



Financial Markets Law Committee (“FMLC”)

Insurance Scoping Forum

Date: Tuesday 4 September

Time: 2.00pm to 3.15pm

Location: Simmons & Simmons LLP, CityPoint, One Ropemaker Street, London, EC2Y 9SS

In Attendance:

Pollyanna Deane (Chair)	Simmons & Simmons LLP
Beth Dobson	Slaughter and May
Jennifer Donohue	Algorithm and Extremal Consulting Limited
Reid Feldman (dial in)	Kramer Levin Naftalis & Frankel LLP
Adam Levitt	Ashurst LLP
Alison Matthews	Herbert Smith Freehills LLP
Steven McEwan	Hogan Lovells International LLP
Mike Munro	CMS Cameron McKenna Nabarro Olswang LLP
Chris Newby	AIG
Selina Sagayam (dial in)	Gibson, Dunn & Crutcher UK LLP
Victoria Sander	Linklaters LLP
Jonathan Teacher	Swiss Re Management Ltd
Michael Wainwright	Dentons UK and Middle East LLP
Venessa Parekh	FMLC
Thomas Willett	FMLC

Guest Speaker:

Felix Zimmermann	Simmons & Simmons LLP
------------------	-----------------------

Regrets:

George Belcher	Skadden, Arps, Meagher & Flom LLP
Peter Bloxham	
Nick Bonsall	Slaughter and May
Theresa Chew	Hymans Robertson LLP
Katherine Coates	Clifford Chance LLP
Hilary Evenett	Clifford Chace LLP
Charlotte Heiss	Royal & Sun Alliance Insurance Group plc

Registered Charity Number: 1164902.

"The FMLC" and "The Financial Markets Law Committee" are terms used to describe a committee appointed by Financial Markets Law Committee, a limited company ("FMLC" or "the Company"). Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales. Company Registration Number: 8733443.

David Kendall
Geoffrey Maddock
James Middleton
Chris Sage
Kees van der Klugt
Graham White

Cooley (UK) LLP
Herbert Smith Freehills LLP
AIG
Transatlantic Reinsurance Company
Lloyd's Market Association
Marine Aviation & General (London) Ltd

Minutes:

1. Introductions

1.1. Pollyanna Deane opened the meeting.

2. Administration: Scoping Exercise—Statutory Instruments under the Withdrawal Act (Venessa Parekh)¹

2.1. Venessa Parekh described to members the way in which the FMLC is conducting work on the draft statutory instruments (“**SI**s”) under the European Union (Withdrawal) Act 2018 in relation to the financial services. In addition to the FMLC resolving to meet on an *ad hoc* basis should the volume of draft SIs and gravity of the legal complexities require the Committee’s full attention, the Secretariat will also write to an existing Working Group or Scoping Forum on the topic of the SI to ask for their assistance and expertise in identifying any drafting inconsistencies or logical discrepancies.²

3. Ransomware and its impact on cyber insurance (Felix Zimmermann)

3.1. Felix Zimmermann began his presentation by recounting the case study of a secondary school which was hacked. The school’s computers were infected with a computer virus that corrupted their pdf files which often held sensitive data about staff and students or financial data. The hacker demanded a ransom in return for the decryption codes which would release the files. The school had a cyber insurance policy under which they were able to avail themselves of the services of an IT consultant. The consultant provided a range of services, including due diligence and liaising with the hacker. The latter task involved the school paying the ransom to the consultant in fiat; he would then pay the hacker in Bitcoin.

¹ Please see Appendix I below.

² Should you identify an issue of legal uncertainty in a statutory instrument before receiving correspondence from the Secretariat, please contact Venessa Parekh at: research@fmlc.org.

The school could, under its policy, recover the ransom amount subsequently from the insurance company.

- 3.2. Mr Zimmermann observed that a potential problem would arise if, in the time between paying the ransom and recovering the monies from the insurance company, the hacker was found to be involved in terrorism. The Terrorism Act 2000 lists two types of offences in relation to cyber threats: (1) funding terrorism and (2) failing to disclose knowledge terrorism. If the insurers gain knowledge of terrorism, they are obliged to report it and would be unable to indemnify the claim. Further offences under section 19 may also prevent in the insurer making payment to the insured.
- 3.3. Mr Zimmerman noted that there is no case law regarding such cyber threats; the closest example would be the case of the Somali pirates from 2011. Yet, the test in these cases is that the insurer must have “reasonable cause to suspect” terrorism upon which it must report the case to the authorities. This could be considered a low bar and, it was suspected, could hamper the commerciality of cyber threat insurance.
- 3.4. One member queried how, in the case study above, representatives of the school would gather sufficient knowledge to prove that they did not know that, when the ransom was paid, the hacker was committing offences under the Terrorism Act 2000. Mr Zimmermann explained that prosecutors were likely to be very interested in all the due diligence carried out by the insurer and the insured.
- 3.5. Another member asked if there have been any prosecutions under the Terrorism Act, to which Mr Zimmermann confirmed that there have not. Finally, a member queried whether such policies could have terrorism exemptions. Mr Zimmerman observed that such clauses would be unnecessary because reporting terrorism would be considered a public policy issue.

4. PRA consultation on credit risk mitigation and its potential implications for credit insurance (Michael Wainwright)

- 4.1. Mr Wainwright provided an update on a consultation by the Prudential Regulatory Authority (the “PRA”) on Credit Risk Mitigation: Eligibility of guarantees as unfunded credit protection.³

³ A discussion on the consultation was held at a previous meeting. Minutes from that meeting can be found here: <http://fmfc.org/wp-content/uploads/2018/07/Insurance-Scoping-Forum-meeting-minutes-20-February-2018.pdf>.

- 4.2. He noted that the Association for Financial Markets in Europe (“**AFME**”), UK Finance, Lloyd’s Market Association, the British Bankers’ Association and a collective response from The International Chamber of Commerce (“**ICC**”) Banking Commission, the International Trade and Forfeiting Association (“**ITFA**”), the Institute of International Finance (“**IIF**”) and BAFT (**Bankers Association for Finance and Trade**) had responded to the Consultation.
- 4.3. Mr Wainwright emphasised the industry’s concern with the PRA’s proposed requirement for the guarantor to be obliged, contractually, to pay out in “a timely manner”, i.e. within days instead of weeks or months. It was mentioned that the European Banking Authority (“**EBA**”) has not issued any guidance on the meaning of “timely manner”—neither has any other regulator in any E.U. Member State. Participants stressed that a “one size fits all” interpretation of in a “timely manner” would not be appropriate in all cases. For credit insurance, for example, payment periods of up to around 180 days are common in the market and do not cause concern for firms.
- 4.4. The view that amendments of the eligibility requirements are needed was also discussed. Respondents had demonstrated concerns about the meaning of “legally effective and enforceable”. Mr Wainwright explained that the PRA has indicated that it expects banks to obtain independent legal opinions which cover all legal and factual scenarios including the requirements in Articles 201, 213 and 215 of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (the “**Capital Requirements Regulation**” or the “**CRR**”). The published responses stressed that this expanded the scope of the legal opinions firms require.
- 4.5. The Forum members reiterated the concern that the PRA’s proposals refer to “guarantees” and do not address credit insurance as a specific type of guarantee. It was suggested by members that the PRA have not considered the impact these proposals would have on credit insurance.

5. **Plenary discussion on recent developments and legal uncertainties in the insurance sector (Pollyanna Deane)**

- 5.1. A participant mentioned the paper by the European Insurance and Occupational Pensions Authority (“**EIOPA**”) on Understanding Cyber Insurance—A Structured Dialogue with Insurance Companies. The paper identified a need to understand cyber risks better as well as the gradual increase in the demand of cyber insurance owing to new regulations and

increased awareness. Participants observed that crypto-currencies and “smart” appliances presented new frontiers for insurers.

5.2. Directive (EU) 2016/97 on insurance distribution (the “**IDD**”) was then raised by a Forum member. It was mentioned that firms no longer need to be registered as “introducer appointed representatives” (“**IARs**”) under the IDD; they can, instead, become ordinary introducers excluded from regulation by the new article 33B. The member queried the approach by the Financial Conduct Authority (“**FCA**”) on this. Another participant suggested that the FCA have aligned their policy in this context with that present in Directive 2014/65/EU on markets in financial instruments (“**MiFID**”). A discussion on unit-linked policies under the IDD was also raised with a member, who queried if they are exempt for pension policies, stressing that the advice surrounding this is unclear.

5.3. A Forum member drew attention to an uncertainty arising from Q&A published by EIOPA on the ability to use an insurer’s rating to “improve” the quality of credit which can be attributed to an insurance policy by a bank. Finally, participants briefly discussed the Law Commission’s consultation on Insurable Interest but concluded that it wasn’t relevant for this group.

6. Any other business

6.1. Forum members noted that the next meeting of the Insurance Scoping Forum will be held on Tuesday 20 November between 2.00pm and 3.30pm.

Scoping Exercise—Statutory Instruments under the Withdrawal Act



Venessa Parekh, Research Manager

Registered Charity Number: 1164902.

"The FMLC" and "The Financial Markets Law Committee" are terms used to describe a committee appointed by Financial Markets Law Committee, a limited company ("FMLC" or "the Company"). Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales. Company Registration Number: 8733443.

Recent Developments ...

- The European Union (Withdrawal) Act 2018 (“**Withdrawal Act**”) will repeal the European Communities Act 1972 as of Exit Day, copy into the domestic framework all directly applicable E.U. law which is in operation on Exit Day, and give HM Government the ability to modify and adapt this “retained” law as necessary to resolve any deficiencies. This last stated aim of the Withdrawal Act will be fulfilled by means of statutory instruments (“**SI**s”) published by relevant ministries.
- HM Treasury has announced it will approximately 70 pieces of secondary legislation under the European Union (Withdrawal) Act 2018 in relation to the financial services. As the end of the Article 50 notice period rapidly approaches, the timeline for any comment or consultation on these drafts is likely to be compressed.

The FMLC's Response



- In its meeting on 31 May 2018, the FMLC resolved to meet on an *ad hoc* basis—in addition to its scheduled bimonthly meetings—should the volume of the draft statutory instruments and gravity of the legal complexities require the Committee's full attention.
- The Secretariat organised meetings on 29 June 2018 and 3 August 2018 amongst leading organisations in the City to discuss a coordinated response to HM Treasury's announcement.
- As the statutory instruments are published, the FMLC hopes to be able to rely on and amplify its Radar function to identify legal uncertainties arising from the them.

FMLC radar function

- Currently, the FMLC identifies relevant issues of uncertainty through the radar function.
- New issues of legal uncertainty on which the FMLC can undertake work are raised in Scoping Forum meetings, bilateral radar meetings with Joanna Perkins (FMLC CEO) and during monthly Patron and Stakeholder relationship calls with members of the Secretariat.
- For the purposes of analysing the raft of secondary “reception” instruments, however, the Secretariat proposes to expand its Radar function by reaching out to pre-existing working groups and scoping forums on an *ad hoc* basis to request their assistance in assessing legal risks, identifying priorities and selecting issues in relation to the draft SIs.



Next Steps ...

- Once an SI is published, the Secretariat will write to an existing Working Group on the topic of the SI or, where such a group does not exist or where the SI covers a significant piece of financial markets legislation, to the relevant Scoping Forum to ask for their help and expertise in identifying any drafting inconsistencies or logical discrepancies.
- Scoping Forum members are requested to indicate any areas of uncertainty on which they think the FMLC might usefully contribute.
- Owing to the shorter timescale for review, the Secretariat would be grateful to receive quick bullet points if that is easier.
- Needless to say, if you don't hear from us but spot a legal uncertainty in an SI, please do get in touch anyway!