FINANCIAL MARKETS LAW COMMITTEE

29 January 2015

Dr Nemat Shafik
Deputy Governor, Markets & Banking
Bank of England
Threadneedle Street
London
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Dear Dr Shafik

FAIR AND EFFECTIVE MARKETS REVIEW

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

The FMLC welcomes the opportunity afforded by the recent consultation document, *How fair and effective are the fixed income, foreign exchange and commodities markets?* (the "Consultation")[1] to engage with the Fair and Effective Markets Review (the "FEMR") and is grateful for the chance to contribute to the important work that review is undertaking.

The Consultation seeks to assess, *inter alia*, areas where fairness and effectiveness in the Fixed Income, Currency and Commodities ("FICC") markets could be improved; the extent to which ongoing regulatory, organisational and technological change is likely to address any deficiencies; and the further steps which are needed to implement improvements.

Although it is not the role of the FMLC to comment on policy issues, the FMLC applauds this initiative to reinforce confidence in the integrity of the wholesale financial markets and to bolster the fairness and effectiveness of market activity.

The FMLC has previously considered a number of regulatory and legal reform initiatives responding to perceived problems of market abuse and benchmark manipulation.[2] In each case, the Committee has identified issues of legal uncertainty, or potential uncertainty, arising in the context of a proposal for legislation or regulation and it has addressed these in published papers or correspondence in the hope that the resulting legislation may be strengthened and improved thereby. Several FMLC publications of this kind are available on the Committee's website at www.fmlc.org.

In light of a number of questions posed by the Consultation, especially those on barriers to transparency of markets and, specifically, question 11 which seeks to tackle

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1 Available here.

2 See, for example, the FMLC's Letter to HM Treasury on the Department of Energy and Climate Change Consultation proposing new criminal offences in the regulation of wholesale energy markets; the FMLC Paper on Legal Uncertainty Arising from the Proposal for a Regulation on Indices used as Benchmarks in Financial Instruments and Financial Contracts, dated 18 March 2014 and the FMLC's Report entitled "Observations on proposals for benchmark reform", dated 1 December 2012.

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"fundamental structural problems" by way of "regulatory measures or internationally co-ordinated regulatory action", the Committee wishes to draw attention to the issues it has identified in the context of certain legal barriers, such as restrictions on information sharing (e.g. data protection, confidentiality and secrecy requirements), which may constitute a significant barrier to the effective functioning of regulation in a cross-border context. The Committee has observed on several occasions that such barriers can give rise to conflict of laws issues and significant uncertainty for market participants and may also, ultimately, undermine market integrity.

National rules on data protection and bank security have also been identified by others as an obstacle to efficient cross-border cooperation in the field of financial regulation.[3] For example, in the field of derivatives, the OTC Derivatives Regulators Group has noted that barriers—including data protection laws, blocking statutes, state secrecy laws and bank secrecy laws—exist which can prevent reporting to trade repositories, and that such barriers to reporting will continue to have a negative impact on the effectiveness of reporting obligations unless these barriers are removed.[4]

The FSB and other international standard-setting bodies are undertaking work with national regulators and legislators to identify and reduce these obstacles. The G20's Data Gaps initiative is an example of the important work that has been done to overcome the gaps in information that exist in certain sectors of the financial markets.[5] While this initiative has made significant progress, the FMLC's research suggests that further work to remove obstacles and promote data sharing is still necessary.

In particular, the FMLC has identified a number of issues arising in regard to the restrictions on data sharing set out in the European Commission's proposed Regulation and Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (together the "Proposals").[6] The issues identified by the FMLC were summarised in a letter to the European Commission and comprise three principal concerns: (i) the lack of an express safe-harbour in the Proposals for the exchange of information between national regulators pursuant to international agreements, for example, the International Organization of Securities Commissions Multilateral Memorandum of Understanding Concerning Consultation And Cooperation And The Exchange Of Information; (ii) a lack of clarity in the application of various exemptions establishing legitimacy for data sharing between market participants and regulatory authorities (in particular sharing that occurs without the consent of the data subject); and (iii) the likelihood of conflict between the restrictions imposed by the proposals and market participants' obligations to provide information to third country regulators under the terms of their authorisation to conduct

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3 See a letter on Bank Secrecy from the European Financial Markets Lawyers Group to the European Commission and the European Banking Authority, dated 30 October 2014.

4 Letter from the ODRG to the FSB on OTC Derivatives Regulators Group—Barriers to Reporting Trade Repositories (12 August 2014).

5 See, for example, its most recent report: "The Financial Crisis and Information Gaps—Fifth Implementation Progress Report".

6 The proposal for a Regulation: COM (2012) 11 final; 2012/0011 (COD) and the proposal for a Directive: COM (2012) 10 final; 2012/0010 (COD).

business in that jurisdiction.[7] Although the Proposals establish a number of legitimate grounds for data processing and data sharing, the FMLC expressed the view that the application of the relevant provisions was uncertain and that the provisions failed adequately to take into account the context and challenges of financial regulation.

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The Committee has also published a paper identifying additional legal uncertainties that could arise as a result of the broad territorial scope of the Proposals:

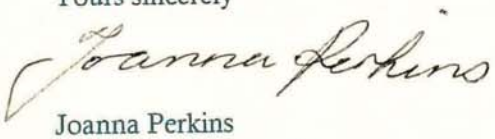
> *The FMLC observes that, in the case of third country entities caught by the provisions of the Draft Regulation, the entities in question are likely to be subject to overlapping regulation, i.e. under their own home legal or regulatory system and under the Proposals. Evidently, this may lead to legal and/or regulatory conflicts. [...]*
>
> *...there is the practical question of the position of entities established in third countries that are required to process data to comply with obligations imposed by their 'home' legal system and the confusion likely to be caused in these circumstances, where data processing is unlawful under the Regulation but obligatory in their home jurisdiction.*[8]

The FMLC believes that issues such as those outlined in publications referred to above will continue to have a negative impact on the effectiveness of cross-border regulation in the global FICC markets unless legal barriers to data sharing are resolved in such a way as to permit the processing, retention and transfer of data where to do so would enhance international supervision and enforcement.

Following this consultation, if and when the FEMR gives rise to concrete recommendations addressing the need for improved fairness and effectiveness in the FICC markets, the FMLC would be delighted to assist the FEMR in considering how to ensure those recommendations are robust and preserve certainty in the legal framework of the wholesale financial markets.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me to arrange such a meeting or should you require further information.

Yours sincerely



Joanna Perkins
FMLC Chief Executive

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7 The FMLC has published (i) a letter to the European Commission, dated 8 July 2014; (ii) a paper, dated 4 November 2014; (iii) a letter to HM Ministry of Justice, dated 21 November 2014; and (iv) a letter to the European Commission, dated 11 December 2014.

8 Financial Markets Law Committee "Discussion of legal uncertainties arising in the area of EU Data Protection Reforms", page 8.