

Appendix 3 Guidance on passporting issues

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*.