

## Chapter 2

# Authorisation and regulated activities

## 2.3 The business element

**2.3.1** **G** Under section 22 of the *Act (Regulated activities)*, for an activity to be a *regulated activity* it must be carried on 'by way of business'.

**2.3.2** **G** There is power in the *Act* for the Treasury to change the meaning of the business element by including or excluding certain things. They have exercised this power (see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177), as amended from time to time). The result is that the business element differs depending on the activity in question. This in part reflects certain differences in the nature of the activities:

- (1) The activity of *accepting deposits* will not be regarded as carried on by way of business by a *person* if he does not hold himself out as *accepting deposits* on a day-to-day basis and if the *deposits* he accepts are accepted only on particular occasions. In determining whether *deposits* are accepted only on particular occasions, the frequency of the occasions and any distinguishing characteristics must be taken into account.
- (2) Except as stated in **■ PERG 2.3.2G (2A)** and **■ PERG 2.3.2G (3)**, the business element is not to be regarded as satisfied for any of the following *regulated activities* unless a *person* carries on the business of engaging in one or more of them:
  - (a) *regulated activities* carried on in relation to *securities* or *contractually based investments*;
  - (b) *regulated activities* carried on in relation to 'any property'
  - (c) the *regulated activities* listed in **■ PERG 2.7.2-BG** (Accepting deposits and other regulated activities applying to deposits) so far as they relate to *structured deposits*;
  - (d) the *regulated activities* of *advising on P2P agreements*, *advising on a home finance transaction* and *arranging a home finance transaction*.

This is a narrower test than that of carrying on *regulated activities* by way of business (as required by section 22 of the *Act*), as it requires the *regulated activities* to represent the carrying on of a business in their own right.

- (2A) A *person* who carries on an *insurance distribution activity* will not be regarded as doing so by way of business unless that activity is taken up or pursued for remuneration. **■ PERG 2.3.3 G** gives *guidance* on the factors that are relevant to the meaning of 'by way of business' in section 22 of the *Act*. **■ PERG 5.4** (The business test) gives further *guidance* on the business element as applied to *insurance distribution activity*.

- (3) A *person* managing assets on a discretionary basis while acting as trustee of an *occupational pension scheme* may in certain circumstances be regarded as acting by way of business even if he would not, in the ordinary meaning of the phrase, be regarded as doing so. The Financial Services and Markets Act (Carrying on Regulated Activities by Way of Business) Order 2001 (as amended) contains some exceptions from this (see article 4).
- (3A) A *person* who enters into a *regulated sale and rent back agreement* as *SRB agreement provider* is to be regarded as carrying on that activity by way of business except where that *person* is a *related party* in relation to the *SRB agreement seller*.
- (3B) If a *not-for-profit body* is carrying on *debt adjusting, debt counselling or providing credit information services (or agreeing to carry on a regulated activity so far as relevant to any of those activities)*, it is to be regarded as doing so by way of business. It is immaterial whether the *not-for-profit body* also carries on other activities. This change to the business element does not apply, however, if the *not-for-profit body* carries on that activity only on an occasional basis.
- (3C) No provision in relation to the business element is made in respect of *not-for-profit bodies* carrying on *regulated claims management activity*; but article 89O of the *Regulated Activities Order* provides an exclusion for such bodies (see ■ PERG 2.8.14DG(2)).
- (4) The business element for all other *regulated activities* is that the activities are carried on by way of business. This applies to the activities of *effecting or carrying out contracts of insurance*, certain activities relating to the Lloyd's market, *entering as provider into a funeral plan contract, carrying out a funeral plan contract as provider, entering into a home finance transaction or administering a home finance transaction, operating a dormant account fund, credit-related regulated activities* (subject to the modification for *not-for-profit bodies* in (3B)) and *operating an electronic system in relation to lending*.

2.3.3 G Whether or not an activity is carried on by way of business is ultimately a question of judgement that takes account of several factors (none of which is likely to be conclusive). These include the degree of continuity, the existence of a commercial element, the scale of the activity and the proportion which the activity bears to other activities carried on by the same *person* but which are not regulated. The nature of the particular *regulated activity* that is carried on will also be relevant to the factual analysis.

2.3.4 G A *person* carrying out the activity of *administering a specified benchmark or providing information in relation to a specified benchmark* will always be carrying out these activities by way of business.

2.3.4A G A *person* carrying out the activity of *administering a benchmark* will always be carrying out that activity by way of business.

2.3.4B

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- (1) The *funeral plan* sector gives an example of how the 'by way of business' requirement referred to in ■ PERG 2.3.1G should be interpreted.
- (2) A burial society or other religious organisation operating within a particular religion and serving a defined religious community of members of that religion may provide a *funeral plan* to its members to facilitate their burial in a manner which complies with the teachings of that religion. In doing that, it may be carrying on *funeral plan provision activity*. However, if the provider does so on a not-for-profit basis, it is unlikely to do so by way of business.
- (3) One should look at whether the provider carries on its activities on a not-for-profit basis in a realistic way. So one should take into account:
  - (a) whether the services benefit, or are provided as part of, wider commercial activities carried on by the provider or by an affiliate or by their members; and
  - (b) any benefits an affiliate may get as well as those the provider gets.
- (4) If the provider's *funeral plan* activities generate a profit, that does not mean that it acts by way of business as long as the surplus is used for the purposes of its funeral activities, for example to buy new land for burials or to maintain its graveyards.
- (5) An important factor in this example is that the overall context is clearly non-commercial. The recipients of the services are not acting commercially. The funerals and the *funeral plan* activities take place within a religious community whose activities cover a much broader range of non-commercial activities. The funerals and the *funeral plan* activities are an integral part of those wider religious activities.
- (6) This non-commercial context means that the burial society or other religious organisation does not carry on the *funeral plan* activities by way of business just because:
  - (a) it carries on the *funeral plan* activities on a continuing basis;
  - (b) it carries on the *funeral plan* activities on an extensive scale; or
  - (c) (in the case of a burial society) the *funeral plan* activities are a major part of what the society does.

**Whether someone is carrying on his or her own business**

2.3.5

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Another aspect of the *general prohibition* is that an employee will not breach the *general prohibition* by carrying on a *regulated activity* on behalf of his employer. The reason for that is that it is the employer who is carrying on that activity. The employee is simply carrying on the employer's business.

2.3.6

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This principle potentially also applies to agents and others who assist another to carry on that other's business. That does not mean however that agents and other such *persons* can never carry on a *regulated activity*. Apart from anything else it is clear that some *regulated activities* are meant to be carried on by such *persons*, such as *dealing in investments as agent*.

2.3.7

**G** In the FCA's view the following factors are relevant in deciding whether a *person* (referred to in this paragraph as "an individual") is to be treated as carrying on his own business (in which case he may require *authorisation* unless an exemption or exclusion is available) or whether he is carrying on the business of the *person* for whom he works (in which case he will not require *authorisation*). In this paragraph, the *person* for whom the individual works is referred to as the principal *firm*.

- (1) The degree of control the principal *firm* has over the individual (the greater the control the more likely it is that the *general prohibition* does not apply). This takes into account the power of deciding the tasks to be carried out, the way in which the tasks are to be done, the means to be employed in doing them and the time when and the place where they are to be done. For example, at one end of the spectrum the individual may merely agree to achieve an end result without that end result being specified in detail. At the other end of the spectrum, the individual may be controlled in every detail of how things are to be done.
- (2) The degree to which the individual is integrated into the principal *firm's* business (the greater the integration the more likely it is that the *general prohibition* does not apply). One may look at how much the individual is subject to the managerial procedures of the principal *firm* in relation to such matters as quality of work and performance.
- (3) The degree to which the individual takes on the financial risks and rewards of an independent business (the more the individual takes on such risks the more likely it is that the *general prohibition* applies). For example, one might take into account whether the individual provides his own equipment; whether he hires his own helpers; what degree of financial risk he takes; what degree of responsibility for investment and management he has; whether and how far he has an opportunity of profiting from sound management in the performance of his task.
- (4) For example, if the individual is tasked with finding customers it may be relevant whether he is paid a commission for each customer gained. However, commission is not a particularly strong factor as many conventional employees are paid by commission.
- (5) The degree to which the individual deals with the principal *firm's* customers in his own name (if the individual deals with customers in his own name that points towards the *general prohibition* applying). For example, it may be relevant whether the individual receives monies from the principal *firm's* customers into a bank account in the individual's name.
- (6) The degree to which the services supplied by the individual to the principal *firm* are ones that the individual supplies to other clients as well. If the individual supplies services to more than one clients, it is very likely that the individual is in the business of providing those services generally and that, as a result, he is carrying on his own business and hence needs *authorisation* or an exemption from the *general prohibition*.
- (7) Whether the individual is a natural *person*. It is unlikely that a company or a partnership will fall outside the *general prohibition* on the grounds in ■ PERG 2.3.6 G.

- 2.3.8** **G** In practice, a *person* is only likely to fall outside the *general prohibition* on the grounds that he is not carrying on his own business if he is an employee or performing a role very similar to an employee.
- 2.3.9** **G** Even though working for more than one *firm* is likely to mean that the *person* will not be able to rely on the grounds in **■ PERG 2.3.6 G** to escape the *general prohibition* (see **■ PERG 2.3.7G (6)**), that will not always be the case. In particular, say that a *person* is acting as an employee of one *firm* (Firm A) and as a self-employed agent of another *firm* (Firm B). In his capacity as an employee of Firm A, the *person* would not be carrying on his own business. Thus, the *general prohibition* does not apply in relation to his work for Firm A. If the only *firm* for which that *person* acts on a self-employed basis is Firm B, he could still fall outside the *general prohibition* in relation to Firm B too. The situation would be different if he was providing services to, or on behalf of, more than one client *firm* on a self-employed basis as under such circumstances he would be likely to be carrying on his own business.
- 2.3.10** **G** One example in the consumer credit industry of how the factors in **■ PERG 2.3.7 G** might apply can be found in the home collected credit sector. Home collected credit *firms* supply small, short-term, unsecured loans direct to customers in their homes. It is common practice in this sector for some of the larger *firms*, in particular, to deal with their customers via self-employed agents. Self-employed agents are not paid a salary by an employer. These agents call on customers in their homes to provide loans and/or collect repayments due on loans, on behalf of the home collected credit providers they represent, and they receive commission on the repayments they collect. Agents of home collected credit firms may:
- introduce new clients to the credit provider;
  - arrange for the completion of the relevant credit agreements by new clients; and
  - collect repayments.
- 2.3.11** **G** Although the overall relationship between a home collected credit provider (the principal *firm*) and a *person* providing the services described in **■ PERG 2.3.10 G** (the individual) will need to be taken into account, meeting the following criteria is likely to mean that the individual is carrying on the business of the principal *firm* (as its agent) and not his own, meaning that the individual does not require *authorisation* or to be exempt:
- (1) the principal *firm* appoints the individual as an agent;
  - (2) the individual only works for one principal *firm*;
  - (3) the principal *firm* has a *permission* from the *FCA* for every activity the individual is carrying on for which the principal *firm* would need *permission* if it was carrying on the activity itself;
  - (4) the contract sets out effective measures for the principal *firm* to control the individual;
  - (5) (in the case of collecting debts) receipt of repayment by the individual is treated as receipt by the principal *firm* so that the debtor is not disadvantaged if the individual becomes insolvent before the money is passed to the principal *firm*;

- (6) the principal *firm* accepts full responsibility for the conduct of the individual when the individual is acting on the principal *firm's* behalf in the course of its business; and
- (7) the individual makes clear to customers that it is representing a principal *firm* as its agent and the name of that principal *firm*.