

FINANCIAL SERVICES (BANKING REFORM) ACT 2013

EXPLANATORY NOTES

COMMENTARY

Part 4 – Conduct of Persons Working in Financial Services Sector

Amendments of FSMA

Section 36: Offence relating to a decision causing a financial institution to fail

218. *Section 36* creates a new criminal offence of taking a decision that results in the failure of certain types of financial institution. These are: a UK incorporated bank or building society or a UK investment firm that is regulated by the PRA (a “relevant financial institution”). This section defines the offence and specifies the penalties applicable to those found guilty of it.
219. *Subsection (1)(a)* provides that only those individuals who are senior managers in relation to a relevant financial institution (“F”) can commit the offence. Senior management functions will be designated by the PRA or the FCA under the powers in section 59 of FSMA as amended by *section 18*. The conduct for which an individual can be prosecuted is taking a decision on behalf of F, or failing to prevent a decision being taken on behalf of F, where the decision leads to the failure of F or another relevant financial institution in the same group as F. *Subsection (1)(b)* provides that in either case the person concerned must be aware that the decision may cause the failure.
220. *Subsection (1)(c)* provides that the individual’s behaviour in taking the decision in question must be far below that which could reasonably be expected of a person performing the senior management function that the individual performs.
221. *Subsection (1)(d)* makes it an essential element of the offence that the implementation of the decision for which the person is being prosecuted causes the relevant financial institution to fail. (‘Failure’ is defined in subsections (9) and (10) of *section 37*.)
222. *Subsection (2)* defines “group institution”. It has the effect that a senior manager can be prosecuted for causing the failure not only of F (the relevant financial institution which they manage), but also of any other relevant financial institution in the same group as F.
223. *Subsection (4)* sets out the maximum penalties for the offence. The maximum penalties on summary conviction vary according to the different powers of the lower courts in different parts of the United Kingdom. The maximum penalty on conviction on indictment (in all parts of the United Kingdom) is 7 years imprisonment or an unlimited fine (or both).