

Financial Services (Banking Reform) Bill

Government annotated amendments: Criminal Sanctions

Offence relating to decision that results in bank failure

- (1) A person ("S") commits an offence if-
- (a) at a time when S is a senior manager in relation to a bank ("B"), S-

An individual can only commit the offence if they are a senior manager as defined by the new Senior Managers Regime. The Government is tabling separate amendments which will establish the Senior Managers Regime (by making amendments to the Financial Services and Markets Act 2000 ('FSMA')).

- (i) takes, or agrees to the taking of, a decision by or on behalf of B as to the way in which the business of a group bank is to be carried on, or
- (ii) fails to take steps that S could take to prevent such a decision being taken,

- (b) at the time of the decision, S is aware of a risk that the implementation of the decision may cause the failure of the group bank,

The conduct for which an individual can be prosecuted includes taking a decision on behalf of the bank, or failing to prevent a decision being taken. In either case the person concerned must be aware that the decision may cause the bank to fail – i.e. they must have acted recklessly.

- (c) in all the circumstances, S's conduct in relation to the taking of the decision falls far below what could reasonably be expected of a person in S's position, and

- (d) the implementation of the decision causes the failure of the group bank.

The individual's behaviour in taking the decision must be far below that which could be expected of someone in their position (this builds on precedents in existing offences, for example corporate manslaughter), and the implementation of the decision must cause the bank to fail. 'Failure' is defined in sections (7) and (8).

- (2) A "group bank", in relation to a bank ("B"), means B or any other bank that is a member of B's group for the purpose of FSMA 2000 (see section 421 of that Act).

The individual can be prosecuted for causing the failure of any bank which is a member of the bank's group, not just the bank which directly employs them.

(3) Subsections (1) and (2) are to be read with the interpretative provisions in section (*Interpretation of terms used in offence*).

(4) A person guilty of an offence under this section is liable-

(a) on summary conviction-

- (i) in England and Wales, to imprisonment for a term not exceeding 12 months (or 6 months, if the offence was committed before the commencement of section 154(1) of the Criminal Justice Act 2003) or a fine, or both;
- (ii) in Scotland, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum, or both;
- (iii) in Northern Ireland, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum, or both;

(a) on conviction on indictment to imprisonment for a term not exceeding 7 years or a fine, or both.

The offence can be tried by magistrate (summarily) or in Crown Court (by indictment) in England, Wales and Northern Ireland, or by sheriff (summarily) or Crown Court in Scotland. The maximum penalty on conviction by indictment is seven years imprisonment and/or an unlimited fine.

Punishments on summary conviction vary according to the criminal laws in the devolved nations. In England and Wales the maximum penalty is a 12 month prison sentence or an unlimited fine. By contrast, in Scotland the maximum possible fine is £10,000. In Ireland the maximum prison sentence is six months and the maximum possible fine is £5,000.

Interpretation of terms used in offence

(1) This section has effect for the interpretation of section (*Offence relating to decision that results in bank failure*).

(2) "Bank" means a UK institution which has permission under Part 4A of FSMA 2000 to carry on the regulated activity of accepting deposits.

(3) But "bank" does not include-

- (a) an insurer, or
- (b) a credit union.

(4) In subsections (2) and (3)-

- (a) "UK institution" means an institution which is incorporated in, or formed under the law of any part of, the United Kingdom;
- (b) "insurer" means an institution which is authorised under FSMA 2000 to carry on the regulated activity of effecting or carrying out contracts of insurance as principal;

(c) “credit union” means a credit union as defined by section 31 of the Credit Unions Act 1979 or a credit union as defined by Article 2(2) of the Credit Unions (Northern Ireland) Order 1985.

(5) Subsections (1) and (4)(b) are to be read in accordance with section 22 of FSMA 2000, taken with Schedule 2 and any order under section 22.

The offence will apply to senior managers in banks and building societies which are incorporated in the UK.

(6) A person is a “senior manager” in relation to a bank if, under an arrangement entered into by the bank, or by a contractor of the bank, in relation to the carrying on by the bank of a regulated activity, P performs a function that is designated as a senior management function –

- (a) by the FCA under subsection (6B) of section 59 of FSMA 2000 (approval for particular arrangements), or
- (b) by the PRA under subsection (6C) of that section.

Possible liability for the offence is limited to those who are carrying out senior management functions as defined by the FCA and PRA under the new Senior Managers Regime.

- (7) A bank (“B”) is to be regarded as failing where-
- (a) B enters insolvency,
 - (b) any of the stabilisation options in Part 1 of the Banking Act 2009 is achieved in relation to B, or
 - (c) B is taken for the purposes of the Financial Services Compensation Scheme to be unable, or likely to be unable, to satisfy claims against P.
- (8) In subsection (7)(a) “insolvency” includes-
- (a) bankruptcy,
 - (b) liquidation,
 - (c) bank insolvency,
 - (d) administration,
 - (e) bank administration,
 - (f) receivership,
 - (g) a composition between B and B’s creditors, and
 - (h) a scheme of arrangement of B’s affairs.

The bank will be regarded as failing where it enters insolvency, where a stabilisation option in Part 1 of the Banking Act is exercised in relation to it, or where the bank is unable to meet its obligations with regards to the Financial Services Compensation Scheme.

The stabilisation options in Part 1 of the Banking Act are: transfer to a private sector purchaser, transfer to a bridge bank or transfer to temporary public sector ownership.

Institution of proceedings

In this section “an offence” means an offence under section (*Offence relating to decision that results in bank failure*).

- (2) Proceedings for an offence may be instituted in England and Wales only-
 - (a) by the FCA, the PRA or the Secretary of State, or
 - (b) by or with the consent of the Director of Public Prosecutions.
- (3) Proceedings for an offence may be instituted in Northern Ireland only-
 - (a) by the FCA, the PRA or the Secretary of State, or
 - (b) by or with the consent of the Director of Public Prosecutions for Northern Ireland.

In England, Wales and Northern Ireland, prosecutions can be brought by the FCA, PRA, Secretary of State, and the Director of Public Prosecutions (in Northern Ireland this is the Director of Public Prosecutions for Northern Ireland). Others may bring prosecutions with the consent of the Director of Public Prosecutions.

In Scotland, prosecutions can only be brought by the Procurator Fiscal.

- (4) In exercising its power to institute proceedings for an offence, the FCA or the PRA must comply with any conditions or restrictions imposed in writing by the Treasury.
- (5) Conditions or restrictions may be imposed under subsection (4) in relation To-
 - (a) proceedings generally, or
 - (b) such proceedings, or categories of proceedings, as the Treasury may direct.

The Treasury may place conditions or restrictions on the regulators’ powers to prosecute, providing it does so in writing.