

**EXITING THE EUROPEAN UNION: REGULATORY GUIDES (AMENDMENTS)  
INSTRUMENT 2019**

**Powers exercised**

- A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of:
- (1) section 139A (Power of the FCA to give guidance) of the Financial Services and Markets Act 2000;
  - (2) regulation 120 (Guidance) of the Payment Services Regulations 2017; and
  - (3) regulation 60 (Guidance) of the E-Money Regulations 2011.

**Commencement**

- B. Part 2 of Annex B enters into force on 1 April 2019, immediately after the changes made by the Claims Management Instrument 2018 (FCA 2018/56) come into force, or on exit day as defined in the European Union (Withdrawal) Act 2018, whichever date is the later.
- C. The remainder of this instrument comes into force on exit day as defined in the European Union (Withdrawal) Act 2018.

**Amendments to material outside the Handbook**

- D. The following material outside the Handbook listed in column (1) below is amended in accordance with the Annexes in this instrument listed in column (2) below.

(1)	(2)
The Enforcement Guide (EG)	Annex A
The Perimeter Guidance Manual (PERG)	Annex B
The Responsibilities of Providers and Distributors for the Fair Treatment of Customers (RPPD)	Annex C
The Unfair Contract Terms Regulatory Guide (UNFCOG)	Annex D
The Wind-down Planning Guide (WDPG)	Annex E
The MiFID 2 Guide	Annex F

**Notes**

- E. In this instrument, notes shown as “*Editor’s note*:” or as “**Note:**” are intended for the convenience of the reader but do not form part of the legislative text.

**Citation**

- F. This instrument may be cited as the Exiting the European Union: Regulatory Guides (Amendments) Instrument 2019.

By order of the Board  
28 March 2019

## Annex A

### Amendments to the Enforcement Guide (EG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

## 1 Introduction

### 1.1 Overview

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1.1.2 In the areas set out below, the *Act* expressly requires the *FCA* to prepare and publish statements of policy or procedure on the exercise of its enforcement and investigation powers and in relation to the giving of *statutory notices*.

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(3-A) section 131FA requires the *FCA* to publish a statement of its policy on the conduct of certain interviews in response to requests from ~~EEA~~ overseas regulators; and

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## 2 The FCA's approach to enforcement

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### 2.2 Case selection and referral criteria

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2.2.6 In all cases, before it proceeds with an investigation, the *FCA* will satisfy itself that there are grounds to investigate under the statutory provisions that give the *FCA* powers to appoint investigators. Another consideration will be whether the *FCA* ~~is under a Community obligation to take~~ has any agreements in place regarding taking action on behalf of, or otherwise to provide providing assistance to, ~~an authority from another EU member state~~ other authorities. *EG* 2.5.1 discusses the position where other authorities may have an interest in a case. If the statutory test is met, the *FCA* will consider what is the most efficient and effective way of achieving its statutory objectives of protecting consumers, enhancing market integrity and promoting competition. A referral to Enforcement for an investigation will be made if the *FCA* considers that an investigation, rather than an alternative regulatory response, is the right course of action given all the circumstances. Enforcement action and other regulatory tools can be used together and are not mutually exclusive. To assist in making the decision to refer a matter for investigation, the *FCA* has developed referral criteria that set out a range of factors it may consider when deciding whether to

appoint enforcement investigators. The criteria are not exhaustive, and all the circumstances of a particular case are taken into account. Not all the criteria will be relevant to every case, and additional considerations may apply in certain cases. Any one of the factors alone may warrant the appointment of investigators and in some cases, including cases where *breaches* are self-reported, the misconduct may be so serious that there is no credible alternative to referral.

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## **2.6 Assisting overseas regulators**

2.6.1 The *FCA* views co-operation with its overseas counterparts as an essential part of its regulatory functions. Section 354A of the *Act* imposes a duty on the *FCA* to take such steps as it considers appropriate to co-operate with others who exercise functions similar to its own. This duty extends to authorities in the UK and overseas. In fulfilling this duty the *FCA* may share information which it is not prevented from disclosing, including information obtained in the course of the *FCA*'s own investigations, or exercise certain of its powers under *Part XI* of the *Act*. Further details of the *FCA*'s powers to assist overseas regulators are provided at *EG* 3.7.1 – 3.7.4 (Investigations to assist overseas authorities), *EG* 3.8.1 – 3.8.4 (Information requests and investigations to assist ~~EEA~~ overseas regulators in relation to short selling), ~~*EG* 3.8A (Information requests and entry of premises under warrant to assist EEA regulators in relation to the Market Abuse Regulation)~~, *EG* 4.7.1 (Use of statutory powers to require the production of documents, the provision of information or the answering of questions), *EG* 4.11.9 – 4.11.11 (Interviews in response to a request from an overseas regulator ~~or EEA regulator~~), and *EG* 8.6.1 – 8.6.8 (Exercising the power under section 55Q to vary or cancel a firm's Part 4A permission, or to impose requirements on a firm in support of an overseas regulator: the *FCA*'s policy). The *FCA*'s statement of policy in relation to interviews which representatives of overseas regulators ~~or EEA regulators~~ attend and participate in is set out in *DEPP* 7.

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## **3 Use of information gathering and investigation powers**

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### **3.2A Information requests (section 122A)**

3.2A.1 The *FCA* may use its section 122A power to require information and documents from an *issuer*, a *person discharging managerial responsibilities* or a *person* closely associated with a *person discharging managerial responsibilities* to support its supervisory and its enforcement functions, including those under the *Market Abuse Regulation* ~~or any directly applicable EU regulation made under the *Market Abuse*~~.

...

### 3.2B Information requests (section 122B)

3.2B.1 The *FCA* may use its section 122B power to require information and documents from a person to support both its supervisory and its enforcement functions under the *Market Abuse Regulation* or any ~~directly applicable EU regulation made under the *Market Abuse Regulation*~~, supplementary market abuse legislation (as defined in Part 8 of the Act) ~~or under the *auction regulation*~~.

~~[Note: see Regulation 6 and Schedule 1 to the *RAP Regulations* for application of the power in relation to functions under the *auction regulation*]~~

...

### 3.4 Investigations into general and specific concerns (sections 167 and 168)

3.4.1 Where the *FCA* has decided that an investigation is appropriate (see chapter 2) and it appears to it that there are circumstances suggesting that contraventions or offences set out in section 168 may have happened, the *FCA* will normally appoint investigators pursuant to section 168. Where the circumstances do not suggest any specific breach or contravention covered by section 168, but, the *FCA* still has concerns about a *firm*, an *appointed representative*, ~~or a recognised investment exchange or an unauthorised incoming ECA provider~~, such that it considers there is good reason to conduct an investigation into the nature, conduct or state of the *person's* business or a particular aspect of that business, or into the ownership or control of an *authorised person*, the *FCA* may appoint investigators under section 167.

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### 3.7 Investigations to assist overseas authorities (section 169)

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3.7.2 ~~If the *overseas regulator* is a *competent authority* and makes a request in pursuance of any Community obligation, section 169(3) states that the *FCA* must, in deciding whether or not to exercise its investigative power, consider whether the exercise of that power is necessary to comply with that obligation.~~  
[deleted]

3.7.3 Section 169(4) and (5) set out factors that the *FCA* may take into account when deciding whether to use its investigative powers. ~~However, these provisions do not apply if the *FCA* considers that the use of its investigative powers is necessary to comply with a Community obligation.~~

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### 3.8 Information requests and investigations to assist ~~EEA~~ overseas regulators in relation to short selling

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- 3.8.3 The *FCA*'s power to conduct investigations to assist ~~EEA~~ *overseas regulators* in respect of the *short selling regulation* is contained in section 131FA of the *Act*. The section provides that at the request of an ~~EEA~~ *overseas regulator* or ESMA, the *FCA* may either use its power under section 131E to require the production of information, or appoint a person to investigate any matter.
- 3.8.4 ~~Section 131FA states that the *FCA* must, in deciding whether or not to exercise its investigative power, consider whether the exercise of that power is necessary to comply with an obligation under the *short selling regulation*.~~  
[deleted]

EG 3.8A is deleted in its entirety. The deleted text is not shown but the section is marked deleted as shown below.

**3.8A Information requests and entry of premises under warrant to assist EEA regulators in relation to the Market Abuse Regulation or the auction regulation [deleted]**

Amend the following as shown.

**4 Conduct of investigations**

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**4.7 Use of statutory powers to require the production of documents, the provision of information or the answering of questions**

4.7.1 The *FCA*'s standard practice is generally to use statutory powers to require the production of documents, the provision of information or the answering of questions in interview. This is for reasons of fairness, transparency and efficiency. It will sometimes be appropriate to depart from this standard practice, for example:

...

- (2) In the case of third parties with no professional connection with the financial services industry, such as the victims of an alleged fraud or misconduct, the *FCA* will usually seek information voluntarily.
- (3) In some cases, the *FCA* is asked by *overseas regulators* ~~or EEA regulators~~ to obtain documents or conduct interviews on their behalf. In these cases, the *FCA* will not necessarily adopt its standard approach as it will consider with the *overseas regulator* ~~or EEA regulator~~ the most

appropriate method for obtaining evidence for use in their country.

...

#### **4.11 Approach to interviews and interview procedures**

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Interviews in response to a request from an overseas regulator or EEA regulator

4.11.9 Where the *FCA* has appointed an investigator in response to a request from an *overseas regulator* ~~or EEA regulator~~, it may, under sections 169(7) or 131FA of the *Act* ~~respectively~~, direct the investigator to allow a representative of that regulator to attend, and take part in, any interview conducted for the purposes of the investigation. However, the *FCA* may only use this power if it is satisfied that any information obtained by an *overseas regulator* ~~or EEA regulator~~ as a result of the interview will be subject to safeguards equivalent to those in Part XXIII of the *Act* (sections 169(8) and 131FA ~~respectively~~).

4.11.10 The factors that the *FCA* may take into account when deciding whether to make a direction under section 169(7) include the following:

...

- (4) costs, ~~where no Community obligation is involved~~, and the availability of resources; and

...

4.11.11 Under sections 169(9) and 131FA respectively, the *FCA* is required to prepare a statement of policy with the approval of the Treasury on the conduct of interviews attended by representatives of *overseas regulators* ~~or EEA regulators~~. The statement is set out in *DEPP* 7.

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EG 6.3 is deleted in its entirety. The deleted text is not shown but the section is marked deleted as shown below.

## **6 Publicity**

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### **6.3 Decisions against ECA providers [deleted]**

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Amend the following as shown.

**7 Financial penalties and other disciplinary sanctions**

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**7.2 Alternatives to sanctions**

7.2.1 The *FCA* also has measures available to it where it considers it is appropriate to take protective or remedial action. These include:

...

(4) where the *FCA* considers it necessary for the purpose of the exercise by it of functions under the *Market Abuse Regulation* or any ~~directly applicable EU regulation made under the *Market Abuse Regulation*~~ supplementary market abuse legislation (as defined in Part 8 of the Act), the *FCA* may suspend trading in a *financial instrument* under section 122I of the Act;

(4a) ~~where the *FCA* considers it necessary for the purpose of the exercise by it of functions under the *auction regulation* the *FCA* may suspend trading in *emission auction products* under section 122I of the Act;~~

~~[Note: see Regulation 6 and Schedule 1 to the *RAP Regulations* for power in relation to *emission auction products*] [deleted]~~

(5) where there are reasonable grounds for suspecting that a provision of Part VI of the Act, a provision contained in the *prospectus rules*, or any other provision that was made in accordance with the *Prospectus Directive* has been infringed, the *FCA* may:

(a) suspend or prohibit the offer to the public of transferable securities as set out in section 87K of the Act; or

(b) suspend or prohibit admission of transferable securities to trading on a regulated market as set out in section 87L of the Act;

...

**8 Variation and cancellation of permission and imposition of requirements on the FCA's own initiative and intervention against incoming firms**

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**8.6 Exercising the power under section 55Q to vary or cancel a firm's Part 4A permission or to impose requirements on a firm in support of an overseas regulator: the FCA's policy**



- 8.6.1 The *FCA* has a power under section 55Q to vary, or alternatively cancel, a *firm's Part 4A permission*, or to impose requirements on a *firm*, in support of an *overseas regulator*. Section 55Q(4), (5) and (6) ~~set sets~~ out matters the *FCA* may, or must, take into account when it considers whether to exercise these powers. ~~The circumstances in which the *FCA* may consider varying a *firm's Part 4A permission* or imposing requirements in support of an *overseas regulator* depend on whether the *FCA* is required to consider exercising the power in order to comply with a Community obligation. This reflects the fact that under section 55Q, if a relevant *overseas regulator* acting under prescribed provisions has made a request to the *FCA* for the exercise of its own *initiative power* to vary or cancel a *Part 4A permission* or to impose requirements, the *FCA* must consider whether it must exercise the power in order to comply with a Community obligation.~~
- 8.6.2 ~~Relevant Community obligations which the *FCA* may need to consider include those under the Capital Requirements Directive, the *Solvency II Directive*, the Investment Services Directive/Markets in Financial Instruments Directive, the Insurance Distribution Directive and the *Market Abuse Regulation*. Each of these legislative acts imposes general obligations on the relevant *EEA competent authority* to cooperate and collaborate closely in discharging their functions under the legislative acts. [deleted]~~
- 8.6.3 ~~The *FCA* views this cooperation and collaboration as essential to effective regulation of the international market in financial services. It will therefore exercise its own *initiative powers* wherever:~~
- ~~(1) an *EEA Competent authority* requests it to do so; and~~
  - ~~(2) it is satisfied that the use of the power is appropriate (having regard to the considerations set out at paragraphs 8.2.1 to 8.2.6) to enforce effectively the regulatory requirements imposed under the *Single Market Directives* or other Community obligations. [deleted]~~
- 8.6.4 The *FCA* will actively consider ~~any other~~ requests for assistance from ~~relevant overseas regulators (that is requests in relation to which it is not obliged to act under a Community obligation)~~. Section 55Q, which sets out matters the *FCA* may take into *account* when it decides whether to vary or cancel a *firm's Part 4A permission* or to impose *requirements* on a *firm* in support of the *overseas regulator*, applies in these circumstances.

...

EG 8.7 is deleted in its entirety. The deleted text is not shown but the section is marked deleted as shown below.

- 8.7 The *FCA's* policy on exercising its power of intervention against incoming firms under section 196 of the Act [deleted]**

Amend the following as shown.

## 9 Prohibition Orders and withdrawal of approval

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### 9.3 Prohibition orders and withdrawal of approval - approved persons

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9.3.2 When the *FCA* decides whether to make a *prohibition order* against an *approved person* and/or withdraw their approval, the *FCA* will consider all the relevant circumstances of the case. These may include, but are not limited to those set out below.

...

(3) Whether, and to what extent, the *approved person* has:

...

(b) been knowingly concerned in a contravention by the relevant *firm* of a requirement imposed on the *firm* by or under the *Act* (including the *Principles* and other *rules*), the *AIFMD UK regulation* or any qualifying ~~EU~~ provision specified, or of a description specified, for the purpose of section 66(2) by the Treasury by order.

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## 10 Injunctions

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### 10.2 Section 380 (injunctions for breaches of relevant requirement<sup>9</sup>) and section 381 (injunctions in cases of market abuse): the *FCA*'s policy

<sup>9</sup>Under sections 380(6)(a) and (7)(a), a 'relevant requirement' in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the *Act* or by a qualifying ~~EU~~ provision specified, or of a description specified, for the purpose of subsection 380(6) by the Treasury by order; or which is imposed by or under any other Act and whose contravention constitutes an offence mentioned in section 402(1) of the *Act*; or which is imposed by the *AIFMD UK regulation*. The definition of "appropriate regulator" is set out in subsections 380(8) to (12) of the *Act*.

...

EG 10.5 is deleted in its entirety. The deleted text is not shown but the section is marked deleted as shown below.

## 10.5 Section 198: the FCA’s policy [deleted]

Amend the following as shown.

## 11 Restitution and redress

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### 11.5 Other relevant powers

11.5.1 The *FCA* may apply to the court for an *injunction* if it appears that a *person*, whether *authorised* or not, is reasonably likely to breach a relevant requirement<sup>12</sup>, or engage in *market abuse*. It can also apply for an *injunction* if a *person* has breached one of those requirements or has engaged in *market abuse* and is likely to continue doing so.

<sup>12</sup>Under section 380(6)(a) and (7)(a), a ‘relevant requirement’ in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the *Act* or by a qualifying ~~EU~~ provision specified, or of a description specified, for the purpose of section 380(6) by the Treasury by order; or which is imposed by or under any other Act and whose contravention constitutes an offence mentioned in section 402(1) of the Act; or which is imposed by the *AIFMD UK regulation*. The definition of “appropriate regulator” is set out in section 380(8) to (12) of the *Act*.

11.5.2 The *FCA* may consider taking disciplinary action using a range of powers as well as seeking restitution, if a *person* has breached a relevant requirement<sup>13</sup> of the *Act* or ~~any directly applicable Community regulation or decision under MiFID or the UCITS Directive or the auction regulation,~~ onshored regulation, or has engaged in *market abuse*.

<sup>13</sup>Under section 204A(2), a ‘relevant requirement’ in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the *Act* or by a qualifying ~~EU~~ provision specified, or of a description specified, for the purpose of section 204A(2) by the Treasury by order or which is imposed by the *AIFMD UK regulation*. The definition of “appropriate regulator” is set out in section 204A(3) of the *Act*.

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**13**            **Insolvency**

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**13.7**            **Petitioning for compulsory winding up of a company already in voluntary winding up**

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13.7.4            ~~Where the *FCA* is requested by a *Home State regulator* of an *EEA firm* or a *Treaty firm* to present a petition for the compulsory winding up of that firm, the *FCA* will first need to consider whether the presentation of the petition is necessary in order to comply with a Community obligation. [deleted]~~

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EG 14.3 is deleted in its entirety. The deleted text is not shown but the section is marked deleted as shown below.

**14**            **Collective Investment Schemes**

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**14.3**            **Exercise of the powers in respect of recognised schemes: section 267 of the Act - power to suspend promotion of a scheme recognised under section 264: the FCA's policy [deleted]**

EG 19.8 and 19.9 are deleted in their entirety. The deleted text is not shown but the sections are marked deleted as shown below.

...

**19**            **Non-FSMA powers**

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**19.8**            **Electronic Commerce Directive (Financial Services and Markets) Regulations 2002 [deleted]**

**19.9**            **Electronic commerce activity directions: the FCA's policy [deleted]**

Amend the following as shown.

## 19.10 Enterprise Act 2002

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19.10.2 The Enterprise Act identifies two types of breach which trigger the Part 8 enforcement powers. These are referred to as:

- (1) “domestic infringements”, which are breaches of particular UK enactments or of contractual or tortious duties, in each case if they occur in the course of a business and in relation to goods or services supplied or sought to be supplied:
  - (a) to or for a person in the UK; or
  - (b) by a person with a place of business in the UK; and
- (2) “~~Community~~ Schedule 13 infringements”, which are breaches of the EU legislation listed in Schedule 13 to the Enterprise Act, ~~if directly effective, or of national laws, whether of the UK or not, giving effect to that EU legislation, even where it is directly effective, including provisions of those national laws that provide additional protections, beyond but permitted by that EU legislation.~~

In both cases the breach must, to trigger those powers, harm the collective interests of *consumers*.

19.10.3 ~~The Community legislation falling within the FCA’s scope under the Enterprise Act is:~~

~~the Unfair Terms in Consumer Contracts Directive;<sup>17</sup>~~

~~the Comparative and Misleading Advertising Directive;<sup>18</sup>~~

~~the E-Commerce Directive;<sup>19</sup>~~

~~the Distance Marketing Directive;<sup>20</sup>~~

~~the Unfair Commercial Practices Directive;<sup>21</sup> and~~

~~the Consumer Credit Directive.<sup>22</sup>~~

<sup>17</sup>~~Directive 93/13/EEC~~

<sup>18</sup>~~Directive 97/55/EC~~

<sup>19</sup>~~Directive 2000/31/EC~~

<sup>20</sup>~~Directive 2002/65/EC~~

<sup>21</sup>~~Directive 2005/29/EC~~

<sup>22</sup>~~Directive 2008/48/EC~~

[deleted]

19.10.4 The *FCA* has powers under Part 8 of the Enterprise Act both as a “designated enforcer” in relation to domestic and Community Schedule 13 infringements and as a “CPC Schedule 13 enforcer” which gives the *FCA* and other CPC Schedule 13 enforcers additional powers in relation to Schedule 13 Community infringements under the CRA so that they can meet their obligations as “competent authorities” under Regulation (EC) No.2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection laws (the CPC Regulation).

The *FCA*’s powers as a designated enforcer

19.10.5 As a designated enforcer, the *FCA* has the power to apply to the courts for an enforcement order which requires a *person* who has committed a domestic or Community Schedule 13 infringement or, as to the latter, is likely to commit such an infringement:

- (1) not to engage, including through a company and, as to a domestic infringement, whether or not in the course of business, in the conduct which constituted, or is likely to constitute, the infringement;
- (2) to publish the order and/or a corrective statement;
- (3) to offer compensation or other redress, including the right to terminate relevant contracts, to affected *consumers*;
- (4) where such *consumers* cannot be practically identified, to take measures in the collective interests of *consumers*;
- (5) to take measures intended to prevent or reduce the risk of the relevant conduct occurring or being repeated; and/or
- (6) to take measures intended to enable *consumers* to choose more effectively between *persons* supplying or seeking to supply goods or services;

although it should be noted that the remedies listed under (3) to (6) inclusive are only applicable to conduct taking place or likely to occur after the relevant provisions of the *CRA* came into force.

19.10.6 The *FCA* may also apply, if necessary without notice, for interim enforcement orders where immediate temporary prohibition of the relevant conduct is expedient pending full consideration by the court. Such interim orders can also be sought pre-emptively in relation to Community Schedule 13 infringements, but again only preventing conduct in the course of business.

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19.10.11 The Enterprise Act also makes provision for enforcers and courts to accept undertakings from *persons* who have committed breaches or, in respect of Community Schedule 13 infringements, are considered likely to do so. The undertaking confirms that the *person* will not, amongst other things,

commence, continue or repeat the conduct which constituted or, as to a ~~Community~~ Schedule 13 infringement, would constitute the breach, although, as above, such a pre-emptive prohibition will only apply to conduct in the course of business. The undertaking may also confirm that the *person* will compensate consumers and/or take the other measures described in paragraph 19.10.5, above. There is a general expectation that, if a breach of applicable legislation or of a relevant duty is committed, or if a ~~Community~~ Schedule 13 infringement is likely to be committed, enforcers will seek an undertaking from the *person* in question before applying to court for an enforcement order.

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The FCA's powers as a ~~CPC~~ Schedule 13 enforcer

- 19.10.13 In addition to its powers as a designated enforcer under the Enterprise Act, the *FCA* also has powers, in its capacity as a "~~CPC~~ Schedule 13 enforcer" under the CRA and, therefore, only in respect of ~~Community~~ Schedule 13 infringements, to enter commercial premises with or without a warrant. The *FCA* must give at least two working days' notice of its intention to enter such premises without a warrant unless that is not reasonably practicable. If the *FCA* cannot give a notice in advance, it must produce the notice on the day the premises are entered.

Use of enforcement powers under Enterprise Act

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- 19.10.15 ~~Further information about the FCA's powers under the CPC Regulations is provided at paragraphs 19.13.1 to 19.13.5 below. [deleted]~~

...

## **19.11 Financial Services (Distance Marketing) Regulations 2004**

- 19.11.1 These Regulations ~~give~~ gave effect to the Distance Marketing Directive.<sup>24</sup> Under the Regulations, the *FCA* can enforce breaches of the Regulations concerning "specified contracts". Specified contracts are certain contracts for the provision of financial services which are made at a distance and do not require the simultaneous physical presence of the parties to the contract.

<sup>24</sup>Directive 2002/65/EC

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## **19.12 Financial Conglomerates and Other Financial Groups Regulations 2004**

- 19.12.1 These Regulations ~~implement~~ implemented in part the Financial Conglomerates Directive,<sup>25</sup> which ~~imposes~~ imposed certain procedural requirements on the *FCA* as a competent authority under the Directive. These Regulations also ~~make~~ made specific provision about the exercise of certain supervisory powers in relation to financial conglomerates.

<sup>25</sup>Directive 2002/87/EC

19.12.2 The *FCA*'s powers to vary a firm's *Part 4A permission* or to impose requirements under sections 55J and 55L of the *Act* ~~have been~~ were extended under these Regulations. The *FCA* is able to use these powers where it is desirable to do so for the purpose of:

supervision in accordance with the ~~Financial Conglomerates Directive~~ *Financial Groups Directive Regulations*;

acting in accordance with specified provisions of the ~~Capital Requirements Directive~~ *Capital Requirements Regulations 2013*; and

acting in accordance with specified provisions of that implemented or supplemented the *Solvency II Directive*.

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EG 19.13 is deleted in its entirety. The deleted text is not shown but the section is marked deleted as shown below.

### 19.13 **The Consumer Protection Co-operation Regulation** [deleted]

Amend the following as shown.

### 19.14 **The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017**

...

19.14.2 The *FCA* is responsible for monitoring and enforcing compliance with the *Money Laundering Regulations* not only by authorised firms who are within the *Money Laundering Regulations*' scope, but also by what the Regulations describe as "Annex I financial institutions". These are businesses which are not otherwise authorised by us but which carry out certain of the activities which were listed in Annex I of the Banking Consolidation Directive<sup>28</sup>, now then in Annex I of the ~~CRD~~ Capital Requirements Directive, the relevant text of which is set out in Schedule 2 of the *Money Laundering Regulations*. The activities include lending (e.g. forfaiters and trade financiers), financial leasing, and safe custody services. Annex I financial institutions are required to register with the *FCA*.

<sup>28</sup>Money service businesses are also outside the definition of "Annex I financial institution", which is set out in Regulation 55(2) of the *Money Laundering Regulations*.



[Note: Directive 2013/36/EU]

19.14.2A The *FCA* is also responsible for monitoring and enforcing compliance with the Funds Transfer Regulation by payment service providers specified under regulation 62(1) of the *Money Laundering Regulations*.

[Note: Regulation (EU) No 2015/847 on information accompanying transfer of funds as amended by the Money Laundering and Transfer of Funds (Information) (Amendment) (EU Exit) Regulations 2018 (SI 2019/253)]

19.14.3 The *Money Laundering Regulations* add to the range of options available to the *FCA* for dealing with anti-money laundering and anti-terrorist financing failures. These options include:

- to prosecute a relevant person, including but not limited to an authorised firm, ~~or an Annex I financial institution or an auction platform~~, as well as any responsible officer;
- to fine or censure a relevant person, including but not limited to an authorised firm, ~~or an Annex I financial institution or an auction platform~~, as well as any officer knowingly concerned in the breach, under regulation 76 of the *Money Laundering Regulations*;
- to cancel, suspend or impose limitations or other restrictions on the authorisation or registration of an authorised person or payment service provider, under regulation 77 of the *Money Laundering Regulations*; and

to impose a temporary or permanent prohibition on an officer knowingly concerned in a breach by a relevant person, including an authorised firm or Annex I financial institution, or a payment service provider, under regulation 78 of the *Money Laundering Regulations*.

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## **19.19 Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2008**

19.19.1 The Lloyd's Accounting Regulations ~~implement~~ implemented the Audit and Accounts Directives in relation to the Lloyd's insurance market. They ~~aim~~ aimed to increase the transparency of the accounts published by Lloyd's syndicates by imposing requirements in relation to the preparation and disclosure of the accounts. The Regulations give the *FCA* the power to institute criminal proceedings for an offence committed under the Regulations.

...

## **19.20 Payment Services Regulations 2017**

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19.20.4 ~~The *FCA* also has the power to prohibit or restrict the carrying out of certain regulated activities by EEA authorised payment institutions and EEA registered account information service providers.~~ [deleted]

...

**19.21 The conduct of investigations under the Payment Services Regulations**

...

19.21.3 ~~The *Payment Services Regulations* also apply much of Part 13 of the *Act*. The effect of this is that the *FCA* has the power to deal with an *EEA authorised payment institution* or an *EEA registered account information service provider* (‘incoming firm’) that is likely to contravene a requirement which is imposed on it by or under the *Payment Services Regulations*. Under the *Payment Services Regulations* the *FCA* will be able to use the power of intervention to:~~

- ~~(1) impose a requirement on an incoming *firm* as it considers appropriate; and~~
- ~~(2) impose a variation on the permissions of an incoming *firm*. [deleted]~~

...

**19.23 Electronic Money Regulations 2011**

...

19.23.2 ~~In addition to its powers that apply to *authorised electronic money institutions*, generally the *FCA* has the power to prohibit or restrict the carrying out of certain *regulated activities* by *EEA authorised electronic money institutions*. [deleted]~~

...

EG 19.24 is deleted in its entirety. The deleted text is not shown but the section is marked deleted as shown below.

**19.24 Cross-Border Payments in Euro Regulations 2010 [deleted]**

EG 19.25 is deleted in its entirety. The deleted text is not shown but the section is marked deleted as shown below.

**19.25 Recognised Auction Platforms Regulations 2011 [deleted]**

Amend the following as shown.

## 19.26 Derivatives, Central Counterparties and Trade Repositories Regulations 2013

19.26.1 The *FCA* has information gathering and sanctioning powers under the *Act* which are applicable to breaches of *EMIR requirements* by *authorised persons* or *recognised bodies*. The *OTC derivatives, CCPs and trade repositories regulation* adds to the powers available to the *FCA* for dealing with breaches of *EMIR requirements* and sets out information gathering and sanctioning powers enabling the *FCA* to investigate and take action for breaches of the *EMIR requirements* by *non- authorised counterparties* and for certain breaches of the *OTC derivatives, CCPs and trade repositories regulation* by *authorised persons*. Such powers under the *OTC derivatives, CCPs and trade repositories regulation* or the *Act* do not extend to breaches of article 11(3) and (4) of *EMIR* by PRA-*authorised financial counterparties*. The *FCA* has additional powers in relation to trade repositories under the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 (see EG 19.40).

...

## 19.27 Alternative Investment Fund Managers Regulations 2013

19.27.1 The *AIFMD UK regulation* ~~transposes~~ transposed *AIFMD* and ~~makes~~ made the necessary changes to *UK* legislation in relation to the implementation of the *EuSEF regulation*, the *EuVECA regulation*, the *ELTIF regulation* and the *Money Market Funds regulation*. It ~~provides~~ provided new and updated powers in relation to both existing and new managers of *AIFs*, whether authorised or registered.

19.27.2 The *AIFMD UK regulation* includes information gathering and sanctioning powers that enable the *FCA* to investigate and take action for breaches of the regulations and ~~directly applicable EU regulations~~ *onshored regulations*. Specific standalone powers are in the *AIFMD UK regulation* for *unauthorised AIFMs*, by applying relevant sections of the *Act*. Amendments to the *Act*, including those made under the ~~Financial Services and Markets Act (Qualifying EU Provisions) Order 2013~~ Financial Services and Markets Act (Qualifying Provisions) Order 2013 (as amended by the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632), extend certain *FCA* powers (e.g. disciplinary powers, injunctions and restitution) so that they apply to contraventions of requirements of the *AIFMD UK regulation* and to contraventions of ~~directly applicable EU regulations~~ *onshored regulations*.

Information gathering and investigation powers

...

19.27.4 The ~~new~~ powers under the *AIFMD UK regulation* include powers of direction and the power to revoke the registration of *small registered UK AIFMs*,

(including a SEF manager or RVECA manager ~~EuSEF manager~~ or a ~~EuVECA manager~~ and, in some circumstances, EEA managers of a *qualifying social entrepreneurship fund* or a *qualifying venture capital fund*), the registration of ~~qualifying social entrepreneurship funds or qualifying venture capital funds~~ or the authorisation of a money market fund.

19.27.5 The *FCA* will respect the principle of proportionality when taking action against ~~EuSEF or EuVECA managers~~ SEF managers or RVECA managers for breaches identified in articles 22 and 21 of the ~~directly applicable EuSEF regulation and EuVECA regulation~~ SEF regulation or RVECA regulation, respectively. The *FCA* may take action to ensure compliance with the regulations or prohibit the use of the designation of ~~EuSEF manager or EuVECA manager~~ SEF manager or RVECA manager and revoke registration of such managers. The prohibition route is more likely to apply to serious breaches of the ~~EU regulations~~ onshored regulations such as in situations where:

- registration has been obtained through false statements or any other irregular means; or
- there are grounds for concern over the behaviour of a ~~EuSEF manager or a EuVECA manager~~ SEF manager or RVECA manager in the management of a *qualifying social entrepreneurship fund* SEF or a *qualifying venture capital fund* RVECA, respectively.

...

### 19.30 The Mortgage Credit Directive Order

19.30.1 The Mortgage Credit Directive (MCD) ~~allows~~ allowed for an exemption not to apply the MCD to buy-to-let lending if there ~~is~~ was in place an appropriate framework for the regulation of these mortgages. The Mortgage Credit Directive Order 2015 (MCDO) is the vehicle through which the framework for “consumer buy-to-let” (CBTL) mortgages ~~has been~~ was established in order to comply with the MCD.

...

### 19.32 The Payment Accounts Regulations 2015

19.32.1 The *Payment Accounts Regulations 2015* (“the PARs”) ~~implement~~ implemented the Payment Accounts Directive. They entitle *consumers* who hold a payment account (such as a current account) to receive certain information about the fees and charges applied to that account. They also entitle *consumers* to use a switching service which meets certain minimum standards, if they wish to change their payment account to another provider.

...

### 19.34 Markets in Financial Instruments Regulations 2017

19.34.1 The *MiFI Regulations* in part ~~implement~~ implemented *MiFID*. The *FCA* has investigative and enforcement powers in relation to both criminal and non-

criminal breaches of the *MiFI Regulations* (including requirements imposed on persons subject to the *MiFI Regulations* by *MiFIR* and any ~~directly applicable EU regulation~~ onshored regulation which was an EU regulation made under *MiFIR* or *MiFID*). The *MiFI Regulations* impose requirements on:

- (1) *persons* holding positions in relevant contracts for commodity derivatives trading on *trading venues* and for *economically equivalent OTC contracts*, whether or not the *persons* are authorised; and
- (2) exempt *investment firms* providing services in *algorithmic trading*, *direct electronic access* or acting as a general clearing member or in relation to the synchronisation of business clocks.

The *MiFI Regulations* also give the *FCA* the powers to investigate and enforce breaches of article 28 of *MiFIR* and any ~~directly applicable EU regulation~~ onshored regulation which was an EU regulation made under *MiFIR*.

...

### 19.35 Data Reporting Services Regulations 2017

19.35.1 The *DRS Regulations* ~~implement~~ implemented *MiFID*. The *FCA* has investigation and enforcement powers in relation to both criminal and non-criminal breaches of the *DRS Regulations* (including requirements imposed on *persons* subject to the *DRS Regulations* by *MiFIR* and any ~~directly applicable EU regulation~~ onshored regulation which was an EU regulation made under *MiFIR* or *MiFID*). The *DRS Regulations* impose requirements on *data reporting services providers* (“*DRSPs*”) which are entities authorised or verified to provide services of:

- (1) publishing trade reports (“*APA*”);
- (2) reporting details of transactions (“*ARM*”); and
- (3) collecting trade reports (“*CTP*”).

...

### 19.36 The Packaged Retail and Insurance-based Investment Products Regulations 2017

19.36.1 The Packaged Retail and Insurance-based Investment Products Regulations ~~implement~~ implemented the *PRIIPs Regulation* (before it was brought into *UK law*). The *FCA* has investigative and enforcement powers in relation to both criminal and civil breaches of the Packaged Retail and Insurance-based Investment Products Regulations, *PRIIPs Regulation* and any ~~directly applicable EU regulation~~ onshored regulation which was an EU regulation made under the *PRIIPs Regulation*. The *PRIIPs Regulation* imposes requirements on both authorised and unauthorised *persons* who manufacture, advise on, market or sell a *PRIIP*.

...

## 19.37 UK Benchmarks Regulations 2018

...

19.37.1 The *UK Benchmarks Regulations 2018* in part ~~implement~~ implemented the *benchmarks regulation* (before it was brought into *UK law*). The *FCA* has investigative and enforcement powers in relation to both criminal and non-criminal breaches of the *UK Benchmarks Regulations 2018* (including requirements imposed on *persons* subject to the *UK Benchmarks Regulations 2018* by the *benchmarks regulation* and any ~~directly applicable EU regulation~~ onshored regulation which was an *EU regulation* made under the *benchmarks regulation*). Our powers in relation to Miscellaneous BM *persons* are set in the *UK Benchmarks Regulations 2018*.

...

## 19.38 UK Securitisation Regulations

19.38.1 The *UK Securitisation Regulations* ~~implement~~ implemented the *Securitisation Regulation* (before it was brought into *UK law*). The *FCA* has investigative and enforcement powers in relation to both criminal and non-criminal breaches of the *UK Securitisation Regulations*, *Securitisation Regulation* and any ~~directly applicable EU regulation~~ onshored regulation which was an *EU regulation* made under the *Securitisation Regulation*.

19.38.2 The *Securitisation Regulation* and the *UK Securitisation Regulations* seek to make the securitisation market work more effectively. They aim to address some of the harms to investors identified in these markets following the financial crisis, including the lack of adequate disclosure, and the misalignment between issuers' and investors' interests. The new framework consolidates existing requirements and strengthens the legislation on securitisation. The *Securitisation Regulation* and the *UK Securitisation Regulations* promote transparency and appropriate due diligence by investors for securitisation investments. They create a framework for simple, transparent and standardised (STS) securitisations. This framework will help to reduce the harm from investors making badly-informed decisions because they fail to understand and appropriately analyse the risks in their securitisation investments.

...

## 20 Enforcement of the Consumer Credit Act 1974

### 20.1 Introduction

20.1.1 The *CCA Order* gives the *FCA* the power to enforce the *CCA* through the application of its investigation and sanctioning powers in the *Act* by reference to the contravention of *CCA Requirements* and criminal offences under the *CCA*. The *FCA's* investigation and sanctioning powers include the following: power to censure or fine an approved person, or impose a suspension or a

restriction on their approval under section 66 of the *Act*, for being knowingly concerned in a contravention by the relevant *authorised person* of a *CCA Requirement*;

power to require information and documents, under section 165 of the *Act*, it reasonably requires in connection with the exercise of the functions conferred on it by the *CCA Order*;

power to appoint an investigator under section 167 of the *Act* for reasons related to its functions under the *CCA Order*;

power to appoint an investigator under section 168 of the *Act* where there are circumstances suggesting that an offence under the *CCA* may have been committed or that a person may have failed to comply with a *CCA Requirement*;

~~power to impose a requirement under section 196 of the *Act* on an *incoming firm* by reference to the contravention or likely contravention of a *CCA Requirement*;~~

power to censure (under section 205 of the *Act*) or fine (under section 206 of the *Act*) an authorised person, or impose a suspension or restriction on their permission (under *section 206A* of the *Act*) for the contravention of a *CCA Requirement*;

power to apply to the court for an injunction under section 380 of the *Act* by reference to the contravention or likely contravention of a *CCA Requirement*;

power to apply to the court for a restitution order under section 382 of the *Act* by reference to the contravention of a *CCA Requirement*;

power to impose a restitution requirement under section 384 of the *Act* by reference to the contravention of a *CCA Requirement*; and

power to prosecute under section 401 of the *Act* an offence committed under the *CCA*.

...

## **Appendix 2 Guidelines on investigation of cases of interest or concern to the Financial Conduct Authority and other prosecuting and investigating agencies**

### **App 2.1 Purpose, status and application of the guidelines**

...

Indicators for deciding which agency should take action

App 2.1.9 The following are indicators of whether action by the *FCA* or one of the other agencies is more appropriate. They are not listed in any particular order or ranked according to priority. No single feature of the case should be considered in isolation, but rather the whole case should be considered in the round.

(a) Tending towards action by the *FCA*

Where the suspected conduct in question gives rise to concerns regarding market confidence or protection of consumers of services regulated by the

FCA.

Where the suspected conduct in question would be best dealt with by:  
criminal prosecution of offences which the *FCA* has powers to prosecute by virtue of the Financial Services and Markets Act 2000 (“the 2000 Act”) (See Appendix paragraph 1.4) and other incidental offences;

civil proceedings under the 2000 Act (including applications for injunctions, restitution and to wind up firms carrying on regulated activities);

regulatory action which can be referred to the *Tribunal* (including proceedings for market abuse); and

proceedings for breaches of Part VI of the *Act*, of *Part 6 rules* or the *Prospectus Rules* or a provision that was otherwise made in accordance with the *Prospectus Directive*.

Where the likely defendants are *authorised persons*, *approved persons* or *conduct rules staff*.

Where the likely defendants are issuers or sponsors of a security admitted to the official list or in relation to which an application for listing has been made.

Where there is likely to be a case for the use of *FCA* powers which may take immediate effect (e.g. powers to vary the permission of an authorised firm or to suspend listing of securities).

Where it is likely that the investigator will be seeking assistance from overseas regulatory authorities with functions equivalent to those of the *FCA*.

Where any possible criminal offences are technical or in a grey area whereas regulatory contraventions are clearly indicated.

Where the balance of public interest is in achieving reparation for victims and prosecution is likely to damage the prospects of this.

Where there are distinct parts of the case which are best investigated with regulatory expertise.

...

...

**Appendix 3**      **Appendix to the guidelines on investigation of cases of interest or concern to the financial conduct authority and other prosecuting and investigating agencies**

**App 3.1**      **The FCA**

...

- App 3.1.3      Under the 2000 Act the *FCA* has powers to investigate concerns including:
- regulatory concerns about authorised *firms* and individuals employed by



them;

- suspected contraventions of the *Market Abuse Regulation* or any ~~directly applicable EU regulation made under the *Market Abuse Regulation*~~ supplementary market abuse legislation (as defined in Part 8 of the Act) ~~or for contraventions of the *auction regulation*~~;

~~[Note: see Regulation 6 and Schedule 1 to the *RAP Regulations* for powers in relation to contraventions of the *auction regulation*]~~

- suspected misleading statements and practices under s.397 of the 2000 Act and Part 7 of the Financial Services Act 2012;
- suspected *insider dealing* under of Part V of the Criminal Justice Act 1993;
- suspected contraventions of the general prohibition under s.19 of the 2000 Act and related offences;
- suspected offences under various other provisions of the 2000 Act (see below);
- suspected breaches of Part VI of the Act, of *Part 6 rules* or the *prospectus rules* or a provision that was otherwise made in accordance with the *Prospectus Directive*.

The *FCA*'s powers of information gathering and investigation are set out in Part XI of the 2000 Act and in s.97 in relation to its Part VI functions.

App 3.1.4 The *FCA* has the power to take the following enforcement action:

- discipline authorised firms under Part XIV of the 2000 Act and approved persons and other individuals under s.66 of the 2000 Act;
- impose penalties on persons that perform *controlled functions* without approval under s.63A of the 2000 Act;
- impose civil penalties under s.123 of the 2000 Act;

~~[Note: see Regulation 6 and Schedule 1 to the *RAP Regulations* for the application of this power and those below to contraventions of the *auction regulation*]~~

- temporarily prohibit an individual from exercising management functions in *MiFID investment firms* or from dealing in *financial instruments* ~~or *emissions auction products*~~ on their own account or on the account of a third party, under s.123A(2) of the 2000 Act;
- ~~temporarily prohibit an individual from making a bid, on his or her own account or the account of a third party, directly or indirectly, at an auction conducted by a *recognised auction platform* under s.123A(2) of the 2000 Act;~~
- permanently prohibit an individual from exercising management functions in *MiFID investment firms* under s.123A(3) of the 2000 Act;
- suspend the permission of an *authorised person* or impose limitations or other restrictions in relation to the carrying on of a *regulated activity* by an *authorised person* under s.123B of the 2000 Act;

- prohibit an individual from being employed in connection with a *regulated activity*, under s.56 of the 2000 Act;
- apply to Court for *injunctions* (or interdicts) and other orders against persons contravening relevant requirements (under s.380 of the 2000 Act) or engaging in *market abuse* (under s.381 of the 2000 Act);
- petition the court for the winding up or administration of companies, and the bankruptcy of individuals, carrying on *regulated activities*;
- apply to the court under ss.382 and 383 of the 2000 Act for restitution orders against persons contravening relevant requirements or persons engaged in *market abuse*;
- require restitution under s.384 of the 2000 Act of profits which have accrued to authorised persons contravening relevant requirements or persons engaged in *market abuse*, or of losses which have been suffered by others as a result of those *breaches*;
- (except in Scotland) prosecute certain offences, including under the Money Laundering Regulations 2007, the Transfer of Funds (Information on the Payer) Regulations 2007, Part V Criminal Justice Act 1993 (insider dealing), Part 7 of the Financial Services Act 2012 and various offences under the 2000 Act including (Note: The *FCA* may also prosecute any other offences where to do so would be consistent with meeting any of its statutory objectives): carrying on *regulated activity* without authorisation or exemption, under s.23;
- making false claims to be authorised or exempt, under s.24;
- promoting investment activity without authorisation, under s.25;
- breaching a prohibition order, under s.56;
- failing to co-operate with or giving false information to *FCA* appointed investigators, under s.177;
- failing to comply with provisions about influence over authorised persons, under s.191;
- making misleading statements and engaging in misleading practices, under s.397;
- misleading the *FCA*, under s.398;
- various offences in relation to the *FCA*'s Part VI function;
- Fine, issue public censures, suspend or cancel listing for breaches of the Listing Rules by an issuer; and
- Issue public censures or cancel a sponsor's approval.

## Annex B

### Amendments to the Perimeter Guidance Manual (PERG)

#### Part 1: Comes into force on exit day as defined in the European Union (Withdrawal) Act 2018

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 1 Introduction to the Perimeter Guidance Manual

...

#### 1.4 General guidance to be found in PERG

...

##### 1.4.2 G Table: list of general guidance to be found in *PERG*.

Chapter:	Applicable to:	About:
...		
PERG 13: Guidance on the scope of <u>the UK provisions which implemented MiFID and CRD IV</u>	Any UK person who needs to know whether <i>MiFID</i> or the <i>CRD</i> and <del>EU</del> <u>UK CRR</u> (which allow <u>provisions which correspond to the recast CAD</u> to continue to apply to certain firms) as <del>implemented in the UK</del> apply to him	the scope of <u>the UK provisions which implemented MiFID</u> and the <i>CRD</i> and <del>EU</del> <u>UK CRR</u> .
...		

#### 2 Authorisation and regulated activities

...

#### 2.2 Introduction

...

- 2.2.4 G The rest of this chapter provides a high level guide through the questions set out in *PERG 2.2.3G*. It aims to give an overall picture but in doing so it necessarily relies on the reader referring to *UK* statutory provisions ~~and European legislation~~ to fill in the detail (which can be extensive).

...

## 2.4 Link between activities and the United Kingdom

....

- 2.4.3 R Section 418 of the *Act* (Carrying on regulated activities in the United Kingdom) takes this one step further. It extends the meaning that ‘in the United Kingdom’ would ordinarily have by setting out ~~five~~ additional cases. The *Act* states that, in these ~~five~~ cases, a person who is carrying on a *regulated activity* but who would not otherwise be regarded as carrying on the activity in the *United Kingdom* is, for the purposes of the *Act*, to be regarded as carrying on the activity in the *United Kingdom*.

- (1) ~~The first case is where a UK based person carries on a regulated activity in another EEA State in exercise of rights under a Single Market Directive or the auction regulation. [deleted]~~
- (2) ~~The second case consists of the marketing in another EEA State of a UK based collective investment scheme by the scheme’s manager where the scheme in question is one to which the UCITS Directive applies. [deleted]~~
- (3) The ~~third~~ case is where a *regulated activity* is carried on by a *UK-based person* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*.
- (4) The ~~fourth~~ case is where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an establishment in the *United Kingdom*. This might occur when each of the stages that make up a *regulated activity* (such as *managing investments*) takes place in different countries. For example, a person’s management is in country A, the assets are held by a nominee in country B, all transactions take place in country B or country C but all decisions about what to do with the investments are taken from an office in the *United Kingdom*. Given that the investments are held, and all dealings in them take place, outside the *United Kingdom* there may otherwise be a question as to where the *regulated activity* of *managing investments* is taking place. For the purposes of the *Act*, it is carried on in the *United Kingdom*.
- (5) ~~The fifth case, inserted by the ECD Regulations is, in effect, where an electronic commerce activity is carried on, from an establishment in the United Kingdom, in another EEA State. [deleted]~~

...

2.4.7 G ~~Electronic commerce activities, other than insurance business falling within the scope of the Solvency II Directive, provided by an incoming ECA provider will not be regulated activities (see PERG 2.9.18G(2)). [deleted]~~

...

- 2.4.10 G
- (1) The requirement to be authorised to carry on the *regulated activity* of *administering a benchmark* gives effect to the authorisation and registration regime under article 34 of the *benchmarks regulation*.
  - (2) Article 34 only requires a *person* to be authorised or registered in the *UK* (as opposed to elsewhere in the *EU*) if that *person* is located in the *UK*.
  - (3) Accordingly, the FCA considers that where a person (P) administers a benchmark in the *UK* but P is not located in the *UK*:
    - (a) P does not carry on the *regulated activity* of *administering a benchmark* from an establishment maintained by P in the *UK* for the purposes of section 418 of the *Act*; and
    - (b) P would not otherwise be regarded as carrying on that *regulated activity* in the *UK*.
  - (4) *Located* is defined in the *Glossary* and has the same meaning as it does in the *benchmarks regulation*.

....

## 2.5 Investments and activities: general

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Modification of certain exclusions as a result of MiFID, the IDD and the Mortgage Credit Directive

- 2.5.3 G The application of certain of the exclusions considered in *PERG 2.8* (Exclusions applicable to certain regulated activities) and *PERG 2.9* (Regulated activities: exclusions applicable to certain circumstances) is modified in relation to *persons* who are subject to the UK provisions which implemented MiFID, the *Insurance Distribution Directive* and the *MCD*. The reasons for this and the consequences of it are explained in *PERG 2.5.4G* for MiFID, *PERG 5* (Guidance on insurance distribution activities), for the *Insurance Distribution Directive* and *PERG 4.10A* for the *MCD*.

Investment services and activities

- 2.5.4 G ~~It remains the Government's responsibility to ensure the proper implementation of MiFID.~~ Certain *persons* subject to the requirements of the UK provisions which implemented MiFID must be brought within the scope of regulation under the *Act*. A core element of *MiFID* is the concept

of investment firm. An *investment firm* is any *person* whose regular occupation or business is the provision of one or more *investment services* to third parties or the performance of one or more *investment activities* on a professional basis. An *investment firm* is not subject to the UK provisions which implemented MiFID requirements if it falls within one or more of the exemptions in ~~article 2 MiFID~~ Part 1 of Schedule 3 of the *Regulated Activities Order*. Further information about these exemptions is contained in PERG 13.5. To the extent that an *investment firm* falls within one of these exemptions, it will not be a *MiFID investment firm*. Where a firm is not a *MiFID investment firm* because one or more of the exemptions in ~~article 2~~ Part 1 of Schedule 3 of the *Regulated Activities Order* apply, it may still be carrying on *regulated activities* and therefore require *authorisation* unless it is an *exempt person*.

2.5.4A G Prior to exit day, the UK has exercised part of the optional exemption in article 3 of *MiFID*. This is now set out in regulation 8 of the *MiFI Regulations*. Further information about this exemption is contained in Q48 to 53 in PERG 13.5. The investment services to which ~~article 3~~ apply regulation 8 of the *MiFI Regulation* applies (namely reception and transmission of orders and investment advice in relation to either *transferable securities* or units in collective investment undertakings) correspond to regulated activities (see PERG 13 Annex 2 Tables 1 and 2).

2.5.5 G For persons who are *MiFID investment firms*, the activities that must be caught by the *Regulated Activities Order* are those that are caught by the UK provisions which implemented MiFID. To achieve this result, some of the exclusions in the Order (that will apply to *persons* who are not caught by *MiFID*) have been made unavailable to *MiFID investment firms* when they provide or perform *investment services and activities*. A “*MiFID investment firm*”, for these purposes, includes *credit institutions* to which the UK provisions which implemented MiFID applies (see PERG 13, Q5 and 9); *collective portfolio management investment firms* providing the services of *portfolio management* and *personal recommendations* in relation to *financial instruments* or the ancillary service of safekeeping and administration in relation to units of collective investment undertakings; and *AIFM investment firms* providing the ancillary service of reception and transmission of orders in relation to *financial instruments*. The same exclusions are also unavailable to *third country investment firms* when they provide *investment services and activities*. Article 4(4) of the *Regulated Activities Order* (Specified activities: general) lists a number of exclusions that must be disregarded. These relate to the exclusions concerned with:

...

...

Insurance distribution or reinsurance distribution

2.5.6 G The *IDD* ~~is~~ was in part ~~been~~ implemented through various amendments to the *Regulated Activities Order*. These ~~include~~ included article 4(4A) (Specified activities: general) which ~~precludes~~ precluded a *person* who, for

remuneration, takes up or pursues *insurance distribution* or *reinsurance distribution* in relation to a risk or commitment situated in from making use of certain exclusions. Post *exit day*, this provision has been amended to refer to a risk or commitment situated in the *United Kingdom*. In other cases, some of the exclusions provided in relation to particular *regulated activities* are unavailable where the activity involves a *contract of insurance*. This is explained in more detail in *PERG 5* (Insurance distribution activities).

Wider definition of certain specified investments when carrying on some kinds of ~~EU~~ MiFID business

- 2.5.7 G Some specified investments are defined so that certain products only come within that specified investment when a person is providing services under certain ~~EU~~ legislation in relation to that product.
- 2.5.8 G When *PERG 2.5.7G* applies, the product is only treated as falling within the definition of the *specified investment* concerned if (in relation to that product):
- (1) one of the following *persons*:
    - (a) a *MiFID investment firm*; or
    - (b) a *third country investment firm*; or
    - (c) a *CRD credit institution*; or
    - (d) a credit institution that would qualify to be a CRD credit institution if its registered or head office were in the ~~EEA~~ *United Kingdom*;
 

provides or performs *investment services and/or activities* on a professional basis; or
  - (2) a *UCITS investment firm* is providing certain *investment services and/or activities* under the *UK provisions which implemented* article 6.3 of the *UCITS Directive* (provision of services in addition to UCITS management); or
  - (3) a *market operator* (or someone who would be a market operator if it was based in the ~~EEA~~ *United Kingdom*) is providing the *investment services and/or activities* of operating a *multilateral trading facility* or *organised trading facility* (these activities are described in Q24 and Q24A in *PERG 13.3*); or
  - (4) an *AIFM investment firm* is providing services under the *UK provisions which implemented* article 6.4 of the *AIFMD* (provision of services in addition to AIF management).

...

## 2.6 Specified investments: A broad outline

...

~~Greenhouse gas emission~~ Emission allowances

- 2.6.19D G (1) ~~There are two specified investments relating to the scheme for greenhouse gas emission allowance trading within the EU:~~
- (a) ~~the first kind comprises emission allowances that are auctioned as financial instruments or two-day emissions spots (together, emissions auction products); and~~
  - (b) ~~the second kind is an emission allowance itself, subject to (2): [deleted]~~
- (2) ~~An emission allowance is only a specified investment under (1)(b) if PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of EU business) applies.~~
- (3) ~~An emission allowance can also be the underlying for an option, future or contract for differences.~~
- 2.6.19E G ~~The emissions auction product specified investment relates only to the regulated activity of bidding in emissions auctions (whereby a bid is received, transmitted and submitted on an auction platform) and captures the two forms of allowance products that may be auctioned under article 4(2) of the auction regulation: a two-day spot or a five-day future. [deleted]~~
- 2.6.19F G ~~See PERG 2.7.6DG for more about:~~
- (1) ~~how the RAO deals with the overlap between emission allowances and emissions auction products; and~~
  - (2) ~~whether these products are a security, a contractually-based investment or a relevant investment. [deleted]~~
- 2.6.19G G ~~Some other points about emission allowances are:~~
- (1) ~~Emission allowance means an allowance as defined in article 3(a) of Directive 2003/87/EC which established the scheme for greenhouse gas emission allowance trading within the EU. That article provides that an allowance is an allowance to emit one tonne of carbon dioxide equivalent during a specified period, only valid for the purpose of meeting the requirements of Directive 2003/87/EC and only transferable in accordance with the provisions of that directive (emission allowance).~~
  - (2) ~~A two-day spot is defined by reference to article 3(3) of the auction regulation. That article provides that a two-day spot is an allowance auctioned for delivery at an agreed date no later than the second~~



~~trading day from the day of the auction (*two-day emissions spot*).~~  
~~[deleted]~~

- (3) ~~A *financial instrument* is defined as any instrument listed in Section C of Annex I to *MiFID*.~~ ~~[deleted]~~
- (4) ~~The distinction between *emission allowances* that are auctioned as *financial instruments* and those auctioned as *two-day spots* is no longer relevant as all *emissions auction products* are *financial instruments*. When this part of the *Regulated Activities Order* was brought into force, a *two-day emissions spot* was not a *financial instrument*. Changes in *EU* legislation since then mean that it is one now.~~ ~~[deleted]~~

## Options

2.6.20 G The specified investment category of options comprises:

- (1) *options* to acquire or dispose of *securities* or *contractually based investments*, currency and certain precious metals and *options* to acquire or dispose of such *options*. *Options* to buy or sell other types of *commodity* will only fall within this *specified investment* category if they are *options* to buy or sell futures, or *options* to buy or sell *contracts for differences*, which are based on other *commodities*. But *options* to buy or sell other types of *commodity* may be *contracts for differences* (see *PERG* 2.6.23G);
- (2) *options* to acquire or dispose of other property and falling within paragraphs 5, 6, 7 or 10 of ~~Section C of Annex 1 to *MiFID*~~ Part 1 of Schedule 2 to the *Regulated Activities Order* (see article 83(2) of the *Regulated Activities Order* and *PERG* 13, Q33A to Q34 for guidance about these instruments), but only where they are options to which *PERG* 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of ~~EU~~ MiFID business) applies; and
- (3) options to acquire or dispose of an option to which (2) applies, but only where *PERG* 2.5.7G applies (see article 83(1)(e) of the *Regulated Activities Order*).

...

## Futures

...

2.6.22A G As with options, there is an additional category of instruments which are *futures* only in limited circumstances. These are contracts as described in *PERG* 2.6.21G:

- (1) that would not be regarded as having been entered into for investment purposes because they fail one of the tests mentioned in

*PERG 2.6.22G;*

- (2) that:
- (a) fall within paragraph 4 of ~~Section C of Annex 1 to MiFID Part 1 of Schedule 2 to the Regulated Activities Order~~ and relate to currencies (see *PERG 13, Q31A to Q31S* for *guidance* about these derivatives); or
  - (b) fall within paragraphs 5, 6, 7 or 10 of ~~Section C of Annex 1 to MiFID Part 1 of Schedule 2 to the Regulated Activities Order~~ (see *PERG 13, Q33A to Q34* for *guidance* about these derivatives); and
- (3) to which *PERG 2.5.7G* (Wider definition of certain specified investments when carrying on some kinds of ~~EU~~ MiFID business) applies

See article 84(1A)-(1D) of the *Regulated Activities Order*

...

Contracts for differences

- 2.6.23 G The *specified investment* category of *contracts for differences* covers:
- (1) rights under *contracts for differences*;
  - (2) rights under other contracts whose purpose or pretended purpose is to secure a profit or avoid a loss by reference to fluctuations in certain factors; and
  - (3) derivative contracts for the transfer of credit risk (not within (1) or (2)) falling within paragraph 8 or 9 of ~~Section C of Annex 1 to MiFID Part 1 of Schedule 2 to the Regulated Activities Order~~ (see *PERG 13, Q31* for *guidance* about these instruments), but only where *PERG 2.5.7G* (Wider definition of certain specified investments when carrying on some kinds of ~~EU~~ MiFID business) applies.

The factors mentioned in (2) include the value or price of property of any description or an index or any ‘other factor designated in the contract’. This catches a wide range of factors.

...

- 2.6.24A G (1) A binary or other fixed outcomes bet is also treated as *contract for differences*. This is defined as something that meets the following conditions:
- (a) it is a derivative contract of a binary or other fixed outcomes nature;

- (b) it is not covered by *PERG* 2.6.23G(1) or (2);
- (c) it is settled in cash;
- (d) it is a *financial instrument* that falls within paragraphs 4, 5, 6, 7 or 10 of ~~Section C of Annex 1 to MiFID~~ Part 1 of Schedule 2 to the *Regulated Activities Order* (see *PERG* 13, Q31A to Q34 for guidance about these instruments); and
- (e) one of the following requirements is met:
  - (i) *PERG* 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of ~~EU~~ MiFID business) applies; or
  - (ii) a person is *making arrangements with a view to transactions in investments* in relation to it.

...

#### Rights under a regulated mortgage contract

- 2.6.27 G In accordance with article 61(3)(a) of the *Regulated Activities Order*, a *regulated mortgage contract* is a contract which, at the time it is entered into, satisfies the following conditions:
- (1) the contract is one where the lender provides credit to an individual or trustees (the “borrower”);
  - (2) the obligation of the borrower to repay is secured by a mortgage on land: ~~in the EEA; and~~
    - (a) in relation to a contract entered into before *exit day*, means land in the *United Kingdom* or, if the contract was entered into on or or after 21 March 2016, within the territory of an *EEA state*;
    - (b) in relation to a contract entered into on or after *exit day*, means land in the *United Kingdom*; and
  - (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling.

Detailed guidance on this is set out in *PERG* 4.4 (Guidance on regulated activities connected with *mortgages*). However, generally, the definition of *regulated mortgage contract* does not include certain loans to commercial borrowers, second charge loans by a credit union, exempt consumer buy-to let mortgage contracts (see *PERG* 4.4.31G) and second charge bridging loans (see *PERG* 4.4.1-AG).

...

## 2.7 Activities: a broad outline

...

- 2.7.6B G ~~The RAO and the auction regulation together generate three broad categories of person in relation to bidding for emission allowances on an auction platform:~~
- (1) ~~The first category consists of an investment firm to which MiFID applies, a CRD credit institution and a third country credit institution where the firm is bidding on behalf of its clients or on its own account for emissions auction products. For these purposes a third country credit institution refers to a credit institution that would qualify to be a CRD credit institution if its registered or head office were in the EEA.~~
  - (1A) ~~The first category also consists of a person that is exempt from MiFID under article 2(1) (j) where it is bidding on behalf of a client of its main business or bidding on its own account (further information on the article 2(1) (j) exemption from MiFID is in PERG 13.5, Q44).~~
  - (1B) ~~A person in this first category is entitled to bid on an auction platform but requires permission from the FCA for bidding in emissions auctions to do so.~~
  - (2) ~~The second category consists of operators or aircraft operators bidding on their own account as well as group entities or business groupings of those operators or public bodies or state-owned entities of Member States that control any of those operators (as set out in article 18 of the auction regulation). A person or entity in this category is entitled to bid on an auction platform but does not require permission from the FCA to do so as a result of an exclusion from the regulated activity of bidding in emissions auctions in article 24B of the RAO.~~
  - (3) ~~The third category consists of all other persons. The auction regulation prevents an auction platform from granting these persons admission to bid. A person in this category is not entitled to bid on an auction platform and the FCA is not able to grant such a person permission to do so.~~
  - (4) ~~Article 24B(2) of the RAO includes in the second category (see (2)) an investment firm to which MiFID applies, a CRD credit institution or a third country credit institution where it is bidding on its own account for emissions auction products that are not financial instruments under MiFID. This part of the RAO no longer has effect as all emissions auction products are now financial instruments. When it was brought into force, a two-day emissions spot was not a financial instrument. [deleted]~~

- 2.7.6C G ~~A person may fall into both the first and the second category. For example, a person might be both exempt from MiFID under article 2(1)(j) (within the first category) and be a group entity of an operator (within the second category). In this case, that person does not require permission for activities that cause that person to fall into the second category because those activities are excluded from the activity of bidding in emissions auctions. [deleted]~~
- 2.7.6D G (1) ~~As explained in PERG 2.6.19DG, an emission allowance and an emissions auction product are both specified investments. The Regulated Activities Order deals with this as follows. [deleted]~~
- (2) ~~A person in the first category in PERG 2.7.6BG requires permission from the FCA for bidding in emissions auctions but does not require any other permission to do so. [deleted]~~
- (3) ~~A person in the second category in PERG 2.7.6BG does not require any permission from the FCA for bidding. [deleted]~~
- (4) ~~Article 24A(2) of the RAO is the main provision that deals with (2) and (3). It provides that bidding in emissions auctions does not form part of any other regulated activity and so a person seeking to carry on bidding activity will only require permission for bidding in emissions auctions to do so and will not require permission for any other regulated activities. Except for this exclusion, in the FCA's view, bidding in emissions auctions would broadly equate to the following regulated activities:~~
- ~~(a) dealing in investments as principal;~~
- ~~(b) dealing in investments as agent;~~
- ~~(c) arranging (bringing about) deals in investments; or~~
- ~~(d) making arrangements with a view to transactions in investments. [deleted]~~
- (5) ~~An emission allowance is a security. This means that any person wishing to carry out any activity in relation to it will need to consider whether any of the regulated activities relating to securities apply (subject to (8)).~~
- (6) ~~A derivative on an emission allowance is potentially a contractually based investment and a relevant investment. Therefore any person wishing to carry out any activity in relation to it will need to consider whether any of the regulated activities relating to contractually based investments and relevant investments apply (subject to (8)).~~
- (7) ~~An emission allowance auctioned under the auction regulation, as well as being a specified investment in its own right (an emissions~~

~~auction product) may also be included in the emission allowance category of specified investment (subject to (8)). It is unlikely to be a contractually based investment or a relevant investment. [deleted]~~

- (8) ~~However (as explained in (2) to (4)), for a firm that is bidding under the auction regulation:~~
- ~~(a) the only regulated activity is bidding in emissions auctions; and~~
  - ~~(b) the only specified investment is an emissions auction product. [deleted]~~
- (9) ~~(7) means that a person may need permission to carry out activities in relation to emission allowances that are auctioned under the auction regulation other than bidding activities, such as:~~
- ~~(a) buying and selling them in the secondary market; or~~
  - ~~(b) advising a client about buying or selling them. [deleted]~~
- (10) ~~Where (9) applies, the specified investment involved will be an emission allowance or one of the contractually based investments. The emissions auction product category of specified investment is only relevant to the regulated activity of bidding in emissions auctions. [deleted]~~
- (11) ~~(9) applies to a person in (2) or (3) as well as anyone else wanting to carry out such activities. [deleted]~~

...

#### Operating a UK multilateral trading facility

...

- 2.7.7DA G The definition of a UK multilateral trading facility covers:
- (1) a multilateral trading facility ~~MiFID~~ as defined by article 2(1)(14A) of MiFIR (see *PERG* 13, Q24) operated by an investment firm, a credit institution or a market operator; or
  - (2) a facility which:
    - (a) is operated by an investment firm, a credit institution or a market operator that is set up outside the EEA United Kingdom; and
    - (b) would come within (1) if its operator was set up in the EEA United Kingdom.

...

Operating a UK multilateral trading facility

...

- 2.7.7DC G The definition of a UK *organised trading facility* covers:
- (1) a UK organised trading facility as defined by ~~MiFID~~ article 2(1)(15A) of *MiFIR* (see *PERG* 13, Q24A) operated by an *investment firm*, a *credit institution* or a *market operator*; or
  - (2) a facility which:
    - (a) is operated by an *investment firm*, a *credit institution* or a *market operator* that is set up outside the ~~EEA~~ United Kingdom; and
    - (b) would come within (1) if its operator was set up in the ~~EEA~~ United Kingdom.

...

Managing a UK UCITS, managing an AIF, and establishing etc collective investment schemes

...

- 2.7.13B G The activity of *managing a UK UCITS* is derived from the *UCITS Directive*. A person will manage a UK UCITS where they carry on *collective portfolio management* of a UK UCITS. A UK UCITS is a type of *collective investment scheme* which is authorised by a ~~competent authority in an EEA State~~ the *FCA* as meeting the requirements under the UK provisions which implemented *UCITS Directive*.

...

- 2.7.13G G ~~Operators, trustees or depositaries of UCITS established in other EEA States are also authorised persons under Schedule 5 of the Act if those schemes are recognised schemes for the purposes of section 264 of the Act.~~  
[deleted]

...

**2.8 Exclusions applicable to particular regulated activities**

...

## Accepting deposits

- 2.8.2 G ~~Three~~ Two exclusions apply to the *regulated activity* of *accepting deposits*. ~~The first is that a deposit taker providing its services as an electronic e-commerce activity from another EEA State into the United Kingdom (see PERG 2.9.18G) does not carry on a regulated activity.~~ The second first

relates to a *firm* with a *Part 4A permission to manage an AIF or manage a UK UCITS* (see *PERG 2.9.22G* (Managers of UK UCITS and AIFs)). There is also excluded from *accepting deposits* any activity which is carried on by a local authority (see *PERG 2.9.23G*). In addition to the situations that are excluded from being '*deposits*' (see *PERG 2.6.2G* to *PERG 2.6.4G*), several *persons* are *exempt persons* in relation to the *regulated activity of accepting deposits* (see *PERG 2.10.8G* (2)).

#### Effecting and carrying out contracts of insurance

- 2.8.3 G The following *activities* are excluded from both the *regulated activities of effecting and carrying out contracts of insurance*.
- (1) In specified circumstances, the activities of an *EEA firm* when participating in a Community co-insurance operation are excluded. A Community co-insurance operation is defined in the *Solvency II Directive*.
  - (2) In specified circumstances, activities that are carried out in connection with the provision of on-the-spot accident or breakdown assistance for cars and other vehicles (such as repairs, vehicle retrieval, delivery of parts or fuel) are excluded.
  - (3) ~~*Electronic commerce activities provided by an incoming ECA provider where those activities are outside the scope of the Solvency II Directive* (see *PERG 2.9.18G*); [deleted]~~
  - (4) Activities carried on by a *firm* with a *Part 4A permission to manage an AIF or manage a UK UCITS*, where they are in connection with, or for the purposes of, *managing an AIF or managing a UK UCITS* (see *PERG 2.9.22G* (Managers of UK UCITS and AIFs)).

#### Dealing in investments as principal

- 2.8.4 G The *regulated activity of dealing in investments as principal* applies to specified transactions relating to any security or to any *contractually based investment* (apart from rights under *funeral plan contracts* or rights to or interests in such contracts). The activity is cut back by exclusions as follows.
- ...
- (6) A *person* will not be treated as carrying on the activity of *dealing in investments as principal* if, in specified circumstances (outlined in *PERG 2.9*), he enters as principal into a transaction:
 

...

    - (g) ~~as an *incoming ECA provider* (see *PERG 2.9.18G*); [deleted]~~



...

- (i) that involves a *contract of insurance* covering large risks situated outside the *EEA United Kingdom* (see *PERG 2.9.19G*);

...

- (7) ~~An activity that might otherwise be both *dealing in investments as principal* and *bidding in emissions auctions* is specifically excluded from *dealing in investments as principal* as a result of article 24A(2) of the *RAO* which provides that the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see *PERG 2.7.6DG*).~~ [deleted]

...

#### Dealing in investments as agent

- 2.8.5 G The *regulated activity* of *dealing in investments as agent* applies to specified transactions relating to any *security* or to any *relevant investment* (apart from rights under *funeral plan contracts* or rights to or interests in such rights). In addition, the activity is cut back by exclusions as follows.

...

- (3) In addition, exclusions apply in specified circumstances (outlined in *PERG 2.9 (Regulated activities: exclusions available in certain circumstances)*) where a person enters as agent into a transaction:

...

- (g) ~~as an *incoming ECA provider* (see *PERG 2.9.18G*);~~ [deleted]

- (4) ~~An activity that might otherwise be both *dealing in investments as agent* and *bidding in emissions auctions* is specifically excluded from *dealing in investments as agent* as a result of article 24A(2) of the *RAO* which provides that the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see *PERG 2.7.6DG*).~~ [deleted]

...

#### Arranging deals in investments and arranging a home finance transaction

...

- 2.8.6A G The exclusions in the *Regulated Activities Order* that relate to the various *arranging activities* are as follows.

- (-1) ~~Under Article 24A(2), an activity that would otherwise be both *arranging* and *bidding in emissions auctions* is specifically excluded~~

~~from *arranging* because the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see *PERG 2.7.6DG*); [deleted]~~

...

- (3) The following exclusions from both article 25(1) and (2) (outlined in *PERG 2.9*) apply in specified circumstances where a *person* makes arrangements:

...

- (g) ~~as an *incoming ECA provider* (see *PERG 2.9.18G*); [deleted]~~

...

- (k) that involve a *contract of insurance* covering large risks situated outside the ~~EEA~~ United Kingdom (see *PERG 2.9.19G*);

...

#### Operating an electronic system in relation to lending

- 2.8.6D G An activity of a kind specified below is excluded from the regulated activity of operating an electronic system in relation to lending:

...

- (2) ~~The exclusion for *electronic commerce activities by an incoming ECA provider* (see *PERG 2.9.18G*) also applies to the *regulated activity of operating an electronic system in relation to lending*. [deleted]~~

...

#### Managing investments

- 2.8.7 G The activities of *persons* appointed under a power of attorney are excluded under article 38 of the *Regulated Activities Order*, from the *regulated activity of managing investments*, if specified conditions are satisfied. The exclusion only applies where a *person* is not carrying on *insurance distribution* or *reinsurance distribution* and is subject to further limitations discussed below. In addition, the following exclusions (outlined in *PERG 2.9*) apply in specified circumstances where a *person* manages assets:

...

- (4) ~~as an *incoming ECA provider* (see *PERG 2.9.18G*); [deleted]~~

...

## Assisting in the administration and performance of a contract of insurance

...

- 2.8.7B G The following exclusions from *assisting in the administration and performance of a contract of insurance* also apply to a *person* in specified circumstances:

...

- (3) ~~as an incoming ECA provider (see PERG 2.9.18G); [deleted]~~

...

- (6) that involve a *contract of insurance* covering large risks situated outside the *EEA United Kingdom* (see PERG 2.9.19G); or

...

## Debt adjusting, debt counselling, debt collecting and debt administration

- 2.8.7C G ...

- (6) The exclusions relating to ~~*electronic commerce activities by an incoming ECA provider (see PERG 2.9.18G)*~~ and for activities carried on by a *local authority* (see PERG 2.9.23G) or an insolvency practitioner (see PERG 2.9.25G) also apply to these *regulated activities*.

...

## Safeguarding and administering investments

- 2.8.8 G The exclusions from the regulated activity of safeguarding and administering investments are as follows.

...

- (4) The following exclusions apply in specified circumstances where a *person* safeguards and administers assets (or arranges for another to do so):

...

- (f) ~~as an incoming ECA provider (see PERG 2.9.18G); [deleted]~~

...

## Sending dematerialised instructions

- 2.8.9 G Exclusions from the regulated activity of sending dematerialised instructions apply in relation to certain types of instructions sent in the

operation of the system maintained under the Uncertificated Securities Regulations 2001 (SI 2001/3755). The various exclusions relate to the roles played by participating issuers, settlement banks and network providers (such as Internet service providers) and to instructions sent in connection with takeover offers (as long as specified conditions are met). In addition, the following exclusions (outlined in *PERG 2.9*) apply in specified circumstances where a person sends dematerialised instructions:

...

(3) ~~as an *incoming ECA provider* (see *PERG 2.9.18G*); [deleted]~~

...

Managing a UK UCITS, managing an AIF and establishing etc collective investment schemes

- 2.8.10 G (1) ~~The exclusion for *incoming ECA providers* (see *PERG 2.9.18G*) applies to the range of activities specified as being regulated in relation to *AIFs* and *collective investment schemes* (see *PERG 2.7.13AG*). The exclusion for business angel-led capital funds (see *PERG 2.9.20G*) applies to the activities of managing an AIF, *managing a UK UCITS* and *establishing, operating and winding up a collective investment scheme*. There is a third exclusion for insolvency practitioners (see *PERG 2.9.25G*).~~

...

Establishing etc pension schemes

- 2.8.11 G ~~Three~~ Two exclusions apply to the range of activities specified as being regulated in relation to *stakeholder pension schemes* and *personal pension schemes*. ~~The first~~ relates to *incoming ECA providers* (see *PERG 2.9.18G*). ~~The second~~ first relates to *firms* with a Part 4A permission to *manage an AIF* or *manage a UK UCITS* (see *PERG 2.9.22G* (Managers of UK UCITS and AIFs)). ~~The third~~ second relates to insolvency practitioners (see *PERG 2.9.25G*).

...

Advising on investments

...

- 2.8.12A G Advice given by an unauthorised person in relation to a *home finance transaction* or *advising on regulated credit agreements* for the acquisition of land in the circumstances referred to in *PERG 2.8.6AG* (5)(a) or (b) (Arranging deals in investments and arranging a home finance transaction) is also excluded. In addition:
- (1) the following exclusions apply in specified circumstances where a person is *advising on investments*, *advising on regulated credit*

*agreements for the acquisition of land or advising on a home finance transaction:*

...

(c) ~~as an incoming ECA provider (see PERG 2.9.18G); [deleted]~~

...

#### Lloyd's activities

- 2.8.13 G ~~Electronic commerce activities provided by an incoming ECA provider are excluded from the regulated activities that relate expressly to business carried on at Lloyds (see PERG 2.9.18G). A firm with a Part 4A permission to manage an AIF or manage a UK UCITS is also excluded from carrying on a regulated activity if the person carries on that activity in connection with, or for the purposes of, managing an AIF or managing a UK UCITS (see PERG 2.9.22G). Otherwise the only exclusions that apply concern the regulated activity of arranging deals in its application to business carried on at Lloyd's.~~

...

#### Entering funeral plan contracts

- 2.8.14 G *Entering as provider into a funeral plan contract is not treated as a regulated activity where:*
- ...
- (3) ~~it is provided as an electronic commerce activity by an incoming ECA provider (see PERG 2.9.18G); or [deleted]~~

...

#### Administering regulated mortgage contracts

...

- 2.8.14B G The following exclusions apply in specified circumstances where a person is administering a home finance transaction:
- ...
- (3) ~~as an incoming ECA provider (see PERG 2.9.18G) [deleted]~~
- ...

#### Regulated credit agreements

...

2.8.14ZB G ~~Activities carried on by an EEA authorised payment institution or an EEA authorised electronic money institution exercising passport rights in the United Kingdom in accordance with article 16(3) of the Payment Services Directive (in the latter case, as applied by article 6 of the Electronic Money Directive) are excluded from the regulated activities of entering into a regulated credit agreement as lender and exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement. [deleted]~~

2.8.14ZC G (1) ~~The exclusion for electronic commerce activities by an incoming ECA provider (see PERG 2.9.18G) applies to entering into a regulated credit agreement as lender and exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement. [deleted]~~

...

#### Regulated consumer hire agreements

2.8.14Z D G (1) The exclusions for ~~electronic commerce activities provided by an incoming ECA provider~~ and an activity carried on by a local authority (see PERG 2.9.23G) also ~~apply~~ applies to the regulated activities of entering into a regulated consumer hire agreement as owner and exercising, or to having the right to exercise, the owner's rights and duties under a regulated consumer hire agreement.

#### Providing credit information services or credit references

2.8.14C G (1) The exclusions relating to activities carried on by members of the legal profession (see PERG 2.8.6CG(6)), ~~and to electronic commerce activities by an incoming ECA provider (see PERG 2.9.18G)~~ apply applies to providing credit information services and providing credit references.

#### Agreeing

2.8.15 G A person who agrees to carry on certain other regulated activities (which is itself a regulated activity see PERG 2.7.21G) does not require authorisation where the person concerned is an overseas person and the agreement is reached as a result of a legitimate approach (see PERG 2.9.12G). For this exclusion to apply, the agreement must be one to arrange deals, manage investments, assist in the administration and performance of a contract of insurance, safeguard and administer investments or send dematerialised instructions. ~~The provision of electronic commerce activities by an incoming ECA provider is also excluded from the regulated activity of agreeing to carry on certain other regulated activities (see PERG 2.7.21G). But this is not the case where the agreement relates to the regulated activity of effecting or carrying out contracts of insurance falling under the Solvency II Directive (see PERG 2.8.3G). This is still a regulated activity when provided as an electronic commerce activity.~~

...

## 2.9 Regulated activities: exclusions applicable in certain circumstances

2.9.1 G The various exclusions outlined below deal with a range of different circumstances.

- (1) Each set of circumstances described in *PERG 2.9.3G* to *PERG 2.9.17G* has some application to several *regulated activities* relating to *securities, structured deposits, relevant investments* or *home finance transactions*. They have no effect in relation to the separate *regulated activities* of *accepting deposits, issuing electronic money, effecting or carrying out contracts of insurance, bidding in emissions auctions, advising on syndicate participation at Lloyd's, managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's* or *entering as provider into a funeral plan contract*. Within each set of circumstances, the *Regulated Activities Order*, in Chapter XVII of Part II of the Order, makes separate provision for each *regulated activity* affected. This is necessary because each exclusion has to be tailored to reflect the different nature of the *regulated activity* involved and the different language required (for example, some activities involve entering directly into transactions while others relate to the provision of services).
- (2) ~~The exclusion described in *PERG 2.9.18G* relates to *electronic commerce activities* provided by an *incoming ECA provider*. This exclusion applies to all *regulated activities* except *effecting or carrying out contracts of insurance*. [deleted]~~

...

### Overseas Persons

...

- 2.9.17B G
- (1) The exclusion for *overseas persons* described in *PERG 2.9.17G* does not apply to an *investment firm* or *credit institution* set up in a third country that has been found equivalent under article 46 or 47 of *MiFIR*, as described in more detail in the rest of this paragraph.
  - (2) Article 46 of *MiFIR* has a mechanism under which ~~ESMA~~ the FCA may register a *third country investment firm* or a *third country credit institution* without a *branch* in the ~~EEA~~ United Kingdom. Registration allows the *third country investment firm* or *third country credit institution* to provide certain services to certain customers within the ~~EEA~~ United Kingdom without the need for further authorisation by an ~~EEA State~~ the United Kingdom.
  - (3) (2) only applies where the ~~European Commission~~ Treasury has made a formal assessment that the legal and supervisory

arrangements of that third country ensure that *investment firms* and *credit institutions* authorised in that third country comply with legally binding prudential and conduct of business requirements which have equivalent effect to the UK provisions which implemented MiFID, MiFIR and CRD.

- (4) ~~Under article 47 of MiFIR an *investment firm* or *credit institution* that:~~
- ~~(a) has a *branch* in an *EEA State* and is authorised in that *EEA State*; and~~
  - ~~(b) is set up in a third country that is subject to an equivalence assessment in (3);~~
- ~~may provide certain services to certain clients in other *EEA States* without the need for further authorisation. [deleted]~~
- (5) The exclusion for *overseas persons* described in PERG 2.9.17G does not apply to *investment services or activities* provided by an *investment firm* or *credit institution* in (1) if:
- (a) it is registered as described in (2); or
  - (b) ~~its branch is authorised in an *EEA State* other than the *United Kingdom* as described by (4); or [deleted]~~
  - (c) it provides the *investment services or activities* at the initiative of certain *EEA United Kingdom*-based clients.
- (6) However, (5) only applies from three years after the equivalence decision in (3). For the first three years following the equivalence decision, the exclusion for *overseas persons* described in PERG 2.9.17G continues to apply in the normal way.
- (7) The purpose of the three year period is to implement article 54 of *MiFIR* (transitional provisions) under which the *Act* the national regimes of *EEA States* will continue to apply for three years after the equivalence decision in (3).
- (8) There are currently no special provisions in the *Act* or related legislation such as the *Regulated Activities Order* dealing expressly and specifically with the treatment of *third country investment firms* and *third country credit institutions* under the *general prohibition* after the overseas persons exclusion is switched off at the end of the three year period in (6).

#### ~~Incoming ECA providers~~

- 2.9.18 G (4) ~~In accordance with article 3(2) of the *E-Commerce Directive*, all requirements on persons providing *electronic commerce activities* into the *United Kingdom* from the *EEA* are lifted, where these fall~~



~~within the co-ordinated field and would restrict the freedom of such a firm to provide services. The coordinated field includes any requirement of a general or specific nature concerning the taking up or pursuit of *electronic commerce activities*. Authorisation requirements fall within the coordinated field. The services affected are generally those provided electronically, for example through the Internet or solicited e-mail.~~

- (2) ~~The *Regulated Activities Order* was amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (Electronic Commerce Directive) Order 2002 (SI 2002/2157). This Order creates a general exclusion from *regulated activities* (except for the *regulated activities* of *effecting or carrying out contracts of insurance*). Where activities consist of *electronic commerce activities*, an *incoming ECA provider* will not require *authorisation* for such activities in the *United Kingdom*. This does not extend to the regulated activity of *effecting or carrying out contracts of insurance* falling under the *Solvency II Directive* (see *PERG 2.8.3G*). However, services provided off-line in the *United Kingdom* (that is, other than as an *electronic commerce activity*) by such a firm which amount to *regulated activities* still require *authorisation*.~~
- (3) ~~*Incoming ECA providers* should note that notification requirements under the *Single Market Directives* still apply (see *SUP 13A*).  
[deleted]~~

#### Insurance distribution activities

- 2.9.19 G The exclusions in this group apply to certain regulated activities involving certain contracts of insurance. The exclusions and the regulated activities to which they apply are as follows.

...

- (3) The third exclusion applies to certain general insurance contracts covering large risks where the risk is situated outside the ~~EEA~~ *United Kingdom*. This exclusion applies where the regulated activities concerned are:
- (a) *dealing in investments as agent;*
  - (b) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
  - (c) *assisting in the administration and performance of a contract of insurance; and*
  - (d) *advising on investments.*

...

Business Angel-led Enterprise Capital Funds

- 2.9.21 G The exclusions apply, in general terms:
- (1) to a body corporate with limited liability:
    - (a) that is formed in accordance with the law of, and having its registered office, central administration or principal place of business in, ~~an EEA State~~ the United Kingdom;
    - (b) that operates a business angel-led enterprise capital fund, being a fund that invests only in securities of unlisted companies and whose participants are made up solely of persons of a specified kind; and
    - (c) whose members are limited to persons of a specified kind.

**2.10 Persons carrying on regulated activities who do not need authorisation**

...

- 2.10.14 G The *regulated activities* that may be carried on in this way are restricted by an Order made by the Treasury under section 327(6) of the *Act* (Exemption from the general prohibition) (the *Non-Exempt Activities Order*). Accordingly, under that section, a *person* may not by way of business carry on any of the following activities without *authorisation*:

...

- (3A) ~~*bidding in emissions auctions*~~; [deleted]

...

- (3C) *acting as the trustee or depositary of a UK UCITS*

...

...

**2 Annex Regulated activities and the permission regime**

2

Table 1: Regulated Activities (excluding PRA-only activities) [See note 1 to Table 1]	
...	....
<b>Bidding in emissions auctions</b>	
(ac) <del>bidding in emissions auctions</del> <u>[deleted]</u>	<del>emissions auction products</del>

...	...
Notes to Table 1	
...	
<p><b>Note 1C:</b></p> <p><del>Although MiFID business bidding (part of bidding in emissions auctions) is designated investment business, it is not separately listed in this table under designated investment business because bidding in emissions auctions is already referred to above.</del></p>	
...	

...

### 3A Guidance on the scope of the Electronic Money Regulations 2011

#### 3A.1 Introduction

##### **Q1. What is the purpose of these questions and answers ('Q&As') and who should be reading them?**

The purpose of these Q&As is to help *persons* to consider whether they fall within the scope of the *Electronic Money Directive* which repealed and replaced an earlier ~~Electronic Money Directive (2000/46/EC)~~. ~~The *Electronic Money Directive* is given effect in the United Kingdom by the *Electronic Money Regulations*.~~ The Q&As are intended to help these *persons* consider whether they need to be authorised or registered for the purposes of *electronic money* issuance in the *United Kingdom*.

The *Electronic Money Regulations* implemented the *Electronic Money Directive* in the *United Kingdom*. The *Electronic Money Regulations* create a separate authorisation and registration regime for issuers of *electronic money* that are not *full credit institutions*, *credit unions* or municipal banks:

- the conditions for authorisation as an *authorised electronic money institution* are set out at regulation 6 of the *Electronic Money Regulations*;
- *small electronic money institutions* have less stringent capital requirements than *authorised electronic money institutions*; however, they need to be registered in accordance with regulation 13 of the *Electronic Money Regulations*;
- *full credit institutions*, *credit unions* and municipal banks are exempt from requiring authorisation and registration under the *Electronic Money Regulations* but must have a *Part 4A permission* for *issuing electronic money* and are subject to some of the conduct of business requirements in the *Electronic Money Regulations*.

A reference in this chapter to:

- individual regulations is a reference to the *Electronic Money Regulations* unless otherwise stated; and
- ‘municipal bank’ means a company which, immediately before 1st December 2001, fell within the definition in section 103 of the Banking Act 1987.

The Q&As that follow are set out in the following sections:

- General issues (*PERG 3A.2*)
- The definition of electronic money (*PERG 3A.3*)
- Small electronic money institutions, mixed businesses, distributors, agents and exempt bodies (*PERG 3A.4*)
- Exclusions (*PERG 3A.5*)
- Territorial scope (*PERG 3A.6*)
- Transitional arrangements (*PERG 3A.7*)

### 3A.2 General issues

#### **Q2. Why does it matter whether or not we fall within the scope of the Electronic Money Regulations?**

It matters because if you issue *electronic money* in the *United Kingdom* and do not fall within an exclusion or exemption you must be:

- an *authorised electronic money institution*; or
- a *small electronic money institution*; or
- ~~an *EEA authorised electronic money institution*; or~~
- a *credit institution*; or
- the Post Office Limited; or
- the Bank of England ~~or a central bank~~ when not acting in its capacity as a monetary authority; or
- other public authority; or
- a government department or local authority when acting in its capacity as a public authority; or
- a *credit union*, municipal bank or the National Savings Bank.

Otherwise you risk committing a criminal offence under regulation 63.

### **Q3. How much can we rely on these Q&As?**

The answers given in these Q&As represent the *FCA*'s views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of *Electronic Money Regulations* affects the regulatory position of any particular *person* will depend on their individual circumstances. If you have doubts about your position after reading these Q&As, you may wish to seek legal advice. The Q&As do not purport to be exhaustive and are not a substitute for reading the relevant legislation. In addition to *FCA* guidance, some of the *Electronic Money Directive* provisions (from which the *Electronic Money Regulations* are derived) may be the subject of guidance or communications by the European Commission.

...

### **Q5. I intend to issue electronic money in the United Kingdom. How does the authorisation and registration process apply to me?**

It depends on a number of factors:

- i) Unless you are a person falling within ii) to iv) below you must apply under the *Electronic Money Regulations* for either:
  - authorisation to be an *authorised electronic money institution* (see regulation 6 for the relevant conditions); or
  - registration to be a *small electronic money institution* (see regulation 13).
- ii) If you are a *credit union*, municipal bank or a ~~UK or non-EEA~~ *full credit institution*:
  - authorisation and variation of permission remains that imposed by Part 4A of the *Act*. This means you will need to have a separate *Part 4A permission* in order to issue *electronic money*;
  - where you issue *electronic money* you will be subject to the provisions on issuance and redeemability of *electronic money* in the *Electronic Money Regulations*;
  - note that you may also be subject to the conduct of business requirements in the *Payment Services Regulations*.

~~If your head office is located in an EEA state other than the United Kingdom you cannot apply for authorisation or registration under the *Electronic Money Regulations*. However, you may be entitled to issue *electronic money* in the United Kingdom as an *EEA authorised electronic money institution*, in which case the Competent Authority in your Home State will be responsible for your authorisation.~~

Government departments, local authorities, the Post Office Limited and the National Savings Bank cannot apply for authorisation or registration under the *Electronic Money Regulations* but they must give notice to the FCA if they issue or propose to issue *electronic money*.

Transitional arrangements may also be relevant, see *PERG* 3A.7.

...

...

### **3A.4 Small electronic money institutions, mixed businesses, distributors, agents and exempt bodies**

...

#### **Q18. We satisfy the conditions for registration as a small electronic money institution - does that mean we have to register as one?**

Not necessarily, there are other options available to you.

~~If you register as a *small electronic money institution*, you cannot acquire passport rights under the *Electronic Money Directive*. So you may wish to become an *authorised electronic money institution* if you wish to take advantage of a passport.~~

If your business does not currently exceed the thresholds referred to in the first two bullets at Q17, but you expect that it will, you may also wish to apply for authorisation rather than registration.

...

#### **Q20. We are a branch of a firm which has its head office outside the ~~EEA~~ UK. If we became an electronic money institution can we also engage in mixed business?**

Yes, but you can only provide *payment services* that are linked to the issuance of *electronic money*. You cannot undertake any of the other *payment services*.

...

#### **Q22. We distribute and redeem electronic money. What is the scope of our activities under the regulations?**

In some *electronic money* schemes an originator creates *electronic money* and then sells it to banks and other distributors. The latter then sell the *electronic money* to the public. In our view reference to the issuer of *electronic money* in the *Electronic Money Regulations* is a reference to the originator and not the distributor.

So, provided you are not:

- issuing *electronic money* yourself; or

- acting as an agent for an *electronic money institution*, see Q21;

you do not need to be authorised or registered under the *Electronic Money Regulations*. However, the *electronic money institution* that is acting as your principal should notify the *FCA* that you are acting as a distributor, see regulations 26 and 37 and Schedule 1.

You should also bear in mind that if, in distributing and redeeming *electronic money*, your activities amount to *payment services* you will need to consider whether you are required to be authorised or registered under the *Payment Services Directive Regulations*, see *PERG 15* for further guidance.

**Q23. We have been registered by one of our principals as an agent under the Payment Services Regulations. If we wish to act as agent for an electronic money institution as well will we need to be registered again?**

Yes. If your principal is an *electronic money institution*, it is its responsibility to apply for registration on your behalf even if you have been registered as agent under the *Payment Services Regulations*. ~~Assuming your principal is not an EEA firm, you~~ You are required to be registered on the *Financial Services Register* before you provide *payment services* for your principal, subject to any relevant transitional provisions which may delay or avoid the need for registration. ~~If your principal is an EEA firm, your principal will need to comply with the relevant Home State legislation relating to your appointment, and your Home State competent authority will need to notify the FCA.~~

...

...

### 3A.6 Territorial scope

**Q29. We are a non-EEA UK firm with a branch in the United Kingdom and we wish to issue electronic money. Can we apply for authorisation or registration?**

Yes. You may apply to be an *authorised electronic money institution* if you are a body corporate (regulation 6(4)(b)). However, you cannot apply to be a *small electronic money institution* unless your head office is in the *United Kingdom* (regulation 13(9)).

## 4 Guidance on regulated activities connected with mortgages

...

### 4.4 What is a regulated mortgage contract?

The definition of “regulated mortgage contract”

- 4.4.1 G Article 61(3)(a) of the *Regulated Activities Order* defines a *regulated mortgage contract* as a contract which, at the time it is entered into, satisfies

the following conditions:

- (1) ...
- (2) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land ~~in the EEA~~, where “land” for this purpose means:
  - (a) in relation to a contract entered into before *exit day*, land in the *United Kingdom* or, if the contract was entered into on or or after 21 March 2016, within the territory of an *EEA State*; and
  - (b) in relation to a contract entered into on or after *exit day*, land in the *United Kingdom*; and

...

...

Land ~~in the EEA~~

4.4.5 G The condition set out in *PERG 4.4.1G(2)* means that a *regulated mortgage contract* must be secured on land ~~in the EEA~~, where “land” for this purpose means:

- (1) in relation to a contract entered into before *exit day*, land in the *United Kingdom* or, if the contract was entered into on or or after 21 March 2016, within the territory of an *EEA State*; and
- (2) in relation to a contract entered into on or after *exit day*, land in the *United Kingdom*.

Contracts which involve taking security over moveable property therefore cannot be *regulated mortgage contracts*. So a contract secured on a caravan will not be a *regulated mortgage contract*, unless the contract also involves a mortgage over the land on which the caravan stands.

...

Type of security

4.4.16 G A mortgage has a wide meaning for the purpose of the definition of a *regulated mortgage contract*. It includes:

...

- (3) (in Scotland) a heritable security; ~~and~~
- (4) ~~security commonly used in another *EEA State* for loans secured on residential property.~~ [deleted]

...



## Exclusion for housing association and other housing authority loans

4.4.28C G A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

- (1) ...
- (2) if entered into on or after 21 March 2016:
  - (a) it is an agreement ~~of a kind to which the MCD does not apply by virtue of article 3(2) of the MCD~~ an agreement to which section 423A(3) of the Act applies (in other words, it is an agreement listed in *PERG* 4.10A.5G(1) to (6)); or it is a *credit agreement* which relates to the deferred payment, free of charge, of an existing debt and is not secured by a *legal or equitable mortgage*); or

...

...

#### 4.10 Exclusions applying to more than one regulated activity

Exclusion: Activities carried on in the course of a profession or non-investment business

...

- 4.10.4A G (1) The exclusion in article 67 of the Regulated Activities Order (Activities carried on in the course of a profession or non-investment business) does not apply if applying the exclusion would take activities ~~covered by~~ within the scope of the MCD (or which would be within such scope if carried out in an EEA State, or in relation to a customer in an EEA State or an agreement secured on residential land in an EEA State) outside the definition of certain *regulated mortgage activities*.
- (2) Please see *PERG* 4.10A (Activities ~~regulated under~~ within scope of the Mortgage Credit Directive) for more details.

...

Exclusion: Trustees, nominees and personal representatives

...

- 4.10.8A G (1) The exclusion in article 66 of the Regulated Activities Order (Trustees, nominees and personal representatives) does not apply if applying the exclusion would take activities ~~covered by~~ within the scope of the MCD (or which would be within such scope if carried out in an EEA State, or in relation to a customer in an EEA State or to an agreement secured on residential land in an EEA State) outside the definition of

certain *regulated mortgage activities*.

- (2) Please see *PERG 4.10A* (Activities ~~regulated under~~ within scope of the Mortgage Credit Directive) for more details.

...

Exclusion: Local authorities

4.10.10 G There are exclusions that apply, in relation to each of the *regulated mortgage activities* and to *advising on regulated credit agreements for the acquisition of land*, if the *person* carrying on the activity is a local authority or a wholly owned subsidiary of a *local authority*. They can be found in article 72G of the Regulated Activities Order, but only apply where:

(a) ...

(b) the relevant agreement is entered into on or after 21 March 2016 and:

- (i) the agreement is ~~of a kind to which the MCD does not apply by virtue of article 3(2) of the MCD~~ one to which section 423A(3) of the Act applies (in other words, it is an agreement listed in *PERG 4.10A.5G*(1) to (6); or it is a *credit agreement* which relates to the deferred payment, free of charge, of an existing debt and is not secured by a *legal or equitable mortgage*); or

...

...

4.10A Activities ~~regulated under~~ within scope of the Mortgage Credit Directive

General treatment for activities ~~regulated under~~ 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 exit 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.

...

**4.10B Regulation of buy to let lending**

...

What does buy-to-let credit agreement mean?

- 4.10B.5 G (1) A *buy-to-let credit agreement* means either:
- (a) a contract that at the time it is entered into has the following characteristics:
    - (i) ...
    - (ii) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the ~~EEA~~ United Kingdom;
  - ...
- ...

Link to the legislation which implemented the Mortgage Credit Directive

- 4.10B.15 G (1) The definitions of *CBTL arranger* and *CBTL adviser* are largely the same as those under the legislation which implemented the Mortgage Credit Directive MCD.
- (2) There is *guidance* on these terms in *PERG 4.10A* (Activities ~~regulated under~~ within scope of the Mortgage Credit Directive).
- ...

Exempt consumer buy-to-let contracts

- 4.10B.21 G A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:
- (1) ...
  - (2) it is either:
    - (a) of a kind ~~to which~~ outside the scope of the Mortgage Credit Directive does not apply MCD by virtue of the exclusions summarised in *PERG 4.10A.5G(1) to (8)*; or
  - ...

#### 4.11 Link between activities and the United Kingdom

...

Legislative provisions: definition of “regulated mortgage contract”

- 4.11.3 G A contract is only a regulated mortgage contract if the land is: ~~in the EEA~~
- (1) in relation to a contract entered into before *exit day*, land in the *United Kingdom* or [, if the contract was entered into on or after 21 March 2016,] within the territory of an *EEA State*; and
  - (2) in relation to a contract entered into on or after *exit day*, land in the *United Kingdom*.
- (see *PERG* 4.4.5 G (Land ~~in the EEA~~)).

Legislative provisions: section 418 of the Act

...

- 4.11.5 G For the purposes of *regulated mortgage activities*, sections 418(2), (4), (5), (5A) and (6) are relevant, as follows:
- (1) ~~Section 418(2) refers to a case where a UK-based person carries on a regulated activity in another EEA State in the exercise of rights under a Single Market Directive. The only Single Market Directives which are relevant to mortgages are the CRD and the MCD. [deleted]~~
- ...
- (4) ~~Section 418(5A) refers to the case where an electronic commerce activity is carried on with or for a person in an EEA State from an establishment in the United Kingdom. See further *PERG* 4.11.21G (E-Commerce Directive). [deleted]~~

...

Territorial scenarios: general

...

- 4.11.9 G Simplified summary of the territorial scope of the regulated mortgage activities for contracts entered into on or after *exit day*, to be read in conjunction with the rest of this section.
- [Note: readers wishing to understand the territorial scope of the regulated mortgage activities for contracts entered into before *exit day* may wish to refer to the version of this guidance as at the date on which the relevant contract was entered into.]

This table belongs to *PERG* 4.11.8G.

The tables in *PERG* 4.11.9G are deleted in their entirety and replaced with the following. The

deleted tables are not shown but the new text is shown below, with underlining.

		<u>Individual borrower resident and located:</u>	
		<u>in the United Kingdom</u>	<u>outside the United Kingdom</u>
<u>Service provider carrying on regulated activity from establishment in the United Kingdom</u>	<u>land in the United Kingdom</u>	<u>Yes</u>	<u>Yes</u>
	<u>land outside the United Kingdom</u>	<u>No</u>	<u>No</u>
<u>Service provider carrying on regulated activity from establishment outside the United Kingdom</u>	<u>land in the United Kingdom</u>	<u>Yes</u>	<u>No</u>
	<u>land outside the United Kingdom</u>	<u>No</u>	<u>No</u>
<u>Yes = authorisation or exemption required</u>			
<u>No = authorisation or exemption not required</u>			

...

Service provider overseas: general

...

- 4.11.12A G ~~If the service provider is a UK firm exercising its rights under a Single Market Directive by providing services from another EEA State, section 418 of the Act means that the services are treated as being carried on in the. This factor is not covered further in the remainder of this section. [deleted]~~

Service provider overseas: arranging regulated mortgage contracts

- 4.11.13 G When a person is arranging (bringing about) regulated mortgage contracts or making arrangements with a view to regulated mortgage contracts from overseas, the question of whether he will be carrying on regulated activities in the United Kingdom will depend on the relevant circumstances. In the FCA's view, factors to consider include:
- (1) the territorial limitation in the definition of regulated mortgage contract so that regulation only applies if the land is in the EEA United Kingdom;

...

...

## Service provider overseas: entering into a regulated mortgage contract

...

- 4.11.17 G In the *FCA's* view, in circumstances other than those excluded by article 72(5D) of the *Regulated Activities Order*, the need for an overseas lender to be *authorised* or to have an exemption will depend on the location of the land. This is because of:
- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation only applies if the land is in the ~~EEA~~ United Kingdom;
  - (2) ...
  - (3) practical issues of conveyancing; a lender is likely to use the services of a lawyer or licensed conveyancer operating from the *United Kingdom* ~~or the other EEA State in question~~, who enters into the *regulated mortgage contract* as agent for the lender in the *United Kingdom* ~~or the other EEA State in question~~; and

...

## Service provider overseas: administering a regulated mortgage contract

...

- 4.11.19 G In the *FCA's* view, in circumstances other than those excluded by article 72(5E) of the *Regulated Activities Order*, the need for an overseas administrator to be *authorised* or to have an exemption will depend on the location of the land. This is because:
- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation only applies if the land is in the ~~EEA~~ United Kingdom;
  - (2) when administrators notify borrowers resident in the *United Kingdom* ~~or the other EEA State in question~~ of matters pursuant to a *regulated mortgage contract*, such notification is likely to be carried on in the *United Kingdom* ~~or the other EEA State in question~~;
  - (3) the steps involved in collecting or recovering payments will generally include giving notice to the borrower at his address in the *United Kingdom* ~~or the other EEA State in question~~;
  - (4) legal action to recover sums due under *regulated mortgage contracts* will in many cases require proceedings before courts in the *United Kingdom* ~~or the other EEA State in question~~, either to enforce *regulated mortgage contracts* subject to the jurisdiction of these courts or to register and enforce judgements obtained elsewhere, in the case of contracts subject to non-UK jurisdictions; and

...

...

~~E-Commerce Directive~~

4.11.21 G ~~The *E-Commerce Directive* removes restrictions on the cross border provision of services by electronic means, introducing a *country of origin* approach to regulation. This requires *EEA States* to impose their requirements on the outward provision of such services and to lift them from inward providers. The *E-Commerce Directive* contains only a few exceptions, termed derogations, from this principle. The *E-Commerce Directive* defines an e-commerce service (termed an information society service) as any service, normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the service. So, for example, it includes services provided over the internet, by solicited e-mail, and interactive digital television. [deleted]~~

~~Distance marketing directive~~

4.11.22 G ~~The *FCA* will be responsible for implementing the *Distance Marketing Directive* for those firms and activities it regulates. The *FCA* and the Treasury agree that the *Distance Marketing Directive* is intended to operate on a *country of origin* basis, except where a firm is *marketing* into the *UK* from an establishment in an *EEA State* which has not implemented the *Directive*. [deleted]~~

...

**4.13 Other exemptions**

...

4.13.5 G ...

---

Type of regulated mortgage contract	Explanation
<del>Exempted under article 3(2) <u>Out of scope of the Mortgage Credit Directive <i>MCD</i> by virtue of article 3(2)</u></del>	...
...	...

...

**4.14 Mortgage activities carried on by professional firms**

...

- 4.14.2A G *PERG* 4.10A (Activities ~~regulated under~~ within scope of the Mortgage Credit Directive) explains that some of these exclusions do not apply to activities which fall ~~under~~ within the scope of the *MCD*.

...

## 5 Guidance on insurance distribution activities

...

### 5.2 Introduction

...

Approach to implementation of the IDD

...

- 5.2.6 G The *United Kingdom* has implemented the *IDD* (and the *IMD* before it), in part, through secondary legislation, which applies pre-existing *regulated activities* (slightly amended) in the *Regulated Activities Order* to the component elements of the *insurance distribution* and *reinsurance distribution* definitions in the *IDD* (see *PERG* 5.2.5G and the text of *IDD* articles 2.1(1), 2.1(2) and 2.2 in *PERG* 5.16).

...

- 5.2.9 G It is the scope of the *Regulated Activities Order* rather than the *IDD* which will determine whether a *person* requires *authorisation* or exemption. However, the scope of the activities set out in the *IDD* is relevant to the application of certain exclusions under the *Regulated Activities Order* (see, for example, the commentary on article 67 in *PERG* 5.11.9G (Activities carried on in the course of a profession or non-investment business)).

...

### 5.3 Contracts of insurance

...

- 5.3.5 G The *Regulated Activities Order* does not define a *reinsurance* contract. The essential elements of the common law description of a *contract of insurance* are also the essential elements of a *reinsurance* contract. Whilst the terms derived from the *IDD* addresses address insurance and *reinsurance* separately, throughout this *guidance* the term ‘contract of insurance’ (italicised or otherwise) also applies to contracts of *reinsurance*.

...



## Large risks

- 5.3.8 G Large risks situated outside the ~~EEA~~ UK are also excluded (described in more detail at *PERG* 5.11.16 G (Large risks)). The location of the risk or commitment may be determined by reference to the ~~EEA State~~ State in which the risk is situated, ~~defined in article 13(13) of the *Solvency II Directive*~~ or the ~~EEA State~~ State of the commitment, ~~defined in article 13(14) of the *Solvency II Directive*~~. Broadly put, this is:
- (1) for insurance relating to buildings and/or their contents, the ~~EEA State~~ State in which the property is situated;
  - (2) for insurance relating to vehicles, the ~~EEA State~~ State of registration;
  - (3) for policies of four months or less duration covering travel or holiday risks, where the *policy* was taken out;
  - (4) in all other cases (including those determined by reference to the ~~EEA State~~ State of the commitment), the ~~EEA State~~ State where the policyholder has his habitual residence, or if the policyholder is a legal person, where his establishment, to which the contract relates, is situated.

...

**5.6 The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance**

...

Exclusion: article 33B (Provision of information – contracts of insurance)

- 5.6.4B G In broad terms, article 33B of the *Regulated Activities Order* excludes from article 25 (*arranging*) activities that consist of:
- (1) the provision of information about a potential policyholder to:
    - (a) a relevant insurer (as defined in article 39B(2) of the *Regulated Activities Order*) or
    - (b) an insurance intermediary (as defined in ~~article 2(1)(3) of the *IDD*~~ article 33B(4) of the *Regulated Activities Order*) or
    - (c) an *IDD reinsurance intermediary*; or
  - (2) the provision of information to a potential policyholder about:
    - (a) a *contract of insurance*; or
    - (b) a relevant insurer (as defined in article 39B(2) of the *Regulated Activities Order*) or insurance intermediary (as defined in ~~article 2(1)(3) of the *IDD*~~ article 33B(4) of the

Regulated Activities Order) or *IDD reinsurance intermediary*,

where the provider of the information does not take any step other than the provision of information to assist in the conclusion of a *contract of insurance*.

- 5.6.4C G The exclusion in *PERG 5.6.4BG* will be of assistance to persons who would otherwise be carrying on the *regulated activity* of *arranging*. This exclusion ~~is intended~~ was introduced to give effect to article 2.2 of the *IDD* (the text of which is reproduced in *PERG 5.16.2G(2)*) which refers to the ‘mere’ provision of this information without taking any additional steps not being considered to constitute *insurance distribution*. In the *FCA’s* view, the effect of this, and the reference in article 2.2(c) of the *IDD* to ‘data and information on potential policyholders’, is that the exclusion in *PERG 5.6.4BG* covers those situations where a *person* provides existing information they hold on potential policyholders (for example their name and contact details) but does not extend to information they obtain from other means such as pre-purchase questioning.

...

- 5.7.8 G A ‘relevant insurer’ for the purposes of article 39B means:
- (1) an *authorised person* who has *permission* for *effecting and carrying out contracts of insurance*; or
  - (2) a member of the Society of Lloyd’s or the members of the Society of Lloyd’s taken together; or
  - (3) ~~an EEA firm that is an insurer; or~~ [deleted]
  - (4) a reinsurer, being a *person* whose main business consists of accepting risks ceded by a person falling under ~~(1), (2) or (3)~~ (1) or (2) or a person who is established outside the *United Kingdom* and who carries on the activity of *effecting and carrying out contracts of insurance*.

...

...

## 5.11 Other aspects of exclusions

- 5.11.1 G This part of the *guidance* deals with:

...

- (3) exclusions which are disapplied where a *person* carries on *insurance distribution*; and

...

- (c) large risks (article 72D (Large risks contracts where risk situated outside the ~~EEA~~ *United Kingdom*));
- (d) activities carried on by *firms* with a *Part 4A permission to ~~manage a UCITS~~ manage a UK UCITS or manage an AIF* (article 72AA (Managers of UCITS and AIFs));

...

...

5.11.2 G Several exclusions that would have the effect of restricting the scope of the *regulated activities* referred to in this *guidance* are disapplied or modified. This was in order to properly implement *IDD*.

...

5.11.7 G Article 4(4A) of the *Regulated Activities Order* (Specified activities: general) disapplies certain exclusions where a *person*, for remuneration, takes up or pursues *insurance distribution* or *reinsurance distribution* (as defined in articles 2.1(1), 2.1(2) and 2.2 of the *IDD* (see *PERG 5.2.5G* (Approach to implementation of the *IDD*) and *PERG 5.16.2G*) in relation to a risk or commitment located in the *United Kingdom*. In relation to a *contract of insurance* entered into before exit day, article 4(4A) applies in relation to a risk or commitment located in the *United Kingdom* or an *EEA State*. The relevant exclusions which are disapplied are:

...

## 5.12 Link between activities and the United Kingdom

### Introduction

...

5.12.4 G Table: Territorial issues relating to overseas insurance intermediaries carrying on *insurance distribution activities* in or into the *United Kingdom*

	Needs Part 4A permission	<del>Schedule 3 EEA passport rights</del> available	Overseas persons exclusion available
<del>Registered EEA based intermediary with UK branch (registered office or head office in another EEA State)</del>	No	Yes	No
<del>Registered EEA based intermediary with no UK branch providing cross-</del>	No	Yes	Potentially available [see Note]

border services			
Third country intermediary operating from branch in the <i>UK</i>	Yes	No	No
Third country intermediary providing services in (or into) the <i>UK</i>	Yes unless overseas persons exclusion applies	No	Potentially available
This does not, however, affect the <i>firm's authorisation under Schedule 3 to the Act</i> (see <i>PERG 5.12.9G to PERG 5.12.10G (Passporting)</i> ).			
For <i>EEA</i> -based intermediaries this table assumes that the <i>insurance distribution activities</i> are within the scope of the <i>IDD</i> .			

5.12.7 G Section 418 of the *Act* extends the meaning that ‘carry on regulated activity in the *United Kingdom*’ would normally have by setting out additional cases in which a *person* who would not otherwise be regarded as carrying on the activity in the *United Kingdom* is to be regarded as doing so. Each of the following cases thus amounts to carrying on a *regulated activity* in the *United Kingdom*:

- (1) ~~where a *UK*-based *person* carries on a *regulated activity* in another *EEA* State in the exercise of rights under a *Single Market Directive* [deleted];~~
- (2) where a *UK*-based *person* carries on a *regulated activity* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*;
- (3) where a *regulated activity* is carried on by a person who is not based in the *United Kingdom* but is carried on from an establishment maintained by him in the *United Kingdom*; and
- (4) ~~where an *electronic commerce activity* is carried on with or for a *person* in an *EEA* State from an establishment in the *United Kingdom*. [deleted]~~

In each of these cases it is irrelevant where the person with whom the activity is carried on is situated.

...

5.12.10 G The *overseas person* exclusion is available to *persons* who do not have a permanent place of business in the *United Kingdom* and so is of relevance to third country intermediaries (~~that is, non-*EEA*-based intermediaries~~) who carry on *insurance distribution activities* in, or into, the *United Kingdom* (for example with or through authorised insurance brokers and insurance

*undertakings* operating in the Lloyd's market).

How should persons be authorised?

- 5.12.11 G *UK-based persons* must obtain *Part 4A permission* in relation to their *insurance distribution activities* in the *United Kingdom* as one of the following:
- (1) a *body corporate* whose registered office is situated in the *United Kingdom*; or
  - (2) a *partnership* or unincorporated association whose head office is situated in the *United Kingdom*; or
  - (3) an individual (that is, a sole trader) whose residence is situated in the *United Kingdom*.

~~The *United Kingdom* will, in each case, be the *Home State* for the purposes of the *IDD* for insurance or reinsurance intermediaries (see further in connection with the *E-Commerce Directive* in *PERG 5.12.15G* to *PERG 5.12.17G* (*E-Commerce Directive*)).~~

- 5.12.12 G Non-*UK-based persons* wishing to carry on *insurance distribution activities* in the *United Kingdom* must:
- (1) ~~qualify for *authorisation* by exercising passport rights (see section 31 (Authorised persons) and schedule 3 (EEA passport rights) to the Act and *PERG 5.12.13G* to *PERG 5.12.14G* (Passporting)); or~~  
[deleted]

...

Passporting

- 5.12.13 G ~~The effect of the *IDD* is that any *EEA-based insurance intermediaries* doing business within the Directive's scope must first be registered in their home *EEA State* before carrying on *insurance distribution* in that *EEA State* or other *EEA States*. For these purposes, an *EEA-based insurance intermediary* is either:~~
- (1) a legal *person* with its registered office or head office in an *EEA State* other than the *United Kingdom*; or
  - (2) a natural *person* resident in an *EEA State* other than the *United Kingdom*.

~~Registered *EEA-based insurance intermediaries* wishing to establish branches in the *United Kingdom* or provide services on a cross-border basis into the *United Kingdom* can do so by notifying their *Home State regulator* which in turn notifies the *FCA*. This enables the intermediary to acquire passporting rights for business within the Directive's scope (so excluding *insurance distribution activities* relating to *connected contracts* or~~

*connected travel insurance contracts*) under Schedule 3 to the Act. SUP 13A (Qualifying for authorisation under the Act) has general *guidance* on the exercise of passporting rights by *EEA firms*. [deleted]

- 5.12.14 G ~~On the other hand, non-EEA based~~ *Non-UK-based* insurance intermediaries wishing to establish a branch in the *UK* for the purpose of carrying on *insurance distribution activities* may only do so with *Part 4A permission*.

#### E-Commerce Directive

- 5.12.15 G ~~The E-Commerce Directive removes restrictions on the cross-border provision of services by electronic means, introducing a country-of-origin approach to regulation. This requires EEA States to impose certain requirements on the outward provision of such services and to lift them from inward providers. The E-Commerce Directive defines an e-commerce service (termed an information society service) as any service, normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the service. So, for example, it includes services provided over the internet, by solicited e-mail, and interactive digital television.~~ [deleted]
- 5.12.16 G ~~The E-Commerce Directive does not remove the IDD requirement for persons taking up or pursuing insurance distribution for remuneration to be registered in their Home State. Nor does it remove the requirement for EEA-based intermediaries to acquire passporting rights in order to establish branches in the United Kingdom (see PERG 5.12.7G in relation to electronic commerce activity carried on from an establishment in the United Kingdom) or provide services on a cross-border basis into the United Kingdom where the relevant activity is carried on in the United Kingdom. An example of electronic commerce activity provided on a cross-border basis into the United Kingdom could be a recommendation in a (solicited) e-mail from an EEA-based intermediary to a UK-based customer to buy a particular contract of insurance.~~ [deleted]
- 5.12.17 G ~~Put shortly, the E-Commerce Directive relates to services provided into the United Kingdom from other EEA States and from the United Kingdom into other Member States. In broad terms, such cross-border insurance distribution services provided by an EEA firm into the United Kingdom (via electronic commerce activity or distance means) will generally be subject to IDD registration in, and conduct of business regulation of, the intermediary's EEA State of origin. By contrast, insurance distribution services provided in the United Kingdom will be subject to UK conduct of business regulation, although the requirement for registration will again depend upon the intermediary's EEA State of origin.~~ [deleted]

### 5.13 Appointed representatives

...

- 5.13.5 G A person may wish to become an *appointed representative* in relation to

one or more of the *insurance distribution activities* specified in the *Appointed Representatives Regulations* (see table in PERG 5.13.4G). If so, the *person* must be appointed under a written contract by an *authorised person*, who has *permission* to carry on those *regulated activities* and who accepts responsibility for the *appointed representative's* actions when acting for them. SUP 12.4 (What must a firm do when it appoints an appointed representative or an ~~EEA~~ FCA registered tied agent?) and SUP 12.5 (Contracts: required terms) set out the detailed requirements that must be met for an appointment to be made. In particular, an *appointed representative* will not be able to commence an *insurance distribution activity* until that *appointed representative* is included on the *Financial Services Register* for such activities.

Persons who are already appointed representatives

5.13.6 G Where a *person* (A), who is already an *appointed representative*, proposes to start to carry on any *insurance distribution activities*, A will need to consider the following matters.

(1) ...

(2) ...

...

(e) If A's activities are limited to introducing, A should consider the specific *Handbook* provisions relating to *introducer appointed representatives* (see SUP 12 (What must a firm do when it appoints an appointed representative or an ~~EEA~~ FCA registered tied agent?)).

...

**5.15 Illustrative tables**

...

5.15.4 G Types of activity – are they regulated activities and, if so, why?

Type of activity	Is it a regulated activity?	Rationale
...		
<b>MID-TERM ADJUSTMENTS AND ASSIGNMENTS</b>		
...	...	As the assignment of rights under a <i>contract of insurance</i> (as opposed to the creation of new <i>contracts of insurance</i> ) does not fall within <del>the</del> <u>IMD insurance distribution</u> , article

		67 is of potential application (see <i>PERG 5.11.9G</i> to <i>PERG 5.11.12G</i> ).
...		

...

## 8 Financial promotion and related activities

...

### 8.2 Introduction

...

8.2.9 G Because of the *United Kingdom's* exit from the *EU*, the Treasury amended the *Financial Promotion Order*. This included the amendment or removal of certain exemptions in the *Financial Promotion Order* that had previously been in place to take account of the *United Kingdom's* membership of the *EU*. Where those amendments are relevant to the *guidance* in this Chapter the *FCA* has amended the *guidance* accordingly. The Treasury also made transitional provision so that nothing in those amendments to the *Financial Promotion Order* will cause a *communication* to breach the restriction in section 21, if the *communication* is required under a contact entered into before *exit day*, and it would not have constituted a breach if it had been made before *exit day*.

[Note: see Part 4 of the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632)]

...

## 8.8 Having an effect in the United Kingdom

...

8.8.3 G Where communications by *persons* in another *EEA State* are made to or directed at *persons* in the *United Kingdom* account must be taken of the effect of any relevant EU Directives. For example, the *E-Commerce Directive* will, with limited exceptions, prevent the *United Kingdom* from imposing restrictions on incoming *financial promotions* in information society services. The Treasury has given effect to this through the *Financial Promotion Order* (see *PERG 8.12.38G*). Other potentially relevant directives include the Television Without Frontiers Directive (89/552/EEC). This prevents the *United Kingdom* from restricting the re-transmission in the *United Kingdom* of television broadcasts from other *EEA States*. The *Financial Promotion Order* does not have any specific provisions about the Television Without Frontiers Directive. However, it is not intended to block incoming television programmes from other *EEA States*. The *FCA* will take this into account in interpreting the *Financial Promotion Order* and enforcing the restriction in section 21 of the *Act*.



[deleted]

...

## 8.12 Exemptions applying to all controlled activities

...

Financial promotions to overseas recipients (article 12)

...

- 8.12.4 G The exemption applies whether or not the *financial promotion* is made from the *United Kingdom*. However, there is the exception that, if it is an *unsolicited real time financial promotion*, it must be made from a place outside the *United Kingdom* and be for the purposes of a business carried on entirely outside the *United Kingdom*. ~~To give effect to the principle of *country of origin* regulation of information society services as required by the *E-Commerce Directive*, article 12(7) of the *Financial Promotion Order* prevents the exemption applying to an outgoing electronic commerce communication.~~

...

Mere conduits (article 18 and 18A)

- 8.12.18 G The purpose of these exemptions is to ensure that, subject to certain conditions, the restriction in section 21 of the *Act* does not apply to those who merely transport the *financial promotions* of other *persons*. Obvious examples here are postal and Internet service providers, courier companies and telecommunications companies. *PERG* 8.6.5G explains that such *persons* may not be regarded as *communicating a financial promotion* simply because they have distributed it. Article 18 (Mere conduits) does not apply to the *person* who causes the mere conduit to make the communication. Neither does it apply where the *financial promotion* is an *electronic commerce communication* ~~that is, or will be, communicated from an establishment in the *United Kingdom* to a person in an *EEA State* other than the *United Kingdom*.~~ A *person* acting as a mere conduit for *financial promotions* of this kind will, however, be able to use article 18A (Outgoing electronic commerce communications: mere conduits, caching and hosting). Article 18A is not subject to the conditions that apply to other forms of mere conduit (as referred to in *PERG* 8.12.19G and *PERG* 8.12.20G). However, it does require compliance with the relevant conditions in articles 12(1), 13(1) and 14(1) of the *E-Commerce Directive* regulation 17(1), 18 or 19 of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) that relate to the liability of intermediary service providers.

...

Incoming electronic commerce communications (article 20B)

8.12.38 G ~~Article 20B gives effect to the provisions of the *E-Commerce Directive* by exempting *electronic commerce communications* made from an *establishment* in an *EEA State* other than the *United Kingdom* to an *ECA recipient* in the *United Kingdom*. However, article 20B does not apply to the following communications:~~

- (1) ~~an advertisement by the *operator* of a UCITS of *units* in that *scheme*; or~~
- (2) ~~an invitation or inducement to enter into a *contract of insurance* where
 
  - (a) ~~it is made by an undertaking which has received official authorisation for direct insurance in line with article 14 of the *Solvency II Directive*; and~~
  - (b) ~~the insurance falls within the scope of the *Solvency II Directive*; or~~~~
- (3) ~~an unsolicited communication made by electronic mail.~~

~~For the purposes of (3), a communication is unsolicited unless it is made in response to an express request from its recipient. [deleted]~~

...

## 8.14 Other financial promotions

...

Nationals of EEA States other than the United Kingdom (article 36)

8.14.18 G ~~This exemption allows a *person* in another *EEA State* who lawfully carries on a *controlled activity* in that State to promote into the *United Kingdom*. The terms of the exemption are that the promotion must comply with the *rules in COBS 4, MCOB 3A or CONC 3* (as relevant). Care should be taken as any failure to satisfy any of the relevant requirements of these rules may mean that this exemption is not satisfied and that the *financial promotion* may breach section 21 if it has not been *approved* and no other exemption applies to it. The *FCA* recommends that anyone seeking to rely on this exemption either seeks professional advice or contacts the *FCA* before *communicating the financial promotion*. This exemption does not apply to *unsolicited real time financial promotions*. [deleted]~~

...

High net worth companies, unincorporated associations and trusts (article 49)

...

8.14.27 G To be a sophisticated investor for the purposes of article 50, the recipient of a *financial promotion* must have a current certificate from an *authorised*

---

*person* stating that he has enough knowledge to be able to understand the risks associated with the description of investment to which the *financial promotion* relates. ~~Where the *financial promotion* is an outgoing electronic commerce communication, the certificate may be signed by a *person* who is entitled, under the law of an *EEA State* other than the *United Kingdom*, to carry on *regulated activities* in that *EEA State*.~~ The *FCA* considers that a ‘description of investment’ relates to a category of *investments* with similar characteristics. Examples are given below.

...

...

#### Common interest group of a company (article 52)

...

8.14.31 G The exemption is subject to certain conditions. In broad terms, these are that the *financial promotion* must be accompanied by an indication:

...

(3) that any *person* who is in doubt about the investment should consult an *authorised person*; and

...

~~Where the *financial promotion* is an outgoing electronic commerce communication, the reference in (3) to an *authorised person* includes a *person* who is entitled, under the law of an *EEA State* other than the *United Kingdom*, to carry on *regulated activities* in that *EEA State*.~~

...

### 8.19 Additional restriction on the promotion of life policies

8.19.1 G Article 10 of the *Financial Promotion Order* (Application to qualifying contracts of insurance) precludes any of the exemptions from applying to a *financial promotion* which invites or induces a *person* to enter into a *life policy* with a *person* who is not:

- (1) an *authorised person*; or
- (2) an exempt *person* who is exempt in relation to *effecting* or *carrying out contracts of insurance* of the class to which the promotion relates; or
- (3) ~~a *company* with its head office or a *branch* or agency in another *EEA State* and which is entitled to carry on in that country the class of *insurance business* being promoted; or [deleted]~~
- (4) a *company* authorised in one of the following countries or states to

carry on the class of *insurance business* being promoted:

...

...

## 8.20 Additional restriction on the promotion of collective investment schemes

8.20.1 G Where *collective investment schemes* are concerned additional restrictions are placed on their promotion to ensure that only those which are regulated are promoted to the general public. This is achieved by a combination of sections 21 and 238 (Restrictions on promotion) of the *Act* as explained in *PERG 8.20.2G*. A *regulated collective investment scheme* is:

- (1) an *authorised unit trust scheme*; or
- (1A) an *authorised contractual scheme*; or
- (2) an *investment company with variable capital*; or
- (3) ~~a *scheme* recognised under section 264 of the *Act* (Schemes constituted in other EEA States); or [deleted]~~
- (4) [deleted]
- (5) a *scheme* recognised under section 272 of the *Act* (Individually recognised overseas schemes).

...

## 8.21 Company statements, announcements and briefings

...

Article 59: Annual accounts and directors' report

8.21.11 G Article 59 is capable of applying to *financial promotions* in *company* statements and briefings where they are accompanied by:

- (1) the whole or any part of the annual accounts of the *company* (provided it is not an *open-ended investment company*); or
- (2) any report prepared and approved by the directors of such a *company* under sections 414A and 414D of the Companies Act 2006 (strategic reports) or sections 415 and 419 of that Act (directors' reports); ~~or corresponding legislation in another EEA State.~~

...

...

## Article 70: Promotions included in listing particulars, etc

8.21.20 G Article 70 applies to a *non-real time financial promotion* included in:

- (1) *listing particulars*; or
- (2) *supplementary listing particulars*; or
- (3) a prospectus or supplementary prospectus approved in line with *Prospectus Rules* ~~or by the competent authority of another EEA State (provided the requirements of section 87H of the Act are met)~~ – including part of such a prospectus or supplementary prospectus; or
- (4) any other document required or permitted to be published by *listing rules* or *Prospectus Rules*.

Article 70 also applies to a *non-real time financial promotion* comprising the final terms of an offer or the final offer price or amount of *securities* which will be offered to the public and that complies with ~~articles 5(4), 8(1) and 14(2) of the Prospectus Directive~~ PR 2.2.7R to PR 2.2.9AR, PR 2.3.2R, PR 3.2.4R and PR 3.2.4AR as those *rules* have effect on *exit day*.

The comments in *PERG* 8.21.14G about when something is required or permitted to be published apply also to (4).

...

### 8.36 Illustrative tables

...

#### 8.36.6 G Application of Exemptions to Forms of Promotions

Financial Promotion Order		Applies to		
Article No.	Title and PERG 8 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
...				
<del>20B</del>	<del>Incoming electronic commerce communications (8.12.38G)</del>	*	*	*
...				
36	<del>Nationals of EEA States other than United Kingdom (8.14.18G)</del>		*	*

...				
-----	--	--	--	--

...

### 8.37 AIFMD Marketing

#### Introduction and purpose

8.37.1 G (1) Part 6 (Marketing) of the AIFMD *UK* regulation contains restrictions on an AIFM or an investment firm marketing an AIF. Such a person may not market an AIF in the *UK* or Gibraltar unless the relevant conditions set out in the AIFMD *UK* regulation are met.

(2) The purpose of this section is to give *guidance* on:

...

(f) the interaction between the *marketing* of an AIF and the UK provisions which implemented the prospectus directive (see *PERG* 8.37.15G).

...

(3) ~~No guidance has been provided by the European Commission or ESMA on the meaning of *marketing* in AIFMD and, therefore, this *guidance* is subject to any future clarification from these (or other) European bodies. This means that other EEA States may take a different view on the meaning of *marketing* in AIFMD. [deleted]~~

...

#### Restrictions on an AIFM marketing an AIF

8.37.2 G Regulations 49 and 50 place restrictions on an AIFM *marketing* an AIF. These regulations provide that the following types of AIFM may not *market* the following types of an AIF in the *UK* unless the conditions summarised below are met.

(1) The conditions that need to be met vary depending on whether the AIF falls within regulation 57(1) or not. An AIF falls within this regulation if it is:

(a) a *feeder AIF* that is a UK AIF, a Gibraltar AIF or an EEA AIF, the master AIF of which is either managed by a ~~non-EEA AIFM~~ non-UK AIFM or is a ~~non-EEA AIF~~ non-UK AIF, and where the feeder AIF is managed by a full-scope UK AIFM or a full-scope Gibraltar AIFM; or

(b) ~~a non-EEA AIFM or is a non-EEA AIF; or [deleted]~~

- (c) a ~~non-EEA AIF~~ non-UK AIF which is managed by a full-scope UK AIFM or a full-scope Gibraltar AIFM.

Such AIFs are not entitled to benefit from the marketing passport under AIFMD and are subject to the national private placement provisions in respect of their marketing.

- (2) Regulation 49 (Marketing by full scope ~~EEA~~ AIFMs of certain AIFs) provides that a ~~full-scope EEA AIFM~~ full-scope Gibraltar AIFM may not market an AIF that does not fall within regulation 57(1) in the UK unless:
- (a) when marketing to a professional client, the FCA has received a regulator's notice regarding the marketing of the AIF, in accordance with Schedule 3 to the Act, as it applies in relation to Gibraltar AIFMs and Gibraltar AIFs (~~EEA passport rights~~); or
- (b) when marketing to a retail client:
- (i) the FCA has received a regulator's notice regarding the marketing of the AIF, Schedule 3 to the Act, as it applies in relation to Gibraltar AIFMs and Gibraltar AIFs (~~EEA passport rights~~); or
- ...
- (3) Regulation 50 (Marketing by AIFMs of other AIFs) provides that:
- ...
- (b) the following types of AIFM may not market the following types of AIF unless the AIFM has complied with the national private placement provisions set out in chapter 3 (National private placement) of Part 6 of the AIFMD UK regulation (see FUND 10.5 (National private placement)):
- ...
- (ii) a ~~full-scope EEA AIFM~~ full-scope Gibraltar AIFM of an AIF falling within regulation 57(1); and
- (iii) a ~~non-EEA AIFM non-UK AIFM~~ (ie a ~~small non-EEA AIFM~~ small non-UK AIFM or an ~~above-threshold non-EEA AIFM~~ above-threshold non-UK AIFM) of a UK AIF, ~~an EEA AIF~~ or a ~~non-EEA AIF~~ non-UK AIF.

...

The circumstances in which an AIFM or an investment firm markets an AIF

- 8.37.4 G (1) Regulation 45 (References in this part to an AIFM or an investment firm marketing an AIF) provides that:
- (a) an *AIFM markets* an *AIF* when the *AIFM* makes a direct or indirect offering or placement of *units* or *shares* of an *AIF* managed by it to an investor domiciled or with a registered office in ~~an EEA State~~ the United Kingdom or Gibraltar, or when another person makes such an offering or placement at the initiative of, or on behalf of, the *AIFM*; and
  - (b) an *investment firm markets* an *AIF* when it makes a direct or indirect offering or placement of *units* or *shares* of the *AIF* to an investor domiciled or with a registered office in ~~an EEA State~~ the United Kingdom or Gibraltar at the initiative of, or on behalf of, the *AIFM* of that *AIF*.

...

...

#### Communications with investors in relation to draft documentation

- 8.37.6 G (1) Under the UK provisions which implemented article 31 *AIFMD*, an *AIFM* is required to submit the documentation and information set out in the law that implemented Annex III to AIFMD with its application for permission to market an *AIF* managed by it and to notify ~~their competent authority~~ the FCA of any material changes to this documentation and information. Therefore, the prescribed documentation and information should be in materially final form before the *AIFM* may apply for permission to market an *AIF*. Any communications relating to this draft documentation do not, in our view, fall within the meaning of an ‘offer’ or ‘placement’ for the purposes of the law that relates to the regulation of *AIFMs* in the ~~UK AIFMD~~ United Kingdom, as the *AIFM* cannot apply for permission to *market* the *AIF* at this point. For example, a promotional presentation or a pathfinder version of the private placement memorandum would not constitute an offer or placement, provided such documents cannot be used by a potential investor to make an investment in the *AIF*. However, a *unit* or *share* of the *AIF* should not be made available for purchase as part of the capital raising of the *AIF* on the basis of draft documentation in order to circumvent the *marketing* restriction.
- (2) In our view, the position for draft documentation set out in (1) should apply to marketing under ~~article 32 of AIFMD and the national private placement provisions. However, as there is no European guidance on the meaning of marketing, other EEA States may take a different view.~~
- (3) Regard should be had to national law in relation to a communication which does not amount to an offering or a placement. In the *UK*,



consideration needs to be given to whether such a communication is a *financial promotion* (see PERG 8.37.14G). ~~If a UK AIFM is marketing in another EEA State using the marketing passport in article 32 AIFMD, regard should be had to the national law of that EEA State, as the arrangements for marketing are a matter for the Host State in accordance with article 32(5) of AIFMD (unless the communication is an information society service in which case regard should be had to the law of the country of origin).~~

...

#### Territorial scope of the marketing restrictions

- 8.37.10 G (1) The restrictions on the *marketing* of an AIF in regulations 49 to 51 only apply to *marketing* that takes place in the UK. In addition, under regulation 45, an AIFM or an *investment firm* only markets an AIF if the investor is domiciled in ~~an EEA State~~ the United Kingdom or Gibraltar or has its registered office in ~~an EEA State~~ the United Kingdom or Gibraltar.
- (2) Under regulation 2(2)(a) (Interpretation), the reference to ‘domicile’ should be construed in line with its meaning in AIFMD, ~~ie its meaning under EU law~~. This may be different to the domicile of an investor for tax purposes.

[**Note:** see section 6 of the EUWA]

#### Marketing at the initiative of the investor

- 8.37.11 G ...
- (2) A confirmation from the investor that the offering or placement of *units of shares* of the AIF was made at its initiative, should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place. However, AIFMs and *investment firms* should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of the legislation that implemented AIFMD.

...

#### The interaction between marketing and the prospectus directive

- 8.37.15 G (1) The UK provisions which implemented the prospectus directive ~~has~~ were not been amended by the UK provisions which implemented the AIFMD and closed-ended AIFs that are making an offer of securities to the public as defined in the *prospectus directive* need to comply with the requirements under the UK provisions which implemented both Directives.

- (2) However, where the *AIF* is required to publish a *prospectus* under ~~section 85 of the Act or the equivalent provision implementing article 3 of the Prospectus Directive in the AIF's Home State~~, only information referred to in *FUND 3.2.2R* and *FUND 3.2.3R* that is additional to that contained in the *prospectus* needs to be disclosed, either separately or as additional information in the *prospectus*.

## 9 Meaning of open-ended investment company

### 9.1 Application and Purpose

...

Other guidance that may be relevant

- 9.1.5 G ~~*Open-ended investment companies* constituted in other *EEA States* which are seeking to exercise rights conferred by the *UCITS Directive* should refer to *COLL 9* (Recognised schemes) for *guidance* on the requirements of section 264 of the *Act* (Schemes constituted in other *EEA States*). Those seeking to exercise rights under *AIFMD* should refer to *FUND 10* (Operating on a cross border basis). [deleted]~~

...

### 9.6 The investment condition (section 236(3) of the Act): general

...

- 9.6.5 G Certain matters are to be disregarded in determining whether the investment condition is satisfied. Section 236(4) of the *Act* states that, for these purposes, no account is to be taken of any actual or potential redemption or repurchase of *shares* or *securities* under:

...

- (3) ~~corresponding provisions in force in another *EEA State*; or [deleted]~~
- (4) provisions in force in a country or territory ~~other than an *EEA State*~~ which the Treasury has, by order, designated as corresponding provisions (no orders have yet been made).

**10.4A The application of requirements which implemented EU directives**

**Q41A Are pension scheme trustees and administration service providers likely to be subject to authorisation under the UK provisions which implemented the Markets in Financial Instruments Directive or subject to the UK provisions which implemented the Directive on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms?**

This is possible, but in many instances it is likely that pension scheme trustees and service providers will either not be providing an investment service for the purposes, or otherwise be exempt under the exemptions which were set out in article 2.1 of the Markets in Financial Instruments Directive, but have been onshored in Part 1 of Schedule 3 to the *Regulated Activities Order*. The following

9.6.6 G ~~The FCA considers that the reference in PERG 9.6.5G(3) to corresponding provisions in force in another EEA State will include provisions that derive from the maintenance of capital requirements of the Second Council Directive on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies (77/91/EEC). [deleted]~~

...

table expands on this in broad terms.

As for the UK provisions which implemented the CRD, ~~this~~ these will only apply to persons who are *MiFID investment firms* or *CRD credit institutions*.

Detailed guidance on the scope of the UK provisions which implemented the MiFID and the *CRD* and ~~EU~~ UK CRR is in *PERG* 13.

In the table below, references to relevant paragraphs of Article 2.1 of *MIFID* should be read as the equivalent exemptions which have been onshored in Part 1 of Schedule 3 to the Regulated Activities Order, or, in respect of Article 3 of *MIFID*, which can now be found in regulation 8 of the *MiFI Regulations*.

...

#### 12.4 **The application of requirements which implemented EU directives**

##### Q24 **Do the changes in the scope of regulated activities concerning pension schemes that took effect on 6 April 2007 have any implications for pension scheme trustees or service providers under the UK provisions which implemented the Investment Services Directive (~~or, in future, the~~ or the UK provisions which implemented the Markets in Financial Instruments Directive) or the Insurance Mediation Distribution Directive?**

In general terms, if a pension scheme trustee or service provider did not need to be authorised under the *Investment Services Directive* prior to 6 April 2007 he should not need to be authorised for carrying on the same activities after that date. This is because rights under a personal pension scheme are not a financial instrument under ~~the~~ that Directive and establishing, operating or winding up a personal pension scheme is not an investment service under the Directive. This ~~will~~ is also be the case under the Markets in Financial Instruments Directive ~~when it replaces~~ which replaced the Investment Services Directive ~~later in late~~ later in late 2007. ~~But this is~~ subject to the fact that investment advice will become an investment service for the first time. Guidance on the application of the Investment Services Directive to the activities of pension scheme trustees and service providers generally is in Chapter 10.4A of PERG. Draft Guidance on the changes in regulatory scope that will be caused by the implementation of the Markets in Financial Instruments Directive was issued as Annex 5 to Consultation Paper 06/9 (Organisation systems and controls) and will form Chapter 13 to PERG the scope of MIFID as implemented into UK law can be found in PERG 13.

Similarly, a pension scheme trustee or service provider who was not subject to regulation under the *Insurance Mediation Directive* prior to 6 April 2007 will not become subject to regulation purely as result of the changes in regulatory scope that took effect on 6 April 2007. Detailed guidance on the application of that Directive (as replaced by the Insurance Distribution Directive) to pension scheme trustees and service providers is in Chapters 10.4 and 10.4A of *PERG*.

...

#### 13 **Guidance on the scope of the UK provisions which implemented MiFID and CRD IV**

## 13.1 Introduction

13.1 The purpose of this chapter is to help *UK* firms consider:

- whether they fall within the scope of the *UK* provisions which implemented Markets in Financial Instruments Directive 2014/65/EU ('MiFID') and therefore are subject to the ~~its~~ requirements derived from it;
- how their existing *permissions* correspond to related MiFID derived concepts;
- whether the *UK* provisions which implemented CRD and the *EU-CRR UK CRR* apply to them, and for certain firms, whether the provisions which correspond to the recast CAD continue to apply to them; and
- if so, which category of investment firm they are for the purposes of the ~~transposition of the~~ the provisions which correspond to the recast CAD or the *UK* provisions which implemented CRD and the *EU-CRR UK CRR*.

...

### Background

MiFID ~~replaces~~ replaced the Markets in Financial Instruments Directive 2004/39/EC (MiFID 1), which in turn replaced the Investment Services Directive (ISD).

~~MiFID is complemented by regulation (EU) No. 600/2014 on markets in financial instruments ('MiFIR'). MiFID and MiFIR are supplemented by "Level 2 measures". The most relevant for the purposes of this chapter are Commission Delegated Regulation (EU) 2017/565 (the MiFID Org Regulation) and Commission Delegated Regulation (EU) 2017/592 (regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business). These implementing measures amplify and supplement certain of the concepts and requirements specified in MiFID and MiFIR.~~

### MiFID onshoring in UK legislation and the FCA Handbook

The *United Kingdom's* onshoring of the directive takes the form of a combination of legislation made by HM Treasury, in the form of a number of statutory instruments, and rules contained in the FCA Handbook and the PRA Rulebook. "Onshoring", for these purposes, refers to the process by which law deriving from EU legislation at exit date is retained or adapted, post exit date.

The Treasury legislation is set out in the following statutory instruments as amended by the Exit Regulations, in particular:

- Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 ('MiFI regulations'), SI 2017/701;
- Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017 2001 ('RAO Amendment Order'), SI 2017/488 2001/544.

The FCA Handbook complements the Treasury legislation, referred to above.

### **Transitional onshoring provisions**

The effect of section 3 of the European Union (Withdrawal) Act 2018 is that “direct EU legislation” became part of UK law, as at exit day (and is known as “retained EU law” in accordance with section 6 of the same legislation). As such, MiFIR and all directly applicable regulations made under MiFID and MiFIR including the MiFID Org Regulation (Commission Delegated Regulation 2017/565), the MiFIR Delegated Regulation (Commission Delegated Regulation 2017/567) and technical standards became part of UK law, as at exit date.

Each of these pieces of legislation is subject to the power in section 8 of the European Union (Withdrawal) Act 2018 to deal with deficiencies arising out of the United Kingdom’s withdrawal from the EU. The Treasury has exercised this power in the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (the ‘Exit Regulations’) to amend each of the following:

- MiFIR
- MiFID Org Regulation
- MiFIR Delegated Regulation
- Data Reporting Services Regulations
- The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017

A reference to any of the above in the remaining text of this chapter is to the legislation as amended by the Exit Regulations.

### **MiFID scope**

The scope aspects of MiFID are primarily addressed through the *Regulated Activities Order* (‘RAO’) and *PERG 2* focuses on the scope of regulated activities under the RAO and includes materials on the effect that the UK provision which implemented MiFID has had on the RAO. This chapter focuses more on the underlying MiFID investment services and activities, as well as the exemptions.

Where a firm’s regular occupation or business is providing one or more *investment services* to third parties or performing investment activities in relation to MiFID financial instruments on a professional basis, it is a firm to which UK provisions which implemented MiFID applies unless it is exempt.

Broadly, the exemptions from MiFID are likely to be relevant to insurers, group treasurers, professional firms to which *Part XX* of the *Act* applies, many *authorised professional firms*, professional investors who invest only for themselves, pension schemes, depositaries and operators of collective investment schemes or other collective investment undertakings (such as investment trusts), journalists, and commodity producers and traders. The exemptions are subject to conditions and limitations described in more detail below (see *PERG 13.5*).

The Treasury’s implementation of the article 3 MiFID exemption, onshored in

regulation 8 of the MiFI Regulations, is likely to be relevant to many financial advisers (see Q50) including some corporate finance advisers. It may also be relevant to some venture capital firms. The Treasury legislation enables firms falling within the scope of the exemption to elect to be subject to the requirements ~~derived from~~ of MiFID ~~and thereby acquire passport rights~~ (see Q52).

In each case, it will be for firms and individuals to consider their own circumstances and consider whether they fall within the relevant exemptions. A firm which takes the benefit of one or more of the exemptions in article 2 or 3 MiFID, onshored in Part 1 of Schedule 3 to the Regulated Activities Order and Regulation 8 of the MiFI Regulations, may nevertheless require authorisation under the Act (see PERG 2).

In addition to *investment firms*, the UK provisions which implemented MiFID is also relevant to *credit institutions* providing investment services or performing investment activities (see Q5), to *AIFMs* to which the UK provisions which implemented article 6.4 of *AIFMD* applies (in other words, *AIFM investment firms*) and to *UCITS management companies* to which the UK provisions which implemented article 6.4 of the *UCITS Directive* applies (in other words, *UCITS investment firms*).

This guidance is concerned with the scope of the UK provisions which implemented MiFID and does not address the question of whether an investment firm that falls within the scope of the UK provisions which implemented MiFID is providing a MiFID investment service as opposed to an investment activity.

#### CRD IV

Investment firms subject to the UK provisions which implemented MiFID, including those who fall within the article 3 MiFID exemption, onshored in regulation 8 of the MiFI Regulations, but opt not to take advantage of it, are subject to the requirements of the UK provisions which implemented CRD and the ~~EU CRR~~ UK CRR. There are special provisions for certain commodities firms as well as firms whose MiFID investment services and activities are limited to only one or more of the following investment services and activities:

- execution of orders on behalf of clients;
- portfolio management;
- giving investment advice; or
- receiving and transmitting client orders, and

who are not permitted to hold client money or securities nor are authorised to provide ancillary service (1) referred to in Section B of Annex 1 to MiFID, onshored in Part 3A of Schedule 2 to the Regulated Activities Order (which is safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management).

*Collective portfolio management investment firms* (a term that is used to refer to both *AIFM investment firms* and *UCITS investment firms*) are subject to the

requirements of the UK provisions which implemented CRD and the EU-CRR UK CRR, unless they are firms whose *MiFID* investment services and activities are limited to those in the preceding paragraph.

Under the *UK* implementation of the *CRD* and the EU-CRR UK CRR, the level of capital an investment firm subject to *MiFID* requires is determined by the type of investment services and activities it provides or performs, its scope of permission and any limitations or requirements attaching to that permission (see *PERG* 13.6). A firm relying on an article 2 or 3 *MiFID* exemption, onshored in Part 1 of Schedule 3 to the Regulated Activities Order and Regulation 8 of the *MiFI Regulations*, is not subject to *CRD* and the EU-CRR UK CRR.

### **How does this document work?**

This document is made up of Q and As divided into the following sections:

- General (*PERG* 13.2);
- Investment services and activities (*PERG* 13.3);
- Financial instruments (*PERG* 13.4);
- Exemptions from *MiFID* derived provisions (*PERG* 13.5);
- The *CRD* IV (*PERG* 13.6); and
- Flow charts, tables and lists (*PERG* 13 Annex 1, *PERG* 13 Annex 2, *PERG* 13 Annex 3, *PERG* 13 Annex 4).

We have also included guidance in the form of flow charts to help firms decide whether the UK provisions which implemented *MiFID* and the *CRD* and the EU-CRR UK CRR (which allow provisions which correspond to the recast CAD to apply to certain firms) apply to them as well as permission maps indicating which regulated activities and *specified investments* correspond to *MiFID* investment services, activities and *MiFID* financial instruments (see *PERG* 13 Annex 1, *PERG* 13 Annex 2 and *PERG* 13 Annex 3).

Article and recital references are to *MiFID* (Level 1 measures) unless otherwise stated. References to categories of *MiFID* investment services and activities and *MiFID* financial instruments adopt the structure of Annex 1 *MiFID*: for example, A1 refers to “reception and transmission of orders in relation to one or more financial instruments” and C1 relates to “transferable securities”.

While these provisions have been “onshored”, we have, unless otherwise stated, retained the references in this chapter, and its annexes, to the provisions in *MiFID* and other relevant directives such as *CRD*, *UCITS* directive and *AIFMD* for ease of reference. As a result, where the context requires, any references to a directive, its articles or recitals, which could be read as having continuing effect, should be read as a reference to ‘the UK provisions which implemented’ that directive or the relevant article. In addition, any reference which adopts the structure of Annex 1 of *MiFID*, for example by referring to A1 or C1, should be read as a reference to the relevant corresponding paragraph as onshored in Schedule 2 of the *Regulated*



Activities Order.

...

**13.2 General****Q1. Why does it matter whether or not we fall within the scope of MiFID?**

Depending on whether or not you fall within the scope of MiFID, you may be subject to:

- domestic legislation implementing MiFID (for example, FCA rules);
- “direct EU legislation” directly applicable, which became part of UK law as at exit date in accordance with section 3 of the European Union (Withdrawal) Act 2018, and is known as “retained EU law” in accordance with section 6 of the same legislation. made by the European Commission (such as, ~~MiFIR, EU-CRR~~ UK CRR and all directly applicable EU regulations made under them or under MiFID); and
- domestic legislation implementing the CRD (see *PERG* 13.6).

~~The question is also relevant to whether you can exercise passporting rights in relation to investment services or activities – only firms to which MiFID applies can do so.~~

...

**Q3. How much can we rely on these Q and A’s?**

The answers given in these Q and As represent the FCA’s views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of MiFID and the *CRD* and the ~~EU-CRR~~ UK CRR affect the regulatory position of any particular person will depend on his individual circumstances. If you have doubts about your position after reading these Q and As, you may wish to seek legal advice. The Q and As are not a substitute for reading the relevant the UK provisions which implemented ~~in~~ MiFID, the *CRD* and the ~~EU~~ UK CRR (and the provisions which correspond to the recast CAD for certain firms), ~~the MiFID implementing measures and The Treasury’s implementing legislation.~~

Moreover, MiFID, the *CRD* and the ~~EU~~ UK CRR ~~are~~ were subject to guidance and communications by the European Commission, the European Securities and Markets Authority (‘ESMA’) and the European Banking Authority (‘EBA’), we have now issued guidance on how this will be treated after exit day.

[Note: link to the relevant guidance is to be inserted].

...

**Q4. We provide investment services to our clients – does MiFID apply to us?**

Yes if you are:

- an “investment firm” and the exemptions in MiFID do not apply to you; or
- a “tied agent” as defined by MiFID.

If you are a non-~~EU~~ UK firm, for example the *UK* branch of a US firm, MiFID does not apply to you. However, if MiFID would have applied to you if you had been incorporated or formed in the ~~EU~~ United Kingdom, you will be a third country investment firm under the FCA’s rules. As a result, certain MiFID based requirements will apply to you.

See the flow charts in Annex 1 for further information and *PERG* 13.5 for guidance relating to exemptions. See Q7 and 8 for guidance on whether you are an investment firm and Q11 for guidance relating to tied agents.

#### **Q5. We are a credit institution. How does MiFID apply to us?**

If you are an ~~EEA~~ credit institution, article 1.3 MiFID provides that selected MiFID provisions apply to you, including organisational and conduct of business requirements, when you are providing investment services to your clients or performing investment activities. In our view, MiFID will apply when you are providing ancillary services in conjunction with investment services. Where you provide ancillary services on a standalone basis, MiFID will not apply in relation to those services. Article 1.3 MiFID is reflected in paragraph (2) of the *Handbook* definition of “MiFID investment firm”.

In addition, article 1.4 MiFID provides that various MiFID provisions apply when selling or advising clients about structured deposits (see Q34B). Article 1.4 MiFID is reflected in paragraph (2) of the *FCA Handbook* definition of “MiFID investment firm”.

...

#### **Q.11 How will we know whether we are a tied agent (article 4.1(29))?**

A tied agent under MiFID is a similar concept to an appointed representative under the Act. A tied agent does not require authorisation for the purposes of MiFID, just as an appointed representative does not require authorisation under the Act. In our view, you will only be a tied agent if your principal is an investment firm (including a credit institution) to which MiFID applies. So, if you act for a principal that is subject to an exemption in article 2 of MiFID, you are not a tied agent for the purposes of MiFID although you may be an appointed representative for domestic purposes. You will still not require authorisation under MiFID, either because you are not performing investment services and activities or, if you are, because you fall within an exemption in article 2 of MiFID.

MiFID says that firms exempt under article 3 should be subject to requirements which are at least analogous to the MiFID regime for tied agents of investment firms. This has been implemented in the *UK* through the appointed representative regime. If you are an appointed representative of a principal who is exempt under article 3 you will also be exempt under MiFID. Q48 to Q53 deal with the article 3 exemption.

Assuming your principal is an investment firm to which MiFID applies, if you are registered as an appointed representative on the Financial Services Register and

carry on the activities of arranging (bringing about) deals in investments or advising on investments, in either case in relation to MiFID financial instruments, you are likely to be a tied agent for the purposes of article 4.1(29).

~~It is possible for a UK representative to be a tied agent of an incoming EEA firm, in which case if the representative is established in the UK it will also be a branch of its principal. However, it~~ It is not possible for a tied agent to provide investment services on behalf of more than one investment firm to which MiFID applies.

Further material on appointed representatives and tied agents is contained in chapter 12 of our Supervision Manual ('SUP').

### 13.3 Investment Services and Activities

#### Q.12 Where do we find a list of MiFID services and activities?

~~The list in Section A of Annex 1 to of MiFID has been onshored in Part 3 of Schedule 2 to the Regulated Activities Order.~~ There are nine investment services and activities in Part 3 Section A (A1 to A9 have now been onshored in paragraph 1 to paragraph 9). However, as explained in *PERG* 13.1 above, for ease of reference we have retained the references to the relevant MiFID provisions in this chapter. Article 4 MiFID defines some of them in more detail:

- investment advice (article 4.1(4) MiFID);
- execution of orders on behalf of clients (article 4.1(5) MiFID);
- dealing on own account (article 4.1(6) MiFID); and
- portfolio management (article 4.1(8) MiFID).

A further provision relating to investment advice is contained in article 9 of the *MiFID Org Regulation*.

As explained in *PERG* 13.1, this chapter only covers the MiFID activities dealt with through the authorisation regime under the Act. The other activities covered by MiFID and MiFIR are not dealt with in section A of Annex 1, as onshored in Part 3 of Schedule 2 of the *Regulated Activities Order*.

...

#### Q.26 We are an investment firm – can we apply for passporting rights that include ancillary services?

~~Yes, but only if:~~

- ~~you carry on the ancillary services together with one or more investment services and activities; and~~
- ~~where the ancillary service is also a *regulated activity*, you have a permission enabling you to carry on those activities.~~

~~You will not be able to apply for passporting rights in respect of ancillary services only. In our view, this does not restrict the ability of credit institutions to exercise passporting rights under the *CRD* which correspond to ancillary services under~~

~~MiFID (for example, the activity of safekeeping and administration of securities in Annex 1 paragraph 12 of the CRD). [deleted]~~

## 13.4 Financial instruments

### Introduction

#### Q27. Where do we find a list of MiFID financial instruments?

~~The list in Section C of Annex 1 to MiFID has been onshored in Part 1 of Schedule 2 to the Regulated Activities Order. There are eleven categories of financial instruments in section C, which have been onshored in Part 1 (C1 to C11, which have been onshored in paragraph 1 to paragraph 11). However, as explained in PERG 13.1 above, for ease of reference we have retained the references to the relevant MiFID provisions in this chapter. Transferable securities (C1) and money market instruments (C2) are defined in article 4. Some financial instruments are further defined in the *MiFID Org Regulation*.~~

...

### Derivatives: general

#### Q30. Which types of derivative fall within MiFID scope?

The following derivatives fall under MiFID:

- derivative instruments relating to securities, currencies, interest rates, emission allowances or certain other underlyings (see Q31A to Q31S);
- commodity derivatives (see Q32 to Q33C);
- derivative instruments for the transfer of credit risk (see Q31);
- financial contracts for differences (these are included in paragraph 9 of Section C of Annex 1 to MiFID, onshored in paragraph 10 of Part 1 of Schedule 2 of the *Regulated Activities Order*); and
- derivatives on miscellaneous underlyings (see Q34).

The scope of these derivatives does not extend to sports spread bets.

...

### Commodity derivatives

#### Q.32 Which types of commodity derivatives fall within MiFID scope?

Broadly speaking, the following commodity derivatives fall within the scope of MiFID:

- a derivative relating to a commodity derivative, for example, an option on a commodity future (C4);

- cash-settled commodity derivatives (as explained in more detail in Q33A) (C5);
- physically settled commodity derivatives traded on certain markets or facilities (as explained in more detail in Q33B)(C6); and
- other commodity derivatives capable of physical settlement and not for commercial purposes or wholesale energy products traded on an EU OTF that must be physically settled (as explained in more detail in Q33C) (C7).

The definition of commodity derivative in MiFIR also includes derivatives falling into C10 of Section A of Annex 1 to MiFID, onshored in paragraph 10 of Part 1 of Schedule 2 of the Regulated Activities Order (see the answer to Q34 for this type of derivative).

...

**Q33B. Can you tell me more about category C6 commodity derivatives?**

This type of commodity derivative is one that:

- can be physically settled; and
- is traded on a UK regulated market, ~~an~~ UK MTF or ~~an~~ UK OTF.

The category C6 type of commodity derivative excludes a wholesale energy product traded on ~~an~~ UK OTF that must be physically settled. The *MiFID Org Regulation* defines physical settlement in more detail.

Article 6 of the *MiFID Org Regulation* has special definitions for what types of oil, coal and wholesale energy products are included in the C6 category of commodity derivative.

A contract that can be physically settled but which is not traded on a regulated market, MTF or OTF might still fall within the C5 or C7 category of commodity derivative even though it falls outside category C6.

**Q33C. Can you tell me more about category C7 commodity derivatives (recital 5 to, and article 7 of, the MiFID Org Regulation)?**

This type of commodity derivative is one that meets all the following conditions:

- It can be physically settled.
- It is not a C6 commodity derivative.
- It is not a spot contract. A spot contract means one under the terms of which delivery is scheduled to be made within the longer of the following periods:
  - two trading days; or

- the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

For these purposes a contract is not a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the spot period described earlier in this answer.

- It meets one of the following criteria:
  - it is traded on a ~~non-EEA~~ third country trading venue that performs a similar function to a regulated market, an MTF or an OTF (an “equivalent third country trading venue”); or
  - it is expressly stated to be traded on, or is subject to the rules of, a UK regulated market, ~~an~~ UK MTF, ~~an~~ UK OTF or an equivalent third country trading venue; or
  - it is equivalent to a contract traded on a UK regulated market, UK MTF, UK OTF or equivalent third country trading venue. Equivalence is judged by reference to the price, the lot, the delivery date and other contractual terms such as quality of the commodity or place of delivery.
- It is standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

Certain contracts entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network are excluded from the C7 category of commodity derivative.

The category C7 type of commodity derivative also excludes a wholesale energy product traded on an EU OTF that must be physically settled. The *MiFID Org Regulation* defines physical settlement in more detail.

### **Miscellaneous derivatives (C10)**

#### **Q34. What derivatives fall into the C10 category?**

...

A contract of insurance or reinsurance is not a C10 commodity derivative (recital 6 to the MiFID Org Regulation). Neither is a contract falling under one of the other paragraphs of section C of Annex 1 to MiFID, onshored in part 1 of Schedule 2 of the *Regulated Activities Order*.

### **Emission allowances**

#### **Q34A. How are emission allowances treated?**

They are covered in the following ways:

- ~~Article 6(5) of the auction regulation deems as an investment service or activity the reception, transmission and submission of a bid for a financial instrument on an auction platform by an investment firm to which MiFID applies or a CRD credit institution.~~
- ~~The auction regulation regulates bids for allowances in the form of two-day spot contracts or five-day futures.~~
- ~~The auction regulation allows the following to bid:~~
  - ~~aircraft operators and others referred to in (5) below;~~
  - ~~investment firms and credit institutions; and~~
  - ~~a person exempt under article 2(1)(j) of MiFID (see Q44 to Q45 for more on this exemption).~~
- An emission allowance is itself a financial instrument (C11).
- An option, future, swap, forward rate agreement or any other derivative contract relating to emission allowances is included as a C4 derivative.

It is not always clear how all this ~~overlapping legislation~~ fits together but in the FCA's view, it works like this:

- (1) ~~An emission allowance auctioned as a five-day future or a two-day spot contract is regulated under the auction regulation. [deleted]~~
- (2) The five-day future auction product is a financial instrument and is regulated under MiFID. It is included under C4 and C11.
- (3) The two-day spot contract product is also a financial instrument. It is included under C11. It is therefore also regulated under MiFID.
- (4) In the FCA's view an emission allowance (~~including when auctioned under the auction regulation~~) will not come within C1.
- (5) ~~The auction regulation provides certain exemptions for aircraft operators and operators of plant and other installations. These exemptions continue to apply whether or not a MiFID exemption is available, but only for bidding activities covered by the auction regulation. [deleted]~~
- (6) ~~Thus for example, article 18 of the auction regulation allows business groupings of operators in (5) to submit bids. The MiFID exemption in (12) below may not cover all such persons but they are still entitled to submit bids under the auction regulation without obtaining MiFID authorisation. [deleted]~~
- (7) ~~The mere fact of being exempt under MiFID does not allow someone to bid under the auction regulation. The auction regulation regulates who can and cannot bid. [deleted]~~

- (8) ~~The auction regulation covers the reception, transmission and submission of a bid. This corresponds to the MiFID activities of the reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients and dealing on own account. [deleted]~~
- (9) ~~Therefore the auction regulation activities of receiving, transmitting and submitting a bid are all also covered by MiFID, whether the emission allowance is auctioned as a five day future or a two day spot contract. However, a person exempt under (5) is not subject to MiFID when bidding (subject to (10)). [deleted]~~
- (10) ~~If a person who is allowed to bid under the auction regulation is authorised under MiFID (because for example it wants to carry out other activities for which it needs MiFID authorisation), MiFID will apply to its bidding activities. [deleted]~~
- (11) ~~The MiFID activities that apply to a product covered by the auction regulation are not limited to the bidding activities listed in paragraph (8) of this list. All the MiFID investment services and activities apply to emission allowances auctioned as a financial instrument. Therefore, for example, giving personal recommendations about bids for emission allowances (including bids) is covered by MiFID. Anyone wishing to carry out such activities will need to be authorised as a MiFID firm, unless some other exemption is available.~~
- (12) Article 2.1(e) of MiFID exempts an operator with compliance obligations under Directive 2003/87/EC (Emissions Trading Scheme) from MiFID.
- (a) ~~The exemption covers some of the same ground as the exemption in the auction regulation described in (5) to (7) above. However this overlap neither extends nor narrows the effect of the auction regulation exemption. [deleted]~~
- (b) ~~The article 2.1(e) exemption also covers activities not covered by the auction regulation. So, for example, the article 2.1(e) exemption covers buying and selling the underlying emission allowance or the five day future or two day spot auction product in the secondary market. [deleted]~~
- (c) See the answer to Q35A for more details about the conditions of the exemption.

## 13.5 Exemptions from MiFID

### Q35. Where do we find the list of MiFID exemptions?

~~The exemptions found in articles 2 and 3 MiFID, have been onshored in Part 1 of Schedule 3 to the Regulated Activities Order and Regulation 8 of the MiFI Regulations. However, as explained in PERG 13.1 above, for ease of reference we have retained the references to the relevant MiFID provisions in this chapter.~~



...

**Q45. What is an ancillary activity for the purposes of the commodities exemption?**

You can find the meaning of ‘ancillary’ for the purposes of the commodities exemption described in the answer to Q44 in ~~Commission Delegated Regulation (EU) 2017/592~~ MiFID RTS 20 (regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business).

This answer does not give a full summary as the definition is too detailed for *PERG*. Instead this answer summarises the broad approach.

There are two tests. The exemption only applies if you meet both tests. Both are based on commodities trading activities in the EEA.

The first test looks at the size of trading activities of members of your group in various asset classes. For each class, this is calculated by comparing their trading activities in that class with the overall trading activity in the EEA for that class.

The asset classes are made up of emission allowances and various types of commodity derivatives. The emission allowances asset class includes emission allowances to which the exemption for emission allowances in article 2.1(e) (see the table in the answer to Q35A) applies ~~and any bidding under the auction regulation.~~

For this test to be met, the trading level of persons within your group needs to be below the maximum amount for each asset class. There is a different maximum amount for each class.

Certain privileged transactions are excluded from the calculation:

- intra-group transactions that serve group-wide liquidity or risk management purposes;
- transactions in derivatives that reduce risks directly relating to commercial activity or treasury financing activity in accordance with criteria set out in ~~Commission Delegated Regulation (EU) 2017/592~~ MiFID RTS 20 (regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business);
- transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a *trading venue*, where such obligations are required by:
  - regulatory authorities in accordance with ~~EEA~~ domestic law;
  - national laws, regulations and administrative provisions; or
  - those *trading venues*; and

- transactions executed by a group member authorised under MiFID or the CRD or with a corresponding Part 4A permission.

The second test has two calculation methods. If the result of either calculation is that you fall below the specified threshold, you meet the second test.

- One method is based on the size of group trading activities in commodity derivatives and emission allowances.
- The second measure compares the estimated capital employed for carrying out commodity derivative and emission allowance activities with group capital.

...

#### **Q49. Which firms might fall within this exemption?**

The exemption applies to persons who meet all the following conditions:

...

- they transmit orders only to one or more of the following:
  - other MiFID investment firms;
  - credit institutions authorised under the *CRD*;
  - branches of third country investment firms or credit institutions which are subject to, and comply with, prudential rules considered by the *appropriate regulator* to be at least as stringent as those laid down in MiFID, MiFID, the *CRD* or the ~~*EU-CRR*~~ *UK CRR*;
  - collective investment undertakings or their managers authorised under the law of ~~an EEA State~~ the *United Kingdom* to market units to the public;
  - EU incorporated investment companies the securities of which are listed or dealt in on a *United Kingdom regulated market*, for example investment trust companies.

...

**Q50. We are (or previously were) an IFA and have a permission which covers (i) arranging (bringing about) deals in investments; (ii) making arrangements with a view to transactions; and (iii) advising on investments, in each case in relation to securities but not derivatives. We are not permitted to hold client money or investments and do not have dealing or managing permissions in relation to MiFID financial instruments. Are we exempt?**

The FCA expects so, assuming you do not:

- carry on activities outside your permission; or
- transmit orders to persons other than those listed in Q49 (for example, you will fall outside the exemption if you transmit orders directly to collective investment schemes whose units cannot be marketed to the public in ~~any EEA State~~ the UK either because they are unregulated schemes or ~~EEA non-UK~~ authorised collective investment schemes); or
- place MiFID financial instruments without a firm commitment basis (see Q22 and Q23).

We would generally not expect IFAs to be placing MiFID financial instruments without a firm commitment basis as we associate placing of financial instruments with situations where a company or other business vehicle wishes to raise capital for commercial purposes, and in particular with primary market activity.

...

**Q52. If we fall within the exemption does this prevent us from acquiring passporting rights under MiFID?**

~~No. Firms which would otherwise be exempt can apply to opt into MiFID regulation with a view to acquiring passport rights (although they would then become subject to the requirements of MiFID, including certain enhanced prudential requirements—see Q58 and Q59). [deleted]~~

**Q53. What is the practical effect of exercising the optional exemption for those firms falling within its scope?**

You are not a firm to which MiFID applies and so are not a *MiFID investment firm* for the purposes of the Handbook. As such you are not subject to the requirements of the *CRD* as transposed in the Handbook and the ~~*EU CRR UK CRR*~~ and cannot exercise passporting rights.

Article 3.2 of MiFID applies certain MiFID requirements to firms making use of the article 3 exemption. These are implemented in the *Handbook* and the Act.

...

**13.6 CRD IV**

...

**Q55. Are we subject to the CRD and the ~~EU CRR~~ UK CRR?**

Only *investment firms* subject to the requirements of *MiFID* are subject to the requirements of the *CRD* and the ~~*EU CRR UK CRR*~~ (which allow provisions which correspond to the recast *CAD* to apply for certain firms). This includes *collective portfolio management investment firms* (see Q6, Q6A and Q63).

Despite being subject to the requirements of MiFID, broadly speaking, if you are one of the following investment firms, *CRD* and the ~~*EU CRR UK CRR*~~ will only

apply to you in a limited way:

- a firm whose main business consists exclusively of providing *investment services or activities* in relation to commodity derivatives or C10 derivatives, or both, and to whom the ISD would not have applied. If you fall into this category, you will fall within a transitional regime under which you will not be subject to the capital requirements of the ~~EU CRR~~ UK CRR or *CRD* but will be subject to other requirements (see Q57); or
- a firm that is only authorised to provide investment advice or receive and transmit orders, or both, without holding client money or securities and does not provide the ancillary service (1) referred to in Section B of Annex I to MiFID, onshored in Part 3A of Schedule 2 to the Regulated Activities Order, which is safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management. If you fall into this category, you will be an *exempt CAD firm* and only subject to base capital requirements under the *CRD* (see Q58 and Q59 below); or

...

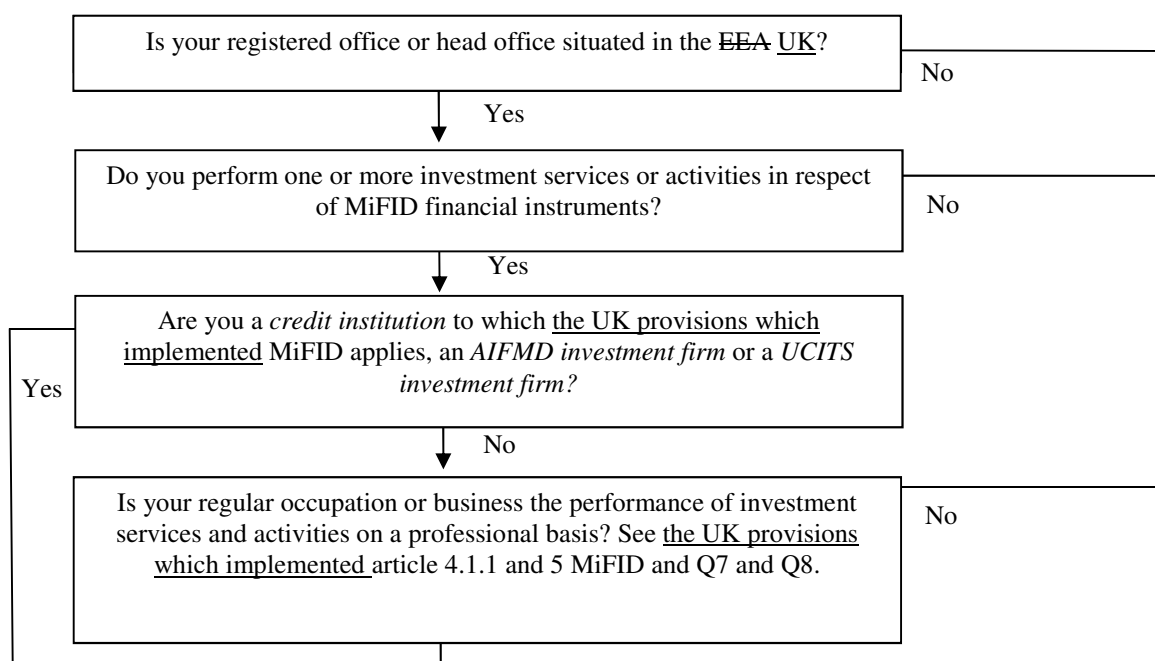
If you fall into this category, you may be a *BIPRU firm* and as such would not be subject to the capital requirements of the ~~EU CRR~~ UK CRR or *CRD* but would instead be subject to other requirements (see Q58A).

If you are an investment firm to which an exemption in either article 2 or article 3 MiFID applies (see *PERG* 13.5 and *PERG* 13 Annex 1 flow chart 2), you are not subject to the *CRD* and the ~~EU CRR~~ UK CRR. However, if you potentially fall within the article 3 exemption, but decide to opt into MiFID regulation, ~~for instance to acquire passporting rights (see Q52)~~, you are subject to the *CRD* and the ~~EU CRR~~ UK CRR. If you do so, you are an *exempt CAD firm* (see Q58 and Q59).

There is also an exemption under the ~~EU CRR~~ UK CRR for local firms.

### 13 Annex 1

#### Flow chart 1 – ~~Does~~ Do the UK provisions which implemented MiFID apply to us?



## 13 Annex 2

The list of MiFID investment services in Section A of Annex 1 of MiFID, has been onshored in Part 3 of Schedule 2 to the Regulated Activities Order and the list of MiFID instruments in Section C of Annex 1 to MiFID has been onshored in Part 1 of Schedule 2 to the Regulated Activities Order. However, as explained in PERG 13.1 above, for ease of reference we have retained the references to the relevant MiFID provisions in this Annex.

Table 1 – MiFID Investment services and activities and the Part 4A permission regime

MiFID Investment Services and Activities	Part 4A permission	Comments
A1- Reception and transmission of orders in relation to one or more financial instruments	<p>Arranging (bringing about) deals in investments (article 25(1) RAO)</p> <p><del>Bidding in emissions auctions (article 24A RAO)</del></p>	<p>Generally speaking, only firms with permission to carry on the activity of arranging (bringing about) deals in investments in relation to securities and contractually based investments which are financial instruments can provide the service of reception and transmission. This is because a service must bring about the transaction if it is to amount to reception and transmission of orders.</p> <p>The activity of arranging (bringing about) deals in investments is wider than A1, so a firm carrying on this regulated activity will not always be receiving and transmitting orders.</p> <p>See Q13, Q14 and Q34A for further guidance.</p>
A2- Execution of orders on behalf of clients	<p>Dealing in investments as agent (article 21 RAO)</p> <p>Dealing in investments as principal (article 14 RAO)</p> <p><del>Bidding in emissions auctions (article 24A RAO)</del></p>	<p>Usually, where a firm executes orders on behalf of clients it will need permission to carry on the activity of dealing in investments as agent. Where a firm executes client orders on a true back-to-back basis or by dealing on own account, it also needs permission to carry on the activity of dealing in investments as principal.</p> <p>See Q15, Q15A and 34A for further guidance.</p>

C6- Options, futures, swaps, and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a <u>United Kingdom</u> regulated market, <del>an</del> a <u>UK</u> MTF or <del>an</del> a <u>UK</u> OTF	commodity option and option on a commodity future  commodity future  contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet)  binary bet	
...		
<p><b>Note:</b> The activity of bidding in emissions auctions can form part of A1, A2 or A3. In terms of the permission regime, bidding in emissions auctions does not form part of any other regulated activity (see <i>PERG 2.7.7CG</i>) and so a firm must have a separate permission to undertake that activity.</p>		

Table 2 - MiFID financial instruments and the Part 4A permission regime

MiFID financial instrument	Part 4A permission category	Commentary
...		
C6- Options, futures, swaps, and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a <u>United Kingdom</u> regulated market, <del>an</del> a <u>UK</u> MTF or <del>an</del> a <u>UK</u> OTF	commodity option and option on a commodity future  commodity future  contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet)  binary bet	C6 instruments will generally be either commodity futures or commodity options, depending on their structure. Those instruments with a cash settlement option may also be contracts for differences.  For further guidance see Q33B.
...		

## 15 Guidance on the scope of the Payment Services Regulations 2017

### 15.1 Introduction

The purpose of this chapter is to help businesses in the *UK* consider whether they fall within the scope of ~~the Second Payment Services Directive 2015/2366/EC (PSD2), as given effect to in~~ the Payment Services Regulations 2017 (the ‘PSRs 2017’). The PSRs 2017 create a separate authorisation and registration regime which differs from the authorisation requirements under the Financial Services and Markets Act. In particular, it is aimed at helping these businesses consider whether they need to be separately authorised or registered for the purposes of providing payment services in the UK. References to individual regulations are to the PSRs 2017, unless otherwise stated.

#### Background

~~The PSRs 2017 implemented the Second Payment Services Directive (2015/2366/EC) (PSD2) in the *United Kingdom*. The PSRs 2017 PSD2 provides the legal framework for the operation of a single market in payment services. This includes a harmonised provide an~~ authorisation regime, ~~designed to establish a single licence for~~ payment service providers which are neither deposit-takers nor electronic money institutions.

The relevant payment services, ~~as transposed in the PSRs 2017,~~ are set out fully in Annex 2 to this chapter and include, amongst other things, services relating to the operation of payment accounts (for example, cash deposits and withdrawals from current accounts and flexible savings accounts), execution of payment transactions, card issuing, merchant acquiring, and money remittance. ~~The Directive~~ PSRs 2017 focuses on electronic means of payment including direct debit, debit card, credit card, standing order, mobile or fixed phone payments and payments from other digital devices as well as money remittance services; ~~it does they do~~ not apply to cash-only transactions or paper cheque-based transfers.

~~PSD2~~ The PSRs 2017 also creates authorisation and registration regimes for firms who provide holders of online payment accounts with payment initiation services and account information services.

~~Authorised payment institutions and registered account information service providers can provide services on a cross border basis, using passport rights acquired under PSD2.~~

...

#### Scope

...

Generally speaking, depending on the nature and size of its activities, a business to which the PSRs 2017 apply (other than a credit institution ~~or~~; an electronic money institution, ~~an EEA authorised payment institution or an EEA authorised electronic money institution~~ and their agents) will need to be: authorised by the FCA as an authorised payment institution; or registered as a “small payment institution”; or registered as a registered account information services provider; or registered as an agent of an authorised payment institution, ~~EEA authorised payment institution~~, a small payment institution or a registered account information services provider.

...

The PSRs 2017 also provide for the appointment of agents by authorised payment institutions, small payment institutions and registered account information services providers. These agents are not required to be authorised under regulation 6 but they are required to be registered on the Financial Services Register by their principal (or each of their principals). ~~When the agent’s principal is an EEA authorised payment institution, it needs to be registered on the register of the Home State of that payment institution.~~ A business can also provide payment services as an agent of a credit institution, in which case there are no registration requirements under the PSRs 2017. Electronic money institutions can provide payment services through agents, in which case the registration requirements of the Electronic Money Regulations 2011 apply (see *PERG* 3A).

...

### **Transitionals**

Subject to the exclusions and exemptions outlined above, a person (other than ~~an EEA payment services provider and its agents~~, a credit institution, an electronic money institution and certain other specified bodies such as the Post Office) is caught by the authorisation and registration requirements of the PSRs 2017 when it provides payment services, as a regular occupation or business activity, in or from the UK. That said, there are important transitional provisions which delay the need for businesses authorised or registered under the Payment Services Regulations 2009 to re-apply for authorisation or registration under the PSRs 2017, before and during an initial period after the commencement of regulation on 13 January 2018. There is also a transitional provision applying to providers of account information services and payment initiation services which were providing those services before 12 January 2016 – see 15.7.

...

## **15.2**

### **General**

#### **Q1. Why does it matter whether or not we fall within the scope of the PSRs 2017?**



Broadly, when you provide payment services, as a regular occupation or business activity, in the UK and these services do not fall within an exclusion or exemption, you must be:

- an authorised payment institution; or
- ~~an EEA authorised payment institution; or~~
- a small payment institution; or
- a registered account information services provider ~~or an EEA registered account information service provider; or~~
- a credit institution (~~either one with a Part 4A permission to accept deposits) or an EEA credit institution where it is exercising passport rights under paragraph 4 of Annex 1 to the CRD; or~~
- an electronic money institution ~~or an EEA authorised electronic money institution; or~~
- the Post Office Limited, Bank of England, ~~a central bank~~ or government departments and local authorities; or
- an exempt person (that is a credit union, municipal bank and the National Savings Bank)

...

### **Q3. How much can we rely on these Q&As?**

The answers given in these Q&As represent the FCA's views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of the PSRs 2017 affects the regulatory position of any particular person will depend on his individual circumstances. If you have doubts about your position after reading these Q&As, you may wish to seek legal advice. The Q&As do not purport to be exhaustive and are not a substitute for reading the relevant legislation. In addition to FCA guidance, some PSD2 provisions (from which the PSRs 2017 are derived) may be the subject of guidance or communications by the European Commission or the European Banking Authority.

### **Q4. We are a UK firm not authorised under FSMA providing payment services to our clients, as a regular business activity. Are we required to be authorised or registered under the regulations?**

Yes, unless the exclusions or exemptions in the regulations apply to you or you are an electronic money institution, ~~an EEA authorised electronic money institution~~, the Post Office Limited or an agent of a credit institution or electronic money institution. If this is not the case, you need to be:

- authorised by the FCA as an authorised payment institution; or
- registered as a small payment institution; or
- registered as an account information services provider; or
- registered as an agent of an authorised payment institution, ~~EEA authorised payment institution~~ or a small payment institution.

...

#### **Q7. We are a credit institution. Do the PSRs 2017 apply to us?**

Yes. If you are a credit institution, you will be subject to the conduct of business requirements in the PSRs 2017 to the extent that you provide payment services. The authorisation process applying to ~~UK and non-EEA~~ credit institutions remains that imposed by Part 4A of the Act. Authorised credit institutions will do not though need to apply for a separate Part 4A permission, in order to provide payment services. In other words, if a *UK* credit institution has a Part IV permission to carry on the regulated activity of accepting deposits, it will not need to be separately authorised to provide payment services in the *UK*. However, credit institutions intending to provide account information services or payment initiation services should have regard to the notification requirements in *SUP* 15.8. The *UK* branch of a non-~~EEA~~ *UK* credit institution with a Part 4A permission to accept deposits is also authorised to provide payment services in the *UK*.

~~An EEA credit institution wishing to provide payment services through a UK branch must exercise its passport rights under paragraph 4 of the Annex to the CRD. Similarly, a UK credit institution which wishes to provide payment services in other Member States may exercise its CRD passport rights to do so.~~

#### **Q8. We are an electronic money institution. Do the PSRs 2017 apply to us?**

Yes. If you are an electronic money institution, you will be subject to the conduct of business requirements in the PSRs 2017. If you are a credit institution, a credit union or a municipal bank, issuing electronic money is a regulated activity and you will require permission under the Act (see *PERG* 2.6.4A). The authorisation and registration requirements for any other person intending to issue electronic money are governed by the Electronic Money Regulations (see *PERG* 3A for guidance on the scope of the Electronic Money Regulations). If you are an authorised or small electronic money institution ~~or an EEA authorised electronic money institution~~, the PSRs 2017 introduce a transitional provision into the Electronic Money Regulations which affects your right to continue to provide services in the *UK* after 12 July 2018 – see *PERG* 3A.7.

...

**Q12. We provide electronic foreign exchange services to our customers/clients. Will this be subject to the PSRs 2017?**

...

By contrast, we would not expect the conduct of business provisions (including the right of cancellation) in the Payment Services Regulations to apply to a spot or forward fx transaction itself. That said, the electronic transmission, for example, by a bank on behalf of a customer to an fx services provider is likely to be subject to the ~~PSD~~ PSRs 2017, because this is a transfer of funds executed by the bank. Similarly, the onward payment by a bank or fx services provider, on behalf of a client, to a third party of currency purchased in an fx transaction may amount to a payment service.

If you are a small payment institution or an authorised payment institution under the PSRs 2017, you may provide foreign exchange services that are closely related and ancillary to your payment services. However, that does not allow you to provide foreign exchange derivative services that would otherwise require authorisation under ~~MiFID~~ FSMA. You therefore need to consider the availability of ~~MiFID~~ exclusions for your foreign exchange business (see *PERG 13 Q31K*).

...

### 15.3 Payment Services

**Q14. Where do we find a list of payment services?**

In Schedule 1 Part 1 to the PSRs 2017. There are eight payment services, set out in full in Annex 2 to this chapter (including six activities which were payment services under the PSD regulations and the two new activities of payment initiation services and account information services). References to categories of payment services below adopt the structure of Schedule 1 to the PSRs 2017: for example, paragraph (1)(f) refers to “money remittance”.

The payment service referred to in paragraph (1)(g) of Schedule 1 to the PSD regulations does not appear as a separate payment service in the PSRs 2017. Telecommunications, IT system or network operators with a paragraph (1)(g) permission should consider which permission(s) they require under the PSRs 2017, such as executing a payment transaction within (1)(c) or issuing a payment instrument under (1)(e). If the services within your paragraph 1(g) permission are also of the type described in paragraph 1(c), under the transitional provisions in regulation 152 of the PSRs 2017 you will be treated as an authorised payment institution, subject to the requirement to provide us ~~(or your home state competent authority if you are an EEA firm)~~ with evidence, by 13 January 2020, that you hold the required own funds.

...

**Q20A We are applying to become an authorised payment institution. Do we also need to be authorised under FSMA in order to issue credit cards?**

...

This is not necessarily the case, however, if you do not provide credit to individuals or relevant recipients of credit, or if the credit agreements are exempt agreements or an exclusion applies. ~~There is, for example, a specific FSMA exclusion for activities carried on by an EEA authorised payment institution exercising passport rights in the United Kingdom in accordance with article 18(4) of the Payment Services Directive. Those activities are excluded from the regulated activities of entering into a regulated credit agreement as lender and exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement (see *PERG 2.8.14ZBG* and article 60JA of the FSMA Regulated Activities Order).~~

...

#### **15.4 Small payment institutions, agents and exempt bodies**

**Q26. What criteria must we meet to be a “small payment institution”?**

The conditions are set out in regulation 14 and include the following:

...

if you are a body corporate you must satisfy us that any close links you have with another person are not likely to prevent our effective supervision of you. If it appears to us that you have any close links that are subject to the laws, regulations or administrative provisions of a territory outside of the ~~EEA~~ UK (“the foreign provisions”) you must satisfy us that neither the foreign provisions, nor any deficiency in their enforcement, would prevent our effective supervision of you;

...

**Q27. We satisfy the conditions for registration as a small payment institution - does that mean we have to register as one?**

~~No, there are other options available to you. If you register as a small payment institution, you cannot acquire passport rights under the regulations, so you may wish to become an authorised payment institution if you wish to take advantage of the passport. You may also choose to become an agent of a payment services provider.~~

**Q28. We only wish to be an agent. Do we need to apply to the FCA and/or PRA for registration?**

No. If your principal is a payment institution, it is its responsibility to

~~register you as its agent. Assuming your principal is not an EEA firm, you are required to be registered on the Financial Services Register before you provide payment services. If your principal is an EEA firm, your principal will need to comply with the relevant Home State legislation relating to your appointment. You will not be able to provide payment services in the UK on behalf of an EEA firm unless it has also complied with the relevant requirements for the exercise of its passport rights.~~

...

**Q29. We are an agent of a credit institution for the purpose of providing payment services. Do we need to apply to the FCA and/or PRA for registration?**

No. If you are such an agent of a credit institution which is permitted to provide payment services in the UK, you are not required to be registered under the PSRs 2017. A credit institution will be permitted to provide payment services if it has a Part 4A permission to accept deposits, ~~or if it is an EEA credit institution exercising passport rights under paragraph 4 of Annex I to the Fourth Capital Requirements Directive.~~

...

**15.5 Negative scope/exclusions**

...

**Q40. Which types of payment card could fall within the so-called “limited network” exclusion (see PERG 15, Annex 3, paragraph (k))?**

...

- (d) ~~are valid only in a single EEA State~~ the United Kingdom, are provided at the request of an undertaking or a public sector entity, and are regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers which have a commercial agreement with the issuer.

...

**15.6 Territorial scope**

**Q45. We are a UK payment institution - when will we need to make a passport notification?**

~~You will need to make a notification if you intend to exercise passport rights either for the purposes of:~~

- ~~● establishment (for example, setting up a branch in another EEA State); or~~
- ~~● providing services in another EEA State.~~

~~As to the circumstances in which you may need to exercise these rights, this gives rise to issues of interpretation both under the PSRs 2017 and the local law of the EEA State in which you wish to do business. Our guidance below relates only to the PSRs 2017 and may differ from the approach in other EEA States. We cannot give guidance on the local law of other EEA States and you may therefore wish to take professional advice if you think your business is likely to be affected by these issues (for instance, if you are soliciting clients in other EEA States).~~

~~As regards the provision of payment services in other EEA States and passport notification, in our view the Commission Interpretative Communication (Freedom to provide services and the interest of the general good in the Second Banking Directive (97C 209/04)) provides a useful starting point, in particular because payment services form part of the CRD passport. On this basis, we would identify the following factors as being relevant to whether you need to make a passport notification.~~

~~Factors indicating the provision of payment services in another EEA State and the need for passport notification~~

~~The establishment of a physical presence (for example, offices) in another EEA State, for use by you, triggers the need for an establishment notification. The appointment of an agent established in another EEA State is likely to amount to an exercise of a right of establishment where the agent (a) has a permanent mandate in relation to payment services, (b) is subject to your management and control and (c) is able to provide payment services on your behalf. The installation of an ATM in another EEA State, where the ATM is your only presence in that other EEA State, gives rise to the need for a services (and not an establishment) notification.~~

~~Actions which are not sufficient alone to constitute cross-border services into another EEA State and the need for passport notification~~

~~The act of executing direct debits/standing orders/credit transfers from the UK where the payee is located in another EEA State. The act of remitting money from the UK to a payee in another EEA State. The act of executing a payment transaction to a payee located in another EEA State upon receipt of an instruction from the payer received by e-mail, text, or other electronic means (for example, internet banking). Where you provide an execution service enabling your credit or debit cardholders to use their credit card/debit card within the territory of another EEA State, for example for the purposes of a hotel bill (see the services in *PERG 15 Annex 2*, paragraphs (c) and (d)). [deleted]~~

**Q46. We are a non-EEA UK payment institution providing payment services to UK customers from a location outside the EEA UK. Do we require authorisation or registration under the regulations?**

No. When considering whether you fall within the scope of the PSRs 2017, our starting point is to consider whether a UK an EEA payment services provider would be providing cross-border services in analogous

circumstances (for example, when it provides payment services to EEA customers ~~from a location in the UK~~ in an EEA State other than the place in which it is located).

As regards the provision of cross-border payment services between EEA States, in our view the Commission Interpretative Communication (Freedom to provide services and the interest of the general good in the Second Banking Directive (97C 209/04)) provides a useful starting point, in particular because payment services form part of the CRD passport.

Accordingly, we would not generally expect a payment services provider incorporated and located outside the ~~EEA~~ UK to be within the scope of the regulations, if all it does is to provide internet-based and other services to UK customers from that location. ~~A non-EEA payment institution for these purposes would include firms incorporated in the Isle of Man or Channel Islands, both of which are outside the scope of the Second Payment Services Directive.~~

## 15.7 Transitional provisions

**Q47. We are a provider of account information and payment initiation services who was providing those services before 12 January 2016. Can we continue to provide those services after the PSRs 2017 come into force?**

Yes, initially. Providers of account information services and payment initiation services which were providing those services before 12 January 2016 and which continue to provide such services immediately before 13 January 2018 will be able to continue to do so after that date without registration or authorisation until the ~~EBA's~~ Regulatory Technical Standards on strong customer authentication and common and secure communication apply. However, while provided in reliance on this transitional provision, those services will be treated under the PSRs 2017 as if they were not account information services or payment initiation services. More information can be found in Chapters 3 and 17 of our Approach Document.

...

## 15 Annex 3 Schedule 1 Part 2 to the PSRs 2017: Activities which do not constitute payment services

...

(k)	Services based on specific payment instruments that can only be used in a limited way and meet one of the following conditions:	
	...	
	(iv)	are valid only in <del>a single EEA State</del> <u>the United Kingdom</u> , are provided at the request of an undertaking or a public sector entity, and are regulated by a

		national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers which have a commercial agreement with the issuer,
...		

...

## 16 Scope of the Alternative Investment Fund Managers Directive Regime

### 16.1 Introduction

#### Question 1.1: What is the purpose of the questions and answers in this chapter?

The purpose is to consider the scope of regulated activities specifically relating to the Alternative Investment Fund Managers Directive 2011/61/EU (“AIFMD”) as it was implemented in the *UK* through the *RAO*. The AIFMD regime in the United Kingdom is based on the AIFMD and the AIFMD level 2 regulation as well as other UK legislation, including the AIFMD UK regulation.

#### Question 1.2: What are the regulated activities specifically relating to AIFMD?

The *regulated activities* that specifically relate to the AIFMD regime in the United Kingdom are:

...

#### Question 1.3: What are the main ~~European~~ measures dealing with the scope?

~~As well as AIFMD itself, they are~~ They are the UK provisions which implemented the AIFMD, which include:

- (1) ~~Commission delegated regulation (EU) No 231/2013 the AIFMD level 2 regulation, supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (the AIFMD level 2 regulation); and~~
- (2) the ESMA document “Guidelines on key concepts of the AIFMD” ~~(the ESMA AIFMD key concepts guidelines ESMA/2013/611); and~~
- (3) the AIFMD UK regulation which largely implemented the AIFMD in the UK.

...

### 16.2 What types of funds and businesses are caught?



**Question 2.1: What is the basic definition of an AIF?**

~~An~~ For the purposes of the *AIFMD* regime in the *United Kingdom*, an *AIF* is a collective investment undertaking, including investment compartments of such an undertaking, which:

- (1) ...
- (2) ~~does not require authorisation pursuant to article 5 of the *UCITS Directive*~~ is not a *UK UCITS*.

The key elements of the definition are:

- ...
- (6) an *AIF* does not include ~~an undertaking that requires authorisation under article 5 of the *UCITS Directive*~~: a *UK UCITS*.
- ...

**Question 2.2: Does an AIF have to take a particular legal form?**

No.

- ...
- It does not matter where the *AIF* is formed. It may be formed under the laws of ~~any EEA State (including any part of the *UK*) or the *United Kingdom*~~ or any ~~*non-EEA state*~~ other country.
- ...

**Key elements of the definition****Capital raising**

...

**Question 2.12: Is a fund that only allows a single investor always outside the definition of an AIF?**

No. Under the *ESMA AIFMD Key Concepts*, an undertaking which is prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors if the sole investor:

...

- (2) consists of an arrangement or structure which in total has more than one investor for the purposes of the UK provisions which implemented the AIFMD.

...

### Defined investment policy

#### **Question 2.13: What indicative criteria could be taken into account in determining whether or not an undertaking has a defined investment policy?**

...

~~Under~~ Following the approach in the ESMA AIFMD key concepts guidelines, leaving full discretion to make investment decisions to the legal person managing an undertaking should not be used to circumvent the UK provisions of that implemented AIFMD. Part of the definition of an *AIF* is that there should be a defined investment policy. It is our view that this guidance is aimed at arrangements that whilst in form do not meet the definition, may in practice do so. For example, say that the manager has a legal discretion that is too wide to meet the definition of a defined investment policy but publishes a detailed investment policy (which is not legally binding) and leads the investors to expect that it will follow it. Under the approach in *ESMA AIFMD key concepts guidelines* that fund may still be an *AIF*.

### Collective investment undertaking

...

#### **Question 2.23: What are financial assets for the purpose of Question 2.22?**

Financial assets include investments under the UK provisions which implemented MiFID and investment life insurance contracts; real estate is not considered a financial asset.

...

#### **Question 2.25: What is the justification for the approach in the answers to Questions 2.15 (What is the basic definition of a collective investment undertaking?) to 2.23 (What are financial assets for the purpose of Question 2.22)?**

...

Such a wide interpretation would be unreasonable. It would be unreasonable to say that a detailed statement of commercial objects turns an undertaking into a *CIU*. It would be contrary to the early recitals of *AIFMD*. The exclusion for holding companies (see Questions 6.2 to 6.5) may not apply because the business may not be acting through subsidiaries. Therefore, it is necessary to consider the

policy objectives of the AIFMD regime in the United Kingdom.

The AIFMD regime in the United Kingdom is aimed at funds. ~~This is shown by the title of the Directive itself.~~ The lists of the main types of undertaking covered by the UK provisions which implemented AIFMD in the answer to Question 2.28 (What are the commonest types of AIFs?) are taken from formal *EU* documents, which assist in analysing *AIFMD's* the intended scope of the UK provisions which implemented AIFMD.

...

The reason for looking at whether an undertaking is set up as a fund is that it helps to make the distinction required by the AIFMD regime in the United Kingdom between a fund that invests in non-financial assets and an undertaking with a general commercial or industrial purpose and to reflect the fact that the AIFMD regime is aimed at funds.

However, it is clear from *AIFMD* and the *EU* documents referred to in the answer to Question 2.28 that private equity, hedge funds and venture capital funds are intended to be within the scope of the UK provisions that implemented AIFMD and the AIFMD regime in the United Kingdom. *AIFMD* expressly refers to these types of funds in a number of places.

Also, a fund controlling a business is more than an investor, as it is in a position to control and run that business. Indeed, one of the benefits of a private equity fund is that it can restructure and improve businesses of target companies for the long term. These funds may need an extensive staff to carry on the business of the fund. It is clear though that a fund that takes over a business can still be an *AIF*, as the UK provisions that implemented AIFMD has detailed requirements for *AIFs* that do that.

Another point is that, as far as financial businesses are concerned, it is not a question of identifying businesses that should not be subject to financial services legislation, as many financial services businesses that do not fall within the scope of the AIFMD regime in the United Kingdom are regulated under the UK provisions that implemented MiFID instead.

Therefore, the distinctions in the answers to Question 2.19 (Does that mean that if my undertaking deals in non-financial assets it can't be a CIU?) to 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund) do not work for all the types of undertakings to which the AIFMD regime in the United Kingdom is meant to apply. The distinction between an undertaking with a general commercial or industrial purpose and a financial purpose made by the *ESMA AIFMD key concepts guidelines* (see the answer to Question 2.18) is the key to reconciling the aim of excluding ordinary businesses and regulating funds.

...

## Overview of the AIF definition

**Question: 2.26: Could you give a brief overview of how I should go about applying the guidance in *PERG 2.2* in deciding whether AIFMD applies?**

- (1) Apply the ~~Directive~~ definition in the *AIFMD UK regulation* to see if it gives a clear answer. If it does, there is no need to go further.

...

**Question: 2.27: Should all the factors be considered together?**

Yes. As the *ESMA AIFMD key concepts guidelines* point out, appropriate consideration should be given to the interaction between the individual concepts of the definition of an *AIF*. An undertaking should not be considered an *AIF* unless all the elements in the definition (summarised in the answer to Question 2.1 (What is the basic definition of an *AIF*?)) are present. For example, undertakings which raise capital from a number of investors, but not with a view to investing it in accordance with a defined investment policy, should not be considered *AIFs* for the purposes of the *United Kingdom's AIFMD regime*.

...

**Examples of schemes that are AIFs and of ones that are likely not to be AIFs**

...

**Question 2.31: Is a timeshare scheme covered?**

No. Arrangements do not amount to an *AIF* if the rights of the investors are rights under a timeshare contract or a long-term holiday product contract as defined in the *Holiday Products, Resale and Exchange Contracts Regulations 2010*, because these are already regulated ~~under other European legislation~~.

...

**Question 2.40: Are individual investment management agreements caught?**

In principle, No.

An *AIF* is an investment undertaking which pools together capital raised from investors to invest it on a collective basis. The management of a portfolio of investments or other property on an individual client-by-client basis is covered by UK provisions that implemented *MiFID* rather than the *AIFMD regime in the United Kingdom*.

...

**Question 2.44: Can an issue of debt securities be an AIF?**

...

~~Further guidance from ESMA or the European Commission may be given in due course. However, given~~ Given that the list of the main types of undertaking covered by *AIFMD* taken from the Commission impact assessment referred to in the answer to Question 2.28 (What are the commonest types of AIFs?) does not mention debt instruments of this kind, it seems likely that they were not meant to be caught. ~~Pending any future clarification at the EU level, we~~ We shall assume that an SPV issuing debt securities in the way described in the answer to this question will not be an *AIF* if the arrangements meet the exclusion in paragraph 5 of the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (Debt securities).

...

**Question 2.46: Is a joint venture caught?**

Not normally.

There is no exclusion for joint ventures in the UK provisions which implemented *AIFMD*. However, recital (8) of *AIFMD* confirms that they are not covered. Therefore, to decide what undertakings are excluded as joint ventures, one must identify the principles on which the recital appears to be based. Another reason for looking at the underlying principles is that the term ‘joint venture’ does not have a precise legal meaning ~~in EU law or a commonly accepted meaning across the legal systems of all Member States~~.

...

**Question 2.50: Are family investment vehicles AIFs?**

No. There is no specific exclusion for family investment vehicles in the ~~operative parts of the~~ UK provisions which implemented *AIFMD*. Recital (7) of *AIFMD* says that a family office vehicle that invests the private wealth of investors without raising external capital is not an *AIF*. To decide what undertakings are excluded as family investment vehicles, one must identify the principles on which the recital appears to be based. The recital is making a distinction between external and internal capital. In our view this recital is based on the part of the *AIF* definition that requires capital to be raised. The recital explains that the *AIF* definition does not cover an arrangement in which the persons raising and providing capital are the same. Based on this, features of a family investment vehicle are likely to include:

(1) ...

...

**Question 2.51: What happens if a family group invests alongside others investors?**

The *ESMA AIFMD key concepts guidelines* say that the fact that a member of a pre-existing group invests alongside investors not being members of a pre-existing group, should not have the consequence that the part of the *AIF* definition requiring the raising of capital is not fulfilled. Whenever such a situation does arise, all the investors should enjoy full rights under the AIFMD regime in the United Kingdom. If a family group invests in an undertaking alongside other investors and the undertaking meets the other parts of the *AIF* definition, that undertaking is an *AIF* and the family members are treated as investors with the same protections under the AIFMD regime in the United Kingdom as other investors. However, please also see the answer to Question 2.52 (Is a co-investment vehicle caught?).

...

**Question 2.52: Is a co-investment vehicle caught?**

...

In our view, a co-investment vehicle of the type covered by this question should not be seen as an *AIF*. If the manager or employees only make a nominal investment, there is no *AIF* as nominal investments should be disregarded (see the answer to Question 2.11 (Is a fund that only allows a single investor caught?)). Even if the investment is more than nominal, the undertaking only raises capital from a single external investor, which is the institutional investor. Please see the answer to Question 2.50 (Are family investment vehicles *AIFs*?) as to why the *FCA* believes that the concept of an external investor is part of the AIFMD regime in the United Kingdom.

In addition, in our view, an investment by the manager should not normally change an undertaking into an *AIF*. The purpose of the AIFMD regime in the United Kingdom is to protect the investors from whom capital is raised as referred to in the answer to Question 2.1 (What is the basic definition of an *AIF*?) and Question 2.10 (You say that an undertaking needs to raise capital to be an *AIF*. What does capital raising involve?) by regulating, among others, the manager. In our view, this means that co-investment by the manager should not generally affect the status of an undertaking as an *AIF*.

...

**Question 2.54: Is an arrangement for multiple participation by a number of funds in a single investment, a single *AIF*?**

...

It is also necessary to take into account the UK provisions which implemented article 26 of *AIFMD* (Obligations for *AIFMs* managing *AIFs*)

which acquire control of non-listed companies and issuers: Scope), which contemplates that several *AIFs* may agree jointly to acquire control of a non-listed company without that resulting in all the *AIFs* being considered as a single *AIF*.

...

**Question 2.57: Is a firm that deals in financial instruments on its own account caught?**

As explained in the answer to Question 43 in *PERG* 13.5 (Exemptions from MiFID), *CIUs* are specifically exempt from the UK provisions which implemented MiFID, as are their depositaries and managers. An *AIF* is a *CIU* and an *AIFM* is a *manager*.

However, that does not mean that a company that buys and sells financial instruments for its own account is covered by the UK's AIFMD regime rather than covered by the UK provisions which implemented MiFID, or rather than excluded from both *AIFMD* and *MiFID*.

...

**Question 2.58: Is a bank or insurer caught?**

An undertaking authorised under the UK provisions which implemented the Solvency II Directive or the *CRD* will not be an *AIF*.

...

**Investment compartments**

**Question 2.63: Is each investment compartment a separate AIF?**

...

Another argument against this alternative approach is the requirement in the UK provisions which implemented article 5(1) of *AIFMD* that each *AIF* have a single *AIFM*. It would be difficult to meet that requirement if each compartment is subject to the management of the manager of the overall fund. It would also seem unlikely that the UK provisions which implemented AIFMD would get round that problem by implicitly prohibiting funds from having an overall manager.

...

**Other general points**

**Question 2.66: Does the interpretation of a CIU in PERG 16 apply to MiFID?**

*PERG* 16 is not intended to cover the meaning of a collective investment

undertaking in UK provisions which implemented other *EU* Directives. This reflects the fact that the *ESMA AIFMD key concepts guidelines* do not apply to the UK provisions that implemented *MiFID*.

### 16.3 Managing an AIF

...

#### **Question 3.7: What effect does delegation have?**

...

This answer reflects the AIFMD regime in the United Kingdom, which envisages that generally an *AIFM* may delegate functions without the delegate becoming the *AIFM* in place of the original manager, or the delegate becoming the *AIFM* alongside the original manager, in breach of the requirement that there be only one *AIFM*.

#### **Question 3.8: Does this mean that delegation can never affect who is doing the regulated activity of managing an AIF?**

...

This raises four questions. First, whether an *AIFM* that delegates in such a way as to make itself into a letter-box entity is still carrying on the *regulated activity of managing an AIF*. This is dealt with in Question 3.9. Secondly, whether the delegate is carrying on the *regulated activity of managing an AIF*. This is dealt with in Question 3.10. The third question is whether this only applies when the UK provisions which implemented article 20 of *AIFMD* (which contains the letter-box entity provisions elaborated by article 82) applies. This is dealt with by Question 3.12. The fourth question is what the test for a letter-box entity is. This is dealt with in Question 3.13.

#### **Question 3.9: Does delegation by the manager mean that it is no longer carrying on the regulated activity of managing an AIF?**

The fact that article 82 of the *AIFMD level 2 regulation* says that a letter-box entity shall no longer be considered to be the manager of the *AIF* would appear to mean that an *AIFM* that delegates in this way is no longer managing an *AIF*. However, in our view, an *AIFM* that delegates in such a way as to make itself into a letter-box entity is still carrying on the *regulated activity of managing an AIF*. The following points support this:

...

- (4) The UK provisions which implemented ~~Article~~ article 20 of *AIFMD* (which contains the letter-box entity provisions elaborated by article



82) ~~deals~~ deal with regulating how an *AIFM* should manage its *AIF*.

...

**Question 3.10: Does delegation by the manager mean that the delegate is carrying on the regulated activity of managing an AIF?**

The factors listed in the answer to Question 3.9 (Does delegation by the manager mean that it is no longer carrying on the regulated activity of managing an AIF?) support the view that a delegate of a letter-box entity does not *manage an AIF*. However, despite this, we believe that a delegation by the *AIFM* to a delegate can result in the delegate managing an *AIF* if the delegation results in the *AIFM* becoming a letter-box entity.

- (1) Recital (9) of *AIFMD* confirms that the letter-box entity provision is an anti-avoidance provision preventing circumvention of the UK provisions which implemented *AIFMD* by means of turning the *AIFM* into a letter-box entity. A provision of this kind reflects a more general principle that rights originally given by the UK provisions which implemented European law (such as the right of a manager to delegate or the right of a delegate to carry on its business without being authorised as an *AIFM*) should not be abused. It is important to know who the real manager of an *AIF* is, so as to know whether ~~an EEA State~~ an overseas regulator is responsible for its supervision or whether the *AIF* is managed from outside the ~~EEA~~ United Kingdom. If the real manager is not *managing an AIF*, it may not be carrying on any *regulated activity* and may not fall under any ~~EEA~~ financial services regulation, even though effective implementation of *AIFMD* would ~~require~~ have required the situation to be regularised.

...

**Question 3.12: Do the answers to Questions 3.7 to 3.11 apply just to delegation by a full-scope UK AIFM?**

No. For example, they would be relevant to whether a delegate in the *UK* is *managing an AIF* if it accepts a delegation from an overseas manager. We take this approach for the following reasons.

- (1) The arguments in Question 3.10 (Does delegation by the manager mean that the delegate is carrying on the regulated activity of managing an AIF?) are also in favour of the view that the effect of delegation on a delegate should not be confined to delegation by an authorised *AIFM*. In any case, it would be anomalous for delegation to affect who is *managing an AIF* only when the UK provisions which implemented article 20 of *AIFMD* ~~applies~~ apply, particularly given that article 82 is, in our view, an anti-avoidance provision (see the answer to Question 3.10).

...

**Question 3.13: What is the test for a letter-box entity?**

In our view, the test of whether delegation results in the delegate *managing an AIF* is decided by article 82 of the *AIFMD level 2 regulation* in circumstances when article 82 and the UK provisions which implemented article 20 of AIFMD apply to the delegating *AIFM*.

When the UK provisions which implemented article 20 ~~does~~ do not apply we look at whether the delegation is to such a degree that the manager can no longer be considered to be carrying out the activities in the answer to Question 3.1 (What does managing an AIF mean?). We take the various factors elaborated in article 82 into account but they will not necessarily decide the matter because article 82 is, on its face, linked to article 20 and article 51ZC(3) of the RAO does not specifically refer to article 20 or 82.

...

**Question 3.16: Can an AIF in the form of a limited partnership under the Limited Partnerships Act 1907 appoint its general partner as the AIFM?**

...

On the face of it the answer should be No. The starting position is that if an *AIF* is managed by the body that has responsibility for governing it under the legislation under which the *AIF* is formed, the *AIF* is internally managed, particularly if there is no governing body that appoints and supervises the manager and the manager is a member of that *AIF*. A general partner is a partner and there will usually be no governing body separate from the general partner. Under this approach, a limited partnership would be internally managed, which would be contrary to the AIFMD regime in the United Kingdom, as an *AIFM* must be a legal person and an English and Welsh limited partnership is not a legal person.

...

**16.4 Acting as a depositary of an AIF**

...

**Question 4.2: What does depositary mean?**

For the purposes of paragraphs (1) to (3) of the answer to Question 4.1, depositary means:

- (1) a person appointed in compliance with the requirement for the *AIFM* to appoint a depositary in the UK provisions which implemented article 21.1 of AIFMD; or

(2) ...

...

**Question 4.3: The AIFMD allows the depositary to delegate some functions to a third party. Is that third party acting as the depositary of an AIF?**

No. The UK provisions which implemented Article article 21 of AIFMD envisages envisage that a depositary remains the sole depositary even if, in accordance with that article, it delegates certain of its functions.

...

## 16.6 Exclusions

**Question 6.1: What exclusions from the regulated activities specific to AIFs are there?**

The following table lists the exclusions. Some exclusions are relevant to the definition of an *AIF*, some to the definition of an *AIFM* and some to both.

Table: exclusions		
Entities that are not <i>AIFs</i>	<i>Persons</i> excluded from the definition of <i>managing an AIF</i>	Where further <i>Handbook</i> material can be found
An institution for occupational retirement provision which <del>falls within the scope of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement</del> <u>is an occupational pension scheme, within the meaning of section 1(1) of the Pension Schemes Act 1993</u>	An institution for occupational retirement provision which <del>falls within the scope of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in article 2.1 of that directive, or the investment managers appointed pursuant to article 19.1 of that directive, in so far as</del>	Question 2.32

	they do not manage <i>AIFs</i> , <u>is an occupational pension scheme, within the meaning of section 1(1) of the Pension Schemes Act 1993</u>	
...		
	An <i>AIFM</i> , the registered office of which is not in an <del>EEA State</del> <u>the United Kingdom</u>	Question 8.3
...		
<p>Note 2: In general the meaning of <i>AIF</i> in the RAO is the one in the <i>AIFMD UK Regulation</i>. The exclusions from the <i>AIF</i> definition noted in this table come from the <i>AIFMD UK Regulation</i>. <del>However, the RAO article dealing with <i>managing an AIF</i> says that any expression used in that article which is not defined in the <i>AIFMD UK Regulation</i> and is used in <i>AIFMD</i> has the same meaning as in that directive. This makes no difference as, in our view, the <i>AIFMD UK Regulation</i> implements <i>AIFMD</i>.</del></p>		

**Question 6.2: Is a holding company subject to the AIFMD regime in the United Kingdom?**

...

For these purposes, a holding company means a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy(s) through its subsidiaries, associated companies or participations in order to contribute to their long-term value and which is either a company:

- (1) operating on its own account and whose shares are admitted to trading on a regulated market in the ~~European Union~~ United Kingdom; or

...

**Question 6.3 How wide does the holding company exclusion go?**

Broadly speaking, therefore, an undertaking will be able to use the holding company exclusion if:

...

(2) ...

...

However, the exclusion envisages that an undertaking, whose main purpose is generating returns for its investors by means of divestment of its subsidiaries or associated companies, may still be excluded from the AIFMD regime in the United Kingdom if its shares are listed.

...

The question then is how the recital and the exclusion are to be reconciled.

There is guidance on this on the *AIFMD* section of the European Commission's webpages "Questions on Single Market Legislation". The answer to Question ID 1146 says that the definition has to be read as a whole and jointly with recital (8). Consequently, private equity as such should not be deemed to be a holding company. The concept of "operating on its own account" should also be interpreted in the context of the requirement that the shares of such holding company are admitted to trading on ~~an EU~~ regulated market in the United Kingdom. Hence, says the guidance, this means that a holding company is a separate legal entity that carries out the business of owning and holding equity shares of other companies without the intent to dispose of such shares. Such business is done on the own account of the holding company and not on behalf of a third party. The answer says that the exemption is meant to cover "large corporates such as Siemens or Shell".

...

(3) ...

...

(6) the AIF's shares are admitted to trading on a regulated market in the ~~European Union~~ United Kingdom.

...

**Question 6.4: Is the holding company exclusion always available where the fund holds controlling stakes in the businesses in which it invests so that the businesses are its subsidiaries?**

...

The European Commission's Q&A about *AIFMD* say (Question ID 1146) that it is inherent in the concept of a holding company that all operations apart from those related to the ownership of shares and assets are done via its subsidiaries, associated companies or participations. In our view, the exemption is available only to the extent that the undertaking is acting as a holding company. It does not matter if the undertaking carries out other activities but any such activities will not get the

benefit of the holding company exclusion. Those activities should be entirely ancillary to its role as a holding company or otherwise outside the scope of the AIFMD regime in the United Kingdom. Thus, for example, a holding company may also provide services to other members of the group such as raising capital through the capital markets, treasury functions and human resources services.

...

...

## 16.8 Territorial scope

...

### Question 8.3: Can the AIF activities be carried on by an overseas firm?

As explained in the answer to Question 6.1 (What exclusions from the regulated activities specific to AIFs are there?), the *regulated activity of managing an AIF* does not apply to an *AIFM* whose registered office is not in ~~an EEA State~~ the United Kingdom. Regulation 81 of the *AIFMD UK Regulation* restricts the scope of this exclusion from the date that ~~the EU~~ HM Treasury brings in certain further legislation relating to ~~non-EU AIFs~~ non-UK AIFs and *AIFMs*.

The *regulated activity* of acting as a depository of an *AIF* can apply to a person whose registered or head office is outside the *UK*.

...

**Part 2: Comes into force on 1 April 2019, immediately after the changes made by the Claims Management Instrument 2018 (FCA 2018/56) come into force, or on exit day as defined in the European Union (Withdrawal) Act 2018, whichever date is the later.**

## 2 Authorisation and regulated activities

...

### 2.8 Exclusions applicable to particular regulated activities

...

Regulated claims management activity

2.8.14D G The *Regulated Activities Order* excludes a number of activities from *regulated claims management activity*. The exclusions include:

...

- (3) exclusion from *seeking out, referrals and identification of claims or potential claims* for providers of referrals who meet all the following

conditions (article 89V):

...

- (e) the introducer, in obtaining and referring those details, has complied with ~~the provisions of the Data Protection Act 2018,~~ the Privacy and Electronic Communications (EC Directive) Regulations 2003, ~~the General Data Protection Regulation (EU)~~ *data protection legislation* and the *Unfair Trading Regulations* (but this condition does not apply in the case of a referral to a legal practitioner, or to a firm, *organisation*, or *body corporate* that carries on the activity through legal practitioners); and

...

## **8 Financial promotion and related activities**

...

### **8.14 Other financial promotions**

...

[*Editor's note:* PERG 8.14.18G is deleted in Part [1] of this instrument with effect from exit day as defined in the European Union (Withdrawal) Act. If exit day is before 1 April 2019, then the effect of this deletion is that the amendments made to PERG 8.14.18G by instrument FCA 2018/56 could not take effect. We are showing the provision as [deleted] here for clarity and completeness.]

Nationals of EEA States other than the United Kingdom (article 36)

8.14.18 G [deleted]

## Annex C

**Amendments to the Responsibilities of Providers and Distributors for the Fair Treatment of Customers (RPPD)**

In this Annex, underlining indicates new text and striking through indicates deleted text.

...

*Distributor responsibilities*

1.25

...

<b>Notes:</b>	
(1)	The Guide represents our view based on the law, regulation and other circumstances that exist as at the publication date, but also takes into account changes to the Handbook including those <del>to implement</del> <u>that implemented</u> the Markets in Financial Instruments Directive (MiFID).
...	



## Annex D

### Amendments to the Unfair Contract Terms Regulatory Guide (UNFCOG)

In this Annex, striking through indicates deleted text.

#### 1 The Unfair Contract Terms and Consumer Notices Regulatory Guide

...

#### 1.3 The CRA

Terms and notices to which the CRA applies

- 1.3.1 G (1) ...
- (2) Terms or notices cannot be reviewed for fairness within the meaning of the *CRA* if they reflect:
- (a) mandatory statutory or regulatory provisions; or
  - (b) the provisions or principles of an international convention to which the *United Kingdom* ~~or the EU~~ is a party.

## Annex E

### Amendments to the Wind-down Planning Guide (WDPG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

## 2 Application and interpretation

### 2.1 Application and interpretation

- 2.1.1 G This guide aims to assist *FCA* solo-regulated *firms* authorised with a *Part 4A permission* ~~and for which the *FCA* is the *Home State regulator*~~ with wind-down planning. It is not relevant where a *firm* is already in administration or liquidation, nor is it directly relevant to recovery strategies a *firm* may engage in as part of its recovery plan. While the guide does not impose any obligation on a *firm* to create a wind-down plan, it shows what an effective wind-down plan might include.

...

## 3 The concept and process of wind-down planning

### 3.1 What is wind-down planning?

...

- 3.1.6 G We know that some *firms* may have carried out similar planning exercises under different but related regulatory processes (e.g. *ICAAP*, *RRD*). This guide does not replace or re-interpret those processes. However, *firms* may want to take this guide into account to further strengthen their wind-down planning as well as to consider how consistent these processes are with one another.

[**Note:** Internal Capital Adequacy Assessment Process (*ICAAP*) is for *firms* which are subject to the *UK provisions which implemented CRD IV / BIPRU*. Some of these *firms* are also subject to the *UK provisions which implemented the Recovery and Resolution Directive (RRD)*.]

...

### 3.4 Effective risk management

...

- 3.4.6 G *Firms* may consider potential options for recovery in the face of adverse business conditions, such as selling part of the business or seeking a capital injection. This is known as *recovery planning*. Even if a *firm* has carried out *recovery planning*, wind-down planning can still be relevant as there is no guarantee that recovery options would save the *firm's* business.

[**Note:** Some *firms* are required to prepare *recovery plans*, i.e. those subject to the UK provisions which implemented the Recovery and Resolution Directive (RRD).]

## Annex F

**The MiFID 2 Onshoring Guide (M2G)**

In this Annex, underlining indicates new text and striking through indicates deleted text.

## **1 ~~Implementation~~ Onshoring for Trading Venues & Data Reporting Service Providers**

### **1.1 Background**

1.1.1 This guide sets out an overview of the FCA’s approach to ~~transposition~~ onshoring of the recast Markets in Financial Instruments Directive 2 (MiFID 2) in the MAR and REC sourcebooks, ~~by explaining how they fit within the context of the overall implementation of the legislation at a UK and EU level.~~ “Onshoring”, for these purposes, refers to the process by which law deriving from EU legislation at exit day is retained or adapted, post exit day. This guide focuses on the regulatory regime in MiFID 2 for UK trading venues (as defined by article 4(1)(24) ~~MiFID 2(16A)~~ MiFIR: this term comprises UK regulated markets, multilateral trading facilities and organised trading facilities, but not systematic internalisers) and UK data reporting services providers (DRSPs)).

1.1.2 ~~MiFID 2 is made up of MiFID (2014/65/EU) and the Markets in Financial Instruments Regulation (MiFIR – 600/2014/EU). MiFID is addressed to all Member States and being a directive is binding as to the result to be achieved, albeit leaving the choice of form and methods of implementation to national authorities. The UK has implemented the directive through a combination of primary legislation, secondary legislation and regulatory rules. As an EU regulation, MiFIR is binding in its entirety and directly applicable, its content becomes law in the UK without the need for domestic legislative intervention.~~ [deleted]

1.1.3 MiFID 2 enables the Commission to make secondary legislation in several places. That legislation takes the form of a combination of delegated acts (for example as provided for in article 4(2) MIFID to specify elements of the definitions), regulatory technical standards (RTS) and implementing technical standards (ITS). Delegated acts under MiFID 2 are both drafted and made by the Commission, after it receives advice from the European Securities and Markets Authority (ESMA), and may take the form of either directives or directly applicable regulations. As for RTS and ITS, these are prepared in draft by ESMA and subject to public consultation, before endorsement and making by the Commission; both take the form of regulations and so are directly applicable. RTS and ITS feature, in particular, in the MiFID 2 provisions relating to trading venues and DRSPs. After exit day, in the United Kingdom, in broad terms, the former role of the Commission is discharged by the Treasury and ESMA’s functions are performed by the FCA. For further details, see the Financial Regulators’ Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018.

1.1.4 You can be subject to a MiFID derived or MiFIR requirement, even if you are not an authorised financial institution. ~~This is the effect of article 1 MiFID and article 1 MiFIR. In the case of article 1 MiFID, this regulation 30 of the~~ Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 applies algorithmic trading requirements to certain persons exempt under MiFID, where they are members of a regulated market or multilateral trading facility (article 1(5) MiFID). Similarly, article 1 MiFIR requires non-financial counterparties above the clearing threshold in article 10 of the European Market Infrastructure Regulation (‘EMIR’) (Regulation 648/2012/EU. See our EMIR webpage (<https://www.fca.org.uk/markets/emir>) for further details about non-financial counterparties and the clearing threshold) to comply with the obligations in Title V MiFIR. This means trading certain classes of derivatives on organised venues only, UK regulated markets, UK multilateral trading facilities (MTFs), UK organised trading facilities (OTFs) and permitted third country venues (article 28 MiFIR). EEA venues are treated as third country venues for these purposes.

## **1.1A** **Transitional onshoring provisions**

1.1A.1 The effect of section 3 of the European Union (Withdrawal) Act 2018 is that “direct EU legislation” became part of UK law, as at exit day (and is known as “retained EU law” in accordance with section 6 of the same legislation). As such, MiFIR and all directly applicable regulations made under MiFID and MiFIR, including the MiFID Org Regulation (Commission Delegated Regulation 2017/565), the MiFIR Delegated Regulation (Commission Delegated Regulation 2017/567) and technical standards became part of UK law, as at exit day.

1.1A.2 Each of these pieces of legislation is subject to the power in section 8 of the European Union (Withdrawal) Act 2018 to deal with deficiencies arising out of the United Kingdom’s withdrawal from the EU. The Treasury has exercised this power in the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (the ‘Exit Regulations’) to amend each of the following:

- MiFIR;
- MiFID Org Regulation;
- MiFIR Delegated Regulation;
- Data Reporting Services Regulations; and
- The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017.

A reference to any of the above in the remaining text of this guide is to the legislation as amended by the Exit Regulations.

## **1.2** **MiFID implementation onshoring in UK legislation and the FCA**

## Handbook

- 1.2.1 The UK's ~~implementation~~ onshoring of the directive takes the form of a combination of legislation made by HM Treasury, in the form of a number of statutory instruments, and rules contained in the FCA Handbook and the PRA Rulebook.
- 1.2.2 The Treasury legislation is set out in the following statutory instruments as amended by the Exit Regulations, ~~(links to statutory instruments relate to the instrument when made and users may need to update their searches of the relevant legislation):~~
- Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 ~~{('MiFI regulations'), SI 2017/701; <http://www.legislation.gov.uk/uksi/2017/701/contents/made>~~
  - The Data Reporting Services Regulations 2017 ('DRS regulations'), SI 2017/699: ~~<http://www.legislation.gov.uk/uksi/2017/699/made>~~
  - Financial Services and Markets Act 2000 (Regulated Activities) ~~(Amendment) Order 2017 2001 ('RAO Amendment Order'), SI 2017/488 2001/544; <http://www.legislation.gov.uk/uksi/2017/488/contents/made>~~
  - **The MiFI regulations amend** Part XVIII FSMA and the Recognition Requirements Regulations ('RRRs') applying to recognised investment exchanges. This includes implementing the regulatory regimes relating to a market operator operating an organised trading facility and data reporting services, as well as obligations in regard to the management body and systems and controls. It also includes applying algorithmic trading requirements in relation to unauthorised entities and position management requirements for trading venues on which commodity derivatives are traded. ~~The Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013, SI 2013/419 is updated by the MiFI regulations so that FCA supervisory and enforcement powers under FSMA may be applied in the event of breach of MiFIR and regulations made under MiFID and MiFIR.~~
  - **The RAO Amendment Order imposes reflects** scope changes arising out of MiFID, notably the ~~new~~ investment service of operating an organised trading facility and the extension of "financial instruments" to include emission allowances. The onshoring amendments to Part 1 of Schedule 2 to the RAO essentially preserve the pre-exit day scope of regulation relating to physically-settled power forward contracts.
- 1.2.3 ~~The amendments to the~~ The FCA Handbook complement complements the Treasury legislation, referred to above, so for example:
- REC contains, in REC 2, extracts of the RRRs ~~as amended by the MiFI regulations~~ and 'Notes' signposting ~~further~~ directly applicable

technical standards ~~made under MiFID or MiFIR~~ which are relevant to recognised investment exchanges' compliance with certain RRRs. These include having adequate systems and controls for algorithmic trading (see REC 2.5), and sufficient price transparency to ensure fair and orderly trading (see REC 2.6). ~~Where REC 2 previously copied out EU legislation which has been repealed by MiFID or MiFIR, this has now been deleted and, where appropriate, replaced with a simple reference to the equivalent MiFID or MiFIR provision.~~

- REC 3, which contains ~~existing~~ FCA rules requiring certain notifications to be made by RIEs to the FCA, ~~has been amended to include also includes~~ 'Notes' signposting ~~further new~~ notification requirements set out in the ~~amended~~ RRRs or ~~directly applicable~~ technical standards ~~made under MiFID or MiFIR~~.
- MAR 5 ~~is amended to apply~~ applies the MiFID requirements on systems and controls for algorithmic trading to MTFs, including requirements in the areas of systems resilience, algorithmic market-making, tick sizes and clock synchronisation. It is also ~~amended to align~~ aligns further the organisational requirements on MTFs with those for regulated markets, in the areas of conflicts of interest and risk management, and the management of technical operations. Rules on the suspension and removal of financial instruments also align with those for regulated markets. ~~The rules concerning pre and post transparency are removed, given the directly applicable nature of these requirements imposed by MiFIR, while~~ chapter contains guidance on the ability to register an MTF as an SME Growth Market ~~is new~~.
- MAR 5A ~~introduces~~ imposes a regime for OTFs. OTFs are distinguished from MTFs and regulated markets by the requirement for discretionary order execution and by trading only being permitted on these venues in bonds, structured finance products, emission allowances or derivatives. Restrictions on proprietary and matched principal trading applicable to MTFs and regulated markets are more relaxed for OTFs. In other respects, however, the regulation of these venues aligns with that for MTFs, and also, therefore, substantially with that for regulated markets.
- MAR 6 ~~is amended to remove areas relating to systematic internalisers that are now covered by directly applicable regulations—in particular, by Title III of MiFIR. The notification requirement for~~ relates to systematic internalisers ~~remains, however,~~ and the article 27(3) MiFID execution quality publication requirement (applying to systematic internalisers, amongst other execution venues). This requirement has been ~~incorporated~~ preserved as part of onshoring as a rule (see MAR 6.3A).
- ~~MAR 7 concerning disclosure of over the counter trades conducted by systematic internalisers is deleted because this subject matter is now covered by Title III of MiFIR.~~

- MAR 7A ~~transposes~~ corresponds to article 17 of the recast MiFID for ~~authorised firms~~. It imposes systems and controls and notification requirements on firms engaging in algorithmic trading, as well as providing for market making obligations where a firm engages in a high-frequency algorithmic trading technique. It also imposes systems and controls and notification requirements on firms providing direct electronic access services. The services of a general clearing member are ~~now~~ also subject to ~~new~~ rules, of a similar nature.
- MAR 9 provides directions and guidance applicable to the operation of the ~~new~~ data reporting services regime, set out in the DRS regulations.

...

1.2.4 More generally, where requirements in MiFID ~~have been transposed in~~ correspond to FCA rules, the source of the corresponding requirement is referred to below the relevant provision, for example MAR 5A.3.5: -

5A.3.5 R A firm must not engage in:

- (1) *matched principal trading* on an *OTF* operated by it except in bonds, *structured finance products*, *emission allowances* and *derivatives* which have not been declared subject to the clearing obligation in accordance with article 5 of *EMIR*, where the client has consented; or
- (2) *dealing on own account* on an *OTF* operated by it, excluding *matched principal trading*, except in sovereign debt instruments for which there is not a liquid market.

[**Note:** article 20(2) and (3) of *MiFID*]

1.2.5 ~~Amendments to the~~ The scope of MIFID ~~are~~ is the subject of guidance in PERG 2 and 13.

### 1.3 Markets in Financial Instruments Regulation ('MiFIR')

1.3.1 ~~Although MiFIR is a separate piece of legislation, recital 7 of the recast MiFID notes 'both instruments should form the legal framework governing the requirements applicable to investment firms, regulated markets, data reporting services providers and third country firms providing investment services or activities in the Union. The Directive should therefore be read together with that Regulation'. [deleted]~~

1.3.2 ~~As MiFIR is directly applicable, we have not copied out its content into the Handbook. This means that, for example, the previous Handbook material in REC 2 and MAR 5 relating to transparency requirements for recognised investment exchanges and MTFs under the existing MiFID have been deleted and the new MiFIR provisions referenced instead in the relevant sections of REC 2 and MAR 5. [deleted]~~



1.3.3 MiFIR as onshored ~~also~~ provides for delegated acts and technical standards on amongst other things:

- price transparency for equity and derivative instruments, see REC 2, MAR 5 and MAR 5A;
- straight-through processing of clearing for derivative instruments, see REC 2, MAR 5 and MAR 5A; and
- transaction reporting, see SUP 17A.

#### 1.4 ~~MIFID 2 technical~~ Technical standards and delegated acts

1.4.1 ~~MiFID 2 also requires the Commission, in certain places, to adopt technical standards, submitted by ESMA. These technical~~ Technical standards, which take the form of regulatory technical standards or implementing technical standards, are, as their names suggest, technical in nature ~~and according to articles 10 and 15 of the ESMA regulation (1095/2010/EU) (see <http://data.europa.eu/eli/reg/2010/1095/oj>) ‘... shall not imply strategic decisions or policy choices’.~~

...

1.4.3 ~~Given their directly applicable nature and length, we~~ We have not copied out the onshored technical standards into the Handbook, but instead adopted the signposting convention illustrated above. The technical standards appear on the FCA website

1.4.4 In addition to enabling the FCA and PRA to make technical standards, ~~MiFID II the Exit Regulations also contains onshore~~ delegated acts prepared by the Commission, itself, in the form of regulations (see, for example, references to the MiFID Org Regulation (Commission Delegated Regulation (EU) 2017/565) and the MiFIR Delegated Regulation (EU) 2017/567).

#### 1.5 ESMA Guidelines

1.5.1 ~~In addition to being required to submit draft technical standards to the Commission, where required by MiFID and MIFIR, ESMA may be required to issue guidelines, for example, on the requirements for the management body of a market operator and a data reporting services provider. [deleted]~~

...

1.5.3 As a general practice, when the FCA ~~decides~~ decided to comply with the guidelines issued by ESMA it ~~will signpost~~ signposted a reference to these by means of a note at the beginning of the relevant section of the Handbook. ~~Although the FCA is required to notify ESMA whether it will comply or intends to comply with the guidelines, with reasons for any non-compliance, financial market participants are not required to report to ESMA (for notification of regulatory breaches by firms to the FCA, see, generally, SUP 15). The FCA have issued non-handbook guidance setting out the FCA’s~~

approach to ESMA guidelines after exit day. The guide can be found on the FCA website at [URL to be added].

## 1.6 Third country firms

1.6.1 MiFIR and the ~~EU~~ onshored regulations ~~made under MiFID 2~~ forming part of “retained EU law” (see M2G 1.1A.1G) apply to ~~EU UK firms and EEA firms (when adopted by the EEA states)~~. For the UK branches of ~~non-EEA non-UK~~ firms (third country firms), these regulations are not of general application and it is necessary to ensure, ~~via domestic measures~~, that these branches do not receive more favourable treatment than their ~~EU UK~~ counterparts (see ~~Recital 109 of the recast MiFID~~). A new rule, GEN 2.2.22AR, is included for this purpose.

1.6.2 MiFIR, the MiFIR Delegated Regulation and the MiFID Org Regulation apply to EEA firms with temporary Part 4A permissions to the extent specified in the Exit Regulations. Technical standards deriving from MiFID apply to these firms to the extent provided for by GEN 2.2.29R.

## 1.7 Overview

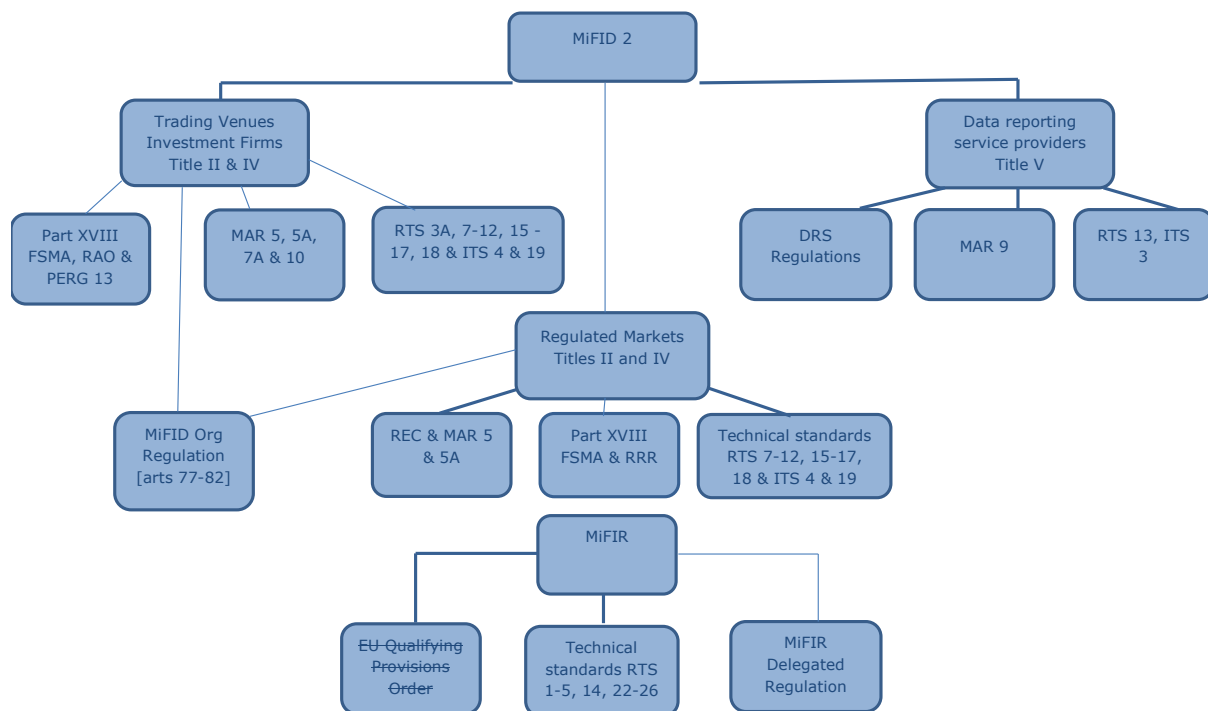
1.7.1 The diagram in M2G 1 Annex 1 provides an overview of trading venue and DRSP requirements ~~deriving from MiFID 2~~ and the location of their implementation. The references to “technical standards” are to those described in the FCA Handbook Glossary. ~~The technical standards can be accessed from the Commission website.~~

1.7.2 In addition to MAR and other requirements noted in the overview, firms operating an MTF or OTF will be subject to other ~~MiFID~~ requirements applying elsewhere in the Handbook, notably in SYSC, COBS and SUP 17A.

1.7.3 SUP 17A sets out rules and guidance for transaction reporting and supply of reference data: it also cross-refers to the relevant ~~EU~~ legislation in articles 26 and 27 MiFIR and MiFID RTS 22 and 23 (see ~~Glossary (MiFID 2) Instrument 2017 (FCA 2017/36)~~ at [https://www.handbook.fca.org.uk/instrument/2017/FCA\\_2017\\_36.pdf](https://www.handbook.fca.org.uk/instrument/2017/FCA_2017_36.pdf)). It further confirms that we will allow operators of trading venues and investment firms to use third party technology providers when supplying financial instrument reference data to the FCA.

## 1 Annex 1 MiFID and Market Infrastructure: An Overview

Annex 1 An overview of MiFID and Market Infrastructure:



...

## 2 ~~Implementation for~~ Onshoring of senior management arrangements and systems and controls obligations

### 2.1 Background

- 2.1.1 This guide sets out an overview of the FCA's approach to the ~~transposition~~ onshoring of the Markets in Financial Instruments Directive II (MiFID II) in the SYSC sourcebook. ~~It explains how this fits within the context of the overall implementation of the legislation at EU and UK levels.~~ The guide focuses on the regulatory regime for UK firms and is aimed at UK MiFID investment firms, that is investment firms ~~authorised~~ authorised that would require authorisation under MiFID and credit institutions carrying on MiFID business, and MiFID Optional exemption firms. The latter comprise advisers or arrangers who do not hold client money or assets and meet other conditions imposed under article 3 MiFID II, so as to be exempt from the Directive's full application. See PERG 13 Q49, ~~as updated by the Conduct, Perimeter Guidance and Miscellaneous Provisions (MiFID 2) Instrument 2017, FCA 2017/39.~~
- 2.1.2 ~~MiFID II (2014/65/EU) is addressed to all Member States and is binding as to the result to be achieved, albeit leaving the choice and method to national authorities. The UK has implemented the Directive via a combination of primary legislation, secondary legislation and regulatory rules. [deleted]~~
- 2.1.3 MiFID II contains revised senior management and systems and controls obligations relating to firms. With the exception of one aspect ~~of the implementation~~ of the whistleblowing obligations in MiFID II ~~by way of~~

contained in primary legislation, transposition onshoring of the MiFID II Level 1 requirements takes the form of regulatory rules. The relevant FCA rules are mainly contained in SYSC but PRA-authorised firms will also be subject to rules in the General Organisational Requirements in the PRA Rulebook.

2.1.4 ~~MiFID II also enables the European Commission to make secondary legislation which is of particular importance in the case of systems and controls. The Commission Delegated Regulation 2017/565 of 25 April 2016 (the MiFID Org Regulation (see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R0565>)), as onshored by the Exit Regulations, contains detailed organisational requirements for those firms to which it applies, including authorised MiFID investment firms and credit institutions. These ‘Level 2’ obligations supplement the more general systems and controls obligations in MiFID II itself. As an EU regulation, the MiFID Org Regulation is binding in its entirety and directly applicable, and it becomes law in the UK without the need for domestic legislation.~~

2.1.5 ~~Many of the obligations in the MiFID Org Regulation feature in the MiFID implementing Directive (2006/73/EC) and so were implemented in SYSC by way of regulatory rules. The use of a regulation in MiFID II to impose many detailed requirements necessitates revisiting the corresponding rules in SYSC implementing MiFID and adapting the structure of SYSC. [deleted]~~

## 2.2 MiFID I implementation and SYSC [deleted]

2.2.1 ~~The main Handbook sourcebook for implementing the MiFID requirements in relation to the management body, general organisational requirements, conflicts of interest and whistleblowing is SYSC. As regards the obligations on the management body, general organisational requirements and conflicts of interest, the corresponding requirements in MiFID I were implemented using the ‘common platform’. The common platform requirements in SYSC 4 to 10 covered the following areas:~~

- ~~● SYSC 4 (General organisational requirements including persons who effectively direct the business and responsibility of senior personnel);~~
- ~~● SYSC 5 (Employees, agents and other relevant persons);~~
- ~~● SYSC 6 (Compliance, internal audit and financial crime);~~
- ~~● SYSC 7 (Risk control);~~
- ~~● SYSC 8 (Outsourcing);~~
- ~~● SYSC 9 (Record keeping);~~
- ~~● SYSC 10 (Conflicts of interest).~~

2.2.2 ~~The common platform was initially devised to ensure that a single set of requirements apply to firms subject to MiFID and CRD, as opposed to similar, but different, regulatory requirements arising from these Directives being imposed upon the same business functions. A unified set of requirements is~~

simpler and more cohesive for firms, and was supported in consultation responses. The common platform requirements in SYSC 4-10 were then adapted and extended to non MiFID firms, including investment advisers and arrangers subject to the article 3 MiFID exemption. The adaptation of the common platform requirements took the form of applying various rules as guidance to these firms, as set out in the application tables in SYSC 1 Annex 1 Part 3.

...

## 2.4 MiFID II ~~implementation~~ onshoring and SYSC

2.4.1 The combination of senior management and systems and controls requirements for firms in a directive and regulation means that FCA rules are ~~still required in order used to implement onshore~~ the provisions in the directive. As such, the approach to ~~implementation onshoring~~ of MiFID II retains the familiar approach of the common platform ~~but adapts the existing structure of SYSC in and the following principal ways:~~

- ~~updates~~ the application of common platform requirements in SYSC 1 Annex 1 Part 3 and ~~creates a new~~ Table B for MiFID optional exemption firms;
- ~~creates a new~~ rule which has the effect, amongst other things, of extending the application of certain parts of the MiFID Org Regulation to all of a UK MiFID investment firm's designated investment business, MiFID or otherwise (SYSC 1 Annex 1 2.8AR) (in the Handbook, the definition of 'MiFID investment firm' captures any UK firm to which MiFID would apply if the United Kingdom were a Member State);
- ~~creates a new~~ rule which extends the application of the MiFID Org Regulation in relation to general organisational requirements, compliance, risk management, internal audit, responsibility of senior management, remuneration policies and practices and outsourcing to all of a MiFID optional exemption firm's designated investment business, by way of rule or guidance depending on the individual provision (SYSC 1 Annex 1 3.2CR discussed further in M2G 2.5);
- ~~uses~~ signposting references in the application provisions to individual SYSC chapters to identify the relevant articles of the MiFID Org Regulation which supplement the rules implementing the MiFID requirements. These are also listed in ~~the new~~ Table C in SYSC 1 Annex 1;
- ~~creates a new~~ chapter (SYSC 10A) on recording telephone conversations and electronic communications ~~to implement new obligations imposed by MiFID II, supplemented by the MiFID Org Regulation~~;
- ~~creates a new~~ section (SYSC 18.6) on the whistleblowing obligations

imposed upon MiFID investment firms ~~and which includes a~~ signposting mechanism pointing firms to similar obligations ~~in~~ derived from other single market legislation; and

- ~~creates a new section (SYSC 19F) to implement a new obligation in~~ respect of remuneration and performance management of sales staff.

...

## 2.8 Other firms- Collective portfolio management investment firms and authorised professional firms

This short summary focuses only on MiFID II ~~transposition~~ onshoring and not obligations arising under other single market legislation.

2.8.1 A collective portfolio management investment firm ('CPMI') ~~is a firm which is subject to authorisation under UCITS or AIFMD which does MiFID business, in accordance with article 6 UCITS directive or article 6 AIFMD.~~ A CPMI takes the ~~forms form~~ form of a 'UCITS investment firm' or an 'AIFM investment firm', as defined in the FCA Handbook Glossary. A UCITS investment firm is subject to the common platform requirements as set out in Column A+ in SYSC 1 Annex 1 Table A. An AIFM investment firm is subject to the requirements listed in Column A in SYSC 1 Annex 1 Table A in relation to their MiFID business. ...

2.8.2 Authorised professional firms ~~exempt from MiFID II under article 2(1)(e) of the directive~~ falling within the exemption in paragraph 1(d) of Part 1 of Schedule 3 to the RAO will be subject to common platform requirements as set out in Column B in SYSC 1 Annex 1 Table A. If they satisfy the criteria of a MiFID optional exemption firm (in accordance with Chapter 1 of Part 2 of the MiFI regulations) they will be subject to the provisions in the SYSC 1 Annex 1 Part 3 Table B column A. If they fall within both the ~~article 2(1)(e) and 3 exemptions in paragraph 1(d) of Part 1 of Schedule 3 to the RAO and Chapter 1 of Part 2 of the MiFI regulations,~~ they are entitled to comply only with the common platform requirements relating to article 2(1)(c) exempt firms in Column B in SYSC 1 Annex 1 Table A. Where they ~~are~~ would be required to be authorised by MiFID II, they will be subject to common platform requirements in Column A in SYSC 1 Annex 1 Table A and other SYSC requirements as a UK MiFID investment firm, except to the extent indicated otherwise (including SYSC 1 Annex 1 2.5R).

...

## 2.9 Other organisational requirements

2.9.1 In addition to the SYSC obligations outlined above, firms will find MiFID II-related organisational requirements in respect of complaints handling in DISP, client money and assets (CASS) and product governance obligations in PROD. Firms will also remain subject to ~~domestic~~ obligations in the form of the relevant senior management, certification, COCON and approved persons requirements.

## 2 Annex 1 Overview

Annex 1 ...

The diagram focuses on the position of UK MiFID investment firms (other than CPMI and authorised professional ~~firm~~ firms) and MiFID optional exemption firms.

### MiFID II Organisational requirements for firms

