



Financial Markets Law Committee (“FMLC”)

Note for Record of Committee Meeting

Date: 28 March 2019

Time: 4:30PM-6:30PM

Location: J.P. Morgan, 25 Bank Street, Canary Wharf, London E14 5JP

Copies to: FMLC Members, Joanna Perkins

In attendance

Lord Thomas (Chairman)

David Greenwald (Deputy Chairman)

Andrew Bagley

Sir William Blair

Paul Double

Bradley Gans

Kate Gibbons

Rachel Kent

Sinead Meany

Oliver Moullin

Jan Putnis

Pansy Wong

Joanna Perkins (Chief Executive Officer)

Virgilio Diniz (Project Manager)

Venessa Parekh (Research Manager)

Chairman’s Comments

Lord Thomas thanked J. P. Morgan for hosting the Committee Meeting. He told Members that the FMLC has been asked to organise its annual Judicial Seminar as a means of providing an update on the topics raised during the Update Day organised for members of the judiciary in January.

ACTIVE ISSUES

Issue 228: Brexit—Financial Contracts—Reverse Enquiry (Chairs: Barney Reynolds and Mark Calderon)

This Working Group was established to consider legal uncertainties with respect to reverse enquiry arrangements for financial contracts, as a continuation of the FMLC’s work on the continuity of contracts under a no-deal (hard) Brexit. The Secretariat updated Members on the Working Group’s progress: the co-Chairs had agreed, during a first meeting, to produce a list of

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key issues and Working Group members had volunteered to produce drafting contributions in response to those questions. The Chief Executive recounted a telephone call she had received from a stakeholder who had expressed concerns about this project and the impacts its conclusions might have on the bond markets.

Several Members reiterated concerns that publishing a paper on this topic might lead to heightened uncertainty. As both co-Chairs were absent, the Chairman suggested that the Committee would deliberate carefully at the next meeting on any draft paper that might be produced.

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 the regulatory framework the [winding-up and reorganisation of credit institutions](#) and Solvency II. Members also reviewed a response from the Insolvency Service to the FMLC’s [letter](#) about regulations 4 and 5 of the draft SI onshoring the E.U. Insolvency Regulation.

The Chairman observed that the Committee’s scrutiny of the onshoring SIs has been appreciated by HM Government. In case of a no deal Brexit, he noted, it was likely that the Committee might be required to scrutinise, in a similar manner, any treaties and domestic legislation implementing those treaties between the U.K. and the E.U. or other Third Countries.

Members also approved the publication of a draft paper on the statutory instrument which would onshore the E.U. Securitisation Regulation.

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

This Working Group was established to consider issues of legal uncertainty relating to extra-territorial U.S. sanctions against Iran and the E.U.’s Blocking Regulation. A draft paper had been produced by the Working Group. The Chief Executive noted that this was final, subject to a last proofread, and urged Members to send any comments they may have on it at their earliest convenience. The Secretariat would aim to publish the paper shortly.

SCOPING AND RADAR

Review of new voluntary ombudsman scheme

A stakeholder had written to the Chief Executive regarding a new voluntary ombudsman scheme (“**VOS**”) for small to medium enterprises with a turnover between £6.5 to £10 million. The VOS initiative was a topic of discussion between the banking industry (through U.K. Finance) and HM Treasury. The stakeholder had recommended that the FMLC consider the implications of granting VOS jurisdiction to adjudicate the outcome of complex disputes impacting more complex products.

At the last meeting, Members had agreed that the FMLC should offer support to this project. It was resolved that the Secretariat would monitor developments and that Mr Putnis would contact the stakeholder to ascertain how and when the FMLC might get involved. Mr Putnis noted that a U.K. Finance steering committee has been established to build the dispute resolution service (“**DRS**”) and a skeleton target operating model of that service. Meanwhile, the stakeholder had sent a document setting out its concerns in respect of the draft skeleton target operating model.

Members discussed the benefits of establishing the DRS. They confirmed that reviewing a proposal for such a DRS would fall within the FMLC’s remit. They discussed the best way for the FMLC to engage with the project at this early stage. The Chief Executive suggested a broad discussion amongst persons involved at all stages of the proposal, organised by the Committee as an “honest broker” and for the benefit of an audience. Members agreed that this would be a helpful first step.

Asset Management Scoping Forum

At the last Committee meeting, Members had considered a recommendation from this Forum that scoping work be undertaken on certain definitions in the Benchmarks Regulation. Forum members had probed the definition of “use of a benchmark” found in Article 3(7)(b) of the Benchmarks Regulation in the context of an asset manager acting as agent on behalf of an investment vehicle entering into a derivative contract. Forum members took the view that an ESMA Q&A had injected uncertainty, apparently by exhaustively defining those captured by Article 3(7)(b), as: trading venues, investment firms, CCPs and “parties” to the contract. According to members of the Forum, the question arises whether agents, such as fund managers, are “parties” to the contract.

The Secretariat has asked the Forum member who raised the issue to provide a briefing note. On reviewing it, Members agreed that no real legal uncertainty arose from the Q&A, which was, after all, non-binding. In addition, writing to ESMA on this point might be politically tricky in the current Brexit-dominated climate. Members resolved not to take this issue forward at this time.

Securities Markets Scoping Forum

This Forum's inaugural meeting was held on 13 March 2019 and chaired by Carolyn Jackson.

Matthias Lehmann from the University of Bonn, who had served on an expert group advising the European Commission on their proposal for a regulation on the law applicable to the third party effects of assignments of claims, gave remarks on the [publication](#) in February 2019 of the European Parliament's proposal on the topic. He observed that the European Parliament had accepted the Commission's proposal that the law which should apply to the third-party effects of assignments of claims would be the law of the habitual residence of the assignor but had struck out a carve-out, proposed by the Commission, which would apply the law of the assigned claim to securitisations (Amendment 12). Forum members had noted that the deletion of this carve-out was incongruous to market practice with respect to securitisations. It would be difficult to pinpoint the law of the habitual residence of the assignor with regards to, for example, portfolios which are traded multiple times, whereas the law of the claim would remain the same. They observed that the secondary loan market had similar concerns. Forum members thought it might be helpful to update the [FMLC's letter](#) on the legislative proposal from August 2018 with these concerns and send it before the trilogue on this subject began. (They noted, however, that HM Treasury had indicated that the U.K. would opt out of implementing this regulation.)

Members agreed that a short letter reiterating comments made previously should be sent.

Sovereign Debt Scoping Forum

This Scoping Forum had recently discussed the interaction—and, often, overlap—between investor-state dispute settlement (“**ISDS**”) in trade agreements and treaties and the framework adopted by the E.U. after the financial crisis for “negotiated restructurings” including through the use of collective action clauses (“**CACs**”). For example, the E.U. Singapore Investor Protection Agreement (“**EUSIPA**”) treats government bonds as covered bonds and brings them within the purview of the ISDS. Euro-area government bonds, however, have included CACs

since 2013, which allow a super-majority of bondholders to overrule the rest in a structuring. The terms of EUSIPA could enable European government bonds to be subject to ISDS as well as CAC restructuring.

The Forum wished to recommend to the Committee further analysis into the nature of the claims that can be made via the ISDS as contrasted with those made under the terms of the bonds including via any CACs. Members resolved to consider this at the next meeting when the Forum had provided a fuller brief on the topic.

FOR INFORMATION ONLY

Definition of “financial services”

At the December meeting, Members had discussed on 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. A stakeholder had written to the Secretariat with the question and had highlighted that 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.

At that meeting, Members had agreed that this is not a pressing issue and they would return to it in the future. The stakeholder wrote to the Secretariat again emphasising that the subject has come up again in exchanges with officials about financial services in future U.K. free trade agreements, including various electronic technology and data aspects.

Members considered that recommending an amendment to a definition in the WTO GATS was unlikely to be simple and that the question was too politicised given the current stage of the Brexit preparations. The Committee will keep the question on their radar and return to it at a future meeting.