

Chapter 5

Guidance on insurance distribution activities



5.12 Link between activities and the United Kingdom

Introduction

5.12.1 **G** Section 19 of the *Act* (The general prohibition) provides that the requirement to be *authorised* under the *Act* only applies in relation to *regulated activities* which are carried on 'in the *United Kingdom*'. In many cases, it will be quite straightforward to identify where an activity is carried on. But, when there is a cross-border element, for example because a *customer* is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may need careful consideration. ■ PERG 5.15.8 G (Flow chart: am I carrying on regulated activities in the United Kingdom?) has a flow chart setting out the questions a *person* needs to consider in determining whether or not his *regulated activities* are carried on 'in the *United Kingdom*'.

5.12.2 **G** Even if a *person* concludes that he is not carrying on a *regulated activity* in the *United Kingdom*, he will need to ensure that he does not contravene other provisions of the *Act* that apply to *unauthorised persons*. These include the controls on *financial promotion* (section 21 (Financial promotion) of the *Act*) (see ■ PERG 8 (Financial promotion and related activities)), and on giving the impression that a *person* is *authorised* (section 24 (False claims to be authorised or exempt)).

5.12.3 **G** The table in ■ PERG 5.12.4 G is a very simplified summary of territorial issues relating to overseas insurance intermediaries carrying on the business of *insurance distribution activities* in or into the *United Kingdom* for remuneration.

5.12.4 **G** Table Territorial issues relating to overseas insurance intermediaries carrying on *insurance distribution activities* in or into the *United Kingdom*

	Needs Part 4A permission	Schedule 3 EEA passport rights available	Overseas persons exclusion available
Registered EEA-based intermediary with UK branch (registered office or head office in another EEA State)	No	Yes	No

	Needs Part 4A permission	Schedule 3 EEA passport rights available	Overseas persons exclusion available
Registered EEA-based intermediary with no UK branch providing cross-border services	No	Yes	Potentially available [see Note]
Third country intermediary operating from branch in the UK	Yes	No	No
Third country intermediary providing services in (or into) the UK	Yes unless overseas persons exclusion applies	No	Potentially available

This does not, however, affect the firm's authorisation under Schedule 3 to the Act (see PERG 5.12.9 G to PERG 5.12.10 G (Passporting)).

For EEA-based intermediaries this table assumes that the insurance distribution activities are within the scope of the IDD.

Where are insurance distribution activities carried on?

5.12.5 G Persons carrying on insurance distribution activities from a registered office or head office in the United Kingdom will clearly be carrying on regulated activities in the United Kingdom. However, a person may be considered to be carrying on regulated activities in the United Kingdom even where not carrying on the activity from a registered office or head office in the United Kingdom. This is explained further in ■ PERG 5.12.6 G to ■ PERG 5.12.8 G.

5.12.6 G In determining the location of an activity, and hence whether it is carried on in the United Kingdom, various factors need to be taken into account in turn, notably:

- (1) section 418 of the Act (Carrying on regulated activities in the United Kingdom);
- (2) the nature of the activity; and
- (3) the overseas persons exclusion (see ■ PERG 5.12.9 G to ■ PERG 5.12.10 G (Overseas persons)).

5.12.7 G Section 418 of the Act extends the meaning that 'carry on regulated activity in the United Kingdom' would normally have by setting out additional cases in which a person who would not otherwise be regarded as carrying on the activity in the United Kingdom is to be regarded as doing so. Each of the following cases thus amounts to carrying on a regulated activity in the United Kingdom:

- (1) where a UK-based person carries on a regulated activity in another EEA State in the exercise of rights under a Single Market Directive;

- (2) where a *UK-based person* carries on a *regulated activity* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*;
- (3) where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an establishment maintained by him in the *United Kingdom*; and
- (4) where an *electronic commerce activity* is carried on with or for a *person* in an *EEA State* from an establishment in the *United Kingdom*.

In each of these cases it is irrelevant where the *person* with whom the activity is carried on is situated.

5.12.8 G Otherwise, where the cases in ■ PERG 5.12.7G (1) do not apply, it is necessary to consider further the nature of the activity in order to determine where *insurance distribution* is carried on. *Persons* that arrange *contracts of insurance* will usually be considered as carrying on the activity of *arranging* in the location where these activities take place. As for dealing activities, the location of the activities will depend on factors such as where the acceptance takes place, which in turn will depend on the method of communication used. In the case of advising, this is generally considered to take place where the advice is received.

Overseas persons

5.12.9 G Article 72 of the *Regulated Activities Order (Overseas persons)* provides a potential exclusion for *persons* with no permanent place of business in the *United Kingdom* from which *regulated activities* are conducted or offers to conduct *regulated activities* are made. Where these *persons* carry on *insurance distribution activities* in the *United Kingdom*, they may be able to take advantage of the exclusions in article 72 of the *Regulated Activities Order*. In general terms, these apply where the *overseas person* either:

- (1) deals or arranges deals with or through authorised or *exempt persons* only; or
- (2) enters into deals with (or on behalf of) a *person* in the *United Kingdom* or gives advice on investments in the *United Kingdom*, in each case as a result of a 'legitimate approach'.

A 'legitimate approach', for the purposes of (2), is one that results from an unsolicited approach by a *person* (for example, a *customer*) or otherwise is a result of an approach by, or on behalf of, an *overseas person* which complies with the restriction on *financial promotion* under section 21 of the *Act* (see ■ PERG 8.3.1 G (Financial promotion)).

5.12.10 G The *overseas person* exclusion is available to *persons* who do not have a permanent place of business in the *United Kingdom* and so is of relevance to third country intermediaries (that is, non *EEA*-based intermediaries) who carry on *insurance distribution activities* in, or into, the *United Kingdom* (for example with or through authorised insurance brokers and insurance *undertakings* operating in the Lloyd's market).

How should persons be authorised?

- 5.12.11 **G** *UK-based persons* must obtain *Part 4A permission* in relation to their *insurance distribution activities* in the *United Kingdom* as one of the following:
- (1) a *body corporate* whose registered office is situated in the *United Kingdom*; or
 - (2) a *partnership* or unincorporated association whose head office is situated in the *United Kingdom*; or
 - (3) an individual (that is, a sole trader) whose residence is situated in the *United Kingdom*.

The *United Kingdom* will, in each case, be the *Home State* for the purposes of the *IDD*

for insurance or reinsurance intermediaries (see further in connection with the *E-Commerce Directive* in ■ PERG 5.12.15 G to ■ PERG 5.12.17 G (*E-Commerce Directive*)).

- 5.12.12 **G** *Non-UK-based persons* wishing to carry on *insurance distribution activities* in the *United Kingdom* must:
- (1) qualify for *authorisation* by exercising passport rights (see section 31 (Authorised persons) and schedule 3 (EEA passport rights) to the Act and ■ PERG 5.12.13 G to ■ PERG 5.12.14 G (Passporting)); or
 - (2) make use of the *overseas persons* exclusion (which then has the effect that activities are deemed not to be *regulated activities* carried on in the *United Kingdom*); or
 - (3) seek *Part 4A permission*.

Passporting

- 5.12.13 **G** The effect of the *IDD* is that any *EEA-based* insurance intermediaries doing business within the Directive's scope must first be registered in their home *EEA State* before carrying on *insurance distribution* in that *EEA State* or other *EEA States*. For these purposes, an *EEA-based* insurance intermediary is either:
- (1) a *legal person* with its registered office or head office in an *EEA State* other than the *United Kingdom*; or
 - (2) a *natural person* resident in an *EEA State* other than the *United Kingdom*.

Registered *EEA-based* insurance intermediaries wishing to establish branches in the *United Kingdom* or provide services on a cross-border basis into the *United Kingdom* can do so by notifying their *Home State regulator* which in turn notifies the *FCA*. This enables the intermediary to acquire passporting rights for business within the Directive's scope (so excluding *insurance distribution activities* relating to *connected contracts* or *connected travel insurance contracts*) under Schedule 3 to the *Act*.

5.12.14 **G** On the other hand, non-EEA-based insurance intermediaries wishing to establish a branch in the UK for the purpose of carrying on *insurance distribution activities* may only do so with *Part 4A permission*.

E-Commerce Directive

5.12.15 **G** The *E-Commerce Directive* removes restrictions on the cross-border provision of services by electronic means, introducing a *country of origin* approach to regulation. This requires *EEA States* to impose certain requirements on the outward provision of such services and to lift them from inward providers. The *E-Commerce Directive* defines an e-commerce service (termed an *information society service*) as any service, normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the service. So, for example, it includes services provided over the internet, by solicited e-mail, and interactive digital television.

5.12.16 **G** The *E-Commerce Directive* does not remove the *IDD* requirement for *persons* taking up or pursuing *insurance distribution* for remuneration to be registered in their *Home State*. Nor does it remove the requirement for *EEA*-based intermediaries to acquire passporting rights in order to establish branches in the *United Kingdom* (see ■ PERG 5.12.7 G) in relation to *electronic commerce activity* carried on from an establishment in the *United Kingdom* or provide services on a cross-border basis into the *United Kingdom* where the relevant activity is carried on in the *United Kingdom*. An example of *electronic commerce activity* provided on a cross-border basis into the *United Kingdom* could be a recommendation in a (solicited) e-mail from an *EEA*-based intermediary to a *UK*-based customer to *buy* a particular *contract of insurance*.

5.12.17 **G** Put shortly, the *E-Commerce Directive* relates to services provided into the *United Kingdom* from other *EEA States* and from the *United Kingdom* into other Member States. In broad terms, such cross-border insurance distribution services provided by an *EEA firm* into the *United Kingdom* (via *electronic commerce activity* or distance means) will generally be subject to *IDD* registration in, and conduct of business regulation of, the intermediary's *EEA State* of origin. By contrast, insurance distribution services provided in the *United Kingdom* will be subject to *UK* conduct of business regulation, although the requirement for registration will again depend upon the intermediary's *EEA State* of origin.