



Financial Markets Law Committee (“FMLC”)

Note for Record of Committee Meeting

Date: 30 May 2019

Time: 4:30PM-6:30PM

Location: Goldman Sachs International, Peterborough Court, 133 Fleet Street, London EC4A 2BB

Copies to: FMLC Members, Joanna Perkins

In attendance

Lord Thomas (Chairman)

David Greenwald (Deputy Chairman)

Andrew Bagley

Sir William Blair

Paul Double

Simon Firth

Bradley Gans

Kate Gibbons

Carolyn Jackson

Mark Kalderon

Rachel Kent

Sir Robin Knowles

Jon May

Sinead Meany

Oliver Moullin

Jan Putnis

Barney Reynolds

Joanna Perkins (Chief Executive Officer)

Virgilio Diniz (Project Manager)

Venessa Parekh (Research Manager)

Chairman’s Comments

Lord Thomas thanked Goldman Sachs 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.

Chief Executive’s Comments

The Chief Executive recounted the most recent International Correlation Issues (“ICI”) teleconference which provides a forum for the periodic exchange of information with the

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Secretariats of six sister organisations around the world. The FMLC Secretariat provided an update on Brexit and FinTech.

She reminded Members that the Quadrilateral Conference—an arrangement with the European Financial Markets Lawyers Group (“EFMLG”), the Financial Law Board (“FLB”) of the Bank of Japan, and the Financial Markets Lawyers Group (“FMLG”) of the New York Federal Reserve Bank to meet annually to discuss topics of mutual interest—will take place in Tokyo on 11 and 12 July.

ACTIVE ISSUES

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

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. At the last Committee meeting, several Members had expressed concerns that publishing a paper on this topic might lead to heightened uncertainty. As both co-Chairs were absent then, the Chairman had suggested that the Committee would deliberate carefully at the next meeting on this project.

The co-Chairs expressed the view that a close-to-complete draft paper should be produced for the Committee to review before any decision is made. A Member observed that the practical utility of reverse enquiry arrangements had diminished with the extension in the Article 50 notice period as most firms had now made alternative arrangements to service clients in the E.U. or had the time to put such arrangements into place. Several other Members reiterated concerns about the possibility that this paper could heighten uncertainty and that the topic was now so politically charged, it was unlikely that the paper could usefully inform the debate. In these circumstances, the Chairman felt it best to discontinue work on this project.

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 the [paper](#) on the draft exit legislation “onshoring” Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific

framework for simple, transparent and standardised securitisation (the “**Securitisation Regulation**”).

The Secretariat stated that, after the second extension was granted by the E.U. to the Article 50 notice period, news reports suggested that HM Government had stood down “no deal” preparations. Accordingly, the Secretariat had slowed down its work on reviewing the SIs. It had forwarded comments received from a stakeholder on the SI onshoring Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the “**Benchmarks Regulation**”) to HM Treasury.

Members discussed the current hiatus in the Brexit negotiations and agreed that the Secretariat should pause its work on the SIs for the summer. They recommended that the Secretariat nonetheless write to Peter King, who sits on the Committee on behalf of HM Treasury, to ask if he might foresee any areas where the FMLC’s input would be useful.

The Chairman drew attention to the FMLC’s [paper](#) on Brexit and equivalence, published in July 2017. He asked if this was the right time to review the paper and see if it needed to be updated. Members agreed that there was still much interest in this topic and that the Secretariat should survey any market, political and legal changes ahead of the next meeting.

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. One Member noted that a case mentioned in section 3 needed to be checked and updated. Members otherwise approved the publication of the paper.

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

This Working Group was established to consider the legal issues relating to Initial Coin Offerings (“**ICOs**”). A draft paper was circulated amongst Members. The Chief Executive noted that the section on solutions needed some work but it was otherwise ready for publication. She urged Members to send any comments they may have on it at their earliest convenience.

SCOPING AND RADAR

Securitisation Regulation

The Securities Markets Scoping Forum had recommended a project on the due diligence requirements in the Securitisation Regulation which began to apply from 1 January 2019. Uncertainties arose from territorial scope of Article 7 of the Securitisation Regulation and, specifically, in respect of the assessment of whether Article 5 of Securitisation Regulation allows European “institutional investors” to invest in non-European securitisations that do not comply with the transparency requirements of Article 7.

Members agreed a working group should be established to consider this question.

Definition of “financial services”

At previous meetings, Members had discussed 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 services 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. Members had agreed then that this is not a pressing issue and they would return to it in the future.

A Member observed that this was quite a tricky question as many treaties were written on the basis of the GATS definition which was interpreted expansively. Ms Kent stated that this was a topic of interest to her and offered to liaise with the stakeholder, who had initially raised the question with the Secretariat, to gather more information ahead of the next Committee meeting.

EMIR Refit

Members of the Infrastructure Scoping Forum had proposed two projects in relation to the European Commission proposal to amend and simplify Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (“EMIR”). First, they had highlighted legal uncertainties in relation to the principle that clearing service providers must provide clearing on fair, reasonable, non-discriminatory and transparent terms (“FRANDT Principle” or

“FRANDT”) under a proposed requirement which aims to improve access to clearing for small counterparties and incentivise and facilitate access to clearing. The Forum had expressed concerns that the transparency criteria would constitute an area of uncertainty for banks. Members agreed that the Secretariat should scope this issue further.

Separately, HM Treasury is currently reviewing The Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 which implemented EMIR in the U.K. the Review proposes changes to Part VII of the Companies Act 1989. A member of the Forum informed the Secretariat that other market participants were urging HM Treasury to take into account a [2016 FMLC paper](#) on the obligations of central counterparties and their clearing members if they undertake a review of Part VII. He recommended that the Committee send a similar letter. The Committee agreed that a letter should be sent.

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. On the Chief Executive’s recommendation, it was agreed that a broad discussion amongst persons involved at all stages of the proposal should be organised by the Committee as an “honest broker”.

The Secretariat had sent speaking invitations to key individuals but hadn’t heard back. Members agreed that the colloquium would be a helpful first step in ascertaining how the FMLC might contribute to this topic and urged the Secretariat to press on.

Issue 229: Financial Services (Implementation of Legislation) Bill

A [letter](#) was sent to HM Treasury on 3 January 2019 commenting on the 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. At the last meeting, Members had noted that the Bill only takes into account those pieces of in-flight legislation which seemed relevant for a March exit date. In case of a long extension, it was likely that HM Treasury would have to update that list.

Members agreed that the Secretariat should consider any items of "in-flight" legislation which may now have to be included in that Bill and that this should be forwarded to HM Treasury.