

Financial Markets Law Committee (“FMLC”)

Brexit Advisory Group

Meeting Date: Monday 6 January 2020

Tea and coffee: 9.30am

Meeting Time: 10.00am

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



Attendees:

Joanna Perkins (Chair)	FMLC
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Charles Clark	Linklaters LLP
Paul Double	City of London Corporation
Jonathan Gilmour	Travers Smith LLP
Rashpal Kaul	Rabobank International
Vanessa Knapp	
Vladimir Maly	Morrison & Foerster LLP
Ian Mathers	
Hamish Patrick	Shepherd and Wedderburn LLP
Jan Putins	Slaughter and May
Julia Smithers Excell	White & Case LLP
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

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Minutes:

1 Introduction

- 1.1. Dr. Perkins opened the meeting. She briefly recounted political developments since the last meeting—including the election of a majority Conservative government, which has provided clarity in some respects. She introduced the speakers.

2. Update on Brexit developments (Paul Double)

- 2.1. Mr. Double provided an account of the procedural environment in the House of Commons with respect of the debate around the European Union (Withdrawal Agreement) Bill (“**Withdrawal Agreement Bill**”), which would implement the Withdrawal Agreement negotiated between the U.K. and E.U. into U.K. law. He explained that the Withdrawal Agreement Bill was being treated like a Constitutional Bill. Consequently, amendments to the Withdrawal Agreement Bill for the debate in the House of Commons would be selected by the Chairman of Ways and Means. As the seat of Chairman was currently empty, this will be done by the Deputy Speaker. He further explained that the recorded amendments are first grouped and then debated. If the amendments are not grouped then they are not debated.
- 2.2. Mr. Double referred to the House of Commons—Notices of Amendments (“**Notices of Amendments**”) in respect of the Withdrawal Agreement Bill, which catalogued all the amendments scheduled for its second reading.¹ He informed Advisory Group members that the Withdrawal Agreement Bill will be presented to a Committee of the whole House. He drew attention to the Timetable provided in an Order of the House at the end of Notices of Amendments. The timetable limited the time for debate during each of the stages. The proceedings in Committee are to be completed in two days. Mr. Double also pointed that any proceedings on “Consideration”, “Legislative Grand Committee” and on “Third Reading” will be taken in one day in accordance with the provisions of the Notices of Amendments. Proceedings on Third Reading will (so far as not previously concluded) be brought to a conclusion at the moment of interruption on that day.
- 2.3. Mr. Double brought members’ attention to various amendments under the Notices of amendments. He particularly drew members’ attention to an amendment proposed by the Leader of Opposition and Sir Edward Davey on the “Extension of the implementation period by two years”². Mr. Double noted that this amendment is unlikely to pass in the House of Commons,

¹ See Notices of Amendments as at 20 December 2019, available at: https://publications.parliament.uk/pa/bills/cbill/58-01/0001/amend/euwithdrawal_rm_cwh_1220.pdf.

² NC4 and NC36 of Notices of amendments

given the Prime Minister’s position that the Implementation Period end on 31 December 2020. Another amendment was proposed on the rights of citizens from Member States of the European Economic Area (“**EEA**”) and Switzerland under Article 18(4) of the Withdrawal Agreement.³ Mr. Double also drew attention to an amendment on the Consent and the Ireland/Northern Ireland Protocol,⁴ which re-states the existing law on the operation of cross-community support in votes of the Northern Ireland Assembly. Mr. Double explained that the Democratic Unionist Party (“**DUP**”) in Northern Ireland has expressed concern about the proposed change to the approval procedure in the Withdrawal Agreement.

2.4. Moving on to the other amendments, Mr. Double drew members’ attention to an amendment proposed by Mr. David Davis on the International Trade, which would mandate the Government to participate actively in the World Trade Organization to serve the UK’s national interest.⁵ A relevant amendment for financial services, proposed by Mr. David Davis, focused on the “UK-E.U. trade agreement: mutual recognition and standards”, which would mandate HM Government to seek mutual recognition, adequacy or deemed equivalence arrangements on standards to be included in the future trade relationship, while preserving the right of Parliament to set laws and standards in the U.K.⁶ Mr. Double noted that considering the size of the Government majority in the Commons there is unlikely to be any changes to the Withdrawal Agreement Bill notwithstanding the amendments tabled

2.5. Dr. Perkins thanked Mr. Double for his insightful presentation and invited the members to ask any questions that they had on the Withdrawal Agreement Bill. One member asked if there are any guidelines for the Speaker in respect of the selection of amendments for discussion. Mr. Double explained that, although there are guidelines, precedents suggest that the Speaker’s discretion plays an important role in the selection process. Another member asked if the FMLC was looking at the question of “deemed equivalence”. Dr. Perkins explained that FMLC has two Working Groups, each of which looked at different aspects of that question—one on equivalence provisions in E.U. legislation and the other on World Trade Organization Rules—either or both of which could be revived/reconstituted on FMLC’s discretion.

3. Update on a Second Scottish Independence Referendum (Hamish Patrick)

3.1. Dr. Patrick explained that, after the General Election held in December, the number of representatives of the Scottish National Party (“**SNP**”) elected to the Westminster Parliament

³ NC5 of the Notices of amendments

⁴ NC11 of the Notices of amendments

⁵ NC21 of the Notices of amendments

⁶ NC20 of Notices of amendments

has risen, although not to quite as high a level as after the 2015 elections and the SNP retains a very large majority. He noted that the Conservative Party had also performed better than some had expected, with Labour being reduced to one seat. Dr. Patrick explained that while the Scottish membership of Westminster now has an even larger majority of SNP MPs than before, the polls on the topic of Scottish Independence remain similar to where they were when the first Independence referendum was held.

3.2. A week after the General Elections, the Scottish Government made a request to HM Government for an Order in Council under Section 30 of the Scotland Act 1998 to allow a second referendum on independence to be held. Dr. Patrick stated that the Scottish Government accompanied their request to HM Government with a Paper that proposes primary legislation or a section 30 order which would give the Scottish Parliament an open ended basis to hold a Referendum.⁷ The Paper also discusses Scotland's right to self-determination, and a mandate for an independence referendum. HM Government responded briefly that it will consider the issue of Independence in January 2020. If this request is refused, it is possible that a judicial challenge could be launched, of which the Supreme Court would be the final arbiter. Dr Patrick commented that this is now more of a political question rather than a constitutional one. He stated that if the request is refused not much is likely to happen, however, until after the result of the 2021 Scottish elections as these are held using a proportional representation system and it becomes politically more difficult to refuse a referendum if parties favoring an independence referendum gain a majority under that system on manifestos to that effect.

3.3. Advisory Group members asked questions about financial arrangements in the Withdrawal Agreement Bill for Scotland and about whether Scotland would lobby for membership of the E.U. after Independence. Dr. Patrick explained that discussion on the first issue has not been very concrete and the latter was likely.

4. Update on next steps (Joanna Perkins)

4.1. Dr. Perkins said that the European Parliament is not likely to approve the Withdrawal Agreement until the U.K. Parliament approves it. She pointed that this situation raises the following important questions for this Forum to consider —

(1) Would the U.K. will still be bound by the Withdrawal Agreement Bill if the E.U. Parliament doesn't approve the Withdrawal Agreement before the end of the Article 50 notice period (31 January)?

(2) Is the German Constitution Court, which has in the past retrospectively commented on E.U.

⁷ Scottish Government, Scotland's right to choose: putting Scotland's future in Scotland's hands (19 December 2019), available at: <https://www.gov.scot/publications/scotlands-right-choose-putting-scotlands-future-scotlands-hands/>.

legislation, likely to raise objections to the Withdrawal Agreement? In the event it does, what would be the consequences?

(3) What will be the likely impact of crossing the threshold (31 January) into the implementation period?

(4) What will be FMLC's role in E.U. after Brexit?

4.2 Advisory Group members discussed whether the FMLC's input on E.U. legislation could be helpful after Brexit. Dr. Perkins explained that the FMLC would determine whether it would continue to respond to future E.U. Consultations. One of the members pointed that other institutions like Financial Conduct Authority ("FCA") is likely to follow E.U. developments. Dr. Perkins explained that even though FMLC will be interested in E.U.'s work, the E.U. might think that the FMLC does not have any standing in the matters of E.U. and might not take FMLC's views into consideration. The FMLC is, however, likely to monitor any possible divergence between U.K. and E.U. in financial services legislation.

4.3 The other members supported the idea of FMLC continuing to respond to E.U. Consultations. Dr. Perkins suggested putting a notice on FMLC's website that the FMLC will continue to respond speedily to any legal uncertainties which might arise in the changed circumstances of U.K.'s withdrawal from the E.U.

5. **Any other business**

5.1. No other business was raised.⁸

⁸ The next meeting of the Brexit Advisory Group is scheduled for Monday 9 March at 9.30am to 11.00am.