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FMLC Paper on the Proposal to Amend Moratorium Powers

On 23 November 2016, the European Commission published a package of reforms proposing significant changes to E.U. legislation on bank resolution and bank capital (the "**Banking Reform Package**"). One proposal included amendments to moratorium provisions in the Bank Recovery and Resolution Directive (the "**BRRD**"), which establishes a framework for the recovery and resolution of credit institutions and investment firms. The amendment introduces additional moratorium powers, giving relevant authorities new abilities to suspend payment or delivery obligations pursuant to any contract to which an institution in resolution is party.

In response, the FMLC resolved to establish a Banking Scoping Forum to provide a space for discussion on issues of legal uncertainty related to the Banking Reform Package. On recommendation from members of the Banking Scoping Forum, this paper highlights legal and practical risks which arise in the context of the proposal to amend moratorium powers. The FMLC considers four sets of uncertainties caused by the interaction of provisions in the legislative proposal with: (1) existing moratorium powers; (2) financial collateral arrangements; (3) custody requirements; and (4) back-to-back contracts involving central counterparties ("**CCPs**").

The FMLC recommends that further thought is given to synchronising these new moratorium powers with international standards. In the event that a departure from these standards is considered best, the FMLC urges the European Commission to consider clarifying the interaction of the new powers with existing sections of the BRRD and other relevant legislation.

[\(Read / download the paper here\)](#)

Curious?

If you are interested in this topic or would like to inquire about participation in the Banking Scoping Forum, please email Thomas Willett at forums@fmlc.org.

Brexit, a draft Statutory Instrument and the impending legal uncertainties

The European Union Withdrawal Bill (the “**Withdrawal Bill**”) will, when enacted, repeal the European Communities act, incorporate into U.K. law all E.U. legislation and provide delegated power to Ministers to make secondary legislation to help resolve any “deficiencies”. On Thursday 19 April, pursuant to that power, HM Treasury published a [draft statutory instrument](#) (“**SI**”) to help inform Parliamentary scrutiny of the Withdrawal Bill.

A covering note, published with the SI, states that the SI is in development and various drafting and technical aspects may change before it is presented to Parliament.

Once the Withdrawal Bill receives Royal Assent, several SIs relating to the financial markets are likely to be published in quick succession and with short consultation periods. Market participants have long anticipated that substantial legal uncertainty is likely to arise.

Any suggestions?

If you have any suggestions on how the FMLC might be able to evaluate and respond to potential legal concerns in the context of the upcoming draft SIs , please contact Venessa Parekh at research@fmlc.org.

Article on the Transition Pathway from LIBOR to “risk free” rates

In an article for Butterworth’s *Journal of International Banking and Finance Law*, FMLC CEO, Dr Perkins and former Project Manager, Jennifer Enwezor, examine the difficulties in the transition from IBOR benchmarks to alternative risk-free rates (“**RFRs**”). They consider significant questions frequently asked in relation to the LIBOR transition, such as: will the move from a single calculation methodology to multiple methodologies in multiple jurisdictions have a significant negative impact? Concerning the objectives identified in the Financial Stability Board’s February 2013 review of benchmarks, does the goal of a market-wide transition to new reference rates remains achievable?

The article determines that a divergence in the methodologies which will be adopted in different jurisdictions with respect to different currencies, is likely to be less of an obstacle than market discussions would suggest. From the brief account of developments, Dr Perkins and Ms Enwezor conclude that the transition path looks tough but not impassable. ([Read / download the article here](#))

Upcoming Speeches and Events

Infoline's Risk Free Rate Conference

On Wednesday 2 May 2018, FMLC CEO Joanna Perkins, will be speaking at [Infoline's Risk Free Rate Conference](#), "Navigating the Transition to Risk Free Rates". Dr Perkins will give a presentation.

Secretariat News

Aarushi Sahore recently joined the FMLC Secretariat as Legal Intern. Aarushi has played netball for over 10 years and continues to practice twice a week. An avid reader, her favourite authors are Salman Rushdie and Virginia Woolf.

Scoping Forum Update

Q1 Highlights

The first round of FMLC Scoping Forum meetings for 2018 is now complete. A wide variety of topics were discussed and distinguished guest speakers gave presentations on their areas of expertise. Highlights include:

- At the **FinTech Scoping Forum** meeting, guest speaker, Gavin Lee of CME Benchmark & Index Services delivered a talk on "Bitcoin futures". Lewis Lui (Eigen Technologies) spoke on the topic of AI and the Qualitative Data Revolution;
- Short remarks by Daniel Bayfield QC on the case of *Bakhshiyeva v Sberbank of Russia [2018] EWHC 59 (Ch)* at the **Sovereign Debt Scoping Forum** led to a lively discussion on the application of the rule in *Gibbs* to government/government-agency debt;
- Members of the **Asset Management Scoping Forum** discussed the impact of Brexit and the route to E.U. equivalence determinations;
- During the **Insurance Scoping Forum** meeting, William Hogarth (Clyde & Co LLP), evaluated key legal and regulatory issues currently facing parametric insurance;
- At the meeting of the **Infrastructure Scoping Forum**, Ciarán McGonagle of ISDA delivered a presentation on the two primary challenges arising in the context of the transition from IBORS to a nearly risk free rate; and
- Fred Sturm from the CME Group provided to members of the **Brexit Advisory Group** an overview of the Brexit experience from the perspective of a Third Country exchange.
- At the start of **every Scoping Forum meeting**, members of the FMLC Secretariat gave a short presentation, outlining the remit of the FMLC and its radar function.

The agenda, minutes and presentations for each Q1 Scoping Forum meeting can be found on the [website](#).

Scoping Forum Participation

The second round of Scoping Forum meetings in 2018 will commence shortly. Below is an summary of the areas on which the Scoping Forums are focus, along with the dates of upcoming meetings.

Asset Management Scoping Forum

The forum encourages discussion of developments in relation to the asset management sector. It will next meet on Thursday 24 May.

Banking Scoping Forum

This serves as a space for discussion on issues of legal uncertainty related to the wholesale banking sector. Its next meeting is scheduled for Tuesday 19 June.

Brexit Advisory Group

The interdisciplinary group provides a forum for discussion of current and future issues of legal uncertainty affecting the wholesale financial markets that relate to British secession from the E.U. The next meeting will be on Thursday 14 June.

FinTech Scoping Forum

This serves as a space for discussion of legal issues with respect to virtual currency, block chain, FinTech, RegTech and Cybersecurity. The next meeting will be held on Thursday 10 May.

Infrastructure Scoping Forum

This was formed to address issues of uncertainty in market infrastructure organisations. The forum will next meet on Thursday 7 June.

Insurance Scoping Forum

This is a forum for discussion of legal uncertainty in the insurance industry. It will next meet on Tuesday 22 May.

Sovereign Debt Scoping Forum

This allows market participants and representatives from the public sector to consider whether there are sovereign debt issues which should be presented to the FMLC. The next meeting will take place on Tuesday 5 June.

The FMLC Secretariat would be delighted to hear from Patrons interested in participating in any of its Scoping Forums. For further information, please contact Thomas Willett by email: forums@fmlc.org.

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