

Financial Markets Law Committee (“FMLC”)



FinTech Scoping Forum

Date: 5 November 2019

Time: 2.00 to 3.30pm

Location: Herbert Smith Freehills LLP, Exchange House, Primrose Street, London, EC2A 2EG

In Attendance:

Cat Dankos (Chair)	Herbert Smith Freehills LLP
Antony Beaves	Bank of England
Chris Glennie	Bank of England
Sian Jones	xReg Consulting
Tessa Jones	FIA
Helen McGrath	Stripe
Angus McLean (dial in)	Simmons & Simmons LLP
Matthew Nyman	
Michael Sholem	Cadwalader, Wickersham & Taft LLP
Julia Smithers Excell	White & Case LLP
Ian Stevens (dial in)	CMS Cameron McKenna Nabarro Olswang LLP
John Taylor	Queen Mary University of London
Kathleen Tyson	Granularity Ltd
Virgilio Diniz	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Regrets:

Simon Evers	Crowell & Moring LLP
Jonathan Gilmour	Travers Smith LLP
Andrew Harvey	Global Financial Markets Association (“GFMA”)
Richard Hay	Linklaters LLP
Carolyn Jackson	Katten Muchin Rosenman UK LLP
Lorraine Johnston	Ashurst LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Lewis Lee	CLS Bank International

Registered Charity Number: 1164902.

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Minutes:

1. Introductions

1.1. Ms Dankos opened the meeting and invited attendees to introduce themselves.

2. The FMLC's Engagement with the Public Sector (Virgilio Diniz)

2.1. Mr Diniz delivered a short presentation providing an overview of the FMLC's engagement with public authorities.¹ He explained that FMLC is a charity which does not engage in lobbying; it does, however, interact closely with legislative and regulatory bodies in the U.K. and E.U. He provided examples of recent projects on which the FMLC had liaised with public authorities.

3. FATF recommendations on virtual assets and virtual asset service providers (Sian Jones)

3.1. Ms Jones introduced herself and explained that the Financial Action Task Force ("FATF") is an inter-governmental body which aims to set global standards in anti-money laundering ("AML"), counter-terrorist financing ("CTF") and against other related threats to the integrity of the international financial system. Ms Jones served as a technical expert to FATF in her previous role with the Gibraltar Financial Services Commission.

3.2. Ms Jones stated there are three types of FATF publications: recommendations, interpretive notes and guidance. FATF recommendations and interpretive notes, which expand on recommendations, are binding upon members of FATF. Given the number of countries which have signed up to FATF, their recommendations take on the status of a quasi-treaty obligation on those countries.

3.3. In October 2018 the [FATF Recommendations](#), in particular number 15, were amended and new definitions "virtual asset" and "virtual asset service provider" ("VASP") added in order to clarify how AML/CFT requirements apply in the context of virtual assets. Ms Jones noted virtual assets and VASPs were quite broadly defined, and will include other institutions that perform virtual asset activity. In June 2019, a new interpretive

¹ Please see Appendix I below

note (Interpretive Note to Recommendation 15) was released by FATF that sets out the application of the FATF Standards to virtual asset activities and service providers.

- 3.4. Ms Jones drew attention to FATF Recommendation 10 on customer due diligence and FATF Recommendation 16 on wire transfers. She discussed the possible technical challenges institutions may face in meeting these requirements, in particular the relatively low transaction limits and the need to obtain, hold and transmit the required originator and beneficiary information immediately and securely. Attendee discussion on the possible impact the recommendations would have on industry practices followed.
- 3.5. A member suggested it may be worthwhile to discuss the implementation progress of Fifth Anti-Money Laundering Directive (EU) 2018/843 (“**AMLD5**”) across the E.U. at a future meeting.

4. Forum Activities review and plenary discussion of potential areas of focus for future meetings (Cat Dankos)

- 4.1. Ms Dankos gave an overview of what the Forum had discussed this year including:
 - a) Blockchain in Trade Finance and considerations for Secured Transaction Law
 - b) FCA Consultation Paper CP19/3: Guidance on Crypto-assets
 - c) Legal uncertainties concerning the impact of smart contracts on the ordinary elements and functioning of a contract such as formation, frustration and mistake
 - d) Smart Derivative Contracts
 - e) the Transposition of the AMLD5
 - f) The legal aspects of the transaction management in relation to a new digital product known as the Digital Ledger Payment Commitment
 - g) Facebook’s Libra currency and the regulatory reaction to date
 - h) Machine learning/big data and the regulation of consumer credit markets.
- 4.2. Members discussed possible future topics and upcoming consultations including:
 - a) Treatment of crypto-assets:

- i. Joint E.U. Commission and Council statement on stable coins expected in December 2019
 - ii. HM Treasury Consultation on the regulatory perimeter expected in the second half of 2020
 - iii. E.U. Commission regulatory framework assessment due by April 2020
 - iv. Possibility of Central Bank issued digital currencies
- b) Data, artificial intelligence, and machine learning:
 - i. E.U. Commission’s High-Level Expert Group on Artificial Intelligence (“AI HLEG”) Ethics Guidelines on Artificial Intelligence report expected in 2020
- c) Cloud outsourcing:
 - i. Prudential Regulation Authority (“PRA”) consultation on draft outsourcing supervisory statement expected December 2019
 - ii. European Insurance and Occupational Pensions Authority (“EIOPA”) Guidelines on Outsourcing to Cloud Service Providers expected December 2019
- d) Cyber security:
 - i. FSB Consultation expected on developing a toolkit of effective practices relating to a financial institution’s response to, and recovery from, a cyber-incident.

5. 2020 Forward Schedule (Virgilio Diniz)

- 5.1. Mr Diniz asked attendees to email the Secretariat should they have any comments on the draft Forward Schedule for 2020.

6. Any other business

- 6.1. No further business was raised at the meeting.

Did you know that although the FMLC is a charity and not a lobbying organisation...it has engaged significantly with public authorities?

Virgilio Diniz, Project Manager



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The FMLC's charitable remit

According to its charitable remit, the FMLC has a tripartite mission:

- to *identify* relevant issues (the **radar** function);
- to *consider* such issues (the **research** function); and
- to *address* such issues (the **public education** function).

FMLC's engagement with public authorities

- The FMLC is NOT a lobbying organisation, but it has engaged significantly and effectively with public authorities;
- The engagement with public authorities is a natural adjunct to its radar, research and public education functions of identifying, considering and addressing issues of legal uncertainties;
- A few examples of topics on which the FMLC has corresponded with public authorities and has achieved effective outcomes and impact are set out in slides below.

U.K. withdrawal from the E.U. based on a free trade agreement not covering financial services – evidence to the House of Lords E.U. Financial Affairs Sub-Committee

- As an extension of work conducted by an FMLC Working Group examining whether a withdrawal from the E.U. based on a free trade agreement not covering the provision of financial services would have any legal ramifications for existing financial contracts, Professor Hugh Beale (University of Warwick) and Simon Firth (Linklaters LLP) gave evidence on the topic of post-Brexit contractual continuity to the House of Lords E.U. Financial Affairs sub-committee.



Colloquium on crypto-assets with the Chief of Staff of the U.S. Securities and Exchange Commission

- On 21st June 2019, the FMLC was delighted to welcome Michael Gill, Chief of Staff and Chief Operating Officer of the U.S. Commodity Futures Trading Commission (the “CFTC”), as keynote speaker at a colloquium on regulating crypto-assets. In the U.S., regulation of crypto-assets has evolved into a multifaceted, multi-regulatory approach and oversight is split between several federal and state authorities. The CFTC has responsibility over crypto-assets used in derivatives contract, or if there is fraud or manipulation involving crypto-assets traded in interstate commerce. Mr. Gill provided an overview of the development of crypto-assets and of the approaches taken by U.S. regulators in evaluating them. He outlined the CFTC’s priorities in considering whether and how crypto-assets should be regulated.



Review of Brexit “onshoring” legislation

- In recent months, the FMLC has focused on reviewing statutory instruments published in draft by HM Treasury under the European Union (Withdrawal) Act 2018. These instruments incorporate and amend (i.e., “**onshore**”) the E.U.’s legal and regulatory framework for financial services.
- The FMLC Secretariat was invited by HM Treasury to review draft versions of this legislation and, to facilitate a quick response to such secondary legislation, the Secretariat has organised meetings amongst leading organisations in the City, comprising representatives from the Brexit Law Committee, (the legal wing of the IRSG), the CLLS Financial and Regulatory Law Committees and the Law Society, to discuss coordinated responses.
- The FMLC has also published papers on the statutory instruments onshoring regulations relating to bank recovery and resolution, investment funds and their managers, markets in financial instruments, corporate insolvency, securitisation and the Benchmark regulation.

ESMA update on its Q&A on MAR in response to a letter from the FMLC

- On 5 September 2017, the FMLC received a response from the Financial Conduct Authority (“**FCA**”) on its paper that explores uncertainties as to the financial instruments that fall within the scope of the Market Abuse Regulation (“**MAR**”). The letter states that the FMLC’s analysis and recommendations stemming from this paper were circulated to the FCA policy team, who works with the European Securities and Markets Authority (“**ESMA**”) in its development of its MAR guidance materials. The letter flags that ESMA has updated its Q&A on MAR on 1 September 2017 to include a new Q&A 9 on market soundings, which seeks to provide guidance on some of the issues highlighted in the FMLC paper.

Summary and Conclusion

- The FMLC seeks to accomplish its radar, research and public education remits while also engaging with public authorities;
- Although the FMLC is NOT a lobbying organisation, it has charitable remits which are aligned with engagement with public authorities; engagement which serves to accomplish the charity's objectives of radar, research and public education.