

A big future for small and medium-sized businesses

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Commercial analysis: Will the Small Business, Enterprise and Employment Act 2015 (SBEEA 2015) improve access to finance for small and medium-sized businesses? David Bowden of David Bowden Law explores the potential implications of SBEEA 2015 in the context of current and future legislation.

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SBEEA 2015 is intended to ensure that the UK continues to be recognised as a trusted and fair place to do business and to open up new opportunities for small businesses to innovate and compete. It includes provisions to give small businesses greater access to finance sources, increase transparency around who owns and controls UK companies, require the payment practices of the UK's largest companies to be reported and introduce new insolvency measures to prohibit and limit certain aspects of pre-pack sales if deemed necessary.

How does SBEEA 2015 seek to improve access to finance?

In SBEEA 2015, s 4, the Treasury is given the power to get major banks to provide the credit data of their small and medium-sized enterprises (SME) customers to smaller funders. Credit reference agencies (CRA) will share the credit data. The banks must seek permission from their business customers before sharing this information. Details of this are provided in the Small and Medium Sized Business (Finance Platforms) Regulations 2015, Pt 2, 3, (FPR 2015) which the Treasury has now published in draft for consultation before they are laid before parliament.

The aim of this proposal is to ensure that smaller funders, who are not currently part of credit data arrangements, can access the information. The hope is that this will increase lending to SMEs.

The aim is also to improve competition in the market for business current accounts. The explanatory notes that accompanied FPR 2015 proceeded on the basis that established banks hold data on current accounts of their SME customer, yet this data was retained by lenders and not shared with CRAs in the same way that data on personal current accounts, credit cards or loans is presently shared.

SBEEA 2015 also sees the creation of online platforms that banks can refer SMEs to if they have been rejected for a loan. This data sharing will be extended once FPR 2015 is laid in final form and come into force. When this happens, where a SME has applied to a designated bank for a loan or credit and has been turned down, there will be a duty on the bank not just to provide this data to the established CRAs, but also to 'designated finance platforms'.

The Payment Systems Regulator (PSR) was set up by the Financial Services (Banking Reform) Act 2013. SBEEA 2015, s 14 widens the PSR's powers, so it can consider a restriction or distortion between different:

- o operators of payment systems
- o payment services providers
- o infrastructure providers

What are the risks for businesses as they gain access to previously unavailable finance options?

SBEEA 2015 broadly envisages that a system of peer-to-peer or crowdfunding will emerge to serve the finance needs of small and medium-sized businesses in much the same way that these have developed to serve consumer finance needs. Banks and traditional lenders have traditionally assessed the risk of lending by:

- o the information provided by customers themselves
- o how other accounts have been operated

- o the information provided by any CRAs to which they subscribe

Designated finance platforms will need to be able to meet the criteria set by the CRAs to access data that CRAs already hold. Over time, designated finance platforms should have data sets of their own that will enable them to assess risk. It is probably too early to say if there are any risks. Many established funders have been in existence for a long time, so this type of finance has not been previously unavailable. However, new funders may emerge to take advantage of the opportunities that SBEEA 2015 presents.

What should lawyers advise their clients who might wish to take advantage of new finance options resulting from SBEEA 2015?

Lawyers should make sure their clients understand the terms and conditions of any agreement, particularly if a business is unfamiliar with this form of funding.

Although SBEEA 2015 has now received Royal Assent, this part will not come into effect until the Treasury's draft FPR 2015 has been laid before Parliament for approval. This draft cannot now come into effect until after the general election. As FPR 2015 had cross-party support, it would appear unlikely that there would be significant changes to the text. However, as always, only once there is a final version of FPR 2015 as laid and approved by parliament will lawyers be able to give any definitive advice on SBEEA 2015.

During the passage of FPR 2015, the Department for Business, Innovation and Skills (BIS) met many industry concerns. However, there are still two important questions that are worth highlighting as the envisaged new market emerges:

- o How will the online platforms ensure they are matching the small businesses concerned with the right finance providers?
- o Will the government establish a definitive directory of all UK finance providers to help SMEs source the right finance solution?

Could the provisions around finance lead to an increase in litigation as inexperienced businesses enter the finance market for the first time?

The majority of asset finance providers are well-established in the market. New entrants are likely to be formed by practitioners who have many years of experience in providing leasing or hire purchase options to business. It is unlikely that the industry will see any increase in litigation in this mature and stable market.

In the consumer finance space, we have seen over the last few years many technical challenges to the terms of agreements or their enforceability--in part fuelled by claims management companies. Any new finance provider would be wise to pay heed to this and ensure that their documentation and processes are as robust as they can be. This should minimise the potential risk that litigation will arise to determine whether or not standard form documentation used by the new operators in the crowdfunding and peer-to-peer lending space is enforceable or not.

The decisive test for any finance agreement is how it stands up when it comes to enforcing its terms because of default for non-payment or insolvency. If a business asset, such as a vehicle, has been financed by a crowdfunding provider and in turn a number of different providers have offered funding, then if there is an insolvency even though it may appear that the SME lending is secured over the asset, that security may turn out to be comparatively worthless.

How can lawyers assist businesses in relation to the finance provisions in SBEEA 2015?

It will be important to keep this under review and look out for the draft secondary legislation when this appears. There will be an opportunity to change any of the detail in FPR 2015 by making representations to the Treasury or BIS directly. Compliance with the FPR 2015 is a task that needs to have proper focus within a business because the great majority of the FPR 2015 is concerned with powers to the Financial Conduct Authority including on:

- o monitoring and enforcement
- o reporting requirements
- o investigations, financial penalties and censure

- o injunctions, warning notices and decision notices
- o powers to refer firms to the financial services and markets tribunal

While this will be business as usual for established firms, the compliance needs generated by operating in a heavily regulated financial services environment may come as a culture shock to some new entrants in the online platforms arena. FPR 2015, reg 3(3) provides an exemption for finance of less than £1,000 or where the credit provided is for 30 days or less.

SBEEA 2015, s 13 amends the Bills of Exchange Act 1882, s 89. This gives effect to the proposals in an earlier March 2014 consultation. SBEEA 2015, s 89A provides for the introduction of cheque imaging where an electronic image of the instrument is sent for clearing instead, which BIS claims will speed up clearing times for cheques. The sting in the tail is SBEEA 2015, s 89E, which gives power to HM Treasury to lay regulations that will compel a banker to compensate any person for any loss of a kind that that person incurs in connection with electronic presentment or purported electronic presentment of an instrument. Again, until further details are available, and the scope of any exceptions or qualifications is made clear, then it will be difficult to advise business on any potential compensation claims.

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