

1 June 2021

Keith Skeoch
Ring-fencing and Proprietary Trading Independent Review

Via email: feedback@rfptreview.org.uk



Dear Mr Skeoch,

Ring-fencing and Proprietary Trading Independent Review: Call for Evidence

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.

The FMLC fulfils this role by liaising with legal and financial experts from both the public and private sectors to ascertain areas of legal uncertainty troubling stakeholders in the financial markets. Once identified, the FMLC will publish an objective paper outlining the relevant legal uncertainty and making suggestions on how it might be eliminated or ameliorated. The FMLC will raise the profile of such papers with representatives of the authorities (HM Government, European and/or international authorities) best positioned to assess the recommended suggestions and clarify the laws or regulations in question.¹

FMLC working group on legal uncertainties in the Ring-fenced Bank legislation

The FMLC was heavily involved in commenting on issues of legal uncertainty at the time of the passage of the Financial Services (Banking Reform) Act 2013 (the "FSBRA"), which established the ring-fenced banking regime.² Not all the issues raised at the time were, however, addressed in the FSBRA, and experience of the functioning of the regime demonstrates that many of those issues remain of concern and that others have been identified. The FMLC has therefore established a Working Group, chaired by Dorothy Livingston, a consultant at Herbert Smith Freehills and Chair of the City of London Law Society Financial Law Committee, to prepare a paper dealing with those legal uncertainties and making suggestions as to how they might be eliminated or ameliorated.

The Working Group noted with interest the appointment by HM Treasury of an independent panel to review the operation of the legislation relating to ring-fencing (the "RFPT Review"). To a large extent, the FMLC Working Group's work is parallel to the work of the RFPT Review, which is largely concerned with policy issues or aspects of the regime that do not involve any question of legal uncertainty. The FMLC review may impinge to some extent on Questions 11, 13 and 17 of the RFPT Review's Call for Evidence, which are concerned with the appropriateness of aspects of the regime and whether there are any unintended consequences.

The existence of legal uncertainties does not seem helpful to the smooth operation of the regime and can damage its effectiveness, as well as cause unnecessary costs for ring-fenced banks and their customers and counterparties. The following examples are illustrative of the many issues that the FMLC Working Group is considering in detail:

brian.gray@fmlc.org

8 Lothbury
London
EC2R 7HH
www.fmlc.org

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.

- Uncertainties about how a bank can comply with the law in becoming a ring-fenced bank and on the correct process to be used for reorganisations (e.g. assets moving between ring-fenced and non-ring-fenced banks as the rules develop);
- Absence of a regulatory process for clarifying in a legally binding manner how banks should behave where the key statutory instruments are uncertain or fail to deal with a situation: thus, these uncertainties may inhibit lawful action or, where action is taken, even with best advice, raise a risk of legal challenge in the future, when a binding regulatory ruling could provide certainty;
- Uncertainty about whether a ring-fenced bank can lawfully participate in a reorganisation of, or otherwise deal with, a minority stake that it holds. This may arise as a difficulty, for example, if a payment or clearing system has members, including the ring-fenced bank, who are obliged to hold shares which need to be transferred. Another problem area is for pre-existing stakes, for example in FinTech joint ventures or related to M&A activity, held by banks which newly become subject to the ring-fencing rules. If the company decides to reorganise, or if the stake is in a quoted company and the rules on takeovers require the sale of the stake to an offeror, the bank would face a conflict between the takeover rules and the ring-fencing rules. Although ring-fenced banks do not often have assets of this type, such assets may have been carried over from before they became ring-fenced or the bank may need to hold them in order to provide services to customers, or attain or retain memberships of, or access to, certain market infrastructure.

Timing

It is unlikely that the FMLC Working Group, which has only recently been established, will complete its work in time to respond to the Call for Evidence. It is hoped, however, that the work will be completed by end-July and can be shared in time for it to be taken into account. The paper will also be submitted to HM Treasury, in the hope that suggestions to ameliorate or remove legal uncertainties affecting the ring-fenced bank regime can be addressed.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,



Brian Gray
FMLC Chief Executive³

¹ The FMLC is a registered charity, and as such, does not address matters of policy. The FMLC is independent and its members serve in their personal capacities. The views of the FMLC do not necessarily reflect the views or policies of the institutions from which its membership is drawn, nor does the sponsorship of the FMLC indicate that its views reflect those of its Patrons.

² See: FMLC: *Banking Reform (Ring-Fencing)* (February 2013); available at: <http://fmlc.org/wp-content/uploads/2018/03/Issue-175-Banking-Reform-Ring-Fencing-Report.pdf>;

Addendum (October 2013); available at: <http://fmlc.org/wp-content/uploads/2018/03/Issue-175-Addendum-to-Banking-Reform-Report.pdf>

³ The FMLC is grateful to Dorothy Livingston (Herbert Smith Freehills LLP) for her help in drafting this letter.