

## Financial Markets Law Committee (“FMLC”)

### Insurance and Pensions Scoping Forum

Date: Thursday 22 July 2021

Time: 2.00pm to 3.30pm

Virtual meeting



#### Attendees:

Steven McEwan (Moderator)	Hogan Lovells LLP
Peter Bloxham	
Katherine Coates	Clifford Chance LLP
Beth Dobson	Slaughter and May
Reid Feldman	Kramer Levin Naftalis & Frankel LLP
David Kendall	Cooley (UK) LLP
Adam Levitt	Ashurst LLP
Thomas Lockley	CMS Cameron McKenna Nabarro Olswang LLP
Benjamin Lyon	Debevoise & Plimpton LLP
Ian Mathers	
Alison Matthews	Herbert Smith Freehills LLP
James Middleton	AIG Europe Limited
James Phythian-Adams	Sidley Austin LLP
James Smethurst	Freshfields Bruckhaus Deringer LLP
Clare Swirski	Debevoise & Plimpton LLP
Michael Wainwright	Dentons UK and Middle East LLP
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat

#### Guest Speakers:

Jessica Morrison	HM Treasury
Peter Symons	HM Treasury

#### Regrets:

Duncan Barber	Linklaters LLP
Pollyanna Deane	Fox Williams LLP

**Registered Charity Number: 1164902.**

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## Minutes

### 1. Introductions

1.1. Mr McEwan opened the meeting and introduced the guest speakers.

### 2. Solvency II: Responses to HM Treasury’s Call for Evidence (Jessica Morrison and Peter Symons)

2.1. Ms Morrison provided a brief background to the responses received by HM Treasury in response its Call for Evidence on the “onshored” Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (“**Solvency II**”).<sup>1</sup> She explained that in June 2020, the Government announced that it would review certain features of the prudential regulatory regime for the U.K. insurance sector, known as Solvency II. In October 2020, the Government published a Call for Evidence, asking respondents to raise any issues relating to Solvency II. HM Treasury received 64 written responses from insurance and reinsurance undertakings and industry representative bodies. Respondents were generally supportive of the Solvency II regime, noting that while there was a strong case to reform many of the features of Solvency II, that they supported the framework of the regime.

2.2. Mr Symons explained that, informed by the responses to the Call for Evidence, the Government is considering the case to reform particular elements of Solvency II. He added that, in the summer, the PRA is likely to publish a quantitative impact study (QIS) on Solvency II. The QIS will, later this year, provide evidence to inform decisions on key policy areas. Mr Symons noted that HM Government’s review on the future regulatory framework (published in October 2020) for financial services, will also inform decisions on reform to Solvency II, including the balance of roles and responsibilities between the Government and the regulators. The Government will publish a further consultation on Solvency II in early 2022. A member asked about the lengthy timeline of the Solvency II

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<sup>1</sup> HM Treasury, *Review of Solvency II: Call for Evidence – Response* (July 2021); available at: [20210616 Solvency II Call for Evidence Response.docx \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/95422/20210616_Solvency_II_Call_for_Evidence_Response.docx)

reform and the uncertainty that it might generate. Mr Symons explained that, while reform may generate uncertainty, he hopes, in this case, as the direction and objective of reform was recently signalled in the Response to the Call for Evidence (published in July 2021), any uncertainty is likely to be reduced. Nevertheless, the Government intends, as quickly as possible, to provide clarity on the details of the reforms to mitigate any uncertainty. He added that while the legislative and parliamentary process might necessarily take time, thus affecting the date of implementation of the reforms, the intention is to reduce uncertainty by providing the details of the reforms as soon as possible.

2.3. A member drew attention to the existing ambiguity and interpretation of the provisions of Solvency II and suggested that the PRA issue guidance to provide clarity. There followed a discussion around the question of equivalence with the E.U. Mr Symons remarked that the Treasury will ensure that it is aware of any changes made to the 'EU Solvency II', along with international development of insurance standards, but that issues relating to equivalence were being handled as part of the broader EU-UK negotiations.

2.4. Members agreed to provide HM Treasury with more concerns and evidence in the future. Mr Symons offered to send a list of questions (that HM Treasury might publish in the future) for the members to consider.

### **3. European Commission's review of Solvency II (Reid Feldman)**

3.1. Mr Feldman provided an overview of the European Commission's review of Solvency II. He explained the review process including the many consultations and technical proposals organized by the E.U. Commission and EIOPA, expected to result in a detailed reform proposal to be presented by the E.U. Commission to the Parliament and Council, with adoption possible in 2022.<sup>2</sup> Mr Feldman noted that commentators have called it the most sophisticated prudential framework in the world but that some claim that it is the most conservative, creating unnecessary costs and barriers which have a significant impact on insurers. Potential changes in Solvency II may involve long-term/low-carbon investment by insurers; mitigation of excessive volatility; better application of proportionality; improved supervision and cooperation among national regulators; and increased harmonization of insolvency procedures. Members discussed several questions raised in the E.U. context and whether review of the U.K.'s Solvency II can achieve the same objective.

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<sup>2</sup> The E.U. Commission's proposal was published on 22 September 2021.

**4. Evolution of litigation in France on business interruption coverage of losses related to the COVID-19 pandemic (Reid Feldman)**

4.1. Mr Feldman remarked that, in France, at the outset of the COVID-19 pandemic the French regulator (the ACPR) and French insurers considered that most business interruption policies would not be triggered by the pandemic, but that in the extensive litigation that followed French courts have ruled otherwise in many (but not all) cases. He described the requirements in the French insurance code regarding exclusionary language and cited examples of how courts have applied those requirements, resulting in many instances of exclusions being disregarded. He described the positions taken by AXA, involved in more such litigation in France than any other insurer, and the settlement offers is making to policyholders. A member asked if France would undertake a test case as was done in the U.K. and Mr Feldman explained that this is not likely.

**5. Any other business**

5.1 No other business was discussed.