

Chapter 12

Guidance for persons running or advising on personal pension schemes

12.3 Rights under a personal pension scheme

Q15. I am a financial intermediary dealing with pensions. Am I affected by the fact that rights under a personal pension scheme are a specified investment?

Yes. The *specified investment* of rights under a *personal pension scheme* is a *security*. This means that the following regulated activities apply in relation to such rights:

- *dealing;*
- *arranging;*
- *managing investments;*
- *safeguarding and administering investments;* and
- *advising on investments.*

In addition, rights or interests under a pension scheme which provides *safeguarded benefits* is a specified investment in respect of *advising on conversion or transfer of pension benefits* (see ■ PERG 12.6).

Q16. What are the rights under a personal pension scheme that are specified investments and securities?

These are all the rights that membership of the scheme confers on a member. This may vary (for example, where the scheme is a SIPP) but is likely to include some or all of the following rights:

- to make payments to the scheme;
- to withdraw sums from the scheme in certain circumstances;
- to transfer value to another pension scheme;
- to receive benefits arising from the capital value of or income derived from particular assets or from the performance of a unitised fund;
- to place certain types of property (for example, commercial property) in the scheme;
- to instruct the operator which assets to buy or sell for the purposes of the scheme;
- to instruct the operator to switch funds from one managed or unitised fund to another;
- to appoint a *person* to manage the assets or to give instructions to the operator about which assets to buy or sell on behalf of the member; and
- to instruct the operator to borrow money to purchase assets (for example, to take out a mortgage on a commercial property).

Q17. Regulated activities such as dealing and arranging deals in, and advising on, investments relate to transactions involving the buying or selling of certain specified investments including securities. When will rights under a personal pension scheme be bought or sold so as to trigger these regulated activities?

The terms 'bought' and 'sold' are given a wide meaning and include any acquisition or disposal for valuable consideration. The term disposal is also given a wide meaning and, in relation to an investment comprising rights under a contract, includes surrendering, assigning or converting such rights. Taking these facts into account, the circumstances in which rights under a *personal pension scheme* may be bought or sold include:

- when the member first joins the scheme and acquires all the rights that the scheme provides to its members (since he has bought those rights);
- when the member makes regular or occasional additional payments to the scheme (since he has bought further rights being rights to an increased entitlement to benefits);
- when income withdrawals are made or benefits are transferred to another scheme or benefits are released to permit the purchase of an annuity (since the rights giving entitlement to benefits represented by the sums moved out of the scheme are surrendered and so sold);
- where the member or his agent instructs the operator to buy assets of any kind either from existing cash holdings or from the proceeds of selling existing assets (since, in switching the assets, the member is converting his rights from an entitlement to benefits from the performance of certain assets to an entitlement to benefits from the performance of other assets - the former rights are sold and the latter are bought); and

[*Editor's note:* The Court of Appeal (in the case of Russell David Edward Adams v Options UK Personal Pensions LLP (formerly Options SIPP UK LLP and Carey Pensions UK LLP) and the FCA (as intervenor) ([2020] EWHC 1229 (Ch)) held to be incorrect the view in the preceding paragraph that rights under a pension scheme are being sold and bought if assets held within the scheme are disposed of in order to reinvest in another asset to be held within the scheme. The FCA is considering what changes to PERG are needed to reflect this decision.]

- where the member exercises his right to switch between managed or unitised funds (since, in switching funds, the member is converting his rights from an entitlement to benefits from the performance of one fund to an entitlement to benefits from the performance of another fund - again, the former rights are sold and the latter are bought).

The operator of a personal pension scheme will also be selling rights when he grants rights to a member.

Q18. The members of the personal pension scheme that I operate acquire rights to or interests in specified investments such as units or life policies. Such rights or interests are usually specified investments in their own right and arranging or advising on them is a regulated activity. Does the fact that rights under the personal pension scheme are themselves a specified investment affect this?

In certain circumstances this may be the case, but, in practice, the effect will be largely academic. Where the rights or interests would form part of the rights under a *personal pension scheme*, they will fall under that category of specified investment and will not be a specified investment in their own right. But where, for example, advice is being given on the merits of acquiring rights to or interests in specified investments for the purpose of their being held under a personal pension scheme but not any one particular scheme, the rights or interests will remain specified investments in their own right. This is because there are no rights under a personal pension scheme at that stage.

This will only affect the rights that the member obtains. It does not alter the nature of any asset that is held by or on behalf of the operator for the purpose of providing benefits to the scheme member. So, any person who arranges for the scheme operator (or trustee as the case may be) to acquire assets is likely to be carrying on the regulated activity of *arranging* where those assets are *securities* or *relevant investments* but not where they involve other property such as real estate. This contrasts with a person who is arranging for scheme members to acquire rights under the scheme which will be a regulated activity regardless of the nature of the underlying property.

Q19. For advice to be regulated, it needs to relate to the merits of buying or selling a particular investment. When do rights under a personal pension scheme become 'particular' rights and so particular investments?

It is the rights under a *personal pension scheme* that must be a particular investment. This means that the rights must arise under a particular personal pension scheme. So, provided the rights on which advice is given relate to rights conferred, or to be conferred, by a particular scheme, they will be particular rights and advice on the merits of buying or selling them is likely to be regulated. This is the case, whatever the nature of the rights or of the underlying assets or prospective underlying assets. Conversely, if there is no particular personal pension scheme, there cannot be any particular rights.

As for advice to a prospective member on the merits of buying particular assets at a stage where there are no particular rights under a personal pension scheme, such advice is likely to be regulated where the assets are *securities* or *relevant investments* (as being advice on the merits of buying rights to or interests in those investments). But such advice will not be regulated where the assets are not investments of that kind (such as commercial property).

A person may be asked to advise a client on the merits of his acquiring a commercial property for holding it under a SIPP in circumstances where the client has an existing SIPP of which the adviser may or may not be aware. Provided the adviser has not been asked to, and it is reasonable for him to believe that he would not be expected to, advise his client on the merits of his holding the property under the particular SIPP, the advice may remain generic as respects rights under a personal pension scheme and so would not be subject to regulation.

In addition, it should be noted that advising a client P in their capacity as *member of a pension scheme* who has *subsisting rights* in respect of any *safeguarded benefits* on the merits of P requiring the trustee or manager of the pension scheme to:

- (a) convert any of the *safeguarded benefits* into different benefits that are flexible benefits under the scheme; or
- (b) make a transfer payment in respect of any of the *safeguarded benefits* with a view to acquiring a right or entitlement to flexible benefits for P under another pension scheme; or
- (c) pay a lump sum that would be an uncrystallised funds pension lump sum in respect of any of the *safeguarded benefits*;

is a regulated activity on its own and would require the person carrying it out to be authorised for *advising on conversion or transfer of pension benefits* (see ■ PERG 12.6).

Q20. Can you provide examples of when the regulated activities of advising on and arranging deals in investments are likely to arise in typical situations involving rights under a personal pension scheme?

Yes. The following table indicates whether certain typical scenarios are likely to involve regulated advising or arranging activities.

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
his joining a <i>personal pension scheme</i> (PPS) either generally or of a particular kind (such as a <i>self-invested personal pension scheme</i> (SIPP))	No - this would be generic advice	N/A
his joining a particular PPS that is already established	Yes - the rights are particular rights as the PPS already exists and offers specific rights	Yes - rights are being bought
establishing a PPS (typically a SIPP) intended solely for the prospective member's benefit	Yes - because the advice will concern establishing a particular scheme which will offer the investor particular rights (such as the right to make payments and direct investment)	Yes - rights are being bought
acquiring, for the purpose of holding under a PPS (typically a SIPP), but not any particular PPS, physical property of a particular description (such as commercial property) or particular physical property	No - there are no particular rights under a PPS at that stage, so the advice is generic as respects the acquiring of such rights	No
acquiring, for the purpose of holding under a PPS (typically a SIPP), but not any particular PPS, <i>securities or relevant investments</i> of a particular description or particular investments of that kind	Yes, where the advice relates to acquiring particular investments of that kind - whilst the rights under the PPS may remain generic, the advice relates to acquiring rights to or interests in particular securities or relevant investments. Those rights or interests are themselves a particular investment	Yes - rights to or interests in specified investments are being bought

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
acquiring a particular property for the purpose of holding it in a particular SIPP but where the advice to be given is limited to the tax or legal consequences of doing so	<p>No, where the advice only relates to acquiring a particular type of investment - both the rights under the PPS and the investment remain generic</p> <p>No. Although the advice relates to the merits of buying particular rights, provided the advice may reasonably be regarded as a necessary part of the service of providing tax or legal advice it should be excluded from the scope of regulation (see Q21)</p>	<p>No, provided the arranging is undertaken as a necessary part of providing tax or legal services. This may be more likely to arise in practice where, for example, a legal adviser goes on to arrange the conveyancing of the property as a necessary part of legal services. There may be limited circumstances in which it would be necessary for a tax adviser to go on to arrange for the client to acquire the rights under the PPS having given tax advice on the merits of doing so.</p>
making additional payments into a particular PPS, either for investment in line with pre-existing arrangements or in accordance with instructions to be given to the operator, or of not making such additional payments	Yes - the advice relates to the merits of acquiring further particular rights	Yes - rights are to be bought
appointing a fund manager to manage the PPS assets on behalf of the member(s) or changing an existing fund manager	No - the advice is about the merits of exercising rights but not for the purpose of buying or selling particular investments - and no rights are being bought or sold	<p>No, where the assets do not include <i>securities</i> or <i>relevant investments</i></p> <p>Possibly, where the assets do include investments of that kind (because the arrangements are made with a view to the fund manager buying and selling, and possibly safeguarding and administering, investments)</p>

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
changing the investment objectives with which the fund manager appointed to manage the PPS assets on behalf of the member(s) is instructed to comply	No - the advice is about the merits of exercising rights but not for the purpose of buying or selling particular specified investments - and no rights are being bought or sold	No
placing particular assets or assets of a particular description, into a particular PPS, or of instructing the operator to purchase such assets, either: <ul style="list-style-type: none"> • by means of funds to be made available by selling existing assets or of existing cash holdings within the PPS; or • from new funds to be provided by the member 	Yes - the advice relates to either: <ul style="list-style-type: none"> • disposing of particular rights and acquiring new particular rights; or • acquiring new particular rights 	Yes - rights are being bought or sold or both
instructing the operator to dispose of particular assets or assets of a particular description, to raise funds for purchasing other assets of any kind or to form a cash holding	Yes - the advice relates to disposing of particular rights as well as acquiring new particular rights	Yes - rights are being bought and sold
instructing the operator to realise an investment in a managed or unitised fund and re-invest the sums in another such fund	Yes - the advice relates to disposing of particular rights and acquiring new particular rights	Yes - rights are being bought and sold
withdrawing cash sums (income withdrawal)	Yes - the advice relates to disposing of particular rights	Yes - rights are being sold
transferring existing assets of any kind or their cash value to another PPS	Yes - the advice relates to disposing of particular rights There may also be regulated advice on the merits of acquiring rights under the new PPS	Yes - rights are being sold and rights in the new PPS are being bought
instructing the operator/trustee to obtain a mortgage to purchase a particular commercial	Yes - the advice relates to acquiring new rights under the PPS in the form of the borrowed	Yes - rights are being bought Arranging for a personal pension scheme

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
property to be held under the PPS	money or the property to be acquired with it But the advice given to the member on the mortgage itself is not regulated as the mortgage would not be a <i>regulated mortgage contract</i> (because, under tax rules, a member of a PPS cannot hold property under the scheme if he intends to make personal use of it).	trustee to take out a mortgage will not be regulated as it will not be a <i>regulated mortgage contract</i>
[Editor's Note: The answers to some of the scenarios in this table may be affected by the Adams decision noted in the answer to Q.17]		

Q21. What exclusions may be available for advising on investments in connection with acquiring or disposing of rights under a personal pension scheme?

The usual exclusions for *advising on investments* and *advising on conversion or transfer of pension benefits* will potentially be available. In particular, article 67 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*):

- may permit firms such as solicitors or licensed conveyancers to advise on the implications of transferring title to real property to the operator of a particular *personal pension scheme*;
- may permit tax advisers or solicitors to advise their clients on the tax or legal consequences of holding property of any description, or of acquiring or exercising rights, under a particular personal pension scheme; and
- may permit firms such as surveyors or estate agents to advise on the merits of acquiring commercial property which is intended to be held under a particular personal pension scheme.

This is, in each case, so long as it may reasonably be regarded as necessary for them to provide the advice in order to provide their professional services and they are not remunerated for *advising on investments* separately from any remuneration they receive for providing their professional services.

If the rights relate to a contract of insurance, the adviser can still make use of the exclusion so long as A is not carrying on an activity that requires him to be regulated under the *IDD*. And that is only likely to be the case if the advice relates to the merits of A's client directly acquiring rights under a contract of insurance (for example, because the client is also a trustee of the scheme). Advice about acquiring a beneficial interest in a contract of insurance held under trust will not be subject to regulation under the Directive.

Q22. What exclusions may be available for arranging deals in investments in connection with acquiring or disposing of rights under a personal pension scheme?

The usual exclusions for *arranging* will potentially be available. The following exclusions may be particularly relevant.

Article 29 of the *Regulated Activities Order* will apply where the arranging is done with or through an *authorised person* and, broadly speaking, the arranger:

- is an *unauthorised person*;
- does not advise on the merits of the member or prospective member entering into the transaction; and
- is not rewarded other than by their client (the member).

This exclusion should mean that many firms providing professional services to members of the scheme (such as estate agents, surveyors, property developers and experts on valuing or appraising the particular type of asset that is to be acquired for the personal pension scheme) would be able to arrange for the property to be held under the scheme without needing *authorisation* or exemption. This is because the operator of the scheme will be an *authorised person* and the firm is likely to be paid by its client and not by the scheme operator.

Article 29 does not apply where the arrangements relate to a contract of insurance. But this will only affect the availability of the exclusion as it applies to personal pension schemes where either:

- the member is himself directly acquiring rights under the contract of insurance (for example, because the member is also a trustee of the scheme); or
- the rights which the member is acquiring (or disposing of) relate directly to rights under a contract of insurance that is or is to be held by or on behalf of the operator for the purpose of providing benefits to that member.

Article 33 of the *Regulated Activities Order* will allow *persons* such as estate agents, surveyors or property developers (whether or not they are *authorised*) to refer clients to an *authorised* or *exempt person* for independent advice on the merits of their placing a commercial property in a particular personal pension scheme. Article 33 may also apply where a person arranges for an independent fund manager to be appointed to manage the assets of a personal pension scheme or for members or potential members to obtain independent advice in relation to their rights under the scheme. As with article 29, the article 33 exclusion does not apply where the introductions relate to a contract of insurance.

Article 67 of the *Regulated Activities Order* may permit firms such as solicitors and licensed conveyancers to arrange for the title to property to be transferred to the operator of the personal pension scheme. The exclusion could also apply to firms such as surveyors or estate agents arranging the transfer of title to commercial property. This is so long as it is necessary for them to arrange the transaction in order to provide their professional services and they are not separately remunerated for doing it.

Q23. I am an exempt professional firm. Will I be able to advise on, and arrange deals in, rights under personal pension schemes without needing FCA authorisation?

Rights under a personal pension scheme will be securities. This means that, subject to your being able to satisfy the general requirements of Part XX of the FSMA:

- you will be limited in your ability to give advice without authorisation; but

- you will be able to arrange deals in such rights without authorisation.

The limitation on your being able to give advice, as an exempt professional firm, to a member of a personal pension scheme will be, in broad terms, that:

- the advice must not consist of a recommendation to acquire or dispose of rights (unless it endorses a corresponding recommendation that has been given to the member by a suitably authorised or exempt person); and
- if, in addition, the advice relates to a contract of insurance, you must be a firm that is included in the Financial Services Register of Exempt Professional Firms.