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Brexit & financial services

Insurance Distribution

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Introduction

The Insurance Distribution Directive[1] ('the IDD') provides a passporting mechanism, pursuant to which '(re)insurance intermediaries established in an EEA State and registered[2] with a competent authority[3] in that State may do business in an EEA Host State, on either a freedom of services basis;[4] or a freedom of establishment basis.[5] As a result of Brexit, those passporting rights have now been lost by UK firms wishing to do business in an EEA state and by EEA firms wishing to do business in the UK.

This note explores the options available to a UK (re)insurance intermediary that wishes to continue doing business in an EEA Member State and to an EEA (re)insurance intermediary that wishes to continue doing business in the UK.

1 Directive (EU) 2016/97 of 20 January 2016 on insurance distribution (recast).
2 IDD, Art. 3 (Registration).
3 In the UK, the relevant competent authority is the Financial Conduct Authority, which is the solo regulator of firms with permission under FSMA 2000 to undertake (re) insurance distribution activities (as to which, see paragraph above.
4 IDD, Art. 4.
5 IDD, Art 6.

Background

The EEA regime

The IDD 'lays down rules concerning the taking-up and pursuit of the activities of insurance and reinsurance distribution in the ... [EU]'.[6] The directive applies[7] 'to any natural or legal person who is established in a Member State or who wishes to be established there in order to take up and pursue the distribution of insurance and reinsurance products'.

IDD, Art 2(1) defines 'insurance distribution' as:

> *'the activities of advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, including the 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'.*

Correspondingly, IDD, Art 2(3) defines an 'insurance intermediary' as:

> *'any natural or legal person, other than an insurance or reinsurance undertaking or their employees and other than an ancillary[8] insurance intermediary, who, for remuneration, takes up or pursues the activity of insurance distribution' (emphasis added).*

IDD, Arts. 2(2) and 2(5) define 'reinsurance distribution' and 'reinsurance intermediary' in similar terms. In what follows, a reference to 'insurance distribution' or an 'insurance intermediary' should be taken to include reinsurance, unless the context indicates otherwise.

Insurance distribution and insurance intermediaries

The definitions set out above make an important distinction between the activity of insurance distribution and the status of being an insurance intermediary. Not all entities that carry on the activity of insurance distribution will be insurance intermediaries. Most obviously, an insurance undertaking authorised in an EEA State under Solvency II (a) will carry on insurance distribution activities when it sells insurance directly to its customers; (b) must therefore comply with the conduct requirements of the IDD in relation to those sales – including for example as to the information to be provided to the customer; but (c) is not an insurance intermediary.

By contrast, a person who is not an insurance undertaking, (for example, an independent insurance broker) (a) will be subject to the same conduct requirements of the IDD in respect of its insurance distribution activities; and (b) must in addition comply with the registration and professional competence requirements that the IDD imposes on insurance intermediaries. By the same logic, the passporting mechanism under the IDD (described above, is relevant and available to an insurance intermediary registered in its EEA Home State, but is not relevant to an insurance undertaking, whose passporting rights and other regulatory requirements are governed by or under the Solvency II Directive.

Territorial scope of the IDD

IDD, Art 6(6) provides that:

> *'This Directive shall not apply to insurance and reinsurance distribution activities in relation to risks and commitments located outside the Union.*
>
> *This Directive shall not affect a Member State's law in respect of insurance and reinsurance distribution activities pursued by insurance and reinsurance undertakings or intermediaries established in a third country and operating on its territory under the principle of freedom to provide services, provided that equal treatment is guaranteed to all persons carrying out or authorised to carry out insurance and reinsurance distribution activities on that market.*
>
> *This Directive shall not regulate insurance or reinsurance distribution activities carried out in third countries.'*

Restriction on the use of intermediaries

IDD, Art. 16 provides (with paragraph breaks added for readability) that:

> *'Member States shall ensure that*
>
> *when using the services of the insurance, reinsurance or ancillary insurance intermediaries,*
>
> *insurance and reinsurance undertakings and intermediaries*
>
> *use the insurance and reinsurance distribution services only of registered insurance and reinsurance intermediaries or ancillary insurance intermediaries ...' (emphasis added).*

EIOPA's view on the provision of services under the IDD

In September 2018, EIOPA published a joint decision of the competent authorities in the EEA Member States, regarding their mutual co-operation and exchange of information in the implementation of the IDD.

The decision explains[10] that:

> *'EIOPA understands freedom to provide services in the case of Intermediaries ... as meaning:*
>
> *An Intermediary[11]... is operating under freedom to provide services ("FoS") if it intends to provide a policyholder, who is established in a Member State different from the one where the Intermediary ... is registered, with an insurance contract relating to a risk situated in a Member State different from the Member State where the Intermediary ... is registered.'*

6 IDD, Art 1(1).
7 IDD, Art. 1(2)
8 Ancillary insurance intermediaries are defined in IDD, Art 2(4). In summary they are natural or legal persons (other than banks and investment firms), (a) whose principal activity is not insurance distribution; and (b) who only distribute a limited range of insurance products that are complimentary to a good or service.
9 EIOPA, 'Decision of the Board of Supervisors on the cooperation of the competent authorities of the Member States of the European Economic Area with regard to Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, EIOPA-BoS/18-340', 28 September 2018.
10 Ibid., ¶ 2.2.1.1.
11 Which includes, in each case, an ancillary intermediary

The decision adds,[12] by way of an example of activities carried on under the freedom to provide services that

> *'Regarding electronic distance or distance marketing activities:*
>
> *If the content of the website of an Intermediary … is general and only in the language of the Member State of the Intermediary … , if it is not addressed to a specific group of customers or customers in specific Member States and when the customer is not able to directly or indirectly conclude an insurance contract using a website or other media, then the Intermediary … cannot be considered as actively seeking these customers and therefore cannot be considered as having the intention to do FoS in the Member State, where those customers are established.*
>
> *If an Intermediary … is contacted by those customers, it will not be considered as an intention to write business under FoS in the Member State of residence or of establishment of these customers.'*

The UK regime

The UK regulatory system is 'activity based'. Specifically, FSMA 2000, s. 19 (the general prohibition), read with FSMA 2000, s. 22 provides that no person may carry on a regulated activity in the UK by way of business, unless he is authorised or exempt. By corollary, however, UK financial services regulation does not bite on (a) activities that are not carried on in the UK; or (b) an invitation to engage in regulated financial services business, if the invitation originates outside the UK and is not capable of having an effect in the UK.

The UK implemented the IDD by designating as regulated activities under FSMA 2000 six 'insurance distribution activities'.[13] The UK regulatory regime generally treats reinsurance as a variety of insurance. Accordingly, in what follows, a reference to 'insurance' or an 'insurance intermediary' should be read as including a reference to reinsurance, unless the contrary is indicated.

The regulated activities that make up insurance distribution are:

> *'any of the following regulated activities carried on in relation to a contract of insurance or rights to or interests in a life policy:*
>
> *(a) dealing in investments as agent (RAO,[14] article 21);*
>
> *(b) arranging (bringing about) deals in investments (RAO, article 25(1));*
>
> *(c) making arrangements with a view to transactions in investments (RAO, article 25(2));*
>
> *(d) assisting in the administration and performance of a contract of insurance (RAO, article 39A);*
>
> *(e) advising on investments … (RAO, article 53(1));*
>
> *(f) agreeing to carry on a regulated activity in (a) to (e) (RAO, article 64).'*

Insurance distribution activities carried on by UK insurance firms

As noted above, the IDD distinguishes between (a) the activity of insurance distribution; and (b) the status of an insurance intermediary. The UK implementation of the IDD follows this pattern. A firm that is granted a FSMA 2000, Part 4A permission to effect or carry out contracts of insurance (i.e. a UK insurer) (a) will automatically receive permission to carry on the regulated activities that make up insurance distribution; and (b) will be regulated by the FCA in respect of its conduct, including its insurance distribution activities in the UK; but (c) will not be an insurance intermediary.

"By way of business"

This note assumes that any EEA insurance intermediary seeking to carry on insurance distribution in, or into, the UK will do so by way of business. Consistent with the IDD definition of a (re)insurance intermediary, as a person who carries on insurance distribution activity 'for remuneration', the Financial Services and Markets act (By way of Business) Order 2001 (SI 2001/1177), Art. 3(4) provides that:

> *'A person is not to be regarded as carrying on by way of business any insurance distribution activity unless he takes up or pursues that activity for remuneration.'*

Note, however, that the FCA Perimeter Guidance Manual, Chapter 5 ('PERG 5') defines 'remuneration' extremely broadly,[15] in line with this definition in the IDD, Art. 2(1)(9):

> *'remuneration' means any commission, fee, charge or other payment, including an economic benefit of any kind or any other financial or non-financial advantage or incentive offered or given in respect of insurance distribution activities'.*

"In the UK"

FSMA 2000, s. 418 (Carrying on regulated activities in the United Kingdom) deems certain activities to be carried on in the UK if, for example, a financial services business has its head office or its registered office in the UK, or maintains an establishment in the UK, from which the relevant activity is carried on. The English law decisions as to the meaning of 'establishment' in that context are considered in the note on Insurance & Reinsurance in this series.

The question of where a person carries on insurance distribution activities is a question of fact, on which there is little, if any, case law. In general terms, the test is whether activities in the UK are of 'sufficient regularity and substance to constitute the carrying on of business in the UK' (Financial Services Authority v Fradley and Woodward [2005] EWCA 1183, per Arden LJ, at [53]).

The FCA's view is set out at PERG 5.12.8G:

> *'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.'*

The case of an insurer established outside the UK and providing cover for risks and policyholders located in the UK, on a cross-border basis without a UK authorisation is addressed in the separate Insurance & Reinsurance note in this series. If that insurer carries on insurance distribution activities (either itself, or through the agency of a person - including an insurance intermediary),[16] the location of the agent's insurance distribution activities (in or out of the UK), will be a relevant factor for the UK regulators and the English Court to consider in deciding whether (or not) there is an insurance business in the UK.

13 The collective noun used in the Glossary to the FCA Handbook of Rules and Guidance.
14 The RAO is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), as to which, see paragraphs [...] to [...] above.
15 See PERG 5.4.3G.
16 Note that the activities of the insurer's agents will be attributed to the insurer, whether or not the agent is authorised and regulated in its own right (for example because the agent is a UK insurance intermediary with a FSMA 2000, Part 4A permission for insurance distribution activities).

Insurance distribution firms established in the UK doing business in the EEA

The options now available to UK (re)insurance intermediary that wishes to continue doing business in the EEA are as follows:

1. UK insurance intermediary sets up an establishment and seeks registration in an EEA State
2. UK insurance intermediary gives generic indications of services and availability
3. UK insurance intermediary targets insurance distribution services at policyholders and risks located in the EEA

Each option carries with it implications for, amongst other things, the capital requirements and group supervision arrangements that might apply to the firms concerned. Those implications require detailed analysis based on the particular circumstances of the firms concerned and are outside the scope of this note.

UK Insurance intermediary sets up an establishment and seeks registration in an EEA State

It is of course open to a UK insurance intermediary (or group) to establish a new intermediary (perhaps as a sister company or subsidiary of an existing UK firm) in an EEA Member State and to seek the IDD registration of that intermediary with the relevant competent authority in that State. That will carry with it the disadvantage of cost, but the advantage that the new entity will be able to exercise passporting rights under the IDD to do business in any other EEA State.

The extent to which the newly registered entity may be entitled to rely on or make use of resources and expertise provided by its UK parent or sister companies (whether by secondment of employees or otherwise) will be a matter for the law of the EEA State in which the new intermediary is established and the implementation in that State of the professional and organisational requirements applicable to insurance intermediaries, under IDD, Art. 10. By way of example, IDD, Art. 10(1) provides that:

> *'Home Member States shall ensure that insurance and reinsurance distributors and employees of insurance and reinsurance undertakings carrying out insurance or reinsurance distribution activities possess appropriate knowledge and ability in order to complete their tasks and perform their duties adequately'.*

In that context, EIOPA's recommendation[17] regarding insurance distribution activities is that:

> *'Competent authorities should ensure that UK intermediaries and entities which intend to continue or commence distribution activities to EU27 policyholders and for EU27 risks after the UK's withdrawal are established and registered in the EU27 in line with the relevant provisions of the IDD. Competent authorities should ensure that intermediaries, which are legal persons and are established and registered in the Union, demonstrate an appropriate level of corporate substance, proportionate to the nature, scale and complexity of their business. These intermediaries should not display the characteristics of an empty shell. Moreover, the professional and organisational requirements of the IDD must be met on a continuous basis.*
>
> *This is without prejudice to the right of the Member States to introduce special provisions in their national law for third country intermediaries, provided that equal treatment of intermediaries on the respective market is guaranteed.'*

UK insurance intermediary giving generic indications of services and availability

It appears to follow from EIOPA's September 2018 decision (set out above) that generic advertising (in the sense outlined there, for example not addressed to specific customers) in English, by a UK insurance intermediary would not be regarded as an exercise of the freedom to provide services under the IDD, even if the advertising results in an approach by the potential policyholder to the intermediary in the UK. In addition, if the UK intermediary then carries on its activities with or for the potential policyholder only in the UK (or, in any event, outside the EEA), that activity ought not to be caught by the IDD, pursuant to Art. 6(6), which (as set out above), provides that the IDD 'shall not regulate insurance or reinsurance distribution activities carried out in third countries'.

UK insurance intermediary targeting insurance distribution services at policyholders and risks located in the EEA

The EU regime for insurance regulation generally operates on the basis that the trigger for regulation is that the relevant risk or the relevant policyholder is located in the territory of the single market (i.e. in an EEA State). Against that background (a) the different treatment for generic advertising (described above) is unusual; and (b) it is unsurprising that EIOPA appears to have set its face against the possibility of a UK insurance distribution firm targeting its services into the EEA on a cross-border basis, and without an establishment in the EEA. EIOPA's Recommendation[18] is that:

> *'When assessing whether a specific UK intermediary or entity is providing distribution activities in the EU, competent authorities should take into account that only the consistent and uniform application of the IDD can guarantee the same level of protection for consumers and ensure a level playing field in the Union. Competent authorities should ensure that all intermediaries carrying out distribution activities which target EU27 policyholders and EU27 risks fall under the scope of the IDD.*
>
> *For this purpose, competent authorities should assess any distribution model against the definition of distribution activity as provided for in the IDD.'*

In so far as a UK insurance distribution firm targets its services not at potential policyholders, but at insurance undertakings and insurance intermediaries established in the EEA, the point made in the previous paragraph is reinforced by IDD, Art. 16, which requires EEA Member States to ensure that their national undertakings and intermediaries use only insurance distribution services provided by other IDD registered insurance intermediaries and undertakings. That would, of course, now preclude the use of a UK insurance intermediary.

17 EIOPA, 'Recommendations for the insurance sector in light of the United Kingdom withdrawing from the European Union, EIOPA-BoS-19/040', 19 February 2019, ¶ 29.
18 Ibid., ¶ 30.

Insurance distribution firms established in the EEA doing business in the UK

The options now available to an EEA (re)insurance intermediary that wishes to continue doing business in the UK are as follows:

1. EEA (re)insurance intermediary or group establishes an authorised subsidiary in the UK;
2. EEA (re)insurance intermediary establishes an authorised branch in the UK;
3. EEA (re)insurance intermediary or group implements either of Option 1 or Option 2 by way of the UK Temporary Permission Regime ('the TPR');
4. EEA (re)insurance intermediary enters the Financial Services Contracts Regime ('the FSCR') in order to run-off its existing UK insurance business; and
5. EEA (re)insurance intermediary distributes (re)insurance in the UK on a cross-border basis and without a UK authorisation.

As with the options open to UK (re)insurance intermediaries discussed above, each option carries with it implications for, amongst other things, the capital requirements and group supervision arrangements that might apply to the firms concerned.

1. Obtaining authorisation for an insurance intermediary in the UK

Authorisation and permission under FSMA 2000

The route to authorisation followed by UK domestic entities that wish to carry on insurance distribution, is indirect. The intending intermediary must apply for a FSMA 2000, Part 4A permission, to carry on the regulated activities that make up insurance distribution business, set out above. Authorisation follows automatically, when the required permissions are granted.

Insurance intermediaries are solo regulated by the FCA under FSMA 2000. Accordingly, the application for authorisation will be made to the FCA; and the applicant for authorisation must satisfy the threshold conditions for authorisation that are relevant to the FCA.

Threshold conditions for authorisation

The threshold conditions for authorisation (specified in FSMA 2000, Schedule 6) are the minimum standards that an entity must meet in order to obtain (and maintain) authorisation under FSMA 2000. As a solo-regulated firm, an insurance intermediary must meet threshold conditions that are relevant to the statutory objectives of the FCA. By way of example only, FSMA 2000, Schedule 6, Part 1B specifies the threshold conditions for 'Authorised Persons Who are not PRA-authorised Persons'.[19] It provides in part as follows:

> *'2B Location of offices...*
>
> *(4) If A [i.e. the applicant for authorisation] is seeking to carry on, or is carrying on, an insurance distribution activity—*
>
> *(a) where A is a body corporate incorporated in the United Kingdom, A's registered office, or if A has no registered office, A's head office, must be in the United Kingdom;*
>
> *(b) where A is an individual, A is to be treated for the purposes of sub-paragraph (2) as having a head office in the United Kingdom if A is resident in the United Kingdom.*
>
> *2C Effective supervision*
>
> *(1) A must be capable of being effectively supervised by the FCA having regard to all the circumstances ...*
>
> *2D Appropriate resources*
>
> *(1) The resources of A must be appropriate in relation to the regulated activities that A carries on or seeks to carry on....*
>
> *2E Suitability*
>
> *Must be a fit and proper person having regard to all the circumstances...*
>
> *2F Business model*
>
> *(1) A's business model (that is, A's strategy for doing business) must be suitable for a person carrying on the regulated activities that A carries on or seeks to carry on....'*

Process and time-line

Applying for UK authorisation is a detailed and complex process that almost inevitably requires professional advice and assistance. Even under 'business as usual' conditions, a straightforward application can take up to a year.

2. Obtaining authorisation for a branch in the UK

A third-country insurance intermediary may apply for the authorisation of a branch established in the UK. In principle, that application for authorisation is no different from an application for the authorisation of a UK subsidiary, considered above. The insurer must apply to the FCA for permission to carry on the regulated activities that make up insurance distribution, albeit through a UK branch. Permission will not be granted unless the relevant FCA threshold conditions are met. The firm will be authorised once permission is granted and will thereafter be solo-regulated by the FCA.

The complication, of course, is that whereas the FCA is the primary regulator of a UK insurance intermediary, that is not the case for the UK branch of a third-country insurance intermediary. Regulatory competence is shared between the FCA on one hand; and the insurer's home state supervisor on the other.

In September 2020 the FCA published[20] a Consultation Paper on its approach to international firm, which included the following. As at the time of writing, this consultation had not yet closed, with the result that the policy expressed by the FCA may change in response to consultation:

> *'Choosing between branch and subsidiary*
>
> *2.5 International firms have a degree of choice regarding the legal form of their UK presence. They can serve UK customers from an entity incorporated outside the UK, or they can do so through a UK-incorporated entity. In both cases, where an authorisation is sought, the authorisation covers the whole entity, including its UK and overseas offices, and we expect it to have an establishment or physical presence in the UK.*

19 A 'PRA-authorised person' is a FSMA 2000 jargon for a dual-regulated firm. See paragraph [...] above.

20 Financial Conduct Authority, 'Our Approach to International Firms, Consultation Paper CP 20/20', September 2020.

2.6 We refer to the UK establishment or physical presence of a non-UK entity as a UK 'branch'. The use of branches is an established part of the UK's financial services landscape. The ability of international firms to efficiently conduct business in the UK helps markets function well, in line with our objectives.

2.7 If an international firm meets the requirements to be authorised, and has good risk mitigation in place, then we will authorise it on that basis. However, we believe that, without appropriate mitigation, certain potential harms could be more likely to occur where the regulated activities are undertaken by international firms from branches rather than through UK-incorporated subsidiaries. This is in part because it might be more complex for us to take certain actions where international firms operate from branches.

2.8 In addition, jurisdictional differences may be an issue. International firms operating from branches may be subject to regulation and supervision in their home state that also cover aspects of activities in UK branches, thereby overlapping with UK rules and supervision by the FCA. It will not always be possible for the UK regulatory framework to take full account of the regulation and supervision in every home state, which could evolve over time. It may also be more difficult for us to influence risks to the customers of the UK branches from the actions and omissions at the firms' offices outside the UK.

2.9 In insolvency, a UK branch will usually be wound up together with its head office as part of the insolvency proceedings for the international firm in its home country. This may in some cases make protections of customers of that UK branch less effective.

2.10 To account for this, when assessing an international firm against the relevant minimum standards, we will have regard to whether there is a heightened potential to cause harm from the activities being undertaken from a branch and whether the risks can be adequately mitigated. We will also consider the nature and scale of the activities the international firm intends to conduct from outside the UK.'

3. The Temporary Permission Regime

The essentials of the UK Temporary Permission Regime ('the TPR') are outlined in the Overview note in this series. The purpose of the TPR is to provide an EEA firm that has exercised passport rights to carry on insurance business in the UK on a freedom of establishment, or a freedom of service basis, an enhanced opportunity to seek the authorisation of a UK branch, should it wish to do so. The TPR creates that enhanced opportunity by providing that if the EEA firm (a) made an application for UK branch authorisation before the end of the Brexit implementation period on 31 December 2020; and (b) is admitted to the TPR, it will deemed to have a FSMA 2000, Part 4A permission (covering the activities that it carried on immediately before the end of the current transition period) for up to three years after the end of the transition period, while its application for branch authorisation is processed, or until its deemed permission is revoked, whichever happens earlier.

4. The Financial Services Contracts Regime

The essentials of the Financial Services Contracts Regime ('the FSCR') as it is currently envisaged, are set out in the Overview note in this series. In summary, the FSCR is expected to provide both (a) a regime for the lawful run-off of legacy insurance business carried on in the UK by an EEA firm on a freedom of services basis; and (a) a supervised regime for the lawful run-off of legacy insurance business carried on in the UK by an EEA firm that operated in the UK on a freedom of establishment basis, but does not propose to establish an authorised branch here; or which entered the TPR but failed to obtain a UK branch authorisation.

5. Insurance distribution on a cross-border basis without a UK authorisation

The general position

Because UK financial regulation is activity based, it is possible in principle for an insurer or insurance intermediary established outside the UK to carry on insurance distribution activities without a UK authorisation (i.e. 'on a non-admitted basis'). The essential conditions underlying this option are (a) that the activities in question 'are not regarded as carried on in the UK';[21] and (b) that the insurer or intermediary complies with the restrictions in or under FSMA 2000 on financial promotions capable of having an effect in the UK. By way of example, if an insurer or insurance intermediary established in Australia advises its Australian clients as to which UK (re)insurer might be suitable to provide the specialist (re)insurance cover that the client requires, that activity (perhaps obviously – because there is no cross-border element and no invitation capable of having an effect in the UK) does not fall within the remit of UK financial regulation.

The Overseas Persons Exclusion

Less obviously, RAO, Art. 72 provides an 'overseas persons exclusion' ('the OPE'). The effect of the OPE is that some insurance distribution activities that do have a cross-border element (e.g. because some aspect of the distribution activity will inevitably be carried on in the UK), nevertheless fall outside the scope of UK financial regulation, when the activities are carried on by an overseas person.

In this context an 'overseas person' is defined[22] as a person who does not carry on (or offer to carry on) insurance distribution activities from a permanent place of business maintained by him in the UK. What is meant by 'a permanent place of business' is discussed in the Insurance & Reinsurance note in this series.

FCA guidance[23] outlines the operation of the OPE in the following terms:

'The [OPE] exclusions are available ... in ... two broad cases ...

(1) The first case is where the nature of the regulated activity requires the direct involvement of another person and that person is authorised [(i.e. has a FSMA 2000, Part 4A permission)] or exempt [from the requirement to have a Part 4A permission] (and acting within the scope of his exemption).

For example, this might occur where the person with whom an overseas person deals is an authorised person or where the arrangements he makes are for transactions to be entered into by such a person.

(2) The second case is where a particular regulated activity is carried on as a result of what is termed a "legitimate approach".

21 See the Perimeter Guidance Manual, Chapter 2, at PERG 2.9.16G.
22 RAO, Art. 3(1).
23 PERG 2.9.17G.

An approach to an overseas person that has not been solicited by him in any way, or has been solicited in a way that does not contravene the restrictions on financial promotion in … [FSMA 2000, s. 21], is a legitimate approach.

An approach that is made by … [the overseas person to a person in the UK] in a way that does not contravene … [FSMA 2000, s. 21] is also a legitimate approach.

In such circumstances [(i.e. where there is a legitimate approach)], the overseas person can, without requiring authorisation, enter into deals with (or on behalf of) a person in the United Kingdom, give advice in the United Kingdom or enter into agreements in the United Kingdom to carry on certain regulated activities.'

Activities with or through UK-authorised or exempt persons

As an example of the first case, an insurance intermediary established in outside the UK may rely on the OPE when it acts as agent for its customer (also established outside the UK) to bring about a contract of (re)insurance with a UK-authorised (re)insurer – a common scenario when an overseas broker seeks to place a customer's specialist risks in the London insurance market. That activity will inevitably include a cross-border element (for example, dealing with a (re)insurer based in the UK and operating in the London market, but the OPE permits the intermediary lawfully to carry on that activity in the UK without a FSMA 2000, Part 4A permission.

Legitimate approach and the financial promotion restriction

The second case rests on the concept of 'a legitimate approach'. The most obvious example of a legitimate approach occurs when an overseas person is approached for advice or assistance by a person established in the UK either (a) without the overseas person having solicited that contact at all (perhaps an unusual case); or (b) in response to solicitation by the overseas person that complies with, or is exempt from, the financial promotion restriction in FSMA 2000, s. 21 ('the FPR'). A legitimate approach also occurs when an overseas person offers advice or assistance to a person established in the UK, but only if that offer complies with, or is exempt from, the FPR.

The operation and effect of the FPR is outlined in the Overview note in this series. As noted there, the detailed scope of the FCR is set out in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/1529) ('the FPO'), which creates a complex network of definitions, inclusions and exceptions, the application of which is almost always fact-specific.

Given the complexity of the FPR, a prudent insurance intermediary will obtain specialist advice to determine whether or not the FPR applies to proposed communication in or into the UK. In broad outline, however, the FPR does not apply to communications relating to non-investment insurance distribution services (for example, offers to deal in, arrange or advise on contracts of insurance that are not life policies).[24]

An insurance distribution firm that is invited to assist an insurer established outside the UK to promote the insurer's products in or into the UK should carefully consider the application of the FPR to insurance business in question.

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24 Broadly, a contract of long-term insurance that is neither (a) reinsurance; nor (b) a pure protection policy (e.g. without a surrender value). See FPO, Schedule 1, ¶ 21, read with the FPO, Art. 2 and the RAO, Art. 3.

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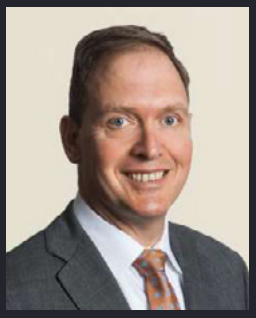

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