

Chapter 5

Guidance on insurance distribution activities

5.8 The regulated activities: advising on contracts of insurance

- 5.8.1** G Article 53(1) of the *Regulated Activities Order* (Advising on Investments (except P2P agreements)) makes advising on *contracts of insurance* a *regulated activity*. This covers advice which is both:
- (1) given to a *person* in his capacity as an insured or potential insured, or as agent for an insured or a potential insured; and
 - (2) advice on the merits of the insured or his agent:
 - (a) *buying, selling*, subscribing for or underwriting a particular *contract of insurance*; or
 - (b) exercising any right conferred by a *contract of insurance* to *buy, sell*, subscribe for or underwrite a *contract of insurance*.
- 5.8.2** G For advice to fall within article 53(1), it must:
- (1) relate to a particular *contract of insurance* (that is, one that a *person* may enter into);
 - (2) be given to a *person* in his capacity as an investor or potential investor;
 - (3) be advice (that is, not just information); and
 - (4) relate to the merits of a *person buying, selling*, subscribing for or underwriting (or exercising any right to do so) a *contract of insurance* or rights to or interests in *life policies*.
- 5.8.3** G Each of these aspects is considered in greater detail in the table in ■ PERG 5.8.5 G. Where an activity is identified as not amounting to *advising on investments (except P2P agreements)* it could still form part of another *regulated activity*. This will depend upon whether a *person's* activities, viewed as a whole, amount to *arranging*. Additionally, it should be borne in mind that the provision of advice or information may involve the communication of a *financial promotion* (see ■ PERG 8 (Financial promotion and related activities)).
- 5.8.3A** G (1) The scope of the *regulated activity of advising on investments (except P2P agreements)* is narrower for a *person* who is authorised for the purposes of the *Act* to carry on certain *regulated activities* (as set out in (2)) than as described in ■ PERG 5.8.1G and ■ PERG 5.8.2G.

- (2) The narrower scope of *advising on investments (except P2P agreements)* referred to in (1) applies to a person who is authorised for the purposes of the Act to carry on any *regulated activity* other than (or in addition to):
 - (a) *advising on investments (except P2P agreements)*; or
 - (b) the *regulated activity of agreeing to carry on a regulated activity* in relation to (a).
- (3) A person in (2) is not *advising on investments (except P2P agreements)* except to the extent that they are providing a *personal recommendation*.
- (4) ■ PERG 8.24 explains in more detail when *advising on investments (except P2P agreements)* is limited to providing *personal recommendations*.
- (5) ■ PERG 8.30B (Personal recommendations) explains what a *personal recommendation* is.

5.8.3B

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- (1) There is more detail on the definition of *advising on investments (except P2P agreements)* in ■ PERG 8.24 to ■ PERG 8.30B. A person interested in what activities come within the *regulated activity of advising on investments (except P2P agreements)* in relation to *contracts of insurance* should also read ■ PERG 8.24 to ■ PERG 8.30B.
- (2) In particular:
 - (a) ■ PERG 5.8.4G to ■ PERG 5.8.5G reflect ■ PERG 8.26 (The investment must be a particular investment);
 - (b) ■ PERG 5.8.6G to ■ PERG 5.8.7G reflect ■ PERG 8.27 (Advice to be given to persons in their capacity as investors (on the merits of their investing as principal or agent));
 - (c) ■ PERG 5.8.8G to ■ PERG 5.8.11G reflect ■ PERG 8.28 (Advice or information);
 - (d) ■ PERG 5.8.12G to ■ PERG 5.8.14G reflect ■ PERG 8.29 (Advice must relate to the merits (of buying or selling a particular investment));
 - (e) ■ PERG 5.8.20G to ■ PERG 5.8.23G reflect ■ PERG 8.30 (Medium used to give advice or information);
 - (f) ■ PERG 5.8.15G to ■ PERG 5.8.19G reflect ■ PERG 8.30A (Pre-purchase questioning (including decision trees));
 - (g) ■ PERG 8.30B contains further material on decision trees; and
 - (h) ■ PERG 8.30B explains how ■ PERG 8.24 to ■ PERG 8.30A (and therefore the corresponding parts of ■ PERG 5.8 as listed in (a) to (g)) apply to the definition of *personal recommendation*.

Advice must relate to a particular contract of insurance

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Advice about *contracts of insurance* will come within the *regulated activity* in article 53(1) of the *Regulated Activities Order* only if it relates to a particular *contract of insurance*. So, generic or general advice will not fall under article 53(1). In particular:

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Typical recommendations and whether they will be regulated as advice on contracts of insurance under article 53(1) of the *Regulated Activities Order*. This table belongs to ■ PERG 5.8.4 G.

| Recommendation | Regulated under article 53(1) or not? |
|---|---|
| I recommend you take the ABC Insurers motor insurance <i>policy</i> | Yes. This is even the case if ABC Insurers has many different motor insurance policies, as explained in PERG 4.6.6 G. Although PERG 4.6.6 G is about mortgages the same reason applies to insurance. |
| I recommend that you take out the GHI Insurers life insurance <i>policy</i> | Yes |
| I recommend that you do not take out the ABC Insurers motor insurance <i>policy</i> | Yes. See the entry in this table for the recommendation to take out the ABC Insurers motor insurance <i>policy</i> . |
| I recommend that you do not take out the GHI Insurers life insurance <i>policy</i> | Yes |
| I recommend that you take out either the ABC Insurers motor insurance <i>policy</i> or the DEF Insurers motor insurance <i>policy</i> | Yes |
| I recommend that you take out either the GHI Insurers life insurance <i>policy</i> or the JKL Insurers life insurance <i>policy</i> | Yes |
| I recommend that you take out (or do not take out) contents insurance | No, unless a specific insurance <i>policy</i> is implied by the context |
| I recommend that you take out (or do not take out) life insurance | No, unless a specific insurance <i>policy</i> is implied by the context |

Advice given to a person in their capacity as an investor or potential investor

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For the purposes of article 53(1), advice must be given to a *person* in that *person's* capacity as an investor or potential investor (which, in the context of *contracts of insurance*, will mean as *policyholder* or potential

policyholder). So, article 53(1) will not apply where advice is given to *persons* who receive it as:

- (1) an adviser who will use it only to inform advice they give to others;
or
- (2) a journalist or broadcaster who will use it only for journalistic purposes.

5.8.7 G Advice will still be covered by article 53(1) even though it may not be given to any particular *policyholder* (for example, advice given in a periodical publication or on a website). Such advice would, however, be unlikely to be a *personal recommendation* (see ■ PERG 5.8.3AG, ■ PERG 8.24.1G and ■ PERG 8.30BG).

Advice or information
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5.8.8 G In the *FCA's* view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of facts or figures.

5.8.9 G In general terms, simply giving information, without making any comment or value judgement on its relevance to decisions which a *person* may make, is not advice. In this respect, it is irrelevant that a *person* may be providing information on a single *contract of insurance* or on two or more. This means that a *person* may provide information on a single *contract of insurance* without necessarily being regarded as giving advice on it. ■ PERG 5.8.11 G has *guidance* on the circumstances in which information can assume the form of advice.

5.8.10 G In the case of article 53(1), information relating to *buying or selling contracts of insurance* may often involve one or more of the following:

- (1) an explanation of the terms and conditions of a *contract of insurance* whether given orally or in writing or by providing leaflets and brochures;
- (2) a comparison of the features and benefits of one *contract of insurance* compared to another;
- (3) the production of pre-purchase questions for a *person* to use in order to exclude options that would fail to meet his requirements; such questions may often go on to identify a range of *contracts of insurance* with characteristics that appear to meet the *person's* requirements and to which he might wish to give detailed consideration (pre-purchase questioning is considered in more detail in ■ PERG 5.8.15 G to ■ PERG 5.8.19 G (Pre-purchase questioning (including decision trees)));
- (4) tables that compare the costs and other features of different *contracts of insurance*;
- (5) leaflets or illustrations that help *persons* to decide which type of *contract of insurance* to take out; and

(6) the provision, in response to a request from a *person* who has identified the main features of the type of *contract of insurance* he seeks, of several leaflets together with an indication that all the *contracts of insurance* described in them have those features.

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In the *FCA's* opinion, however, such information is likely to take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. Examples of situations where information provided by a *person* (P) might take the form of advice are given below.

(1) P may provide information on a selected, rather than balanced and neutral, basis that would tend to influence the decision of a *person*. This may arise where P offers to provide information about *contracts of insurance* that contain features specified by the *person*, but then exercises discretion as to which complying *contract of insurance* to offer to that *person*.

(2) P may, as a result of going through the sales process, discuss the merits of one *contract of insurance* over another, resulting in advice to enter into a particular one. In contrast, advice on how to complete an application form, without an explicit or implicit recommendation on the merits of *buying* or *selling* the *contract of insurance* whilst 'advice' in the general sense of the word, is not, in the view of the *FCA*, advice within the meaning of article 53(1). Such advice may, however, amount to *arranging* (for which see ■ PERG 5.6.1 G to ■ PERG 5.6.4 G (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance)).

Advice must relate to the merits (of buying or selling a contract of insurance)

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Advice under article 53(1) relates to the advantages and disadvantages of *buying*, *selling*, subscribing for or underwriting a particular *contract of insurance*. It is worth noting that, in this context, '*buying*' and '*selling*' are defined widely under article 3 of the *Regulated Activities Order* (Interpretation). '*Buying*' includes acquiring for valuable consideration, and '*selling*' includes surrendering, assigning or converting rights under a *contract of insurance*.

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The requirements imposed by the *IDD* (see ■ PERG 5.2.5 G (Approach to implementation of the *IMD*)) and the text of article 2.3 *IDD* articles 2.1(1), 2.1(2) and 2.2 in ■ PERG 5.16.1 G are narrower than the scope of the *Regulated Activities Order* (see ■ PERG 5.2.7 G (Approach to implementation of the *IDD*)). Unlike the *Regulated Activities Order*, they do not relate to the assignment of *contracts of insurance*. This is of relevance to, amongst others, *persons* involved in the 'second-hand' market for *contracts of insurance* such as traded endowment policies and certain viatical instruments (that is, arrangements by which a terminally ill person can obtain value from their *life policy*) (see also ■ PERG 5.6.12 G (Exclusion from article 25(2): transactions to which the arranger is a party)). *Persons* advising on or arranging assignments of these *contracts of insurance* are therefore potentially carrying on *regulated activities* although they may be able to take the benefit of article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) in certain circumstances (see

■ PERG 5.11.9 G to ■ PERG 5.11.12 G (Activities carried on in the course of a profession or non-investment business)).

5.8.14 G Generally speaking, advice on the merits of using a particular *insurance undertaking*, broker or adviser in their capacity as such, does not amount to advice for the purpose of article 53(1). It is not advice on the merits of *buying or selling a particular contract of insurance* (unless, in the circumstances, the advice amounts to an implied recommendation of a particular *policy*).

Pre-purchase questioning (including decision trees).....

5.8.15 G Pre-purchase questioning involves putting a sequence of questions in order to extract information from a *person* with a view to facilitating the selection by that *person* of a *contract of insurance* or other product that meets his needs. A decision tree is an example of pre-purchase questioning. The process of going through the questions will usually narrow down the range of options that are available.

5.8.16 G A key issue for those *firms* proposing to use pre-purchase questioning is whether the specific questioning used may amount to advice. There are two main aspects:

- (1) advice must relate to a particular *contract of insurance* (see ■ PERG 5.8.4 G (Advice must relate to a particular contract of insurance)); and
- (2) the distinction between information and advice (see ■ PERG 5.8.8 G to ■ PERG 5.8.11 G (Advice or information)).

Whether or not pre-purchase questioning in any particular case is advising on *contracts of insurance* will depend on all the circumstances. The process may involve identifying one or more particular *contracts of insurance*. If so, to avoid advising on *contracts of insurance*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the *person* as, assisting the *person* to make his own choice of product which has particular features which the *person* regards as important. The questioner will need to avoid providing any judgement on the suitability of one or more products for that *person* and in this respect should have regard to the factors set out in ■ PERG 5.8.2 G to ■ PERG 5.8.4 G (Advice must relate to a particular contract of insurance) and the table in ■ PERG 5.8.5 G. See also ■ PERG 5.8.12 G to ■ PERG 5.8.14 G (Advice must relate to the merits (of buying or selling a contract of insurance)) for other matters that may be relevant.

5.8.17 G The potential for variation in the form, content and manner of pre-purchase questioning is considerable, but there are two broad types. The first type involves providing questions and answers which are confined to factual matters (for example, the amount of the cover). In the *FCA's* view, this does not itself amount to advising on *contracts of insurance*, if it involves the provision of information rather than advice. There are various possible scenarios, including the following:

- (1) the questioner may go on to identify one or more particular *contracts of insurance* which match features identified by the pre-purchase

questioning; provided these are selected in a balanced and neutral way (for example, they identify all the matching *contracts of insurance* available without making a recommendation as to a particular one) this need not involve advising on *contracts of insurance*; and

- (2) the questioner may go on to advise a *person* on the merits of one particular *contract of insurance* over another; this would be advising on *contracts of insurance*.

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The second type of pre-purchase questioning involves providing questions and answers incorporating opinion, judgement or recommendation. There are various possible scenarios, including the following:

- (1) the pre-purchase questioning may not lead to the identification of any particular *contract of insurance*; in this case, the questioner has provided advice, but it is generic advice and does not amount to advising on *contracts of insurance*; and
- (2) the pre-purchase questioning may lead to the identification of one or more particular *contracts of insurance*; the key issue then is whether the advice can be said to relate to a particular *contract of insurance* (see further ■ PERG 5.8.4 G (Advice must relate to a particular contract of insurance)).

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In the case of ■ PERG 5.8.18G (2) and similar scenarios, the *FCA* considers that it is necessary to look at the process and outcome of pre-purchase questioning as a whole. It may be that the element of advice incorporated in the questioning can properly be viewed as generic advice if it were considered in isolation. But although the actual advice may be generic, the process has ended in identifying one or more particular *contracts of insurance*. The combination of the generic advice and the identification of a particular or several particular *contracts of insurance* to which it leads may well, in the *FCA*'s view, cause the questioner to be advising on *contracts of insurance*. Factors that may be relevant in deciding whether the process involves advising on *contracts of insurance* may include:

- (1) any representations made by the questioner at the start of the questioning relating to the service he is to provide;
- (2) the context in which the questioning takes place;
- (3) the stage in the questioning at which the opinion is offered and is significant;
- (4) the role played by the questioner who guides a *person* through the pre-purchase questions;
- (5) the outcome of the questioning (whether particular *contracts of insurance* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
- (6) whether the pre-purchase questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party, and all that the questioner has done is help the *person* understand

what the questions or options are and how to determine which option applies to his particular circumstances.

Medium used to give advice

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With the exception of:

- (1) periodicals, broadcasts and other news or information services (see ■ PERG 5.8.24 G to ■ PERG 5.8.25 G (Exclusion: periodical publications, broadcasts and web-sites)); and
- (2) situations involving an overseas element (see, generally, ■ PERG 5.12 (Link between activities and the United Kingdom) and, in particular, ■ PERG 5.12.8 G (Where is insurance distribution carried on?)),

the use of the medium itself to give advice should make no material difference to whether or not the advice is caught by article 53(1).

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Advice can be provided in many ways including:

- (1) face to face;
- (2) orally to a group;
- (3) by telephone;
- (4) by correspondence (including e-mail);
- (5) in a publication, broadcast or web-site; and
- (6) through the provision of an interactive software system.

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Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problem. The same principles apply as with a paper version (see ■ PERG 5.8.15 G to ■ PERG 5.8.19 G (Pre-purchase questioning (including decision trees))).

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Advice in publications, broadcasts and web-sites is subject to a special regime (see ■ PERG 5.8.24 G (Exclusion: periodical publications, broadcasts and web-sites) and ■ PERG 7 (Periodical publications, news services and broadcasts: applications for certification)).

Exclusion: periodical publications, broadcasts and website

5.8.24

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An important exclusion from advising on *contracts of insurance* relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54 of the *Regulated Activities Order* (Advice given in newspapers etc)). The exclusion applies if the principal purpose of the publication or service taken as a whole (including any advertising content) is neither to give advice of a kind mentioned in article 53 (Advising on investments) or article 53A (Advising on regulated mortgage activities) nor to lead or enable *persons* to *buy, sell*, subscribe for or underwrite *relevant investments* or, as borrower, to enter into or vary the terms of a *regulated mortgage contract*.

5.8.25 **G** This is explained in greater detail, together with the provisions on the granting of certificates by the *FCA* on the application of the proprietor of a periodical publication or news or information service or broadcast, in ■ **PERG 7** (Periodical publications, news services and broadcasts: applications for certification).

5.8.25A **G**

- (1) Where the definition of *advising on investments (except P2P agreements)* is limited to providing *personal recommendations*:
 - (a) the exclusion described in ■ **PERG 5.8.24G** does not apply; but
 - (b) advice given in a publication issued to the general public, in a broadcast or on a website accessible to the general public will generally not involve a *personal recommendation* and hence will not involve *advising on investments (except P2P agreements)*.
- (2) ■ **PERG 7** and ■ **PERG 8.30B** (Personal recommendations) give more details.

Other exclusions

5.8.26 **G** The *Regulated Activities Order* contains other limited exclusions which have the effect of preventing certain activities from amounting to advice on *contracts of insurance*. These are referred to in ■ **PERG 5.11.8 G** (Exclusions applying to more than one regulated activity) to ■ **PERG 5.11.16 G** (Large risks).