Ashurst London
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Financial institutions briefing

Business banking transfers under FSMA

RBS and Lloyds are in the process of trying to dispose of parts of their banking business, in order to obtain EC approval for the state aid they have received.

The disposals will include liabilities to depositors, as well as loan assets. The starting position is that liabilities to depositors cannot be transferred without depositor consent, but the Financial Services and Markets Act 2000 (FSMA) allows banks to transfer liabilities (and assets), if they obtain court approval.

How long does the process under FSMA take?

The process of obtaining court approval to a transfer could take as little as three months, but would normally take about six months. However, before the court process starts, it would be necessary to ensure that the FSA was comfortable with the proposal.

What can be transferred?

Any kind of asset, liability, right or obligation can be transferred, including obligations under listed debt (although a transferee of listed debt would need to publish a prospectus). Even contracts that expressly prohibit transfer can be transferred, because the court has power to override prohibitions against transfer.

Could initiating a transfer amount to a default under an existing contract?

Anything done "or likely to be done" in connection with a transfer can be disregarded. Cross-defaults which would otherwise be triggered by a disposal of the relevant business would, therefore, not apply.

How are non-UK law contracts dealt with?

FSMA would not be sufficient to transfer customer contracts and other contracts governed by a law other than that of the UK. Also, the FSMA would not override prohibitions against transfer or cross-default provisions in contracts governed by a law other than that of the UK.

Can infrastructure be transferred under the FSMA?

A transfer can include infrastructure assets, such as offices, and outsourcing contracts. However, one cannot rely on the FSMA to split an existing contract. Employees would probably transfer to the extent they are principally involved in the business transferred.

Can the FSMA be used to transfer business to a building society?

Yes, although a transfer would raise certain challenges. For example, it would need to be decided whether transferring customers would get membership rights; and the existing members of the building society would need to vote on the acquisition if it was significant enough.

Can customers or other counter-parties derail the process?

So long as the court can be persuaded that the transfer is fair, depositors, mortgagors and other counter-parties cannot stop the transfer. However, they have the right to make their views known at the court hearing to sanction the transfer (which is in open court).

Does the FSA need to approve the transfer?

In practice, the parties will need to have concluded that the FSA does not object. The FSA will be interested in whether the bank's retail and other customers are likely to be prejudiced by the transfer and so the FSA will be interested in the factors that will affect the court's decision (as to which, see below).

Do customers need to be sent a circular?

Strictly, they do not. However, in practice, transferor banks tend to notify customers in advance.

What factors will persuade the court to sanction the transfer?

Fairness is key, so it will be important to show that products which allow the bank discretion (e.g. standard variable rate products) will be managed on a similar basis, after the transfer. Also, it will be important to show that customer service will not be adversely affected.

Further, the court will be interested in whether transferring customers will lose any element of their cover under the Financial Services Compensation Scheme, which they could do if transferred to a bank where they already have a deposit.

Can a cross-border transfer be done?

The FSMA permits transfers to UK branches of EEA institutions, but the court needs to be shown that any transferee has sufficient solvency. In the case of a non-UK transferee, this will necessitate a certificate from the home state regulator.

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