

c/o Bank of England  
Threadneedle Street  
London  
EC2R 8AH

Telephone: (+44) (0)20 7601 3918  
Fax: (+44) (0)20 7601 5226

Email: [fmlc@bankofengland.co.uk](mailto:fmlc@bankofengland.co.uk)  
Website: [www.fmlc.org](http://www.fmlc.org)

2 February 2011

European Commission  
Directorate General Internal Market and Services  
Securities Markets (Unit G3)  
B-1049 Brussels  
Belgium

[markt-consultations-mifid@ec.europa.eu](mailto:markt-consultations-mifid@ec.europa.eu)

Dear Sirs

### **Public Consultation: Review of the Markets in Financial Instruments Directive**

The role of the Financial Markets Law Committee (“FMLC”) is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial services markets which might give rise to material risk and to consider how such issues should be addressed.

This letter sets out the FMLC’s response to the European Commission’s Public Consultation, published on 8 December 2010, entitled *Review of the Markets in Financial Instruments Directive* (the “Consultation Paper” or the “Paper”). The Consultation Paper seeks comments on the Commission’s proposals for a comprehensive review of EC Directive 2004/39/EC on Markets in Financial Instruments (“MiFID”), which are intended to reduce systemic financial stability risk and equalise the level of investor protection in the European Union. The Paper states the Commission intends to introduce legislation in spring 2011 (the “Spring Legislation”) to implement amendments to MiFID.<sup>1</sup>

Some of the questions in the Consultation Paper raise issues of policy as well as of law. The FMLC has confined its response to those questions which, at this early stage in the legislative process, appear potentially to raise issues of legal uncertainty which may have an impact upon the financial markets. Further such issues may emerge when the Spring Legislation is published and the FMLC will consider at that stage whether further comment is appropriate.

#### **Question 107. What is your opinion on introducing a principle of civil liability applicable to investment firms? Please explain the reasons for your views.**

1.1 Section 7.2.6. of the Consultation Paper proposes the introduction of a principle of civil liability for investment service providers in order to harmonise investor protection in Member States. However, the nature of the liability proposed is not set out in the Paper. In particular, the Commission has not yet announced whether it intends the Spring Legislation to:

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<sup>1</sup> European Commission, *Public Consultation: Review of the Markets in Financial Instruments Directive*, p. 6.

- (i) require Member States to ensure that their laws on civil liability apply to persons responsible for causing an investor to suffer loss as a result of a breach of a duty set out in MiFID,<sup>2</sup> or
- (ii) impose an EU-wide standard of care on investment firms applicable in all Member States.

1.2 A state-by-state approach could complement national civil liability regimes, giving investors similar rights across the EU and giving Member States the discretion to implement the measures in a way that will not clash with national legislation. Member States' national laws already provide protection for investors by imposing legal duties on investment firms as to the conduct of their relations with clients.<sup>3</sup>

1.3 The FMLC has, however, identified several potential legal uncertainty points surrounding an EU-wide standard of care. In particular, the FMLC has concerns about the constitutional basis of an EU-wide approach. The Consultation Paper states that "all measures to be proposed for implementing legislation will be drawn up in accordance with relevant parts of the Treaty on the Functioning of the European Union ("TFEU") and the case law of the European Court of Justice" and refers to "Articles 290 and 291 of the TFEU (OJ C 83/1, 30.3.2010) and the ECJ's Judgment of 13 June 1958, *Meroni / ECSC High Authority* (9/56, ECR 1957-1958)".<sup>4</sup> Given the stage of the proposals, the Commission has not yet had to detail how this proposal meets these standards. The FMLC is therefore unable to comment on this issue at this stage but will seek to comment on this aspect of the proposal once the Commission has published the analysis.

1.4 The FMLC has also expressed concerns regarding the application of a wholly new liability standard in a paper entitled *AIFM Directive: Legal Risks*, dated January 2010, and concerns about the constitutional basis of other EU-wide legislative proposals in a paper entitled *A European Commission Consultation on Contract Law: UK Government Call for Evidence*, dated November 2010. The Commission may wish to consider these papers when drafting the Spring Legislation. These papers are available at <http://www.fmlc.org/papers.html> or could be sent in hard copy to the Commission upon your request.

1.5 Further, clearly divergent interpretations of a new legal standard and consequential legal uncertainty are likely to arise when: (i) 27 Member States are required to implement a legal standard (as a result of different legal and cultural traditions); and (ii) courts and regulators are tasked with interpreting the standard (owing to different methods of construing the law). Legal uncertainty as to what a firm must do to discharge its duty to third parties could result in an overly conservative approach to business. Legitimate activities may be prevented or the cost of undertaking them increased, such that particular services or products are placed out of the reach of clients that might otherwise have benefited from them.

1.6 The FMLC takes the view that, whichever approach to the introduction of a principle of civil liability is adopted, it will be essential in the interests of legal certainty that the Spring Legislation expressly defines the categories of clients that will be affected by the legislation and the MiFID rules to which civil liability will apply.

**Question 142. What is your opinion on the possibility to ban products, practices or operations that raise significant investor protection concerns, generate market disorder or create systemic risk? Please explain the reasons for your views.**

#### *Mechanism for extended regulatory powers under MiFID*

2.1 The proposals in Section 9 of the Consultation Paper seek to give greater powers to European and national regulators. The Consultation Paper states that these powers will be precisely drawn but broad

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<sup>2</sup> An analogous provision is Article 6(2) of EC Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, which provides that "Member States shall ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus."

<sup>3</sup> In the United Kingdom, section 150 of the Financial Services and Markets Act 2000 provides a civil liability regime in respect of breaches of Financial Services Authority rules (including rules which originated in MiFID) in favour of private persons.

<sup>4</sup> Consultation Paper, p. 5.

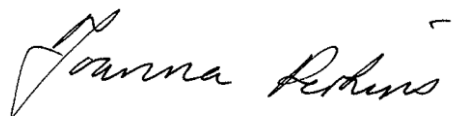
ranging. The FMLC is concerned about the proposal in Section 9.1 to create a “mechanism” at EU level to ban a particular financial instrument or activity if the (so far unnamed) EU authority deems that a national regulator has “not taken measures to address a threat to the orderly functioning and integrity of financial markets or the stability of the ... system” or has not “sufficiently” addressed the threat. Whilst the FMLC does not wish to comment on matters of policy, it considers that rigorous testing of the proposals in the impact assessment due to accompany the Spring Legislation<sup>5</sup> may well identify unforeseen consequences for the financial markets resulting from this proposal. In particular, the FMLC is concerned that this proposal will give the supranational authority the power to override decisions taken by national regulators, which may remove legal certainty from the decision-making process for both national regulators and the investment firms being regulated.

2.2 If the Commission does decide to empower a supranational authority with interventionist powers, it may wish to consider the FMLC’s Paper on *European Financial Supervision: Legal Risks*, which discusses concerns as to the constitutional basis for similar powers conferred on the European Supervisory Authorities for regulating the financial markets. Again, this paper is available at <http://www.fmlc.org/papers.html> or could be sent in hard copy to the Commission upon your request.

2.3 Finally, the Consultation Paper is unclear as to how the powers given to a supranational authority will interrelate with the powers already conferred on the European Supervisory Authorities, in particular the European Securities and Markets Authority. As these proposals are developed, the FMLC considers that a clear delineation of each body’s respective powers and functions will be important for legal certainty in the financial markets.

I would be happy to discuss any of the above comments<sup>6</sup> with you further. Please do not hesitate to contact me if you would like to do so.

Yours sincerely

A handwritten signature in black ink that reads "Joanna Perkins". The signature is written in a cursive style with a large initial 'J'.

Joanna Perkins  
**FMLC Director**

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<sup>5</sup> Consultation Paper, p. 8.

<sup>6</sup> The FMLC is grateful to David Rouch, Nicholas Bradbury and Ruth Fox for their assistance with preparing this letter.