

## Factoring, Owners, Major Repairs and Credit Agreements



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Many Registered Social Landlords (RSLs) routinely enter into agreements with private owners in order to spread the burden of shared roof repairs and other maintenance costs across instalment payments.

Such agreements provide a form of credit to the owner, who defers payment due to the RSL for the repairs.

Such credit agreements constitute "regulated activity" under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) and are subject to consumer credit regulation. The Office of Fair Trading (OFT) passed its regulatory role to the Financial Conduct Authority (FCA) last year at which time previous OFT licence holders applied for FCA interim permission, to be followed by a requirement to obtain FCA authorisation.

### Exemptions

An RSL can carry out regulated consumer credit activities without FCA authorisation if any of the exemptions in the RAO apply, some of which are well known and regularly used.

For example, fixed-sum credit agreements are exempt if they are to be repaid in not more than 4 instalments, within 12 months, and without interest. This can assist, but where owners are to pay significant repair costs it may be impracticable to be limited to so few payments or this payment term.

Other exemptions require an RSL to obtain security over land, as one of a number of conditions, before it can enter into credit agreements without FCA authorisation. In

many cases, private owners will neither be willing nor in a position to provide a security over their property.

Therefore, FCA authorisation currently seems unavoidable for those RSLs that need to be able to enter into credit agreements to cover repair costs due by owners.

### Repayment Charges

However, the addition of Section 174A to the Housing (Scotland) Act 2006 (the 2006 Act) on 20 November 2014 may provide an answer. The addition seeks to give RSLs the ability to register a charge to secure credit extended to an individual in respect of "scheme costs" for flatted properties, which would include roof repairs and other building maintenance.

However, it is not yet clear exactly what kind of charge an RSL will be able to grant because Scottish Ministers first need to make regulations governing the details of such charges, and we await this further legislation.

If it transpires that Section 174A allows an RSL to grant a charge that is deemed a security on land, exemptions under the RAO previously thought unattainable may become available. Even then, such exemptions may require compliance with specific FCA rules governing the content of any exempt credit agreements, so the consumer credit administrative burden would not entirely vanish.

### Conclusion

RSLs have long sought to reduce the burden of FCA authorisation when extending credit to owners, so the new legislation is potentially very interesting but it is not yet certain the extent of the powers it creates. Even if RSLs become able to grant securities in their own favour, this will require a deed to be drafted and registered for each private owner, attracting its own costs and efforts. For now the burden of FCA authorisation may remain, but we are hopeful that there is change on the horizon.

## In this edition

### Factoring, Owners, Major Repairs and Credit Agreements

A summary of the issues RSLs face as they enter into credit agreements with private owners.

### EU and UK Procurement – RSLs, RPs and SMEs

With the introduction of the new Procurement Directive 2014/24/EU approaching, we ask: Where are we? and Where to next?

### Watch out for...

New consultations under the Housing (Scotland) Act 2014.

# EU and UK Procurement – RSLs, RPs and SMEs:

## Where are we at and where to next?



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Company category	Employees	Turnover	or	Balance sheet total
Medium-sized	< 250	≤ € 50 m		≤ € 43 m
Small	< 50	≤ € 10 m		≤ € 10 m
Micro	< 10	≤ € 2 m		≤ € 2 m

RSLs in Scotland and RPs in England and Wales will be familiar with the new Procurement Directive 2014/24/EU which is to be transposed into member states' law by 16 April 2016 or earlier.

Scotland has 2012 Regulations for Public Contracts and Utilities, which require amendment in light of the new Directive. England and Wales have their own 2006 Procurement Regulations and already have draft replacement Regulations to transpose the new Directive. Except where Scotland introduced a Regulation for both Contracts and Utilities that enshrines the principles of the European Telaustria case, both jurisdictions follow EU Procurement Directives very closely.

However, Scotland has again gone one step further by introducing the Procurement Reform (Scotland) Act 2014 which deals largely with contracts with values below those thresholds and, as far as we are aware, for the first time, has introduced a statutory definition of SMEs – Section 9 (3) of that Act:

*“small and medium enterprises” means businesses with not more than 250 employees.*

The Directive does not define SMEs. What we have instead is the European Commission's “non-statutory” definition of SMEs (set out in its Recommendation of 6 May 2003) – more elaborate in that it defines SMEs by reference to the number of employees **and** turnover or balance sheet total. (See table above).

It is evident that by choosing the figure of 250 employees, the Scottish Government aimed to align with the European Commission's Recommendation.

One of the issues with the Scottish Government's approach is: whilst it rightly aims to avoid exclusion of SMEs from major public contracts, the focus remains on the predicament of tenderers, not contracting authorities who are not much different from SME tenderers with limited resources. The Scottish Federation of Housing Associations summarised the situation very well when commenting on the 2014 Act proposals:

*“... at a time of welfare reform changes and desperate housing need, our members can only see resources being wasted on an unnecessary bureaucracy imposed from above”.*

**bto** have long argued that RSLs and RPs should not be subject to EU Procurement Regulations (Scots Law Times: Issue 24:22-7-2011 – pp 173-178). The Scottish Government has, if anything, compounded the problem by introducing the 2014 Act. However, as removing RSLs and RPs from EU Procurement seems to be a step too far, what other options might be considered?

- Could the Scottish and Westminster Governments respectively exempt RSLs and RPs, or contracting authorities generally, who meet the SME definition (250 employees or fewer) to lighten the burden?
- Or, another smaller threshold number of employees?
- Or, why not rely on turnovers or use a combination of the European Commission's classification of SMEs?

## Watch out for...

Consultations may soon come out under the Housing (Scotland) Act 2014 – covering:

- Allocations policy guidance
- The creation and / or termination of Short SSTs
- Actions for recovery of SSTs
- Circumstances where SHR consultation is not required before an RSL asset transfer

Heat Network (Metering and Billing) Regulations 2014 – largely now in force – regulate both District Heat Networks and Communal Heating – Is your RSL compliant?

Given the May 2015 general election, remember recent legislation requires registration and reporting compliance by non-party campaigners, which may include RSLs or their umbrella bodies, if they spend over £10,000 pa in Scotland on campaigning.

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