

Financial Markets Law Committee (“FMLC”)

Banking Scoping Forum

Date: Thursday 16 March 2017

Time: 10.00 am to 11.30 am

Location: Bank of England, Threadneedle Street, London, EC2R 8AH



In Attendance:

Jan Putnis (Chair)	Slaughter and May
Paul Gough	The Bank of New York Mellon
Leland Goss	International Capital Market Association
Charles Gray (by telephone)	Sullivan & Cromwell LLP
Simon Hills	British Bankers' Association
Tom Lodder	Barclays Bank PLC
Oliver Moullin	Association for Financial Markets in Europe
Bob Penn	Cleary Gottlieb Steen & Hamilton LLP
Mitja Siraj	FIA
Venessa Parekh	FMLC
Thomas Willett	FMLC

Regrets:

Alex Biles	Ashurst LLP
Thomas Donegan	Shearman & Sterling LLP
Michael Duncan	Allen & Overy LLP
Dorothy Livingston	Herbert Smith Freehills LLP
Matina Papadopoulou	CHAPS Co
James Perry	Ashurst LLP

Registered Charity Number: 1164902.

“FMLC” and “The Financial Markets Law Committee” are terms used to describe a committee appointed by **Financial Markets Law Committee**, a limited company. Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales. Company Registration Number: 8733443.

Minutes:

1. Introduction

- 1.1. Jan Putnis (Chair) opened the meeting and gave a brief introduction.

2. Forum administration

- 2.1. Venessa Parekh outlined the remit of the FMLC, the practical meaning of “legal uncertainty” within this remit, the mission which derives from the remit, the role of scoping fora within this mission, the six purposes which are fulfilled by the eight scoping fora which the FMLC has established so far and the questions which it would be helpful for members to address in 2017.¹
- 2.2. The procedure for publishing Forum documentation on the FMLC website within the public domain was outlined.
- 2.3. Forum members agreed that representatives from non-UK European and Asian Banks should be asked to join the Forum. It was suggested that members would contact Venessa Parekh to suggest specific individuals or organisations and to make recommendations for topics to the Forward Agenda.²

3. Issues of legal uncertainty arising in relation to the proposals included in European Commission’s Banking Reform Package

- 3.1. The discussion then turned to the Banking Reform Package published by the European Commission in November 2016.³
- 3.2. Forum members discussed the proposed new requirements for non-E.U. banking groups that satisfy certain criteria to establish an intermediate holding company (“IHC”) in the E.U., and compared this with similar requirements in the U.S.
- 3.3. The question of how this requirement would affect U.K. banks wanting to operate in the E.U. following Brexit was raised but it was agreed that the form of any future relationship the U.K. might negotiate with the E.U. is too unknown to make predictions at this moment. It was also agreed that while the E.U. IHC proposals raised policy

¹ Please see Appendix I below.

² Venessa Parekh can be reached at communications@fmlc.org

³ Further details of the package are set out in a Commission press release dated 23 November 2016, available at: http://europa.eu/rapid/press-release_IP-16-3731_en.htm

questions and uncertainties, members did not currently recommend the establishment of a Working Group.

- 3.4. Forum members discussed whether the Proposals have met their objective of implementing the term sheet published by the Financial Stability Board (“FSB”) on total loss absorbing capacity (“TLAC”) for global systemically important banks (“G-SIBs”). Attention was drawn to the separate eligibility criteria proposed for the minimum requirements for own funds and eligible liabilities (“MREL”) and the eligibility criteria for TLAC.
- 3.5. The proposal for new pre-insolvency moratoria powers in the revisions to the Bank Recovery and Resolution Directive (“BRRD”) was also considered.
- 3.6. Forum members discussed whether work should be undertaken on the application of the BRRD to Third Country groups. Venessa Parekh referred Forum members to the FMLC's existing work on Third Country regimes and encouraged them to contact her if they wished to feed into that project.
- 3.7. The Forum also discussed the legal uncertainties that may arise concerning services provided by non-E.U. branches of E.U. banks to E.U. customers following Brexit. While it was acknowledged that this issue remained controversial in the context of Brexit, Forum members agreed this would provide a fruitful topic for further exploration.

4. Proposals

- 4.1. The Forum recommended that consideration be given by the FMLC to the following:
 - establishing a Working Group—or reconvening the FMLC's older Working Group on issues of bank resolution—in order to investigate issues of legal uncertainty arising from, in particular, the proposals to amend Article 55 of the BRRD, and to assess the extent to which the legal uncertainties identified in previous FMLC work has now been resolved;
 - establishing a Working Group to examine legal uncertainties in the regime for approval of qualifying holdings in financial institutions, focusing on uncertainties in the application of the PRA and FCA change in control regimes in the U.K., particularly in circumstances involving complex acquisition structures with multiple applicants for approval; and

- establishing a Working Group to examine legal uncertainties in the concept of the “place of characteristic performance” of regulated activities under E.U. law.

Financial Markets Law Committee Banking Scoping Forum



Monday 16 March 2017

10.00am to 11.30am

Bank of England, Threadneedle Street, London

Registered Charity Number: 1164902.

“FMLC” and “The Financial Markets Law Committee” are terms used to describe a committee appointed by **Financial Markets Law Committee**, a limited company.
Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales. Company Registration Number: 8733443.

**Appendix I—THE FMLC RADAR
FUNCTION:
*an introduction***



Venessa Parekh, Acting Project Secretary
Financial Markets Law Committee

FMLC Remit

“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.”

FMLC Founding Documents, September 2002



What this means...

"But in my view, legal uncertainty is just another name for legal risk: the risk of increased litigation over legal rights that are poorly defined, the risk of market disruption because legislation has unintended consequences, or the risk that market standard contracts turn out to be unenforceable. These are broadly the sorts of issues the FMLC has been established to tackle."

Joanna Perkins, FMLC Chief Executive



FMLC Mission



- According to the remit, the FMLC has a tripartite mission:
 - to identify relevant issues (the **radar** function);
 - to consider such issues (the **research** function); and
 - to address such issues (the **public education** function).
- The **radar function** relies on the FMLC’s scoping forums and other horizon-scanning, advisory bodies. It also relies on a relationship management programme which the FMLC Secretariat maintains with Patrons and Stakeholders.
- The **research function** is addressed by the FMLC Secretariat and by highly-focused working groups who work to draft papers and correspondence on behalf of the FMLC.
- The **public education function** is furthered when the FMLC publishes these letters and papers. It is also addressed by the regular programme of events organised by the FMLC Secretariat, including: roundtables, seminars and conferences. These feature high-profile guest speakers.

Scoping Forums

“Scoping forums serve as an avenue for the FMLC to engage with focus groups on legal issues affecting specific segments of the financial markets. The forums serve as spaces for discussion of broader issues of legal uncertainty, and members formulate and propose to the FMLC issues considered by them to cause substantive legal uncertainty to their industry.”

FMLC Brochure, January 2017



How Scoping Forums work...



- A scoping forum, then, should serve six key purposes:
 1. to establish a pool of expertise available to the FMLC;
 2. to enable full discussion among interested parties with a view to facilitating collective legal risk assessment;
 3. to guide the FMLC and establish priorities for the expenditure of resources;
 4. to make recommendations to the FMLC as to specific issues to be addressed;
 5. to make non-binding suggestions as to the manner of the FMLC's engagement with the issues; and
 6. to nominate experts to working groups.
- At this time of significant political change, the FMLC Secretariat would be grateful for assistance with items 2-4, in particular.

Questions, questions...

- Assuming the FMLC has limited resources to devote to banking issues, in 2017, which are those that it should prioritise?
- Does the Forum agree that the flow of information between members and the FMLC Secretariat should ideally be a 2-way process? How can the Secretariat best assist the Forum in its discussions?
- Does the Forum agree that the Secretariat should table updates for the Forum on issues which the FMLC considers relevant to the industry, although not a commercial priority (e.g. developments in other jurisdictions)?
- Does the Forum consider that it would be beneficial to expand the membership of this group? Who might we approach?

Summary and Conclusion



To sum up...

- The FMLC is tasked with identifying, considering and addressing legal uncertainty...
- ...which is sometimes better thought of as “legal risk”.
- The Forum is a means by which the FMLC can fulfil its radar function.
- The Forum serves six key purposes.
- At this time, the FMLC Secretariat would be grateful for help with assessing legal risks, identifying priorities and selecting issues for further work.
- The Secretariat has highlighted questions for possible consideration.