

Insurance business in Sweden from a cross-border perspective

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Introduction

In recent decades, business in the insurance sector has become increasingly transnational. It is not only insurers based in Sweden or other EEA countries that target the Swedish market, but also insurers from outside the European Economic Area that seek ways to offer their products in Sweden.

Under Swedish law, conducting insurance business requires a licence issued by the Financial Supervisory Authority. Insurers based within the European Economic Area may instead rely on the licence issued by their domestic financial supervisory authority, which may easily be passported to Sweden by way of a notification procedure (ie, without the need for a separate approval by the Swedish Financial Supervisory Authority).

However, companies located outside the European Economic Area cannot passport their licences under the EEA notification regime. If they intend to conduct insurance business in Sweden, they must instead generally apply to the Swedish Financial Supervisory Authority for a marketing permit or a licence to conduct insurance business from a Swedish branch.

The delineation between insurance business and similar, but unregulated, business is sometimes unclear and often subject to thorough considerations and deliberations. The definition of 'insurance business' is not harmonised within the European Economic Area. This article sheds some light on the definition of insurance business under Swedish law and under what circumstances international insurers based outside the European Economic Area can conduct insurance business in Sweden.

Definition of 'insurance business'

Under Swedish law, the assessment of whether an activity is regulated as insurance business and therefore subject to insurance regulatory requirements – notably, the requirement to hold a licence – is not determined based on whether the activity constitutes insurance from a technical or contractual perspective. Instead, the assessment of whether an activity is regulated as insurance business is made based on whether the activity constitutes insurance business under the Insurance Business Act (2010:2043).

There is no statutory definition of 'insurance business' under Swedish law. However, the prevailing view is that the cumulative criteria below must be fulfilled and consideration of the additional factors below must lead to the conclusion that the business should be regulated as insurance business. The cumulative criteria state that:

- the business must be conducted commercially;
- the activity must entail the insurer's binding commitment to indemnify the insured;
- the insurer's commitment must be contingent on the occurrence of an uncertain event;
- the insurer must make the insurance commitment in return for a premium; and
- the insurance commitment must be compensatory (ie, serve to protect the insured against negative economic effects by paying financial compensation or to carry out a certain pre-determined performance).

The additional factors include as follows:

- In addition to the cumulative criteria above, the public interest in having a business supervised and monitored by the authorities must be considered when deciding whether a business should qualify as insurance business.

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- Regardless of whether the cumulative criteria are met and consideration of the above point speaks in favour of classification as insurance business, some activities may still fall outside the scope of insurance business (eg, insurance-like commitments ancillary to a main commitment concerning, for example, vehicles, travel services or construction).

In the event of uncertainty, parties can request a legally binding preliminary ruling from the Financial Supervisory Authority on whether a specifically outlined business activity constitutes insurance business.

Cross-border insurance business into Sweden

For non-Swedish undertakings, it is of particular interest that the Insurance Business Act does not stipulate that the business must be conducted physically in Sweden in order for the business to constitute insurance business under Swedish law. There are also no formal exceptions under which insurance business that is conducted solely from a location abroad is excluded from the licence requirement and other provisions of the Insurance Business Act.

However, the fact that the business is conducted from a location abroad may become relevant in the assessment of whether the business in question constitutes insurance business under the abovementioned criteria. One of the factors to consider in the assessment of whether an activity constitutes insurance business is the public interest in having a business supervised and monitored by the Swedish authorities. If the business has limited nexus with Swedish interests, it is unlikely that the Financial Supervisory Authority will consider it necessary to supervise the business and therefore categorise the business as insurance business.

Subsequent to the decision of whether a certain business constitutes insurance business, it is often unclear when insurers are conducting insurance business in Sweden. The assessment of whether EEA insurers' activities constitute regulated insurance business in Sweden is mainly decided based on the EEA insurers' connection with Sweden, especially whether the policies cover risks located in Sweden or commitments to be fulfilled in Sweden. If the policies cover no risks located in Sweden or commitments to be fulfilled in Sweden, the EEA insurers' activities typically do not constitute insurance business in Sweden.

However, with regard to third-country insurers, the assessment of whether their activities have sufficient connection with Sweden to constitute insurance business in Sweden is more complex and made on a case-by-case basis in light of several factors. The decisive factor in this regard tends to be what general connection the third-country insurer's business has with Sweden. Factors to consider in this assessment include the following non-exhaustive list of circumstances that could be relevant to the assessment of whether the insurer's business has enough connection with Sweden for it to warrant a Swedish licence:

- whether the third-country insurer has its own premises or personnel in Sweden;
- whether, and if so, how, the insurer markets its insurance products in Sweden;
- whether the marketing concerns risks located in Sweden or commitments to be fulfilled in Sweden; and
- whether the insurer has entered into cooperation agreements with insurers or insurance intermediaries that are represented on the Swedish market.

Based on Swedish case law, the concept of conducting insurance business in Sweden should be interpreted relatively extensively, entailing that the connection with Sweden need not be strong in order for an insurance business to be deemed to be conducted in Sweden. Similarly, the Financial Supervisory Authority's practice indicates that a third-country insurer's business is subject to authorisation as soon as the insurer in some way, through its own activities in Sweden, attempts to provide insurance on its own behalf.

If a business is deemed to constitute insurance business under Swedish law and to be conducted in Sweden, the requirement to have authorisation as a third step depends on whether the insurance business is to be categorised as active or passive. The *travaux préparatoires*⁽¹⁾ behind the Foreign Insurers' Act (SFS 1998:293) emphasise that active insurance business into Sweden without a licence (eg, by way of advertising in newspapers or over the telephone or by way of active sales measures in Sweden) is prohibited regardless of whether it is carried on by an EEA or third-country insurer. As opposed to what may be the case in other jurisdictions, Swedish law affords little importance to where the actual insurance activities (eg, claims handling) are physically performed.

On the other hand, passive insurance business may be possible for a non-EEA insurer to engage in without a Swedish licence. Passive insurance business has generally been permitted in Sweden only in situations where the policyholder or customer approaches the insurer (ie, reverse solicitation), rather than the other way around. Moreover, it is generally restricted to non-EEA insurers, rather than EEA insurers. The rationale behind this is the well-developed notification system for cross-border insurance business in the European Economic Area, which allows supervisory authorities to exercise supervision over both active and passive insurance business and insurance firms to easily passport their licence for purely passive business. In contrast, the Swedish

legislature has found that it would be too much to regulate purely passive insurance activities in Sweden conducted by non-EEA insurers. There is no easy way for non-EEA insurers to passport their licence to Sweden and there is no easy way for the Financial Supervisory Authority to prevent purely passive insurance business conducted in Sweden by non-EEA insurers.

In summary, active insurance business cross-border into Sweden without a licence is prohibited under Swedish law for both EEA insurers that have not passported their licence from another EEA state and for non-EEA insurers. Passive insurance business conducted cross-border into Sweden without a licence is generally permitted for non-EEA insurers but not for foreign insurers based within the European Economic Area.

Comment

It may be a delicate task to assess whether a certain activity should be defined as insurance business under Swedish law. Perhaps even more difficult is the assessment of whether such insurance business is conducted in Sweden. In this context, the exact delineation between active and passive insurance business is sometimes unclear. In light of this, and to improve the foreseeability for third-country insurers providing their products to Sweden, it would be desirable to receive more guidance from the Swedish courts and the Financial Supervisory Authority about these questions. Given that the United Kingdom has now left the European Economic Area, questions relating to cross-border insurance provision will likely remain significant on the agenda of many international insurers.

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Endnotes

(1) *Travaux préparatoires* (eg, investigative reports, government bills and committee reports) are part of the Swedish legislative procedure. They are considered to be among the most important secondary sources of law when interpreting Swedish statutory law.

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