

Chapter 13

Guidance on the scope of the
UK provisions which
implemented MiFID and CRD
IV

13.1 Introduction

13.1

The purpose of this chapter is to help UK firms consider:

- whether they fall within the scope of the *UK* provisions which implemented Markets in Financial Instruments Directive 2014/65/EU ('MiFID') and therefore are subject to the requirements derived from it;
- how their existing *permissions* correspond to related MiFID derived concepts;
- whether the *UK* provisions which implemented *CRD* and the *UK CRR* apply to them, and for certain firms, whether the provisions which correspond to the recast *CAD* continue to apply to them; and
- if so, which category of investment firm they are for the purposes of the the provisions which correspond to the recast *CAD* or the *UK* provisions which implemented *CRD* and the *UK CRR*.

This chapter is mostly aimed at questions that are relevant to someone who wants to know whether they need to be authorised under the *Act*. This means that this chapter does not cover those types of persons for whom MiFID or MIFIR requirements are applied outside the authorisation regime under the *Act*, such as:

- a *data reporting service provider*;
- those subject to position limit requirements in derivatives markets;
- those subject to an obligation to trade in derivatives on a regulated market, OTF or MTF;
- persons with a proprietary interest in benchmarks who are obliged to provide access to certain information; or
- central counterparties subject to the requirements about non-discriminatory access for financial instruments.

Background

MiFID replaced the Markets in Financial Instruments Directive 2004/39/EC (MiFID 1), which in turn replaced the Investment Services Directive (ISD).

MiFID onshoring in UK legislation and the FCA Handbook

The *United Kingdom's* onshoring of the directive takes the form of a combination of legislation made by HM Treasury, in the form of a number of statutory instruments, and rules contained in the FCA Handbook and the PRA Rulebook. "Onshoring", for these purposes, refers to the process by which law deriving from EU legislation at IP completion day is retained or adapted, post IP completion day.

The Treasury legislation is set out in the following statutory instruments as amended by the Exit Regulations, in particular:

- Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 ('MiFI regulations'), SI 2017/701;

● Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017 2001 ('RAO Amendment Order'), SI 2017/488 2001/544.

The FCA Handbook complements the Treasury legislation, referred to above.

Transitional onshoring provisions

The effect of section 3 of the European Union (Withdrawal) Act 2018 is that "direct EU legislation" became part of UK law, as at IP completion day (and is known as "retained EU law" in accordance with section 6 of the same legislation). As such, MiFIR and all directly applicable regulations made under MiFID and MiFIR including the MiFID Org Regulation (Commission Delegated Regulation 2017/565), the MiFIR Delegated Regulation (Commission Delegated Regulation 2017/567) and technical standards became part of UK law, as at IP completion day.

Each of these pieces of legislation is subject to the power in section 8 of the European Union (Withdrawal) Act 2018 to deal with deficiencies arising out of the *United Kingdom's* withdrawal from the EU. The Treasury has exercised this power in the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (the 'Exit Regulations') to amend each of the following:

- MiFIR
- MiFID Org Regulation
- MiFIR Delegated Regulation
- Data Reporting Services Regulations
- The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017

A reference to any of the above in the remaining text of this chapter is to the legislation as amended by the Exit Regulations.

MiFID scope

The scope aspects of MiFID are primarily addressed through the *Regulated Activities Order* ('RAO') and ■ PERG 2 focuses on the scope of *regulated activities* under the RAO and includes materials on the effect that the UK provision which implemented MiFID has had on the RAO. This chapter focuses more on the underlying MiFID investment services and activities, as well as the exemptions.

Where a firm's regular occupation or business is providing one or more *investment services* to third parties or performing investment activities in relation to MiFID financial instruments on a professional basis, it is a firm to which UK provisions which implemented MiFID applies unless it is exempt.

Broadly, the exemptions from MiFID are likely to be relevant to insurers, group treasurers, professional firms to which Part XX of the *Act* applies, many *authorised professional firms*, professional investors who invest only for themselves, pension schemes, depositaries and operators of collective investment schemes or other collective investment undertakings (such as investment trusts), journalists, and commodity producers and traders. The exemptions are subject to conditions and limitations described in more detail below (see ■ PERG 13.5).

The Treasury's implementation of the article 3 MiFID exemption, onshored in regulation 8 of the *MiFI Regulations*, is likely to be relevant to many financial advisers (see Q50) including some corporate finance advisers. It may

also be relevant to some venture capital firms. The Treasury legislation enables firms falling within the scope of the exemption to elect to be subject to the requirements derived from MiFID (see Q52).

In each case, it will be for firms and individuals to consider their own circumstances and consider whether they fall within the relevant exemptions. A firm which takes the benefit of one or more of the exemptions in article 2 or 3 MiFID, onshored in Part 1 of Schedule 3 to the Regulated Activities Order and Regulation 8 of the MiFI Regulations, may nevertheless require authorisation under the Act (see ■ PERG 2).

In addition to *investment firms*, the UK provisions which implemented MiFID are also relevant to *credit institutions* providing investment services or performing investment activities (see Q5), to AIFMs to which the UK provisions which implemented article 6.4 of AIFMD applies (in other words, *AIFM investment firms*) and to UCITS management companies to which the UK provisions which implemented article 6.4 of the UCITS Directive applies (in other words, *UCITS investment firms*).

This guidance is concerned with the scope of the UK provisions which implemented MiFID and does not address the question of whether an investment firm that falls within the scope of the UK provisions which implemented MiFID is providing a MiFID investment service as opposed to an investment activity.

CRD IV

Investment firms subject to the UK provisions which implemented MiFID, including those who fall within the article 3 MiFID exemption, onshored in regulation 8 of the MiFI Regulations, but opt not to take advantage of it, are subject to the requirements of the UK provisions which implemented CRD and the UK CRR. There are special provisions for certain commodities firms as well as firms whose MiFID investment services and activities are limited to only one or more of the following investment services and activities:

- execution of orders on behalf of clients;
- portfolio management;
- giving investment advice; or
- receiving and transmitting client orders, and

who are not permitted to hold client money or securities nor are authorised to provide ancillary service (1) referred to in Section B of Annex 1 to MiFID, onshored in Part 3A of Schedule 2 to the Regulated Activities Order (which is safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management).

Collective portfolio management investment firms (a term that is used to refer to both *AIFM investment firms* and *UCITS investment firms*) are subject to the requirements of the UK provisions which implemented CRD and the UK CRR, unless they are firms whose MiFID investment services and activities are limited to those in the preceding paragraph.

Under the UK implementation of the CRD and the UK CRR, the level of capital an investment firm subject to MiFID requires is determined by the type of investment services and activities it provides or performs, its scope of permission and any limitations or requirements attaching to that permission (see ■ PERG 13.6). A firm relying on an article 2 or 3 MiFID exemption, onshored in Part 1 of Schedule 3 to the Regulated Activities Order and Regulation 8 of the MiFI Regulations, is not subject to CRD and the UK CRR

How does this document work?

This document is made up of Q and As divided into the following sections:

- General (■ PERG 13.2);
- Investment services and activities (■ PERG 13.3);
- Financial instruments (■ PERG 13.4);
- Exemptions from MiFID derived provisions (■ PERG 13.5);
- The CRD IV (■ PERG 13.6); and
- Flow charts, tables and lists (■ PERG 13 Annex 1, ■ PERG 13 Annex 2, ■ PERG 13 Annex 3, ■ PERG 13 Annex 4).

We have also included guidance in the form of flow charts to help firms decide whether the *UK* provisions which implemented MiFID and the *CRD* and the *UK CRR* (which allow provisions which correspond to the recast *CAD* to apply to certain firms) apply to them as well as permission maps indicating which regulated activities and *specified investments* correspond to MiFID investment services, activities and MiFID financial instruments (see ■ PERG 13 Annex 1, ■ PERG 13 Annex 2 and ■ PERG 13 Annex 3).

Article and recital references are to MiFID (Level 1 measures) unless otherwise stated. References to categories of MiFID investment services and activities and MiFID financial instruments adopt the structure of Annex 1 MiFID: for example, A1 refers to "reception and transmission of orders in relation to one or more financial instruments" and C1 relates to "transferable securities".

While these provisions have been "onshored", we have, unless otherwise stated, retained the references in this chapter, and its annexes, to the provisions in MiFID and other relevant directives such as CRD, UCITS directive and AIFMD for ease of reference. As a result, where the context requires, any references to a directive, its articles or recitals, which could be read as having continuing effect, should be read as a reference to 'the *UK* provisions which implemented' that directive or the relevant article. In addition, any reference which adopts the structure of Annex 1 of MiFID, for example by referring to A1 or C1, should be read as a reference to the relevant corresponding paragraph as onshored in Schedule 2 of the *Regulated Activities Order*.