

Promoting unregulated investments: it's the reality of the relationship that counts (*FCA v Avacade*)

In *FCA v Avacade* [2020] EWHC 1673 (Ch) the High Court considered several points important for the financial services sector (particularly for unregulated entities), practitioners, and the regulator. [Kajetan Wandowicz](#) has written an analysis of the judgment for LexisNexis PSL.

The Defendants purported to outline to their customers the options available to them for dealing with their pension funds, but in reality, through the use of leading questions and veiled suggestions, they steered the customer to a supposedly independent decision to transfer their pension into a SIPP, and invest in certain alternative investments promoted by the Defendants. The court found that by leading customers to their promoted schemes, the Defendants made arrangements with a view to a person buying or selling investments, thus breaching the general prohibition contained in s.19 FSMA.

The four most notable points arising from the judgment are that:

1. Making arrangements with a view to a person buying or selling securities (art. 25(2) RAO) does not require causing a transaction to be concluded. It is enough if the arrangements have the effect of contributing to, or encouraging, the conclusion of a transaction.
2. Any advice (direct or indirect) given in respect of transferring a pension into a SIPP is a regulated activity.
3. Whether the defendant is carrying out a regulated activity (such as advising on investments) depends on the factual question of whether what is being done in fact amounts to that activity (e.g. whether in fact advice is being given). It is irrelevant to ask whether the contractual function of the defendant extends to that particular activity, or whether he successfully excluded his liability to the customer by a disclaimer. Whilst that impacts on the private law rights between the defendant and his customer, it has no bearing on the regulatory framework.

Establishing a direct contravention of s.89 FSA (which prohibits knowingly or recklessly making false or misleading statements in the course of promoting financial services) by a corporate defendant is not straightforward, because it is likely to depend on the exact statement being approved by the directing mind(s) behind the company.

[The full article is available on LexisNexis PSL](#)