

FINANCIAL MARKETS LAW COMMITTEE



Date: 7 April 2022

Time: 4.30pm to 6.00pm

Venue: Marshall Wace LLP, George House, 131 Sloane Street, London SW1X 9AT and by videoconference

MINUTES

Attendees:

Lord Thomas (Chairman)	FMLC Chairman
David Greenwald (Deputy Chairman)	Fried Frank Harris Shriver & Jacobson LLP
Andrew Bagley (dial in)	Goldman Sachs
Sir William Blair (dial in)	Queen Mary University of London
Claude Brown (dial in)	Reed Smith LLP
Paul Double	City of London Corporation
Kate Gibbons	Clifford Chance LLP
Carolyn Jackson (dial in)	Katten Muchin Roseman LLP
Mark Kalderon (dial in)	Freshfields Bruckhaus Deringer LLP
Peter King	HM Treasury
Sir Robin Knowles (dial in)	Royal Courts of Justice
Ida Levine (dial in)	Impact Investing Institute
Karen Levinge with Stephen Braviner Roman (dial in)	FCA
Jon May	Marshall Wace LLP
Chris Newby (dial in)	AIG
Barney Reynolds	Shearman & Sterling LLP
Brian Gray	CEO
Venessa Parekh	Research Manager

Registered Charity Number: 1164902.

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CHAIRMAN'S COMMENTS

The Chairman observed that the event held on 23 February on climate-related litigation had been very interesting and well attended. He noted that the webinar on the Investment Firms Prudential Regime on 4 April had explained thoroughly the issues faced by relevant firms and the regulators' response, despite the technical nature of the subject.

The first virtual meeting of the 2022 Quadrilateral Conference—an annual arrangement with the FMLC's sister organisations in the US, EU and Japan to meet annually to discuss topics of mutual interest—was held on 6 April. The Chairman stated that the panels on digitalisation and sanctions against Russia had been enlightening, offering a global view on two important developments in the financial markets.

CHIEF EXECUTIVE'S COMMENTS

The CEO asked Members for their opinions on whether meetings and events should be held in person or stay virtual. A benefit of virtual events was increased attendance but, he noted, that did not necessarily translate into increased engagement and lacked the social aspect. Several Members expressed the view that events focused on UK issues might be held in person, as long as government restrictions and logistics permit it. For events with a global focus, a virtual format, with contributions from experts abroad, would provide greater benefit.

The CEO reported that Emma McClean, who had worked as Operations Manager at the Secretariat for several years, had left. Members expressed their thanks to Ms McClean for her contributions.

ACTIVE PROJECTS

Regulation of cryptoassets

The CEO reported that, at a recent meeting of the FinTech Scoping Forum, attendees discussed HM Government's [Response](#) to its proposal, published in October 2020, to expand the perimeter of the financial promotions regime to include cryptoasset promotions. The discussion identified areas where the proposed amendments and approach would lead to significant legal uncertainty. Forum members recommended that the FMLC send a brief letter setting out these concerns before the legislation amending the financial promotions regime is published, with the

aim of opening a dialogue with HM Treasury so as to delve into these issues in greater detail at an appropriate stage in the future.

After the [letter](#) was sent on 15 March, HM Treasury contacted the Secretariat requesting a meeting to discuss the issues identified in the letter. A meeting among the team at HM Treasury, those stakeholders involved in drafting the letter and members of the Secretariat was held on 30 March. The meeting focused on the uncertainties arising from the expansion of the financial promotions regime to include cryptoassets and attendees on the FMLC side made recommendations on how the regulation of cryptoassets may be simplified so as to achieve the goal of consumer protection while encouraging innovation. It was agreed that the FMLC and the team from HM Treasury would keep a dialogue open on related developments.

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 Working Group has had two meetings and has produced a note setting out issues. Before undertaking any further work, Working Group members wanted to gather feedback from the market on the degree of uncertainty and possible disruption which these issues are causing. Such feedback was being sourced through the Loan Markets Association and the Association for Financial Markets in Europe. The CEO reported that once such feedback has been received, the Working Group will reconvene. Members discussed whether the FMLC could have impact on an EU directive. The CEO suggested that, subject to the feedback received, it would be helpful to raise awareness of the issues identified by the Working Group and hope that the Regulatory Technical Standards, which are still to be agreed, might be influenced.

Good faith and financial contracts (Chair: Ewan McKendrick)

A Working Group had been established to draft a report, under the FMLC’s educational remit, expressing a nuanced view on the issue of whether good faith might provide a more flexible solution to contractual disputes than *force majeure*, frustration and illegality. Two meetings of the

Working Group were held last year, at which attendees discussed the scope of the project. Four sub-groups for drafting sections of the discussion paper were established.

The Secretariat reported that the Working Group Chair had reluctantly decided to step down, owing to personal circumstances. The Secretariat suggested that Charles Clark, who had retired from Linklaters LLP and is already a Working Group member, might be a good Chair. Members agreed that Mr Clark would be ideal. They suggested that it might be helpful to get input from an academic.

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

The FMLC's [Report](#) examining legal uncertainties in the context of the U.K.'s ring-fencing regime, which was published on 9 November 2021, was also forwarded to the Independent Review Panel appointed by HM Treasury to review the operation of the ring-fencing legislation. The Review Panel has now published its Final Report, setting out recommendations to HM Treasury on how the regime may be amended. The Secretariat noted that the Final Report acknowledges some of the uncertainties identified by the Working Group.

Since the Final Report leaves the detail of how its recommendations are implemented to the discretion of HM Treasury, the Working Group Chair has recommended sending a letter, enclosing the FMLC report, to HM Treasury, offering the Working Group and Committee's expertise when the possible amendments to the ring-fencing regime are being drawn up. The Secretariat has drafted such a letter, which Members approved.

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. The Secretariat has been working with Members to make possible amendments to the draft paper drafted by the Working Group examining the uncertainties in this context and proposing possible mitigants.

The Chairman asked that Members provide feedback to the Secretariat such that the paper can be approved at the next meeting.

RADAR

National Security and Investments Act 2021

At the last meeting, Members had discussed the possible inadvertent impact of the National Security and Investments Act 2021 (“NSIA”), which was causing uncertainty. At that time, Members had observed that general awareness of the impact of the NSIA remained low, which meant that legal advice on the issue was still coalescing. 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 had resolved, therefore, that a short letter be sent to DBEIS letting it know that the issue had been brought to the Committee’s attention and that it was scoping the issue amongst stakeholders. Accordingly, a letter was sent.

The Secretariat recounted to Members its conversations with a number of law firms about how this issue is being dealt with in practice. It asked Members whether the FMLC should form a Working Group on any residual issues. A Member stated that she was aware that DBEIS was considering the points made by CLLS and other market participants. It was suggested that the FMLC monitor developments and consider establishing whether the issue needs to be brought back before the Committee at some point.

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 December meeting, the Chief Executive had drawn to Members’ attention the FCA’s [second consultation on the new consumer duty](#). A Member had kindly offered to discuss this with the Banking Scoping Forum at an upcoming meeting to explore whether the FMLC could usefully respond.

The Member stated that the Banking Scoping Forum had considered the second consultation and discussed several instances of the application of new consumer duty (including acting in good faith) in the context of banking services. It noted that the FCA had provided some definition around the duty, which partially mitigated the uncertainty caused by the vagueness of the FCA’s first consultation. Crucially, the FCA had decided for the moment not 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, although the possibility remains that they may do so in future. If a PROA is introduced, attendees observed that it might create uncertainty as Principle 12, which makes it possible, is broad and vague.

Members considered whether the FMLC should intervene by sending a letter now alerting the FCA to possible uncertainty were an PROA introduced. A Member stated that he didn't consider the uncertainty to have been resolved to a satisfactory degree by the FCA's second consultation, drawing attention to uncertainties around how the Ombudsman might interpret the principles. He acknowledged, however, that this may be outside the FMLC's remit. Another Member noted that existing principles under other regimes—the Senior Managers and Certification Regime, for example—would provide protection for consumers, rendering the PROA unnecessary. The discussion moved to whether the FMLC might express the opinion that a PROA is unnecessary but a Member observed that the decision of whether or not to introduce a PROA is a policy question. Members resolved therefore to do nothing further unless and until the question of a PROA reemerges.

Sustainable finance and fiduciary duties

A stakeholder suggested that the FMLC hold a joint meeting of the ESG and Insurance and Pensions Scoping Forums to discuss legal uncertainties which may arise in the application of pension trustees' fiduciary duties in the context of sustainable and impact investing. Members agreed that the legal uncertainties surrounding fiduciary duties would be an important issue for the FMLC to consider. A Member noted that the Law Commission had conducted research around these issues but the large volume and rapid pace of ESG regulation may have given rise to further issues. That Member also noted that these questions were being considered by authorities, drawing attention to a [speech](#) from the Bank of England on firms' responsibilities.

The Chairman suggested that it would be useful to include in the discussion the perspective of an expert with a conservative view of trusts. A Member suggested that Professor Sarah Worthington's research on the evolution of fiduciary duties might be helpful.

Distributed ledger technology in financial market infrastructures

The Secretariat reported that it had arranged a joint meeting of the Infrastructure and FinTech Scoping Forums to provide the “decentralised finance” or “DeFi” perspective on the use of

blockchain in the financial markets and the legal challenges arising thereof. The meeting featured speakers from Applied Blockchain, a firm providing blockchain solutions to a variety of companies, MetaMUI, an identity-based blockchain providing transfers between users, and TriliTech, a blockchain research and development hub focused on the open source Tezos blockchain. It would continue scoping the legal issues surrounding the adoption of distributed ledger technology.

Sanctions against Russia

The international response to the evolving political situation in Ukraine following the invasion by Russia has been to impose strict sanctions against Russian individuals and state-owned financial institutions. Stakeholders have mentioned to the Secretariat, in Relationship Management calls, that the effects of the sanctions have been widely felt and have become the focus of their work. While stakeholders have not yet suggested that the FMLC undertake work on any specific issues of legal uncertainty related to the effect of the sanctions against Russia, the Secretariat asked Members whether any work might be undertaken.

A Member noted that developments around the sanctions around Russia were very fast-moving and it would be unlikely that the FMLC could engage authorities with any impact at this time. He noted that there were inevitably uncertainties arising from the sanctions, including complexities from the differences in sanctions legislation across jurisdictions, but that these would be best considered in slower times. Members agreed that the sanctions were causing uncertainties because they were impacting banks in their role as agents and members of syndicates, as well as payment systems. In addition, the cross-jurisdictional uncertainties would yield useful lessons for the future. Members resolved to set this project aside until such time as the conflict in Ukraine is resolved and, thereafter, to consider a project offering “lessons learned” from a sanctions-implementation perspective.

Economic Crime (Transparency and Enforcement) Act

Members briefly discussed the Economic Crime (Transparency and Enforcement) Act (the “**Economic Crime Act**”), which is designed to tackle economic crime and sanctions evasion. Among other measures, the Economic Crime Act establishes a Register of Overseas Entities. They agreed to monitor developments.