

Financial Markets Law Committee (“FMLC”)

Insurance and Pensions Scoping Forum

Date: 8 September 2020

Time: 2.00pm to 3.30pm

Virtual meeting



In Attendance:

Adam Levitt (Moderator)

Ashurst LLP

George Belcher

Skadden, Arps, Meagher & Flom LLP

Peter Bloxham

Pollyanna Deane

Fox Williams LLP

Beth Dobson

Slaughter and May

Reid Feldman

Kramer Levin Naftalis & Frankel LLP

David Kendall

Cooley (UK) LLP

Ben Lyon

Debevoise & Plimpton LLP

James Phythian-Adams

Sidley Austin LLP

Victoria Sander

Latham & Watkins LLP

James Smethurst

Freshfields Bruckhaus Deringer LLP

Jonathan Teacher

Swiss Re Management Ltd

Kees Van Der Klugt

Lloyd's Market Association

Michael Wainwright

Dentons UK and Middle East LLP

Chhavi Sinha

FMLC Secretariat

Katja Trela-Larsen

FMLC Secretariat

Regrets:

Martin Membery

Sidley Austin LLP

Robert Purves

3 Verulam Buildings

Chris Sage

Trans Re

Clare Swirski

Debevoise & Plimpton LLP

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.

Minutes

1. Introductions

1.1. Mr Levitt opened the meeting.

2. Did you know that FMLC are moving premises? (Katja Trela-Larsen)¹

2.1. Ms Trela-Larsen informed members the FMLC Secretariat will be moving out from the current offices in the Bank of England to new premises offered by the City of London later this year. In light of the coronavirus pandemic, many FMLC meetings have been held virtually and there is a possibility of continuing to schedule more of the FMLC's meetings online in future. Ms Trela-Larsen noted some meetings and events are better face to face and when in-person meetings can resume the FMLC would appreciate offers to host and cater some of its annual events and meetings, or even for logistical support, such as printing.

3. Review of the Solvency II Directive (Beth Dobson)

3.1. Ms Dobson presented an overview of the review of the Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (the "**Solvency II Directive**"). The Solvency II Directive provides that the following areas of the framework should be reviewed by the European Commission: the methods, assumptions and standard parameters used in the solvency capital requirements standard formula; the operation of the duration-based equity risk sub-module; and the application of the long-term guarantee measures. Additional aspects of the Solvency II Directive have been added to the review, including group supervision, own funds and recovery and resolution. Ms Dobson stated there are two consultations relevant to the review.

3.2. Firstly, in response to a call for advice from the European Commission, the European Insurance and Occupational Pensions Authority ("**EIOPA**") issued a consultation paper setting out technical advice for the review of Solvency II Directive (the "**EIOPA Consultation**") in October 2019.² The original deadline for EIOPA's advice to the European Commission was June 2020 but this has been pushed back to December 2020

¹ Please see Appendix I below

² EIOPA, *Consultation Paper on the Opinion on the 2020 review of Solvency II* (15 October 2020): available at: https://www.eiopa.europa.eu/content/consultation-paper-opinion-2020-review-solvency-ii_en

as a result of the pandemic. The European Commission's final report will therefore also be delayed.

- 3.3. Ms Dobson highlighted some key areas covered by the EIOPA Consultation. Changes are proposed to the calculation methodology of the risk free rates; matching adjustments; and to the design of volatility adjustments, to improve risk sensitivity. Ms Dobson commented that the Prudential Regulatory Authority (the “PRA”) was similarly looking at the introduction of a “look through” approach for restructured assets in matching adjustments. The EIOPA Consultation also proposes phasing out the duration-based equity risk sub-module owing to low take up, and recommends additional requirements to ensure that long-term equity investments are properly diversified and do not include strategic investments. There are no changes proposed to the risk margin. A move to a “relative shift approach” to modelling is proposed to address the current underestimation of interest rate risk in the current calibration. Other key areas covered by the EIOPA Consultation include group supervision, group solvency and recovery and resolution.
- 3.4. Ms Dobson explained that most of the amendments proposed under the group supervision section are clarificatory amendments, including the definition of an “insurance holding company”; direct supervision of holding companies; additional “other methods” to be included in the directive; and group governance requirements. She stated that such clarification would provide legal certainty. Amendments with regards to group solvency clarify the text and increase harmonisation where different interpretations have been adopted by Member States. Under the recovery and resolution section, some of the changes include pre-emptive recovery plans, early intervention powers, and broad resolution powers, which were recently introduced. Furthermore, Ms Dobson stated that another key area covered by the EIOPA Consultation was macro prudential policy.
- 3.5. Turning to the second consultation, Ms Dobson noted that, on 1 July 2020, the European Commission published a consultation on the review of the key elements of the prudential framework for insurance and reinsurance companies in the European Union (the “**European Commission Consultation**”).³ Ms Dobson remarked that the European Commission Consultation included wide questions and reflects changing priorities since the Solvency II Directive was enacted, including sustainable investment, investment in

³ European Commission, *Consultation on review of the key elements of the prudential framework for insurance and reinsurance companies in the European Union* (1 July 2020) available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12461-Review-of-measures-on-taking-up-and-pursuit-of-the-insurance-and-reinsurance-business-Solvency-II-/public-consultation>

the “real economy” and the impact of COVID-19. She explained that the European Commission Consultation focuses on areas such as the objectives of insurance supervision—including, for example, questions regarding whether a new objective to invest in sustainable economic activities should be added.

- 3.6. Ms Dobson commented that it remained unknown whether the U.K. would choose to mirror changes to the Solvency II Directive after its withdrawal from the E.U. or whether there will be a positive equivalence determination under the Solvency II Directive. She informed the members that the HM Government plans to publish a call for evidence on possible amendments to the U.K.’s Solvency II regime in autumn 2020. This review is expected to include the risk margin, the matching adjustment, internal models and reporting requirements.
- 3.7. Members discussed if there should be any specific regime for insurance guarantee schemes. Ms Dobson stated that EIOPA hasn’t clearly specified a separate regime of these schemes. A member noted that it is not clear from either consultation whether Member States are expected to put into place more defined regimes for insurance guarantee schemes. Members discussed that lawyers have been asked to provide more specific terms of contract in the context of resolution and recovery. Attendees discussed whether the proposed changes to Solvency II Directive, under the two consultations, address the issue of COVID-19 as a pandemic. A member noted that the European Commission Consultation has asked a question on whether the current prudential requirements address the existing COVID-19 condition. However, no such reference is seen in the EIOPA Consultation as the same came before the outbreak of COVID-19. Members discussed that there are several open ended questions that are to be considered under the EIOPA Consultation; for example: which factors will determine whether an undertaking should be covered under the EIOPA supervision. A member pointed out that from the U.K. perspective it is hard to know the position at this stage and there is likely to be divergence on how insurance companies are treated.

4. Brexit Preparedness (Adam Levitt)

- 4.1 Mr Levitt explained that the U.K. has temporary provisions in place to allow for contractual run off within the insurance sector following the end of the transition period. However, similar provisions are not clearly in place across Europe. Mr Levitt drew members’ attention to EIOPA’s recommendation for the insurance sector in light of U.K. withdrawing from the European Union (“**EIOPA’s Recommendations**”), which were

published in February 2019 in view of a potential no-deal Brexit.⁴ Following this, EIOPA published a table detailing whether Member States complied or had intentions to comply with EIOPA's Recommendations in October 2019.⁵ Mr Levitt noted that since then, this table has not been updated. It could be the case that a Member State then intending to comply with EIOPA's Recommendations for orderly run-off in the event of a no-deal Brexit has not put in place the relevant provisions for after the end of the transition period. A member pointed out that this position is political and it can go in any direction but there should be some run-off regime even though temporary. Members discussed whether it would be useful for the FMLC to write to HM Treasury to request an updated version of the table on Member States' compliance with EIOPA's recommendations. Members agreed that this is an area of uncertainty and should be addressed. Members noted that the political negotiation between the U.K. and E.U. would have substantial impact on many of the questions raised during the meeting and that they could have a more informed discussion at the next meeting which would be closer to the end of the transition period.

5. Any other business

- 5.1. Ms Trela-Larsen informed the members that the next meeting of this Scoping Forum will be held on 24 November 2020. A member suggested that the Court of Appeal decision on Part VII of the Financial Services and Markets Act 2000 should be delivered soon and that it could be a topic of discussion for the next meeting. Other members suggested the FCA test case decision also to be a potential agenda item.

⁴ EIOPA, *Recommendation for the insurance sector in light of U.K. withdrawing from the European Union* (EIOPA-BoS-19/040 (19 February 2019)); available at https://www.eiopa.europa.eu/content/recommendations-insurance-sector-light-united-kingdom-withdrawing-european-union_en

⁵ EIOPA, *Compliance table of Brexit recommendations overview of replies* (October 2019), available at: https://www.eiopa.europa.eu/sites/default/files/publications/eiopa_guidelines/overview_replies_brexit_recommendation.pdf

Did you know ... the FMLC is moving?



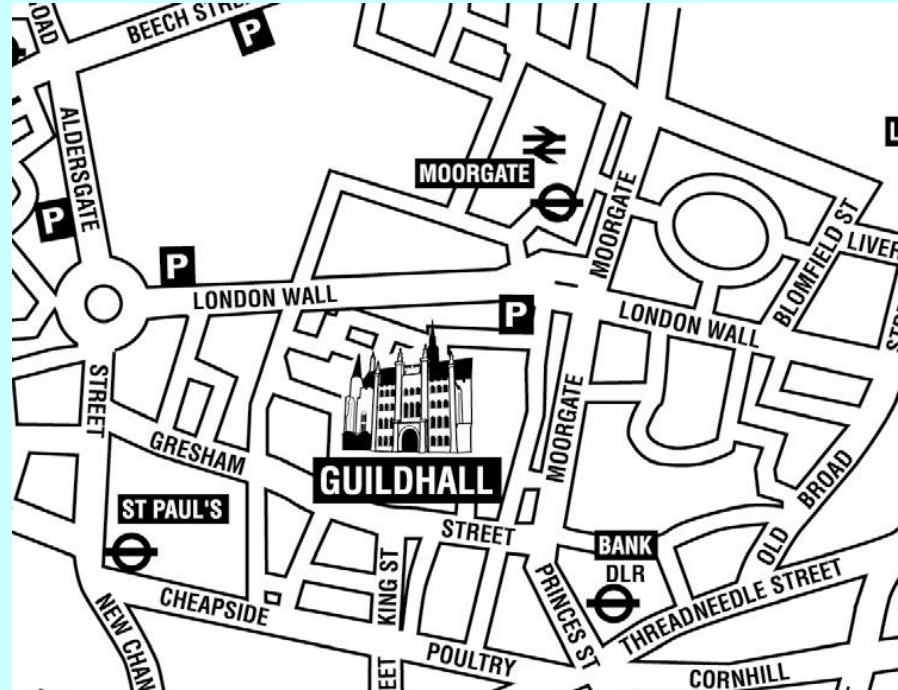
Katja Trela-Larsen
Forums Coordinator

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.

New Premises in the City of London

The FMLC Secretariat will be moving from the current offices in the Bank of England to new premises offered by the City of London later this year. We are not moving far, the Secretariat's new office is less than a five minute walk from the Bank of England.



New ways of working



In light of the coronavirus pandemic, many of our meetings have been held virtually.

When we return to face-to-face meetings the FMLC will no longer be able to host Scoping Forum meetings at the Bank of England facilities.

The Secretariat is exploring the possibility of continuing to schedule more of the FMLC's meetings online in future.

We would also appreciate offers to host some meetings for us.

FMLC Events



In addition to in-person Scoping Forum meetings, we would appreciate help with annual FMLC events, including:

- Judicial Seminar
- Quadrilateral Conference
- Spring and Autumn Seminars
- Patrons' Dinner, and
- Festive drinks reception

Help may take the form of hosting and catering for the event, or even providing logistical support, such as printing.

Supporting the FMLC



If you wish to find out more about upcoming FMLC events and the ways you can offer support, please contact Rachel Toon (executivesupport@fmlc.org)

As ever, if you have an issue of legal uncertainty you would like to raise with the FMLC, or if you or your organisation would like to contribute to the FMLC's work via a Scoping Forum or Working Group, please contact Venessa Parekh (research@fmlc.org) or Katja Trela-Larsen (forums@fmlc.org)