

‘Making arrangements with a view’

High Court provides further perspective on Article 25(2) RAO

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Overview

On 30 June 2020, the English High Court handed down its judgment in *Financial Conduct Authority v Avacade Ltd (In Liquidation) & Others* [2020] EWHC 1673 (Ch) (“*Avacade*”).¹ This note considers the analysis in *Avacade* in relation to the scope of the regulated activity in Article 25(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“RAO”). Article 25(2) RAO concerns the somewhat elusive regulated activity of ‘making arrangements with a view to transactions in investments’.

Avacade confirms a broad interpretation of Article 25(2) RAO. The case rejects dicta in *Watersheds v DaCosta* [2009] EWHC 1299 (QB) (“*Watersheds*”)² and expressly provides that the regulated activity applies even to cases where the arrangements involve providing assistance to only one party. *Avacade* highlights the need for firms and individuals engaged in financial services to properly assess whether their activities fall within the scope of Article 25(2) RAO or relevant exclusions. This is particularly important for unregulated corporate finance firms, fund introducers, and digital/e-commerce platforms with pass-throughs to financial products who may consider themselves out of scope.

Background

In *Avacade* the UK Financial Conduct Authority (“FCA”) alleged that two unauthorised companies, Avacade Limited and Alexandra Associates (UK) Limited, provided a pension report service and made misleading statements which induced consumers to transfer their pensions into self-invested personal pensions (“SIPPs”). These funds were then placed into alternative investments, including

¹ <https://www.bailii.org/ew/cases/EWHC/Ch/2020/1673.html>

² <https://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWHC/QB/2009/1299.html>

tree plantations and Brazilian property developments.³ More than 2,000 clients transferred approximately £91.8m from their pensions into SIPPs.⁴

The High Court found that the activities were unlawful as they involved engaging in the regulated activities of arranging and advising on investments; making unapproved financial promotions through websites, promotional material and in telephone calls to consumers; and making false or misleading statements.⁵

Following the substantive judgment, the High Court ordered the two companies and three of their directors to pay a total of £10,715,000 in restitution to customers who were induced to transfer their pensions into SIPPs. Additionally, Alexandra Associates (UK) Limited and the three directors were banned from engaging in regulated activities in the UK without authorisation.⁶

Analysis of Article 25(2) RAO

Article 25(2) prescribes the following as a regulated activity requiring authorisation:

"(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1) (a) [i.e., a security] ... (whether as principal or agent) is also a specified kind of activity."

Paragraph 225 of *Avacade* notes that Article 25(2) RAO forms part of a set of "interlocking" provisions, including the regulated activity in Article 25(1) RAO and various exceptions, which should be considered together to determine the proper scope of Article 25(2) RAO.

The analysis in *Avacade* starts by reaffirming that the regulated activity of 'arranging (bringing about) deals in investments' in Article 25(1) RAO applies only where the arrangements bring about or would bring about the particular transaction in question. This is because of the exclusion in Article 26 RAO (arrangements not causing a deal), which applies to Article 25(1) RAO and not to Article 25(2) RAO.⁷

³ <https://www.fca.org.uk/news/press-releases/high-court-finds-against-illegal-pension-introducers-avacade-and-others>

⁴ <https://www.ftadviser.com/pensions/2020/06/30/high-court-sides-with-fca-over-pension-introducers/>

⁵ *Avacade* at para. 473

⁶ <https://www.fca.org.uk/news/press-releases/high-court-orders-illegal-pension-introducers-avacade-alexandra-associates-pay-restitution>

⁷ See *Avacade* at para. 227(i)-(ii)

Avacade notes that the regulated activity in Article 25(2) is broader and captures arrangements which, although they do not or would not necessarily “bring about” the transaction, in the direct sense of causing it to occur, are nonetheless performed “with a view to” encouraging or assisting it to happen. The High Court observed that “[t]he phrase “with a view to” [in Article 25(2) RAO] describes a more inchoate form of activity, which is not necessarily causative of the transaction in the sense that it brings it about, but which nonetheless helps it to happen.”⁸

Avacade’s reading of Article 25 is consistent with that in the FCA’s Perimeter Guidance manual (“PERG”) at PERG 5.6.2G and 5.6.4G. The aforementioned provisions in PERG were also expressly approved by the Court of Appeal in *SimplySure Ltd v Personal Touch Financial Services Ltd* [2016] EWCA Civ 461 (“*SimplySure*”), which *Avacade* follows.⁹

In line with the analysis in *SimplySure*, *Avacade* also expressly confirms that Art 25(2) applies to cases where the arrangements involve providing assistance to only one party. *Avacade* thus rejects the analysis in the previous High Court authority of *Watersheds* at paragraph 69, which suggested that providing assistance to one party only does not involve “making arrangements” under Art 25(2).¹⁰

Based on its analysis of Article 25(2), in *Avacade* the High Court found that the following steps in *Avacade Limited’s* business model collectively qualified as “arrangements” within Art 25(2):

1. the initial contact, in particular obtaining a letter of authority, in order to facilitate the collection of information about consumers' existing pension arrangements;
2. the subsequent process of collecting information from existing pension providers, and the generation of a pension report using that information;
3. telephone calls to consumers - i.e. the welcome call, pre-report call, and report call and investment call;
4. the completion of application forms on behalf of consumers. *Avacade Limited* asked the questions and completed the forms for both the SIPP transfer and the investments, and customers were then asked to sign where indicated; and

⁸ *Id.* at para. 227(iii)

⁹ *Id.* at para. 227(v)

¹⁰ *Id.* at paras. 223 and 228

5. the processing of application forms when completed, with Avacade Limited acting as a hub for the collection and onward transmission of such forms both to SIPP providers and the investment providers.¹¹

In coming to the view that the above steps collectively fell within the scope of Article 25(2) RAO, the High Court followed previous authorities and rejected attempts to divide up the transaction steps into discrete elements, or to separate out regulated from unregulated activities.¹² This was because in the court's view "*it was all one set of arrangements*" - without the prior steps the later ones would not have occurred; and the earlier "*arrangements*" were only in place at all in order to create a situation in which the later ones could happen.¹³ Indeed, the court notes that it is possible that some of these steps (in particular, filling out and processing the application forms) would also qualify as arranging under Article 25(1) RAO, "*in the sense that they are sufficiently important that they serve to 'bring about' the relevant transaction.*"¹⁴

Commentary

Avacade stresses that the concept of 'making arrangements with a view' in Article 25(2) RAO is very broad. Indeed, the High Court considered it relevant to note the Supreme Court's guidance in *FCA v Asset Land*¹⁵, which related to another regulated activity, that "*'Arrangements' is a broad and untechnical word*".¹⁶ *Avacade* observes, with respect to Article 25(2) RAO, that the "*net is cast very wide*" and emphasises the importance of relevant exclusions to fetter its scope.¹⁷ Of particular relevance in the introducer context are the exclusions related to arranging deals with or through authorised persons (Article 29 RAO) and introducing in certain contexts (Article 33 RAO). These exclusions are nuanced and require careful consideration before they are used.

For instance, *Avacade* notes that the confused syntax of Article 33 RAO should be interpreted "*in a manner which affords greater, not lesser, protection to the investor*".¹⁸ Accordingly, the exclusion in Article 33 RAO applies, inter alia, where the introduction is made to an authorised person with a view to the provision of *either* independent advice or the independent exercise of discretion and, *in either case, either* in relation to investments generally or in relation to any class of investments to

¹¹ *Id.* at para. 243

¹² *Id.* at para. 249

¹³ *Id.* at para. 248(v)

¹⁴ *Id.* at para. 244

¹⁵ [2016] UKSC 17 at para. 91

¹⁶ *Avacade* at para. 218

¹⁷ *Id.* at para. 229

¹⁸ *Id.* at para. 229(x)

which the arrangements relate.¹⁹ This interpretation enlarges the scope of the required advice, so as to include, for example, an assessment of the suitability of any particular investment product as against other investment options, rather than in relation to one investment option only.²⁰

The rejection of the *Watersheds* analysis also affirms the FCA’s attempts to limit the significance of that judgment. The FCA expressly addresses *Watersheds* at PERG 2.7.7BD G, where it emphasises that, notwithstanding the “element of doubt” introduced by *Watersheds*, the FCA remains of the view that certain types of arrangements for making introductions may fall within scope of Article 25(2) RAO. In supporting this view, *Avacade* also reinforces the general proposition that regulated activities can and should be construed in the light of their associated exclusions.

Avacade therefore reemphasises the need for firms and individuals engaged in financial services to properly assess whether their activities fall within the scope of Article 25(2) RAO or relevant exclusions. This is particularly relevant for corporate finance firms and fund managers, who often utilise a network of unregulated introducers under various exclusions. In these cases, the regulatory analysis can often centre on investment advice, financial promotions and related exclusions. However, *Avacade* provides a robust reminder that detailed consideration of the regulated activity in Article 25(2) RAO and its exclusions is equally important. Other approaches risk making arrangements with a view to harbouring significant regulatory risk.

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¹⁹ *Id.* at para. 230(vii)

²⁰ *Id.* at para. 230(ix)-(x)



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