Financial Markets Law Committee ("FMLC")

Brexit Advisory Group

Meeting Date: Thursday 14 January 2020

Meeting Time: 10.00am to 11.00am

Virtual meeting

Attendees:

Joanna Perkins (Moderator)	FMLC
Rob Aird	Ashurst LLP
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Nick Brittain	Sidley Austin LLP
Charles Clark	Linklaters LLP
Paul Double	City of London Corporation
Paul Edmonson	CMS Cameron McKenna Nabarro Olswang LLP
Kate Gibbons	Clifford Chance LLP
Jonathan Gilmour	Travers Smith LLP
Alexander Hewitt	Dentons U.K. and Middle East LLP
Jim Ho	Cleary Gottlieb Steen & Hamilton LLP
Bruce Johnston	Morgan Lewis & Bockius U.K. LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Rashpal Kaul	Rabobank International
Vanessa Knapp	
Dorothy Livingston	Herbert Smith Freehills LLP
Ian Mathers	
Hamish Patrick	Shepherd and Wedderburn LLP
Jan Putnis	Slaughter and May
Marke Raines	Raines & Co
Julia Smithers Excell	White & Case LLP
Sanjev Warna Kula Suriya	Latham & Watkins LLP
Peter Werner	International Swaps and Derivatives Association
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Minutes

1. Introduction

1.1. Dr Perkins opened the meeting. She reminded attendees that Advisory Group members had requested a meeting in January so that they could take stock of the impact on the financial services market of the end of the Brexit transition period.

2. Parliamentary Update (Paul Double)

2.1. Mr Double began by drawing attention to the European Union (Future Relationship) Bill 2020 (the "**Future Relationship Bill**"), which was introduced as emergency legislation and debated in Parliament on 30 December 2020. The Future Relationship Bill implements into U.K. law the U.K.-E.U. Trade and Cooperation Agreement (the "**TCA**").[1] The Future Relationship Bill had been enacted after a single day of debate. In the E.U., the European Council had agreed that the TCA would take effect from 1 January 2021; the European Parliament, however, was still in the process of formally ratifying it. Mr Double noted that it was unlikely that the European Parliament would raise any objections to the TCA at this point, although the media has reported discontentment.

2.2. Returning to the debate in Parliament on the Future Relationship Bill, Mr Double said that numerous MPs had expressed the opinion that financial services had seemingly been forgotten in negotiations on the TCA. In the House of Lords, former Cabinet Secretary, Robin Butler had expressed regret at the outcome of the 2016 Referendum but observed that the TCA was not itself a bad deal despite the bureaucratic hurdles it presented, and he had complimented the negotiators. He said that HM Government should treat the TCA as the foundation upon which a better future relationship with E.U. might be built.

2.3. Mr Double then turned to the Financial Services Bill 2019-21 (the "**Financial Services Bill**"), an "omnibus" bill on a variety of themes amending several pieces of existing financial services legislation. The Financial Services Bill, although important, had not been controversial politically. Mr Double provided a brief overview of some of the topics covered during the debate, including those not included in the Bill such as on "buy now, pay later" service providers and on the U.K.'s net zero commitments. Mr Double also drew attention to a debate on the subject of potentially requiring the Financial Conduct Authority (the "**FCA**") to take into account reports by the International Criminal Court on genocide and ethnic cleansing when

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[1] *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part* (24 December 2020), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/E.U.-U.K._Trade_and_Cooperation_Agreement_24.12.2020.pdf.

determining the boundaries of "ethical investing". The inclusion had been rejected by HM Government in debate, which said the proposal was not appropriately framed. Mr Double noted that the issue was likely to return to Parliament in debate on other measures, particularly in the Trade Bill. He ended by stating that it could be said that one of the principal themes of Parliament's debate on the Financial Services Bill, particularly in the Commons, had been the importance of financial services to the U.K.'s economy.

3. Expected negotiations on future financial services arrangements (Paul Double)

3.1. Mr Double turned to the TCA, which comprised 1500 pages, established a Partnership Council and more than 20 committees and required a complex dispute resolution structure. Financial services and market access were not explicitly covered by the TCA, which instead offered a commitment to dialogue and the aim of reaching a Memorandum of Understanding ("**MoU**") by 31 March 2021. Mr Double noted that it was unlikely that negotiations would remotely end by this date. It would be difficult to predict what would comprise the detail of the dialogue. Both the U.K. and E.U. are governed by international standards, which may make it easier to reach agreement on big picture commitments if the political will existed. He also noted that there seemed to be little interest in extending equivalence. It was possible that the negotiations would result in more bilateral agreements between U.K. and E.U. authorities, in addition to the 30 existing agreements. Mr Double observed that the E.U. was mindful of continental cities which might take London's place as a financial services centre for particular work but that there was no one location to rival it. While this aspiration this might reduce the E.U.'s inclination to offer equivalence to the U.K., were equivalence not agreed, the E.U. would be less able to influence regulatory developments in U.K. This demonstrated the tricky balance to be struck by both the U.K. and E.U., given other political considerations.

3.2. An Advisory Group member drew attention to the tendency of politicians to refer to equivalence as an umbrella term covering market access. He noted that, while equivalence would be helpful, it would not be the panacea authorities and the media sometimes made it out to be. For example, the relevant E.U. legislation governing insurance and banking businesses offer very limited equivalence provisions, often only enabling the provision of specific services by Third Country firms in the E.U. Mr Double said that the point had been raised in the margins of the debate in Parliament but was frequently lost in the political narrative. Equivalence had sometimes been used catchword relied upon for headlines. There was a need to increase such awareness. The select committees of both Houses took evidence from experts as part of their inquiries and would be an important element in securing informed analysis of the many technical issues involved.

3.3. The discussion turned to whether there may be an argument that the Most Favoured Nation ("**MFN**") rule established by the World Trade Organization (the "**WTO**") has been breached if, in areas where the E.U. had already granted equivalence to the U.S., it declined to make a positive determination in respect of the U.K. Attendees noted that discussions among politicians and in the media about the WTO's rules had become heavily politicised; Mr Double opined that the commitment to dialogue under the TCA was likely to take precedence for negotiators over any WTO commitments. Advisory Group members noted that there are many political considerations around equivalence determinations too. Businesses remained nervous about the E.U.'s ability to withdraw equivalence at any time. Mr Double reminded attendees that equivalence in its current form had been considered the worst possible option for U.K. businesses in the years immediately following the 2016 Referendum. It was hoped that, in the upcoming dialogue, negotiators would at least be able to agree to an arrangement that provided businesses with reasonable notice periods should authorities in the U.K. or E.U. choose to withdraw access at any time. Attendees noted that another reason equivalence would be an unsatisfactory solution to market access problems is because it is intended to be mutual but the U.K.'s Overseas Persons Exemption is already more liberal than equivalence provisions onshored and inherited under E.U. legislation like MiFIR, which could disadvantage U.K. firms in comparison to E.U. firms.

3.4. Advisory Group members noted that the longer the process of agreeing market access for financial services takes, the more likely regulatory divergence between the U.K. and E.U. becomes. A member noted that, in non-financial services areas—for example, in relation to the use of insecticide by sugar farmers—the U.K. had already begun to diverge from E.U. practices. Regulatory and practical divergence was unlikely to be noticed immediately; the member observed that it is more likely that divergent practices will add up until such date that the E.U. considers the lack of alignment between itself and the U.K. has surpassed a so far unknown threshold, prompting action. He asked other attendees whether a private body or government department should be monitoring this. Members agreed that this was an important issue.

3.5. An Advisory Group member drew attention to section 29 of the Future Relationship Act that provides guidance on the implementation of the TCA and its interaction with existing domestic law. The member noted that the provision was quite convoluted but seemed to suggest, ultimately, that the TCA should take precedence if there was to be conflict between its provisions and those in existing U.K. law. She asked attendees' views on whether this was a direct effect provision and how it would be applied if there were no domestic provisions in an area (such as state aid). Advisory Group members agreed that it was quite an odd provision. One member raised further concern about the application of section 29 if it were to conflict with other international commitments—such as, for the example, the WTO's MFN.

3.6. Finally, an attendee observed that, while market participants had expressed concerns about provisions relating to financial collateral arrangements in the Financial Services Bill, this had not yet been addressed in the debate in the House of Commons. Mr Double said that, as the Financial Services Bill progressed through its latter stages in the House of Lords, he hoped to draw attention to the FMLC's letter highlighting these concerns.[2]

4. Next steps (Joanna Perkins)

4.1. Dr Perkins asked attendees whether the FMLC should be working on or publishing research in relation to topics discussed at the meeting over the next two months. An attendee stated that many issues remain subject to negotiation and political consideration; the FMLC might wish to wait to comment after there was more clarity on the arrangements for financial services. Dr Perkins noted that themes covered by the FMLC in research published since the 2016 Referendum remain relevant to current circumstances. She asked if it would be useful to produce a document recapitulating the conclusions of those publications. Advisory Group members agreed that such a document would be helpful.

4.2. Dr Perkins asked if attendees wished for a meeting of the Advisory Group to be convened ahead of the scheduled date for the next meeting (31 March 2021). Attendees indicated that they did not think an additional meeting was necessary.

5. Any other business

5.1. No other business was raised.

[2] FMLC, Letter to HM Treasury: Financial Services Bill 2019-21 (13 January 2021), available at: http://fmlc.org/letter-to-hm-treasury-financial-services-bill-2019-21-13-january-2021/