Financial Regulatory Authorisation: Doorway or Barrier to the Irish Market?

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Introduction

The Financial Regulator is an Irish statutory body established by the Central Bank and Financial Services Authority of Ireland Act, 2003 ("the Act"). The Act sets out *inter alia* the powers and duties of the regulator in respect of the authorization and supervision of financial service and insurance service providers.

Where the Financial Regulator authorizes an undertaking to engage in financial or insurance service activities, that authorization represents a State act conferring official permission, sanction or approval on the undertaking to perform those activities in Ireland, subject to the terms and conditions of the authorization and having regard to the broader EU and Irish legal/regulatory framework enforced by it.

In exercising its authorization function, the Financial Regulator must at all times be mindful of its obligations under Irish constitutional law, administrative law and EU law. As a matter of Irish law, any grant or refusal of authorization by the Financial Regulator is a decision of a public body subject to judicial review before the Irish courts. As a matter of administrative law, the regulator is required to set out reasons for any denial of authorization to an applicant undertaking.

The Legal Framework Considered

Under EU law, any State measure requiring a potential entrant to hold a licence or authorization is on its face a legal/regulatory barrier to entry into the Irish financial and/or insurance service markets. It is a matter of fact, however, that exercise by the Financial Regulator of its authorization function is necessary for, amongst other things, the protection of consumer interests and the common good. Balanced against this, Ireland is an EU Member State. The European Union is committed legally and politically to the creation of an internal market where goods and services move freely and where EU undertakings enjoy freedom of establishment within a legal framework designed to eliminate/reduce cross-border obstacles to the free movement of trade in services.

Article 49 of the EC Treaty guarantees the free movement of services within a broader legal framework set out in the treaty. Article 49 is directly effective as a matter of EC law, and as such it engenders legal rights in individuals which may be relied upon before the national courts. Any financial or insurance service provider is entitled to rely on Article 49 to challenge, before the Irish courts or the European Commission, the lawfulness or otherwise of any State act, measure or decision which unlawfully affects their rights to provide or receive cross-border services.

Financial and insurance services are “services” normally provided for remuneration within the meaning of Articles 49 and 50 of the EC Treaty. Regulatory authorization, by its very nature, is a restriction upon the right of services to move freely between Member States. Why, therefore, do not all authorization requirements imposed by the Financial Regulator fall foul of the general prohibition in Article 49?

Article 49 guarantees the free movement of financial and insurance services within the broader framework of the EC Treaty. The European Court of Justice and the national courts will only impugn authorization requirements which amount to an *unlawful* restriction on the legal right to provide intra-Community services. The EC Treaty recognizes the legal right of Member States to protect certain non-economic national interests such as public policy and public security. The Treaty also respects the need for Member States to impose non-distinct regulatory rules designed to ensure proper prudential supervision of service providers and the protection of consumers and the common good.

In order to ensure that reliance by Member States on legitimate interests do not operate as unnecessary or disproportionate obstacles to the free movement of services within the internal market, EU legislators sometimes pursuant to Article 95 of the EC Treaty adopt pre-emptive legislation in the form of directives to harmonize the environment for the exercise of authorization function by domestic regulators.

Member States are obliged to transpose the EU’s harmonisation directives into national law. Directives, as a matter of EC law, are binding as to the policy objective to be achieved but the means and method for transposition are left to the discretion of the Member States. In Ireland, directives under our Constitution (Article 29.4.10) may be transposed into Irish law by Act of the Oireachtas or by Ministerial Regulation.

Where an Irish Minister transposes an EU directive, he/she must give full effect to the principles, policies and objectives set out in that directive. He/she, when transposing the directive, cannot purport to insert into the ministerial regulation, policy objectives wider than those set out in the directive. Such an act would amount to an unconstitutional interference

with the separation of power between the Oireachtas and the Government, in contravention of Article 15.2.1 of the Irish Constitution.

The separation of powers doctrine must apply also to any exercise of authorization function by the Financial Regulator, an organ of the executive branch of government. Authorization and supervision of financial service and insurance providers is an executive function. The regulator must discharge this function having regard to the principles and policies set out in its enabling statutes, ministerial regulations transposing EU directives and the policy objectives set out in wider EC law.

In exercising its authorization function, as a matter of Irish constitutional law, the Financial Regulator cannot of its own volition pursue policies or objectives other than those clearly set out in legislation. If it does so, its actions may be challenged as an unlawful exercise of public power and as void.

Where EU harmonizing pre-emptive legislation lays down a general framework for the exercise of authorization regulatory function and that framework exempts applicant providers from compliance with specific requirements, the regulator cannot treat an applicant's decision to rely on the exemption as a ground for refusal to authorize.

Conclusion

The Financial Regulator is committed to effective regulation. A critical key to a thriving competitive financial and insurance market in Ireland is legal certainty and effective compliance. Sound regulatory enforcement engenders confidence in the market. An Irish financial and insurance services environment with a reputation for sound regulation and effective compliance is an attractive base from which any service provider wishing to offer EU cross-border and international services would wish to operate. The Financial Regulator's authorization, where required, operates as a doorway to the Irish financial and insurance services market. The regulator's authorization function should continue to protect essential national interests while ensuring transparency and fairness in the authorization application process in line with EU and Irish legislative and principles-based policy requirements.

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