

Chapter 5

Guidance on insurance distribution activities

5.4 The business test

- 5.4.1** G A *person* will only need *authorisation* or exemption if carrying on a *regulated activity* 'by way of business' (see section 22 of the *Act* (Regulated Activities)).
- 5.4.2** G There is power in the *Act* for the Treasury to specify the circumstances in which a *person* is or is not to be regarded as carrying on *regulated activities* by way of business. The *Business Order* has been made using this power (partly reflecting differences in the nature of the different activities). As such, the business test for *insurance distribution activity* is distinguished from the standard test for 'investment business' in article 3 of the *Business Order*. Under article 3(4) of the *Business Order*, a *person* is not to be regarded as carrying on by way of business any *insurance distribution activity* unless that *person* takes up or pursues that activity for remuneration. Accordingly, there are two principal elements to the business test in the case of *insurance distribution activities*:
- (1) does a *person* receive remuneration for these activities?
 - (2) if so, does he take up or pursue these activities by way of business?
- 5.4.3** G
- (1) As regards ■ PERG 5.4.2G(1), the *Business Order* does not provide a definition of 'remuneration', however 'remuneration' is defined in the *IDD*. Article 2(1)(9) of the *IDD* defines 'remuneration' to mean any commission, fee, charge or other payment, including an economic benefit of any kind or any other financial or non-financial advantage or incentive offered or given in respect of insurance distribution activities.
 - (2) In the *FCA's* view, 'remuneration' in the *Business Order* follows the meaning of the *IDD* definition of remuneration, and:
 - (a) it has a broad meaning and covers both monetary and non-monetary rewards. This is regardless of who makes them. For example, where a *person* pays discounted premiums for their own insurance needs in return for bringing other business to an *insurance undertaking*, the discount would amount to remuneration for the purposes of the *Business Order*;
 - (b) it can also take the form of an economic benefit which the *person* expects to receive as a result of carrying on *insurance distribution activities*;

- (c) it does not have to be provided or identified separately from remuneration for other goods or services provided. Nor is there a minimum level of remuneration.

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As regards ■ PERG 5.4.2G (2), in the FCA's view, for a *person* to take up or pursue *insurance distribution activity* by way of business, the *person* will usually need to be carrying on those activities with a degree of regularity. The *person* will also usually need to be carrying on the activities for commercial purposes. That is to say, the *person* will normally be expecting to gain a direct financial benefit of some kind. Activities carried on out of friendship or for altruistic purposes will not normally amount to a business. However, in the FCA's view:

- (1) it is not necessarily the case that services provided free of charge will not amount to a business; for example, advice (including advice available on a website) may be provided free of charge to potential *policyholders* but in the course of a business funded by commission payments; and
- (2) the 'by way of business' test may very occasionally be satisfied by an activity undertaken on an isolated occasion (provided that the activity would be regarded as done 'by way of business' in other respects, for example, because of the size of reward received or its relevance to other business activities).

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It follows that whether or not any particular *person* is acting 'by way of business' for these purposes will depend on that *person's* individual circumstances. However, a typical example of where the applicable business test would be likely to be satisfied by someone whose main business is not *insurance distribution activities*, is where a *person* recommends or arranges specific insurance *policies* in the course of carrying on that other business and receives a fee or commission for doing so.

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Some typical examples of where the business test is unlikely to be satisfied, assuming that there is no direct financial benefit to the arranger, include:

- (1) arrangements which are carried out by a *person* for their own benefit, or for members of the *person's* family;
- (2) where employers provide insurance benefits for staff; and
- (3) where affinity groups or clubs set up insurance benefits for members.

5.4.7

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■ PERG 5.4.8 G contains a table that summarises the main issues surrounding the business test as applied to *insurance distribution activities* and that may assist *persons* to determine whether they will need *authorisation* or exemption. The approach taken in the table involves identifying factors that, in the FCA's view, are likely to play a part in the analysis. Indicators are then given as to the significance of each factor to the *person's* circumstances. By analysing the indicators as a whole, a picture can be formed of the likely overall position. The table provides separate indicators for the two elements of remuneration and by way of business. As a *person* has to satisfy both elements, a clear overall indication against either element being satisfied should mean that the test is failed. This approach cannot be expected to

provide a clear conclusion for everyone. But it should enable *persons* to assess the relevant aspects of their activities and to identify where changes could, if necessary, be made so as to make their position clearer. The *person* to whom the indicators are applied is referred to in the table as 'P'.

5.4.8

G Table: Carrying on insurance distribution activities 'for remuneration' and 'by way of business'

Carrying on insurance distribution activities 'for remuneration' and 'by way of business'

'For remuneration'

Factor	Indicators that P <u>does not</u> carry on activities "for remuneration"	Indicators that P <u>does</u> carry on activities "for remuneration"
Direct remuneration, whether received from the customer or the insurer/broker (cash or benefits in kind such as tickets to the opera, a reduction in other insurance premiums, a remission of a debt or any other benefit capable of being measured in money's worth)	P does not receive any direct remuneration specifically identified as a reward for P's carrying on <i>insurance distribution activities</i> .	P receives direct remuneration specifically identified as being a reward for P's carrying on <i>insurance distribution activities</i> .
Indirect remuneration (such as any form of economic benefit as may be explicitly or implicitly agreed between P and the insurer/broker or P's customer – including, for example, through the acceptance of P's terms and	P does not obtain any form of indirect remuneration through an economic benefit other than one which is not likely to have a material effect on P's ability to make a profit from P's other activities.	P obtains an economic benefit that: (a) is explicitly or implicitly agreed between P and the insurer/broker or P's customer; and (b) has the potential to go beyond mere cost recovery through fees or other benefits received for providing a package of services that includes <i>insurance distribution activities</i> but where no particular part of the fees is attributable to <i>insurance distribution activities</i> . This could include where <i>insurance distribution activities</i> are likely to: <ul style="list-style-type: none"> • play a material part in the success of P's other business activities or in P's ability to make a profit from them; or • provide P with a materially increased opportunity to provide other goods or services; or

<p>conditions or mutual recognition of the economic benefit that is likely to accrue to P). An indirect economic benefit can include expectation of making a profit of some kind as a result of carrying on <i>insurance distribution activities</i> as part of other services.</p>			<ul style="list-style-type: none">• be a major selling point for P's other business activities; or• be essential for P to provide other goods or services. <p>P charges customers a greater amount for other goods or services than would be the case if P were not also carrying on <i>insurance distribution activities</i> for those customers and this:</p> <ul style="list-style-type: none">• is explicitly or implicitly agreed between P and the insurer/broker or P's customer; and• has the potential to go beyond mere cost recovery.		
<p>Recovery of costs</p>			<p>P receives no benefits of any kind (direct or indirect) in respect of his <i>insurance distribution activities</i> beyond the reimbursement of his actual costs incurred in carrying on the activity (including receipt by P of a sum equal to the insurance premium that P is to pass on to the <i>insurer</i> or broker).</p> <p>P receives benefits of any kind (direct or indirect) in respect of his <i>insurance distribution activities</i> which go beyond the reimbursement of his actual costs incurred in carrying on the activity.</p>		
<p>'By way of business'</p>					
<p>Factor</p>		<p>Indicators that P <u>does not</u> carry on activities "by way of business"</p>		<p>Indicators that P <u>does</u> carry on activities "by way of business"</p>	
<p>Regularity/frequency</p>		<p>Involvement is one-off or infrequent (for instance,</p>		<p>Involvement is frequent (for instance, once a week).</p> <p>Involvement is infrequent but the transactions are of such size or importance that</p>	

	<p>once or twice a year) provided that the transaction(s) is not of such size and importance that it is essential to the success of P's other business activities.</p> <p>Transactions do not result from formal arrangements (for instance, occasional involvement purely as a result of an unsolicited approach).</p>	<p>they are essential to the success of P's other business activities.</p> <p>P has formal arrangements which envisage transactions taking place on a regular basis over time (whether or not such transactions turn out in practice to be regular).</p>
Holding out	<p>P does not hold him or herself out as providing a professional service that includes <i>insurance distribution activities</i> ('professional' meaning 'not the services of a layman').</p>	<p>P holds him or herself out as providing a professional service that includes <i>insurance distribution activities</i>.</p>
Relevance to other activities/ business	<p><i>Insurance distribution activities</i>:</p> <ul style="list-style-type: none">• have no relevance to P's other activities; or• have some relevance but could easily be ceased without causing P any difficulty in carrying on their main activities; or• would be unlikely to result in a material reduction in income from P's	<p><i>Insurance distribution activities</i>:</p> <ul style="list-style-type: none">• are essential to P in carrying on their main activities; or• would cause a material disruption to P carrying on their main activities if ceased; or• would be likely to reduce P's income by a material amount.

<p>Commercial benefit</p>	<p>main activities if ceased.</p> <p>P receives no direct or indirect pecuniary or economic benefit.</p> <p>P is a layman and acting in that capacity.</p> <p>P would not obtain materially less income from P's main activities if they did not include <i>insurance distribution activities</i>.</p>	<p>P receives a direct or indirect pecuniary or economic benefit from carrying on <i>insurance distribution activities</i> – such as a fee, a benefit in kind or the likelihood of materially enhanced sales of other goods or services that P provides.</p> <p>P would obtain materially less income from P's main activities if they did not include <i>insurance distribution activities</i>.</p>
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