

Financial Markets Law Committee (“FMLC”)

Note for Record of Committee Meeting

Date: 31 May 2018

Time: 4:30PM-6:00PM

Location: Marshall Wace, 131 Sloane Street, London SW1X 9AT

Copies to: FMLC Members, Joanna Perkins

In attendance

Lord Thomas (Chairman)

David Greenwald (Deputy Chairman)

Sir William Blair

Paul Double

Simon Firth

Bradley J Gans

Kate Gibbons

Carolyn H. Jackson

Mark Kalderon

Peter King

Sir Robin Knowles CBE

Jon May

Sanjev Warna-kula-suriya

Joanna Perkins (Chief Executive Officer)

Virgilio Diniz (Project Manager)

Venessa Parekh (Research Manager)

Aarushi Sahore (Legal Intern)

Chairman’s Comments

Lord Thomas thanked Marshall Wace for hosting the Committee Meeting. He began by asking the Chief Executive for her update on the International Correlation Issues (“ICI”) teleconference which took place on 22 March 2018. The Chief Executive advised that the ICI conference involved legal certainty units associated with seven central banks. The FMLC presented at the ICI conference on the topics of benchmarks, Financial Technology and Brexit.

Lord Thomas noted the upcoming Quadrilateral conference on 8 June 2018 and the Chief Executive encouraged Members to attend the Quadrilateral conference. Lord Thomas expressed his regret at not being able to attend and noted that if the dates of the Quadrilateral meeting were set further in advance it would be easier for more Members to attend.

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Lord Thomas noted that the Judicial Seminar will be held on 13 June 2018. He observed that the Judicial Seminar was a very useful contribution by the FMLC and the presenting lawyers.

The Chairman reminded the Committee Members about the change in the venue for the October meeting, which will now be held at the offices of Shearman & Sterling. He noted that the meeting would be followed by the Patrons' Dinner at the Bank of England which Members were encouraged to attend.

Issue 219: Brexit—Judicial Interpretation

The Committee noted that the letter to Ministry of Justice on clause 6 of the European Union (Withdrawal) Bill and judicial interpretation was published on 19 March 2018.

Issue 223: Brexit—Retained Law

The Committee noted that this Working Group would have a significant amount of work to do when matters relating to the Withdrawal Bill became more certain. Progress was being made, however, and the Secretariat will compile chapters for the draft paper once they had been received.

Issue 222: Brexit—Part VII Transfers

The Chief Executive advised that the Secretariat had prepared an initial draft letter based on the recommendation from the Insurance Scoping Forum, in which two potential legal uncertainties in the Part VII Transfer process were identified. Upon review, members of the Insurance Scoping Forum commented that those matters were no longer uncertainties but that the residual issue was the interpretation of “establishment” in this context. Establishment was defined in an old Interpretive Communication published by the European Commission which was then superseded by Solvency II. The issue is acute in the context of Part VII Transfers. As the outcome of this issue aligns with the Establishment Paper (Issue 204, below), the letter has been redrafted to support and cohere with the Establishment Paper.

The Committee approved the draft letter to be sent to the Department for Exiting the E.U.

Issue 221: Proposal to Amend Moratorium Powers in the BRRD

The Committee noted that the Paper on Legal Uncertainties in the Proposal to Amend Moratorium Powers was published on the FMLC website on 13 April 2018.

The Chief Executive confirmed that the paper was going to be sent to the European Parliament, following the publication of a new proposal which exacerbated the uncertainties regarding the moratoria powers and raised additional practical complexities, subject to identifying the correct addressee. It was agreed that the letter should be sent to the rapporteur or, if possible, the person holding the file on the proposal in the European Parliament.

Issue 220: Initial Coin Offerings

The Chief Executive advised that the Secretariat were awaiting finalisation of the minutes of the first meeting and the proposal going forward.

One Member who had attended the initial meeting commented that the Working Group was seeking to build a consensus on the legal uncertainties by working through anonymised case studies. Members acknowledged that there was political interest in better understanding and addressing potential regulatory issues in Initial Coin Offerings but that it was difficult to take a firm view on regulatory compliance. The Committee agreed that it would be useful to canvas the disparate pieces of regulation which might apply depending on the nature of individual digital tokens and identify tokens which are incompatible with pre-existing categories of assets and for which new regulation might be needed.

Issue 215: Brexit—Robustness of Financial Contracts

The Chairman thanked Simon Firth for appearing before the House of Lords E.U. Financial Affairs Sub-Committee on 16 May 2018 along with Professor Hugh Beale (the Working Group Chair). Simon Firth commented that it had been a useful exercise and that he and others had drawn the relevant issues to the Sub-Committee's attention. He said that if a legislative solution was not found then there could be disruptions to derivative contracts.

Members agreed that a solution could be built into the Withdrawal Agreement with the E.U., given that the negotiating directives of the E.U. acknowledge the importance of performing prior obligations post-Brexit.

The Chairman observed that it was important that the profile of this issue was promoted, as there was such a large list of issues for the Government to consider in its negotiations. The Chief Executive confirmed that there was a paper addressing this issue and the FMLC would send it with a covering letter to HM Treasury and the Department for Exiting the E.U.

Issue 204: Establishment of an E.U. Insurer in another Member State

This Working Group was initially established to examine the lack of clarity surrounding the distinction between a (re)insurer providing service in an E.U. Member State and becoming established in that Member State. The Secretariat proposed to the Committee that this paper could examine the questions raised by the Working Group about the European Commission's Interpretive Communication on Insurance, published in 2000. The paper would focus on uncertainties in the determination of whether an E.U. insurer must avail of the freedom of establishment or the freedom of services in order to provide cross-border business and highlight the likelihood that these uncertainties will be thrown into the spotlight after Brexit.

The Secretariat had created such a draft paper using text provided by the Working Group. The Committee approved the draft paper.

Issue 200: Execution and Financial Contracts

The Chair of the Working Group, Robin Knowles, confirmed that work was continuing on this issue in conjunction with the Law Commission. He noted that the Law Commission were expecting to publish a consultation paper in the coming months and were interested in hosting a joint event with the FMLC.

Issue 209: DLT Governing Law and Jurisdiction

The Committee noted that the Distributed Ledger Technology and Governing Law: Paper on Issues of Legal Uncertainty was published on the FMLC website on 27 March 2018.

Brexit—New financial markets law and regulation

The Chairman drew the Committee's attention to three related issues on the topic of secondary legislation expected over coming months in pursuit of the objectives of the European Union (Withdrawal) Bill. First, he observed that there was considerable uncertainty as to when drafts of subordinated regulations would be published and when the Withdrawal Agreement would be finalised. He asked Members to confirm whether they would be willing and able to meet on an *ad hoc* basis, if necessary, between the pre-scheduled bi-monthly meetings. Members of the Committee agreed that they were prepared to convene on an urgent basis in light of developments on Brexit-related legislation.

Secondly, the Chairman observed that there would be a significant amount of subordinated legislation to review in upcoming months and that there should be logistical preparations for an extensive review exercise. Members agreed that it would be useful to coordinate efforts with other bodies such as the Brexit Law Committee and the City of London Law Society, because it would not be feasible for the FMLC to review each and every instrument in detail. Members also observed that duplication should be avoided and, in an ideal scenario, Parliamentary draftspersons should receive one consolidated set of comments from the legal industry.

Members of the Committee agreed to return to this at the July meeting, with an update from HM Treasury, if any. The Chief Executive agreed to consider what plans could be put in place to join up efforts with other bodies.

Thirdly, the Chairman noted that, unlike ordinary decolonisation legislation, the Withdrawal Bill had the effect of freezing E.U. law in the U.K. at the time of withdrawal without any provision for evolution or convergence. He observed that this was a very serious issue and asked whether the FMLC should be considering it in detail. Members agreed that this was an issue the FMLC should review but noted that uncertainty remained until the agreement was finalised. Members agreed to revisit this issue at the July meeting with any further update from HM Treasury if available.

ANY OTHER BUSINESS

The next Committee meeting will be held on 26 July at the offices of Linklaters LLP.