

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:

- (1) in relation to a contract entered into before *IP completion day*, land in the *United Kingdom* or [, if the contract was entered into on or after 21 March 2016,] within the territory of an *EEA State*; and
- (2) in relation to a contract entered into on or after *IP completion day*, land in the *United Kingdom*,

(see ■ PERG 4.4.5 G (Land)).

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

		<p>the activity in the <i>United Kingdom</i> is, for the purposes of the Act, to be regarded as carrying on the activity in the <i>United Kingdom</i>.</p>
4.11.5	G	<p>For the purposes of <i>regulated mortgage activities</i>, sections 418(4), (5), and (6) are relevant, as follows:</p> <p>(1) [deleted]</p> <p>(2) Section 418(4) refers to the case where a UK-based <i>person</i> carries on a <i>regulated activity</i> and the day-to-day management of the activity is the responsibility of an establishment in the <i>United Kingdom</i>.</p> <p>(3) Section 418(5) refers to the case where a <i>regulated activity</i> is carried on by a <i>person</i> who is not based in the <i>United Kingdom</i> but is carried on from an <i>establishment</i> maintained by him in the <i>United Kingdom</i>.</p> <p>(4) [deleted]</p> <p>(5) Section 418(6) makes it clear that for the purposes of sections 418(2) to (5A), it is irrelevant where the <i>person</i> with whom the activity is carried on is situated.</p>
		<p>Legislative provisions: overseas persons exclusion</p>
4.11.6	G	<p>The exclusions in article 72(5A) to (5F) of the <i>Regulated Activities Order</i> (Overseas persons) provide that an <i>overseas person</i> does not carry on the <i>regulated activities</i> of:</p> <p>(1) <i>arranging (bringing about) or making arrangements with view to a regulated mortgage contract;</i></p> <p>(2) <i>entering into a regulated mortgage contract; or</i></p> <p>(3) <i>administering a regulated mortgage contract;</i></p> <p>of the borrower (and each of them, if more than one) is an individual and is normally resident outside the <i>United Kingdom</i>. In the case of arranging a variation of, or administration of, an existing <i>regulated mortgage contract</i>, each borrower must be an individual who was normally resident outside the <i>United Kingdom</i> 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 if continuity, making allowance for occasional temporary absences (e.g. holiday). An <i>overseas person</i> under article 3 of the <i>Regulated Activities Order</i> (Interpretation) is a <i>person</i> who carries on certain <i>regulated activities</i> albeit not from a permanent place of business maintained by him in the <i>United Kingdom</i>.</p>
4.11.6A	G	<p>The exclusion for overseas <i>persons</i> described in ■ PERG 4.11.6 G does not apply where the overseas person is a mortgage intermediary whose <i>home Member State</i> is the <i>United Kingdom</i>. A mortgage intermediary is defined in ■ PERG 4.10A.3 G.</p>
4.11.7	G	<p>An <i>overseas person</i> might advise a <i>person</i> in the <i>United Kingdom</i> on an <i>endowment assurance</i> at the same time as advising on a <i>regulated mortgage</i></p>

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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

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.

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Simplified summary of the territorial scope of the regulated mortgage activities for contracts entered into on or after *IP completion day*, to be read in conjunction with the rest of this section.

[**Note:** readers wishing to understand the territorial scope of the regulated mortgage activities for contracts entered into before *IP completion day* may wish to refer to the version of this *guidance* as at the date on which the relevant contract was entered into.]

This table belongs to ■ PERG 4.11.8 G

		Individual borrower resident and located:	
		in the <i>United Kingdom</i>	outside the <i>United Kingdom</i>
Service provider carrying on regulated activity from establishment in the <i>United Kingdom</i>	land in the <i>United Kingdom</i>	Yes	Yes
	land outside the <i>United Kingdom</i>	No	No
Service provider carrying on regulated activity from establishment outside the <i>United Kingdom</i>	land in the <i>United Kingdom</i>	Yes	No
	land outside the <i>United Kingdom</i>	No	No
Yes = <i>authorisation</i> or exemption required			
No = <i>authorisation</i> or exemption not required			

		Service provider in the United Kingdom
4.11.10	G	<p>Where a <i>person</i> is carrying on any of the <i>regulated mortgage activities</i> from an establishment maintained by him in the <i>United Kingdom</i>, that <i>person</i> will be 'carrying on a <i>regulated activity</i> in the <i>United Kingdom</i>'. The location and residence of the borrower is irrelevant. That is the practical effect of sections 418(4), (5) and (6) of the Act.</p>
4.11.11	G	<p>There may also be situations where a lender, who does not maintain an <i>establishment</i> in the <i>United Kingdom</i>, provides services in the <i>United Kingdom</i>. For instance, a lender might attend a property exhibition in the <i>United Kingdom</i> 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 <i>regulated activity</i> in the <i>United Kingdom</i> if he subsequently enters into a <i>regulated mortgage contract</i> with a UK resident. This is because <i>arrangements</i> made with borrowers at the exhibition would be subject to the exclusion in article 28 of the <i>Regulated Activities Order</i> (Arranging transactions to which the arranger is a party) (see ■ PERG 4.5.7 G). As regards <i>entering into a regulated mortgage contract</i> with a borrower resident overseas, this would be subject to the <i>overseas persons</i> exclusion.</p>
		Service provider overseas: general
4.11.12	G	<p>If a service provider is overseas, the question of whether that <i>person</i> is carrying on a <i>regulated activity</i> in the <i>United Kingdom</i> will depend upon:</p> <ul style="list-style-type: none"> (1) the type of <i>regulated activity</i> being carried on; (2) section 418 of the Act; (3) the residence and location of the borrower; (4) the application of the <i>overseas persons</i> exclusion in article 72(5A) to (5F) of the <i>Regulated Activities Order</i>; and (5) whether the service provider is carrying on an <i>electronic commerce activity</i>. <p>The factors in (1), (3) and (4) are considered in relation to each <i>regulated activity</i> in ■ PERG 4.11.13 G to ■ PERG 4.11.20 G. The factor in (5) is considered in ■ PERG 4.11.21 G.</p>
4.11.12A	G	<p>[deleted]</p>
		Service provider overseas: arranging regulated mortgage contracts
4.11.13	G	<p>When a <i>person</i> is <i>arranging (bringing about) regulated mortgage contracts</i> or <i>making arrangements with a view to regulated mortgage contracts</i> from overseas, the question of whether he will be carrying on <i>regulated activities</i> in the <i>United Kingdom</i> will depend on the relevant circumstances. In the FCA's view, factors to consider include:</p>

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In the *FCA's* view:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation only applies if the land is in the *United Kingdom*;
- (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.

- (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

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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

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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.

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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 *United Kingdom*;
- (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*, who enters into the *regulated mortgage contract* as agent for the lender in the *United Kingdom*; 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 *United Kingdom*;
- (2) when administrators notify borrowers resident in the *United Kingdom* of matters pursuant to a *regulated mortgage contract*, such notification is likely to be carried on in the *United Kingdom*;
- (3) the steps involved in collecting or recovering payments will generally include giving notice to the borrower at his address in the *United Kingdom*;
- (4) legal action to recover sums due under *regulated mortgage contracts* will in many cases require proceedings before courts in the *United Kingdom*, 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 <i>regulated mortgage contract</i> in advance of entering into the contract itself. Moreover, the exclusions relevant to a <i>regulated activity</i> are taken into account to determine whether a <i>person</i> is <i>agreeing to carry on</i> that <i>regulated activity</i> . So, for example, agreeing to arrange <i>regulated mortgage contracts</i> in cases where borrower and service provider are overseas, would not be <i>regulated activities</i> because the activities themselves are outside the scope of regulation. Otherwise, in the <i>FCA's</i> view, the issue of where agreeing to carry on a <i>regulated activity</i> 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).
4.11.21	G	[deleted]
4.11.22	G	[deleted]