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Foreign (re)insurers doing business in the EEA: setting the record straight

Prior to the Reinsurance Directive, there was no harmonised system of regulation of pure reinsurers in the European Economic Area (see Note). Member States, bearing in mind the GATS provisions, as noted below, could choose to what extent reinsurance was regulated in their own jurisdiction, resulting in inconsistencies for reinsurers throughout the EEA both in terms of authorisation requirements and prudential supervision requirements.

Recently, there has been considerable industry debate and press comment about the ability of foreign, ie non EEA, insurers and reinsurers to carry on business in the European market. It is apparent that there is widespread confusion as to the current position of foreign reinsurers. We hope the following summary will set the record straight.

WTO/GATS agreement

GATS is The World Trade Organisation General Agreement on Trade in Services. GATS was signed in 1995 and covers international trade in services including the provision of insurance and reinsurance. Signatories included all members of the WTO, which include the US and the EEA Member States.

GATS allows services to be provided through a number of methods including 'cross-border trade', which is defined as a service provided from the territory of one country into the territory of another. Each GATS signatory has been obliged to make commitments in relation to the relevant services in its jurisdiction that would be opened up to the other signatories. Within the EEA, it has been agreed under GATS that non-EEA insurers, eg US, Bermuda and Swiss insurers, could provide (as a principal, through an intermediary or as an intermediary) marine, aviation and transport insurance (MAT Insurance) and that non-EEA reinsurers could provide reinsurance throughout the EEA on a cross border trade basis. Non-EEA insurers and reinsurers have also been given the right under GATS to establish a commercial presence in EEA Member States, subject to any terms, conditions and procedures for authorisation in each jurisdiction.

It is also obligatory for GATS signatories to state in their national law any limitations to those commitments. In other words, notwithstanding the principles of freedom of services enshrined in GATS, it remains permissible to apply national law to regulate services, eg insurance and reinsurance, for prudential reasons or to ensure the integrity and stability of the financial system, provided that such domestic regulation is administered "in a reasonable, objective and impartial manner".

In relation to the supply of MAT Insurance, a number of

specific limitations have been imposed by some other EEA states that limit the ability of non-EEA insurers to provide MAT Insurance in accordance with the cross-border trade provisions of GATS. For example, in Austria compulsory air insurance can only be provided by an EEA authorised subsidiary or an Austrian branch of a non-EEA insurer. Other States simply require notification that business is being conducted in that jurisdiction on a GATS basis.

At the time of GATS negotiations, reinsurance was not regulated in the vast majority of EEA Member States. There were, therefore, in those jurisdictions, very few specific limitations relating to the cross border supply of reinsurance. Some States, eg Germany, permitted the provision of reinsurance by non-EEA reinsurers on a 'correspondence' basis only, that is, no presence or activity in Germany itself (including activity by brokers) and all communication only by correspondence. Other States, namely France, Spain and Portugal, imposed collateral requirements on all foreign (EEA and non EEA) reinsurers. Other jurisdictions such as the UK fully regulated reinsurance at the time of the GATS negotiations. The regulation of reinsurance in the UK (and in certain other EEA Member States) was imposed on the basis that this was permissible under GATS as such regulation is required for prudential reasons or to ensure the integrity and stability of the financial system.

Regulation of insurance

The EU insurance directives of 1973, 1988 and 1992 implemented a regime throughout the EEA for the authorisation and supervision of direct/primary insurers and reinsurers who also carry on insurance business, setting out a minimum set of rules and standards aimed at protecting policyholders, eg through minimum solvency requirements. Each EEA Member State has implemented the directives so that an insurer must have authorisation to carry on business in that state or be exempt from the authorisation requirements. GATS provides exemptions to these requirements in respect of MAT insurance.

The insurance directives give insurance companies headquartered in an EEA Member State the freedom to establish a physical presence, eg a branch, in other EEA Member States and the

freedom to provide services (without establishing a physical presence) in the territory of other EEA Member States where they wish to conduct insurance business. These principles of freedom of establishment and freedom to provide services are two of the so-called fundamental freedoms which are central to the EEA internal market. These freedoms are referred to as 'passporting'.

Procedures are in place relating to the notification and (in the case of establishing a branch) approval of passporting by the home state regulator. Passporting firms continue to be regulated by their home state regulator but the host state is entitled to impose 'general good' conditions in relation to their business in the host state, that is, domestic rules with which the passporting firm has to comply but which are justified on the basis that they are for the general good.

Regulation of reinsurance

The Reinsurance Directive applies to pure reinsurers and was required to be implemented by EEA Member States by 10 December 2007. However, not all have done so, including France and Italy. The key provisions include:

- requirement for every EEA reinsurer to be authorised and regulated in the EEA Member State in which it has its head office
- implementation of an EEA-wide supervisory regime
- permission for EEA authorised reinsurers to carry on business throughout the EEA under the freedom of establishment and freedom to provide services in the same way as insurers
- abolition of collateral requirements for EEA (but not non-EEA) reinsurers (from 10 December 2008).

Non-EEA insurers and reinsurers

Now that reinsurance is regulated throughout the EEA, all EEA Member States, although they must consider their obligations under GATS, will, when transposing the reinsurance directive have to impose limitations on the cross border supply of reinsurance as the directive takes precedence over GATS. It is no longer possible for a non-EEA reinsurer to carry on business in an EEA Member State without ensuring that it is doing so in compliance with the local authorisation and regulatory requirements in that jurisdiction. For example, in the UK, the cross-border supply of reinsurance into the UK is only permissible if it does not constitute the carrying on of a regulated activity in the UK.

For those reinsurers operating in EEA Member States which before the Directive did not regulate reinsurance or which had minimal regulation of reinsurance, the impact is likely to be significant. The Directive prohibits non-EEA reinsurers receiving more favourable treatment than EEA reinsurers, which means that the regulatory burden for non-EEA reinsurers must at least be equivalent to those for EEA reinsurers. The passporting rights set out in the Directive will not be available to non-EEA reinsurers or to branches of non-EEA reinsurers. Furthermore EEA Member States may continue to impose collateral requirements on non-EEA reinsurers and are not required to permit insurance business transfers to or from non-EEA reinsurers.

Conclusion

In summary, non-EEA insurers (subject to any exemptions available in the relevant jurisdiction for MAT Insurance under GATS) and reinsurers may only operate within the EEA in the following ways:

- establishment of a subsidiary with authorisation in an EEA Member State
- establishment of an authorised branch of the non-EEA insurer or reinsurer in an EEA Member State (although passporting rights will not be available)
- provision of insurance or reinsurance into an EEA Member State (without actually carrying on regulated insurance or reinsurance business in the State), but only where permitted by the rules of the State. Most EEA Member States restrict the provision of insurance by non-EEA insurers at least to some extent.

The Directive authorises the EU Commission to negotiate mutual recognition treaties between the EU and third countries. Negotiation of such treaties may eventually make it easier for non-EEA (re)insurers to do business in the European market. At present the EU has treaties only with Norway, Iceland and Liechtenstein (which provide full mutual recognition) and Switzerland (which provides only for rights of establishment for insurers, subject to host state authorisation). Switzerland and Bermuda are known to be enthusiastic to negotiate treaties but the US position is bound up with the state-based regulatory system, which makes mutual recognition unlikely in the short to medium term.

This article first appeared in *The Insurance and Reinsurance* (March 2008). It is for guidance only and is not intended to be a substitute for specific legal advice. If you would like any further information please contact:

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