

# Authorisation requirements for third-country insurers: implications of a hard Brexit

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## Introduction

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## Introduction

Three years after the United Kingdom voted to leave the European Union, significant uncertainty remains regarding how the withdrawal will take place and what effects it will have – especially in the event of a hard Brexit (ie, the United Kingdom's withdrawal from the European Union without a deal). A hard Brexit would have a substantial impact on the insurance market, as UK insurers would go from being based in the European Economic Area (EEA) to being third-country insurers overnight. Consequently, UK insurers would no longer benefit from the right to establishment and freedom of services and the principles of single authorisation and home state supervision.

A frequently posed question in these uncertain times is whether, in the event of a hard Brexit, UK insurers will have to obtain authorisation as third-country insurers in Sweden in order to offer their products to the Swedish market.

This is a simple question with a complex answer. This article aims to shed some light on the issue and outlines the Swedish authorisation requirements for third-country insurers – in particular, the relevant factors in the assessment of whether a third-country insurer's activity is subject to authorisation. This topic is relevant for all third-country insurers considering approaching the Swedish market and may, in these uncertain times, be of particular interest to UK insurers.

## Authorisation requirements for third-country insurers

The authorisation requirements for foreign insurers that wish to offer their insurance products on the Swedish market are vastly different depending on whether their home state is an EEA member. EEA insurers may, through a notification procedure, passport their authorisation to Sweden and conduct insurance business in Sweden either via an establishment (eg, a branch) or through cross-border operations.

On the other hand, third-country insurers are (as a main rule) prohibited from conducting insurance business in Sweden through cross-border operations; instead, they must establish a branch or general agent in Sweden. In addition, they do not benefit from the principle of single authorisation and must obtain a permit from the Swedish Financial Supervisory Authority (SFSA) in order to conduct insurance business in Sweden.

One option for third-country insurers that do not wish to establish a branch or general agent in Sweden is to apply for a permit from the SFSA to market insurance policies covering risks located in Sweden. This requires that the marketing is conducted through mediation of an insurer that is authorised in Sweden and that the insurers belong to the same group or have entered into a cooperation agreement.

Such a permit to market insurances in Sweden can be considered as an exemption from the prohibition against cross-border operations into Sweden.

## Assessment of whether third-country insurers conduct insurance business in Sweden

As described above, to conduct insurance business in Sweden, third-country insurers must obtain authorisation from the SFSA. This leads to the following question: when is a third-country insurer's insurance business considered to be conducted in Sweden?

## AUTHORS

[Hans Hammarbäck](#)



[Sofia Andersson](#)



[Hanna Hamrén](#)



While the assessment of whether EEA insurers' activities constitute cross-border operations into Sweden is based on whether the insurance policies provided cover risks located in Sweden or commitments to be fulfilled in Sweden, the assessment of whether third-country insurers' activities constitute insurance business in Sweden is much more complex and made on a case-by-case basis based on a number of factors.

The decisive factor for whether an activity constitutes insurance business in Sweden is what connection the insurer's business has to Sweden.<sup>(1)</sup> Factors to consider in this assessment include:

- 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.

It should be emphasised that the above-mentioned factors are not an exhaustive list of circumstances that could be relevant to the assessment of whether the insurer's business has enough connection to Sweden for it to warrant a Swedish permit.

According to a court ruling, the concept of 'conducting insurance business in Sweden' should be given a relatively broad interpretation. Along the same lines, SFSA case law 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.

However, under all circumstances, at least some activity by the insurer is necessary to trigger the authorisation requirement. The concept of 'passive sale', where a Swedish customer (on its own or via an intermediary acting on the customer's behalf) approaches a third-country insurer that has not marketed or in any other way offered its products on the Swedish market, does not warrant a permit.

### **Comment**

Following a hard Brexit, UK insurers will by definition be third-country insurers and thus on the face of it subject to the assessment and requirements for third-country insurers that have been outlined above. As discussed, there is a discrepancy between the authorisation requirements for EEA insurers and third-country insurers, respectively. This entails that the activities of a UK insurer that is required to passport its authorisation to Sweden would not necessarily be considered insurance business in Sweden and thus require Swedish authorisation after a hard Brexit.

In any event, the present situation is unprecedented – no country has previously gone from being an EEA member to being considered a third country – and it remains to be seen how the SFSA and the Swedish legislature will respond to a potential hard Brexit with regard to UK insurers' activities. Currently, the SFSA has made no announcement about how it will assess UK insurers' activities post-Brexit, nor does it appear that any legislation to address the situation is underway.

However, the SFSA has announced that UK insurers can apply for authorisation as a third-country insurer before the United Kingdom withdraws from the European Union. If the SFSA were to grant authorisation based on such an application, it would be conditional on a hard Brexit taking place within six months from the date of the SFSA's decision.

Notably, insurers that are uncertain of whether the business that they intend to conduct constitutes insurance business in Sweden and thus is subject to authorisation can apply for a preliminary ruling from the SFSA on the issue.

For further information on this topic, please contact [Hans Hammarbäck](#), [Sofia Andersson](#) or [Hanna Hamrén](#) at Mannheimer Swartling by telephone (+46 8 595 064 26) or email ([hans.hammarback@msa.se](mailto:hans.hammarback@msa.se), [sofia.andersson@msa.se](mailto:sofia.andersson@msa.se) or [hanna.hamren@msa.se](mailto:hanna.hamren@msa.se)). The Mannheimer Swartling website can be accessed at [www.mannheimerswartling.se](http://www.mannheimerswartling.se).

### **Endnotes**

(1) An underlying assumption for the discussion in this article is of course that the activity in question constitutes insurance business at all. This, too, is a complex assessment – an analysis of which is beyond the scope of this article.