



Brexit

Key issues for insurance

9 October 2020

Background

The UK left the EU on 31 January 2020 (**exit day**). However, this profound change has so far had limited impact on UK law and regulation. Under the agreement on the UK's withdrawal from the EU (the **Withdrawal Agreement**), the UK continues in most respects to be treated as if it were still part of the EU from exit day until 31 December 2020. The Withdrawal Agreement provided a mechanism to extend this period but it has not been used. It therefore appears that the full legal consequences of Brexit will begin to be felt from 1 January 2021.

The Withdrawal Agreement does not regulate future trade between the UK and EU, or any other area of potential future EU-UK cooperation, except to a limited extent in relation to Northern Ireland. It remains unclear if a deal on future UK-EU relations will be agreed by 31 December 2020. In some areas there is an obvious legal fall-back framework in the absence of a deal (for example, if agreement is not reached on tariff-free trade, "WTO rules" will apply); in other areas there is not. Whatever happens, those trading between the UK and EU will face significant regulatory changes (for example, in relation to customs). It also seems likely that, if the UK and EU reach a deal in the coming weeks, it may be a fairly "thin" agreement, meaning that negotiations on some aspects of the UK-EU post-Brexit relations may continue well beyond 2020.

For more detailed background, click [here](#).

Insurance authorisation

Deal. During the implementation period, the UK will retain many of the benefits and burdens of EU membership. UK insurers, which have passporting rights, will be able to continue to exercise them.

Passporting allows a firm authorised in one EEA member state to carry on business in any other EEA member state by way of a branch or on a cross-border services basis with the firm relying on its home state authorisation and without being required to be authorised locally.

Following the end of the implementation period, the expectation is that these passporting rights will be lost.

The Political Declaration agreed by the UK and EU alongside the Withdrawal Agreement, which sets out the ambitions of the UK and EU in respect of future relationship agreements, loosely sketches out the possible nature of the long-term UK-EU relationship which they hope will be agreed by the end of the implementation period.

The Political Declaration suggests that access to each other's financial services markets may be provided on the basis of "equivalence" after the implementation period (assuming a future relationship agreement is finalised in time). However, in the case of insurance, any such equivalence would be of fairly limited benefit and would not provide any of the benefits which passporting rights currently do.

Therefore, UK insurers who wish to carry on doing business in the EEA and write new business will need to consider alternative options. These could include:

- setting up a new licensed entity within an EEA member state which could then seek to passport into other EEA member states;
- obtaining authorisation for one or more local branches although such branches would not have passporting rights;
- acquiring a local authorised insurer within the EEA; or
- writing business through local fronting insurers and then reinsuring back to the UK.

Finally, consideration needs to be given to existing business written by a UK insurer (perhaps on a passporting basis) in the EEA prior to the end of the implementation period. Absent any trade or other agreement which exempts business already written, depending on the local laws in the relevant EEA country, it could be illegal for the UK insurer to service that business (e.g. pay claims) following the implementation period.

Options to deal with this prior to the end of the implementation period could include:

- transferring this existing business by way of a portfolio transfer or Part VII transfer to a new EEA insurer which could then carry it on (time permitting);
- merging the UK insurer into a new EEA insurer on a cross-border basis so that the business ends up in the surviving new entity (time permitting);
- converting the UK insurer into an SE and then redomiciling that entity to a member state within the EEA, allowing it to service existing business (time permitting); or
- if there is no branch in the relevant member state, out of which the business has been written, establishing a branch and seeking local authorisation for it.

A number of insurers appear to be adopting a policy of wait and see, or have tried to introduce so-called Brexit continuity clauses into policies (although query how effective these may be), or have got themselves comfortable that, in those EEA countries in which they have written business, they may be permitted to continue to write that business.

No deal. On a "no deal", UK insurers (and insurance brokers for that matter) would lose their passporting rights immediately. This is the so-called "cliff-edge" scenario.

In such a situation, it is likely that many of the mechanisms referred to above (such as Part VII transfers) could no longer be used as there would likely no longer be any mutual recognition of these arrangements.

Also, if the UK insurer has not already taken steps to establish a new EEA platform so it can write new business, there will be a time lag (perhaps a considerable one) before it can do so and put in place an alternative solution (as noted above). In the case of Lloyd's, it has established an underwriting platform in Brussels to write EEA risks.

In addition, the UK insurer may not be permitted to service existing policies in certain EEA countries and its ability to do something about this will have been significantly curtailed, assuming there is anything which can be done at all at this point in time.

However, a number of EEA countries may have unilaterally passed laws to provide transitional relief for varying time periods in respect of certain permitted activities, such as settling existing obligations.

Next steps UK insurers should actively step up their contingency planning, in particular their no deal Brexit planning, although if there is to be a no deal Brexit, their ability to do something about this is (as noted above) now seriously limited.

One area on which insurers will need to focus is the extent to which they may need to "repaper" existing contracts. For example, they should consider what steps need to be taken to terminate (in whole or in part) distribution agreements so that they do not end up writing new business in a country in which they are not permitted to do so following Brexit. In addition, consequential changes are likely to be required to be made to a number of contractual arrangements to reflect the fact that the UK will no longer be a member of the EU.

We would be very happy to discuss in more detail the implications of Brexit, and what contingency planning options might be available.

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