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FACEBOOK'S LIBRA – AN EXCITING BUT CHALLENGING ROAD AHEAD

– THOUGHT LEADERSHIP

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FACEBOOK'S LIBRA – AN EXCITING BUT CHALLENGING ROAD AHEAD

Facebook has announced that it is to launch Libra, a global digital currency, backed by some of the biggest names in financial services and tech including Visa, Mastercard, Uber and Spotify. The aim is to provide instant international money transfers by blockchain for the 1.7 billion people around the world without a bank account. Libra is a "stablecoin" and so, unlike Bitcoin, for example, will be linked to a reserve of underlying stable assets to maintain its value. However, getting a project of this global reach and magnitude off the ground gives rise to a range of regulatory, legal, practical and political challenges, some of which we discuss below.

What is Libra?

Libra is a global cryptocurrency launched by Facebook in a White Paper published on 18 June 2019. Libra will consist of tokens issued in exchange for, and backed by a reserve of, low-volatility assets, such as bank deposits and short-term government securities (the Libra Reserve), i.e. it's a so-called stablecoin. The intention is that Libra will be accepted as a means of payment in a diverse ecosystem of merchants but also can be used on a peer-to-peer basis. Libra will use a new open source blockchain software platform (the Libra Blockchain) built using a specially designed programming language called Move.

The low-volatility assets in the Libra Reserve will be held by network of investment-grade credit rated custodians, which are geographically spread, with the aim of greater security by decentralisation of the assets.

Libra's governance and operation

The Libra Reserve and the Libra Blockchain will be governed by the Libra Association, an independent, not-for-profit membership organisation, headquartered in Geneva, Switzerland. Initially, the Association and its governing Libra Association Council will be made up of a range of businesses, non-profits, multilateral organisations and academic institutions from across the globe and they will operate the Libra Blockchain on a permissioned basis. The founding members of the Libra Association, who will serve as validator nodes on the Libra Blockchain and enjoy the right to appoint

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Blockchain

A type of distributed ledger technology, blockchain is a data storage structure which is maintained and replicated across a decentralised network of "nodes" such that an individual node cannot tamper with the information recorded in the ledger by rewriting the transaction history. This technology was first applied in the design of the cryptocurrency Bitcoin, but has the potential to revolutionise how many different types of transactions are conducted and assets are transferred.

Cryptocurrency

A currency that uses cryptography to control the creation and transfer of new "coins" or "units" and to secure transactions. Cryptocurrencies are typically not issued or administered by any central bank or authority, although some have – Venezuela, for example, has experimented with Petro – a government-authorised, oil-backed cryptocurrency.

a representative to the Libra Association Council, comprise 28 firms including MasterCard, Visa, PayPal, Vodafone, Uber and eBay. Ultimately, however, the aim is to increasingly decentralise governance with short and long-term aims of expanding membership of the Libra Association and Council and realising a permissionless model respectively.

The Libra Association will have sole authority to mint and burn Libra coins, facilitated by a network of authorised resellers (e.g. cryptocurrency exchanges and other liquidity providers) who will interface with users. New coins can only be minted when authorised resellers initially purchase them from the Libra Association (for re-sale to users), using fiat assets equal to the value of the new coins. Coins will be burned when authorised resellers sell them back to the Libra Association as a "buyer of last resort", receiving the fiat assets underlying those coins in return (for distribution to users). This means that the total amount of Libra tokens in circulation will be determined by demand from authorised resellers (and ultimately Libra users), i.e. Facebook and other members of the Libra Association will not actively set or manage monetary policy for Libra, although this is something that could be altered in the future by a supermajority decision of the Libra Association.

Facebook has incorporated a regulated subsidiary, Calibra, to manage the financial services it will provide in relation to Libra with the stated aim of keeping individuals' financial and social data separate. Calibra's first product is a digital wallet allowing consumers to hold and spend Libra, although there is no restriction on other firms creating competitor wallets.

The development of Libra will be funded by the marketing of Libra investment tokens. These are expected to be securities be issued by way of private placement to founding members of the Libra Association and accredited investors, with any returns on these tokens paid from interest earned on the assets in the Libra Reserve left after meeting the expenses of the system.

According to the White Paper, Libra is expected to be operational in permissioned form in the first half of 2020, with the transition to a fully permissionless Libra Blockchain starting within five years of launch.

What are the aims of Libra?

The aspirations for Libra are laudable – bringing quick and affordable payments to the 1.7 billion people on the planet without bank accounts. The White Paper says that "Libra's mission is to enable a simple global currency and financial infrastructure that empowers billions of people." And adds that: "Moving money around globally should be as easy and cost-effective as — and even more safe

Libra – at a glance

- Libra is a new global digital currency backed by Facebook and some of the biggest players in financial services and tech, due for launch in 2020.
- It offers international money transfers for 1.7 billion people without bank accounts.
- Libra faces a number of legal and regulatory hurdles including the complex patchwork of international financial services regulation.
- Data privacy will be a thorny issue as Libra will have to ensure compliance with global data protection requirements.
- Tax authorities are likely to take an interest in who is using and accepting Libra.
- Libra faces a range of political difficulties - in the US, for example, there are calls for a break up of big tech and the power that it wields and there are international calls for central bank oversight.

Stablecoins

A cryptocurrency designed to have minimal price volatility, usually with a form of inherent value.

- **Collateralised stablecoins**
  Commonly, as with Libra and Tether – a cryptocurrency launched in 2014 – price stability is achieved by linking the currency to a reserve of stable assets such as fiat currencies or commodities.
- **Cryptocollateralised stablecoins**
  A reserve could alternatively be made of other cryptocurrencies, as seen in the cryptocurrency Dai, issued by MakerDAO. Given the price volatility of cryptocurrencies, such a reserve would typically require over-collateralisation and frequent auditing to maintain stability.
- **Non-collateralised stablecoins**
  These are stablecoins which do not have any reserve but instead use central bank-like monetary policy to maintain a fixed price by closely controlling supply with algorithms which respond to market conditions.

and secure than — sending a text message or sharing a photo, no matter where you live, what you do, or how much you earn."

Of course, this is not the first time technology has bridged the gap between financial services and those with limited access. In Kenya (and now across a number of countries), technology has provided a solution to this challenge for well over a decade in the form of M-Pesa, a mobile-based payments platform enabling instant transfers of value between anyone with a mobile phone account. The fundamentals of Libra sound eerily similar to M-Pesa albeit with an additional cryptocurrency and decentralised governance flavour. Perhaps, in time, Libra will come to be known as M-Pesa 2.0. However, it is quite clear that Libra is not solely intended as a financial inclusion tool. The list of founding members of the Libra Association includes many businesses with plenty of affluent tech-savvy customers and Libra has obvious potential to become a global currency with worldwide acceptance.

What are the challenges facing Libra?

With all innovation, and especially when it involves new means of delivering financial services to the public, myriad challenges arise – regulatory, legal, practical and political.

Howey "investment contract" test

Generally, an offer and sale of tokens will be subject to US securities laws and the jurisdiction of the US Securities and Exchange Commission (SEC) where: (i) an investment of money; (ii) is made with an expectation of profits; (iii) arising from a common enterprise; (iv) which depends solely on the efforts of others. *SEC v. W.J. Howey Co., 328 U.S. 293 (1946)*

Regulatory considerations

One of the regulatory mazes Libra will need to navigate is the complex patchwork of international regulatory frameworks governing financial services. The characterisation of the Libra currency, the activities of its participants and the overall Libra system which will be established (albeit decentralised in nature) will need to be mapped against these frameworks, and touchpoints established and dealt with.

In the US, a key issue will be whether Libra will be treated as a security and, consequently, subject to US securities laws and the jurisdiction of the Securities and Exchange Commission (SEC). This depends on the application of the now infamous Howey test.

Facebook considers Libra to be simply a means of exchange and store of value, and not a profit-making investment in an entrepreneurial venture, which can be contrasted with the separate Libra investment token described above which it designed for that purpose. The value of Libra is intended to be reflective of the value of the basket of underlying low-volatility assets comprising the Libra Reserve, implying that any changes in Libra's value should be the product of market forces acting on the underlying assets in the Libra Reserve instead of Facebook's entrepreneurial efforts, as well as making Libra's value stable and correspondingly reducing speculative appeal. Libra will effectively be minted and burned automatically in response to external demand (i.e., as fiat assets are deposited with the Libra Association and as Libra Association repurchases Libra coin from authorised resellers respectively). This means that, unlike with many digital assets, neither Facebook nor its fellow members of the Libra Association will actively set or manage monetary policy, which would appear to remove it as a source of expected profits. Nevertheless, whether the SEC will adopt the view that Libra is not a security because of this or because Libra is of the nature of a currency or is "sufficiently decentralised" is by no means entirely clear. Libra would offer the opportunity of speculation if you can exchange a depreciating currency (especially from a high inflation economy but not limited to that case) for a Libra coin which may appreciate in value against that currency.

Outside of securities law, Libra also potentially triggers US money transmission and commodities regulatory regimes, among others. As to money transmission, US-based Calibra is registered as a Money Services Business (MSB) with the US Treasury Department's Financial Crimes Enforcement Network (FinCEN), and it possesses money transmitter licenses in a number of states. It is not clear whether the Switzerland-based Libra Association, or any of the planned authorised resellers, will follow suit. FinCEN guidance suggests that an "administrator" of a virtual currency, defined as a person in the business of issuing (putting into circulation), and with the authority to redeem (withdraw from circulation), a virtual currency, may have an MSB registration obligation to the extent they do business "in substantial part" within the US, though certain exemptions exist. As to commodities law, to the extent Libra is considered a virtual currency, the US Commodity Futures Trading Commission could potentially assert the right to police fraud and manipulative conduct.

In the EU, similar (but different) challenges await. The establishment of the Libra Reserve pool of assets which provide backing for Libra has the hallmarks of a collective investment undertaking or scheme. The issuance of, and intermediaries providing services with respect to, Libra to EU customers will need to be mindful of fund and investment services legislation as well as regulations governing the authorisation of intermediaries and trading venues, fund marketing and securities offers, the distribution of packaged products to retail investors, securitisation (at least if there is some element of subordination of the claims of the holders of investment tokens on the asset pool) and market abuse. Furthermore, the EU payment services framework may also be relevant given that Libra's explicit function is to enable users to meet their obligations arising from transactions, as will the EU electronic money rules if Libra gives its holders claims on an issuer in exchange for the receipt of funds.

As Libra is intended to act as a global currency, regulatory constraints across the globe will be relevant. For example, some countries such as China have introduced a cryptocurrency prohibition, some, such as Germany, have extended existing financial services legislation to bring even true cryptocurrencies such as Bitcoin in scope whereas other jurisdictions such as Malta and Gibraltar have developed bespoke cryptocurrency regimes, each of which will need to be traversed. The global picture is a patchwork which is notoriously difficult to navigate but, that said, there are movements afoot which might help to develop a harmonised approach. France's central bank governor Francois Villeroy de Galhau, for example, has announced that the G7 has set up a task force led by European Central Bank board member Benoit Coeure to assess stablecoins like Libra and how they fit within existing regulatory frameworks.

The characterisation process also only takes us so far though; many other regulatory questions arise, such as how will financial crime regulations apply to transactions involving Libra (and to whom)? How and how frequently will the costs, income and assets of the Libra Reserve be calculated and reconciled against outstanding Libra, will this be published, and how frequently? What contractual and transparency requirements – such as the need for a written agreement, and statements of transactions, to be provided on paper or in a durable medium – apply to intermediaries providing services relating to Libra and can these be discharged in practice? Will Libra users benefit from government insurance or deposit guarantee schemes in respect of their Libra holdings or in respect of services provided to them relating to Libra by professional providers? From an institutional perspective, what is the regulatory capital or liquidity treatment of banks or other regulated financial institutions holding or trading in Libra and are entities with limited charters permitted to hold Libra at all? What is the liquidity treatment of banks or other regulated financial institutions acting as custodians of the Libra Reserve asset pool?

There is one further regulatory question mark which stands out amongst others and is both thorny and emotive – data privacy. The data and data flows relating to Libra, Libra transactions and Libra users will be numerous, cross-border and rich in nature, making for a heady mix of challenge and opportunity in a post-GDPR world. Building the system to ensure current and future compliance with global data protection requirements will be critical but no mean feat, and regulators have already voiced concerns on this front given Facebook's recent past.

Antonello Soro, President of the Italian Data Protection Authority, commenting on Libra said: "If the sector is not quickly bound to democratic governance principles, we risk handing over a large share of our rights to a handful of digital monarchies."

"Building the system to ensure current and future compliance with global data protection requirements will be critical but no mean feat."

The real challenge, of course, is not to answer these questions in isolation but, since there are no universal answers, the key is to arrive at answers that make sense on a truly international basis.

Legal considerations

Besides the regulatory hurdles, there are legal considerations too, and the analyses required will also necessarily relate to the laws of many different jurisdictions.

One such question is as to the legal nature of Libra – a broader question which continues to challenge the cryptocurrency market. This is particularly important for Libra, however, because of the asset-backing. Its legal characterisation will determine whether the holders of Libra or authorised resellers have any legal claims in respect of the Libra Reserve assets, the law governing those claims and the jurisdiction for enforcing those claims and how holders and resellers are protected against future changes in the arrangements governing Libra or a failure of the Libra Association or the custodians of the Libra Reserve assets. If, on the other hand, owners of Libra do not have any legal claims, this may itself affect the analysis of the regulatory characterisation of Libra and how it is marketed.

In addition, the legal nature of Libra will determine how ownership can be transferred, whether security may be granted over Libra (and, if so, how), whether Libra can be stolen and how it may be retrieved (and who has the better claim in any dispute). It may also affect whether acquisitions of goods and services made using Libra are protected under, for example, consumer protection measures (perhaps they will if it is a sale but not if it is a barter). It is a fundamental question with far-reaching consequences.

The liability framework for Libra will also be complex – it is multi-actor and multi-layered. Unpicking this, if and when the system does not work as parties intend will, no doubt, keep litigators busy for years to come and, what is more, the questions will be unprecedented – questions such as who should be liable for bugs in open source code which has been used by parties transacting in different jurisdictions where there is no single party with overall responsibility for governance of the Libra Blockchain? Will a claim in respect of a failure to transfer Libra be a debt or a claim for damages and will a judgment be made in Libra or in a fiat currency?

Tax considerations

Tax is another key area which will need to be considered by participants in the Libra system.

To date tax hasn't been seen as a big issue in relation to decentralised cryptocurrencies like Bitcoin. This is despite the fact that most tax authorities treat many cryptocurrencies as an "asset" for tax purposes, meaning that tax is technically payable on a range of cryptocurrency-related transactions. It is likely that tax has been largely ignored because the absence of a central authority for these cryptocurrencies means the chance of a tax authority finding out about taxpayers' transactions has been extremely low. As a result, we expect that very few taxpayers have reported or paid the amounts due.

However, Libra's high profile and its potential for wide adoption means that tax authorities are unlikely to be content to rely on voluntary compliance. We expect the Libra Association to be required to report on its users' transactions to tax authorities, either under existing domestic and international frameworks, a semi-voluntary scheme (like Airbnb's agreement with the Danish tax authority) or specific new rules. Tax is therefore likely to become far more of an issue for both consumers using Libra and businesses accepting Libra.

For example, if there is any time lag between consumers acquiring Libra and spending it, then any gain or loss will fall under applicable capital gains tax rules. While exemptions may apply, computing a user's liability over the course of a tax year (on potentially hundreds of transactions) will be practically difficult.

Authorised resellers and other businesses accepting Libra will suffer two taxable events: first, upon receiving Libra from consumers (i.e. "normal" tax on trading profits, which would have happened if they had received fiat currency); and second, upon either converting Libra back to fiat assets or spending the Libra with another Libra-accepting business (profit/loss/gain on the "disposal" of Libra). This means those businesses will be subject to real uncertainty and potentially higher costs.

While these issues may be mitigated by the fact that Libra is expected to be relatively stable, which makes its appeal as a speculative asset more limited, we would nevertheless expect it to be at least as volatile as a conventional fiat currency. Heavy users of Libra (especially businesses) may find computing their tax liability a real challenge, with a capital gains computation required to be undertaken for a potentially very large number of transactions occurring throughout the tax year.

Ultimately, we expect these issues will need to be solved somehow by the Libra Association, although it is not clear that there is any straightforward answer which would avoid these additional taxable events arising and which would not undercut the goal of providing a seamless user experience (such as incorporating automatic tax calculation and reporting mechanisms).

Practical considerations

The main practical challenge for Libra will be acceptance from a broad set of stakeholders, allowing for a critical mass of participants and particularly a sufficient number of international exchanges and other infrastructure to facilitate the intended global payments network. While Facebook has begun the hard work on this front with its high-profile list of fellow founding members, including global payment systems, telecoms providers and merchant brands, the scale and global reach required will make this challenging.

While clearly there are advantages to be gained by many consumers and businesses from low-cost, fast, cross-border peer-to-peer payments, building trust in Libra and the Libra Blockchain is crucial. That Facebook alone has over 2.3 billion active users will clearly help its cause. However, many are sceptical or even fearful of blockchain and cryptocurrencies (which is unsurprising given the volatility of the most widely known iteration, Bitcoin) and cautious about Facebook's record on data privacy following the Cambridge Analytica scandal. However, whilst Facebook is the principal backer, it has been careful in structuring the not-for-profit Libra Association to distance itself legally and optically. There are 27 other founding members of the Libra Association and a stated aim to have 100 members by launch, with the intention of continued decentralisation over time.

It's also clear that the benefits of Libra will be greater to populations currently underserved by financial services. This may mean a disproportionate take-up of Libra in emerging markets – assuming that the infrastructure and local regulators permit. Although, that said, it will be interesting to see whether consumers will prefer to continue using existing services like M-Pesa in countries such as Kenya, where they are already well-established.

Policy considerations

Given the global footprint, size and dominance of Facebook, policy issues abound but several interesting ones will be played out.

First, Libra heralds another major foray by big techs into financial services. Whilst Anthony Jenkins, former Barclays CEO, predicted in 2017 that the banks' Uber moment was five years away, that clock has been quietly ticking down. The disintermediation of banks from payments and payment system access seems to be inexorable and has precedent in China where over half of transactions now take place using third-party payment providers such as WeChat and AliPay. In fact, over half a trillion transactions were processed using the platforms of these two tech giants last year (around 1.7 billion transactions a day).

The power that big techs apparently wield has its critics and, increasingly, particularly in the US, there have been calls for a break up of big tech. The launch of Libra will add fuel to this particular fire. Senator Elizabeth Warren (Democrat) was recently quoted as

"Given the global footprint, size and dominance of Facebook, policy issues abound."

> **“Flows out of conventional bank deposits and into Libra could adversely affect banks, for example by reducing the amount that they are able to lend, and distort government bond markets.”**

saying: “Today’s big tech companies have too much power — too much power over our economy, our society, and our democracy. They’ve bulldozed competition, used our private information for profit, and tilted the playing field against everyone else. And in the process, they have hurt small businesses and stifled innovation.”

Whether or not a break up of big techs occurs, any substantial move towards developing a payment ecosystem at scale will inevitably lead to greater supervision. If, for example, Libra were indeed to become a global payment system enabling payments across geographies, Mark Carney, Governor of the Bank of England, indicated that central bank oversight would be necessary. He said: “If it’s going to work, it would be so important that ourselves, the Fed (Federal Reserve), the ECB, the major central banks of the world would have direct regulatory oversight of the entity”. He added that the Bank of England “approaches Libra with an open mind but not an open door”.

It is worth noting in this regard that Section 113 and Schedule 9 of the UK Digital Economy Act 2017 had the effect of extending the perimeter of Bank of England oversight of interbank payment systems, making the definition of ‘payment system’ capable of capturing non-bank payment systems. Whether this will be effective in the case of decentralised arrangements such as Libra remains a question, although Mark Carney has previously indicated that the Financial Policy Committee of the Bank of England would be prepared to “consider recommending that the perimeter be further expanded”.

The potential influence of big techs in the area of payments has also been recognised by international bodies. The Bank of International Settlements, for example, in its Annual Economic Report noted that “in some settings, such as the payment system, big techs have the potential to loom large very quickly as systemically relevant financial institutions”.

This paradigm shift in financial services is going to lead to a great deal of upheaval in regulatory technique and targets. Indeed, whilst the rise of big tech and big tech’s encroachment into financial services has been happening for some time, the launch of Libra presents a first real opportunity for politicians, regulators, tech companies, the financial services industry, central banks and consumers to stake out their position and begin to advocate for those new boundaries.

Another political discussion that will play out will be the potential for ‘dollarisation’. The accessibility and perceived security and stability of Libra and other stablecoins could mean that, increasingly, users of financial services are willing to transact in foreign currency, particularly in countries with weak domestic currencies (so-called ‘dollarisation’). Libra could facilitate this and bodies, including the IMF, are concerned that dollarisation could mean countries will lose monetary policy control, financial systems become more exposed to foreign exchange rate shocks, while central banks are constrained in providing liquidity. Ultimately, dollarisation can act as a restraint on financial development and long-term growth.

On a related note, another less-concealed underlying political dimension for Libra to contend with is the continuing and escalating trade war between the US and China, and particularly for technological (and, in this case, reserve currency) dominance. Remember petrodollars? The future now is about technodollars.

This is not lost on those outside the US and China, however. Cédric O, France’s digital economy minister, for example, recently told a Senate committee that inaction on the part of France and the EU would “leave the keys of our future to the Americans and the Chinese”.

US politicians too worry that Facebook may just sidestep US regulation, its political levers and constraints and undermine the US in its fight for supremacy. Maxine Waters, chair of the U.S. House Financial Services Committee said: “It’s very important for them to stop right now what they’re doing so that we can get a handle on this. We’ve got to protect our consumers. We just can’t allow them to go to Switzerland with all of its associates and begin to compete with the dollar.”

Another policy question which will no doubt be raised in connection with Libra's structure, is the potential systemic impact of large-scale flows into and out of the Libra Reserve fund if Libra grows in scale. Flows out of conventional bank deposits and into Libra could adversely affect banks, for example by reducing the amount that they are able to lend, and distort government bond markets. Conversely, a 'run' on Libra leading to large-scale sales of Libra Reserve fund assets could lead to disorderly government bond markets. In addition, disruptions to the mechanisms for reconversions of Libra into fiat assets would not only potentially trigger a run but also potentially present wider consumer and systemic issues.

The future of Libra

Libra is scheduled for launch in the first half of 2020. This would have been a tall order just given the myriad legal, regulatory and practical considerations that will need to be addressed. But, layering on top of this the political factors and feuds which are no doubt bound to be played out over the course of the next six to twelve months, that timing looks even more demanding.

However, putting aside those issues which Facebook and the Libra Association will simply not be able to control, the key challenge for Libra will be how to address those which it can tackle on a global basis. In this regard, the words of Creighton Abrams (General and later Chief of Staff, US Army) seem apt: "When eating an elephant, take one bite at a time". And, whilst Libra has the backing of some of the world's largest businesses, many of whom are expert in building payment system ecosystems and navigating the patchwork of regulatory frameworks which may apply, building a novel payments platform such as Libra from the ground up will require expert support from across the globe.

With those experts and good tail-winds, we may well see Libra in e-wallets across the globe during 2020 but, if so, it will have taken a significant degree of determination to get there. Our bet would be on a more phased delivery, where Libra is made available in certain jurisdictions and to certain target markets first with more to follow on a rolling basis.

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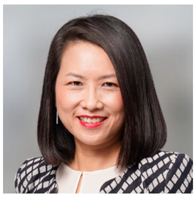

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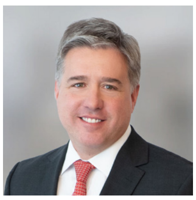

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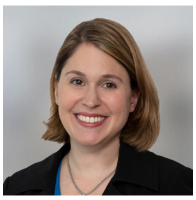

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C H A N C E

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