



Public & Regulatory Law Update

November 2009

European Commission approval for revised State guarantee

On 20 November 2009 the European Commission gave State aid approval for a revised State guarantee to facilitate longer-term funding by credit institutions in Ireland of up to five years duration. The Minister for Finance has indicated that a draft scheme entitled the Credit Institutions (Eligible Liabilities Guarantee) Scheme 2009 will be published shortly for approval by the Oireachtas. The revised guarantee will be more targeted than the current State guarantee and will apply to certain liabilities (including deposits) incurred by participating institutions during the period up to 29 September 2010. Dated subordinated debt and asset covered securities will not be guaranteed under the scheme.

The State guarantee for existing liabilities covered under the Credit Institutions Financial Support Scheme set up under the Credit Institutions (Financial Support) Act 2008 will remain in place.

NAMA update

The National Asset Management Agency Act 2009 which establishes the National Asset Management Agency (NAMA) was signed by the President on 22 November 2009. NAMA will essentially acquire and manage certain bank assets (*for more background on its provisions see the Public and Regulatory Law ezines, September and October 2009*). The Act will come into force on such day or days as the Minister for Finance (the Minister) may appoint by order once it is approved by the EU. Therefore a Government order will direct when its provisions or certain specific provisions will be commenced.

Companies (Miscellaneous Provisions) Bill 2009

This Government sponsored Bill was introduced into the Seanad on 12 November 2009 and makes two specific amendments to the Companies' Acts:

1. It provides, in limited circumstances, for the use on a transitional basis, of US Generally Accepted Accounting Principles (US GAAP) by certain US parent undertakings to the extent that such use does not contravene the provisions of the Irish Companies Acts or any regulations made thereunder. This means that the relevant US companies will no longer be required to prepare two sets of accounts and can instead prepare one set in accordance with US GAAP. This is aimed at encouraging the migration of US companies to Ireland.
2. It removes the upper limit (that is, the ceiling of €317,435) that applicants can be asked to contribute towards the costs of court investigations into companies by court-appointed inspectors under sections 7 and 13 of the Companies Act 1990. In the explanatory memorandum to the Bill it is indicated that the removal of the upper limit would give the courts total discretion in relation to the issue of costs and will place persons who make applications under section 7 on the same footing as other parties initiating court proceedings in that they can be held liable for the full costs if the court so decides.



Jurisdiction of Ombudsman

Background. The Financial Services Ombudsman (Ombudsman) adjudicates complaints regarding the conduct of regulated financial services providers.

Section 57BK(4) of the Central Bank Act 1942 states that the Ombudsman “when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.” Section 57BX(2) provides that “except in the case of a complaint that may be within the jurisdiction of the Pensions Ombudsman, the Ombudsman has sole responsibility for deciding whether or not a complaint is within that Ombudsman’s jurisdiction.” Once the Ombudsman is satisfied that the complaint is within his jurisdiction, he is obliged to investigate it.

Facts. Mary Gallagher (the notice party to this case) was advised by Square Capital Limited (the company) to invest money in two apartments in the UK. She was unhappy with the investment and questioned the company about its interest in the apartments. She then complained to the Ombudsman when she did not receive what she felt was a satisfactory response from the company. The Deputy Ombudsman established that the company owned the apartments and held that investment advice in relation to the purchase was a financial service and found that the company failed in its duty of care to Gallagher by not informing her of their interest and awarded her £25,000 compensation. On review this decision was upheld by the Ombudsman. The company appealed to the High Court and argued that the Ombudsman had made a mistake in relation to his jurisdiction to hear the complaint on the basis that the advice was not a “financial service” as Gallagher did not come to it for financial advice but came to buy property.

Decision. The High Court held that an appeal to the High Court from the Ombudsman’s decision was not a full rehearing of the case. The court followed the High Court decision in *Ulster Bank Investment Funds Limited v Financial Services Ombudsman & Ors* ([2006] IEHC 323) (this case is being appealed) and held that the company had to establish, as a matter of probability, that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or by a series of errors and in the present case this was not established. The High Court confirmed that the decision as to whether or not a complaint falls within the Ombudsman’s jurisdiction is one that falls to the Ombudsman to determine and that a court should intervene only in clear cut cases and then, only if such a case contains a serious and significant error. On an objective analysis of the evidence before the Ombudsman, it seemed to the court that the transactions involved more than a mere sale of property and constituted the giving of financial advice and therefore the jurisdictional argument put forward by the company was unsustainable.

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