



Financial Markets Law Committee (“FMLC”)

Note for Record of Committee Meeting

Date: 25 January 2018

Time: 4:30PM-6:00PM

Location: Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Copies to: FMLC Members, Joanna Perkins

In attendance

Lord Thomas (Chairman)	Robin Knowles
David Greenwald (Deputy Chairman)	Sean Martin
Sir William Blair	Jon May
Paul Double (Observer)	Sinead Meany
Michael Duncan	Oliver Moullin (Observer)
Simon Firth	Jan Putnis
Kate Gibbons	Barney Reynolds
Richard Gray	Joanna Perkins (Chief Executive Officer (“CEO”))
Carolyn Jackson	Jennifer Enwezor (Projects Manager)
Rachel Kent	Juliana Franco (Legal Analyst)
Peter King	Venessa Parekh (Research Manager)

Chairman’s Comments

Lord Thomas thanked Clifford Chance for hosting the Committee meeting. He commended the Secretariat for successfully hosting the festive drinks in December 2017 and the Colloquium on Brexit and the continuity of financial contracts on 18 January 2018. The preparation and organisation had been outstanding.

He thanked outgoing members Piers Le Marchant and Sean McGovern for their contributions to the FMLC and welcomed new members Peter King (HM Treasury) and Rachel Kent (Hogan Lovells International LLP) to the Committee.

He then noted that there are two main developing areas which may be sources of legal uncertainties for exploration by the FMLC: FinTech and Brexit, the latter more pressing. He mentioned a recent meeting he and the CEO had with the European Union Committee of the House of Lords to introduce the FMLC.

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As a prelude to the discussion on the role that the FMLC should play in relation to the Brexit deliberations in Parliament, Lord Thomas gave an overview of the statutory instruments currently laid or to be laid before Parliament and the timetable. He noted that the FMLC could contribute by producing papers on salient issues such as the question of statutory interpretation post-Brexit and by scrutinising statutory instruments. He emphasised that any intervention by the FMLC would have to be done in a timely manner given the time constraints around the Brexit process and invited Paul Double to give a talk on the ways in which the FMLC could engage with Parliament.

Mr Double outlined three ways that the FMLC could engage with the Parliament: (i) ensuring that relevant paper published on its website are brought to the attention of Parliament either directly or through intermediaries; (ii) proposing amendments to Parliamentary Bills or draft statutory instruments and (iii) giving evidence before Select Committees in Parliament.

Members agreed that the FMLC's publications should be brought to the attention of Parliament and that the publications remain policy neutral in overall outlook without putting forward a preferred view on overall outlook. Members also agreed that a process should be put in place and a check point established before FMLC work is sent, and that the quality of the work should be the priority against any time factors. It might on occasions be useful for additional evidence to be given orally or in writing to Parliamentary Committees, but the FMLC would throughout maintain a neutral view on overall outlook. It was unlikely that the FMLC would ever wish itself to propose amendments.

Chief Executive's Comments

The CEO confirmed that minutes of the last Committee meeting had now been published on the FMLC website.

She noted certain staff changes in the Secretariat.

ACTIVE ISSUES

Issue 219: Brexit and Judicial Interpretation (Chair—Ed Murray)

At the last meeting of the High Level Advisory Group (“**HLAG**”) on Brexit, members of HLAG recommended that the FMLC establish a Working Group to identify potential legal uncertainties arising from the interpretation by U.K. courts of autonomous E.U. legal concepts which appear in received E.U. legislation as it is incorporated into U.K. law. The Secretariat wrote to

Committee Members asking for approval to establish a Working Group on this issue. As several Members had expressed their support, a Working Group was established with Ed Murray kindly agreeing to chair.

In light of the discussion on the FMLC's potential for contributing to the Brexit discussions, recorded above, the Chairman urged this Working Group to prepare a letter or paper to the Government and the appropriate Parliamentary Committees within a month highlighting relevant uncertainties and making recommendations which might help ensure greater certainty in the statutory instruments being debated by Parliament.

Issue 215: Continuity of Financial Contracts

The Chairman reported on the success of the Colloquium (mentioned previously) and commented that the test case procedure (Financial List) had been suggested at the Colloquium as an avenue for addressing the doubts over the continuity of certain financial contracts following Brexit (for example, issues of illegality under the laws of the country where the contract is to be performed and enforcement in foreign jurisdictions and/or the continuation of regulated activities post-Brexit).

Issue 214: Business Contract Terms (Assignment of Receivables) Regulations

Members welcomed the engagement between the Department for Business, Energy & Industrial Strategy (“DBEIS”) and the Financial Markets Law Committee of the City of London Law Society (the “CLLS”) which has resulted in revisions to the draft Business Contract Terms (Assignment of Receivables) Regulations 2017 (the “**draft Regulations**”). The Secretariat, party to some of the meetings held between representatives of the DBEIS and the CLLS, would continue to monitor the developments.

Issue 210: Scope of WTO Rules (Co-chairs—Chris Newby and Stephen Powell)

Members noted the publication of this Working Group's [paper](#).

Issue 204: Establishment of an E.U. Insurer in another Member State (Chair—David Kendall)

The Secretariat confirmed that a draft paper which had been produced by this working group convened by the FMLC had been published by the British Insurance Law Association.

At the last Committee meeting, Members had recommended that another attempt be made to discuss with the Working Group whether it might be possible to produce a short paper for publication by the FMLC. Further to this recommendation, the Secretariat and Jan Putnis had discussed reframing an earlier draft paper, which was substantial, with David Kendall, the Chair of the Working Group, and Steven McEwan, another significant contributor. They suggested that the FMLC's paper focus simply on the complexities concerning those activities which the U.K. will be regulating, post-Brexit. The questions to be addressed would include setting out what activities the U.K. would understand as falling under the definition of “doing business” and making recommendations as to the U.K.'s post-Brexit requirements of E.E.A. (re)insurers seeking to do business in the U.K. They also suggested that it might be preferable to rely upon the full report for context and examples while only including the salient details in this paper.

Members approved this proposal as a way forward.

SCOPING AND RADAR

Brexit High Level Advisory Group (“HLAG”)

The HLAG met on 8 December 2017. The CEO recapped the discussions of the HLAG which had concluded that the FMLC should further examine and usefully make recommendations on the questions around interpretation, leading to the establishment of the Working Group on Issue 219, above.

The Chairman asked that parliamentary deadlines be drawn to the attention of the HLAG.

Quarterly Discussion Forum

The Quarterly Discussion Forum call, a bilateral teleconference between the FMLC and the Financial Markets Lawyers Group (the “FMLG”, associated with the New York Federal Reserve), was held on 8 December 2017.

The CEO updated Members on a request made by a representative of the FMLG on so-called “Brexit subsidiaries”—i.e., new group companies which U.K. operating firms may putatively establish so as to retain a presence within the E.U. regulatory perimeter for financial services after Brexit. The CEO requested Members who were aware of the legal background and complexities in this regard to attend (via dial-in) the next call and provide a few remarks.

She also encouraged Members to participate in the Quarterly Discussion Forum calls and to get in touch with the Secretariat if they would like to propose topics.

Initial Coin Offerings (“ICOs”)

Several stakeholders have proposed to the Secretariat that the FMLC undertake research on the legal characterisation of ICOs. The difficulty as highlighted by contacts rests primarily on whether ICOs constitute a regulated activity or an unregulated activity.

Members approved the establishment of a working group.

Proposal to amend Moratoria Powers in BRRD

Members of the Banking Scoping Forum have recommended that the FMLC examine the legal uncertainties arising from the new moratoria powers proposed by the European Commission. In brief, the proposals aim at introducing two new moratoria powers in regard to suspension of payment or delivery obligations which substantially expand the period an institution in resolution can be subject to a stay. Other uncertainties also arise from the interaction of these new powers with existing moratorium powers.

Oliver Moullin confirmed that AFME had been following this issue closely. Given that the trade associations have already weighed in on this topic and that this is quite time sensitive—and in view of the Secretariat’s limited resources—the Committee decided not to establish a working group at this time but instead send a letter to the relevant authorities drawing attention to the uncertainties and recommending reconsideration. It was agreed that the draft letter would be prepared by the Secretariat and circulated to those stakeholders who had raised the uncertainties as well as to members of an existing Working Group which had undertaken work on the Bank Recovery and Resolution Directive.

Part VII Transfers

At the last meeting of the Insurance Scoping Forum, a discussion ensued on the concerns regarding the continuity of contracts written by U.K. insurers with E.U. policyholders or over E.U. situs risk (and vice versa) pre-Brexit where those insurers lost their authorisation in the E.U. as a result of Brexit. This concern has focused attention on the Part VII process as a way of transferring such policies to an E.U. licensed insurer (or U.K. insurers in the case of insurance policies written by E.U. insurers in the U.K.) and the uncertainties in its regard. Interested members of the Insurance Scoping Forum put together a short note drawing attention in particular to the following legal complexities on which clarification would be appreciated.

- the ability of the Court to effect ancillary matters such as the splitting of inwards policies and outwards reinsurance contracts between U.K. and E.E.A. business (assuming this cannot be agreed with a policyholder/reinsurer); and
- the extent to which the particular circumstances of Brexit (which may require Part VII transfers to be effected if an insurer is to be permitted lawfully to service the contract, including by paying claims, after the U.K. leaves the E.U.) should be reflected in the criteria to be applied by both the PRA/FCA and the Court to their assessment of a proposed transfer (e.g., what approach should be taken to issues which might normally give rise to problems in achieving an approved scheme, such as potential loss of protection for the transferring of policies under the Financial Services and Compensation Scheme).

Members discussed that the Part VII transfers affected a variety of market sectors and that clarification would be difficult to achieve. It was acknowledged that the process involved a degree of discretion which, again, would be difficult to impact.

Members agreed that a short letter on only the two issues above should be sent to the FCA.

ANY OTHER BUSINESS

The Chairman drew attention to a conference of the European Law Institute on How Digital Transformation Drives European Integration on 27 February 2018 in which he will be participating. He invited Members to attend.

No other business was raised.