

8 February 2016

Secretariat to the Financial Stability Board (the "FSB")  
Bank for International Settlements  
Centralbahnplatz 2  
CH-4002 Basel  
Switzerland

By email to: [fsb@bis.org](mailto:fsb@bis.org)

Dear Sirs,

## Bank Recovery and Resolution

### Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution<sup>1</sup>

The role of the Financial Markets Law Committee (the "FMLC" or the "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 submitted comments on the proposal of the Financial Stability Board (the "FSB") for an international standard on total loss absorbing capacity ("TLAC") of global systemically important banks ("G-SIBs").<sup>2</sup> The FSB issued its final Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution and its final TLAC Term Sheet (the "FSB Term Sheet") on 9 November 2015.

The FMLC welcomes the FSB's initiative and the introduction of the minimum TLAC requirements in an internationally coordinated manner.

The FMLC notes that the FSB Term Sheet continues to give rise to a number of legal uncertainties, as identified in its earlier response, in part owing to the high level of generality at which a number of the requirements are expressed. The existence of such uncertainties is liable to lead to differences in the implementation of the FSB Term Sheet by national governments and regulatory authorities. The Committee also notes the paramount importance of achieving a uniform international approach to TLAC in order to facilitate the orderly operation of resolution procedures for G-SIBs operating in multiple jurisdictions. For this to occur, it is imperative that the resolution authority in any jurisdiction has confidence in the resolution frameworks in place in other jurisdictions in which a G-SIB has branches or subsidiaries.

The Committee observes that the FSB has agreed to undertake further work and provide guidance as necessary to support the implementation of the TLAC standard and internal

<sup>1</sup> The FMLC is grateful to Mark Kalderon of Freshfields Bruckhaus Deringer LLP for his assistance in drafting this letter.

<sup>2</sup> The FSB, Adequacy of Loss-Absorbing Capacity of Global Systemically Important Banks in resolution dated 10 November 2014: <http://www.financialstabilityboard.org/wp-content/uploads/TLAC-Condoc-6-Nov-2014-FINAL.pdf>. The FMLC's comments are available at [http://www.fmlc.org/uploads/2/6/5/8/26584807/fmlc\\_paper\\_discussing\\_legal\\_uncertainty\\_arising\\_from\\_the\\_proposal\\_of\\_the\\_financial\\_stability\\_board\\_for\\_an\\_international\\_standard\\_on\\_adequacy\\_of\\_loss\\_absorbing\\_capacity.pdf](http://www.fmlc.org/uploads/2/6/5/8/26584807/fmlc_paper_discussing_legal_uncertainty_arising_from_the_proposal_of_the_financial_stability_board_for_an_international_standard_on_adequacy_of_loss_absorbing_capacity.pdf).

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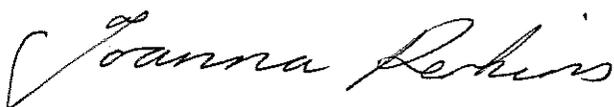
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TLAC mechanisms.<sup>3</sup> The FMLC encourages the FSB to provide guidance with a view to promoting the consistent international implementation of the FSB Term Sheet, in relation to the areas of uncertainty identified in the FMLC's earlier response as well as in relation to the internal TLAC requirement.

One consequence of the relatively high level of generality of the FSB Term Sheet and the uncertainty of its interpretation in a number of areas is that, until national governments and regulatory authorities implement the FSB Term Sheet into national law or rules, issuers of financial instruments will be unclear whether those financial instruments will comply with the requirements for inclusion in TLAC. Given the relatively short timescale for achieving TLAC compliance, it is important for G-SIBs to be in a position to issue TLAC-compliant instruments as early as possible. The Committee therefore suggests that the FSB should provide guidance to national governments and regulatory authorities as to the possibility of grandfathering issues of financial instruments made in the period between the issue of the FSB Term Sheet and the adoption of national implementing legislation or regulations where such issues are in material compliance with the principles of the FSB Term Sheet.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me to arrange such a meeting or should you require further information or assistance.

Yours sincerely,



Joanna Perkins

FMLC Chief Executive

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<sup>3</sup> FSB report to the G20 on Removing Remaining Obstacles to Resolvability, 9 November 2015, paragraph 3.4.