



Financial Markets Law Committee (“FMLC”)

Note for Record of Committee Meeting

Date: 6 December 2018

Time: 4:30PM-6:30PM

Location: Katten Muchin Rosenman LLP, Paternoster House, 65 St Pauls Churchyard, London EC4M

Copies to: FMLC Members, Joanna Perkins

In attendance

Lord Thomas (Chairman)

David Greenwald (Deputy Chairman)

Paul Double

Bradley Gans

Kate Gibbons

Mark Kalderon

Peter King

Sir Robin Knowles CBE

Sinead Meany

Chris Newby

Jan Putnis

Barney Reynolds

Pansy Wong

Joanna Perkins (Chief Executive Officer)

Virgilio Diniz (Project Manager)

Venessa Parekh (Research Manager)

Chhavi Sinha (Acting Manager)

Clare Wiles (Legal Analyst)

Chairman’s Comments

Lord Thomas thanked Katten Muchin Rosenman LLP for hosting the Committee Meeting. He told Members that the Secretariat was organising an update day for members of the senior judiciary, to be held on 10 January 2019. Members discussed the merits of putting the presentation materials used by speakers in to the public domain.

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 during the week commencing 8 July 2019. The Chief Executive encouraged Members to attend and speak at the Quadrilateral.

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She drew Members' attention to the dates for Committee meetings in 2019.

ACTIVE ISSUES

Issue 227: Brexit—Statutory Instruments

Members discussed the work undertaken by the Secretariat in the review of the draft statutory instruments (“SIs”) published by HM Treasury under the European Union (Withdrawal) Act 2018 and noted the publication of papers on the draft exit legislation for [Bank Recovery and Resolution](#) and [Investment Funds and their Managers](#). They thanked the Secretariat for the excellent way it had carried out this difficult and time-consuming task. Members speculated that, depending on whether Parliament approved the Withdrawal Agreement, the SIs would be amended in due course to reflect changing policy priorities.

The Chairman observed that coordinating across similar City organisations on the review of the SIs had yielded limited success. He asked Members if there might be a better way to encourage coordination and the creation of a scrutiny mechanism, particularly in view of the capacity constraints on U.K. Parliament when reviewing and drafting SIs and their impact. The Committee agreed to return to this question at a future meeting.

Issue 226: 2018 Proposal for a National Security and Investment Regime

Members noted that a [letter](#) had been sent to the U.K. Department for Business, Energy & Industrial Strategy in response to its White Paper setting out the proposal for a new national security and investment regime.

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

This Working Group published a paper on 14 September highlighting specific issues of legal uncertainty arising from the European Commission's proposal to alter the processes for authorisation and recognition of legal entities as Central Counterparties (“CCPs”) and the framework for monitoring and supervising CCPs under Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (“EMIR”). A member of the Working Group has observed that the FMLC's recommendations seem not to have been taken into

account in the latest compromise proposals published by the E.U. and has suggested that the paper be sent to key individuals in the European Parliament and the Council of the European Union.

Members discussed whether it would be within the FMLC's remit to engage with the political process by sending letters enclosing the paper to political officers. They concluded that little could be gained at this point by writing specifically to draw attention to the paper and agreed to do nothing at this point.

Issue 212: Brexit Emissions Allowances (Chairs: Graham Bryant and Brett Hillis)

This Working Group had drafted a paper examining issues of legal uncertainty relating to the E.U. Emissions Trading Scheme ("E.U. ETS") and the European emissions allowances ("EUAs") in the context of Brexit. It is expected that, as a result of Brexit, the U.K. will no longer be able to participate in the E.U. ETS, which raises issues of legal uncertainty concerning: (i) the status of current U.K. emissions account holders; (ii) the use of EUAs as securities by installations during the transitional period before and after Brexit; and (iii) the legal nature of U.K. emissions allowances should a separate U.K.-only emissions scheme be established.

Members approved the publication of the paper.

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

This Working Group was established to identify and make recommendations to resolve, where and if possible, uncertainties, difficulties and concerns around the execution of documents under English law, including issues arising from electronic execution and "signing" blockchain transactions.

The Chair of the Working Group mentioned the Law Commission's Consultation Paper on the electronic execution of contracts. He confirmed that the next steps would be to hold a meeting with the relevant team at the Law Commission to discuss this and smart contracts.

SCOPING AND RADAR

Asset Management Scoping Forum

Members of the Asset Management Scoping Forum had recommended that work be undertaken on some definitions in the Benchmarks Regulation and the Securitisation Regulation. Members agreed to return to this question at the next Committee meeting by which time the Secretariat might be better resourced to engage with this project and the Committee would have a better understanding of U.K.'s position *vis a vis* Brexit and the E.U. Another Member pointed out that the questions arising from the Benchmarks Regulation will become more important as the market transitions away from LIBOR.

Brexit—Financial Contracts—Reverse Enquiry

Members have discussed, in past meetings, the prospect of undertaking a project to survey rules around reverse enquiry arrangements in individual E.U. Member States as a continuation of the FMLC's work on the continuity of contracts in a no deal Brexit. No consensus view was reached at those meetings.

At this meeting, Members surveyed preparations made already by market participants for the possibility of a hard Brexit. They generally agreed that banks were best prepared for a cliff-edge while insurers were beginning to make arrangements. Members noted that the Bank of England and HM Treasury, along with other regulators in the E.U., had taken the view that complexities were likely to rise in respect of contractual continuity and were working on legislation which might resolve the issue.

A Member asked whether it might be worth revisiting questions about reverse enquiry arrangements as a contribution to this debate. The Chairman proposed a limited project which surveyed the provisions for reverse enquiry in three or four Member States and asked Barney Reynolds if he might act as a Chair for this Working Group.

Finance and Technology Scoping Forum

At the FinTech Scoping Forum meeting on 8 November 2018, a participant raised the question of whether it would be helpful to undertake a more in-depth analysis of whether smart contracts would impact the ordinary elements and functioning of a contract such as formation, frustration, and mistake. The idea received a mixed response from attendees. Carolyn Jackson, who had

chaired this Forum meeting, summarised attendees' views. Members held that it might be too early in the development of smart contracts to initiate such work. Some Members also observed that this was not likely to give rise to legal uncertainty. A publication might, however, be useful to set out the Committee's views in the future to prevent speculation.

The Chairman asked Ms Jackson if she would kindly probe Forum at its next meeting as to their thoughts on the timing and scope of such a project.

Insurance Scoping Forum

A member of this Forum had drawn the Committee's attention to a slight discrepancy in the treatment of credit insurance and guarantees under the Capital Requirements Regulation and the Solvency II Directive. He had observed that, increasingly, insurers and banks invest in similar kinds of assets. Under the Capital Requirements Regulation, however, credit protection deriving from guarantees is subject to a lower risk rate and capital charge.

Members agreed that this was not an issue of legal uncertainty on which the FMLC might contribute.

ANY OTHER BUSINESS

Brexit—Financial Services (Implementation of Legislation) Bill

HM Treasury has published a [policy note](#) on the proposed Financial Services (Implementation of Legislation) Bill. The Bill will provide HM Government with a delegated power to implement and make changes to “in-flight” financial services legislation for two years after the U.K.'s withdrawal from the European Union. Clause 1 of the Bill provides a seemingly exhaustive list of legislation which has been entered in the Official Journal of the European Union but certain provisions of which do not take effect until after exit.

The Secretariat noted that the Bill does not take into account Level 2 measures issued by the European Supervisory Authorities which might not come into effect until after Brexit and therefore will not be onshored even though the Level 1 legislation is retained. Members resolved to send a letter to HM Treasury drawing attention to this point.

Brexit—Withdrawal Agreement

Members agreed that any comment on the Withdrawal Agreement, at this stage, might be too political and, therefore, outside the FMLC’s remit.

Definition of “financial services”

The Secretariat had received an email querying whether the definition of “financial services” in the WTO General Agreement on Trade and Services (“GATS”)—which is provided in paragraph 5 of the [Annex on Financial Services](#) to the GATS and includes an exhaustive list of activities and service which might be considered a “financial service”—is reflective of current practices or whether it might need to be expanded to take account of technological advancement. Similar questions arise in relation to domestic legislation, such as the adequacy of the existing U.K. Bills of Exchange legislation in relation to Bill transactions made entirely electronically.

Members agreed, however, that this is not a pressing issue and they should return to it in the future.