



## Financial Markets Law Committee (“FMLC”)

### Note for Record of Committee Meeting

**Date:** 31 January 2019

**Time:** 4:30PM-6:30PM

**Location:** Bank of England, Threadneedle Street, London EC2R 8AH

**Copies to:** FMLC Members, Joanna Perkins

#### In attendance

Lord Thomas (Chairman)

David Greenwald (Deputy Chairman)

Sir William Blair

Paul Double

Michael Duncan

Simon Firth

Bradley Gans

Kate Gibbons

Carolyn Jackson

Peter King

Sean Martin

Jon May

Sinead Meany

Oliver Moullin

Chris Newby

Jan Putnis

Barney Reynolds

Sanjev Warna-kula-suriya

Pansy Wong

Joanna Perkins (Chief Executive Officer)

Virgilio Diniz (Project Manager)

Venessa Parekh (Research Manager)

Clare Wiles (Legal Analyst)

#### Chairman’s Comments

Lord Thomas thanked the Bank of England for hosting the Committee Meeting. He told Members that the Judicial Update Day, which was held on 10 January 2019 for members of the senior judiciary, had been a success and was appreciated by attendees.

#### 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 on 11 and 12 July 2019. The Chief Executive encouraged Members to attend and speak at the Quadrilateral. She said the Secretariat would send more information in coming weeks.

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## **ACTIVE ISSUES**

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

At the last meeting, Members had resolved to establish a Working Group 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 had prepared a briefing note and terms of reference and invited Members, Patrons and Stakeholders to nominate contributors to the Working Group. A first meeting had been arranged for 15 February.

Some Members observed that this was likely to be a controversial topic of analysis on which it would be difficult to arrive at consensus. They cautioned that was important to limit the scope of the project. Mr Reynolds, as a co-chair of the Group, said that he hoped that the Group would be able to observe a pan-E.U. approach to reverse enquiry in respect of some products or services, and then would analyse the situations in France and Germany. Other Members expressed concern that a publication on this topic might give rise to more uncertainty. The Chairman asked Mr Reynolds and the Secretariat to keep the Committee closely apprised of the Working Group's progress.

### **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 on [Markets in Financial Instruments](#), the [Insolvency Regulation](#), and the [Financial Services and Markets Act 2000](#). Mr King observed that HM Treasury was grateful to receive feedback from experts and interested stakeholders, and that it tried to incorporate all those amendments which HM Government's policy position would allow. A brief discussion was held on the Financial Services (Implementation of Legislation) Bill and those changes which HM Treasury would have to make to the regulatory and legal framework for financial services after exit day.

Members also approved the publication of a draft paper on the statutory instrument which would onshore the framework for the insolvency and winding up of credit institutions and insurers.

## **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.

Mr Putnis, who had been in touch with the stakeholder, observed that several issues of legal uncertainty exist in the current financial ombudsman scheme (“**FOS**”) and there were concerns that these would trickle down to the VOS too. He noted that the ombudsman was starting with a degree of discretion and that there were concerns about the ability of the ombudsman to apply discretion to more sophisticated disputes. He queried whether the FMLC might be able to suggest principles to guide such discretionary decision-making. He also commented that the VOS is likely to be contentious as it is aimed that its decisions are retrospective. Members also expressed concern that the VOS would remove a large swathe of work from business and property courts and so hinder the ability of such courts to develop case law in these areas.

Members 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. The Chairman observed that Mr Putnis [and/or the Secretariat] should keep the Chancellor of the High Court apprised of this project as he was likely to be interested in it because of the role of the Business and Property Courts in dispute resolution.

### **Proposal to establish a new Securities Markets Scoping Forum**

The Chief Executive proposed that a new Scoping Forum be established for horizon scanning purposes with respect to the primary markets. The Forum would consider topics including the aspects of MiFID II and MAR which impact on primary markets, the Prospectus Regulation and PRIIPS, non-MiFID primary markets conduct, infrastructure financing and securitisation issues. These topics are not currently within the remit of any existing Forum.

Members agreed that such a Scoping Forum, focusing on the securities markets and concerns which arise in relation to issuers and underwriters, would be useful. Members also agreed that

this Scoping Forum should cover both primary and secondary markets, as there is often overlap in the issues facing both markets.

### **Asset Management Scoping Forum**

Members of the Asset Management Scoping Forum had recommended that work be undertaken on some 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. (In this context, they also considered provisions in Articles 28 (*Supervised entities*) and 29 (*Use of a benchmark*) of the Benchmarks Regulation.) 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. The question arises whether agents, such as fund managers, are “parties” to the contract. This will be of particular concern with the phase-out of LIBOR.

Members agreed that the Secretariat should conduct a scoping exercise on this question.

### **Insurance Scoping Forum**

The Chief Executive proposed to Members that the scope of the Insurance Scoping Forum be expanded to include issues related to pensions. Members did not object.

## **ANY OTHER BUSINESS**

### **Brexit—Financial Services (Implementation of Legislation) Bill**

Members noted the publication of a [letter](#) to HM Treasury on the Financial Services (Implementation of Legislation) Bill.

### **Issue 212: Brexit – Emissions Allowances**

The Chief Executive noted that the [paper](#) on Brexit and emissions allowances had been published on the FMLC website earlier that day. The paper had been approved by Members at

the last meeting but the Secretariat had since updated it to reflect amendments to the regulatory regime introduced by draft Brexit-related secondary legislation published over the past month.

### **Brexit—Agreements with Third Countries during a Transitional Period**

Ms Gibbons raised a question about the treatment of the U.K. or U.K. firms during the transition period (if one is agreed) by Third Countries with whom the E.U. has signed trade agreements. She noted that U.K. and U.K. firms are to be treated during the transitional period in the same way as an E.U. Member State. The E.U.'s international agreements form part of Union law under Article 2(a)(iv) of the Withdrawal Agreement and, therefore, under Article 127, the U.K. and the E.U. shall apply these agreements during the transition period as if the U.K. were a Member State. In addition, Article 129(1) of the Withdrawal Agreement explicitly provides that the U.K. shall be bound the obligations under these agreements during the transition period and that the E.U. will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements. However, the U.K. ceases to be a Member State when it withdraws from the E.U. on exit day and there are concerns that the Withdrawal Agreement cannot modify the effect of agreements with Third Countries without their explicit consent and, therefore, it is unclear whether Third Countries will continue to regard the U.K. and U.K. firms as if they were part of the E.U. Ms Gibbons asked if this might be an issue to which the FMLC could draw attention.

Mr King stated that he was aware that the Department for Exiting the European Union had this concern in sight and was working to resolve it. Members agreed that the FMLC would not adopt this issue at this moment, pending political developments in this regard.

Ms Gibbons had referred to a Clifford Chance memo which had explained the issue. Some Members expressed interest in viewing the document and the Secretariat agreed to circulate it.