2 November 2018

Theodore Read
Policy Adviser, Resilience and Resolution
HM Treasury Financial Stability Group | 1/36
1 Horse Guards Road,
London, SW1A 2HQ

Dear Mr Read

Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.[1]

A key element of HM Government's preparation for the U.K.'s withdrawal from the E.U. ("**Brexit**") is the European Union (Withdrawal) Act 2018 (the "**Withdrawal Act**") which aims, *inter alia*, to incorporate into U.K. law all applicable E.U. legislation and gives powers to Ministers to make any such amendments to retained law as are necessary to deal with any deficiencies arising from withdrawal. In furtherance of these aims, HM Treasury has begun to publish drafts of statutory instruments ("**SIs**") which will "onshore" E.U. legislation related to the financial markets. The draft Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018 (the "**draft BRR SI**") amends the Banking Act 2009 as well as other pieces of U.K. legislation to create an amended legislative framework for bank recovery and resolution after Brexit.

Enclosed with this letter, please find the FMLC's paper examining the draft BRR SI (the "**FMLC Paper**"). The draft BRR SI, on the whole, does a remarkable job of fitting together pieces of the U.K.'s legislative jigsaw which deal with bank recovery and resolution. The FMLC understands that the draft BRR SI is drafted with the intention of implementing a policy position arising from a "no deal" Brexit. The FMLC does not comment on matters of policy or the form that future regulatory approaches, if any, should take; in the paper, the Committee has drawn attention to some legal and operational uncertainties which will arise primarily owing to the "no deal" nature of the context in which this draft BRR SI will be applied.

In writing the Paper, the Committee's attention was drawn to another uncertainty which will arise in a "no deal" Brexit in the event of a cross-border bank recovery or resolution action. As this is not directly the product of, nor resolvable by, the draft BRR SI, the FMLC has not included it in the paper and instead has set it out below.

Recognition of Third Country Resolution Action

The repeal of the provisions affording special recognition to E.U. resolution measures brings into prominence a pre-existing legal uncertainty regarding the effect of Section 89H of the Banking Act 2009 (as amended) (*Recognition of third-country resolution actions*)

[1] In view of the role of the Bank of England, the Financial Conduct Authority and HM Treasury in the U.K.'s preparations for withdrawal from the E.U., Sinead Meany, Sean Martin and Peter King took no part in the preparation of this paper and the views expressed should not be taken to be those of the Bank of England, the FCA and HM Treasury.

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which is likely to be used more frequently after Brexit given the role of E.E.A. banks in U.K. markets and their future categorisation as Third Country banks.

Section 89H(5) states that "the recognition of third-country resolution action (or any part of it) is without prejudice to any normal insolvency proceedings". Section 89I(2) of that Act provides that the Third Country resolution action has the same effect in any part of the U.K. as if it had been made under the law of that part of the U.K. and allows the Bank of England to take any supplementary measures available in relation to a U.K. resolution in support of a Third Country resolution which has been recognised under Section 89(H). Finally, Section 89K of that Act provides that the Bank of England will have control over whether or not insolvency proceedings may be commenced if it has or is in a position to take stabilisation measures and this appears to extend to cases where these conditions are satisfied in relation to either U.K. institutions or those from other countries.

There appears to be a question of legal uncertainty whether the specific provision in Section 89H(5) would be read as taking priority over the general provision in Section 89K in the case where creditors (particularly creditors seeking to avoid bail-in of their claims) sought an administration or winding up under the general law of the U.K. (not a special administration or winding up) in relation to the U.K. assets of the institution. In the event a Third Country resolution authority is attempting to rescue the same legal entity with bail-in, the success of any such application could impede the resolution—including in the case of a foreign winding up with a bridge institution—and give rise to exactly the adverse effects that resolution recognition by the Bank of England was designed to avoid.

Now that these provisions, rather than E.U. provisions, which prioritised E.U. resolution processes over U.K. insolvency processes, will be used in the event of the failure of a major E.U. institution, the inherent uncertainty arising from these provisions will become more relevant. The FMLC urges HM Treasury to undertake further legislative measures clarifying the interaction of a recognised foreign resolution process and a U.K. insolvency process.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,

Joanna Perkins

Joanna Perkins
FMLC Chief Executive[2]

[2] The FMLC is grateful to Dorothy Livingston (Herbert Smith Freehills LLP) for raising this issue.