

7 May 2021

Directorate-General for Financial Stability, Financial Services and Capital Markets Union
European Commission
1049 Bruxelles
Belgium



Dear Sir or Madam

Targeted consultation on the review of the Directive on financial collateral arrangements

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.

In February 2021, the European Commission published a consultation to gather views on the functioning of Directive 2002/47/EC on financial collateral (the "**Financial Collateral Directive**" or the "**FCD**"). The FCD makes provision for the enforceability and non-registration of certain financial collateral arrangements. In particular, section 2 of the Consultation asks whether the concepts of "possession" and "control" in the FCD are sufficiently clear or might need further clarification". Question 2.2 asks whether the concepts of "possession" and "control" in the FCD require further clarification and 2.2.1 asks for reasoning.

The FMLC is of the view that the definitions of "possession" and "control" give rise to serious issues of legal uncertainty and give rise to material difficulties in practice and that these do therefore require further clarification. The reasons for these conclusions are set forth in the previous FMLC papers on "possession" and "control", written in 2010 and 2012.¹ Although the papers were written whilst the United Kingdom was an E.U. Member State, issues raised in them remain germane to these definitions under the FCD itself. The FMLC would recommend that these be taken into account.

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 should you wish to arrange a meeting or if you have any questions.

Yours sincerely,


Brian Gray
FMLC Chief Executive²

¹ FMLC, *Report: Gray v G-T-P Group Ltd*, (December 2010), available at: <http://fmlc.org/wp-content/uploads/2018/02/Issue-87-Control-Gray.pdf>

FMLC, *Report: Analysis of uncertainty regarding the meaning of "possession or ... control" and "excess financial collateral" under the Financial Collateral Arrangements (No. 2) Regulations 2003*, (December 2012), available at: <http://fmlc.org/wp-content/uploads/2018/03/Issue-1-Collateral-Directive-Report.pdf>

² The FMLC is grateful to Thomas Donegan (Shearman & Sterling LLP) for his assistance in drafting this letter.

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