

**BREXIT FOR BROKERS** > SCOTT SINDER, PHILIP WOOLFSON AND GUY SOUSSAN

## Navigating the Channel

As the Brexit deadline looms, insurance agents and brokers face complicated choices.

**On March 29, 2017**, the United Kingdom notified the European Council of its intent to withdraw from the European Union. The United Kingdom will cease to be a member of the EU two years from that date unless the final withdrawal agreement extends that deadline (an extension to Dec. 31, 2020, is under discussion). The EU will then have 27 members. The immediate implications of Brexit for (re)insurance carriers have been largely explained and commented on, but the implications for insurance intermediaries, including brokers, have attracted less attention.

For U.K. (re)insurers specifically, Brexit means exclusion from the future EU-27 market, loss of EU “passport rights” and, consequently, pressure to reallocate capital to newly set-up structures,

whether branches or subsidiaries, within the EU-27 market.

While this new environment will be more complicated for carriers, it will also challenge the 5,700-odd intermediaries who have passported from the European Economic Area (the EU-27 plus Iceland, Liechtenstein and Norway) into the U.K. (“U.K. inwards”) and for the approximately 2,700 insurance intermediaries passporting from the U.K. into the EEA (“U.K. outwards”). First, EU-27 intermediaries will lose their ability to

place global programs, including EU-located risks, with U.K. specialist (re)insurers, since the latter will become third-country insurers from an EU-27 standpoint. Likewise, in the absence of a local,

U.K. license, they will themselves become non-authorized from a U.K. standpoint. The same is true for U.K. outwards brokers who were reaching out to EU-27 customers in order to broker risks situated in the EU-27 market with the U.K. specialty commercial insurance sector.

For EU-27 intermediaries operating on a freedom of services or branch basis in the U.K. market, their U.K. inwards EU passport will end next March. For U.K. intermediaries operating on a freedom of services or branch basis in EU-27 markets, their U.K. outwards EU passport will also end next March: the U.K. will become a third country vis-à-vis the EU-27. In each case, the broker faces a stark choice: absent any national rule that allows the broker access to the market, the broker might have to withdraw from the market or upgrade services or branch operations—for example, by transferring a branch operation into a duly incorporated and authorized subsidiary. Industry sources warn that time is short for applications for authorization—it’s already estimated that the issuance of an authorization

is likely to require six to nine months to process.

In contrast with (re)insurance carriers, U.K. intermediaries relocating to an EU-27 jurisdiction should not find the rules as stringent. For

example, authorization requirements are simpler than those applicable to (re)insurers; local presence and corporate substance may also be more flexible, enabling the subsidiary to call upon the resources and expertise of the U.K. parent organization.

The last option for U.K. intermediaries could be to continue operating from their U.K. base. But in the absence of EU-harmonized rules, and subject to commitments that

member states might have undertaken within the framework of the WTO General Agreement on Trade in Services, any promotional or servicing activity that they carry out would likely bring them within the scope of a regulated mediation activity subject to prior authorization in an EU-27 member state. U.K. intermediaries might well conclude that they have to transfer their EU-27 customers to EU-27 licensed >>

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>> intermediaries. EU intermediaries that continue to operate from an EU-27 base might reach the same conclusion in relation to their U.K. customers.

Under EU (re)insurance rules, loss of EU-27 authorization might also affect the ability of U.K. outwards firms to perform their obligations with regard to contracts concluded before exit day in terms of servicing the contract that they helped to place, including claims handling. From the EU perspective, enduring regulatory uncertainty could discourage EU-27 intermediaries from recommending renewing contracts with U.K. (re)insurers.

It is important to note that the Insurance Distribution Directive (IDD) will apply by autumn 2018: its registration, training, professional and conduct-of-business requirements must not be underestimated; the IDD's implementation in EU-27 countries might make compliance challenging

for all intermediaries operating within the EU and U.K. For example, customers who are disgruntled over claims issues could question whether, as required under the IDD, the intermediary has acted professionally and in the customer's best interests.



Meantime, the European Insurance and Occupational Pensions Authority, the EU-level supervisor, is increasingly vocal. It has called on national authorities to require insurers to properly address all risks to their solvency in light of Brexit. EIOPA will be closely monitoring the risks, taking into account their nature, scale and complexity. The regulator has reminded authorities to require insurance carriers and intermediaries to take appropriate contingency measures to ensure the continuity of services for cross-border insurance contracts. Customers should be made aware in a timely manner of the implications of these measures, both for existing contracts and for new contracts concluded before the withdrawal date. EIOPA also calls for enhanced cooperation and continuous dialogue between the authorities.

Intermediaries that have not yet taken action are caught between the devil and the deep blue sea—a fast-approaching exit day and the tantalizing possibility of a transition until Dec. 31, 2020. Meanwhile, the European Council's March 2018 guidelines for negotiating with the U.K. contemplate a

modest free trade agreement in services (including (re)insurance) to allow "... market access to provide services under host state rules, including as regards right of establishment for providers, to an extent consistent with the fact that

the UK will become a third country ..."

On the U.K. side, the government has proposed "a new economic and regulatory arrangement" for financial services based on the "principle of autonomy for each party over decisions regarding access to its market" and therefore limited to an

enhanced equivalence framework. The U.K. proposes a reciprocal recognition of equivalence under all existing third-country regimes that would take effect at the end of an implementation period. The future arrangement contemplates equivalence of "outcomes" achieved by the U.K. and EU regimes and will depend on extensive supervisory cooperation and regulatory dialogue, as well as predictable, transparent and robust processes. The U.K. expressly recognizes that "this arrangement cannot replicate the EU's passporting regime" (or even guarantee any access). Industry reactions have so far been mixed: the Association of British

Insurers calls the government proposal the "worst possible scenario," while the International Underwriting Association has been more welcoming, in particular for reinsurance and large-scale wholesale risks for marine and aviation business. The London Insurance and International Brokers Association is "disappointed" and, in particular, fears for contract continuity.

In any event, certain conclusions are already evident: the U.K. and EU-27 will not explore the mutual market access based on mutual regulatory recognition that the London market sought; the U.K. proposals will further complicate an already tortuous legislative process in the EU; and, for agents and brokers, the IDD is an inadequate regulatory text in any event, since it makes no provision for equivalence of regimes (whether enhanced or not).

**Sinder is The Council's chief legal officer and Steptoe & Johnson partner.**  
ssinder@steptoe.com

**Woolfson is a partner in and former chair of Steptoe's Brussels office.**  
pwoolfson@steptoe.com

**Soussan is a partner in Steptoe's Brussels office.**  
gsoussan@steptoe.com

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