

FINANCIAL MARKETS LAW COMMITTEE

Videoconference

Date: 30 July 2020

Time: 4.30pm to 6.00pm



Attendees:

Lord Thomas (Chair)

David Greenwald (Deputy Chairman)

Andrew Bagley

Sir William Blair

Claude Brown

Paul Double

Simon Firth

Kate Gibbons

Carolyn Jackson

Sir Robin Knowles

Peter King

Ida Levine

Karen Levinge

Jon May

Joanna Perkins

Venessa Parekh

Chhavi Sinha

FMLC Chairman

Fried, Frank, Harris, Shriver & Jacobson LLP

Goldman Sachs

Queen Mary University of London

Reed Smith LLP

City of London Remembrancer's Office

Linklaters LLP

Clifford Chance LLP

Katten Muchin Rosenman UK LLP

Royal Courts of Justice

HM Treasury

Impact Investing Institute

Financial Conduct Authority

Marshall Wace LLP

FMLC Chief Executive

FMLC Research Manager

FMLC Acting Manager

Registered Charity Number: 1164902.

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MINUTES

Introductions

The Chairman opened the meeting. He began by thanking Paul Double and the City of London Corporation for their great generosity and support in providing new offices for the FMLC Secretariat in the premises of the City of London.

The Chairman stated that the FMLC had received praise for its annual Judicial Seminar, which had been held virtually on Wednesday 24 June on the topic of uncertainties arising from the pandemic. He drew attention to upcoming events, including an interim virtual meeting of the Quadrilateral Conference. The Chief Executive said that the format of the interim Quadrilateral conference was yet to be determined but it was likely that it would be a combination of keynote addresses and panels.

Members agreed that, in light of the government's social distancing guidelines, it would be wise to postpone the annual Patrons' Dinner from its scheduled date of 24 September to the New Year.

Ministry of Justice Consultation—Departure from retained E.U. case law by U.K. courts and tribunals

The European Union (Withdrawal) Act 2018 (“**the 2018 Act**”), as amended by the European Union (Withdrawal Agreement) Act 2020 (“**the 2020 Act**”) sets the legal framework following our departure from the EU and after the end of the Transition Period on 31 December 2020. The legislation sets out how retained EU law is to be interpreted, including the extent to which the case law of the Court of Justice of the European Union is retained and should be followed by UK courts and tribunals. Sections 6(4) of the 2018 Withdrawal Act states that the U.K. Supreme Court and the High Court of Justiciary in Scotland have jurisdiction to depart from retained E.U. case law. The Ministry of Justice has issued a [Consultation](#) on whether to extend the power to other courts and tribunals and, if so, which test should be applied and factors considered in any decision by a court or tribunal to depart from retained E.U. case law.

The Chief Executive drew attention to a letter sent in March 2018 to the Ministry of Justice to draw attention to potential legal uncertainties arising from related provisions in the then-European Union (Withdrawal) Bill, and recommended that a response on similar lines be submitted to the current Consultation. Members agreed that the FMLC should submit a

response. Each Member offered their views on whether the power to depart from retained case should be extended beyond the Supreme Court. The Chief Executive asked Members to email the Secretariat their views from which it would try to reach a consensus view.

HM Treasury Consultation on the transposition of BRRD II

HM Treasury has published a [Consultation](#) on the transposition of the Bank Recovery and Resolution Directive II (“**BRRD II**”). BRRD II makes amendments to the BRRD in order to update the E.U.’s resolution policy and Minimum Requirements for Own Funds and Eligible Liabilities (“**MREL**”) framework. Members of the Banking Scoping Forum have suggested the FMLC might submit a response drawing attention to uncertainties in respect of resolution groups and the selling of eligible liabilities to retail clients, as well as reiterate points made previously by the FMLC in connection with [Article 59](#).

The Chief Executive also updated Members on a meeting of the Banking Liaison Panel convened by HM Treasury to discuss the draft legislation which, it is intended, will transpose BRRD II. She suggested that the FMLC might also wish in its response to draw HM Treasury’s attention to the merits, at least in the short-term, of not diverging from E.U. legislation.

Members agreed that a response should be sent.

ESG and Sustainable Finance

The European Supervisory Authorities have published a [Consultation Paper](#) setting out the proposed Regulatory Technical Standards on content, methodologies and presentation of disclosures under the Sustainable Finance Disclosure Regulation, feedback to which is due by 1 September. There are also two consultations relating to Green Bonds: an [impact assessment](#) on an E.U. standard for ‘green bonds’ and a targeted [Consultation](#) on the establishment of an E.U. Green Bond Standard (feedback to which is due by 2 October).

A Member stated that there were indeed a number of uncertainties arising in respect of the Consultation on the Sustainable Finance Disclosure Regulation and agreed to send some thoughts to the Secretariat.

E.U. Consultation on 2020 Action Plan on preventing money laundering and terrorist financing

The European Commission has launched a public consultation to gather stakeholder views on the possible enhancements to the EU anti-money laundering/countering the financing of terrorism framework. One of the areas on which the Consultation focuses is FinTech.

The Chief Executive recommended that a response be sent reiterating points made by the FMLC in a previous paper on the application of the Fifth Money Laundering Directive to virtual currencies and the legal uncertainties which arose as a result.

Members agreed that a response should be sent.

U.K. Bank Ring-Fencing Legislation

In the January meeting of the FMLC, a discussion was held about the uncertainties arising in the context of the U.K.'s ring-fencing regime. Jan Putnis had 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 has provided a briefing note, attached.

Members agreed that there were legal uncertainties in this context. A Member highlighted the several more urgent issues with which HM Government and HM Treasury were currently dealing, including legislation in relation to Brexit and the pandemic. It is unlikely that recommendations put forward by the FMLC in this area would have much impact in the short term.

Members agreed to reconsider this proposed project at the next meeting.

Active Projects

The Chief Executive provided a summary of active projects on which the Secretariat will continue work over the summer. These include:

- a) a draft paper on the ways to mitigate residual uncertainties arising in the context of the transition from LIBOR is being finalised—the Secretariat hopes to send the paper to Members for approval ahead of the meeting;
- b) the Secretariat has been in correspondence with the European Commission regarding concerns raised first by the Committee in November 2019 on BRRD II; a follow-up letter is being drafted;
- c) a paper surveying approaches to the electronic execution of documents in the U.K. and E.U.;
- d) a new draft of the paper on negative oil prices; and
- e) an explanatory note on monetary financing (as to its legal aspect) for public education purposes.

Any other business

A Member noted that the Breathing Space Regulations—a 2017 campaign manifesto commitment to provide a breathing space and a statutory debt repayment plan—were likely to raise uncertainties in the future. Another Member said that the Financial Services Bill, anticipated to be published in September, would focus on the future structure of financial services regulation in the U.K. and, it is likely, would raise questions.