

# FINANCIAL MARKETS LAW COMMITTEE

## Videoconference

## Minutes

**Date:** 29 July 2021

**Time:** 4.30pm to 6.00pm



## Attendees:

Lord Thomas (Chair)	FMLC Chairman
David Greenwald (Deputy Chairman)	Fried Frank Harris Shriver & Jacobson LLP
Sir William Blair	Queen Mary University of London
Claude Brown	Reed Smith LLP
Michael Duncan	Allen & Overy LLP
Kate Gibbons	Clifford Chance LLP
Simon Firth	Linklaters LLP
Carolyn Jackson	Katten Muchin Rosenman UK LLP
Rachel Kent	Hogan Lovells International LLP
Peter King	HM Treasury
Sir Robin Knowles	Royal Courts of Justice
Ida Levine	Impact Investing Institute
Karen Levinge	Financial Conduct Authority
Rob Price	Bank of England
Jan Putnis	Slaughter & May
Sanjev Warna-kula-suriya	Latham & Watkins LLP
Brian Gray	Interim CEO
Venessa Parekh	Research Manager
Chhavi Sinha	Researcher
Katja Trela-Larsen	Researcher

**Registered Charity Number: 1164902.**

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## **CHAIRMAN’S COMMENTS**

The Chairman updated Members on the success of the second of three videoconferences, held on 3 June as part of the programme for the 2021 Quadrilateral Conference. He thanked Ida Levine and Barney Reynolds for their participation on panels on ESG and the future of regulation, respectively. He observed that the virtual format of these meetings had allowed for greater participation such that it ought to be considered as an option even after business travel has recommenced.

The Chairman asked the Secretariat to follow up with the Financial Markets Lawyers Group (“FMLG”) to ascertain the agenda for the third session, scheduled for 9 September.

## **CHIEF EXECUTIVE’S COMMENTS**

The Chief Executive informed Members that, in view of the uncertainty around pandemic-related restrictions over the next few months and given the general caution advised around large gatherings, the Secretariat had decided to cancel the Patrons’ Dinner scheduled for October. The Chief Executive said that he hoped to hold the annual Festive Drinks in December.

Members noted the publication of the following on the FMLC website:

- [Response to FCA Consultation](#): new powers over use of critical benchmarks under the Benchmarks Regulation (17 June 2021); and
- [Letter](#): Ring-fencing and Proprietary Trading Independent Review (1 June 2021).

## **ACTIVE PROJECTS**

### **Law Commission Call for Evidence on Digital Assets (Chair: John Salmon)**

A Working Group was established to draft a response to the Law Commission’s [Call for Evidence on digital assets](#), which seeks views about how the law might accommodate digital assets now and in the future, and on the potential consequences of digital assets being “possessable”. The Chief Executive reported that building consensus for the response had been difficult because the technology and its applications, which the Call for Evidence is concerned with, remain in development. The Call for Evidence addresses digital assets as a whole; the Working Group had focused its comments on cryptoassets, defining them in a manner similar to that adopted by the

U.K. Jurisdiction Taskforce in its report published last year. With regards to possessability, nevertheless, the response had expressed the view that cryptoassets should be possessable, as the FMLC had said in a prior publication in 2016. The Chief Executive noted that he was aware that other respondents in the City were taking a divergent view on this topic.

Members resolved that the response should be sent.

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

The Law Commission has published a [Consultation Document](#) with a view to submitting to the Lord Chancellor a draft Programme of Law Reform. 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. At the last meeting, Members had noted that several law firms and other market associations were submitting individual responses to the Consultation and that the Law Commission was looking for topics on which to conduct in-depth research and analysis itself. It was concluded that the most efficient method of responding would be to write a short letter, drawing attention to the many topics that Members had identified which might benefit from the Law Commission's attention and pointing them in the direction of the relevant experts.

The Chairman asked Members if they agreed with the prioritisation in the list of topics set out in the letter. Members approved the publication of the draft letter.

### **Section 3 of the RAO—Definition of contract of insurance (Chair: Peter Bloxham)**

This Working Group is considering uncertainties around the definition of the phrase “contract of insurance” as set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“RAO”). The definition contains an extension “or similar contracts of guarantee” (having specified certain types of bonds such as performance bonds) which is broad and difficult to interpret. A paper has been drafted examining the uncertainties in this context and proposing possible mitigants. At previous meetings, the Chairman had stated that he would like Members to review this paper thoroughly before its publication. Although the draft remains subject to further revisions as recommended by the Working Group, it was circulated amongst Members to provide them the opportunity to review it.

A Member expressed hesitation about making recommendations to clarify the definition since the market has arrived at a consensus about its meaning which might be disturbed. Another Member noted the difficulty in arriving at a solution which would impact the range of products affected by the uncertainty.

A Member stated that the uncertainty is felt most acutely in the context of structuring financial products and the consequences can be quite costly. He emphasised that the uncertainty arising simply from the RAO definition can be easily resolved by modifying and modernising the text of the legislation. Another Member stated that, while the market has learned to adapt around the definitional ambiguity, a court judgment on this issue could cause greater uncertainty in the future. He recommended that the FMLC publish the paper.

The Chief Executive noted that the Secretariat hoped to be discussing the draft with Lloyds of London in coming weeks. The Chairman asked the Secretariat to report back after that conversation and to ensure, together with the Working Group, that the scope of the paper remained narrow and focused on the regulatory question. The Chairman asked that the Committee return to the draft at the next meeting.

The Secretariat reported that it had received an email from the Law Commission, which was considering selecting the definitional issue around “contract of insurance“ to form part of its 14th research program. The Law Commission had requested sight of the draft paper. The Chairman suggested that the draft paper be sent to the Law Commission in strict confidence and with the caveat that the FMLC continued to have concerns which it was still considering.

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

Following an event organised by the London Shipping Law Centre and Linklaters on the relevance of good faith in disputes triggered by the Covid-19 crisis (at which Simon Firth was a panellist and which was attended by the then Chief Executive), Members had considered the possibility of expressing a nuanced view on this issue, under the FMLC’s educational remit. The Secretariat reported that a Working Group has now been established. The Secretariat, Mr Firth and Sir William Blair have had a meeting with Professor Ewan McKendrick who has agreed to Chair the Working Group.

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

A Working Group was established to examine legal uncertainties in the context of the U.K.'s ring-fencing regime. A [letter](#) was sent, following the Working Group's inaugural meeting, to the Independent Review of Ring-fencing and Proprietary Trading ("the **RFPT Review**"), established by HM Treasury, to make it aware of the establishment of the Working Group and to highlight the issues of legal uncertainty that it will examine. The Secretariat reported that a positive response was received from the RFPT Review. Working Group members have volunteered to draft sections of the paper. The Secretariat has received most of the draft contributions and will begin collating the draft paper.

## **LIBOR Transition**

The FMLC and the European Financial Markets Lawyers Group (the "EFMLG") had sent a [letter](#) on 19 March 2021 asking for increased coordination to avoid unintended consequences linked to legislative initiatives in relation to LIBOR transition. In response, the FCA had 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., U.S. and E.U. as an opportunity to outline concerns and raise questions. Carolyn Jackson and Claude Brown, along with the Chief Executive, attended the meeting on 9<sup>th</sup> June.

The Chief Executive reported that GFMA, FMLC and EFMLG raised largely similar concerns regarding the risks of uncoordinated transition to risk free rates. The authorities had emphasised the huge amount of co-ordination taking place internationally and had reassured attendees that the issues raised had been considered in detail. Whilst the approaches being taken by authorities differed at a technical level they were confident that unexpected outcomes would be avoided in practice.

Members asked the Secretariat to continue monitoring developments and to review related legislation when it was published.

## **RADAR**

### **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 Secretariat had prepared a short note of the developments so far and possible areas on which the Committee might focus.

Members noted that the focus of authorities on the U.K.'s post-Brexit framework could be split into two prongs: the first was concerned with solidifying London's position as a financial services centre; the second was focused on new areas of development, such as green finance. A Member noted that HM Government's current focus is on modifying the law it has inherited from the E.U. Members agreed that HM Treasury's approach to modifying the "onshored" legislation had been sensible and they discussed when would be the right time for the FMLC to comment. A Member recommended waiting because the current considerations relate to policy questions rather than legal ones.

A Member queried why post-Brexit legislation should be considered in a manner different to that which the FMLC has previously adopted to consider legislative proposals. Another Member drew attention to the several developments which have recently occurred in relation to sustainable finance across jurisdictions. That Member agreed that the ESG Scoping Forum presented the ideal space for initial consideration. A Member agreed that ESG presents several challenges and concerns, given that the current regulatory framework has been designed without taking ESG products or priorities into consideration. Questions arise therefore about how emissions allowances may be classified or how institutions might be stress tested from a moral/green perspective. Another Member agreed that developments in relation to ESG are occurring at great speed. That Member also highlighted the difficulties in identifying current U.K. law given the several layers of amendments.

A Member drew attention to the publication by HM Treasury of responses received to its consultation on the U.K.'s overseas framework and noted that several respondents had highlighted uncertainties in relation to determining when a firm is conducting activities "in the U.K." since the test for this differs across products and sectors. The matter has been complicated by the rise in working from home and the increased adoption of technology. HM Treasury, the FCA and the Bank of England will consider this issue and publish a consultation in due course which, she recommended, the FMLC might weigh in on.

The Chairman asked the Secretariat to consider more broadly ahead of the next meeting how the FMLC might usefully contribute to these discussions and developments. He asked Members

whether, in the shorter term, the Committee should respond to any of the consultations identified in the Secretariat's note. Members agreed that the questions currently being asked were focused on policy and therefore the FMLC should not engage at this stage.

### **Infrastructure Scoping Forum: No Action Letters**

At the last meeting of the Infrastructure Scoping Forum, attendees discussed the [FCA's "no action" statement](#), issued on 19 March, with regard to reports on execution quality mandated under RTS 27 of MiFID II. The FCA's announcement prompted a wider discussion about the legal basis in the U.K. of "no action" letters. Attendees at the meeting noted that "no action" letters are used frequently in the US but that there remain concerns amongst market participants about the level of protection they offer (particularly to those who aren't directly the subject of such an announcement). The Chief Executive noted that this was an interesting development which the Secretariat would probe further over the summer.

### **Distributed ledger technology in financial market infrastructures**

The Secretariat reported that it has been contacted by HM Treasury to arrange a meeting with them and representatives from the FCA and Bank of England, to discuss the legal issues surrounding the adoption of distributed ledger technology ("DLT") in financial market infrastructures ("FMI"). In particular, the questions on which the FMLC's input is being sought include whether the U.K.'s legal and regulatory framework is sufficiently technology neutral for DLT transactions and what legal barriers exist to setting up a DLT FMI in the U.K. The Secretariat undertook to report back after the meeting.