

## Chapter 8

# Financial promotion and related activities

## 8.32 Arranging deals in investments

- 8.32.1** G Under article 25 of the *Regulated Activities Order*, *arranging deals in investments* covers:
- (1) making arrangements for another *person* (whether as principal or agent) to *buy, sell*, subscribe for or underwrite a particular *investment* which is:
    - (a) a *security* or a *structured deposit*; or
    - (b) a *relevant investment*; or
    - (c) an *investment* of the kind specified by article 86, or article 89 so far as relevant to that article (Lloyd's *syndicate* membership and capacity and rights to or interests in such *investments*); or
  - (2) making arrangements with a view to a *person* who participates in the *arrangements buying, selling*, subscribing for or underwriting *investments* falling within ■ PERG 8.32.1G (1)(a) to ■ (c) (whether as principal or agent).
- 8.32.2** G Article 25(1) 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. In the FCA's view, a *person* brings about or would bring about a transaction only if his involvement in the chain of events leading to the transaction is of enough importance that without that involvement it would not take place. The second limb (article 25(2)) is potentially much wider as it does not require that the arrangements would bring about particular transactions. It is this limb which is of potential relevance within the scope of this *guidance*.
- 8.32.3** G In the course of their business, people such as publishers or broadcasters, Internet service providers, website operators or telephone marketing companies may provide services for *authorised* or *exempt persons* or other *persons* (such as *overseas persons*) who carry on *regulated activities*. This does not necessarily mean that any arrangements they make with such *persons* will fall within the scope of article 25(2). For that to be the case, the arrangements must be made with a view to the *authorised* or *exempt* (or *overseas*) *person* or that *person's* customers or counter parties or any or all of them *buying* or *selling investments*. This means that a *person* making arrangements must take account of the purpose for which he makes them.
- 8.32.4** G The ordinary business of a publisher or broadcaster can involve him in publishing or broadcasting *financial promotions* (for example,

advertisements) on behalf of *authorised or exempt persons*. Journalists who write about *investments* or financial services may promote the services of an *authorised or exempt person*. In the FCA's opinion, such *persons* would not normally be regarded as making arrangements under article 25(2). This is the case even if any arrangements they may have made may lead their readers or viewers to *buy or sell investments* in response to the promotions. In the FCA's view, the publisher or broadcaster may normally be seen to be making arrangements with a view to publishing or broadcasting promotions which may include *financial promotions*. The same may apply to arrangements made by Internet website operators who may allow the promotion on their site of services including *financial promotions* through the setting up of hypertext links or the placing of banner advertisements.

**8.32.5** G The *Regulated Activities Order* contains an exclusion (article 27: Enabling parties to communicate) to bring a degree of certainty to this area. This applies to arrangements which might otherwise fall within article 25(2) merely because they provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties. In the FCA's view, the crucial element of the exclusion is the inclusion of the word 'merely'. So that, where a publisher, broadcaster or Internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25(2).

**8.32.6** G For example, in the FCA's view a publisher or broadcaster would be likely to be making arrangements within the meaning of article 25(2) and be unable to make use of the exclusion in article 27 if:

- (1) he enters into an agreement with a provider of investment services such as a broker or product provider for the purpose of carrying their *financial promotion*; and
- (2) as part of the arrangements, the publisher or broadcaster does one or more of the following:
  - (a) brands the investment service or product in his name or joint name with the broker or product provider;
  - (b) endorses the service, or otherwise encourages readers or viewers to respond to the promotion;
  - (c) negotiates special rates for his readers or viewers if they take up the offer;
  - (d) holds out the service as something he has arranged for the benefit of his readers or viewers.

**8.32.7** G It would also be an indicator that a publisher or broadcaster might be making arrangements falling within article 25(2) if he receives a commission or other form of reward based on the amount of regulated business done as a result of his carrying the promotion. This would be on the basis that the existence of the financial interest will inevitably have a bearing on the purpose for which the arrangements are viewed as having been made by him. However, the article 27 exclusion will apply in cases where there is such a reward provided the arrangements are made merely to allow the communication to be made.

- 8.32.8** G So, the same considerations are liable to apply to a website operator or an operator of a similar service (such as an intranet or closed user electronic service) who is carrying banner advertising from, or otherwise setting up links to the sites of, *authorised or exempt persons*.
- 8.32.9** G Other *persons* who may benefit from the exclusion in article 27 include *persons* who provide the means for someone to route an order to another *person*. A *person* providing such order routing services would not, in the FCA's view, be merely facilitating communication (of the orders) if he provides added value. This added value could be in the form, for example, of such things as formatted screens, audit trails, checking completeness of orders or matching orders or reconciling trades.
- 8.32.10** G Companies providing telephone marketing and related services to investment firms will face similar issues. If their services are entirely passive – for example, answering telephone calls, sending out literature upon request or referring enquirers to representatives of their client – they may simply be regarded as making arrangements with a view to their providing telephone answering services. On the other hand, where a telephone marketing company:
- (1) makes proactive calls to prospective customers of its clients; or
  - (2) is expected proactively to raise the possibility, during a call made by the prospective customer, of a meeting with or visit by a representative of their client or of the caller being sent promotional literature;
- the arrangements are liable to be made with a view to the company's client and its prospective customers *buying or selling investments*. So such arrangements will be likely to fall within article 25(2) unless another exclusion applies (such as that for introductions – see ■ PERG 8.33).
- 8.32.11** G The mere provision by a website operator of a bulletin board or chat room ought not to amount to making arrangements under article 25(2) unless making such arrangements is the specific purpose of the facility. However, operators of websites with such facilities will clearly need to be aware of potential implications (such as the service being used by *unauthorised persons* to give advice or make *financial promotions* or to make misleading statements with a view to manipulating market prices). They may wish to consider drawing such matters to the attention of *persons* who use the facility.
- 8.32.12** G Where *persons* are making arrangements concerning *contracts of insurance* or are carrying on *insurance distribution* or *reinsurance distribution* certain exclusions to article 25 are not available. This results from the requirements of the *IDD* and is explained in more detail in ■ PERG 5.6 (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance).