

Chapter 7

Periodical publications, news services and broadcasts: applications for certification

7.4 Does the article 54 exclusion apply?

The formats

- 7.4.1** **G** The exclusion applies to advice given in one of the following formats:
- (1) advice in writing or other legible form which is contained in a newspaper, journal, magazine, or other periodical publication;
 - (2) advice in writing or other legible form which is given by way of a service comprising regularly updated news or information;
 - (3) advice given in any service consisting of the broadcast or transmission of a television or radio programme.
- 7.4.2** **G** But the exclusion applies only if the principal purpose of the publication or service is not:
- (1) to advise on *securities* or *structured deposits* or *relevant investments* or *P2P agreements* or *home finance transactions* or amounts to carrying on *advising on conversion or transfer of pension benefits*; or
 - (2) to lead or enable *persons*:
 - (a) to *buy, sell, subscribe for or underwrite securities, structured deposits or relevant investments*; or
 - (aa) to enter into a relevant article 36H agreement (within the meaning of article 53(4) of the *Regulated Activities Order*) as a *lender*, to assume the rights of a *lender* under such an agreement by *assignment* or operation of law, or to assign rights under such an agreement; or
 - (b) to enter as borrower into *regulated mortgage contracts*, or vary the terms of *regulated mortgage contracts* entered into by them as borrower on or after 31 October 2004 or the terms of *legacy CCA mortgage contracts* entered into by them as borrower; or
 - (c) to enter as *reversion occupier* or reversion provider into *home reversion plans* or to vary the terms of *home reversion plans* entered into by them as *reversion occupier* or as reversion provider where the plan was originally established on or after 6 April 2007;
 - (d) to enter as *home purchaser* into *home purchase plans* or to vary the terms of *home purchase plans* entered into by them as *home purchaser* on or after 6 April 2007; or

- (e) to enter as *SRB agreement seller* or *SRB agreement provider* into *regulated sale and rent back agreements* or to vary the terms of *regulated sale and rent back agreements* entered into by them as *SRB agreement seller* or *SRB agreement provider* where the agreement was originally established on or after 1 July 2009; or
- (f) to enter as a recipient of credit into a *regulated credit agreement* the purpose of which is to acquire or retain property rights in *land* or in an existing or projected building.
- (g) to do any of the following in the context of *advising on conversion or transfer of pension benefits*:
 - (i) convert *safeguarded benefits* into different benefits that are *flexible benefits* under the scheme; or
 - (ii) make a transfer payment in respect of any of the benefits with a view to acquiring a right or entitlement to *flexible benefits* under another pension scheme; or
 - (iii) pay a lump sum that would be an *uncrystallised funds pension lump sum* in respect of any of the benefits.

Formats in writing or other legible form

7.4.3

G

- (1) There are two specified formats for advice appearing in writing or other legible form.
- (2) The first is that of a newspaper, journal, magazine or other periodical publication. For these purposes it does not matter what form the periodical publication takes as long as it can be read. This will include, for example, a newspaper appearing as a hard copy or electronically on a website. It will also include any periodical published on an intranet site.
- (3) The second is that of a regularly updated news or information service. As with periodical publications, it does not matter how the service is accessed by, or delivered to, the user as long as it can be read. This will include, for example, a service provided through teletext, a fax retrieval system or a website (including websites that are used through handheld devices). The fact that it must be a 'regularly updated' service means that the provision of up-to-date news or information must be a primary feature of the service (for example, where it is likely to be of commercial value to the recipient). But, in the FCA's view, a news or information 'service' is not restricted only to the giving of news or information since this would not generally constitute the *regulated activity* of *advising on investments* (see ■ PERG 8.28 (Advice or information)), *advising on regulated mortgage contracts* (see ■ PERG 4.6.13 G to ■ PERG 4.6.16 G (Advice or information)), *advising on regulated credit agreements for the acquisition of land* (see ■ PERG 4.10A.20 G), *advising on conversion or transfer of pension benefits* (see ■ PERG 12.6), *advising on a home reversion plan*, *advising on a home purchase plan* or *advising on regulated sale and rent back agreements*. So the exclusion applies to services providing material in addition to news or information, such as comment or advice.

Television and Radio

7.4.4

G

The third specified format is for advice in any service consisting of the broadcast or transmission of television or radio programmes. This will encompass the transmission through cable of interactive television programmes. In the FCA's view, 'service' in this context goes beyond any particular series of programmes broadcast or transmitted through a given medium. It refers instead to the administrative system (usually aimed at a particular audience) through which a range of different programmes is provided, for example any particular TV or radio channel. In the FCA's view, it is unlikely that a TV or radio service will have one of the *principal* purposes that would prevent its being able to rely on the exclusion unless the complete service is designed to focus on financial or *investment* matters.

The principal purpose test

7.4.5

G

The exclusion applies only if the principal purpose of the publication or service is not:

- (1) to give advice on *securities, structured deposits, relevant investments, P2P agreements or home finance transactions* or amounts to carrying on *advising on conversion or transfer of pension benefits*; or
- (2) to lead or enable *persons*:
 - (a) to *buy, sell, subscribe for or underwrite securities, structured deposits or relevant investments*; or
 - (aa) to enter into a relevant article 36H agreement (within the meaning of article 53(4) of the *Regulated Activities Order*) as a *lender*, to assume the rights of a *lender* under such an agreement by *assignment* or operation of law, or to assign rights under such an agreement; or
 - (b) to enter as *borrower* into *regulated mortgage contracts*, or vary the terms of *regulated mortgage contracts* entered into by them as *borrower* on or after 31 October 2004 or the terms of *legacy CCA mortgage contracts* entered into by them as *borrower*; or
 - (c) to enter as *reversion occupier* or *reversion provider* into *home reversion plans* or to vary the terms of *home reversion plans* entered into by them as *reversion occupier* or as *reversion provider* where the plan was originally established on or after 6 April 2007;
 - (d) to enter as *home purchaser* into *home purchase plans* or to vary the terms of *home purchase plans* entered into by them as *home purchaser* on or after 6 April 2007;
 - (e) to enter as *SRB agreement seller* or *SRB agreement provider* into *regulated sale and rent back agreements* or to vary the terms of *regulated sale and rent back agreements* entered into by them as *SRB agreement seller* or *SRB agreement provider* where the agreement was originally established on or after 1 July 2009;
 - (f) to enter as a recipient of credit into a *regulated credit agreement* the purpose of which is to acquire or retain property rights in *land* or in an existing or projected building; or
 - (g) to do any of the things listed in ■ PERG 7.4.2G(2)(g).

References to leading or enabling *persons* to do the things mentioned in (2)(a) or (b) are abbreviated in ■ PERG 7.4.9 G and ■ PERG 7.4.11 G as leading or enabling *persons* 'to engage in a relevant transaction'.

7.4.6

G

Any assessment of the principal purpose of a periodical publication, news service or broadcast needs to be carried out against the background that:

- (1) they all share the characteristic of being available over a sustained period and, within that period, appearing from time to time with a different content;
- (2) the same periodical publication will have many different editions;
- (3) the regular updating of the news or information service will produce differences in the material provided, comparing the content of the service as it appears at any one time with its content as it appears at any other; and
- (4) the programmes in a TV or radio service are bound to have a different content from each other.

7.4.7

G

To address this feature of variation in content, article 54 requires that the principal purpose of a publication or service is to be assessed by looking at the publication or service taken as a whole and including any advertisements or other promotional material contained in it. This requirement of an overall assessment of purpose or purposes goes beyond the content of any particular example of the publication or service (such as a particular edition or programme). It fixes instead on the characteristic content of the publication or service looked at over time. This judgment depends on the overall impression of content. One way of approaching this is to consider what an average consumer of a publication or service might expect to find when making a decision whether to buy a particular edition or to use the service.

7.4.8

G

Looking at the first disqualifying purpose set out in the exclusion, all the matters relevant to whether the *regulated activities 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* are being carried on must be taken into account (see ■ PERG 8.24 (Advising on investments)). If the principal purpose of a publication or service is to give to *persons*, in their capacity as investors (or potential investors), as borrowers, as *reversion occupiers* or reversion providers or as *home purchasers* or as *SRB agreement sellers* or *SRB agreement providers* (as the case may be), advice as referred to in ■ PERG 7.4.5G (1), then the publication or service will not be able to benefit from this exclusion.

7.4.9

G

For the second disqualifying purpose, the focus switches to assessing whether the principal purpose of a publication or service is to lead a *person* to engage in a relevant transaction or enable him to do so. This disqualifying purpose is an alternative to the first. So it extends to material not covered by the first. In this respect:

- (1) material in a publication or service that invites or seeks to procure *persons* to engage in a relevant transaction can be said to "lead" to those transactions even if it would not constitute the *regulated activities* 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*; this includes, for example, material that consists of generic *buy or sell* recommendations, corporate brochures or invitations to invest in particular products or with a particular broker or fund manager; and
- (2) material enables *persons* to engage in a relevant transaction if it facilitates the transactions, for example by giving a user the forms that enable him to carry out relevant transactions; so this limb of the second disqualifying purpose would apply to the material providing an online dealing facility on an interactive website or to facilities for on-screen dealing through digital television.

In the *FCA's* view, material will not lead or enable a *person* to engage in a relevant transaction where the material is intended merely to raise people's awareness of matters relating to *securities*, *structured deposits*, *relevant investments*, *P2P agreements*, *home finance transactions* or pension scheme transfers.

7.4.10 **G** The test for determining the principal purpose of any publication that appears on a website, or of any news or information service on a website, is no different from any other medium. An overall view will need to be taken of all the contents of the publication or service, including any features such as chatrooms, advertisements or other promotional material.

7.4.11 **G** In the context of the second disqualifying purpose, whether or not the presence of a hypertext link to another website indicates that the purposes of a publication or service include leading to relevant transactions (or enabling them to be entered into) will depend on all the circumstances. It will, in particular, be necessary to consider the form of the link and the content of the destination website. In the *FCA's* view, the presence on a host publication or service of a hypertext link which is only the name or logo of another website is unlikely itself to indicate that a purpose of the host website is to lead to relevant transactions (or enable them to be entered into). But if more sophisticated links, such as banners or changeable text, contain promotional material inviting or seeking to procure *persons* to enter into relevant transactions, those links will have to be weighed in the balance in determining the principal purpose of the publication or service hosting the link. The same applies if the host publication or service hosting the link itself contains material inviting *persons* to activate the link with a view to entering into relevant transactions.

7.4.12 **G** In reaching a view of the principal purpose of the publication or service as a whole, all the material that falls within either the first or second disqualifying purpose must be considered together.

Personal recommendations

- 7.4.12A **G** (1) The exclusion does not apply to *advising on investments (except P2P agreements)* when the definition of that *regulated activity* is restricted to giving *personal recommendations*.
- [**Note:** For these *personal recommendations*, see ■ PERG 7.3.1G(3).]
- (2) In practice, advice given as described in ■ PERG 7.4.1G is unlikely to be a *personal recommendation* in the first place, for the reasons set out in ■ PERG 8.30B.2G(4) and ■ PERG 8.30B.22G to ■ PERG 8.30B.24G (Recommendation to the public).

Who can benefit from the exclusion?

- 7.4.13 **G** The *persons* who directly benefit from the exclusion will be the *persons* who would otherwise require *authorisation* (see ■ PERG 7.3.9 G), that is, the *person* whose business it is to have editorial control over the content of the publication or service. The exclusion will apply regardless of the legal form of the *person* giving the advice so, for example, it will extend to advice given by a *company* through its employees.