Brexit: a legal analysis of the impact on European insurers' operations

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Abstract

As a result of the referendum organised on 23 June 2016, the United Kingdom will leave the European Union at a date and under modalities which are yet to be determined. The consequences of what is now referred to as "Brexit" are difficult to apprehend, especially in relation to insurers operating on a cross-border basis either from or to the United Kingdom. This article provides a preliminary analysis of the legal consequences of Brexit, including the potentially long-lasting uncertainty resulting from the United Kingdom leaving the European Union, and attempts to identify potential options for insurers.

1 Introduction

Following the results of the referendum of 23 June 2016, it appears most likely that the United Kingdom (UK) will leave the European Union. While much has been written about the potential macro-economic consequences of what we refer to as Brexit, a lot of uncertainty remains on the practical impact for insurers.

For the purpose of this article, Brexit will refer to the process whereby the UK makes a request under article 50 of the Treaty on European Union to withdraw from the EU.

Brexit will have a certain impact on the ability for insurers and reinsurers to use the "EU passport", i.e. the possibility offered by European Union (EU) law to an insurer established and authorised in one Member State to conduct business across the European Economic Area (EEA) without obtaining additional authorisation from the Member State in which the risk is being insured.

Data provided by the UK Prudential Regulatory Authority indicates that nearly 500 insurers established in the UK currently use the EU Passport to conduct insurance business in the EEA. Figures provided by the French supervisor (*Autorité de contrôle prudentiel et de resolution – ACPR*) indicate that, at the time of writing, 216 insurers established in the UK have notified their intention to conduct business in France on a freedom to provide services basis.

The mechanism of the EU passport entails that pending the negotiation and agreement of a new legal framework, insurers conducting business on such basis from or to the UK will need to consider carefully the impact on their current and future operations. This article focuses specifically on the insurance passport, as the position for reinsurers may be less complex.

2 Conducting cross-border business in the EEA under the EU passport

2.1 An implementation of the fundamental right of establishment and freedom to provide services

The current legal framework applying to the EU passport constitutes the implementation of the fundamental right of establishment and of the freedom to provide services found under Title IV of the Treaty on the Functioning of the European Union (TFEU)[1]. The Court of Justice of the European Union (CJEU) recognised the ability for individuals to invoke the right of establishment in front of national jurisdictions[2] and the direct applicability of the freedom to provide services[3] long before the adoption of the first EU insurance directives.

Case C-205/84 *Commission of the European Communities v Federal Republic of Germany* is of particular interest as it relates specifically to the ability of an insurer established in one Member State to write risks in another without the need to obtain authorisation and set-up a permanent establishment, as was required by Germany.

In its judgement, the CJEU reminded that "*the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which are justified by the general good and which are applied to all persons or undertakings operating within the territory of the State in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment*".

The CJEU concluded that Germany's requirement that an insurer authorised and supervised in another Member State create a permanent establishment and obtain authorisation was incompatible with the Treaty.

This context is important to understand the legal standing of what is commonly referred to as the EU passport, which constitutes an implementation of the fundamental freedom to provide services to the specific sector of insurance.

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[1] Title IV *Free movement of persons, services and capital.*
[2] Case C-2/74 *Reyners* [1974] ECR 631
[3] Case C-33/74 *Van Binsbergen* [1974] ECR 1299 and later, specifically on insurance, Case C-205/84 *Commission of the European Communities v Federal Republic of Germany* ECR 3755

2.2 Key features of the EU passport

The EU passport as we know it today is the result of five "generations" of secondary acts marking the construction of the single insurance market, starting in the 1970s and now consolidated in the Solvency II Directive[4].

2.2.1 Basic principles of the EU passport

The principle of the EU passport is that an insurer established, authorised and supervised in an EU Member State or a state party to the EEA[5] may carry on its insurance business in all other Member States without having to obtain additional authorisation in such each of those Member States.

As such, it will only be subject to the prudential supervision of the Member State in which it is authorised, referred to as the *home Member State*[6].

2.2.2 The host Member State and the location of risk

The State in which the insurer is conducting its business is referred to as the *host Member State* and is defined by Article 13 of the Solvency II Directive[7]:

> *'host Member State' means the Member State, other than the home Member State, in which an insurance or a reinsurance undertaking has a branch or provides services; for life and non-life insurance, the Member State of the provisions of services means, respectively, the Member State of the commitment or the Member State in which the risk is situated, where that commitment or risk is covered by an insurance undertaking or a branch situated in another Member State;*

It results from the above that for life assurance, the criterion is the Member State of the commitment, i.e. the Member State where the policyholder has his or her habitual residence, or if the policyholder is a legal person, the Member State where the relevant establishment is situated[8].

For non-life insurance, the criteria depend on the class of insured risk[9]:

(a) the Member State in which the property is situated, where the insurance relates either to buildings or to buildings and their contents, in so far as the contents are covered by the same insurance policy;

(b) the Member State of registration, where the insurance relates to vehicles of any type;

(c) the Member State where the policyholder took out the policy in the case of policies of a duration of four months or less covering travel or holiday risks, whatever the class concerned;

(d) in all cases not explicitly covered by points (a), (b) or (c), the Member State in which either of the following is situated:

    (i) the habitual residence of the policyholder; or

[4] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
[5] For ease of read, the term "Member State" will include all states which are party to the EEA
[6] Article 13 paragraph 8) of the Solvency II Directive
[7] Article 13 paragraph 9) of the Solvency II Directive
[8] Article 13 paragraph 14) of the Solvency II Directive
[9] Article 13 paragraph 13) of the Solvency II Directive

(ii) if the policyholder is a legal person, that policyholder's establishment to which the contract relates.

In summary, whenever an insurer insures a risk located in another Member State, it will fall within the scope of the EU passport.

It is not within the scope of this paper to provide an extensive analysis of the concept of location of risk, nevertheless it is useful to note that this can include a variety of practical scenarios, including the following examples:

- An insurer established in Member State A is offering a home insurance contract to persons who are habitual residents in Member State B for their main residence.
- An insurer established in Member State A is offering a home insurance contract to persons who are habitual residents in its own Member State, with the ability also to insure their secondary residence in Member State B. The insurance of such secondary residence falls within the scope of the EU passport.
- An insurer established in Member State A insures a company whose head office is established in Member State A, as well as subsidiaries in Member States B and C as part of an international programme. It also insures the subsidiary located in Member State D, which however benefits from the cover of a local policy – for this subsidiary, the insurer's cover is on a *difference in conditions* and *difference in limits* basis. The insurer's cover provided in Member States B, C and D all fall within the scope of the EU passport.

2.2.3 The notification process

Any insurer which intends to establish a branch in another Member State or proposes to conduct business in such Member State under the freedom to provide services must first notify its home Member State supervisor[10].

(a) The filing of the request

The Solvency II Directive provides minimum requirements for the notification process.

For the right of establishment, the information to be provided must include the Member State in which the insurer proposes to conduct business, a scheme of operations including the type of business and structural organisation of the branch, the name of the person who can bind the insurer and an address for communication – also referred to as the authorised agent. Unless the home Member State supervisor has reasons to doubt the adequacy of the system of governance or the financial situation of the insurer or the compliance of the authorised agent with the fit and proper requirements, it must (ii) communicate the notification to the supervisor of the envisaged host Member State within three months of receiving such notification[11] and (ii) attest that the insurer covers the Solvency Capital Requirement and the Minimum Capital Requirement[12].

[10] Articles 145 (right of establishment) and 147 (freedom to provide services) of the Solvency II Directive
[11] Article 146 par. 1 of the Solvency II Directive
[12] As defined respectively under articles 100 and 129 of the Solvency II Directive

The requirements for the freedom to provide services are, perhaps surprisingly, lighter and only require the insurer to indicate the nature of the risks it proposes to cover. The home Member State supervisor then has one month to communicate the notification to the host Member State supervisor, while also attesting that the insurer covers the Solvency Capital Requirement and the Minimum Capital Requirement.

The insurer may start conducting business in the host Member State once it has been informed of the communication of its notification to the host Member State supervisor.

(b) The process is not an authorisation request but refusal is possible

While the process is not an authorisation requirement but merely a notification, the distinction is rather theoretical. First, the Solvency II Directive itself provides that the home Member State supervisor may refuse to notify the request to the host Member State supervisor, thus preventing the insurer from benefiting from the EU passport. Such a refusal must "*be subject to a right to apply to the courts in the home Member State*"[13].

Most importantly, several Member States impose additional requirements on insurers. Such requirements stem both from legislation and from the practice of the supervisor.

The Prudential Regulatory Authority in the UK requires[14], for instance, UK insurers intending to establish a branch in the EEA to fill in a fairly detailed questionnaire which includes in essence the business plan for the first three years of operation, the bases of premium rates and mathematical reserves calculation, reinsurance, agreements with intermediaries etc.

The French ACPR as issued an *instruction*[15], requiring *inter alia* a note detailing the internal governance relating to the proposed activity, including internal controls (specific procedures and processes) and a description of internal responsibilities in charge of managing the proposed activity, as well as a three-year detailed business plan. In practice, the ACPR will want to ascertain that the insurer's business plan for the branch or freedom of services business activity is sound and complies with their duty to protect policyholders, insureds and beneficiaries. The process is not trivial and subsidiaries of large and solvent international groups have been faced with refusals.

(c) EU passport is limited to prudential supervision

Once the notification process is done, insurers will still face a rather complex set of constrains. In particular, the law applicable to the insurance contracts will be determined in accordance with the Rome I Regulation[16] and in particular with its article 7. They will also be subject, *inter alia*, to the

[13] Article 146 par. 2 (right of establishment) and article 148 par. 3. (freedom to provide services) of the Solvency II Directive
[14] Branch Notification Form available at http://www.bankofengland.co.uk/pra/Documents/authorisations/passporting/branchnotificationform.pdf
[15] Instruction n° 2015-I-16 relative aux documents à produire dans le cadre de l'exercice d'une activité d'assurance dans autre Etat de l'EEE
[16] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) – not applicable to Denmark.

host Member State's conduct of business rules, general good provisions[17] and mandatory provisions of local law[18].

3 The impact of Brexit on cross-border business

3.1 The probable end of the current EU passport

3.1.1 The impact of Brexit on the *acquis communautaire*

It is now a well-documented fact that article 50 of the Treaty on European Union provides very limited indications as to the legal consequences of leaving the EU. In essence, this is a two-step process: the withdrawal phase, followed by the negotiation of a new relationship between the UK on the one hand and the EU and/or each of the 27 Member States on the other hand.

If the UK gives notice of its intention to withdraw from the EU, the UK will automatically leave two years later unless by the end of that period (i) an agreement on the terms of the withdrawal has been concluded or (ii) the other 27 member states have unanimously agreed to an extension of the period to negotiate the withdrawal.

In the meantime, the UK will continue to be a Member State of the EU with the full benefits and responsibilities of EU membership (except that it will not be entitled to participate on the EU side of the discussions and decisions about its withdrawal).

However, once the withdrawal is effective, the UK will cease to be a member of the EU and so will the EU passport to and from the UK.

3.1.2 The consequences for the EU passport

Indeed, as seen above, the EU passport is the sector-specific implementation of the fundamental freedom to provide services found under Title IV of the TFEU. Article 50 of the Treaty on European Union provides that the Treaties shall cease to apply from the date on which the withdrawal is effective. The EU passport, in its current form, will therefore cease on such date.

While other options may well be negotiated, including potentially grandfathering provisions for existing books of business, the end of the EU passport is the current default situation in case of Brexit.

The foreseeable consequences are therefore as follows:

(a) For insurers established and authorised in the UK and conducting insurance business in the EEA via branches or on a freedom to provide services basis:

  (i) Obtain authorisation of the EEA branches, or set up branches, in each Member State pursuant to article 162 of the Solvency II Directive. The process is more complex than setting up a branch under the EU passport as it includes the obligation to

[17] Article 180 of the Solvency II Directiv, see also the *Interpretative communication of the Commission concerning the freedom to provide services and the general good of the insurance sector*, OJ C 83, 16 February 2000, p. 5

[18] Such as the mandatory insurance of terrorism risk in property insurance cover pursuant to article L. 126-2 of the French Insurance Code

submit an extensive scheme of operations[19], to cover the branch's Solvency Capital Requirement, to hold assets of an amount equal to at least one half of the absolute floor of the Minimum Capital Requirement and to deposit one fourth of that absolute floor as security. Furthermore, such branches would not benefit from the EU passport, which entails following the process in each Member State.

(ii) Set up or acquire a subsidiary within the EEA which would benefit from the EU passport. This is likely to be the preferred solution for insurers which require the ability to write business across the EEA on one single balance sheet.

(b) For insurers established and authorised in the EEA and conducting insurance business in the UK via a branch or on a freedom to provide services basis:

(i) Obtain authorisation for the branch. It may be possible to conduct some business on a cross-border basis without obtaining prior authorisation, provided there is no permanent establishment in the UK.

(ii) Set-up or acquire a subsidiary in the UK.

3.2 New passport notifications to and from the UK may be impacted

As seen above, there is a high level of uncertainty surrounding the post-Brexit environment for insurers and reinsurers. One of such uncertainties is timing.

On the one hand, the UK government has not yet provided certainty as to when notice under article 50 of the Treaty on European Union will occur, with some suggesting that it may take some time or actually never happen. Much of the arguments in favour of delaying the notice seem to be based on the assumption that the article 50 of the Treaty on European Union notice alone may trigger the end of the EU passport and that until such time as the notice is given, there will be no impact on the EU passport.

However, this assumption may be challenged both from a legal and from a practical point of view.

From a legal standpoint, "*the main objective of* [EU] *insurance and reinsurance regulation and supervision is the adequate protection of policyholders and beneficiaries*"[20].

This is set out under Article 27 of the Solvency II Directive which provides:

> *"Main objective of supervision*
>
> *Member States shall ensure that the supervisory authorities are provided with the necessary means, and have the relevant expertise, capacity, and mandate to achieve the main objective of supervision, namely the protection of policy holders and beneficiaries."*

Indeed, EU legislation provides a harmonised legal framework for the prudential supervision of insurers which is a prerequisite for the mutual

[19] Article 163 of the Solvency II Directive
[20] Recital (16) of the Solvency II Directive

recognition mechanism that underpins the EU passport. In other words, the Solvency II Directive aims at ensuring that a person taking an insurance contract in Member State A with an insurer established in Member State B can rely on the fact that the insurer of Member State B is subject to a prudential supervision regime at least equivalent to those of his/her/its home Member State A.

This is also why Member States are expected to allow insurers authorised in their jurisdiction to conduct business in other Member States only if they are confident that this will not breach the duty they owe to the policyholders and beneficiaries of the host Member State. As seen above, most Member States (including the PRA in the UK and the ACPR in France) will require an insurance company going through the EU passport notification process to provide a three-year business plan and generally to prove that the business they will conduct on a cross-border basis is viable and does not jeopardise the interests of policyholders and beneficiaries in the host Member State. In practice, one key concern of supervisors when allowing one of their supervised entities to offer its products on a cross-border basis is to ensure that such an undertaking is fully integrated in the insurer's strategy, risk-management policy and that all the necessary means have been allocated to ensure the viability of the operation. One recurring concern is to avoid the insurer pulling out after several years, having to run off its business and/or deciding to transfer it to another insurer.

What we understand from informal discussions at this stage is that the uncertainty surrounding the post-Brexit situation is seen as a real risk to the viability of cross-border business by supervisors. While reflections are still at an early stage, the reasoning would be that it is not possible for insurers to anticipate (i) if they can continue to write new business once the UK has left the EU and (ii) whether they can manage the run-off in an acceptable manner, if at all. This is especially the case for long risks, such as liability insurance or life assurance.

Translating this concern into a legal reasoning, some supervisors may consider that they would be breaching their duty to the host Member State's policyholders and beneficiaries by allowing insurers to start conducting business in the UK under the EU passport as there is too much uncertainty as to their ability to anticipate and manage the consequences of Brexit on such business.

Such reasoning could equally apply to the PRA for notification requests made by UK insurers.

On the other hand, faced with a refusal by their supervisors, insurers seeking to conduct business to or from the UK on a cross-border basis could challenge its legal soundness. It could indeed be argued that the result of the 23 June referendum is not legally binding and as a sovereign democratic Member State, it is for the UK's institutions to decide if and when it will go ahead with the notification under article 50 of the Treaty on European Union. In the meantime, insurers can benefit from the fundamental freedoms and therefore from the EU passport.

3.3 The question of equivalence

It is likely that the UK, having fully transposed the Solvency II Directive, should benefit from full equivalence under articles 172 and 227 of the Solvency II Directive, subject to any changes that may intervene in the current UK solvency regime. Indeed, if the UK was to modify its current regime in a manner that makes it depart significantly from Solvency II or, more generally, incompatible with the convergence with the International Association of Insurance Supervisors' (IAIS) International Capital Standard[21].

Insurers and reinsurers are global actors, which needs to be reflected in regulation. The Solvency II Directive caters for this need at least partly through the concept of equivalence. Following an assessment of a third country's prudential supervision regime, it may be treated as equivalent to Solvency II under certain circumstances briefly summarised below. Nevertheless, while equivalence for reinsurers does entail the right to be treated as an EEA reinsurer for prudential supervision purposes, this is not the case for insurers: equivalence will reduce the burden of dealing with different prudential supervision regimes for international groups, but will not allow full access to the EEA insurance market in the way the EU passport does.

As such, a UK insurer having subsidiaries in the EEA will, under certain circumstances, be subject to simpler rules with regards to prudential supervision once the UK is granted equivalence. Nevertheless, such equivalence does not grant *per se* the right for this UK insurer to write business across the EEA without obtaining authorisation in each Member State where it intends to conduct business.

Equivalence under Solvency II - Summary

There are three distinct sections of the Solvency II Directive which deal with equivalence:

Reinsurance[22]: If the third country's prudential supervision regime is deemed equivalent, reinsurers from such country must be treated by EEA supervisors in the same way as EEA reinsurers.

Solvency calculation[23]: equivalence of the third country's prudential supervision framework will allow EEA insurance groups having subsidiaries in the equivalent country to use such country's rules relating to solvency capital requirements rather than the Solvency II rules.

Group supervision[24]: for an insurer established in third countries with one or several subsidiaries in the EEA, equivalence granted to such third country will enable EEA supervisors, under certain conditions, to rely on the group supervision exercised by the third country.

3.4 Brexit as an operational risk

From an operational point of view, insurers on both sides of the Channel are beginning to assess their options. It is arguably their legal obligation to do

[21] The International Capital Standard (ICS) are developed by the IAIS and aim at developing a risk-based, global insurance capital standard (ICS). Once adopted, the ICS will apply to internationally active insurance groups (IAIGs) as part of the IAIS' common framework for the supervision of IAIGs, or ComFrame – the document entitled *The IAIS Risk-based Global Insurance Capital Standard (ICS): Ultimate and Interim Goals, Principles for Development and Delivery Process* is available at file:///C:/Users/samothy/Downloads/ICS_Goals_Principles_and_Delivery_Process_(updated_19_July_2016).pdf

[22] Article 172 of the Solvency II Directive

[23] Article 227 of the Solvency II Directive

[24] Article 260 of the Solvency II Directive

so as the consequences of Brexit may constitute, *inter alia*, an operational risk defined as "*the risk of loss arising from inadequate or failed internal processes, personnel or systems, or from external events*"[25]. To be more precise, Brexit is not a risk as the probability that it may not occur is remote. However, the effect of Brexit on individual insurers' operations is, as discussed in this paper, rather complex to predict. It is in that sense that insurers are faced with an operational risk.

Indeed, the Solvency II Directive provides that insurers' risk-management system should comprise "*strategies, processes and reporting procedures necessary to identify, measure, monitor, manage and report, on a continuous basis the risks, at an individual and at an aggregated level, to which they are or could be exposed, and their interdependencies*".

If the consequences of Brexit constitute an operational risk, then insurers will be expected to *measure* and *manage* such risk and adapt their Enterprise Risk Management system accordingly.

3.5 The uncertainty surrounding complex insurance schemes

In its simplest form, an insurance contract has two parties: the insurer and the policyholder.

There are however more complex set-ups:

- In international programmes, the policyholder is typically an international company seeking cover some or all of its subsidiaries. The insurance cover is composed of a maser policy, taken by such international company and covering some or all of its subsidiaries. The subsidiaries may be insured only under the master policy, or may benefit from local cover under local policies. In such case, the cover provided by the master policy would typically complement the local cover, either by offering cover not provided under the local policy (which is referred to as *difference in conditions* or DIC) or by increasing its limits (which is referred to as *difference in limits* or DIL). Generally, even when covering risks on a DIC or DIL basis, the insurer will be expected to be authorised to conduct insurance business in the country where the risk is located. Insurance programmes where either the master policy or local policies are either issued in the UK or cover UK subsidiaries will need to be reassessed.

- "Group" or "collective" insurance: several countries use or allow group or collective insurance schemes. As this is not regulated at EU level, the legal structuring of such schemes varies from one Member State to another. Generally speaking, a "policyholder" will negotiate certain terms with an insurer which will apply to a predetermined category of "insureds" which may choose to purchase such cover or, in certain cases, will automatically be covered. In France for example, group or collective insurance contracts are widely used, from life assurance distributed by banks to professional liability insurance covering entire professions such as lawyers or notaries[26]. In such case, according to French case

[25] Article 13 par. 33 of the Solvency II Directive
[26] The relevant provisions under French law are articles L. 141-1 *et seq*. and L. 129-1 of the Insurance Code

law, a direct contractual relationship exists between the insured and the insurer[27], which entails that if the insurer is located in another Member State such as the UK, the cover falls within the scope of the EU passport. The complexity of assessing and managing the impact of the UK leaving the EU on such contractual set-ups, in particular with regards to the respective contractual relationship of the insurer with the policyholder on the one hand and the insureds on the other hand, may be challenging.

- Co-insurance pools: these are defined under the Block Exemption Regulation as follows:

  "'co-insurance pools' means groups set up by insurance undertakings either directly or through brokers or authorised agents, with the exception of ad-hoc co-insurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of the risk is covered by follow insurers who are invited to cover that remainder, which:

  (a) agree to underwrite, in the name and for the account of all the participants, the insurance of a specified risk category; or

  (b) entrust the underwriting and management of the insurance of a specified risk category, in their name and on their behalf, to one of the insurance undertakings, to a common broker or to a common body set up for this purpose;"

  Currently, co-insurance pools exist across the EEA with the participation of both UK and non-UK insurers. Assessing the impact of the loss of the EU passport on such arrangements may prove extremely complex, not least when the location of risk or, in some cases, the actual identity of insured is not easily determined[28].

These examples aim at illustrating rather than analysing the complexity facing insurance in case of Brexit and the potential far-reaching impact which goes beyond the insurance industry. While it is in the EU Member States' best interest to ensure a smooth transition to a post-Brexit world, insurers, policyholders, insureds and beneficiaries on both sides of the Channel can hardly anticipate the legal environment to which their operations will be subject.

4 Options for insurers

As seen above, while the Brexit in itself will mark the end of the EU passport, this does not entail that it will not be replaced by an equivalent regime that will allow insurers to continue their business seamlessly. Indeed, considering that the UK is the first market in the EEA based on gross written premiums[29], the incentive to find a post-Brexit agreement equivalent to the EU passport is obvious.

[27] Cass. Civ. 1ère, 7 June 1989, N° 87-14648
[28] This is for instance the case if the pool is in run-off
[29] With 241.4 bn Euros I 2014 according to Insurance Europe's, Key Facts 2015 available at http://www.insuranceeurope.eu/european-insurance-%E2%80%94-key-facts

Nevertheless, as the process to reach an agreement on this issue may be challenging and could take longer than the exit process, insurers may decide to explore possible options to mitigate the risk.

More precisely, in a situation where the UK has left the EU and unless an agreement to the contrary is found, the mutual recognition of portfolio transfer procedures as well as the ability to transfer insurance portfolios from or to the UK may disappear.

One commonly contemplated option would be to restructure the business in order to keep the UK risks in UK-authorised insurance companies and the EEA business in insurance companies authorised in a Member State other than the UK:

- In the case of an insurer authorised in the UK insuring both UK and EEA risks:
    - As a first step, the renewal rights for the EEA business written from the UK (either on a freedom to provide services or via branches) could be transferred to an insurer established in the EEA, which would allow the UK entity to cease writing new business on a cross-border basis immediately.
    - The EEA risks already written could then be transferred via a Part VII insurance business transfer[30] from the UK entity to an insurer established and authorised in another Member State which is either an existing parent company of the UK insurer, or one that would be set-up or acquired. One of the advantages of the Part VII insurance business transfer is the ability to transfer the benefit of third party contracts (such as reinsurance or supplier agreements).
- In the case of an insurer authorised in a Member State other than the UK insuring both EEA and UK risks, the process will be the reverse of the above, i.e.:
    - Renewal rights could be transferred to an insurer established and authorised in the UK.
    - The contracts insuring UK risks could then be transferred to the UK entity via the applicable portfolio transfer mechanism[31].

In all these situations and provided that the UK, as a third country, has been granted equivalence for reinsurance[32], it will be possible to use reinsurance as a tool to mitigate the effects of the transfers. For instance, taking the first scenario where a UK insurer decides to transfer all of its EEA business to an insurance entity authorised in another Member State, it may afterwards decide to reinsure the transferred risks in whole or in part.

[30] Part VII Transfer refers to the insurance portfolio transfer scheme contained under Part VII of the UK Financial Services & Markets Act 2000

[31] For example in France, the portfolio transfer mechanism for insurers is found under article L. 324-1 of the Insurance Code

[32] Under article 172 of the Solvency II Directive