

## Chapter 4

# Guidance on regulated activities connected with mortgages

## 4.11 Link between activities and the United Kingdom

### Introduction

**4.11.1** **G** Section 19 of the *Act* (The general prohibition) provides that the requirement to be *authorised* under the *Act* only applies in relation to *regulated activities* which are carried on 'in the *United Kingdom*'. In many cases, it will be quite straightforward to identify where an activity is carried on. But when there is a cross-border element, for example because a borrower is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may arise as to where the activity is carried on. This section describes the legislation that is relevant to this question and gives the *FCA's* views on various scenarios.

**4.11.2** **G** Even if a *person* concludes that he is not carrying on a *regulated activity* in the *United Kingdom*, he will need to ensure that he does not contravene other provisions of the *Act* that apply to *unauthorised persons*. These include the controls on *financial promotion* (section 21 (Financial promotion) of the *Act*) (see ■ PERG 8 (Financial promotion and related activities)), and on giving the impression that a *person* is authorised (section 24 (False claims to be authorised or exempt)).

### Legislative provisions: definition of "regulated mortgage contract"

**4.11.3** **G** A contract is only a *regulated mortgage contract* if the land is in the *EEA* (see ■ PERG 4.4.5 G (Land in the *EEA*)).

### Legislative provisions: section 418 of the Act

**4.11.4** **G** Section 418 of the *Act* deals with the carrying on of *regulated activities* in the *United Kingdom*. It extends the meaning that 'carry on a *regulated activity* in the *United Kingdom*' would ordinarily have by setting out additional cases. The *Act* states that in these cases a *person* who is carrying on a *regulated activity* but would not otherwise be regarded as carrying on the activity in the *United Kingdom* is, for the purposes of the *Act*, to be regarded as carrying on the activity in the *United Kingdom*.

**4.11.5** **G** For the purposes of *regulated mortgage activities*, sections 418(2), (4), (5), (5A) and (6) are relevant, as follows:

- (1) Section 418(2) refers to a case where a *UK-based person* carries on a *regulated activity* in another *EEA State* in the exercise of rights under

a *Single Market Directive*. The only *Single Market Directives* which are relevant to mortgages are the *CRD* and the *MCD*.

- (2) Section 418(4) refers to the case where a UK-based *person* carries on a *regulated activity* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*.
- (3) Section 418(5) refers to the case where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an *establishment* maintained by him in the *United Kingdom*.
- (4) Section 418(5A) refers to the case where an *electronic commerce activity* is carried on with or for a *person* in an *EEA State* from an establishment in the *United Kingdom*. See further ■ PERG 4.11.21 G (E-Commerce Directive).
- (5) Section 418(6) makes it clear that for the purposes of sections 418(2) to (5A), it is irrelevant where the *person* with whom the activity is carried on is situated.

**Legislative provisions: overseas persons exclusion**

4.11.6

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The exclusions in article 72(5A) to (5F) of the *Regulated Activities Order* (Overseas persons) provide that an *overseas person* does not carry on the *regulated activities* of:

- (1) *arranging (bringing about) or making arrangements with view to a regulated mortgage contract;*
- (2) *entering into a regulated mortgage contract; or*
- (3) *administering a regulated mortgage contract;*

of the borrower (and each of them, if more than one) is an individual and is normally resident outside the *United Kingdom*. In the case of arranging a variation of, or administration of, an existing *regulated mortgage contract*, each borrower must be an individual who was normally resident outside the *United Kingdom* when he entered into the contract. In the *FCA's* view, normal residence for the purposes of this exclusion envisages physical presence with a degree of continuity, making allowance for occasional temporary absences (e.g. holiday). An *overseas person* under article 3 of the *Regulated Activities Order* (Interpretation) is a *person* who carries on certain *regulated activities* albeit not from a permanent place of business maintained by him in the *United Kingdom*.

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The exclusion for *overseas persons* described in ■ PERG 4.11.6 G does not apply where the *overseas person* is a mortgage intermediary whose *home Member State* is the *United Kingdom*. A mortgage intermediary is defined in ■ PERG 4.10A.3 G.

4.11.7

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An *overseas person* might advise a *person* in the *United Kingdom* on an *endowment assurance* at the same time as advising on a *regulated mortgage contract*. If so, whilst the *overseas person* exclusion in article 72(5) will apply in relation to the advice on the *endowment assurance*, there will be no

'overseas persons exclusion' for the advice on the *regulated mortgage contract*.

**Territorial scenarios: general**

4.11.8

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The FCA's view of the effect of the Act and *Regulated Activities Order* in various territorial scenarios is set out in the remainder of this section. In those scenarios:

- (1) the term "service provider" is used to describe a *person* carrying on any of the *regulated mortgage activities*;
- (2) the term "borrower" refers to a borrower who is an individual and not a trustee; the position of a borrower acting as a trustee is not considered; and
- (3) it is assumed that the activity is not an *electronic commerce activity* (as to which, see ■ PERG 4.11.21 G (E-Commerce Directive)).

■ PERG 4.11.9 G contains a simplified tabular summary of those views, which should be used only in conjunction with the more detailed analysis.

4.11.9

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Simplified summary of the territorial scope of the regulated mortgage activities, to be read in conjunction with the rest of this section.

This table belongs to ■ PERG 4.11.8 G

| Regulated activities other than advice  |                                    |   |                      |                 |
|---|------------------------------------|---|----------------------|-----------------|
| Location of establishment of service provider:                                    | Location of land:                  | Individual borrower resident and located: |                      |                 |
|   |                                    | in the UK                                 | in another EEA State | outside the EEA |
| UK or non-UK person: Establishment in the UK                                      | land in the UK                     | Yes                                       | Yes                  | Yes             |
|   | land in another EEA State          | Yes                                       | Yes                  | Yes             |
| UK person: Establishment in another EEA State or in a country outside the EEA     | land in the UK                     | Yes                                       | Yes                  | Yes             |
|   | land in another EEA State (Note 1) | No  | No                   | No              |
| Non-UK person: Establishment in another EEA State or in a country outside the EEA | land in the UK                     | Yes                                       | No                   | No              |
|   | land in another EEA State          | No  | No                   | No              |

Yes = *authorisation* or exemption required

No = *authorisation* or exemption not required  
 Note 1: If the service provider is a *UK firm* operating from an office in another *EEA State* in the exercise of rights under a *Single Market Directive*, the activities will be treated as taking place in the *United Kingdom* and the *firm* will need to make sure that its *permission* covers the *regulated mortgage activities* it is carrying out. See PERG 4.11.5G (1).

The regulated activity of advice

| Location of establishment of service provider:   | Location of land:                         | Individual borrower resident and located: |                             |                        |
|--|---|---|-----------------------------|------------------------|
|  |   | in the <i>UK</i>                          | in another <i>EEA State</i> | outside the <i>EEA</i> |
| <i>UK</i> or non- <i>UK person</i> : Establishment in the <i>UK</i>                                      | land in the <i>UK</i>                     | Yes                                       | Yes                         | Yes                    |
|  | land in another <i>EEA State</i>          | Yes                                       | Yes                         | Yes                    |
| <i>UK person</i> : Establishment in another <i>EEA State</i> or in a country outside the <i>EEA</i>      | land in the <i>UK</i>                     | Yes                                       | No                          | No                     |
|  | land in another <i>EEA State</i> (Note 1) | Yes                                       | No                          | No                     |
| Non- <i>UK person</i> : Establishment in another <i>EEA State</i> or in a country outside the <i>EEA</i> | land in the <i>UK</i>                     | Yes                                       | No                          | No                     |
|  | land in another <i>EEA State</i>          | Yes                                       | No                          | No                     |

Yes = *authorisation* or exemption required  
 No = *authorisation* or exemption not required  
 Note 1: If the service provider is a *UK firm* operating from an office in another *EEA State* in the exercise of rights under a *Single Market Directive*, the activities will be treated as taking place in the *United Kingdom* and the *firm* will need to make sure that its *permission* covers the *regulated mortgage activities* it is carrying out. See PERG 4.11.5G (1).

**Service provider in the United Kingdom**

**4.11.10** **G** Where a *person* is carrying on any of the *regulated mortgage activities* from an establishment maintained by him in the *United Kingdom*, that *person* will be 'carrying on a *regulated activity* in the *United Kingdom*'. The location and residence of the borrower is irrelevant. That is the practical effect of sections 418(4), (5) and (6) of the *Act*.

**4.11.11** **G** There may also be situations where a lender, who does not maintain an *establishment* in the *United Kingdom*, provides services in the *United Kingdom*. For instance, a lender might attend a property exhibition in the

*United Kingdom* at which he sets up a loan with a borrower. A lender might also attend the offices of its *UK*-based lawyers, or appoint them as its agent, to enter into a contract with a borrower. In these cases, the overseas lender would only be carrying on a *regulated activity* in the *United Kingdom* if he subsequently enters into a *regulated mortgage contract* with a *UK* resident. This is because *arrangements* made with borrowers at the exhibition would be subject to the exclusion in article 28 of the *Regulated Activities Order* (Arranging transactions to which the arranger is a party) (see ■ PERG 4.5.7 G). As regards *entering into a regulated mortgage contract* with a borrower resident overseas, this would be subject to the *overseas persons* exclusion.

**Service provider overseas: general**

4.11.12 **G** If a service provider is overseas, the question of whether that *person* is carrying on a *regulated activity* in the *United Kingdom* will depend upon:

- (1) the type of *regulated activity* being carried on;
- (2) section 418 of the *Act*;
- (3) the residence and location of the borrower;
- (4) the application of the *overseas persons* exclusion in article 72(5A) to (5F) of the *Regulated Activities Order*; and
- (5) whether the service provider is carrying on an *electronic commerce activity*.

The factors in (1), (3) and (4) are considered in relation to each *regulated activity* in ■ PERG 4.11.13 G to ■ PERG 4.11.20 G. The factor in (5) is considered in ■ PERG 4.11.21 G.

4.11.12A **G** If the service provider is a *UK firm* exercising its rights under a *Single Market Directive* by providing services from another *EEA State*, section 418 of the *Act* means that the services are treated as being carried on in the *United Kingdom*. This factor is not covered further in the remainder of this section.

**Service provider overseas: arranging regulated mortgage contracts**

4.11.13 **G** When a *person* is *arranging (bringing about) regulated mortgage contracts* or *making arrangements with a view to regulated mortgage contracts* from overseas, the question of whether he will be carrying on *regulated activities* in the *United Kingdom* will depend on the relevant circumstances. In the *FCA's* view, factors to consider include:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation only applies if the land is in the *EEA*;
- (2) the *overseas persons* exclusion in article 72(5A) to (5C) of the *Regulated Activities Order*; and
- (3) where the arrangements are in fact made.

4.11.14 **G** In the *FCA's* view:

- (1) if the borrower is *normally resident* in the *United Kingdom* and the land is in the *United Kingdom*, the clear territorial limitation in the definition of *regulated mortgage contract* carries most weight in determining where regulation should apply; it is likely that the arranger will be carrying on *regulated activities* in the *United Kingdom*;
- (2) if the borrower is *normally resident* overseas, the arrangements are excluded by the *overseas persons* exclusion if the lender is an *overseas person*.

In the case of *arranging (bringing about) regulated mortgage contracts*, the normal residence of the borrower at the time the arrangements are made is the determining factor, except in the case of *arranging (bringing about) a variation of a contract*, in which case it is the normal residence of the borrower at the time that the *regulated mortgage contract* was entered into. In the case of *making arrangements with a view to regulated mortgage contracts*, the *normal residence* of the borrower at the time he participates in the arrangements is the determining factor.

**Service provider overseas: advising on regulated mortgage contracts**

4.11.15 **G** In the *FCA's* view, *advising on regulated mortgage contracts* is carried on where the borrower receives the advice. Accordingly:

- (1) if the borrower is located in the *United Kingdom*, a *person* advising that borrower on *regulated mortgage contracts* is carrying on a *regulated activity* in the *United Kingdom*; but
- (2) if the service provider and borrower are both located overseas, the *regulated activity* is not carried on in the *United Kingdom*.

**Service provider overseas: entering into a regulated mortgage contract**

4.11.16 **G** The effect of article 72(5D) of the *Regulated Activities Order* is that an *overseas person* does not carry on the *regulated activity* of *entering into a regulated mortgage contract* if the borrower is resident overseas at the time the contract is entered into.

4.11.17 **G** In the *FCA's* view, in circumstances other than those excluded by article 72(5D) of the *Regulated Activities Order*, the need for an overseas lender to be *authorised* or to have an exemption will depend on the location of the land. This is because of:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation applies only if the land is in the *EEA*;
- (2) the general principle and practice that contracts relating to land are usually governed by the law of the place where the land is situated; and



(3) practical issues of conveyancing; a lender is likely to use the services of a lawyer or licensed conveyancer operating from the *United Kingdom* or the other *EEA State* in question, who enters into the *regulated mortgage contract* as agent for the lender in the *United Kingdom* or the other *EEA State* in question; and

(4) the existence of the *overseas persons* exclusion in article 72(5D).

**Service provider overseas: administering a regulated mortgage contract**

4.11.18 **G** The effect of article 72(5E) and (5F) of the *Regulated Activities Order* is that an *overseas person* who administers a *regulated mortgage contract*, where the borrower was resident overseas at the time that the contract was entered into, does not carry on the *regulated activity of administering a regulated mortgage contract*.

4.11.19 **G** In the *FCA's* view, in circumstances other than those excluded by article 72(5E) of the *Regulated Activities Order*, the need for an overseas administrator to be *authorised* or to have an exemption will depend on the location of the land. This is because:

(1) the territorial limitation in the definition of *regulated mortgage contract* means that regulation applies only if the land is in the *EEA*;

(2) when administrators notify borrowers resident in the *United Kingdom* or the other *EEA State* in question of matters pursuant to a *regulated mortgage contract*, such notification is likely to be carried on in the *United Kingdom* or the other *EEA State* in question;

(3) the steps involved in collecting or recovering payments will generally include giving notice to the borrower at his address in the *United Kingdom* or the other *EEA State* in question;

(4) legal action to recover sums due under *regulated mortgage contracts* will in many cases require proceedings before courts in the *United Kingdom* or the other *EEA State* in question, either to enforce *regulated mortgage contracts* subject to the jurisdiction of these courts or to register and enforce judgements obtained elsewhere, in the case of contracts subject to non-UK jurisdictions; and

(5) of the existence of the exclusion in article 72(5E) (*Overseas persons*).

**Service provider: agreeing to carry on a regulated activity**

4.11.20 **G** In most cases, there will be no preliminary agreement to enter into a *regulated mortgage contract* in advance of entering into the contract itself. Moreover, the exclusions relevant to a *regulated activity* are taken into account to determine whether a *person* is *agreeing to carry on* that *regulated activity*. So, for example, agreeing to arrange *regulated mortgage contracts* in cases where borrower and service provider are overseas, would not be *regulated activities* because the activities themselves are outside the scope of regulation. Otherwise, in the *FCA's* view, the issue of where agreeing to carry on a *regulated activity* takes place will depend on such factors as a contractual analysis of where the agreement is entered into,



including where appropriate the general position at common law (see, for example, ■ PERG 4.11.17 G).

**E-Commerce Directive**

**4.11.21** **G** The *E-Commerce Directive* removes restrictions on the cross-border provision of services by electronic means, introducing a *country of origin* approach to regulation. This requires *EEA States* to impose their requirements on the outward provision of such services and to lift them from inward providers. The *E-Commerce Directive* contains only a few exceptions, termed derogations, from this principle. The *E-Commerce Directive* defines an e-commerce service (termed an information society service) as any service, normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the service. So, for example, it includes services provided over the internet, by solicited e-mail, and interactive digital television.

**Distance marketing directive**

**4.11.22** **G** The *FCA* will be responsible for implementing the *Distance Marketing Directive* for those firms and activities it regulates. The *FCA* and the Treasury agree that the *Distance Marketing Directive* is intended to operate on a *country of origin* basis, except where a firm is *marketing* into the *UK* from an establishment in an *EEA State* which has not implemented the Directive.