

BUILDING SOCIETIES ACT 1986

DECISION BY THE FINANCIAL SERVICES AUTHORITY ON THE APPLICATIONS OF SCOTTISH BUILDING SOCIETY AND CENTURY BUILDING SOCIETY FOR CONFIRMATION OF A TRANSFER OF ENGAGEMENTS UNDER SECTIONS 94 AND 95 OF THE BUILDING SOCIETIES ACT 1986

The Financial Services Authority appointed Nicholas Lock, a manager in UK Banks and Mutuels Department, to hear and decide the application on its behalf.

1. INTRODUCTION

1.1 The **Scottish Building Society** ("the Scottish") and **Century Building Society** ("the Century") applied on 23 November 2012 to the Financial Services Authority ("the Authority") for confirmation of the transfer of engagements of the Scottish to the Century.

Procedure

1.2 Paragraph 8 of Schedule 16 to the Building Societies Act 1986 ("the Act") requires that, where a building society applies to the Authority for confirmation of a transfer of engagements, a notice shall be published stating that interested parties have the right to make representations to the Authority with respect to the application. The notice must specify the date, determined by the Authority, before which any written representations, or notice of a person's intention to make oral representations, must be received by the Authority, and the date on which the Authority intends to hear any oral representations. In the case of this proposed transfer of engagements ("the merger") notice was given:

- (i) in the Edinburgh Gazette and in the London Gazette by the Scottish and by the Century on 27 November 2012 and in the Belfast Gazette by the Scottish and the Century on 30 November 2012;

- (ii) in the Daily Telegraph, The Scotsman, and The Herald by the Scottish and the Century on 27 November 2012.
- 1.3 The notices specified 14 December 2012 as the closing date for receipt by the Authority of written representations or notice of intention to make oral representations and 3 January 2013 as the date set aside by the Authority to hear oral representations.
- 1.4 By the close of 14 December 2012 the Authority had received one written representation and no notices of intention to make oral representations. No representations were received out of time. The Authority decided that, in the absence of any notice of intention to make oral representations, there were no matters which it wished to put to either society at an oral hearing, and that an oral hearing was not therefore necessary.

The purpose of Confirmation

- 1.5 Section 95 of the Act sets out what is required of the Authority when an application is made to it for confirmation of a transfer of engagements. Subsections (3) and (4) provide that the Authority **shall** confirm a transfer of engagements **unless** it considers that:
 - (a) some information material to the members' decision about the transfer of engagements was not made available to all the members eligible to vote; or
 - (b) the vote on any resolution approving the transfer of engagements does not represent the views of the member eligible to vote; or
 - (c) some relevant requirement of the Act or the rules of any of the societies participating in the transfer of engagements was not fulfilled as regards that society.

The criteria set out in (a), (b) and (c) above are referred to subsequently in this Decision as, respectively, the "First", "Second" and "Third Criterion".

- 1.6 Section 95(5) provides that the Authority shall not be precluded from confirming a transfer of engagements by virtue only of the non-fulfilment of some relevant requirement of the Act or the rules of a society if it appears to the Authority that it could not have been material to the members' decision about the transfer of engagements and the Authority gives a direction that the failure is to be disregarded for the purposes of this section. Section 95(11) of the Act states that "relevant requirement" in the Third Criterion means a requirement of sections 94 and 95 of the

Act, Schedule 16 to the Act or any rules prescribing the procedures to be followed by the society in approving or effecting a transfer of engagements.

1.7 In considering the three criteria, referred to in paragraph 1.5 above, the Authority reconsidered the booklet ("the merger booklet") produced by the Century for circulation to its members which contained the statutory statement required to be sent to members of the society under paragraph 3 of Schedule 16 to the Act ("the merger statement"). In addition to the merger statement, the merger booklet contained other information including a letter from the chairman of the Century and notice of the Special General Meeting ("the SGM") at which the shareholding and borrowing members' resolutions of the society were to be put. The Authority is entitled to look again at the confirmation stage at issues which it considered in connection with the approval of the merger statement. In doing so, it has a duty to consider any information and arguments put to it by representers and by the societies, which of their nature would not have been available earlier, as well as those arising from its own further consideration of the matter. The Authority, accordingly, cannot properly be bound at the confirmation stage to the view that it took at the time of approval of the merger statement that it did not require further factual information, or to the view which it took of the accuracy of the statement's contents. It is under a duty to re-examine the merger statement and connected issues at the time of confirmation in the light of any new information and arguments available to it. That said, the Authority would clearly only change its view if there were good reason to do so.

1.8 It is, however, **not** for the Authority to consider the merits of proposals which the members have approved.

2. THE CENTURY MEETING AND VOTES

2.1 In its application for confirmation, the Century declared under seal that the requisite shareholding and borrowing members' resolutions, as required by section 94(2) of the Act, were passed at the SGM of the society on 22 November 2012. A certified copy of the minutes was furnished to the Authority.

2.2 The Century did not propose to pay compensation for loss of office to any of its directors or officers so no special resolution in accordance with section 96(1) of the Act was required.

2.3 The scrutineers for the Century reported that the resolutions were passed by the required majorities and confirmed that, in their opinion, the arrangements for the

conduct of the voting were such as to ensure that notices of the meeting and merger statements were sent to all those entitled to receive them, with the requisite periods of notice being given, in accordance with the Act and the society's rules, and that there were satisfactory procedures to ensure the safe custody and proper counting of the votes.

2.4 The voting figures were:

Shareholdings Members' Resolution	At the meeting	By Proxy	Total
In favour	13	787	800
Against	1	182	183
Total	14	969	983
Percentage of eligible shareholding members who voted: 45.1%	Votes in favour as percentage of valid votes cast: 81.4%		

Borrowing Members' Resolution	At the meeting	By Proxy	Total
In favour	3	39	42
Against	-	1	1
Total	3	40	43
Percentage of eligible borrowing members who voted: 19.7%	Votes in favour as percentage of valid votes cast: 97.7%		

2.5 By virtue of section 94(2) and paragraph 27A of Schedule 2 to the Act, a shareholding members' resolution must be passed by no less than three-quarters of the number of the shareholding members of the society eligible to vote on the resolution and voting on the resolution either in person or by proxy at the meeting. This was secured: 81.4% of the shareholding members who voted cast their votes in favour of the shareholding members' resolution.

2.6 By virtue of section 94(2) and paragraph 29 of Schedule 2 to the Act, a borrowing members' resolution must be passed by a simple majority of borrowing members eligible to vote on the resolution and voting on the resolution either in person or by

proxy at the meeting. This was secured: 97.7% of the borrowing members who voted cast their votes in favour of the borrowing members' resolution.

- 2.7 The Century's scrutineers also provided an analysis of spoilt or invalid votes: 17 in respect of the shareholding members' resolution and none in respect of the borrowing members' resolution. The majority were in respect of members who ceased to be eligible to vote after the dispatch of the notice of the SGM and voting forms, with most of the others being in respect of members who abstained (vote withheld).

3. THE SCOTTISH'S APPLICATION

- 3.1 In its application for confirmation the Scottish declared under seal that, pursuant to the consent of the Authority in accordance with section 94(5)(b) of the Act, it had undertaken by a resolution of its Board of Directors to fulfil the engagements of the Century.
- 3.2 Section 94(5)(b) of the Act allows a society that proposes to accept a transfer of engagements to resolve to do so by a resolution of the Board of Directors, if the Authority consents to that mode of proceeding, rather than by the passing of a shareholding members' resolution and a borrowing members' resolution at a general meeting. The Authority has indicated, in its guidance on Merger Procedures contained in paragraphs 2.4.41 and 2.4.42 of the Building Societies Regulatory Guide ("BSOG"), the general circumstances in which it may be prepared to give such consent. The two key factors are that (i) the transferee society's assets are substantially - more than 5:1 – larger than those of the transferor society and (ii) the merger will not affect the interests of the members of the transferee society to a significant extent. The Scottish's assets are approximately 16.5 times those of the Century. In addition, the Scottish explained to the Authority how the merger would not significantly affect the interests of its members. Having considered this explanation the Authority gave its consent to the Scottish on 17 August 2012. The Scottish was not required, therefore, to hold a general meeting so as to secure members' approval of its acceptance of the transfer of the Century's engagements.
- 3.3 Section 96(4) of the Act does however require that any distribution of funds by a society in consideration of the transfer must, if it exceeds prescribed limits, be approved by the members' resolutions of the other society as well as by the members' resolutions of the society making the distribution. There is no such distribution of funds in this merger.

4. THE REPRESENTATIONS AND THE CENTURY'S RESPONSES

4.1 Paragraph 4.2 of this section summarises the substance of one of the points made by the representer that relates to the first of the criteria in section 95 of the Act. Paragraphs 4.3 and 4.4 refer to another point made by the representer.

The First Criterion – Material Information

4.2 The **representer** said that while the merger booklet mentions the costs involved in the merger and the long term benefits it did not give any figures : in the representer's view more detail should have been given so that members were better informed. The **Century** responded that a summary of the benefits of the merger was set out in the merger booklet as were the additional costs that the merger would give rise to as a result of (i) communicating with members to provide details of the merger proposal, resolving members' queries and circulating voting documents in advance of the SGM; (ii) payments in respect of professional advice received; and (iii) business and systems integration post the merger and harmonising procedures and operations of the Century with those of the Scottish, although it did not expect these costs to be material in relation to the administrative expenses and profits of the Scottish. It also noted that there was no requirement in the Act or in BSOG for all the costs and benefits to be fully quantified, adding that in the context of the Scottish's financial position, and the cost savings and benefits to be realised following the merger, the one off costs of the merger were not considered to be material.

Representations on other matters

4.3 The **representer** also argued that it may be against the policy of the Government for continuous mergers which made building societies and banks larger. If there was more choice there would be less chance for banks and building societies to fail. He also argued that the problem was not that there was not enough regulation but that at present there was far too much. In addition he argued that the European Commission wants to increase competition and consumer choice in the UK Banking sector, and that this proposed merger did not fit in with that.

4.4 In the view of the Authority, the representations referred to in paragraph 4.3 are not relevant to the three confirmation criteria.

5. THE AUTHORITY'S CONCLUSIONS

5.1 The Authority is **required** to confirm a proposed transfer of engagements **unless** it considers that any of the three criteria referred to in paragraph 1.5 above apply. The Authority's own view of the way in which it interprets the three criteria is summed up below, followed respectively by its conclusion on the representation made and on other matters relevant to the three criteria.

(i) The First Criterion – Material Information

5.2 This criterion is mainly, if not exclusively, directed to the information provided by a society to the generality of its shareholding and borrowing members. The totality of information provided to members has to be assessed, recognising that the relevance of a particular piece of information to a shareholder and a borrower might be different, and the extent to which, if at all, it falls short of what might be expected or whether it is within the bounds of reasonable possibility that the members' decision on voting would have been different had any deficiency in information been made good. If it is considered that such a deficiency might have changed the outcome of the vote the Authority should put the decision back to the members. But this requires the Authority to take account both of the size of the vote and of the size of the majority.

5.3 In determining whether this criterion applies, the Authority will have regard to the material put to members, the representations made, the societies' responses and, if appropriate, taking points of its own accord. It will consider whether information provided to members is what might reasonably have been expected of a society considering its fiduciary duty and the extent to which, if at all, it falls short, and whether any deficiency identified was sufficient to amount to information that was material to the members' decision.

5.4 As explained in paragraphs 3.1 to 3.3 above, the Scottish obtained, and relied on, the Authority's consent to proceeding by way of Board Resolution. It was therefore not required to put a shareholding members' resolution and a borrowing members' resolution to a general meeting, or to circulate a statutory statement to its members, and did not do so. The First Criterion cannot therefore apply to the Scottish in relation to the merger.

5.5 The Authority considered, having regard to the representation summarised in paragraph 4.2 above, whether the criterion applied in this case to the Century. In

doing so it reconsidered the merger booklet and reached the conclusion set out in paragraph 5.6.

5.6 The Authority finds that sufficient information was given about the costs and benefits of the merger. The merger booklet explained that the merger would give rise to additional costs through (i) the need to communicate to members about the merger; (ii) payment for professional advice received by both societies in connection with the merger, and (iii) the need post the merger to integrate systems and harmonise procedures and operations. In addition the merger booklet explained that the Scottish would apply fair value adjustments of £1.4m to the Century's assets and liabilities. The benefits of the merger, as identified by the Century's board, were also clearly set out in the section "What are the benefits for the Century's members" in the Chairman's letter (part of the merger booklet). In addition, the Authority notes that there is no requirement in the Act or in BSOG for the costs and the benefits to be specifically quantified.

5.7 The Authority finds, therefore, that **the First Criterion does not apply.**

(ii) The Second Criterion – the Views of the Members

5.8 The main mischief to which this criterion appears to be directed is a resolution carried by a small and unrepresentative number of votes. In the case of the Scottish no members' resolutions were put (as previously explained) and so the Second Criterion cannot apply to the Scottish in relation to the merger.

5.9 The Century is, as explained in paragraphs 2.5 and 2.6 above, subject to:

- (i) the requirements, in sections 94(2) and paragraph 27A of Schedule 2 to the Act, that a shareholding members' resolution approving the terms of the merger must be passed by not less than three-quarters of the number of the shareholding members of the society qualified to vote on the resolution and voting either in person at the meeting or by proxy on the resolution: and
- (ii) the requirements, in sections 94(2) and paragraph 29 of Schedule 2 to the Act, that a borrowing members' resolution approving the terms of the merger must be passed by a simple majority of borrowing members qualified.

5.10 The scrutineer's report (paragraphs 2.3 to 2.6 above refer) confirms that both these requirements have been satisfied. Having regard to the voting figures reported by the scrutineers, and in the absence of any representations alleging that the result of the votes did not represent the views of the members, the Authority finds that **the Second Criterion does not apply.**

(iii) The Third Criterion – Requirements of the Act and the Rules

- 5.11 As explained in paragraph 1.6 above, the relevant requirements of the Act are those set out in sections 94 and 95 of the Act and in Schedule 16 to the Act, and the relevant requirements of the Rules are those prescribing the procedures to be followed by the society in approving or effecting a transfer of engagements. The rules of the Century that are of particular relevance are Rules 31 (Special Meetings), 32 (Notice of Meetings), 36 (Entitlements of Members to Vote on Resolutions) and 39 (Counting of Votes). The rules of the Century require that notice of a meeting may be served either personally on a member or by sending it by post – or otherwise delivering it – addressed to him at his Registered Address (the address that appears in the Register of Members maintained by the society).
- 5.12 In proceeding exclusively by way of Board Resolution the Scottish is relying on the Authority's consent under section 94(5)(b) and on there being no distribution to members. These matters were covered in paragraphs 3.1 to 3.3 above.
- 5.13 The Authority has considered the scrutineer's report on the Century's arrangements for the despatch of notices and statutory statements and for the conduct of the voting, and the other documents supplied by both societies with their applications for confirmation. It notes in particular the comment of the scrutineers referred to in paragraph 2.3 above. It has received no representations to the effect that either society has failed to fulfil any requirements of the Act or of their rules.
- 5.14 The Authority, therefore, having no evidence to suggest nor reason to suppose to the contrary, finds that **the Third Criterion does not apply.**

6. DECISION

The Authority has considered the applications by Century Building Society and Scottish Building Society for confirmation of the transfer of engagements of Century Building Society to Scottish Building Society and, having had regard to the information available to it, confirmed the transfer of engagements on 8 January 2013.

For and on behalf of the
Financial Services Authority

NICHOLAS LOCK

**8 January 2013
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