



## Financial Markets Law Committee (“FMLC”)

### Note for Record of Committee Meeting

**Date:** 12 December 2019

**Time:** 4:30PM-6:30PM

**Location:** Bank of England, Threadneedle Street, London EC2R 8AH

**Copies to:** FMLC Members, Joanna Perkins

#### In attendance

Lord Thomas (Chairman)

David Greenwald (Deputy Chairman)

Sir William Blair

Paul Double

Simon Firth

Kate Gibbons

Carolyn Jackson

Mark Kalderon

Peter King

Sir Robin Knowles

Rob Price

Jan Putnis

Barnabas Reynolds

Sanjev Warna-kula-suriya

Joanna Perkins (Chief Executive Officer)

Virgilio Diniz (Project Manager)

Venessa Parekh (Research Manager)

#### Chairman’s Comments

The Chairman welcomed Rob Price who will be representing the Bank of England on the FMLC.

He reminded Members that the annual Festive Drinks Reception, hosted at the Bank of England, would follow this Committee meeting.

#### Chief Executive’s Comments

The Chief Executive informed Members that the FMLC will host the Quadrilateral Conference—an annual arrangement with the FMLG (NY Federal Reserve), EFMLG (ECB) and FLB (Bank of Japan) to meet annually to discuss topics of mutual interest—next year. The Conference will be held in London from Tuesday 9 June to Thursday 11 June 2020. She

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encouraged Members to attend and said that the Secretariat will be in touch to discuss the agenda.

## **ACTIVE ISSUES**

### **A Cryptoassets/Virtual Currencies Taxonomy**

The Chief Executive said that the last Quadrilateral Conference had thrown light on the diversity of terms adopted around the world to describe and categorise digital assets. Many jurisdictions have attempted to categorise cryptoassets as a step in determining whether and how to regulate them. While the Financial Conduct Authority (“FCA”) and European Securities and Markets Authority (“ESMA”) are broadly aligned (in categorisation if not in vocabulary), the U.S. and Asian jurisdictions have developed their own methods of categorising digital assets. The boundaries of these proposed taxonomies sometimes overlap but often the points of definitional reference are quite dispersed. In addition, there are words and terms which have come into existence over the past few years the meanings of which have evolved: virtual currency, cryptocurrency, cryptoassets, etc. Finally, there are terms—like stablecoin—the general meanings of which are more-or-less agreed across jurisdictions but they interact with the various taxonomies in different ways.

The Secretariat proposed a project wherein it would map such terms on a diagram to discern when and how they overlap. It would also try to pinpoint where various cryptoassets—like Bitcoin, Libra, etc.—fall.

Members agreed that this project would be very useful.

### **Issue 233: Revised Bank Recovery and Resolution Directive (“BRRD2”)**

Members noted the publication of letters to the [European Commission](#) and [HM Treasury](#) on issues of legal uncertainty regarding the newly expanded scope of Article 59 of BRRD2 on 20 November 2019.

### **Issue 231: Exchange Tokens and Anti-Money Laundering**

Members noted the publication of the [report](#) on exchange tokens and the new anti-money laundering regime on 23 October 2019.

### **Issue 230: Securitisation Regulation—Due Diligence Requirements (Chair: James Perry)**

A letter to the European Commission about the due diligence requirements in Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the “**Securitisation Regulation**”) was sent and published on the FMLC website on 5 November 2019.

The Working Group also proposed to draft a second, separate letter to the Financial Conduct Authority and HM Treasury, building on the first letter, since the on-shoring of the Securitisation Regulation via statutory instrument would raise separate issues. The Secretariat has drafted a letter and sent it to the Working Group for comment.

A Member noted that some of the issues which concerned the FMLC Working Group might be resolved by the impending publication of an update by a Working Group comprising representatives of the European Banking Authorities and ESMA. The announcement was expected in the New Year. He advised the Secretariat to hold off on the second letter until the updated guidance is published.

### **Issue 229: Financial Services (Implementation of Legislation) Bill**

Members noted the publication of a [letter](#) to HM Treasury on the Financial Services (Implementation of Legislation) Bill on 23 October 2019.

### **Issue 227: Brexit—Statutory Instruments**

Members noted the publication of a [paper](#) setting out issues of legal uncertainty arising in respect of the statutory instrument onshoring the Benchmarks Regulation on 23 October 2019.

### **Issue 208: Brexit—Third Country Regimes**

Members noted the publication of an [addendum](#) to the July 2017 FMLC paper on equivalence regimes on 23 October 2019.

## **Issue 203: Brexit—Governing Law and Jurisdiction Clauses (Chair: Professor Trevor Hartley)**

Members noted the publication of a [paper](#) analysing the application of the Hague Convention on Choice of Court Agreements in the U.K. after Brexit on 23 October 2019.

## **Issue 177: Benchmark Reform**

On 11 October 2019, the European Commission launched a Consultation on a review of the E.U. Benchmarks Regulation. The Commission is mandated by Article 54 of the Benchmarks Regulation to conduct a review of certain provisions of the Regulation and to submit a report to the European Parliament and to the Council.

The Secretariat had drafted a response to the Consultation. Members approved its publication.

Members had a discussion on the imminent discontinuation of the London Interbank Overnight Rate (“**LIBOR**”) and the transition to successor rates. A Member noted the difficulty being faced in the U.S. in the course of the transition from USD LIBOR, which is unsecured, to the Secured Overnight Financing Rate (“**SOFR**”), which is secured, complicating a direct substitution in contracts. He asked whether the FMLC would undertake projects related to the transition from LIBOR. The Chief Executive noted that the FMLC had published extensively in the past on the topics of benchmarks reform and transition and made recommendations. Nevertheless, LIBOR remained on the Secretariat’s radar. Many of the issues being faced by the market seemed to be of commercial rather than legal complexity. It was agreed that the Secretariat would republish the FMLC’s previous work on benchmarks reform and transition with an updated summary of the Committee’s views on the risks and its recommendations.

## **Issue 154 Market Abuse Directive Review**

Members noted that a [response](#) to ESMA’s review of the Market Abuse Regulation was submitted on 29 November 2019.

## **SCOPING AND RADAR**

## Definition of “A Contract of Insurance”

At the last meeting of the Insurance Scoping Forum, a Forum member raised the historical and enduring uncertainties around the definition of the phrase “a contract of insurance”. The relevant statutory definition of a "contract of insurance" in English law is the definition contained in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the “RAO”).

'contract of insurance' means *any contract of insurance* which is a contract of long-term insurance or a contract of general insurance , and includes—

(a) fidelity bonds, performance bonds, administration bonds, bail bonds, customs bonds or similar contracts of guarantee, where these are—

(i) effected or carried out by a person not carrying on a banking business;

(ii) not effected merely incidentally to some other business carried on by the person

effecting them; and

(iii) effected in return for the payment of one or more premiums;

... (emphasis added)

The effect of the italicised words is that for a contract to fall within this definition, it must be a contract of insurance under some other definition (i.e. a case law definition) and also fall within the definition of "contract of long-term insurance" or "contract of general insurance" set out in the Schedule 1 to the Regulated Activities Order. The FCA's own guidance contains a reference to the fact that not all contracts that are treated as contracts of insurance for regulatory purposes will meet the common law definition of contract of insurance (see: PERG 2.6.5). The Forum considered that further analysis on an appropriate definition of the phrase could be submitted to HM Government in the course of its Financial Services Future Regulatory Framework Review.

Members agreed that there was a definitional complexity but observed that this existed because it was incredibly difficult to reach consensus on a definition which would describe all relevant activities. A review of the definition might further complicate matters by bringing contracts such as credit derivative contracts into scope.

A Member stated that the definition in the RAO contains an extension “or similar contracts of guarantee” (underlined above) which is broad and difficult to interpret. While reviewing the

Common Law definition of a “contract of insurance” might be too large a project, simply examining the extended definition in the RAO might be within the remit of the FMLC.

Mr King informed Members that the aim of the Financial Services Future Regulatory Framework Review was to examine the interaction of the U.K. regulators. It was not to be treated as a launching point for broader projects.

### **Solvency II 2020 Review**

Another topic of discussion at the Insurance Scoping Forum was the impending review of the Solvency II Directive. The European Insurance and Occupational Pensions Authority (“EIOPA”) has published a [consultation paper](#) setting out technical advice for the review of Solvency II. The call for advice comprises three broad parts. Firstly, the review of the long term guarantee measures. Secondly, the potential introduction of new regulatory tools in the Solvency II Directive, notably on macro-prudential issues, recovery and resolution, and insurance guarantee schemes. Thirdly, revisions to the existing Solvency II framework including in relation to freedom of services and establishment; reporting and disclosure; and the solvency capital requirement.

Forum members have sent in to the Secretariat the legal uncertainties which arise from EIOPA’s Consultation and/or proposed approach. Members resolved the Secretariat would draft a response based on those contributions.

### **Debt Restructuring and International Treaties**

At the March meeting of the Sovereign Debt Scoping Forum, a Forum member mentioned a complexity which had been brought to his attention in relation to the interaction between dispute resolution mechanisms in international treaties and the framework established in the E.U. for sovereign debt restructurings. The E.U.-Singapore Investor Protection Agreement (“EUSIPA”), approved by the European Parliament in February 2019, treats government bonds as “covered investments” (in contrast to the Comprehensive Economic and Trade Agreement (“CETA”) between Canada and the E.U. which only includes debt issued by private companies). Attendees discussed whether treaties should explicitly exempt government debt from such restructuring clauses. They agreed that the inclusion of secondary market investors seemed out of place and created unnecessary complications. The Forum suggested that the FMLC might recommend

that international treaties should follow the CETA approach and exclude government debt from dispute settlement.

The Chief Executive noted that this issue arises in the context of a much larger question about the framework for sovereign debt restructurings. At the turn of the century, the International Monetary Fund had published a recommendation for an international framework for sovereign debt restructuring, aimed at providing stability and certainty. It was difficult to build support for the framework which had several knock-on effects. The Chief Executive would suggest that this might be an appropriate time to assess why the IMF's recommendation did not gain traction, whether it could be resuscitated and whether the U.K. might unilaterally take action in this area through statute on the restructuring of English law-governed sovereign debt. The Forum's issue, above, would be a part of the analysis.

A Member noted that the FMLC's work on sovereign debt issues and its research papers on *pari passu* clauses had been highly praised in the past. Members agreed that the Secretariat should carry out some scoping work on this topic.

### **The Role of Trustees in Capital Markets Transactions**

A guest speaker at the Securities Markets Scoping Forum had raised the topic of difficulties faced by investors in relation to trustees in capital markets transactions. He had explained that in respect of a capital market instrument, where there is a trustee involved, a requisite number of aligned investors are necessary to instruct the trustee to enforce the rights given via the structure of the trust. Often, this process is very slow and hampered by statutory requirements on trustees, which are perceived to have little utility in the context of capital markets transactions. For example, the trustee is not required to take action until it is indemnified to satisfaction, which serves a purpose in a commercial context. Further, in a capital markets context, this requirement is accompanied by section 750 of the Companies Act 2006, which says that nobody may have any indemnity for any type of breach of their duty of care or diligence as a trustee of a debenture. Any such indemnity would render the duty void. Legal uncertainty therefore arises because the law's application is far from clear and prevents investors with legitimate rights from enforcing them. The guest speaker had suggested that the FMLC send a letter identifying the inefficiencies in the law.

A Member commented that this issue had been considered in the past by the FMLC but it had been difficult to make recommendations. Mr Warna-kula-suriya, who had Chaired the meeting of the Securities Markets Scoping Forum where this had been raised, recounted the discussion in

the Forum meeting. He stated that the Forum too had not been convinced that this was an issue of legal uncertainty with a legislative solution. This seemed to be a question of commercial complexity which might be mitigated by a contractual solution. Industry bodies might be better placed to consider such a tweak and raise awareness of it in the market.

The Committee resolved that this was not an issue for the FMLC.

### **Law Commission Call for Evidence on Intermediated Securities**

At the last meeting of the Securities Markets Scoping Forum, a guest speaker presented a timeline of action taken to regulate intermediated securities over past two decades. The latest development was that the Law Commission had issued a [Call for Evidence](#) on the topic (the “**Consultation**”). The speaker noted, however, that the Consultation does not address conflict of laws issues and focuses largely on the shareholders’ rights and governance aspects of intermediation.

Attendees at the meeting discussed work which the FMLC might consider in regards the conflicts of laws issues in respect of intermediated securities. Although the Law Commission’s Consultation does not deal with conflicts of laws questions, a research paper could usefully examine all aspects of the financial markets infrastructure around securities. Attendees agreed that it might be useful to refer the Law Commission to the FMLC’s work in 2003 on custody issues, as that one issue could be separated from the rest of the Consultation. Forum members also agreed that it might be useful to highlight to the Law Commission that there remained issues outside the scope of the current call for evidence and urge it to broaden the scope in the next stage of its project. Members agreed that such a letter be sent to the Law Commission, copying HM Treasury.

In order to implement the Committee’s recommendation, the Legal Analyst reviewed the Consultation and the FMLC’s 2004 work. She observed that the paper is already mentioned in several places in the Law Commission’s Call for Evidence. Given that the Law Commission is aware of the paper, it would appear to be redundant to write to the Commission referring it to the FMLC’s work.

Members considered that the conflicts of laws issues in respect of intermediated securities are important to market certainty and that an email should nonetheless be sent to the Law Commission bringing the FMLC’s willingness to engage to their attention.



## **Securities Markets Scoping Forum**

This Scoping Forum met on 11 December and discussed the recent judgment in *SL Claimants v Tesco Plc* [2019] EQHC 2858 (Ch) which considered related issues in relation to intermediated securities. The Chief Executive highlighted that the issues in that judgment were connected to the questions previously discussed in respect of intermediated securities. These issues include considerations in respect of conflict of laws, shareholders' rights, and the rights of intermediaries. The issues are large, complex and possibly intractable. The Chief Executive suggested that the FMLC might be well placed to make recommendations that the legal issues which arise in the context of intermediated securities are considered at regional or supra-national level. Consensus-building in this area was likely to be difficult—as seen from the experiences building consensus around the Convention on the law applicable to certain rights in respect of securities held with an intermediary (the “**Hague Securities Convention**”)—but was important. This might be the right time to revisit this project as thinking on shareholders' rights had evolved in recent years. The Chairman asked that the Secretariat prepare a note setting out more information related to the proposed project.

## **Banking Scoping Forum**

This Scoping Forum met on 10 December 2019 for a meeting chaired by Jan Putnis. Mr Putnis reported that the Forum had resolved to recommend further work on bank ring-fencing legislation and agreed to prepare a short briefing note ahead of the next meeting.

## **Brexit**

Members discussed the U.K.'s General Election and the likely implications of the projected result on the preparations for Brexit. The Chairman suggested that Brexit be put on the agenda for the next meeting.

## **ANY OTHER BUSINESS**

Mr Warna-kula-suriya brought to Members' attention changes expected under E.U. Council Directive 2011/16 in relation to cross-border tax arrangements (“**DAC6**”), which had a broad ambit and required the early reporting of transactions. He advised the Secretariat to keep DAC6 on its radar.