Financial Markets Law Committee ("FMLC")
Banking Scoping Forum

Date: Tuesday 19 March
Time: 2.00pm to 3.30pm
Location: Ashurst LLP, Broadwalk House, 5 Appold Street, London, EC2A 2AG.

In Attendance:

Alex Biles (Chair)  
Thomas Donegan  
Mark Kalderon  
Suhail Khawaja  
Dorothy Livingston  
Knox McIlwain  
Chhavi Sinha  
Clare Wiles

Ashurst LLP  
Shearman & Sterling (London) LLP  
Freshfields Bruckhaus Deringer LLP  
Wilmington Trust  
Herbert Smith Freehills LLP  
Cleary Gottlieb Steen & Hamilton LLP  
FMLC

Regrets:

James Bresslaw  
Lee Goss  
Charles Gray  
Simon Hills  
Ian Jameson  
Jons Lehmann  
Oliver Moullin  
Monica Sah  
Mitja Siraj  
Jeremy Stokeld

Simmons & Simmons LLP  
International Capital Markets Association ("ICMA")  
Sullivan & Cromwell LLP  
UK Finance  
Sumitomo Mitsui Banking Corporation Europe Limited  
Fried, Frank, Harris, Shriver & Jacobson (London) LLP  
The Association for Financial Markets in Europe ("AFME")  
Clifford Chance LLP  
FIA  
Linklaters LLP
Minutes:

1. **Introductions**

1.1. Alex Biles opened the meeting and members introduced themselves.

2. **Administration: Elsewhere at the FMLC (Clare Wiles)**

2.1. Ms Wiles updated the members with the work undertaken and issues of legal uncertainty being considered at the other FMLC Scoping Forums. She highlighted that the work undertaken by the newly formed Securities Markets Scoping Forum might be of interest to the Banking Scoping Forum.

3. **Update on FMLC Working Group on Reverse Enquiry (Mark Kalderon)**

3.1. Mark Kalderon led a discussion on the work undertaken by the Reverse Enquiry Working Group, observing that the issues of legal uncertainty surrounding reverse enquiry are of particular interest in the context of a hard Brexit. He explained that the Working Group's starting point for examining reverse enquiry will be Regulation (EU) No 600/2014 on markets in financial instruments (“MiFIR”) and Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (“MiFID II”), as these expressly set out the concept of services being initiated at the client’s own exclusive initiative. The Working Group will also be considering reverse enquiry in the context of the Directive 2011/61/EU on Alternative Investment Fund Managers (“AIFMD”). Mr Kalderon noted that there is nothing express on reverse enquiry in the relevant directives for banking services, lending and deposit-taking, but he thought that the Working Group's analysis may produce something that is transferable or of interest to the Banking Scoping Forum.

3.2. Mr Kalderon observed that the framing question for the Working Group is whether reverse enquiry is a concept of E.U. law or something on which Member States develop their own laws. In the context of MiFID II/MiFIR, it is unclear whether a pan-E.U. concept of reverse enquiry exists, or whether reverse enquiry is only activated where equivalency determinations have been made (Article 46(5) of MiFIR) or where a Member State has exercised the “branch option” (Article 42 of MiFID II). Although ESMA has provided guidance on the concept of reverse enquiry in its Q&As, implementation by Member States

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1 Please see Appendix I below.
2 See Article 46(5) of MiFIR and Article 42 and Recital 111 of MiFID II.
3 See Recital 70 of the AIFMD.
is clearly mixed (some have incorporated the principle as it is set out in MiFIR, whereas others, such as the U.K., have taken a national approach to it). Mr Kalderon considered that any paper produced would be more useful if it could define an E.U. concept of reverse enquiry; if it could not, then it would be difficult for the Working Group to contribute to a uniform understanding of reverse enquiry.

3.3. Mr Kalderon also summarised several other substantive questions that the Working Group is considering, including the following:

- Do the requirements on reverse enquiry have to be satisfied on a relationship basis or do they need to be examined on a service-by-service basis? If reverse enquiry requirements can be satisfied on a relationship basis, then can services continue to be provided under that relationship post-Brexit if the relationship was established pre-Brexit? When does a relationship “cease”?

- Can a client agree with a firm to hear about services being offered, such that the firm will not be soliciting business but rather agreeing to perform its contractual obligation? What if the client has not entered into a contract with the firm, but has indicated that it is willing to receive services from the firm with respect to various kinds of products?

- Can reverse enquiry apply in a situation where there is receipt of services through an intermediary?\(^4\)

- To what extent is the type of client relevant in a reverse enquiry structure? A public document analysing reverse enquiry under the German regulatory framework suggests that large scale customers are to be expected to wish to tap the global liquidity located in London and there is no real outreach to them regardless of who makes the first move.\(^5\) Can this analysis be extrapolated to different types of clients or types of markets?

- What is the scope of reverse enquiry? For instance, would it comprise general brand awareness?

\(^4\) It was noted that recital 43 of MiFIR is useful in envisaging this type of situation.

Mr Kalderon noted that the Working Group will also be looking at the Investment Firm Review, which has tightened up third-party access provisions. Additionally, the Working Group will consider whether there have been any examples of challenges to reverse enquiry in practice by regulators, and what is considered best market practice in terms of documenting reverse enquiry.

Mr Kalderon concluded by observing that, although the Working Group is putting a paper addressing these and other uncertainties, it is unclear as yet to whom any such paper will be directed.

3.4. Mr Kalderon invited comments from the members on any issues that they have faced during their practice. One member queried the overlay of World Trade Organization (“WTO”) rules, noting that the WTO rules expressly allow for cross-border trade, and that reverse enquiry appears to cut across this. The member thought that where non-E.U. assets are being acquired, the right regulatory control should be testing the assets for capital adequacy, not preventing trade based on who initially made contact.

3.5. Another member mentioned that, in the banking context, the concept of characteristic performance under Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (the “Capital Requirements Regulation”) is somewhat similar to reverse enquiry. The member offered to present a briefing note on this to the FMLC, and it was agreed that the Reverse Enquiry Working Group could consider whether this point could be incorporated into its work.

4. **Plenary discussion on recent and anticipated legislation and developments in the banking sector- potential areas of focus and recommendations for work for the Banking Scoping Forum in 2019 (led by Alex Biles)**

4.1. Mr Biles led a discussion on recent and anticipated legislation and developments in the banking sector and explained that purpose of this discussion is for members to identify potential areas of focus and recommendations for work for the Banking Scoping Forum in 2019. Mr Biles began the discussion by noting two developments which are of relevance to the Banking Scoping forum.

4.2. Mr Biles first considered an issue of uncertainty with respect to the new Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the “Prospectus Regulation”). Further to the revision of Directive 2003/71/EC of on the prospectus to be published when securities are offered to the public.
or admitted to trading (the “Prospectus Directive”) in 2011, certain withdrawal rights for investors were removed. The language used to achieve this was, however, considered defective in certain ways. In spite of this, the same language regarding withdrawal rights has been used in the new Prospectus Regulation; additionally, the Prospectus Regulation imposes a new obligation on underwriting banks to go out and notify investors if a supplement is being published during an offer period, despite the fact that this does not seem to be the policy intention.

4.3. Mr Biles also flagged the planned review by the Financial Stability Board (“FSB”) of the technical implementation of the Total Loss-Absorbing Capacity (“TLAC”) standards. Members discussed issues of uncertainty that have been raised in the past few years with respect to the TLAC standards. In particular, members noted that in order for an obligation to be TLAC-eligible, it must have a maturity of more than 12 months, which raises uncertainty as to eligibility in the instrument’s last year of maturity. To address this issue, some French banks have been issuing notes that have a call date a year before the maturity of the note, a practice that appears to be accepted by French authorities. Members agreed that it would be useful if the FSB could provide some guidance on their views regarding such structures. Another member also flagged the legal opinions requirement from the Single Resolution Board’s policy statement and commented that this would be worth examining.

4.4. One of the members mentioned that the Treasury is in the process of amending the Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) to account for changes to the insolvency rules and to add in references to Northern Ireland insolvency rules. The member noted that one question being debated by the Treasury is whether insolvency or contractual rules should be applied to netting. The member further proposed to bring this issue to the Banking Scoping Forum if the debate does not succeed.

4.5. Another member raised an issue of uncertainty regarding the proper risk weighting of crypto-assets. Ms Wiles explained that an FMLC Initial Coin Offering (“ICO”) Working Group is already examining issues around the classification of crypto-assets. It was suggested that the member could prepare a briefing note on the uncertainties regarding risk weight of crypto-assets, and the FMLC could consider whether this could be incorporated into the material of the ICO Working Group.

4.6. One member raised an issue regarding the procedure for recognition of third country resolution measures under the Banking Act 2009 (as amended), which allows for the Bank of England to take measures against the branches of third country banks and in relation to U.K. assets of third country banks. For reasons connected with the E.U. regime on the
insolvency of banks (which is largely adopted under U.K. law), the law provides that this third party regime is without prejudice to insolvency law. In particular, the provision that would allow the Bank of England to stop the insolvency of a branch is not part of the package; similarly, the provision that would allow the Bank of England to stop the insolvency of a U.K. bank being resolved elsewhere is also doubtful. The law does not, in this case, seem to be in line with U.K. policy intention. The member thought, however, that this may be more a policy issue as opposed to an issue of legal uncertainty. The member also noted that this issue was being considered by the Treasury Banking Liaison Panel, but that it may be worth revisiting at the FMLC once the path for Brexit becomes clearer.

4.7. Members also discussed the FCA’s consultation on the implementation of Directive (EU) 2017/828 (the revised Shareholders Rights Directive) but considered that this was more of a company law issue and did not fall squarely within the Banking Scoping Forum’s remit.

5. **Next Steps**

5.1. Members agreed that the next meeting of the Banking Scoping Forum should focus on issues of uncertainty under the revised Capital Requirements Regulation (“CRR2”) and revised Bank Recovery and Resolution Directive (“BRRD2”). It was agreed that the Secretariat would try to scope speakers for these topics. It was noted that the FSB’s review of TLAC standards (see above) could be discussed in greater detail as part of this CRR2/BRRD2 session.

5.2. The Chair agreed to prepare a briefing paper on the issue of uncertainty identified under the Prospectus Regulation, and to liaise with members of the Securities Markets Scoping Forum in preparing this.

5.3. As noted in paragraph 4.5 above, it was suggested that the Forum member who had raised the issue surrounding the risk weighting of crypto-assets could prepare a briefing note on this topic, which the FMLC could consider in the context of the ICO Working Group.

5.4. Additionally, it was agreed that the Secretariat would ask the member who raised the point on characteristic performance (see paragraph 3.5 above) to provide a briefing note on this.

6. **Any other business**

6.1. No other business was raised.
Elsewhere at the FMLC ...
Addressing legal uncertainty

Since 2003, the FMLC has analysed and made recommendations to resolve legal uncertainties in 222 disparate topics.
Remit and Scope

“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

The FMLC’s remit covers the entirety of the wholesale financial markets. In order to identify issues of legal uncertainty, the FMLC Secretariat runs nine “horizon scanning” Forums, each focused on a specific area of the financial services.

We thought you might be interested in the recent priorities of the other Forums.
Asset Management

- Established to provide a space for discussion of current and future issues of legal uncertainty that are of concern to the asset management industry.
- In recent months, the Forum has considered:
  - Scope of the definition of “user” under the Benchmarks Regulation;
  - Scope of the definition of “institutional investor” under the Securitisation Regulation; and
  - The FCA consultation paper on illiquid assets and open-ended funds.
Banking

• Originally established to review the European banking reform package which proposed fundamental changes to E.U. legislation on bank resolution and bank capital.

• In recent months, the Forum has considered:
  – The European legislative proposal for a Directive on credit services, credit purchasers and the recovery of collateral;
  – The preparations by the loan market ahead of the discontinuation of LIBOR; and
Brexit

- Established to provide a space for discussion of current and future complexities affecting the financial markets as a result of the U.K.’s secession from the E.U. This group is also tasked with providing advice and guidance to the FMLC on the scope and nature of work which relates to the referendum and consequential withdrawal.

- This Forum has considered:
  - The options for the U.K.’s future relationship with the E.U.;
  - The European Union (Withdrawal) Bill (now enacted); and
  - HM Treasury’s preparations for withdrawal by way of the publication of secondary legislation “onshoring” E.U. law
FinTech

• Established to encourage discussion of current and future issues of legal uncertainty arising in the context of technological innovations in financial markets.

• Recently, this Forum has discussed:
  – The evolution of U.S. regulatory position on cryptocurrencies;
  – ISDA’s recent report on smart contracts;
  – New regulations in Gibraltar on the use of DLT and tokens; and
  – The FCA’s consultation on cryptoassets and the U.K.’s regulatory perimeter.
Infrastructure

- Established to provide a space for discussion amongst market infrastructure bodies and a channel of communication between the market infrastructure sector and the public authorities.

- Recently, this Forum has discussed:
  - ESMA Q&As on the Benchmarks Regulation;
  - ESMA Public Statement on managing the risks of a no-deal Brexit in the area of central clearing;
  - The Draft Payments and electronic money (Amendment) (EU Exit) Regulations; and
  - The Draft Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018.
Insurance

• Established to identify current and future issues of legal uncertainty that are of concern to the insurance industry.
• Recently widened to bring into scope the pensions industry.
• This Forum’s priorities over the past year include:
  – The development of cyber insurance;
  – The impact of Brexit on existing insurance contracts; and
  – The PRA’s consultation on credit risk mitigation
Securities Markets

• The FMLC resolved in January 2019 to establish a new Forum for horizon scanning purposes in respect of the primary markets
• The Forum will consider topics including the aspects of MiFID II and MAR which impact on primary markets, the Prospectus Regulation and PRIIPS, non-MiFID primary markets conduct, infrastructure financing and securitisation issues.
Quarterly Discussion Forum

• The Quarterly Discussion Forum call is a bilateral teleconference between the FMLC and the Financial Markets Lawyers Group (the “FMLG”, associated with the New York Federal Reserve).

• In recent months, topics discussed on these calls have included Brexit, the phasing out of LIBOR and the development of alternative reference rates, and the Benchmarks Regulation.

• This is a “closed” Forum in the sense that it does not have a standing membership and is usually attended by Members of the FMLC. The Secretariat would be grateful, however, to hear from persons who might volunteer to attend as a guest speaker.
Sovereign Debt

• Established to provide a space for ongoing discussion regarding legal uncertainty issues affecting sovereign debt under English, European, international and, possibly, foreign law.

• Last year, this Forum:
  – Welcomed guest speakers, Lee Buchheit and Mitu Gulati, to discuss the Venezuelan debt crisis;
  – Considered the “odious debt” defence; and
  – Discussed a proposal to make “secret” loans unenforceable.
Conclusion

• If you wish to enquire about your firm’s participation in any of the Scoping Forums, please do get in touch.

• The Secretariat is always pleased to receive recommendations for topics for discussion or guest speakers.