



Financial Markets Law Committee (“FMLC”)

Banking Scoping Forum

Date: Tuesday 19 June 2018

Time: 2.00pm to 3.00pm

Location: White & Case LLP, 5 Old Broad St, London EC2N 1DW

In Attendance:

Stuart Willey (Chair)	White & Case LLP
James Bresslaw	Simmons & Simmons LLP
Simon Hills	UK Finance
Ian Jameson	Sumitomo Mitsui Banking Corporation Europe Limited
Suhail Khawaja	Wilmington Trust
Jons Lehmann	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Dorothy Livingston	Herbert Smith Freehills LLP
Tom Lodder	Barclays Bank Plc
John McGrath	Sidley Austin LLP
Venessa Parekh	FMLC
Thomas Willett	FMLC

Guest Speaker:

Nicholas Voisey	Loan Market Association
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Regrets:

Alex Biles	Ashurst
Clare Dawson	Loan Market Association
Thomas Donegan	Shearman & Sterling (London) LLP
Michael Duncan	Allen & Overy LLP
Laura Feldman	Eversheds Sutherland
Leland Goss	International Capital Market Association (“ICMA”)
Charles Gray	Sullivan & Cromwell LLP
Benedict James	Linklaters LLP
Amy Kennedy	Gibson, Dunn & Crutcher LLP
Monica Sah	Clifford Chance LLP
Martin Sandler	PricewaterhouseCoopers LLP

Registered Charity Number: 1164902.

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Minutes:

1. Introduction

1.1. Stuart Willey opened the meeting and delivered a brief introduction.

2. Proposal for a Directive on credit servicers, credit purchasers and the recovery of collateral:

a. **Overview from the perspective of non-bank non-performing loan purchasers (John McGrath)**

b. **Remarks from the Loan Market Association (Nicholas Voisey)**

2.1. John McGrath delivered an overview of the Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral (the “**Proposal**”). He began by explaining that the proposal forms part of the E.U.’s work to address the high stocks of non-performing loans (“**NPLs**”) and to prevent the build-up of NPLs in the future but the Directive is much broader in application covering all credit agreements issued by European credit institutions and applying to good and bad loans.

2.2. Mr McGrath identified legal uncertainties in the scope and use of defined terms in the legislation which had been highlighted previously in public responses by industry groups such as the LMA. Mr McGrath also drew particular attention to Title III Article 13 which stipulates that creditors shall provide all necessary information to a credit purchaser prior to entering into a contract. Mr McGrath highlighted the unclear wording on what information the creditors are required to provide and noted that the wording did not take account of the disclosure and verification obligations imposed by the securitisation regulation (EU) 2017/2402. Nicholas Voisey expressed his agreement with the uncertainties identified by Mr McGrath. Mr Voisey elaborated that the expansive scope of the proposal gives rise to unnecessary complexities. The proposed Directive covers primary and secondary market as well as distressed and non-distressed loans. The disclosure requirements, as a result, seem impossible to meet.

- 2.3. Mr McGrath continued by drawing attention to the conflicts between the distinct common accelerated extrajudicial collateral enforcement procedure (“**AECE**”) proposed by the Directive. Mr McGrath mused that the proposals would not work very well for loans written under English law. Forum members agreed, querying the use of such an elaborate process and its intended relationship to insolvency laws.
- 2.4. Mr Voisey then delivered an overview of the LMA’s perspective on the proposal. He reiterated the uncertainties in the scope of the proposed Directive and mentioned that the LMA has suggested drafting amendments to carve out syndicated and other wholesale loans from scope of the Directive and to apply the requirements in a more targeted way. Mr Voisey agreed to share the LMA’s response to the proposals with the Secretariat for circulation to the Scoping Forum members. Mr Voisey also relayed that the LMA has requested a follow-up meeting with the European Commission and will circulate its feedback to Forum members.
- 3. Plenary discussion on recent developments and legal uncertainties in the banking sector (Stuart Willey)**
- 3.1. One member mentioned the European Commission’s recently proposed regulation concerning the law applicable to the third-party effect of assignments of claims. The member explained that currently, Article 14 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (“**Rome I**”) governs the contractual aspects of such assignments, but the proposed regulation would fill an apparent gap by applying the law of the assignor’s habitual residence to the third-party consequences. The member highlighted that legal uncertainty is evident and that the preferred law in this context should be the law of the assigned claim, rather than the law of the assignor’s habitual residence.
- 3.2. Ms Parekh informed the members that the FMLC are preparing a letter on this issue. Mr Voisey also mentioned that the LMA are conducting work into this area and offered to send the Secretariat its findings.
- 3.3. Another participant raised concerns over the publication by H.M. Government of up to 120 statutory instruments related to the financial services pursuant to the goals of the Withdrawal Act. This secondary legislation will amend E.U. law which is retained in U.K. law after Brexit to resolve any deficiencies. Attending members who are also members of the FMLC’s Brexit Advisory Group mentioned that concerns over these instruments were also raised at the recent meeting of the Brexit Advisory Group.

3.4. Ms Parekh mentioned that the FMLC has initiated an effort with the City of London Law Society (“**CLLS**”), the International Regulatory Strategy Group (“**IRSG**”), the Law Society and the Brexit Law Committee to respond to the statutory instruments in a coordinated manner so as to prevent overlap.

4. Administration: the FMLC—a charity (Venessa Parekh)¹

4.1. Venessa Parekh described to the members the FMLC’s transition from an independent body established by the Bank of England to its current status as a registered charity under the Charity Commission. She elaborated on the ways in which the FMLC’s charitable remit has an impact on its work and conduct, including very closely-guarded requirements to be transparent and impartial.²

5. Any other business

5.1. Forum members noted that the next meeting of the Infrastructure Scoping Forum will be held on Tuesday 18 September between 2.00pm and 3.30pm.

¹ Please see Appendix I below.

² For further information as to how you can support the work of the FMLC, please contact Thomas Willett at forums@fmlc.org.

Financial Markets Law Committee: a charity (And what that really means)

Venessa Parekh, Research Manager

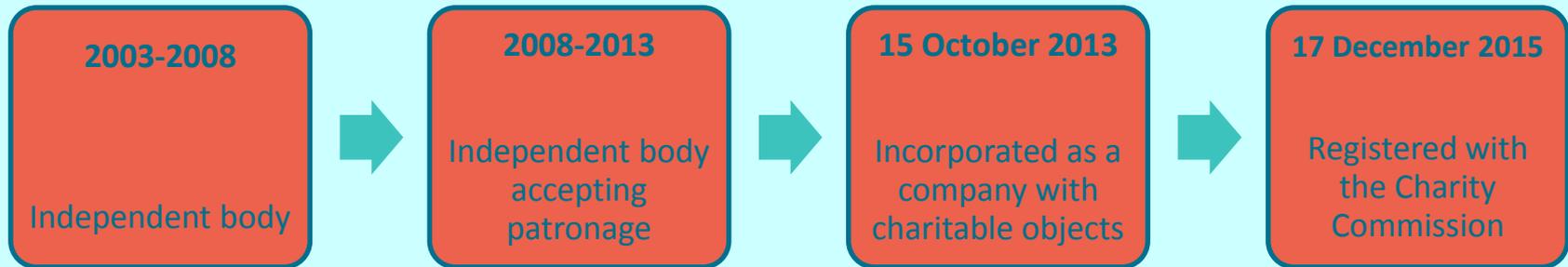


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The road to incorporation

- In **2003** the Bank of England established the FMLC as an independent organisation solely responsible for its own recommendations.
- In **2008**, the FMLC took a step towards greater independence by accepting funding from patrons.
- In **October 2013** the FMLC achieved structural self-sufficiency by **incorporating under charitable articles of association**.
- In **December 2015** the Charity Commission accepted the FMLC's application to **register as a charity**.



The FMLC's charitable remit



According to the charitable 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).

Reduced legal uncertainty and risk is in the public good; the *radar* and *research* functions are somewhat self-explanatory in this regard. The *public education* function is a key aspect of the FMLC's status as a charity, and is addressed in the following ways:

- All FMLC papers, presentations/speeches and correspondence are freely available via the FMLC website.
- The FMLC seeks to raise the profile of its research with those who are best positioned to implement solutions.□This is achieved primarily through correspondence: the FMLC maintains active correspondence with regulatory and legislative groups around the world, particularly HM Treasury and the European Commission.
- Most FMLC events (with the exception of Patrons' events) are free to attend by members of the public.
- The FMLC also acts as a bridge to the judiciary, a task it carries out primarily by organising seminars to brief senior members of the judiciary on aspects of wholesale financial markets practice.

Transparency...



The FMLC follows the Charity Commission's guidance with the aim of maximising transparency. To this end, the FMLC:

- is registered with—and submits financial data to—the European Transparency Register;
- publishes full lists of both Patrons and Members on its website;
- is regularly audited by an independent accountancy firm;
- provides funding/expenditure breakdowns on request;
- publishes the minutes of Committee meetings to its website;
- publishes the agendas/minutes of every Scoping Forum meeting on its website;
- maintains policies governing conflict of interest, risk management and volunteer management; and
- remains independent from the Bank of England, government or legislative bodies and the financial sector itself..

...and impartiality



Since its creation the FMLC has been an independent body solely responsible for its own views and research. The Bank of England does not guide or submit input to the FMLC's reports. Anyone—including members of the general public—can raise issues of legal uncertainty for the Committee to investigate.

The FMLC does not comment on or seek to influence matters of policy. Issues relating to policy rather than solely to legal uncertainty are rejected.

The FMLC is dedicated to impartial consensus; for this reason the absolute maximum number of members from a single organisation is two individuals for a Scoping Forum, and one for a Working Group.

Scoping Forums have no *vires* to initiate projects or pass resolutions affecting the FMLC. Substantive issues of legal uncertainty are proposed by the Secretariat to the FMLC as a topic which may require further action.

Papers drafted by Working Groups are submitted to the entire Committee for review to ensure accuracy, objectivity and impartiality.

The FMLC is supported entirely by patronage. Patronage relates to funding only, there are no further contribution expectations or requirements and no special treatment for Patrons apart from seasonal social events.

Future endeavours/ can you help?

The FMLC's educational remit is theoretically endless: there are always more financial markets participants, regulatory/government bodies and members of the public to keep informed of our work.

To that end, the FMLC is currently researching or pursuing the following:

- A full revamp of the website, focusing on accessibility and greater sharing of materials.
- Boosting attendance of FMLC events by members of the general public.

The FMLC is also considering new ways to disseminate its research, and in future may investigate:

- Recording/broadcasting solutions for events to allow greater access.
- Summarising and disseminating the FMLC's work in easily digestible media formats such as short videos or podcasts.

The FMLC is grateful for suggestions on how to amplify its message, better to serve its charitable function and the general public. Can you help?