Exchange Tokens: Issues of Legal Uncertainty

October 2019

www.fmlc.org

Financial Markets Law Committee

This paper has been prepared by the FMLC Secretariat.[1]

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1. EXECUTIVE SUMMARY AND INTRODUCTION

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.

1.2. In July 2016, the FMLC published a paper examining how established cryptocurrencies may fit into the traditional categories of property and personal rights established at common law (the "**2016 Report**").[2] In that paper, the Committee expressed the view that virtual currencies which have achieved status as a medium of exchange within a significant user community have a good claim to be regarded as money. In December 2016, the FMLC published an addendum to the paper to highlight two decisions in the U.S. which took conflicting views on whether Bitcoin, one of the most commonly used forms of virtual currency, is to be regarded as money.[3]

1.3. In the years since the publication of those reports, tokens, as virtual currencies and other digital assets are now more commonly known, have proliferated in the market.[4] Two dominant narratives have emerged: first, that tokens represent the future of the financial services, transforming payment services, capital raising and several other market activities. Second, that owing to their decentralised nature and the anonymity they bestow upon users, tokens can facilitate crime, money laundering, tax evasion and terrorism financing. As a result, regulatory authorities and legislative bodies in several jurisdictions have attempted to grapple with the issue of whether and how they might be regulated—beginning with the question of their characterisation. A number of regulatory authorities have agreed on three broad types—exchange tokens, security tokens and utility tokens (more on this in Section 2, below). This paper will focus on exchange tokens.[5]

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2 FMLC, *Report: Virtual Currencies*, (18 July 2016), available at: http://fmlc.org/report-virtual-currencies-18-july-2016/.

3 FMLC, *Addendum: Virtual Currencies*, (16 December 2016), available at: http://fmlc.org/addendum-virtual-currencies-16-december-2016/. The context in which the question arises for consideration is critical to the interpretative outcome and, in both cases, the context was the term "money" within a criminal statute.

4 Virtual currencies are variously referred to as cryptocurrencies, cryptoassets or virtual assets. Certain bodies, including the Financial Conduct Authority, HM Government's Cryptoassets Taskforce and the European Securities and Markets Authority, have adopted the term "cryptoasset" in their publications. The E.U. Financial Action Task Force and some E.U. legislative bodies have opted for "virtual currency". This Report, much like the FMLC's 2016 Report, uses the term "virtual currency".

5 The Committee has analysed the regulation of security tokens in a separate paper. See: FMLC, *Report: Initial Coin Offerings*, (30 July 2019), available at: http://fmlc.org/report-initial-coin-offerings-30-july-2019/.

1.4. In this paper, the FMLC explores the ways in which regulators and legislators have tried to get a grip on the many varieties of virtual currencies and in particular those which have arguably come to function as money for legal purposes. Section 2 provides a brief summary of regulatory and non-legislative developments with regards to virtual currencies. Section 3 explores the possible characterisation of exchange tokens as property, money and/or e-money. Sections 4, 5 and 6 analyse the approach to virtual currencies taken by the E.U. in its anti-money laundering regime, the uncertainty arising from such approach and the impact of the uncertainty. Section 7 offers some mitigants.

2. BACKGROUND—THE CATEGORIES AND FEATURES OF VIRTUAL CURRENCIES

2.1. Given the variety of tokens available, there is no single widely-agreed definition, nor is there one for virtual currencies (insofar as that may be a narrower concept). Broadly, a virtual currency is a cryptographically-secured, digital representation of value that uses some type of distributed ledger technology ("**DLT**") and that can be transferred, stored or traded electronically.[6] In determining whether and how to regulate assets of this kind, authorities have focused instead on their characteristics and functions. This has resulted in the sorting of tokens into broad categories. In the U.K., the Cryptoassets Taskforce, comprising representatives from HM Treasury, the Financial Conduct Authority ("**FCA**") and the Bank of England, has adopted the following categories: (1) exchange tokens, which are used as a means of exchange or for investment; (2) security tokens, which provide rights such as ownership, repayment of a specific sum of money, or entitlement to a share in future profits; and (3) utility tokens, which can be redeemed for access to a specific product or service, typically provided using a DLT platform.[7] At the beginning of this year, the European Securities and Markets Authority ("**ESMA**") issued Advice to the European Commission, Council and Parliament in which it proposed a similar taxonomy, labelling tokens payment-type, investment-type and utility-type cryptoassets.[8]

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6 This is the definition adopted by HM Government's Cryptoassets Taskforce: HM Government, *Policy paper: Cryptoassets Taskforce: Final Report*, (October 2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752070/cryptoassets_taskforce_final_report_final_web.pdf, paragraph 2.10.

7 *Ibid*, paragraph 2.11.

8 ESMA, *Advice: Initial Coin Offerings and Crypto-Assets*, (9 January 2019), available at: https://www.esma.europa.eu/press-news/esma-news/crypto-assets-need-common-eu-wide-approach-ensure-investor-protection, paragraph 80.

2.2. Security and utility tokens are created, most often, for crowdfunding purposes by means of Initial Coin Offerings ("**ICOs**"). Market participants hold and trade such virtual currencies for investment purposes. Exchange tokens, which may be used primarily as a means of exchange rather than investment, include some of the best-known varieties of virtual currencies, including Bitcoin and Ethereum.[9] Some exchange-type virtual currencies can be held and used only in the context of a computer game, while others are a straightforward electronic reflection of a "real world"—sovereign fiat—currency, like U.S. dollars. Some virtual currencies are pegged to a sovereign fiat currency; others can be bought and sold using sovereign fiat currency on speciality exchanges—this includes Bitcoin, the value of which is determined by demand and supply.

2.3. The FCA stated in January 2019 that exchange tokens will usually fall outside the regulatory perimeter.[10] In the E.U.—and consequentially in the U.K.—one of the first legislative frameworks to regulate the use of exchange-type virtual currencies is Directive (EU) 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "**Fifth Money Laundering Directive**" or "**5MLD**").[11] As explored below, 5MLD exemplifies the difficulty faced by legislative and regulatory authorities in defining virtual currencies so as to capture their varied characteristics and functions.

3. EXCHANGE TOKENS AND THE COMMON LAW

Virtual currencies as property

3.1. The 2016 Report analysed in depth the manner in which the common law might apply to virtual currencies. It explored the legal test for property—whether the thing can acquire real economic value and whether it is susceptible to transfer and trade—and concluded that there is a good argument for believing that well-engineered virtual currencies which have been convincingly shown to have both economic value and transferability among market participants will be categorised as a type of property at common law. The 2016 Report further surveyed the categories of personal property in English law, beginning with the subdivisions of property either "in possession" or "in

9 Section 2 of the FMLC's 2016 Report, mentioned at n. 2 above, provides an overview of the types and characteristics of virtual currencies.

10 FCA, *Consultation Paper (CP 19/3): Guidance on Cryptoassets*, (January 2019), available at: https://www.fca.org.uk/publication/consultation/cp19-03.pdf, paragraph 3.38.

11 5MLD will need to be transposed into U.K. law for it to apply in the U.K. following U.K.'s withdrawal from the E.U.

action", hence: "*choses* in possession" and "*choses* in action". A chose in action is a property right that can only be obtained or enforced through legal action. A chose in possession, in contrast, is a thing of which physical possession can be taken. Categorising virtual currencies as either raises some difficult questions as they are designed to be passed around like the banknotes and coins but are intangible. The 2016 Report noted that it might be helpful to understand certain virtual currencies as a new hybrid: "virtual choses in possession", which are intangible property with the essential characteristics of choses in possession. The 2016 Report further surveyed the questions of possession, ownership and negotiability in respect of virtual currencies, before considering whether virtual currencies might be negotiable property like money. The debate as to whether virtual currencies may be considered money is examined in some depth below.

Virtual currencies as money

3.2. In economic literature, money is traditionally associated with three functions: it must be (i) a store of value, (ii) a medium of exchange, and (iii) a unit of account.[12] In its consideration of virtual currencies, the Cryptoassets Taskforce, building on arguments made by the Bank of England and the G20 Finance Ministers, concluded that while virtual currencies can be used as a means of exchange, they are not considered to be a currency or money.[13] The primary argument is that virtual currencies have been found to be too volatile to be a good store of value and they are not, therefore, widely-accepted as means of exchange. This conclusion, although at variance with legal analyses, including the 2016 Report, has formed the basis of the regulatory approach to virtual currencies in the U.K., including, as mentioned above, in the FCA's Guidance on Cryptoassets and in HM Treasury's consultation on the transposition of 5MLD.[14] This regulatory approach, which justifies excluding existing money laundering controls, is bolstered by media reports which suggest that the usage of virtual currencies for payments rather than investment might be declining. The FMLC notes, however, that recent news might indicate a shift in this trend.

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12 Smith, A., *An Inquiry into the Nature and Causes of the Wealth of Nations*, (1776).

13 *Cryptoassets Taskforce Policy Paper* (*supra*, n. 6), paragraph 2.13.

14 HM Treasury, *Transposition of the Fifth Money Laundering Directive: Consultation*, (April 2019), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795670/20190415_Consultation_on_the_Transposition_of_5MLD__web.pdf.

3.3. In June 2019, Facebook announced that it will launch a virtual currency called Libra.[15] Regulatory authorities in several jurisdictions have called for close scrutiny of the project. The FCA has expressed concerns about the size and scale of the project and has stated that it will monitor Facebook's proposal together with the Bank of England and HM Treasury.[16] The European Commission has similarly expressed concerns about the potential concentration of personal and financial data.[17]

3.4. Any regulatory approach which attempts to bring within its scope all types of virtual currencies may need to move away from the purely economic analysis of money. The FMLC's 2016 Report considered a legal understanding of money which focuses on the function of money as the currency of commerce: Charles Proctor, in *Mann on the Legal Aspect of Money*, refers to a theory of money in which the negotiability of coins and notes stems from their ability to "pass in currency", i.e. commonly and continuously to be accepted as payment in exchange for articles of commerce.[18] Whether units of a virtual currency can achieve or have achieved the status of being "passed in currency" is a mixed question of fact and law. It is beyond the scope of this paper to analyse, or speculate on, whether individual virtual currencies might qualify or not. It might be relevant to note, however, that the current regulatory regime would exclude virtual currencies like Libra—which will not be issued in the course of an ICO but is intended to function as money.[19]

Virtual currencies as electronic money

3.5. In the 2016 Report, the FMLC had considered the extent to which virtual currencies could be classified as electronic money ("**e-money**"). E-money has been defined in Article 2(2) of Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (the "**E-Money Directive**") as

[15] Libra Association, *Libra White Paper* (18 June 2019), available at: https://libra.org/en-US/white-paper/.

[16] FCA, *Regulating Financial Innovation – Going Behind The Scenes*, (2 July 2019), available at: https://www.fca.org.uk/news/speeches/regulating-financial-innovation-going-behind-scenes.

[17] Helmore, *"Facebook's Libra cryptocurrency faces questions from international regulators"*, *The Guardian* (25 June 2019), available at: https://www.theguardian.com/technology/2019/jun/25/facebook-libra-cryptocurrency-regulation.

[18] Proctor, *Mann on the Legal Aspect of Money*, 7th Edition, (Oxford, 2012). See also FMLC's 2016 Report, *supra*, n. 2, section 7.

[19] The White Paper referenced above at n. 15, states: "The world truly needs a reliable digital currency and infrastructure that together can deliver on the promise of 'the internet of money'." and that "The mission for Libra is a simple global currency and financial infrastructure that empowers billions of people."

electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer.

3.6. E-money includes pre-paid cards (like oyster cards), pre-paid accounts online (as Paypal can be) and on electronic devices (such as mobile telephones). The 2016 Report observed that individuals generally consider bank transfers to be dealings in "money"—rather than in claims on the bank account provider(s)—and will also strongly think of themselves as possessing and owning that money when funds are credited, even though there may be, on a strictly traditional legal analysis, no choses in possession or negotiable chattels changing hands. This view lends support to the functional definition of money: virtual currencies which are utilised as and accepted to be currency for the purpose of commercial activities should, in their legal aspect, be viewed as money. It also lends support to the view that some virtual currencies—and, in particular, those which are pegged to a sovereign fiat currency—may be considered to be e-money. In the U.K., the FCA has expanded its taxonomy of cryptoassets to create a new category—that of "E-money tokens"—which it defines as any token which reaches the definition of e-money. Such tokens are subject to the E-Money Regulations 2011 and firms must ensure they have the correct permissions and follow the relevant rules and regulations.[20]

4. THE ANTI-MONEY LAUNDERING REGIME

4.1. Proposals for the Fifth Money Laundering Directive emerged in the aftermath of terrorist attacks across the E.U. and the Panama Papers leak which revealed the use of shell corporations for illegal purposes such as fraud, tax evasion and money laundering.[21] The E.U.'s 2016 Action Plan on Terrorist Financing noted that

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20 FCA, *Policy Statement (PS19/22): Guidance on Cryptoassets—Feedback and Final Guidance to CP 19/3*, (July 2019), available at: https://www.fca.org.uk/publication/policy/ps19-22.pdf, p. 14. It is interesting that, before the FCA repositioned its taxonomy, it considered e-money tokens to be a subset of utility tokens and not exchange tokens.

21 European Commission, *Communication from the Commission to the European Parliament and the Council towards better implementation of the EU's anti-money laundering and countering the financing of terrorism framework*, (24 July 2019), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0360&qid=1566394831674&from=EN, p. 2.

> [n]ew financial tools such as virtual currencies create new challenges in terms of combatting terrorist financing. Highly versatile criminals are quick to switch to new channels if existing ones become too risky. For innovative financial tools, it is critical to be able to manage the risks relating to their anonymity, such as for virtual currencies.[22]

4.2. The European Commission's intention to update the bloc's anti-money laundering regime to bring within its scope challenges posed by technological innovation in the financial services sector manifested in the form of new anti-money laundering requirements for cryptoasset exchanges and custodian wallet providers. For the purposes of these obligations, 5MLD provides a definition of virtual currencies which is inspired by non-legislative statements issued by regulatory authorities in the E.U. but which further defines virtual currencies by reference to all the things they cannot be. Article 1(2)(d) of 5MLD provides that

> "virtual currencies" means a digital representation of value that is *not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money*, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically[.] (Emphasis added.)

Virtual currencies must therefore be accepted as a means of exchange and be capable of being transferred, stored and traded electronically in order to fall within that definition.

4.3. In the recitals to 5MLD—which, although non-binding, offer insight into the European legislative authorities' reasoning—virtual currencies are distinguished from electronic money (a logical step, given the evolution of e-money regulation described above).[23] They are further distinguished from "funds", which are legally defined in Directive (EU) 2015/2366 on payment services in the internal market (the "**Second Payment Services Directive**" or "**PSD2**") as banknotes and coins, scriptural money or electronic money. Nevertheless, recital 10 of 5MLD continues to say that

> [a]lthough virtual currencies *can frequently be used as a means of payment*, they could also be used for other purposes and find broader applications such as

[22] European Commission, *Communication from the Commission to the European Parliament and the Council on an Action Plan for Strengthening the Fight against Terrorist Financing,* (2 February 2016), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1455113825366&uri=CELEX:52016DC0050, p. 3.

[23] Recital 10 of 5MLD.

> means of exchange, investment, store-of-value products or use in online casinos. The objective of this Directive is to cover *all the potential uses of virtual currencies*. (Emphasis added.)

4.4. While the reasoning behind the limited definition of virtual currencies is understandable, given both the proliferation in the types of virtual currencies as well as the complex nature of financial interaction prevalent in the markets, the exclusion of any exchange token which arguably has attained the "legal status of currency or money" is problematic and may ultimately exclude the very type of virtual currencies which might be used for money laundering. The exclusion of virtual currencies "not necessarily attached" to sovereign fiat currencies may also prove problematic.

5. ISSUES OF LEGAL UNCERTAINTY

5.1. As explained above, virtual currencies are defined in 5MLD as "a digital representation of value" which (1) is not issued or guaranteed by a central bank or a public authority; (2) is not necessarily attached to a legally established currency; and (3) does not possess a legal status of currency or money. The definition of virtual currencies in 5MLD specifically excludes any exchange token which arguably has attained the legal status of currency or money. As seen from publications and statements made by the European Commission, the intention behind the definition is that 5MLD is to draw a distinction between virtual currencies and sovereign fiat currencies—including those held electronically in bank accounts, etc. A further interpretation which might be made from the use of the phrase "legal status" of money is that the legislators wished to exclude money or currency which might be accepted as legal tender in the jurisdiction. Such reasoning is self-defeating to some extent because items such as cheques and debit cards are accepted as forms of money even though they do not have the status of legal tender. Further, as seen in Section 3 above, the ability of virtual currencies to attain legal status in, say, a common law jurisdiction, depends on the practical question whether they "pass in currency" among users, rather than recognition by the state or regulators.

5.2. The result instead is that virtual currencies which may be used in lieu of currency or money for commercial purposes—and not for investment purposes—are excluded from the scope of the regulation. The type of virtual currencies captured by the 5MLD definition are in fact security or utility tokens, created by a company raising funds by means of an ICO and held by investors, in return for their capital contribution, in the expectation that the endeavour will prove successful and the value of the coins will appreciate.

6. IMPACT

6.1. The limited definition of "virtual currencies" in 5MLD could give rise to a number of unintended and unhelpful consequences. These include the direct consequences of under-regulation and confusion as to the categorisation of virtual currencies and how legislative definitions apply thereof, as well as the indirect consequences of increased criminal activity and attempts by entities to remain outside the regulatory perimeter.

6.2. As to direct consequences, some might say that excluding virtual currencies which have attained the legal status of money from this definition should not raise acute concern because they will be regulated as money. This, however, overlooks the fact that the 5MLD's controls for traditional finance do not apply to cryptoasset exchanges, custodian wallet providers and other actors on a traditional fiat money analysis.

6.3. The principle aim of 5MLD, as demonstrated above, was to limit the use of money for the purposes of money-laundering and terrorist financing. The result of the exclusions in the definition of "virtual currencies" is that it leaves loopholes by the means of which persons or entities might be able to engage in those activities. A virtual currency like Libra, for example, which will be "pegged" to a basket of sovereign fiat currencies and, if accepted as a method of payment by a number of businesses will fall outside the scope of 5MLD because Libra's stated purpose is to be the "internet of money", rather than to act as a representation or acknowledgment of investment.[24] A similar situation arises in the context of a virtual currency like Bitcoin, which is not attached to a sovereign fiat currency but which nonetheless had begun to be accepted as a method of payment by retailers and arguably has attained the legal status of money. Regulators have noted the decreasing popularity and increasing volatility of Bitcoin in recent years but, not only does it remain possible these trends might reverse, earlier this year hackers in the U.S. ignored the trend and demanded ransom in Bitcoin.[25] The exclusion of Bitcoin from the scope of 5MLD would be a very surprising policy decision. In addition, were key virtual currencies to remain outside the scope of 5MLD, the attempt to regulate under

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[24] *Supra*, n. 19 and paragraph 5.2.

[25] Emem, M., *NSA's Terrifying Bitcoin Ransomware Leaves Baltimore Begging for Help*, *CNN*, (28 May 2019), available at: https://www.ccn.com/nsa-bitcoin-ransomware-baltimore.

5MLD custodian wallet providers or providers of exchange services between virtual and fiat currencies might prove futile.[26]

6.4. The definition in 5MLD seems not to acknowledge analysis carried out by European and British regulators which have set out well-considered taxonomies of virtual currencies. Although there remain differences in the terminology adopted by different organisations, as mentioned above, and there are ongoing efforts to expand the taxonomy, such efforts to categorise virtual currencies make it easier to visualise the manner in which they might fit into the established regulatory and legislative frameworks. It is likely that the definition in 5MLD, which does not depend on any taxonomy—perhaps to avoid uncertainties posed by their fluctuating nature—will increase confusion as market participants attempt to map the various types of tokens into the definition. Terms such as "legally established currency" have no legislative or widely-accepted meaning, while, as explored above, the "legal status of currency" can be determined using parameters quite different to those used to determine what might be considered money by economists.

6.5. Finally, the definitional confusion might enable certain entities and virtual currencies which should fall within the anti-money laundering or regulatory perimeters to be excluded, defeating the aim of 5MLD.

7. MITIGANTS AND CONCLUSION

7.1. In April 2019, HM Treasury published a consultation on the transposition of 5MLD in the U.K.[27] The FMLC sent a response recommending a narrower definition of virtual currencies—by reference to what they cannot be—which may better reflect the presumed legislative intention to capture paradigmatic and well-established exchange tokens such as Bitcoin.[28] The FMLC's proposed definition of virtual currencies is:

> "virtual currencies" means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status

26 Article 1(29) of 5MLD which amends Article 47(1) of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing requires E.U. Member States to ensure that providers of exchange services between virtual currencies and fiat currencies, and custodian wallet providers, are registered.

27 *Supra*, n. 14.

28 FMLC, *Transposition of the Fifth Money Laundering Directive: Consultation* (30 July 2019), available at: http://fmlc.org/wp-content/uploads/2019/07/5D404C2C.pdf.

> of **sovereign fiat** currency ~~or money~~, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically[.][29]

The Committee noted, however, that even its amended definition retains a great deal of overlap and redundancy between the three exceptions in the definition.

7.2. Virtual currencies have always meant a number of different things used in several different ways. This was the challenge which regulatory authorities attempted to mitigate by categorising virtual currencies on the basis of their characteristics and functions. Such categorisation, it was hoped, would guide legislative and regulatory authorities in their assessment of which virtual currencies—and which activities in virtual currencies—were already within the regulatory perimeter and which required a legislative response. Nonetheless, the definition of virtual currencies in 5MLD does not utilise these categories and provides instead a wide definition of exceptions. To some extent, this might be traced to the historical reluctance to concede the ability of virtual currencies to function as money, perhaps for market protection purposes and despite the creation of the category of exchange tokens. It might, however, be useful to use the non-legislative definitions of the types of virtual currencies in any attempt to legislate virtual currencies so as to provide market and legal certainty.

7.3. In the context of 5MLD, which will come into effect in January 2020, it might be useful to receive guidance on what a "legally established currency" might be or indeed how authorities in the E.U. and U.K. perceive a currency might attain the "legal status" of money.

29 A fiat currency is, by translation ("let it be"), a currency which is accepted to have certain value in terms of its purchasing power which is unrelated to the material from which it is made. In theory at least, or in a limited context, a non-sovereign currency could achieve this status, and so "sovereign" has been used as an additional qualifier. The FMLC has taken the view in proposing this definition that the euro is a sovereign currency but understands that there may be a lack of certainty in this regard. In that context, a more precise, albeit cumbersome definition, might read "*does not possess a legal status of fiat currency issued by a government or inter-governmentally*".

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