

Chapter 9

Meaning of open-ended investment company

9.3 The definition

- 9.3.1

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For a *body corporate* to be an *open-ended investment company*, as defined in section 236(1) of the Act:

(1) it must be a *collective investment scheme*;

(2) it must satisfy the property condition in section 236(2); and

(3) it must satisfy the investment condition in section 236(3).

9.3.2

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Each of these aspects of the definition is considered in greater detail in ■ PERG 9.4 (Collective investment scheme (section 235 of the Act)) to ■ PERG 9.9 (The investment condition: the 'satisfaction test' (section 236(3)(b) of the Act)). Although the definition has a number of elements, the *FCA* considers that it requires an overall view to be taken of the *body corporate*. This is of particular importance in relation to the investment condition (see ■ PERG 9.6.3 G and ■ PERG 9.6.4 G (The investment condition (section 236(3) of the Act: general))).

9.3.3

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An *open-ended investment company* may be described, in general terms, as a *body corporate*, most or all of the *shares* in, or *securities* of, which can be realised within a reasonable period. Realisation will typically involve the redemption or repurchase of shares in, or securities of, the *body corporate*. This realisation must be on the basis of the value of the property that the *body corporate* holds (that is, the net asset value).

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In the *FCA*'s view, all of the elements of the definition are clearly objective tests. In applying the definition to any particular case, a *person* would need to have regard to all the circumstances. This includes any changes in the way that the *body corporate* operates.

9.3.5

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The *FCA* understands that the aim of the definition in section 236 of the *Act* is to include any *body corporate* which, looked at as a whole, functions as an open-ended investment vehicle. The definition operates against a background that there is a wide range of different circumstances in which any particular *body corporate* can be established and operated. For example, the definition applies to *bodies corporate* wherever they are formed. So, in the application of the definition to different cases, the law applicable to, and the detailed corporate form of, particular *bodies corporate* may differ considerably.
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9.3.6

G For a *body corporate* formed outside the *United Kingdom*, there is an additional issue as to how the applicable corporate law and the definition of *open-ended investment company* in the *Act* relate to one another. The *FCA* understands this to operate as follows. The term 'body corporate' is defined in section 417(1) of the *Act* (Interpretation) as including 'a body corporate constituted under the law of a country or territory outside the United Kingdom'. So, whether or not any particular overseas person is a body corporate will depend on the law applicable in the country or territory in which it is constituted. But if it is a *body corporate* under that law, the question whether it is an *open-ended investment company* is determined, as a matter of *United Kingdom* law, by the definition in section 236 of the *Act*. This is regardless of whether or not the *body corporate* would be considered to be open-ended under the laws of the country or territory in which it is constituted.