

5. Irish Regulation

General

Most Irish retail lenders are regulated by the Financial Regulator. Regulation was extended to retail credit firms, who formerly fell outside regulation, in 2008.

The principal rules encountered in dealings with borrowers are set out in the conduct of business rules made by the Financial Regulator. The Consumer Protection Code as updated by a number of other amending codes, is the principal code containing rules and regulations on the conduct of business.

Enforcement by the Financial Regulator

Breach of legal obligations are generally enforced through criminal and civil court proceedings. Because this was perceived to be inflexible and not to give consumers sufficient protection, regulated lenders are also subject to adjudication and enforcement by the Financial Regulator itself and by the Financial Services Ombudsman in the case of complaints by consumers. Both bodies have legal powers of enforcement over regulated lenders which are equivalent to and in many respects, more far reaching, than the powers of a court.

The Financial Regulator effectively acts as policeman to the financial services industry. Regulated lenders have obligations to comply with all regulations and codes and to ensure that there are structures and systems in place to ensure compliance throughout the organisation.

The Financial Regulator has powers to conduct enquiries and impose sanctions for breach of legal rules and codes of conduct. Regulatory sanctions can be imposed for “prescribed contraventions” which include breaches of law, breaches of codes and breach of other obligations imposed under the regulatory scheme. The sanctions are potentially severe, ranging from a caution or reprimand to orders to repay money, a penalty / fine of up to €5,000,000 and disqualification of management personnel and other orders.

Decisions may be appealed to the Financial Services Appeals Tribunal or Court. Individuals managing the regulated lender can themselves be subject to personal sanctions.

The Financial Services Ombudsman

The Financial Services Ombudsman is an office to which consumers can take complaints in relation to dealings with

regulated lenders. Compensation may be awarded without the formality, costs, risk or expense of Court proceedings.

A consumer, for the purpose of making an Ombudsman complaint, includes both an individual acting outside his business and companies and businesses with turnover of less than €3,000,000 per annum.

The Ombudsman can make findings based on its investigations. It can make orders to remedy complaints which are upheld. It can make awards of compensation up to €250,000.

The Financial Service Ombudsman can uphold complaints, take action and award compensation not only for breach of legal rules and code, but also on the basis of wider criteria. An Ombudsman complaint can be upheld on the basis that the conduct was:

- ❖ contrary to law;
- ❖ unreasonable, unjust, oppressive or improperly discriminatory (even if lawful);
- ❖ the conduct was based on improper motive or irrelevant consideration;
- ❖ conduct was based on a mistake of law or fact;
- ❖ a proper explanation for the conduct complained of was not given when it should have been given;
- ❖ the conduct was otherwise improper

Consumer Protection Code

The Consumer Protection Code embodies certain general principles and specific requirements for credit institutions and other lenders in their dealings with customers and consumers. The Code has the force of law and can be enforced by penalties and sanctions by the Financial Regulator or by way of financial compensation in claims by consumers to the Financial Services Ombudsman.

There are certain, high-level principles which apply to regulated lenders in their dealings with all “customers”. There are other more specific rules which apply to dealings with “consumers”. A customer is any person or company to which a regulated lender provides or offers to provide services covered by the Code.

A consumer under the Code, to whom more onerous obligations are owed, is defined in a much broader way than under most other consumer protection legislation. A “consumer” under the code is defined to include businesses with turnover less than €3M. A consumer is any of the following

- ❖ a person acting outside his business trade or profession;
- ❖ a group of persons including a partnership with turnover less than €3

million annually;

- ❖ a company with turnover of less than €3 million not being part of a group of companies with turnover greater than this amount; or
- ❖ a member of credit union.

The general obligations in the Code apply throughout the loan period, including during the loan management and enforcement stage. Many of the more specific obligations in the Code are relevant to the “front end” aspects of lending, rather, than enforcement. However, they may be relevant in the context of a variation agreement or similar arrangements.

The Code’s general principles make the following requirements of regulated lenders in dealings with all customers (and not just consumers);

- ❖ that its acts honest, fairly and professionally in the customer’s best interests;
- ❖ that it uses due skill care and diligence in the best interest of customers;
- ❖ that it does not recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of a product or service;
- ❖ that it seeks relevant information from customers in relation to products or services requested;
- ❖ that it make full disclosure of all material

information, including charges;

- ❖ that it avoids conflicts of interest;
- ❖ that its correct errors and handles complaints speedily and efficiently and fairly;
- ❖ that it does not exert undue pressure or undue influence on a customer;
- ❖ that it complies with the spirit and letter of the Code.

Obligations to Consumers

The following general obligations may be of relevance to arrears handling, loan management, variation of loan agreements, negotiation and enforcement of agreements with consumers;

- ❖ to process customer’s instructions promptly and correctly;
- ❖ to maintain records of instructions where instructions are accepted with conditions imposed by consumers;
- ❖ not to make a product or service provision contingent upon purchase of another product or service;
- ❖ not to charge a consumer a fee for optional extra input offered in conjunction with the product unless the consumer indicates that he wishes to purchase it;
- ❖ to ensure the required warnings are in a box in bold and of appropriate font size

Information must be clear and comprehensible. Key items must be brought to the consumer's attention. Information must be supplied on a timely basis depending on urgency and importance.

If it is intended to record a conversation, this must be disclosed at the outset. Terms and conditions for a service must be provided before the consumer enters the contract and before a cooling off period expires. Printed information must be clearly legible.

A regulated lender must not seek to exclude or restrict its duty under law or limit its liability by the terms of an agreement.

Suitability / Knowing the Consumer

A regulated lender is obliged to gather and record sufficient information to enable it to make a proper recommendation for a product or service. This does not apply where the consumer specifies the product and product provider and has not received advice.

The regulated lender must gather details of material changes to the consumer's circumstances before it provides a subsequent product or service. A regulated lender must endeavour to have the consumer verify the accuracy of information provided.

A regulated lender must ensure that on the facts disclosed by consumer and all the relevant facts available, that the product or service is suitable for the consumer. If it offers a selection of product and service options, the most suitable from the range available must be offered. Where it recommends a product, the recommended product must be the most suitable. These requirements do not apply where the consumer has specified the product and product provider and not received advice.

Before providing a service or product, a regulated lender must prepare a written statement setting out the reasons it is considered suitable. The regulated lender must give a copy to the consumer and retain a copy in writing. This does not apply to "execution only" consumers who have specified the product and provider and have not received any advice

Contact with Consumers

There are restrictions on making unsolicited contact with non-customers. A regulated lender may not make unsolicited contact with a individual consumer by way of personal visit or telephone call, unless

- ❖ it has consent;
- ❖ it has provided a product or similar service within the previous 12 months;

or

- ❖ a product requires maintenance of contact.

There are restrictions on the hours in which unsolicited contact may be made with consumers. Unless otherwise requested by the consumer, contact may only be made within certain hours (generally 9am to 9pm Monday to Saturday).

When making unsolicited contact, the representative must identify himself, the regulated institution and the purpose of call. It must disclose if the call is being recorded, ask and establish if the consumer wishes to proceed. If not, the contact must be ended.

Information on Charges

There are requirements that a consumer be advised of charges including third-party charges prior to a product or service or product being provided. Increases in charges must be advised thirty days in advance. A statement must be provided to consumers of all charges in a period. Where charges are accumulated and applied periodically to accounts, 10 days business notice must be given before deduction.

Complaints

There must be an internal procedure for handling complaints. Complaints must be dealt with, within certain periods. Complainants must be advised of the outcome of the complaint within five business days, explaining, if applicable, any offer of settlement. The right to refer to the Financial Services Ombudsman must be notified. A record must be kept of complaints

Certain customer records and documents must be kept for at least six years. This includes identity documents, product details, correspondence, applications, original legal documents and certain other required information.

Banking Products / Loans.

They are specific requirements in relation to loans. Most of them do not apply or will be of limited relevance in relation to loan management or enforcement. Where there is a variation of a loan agreement in a consumer case, the requirements may have to be followed.

There is a prescribed warning in relation to guarantees This must be highlighted in a box. It recommends legal advice. This should be followed where a new guarantor is offered. If there is a change in a loan agreement, the guarantor must be notified. This is of key importance in a variation of a

loan which has the benefit of a guarantee

Prior to a loan being approved, a regulated lender must explain to a consumer the effect, if any, of missing any of the scheduled repayments. This information must be highlighted in any relevant documentation and the following notice should also appear:

Warning: If you do not meet the repayments on your loan, your account will go into arrears. This may affect your credit rating.

There must be a procedure in respect of arrears. Once an account is in arrears, the consumer must be informed of the status of the account as soon as possible. This must include

- ❖ that date when the arrears commenced;
- ❖ the number of and total payments missed;
- ❖ the amount of arrears interest charged to date;
- ❖ the interest rates applicable to arrears;
- ❖ details of fees and charges to calculate used to calculate arrears amount.

Recent Codes of Conduct

The Code of Conduct on Mortgage Arrears only applies to lending to consumers in respect of their principal private residence within the State. Therefore, there are no

specific provisions relevant to owner occupier of or investors in residential investment property in England and Wales

The code of conduct a business lending to small and medium enterprises relates to “enterprises” and does not appear relevant to an investment activity.

Confidentiality and Data Protection

The borrower’s right to confidentiality must be respected in all loan management and dealings. It is an implied term of the relationship of a customer and bank that the bank will keep secret and confidential, information in relation to customer’s accounts and affairs. A customer may be entitled to compensation or may succeed in a claim with the Financial Services Ombudsman in the event of a breach of this duty.

The terms of any consent, express or implied, must be considered. Information may not be passed on to another entity without compliance with the terms of the consent. A lender may comprise a group of different companies. It should be verified that any consent to passing of information covers other group companies, where they are involved.

There are exceptions to the duty of

confidentiality. Where it is reasonably necessary to protect the bank's interest either against the customer or against third parties, the duty may not apply. This will apply, for example, to taking legal proceedings, which of necessity involves production of court documents many of which are in the public domain.

There are situations where a lender is legally obliged to disclose information. This can apply under court order or under Revenue Commissioners powers, in a range of contexts.

A lender can be compelled by subpoena to attend court to give information. The lender and its representatives must supply information and answer questions in court. The duty of confidentiality will not apply to information required to be disclosed and to replies to questions properly asked in court proceedings.

There are a number of governmental authorities including the Revenue Commissioners who have the right to obtain information in relation to accounts. The Revenue have been given ever wider powers to obtain information and access to customer's bank accounts.

The Data Protection Act restricts dealing with certain categories of personal data. There are controls on the use and

processing of information other than in accordance with the specific consent. See the E-Commerce section of our England and Wales website.

LAVELLE COLEMAN

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.

© Paul McMahon, Lavelle Coleman 2009

Lavelle Coleman Solicitors

20 On Hatch, Lower Hatch Street,
Dublin 2, Ireland.

t +353 1 644 5800

f +353 1 661 4581

dx 109010 Fitzwilliam

e law@lavellecoleman.ie

w www.lavellecoleman.ie

CONTACTS

Paul McMahon

pmcmahon@lavellecoleman.ie

Phone: (353) 1 6445800

Fax: (353) 1 6614581

Lavelle Coleman
Solicitors
20 On Hatch
Lower Hatch Street
Dublin 2
Ireland

www.lavellecoleman.ie