



FINANCIAL MARKETS LAW COMMITTEE

Videoconference

Date: 24 September 2020

Time: 4.30pm to 6.00pm

Attendees:

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| Lord Thomas (Chairman) | FMLC Chairman |
| David Greenwald (Deputy Chairman) | Fried, Frank, Harris, Shriver & Jacobson LLP |
| Andrew Bagley | Goldman Sachs |
| Sir William Blair | Queen Mary University of London |
| Paul Double | City of London Corporation |
| Simon Firth | Linklaters LLP |
| Kate Gibbons | Clifford Chance LLP |
| Carolyn Jackson | Katten Muchin Rosenman LLP |
| Sir Robin Knowles | Royal Courts of Justice |
| Ida Levine | Impact Investing Institute |
| Karen Levinge | FCA |
| Oliver Moullin | AFME |
| Rob Price | Bank of England |
| Jan Putnis | Slaughter and May |
| Barney Reynolds | Shearman & Sterling LLP |
| Sanjev Warna-kula-suriya | Latham & Watkins LLP |
| Joanna Perkins | FMLC Chief Executive |
| Venessa Parekh | FMLC Research Manager |
| Chhavi Sinha | FMLC Acting Manager |

Registered Charity Number: 1164902.

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MINUTES

INTRODUCTIONS

The Chairman opened the meeting. He began by recapitulating publications which had been completed since the last meeting. He stated that a virtual colloquium on cybersecurity, held on 15 September, had been well received. He drew attention to upcoming events, including an interim virtual meeting of the Quadilateral Conference to be held on 21 October. He emphasised the importance of the FMLC's continued international engagement and encouraged the Secretariat to organise more such events in the future.

The Chairman thanked the Bank of England and the City of London Corporation for their support in facilitating the impending move of the FMLC Secretariat's office.

ACTIVE PROJECTS

LIBOR Transition

Stakeholders have frequently raised with the FMLC Secretariat the residual risks arising in the context of the discontinuation of, and transition from, LIBOR. The Committee had resolved to publish a paper examining remedies in this context. This includes action by the regulator, based perhaps on the Financial Stability Board's seminal recommendations from 2014; the enactment of legislation which could help ameliorate legal and operational uncertainty; and market-based remedies such as repapering and protocols. A Working Group was established to consider possible mitigants. A draft of the paper produced by the Secretariat on the basis of the Working Group's contributions was circulated to Members for their review and approval.

The Chief Executive explained that the draft paper had reached Members later than anticipated owing to a technological failure but invited comments and feedback over the course of the weekend so that the paper could be published in the following week.

A Member noted the references in the paper to HM Treasury's proposal to publish legislation giving the FCA additional powers with regards to LIBOR transition and asked if the FMLC would comment on that legislation when it was published. The Chief Executive noted that it was evident that the proposed measures would give rise to legal uncertainty, as set out in the paper, and it would be logical for the FMLC to comment on the legislation specifically to highlight the uncertainties again.

European Commission Proposal to Amend the Benchmarks Regulation

The European Commission has published a draft regulation to amend the Benchmark Regulation ("BMR"), in respect of (i) the exemption of certain Third Country foreign exchange benchmarks and (ii) the designation of replacement benchmarks for certain benchmarks which are being discontinued. The European Commission intends to amend the BMR to establish a statutory replacement rate to facilitate the mitigation of adverse consequences for legal certainty and financial stability that might ensue if LIBOR was discontinued without a replacement rate being both available and integrated into legacy contracts. The Secretariat had drafted a response on which it had invited Members' comments.

Members agreed that the letter should be sent. A brief discussion was held on whether the letter should urge authorities to avoid "regulatory divergence" between the U.K. and the E.U., which one Member suggested may be considered a political consideration in the context of Brexit. The Chief Executive noted that the issue is not divergence in standards but rather in the use of different mechanisms which leads to divergent interpretations causing uncertainty. It was agreed that the wording should be amended slightly to make that clear. A Member also thought that the letter might examine the interaction of the proposed amendment with the European Convention on Human Rights; another Member suggested that the amendment's interaction with protections granted under bilateral investment treaties might be considered.

Wet signatures and notarisation

The restrictions on the movement of people has brought into focus complexities relating to the need for "wet ink" signatures in contracts in cases where electronic execution is not possible. At the May meeting, the Secretariat had reported an issue raised by stakeholders around the authentication of global notes. The Secretariat is drafting a paper in pursuit of the FMLC's public education function highlighting the positions taken by these legal systems with regards to electronic signatures.

A Member suggested that, ahead of publication, the draft paper should be sent to the Law Society and the City of London Law Society for their comments.

RADAR AND SCOPING

Internal Market Bill

After the end of the Brexit Transition Period, HM Government and the devolved administrations will no longer be collectively bound by E.U. law. As powers over key policy areas return to the U.K. government and the devolved administrations, there is a possibility that different parts of the U.K. may in future make different rules. HM Government has proposed a Bill—the Internal Market Bill—which would rely on the principles of mutual recognition and non-discrimination to ensure there are no new barriers for businesses trading across the U.K. While the Internal Market Bill has been the subject of some political controversy—given the proposal in it to give ministers powers to amend the implementation of the Northern Ireland protocol—the possible implications of the Internal Market Bill for financial services is less certain.

Members noted that financial services are regulated on a U.K.-wide basis and are not a devolved matter, which suggests that the Internal Market Bill should not raise concerns under the FMLC's remit. A Member observed that the definition of financial services in the Bill is narrower than that in the Financial Services and Markets Act 2000 but that it should not cause uncertainty. Another Member said that the Bill may raise questions with regards to “passporting back” into the U.K. The Chairman noted that the Bill was progressing through Parliament very swiftly and invited Members to send any thoughts to the Secretariat so that they may be forwarded to the relevant department.

Regulatory Cooperation for a Global Britain

HM Government has launched a [Call for Evidence](#) on how to improve the U.K.'s international regulatory cooperation practices, in response to a review by the Organisation for Economic Cooperation and Development (“OECD”) into the U.K.'s international regulatory cooperation practices. The [OECD report published in May 2020](#) recommended that the government take action to ensure more systematic consideration of international regulatory cooperation across government and regulatory bodies. The Call for Evidence will assist HM Government in setting priorities for international cooperation.

The Secretariat suggested that a response may be submitted drawing attention to the legal uncertainties and concerns set out by the FMLC in its [2015 Report](#) on Coordination in the Reform of International Financial Regulation. Members agreed that such a response should be sent.

Cryptoasset Promotions Consultation

A Member had drawn to the Secretariat's attention issues of legal uncertainty arising in the context of the HM Treasury's [Cryptoasset Promotions Consultation](#). The Consultation seeks views on a proposal to bring the promotion of certain types of cryptoassets within scope of financial promotions regulation. The Consultation offers a definition of what it calls a qualifying cryptoasset. The Member highlight two concerns which arise in relation to this definition. First, it creates a new category of cryptoassets which are described using terms which are difficult to define—including, in particular, “fungible”. Second, the definition bears no relation to any other definitions, adopted for example in the money-laundering regime, or categorisations, put forward by the FCA last year. The Chief Executive noted the publication, earlier that day, of a draft E.U. legislation for Markets in Cryptoassets which, it was likely, offered yet another definition of “cryptoasset”. This proliferation of multiple regimes and definitions may lead to uncertainty.

Members agreed that international coordination in this respect would be helpful. They discussed whether the variances between the new definition and the definition in the Fifth Anti-Money Laundering Directive arose simply owing to a difference in the U.K. and E.U.'s drafting styles. A Member noted that focusing comments on stylistic differences would be an error; if the U.K. was proposing a new definition of a term already defined in E.U. legislation which had been onshored, there would be legal uncertainty. Members agreed that a response be sent.

The Chairman suggested that Members return to questions around stylistic differences at a future meeting.

Good faith in English law

An event was organised last week by the London Shipping Law Centre and Linklaters on the possible relevance of good faith in disputes triggered by the Covid-19 crisis. Simon Firth was on the panel and the Chief Executive attended the event. Another panellist made the point in the event that sometimes participants in the commodities derivatives markets did not necessarily know what they were doing in legal terms, and the lack of knowledge is especially exacerbated amongst smaller institutions overseas. He contacted the Secretariat after the event to suggest that the FMLC might publish a paper on this topic.

Simon Firth, who was also on the panel, stated to the Secretariat that there may be some merit in commenting on the subject. While there has been quite a lot of focus on good faith in the context of long-term “relational” contracts, where there may be a duty to co-operate or to try to resolve

issues, another area where the concept arises is in the context of discretionary decisions. These are very common in the financial markets (such as determinations of close-out amounts under an ISDA Master Agreement) and good faith in this context has a somewhat different meaning—i.e., it involves a duty to make a genuine effort to perform the task required by the contract (as opposed to a result that favours the decision-maker). A development in an unrelated context could have a knock-on effect here and so there may be some merit in making sure that the courts are aware of this. The standard that applies to discretionary determinations is a developing area on which there may be room for some commentary.

A Member noted that the concept extended beyond the financial markets and another highlighted that its application was very dependent on the context of the contract. Nevertheless, Members agreed that expressing a nuanced view on this issue would be useful and would fall within the FMLC's educational remit, Secretariat resources permitting.

The Chairman suggested that, in the first instance, the Secretariat conduct a scoping exercise, with the help of Simon Firth and Sir William Blair, by contacting the panellists for their views on how the FMLC might add value to this issue.

U.K. Bank Ring-Fencing Legislation

At the last meeting, Members discussed uncertainties arising in the context of the U.K.'s ring-fencing regime, raised by Jan Putnis. Members had agreed that there were legal uncertainties in this context but resolved to defer any decision on this topic owing to capacity constraints at the Secretariat and HM Government's other priorities.

Members agreed that a Working Group might be set up to examine legal uncertainties in this context. Owing to the pressure on the Secretariat's capacity for work which would arise from other projects initiated at the meeting, it was agreed that Mr Putnis would coordinate the initial scoping exercise.