

UK EMISSION TRADING SCHEME (NO 2) INSTRUMENT 2021

Powers exercised by the Financial Conduct Authority

- A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of section 139A (Power of the FCA to give guidance) of the Financial Services and Markets Act 2000 (“the Act”).

Amendments to material outside the Handbook

- B. The Perimeter Guidance manual (PERG) is amended in accordance with the Annex A in this instrument.

Commencement

- C. This instrument comes into force on 17 December 2021.

Citation

- D. This instrument may be cited as the UK Emission Trading Scheme (No 2) Instrument 2021.

By order of the Board
16 December 2021

Annex A

Amendments to the Perimeter Guidance manual (PERG)

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

2 Authorisation and regulated activities

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2.7 Activities: a broad outline

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Bidding in emissions auctions

- 2.7.6B G The *RAO* and the *UK auctioning regulations* together generate three broad categories of *person* in relation to bidding for *emission allowances* on an *auction platform*:
- (1) The first category consists of a *MiFID investment firm* (other than a *collective portfolio management investment firm*) or a *third country investment firm* (other than one which would be a *collective portfolio management investment firm* if its head office were in the *United Kingdom*).
 - (1A) The first category also consists of a *person* that is exempt from *MiFID* under article 2(1) (j), as onshored by Part 1 of Schedule 3 to the *RAO*, where it is bidding on behalf of a client of its main business or bidding on its own account (further information on the article 2(1) (j) exemption from *MiFID* is in *PERG* 13.5, Q44).
 - (1B) A *person* in this first category is entitled to bid on an *auction platform* but requires permission from the *FCA* for *bidding in emissions auctions* to do so.
 - (2) The second category consists of operators or aircraft operators bidding on their own account as well as group entities or business groupings of those operators or *UK* public bodies or *UK* state-owned entities that control any of those operators (as set out in regulation 16 of the *UK auctioning regulations*). A *person* or entity in this category is entitled to bid on an *auction platform* but does not require *permission* from the *FCA* to do so as a result of an exclusion from the *regulated activity* of *bidding in emissions auctions* in article 24B of the *RAO*.
 - (3) The third category consists of all other *persons*. The *UK auctioning regulations* prevent an *auction platform* from granting these *persons* admission to bid. A *person* in this category is not entitled to bid on an

auction platform and the *FCA* is not able to grant such a *person permission* to do so.

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

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13.4 Financial instruments

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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 ~~a MiFID~~ 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 ~~UK~~ *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) ~~Although third country investment firms cannot bid on an auction platform, an~~ 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.