Financial Markets Law Committee ("FMLC")

ESG Scoping Forum

Date: Wednesday 15 September 2021

Time: 2.00pm to 3.30pm

Virtual meeting

Attendees:

Tamara Cizeika (Moderator)	Allen & Overy LLP
Philip Bartram	Travers Smith LLP
Paul Double	City of London
Stuart Doxford	Simmons & Simmons LLP
Belinda Ellington	Citigroup
Gyongyver Fekete	Natwest Markets Legal
Selmin Hakki	Slaughter and May
Mindy Hauman	White & Case LLP
Lorraine Johnston	Ashurst LLP
Ida Levine	Impact Investing Institute
Christiane Leuthier	FIA
Caitlin McErlane	Baker McKenzie LLP
Daniel Nevzat	Norton Rose Fulbright LLP
Benedetta Pacifico	Sidley Austin LLP
Selina Sagayam	Gibson, Dunn & Crutcher UK LLP
Sarah Oliver Scemla	Bank of America
Ayesha K. Waheed	Morgan, Lewis & Bockius UK LLP
James Warbey	Milbank
Simon Witney	Travers Smith LLP
Claude Brown	Reed Smith LLP
Ezra Zahabi	Akin Gump Strauss Hauer & Feld
Lauren N Butchart	JP Morgan
Peter Werner	International Swaps and Derivatives Association

Brian Gray	FMLC Secretariat
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat

Regrets:

Imogen Garner	Norton Rose Fullbright LLP
Leland Goss	International Capital Market Association
Katy Hyams	LME
Leonard Ng	Sidley Austin LLP

Guest Speakers:

Chris Faint	Bank of England
Oonagh Harrison	Allen & Overy LLP

Minutes:

1. Introductions

1.1. Ms Cizeika opened the meeting.

2. The FMLC is in technological transition (Venessa Parekh)

2.1. Ms Parekh informed Forum members of some changes they may notice while the FMLC is in technological transition, including the use of a temporary domain and the new systems being trialed to track members' availability to attend Scoping Forum meetings.[1] Finally, she asked attendees to send in short testimonials about the FMLC for use on the FMLC website.

3. The role of central banks in the context of climate change (Chris Faint)

3.1. Mr Faint provided an update on the role, strategy and priorities of the Bank of England (the "**BoE**") in relation to addressing the financial risks from climate change, including its international engagement to build consensus. He explained that the financial system plays

[1] Please see Appendix I

a crucial role in supporting and accelerating the real economy's transition to net-zero. He noted that whilst individuals can comply with requirements, the necessary industry-wide emission reduction will be difficult to achieve without the involvement of the financial system. He provided an overview of the different types of climate risks, which are constantly changing, causing the role of market participants in climate change to evolve too.

3.2. Mr Faint stated that the BoE's climate objective is to play a leading role, through its policies and operations, in ensuring the financial system, the macro-economy and the banks are resilient to the risks from climate change and supportive of the transition to a net-zero economy. He drew attention to some climate-related supervisory practices and explained that there is an expectation that firms will develop tools to measure risk and judgment to enhance their approaches to managing financial risks from climate change.

3.3. Mr Faint added that the Taskforce on Climate-related Financial Disclosure (the "**TCFD**") has established a key framework for climate disclosure. The BoE is working jointly with other U.K. regulators and HM Government to make the TCFD framework mandatory in the U.K. by 2025. Mr Faint brought to members' attention the importance of climate scenario analysis, adding that the BoE had recently launched the Climate Biennial Exploratory Scenario ("**CBES**") which is a bespoke exercise designed to explore the resiliency of the financial system and individual banks and insurers to three different climate scenarios. He stated that the BoE will be approaching individual firms to examine their climate scenario and analyse important figures/trends. A member asked why the CBES does not prescribe capital requirements for banks. Mr Faint explained that CBES will not be used mechanically to set capital but will let the BoE better understand how the risk crystalises. He added that while the BoE does not prescribe capital requirements, every firm has a responsibility to ensure the availability of sufficient capital by using its own judgement and expertise. Another member added that the U.K. is a member of the Network for Cleaning the Financial System ("NGFS") which focusses on mobilising capital and asked if the BoE has a similar focus. Mr Faint explained that the NGFS and the BoE focus primarily on climate risks, rather than mobilising capital, but have both considered how capital would ideally be mobilised to reduce risks. The BoE is therefore focused on putting forth a framework to enable the mobilisation of capital. It is also working on the scenario analysis and will ensure a coordinated effort with other regulators. Members discussed challenges around the onshoring of E.U. regulations on ESG matters and the lack of clarity in relation to the equivalence regime.

4. *Friends of the Earth (Netherlands)* v *Royal Dutch Shell* and the proxy fight at ExxonMobil: key takeaways from a U.K, E.U. and U.S. perspective (Stuart Doxford)

4.1. Mr Doxford remarked that both the cases, *Friends of the Earth (Netherlands)* v *Royal Dutch Shell* (hereinafter referred to as "***Shell***") and the proxy fight at ExxonMobil are examples of investors pushing the companies to comply with climate targets. He explained that, in the proxy fight at ExxonMobil, an activist investor won at least two seats on the board of ExxonMobil. This development was likely to force the company to alter its fossil fuel-focused strategy and more directly confront growing shareholder concerns about climate change. Mr Doxford explained that following such developments in the U.S. is important because it provides insight into the impact of shareholders' activism in broadening firms' compliance requirements to cover climate change. He added that there has been an increase in the interest and participation of shareholders on these issues. Asset management companies are creating, or reinventing existing offerings as, sustainable funds with a focus on the continued development of disclosure requirements and increased transparency. He provided examples from Australia and Poland of measures taken to incorporate climate-related objectives in companies' products and targets.

4.2. Mr Doxford briefly explained the facts of *Shell*, which was a class action suit. The claimants believe that, as the policy-setting component of the Shell Group, Shell takes insufficient action, acts unlawfully, and should do more to reduce CO2 emissions. The claims concern the CO2 emissions of the Shell Group itself as well as those of its suppliers and customers. The Hague District Court ("the Court") concluded that Shell is obliged to ensure, through the Shell Group's corporate policy, that the CO2 emissions of the Shell Group, its suppliers and its customers are reduced. This follows from the unwritten standard of care applicable to Shell, which the Court interpreted based on the facts, widespread consensus and internationally accepted standards. The Court ordered Shell to reduce the emissions of the Shell group, its suppliers and its customers by net 45%, by the end of 2030 through the Shell Group's corporate policy. Mr Doxford explained that this is the first time a court has ordered a company to reduce emissions. Members discussed the significant shift in the public perception of companies' obligations, including a strengthening of the principle of a duty of care requirement. This shift is further evidenced by new regulatory requirements and increased engagement from institutional investors.

5. Recent developments: the G7 communique, President Biden's Executive Order, and the U.K. Working Group on Green Taxonomy (Oonagh Harrison)

5.1 Ms Harrison provided an overview of relevant recent developments, beginning with the signing, in May 2021, by U.S. President Biden of the Executive Order on Climate-Related Financial Risk (the "**Executive Order**").[2] The Executive Order outlines initiatives to promote policies related to climate change and to prioritize federal investments in support of those policies. She noted that Section 1 of the Executive Order sets out a consistent disclosure of climate-related financial risk, including both physical and transition risks, and offers risk mitigation techniques, setting a target of achieving a net-zero emissions economy by 2050. Section 2 gives responsibility to the authorities to develop a comprehensive climate-related financial risk strategy. Section 3 of the order requires the Secretary of the Treasury to engage with the members of Financial Stability Oversight Council ("**FSOC**") to assess Climate-Related Financial Risk.

5.2 Ms Harrison turned to the Communiqué issued by G7 finance ministers and central bank governors on 5 June 2021, following a meeting in London.[3] Among other things, the Communiqué centres climate change and biodiversity loss considerations in economic and financial decision-making and expresses support for mandatory climate-related financial disclosures based on the TCFD. In this context, Ms Harrison brought members' attention to the recently published TCFD consultation on its Proposed Guidance on Climate-related Metrics, Targets and Transition Plans.[4] She noted that the Consultation provides general guidance for firms, as well as proposes several specific changes to the guidance that emerged from the TCFD's 2017 Final Report. Ms Harrison added that the TCFD also published a Technical Supplement, which is focused on developing technical guidance on emerging best practices to align financial portfolios with the goals of the Paris Agreement.[5] Members discussed the challenges faced by the financial sector in respect of the carbon-related assets

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2 The White House, Executive Order on Climate-Related Financial Risk: Presidential Actions, 21 May 2021; available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/

3 G7 Financial Ministers & Central Bank Governors Communique, (5 June 202); available at: https://www.gov.uk/government/publications/g7-finance-ministers-meeting-june-2021-communique/g7-finance-ministers-and-central-bank-governors-communique

4 TCFD, *CP: Proposed Guidance on Climate-related Metrics, Targets and Transition Plans*; 7 June 2021; available at 2021-TCFD-Metrics_Targets_Guidance.pdf (bbhub.io)

5 TCFD, *Technical Supplement*: *Measuring Portfolio Alignment:*; June 2021; available at 2021-TCFD-Portfolio_Alignment_Technical_Supplement.pdf (bbhub.io)

disclosure. Members hoped that these initiatives would provide advice on how firms might meet targets.

5.3 Ms Harrison lastly explained that HM Treasury has announced the establishment of the Green Technical Advisory Group ("**GTAG**"), an expert group that will provide independent, non-binding advice to the government on the development and implementation of a UK Green Taxonomy.[6] Among other things, the GTAG will advise on the development of a Green Taxonomy that is usable and practicable for financial and nonfinancial firms. She added that a series of issue papers are expected to be agreed after the inaugural meeting of the group in June 2021. Members recommended that the FMLC try to secure the participation of regulators and authorities at future meetings of this Forum.

6. Any other business

6.1. No further business was raised.

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[6] Press Release available at: New independent group to help tackle 'greenwashing' - GOV.UK (www.gov.uk