

## Financial Markets Law Committee (“FMLC”)

### Infrastructure Scoping Forum

Date: 3 March 2020

Time: 2.00pm to 3.30pm

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



#### **In Attendance:**

Natalie Lewis (Chair)	Travers Smith LLP
John Ewan	
Jonathan Gilmour	Travers Smith LLP
Rachel Kench	Intercontinental Exchange (ICE)
Nate Lalone	Katten Muchin Rosenman UK LLP
Iona Levine	Minerva Chambers
Julia Smithers Excell	White & Case LLP
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

#### **Regrets:**

Antony Beaves	Bank of England
Thomas Donegan	Shearman & Sterling LLP
Emma Dwyer	Allen & Overy LLP
Hannah Meakin	Norton Rose Fulbright LLP
Barney Reynolds	Shearman & Sterling LLP
Alex Rutter	Tradeweb
Mitja Siraj	Futures Industry Association (FIA)
Ferdisha Snagg	Cleary Gottlieb Steen & Hamilton LLP
Paul Watkins	Blue Nile Training

**Registered Charity Number: 1164902.**

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## Minutes:

### 1. Introductions

- 1.1. Ms. Lewis opened the meeting and invited attendees to introduce themselves.

### 2. Linking in with the FMLC (Venessa Parekh)

- 2.1. Ms. Parekh provided an overview of a few non-pecuniary ways in which Forum members, or their institutions, could contribute to the work of the FMLC.<sup>1</sup> These include contributing to research, hosting meetings and events and seconding lawyers to the Secretariat.

### 3. Financial markets infrastructure trusts —expanded registration requirements under the Fifth Money Laundering Directive (Natalie Lewis)

- 3.1. Ms. Lewis explained that Directive (EU) 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "**Fifth Money Laundering Directive**" or "**5MLD**") introduces expanded registration requirements to cover all express trusts. While certain sections of 5MLD have already been implemented in the U.K., changes required by 5MLD in respect of the registration of the beneficial ownership of trusts have not yet come into force. HM Treasury and HM Revenue and Customs recently issued a joint consultation (the "**Consultation**") on this aspect of the regime.<sup>2</sup>
- 3.2. Ms Lewis provided an overview of the FMLC's response to the Consultation.<sup>3</sup> Ms Lewis stated the FMLC's response identified three principal types of systemically-important arrangements in the financial markets infrastructure ("**FMI**") context where it is unclear whether such trusts may be captured by the legislation. These so-called "financial markets trusts" are generally special purpose trusts which are used to enhance market confidence in trading, clearing, settlement and payments. The FMLC

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<sup>1</sup> Please see presentation at Appendix I

<sup>2</sup> HM Treasury and H M Revenue and Customs, *Fifth Money Laundering Directive and Trust Registration Service: Technical Consultation Document*, (24 January 2020), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/860269/Technical\\_consultation\\_document\\_Fifth\\_Money\\_Laundering\\_Directive\\_and\\_Trust\\_Registration\\_Service.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860269/Technical_consultation_document_Fifth_Money_Laundering_Directive_and_Trust_Registration_Service.pdf)

<sup>3</sup> FMLC, *Letter to H M Revenue and Customs: Trust Registration and the Fifth Money Laundering Directive* (21 February 2020) available at: [http://fmlc.org/wp-content/uploads/2020/02/11706293\\_2.pdf](http://fmlc.org/wp-content/uploads/2020/02/11706293_2.pdf)

recommended that bespoke exemptions are drafted for the following types of trusts given their systemic importance:

- a) Trusts created for the purpose of managing systemic and other risks in the FMI context: Designated systems under the Settlement Finality Regulations 1999 use express trusts as part of their "default arrangements"—i.e. the trusts operate as part of arrangements put in place by operators of designated systems for the purpose of limiting systemic and other risks which arise in the event of a participant appearing to be unable, or likely to become unable, to meet its obligations as a participant.
- b) Bank of England as "security trustee": The Bank of England acts as security trustee for charges granted by participants in designated payment systems over their reserve collateralisation accounts and/or settlement collateralisation accounts held by it (as settlement agent for the relevant payment systems). Ms Lewis noted it is uncertain whether these arrangements could also fall within the Bank "as monetary authority" exemption which is currently proposed in the Consultation.
- c) Trusts in support of FMI settlement and accounting arrangements: A subsidiary of Euroclear UK & Ireland Limited ("**EUI**"), the U.K.'s central securities depository ("**CSD**") issues "CREST depository interests" ("**CDIs**") under a trust deed poll in favour of CREST members who hold, from time to time, uncertificated units of the CDIs on the relevant Operator register of securities maintained and updated by EUI pursuant to its statutory obligations under the Uncertificated Securities Regulations 2001.

3.3. Ms. Lewis highlighted that although the Consultation does not specifically address the question of legal entity identifiers ("**LEIs**"), the FMLC had brought to HM Treasury's attention the importance of LEIs in the context of the expansion of the anti-money laundering regulatory regime to cover virtual currencies. She queried if there were any trusts arrangements that could potentially fall within the scope of the proposed registration requirement that members wished to highlight.

#### 4. **ESMA Final Report: Alignment of MiFIR with the changes introduced by EMIR Refit (Nate Lalone)**

- 4.1. Mr. Lalone stated that European Securities and Markets Authority (“**ESMA**”) had recently published its final report (the “**Report**”)<sup>4</sup> on the alignment of Regulation (EU) 600/2014 on markets in financial instruments (the “**Markets in Financial Instruments Regulation**” or “**MiFIR**”) with the changes introduced by Regulation (EU) 2019/834 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (“**EMIR Refit**”).
- 4.2. Mr. Lalone gave an overview of the issues of misalignment between MiFIR and EMIR Refit. For example, the EMIR Refit introduced a distinction between two types of financial counterparties (“**FC**”): those which may pose an important systemic risk to the E.U.’s financial system (“**FC+**”) and those that may not (“**FC-**”). From the entry into force of EMIR Refit, only FC+ are subject to mandatory clearing requirements. Under MiFIR, however, the scope of the mandatory trading obligation is defined in respect of FCs, with a cross-reference to the (unamended) definition of FC in 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 (“**European Market Infrastructures Regulation**” or “**EMIR**”). This leads to a disjunction where the scope of the derivatives trading obligation will apply to all FCs whereas the clearing obligation will only apply to FC+s.
- 4.3. EMIR Refit also introduced another disjunction between EMIR and MiFIR as regards non-financial counterparties (“**NFCs**”). Under EMIR Refit, NFCs are only subject to mandatory clearing obligations for those classes of OTC derivatives for which they exceed the relevant clearing threshold; previously, an NFC that crossed the relevant threshold for *one* asset class became subject to the mandatory clearing obligations for *all* asset classes. However, the MiFIR provisions relating to the mandatory trading obligation contain a cross-reference to language in EMIR that has been removed due to EMIR Refit.

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<sup>4</sup> ESMA, *Final Report: Alignment of MiFIR with the changes introduced by EMIR Refit*, (7 February 2020), available at: [https://www.esma.europa.eu/sites/default/files/library/esma70-156-1555\\_consultation\\_paper\\_on\\_emir\\_refit\\_report\\_-\\_clearing\\_and\\_trading\\_obligations.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-1555_consultation_paper_on_emir_refit_report_-_clearing_and_trading_obligations.pdf)

4.4. Mr Lalone observed that the Report suggests that MiFIR should be adapted to replicate the changes introduced by EMIR Refit to the scope of the clearing obligation in the trading obligation. He stated the Report will influence the upcoming European Commission report, due to be published later this year, on the necessity and appropriateness of aligning the trading obligation for derivatives under MiFIR with changes made by EMIR Refit to the clearing obligation for derivatives.

## 5. **IBOR transition (TBC)**

5.1. Members agreed to defer discussion on this topic to a future meeting.

## 6. **Any other business<sup>5</sup>**

6.1. Ms Lewis mentioned the draft Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2020, recently published by HM Treasury.<sup>6</sup> This draft statutory instrument makes amendments to E.U. law relating to the supervision framework for third country central counterparties, retained in the U.K. under the European Union (Withdrawal) Act 2018 in the context of Brexit. The statutory instrument ensures that the requirements imposed by Regulation (EU) 2019/2099 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 (the “**amended European Markets Infrastructure Regulation**” or “**EMIR 2.2**”) will be implemented in the U.K. She noted, in this context, that ESMA’s powers were being conferred upon the Bank of England.

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<sup>5</sup> The next meeting of the Infrastructure Scoping Forum is scheduled for Tuesday 23 June at 2.00pm to 3.30pm

<sup>6</sup> Draft of the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2020 (published 24 February 2020), available at: <https://www.gov.uk/government/publications/draft-of-the-over-the-counter-derivatives-central-counterparties-and-trade-repositories-amendment-etc-and-transitional-provision-eu-exit-regul>

# Linking into the work of the FMLC

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**Venessa Parekh**

**Research Manager**

**Registered Charity Number: 1164902.**

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# Non-pecuniary involvement with the FMLC

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The FMLC's work in furthering legal certainty in the wholesale financial markets, addressing legal risk, and providing impartial analysis is vitally important at this time when so much is happening.

The FMLC appreciates your support through participation in this Scoping Forum. Do you know other ways you can engage with and contribute to the FMLC, aside from a monetary donation?

# Engaging with the FMLC

Alerting the FMLC Secretariat to issues of legal uncertainty

Participation in FMLC scoping forums, either as a member or a guest speaker

Joining FMLC working groups, contributing legal expertise and drafting chapters of papers

Participation in FMLC events, either as a attendee or guest speaker

# Supporting FMLC Events

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Your organisation can host FMLC events and/or provide logistical support for events, such as printing.

For example:

- Judicial Seminar
- Quadrilateral Conference
- Spring and Autumn Seminars
- Patrons' Dinner, and
- Festive drinks reception

# FMLC Secondment Programme

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Law firms can supply lawyers on secondment to the FMLC Secretariat, in the role of Legal Analyst.

The secondment provides an opportunity to conduct detailed research on specific issues and will hone key skills such as drafting, legal research and stakeholder relationships.

Each secondment typically lasts for a period of 6 months. Recent secondees have included trainee solicitors and associates at NQ level, as well as associates who are one year or more PQE.

# Supporting the FMLC

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If you wish to find out more about the FMLC secondment programme and how your organisation can participate, please contact Emma McClean ([operations@fmlc.org](mailto:operations@fmlc.org))

If you wish to find out more about upcoming FMLC events and the ways you can offer support, please contact Rachel Toon ([executivesupport@fmlc.org](mailto:executivesupport@fmlc.org))

If you have an issue of legal uncertainty you would like to raise with the FMLC, or if you or your organisation would like to contribute to the FMLC's work via a Scoping Forum or Working Group, please contact Venessa Parekh ([research@fmlc.org](mailto:research@fmlc.org)) or Katja Trela-Larsen ([forums@fmlc.org](mailto:forums@fmlc.org))