

Appendix 3 Guidance on passporting issues

3.6 Freedom to provide services

App3.6.1 **G** 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 **G** 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 **G** 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 ■ (2) (How services may be provided).

App3.6.4 **G** [deleted]

Place of supply

App3.6.5 **G** 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 **G** 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 **G** 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 **G** 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 **G** 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 **G** 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 **G** 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.

App3.6.12 **G** [deleted]

App3.6.13 **G** [deleted]

App3.6.14 **G** [deleted]

Monitoring procedures

App3.6.15 **G** 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.

App3.6.16 **G** [deleted]

App3.6.17 **G** [deleted]

App3.6.18 **G** [deleted]

App3.6.19 **G** [deleted]

App3.6.20 **G** [deleted]

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App3.6.23 **G** [deleted]

App3.6.24 **G** [deleted]

Membership of trading venues

- App3.6.25** **G** (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 **G** *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 **G** *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 **G** [deleted]

App3.6.29 **G** [deleted]

App3.6.30 **G** [deleted]

App3.6.31 **G** [deleted]