Insurance/
Reinsurance

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PREPARING FOR BREXIT

SEVEN THINGS THAT (RE)INSURANCE BUSINESSES CAN DO NOW

June's vote to leave the EU has set the UK on course for Brexit. It is not yet known exactly when the final exit will take place (although two years' notice is required) and it is far from clear which EU treaties and legislation will continue to apply in the UK or the extent to which UK businesses will be able to continue operating in the EU.

Despite this uncertainty, businesses operating in the insurance sector would be wise to start making plans now. Here we look at seven factors to consider in advance of the UK's formal withdrawal becoming effective:

1. Passporting

Many (re)insurers and intermediaries currently have a "passport" to provide regulated insurance services on a cross-border basis from the UK into other EU member states (and vice versa), or have established a branch of a UK company in other EU member states (and vice versa). If an agreement is not concluded between the UK and the EU in relation to passporting, these passporting rights (either or both of the freedom of establishment and the freedom of services) would be lost. (Re)insurers and intermediaries should plan at an early stage how to continue their business without interruption.

2. Entering and exiting Europe

The potential loss of passporting rights may prompt UK (re)insurers and intermediaries to establish a subsidiary in an EU member state and obtain authorisation there (or vice versa). However, the process of obtaining authorisation, either in the EU or in the UK, would likely be costly and time-consuming and should be commenced well in advance of the formal split.

3. Migrating within the EU

UK (re)insurers or intermediaries may also consider migrating to another EU member state. The existing methods for migrating a UK business to an EU member state include undertaking an insurance business transfer (known in the UK as a "Part VII transfer"), effecting a cross-border merger or converting to a Societas Europaea (SE) and migrating the SE into or out of the UK. It remains to be seen whether these methods will be available after the UK leaves the EU, so it may be prudent to use them while they remain available.

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4. Strategy

As well as the method by which a business enters from or migrates to another EU member state (the target state), consideration should be given to other factors which may play a role in the exit or migration strategy, such as:

- Solvency II is maximum-harmonising and the Insurance Mediation Directive is minimum-harmonising but the regulatory approach in each member state may vary – how manageable for the business is the approach of the target state's regulator?
- Given that the business's head office will need to be located in the target state, to which jurisdictions can the business realistically move its head office?
- Are the corporate tax rate and the individual tax rates and social charges attractive in the target state?
- Will the target state's laws make it difficult to extract capital or profits from the business?
- From a practical perspective, how physically accessible will the target state be, and will the language and culture of the target state make it easy to continue business?
- Will professional staff and relevant services be available in the target state?
- Given that employment laws vary widely throughout the EU, what would be the impact of the target state's employee rights and protection?

Consider whether other laws and regulations in the target state will have a significant impact on your business, for example, data protection law, business regulation, and fairness and efficiency of court and governmental processes.

5. Changes to UK laws and regulations

While we expect the UK to maintain its current insurance regulatory regime, businesses which remain in the UK may have to deal with changes to UK laws and regulations which have direct effect in the UK or implement EU Directives. We expect that the UK will strive to maintain its equivalence under Solvency II for group supervision, group solvency and reinsurance. However, there may be some beneficial changes which do not affect the UK's equivalence. We would also not be surprised to see some "gold-plating" of UK rules which implement maximum harmonising Directives.

6. Enforcing judgments

A (re)insurer or intermediary involved in a claims-related or commercial dispute may find that, post-Brexit, the judgment is harder to enforce in EU member states. Enforcement is automatic under the Recast Brussels Regulation 1215/205 but, without an agreement to continue this reciprocal arrangement, the local courts would need to determine the issues forming the basis of the judgment. Aim for final determination of existing litigation as soon as possible and consider arbitration for new disputes – enforcement of arbitration awards will not be affected as the UK and all other EU member states are signatories to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

7. Service of proceedings

Service on parties in EU member states is currently relatively straightforward thanks to the EU Service Regulation: there is no need to ask for leave of the English Court to serve out of jurisdiction. If no equivalent regime to this is established, the UK may revert to and enact the 1965 Hague Convention, if so service will be time-consuming and more expensive, perhaps taking up to six months. Consider how this impacts litigation strategy in active cases. For new agreements, if contractual counterparties will not agree to arbitration, insist that they appoint a UK agent for service of process.

For UK (re)insurers and intermediaries operating in the EU, and EU (re)insurers and intermediaries providing services to the UK, Brexit will inevitably bring significant challenges. It may also open up new opportunities. HFW is equipped to help you navigate this new legal landscape as it begins to take shape.

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