

# FINANCIAL MARKETS LAW COMMITTEE



## Videoconference

## Minutes

**Date:** 27 May 2021

**Time:** 4.30pm to 6.00pm

## Attendees:

Lord Thomas (Chair)	FMLC Chairman
David Greenwald (Deputy Chairman)	Fried Frank Harris Shriver & Jacobson LLP
Andrew Bagley	Goldman Sachs
Sir William Blair	Queen Mary University of London
Claude Brown	Reed Smith LLP
Paul Double	City of London Corporation
Simon Firth	Linklaters LLP
Kate Gibbons	Clifford Chance LLP
Carolyn Jackson	Katten Muchin Rosenman LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Rachel Kent	Hogan Lovells International LLP
Peter King	HM Treasury
Ida Levine	Impact Investing Institute
Jon May	Marshall Wace LLP
Oliver Moullin	AFME
Chris Newby	AIG
Jan Putnis	Slaughter and May
Rob Price	Bank of England
Barney Reynolds	Shearman & Sterling LLP
John Tribolati	JP Morgan
Brian Gray	Interim CEO
Venessa Parekh	Research Manager
Chhavi Sinha	Researcher
Katja Trela-Larsen	Researcher

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## **CHAIRMAN'S COMMENTS**

The Chairman welcomed Brian Gray, who was recently appointed as Chief Executive of the FMLC on an interim basis. He stated that Mr Gray's review of the FMLC's operation and work will be vital in informing the Committee's future course.

The Chairman also stated that the webinar on 30 March for senior members of the Judiciary on issues relating to LIBOR transition had been a success. He thanked Claude Brown and Carolyn Jackson for their participation on the panel.

## **CHIEF EXECUTIVE'S COMMENTS**

Mr Gray introduced himself and provided information about his background. He stated that he was excited to be joining the FMLC at a time of regulatory and legal change. He said that he has already had meetings with some Committee Members over the past month and would be contacting others to arrange appointments shortly.

He drew Members' attention to the draft agenda for the virtual Quadrilateral meeting on 3 June. He also remarked that the FMLG, which was hosting the Quadrilateral this year, had proposed digital currencies, LIBOR transition and developments in the rule of law as potential agenda items for the final Quadrilateral meeting in September. The Chairman noted that the discussion on LIBOR transition at the Judicial Webinar had demonstrated the many legal issues which remained and suggested that the panel on that topic at the Quadrilateral provide ample time for a full discussion.

## **ACTIVE PROJECTS**

### **U.K. Bank Ring-Fencing Legislation (Chair: Dorothy Livingston)**

A Working Group established to examine legal uncertainties in the context of the U.K.'s ring-fencing regime had convened for its first meeting on 4 May. Working Group members discussed the issues of legal uncertainty set out in a briefing note provided by Jan Putnis. Mr Putnis provided an update on the meeting at which attendees agreed to draft a paper examining these issues. The Secretariat is working with the Working Group chair to allocate responsibility for drafting sections of the paper.

The Working Group had also noted the establishment of the Independent Review of Ring-fencing and Proprietary Trading (“the **RFPT Review**”), by HM Treasury, which has published a Call for Evidence with a deadline of 13 June. It had noted that the Group’s work will not be complete in time to respond to the Call for Evidence. The Working Group Chair had drafted a letter to the Review, informing it of the Working Group’s remit and progress.

Members agreed that the letter should be sent.

### **LIBOR Transition**

A on 19 March 2021 to relevant authorities (IOSCO, the FSB, ESMA, the European Commission, HM Treasury, the Bank of England and the FCA) asking for increased coordination.

Members noted the responses received from IOSCO, the European Commission and the FCA to the [letter](#) was sent jointly with the European Financial Markets Lawyers Group (the “EFMLG”) to various authorities urging international coordination to avoid unintended consequences linked to legislative initiatives in relation to LIBOR transition. The FCA has proposed a call amongst Members of the FMLC, the EFMLG, the Global Financial Markets Association (“GFMA”)—which had also sent a similar letter—the Secretariats of IOSCO and the Official Sector Steering Group (“OSSG”) of the FSB and authorities in the U.K. and E.U. The Chairman asked Members’ views on whether the FMLC should participate. If yes, he asked who from the Committee would like to attend and what issues might be highlighted on the call.

A Member noted that the publication of the ISDA Protocol had helped resolve a majority of the uncertainties. Another Member stated that he perceived four key issues. First, as markets adjusted to a post-LIBOR world, discrepancies were developing in market practices in the U.K. and the U.S. Second, in the E.U., there remained a degree of uncertainty in relation to the continued existence of EURIBOR. Third, he noted concerns around the definition of “tough legacy” contracts when considering the new legislation passed in various jurisdictions to help markets transition away from LIBOR. Finally, he noted that there are issues which arise in relation to forward looking term rate requirements in certain contracts—including, for example, agreements between shipping charter parties which do not have fallback provisions—which will give rise to uncertainties.

A Member noted that the Financial Services Act does not include any safe harbour provisions. HM Treasury had consulted on the question of whether safe harbours would be welcomed by the market but there was no update on whether such provisions would in fact be introduced. He said

that the question should be monitored, given that other jurisdictions have introduced such provisions.

### **FCA Consultation on its new powers in relation to the use of a benchmark:**

The FCA has published a [Consultation](#) on the powers granted to it by the Financial Services Act 2021 to help it manage the transition of legacy contracts which reference LIBOR. The new Consultation sets out the FCA's proposed policy for (1) considering whether and how to exercise its powers (under new Article 23C(2) of the BMR) to permit legacy use of an Article 23A benchmark; and (2) considering whether and how to exercise its power to restrict new use of a ceasing critical benchmark. The Consultation closes on 17 June 2021.

The Secretariat reported that it has written to the existing Working Group on LIBOR Transition to ask whether they would recommend the FMLC respond and, if yes, what points it might raise.

### **Negative oil prices**

The Secretariat had drafted a paper exploring the nature of the legal uncertainties arising in financial markets as a result of negative oil prices. After several rounds of amendments, there remained a lack of consensus amongst Members as to its publication. At the last meeting, Members had suggested that the paper might be published elsewhere if the Committee was unable to agree on its publication.

Upon another review, Members resolved that the report should be published in an academic journal and not under the FMLC's imprimatur. A Member offered to make introductions to the editor of such a journal which might be interested in publishing the report.

### **Good faith in English law**

At previous meetings, the Chairman had asked Simon Firth and Sir William Blair to advise the Committee on how it should proceed in relation to a project considering the relevance of good faith in disputes. At the last meeting, Mr Firth and Sir William reported that they agreed that it would be helpful to reach out to an academic to Chair the project and recommended that any such

project should consider the position under New York law. Discussions are continuing on the composition of the Working Group and chair for the project.

The Chairman asked that this Working Group be established soon given the increased interest in the relevance of good faith in the context of the pandemic. A brief discussion was held on securing expertise in the position of New York law on good faith to contribute to the paper.

## **RADAR**

### **Law Commission Call for Evidence on Digital Assets**

The Law Commission has published a [Call for Evidence on digital assets](#). The FinTech Scoping Forum has recommended that the FMLC consider responding to the Law Commission at this stage of the project. The Secretariat suggested that it establish a Working Group to discuss the content of a possible response and secure drafting help.

### **The Future of Financial Services Regulation in the U.K.**

Members have resolved that the FMLC should continuously monitor issues of uncertainty arising in the context of the U.K.'s post-Brexit financial services framework. The Chairman had asked the Secretariat to prepare a short note of the developments so far and possible areas on which the Committee might focus. Members noted that it would become increasingly important for the FMLC to comment on the development of the U.K.'s post-Brexit regulatory framework. Considering the summary note, the Chairman asked the Secretariat to propose, at the next meeting, areas on which the Committee could usefully comment.

A Member drew attention to a concern around the new “duty of care,” established under the Financial Services Act 2021, owed by financial institutions to consumers, which raises legal uncertainties. Another Member noted that the FCA is currently consulting on the provision. Members resolved that the issue should be probed further.

A Member provided a brief overview of the developments in relation to ESG legislation in the U.K. She noted that it was still anticipated that the U.K. would diverge from the E.U. in this area.

Members noted that tracking legislative divergence between the U.K. and the E.U. would be a large and difficult project. They stated that some trade associations are undertaking such a tracking exercise at a high level in the areas of their competence.

### **Law Commission Consultation on its 14th Research Programme**

A meeting was organised at the end of February between some Committee Members and the Law Commission to discuss areas of the law which the FMLC has identified as in need of reform, and which might be suitable for the Law Commission to consider as part of its 14<sup>th</sup> research programme. The [Consultation Document](#) has now been published with a deadline of 31 July 2021. Members were asked to consider whether a written response should be submitted.

Members noted that several law firms and other market associations were submitting individual responses to the Consultation. The Chief Executive stated that the Consultation would require analysis of several issues and the Secretariat would not have the capacity to undertake such a vast project. A Member suggested that an FMLC response only touch upon questions in relation to FinTech, ESG and the future of the U.K.'s regulatory framework, which are all areas of interest for the FMLC. Another Member suggested that the FMLC send a letter, simply summarising the issue and putting the Law Commission in contact with the appropriate subject expert. The Chairman asked Members to send in contributions to the Secretariat and asked the Chief Executive to determine the best format for a response.

### **Brexit Advisory Group**

The Brexit Advisory Group was established on the day after the 2016 referendum. As well as providing a space for general discussion, the BAG was tasked with providing advice and guidance to the FMLC on the scope and nature of work it might undertake relating to the referendum and the consequential withdrawal of the U.K. from the E.U. The end of the Brexit Implementation Period on 31 December 2020 suggests that the BAG's remit might be too limited or indeed superfluous. Members were asked whether there remains value in convening the BAG on a quarterly basis.

Members agreed that it was unlikely that legal issues would arise for the Brexit Advisory Group to consider. A Member suggested that a Scoping Forum be established instead to consider market

developments between the U.K. and the E.U. Members agreed that such a Forum would be useful, especially once HM Treasury had published its report on the overseas framework.

Members resolved that meetings of the Brexit Advisory Group be discontinued and a market access forum be established in due course.

#### **ANY OTHER BUSINESS**

A Member queried the FMLC's historical policy not to comment on issues relating to remuneration. Another Member noted that questions around remuneration were often political or based in policy. It was suggested that Scoping Forums might consider questions around remuneration and, in the event an uncertainty which was legal in nature was identified, the Committee would consider whether and how to respond.