Brexit : Where does the journey go? - (2/3)

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After exploring the different possible options in the first part, let's see what happens when carrying business under the Freedom to Provide Services.

UK business to be carried out by way of Freedom to Provide Services ("FPS")

Along the options as mentioned in part 1 of this series, an EEA insurer may not be carrying out regulated activity in the UK without being in breach of the general prohibition under UK law, which applies to carrying out regulated activities in the UK unless either authorised by UK regulators to carry out relevant regulated activities, or exempt from the requirement to be authorised.

UK regulation in as far as it is relevant to EEA insurers applies to the "insurance" activities of effecting, and carrying out, contracts of insurance as principal, and to certain insurance intermediary activities – broadly the distribution activities which are set out in the Insurance Distribution Directive.

If these activities are carried out in the UK by an EEA insurer without being physically present in the UK, or by anyone acting on its behalf as agent, it is likely to be in breach of UK regulation.

The UK Financial Promotions Regime

UK regulation imposes restrictions on financial promotions communicated in (or capable of having an effect in) the UK.

A financial promotion is an invitation or inducement to engage in investment activity (for example in connection with a life policy).

Financial promotions can take many forms – including spoken communication as well as brochures, web pages and the like. It is likely that specific promotional and marketing material referring to insurers' products would be considered a financial promotion, as could oral and written communications by IFAs and banks.

Generally, such financial promotion must either have been communicated, or approved by, a firm which is authorised in the UK. Where the financial promotion relates to a life policy, it may only be communicated or approved if the person with whom the policy will be entered into (i.e. the insurer) is either authorised in the UK, exempt in relation to effecting or carrying out contracts of insurance of the class to which the promotion relates, or within the definition of an "overseas long-term insurer".

That definition initially included an insurer which is not authorised in the UK and which "has its head office in an EEA State other than the United Kingdom, and is entitled to carry on long-term insurance business in that EEA State". It would therefore have been possible for a financial promotion to be made or approved by a UK authorised firm on behalf of an EEA life insurer which is not authorised in the UK. If relevant EEA insurer was not currently passporting into the UK under Solvency II (and therefore deemed an authorised firm in the UK), it would still be possible for financial promotions to be made in respect of its policies on the basis that it would qualify as an overseas long-term insurer.

However, with effect from the end of Transition, the relevant legislation – Article 10 of the Financial Services and Markets Act 2000 Financial Promotions Order ("FPO") – has been amended so that the definition of overseas long-term insurer no longer includes a life insurer with its head office in an EEA State.

Even upon its temporary transitional power ("TTP"), under which, until 31st March 2022, a standstill applies to certain changes to legislation that would otherwise apply from the end of Transition, no transitional relief under the TTP will apply in respect of the change in definition of overseas long-term insurer.

The TTP was originally intended to provide transitional relief for a no deal exit. However, at the end of March 2020 year HM Treasury outlined their intention to retain the TTP, and shift its application so that it is available for use by the UK's financial services regulators in order to grant transitional relief for a period of up to two years from the end of the transition period. Subsequently, FCA has updated its approach to the TTP and provided further guidance on its website on 1st October 2020.

The Statement clarifies that FCA intends to apply the TTP on a broad basis from the end of the transition period until 31st March 2022 but does not intend to use the TTP to change what already falls within the FCA's regulatory perimeter – in particular, FCA is not applying the TTP to the FPO.

Therefore, the TTP standstill direction does not apply to (amended) Article 10 of FPO.

That means that, for the duration of the standstill provided for under the TTP, only an authorised person could continue to communicate or approve financial promotions relating to the life policies of EEA insurers in the same way that it does today (with approvals being for the purposes of section 21 of the Financial Services and Markets Act 2000).

An authorised person would include an EEA insurer with temporary permission (through the TPR) in this instance, whereas EEA insurers without temporary permission would not be authorised persons who may communicate financial promotions relating to their offshore bonds (unless the financial promotion is approved by an authorised person).

For these purposes, it is important to remember that 'communicating' includes "causing a communication to be made." Only an authorised person will be able to communicate financial promotions relating to the offshore bonds of an EEA insurer without temporary permission, or otherwise approve financial promotions to be communicated by that EEA insurer for the duration of the standstill.

As a result, EEA insurers may, with effect from 1st January 2021, solely be able to provide insurance to policyholders in the UK by way of so called passive FPS, whereby they are required to avoid carrying out any activities in the UK (either itself or through agents), which are regulated activities in the UK.

The last article of the series will explain how to continue performing obligations for existing policies.

Acronyms lexicon:

APR: Approved Persons Regime

CRO: The contractual Run-Off

EEA: European Economic Area

FCA: Financial Conduct Authority

FPO: Financial Promotions Order

FSCR: Financial Services Contracts Regime

FSCS: Financial Services Compensation Scheme

SFGB: Single Financial Guidance Body and Devolved Authorities

SMCR: Senior Manager and Certifications Regime

SRO: supervised run-off

TPR : Temporary Permissions Regime

TPP: Temporary Transitional Power

PRA: Prudential Regulation Authority

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