June 2013

FINANCIAL MARKETS LAW COMMITTEE

Response to the European Parliament Committee on Economic and Monetary Affairs' Public Consultation on enhancing the coherence of EU financial services legislation

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This paper has been produced by the Financial Markets Law Committee (the "FMLC") Secretariat, under the supervision of Joanna Perkins (FMLC Director) and a sub-committee of the FMLC comprising Kate Gibbons, James Grand and Ed Murray.[1]

[1] The FMLC is grateful to Jennifer Enwezor, Joshua Mangeot, Sherine el-Sayed and Roland Susman of the FMLC Secretariat for their assistance with drafting this paper.

1. INTRODUCTION

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

1.2. On 14 March 2013, The European Parliamentary Committee on Economic and Monetary Affairs (the "**ECON Committee**") launched a public consultation on enhancing the coherence of EU financial services legislation. In response to that consultation, the FMLC has prepared this paper setting out various areas where it has identified one or more of the following types of incoherence or inconsistency:

(i) internal incoherence or inconsistency within a piece of EU legislation (including inconsistency between Level 1 texts and Level 2 implementing measures);

(ii) incoherence, inconsistency or overlap between different pieces of EU legislation;

(iii) instances of incoherent or inconsistent implementation by individual Member States (each, a "**Member State**"); and/or

(iv) incoherence with—or inconsistency between—EU legislation and national legal regimes.

2. SUMMARY

2.1. This paper sets out instances of incoherence or inconsistency which the FMLC has identified in the following legislative areas:

(i) Risk retention requirements under: Directive 2006/48/EC, as amended by Directive 2009/111/EC ("**CRD II**"); the forthcoming Capital Requirements Regulation ("**CRR**");[2] Directive 2011/61/EU ("**AIFMD**"); Directive 2009/138/EC ("**Solvency II**"); and Directive 2009/65/EC (the "**UCITS Directive**"), as amended by the AIFMD.

[2] 2011/0202(COD). Political agreement was reached on the CRR on 26 March 2013.

(ii) The use of netting-related terms in the Commission proposal for a Directive establishing a framework for the recovery and resolution of credit institutions and investment firms (the "**RRD**")[3] and the existing *acquis*.

(iii) The meaning of "acting in concert" in Directive 2007/44/EC (the "**Acquisitions Directive**").

(iv) The rules for determining the location of assets in Regulation 1346/2000 (the "**Insolvency Regulation**"), which rules are proposed to be amended by an amendment Regulation published by the European Commission (the "**Commission**") on 12 December 2012 (the "**Amendment Regulation**").[4]

(v) The civil liability of credit rating agencies under Regulation 462/2013 ("**CRA III**").

(vi) The civil liability of custodians under the proposals to amend the UCITS Directive ("**UCITS V**").[5]

(vii) European Parliament proposals to amend the Market Abuse Regulation ("**EP MAR**")[6] and Commission proposals for a recast Directive on markets in financial instruments ("**MiFID II**")[7], as those proposals pertain to algorithmic and high frequency trading.

(viii) Client asset protections under Directive 2004/39/EC ("**MiFID**") and the proposed RRD.

3 COM(2012) 280/3.

4 COM(2012) 744 final.

5 2012/0168 (COD). The Commission proposal was published on 3 July 2012 (COM(2012) 350 final); a Presidency Compromise Text (16902/12) was published on 11 December 2012.

6 Final Report of the Committee on Economic and Monetary Affairs of the European Parliament, dated 22 October 2012 (2011/0295(COD)).

7 Commission Proposal dated 20 October 2011 (2011/0298(COD)).

3. RISK RETENTION REQUIREMENTS

3.1. The FMLC considers that risk retention requirements—which restrict investment in securitisations[8]—provide examples of inconsistency across EU legislation and also between the relevant Level 1 text and Level 2 implementing measures.

3.2. Rules for credit institutions currently are found in CRD II but these will soon be superseded by rules in the CRR, which will also apply to investment firms.[9] Rules for alternative investment fund ("**AIF**") managers are in the AIFMD and a delegated Regulation pursuant to it ("**AIFMD Level 2**").[10] Rules for insurers and reinsurers are in Solvency II, whilst those for UCITS are in the UCITS Directive (as amended by the AIFMD).

3.3. The FMLC believes that the language of the risk retention legislation reflects numerous inconsistencies—for example:

(i) The CRR restricts the circumstances in which a party (an investment firm or credit institution) may be *exposed to the credit risk* of securitisation, whereas the other pieces of legislation listed above restrict the circumstances in which a party (*e.g.*, an AIF, insurer or UCITS) may *invest in* a securitisation.

(ii) The CRR restrictions apply to "securitisation positions", whilst those under the AIFMD and Solvency II apply to "securities or other financial instruments"[11] and to "securities or instruments", respectively.

(iii) The AIFMD presents an "originator" as an alternative to the concept of a firm that repackages loans into tradable securities. By contrast, Solvency II and the UCITS Directive define an "originator" as a firm that repackages loans into

[8] The EU risk retention regime requires, first, that certain entities responsible for bringing financial instruments to market assume exposure to those same instruments and, second, that other specified entities invest exclusively in financial instruments which comply with the first requirement.

[9] Article 122a of CRD II. Cf. CRR, Articles 394 to 399. Given that CRD II will cease to apply soon, this paragraph does not consider that Directive further.

[10] (EU) No 231/2013.

[11] The AIFMD does not define "securities". "Financial instrument" is defined, at Article 4(1)(n), by reference to Section C of Annex I, MiFID. The UCITS Directive uses the same wording as the AIFMD. It defines "transferable securities" at Article 2(1)(n)(i).

tradable securities or other financial instruments.[12] The CRR definition of "originator" is different again and refers to an entity involved in the creation or purchasing of the obligations underlying the securitisation.[13]

(iv) Solvency II mandates the Commission to make rules implementing its risk retention provisions, which include a requirement that the *originator* retains a 5 per cent. interest. By contrast, the AIFMD and the UCITS Directive each mandate that rules shall be made that include a requirement that the *originator, the sponsor or the original lender* retain a 5 per cent. interest.

3.4. There is no clear rationale for these inconsistencies but their effect is to create uncertainty as to the applicability and effect of the rules. Consistency—and certainty—would be increased were the relevant provisions to be harmonised across the legislation.

3.5. As regards inconsistencies between approaches to Level 1 texts and Level 2 implementing measures, the CRR includes comprehensive risk retention provisions whereas the other pieces of legislation discussed above contain only outline provisions which require implementation through Level 2 measures.

3.6. Finally, the language of AIFMD Level 2 is inconsistent with the language of the AIFMD because it applies the restriction to a "securitisation" whereas—as noted above—the AIFMD refers to "securities or other financial instruments". One might infer that this is to increase consistency with the CRR but—if that is the case—it would be better for the Level 1 texts themselves (*i.e.*, the AIFMD and the CRR) to be consistent.

4. NETTING-RELATED TERMS UNDER THE RRD AND THE EXISTING *ACQUIS*

4.1. The FMLC considers that netting-related terms are used inconsistently in the proposed RRD. Such inconsistency is unfortunate in view of the further inconsistency and lack of clarity surrounding similar terms in the existing *acquis*. In February 2013, the FMLC published a paper discussing legal uncertainties arising from the RRD (the

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12 The word "originators" is in brackets following the phrase "firms that repackage loans into tradable securities or other financial instruments" (Article 135(2) of Solvency II and Article 50a of the UCITS Directive).

13 The AIFMD makes reference to the equivalent definition in CRD II. Given that CRD II will soon cease to apply, this is rather unfortunate. However, to the extent that the definitions in CRD II and CRR are similar, this does provide for a certain level of coherence between the AIFMD and the CRR.

"**RRD Paper**"), a copy of which paper was sent to the Commission and to certain members of the European Parliament (including the Chairwoman of the ECON Committee, Sharon Bowles, and the *rapporteur* of the ECON Committee, Gunnar Hökmark).[14]

4.2. The key observations of the FMLC regarding netting-related terms in the RRD—which are set out in fuller detail in its RRD Paper—are as follows:[15]

(i) The RRD does not define "netting". Terms such as "netting agreement", "netting arrangement" and "close-out netting agreement" are used variously throughout the proposed text and it is not always easy to discern any justification for the inconsistency. Of these terms, only "netting arrangement" is the subject of further elaboration or description.[16] A number of examples of inconsistent or incoherent usage of netting-related terms in the RRD are set out in the RRD Paper.[17]

(ii) In particular, in the FMLC's view, the use of netting-related terms in the RRD without further clarification misses the opportunity to resolve a lack of clarity regarding the meaning of "netting agreement" in Directive 2001/24/EC on the reorganisation and winding-up of credit institutions (the "**CIWUD**") and the meaning of "close-out netting provisions" in Directive 2002/47/EC on financial collateral arrangements (the "**FCAD**").[18]

4.3. In the FMLC's view, such inconsistency and incoherence could be ameliorated by clarifying the meaning of netting-related terms—as they appear in the CIWUD and the FCAD—in the RRD. Consideration might then also be given to using the established terms "netting agreements" and "close-out netting provisions" in the RRD, to improve consistency with the existing *acquis*.

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14 A copy of the RRD paper—as well as other FMLC papers—is available online at http://www.fmlc.org/Pages/papers.aspx.

15 At pages 16 to 23 of the RRD Paper.

16 Article 68(2)(d) of the RRD.

17 At pages 17 to 19 of the RRD Paper.

18 *Ibid.*, at pages 19 to 22. See also the "Report on Protection for Bilateral Insolvency Set-Off and Netting Agreements under EC Law" (2004), published by the European Financial Markets Lawyers Group established by the European Central Bank, which identified similar uncertainties regarding the use of the word "*compensation*" in French legislative texts.

5. THE MEANING OF "ACTING IN CONCERT" IN THE ACQUISITIONS DIRECTIVE

5.1. The FMLC considers that there is inconsistency between the concept of persons "acting in concert", as it appears in the Acquisitions Directive and in Directive 2004/25/EC (the "**Takeover Directive**"). Furthermore, the FMLC considers that this incoherence may have led to inconsistent implementation of the Acquisitions Directive by individual Member States.

5.2. The Acquisitions Directive does not define the concept of persons "acting in concert". Broadly, it requires that specific provisions of Directive 2004/109/EC (the "**Transparency Directive**") regarding the aggregation of voting rights must be "taken into account" in the context of the provisions of the Acquisitions Directive where the concept of persons "acting in concert" appears.[19] The Transparency Directive does not use the phrase "acting in concert" but *inter alia* provides for a person's voting rights to be aggregated with those of a third party with whom that person has concluded an agreement requiring them both "to adopt, by a concerted exercise of the voting rights they hold, a lasting common policy towards the management" of the relevant entity.[20] It is not clear how those provisions are to be construed in the context of persons "acting in concert".[21]

5.3. A broad, non-binding definition contained in guidance published by the former three "Level-3 Committees" (the "**3L3 Guidelines**") states that persons are "acting in concert" when each person decides to exercise "rights linked to the shares he acquires in accordance with an explicit or implicit agreement... between them".[22] Taken

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19 See Articles 1(2)(a), 2(2)(a), 3(2), 4(2) and 5(2) of the Acquisitions Directive, which cross-refer to Articles 9, 10 and 12(4) and (5) of the Transparency Directive. No further guidance is given as to what is required by the phrase "taken into account".

20 Article 10(1)(a) of the Transparency Directive. Article 10(1) also covers other circumstances where voting rights may be attributed to a person.

21 The FMLC considers that the areas of legal uncertainty arising from this lack of clarity are beyond the scope of this paper, but expects to write to the Commission (and other relevant institutions) in this regard in the future.

22 The Committee of European Banking Supervisors (CEBS), The Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR): joint guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector as required by Directive 2007/44/EC (published in 2008), at Pt 1, Appendix I.. Cf. the Commission's report on the application of the Acquisitions Directive, published on 11 February 2013 (COM(2013) 64 final), which describes the 3L3 Guidelines definition as "very broad", at page 5.

literally, this definition could result in the holdings of persons being aggregated for the purposes of the Acquisitions Directive where they have, at any time, entered into any agreement to exercise their rights, even where there is no ongoing agreement regarding the management of the relevant entity. This may be inconsistent with the provisions of the Transparency Directive referred to above.

5.4. The concept of "persons acting in concert" is, however, defined in the Takeover Directive.[23] That definition clearly contemplates a takeover; however, it is conceptually inconsistent with the provisions of the Transparency Directive referred to by the Acquisitions Directive, which refer to an agreement to adopt a "lasting common policy towards the management" of the relevant entity. There is also no obvious reason why the definition in the 3L3 Guidelines (which refer to an "explicit or implicit agreement") should be inconsistent with that in the Takeover Directive (which refers to an agreement "either express or tacit, either oral or written").

5.5. In a report published in February 2013, the Commission observed that "the interpretation of this notion [of persons acting in concert] can be divergent to a limited extent" and also that "differences between the definitions" used in the relevant Directives "raise some concerns in the private sector".[24] The FMLC is concerned that the relevant provisions of the Acquisitions Directive may be implemented inconsistently by individual Member States and believes that further definition and clarification regarding the concept of "acting in concert" would be beneficial in addressing these concerns.[25] Accordingly, the FMLC welcomes the Commission's proposal to consider this issue as part of its review of the Takeover Directive and the Acquisitions Directive.

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23 Article 2(1)(d) of the Takeover Directive.

24 COM(2013) 64 final.

25 In the UK, the Acquisitions Directive has been implemented as Part XII (*Control over authorised persons*) of the Financial Services and Markets Act 2000 ("**FSMA**"). The implementation of those provisions in the UK (and related guidance published by the Financial Services Authority) was the subject of some debate (SUP 11 Annex 6G, as introduced by the Change of Control (Aggregation of Holdings) Instrument 2011 (FSA 2011/2). This is unfortunate given the fact that failure to give notice and to complete the necessary approval procedure in advance of a relevant acquisition of control is a criminal offence under section 191F of the FSMA.

6. RULES FOR DETERMINING THE LOCATION OF ASSETS IN THE INSOLVENCY REGULATION

6.1. The FMLC believes that the rules for determining the location of contractual claims for the purposes of Article 5 (*Third parties' rights in rem*) of the Insolvency Regulation are not consistent with other conflict of law rules in the existing *acquis*.[26] In this regard, the FMLC recently circulated an as-yet-unpublished paper discussing the treatment of rights *in rem* under Article 5 to various members of DG Justice.[27]

6.2. Broadly, the FMLC considers that there are key differences between the centre of main interests ("**COMI**") test, as determined by Article 3(1) in the Insolvency Regulation, and the rules which determine the governing law or jurisdiction under the primary Regulations on conflict of laws enacted by the EU. Under the Insolvency Regulation, once insolvency proceedings have been initiated, questions regarding the nature of a proprietary interest in a claim will be governed by the law of the place where the obligor has its COMI. Under Regulation 593/2008 ("**Rome I**"), prior to the onset of insolvency, questions regarding the proprietary effects of the creation, assignment (including transfers by way of security or other security rights) or subrogation of claims will be allocated to the law of the claim in which the relevant security or similar proprietary interest has been created. That law will be the applicable law of the instrument giving rise to the claim.[28]

6.3. It is further noted that the "habitual residence" test under Rome I—for determining the governing law of a contract (in the absence of party choice) and hence the contractual law of a claim—does not precisely track the COMI test under the Insolvency Regulation.[29] For corporate bodies, the place of "habitual residence" is the centre of main administration (not the COMI) and, in the case of contracts made by branches, agencies or other establishments, the place of the relevant branch *etc.* This may be considered unfortunate; however, it is not of as much concern to the FMLC as the way in which choice of law rules—under the Insolvency Regulation and Rome I,

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26 The Insolvency Regulation is proposed to be amended by the Amendment Regulation. However, references to Articles in this Section 6 are to the Insolvency Regulation as currently in force, unless otherwise stated.

27 Recipients of that paper included Ms Niovi Ringou, Acting Head of Unit 1: Civil Justice Policy. The FMLC hopes that the content of that paper might be considered in the light of the proposed Amendment Regulation.

28 Article 14 of Rome I. Conversely, the relationship between the assignor and assignee of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and the assignee.

29 *Ibid.*, Article 19.

respectively—potentially allocate questions regarding security rights to different legal systems depending on whether the corporate entity is subject to an insolvency proceeding or not.

7. LIABILITY OF CREDIT RATING AGENCIES UNDER CRA III

7.1. The FMLC considers that the liability regime for credit rating agencies ("**CRAs**") under CRA III is inconsistent with existing EU and national liability regimes. Furthermore, in the absence of further definition or guidance, CRA III is likely to be implemented inconsistently by individual Member States.

7.2. The final text of CRA III effectively introduces—under Article 35a—an EU-wide civil liability regime for negligence of CRAs. It does so by imposing a new cause of action on Member States' legal systems in a manner which is not consistent with existing EU liability regimes. Furthermore, it introduces concepts (such as "gross negligence") and principles that may not be in line with established national civil liability laws or rules of procedure and which may be implemented inconsistently by individual Member States.[30]

7.3. First, Article 35a is qualitatively different to the general position under equivalent EU liability regimes which require that obligations are enforced in accordance with Member States' civil liability regimes. The introduction of an EU-wide regime will thus likely lead to litigation regarding the nature and enforceability of rights conferred by Article 35a. Furthermore, the lack of convergence in Member States' legal systems is problematic in two senses: first, legal uncertainty will persist while each Member State decides on its interpretation of the various aspects of the regime; and secondly—in the absence of any provision in CRA III to address matters such as limitation periods, rules of evidence and quantification of loss—both procedure and substantive law and regulation are capable of producing materially different outcomes in otherwise identical circumstances.

7.4. Secondly, Article 35a(3) provides that a CRA may have an action brought against it if it has demonstrated "gross negligence". There is, however, uncertainty as to the meaning of "gross negligence". Article 35a(4) provides that that term and other terms

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[30] In November 2012, the FMLC sent a letter to the Chairwoman of the ECON Committee, Sharon Bowles, reiterating certain concerns regarding CRA III. Since the date of that letter, the final text of CRA III has been approved following a European Parliament vote and adopted by the Council. The final text of CRA III was published in the Official Journal on 31 May 2013 and will enter into force on 20 June 2013. The final text of CRA III addressed, to some extent, the concerns raised by the FMLC in relation to the Commission's original proposal.

which are referred to in [Article 35a] but are not defined, shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law.

A failure to define clearly the standard of negligence required under this Article is likely to lead to uncertainty that will persist until the term has been interpreted by the courts. The term may also be interpreted differently across Member States, which could lead to a divergence in regulatory standards across the EU.

8. LIABILITY OF DEPOSITARIES UNDER UCITS V

8.1. The FMLC considers that the civil liability standards for depositaries under UCITS V (as currently proposed) are inconsistent with the liability standards set out in the AIFMD. The FMLC also considers that certain provisions under UCITS V are inconsistent with civil procedures in some national regimes and give rise to internal incoherence within the proposed text itself.

8.2. Under Article 24(1) of UCITS V, a depositary may be liable for loss caused to the relevant UCITS or to a unit-holder of the UCITS.[31] A depositary is prohibited from contractually limiting its liability under Article 24(1) and any agreement which purports to limit such liability shall be "void".[32] By contrast, Article 21(13) of AIFMD allows a depositary to limit its liability by "written contract", subject to certain conditions.[33] Prohibiting depositaries from limiting their liability for the loss of financial instruments also runs contrary to the general tenor of Member States' existing legal regimes. The FMLC notes that, in the case of agreements between commercial parties, the right to limit liability is generally accepted in many jurisdictions (including under English law).

8.3. Furthermore, UCITS V provides that a depositary shall be released from its liability for loss of financial instruments only where that depositary can prove that it could not

[31] Under Article 24(1), EU Members States must ensure that the depositary shall be liable to the UCITS and to the unit-holders of the UCITS for the loss caused by the depositary or a third party to whom the custody of financial instruments has been delegated. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

[32] This is set out under Article 24(3) and 24(4) of UCITS V.

[33] See Article 102 of AIFMD Level 2, which sets out certain "objective reasons" a depositary must establish to limit its liability for the purposes of Article 21(13).

have avoided the loss despite taking all reasonable efforts to the contrary, thereby reversing the evidential burden of proof. This approach is inconsistent with the civil procedural rules observed in many Member States. There is, therefore, a risk that this reversed burden of proof under UCITS V could invite litigation which may lead to an inconsistent application of regulatory standards across the EU.[34]

8.4. The FMLC considers that Recital 23 of UCITS V and Article 24(5) of the Presidency Compromise Text give rise to internal incoherence.[35] Recital 23 states "redress against the depositary should not depend on the legal form that a UCITS fund takes". By contrast, Article 24(5) provides that liability may be invoked "depending on the legal nature of the relationship between the depositary, the management company and the unit holders". The FMLC has been given to understand that Article 24(5) reflects market practice where standard contractual arrangements are established between the manager of the UCITS and the depositary. This incoherence may result in inconsistent implementation by individual Member States.

9. ALGORITHMIC AND HIGH FREQUENCY TRADING

9.1. The FMLC has observed inconsistency between the proposed EP MAR and MiFID II, as those proposals would pertain to algorithmic and high frequency trading. Specifically, Article 10a of EP MAR would appear to overlap with Article 17 of MiFID II.

9.2. Article 17(2) of MiFID II obliges an investment firm to provide information on its algorithmic trading strategy to the relevant competent authority. Article 10a(3) of EP MAR covers the same subject matter—that Article sets out requirements as regards the updating of the type of information referred to in Article 17(2) of MiFID II.

9.3. If the proposed legislation is implemented, the result of the overlap described above is likely to be confusion and uncertainty for financial markets participants who may find it difficult to navigate the rules to which they are subject. As a general recommendation, the FMLC believes that coherence is increased where regulatory rules concerned with a particularly subject matter are consolidated as far as possible in the same legislation. Where that is not possible or desirable, the FMLC acknowledges

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34 The FMLC notes that, in earlier versions of CRA III, the burden of proof was reversed; in the final text of CRA, the burden of proof falls on the claimant. This development was broadly consistent with the recommendations of the FMLC letter of November 2012 regarding CRA III—see fn 30 above.

35 Presidency Text of 11 December 2012 (2012/0168(COD)).

that the inclusion of cross-references between the provisions of different pieces of legislation—*e.g.,* the reference in Article 10a of EP MAR to Article 17 of MiFID II—can help increase coherence.

9.4. Furthermore, Article 10a of EP MAR appears inconsistent with Article 17(3) of MiFID II. Article 17(3) requires quoting behaviour by a firm engaging in algorithmic trading—such as posting "firm quotes at competitive prices with the result of providing liquidity on a regular and ongoing basis—that could conflict with Article 10a(1) of EP MAR, which obliges trading venues to have in place rules to prevent "abusive order entry". A similar point can be made in relation to Article 10a of EP MAR and Article 51(1a) of MiFID II, as amended by the European Parliament.

9.5. The effect of this inconsistency—should the proposed legislation come into force—may be to render firms liable under market abuse legislation for actions taken pursuant to other European regulatory rules. It is important that conflicting requirements are not placed on market participants, as it could be difficult or impossible for them to comply with the applicable rules in such a situation. This point appears all the more significant where the consequences of breach may include the imposition of significant administrative measures and sanctions, as is provided for under market abuse legislation.

10. CLIENT PROTECTIONS UNDER MIFID

10.1. The FMLC considers that the resolution objectives and principles in the RRD are inconsistent with the "organisational requirements" outlined in MiFID. The FMLC has previously commented on this topic in its RRD Paper.[36] Such inconsistency could create confusion in the interpretation of key concepts in this area.

10.2. The FMLC considers that, where definitions of core concepts across legislation cannot be harmonised, cross-references can aid interpretation by providing the necessary consistency. The absence of relevant cross-references may result in inconsistent interpretations. In this regard, the FMLC takes the view that Article 26(2)(f) of the RRD—which provides that resolution authorisation must have regard to the need "to protect client funds and client assets"—should expressly refer to

[36] See Section 4 and fn 14 above.

certain relevant provisions within Article 13 of MiFID[37] to maintain legislative consistency.[38]

10.3. Furthermore, Article 29 of the RRD specifies the general principles that resolution authorities must take into account when applying resolution tools and exercising resolution powers. There would be merit in introducing a new principle into Article 29 of the RRD in contemplation of Article 13(7) of MiFID, pursuant to which a client's instruments should not be used on the institution's account except with the client's express consent.

10.4. The FMLC considers that instances of inconsistency or incoherence have arisen as a result of varying interpretations of Article 13(8) of MiFID in some Member States. In February 2013, the FMLC commented on this issue in a paper published in response to an FSA consultation paper on the client assets regime.[39]

10.5. Article 13(8) of MiFID provides that an investment firm must, among other things, make adequate arrangements to safeguard clients' rights when holding client assets, "except in the case of credit institutions". Some Member States have interpreted this Article as providing credit institutions with an absolute carve-out from the provisions concerning the protection of clients' funds, notwithstanding the wording in Article 18(1) of Directive (2006/73/EC), which implements MiFID and makes it clear that the carve-out only applies to deposits within the meaning of the Banking Consolidation Directive (2006/48/EC). The inconsistency between those Directives could have the consequence of making the position relating to the branches of such banks less clear in the context of a client monies regime. By way of example, where a bank incorporated in another Member State holds segregated client positions at a central counterparty, those positions will benefit from the default protections in Article 48 of Regulation (EU) 648/2012 ("**EMIR**") but it may not be clear that clients will benefit from the protections of the host state client monies rules implementing MiFID.

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37 Article 13 of MiFID sets out specific organisational requirements with which investment firms must comply.

38 Article 26(2)(f) of the RRD might be amended to provide that a resolution authority must have regard to the following objective: to safeguard clients' ownership rights in accordance with Articles 13(7) and (8) of MiFID and Article 16 of Directive 2006/73/EC.

39 The paper is entitled "Response to the FSA Consultation Paper entitled "Client assets regime: EMIR, multiple pools and the wider review" (CP12/22) Report" and can be accessed on the FMLC's website—see fn 14 above.

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