

3. UK Regulation

Application of UK Regulation

Most Irish financial institutions are regulated under EU wide legislation. Under this legislation, they are entitled to provide services in the United Kingdom subject to certain terms and conditions. Generally, buy to let lending undertaken by an Irish-based credit institution / bank to an Irish-based borrower, secured on UK property does not by itself fall within the scope of UK regulation at all.

Financial services legislation applies on a UK wide basis. Therefore, the same law applies in Northern Ireland, Scotland and England and Wales. UK financial services legislation only applies to regulated activity carried out "in" the United Kingdom. The main legislation is the Financial Services and Markets Act (called the FSMA) and the UK regulator is the Financial Services Act (called the FSA).

Generally, a business which is wholly conducted in the Republic of Ireland, with no element of advertising, promotion or solicitation in the UK, is not deemed to be carried out in the UK.

Because of private international law rules, England and Wales mortgage and land law will apply to the security and the enforcement of the security. The loan contract might stipulate that English law applies. This is different to the issue of whether a regulated lending activity takes place in the UK.

Even if there is some element of business conducted in the UK, certain exemptions may apply. There are exclusions from UK regulation for overseas entities where regulated activities are not offered from a permanent establishment or place of business in the United Kingdom. The exemption applies insofar as the business results from an approach which complies with the restrictions on financial promotion (see below).

EU Rights to provide Services

Apart from the above, European Union banks can establish a branch in the UK or carry on a business on a cross border basis into the UK. To do so, they must exercise "passport rights" under EU based financial services legislation. This will involve certain notifications to the Financial Regulator which in turn notifies the FSA. The UK consumer protection and conduct of business rules would apply, although the business would

continue to be regulated in Ireland from a prudential perspective.

There are special exceptions to regulation where the E-Commerce Directive applies. This is EU based law which is in force in Ireland and the UK. Where these regulations apply, services need only comply with the home state's laws. "E-commerce" services broadly mean services provided at a distance by electronic means and at the individual request of the recipient. This will include services provided over the internet, e-mail, text messages and interactive digital TV services.

The home state must ensure that providers of e-commerce services within its territory, comply with the home state's rules. The home state must equally permit incoming service providers from other EU states, to provide services on an equivalent basis. There are certain derogations where the state of the recipient rules apply. These relate to certain matters including unsolicited e-mails, certain mutual funds matters and certain consumer protection legislation.

Mortgage Business Rules in the UK

A separate issue from the issue of licensing and authorisation, is the conduct of business rules that may apply where the financial

service are provided to UK residents.

Certain mortgage lending is regulated in the UK. A regulated mortgage contract is one where the loan is to an individual or a trustee, is secured by a first legal mortgage on land and where at least 40% of the land is used for residential purposes by the borrower or certain related persons. This regulation was introduced in October 2004 and is part of general UK financial services legislation

Buy to let loans secured on buy to let properties are not regulated in the UK. They are treated as commercial loans. Buy to let loans secured on property in which the borrower or certain relatives intend to live, is regulated under Financial Services legislation. Second charges on such properties are regulated under Consumer Credit legislation. See the next chapter on UK Consumer Credit Act regulation.

There is no direct equivalent of the Housing loan provisions of the Irish Consumer Credit Act. Most mortgage lending was unregulated until October 2004. The UK Consumer Credit Act was subject to a £25,000 limit until recently so that transactions above this amount were not regulated at all. There were also wide exemptions under that Act for property-based secured lending.

FSMA Regulation

Mortgage lenders, brokers, financial advisers must be authorised under financial services legislation, if they conduct regulated mortgage business in the UK. This regulation parallels the system of regulation by the Financial Regulator in Ireland.

Each of the relevant participants in the market must be authorised by the FSA. They must have a compliance plan and must undertake certain compliance obligations. They must also have a compliance officer, minimum controls, a complaints procedure and undergo training and establish competence.

The FSA has laid down high-level principles which apply to all regulated activities. The high-level principles are supplemented by more specific conduct of business rules. Failure to comply with the rules can be enforced directly by the FSA using a wide range of disciplinary and fining powers similar to those exercised by the Financial Regulator.

The conduct of business rules cover detailed matters such as independence, soft commissions, procedures regarding suitability of investments, charges, contract notes, complaints and periodic information. There is a requirement of best execution

and fair dealing. There are record keeping requirements. There are restrictions on certain high-pressure selling. There are detailed provisions in respect of financial promotion.

One of the most important rules that applies to all investment, including most credit and mortgage business, is the requirement that the product must be suitable. The best execution rule is a duty to take reasonable care to obtain the best price for the customer.

There are specific mortgage conduct of business rules (called MCOB) in the FSA Handbook. The FSA Handbook is available on-line. See our separate note on the Mortgage Conduct of Business rules.

Financial Promotion

There are special rules in relation to the promotion and advertising of mortgage business. These rules apply to financial promotion both for regulated mortgage contracts and for qualifying credit. "Qualifying credit" is credit with a lender who enters into or administers regulated mortgage contracts. Therefore, the promotion rules can apply to a buy to let lender who also provides regulated owner occupier products.

A financial promotion must not be communicated, other than by an authorised person or approved by an authorised person. Promotion must comply with FSMA rules and also other general rules and codes on misleading advertising and unfair trading practices, overseas regulators' requirements, e-commerce rules and consumer protection legislation. Much of this legislation has been harmonized across the EU.

There is a distinction between a real-time and non-real-time promotion. A real-time promotion is interactive, e.g. one in the course of a meeting, a telephone conversation or interactive dialogue. A non-real-time promotion must contain the name of the firm, its address and contact points. It must make clear that it is a promotion. It must be clear, fair and not misleading. Certain matters must be specified.

Where there is a comparison of products, this must be done objectively based on verifiable representative features. It must not discredit or denigrate other businesses or trademarks. It must use plain intelligible language and be easily legible. All statements must be substantiated.

Any claim or prediction must be fair and not misleading and based on disclosed assumptions. It must not contain anything

misleading in relation to the firm's independence, resources, scale of activity or the scarcity of the product. The design and content of the promotion must not disguise, obscure or diminish in significance any statement which must be contained. Certain financial information is required. There are specific restrictions on certain words and expressions including "overdraft" and "interest free".

There are also specific provisions in relation to real-time promotions. They must be clear, fair and not misleading. The purpose of the communication must be made clear at the outset. The recipient must be asked he wishes to proceed and told that he may terminate it at any time. The rights of the recipient must be respected.

Lavelle Coleman is an Irish firm of solicitors with an England and Wales legal practice. Our England and Wales qualified and regulated solicitors provide a wide range of legal services from our Dublin offices. We have written legal guides in relation to a broad range of England and Wales legal matters as they relate to Irish based individuals and businesses. These guides are available on our website at <http://www.lavellecoleman.ie/England-Wales-Law.aspx>

This is an extract from our "Legal Guide to the Management and Enforcement of Security in England and Wales for Irish Lenders (2009). The Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. It should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances. While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in it. The reader should rely only on specific legal or taxation advice. This extract is based on the law as of 1st August 2009.

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