

FINANCIAL MARKETS LAW COMMITTEE

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CHAIRMAN, LORD BROWNE-WILKINSON

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The Lord Woolmer of Leeds
Chairman, European Union Sub-Committee B
Energy, Industry and Transport
Committee Office
House of Lords
London SW1A 0PW

Dear Lord Woolmer

**FINANCIAL MARKETS LAW COMMITTEE
ISSUE 38: EU LEGISLATION & COMMERCIAL DEALINGS**

Thank-you for your letter 2 July inviting me to give oral evidence on Monday 6 October to Sub-Committee B (Energy, Industry & Transport) of the House of Lords Select Committee on the European Union in relation to its inquiry into the European Commission's Financial Services Action Plan.

The role of the Financial Markets Law Committee is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed. The FMLC also acts as a bridge to the judiciary to help UK courts remain up-to-date with developments in financial markets practice.

The FMLC was established in 2002 by the Bank of England for the following reason. Some element of legal uncertainty is inevitable in financial markets that are international, competitive and innovative. Although the UK framework of law for financial markets is highly developed and robust, new ideas or practices can sometimes raise legal uncertainties as to how the law will apply, on occasion based on misunderstandings about existing law. In addition, proposals (whether at home or abroad) for new law or regulation can give rise to uncertainties or misunderstandings, when the specific features of wholesale market practice have not been fully understood by a legislator or other public authority.

The establishment of the FMLC reflects the view, widely held across the wholesale financial markets, that London should continue to have arrangements in place to identify and analyse areas of legal uncertainty or misunderstanding affecting those markets. The FMLC is made up of senior lawyers and representatives of financial market participants, authorities, bodies and associations. More information may be found at www.fmlc.org.

Once identified, issues falling within the FMLC's remit may be addressed in a variety of ways, ranging from informing commercial or public sector interests of the existence of a pertinent issue, to developing solutions. Often, an issue may best be addressed by other bodies or groupings, in which case the FMLC's role need not go beyond steering the issue towards those others and monitoring the progress of its resolution. The FMLC is independent from the Bank and its views and any published materials cannot be taken to reflect the views of the Bank.

To achieve the FMLC's remit, a great deal of energy is dedicated to our "radar" function, by which we endeavour to consult wholesale financial market participants, both banks and other institutions, the professional firms which

serve them, infrastructure bodies such as stock exchanges and clearing houses, relevant public authorities, and academics to discover what are perceived as being the most pressing legal issues. From this general trawl for information the FMLC then seeks to identify which matters so raised represent a material risk to the wholesale financial markets arising through legal uncertainty or legal misunderstanding.

Perhaps unsurprisingly given the frequency with which its measures have been released over the last few years, legislation under the FSAP is the most commonly mentioned source of issues that are suggested as being within the Committee's remit. These FSAP-related issues raised with the FMLC are all fairly specific and normally relate to identified provisions within FSAP legislation (including very often draft legislation).

In reviewing our work generally, the FMLC has spent some of its discussions considering whether there is any general conclusion that can be drawn from the frequency with which FSAP-related issues are mentioned and the salient features these issues have in common. No conclusions have been drawn. And it may be that none can be drawn by a specialist committee dedicated to analysing issues of legal uncertainty. However there does seem to be one commonly-held view among wholesale financial market legal experts, that the differences between Community legislation and commercial law are such that Community legislation may not be as effective when aimed at business dealings in the wholesale financial markets as it is when aimed at other areas of activity.

The issue (if it exists) arises because wholesale financial markets require, and by their regulators are required to exhibit, an unusually high level of "to-the-minute" and "to-the-penny" legal certainty. In English law, business dealings are governed by that part of the common law known as commercial law. English commercial law offers its users the opportunity to achieve a level of legal certainty greater than in almost any other walk of life. Community legislation has been mentioned to the FMLC as falling short of this, by reason of the purposive, teleological approach to the interpretation that applies to Community legislation.

To investigate whether any consequences of this type arises from differences between Community legislation and commercial law and, if so, how and by whom they might be addressed, we are arranging a colloquium jointly with the British Institute of International Comparative Law in October under the title "European Financial Law: Conjecture & Outlook" at which this and connected issues will be ventilated in discussion between expert lawyers drawn from the public and private sectors and academia. We will endeavour to make a note of the discussion and, if your Committee's inquiry is continuing at that time, I will be happy to see that a copy is circulated to you.

I hope what I have said is helpful. I think that there are so many others more expert than myself in these areas that it would not be appropriate for me to give oral evidence on Monday 6 October. But I would be more than happy to suggest relevant experts if that would be helpful.

I look forward in any event to hearing the result of the Committee's deliberations. I am copying this letter to Graham Bishop, Specialist Advisor to your inquiry, who first suggested you may find it useful to hear from the FMLC in this way, and to Patrick Wogan.

Yours sincerely

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Chairman

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