

## Chapter 9

# Meaning of open-ended investment company

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

9.6.1 **G** If BC comes within the definition of a *collective investment scheme*, the third element in determining whether it is an *open-ended investment company* is whether the 'investment condition' is satisfied. This condition is that, in relation to BC, a reasonable investor would, if he were to participate in the scheme:

- (1) expect that he would be able to realise his investment in the scheme, within a period appearing to him to be reasonable; his investment would be represented, at any given time, by the value of the shares in, or securities of, BC held by him as a participant in the scheme; and
- (2) be satisfied that his investment would be realised on a basis calculated wholly or mainly by reference to the value of the property for which the scheme makes arrangements.

9.6.2 **G** Under the investment condition, the reasonable investor is looking to satisfy two criteria. Both of these are fundamental to his decision to invest. But the thresholds referred to in **■ PERG 9.6.1 G (1)** and **■ PERG 9.6.1 G (2)** are different. In the *FCA's* view, a *person* expects something where he regards it as likely to happen or anticipates that events will turn out in a particular way. A *person* is satisfied of something where he has made up his mind or is persuaded that it is the case. The first of these criteria is referred to in this *guidance* as the 'expectation test' and the second as the 'satisfaction test'.

9.6.3 **G** Section 236(3) of the *Act* states clearly that the investment condition must be met 'in relation to BC'. In the *FCA's* view, this means that the investment condition should not be applied rigidly in relation to specific events such as particular issues of shares or securities or in relation to particular points in time. The requirements of the investment condition must be satisfied in relation to the overall impression of the *body corporate* itself, having regard to all the circumstances.

9.6.4 **G** In the *FCA's* view, and within limits, the investment condition allows for the possibility that a *body corporate* that is an *open-ended investment company* may issue shares or securities with different characteristics. Some shares or securities may clearly satisfy the condition whereas others may not. The *FCA* considers that a reasonable investor contemplating investment in such a *body corporate* may still take the view, looking at the *body corporate* overall, that the investment condition is satisfied. In the *FCA's* view, a *body corporate* issuing a number of different classes of shares or securities on different terms might be expected to satisfy the investment condition where

the overall balance between those that do and those that do not is strongly in favour of those that do satisfy the investment condition. The *FCA* considers that, in any case where there is a genuine and reasonable doubt as to where the balance between the different classes lies, it is very likely that the *body corporate* would not be an *open-ended investment company*.

■ PERG 9.8.8 G (Some relevant factors in applying the 'expectation test') comments further on this aspect of the investment condition in the specific context of the 'expectation test'.

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

- (1) Chapters 3 to 7 of Part 18 of the Companies Act 2006; or
- (2) [deleted]
- (3) [deleted]
- (4) provisions in force in a country or territory which the Treasury has, by order, designated as corresponding provisions (no orders have yet been made).

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The *FCA*'s views on the following three elements of the investment condition are explained separately:

- (1) the 'reasonable investor' (see ■ PERG 9.7 (The investment condition: the 'reasonable investor'));
- (2) the 'expectation' test (see ■ PERG 9.8 (The investment condition: the 'expectation test' (section 236(3)(a) of the Act))); and
- (3) the 'satisfaction' test (see ■ PERG 9.9 (The investment condition: the 'satisfaction test' (section 236(3)(b) of the Act))).