

Chapter 4

Guidance on regulated activities connected with mortgages

4.10A Activities within scope of the Mortgage Credit Directive

General treatment for activities within scope of the Mortgage Credit Directive

4.10A.1 **G** Article 4(4B) of the *Regulated Activities Order* says that certain exclusions in the *Regulated Activities Order* do not apply in certain cases; briefly, those are cases which were covered by the *MCD* as it applied to the *United Kingdom* before *IP completion day*, and the effect of the legislation which refers to those cases has been preserved. This section explains the situations in which this applies. References in this section to agreements or activities covered by, regulated under or within the scope of the *MCD* should be read as including reference to agreements or activities which would be within such scope if secured on residential land in an *EEA State*, or carried out in an *EEA State* or in relation to a *customer* in an *EEA State*.

4.10A.2 **G** Article 4(4B) of the *Regulated Activities Order* says that where:

- (1) a *person* is:
 - (a) a mortgage creditor (see ■ PERG 4.10A.6 G); or
 - (b) a credit intermediary (see ■ PERG 4.10A.12 G); or
 - (c) a *person* providing advisory services (see ■ PERG 4.10A.20 G); under the *MCD*; and
- (2) that *person* is (ignoring the exclusions in (3)) carrying on one of the following *regulated activities*:
 - (a) article 25A (*arranging (bringing about) regulated mortgage contracts and making arrangements with a view to regulated mortgage contracts*);
 - (b) article 53A (*advising on regulated mortgage contracts*); or
 - (c) article 61(1) (*entering into a regulated mortgage contract as lender*); and
- (3) in acting as described in (1), that *person* is relying on one of the following exclusions to take it outside the *regulated activities* in (2):
 - (a) article 29 (*Arranging deals with or through authorised persons*);
 - (b) article 66 (*Trustees, nominees and personal representatives*); or
 - (c) article 67 (*Activities carried on in the course of a profession or non-investment business*);

then the result is that:

- (4) the exclusions in (3) are switched off; and
- (5) that *person* is treated as carrying on the *regulated activity* in (2) in question.

4.10A.2A G Some *credit agreements* fall outside of the mortgages perimeter but are nevertheless covered by *MCD*. Specifically, the scope of *MCD* includes *credit agreements with consumers* that are not secured on residential land where their purpose is to acquire or retain property rights in land or in an existing or projected building.

As a result of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2022, article 4(4B) of the *Regulated Activities Order* does not apply in respect of these *credit agreements* when entered into with high net worth *borrowers* on or after 21 July 2022. Such agreements can therefore now be exempt from the *consumer credit lending* activity if certain conditions (set out in article 60H of the *Regulated Activities Order*) are met (see ■ PERG 2.7.19J) (High net worth exception). It should be noted that this exemption does not apply to *regulated mortgage contracts* as there is no general ‘high net worth’ exemption to the mortgages perimeter.

The meaning of mortgage intermediary

4.10A.3 G The *Regulated Activities Order* refers to credit intermediaries (■ PERG 4.10A.2G (1)(b)) and providers of advisory services (■ PERG 4.10A.2G (1)(c)) as mortgage intermediaries.

What mortgages are covered by the Mortgage Credit Directive?: General

4.10A.4 G Article 4(4B) of the *Regulated Activities Order* only applies if the *regulated mortgage contract* is covered by the *MCD*. A *regulated mortgage contract* is covered if:

- (1) the lender is acting in the course of his trade, business or profession; and
- (2) the borrower is an individual; and
- (3) the borrower is acting for purposes which are outside their trade, business or profession; and
- (4) the *regulated mortgage contract* does not come within one of the exclusions summarised in ■ PERG 4.10A.5 G.

4.10A.5 G

- (1) This paragraph lists the *regulated mortgage contracts* outside the *MCD*.
- (2) *MCD exempt lifetime mortgages* are excluded from the *Mortgage Credit Directive*. These are *regulated mortgage contracts* or *article 3(1)(b) credit agreements* where the creditor:
 - (a) contributes a lump sum, periodic payments or other forms of credit disbursement;

- (b) contributes the sums in (a) in return for a sum deriving from the future sale of a residential property or a right relating to residential property; and
- (c) will not seek repayment of the capital until the occurrence of one or more *specified life events* of the consumer.

However, notwithstanding (c), the creditor may seek early repayment if the consumer breaches his contractual obligations and the breach allows the creditor to terminate the credit agreement.

Only *lifetime mortgages* that do not meet these conditions fall within the *Mortgage Credit Directive*. Normally, these will be mortgages where partial repayment of the capital is, or may become, due. These are known as *MCD lifetime mortgages*.

- (3) Agreements where:
 - (a) the credit is granted by an employer to his employees;
 - (b) the employer does so as a secondary activity; and
 - (c) such a credit agreement is offered:
 - (i) free of interest; or
 - (ii) at an *APRC* lower than those prevailing on the market and not offered to the public generally;

are excluded from the *MCD*.
- (4) Agreements where the credit is granted free of interest and without any other charges except those that recover costs directly related to the securing of the credit are excluded from the *MCD*.
- (5) An *MCD exempt overdraft loan* is excluded from the *MCD*.
- (6) Agreements which are the outcome of a settlement reached in court or before another statutory authority are excluded from the *MCD*.
- (7) An *MCD exempt bridging loan* is excluded from the *MCD*.
- (8) An *MCD exempt credit union loan* is excluded from the *MCD*.

What mortgages are covered by the Mortgage Credit Directive?: Borrower as consumerWhat effect does article 4(4B) have on lenders?

4.10A.6 G To work out the effect of article 4(4B) of the *Regulated Activities Order* (see ■ PERG 4.10A.2 G) on the *regulated activity* of entering into a regulated mortgage contract as lender, it is necessary to look at what a mortgage creditor means.

4.10A.7 G In relation to a *regulated mortgage contract*, mortgage creditor means a *person* who grants or promises to grant credit falling within the scope of the definition of a *regulated mortgage contract* in the course of its trade, business or profession.

4.10A.8 **G** Therefore, article 4(4B) means that the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) do not apply to entering into a regulated mortgage contract as lender unless:

- (1) the *regulated mortgage contract* falls outside the *MCD* (see ■ PERG 4.10A.5 G); or
- (2) the lender is not acting in the course of his trade, business or profession.

The effect of article 4(4B) on arrangers: The basics.....

4.10A.9 **G** Article 4(4B) of the *Regulated Activities Order* (see ■ PERG 4.10A.2 G) does not affect the *regulated activity* of *making arrangements with a view to regulated mortgage contracts*. This is because, in the *FCA*'s view, the activities covered by this *regulated activity* are not covered by the *MCD*.

4.10A.10 **G** Article 4(4B) of the *Regulated Activities Order* disapplies the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) for the *regulated activity* of *arranging (bringing about) regulated mortgage contracts*, but only in relation to the credit intermediary activities described in ■ PERG 4.10A.12 G.

4.10A.11 **G** To work out the effect of article 4(4B) of the *Regulated Activities Order* on the *regulated activity* of *arranging (bringing about) regulated mortgage contracts*, it is necessary to look at what a credit intermediary (as referred to in ■ PERG 4.10A.2G (1)(b)) means.

The effect of article 4(4B) on arrangers: What does credit intermediary mean?: General.....

4.10A.12 **G** A credit intermediary means a *person* who:

- (1) is not acting as a creditor or notary; and
- (2) is not merely introducing, either directly or indirectly, a consumer to a creditor or credit intermediary; and
- (3) carries out the following activities:
 - (a) presenting or offering *regulated mortgage contracts* to consumers;
 - (b) assisting consumers by undertaking preparatory work or other pre-contractual administration in respect of *regulated mortgage contracts*, other than as referred to in (a); or
 - (c) concluding *regulated mortgage contracts* with consumers on behalf of the creditor.
- (4) carries out those activities in the course of his trade, business or profession, for remuneration;

4.10A.13 **G** The remuneration in ■ PERG 4.10A.19 G may take a pecuniary form or any other agreed form of financial consideration.

- 4.10A.14** G
- (1) A *person* who merely introduces or refers a consumer to a creditor or credit intermediary does not act as a credit intermediary.
 - (2) An example of a *person* who merely introduces is someone who just indicates to a potential borrower:
 - (a) the existence of a creditor or credit intermediary; or
 - (b) a type of product provided by a particular creditor or credit intermediary;
 without further advertising or engaging in the presentation, offering, preparatory work or conclusion of the *regulated mortgage contract*.

The effect of article 4(4B) on arrangers: Conclusion about the effect on arranging (bringing about) regulated mortgage contracts

- 4.10A.15** G
- In the *FCA's* view, credit intermediation under the *MCD* covers the same activities as the *regulated activity of arranging (bringing about) regulated mortgage contracts*, except that:
- (1) credit intermediation only applies if the intermediary acts for remuneration; and
 - (2) the *MCD* does not cover the *regulated mortgage contracts* listed in ■ PERG 4.10A.5 G; and
 - (3) the *MCD* only applies to services provided to consumers;
 - (4) if the intermediary only acts for the creditor, the *MCD* intermediation activity is narrower, as described in ■ PERG 4.10A.17 G.

- 4.10A.16** G
- Except as described in ■ PERG 4.10A.15 G, the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) do not apply to the *regulated activity of arranging (bringing about) regulated mortgage contracts*.

The effect of article 4(4B) on arrangers: Remuneration under the MCD

- 4.10A.17** G
- PERG 5.4 (The business test for insurance distribution) has *guidance* on the meaning of remuneration in the *IDD*. That *guidance* is also applicable to the meaning of remuneration for the purpose of ■ PERG 4.10A.12 G.

- 4.10A.18** G
- Article 4(4B) is not relevant to an intermediary that carries on its activities by way of business (see ■ PERG 4.3.3 G to ■ PERG 4.3.9 G) but does not act for remuneration. The *FCA* does not expect this distinction to apply in practice.

The effect of article 4(4B) on arrangers: Acting for the creditor

- 4.10A.19** G
- (1) The *MCD* applies to credit intermediation activities performed for the creditor, as well as for the borrower.
 - (2) However, the activities carried out for the creditor are defined differently from the ones carried out for the borrower. They seem to

be narrower. The activities are limited to concluding *regulated mortgage contracts* with consumers on behalf of the creditor.

- (3) Just assisting the creditor by undertaking preparatory work or other pre-contractual administration is not enough on its own.
- (4) The activity covers actually entering into the *regulated mortgage contract* on behalf of the creditor.
- (5) The activity also covers activities that result in the lender entering into the *regulated mortgage contracts* if the role of the creditor and any *person* acting for the creditor is minimal.
- (6) When deciding whether the intermediary is acting for the creditor alone, the *FCA* will not just look at the contractual position. In particular, the *FCA* will also look at whether a separate intermediary is acting for the borrower.
- (7) The *guidance* in ■ PERG 4.5.4A G (*Guidance on making arrangements to enter into a regulated mortgage contract with a borrower on behalf of a lender*) applies here too.

The effect of article 4(4B) on advisers

- 4.10A.20 **G** To work out the effect of article 4(4B) of the *Regulated Activities Order* (see ■ PERG 4.10A.2 G) on the *regulated activity of advising on regulated mortgage contracts*, it is necessary to look at what advisory services as referred to in ■ PERG 4.10A.2G (1)(c) means.
- 4.10A.21 **G** Advisory services mean the provision of personal recommendations to a consumer in respect of one or more transactions relating to *regulated mortgage contracts* covered by the *MCD*.
- 4.10A.22 **G** Where *advising on regulated mortgage contracts* falls within the *MCD*, the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) do not apply to this activity. Advisers should note that:
 - (1) if the adviser does not act for remuneration, the *MCD* does not apply;
 - (2) the *MCD* does not cover the *regulated mortgage contracts* listed in ■ PERG 4.10A.5 G;
 - (3) the *MCD* only applies to advisory services provided to consumers;
 - (4) the *MCD* only applies to personal recommendations.
- 4.10A.23 **G** Giving personal recommendations is narrower than giving advice. The *guidance* on this point in relation to *MiFID* in Q18 to Q21 in ■ PERG 13.3 (*Investment Services and Activities*) is relevant here.
- 4.10A.24 **G** A *firm* that does not give personal recommendations is not affected by article 4(4B).

4.10A.25 **G** A *firm* can provide advisory services even though it does not act as a credit intermediary.

The effect of article 4(4B) on professional firms

4.10A.26 **G** Article 4(4B) does not apply to advising or arranging activities if:

- (1) they are carried out on an incidental basis in the course of professional activity;
- (2) that professional activity is regulated; and
- (3) the rules governing that professional activity do not prohibit the carrying out, on an incidental basis, of credit intermediation activities.

4.10A.27 **G** Work carried out by a *professional firm* which may reasonably be regarded as a necessary part of legal conveyancing services provided by that *professional firm* can still take advantage of the exclusion in article 67 (Activities carried on in the course of a profession or non-investment business).

4.10A.28 **G** Article 4(4B) does not cut back the *Part XX exemption*.