



INSURANCE BREXIT UPDATE: TRANSITION, TEMPORARY PERMISSIONS AND CONTRACT CONTINUITY

At a joint press conference held on 19 March 2018, David Davis and Michel Barnier representing the United Kingdom and the European Union announced the agreement in principle to a draft Withdrawal Agreement (“**WA**”) containing a transitional period of 21 months, i.e. from the entry into force of the withdrawal agreement (no later than 30 March 2019) until 31 December 2020.

In effect, the WA will allow the UK and EU to work out the finer details of their future relationship that will evolve over many years. This note examines the impact of the WA on key issues for the insurance sector, including Brexit planning and continuity of insurance contracts. The possibility of a ‘temporary permissions’ regime is also considered.

Key points

- Transitional period until 31 December 2020 proposed.
- Withdrawal agreement largely agreed, but formal ratification required.
- Continued calls from insurance associations for clarity on contract continuity.
- UK government announced a solution for inwards passporting firms through ‘temporary permissions’ regime.

Ratification

- The WA is a lengthy 129 pages and is colour-coded, showing where the UK and the EU have reached agreement (in green and the dominant colour), where they are halfway towards an agreement (in yellow) and where matters are unresolved (in white). To take effect the WA must be formally approved by both sides, with the approval process expected to operate in parallel. The ratification process is expected to start in October 2018: by the EU, through voting in the European Parliament and the European Council and, by the UK, through the usual parliamentary process (with the WA currently in the House of Lords committee stage).
- On 22 and 23 March 2018, EU leaders met for a European Council meeting at which Michel Barnier briefed them on the recent Brexit negotiations and the resulting WA. Remarks by President Donald Tusk after the meeting reflected on the ‘positive momentum in the negotiations’ and indicated that the WA would be discussed further in the next European Council meeting in June, followed by the meeting in October where it is hoped that final agreement will be reached with a view to ratification of the WA.
- Understanding the ratification process will be important to insurers’ planning needs. The Prudential Regulation Authority (“**PRA**”) and the Financial Conduct Authority (“**FCA**”) may provide formal guidance on the WA but given that, prior to ratification, it remains a legally unenforceable document, this cannot amount to a guarantee that firms can rely on transition. The Bank of England has indicated that it will give the WA ‘regulatory underpinning’ but it remains to be seen what form this will take. There is also a risk that, irrespective of the high level agreement of the text, the WA is not ratified by either side. Insurers will therefore need to determine their next steps in light of this position.

Passporting

- Currently, EU insurers can provide insurance contracts to customers in the UK (and vice versa) through passporting across borders (freedom of services) and through local branches (freedom of establishment). The WA permits passporting in the transition period, thereby allowing insurers to continue to enter into and to service insurance contracts throughout the EEA. The WA, if ratified, therefore significantly mitigates cliff edge risks associated with discontinuation of passporting and provides more time to plan.
- If the WA is ratified, the continuation of passporting relieves pressure on outbound insurers to implement their contingency plans for a March 2019 exit. Given this, we expect the PRA and FCA to provide guidance on deadlines for Brexit implementation, which may alleviate the time pressure on complex Part VII portfolio transfers or other contingency plan processes, including obtaining authorisations for EU subsidiaries.
- For contingency plans currently in process, insurers will need to carefully assess next steps depending on where they are in the process and their own board's views on the risks of the WA not being ratified.
- The PRA is clear that supervision for EEA insurers currently passporting into the UK on a branch basis remains unchanged until the UK withdraws from the EU. On leaving the EU, they would then be treated in the same way as other insurance branches and the PRA recently consulted (in CP30/17) on its approach to such firms – see our briefing 'PRA consult on approach to insurance branch authorisation after Brexit'¹. Incoming EU insurers preparing third country branch applications to submit to the PRA (on the basis of the CP30/17 proposed approach) may continue on their present timelines if their applications are well advanced.

Contract continuity

- Contract continuity is a key issue for UK and EU insurers. In continuing the status quo (if ratified), the WA has provided a degree of certainty and temporary relief for insurers with cross-border insurance contracts coming up for renewal. There is a hope that the transition period will allow the UK and EU time to legislate or otherwise provide regulatory certainty on the issue.
- From the UK side, the Chancellor of the Exchequer published a written statement on 20 November 2017² confirming that the government will bring forward legislation enabling EEA firms (including insurers) operating in the UK to obtain a 'temporary permission' to continue their activities in the UK for a limited period after withdrawal and will legislate, if necessary, to ensure that contractual obligations, such as insurance contracts, which are not covered by the regime, can continue to be met. It remains to be seen how the 'temporary permission' regime will work in practice, but we assume that all currently inbound passported firms would be given a temporary permission to 'carry out insurance business' under the relevant legislation and so continue to meet their contractual obligations until those obligations expire, without the need to establish a subsidiary or branch. They would however, be subject to PRA/FCA jurisdiction.

¹ https://www.cliffordchance.com/briefings/2018/02/prc_consult_on_approachtoinsurancebranch.html

² Financial Services Update: Written statement – HCWS382

- Although details on the ‘temporary permission’ regime are awaited, it was mentioned in an exchange of letters between Andrew Bailey of the FCA and Huw Evans of the Association of British Insurers (“ABI”).³ Andrew Bailey’s letter, in particular, provides important clarity as it assures that inbound passporting firms can rely on the Chancellor’s public statements referred to above. The letter confirms that the FCA will take the current level of uncertainty over the Brexit negotiations into account and judge firms’ customer communications accordingly. The FCA, understandably, reinforces the message that outbound passporting firms should continue to make appropriate arrangements to service clients after Brexit.
- The Chancellor’s written statement followed EIOPA’s⁴ earlier Opinion stating that insurance contracts concluded by UK insurers in the EU, before the date at which the UK exits the EU, are in principle valid after that date. In contrast to the UK position, however EIOPA opined that UK insurers would require authorisation to carry out insurance activities with regard to these cross border insurance contracts after the UK withdrawal date. No mention of a temporary regime was made, although the EU institutions may use the transitional period (if the WA is ratified) to put in place legislation necessary to accommodate contract continuity in the post-Brexit scenario. This is an area where clarity is still required, notwithstanding the WA. It would help contingency planning significantly and enable firms to put greater reliance on the transition period, if contract continuity could be resolved. Helpfully, Insurance Europe is now supportive of resolution in this area, lending its voice to the ABI and the London Market Group.

Gibraltar

- Whilst Gibraltar is within the territorial scope of the WA, an asterisked footnote references Spain’s veto on Gibraltar’s future relationship with the EU bloc. This reference therefore raises uncertainty as to whether the WA, even if ratified, applies to Gibraltar as it would to the rest of the UK. The uncertainty is particularly unhelpful to Gibraltar insurers’ passporting into the EU as their contingency plans would still need to assume a March 2019 deadline.
- It is expected that the UK government will now have bilateral discussions with its Spanish counterpart to find a compromise in order to resolve the issue and for negotiations to progress. Impacted insurers, including those dependent on passporting access currently available in Gibraltar, will therefore have continued uncertainty until an official update (expected over the next few months) is given by the UK or the EU on the Gibraltar question.

³ Letters are available here:
<https://www.fca.org.uk/publication/correspondence/correspondence-abi-fca-eu-withdrawal.pdf>

⁴ Opinion on service continuity in insurance in light of the withdrawal of the United Kingdom from the European Union EIOPA-BoS-17/389

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