

# FINANCIAL MARKETS LAW COMMITTEE

**Date:** 27 January 2022

**Time:** 4.30pm to 6.00pm

**Venue:** Via videoconference



## MINUTES

### Attendees:

Lord Thomas (Chair)	FMLC Chairman
David Greenwald (Deputy Chairman)	Fried Frank Harris Shriver & Jacobson LLP
Andrew Bagley	Goldman Sachs
Paul Double	City of London Corporation
Kate Gibbons	Clifford Chance LLP
Simon Firth	Linklaters LLP
Rachel Kent	Hogan Lovells International LLP
Peter King	HM Treasury
Ida Levine	Impact Investing Institute
Karen Levinge	FCA
Jon May	Marshall Wace
Bob Penn	Allen & Overy LLP
Rob Price	Bank of England
Barney Reynolds	Shearman & Sterling LLP
Sanjev Warnakulasuriya	Latham & Watkins LLP
Brian Gray	CEO
Venessa Parekh	Research Manager

**Registered Charity Number: 1164902.**

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## **CHAIRMAN’S COMMENTS**

The Chairman welcomed Bob Penn, who had recently been appointed to the Committee. He also thanked Michael Duncan, who had resigned from the Committee, for his time and participations on the Committee and the FMLC’s Board of Directors over the years.

The Chairman informed Members that this year’s Quadrilateral Conference—an annual arrangement with the FMLC’s sister organisations—will remain virtual. The European Financial Markets Lawyers Group (“**EFMLG**”), which is hosting the conference this year has suggested two meetings of four hours each, to be held in April and October. Members expressed a preference for shorter meetings and asked the Chief Executive to discuss with the EFMLG the possibility of holding more but shorter meetings. The Chairman urged Members to send their suggestions of topics to be discussed at the first meeting to the Secretariat.

## **CHIEF EXECUTIVE’S COMMENTS**

The Chief Executive updated Members on changes to the Secretariat. He also mentioned that the FMLC website was being redesigned.

Following the success of the FMLC’s Judicial Seminar held on Monday, 29 November 2021, on the topic of climate-related litigation, the Secretariat is trying to organise another seminar with the same speakers for a wider range of stakeholders. The event will be held on 23 February. The Secretariat is also organising an event (or a series of events) examining proposed post-Brexit amendments to the regulatory framework as relevant to three or four areas of the financial services.

Members noted that the following have been published on the FMLC website:

- [Response to PRA Consultation: The Definition of an “Insurance Holding Company”](#) (7 December 2021)

## **ACTIVE PROJECTS**

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

This Working Group has been considering uncertainties which arise owing to the inclusion in the definition of a “contract of insurance” as set out in the (in Article 3 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001) of the phrase “or similar contracts of

guarantee”. The extension has been considered by market participants to make the definition broad and difficult to interpret. A paper has been drafted examining the uncertainties in this context and proposing possible mitigants.

At the last meeting, Members suggested providing clarity on few sections of the paper in order to make its focus narrower and clarify the explanation of derivative contracts. The Secretariat reported that it is working with those Members to make suitable amendments, following which the paper would be sent back to the Working Group for review.

### **Good faith and financial contracts (Chair: Ewan McKendrick)**

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, Members had resolved to establish a Working Group to draft a report expressing a nuanced view on this issue, under the FMLC’s educational remit. Two meetings of the Working Group have been held so far, at which attendees discussed the scope of the project. Sub-groups for drafting sections of the discussion paper are being set up.

### **EU Directive on Credit Servicers and Credit Purchasers (Chair: Sanjev Warna-kula-suriya)**

On recommendation from the Securities Markets Scoping Forum, Members had resolved to establish a Working Group to consider issues of legal uncertainty arising in the context of Directive (EU) 2021/2167 on credit servicers and credit purchasers (the “**Directive**”). The European Commission proposed the Directive as part of its strategy to reduce current stocks of non-performing loans (“**NPLs**”) on EU banks’ balance sheets and prevent future NPL build-ups. The Secretariat has established the Working Group—which Sanjev Warna-kula-suriya has kindly agreed to chair. Mr Warna-kula-suriya informed Members that the Working Group’s first meeting would be held on 10 February. The Chief Executive stated that, following the discussion at the last meeting about the Loan Market Association’s work on this topic, the Secretariat had invited the LMA to join the Working Group. The LMA had accepted the invitation. Members discussed other industry bodies which would have an interest in this legislation.

## **RADAR**

### **Consultations by HM Treasury and the FCA on the Appointed Representatives Regime**

The Secretariat has been in contact with HM Treasury in relation to a [Call for Evidence](#) launched last year on the appointed representatives (“AR”) regime. The Call for Evidence is an information gathering exercise on how market participants use the AR regime and how effectively the regime works in practice. The FCA has simultaneously issued its own [Consultation](#), having identified evidence of detriment arising from certain aspects of the regime. Members’ views were invited on whether the FMLC should respond to either HM Treasury’s Call for Evidence or the FCA’s Consultation.

Members noted that the consultations both seem to be aimed at determining how the AR regime is used in practice. The questions seem to be at a policy level in relation to which it would be difficult to identify legal uncertainties. Members resolved to await developments, including any legislative amendments, before considering whether to weigh in.

### **National Security and Investments Act 2021**

The Secretariat has been made aware of letters sent by the City of London Law Society’s Financial Law Committee to the Department for Business, Energy and Industrial Strategy (“DBEIS”) on the National Security and Investments Act 2021 (“NSIA”), drawing attention to the possibly inadvertent impact of the NSIA on loans secured over substantial (direct or indirect) holdings of shares in companies in any of the 17 specified sectors for which mandatory pre-notification is required. Members were asked to consider if the Committee would support the need for resolution of the uncertainties identified in the letter.

Members agreed that the NSIA had possibly unintended consequences for financial markets participants, giving rise to issues of legal uncertainty. They noted, however, that the degree to which the problem would impact market practice was unclear. Members observed that general awareness of the impact of the NSIA remained low, which meant that legal advice on the issue was still coalescing. A Member noted that the impact of the NSIA was quite broad; it would not only affect secured loans. Another Member highlighted the possibility of further unintended consequences if firms were to take mitigating action to work around the unclear or onerous provisions.

Members resolved that a short letter be sent to BEIS letting it know that the issue had been brought to the Committee's attention and that it was scoping the issue amongst stakeholders. Members agreed that the Secretariat should contact stakeholders in two weeks to see if the problem had been mitigated by a work-around, and then decide what follow-up correspondence may be sent to BEIS.

### **HM Treasury Consultation on Future Regulatory Framework Review for CCPs and CSDs**

The Secretariat brought to Members' attention the publication by HM Treasury of a [Consultation](#) on the Future Regulatory Framework Review ("FRFR") for central counterparties ("CCPs") and central securities depositories ("CSDs"). Specifically, the Consultation sets out proposals for granting the Bank of England ("BoE") greater rule-making powers over CCPs and CSDs, subject to a new accountability and transparency framework. The government intends to grant the BoE a general rule-making power in relation to CCPs and CSDs (modelled on the FCA's general rule-making power in section 137A of FSMA and the PRA's general rule-making in section 137G of FSMA) so that it can set appropriate rules for these firms. The Consultation also sets out the government's proposals to enhance and expand upon the mechanisms governing the relationships between the Bank, HM Treasury, Parliament and external stakeholders in relation to the regulation of CCPs and CSDs. The Consultation poses two broad questions, requesting feedback on: (1) the proposed set of statutory objectives and regulatory principles for the Bank in its capacity as the regulator of CCPs and CSDs; and (2) the proposed enhanced accountability and transparency mechanisms.

Members noted that the Consultation posed policy questions but resolved that the Secretariat should consult members of the Infrastructure Scoping Forum for their views on whether any legal uncertainties arise which the FMLC should highlight in a response.

### **Legislative oversight of financial services regulation**

A stakeholder had drawn to the Secretariat's attention oddities arising in relation to the consideration by Parliament of financial services legislation. This includes instances in which a statutory instrument was considered by Parliament after it had come into force. These oddities may feed into the Committee's continued consideration of whether the FMLC might draw attention to concerns around the inadequate oversight of amendments to the financial regulatory framework which might increase legal uncertainty in the market.

Members agreed that, while this was a problem, it was not clear what the FMLC could do at this stage. It was agreed that the Secretariat should monitor developments and discuss concerns with stakeholders.

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

The Secretariat has been in discussions with various stakeholders regarding the legal issues surrounding the adoption of distributed ledger technology (“**DLT**”) by financial market infrastructures (“**FMI**”). It had a meeting with HM Treasury and the Bank of England on these issues and has continued to discuss follow up questions with stakeholders.

At the last meeting, a Member suggested that views of the Infrastructure Scoping Forum should also be sought on this topic. Accordingly, these issues were discussed at the last meeting of the Forum. Members of the Forum, recognising that it would be useful to hear about the commercial imperatives for the adoption of DLT, kindly offered to put the Secretariat in contact with FMIs which were exploring using DLT. As a result, a seminar was held on Tuesday 7 December at 8am for members of the FinTech and Infrastructure Scoping Forums with speakers from the Australian Securities Exchange and Euroclear to provide remarks on why and how their organisations are adopting the use of DLT and dealing with the legal and regulatory challenges arising therein.

A member who had attended the seminar reported that the remarks provided by the speakers were interesting and the discussion that followed thereafter was extremely good. He stated that it will be important to monitor future developments in this area. Members shared their views on the usage of DLT in the FMI.

The Chairman urged the Secretariat to monitor developments and continue with scoping in this area.

### **The New Consumer Duty**

At the September meeting, Members discussed possible uncertainties arising in relation to the FCA’s proposal of a new Consumer Duty. The Consultation, which closed on 31 July 2021, proposed package of measures intended to deliver better outcomes for consumers. At the time, Members had agreed that the new provisions were broad and vague but had resolved not to

undertake any work on this topic. At the last meeting, Members had asked for the Banking Scoping Forum's views on the FCA's [second consultation on the new consumer duty](#).

The Secretariat reported that members of the Banking Scoping Forum had welcomed the FCA's decision not for the moment to recommend the introduction of a Private Right of Action ("PROA") for clients who consider they have suffered loss as a result of breach of the new principle. The Scoping Forum thought that a degree of uncertainty was inevitable in consumer legislation and that there was no need for the FMLC to intervene, at least while no private right of action was being proposed.

A Member observed that the degree of uncertainty, identified by the Forum, existed because the proposed principles were quite broad, and that the FMLC should highlight it. Members agreed to return to this topic at the next meeting when, it was hoped, the Committee Member who had attended the Banking Scoping Forum meeting would also be present.

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

The Secretariat has been in discussions with various stakeholders regarding the legal issues surrounding the adoption of distributed ledger technology ("DLT") by financial market infrastructures ("FMI"). One such conversation resulted in the idea of holding a joint meeting of the Infrastructure and FinTech Scoping Forums, featuring speakers representing providers of DLT-based technology.

Members noted that developments in FinTech were occupying the time of a range of market participants. A Member asked if it would be possible to update the [FMLC's 2018 paper](#) on DLT to discuss how practice has evolved and identify new legal issues. Another Member pointed out that the E.U. had already begun considering legislation around DLT, while the U.K. remained behind. A third Member noted that the discussions in both jurisdictions remained focused on policy.

The Chairman asked the Secretariat to consider, with the FinTech Scoping Forum, whether emerging technology is giving rise to uncertainty and how regulation is coping with technological changes.