



## Financial Markets Law Committee (“FMLC”)

### Asset Management Scoping Forum

Date: Thursday 20<sup>th</sup> June

Time: 2pm to 3.30pm

Location: Travers Smith LLP, at 10 Snow Hill, Farringdon, London EC1A 2AL

#### In Attendance:

Philip Bartram (chair)	Travers Smith LLP
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Iain Cullen	Simmons & Simmons LLP
David Gasperow	Orbis Investments
Jonathan Gilmour	Travers Smith LLP
Laura Houet	CMS Cameron McKenna Nabarro Olswang LLP
Owen Lysak	Clifford Chance LLP
Michelle Moran	K&L Gates LLP
Martin Parkes	BlackRock
Ezra Zahabi	Akin Gump Strauss Hauer & Feld

Virgilio Diniz

FMLC

#### Guest Speaker:

Carolyn Jackson

Katten Muchin Rosenman UK LLP

#### Regrets:

Monica Gogna	Dechert LLP
Neil Robson	Katten Muchin Rosenman UK LLP
Emma Rachmaninov	Freshfields Bruckhaus Deringer LLP
Palvi Shah	J.P. Morgan

#### Minutes:

**Registered Charity Number: 1164902.**

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## 1. **Introductions**

1.1. Philip Bartram opened the meeting.

## 2. **Administration: FMLC in numbers (Virgilio Diniz)**

2.1. Virgilio Diniz provided attendees with an update on the performance of the FMLC in 2018.

## 3. **Introductory remarks on points of uncertainty emerging out of the proposed Regulation on the prudential requirements for investment firms (“IFR”) and a proposed Directive on the prudential supervision of investment firms (“IFD”) and the definition of “investment firms” and scope of “assets under advice” ( Philip Bartram)**

3.1. Mr. Bartram introduced the issue of the [IFR](#) and the [IFD](#) (or, both together, (“**IFR/IFD**”))<sup>1</sup>, stating that the scope of “investment firm” is unclear in a number of places in the IFR. In fact, the IFR definition<sup>2</sup> of "investment firm" cross-refers to the definition in Article 4(1)(1) of Directive 2014/65/E.U. on markets in financial instruments (“**MiFID II**”), but does not incorporate the exemptions in articles 2 and 3 of MiFID II<sup>3</sup> or any territorial restrictions.

3.2. The definition raises a particular issue of substance in respect of the test for small and non-interconnected firms (“**SNIFs**”), such as how the exemption threshold should be calculated and how the transitional reliefs work, as well as the treatment of Alternative Investment Fund Managers (“**AIFMs**”) and other collective investment undertakings which are not authorised under MiFID II. Similar issues arise under the Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the “**Securitisation Regulation**”), where the definition of “sponsor” includes “investment firm” as defined in Article (4) (1) (1) of MiFID II..

3.3. This particular issue potentially represents an area of ambiguity, as it is unclear whether the wide definition of investment firm was a deliberate choice of the legislators and is only intended to be narrowed where explicitly stated in the text of the IFR/IFD or whether it was intended only to refer to firms within the scope of MiFID II in all cases but this has not been

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<sup>1</sup> Proposals available at: [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1546878\\_en#po-2017-9235](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1546878_en#po-2017-9235)

<sup>2</sup> This states: ‘investment firm’ means investment firm as defined in Article 4(1)(1) of Directive 2014/65/EU.

<sup>3</sup> Please check for exemptions in article 2 and 3 of MiFID II [here](#).

fully reflected in the text of the IFR/IFD. Mr. Bartram proposed to take further soundings as to the impact of the issue before recommending that it be escalated to the FMLC. He briefly touched on AIMA's previous concerns about the use of the definition of AIFM in Article 4(1)(b) of Directive 2011/61/EU on Alternative Investment Fund Managers (the "AIFMD").

- 3.4. Mr. Bartram also introduced the question of the extent to which the provision of advice is caught by the definition of assets under management ("AUM") in the IFR. In particular, there could be uncertainty as to how assets under an arrangement where a portfolio manager appoints an advisor are to be treated including, whether that would be considered a delegation for the purposes of calculation of the K-AUM under the IFR. In this regard, one member pointed out that this was similar to the issues around the exemption of variation margin requirements under Regulation (EU) 2019/834 ("**EMIR Refit**").

#### 4. **EMIR Refit: what non-EU Asset Managers should be doing now (Carolyn Jackson)**

- 4.1. Ms. Jackson introduced the subject, noting that EMIR Refit had entered into force on 17 June 2019. She emphasised that the biggest impact of EMIR Refit on the funds industry was that any Alternative Investment Fund ("AIF") outside the E.U. that had classified themselves as a third country non-financial counterparty ("NFC-") because they were below the applicable EMIR clearing thresholds and did not have a manager subject to regulation under the AIFMD would now have to classify themselves as Financial Counterparties ("FCs") and therefore be subject to the EMIR margin obligation. EMIR Refit amended EMIR to ensure treatment of all AIFs as FCs, regardless of whether or not their AIFMs are authorised or registered under the AIFMD.
- 4.2. Ms. Jackson noted that such non-E.U. AIFs that did not have any margin agreements in place with their E.U. FC and NFC+ OTC derivatives counterparties had to have EMIR-compliant margin documentation in place when in place on 17 June 2019. Even for those AIFs with existing margin agreements may be required to make certain amendments to ensure such agreements are EMIR-compliant. It was mentioned that non-E.U. AIFs should notify their E.U. OTC derivatives counterparties of their new status as either third country entities "TCE" FC-s or TCE FC+s and make any necessary amendments to any documentation that included a representation of their EMIR status.

4.3. Members of the forum considered that the issues discussed on EMIR Refit did not present any areas of legal uncertainty that should be raised to the FMLC. They observed that it might be prudent to revisit certain issues relating to calculation of the EMIR clearing thresholds if ongoing joint lobbying by AIMA and ISDA does not produce results.

**5. Plenary discussion on potential areas of focus and recommendations for work for the Asset Management Scoping Forum in 2019 (led by Philip Bartram)**

5.1. Members agreed that future agenda topics to the forum could include an overview of multiple overlapping legislative initiatives (including revisions of MiFID II, AIFMD and Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (“UCITS”) and transparency) in relation to Environmental, Social and Governance (“ESG”) and Stewardship with a view to identifying the most material points of legal uncertainty. Members also agreed that liquidity mismatch in funds and an update on IFR/IFD – definition of "investment firm" should be on the radar of the forum.

5.2. Finally, there was a plenary discussion of wider concerns in relation to the remuneration exemption threshold.

**6. Any other business**

6.1. No other business was discussed.