

Brexit: where will it leave insurers and the insured in Europe?



As it currently stands, on 29 March 2019, the United Kingdom will leave the European Union. At the time of going to press, the exact details of 'Brexit' are still being debated by the UK government – ranging from a negotiated deal to no deal at all. The lack of clarity stems from real uncertainty about whether there will be a hard Brexit, with no agreement as to future and ongoing terms, or a soft(er) exit under which the UK leaves via a transitional period and with some consensus around its future relationship with the EU 27. Whatever the exact terms, the UK will leave the European single market and become a 'third country'.

Much has been written about how this will impact UK insurers, but as we arrive in the year of Brexit, we thought that we should consider an alternative view. How will Brexit impact insurers and insureds in other countries in Europe?

The main concern of (re)insurance companies and intermediaries is the extent to which market access rights will be lost as a result – and this works both ways, into and out of the UK. Many firms have already taken steps to preserve their business based on worst-case assumptions but with many moving parts the future still contains a great deal of uncertainty not least around

topics such as contract continuity and future business. Below is a summary of how things stand across a range of major re/insurance markets in Europe.



Jim Sherwood, Chairman of Global Insurance Law Connect (GILC)

Belgium

Brexit will have major economic repercussions for Belgium considering that the UK is one of the largest economic partners of Belgium. What will be the impact for the insurance sector?

If UK (re)insurance companies and intermediaries lose their “passporting” rights (i.e., the right to be active throughout the EU, by way of freedom of establishment and/or freedom to provide services, on the basis of a UK registration or licence), they will need to have fixed establishment(s) in the EU in order to ensure the continuity of their current EU business and to facilitate their business in the EU in the future.

Some UK insurers have already relocated to Belgium. For example, the National Bank of Belgium has granted (re)insurance company licences to Lloyd’s Insurance Company, QBE Europe and Amlin Insurance SE. Similarly, Brexit will very likely have an impact on Belgian or other EU (re)insurance companies and intermediaries, which will lose their passporting rights to conduct business into the

UK on a freedom-of-establishment and/or freedom-to-provide-services basis.

There are ongoing negotiations between the EU and the UK on a withdrawal agreement, but the outcome of these negotiations is uncertain. A transitional period is not excluded.

The outline of the political declaration setting out the framework for the future relationship between the EU and the UK establishes 3 key principles for the financial services: ((i) commitments to preserving financial stability, market integrity, investor protection and fair competition; (ii) commencement of equivalence assessments by the EU and the UK as soon as possible after the UK’s withdrawal and (iii) close and structured cooperation on regulatory and supervisory matters) but says nothing about contract continuity.

On 28 June 2018, the European Insurance and Occupational Pensions Authority (EIOPA) published an ‘Opinion on disclosure of information to customers about the impact of the withdrawal of the United Kingdom from

the European Union’. This opinion is addressed to the national supervisory authorities and deals with the duty imposed on insurance companies and intermediaries to inform customers about the possible consequences of Brexit.



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Norway

The worst-case scenario – a hard Brexit/no deal – will lead to the UK’s complete withdrawal from the EU without negotiated access and means that they will also lose access to the European Economic Area (EEA) which is Norway’s connection to the single market of the EU. This will, of course, also affect insurance businesses in Norway, since the EEA has been beneficiary for Norwegian insurance companies operating in the UK on a cross-border, or a subsidiary basis.

The withdrawal also means that insurance companies based in the UK lose their right to conduct business in the EU on a freedom of establishment and freedom to provide services basis in other member states, including in Norway. However, there will still be possibilities for UK businesses to access the EEA market and vice versa, by establishing new firms in a member country. With the current uncertainty of the no deal situation, companies affected

will have to do an independent assessment of the consequences and risks involved and take the necessary precautions. This has led some UK based companies to set up firms in an EEA member state and they are working on moving their EEA business there, so they can keep up their contractual commitments.

These companies will still be able to conduct business in Norway, even in a no deal situation. Insurance companies in Norway with subsidiaries in the UK are also doing similar preparations to provide certainty for their customers. Either by seeking authorization as a third country branch, affective from Brexit, or to convert to being an authorized UK subsidiary in advance of Brexit. As a part of the EEA, Norwegian insurance regulations are based on the EU-law. If the negotiations between the UK and the EU are successful, it is likely that Norway will enter into the same agreement with the UK as the UK then will

have established with the EU. If the outcome is a no deal situation, Norway will have to regulate the industry in accordance with existing national regulations which is done today with third country entries. Companies who wants to be present in the Norwegian market will have to establish a new entity here, or in another EU/EEA state. We have yet to learn what will be the outcome of the Brexit negotiations, but Riisa is following this process closely.



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Germany

Brexit, and especially a no-deal Brexit ("hard" Brexit), will have considerable ramifications for British insurers conducting business in the German insurance market. The German government is about to address the upcoming change with a legislative process, which shall be reviewed in context of German insurance supervisory law.

1. Passporting gives insurers the freedom to provide services in the European Union, so British insurers currently don't need their own licence to do business in the German insurance market. It was and still is sufficient to be licensed in Great Britain as a member state of the European Communities. British insurers had to comply with some additional regulatory requirements, but they didn't need a specific license to conduct insurance business in Germany. In a "hard"-Brexit-Scenario this practice would be stopped on the 29th of March 2019.

2. In Germany, insurance regulation is governed by the Insurance Supervision Act (VAG). The competent authority is the Federal Financial Supervisory Authority (BaFin). If British insurers want to continue conducting insurance business in Germany, they have to set up an insurer in one of the member states of the European Communities and transfer their existing insurance business to this new entity until the day of Brexit. This new insurer

will be able to use the Passporting rights and conduct insurance business in all member state of the European Communities. If British insurers decide to set up an insurer in Germany, they need to obtain their own German approval from the Bafin, who already announced that it will not tolerate any letter box subsidiaries. Furthermore, if British insurers haven't started the process already, it is nearly impossible to finish it until the 29th of March 2019.

But what happens to existing insurance policies, if a British insurer fails to set up a new European insurer or if the existing insurance policies can't be transferred to this new entity?

3. According to Sec. 8, 331 VAG, an insurance company conducting its business without authorisation is acting unlawfully. As a result, the so conducted business is void (Sec. 134 German Civil Code). Hence any new business would be qualified as invalid. However, this does not apply to established insurance policies, since the insurer was licensed at the time the contract was concluded. However, these established and continuing insurance contracts could become terminable for both parties because of the Brexit. Furthermore, with respect to these insurance policies the provision of insurance services (e.g. payment of claims) could become legally impossible. The consequences of such a legal impossibility are

not yet predictable. One possible consequence is that the insurer will be liable for damages of the policyholder.

In order to avoid uncertainties associated with the consequences of the Brexit for established and continuing insurance policies, the German government reacted with starting a legislative process on November 20, 2018. This process has not yet been closed. According to the proposed regulation, BaFin will be entitled to order a transitional national solution in the event of a "hard" Brexit. British insurers would be able to continue to use Passporting with respect to insurance contracts concluded before the 29th of March 2019 for a transitional period of up to 21 months. Any new business would remain excluded, as the regulation only wants to avoid disadvantages for existing policies.



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Italy

On 3rd October 2018 the Italian insurance supervisory authority IVASS sent a letter to all UK insurance undertakings operating in Italy about the information that they need to provide to Italian policyholders on the impact of Brexit.

IVASS referred to the "Opinion on disclosure of information to customers about the impact of the withdrawal of the United Kingdom from the European Union" issued by EIOPA on June 25, 2018*, and (by reference to the Freedom of Establishment and/or Freedom to Provide Service provisions) required all relevant bodies to:

a. Issue adequate information about the impact of Brexit on their Italian policyholders

and beneficiaries, in accordance with the above EIOPA publication (this highlights the importance of all being made aware of the implications of Brexit "both for existing and for new contracts concluded before the withdrawal date in due time and are provided with clear and non-misleading information on the contingency measures taken or planned and on their impact on their insurance contracts");

b. Publish similar information on their websites;

c. Suitably instruct their information and distribution networks about the information to provide to current, and also potential, policyholders.

All UK insurance undertakings operating in Italy should have already laid their plans in these respects and confirmed that they have been carried out.



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UK

With fewer than 100 days before the UK is due to leave the EU on 29 March 2019 the precise impacts of Brexit on many sectors of the UK economy, including insurance and financial services, remain worryingly opaque. The Government's decision to postpone the Parliamentary vote on the draft Withdrawal Agreement until January 2019 and the likelihood of it being defeated in any event add to the uncertainty.

The Government has issued dozens of technical notices setting out possible impacts in the event of a no deal exit. The notice covering banking, insurance and other financial services states that "For UK-based customers accessing domestic services in the UK provided entirely by UK-based providers, there is unlikely to be any change as a result of exit." This statement is accurate and very likely to apply to a wide range of personal lines and SME policies issued by UK insurance providers and under which claims and policy administration will very much be 'business as usual' after 29 March.

However, in respect of other insurance business (most likely to be commercial risks) which has any connection with the EU - such as the insured having EU-based branches, or exporting goods or services, or sending employees on projects within the EU - different steps need to be taken. The fundamental issue is the loss of so-called passporting rights for UK-based financial services providers once the UK leaves the EU's single market and any realistic contingency planning must be around the hardest of Brexits next March.

Although the UK Government has confirmed a temporary permissions regime for inbound EU providers offering services in the UK, similar arrangements have not been offered by the EU 27 to the UK financial services sector. Therefore, setting up some form of EU-authorized subsidiary - which has regulatory and capital implications, of course, and is not an instant procedure either - is a strong option for continuing to operate after Brexit. Lloyd's of London has set up a hub in Brussels for this purpose while Ireland and Luxembourg have proved other popular locations. Entering into formal 'fronting' arrangements with one or

more EU carriers is another option likely to appeal to carriers who may be unwilling or unable to set up a dedicated EU-based subsidiary.

The reality is that detailed plans to preserve access to EU markets have already been implemented by a significant number of UK insurance providers. It seems that few, if any, are relying on the Government to secure binding terms that deal comprehensively with the topic.



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Switzerland

With annual gross written premiums totalling approximately CHF 130 Billion and premiums per capita of approximately CHF 6,650 in 2017, the Swiss insurance market is not to be sniffed at. It is therefore no wonder that as of December 2018, no less than 15 UK insurers operate branches in Switzerland in order to access the Swiss insurance market. To date these insurers have made use of the freedom of establishment rights accorded by the agreement dated 10 October 1989 between the Swiss Confederation and the European Economic Community (now the EU) on Direct Insurance other than Life Insurance (the so-called "Non-Life Insurance Agreement" hereafter referred to as the "Agreement"). While the Agreement does not provide for full freedom of services, it is nevertheless very useful and has facilitated business in Switzerland not least because it allows the home state supervisor to continue supervising solvency (i.e. Swiss branches of UK insurers are not subject to solvency-supervision by the Swiss Financial Market Supervisory Authority, FINMA). It has also ensured that the Solvency II risk location principles apply, which is of paramount importance when structuring international programs.

In preparation of Brexit, the United Kingdom's exit from the European Union, and in light of the uncertainty as to whether the Agreement will still apply to UK insurers post-Brexit, a considerable number of UK insurers with Swiss

branch operations have put plans into motion to revise their Swiss insurance licence arrangements, in particular by moving risks to EU risk carriers, either by way of cross-border mergers or by establishing new EU insurance companies. In both scenarios, the new EU risk carrier usually ultimately assumes the Swiss insurance portfolio while the Swiss branch of the UK insurance company asks for a release from supervision by the Swiss Financial Market Supervisory Authority FINMA.

Yet, there currently are other UK insurers with Swiss branch operations that have assessed the impact of Brexit on their Swiss insurance licence in light of their business model (and, in particular, the location of risks in the UK-Swiss context), and have decided not to act for the time being, as the Non-Life Insurance Agreement also features certain provisions applicable to "branches of undertakings whose head office is situated outside the territories" of the parties to the Agreement (i.e. whose head office is situated outside Switzerland and the EU). For some UK insurers, a continuation of their present business model should therefore be possible post-Brexit, but might result in increased capital requirements for their Swiss branch operations.

In addition, given the importance of the United Kingdom – Switzerland relationship, it is worthwhile to bear in mind that the Swiss authorities have indicated a desire to ensure

that the existing mutual rights and obligations in Switzerland's relationship with the UK will continue to apply as far as possible after the UK leaves the EU. In this regard, the Swiss Federal Council has adopted the so-called "Mind the gap" strategy and entered into bilateral talks which have already resulted in the approval of a new trade agreement with the UK. It is expected that the UK and Switzerland will also approve a new bilateral agreement very similar to the current Non-Life Insurance Agreement, which would ensure a smooth continuation of UK-Swiss insurance business even in the event of a "No-deal" scenario. Current developments should therefore be closely monitored as the conclusion of a new bilateral agreement would provide certainty for UK insurers and could well result in new business opportunities for UK insurers in Switzerland.



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Spain

The Spanish insurance market is not particularly affected by Brexit as the most important companies operating in the market have moved their headquarters to other countries of the European Union, although they maintain their operational centres in the UK.

Only one British company, Admiral Group, has moved to Spain. The impact of Brexit raises many questions on a theoretical level, ranging from different types of products to financial investment policy. With regard to the latter, Spanish companies concentrate their investments on public debt, real estate, obligations and, in general, they abstain from investing in currencies that carry foreign exchange risks, so in this respect there are no surprises to be expected. Regarding the regulatory aspects, the exit from Great Britain means that the British companies will not be subjected to the Solvency II Criteria, being able to make the British market more competitive. However, the dependence on the English market, except in the aviation lines that are signed through reinsurance, is very limited given that the companies and continental reinsurers established in Spain provide sufficient capacity. On the other hand, once Brexit becomes effective, any British entity wishing to operate in Spain must establish itself as a subsidiary company or under the

right of establishment regime. With regard to this last point, it should be remembered that Spanish legislation establishes the prohibition of arranging insurance directly with insurance entities from third countries outside the EU or through private insurance mediators that carry out their activities. In this regard, we must point out that any British entity that operates in Spain under the establishment regime and transfers its portfolio to a subsidiary within the EU, must obtain authorization from the General Spanish Directorate of Insurance and if within three months does not issue a report in this regard, it will be understood granted its agreement. At the same time the policyholders must be notified of the change. Furthermore, any insurance contract signed prior to the conclusion of Brexit will remain in effect until the expiration of the same -there being no possibility of renewal- and, with the same conditions agreed, all without prejudice to the obligations established during the remaining period until its expiration and the transitory regime that will be established at the time. Moreover, all British entities that currently operate under the regime of freedom of services, in the future they only will operate through the corresponding establishment.

In short, although the British insurance market is the most important in Europe, its presence in the Spanish market is not relevant today

despite having been in the past through reinsurance. At present, its importance and weight have dissipated, even in special lines of business (see D&O or financial lines). On the contrary, there are very few Spanish companies that operate in the British market, so from this point of view they have no need to make big changes either. It is true that with Brexit the so-called passport will be lost, so we must wait for the result of the agreements or operate with the corresponding partners via reinsurance. A different issue is the presence of Spanish companies in the United Kingdom as Spain has important interests in various sectors (banking, infrastructure, energy or textiles, among others). Nowadays, the insurance policies of these companies are contracted in Spain and issued for the corresponding subsidiaries in free provision of services. In summary, a relatively negative impact is expected for the Spanish market due to the UK's exit from the EU.



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France

These comments are drawn in part from a September 2018 report on the impact of Brexit by the Haut Comité Juridique de la Place Financière de Paris (HCJP).

Post-Brexit, UK insurers may practice insurance activities in France through a subsidiary with its head office in France (Article L.310-2-1 (1°) of the French Insurance Code). UK insurers may transfer their insurance contracts to a French subsidiary, subject to the approval of the French insurance regulators (the ACPR) and subject to UK procedures; or they may insure French risks through a subsidiary established in another EU Member State (Article L.310-2-1 (2°)).

If a UK insurer transfers a portfolio to another EU Member which includes risks situated in France, the ACPR must be consulted. The ACPR will advise the insureds through a publication in the Journal Officiel, consider the risk of the transfers in order to assure that the interests of the insureds are protected, and verify that the assignee has all necessary authorizations.

Presently, it appears from public sources that the jurisdictions most favoured by UK based

insurers to set up a subsidiary are Luxembourg (e.g. AIG, Hiscox, CNA Hardy, RSA, FM Global), the Republic of Ireland (Beazley, Aviva) and Belgium (Lloyd's, QBE).

The only major insurer to publicly choose France is Chubb, who announced in September 2018 that it will move its European headquarters to Paris after the UK leaves the EU.

As regards insurance contracts insuring risks in France and legally concluded by UK insurers prior to Brexit, the EIOPA has given its opinion that such contracts will remain in effect in France after Brexit. There remain, however, some unresolved issues which will need to be addressed by European and/or French authorities, in particular as regards run-offs and management of losses arising out of insurance contracts concluded prior to Brexit.

After Brexit, UK insurers may not insure risks or undertake contractual obligations with insureds for risks situated in France, except, as mentioned above, through the establishment of a subsidiary in France or in another EU Member State (or a third country branch office

or European Company).

There remains an issue as to whether such a prohibition would affect new undertakings under existing insurance contracts. The HCJP is of the view that such a prohibition would include express or tacit renewals of annual insurance contracts and in general terms any substantial modification of the obligations of the parties under the insurance contract after Brexit. However, the HCJP recognizes that this issue needs to be addressed by the European and ultimately the French authorities.



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