



Financial Markets Law Committee (“FMLC”)

Asset Management Scoping Forum

Date: Thursday 17 December 2020

Time: 2.00pm to 3.30pm

Virtual meeting

Attendees:

Jon May (Moderator)

Phil Bartram

Iain Cullen

Jonathan Gilmour

Kirsten Lapham

Philippa List

Owen Lysak

Leonard Ng

Neil Robson

Selina Sagayam

Palvi Shah

Marshall Wace LLP

Travers Smith LLP

Simmons & Simmons LLP

Travers Smith LLP

Proskauer Rose LLP

Dechert LLP

Clifford Chance LLP

Sidley Austin LLP

Katten Muchin Rosenman UK LLP

Gibson, Dunn & Crutcher UK LLP

J.P. Morgan Asset Management

Venessa Parekh

Katja Trela-Larsen

FMLC Secretariat

FMLC Secretariat

Regrets:

Gregg Beechey

Richard Chapman

David Gasperow

Michelle Kirschner

Michelle Moran

Ezra Zahabi

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

AB Trading Advisors

Orbis Investments

Gibson, Dunn & Crutcher UK LLP

K&L Gates LLP

Akin Gump Strauss Hauer & Feld

Registered Charity Number: 1164902.

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Minutes:

1. Introductions

1.1. Mr May opened the meeting.

2. The implications of Brexit for the FMLC (Katja Trela-Larsen pp Venessa Parekh)

2.1. Ms Trela-Larsen explained that members of the Brexit Advisory Group, at a recent meeting, had recommended for the FMLC to continue to engage with E.U. law after Brexit Transition Period ends on 31 December 2020. Ms Trela-Larsen noted the FMLC has always monitored and responded to legislative developments and proposals in key financial services jurisdictions, and work on certain topics would be incomplete without an international perspective. Ms Trela-Larsen concluded that the FMLC will continue to monitor E.U. legislative developments in relation to financial services through Scoping Forums which may then recommend further engagement for the Committee to consider.

3. European Commission AIFMD review (Jon May)

3.1. Mr May went directly to a plenary discussion on the European Commission's Consultation (the "**Consultation**") on the review of Directive 2011/61/EU on Alternative Investment Fund Managers (the "**Alternative Investment Fund Managers Directive**" or "**AIFMD**") the Alternative Investment Fund Managers Directive and opened the floor to members.¹ He invited members to consider the aim of the AIFMD review process, particularly in light of comments made by the European Securities and Markets Authority ("**ESMA**") in its letter to the European Commission on the AIFMD Review and the significant range of questions posed by the Consultation.²

3.2. Mr May invited comments on the Consultation from members. Members agreed that there were good arguments against substantial revision of AIFMD because this might cause greater upheaval in the market than the inconvenience caused by the current provisions of the AIFMD. A member commented that areas for comment might include definition of a custody asset and asset stripping and transparency rules. Another member drew attention to a recent speech by Verena Ross, Executive Director of ESMA, in which she highlighted

¹ European Commission, Financial services—review of EU rules on alternative investment fund managers (22 October 2020), available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12648-Alternative-Investment-Fund-Managers-review-of-EU-rules>

² ESMA, Letter to the European Commission Re: Review of the Alternative Investment Fund Managers Directive (18 August 2020), available at: [esma34-32-551_esma_letter_on_aifmd_review.pdf \(europa.eu\)](https://www.esma.europa.eu/press-news/esma-news/esma34-32-551-esma-letter-on-aifmd-review)

the need for precision in rules on delegation arrangements under AFIMD, in light of the looming end of the Brexit Transition Period.³ Another member commented that a point on which the FMLC might comment is the liability of external valuers because the extent of potential liability has caused certain valuers to refrain from valuing Level 3 assets.

- 3.3. Forum members asked the Secretariat to circulate via email previous publications by the FMLC on the AIFMD to help them consider whether to recommend to the FMLC that a response to the Consultation be sent.

4. 2021 Forward Schedule (Katja Trela-Larsen)

- 4.1. Ms Trela-Larsen stated she would circulate the proposed dates for meetings in 2021 to the Forum following the meeting. She asked attendees to raise any issues with the proposed dates in response to her email. In the absence of any objections being received within two weeks, the Forward Schedule would be confirmed. The meeting dates were discussed.

5. Any other business

- 5.1. A member suggested that the Forum consider ESMA's consultation on guidelines on marketing communications under the Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings.⁴
- 5.2. A member raised that there is ambiguity as to whether non-E.U. firms are required to comply with firm-level disclosure requirements under Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (the "SFDR").

³ Verena Ross, Keynote Address: Future challenges for fund managers AIMA Global Policy & Regulatory Forum (19 November 2020), available at: https://www.esma.europa.eu/sites/default/files/library/esma34-38-259_verena_ross_keynote_speech_-_aima_conference_19_nov_2020.pdf

⁴ ESMA, Consultation Paper on Draft Guidelines On Marketing Communications (9 November 2020), available at: <https://www.esma.europa.eu/press-news/esma-news/esma-consults-guidance-funds%E2%80%99-marketing-communications>

The implications of Brexit for the FMLC



Venessa Parekh Research Manager

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Brexit

- On 31 December 2020, the Brexit Transition Period—also known in the U.K. as the Implementation Period—will come to an end.
- The shape of the relationship between the U.K. and E.U. after the end of the Transition Period remains unknown. Negotiations continue.
- During the Transition Period, the U.K. has continued to receive E.U. law. Any legislation passed during this time will be “onshored” in the U.K. under the European Union (Withdrawal) Act 2018.
- After the Transition Period, it is uncertain whether the U.K. will continue to incorporate E.U. law

Brexit Advisory Group

- In the week following the referendum result, the FMLC established an Advisory Group of experts from the fields of law to give direction to the Committee's work relating to Brexit. The Brexit Advisory Group meets quarterly and meetings are usually chaired by FMLC CEO Joanna Perkins.
- At a recent meeting of the Brexit Advisory Group, Joanna asked attendees for their views on the FMLC's continued engagement with E.U. law after Brexit.
- Members of the Advisory Group unanimously recommended that the FMLC should continue to engage with E.U. law. This recommendation was communicated to the FMLC.

This would not be unusual ...

As per the FMLC's Remit:

“Although the legal and regulatory frameworks governing wholesale financial markets in the E.U. and the U.K. are highly developed and robust, an element of legal uncertainty is inevitable in such international, competitive and innovative spheres.

“New practices frequently give rise to uncertainties as to the application of existing laws or regulations. Proposals for new laws or regulations—whether as part of domestic or international initiatives—can give rise to uncertainties or misunderstandings when specific features of wholesale markets practice have not been fully or accurately considered in the drafting by a legislator or other public authority.”

International Coordination

- The FMLC has always monitored and responded to legislative developments and proposals in key financial services jurisdictions. In relation to such topics as LIBOR transition or the regulation of cryptoassets, its work would be incomplete if it did not take an international perspective.
- The FMLC has enduring connections with sister organisations around the world with which it participates regularly in information-exchange activities.
- Given that a great proportion of the U.K.'s financial services legislation comprises “onshored” / “retained” E.U. law, it would be remiss not to monitor developments in the E.U.

In Conclusion

- As an impartial and independent body with access to a significant breadth and depth of financial markets expertise, the FMLC provides an invaluable link between the international financial markets and the government, the regulators and the judiciary.
- The FMLC will continue to monitor E.U. legislative developments in relation to financial services through Scoping Forums which may then recommend further engagement
- The FMLC will determine how and whether to engage with specific proposals in the context of its apolitical remit and constraints imposed by Secretariat resources.