

Financial Markets Law Committee (“FMLC”)

FinTech Scoping Forum

Date: Tuesday 27 April 2021

Time: 2.00pm to 3.30pm

Virtual meeting



Attendees:

Ben Kingsley (Moderator)	Slaughter and May
Nikita Aggarwal	University of Oxford
Diego Ballon Ossio	Clifford Chance LLP
Antony Beaves	Bank of England
Anne Bodley	Queen Mary University of London
Emily Bradley	Slaughter and May
John Casanova	Sidley Austin LLP
Cat Dankos	Herbert Smith Freehills LLP
Jonathan Gilmour	Travers Smith LLP
Richard Hay	Linklaters LLP
Sian Jones	xReg Consulting
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Suhail Khawaja	Wilmington Trust
Lewis Lee	CLS Bank International
Matthias Lehmann	University of Bonn
Sarah Lewis	Cleary Gottlieb Steen & Hamilton LLP
Ernest Lima	xReg Consulting
Oliver Linch	Shearman & Sterling LLP
Philippa List	Dechert LLP
Ciaran McGonagle	International Swaps and Derivatives Association
Tetsuo Morishita	Sophia University of Law School
Matthew Nyman	CMS Cameron McKenna Nabarro Olswang LLP
Bradley Rice	Ashurst LLP
Deborah Sabalot	Deborah A. Sabalot Regulatory Consulting
John Salmon	Hogan Lovells International LLP
Adam Sanitt	Norton Rose Fulbright LLP

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Julia Smithers Excell

Ian Stevens

John Taylor

Kathleen Tyson

Heenal Vasu

White & Case LLP

CMS Cameron McKenna Nabarro Olswang LLP

Queen Mary University of London

Granularity Ltd

Allen & Overy LLP

Brian Gray

Venessa Parekh

Katja Trela-Larsen

FMLC Secretariat

FMLC Secretariat

FMLC Secretariat

Guest Speakers:

Jonathan Kewley

Herbert Swaniker

Clifford Chance LLP

Clifford Chance LLP

Regrets:

Dorothy Delahunt

Andrew Godwin

Andrew Harvey

Carolyn Jackson

Rachel Kent

Emmanuel Le Marois

Helen McGrath

Laura Nixon

James Reynolds

Delahunt and Associates

Melbourne Law School

Global Financial Markets Association

Katten Muchin Rosenman UK LLP

Hogan Lovells International LLP

Association for Financial Markets in Europe

Stripe

Clifford Chance LLP

The Law Society

Minutes

1. Introductions

- 1.1. Mr Kingsley opened the meeting.

2. The FMLC is in technological transition (Venessa Parekh)

- 2.1. Ms Parekh informed Forum members of some changes they may notice while the FMLC is in technological transition, including the use of a temporary domain and the new systems being trialed to track members' availability to attend Scoping Forum meetings. Finally, she asked attendees to send in short testimonials about the FMLC for use on the FMLC website.

3. European Commission's Proposal for a Regulation on Artificial Intelligence (Herbert Swaniker and Jonathan Kewley)

- 3.1. Mr Swaniker and Mr Kewley gave an overview of the European Commission's recently announced proposal for a Regulation on Artificial Intelligence (the "**AI Regulation**").¹ The Regulation applies to all Artificial Intelligence ("**AI**") systems. The AI Regulation creates different obligations to apply to uses of AI that are perceived to create different levels of risks, including unacceptable, high and low or minimal risks. For example, systems deemed to create an unacceptable risk, such as those which manipulate customer behaviour or use social scoring, are prohibited. Mr Swaniker commented that the territorial scope of the AI Regulation is wide, similar to the scope of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "**General Data Protection Regulation**" or "**GDPR**"). He commented on the prescriptive nature of the requirements and suggested that a starting point for businesses to consider will be identifying where they use AI. Mr Kewley explained that the definition of AI in the legislation is very broad, and wider than what may initially come to mind as being AI—technology covered by the AI Regulation may have been in business use since the 1970s.

¹ European Commission, *Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)* (21 April 2021), available at: <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence-artificial-intelligence>

3.2. A member queried whether it is made clear what is considered AI. Mr Kewley recognised that a consensus in defining AI has historically proved elusive. He explained the AI Regulation’s definition of AI casts a very wide net, capturing machine learning as well as much more basic automated decision making. Members discussed the work on AI published by the Centre for Data Ethics and Innovation and speculated on the approach the U.K. may adopt on regulating the use of AI. A member noted that there has been a shift in regulatory focus from the financial institutions which utilise the technology to the providers of the technology.

4. Financial Action Task Force proposed updated guidance on virtual assets and virtual asset service providers (Sian Jones)

4.1. Ms Jones gave a summary of proposed updated guidance on virtual assets and virtual asset service providers, which was recently published for consultation, by the Financial Action Task Force (“**FATF**”).² The revisions include guidance on the definitions of Virtual Asset (“**VA**”) and Virtual Asset Service Provider (“**VASP**”). Ms Jones explained that a VA, per the FATF definition, is a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. VAs do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations. All assets are either VAs or financial assets, on the FATF’s updated guidance also covers licensing and registration, the “travel rule”, the requirement for VASPs to conduct due diligence on counterpart VASPs (requiring a relationship between VASPs akin to correspondent banks), stablecoins, decentralised services, “unhosted” wallets and peer-to-peer transactions.

4.2. Members discussed when the Financial Action Task Force’s proposed updated guidance on virtual assets and virtual asset service providers might come into effect. Ms Jones noted the FATF Consultation closed last week and the initial intent was any changes would be adopted at the FATF’s June plenary meeting. She commented that a large number of responses had been received to the Consultation, which may delay the FATF’s next step.

² FATF, *Public Consultation on FATF draft guidance on a risk-based approach to virtual assets and virtual asset service providers* (March 2021), available at: <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-guidance-vasp.html>

5. **The Kalifa Review of UK FinTech (Matthew Nyman)**³

- 5.1. Mr Nyman gave a brief overview of the Kalifa Review of U.K. FinTech (the “**Review**”), explaining that the review proposes the creation of think-tanks along with a five-point plan to promote FinTech in the U.K. Mr Nyman highlighted several observations and proposals made by the Review in respect of the policy and regulation of FinTech in the U.K., including recommendations to develop a Central Bank Digital Currency, consider the regulatory implications of artificial intelligence, support the digitisation of financial markets infrastructure, and introduce a new regime for the regulation of cryptoassets.
- 5.2. Members agreed that the Review was a substantial overview of the sector but did not set out any concrete proposals for legislative or regulatory change. Members discussed whether the proposed new regime for the regulation of cryptoassets could truly take a technology-neutral approach. Members agreed that they read the Review to have a largely deregulatory agenda.

6. ***Ion Science Ltd v Persons Unknown and others (unreported)*, 21 December 2020, Commercial Court (Ben Kingsley and Emily Bradley)**

- 6.1. Mr Kingsley gave a brief summary of the facts of the case, wherein the Commercial Court had considered whether Ion Science Ltd was the victim of an alleged fraud worth half a million pounds, involving the transfer of Bitcoin. The Bitcoin could be traced to an exchange which should hold information to identify the alleged fraudsters. Ion Sciences applied for various disclosure orders and injunctions to hold the Bitcoin and last year were granted a worldwide freezing order and a disclosure order against Binance and Kraken cryptocurrency exchanges.
- 6.2. The case considered the question of jurisdiction. Mr Kingsley commented that *Ion Science Ltd v Persons Unknown* is notable for possibly being the first time an U.K. court has considered the *lex situs* of Bitcoin. In the absence of prior case law, the judgment relies on academic commentary, in particular on analysis by Professor Andrew Dixon.⁴

³ HM Treasury, *The Kalifa Review of UK FinTech* (26 February 2021), available at: <https://www.gov.uk/government/publications/the-kalifa-review-of-uk-fintech>

⁴ Andrew Dickinson, 'Cryptocurrencies and the Conflict of Laws' in Fox and Green (eds), *Cryptocurrencies in Public and Private Law* (Oxford University Press 2019)

The Court concluded that the *lex situs* of a Bitcoin is the place where the person or company who owned the coin or token is domiciled.

6.3. Mr Kingsley reminded Forum members of the FMLC's 2018 paper which considered the *lex situs* of DLT systems.⁵ He noted that the judgement is broadly consistent with the conclusions of that paper. A member suggested it would be interesting to hear the views of Professor George Walker, one of the key contributors to the 2018 FMLC paper, on the verdict.

7. **Any other business**

7.1. No further business was raised.

⁵ FMLC, *Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty* (March 2018), available at: http://fmlc.org/wp-content/uploads/2018/05/dlt_paper.pdf