

13 January 2021

Perry Scott Esq  
Her Majesty's Treasury  
1 Horse Guards Rd  
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London  
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Dear Mr Scott

## Financial Services Bill 2019-21

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.

On 21 October 2020, HM Government published the Financial Services Bill 2019-21 (the "Bill").<sup>1</sup> The Bill amends the U.K.'s existing legislative framework for financial services in 17 distinct areas, addressing issues arising from the U.K.'s departure from the E.U. In this context, the FMLC would like to draw attention to a couple of areas of legal uncertainty within the Bill's provisions.

### 1. Regulations about financial collateral arrangements

Clause 36 of the Bill is designed to fix a problem with the Financial Collateral Arrangements (No. 2) Regulations 2003 (the "2003 Regulations"), which implement Directive 2002/47/EC on financial collateral arrangements (the "Financial Collateral Arrangements Directive"). The scope of the 2003 Regulations is broader than the Financial Collateral Arrangements Directive, which has led to concern that the 2003 Regulations might be *ultra vires* the powers in Section 2 of the European Communities Act 1972.<sup>2</sup> Clause 36 of the Bill acts retrospectively to cure any lack of *vires* in the making of the 2003 Regulations.<sup>3</sup>

Stakeholders have expressed to the FMLC concerns as to whether Clause 36 of the Bill sufficiently meets the standard for retrospective legislation, established by the European Court of Human Rights ("ECHR") in *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* no. 21319/93, 21449/93 and 21675/93, 23 October 1997. It is generally accepted that the

<sup>1</sup> HM Government, Financial Services Bill 2019-21 (21 October 2020), available at <https://services.parliament.uk/bills/2019-21/financialservices.html>

<sup>2</sup> This opinion is given in the *obiter dicta* of Lord Mance in *USA v Nolan* [2015] UKSC 63 paragraph 67 to 69, available at: <https://www.supremecourt.uk/cases/docs/uksc-2014-0073-judgment.pdf>

<sup>3</sup> Financial Services Bill 2019-21 Clause 36 (1) & (2):

Regulations about financial collateral arrangements

(1) The Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226) as originally made, and all amendments made to them, have effect, and are to be treated as having had effect, despite any lack of power to make the regulations and amendments.

(2) Accordingly, the validity of anything done under or in reliance on those regulations (whether as originally made or as amended) is to be treated as unaffected by any such lack of power.

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right to not be deprived of possessions can include the right not to be deprived of an asserted claim. In that case, the ECHR held that the legislation in question was valid because it contained a reservation for cases commenced before a particular date, at which time parties affected by the retrospectivity and aware of their rights had had an opportunity to start proceedings. There also is precedent in U.K. legislation pre-dating the ECHR for putting in a cut-off date into retrospective legislation.<sup>4</sup> The FMLC would therefore urge HM Government to consider adding a provision to Clause 36 of the Bill establishing a cut-off date so as to not interfere with asserted claims and to ensure that the ECHR standard is met.

## 2. Benchmarks

Separately, the FMLC notes that the Bill amends the U.K.’s “onshored” version of Regulation (EU) 2016/1011 on indices used as benchmarks (the “**Benchmarks Regulation**” or “**BMR**”) to provide an overarching legal framework which gives the FCA new and enhanced powers to manage the wind-down of a critical benchmark. The prospective use of such powers in the context of the discontinuation of LIBOR was the subject of comment in paragraphs 2.7 to 2.10 of the FMLC’s Report published in October 2020 which surveyed uncertainties in the context of the transition away from LIBOR and the steps taken by authorities around the world.<sup>5</sup>

The Bill empowers the FCA to help those who cannot amend their contracts by directing the administrator of LIBOR—ICE Benchmark Administration (“**IBA**”)—to change the methodology used to compile the benchmark, creating a so-called “**Transition LIBOR**”. In addition to the economic and mathematical challenges of developing a Transition LIBOR, one of the issues that will arise in this scenario is the extent to which market participants can rely on the index beyond a wind-down period and/or beyond the limited range of “tough legacy” contracts highlighted by the FCA. It remains unclear how the U.K. measures will interact with E.U. and U.S. measures in respect of benchmark reform, and the transition from LIBOR.

In respect of Transition LIBOR, it is at least possible that LIBOR might both have been discontinued—for the purposes of the amended BMR, triggering the European Commission’s power to designate a replacement rate—and preserved in the sense that IBA has been required by the FCA to produce a synthetic benchmark for publication on LIBOR publication venues. Given that other jurisdictions, including New York, are also considering legislation to incorporate a successor rate by operation of law into contracts, where they are governed by local law, the problem of potential conflict and overlap is a pressing one.<sup>6</sup> The challenge for regulators will be one of careful coordination.

IBA has announced its intention, subject to confirmation following consultation, to cease the production of euro, sterling, Swiss franc and yen LIBOR panels at the end of

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<sup>4</sup> For example, the Statutory Instruments (Production and Sale) Act 1996, addressed a problem that had arisen because of the Statutory Instruments Act 1946 and preserves any rights in proceedings already in progress before 21st June 1996.

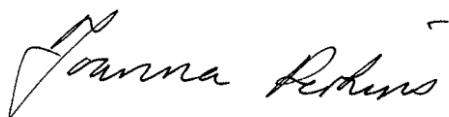
<sup>5</sup> FMLC, Report: LIBOR Transition—Issues of Legal Uncertainty (23 October 2020), available at: <http://fmlc.org/report-libor-transition-issues-of-legal-uncertainty-23-october-2020/>

<sup>6</sup> See *ARRC Executive Summary of Proposed Legislative Solution to LIBOR Transition*, (NY, 6 March 2020) available at: <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-Proposed-Legislative-Solution.pdf> and *ARRC Proposed Legislative Solution Press Release*, (NY, 6 March 2020), available at: [https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC\\_Press\\_Release\\_Proposed\\_Legislative\\_Solution.pdf](https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Press_Release_Proposed_Legislative_Solution.pdf)

2021.<sup>7</sup> In addition, it has stated that one week and two month USD LIBOR settings will cease at end-2021, and the USD LIBOR panel will cease at end-June 2023.<sup>8</sup> While the FCA welcomed IBA's announcement,<sup>9</sup> the FMLC notes that it is not clear how the IBA's proposals to continue the production of the USD LIBOR panel past 2021 will interact with transitional arrangements. Given the robust statements in 2020 about LIBOR discontinuation this may add to the overall sense of confusion and uncertainty mentioned above.<sup>10</sup> The FMLC observes, however, that the Bill provides for the selective application of the FCA's powers regarding LIBOR calculation and methodology on a currency-by-currency basis.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours faithfully,



Joanna Perkins  
FMLC Chief Executive<sup>11</sup>

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<sup>7</sup> ICE, Benchmark statement (18 November 2020), available at: <https://ir.theice.com/press/news-details/2020/ICE-Benchmark-Administration-to-Consult-On-Its-Intention-to-Cease-the-Publication-of-GBP-EUR-CHF-and-JPY-LIBOR/default.aspx>

<sup>8</sup> ICE, Benchmark statement (30 November 2020), available at: <https://ir.theice.com/press/news-details/2020/ICE-Benchmark-Administration-to-Consult-on-Its-Intention-to-Cease-the-Publication-of-One-Week-and-Two-Month-USD-LIBOR-Settings-at-End-December-2021-and-the-Remaining-USD-LIBOR-Settings-at-End-June-2023/default.aspx> and ICE, LIBOR Consultation on Potential Cessation (December 2020), available at: <https://www.theice.com/publicdocs/ICE LIBOR Consultation on Potential Cessation.pdf>

<sup>9</sup> FCA, Response to IBA's proposed consultation on intention to cease US\$ LIBOR (30 November 2020), available at <https://www.fca.org.uk/news/statements/fca-response-iba-proposed-consultation-intention-cessate-us-dollar-libor> and FCA, Statement on consultation on new benchmarks powers (18 November 2020), available at: <https://www.fca.org.uk/news/statements/fca-consults-on-new-benchmark-powers>

<sup>10</sup> FCA, Impact of the coronavirus on firms' LIBOR transition plans (25 March 2020), available: <https://www.fca.org.uk/news/statements/impact-coronavirus-firms-libor-transition-plans>; FCA, Further statement from the RFRWG on the impact of Coronavirus on the timeline for firms' LIBOR transition (29 April 2020), available at: <https://www.fca.org.uk/news/statements/further-statement-rfrwg-impact-coronavirus-timeline-firms-libor-transition-plans>; FCA and Bank of England, Joint Letter How the discontinuation of LIBOR may affect your members and stakeholders (9 March 2020), available at: <https://www.fca.org.uk/publication/correspondence/how-libor-discontinuation-may-affect-your-members-stakeholders.pdf>; and Rishi Sunak (The Chancellor of the Exchequer), Financial Services Regulation: Written statement - HCWS307, (23 June 2020), available at: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-06-23/HCWS307/>

<sup>11</sup> The FMLC is grateful to Dorothy Livingston of Herbert Smith Freehills LLP for their assistance in drafting this letter.