

## Financial Markets Law Committee (“FMLC”)

### FinTech Scoping Forum

Date: 21 January 2020

Time: 9.30am to 11.00am

Location: Bank of England, Threadneedle St, London, EC2R 8AH



#### In Attendance:

Richard Hay (Chair)	Linklaters LLP
Antony Beaves	Bank of England
Anne Bodley	HSBC Bank plc
John Casanova	Sidley Austin LLP
Dorothy Delahunt	
Sian Jones (dial in)	xReg Consulting
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Matthias Lehmann	University of Bonn
Emmanuel Le Marois	Global Financial Markets Association
Ernest Lima (dial in)	xReg Consulting
Matthew Nyman	
James Reynolds	The Law Society
Julia Smithers Excell	White & Case LLP
Ferdisha Snagg	Cleary Gottlieb Steen & Hamilton LLP
Ian Stevens	CMS Cameron McKenna Nabarro Olswang LLP
John Taylor (dial in)	Queen Mary University of London
Venessa Parekh	FMLC
Katja Trela-Larsen	FMLC

#### Regrets:

Nikita Aggarwal	University of Oxford
Cat Dankos	Herbert Smith Freehills LLP
Jonathan Gilmour	Travers Smith LLP
Carolyn Jackson	Katten Muchin Rosenman UK LLP
Ben Kingsley	Slaughter and May

Registered Charity Number: 1164902.

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Lewis Lee	CLS Bank International
Oliver Linch	Shearman & Sterling
Vlad Maly	Morrison & Foerster LLP
Ciarán McGonagle	International Swaps and Derivatives Association
Helen McGrath	Stripe
Angus McLean	Simmons & Simmons LLP
John Salmon	Hogan Lovells International LLP
Nicole Sandler	Barclays Bank plc
Michael Sholem	Cadwalader, Wickersham & Taft LLP
Kathleen Tyson	Granularity Ltd
Rupert Wall	Sidley Austin LLP
Stuart Willey	White & Case LLP
Simon Wright	Dechert LLP
Mr Justice Zacaroli	Royal Courts of Justice

## Minutes

### 1. Introductions

- 1.1. Mr Hay opened the meeting. Forum members introduced themselves.
- 1.2. Mr Hay explained that this special meeting was being held to discuss a possible response to two consultations issued by the European Commission. These consultations focus on: (1) regulating the market in cryptoassets and (2) operational resilience in the face of cyber security threats.

### 2. Linking in with the FMLC (Venessa Parekh)

- 2.1. Ms Parekh provided an overview of a few non-pecuniary ways in which Forum members, or their institutions, could contribute to the work of the FMLC. These include contributing to it research, hosting meetings and events and seconding lawyers to the Secretariat.

### 3. E.U. Commission [Consultation](#) on an E.U. framework for markets in cryptoassets

- 3.1. Mr Hay stated that the FMLC Secretariat was working on a response to the first half of the cryptoassets consultation, which focuses on questions relating to the

characterisation and definition of cryptoassets. It was hoped that the Forum would help the Secretariat with a response to the second half of the consultation which looks at how existing regulation may be applied to cryptoassets, their users and related activities.

- 3.2. A Forum member asked if the response would address the specific question of how cryptoassets should be defined. Ms Parekh said that the Secretariat was keen to hear the Forum's views on all sections of the consultation but, if it was not discussed in entirety during the meeting, she would very much appreciate receiving members' views by email.
- 3.3. Mr Hay suggested the Forum deal first with section 4 of the consultation which asked about the application of existing regulation to cryptoassets. He noted that the European Commission had incorporated an insufficient differentiation between permissioned and permissionless networks as well as between private and public networks. A Forum member said that he had discerned, from meetings with the European Commission that it was focusing on permissioned networks but would appreciate input on permissionless networks too. Another Forum member expressed the view that: the European Commission's approach should not be to regulate the technology but instead to regulate products, assets and actors. While the underlying technology would contribute to the shape and form of the asset, it should not affect the regulation. A discussion was held on the concept of "principles-based regulation" which is "technology-agnostic". Other members expressed the opposing view: without enough information about the actors and transactions, regulations and enforcement could be challenging. In these circumstances, regulators may wish to require the disclosure of specific types of information from firms, only after which that firm would be permitted to use a specific technology or technological model. A member said that since the decision to be "technology-agnostic" underpinned the approach to regulation, moving away from that approach was a larger policy question which was perhaps outside the scope of the FMLC's response.
- 3.4. Mr Hay then turned the discussion to questions 88-93 of the consultation, which cover regulations relating to financial markets infrastructure and, in particular, Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories (the "CSDR"). A Forum member observed uncertainty in relation to "transferable securities" in a cryptoasset context. She noted that questions arose in relation to what might be considered negotiable and whether such securities could be settled in existing central security depositories ("CSDs") using existing custodians. Another member noted that the CSDR relates to a specific infrastructure

which does not necessarily exist—or need to exist—in a cryptoasset context, the enduring characteristic of which is decentralisation on a Distributed Ledger Technology (“DLT”) platform. Continuing in a similar vein, a member observed that while depositories might prove unnecessary in the context of cryptoassets, new concepts such as “wallets” did not have a natural place in existing financial markets infrastructure. Questions were raised in relation to the regulation of “wallets”, including how any fallout from their insolvency would be managed. A related question arose in respect of “private keys” and whether the holder of the “private key” would be considered the owner of the “wallet”. Another participant noted that one concept which might prove problematic is finality. Another member mused that when an existing security is tokenised, it is unclear how the new asset will be characterised—i.e., whether as a new security or a security token.

3.5. The conversation then turned to the sections of the consultation dealing with regulating e-money and payment services. An attendee noted that it was interesting that Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (the “**E-money Directive**”) had not been technology-agnostic. A discussion followed on how “nodes” within a DLT network would be characterised within existing regulation and whether a “node” could be considered a technical service provider. A member stated that a payment services institution normally has agency in any transaction, whereas “node” would normally not. Members discussed circumstances in which “nodes” might be considered outsourced service providers, for example, in relation to a CSD. Furthermore, participants discussed that, for a cryptoasset to fall within the definition of e-money in the E-money Directive, it needed an identifiable issuer; in the absence of issuer, there would be no one to regulate.

3.6. It was also noted by several participants that attempting to apply existing regulation to new types of products and actors was likely to lead to uncertainty.

#### 4. **E.U. Commission [Consultation](#) on a Digital Operational Resilience Framework for financial services - Making the E.U. financial sector more secure**

4.1. Forum members generally agreed that the consultation on operational resilience seemed very wide in scope. It also raised questions which might be better addressed by an international organisation like International Organization of Securities Commissions (“IOSCO”).

4.2. One participant queried whether the term “Operational Resilience” was the appropriate term for the consultation (and related framework), in light of the substance of the proposals.

**5. Any other business<sup>1</sup>**

5.1. Forum members agreed to send any further thoughts and drafting to the FMLC Secretariat by COB 31 January.

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<sup>1</sup> The next meeting is scheduled for 31 March 2020 at 9.00am to 10.30am (U.K. time)

# Linking into the work of the FMLC

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**Venessa Parekh**

**Research Manager**

**Registered Charity Number: 1164902.**

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# Non-pecuniary involvement with the FMLC

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The FMLC's work in furthering legal certainty in the wholesale financial markets, addressing legal risk, and providing impartial analysis is vitally important at this time when so much is happening.

The FMLC appreciates your support through participation in this Scoping Forum. Do you know other ways you can engage with and contribute to the FMLC, aside from a monetary donation?

# Engaging with the FMLC

Alerting the FMLC Secretariat to issues of legal uncertainty

Participation in FMLC scoping forums, either as a member or a guest speaker

Joining FMLC working groups, contributing legal expertise and drafting chapters of papers

Participation in FMLC events, either as a attendee or guest speaker



# Supporting FMLC Events

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Your organisation can host FMLC events and/or provide logistical support for events, such as printing.

For example:

- Judicial Seminar
- Quadrilateral Conference
- Spring and Autumn Seminars
- Patrons' Dinner, and
- Festive drinks reception

# FMLC Secondment Programme

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Law firms can supply lawyers on secondment to the FMLC Secretariat, in the role of Legal Analyst.

The secondment provides an opportunity to conduct detailed research on specific issues and will hone key skills such as drafting, legal research and stakeholder relationships.

Each secondment typically lasts for a period of 6 months. Recent secondees have included trainee solicitors and associates at NQ level, as well as associates who are one year or more PQE.

# Supporting the FMLC

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If you wish to find out more about the FMLC secondment programme and how your organisation can participate, please contact Emma McClean ([operations@fmlc.org](mailto:operations@fmlc.org))

If you wish to find out more about upcoming FMLC events and the ways you can offer support, please contact Rachel Toon ([executivesupport@fmlc.org](mailto:executivesupport@fmlc.org))

If you have an issue of legal uncertainty you would like to raise with the FMLC, or if you or your organisation would like to contribute to the FMLC's work via a Scoping Forum or Working Group, please contact Venessa Parekh ([research@fmlc.org](mailto:research@fmlc.org)) or Katja Trela-Larsen ([forums@fmlc.org](mailto:forums@fmlc.org))