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## **‘FALLING BACK ON THE WTO’: NO DEAL IMPLICATIONS FOR THE UK INSURANCE SECTOR**

*A no-deal Brexit looms large again after Michael Barnier, the EU’s top negotiator, warned of ‘no progress’ on key issues at last month’s trade talks. Although negotiations are expected to intensify, if a Free Trade Agreement (FTA) is not agreed in the next few months, access to the EU would change from passporting rights, based on the EU single market directives, to rules of the World Trade Organisation (WTO). Exiting on WTO rules will have significant implications for UK insurers who cannot write EU risks on a services basis, save in limited circumstances. The position is somewhat better for UK reinsurers who do not face the same access constraints but who could be subject to local restrictions. The position for UK reinsurers would also benefit from a positive equivalence decision under Article 172 of Solvency II.*

The WTO describes its principal function as a forum for members to negotiate on trade issues, with the EU and the UK both members in their own right. It operates a body of rules in the form of the WTO agreements, with the General Agreement on Trade in Services (GATS) and the legal instruments that fall under it: the Annex on Financial Services, the Understanding on Commitments in Financial Services and the Specific Commitments of individual members. These establish a framework for cooperation for financial services, including insurance, reinsurance, insurance mediation and auxiliary services such as risk assessment and claim settlement.

GATS envisages cross-border access for financial services through four so called ‘modes of supply’: cross border trade in services, consumption abroad, commercial presence and presence of natural persons. Notably, access through the first two modes is restricted to the direct supply or mediation of a limited range of insurance (such as marine, aviation and transport (MAT) risks) on a services basis. This means that, under GATS, UK insurers can only write these limited risk on a services basis provided that these risks are within the insurer’s host state’s GATS Specific Commitments and any requirements of its host regulator are met, which may well include a requirement for local authorisation. However, insurance groups who completed their contingency plans and established an EU authorised subsidiary and a UK authorised subsidiary or branch pre-Brexit should largely be unaffected if GATS applies from the end of the transition period. In any case, the extent of access under GATS will also depend on the UK’s ability to obtain WTO participation in any agreements to which it is currently a party by virtue of its membership of the EU.

Under WTO rules, the UK will be subject to the Most Favoured Nation (MFN) Principle which obliges members to accord “no less favourable treatment that it accords to like services and service suppliers of any other country” (Article II GATS). MFN rules are subject to a ‘prudential carve-out’ which permits members to take measures for “the protection of... policyholders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system” (GATS Annex, paragraph 2(a)).

The ‘prudential carve-out’ will generally speaking allow the UK to maintain its regulatory autonomy, but, of course, allows other WTO members to implement their own prudential measures. Individual EU-27 members currently impose limitations on non-EEA firms, in respect to MAT risks and reinsurance. 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, whilst Germany permits the provision of reinsurance by non-EEA reinsurers (and who are not from a jurisdiction deemed equivalent for Solvency II purposes) on a ‘correspondence’ basis only, that is, no presence or activity in Germany itself. There are several other limitation examples, demonstrating that there is not a constant approach to MAT and reinsurance risks under GATS.

Given its high-level nature, GATS will do little to ensure a standardised approach on access across the EU-27 and a fragmented regulatory and legal landscape may be the first discernible sign of a ‘no deal’ Brexit on insurers. Firms looking to rely on GATS rules to trade are therefore advised to analyse the position in each jurisdiction ahead of the end of the transition period to ensure that service and access disruption is minimised where possible.

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