



Financial Markets Law Committee (“FMLC”)

ESG Scoping Forum

Date: Tuesday 30 June 2020

Time: 2.00pm to 3.30pm

Virtual meeting

Attendees:

Ida Levine (Moderator)	Impact Investing Institute
Phil Bartram	Travers Smith LLP
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Lauren Butchart	J.P. Morgan
Tamara Cizeika	Allen & Overy LLP
Dickson Chin	Jones Day
Paul Double	City of London Corporation
Imogen Garner	Norton Rose Fulbright LLP
John Graham	FIA
Lee Goss	International Capital Market Association (ICMA)
Mindy Hauman	White & Case LLP
Linda Hesse	Jones Day
Bruce Johnston	Morgan, Lewis & Bockius UK LLP
Christiane Leuthier	FIA
Caitlin McErlane	Baker McKenzie LLP
Sarah Oliver Scemla	Bank of America
Adam Pierce	Dentons UK and Middle East LLP
Martin Penn	DLA Piper UK LLP
Ashar Qureshi	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Ferdisha Snagg	Cleary Gottlieb Steen & Hamilton LLP
Matthew Townsend	Allen & Overy LLP
Joanna Treacy	K&L Gates LLP
James Warbey	Millbank LLP
Simon Wright	Dechert LLP
Venessa Parekh	FMLC Secretariat

Registered Charity Number: 1164902.

"The FMLC" and "The Financial Markets Law Committee" are terms used to describe a committee appointed by Financial Markets Law Committee, a limited company ("FMLC" or "the Company"). Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales. Company Registration Number: 8733443.

Chhavi Sinha
Katja Trela-Larsen

FMLC Secretariat
FMLC Secretariat

Guest Speaker:

Jonathan Gilmour

Travers Smith LLP

Regrets:

Katy Hyams
Simon Witney

The London Metal Exchange
Debevoise & Plimpton LLP

Minutes:

1. Introductions

1.1. Ms Levine opened the meeting, welcoming attendees and introducing the other speakers.

2. Potential divergence in Sustainable Finance rules after the Brexit Transition period (Ida Levine and Phil Bartram)

2.1. Ms Levine began her remarks with the observation that developments in sustainable finance rules will shape financial firm's duties and business models for a long time to come. She gave some examples of recent European legislative developments in this area including:

- Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (the "**Sustainable Finance Disclosure Regulation**" or "**SFDR**").
- Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (the "**Taxonomy Regulation**").
- Directive 2014/65/EU on markets in financial instruments ("**MiFID II**"), Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (the "**UCITS Directive**") and Directive 2011/61/EU on Alternative Investment Fund Managers ("**AIFMD**") will all be amended to include sustainability risks and factors

to be considered by asset managers, reinsurance and insurance firms and investment funds.¹

- Review of Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (the “**Non-Financial Reporting Directive**” or “**NFRD**”) in line with the European Green Deal.²
- E.U. sustainable finance standards, labelling and benchmarks are also in progress, such as the plans for an E.U. Green Bond standard.³

2.2. Under the U.K.’s European Union (Withdrawal) Act 2018 (the “**Withdrawal Act**”), direct E.U. legislation that is operative immediately before the end of the Brexit transition period—i.e. on or before 31 December 2020 at 11.00pm—will be amended and incorporated into U.K. law, becoming “retained E.U. law”. This process will henceforth be referred to as the current “onshoring” mechanism. Consequently, E.U. legislation that becomes operative after 31 December 2020 will not, under the current onshoring mechanism, become E.U. retained law in the UK. Ms Levine specified that this discussion would focus on two “in-flight” packages of E.U. legislation—the SFDR and the Taxonomy Regulation—and implications of work towards further European legislation at both Level 1 and Level 2. She commented that the current onshoring mechanism could mean that, after Brexit, the U.K. will have implemented the Taxonomy Regulation Level 1 framework but none of the details regarding operative disclosure requirements or detailed technical screening criteria, which would all form part of the Level 2 regulations. The U.K. might similarly not implement the SFDR.

2.3. Mr Bartram explained that the SFDR came into force on 29 December 2019 but only those provisions requiring the European Supervisory Authorities (“**ESAs**”) to develop draft regulatory technical standards (“**RTS**”) came into effect on that date.⁴ None of the operative

¹ The European Commission published a series of consultations on their proposed sustainability-related changes to the Delegated Acts under the [AIFMD](#) and MiFID II ([organisational requirements/operating conditions](#) (including suitability) and [product governance](#)) frameworks, and initiatives for [insurance firms and brokers](#); [reinsurance companies](#); and [mutual funds](#). All six consultations close on 6 July 2020.

² European Commission, Consultation strategy for the revision of the Non- Financial Reporting Directive (20 February 2020), available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation>

³ There are two European Commission consultations relating to Green Bonds: an [impact assessment](#) on an E.U. standard for ‘green bonds’ (closing on 7 August 2020) and a targeted consultation targeted [consultation](#) on the establishment of an E.U. Green Bond Standard (closing on 2 October 2020).

⁴ i.e. Articles 4(6) and (7), 8(3), 9(5), 10(2), 11(4) and 13(2) of the SFDR

provisions of the SFDR affecting firms apply until 10 March 2021 at the earliest and the specific periodic disclosure requirements do not take effect until 1 January 2022. Additional requirements, as imposed by amendments made by the Taxonomy Regulation, apply as from 12 July 2020 and then some specific requirements relating to the climate mitigation and climate adaptation objectives come into force on 1 January 2022 and 1 January 2023, respectively, to align with the Taxonomy Regulation itself. The disclosure obligations under the SFDR all come into effect after 31 December 2020 so will not become retained E.U. law in the U.K. under the current onshoring mechanism.

- 2.4. Mr Bartram highlighted that Regulation 22 of the draft Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020 (the "**Draft EU Exit Regulations**"), laid before the HM Parliament on 21 April 2020, omits those provisions of the SFDR which would become retained E.U. law under the current onshoring mechanism.⁵ The implication is that the SFDR will *de facto* be revoked. The draft explanatory memorandum which accompanies the Draft E.U. Exit Regulations states that Regulation 22 omits aspects of the sustainability-related disclosures in financial services regulations "as they will not function effectively at the end of the transition period in a UK-only context".⁶
- 2.5. Moving on to cover the Taxonomy Regulation, Mr Bartram explained the critical infrastructure of the Taxonomy Regulation, in terms of its definitions and those Level 1 measures establishing the six environmental objectives and the criteria for environmentally sustainable economic activities will be onshored at the end of the transition period as it comes into force on 12 July 2020. However, the substantive disclosure provisions in Articles 4 to 8 of the Taxonomy Regulation will only apply to firms from 1 January 2022—in relation to the climate change mitigation and climate change adaptation environmental objectives—and from 1 January 2023—in relation to the other four environmental objectives. Those obligations are dependent on a number of detailed delegated acts setting out technical standards which are not expected be finalised in the E.U. until later this year. This means that the U.K. will retain the framework for the E.U. taxonomy regime, including the high-

The ESAs have published a consultation paper on their proposed RTS on the content, methodologies and presentation of the required disclosures under the SFDR which is open until 1 September 2020.

European Supervisory Authorities (EBA, EIOPA and ESMA), Joint Consultation Paper: ESG disclosures (23 April 2020), available at: <https://www.esma.europa.eu/press-news/esma-news/esas-consult-environmental-social-and-governance-disclosure-rules>

⁵ Articles 4(6) and (7), 8(3), 9(5), 10(2), 11(4) and 13(2) of the SFDR

⁶ Draft Explanatory Memorandum to the Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020 available at: <https://www.legislation.gov.uk/ukdsi/2020/9780111195529/memorandum/contents>

level environmental objectives, but the disclosure requirements will not form part of retained E.U. law. In addition, the E.U. delegated acts setting out technical standards that which are critical to the operation of the framework will also not form part of retained E.U. law.

- 2.6. Mr Bartram noted that HM Government has said it is committed to at least match the objectives of the E.U. Sustainable Finance Action Plan. Ms Levine raised recent correspondence between John Glen MP, Economic Secretary to the Treasury, and William Cash MP, Chair of the European Scrutiny Committee, on this topic in which John Glen MP stated that HM Government will be addressing any deficiencies in retained law to ensure that it is fully operable from the end of the implementation period.⁷
- 2.7. Mr Bartram stated, in 2019, HM Government had added the SFDR and the Taxonomy Regulation to a list of so-called "in flight" legislation included in the Financial Services (Implementation of Legislation) Bill 2017-19 (the "**Financial Services Implementation Bill**"). The Financial Services Implementation Bill was to have provided an additional legal mechanism and power to HM Government to incorporate into U.K. law significant E.U. legislation notwithstanding that it, or sections of it, might not become operative until after the U.K.'s exit from the E.U. The Financial Services Implementation Bill fell when Parliament was dissolved at the end of 2019 and has not been resuscitated in the new Parliamentary session. Mr Bartram noted the FMLC has written to HM Treasury about this.⁸
- 2.8. Mr Bartram gave the opinion that if there are no specific arrangements in relation to "in-flight" legislation such as the SFDR and the Taxonomy Regulation, considerable uncertainty arises as to what U.K. financial services firms will be required to do, and how long they will have to prepare for it. Absent a legal mechanism, and in the light of only very high-level and unspecific U.K. commitments to match the E.U.'s objectives, there is practical uncertainty.
- 2.9. Mr Bartram listed questions firms may have in light of this practical uncertainty. For example, he posed the question whether firms should be engaging with the ESA's

⁷ John Glen MP, Economic Secretary to the Treasury, Letter to William Cash MP, Chair of the European Scrutiny Committee, RE: 9355/18: Proposal for a Regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment (28 May 2020), available at: http://europeanmemoranda.cabinetoffice.gov.uk/files/2020/06/EST_letter_to_Sir_William_Cash_MP.pdf

William Cash MP, Chair of the European Scrutiny Committee, Letter to John Glen MP, Economic Secretary to the Treasury, RE: UK implementation of the EU's Sustainable Investment Taxonomy (25 June 2020), available at: <https://committees.parliament.uk/publications/1658/documents/15916/default/>

⁸ FMLC, Letter to HM Treasury: Financial Services (Implementation of Legislation) Bill (23 October 2019) available at: <http://fmlc.org/letter-to-hm-treasury-financial-services-implementation-of-legislation-bill-23-october-2019/>

consultation on SFDR disclosures (i.e., on the working assumption that the Level 1 obligations and detailed technical standards—or something similar—will apply to them under U.K. legislation and regulation). He also thought it important to ask when it would be clear what measures and standards would apply to U.K. firms and he suggested that uncertainty might arise in that U.K. firms could find themselves having to comply with two sets of regulations—one for the U.K. domestic operations and one for when they are marketing into the E.U. Finally, he pondered the question whether sustainable finance measures would contribute to the U.K. meeting its obligations under the Paris Agreement.

2.10. Members discussed and agreed there is practical uncertainty. A member commented there is also uncertainty for E.U. firms as to whether there is enough time to implement the changes required to implement and comply with the still pending Level 2 obligations of the SFDR by March 2021. A member queried whether the FMLC could respond to the current E.U. Consultations. Ms Parekh stated that it is within the FMLC’s remit to comment where law and practice are out of step. Members recommended seeking clarity on this issue. Ms Parekh asked members to send any further detail on points they would recommend raising by email.

3. E.U. Green Bond Standard (Jonathan Gilmour)

3.1. Mr Gilmour opened his remarks by stating that the European Commission published its proposal for an E.U. Green Bond Standard on 12 June 2020. The European Green Deal represents a turning point in this area and the E.U. Green Bond Standard is part of a wider package.⁹ He commented that the E.U. is looking at a broader effort to encourage sustainable investing and meet its 2030 climate and energy targets. The initiative aims to attract more finance for sustainable investment by establishing an E.U. standard for “green bonds”. Bonds are one of the main instruments used for financing fixed assets, particularly for the energy market. For this reason, bond markets have been identified as playing an important role in reaching the E.U.’s environmental sustainability objectives. The E.U. Green Bond Standard is expected to be voluntary and to reduce the cost of issuance. It could consolidate an E.U. position as a hub for Green Finance.

3.2. Mr Gilmour noted the European Commission is currently seeking feedback on the proposal via two consultations: an inception impact assessment on an E.U. standard for “green

⁹ European Commission, The European Green Deal (11 December 2019), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0640>

bonds”¹⁰ and a targeted consultation on the establishment of an E.U. Green Bond Standard.¹¹ The E.U. Green Bond Standard would need to be integrated with the E.U.’s Green Taxonomy. Mr Gilmour commented while onshoring is an obvious question—whether and if so how the U.K. might do so—there was currently not any legal uncertainty in the proposals. He noted that any future discrepancies between the SFDR, Taxonomy Regulation and the E.U. Green Bond Standard would create uncertainty.

4. Linking in with the FMLC (Venessa Parekh)

- 4.1. The presentation slides were circulated to members following the meeting owing to lack of time.

5. Any other business

- 5.1. No further business was raised.

¹⁰ European Commission, Establishment of an EU Green Bond Standard (12 June 2020), available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12447-EU-Standard-for-Green-Bond-#publication-details>

¹¹ European Commission, Targeted consultation on the establishment of an EU Green Bond Standard (12 June 2020), available at: https://ec.europa.eu/info/consultations/finance-2020-eu-green-bond-standard_en