Chapter 5

Guidance on insurance distribution activities
5.12 Link between activities and the United Kingdom

Introduction

5.12.1 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.

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

<table>
<thead>
<tr>
<th>Needs Part 4A permission</th>
<th>Schedule 3 EEA passport rights available</th>
<th>Overseas persons exclusion available</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registered EEA-based intermediary with UK branch (registered office or head office in another EEA State)</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Registered EEA-based intermediary with no UK branch providing</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>
WHERE ARE INSURANCE DISTRIBUTION ACTIVITIES CARRIED ON?

5.12.5 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 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 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 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 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 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 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 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 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 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.
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.

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.

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.