

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

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This last article of the series explores how to continue performing obligations for existing policies.



Continuation to perform obligations under existing policies post-brexit

As considered in the second article of the series, it may be possible for an EEA insurer to operate without carrying out regulated activity in the UK at all. To the extent it needs to carry out regulated activity in the UK (and if it is not entering the TPR) the EEA insurer will have the benefit of the FSCR, which will allow it to run off its UK business over a period of fifteen years.

Any such EEA insurer that has passported into the UK under Solvency II on a services basis, and on the assumption it has not qualified for the TPR (by having made a TPR notification in time, or making an application for authorisation in the UK), has automatically entered the UK's run-off regime for passporting EEA insurers, FSCR, at the end of Transition.

As a services passporting insurer it enters Contractual Run Off ("CRO") and will benefit from an exemption from the requirement to be authorised to carry out regulated activities in the UK, as set out in the legislation implementing the FSCR, the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (the "Exit Regulations").

As an insurance firm in CRO, an EEA insurer is required to contribute to UK Financial Services Compensation Scheme (FSCS) and its policies entered into before the end of Transition will continue to qualify for FSCS protection. However, it will otherwise be subject to be very limited supervision by UK regulators, who will rely on it continuing to be authorised and regulated in its home state.

The exemption provided for under the Exit Regulations will last for a period of fifteen years from when the EEA insurer enters FSCR – at the end of Transition – provided it continues to be authorised to carry on regulated activity by its home state regulator, and the UK regulators do not take steps to move it to another regime.

a. Regulation 52 of exit regulations

The exemption for a firm in CRO under the FSCR only has effect for a regulated activity in circumstances set out in regulation 52 of the Exit Regulations:

- (a) which is necessary for the performance of a pre-existing contract,
- (b) which is carried on for the purposes of performing such a contract,
- (c) which is not a regulated activity [which the person is authorised in the UK to carry on],
- (d) which is an activity which, if carried on in the person's home state – (i) would need authorisation by the person's home state regulator, and (ii) is authorised by the person's home state regulator,

[and] which the person is, immediately before [the end of Transition], authorised to carry on in the United Kingdom by virtue of [exercising EEA passport rights].

Regulation 52 provides that (for the purposes of (a) above, the performance of a pre-existing contract includes the performance of an obligation under the contract which is contingent or conditional, and that the exemption also applies in respect of a regulated activity which is necessary:

- for the purposes of reducing the financial risk of (i) a party to a pre-existing contract, or (ii) a third-party affected by the performance of a pre-existing contract;
- in order to transfer the property, rights or liabilities under a pre-existing contract to a person authorised [in the UK] to carry on a regulated activity;
- in order to comply with a statutory requirement.

Life policies entered into before the end of Transition will be pre-existing contracts for the purposes of regulation 52. If EEA life insurer enters CRO under the FSCR it will

therefore, while it remains in FSCR, be able to carry out regulated insurance activity within regulation 52 if that activity is necessary for the contracts' performance and is carried out for the purposes of performing the contract. This includes (to the extent this arises) regulated activity carried out by its agent in the UK, which would be attributed to it, and for which it would otherwise need to be authorised in the UK (and for which depending on the circumstances the agent may also need to be UK authorised).

Any regulated activity in the UK required to pay benefits under pre-existing policies will therefore be covered by the exemption. If the EEA life insurer in the UK (or an agent on its behalf in the UK) needs to carry out regulated activity to effect top up under an existing policy (and the client concerned has a contractual right to have the top up put in place), that would also be exempt. As an insurer in CRO under the FSCR the EEA life insurer can expect to be able to carry out any regulated activity it needs to perform to carry out to meet its contractual obligations in respect of policies written for UK policyholders before the end of Transition.

b. FORECAST

As noted above, the exemption lasts for only fifteen years, which may not be sufficient for all obligations under EEA insurer's existing policies to be run off. The Exit Regulations include provisions for HM treasury, on the recommendation of UK regulators to extend that period. At this stage it is impossible to say whether and on what terms that fifteen year period might be extended. If all UK policies have not been run off at that point and there is no general extension, it may be possible to agree with the UK regulators a basis on which a concerned EEA insurer would be permitted to continue to run off its UK book. That is more likely if in fact it is possible for the run off to continue with no or very little regulated activity taking place in the UK.

Financial promotions in respect of life insurance communicated in, or capable of having an effect in, the UK are only lawful if the insurer is authorised or exempt under UK law, or is within the definition of "overseas long-term insurer", which however no longer includes EEA life insurers after the end of the Brexit Transition period (i.e. from 1st January 2021).

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As a result, it means that any financial promotion relating to EEA insurers' products could basically not continue to be communicated in (or capable of having effect in) the UK up to 31st March 2022.

Given that, an EEA insurer may now only be able to provide insurance to policyholders in the UK if it can avoid carrying out any activities in the UK (either itself or through agents) which are qualified as financial promotions and therefore regulated activities in the UK:

If a UK customer already knew of it, either he himself (or his intermediary on his behalf) approached the EEA insurer and subsequently travelled to its country of residence in order to arrange the policy (→ Passive Freedom of Services), that would be unlikely to breach UK regulation. However, if there was any contact with the customer while he or she was in the UK, care would have to be taken to avoid any communication that breached UK financial promotions regulation.

Nevertheless, despite what has been said and because FCA's position here is still not clear, we assume that UK as well as EEA intermediaries that are FCA UK authorised firms (→ firms into TPR) may continue to issue financial promotions re. its products until 31st March 2022.

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