



Financial Markets Law Committee (“FMLC”)

Securities Markets Scoping Forum

Date: Wednesday 13 March 2019

Time: 9am to 10.30am

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

Please kindly note that you will not be allowed access to the building without photo ID (passport or driving licence only).

In Attendance:

Carolyn Jackson (Chair)	Katten Muchin Rosenman UK LLP
Andrew Bryan	Clifford Chance LLP
Mark Chalmers	Davis Polk LLP
Paul Deakins	Clifford Chance LLP
Tom Falkus	White & Case LLP
Leland Goss	ICMA
Matthias Lehmann (dial-in)	University of Bonn
Eleanor Ley	Allen & Overy LLP
Stephanie Lincoln	Deutsche Bank AG
Raj Panasar	Cleary Gottlieb Steen & Hamilton LLP
James Parkes	CMS Cameron McKenna Nabarro Olswang LLP
Michael Sholem	Davis Polk LLP
Ferdisha Snagg	Freshfields Bruckhaus Deringer LLP
Alasdair Steele	CMS Cameron McKenna Nabarro Olswang LLP
Amanda Thomas	Allen & Overy LLP
Catherine Wade	Linklaters LLP
James Warbey	Milbank LLP
Venessa Parekh	FMLC

Regrets:

Carter Brod	Morgan, Lewis & Bockius UK LLP
Daniel Csefalvay	Bryan Cave Leighton Paisner LLP
Mindy Hauman	White & Case LLP

Registered Charity Number: 1164902.

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Minutes:

1. Introductions

- 1.1. Ms Jackson opened the meeting. Attendees introduced themselves.

2. Administration (Venessa Parekh)¹

- 2.1. Ms Parekh delivered a presentation on the FMLC's Radar function and the Securities Markets Scoping Forum's role in it. She explained the minutes policy adopted by the Secretariat for recording minutes of Scoping Forums. Finally, she set out the Forward Schedule of meetings for 2019.

3. European Commission's work on conflict-of-law rules for securities (Matthias Lehmann)

- 3.1. Dr Lehmann introduced the proposal by the European Commission (the "**Proposal**") for a regulation on the conflict of law rules applicable to third party claims in assignments. He noted that currently different criteria are used to determine the law that applies to the transfer of claims in assignments across E.U. Member States and it is therefore inconsistent. The Proposal applies the law of the assignor's habitual residence to third-party effects, subject to various exceptions including one for securitisations. On 13 February 2019, the European Parliament published its legislative resolution (the "**legislative resolution**") adopting the proposed regulation, albeit with some amendments. One of the amendments was to remove the exception in the Proposal, therefore applying the law of the habitual residence of the assignor to claims in relation to securitisations. This would lead to much uncertainty owing to the complex nature of securitisations.
- 3.2. At Forum members' request, Dr Lehmann charted the history of the Proposal in greater detail. He noted that the European Commission had been reluctant to address the conflicts of laws rules in this area owing to the lack of consensus in Member States. Another attendee asked why derivatives were still subject to the carve-out while securitisations were not. Dr Lehmann explained that it was embedded in derivative contracts that the law applicable at all points would be the law governing the contract. An attendee noted the difficulty in applying the law of the habitual residence of the assignor in case of securitisations arose from the nature of securitisations in which portfolios are traded multiple times. He added that the secondary loan market had flagged similar problems.

¹ Please see Appendix I for the slides used for this section of the meeting.

3.3. Attendees agreed to recommend to the Committee that a letter be sent to the European Parliament highlighting the possible complexities.

4. **Update on the Prospectus Regulation (Amanda Thomas)**

4.1. Ms Thomas observed that there were areas in relation to Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (“PD3”) which suffered from a lack of clarity. Market participants had hoped for a clearer framework in PD3 than previous regimes but much of the detail, which would be filled in through regulatory technical standards, was still missing. She noted that PD3 would not be in force ahead of 29 March 2019 when the U.K. was scheduled to withdraw from the E.U. but it was included in a list of legislation HM Government had termed “in-flight” and hoped to incorporate into domestic law later.

4.2. Ms Thomas then provided an overview of the components of the legislation which were giving rise to uncertainty. These included:

- a) Disclosure requirements, which although similar in substance to those in Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (“PD2”) used different language that lead to interpretative issues.
- b) Risk factors, which seemed vague and open to interpretation by involved parties. It was hoped that the European Securities and Markets Association would clarify this in upcoming guidelines.
- c) Scrutiny and approval by National Competent Authorities, which seemed likely to give rise to problems in the future.

4.3. An attendee asked about the new summary requirements and any overlap with the requirement in the regime for packaged retail investment and insurance-based products (the “**PRIIPS regime**”) to provide a Key Information Document.

5. **Securitisation Regulation: Article 5(1)(e) and the need to check compliance with Article 7 by third country issuers/originators/sponsors (Andrew Bryan)**

5.1. Mr Bryan stated that Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the “**Securitisation Regulation**”) had been in force for three months but no Regulatory Technical Standards had been published yet, giving rise to uncertainty in the

market. In particular, Mr Bryan noted the question surrounding the due diligence obligation in respect of "institutional investors" (set out in Article 5 of the Securitisation Regulation) to verify they are receiving E.U.-style disclosure (as described in Article 7 of the Securitisation Regulation) from the originator, sponsor and SSPE. Market participants had perceived uncertainty around whether this obligation extends to circumstances when the originator, sponsor and SSPE are established in a Third Country. There is a market consensus that Third Country originators, sponsors and SSPEs have no direct obligation under Article 7 to comply with E.U. disclosure requirements but it was possible that institutional investors within the meaning of the Securitisation Regulation would nonetheless be prevented from investing in circumstances where a Third Country entity fails to comply voluntarily.

- 5.2. Another attendee stated that his firm had taken the view there was no uncertainty in the interpretation and that Article 5 requirements would not apply to Mr Bryan noted that the statutory instrument published under the European Union (Withdrawal) Act 2018 to incorporate the Securitisation Regulation into U.K. law had used different wording.
- 5.3. Forum members agreed to recommend to the Committee that work be undertaken highlighting this uncertainty.

6. Any other business

- 6.1. No other business was raised.

The FMLC Radar Function: *an introduction*



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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.

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.

FMLC Minutes Policy



- The FMLC Secretariat publishes the agendas and minutes of all Scoping Forum meetings on the FMLC website.
- Minutes will (i) only attribute pre-arranged presentations, not *ad hoc* comments or observations and (ii) only record any resolutions and agreed next steps.
- Following every meeting, a member of the Secretariat will send draft minutes to you for approval and request permission to publish any background materials you may have provided as part of the Agenda.

Forward Schedule



Wednesday 12 June

9am to 10.30am

Wednesday 11 September

9am to 10.30am

Wednesday 11 December

9am to 10.30am