

Appendix 3

Guidance on passporting issues

3.1 Application

App3.1.1 **G** This appendix applies to all *firms* when carrying on a *passporting activity*, except for a *firm* which is only carrying on a *passporting activity* under the *auction regulation*.

3.2 Purpose

App3.2.1 **G** The purpose of this appendix is to give *guidance*:

- (1) to *UK firms* on some of the issues that arise when carrying on *passporting activities* (see ■ SUP App 3.5 and ■ SUP App 3.6);
- (2) to all *firms* on the relationship between *regulated activities* and activities passported under the *Single Market Directives* (see ■ SUP App 3.9 and ■ SUP App 3.10).

3.3 Background

The Treaty on the Functioning of the European Union

App3.3.1 **G** (1) The *Treaty* establishes in *EU law* the rights of freedom of establishment and freedom to provide services in the *EU*.

- (2) The *Treaty* lays down central principles governing the legal framework for freedom of establishment and the free movement of services in the *EU*. There are, however, a number of areas where the legal position is not clear. This includes, for example, identifying whether a service is provided through an establishment, where the issues involved are complex. Therefore, this Appendix is intended to provide *guidance* but cannot be regarded as comprehensive. Ultimately, the construction of the *Treaty* and relevant Directive provisions is a matter for the European Court of Justice.

App3.3.2 **G** The *Treaty* provides the framework for the provision of banking, insurance business, investment business, UCITS management services and insurance mediation, while the *Single Market Directives* clarify the rights and freedoms within that framework.

EU and EEA

App3.3.3 **G** The agreement on the *European Economic Area*, signed at Oporto on 2 May 1992, extends certain *EU* legislation to those *EEA States* that are not Member States of the *EU*.

Interpretative communications

App3.3.4 **G** In 1997, the European Commission published an interpretative communication (Freedom to provide services and the interests of the general good in the Second Banking Directive (97/C 209/04)) (the text of this directive and the First Banking Directive is now consolidated in the *Banking Consolidation Directive*). The European Commission's objective in publishing this communication was to explain and clarify the *EU* rules. The European Commission deemed it desirable "to restate in a Communication the principles laid down by the Court of Justice and to set out its position regarding the application of these Principles to the specific problems raised by the Second Banking Directive".

App3.3.5 **G** In 2000, the European Commission published a further interpretative communication (Freedom to provide services and the general good in the insurance sector (2000/C43/03)). This allowed the European Commission to publicise its own interpretation of the rules on the freedom to provide services.

App3.3.6 **G** (1) The European Commission has not produced an interpretative communication on *MiFID*. It is arguable, however, that the principles in the communication on the Second Banking Directive can be applied to *investment services and activities*. This is because Chapter II of Title II of *MiFID* (containing provisions relating to operating conditions for investment firms) also applies to the *investment services and activities* of firms operating under the *Banking Consolidation Directive*, which is repealed and replaced by the *CRD*.

- (2) The European Commission has not produced an interpretative communication on the *IDD*, *AIFMD*, the *MCD* or the *UCITS Directive*.

App3.3.7 **G** In giving its views, communications made by the European Commission have the status of guidance and are not binding on the national courts of *EEA States*. This is because it is the European Court of Justice that has ultimate responsibility for

interpreting the *Treaty* and secondary legislation. Accordingly, the communications "do not prejudice the interpretation that the Court of Justice ..., which is responsible in the final instance for interpreting the *Treaty* and secondary legislation, might place on the matter at issue." (European Commission interpretative communication: Freedom to provide services and the general good in the insurance sector (C(99) 5046). However, the Courts may take account of European Commission communications when interpreting the *Treaty* and secondary legislation.

App3.3.8 **G** *Firms* should also note that European Commission communications do not necessarily represent the views taken by all *EEA States*.

E-Commerce

App3.3.9 **G** The *E-Commerce Directive* covers services provided at a distance by means of electronic equipment for the processing (including digital compression) and storage of data. The services would normally be provided in return for remuneration and must be provided at the individual request of a recipient (see recital 17 of the *E-Commerce Directive*). The Directive implements the *country of origin* approach to regulation. This approach makes *firms* subject to the conduct of business requirements of the *EEA State* from which the service is provided. This is subject to certain derogations (see ■ SUP App 3.3.11 G).

App3.3.10 **G** The *E-Commerce Directive* does not affect the responsibilities of *Home State* under the *Single Market Directives*. This includes the obligation of a *Home State regulator* to notify the *Host State regulator* of a *firm's* intention to establish a *branch* in, or provide *cross border services* into, the other *EEA State*.

App3.3.11 **G** There are, however, general derogations from the internal market provisions under article 3(3) of the *E-Commerce Directive*. The derogations include consumer contracts, the permissibility of unsolicited e-mail and certain insurance services (both life and non-life). Where these derogations apply, the *EEA States* in which the recipients of the service are based may continue to be able to impose their own requirements.

App3.3.12 **G** [deleted]

Notification of establishing a branch or of providing cross border services

App3.3.13 **G** The *Single Market Directives* require *credit institutions, insurance undertakings* (other than *reinsurance undertakings*), *MiFID investment firms, AIFMs, UCITS management companies, insurance intermediaries* and *MCD credit intermediaries* to make a notification to the *Home State* before establishing a *branch* or providing *cross border services*.

■ SUP 13.5 (Notices of intention) sets out the notification requirements for a *firm* seeking to establish a *branch* or provide *cross border services*. As *firms* will note, the decision whether a passport notification needs to be made will be a matter of interpretation. The onus is on *firms* to comply with the requirements of the *Act* and, where relevant, the laws of other *EEA States*. So, in cases of doubt, *firms* should obtain their own legal advice on the specific issues involved.

App3.3.14 **G** Blanket notification is the practice of the *Home State regulator* notifying all *Host State regulators* in respect of all activities regardless of any genuine intention to carry on the activity. This practice is discouraged by the *FCA* and *PRA*. However, a *firm* may be carrying on activities in the *United Kingdom* or elsewhere in a way that necessarily gives rise to a real possibility of the provision of services in other *EEA States*. In such cases, the *firm* should consider with its advisers whether it should notify the relevant authorities and include that possibility in its business plan.

3.6 Freedom to provide services

App3.6.1 **G** Article 56 (Services) of the *Treaty* grants to *EEA* nationals established in one *EEA State* the freedom to provide *cross border services* to other *EEA States*.

How services may be provided

App3.6.2 **G** Under the *Treaty*, the freedom to provide services within the EC may be exercised in three broad ways:

- (1) where the provider of a service moves temporarily to another *EEA State* in order to provide the service;
- (2) where the service is provided without either the provider or the recipient moving (in this situation the provision, and receipt, of the service may take place by post, telephone or fax, through computer terminals or by other means of remote control);
- (3) where the recipient of a service moves temporarily to another *EEA State* in order to receive (or, perhaps, commission the receipt of) the service within that State.

App3.6.3 **G** Under the *Single Market Directives*, however, *EEA rights* for the provision of services are concerned only with services provided in one of the ways referred to in ■ SUP App 3.6.2 G (1) and ■ (2) (How services may be provided).

App3.6.4 **G** [deleted]

Place of supply

App3.6.5 **G** In the opinion of the European Commission (and in the wording of the *Single Market Directives*) "only activities carried on within the territory of another Member State should be the subject of prior notification" (Commission interpretative communication: Freedom to provide services and the interests of the general good in the Second Banking Directive (97/C 209/04)). In determining, for the purposes of notification, whether a service is to be provided 'within' another *EEA State*, it is necessary to determine the place of supply of the service.

App3.6.6 **G** An *insurance undertaking* that effects *contracts of insurance* covering risks or commitments situated in another *EEA State* should comply with the notification procedures for the provision of services within that *EEA State*. The location of risks and commitments is found by reference to the rules set out in paragraph 6 of schedule 12 to the *Act*, which derive from article 13(13) and (14) of the *Solvency II Directive*. It may be appropriate for *insurers* to take legal advice as to how these rules are interpreted and applied in other *EEA States*. The need to passport may arise because of only one of the risks covered by an insurance policy. This includes, for example, where a policy covers a number of property risks and one of those properties is in another *EEA State*.

App3.6.7 **G** In respect of banking services, the European Commission believes that "...to determine where the activity was carried on, the place of provision of what may be termed the 'characteristic performance' of the service i.e. the essential supply for which payment is due, must be determined" (Commission interpretative communication: Freedom to provide services and the interests of the general good in the Second Banking Directive (97/C 209/04)). In the view of the *FCA*, this requires consideration of where the service is carried out in practice.

App3.6.8 **G** The *FCA* is of the opinion that *UK firms* that are *credit institutions* and *MiFID investment firms* should apply the 'characteristic performance' test (as referred to in **■ SUP App 3.6.7 G**) when considering whether prior notification is required for services business. *Firms* should note that other *EEA States* may take a different view. Some *EEA States* may apply a solicitation test. This is a test as to whether it is the consumer or the provider that initiates the business relationship.

App3.6.9 **G** In the case of a *UK firm* conducting portfolio management, for example, this would mean looking at where the investment decisions and management are actually carried on in order to determine where the service is undertaken. Similarly, a *UK stockbroker* that receives orders by telephone from a *customer* in France for execution on a *UK exchange* may be deemed to be dealing or receiving and transmitting orders within the territory of the United Kingdom. In such a case, whether the *firm* solicited the overseas investor would be irrelevant.

App3.6.10 **G** Where, however, a *credit institution* or *MiFID investment firm*:

- (1) intends to send a member of staff or a temporarily authorised intermediary to the territory of another *EEA State* on a temporary basis to provide financial services; or
- (2) provides advice, of the type that requires notification under either *MiFID* or the *Banking Consolidation Directive*, to *customers* in another *EEA State*;

the *firm* should make a prior notification under the freedom to provide services.

Temporary activities

App3.6.11 **G** The key distinction in relation to temporary activities is whether a *firm* should make its notification under the freedom of establishment in a *Host State*, or whether it should notify under the freedom to provide services into a *Host State*. It would be inappropriate to discuss such a complex issue in *guidance* of this nature. It is recommended that, where a *firm* is unclear on the distinction, it should seek

appropriate advice. In either case, where a *firm* is carrying on activities in another *EEA State* under a *Single Market Directive*, it should make a notification.

App3.6.12 **G** [deleted]

App3.6.13 **G** [deleted]

App3.6.14 **G** [deleted]

Monitoring procedures

App3.6.15 **G** The *FCA* considers that, in order to comply with *Principle 3: Management and control* (see ■ PRIN 2.1.1 R), a *firm* should have appropriate procedures to monitor the nature of the services provided to its *customers*. Where a *UK firm* has non-resident *customers* but has not notified the *EEA State* in which the *customers* are resident that it wishes to exercise its freedom to provide services, the *FCA* would expect the *firm's* systems to include appropriate controls. Such controls would include procedures to prevent the supply of services covered by the *Single Market Directives* in the *EEA State* in which the *customers* are resident if a notification has not been made and it is proposed to provide services otherwise than by remote communication. In respect of *insurance business*, the *insurer's* records should identify the location of the risk at the time the policy is taken out or last renewed. That will, in most cases, remain the location of the risk thereafter, even if, for example, the *policyholder* changes his habitual residence after that time.

App3.6.16 **G** [deleted]

App3.6.17 **G** [deleted]

App3.6.18 **G** [deleted]

App3.6.19 **G** [deleted]

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App3.6.24 **G** [deleted]

Membership of trading venues

App3.6.25 **G** (1) The *FCA* is of the opinion that where a *UK firm* becomes a member of:

- (a) a *regulated market* that has its registered office or, if it has no registered office, its head office, in another *EEA State*; or
- (b) an *MTF* or *OTF* operated by a *MiFID investment firm* or a *market operator* in another *EEA State*,

the same principles as in the 'characteristic performance' test should apply. Under this test, the fact that a *UK firm* has a screen displaying the *regulated market's* or the *MTF's* or the *OTF's* prices in its *UK* office does not mean that it is *dealing* within the territory of the *Home State* of the *regulated market* or of the *MTF* or *OTF*.

(2) In such a case, the *FCA* would consider that:

- (a) the *market operator* operating the *regulated market* or the *MTF* or the *OTF* is providing a *cross-border service* into the *UK* and so, provided it has given notice to its *Home State regulator* in accordance with articles 53(6) or 34(6) of *MiFID*, it will be exempt from the *general prohibition* in respect of any *regulated activity* carried on as part of the business of the *regulated market*, of *operating a multilateral trading facility* or of *operating an organised trading facility* (see section 312A of the Act);
- (b) the *MiFID investment firm* operating the *MTF* or *OTF* is providing a *cross-border service* into the *UK* and so needs to comply with **■** SUP 13A.

App3.6.26 **G** *Firms* are reminded of their rights, under article 36 of *MiFID*, to become members of, or have access to, the *regulated markets* in other Member States.

App3.6.27 **G** *Firms* should note that, in circumstances where the *FCA* take the view that a notification would not be required, other *EEA States* may take a different view.

App3.6.28 **G** [deleted]

App3.6.29 **G** [deleted]

App3.6.30 **G** [deleted]

App3.6.31 **G** [deleted]

3.9 Mapping of MiFID, CRD, AIFMD, UCITS Directive, MCD and IDD to the Regulated Activities Order

App3.9.1 **G** The following Tables 1, 2, 2ZA, 2A and 2B provide an outline of the *regulated activities* and *specified investments* that may be of relevance to *firms* considering undertaking *passporting activities* under the *CRD, MiFID, AIFMD, the UCITS Directive, the MCD* and the *IDD*. The tables may be of assistance to *UK firms* that are thinking of offering financial services in another *EEA State* and to *EEA firms* that may offer those services in the *United Kingdom*.

App3.9.2 **G** The tables provide a general indication of the *investments* and activities specified in the *Regulated Activities Order* that may correspond to categories provided for in the *CRD, MiFID, AIFMD, the UCITS Directive, the MCD* or the *IDD*. The tables do not provide definitive *guidance* as to whether a *firm* is carrying on an activity that is capable of being passported, nor do the tables take account of exceptions that remove the effect of articles. Whether a *firm* is carrying on a *passporting activity* will depend on the particular circumstances of the *firm*. If a *firm's* activities give rise to potential passporting issues, it should obtain specialist advice on the relevant issues.

App3.9.3 **G** In considering the issues raised in the tables, *firms* should note that:

- (1) article 64 of the *Regulated Activities Order* (Agreeing to carry on specific kinds of activity) may apply in respect of agreeing to undertake the specified activity (see ■ PERG 2.7.21G); and
- (2) article 89 of the *Regulated Activities Order* (Rights to or interests in investments) applies in respect of rights to and interests in the types of *investments* to which the category applies.

Activities set out in Annex 1 of the CRD

App3.9.4 **G**

Table 1: CRD activities		Part II RAO Activities	Part III RAO Investments
1.	Taking deposits and other repayable funds from the public	Article 5	Article 74
2.	Lending	Article 61, 64	Article 88
3.	Financial leasing		
4.	Money transmission services		
5.	Issuing and administering means of payment (eg credit cards, travellers' cheques and bankers' drafts)		
6.	Guarantees and commitments		
7.	Trading for own account or for account of customers in:		
	(a) money market instruments	Article 14, 21, 25 (see Note 1), 64	Article 77, 78, 80, 83-85, 89
	(b) foreign exchange	Article 14, 21, 25, 64	Article 83-85, 89

Table 1: CRD activities		Part II RAO Activities	Part III RAO Investments
	(c) financial futures and options (d) exchange and interest rate instruments (e) transferable securities	Article 14, 21, 25, 64 Article 14, 21, 25, 64 Article 14, 21, 25, 64	Article 83-85, 89 Article 83-85, 89 Article 76-81, 89
8.	Participation in share issues and the provision of services relating to such issues	Article 14, 21, 25, 53(1), 64	Article 76-81, 89
9.	Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings	Article 14, 21, 25, 53(1), 64	Article 76-80, 83-85, 89
10.	Money broking	Article 25, 64	Article 77, 78, 89
11.	Portfolio management and advice	Article 14, 21, 25, 37, 53(1), 64	Article 76-81, 83-85, 89
12.	Safekeeping and administration of securities	Article 40, 45, 64	Article 76-81, 83-85, 89
13.	Credit reference services		
14.	Safe custody services		
15.	Issuing electric money	Article 9B	Article 74A

Note 1: The services and activities provided for in Sections A and B of Annex I of *MiFID* when referring to the *financial instruments* provided for in Section C of Annex I of that Directive are subject to mutual recognition according to the CRD from 1 January 2013. See the table at SUP App 3.9.5 G below for mapping of *MiFID investment services and activities*. For further details relating to this residual category, please see the "CRD" section of the passporting forms entitled "Notification of intention to establish a branch in another EEA State" and "Notification of intention to provide cross border services in another EEA State".

Services set out in Annex I to MiFID

App3.9.5 **G**

Table 2: <i>MiFID investment services and activities</i>		Part II RAO Activities	Part III RAO Investments
<i>A MiFID investment services and activities</i>			
1.	Reception and transmission of orders in relation to one or more financial instruments	Article 25	Article 76-81, 82B, 83-85, 89
2.	Execution of orders on behalf of clients	Article 14, 21	A Article 76-81, 82B, 83-85, 89
3.	Dealing on own account	Article 14	Article 76-81, 82B, 83-85, 89
4.	Portfolio management	Article 37 (14, 21, 25 - see Note 1)	Article 76-81, 82B, 83-85, 89
5.	Investment advice	Article 53(1)	Article 76-81, 82B, 83-85, 89

6.	Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis	Article 14, 21	Article 76-81, 82B, 83-85, 89
7.	Placing of financial instruments without a firm commitment basis	Article 21, 25	Article 76-81, 82B, 83-85, 89
8.	Operation of Multilateral Trading Facilities	Article 25D (see Note 2)	Article 76-81, 82B, 83-85, 89
9.	Operation of an OTF	Article 25DA (see Note 3)	Article 77, 77A, 78, 79, 80, 81, 82B, 83-85, 89
	Ancillary services	Part II RAO Activities	Part III RAO Investments
1.	Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management	Article 40, 45, 64	Article 76-81, 82B, 83-85, 89
2.	Granting credits or loans to an investor to allow him to carry out a transaction in one or more of the relevant instruments where the firm granting the credit or loan is involved		
3.	Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings	Article 14, 21, 25, 53(1), 64	Article 76-80, 82B, 83-85, 89
4.	Foreign exchange services where these are connected with the provision of investment services	Article 14, 21, 25, 53(1), 64	Article 83-85, 89
5.	Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments	Article 53(1), 64 (see Note 4)	Article 76-81, 82B, 83-85, 89
6.	Services related to underwriting	Article 25, 53(1), 64	Article 76-81, 82B, 83-85, 89
7.	Investment services and activities as well as ancillary services of the type included under Section A or B of Annex I related to the un	Article 14, 21, 25, 25D, 37, 53(1), 64	Article 83 and 84

derlying of the derivatives included under Section C 5, 6, 7 and 10-where these are connected to the provision of investment or ancillary services.

Note 1. A *firm* may also carry on these other activities when it is *managing investments*.

Note 2. A *firm* operating an *MTF* under article 25D does not need to have a *permission* covering other *regulated activities*, unless it performs other *regulated activities* in addition to *operating an MTF*.

Note 3. A *firm* operating an *OTF* under article 25DA does not need to have a *permission* covering other *regulated activities*, unless it performs other *regulated activities* in addition to *operating an OTF*.

Note 4: A *firm* which provides *investment research* and financial analysis or other forms of general recommendation relating to transactions in *financial instruments* does not need *permission* under article 53(1) of the *Regulated Activities Order* if it is appropriately authorised (see article 53(1) to (1D) of the *Regulated Activities Order*).

Activities set out in article 6(2) to (4) of AIFMD

App3.9.5A **G**

Table 2ZA: AIFMD activities		Part II RAO Activities	Part III RAO Investments
1.	<i>AIFM management functions.</i>	Article 51ZC	N/A (activity relates to property of any kind)
2.	Management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement in accordance with article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary client-by-client basis (Note 2).	Articles 14, 21, 25, 37, 40 (arranging only), 64	Articles 76 to 81, 82B, 83 to 85, 89
3.	Investment advice (Note 2).	Articles 53(1), 64	Articles 76 to 81, 82B, 83 to 85, 89
4.	Safe-keeping and administration in relation to <i>shares</i> or <i>units</i> of collective investment undertakings.	Articles 40, 45, 64	Articles 76 to 81, 82B, 83 to 85, 89

Table 2ZA: AIFMD activities		Part II RAO Activities	Part III RAO Investments
5.	Reception and transmission or orders in relation to <i>financial instruments</i> .	Articles 25(1), 64	Articles 76 to 81, 82B, 83 to 85, 89

Note 1. See FUND 1.4.2 R to FUND 1.4.4 R for further information in relation to the activities that *full-scope UK AIFMs* are able to perform.

Note 2. See FUND 1.4.5 G for the position with respect to assets which are not *financial instruments*.

Activities set out in Article 6(2) and (3) of the UCITS Directive

App 3.9.6 G

Table 2A: UCITS Directive activities		Part II RAO Activities	Part III RAO Investments
1.	The management of UCITS in the form of unit trusts / common funds or of investment companies; this includes the function mentioned in Annex II of the <i>UCITS Directive</i> (see Note 2).	Article 51ZA	N/A (activity relates to property of any kind) (Note 3)
2.	Managing portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Section C of Annex I to <i>MiFID</i> .	Articles 14, 21, 25, 37, 40 (arranging only), 64	Articles 76-81, 82B, 83-85, 89
3.	Investment advice concerning one or more of the instruments listed in Section C of Annex I to <i>MiFID</i> .	Articles 53(1), 64	Articles 76-81, 82B, 83-85, 89
4.	Safekeeping and administration services in relation to units of collective investment undertakings.	Articles 40, 45, 64	Articles 76-81, 82B, 83-85, 89

Note 1. A *UCITS management company* can only be authorised to carry on the non-core services set out in rows (3) and (4) of Table 2A if it is also *authorised* to carry on the activity set out in row (2) of the table (see COLL 6.9.9 R).

Note 2. The functions set out in Annex 2 to the *UCITS Directive* are:

1. Investment management.
2. Administration:
 - a. legal and fund management accounting services;
 - b. customer inquiries;
 - c. valuation and pricing (including tax returns);
 - d. regulatory compliance monitoring;
 - e. maintenance of unit-holder register;

Table 2A: UCITS Directive activities	Part II RAO Activities	Part III RAO Investments
f.	distribution of income;	
g.	unit issues and redemptions;	
h.	contract settlements (including certificate dispatch);	
i.	record keeping.	
3. Marketing.		
<p>Note 3. The <i>regulated activity of managing a UCITS</i> may be carried on for property of any kind (article 4(2) of the <i>regulated activities order</i>). However, the <i>scheme property</i> of a <i>UCITS scheme</i> is limited to certain types of property, in line with COLL 5 (Investment and borrowing powers).</p>		

Activities set out in articles 2.1(1) and 2.1(2) of the IDD

App3.9.7 G

Table 2B: Insurance Distribution Directive Activities/Examples		Part II RAO Activities	Part III RAO Investments
1.	Proposing or carrying out other work preparatory to the conclusion of contracts of insurance or reinsurance.	Articles 25, 53(1) and 64	Articles 75, 89 (see Note 1)
1A.	Advising on contracts of insurance or reinsurance	Articles 53(1) and 64	Articles 75, 89
2.	Concluding contracts of insurance or reinsurance	Articles 21, 25, 53(1) and 64	Articles 75, 89
3.	Assisting in the administration and performance of contracts of insurance or reinsurance, in particular in the event of a claim.	Articles 39A, 64	Articles 75, 89
4	Provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media.	Articles 21, 25, (where this involves the provision of advice) 53(1), and 64.	Articles 75, 89

Note 1. Rights to or interests in *life policies* are *specified investments* under Article 89 of the *Regulated Activities Order*, but rights to or interests in *general insurance contracts* are not.

Note 2. Row 4 in Table 2B includes text that appears in article 2.1(1) of the *IDD*. These activities are not considered to be separate, discrete activities under the *IDD* but rather are included by way of an example of what constitutes *insurance distribution*. They have been included in this table for completeness, together with an indication of the Part II RAO activities and Part III RAO investments that may be relevant. This is to indicate, including for *firms* considering undertaking passport activities under the *IDD*, how these examples may relate to *regulated activities* and *specified investments*.

Activities set out in article 4 of the MCD

App3.9.8 **G**

Table 3: MCD activities	Part II RAO specified activities	Part III RAO Investments
1 Acting as credit intermediary	Articles 25A(1), 25A(2A), 53A, 36A(1)(d), (e), (f) and 53DA	Articles 88 and 88D

3.10 Mapping of the Solvency II Directive to the Regulated Activities Order

Introduction

App3.10.1 **G** The *guidance* in Table 3 describes in broad outline the relationship between:

- (1) the insurance-related *regulated activities* specified in the *Regulated Activities Order*; and
- (2) the activities within the scope of the *Solvency II Directive*

App3.10.2 **G** This is a guide only and should not be used as a substitute for legal advice in individual cases.

Table 3: Solvency II Directive activities		Part II RAO Activities	Part III RAO Investments
1. Non-life insurance activities			
1.	Taking up and carrying on direct non-life insurance business	Article 10	Article 75
2.	Classes 1 to 18 of non-life insurance business in Point A of Annex I to the Solvency II Directive		Corresponding paragraphs 1 to 18 of Schedule 1, Part I
2. Life insurance activities			
1.	Taking up and carrying on direct life insurance business	Article 10	Article 75
2.	Classes I to IX of direct life insurance business in Annex II to the Solvency II Directive		Corresponding paragraphs I to IX of Schedule 1, Part II

Meaning of contract of insurance

App3.10.3 **G** The meaning of *contract of insurance* is set out in article 3(1) of the *Regulated Activities Order* (Interpretation). It does not include benefit-in-kind funeral plans, which are specified in article 60 of the *Regulated Activities Order* (plans covered by insurance or trust arrangements). Such funeral plans (to the extent that they are insurance) are also excluded from the *Solvency II Directive*. It covers some contracts

which might not otherwise be viewed as insurance in the *United Kingdom* (for example, contracts of guarantee). These contracts are also governed by the *Solvency II Directive*. For the purpose of the *Regulated Activities Order*, a *contract of insurance* includes a contract of reinsurance as well as a contract of direct insurance.

The Solvency II Directive

App3.10.4 **G** Article 1 of the *Solvency II Directive* provides that the Directive "lays down rules concerning... the taking up and pursuit, within the Community, of the self-employed activities of direct insurance and reinsurance". Article 10 of the *Regulated Activities Order* (Effecting and carrying out contracts of insurance) also covers reinsurance.

App3.10.5 **G** Articles 3 to 12 of the *Solvency II Directive* set out certain exclusions by reference to:

- (1) types of insurance;
- (2) types of insurer;
- (3) particular conditions under which insurance activities are carried out.
- (4) annual income; and
- (5) particular identified institutions.

App3.10.6 **G** Some of the exclusions referred to in the *Solvency II Directive* mirror exclusions in the *Regulated Activities Order*. So, the exclusion for breakdown insurance in article 6 of the *Solvency II Directive* is matched by a slightly narrower exclusion in article 12 of the *Regulated Activities Order* (Breakdown insurance). The separate treatment of benefit-in-kind funeral plans under the *Regulated Activities Order* (see ■ SUP App 3.10.4 G) is matched by their exclusion on a slightly wider basis in article 10 of the *Solvency II Directive*. Other requirements from the *Solvency II Directive* are also excluded from regulation by the *Exemption Order*.

App3.10.7 **G** Most of the exclusions under the Directives, however, are not excluded from being *regulated activities*. For example, the activities of "*non-directive friendly societies*" are regulated under the *Act*, on a "lighter basis" than the activities of other insurers.

Territorial scope of the Regulated Activities Order and the Directive

App3.10.8 **G** Under the *Act* and the *Regulated Activities Order*, the activities of *effecting and carrying out contracts of insurance* are treated as being carried on in the *United Kingdom* on the basis of legal tests under which the location of the risk is only one factor. If the risk is located in the *United Kingdom*, then (other relevant factors being taken into account) the activity will, in the vast majority of cases, also be viewed as carried on in the *United Kingdom*. There are exceptions, however, and overseas insurers may insure risks in the *United Kingdom* without carrying on business here and so without requiring to be regulated (although the *financial promotion* regime may apply). By contrast, under the *Solvency II Directive*, the responsibility, as between *EEA States*, for regulating the conduct of passported

insurance services is determined by reference to the location of the risk or commitment, as defined in article 13(13) and (14) of the *Solvency II Directive*.

App3.10.9 G So, the effect of App 3.12.1 is that an insurer may be carrying on *insurance business* in the *United Kingdom* which is to be treated as a *regulated activity* under article 10 to the *Regulated Activities Order* (Effecting and carrying out contracts of insurance) in circumstances where the risks covered are treated as located in another *EEA State*. In that event, the *insurer* is required by Schedule 3 to the *Act* to passport into the State concerned and may be subject to conduct of business requirements in that State (see ■ SUP 13.10 (Applicable provisions)).

App3.10.10 G An *insurer* authorised in another *EEA State* who is insuring *UK risks* and so passports on a services basis under the *Solvency II Directive* into the *United Kingdom* may not be carrying on a *regulated activity* in the *United Kingdom*. But, if it passports into the *United Kingdom*, it will qualify for *authorisation* under paragraph 12 of Schedule 3 to the *Act* (Firms qualifying for authorisation). Where this is the case, the *insurer* will be subject to conduct of business requirements in the *United Kingdom* (see ■ SUP 13A.6 (Which rules will an incoming EEA firm be subject to?)).

Activities carried on by incoming EEA firms in connection with insurance business.

App3.10.11 G Although the *Solvency II Directive* is concerned with the *regulated activities of effecting and carrying out contracts of insurance*, an *incoming EEA firm* passported under the *Solvency II Directive* will be entitled to carry on certain other *regulated activities* without the need for *top-up permission*. This is where the *regulated activities* are carried on for the purposes of or in connection with the *incoming EEA Firm's insurance business*. These *regulated activities* may include:

- (1) *dealing in investments as principal;*
- (2) *dealing in investments as agent;*
- (3) *arranging (bringing about) deals in investments;*
- (4) *making arrangements with a view to transactions in investments;*
- (5) *managing investments;*
- (6) *safeguarding and administering investments;*
- (7) *advising on investments;*
- (8) agreeing to carry on a regulated activity of the above kind.

Financial promotion

App3.10.12 G The *financial promotion* regime under section 21 of the *Act* (Restrictions on financial promotion) may also apply to EEA insurance undertakings regardless of whether they carry on a *regulated activity* in the *United Kingdom* or passport into the *United Kingdom*.