

Brexit: contingency planning
questions for EU/EEA insurers





Checklist

☐ **Cross-border business**

Do we currently do business in the UK (using the 'insurance single passport'):

- on an 'establishment basis', through a UK branch; or
- on a cross-border services basis?

☐ **Staff**

Are any of our staff (whether based in the UK or elsewhere in the EU/EEA) currently utilising the free movement of persons regime?

☐ **Data**

Do we process personal data in the UK and the EU/EEA?

☐ **Distribution arrangements**

Will any of our existing UK distribution arrangements be impacted by Brexit?

☐ **Existing key commercial contracts (distribution, outsourcing, IP licensing, IT and financing agreements, standard terms and conditions)**

Apart from the impact of a non-continuation of passporting rights for the UK, are any of our existing key commercial contracts that relate (or are capable of relating), in whole or in part, to business involving the UK market likely to be affected by Brexit?

☐ **Future key commercial contracts/arrangements**

How might Brexit affect key commercial contracts/arrangements that we enter into over the next two years?

☐ **Intellectual property**

Do we protect our brand in the UK by means of European Union trade marks (ie the single unitary trade mark registration system covering the whole of the EU)?

☐ **Market volatility**

What impact would market volatility have on our business?

☐ **Credit ratings**

Could Brexit result in a downgrade of our credit rating? If so, what contractual consequences might there be?

What impact could Brexit have on the credit ratings of our counterparties and our risk exposures to them?

☐ **Joint venture arrangements**

Will any existing joint venture arrangements we may have that involve the UK market be impacted by Brexit?

☐ **Products**

Will we need to make any alterations to our product wordings in connection with Brexit?

☐ **Prudential regulation and reporting**

What Brexit-related issues may arise for us in this area?

☐ **Communications**

What (if any) Brexit-related communications strategy should we have?

☐ **Transfers of underwriting portfolios**

Are we anticipating any transfer of underwriting portfolios (whether intra-group or to or from a third party)?

☐ **Outwards insurance policies: unexpected Brexit-related liabilities**

Might unexpected potential liabilities arise if as a result of Brexit we fail to meet any of our obligations under the insurance policies we have written?

☐ **Opportunities**

Will Brexit create additional business opportunities?



Brexit: contingency planning questions for EU/EEA insurers

If the UK votes to leave the EU in the referendum that is being held on 23 June 2016 to decide whether Britain should remain in or leave the European Union, contingency planning by EU/EEA insurers to address the issues that Brexit poses to their businesses will become a reality. This document – which contemplates the scenario of the UK having voted to leave and is drafted accordingly – contains a list of some key questions that EU/EEA insurers should be asking as they progress their plans to identify and address these issues.

Key

cEU: the continuing European Union (after the UK leaves)

EEA: the European Economic Area

EU: the European Union

EU/EEA insurer: an insurance company established and authorised in an EU member state (other than the UK) or in Norway, Iceland or Liechtenstein

UK branch: a branch in the UK of an EU/EEA insurer

UK insurer: an insurance company established and authorised in the UK



☐ Cross-border business

Do we currently do business in the UK (using the ‘insurance single passport’):

- on an ‘establishment basis’, through a UK branch; or
- on a cross-border services basis?

It will be some time before the basis on which UK insurers will be able to do business in the cEU/EEA (and on which cEU/EEA insurers will be able to do business in the UK) following Brexit becomes known, since the position on this issue will depend on the negotiations that will take place (over a period of perhaps as few as two years but quite possibly as many as five or more) between the UK and the EU concerning their future relationship.

It is possible (albeit perhaps unlikely) that a future regime could effectively retain the ‘insurance single passport’ as between the UK and the cEU/EEA, such that UK insurers and cEU/EEA insurers would be able to continue to maintain branches and provide services in the other’s territory on the basis of their ‘home’ authorisation.

Another possibility is a ‘grandfathering’ arrangement, under which cross-border trading arrangements that were in place on or before the date of the arrangement could continue to be operated for a period of time after that date. (An arrangement of this nature might be used if, for example, an ‘Article 50’¹ agreement for the UK’s withdrawal from the EU were entered into before a separate agreement between the UK and the cEU providing for their future relationship).

Possible actions

- Pending clarity on these issues, consider the UK licensing requirements that would apply in order to continue doing business in or into the UK if the future relationship between the UK and the cEU does not provide for the continuation of insurance passporting rights:

- If you currently have a branch in the UK then in order to continue to write UK business you will need to either:
 - obtain UK authorisation for the UK branch; or
 - establish a UK subsidiary (with its own regulatory capital); or
 - acquire an existing UK insurance company
- If you currently write risks situated in the UK from the EU/EEA on a cross-border services basis then you may be able to continue to write such risks without establishing a UK-authorised branch or subsidiary; you may however wish to take UK legal advice to confirm the position with respect to the specific circumstances of your business
- Assess the viability of such options (including through M&A activity) and any others (including, for example, fronting arrangements with UK-authorised third party insurers) and make plans accordingly – including, as may be applicable, identifying any changes to your strategy/business model and appropriate mechanisms (sale of renewal rights, transfer/reinsurance of existing portfolios etc.) through which to exit UK business
- Plan for execution of any restructuring plans well within the two year (or any extended) ‘Article 50 period’², in view of the length of time it will take to obtain any relevant regulatory approvals

(For a commentary on the implications of Brexit for cross-border insurance business transfers, see the ‘Transfer of underwriting portfolios’ section below)

¹ Article 50 of the Treaty on European Union

² Pursuant to the terms of Article 50 TEU, the UK will automatically leave the EU two years after giving notice of intention to withdraw from the EU unless, by the end of that period, an agreement on the terms of the withdrawal has been concluded or the other 27 member states have unanimously agreed to an extension of the period to negotiate the withdrawal



☐ Staff

Are any of our staff (whether based in the UK or elsewhere in the EU/EEA) currently utilising the free movement of persons regime?

Action

If so, identify the members of staff concerned and consider:

- How any changes to the work permit system and other employment laws might affect, post-Brexit, the ability of staff who are UK citizens to work in the cEU/EEA, or of cEU/EEA citizens to work in the UK, or result in increased employment costs; and
- How any structural changes to secure ongoing access to the UK market might affect the location of senior management and other staff

Note also that employers of UK-located staff will need to keep abreast of any post-Brexit changes in UK employment law. In particular, the more onerous and less popular regulations may be repealed. These could include the collective consultation requirements (collective redundancy, TUPE and consultation under the Information and Consultation Regulations) and the Working Time Regulations, allowing employers to set working hours that may be more suited to their business.

☐ Data

Do we process personal data in the UK and the EU/EEA?

Currently, the UK has in place the Data Protection Act 1998, which is the UK's implementation of the 1995 European Data Protection Directive. The Data Protection Act 1998 is due to be replaced in its entirety by the new EU General Data Protection Regulation, which will come into direct force in all EEA countries in May 2018 and will create much stricter rules around how personal data is processed in the context of the EEA.

Following the referendum (in the event of a vote to leave), the current Data Protection Act 1998 will continue to apply until the UK amends its legal framework to take account of Brexit. This may result in dual UK/EEA regulation of data processing, depending upon the form Brexit takes.

Action

- Keep a watching brief on how matters develop as regards the UK's and EU's data protection regimes
- Different rules may apply to how you process data in the UK and the rest of the cEU/EEA following Brexit
- In particular, data transfers between the UK and the cEU/EEA may be more difficult following Brexit, whether that be intra-group or third party data transfers



☐ Distribution arrangements

Will any of our existing UK distribution arrangements be impacted by Brexit?

Action

Review your distribution arrangements to confirm whether you are currently receiving product distribution/administration services from a third party who provides its services using the EU passporting regime (whether by way of a UK branch if the third party is an EU/EEA firm or an EU/EEA branch if the third party is a UK firm).

If there are any instances of this scenario then alternative solutions may need to be found, depending on whether or not the relevant service provider intends to maintain the necessary authorisations post-Brexit.

☐ Existing key commercial contracts

(distribution, outsourcing, IP licensing, IT and financing agreements, standard terms and conditions)

Apart from the impact of a non-continuation of passporting rights for the UK, are any of our existing key commercial contracts that relate (or are capable of relating), in whole or in part, to business involving the UK market likely to be affected by Brexit?

Action

Provisions in any contracts falling into this category that deal with a number of matters could be reviewed to assess how Brexit might affect the rights and obligations imposed by the provisions and whether amendments may be necessary or desirable (if they are possible), including those regarding:

- Territorial scope (with respect to distribution obligations and non-competition clauses, for example)
- References to European laws, legal concepts, matters driven by EU legislation or UK laws implemented pursuant to EU Directives
- Regulatory reporting and compliance with other regulatory obligations
- Compliance with applicable laws (and meeting the cost of such compliance)
- Data protection
- Financial condition
- Termination (including any material adverse change clauses)
- Force majeure
- Law and jurisdiction



☐ Future key commercial contracts/arrangements

How might Brexit affect key commercial contracts/arrangements that we enter into over the next two years³?

Action

Key commercial contracts/arrangements entered into within the two year (or any extended) 'Article 50 period' will need to be drawn up taking into account the possibility that an 'Article 50 agreement' for the UK's withdrawal from the EU may be entered into before a separate agreement between the UK and the cEU providing for their future relationship.

In addition, consider how Brexit may impact the drafting of the provisions listed in the 'Existing key commercial contracts' section above.'

☐ Intellectual property

Do we protect our brand in the UK by means of European Union trade marks (ie the single unitary trade mark registration system covering the whole of the EU)?

Action

If so, consider whether separate UK trade mark registrations will be needed following Brexit in order to secure continued protection for your brands in the UK.

³ Or any extended 'Article 50 period' as referred to in footnote 2 above



☐ Market volatility

What impact would market volatility have on our business?

Action

Although issues of market volatility are likely to be of more significance for UK insurers than EU/EEA insurers, EU/EEA insurers who do UK business may nevertheless wish to consider:

- The extent to which volatility in the foreign exchange, equity and loan markets and its possible effects on their liquidity, investments and solvency position (as well as any applicable credit ratings – as to which, see the 'Credit Ratings' section below) are already factored into their existing capital/solvency modelling
- How those possible effects might be mitigated (bearing in mind that market volatility may make it difficult for additional capital to be raised)

☐ Credit ratings

Could Brexit result in a downgrade of our credit rating?
If so, what contractual consequences might there be?

What impact could Brexit have on the credit ratings of our counterparties and our risk exposures to them?

Action

Review all relevant contracts to determine whether a downgrade of your credit rating would trigger adverse consequences (eg default under a loan agreement or credit facility) and, if it would (or might), consider what mitigating steps you may be able to take / alternative arrangements you may be able to make.

Identify options for mitigating any increased counterparty risk you may perceive (including assessing the possibility of termination of any contracts that may present an unacceptable risk).



☐ Joint venture arrangements

Will any existing joint venture arrangements we may have that involve the UK market be impacted by Brexit?

Action

Review the contracts for any joint venture arrangements of this kind in order to determine what impact Brexit may have on the arrangements and identify any issues that may make necessary or desirable any amendments to the relevant contracts/arrangements.

(See also the 'Existing key commercial contracts' section above)

☐ Products

Will we need to make any alterations to our policy wordings in connection with Brexit?

Action

Alterations may be needed to policy wordings for products that provide cover to UK policyholders or cover in respect of risks situated in the UK (or in respect of which any laws of the UK may have some relevance to the scope of cover provided).

How extensive such alterations may need to be will depend on the product, the nature of the future relationship between the UK and the cEU and the extent of associated changes to English law in the years ahead. Among the provisions that may need to be altered are any relating to territorial scope (eg a definition of the EU) and, possibly, jurisdiction clauses.



☐ Prudential regulation and reporting

What Brexit-related issues may arise for us in this area?

It must be highly likely that, following Brexit, the UK will maintain a Solvency II-based system (Solvency II itself being heavily based on the UK's previous risk-based regime). If this is the case and if the future relationship between the UK and the cEU does not provide for the continuation of insurance passporting rights, it is likely that the UK system will be assessed by the cEU as "equivalent" for the purposes of Solvency II (ie as regards the treatment of reinsurance, the calculation of group solvency and group supervision).

In the unlikely event of the UK system diverging from Solvency II, or of the UK maintaining a Solvency II-based system but not obtaining a grant of full equivalence for that system from the cEU, Europe-wide groups headquartered in the cEU/EEA that include a UK subsidiary or a UK branch of a cEU/EEA insurer might become subject to 'double supervision' under both the UK regime and Solvency II.

Action

Take into account as may be necessary:

- Additional information in respect of UK branches of EU/EEA insurers being required by 'home state' EU/EEA regulators; and
- As may be relevant to your contingency planning (if, for example, you propose to establish or acquire a UK insurer), increased demands on the UK regulators impacting on their speed of response to requests for approvals (eg to new authorisations or changes in control) and rule waivers/modifications

☐ Communications

What (if any) Brexit-related communications strategy should we have?

Action

Depending on the nature of your business (eg long term, investment-related or general insurance) and the extent of your involvement in the UK market, consider the development of an appropriate communications strategy for all or any of the following:

- UK policyholders (to mitigate the risk of policy surrenders or non-renewals);
- UK agents/distributors;
- Reinsurers;
- Any other key business counterparties



☐ Transfers of underwriting portfolios

Are we anticipating any transfer of underwriting portfolios (whether intra-group or to or from a third party)?

A likely consequence of a non-continuation of passporting rights for the UK would be the loss of automatic mutual recognition (as between the UK and the cEU/EEA) of insurance business transfers sanctioned by UK or cEU/EEA courts or regulators, potentially making the process of reorganising books of insurance business located in insurance companies and their branches in the UK and the cEU/EEA considerably more complex (through a need for multiple applications to courts or regulators) or perhaps, in some cases, impossible.

Action

Review any such project to determine whether it is envisaged that either:

- An insurance business transfer sanctioned by a UK court; or
- An insurance business transfer sanctioned by an EU/EEA court or regulator that would involve a requirement to consult with and/or obtain any certificate or consent from the UK regulator

should be utilised in order to transfer the book of business concerned. If this is the case, consider accelerating the project in order for it to be completed before Brexit occurs.

☐ Outwards insurance policies: unexpected Brexit-related liabilities

Might unexpected potential liabilities arise if as a result of Brexit we fail to meet any of our obligations under the insurance policies we have written?

Action

Consider on a product-line-by-product-line basis whether there is scope for any such unexpected potential liabilities to arise.

If any such potential liabilities are identified:

- Consider the extent to which recovery may be made in respect of them under your reinsurance protections;
- Consider making changes to the scope of cover provided under the products concerned

(See also the 'Products' section above)



☐ Opportunities

Will Brexit create additional business opportunities?

Action

Each line/unit of business should keep in mind any potential opportunities for new/amended products or relationships with distributors/reinsurers that Brexit may create.



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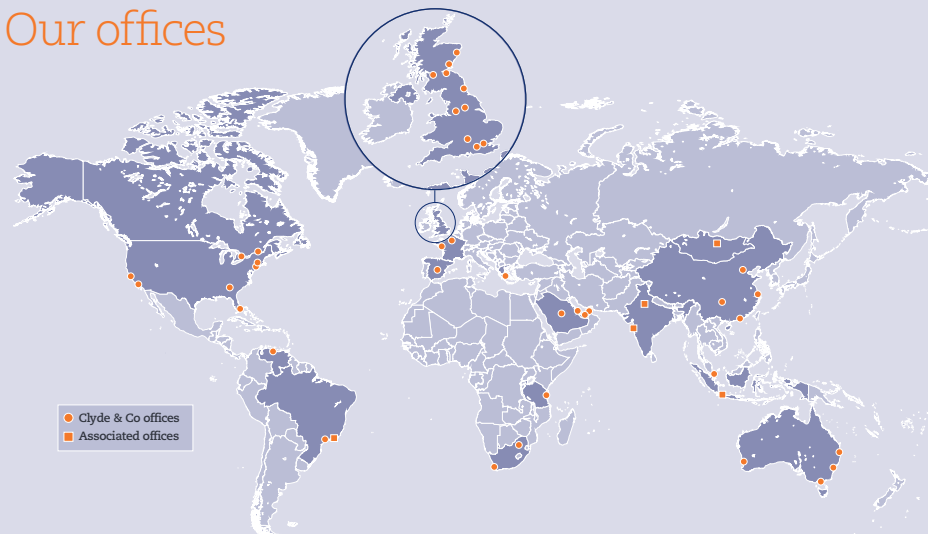
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