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CMS Insurance Group webinars

Brexit for Insurance



Brexit for Insurers | 6 March 2019

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Agenda

1. Introduction – the current status of the Brexit process
2. Contract continuity (Belgium, Germany, France)
3. Risks for UK insurers and intermediaries operating into Europe
4. EU insurers and intermediaries continuing their UK business
5. What happens next - best and worst case scenarios



1. Introduction – the current status of the Brexit process

UK Politics

Deal or no deal?



2. Contract continuity (Belgium)

– Validity of insurance contracts after a hard Brexit

- **Art 8 Belgian Insurance Act:** « *Insurance contracts that are entered into by a non-licensed insurer are null and void. For foreign insurers, this nullity only applies to risks or liabilities that are situated in Belgium. The insurer however remains liable for the coverage of the risks subject to the condition that the policyholder has concluded the policy in good faith.* »
- « **Insurance mediation services** » can not be carried out by non licensed intermediaries
- **Lloyd's:** will continue to honour all their contractual commitments post-Brexit (statement on website & letter to all European Regulators)

– Recommendations for the insurance sector issued by on 19 February 2019



2. Contract continuity (Belgium)

- Draft Bill on Brexit of 19 February 2019 deposited in the Belgian Parliament
 - Delegation of powers to the federal government to grant transitional relief to financial service companies. The government will first seek advice from the Belgian Regulator (NBB and FSMA) and will then take the necessary measures to ensure and secure the continuity of agreements concluded between Insurers/insurance intermediaries and their clients in Belgium as these insurers will lose their passporting rights post Brexit.
 - Creation of new framework for “underwriting agents”



2. Contract continuity (Germany)

- German legislator passed Brexit-Bill (*Brexit-Steuerbegleitgesetz* – Brexit-StBG) on 21 February 2019
- Besides several other aspects, the German Brexit-Bill concerns service continuity for insurance and reinsurance contracts in Germany underwritten by UK risk carriers via FoS or FoE before Brexit
- Measure is designed to ensure that policyholders do not find that their claims not being paid under existing contracts after the UK leaves the European Union in what increasingly looks like a ‘hard’ Brexit with no deal agreed
- However, it expressly does not apply to new business



2. Contract continuity (Germany)

- German civil law perspective: Insurance contracts are effective even if they contradict German insurance supervisory law
- Effectiveness of the insurance contracts entered into in accordance with the current supervisory law will not be affected by Brexit
- Contracts need to be serviced and wind-up
- Unauthorized insurance business constitutes criminal offence (Section 331 para. 1 No. 1 Insurance Supervision Act, "**VAG**")
- New rule (Section 66a VAG):

If the withdrawal of the UK takes effect without a withdrawal agreement having entered into force by that date, the BaFin may order that for a transitional period of a maximum of 21 months UK insurers may carry on activities for the purposes of settling claims under contracts concluded up to Brexit

 - In case that BaFin will – based on the legislation – actually issue such temporary order UK insurers will be able to perform and wind-up contracts existing at the time of Brexit in Germany
 - Underwriting of new business is explicitly excluded

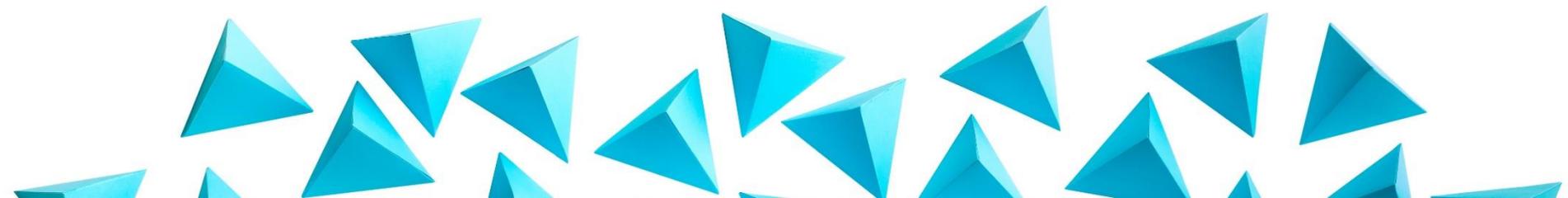
2. Contract continuity (Germany)

- Transitional period of 21 month is intended to be a settlement period – UK insurers will not be allowed to actively underwrite any new risk.
- German legislator has explained that it expects UK insurers to:
 - cancel and to fully “settle” the insurance contracts within 21 month transitional period, or (if this is not possible) to
 - continue the contracts by either obtaining a German license to conduct insurance business via a branch in Germany until the extension period has expired or by obtaining the necessary approval for a transfer of portfolio to an insurance undertaking which has a German or EU/EEA license
- German Brexit-Bill does not contain any provision in relation to insurance mediation post-Brexit and it is not anticipated to have any legislation in Germany on this matter
 - UK insurance intermediaries will no more be allowed to carry out any insurance mediation activity at the time Brexit becomes effective in Germany
 - establishment of new intermediaries (eg. Managing General Agencies, MGAs) can be authorized by the Chamber of Commerce and Industry (BaFin is not competent)
 - currently only authorisation but no ongoing supervision over insurance intermediaries in Germany

2. Contract continuity (France)

– Insurance undertakings

- **Ordinance** n° 2019-75 of **6 February 2019** related to financial services post-Brexit, issued in accordance with law n° 2019-30 of 30 January 2019 authorising the French government to legislate on post-Brexit issues
 - article 2 indirectly confirms that insurance contracts related to risks located in France entered into before Brexit by UK insurers remain valid and enforceable **but** states that such contracts cannot either be renewed or give rise to insurance transactions implying the issuance of new premiums
 - the contract unduly renewed or giving rise to new premiums will be void **though** this nullity cannot be opposed to policyholders and beneficiaries
 - question for contracts carrying long-lasting commitments (life insurance): French supervisor (ACPR) keen to see them rapidly transferred post-Brexit to authorised insurers
 - the ordinance does not apply to reinsurance: Brexit does not have any consequence for reinsurance transactions, since they can be freely carried out in France by any foreign reinsurer



2. Contract continuity (France)

– Insurance intermediaries

- The Ordinance of 6 February 2019 does not contain any provision in relation to insurance mediation post-Brexit and it is not anticipated to have any legislation in France on this matter; as a consequence, UK insurance intermediaries will no more be allowed to carry out any insurance mediation activity at the time Brexit becomes effective
- Judgment of the *Cour de Cassation* (French supreme court) on 24 October 2018
 - an insurance intermediary who is no more registered with the ORIAS can no more receive any commission **even** in relation to insurance contracts entered into before it is unlisted from the ORIAS register
 - the right to receive the commissions is not definitively lost, subject to being transferred to an authorised intermediary
 - though there is no clear legislation to comfort it, the ORIAS seems ready to register French branches of UK insurance intermediaries as French authorised intermediaries, subject to the fulfilment of the registration conditions (professional capacity and honourability of the branch managers, mandatory professional liability insurance and financial guarantee for intermediaries handling funds on behalf of insurers or insureds)



3. Risks for UK insurers and intermediaries operating into Europe

- Hard Brexit means loss of passporting rights
- Where to draw the line?

Insurance carriers

- UK insurers may no longer underwrite EEA risks or EEA insureds / policyholders (beneficiaries?)
- Transfer of the books to a EEA subsidiary or run-off

Insurance intermediaries

- « Insurance distribution » widely defined in IDD
- Various approaches from EEA regulators: driven by location of the services and/or the client and/or the risk
- Services to be provided by a EEA subsidiary => need to split the existing book



3. Risks for UK insurers and intermediaries operating into Europe

- Sanctions for carrying out regulated activities without permission vary from country to country

- **Belgium**

Administrative fine which can be up to EUR 5,000,000 or 10% of the “technical and financial products” of the previous year; criminal fine (EUR 80,000)

- **Germany**

Insurers – criminal sanctions – imprisonment up to 5 years and fine against responsible directors – further corporate fine against company in case of an intentional crime up to EUR 10 million / in the case of a negligent offence up to EUR 5 million

Intermediaries – administrative sanction – fine up to EUR 5,000 per infringement

- **France**

Criminal sanctions: imprisonment up to 3 years and fine up to EUR 375,000 (up to 2 years and up to EUR 30,000 for intermediaries)

Administrative sanctions: fine up to EUR 100,000,000



3. Risks for UK insurers and intermediaries operating into Europe

But what should you really worry about?

- New business for EEA clients
 - Yes: need to get this right
- Servicing existing business
 - Less of a concern if fulfilling existing contractual commitments
 - But different countries are adopting different approaches



3. Risks for UK insurers and intermediaries operating into Europe

A softening of EIOPA's stance?

December 2017

“Insurance contracts concluded before the withdrawal date by UK insurance undertakings are in principle valid after that date.

Without taking mitigating actions before the withdrawal, insurance undertakings will usually not be able to ensure the continuity of their services with regard to such cross-border insurance contracts, which may prevent them from fulfilling these contracts.”

3. Risks for UK insurers and intermediaries operating into Europe

February 2019

“Competent authorities should apply a legal framework or mechanism to facilitate the orderly run-off of business which became unauthorised.

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.”

4. What are the options for EEA incorporated financial institutions doing business with UK clients?

- UK proposals to allow business to continue without interruption
 - the temporary permissions regime
 - orderly run off
- And in the long term
 - carry on without any UK authorisation?
 - apply for UK authorisation?



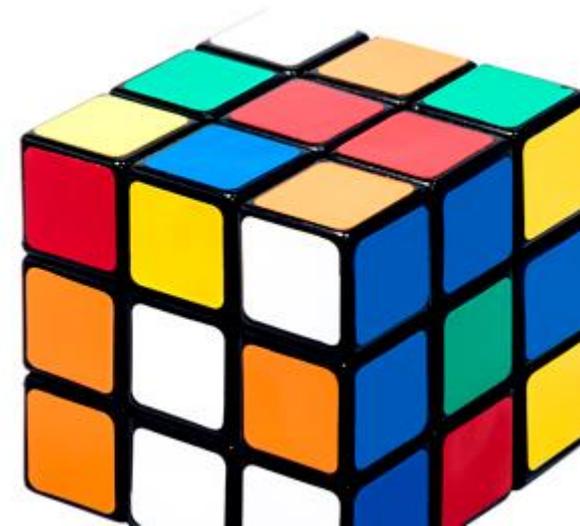
4. The temporary permission regime (TPR)

- If you have exercised passport rights into the UK
- And you register by 28/3/19
- You are given temporary authorisation to
 - continue the business for which you have passported
 - for up to 3 years
 - during which period you can apply for full authorisation
- A wider range of UK regulatory requirements may apply but
 - EU law/rules being implemented to UK law
 - Substituted compliance in many areas



4. The run-off regime

- Applies automatically to firms in run-off
 - can fulfil pre-existing contractual obligations
 - but no new businesses
- Branch = supervised run-off
- Freedom of services = contractual run-off
- Period: 5 years (15 for insurance)



4. Carrying on without UK authorisation – 2 possibilities

- Not carried on in the UK eg
 - effecting and carrying out insurance
 - arranging insurance
- Rely on an exemption
 - no help to insurers
 - but for intermediaries, the overseas person exclusion



4. Applying for authorisation

- Firms in TPR will be given a “landing slot”
 - not yet clear whether there will be easier/quicker process
- Branch or subsidiary?
- All firms will need
 - UK presence
 - well considered and realistic business plan
 - adequate resources
 - competent management



5. What happens next - best and worst case scenarios

A new deal?

“The Parties agree that close and structured cooperation on regulatory and supervisory matters is in their mutual interest. This cooperation should be grounded in the economic partnership and based on the principles of regulatory autonomy, transparency and stability. It should include transparency and appropriate consultation...information exchange and consultation on regulatory initiatives and other issues of mutual interest.”

Source: Political Declaration attached to Withdrawal Agreement

5. Equivalence and the insurance sector

- Not asking for passport rights or anything similar
- No special deal
- Reliance on equivalence only
- Solvency II
 - reinsurance
 - solvency assessment
 - group supervision
- IDD
 - precisely nothing
- So need enhancement of existing regimes



5. Enhanced or extended equivalence?

“The UK and the EU have committed to keeping their financial services equivalence frameworks under review. The UK and the EU have also agreed that it would be in the interests of both sides to have a close and structured approach to the regulation and supervision of their financial services sectors...This cooperation will [provide] industry with greater predictability around the adoption and withdrawal of equivalence decisions.”

Source: UK government Explainer for the Political Declaration

5. What happens next - best and worst case scenarios

WTO (“Understanding on Commitments in Financial Services”)

Each Member shall permit non-resident suppliers of financial services to supply, as a principal, through an intermediary or as an intermediary, and under terms and conditions that accord national treatment, the following services:

(a) insurance of risks relating to:

- (i) maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods and any liability arising therefrom; and
- (ii) goods in international transit;

(b) reinsurance and retrocession



5. What happens next - best and worst case scenarios

Example (not a generality!): Belgium: they must first their intention to the National Bank of Belgium.

The notification contains a file with the following information:

- address of the seat from which the activity will be carried on;
- a declaration from the home country regulator confirming that:
 - the insurer has sufficient solvency to carry on these activities;
 - the insurer has a proper license in the home country to carry on these activities;
 - there is no objection to the performance in Belgium of the planned activities;
- details on the risks to be covered and features of the insurance products and (if applicable) the general and special terms and conditions of any mandatory insurance.
- The insurer may start its activities as from the moment the National Bank of Belgium confirms that the file is complete. In the absence of reaction within 2 months, the insurer may start its activities. Any amendment to the information contained in the file must be notified to the National Bank of Belgium.

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