communication of 13 November 2018 *"Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan"*, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:3dd5b905-e829-11e8-b690-01aa75ed71a1.0001.02/DOC_1&format=PDF.

12 *Ibid*.

is necessary to safeguard financial stability in the EU27.[13] These measures are said to mitigate financial stability risks only in those areas where the European Commission views preparedness actions from market operators alone are not sufficient to address these risks by the withdrawal date.

2.1.4. The European Commission has also repeatedly stated that any contingency measures are unilateral E.U. measures and therefore revocable by the E.U. at any time; will generally be temporary; should not replicate the benefits of membership of the E.E.A. or the terms of any transitional period; and would only mitigate the most severe consequences of "no-deal".[14]

2.1.5. A point to note is that, although the 2017 Report and this paper focusses on the access by U.K. financial services providers to the E.U., similar uncertainties will be faced by E.U. financial services providers seeking access to markets in the U.K.

2.1.6. The key contingency measures taken by both the E.U. and the U.K. to mitigate the effects of a "no-deal" Brexit are considered in this section two below.

No bilateral agreements between U.K. and E.U. Member States

2.1.7. Not only has the E.U. taken only very limited contingency measures in the context of financial services, the European Commission also discourages E.U. Member States from agreeing bilateral agreements with the U.K. and have accordingly called on E.U. Member States not to enter into bilateral agreements, arrangements and discussions with the U.K., and to continue with a united approach to E.U. "no-deal" planning.[15] The European Commission added that

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13 This is part of the European Commission's "no-deal" contingency action plan which it started implementing on 19 December 2018. See the European Commission's communication of 19 December 2018 *"Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan"*, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A52018DC0890.

14 The European Commission's first Brexit preparedness communication, Communication of 19 July 2018 *"Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019"* already made the point that "even if the Withdrawal Agreement is ratified and a future relationship agreement is successfully concluded during the transition period, this relationship would not be that of a Member State of the Union. The European Council has consistently recalled that a third country cannot have the same rights and enjoy the same benefits as a Member State." Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:cb76570b-a9c2-11e8-99ee-01aa75ed71a1.0005.02/DOC_1&format=PDF.

15 *Supra*, n.11, the European Commission's communication of 13 November 2018 *"Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan"*.

> In the absence of a Withdrawal Agreement, the European Union will act to protect its interests, and should display a united and coordinated approach in all areas.[16]

2.1.8. On 29 March 2019, the European Commission reiterated that sectoral mini-deals are not an option, and that benefits of the Withdrawal Agreement, including a transitional period, will in no circumstances be replicated in a "no-deal" scenario.[17]

Key Changes – General

2.1.9. The 2017 Report considered the following sectors for the purposes of illustration:

(a) Banking

(b) Investment Services

(c) CCPs and Trading Venues

(d) Alternative Investment Funds and Fund Management

(e) Insurance and Reinsurance

(f) Benchmark Administration

(g) Securities Issuance

Key Changes – Banking

2.1.10. Little has changed since the 2017 Report. The CRD and PSD still do not have equivalence mechanisms for core banking activities such as deposit-taking, payment and lending.[18] Banks are therefore still required to set up branches or subsidiaries in an E.U. Member State and be authorised as such to carry out these activities by that E.U.

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16 According to the European Commission, a united approach is necessary so as to avoid undermining the ratification process. Bilateral agreements would also in most cases not be compatible with E.U. law (or, even where compatible, would in the end jeopardise the integrity of the E.U.), risk creating an uneven level playing field among E.U. Member States and complicate the E.U.'s future negotiations on a new partnership with the U.K.

17 See the European Commission's press release of 29 March 2019, available at: https://europa.eu/rapid/press-release_STATEMENT-19-1914_en.htm.

18 See the European Commission's preparedness notice of 8 February 2018 on the *"Withdrawal of the United Kingdom and EU Rules in the Field of Banking and Payment Services"*, available at: https://ec.europa.eu/info/sites/info/files/file_import/banking_services_en.pdf.

Member State.[19] Alternatively, it is arguable that banks could use the concept of "reverse solicitation" to gain access to E.U. markets without the need to set up branches or subsidiaries in, or obtain any license or authorisation from, their customers' E.U. jurisdictions.[20] "Reverse solicitation" is, however, a complex area and an examination of the issues relating to its potential use is beyond the remit of this paper. It suffices to note that the question of whether "reverse solicitation" is permitted is often a matter of domestic law in the individual E.U. Member State, and as the rules are vague and vary from country to country, it could be difficult and risky to use in practice.[21]

2.1.11. In the meantime, approval has been obtained for U.K. payment service providers to continue to send and receive Euro payments within the Single Euro Payments Area (SEPA) schemes, subject to among other things, continued compliance by participants of the participation criteria of the SEPA schemes.[22]

2.1.12. ESMA has since published some general principles in an Opinion to assist Member States dealing with requests from U.K. financial market participants planning to relocate to the E.U.[23] These principles aim to address various concerns, one of which is that U.K. financial institutions planning to relocate might seek to operate a "letter-box" entity in the E.U. with extensive use of outsourcing and delegation, this being done with the intention of benefitting from an E.U. passport whilst essentially performing all substantial activities or functions outside the EU27.

Key Changes – Investment Services

2.1.13. As considered in the 2017 Report, there are "equivalence" mechanisms under MiFIR with respect to investment services provided to professional investors and eligible

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19 *Supra*, paras 2.1.1 and 2.1.2.

20 "Reverse solicitation" generally means that the service is provided at the customers' own initiative.

21 Note also that although MiFID II and AIFMD contain provisions which recognise "reverse solicitation", there are still issues as to the uncertainty of the scope and manner of their application. An examination of these issues is beyond the remit of this paper.

22 See the *"European Payments Council decision on Brexit and UK PSPS' Participation in SEPA Schemes"* dated 7 March 2019, available at: https://www.europeanpaymentscouncil.eu/sites/default/files/kb/file/2019-03/EPC065-19%20EPC%20Board%20Decision%20Paper%20on%20Brexit%20v1.0%20-%207%20March.pdf.

23 ESMA's opinion on *"General Principles to Support Supervisory Convergence in the Context of the United Kingdom Withdrawing from the European Union"* published 31 May 2017, available at: https://www.esma.europa.eu/sites/default/files/library/esma42-110-433_general_principles_to_support_supervisory_convergence_in_the_context_of_the_uk_withdrawing_from_the_eu.pdf.

counterparties although no "equivalence" decision has been made with respect to the U.K. to date.

2.1.14. It has, in the meantime, been proposed that the equivalence regime be amended to strengthen and clarify the equivalence rules for the provision of investment services by Third Country firms by introducing new equivalence assessment criteria and enhancing the monitoring role of ESMA.[24] Among other things, the revised legislation provides that:

(a) in the case of activities performed by Third Country firms that are "likely to be of systemic importance" for the E.U. (i.e. the U.K. post-Brexit), they will have to comply with legally binding "prudential, organisational and business conduct requirements" considered by the European Commission to be "equivalent" to E.U. legislation after a "detailed and granular assessment". For these purposes, the European Commission shall also assess and take into account the supervisory convergence between the Third Country concerned and the E.U.; and

(b) Third Country firms who are granted equivalence will have to report annually to ESMA its scale and scope of activities carried out in the E.U. as well as other related financial information.

Key Changes – CCPs and Trading Venues

2.1.15. EMIR provides an equivalence mechanism for recognising CCPs and trade repositories based outside of the E.U. To date, this is the only area where the European Commission has made temporary equivalence decisions and adopted Acts, all of which are to apply only if there is a "no-deal" Brexit:

(a) A temporary and conditional equivalence decision to ensure that there will be no disruption in central clearing of derivatives. ESMA will, until 30 March 2020,

24 See the Regulation of the European Parliament and of the Council on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014, (23 October 2019), available at: https://data.consilium.europa.eu/doc/document/PE-80-2019-INIT/en/pdf and the Directive of the European Parliament and of the Council on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU, (23 October 2019), available at: https://data.consilium.europa.eu/doc/document/PE-79-2019-INIT/en/pdf. The Council is expected to adopt them on 8 November (see, *Progress on financial services legislative files (31 October 2019)*, available at: http://data.consilium.europa.eu/doc/document/ST-13504-2019-INIT/en/pdf). Both the Regulation and Directive will enter into force on the 20th day following their publication in the Official Journal.

recognise temporarily U.K. CCPs so as to allow them temporarily to continue providing services in the E.U. [25]

(b) A temporary and conditional equivalence decision to ensure that there will be no disruption in services provided by U.K. CSDs. U.K. CSDs will, until 30 March 2021, be allowed to temporarily continue to provide services to E.U. operators.[26]

(c) Two Delegated Regulations to facilitate novation, for a fixed period of 12 months, of certain over-the-counter derivatives contracts, where a contract is transferred from a U.K. to an EU27 counterparty:

    (i) one relating to the date at which the clearing obligation takes effect for certain types of contracts;[27] and

    (ii) another relating to the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative contracts not cleared by a CCP.[28]

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25 The Commission Implementing Decision (EU) 2018/2031 of 19 December 2018 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D2031&from=EN.

Three U.K. CCPs, namely, LCH Limited, ICE Clear Europe Limited and LME Clear Limited, will be granted temporary equivalence.

26 The Commission Implementing Decision (EU) 2018/2030 of 19 December 2018 determining, for a limited period of time, that the regulatory framework applicable to central securities depositories of the United Kingdom of Great Britain and Northern Ireland is equivalent in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D2030&from=EN.

The Euroclear UK and Ireland Ltd as U.K.'s Central Securities Depository (CSD) will continue to be recognised until 30 March 2021.

27 The Commission Delegated Regulation (EU) 2018/9122 of 19.12.2018 amending Commission Delegated Regulation (EU) 2015/2205, Commission Delegated Regulation (EU) 2016/592 and Commission Delegated Regulation (EU) 2016/1178 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date at which the clearing obligation takes effect for certain types of contracts, available at: https://ec.europa.eu/transparency/regdoc/rep/3/2018/EN/C-2018-9122-F1-EN-MAIN-PART-1.PDF.

28 The Commission Delegated Regulation (EU) 2018/9118 of 19.12.2018 amending Delegated Regulation (EU) 2016/2251 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative contracts not cleared by a CCP, available at: https://ec.europa.eu/info/sites/info/files/regulatory-technical-standards-margins-com-2018-9118_en.pdf.

2.1.16. The European Commission in taking these actions recognised that EU27 companies and operators need time to put in place fully viable alternatives to the use of U.K. CCPs, U.K. CSDs and U.K. counterparties.

2.1.17. In June 2017, it was proposed that EMIR be amended to enhance the recognition regime for Third Country CCPs (commonly known as "**EMIR 2.2**").[29] EMIR 2.2 will introduce a new two tier system as follows:

(a) non-systemically important CCPs (a Tier 1 CCP) will continue to be able to operate under the existing EMIR equivalence framework; and

(b) CCPs that are considered systemically important for the E.U.'s financial stability (a Tier 2 CCP) (i.e. the U.K. post-Brexit) will, however, have to comply with additional requirements or, if that is not sufficient, can be required under EMIR 2.2 to relocate to an E.U. Member State in order to provide some or all of its services.

2.1.18. Further, the role of ESMA in monitoring the activities of CCPs which are granted equivalence is strengthened in particular as regards access to information. The European Commission views the purpose of monitoring as being a "helpful means to ensure stability in equivalence arrangements and not as a source of uncertainty in those arrangements".[30]

2.1.19. Separately, in the absence of an equivalence decision in respect of the U.K. by the European Commission, some clarity was provided by ESMA in March and May 2019 regarding the scope of application of the E.U. share trading obligation which requires

29 See the Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, (10 October 2019), available at: https://data.consilium.europa.eu/doc/document/PE-88-2019-INIT/en/pdf. The Regulation will enter into force on the 20th day following its publication in the Official Journal. According to the Council's press release (available at: https://www.consilium.europa.eu/en/press/press-releases/2019/10/15/capital-markets-union-council-adopts-new-clearing-house-rules/), the Regulation is expected to be published in the Official Journal on 12 December.

30 See the European Commission's communication of 29 July 2019 on *"Equivalence in the area of financial services"* on page 10, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:989ca6f3-b1de-11e9-9d01-01aa75ed71a1.0001.02/DOC_1&format=PDF.

This communication builds on a Staff Working Paper dated 27 February 2017 by the European Commission titled *"Commission Staff Working Document, EU equivalence decisions in financial services policy: an assessment"*, available at: https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf.

E.U. investment firms to trade shares traded on an E.U. trading venue only on E.U. trading venues or Third Country trading venues assessed as being "equivalent". In the statements, ESMA clarified that the share trade obligation would not apply to all U.K. shares with a GB ISIN in the case of a "no-deal" Brexit.[31] It added that it can, however, still assess and adjust its approach in light of future market developments. Following the latest ESMA's statement in May 2019, the FCA issued a statement highlighting other possible disruptions for shares with EU27 ISINs but which have listings and their main or significant centre of market liquidity in the U.K. markets.[32] The FCA in its statement calls for reciprocal equivalence which it believes is the best way of dealing with overlapping share trading obligations.

Key Changes – Alternative Investment Funds and Fund Management

2.1.20. As considered in the 2017 Report, the AIFMD contemplates two regimes for access to the E.U. market by Third Country alternative investment fund managers, namely, the national private placement regimes of each individual E.U. Member State—which could be phased out if the latter becomes available—and a "passport" regime which involves authorisation and licensing by ESMA. This "passport" regime is, however, not yet activated.[33]

2.1.21. In the meantime, a multilateral memorandum of understanding has been entered into—to take effect in the event of a "no-deal"—between the U.K. and the E.U. regulators to facilitate co-operation and information sharing.[34] This agreement formed, at least for the time being, the basis on which E.U. fund managers can continue delegating portfolio management services to U.K. based entities hence minimising disruption in this area in the event of a "no-deal" Brexit.

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31 See ESMA's press releases of 19 March 2019 and 29 May 2019, available at: https://www.esma.europa.eu/press-news/esma-news/esma%E2%80%99s-application-trading-obligation-shares-following-no-deal-brexit-0 and https://www.esma.europa.eu/press-news/esma-news/esma-adjusts-application-trading-obligation-shares-in-no-deal-brexit respectively.

32 See the FCA's statement of 29 May 2019, available at: https://www.fca.org.uk/news/statements/fca-update-share-trading-obligations.

33 See also the European Commission's preparedness notice of 8 February 2018 on the *"Withdrawal of the United Kingdom and EU Rules in the Field of Asset Management"*, available at: https://ec.europa.eu/info/sites/info/files/file_import/asset_management_en.pdf.

34 See ESMA's press release of 1 February 2019, available at: https://www.esma.europa.eu/press-news/esma-news/esma-and-eu-securities-regulators-agree-no-deal-brexit-mous-fca.

Key Changes – Insurance and Reinsurance

2.1.22. The European Commission has previously stated that many insurance firms have taken action, including transferring contracts, setting up branches and subsidiaries or merging with EU27 firms, to be in a position to continue providing services to their clients.[35]

2.1.23. On 19 February 2019, EIOPA addressed recommendations to the national competent authorities in E.U. Member States.[36] These recommendations are helpful in that they are aimed at the general objective of minimising the detriment to policyholders with cross-border insurance contracts. Among other things, EIOPA recommended that competent authorities should establish a mechanism to facilitate the orderly run-off of business which becomes unauthorised. It also suggested that competent authorities should allow the finalisation of portfolio transfers from U.K. insurance undertakings to EU27 insurance undertakings, provided that the transfer is initiated before the withdrawal date.[37]

Key Changes – Benchmark Administration

2.1.24. The FMLC noted in the 2017 Report that the Benchmarks Regulation came into effect in January 2018 following which financial institutions in the E.U. will only be able to use benchmarks registered with ESMA. Among other things, it provides for a transitional period which allows for the use of non-compliant benchmarks until 31 December 2019.

2.1.25. In February 2019, it was announced that a political agreement had been reached to extend the 31 December 2019 deadline for compliance and hence for Third Country administrators (such as the LIBOR administrator, ICE Benchmark Administration Limited) to gain recognition, be endorsed or have an "equivalence" decision—one of

35 *Supra*, para 2.1.1.

36 See also the European Commission's preparedness notice of 8 February 2018 on the *"Withdrawal of the United Kingdom and EU Rules in the Field of Insurance/Reinsurance"*, available at: https://ec.europa.eu/info/sites/info/files/file_import/insurance_en.pdf.

37 For more details, see EIOPA's recommendations, *"Recommendations for the insurance sector in light of the United Kingdom withdrawing from the European Union"*, available at: https://eiopa.europa.eu/Publications/Standards/EIOPA-BoS-19-040_Recommendation_Brexit_final.pdf.

the few areas to have equivalence regimes—to that of 31 December 2021.[38] The European Commission in its press release had said:[39]

> Given the crucial importance of third-country benchmarks for EU companies, the extra two years for benchmarks produced outside the EU was also introduced to provide additional time for work with non-EU regulators on how these benchmarks can be recognised as equivalent or otherwise endorsed for use in the EU.

Key Changes – Securities Issuance

2.1.26. There has not been any significant development in this area and in particular, ESMA has not, to date, published its advice on the development of delegated acts on the general equivalence criteria for Third Country prospectuses as mentioned in the 2017 Report.

Key Changes – Equivalence decision making

2.1.27. Having considered the key changes or updates to specific sectors in the paragraphs above, the paragraphs below now turns to the broader picture of the E.U. equivalence decision-making process as a whole and the recent updates to that process.

2.1.28. The impact of the loss of passporting rights will vary from sector to sector. Third Country regimes set out in various pieces of E.U. financial services legislation confer on Third Countries varying degrees of permission to engage in cross-border services in the E.U. The existence of a Third Country regime does not, however, solve all access issues as the regime may be limited in scope hence permitting only some but not all services and/or permission may only be obtained after a substantial delay hence resulting in major disruptions during the interim limbo period prior to obtaining

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38 See the European Commission's press release of 25 February 2019, available at: https://europa.eu/rapid/press-release_IP-19-1418_en.htm. See also the Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, (23 October 2019), available at: https://data.consilium.europa.eu/doc/document/PE-90-2019-INIT/en/pdf. The Council is expected to adopt it on 8 November (see, *Progress on financial services legislative files (31 October 2019)*, available at: http://data.consilium.europa.eu/doc/document/ST-13504-2019-INIT/en/pdf). The Regulation will enter into force on the day following its publication in the Official Journal.

39 *Ibid*.

permission. Their diverse nature also creates an unsatisfactory patchwork of regulatory landscape that needs to be navigated on a country-by-country basis.[40]

2.1.29. A positive "equivalence" decision by the European Commission in respect of the Third Country regulatory framework can allow access to the single market as a whole rather than piecemeal access to individual countries. Any such "equivalence" decision will, however, be a unilateral decision on the part of the European Commission and can therefore be withdrawn at any time.[41] Further, the concept of "equivalence" will not be relevant for those financial services measures which are silent on this issue.

2.1.30. According to the Political Declaration, "equivalence" will govern the provision of financial services post-Brexit and that the U.K. and the E.U. should aim to complete their assessment of equivalence frameworks by June 2020, which is in advance of the end of the transitional period of 31 December 2020 contemplated in the Withdrawal Agreement.

2.1.31. The European Commission in its communication on 29 July 2019 aims to clarify the way it intends to carry out equivalence decisions and the ongoing monitoring of equivalence once granted.[42] It outlines the overall approach to "equivalence" it will adopt in the area of financial services and the recent legislative amendments to the equivalence regimes—including a stronger regime in relation to Third Country entities which are considered to be of "systemic importance" to the E.U.—relating to the ESAs, the European market infrastructures and the prudential treatment of investment firms.[43]

2.1.32. The European Commission confirmed that it would be extremely difficult to implement a uniform assessment and decision-making process encompassing various areas of equivalence and that policy-makers, regulators and other stakeholders have accepted the need for heterogeneity in the E.U. approach to equivalence provided the common principles are respected, namely, proportionality in the assessments, a risk-sensitive approach to determining equivalent outcomes and enhanced transparency towards the interested third country and the public at large.

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40 For more information on Third Country regimes, please refer to the 2017 Report.

41 The "equivalence" decision could also be time-limited or have conditions or limitations apply to it. *Supra*, n.30, the European Commission's communication of 29 July 2019 on *"Equivalence in the area of financial services"* on page 8.

42 *Supra*, n.30, the European Commission's communication of 29 July 2019 on *"Equivalence in the area of financial services"*.

43 *Supra*, paras 2.1.14, 2.1.17 and 2.1.18.

2.1.33. The European Commission also emphasises the need for adequate monitoring of equivalence decisions by the European Commission and the ESAs to ensure that they continue to fulfil the E.U.'s objectives and preserve financial stability, investor protection, market integrity and a level playing field in the E.U. In this context, the European Commission withdrew, in July 2019, positive equivalence determinations for credit rating agencies in Argentina, Australia, Brazil, Canada and Singapore as they could not satisfy updated E.U. legislation.

2.1.34. The European Commission further emphasises that

> some categories of equivalence decisions are taken after due consideration of the *treatment that the third country affords to the EU regulatory framework*, to the supervisory work performed by EU authorities and to the local presence of EU market participants. (emphasis added)

2.2. U.K.'s "no-deal" Contingency Planning

2.2.1. In order to ensure that the U.K.'s legal system will continue to function properly after Brexit, the European Union (Withdrawal) Act 2018 (the "**Withdrawal Act**") was passed in June 2018 to "onshore" into U.K. domestic law as "retained E.U. law" most of the E.U. law that applies in the U.K. immediately before "exit day".[44] The Withdrawal Act also gives HM Government wide powers to amend this retained E.U. law in order to correct deficiencies in that law arising from the U.K.'s withdrawal from the E.U. Many statutory instruments (or "**SIs**") made under the Withdrawal Act have since been laid in Parliament and some of the key ones relating to financial services are set out below. Any potential issues arising from the Withdrawal Act or the SIs made under the Withdrawal Act are, however, beyond the remit of this paper.

2.2.2. The U.K. has announced a temporary permissions regime (TPR), a temporary recognition regime (TRR) and a financial services contracts regime (FSCR):

(a) The temporary permissions regime will allow E.E.A. firms and funds using a passport to operate for a limited period while they seek authorisation from U.K. Regulators.[45]

44 The EU (Withdrawal) Act 2018 is available at: http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted/data.htm.

45 The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018, available at: http://www.legislation.gov.uk/uksi/2018/1149/contents/made.

(b) The temporary recognition regime provides for a temporary recognition regime for non-U.K. CCPs.[46]

(c) The financial services contracts regime will provide a limited period of time during which E.E.A. passporting firms—which have not entered into the temporary permissions regime or are unsuccessful in securing an authorisation—can continue to service U.K. contracts entered into prior to exit in order to wind down their U.K. business in an orderly fashion.[47]

2.2.3. The temporary permissions and temporary recognitions regimes granting market access to E.U. firms for a limited period of time are similar to a time-limited equivalence decision. As considered above, the European Commission has not, however, provided similar broad regimes and only considered it necessary to implement contingency measures mainly in the area of derivatives for which temporary and conditional equivalence decisions have been taken.[48]

2.2.4. Separately, the Financial Regulators' Powers (Technical Standards) (Amendment etc) (EU Exit) Regulations 2018 (the "**Financial Regulators' Powers Regulations**") sets out the powers of the U.K. Regulators relating to retained E.U. legislation containing regulatory technical standards or implementing technical standards.[49] The Regulations give the U.K. Regulators the power to make E.U. exit instruments to correct deficiencies in retained technical standards to ensure they are legally effective after Brexit.

2.2.5. Legislation that is "in flight but not in effect" on exit day will not form part of retained E.U. law under the Withdrawal Act. They include E.U. financial services legislation which have either been adopted by the E.U. but will not be implemented by the time the

46 The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, available at: https://www.legislation.gov.uk/ukdsi/2018/9780111171882.

Note that the Central Securities Depositories (Amendment) (EU Exit) Regulations 2018 also establishes a transitional regime for non-U.K. CSDs that will allow them to continue to provide services in the U.K. until the recognition process is complete. Available at: http://www.legislation.gov.uk/uksi/2018/1320/made.

47 The Financial Services Contracts Regime (Transitional and Saving Provision) (EU Exit) Regulations 2019, available at: http://www.legislation.gov.uk/uksi/2019/405/contents/made.

48 *Supra*, para 2.1.15.

49 The Financial Regulators' Powers (Technical Standards) (Amendment etc) (EU Exit) Regulations 2018, available at: https://www.legislation.gov.uk/ukdsi/2018/9780111171394/contents.

U.K. is currently scheduled to leave, or that are currently in negotiation and may be adopted shortly after. The U.K. therefore introduced the Financial Services (Implementation of Legislation) Bill which enables HM Treasury to make provision corresponding, or similar, to specified E.U. financial services legislation if the U.K. leaves the E.U. with "no-deal".[50]

2.2.6. The "in-flight" legislation does not, however, take into account those pieces of E.U. Level 2 legislation—like Commission Delegated Regulations which implement regulatory technical standards issued by the ESAs in support of Level 1 legislation—that do not come into effect before exit day and will not therefore be retained under the Withdrawal Act. Anticipating this, HM Government has, by way of the Financial Regulators' Powers Regulations, bestowed upon the U.K. Regulators the power to make "standards instruments" prescribing U.K. binding technical standards ("**U.K. BTS**"). "Onshoring" statutory instruments published under the Withdrawal Act contain provisions permitting regulators to make such U.K. BTS.

2.2.7. In the FMLC's letter to HM Treasury dated 3 January 2019, the FMLC highlighted to HM Treasury that this method of incorporating Commission Delegated Regulations (which are subject to objections from the European Council and Parliament) through U.K. BTS gives rise to concerns about oversight and predictability and that while the U.K. Regulators are required to hold market consultations ahead of issuing technical standards, the only oversight of these new exit instruments, published in accordance with regulation 3(1) of the Financial Regulators' Powers Regulations, would come from HM Treasury, which has been provided an "approval" function under regulation 5(5) of those Regulations.[51] According to the Financial Services and Markets Act 2000, as amended by regulation 7 of the Financial Regulators' Powers Regulations, these standards instruments will then be laid before Parliament, apparently without a specified period for objections. This arguably leads to a lack of democratic overview of

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50 The Financial Services (Implementation of Legislation) Bill, available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0342/19342.pdf.

In a House of Commons debate on 5 September 2019, it was confirmed that the Bill had fallen as it failed to receive Royal Assent in the session in which it was introduced. The FMLC is of the view that it is essential that the Bill is resuscitated and passed so as to ensure continuity and certainty for the financial services industry. The FMLC has written a letter dated 23 October 2019 on this to HM Treasury, available at: http://fmlc.org/letter-to-hm-treasury-financial-services-implementation-of-legislation-bill-23-october-2019/.

51 A copy of the FMLC letter to HM Treasury dated 3 January 2019 is available at: http://fmlc.org/letter-to-hm-treasury-financial-services-implementation-of-legislation-bill-3-january-2019/.

decisions taken by the U.K. Regulators to track or diverge from E.U. technical standards.

2.3. Individual E.U. Member States Preparation of Brexit

2.3.1. In light of the few "across the E.U." contingency measures the European Commission has taken, some individual E.U. Member States have started preparing for a "no-deal" Brexit so as to mitigate the impact of Brexit on continuing U.K.-E.U. cross-border business by introducing temporary national regimes to address some of the impacts of the loss of the passport.

2.3.2. France for example plans to adopt a run-off regime for ongoing contracts which have not been transferred to an E.U. entity and ensure that mere performance of most ongoing contracts (including derivatives) will remain possible post-Brexit. Germany has also published a draft law to preserve market access for currently passported U.K. firms offering banking business or financial services in Germany to continue to do so during a transitional period—for a period not exceeding 21 months—in the case of a "no-deal" Brexit.

2.3.3. Consistent with its previous calls for E.U. Member States to stand united in the E.U.'s "no-deal" Brexit planning, the European Commission has stated in its communication dated 12 June 2019 that it is working together with E.U. Member States to ensure a consistent approach to contingency preparations in the area of financial services at national level so as to preserve financial stability and avoid harming the E.U.'s single market level playing field.[52]

3. IMPACT

Access to the E.U. market

3.1. Although more than a year has passed since the E.U. and the U.K reached broad agreement on their post-Brexit relationship,[53] the anticipated level of Third Country

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52 See the European Commission's fifth Brexit preparedness communication, Communication of 12 June 2019 *"State of play of preparations of contingency measures for the withdrawal of the United Kingdom from the European Union"*, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:40eadc58-8dc8-11e9-9369-01aa75ed71a1.0016.02/DOC_1&format=PDF.

53 *Supra*, para 1.6.

market access for U.K. firms is still relatively limited, whether the U.K. leaves with the Withdrawal Agreement or "no-deal":

(a) **Scope not wide enough**: The scope of the current equivalence regimes is not wide enough to cover, for example, core banking activities such as deposit-taking, payment and lending. These activities will therefore have to be subject to the establishment of a branch or subsidiary in an E.U. Member State and be authorised as such to carry out these activities by that E.U. Member State, or to the rules on "reverse solicitation".[54]

(b) **Equivalence not activated**: Where there are equivalence or "passporting" regimes, they have not been "activated" or no decisions have been made as can be seen from the examples of no decisions being made with respect to the U.K. in the context of investment services that can be provided by Third Country firms to professional investors and eligible counterparties in the E.U. under MiFIR and access to the E.U. market that can be granted to Third Country alternative investment fund managers under AIFMD.

(c) **Temporary equivalence**: The current equivalence decisions made in respect of U.K. CCPs and U.K. CSDs for example are only temporary and for a short period of time. The CCP and CSD recognition periods have also not been updated to reflect the Article 50 extension to 31 January 2020 and will therefore expire on 30 March 2020 and 30 March 2021 respectively regardless of the actual Brexit date. With the first looming deadline of 30 March 2020, unless there is certainty as to the extension of the recognition period or both the E.U. and the U.K can agree a longer term solution, U.K. CCPs and CSDs will need to start taking action soon.[55] The extension of the Benchmark Regulation compliance deadline to 31 December 2021 is also only temporary.

54 *Supra*, para 2.1.10.

55 The European Commission in its communication of 12 June 2019 has said that it would consider whether any adjustments are needed for contingency measures to take into account the new timeline following the second Article 50 extension. *Supra*, n.52, the European Commission's fifth Brexit preparedness communication.

(d) **Possible residual risks**: Even where a "temporary solution giving certainty" can be found, for example, in the case of ESMA clarifying that the E.U. share trading obligation does not apply to shares with GB ISINs, the "solution" may not mitigate all risks and eliminate or minimise all possible disruptions, as can be seen from the FCA's statement that disruptions are still possible for E.U. shares with EU27 ISINs.[56]

(e) **Non-binding recommendations**: The recommendations issued by EIOPA although helpful in principle fall short of guarantees on market access and are non-binding on national competent authorities in the E.U. Member States to whom they are addressed.

(f) **Patchy E.U. Member States access**: Although individual E.U. Member States have started preparing for a "no-deal" Brexit, the measures put, or to be put in place, are mostly temporary and result in a patchy network of access for the U.K. in respect of different financial services in different E.U. Member States.

3.2. Although both the European Commission's recent communication on its equivalence policy and the recent proposed changes to the equivalence regime under MiFIR and EMIR provide some clarity on the E.U.s approach to equivalence and third country market access, they also appear to suggest the adoption of a stricter and narrower approach towards equivalence regimes. As considered in section two above, the equivalence regime under MiFIR is subject to proposed amendments regarding a "detailed and granular assessment" of equivalence requirements for systemically important Third Country firms and a grant to the ESAs of greater supervisory powers over Third Country firms. Similarly, the equivalence regime under EMIR is subject to a proposed amendment regarding the imposition of additional requirements, including a requirement to set up an E.U. entity in the case of a systemically important CCP. There is also a proposal to grant the ESAs greater supervisory powers over Third Country CCPs. These suggested changes aimed at enhancing the equivalence regimes under MiFIR and EMIR indicate that Third Country firms, particularly those which are "systematically important"—which U.K. CCPs can be assumed to be—could, going forward, be facing more stringent requirements and be subject to more supervision from the ESAs and not just under MiFIR and EMIR but very likely also in other areas where

56 *Supra*, para 2.1.19.

equivalence or "passporting" (for example in the context of the AIFMD) assessments are being made by the E.U.

3.3. The tightening of the equivalence regimes is further exacerbated by the European Commission's position that equivalence decisions are unilateral and discretionary decisions and that Third Countries do not have a right for their framework to be assessed or to receive an equivalence determination "even if those Third Counties are able to demonstrate that their framework fulfils the relevant criteria". This indicates that closer regulatory alignment by the U.K. with the E.U.—which the U.K. is very likely to achieve post-Brexit—does not of itself guarantee a positive equivalence decision in favour of the U.K.[57]

3.4. Greater optimism than this inference implies would, however, appear to be justified by the European Commission's statement that when assessing some categories of equivalence decisions, due consideration would be given to "the treatment that the third country affords to the EU regulatory framework, to the supervisory work performed by EU authorities and to the local presence of EU market participants".[58] In fact, the European Commission withdrew, in July 2019, positive equivalence determinations for credit rating agencies in Argentina, Australia, Brazil, Canada and Singapore as they could not satisfy updated E.U. legislation. This difference in fact demonstrates the different conflicting considerations and hence uncertainties surrounding the making of an equivalence decision or the withdrawal of one.

3.5. Given that access into the E.U. is still very limited, many of the issues raised in the 2017 Report remain relevant in the context of a possible "no-deal" Brexit.[59] Recent announcements indicate that the equivalence regimes are being tightened potentially resulting in their being more difficult for Third Countries to satisfy. This could cause more delays to the equivalence assessment process, or, in the worst case, a negative finding of equivalence.

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57 The U.K. is likely to achieve close regulatory alignment with the E.U. given that the U.K. will transpose existing E.U. rules into national law following Brexit.

58 *Supra*, para 2.1.34.

59 The 2017 Report drew attention to the partial, complex and uncertain nature of Third Country regimes and to the market disruption which may potentially arise at the point at which the U.K. withdraws from the E.U. if no additional provision is made. The 2017 Report also considered the diversity, specificity and complexity of the various threshold conditions that may need to be satisfied in order for U.K. participants to gain access to the E.U. market.

Potential issues with U.K.'s onshoring of "in-flight" legislation

3.6. As considered in section two above, any decisions taken by the U.K. Regulators—who are exercising the power bestowed upon them under the Financial Regulators' Powers Regulations—to track or diverge from E.U. technical standards could, as a result, be taken on a case-by-case basis.[60] The collective effect, however, of these decisions may ultimately affect firms' access to E.U. markets *via* minimum requirements in E.U. law on adequacy and equivalence.[61]

3.7. Further, the view of the FMLC is that the exercise of a power to diverge from E.U. measures incorporating standards which have already been subject to the rigours of the consultative European legislative process pre-exit day is undesirable. Market participants have prepared to comply with such E.U. technical standards as have been agreed ahead of exit day, and the lack of predictability about the form of U.K. BTS to be issued by the U.K. Regulators begets market uncertainty.[62]

4. SOLUTIONS AND MITIGANTS

4.1. On 25 March 2019, the European Commission announced that it had completed its "no-deal" preparations for 12 April 2019, the deadline of the first Article 50 extension.[63] In its communication dated 12 June 2019, the European Commission also confirmed that it does not plan to put in place any new measures ahead of the extended withdrawal date.[64] This is again reiterated by the European Commission in its communication dated 4 September 2019 where it added that market participants should not rely on the assumption that a third extension will be requested by the U.K. and, if

60 *Supra*, at paras 2.2.5 to 2.2.7.

61 In its letter dated 3 January 2019 to HM Treasury (*supra*, n.51), the FMLC has asked for HM Treasury's assessment to consider both the cumulative and granular effect of any provisions in the U.K. BTS which depart from E.U. technical standards.

62 In its letter dated 3 January 2019 to HM Treasury (*supra*, n.51), the FMLC has also encouraged HM Treasury to ensure continuity of the regulatory regime by including "in-flight" technical standards within the permits of the Financial Services (Implementation of Legislation) Bill.

63 See the European Commission's press release of 25 March 2019, available at: https://europa.eu/rapid/press-release_IP-19-1813_en.htm.

64 *Supra*, n.52, the European Commission's fifth Brexit preparedness communication.

so, will be agreed by the European Council.[65] It therefore calls on affected market participants to make all necessary final adjustments to their plans to prepare for a "no-deal" Brexit on 1 November 2019.[66]

4.2. The contingency measures put in place by the E.U. are not long-term solutions and are far from being sufficient to cover the wide range of financial services the U.K. provides to the E.U. and/or the wide range of financial activities the U.K. carries out in the E.U. The limited availability, to date, for Third Countries such as the U.K. to access the E.U. single market for financial services and the unsatisfactory patchwork of national regimes, were such Third Countries to approach individual E.U. Member States with respect to each and every sector of financial services, highlights the importance of the U.K. and the E.U. having to work closely together in order to build a "mutual access" framework that benefits both the U.K. and the E.U. In light of the European Commission's various communications (see paragraph 4.1 above), however, it is unlikely that the E.U. will reciprocate and put in place any further temporary arrangements (whether of limited or wider application) for the period immediately following Brexit despite the U.K.'s efforts to put in place broader temporary regimes for E.U. firms access into the U.K. (see paragraph 2.2 above).

4.3. Given that the U.K. regulatory framework is likely to be similar to that of the E.U. immediately following Brexit and it therefore stands a good chance of being considered "equivalent" by the E.U.—this being the result of the onshoring of E.U. legislation under the Withdrawal Act—the adoption by the E.U. of an expanded or enhanced framework for equivalence decisions might be a starting point for a future relationship between the U.K. and the E.U.[67] This is contemplated in the Political Declaration which sets out a very ambitious deadline for an assessment of all the equivalence

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65 See the European Commission communication of 4 September 2019 on *"Finalising preparations for the withdrawal of the United Kingdom from the European Union on 1 November 2019"*, available at: https://ec.europa.eu/info/sites/info/files/com-2019-394-final_en.pdf.

66 Note that these dates have since been superseded by the third Article 50 extension, which extends the Exit Day to 31 January 2020. See *supra*, para 1.6. The European Commission clarified that reference in its Brexit communications, including the communication of 4 September 2019 (*ibid*), to the earlier Exit Day of 30 March 2019, 13 April 2019 and 1 November 2019 must be read as referring to 1 February 2020. These communications are available at: https://ec.europa.eu/info/brexit/brexit-preparedness/other-preparedness-activities_en.

67 Note that it is not for the FMLC to comment on matters of policy or the form of regulatory landscape the U.K. should take post-Brexit.

frameworks by June 2020.[68] It is likely that this will have to be pushed back in light of serial deferrals of the U.K.'s withdrawal. For an expanded or enhanced equivalence framework to work will, however, require the current scope of equivalence regimes to be significantly expanded as only very few areas at the moment provide for equivalence regimes. Where they are currently available, they will also need to be activated with respect to the U.K.

4.4. Although the proposed amendments to the equivalence regimes under MiFIR and EMIR and the European Commission's 29 July 2019 communication on equivalence go to some extent to provide clarity, they have not shed more light on the considerations that go into the making, or withdrawal of, an equivalence decision. For the purposes of maintaining financial stability, it has been suggested that the U.K. and the E.U. should agree transparent methodologies for determinations acceptable to both sides as otherwise the regime would risk being opaque and too unreliable to be used as a stable basis for cross-border operations.[69] Achieving this would go a long way to providing certainty for market participants but may not address some other practical and policy issues which are beyond the remit of this paper. They include:

(a) potential delays in the equivalence assessment process as considered in the 2017 Report;

(b) whether the U.K. would, going forward, want to align its regulatory regime as closely with the E.U. (although alignment is no guarantee for a positive equivalence decision);[70]

(c) if there were to be more stringent requirements imposed on "systematically important" entities, whether U.K. entities—assumed to be "systematically important" to the E.U.—could satisfy these stringent requirements; and

(d) the discretion of the European Commission to make equivalence decisions and the different conditions it might impose on the U.K.. This could, however, to a

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68 *Supra*, para 2.1.30.

69 See the UK Finance Quick Brief #12 on *"Equivalence in a future EU-UK trade framework for financial services"*, available at: https://www.ukfinance.org.uk/sites/default/files/uploads/pdf/BQB12-Equivalence-in-a-future-EU-UK-trade-framework-for-financial-services-final.pdf.

70 *Supra*, para 3.3.

large extent be mitigated by the U.K. and the E.U. agreeing transparent methodologies for determinations as mentioned above.

4.5. As also considered in the 2017 Report, the mitigants which might be reflected in forthcoming negotiations between the E.U. and the U.K.—such as a bespoke FTA or the development of a regime similar to the U.K.'s overseas persons exemption—are still relevant.[71] It remains to be seen, however, if any of the models put forward will be acceptable to both sides.

5. CONCLUSION

5.1. In this paper, the FMLC has considered the current status of Brexit in section one and laid out some key updates to the 2017 Report in section two. In sections three and four, the FMLC considered the implications of these updates and sets out some solutions and mitigants which are in addition to those set out in the 2017 Report.

5.2. The uncertainties highlighted in the 2017 Report continue to paint a daunting picture for U.K. market participants who have been, and would like to continue, providing services into the E.U. and the risk of a "cliff edge" continues to present a substantial danger of market disruption and of litigation in relation to legacy business.

5.3. The FMLC has previously recommended prioritising the negotiation of transitional provisions and has also identified actions which financial markets participants might take themselves to ameliorate uncertainty. The FMLC does note, however, that as the extended Brexit deadline of 31 January 2020 is now only about three months away—with the possibility of "no-deal" Brexit still remaining as considered in section one of this paper—there may not be sufficient time to put in place more significant transitional provisions before then or for market participants to take (if they haven't already taken) any necessary actions or to complete any actions that have been taken.

5.4. The U.K. and the E.U. will now need to turn their minds, whether or not there is a transitional period or, whether or not there is a "no-deal" Brexit—although a "no-deal" Brexit will increase the time pressure for doing so—to putting in place mutually

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71 It might be worth noting that one of the changes made to the revised Political Declaration (*supra*, n.6) was to replace references to "free trade area" in the previous version to that of Free Trade Agreement (FTA). The significance of this change remains to be seen.

beneficial arrangements for all areas of financial services taking into account the need for stability and hence predictability of any decisions made in this regard.

GLOSSARY OF TERMS

“AIFMD” refers to the Directive 2011/61/EU on alternative investment fund managers.

“Benchmarks Regulation” refers to the Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds.

“Capital Requirements Directive” and “CRD” refers to Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

“CCP” means central counterparty.

“CSD” means central securities depository.

“E.E.A.” means the European Economic Area.

“E.U.” refers to the European Union.

“E.U. Member States” and “Member States” refers to member states of the E.U.

“EIOPA” is the European Insurance and Occupational Pensions Authority.

“EMIR” refers to the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

“ESMA” refers to the European Securities and Markets Authority.

“EU27” refers to the 27 E.U. countries remaining in the E.U. after Brexit.

“European Commission” is the E.U.’s executive body.

“European Supervisory Authorities” and “ESAs” refers to the European Banking Authority (EBA), ESMA and EIOPA.

“FCA” is the U.K.’s Financial Conduct Authority.

“FTA” refers to a free trade agreement.

“MiFID II” refers to the Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

“MiFIR” refers to the Regulation (EU) No 600/2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

“Payment Services Directive” and “PSD” refers to Directive (EU) 2015/2366 on payment services in the internal market.

"Political Declaration" refers to the draft political declaration on the framework for the future relationship between the U.K. and the E.U.

"PRA" is the U.K.'s Prudential Regulation Authority.

"PSR" is the U.K.'s Payment Systems Regulator.

"Third Country" refers to a jurisdiction outside of the E.U./E.E.A.

"Third Country regimes" refers to the various provisions written into E.U. legislation which permit, under specific conditions, non-E.U. countries to provide services into the E.U.

"U.K. Regulators" refers to the Bank of England, the PRA, the FCA and the PSR.

"Withdrawal Agreement" refers to a proposed agreement between the U.K. and the E.U. on how to implement Brexit.

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Peter King, HM Treasury

Sir Robin Knowles CBE

Sean Martin, Financial Conduct Authority

Jon May, Marshall Wace LLP

Sinead Meany, Bank of England

Chris Newby, AIG

Jan Putnis, Slaughter and May

Barnabas Reynolds, Shearman & Sterling LLP

Peter Spires, Lloyd's of London

Sanjev Warna-kula-suriya, Latham & Watkins LLP

Pansy Wong, J.P. Morgan

Mr Justice Zacaroli

Joanna Perkins (Chief Executive)

72 Note that Members act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.