

Policy Statement | PS10/16

The implementation of ring-fencing: the PRA's approach to ring-fencing transfer schemes

March 2016



BANK OF ENGLAND
PRUDENTIAL REGULATION
AUTHORITY



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This policy statement (PS) includes responses to the feedback on Consultation Paper (CP) 33/15 'The implementation of ring-fencing: the PRA's approach to ring-fencing transfer schemes' and a statement of policy.

1 Introduction

1.1 This policy statement (PS) sets out the Prudential Regulation Authority's (PRA) responses to feedback on Consultation Paper 33/15 'The implementation of ring-fencing: the PRA's approach to ring-fencing transfer schemes'.¹ This PS also includes the final statement of policy (SoP) following CP33/15.

1.2 This PS will be of relevance to groups subject to ring-fencing and skilled persons commissioned to author the scheme report submitted to the court as part of the ring-fencing transfer scheme (RFTS) application. It may also be of interest to other financial institutions and customers who have dealings with ring-fenced bodies.

1.3 The PRA is required by the Financial Services and Markets Act 2000 (FSMA) to have regard to any representations made to the proposals in a consultation, and to publish an account, in general terms, of those representations and its response to them.

1.4 The PRA does not consider that the responses to the consultation necessitate major changes to the proposed overall approach as set out in the draft SoP in CP33/15. But the PRA has made some amendments to the draft SoP. This PS describes the material issues raised by respondents and notes the main areas where the PRA is making amendments to the proposals in CP33/15.

1.5 Many responses received by the PRA also appeared ultimately to be aimed at the provisions related to RFTS that originate from Part VII of the Act, not the PRA's CP. The primary legislation sets out the question that the skilled person appointed to write the scheme report must answer, ie 'whether persons other than the transferor concerned are likely to be adversely affected by the scheme, and if so whether the adverse effect is likely to be greater than is reasonably necessary in order to achieve whichever of the purposes mentioned in section 106B(3) is relevant' ('the statutory question'). The legislation also defines the distinct roles of the PRA, the FCA, the skilled person, the transferor and the courts.

2 Responses

2.1 This chapter provides feedback to responses to the consultation and areas where the PRA has sought to clarify its expectations or approach.

The certificate as to financial resources

2.2 Some respondents queried whether the skilled person could rely on the certificate as to financial resources produced by the regulator when answering the statutory question. In the view of these responses, if the skilled person is confident that the PRA will issue the certificate, the skilled person could be assured that, from a prudential perspective, persons other than the transferor would not be adversely affected.

2.3 The PRA considers that the certificate as to financial resources and the scheme report have different purposes:

- The certificate as to financial resources must be provided by the PRA (or home state regulator of the transferee or the FCA for an FCA solo regulated entity) and attest to the

¹ PRA Consultation Paper 33/15 'The implementation of ring-fencing: the PRA's approach to ring-fencing transfer schemes', September 2015: www.bankofengland.co.uk/pr/Pages/publications/cp/2015/cp3315.aspx

court that the transferee will have adequate financial resources if the transfer were to be sanctioned.

- The skilled person must examine adverse effects on groups of persons other than the transferor to ascertain whether these persons are adversely affected as a result of the transfer.

2.4 We therefore consider that the skilled person should not use the certificate as to financial resources as a means of assurance that persons other than the transferor would not be adversely affected.

2.5 Additionally, given that the PRA must consent to the application before a firm may submit its proposed RFTS to the court, and in doing so have regard to the scheme report, we consider it would be inappropriate for the skilled person to depend on the PRA's view on adequate financial resources of the transferee. This could be perceived as compromising the objectivity of the PRA's assessment of the application.

New bank authorisations

2.6 Respondents asked whether the skilled person could also rely on the PRA's conclusions when it assesses new bank authorisations which relate to the proposed RFTS.

2.7 The PRA (and FCA) undertake a Threshold Conditions¹ assessment when deciding whether to grant a permission to carry on a regulated activity but we do not share the details of this assessment with third parties. This assessment also does not address the statutory question that the skilled person must answer in their scheme report.

Alternative group arrangements

2.8 Respondents questioned whether the skilled person would need to assess alternative group arrangements in order to determine whether an adverse effect was greater than is reasonably necessary.

2.9 The PRA considers this to be necessary in order to address the statutory question. The skilled person should not only consider the proposal put forward by the firm but also whether there are viable alternative arrangements that would achieve the relevant purposes in s106B(3).

2.10 It is not the function of the skilled person to identify a preferred way for the group to structure its business. But if, in assessing the reasonableness of the likely adverse effects from the firm's proposal for a RFTS, he or she identifies a viable alternative approach that would have materially fewer adverse effects than those likely to arise from the firm's proposal, that alternative will need to be raised with the firm, and the firm asked to consider it. The firm may choose in response to modify its proposal. If it does not, it should provide its reasons for not doing so. The skilled person will then be able, in the light of the firm's consideration of the alternative approach, and taking account of all other relevant factors, to assess whether the adverse effects of the firm's proposal (original or modified as the case may be) are reasonably necessary to achieve the relevant purposes in section 106B(3). It is expected that in adopting this approach the skilled person would accept the group's overall strategy for organisation of its business, but it is possible that the consideration of viable alternatives may lead to some reshaping of the strategy.

¹ The full Threshold Conditions Order can be found at <http://www.legislation.gov.uk/uksi/2013/555/contents/made>

Proposed topics to address the statutory question

2.11 Respondents challenged whether the skilled person would need to consider addressing the proposed topics listed in the draft SoP, in order to answer the statutory question.

2.12 Depending on the nature of the proposed RFTS and given the breadth of the statutory question the skilled person may need to consider a broad list of topics to determine likely adverse effects. The proposed topics have been suggested because they reflect the PRA's objective of safety and soundness which the PRA will have regard to when consenting to the application. However this is not an exhaustive list and the skilled person should consider addressing issues that are relevant to each transfer.

Groups of persons

2.13 We consider similarly that the list in the draft SoP of potential groups of persons that the skilled person may be required to consider in assessing likely adverse effects is not an exhaustive list. This is because the statutory question does not confine adverse effects to a select group of persons. Additionally groups of persons, such as depositors, may be sub-divided further if the skilled person believes that there will be different types of adverse effect.

Firm analysis on the statutory question

2.14 The PRA has requested the firms embarking on an RFTS undertake their own analysis of the statutory question. The PRA expects that firms will already have been undertaking such analysis as part of their own work to ensure that their ring-fencing plans do not impose adverse effects that are greater than is reasonably necessary. Such an assessment may also be of use to the skilled person when they review the alternative group arrangements.

Immunity for the skilled person

2.15 Some respondents asked whether the skilled person could be granted immunity from liability.

2.16 The scope of immunity granted for reports written under s.166 of FSMA does not extend to skilled persons. FSMA does not provide powers for the PRA to give immunity to authors of the scheme report. The skilled person's duty in this instance is to the court.

The form of the report

2.17 In the draft SoP, the PRA indicated that we would approve the form of the scheme report and the nominated skilled person in close proximity.

2.18 The PRA will approve or nominate the skilled person and then at a later point approve the form of the report. When the form of the report has been approved, the PRA will notify the approved skilled person. This should ensure that the nominated skilled person is in a position to have their role confirmed at an earlier stage of the process.

The role of the skilled person

2.19 The PRA has outlined in the SoP its expectations of the skilled person. The skilled person should avoid undertaking excessive preliminary work after they are appointed by the firm but before the PRA has approved their position. This should ensure that their independence is not compromised or perceived to be compromised.

The PRA's consent and approval of the application

2.20 The SoP gives greater clarity on the role of the PRA when reviewing the RFTS application. The PRA will consent to the application before it proceeds to court, and in doing so, will have

regard for the scheme report. When the PRA has taken account of any representations made to the court it will, if appropriate, reconfirm its approval of the application.

Appendices

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- 1 Statement of Policy 'The implementation of ring-fencing: the PRA's approach to ring-fencing transfer schemes', available at <http://www.bankofengland.co.uk/pr/Pages/publications/sop/2016/approachtortfts.aspx>