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Gillian Dorner
Deputy Director
Head of Financial Services Domestic Strategy
HM Treasury

By email

20 May 2020

Dear Gillian,

IRSG Report – The Architecture for Regulating Finance after Brexit: Phase II

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

The Committee welcomes the International Regulatory Strategy Group ("**IRSG**") report on "The Architecture for Regulating Finance after Brexit: Phase II" (the "**Report**"). The Committee supports the key recommendations of the Report and urges stakeholders to consider its important input when assessing the UK's financial regulatory architecture post-Brexit. To contribute to this debate, we have set out in this letter some comments and recommendations based on the lengthy experience of Committee members in working with and advising on the current regulatory settlement.

1. The discipline around the making of financial regulation has been diminished since the financial crisis and needs to be regained. As noted in Section 2.4.1 of the Report, it is understandable that the financial crisis resulted in a huge pace of change in this area. However, this has come at the cost of the coherence, accessibility and competitiveness of the UK's financial regulatory system. Notably, many new regulatory regimes have been introduced without careful consideration of how they interact with other existing or new pieces of regulation. When new rules are introduced it is very rare for pre-existing rules to be amended or removed and replaced by the incoming standards.

For example, it is unclear why the UK needs separate civil and criminal regimes for market abuse and insider dealing which overlap but do not fully align. This has a negative effect on the rule of law (as the law becomes unclear and confused), and competition and competitiveness as both new and existing entrants find financial regulation increasingly difficult to navigate. Policymakers should, going forward, take a more targeted approach to addressing market failures, and consider simplifying and consolidating regulation.

2. There are also a number of ways in which the "onshoring" of EU financial services legislation post-Brexit has added to the existing complexity and lack of clarity in the UK's regulatory system. The Report recommends (in Section 3.4.1) that regulation should be consolidated and in the Committee's view this should not be limited to the onshoring process.

   A particular priority should be to clarify and simplify questions related to the regulatory perimeter and marketing of financial products. The regime as it stands currently presents a significant barrier for new entrants and for interactions between international customers and financial institutions and the UK market. For example, the interplay between rules on financial promotion, promotion of unregulated collective investment schemes and the marketing of alternative investment funds are unnecessarily complex to navigate without extensive professional advice.

3. Section 2.3 of the Report discusses a concern that regulators are not currently subject to appropriate scrutiny and accountability mechanisms (particularly bearing in mind their enhanced powers post-Brexit). Certain mechanisms such as judicial review are not as effective as they could be due to the practicalities of firms operating in the regulated sphere. In addition to the points noted in the Report, the Committee suggests that there should be a role for a body to receive the reports of the Complaints Commissioner and ensure regulators act on their recommendations.

4. Whilst the regulators are currently required to undertake consultations and cost-benefit analyses, the speed with which these are undertaken often means they are not as rigorous as they should be. Whilst often overlooked, it is obviously key to maintaining an effective system of regulation that regulatory changes are only made where the benefits genuinely outweigh the costs.

   Linked to the above, in the current system once regulations have been enacted they are rarely reconsidered or repealed. This is despite many notable regulatory initiatives failing to achieve their intended objectives. The Report proposes mandatory review mechanisms as (Section 3.4.3) and in the Committee's view this would assist both in holding regulators to account and in the point noted above regarding the overlap and complexity of the regulatory regime.

5. Aside from formal regulatory requirements, which are subject to cost-benefit analysis to a degree, much of the regime is in practice contained in the expectations placed on firms by regulators which go beyond the actual requirements of law and regulation. Examples of good practice in particular areas often become treated by regulators as required minimum standards. Whilst these standards may be appropriate, it is important that their introduction and retention as de facto obligations are subject to the same scrutiny as more formal regulation. Hence the Committee support the call for additional scrutiny and constraints (for example, Report Section 3.3.3) on the regulators' interpretation of rules and legislation.

6. Finally, the Committee notes the recommendation in Section 3.2.3 of the Report that competitiveness should be factored in to the regulators' objectives. The Committee would not support a regulatory "race to the bottom", as an effective and robust regulatory and legal system is a key contributor to the UK's status as a global financial centre. However, the Committee strongly believes that regulators necessarily consider competitiveness when undertaking their functions already, and hence it is appropriate that the process of managing

the trade-offs between competitiveness and certain aspects of regulation should be open and transparent, and open to consultation with all stakeholders.

The Committee is grateful to the IRSG for its contribution to the debate in this area and would be open to discussing it further with regulators, policymakers and other stakeholders.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours sincerely

Karen Anderson
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
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