

Chapter 13

Exercise of passport rights by UK firms

13.3 Establishing a branch in another EEA State

What constitutes a branch

13.3.1

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- (1) Guidance on what constitutes a *branch* is given in ■ SUP App 3.
 - (2) (a) Where a *UK MiFID investment firm* is seeking to use a *tied agent* established in another *EEA State* in which a *branch* is already established, the *tied agent* will be assimilated into the *branch*.
 - (b) If a *UK MiFID investment firm* is seeking to use a *tied agent* established in another *EEA State* in which no *branch* is already established, the rules in ■ SUP 13 will apply as if that *firm* were seeking to establish a *branch* in that *EEA State* (paragraph 20A of Schedule 3 to the Act).
 - (c) In any event, the appointment of a *tied agent* established in another *EEA State* leads to the application of conduct requirements to the *tied agent's* business, as if it were a *branch* of a *UK MiFID investment firm*.
 - (d) See ■ SUP 13.3.9G for details of the *MiFID branch* forms.
- [Note: article 35(2) of *MiFID*]

The conditions for establishing a branch

13.3.2

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A *UK firm* cannot establish a *branch* in another *EEA State* for the first time under an *EEA right* unless the relevant conditions in paragraphs 19(2), (4) and (5) of Part III of Schedule 3 to the Act are satisfied. It is an offence for a *UK firm* which is not an *authorised person* to contravene this prohibition (paragraph 21 of Part III of Schedule 3 to the Act). These conditions are that:

- (1) the *UK firm* has given the *appropriate UK regulator*, in accordance with the *appropriate UK regulator's rules* (see ■ SUP 13.5.1 R) or the directly applicable regulations made under the *CRD* (see ■ SUP 13.5.1 R), notice of its intention to establish a *branch* (known as a *notice of intention*) which:
 - (a) identifies the activities which it seeks to carry on through the *branch*; and
 - (b) includes such other information as may be specified by the *appropriate UK regulator* (see ■ SUP 13.5.1 R) or by the directly applicable regulations made under the *CRD* (see ■ SUP 13.5.1 R);
- (2) the *appropriate UK regulator* has given notice (known as a *consent notice*) to the *Host State regulator*;

- (2A) if the *UK firm's EEA right* relates to providing *collective portfolio management services* under the *UCITS Directive*, the *FCA* has provided to the *Host State regulator*:
 - (a) confirmation that the *firm* has been *authorised* as a *management company* under the provisions of the *UCITS Directive*;
 - (b) a description of the scope of the *firm's authorisation*; and
 - (c) details of any restriction on the types of *EEA UCITS scheme* that the *firm* is *authorised* to manage; and

- (3) (a) if the *UK firm's EEA right* derives from the *MCD*, one month has elapsed beginning on the date on which the *UK firm* received notice that the *appropriate UK regulator* had given a *consent notice* as described in ■ SUP 13.3.6 G (1);
- (aa) if the *UK firm's EEA right* derives from the *IDD*, either:
 - (i) the *Host State regulator* has notified the *appropriate UK regulator* of the *applicable provisions*; or
 - (ii) one month has elapsed beginning with the date on which the *appropriate UK regulator* gave the *consent notice* as described in ■ SUP 13.3.5G(2);
- (b) in any other case (except for a *firm* passporting under *AIFMD*):
 - (i) the *Host State regulator* has notified the *UK firm* of the *applicable provisions* or, in the case of a *UK firm* passporting under *MiFID* or the *UCITS Directive*, that the *branch* may be established; or
 - (ii) two months have elapsed beginning with the date on which the *appropriate UK regulator* gave the *consent notice*.

13.3.2A **G** [deleted]

13.3.2B **G** An *appointed representative* appointed by a *firm* to carry on *insurance distribution activity* on its behalf may establish a *branch* in another *EEA State* under the *IDD*. In this case, the *notice of intention* in ■ SUP 13.3.2 G (1) should be given to the *appropriate UK regulator* by the *firm* on behalf of the *appointed representative*.

13.3.2C **G** An *exempt professional firm* which is included in the record of *unauthorised persons* carrying on *insurance distribution activity* maintained by the *FCA* under article 93 of the *Regulated Activities Order* may establish a *branch* in another *EEA State* under the *IDD* (see ■ PROF 7.2).

13.3.2D **G** A *tied agent* appointed by a *MiFID investment firm* to carry on *investment services and activities* (and *ancillary services* where relevant) does not have its own passporting right to establish a *branch* in another *EEA State*. However, a *MiFID investment firm* remains free to appoint a *tied agent* to do business in another *EEA State* and where it does so, the *tied agent* will benefit from its passport.

13.3.4 **G** [deleted]

13.3.4-A **G** If a *UK firm* is passporting under *AIFMD*, it may establish a *branch* in another *EEA State* as soon as the conditions in ■ SUP 13.3.2 G (1) and ■ SUP 13.3.2 G (2) are met.

13.3.4A **G** [deleted]

Issue of a consent notice to the Host State regulator

13.3.5 **G** (1) If the *UK firm's EEA right* derives from the *CRD* or *MiFID*, the *appropriate UK regulator* will give the *Host State regulator* a *consent notice* within three *months* unless it has reason to doubt the adequacy of a *UK firm's* resources or its administrative structure. The *Host State regulator* then has a further two *months* to notify the *applicable provisions* (if any) and prepare for the supervision, as appropriate, of the *UK firm*, or in the case of a *MiFID investment firm*, to inform the *UK firm* that a *branch* can be established.

(1A) If the *UK firm's EEA right* derives from the *UCITS Directive*, the *FCA* will give the *Host State regulator* a *consent notice* within two *months* unless it has reason to doubt the adequacy of the *UK firm's* resources or its administrative structure. The *Host State regulator* then has a further two *months* to prepare for the supervision of the *UK firm*.

(1B) Where the *UK firm's EEA right* derives from *AIFMD*, the *FCA* will give the *Host State regulator* a *consent notice* within two *months* of having received the *notice of intention* and immediately inform the *UK firm* pursuant to ■ SUP 13.3.6 G (1) if the *FCA* is satisfied that the *firm* complies, and continues to comply with:

- (a) the provisions implementing the *AIFMD*; and
- (b) any directly applicable EU regulation made under that directive.

(2) If the *UK firm's EEA right* derives from the *IDD*, the *appropriate UK regulator* will give the *Host State regulator* a *consent notice* within one *month* of the date on which it received the *UK firm's notice of intention* unless it has reason to doubt the adequacy of the *UK firm's* resources or its administrative structure. The *Host State regulator* then has a further one *month* to notify the *applicable provisions*.

(3) If the *UK firm's EEA right* derives from the *MCD*, the *FCA* will give the *Host State regulator* a *consent notice* within one *month* of the date on which it received the *UK firm's notice of intention*. The *Host State regulator* then has a further two *months* to prepare for the supervision of the *UK firm*.

13.3.5A **G** Where the *PRA* is the *appropriate UK regulator*, it will consult the *FCA* before deciding whether to give a *consent notice*, except where paragraph 19(7A) of Part III of Schedule 3 to the *Act* applies. Where the *FCA* is the *appropriate UK regulator*, it will consult the *PRA* before deciding whether to give a *consent notice* in relation to a *UK firm* whose immediate group includes a *PRA-authorized person*.

13.3.6

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- (1) Save where (1A) applies, if the *appropriate UK regulator* gives a *consent notice*, it will inform the *UK firm* in writing that it has done so.
- (1A) If the *UK firm's EEA right* derives from the *IDD*, where the *appropriate UK regulator* has given a *consent notice* and the *Host State regulator* has acknowledged receipt of that notice, the *appropriate UK regulator* must give written notice to the *UK firm* concerned that the *Host State regulator* has received the *consent notice*.
- (2) The *consent notice* will contain, among other matters, the *requisite details* (see ■ SUP 13 Annex 1) provided by the *UK firm* in its *notice of intention* (see ■ SUP 13.5 (Notices of intention)).
- (3) Where a *consent notice* is given under the *UCITS Directive*, the *FCA* will at the same time:
 - (a) communicate to the *Host State regulator* details of the *compensation scheme* intended to protect investors; and
 - (b) enclose the information described at ■ SUP 13.3.2 G (2A).
- (4) Where a *consent notice* is given under the *AIFMD* it must include confirmation that the *UK firm* has been *authorised* by the *FCA* under *AIFMD*.
- (5) Where a *consent notice* is given under the *MCD* in relation to a *tied MCD credit intermediary*, it will include details of:
 - (a) any *MCD creditor or group* to which it is tied; and
 - (b) whether the *MCD creditor or group* take full and unconditional responsibility for the *tied MCD credit intermediary's* activities.
- (6) Where a *consent notice* is given under the *IDD*, it will include the following information:
 - (a) the name, address and, where applicable, the registration number of the *insurance intermediary*;
 - (b) the *EEA State* within the territory of which the *insurance intermediary* plans to establish a *branch*;
 - (c) the category of *insurance intermediary* and, if applicable, the name of the *insurer* represented;
 - (d) the relevant classes of insurance, if applicable;
 - (e) the address within the *Host State* from which *documents* may be obtained; and
 - (f) the name of any person responsible for the management of the *branch*.

13.3.7

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- (1) If the *appropriate UK regulator* proposes to refuse to give a *consent notice*, then paragraph 19(8) of Part III of Schedule 3 to the *Act* requires the *appropriate UK regulator* to give the *UK firm* a *warning notice*.
- (2) If the *appropriate UK regulator* decides to refuse to give a *consent notice*, then paragraph 19(12) of Part III of Schedule 3 to the *Act*

requires the *appropriate UK regulator* to give the *UK firm* a *decision notice* within *three months* of the date on which it received the *UK firm's notice of intention*(*two months* in the case of a *UK firm* which is a *UCITS management company* or an *AIFM* and *one month* in the case of a *UK firm* which is an *insurance intermediary*). The *UK firm* may refer the matter to the *Tribunal*.

(3) [deleted]

13.3.7A G For details of the *FCA's* procedures for the giving of *warning notices* or *decision notices* see ■ DEPP 2 (Statutory notices and the allocation of decision making).

UCITS management companies: other information to be provided to the Host State

13.3.8 G A *UK firm* seeking to provide *collective portfolio management* services from a *branch* in another *EEA State*, is advised that it will need to refer to the rules of the *competent authority* of the *UCITS Home State* implementing article 20 of the *UCITS Directive* which will require it to submit to that *competent authority* information relating to its depositary agreement and certain delegation arrangements.

MiFID branch forms

13.3.9 G

(1) (a) A *UK MiFID investment firm* wishing to use a *tied agent* established in another *EEA State* is required to complete the form in Annex VII of *MiFID ITS 4A* and send it to the *FCA*.
 [Note: article 14(1) of *MiFID ITS 4A*]

(b) A *UK MiFID investment firm* which intends to establish a *branch* in another *EEA State* is required to complete the form in Annex VI of *MiFID ITS 4A* and send it to the *FCA*.
 [Note: article 13(1) of *MiFID ITS 4A*]

(c) A *UK MiFID investment firm* that intends to establish a *branch* which in turn intends to use *tied agents* is required to complete the forms in Annex VI and Annex VII of *MiFID ITS 4A* and send them to the *FCA*.
 [Note: article 13(2) of *MiFID ITS 4A*]

(2) (a) Each of the forms in *MiFID ITS 4A* referred to in ■ SUP 13.3.9G(1)(a) to (c) is replicated in ■ SUP 13 Annex 1AR.

(b) These versions should be used for the purposes of notifications to the *FCA*.

(c) The forms should be submitted in accordance with ■ SUP 13.5.3R.