In common with other financial services firms, UK (re)insurers and (re)insurance intermediaries currently benefit from passporting rights set out in the Solvency II Directive (“Solvency II”) and the Insurance Distribution Directive (“IDD”). Withdrawal from the EU does not of itself mean that they will no longer be able to do business in EEA States. What it does mean is that they will not be able to carry on insurance activities on an EEA-wide basis as a matter of right, flowing from the UK’s membership of the EU.

To mitigate the impact of this change, and absent a deal between the UK and EU preserving passporting rights (which is not currently expected), a number of UK (re)insurers and intermediaries have established, or are establishing, an EEA subsidiary to act as a “hub” for their group’s EEA business with a single EEA authorisation.

Other approaches available to ensure that cross-border business can continue post-Brexit include establishing authorised branches in relevant EEA jurisdictions, as provided for in Solvency II. A key disadvantage with this approach, however, is that a UK (re)insurer or intermediary will not be able to rely on a branch authorisation obtained in one EEA State to conduct insurance activities in other EEA States; passporting rights do not attach to a branch authorisation.

The loss of passporting rights is equally relevant to the cross-border activities of (re)insurers and intermediaries coming from the EEA into the UK – those that are carrying on insurance business in the UK will require authorisation from the Prudential Regulation Authority (“PRA”) or the Financial Conduct Authority (“FCA”) (as the case may be) for those activities.

Leaving the EU – process and next steps

The European Union (Withdrawal Agreement) Act 2020 approving the implementation of the Withdrawal Agreement in the UK became law on 23 January 2020. Subsequent ratification of the Withdrawal Agreement by the EU completed the legal formalities for the UK’s withdrawal from the EU, with the following consequences:

- At 11pm on 31 January 2020, the UK ceased to be a Member State of the EU and is now in a transition period until the end of 2020. UK legislation calls this the “implementation period”.

The section is part of our Brexit Legal Guide.

Deal/transition period

- Following its approval by the UK and EU Parliaments, the Withdrawal Agreement sets out arrangements for the UK’s withdrawal from the EU with effect from 11 pm on 31 January 2020 – when the UK ceased to be an EU Member State.
- The UK is now in a transition period following its exit from the EU until the end of 2020. UK legislation calls this the “implementation period”.
- During transition, EU law continues to apply in and to the UK and the UK continues to trade with the EU as part of the Single Market.
- The Political Declaration on the future relationship between the UK and the EU accompanies the Withdrawal Agreement – there will now be an intense period of negotiations to seek to finalise the details of the future relationship.
- Means:
  - Passporting rights between the UK and the EEA for (re)insurers and (re)insurance intermediaries will continue during the transition period.
During transition, EU law continues to apply in and to the UK and the UK continues to trade with the EU as part of the Single Market. Immediate changes associated with leaving the EU are, therefore, small. In particular, UK and EEA (re)insurers and intermediaries will continue to benefit from the passporting rights that they held before exit day but in all likelihood stand to lose from the end of the year.

The Withdrawal Agreement, which sets out the terms for the UK’s departure from the EU, is accompanied by a non-binding Political Declaration on the future relationship between the UK and EEA States. This relationship needs to be negotiated during the transition period.

Meanwhile, work is also continuing to fill the gaps that would otherwise appear in the UK’s legislative landscape following Brexit in accordance with the scheme laid down in the European Union (Withdrawal) Act 2018.

No deal – in the sense of a “cliff-edge” end of: (i) our trading relationship with the EU (and wider EEA); and (ii) the fundamental freedoms (people, establishment, capital and goods) – is still a possibility at 11pm on 31 December 2020 if the transition period is not extended and a new free trade agreement is not ready by that date.

Despite the fact that the UK ceased to be a Member of the EU on 31 January 2020, there is as yet no clarity what the future trading relationship between the UK and the EU will involve. As the UK Government is determined not to extend the transition period beyond the end of 2020, there is also a question whether a trade deal can be agreed in the remaining 11 months to a point where it could be implemented at the beginning of 2021. The risk of the UK ending transition without a new trade deal with the EU and reverting to trade on WTO terms remains a real one, although this is not what either the UK or the EU wants. For further detail, please see accompanying section: Leaving the EU: The process and preparations.

On 3 February 2020, the European Commission issued a press release setting out a recommendation to the European Council to begin negotiations on the future relationship with the UK. The recommendation includes the draft text of the negotiating directives, which set out the parameters of the future relationship that the EU wishes to have with the UK and build on the Political Declaration. Also on 3 February 2020, the UK Prime Minister, Boris Johnson, published a written statement setting out the UK Government’s proposed approach to the future UK/EU relationship. It is clear, however, that their starting positions are a long way apart.

Even if negotiations do result in agreement by the end of the year, the Political Declaration contains little of substance about the future conduct of cross-border financial services beyond the parties aspiring to complete equivalence assessments with respect to each other before the end of June 2020. Whilst a finding of equivalence would have some value for certain UK (re)insurers, those benefits fall considerably short of offsetting the loss of the passport. In the case of intermediaries, “equivalence” has no meaning whatsoever under the IDD. It is not clear, therefore, that a finding of equivalence would assist those wishing to distribute insurance cross-border.

In summary, irrespective of whether a future trading relationship can be agreed by the end of the transition period, UK and EEA (re)insurers and (re)insurance intermediaries need to be prepared for the loss of passporting rights by the end of 2020. It is particularly important to understand that a future trading relationship for financial services that is based on “equivalence” assessments will do little, if anything, to mitigate the impact of that loss.

**Likely outcome for insurance at end of transition period**

Notwithstanding the lack of clarity that currently surrounds the UK’s future trading relationship with the EU, the UK Government has established a Temporary Permissions Regime (“TPR”), which will enable firms coming into the UK from other EEA jurisdictions to carry on business here for up to three years after the transition period ends (and in some cases even longer) while they obtain the PRA and FCA authorisations needed for those activities. Whilst the original purpose of establishing the TPR was to provide temporary relief for incoming EEA firms in the event that the UK left the EU without a deal (i.e without ratification of the Withdrawal Agreement), both the PRA and FCA have confirmed that it will now apply from the end of the implementation period.

The introduction of the TPR means that incoming EEA (re)insurers and (re)insurance intermediaries do not need to apply for, and obtain, full authorisation for their UK operations by the end of 2020. Irrespective, it seems, of whether terms have been agreed for a future trading relationship, these firms will be able to rely on the TPR whilst they apply for the authorisations they need to continue their business long term.

As regards insurers wishing to rely on the TPR, the PRA has confirmed that no further action is required if an EEA firm has already:

- made (and not withdrawn) a valid notification to the PRA that it wishes to enter the TPR; or
- directly applicable EU legislation, such as the Solvency II Delegated Regulation, will continue to apply in the UK until the end of that period.
- There will not be any immediate Brexit-driven changes to financial services laws (eg the Financial Services and Markets Act 2000) or the FCA and PRA rules.
- Issues relating to equivalence may be dealt with under any future relationship agreement between the UK and the EU27.
- No-deal contingency measures implemented by the UK Government and regulators (including the TPR and the FSCR) will not be activated upon Brexit.
- The non-binding Political Declaration will provide a framework for the future relationship between the UK and the EU. There is nothing in the present version that indicates there would be a return to passporting.
- The establishment of equivalence declarations seems likely, in the event of a deal, but these would not provide the comprehensive passporting rights available to insurers established in Member States of the EEA. Equivalence has no application whatsoever under the intermediaries’ regime.

**At the end of transition – will there be elements of no deal?**

- At the end of the transition period, if the new trading relationship is not in place, there could be a no-deal at that point. It is more likely that this will be modified by the introduction of agreed elements of the future relationship or some other temporary set of rules, even though the UK Government has ruled out extending the transition period. There will be no clarity as to what will happen until towards the end of 2020 and the adage “plan for the worst, hope for the best” continues to apply. No-deal guidance therefore remains relevant. See the accompanying section of our Brexit Guide: Leaving the EU:
The validity of existing TPR notifications is not affected by the change to the start date of the TPR to after the implementation date. The PRA has said a firm that has not taken the necessary steps to enter the TPR may still submit an application for permission under Part 4A of FSMA (or for variation of an existing “top-up” permission) before the end of the implementation period although it is no longer possible to make a TPR notification (the deadline for firms notifying the PRA closed in April 2019).

The FCA notification window, which applies to intermediaries, closed on 31 January 2020 but it has indicated that it expects to invite further applications later in the year.

The UK is also introducing a Financial Services Contracts Regime (“FSCR”) to ensure that those EEA firms that do not enter the TPR, and those that exit the TPR without UK authorisation, are able to wind down their UK regulated activities in an orderly manner.

The position is considerably more difficult for UK firms as the UK’s jurisdiction is limited to activities carried on here. The TPR is only effective, therefore, for EEA firms operating in the UK and it can do nothing to help UK firms wishing to conduct activities in other jurisdictions without the benefit of passporting rights.

For UK insurers with policyholders in EEA States, there is a particular risk that they will no longer be licensed to deliver services in those countries unless they go through the onerous process of establishing an authorised branch in each country (or unless the policies have been transferred by the time of Brexit to an EEA carrier). Not doing this may leave insurers unable to pay out on claims.

Despite many calls for this issue to be dealt with as a matter of priority during exit negotiations, it was not covered by the Withdrawal Agreement or by the terms of the Political Declaration.

**EIOPA recommendations**

Recommendations published by the European Insurance and Occupational Pensions Authority (“EIOPA”) in February 2019 provided some, very late, guidance in relation to cross-border insurance activities.

In some areas, EIOPA provided explicit guidance on the approach it expected individual States to take. For example, and unsurprisingly, EIOPA stated that UK insurers should not be allowed to write new contracts in the EEA post-Brexit without having an EEA authorisation. In other areas, EIOPA took a “softer” approach, leaving it up to individual States to decide how to respond. Some of the key points arising from EIOPA’s recommendations are set out below. For additional detail, see our blog post dated 21 February 2019 here.

**Insurers**

Key points on legacy business that insurers can take from the recommendations include the following:

- EEA States were encouraged to apply a mechanism for the run-off of EEA business by UK insurers who lose their authorisation or to require those insurers to take immediate steps to become authorised. A number of jurisdictions, including France, Germany, Ireland and Spain have introduced measures to deal with the run-off of insurance contracts (see our blog post here for discussion of the position in France).
- EEA States were also encouraged to recognise that, whilst UK insurers should not be able to write new business (including any renewals, extension or increase of cover) without obtaining a suitable EEA authorisation, policyholders who exercise an option or right in an existing policy to start taking their pension should not be prejudiced.
- Where a policyholder is habitually resident in the UK at the date of entering into a life insurance contract but moves to the EEA afterwards, national authorities should take this into account in their supervisory review. Implicit in this recommendation, the UK insurer should be enabled to meet its obligations to policyholders under this category of contract without the need for an EEA authorisation (or without having to transfer the policy to an EEA carrier).
- National authorities should take the same approach to those classes of non-life business where the risk is treated by Solvency II as situated in the State of an individual’s habitual residence (or the State of a legal person’s establishment). Making an exception for cover relating to buildings and their contents and to vehicles, as EIOPA does, is consistent with Solvency II rules on the location of risk. It is

For UK insurers with policyholders in EEA States, there is a particular risk that they will no longer be licensed to deliver services in those countries.”

GEOFFREY MADDOCK
also consistent with the view that the habitual residence of an individual is only relevant at the outset of a contract. EIOPA recognises, however, that individual States may take different views on this.

**Intermediaries**

The difficulties raised by Brexit for intermediaries have received considerably less attention from regulators than those of insurers. EIOPA’s recommendation on distribution activities emphasises the importance of consistency in regulation across the EU and in the uniform application of the IDD. At the same time, it recognises explicitly the ability of individual States to take their own view on how intermediaries should be regulated, provided that the minimum standards of the IDD are met.

Planning for Brexit has been hindered by competing provisions in the IDD determining its jurisdictional scope, including uncertainty about how far the prohibition in Article 16 (restricting reliance by EEA insurers and intermediaries on non-EEA brokers) extends. The following remarks made by EIOPA are relevant:

- EIOPA recommends that national regulators consider “distribution activities which target EU27 policyholders or EU27 risks”. This is different to the language in IDD, which references the “taking up and pursuit” of distribution activities in the EEA; and
- national regulators should also “assess any distribution model against the definition of distribution activity ... in the IDD”.

EIOPA’s view seems to be that IDD requirements should be applied to all distribution activities that involve EEA policyholders and EEA risks. This would be a broader test of what amounts to “distribution activities” than regulators in some jurisdictions are thought to apply. The UK, for example, applies a test of where the relevant activities are carried on and not one of where the risk or client is located.

FCA guidance published shortly after EIOPA’s recommendations were released adds little, if anything, to what was said by EIOPA. For brokers, in particular, the FCA acknowledged that this is “a complex area” and advised firms to contact local EEA regulators and seek legal advice. Further commentary on the FCA guidance can also be found on our Brexit blog here.

**Post-transition UK regime**

UK regulation of (re)insurers post-Brexit seems likely to follow Solvency II closely. The argument for further change (beyond the various changes that have already been introduced by the PRA) once the UK is no longer constrained by Solvency II is that reducing the burdens imposed on UK-headquartered groups would enable them to become more competitive outside the EEA. In practice, other considerations include:

- the PRA was behind much of the content of Solvency II and is unlikely to want to depart radically from its standards;
- many UK insurance companies have also said that they would not welcome the upheaval that would accompany a significant rewriting of the rules; and
- for the UK to be assessed as “equivalent”, it will undoubtedly need to follow Solvency II closely.

Equally, post-Brexit UK regulation of (re)insurance intermediaries can be expected to remain much the same as today. This is in large part because the IDD establishes minimum standards only for the conduct of insurance distribution business and the UK therefore already has greater freedom than under Solvency II to establish its own rules.

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