

In Practice

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Taking security where a regulated entity is in the group

One of the most important rules when taking security is to consider how and when that security can be enforced. The value of security over an asset is clearly affected if the security holder can only take enforcement action, for example, with a court order or after a 12-month public sale process. Similarly the financial and "control" value of security over shares/units in an entity is seriously undermined if the consent or approval of a regulator is required in order to take possession of the shares/units and/or to replace the management team. This article focuses on the issues relating to taking and enforcing security over entities who are either themselves subject to financial services or consumer credit regulation in the UK, or who have members of their group which are so subject. A similar analysis should also be undertaken when dealing with any other regulated area, such as utilities, waste and defence. This article does not attempt to cover the complex rules relating to the transfer of a whole banking or insurance business.

RELEVANT REGULATORS

Someone wishing to take share/unit security should establish whether any relevant entity is regulated by any of the Prudential Regulatory Authority (PRA), the Financial Conduct Authority (FCA) or the Office of Fair Trading (OFT)¹.

There are publicly available registers which can be searched online to establish whether any relevant entity is regulated².

RELEVANT ENTITIES

A company or other entity is "relevant" in this context not only if it is to be the subject of security itself, but also if the ownership or control of that entity will be changed by the taking or enforcement of security elsewhere in the group.

If, for example, a finance provider is looking to take security over a company which has a regulated subsidiary, but not over that regulated subsidiary, that finance provider should still analyse whether any regulatory consents/approvals are required either to take the security over the shares in the parent company or to enforce that security (whether by taking possession of the shares or by exercising a power of sale).

RELEVANT CONSENTS/APPROVALS/NOTIFICATIONS FCA/PRA

The acquisition of 10% or more of the shares or voting rights in an FCA or dual-regulated firm³ or any parent undertaking of such a firm must be notified to the relevant regulator *and prior consent* obtained. Any subsequent increase in "control" which takes the relevant party beyond 20%, 30% or 50% of ownership/control also

requires *prior consent*⁴.

Making an "acquisition" without consent is a criminal offence under the relevant legislation⁵.

A security holder cannot, therefore, enforce its security over the shares in a regulated entity of this type, or any of its holding companies, without prior consent from the relevant regulator. Consent may also be required to the taking of the initial security, if the security document passes the voting rights over to the security holder prior to enforcement, as "control" includes the ability to exercise voting rights which are held as a result of the shares/units having been provided as collateral.

There is no exemption from the approval process for an acquiring entity which is already an approved person – a new application still has to be made for the acquisition.

The relevant regulator has 60 working days to determine approval of an application, and may impose conditions on its approval.

CONSUMER CREDIT ACT LICENCE

If a relevant entity holds a Consumer Credit Act licence, the taking of security over the shares in that entity should not require any regulatory compliance, unless the way in which the security is taken means that the ownership and control of the shares actually passes to the security holder at the time of taking the security.

If, however, any enforcement action takes place which means that the "control" of the licence-holder changes (whether directly or further up the group structure), then various steps must be taken within relatively short timescales.

Within 21 days of the change, the licence-holder must notify the OFT of:

- any change in its officers;
- any change in the officers of any body corporate which is its "controller"; and
- a person becoming or ceasing to be a "controller" of the licence holder.

Within 28 days of the change, the licence-holder must notify the OFT of:

- any change to the previously notified list of individuals/organisations who can "influence the business".

This is simply a notification obligation, but the OFT can choose, following a change, to review whether the licence-holder is still a "fit and proper person" to hold a licence. There is no pre-clearance mechanism, so the new "controller" is at risk of a challenge, albeit that this risk would be extremely small if a regulated lender such as a bank or building society were to be the new controller.