

MARKET BULLETIN

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Title Counter-Terrorism and Security Act 2015 – Amendments to the Terrorism Act 2000

Purpose To provide guidance to the Lloyd's Market of the impact of amendments to the Terrorism Act 2000 on kidnap and ransom (re)insurance business

Type Event

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Introduction

With the terrorist threat in the UK having been increased to “severe”, on 26 November 2014 the UK Government announced its intention to amend existing terrorism legislation to clarify the law in relation to insurance payments made in response to terrorist demands. Consequently the Counter-Terrorism and Security Act 2015 (“the Act”) received Royal Assent on 12 February 2015.

Part 6 of the Act amends the Terrorism Act 2000 (“TACT”) and is of relevance to the insurance industry and those providing kidnap and ransom (“K&R”) insurance. The amendment clarifies the intent of existing legislation, making it explicit that the reimbursement of terrorist ransoms is illegal and that (re)insurers are prohibited from reimbursing ransom payments made to terrorists. The amendment does not however impact K&R cases involving non-terrorism related criminality (including piracy).

The UK Government is cognisant that the London insurance industry operates within an effective compliance framework to comply with this requirement, and has confirmed that the purpose of the K&R amendment is to clarify the intent of the original legislation rather than remedy any non-compliant practice. Nevertheless, Lloyd's requires that managing agents ensure that they have in place a robust compliance framework, implement risk mitigation strategies and conduct appropriate due diligence in order to prevent making an illegal payment.

The Home Office, which has held consultation regarding the amended legislation with representatives from the UK insurance industry, including Lloyd's and Company market participants, London Market brokers, legal advisors and the FCA, has reviewed the content of this guidance.

Purpose of the Guidance

The purpose of this guidance is to inform managing agents of the change in legislation to clarify any impact on K&R (re)insurance business and to reiterate the need for K&R (re)insurance to be subject to vigorous risk mitigation and due diligence controls.

Offence impacting K&R (re)insurance

The legislation inserts a new section 17A of TACT which explicitly states that an insurer commits an offence if they make a payment under an insurance contract for money or property handed over in response to a demand made wholly or partly for the purposes of terrorism, when the insurer knows or has reasonable cause to suspect that the money has been handed over for that purpose.

The offence relates to any reimbursement made in respect of ransoms paid for the purposes of terrorism. As stated in the Home Office's 'Explanatory Notes' on the Act, the offence will apply in respect of insurance contracts entered into prior to Royal Assent (12 February 2015) in respect of ransoms that have been paid from 27 November 2014, when the intention to legislate was publicly announced.

The provisions have extra-territorial application in that arrangements made to conduct financial transactions outside the UK by UK persons/entities are also captured. Therefore, reimbursements made in response to terrorist demands both inside and outside of the UK are prohibited.

Both companies and individuals may be held liable for this offence, where knowledge or suspicion is attributable either to the directing minds of the body corporate or to the person who authorised the payment. An individual may also be liable if they 'aid and abet' another party to commit an offence, or a senior officer consents to or connives in the offence, or their neglect leads to the offence occurring.

Definition of terrorism

"Terrorism" is defined in section 1(1) of TACT, and should be reviewed in detail by each Managing Agent. In summary, the definition applies when there is the use or threat of action which:

- 1) involves serious violence, danger to a person's life, creates a serious risk to health or safety of the public, or seriously interferes with or disrupts an electronic system.
- 2) is designed to influence the Government or to intimidate the public or a section of the public; and

3) is done for the purpose of advancing a political, religious, racial or ideological cause.

Please note, however, that the use of a firearm or explosives by perpetrators has the effect of removing the second requirement above.

In light of the above definition, the offence is not limited to dealing with proscribed terrorists or terrorist groups (e.g. persons/entities appearing on screening lists) but could also be triggered by dealing with a person/entity whose activities are known or suspected to fall into the above definition.

What is the penalty?

If a person is found guilty of the offence and convicted on indictment the penalty is a prison term to a maximum of 14 years and/or a fine. If found guilty on summary conviction (i.e. a trial before a magistrate or court, without the intervention of a jury) the penalty is a prison term to a maximum of 6 months and/or a fine.

The Home Office has clarified that, as with existing terrorist financing offences, an insurer must have actual knowledge or reasonable cause to suspect to commit an offence, and that prosecuting authorities will need to prove each element of the offence “beyond reasonable doubt.”

What is the impact of the offence on (re)insurers?

The amendment serves to clarify the purpose of the original legislation: to prohibit the reimbursement of ransom payments where all or part of the underlying payment by the insured parties has been made to persons involved or suspected to be involved in terrorism. It does not prohibit reimbursement payments in respect of non-terrorism related criminality and such cases will fall outside the scope of the offence.

In practical terms the legislation will not alter insurers' current practice of assessing reimbursement payments in relation to K&R insurance or affect their ability to resolve kidnapping/hijacking cases where terrorism is not involved. The amendments to TACT do not affect reimbursement payments where there is no reasonable cause to suspect terrorist activity at the time the reimbursement payment is made.

The Home Office has reiterated the position that ancillary costs, such as response consultants' fees, continue to be permitted so long as those payments are not made for the purposes of terrorism (which would then be caught by the existing terrorist finance offences under sections 15 to 18 of TACT). Likewise, the reimbursement of ancillary expenses such as legal and response consultant fees, medical expenses, expenses of the victim's family, transport expenses for the victim's family and psychiatric expenses for the victim after their release would not be prevented by the offence.

An effective compliance framework

Whilst not subject to the UK Money Laundering Regulations 2007 (“MLR2007”), general insurers must still have systems and controls in place to prevent financial crime. This would also include processes to counter the risk of committing money laundering offences such as a process for reporting knowledge or suspicions of money laundering, including that related to terrorist financing. In order to mitigate financial crime risk, firms should implement due diligence controls in line with the MLR 2007, particularly enhanced due diligence checks for higher risk transactions.

(Re)insurers need to make certain that through carrying out relevant due diligence and screening of K&R parties, they consider whether the kidnappers’ actions or threats could give them knowledge of or a reason to suspect activities falling within the definition of terrorism, as provided above.

If such due diligence uncovers information that provides the (re)insurer with knowledge or suspicion that a K&R claims payment will reimburse monies made to a terrorist, then the payment cannot be paid.

If this information results in insurers having cause to suspect, but with insufficient evidence to prove that terrorism is involved, further steps should be taken to confirm or eliminate those suspicions. It may be necessary to engage other professional parties to conduct further investigations or provide legal advice.

If at the conclusion of its investigations, an insurer is unable to eliminate its suspicion, it may be appropriate to apply for consent from the National Crime Agency (under section 21za of TACT) to proceed with the reimbursement if the insurer does not have sufficient grounds to decline the insured’s claim. Failure to do so may result in a criminal offence being committed if a payment is made and it is later held that the insurer had knowledge or reasonable cause to suspect that said payment constituted a reimbursement of a terrorist ransom.

Conclusion

In summary, managing agents conducting K&R business should be aware that reimbursing monies paid to a terrorist is a criminal offence and that effective due diligence processes need to be undertaken to ensure that reimbursements are not made in respect of monies paid to a terrorist as defined under TACT.

Contact

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Information sources

- Terrorism Act 2000 - <http://www.legislation.gov.uk/ukpga/2000/11/contents>
- Lloyd's Market Bulletin Y4560 – Sanctions Compliance – Due diligence guidance for the Lloyd's Market
- Regulatory guidance: Financial crime: a guide for firms. Chapter 3 of the guide provides proposed guidance on AML.
- The FSA's financial crime and AML rules and guidance are set out at SYSC 3.2.6 R – SYSC 3.2.6J G (for insurers and managing agents) and SYSC 6.1.1R and SYSC 6.3 (for other firms).
- Joint Money Laundering Steering Group Guidance
- FCA guidance on AML - <http://www.fca.org.uk/firms/being-regulated/meeting-your-obligations/firm-guides/systems/aml>
- <https://www.gov.uk/money-laundering-regulations-your-responsibilities>