Appendix 3
Guidance on passporting issues

3.6 Freedom to provide services

App3.6.1 Article 56 (Services) of the Treaty grants to EEA nationals established in one EEA State the freedom to provide cross border services to other EEA States.

How services may be provided

App3.6.2 Under the Treaty, the freedom to provide services within the EC may be exercised in three broad ways:

(1) where the provider of a service moves temporarily to another EEA State in order to provide the service;

(2) where the service is provided without either the provider or the recipient moving (in this situation the provision, and receipt, of the service may take place by post, telephone or fax, through computer terminals or by other means of remote control);

(3) where the recipient of a service moves temporarily to another EEA State in order to receive (or, perhaps, commission the receipt of) the service within that State.

App3.6.3 Under the Single Market Directives, however, EEA rights for the provision of services are concerned only with services provided in one of the ways referred to in SUP App 3.6.2 G (1) and G (2) (How services may be provided).

App3.6.4 [deleted]

Place of supply

App3.6.5 In the opinion of the European Commission (and in the wording of the Single Market Directives) "only activities carried on within the territory of another Member State should be the subject of prior notification" (Commission interpretative communication: Freedom to provide services and the interests of the general good in the Second Banking Directive (97/C 209/04)). In determining, for
the purposes of notification, whether a service is to be provided ‘within’ another EEA State, it is necessary to determine the place of supply of the service.

App3.6.6  An insurance undertaking that effects contracts of insurance covering risks or commitments situated in another EEA State should comply with the notification procedures for the provision of services within that EEA State. The location of risks and commitments is found by reference to the rules set out in paragraph 6 of schedule 12 to the Act, which derive from article 13(13) and (14) of the Solvency II Directive. It may be appropriate for insurers to take legal advice as to how these rules are interpreted and applied in other EEA States. The need to passport may arise because of only one of the risks covered by an insurance policy. This includes, for example, where a policy covers a number of property risks and one of those properties is in another EEA State.

App3.6.7  In respect of banking services, the European Commission believes that “...to determine where the activity was carried on, the place of provision of what may be termed the ‘characteristic performance’ of the service i.e. the essential supply for which payment is due, must be determined” (Commission interpretative communication: Freedom to provide services and the interests of the general good in the Second Banking Directive (97/C 209/04)). In the view of the FCA, this requires consideration of where the service is carried out in practice.

App3.6.8  The FCA is of the opinion that UK firms that are credit institutions and MiFID investment firms should apply the ‘characteristic performance’ test (as referred to in SUP App 3.6.7 G) when considering whether prior notification is required for services business. Firms should note that other EEA States may take a different view. Some EEA States may apply a solicitation test. This is a test as to whether it is the consumer or the provider that initiates the business relationship.

App3.6.9  In the case of a UK firm conducting portfolio management, for example, this would mean looking at where the investment decisions and management are actually carried on in order to determine where the service is undertaken. Similarly, a UK stockbroker that receives orders by telephone from a customer in France for execution on a UK exchange may be deemed to be dealing or receiving and transmitting orders within the territory of the United Kingdom. In such a case, whether the firm solicited the overseas investor would be irrelevant.

App3.6.10  Where, however, a credit institution or MiFID investment firm:

(1) intends to send a member of staff or a temporarily authorised intermediary to the territory of another EEA State on a temporary basis to provide financial services; or

(2) provides advice, of the type that requires notification under either MiFID or the Banking Consolidation Directive, to customers in another EEA State;

the firm should make a prior notification under the freedom to provide services.

Temporary activities

App3.6.11  The key distinction in relation to temporary activities is whether a firm should make its notification under the freedom of establishment in a Host State, or
whether it should notify under the freedom to provide services into a Host State. It would be inappropriate to discuss such a complex issue in guidance of this nature. It is recommended that, where a firm is unclear on the distinction, it should seek appropriate advice. In either case, where a firm is carrying on activities in another EEA State under a Single Market Directive, it should make a notification.

Monitoring procedures

The FCA considers that, in order to comply with Principle 3: Management and control (see [PRIN 2.1.1 R]), a firm should have appropriate procedures to monitor the nature of the services provided to its customers. Where a UK firm has non-resident customers but has not notified the EEA State in which the customers are resident that it wishes to exercise its freedom to provide services, the FCA would expect the firm’s systems to include appropriate controls. Such controls would include procedures to prevent the supply of services covered by the Single Market Directives in the EEA State in which the customers are resident if a notification has not been made and it is proposed to provide services otherwise than by remote communication. In respect of insurance business, the insurer’s records should identify the location of the risk at the time the policy is taken out or last renewed. That will, in most cases, remain the location of the risk thereafter, even if, for example, the policyholder changes his habitual residence after that time.
**Membership of trading venues**

App3.6.25  

(1) The FCA is of the opinion that where a UK firm becomes a member of:

(a) a regulated market that has its registered office or, if it has no registered office, its head office, in another EEA State; or

(b) an MTF or OTF operated by a MiFID investment firm or a market operator in another EEA State,

the same principles as in the 'characteristic performance' test should apply. Under this test, the fact that a UK firm has a screen displaying the regulated market's or the MTF's or the OTF's prices in its UK office does not mean that it is dealing within the territory of the Home State of the regulated market or of the MTF or OTF.

(2) In such a case, the FCA would consider that:

(a) the market operator operating the regulated market or the MTF or the OTF is providing a cross-border service into the UK and so, provided it has given notice to its Home State regulator in accordance with articles 53(6) or 34(6) of MiFID, it will be exempt from the general prohibition in respect of any regulated activity carried on as part of the business of the regulated market, of operating a multilateral trading facility or of operating an organised trading facility (see section 312A of the Act);

(b) the MiFID investment firm operating the MTF or OTF is providing a cross-border service into the UK and so needs to comply with SUP 13A.

App3.6.26  

Firms are reminded of their rights, under article 36 of MiFID, to become members of, or have access to, the regulated markets in other Member States.

App3.6.27  

Firms should note that, in circumstances where the FCA take the view that a notification would not be required, other EEA States may take a different view.

App3.6.28  

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App3.6.29  

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App3.6.30  

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App3.6.31  

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