

Chapter 2

Authorisation and regulated activities

2.5 Investments and activities: general

2.5.1 **G** In addition to the requirements as to the business test and the link to the *United Kingdom*, two other essential elements must be present before a *person* needs *authorisation* under the *Act*. The first is that the *investments* must come within the scope of the system of regulation under the *Act* (see ■ PERG 2.6). The second is that the activities, carried on in relation to those *specified investments*, are regulated under the *Act* (see ■ PERG 2.7). Both *investments* and activities are defined in the *Regulated Activities Order* made by the Treasury under section 22 of the *Act*.

2.5.1-A **G** The following *regulated activities* may be carried on in relation to property of any kind:

- (1) *managing a UCITS*;
- (2) *acting as trustee or depositary of a UCITS*;
- (3) *managing an AIF*;
- (4) *acting as trustee or depositary of an AIF*;
- (5) *establishing, operating and winding up a collective investment scheme*;
- (6) *establishing, operating and winding up a stakeholder pension scheme*;
- (7) *establishing, operating and winding up a personal pension scheme*;
- (8) *meeting of repayment claims*; and
- (9) *managing dormant account funds (including the investment of such funds)*.

2.5.1A **G** The *regulated activity* of *administering a benchmark* does not require the involvement of a *specified investment* in any way.

2.5.1B **G** The activities of *providing credit information services* and *providing credit references* are not required to relate to a *specified investment* to be *regulated activities*, but rather relate to information about a *person's* financial standing.

2.5.2 **G** The *Regulated Activities Order* contains exclusions. Exclusions may exist in relation to both the element of investment and the element of activity. Each should therefore be checked carefully. The exclusions that relate to *specified investments* are considered in ■ PERG 2.6, together with the outline of the *specified investments*. The exclusions that relate to activities are considered separately from the outline of activities (see ■ PERG 2.8 and ■ PERG 2.9).

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

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

Investment services and activities

2.5.4 **G** It remains the Government's responsibility to ensure the proper implementation of *MiFID*. Certain *persons* subject to the requirements of *MiFID* must be brought within the scope of regulation under the *Act*. A core element of *MiFID* is the concept of investment firm. An *investment firm* is any *person* whose regular occupation or business is the provision of one or more *investment services* to third parties or the performance of one or more *investment activities* on a professional basis. An *investment firm* is not subject to *MiFID* requirements if it falls within one or more of the exemptions in article 2 *MiFID*. Further information about these exemptions is contained in PERG 13.5. To the extent that an *investment firm* falls within one of these exemptions, it will not be a *MiFID investment firm*. Where a *firm* is not a *MiFID investment firm* because one or more of the exemptions in article 2 apply, it may still be carrying on *regulated activities* and therefore require *authorisation* unless it is an *exempt person*.

2.5.4A **G** The *UK* has exercised part of the optional exemption in article 3 of *MiFID*. Further information about this exemption is contained in Q48 to 53 in PERG 13.5. The investment services to which article 3 apply (namely reception and transmission of orders and investment advice in relation to either *transferable securities* or units in collective investment undertakings) correspond to *regulated activities* (see PERG 13 Annex 2 Tables 1 and 2).

2.5.5 **G** For *persons* who are *MiFID investment firms*, the activities that must be caught by the *Regulated Activities Order* are those that are caught by *MiFID*. To achieve this result, some of the exclusions in the Order (that will apply to *persons* who are not caught by *MiFID*) have been made unavailable to *MiFID investment firms* when they provide or perform *investment services and activities*. A "MiFID investment firm", for these purposes, includes *credit institutions* to which *MiFID* applies (see ■ PERG 13, Q5 and 9); *collective portfolio management investment firms* providing the services of *portfolio management* and *personal recommendations* in relation to *financial instruments* or the ancillary service of safekeeping and administration in relation to *units* of collective investment undertakings; and *AIFM investment firms* providing the ancillary service of reception and transmission of orders in relation to *financial instruments*. The same exclusions are also unavailable

to *third country investment firms* when they provide *investment services and activities*. Article 4(4) of the *Regulated Activities Order* (Specified activities: general) lists a number of exclusions that must be disregarded. These relate to the exclusions concerned with:

- (1) the absence of holding out (see ■ PERG 2.8.4G (1));
- (2) transactions or arrangements with or through certain *persons* (see ■ PERG 2.8.4G (2), ■ PERG 2.8.5G (1) and ■ PERG 2.8.6G (4));
- (2A) issuing own securities (see ■ PERG 2.8.4G(4));
- (3) risk management (see ■ PERG 2.8.4G (5) and ■ PERG 2.8.5G (2));
- (3A) arranging for the issue of your own securities ■ PERG 2.8.6AG(11);
- (4) *persons* acting under powers of attorney (see ■ PERG 2.8.7 G);
- (4A) professions or businesses not involving *regulated activities* (see ■ PERG 2.9.5 G);
- (5) sale of goods (see ■ PERG 2.9.7 G);
- (6) groups and joint enterprises (see ■ PERG 2.9.9 G);
- (7) sale of a *body corporate* (see ■ PERG 2.9.11 G); and
- (8) business angel-led enterprise capital funds (see ■ PERG 2.9.20 G to ■ PERG 2.9.22 G).

Insurance distribution or reinsurance distribution

2.5.6

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The *IDD* is, in part, implemented through various amendments to the *Regulated Activities Order*. These include article 4(4A) (Specified activities: general) which precludes a *person* who, for remuneration, takes up or pursues *insurance distribution* or *reinsurance distribution*, in relation to a risk or commitment situated in an *EEA State* from making use of certain exclusions. In other cases, some of the exclusions provided in relation to particular *regulated activities* are unavailable where the activity involves a *contract of insurance*. This is explained in more detail in ■ PERG 5(Guidance on insurance distribution activities).

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

2.5.7

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Some *specified investments* are defined so that certain products only come within that *specified investment* when a *person* is providing services under certain *EU* legislation in relation to that product.

2.5.8

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When ■ PERG 2.5.7G applies, the product is only treated as falling within the definition of the *specified investment* concerned if (in relation to that product):

- (1) one of the following *persons*:
 - (a) a *MiFID investment firm*; or

- (b) a *third country investment firm*; or
 - (c) a *CRD credit institution*; or
 - (d) a *credit institution* that would qualify to be a *CRD credit institution* if its registered or head office were in the *EEA*; provides or performs *investment services and/or activities* on a professional basis; or
- (2) a *UCITS investment firm* is providing certain *investment services and/or activities* under article 6.3 of the *UCITS Directive* (provision of services in addition to *UCITS* management); or
 - (3) a *market operator* (or someone who would be a *market operator* if it was based in the *EEA*) is providing the *investment services and/or activities* of operating a *multilateral trading facility* or *organised trading facility* (these activities are described in Q24 and Q24A in ■ PERG 13.3); or
 - (4) an *AIFM investment firm* is providing services under article 6.4 of the *AIFMD* (provision of services in addition to *AIF* management).

2.5.9

■ PERG 2.5.7G only applies to the following *specified investments*:

- (1) an *emission allowance* (see ■ PERG 2.6.19DG for more details);
- (2) an *option* (see ■ PERG 2.6.20G for more details);
- (3) a *future* (see ■ PERG 2.6.22AG for more details);
- (4) a credit derivative treated as a *contract for differences* (see ■ PERG 2.6.23G for more details); and
- (5) a binary or fixed outcomes derivative treated as a *contract for differences* (see ■ PERG 2.6.24AG for more details, which also explains that in certain circumstances ■ PERG 2.5.7G does not apply to this product).

2.5.10

- (1) When deciding whether a person is a *MiFID investment firm* or a *third country investment firm* for the purposes of ■ PERG 2.5.8G(1), it is necessary to take into account the services that that *person* is providing in relation to the product concerned.
- (2) For example, say that a *UK person* does business in an option product to which ■ PERG 2.5.7G applies. When deciding whether that product is a regulated *option*, it is not necessary for that *person* already to be:
 - (a) a *MiFID investment firm*; or
 - (a) *authorised* under the *Act*;
 because of its other activities.
- (3) Therefore, when deciding whether the *UK person* in (2) is a *MiFID investment firm* and whether it needs to be *authorised* under the *Act*, it is necessary to take into account all the business it does, including business in that option product.