

Financial Markets Law Committee (“FMLC”)

Infrastructure Scoping Forum

Date: 7 November 2019

Time: 2.00pm to 3.30pm

Location: Shearman & Sterling, 9 Appold Street, London, EC2A 2AP



In Attendance:

Barney Reynolds (Chair)	Shearman & Sterling LLP
Antony Beaves	Bank of England
John Ewan	
Natalie Lewis	Travers Smith LLP
Iona Levine	Minerva Chambers
Julia Smithers Excel	White & Case LLP
Ferdisha Snagg	Cleary Gottlieb Steen & Hamilton LLP
Paul Watkins	Blue Nile Training
Virgilio Diniz	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Regrets:

Emma Dwyer	Allen & Overy LLP
Nick Carew-Hunt	
Jonathan Gilmour	Travers Smith LLP
Hannah Meakin	Norton Rose Fulbright LLP
Keti Tano	The London Metal Exchange

Registered Charity Number: 1164902.

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Minutes:

1. Introductions

1.1. Mr Reynolds opened the meeting and invited attendees to introduce themselves.

2. The FMLC's Engagement with the Public Sector (Virgilio Diniz)

2.1. Mr Diniz delivered a short presentation providing an overview of the FMLC's engagement with public authorities.¹ He explained that FMLC is a charity which does not engage in lobbying; it does, however, interact closely with legislative and regulatory bodies in the U.K. and E.U. He provided examples of recent projects on which the FMLC had liaised with public authorities.

3. K-CMG in the context of the Investment Firms Review and the impact on clearing structures (Barney Reynolds)

3.1. Mr Reynolds provided an overview of an issue arising in the context of the Investment Firms Review ("IFR"). It was expected that the Review would result in amendments in the Capital Requirements Regulation (EU) No 575/2013 ("CRR") and Markets in Financial Instruments Directive 2014/65/EU ("MiFID II").

3.2. One such amendment relates to the capital requirements for investment firms which are not themselves clearing members but which use clearing members to access clearing houses. Mr Reynolds noted that the lower "K-CMG" capital charge would usually apply to cleared trades. However, this will only be possible after IFR comes into force when the clearing member is "*an undertaking established in a Member State which fulfils the definition of Article 2(14) of [EMIR]*",² i.e. the clearing member is located in the E.U. Mr Reynolds said that the new requirement in IFR for E.U. firms interacting with clients to clear via E.U. clearing members (or otherwise face a penal capital charge) runs contrary to the business structure and Brexit contingency plans of most financial institutions and would make clearing via U.S. and Asian affiliates difficult also. He stated, however, that it seemed unlikely that these amendments or their effects could be avoided, although the effect might be mitigated a little for firms adopting advanced capital models based on their own risk models.

¹ Please see Appendix I below

² "EMIR" refers to 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.

3.3. A discussion followed as to the possible impact of Brexit, if the E.U. does not grant equivalence or take further steps in this area.

4. European Commission consultation on a review of the Benchmarks Regulation – IBOR Reform

4.1. Mr Reynolds invited comments from attendees on the [Consultation](#) published by the European Commission on a review of the Benchmarks Regulation (EU) 2016/1011 (the “BMR”).

4.2. Attendees discussed benchmark categorisation, third country benchmarks and equivalence. Members also commented on LIBOR and a perceived lack of market engagement with LIBOR transition.

4.3. Attendees agreed that they wished to advise the FMLC to respond to this consultation.

5. 2020 Forward Schedule (Virgilio Diniz)

5.1. Mr Diniz asked attendees to email the Secretariat should they have any comments on the draft Forward Schedule for 2020.

6. Any other business

6.1. No further business was raised at the meeting.

Did you know that although the FMLC is a charity and not a lobbying organisation...it has engaged significantly with public authorities?

Virgilio Diniz, Project Manager



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The FMLC's charitable remit

According to its charitable remit, the FMLC has a tripartite mission:

- to *identify* relevant issues (the **radar** function);
- to *consider* such issues (the **research** function); and
- to *address* such issues (the **public education** function).

FMLC's engagement with public authorities

- The FMLC is NOT a lobbying organisation, but it has engaged significantly and effectively with public authorities;
- The engagement with public authorities is a natural adjunct to its radar, research and public education functions of identifying, considering and addressing issues of legal uncertainties;
- A few examples of topics on which the FMLC has corresponded with public authorities and has achieved effective outcomes and impact are set out in slides below.

U.K. withdrawal from the E.U. based on a free trade agreement not covering financial services – evidence to the House of Lords E.U. Financial Affairs Sub-Committee

- As an extension of work conducted by an FMLC Working Group examining whether a withdrawal from the E.U. based on a free trade agreement not covering the provision of financial services would have any legal ramifications for existing financial contracts, Professor Hugh Beale (University of Warwick) and Simon Firth (Linklaters LLP) gave evidence on the topic of post-Brexit contractual continuity to the House of Lords E.U. Financial Affairs sub-committee.



Colloquium on crypto-assets with the Chief of Staff of the U.S. Securities and Exchange Commission

- On 21st June 2019, the FMLC was delighted to welcome Michael Gill, Chief of Staff and Chief Operating Officer of the U.S. Commodity Futures Trading Commission (the “CFTC”), as keynote speaker at a colloquium on regulating crypto-assets. In the U.S., regulation of crypto-assets has evolved into a multifaceted, multi-regulatory approach and oversight is split between several federal and state authorities. The CFTC has responsibility over crypto-assets used in derivatives contract, or if there is fraud or manipulation involving crypto-assets traded in interstate commerce. Mr. Gill provided an overview of the development of crypto-assets and of the approaches taken by U.S. regulators in evaluating them. He outlined the CFTC’s priorities in considering whether and how crypto-assets should be regulated.



Review of Brexit “onshoring” legislation

- In recent months, the FMLC has focused on reviewing statutory instruments published in draft by HM Treasury under the European Union (Withdrawal) Act 2018. These instruments incorporate and amend (i.e., “**onshore**”) the E.U.’s legal and regulatory framework for financial services.
- The FMLC Secretariat was invited by HM Treasury to review draft versions of this legislation and, to facilitate a quick response to such secondary legislation, the Secretariat has organised meetings amongst leading organisations in the City, comprising representatives from the Brexit Law Committee, (the legal wing of the IRSG), the CLLS Financial and Regulatory Law Committees and the Law Society, to discuss coordinated responses.
- The FMLC has also published papers on the statutory instruments onshoring regulations relating to bank recovery and resolution, investment funds and their managers, markets in financial instruments, corporate insolvency, securitisation and the Benchmark regulation.

ESMA update on its Q&A on MAR in response to a letter from the FMLC

- On 5 September 2017, the FMLC received a response from the Financial Conduct Authority (“FCA”) on its paper that explores uncertainties as to the financial instruments that fall within the scope of the Market Abuse Regulation (“MAR”). The letter states that the FMLC’s analysis and recommendations stemming from this paper were circulated to the FCA policy team, who works with the European Securities and Markets Authority (“ESMA”) in its development of its MAR guidance materials. The letter flags that ESMA has updated its Q&A on MAR on 1 September 2017 to include a new Q&A 9 on market soundings, which seeks to provide guidance on some of the issues highlighted in the FMLC paper.

Summary and Conclusion

- The FMLC seeks to accomplish its radar, research and public education remits while also engaging with public authorities;
- Although the FMLC is NOT a lobbying organisation, it has charitable remits which are aligned with engagement with public authorities; engagement which serves to accomplish the charity's objectives of radar, research and public education.