

Financial Markets Law Committee (“FMLC”)

Brexit Advisory Group

Meeting Date: Thursday 21 November 2019

Tea and coffee: 9.30am

Meeting Time: 10.00am

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



Attendees:

Joanna Perkins (Chair)	FMLC
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Caroline Boon	Barclays Bank plc
Nick Brittain	Sidley Austin LLP
Rebecca Chalk	BlackRock Investment Management (UK) Limited
Charles Clark	Linklaters LLP
Thomas Donegan	Shearman & Sterling LLP
Paul Double	City of London Corporation
Kate Gibbons	Clifford Chance LLP
Jonathan Gilmour	Travers Smith LLP
Antony Hainsworth	Societe Generale
Jim Ho	Cleary Gottlieb Steen & Hamilton LLP
Ian Jameson	Sumitomo Mitsui Banking Corporation Europe Limited
Dorothy Livingston	Herbert Smith Freehills LLP
Ian Mathers	
Rob Price	Bank of England
Hamish Patrick (video link)	Shepherd and Wedderburn LLP
Arad Reisberg	Brunel Law School
Stuart Willey	White & Case LLP
Venessa Parekh	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

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Minutes:

1 Introduction

1.1. Dr Perkins opened the meeting. She briefly recounted the developments in the Brexit process since the last meeting and introduced speakers.

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

2.1. Dr Patrick commented that little has changed with regards to the prospects for Scottish independence since he last spoke to the Group in May. Scotland may seek independence in order to remain in or rejoin the E.U. The Scottish National Party (“SNP”) Scottish Government has announced that it will make a formal request for an Order in Council under Section 30 of the Scotland Act 1998 in December to allow the Scottish Parliament to hold a second referendum on independence. Section 30 allows adjustment of what are “reserved matters”, and an Order in Council under Section 30 was used to grant the last Scottish independence referendum. The process of the referendum would need to be agreed between the Scottish and U.K. governments following the Section 30 order.

2.2. The U.K. Government’s response is likely to depend on the result of the upcoming General Election. Prime Minister Boris Johnson is against a second Scottish Independence referendum, having stated the Scottish independence referendum was a “once in a generation event”. The Labour Party has more nuanced views on a second referendum. Scottish Labour is against a second referendum while U.K. Labour have made various statements. They appear to be keen to be seen not to bow to the SNP in the context of the upcoming General Election, perhaps recalling the Conservative Party campaign posters of Ed Miliband in Alex Salmond’s pocket. There are fringe elements within Scotland’s referendum campaign which would like to declare independence like Catalonia. Dr Patrick said that the SNP does not wish to take a radical route but feels it has a mandate for an independence referendum.

2.3. In respect of how a referendum vote might turn out, the possibility of a “no deal” Brexit gave the “yes” for Independence vote a spike in the polls. If the U.K. election yields a Labour or coalition government, the outcome for Brexit is less clear. Should the U.K. remain in the E.U., the path forward for the Scottish Independence campaign is less clear. If a Conservative government is elected, calls for an independence referendum in Scotland are likely to increase.

2.4. A member asked what might happen to Scottish membership of the E.U. after Brexit. Dr Patrick replied that it is unclear and perhaps a question of timing. If a vote for independence is won before Brexit—i.e., when the UK is still an EU Member State—Scotland might be able successfully to make a “successor state” argument. Whereas, if Brexit has already happened Scotland would have to reapply for membership. This is perhaps one reason why the SNP wants a referendum in 2020.

3. **Update on Brexit developments (Paul Double)**

3.1. Mr Double explained that as Parliament was not currently sitting, and bearing in mind the current polls, he would remark first on what might occur if a Conservative majority is returned and secondly if a coalition is formed from the general election.

3.2. If the Conservatives form a government, they intend to push forward the European Union (Withdrawal Agreement) Bill (the “Withdrawal Agreement Bill”), which implements the Withdrawal Agreement into U.K. law. Mr Double commented that the European Union (Withdrawal) Act 2018, which was the last piece of major legislation passed to implement Brexit, had been considered in both Houses of Parliament with more opportunity for scrutiny, whereas the timetable for the passing of the Withdrawal Agreement Bill removes sifting committees and gives no capability to ramp up to the affirmative resolution procedure.

3.3. Mr Double drew attention to Clause 36 (1) of the Bill which makes a specific reference to recognition of parliamentary sovereignty, with clause 36 (3) stating “Accordingly, nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom.” If there is a majority in the House of Commons they will pass a timetable motion for the Bill, which will truncate the role of the House of Lords in scrutinising the Bill. This will also curtail amendments as what is not debated in the time given will pass pro-forma.

3.4. Mr Double moved on to discuss the role of the House Speaker and John Bercow’s effect on parliamentary business, including, for example, the use of Standing Order 24 of the House of Commons to debate the European Union (Withdrawal) (No.6) Bill (referred in media reports as the “Benn Act” after Hilary Benn MP who had sponsored it) and Oliver Letwin’s amendment to the European Union (Withdrawal) Act 2019. Mr Double commented that Lindsay Hoyle will be a different type of speaker to John Bercow.

3.5. Attendees raised questions about the possibility of judicial intervention in respect of amendments chosen by the Speaker. The discussion then focused on the implementation of the Withdrawal Agreement and the negotiation of the future relationship under the Political Declaration. Mr Double noted that the composition of the House of Commons after the General Election would be a key factor in the shape of the future relationship.

4. Update on FMLC’s work on Brexit (Joanna Perkins)

4.1. Dr Perkins provided an update on the FMLC’s recent work on Brexit. This included papers on equivalence provisions in E.U. legislation, on the application of the Hague Convention to choice-of-court agreements negotiated before Exit Day and on the statutory instrument “onshoring” Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the “**Benchmarks Regulation**”) in case of a “no deal” Brexit.

5. Proposed 2020 Forward Schedule (Joanna Perkins)

5.1. Dr Perkins noted that the next meeting was scheduled for March 2020. In light of several significant events which would take place in the intervening months—including the General Election on 12 December 2019 and the anticipated end of the Article 50 notice period on 31 January 2020—attendees expressed a preference for an additional meeting to be held in January.

6. Any other business

6.1. No other business was raised.