
STATUTORY INSTRUMENTS

2009 No. 322

**The Banking Act 2009 (Restriction of
Partial Property Transfers) Order 2009**

PART 2

Restrictions on partial property transfers

Set-off and netting

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 banking institution under a particular set-off arrangement⁽¹⁾, netting arrangement⁽²⁾ or title transfer financial collateral arrangement.

(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 banking institution.

(3) For the purposes of paragraphs (1) and (2), rights and liabilities between P and a banking institution are protected if they are rights and liabilities which either P or the banking institution is entitled to set-off or net under a set-off arrangement, netting arrangement or title transfer financial collateral arrangement which P has entered into with the banking institution so long as they are not excluded rights or excluded liabilities.

(4) For the purposes of paragraph (1), a property transfer instrument or order which purports to transfer all of the protected rights and liabilities between P and a banking institution under a particular set-off arrangement, netting arrangement or title transfer financial collateral arrangement 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 been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39 of the Act.

(5) For the purposes of paragraph (3), it is immaterial whether—

- (a) the arrangement which permits P or the banking institution to set-off or net rights and liabilities also permits P or the banking institution to set-off or net rights and liabilities with another person; or
- (b) the right of P or the banking institution to set-off or net is exercisable only on the occurrence of a particular event.

(6) In this article, “excluded rights” and “excluded liabilities” have the meanings given in article 1 except that the reference to subordinated debt shall be treated as if it were a reference to subordinated debt issued by P or by the banking institution.

(1) “Set-off arrangements” is defined in section 48(1) of the Act.

(2) “Netting arrangements” is defined in section 48(1) of the Act.

Community 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 Community law.

Secured liabilities

5.—(1) Subject to paragraph (5), paragraphs (2), (3) and (4) apply 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 transfer the property or rights against which the liability is secured unless that liability and the benefit of the security are also transferred.

(3) A partial property transfer to which this Order applies may not transfer the liability unless the benefit of the security is also transferred.

(4) A partial property transfer to which this Order applies may not 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 right.

(5) Paragraphs (2), (3) and (4) do not apply if the arrangement has been entered into by a banking institution in contravention of a rule prohibiting such arrangements made by the Financial Services Authority under the Financial Services and Markets Act 2000 or otherwise than in accordance the Part 4 permission (within the meaning of that Act) of the banking institution.

(6) For the purposes of paragraphs (2) and (3), a property transfer instrument or order 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) or (3)), notwithstanding the possibility that any of those property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39 of the Act.

Capital market arrangements

6.—(1) Subject to paragraph (3), a partial property transfer to which this Order applies may not provide for the transfer of some, but not all, of the property, rights and liabilities which are or form part of a capital market arrangement to which the banking institution is a party.

(2) Subject to paragraph (3), a partial property transfer to which this Order applies may not include provision under the continuity powers which terminates or modifies property, rights or liabilities which are or form part of a capital market arrangement to which the banking institution is a party.

(3) Paragraphs (1) and (2) do not apply where the only property, rights and liabilities transferred or not transferred, or terminated or modified (as the case may be) are property, rights and liabilities which relate to deposits.

(4) For the purposes of paragraph (1), a property transfer instrument or order which purports to transfer all of the property, rights and liabilities which are or form part of a capital market arrangement to which the banking institution is a party 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

those property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39.

(5) For the purposes of this article, “capital market arrangement” has the meaning given by paragraph 1 of Schedule 2A to the Insolvency Act 1986⁽³⁾.

Financial markets

7.—(1) A property transfer order 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 have the effect of modifying, modifying the operation of or rendering unenforceable—

- (a) a market contract;
- (b) the default rules of a recognised investment exchange or recognised clearing house; or
- (c) the rules of a recognised investment exchange or recognised clearing house as to the settlement of market contracts not dealt with under its default rules.

(2) For the purposes of this article—

“default rules” has the meaning given by section 188 of the Companies Act 1989⁽⁴⁾;

“market contract” has the meaning given by section 155 of the Companies Act 1989;

“recognised clearing house” and “recognised investment exchange” have the meanings given by section 285 of the Financial Services and Markets Act 2000.

Additional restrictions on reverse transfers

8.—(1) This article applies to a partial property transfer to which this Order applies which is made—

- (a) by the Bank under section 44 of the Act; or
- (b) by the Treasury under section 46 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 order;
- (b) any liability which was not, at the time immediately before the original instrument or order was made, a liability owed by the banking institution; or
- (c) rights or liabilities under a financial instrument.

(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 or order;
- (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 or order;
- (c) a transfer of a claim for damages or an award of damages against the banking institution which was in existence immediately before the original instrument or order was made;
- (d) a transfer to an undertaking which has not entered insolvency; or
- (e) a transfer under article 12(6).

⁽³⁾ 1986 c.45; Schedule 2A was inserted by the Enterprise Act 2002, Schedule 18 and amended by SI 2003/1468.

⁽⁴⁾ 1989 c.40.

(4) In this article—

- (a) “original instrument” has the meaning given by section 44 of the Act and “original order” has the meaning given by section 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.

Termination rights

9. A partial property transfer to which this Order applies may not make provision for subsection (6) or (7) of section 38 of the Act to apply in relation to—

- (a) a relevant financial instrument to the extent that it confers rights and liabilities which either party to the instrument is entitled to set-off or net under a set-off arrangement, netting arrangement or title transfer financial collateral arrangement except in so far as those rights and liabilities are excluded rights or excluded liabilities; or
- (b) a set-off arrangement, netting arrangement or title transfer financial collateral arrangement to the extent that it confers a right to set-off or net rights and liabilities under a relevant financial instrument except in so far as those rights and liabilities are excluded rights or excluded liabilities.