**FSMA 2000**

This section deals with the impact of the provisions of the Financial Services and Markets Act 2000 on a corporate transaction

**Introduction**

When giving advice to a seller on a sale, in particular on an auction sale, it is important to consider the provisions of the Financial Services and Markets Act 2000 (‘**FSMA**’). In this context, there are a number of provisions of which clients and their advisers need to be aware:

1. The **restrictions on financial** promotion under s.21(1) FSMA
2. The **requirement for a prospectus** under s.85(1) FSMA.

In addition to the above it may be necessary to consider whether there is a regulated activity under s.19 of FSMA. You covered this in Business Law and Practice and Professional Conduct and we will not consider it further on this course.

**Restrictions on financial promotion: s.21(1) FSMA**

Section 21(1) FSMA contains a **general prohibition** on **all types of financial promotion** and marketing of investment activity and **regulates all forms of communication** (for example: adverts; cold-calling; web sites; and general advertising).

Section 21(1)  FSMA

* A person must not, **in the course of business;**
* communicate an invitation or inducement to engage in **investment activity;**
* unless they are an **authorised person**, or the contents of the communication have been **approved by an authorised** **person**.

Section 21(1) applies to **share sales** because shares fall within the type of investments in the FSMA 2000 (Financial Promotion) Order 2005 (‘FPO’). It does **not apply to** most business sales. It could be relevant, though, if any of the assets are specified investments. This means that approaching potential buyers to induce them to enter into negotiations for the acquisition of shares in a company (or shares owned by that company as assets of that company) would be caught by the financial promotion restrictions. This has serious consequences; failure to comply with s.21(1) is a **criminal offence** which carries the sanction of a fine or imprisonment.

**Exemptions to the restrictions on financial promotion**

The FPO contains over 60 exemptions from the restrictions contained in s.21(1) FSMA. The most relevant of these exemptions to the types of transactions covered by this knowledge stream are:

* **Art 19(1),** where communications are made only to recipients whom the person making the communication believes - on reasonable grounds - to be an investment professional.
* **Art 49(2)(a),** where the communication is made to ... any body corporate which has, or which is a member of the same group as an undertaking which has, a called-up share capital or net assets of not less than:
  + (a) (if the body corporate has more than 20 members or is a subsidiary undertaking of an undertaking which has more than 20 members), £500,000;
  + (b) otherwise, £5 million.
* **Art 62(2)(b)(ii),** where the communication related to a transaction which meets the same conditions as set out in Art 70 RAO, which includes the transaction being reasonably regarded as the acquisition of day-to-day control of the affairs of the body corporate.

It is only necessary to qualify for **one of the exemptions** under the FPO in order to be exempt from the restrictions contained in s.21(1) FSMA.

**Requirement for a prospectus**

Another aspect of the FSMA regime that may at first glance appear to apply on a sale of shares is the requirement to issue a prospectus as set on in s.85 FSMA and the Prospectus Regulation Rules.

S. 85(1) FSMA states ‘*It is unlawful for transferable securities... to be offered to the public in the United Kingdom unless an approved prospectus has been made available to the public before the offer is made’.*

This would include offering to sell shares in a private company (but not the assets of a business). Where a prospectus is required, this is a very detailed document which will be costly and time-consuming to produce, and which must be approved by the FCA before being published. This would significantly slow down the timing of the sale. There are a number of **exemptions from the requirement to issue a prospectus**, which are set out in the Prospectus Regulation Rules. Most offers to sell shares in a private company will fall within the exemption for offers made to fewer than 150 persons, other than qualified investors.   
Students studying Equity Finance or Listed Companies will cover this in more detail on that knowledge stream.

**Summary**

* FSMA includes restrictions on financial promotions under s.21(1) FSMA.
* There are exemptions from the financial promotion restrictions in the FSMA 2000 (Financial Promotion) Order 2005 (‘FPO’). The most relevant exemptions for share sales are Articles 19(1), 49(2)(a) and 62(2)(b)(ii) FPO.
* Another aspect of the FSMA regime to consider is the requirement for a prospectus on the sale of shares set out in s.85 FSMA. There are a number of exemptions from this requirement under the Prospectus Regulation Rules.