

Chapter 9

Meaning of open-ended investment company

9.4 Collective investment scheme (section 235 of the Act)

- 9.4.1** G The first element of the definition is that *open-ended investment companies* are a corporate form of *collective investment scheme*. This means that they must have the features in section 235 of the Act.
- 9.4.2** G Section 235(1) states that a *collective investment scheme* means any arrangements with respect to property of any description. The purpose or effect of the arrangements must be to enable the *persons* taking part in them to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. The participants must not have day-to-day control over the management of the property (section 235(2)) and the arrangements must provide:
- (1) for the contributions of the participants and the profits or income to be pooled (section 235(3)(a)); or
 - (2) for the property to be managed as a whole by or on behalf of the operator of the scheme (section 235(3)(b)); or
 - (3) for both (1) and (2).
- 9.4.3** G In the FCA's view, it is the very existence of the *body corporate* that is the *collective investment scheme*. There are a number of statutory references that support this view. For example, it is clear that paragraph 21 of the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062) (Arrangements not amounting to a collective investment scheme) is drafted on the basis that it is the *body corporate* itself that is (or would be) the *collective investment scheme*. This provision sets out that no body corporate other than an open-ended investment company, a limited liability partnership or certain other types of mutual body amounts to a collective investment scheme. So, any particular *body corporate* is either an *open-ended investment company* or it is not. It cannot be both at the same time, although it may change from one to the other over time (see ■ PERG 9.7.5 G (The investment condition: the 'reasonable investor') for further guidance on this point).
- 9.4.4** G Analysing a typical corporate structure in terms of the definition of a *collective investment scheme*, money will be paid to the *body corporate* in exchange for *shares* or *securities* issued by it. The *body corporate* becomes the beneficial owner of that money in exchange for rights against the legal entity that is the *body corporate*. The *body corporate* then has its own duties

and rights that are distinct from those of the holders of its shares or securities. Such arrangements will, in the FCA's view, qualify as arrangements of the kind described in ■ PERG 9.4.2 G. The holders of the *shares* or *securities* in the *body corporate* do not have day-to-day control over the management of the property (as specified in section 235(2) of the Act) and the property is managed as a whole by or on behalf of the *body corporate* (as specified in section 235(3) of the Act).

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Where a *body corporate* does come within the definition of a *collective investment scheme* in section 235(1) to (3), the only relevant issue is to determine whether or not it is excluded. As ■ PERG 9.2.2 G (Introduction) explains, the exclusions are in the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062) (Arrangements not amounting to a collective investment scheme). If a *body corporate* satisfies any of the exclusions in paragraphs 1 to 20 of the Schedule to the Order it will not be a *collective investment scheme*. This means that it will not then be necessary to consider whether or not it is an *open-ended investment company*. In any other case, it will be necessary to consider whether the *body corporate* is an *open-ended investment company* to see whether the exclusion in paragraph 21 of the Schedule to the Order (Bodies corporate) for *bodies corporate* other than *open-ended investment companies* and *limited liability partnerships* applies.

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In the FCA's view, the question of what constitutes a single scheme in line with section 235(4) of the Act does not arise in relation to a *body corporate*. This is simply because the *body corporate* is itself a *collective investment scheme* (and so is a single scheme). Section 235(4) contemplates a 'separate' pooling of parts of the property that is subject to the arrangements referred to in section 235(1). But to analyse a *body corporate* in this way requires looking through its corporate personality and ignoring the legal entity that exists separately from the holders of *shares* or *securities* and their rights. As a corporate entity, it cannot be broken up into component parts in this way. This is so even though a *body corporate* may issue *shares* or *securities* of deferred classes or of classes carrying different rights.