



Financial Markets Law Committee (“FMLC”)

Note for Record of Committee Meeting

Date: 12 December 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)

Andrew Bagley

Paul Double

Simon Firth

Kate Gibbons

Mark Kalderon

Rachel Kent

Peter King

Ida Levine

Karen Levinge

Jon May

Oliver Moullin

Chris Newby

Rob Price

Jan Putnis

Barnabas Reynolds

Pansy Wong

Joanna Perkins (Chief Executive Officer)

Chhavi Sinha (Acting Manager)

Venessa Parekh (Research Manager)

Chairman’s Comments

The Chairman welcomed Claude Brown (Reed Smith LLP), Ida Levine (Impact Investing Institute) and Karen Levinge (Financial Conduct Authority) to the FMLC.

He informed Members that the following events would be organised by the Secretariat in coming months:

- a Judicial Update Day on 20 April;
- the annual Judicial Seminar on 24 June; and
- the annual Quadrilateral Conference—an arrangement with the FMLG (NY Federal Reserve), EFMLG (ECB) and FLB (Bank of Japan) to meet annually to discuss topics of mutual interest—from 8 to 10 June.

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He emphasised the importance of these events and encouraged Members to attend.

Chief Executive's Comments

The Chief Executive said that the Secretariat would be working on the agendas for each event and would rely on Members to lend their expertise on panels. With regards to the Quadrilateral Conference, she encouraged Members to let the Secretariat know their preferences as to panels on which they would be willing to appear.

The Chief Executive recapitulated personnel changes the Secretariat. She encouraged those firms which were able to provide the Secretariat with a secondee to consider doing so in 2020.

ACTIVE ISSUES

Issue 236: Solvency II 2020 Review

Members noted the publication of a [response](#) to the Consultation Paper published by the European Insurance and Occupational Pensions Authority ("EIOPA"), setting out technical advice for the review of Solvency II.

Issue 234: Cryptoassets/Virtual Currencies Taxonomy

At the last meeting, the Secretariat had proposed work on the diversity of terms adopted around the world to describe and categorise digital assets. Members had agreed that this project would be very useful.

The Chief Executive drew Members' attention to two Consultation Papers published by the European Commission: one on regulating the [markets in cryptoassets](#) and another on [cyber security and operational resilience](#). The former can be divided, roughly, into two halves: the first asks questions about the uses and characterisation of cryptoassets, the second focuses on the application of existing regulation to cryptoassets as well as users of, and providers of services (trading platforms, exchanges, etc.) in relation to, such digital assets. She said that the Secretariat's work in respect of the taxonomy of cryptoassets would be a key component of a possible response to the first half of the Consultation.

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

The FMLC published a [paper](#), in June 2019, on the uncertainties arising from the impositions on sanctions on Iran by the U.S. and the adoption by the E.U. of the Blocking Regulation which, *inter alia*, prohibits E.U. persons from complying with specified extra-territorial sanctions, to cover the re-imposed U.S. measures on Iran. In light of recent political developments, stakeholders have raised with the Secretariat the issues which will arise should new sanctions be imposed. The Secretariat had asked for guidance on whether the Chair of this Working Group might be asked for a recommendation as to possible next steps.

Members resolved that, at the moment, there wasn't much for the FMLC to do and that the Secretariat would monitor developments in this space.

Issue 177: Benchmark Reform

Members noted the publication of a [response](#) to the European Commission's Consultation on a review of the E.U. Benchmarks Regulation.

At the last meeting, Members had a discussion on the imminent withdrawal of support by the FCA for the London Interbank Overnight Rate (“**LIBOR**”), the risk of discontinuation and the need for transition to successor. A Member had asked whether the FMLC would undertake projects related to the transition from LIBOR. The Chief Executive had noted that the FMLC had published extensively in the past on the topics of benchmarks reform and transition and made recommendations.

The Chief Executive proposed now that a paper might be published on the remedies available in the context of the transition of legacy contracts from LIBOR to successor rate(s). This would include action by the regulator, based perhaps on the Financial Stability Board's seminal recommendations from 2014; the enactment of legislation which could help ameliorate legal and operational uncertainty; and market-based remedies such as repapering and protocols.

A Member noted that the Tripartite Authorities had informally indicated recently that they might be willing to consider a legislative intervention in the course of this transition. In these circumstances, she noted, that a recommendation from the FMLC which encouraged progress in such a direction would be welcome. Another Member noted the precedent in New York law for such legislation.

Members agreed that a paper should be prepared.

SCOPING AND RADAR

Debt Restructuring and International Treaties

At the March meeting of the Sovereign Debt Scoping Forum, a Forum member mentioned a complexity which had been brought to his attention in relation to the interaction between dispute resolution mechanisms in international treaties and the framework established in the E.U. for sovereign debt restructurings. The E.U.-Singapore Investor Protection Agreement (“**EUSIPA**”), approved by the European Parliament in February 2019, treats government bonds as “covered investments” (in contrast to the Comprehensive Economic and Trade Agreement (“**CETA**”) between Canada and the E.U. which only includes debt issued by private companies). Attendees discussed whether treaties should explicitly exempt government debt from such restructuring clauses. They agreed that the inclusion of secondary market investors seemed out of place and created unnecessary complications. The Forum suggested that the FMLC might recommend that international treaties should follow the CETA approach and exclude government debt from dispute settlement.

The Chief Executive noted that this issue arises in the context of a much larger question about the framework for sovereign debt restructurings. At the turn of the century, the International Monetary Fund had published a recommendation for an international framework for sovereign debt restructuring, aimed at providing stability and certainty. It was difficult to build support for the framework which had several knock-on effects. The Chief Executive would suggest that this might be an appropriate time to assess why the IMF’s recommendation did not gain traction, whether it could be resuscitated and whether the U.K. might unilaterally take action in this area through statute on the restructuring of English law-governed sovereign debt. The Forum’s issue, above, would be a part of the analysis. Members had asked the Secretariat to carry out some scoping work on this topic.

The Chief Executive presented a briefing note which recounted developments in this space since 2013. She suggested that the FMLC might be able to recommend work on the possibility of creating a statutory framework for sovereign schemes of arrangement under New York and English law respectively. Such work might consider the viability of unilateral action in the United Kingdom for debt governed by English law in the event that neither the federal U.S. government nor the New York jurisdiction was keen to pursue such an initiative. She outlined definitional and practical questions and possible objections which might be raised in respect of this project.

Members agreed that such a paper would be helpful but wished to understand better how the EUSIPA aspect would be incorporated.

U.K. Ring-Fencing Regime

At the last meeting of the Banking Scoping Forum, chaired by Jan Putnis, attendees discussed uncertainties arising in the context of the U.K.'s ring-fencing regime and resolved to recommend to the Committee that work be commenced on this topic. Mr Putnis provided further information to Members regarding this. He noted that the FMLC had published papers prepared by the Banking Reform (Ring-Fencing) Working Group in [February](#) and [October](#) 2013. At that time, the secondary legislation, in which much of the detail of the ring-fencing requirements are to be found, was still in draft. Those papers identified some important areas of legal uncertainty that have persisted and remain, in many cases, problematic for banking groups that are subject to the ring-fencing regime.

In the intervening years, further areas of uncertainty have emerged in addition to those addressed in the 2013 papers. Most of these concern more specific applications of the ring-fencing regime than those aspects that the papers addressed, but many of these applications are nevertheless important. Mr Putnis recommended that the Working Group be reconvened to gather their views on such uncertainties.

Members agreed that such a scoping exercise would be useful.

Scoping project on Intermediated Securities

At the last FMLC meeting, Members had discussed the Law Commission had issued a [Call for Evidence](#) on intermediated securities. The Consultation does not address conflict of laws issues and focuses largely on the shareholders' rights and governance aspects of intermediation, owing to which members of the Securities Markets Scoping Forum had recommended that the FMLC 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 had agreed that such an email be sent. The Law Commission had, in response, requested a meeting with the Secretariat. The Chief Executive updated Members on that meeting in which the Law Commission had confirmed that conflict of laws issues had been explicitly excluded from their terms of reference. The Chief Executive and the Law Commission had discussed possible

wording for the Law Commission's Report on the subject which would state that stakeholders had brought concerns regarding conflict of laws to its attention.

At the last meeting, Members also discussed the recent judgment in *SL Claimants v Tesco Plc* [2019] EQHC 2858 (Ch) which considered related issues in relation to intermediated securities. The Chief Executive highlighted that the issues in that judgment were connected to the questions previously discussed in respect of intermediated securities. These issues include considerations in respect of conflict of laws, shareholders' rights, and the rights of intermediaries. The Chief Executive suggested that the FMLC might be well placed to make recommendations that the legal issues which arise in the context of intermediated securities are considered at regional or supra-national level. The Chairman had asked that the Secretariat prepare a note setting out more information as background to the proposed project. Such a note was drafted by the Chief Executive and circulated ahead of the meeting.

On reviewing the note, Members resolved to adopt a project.

Proposal for an ESG Scoping Forum

Environmental, Social and Governance (“**ESG**”) considerations are gaining importance in the financial markets. ESG has moved to the forefront of decision-making for asset managers and institutional investors. Increasingly, ESG considerations are being integrated into the charters of a growing number of entities, included in their practice and applied to the due diligence process when assessing assets to be acquired.

Both the E.U. and the U.K. have announced commitment to “green finance”. In the E.U., the European Commission adopted a package of measures implementing several key actions, including Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon impact benchmarks (the “**Low Carbon Benchmarks Regulation**”), the Proposal for a regulation on disclosures relating to sustainable investments and sustainability risks, and the Proposal for a regulation on the establishment of a framework to facilitate sustainable investment. In the U.K., the Green Finance Strategy was launched on 2 July 2019.

Many stakeholders have suggested to the Secretariat that the FMLC monitor developments in this respect and a diverse group of stakeholders has recommended the establishment of a standing Forum for this purpose.

Members agreed that a Forum be established.

Brexit

Members discussed the enactment of the European Union (Withdrawal Agreement) Bill (the “**Withdrawal Agreement Act**”) which implements the Withdrawal Agreement in U.K. law. They observed uncertainties with regards to definitional issues—such as the use of the phrase “Exit Day” which was previously defined in the European Union (Withdrawal) Act 2018 as the day on which the E.U. Treaties will cease to apply in the U.K.—and the uncertainty as to the scope of the future relationship and the future of the financial markets.

Mr King noted that certain definitional questions relating to the Withdrawal Agreement Act, which the FMLC Secretariat had drawn to Members’ attention, would likely be resolved before the end of the month. Members discussed the possibility that the FMLC might review the text of the treaty in the future. They noted that there was likely to be a vast volume of legislation in the future and the FMLC would have to determine where it would have most impact.

A Member noted that financial services legislation over the past four decades had been determined by the EU. As the U.K. begins to determine its own direction, it is likely that the roles of the regulators might also evolve. The Chairman noted that the FMLC’s scrutiny in those circumstances would be essential.

Members discussed the possibilities for a future relationship—including a possible deal, receiving deemed equivalence status and hard Brexit. A Member said it would be helpful to have the options, and any consequences for financial services, mapped out so that the future direction of FMLC work could be better considered.

Members agreed that, in other respects, the FMLC would have to wait for the political direction to be clarified before it could comment. Another Member stated that a possible avenue for analysis might be the U.K.’s own provisions for non-U.K. firms to access its markets. The Chairman urged Members to send to the Secretariat any further thoughts they might have on possible work on the next stage of Brexit.