

Financial Markets Law Committee (“FMLC”)

ESG Scoping Forum

Supplementary Video Conference

Date: 8 April 2020

Time: 2.00pm to 3.00pm



In Attendance:

Mindy Hauman (Moderator)	White & Case LLP
Phil Bartram	Travers Smith LLP
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Lauren Butchart	JP Morgan
Sarah Brungs	Goldman Sachs International
Caroline Dawson	Clifford Chance LLP
Paul Double	City of London Corporation
Claire Doust	BNP Paribas
Belinda Ellington	Citigroup
Leland Goss	ICMA
John Graham	FIA
Selmin Hakki	Slaughter and May
Linda Hesse	Jones Day
Laura Houët	CMS Cameron McKenna Nabarro Olswang LLP
Katy Hyams	LME
Bruce Johnston	Morgan, Lewis & Bockius U.K. LLP
Lorraine Johnston	Ashurst LLP
Christiane Leuthier	FIA
Ida Levine	Impact Investing Institute
Caitlin McErlane	Baker McKenzie LLP
Christiana Norman	Bank of America
Sarah Oliver Scemla	Bank of America
Ashar Qureshi	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Neil Robson	Katten Muchin Rosenman U.K. LLP

Registered Charity Number: 1164902.

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Richard Small	Addleshaw Goddard LLP
Ferdisha Snagg	Cleary Gottlieb Steen & Hamilton LLP
Joanna Treacy	K&L Gates LLP
James Warbey	Millbank
Peter Werner	ISDA
Simon Wright	Dechert LLP
Jana Zupikova	Dechert LLP
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Minutes:

1. Introductions

1.1. Ms. Hauman opened the meeting.

2. The FMLC Radar Function: *an introduction* (Venessa Parekh)

2.1. Ms Parekh provided an overview of FMLC radar function and explained the Scoping Forums are the means by which FMLC fulfils its function. This is achieved by assessing legal risks, identifying priorities and selecting issues for further work.

3. FCA proposals outlining new climate-related disclosure requirements for premium listed issuers (Mindy Hauman)

3.1. The Chair provided a high level overview of the Consultation published by the Financial Conduct Authority (“FCA”) on the proposals to enhance climate-related disclosures by listed issuers and clarification of existing disclosure obligations (“FCA Proposal”) published in March 2020.¹ Ms Hauman explained that the FCA proposal outlines the climate related disclosure requirements for commercial companies with U.K. premium listing. She noted that the FCA proposal introduces a new rule in the existing Listing Rules under the FCA Handbook to promote the adoption of recommendations by the

¹ FCA, CP20/3: Proposals to enhance climate-related disclosures by listed issuers and clarification of existing disclosure obligations (6 March 2020), available at <https://www.fca.org.uk/publications/consultation-papers/cp20-3-proposals-enhance-climate-related-disclosures-listed-issuers-and-clarification-existing>

Financial Stability Board's ("**FSB**") Taskforce on Climate-related Financial Disclosures ("**TCFD**"). The proposed rule will require commercial companies with U.K. premium listing to include a statement in their annual financial report, setting out: (a) whether they comply with the TCFD's recommendations and to explain any non-compliance; and (b) where in the annual report such disclosures can be found.

- 3.2. Furthermore, Ms. Hauman brought members' attention to a Technical Note in the FCA's proposal that clarifies existing disclosure requirements. According to the Technical Note, issuers may already be required to make disclosures on climate change and other Environmental, Social and Governance ("**ESG**") related matters under existing E.U. legislation including in Regulation (EU) No 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC ("**Prospectus Regulation**"); Regulation (EU) NO 596/2014 on market abuse ("**Market Abuse Regulation**") and rules in the FCA Handbook, including in Listing Rules, and Disclosure Guidance and Transparency Rules. She further explained that the proposed Technical Note does not introduce new or novel expectations for issuers but clarifies existing obligation that issuers should already be meeting. The Technical Note impacts a wider scope of issuers, including: listed issuers, issuers with securities admitted to trading on regulated markets and other entities in scope of requirements under the Market Abuse Regulation and the Prospectus Regulation.
- 3.3. Members agreed that the FCA Proposal clearly lays down (for U.K. Premium listed companies) the requirement of compliance with the TCFD recommendations and disclosures making clear reference to the existing relevant provisions under FCA Handbook. They agreed that the FCA Proposal does not give rise to any legal uncertainty. A member, however, highlighted the potential for complexities to arise in the future given the speed at which E.U. rules are being developing and the U.K.'s impending withdrawal from the E.U. There is a lack of clarity on whether E.U. rules will still be applicable in the U.K. next year, once the implementation period has ended. Members suggested that, in light of uncertainty about the application of E.U. laws in the U.K. post-Brexit, it would be advisable for the FCA to provide in the Annex 2 of the FCA Proposal that these requirements may be amended over time. They concluded that, although they did not currently think there were any wider legal uncertainties in this context, it would be advisable to monitor the development of this and related proposals, especially when these rules are put into practice in the changed regulatory environment which could lead to practical/commercial difficulties and uncertainty.

4. The European Commission's inception impact assessment on climate change mitigation and adaptation taxonomy (Mindy Hauman)

4.1. Ms Hauman stated that the E.U. Commission has recently published inception impact assessment on climate change mitigation and adaptation taxonomy (“impact assessment”).² She explained that this impact assessment allows the citizens and the stakeholders to provide feedback on the intended initiative and to participate effectively in future consultation activities.

4.2. While providing the context to the impact assessment, Ms. Hauman explained that in order to meet the E.U.'s climate and energy targets for 2030, and other environmental related goals, the E.U. thought it necessary to reorient investment towards environmentally sustainable projects and activities. The lack of a clear definition of what is “environmentally sustainable” currently presents one of the biggest obstacles to scale up green investment, as outlined in the European Commission communication on Action Plan on Sustainable Finance.³ For this purpose, the European Commission has proposed a Regulation on the establishment of a framework to facilitate sustainable investment (“**Taxonomy Regulation**”) that sets out a framework to define environmentally sustainable economic activities for investment purposes.⁴ The Taxonomy regulation has been agreed by the E.U. at the political level. Subject to formal approval, the Taxonomy will be embedded into E.U. law.

4.3. Ms Hauman highlighted that the impact assessment initiative is necessary to implement the Taxonomy Regulation that has been introduced to address the lack of clarity on which economic activities can be considered environmentally sustainable for investment purposes. As outlined in the impact assessment, several market-led and Member State schemes currently exist that define criteria for environmentally sustainable investments and underlying assets differently. This leads to fragmentation across markets and

² European Commission, Inception Impact Assessment: Commission Delegated Regulation on a climate change mitigation and adaptation taxonomy (23 March 2020), available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12302-Climate-change-mitigation-and-adaptation-taxonomy>

³ European Commission, COM/2018/097 final: Communication from the commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social committee and the committee of the regions - Action Plan: Financing Sustainable Growth, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097>

⁴ European Parliament and of the Council: COM (2018) 353 final: Proposal for a Regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment - Approval of the final compromise text, available at : <https://data.consilium.europa.eu/doc/document/ST-14970-2019-ADD-1/en/pdf>

borders and allows for potential “greenwashing”.⁵ The current situation is also problematic for businesses that would like to reorient their business activities in line with environmental targets to attract the interest of green investors. The situation therefore hampers investments and business decisions that would contribute to the E.U.’s environmental objectives. The objectives of the initiative, in line with the Taxonomy Regulation, are to establish technical screening criteria for economic activities that make a substantial contribution to the E.U.’s environmental objectives on climate change mitigation and climate change adaptation while avoiding significant harm to the other environmental objectives. The initiative will need to be developed in accordance with the Taxonomy Regulation, in particular with the requirement to assess the alignment of the technical screening criteria with existing E.U. legislation. The resulting set of activities and criteria will provide clarity on what can be considered environmentally sustainable for investment purposes and thus enhance the information that businesses and investors have at their disposal.

- 4.4. Members agreed that no issues of legal uncertainty could be identified on this occasion. One member pointed that as these are the technical assessment, an expert might have a different opinion, however, there is no apparent uncertainty emanating from this consultation. Members concluded that TCFD is a practical tool for the firms to comply with the requirements and are widely acceptable.
- 4.5. One member brought attendees’ attention to a recently published European Commission Consultation on the Renewed Sustainable Finance Strategy and suggested that this forum might be interested in exploring if the consultation raises issues of legal uncertainty which warrant further discussion. Ms Parekh asked members to send their high level views/opinion on this consultation to the FMLC Secretariat. She also asked members to write to the Secretariat with suggestions as to topics for consideration for future meetings or to draw attention to any developments that might be relevant for this Forum.

⁵ Greenwashing is the process of conveying a false impression or providing misleading information about how a company's products are more environmentally sound. Greenwashing is considered an unsubstantiated claim to deceive consumers into believing that a company's products are environmentally friendly.

For example, companies involved in greenwashing behavior might make claims that their products are from recycled materials or have energy-saving benefits. Although some of the environmental claims might be partly true, companies engaged in greenwashing typically exaggerate their claims or the benefits in an attempt to mislead consumers. Definition obtained from Investopedia available at <https://www.investopedia.com/terms/g/greenwashing.asp>

5. **Any other business**
6. No further business was raised at the meeting.

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.