



## Financial Markets Law Committee (“FMLC”)

### Insurance Scoping Forum

Date: Thursday 8 June 2017

Time: 10.00am to 11.40am

Location: Bank of England, Threadneedle Street, London EC2R 8AH

#### **In Attendance:**

Chris Newby (Chair)	AIG Europe Limited
Beth Dobson	Slaughter and May
Jennifer Donohue	Ince & Co
Hilary Evenett	Clifford Chance LLP
Daisy Godfrey (Dial in)	AIG Europe Limited
Matthew Griffith	RPC
David Kendall	Cooley (UK) LLP
Adam Levitt	Ashurst LLP
Geoffrey Maddock	Herbert Smith Freehills LLP
Michael Munro	CMS Cameron McKenna Nabarro Olswang LLP
Chris Sage	Transatlantic Reinsurance Company
Michael Wainwright	Dentons UKMEA LLP
Venessa Parekh	FMLC
Thomas Willett	FMLC

#### **Regrets:**

Alastair Evans	Lloyd’s of London
George Belcher	Skadden, Arps, Meagher & Flom LLP
Nigel Brook	Clyde & Co LLP
Reid Feldman	Kramer Levin Naftalis & Frankel LLP
Benjamin Lyon	Debevoise & Plimpton LLP
Alison Matthews	Herbert Smith Freehills LLP
Steven McEwan	Hogan Lovells International LLP
Kate McInerney	Allen & Overy LLP
James Ray	Twelve Capital Ltd
Victoria Sander	Linklaters LLP
George Scott	Pacific Life Re Limited

**Registered Charity Number: 1164902.**

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James Scoville  
James Smethurst  
Martin Thomas  
Kees van der Klugt

Debevoise & Plimpton LLP  
Freshfields Bruckhaus Deringer LLP  
Altima Partners LLP  
Lloyd's Market Association

## **Minutes:**

### **1. Introduction**

1.1. Participants introduced themselves.

### **2. Administration:**

a. **Short presentation on the operation of FMLC Working Groups (Venessa Parekh);<sup>1</sup>**

b. **Forward agenda—forward schedule**

2.1. Venessa Parekh described the different characteristics of scoping fora and working groups: how working groups can be initiated and established; the objectives of working groups; the conduct of business of working groups; and how the Secretariat supports working groups.

2.2. Ms Parekh then observed that, in the absence of supervening offers, the Q3 and Q4 Forum meetings will likely be hosted by the FMLC at their offices on Lothbury. The Secretariat would gratefully welcome any offers from Forum members to host the September and December meetings.<sup>2</sup>

### **3. Discussion on the Insurance Distribution Directive (Hilary Evenett)**

3.1. Hilary Evenett provided an overview of the Directive (EU) 2016/97 of the European Parliament and of the council of 20 January 2016 on insurance distribution (“**Insurance Distribution Directive**” or the “**IDD**”), which will replace Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (the “**Insurance Mediation Directive**” or the “**IMD**”). The IDD will further the objectives of the IMD, which was designed to encourage competition between insurance firms, as well as ensure protection for customers. Consultations on the IDD were carried

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<sup>1</sup> Please see Appendix I below.

<sup>2</sup> If you would like to host an Insurance Scoping Forum meeting, please contact [forums@fmlc.org](mailto:forums@fmlc.org)

out in 2017 by HM Treasury and the Financial Conduct Authority (“FCA”). A second round of consultations will follow in the second half of the year.

- 3.2. Ms Evenett said that the requirement in the IDD for insurance distributors to provide 15 hours of continuing professional education was a matter of concern in the market. The IDD presents other changes to client account rules regarding personal injury claims handling and firms’ complaints procedures.
- 3.3. An additional issue highlighted by Ms Evenett was the proposed rule that distributors must act “honestly, fairly and professionally in the best interests of their customers”. Forum members noted that where intermediaries such as underwriting agents, who owe their primary obligations to the insurer, not to the customer, conflicts of interest may arise owing to this obligation. One participant further queried if the same obligations would apply to insurers when they are distributing directly.
- 3.4. One participant highlighted that issues with commission charges are also evident. The Forum members noted a divergence between the Retail Distribution Review (“RDR”) and the FCA over the disclosure of commission charges to customers. It was stated that the FCA’s viewpoint on this was still ambiguous, and that a recent report from the Prudential Regulation Authority (“PRA”) may indicate a different approach.
- 3.5. Forum members agreed to monitor issues related to the IDD, including any that may arise or be clarified during the second round of consultations.

#### 4. **Insurance-related issues of legal uncertainty arising from the new [E.U. General Data Protection Regulation](#) (Daisy Godfrey)**

- 4.1. Daisy Godfrey began her talk on Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the “**General Data Protection Regulation**” or “**GDPR**”) by explaining that it was implemented on 25 May 2016 but includes a two-year phase-in period and will come into effect on 25 May 2018.
- 4.2. While the GDPR is designed to replace the current Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the “**Data Protection Directive**”) and aims to create more harmonisation between E.U. states, there are certain areas where derogations are permitted at a national level, such as employment data, data protection officers and customer consent.

- 4.3. Ms Godfrey stipulated that the question of customer consent poses potential issues of legal uncertainty for insurers. While insurers will have to rely on obtaining customers' consent for the processing of special categories of personal data, such as personal data concerning health, in a number of circumstances for insurance purposes under the GDPR, this will be difficult for U.K. insurers to achieve.
- 4.4. Lobbying efforts from insurance groups have been taking place for a new condition under Article 9 of the GDPR, which would allow U.K. insurers to process personal data concerning health for insurance purposes without the need for customer consent.
- 4.5. In addition, Ms Godfrey emphasised that a derogation under Article 10 of the GDPR is needed for using criminal conviction data, such as to prevent fraud in the insurance industry.
- 4.6. Another area of legal uncertainty the group considered was with respect to automated processes. The GDPR gives customers certain rights not to have decisions automated, yet a high proportion of some decisions from firms are currently automated, such as profiling, online price generation and fraud-checking.
- 4.7. The group agreed that the greater part of the legal uncertainty in this area resulted from "gaps" in the legislation, as opposed to conflicts between laws or unclear terms.
5. **A discussion on the [consultation](#) on revisions to the [Insurance Core Principles \("ICP"\) 13: Reinsurance and Other Forms of Risk Transfer by The International Association of Insurance Supervisors \("IAIS"\)](#)**
  - 5.1. The group noted that ICP 13 was directed at supervisors more in an auditing capacity than in a purely supervisory one. The participants agreed that the ICP does not appear to generate significant legal uncertainty.
6. **The FMLC's work on Brexit:**
  - a. **Update on Working Groups;**
    - 6.1. Ms Parekh confirmed that Steven McEwan had collated the chapters for the draft paper on the establishment of an E.U. insurer in another Member State. The FMLC Secretariat is currently in the process of reviewing the paper before its circulation to the Working Group and the FMLC Committee for comments.
    - 6.2. She also provided an overview of two other FMLC papers in draft. The first, on Brexit and Third Country regimes, considers the scope and timing of Third Country provisions in E.U. law and the ways in which these apply to specific sectors of the wholesale

financial markets. In relation specifically to insurance, it examines the operation of cross-border legacy businesses, reinsurance businesses and insurance intermediation. A second paper, at a less advanced stage, considers the scope of the World Trade Organisation (“WTO”) rules, in particular the General Agreement on Trade in Services (“GATS”), to allow U.K. insurers access to the E.U. post Brexit.

**b. Proposed briefing note on Insurance Intermediaries.**

- 6.3. In the context of this existing work, Forum members were asked whether they thought any of the issues highlighted in the briefing note remained unaddressed or required further investigation. Members agreed to wait for these papers to be published before making a decision on future work.
- 6.4. It was noted that the question of “carrying on” insurance business, raised in the briefing note, pre-dates 2004 and may be hard to resolve. The cases referenced in the briefing note follow the Insurance Companies Act [1982 (repealed)]. One Forum member held that it may not be appropriate to bring offshore insurance activities under the IDD as it would pose onerous duties for an agent. Another noted the need for more jurisprudence in this area.
- 6.5. Forum members thought that any new U.K. legislation post-Brexit could provide greater clarity on this issue and agreed to monitor the issue.

**7. Any other business**

- 7.1. No other business was raised.

# Operation of FMLC Working Groups

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Venessa Parekh, FMLC Acting Project Secretary

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Standing forums are convened quarterly to provide a space for exploration and discussion

FMLC

Scoping Forums

Working Groups

Working Groups

Working Groups are convened ad hoc to address a specific issue of legal uncertainty

N.B. Working Groups may be established on the basis of: 1) a recommendation from a Scoping Forum; 2) a stakeholder proposal; 3) a consultation request; or 4) Secretariat research.

# Working groups: objectives

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- The ultimate function of a Working Group established by the FMLC is to assist the Committee to address a specific issue of legal uncertainty by expressing an authoritative consensus.
- Pursuant to this aim and to the FMLC's remit, a Working Group will have the following objectives:
  1. to encourage discussion and the expression of a range of views;
  2. to build consensus that can be expressed in an FMLC publication; and
  3. to produce a draft publication to which, ideally, as many Working Group members have contributed as possible.



# How are working groups initiated?

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- Working Groups are established by the FMLC on the basis of a note specifying the relevant legal uncertainty (the “brief”).
- This brief defines the scope of work to be undertaken. It serves a threefold function:
  - to establish controls over the group’s output on behalf of FMLC Members;
  - to inform prospective contributors as to the scope of the project; and
  - to assist the Chair and Secretariat to allocate appropriate resources to the project, according to its expected size and complexity.
- In the case of work recommended by the members of a Scoping Forum or any other stakeholder(s), the brief should be prepared by the person or persons making the recommendation and put before the FMLC Committee for approval. (The FMLC Secretariat will normally offer formatting and other assistance in preparing the brief.)

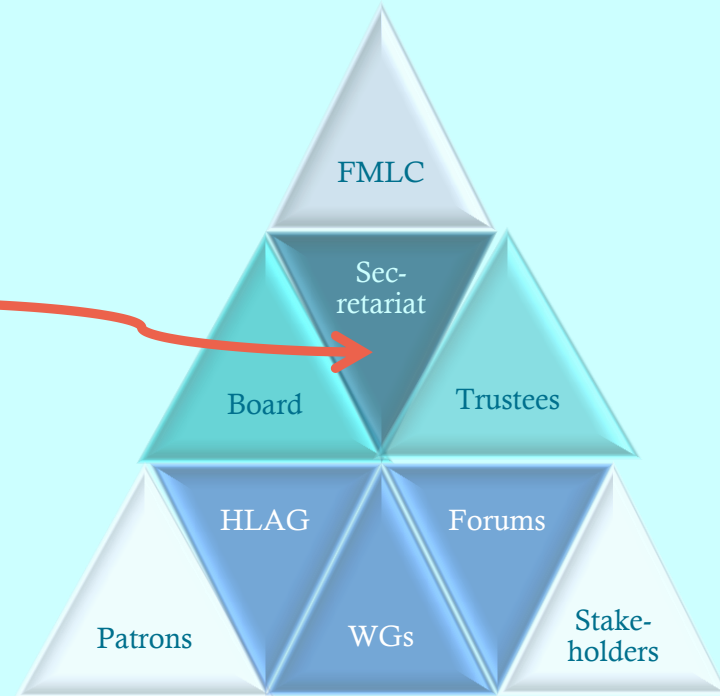
# Working groups: conduct of business

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- Working groups are convened under Terms of Reference, including conduct of business guidelines. These include the following:
  1. to encourage a diversity of perspectives, Working Group participation is limited to one member per organisation;
  2. to ensure accountability and transparency, alternates are, as a general rule, not permitted to attend meetings; and
  3. to foster individual engagement, Working Group meetings are to be attended in person, where possible. (Accordingly, the FMLC Secretariat does not provide dial-in details for working group meetings unless a member is based abroad.)
- Work within the Group follows a schedule (“Milestones”) established at the inaugural meeting and implemented by the FMLC Secretariat.

# Working groups: FMLC Secretariat

- The Secretariat supports the Chair and the Working Group during meetings, and manages Group-related communications outside meetings.
- The Secretariat helps draft and circulate meeting agenda and related documents in advance of Working Group meetings and takes minutes.
- Contributors are asked to send draft submissions to the Secretariat, whether directly or in copy.



# Forward agenda—forward schedule

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Thursday 7 September

10.00am to 11.30am

Thursday 7 December 2017

10.00am to 11.30am



**Financial Markets Law Committee**

**[Communications@FMLC.org](mailto:Communications@FMLC.org)**

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# Conclusion / The End

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