

FINANCIAL SERVICES AND MARKETS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 3: Eea Passport Rights

783. This Schedule gives effect in UK law to the single markets in banking, investment services and insurance as provided for by the relevant directives: the 2nd Banking Co-ordination Directive, the Investment Services Directive and the Life and Non-Life Directives.
784. Under the directives, credit institutions (a term embracing both banks and building societies), investment firms and insurance companies (which includes friendly societies) with head offices in any member State of EEA (that is the 15 States of the EU plus Norway, Iceland and Liechtenstein) have rights to carry on certain activities in other member States by virtue of their home State authorisation. These rights are often referred to as their “passport” and cover a range of financial services (some of which may only be conducted by firms which are authorised under these categories), which include deposit-taking, effecting and carrying out life or general insurance.
785. Under the 2nd Banking Co-ordination Directive, subsidiaries of credit institutions which meet certain criteria set out in article 18(2) of that directive may also have passport rights, and are therefore included in the definitions of “EEA firms” (persons from other member States who qualify for the passport into the United Kingdom) and “UK firms” (persons established in the United Kingdom who exercise their passport rights in other member States) in this Schedule.
786. The authorities in the member States, other than the home State, where these passporters are carrying on business under their passports (referred to as the host State authorities) may only impose limited regulations on the conduct of business under the passport, in accordance with the established principle of the “general good”. This requires those rules to be proportionate, non-discriminatory and non-duplicative of home State rules with equivalent effect. Conduct of business rules generally come within the host State remit. The home State retains full responsibility for authorising the passporting firms and conducting their overall prudential supervision (that is, supervising their financial soundness and ensuring that they and their controllers are fit and proper to conduct such business).
787. The passport may be exercised in order to establish a permanent place of business, referred to in the directives as a “branch” irrespective of the number of sites involved, or in order to provide cross-border services without a permanent place of business. Indeed the passport may be exercised in order to provide services, perhaps different services, by these two means in parallel.
788. The business activities covered by the passport do not necessarily correspond exactly to the activities which are regulated under the law of any member State, although certain activities, such as deposit-taking, insurance business or the core investment services

defined under the Investment Services Directive, must be regulated, and will all be regulated activities under the order made under section 22. There are therefore activities for which firms may have rights to conduct in other member States by virtue of the passport, but which are not necessarily central to the definition of those firms which qualify for the passport. There may equally be activities which are covered by the passport, but which are not regulated activities in every member State.

789. An example of an activity not regulated in every member State is lending. Lending, in conjunction with deposit-taking, is a defining characteristic of what is a credit institution and therefore of those who may qualify for passport rights under the 2nd Banking Co-ordination Directive. However, the directives do not require that lending should be regulated, though they do require the regulation of deposit-taking. The passport under that directive therefore not only covers lending, but qualification for that passport depends on it being part of the business of the firm. However, lending is not covered by the other directives (indeed, insurance companies are prohibited from carrying on the business of lending unless it is ancillary to their insurance business) and it does not need to be regulated by member States. It is not currently a regulated activity in the United Kingdom, except to the extent that it falls within the scope of the CCA 1974.
790. This Schedule, in conjunction with section 31, therefore defines the firms from other EEA member States, which may qualify for authorisation via this route, and the procedures which, in accordance with the various directives, must be followed (see paragraphs 12 to 14 in Part II). An EEA firm which fails to follow the correct notification procedure does not, however, commit an offence and their contracts are not rendered unenforceable in consequence (see paragraph 16).
791. Part III of the Schedule gives effect to the outward passport entitlements of UK credit institutions, investment firms and insurance companies. For the reasons referred to above, those qualifying for the passport form a narrower class than all persons who have their head office in the United Kingdom and who are authorised by virtue of having a Part IV permission. For example, not all banks and building societies are necessarily credit institutions, though the vast majority are. Equally the definition of an investment firm for the purposes of the Investment Services Directive is restricted to a firm which is authorised to carry on the business of providing for third parties the core services defined under that directive.
792. [Paragraphs 19 and 20](#) set out the procedure and conditions on which the Authority may grant the passport to those UK firms who qualify. A UK firm which fails to follow the required notification procedures before establishing a branch or providing services in another member State commits an offence under paragraph 21.
793. The Schedule also gives the Treasury powers to make regulations governing the continuing regulation of both EEA firms and UK firms.
794. [Paragraph 23](#) enables the Authority to intervene in respect of a UK firm's consumer credit business in another member State. [Paragraph 24](#) similarly enables the Authority to intervene in the business carried on in other member States of subsidiaries qualifying for the outward passport under Article 18(2) of the 2nd Banking Co-ordination Directive. Such subsidiaries need not be authorised persons in their own right.