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Recommendations for the insurance sector in light of the United Kingdom withdrawing from the European Union

Recommendations

Introduction

1. In accordance with to Article 16 of Regulation (EU) No 1094/2010¹ (EIOPA Regulation), EIOPA is issuing recommendations for the insurance sector in light of the United Kingdom's (UK) withdrawing from the European Union.
2. These Recommendations are based on Directive 2009/138/EC² (Solvency II Directive), Directive (EU) 2016/97³ (IDD) and EIOPA's guidelines and other relevant EIOPA instruments.
3. These Recommendations follow a series of Opinions, which EIOPA developed to promote consistent supervisory practices in matters related to the consequences of the UK's withdrawal from the European Union.
4. The withdrawal will take place on the date of entry into force of a withdrawal agreement or, failing that, two years after the UK's notification, on 30 March 2019, provided that there is no decision taken to extend the two-year period.
5. If the UK withdraws from the EU without ratification of the withdrawal agreement, the UK becomes a third country on 30 March 2019 and UK insurance undertakings and distributors lose their right to conduct business across the Member States by way of freedom of establishment and freedom to provide services. Furthermore, UK distributors with no registration in the EU27 will not be allowed anymore to carry out distribution activities in the EU27.
6. The EU and the UK negotiated a draft withdrawal agreement that includes a transition period after the withdrawal, during which the UK would remain part of the single market. The endorsement of the draft withdrawal agreement is uncertain at this stage. On 13 December 2018, the European Council called for work on preparedness at all levels for the consequences of the UK's withdrawal to be intensified, taking into account all possible outcomes.⁴
7. Article 41(4) of the Solvency II Directive requires insurance undertakings to take reasonable steps to ensure continuity and regularity in the performance of their activities, including the development of contingency plans.⁵ EIOPA issued an Opinion⁶ on 21 December 2017, calling on the competent authorities to ensure that insurance undertakings with affected cross-border business develop realistic contingency plans that set out measures to prevent insurance

¹ Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48-83)

² Directive 2009/138/EC of 25 November 2009 of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1–155)

³ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (OJ L 26, 2.2.2016, p. 19–59)

⁴ See conclusions of the special meeting of the European Council (Article 50) on 13 December 2018, paragraph

⁵ (<http://data.consilium.europa.eu/doc/document/XT-20022-2018-INIT/en/pdf>).

⁶ EIOPA's Opinion on service continuity in insurance in light of the withdrawal of the United Kingdom from the European Union (EIOPA-BoS-17/389)

activity without authorisation and ensure service continuity after the UK's withdrawal and that they implement those measures. The measures available to UK insurance undertakings include the transfer of portfolios of cross-border insurance to an insurance undertaking established in the EU27 and the establishment of third-country branches in the EU27.

8. Many UK insurance undertakings, located in the UK or Gibraltar, in particular with large cross-border business in the EU27, have taken action and are implementing contingency measures. However, as of November 2018, 124 UK and Gibraltar insurance undertakings, representing 0.16% of the total EEA30 insurance business, had no or insufficient contingency plans in place to prevent insurance activity without authorisation and to ensure service continuity after the UK's withdrawal.⁷ The affected business has 9.1 million policyholders and insurance liabilities of EUR 7.4bn. The majority of the business (with insurance liabilities of EUR 5.4bn) relates to a handful of non-life insurance undertakings in the UK. Only 3 % of the potentially affected policyholders have a contract with life insurance undertakings. The remaining business has mainly low value and short-tail liabilities. Overall, 75% of the insurance contracts concerned belong to portfolios with average written premiums of less than EUR 100 per year. On average, the remaining duration of liabilities for 76% of the insurance contracts is less than two years. Whilst this concerns many EU27 Member States, some are more specifically affected in terms of number of policyholders with an existing cross-border contract.
9. The general objective of these Recommendations is to foster convergence and consistent supervisory approaches in the treatment of UK insurance undertakings and distributors across Member States by setting out guidance on the application of the existing legal framework considering arrangements between EU and non-EU counterparties.
10. These Recommendations are also applicable with regard to insurance undertakings and distributors established in Gibraltar.
11. These Recommendations are addressed to the competent authorities. Notwithstanding the fact that specific provisions describe obligations to be met by insurance undertakings and intermediaries, this document is not to be read as imposing any direct requirements upon those financial institutions. Financial institutions are required to comply with the supervisory or regulatory framework applied by their national competent authority.
12. If not defined in these Recommendations, the terms have the meaning defined in the legal acts referred to in the introduction.
13. The Recommendations shall apply from the date following that on which the Treaties cease to apply to and in the UK pursuant to Article 50(3) of the Treaty on European Union.

Recommendation 1 – General objective

14. In their treatment of cross-border business of UK insurance undertakings, competent authorities should aim to minimise the detriment to policyholders and beneficiaries, based on the applicable EU and national laws.

⁷ See EIOPA communication of 5 November 2018, <https://eiopa.europa.eu/Pages/News/EIOPA-calls-for-immediate-action-to-ensure-service-continuity-in-cross-border-insurance-.aspx>.

Recommendation 2 – Orderly run-off

15. Competent authorities should apply a legal framework or mechanism to facilitate the orderly run-off of business which became unauthorised or they should require the insurance undertakings to immediately take all necessary measures to become authorised under Union law.
16. Competent authorities should prevent that UK undertakings conclude new insurance contracts or establish, renew, extend, increase or resume insurance cover under the existing insurance contracts in their jurisdiction as long as they are not authorised for such insurance activities under Union law. This is without prejudice to policyholder rights to exercise an option or right in an existing insurance contract to realise their pension benefits.
17. Competent authorities should make every effort to supervise the cross-border business of UK insurance undertakings in their jurisdictions. The supervision should include conduct supervision and, in co-operation with the supervisory authorities in the UK, appropriate oversight of the relevant prudential aspects of the cross-border business, including the financial position of the UK undertaking. The supervision should be risk-based and take into account proportionality.

Recommendation 3 – Authorisation of third-country branches

18. In accordance with Article 162 of the Solvency II Directive, UK insurance undertakings may seek authorisation to carry out cross-border business through a branch in a Member State and thus ensure that they can service cross-border business in that Member State.
19. In assessing whether the legal conditions for the authorisation of such a branch are fulfilled, competent authorities should apply the principle of proportionality and take into account that the UK insurance undertaking was subject to Solvency II requirements before the UK's withdrawal.
20. Where it would accelerate the authorisation procedure, competent authorities should consider restricting the authorisation of the branch to the run-off of existing business.

Recommendation 4 - Lapse of authorisation

21. Where the legal framework of a Member State includes provisions on the treatment of insurance undertakings after a lapse of their authorisation as referred to in Article 144(1)(a) of the Solvency II Directive, the competent authority should consider applying these provisions to UK insurance undertakings in their jurisdiction after the UK's withdrawal. In that case, the competent authority should make every effort to ensure an effective enforcement of those provisions, in co-operation with the supervisory authorities in the UK.

Recommendation 5 – Portfolio transfers

22. Competent authorities should allow the finalisation of portfolio transfers from UK insurance undertakings to EU27 insurance undertakings, provided that it was initiated before the withdrawal date. For that purpose, competent authorities should co-operate closely with the supervisory authorities in the UK

taking into account the requirements of Article 39 of the Solvency II Directive and the provisions of Section 4.2.1. of the Decision of the Board of Supervisors on the collaboration of the insurance supervisory authorities of the Member States of the European Economic Area of 30 January 2017 (EIOPA-BoS-17/014). Competent authorities should deem a portfolio transfer to be initiated in case the UK supervisory authorities have notified them about the initiation of the portfolio transfer and the UK insurance undertaking has paid the regulatory transaction fee to the supervisory authority(s) in the UK and appointed an independent expert for the transfer.

Recommendation 6 – Change in the habitual residence or establishment of the policyholder

23. Where a policyholder with habitual residence or, in the case of a legal person, place of establishment in the UK concluded a life insurance contract with a UK insurance undertaking and afterwards the policyholder changed its habitual residence or place of establishment to a EU27 Member State, competent authorities should take into account in the supervisory review that the insurance contract was concluded in the UK and the UK insurance undertaking did not provide cross-border services for the EU27 for this contract.
24. Competent authorities should apply the same approach to non-life insurance contracts that do not relate to buildings or to buildings and their contents or to vehicles.

Recommendation 7 – Cooperation between competent authorities

25. Where a UK insurance undertaking has cross-border business in more than one Member State, the competent authorities of those Member States should co-operate with regard to supervising that business, in particular by exchanging the following information, taking into account the principle of proportionality:
 - (a) the nature and scale of the cross-border business in their jurisdiction;
 - (b) measures taken or planned by the undertaking to ensure an orderly run-off of the cross-border business;
 - (c) supervisory measures taken or, where appropriate, intended by the competent authority with regard to the undertaking;
 - (d) any conduct or solvency issues identified with regard to the undertaking.
26. Where deemed necessary, EIOPA may establish a cooperation platform for a specific undertaking with the participation of the competent authorities concerned. Competent authorities should make every effort to participate in the platform.

Recommendation 8 – Communication to policyholders and beneficiaries

27. Competent authorities should inform UK insurance undertakings with cross-border business in their Member State of the requirement to disclose to the policyholders and beneficiaries of those contracts that are affected by the consequences of the UK's withdrawal, the consequences for the rights and obligations of policyholders and beneficiaries regarding those contracts.

28. Competent authorities should remove the UK insurance undertakings from the national register of insurance undertakings upon the withdrawal date and inform the public about the legal framework applicable to the cross-border business of UK insurance undertakings.

Recommendation 9 – Distribution activities

29. Competent authorities should 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 IDD. Competent authorities should ensure that intermediaries, which are legal persons and are established and registered in the Union, demonstrate an appropriate level of corporate substance, proportionate to the nature, scale and complexity of their business. These intermediaries should not display the characteristics of an empty shell. Moreover, the professional and organisational requirements of the IDD must be met on a continuous basis.

This is without prejudice to the right of the Member States to introduce special provisions in their national law for third country intermediaries, provided that equal treatment of intermediaries on the respective market is guaranteed.

30. When assessing whether a specific UK intermediary or entity is providing distribution activities in the EU, competent authorities should take into account that only the consistent and uniform application of the IDD can guarantee the same level of protection for consumers and ensure a level playing field in the Union. Competent authorities should ensure that all intermediaries carrying out distribution activities which target EU27 policyholders and EU27 risks fall under the scope of the IDD.
31. For this purpose, competent authorities should assess any distribution model against the definition of distribution activity as provided for in the IDD.

Compliance and reporting rules

32. This document contains Recommendations issued under Article 16 of the EIOPA Regulation. In accordance with Article 16(3) of the EIOPA Regulation, competent authorities and financial institutions shall make every effort to comply with guidelines and recommendations.
33. Competent authorities that comply or intend to comply with these Recommendations should incorporate them into their regulatory or supervisory framework in an appropriate manner.
34. Competent authorities shall confirm to EIOPA whether they comply or intend to comply with these Recommendations, with reasons for non-compliance, within two months after the issuance of the translated versions.
35. In the absence of a response by this deadline, competent authorities will be considered as non-compliant to the reporting and reported as such.

Final provision on review

36. The present Recommendations shall be subject to a review by EIOPA.