Financial Markets Law Committee ("FMLC")

Note for Record of Committee Meeting

Date: 25 July 2019

Time: 4:30PM-6:30PM

Location: Bank of England, 20 Moorgate, London, EC2R 6DA

Copies to: FMLC Members, Joanna Perkins

In attendance

David Greenwald (Deputy Chairman)
Paul Double
Simon Firth
Kate Gibbons
Carolyn Jackson
Peter King
Sir Robin Knowles
Chris Newby
Joanna Perkins (Chief Executive Officer)
Virgilio Diniz (Project Manager)
Eleanor Hooper (Legal Analyst)
Venessa Parekh (Research Manager)

Deputy Chairman's Comments

In Lord Thomas' absence, Mr Greenwald opened this meeting.

He reminded Members that the annual Judicial Seminar had been held on 5 June and stated that the event had been very well received. The FMLC had also held an event on regulating cryptoassets on 21 June, featuring as keynote speaker Michael Gill, Chief of Staff and Chief Operating Officer of the U.S. Commodity Futures Trading Commission.

Chief Executive's Comments

The Chief Executive recounted 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—which took place in Tokyo on 11 and 12 July. Several FMLC Members and stakeholders had attended the Conference and participated in panel discussions on behalf of the FMLC.

ACTIVE ISSUES

Issue 227: Brexit—Statutory Instruments

At the last meeting, Members had discussed the hiatus in the Brexit negotiations and agreed that the Secretariat should pause its work on the review of the draft statutory instruments ("**SIs**") published by HM Treasury under the European Union (Withdrawal) Act 2018.

Members noted, however, that the new U.K. Prime Minister had stated that he considered 31 October a final deadline by which the U.K. would leave the E.U., whether with or without a deal. In these circumstances, they recommended that the Secretariat take stock of any SIs published in the last two months and remain prepared to undertake a rapid review of new SIs. One Member reminded attendees that the Committee had resolved in the past to meet on an *ad hoc* basis if necessary in the run-up to Exit Day.

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

Members noted the publication of the paper on issues of legal uncertainty relating to extra-territorial U.S. sanctions against Iran and the E.U.'s Blocking Regulation on the FMLC website on 14 June 2019.

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

This Working Group was established to consider the legal issues relating to Initial Coin Offerings ("**ICOs**"). The Chief Executive reported that the paper was ready for publication. It had been amended, following the discussions at the Quadrilateral Conference, to include certain references to questions raised by the incoming Directive (EU) 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "**Fifth Anti-Money Laundering Directive**" or "**5MLD**").

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 Working Group has met on four occasions, including a meeting with the Law Commission which established much common ground on what would and would not be useful towards improving legal certainty. The Law Commission in due course published a consultation paper. It was intended that there be a further meeting with the Law Commission after responses had been received to that. As reported at the last meeting of FMLC, in light of the LawTech Delivery Panel's work in this area the Law Commission has paused its work. It was suggested that the question of a further meeting between Law Commission and FMLC be left until the conclusions of the work by the LawTech Delivery Panel are known.

The Working Group Chair had spoken further to the Law Commission and reported to Members that he and the Law Commission were of the view that for the moment effort is best routed through the LawTech Delivery Panel, not least to avoid duplication. He recommended that work on this project be discontinued for the moment.

Members agreed to follow this course of action.

Issue 186: CCPs and Competing Claims to Collateral

At the last meeting, the Secretariat had reported that HM Treasury is currently reviewing The Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 which had implemented Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**") in the U.K. The Review proposes changes to Part VII of the Companies Act 1989. A stakeholder member of the Infrastructure Scoping Forum suggested writing to HM Treasury with a recommendation that points raised in a 2016 FMLC paper on the obligations of central counterparties be taken into account in this context. The Committee had agreed that a letter should be sent.

The Secretariat produced a draft letter. Members approved its publication, subject to any comments by the stakeholder who made the suggestion.

SCOPING AND RADAR

The Fifth Money Laundering Directive

The Fifth Anti-Money Laundering Directive will come into effect in the U.K. in January 2020. Market commentators have raised concerns about the extension of the scope of the regime to apply to all express trusts, new and pre-existing, not just those that have tax consequences and the potential for the provisions to have a disproportionate impact in the U.K. since trusts are employed so extensively under English law for arrangements which would be contractual in other jurisdictions. One Member had raised parallel concerns and asked whether the Committee wished to consider related issues of uncertainty.

Members observed that HM Treasury's Consultation on the transposition of 5MLD had closed in June. Mr King stated that HM Treasury would nevertheless welcome input, given the importance of the anti-money laundering regime. He noted that the U.K. might not be an E.U. Member State by the January implementation deadline and there may be further scope to revise the regime.

The Chief Executive reminded Members that the FMLC had published a paper in 2006 which highlighted similar issues in respect of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the "**Third Anti-Money Laundering Directive**"). She suggested that a letter could be sent to HM Treasury reiterating that point and drawing attention to any others arising from 5MLD. Members agreed that this might be the most time-effective way to communicate concerns to HM Treasury.

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.

The Secretariat had liaised further with the stakeholder who had raised the issue with it. He noted efforts to update the GATS which had stalled as have negotiations around several bilateral or regional free trade agreements concerning financial services. However, when using the

definitions in the GATS Understanding as the basis for the terminology in its services trade commitments, the UK can add to, alter, or sub-divide the definitions so as to express more exactly how UK commitments are to be interpreted, or so as to make clear that a commitment applies to only part of the activity described in a definition in the GATS Understanding. This will be particularly relevant in the context of the coverage of financial services in any new trade agreements negotiated by the UK as part of its post-Brexit trade and investment policy.

The Deputy Chairman reported that he had discussed this with an expert in trade law who had observed that amending the GATS is a difficult endeavour. He had also highlighted a case before the WTO filed by Venezuela against the United States. Venezuela had, in its filing, made the assumption that the GATS definition of financial services includes digital currencies. A ruling in this case might provide clarification as to the scope of the current definition of "financial services" in the GATS, although it was unlikely that this would be delivered soon. Finally, the Deputy Chairman noted that amending the definition to respond to technological change would mean that it would need to be updated quite frequently.

Members discussed the practical impact of identifying issues of legal uncertainty, particularly in the context of Brexit. A key question raised was whether the FMLC could offer any solutions and, if not, whether simply identifying concerns would be appropriate.

Members resolved that the Secretariat should write to the existing Working Group on the WTO and ask for their help in identifying both issues of legal uncertainty before considering an appropriate form of output.

EMIR Refit

Members of the Infrastructure Scoping Forum had recently discussed Regulation (EU) 2019/834 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (the "**EMIR Refit**"). 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 had asked the Secretariat to scope this issue further.

Members discussed the issue and observed that there were many issues of legal uncertainty arising from EMIR Refit. They agreed that this was not a key question. One Member offered to look into the EMIR Refit and list some concerns.

ANY OTHER BUSINESS

Anti-Money Laundering Directive and Cryptoassets

The Chief Executive reported on a question which was brought to her attention at the Quadrilateral Conference in relation to the definition of virtual currencies in the 5MLD. Article 1(2)(d) of 5MLD provides that:

> "virtual currencies" means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically.

HM Treasury in its consultation on the transposition of 5MLD in the U.K. has asked whether the 5MLD definition is appropriate or whether it needs to be amended in order to capture the three types of cryptoassets set out in the Cryptoassets Taskforce's framework. The Chief Executive noted that the definition in 5MLD seems to exclude the possibility of cryptoassets being used as or considered money, contrary to the conclusion in the FMLC's 2016 report on virtual currencies, and therefore excludes some of the best-known cryptoassets.

Although HM Treasury's consultation deadline (10 June) has passed, the Chief Executive suggested that it might be useful to send a letter to HM Treasury drawing attention to this lacuna. Members agreed to review a letter drafted by the Secretariat on this and offer comments by the following week.