

FINANCIAL MARKETS LAW COMMITTEE (“FMLC”)

ESG SCOPING FORUM

TERMS OF REFERENCE

Background and Remit

Environmental, Social and Governance (“ESG”) considerations are gaining importance in the financial markets. Financial firms and companies are being asked by regulators to measure and report on ESG data and the impact of their activities on sustainability factors.

Both the E.U. and the U.K. have announced their commitment to “green finance”. In the E.U., the European Commission (“Commission”) adopted a package of measures implementing several key actions, including Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon impact benchmarks, the Proposal for a regulation on disclosures relating to sustainable investments and sustainability risks, and the Proposal for a regulation on the establishment of a framework to facilitate sustainable investment. Since then, the Commission has announced the European Green Deal, and the E.U. has finalised the first stage of its regulation on a classification system (taxonomy) of sustainable economic activities—the so-called “green taxonomy”. In the U.K., the Green Finance Strategy was launched on 2 July 2019.

Financial firms, insurance companies and other corporations will need to evaluate and stress test physical, transition and liability risks in connection with climate change, alongside other sustainability factors. Climate litigation is on the rise—with new standards of care, increasing regulation, administrative actions, and the potential for lawsuits based on “green” or ESG washing, if marketing of products or company disclosures are inaccurate or misleading.

ESG considerations, however, extend well beyond “green finance”; they encompass many issues including human rights, employee relations, housing, financial inclusion, supply chains and modern slavery, consumer privacy, fiduciary duties and the need for businesses to act responsibly.

Moreover, ESG has moved to the forefront of decision-making for asset managers and institutional investors. More and more investors appear to be interested in hearing how their investments conform with the United Nations Sustainable Development Goals, which include promoting people’s wellbeing, decent work for all, achieving gender equality and building effective, accountable and inclusive institutions at all levels.

In light of these developments, the Financial Markets Law Committee (“FMLC”) have established the Environment, Social, and Governance Scoping Forum to provide a space for discussion of developments in this area.

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The Forum may examine issues arising under the current regulatory framework as well as future proposals. In this capacity, it may consider any or all of English, European, international and foreign law.

The Forum supports the FMLC's radar function by liaising with legal and financial experts from both the public and private sectors in order to ascertain areas of legal uncertainty.

The Forum will make recommendations as to the FMLC's work on ESG issues. The final decision on these matters rests with the Committee.

Conduct of Business

Members of the Forum should meet at least every quarter but may, if it is deemed necessary, meet more regularly. A Forward Schedule, containing meeting dates for the year, will be circulated at the beginning of every year.

Members of the Forum act in a purely personal capacity. The names of the institutions that they ordinarily represent may be mentioned for information purposes only.

For reasons of diversity of perspective, inclusion and practicality, any one organisation should not have multiple colleagues (i.e. more than a maximum of two) with membership of the Forum.

Non-members may be invited to attend meetings as guest speakers. For reasons of continuity and accountability, the participation of non-members *qua ad hoc* observers are usually permitted. This rule does not apply to individuals from regulatory authorities and international standard setting bodies, who may be invited to attend Forum meetings to ensure transparency.

Issues for the FMLC/Output

The Forum will not itself have any *vires* to initiate projects or pass resolutions affecting the FMLC. Where a substantive issue of legal uncertainty is raised by members of the Scoping Forum, this may be proposed by the Secretariat to the FMLC as a topic which may require further action. The Committee may then establish working groups and undertake further work on the issue.

Moderators

The Moderators of the Scoping Forum will be chosen on a rotational basis.

Secretariat

The Secretariat will support the Moderator and the Forum during meetings, as well as manage Forum-related communications outside meetings. The Secretariat will help draft and circulate meeting agenda and related documents in advance of Forum meetings. Members are encouraged to suggest agenda items through the Secretariat.

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