



Financial Markets Law Committee (“FMLC”)

Note for Record of Committee Meeting

Date: 4 October 2018

Time: 4:30PM-6:30PM

Location: Shearman & Sterling LLP, 9 Appold Street, London EC2A 2AP

Copies to: FMLC Members, Joanna Perkins

In attendance

Lord Thomas (Chairman)

Andrew Bagley

Raymond Cox QC

Paul Double

Simon Firth

Bradley Gans

Mark Kalderon

Rachel Kent

Peter King

Sir Robin Knowles CBE

Sean Martin

Sinead Meany

Oliver Moulin

Jan Putnis

Barney Reynolds

Sanjev Warna-kula-suriya

Pansy Wong

Joanna Perkins (Chief Executive Officer)

Virgilio Diniz (Project Manager)

Venessa Parekh (Research Manager)

Chhavi Sinha (Legal Intern)

Chairman’s Comments

Lord Thomas thanked Shearman & Sterling LLP for hosting the Committee Meeting. He commended the Secretariat for successfully arranging the FMLC Colloquium, which took place on 25 September 2018. He noted that the speakers provided a comprehensive overview of developments in relation to HM Treasury’s preparations for the publication of draft “Brexit” Statutory Instruments (“SIs”). The Chairman reminded Committee Members that the annual Patron’s Dinner would be held at the Bank of England after the Committee meeting.

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Chief Executive's Comments

The Chief Executive informed the Committee that the next Quadrilateral conference—an arrangement with sister organisations to meet annually to discuss topics of mutual interest—will be hosted by the Financial Law Board in Tokyo. She noted that the dates in July 2019 are currently being considered by the organisations and the Secretariat will circulate the confirmed dates as soon as possible. The Chief Executive encouraged Members to attend and speak at the Quadrilateral.

ACTIVE ISSUES

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

This Working Group was established to consider issues associated with the re-imposition of U.S. secondary sanctions and the E.U. Blocking Regulations. The Working Group Chair has drafted a framework paper which will be used as the basis of any publication. Members cautioned again that this topic is politically sensitive and could easily fall outside the remit of the FMLC. The Secretariat confirmed that the Working Group is aware of the dangers and would proceed cautiously.

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

Members noted the publication of two letters on the treatment by the E.U. of Level 2 when the relevant Level 1 act has been repealed or recast.

Issue 223: Brexit —Retained Law (Chair —Ed Murray)

This Working Group was established to examine legal uncertainties in the definition of “retained law” in the European Union (Withdrawal) Bill (now Act). The Working Group identified issues of legal uncertainty and drafted chapters for a paper. Upon review, however, the Secretariat was concerned that some points in the draft paper had already been made by the FMLC in different publications and others did not have specific impact on financial markets.

The Secretariat, with agreement from Working Group Chair, wrote to the Working Group to ask their views on: (a) shortening the introductory sections so that the legal uncertainties are emphasised, and publishing the paper as an addendum to previous work; (b) brainstorming

examples for impact and solutions, which might fill in the gaps; or (c) recommending to the Committee that perhaps this paper is a bit too late. Responses from the Working Group favoured aborting work on the paper as it is unlikely to have impact now that Withdrawal Bill has been enacted. Members agreed that work on the Withdrawal Act might be too late now but observed that issues of legal uncertainty in relation to “retained law” will likely arise in coming months. They recommended reconvening this Working Group in that event.

Issue 222: Brexit—Part VII Transfers

On recommendation of the Insurance Scoping Forum, Members agreed that a letter should be sent to the Financial Conduct Authority (“FCA”) regarding the anticipated transfers of insurance business to E.U.-authorised entities under Part VII of FSMA 2000. The letter highlighted that, in the context of Brexit, such a transfer might come up against the question of whether the U.K. insurer would be conducting its E.E.A. business on a services or establishment basis in the E.E.A.

On 26 September, HM Treasury replied to the letter and affirmed that the issue is a priority for them, and for the Bank of England. The letter records that HM Government has announced various contingencies that “will give certainty to European insurers that they will be able to meet their obligations to UK policy holders” and draws attention to the published draft statutory instrument on the temporary permissions regime, as well as a technical notice on banking, insurance and financial services (published on 23 August). HM Treasury is actively considering the FMLC’s suggestion of requesting a further Commission interpretive communication by way of a potential solution to this problem.

Members agreed that, at this point, no further work was required on this topic.

Issue 221: Proposal to Amend Moratorium Powers in the BRRD

Members noted the publication of a [letter on 31 July](#) to Gunnar Hokmark MEP, the European Parliament Rapporteur for the BRRD, highlighting the practical uncertainties of the latest proposal being considered by the European Parliament to amend the moratorium powers in the BRRD.

Issue 220: Initial Coin Offerings (Chair—Arun Srivastava)

The Working Group considering legal issues relating to Initial Coin Offerings (“ICOs”) met for the third time on 27 September. At this third meeting, Working Group members discussed the report from the Treasury Committee on crypto assets which suggests that, at minimum, the Regulated Activities Order should be amended to include ICOs. The Chair of the Working Group has agreed to prepare a framework document to facilitate the allocation of drafting tasks.

The Chairman urged the Secretariat to work with the Working Group to progress the paper to publication swiftly.

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

Members observed that the paper on the Data Protection Act was published on the FMLC website on 4 October 2018.

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

Members noted that this paper was published on the FMLC website on 14 September 2018.

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

This Working Group was established to examine whether a disorderly cliff-edge withdrawal from the E.U or a withdrawal based on a free trade agreement which does not cover the provision of financial services would have any legal ramifications for existing financial contracts. The paper was published on 8 August 2018 on the [FMLC website](#).

At past FMLC meetings, the Committee has discussed the possibility of undertaking work on (1) reverse solicitation arrangements and (2) human rights provisions as possible solutions to issues relating to contractual continuity. The Secretariat had written to Committee Members to ask whether this work should now be commenced but had received a variety of irreconcilable responses. It now requested Members for guidance.

Members noted that such a project would help bring legal certainty to the financial markets. Several difficulties were raised, however, including the fact that such analysis, in order to be

impactful, would have to be fact-sensitive and technical and, therefore, would be a time-consuming endeavour. Members also observed that Member States were likely to amend their reverse solicitation rules over the next few years, potentially making this work irrelevant.

The Chief Executive also noted that the Secretariat was already struggling to respond to the Brexit SIs and that undertaking a project of this magnitude in addition would be unmanageable.

Members resolved, therefore, not to adopt this issue but to return to it in December. If this project were launched in the future, the Chairman recommended that a new Working Group with a new Chair be established.

Issue 200: Execution and Financial Contracts (Chair—Robin Knowles)

Sir Robin Knowles informed the Committee that the Law Commission has published its Consultation Paper on the topic and that they would welcome the FMLC's views. The Consultation closes at the end of November after which the Law Commission would look to address smart contracts. He recommended that a meeting be held with the Law Commission to discuss both topics.

SCOPING AND RADAR

Brexit—Statutory Instruments published under the Withdrawal Act

The Chief Executive updated Members on steps taken by the Secretariat to coordinate responses to the SIs across the City. She urged Members to contribute to analysis where possible.

ANY OTHER BUSINESS

The Chief Executive raised an issue of legal uncertainty which had been mentioned to the Secretariat by Kate Gibbons, who was unable to attend this meeting. The U.K. Department for Business, Energy & Industrial Strategy published a White Paper setting out the proposal for a new national security and investment regime as a component of HM Government's plan to reform its powers to protect national security and guard against hostile actors' acquisition of control over entities or assets. The proposals also cover loans which raises a few legal uncertainties. Members agreed to send a short response to the Consultation.