
EXPLANATORY NOTE

(This note is not part of the Order)

This Order implements in part Directive 2014/59/EU of the European Parliament and of the Council of 15th May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (OJ L173, 12.6.2014, p.190) (“recovery and resolution directive”). The recovery and resolution directive requires EEA states to have powers to manage the failure of credit institutions and investment firms and their group companies as an alternative to insolvency, in order to ensure that critical functions continue to be performed.

Part 2 of the Order amends the Banking Act 2009 (c.1) (“the Act”) to complete the implementation of the recovery and resolution directive.

Articles 3 to 4 make minor amendments to the overview and interpretation provisions in the Act. Article 5 amends the definition of “institution” in section 3A. Articles 6 and 7 remove references to the valuation carried out under section 6E from the conditions for mandatory reduction instruments and the general conditions for exercise of a stabilisation power.

Article 8 sets out the requirements for marketing property of a bank, or securities issued by a bank which are to be transferred by the Bank of England (“the Bank”) to a private sector purchaser using its powers under Part 1 of the Act.

Article 9 extends the Bank's powers to make onward share transfer instruments in relation to securities issued by a bank in relation to which the Bank has already made a share transfer instrument, to deal with those shares which were transferred by the original share transfer instrument, or which have been issued by the bank after the date on which that instrument was made.

Article 10 extends the Bank's existing power to make reverse share transfer instruments so that it also applies where the Bank has made an onward share transfer instrument.

Article 11 extends the category of property transfer instruments which are able to make special bail-in provision under section 44B to include onward property transfer instruments and bridge bank supplemental transfer instruments.

Article 12 ensures that the specified provisions apply to property transfer instruments which make special bail-in provision as well as to resolution instruments.

Article 13 gives the Bank power to make a property transfer instrument in relation to a bank after the Bank has made a share transfer instrument in relation to securities issued by that bank (see new section 44D), and then a supplemental reverse property transfer instrument in relation to the property, rights and liabilities which have been transferred under that initial property transfer instrument (see new section 44E), and makes consequential amendments.

Article 14 gives the Bank and the Treasury power to recover the expenses which they have incurred where the Bank has exercised the bail-in option in relation to a bank from that bank.

Article 15 amends the definition of “crisis prevention measure” for the purposes of section 48Z to ensure that the appointment by the Prudential Regulation Authority (“PRA”) or the Financial Conduct Authority (“FCA”) of a temporary manager under 71C of the Financial Services and Markets Act 2000 (c.8) (“FSMA”) does not trigger contractual termination rights. It also gives the Bank power to provide that certain contractual termination rights may take effect in accordance with the terms of the contract notwithstanding section 48Z(6).

Article 16 adds onward share transfer instruments, bridge bank supplemental property transfer instruments and bridge bank supplemental reverse property transfer instruments to the list of instruments in relation to which the Treasury may make a compensation scheme order and a third party compensation scheme order.

Article 17 amends section 62A to ensure that the Bank may recover the costs of conducting an independent valuation from the bank which is being valued.

Article 18 amends section 81AA(8)(b) to remove any reference to the valuation carried out under section 6E of the Act.

Articles 20 and 21 give the Bank power to make share transfer instruments in relation to building societies, by converting the building society into a company. New section 84ZA identifies some of the provision which may be made by the Bank in a share transfer instrument which relates to a building society. Article 21 amends section 84D to modify provisions in Part 1 of the Act related to share transfer instruments so far as they apply to building societies.

Article 23 makes a minor amendment to section 89A.

Article 24 ensures that the amendments made by this Order do not apply in relation to recognised central counterparties.

Article 25 ensures that someone who is appointed by the Bank to make a report under section 83ZB of the Act is treated as a “primary recipient” in relation to section 348 of FSMA, and so subject to the prohibition on disclosure of confidential information provided for in that section.

Article 26 amends Part 3 of the Act to replace references to bridge banks by references to resolution companies (which include both bridge banks and asset management vehicles).

Article 27 amends the index of defined terms in section 261 of the Act.

Article 28 ensures charges over property which is acquired by the successor company of a building society when the building society is converted to a company under section 84ZA will be registered under the Companies Act 2006 (c.46), and makes consequential amendments.

Part 3 of the Order amends the Act to provide for the resolution of UK branches of third-country institutions. Article 29 inserts a new Chapter 6A into Part 1 of the Act, comprising new section 89JA.

Subsection (1) applies Part 1 of the Act to UK branches subject to the modifications made in the rest of new section 89JA.

Subsection (4) modifies section 6E to set out how the rules on valuation will apply in relation to UK branches.

Subsection (5) modifies section 7 to set out the conditions which must be satisfied before the Bank may make a property transfer instrument in relation to a UK branch.

Subsection (6) modifies section 7A to set out the factors to which the Bank must have regard before making a property transfer instrument in relation to a UK branch.

Subsection (7) modifies section 44B, to ensure that property transfer instruments made by the Bank in relation to a UK branch can make special bail-in provision in relation to any liabilities which are being transferred by the instrument.

Subsection (8) modifies section 48B, which defines “special bail-in provision” for the purposes of section 44B.

Subsection (9) modifies section 48X, which requires the Bank to obtain an independent valuation where the Bank has made a property transfer instrument in relation to a UK branch in reliance on a provisional valuation, and subsection (10) modifies section 48Y, which provides for the consequences where the independent valuation differs from the provisional valuation.

Subsection (11) contains a table of further modifications of Part 1 of the Act as it applies to UK branches of third-country institutions.

Part 4 of the Order amends FSMA. Article 31 gives the PRA and the FCA power to summon a general meeting of a company in their own right where the company has, inter alia, failed to comply with a requirement that it should do so.

Article 32 provides for removal of directors and senior executives of a relevant firm, and for the appointment of a temporary manager to run the firm, inserting new sections 71B to 71I into FSMA.

New section 71B gives the PRA and the FCA power to remove directors and senior executives, and new section 71C gives the PRA and the FCA power to appoint a temporary manager and sets out what the functions of the temporary manager are.

New section 71D sets out the conditions which must be satisfied before the powers in sections 71B and 71C may be exercised.

New section 71E makes further provision in relation to the qualifications and term of the temporary manager, and new section 71F makes provision in relation to the instrument appointing the temporary manager.

New section 71G provides rights for the relevant firm, the parent undertaking, and any directors or senior executives affected by requirements imposed under sections 71B or 71C to refer the matter to the Tribunal, new section 71H sets out the procedure which is to apply on the removal of directors or senior managers or the appointment of a temporary manager, and new section 71I makes contains the interpretation provisions for these new sections.

Article 33 inserts new section 190A into FSMA, which sets out what happens when the regulators receive a notice under section 178 of FSMA in connection with a transfer made by the Bank using its powers under Part 1 of the Act, which leads to an acquisition or increase of control over a company in the financial services sector, where the regulator concerned was unable to complete its assessment of the proposed acquisition before the transfer proceeded under the Act.

Article 34 amends section 348(5) of FSMA to ensure that temporary managers are subject to the prohibition on the disclosure of confidential information in section 348.

Article 35 amends section 395 of FSMA to ensure that notices issued by the regulators under section 71H are treated as supervisory notices.

Part 5 of the Order amends a number of statutory instruments.

Article 36 amends the Banking Act (Restriction of Partial Property Transfers) Order 2009 (S.I. 2009/322), so that third-country institutions come within the definition of “banking institutions” for the purposes of that Order, and ensures that eligible deposits may, if necessary, be transferred separately from any liability which they are securing.

Article 37 amends the description of those firms which are excluded from the “investment firm” for the purposes of the Act.

Articles 38, 39 and 40 ensure that a third-country institution comes within the definition of “banking institution” for the purposes of the Banking Act 2009 (Third Party Compensation Arrangements for Partial Property Transfers) Regulations 2009 (S.I. 2009/319), the Banking Act 2009 (Restriction of Special Bail-in Provision, etc) Order 2014 (S.I. 2014/3350) and the Banking Act 2009 (Mandatory Compensation Arrangements Following Bail-in) Regulations 2014 (2014/3330) respectively.

Article 41 amends the Bank Recovery and Resolution (No 2) Order 2014 (2014/3348), making consequential amendments in relation to the power for the regulators to appoint a temporary manager, and in paragraph (16) inserting further modifications of the Companies Act 2006 (c.46) to ensure that shareholders of a relevant company have the power to call a general meeting to increase the company's share capital on at least 10 days notice or to change the Articles of Association of the company to permit such general meetings to be called notices to be called on at least 10 days notice.

Article 42 makes provision for the review of articles 2 to 41 of this Order every five years.

A Transposition Note setting out how the recovery and resolution directive is transposed into UK law, and a Supplementary Transposition Note setting out how the provisions of that directive are further implemented by this Order are available from HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ.

An impact assessment has not been produced for this instrument as no significant impact on the costs of business or the voluntary sector is foreseen.

Changes to legislation:

There are currently no known outstanding effects for the The Bank Recovery and Resolution Order 2016.