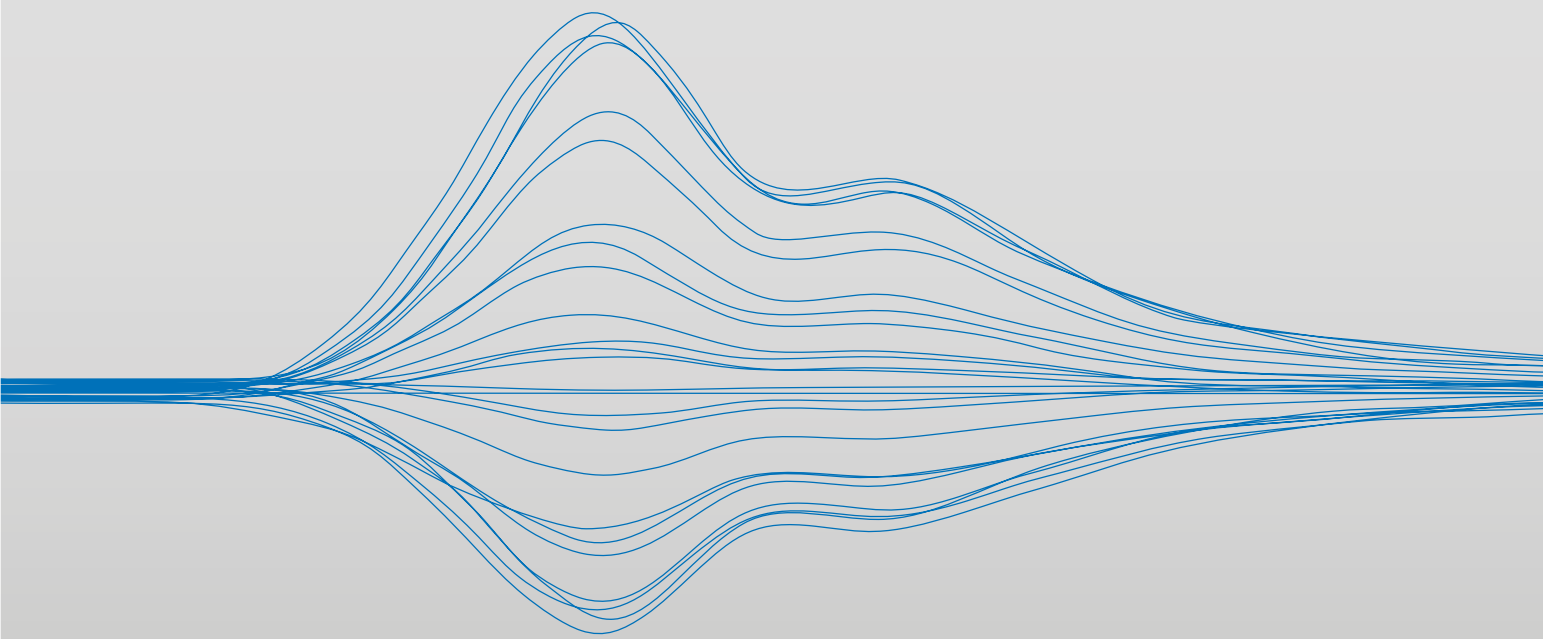


# Brexit for the insurance sector

RUN OFF AND TEMPORARY PERMISSION REGIMES  
FOR CROSS BORDER BUSINESS

A DLA PIPER REPORT

MARCH 2021



# Brexit for the insurance sector – Cross border business between the EU and the UK

This report has been prepared by DLA Piper's insurance regulatory team to provide a high level overview of communications from insurance supervisory authorities following the end of the Brexit transition period, and of regimes that have been put in place to cover cross-border insurance activity between the European Union ("EU") and the United-Kingdom ("UK"). It is intended to help insurers and intermediaries with compliance issues that might arise.

In particular, it considers regimes that may allow UK firms to run off risks underwritten before the UK left the EU single market, and regimes the UK has implemented that allow EU insurers and intermediaries to either run off their existing business in the UK, or continue to write new business with a temporary permission, while they prepare for full UK authorisation.

DLA Piper's insurance team advises insurance sector clients on all aspects of Brexit and its implications, and can provide further information or tailored advice on any of the issues covered in this guide.

## Post-Brexit authorisation issues – Brexit reorganisations and restructurings

The UK left the EU on 31 January 2020, entering into a transition period during which it remained subject to EU laws. Following the end of that period on 31 December 2020, the UK exited the EU single market, including for insurance and insurance distribution, and has become a third country as far as the EU is concerned. UK (re)insurers and intermediaries can no longer passport their UK authorisations across Europe, and European (re)insurers and intermediaries can no longer passport into the UK. Although the UK and EU have concluded a trade agreement, it contains very little on provision of financial services.

In anticipation of this position, insurance and insurance intermediary groups, in particular those using UK-authorized firms to access EU markets, used the period since the UK's 2016 Brexit referendum to develop and implement contingency plans. For many, those plans have involved restructuring, so they can continue to serve markets compliantly across the UK and Europe after Brexit, with separately licensed entities in the UK and a continuing EU state. Such restructurings have involved the set-up of new authorised firms, UK branches, redomiciliations and portfolio transfers. DLA Piper's insurance team in the UK and across Europe has assisted many clients with such plans.

Other groups have decided to put their UK or EU businesses into run off, and many also had existing books of business in run off that licensed entities in the UK or EU may not be able to administer post-Brexit. Even those groups which have restructured so they can enter into new business through licensed entities after Brexit, may have "orphan" books which it has not been possible or practicable to transfer.

Following recommendations from the European Insurance and Occupational Pensions Authority ("EIOPA"), some continuing EU member states have now taken steps to introduce regimes that apply to UK insurers and intermediaries since the end of the Brexit transition period. In other EU states, there is no specific regime. The result for insurers and intermediaries from the UK is uncertainty, and a patchwork of differing provisions applying to the run off of their EU books.

At the same time, the UK has introduced regimes that allow European firms to run off their existing business in the UK, and to continue to enter into new business if their intention is to establish separately authorised UK branches.

Licensing of cross border business between member states of the EU and the UK is likely to remain a complex area with many compliance issues to be taken into consideration.

### The future

The UK and the EU have issued a joint declaration indicating that they will, by March 2021, agree a Memorandum of Understanding (“**MoU**”) on a framework for cooperation between financial regulators. It is intended that the MoU will enable discussions on how to move forward with equivalence determinations.

The UK has already granted the EU full equivalence under Solvency II (and in other areas). The EU has said it will consider equivalence decisions when they are in the EU’s interest, and that it needs to better understand how the UK intends to amend or alter rules going forwards. If the EU insists the UK must agree not to diverge from EU regulations as a requirement for equivalence, such decisions seem unlikely to happen soon.



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# Austria



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- From 1 January 2021 UK firms will be treated as firms from third countries.
- No temporary permission regime has been put in place for UK insurance companies to provide cross-border services – it is unclear whether claims on policies underwritten by UK companies before the end of the transition period can be paid.

The Austrian legislator has provided that insurance companies established in the UK must ensure that policyholders are informed of the effects of the withdrawal of the UK from the EU before the conclusion of any contract and during the term of the insurance contract, and that this information is updated without delay if necessary.

However, neither the Austrian Financial Markets Authority (“**FMA**”) nor the Austrian Government has provided specific information on how UK insurers who previously passported into Austria can continue to pay claims and service policies after the end of the Brexit transition period.

There is no Austrian legislation in this regard, and the EU-UK Trade and Cooperation Agreement does not deal with this topic either. Unlike some other EU member states, Austria has not adopted a national temporary permissions regime that would enable UK insurance companies to provide cross-border services after 31 December 2020 to run off their policies. Consequently, as of 1 January 2021, UK firms will be treated as firms from third countries. In the relevant national legislation, regulations and EU legislation, unless otherwise specified, references to third countries shall be read as including the United Kingdom.

Even though it is widely accepted that the contracts remained valid by civil law, the question of whether the claims from these contracts could be fulfilled at all has caused great difficulties.

To mitigate the risk of not being able to fulfil their obligations, many UK insurance undertakings have decided to transfer insurance contracts held by Austrian customers to an insurance undertaking in a continuing EEA state. The FMA has provided information on the process for portfolio transfers involving Austrian policies and has emphasized that every affected insurance policyholder must be informed about the transfer, and that generally a termination right for the policy holder exists at the end of the current insurance period.

However, where such measures have not been taken, fulfilment of UK insurers’ insurance contracts may not, in principle, be possible.

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- A temporary permissions regime will allow UK insurers, under certain conditions, to continue their existing insurance contracts concluded prior to the end of the Brexit transition period.
- UK intermediaries can continue distribution activities in relation to existing insurance contracts for 18 months if they notify the FSMA no later than two months after the withdrawal of the UK from the EU (i.e. by the end of February 2021).

To address issues that needed urgent attention in a no-deal Brexit scenario, the Belgian legislator enacted the Brexit Act of 3 April 2019 ("**Belgian Brexit Act**").

In the area of financial services, the Belgian Brexit Act is mainly a delegation of power to the Belgian government and the Belgian Financial Services and Markets Authority ("**FSMA**").

The Belgian Brexit Act allows the establishment of a temporary permissions regime for credit institutions, investment firms, insurance or reinsurance undertakings, payment institutions, e-money institutions, a range of funds, and insurers who are operating from or otherwise domiciled in the UK, by facilitating exercise of powers by the Belgian government to secure contractual continuity and continued service by UK financial services providers that are active in the financial sector in Belgium and lost their authorisation as a result of Brexit.

Following the Belgian Brexit Act, the government issued a Royal Decree with regard to insurance undertakings and intermediaries. In order to handle the existing policies in an

orderly manner and to safeguard the rights of policyholders and beneficiaries, the Royal Decree of 22 December 2020 allows insurance undertakings, who were required to stop their activities in Belgium and cease to conclude new insurance contracts as from 1 January 2021, to continue their existing insurance contracts concluded prior to the end of the Brexit transition period, under the following conditions:

- the undertaking confirms to the National Bank of Belgium ("**NBB**") that it intends to make use of this option;
- the undertaking may not conclude any new insurance agreements from the date on which the UK has withdrawn from the EU (i.e. 1 January 2021) (new insurance agreements also includes explicit or tacit renewal of existing insurance agreements);
- the undertaking provides evidence that it is authorised in the UK or Gibraltar to carry on insurance activities with regard to Belgian insurance agreements;
- the undertaking provides evidence (i) that it complies with the legal and regulatory requirements applicable in its country of establishment, (ii) that it is not subject to a recovery plan or a short-term finance scheme and (iii) that it has not been subject to a reorganisation measure in the UK or Gibraltar;
- the undertaking provides the NBB with a plan indicating how it will unwind its obligations;
- the undertaking will support the Belgian activities operationally and financially;
- the NBB may request any information it deems necessary for the supervision of the activities; and
- the undertaking appoints a representative in Belgium.

The Royal Decree of 22 December 2020, also provides for a temporary scheme which allows insurance, reinsurance and ancillary insurance intermediaries, established in the UK or Gibraltar and authorised prior to the date of the UK's withdrawal from the single market, to continue to operate in Belgium on a temporary basis in relation to the contracts concluded prior to that date, without having to be registered with the FSMA.

They will be able to continue the activity of insurance or reinsurance distribution in Belgium, in relation to existing insurance contracts for a maximum period of 18 months, under similar conditions as insurance undertakings. They have to inform the FSMA no later than two months after the withdrawal of the UK from the EU of such intention.

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- The French insurance supervisory authority, the ACPR, has confirmed that policies of UK and Gibraltar insurers, who are not licensed to write new business in France after Brexit, remain valid and must be executed in good faith.
- Those UK and Gibraltar insurers, who still have live policies with French policyholders, will need to write to those policyholders.

The Brexit plans of UK insurers have often involved putting their European business into run off before the UK left the EU single market at the end of the Brexit transition period on 31 December 2020. Many of those insurers have included all their EU policies in portfolio transfers to insurers with continuing EU licenses. Others have decided to rely on run off regimes that may be available in EU states for unexpired policies, and outstanding claims, or may not have been able to include all relevant policies in their portfolio transfers.

On 4 January 2021, the ACPR issued a press release advising that UK and Gibraltar insurers must personally inform their customers in France of the terms and conditions under which their insurance services will continue or cease to be provided.

On the same day, the ACPR also published a list of UK and Gibraltar insurance companies who it considered to be affected.

The ACPR imposes two obligations on UK insurers:

- to set out on their websites the basis on which services to French customers will continue or cease to be provided; and
- if the insurer ceases to provide services in France, to inform customers individually of their rights.

Importantly, the ACPR has confirmed that policies concluded with British insurers, who have now lost their European passport, remain valid and must be executed in good faith. British insurers must comply with their commitments until the end of the insurance contracts.

The ACPR's press release reflects an Order made on 22 December 2020, which obliged UK and Gibraltar insurers, that no longer hold the European passport in France, to provide, within 15 days (i.e. by 15 January) by registered letter or electronic registered letter, to their French policyholders with (i) policies in force, (ii) prescribed information including when policies will expire, and (iii) the means by which policyholders can assert their rights.

In addition, the ACPR expects those UK and Gibraltar insurers to make a second communication, by registered letter or electronic registered letter, two months before the end of the coverage period, recommending that the insured seek new cover from an insurer authorised to practice insurance operations in France.

The ACPR has said it will check compliance with these communication requirements.

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- Unless they have commenced a portfolio transfer before the end of the transition period, UK insurance companies are required to terminate insurance contracts underwritten using EU passporting rights before the end of the transition period, as soon as is legally permissible.
- If it is not permitted to terminate those policies, a UK insurer can run them off in accordance with their contractual terms.
- If they commenced a portfolio transfer before the end of the transition period, UK insurers can continue to service their policies until the transfer takes effect.
- UK insurers who no longer have passporting rights in Germany must provide certain information to BaFin by 27 February 2021.

On 31 December 2020 (the last day before the end of the Brexit transition period) the Federal Financial Supervisory Authority (“**BaFin**”) published a general ruling on conducting and settling cross-border business of UK insurance companies and pensions providers post-Brexit (“**General Ruling**”).

In essence, BaFin is of the opinion that, on the withdrawal of the UK from the EU and the end of the Brexit transition period, UK insurers shall lose their passporting rights, which were previously granted by Article 15(1) of the Solvency II Directive as implemented, which previously allowed them to conduct insurance business in other EU/EEA states. Therefore, in principle, UK insurance companies have to be considered as third-country insurance companies, subject to the supervisory regime under German insurance supervisory law (Sections 67 to 73 German Insurance Supervision Act, (“**VAG**”).

## Details of BaFin’s General Ruling

However, BaFin ordered, in its General Ruling, that UK insurance companies that have underwritten insurance policies in Germany using their passporting rights before 31 December 2020:

- are allowed (without being required to obtain a further license from BaFin in accordance with Sect. 67 (1) VAG) to run off the underwritten policies in accordance with the applicable contractual provisions, but have to:
  - terminate these policies if possible and as soon as legally permissible;
  - completely settle the insurance contracts and terminated insurance contracts on the basis of the terms of the contracts; and
  - fully settle insurance contracts already terminated prior to 31 December 2020 on the basis of the contractual terms.

(Therefore, it is only permissible to fully run-off existing business, if, and for the period that, the termination of the primary insurance contracts is not permitted under civil law.)

- are allowed, even if termination of the relevant contracts is permitted under applicable law, to continue to run off a portfolio of risks pending a transfer of the insurance portfolio to an EU/EEA licensed insurance undertaking or to a third country branch licensed in the EU/EEA, if the portfolio transfer was initiated before 31 December 2020 and could be considered as a “realistic option that is likely to be approved”;
- must submit the following documents and information for the entire duration of the execution or settlement of insurance contracts:
  - a) a specific indication and updates of their contingency plan (e.g. portfolio transfer, pure run-off, other);
  - b) the name and contact information of the person within the insurance company that is responsible for handling complaints related to the affected insurance contracts;
  - c) the expected period of time until the final completion of the settlement of all insurance contracts;
  - d) the number of insurance contracts still to be settled;
  - e) the number of affected policyholders, whose insurance contracts still have to be settled;
  - f) the amount of gross technical provisions for insurance contracts still to be settled;
  - g) the amount of gross premium income as of the last balance sheet as well as the (estimated) gross premium income still to be expected with regard to the insurance contracts to be settled; and
  - h) the number of claims that are still open.



The information/updates under a) and b) must be submitted for the first time by no later than 27 February 2021 and on an ongoing basis as changes are made to the contingency plan.

The information/documents under c) – h) must be submitted once a year, within three months of the end of the fiscal year.

BaFin expressly reserves the right to separately order submission of further information or documents during the year deviating from the rule above.

Insurance companies must also submit this information and documentation separately for each line of business.

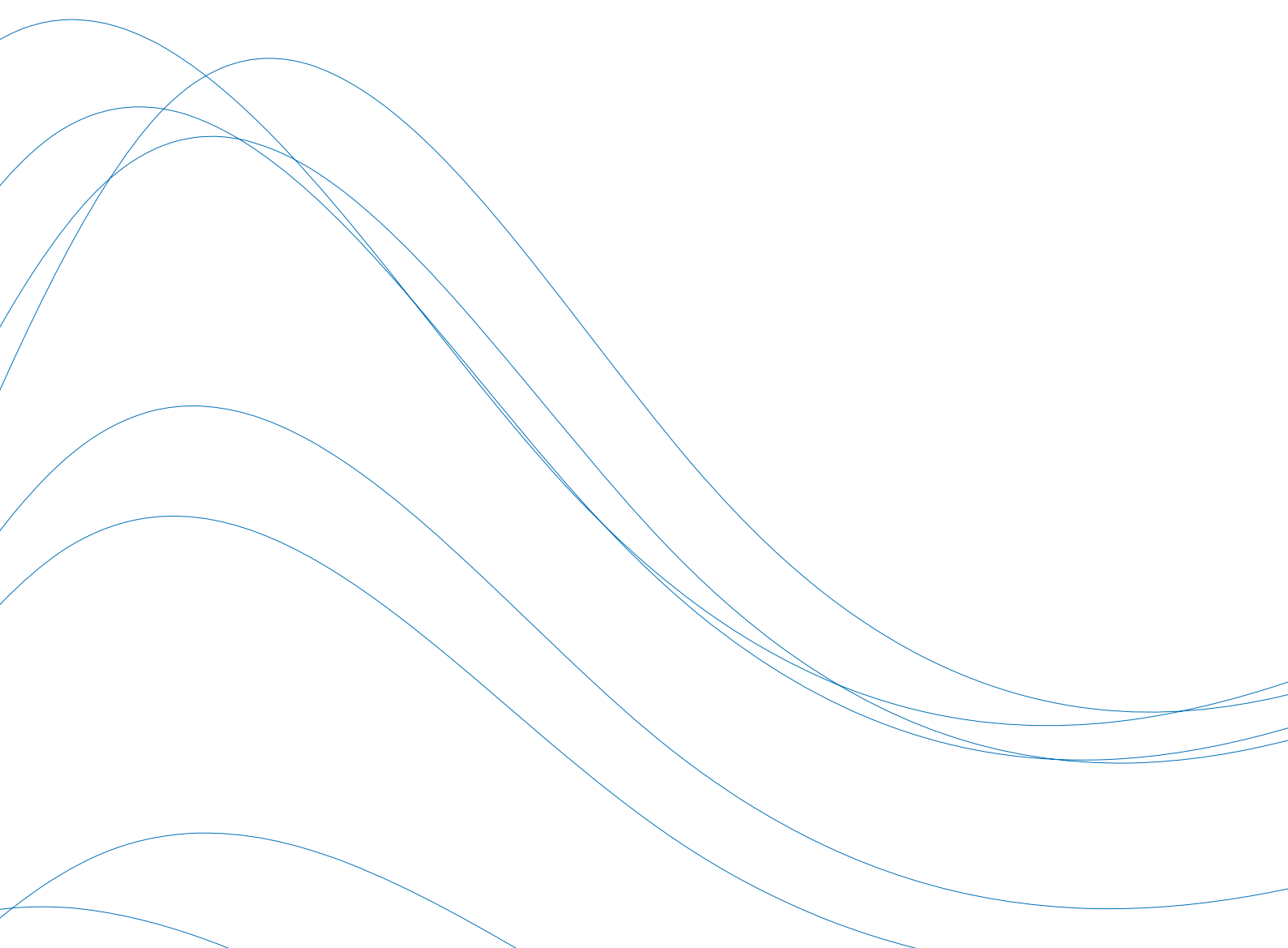
The General Ruling took effect on 1 January 2021. It applies to affected insurance companies until complete termination of the contracts.

The General Ruling can be revoked in respect of all UK insurers or for individual insurers.

## Consequences of the General Ruling

The intention of these regulations is that an orderly run off of the insurance portfolios of British insurers can take place if there is no possibility of termination. However, BaFin attaches great importance to the fact that in cases where termination right exists vis-à-vis the policyholders, this option has to be used by the insurers. It should be stressed that BaFin considers transparency for policyholders to be very important.

As this General Ruling applies to UK insurance companies only, there is a risk that UK insurance intermediaries will not be allowed to carry out insurance distribution activities (even in relation to the run-off of insurance policies underwritten by UK insurers, where this is permitted based on BaFin's General Ruling as considered above) if these activities are licensable distribution activities under the Insurance Distribution Directive ("**IDD**"). Currently, there is no explicit relief for UK intermediaries in relation to their German passported business and operations. Therefore, the exemptions from the licensing requirements provided for under the IDD will gain even more practical importance.



# Italy

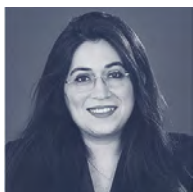


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- UK insurers who passported into Italy before the end of the transition period can continue to manage existing contracts, but are not allowed to enter into new contracts, or renew existing ones.
- UK insurers were expected to provide information to policyholders, insureds and beneficiaries by 15 January 2021 and must provide a run off plan to IVASS (the Italian supervisor) by 31 March 2021.
- Policyholders have the right to withdraw from policies with UK insurers without being charged, and tacit renewal clauses will not be enforceable.

On 31 December 2020, the Italian Government issued the Law Decree No. 183 (the so-called *Milleproroghe for 2021*). The Law Decree entered into force on the same date and contains provisions on various matters, including Brexit.

In particular, paragraphs 6-9 of Article 22, examined below, regulate the activity in Italy under the passporting regime of insurance undertakings with registered offices in the UK after the expiry of the Brexit transition period on 31 December 2020. These paragraphs largely take up provisions previously set out in Article 9 of Law Decree No. 22/2019, as converted and amended by Law No. 41 of 20 May 2019.

## **What happens to UK undertakings previously authorised to carry on insurance business in Italy under the passporting regime? [Article 22(6)]**

- They are removed from the Register of insurance undertakings licensed in Italy of the Institute for the Supervision of Insurance (“**IVASS**”).
- They are entitled to manage contracts in existence as of 31 December 2020.
- They are not allowed to enter into new contracts, or renew existing ones.

- IVASS shall give evidence to the public of the temporary continuation of such kind of activity.

## **What are the information duties for UK insurance carriers? [Article 22(7)]**

By 15 January 2021, UK insurance carriers must have informed policyholders, insureds, and other persons entitled to insurance benefits, of the regime applying to them in respect of the management of existing contracts and also include a communication on their website.

By 31 March 2021, UK insurance carriers must submit to IVASS a plan containing the measures enabling them to expeditiously and properly perform the insurance contracts in force as of 31 December 2020, including the payment of claims.

They must provide IVASS with an annual report on progress with implementation of the plan.

## **Which provisions are UK insurance carriers subject to during the period of temporary continuation of business? [Article 22(9)]**

- Article 193 of the Italian Insurance Code (concerning IVASS’s supervisory authority).
- Any other provision on insurance matters, including the provisions of Title XVIII of the Italian Insurance Code (concerning fines).
- Article 10(8) of the Italian Insurance Code, which states that IVASS “may exchange information with the competent authorities of States outside the European Union”.

## **What are policyholders’ rights after 31 December 2020? [Article 22(8)]**

- Policyholders under insurance contracts issued by UK undertakings with a duration exceeding one year may withdraw from them with no charge, on written notification to the insurer.
- Policyholders may rely on any other termination provisions in the relevant contract.
- Tacit renewal clauses shall no longer be enforceable.

Policyholders’ withdrawal shall take effect next date on which a policy period expires following the date on which the withdrawal is exercised.

# Ireland



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- A Temporary Run-Off Regime will allow UK and Gibraltar insurers and intermediaries to continue to administer direct life and non-life portfolios for up to fifteen years from 31 December 2020.
- Those firms must have ceased to conduct new insurance contracts and/or new insurance distribution business.
- Firms wishing to use the Temporary Run-Off Regime must notify the Central Bank of Ireland no later than three months after 31 December 2020.

The Central Bank of Ireland ("**CBI**") and the Department of Finance have worked together to establish a Temporary Run-Off Regime ("**TRR**") for UK and Gibraltar insurers and insurance intermediaries (including ancillary insurance intermediaries ("**Firms**")), in order to protect their Irish customers, by ensuring that policies written before 31 December 2020 ("**Relevant Date**") can continue to be serviced post-Brexit.

Under the TRR, Firms are permitted to continue administering their existing portfolio in Ireland, for up to a maximum period of 15 years from the Relevant Date, provided the conditions of the TRR (below) are met. This time period allows for orderly termination of activities in Ireland, while ensuring minimum disruption to Irish policyholders. The TRR applies to life and non-life contracts of insurance but does not apply to reinsurance contracts.

The following conditions must be met by a relevant Firm if they wish to avail of the TRR:

- The Firm must (i) be authorised as an insurer or registered as an insurance intermediary in the UK or Gibraltar, and (ii) have started business in Ireland either on a freedom of establishment or freedom to provide services basis before the Relevant Date;

- The Firm must have ceased to conduct new insurance contracts and/or new insurance distribution business in Ireland on or before the Relevant Date;
- The Firm must exclusively administer its existing portfolios in order to terminate activity in Ireland, after the Relevant Date; and
- The Firm must comply with the general good requirements.

Firms are required to notify the CBI that they wish to avail of the TRR no later than three months after the Relevant Date by completing a notification form. Failure to notify does not necessarily preclude a Firm from availing of the TRR. However, if the Firm fails to notify the CBI, it can exercise its supervisory powers and prevent a Firm relying on the TRR.

The required notification forms, which must be submitted by March 2021, are published on the CBI's website. Firms availing of the TRR are also subject to ongoing reporting requirements. A public register of firms availing of the TRR will be available on the CBI's Register.

The CBI may withdraw the temporary authorisation or registration if:

- the Firm does not continue to satisfy the conditions for the TRR; or
- the CBI is not satisfied with the progress made by the Firm towards terminating its business within the maximum of 15 years from the Relevant Date.

Relevant legislation is contained in Part 10 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, which amends the European Union (Insurance and Reinsurance) Regulations 2015 and the European Union (Insurance Distribution) Regulations 2018 to provide for the TRR.

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- Neither the Commissariat aux Assurances nor the Luxembourg Government has provided any information on how UK insurers, who previously passported into Luxembourg, can continue to pay claims and service policies after the end of the Brexit transition period.
- The Commissariat aux Assurances has clarified how investments and deposits in the UK should be treated by Luxembourg life and non-life insurers.

The Luxembourg Insurance Authority (**Commissariat aux Assurances**) ("**CAA**") has not released any update since April 2020.

At that time, in two information notices dated 2 April and 8 April 2020, the CAA clarified the impact of a hard Brexit and the related loss of the UK's status as a member of the EU on the application of the rules governing:

- the investment of the assets underlying unit-linked life-insurance contracts ("**Information Notice CL 15/3**"); and
- the deposit of the assets underlying the technical provisions of direct insurance undertakings ("**Information Notice CL 16/9**").

The Information Notice CL 15/3 clarifies that, as of 1 January 2021, the UK will be deemed an OECD Zone A country, and the UK's depending territories will be deemed countries outside the OECD Zone A. As a result, any investments of assets, underlying unit-linked life-insurance contracts into external funds domiciled in the UK or UK-dependent territories, or financial instruments issued by issuers based in the UK or UK-dependent territories, will be required to comply with the specific thresholds/ restrictions applicable to funds and issuers based in OECD zone A countries respectively in countries outside the OECD zone A.

Insurance undertakings are to take the new status of the UK and its dependant territories into account when defining investment policies and setting-up internal funds for their clients.

The Information Notice CL 16/9 confirms that, as of 1 January 2021, the UK and its dependent territories will be deemed third countries within the meaning of the CAA Circular Letter 16/9. As a result, any deposits of assets representing technical provisions with credit institutions established in the UK are required to comply with the rules of the CAA Circular Letter 16/9 governing deposits of assets outside the EEA.

On 15 January 2021, the CAA also published a concise consumer guide regarding what consumers should do if they have a life insurance policy or pension from the UK.

There has been no specific information about how UK insurers who previously passported into Luxembourg can continue to pay claims and service policies after the end of the Brexit transition period.

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- Formerly passporting UK Insurers are no longer authorised to provide services in the Netherlands from 1 January 2021.
- It is currently possible for UK insurers as third country insurers to provide services into the Netherlands if they make a notification to the Dutch National Bank, but the relevant legislation is expected to be amended or revoked.
- Insurers, who have notified DNB before the entry into force of the amended legislation, may be able to make use of an expected transition period of 24 months to wind-down existing cross-border business.

Insurers and Insurance distributors in the Netherlands are supervised through a twin peak model, with supervision tasks divided between the Authority for Financial Markets (“**AFM**”) (conduct supervision) and the Dutch National Bank (“**DNB**”) (prudential supervision). DNB is the relevant authority for, amongst others, market access for banks (together with the ECB), insurers and payment service providers. AFM grants licenses to intermediaries and advisors, including insurance brokers and intermediaries.

Both the AFM and DNB have published their approach to supervision with regard to UK financial institutions after Brexit.

## Authority for financial markets

The AFM has stated that it will remove UK entities that did not obtain appropriate license in the Netherlands or the EU from its registers.

It is also expected that the AFM will monitor financial institutions in accordance with its supervisory approach and enforcement policy. This means that, in its supervisory role, the AFM will prioritize addressing situations in which the customers’ interests are harmed and major implications arise.

## Dutch national bank

DNB continuously called on UK institutions to take timely preparatory measures to ensure compliance with the relevant Dutch laws and regulations after the Brexit transition period. It is expected that DNB will also monitor financial institutions in accordance with its supervisory approach and enforcement policy. In this regard, it is important to note that DNB’s focus on stability in the financial sector.

Although there is no specific temporary permissions regime for insurers and insurance distributors available in the Netherlands, there currently exists a possible route for UK/Third Country Insurers to continue their business operations in the Netherlands in the adjusted form as summarized below. Most of these options are reflected in DNB’s recently published factsheet.

Currently, the Dutch Financial Supervision Act (*Wet op het financieel toezicht*) allows for cross-border service provision in the area of life and non-life insurance by third country insurers, following a notification procedure with DNB. However, it is envisaged that this notification procedure will be amended or revoked as part of the implementation of Article 162 of the Solvency II Directive into Dutch legislation (introducing a ban on the provision of services in the EU by third country insurers) after which these cross-border services will no longer be allowed. Insurers from third countries, that have notified DNB before the entry into force of the amended legislation, can make use of an expected transition period of 24 months to wind-down existing cross-border business. As UK insurers are third country insurers from 1 January 2021 onwards, they are currently able to make use of this notification procedure. It is uncertain when the amended legislation will come into force. Also, the anticipated transition period of 24 months is subject to parliamentary approval.

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- U.K. insurers are now treated as third country insurers.
- There is no specific run-off regime for UK insurers who have not transferred their policies to another insurer with an EU license or who have become licensed in the EU, and there is no official guidance as to how UK insurers who need to pay claims on policies underwritten before the end of the transition period will be treated.
- Insureds have been advised to check whether UK insurance and pension providers will be able to fulfil their obligations, and, if in doubt, to contact the provider who sold the product.

The Polish supervisor (“**KNF**”) has not provided any guidance, and no specific regime has been introduced concerning how UK insurers, who are no longer authorised in the EU, should run off existing policies and pay claims. The only relevant communication issued by the KNF has solely been addressed to insureds.

The KNF has advised insureds, who have purchased insurance or pension products from an insurance company in the UK or Gibraltar and who live in an EU member state or are planning to move to one, to check whether these products are able to operate under the current rules from 1 January 2021.

It has also stated that after 31 December 2020, the UK will cease to be treated as an EU member state, and that that customers should check whether UK financial services providers will still be able to provide services in Poland and fulfil obligations under their agreements. The KNF has noted that, if UK providers have not already taken steps to transfer their contracts to an establishment authorised in an EU member state, or obtained appropriate licenses in the EU, a consequence of this might be that, in the case of a dispute with a UK insurance company or intermediary, insureds may no longer be able to take a case to court or to an ombudsman in the member state where they live.

Insureds are advised to review their insurance and pension product documents, and, if in any doubt, to contact the insurance company or intermediary that sold them the insurance product so that they can understand how the contract will operate from 1 January 2021.

# Portugal



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- Policies underwritten before the end of the UK Brexit transition period by UK insurers passported into Portugal remain valid and effective.
- Those policies may not be amended or renewed, unless this is for the benefit of the policyholder or following a legal determination.
- UK insurers must report to the Portuguese Insurance Authority on their portfolio of policies where Portugal is the member state the risk or commitment by 1 March 2021 and thereafter annually by 31 March each year.

With the end of the Brexit transition period, insurance undertakings registered in the UK no longer benefit from the EU passporting scheme.

In order to carry any insurance activities in Portugal, insurance undertakings are required to create a branch in Portugal, as determined under the existing Portuguese legal framework applicable to third countries.

With effect from 1 January 2021, Decree-Law 106/2020 applies to the following insurance agreements:

- those which cover risks located in Portuguese territory or in which Portugal is the Member State of the commitment;
- those where the insurer is an insurance undertaking registered in the UK;
- those executed under an authorization valid for Portugal;
- those dated before the Brexit transition period; and
- those not transferred to an insurance company authorized in the EU or a branch of a third-country authorized in Portugal.

Subject to the above, the following transitional rules apply:

- insurance agreements or operations remain valid and effective until the date of their relevant term;
- the above may not be (i) amended or (ii) renewed, unless this is for the benefit of the policyholder or arises from a legal determination.

Insurance undertakings are required to make a report to the Portuguese Insurance Authority ("ASF") of their insurance portfolio which is in force as of 1 January 2021 and which covers risks located in Portuguese territory or in which Portugal is the Member State of the commitment. The following information should be noted:

- The initial reporting deadline date is 1 March 2021.
- The subsequent reporting deadline is 31 March of each year.
- The reporting forms include:
  - Planned or ongoing measures to transfer insurance to an EU-authorized insurance undertaking;
  - Description and current status of the above measures;
  - Maximum deadline for full run-off of the portfolio;
  - Number of policyholders; and
  - Amount in EUR of the gross technical provisions.
- The reports are to be submitted by email to ASF.

# Spain



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- UK insurers and insurance intermediaries will continue to be provisionally authorised, until 30 June 2021, to carry out activities necessary for the orderly termination or assignment of contracts executed before 1 January 2021.
- For UK insurers, this period can be extended to 31 December 2022 to allow them to run off their portfolios if the insurer provides a contingency plan which is expressly authorised by the Spanish insurance supervisor.

On 29 December 2020, a Royal Decree-Law was passed, which sets out measures to address the position of the United Kingdom as a third country (the "Brexit Law").

Article 13 of the Brexit Law deals with the continuity of financial (including insurance) contracts. Specifically:

- Contracts for the provision of insurance services in Spain, where the provider (a) has a registered office in the UK, (b) is authorised by the UK supervisor, and (c) was entered into before 1 January 2021, shall remain in force only according to the terms and conditions set out in paragraphs (ii) and (iii).

- As from 1 January 2021, insurers and insurance intermediaries to whom paragraph (i) applies are subject to Spanish regulations applying to third-country firms, and they will be required to obtain a new Spanish authorisation for the following: (a) renewal of contracts executed before 1 January 2021; (b) amendments to contracts executed before 1 January 2021, if the amendments involve the provision of new services in Spain or affect essential obligations of the parties; (c) where activities related to the management of the contracts require authorisation; and (d) for the conclusion of new contracts.

Activities related to the management of contracts executed before 1 January 2021, which do not fall within the categories (a) through (c) above, will not require a new authorisation.

- However, UK firms will continue to have a provisional authorisation until 30 June 2021 to carry out the activities necessary for the purposes of the orderly termination, or assignment to entities duly authorized to provide insurance services in Spain, of contracts entered into before 1 January 2021. In the case of insurance companies, this period may be extended until 31 December 2022, in order to manage the existing portfolios of insurance contracts in the process of terminating their activities (i.e. for run off purposes), provided that the insurance company provides a contingency plan which is expressly authorised by the Spanish insurance supervisor.



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- With effect from the end of the Brexit transition period, EEA-authorized insurers and insurance intermediaries are no longer able to rely on their EEA passporting rights to carry on regulated activities in the UK.
- EEA insurers and intermediaries who have entered the UK's Temporary Permissions Regime will be able to continue to carry on regulated activities in the UK that were previously covered by their passports for up to three years. During that period they will be expected to apply for full UK authorisation.
- EEA insurers and intermediaries that were passporting into the UK at the end of the Brexit transition period will be able to run off contracts entered into before the end of the transition period for up to five years (or fifteen years for insurance contracts) in the UK's Financial Services Contracts Regime.

Following the end of the Brexit transition period (31 December 2020), EEA-authorized insurers and insurance intermediaries can no longer rely on passporting rights to carry out regulated insurance activities in the UK.

As part of the UK's preparations for Brexit, the UK Government established the Temporary Permissions Regime ("**TPR**") and the Financial Services Contracts Regime ("**FSCR**") for firms based in the EEA.

## Temporary Permissions Regime

The TPR allows EEA-based firms that were passporting into the UK at the end of the transition period to continue operating in the UK within the scope of their previous passport permission for a limited period after the end of the transition period. This is subject to firms having notified the Prudential Regulation Authority ("**PRA**") (for insurers) or the Financial Conduct Authority ("**FCA**") (for insurance intermediaries) that they wished to join the TPR, or having made applications for authorisation as third country insurers or intermediaries before the end of the transition period.

Firms which were formerly authorised to carry on regulated activities in the UK through Freedom of Establishment or Freedom of Services passporting and which have entered the TPR will have a temporary UK authorisation allowing them to carry on those activities for a maximum of three years from the end of the transition period. This will include activities necessary to renew existing contracts, and to enter into new business.

Firms that are now in the TPR will be expected to apply for full authorisation in the UK while they are in the TPR. Firms can be removed from the TPR where they fail to apply for authorisation. Applicants will be expected to have a physical place of business in the UK and must demonstrate that they are ready, willing and organised to comply, on a continuing basis, with UK regulatory requirements and standards.

## Financial Services Contracts Regime

For a limited period of time, the FSCR allows formerly passporting EEA-authorized firms to service UK contracts entered into before the end of the Brexit transition period (or before they entered the FSCR) in order to conduct an orderly exit from the UK market.

The FSCR is relevant to EEA firms that previously passported into the UK if they:

- need to carry out regulated activities in order to continue to perform their existing contracts, and did not notify the PRA or FCA that they wished to enter the TPR, or
- are unsuccessful in securing authorisation when leaving the TPR and still have regulated business in the UK to run off.

The FSCR is time-limited for a maximum of 15 years for insurance contracts and for five years for all other contracts (although the UK Treasury can extend these periods, if necessary, based on a joint assessment by the PRA and FCA). A firm's deemed authorisation (or exemption) under FSCR applies only to the extent that necessary for the performance of a pre-existing contract, or in certain limited circumstances for the purposes of winding down their UK business. The PRA and FCA expect firms in the FSCR to run down their UK business promptly.

Firms which were passporting into the UK prior to the end of the Brexit transition period and did not enter the TPR automatically entered the FSCR at the end of the transition period. Those firms which had a freedom of establishment branch in the UK will be in Supervised Run-Off (SRO) and will have a deemed UK authorisation covering the regulated activities they are able to carry on in the FSCR. Those which passported into the UK on a freedom of services basis only will enter Contractual Run-Off (CRO) and will benefit from an exemption from the requirement to be authorised to carry on regulated activities while they are in the FSCR.

# Equivalence for the UK under Solvency II?

## The UK's future relationship with the EU

The UK-EU Trade and Co-operation Agreement contains a joint declaration stating that the UK and EU will agree by March 2021 a memorandum of understanding (“**MoU**”) establishing the framework for structured regulatory co-operation on financial services.

In addition, the UK has granted all 3 equivalence decisions under Solvency II in respect of reinsurance, group solvency calculation, and group supervision. The EU has not yet granted reciprocal equivalence to the UK. At present the EU has given no timescale for doing so, and current indications are that the EU will expect commitments from the UK not to diverge from EU regulation which are unlikely to be granted.

However, if equivalence is granted by the EU, this would have the following effect:

- Reinsurance (Article 172 of the Solvency II Directive): If the UK's rules are deemed equivalent, UK-authorized reinsurers must be treated by EEA supervisors in the same way as EEA reinsurers. Absent an equivalence declaration, EEA supervisors could require UK reinsurers to post collateral to reinsure cedants in their jurisdiction.

- Solvency calculation (Article 227 of the Solvency II Directive): If the UK's rules are deemed equivalent, EEA-authorized insurance groups will be able to use local rules relating to capital (own funds) and capital requirements rather than the Solvency II rules, which will relieve UK insurers from having to recalculate their data in conformity with EU Solvency II requirements (as the UK will continue to supervise insurers in accordance with Solvency II, at least in the short term, equivalence for group solvency purposes may not make much difference for EEA groups with UK subsidiaries).
- Group supervision (Article 260 of the Solvency II Directive): If the UK's rules are deemed equivalent, EEA supervisors will under certain conditions rely on the group supervision exercised by the UK as a third country, which will free groups from being subject to unnecessary burdens arising from dual group supervision.

In the meantime, EU insurers will benefit from the UK's equivalence decisions – UK regulators will treat EEA reinsurers as equivalent to UK reinsurers, and will accept EU supervision as equivalent for group solvency and group supervision purposes.

## Our team

DLA Piper's insurance team advises on regulatory issues in the UK and key EU markets. The following team members contributed to this guide, and would be happy to provide advice on the issues covered.



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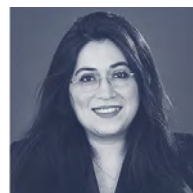
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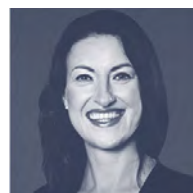
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