



APRIL 2019

BREXIT – IMPLICATIONS FOR INSURANCE BUYERS



FREQUENTLY ASKED QUESTIONS

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The United Kingdom (UK) will leave the European Union (EU) in a matter of weeks. Recent political developments have ruled out certain outcomes, but as negotiations unfold many important issues remain unclear.

Here are the questions that have been asked about the implications of Brexit for insurance buyers, and for the insurance market more broadly, along with answers based on the current status of negotiations between the UK and EU.

GENERAL

1. If my global policy is written by UK-domiciled (re)insurers, will it still be enforceable post Brexit?

The default position post-Brexit (and following the end of any transitional period) is that the UK will be a third country to EU member states and vice versa.

The Financial Conduct Authority (FCA) and Treasury Select Committee indicated at the end of 2017 that, if necessary – and specifically, in the event of the UK leaving the EU without a transition period or free trade agreement (a “Hard Brexit”) – they will enact a Temporary Permissions Regime. This would enable European Economic Area (EEA) insurers to continue to service contracts and make claims payments to UK-based policyholders after Brexit.

Whether UK-based insurers may legally pay claims to EU-based policyholders will depend on the laws which apply in the relevant EU member state, and the nature and location of the risk.

As we explain in more detail below, Marsh and insurers are taking steps to seek to ensure that policies written pre-Brexit will be enforceable post-Brexit.

2. After Brexit, will a UK insurer still be able to issue a single policy covering both the UK and the EU?

The principal impact of Brexit on insurance markets is that UK insurers will lose Freedom of Service (FoS) rights. The loss of EEA market access for UK financial service providers, including insurers, was explicit in the government White Paper published in July 2018.

Under FoS, business services can be provided across national borders within the EEA. For insurance contracts, this means that a single policy can be underwritten in any one EU member country covering exposures in multiple EU jurisdictions.

UK insurers will only be able to continue to issue EEA-wide policies after Brexit *if* there is agreement between the EU and the UK to allow for a single FoS policy to include the UK as part of a future free trade agreement. However, mutual market access for financial services, including insurance, was ruled out in the UK government’s White Paper published in July 2018. Without access to EU insurance markets for UK insurers, separate policies will have to be issued to cover

UK risk and EEA risk, with the EEA policy being issued by an EEA insurer. Alternatively, a single policy could be issued and stamped by an EEA insurer in respect of the EEA risk and by a UK insurer in respect of the UK risk.

3. How do I determine whether I need to insure EEA risk?

The factors that determine the location of the risk vary depending on the nature of the risk.

Property. The location of *immovable* property, such as buildings or other infrastructure, is usually the territory in which the property is situated. In most territories, the risk location for *movable* property is where the property is normally situated. However, for regulatory purposes, EEA member states view the risk location of movable property as the territory in which the insured is resident or established.

Vehicles. For aircraft, ships, and motor vehicles, the risk location may be determined by where the vehicle is located, or where it is registered, or where the insured is resident or established.

General liability and financial loss. For liability classes, the risk location is the territory in which the insured is resident or established. The territory in which an insured peril or event occurs to trigger a claim usually does *not*, by itself, create a risk location.

Reinsurance. If the contract is reinsurance then the risk location is determined by the location of the reinsured(s) and not the location of the original insured(s).

INSURANCE CONTRACTS

4. What steps can I take to ensure that my policy continues to provide cover following Brexit?

Marsh has a range of options to seek to ensure that our clients' global policies issued after Brexit are enforceable, including, among others: writing clients' global programmes out of London as now, but with separate UK and EU stamps; placing a local EU policy, tied to the master policy; placing separate standalone EU policies; and fronting arrangements with EU insurers.

5. What about policies written prior to Brexit?

Many insurers that currently operate across the EU from the UK have established subsidiaries in other EU states. Once these EEA affiliates are operational, insurers may be able to undertake so-called Part 7 transfers, by which EU risks written by the UK entity are transferred to the EEA entity, thereby enabling the payment of claims after passporting ends. You can read more about Part 7 transfers in our [previous briefing](#). The policy will respond subject to its terms, conditions, and limits. And where the insurer is based in the EU, the policy will pay out in the event of a loss in the EEA subject to its terms, conditions, and limits. This is particularly important for long-tail policies such as liability classes.

As a result of the anticipated loss of passporting rights, a number of UK insurers that currently operate across the EEA from the UK have established subsidiaries in other EU member states. Others have re-domiciled their European entities from the UK to an EEA member state, and will operate in the UK as a Third Country Branch. In the short term, these insurers could rely on the Temporary Permissions Regime to service contracts in the UK, although in the long term they would probably need to seek authorisation in the UK. Insurers that re-domicile into an EU member state prior to the UK's departure from the EU will not need to undertake a Part 7 transfer: being authorised in the EEA, they will be able to continue to service contracts and pay claims in the EEA post-Brexit.

Some insurers are willing to accept an EEA contract continuity clause on new policies, designed

to address the risk of a UK-domiciled insurer becoming unable to pay claims into the EEA as a result of Brexit.

6. How will Brexit affect the governing law and jurisdiction of the contract?

The choice of law to govern an insurance contract will not be impacted by Brexit. EU courts will continue to apply the Rome I Regulation, which states that “a contract shall be governed by the law chosen by the parties.” Under the European Union (Withdrawal) Act 2018, the Rome I Regulation will form part of UK domestic law after the UK leaves the EU unless the government legislates otherwise. Even if the UK makes changes to how it applies Rome I, British courts are likely to uphold to contracting parties’ choice of law.

Choice of law and jurisdiction are entirely separate points from the domicile of an insurer. If a UK insurer re-domiciles to an EU member state in order to be able to continue to service EEA risks, there is no reason why the choice of law and jurisdiction for policies underwritten by that insurer should change. Marsh is seeking to encourage insurers to maintain the same policy wording (including choice of law and jurisdiction) to avoid unwanted or unpredictable changes to policy holders’ coverage.

The post-Brexit jurisdictional and enforcement landscape is less clear. Although there are well-developed procedures for enforcing foreign judgments in the UK and EU member states, it may become more costly and time-consuming to enforce an English judgment in the EU than it currently is (and vice versa).

If the aim of a jurisdiction clause is to provide a judgment that will be simpler and cheaper to enforce throughout the EU, options include: giving jurisdiction to the courts of an EU member state; giving non-exclusive jurisdiction to the English courts; agreeing to submit disputes to arbitration under the terms of the New York Convention; or even, counter-intuitively, giving English courts exclusive jurisdiction on the assumption that, post-Brexit, the UK becomes an individual party to the Lugano Convention or the Hague Convention on Choice of Court Agreements (which the EU has ratified).

For further detail, please refer to:

<http://hoganlovellsbrexit.com/blog/117/the-impact-of-brexit-on-the-enforcement-of-judgments-between-the-uk-and-eu-member-states-post-brexit> (Accessed 4 September 2018).

<https://hsfnotes.com/litigation/2018/07/12/brexit-white-paper-reiterates-aims-for-civil-judicial-cooperation/> (Accessed 4 September 2018).

7. What limits will I need in my UK and EU-27 FoS policy?

There is no reason why the current limits (covering the EEA including UK) will necessarily need to be amended. Of course, the limits required for the UK and EEA policies may vary depending on the circumstances of each insurance buyer.

8. Can the wording of the UK policy be the same as the EU-27 FoS policy?

Yes. Clients may choose to buy separate policies for EEA and non-EEA exposures, but there is no obligation to do so. As far as possible, differences between UK and EA-27 FoS policies should be kept to a minimum, and there should be as much continuity as possible between current arrangements and post-Brexit arrangements.

INSURERS

9. Which insurers are Brexit ready?

Marsh's key trading partners are all at different stages of preparation for Brexit. Some insurers that already have EU (ex-UK) companies are, at time of writing, preparing for Part 7 transfers. Others are re-domiciling.

Marsh is closely monitoring insurer preparations for Brexit in order to minimize our clients' exposure even in the case of a Hard Brexit. Please get in touch with your usual Marsh contact if you have any concerns about the insurers on your programme.

10. Will underwriters based in the UK be able to take underwriting decisions for EU-based insurers?

Where EU insurers have established UK branches, the current industry expectation is that underwriters in London will be able to take underwriting decisions. The broader question of cross-border servicing remains under discussion as at the time of writing. (It may be possible to operate through Service Level/Outsourcing Agreements, but this is likely to depend on local regulation and licensing requirements.)

11. Some insurers are setting up third-country branches in London. How will this affect my insurance arrangements?

These new insurer arrangements are intended to minimise adverse impacts on UK, EU global clients who currently obtain their insurance through London, by enabling UK-based underwriters to continue to underwrite EEA risk – either by putting down two separate stamps, or by putting down a single stamp on behalf of an entity that is authorised both in the EEA and in the UK (via a UK branch).

BROKER CLIENT SERVICE

12. How does Marsh propose to service EEA businesses post-Brexit?

At present there is still a prospect of the UK leaving the EU with “no deal”, no transition period, and a loss of passporting rights. The UK could potentially leave the EU on 12 April 2019 without a deal or seek to agree an alternative way forward with the EU prior to that date. Consequently, the exact date upon which the UK could leave the EU is still unknown. As uncertainty of the terms and timing of the UK's departure from the EU remains we have evaluated our options to provide you with continuity of service and access to the London Market.

We currently service our European Economic Area (EEA)-based clients either directly or working alongside one of our EEA offices. However, if the UK leaves the EU with “no deal”, and therefore no transition period, we will need to adjust the way in which we engage with our EEA based clients going forward.

Given the current uncertainty as to the terms of the UK's departure from the EU and when such a departure would take place, we have established a UK branch of Marsh Ireland Brokers Ltd. Following a “no deal” Brexit and the loss of passporting rights, our UK branch of Marsh Ireland Brokers Ltd. will enable us to continue our existing relationship with our EEA based clients

without any disruption.

13. How will my existing or new claims be handled in the event of a 'no deal' Brexit?

In circumstances where our EEA clients have notified claims to (re)insurers prior to Brexit or new claims notifications are required on policies that inception prior to Brexit, both these existing and new claims will continue to be handled by Marsh Ltd. colleagues.

14. Do I need to enter into separate contracts with Marsh in the UK and Marsh in the EU-27?

Clients based in the UK or based elsewhere outside the EEA should see little change: where they need to insure EEA exposures, their current Marsh servicing team will be able to obtain EEA cover from suitably licensed insurers

Following Brexit, Marsh will service its EEA-based clients via its newly established UK branch of Marsh Ireland Brokers Ltd. or authorised Marsh broking entities in the EEA. As a consequence, EEA clients that currently contract directly with Marsh Ltd. will be invited to transfer to the UK branch of Marsh Ireland Brokers Ltd. or their local Marsh office.

15. If so, why? Will it cost more and will I receive the same standard of service?

In order for Marsh to comply with its regulatory requirements in all of the jurisdictions in which it operates, placement and claims advice will be provided by EEA-based Marsh advisors, who will continue to be able to draw on the expertise and capacity of the London Market. There will be no impact on the quality or timeliness of the service you receive. Marsh will strive to keep any impact on cost to a minimum.

16. Can I enter into a single contract with the Marsh producing office in the country in which the main group company is located and the Marsh producing office can then engage with the various other Marsh offices in the EU-27 and the UK?

Yes. Our EEA based clients will only need to enter into a contract with one EEA Marsh office, following which colleagues in the Marsh EEA producing offices will be able to engage with colleagues in other EU/EEA and UK offices, including the UK branch of Marsh Ireland Brokers Ltd. However, in the event of a 'no deal' Brexit, our Marsh Ltd. our UK colleagues will be unable to engage directly with clients in the EEA.

If you have further questions, please contact your usual Marsh relationship manager, who will be able to advise on the best way to manage your engagement with Marsh going forwards.

17. Does Marsh anticipate any change to the level or process of risk presentation (i.e. collation and analysis of risk data for presentation to insurers) post-Brexit?

For international and global clients, Marsh already gathers, analyses, and presents risk data from other parts of the world outside the EU. While this process may need to be reviewed as a result of the ultimate outcome of Brexit negotiations, Marsh does not anticipate challenges with risk presenting as a result of Brexit.

18. If an insurer is changing security as part of a Part 7 transfer, will my broker notify me?

As part of the Part 7 process, insurers – and not brokers – are legally required to notify their clients that the transfer will take place. Marsh brokers will, where possible, notify our clients if

they become aware of a change of insurer – particularly if the financial rating of the new insurer is different to the original insurer.

COSTS

19. Will there be additional cost to the policyholder as a result of Brexit?

The strategies for ensuring that EU and UK risks are covered post-Brexit, and for ensuring continuity of coverage before and after Brexit, may result in an increase in administrative cost. Examples include fronting costs, and the cost of issuing additional local policies. Marsh constantly seeks to minimize any such increases in cost.

20. What are the potential tax implications of Brexit?

Regardless of whether the UK remains in the EEA post-Brexit, premium taxes will continue to apply to the portion of premiums allocated to risks in the member states. For example, if a policy is issued in France and covers French risks, then insurance premium tax (IPT) will still be due on the premiums payable for those risks.

While the method of payment for IPT is unlikely to change as a result of Brexit for UK risks, the UK government is likely to continue to review the rate of IPT.

CAPTIVES and REINSURANCE

21. How will Brexit affect captives?

A key issue for EU captive owners is whether their captive can continue to cover UK risks, post-Brexit. It may be possible for the captive to continue to cover non-compulsory classes of risks on a non-admitted basis, or, alternatively, use a UK-registered insurer to front the UK risks and reinsure them with the captive.

A parent company with business across the EEA and UK may need two captives (or one cell and one captive), or, alternatively, one captive and a front for the element that they cannot write on a direct basis. If this affects you, then we recommend early engagement with the Marsh Captive Management team.

Multinationals with captive insurance and reinsurance companies should also consider whether, due to changes in investment values following a Hard Brexit, their capital and solvency requirements continue to be met.

22. How will UK reinsurance companies' solvency requirements be affected by Brexit?

Given that Solvency II has been implemented in the UK, and reinsurance companies are now required to fulfil the new requirements, it is unlikely that UK reinsurers' solvency requirements will be affected immediately.

23. How will Brexit impact UK reinsurers' ability to underwrite EEA risks?

Under Solvency II reinsurance purchased from a third-country reinsurer is not given as much credit, so reinsurance clients might find themselves having to hold more capital to cover the credit risk. The UK will only be able to apply for Equivalence under Solvency II once it becomes

a third country. Equivalence, which is required for UK reinsurers to retain their current level of access to the EEA, is not granted automatically: the process can take several years. (If the UK adjusts the Solvency II regime, then EU regulators may determine that Equivalence is not attainable at all.)

Each EU member state regulator has its own rules in respect of third-country reinsurers, which are not uniform within the EU. As a result, absent a transitional period during which Equivalence is obtained, UK reinsurers may only be able to conduct correspondence reinsurance – that is, no active marketing – following Brexit.

DATA PROTECTION

24. Will Marsh still be able to process the personal information of EU citizens after Brexit?

Yes, Marsh will still be able to process the personal information of EU citizens after Brexit. However, what is still uncertain is on what basis Marsh, and other British businesses, will be able to transfer personal data to, and receive data from, the EEA following Brexit. Marsh is keeping a close eye on whether the UK will be deemed by the European Commission to offer an adequate level of data protection, and be granted an adequacy decision, at the time the UK officially leaves the EU or shortly thereafter. If an adequacy decision were to be made, the ability of UK insurers – and Marsh – to transfer data to and from the EEA would remain unchanged.

If the UK does not immediately obtain an adequacy decision, Marsh will seek to rely on other available legal mechanisms to ensure that there are adequate safeguards in place in respect of transfers of personal data. For example, MMC, Marsh's parent company, has in place Binding Corporate Rules to ensure that data transfers within the MMC group are adequately covered.

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Registered Office: 1 Tower Place West, Tower Place, London EC3R 5BU.
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