

## Case studies

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#### Consumer credit activities

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#### Related resource

The examples below should be read in conjunction with the [Regulation of consumer credit activities toolkit \[https://news.sra.org.uk/solicitors/resources-archived/financial-services-rules/regulation-consumer-credit-activities/1\]](https://news.sra.org.uk/solicitors/resources-archived/financial-services-rules/regulation-consumer-credit-activities/1).

### Example 1

#### Firm needing FCA authorisation

Firm A is a firm with a team of non legally qualified staff carrying out debt recovery services, managed by a solicitor. This is marketed as one of the firm's primary services provided by the business. The firm is instructed by a financial institution to recover outstanding payments due under the provision of credit given by way of a credit card. The firm is instructed to take steps to recover the debt and consider whether it is commercially viable to continue should the third party fail to respond, but not to issue proceedings or commence litigation.

In this case the consumer credit activity is debt collection which requires authorisation as the 'advocacy or litigation' exclusion does not apply. The service is provided in a manner which does not appear to be incidental to the professional (legal) services of the firm and does not appear to arise out of, or be complementary to, a professional service provided to that client. The firm is therefore unable to rely on the exemption in Part 20 and will need to be authorised by the FCA in relation to its debt recovery activities.

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### Example 2

#### Firm relying on the "advocacy or litigation" exclusion

Firm B is a firm carrying out debt recovery services. This is marketed as one of the firm's services.

The firm is instructed by Bank X to advise them on how to recover sums owed by individuals under defaulted consumer credit agreements. The firm assesses each matter on a case by case basis and identifies certain matters where in their view proceedings should be issued if the debts remain outstanding. The bank accepts the firm's advice and instructs the firm to send each of the relevant debtors a Letter of Claim. The debtors respond, but in some of those matters, after complying with the Pre-Action Protocol for Debt Claims, the firm issues proceedings. The issue of the Letters of Claim and the steps taken under the Pre-Action Protocol would not constitute "debt collecting" since they are services which it is reasonable to expect the firm to provide for the purpose of contemplated proceedings and would fall within the exclusion at article 39K of the RAO.

This means that Firm B will not require FCA authorisation if it is not carrying on any other regulated activity and will not need to carry out the work under Part 20 FSMA.

Firms cannot rely on the exclusion just because they provide advocacy or litigation services. They need to show that they have carried out assessments on a case by case basis and that proceedings have been issued or are contemplated in a particular matter. Furthermore, the exclusion will apply only where the relevant activity is undertaken in the course of providing advocacy or litigation services. These services are defined in article 39K of the RAO.

The exclusion would operate in a similar way in relation to other types of relevant regulated activities, for example debt-counselling and debt adjusting.

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## **Example 3**

### **Firms able to rely on Part 20**

Firm C is a general practice firm. It is handling the conveyancing transaction for a client. Before proceeding with a mortgage application, the client instructs the firm to obtain information held about him by a credit information agency. During the course of the transaction, the client falls into financial difficulties and, in order to enable him to proceed with the purchase, asks the firm to undertake as a separate matter the negotiation of terms of an outstanding debt under a credit agreement.

In this case the firm would be carrying out the regulated activities of providing credit information services and debt adjusting. However, these activities are carried out by the firm in a manner which is incidental to the provision of legal services, and the specific activities arise out of and/or are complementary to the conveyancing transaction. Therefore the firm is able to rely the exemption in Part 20 and the activities would be regulated by the SRA.

Firm D is specialist family practice. The firm is instructed for the purposes of matrimonial proceedings in which the client does not have the benefit of legal aid. Following ancillary relief proceedings and distribution of assets, the client is advised that all matters have been concluded. A bill for professional services is delivered and payment falls due.

The client, on limited means, asks the firm whether the payment can be made over instalments. The firm agrees for the debt to be paid over 24 months by way of 24 monthly instalments.

The arrangement to pay professional fees comprises the activity of entering into a regulated credit agreement as a lender. This activity has arisen out of the provision of a professional service to the client (advice and representation with regards to the matrimonial matter). Firm D would therefore be able to rely on Part 20 and the activity will be regulated by the SRA.

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## **Example 4**

### **Firm not needing FCA authorisation or needing to rely on Part 20**

Firm E is instructed by a large building company to recover debts for unpaid invoices for services provided. The firm is instructed to contact the debtor to recover the debt and consider whether it is commercially viable to issue proceedings should the third party fail to respond.

The firm is not carrying out a regulated activity as it is not carrying out debt recovery pursuant to a consumer credit agreement (Article 39F RAO).

Firm E does not need to be authorised by the FCA and does not need to rely upon Part 20 FSMA.

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## **Example 5**

### **Firm previously relying on Part 20 however now needing to be authorised by the FCA for all regulated financial services**

Firm F is a specialist debt collecting firm which provides debt collection services to clients and relied on the OFT's group licence to do so. The firm also provides, as a minor part of its practice, advice and support in conveyancing and personal injury matters. In the course of providing advice in conveyancing and personal injury matters, the firm arranges after the event insurance for clients (insurance mediation activities) and does so under the Part 20 regime.

With the expiry of the group licence regime, the firm needs to be authorised by the FCA as it would not satisfy the “incidental manner” condition in section 327(4) of FSMA. When the firm is authorised by the FCA, it will no longer be able to rely on Part 20 in respect of its insurance mediation activities. The firm will need to ensure that all activities previously carried on under the scope of Part 20 are brought into the FCA's regime. This is because a firm cannot be both authorised by the FCA and an EPF at the same time.

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## **Example 6**

### **Solicitors working as in-house solicitors**

Solicitor G works in Bank X's in-house legal department. Solicitor G supervises non-legally qualified staff carrying on consumer credit activities.

The SRA Financial Services (Scope) Rules 2001 and SRA Financial Services (Conduct of Business) Rules 2001 do not apply to individuals working in-house and so Solicitor G to rely upon Part 20 FSMA in order to carry out this work.

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## **Example 7**

### **Solicitors' costs**

Firm H agrees that the client can pay the solicitor's by way of 20 payments over 20 months. In exchange the client has offered to grant a charge over the former matrimonial home in favour of Firm H.

Entering into a regulated credit agreement as lender which is secured on land by a legal or equitable mortgage is a prohibited activity. This means that it cannot be carried out under Part 20 FSMA. This activity may only be carried out if the firm is directly authorised by the FCA.

Firm H decides that they are not prepared to agree to the client's proposals. Instead they decide to refer the client to a third party lender.

The referral will amount to credit broking under Article 36A of the RAO.

Such an activity may be carried out under Part 20 FSMA. Firm H will need to ensure that it accounts to the client for any pecuniary reward or other advantage which it receives from the third-party lender.

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## **Example 8**

## **Other activities for which firms may be able to rely on Part 20 FSMA**

Firm I is a general practice firm. It is handling the conveyancing transaction for a client. Before proceeding with a mortgage application, the client instructs the firm to obtain information held about him by a credit information agency. During the course of the transaction, the client falls into financial difficulties and, in order to enable him to proceed with the purchase, asks the firm to undertake as a separate matter the negotiation of terms of an outstanding debt under a credit agreement.

The firm would be carrying out the regulated activities of providing credit information services and debt adjusting (Article 89A and 39D RAO). However, these activities are carried out by the firm in a manner which is incidental to the provision of legal services, and the specific activities arise out of and/or are complementary to the conveyancing transaction. Therefore the firm is able to rely the exemption in Part 20 and the activities would be regulated by the SRA.