

Draft Order laid before Parliament under sections 47(5), 48(6) and 48P(8) of the Banking Act 2009, for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2014 No. ****

BANKS AND BANKING

**The Banking Act 2009 (Restriction of Special Bail-in Provision,
etc.) Order 2014**

Made - - - - - ********
Coming into force - - - *1st January 2015*

The Treasury, in exercise of the powers conferred by sections 47(2) and (4), 48(2), (3) and (4), 48P(3), (5) and (6) and 259(1) of the Banking Act 2009(a), makes the following Order:

A draft of this Order has been laid before and approved by a resolution of each House of Parliament in accordance with 47(5), 48(6) and 48P(8) of the Banking Act 2009.

Citation and commencement

1.—(1) This Order may be cited as the Banking Act 2009 (Restriction of Special Bail-in Provision, etc.) Order 2014.

(2) This Order comes into force on 1st January 2015.

Interpretation

2.—(1) In this Order—

“the Act” means the Banking Act 2009;

“the Bank” means the Bank of England;

“banking institution” means—

(a) a bank(b);

(b) an investment firm(c);

(c) a banking group company;

“eligible liabilities” has the meaning given in Article 2.1(71) of directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms(d);

“netting arrangements” has the meaning given in section 48P(2) of the Act;

(a) 2009 (c.1); section 48P was inserted by the Financial Services (Banking Reform) Act 2013 (c.33), Schedule 2, paragraph 4.

(b) Defined in section 2 of the Act.

(c) Defined in section 258A of the Act. Section 258A was inserted by the Financial Services Act 2012 (c.21), section 101.

(d) OJ L 190, 12.6.2014, p.190.

“relevant banking institution” has the meaning given in article 3(2);

“set-off arrangements” has the meaning given in section 48P(2) of the Act;

“title transfer collateral arrangements” has the meaning given in section 48P(2) of the Act;

“transferable securities” has the meaning given in Article 4.1(44) of Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments(a), but does not include securities (within the meaning of section 14 of the Act(b)) issued by the relevant banking institution.

(2) References to sections of the Act include, as the context requires, those sections as applied by section 89A of the Act (application to investment firms)(c).

Application, etc.

3.—(1) This Order applies to an instrument which makes special bail-in provision.

(2) In this Order “relevant banking institution” means, in relation to an instrument to which this Order applies, the banking institution in respect of which special bail-in provision is made by the instrument.

Set-off and netting

4.—(1) An instrument to which this Order applies may not make special bail-in provision in respect of a protected liability (subject to paragraph (6)).

(2) In this article a “protected liability” is an eligible liability which is not within paragraph (3), and meets the following conditions—

- (a) condition 1 is that the liability is owed by the relevant banking institution to a particular person (“the person”);
- (b) condition 2 is that the liability is a liability which either the person or the relevant banking institution is entitled to set-off or net under particular set-off arrangements, netting arrangements or title transfer collateral arrangements into which the person has entered with the relevant banking institution (“the relevant arrangements”);
- (c) condition 3 is that—
 - (i) where the liability relates to a derivative, financial contract or qualifying master agreement (see article 5), it has not been converted into a net debt, claim or obligation, whether in accordance with the relevant arrangements or through the making of special bail-in provision or otherwise;
 - (ii) where the liability relates to any other type of contract, it has neither been converted nor treated as if it had been converted into a net debt, claim or obligation, whether in accordance with the relevant arrangements or through the making of special bail-in provision or otherwise.

(3) The following liabilities are not protected liabilities—

- (a) liabilities in relation to an unsecured debt instrument which is a transferable security issued by that banking institution, and for these purposes a “debt instrument” is any instrument falling within article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(d);
- (b) liabilities in relation to a capital instrument issued by that banking institution;
- (c) liabilities owed in relation to subordinated debt;
- (d) unsecured liabilities in relation to any instrument or contract which—

(a) OJ L 173, 12.6.2014, p.349.

(b) Amended by SI 2013/3115.

(c) Section 89A was inserted by the Financial Services Act 2012 (c.21), section 101(1), (5).

(d) SI 2001/544. Article 77 was amended by SI 2010/86; 2011/133.

- (i) at the date on which it was issued or made, had a maturity period of 12 months or more, and
 - (ii) is not a derivative, financial contract or qualifying master agreement;
 - (e) unsecured liabilities owed to another member of the same group as the relevant banking institution which are not owed in relation to derivatives, financial contracts or qualifying master agreements;
 - (f) liabilities which relate to a claim for damages or an award of damages or a claim under an indemnity.
- (4) For the purposes of paragraph (2)—
- (a) it does not matter whether—
 - (i) the arrangements which permit the person or the banking institution to set-off or net the liability also permit the person or the banking institution to set-off or net rights and liabilities with another person,
 - (ii) the right of the person or the banking institution to set-off or net is exercisable only on the occurrence of a particular event;
 - (b) a liability is treated as if it is converted into a net debt, claim or obligation if the amount due in relation to the liability is reduced by reference to any sums which the debtor would be able to set off against the liability in the event that the debtor decided to exercise set-off or netting rights.
- (5) For the purposes of paragraph (3), undertakings are in the same group if they are group undertakings in respect of each other, and “group undertaking” has the meaning given in section 1161(5) of the Companies Act 2006.
- (6) Paragraph (1) does not prevent special bail-in provision from being made in order to convert, or in connection with converting, the protected liability into—
- (a) the net debt, claim or obligation that would be due under the set-off arrangements, netting arrangements or title transfer collateral arrangements at the time the special bail-in provision providing for this is made, or
 - (b) an estimate of that net debt, claim or obligation.

Set-off and netting: meaning of “derivative”, “financial contract” and “qualifying master agreement”

5.—(1) In this Order “derivative” means a derivative as defined in Article 2(5) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4th July 2012 on OTC derivatives, central counterparties and trade repositories^(a).

(2) In this Order “financial contract” means any or any combination of the following (other than a derivative)—

- (a) a contract for the purchase, sale, transfer or loan of a transferable security, a group of transferable securities or index of transferable securities;
- (b) a repurchase or reverse repurchase transaction on any transferable security, group of transferable securities or index of transferable securities;
- (c) a commodities contract of a financial nature, including—
 - (i) a contract for the purchase, sale, transfer or loan of a commodity, a group of commodities or an index of commodities for future delivery;
 - (ii) a swap or option on a commodity, a group of commodities or an index of commodities;
 - (iii) a repurchase or reverse repurchase transaction on any such commodity, group or index;

(a) OJ L 201, 27.7.2012, p.1.

- (d) a futures contract, including a contract (other than a commodities contract) for the purchase, sale or transfer of property of any description under which delivery is to be made at a future date and at a price agreed when the contract is made.
- (3) In article 4 “qualifying master agreement” means a master agreement in so far as it relates to—
- (a) a derivative,
 - (b) a financial contract, or
 - (c) a contract for the sale, purchase or delivery of the currency of the United Kingdom or any other country, territory or monetary union.

Remedy

6.—(1) This article applies where any person (“the person”) considers that an instrument to which this Order applies has been made in contravention of any provision of this Order and that as a result the liabilities owed to the person have been affected by the making of special bail-in provision.

(2) The person may give notice to the Bank of the alleged contravention of this Order.

(3) The notice under paragraph (2) (“the notice”) must—

- (a) be given within a period of 60 days beginning with the day on which the instrument was made;
- (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 is alleged to have occurred; and
- (d) identify the liability to which the alleged contravention relates.

(4) The person shall also, on request, provide such additional information as the Bank may reasonably require.

(5) Within the relevant period and acting as soon as reasonably practicable, the Bank must—

- (a) if it does not agree that a provision of this Order has been contravened in the manner specified in the notice, take the steps specified in paragraph (6);
- (b) if it agrees that a provision of this Order has been contravened in the manner specified in the notice, take the steps specified in—
 - (i) paragraph (7), where special bail-in provision is not made in conjunction with the bridge bank stabilisation option, or
 - (ii) paragraph (8), where special bail-in provision is made in conjunction with the bridge bank stabilisation option^(a).

(6) The steps are to give reasons to the person as to why the Bank considers that no provision of this Order has been contravened in the manner specified in the notice.

(7) The steps are to remedy the contravention—

- (a) where practicable—
 - (i) by requiring the relevant banking institution to issue securities, or
 - (ii) by transferring securities issued by the relevant banking institution, which the Bank estimates to have a value equal to the relevant sum, to the person, or
- (b) otherwise, by requiring the relevant banking institution to transfer the relevant sum to the person;

whether by exercising a power under Part 1 of the Act or otherwise.

(8) The steps are to remedy the contravention by either—

(a) Defined in section 12 of the Act, amended by article 18 of the Bank Recovery and Resolution Order 2014.

- (a) requiring the relevant banking institution or bridge bank to issue securities which the Bank estimates to have a value equal to the relevant sum to the person,
- (b) transferring securities issued by the relevant banking institution or bridge bank which the Bank estimates to have a value equal to the relevant sum to the person, or
- (c) requiring the relevant banking institution or bridge bank to transfer the relevant sum to the relevant person;

whether by exercising a power under Part 1 of the Act or otherwise.

(9) In this article—

“relevant period” has the meaning given in article 7;

“relevant sum” means such sum as the Bank considers necessary to put the person in the position the person would have been in had the contravention not occurred.

(10) In paragraph (5)(b)(ii), special bail-in provision is made in conjunction with the bridge bank stabilisation option when special bail-in provision is made in reliance on section 44B of the Act^(a) in—

- (a) a property transfer instrument under section 12(2) of the Act, or
- (b) a supplemental property transfer instrument in relation to which the original instrument (as defined in section 42(1)(b) of the Act) is a property transfer instrument under section 12(2) of the Act;

and the reference in paragraph (5)(b)(i) to special bail-in provision not being made in conjunction with the bridge bank stabilisation option is to be construed accordingly.

Remedy: relevant period

7.—(1) In article 6(5) the “relevant period” means—

- (a) a period of 120 days beginning with the day on which the notice under article 6(2) is received (“the initial period”), and
- (b) any period by which the initial period is extended under paragraph (2) or paragraphs (2) and (3).

(2) The Bank may extend the initial period by a period of up to 120 days if the condition in paragraph (4) is met (“the initial period and first extended period”).

(3) The Bank may extend the initial period and first extended period by a period of up to 120 days if the condition in paragraph (4) is met.

(4) The condition is that the Bank considers that the matters raised in the notice under article 7(2) are of such complexity that it is impracticable to take a decision without granting the extension.

(5) Where the Bank extends time under paragraph (2) or (3), the Bank must as soon as reasonably practicable inform the person who gave the notice of the extension and the duration of the extension.

Review

8.—(1) The Treasury must from time to time—

- (a) carry out a review of the effectiveness of articles 2 to 7,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(a) Section 44B was inserted by the Financial Services (Banking Reform) Act 2013 (c. 33), Schedule 2, paragraph 5(3), and is amended by article 46 of the Bank Recovery and Resolution Order 2014.

(b) Section 42 was amended by the Financial Services (Banking Reform) Act 2013, Schedule 2, paragraph 5(2), and is amended by article 42 of the Bank Recovery and Resolution Order 2014.

(2) In carrying out the review the Treasury must, so far as is reasonable, have regard to how the recovery and resolution directive (which is partially implemented by means of articles 2 to 7) is implemented in other EEA states.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory system established by articles 2 to 7,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this article must be published before the end of the period of five years beginning with the day on which this Order comes into force.

(5) Reports under this article are afterwards to be published at intervals not exceeding five years.

	<i>Name</i>
	<i>Name</i>
Date	Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Order)

This Order imposes restrictions on the making of special bail-in provision in any instrument made by the Bank under Part 1 of the Act. In doing so, it implements, in part, Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (“BRRD”) (OJ L 173, 12.6.2014 p.190). Special bail-in provision can be made in relation to banks and investment firms. This Order will also apply where special bail-in provision is made in respect of banking group companies (by virtue of section 81CA(2) of the Act).

Article 4 provides that special bail-in provision cannot be made in respect of protected liabilities. Protected liabilities are liabilities subject to set-off or netting, which are not excluded from protection (under paragraph (3)), and in the case of liabilities relating to derivatives, other financial contracts or certain master agreements, which have not been set-off or netted. Article 4 does not prevent special bail-in provision from being made to convert the protected liability into the net sum that would be due following set-off or netting (or into an estimate of the net sum).

Article 5 defines derivatives by reference to Article 2(5) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4th July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p.1), as is the case under Article 2.1(64) and (65) of the BRRD. Financial contracts are defined to include certain securities contracts (including repos), commodities contracts (including repos) and futures contracts.

Article 6 (as supplemented by article 7) provides the remedy for contraventions of the provisions of the Order.

Article 8 requires the Treasury to review the regulatory system established by the Order at least once every 5 years.

A Transposition Table setting out how the recovery and resolution directive is transposed into UK law is available from HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ.

A full impact assessment of the effect that these Regulations 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 Regulations on <http://www.legislation.gov.uk/>.

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