

Open letter to Mr Justice Richards**Business and Property Courts of England and Wales – Insolvency and Companies List and to whom it may concern.**

16 January 2024

Dear Mr Justice Richards,

Effective removal of Retail investor combined protections to the Financial Ombudsman Service ('FOS') and Financial Services Compensation Scheme ('FSCS') under The Financial Services and Markets Act 2000 ('FSMA')**Proposed Scheme of Arrangement under part 26 of the Companies Act 2006 ('the Scheme'), LINK FUND SOLUTIONS LIMITED ('Link')**

The signatories of this letter ('we') understand that the Court is considering whether to sanction a scheme of arrangement by Link under part 26 of the Companies Acts 2006. We have no wish to become involved in Link or the merits of its proposed scheme. However, we are concerned the proposed scheme in its current form, if sanctioned, would forcibly denude affected investors of their statutory protections. This would occur many years after they had relied on boilerplate statements asserting the existence of those protections whilst making their investment decisions in good faith. Such a ruling, akin in effect to a removal of statutory protections under FSMA for approximately 300,000 retail investors, would be likely to set a dangerous precedent for the UK financial services market at large, thereby constituting a public interest case.

In addition, sanctioning the above scheme could have grave, unintended consequences of increasing market volatility, diluting market participants' trust and tarnishing the reputation of the UK financial services industry which contributes 8.2 percent of UK GDP.

And it could constitute a systemic risk to the UK economy, and possibly beyond.

The combined protections enacted by FSMA of the FOS (to adjudicate complaints and award compensation up to £415,000) and the FSCS (to deliver recompense in respect of regulated financial services if a firm defaults, of up to £85,000 per eligible consumer) (together, 'the FSMA rights') are central to maintaining public confidence in UK regulated financial services. If the current clear and unambiguous guarantee of protection set out in primary legislation were to be undermined by a Scheme of Arrangement under the Companies Act 2006 or any similarly contrived mechanism which creates a loophole, there is good reason to anticipate a loss of confidence in retail financial services, possibly panic amongst investors and increased systemic and contagion risk in any future financial crisis.

The combined FOS and FSCS protections are a fundamental cornerstone to consumer confidence, not just to the investments in the Link case, but also to all regulated investments, plus bank deposits, building societies, insurance, IFA advice, ISAs, and pensions amongst others. Confidence which comes from the assurance of protection sits at the heart of the nation's financial system; and is a key factor in consumer behaviour at moments of crisis. In fact, the Bank of England recognised the importance of and considered strengthening those protections further in 2023¹. In extremis, we believe it is possible that the UK's credit rating could be reduced if the country were perceived to be at elevated risk of bank runs because of the absence of consumer confidence in its depositor guarantee scheme, the FSCS.

Imagine how the global financial crisis in 2007-10 might have played out had consumers been given any reason to suspect that the FSCS protection on their bank savings was not absolutely bulletproof; or indeed if a pensions or investment firm had failed to withstand the shock from the Truss government mini budget in September 2022 and had sought protection from its creditors by proposing a Scheme of Arrangement rather than declaring a default (the latter allows the FSCS to make good the shortfall). The unqualified combined FOS and FSCS protections remove the incentive for consumers to participate in bank runs and also cut contagion risks, calming consumer and counterparty behaviour at moments of crisis, so thus help stabilise the system. All it would take is a single Court precedent confirming that a Scheme of Arrangement may be used, *ex post facto*, to retroactively deprive consumers of those FSMA rights, for the integrity of the UK financial system to be placed in jeopardy.

In light of the likely severity and potential knock-on effects that the judiciary decision of this case may trigger, we are advising the court to consider seeking satisfactory answers to the following questions:

- 1) Has the Financial Conduct Authority ('FCA') in conjunction with the Prudential Regulatory Authority ('PRA') undertaken a detailed impact assessment of the removal of those protections, including a detailed independent risk and scenario analysis; if so, what were the results?
- 2) Has HM Treasury ('HMT') been consulted to analyse the impact of removal of protections, particularly concerning potential negative sovereign credit rating implications; if so, what are the conclusions?
- 3) Has the Bank of England ('BoE') been consulted to understand the potential impact and unintended consequences on the UK's financial stability as well as any contagion spreading beyond national borders and giving rise to systemic risk; if so, what was the outcome of this?
- 4) Has the Office of Budget Responsibility ('OBR'), which has responsibility to provide independent economic forecasts and independent analysis of the public finances, been consulted with, to consider the foreseeable adverse consequences of the Scheme in relation to the likely impact on tax revenues through the financial services sector and

1

<https://www.reuters.com/world/uk/bank-england-considering-urgent-reform-deposit-guarantee-scheme-ft-2023-04-16/>

future welfare budget increases (due to the likely reduction in individuals' propensity to invest, save for retirement and insure against life's risks)?

- 5) Has the Chancellor of the Exchequer, the Rt. Hon. Jeremy Hunt, been consulted on the potential implications on consumers and general market sentiment as we head towards a General Election? If so, what is his position on this matter of national public policy, and on the economic and systemic risks it presents?
- 6) Finally, within the wider context of a long list of financial scandals, including various investment scandals, the loan charge scandal and the post office scandal, has the UK government assessed its own level of risk appetite for any further administrative missteps and miscarriages of justice that would undermine an already volatile market by eroding confidence of both retail and wholesale investors and ultimately threatening the UK's financial stability.

We suggest that any consideration of such evidence would inevitably lead to the conclusion that the FSMA protections and rights, established by primary legislation and regulations, should not, for reasons of national interest, be in any way undermined or taken away by the Court. The proper forum for any such wide-ranging policy considerations is through His Majesty's Treasury, the Financial Conduct Authority, the Prudential Regulation Authority, the Bank of England, the Office for Budget Responsibility and the UK Parliament.

We hope that our concerns are clear and thank the court for considering the points raised within this letter. We would gladly assist the court further by providing our collective expertise if need be.

Yours sincerely,

Professor Steve Keen
 Professor Markus Krebsz
 Professor Andrew Clare
 Professor David Llewelyn
 Dr Andy Schmulow

Professor Steve Keen is the academic who most accurately and presciently (in December 2005) predicted the occurrence, timing and causation of the Global Financial Crisis ('GFC'), for which was awarded the [Revere Award for Economics](#) by the Real-World Economics Review. Author of, among other works, [Can We Avoid Another Financial Crisis?](#), he is semi-retired, serving as [Honorary Professor \(Research, Innovation and Global Engagement\)](#) at University College London. He is also an [Ambassador of the Transparency Task Force](#).

Professor Markus Krebsz is a professor at Woxsen University, an honorary professor at Stirling Management School, an author, researcher, TEDx speaker and risk specialist with 30 years' experience of financial markets. He is a Member of the United Nations Economic

Commission for Europe's [Group of Experts on Risk Management in Regulatory Systems \(GRM\)](#), established in 2011. He is also an [Ambassador of the Transparency Task Force](#).

Professor Andrew Clare is professor of asset management at Bayes Business School, a role he has combined with independent advisor and trustee positions with corporate pension schemes (including BT plc, Magnox, Marconi and Amey) and non-executive directorships and advisory roles with firms such as Legal and General plc, Old Mutual plc and Quilter plc. He previously worked as a Senior Research Manager in the Monetary Analysis wing of the Bank of England, supporting the work of the Monetary Policy Committee. He is also an [Ambassador of the Transparency Task Force](#).

Professor David Llewelyn is Emeritus Professor of Money and Banking at Loughborough University. He specialises in financial regulation, institutions and markets, crisis management and banking theory. He is a past Chair of the Board of the Banking Stakeholder Group at the European Banking Authority (EBA), has published widely in the area of financial regulation and acted as a consultant to regulatory agencies in several countries. His publication history since the Global Financial Crisis focuses on improving bank regulation, governance and culture - see, for example, [Reforming the Culture of Banking: Restoring Trust and Confidence in Banking](#) (*Journal of Financial Management, Markets and Institutions*, 2016). He is also a member of the Secretariat to the [APPG on Personal Banking and Fairer Financial Services](#)

Dr Andy Schmulow is Associate Professor of Law, School of Law, University of Wollongong, Australia. A globally recognised expert on financial regulation, he is Co-Editor of [The Cambridge Handbook of Twin Peaks Financial Regulation](#), holds visiting appointments at universities in South Africa and South Korea and has given key-note addresses to the South African Reserve Bank and National Treasury, European Central Bank and EU Single Resolution Authority, the Portuguese Ministry of Finance, and the World Bank. He has advised governments and regulators in Australia, South Africa and South Korea. He is also a member of the Secretariat to the [APPG on Personal Banking and Fairer Financial Services](#).