Complaints Commissioner

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Dear Complainant

Complaint against the Financial Conduct Authority
Reference Number: FCA00278

Thank you for your email of 6 June 2017. I have now reviewed the information sent to me by you, by Mark Taber (the co-ordinator of the generic Lloyds ECN group complaint) and by the Financial Conduct Authority (FCA), and am able to write to you.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

What we have done since receiving your complaint

I have reviewed all the papers you and the regulator have sent to my office. Both you and the FCA, as well as Mr Taber, have had the opportunity to comment in response to my preliminary decision. I have carefully considered the points made and, where appropriate, make further reference to them below.

Your complaint

In February 2016 you complained to the FCA about various regulatory matters related to Lloyds Banking Group (LBG) seeking to redeem enhanced credit notes (ECNs) you had acquired as part of an exchange offer memorandum dated 3 November 2009.

On 10 March 2016 the FCA wrote to you setting out its understanding of your complaint and confirmed that it was accepted for investigation under the Complaints Scheme (the Scheme). The FCA identified seven elements to your complaint as follows:

Element One
The FCA failed to supervise by failing properly to "see", "regulate" or "enforce" the Prospectus Rules and the Disclosure and Transparency Rules and to carry out an urgent investigation into LBG.

Element Two
The Financial Services Authority (which later became the FCA) made a mistake and exercised a lack of care in its approval of the ECN prospectus. Specifically:

a) The FSA failed to ensure that the prospectus was accurate and presented in a form which was easily analysable and comprehensible;
b) The FSA approved a prospectus which contained a material mistake; and

c) The FSA approved a prospectus which contained material omissions which the FSA should have been aware of,

the result being that the prospectus failed to comply with the Prospectus Directive and the Prospectus Rules.

Element Three
The FCA made a mistake and acted with a lack of care by failing to ensure that consumers who are potentially entitled to compensation will receive it by taking steps ahead of any redemption.

Element Four
The FCA made a mistake and acted with a lack of care by failing to ensure that consumers are able to sell their claim in the market in advance of the conclusion of the court proceedings.

Element Five
The FCA made a mistake and acted with a lack of care by failing to ensure that any compensation will be assessed independently and awarded expeditiously and without the need for further court proceedings.

Element Six
The FCA is acted with bias by failing to intervene on behalf of consumers to prevent the redemption. By not intervening you allege that the FCA has created an unfair situation where LBG need only succeed once in order to be able to redeem the ECNs but consumers need to succeed multiple times.

Element Seven
The FCA has failed to protect consumers and has made a mistake and acted with a lack of care by allowing LBG to redeem the ECNs on 9 February 2016 whilst there are ongoing court proceedings.

On 29 March 2016, in response to a query from you, the FCA confirmed that all of the points you had made in your correspondence would be considered and that it had not excluded any part of your complaint from the scope of its investigation.

On 17 March 2017, the FCA Complaints Team informed you that it had not upheld your complaint. You are dissatisfied with this response and have asked me to investigate. You have told me that the following points explain why the FCA failed in its obligations to you:

1. The FSA (or their evolved siblings the FCA/PRA) are/were the regulators of the ECN transaction. By December 2009, when the ECN prospectus was published, they were aware of the intended changes that would have affected the ECN Capital Disqualification Event (CDE) trigger based upon LBG's 2009 interim accounts. No amount of ignorance by the FCA of its role to regulate can avoid its failure to properly assess these facts either then or in the ensuing years;

2. The CDE clause itself fails any reasonable test of "not to endanger investor protection in terms of comprehensibility and accessibility of the information" (FSA Prospectus Rule PR 2.4.6). The subsequent ECN court cases leading up to and including the

Supreme Court hearing adequately demonstrate this failure. Verbal opaqueness and dexterity by LBG does not absolve the FCA of "testing" whether the clause meets even the minimum requirements of this rule, given the clarity of the impact changes identified in 1) would have. Whether in 2009 or any year thereafter, given the ever-increasing importance of the CDE clause, it does not seem the FCA ever applied this Rule and "tested" the LBG issuances.

a. You had hoped in submitting your complaints that this issue of rule compliance would have been thoroughly examined by the FCA but it seems not;
b. If the FCA accepted that it did indeed consider it complied with its duties under the Rule (which it must do), then Prospectus Rule PR 2.4.6 (or subsequent evolutions) do not provide any regulatory protection at all to investors - the Supreme Court case has now created powerful case law on the very issue of contract interpretation trumping regulatory requirements;
c. Furthermore, the various ECN court hearings demonstrated that the CDE clause must itself fail PR 2.4.6, given it could not be understood by experts, so what chance investors – the FCA failed to properly regulate;

3. The Supreme Court ruling on the CDE clause interpretations is not a defence the FCA can rely upon, principally for the points outlined in 2) above. However, there is a further point of relevance. There are at least 5 specific events since 2009 up to the Supreme Court case that should have triggered flashing warnings to the FCA regarding its regulatory oversight of the ECNs. There are 2 choices here:

   a. Internally the FCA did properly evaluate and test the ECN documentation against the required regulatory tests;
   b. It did not properly undertake these tests;

   You can find nothing of real substance in the responses to your complaints to indicate that the FCA properly undertook its critical responsibilities in this area. Citing generalities, processes and procedures and self-serving phraseology to indicate some level of compliance over a 5-year period is insufficient given that by mid-2010 the central issue of the uncertain meaning and interpretation of the CDE clause was known to all, yet the FCA seemingly did nothing to resolve this despite having approved the creation of this uncertainty;

4. Taken at face value the FCA would have us believe that it regulated properly, given its mandate, objectives and rules over a 5-year period in allowing uncertain but crucially different ECN CDE interpretations to co-exist. It then took a Supreme Court case to contractually interpret a meaning for the CDE, in a manner that would have rendered the ECN's as uninvestable at the time of their issuance had this been known (an easily foreseeable potential outcome the FCA could see – and yet it did nothing).

   Whilst you cannot object to the Supreme Court interpretation, the FCA had multiple tools at its disposal which would have prevented this failure occurring – as the regulator, it chose to do nothing and thus failed to protect your (and 100,000 others') interests. You ask,

a. Are you or any potential investor to believe or accept the regulatory capability demonstrated by the FCA in this transaction is viewed as sufficient to discharge their responsibilities, which leads to;
b. You can see nothing in the complaint investigation which provides any confidence that the FCA would operate differently such that a similar event could not occur in the future. That is an impossible outcome given their mandate in this matter and thus the complaint investigation is and must be flawed.

My position

In investigating your complaint, I have carefully considered the FCA's complaint file and supporting documents, as well as your submissions and those made by Mr Taber on the group complaint. I have also considered other relevant material, including the contents of the Exchange Offer Memorandum (EOM) and the Supreme Court Judgment dated 16 June 2016. My approach has been to consider the FCA's rationale for its decision-making and whether that and the FCA's complaint response can be considered reasonable in all the circumstances.

Elements One and Two – The Prospectus issues
The FCA's complaint response grouped these two elements together and said that these complaints had not been upheld because it did not think the FCA had failed to regulate or enforce the Prospectus rules.

Regarding whether the Prospectus was easily analysable and comprehensible, the FCA Complaints Team said:

> *Article 5.1 of the Prospectus Directive requires all prospectuses, including a non-equity retail prospectus, to be 'easily analysable and comprehensible'.*
>
> *There isn't any guidance available from 2009 about what an 'easily analysable and comprehensible' prospectus should look like – but the FCA issued guidance in 2014, which can be found here: https://www.fca.org.uk/static/documents/ukla/knowledge-base/tn-632-1-final.pdf.*
>
> *As an example, you allege the Prospectus is not easily analysable and comprehensible because the first attempt at explaining a CDE is on page 99 of the Prospectus with the definition on page 210. You also note the key information on LBG's claimed intention for the CDE clause would not be found until getting to page 1033 if all the documents incorporated by reference are read in order. The examples given are mostly related to where key information is placed in the Prospectuses, rather than the actual language used.*
>
> *The UK Listing Authority (UKLA) is part of the FCA. It oversees the listing of shares and other securities on the UK Official List and, as the competent authority in the UK under the Prospectus Directive, reviews and approves prospectuses published by issuers and offerors. From the discussions I have had with the UKLA, the approach to approving a Prospectus as 'easily analysable and comprehensible' would have been the same in 2009 as is described in the guidance note from 2014.*

In my opinion, relevant key terms are clearly explained and accessible in the documents. For example, in the EOM the CDE is defined first at page 99, but direction on where to find the definition is given as early as page 22 (in the Risk Factors section). In relation to the stress test threshold, this is explained in the LBG rights issue prospectus, which is published on the same day as the EOM and is incorporated by reference into the EOM. The information about the stress test threshold was, as it would normally be, in the capital and liquidity section of the LBG rights issue prospectus.

The Prospectus Directive and the Prospectus Rules do not set a numerical limit on the number of pages that can be incorporated by reference and so it would seem arbitrary and inconsistent with the approach of other competent authorities for the UKLA to seek to do so. I also note that the Prospectus clearly states it is to be read in conjunction with the documents incorporated by reference, which is permitted by the Prospectus rules.

I appreciate the point about the number of pages involved in finding definitions of certain key terms, such as the CDE and the stress test threshold, but this, in itself, is not a breach of the Prospectus Directive. The 'easily analysable and comprehensible' requirements cannot always be readily applied to legal language without potentially changing the meaning of what is being said. Overall, I am satisfied that the UKLA's judgement that the Prospectus was easily analysable and comprehensible was a reasonable one in the circumstances.

In response to the FCA's decision on this element of your complaint, Mr Taber has made the following points:

- There was guidance, in the form of the EU Prospectus Directive (required to be incorporated into national law of Member States by 2005) and the Prospectus Rules.
- The FSA was aware that the Prospectus was inviting retail investors to exchange their existing instruments and required a high acceptance level to meet LBG's needs.
- Prospectus Rule PR 2.4.6 in force at the time states: *When incorporating information by reference, issuers, offerors or persons asking for admission to trading on a regulated market shall endeavour not to endanger investor protection in terms of comprehensibility and accessibility of the information.* Key information relevant to understanding the terms of the ECNs which, under the Prospectus Rules, should have been included in the body of the prospectus was only included in the information incorporated by reference. This information - the FSA's indication that it expected banks to maintain a CT1 capital ratio of at least 4% in the stress scenario - was key to understanding the CDE clause as LBG claim it was intended. This points to a serious mistake by the FCA.

I have looked at the EOM in the light of these points. The EOM was issued on 3 November 2009 with an expiry date of 20 November. The General Notice on page 4 makes it clear that "each prospective investor should consult their own legal, financial, accounting or tax adviser for advice." A summary of Key Features on page 9 includes a CDE as an event that would render the ECNs redeemable before the Maturity Date. A summary of the Risk Factors is set out on pages 11 and 12 and this is followed by Part II, which sets out the Risk Factors in detail (pages 13 to 25). Paragraph 5.10 (page 22) sets out the Redemption Risk, including the occurrence of a CDE as set out more fully in Part A of Appendix 6. This lists the Terms and

Conditions of the ECNs: 8(e) deals with Early Redemption for Regulatory Purposes and the Definitions are listed in 19. The Terms and Conditions set out here are qualified by reference to Schedule 4 of the Trust Deed, which it is clearly stated will prevail in the event of any dispute. Part VII of the EOM gives an overview of the ECNs (pages 96 to 103) and pages 98 to 99 deal with Early Redemption for Regulatory Purposes. (For ease of reference, I have attached as Annex 1 to this decision some relevant extracts from the EOM.)

I appreciate that the meaning of these terms has been subject to scrutiny by the courts and that different interpretations have resulted, including Lord Neuberger's comments on whether there was in fact an error in the Trust Deed. I acknowledge Mr Taber's point, made in response to my preliminary decision, that LBG's written and oral submissions to the courts stated that there was a mistake in the drafting of the CDE clause of the ECN terms. However, I do not consider that these subsequent events mean that the FSA failed in its responsibilities in relation to the issuing of the prospectuses. I am satisfied that early redemption for regulatory purposes based on a CDE is clearly highlighted as a risk factor.

Overall, I am also satisfied that the EOM adequately described the instruments being offered, set out the complexity and risks attached, and included warnings to obtain professional advice. Given this, I do not consider that there is any basis to say categorically that the FSA or the UKLA made a mistake or acted with lack of care when approving the EOM. I consider the FCA's complaints response to you on this element of your complaint to be reasonable and therefore I do not uphold this aspect of your complaint.

Regarding the allegation of mistake, the FCA Complaints Team said:

> *This question of a mistake arises from the Court of Appeal judgment where it refers to an 'obvious mistake' in the Trust Deed by which the ECNs were constituted in relation to the construction of the CDE clause. The error referred to is that the definition of a CDE fails to make adequate provision in the clause for future changes to the capital rules.*
>
> The role of the UKLA
>
> *The role of the UKLA in approving a Prospectus is to check that the documents comply with the Listing and Prospectus Rules and that the required disclosures have been made.*
>
> A mistake in the Trust Deed
>
> *The UKLA has reviewed this point internally and I have had access to its comments. The FCA's view is that the clause is referred to as a mistake in the context of an assessment of the Trust Deed from the perspective of contract law. On that point, I think it is also worth noting how the majority view of the Supreme Court was more open to interpretation on the question of a mistake in the drafting of the relevant CDE clause.*
>
> *In the leading judgment, Lord Neuberger, when discussing whether the drafting does involve a departure from the literal meaning of the clause, he says at paragraph 38 of the Supreme Court Judgment that:*

"It may involve a departure from the literal meaning, but, if it does, it is on the basis of a rather pedantic approach to interpretation."

This, in my view, does not mean the FSA made a material mistake in approving the Prospectus. The Prospectus was required to be reviewed in line with the Listing and Prospectus Rules and to check that the required disclosures had been made. From what I can see, the Prospectus accurately summarises what is in the Trust Deed and the mistake in the Trust Deed referred to by the Court of Appeal does not represent a breach of the Listing and Prospectus Rules in force at the time.

Also, in considering the role of the UKLA in approving a Prospectus and the differing viewpoints on the drafting mistake at both Court of Appeal and Supreme Court level, I do not think it is reasonable to have expected the UKLA, or the FSA to have picked up on it at the time.

In response to this element of your complaint, Mr Taber has made the following points:

- The reference to the Trust Deed is irrelevant because the Prospectus Directive requires the prospectus to contain all necessary information in an easily analysable and comprehensible form
- The FCA's arguments that the UKLA does not sign off or verify accuracy does not stand up to scrutiny because the FSA was heavily involved in the design and structure of the instruments and exchange offer
- If the Supreme Court could not agree on the interpretation of the documentation, how could it have been 'easily analysable and comprehensible' to 123,000 retail investors?

This aspect of your complaint was made in February 2016 after the decision of the Court of Appeal. As noted above, when the matter went to the Supreme Court in June 2016, Lord Neuberger questioned whether there was indeed a drafting 'mistake'. Even if there was, the Court concluded that it was what LBG had intended. There was of course a dissenting judgment on this issue. However, I think the main point to emphasise here is that the Supreme Court decision upheld LBG's interpretation of the circumstances under which a CDE could occur and said that it would be too pedantic to interpret this narrowly. Although this is undoubtedly hugely disappointing to investors, in my view it is not ultimately either a 'prospectus' issue or an issue for the FCA. A problem with later interpretation of the contractual terms in the Trust Deed does not mean that the FSA did anything wrong or that the prospectuses failed the tests under the Prospective Directive. As noted above, that the Trust Deed would prevail in the event of any dispute was made clear in the EOM.

I have not seen any evidence to support the contention that the UKLA or FSA approved a prospectus that contained a material mistake. Furthermore, the principal responsibility for the documents lay with the issuers: it is not the FCA's role to 'copper bottom' every document produced. These were inherently complicated products with clear warnings as to the risks. The need to obtain professional advice was clearly indicated on all the relevant investor documents. I consider the FCA's complaint response to you on this element of your complaint to be reasonable and therefore I do not uphold this aspect of your complaint.

Regarding the question of a material omission, the FCA Complaints Team said:

LBG said in the Prospectus that the CDE provision could be triggered 'as a result of any changes to the Regulatory Capital Requirements or any change in the interpretation or application thereof by the FSA'. This seems to indicate that LBG knew some sort of change was possible. It also doesn't seem unreasonable for the clause to be drafted with the future in mind – especially as ECNs were designed in part to assist LBG in passing the stress tests that banks were subjected to by the relevant regulators. It follows that if the regime changed then a situation may arise where ECNs were no longer serving the purpose of assisting LBG in passing a stress test.

I note the FSA published Consultation Paper 09/29 – "Strengthening Capital Standards" on 3 December 2009 and the Basel Committee for Banking Standards issued a Consultation document on 17 December 2009 titled "Strengthening the Resilience of the Banking Sector" – which are both around the time the ECN prospectuses were issued.

It is clear from this that changes were in the air but having reviewed internal documents analysing this point, the documents referenced above did not seem to contain the level of detail that would have made the trigger of a CDE in the medium term immediately obvious.

It has been argued that the FSA could have ensured that a supplementary prospectus was issued immediately after the Basel Committee met on 8 and 9 December 2009. The obligation on an issuer to file a supplementary prospectus occurs when a 'material mistake' is discovered [or a 'significant new factor' arises]. This would be after the publication of a prospectus but before the closure of any public offer or admissions to trading made pursuant to a prospectus.

The supplementary prospectus would correct the material mistake. In the case of the LBG EOM of 3 Nov 2009, the period during which the prospectus would need to be updated by a supplementary prospectus ran from 3 Nov 2009 to 1 Dec 2009. In this case, the changes to the rules that rendered the CDE clause unclear occurred years later.

There has been significant work involving the Supervision, Markets and UKLA departments at the FCA to establish if there is evidence of whether LBG or the FSA knew of the effect of the Basel Committee's proposed changes to the bank's capital regime ahead of their publication.

I appreciate the point that there were members of FSA staff on the Basel Committee at the time and clearly, this suggests that there were individuals within the FSA who were aware of the direction of the Basle Committee's policy on regulatory capital. However, I do not think it necessarily follows the FSA knew of the effect of the changes to the extent that it should have required LBG to make an amendment to the Prospectus.

This is because, from the analysis contained in the internal documents I have seen, none of the published material from Basel in 2009 and 2010 has enough detail to suggest that the effect of the changes could have been predicted. Also, I am satisfied the FSA was unaware – as it was not agreed until 2013 – that the PRA would pursue an early adoption of the Basel Standards, which subsequently triggered the CDE.

In response to this element of your complaint, Mr Taber has made the following points:

- The FCA's complaint response ignores the Supplementary Prospectus dated March 2010.
- The Basel Standards published on 8 December 2009 had clear detail of the precise changes which could lead to a CDE being triggered but this information was omitted from the prospectus. The changed calculation of core capital came from these standards and at the time the ECNs were offered, the FSA was aware that those standards would be implemented by the end of 2012.

The risk of early redemption for regulatory purposes, including following a CDE "*occurring as a result of **any*** [my emphasis] *changes to the Regulatory Capital Requirements or any change in the interpretation or application thereof by the FSA*", was one of the risk factors identified in the EOM. What Mr Taber appears to be saying is that if there was knowledge within the FSA about the impact of changes arising from the Basel Standards while the prospectus was live, this significantly increased the risk and should have been drawn to the attention of prospective investors. The Basel Committee on Banking Supervision's Consultative Document *Strengthening the resilience of the banking sector* was dated December 2009 and issued for comment by 16 April 2010, shortly after the prospectus was released. It was a consultation document and I accept the FCA's complaint response that the effect of the changes could not have been predicted in 2009/10, particularly as it was not decided until 2013 that the PRA would pursue an early adoption of the Basel Standards. Although it might have been helpful for the FSA to have referred to the existence of emerging new standards, I am not persuaded that the fact that it did not do so represents a significant regulatory failing. Overall, although I agree with Mr Taber that the FCA's complaint response did not specifically refer to the Supplementary Prospectus of March 2010, I am satisfied that it was reasonable for the FCA complaint response to say that none of the actual changes to the regulatory regime made from 2013 onwards were clear and crystallised when this or the EOM was issued. For these reasons, I consider the FCA's complaint response to be reasonable and I do not uphold this aspect of your complaint.

Elements Three to Seven
The FCA's complaint response said that:

- Element Three was not upheld as the FCA Complaints Team was satisfied that the issue of compensation and the importance of being able to identify holders of ECNs had been considered by the FCA and was being closely monitored. Although this sort of work is not announced publicly, as it is part of the FCA's day-to-day supervisory role, the FCA had contacted all the relevant parties (including brokers) in relation to compensation. LBG had confirmed on 29 January 2016 that in the event of the Supreme Court deciding that the CDE had not occurred, it would "*compensate fairly the holders of the ECNs whose securities are redeemed*". The FCA was satisfied that, in the event of the Trustee winning on appeal, it would have been able to ensure all holders of ECNs could be identified and would have been able to consider stepping in if it thought LBG were not compensating ECN holders fairly, or had not identified all relevant ECN holders.
- Element Four was not upheld as the FCA Complaints Team was satisfied that the FCA's decision not to intervene to prevent LBG redeeming the notes before legal action had finished was not unreasonable in the circumstances. Although the FCA Complaints Team "*appreciated that some investors may have actually bought ECNs on the assumption that they were trading at close to par (based on LBG's announced*

intention to redeem) and the instruments would have a much higher value if LBG lost at the Supreme Court and had to pay compensation, any future value was always dependent on the outcome of the Supreme Court hearing". The matter was discussed at a senior level between the FCA and LBG before the notes were called and the Complaints Team was satisfied that the FCA had fully considered the implications of compensation had the courts ruled in favour of the Trustee. "*After the notes were called, but before the Supreme Court hearing, the FCA had started work to ensure its approach was settled before the Supreme Court ruling so it could take prompt action with LBG if necessary. The Court of Appeal had ruled that LBG were entitled to call the notes at par so this may have created a situation where LBG were converting future interest payments into potential compensation claims. However, as this decision was due to be appealed to the Supreme Court, I do not think it was unreasonable for the FCA to decide to not intervene, especially as the value of any claim would be speculative at that point*".

- Element Five was not upheld as the FCA Complaints Team was satisfied that the FCA was fully aware the Supreme Court was only ever going to rule on whether LBG had the right to redeem the notes and not on what any compensation could be. All ECN holders would have been entitled to receive fair compensation from LBG in the event of the Supreme Court ruling in favour of the Trustee. The Complaints Team did not agree that the FCA had failed to ensure compensation would be independently determined as the matter had not reached the stage where that was necessary.
- Element Six was not upheld as the FCA Complaints Team was satisfied that the FCA has fairly considered whether to intervene in this matter and in doing so, had not acted with bias. A relevant consideration was that LBG was legally able to call the notes following the Court of Appeal ruling. Had LBG lost the case at the Supreme Court, the Trustee would have had a claim for breach of contract, which would leave the issue of calculating the amount of compensation. The FCA had been in discussions with LBG and the Trustee on the compensation point and the Complaints Team considered it was reasonable for the FCA to decide it should not intervene while the legal process was ongoing.
- Element Seven was not upheld because, although the FCA could have decided to intervene with LBG's decision to redeem the ECNs, the FCA Complaints Team was satisfied that it had carefully considered a variety of options in line with its objectives before deciding not to do so. The Team did not believe the actions of the FCA at any point were the ultimate cause of you suffering loss.

There is a lengthy regulatory background to the decision by LBG to redeem the ECNs, some of which I set out in a decision I published in December 2015:
http://frccommissioner.org.uk/wp-content/uploads/FCA00053-FD-publish-25-11-15.pdf

Your complaint of course relates to the subsequent period, after LBG had been successful in the Court of Appeal and pending the appeal to the Supreme Court. The substantive, practical consequences arising from these issues have been overtaken by the Supreme Court decision of June 2016 in LBG's favour.

In my earlier decision, I concluded that the FCA's previous decision not to intervene "cannot be said to have been unreasonable, the decision having been reached after careful analysis of the factors involved in a way which is consistent with the FCA's regulatory approach".

The FCA's complaint response to you said that similar considerations applied in early 2016 and that the FCA considered a variety of options before deciding not to intervene. However, the Complaints Team also told you that it could not "*share exactly what options were considered due to the restrictions placed on sharing confidential information by s348 of the Financial Services and Markets Act (FSMA). This relates mainly to information the FCA receives but there are other relevant policy considerations as well*".

Having considered the information supplied by the FCA, including internal briefings, I am satisfied that the situation was fluid and that the FCA kept its options and objectives under review, in accordance with its regulatory remit. Relevant criteria were considered, including the need to balance fairness between institutional and retail investors. After LBG was successful in the Court of Appeal it reapplied to the PRA for permission to redeem the ECNs, which had lapsed. The FCA was in contact with all relevant parties during December 2015 and January 2016 and eventually decided that the FCA should not object to the proposed redemption, but it is important to note that this decision was based on assurances from LBG to protect investors by agreeing to indemnify the Trustee and pay compensation if LBG lost in the Supreme Court.

In my preliminary decision, I also said that "It is important to remember also that LBG had already made a 'buy back' offer to retail investors with clear warnings that a par call was likely if investors declined and ECNs were disqualified. My understanding is that around 75% of investors took up that offer". In response to my preliminary decision, Mr Taber has strongly disputed the accuracy of this statement (which formed part of my earlier decision in case FCA00053) and its use to justify the position of the FCA with respect to retail investors. In view of this, I asked both Mr Taber and the FCA to provide further evidence. Having considered this in detail, I am satisfied that the FCA has provided reasonable explanations for its actions and the decisions that it took about this issue. It is not possible under the Complaints Scheme to resolve the different understanding the FCA and Mr Taber hold about the numbers of retail investors involved or the take-up of the offer. I am satisfied that the FCA carried out some due diligence around the 'buy back' offer and that its actions were not unreasonable.

In response to my preliminary decision, you have made a number of points and arguments explaining why your view remains that as a retail investor, you have not been afforded the required protection in relation to the ECN transaction as identified in your original complaint submission to the FCA. I have considered these points in detail and although I accept you make a logical criticism of the way events were handled, it does not change my view that the FCA's actions were not so unreasonable as to lead me to uphold your complaint. Several of the points that you make relate to the PRA's role in approving LPG's actions and do not fall within the scope of your complaint to the FCA. I have made some observations about the PRA's role in this matter in a decision dated 27 June 2016 available here: http://frccommissioner.org.uk/wp-content/uploads/PRA0008-Final-Decision-27-06-16.pdf

Overall, I am satisfied that the FCA continued to monitor the situation, and sought to ensure that retail investors received protection if the Trustee's Supreme Court appeal succeeded. Ultimately, the FCA's continued decision not to intervene was one that the FCA was entitled to make, however unpopular.

In summary, as was the case in relation to the December 2015 complaint case which I refer to above, I am satisfied that the FCA carefully considered its options, took full account of the

interests of retail investors, and reached a rational decision. I recognise that you, and others, consider that the FCA should have intervened further, and there were clearly arguments for that; but I do not consider that the FCA's decisions were unreasonable. For these reasons, I consider the FCA's complaint response to be reasonable and I do not uphold this aspect of your complaint.

Delay

You first complained to the FCA in February 2016. You contacted my office in February 2017 by copying me into your email to the FCA about the lack of substantive progress in responding to your concerns. We contacted the FCA to monitor the situation and received the FCA's assurance that it would complete its review by 17 March 2017, which it did.

I note that the FCA's complaint response to you apologises for the length of time taken to complete its investigation into your complaint. I have considered whether that is an acceptable response to its delays or whether it would be appropriate for me to recommend that a small payment is made to you. I am aware that this was a complex matter requiring detailed review and liaison with staff across the FCA at senior level. During the period of the FCA's complaints investigation the substantive issues were also being considered by the Supreme Court, which issued its judgment on 16 June 2016.

Nevertheless, I have concluded that overall there were unacceptable and avoidable delays by the FCA in dealing with your complaint, as well as a failure to keep you informed about progress. Following a gap between April and July 2016 you contacted the FCA. You were then advised to expect its response by the end of August. This proved very optimistic and I am not surprised that you contacted my office in February 2017.

In view of this, I **recommend** that the FCA offers to pay you the sum of £100 in recognition of the distress and inconvenience that has been caused to you by its repeated failure to meet its own deadlines in handling your complaint.

Conclusion

In conclusion, for the reasons set out above, I have not upheld your substantive complaint. I have however concluded that there was avoidable delay in responding to you. I recommend that:

- The FCA offers to pay you the sum of £100 for distress and inconvenience caused to you by its complaints handling delays.

Yours sincerely

Antony Townsend
Complaints Commissioner

ANNEX 1 – RELEVANT EXTRACTS FROM LBG Exchange Offer Memorandum (EOM), dated 3 November 2009

Early Redemption for Regulatory Purposes If, immediately prior to the giving of the notice referred to below, a Capital Disqualification Event has occurred and is continuing, then the relevant Issuer may, subject to Condition 8(b) and having given not less than 10 nor more than 21 days' notice to the 98 Trustee, the Principal Paying and Conversion Agent, and the ECN Securityholders (which notice shall, subject as provided in Condition 8(f), be irrevocable), redeem in accordance with the relevant Conditions at any time (in the case of a Fixed Rate ECN) or on any Interest Payment Date (in the case of a Floating Rate ECN) all, but not some only, of the relevant series of ECNs at their principal amount (or at such other amount as may be specified in the relevant Pricing Schedule), together with any accrued but unpaid interest to (but excluding) the relevant redemption date. See Part A of Appendix 6 (''Terms and Conditions of the ECNs – Redemption and Purchase – Redemption for Regulatory Purposes''). A ''Capital Disqualification Event'' is deemed to have occurred (1) if, at any time LBG or, where LTSB is a or the Guarantor, LTSB is required under Regulatory Capital Requirements to have regulatory capital, the ECNs would no longer be eligible to qualify in whole or in part (save where such non-qualification is only as a result of any applicable limitation on the amount of such capital) for inclusion in the Lower Tier 2 Capital of LBG or, as the case may be, LTSB on a consolidated basis; or (2) if as a result of any changes to the Regulatory Capital Requirements or any change in the interpretation or application thereof by the FSA, the ECNs shall cease to be taken into account in whole or in part (save where this is only as a result of any applicable limitation on the amount that may be so taken into account) for the purposes of any ''stress test'' applied by the FSA in respect of the Consolidated Core Tier 1 Ratio.

8(e) Redemption for Regulatory Purposes If, immediately prior to the giving of the notice referred to below, a Capital Disqualification Event has occurred and is continuing, then the Issuer may, subject to Condition 8(b) and having given not less than 10 nor more than 21 days' notice to the ECN Securityholders in accordance with Condition 17, the Trustee, the Principal Paying and Conversion Agent and the Registrar (which notice shall, subject as provided in Condition 8(f), be irrevocable), redeem in accordance with these Conditions at any time (in the case of a Fixed Rate ECN or in the Fixed Interest Rate Period in the case of a Fixed/Floating Rate ECN) or on any Interest Payment Date (in the case of a Floating Rate ECN or in the Floating Interest Rate Period in the case of a Fixed/Floating Rate ECN) all, but not some only, of the ECNs at their principal amount (or at such other amount as may be specified in the relevant Pricing Schedule), together with any accrued but unpaid interest to but excluding the relevant redemption date. Upon the expiry of such notice, the Issuer shall redeem the ECNs as aforesaid.

19 a ''Capital Disqualification Event'' is deemed to have occurred (1) if, at any time LBG or, where LTSB is a or the Guarantor, LTSB is required under Regulatory Capital Requirements to have regulatory capital, the ECNs would no longer be eligible to qualify in whole or in part (save where such non-qualification is only as a result of any applicable limitation on the amount of such capital) for inclusion in the Lower Tier 2 Capital of LBG or, as the case may be, LTSB on a consolidated basis; or (2) if as a result of any changes to the Regulatory Capital Requirements or any change in the interpretation or application thereof by the FSA, the ECNs shall cease to be taken into account in whole or in part (save where this is only as a result of any applicable limitation on the amount that may be so taken into account) for the purposes of any ''stress test'' applied by the FSA in respect of the Consolidated Core Tier 1 Ratio;

''Core Tier 1 Capital'' means core tier one capital as defined by the FSA as in effect and applied (as supplemented by any published statement or guidance given by the FSA) as at 1 May 2009; ''Lower Tier 2 Capital'' has the meaning given to it by the FSA from time to time; ''Regulatory Capital Requirements'' means any applicable requirement specified by the FSA in relation to minimum margin of solvency or minimum capital resources or capital;
''Tier 1 Capital'' has the meaning given to it by the FSA from time to time; and ''Upper Tier 2 Capital'' has the meaning given to it by the FSA from time to time.