

PRA AND FCA CLARIFY IMPACT OF BREXIT TRANSITIONAL FOR INSURANCE SECTOR

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Legal Briefings - By **Alison Matthews, Consultant**

Recent announcements made by the [PRA](#) and [FCA](#) clarify their approach to Brexit following the European Council's agreement to a transition period for the UK's withdrawal from the EU. In particular, insurers, insurance intermediaries and other financial services firms have been encouraged to assume that they will continue to benefit from passporting rights until December 2020. Whilst this is a welcome development, firms cannot be complacent:

As "nothing is agreed until everything is agreed", there can be no certainty about the transition period until all terms of the [Withdrawal Agreement](#) are approved, which will only come much later (if at all) in the Brexit negotiations.

Failing such agreement, the UK's "temporary permission" regime will enable firms coming into the UK from other EEA jurisdictions to carry on business here while they obtain the PRA and FCA authorisations needed for those activities. UK firms with EEA operations seem unlikely, however, to benefit from a similar concession.

In practice, this means that UK firms with significant EEA interests are continuing to plan, for now at least, on the assumption that there will be no transition period. Otherwise, they risk disruption to their business if the UK leaves the EU without agreeing the envisaged transition period as part of the terms for its withdrawal.

We consider the latest announcements from the PRA and the FCA below. We also note the [PRA's](#) policy statement ([PS4/18](#)) and Supervisory Statement ([SS2/18](#)) on its approach to branch authorisation and supervision, which were issued at the same time.

BACKGROUND TO LATEST ANNOUNCEMENTS

On 20 December 2017, the [Treasury](#), [PRA](#) and [FCA](#) made announcements clarifying their approach to EEA-headquartered financial services firms wishing to carry on business in the UK post-Brexit. We issued a [client briefing](#) considering those statements and [evidence](#) given to the House of Commons Treasury Committee which cast further light on the PRA's thinking as regards insurers and reinsurers.

Our briefing, which also considered the PRA's consultation ([CP30/17](#)) on its approach to third country insurers, can be found on our blog [here](#).

Key elements of the approach described by the Treasury, the PRA and the FCA were as follows:

The UK should allow EEA firms to carry on operating in the UK post-Brexit.

The Treasury would, if necessary, establish a "temporary permission" regime, enabling firms to continue their activities in the UK for a limited period after withdrawal whilst they obtained the authorisation they would need in the longer term.

The FCA expected to make full use of the "temporary permission" regime, while the PRA expected to use it only as a fall-back.

The PRA's approach meant that EEA firms currently passporting into the UK were encouraged to begin discussions with the PRA. They would need to apply as soon as possible for a UK authorisation if their application was to be processed in time for March 2019.

WHAT ARE THE PRA AND FCA SAYING NOW?

The European Council agreed last month that the terms of the UK's withdrawal from the EU should include a transition period until the end of 2020. This has caused the PRA and the FCA to look again at their approach to Brexit. In particular, both have said that financial services firms can assume that they will hold passporting rights during the transition period.

In the case of incoming EEA insurers and insurance intermediaries, this means that they do not need to apply for authorisation at this stage. In the event that the UK leaves the EU on 29 March 2019, these firms will be able to rely on the government's "temporary permission" regime whilst they apply for the authorisations they need to continue their business long term. The FCA has confirmed that it expects firms to be able to benefit from the regime through a simple notification process. It has launched a [survey](#) to collect information from EEA firms who would like to participate in the regime. Firms are encouraged to complete the survey by 11 May 2018.

The position is considerably more difficult for UK firms, though, as the UK's jurisdiction only extends to activities carried on here. As Andrew Bailey, Chief Executive of the FCA, recently [said](#): "material risks remain, particularly in areas where actions would be needed by both the UK and the EU authorities". One of these risks is that the transition period is contingent on there being an agreement on all terms for the UK's withdrawal from the EU. Whether this is achievable will only be known much nearer to 29 March 2019.

If the transition period does not materialise, the UK's temporary permission regime is only effective 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. Recent comments made by EIOPA about cross-border legacy insurance business also suggest that EU countries may be less accommodating of UK firms post-Brexit than would reciprocate the UK's relatively benign approach to EEA firms.

This leaves UK firms with a difficult decision. Should they rely on the transition period to put their Brexit plans on ice? Or should they continue to implement their plans by 29 March 2019, in which case they avoid the disruption to their business that may be caused if the transition period does not in fact materialise? How firms respond to this dilemma is likely to depend on the significance of their cross-border activities and the extent of any disruption that would be caused by an early loss of passporting rights.

In either event, UK firms passporting into the UK are advised by the FCA to discuss their plans with relevant EEA supervisory authorities, including how the proposed transition period should be factored into those plans. For UK firms with operations throughout the EEA this may, of course, be easier said than done.

PRA CONFIRMS APPROACH TO INCOMING BRANCHES AND SUBSIDIARISATION

[Previously](#), we also considered the PRA's consultation paper ([CP30/17](#)), a separate "[Dear CEO letter](#)" and comments made to the TC on 16 January on its approach to third country insurers. In particular, we raised concerns about a proposed requirement for incoming EEA firms to subsidiarise based on the amount of a firm's FSCS-protected business.

In a [recent](#) policy statement ([PS4/18](#)), the PRA has confirmed its intention to retain a test for subsidiarisation that is based on the scale of a firm's activity that is covered by the FSCS. However, it intends to increase the threshold from £200 million of FSCS-protected liabilities to £500 million. Firms need to factor this test into their Brexit plans to ensure that they are not caught out by the requirement to subsidiarise.

This is the only significant change made to the PRA's new Supervisory Statement ([SS2/18](#)): "International insurers: the PRA's approach to branch authorisation and supervision", which supplements Supervisory Statement ([SS44/15](#)) "Solvency II: third country insurance and pure reinsurance branches". The PRA has, however, also confirmed that its policy extends to pure reinsurance branches, which was unclear from the consultation.

IMPACT ON SERVICES BUSINESS

As we noted in our last briefing, CP30/17 was directed at third country branches and did not refer to EEA insurers that currently carry on activities in the UK under the services passport. Nothing in the PRA's more recent papers suggests that this has changed.

This should mean that EEA insurers who can satisfy themselves that their activities fall outside the UK regime post-Brexit (because they are not carrying on regulated activities "in the UK") can avoid the need for any authorisation here. To take a different approach would, in our view, be inconsistent with the basic prohibition in FSMA, as applied to all other financial services activities and products, and legal authority in the UK. It would also place EEA insurers on an unequal footing with other non-UK insurers who already carry on insurance activities in the UK on a "non-admitted" basis.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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