Chapter 13

Guidance on the scope of the UK provisions which implemented MiFID

13.2 General

13.2

Q1.Why does it matter whether or not we fall within the scope of MiFID?

Depending on whether or not you fall within the scope of MiFID, you may be subject to:

- domestic legislation implementing MiFID (for example, FCA rules);
- "direct EU legislation", which became part of *UK* law as at IP completion day in accordance with section 3 of the European Union (Withdrawal) Act 2018, and is known as "retained EU law" in accordance with section 6 of the same legislation. (such as, *MiFIR* and all directly applicable regulations made under it or under MiFID); and
- other FCA *rules* or legislation whose scope is drawn by reference to MiFID (for example, the Prudential sourcebook for MiFID investment firms (*MIFIDPRU*)).

Q2. Is there anything else we should be reading?

The Q and As complement, and should be read in conjunction with, the relevant legislation and the general guidance on regulated activities, which is in chapter 2 of our Perimeter Guidance manual ('PERG').

Q3. How much can we rely on these Q and As?

The answers given in these Q and As represent the FCA's views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of MiFID affect the regulatory position of any particular person will depend on his individual circumstances. If you have doubts about your position after reading these Q and As, you may wish to seek legal advice. The Q and As are not a substitute for reading the relevant the *UK* provisions which implemented MiFID.

Moreover, MiFID has been subject to guidance and communications by the European Commission, the European Securities and Markets Authority ('ESMA') and the European Banking Authority ('EBA'), we have now issued guidance on how this will be treated after IP completion day.

[**Note:** link to the relevant guidance is to be inserted].

Q4. We provide investment services to our clients - does MiFID apply to us?

Yes if you are:

- an "investment firm" and the exemptions in MiFID do not apply to you; or
- a "tied agent" as defined by MiFID.

If you are a non-*UK* firm, for example the UK branch of a US firm, MiFID does not apply to you. However, if MiFID would have applied to you if you had been incorporated or formed in the *United Kingdom*, you will be a *third country investment firm* under the FCA's rules. As a result, certain MiFID based requirements will apply to you.

See the flow charts in Annex 1 for further information and ■ PERG 13.5 for guidance relating to exemptions. See Q7 and 8 for guidance on whether you are an investment firm and Q11 for guidance relating to tied agents.

Q5. We are a credit institution. How does MiFID apply to us?

If you are an credit institution, article 1.3 MiFID provides that selected MiFID provisions apply to you, including organisational and conduct of business requirements, when you are providing investment services to your clients or performing investment activities. In our view, MiFID will apply when you are providing ancillary services in conjunction with investment services. Where you provide ancillary services on a standalone basis, MiFID will not apply in relation to those services. Article 1.3 MiFID is reflected in paragraph (2) of the *Handbook* definition of "MiFID investment firm".

In addition, article 1.4 MiFID provides that various MiFID provisions apply when selling or advising clients about structured deposits (see Q34B). Article 1.4 MiFID is reflected in paragraph (2) of the *FCA Handbook* definition of "MiFID investment firm".

Q6. We are a UCITS management company that, in addition to managing unit trusts, contractual schemes and investment companies, provides portfolio management services to third parties. How does MiFID apply to us?

If you are the *management company*of a *UCITS scheme* with a permission to manage investments including MiFID financial instruments pursuant to article 6.3 of the *UCITS Directive*, certain MiFID provisions apply to you when you provide investment services to third parties (see article 6.4 *UCITS Directive*). These include initial capital endowment, organisational and conduct of business requirements. You are a *UCITS investment firm* for the purposes of the Handbook. Article 6.4 of the *UCITS Directive* is reflected in paragraph (3) of the *Handbook* definition of "MiFID investment firm".

Q6A. We are an AIFM that, in addition to managing AIFs, provides portfolio management services to third parties. How does MiFID apply to us?

If you are the *AIFM* of an *AIF* with a *Part 4A permission* to *manage investments* including *MiFID financial instruments* pursuant to article 6.4 of *AIFMD*, certain *MiFID* provisions apply to you when you provide *investment services* to third parties (see article 6.6 of AIFMD). These include initial capital endowment, organisational and conduct of business requirements. You are an *AIFM investment firm* for the purposes of the *Handbook*. Article 6.6 of *AIFMD* is reflected in paragraph (3) of the *Handbook* definition of "*MiFID investment firm*".

Q7. We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?

If your regular occupation or business includes the provision of investment services in relation to MiFID financial instruments to others on a professional

basis, you are an investment firm and require *authorisation* unless you benefit from an exemption or are a tied agent (see Q11).

Where you are a firm with more than one business, you can still be an investment firm. What amounts to a "professional basis" depends on the individual circumstances and in our view relevant factors will include the existence or otherwise of a commercial element and the scale of the relevant activity.

Q8. We do not provide investment services to others but we do buy and sell financial instruments (for example, shares and derivatives) on a regular basis. Are we an investment firm for the purposes of MiFID?

Yes, if you are trading in MiFID financial instruments for your own account as a regular occupation or business on a "professional basis". You can be an investment firm even if you are not providing investment services to others; this arises from the fact that you are also an investment firm under MiFID where you perform investment activities on a professional basis.

Even if you are an investment firm you may still be able to rely on one or more exemptions in article 2 MiFID, in which case MiFID will not apply (see ■ PERG 13.5 and in particular article 2.1(d) (see Q40 to Q41)) and 2.1(j) (see Q44 to Q45).

Q9. We are a credit institution that does not provide investment services to customers but we do have a treasury function. Are we subject to MiFID?

Not necessarily. Although you may be dealing on own account in relation to MiFID financial instruments, you may be able to rely upon the exemption in article 2.1(d) MiFID (see Q40). In our view, credit institutions can rely on exemptions in article 2 where they meet the conditions of the exemptions.

Q10.Is there any change to the "by way of business" test in domestic legislation?

There is no change to article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities By Way of Business) Order 2001 as part of MiFID implementation by the Treasury, so the domestic test for whether you are carrying on 'regulated activities by way of business' and require *authorisation* remains unchanged.

Q11.How will we know whether we are a tied agent (article 4.1(29))?

A tied agent under MiFID is a similar concept to an *appointed representative* under the *Act*. A tied agent does not require authorisation for the purposes of MiFID, just as an *appointed representative* does not require *authorisation* under the *Act*. In our view, you will only be a tied agent if your principal is an investment firm (including a credit institution) to which MiFID applies. So, if you act for a principal that is subject to an exemption in article 2 of MiFID, you are not a tied agent for the purposes of MiFID although you may be an *appointed representative* for domestic purposes. You will still not require authorisation under MiFID, either because you are not performing investment services and activities or, if you are, because you fall within an exemption in article 2 of MiFID.

MiFID says that firms exempt under article 3 should be subject to requirements which are at least analogous to the MiFID regime for tied agents of investment firms. This has been implemented in the UK through

the *appointed representative* regime. If you are an *appointed representative* of a principal who is exempt under article 3 you will also be exempt under MiFID. Q48 to Q53 deal with the article 3 exemption.

Assuming your principal is an investment firm to which MiFID applies, if you are registered as an *appointed representative* on the *Financial Services Register* and carry on the activities of *arranging (bringing about) deals in investments* or *advising on investments*, in either case in relation to MiFID financial instruments, you are likely to be a tied agent for the purposes of article 4.1(29).

It is not possible for a tied agent to provide *investment services* on behalf of more than one investment firm to which MiFID applies.

Further material on *appointed representatives* and tied agents is contained in chapter 12 of our Supervision Manual ('SUP').