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QUESTIONS STILL REMAIN FOR UK INSURANCE UNDERTAKINGS IN BULGARIA POST-BREXIT

CEE ARRANGEMENTS FOR UK-BASED INSURERS IN THE (INCREASINGLY LIKELY) EVENT OF A HARD BREXIT

The UK faces a looming deadline on 30 June 2020 to ask for an extension to the transition period. However, the conclusion of the final Brexit negotiations on 5 June 2020 did little to assuage the concerns of the UK and European insurance industries. The negotiating parties continue to struggle to reach a consensus, with Michel Barnier, the EU's negotiator, accusing the UK of "backtracking on commitments" after the talks ended on 05 June.

According to the Withdrawal Agreement concluded between the EU and the UK, which entered into force on 1 February 2020, UK-authorized insurers, reinsurers and intermediaries are allowed to continue to access the EU Single Market until the end of the transition period on 31 December 2020 (**Termination date**). Following the Termination date, in the event of a no-deal Brexit, UK insurance undertakings will lose their authorization to access the EU through the current passporting regime.

With respect to the post-transition period, several options are anticipated as possible workarounds to address the expected no-deal Brexit's negative impact on the economies of both sides: (i) the establishment of a bilateral treaty regime creating a legal framework between the EU and the UK, such as the one in place between the EU and Switzerland; (ii) the UK could join the European Economic Area (**EEA**), or (iii) other forms of association between the EU and the UK that would grant mutual recognition of the existing regimes. None of these possibilities, however, provides for a satisfactory response to the issues expected to occur as a result of a possible no-deal Brexit.

PREPARATION FOR A HARD BREXIT

The bespoke product range and market know-how of insurance undertakings based in the United Kingdom (**UK**) form a central reason for their success across markets in Europe. The UK insurance industry is the largest in Europe and the fourth largest in the world. The UK's withdrawal from the European Union (**EU**) will terminate UK companies' access to the EU Single Market and will have a very large impact on EU-UK trade and services.

It is therefore not a surprise that a recent survey by EY - Financial Services Brexit Tracker revealed that 41% of UK financial firms (incl. insurers and insurance brokers) are considering moving or have confirmed that they will be moving operations or staff to Continental Europe. This relocation process gives rise to numerous legal issues which need to be carefully considered by UK companies.

EQUIVALENCY CONSIDERATIONS

The European insurance industry is subject to a wide range of international and national laws and regulations. These include the Solvency II Directive, the Insurance Distribution Directive (**IDD**), MiFID and rules on consumer rights, distance selling and GDPR - all of which apply directly or have been implemented within the Bulgarian legislative framework.

Amongst the abovementioned laws and regulations, for the purposes of this article, it is the equivalence regime under the Solvency II Directive which is of main interest for the insurance industry, as it is regarded as one of the possible options for settling EU-UK relations in this area. Equivalency's main features could be summarized as follows:

- Equivalence under art. 172 (relevant for reinsurers from third countries): setting out that if a third country's prudential supervision regime is deemed equivalent, reinsurers from such country have to be treated by EEA supervisory authorities in the same way as they treat EEA reinsurers;
- Equivalence under art. 227 (relevant for EEA insurers operating in a third country): equivalence of the third country's prudential supervision framework will allow EEA insurance groups to use the local rules relating to capital (own funds) and capital requirements rather than the Solvency II Directive rules;
- Equivalence under art. 260 (relevant for insurers from third countries with activities in the EEA): if the third country's rules are deemed equivalent in this area, EEA supervisors will under certain conditions rely on the group supervision exercised by a third country.

However, the equivalence regime has been criticized for and open questions remain with respect to what extent it could effectively respond to the gaps left by a no-deal Brexit. The decision-making process under the Solvency II Directive is fairly one-sided, given that the European Commission has full discretion to determine whether the requesting party covers the required supervisory mechanisms. Third countries may request assessment, but they cannot force the European Commission to make an equivalence decision even if they materially comply with all requirements. Furthermore, equivalency's principal weakness is that it may be altered or withdrawn at short notice and at any time, meaning that it does not provide a secure basis for conducting business.

COMPETENT REGULATORS' POSITION

With this in mind and amid the lack of any clear position of the political actors determining the future relations between the two sides, it is also important to see how the competent EU and national regulators are responding to the emerging challenges.

The UK's competent regulator – the Financial Conduct Authority (**FCA**) also introduced measures by granting EEA insurance undertakings (which explicitly applied) with a temporary permissions regime (**TPR**). It sets out that these companies can continue to exercise their passporting rights up until the Termination date. It is expected that the TPR will give some advantage to those who have applied to it and that it could be used as a basis to provide a "fast-track authorization" of their activities by the FCA at a later stage. To date, there has been no reciprocity measures introduced on the EU level, and, as stated above, following the Termination date in the event of a no-deal Brexit, UK insurance undertakings will no longer have access to the EU Single Market through the passporting rules.

On 19 February 2019, EIOPA issued updated recommendations for the insurance sector in response to the UK's withdraw from the EU. The nine (9) recommendations include topics such as the orderly run-off of business which became unauthorized, the authorization of third-country branches, the lapse of authorization, portfolio transfers, cooperation between the competent national authorities, etc. The EIOPA's recommendations can be considered a guideline for national competent regulators in this respect. The EU/EEA countries to which the recommendations were addressed reported that they either comply with the nine recommendations already or intend to do so. This can be regarded as a sign of the direction in which the EU/EEA members will move with respect to their future relations with the UK insurance sector in particular.

LOOKING AT A CEE EXAMPLE (BULGARIA)

Following the EIOPA's guidance, on 15 October 2019 the Bulgarian Financial Supervision Commission (**FSC**) issued directions for the interpretation and application of the Bulgarian Code of Insurance (**BIC**) in the event of a no-deal Brexit (**Directions**). According to the Directions, following the Termination date:

- UK-established insurers and insurance intermediaries will be treated as undertakings established in a third country and shall be subject to the regulation and supervision provisions of the BIC applicable for third country undertakings;
- Respectively, such insurers will need to apply for a license and establish a branch in Bulgaria while conforming with all the requirements for third country insurers under the BIC;
- Such UK insurers will be considered insurers with revoked licenses and the writing of new insurance business (including offering new terms under existing contracts or changing the terms, including the period, insurance amount and coverage) shall be prohibited;
- UK insurance undertakings shall not be released from their obligations under insurance policies already concluded. Insurance agreements will remain in force until they are terminated according to their terms or on any of the grounds provided for by the applicable law;
- The sanctioning provisions of the BIC shall apply in case of the performance of insurance activities (other than claims settlement) without a license by UK insurers or by insurance intermediaries acting on behalf of such insurers;

- With respect to the insurance intermediaries, FSC outlined that the Bulgarian legislation does not provide for explicit provisions regarding insurance intermediaries established in third countries. Pursuant to the BIC, the registration of an insurance intermediary in Bulgaria is permitted only for persons with registered office or permanent residence in the country. Regarding UK-established subsidiaries registered in Bulgaria, the requirements for registration pursuant to the IDD shall apply in the same way, as these requirements are applicable to subsidiaries of undertakings from other third countries.

CONCLUSION

The questions over the no-deal Brexit loom large. Apart from the regulatory treatment aspects outlined in brief above, a no-deal Brexit raises many other legal questions such as the application of choice of law and jurisdiction rules, data migration & protection rules, competition rules and other legal issues which are of importance to the insurance industry as well.

It should not be a surprise that the current stance of the local regulators across the EU, including in Bulgaria, is that the UK insurance undertakings shall be treated as third country undertakings with all of the regulatory and administrative complexities resulting from such treatment. It remains to be seen if these measures will be relaxed and what other options the EU and the UK are willing to use in order to settle their future economic and legal relations.

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