

Chapter 5

Guidance on insurance distribution activities



5.3 Contracts of insurance

5.3.1 **G** A person who is concerned to know whether his proposed activities may require *authorisation* will wish to consider whether those activities relate to *contracts of insurance* or contracts of *reinsurance*, or to *insurance business* or reinsurance business, which is the business of *effecting* or *carrying out contracts of insurance* or *reinsurance as principal*.

Definition

5.3.2 **G** The *Regulated Activities Order* does not attempt an exhaustive definition of a 'contract of insurance'. Instead, article 3(1) of the order (Interpretation) makes some specific extensions and limitations to the general common law meaning of the concept. For example, article 3(1) expressly extends the concept to fidelity bonds and similar contracts of guarantee, which are not contracts of insurance at common law, and it excludes certain *funeral plan contracts*, which would generally be contracts of insurance at common law.

5.3.3 **G** One consequence of this is that common law judicial decisions about whether particular contracts amount to 'insurance' or their being effected or carried out amounts to 'insurance business' are relevant in defining the regulatory scope of the *Act*.

5.3.4 **G** As with any other contract, a *contract of insurance* that is not effected by way of a deed will only be legally binding if, amongst other things, it is entered into for valuable consideration. Determining what amounts to sufficient consideration in any given case is a matter for the courts. In practice, however, the legal definition of consideration is very wide. In particular, just because a *contract of insurance* is 'free' in the colloquial sense does not mean that there is no consideration for it. In the vast majority of cases, therefore, 'free' insurance policies (such as policies that act as loss leaders for an *insurance undertaking*) will be binding contracts and will amount to *specified investments* and therefore be subject to regulation under the *Act*.

5.3.5 **G** The *Regulated Activities Order* does not define a *reinsurance* contract. The essential elements of the common law description of a *contract of insurance* are also the essential elements of a *reinsurance* contract. Whilst the terms derived from the *IDD* address insurance and *reinsurance* separately, throughout this *guidance* the term 'contract of insurance' (italicised or otherwise) also applies to contracts of *reinsurance*.

5.3.6 **G** Guidance describing how the *FCA* identifies *contracts of insurance* is in ■ PERG 6 (Guidance on the Identification of Contracts of Insurance).

Connected contracts of insurance

5.3.7 **G** Article 72B of the *Regulated Activities Order* (Activities carried on by a provider of relevant goods or services) excludes from *FCA* regulation certain *regulated activities* carried on by providers of non-motor goods or services and services related to travel in relation to *contracts of insurance* that satisfy a number of conditions. Details about the scope of this exclusion can be found at ■ PERG 5.11.13 G to ■ PERG 5.11.14G (Activities carried on by a provider of relevant goods or services).

Large risks

5.3.8 **G** Large risks situated outside the *UK* are also excluded (described in more detail at ■ PERG 5.11.16 G (Large risks)). The location of the risk or commitment may be determined by reference to the State in which the risk is situated or the State of the commitment. Broadly put, this is:

- (1) for insurance relating to buildings and/or their contents, the State in which the property is situated;
- (2) for insurance relating to vehicles, the State of registration;
- (3) for policies of four months or less duration covering travel or holiday risks, where the *policy* was taken out;
- (4) in all other cases (including those determined by reference to the State of the commitment), the State where the policyholder has his habitual residence, or if the policyholder is a legal person, where his establishment, to which the contract relates, is situated.

Specified investments

5.3.9 **G** For an activity to be a *regulated activity*, it must be carried on in relation to 'specified investments' (see section 22 of the Act Regulated activities) and Part III of the *Regulated Activities Order* (Specified investments)). For the purposes of *insurance distribution activity*, *specified investments* include the following '*relevant investments*' defined in article 3(1) of the *Regulated Activities Order* (Interpretation):

- (1) rights under any *contract of insurance* (see article 75 (Contracts of insurance)); and
- (2) rights to or interests in rights under *life policies* (see article 89 (Rights to or interests in investments)).

'*Relevant investments*' is the term used in articles 21 (Dealing in investments as agent), 25 (Arranging deals in investments) and 53(1) (Advising on investments (except P2P agreements))

of the *Regulated Activities Order* to help define the types of investment to which the activities in each of these articles relate.

- 5.3.10 **G** A person will have rights under a *contract of insurance* when that person is a *policyholder*. The question of whether a person has rights under a *contract of insurance* may require careful consideration in the case of group policies (with reference to the *Glossary* definition of *policyholder*). In the case, in particular, of *general insurance contracts* and *pure protection contracts*, the existence or otherwise of rights under such policies may be relevant to whether a person is carrying on *insurance distribution activities*.
- 5.3.11 **G** A person may also have rights to or interests in rights under a *life policy* where he is not a *policyholder*, but this will again depend on the terms of the individual *policy*.