



Financial Markets Law Committee (“FMLC”)

Note for Record of Committee Meeting

Date: 26 July 2018

Time: 4:30PM-6:00PM

Location: Linklaters LLP, One Silk Street, London, EC2Y 8HQ

Copies to: FMLC Members, Joanna Perkins

In attendance

Lord Thomas (Chairman)

David Greenwald (Deputy Chairman)

Sir William Blair

Andrew Bagley

Paul Double

Simon Firth

Kate Gibbons

Carolyn H. Jackson

Mark Kalderon

Peter King

Sir Robin Knowles CBE

Jon May

Chris Newby

Jan Putnis

Sanjev Warna-kula-suriya

Joanna Perkins (Chief Executive Officer)

Venessa Parekh (Research Manager)

Aarushi Sahore (Legal Intern)

Priya Odedra (Publications Coordinator)

Chairman’s Comments

Lord Thomas thanked Linklaters LLP for hosting the Committee Meeting. He commended the Secretariat for successfully arranging the Judicial Seminar, which took place on 13 June 2018. He noted that the speakers provided a comprehensive overview of developments in the financial technology sector. The Chief Executive confirmed that another event will be held in January 2019 for those members of the judiciary who are nominated to the Financial List.

The Chairman asked the Chief Executive for her update on the Quadrilateral conference, which took place on 8 June 2018 in Frankfurt. The Chief Executive mentioned that she and other Members of the Committee had presented on the FMLC’s latest work and participated in panel discussions on topics ranging from issues of legal uncertainty surrounding Brexit, benchmarks reform and regulatory developments in relation to FinTech. The Chief Executive noted that the

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next Quadrilateral conference will take place in 2019 and that the host has not yet been determined.

Lord Thomas reminded Committee Members that the next meeting will be held at the offices of Shearman & Sterling on Thursday 4 October 2018. He noted that the meeting would be followed by the Patrons' Dinner at the Bank of England, which Members were encouraged to attend.

ACTIVE ISSUES

Coordinated Response to Brexit-related Statutory Instruments

Lord Thomas observed that a significant volume of work was required to review carefully the statutory instruments (“SIs”) currently laid or to be laid before Parliament. He emphasised that the resources of the FMLC and other organisations would be critical for assisting the Government in a timely fashion.

The Chief Executive provided an overview of the meeting, held on 29 June 2018, between representatives from the FMLC Secretariat, the City of London Law Society's Regulatory and Financial Law Committees, the Brexit Law Committee and the International Regulatory Standards Group. The purpose of the meeting, as agreed by Members at the May Committee meeting, was to coordinate efforts to review the SIs between the FMLC and other bodies, so as to avoid duplicated efforts and provide HM Government with a consolidated response. The Chief Executive advised that attendees at the meeting agreed to make reasonable efforts to share information and coordinate responses. Each organisation, however, had different areas of concern and it was likely that recommendations in a single voice would be difficult to achieve. A Member suggested that this matter might be resolved by agreeing to send a consolidated response to HM Government highlighting those issues on which there was consensus amongst the organisations but giving each organisation the freedom to raise any other concerns separately.

The Chairman noted that, given the time pressures in the event of no agreement and the vast range of issues to be addressed, organisations in the financial sector were likely to achieve a more effective outcome by focusing on a few, agreed recommendations. The Committee agreed that it is imperative to determine the most significant issues of legal uncertainty in the secondary legislation owing to the large volume of SIs that will be published.

Members agreed that a further attempt should be made to coordinate responses between the bodies. The Chief Executive noted that a second meeting will be held on 3 August.

Issue 225: U.S. Sanctions and Blocking Regulations (Chair—Harriet Territt)

The Chief Executive confirmed that a new Working Group had been established to consider issues associated with the re-imposition of U.S. secondary sanctions on Iran and the E.U. Blocking Regulations. The Working Group is to proceed cautiously with a view to focusing on the legal uncertainties rather than the political background.

Issue 224: “Legacy” E.U. Secondary Legislation

The Chief Executive advised that, following a question raised by stakeholders, the Secretariat had prepared two letters in relation to the treatment by the E.U. of Level 2 legislation in circumstances where the relevant Level 1 act has been repealed or recast.

The Committee approved the draft letters to be sent to the Ministry of Justice and to DG Justice in the European Commission.

Issue 222: Brexit—Part VII Transfers

Members noted the publication of the [letter](#) to the Department for Exiting the European Union detailing the issues of legal uncertainty which arise in relation to insurance business in the context of Brexit.

Issue 221: Proposal to Amend Moratorium Powers in the BRRD

In April 2018, the FMLC had published a [paper](#) considering the legal uncertainties arising from the European Commission’s proposal to amend moratoria powers in the BRRD. Stakeholders had raised concerns with the Secretariat that the proposal, which had evolved as it made its way through the European legislative process, continued to create legal uncertainty.

The Chief Executive advised that the Secretariat had prepared a letter highlighting the practical uncertainties of the [latest proposal](#) being considered by the European Parliament. The proposal suggests a two-day pre-resolution moratorium, followed by a ten-day break before the in-resolution moratorium begins.

Members approved the letter to be sent to Mr Gunnar Hokmark MEP, the European Parliament Rapporteur for the BRRD.

Issue 218: Data Protection Act (Chair—Alan Meneghetti)

The Chairman observed that the General Data Protection Regulation, implemented in the U.K. via the Data Protection Act, would raise substantial and complex issues of uncertainty after Brexit.

The Chief Executive advised that Working Group members have sent in chapter contributions which the Secretariat has put together into a draft paper.

Members agreed to review the draft paper and send in any comments to the Secretariat by 3 August 2018.

Issue 216: EMIR Review: Authorisation of CCPs and Recognition (Chair—Nathaniel Lalone)

The Chief Executive confirmed that Working Group members had drafted a paper highlighting issues of legal uncertainty arising from the European Commission’s proposal to alter the processes for authorising and monitoring Central Counterparties (“CCPs”) under EMIR.

Members agreed that the draft paper should be published.

Members also agreed that this Working Group would have the appropriate expertise to review the Brexit-related draft statutory instrument on the topic of CCPs (The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018) and to scope out any issues.

Issue 215: Brexit—Robustness of Financial Contracts (Chair—Professor Hugh Beale)

The Chief Executive advised that the Chair of this Working Group had drafted a note summarising issues of legal uncertainty relating to whether a disorderly cliff-edge withdrawal from the E.U or a withdrawal based on a free trade agreement would have any legal ramifications for existing financial contracts. The note formed the basis of a draft paper created by the Secretariat, which has been reviewed and approved by the Working Group.

Given the significance of this paper, Members agreed to review the paper once more and send any further comments to the Secretariat in time for it to be published by 3 August 2018.

Issue 213: Assignment of Claims

Members approved the publication of the draft letter to the European Commission about the proposed Regulation on the law applicable to the “third-party effects” of the assignment of claims. The letter reiterates the FMLC’s published view that the proposed regulation on the “third-party effects” of the assignment of claims creates more legal uncertainties than it resolves.

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

The Committee noted that the [paper](#) examining the uncertainties in respect of the establishment of an insurer in an E.U. Member State was published on 12 July 2018.

SCOPING AND RADAR

Fifth Anti-Money Laundering Directive

Kate Gibbons outlined the potential areas of legal uncertainty arising from the application of the new Directive (EU) 2018/843 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the “**fifth Anti-Money Laundering Directive**” or “**AMLD5**”). In particular she emphasised the wide-ranging scope of AMLD5 and the retrospectivity of the requirement to register trusts in a central registry whether or not they are taxable.

- One Member suggested that while this might be an issue on which a paper could be published, the Committee could equally wait and respond to HM Treasury’s Consultation.

Members agreed that, as any work undertaken by the FMLC on this topic would focus on the implementation of AMLD5 in the U.K., and given that the FMLC is currently focused on responding to the Brexit SIs, this topic should be addressed when HM Treasury’s consultation begins. The Chairman also commented that the FMLC’s work on AMLD5 should be careful to focus on the effects on financial markets rather than impacts on the wider community.

Brexit—Uncertainties Arising from the Withdrawal Act

At the May Committee meeting, concerns were raised about the effect of the Withdrawal Act freezing any “retained” E.U. law in the U.K. at the time of withdrawal without any provision for evolution or convergence. A Member noted that this uncertainty was likely to linger until the U.K.-E.U. Withdrawal Agreement is finalised. Members agreed to revisit the topic at the next Committee meeting in October and to continue to monitor the issue.

Separately, Jan Putnis proposed that the FMLC might consider work on the *vires* of the powers given to ministers by the Withdrawal Act to amend legislation and that it might perhaps suggest parameters around the execution of such powers. A Member voiced the concerns that the FMLC might not be able to make any recommendations in this context. The Chairman suggested undertaking a scoping study of the topic and producing a short paper to investigate how the powers are currently being used. He acknowledged that, although it was difficult to forecast how these powers would be used, the issue was of significance for financial markets generally.

Brexit Advisory Group

The Chief Executive confirmed that a speaker from HM Treasury had been arranged for the next meeting taking place on 25 September 2018. The Chairman advised that the Secretariat should invite interested persons to this meeting—perhaps turning it into a colloquium.

Infrastructure Scoping Forum

At the last meeting of the Infrastructure Scoping Forum, members had discussed residual issues of uncertainty arising in relation to the European Benchmarks Regulation (the “**BMR**”). Members agreed to request that interested members of the Infrastructure Scoping Forum produce a short briefing note explaining these issues of legal uncertainty in order to determine whether the topic merited further analysis at this stage. In principle, Members agreed that it might be a significant issue but more explanation was needed before a proposal could be adopted.