



Financial Markets Law Committee (“FMLC”)

Banking Scoping Forum

Date: Tuesday 29 June 2021

Time: 2.00pm to 3.00pm

Virtual meeting

Attendees:

Julia Smithers Excell (Moderator)	White & Case LLP
Chris Allen	
James Bresslaw	Simmons & Simmons LLP
Tom Callaby	Cameron McKenna Nabarro Olswang LLP
Thomas Donegan	Shearman & Sterling LLP
Paul Gough	The Bank of New York Mellon
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Jons Lehmann	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Dorothy Livingston	Herbert Smith Freehills LLP
John McGrath	Dechert LLP
Mitja Siraj	FIA
Ferdisha Snagg	Cleary Gottlieb Steen & Hamilton LLP
Jeremy Stokeld	Linklaters LLP
Brian Gray	FMLC Secretariat
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat

Guest Speaker:

Sanjev D. Warna-kula-suriya	Latham & Watkins' LLP
-----------------------------	-----------------------

Regrets:

Alexander Biles	Ashurst
-----------------	---------

Registered Charity Number: 1164902.

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

Minutes:

1. Introductions

- 1.1. Ms Smithers Excell opened the meeting.

2. The FMLC is in technological transition (Venessa Parekh)¹

- 2.1. Ms Parekh informed Forum members of some changes they may notice while the FMLC is in technological transition, including the use of a temporary domain and the new systems being trialled to track members' availability to attend Scoping Forum meetings. Finally, she asked attendees to send in short testimonials about the FMLC for use on the FMLC website.

3. Regulatory developments relating to Non-Performing Loans (Sanjev D. Warna-kula-Suriya)

- 3.1 Mr Warna-kula-suriya provided a brief background of the origin of non-performing loans ("NPLs"). He explained that large portfolios of "bad" loans were securitised at the time of the global financial crisis, resulting in capital being locked up on the organisations' balance sheet. He highlighted concerns around the capital treatment of NPL exposures and drew attention to the Consultation Paper published by the Prudential Regulation Authority ("PRA") on the implementation of prudential standards agreed by the Basel Committee on Banking Supervision ("BCBS") for NPL securitisations.² It sets out how the PRA proposes to define non-performing exposure ("NPE") securitisations and proposes changes to the associated capital treatment. He added that the proposal in the Consultation Paper would result in the addition of a part on new NPE Securitisations in the PRA Rulebook. He explained that the PRA proposes to define an NPE securitisation as a securitisation backed by a pool of NPEs that make up, at minimum, 90% of the entire pool's nominal value at origination, and at any later stage when assets are added or removed from the underlying pool. Setting the minimum below 100% allows firms to securitise exposures that they expect to become non-performing after execution of the securitisation or become re-performing in the process of preparing the transaction. The Basel standards define the non-refundable purchase price discount ("NRPPD") as 'the difference between the outstanding balance of the exposures in the underlying pool and the price at which these exposures are sold by the

¹ Please see Appendix I below.

² PRA, CP10/21: *Implementation of Basel standards: Non-performing loan securitisations* (June 2021); available at: <https://www.bankofengland.co.uk/prudential-regulation/publication/2021/june/implementation-of-basel-standards-non-performing-loan-securitisations>

originator to the securitisation entity, when neither originator nor the original lender are reimbursed for this difference. The PRA proposes to define the NRPPD in line with the Basel definition and to define a qualifying NPE securitisation as a traditional NPE securitisation, where the NRPPD is at least 50% of the outstanding amount of the underlying exposure at the time they were transferred to the securitisation special purpose entity.

3.2 Members welcomed these developments from a securitisation perspective. A member asked if FMLC would be responding to the Consultation. Mr Warna-kula-suriya noted that the Consultation is aimed largely at market participants and does not raise issues of legal uncertainty at this stage. Members discussed HM Treasury's Call for Evidence on Review of the Securitisation Regulation, which, they agreed gave rise to points of legal uncertainty for the FMLC to examine and address some stage.³

4. Basel Committee on Banking Supervision: Consultative Document on the Prudential treatment of banks' cryptoasset exposures (Julia Smithers Excell)

4.1. Ms Smithers Excell provided an overview of the BCBS Consultative Document on the prudential treatment of banks' cryptoasset exposures.⁴ She remarked that the proposals set out a general approach for determining minimum risk-based capital requirements, under which cryptoassets are screened and classified into two groups depending on whether they fulfil certain classification conditions—Group 1 cryptoassets and Group 2 cryptoassets. She described the classification conditions and remarked that the paper proposes that cryptoassets with the same risk factors (and equivalent economic functions) as traditional assets should be subject to the same capital, liquidity and other requirements as the traditional asset. A discussion around the questions raised in the Consultative Document on the classification requirements followed. Members noted that all classification conditions should be clearly defined, with clarity of transferability and settlement finality requirements a key criterion. Ms Smithers Excell further explained that, at this stage, the BCBS is not proposing to prescribe any new regulatory treatment for Group 1 or Group 2 cryptoassets under the leverage ratio, large exposures framework, or liquidity ratio requirements. She drew attention to the proposals in the paper for additions to the supervisory review process and potential adjustments by supervisors to Pillar 1 requirements.

³ HM Treasury, *Review of the Securitisation Regulation: Call for evidence* (June 2021); https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1000693/Securitisation_Regulation_Call_for_Evidence_June_2021.pdf

⁴ BCBS, *Consultative Document: Prudential treatment of cryptoasset exposures* (June 2021); available at: <https://www.bis.org/bcbs/publ/d519.pdf>

4.2. Members discussed the responsibilities of banks and supervisors listed in the paper. Ms Smithers Excell noted that, while the proposals appear to render it difficult for banks to secure the more favourable capital treatment for cryptoasset arrangements proposed in the paper, there are no issues of uncertainty for the FMLC to address. Another member suggested that the BCBS' proposal could have repercussions on the regulatory treatment of cryptoassets which the FMLC might wish to raise in its response to the Law Commission's Digital Assets Call for Evidence.⁵ A member added that deposit guarantee rules will need to be considered together with cryptoasset rules.

5 Any other business

5.1 Ms Smithers Excell briefly touched upon other regulatory developments in the U.K. and suggested that these are discussed at the next meeting.⁶

⁵ Law Commission, *Digital Assets Call for Evidence (30 April 2021)*, available at: <https://www.lawcom.gov.uk/project/digital-assets/#digital-assets-call-for-evidence>

⁶ [The PRA Consultation Paper on financial holding companies](#) and [HM Treasury's Consultation response on Implementation of the Investment Firms Prudential Regime and Basel 3 Standards](#)