

Chapter 7

Periodical publications, news services and broadcasts: applications for certification

7.3 Does the activity require authorisation?

Regulated advice

7.3.1

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- (1) Article 53(1) of the *Regulated Activities Order* (Advising on investments) deals with giving advice in relation to a *security*, a *structured deposit* or a *relevant investment*.
- (2) A summary can be found in ■ PERG 8.24 (Advising on investments). ■ PERG 8.25 to ■ PERG 8.30B give more detail.
- (3) As described in ■ PERG 8.24, for certain *firms*, the *regulated activity* only covers giving *personal recommendations*.

7.3.1-A

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Under article 53(2) of the *Regulated Activities Order* (Advising on investments), advising a *person* is a specified kind of activity if:

- (1) the advice is given to the *person* in their capacity as a *lender* or potential *lender* under a relevant article 36H agreement (defined in article 53(4) of the *Regulated Activities Order*) or as an agent for a *lender* or potential *lender* under such an agreement; and
- (2) it is advice on the merits of their doing any of the following (whether as principal or agent):
 - (a) entering into a relevant article 36H agreement as a *lender* or assuming the rights of a *lender* under such an agreement by *assignment* or operation of law; or
 - (b) providing instructions to a *P2P platform operator* with a view to entering into a relevant article 36H agreement as a *lender* or assuming the rights of a *lender* under such an agreement by *assignment* or operation of law, where the instructions involve:
 - (i) accepting particular parameters for the terms of the agreement presented by a *P2P platform operator*; or
 - (ii) choosing between options governing the parameters of the terms of the agreement presented by a *P2P platform operator*; or
 - (iii) specifying the parameters of the terms of the agreement by other means; or
 - (c) enforcing or exercising the *lender's* rights under a relevant article 36H agreement; or
 - (d) assigning rights under a relevant article 36H agreement.

- 7.3.1A** **G** Under article 53A of the *Regulated Activities Order* (Advising on regulated mortgage contracts), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as a borrower or potential borrower; and
 - (2) it is advice on the merits of his doing any of the following:
 - (a) entering into a particular *regulated mortgage contract*; or
 - (b) varying the terms of a *regulated mortgage contract* entered into by him after mortgage day in such a way as to vary his obligations under that contract.
- 7.3.1B** **G** Under article 53B of the *Regulated Activities Order* (Advising on regulated home reversion plans), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as a *reversion occupier* or reversion provider or as a potential *reversion occupier* or reversion provider; and
 - (2) it is advice on the merits of his doing any of the following:
 - (a) entering into a particular *home reversion plan*; or
 - (b) varying the terms of a *home reversion plan* entered into by him as *reversion occupier* or as reversion provider (but only where the plan was originally entered into on or after 6 April 2007) in such a way as to vary his obligations under that plan.
- 7.3.1C** **G** Under article 53C of the *Regulated Activities Order* (Advising on regulated home purchase plans), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as a *home purchaser* or potential *home purchaser*; and
 - (2) it is advice on the merits of his doing any of the following:
 - (a) entering into a particular *home purchase plan*; or
 - (b) varying the terms of a *home purchase plan* entered into by him on or after 6 April 2007 in such a way as to vary his obligations under that plan.
 - (3) Under article 53D of the *Regulated Activities Order* (Advising on regulated sale and rent back agreements), advising a *person* is a specified kind of activity if:
- 7.3.1CA** **G** Under article 53D of the *Regulated Activities Order* (Advising on regulated sale and rent back agreements), advising a *person* is a specified kind of activity if:
- 7.3.1D** **G** Under article 53D of the *Regulated Activities Order* (Advising on regulated sale and rent back agreements), advising a *person* is a specified kind of activity if:

- (1) the advice is given to the *person* in his capacity as an *SRB agreement seller* or *SRB agreement provider* or as a potential *SRB agreement seller* or *SRB agreement provider*; and
- (2) it is advice on the merits of his doing any of the following:
 - (a) entering into a particular *regulated sale and rent back agreement*; or
 - (b) varying the terms of a *regulated sale and rent back agreement* entered into by him on or after 1 July 2009 in such a way so as to vary his obligations under that agreement.

7.3.1DA

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Under article 53DA of the *Regulated Activities Order* (Advising on regulated credit agreements for the acquisition of land), advising a *person* ("P") is a specified kind of activity if:

- (1) the advice is given to P in P's capacity as a recipient of credit, or potential recipient of credit, under a *regulated credit agreement*;
- (2) P intends to use the credit to acquire or retain property rights in *land* or in an existing or projected building; and
- (3) the advice consists of the provision of personal recommendations to P in respect of one or more transactions relating to *regulated credit agreements*.

7.3.1E

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Under article 53E of the *Regulated Activities Order* (Advising on conversion or transfer of pension benefits), advising a *person* ("P") is a specified kind of activity if the advice:

- (1) is given to P in their capacity as:
 - (a) a *member of a pension scheme*; or
 - (b) a *survivor of a member of a pension scheme*;where P has *subsisting rights* in respect of any *safeguarded benefits*; and
- (2)
 - (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*.

7.3.2

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Articles 53, 53A, 53B, 53C, 53D 53DA and 53E of the *Regulated Activities Order* contain a number of elements, all of which must be present before a *person* will require *authorisation*. For *guidance* on whether a *person* is carrying on these *regulated activities*, see ■ PERG 8 (Financial promotion and related activities), ■ PERG 4 (Guidance on regulated activities connected with mortgages), ■ PERG 12.6 (Advising on conversion or transfer of pension benefits), , ■ PERG 14.3, ■ PERG 14.4 and ■ PERG 14.4A (Guidance on home reversion, home purchase and regulated sale and rent back agreement

activities). Guidance on the activity in article 53DA (*advising on regulated credit agreements for the acquisition of land*) of the *Regulated Activities Order* is in ■ PERG 2.7.16F G.

Advice in publications and broadcasts and MiFID

7.3.2A **G** Advice about *financial instruments* in a newspaper, journal, magazine, publication, internet communication or radio or television broadcast should not normally be a *personal recommendation* under *MiFID* (see ■ PERG 13, Q18 to Q21).

Carrying on the regulated activity by way of business

7.3.3 **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'. There is power in the *Act* for the Treasury to change the meaning of the business test by including or excluding certain things. It has exercised this power (through the *Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177)* (the *Business Order*), as amended from time to time.

7.3.3A **G** The result of the amendments made to the meaning of the business test in section 22 of the *Act* is that the test differs depending on the activity in question. Where the *regulated activities* of *advising on investments* and *advising on a home finance transaction* are concerned, the business test is not to be regarded as satisfied unless a *person* carries on the business of engaging in those activities. 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. Where the advice relates to a *contract of insurance*, the business test is not to be regarded as satisfied unless the *person* carrying on the activity of giving the advice is taking up or pursuing the activity for remuneration. ■ PERG 2.3 (The Business element) and ■ PERG 2.4 (Link between activities and the United Kingdom) together with ■ PERG 5.4 (The business test) provide further detail on this.

7.3.4 **G** In the *FCA's* view, for a *person* to be carrying on the business of *advising on investments* or *advising on a home finance transaction* he will usually need to be doing so with a degree of regularity and for commercial purposes – that is to say, he will normally be expecting to gain some kind of a direct or indirect financial benefit. But, in the *FCA's* view it is not necessarily the case that advice provided free of charge will not amount to a business. Advice is often given 'free' by a journalist or presenter, or in a publication or website, in the sense that no charge is made or commission received. For example, a newspaper may reply to readers' letters to generate goodwill or to generate a supply of further material that it can publish or a website that is 'free' to the user will be sponsored or paid for by advertising. In such cases, if advice on *securities*, *structured deposits*, *relevant investments*, *P2P agreements* or *home finance transactions* is given, then, in the *FCA's* view, the business of *advising on investments* or *advising on a home finance transaction* is being carried on. In addition, non-commercial motives may be relevant in determining whether a *person* can be said to be carrying on the business of giving advice. For example, an investigative journal or journalist may occasionally feel that it is necessary to warn investors against the purchase of a particular *investment* because there are suspicions of fraud in connection

with that *investment*. The *FCA* takes the view that, in such circumstances, the journal or journalist would not be regarded as carrying on the business of *advising on investments* or *advising on a home finance transaction* as he would be acting to prevent crime rather than in the carrying on of a business.

- 7.3.4A** G For persons carrying on *advising on regulated credit agreements for the acquisition of land* the by the way of business test is set out in ■ PERG 2.3.2G (4)

Carrying on the regulated activity in the United Kingdom

- 7.3.5** G Advice given in periodicals published from an establishment in the *United Kingdom* is regarded by the *FCA* as given in the *United Kingdom*. A similar approach is taken to advice given in, or by way of, a service provided from such an establishment.

- 7.3.6** G In other circumstances, advice issued remotely may still be given in the *United Kingdom*. For example, the *FCA* considers that advice is given in the *United Kingdom* if:

- (1) it is contained in a non-UK periodical that is posted in hard copy to *persons* in the *United Kingdom*;
- (2) it is contained in a non-UK periodical (or given in or by way of a service) which is made available electronically to such *persons*.

- 7.3.7** G But even if advice is given in the *United Kingdom*, the *general prohibition* will not be contravened if the giving of advice does not amount to the carrying on, in the *United Kingdom*, of the business of *advising on investments*, *advising on regulated credit agreements for the acquisition of land*, or *advising on conversion or transfer of pension benefits* *advising on a home finance transaction* . Also, the *general prohibition* will not be contravened if the exclusion for *overseas persons* in article 72 of the *Regulated Activities Order (Overseas persons)* applies. That exclusion applies in relation to the giving of advice on *securities*, *structured deposits* or *relevant investments* by an *overseas person* as a result of a 'legitimate approach' (defined in article 72(7)). In many cases where publications or services are provided from outside the *United Kingdom* it is likely that they will fall within the terms of this exclusion. For example, this will exclude any advice in a publication or service from being a *regulated activity* if it is given in response to an approach that has not been solicited in any way. It should be noted, however, that the exclusions in article 72 do not apply to the regulated activities that involve *advising on a home finance transaction*, *advising on regulated credit agreements for the acquisition of land* or *advising on conversion or transfer of pension benefits*. The effect of this is that, where the principal purpose of an overseas periodical publication is to offer advice on *securities*, *structured deposits*, *relevant investments*, *P2P agreements*, *home finance transactions* and certain pension transfers or conversions, the exclusion for an *overseas person* who provides advice to *persons* in the *United Kingdom* as a result of a legitimate approach will not apply to the advice concerning *home finance transactions* or pension transfers or conversions.

Exclusions and exempt persons

7.3.8 **G** If a *person* is carrying on the business of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* in the *United Kingdom*, he will not require *authorisation* if:

- (1) he is able to rely on an exclusion; in addition to the exclusions already mentioned (in articles 54 and 72 of the *Regulated Activities Order*), other exclusions that may be relevant are in Chapter XVII of Part II of the *Regulated Activities Order*; or
- (2) he is an *exempt person* (see ■ PERG 2.11 (What to do now?)); since *persons* are exempt only in relation to specified *regulated activities*, his exemption must apply to the *regulated activity of advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* as the case may be.

Which person is required to be authorised?

7.3.9 **G** Many people may be involved in the production of a periodical publication, news service or broadcast. But if the *regulated activity of advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* is being carried on so that *authorisation* is required, the *FCA's* view is that the *person* carrying on the activity (and who will require *authorisation*) is the *person* whose business it is to have the editorial control over the content. In the case of a periodical publication, this will often be the proprietor. But particular circumstances may vary so that the responsibility for content and editorial control rests with a freelance journalist rather than with the proprietor. In such cases it may well be that the journalist may properly be viewed as carrying on his own business, using the periodical publication as the vehicle for doing so – in which case it is likely to be the journalist alone who needs the *authorisation*.

7.3.10 **G** Similar principles apply to news services and broadcasts.