Financial Markets Law Committee ("FMLC")

Note for Record of Committee Meeting

Date: 17 October 2019

Time: 4:30PM-6:30PM

Location: AIG, 58 Fenchurch Street, London EC3M 4BE

Copies to: FMLC Members, Joanna Perkins

In attendance

Lord Thomas (Chairman)
David Greenwald (Deputy Chairman)
Andrew Bagley
Sir William Blair
Simon Firth
Bradley Gans
Kate Gibbons
Richard Gray
Carolyn Jackson
Mark Kalderon
Rachel Kent
Peter King
Sir Robin Knowles
Chris Newby
Jan Putnis
Barnabas Reynolds
Pansy Wong
Joanna Perkins (Chief Executive Officer)
Virgilio Diniz (Project Manager)
Hwee Peng Ngoh (Legal Analyst)
Venessa Parekh (Research Manager)

Chairman's Comments

The Chairman said that the FMLC had hosted a colloquium on the topic of sustainable finance on 4 October. The following experts featured on the panel: Claude Brown (Reed Smith LLP) on the topic of weather hedges and pandemic bonds; Dickson Chin (Jones Day LLP) on developments in and approaches to sustainable finance in the U.S.; William Hogarth (Clyde & Co LLP) on insurance products for weather-related disasters; Ida Levine (Capital International Investors) on E.U. regulation in the area; and Anna-Marie Slot (Ashurst LLP) on green taxonomies being developed around the world. The event was very well attended.

He reminded Members that the annual Patrons' Dinner, hosted at the Bank of England, would follow this Committee meeting and the FMLC's Festive Drinks Reception will be held on Thursday 12 December from 6:00pm onwards at the Bank of England.

The Chairman also told Members that the FMLC had been given notice to vacate its premise by the Bank of England because it would no longer be able to find room for the Secretariat in the Bank Building. The Bank of England remains supportive of the FMLC's work and the FMLC was being asked to move only owing to an internal reconsolidation policy. He asked Members to contact the Secretariat if their organisations had any unused office space in which the Secretariat might be housed.

ACTIVE ISSUES

Issue 231: Exchange Tokens and Anti-Money Laundering

At the last FMLC meeting, 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 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**").

HM Treasury in its Consultation on the transposition of 5MLD in the U.K. had 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 U.K. Cryptoassets Taskforce's framework paper. The Chief Executive noted that the definition in 5MLD seems to exclude cryptoassets used as or considered money—at odds with the conclusion in the FMLC's 2016 report on virtual currencies—and therefore excludes some of the best-known cryptoassets.

The Chief Executive proposed that a longer paper be written exploring this question. The Secretariat had drafted such a paper. Members approved its publication.

Issue 230: Securitisation Regulation—Due Diligence Requirements (Chair: James Perry)

This Working Group was established to consider an issue with regards to the due diligence requirements in 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**") which began to apply from 1 January 2019. The Working Group had drafted a letter to the Joint Committee of the European Supervisory Authorities highlighting

the legal uncertainty in the due diligence requirements set out in Article 5(1)(e) of the Securitisation Regulation.

Members approved its publication.

Issue 229: Financial Services (Implementation of Legislation) Bill

In January 2019, the Committee sent a letter to HM Treasury about the Financial Services (Implementation of Legislation) Bill (the "**Bill**") which, it was intended, would complement the European Union (Withdrawal) Act 2018 (the "**Withdrawal Act**") by providing the power to HM Treasury, in a No Deal Brexit, to implement and make changes to a category of legislation which the Bill describes as "in-flight".

After the second extension was agreed, the passage of the Bill through Parliament was temporarily suspended and, after Parliament was prorogued ahead of the Queen's Speech, the Bill had fallen as it failed to get Royal Assent in the session in which it was proposed.

The Secretariat had drafted a second letter urging HM Treasury to ensure that the Bill is resuscitated and noting that certain sections will need to be updated to take into account legislative developments over the past six months. Members approved its publication.

Issue 227: Brexit—Statutory Instruments

The Secretariat drafted a paper setting out issues of legal uncertainty arising in respect of the statutory instrument onshoring the Benchmarks Regulation. Members approved its publication.

Issue 208: Brexit—Third Country Regimes

At the last meeting, the Secretariat reported that it would liaise with members of the Working Group to get their input as to the direction of any publication of an update to the July 2017 FMLC paper "Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the U.K. from the E.U.—Provision and Application of Third Country Regimes in E.U. Legislation". The Secretariat had accordingly prepared a draft of an addendum to the July 2017 FMLC paper to reflect key changes since its publication. Members approved its publication.

Issue 203: Brexit—Governing Law and Jurisdiction Clauses (Chair: Professor Trevor Hartley)

A stakeholder had raised with the Secretariat a question regarding the recognition and enforcement of judgments after Brexit. The U.K. deposited its instrument of accession to the Hague Convention on Choice of Court Agreements in December 2018 with the intention that the Convention would come into force for the U.K. on 1 April 2019. On 29 March 2019, after the first extension to Article 50, the depositary for the 2005 Hague Convention on Choice of Court Agreements issued a notice communicating that the U.K.'s accession to the Convention is suspended until 13 April or 23 May 2019, depending on the date of the U.K.'s exit from the E.U. It is now expected that the U.K. will accede on 1 November after an Exit on 31 October 2019. In the meanwhile, the E.U. published a Questions and Answers document, stating that Hague Convention would only apply to "exclusive choice of court agreements concluded after its entry into force for the United Kingdom". This has raised questions regarding the application of the Hague Convention in the U.K. and the recognition and enforcement of judgments after Brexit.

The Chair of this Working Group drafted an addendum which was reviewed by the Working Group. Members discussed the conclusion to the draft addendum. They approved the publication of the addendum subject to specified redactions.

SCOPING AND RADAR

GATS definition of "financial services"

At the last meeting, Members resolved to consult the Working Group on the WTO rules and Brexit (Issue 210) or to contact selected trade experts from that Group to assist in further scoping the issue on the definition of "financial services" in the WTO General Agreement on Trade and Services ("**GATS**"). A preliminary meeting was held on 2 October between interested parties who have been identified from the Working Group and selected trade experts. Dr Lorand Bartels of Cambridge University lead the meeting.

Attendees at the meeting agreed that some areas of financial services might not be sufficiently covered by the explicit wording in the Annex (it was noted that the financial services listed in the Annex are not exhaustive in the sense that it uses the word "include"). Instead of focusing on analysing the Annex definitions or other definitions at this stage—as the Annex or these other definitions may or may not be used for negotiations—or the U.K.'s own schedule of

commitments, attendees agreed that it is more important to review the commitments made by other Members and/or the FTA practice of other WTO Members (including the Trade in Services Agreement (TiSA)), particularly Members regarded by the U.K. as "priority or target countries" so as to determine if the classifications, definitions etc. used by these countries work for the U.K. in terms of the services the U.K. is or will be providing into that country. They also identified two specific areas of legal uncertainty: (1) a long-standing and well-recognised confusion between mainly Modes 1 (cross-border) and 2 (consumption abroad) out of the four modes of supply under GATS, particularly in the context of services supplied by electronic means; and (2) a degree of uncertainty as to the differences between the WTO prudential carve-out in paragraph 2(a) of the Annex and similar (but narrower) versions of such carve-outs in FTAs.

Committee Members considered the Working Group's findings very interesting and commented that the issues might become increasingly relevant in the future. Members agreed to return to this issue at a later meeting, perhaps in January, to discuss next steps.

Revised Bank Recovery and Resolution Directive ("BRRD2")

The Banking Scoping Forum proposed a project on issues of legal uncertainty regarding the newly expanded scope of Article 59 of BRRD2. For example, it is unclear whether it is intended that the Article 59 power should be used in relation to externally issued "minimum requirements for own funds and eligible liabilities" ("**MREL**") as it appears to be suitable only for internally-issued MREL. Members agreed to adopt this issue.

The Role of Trustees in Capital Markets Transactions

A guest speaker at the Securities Markets Scoping Forum had raised the topic of difficulties faced by investors in relation to trustees in capital markets transactions. He had explained that in respect of a capital market instrument, where there is a trustee involved, a requisite number of aligned investors are necessary to instruct the trustee to enforce the rights given via the structure of the trust. Often, this process is very slow and hampered by statutory requirements on trustees, which are perceived to have little utility in the context of capital markets transactions. For example, the trustee is not required to take action until it is indemnified to satisfaction, which serves a purpose in a commercial context. Further, in a capital markets context, this requirement is accompanied by section 750 of the Companies Act 2006, which says that nobody may have

any indemnity for any type of breach of their duty of care or diligence as a trustee of a debenture. Any such indemnity would render the duty void. Legal uncertainty therefore arises because the law's application is far from clear and prevents investors with legitimate rights from enforcing them. The guest speaker had suggested that the FMLC send a letter identifying the inefficiencies in the law.

A Member commented that this issue had been considered in the past by the FMLC but it had been difficult to make recommendations. Members generally thought this was a question of commercial complexity rather than legal uncertainty. Members resolved to ask Mr Warna-kula-suriya, who had Chaired the meeting of the Securities Markets Scoping Forum where this had been raised but who was not present for the Committee meeting to review the FMLC's previous work and present his view to the Committee at the next meeting.

Law Commission Call for Evidence on Intermediated Securities

At the last meeting of the Securities Markets Scoping Forum, a guest speaker presented a timeline of action taken to regulate intermediated securities over past two decades. The latest development was that the Law Commission had issued a Call for Evidence on the topic (the "**Consultation**"). The speaker noted, however, that the Consultation does not address conflict of laws issues and focuses largely on the shareholders' rights and governance aspects of intermediation.

Attendees at the meeting discussed work which the FMLC might consider in regards the conflicts of laws issues with respect of intermediated securities. Although the Law Commission's Consultation does not deal with conflicts of laws questions, a research paper could usefully examine all aspects of the financial markets infrastructure around securities. Attendees agreed that it might be useful to refer the Law Commission to the FMLC's work in 2003 on custody issues, as that one issue could be separated from the rest of the Consultation. Forum members also agreed that it might be useful to highlight to the Law Commission that there remained issues outside the scope of the current call for evidence and urge it to broaden the scope in the next stage of its project.

Members agreed that such a letter be sent to the Law Commission, copying HM Treasury.

ANY OTHER BUSINESS

Voluntary Ombudsman Scheme

At a previous meeting, Jan Putnis had raised the topic of the new voluntary ombudsman scheme ("**VOS**") for small to medium enterprises with a turnover between £6.5 to £10 million. The VOS initiative has been a topic of discussion between the banking industry (through U.K. Finance) and HM Treasury. At the January meeting, Members had agreed that the FMLC should offer support to this project. 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 and Mr Putnis agreed to liaise with UK Finance.

Mr Putnis updated Members on his discussions with UK Finance, which had expressed a preference to delay a colloquium until more details of the VOS were confirmed. It had asked if a roundtable with interested individuals would be possible. The Chief Executive commented that the FMLC, as a charity, tried to open its events to anyone with an interest.