Chapter 13

Guidance on the scope of the UK provisions which implemented MiFID

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 requirements derived from it, and
- how their existing *permissions* correspond to related MiFID derived concepts;

This chapter is mostly aimed at questions that are relevant to someone who wants to know whether they need to be authorised under the *Act*. This means that this chapter does not cover those types of persons for whom MiFID or MIFIR requirements are applied outside the authorisation regime under the *Act*, such as:

- a *data reporting service provider*;
- those subject to position limit requirements in derivatives markets;
- those subject to an obligation to trade in derivatives on a regulated market, OTF or MTF;
- persons with a proprietary interest in benchmarks who are obliged to provide access to certain information; or
- central counterparties subject to the requirements about non-discriminatory access for financial instruments.

Background

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

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 IP completion day is retained or adapted, post IP completion day.

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 IP completion 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 IP completion day.

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 (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*are 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 [deleted].

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); and
- Flow charts, tables and lists (■ PERG 13 Annex 1 and ■ PERG 13 Annex 2.)

We have also included guidance in the form of flow charts to help firms decide whether the *UK* provisions which implemented MiFID 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 and ■ PERG 13 Annex 2.)

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

13.2

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", which became part of *UK* law as at IP completion day 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. (such as, *MiFIR* and all directly applicable regulations made under it or under MiFID); and
- other FCA *rules* or legislation whose scope is drawn by reference to MiFID (for example, the Prudential sourcebook for MiFID investment firms (*MIFIDPRU*)).

Q2. Is there anything else we should be reading?

The Q and As complement, and should be read in conjunction with, the relevant legislation and the general guidance on regulated activities, which is in chapter 2 of our Perimeter Guidance manual ('PERG').

Q3. How much can we rely on these Q and As?

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 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 MiFID.

Moreover, MiFID has been 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 IP completion 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-*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 *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 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".

Q6. We are a UCITS management company that, in addition to managing unit trusts, contractual schemes and investment companies, provides portfolio management services to third parties. How does MiFID apply to us?

If you are the *management company*of a *UCITS scheme* with a permission to manage investments including MiFID financial instruments pursuant to article 6.3 of the *UCITS Directive*, certain MiFID provisions apply to you when you provide investment services to third parties (see article 6.4 *UCITS Directive*). These include initial capital endowment, organisational and conduct of business requirements. You are a *UCITS investment firm* for the purposes of the Handbook. Article 6.4 of the *UCITS Directive* is reflected in paragraph (3) of the *Handbook* definition of "MiFID investment firm".

Q6A. We are an AIFM that, in addition to managing AIFs, provides portfolio management services to third parties. How does MiFID apply to us?

If you are the *AIFM* of an *AIF* with a *Part 4A permission* to *manage investments* including *MiFID financial instruments* pursuant to article 6.4 of *AIFMD*, certain *MiFID* provisions apply to you when you provide *investment services* to third parties (see article 6.6 of AIFMD). These include initial capital endowment, organisational and conduct of business requirements. You are an *AIFM investment firm* for the purposes of the *Handbook*. Article 6.6 of *AIFMD* is reflected in paragraph (3) of the *Handbook* definition of "*MiFID investment firm*".

Q7. We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?

If your regular occupation or business includes the provision of investment services in relation to MiFID financial instruments to others on a professional basis, you are an investment firm and require *authorisation* unless you benefit from an exemption or are a tied agent (see Q11).

Where you are a firm with more than one business, you can still be an investment firm. What amounts to a "professional basis" depends on the individual circumstances and in our view relevant factors will include the existence or otherwise of a commercial element and the scale of the relevant activity.

Q8. We do not provide investment services to others but we do buy and sell financial instruments (for example, shares and derivatives) on a regular basis. Are we an investment firm for the purposes of MiFID?

Yes, if you are trading in MiFID financial instruments for your own account as a regular occupation or business on a "professional basis". You can be an investment firm even if you are not providing investment services to others; this arises from the fact that you are also an investment firm under MiFID where you perform investment activities on a professional basis.

Even if you are an investment firm you may still be able to rely on one or more exemptions in article 2 MiFID, in which case MiFID will not apply (see ■ PERG 13.5 and in particular article 2.1(d) (see Q40 to Q41)) and 2.1(j) (see Q44 to Q45).

Q9. We are a credit institution that does not provide investment services to customers but we do have a treasury function. Are we subject to MiFID?

Not necessarily. Although you may be dealing on own account in relation to MiFID financial instruments, you may be able to rely upon the exemption in article 2.1(d) MiFID (see Q40). In our view, credit institutions can rely on exemptions in article 2 where they meet the conditions of the exemptions.

Q10.Is there any change to the "by way of business" test in domestic legislation?

There is no change to article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities By Way of Business) Order 2001 as part of MiFID implementation by the Treasury, so the domestic test for whether you are carrying on 'regulated activities by way of business' and require *authorisation* remains unchanged.

Q11.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 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

Introduction

13.3

Q12.Where do we find a list of MiFID services and activities?

The list in Section A of Annex 1 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 (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*.

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Q12A. We carry out the activity of bidding in emissions auctions. Is this a MiFID service or activity? [deleted]

Reception and transmission

Q13. When might we be receiving and transmitting orders in relation to one or more financial instruments? (A1 and recital 44)?

Under the general definition of this service, you only provide the service if you are both receiving and transmitting orders. For example, this would be the case if you transmit subscription or redemption orders received from a client to the operator of a collective investment undertaking or transmit buy or sell orders to agency brokers.

This service though is also extended to include arrangements that bring together two or more investors, thereby bringing about a transaction between those investors. This meaning may be relevant, for example, to corporate finance firms. It could include, in our view, negotiating terms for the acquisition or disposal of investments on behalf of a corporate client with a potential buyer or seller, for example as part of a merger or acquisition. You may be providing this service even though, having brought

the investors together, the actual offer or acceptance is not communicated through you.

The extended meaning of the service only applies if the firm brings together two or more investors. A person issuing new securities, including a collective investment undertaking, should not be considered to be an 'investor' for the purpose of this extended meaning. However, an issuer may be an investor for the purpose of the general definition of the service. Accordingly whilst an arrangement whereby a person, on behalf of a client, receives and transmits an order to an issuer will, in our view, amount to reception and transmission, one in which it simply brings together an issuer with a potential source of funding for investment in a company, will not.

If you are party to a transaction as agent for your client or commit your client to it, you may be doing more than receiving and transmitting orders and will need to consider whether you are providing the investment service of executing orders on behalf of clients.

Q14. We are introducers who merely put clients in touch with other investment firms - are we receiving and transmitting orders?

No. If all you do is introduce others to investment firms so that they can provide investment services to those clients, this in itself does not bring about a transaction and so will not amount to receiving and transmitting orders. But if you are a person who does more than merely introduce, for example an introducing broker, you are likely to be receiving orders on behalf of your clients and transmitting these to clearing firms and therefore may fall within the scope of MiFID.

Executing orders

Q15.When might we be executing orders on behalf of clients (A2, article 4.1(5) and recital 45)?

When you are acting to conclude agreements to buy or sell one or more MiFID financial instruments on behalf of clients. You will be providing this investment service if you participate in the execution of an order on behalf of a client, as opposed simply to arranging the relevant deal. In our view, you can execute orders on behalf of clients either when dealing in investments as agent (by entering into an agreement in the name of your client or in your own name, but on behalf of your client) or, in some cases, by dealing in investments as principal (for example by back-to-back or riskless principal trading).

This activity includes the issue of their own *financial instruments* by an *investment firm* or a credit institution.

Q15A. Is every issue of financial instruments a MiFID investment service?

No. Although the answer to Q15 says that executing client orders includes issuing your own *financial instruments*, not every issue of *financial instruments* amounts to the MiFID investment service of execution of orders on behalf of clients. This is explained in more detail in the rest of this answer.

One difficult question is whether the extension of the executing orders service only applies to firms that are already *investment firms* because of other services and activities they provide or whether this part of the

definition is also relevant to someone who is deciding whether they are an *investment firm* in the first place.

In the FCA's view, this part of the definition is not limited to someone that is already an *investment firm* because of its other activities and services. This is because the risks at which recital 45 of MiFID says this part of the definition is aimed apply whether or not the issuer is already an investment firm for another reason. For example, there is no reason why a *firm* that issues its own complicated securities to the retail market should not need authorisation if a *firm* that distributes ones issued by another *firm* requires authorisation.

On the other hand, it cannot be the case that raising capital by issuing its own capital causes an ordinary commercial company to become an *investment firm*. The reasons why this should not be the case include the following:

- If you do not issue *financial instruments* on a professional basis and do not otherwise execute orders on behalf of clients, you will generally not need permission or authorisation to do this. See Q8 for more information.
- The investor may not be your *client*. For example, an ordinary commercial company issuing debt securities to financial investors is unlikely to be providing a service; it is more likely to be receiving one.
- Recital 45 of MiFID confirms that the definition is intended to catch issuers when distributing their own *financial instruments*. Thus if you get another investment firm or credit institution to distribute your *financial instruments*, you will not be executing client orders.

Dealing on own account

Q16. What is dealing on own account (A3, article 4.1(6)) and recital 24)?

Dealing on own account is trading against proprietary capital resulting in the conclusion of transactions in one or more MiFID financial instruments.

Dealing on own account involves position-taking which includes proprietary trading and positions arising from market-making. It can also include positions arising from client servicing, for example where a firm acts as a *systematic internaliser* or executes an order by taking a market or 'unmatched principal' position on its books.

Dealing on own account may be relevant to firms with a *dealing in investments as principal* permission in relation to MiFID financial instruments, but only where they trade financial instruments on a regular basis for their own account, as part of their MiFID business. We do not think that this activity is likely to be relevant in cases where a person acquires a long term stake in a company for strategic purposes or for most venture capital or private equity activity. Where a person invests in a venture capital fund with a view to selling its interests in the medium to long term only, in our view he is not dealing on own account for the purposes of MiFID.

If a firm executes client orders by standing between clients on a matched principal basis (back-to-back trading), it is both dealing on own account and executing orders on behalf of clients.

Portfolio management

Q17. What is portfolio management under MiFID (A4 and article 4.1(8))?

Portfolio management is managing portfolios in accordance with mandates given by *clients*on a discretionary client-by-client basis where such portfolios include one or more *MiFID financial instruments*. If there is only a single *financial instrument* in a portfolio, you may be carrying on portfolio management even if the rest of the portfolio consists of other types of assets, such as real estate. Portfolio management includes acting as a third party manager of the assets of a*fund*, where discretion has been delegated to the manager by the *operator* or manager of the *fund*. In the case of management of a collective investment undertaking, however, an exemption may be available to the operator (see Q43). The advisory agent who keeps clients' portfolios under review and provides advice to enable the client to make investment decisions (but does not exercise discretion to take investment decisions himself) is not carrying on portfolio management but may be providing other investment services such as investment advice under MiFID.

Investment advice

Q18. What is investment advice under MiFID (A5 and article 4.1(4))?

Investment advice means providing personal recommendations to a client, either at his request or on your own initiative, in respect of one or more transactions relating to MiFID financial instruments.

Q19. What is a 'personal recommendation' for the purposes of MiFID (article 9 of the MiFID Org Regulation)?

A personal recommendation is a recommendation that meets the following conditions:

•it is given to a person in his capacity as an investor, or potential investor, or as agent for either; and

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ois presented as suitable for him or based on a consideration of his personal circumstances; and

oconstitutes a recommendation to him to do one or more of the following:

- buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument; or

- exercise, or not to exercise, any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

This is similar to the UK regulated activity of *advising on investments* but is narrower in scope insofar as it requires the recommendation to be of a personal nature. A personal recommendation does not include advice given to an issuer to issue securities, as the latter is not an "investor" for the purposes of MiFID or article 53 of the *RAO*.

As explained in ■ PERG 8.24.1AG, there are circumstances in which the *UK* regulated activity is also based on giving personal recommendations. ■ PERG 8.30B (Personal recommendations) gives *guidance* on the definition in the context of the *UK* regulated activity. In the *FCA's* view that *guidance* is also relevant to the meaning of 'personal recommendation' under MiFID.

Q20. Can you give us some other practical examples of what are not personal recommendations under MiFID?

A recommendation is not a personal recommendation if it is issued exclusively to the public (article 9 of the *MiFID Org Regulation*) Advice about financial instruments in a newspaper, journal, magazine, publication, internet communication addressed to the public in general or in a radio or television broadcast should not amount to a personal recommendation. However, use of the internet does not automatically mean that a communication is not a personal recommendation on the grounds that it is made to the public. Therefore, for instance, while advice through a generally accessible website is unlikely to be a personal recommendation, an email communication provided to a specific person, or to several persons, may amount to investment advice.

Merely providing information to clients should not itself normally amount to investment advice. Practical examples include:

- advising clients on how to fill in an application form;
- disseminating company news or announcements;
- merely explaining the risks and benefits of a particular financial instrument; and
- producing league tables showing the performance of financial instruments against published benchmarks.

However, you should bear in mind that, where a person provides only selective information to a client, for example, when comparing one MiFID financial instrument against another, or when a client has indicated those benefits that he seeks in a product, this could, depending on the circumstances, amount to an implied recommendation and hence investment advice for the purposes of MiFID.

If you provide an investment research service to your clients or otherwise provide recommendations intended for the public generally, this is not MiFID investment advice (A5) although it may be an ancillary service (B5) for the purposes of MiFID and may also amount to the regulated activity of *advising on investments* for which you are likely to require *authorisation*.

Q21. Is generic advice investment advice for the purposes of MiFID (recitals 15 to 17 to the MiFID Org Regulation)?

No. Investment advice is limited to advice on particular MiFID financial instruments, for example "I recommend that you buy XYZ Company shares". If you only provide generic advice on MiFID financial instruments and do not provide advice on particular MiFID financial instruments, you are not a firm to which MiFID applies and do not require *authorisation*.

If you are an investment firm to which MiFID applies, however, the generic advice that you provide may be subject to MiFID-based requirements. For example, if you recommend to a client that it should invest in equities rather than bonds and this advice is not in fact suitable, you are likely, depending on the circumstances of the case, to contravene MiFID requirements to:

- act honestly, fairly and professionally in accordance with the best interests of your clients; and
- provide information to clients that is fair, clear and not misleading.

Acts carried out by an investment firm that are preparatory to the provision of a MiFID investment service or activity are an integral part of that service or activity. This would include the provision of generic advice. Therefore if a person provides generic advice to a client or a potential client prior to or in the course of the provision of investment advice or any other MiFID investment service or activity, that generic advice is part of that MiFID investment service or activity.

Providing a general recommendation about a transaction in a financial instrument or a type of financial instrument is an ancillary service within Section B(5) of Annex I of MiFID.

Underwriting and firm commitment placing

Q22. What is underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis (A6)?

A6 comprises two elements:

- the 'underwriting of financial instruments'; and/or
- the 'placing of financial instruments on a firm commitment basis'.

Underwriting is a commitment to take up financial instruments where others do not acquire them. In our view, placing is the service of finding investors for securities on behalf of a seller and may involve a commitment to take up those securities where others do not acquire them. We associate underwriting and 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.

In our view, the 'firm commitment' aspect of the placing service relates to the person arranging the placing, as opposed to the person who has agreed to purchase any instruments as part of the placing. Accordingly, placing on a firm commitment basis occurs where a firm undertakes to arrange the placing of MiFID financial instruments and to purchase some or all the instruments that it may not succeed in placing with third parties. In other words, the placing element of A6 requires the same person to arrange the placing and provide a firm commitment that some or all of the instruments will be purchased.

Where a person distributes units in a UCITS fund to investors, in our view this does not amount to placing although it is likely to involve the reception and transmission of orders.

Placing without a firm commitment

Q23. When might placing of financial instruments without a firm commitment basis arise (A7)?

Where the person arranging the placing does not undertake to purchase those MiFID financial instruments he fails to place with third parties.

Operating a multilateral trading facility

Q24.What is a multilateral trading facility (A8, article 4.1(22) and recital 7 of MiFIR)?

A multilateral trading facility involves a multilateral trading system (for example, a trading platform) operated either by an investment firm or by a market operator which brings together multiple buyers and sellers of

financial instruments (for more on multilateral systems, see the answer to Q24B).

A multilateral trading facility does not include bilateral systems where an investment firm enters into every trade on own account (as opposed to acting as a riskless counterparty interposed between the buyer and the seller).

For there to be an MTF, the buying and selling of MiFID financial instruments in these systems must be governed by non-discretionary rules in a way that results in contracts. As the rules must be non-discretionary, once orders and quotes are received within the system an MTF operator must have no discretion in determining how they interact. The MTF operator instead must establish rules governing how the system operates and the characteristics of the quotes and orders (for example, their price and time of receipt in the system) that determine the resulting trades. An MTF may be contrasted with an OTF (see Q24A for OTFs) in this regard, because the operator of an OTF is required to carry out order execution on a discretionary basis.

Operating an organised trading facility

Q24A. What is an organised trading facility (A9, article 4.1(23) and recitals 8 and 9 of MiFIR)?

An OTF is a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in certain products are able to interact in the system in a way that results in a contract (for more on multilateral systems, see the answer to Q24B).

Only bonds, *structured finance products*, emission allowances and derivatives may be traded. Equity instruments may not be traded on an OTF.

Order execution must be carried out on an OTF on a discretionary basis. By contrast with the operation of an MTF or regulated market, the operator of the OTF must exercise discretion in either of, or both:

- placing/retracting client orders; or
- matching client orders.

In exercising its discretion, the operator must comply with the requirement under article 18 of MiFID to establish objective criteria for the efficient execution of orders, and must also comply with the best execution requirements under article 27 of MiFID.

Multilateral system

Q24B. Where can I find more information about what a multilateral system is (article 4.1(19)?

[deleted]

Q24C. What is a multilateral system?

A *multilateral system* is a system or facility in which multiple third-party buying and selling trading interests in *financial instruments* are able to interact in the system (see article 2(1)(11) UK MiFIR).

A *multilateral system*, for these purposes, comprises each of the following main elements:

- it has the characteristics of a trading system or facility;
- it comprises multiple third-party buying and selling trading interests;
- it allows trading interests to interact in the system; and

•those trading interests are in financial instruments.

We provide guidance on each of these elements below.

Characteristics of a system or facility

A *multilateral system* has the characteristics of a trading system or facility. Recital 7 UK MiFIR clarifies that a trading system or facility includes markets composed of a set of rules and a trading platform, as well as those only functioning on the basis of a set of rules. The rules relate to how multiple third-party trading interests in *financial instruments* are able to interact in the system (see below). The rules could be reflected in contracts and/or operating procedures. As such, a system is technology neutral for these purposes, as shown by the different types of trading systems referred to in Annex I to *MiFID RTS 1*, and Annex I to *MiFID RTS 2*. For guidance on voice broking, please refer to Q24D below.

General purpose communications systems would not as such amount to trading systems or facilities. This means that the following services in and of themselves would not amount to operating a *multilateral system*:

•acting as an internet services provider;

•providing a telephone network;

•providing a website; or

•providing chatroom facilities.

Even if the provider of the general purpose communication system is not operating a *multilateral system*, a person using that system to operate a trading system or facility will operate a *multilateral system* if the other elements of the definition of a *multilateral system* are met.

If a system has features specifically designed to enable the interaction of trading interests in *financial instruments*, this would indicate that it is a trading system or facility. More generally, we will consider the role of the operator and its monitoring of the use of the system. Operating the platform requires more than simply providing technology or software. Our assessment of whether there is a trading system or facility will also take into consideration a wider range of factors, including for example:

•its target users and the actual use of a system by its users;

•any relevant restrictions on how the system may be used and their practical effect;

•whether the system is designed to enable trading of any kind amongst users; and

•the determinants of the remuneration of the operator and the extent to which these are linked to the interaction of trading interests in financial instruments in the system.

Accordingly, whilst general communications systems, for example, are used for the purposes of trading *financial instruments*, they will not amount to a *multilateral system* unless they were ever operated by a person for these purposes and then subject to these criteria.

It is possible for a firm to operate more than one piece of technology which, when taken together, have the characteristics of a trading system or facility.

There are multiple third-party buying and selling trading interests

There needs to be multiple third-party buying and selling trading interests for a system to be a *multilateral system*. Recital 7 UK MiFIR clarifies that the

expression 'buying and selling trading interests' is to be understood in a broad sense and includes orders, quotes and indications of interest.

The inclusion of the words 'third-party' in this expression makes it clear that the trading interests in question are not the trading interests of the system operator.

The fact that when any two persons negotiate within the system they do so between themselves does not make the system bilateral rather than multilateral. Instead, what matters is whether the system, at the point of entry, enables one person to interact potentially with multiple others (other than the operator). This is the service a person receives as a user of the system.

Trading interests are able to interact in the system

Multiple third-party trading interests must also be able to interact in the system for it to be a *multilateral system*. A *multilateral system* involves the bringing together of third-party trading interests (see also recital 7 UK MiFIR).

Interaction takes the form of an exchange of information relevant to essential terms of a transaction in *financial instruments* (being price, quantity or subject matter).

Accordingly, in our view, a system which enables this information to be inputted and then responded to in the system would allow trading interests to interact in the system.

Interaction between trading interests can arise in a system because the system:

•matches trading interests within its system; or

•allows users to respond within the system to other users' trading interests, including by communicating in relation to, negotiating or accepting essential terms of a transaction.

Interaction between trading interests in the system does not require a contract to be entered into for the sale/purchase of *financial instruments* (i.e. execution of a transaction to take place) within the system if it is with a view to the parties agreeing the terms of a trade.

As clarified by recital 8 UK MiFIR, any system that merely receives, pools, aggregates and broadcasts trading interests should not be considered a *multilateral system*. This means that a bulletin board should not be considered a trading venue because there is no interaction between trading interests within its system. Similarly, a system which simply notifies the parties of general expressions of interest in relation to *financial instruments* does not amount to an interaction of trading interests in the system. For further guidance on bulletin boards, please refer to Q24H to Q24L below. In addition, neither the service of portfolio compression, which reduces non-market risks in derivative portfolios without changing the market risk, nor post-trade confirmation services, constitute a *multilateral system* by themselves.

Financial instruments

The interaction of multiple third-party buying and selling trading interests in the system must be in *financial instruments* for the system to be a *multilateral system*. A *financial instrument* is an instrument specified in Part 1 of Schedule 2 to the *Regulated Activities Order*. Please refer to ■ PERG 13.4 for further guidance on *financial instruments*.

Trading venue perimeter – specific cases

Q24D. Does voice broking involve the operation of a multilateral system?

Voice broking may but need not comprise the operation of a *multilateral system*.

Merely arranging or executing client orders over the telephone does not constitute a *multilateral system*, although it may amount to other investment services such as reception and transmission or execution of orders on behalf of clients.

A trading system or facility could, however, take the form of a voice trading system (as referred to in Annex I *MiFID RTS 2*) or a hybrid system (as referred to in Annex I *MiFID RTS 1* and Annex I *MiFID RTS 2*). For example, a firm that operates a platform where trading interests of clients are broadcast to other users and then engages in voice broking to enable negotiation between these parties would operate a trading system or facility, unless Q24F applies. Voice broking may also be part of a *multilateral system* when operating in conjunction with other modes of execution such as electronic order books operated by that broker.

Q24E. Does a firm that undertakes portfolio management operate a multilateral system by operating an internal matching system to execute trading interests relating to the portfolio of one of its clients against trading interests relating to the portfolio of another of its clients?

No. A firm engaged in *portfolio management*, in whatever capacity, must exercise discretion in relation to the *financial instruments* it manages. We do not consider that such a firm operates a *multilateral system* when, in the exercise of this discretion, it executes trading interests relating to the portfolio of one of its *clients* (which may be a fund) against the trading interests relating to the portfolio of another of its *clients* in an internal matching system. We also do not consider that it is the purpose of ■ COLL 6.9.9R and ■ FUND 1.4.3R to prevent a *UCITS management company* or an *external AIFM* that is a *full-scope UK AIFM* from doing this in these circumstances. This is because in these circumstances the portfolio manager is the only user of the system and hence, there is no interaction of multiple third-party trading interests in the system.

Q24F. Does a firm using or operating a system to execute trades on behalf of clients operate a multilateral system?

No, if a firm uses or operates a system for the purpose only of executing these trades on a trading venue consistent with the intentions of the parties to the underlying transactions to trade on a trading venue, in accordance with the venue's rules. For example, when arranging a large-in-scale or negotiated trade in accordance with the rules of the venue, in our view these arrangements do not amount to the operation of a *multilateral system* – in accordance with Q24C – in the case of UK MiFIR or otherwise. For guidance on execution of orders on behalf of clients, see ■ PERG 13 Q15.

Q24G. Would a crowdfunding platform be regarded as a multilateral system?

In our view, a crowdfunding platform does not amount to a *multilateral system* when the business funding interests of an issuer of *shares*, *debentures* or *alternative debentures*, as expressed in an offer made by that issuer, on the one hand, are matched with the interests of investors on the other.

A bulletin board provided to assist investors is not itself a *multilateral system* where the trading interests would not be able to interact within the system. By contrast, a crowdfunding platform in which multiple third-party buying

and selling trading interests of investors in *financial instruments* are able to interact within a system (for example, in a secondary market) would be a *multilateral system*.

Bulletin boards

Q24H. What is a bulletin board?

There is no definition of a bulletin board. Recital 8 UK MiFIR, however, refers to 'facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests' or 'other entities aggregating or pooling potential buying or selling interests' and implies that such bulletin boards or entities should not be considered a *multilateral system*.

Q24I. Is a bulletin board a multilateral system?

No. The reason is that, whilst trading interests (including information relevant to essential terms of a transaction in *financial instruments* (being price, quantity or subject matter)) can be posted on a bulletin board, trading interests are not able to interact in such a system. In light of Q24C (see the section on 'Trading interests are able to interact with each other') above, we would not regard a firm as operating only a bulletin board if:

•it matches trading interests within the system;

•it enables users to respond within the system to other users' trading interests, including by communicating in relation to, negotiating or accepting essential terms of a transaction; or

•users can commit to or enter into contracts for the sale/purchase of the financial instruments (i.e. execute transactions) within the system.

By contrast, as a system simply notifying users of general expressions of interest in *financial instruments* does not give rise to an interaction of trading interests in the system, a bulletin board operator can notify and introduce potential counterparties to each other without operating a *multilateral system*.

Please see Q24J to Q24L below for further guidance on bulletin boards.

Q24J. Can the operator of a bulletin board as described in Q24H assist users with exchanging contact details?

The operator of a bulletin board could (subject to data protection legislation) enable publication of contact details of users advertising buying and selling interests on its bulletin board, so that users can use these to contact each other bilaterally outside the system.

However, some users may have reservations about the publication of their contact details. In these circumstances, one possibility might be for them to agree to share contact details on a case-by-case basis. Any such request should be limited to requesting to see another user's contact details and not extend to communicating in relation to, negotiating or accepting essential terms of a transaction (being price, quantity or subject matter).

Q24K. Can an operator of a bulletin board as described in Q24H provide template documentation to assist its users with negotiating and executing transactions?

Yes, an operator of a bulletin board can make available template documentation for download by users of the bulletin board. It can also require users to use this template documentation. This will not mean that

the bulletin board is a *multilateral system*, provided that users use the template documentation to negotiate and execute transactions bilaterally outside the system. The operator should not, however, complete the template documentation in relation to the essential terms of these transactions (being price, quantity or subject matter).

Q24L. Can an operator of a bulletin board as described in Q24H provide post-trade services?

Yes, it is possible for the operator of a bulletin board to provide post-trade services, including in relation to settlement. This might include, for example, assisting with the transfer of funds or registering the transfer of *financial instruments*. The operator could be informed by users of the bulletin board that they have entered into a contract for the sale/purchase of a *financial instrument*, i.e. executed a transaction, bilaterally outside the system and then provide post-trade services in relation to that transaction to them. Providing simply these post-trade services does not require the operator to have permission for *operating a multilateral trading facility* or *operating an organised trading facility*. The operator should, however, consider whether the post-trade services provided may include any *payment services* (see ■ PERG 15.3) or *electronic money* issuance (see ■ PERG 3A).

Q25. What about ancillary services (Annex 1, section B)? Do we need to be authorised if we wish to provide these services?

Yes, but only when providing these services is a *regulated activity*, for example, if you provide custody services which fall within the *regulated activity* of *safeguarding and administering investments*. You are not an investment firm within the scope of MiFID, however, if you only perform ancillary services (regardless of whether these are *regulated activities* requiring *authorisation* under the Act).

Q26. We are an investment firm - can we apply for passporting rights that include ancillary services?

[deleted]

13.4 Financial instruments

Introduction

13.4

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*.

Transferable securities

Q28.What are transferable securities? (C1 and article 4.1(44))?

Transferable securities refer to classes of securities negotiable on the capital markets but excluding instruments of payment. We consider that instruments are negotiable on the capital markets when they are capable of being traded on the capital markets.

Transferable securities include (to the extent they meet this test):

- shares in companies (whether listed or unlisted, admitted to trading or otherwise), comparable interests in partnerships and other entities and equivalent securities;
- bonds and other forms of securitised debt;
- depositary receipts in respect of the instruments above;
- securities giving the right to acquire or sell transferable securities (for example, warrants, options, futures and convertible bonds); and
- securitised cash-settled derivatives, including certain futures, options, swaps and other contracts for differences relating to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

Examples of instruments which, in our view, do not amount to transferable securities include securities that are only capable of being sold to the issuer (as is the case with some industrial and provident society interests) and OTC derivatives concluded by a confirmation under an ISDA master agreement.

Money market instruments

Q28A. What are money market instruments (C2 and article 4.1(17) of MiFID and article 11 of the MiFID Org Regulation)?

This means those classes of instruments which are normally dealt in on the money market. Examples include treasury bills, certificates of deposit and

commercial paper. A money market instrument does not include an instrument of payment.

An instrument is only a money market instrument if it also meets the following conditions:

- it has a value that can be determined at any time;
- it does not fall into sections C4 to C10 of Annex 1 to MiFID (derivatives); and
- it has a maturity at issuance of 397 days or less.

Collective investment undertakings

Q29. What are units in collective investment undertakings (C3)?

This category of *financial instrument* includes *units* in regulated and unregulated *collective investment schemes* and units or *shares* in an *AIF* (whether or not the *AIF* is also a *collective investment scheme*). In our view, in accordance with article 1.2(a) and 2.1(o) of the *Prospectus Directive*, units or *shares* in an *AIF* include shares in closed-ended corporate schemes, such as shares in investment trust companies, and so are also units in collective investment undertakings for this purpose (as well as being. transferable securities). There is *guidance* on what an *AIF* is in chapter 16 of *PERG* (Scope of the Alternative Investment Fund Managers Directive).

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.

Credit derivatives

Q31.What are derivative instruments for the transfer of credit risk (C8)?

Derivative instruments that are designed for the purposes of transferring credit risk from one person to another. They include, for example, credit default products, synthetic collateralised debt obligations, total rate of return swaps, downgrade options and credit spread products

General financial and emission derivatives (C4): General

Q31A. Which types of financial derivative fall within this heading?

The C4 category of financial instruments covers:

- options;
- futures;
- swaps;
- forward rate agreements; and

- any other derivative contracts;

relating to:

- securities;
- currencies;
- interest rates or yields;
- emission allowances; or
- other derivatives instruments, financial indices or financial measures.

A derivative contract is covered whether it is settled physically or in cash.

General financial and emission derivatives (C4): Treatment of foreign exchange contracts

Q31B. Is every foreign exchange contract caught by MiFID (article 10 of the MiFID Org Regulation)?

No. There are two exclusions:

- There is an exclusion for spot contracts (see the answer to Q31C).
- There is an exclusion for a foreign exchange transaction connected to a payment transaction (see the answer to Q31G).

Technically these exclusions relate to the other "any other derivative contracts" type of C4 derivative contract listed in the answer to Q31A. However in the FCA's view no contract that has the benefit of one of these exclusions could be a C4 future either.

These exclusions do not apply to an option or a swap on a currency, regardless of the duration of the swap or option and regardless of whether it is traded on a *trading venue* or not (recital 13 to the *MiFID Org Regulation*).

Q31C. What is the exclusion for foreign exchange spot contracts mentioned in Q31B?

A contract for the exchange of one currency against another currency is excluded if under its terms delivery is scheduled to be made within a specified number of trading days. The number of trading days depends on the type of contract. For these purposes, there are three types of contract.

The first type of contract is one for the exchange of one major currency against another major currency. The contract is exempt if under its terms delivery is scheduled to be made within two trading days.

The second type of contract is one for the exchange of a non-major currency against either another non-major currency or against a major currency. The contract is excluded if under its terms delivery is scheduled to be made within the longer of:

- two trading days; and
- the period generally accepted in the market for that currency pair as the standard delivery period.

The third type of contract is one used for the main purpose of the sale or purchase of a transferable security or a unit in a collective investment undertaking. The contract is excluded if under its terms delivery is scheduled to be made within whichever is the shorter of the following:

- the period generally accepted in the market for the settlement of that security or unit as the standard delivery period; or

- five trading days.

An example of this third category is as follows. Say that X buys a share in Country P for delivery in four days' time (the standard settlement time in Country P for share purchases). X wishes to pay for the shares (and for associated taxes and costs) in local currency. The exclusion applies if X enters into the contract for the purchase of the local currency four or fewer days before the share settlement date.

If a foreign exchange contract falls into the third category (contract for the purpose of purchase of securities) it may also fall into one of the other two categories. As a result there are potentially two maximum delivery periods. Where this is the case, the longer of the two delivery periods applies for the purpose of deciding whether the exclusion applies.

If there is an understanding between the parties to the contract that delivery of the currency is to be postponed beyond the date specified in contract, it is the longer period that is used to calculate the delivery period.

Physical settlement does not require the use of paper money. It can include electronic settlement.

This exclusion only applies if there is a direct and unconditional exchange of the currencies being bought and sold (recital (13) to the *MiFID Org Regulation*). However a contract may still benefit from the exclusion if the exchange of the currencies involves converting them through a third currency.

See the answer to Q31E for what major and non-major currency means and see the answer to Q31F for what a trading day means.

Q31D. How are contracts for multiple exchanges of currency treated under the exclusion for foreign exchange spot contracts mentioned in Q31C?

The exclusion can cover a single contract with multiple exchanges of currencies. In such a contract, each exchange of a currency should be treated separately for the purpose of the exclusion (recital 13 to the *MiFID Org Regulation*).

Q31E. What are the major currencies referred to in the answer to Q31C?

The major currencies for these purposes are the US dollar, euro, Japanese yen, Pound sterling, Australian dollar, Swiss franc, Canadian dollar, Hong Kong dollar, Swedish krona, New Zealand dollar, Singapore dollar, Norwegian krone, Mexican peso, Croatian kuna, Bulgarian lev, Czech koruna, Danish krone, Hungarian forint, Polish złoty and Romanian leu.

All other currencies are non-major currencies for these purposes.

Q31F. What does a trading day mean in the answer to Q31C?

A day is a trading day if it is a day of normal trading in the jurisdiction of both the currencies that are exchanged.

If either of the following conditions is met:

- the exchange of the currencies involves converting them through a third currency for the purposes of liquidity; or
- the standard delivery period for the exchange of the currencies references the jurisdiction of a third currency;

a day is a trading day if it is a day of normal trading in the jurisdiction of both the currencies that are exchanged and also in the jurisdiction of that third currency.

Q31G. What is the second exclusion for foreign exchange contracts mentioned in Q31B?

A contract is excluded if:

- it is a means of payment (see the answer to Q31H for what this means);
- it must be settled physically (although non-physical settlement is permissible by reason of a default or other termination event);
- at least one of the parties is not a financial counterparty as defined in article 2(8) of *EMIR*;
- it is entered into in order to facilitate payment for identifiable goods, services or direct investment; and
- it is not traded on a *trading venue*.

The table in the answer to Q31M gives some examples of what is and is not covered by the exclusion.

Q31H. What do identifiable and means of payment as referred to in the answer to Q31G mean?

The most straightforward example (Example (1) of what this means is a contract where one of the parties to the contract:

- sells currency to the other party which that other party will use to pay for specific goods or services or to make a direct investment; or
- buys currency from the other party which the first party will use to achieve certainty about the level of payments that it is going to receive:
  ofor specific goods or services that it is selling; or
  oby way of a direct investment.

See Example (10) in Q31M (Can you give me some more examples of how the means of payment exclusion referred to in the answer to Q31G works?) for an example of the second type of foreign exchange contract in Example (1) (contract to achieve certainty about the level of payments).

The table in the answer to Q31M gives some more examples of what identifiable goods and services means.

The *MiFID Org Regulation* says that the foreign exchange contract must be a means of payment. Therefore the exclusion requires that not only should the currency contract facilitate payment for identifiable goods, services or direct investment but that it should also be a means of payment. This combined requirement does not mean that there has to be a three-party arrangement between the buyer and seller of goods or services and the foreign exchange supplier. So, for example, if a UK company (A) is buying goods from an exporter in Germany (B) and is paying in euro and A buys the euro forward from a bank (C), there is no need for C to issue some sort of instrument to B (Example (2)).

Instead this combined requirement means that the currency contract that is to be excluded should facilitate the payment in the way described in Example (1) at the start of this answer or that there should be an equivalent close connection between the currency contract and the payment transaction.

Even though there is no requirement for a formal instrument of payment, the exclusion can cover such arrangements. So in Example (2) in this answer, the exclusion may apply to an arrangement that involves bank C issuing a euro letter of credit at the request of A for the benefit of B.

Q31I. What do goods, services and direct investment mean in the answer to Q31G?

The reference to goods and services should be interpreted widely. It can cover, for example, intellectual property (such as computer software and patents) and land.

However, in the FCA's view MiFID investments are only covered by the exclusion if they constitute a direct investment.

In the FCA's view, making a direct investment means making a capital investment in an enterprise to obtain a lasting interest in that enterprise. A lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise, and an investor's significant influence on the management of the enterprise.

The requirement for the investment to be direct does not prevent the investor acquiring an investment in a wholly-owned subsidiary of a holding company by making the investment in the holding company. However this requirement does mean that the investor should acquire its investment from the enterprise or holding company itself rather than by acquiring a stake through the secondary market.

A foreign exchange contract connected to the purchase of a MiFID investment may still be covered by the exclusion for spot contracts if the payment instrument exclusion does not apply. The spot exclusion makes particular provision for purchases of transferable securities and units in a collective investment undertaking (see the answer to Q31C). The result is that the means of payment exclusion does not undermine the specific provisions of the spot contract exclusion dealing with such transactions.

Q31J. How is an agent treated under the means of payment exclusion referred to in the answer to Q31G?

This question is about a foreign exchange contract carried out through agents where:

- at least one of the principals is a non-financial counterparty (see the answer to Q31G for what a financial counterparty means);
- both the agents are financial counterparties; and
- the contract would otherwise meet the exclusion conditions.

If the agents contract with each other on a principal-to-principal basis with back-to-back contracts with their respective clients, the exclusion is not available for the contract between the two agents. It may be available for the contracts between the agent and its client.

If the arrangement is made in such a way that there is a single contract, to which the two principals are party and which is entered into on their behalf by the agents, the exclusion is available.

Q31K. How do I know whether the conditions for the means of payment exclusion described in the answer to Q31G are met?

A financial counterparty (A) selling currency to a client may want to know whether the client (B) is going to use the foreign currency in a way that meets the exclusion conditions. This may be relevant to whether MiFID conduct of business obligations apply.

A non-financial counterparty (A) may sell currency to another non-financial counterparty (B) in circumstances where the currency that A buys is not being used in a way that qualifies for the exclusion. A may therefore want to rely on B using the currency that B purchases in a way that would qualify.

In each example, the application of the exclusion depends on the use to which the other party is going to put the currency.

In these examples A may rely on B's assurances about the purpose of the currency purchase as long as it has no reason to doubt what B says. Such an assurance could be given in several ways:

Option 1	A may ask B to explain to A what the purpose of the transaction is, leaving it to A to work out whether the exclusion applies.
Option 2	B may tell A that the exclusion applies to the transaction in question (for instance by way of a representation in the forward contract). A should only rely on such an assurance if satisfied that B is sufficiently expert to understand what the exclusion means.
Option 3	B may give A an assurance or representation that applies to all foreign exchange transactions that may take place between them from time to time (which might be included in a master agreement governing all forward currency contracts between them). In this case: o Option 2 (B should have sufficient expertise) applies. o In addition, A should be satisfied that B has procedures in place for B to consider whether the exclusion applies in particular cases. This may include for example a procedure under which B: - should tell A that a particular proposed transaction does not qualify for the exclusion; or - is obliged not to ask A to enter into a contract under that master agreement that will be outside the exclusion.

Where B is an ordinary individual consumer or a small business, A may not be able to rely on B's judgement about whether the exclusion applies. In that case A should decide whether the exclusion applies based on questions A asks B (Option 1).

Q31L. Can a flexible forward come within the means of payment exclusion described in the answer to Q31G?

A forward contract may have a flexible delivery date. For example a forward contract may:

- say that delivery can take place at any point in a two-week period rather than on a fixed date; or
- have an expiry date by which delivery has to be taken but part, or parts, of the delivery can take place before that date.

A flexible delivery date within a defined and reasonably short window can still benefit from the exclusion. If the delivery period is very long, it is doubtful whether the requirement for the contract to facilitate payment for identifiable goods, services or direct investment (see the answer to Q31G) can be met.

These examples provide for delivery of the full amount by the end of the delivery period. There might also be a contract under which the purchaser may choose not to take delivery of part. An example of this kind of foreign exchange contract is as follows:

A UK importer of goods buys from a German seller and has to pay in euro. The importer may not know exactly how much it wants to import during the next quarter but may want to fix its foreign exchange risk in advance. The foreign exchange contract allows the importer to take delivery of no more than it needs to pay the exporter. Any balance not needed to pay for imports is cancelled and is not available to the importer.

In the FCA's view, if the contract meets the conditions of the exclusion (and in particular the need for there to be identifiable goods or services) the exclusion potentially applies.

The requirement for there to be identifiable goods or services means that the maximum amount that can be drawn down under the flexible forward contract should be a reasonable estimate of what is payable under an identified potential payment transaction or transactions. The table in the answer to Q31M gives examples of what a reasonable estimate means.

An argument against the availability of the means of payment exclusion is that a flexible forward contract is an option and that the exclusion is not available for an option. However in the FCA's view, the approach in the answer to Q31B applies. That is, a flexible forward contract that meets all the conditions of the exclusion is not a traditional option but rather a hybrid contract that is in the "any other derivative" contract category listed in the answer to Q31A (Types of C4 derivative contracts), even in the example in which the unused balance is cancelled.

Another argument against the availability of the exclusion for a flexible forward under which the unused balance is cancelled is that it does not meet the requirement for the contract to be settled physically. In the FCA's view this argument is not correct because this requirement is aimed at preventing net cash settlement and does not deal with the cancellation of the contract resulting in there being no need for any kind of settlement.

Q31M. Can you give me some more examples of how the means of payment exclusion referred to in the answer to Q31G works?

Examples of how the means of payment exclusion works	
Example	**Explanation**
(1) A customer wants to hedge its balance sheet because it has a euro exposure but reports financially in sterling.	The exclusion is not available as the foreign exchange contract is not entered into in order to facilitate payment for identifiable goods or services. If, as is likely to be the case, the foreign exchange contract is a swap or a non-deliverable forward, that is another reason for the exclusion not being available as the exclusion does not apply to this sort of contract (see the answers to Q31B and Q31R).
(2) A UK customer (X) of a UK payment institution (Y) has a sterling account with a bank (P) in the United Kingdom and a separate euro bank account with another bank (Q) in the Eurozone. X wishes to pay its supplier in euro in 3 months. X enters into a forward contract with Y and requests that the euro be sent to its euro account with Q rather than directly to the supplier. The sterling that X pays under the foreign exchange contract comes from its account with P. Q makes the payment to the supplier for X.	The exclusion is potentially available as the foreign exchange transaction facilitates payment for identifiable goods, even though Y does not itself pay the suppliers. The exclusion can cover an arrangement in which the firm selling the foreign currency is not the firm that makes the payment on behalf of the customer buying the identifiable goods.
(3) A UK importer has bought €100,000 worth of goods. The sup-	The issue here is whether the forward exchange contract relates to

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Examples of how the means of payment exclusion works	
Example	**Explanation**
plier has not yet issued an invoice and the sum is not yet due from the importer. However the importer knows the price. It buys the euro forward.	identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?). The exclusion is potentially available. There is no need for the invoice to have been issued or the sum yet to be due.
(4) A UK importer of goods has ordered a specific quantity of an identified type of goods from the supplier. The price will be payable in euro but the euro price has not yet been fixed. The UK importer makes an estimate of the euro price and buys the euro forward.	The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?). The exclusion is potentially available. There is no need for the amount to be paid under the foreign exchange contract to match precisely the amount of the payment that it is facilitating. An estimate is permissible. The goods are specifically identifiable by purchase order.
(5) A UK importer knows that it wants to purchase €100,000 worth of goods from an identified Eurozone supplier in the next quarter but it has not yet entered into a formal contract with the supplier. It buys the euro forward.	The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?). The exclusion is potentially available. There is no need for the contract for the supply of goods to have been entered into at the time of the currency purchase. The goods are specifically identifiable by type, price and supplier and by the purpose for which the importer is buying them.
(6) A UK importer knows that it wants to purchase €100,000 worth of goods from a Eurozone company in the next year, but does not know from which specific supplier it is going to purchase them. It knows which goods it wishes to buy. It buys the euro forward.	The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?). The exclusion is potentially available. The goods are specifically identifiable by type and price and by the purpose for which the importer is buying them.
(7) A UK importer of goods wishes to buy currency in order to allow it to pay for goods in the next quarter. It does not know precisely how	The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the se-

Examples of how the means of payment exclusion works	
Example	**Explanation**
many of the goods it will want or what their exact price will be. However it has a sufficiently good idea of the amount of goods to make it unlikely that its estimate will be seriously wrong. It knows this because it has an established practice of buying these sorts of goods.	cond exclusion for foreign exchange contracts mentioned in Q31B?). The exclusion is potentially available. The exclusion may be available even though the precise details of the goods to be bought are not known yet. The goods are identifiable by reference to an established practice and need.
(8) A firm wishes to import goods for a project and needs foreign exchange to pay for them. It does not know precisely how many of the goods it will buy or what their exact specification or price will be. However it knows broadly what goods it needs. In this example it knows all this because the goods are needed for a specific purpose in a specific project.	The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?). The exclusion is potentially available. The exclusion may be available even though the precise details of the goods to be bought are not known yet. The goods are identifiable by reference to an established project and a particular purpose within that project.
(9) A customer wishes to undertake a sterling/euro conversion to purchase €100,000 in three months. This amount is to cover 20 individual payments of €5,000 which will be drawn down at different times. This type of contract benefits the customer who obtains a better rate by setting up one contract for a larger value than could be obtained on 20 individual low value contracts.	The exclusion is potentially available. See the answer to Q31L (Can a flexible forward come within the means of payment exclusion described in the answer to Q31G?).
(10) An exporter (A) sells goods to a French importer for payment on delivery in euros. A, before the due date for payment for the goods, sells the euro for the equivalent amount in sterling. The foreign exchange contract is made at the applicable forward rate on the date of the currency contract. Settlement of the currency contract is due on the same day as payment for the goods. A is thereby protected against adverse movements in sterling against the euro.	The exclusion is potentially available. Recital 10 to the *MiFID Org Regulation* says that a contract to achieve certainty about the level of payments for identified goods is covered by the exclusion.

Examples of how the means of payment exclusion works	
Example	**Explanation**
(11) A UK importer (A) has bought €100,000 worth of goods from several suppliers. A has a number of purchase contracts with each supplier and each supplier has issued a number of invoices. The due dates for payment on each invoice are quite close together and so A buys €100,000 forward from one provider in a single contract.	The exclusion is potentially available. There is no need for there to be a single currency contract for each contract under which payment arises. Nor do the payment dates under the purchase contracts have to match exactly the settlement dates under the forward contract.
(12) A UK importer (A) has bought €100,000 worth of goods. A buys €100,000 forward from several currency providers.	The exclusion is potentially available. There is no need for A to use a single currency provider.
(13) A UK importer (A) has bought €100,000 worth of goods from several suppliers. A has a number of purchase contracts with each supplier and each supplier has issued a number of invoices. The due dates for some of the invoices are quite close together and so A buys €50,000 forward from one provider in a single contract to meet these payment obligations. The result is that €50,000 is allocated between a number of import contacts in differing amounts and none of the import contracts are covered in full. A decides to meet the other €50,000 from its own resources.	The exclusion is potentially available. The exclusion may apply even where the excluded currency contract is applied to a number of different payment obligations under a number of import contracts. The exclusion is available even if A relies on its own resources for part of the payment transaction.
(14) A UK importer (A) has bought €40,000 worth of goods from one supplier and €60,000 from another. The suppliers have issued invoices but payment is not yet due from A. A buys €40,000 forward to meet the payment on the first and decides to meet the €60,000 due under the other contract from its own resources.	The exclusion is potentially available. There is no requirement that A should cover every contract for goods to which the exclusion might apply.
(15) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due from A. A buys €200,000 forward. A will use other €100,000 for purposes that do not meet the exclusion conditions.	The exclusion is not available where A uses part of the currency it buys for purposes that do not meet the conditions of the exclusion. The contract should not be treated as partly excluded and partly as a C4 currency derivative. If however A enters into two foreign exchange contracts, each for €100,000, the exclusion may apply to one of them. Also see example (16).
(16) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due from the im	The exclusion is not available for the second contract. The first contract should be taken into account when deciding whether A may rely

Examples of how the means of payment exclusion works	
Example	**Explanation**
porter. A buys the €100,000 forward. Later A buys another €100,000 forward.	on the exclusion for second contract. See the answer to Q31N (How do the examples in the table in the answer to Q31M apply to an exporter or importer with a large portfolio of contracts?) for an example of where the exclusion can apply in similar circumstances.
(17) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due A. A decides to meet the payment out of its own resources. Later A changes its mind and buys the €100,000 forward.	The exclusion is potentially available. The currency contract and the contract generating the payment obligation do not need to be entered into at the same time.
(18) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due from A. A buys the US dollar equivalent of €100,000 forward.	The exclusion will not generally be available because the currency contract is not a means of payment facilitating the payment due from A to the supplier. This is because the payment is due in euro and so the dollar contract is not sufficiently connected to the payment transaction.
(19) A farmer's farm payment under the EU basic payment scheme will be €10,000 and will be paid in sterling. The payment will be made in three months' time. In order to fix the sterling amount they will receive, the farmer wishes to book a forward with a currency provider to sell €10,000 and buy sterling in three months' time.	The issue here is whether the forward exchange contract relates to identifiable goods and services as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?). The exclusion may not be available. This is because the payment may not be linked to any specific goods or services being sold or bought by the farmer. However it is possible that the farmer is going to use the payments under the scheme to purchase goods or stock for their farming business. If there is an identifiable payment transaction in accordance with the examples in this table the exclusion will potentially be available. If the exclusion is not available it is unlikely that the farmer will be carrying on MiFID business for the reasons described in the answer to Q7 (We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?).
(20) An overseas student is given a grant by their home country in their	The issue here is whether the forward exchange contract relates to

Examples of how the means of payment exclusion works	
Example	**Explanation**
local currency to study at a UK university, payable in six months' time. As the fees are payable in sterling, the student wishes to book a forward with a currency provider to sell their home state currency and buy sterling in six months' time. They wish to enter into the forward contract to guarantee the amount of sterling they will receive.	identifiable goods and services as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?). The exclusion may be available because the grant helps the student to pay for the UK university's fees. The exclusion is still available if some of the grant is to meet living costs and the student has not yet decided what exactly they will need to buy (see the answer to Q31Q (holiday spending money) for more on this).
(21) A hedge fund manager has investors in the UK and a fund which is made up of euro denominated securities. The value of the fund to the investor will fluctuate due to the market value of the securities but it will also go up or down in accordance with the euro/sterling exchange rate. The fund manager seeks to hedge this risk by purchasing a forward contract to sell euro and buy sterling for three months in the future. The purpose of the trade is to ensure the investors will not be subject to currency volatility affecting the value of their investment.	The exclusion is not available because the currency transaction is not linked to any payment for specific goods, services or direct investment.
(22) A UK importer (A) wishes to buy some machinery from a Eurozone seller in three months for €500,000. A enters into a three-month forward for the purchase of €500,000 using sterling. However, the machinery purchase is delayed and A asks to extend the forward contract. This may involve A paying more money for the euro depending on the exchange rate at the date of the contract extension.	The fact that the currency forward is later amended by mutual consent to match the changed payment date for the machinery does not prevent the exclusion from applying as long as the amended version meets the exclusion conditions in the light of the changed circumstances. If the foreign exchange provider refuses to amend the contract the exclusion is not lost as long as the exclusion conditions were met at the time the foreign exchange contract was entered into.
(23) A UK importer (A) wishes to buy some machinery from a Eurozone seller in three months for €500,000. A enters into a three-month forward for the purchase of €500,000 using sterling. The machinery purchase falls through but A wants to extend the contract length as they have identi	The answer to (22) applies. As explained in the answer to (7), the exclusion may be available for the proposed new machinery contract even though the precise details are not yet known.

Examples of how the means of payment exclusion works	
Example	**Explanation**
fied replacement machinery with a similar price.	
(24) A UK importer (A) wishes to buy some machinery from a Euro-zone seller in three months for €500,000. A enters into a three-month forward for the purchase of €500,000 using sterling. However, the machinery purchase is delayed and the specifications are changed. The currency contract therefore no longer facilitates payment under the machinery contract. A decides to close out the existing currency contract. A also enters into a new forward contract with another currency provider that matches the revised machinery contract.	The exclusion is potentially available for the close out contract and also for the new currency contract. If A decides to meet the payment due under the revised machinery contract out of its own resources, the exclusion is still potentially available for the close out contract.
(25) A customer is due to receive an inheritance in euro and is advised of the amount but, owing to the need to complete probate, the funds will not be released for a number of months. The customer wishes to ensure that there is no depreciation in value of the inheritance in sterling terms and enters into a euro-sterling forward.	The exclusion is not available because the foreign exchange contract is not linked to any specific goods, services or direct investment.
(26) A UK parent company wishes to inject capital in euro into a European subsidiary in four months' time and enters into a forward contract to purchase the euro.	The exclusion is potentially available as the foreign exchange contract is made to facilitate a direct investment in the subsidiary.
(27) A customer asks a UK payment institution to make a payment to a family member living abroad. The payment is to be made in the currency of the country where the family member lives. The customer buys the foreign currency on a forward basis.	The exclusion is not necessarily available. The exclusion is only available if the family member is going to use the currency for a purpose that comes within the exclusion.
(28) A UK firm (A) has employees abroad. A pays them in local currency. A buys forward the currency with which it will pay its employees.	The exclusion potentially applies.

Q31N. How do the examples in the table in the answer to Q31M apply to an exporter or importer with a large portfolio of contracts?

This question deals with the fact that the examples in the table in the answer to Q31M have relatively simple facts, where the purchaser of the foreign currency only has one or a few payment obligations. In many cases a seller or buyer of goods will have frequent payment transactions for which it needs foreign exchange and it may not wish to meet this need by having a separate currency contract for each import or export contract.

The exclusion can still apply in these cases. This is because, as the examples in the table in the answer to Q31M illustrate, there is some flexibility in the

amount and timing of currency contracts, the ability to estimate currency needs, the ability to close out currency contracts and the use of different currency providers.

However the requirements of the exclusion still apply, including the need to show that the currency contract is a means of payment that is entered into in order to facilitate payment for identifiable goods, services or direct investment. This means that it will be necessary to look at all the importer or exporter's incoming and outgoing payments and currency resources each time the importer or exporter enters into a new currency contract to see whether the exclusion is available for that new currency contract.

Say:

- a UK importer (A) has bought €100,000 worth of goods under a contract with a Eurozone supplier (Contract P);
- the supplier has issued an invoice but the sum is not yet due from A;
- A buys the €100,000 forward; and
- later A buys another €100,000 forward.

When A enters into the second currency contract, changes to Contract P or to A's payment profile may mean that:

- the new currency contract will better facilitate the payment obligation under Contract P and the first currency contract will facilitate another identified payment obligation; or
- the first contract no longer facilitates the payment under Contract P and A needs the new currency contract to allow it to make the payments due under Contract P.

When deciding whether the exclusion applies to the second currency contract entered into by A there is no need to treat the first currency contract as tied to the payment under Contract P just because the payment due under Contract P justified the application of the exclusion when A entered into the first currency contract. Instead it is necessary to look again at all A's incoming and outgoing payments and currency resources at the time A enters into the second currency contract (including both currency contracts).

Q31O. I am a payment services provider under the Payment Services Regulations. How do the spot contract and means of payment exclusions referred to in the answers to Q31C and Q31G apply to me?

(See ■ PERG 15 (Guidance on the scope of the Payment Services Regulations 2009) for the Payment Services Regulations)

This answer only relates to a payment service provider authorised under the *Payment Services Regulations*. It does not cover, for example, banks that are subject to the conduct of business requirements of those Regulations.

The *Payment Services Regulations* allow you to provide foreign exchange services that are closely related and ancillary to your payment services. That right does not allow you to provide foreign exchange derivative services that would otherwise require authorisation under MiFID. You therefore need to consider the availability of MiFID exclusions for your foreign exchange business.

The most common sort of foreign exchange contract you are likely to carry out is where you execute a payment for your customer that involves a currency conversion. For example, you may make a payment for your customer in euros from the customer's sterling payment account to a payee's payment account. The foreign exchange part of this transaction is separate from the payment

part of the transaction (see Q12 in ■ PERG 15.2 (We provide electronic foreign exchange services to our customers/clients. Will this be subject to the PSD regulations?)).

The foreign exchange part of this example may involve a MiFID C4 derivative if it has a forward element. However in practice it is likely that such foreign exchange transactions will fall outside MiFID because the spot exclusion applies.

The following are examples of how the delivery period should be calculated for the MiFID spot exclusion. They are all based on a payment being made in one currency funded from a payment account in another currency.

- If your customer asks for the payment to be made immediately, the delivery period starts on the date of request.
- If your customer asks for the payment to be made some time after the request and the foreign exchange conversion is to be carried out at the spot rate on the transfer date, the delivery period starts on that transfer date.
- If your customer asks for the payment to be made some time after the request and the foreign exchange conversion rate is fixed on the date the customer gives you your instructions, the delivery period starts on that instruction date.
- The date on which the payment is received by the payee's payment services provider should normally be treated as the delivery date.
- If you debit your customer's payment account after receipt by the payee's payment services provider and the foreign exchange conversion rate is fixed on the debit date, the availability of the exclusion is based on the gap between the debit date and the payment to the payee's payment services provider.

If your customer wants to make a foreign currency transfer some time in the future and buys the foreign currency from you in advance at the spot rate and immediately credits it to a payment account with you, the spot exclusion should apply.

If the delivery period is too long for the spot contract exclusion to apply, the means of payment exclusion is potentially available because you are not a financial counterparty for the purposes of that exclusion.

However, the means of payment exclusion only applies if the payment by your customer meets the requirements about identifiable goods, services or direct investments described in the answer to Q31G.

Q31P. Can a non-deliverable forward come within the exclusion for spot foreign exchange contracts in the answer to Q31C or the means of payment exclusion in the answer to Q31G?

No.

A non-deliverable forward is a cash-settled foreign exchange contract relating to a thinly traded or non-convertible foreign currency against a freely traded currency. The first currency may be non-convertible for example because of exchange controls or restrictions on currency dealing. On the contracted settlement date, the profit or loss is adjusted between the two counterparties based on the difference between the contracted rate for the non-deliverable currency and the prevailing spot rate. The price for the convertible currency may be expressed in terms of a second convertible currency.

As settlement is for the difference between an exchange rate agreed before delivery and the actual spot rate at maturity, a non-deliverable forward is not

a spot contract, regardless of the settlement period (recital (12) of the *MiFID Org Regulation*), and the means of payment exclusion is also not available. See the answer to Q31R about why settlement for a difference does not come within either exclusion.

Q31Q. How is holiday spending money treated under the spot contract and means of payment exclusions referred to in the answers to Q31C and Q31G?

One way of buying holiday currency is for the holidaymaker to order currency to be collected, for example, a week after the order, to be paid for at the currency seller's spot rate on the day of collection. This contract is not a MiFID investment either because it does not fall into the category C4 type of derivative in the first place or because the spot contract exclusion described in the answer to Q31C applies.

Another way of buying holiday money is for the holidaymaker to order currency to be collected, for example, a week after the order, to be paid for at the currency seller's spot rate on the day the currency is ordered. This type of contract is potentially within the C4 type of derivative. However the means of payment exclusion is potentially available. The holiday can be treated as identifiable goods or services even though the holidaymaker may not know what restaurant they are going to eat at or what tourist attractions they are going to visit.

In either case the seller of the holiday money may agree to buy back any unused currency at a price fixed at the same time as the rate at which the holidaymaker is to buy the currency is fixed and linked to the original rate. Such an arrangement may also benefit from the means of payment exclusion. This is because the promise to buy back the currency is so closely connected to the original purchase that it can be seen as being an integral part of the same transaction.

These answers are relevant to whether the currency seller requires authorisation under MiFID. The holidaymaker will of course not require authorisation because a holiday-maker buying holiday money is not acting on a professional basis in the way described in the answer to Q7.

Q31R. How does netting affect the exclusions for foreign exchange contracts in the answers to Q31C and Q31G?

A foreign exchange contract may involve a valuation of the currencies being bought and sold for the purposes of settlement and a single payment being made.

The spot contract exclusion described in the answer to Q31C requires there to be exchange and delivery. The means of payment exclusion described in the answer to Q31G requires there to be physical settlement delivery. Therefore neither exclusion applies to a contract involving this type of netting. An instrument that provides for a single payment like this is more like a swap, which is outside the scope of the exclusions.

The fact that a foreign exchange contract provides for early termination and netting on default does not mean that the exclusions cannot apply. Similarly, the existence of force majeure provisions dealing with bona fide inability to settle physically does not prevent a contract from benefiting from the exclusions.

The parties to a foreign exchange contract may also have entered into other foreign exchange or financial contracts with each other. The result may be that the parties exchange multiple cash flows during a given day. In order to reduce operational and settlement risks they may agree to net those cash flows into one payment for each currency (payment netting). For example the parties may each have to make and receive multiple payments in sterling, euro

and US dollars on the same day. The result of payment netting is that there will only be three payments to be made on that day, one in each of the three currencies. This sort of payment netting is compatible with the exclusions.

Q31S. I enter into my foreign exchange contracts on a trading venue. What exclusions or exemption can I rely on?

The spot contract exclusion described in the answer to Q31C may be available.

The means of payment exclusion described in the answer to Q31G will not be available.

If neither exclusion is available, and the contract is a C4 derivative, you may find the own account exemption described in the answer to Q40 helpful. Although that exemption is usually unavailable to those who have direct electronic access to a *trading venue*, this is not the case where the contract is for hedging purposes.

Commodity derivatives

Q32. Which types of commodity derivative 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 paragraph 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).

Q33.What is a commodity for the purposes of MiFID?

"Commodity" means any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products and energy such as electricity (article 2.6 of the *MiFID Org Regulation*). The fact that energy products, such as gas or electricity, may be "delivered" by way of a notification to an energy network (such as notifications under the Network Code or the Balancing and Settlement Code) does not prevent them being "capable of being delivered" for these purposes. If a good is freely replaceable by another of a similar nature or kind for the purposes of the relevant contract (or is normally regarded as such in the market), the two goods will be fungible in nature for these purposes. Gold bars are a classic example of fungible goods. In our view, the concept of commodity does not include services or other items that are not goods, such as currencies or rights in real estate, or that are entirely intangible.

Q33A. Can you tell me more about category C5 commodity derivatives?

This type of commodity derivative is one that must be settled in cash or one that provides for settlement in cash at the option of one of the parties. A derivative that only allows a party to opt for cash in the event of default or termination is not included.

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, a *UK* MTF or a *UK* OTF.

The category C6 type of commodity derivative excludes a wholesale energy product traded on a *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 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, a *UK* MTF, a *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 types of derivatives fall into the C10 category?

There is a miscellaneous category of derivatives in C10, which is supplemented by articles 7 and 8 of the *MiFID Org Regulation*. These relate to:

- climatic variables;
- freight rates;
-
- inflation rates or other official economic statistics;
- telecommunications bandwidth;
- commodity storage capacity;
- transmission or transportation capacity relating to commodities, whether cable, pipeline or other means;
- an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources;
- a geological, environment or other physical variable;
- any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;
- an index or measure related to the price or volume of transactions in any asset, right, service or obligation; or
- an index or measure based on actuarial statistics.

C10 derivatives must also meet at least one of the following criteria:

- the contract is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of default or other termination event; or
- the contract is traded in a *regulated market*, an MTF, an OTF or a non-EEA trading venue that performs a similar function; or
- the contract meets the following criteria in the answer to Q33C:
  - o it is not a spot contract;
  - o it meets the requirements about trading on (or being stated to be traded on), being subject to the rules of or being equivalent to contracts traded on, certain trading venues;
  - o standardisation; and
  - o it does not fall within the exclusion about transmission grids, energy balancing mechanisms or pipeline networks.

All these criteria are explained in more detail in the answer to Q33C.

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:

- Regulation 5(8) of the *UK auctioning regulations* 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* permitted to carry on these activities under the regulations.

- The *UK auctioning regulations* regulate bids for allowances in the form of two-day spot contracts or five-day futures.

- The *UK auctioning regulations* allow the following to bid:

  –aircraft operators and others referred to in (5) below;

–*MiFID investment firms* (other than *collective portfolio management investment firms*) and *UK* credit institutions and similar *third country investment firms*; and

–a person exempt under article 2(1)(j) of MiFID as onshored in Part 1 of Schedule 3 to the *RAO* (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 (for ease of reference the phrase 'MiFID authorisation' is used to refer to *UK* requirements onshoring MiFID):

(1) An emission allowance auctioned as a five-day future or a two-day spot contract is regulated under either the *EU* auction regulation or the *UK auctioning regulations*.

(2) The five-day future auction product is a financial instrument and is regulated under MiFID as onshored by Part 1 of Schedule 2 to the *RAO*. 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 as onshored by Part 1 of Schedule 2 to the *RAO*.

(4) In the FCA's view an *emission allowance* (including when auctioned under the *EU auction regulation* or the *UK auctioning regulations*) will not come within C1.

(5) The *UK auctioning regulations* provide certain exemptions for aircraft operators and operators of plant and other installations. These exemptions continue to apply whether or not a MiFID exemption, as onshored in Part 1 of Schedule 3 to the *RAO* is available, but only for bidding activities covered by the *UK auctioning regulations*.

(6) Thus for example, regulation 16 of the *UK auctioning regulations* enable business groupings of operators in (5) to be eligible to apply for admission to bid. The MiFID exemption in (12) below may not cover all such persons but they are still entitled to submit bids under the *UK auctioning regulations*.

(7) The mere fact of being exempt under MiFID, as onshored in Part 1 of Schedule 3 to the *RAO* does not allow someone to bid under the *UK auctioning regulations*. The *UK auctioning regulations* regulate who can and cannot bid.

(8) The *UK auctioning regulations* cover 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.

(9) Therefore the *UK auctioning regulations* 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)).

(10) If a person who is allowed to bid under the *UK auctioning regulations* or 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.

(11) The MiFID investment services and activities that apply to a product covered by the *UK auctioning regulations* 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 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 as onshored in Part 1 of Schedule 3 to the *RAO* exempts an operator with compliance obligations under the *trading scheme order 2020* from MiFID.

(a) The exemption covers some of the same ground as the exemption in the *UK auctioning regulations* described in (5) to (7) above. However this overlap neither extends nor narrows the effect of the *UK auctioning regulations* exemption.

(b) The article 2.1(e) exemption also covers activities not covered by the *UK auctioning regulations*. 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.

(c) See the answer to Q35A for more details about the conditions of the exemption.

(13) An *EU firm* will be carrying on the *regulated activity* of *bidding in emissions auctions* if they bid from the *UK* on an *EU auction platform*.

Structured deposits

Q34B. How are structured deposits covered?

Article 1.4 of MiFID applies certain provisions of MiFID to an investment firm or credit institution that sells or advises on *structured deposits*.

A *structured deposit* is not a financial instrument. This means, for example, that a firm does not become a *MiFID firm* by advising on or selling them.

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13.5 Exemptions from MiFID

13.5

Introduction

Q35.Where do we find a 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.

Q35A. Can you give me a complete list of exemptions?

Description of exemption	MiFID reference	Guidance in this chapter
Insurers	article 2.1(a)	Q36
Intra-group services	article 2.1(b)	Q37 and Q38
Services complementary to other professional activities	article 2.1(c)	Q39
Own account dealing (except in commodities or emission allowances)	article 2.1(d)	Q40 to Q40C
An operator with compliance obligations under the *UK trading scheme* who, when dealing in emission allowances, does not: ● execute client orders; or ● provide any investment services or perform any investment activities other than dealing on own account; or ● apply a high-frequency algorithmic trading technique.	article 2.1(e)	Q34A
Employee share schemes and pension schemes	article 2.1(f) and (g)	Q42
The following public financial institutions:	article 2.1(h)	None

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Description of exemption	MiFID reference	Guidance in this chapter
●members of the European System of Central Banks; ●other national bodies performing similar functions in the EU; ●other public bodies charged with or intervening in the management of the public debt in the EU; or ●international financial institutions established by two or more EU Member States which have the purpose of mobilising funding and providing financial assistance to the benefit of their members that are experiencing or threatened by severe financing problems.		
Collective investment undertakings and pension funds	article 2.1(i)	Q43
Activities relating to commodity derivatives or emission allowances	article 2.1(j)	Q44 to Q45
Persons providing investment advice in the course of providing another professional activity not covered by MiFID This only applies if the provision of such advice is not specifically remunerated.	article 2.1(k)	None
Transmission system operators as defined in article 2(4) of Directive 2009/72/EC or article 2(4) of Directive 2009/73/EC (Directives about common rules for the internal markets in electricity and natural gas). This exemption is subject to various detailed conditions	article 2.1(n)	None
Central securities depositories when providing services explicitly listed in Sections A and	article 2.1(o)	None

Description of exemption	MiFID reference	Guidance in this chapter
B of EU Regulation 909/2014 (Securities settlement and central securities depositories regulation)		
Optional article 3 exemption	article 3	Q48 to Q53
Exemptions relevant to Italy, Denmark and Finland	articles 2.1(l) and (m)	None

Insurance

Q36. We are an insurer. Does MiFID apply to us?

No. Insurers are exempt from MiFID (article 2.1(a)).

Intra-group activities

Q37. We are a non-financial services group company providing investment services to other companies in the same group. Are we exempt under the group exemption in article 2.1(b)?

Yes, if you provide these services exclusively for your parent company, your subsidiaries and those of your parent company. The exemption is narrower than the corresponding exclusion in article 69 of the Regulated Activities Order (groups and joint enterprises) insofar, for example, as it does not apply to investment services supplied to a joint venture participant (see ■ PERG 2.9.10 G).

Q38. We also buy and sell financial instruments for ourselves. Are we still able to use the group exemption?

Yes. As long as your own account dealing does not involve you providing an *investment service* (to which MiFID applies) to non-group entities, you can still rely on the group exemption in respect of the services you provide solely to other group companies.

So far as your own account dealing is concerned, you may be able to rely upon the exemption in article 2.1(d) (see Q39) or 2.1(j) (see Q44 to Q45) if you meet the relevant conditions. The ability to combine reliance on article 2.1(b) and articles 2.1(d) or 2.1(j) could be relevant to companies performing group treasury functions.

The answer to Q46 (Is it possible to combine article 2 exemptions?) explains why it is possible to combine exemptions.

Incidental services as part of a professional activity

Q39.We provide investment services as a complement to our main professional activity. Are we exempt (article 2.1(c) of MiFID and article 4 of the MiFID Org Regulation)?

Yes, you will be exempt under article 2.1(c) MiFID if:

- you provide these services in the course of your professional activity;
- a close and factual connection exists between your professional activity and the provision of the investment service to the same client, such that

the investment service can be regarded as accessory to your main professional activity;

- the provision of investment services to the clients of your main professional activity does not aim to provide a systematic source of income to you;
- you do not market or otherwise promote your ability to provide investment services, except where these are disclosed to clients as being accessory to your main professional activity; and
- your professional activity is regulated by legal or regulatory provisions or a code of ethics that do not exclude the provision of investment services.

This exemption is relevant, for example, to firms belonging to *designated professional bodies*, such as accountants, actuaries and solicitors, to whom Part XX of the *Act* applies. It could also apply to *authorised professional firms* which provide investment services in an incidental manner in the course of their professional activity. In our view, the criteria set out in ■ PROF 2.1.14 G in relation to section 327(4) of the *Act* are also relevant to considering whether a firm can rely on the this MiFID exemption (see further guidance in ■ PROF 2.1.16G).

If an *authorised professional firm* has the standard requirement on its permission that it "...must not carry on the specified regulated activities otherwise than in an incidental manner in the course of the provision by it of professional services (that is, services which do not consist of regulated activities)", our assumption is that it is exempt from MiFID if it complies with this requirement.

If you are an *authorised professional firm* not falling within article 2.1(c) MiFID, you may also wish to consider whether you are exempt or otherwise from MiFID requirements by virtue of the domestic implementation of the article 3 exemption (see Q48 and Q49).

The article 2.1(c) MiFID exemption may also apply to journalists, broadcasters and publishers (where they are subject to regulation or a code of ethics), although in most cases the FCA would not expect these persons to fall within the MiFID definition of investment firm (see Q7 and Q8).

Own account

Q40.We regularly buy and sell financial instruments ourselves but never as a service to third parties. Are there any exemptions which might apply to us?

Yes, you could fall within the article 2.1(d) MiFID exemption but not if you:

- are a market maker (please see Q41 below);
- are a member of, or a participant in, a regulated market or an MTF (except that non-financial entities can be members or participants as described in the answer to Q40A);
- have direct electronic access to a regulated market, an MTF or an OTF (except that non-financial entities can have such access, as described in the answer to Q40A);
- apply a high-frequency *algorithmic trading* technique (see Q41A); or
- deal on own account when executing client orders.

This exemption does not apply to dealing on own account in commodity derivatives, emission allowances or derivatives thereof (the exemption

discussed in the answer to Q44 (Activities in relation to commodity derivatives) is relevant instead).

MiFID says that persons exempt under the commodities exemption described in the answer to Q44 are not required to meet the conditions laid down in the own account exemption described in this answer in order to be exempt. In the FCA's view that does not mean that you can do business of the type covered by the article 2.1(d) exemption without meeting the exemption conditions described in this answer just because you qualify for the commodities exemption. Recital 22 to MiFID confirms that the two exemptions apply cumulatively. Another reason for this conclusion is that articles 2.1(d) and (j) apply to different asset classes and there does not seem to be any reason apparent from MiFID why exemption under article 2.1(j) should be relevant to the asset classes in article 2.1(d).

See the answer to Q46 for more information about combining this exemption with other exemptions, particularly the exemption for commodity derivatives business.

Q40A. When can a non-financial entity have direct electronic access to or be a participant in a trading venue without losing the benefit of the own account exemption described in the answer to Q40?

The article 2.1(d) exemption can still be available if you are a member of, or a participant in, a regulated market or an MTF or you have direct electronic access to a regulated market, an MTF or an OTF, as long as:

- you are a non-financial entity; and
- your transactions are objectively measurable as reducing risks directly relating to your commercial or treasury financing activity, or the commercial or treasury financing activity of your group.

Q40B. What does direct reduction of risk mean in the answer to Q40A?

The second condition described in the answer to Q40A (objectively measurable reduction of risks) is designed to allow a non-financial business to hedge without losing the exemption. The following points are relevant to whether hedging meets this second condition:

- The exception covers hedging for commercial activities as well as treasury activities. It can therefore cover risks to a change in value of your group's assets, services, inputs, products, commodities or liabilities.
- Hedging may cover potential indirect impacts on your business as well as direct ones.
- A transaction may qualify as risk-reducing taken on its own or in combination with other hedging transactions.
- A transaction may be treated as risk-reducing even though it is not a perfect hedge. Thus for example your group may use proxy hedging through a closely correlated instrument to cover an exposure, such as an instrument with a different but very close underlying in terms of economic behaviour.
- If your group uses portfolio or macro hedging, it may not be able to establish a one-to-one link between a specific hedging transaction and a specific risk directly related to the commercial and treasury financing activities being hedged. The risks related to the commercial and treasury financing activities may be complex. For example, the risks may cover several geographic markets, products, time horizons or entities. Nevertheless, macro or portfolio hedging used to hedge a risk in relation to your group's overall risks may be treated as risk-reducing.

• Positions do not qualify as risk-reducing solely on the grounds that they form part of a risk-reducing portfolio on an overall basis. In such cases your group's risk management systems should prevent such transactions from being categorised as risk-reducing.

• A risk may evolve over time and, in order to adapt to the evolution of the risk, a hedging transaction initially executed for reducing risk may have to be offset through the use of additional hedging transactions. As a result, hedging of a risk may be achieved by a combination of hedging transactions and offsetting transactions that close out earlier hedging transactions that have become unrelated to the risk.

• If a transaction originally qualifies as risk-reducing it does not stop being treated as risk-reducing just because the risk it hedges has since evolved.

• A transaction may be treated as risk-reducing if it qualifies as a hedging contract pursuant to International Financial Reporting Standards adopted in accordance with article 3 of Regulation (EC) No 1606/2002 of the European Parliament and Council.

Q40C. What does non-financial entity mean in the answer to Q40A?

In the FCA's view, non-financial entity means the same thing as it does in *MiFID RTS 21*.

Q41. What is a market maker?

A market maker is "a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against that person's proprietary capital at prices defined by that person" (article 4.1(7) MiFID). In our view anyone who satisfies the definition will be a market maker for the purposes of MiFID, even if they have not entered into the agreement with the regulated market required by article 48(2) of MiFID (Systems resilience, circuit breaker and electronic trading).

Q41A. What is a high-frequency algorithmic trading technique?

This question is included here because it is relevant to the own account exemption described in the answer to Q40 and to the commodities exemption described in the answer to Q44.

A high-frequency *algorithmic trading* technique is a type of *algorithmic trading* technique.Article 4.1(40) of MiFID defines a high-frequency *algorithmic trading* technique as an *algorithmic trading* technique characterised by:

• infrastructure intended to minimise network and other types of latencies, including at least one of the following facilities for algorithmic order entry:
o co-location;
o proximity hosting; or
o high-speed direct electronic access;

• system-determination of order initiation, generation, routing or execution without human intervention for individual trades or orders; and

• high message intraday rates which constitute orders, quotes or cancellations.

Employee share and company pension schemes

Q42. Is there an exemption relating to employee share schemes and company pension schemes?

Yes, there is an exemption in article 2(1)(f) MiFID for persons providing investment services consisting exclusively in the administration of employee-participation schemes, for example employee share schemes and company pension schemes. In our view, whilst administration for these purposes could extend to services comprising reception and transmission or execution of orders on behalf of clients or placing, it would not include *personal recommendations* in relation to, or managing, the assets of employee share schemes or company pension schemes.

This exemption can also be combined with the "group exemption" in article 2.1(b) of MiFID, by virtue of article 2.1(g) of MiFID. See the answer to Q46 for more about combining exemptions.

Collective investment undertakings

Q43. Are we right in thinking that MiFID does not apply to collective investment undertakings and their operators?

Yes. Generally speaking, collective investment undertakings are specifically exempt, as are their *depositaries* and managers. For collective investment undertakings within the scope of the *UCITS Directive* or *AIFMD* the "manager" corresponds to the *management company* or *AIFM* of the undertaking. So far as *collective investment schemes* which are outside the scope of the *UCITS Directive* or *AIFMD* are concerned, the "manager" corresponds, in essence, to the *operator*of a *scheme*and not to a person who is managing the assets of the *scheme* (unless that person is also the *operator*). In our view, the manager of a collective investment undertaking only benefits from the exemption in respect of any investment services or activities it may carry on in that capacity. To the extent that it also provides investment services or performs investment activities in a different capacity, for example, if it provides investment advice to, or manages the assets of, an individual third party, these services and activities fall outside the scope of this exemption.

In the case of *UCITS management companies*, some *MiFID* provisions will apply to those who provide portfolio management services (other than *collective portfolio management*), investment advice or safekeeping and administration services in relation to *units* to third parties, by virtue of article 6.4 of the *UCITS Directive* (see Q6). *UK AIFMs* will also be subject to *MiFID* if they provide *investment services or activities* for an undertaking other than a *fund* for which they are appointed as manager or *operator*. *Full-scope UK AIFMs* are only able to provide a limited range of such activities, for which they are subject to specific *MiFID* provisions by virtue of article 6.6 of *AIFMD* (see Q6A).

Exemption for commodity derivatives business

Q44. Who can rely on the exemption in article 2.1(j)?

You may be able to rely on the exemption if:

- you deal on own account in commodity derivatives or emission allowances or derivatives thereof; or
- provide other investment services in commodity derivatives or emission allowances or derivatives thereof to clients or suppliers of your main business (or if you are part of a group, the group's main business); or
- both.

This exemption can include someone dealing on own account as a market maker.

If you deal on own account when executing client orders you can only meet the exemption condition if the client is a client or supplier of your group's main business.

The article 2.1(j) exemption does not apply to you if you apply a high frequency *algorithmic trading* technique.

The exemption will only apply if what you do is ancillary to your main business (see Q45 for more about this).

The exemption is not available if your group's main business is any of the following (see the answer to Q44A for what main business means in this context):

- the provision of investment services; or
- the provision of banking services; or
- acting as a market maker in relation to commodity derivatives.

Q44A. How do I know whether my main business is investment, banking or commodities?

When considering what is a group's 'main business' for the purpose of the requirement described in the answer to Q44 that your main business should not be investment services, banking services or commodity derivatives market making, in our view various factors are likely to be relevant including turnover, profit, capital employed, numbers of employees and time spent by employees. These factors should then be considered in the round in deciding whether any one operation or business line amounts to your group's main business.

The determination of your main business as described in this answer is not directly related to the test for deciding whether your commodities business is ancillary to your main business (the ancillary test is referred to in the answer to Q45). This is because the ancillary test compares the size of your commodities business with the rest of your business but does not specify how to identify what your main business is within your non-commodities business.

Q44B. Are there any formalities for using the commodities exemption?

It is a condition of the commodities exemption described in the answer to Q44 that you:

- should notify annually the relevant competent authority that you make use of this exemption; and
- upon request, report to the competent authority the basis on which you consider that the requirement for the commodities business to be ancillary is met.

If you are a UK firm, the FCA is the relevant competent authority for these purposes.

If you carry out some occasional commodity derivatives activities you may not need to rely on this exemption. See the answer to Q7 (We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?) for more on this.

Q44C. Can the commodities exemption be combined with other exemptions?

Yes.

There is no requirement that someone relying on this exemption must not carry on an activity covered by one of the other exemptions. In particular, this exemption can be combined with the exemption for own account transactions

described in the answer to Q40 (see recital 22 to MiFID). For more on combining exemptions, please see the answer to Q46.

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 MiFID RTS 20 (regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business). You will need to consider whether your commodity derivatives business exceeds the main business threshold as stipulated in article 3 of MiFID RTS 20.

This answer does not give a full summary as the definition is too detailed for *PERG*.

The test as stipulated by article 3 of MiFID RTS 20 has two calculation methods. If the result of either calculation is that you fall below the specified threshold, you meet the 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.

Both methods are based on commodities trading activities in the EEA, as if the UK were still part of the EU.

Q46.Is it possible to combine article 2 exemptions?

Various other answers to questions in this section deal with certain detailed combinations of exemptions:

- Q42 deals with employee share schemes and company pension schemes.
- It is possible to combine the exemption for own account dealing in article 2.1(d) and the exemption for commodity derivatives in article 2.1(j). The answer to Q40 deals with the treatment of the commodity derivatives business of a firm relying on article 2.1(d). The answer to Q44C deals with the treatment of business within article 2.1(d) for a firm relying on the commodity derivatives exemption in article 2.1(j).

In certain cases a firm will not need to combine exemptions. For example an insurer relying on the exemption described in the answer to Q36 (We are an insurer. Does MiFID apply to us?) does not need to rely on any other exemption.

The answer to this question (Q46) is about whether there is a more general principle that article 2 exemptions can be combined.

There is an argument that the drafting of some of the exemptions does not allow this approach. For example, the group exemption (see the answer to Q37) says that the exemption is available to persons providing investment services exclusively for their fellow group members. However in the FCA's view it is generally possible to combine article 2 exemptions. Recital 22 to MiFID says that exemptions apply cumulatively and that the ability to combine the exemptions in articles 2.1(d) (own account dealing) and 2.1(j) (commodity derivatives) is just an example of this principle. This is consistent with the point that there is no reason apparent from MiFID why combining exemptions should not be allowed.

Where an exemption is only available if the person only carries on a limited range of investment services or activities (as is the case for example with the group exemption) it can be argued that this restriction does not cover a service or activity which is covered by another exemption. This is on the basis that an exempt activity is not an investment service or activity for these purposes. The European Commission's Q&A's dealing with MiFID 1 take this approach.

Treating an exempt activity as not being a MiFID investment service or activity in this way only applies for the purpose of article 2 of MiFID, meaning that it is only relevant for deciding whether a person is a MiFID investment firm.

Q46A. Is it possible to combine the article 2 and article 3 exemptions?

The FCA does not believe that it is generally possible to combine the exemptions in article 2 with the exemption in article 3. However in the FCA's view, a firm that relies on the article 2(1)(i) exemption (see Q43) can combine this with article 3 in relation to business falling outside the article 2(1)(i) exemption.

If however you are subject to the UCITS Directive or the AIFMD you may be restricted in your ability to carry out all the activities within the article 3 exemption.

Locals

Q47. We traded on an investment exchange as a local firm and were exempt from MiFID 1. Are we exempt under MiFID?

The exemption for locals in MiFID 1 no longer applies. It is unlikely that the own account exemption in article 2.1(d) will be available as that exemption does not apply to members of, or participants in, a regulated market (see Q40).

The article 3 exemption

Q48. Article 3 is an optional exemption. Will the exemption apply to UK firms?

Yes, in part. The exemption in articles 3.1(a) to (c) has been exercised by The Treasury. The answers to Q49 to Q53 explain the exemption in more detail.

Articles 3.1(d) and (e) of MiFID provide additional optional exemptions, but they have not been implemented in the UK.

Q49.Which firms might fall within this exemption?

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

- they do not hold clients' funds or securities and do not, for that reason, at any time, place themselves in debit with their clients;
- they do not provide any investment service other than reception and transmission of orders or investment advice, or both, in relation to transferable securities and units in collective investment undertakings;
- 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 *UK CRR*;
  - collective investment undertakings or their managers authorised under the law of the *United Kingdom* to market units to the public;

oEU incorporated investment companies the securities of which are listed or dealt in on a *United Kingdom regulated market*, for example investment trust companies.

If you are a UK firm that meets these qualifying conditions, you will be exempt from regulations made by the European Commission under MiFID.

Where you provide *personal recommendations* or receive and transmit orders in relation to derivatives which are MiFID financial instruments but not transferable securities, you will fall outside the scope of this exemption. In our view, this would be the case, for example, if you provided either or both of these investment services in relation to OTC derivatives concluded by a confirmation under an ISDA master agreement (see ■ PERG 13 Annex 2 Table 2).

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 the *UK* either because they are unregulated schemes or 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.

Q51.What happens if we breach any of the qualifying conditions (see Q49)? Do we then lose the exemption?

You are required to notify us of a breach (see ■ SUP 15.3.11 R). We will then consider whether you should continue to benefit from the exemption and what, if any, supervisory or occasionally enforcement action is appropriate in the circumstances.

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

[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. Nor are you a *MIFIDPRU investment firm* subject to the prudential requirements in *MIFIDPRU*.

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*.

13.5A Child trust funds and MiFID

13.5A

Q53A. Is a child trust fund (a CTF) a financial instrument?

No. A *CTF* account itself is not a *financial instrument*. The funds contributed to a CTF may be invested in financial instruments. However, in the FCA's view, the link between the underlying investment and the rights and interests acquired by the CTF account holder is too remote for the account holder to be considered as having acquired the underlying investment itself. So, the provision of services to a CTF account holder (such as in relation to the establishment of the account and the making of further contributions) will not be an *investment service*.

Q53B. Will the operator of a CTF be carrying on investment services or activities?

Possibly, but it is likely that he will be exempt from the scope of MiFID. Where the CTF is invested wholly or partly in *financial instruments*, the operator may be providing an *investment service* when he executes the transaction or arranges to transfer funds to a new financial instrument (such as a security or collective investment scheme unit). However, in the FCA's opinion, the exemption in article 2(1) (c) of MiFID (see Q39) should be available to CTF operators such that these activities will effectively be outside the scope of MiFID.

The key question in applying this exemption is whether the investment services are incidental to the other activities involved in operating a CTF when viewed on a global basis. In the FCA's view, this is likely to be the case as most CTFs do not involve active trading, such as day trading, by the account holder and, as a result, involve little or no ongoing investment service within the scope of MiFID.

An issue arises as to whether a focus on deal-based charges as the main source of remuneration (instead of charges related to the administration of the CTF itself) might indicate that trading is not incidental. In this respect, the FCA would expect firms designing an account in this way to follow the principle of treating their customers fairly. For example, firms may want to explain to potential account holders the possible impact of frequent switching if this incurs costs and erodes capital. More generally, where active trading is likely to have a detrimental effect on capital value, it may well be that this would be viewed as more than an incidental activity such that the exemption would not apply.

It is necessary to balance investment services against all the activities that are not investment services that have taken place or will take place in the CTF accounts that the firm operates over their full term. The FCA would not expect firms to have to investigate each CTF on a trade-by-trade basis. The

exemption may still apply even if particular accounts experience higher levels of dealing activity.

Q53C. Is a person who provides services relating to investments that underlie the CTF within the scope of MiFID?

Possibly. Firms which provide *investment services* to the CTF operator in relation to financial instruments held within the CTF account (such as executing trades) will be within the scope of MiFID unless an exemption applies to them.

Q53D. Does the same analysis apply to other types of schemes where financial instruments may be held for the benefit of investors such as an ISA or a pension scheme?

This depends on the nature of the scheme in question. CTFs have very particular product features. Other types of schemes such as ISA accounts may simply be tax efficient ways to hold the beneficial interest in financial instruments which may, at the behest of the account holder, be transferred into his direct ownership. So, the beneficial interest that an investor acquires in a share, bond or collective investment scheme unit held under an ISA will be a financial instrument for the purposes of MiFID. And the operation of an ISA will essentially be an investment service such that the exemption in article 2.1(c) of MiFID will not be relevant. Pension schemes, on the other hand, bear a closer similarity to CTFs in that they will have particular product features and the underlying investments are held for the purpose of providing or determining the value of the member's cash benefits. Generally speaking, a member of a pension scheme can only transfer the value of his benefits and not transfer the underlying investments into his direct ownership. For this reason, as explained in ■ PERG 10.4A, the FCA does not consider that a member of a pension scheme acquires a financial instrument purely as a result of having a financial instrument held for his benefit under the trusts of an occupational or personal pension scheme.

13.6 CRD IV [deleted]

13.6 *UK CRR .*

13.7 The territorial application of MiFID [deleted]

13.7

Q67. [deleted]

Q68. [deleted]

Q69. [deleted]

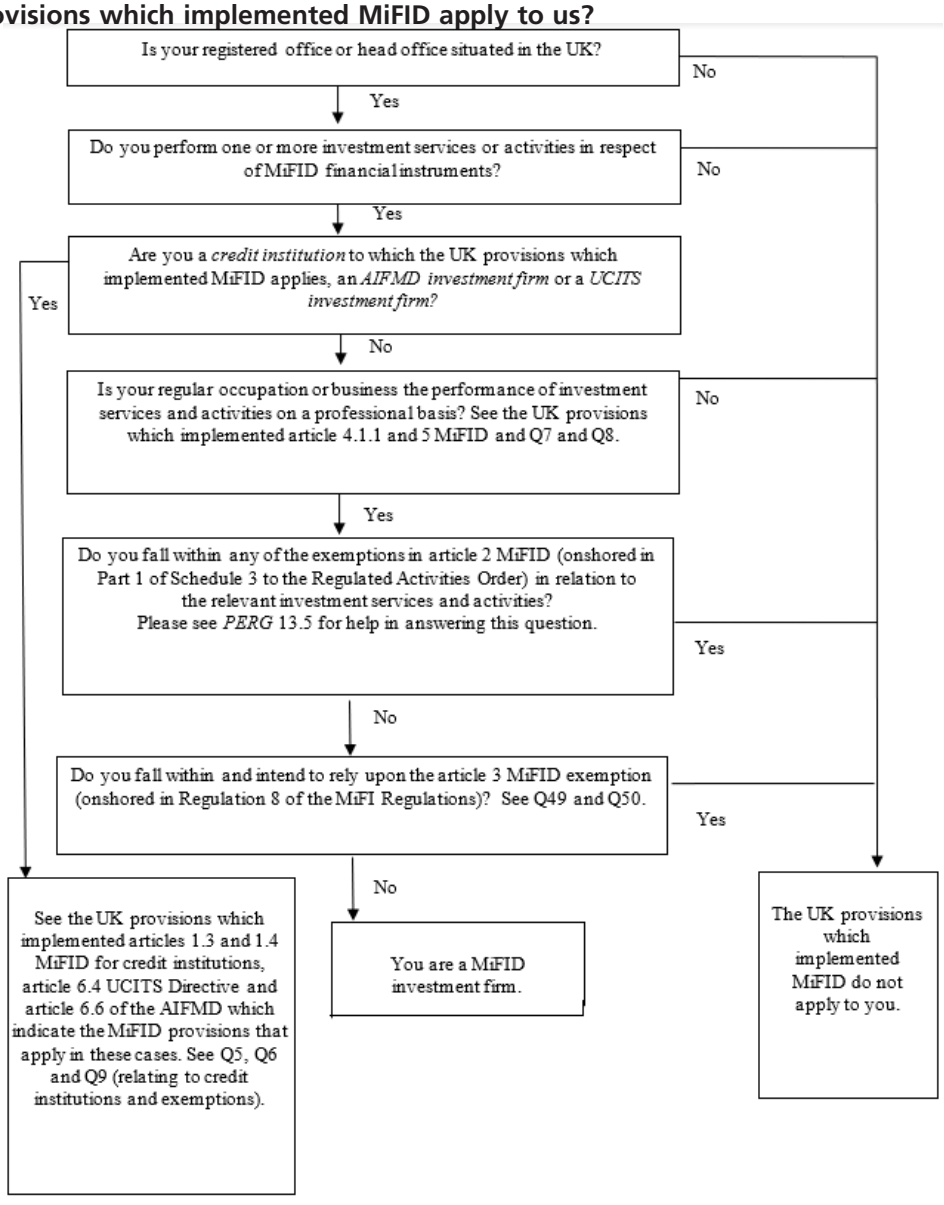
Q70. [deleted]

Q71. [deleted]

Q72. [deleted]

Annex 1

Do the UK provisions which implemented MiFID apply to us?



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	Arranging (bringing about) deals in investments (article 25(1) *RAO*) Bidding in emissions auctions (article 24A *RAO*)	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. 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. See Q13, Q14 and Q34A for further guidance.
A2- Execution of orders on behalf of clients	Dealing in investments as agent (article 21 *RAO*) Dealing in investments as principal (article 14 *RAO*) Bidding in emissions auctions (article 24A *RAO*)	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. See Q15, Q15A and 34A for further guidance.

MiFID Investment Services and Activities	Part 4A permission	Comments
A3- Dealing on own account	Dealing in investments as principal (article 14 *RAO*)	Where a firm is dealing on own account, it needs permission to carry on the activity of dealing in investments as principal. See Q16 and 34A for further guidance.
A4- Portfolio management	Managing investments (article 37 *RAO*) Dealing in investments as principal (article 14 *RAO*) Dealing in investments as agent (article 21 *RAO*) Arranging (bringing about) deals in investments (article 25(1) *RAO*) Making arrangement with a view to transactions in investments (article 25(2))	A firm performing the portfolio management service needs a permission to carry on the activity of managing investments. Firms may also need permission to perform other regulated activities to enable them to give effect to decisions they make as part of their portfolio management (see adjacent column). See Q6, Q6A, Q17 and Q43 for further guidance.
A5- Investment advice	*Advising on investments (except P2P agreements)* (article 53(1) RAO)	A firm providing investment advice will need permission to carry on the activity of advising on investments. See Q18 and Q19 to Q21 for further guidance.
A6- Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis	Dealing in investments as principal (article 14 *RAO*) Dealing in investments as agent (article 21 *RAO*)	Where a firm underwrites an issue of financial instruments and holds them on its books before they are sold or offered to third parties, it needs permission to carry on the activity of dealing in investments as principal. Where an underwriting firm sells the relevant instruments as agent for the issuer and then purchases any remaining instruments as principal, it needs permission to carry on the activity of dealing in investments as agent in relation to its selling activity and of dealing in investments as principal in relation to

MiFID Investment Services and Activities	Part 4A permission	Comments
		its purchase of the remaining instruments. See Q22 for further guidance.
A7- Placing of financial instruments without a firm commitment basis	Dealing in investments as agent (article 21 *RAO*) Arranging (bringing about) deals in investments (article 25(1) *RAO*)	Where a firm arranges the placement of financial instruments with another entity, it needs permission to carry on the activity of arranging (bringing about) deals in investments. Where a firm sells the relevant instruments on behalf of the issuer, it also needs permission to carry on the activity of dealing in investments as agent. See Q22 for further guidance.
A8- Operation of Multilateral Trading Facilities	Operating a multilateral trading facility (article 25D *RAO*)	Firms performing this service will need permission to carry on the regulated activity of operating a multilateral trading facility. Firms will not require permission to carry on any other regulated activities if all they do is operate a multilateral trading facility. If they carry on additional regulated activities, they should ensure that their permission properly reflects this. See Q24 for further guidance.
A9- Operation of organised trading facilities	Operating an organised trading facility (article 25DA *RAO*)	Firms performing this service will need permission to carry on the regulated activity of operating an organised trading facility. Firms will not require permission to carry on any other regulated activities if all they do is operate an organised trading facility. If they carry on additional regulated activities, they should ensure that their permission properly reflects this. See Q24A for further guidance.
Note: 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 PERG 2.7.7CG) and so a *firm* must have a separate *permission* to undertake that activity.		

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

MiFID financial instrument	Part 4A permission category	Commentary
C1- Transferable securities	share (article 76) debenture (article 77) alternative debenture (article 77A) government and public security (article 78) warrant (article 79) certificate representing certain securities (article 80) unit (article 81) option (excluding a commodity option and option on a commodity future) future (excluding a commodity future and a rolling spot forex contract) contract for differences (excluding a spread bet, a rolling spot forex contract and a binary bet) spread bet	The permission investment categories in column 2 (Part 4A permission category) are wider than the MiFID definition of transferable securities, as they comprise both securitised and non-securitised instruments. An instrument is not a transferable security under MIFID if it is not negotiable on the capital market. Therefore an investment listed in column (2) will not always be a transferable security. Firms with permissions containing any of the Part 4A permission investment categories in column (2) will fall outside the article 3 MiFID exemption as transposed in domestic legislation, where they provide investment services in relation to financial instruments which are non-securitised investments (for example, OTC derivatives concluded by a confirmation under an ISDA master agreement). It is possible in theory that options, futures and contracts for differences under the *RAO* that are not mentioned in column (2) could be a MiFID transferable security. However column (2) includes the main *RAO* derivatives that the FCA thinks may in practice be transferable securities. For further guidance on the article 3 exemption see Q49; for further guidance on transferable securities see Q28.
C2- Money market instruments	debenture (article 77) alternative debenture (article 77A) government and public security (article 78) certificate representing certain securities (article 80)	Money market instruments are classes of instruments normally dealt in on the money markets. For further guidance on money market instruments see Q28A.

MiFID financial instrument	Part 4A permission category	Commentary
C3- Units in a collective investment undertaking	unit (article 81) shares (article 76)	C3 includes units in regulated and unregulated collective investment schemes. This category also includes closed-ended corporate schemes, such as investment trust companies (hence the reference to shares in the adjacent column). For further guidance, see Q29.
C4- Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash	option (excluding a commodity option and an option on a commodity future) commodity option and option on a commodity future future (excluding a commodity future and a rolling spot forex contract) rolling spot forex contract contract for differences (excluding a spread bet, a rolling spot forex contract and a binary bet) spread bet binary bet	C4 includes in our view derivatives relating to commodity derivatives, for example options on commodity futures. For further guidance, see Q31A to Q31S. Note that for the purposes of the permission regime, commodity options and options on commodity futures are treated as a single permission category. (see PERG 2 Annex 2 G Table 2).
C5- Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event)	commodity option and option on a commodity future commodity future contract for differences (excluding a spread bet, a rolling spot forex contract and a binary bet) binary bet	C5 instruments are generally contracts for differences. Where a C5 instrument provides for the possibility of physical settlement, it may also be either a commodity future or commodity option, depending on its structure. For further guidance see Q33A.
C6- Options, futures, swaps, and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a *United Kingdom* regulated market, a *UK* MTF or an a *UK* 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.
C7- Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6. This category does not include spot contracts or contracts that meet certain	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)	For further guidance see Q33C.

MiFID financial instrument	Part 4A permission category	Commentary
conditions that are designed to exclude contracts for commercial purposes	binary bet	
C8- Derivative instruments for the transfer of credit risk	option (excluding a commodity option and an option on a commodity future) contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet) spread bet rolling spot forex contract	C8 derivatives are financial instruments designed to transfer credit risk, often referred to as credit derivatives. For further guidance see Q31.
C9- Financial contracts for differences	contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet) spread bet rolling spot forex contract	In our view, C9 derivatives could include those contracts for differences with a financial underlying, for example the FTSE index.
C10- Options, futures, swaps, forward rate agreements and any other derivative contracts relating to various specified underlyings that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event) This category does not include contracts that meet certain conditions designed to exclude non-financial derivative instruments.	option (excluding commodity option and option on a commodity future) future (excluding a commodity future and a rolling spot forex contract) contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet) spread bet binary bet	For further guidance see Q34.
C11- Emission allowances	Emission allowances	See Q34A

Note:

In our view, the categories of financial instrument in C1 to C11 are not mutually exclusive, so a financial instrument may fall within more than one category. For example, an interest in an investment trust company falls within C1 and C3.

Are you subject to the CRD and UK CRR (or allowed to be subject to the recast CAD)? [deleted]

Principal Statutory Instruments relating to MiFID scope issues [deleted]