FINANCIAL MARKETS LAW COMMITTEE

THE IOSCO MULTILATERAL MEMORANDUM OF UNDERSTANDING AND INTERNATIONAL TRANSFERS OF PERSONAL DATA BETWEEN REGULATORY AUTHORITIES

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FINANCIAL MARKETS LAW COMMITTEE[1]

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[1] Given the participation of the UK authorities in the E.U. legislative agenda on data protection and/or the programme for setting regulatory standards in the cross-border securities markets led by IOSCO, Sean Martin, Sinead Meany and Stephen Parker took no part in the preparation or discussion of this paper and it should not be taken to represent the views of the Bank of England, the Financial Conduct Authority, or HM Treasury.

[2] Note that Members act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.

[3] The FMLC has established a Steering Group on coordination in the reform of international law and regulation.

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1 PREFACE

1.1 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. It will also act as a bridge to the judiciary to help UK courts remain up-to-date with developments in financial markets practice.

1.2 The Article 29 Working Party ("**WP29**") is an independent advisory body set up under Article 29 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[4]

1.3 On 18 September 2014 and 24 September 2015, WP29 wrote to the International Organisation of Securities Commissions ("**IOSCO**") about IOSCO's Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (the " **MMoU**")—a memorandum which aims to provide securities regulators with a tool for cross-border cooperation in supervision and enforcement.[5] The letters expressed a concern that the MMoU does not contain any specific provisions as regards data protection safeguards when transfers of personal data take place and went on to suggest that there is

> a risk here that data protection authorities consider that E.E.A. securities regulators are not complying with their obligations [under E.U. data protection legislation] because the safeguards provided in the agreement (the MMoU) cannot be considered as sufficient.[6]

1.4 In 2016, stakeholders raised with the FMLC the question whether these letters, which are published on a website maintained by the European Commission, may have created legal uncertainty about the efficacy of data transfers between E.U. and non-E.U. securities regulators where the transfer includes data which may be classified as personal data under E.U. law. The FMLC, which has repeatedly engaged with the issues of both international regulatory cooperation and data protection, agreed to consider this question further.

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4 The Article 29 Working Party material (opinions, working documents, letters, etc.) are available on their website at: http://ec.europa.eu/justice/data-protection/article-29/index_en.htm.

5 The text of the IOSCO MMoU is available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf.

6 The letters are available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/index_en.htm.

2 BACKGROUND

The FMLC's involvement in coordination in the reform of international law and regulation

2.1 In October 2012, the FMLC initiated a series of panel discussions and seminars to examine the inter-jurisdictional aspects of countries' implementation of certain G20 commitments in the field of financial services regulation and the possibility that divergent implementation may give rise to uncertainty in the legal framework of the global financial markets. This work was followed by a discussion paper on the same theme published in February 2015 (the "**Discussion Paper**").[7] In the Discussion Paper, the FMLC explored options to strengthen the mechanisms by which the G20's political commitments are implemented with a view to addressing legal uncertainty caused by inter-jurisdictional inconsistencies. The paper examined: (i) the challenges facing consistent implementation of G20 commitments; (ii) the factors which contribute to these challenges; and (iii) proposals for possible solutions. Shortly after the publication of the Discussion Paper, it was submitted to, among other recipients, the IOSCO Task Force on Cross-Border Regulation established in the context of its November 2014 Consultation Report on a toolkit for cross-border regulation. In the annex to the Discussion Paper, the FMLC observes that obstacles to data sharing, such as data protection laws, confidentiality and secrecy requirements can be a significant hindrance to cross-border regulatory cooperation.

2.2 In the autumn of 2015, the Committee established a Steering Group of experts, which in March 2016 recommended, *inter alia*, further work on multilateral and bilateral memoranda of understanding ("**MoUs**") on supervision and enforcement.[8]

2.3 One of the most widely relied on mutual supervisory memoranda of this kind is the IOSCO MMoU, which was first established in 2002 with the aim of providing securities regulators with an international cooperation tool for combating cross-border fraud.[9] It was revised in May 2012. This MMoU is the basis for the exchange of information among IOSCO members and sets out general principles in areas such as: mutual assistance and the exchange

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7 Financial Markets Committee, *Coordination in the reform of international financial regulation, addressing the causes of legal uncertainty*, February 2015 available at: http://www.fmlc.org/uploads/2/6/5/8/26584807/fmlc_g20_discussion_paper.pdf.

8 Members of the Steering Group on the International Coordination of Financial Regulatory Reform act in a purely personal capacity. The names of the institutions they ordinarily represent are given for information only. John Taylor (Chair of the Steering Group) is the former General Counsel of the European Bank for Reconstruction and Development and formerly International Director of Berwin Leighton Paisner LLP. The other members of the Steering Group (in alphabetic order) are: Professor Douglas Arner (University of Hong Kong), Whitman Knapp (GTBInsights LLC), Professor Takashi Kubota (Waseda University, Japan), Michel Prada (Chairman of the Trustees of the International Financial Reporting Standards Foundation), Professor Hal Scott (Harvard University Law School, Director of U.S. Committee of Capital Markets Regulation and Co-Chair of the Council on Global Financial Regulation), Professor René Smits (University of Amsterdam) and Professor Shen Wei (Koguan Law School of Shanghai Jiao Ton University, China).

9 The Memorandum is available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf.

of information; the scope of assistance with foreign regulators; the dealing with and execution of requests for assistance with foreign regulators; and the permissible use of information. It also sets out specific requirements regarding the confidentiality of the exchanged information.[10]

2.4 The FMLC has previously expressed support for the desirability of increased cooperation among supervisors of cross-border financial entities and it has considered on previous occasions how, if at all, the use of MoUs between national regulators and supervisors can be improved and their effectiveness maximised. Therefore, in a letter to IOSCO, the FMLC welcomed the proposal—in the *Final Report on Cross-Border Regulation* published as a follow-up to the 2014 Consultation—to set up an information repository of supervisory cooperation MoUs. It noted that one of the benefits of such a repository would be the opportunity to develop drafting recommendations on the basis of clauses or agreements found to be particularly efficacious. The FMLC encouraged the development and use of effective templates for MoUs among regulatory and supervisory authorities. It is the FMLC's view that in due course, these could give rise to templates for MoUs with the benefits that standardisation and uniformity can bring, including settled expectations as to their interpretation.

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2.5 In January 2012, the European Commission presented proposals for two new legislative measures on data protection—a draft directive and a draft regulation (collectively, the "**Proposals**").[11] These measures, which have since been adopted, were introduced to amend and update the existing regulatory framework established by Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "**1995 Directive**").[12]

2.6 The official texts of the new laws—Regulation (EU) 2016/679 (the "**General Data Protection Regulation**" or "**GDPR**"), which repeals and replaces the 1995 Directive, and Directive (EU) 2016/680 (the "**2016 Directive**"), which concerns the processing of personal data by national authorities for the purpose of the prevention, investigation, detection or prosecution of criminal offences—were published in the EU Official Journal on 4 May 2016.

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[10] Letter to IOSCO Secretary General Mr David Wright from Chairwoman Isabelle Falque-Pierrotin dated 18 September 2014: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140918_letter_on_mmou_iosco.pdf.pdf.

[11] The proposal for a Regulation: COM(2012) 11 final; 2012/0011 (COD) and the proposal for a Directive: COM(2012) 10 final; 2012/0010 (COD).

[12] Directive 95/46/EC of the European Parliament and of the Council of 24 October on the protection of individuals with regard to the processing of personal data and on the free movement of such data, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML.

The GDPR came into force on 24 May 2016 and will apply from 25 May 2018. The 2016 Directive entered into force on 5 May 2016 and EU Member States are required to transpose it into their national law by 6 May 2018.[13]

2.7 The FMLC took an active interest in the Proposals from the outset. Its work culminated in the publication of four letters and a paper.[14] In these it identified a number of issues arising in regard to the restrictions on data sharing set out in the Proposals. These were set out in an initial letter in July 2014 to the Commission and comprised three principal concerns: (i) the lack of any express safe-harbour for the exchange of information between national regulators pursuant to the international agreements, such as the IOSCO MMoU; (ii) a lack of clarity in the application of various exemptions establishing legitimacy for data sharing between market participants and regulatory authorities (in particular sharing that occurs without the consent of the data subject); and (iii) the likelihood of conflict between the restrictions imposed by the proposals and market participants' obligations to provide information to third country regulators under the terms of their authorisation to conduct business in that jurisdiction.[15]

2.8 The FMLC published a detailed consideration of the Proposals and identified further issues in a paper published on 4 November 2014. This paper highlights the FMLC's broad concern with the incompatibility of the Proposals in some contexts with market participants' duties to domestic and foreign regulators to monitor and disclose certain personal information that may bear on financial conduct. It addresses uncertainties arising from: (i) incoherence in the Proposals; (ii) issues relating to the competence of authorities; (iii) the Commission's approach to "main establishment"; and (iv) the role, and responsibilities associated therewith, of "Data Protection Officers".[16]

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13 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG&toc=OJ:L:2016:119:TOC.

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0089.01.ENG&toc=OJ:L:2016:119:TOC.

14 See, letter from the FMLC to the Director General, Directorate General for Justice, dated 11 December 2014, enclosing the FMLC Publications on the Proposed E.U. Data Protection Reforms, available at: http://www.fmlc.org/fmlc-papers.html.

15 Letter to Francoise Le Bail (Director General, DG Justice, European Commission) dated 8 July 2014, available at: http://www.fmlc.org/fmlc-papers.html.

16 The FMLC Paper *Discussing legal uncertainties arising in the area of EU Data Protection Reforms* is available at: http://www.fmlc.org/uploads/2/6/5/8/26584807/fmlc_paper_discussing_issues_of_legal_uncertainty_arising_in_the_context_of_european_data_protection_reform_proposals.pdf.

2.9 In November 2014, the FMLC responded to a request by HM Ministry of Justice to draft amendments to the European Commission's Proposals. The suggested amendments were designed either to address or to ameliorate a number of issues of legal uncertainty identified by the FMLC in its earlier publications (referred to above).[17]

2.10 The Committee submitted a further letter to the E.U. Commission on 2 April 2015 in response to suggestions from representatives in the E.U. Commission. The letter provides a summary of the key differences between the Proposals and the original E.U. data protection framework—of which the centrepiece is the 1995 Directive—which reflected new issues of legal uncertainty or which gave greater impact to existing issues. These were focused on: (i) changes to the burden placed on data controllers; (ii) extraterritorial reach; (iii) new concepts; (iv) sanctions; (v) the right to erasure and the right to be forgotten; and (vi) lawfulness and legitimacy of processing.[18]

2.11 Following the publication of a General Approach to the Proposed Regulation and Directive in June 2015, the FMLC wrote another letter on 14 October 2015 in response to this new development.[19] The Committee here expressed its pleasure that many of the uncertainties identified previously had been ameliorated; however, it noted some persistent issues of legal uncertainty. These outstanding issues related to: (i) withdrawal of consent; (ii) requirement for Data Protection Officers to have expert knowledge; (iii) compliance with regulatory rules; (iv) data sharing agreements; (v) definitions; and (vi) the right to be forgotten.[20]

3 EXECUTIVE SUMMARY

3.1 In July 2016, FMLC stakeholders recommended that the Committee undertake further work on the compatibility of the IOSCO MMoU with the GDPR and the 2016 Directive.

3.2 In the sections of this paper which precede the Appendix, the FMLC analyses the concerns raised by WP29 and assesses the normative relationship between the MMoU and E.U. data

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17 The letter from the FMLC to HM Ministry of Justice dated 21 November 2014 is available at: http://www.fmlc.org/fmlc-papers.html.

18 The letter sent by the FMLC to the E.U. Commission on 2 April 2015 is available at: http://www.fmlc.org/uploads/2/6/5/8/26584807/fmlc_letter_to_mr_bruno_gencarelli_(dg_justice),_02.04.15.pdf.

19 The General Approach refers to the fact that the Council has a political agreement on the basis of which it can begin negotiations with the European Parliament with a view to reaching overall agreement on new E.U. data protection rules. This is explained further at: http://www.consilium.europa.eu/en/press/press-releases/2015/06/15-jha-data-protection/.

20 The letter sent by the FMLC to Mr Bruno Gencarelli, Directorate General for Justice, E.U. Commission, dated 14 October 2015 is available at: http://www.fmlc.org/uploads/2/6/5/8/26584807/letter_to_mr_bruno_gencarelli_-_14_october_2015.pdf.

protection legislation. The analysis concludes with suggestions for a side letter or appendix to the MMoU which might help simultaneously to clarify this relationship and address the concerns of WP29, with a view to preserving certainty in the legal framework of the wholesale financial markets. The sections below examine: (i) the views of WP29; (ii) the nature and purpose of the MMoU; (iii) the E.U. data protection framework and the requirement for safeguards in the context of personal data transfers; (iv) the role of legislative derogations from this requirement; and (v) potential clarifications which it is recommended could be made to the MMoU.

4 THE VIEWS OF THE ARTICLE 29 WORKING PARTY

4.1 In relation to the MMoU, WP29 has published two letters (noted at 1.3 above) in which it draws attention to the fact that the MMoU does not contain any guarantees of data protection or safeguards for when personal data transfers are made. Both letters address the subject in the context of the 1995 Directive, which was still in force at the time, as well as other E.U. and international legislative provisions on the protection of personal data.

4.2 WP29 refers in the first of these letters, dated 18 September 2014, variously to the following considerations: (a) the Treaty on the Functioning of the European Union (the "**TFEU**"), introduced by the Lisbon Treaty, establishes the principle that every individual has the right to the protection of personal data concerning them, and it provides a legal basis upon which relevant data protection rules may be adopted; (b) the Treaty, which renders the Charter of Fundamental Rights of the E.U. (the "**Charter**") legally binding, enshrines the protection of personal data as a fundamental right under Article 8 of the Charter; (c) personal data transfers outside the E.U. are subject to specific rules in the 1995 Directive; and (d) the foregoing apply in conjunction with other international instruments such as the legally binding Convention 108 of the Council of Europe, or the non-binding OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.[21]

4.3 The letter recalls that the applicable provisions of the 1995 Directive permit transfers of personal data to third countries only, as a general principle, where those countries ensure "an adequate level of protection". Alternatively, the letter says, transfers are permitted if they take place on the basis of an express legislative derogation from that general principle.

4.4 Under Article 26(2) of the 1995 Directive, Member States may also permit transfers

[21] See Article 16(1) and Article 16(2) and Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg 25 January 1981.

> where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights[.]

The Article clarifies that "such safeguards may in particular result from appropriate contractual clauses".

4.5 The letter does not make this point explicitly, however, other than in the context of discussing transfers of personal data which might be qualified as "repeated, massive or structural", where it takes the view that such transfers "should be carried out within a specific legal framework". By this, WP29 means a legal framework reflected in "contracts or binding corporate rules", as it makes clear by referring to its own earlier work.[22] The letter continues, at risk of tautology, with a stipulation that, in such cases, data transfers should be "governed by appropriate agreements". The agreements in question must be legally binding and must "fully take into account the safeguards provided for by the Directive". It is hard to construe this last admonition in a way which is not either confusing (the 1995 Directive does not, by and large, specify the safeguards on which data controllers may rely), circular (if one takes "safeguards" to mean the restrictions on data transfers imposed by the Directive itself) or, again, tautologous (the reference to "contractual clauses" as a possible safeguard in Articles 26(2) and 26(4) is already implicit in the letter's insistence on "appropriate agreements which should be legally binding").

4.6 Since the publication of the letter, the GDPR and 2016 Directive have come into force, applying an updated schema for international data transfers. Under the relevant provisions of the new measures, transfers may be made: (i) if a Commission adequacy decision (i.e., a decision that data protection is adequately provided for as a matter of national law) is in force in respect of the transferee's jurisdiction; alternatively (ii) if adequate safeguards are in place; or (iii) if a specific derogation applies. Speaking very broadly, an adequate safeguard will be one reflected in a binding and enforceable legal instrument or a commitment with similar force entered into by a public authority. Derogations, on the other hand, principally rely on either the consent of the data subject or overriding necessity, where the latter may be established on the grounds of legal obligation, public interest or on the basis of a legal right.[23] Safeguards and derogations are discussed further in later sections of this paper.

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22 WP29, *Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995*, published 25 November 2005, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp114_en.pdf. See p.9.

23 See Article 26(1)(d): "the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims".

4.7 WP29 concludes the first letter with a recommendation that the MMoU should be enhanced with provisions offering appropriate personal data protection guarantees.

4.8 On 24 September 2015, WP29 wrote offering further recommendations to IOSCO. These, it stated, were aimed at "attaining the most appropriate framework for personal data transfers in the cooperation between securities regulators" under the MMoU. The letter raises certain "elements" of the MMoU as being of particular interest from the perspective of WP29, in the following terms:

- …some core data protection principles [(set out in an Annex to the letter)]… are not provided or not sufficiently enough provided for in the MMoU…
- Paragraph 12(iii) of the MMoU opens the possibility for authorities to consult each other periodically regarding the MMoU about matters of common concerns and, in particular, where circumstances make it necessary or appropriate to consult, amend or extend the MMoU in order to achieve its purpose.
- [Correspondence with the IOSCO Secretariat] leaves open the possibility, somewhere in the future, to have the MMoU's text modified.

The letter concludes by warning (as mentioned above) that there is a risk that data protection authorities will consider that E.E.A. securities regulators are not complying with their obligations because the safeguards provided in the MMoU cannot be considered sufficient. In order to avoid this situation, WP29 suggests that the MMoU should be amended to incorporate sufficient safeguards within the text. This, it says, is preferable to leaving it incumbent upon each E.E.A. securities authority signed up to the MMoU to ensure compliance with local data protection laws when responding to cooperation requests under the MMoU.

4.9 The letter sets out in an Annex a non-exhaustive list of data protection principles that, it says, should be provided more comprehensively in the MMoU. The principles included fall under the following headings: (i) purpose limitation principle; (ii) data proportionality and quality principles; (iii) transparency principle and data subjects' rights; (iv) limited data retention period principle; (v) data protection rules for transferring personal data outside the EU territory; (vi) limitation of onward transfers; and (vii) security principle. The Annex also offers draft wording which is recommended for incorporation in the MMoU to ensure it provides sufficient data protection safeguards.

5 NATURE AND PURPOSE OF THE MMOU

5.1 The MMoU represents a common understanding among its signatories as to how they should consult, cooperate and exchange information for the purpose of regulatory supervision and enforcement in the securities markets. The MMoU provides a general procedural framework for regulators to issue requests for assistance to one another and, accordingly, it sets out specific requirements under the following headings: (i) information requests which can be made when authorities are in the process of investigating offences—the specific types of which are outlined in paragraph 4 of the MMoU; (ii) the general principles regarding mutual assistance and the exchange of information in paragraph 6; (iii) the scope of assistance to be made to members in paragraph 7; (iv) requests for assistance in paragraph 8; (v) execution of requests for assistance in paragraph 9; (vi) permissible uses of information in paragraph 10; (vii) confidentiality in paragraph 11; (viii) consultation regarding mutual assistance and the exchange of information in paragraph 12; (ix) providing unsolicited assistance in paragraph 13; and (x) provision for additional IOSCO members to become Authorities under the MMoU in paragraph 14. The MMoU does not, however, purport to lay down an exhaustive set of terms governing the transfer of information between regulators.

5.2 Two provisions of the MMoU, in particular, bear on the discussion between IOSCO and WP29:

a) first, paragraph 6(a), which provides that the MMoU *"[is] not intended to create legally binding obligations or supersede domestic laws"* (emphasis added); and

b) second, paragraph 6(e)(i), which provides that "A request for assistance may be denied by the Requested Authority … where the request would require the Requested Authority to act in a manner that would violate domestic law".[24]

5.3 Paragraph 6(a) establishes the non-legally binding nature of the MMoU and clarifies that a regulator receiving a request for assistance (a "**Requested Authority**") cannot be compelled by the regulator making the request (a "**Requesting Authority**") to meet it. Correlatively, no right of enforcement action is conferred—or intended to be conferred—by the MMoU on the Requesting Authority for a refusal to cooperate on the part of the Requested Authority.

5.4 Paragraph 6(e)(i) makes it clear that the MMoU does not oblige a Requested Authority—even in the residual moral sense circumscribed by paragraph 6(a)—to provide information in

[24] The text of paragraph 6 of the MMoU is included, for reference, in the Appendix to this paper.

any manner that would contravene the domestic law, including the data protection law, of the Requested Authority's jurisdiction.

5.5 It would appear from the foregoing that it is open to any Requested Authority signatory to the MMoU to scrutinise a request for assistance and—without prejudice to the wider range of options available to that regulator (discussed below)—to deny the request altogether, where to meet the request would be incompatible with the applicable data protection laws.

5.6 The FMLC understands that Requested Authorities based in E.U. Member States do, as a matter of practice, assess requests for assistance under the MMoU in light of their obligations under applicable data protection law. The provision of information in response to a request for assistance is therefore not automatic. The FMLC also understands that requests for assistance are assessed on a case-by-case basis, and are not used as a mechanism for bulk transfers of personal data. That is to say, the MMoU is not, in practice, used as a basis for transfers that are "repeated, massive or structural".[25]

5.7 The FMLC is of the view that the MMoU is not itself incompatible with E.U. data protection law and that a regulator based in an E.U. Member State (or otherwise subject to E.U. data protection law) would not contravene data protection law by entering into the MMoU. This conclusion can be inferred from the way in which the MMoU subordinates the Requested Authority's (non-binding) duty (i.e., to cooperate with a request) to the overriding provisions of local law. Given this relationship of subordination, nothing in the law of E.U. Member States can logically conflict with that duty and *vice versa*.

6 SAFEGUARDS FOR PERSONAL DATA TRANSFERS

6.1 Another inference to be drawn from this relationship of subordination is the conditional observation that if E.U. data protection law requires adequate safeguards to be in place before a transfer of personal data takes place (as averred by WP29), then, under the terms of the MMoU, the Requested Authority may refuse to transfer data on the ground that adequate safeguards are not, or not yet, in place.

6.2 With respect to the implementation of safeguards, the terms of E.U. law are obligatory—or, more precisely, prohibitory, since transfers without the safeguards in place cannot be made unless a derogation applies—and the terms of the MMoU are, in contrast, facultative, since the Requested Authority may either refuse the request on the grounds of incompatibility with

[25] See above paragraph 4.5 and WP29, "Working Document 114", available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp114_en.pdf.

local law or comply with it. A permission (or "faculty") is consistent with a prohibition. It cannot be right, therefore, to say that the MMoU is incompatible with data protection legislation unless it prohibits a data transfer in these circumstances, or itself guarantees the requisite legal safeguards.

6.3 Aside from any question of legal conflict, the comments made by WP29 raise the further question as to whether the MMoU *could* provide the data protection safeguards contemplated by E.U. law—should IOSCO and its Members wish to incorporate them.

6.4 Disclosures relating to information held for the purposes of criminal law enforcement under the MMoU will fall within the scope of the 2016 Directive. Article 37(1), which permits transfers subject to appropriate safeguards, contemplates two means by which such safeguards may be guaranteed. First, they may be provided for in "a legally binding instrument" under Article 37(1)(a). Alternatively, the requirement for safeguards may be satisfied under Article 37(1)(b) where

> the controller has assessed all the circumstances surrounding the transfer of personal data and concludes that appropriate safeguards exist with regard to the protection of personal data.

6.5 The view of the FMLC is that incorporating data protection safeguards in the MMoU would not satisfy the first of these alternative conditions because the MMoU is not a legally binding instrument (by its own express terms). As for the second condition, this appears to refer to safe systems and control practices, among which a non-binding commitment would be, at most, one possible element. Indeed, that a non-binding normative instrument alone will not amount to "appropriate safeguards", is a necessary inference not only from the phrase "all the circumstances" but also from the contrast with "legally binding instrument" in the previous sub-paragraph. To put it another way, establishing safeguards in "all the circumstances surrounding the transfer" cannot be the same as establishing safeguards in a non-binding instrument, without rendering the option to adopt personal data safeguards in a "legally binding instrument" in Article 37(1)(a) otiose. In either case, therefore, it is to be doubted whether the MMoU can implement safeguards at the level of adequacy required by the 2016 Directive in the circumstances which concern WP29.

6.6 Given the scope of the MMoU, which includes non-criminal matters, there will also be inter-authority requests for disclosures which fall outside the 2016 Directive, but within the scope of the GDPR. Under the GDPR, Article 46(1) allows

> a controller or processor to transfer personal data to a third country or an international organisation, [in the absence of an "adequacy decision" by the European Commission] only if the controller or processor has appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

6.7 The appropriate safeguards referred to in Article 46(1) may be provided for in any of the ways set out in Article 46(2) and (3). These are several and various but common to almost all of the prescribed safeguards is a requirement that they be established in a legally binding and enforceable manner. Prominent among them, for the purposes of this paper, are the following examples:

a) Article 46(2)(a) provides that safeguards may be provided for by, among other things, a "*legally binding and enforceable* instrument between public authorities or bodies" (emphasis added); and

b) Article 46(3) provides in the alternative that, with the authorisation of the competent supervisory authority, safeguards may be provided for either by "contractual clauses" or by "provisions to be inserted into administrative arrangements… *which include enforceable and effective data subject rights*" (emphasis added).

6.8 The legislative requirement that safeguards be established in a binding and enforceable manner, taken in conjunction with the non-binding nature of the MMoU (referred to above) means, in the view of the FMLC, that amendments to the MMoU itself are unlikely to establish safeguards which satisfy the requirements of the GDPR. The FMLC does not comment, however, on the desirability, or feasibility, of amending or supplementing the MMoU to incorporate non-binding safeguards. (Provisions amplifying the MMoU which might assist in clarifying the intention of IOSCO Members to have regard to data protection considerations are discussed below.)

6.9 Any Requested Authority signatory to the MMoU may, having scrutinised a request for assistance, either deny the request or require further measures to be taken by the Requesting Authority as a precondition to complying with it. These measures may include putting in place a further agreement incorporating additional safeguards, including some or all of those recommended by WP29. A separate agreement could (unlike the MMoU) impose legally binding obligations on the Requesting Authority.

6.10 There may be circumstances in which further steps must be taken prior to the provision of personal data, in response to a request for assistance under the MMoU, in order to comply

with E.U. data protection law. The provisions of the MMoU leave it open to a Requested Authority to take such steps (or to require another regulator to do so). By entering into the MMoU, an E.U. regulator is not committing itself to transferring personal data to a Requesting Authority in a manner inconsistent with E.U. data protection law (or, indeed, in any manner at all).

7 THE ROLE OF DEROGATIONS

7.1 A further issue, which is addressed only relatively briefly in the correspondence from WP29 with the IOSCO Secretary General, is the significance of the derogations in Article 26(1) of the 1995 Directive.

7.2 Article 25 of the 1995 Directive provides that, as a general rule, personal data cannot be transferred to a third country unless that third country ensures an adequate level of protection. Article 26(1) sets out a number of derogations from the general rule in Article 25.

7.3 Under Article 26(1)(d), a transfer of personal data to a country that does not provide an adequate level of protection may be made if

> the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims.

7.4 The purposes for which non-public information provided in response to a request for assistance may be used are circumscribed by paragraph 10 of the MMoU. Under paragraph 10(a), such information may be used solely for the purposes set out in the request for assistance, including ensuring compliance with Laws and Regulations (as defined in the MMoU) and other purposes related to investigation and enforcement. The use of such information for any other purpose requires the consent of the Requested Authority providing the information (see paragraph 10(b)).

7.5 Whilst it is true that not every use of information provided under the MMoU will necessarily be subject to a derogation—in particular, the FMLC notes in this context WP29's objection to paragraph 10(b)—there will plainly be circumstances in which the transfer of information by a Requested Authority to a Requesting Authority, pursuant to the MMoU, is subject to a derogation. In such cases, the transfer would not contravene the provisions of Member States' law which implement Article 25 notwithstanding that adequate safeguards have not been put in place.

7.6 It follows that, were the recommendations made by WP29 to be adopted, there would likely be circumstances in which regulators were implementing safeguards in excess of those required by domestic provisions giving effect to Article 25 of the 1995 Directive. Whilst there may be individual cases in which regulators wish to implement a "super-equivalent" regime, this may not be appropriate in every case. In contrast, omitting these provisions from the MMoU gives regulators the flexibility to implement additional safeguards as appropriate on a case-by-case basis, where either it is inappropriate to rely on a derogation or it is considered desirable to implement additional safeguards, notwithstanding that a derogation could be relied upon.

7.7 The derogations contemplated in Article 25 of the 1995 Directive are similar to those established by Article 49 of the GDPR and Article 38 of the 2016 Directive. Thus, the concern that implementing the recommendations made by WP29 will entail the application of additional burdens in the form of safeguards, which it would otherwise be unnecessary to apply under E.U. law because of the derogations, will remain equally valid when the new measures come into application. The overriding concern here is that amendments to the MMoU, where they incorporate unnecessary burdens, may prove difficult to agree among regulators, potentially jeopardising the prospects for a consensus and the efficacy of the MMoU itself.

7.8 The MMoU, as currently drafted, leaves it open to regulators either to rely on a derogation, where they are satisfied on that point, or to implement additional safeguards.

8 POTENTIAL CLARIFICATIONS TO THE MMOU

8.1 Whilst, for the reasons given above, the FMLC is of the view that a regulator in an E.U. Member State would not contravene data protection law merely by entering into the MMoU, the FMLC has considered a number of potential clarifications to the MMoU, which might be put in place by way of a side letter or additional appendix. The purpose of such clarifications would be to emphasise that:

a) the MMoU does not require Requested Authorities to make the disclosures in breach of data protection or other laws;

b) the MMoU is intended to deal with disclosures in response to specific requests, rather than the on-going bulk transfers made pursuant to standing arrangements between regulators; and

c) as a matter of best practice, Requesting Authorities should cooperate with Requested Authorities with a view to ensuring that any steps required by data protection or other law are taken to protect the disclosed information.

8.2 The substantive sections of such a clarifying side letter or additional appendix might read as follows:

> X. The MMoU provides for the disclosure of information, subject to compliance with applicable data protection and other law, by Requested Authorities in response to specific requests for assistance from Requesting Authorities. It is not intended to provide for bulk, on-going disclosures of information on a "standing" basis. It is anticipated that requests for assistance will be assessed by Requested Authorities on a case-by-case basis for consistency with applicable data protection and other law.
>
> Y. It may be necessary for a Requested Authority to put in place additional safeguards to protect information requested by a Requesting Authority, so as to allow that information to be provided to the Requesting Authority in compliance with applicable data protection and other law. In those circumstances, a Requested Authority is not required to provide the requested information unless those safeguards are put in place. As a matter of best practice, Requesting Authorities should be prepared to cooperate with Requested Authorities to put in place such additional safeguards, so as to ensure protection of the requested information and allow it to be provided lawfully.

9 CONCLUSION

9.1 The objective of this paper has been to address issues of legal uncertainty with the potential to affect the wholesale financial markets. The issues considered arise primarily in respect of materials published by WP29 suggesting that the IOSCO MMoU, which is an essential element of international regulatory cooperation on supervision and enforcement, may be incompatible with E.U. data protection laws. The FMLC has taken this opportunity to observe that it does not share that view. The FMLC has also provided some suggestions for a side letter or appendix to the MMoU intended to clarify the normative relationship between the MMoU and E.U. data protection legislation and to respond to the concerns of the WP29.

9.2 In doing so, the FMLC highlights: (i) the non-legally binding nature of the MMoU; (ii) the fact that the MMoU is not intended to supersede domestic laws (including data protection

laws); and (iii) that personal data transfers under the MMoU are not in practice carried out without careful consideration by the Requested Authority of, *inter alia*, its legal obligations.

9.3 This paper has also addressed the question as to whether the non-legally binding nature of the MMoU could create adequate safeguards and concludes that this is to be doubted. In addition, it discusses the possibility that blanket "safeguards" in the MMoU might prevent a data transfer which would otherwise be permissible under derogations in E.U. data protection legislation. Finally, to address the concerns put forward by WP29, the FMLC has offered a number of potential clarifications to the MMoU, which it suggests might be put in place by way of a side letter or additional appendix.

APPENDIX: TEXT OF RELEVANT PROVISIONS OF THE MMOU

Paragraph 4

"Laws and Regulations" mean the provisions of the laws of the jurisdictions of the authorities, the regulations promulgated thereunder, and other regulatory requirements that fall within the competence of the Authorities, concerning the following:

a. insider dealing, market manipulation, misrepresentation of material information and other fraudulent or manipulative practices relating to securities and derivatives, including solicitation practices, handling of investor funds and customer orders;

b. the registration, issuance, offer, or sale of securities and derivatives, and reporting requirements related thereto;

c. market intermediaries, including investment and trading advisers who are required to be licensed or registered, collective investment schemes, brokers, dealers, and transfer agents; and

d. markets, exchanges, and clearing and settlement entities.

Paragraph 6(a)

This Memorandum of Understanding sets forth the Authorities' intent with regard to mutual assistance and the exchange of information for the purpose of enforcing and securing compliance with the respective Laws and Regulations of the jurisdictions of the Authorities. The provisions of this Memorandum of Understanding are not intended to create legally binding obligations or supersede domestic laws.

Paragraph 6(e)(i)

The Authorities recognize the importance and desirability of providing mutual assistance and exchanging information for the purpose of enforcing, and securing compliance with, the Laws and Regulations applicable in their respective jurisdictions. A request for assistance may be denied by the Requested Authority:

(i) where the request would require the Requested Authority to act in a manner that would violate domestic law.

Paragraph 10(a)

The Requesting Authority may use non-public information and non-public documents furnished in response to a request for assistance under this Memorandum of Understanding solely for:

(i) the purposes set forth in the request for assistance, including ensuring compliance with the Laws and Regulations related to the request; and

(ii) a purpose within the general framework of the use stated in the request for assistance, including conducting a civil or administrative enforcement proceeding, assisting in a self-regulatory organization's surveillance or enforcement activities (insofar as it is involved in the supervision of trading or conduct that is the subject of the request), assisting in a criminal prosecution, or conducting any investigation for any general charge applicable to the violation of the provision specified in the request where such general charge pertains to a violation of the Laws and Regulations administered by the Requesting Authority. This use may include enforcement proceedings which are public.

Paragraph 10(b)

If a Requesting Authority intends to use information furnished under this Memorandum of Understanding for any purpose other than those stated in Paragraph 10(a), it must obtain the consent of the Requested Authority.

Paragraph 12(a)(ii)

(a) The Authorities will consult periodically with each other regarding this Memorandum of Understanding about matters of common concern with a view to improving its operation and resolving any issues that may arise. In particular, the Authorities will consult in the event of:

(ii) a demonstrated change in the willingness or ability of an Authority to meet the provisions of this Memorandum of Understanding.

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