

EIOPA RECOMMENDATIONS OFFER SOME CLARITY FOR THE INSURANCE SECTOR IN CASE OF A HARD BREXIT

On Tuesday 19 February 2019, the European Insurance and Occupational Pensions Authority ("**EIOPA**") issued [Recommendations for the insurance sector if the United Kingdom \("**UK**"\) withdraws from the European Union \(EU\) without a withdrawal agreement](#). The Recommendations are addressed to National Competent Authorities ("**NCAs**") and apply on a 'comply or explain' basis, with two months given to explain non-compliance. In line with previous EIOPA recommendations, we anticipate that Member States will comply.

UK insurers have for a long-time been calling for clarity as to their ability to service existing contracts after Brexit, with EIOPA only acting after some national governments, including Germany, France, Spain, Italy and Ireland, began to put their own laws in motion and started to deviate from the tightly controlled Brexit withdrawal negotiation process.

Tuesday's Recommendations are broadly speaking helpful for UK insurers but the situation for the UK intermediaries that introduce the vast bulk of risks into the London market and for EU based insurers who seek to source EU business via UK intermediaries remains uncertain.

APPLICATION

The Recommendations will apply from the date the UK withdraws from the EU without ratification of the withdrawal agreement (the "**Exit Date**"). At that point, the UK becomes a third country and UK insurers and distributors would lose their right to conduct business across the EU27 Member States by way of freedom of establishment and freedom to provide services. The Recommendations are helpful in that they:

- Clarify that, in principle, NCAs should aim to minimise detriment to policyholders (Recommendation 1), which together with Recommendation 2, (see below) is interpreted to mean that insurance contracts concluded before the Exit day by UK insurers in the EU27 will be valid and claims may be paid after that date¹, the guidance goes some way to reciprocating steps already being taken by the UK's Temporary Permissions Regime ("**TPR**") which allows EU27 insurers to continue serving UK customers in the event of a no-deal Brexit;
- Advocate an orderly run-off process for books of EU business written by UK insurers that are not setting up an establishment on the continent (Recommendation 2). Details of how the run off of such business will be

¹ Please also see the [EIOPA Press Release](#) accompanying the Recommendations which confirms that "*In principle, insurance contracts concluded before that [Exit] date by UK insurance undertakings in the EU27 are valid after that date*".

handled and supervised, will be for the NCAs to determine. The recommendation is helpful as it replicates the UK's Financial Services Contract Regime ("FSCR") which allows a maximum run off period of 15 years for insurance contracts where an insurer has not entered the TPR. No period of run off is stipulated in Recommendation 2 which leaves scope for NCAs to adopt their own run-off periods, so lobbying may be needed to ensure the adoption of a uniform period;

- Suggest that NCAs prevent UK insurers from establishing, renewing, extending, increasing or resuming insurance cover under existing insurance contracts in their jurisdiction if they are not authorised for such insurance activities under EU law. This is without prejudice to policyholder rights to exercise an option or right in an existing insurance contract to realise their pension benefits (Recommendation 2). This provides a degree of certainty for existing policyholders;
- Recommend an approach to third-country branch authorisation that centres on proportionality and recognises the UK's compliance with Solvency II (Recommendation 3). Again, this should be helpful for UK insurers setting up branches on the continent;
- Call on national EU regulators to facilitate Part VII portfolio transfers that have started but not been completed before Brexit (Recommendation 5). This will likely result in the recognition by EU regulators of the transitional provision (now available in the draft Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019) which allows up to two years from Exit day for parties who have initiated a Part VII transfer before 29 March 2019 (though EIOPA's definition of what "initiated" means may differ from the PRA's approach) to obtain a court order sanctioning the transfer between UK and EEA entities; and
- Advise that in the event of a change in the habitual residence or establishment of the policyholder (for example, a UK policyholder changes their habitual residence of place of establishment to a EU27 Member State) (Recommendation 6), the NCAs should recognise that the insurance contract concluded in the UK and the UK insurer did not provide cross-border services into the EU27 in respect of such contract. This therefore assists in contract continuity after Exit date.

BACKGROUND

The Recommendations follow an [EIOPA Opinion published on 21 December 2018](#) which called on the NCAs to ensure that insurance undertakings with affected cross-border business develop realistic contingency plans setting out measures to prevent insurance activity without authorisation and ensuring service continuity after the UK's withdrawal and the implementation of those measures.

As the Recommendations note, many UK insurers with large cross-border business in the EU27 have already implemented contingency measures. However, EIOPA notes that there is a residual amount of insurance business in the EU27 (quoted as 0.16% of the total insurance business in the EU27 as of November 2018) where UK insurers have not taken appropriate measures. This is consistent with what we have seen in the market, with a succession of insurers completing Part VII Schemes transferring policies of EU based customers to new hubs in the bloc, although some (for example, Lloyd's of London) will finalise their transfers after Exit day whilst others have adopted a

'wait and see' approach. The latter will be given comfort by the Recommendations.

INTERMEDIARIES/DISTRIBUTION

Guidance on the application of the legal framework for insurance distribution after the Exit Date is also part of the Recommendations (see Recommendation 9).

NCA's are encouraged to ensure that UK intermediaries and entities which intend to continue or commence distribution activities to EU27 policyholders and for EU27 risks after the UK's withdrawal are established and registered in the EU27 in line with the relevant provisions of the Insurance Distribution Directive (IDD).

Recommendation 9 appears to adopt an approach to Article 16 of the IDD which will require EU insurers and intermediaries only to use the distribution services of registered entities in relation to EU policyholders with EU based risks, regardless of whether intermediation/distribution activity takes place within the EU or not.

It should be noted, though, that the Recommendations requires NCA's to ensure that all intermediaries carrying out distribution activities which 'target' EU27 policyholders and EU27 risks fall under the scope of the IDD.

The word "targeting" implies that non-solicit exemptions in national legislation can remain available. One question will be whether UK wholesale brokers who place EU risks into Lloyd's Brussels but who are based in London can be considered not to be "targeting" EU risks.

It may now be difficult for an intermediary to continue placing EU risk without setting up an EU subsidiary. The Recommendation also makes clear that to be certain of continued market access, intermediaries will have to obtain EU authorisation of entities with an appropriate level of substance and which will not operate as "empty shells". This could be problematic for smaller businesses which could struggle with the increased costs of establishing an EU base.

As the IDD does not include a concept of regulatory equivalence, Recommendation 9 respects the right of Member States to introduce special provisions in their national law for third country intermediaries, provided that equal treatment of intermediaries across the relevant market is guaranteed. Again, this will be viewed positively by the intermediaries' sector but may result in UK intermediaries' ability to operate in a given EU market being subject to specific national requirements, an unharmonised approach, which will undoubtedly require careful navigation.

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