

2014 No. 1828

FINANCIAL SERVICES AND MARKETS

**The Banking Act 2009 (Restriction of Partial Property
Transfers) (Recognised Central Counterparties) Order 2014**

Made - - - - *9th July 2014*

Coming into force - - *1st August 2014*

The Treasury, in exercise of the powers conferred on them by sections 47, 48 and 259(1) of the Banking Act 2009(a), make the following Order.

In accordance with sections 47(5) and 48(6) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

PART 1

General

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014.

(2) This Order comes into force on 1st August 2014.

(3) In this Order—

“the Act” means the Banking Act 2009;

“the Bank” means the Bank of England;

“continuity powers” means the powers conferred by section 64(2) of the Act (including that subsection as applied by section 65(2) of the Act);

“market contracts” has the meaning given by section 155(1)(d) of the Companies Act 1989(b);

(a) 2009 c.1; section 89B, which applies sections 47 and 48 of the Act to recognised central counterparties, was inserted by the Financial Services Act 2012 (c.21), section 102(1) and (6). Section 89B was amended by S.I. 2013/504.

(b) 1989 c.40; section 155(1) was substituted by S.I. 2013/504.

“title transfer financial collateral arrangement” has the meaning given by regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003(a).

(4) Expressions used in this Order and in the Insolvency Act 1986(b) have the same meaning as in that Act.

(5) References in this Order to netting arrangements include—

- (a) arrangements which provide for netting (within the meaning given by regulation 2 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999(c); and
- (b) arrangements which include a close-out netting provision (within the meaning given by regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003).

(6) In this Order, all references to a provision in Part 1 of the Act are references to that provision as applied to recognised central counterparties by section 89B of the Act.

Application of this Order

2.—(1) Articles 3 to 12 of this Order apply in the following cases.

(2) Case 1 is where a partial property transfer has been made by the Bank in accordance with section 11(2) or 12(2) of the Act.

(3) Case 2 is where—

- (a) the Bank has made a property transfer instrument in accordance with section 11(2) or 12(2) of the Act (whether or not that instrument is a partial property transfer); and
- (b) a property transfer instrument under section 42, 42A(d), 43 or 44 of the Act has been made by the Bank which is a partial property transfer.

(4) Case 3 is where—

- (a) the Bank has made a share transfer instrument in accordance with section 13(2) of the Act, and
- (b) a property transfer instrument has been made by the Bank under section 45(e) or 46(f) of the Act which is a partial property transfer.

(5) For the purposes of this Order, a property transfer instrument which purports to transfer all of the property, rights or liabilities of a recognised central counterparty shall be treated as having done so effectively (and so shall not be treated as a partial property transfer), notwithstanding the possibility that any of the property, rights or liabilities are foreign and may not have been effectively transferred by the property transfer instrument by virtue of steps taken under section 39 of the Act.

(a) S.I. 2003/3226.

(b) 1986 c.45.

(c) S.I. 1999/2979.

(d) Section 42A was inserted by the Financial Services Act 2012, section 97(1) and (5).

(e) Subsection (8) was amended by the Financial Services Act 2012, Schedule 17, paragraphs 1 and 24. Subsection (5A) will be inserted when the Financial Services Act 2012, section 98(1),(4) is commenced.

(f) Subsection (1) was amended by the Financial Services Act 2012, section 97(1) and (7)(a). Subsection (3A) was inserted by the Financial Services Act 2012, section 97(1) and (7)(b). Subsection (7) was amended by the Financial Services Act 2012, Schedule 17, paragraphs 1 and 25. Subsection (5A) will be inserted when the Financial Services Act 2012, section 98(1) and (5) is commenced.

PART 2

Restrictions on partial property transfers

Protected rights and liabilities

3.—(1) A partial property transfer to which this Order applies may not provide for the transfer of some, but not all, of the protected rights and liabilities between a particular person (“P”) and a recognised central counterparty.

(2) A partial property transfer to which this Order applies may not include provision under the continuity powers which terminates or modifies the protected rights or liabilities between P and a recognised central counterparty.

(3) For the purposes of paragraphs (1) and (2), rights and liabilities between P and a recognised central counterparty are protected if either paragraph (4) or paragraph (5) applies.

(4) This paragraph applies where—

- (a) the recognised central counterparty has established a separate default fund for a particular class or classes of financial instruments in accordance with Article 42(4) of the EMIR Regulation; and
- (b) the rights and liabilities—
 - (i) are recorded in the accounts of the recognised central counterparty as positions in the class or classes financial instruments referred to in sub-paragraph (a) or as assets held to cover those positions; or
 - (ii) arise out of the clearing members’ contributions to the separate default fund referred to in sub-paragraph (a).

(5) This paragraph applies where—

- (a) the recognised central counterparty has established a single default fund in accordance with Article 42 of the EMIR regulation; and
- (b) the rights and liabilities—
 - (i) are recorded in the accounts of the recognised central counterparty; or
 - (ii) arise out of the clearing members’ contributions to the single default fund referred to in sub-paragraph (a).

(6) For the purposes of paragraph (1), a property transfer instrument which purports to transfer all of the protected rights and liabilities between P and a recognised central counterparty shall be treated as having done so effectively (and so not give rise to a contravention of paragraph (1)), notwithstanding the possibility that any of the protected rights or liabilities are foreign property and may not have effectively been transferred by the property transfer instrument or by virtue of steps taken under section 39 of the Act.

(7) In this article—

- (a) “clearing member” has the meaning given by Article 2(14) of the EMIR Regulation;
- (b) “EMIR Regulation” means Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories^(a).

EU law

4. A partial property transfer to which this Order applies may not transfer property, rights or liabilities or include provision under the continuity powers to the extent that to do so would contravene EU law.

(a) OJ No L 201, 27.7.2012, p1.

Secured liabilities

5.—(1) Paragraph (2) applies where an arrangement has been entered into under which one party owes a liability to the other and that liability is secured against property or rights; and it is immaterial that—

- (a) the liability is secured against all or substantially all of the property or rights of a person;
 - (b) the liability is secured against specified property or rights; or
 - (c) the property or rights against which the liability is secured are not owned by the person who owes the liability.
- (2) A partial property transfer to which this Order applies may not—
- (a) transfer the property or rights against which the liability is secured unless that liability and the benefit of the security are also transferred;
 - (b) transfer the benefit of the security unless the liability which is secured is also transferred;
 - (c) transfer the liability unless the benefit of the security is also transferred;
 - (d) include provision under the continuity powers which terminates or modifies the arrangement if the effect of that provision is to provide that the liability is no longer secured against the property or rights.

(3) For the purposes of paragraph (2), a property transfer instrument which purports to transfer any property, rights or liabilities shall be treated as having done so effectively (and so not give rise to a contravention of paragraph (2)), notwithstanding the possibility that any of the property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or by virtue of steps taken under section 39 of the Act.

(4) Paragraph (2) does not apply if the arrangement has been entered into by the recognised central counterparty in contravention of any requirement set out in regulations made pursuant to section 286(1) of the Financial Services and Markets Act 2000(a) or any rules made pursuant to section 286(4F) of that Act(b).

Market contracts

6.—(1) Subject to paragraph (2), a partial property transfer to which this Order applies may not transfer property, rights or liabilities or include provision under the continuity powers to the extent that to do so would render unenforceable a market contract.

(2) The restriction in paragraph (1) does not apply to the extent that it would contradict any provision in a relevant property transfer instrument which applies subsection (6) or (7) of section 38 of the Act.

(3) In this Article, “relevant property transfer instrument” means any instrument made for the purposes of effecting a partial property transfer to which this Order applies.

Trusts

7. A partial property transfer to which this Order applies which makes provision under section 34(7)(a) of the Act(c) may remove or alter the terms of the trust (howsoever arising) only to the extent necessary or expedient for the purpose of transferring from the recognised central counterparty to the transferee—

- (a) the legal or beneficial interest of the recognised central counterparty in the property held on trust;
- (b) any powers, rights or obligations of the recognised central counterparty in respect of the property held on trust.

(a) 2000 c.8; section 286(1) was amended by the Financial Services Act 2012, Schedule 8, paragraphs 1, 2(1) and 2(2).

(b) Subsection (4F) was inserted by the Financial Services Act 2012, section 30.

(c) Subsection (7) will be amended when the Financial Services Act 2012, section 98(1),(2) is commenced.

Additional restrictions on reverse transfers

8.—(1) This article applies to a partial property transfer to which this Order applies which is made by the Bank under section 44(a) or 46(b) of the Act.

(2) Subject to paragraph (3), a partial property transfer to which this article applies may not provide for the transfer of—

- (a) any property, rights or liabilities which were not transferred under the original instrument; or
- (b) any liability which was not, at the time immediately before the original instrument was made, a liability owed by the recognised central counterparty.

(3) Paragraph (2) does not apply to—

- (a) a transfer of property, rights or liabilities which have accrued, become or ceased to become payable, changed or lapsed as a result of the application of a default event provision which applies by virtue of the original instrument;
- (b) a transfer of property, rights or liabilities to which consent has been given by the transferee, the transferor and any other person whose consent for the transfer would be required were the transfer not being effected by a property transfer instrument;
- (c) a transfer of a claim for damages or an award of damages against the recognised central counterparty which was in existence immediately before the original instrument was made;
- (d) a transfer to an undertaking which has not entered insolvency; or
- (e) a transfer under article 12(6).

(4) In this article—

- (a) “original instrument” has the meaning given by section 44 or 46 of the Act; and
- (b) the reference to insolvency includes a reference to—
 - (i) liquidation;
 - (ii) bank insolvency;
 - (iii) administration;
 - (iv) bank administration;
 - (v) receivership;
 - (vi) a composition with creditors; and
 - (vii) a scheme of arrangement.

Group companies

9.—(1) A partial property transfer—

- (a) to which this Order applies, and

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- (a) The section heading will be amended when the Financial Services (Banking Reform) Act 2013 (c. 33), Schedule 2, paragraphs (1) and 16(h) are commenced. Subsection (2) will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs 1 and 16(a) are commenced. Subsection (3) was amended by the Financial Services Act 2012, section 97(1), (6)(a) and will be further amended when the the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs 1 and 16(b) are commenced. Subsection (4) will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs 1 and 16(c) are commenced. Subsection (4A) was inserted by the Financial Services Act 2012, section 97(1), (6)(b) and will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs 1 and 16(d) are commenced. Subsections (5) and (7) will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs 1 and 16(e), (g) are commenced. Subsection (6) was amended by the Financial Services Act 2012, Schedule 17, paragraphs 1 and 23 and will be amended when the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraphs (1) and 16(f) are commenced.
 - (b) Subsection (1) was amended by the Financial Services Act 2012, section 97(1), (7)(a). Subsection (3A) was inserted by the Financial Services Act 2012, section 97(1), (7)(b). Subsection (5A) will be inserted when the Financial Services Act 2012, section 98(1), (5) is commenced. Subsection (7) was amended by the Financial Services Act 2012, Schedule 17, paragraphs 1 and 25.

(b) under which the transferor is a relevant company,

may not transfer property, rights or liabilities of the company unless the property, rights or liabilities are necessary for the carrying on of relevant business.

(2) For these purposes it does not matter whether relevant business has been transferred by a property transfer instrument.

(3) In this article—

“financial institution” has the meaning given by point (26) of Article 4(1) of Regulation (EU) No. 575/2013 of the European Parliament and the Council of 26th June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012(a);

“relevant business” means the business, or any part of the business, of a recognised central counterparty which is (or, but for the exercise of a stabilisation power, would be) in the same group as the relevant company; and

“relevant company” means a company, other than a financial institution, which—

(a) is a group company in relation to which this Order has effect by virtue of section 81C of the Act(b); and

(b) is not a parent undertaking of the recognised central counterparty in the same group in respect of which the Bank is satisfied for the purpose of section 81B(2) of the Act(c) that the general conditions for the exercise of a stabilisation power are met.

(4) For the purpose of the definition of “relevant business” undertakings are in the same group if they are group undertakings in respect of each other.

(5) Expressions defined in the Companies Act 2006(d) have the same meaning in this article as in that Act.

PART 3

Remedies

Market contracts and continuity powers

10.—(1) This article applies where a partial property transfer has been made in contravention of article 6 or any other provision of this Order which relates to the exercise of the continuity powers.

(2) The partial property transfer is void in so far as it was made in contravention of those provisions of the Order.

Set-off and netting

11.—(1) This article applies where a partial property transfer has been made in contravention of—

(a) article 3; or

(b) article 4 to the extent that the contravention relates to set-off arrangements, netting arrangements or title transfer financial collateral arrangements,

unless the contravention relates to the exercise of the continuity powers (in which case, article 10 applies).

(2) The partial property transfer does not affect the exercise of the right to set-off or net.

(a) OJ no L176, 27/6/2013, p.1.

(b) Section 81C was inserted by the Financial Services Act 2012, section 100.

(c) Section 81B was inserted by the Financial Services Act 2012, section 100.

(d) 2006 c.46.

Contravention of other provisions of the Order

12.—(1) Subject to paragraph (2), this article applies where any person (“P”) considers that a partial property transfer has been made in contravention of any provision of this Order and that as a result the property, rights or liabilities of P have been affected.

(2) This article does not apply to the extent that article 10 or 11 applies.

(3) P may give notice to the Bank of the alleged contravention of this Order.

(4) The notice under paragraph (3) must—

- (a) be given within 60 days of the day on which the partial property transfer took effect;
- (b) be in writing;
- (c) specify the provision of this Order which is alleged to have been contravened and the manner in which that contravention has occurred;
- (d) identify the property, rights or liabilities to which the alleged contravention relates; and
- (e) contain or be accompanied by such information as the Bank may reasonably require.

(5) Subject to paragraph (8), within 60 days of receipt of a notice under paragraph (3), the Bank must—

- (a) if it agrees that a provision of this Order has been contravened in the manner specified in the notice given under paragraph (3), take the steps specified in paragraph (6);
- (b) if it does not agree that a provision of this Order has been contravened in the manner specified in the notice given under paragraph (3), take the steps specified in paragraph (7).

(6) The steps are to remedy the contravention by transferring property, rights or liabilities to the transferee or the transferor under the partial property transfer.

(7) The steps are to give reasons to P as to why it considers that no provision of this Order has been contravened in the manner specified in the notice given under paragraph (3).

(8) If the Bank considers that the matters raised in the notice given under paragraph (3) are of such complexity that it is impractical to take a decision under paragraph (5) within 60 days of receipt of the notice, the Bank may extend the period of 60 days by no more than 60 days; in such cases it must, within 60 days of receipt of the notice given under paragraph (3), inform P of the extension and the duration of the extension.

(9) The property, rights or liabilities which are transferred under paragraph (6) may be the same property, rights or liabilities which were, in contravention of this Order, transferred or not transferred (as the case may be) or, if the transfer of such property, rights or liabilities is not practicable, property, rights or liabilities which, in the opinion of the Bank, are equivalent to those property, rights or liabilities.

PART 4

Amendments to the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009

13.—(1) The Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009(a) is amended as follows.

(2) In article 2 (application of this Order), after paragraph (5) insert—

“(6) This Order does not apply in the case of a partial property transfer made under Part 1 of the Act as applied by section 89B of the Act.”.

(a) S.I. 2009/322, to which there are amendments not relevant to this Order.

9th July 2014

Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Order)

This Order restricts the making of partial property transfer instruments (“partial property transfers”) under the Banking Act 2009 (c.1) (“the Act”) insofar as such partial property transfers relate to recognised central counterparties (“RCCPs”).

Section 89B of the Act applies Part 1 of the Act (special resolution regime) to RCCPs i.e. those central counterparties which are subject to, and recognised pursuant to, the requirements of Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ No L 201, 27.7.2012, p 1).

Part 1 of the Act allows the Bank of England to exercise stabilisation powers over a RCCP in certain circumstances. These stabilisation powers include the power to make a partial property transfers in respect of a RCCP, i.e. a property transfer instrument which provides for the transfer of some, but not all, of the property, rights and liabilities of a RCCP. This Order places restrictions on the making of partial property transfer instruments. The Order also makes provision to protect certain interests where a partial property transfer has been made in respect of an RCCP, including security interests, set-off arrangements and netting arrangements.

Article 2 describes the circumstances in which the restrictions on the making of partial property transfer instruments set out in articles 3 to 12 of the Order will apply.

Article 3 provides that where a RCCP operates separate default funds for different classes of financial instruments, all the rights and liabilities that attach to each separate default fund must be transferred together, and that where a RCCP operates a single default fund, all rights and liabilities attaching to the single default fund must be transferred together.

Article 4 provides that a partial property transfer may not be made, nor the related continuity powers provided for in sections 64 and 65 of the Act (“the continuity powers”) exercised, in a way that would contravene EU law. The continuity powers allow for the Bank of England to take action to require companies within the same group as the RCCP in respect of which the partial property transfer has been made to continue to provide services and facilities to the acquirer of the transferred business in order to enable it to operate that business effectively.

Article 5 prohibits a partial property transfer or the exercise of any related continuity power from separating from any transferred liability any security that attaches to that liability.

Article 6 prohibits a partial property transfer or the exercising of any related continuity power from rendering unenforceable a market contract (within the meaning of section 155(1)(d) of the Companies Act 1989 (c.40)).

Article 7 places limitations on the exercise of the power provided for in section 34(7)(a) of the Act. Section 34(7)(a) of the Act allows for a partial property transfer to remove or alter the terms of any trust upon which the transferred property was held prior to the transfer.

Article 8 provides for additional limits to apply to reverse property transfers under sections 44 and 46 of the Act. These protections limit what property may be (or may not be) transferred under a reverse transfer.

Article 9 restricts partial property transfers in respect of the property, rights or liabilities of a company that is in the same group as the RCCP. Any such transfers may only be made where they are necessary for carrying on the business, or any part of the business, of any RCCP which is (or, but for the exercise of a stabilisation power, would be) in the same group as the company.

Articles 10 to 12 provide for remedies for contraventions of the Order.

Article 13 amends the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (S.I. 2009/322) (“the 2009 Order”) so as to make it explicit that the 2009 Order does not apply to partial property transfers made under Part 1 of the Act as modified in its application to RCCPs by section 89B of the Act.

A full impact assessment of the effect that this Order will have on the costs of business and the voluntary sector is available from, Her Majesty’s Treasury, 1 Horse Guards Road, London SW1A 2HQ or on <http://www.hm-treasury.gov.uk/> and is published alongside the Order on <http://www.legislation.gov.uk/>.