

**2008 No. 2666**

**BANKS AND BANKING**

**The Transfer of Rights and Liabilities to ING Order 2008**

*Made - - - - 10.00 a.m. on 8th October 2008*

*Laid before Parliament 12.00 noon. on 8th October 2008*

*Coming into force - 10.10 a.m. on 8th October 2008*

It appears to the Treasury to be desirable to make this Order for the following purpose:

maintaining the stability of the UK financial system in circumstances where the Treasury consider that there would be a serious threat to its stability if the Order were not made.

The Treasury, in exercise of the powers conferred by sections 6, 8, 12 and 13(2) of, and Schedule 2 to, the Banking (Special Provisions) Act 2008(a), make the following Order:

**PART 1**

**GENERAL**

**Citation and commencement**

- 1.—(1) This Order may be cited as the Transfer of Rights and Liabilities to ING Order 2008.
- (2) This Order comes into force at 10.10 a.m. on 8th October 2008.

**Interpretation: general**

**2. In this Order—**

“the 2000 Act” means the Financial Services and Markets Act 2000(b);

“the Act” means the Banking (Special Provisions) Act 2008;

“the Authority” means the Financial Services Authority;

“the Companies Acts” has the meaning given by section 2 of the Companies Act 2006(c);

“Deposits Management (Heritable)” means Deposits Management (Heritable) Limited, company registered number 6690442, a company which is for the purposes of the Act wholly owned by the Treasury;

“the effective time” means the time this Order comes into force;

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(a) 2008 c.2.  
(b) 2000 c.8.  
(c) 2006 c.46.

“the Financial Services Compensation Scheme” means the scheme established by the Authority under Part 15 (the financial services compensation scheme) of the 2000 Act;

“the first Order” means the Heritable Bank plc Transfer of Certain Rights and Liabilities Order 2008(c);

“FSCS” means the body corporate established by the Authority under section 212 (the scheme manager) of the 2000 Act;

“Heritable” means Heritable Bank plc, company registered in Scotland number SC000717;

“ING” means ING Direct N.V., incorporated in the Netherlands and acting through its branch in the United Kingdom, branch reference number BR 7357;

“the transfer” means the transfer effected under article 3(1);

“the transitional period” means the period of 6 months beginning with the date of this Order.

## PART 2

### THE TRANSFER

#### **The transfer**

**3.**—(1) By virtue of this Order all the rights and liabilities transferred to Deposits Management (Heritable) by article 3 of the first Order are transferred to ING.

(2) From the effective time, ING shall—

- (a) have the same rights and obligations in relation to depositors in relation to the transferred accounts as it would have if Heritable’s relevant terms of business applied; and
- (b) be liable to pay to depositors any accrued interest on the transferred accounts as at the time of coming into force of the first Order and any interest accruing after that time on those accounts.

(3) In paragraph (2) “transferred accounts” has the same meaning as in the first Order.

(4) Paragraph (1) does not apply to any liability in respect of any breach of contract or other duty which arose before the effective time.

(5) The transfer under paragraph (1) takes place at the effective time.

#### **No consent or concurrence required**

**4.** The transfer is effective despite the absence of any required consent or concurrence to or with the transfer.

#### **Associated liability and interference**

**5.**—(1) The transfer takes effect as if—

- (a) no associated liability existed in respect of any failure to comply with any requirement in respect of the transfer; and
- (b) there were no associated interference with the rights and liabilities transferred.

(2) In this article, “associated liability” and “associated interference” have the meanings given in paragraph 2(2) of Schedule 2 to the Act.

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(c) S.I 2008/2644.

### **Interests, rights and liabilities of third parties relating to property, rights and liabilities transferred**

6.—(1) No interest or right of any third party relating to any right or liability transferred by article 3, shall arise or become exercisable by virtue of or in connection with this Order.

(2) Save as otherwise provided in this Order, no third party shall, by virtue of or in connection with this Order, incur any liability or be subject to any obligation relating to any right or liability transferred by article 3.

(3) Without prejudice to the generality of paragraphs (1) and (2)—

- (a) the consequences specified in paragraph (4) shall not arise in respect of any relevant instrument as a result of the transfer or any other thing done, or matter arising, by virtue of or in connection with the transfer; and
- (b) any circumstances which, but for sub-paragraph (a), would give rise to the consequences specified in paragraph (4) shall be taken not to have arisen for the purposes of any relevant instrument.

(4) The consequences are—

- (a) the termination of a relevant instrument or any rights or obligations under it;
- (b) any right to terminate a relevant instrument or any right or obligation under it becoming exercisable;
- (c) any amount becoming due and payable or capable of being declared due and payable;
- (d) any other change in the amount or timing of any payment falling to be made or due to be received by any person;
- (e) any right to withhold, net or set off any payment becoming exercisable;
- (f) any event of default or breach of any right arising;
- (g) any right not to advance any amount becoming exercisable;
- (h) any obligation to provide or transfer any deposit or collateral;
- (i) any right to give or withhold any consent or approval; or
- (j) any other right or remedy (whether or not similar in kind to those referred to in sub-paragraphs (a) to (i)) arising or becoming exercisable.

(5) Without prejudice to paragraph (4), any provision in a relevant instrument that, as a result of the transfer or any other thing done, or matter arising, by virtue of or in connection with the transfer, provides for an obligation not to be created, suspends or extinguishes (in whole or in part) such an obligation or renders such an obligation subject to conditions, shall be of no effect.

(6) In this article—

“relevant instrument” has the same meaning as in paragraph 4(3) of Schedule 1 to the Act and the specified connection referred to in paragraph 4(3)(c) of that Schedule is between Heritable and those undertakings whose assets and liabilities, profits and losses are consolidated in the consolidated accounts of Heritable; and

“third party” shall be construed in accordance with paragraph 2(3) of Schedule 2 to the Act.

### **Construction of documents etc.**

7. As from the effective time, and save as otherwise provided in this Order—

- (a) agreements made or other things done by or in relation to Heritable shall be treated, so far as may be necessary for the purposes of or in connection with the transfer, but not otherwise, as made or done by or in relation to ING, as the case may be; and
- (b) references to Heritable, or to any officer or employee of Heritable, in instruments or documents relating to the rights and liabilities transferred by or under article 3 shall have effect as if they were references to ING, or to any officer or employee of ING, as the case may be.

### **Provision of information and assistance**

8. Heritable shall provide ING with such information and assistance as is reasonably requested by ING—

- (a) in relation to the rights and liabilities transferred by article 3;
- (b) for any purpose relating to this Order;
- (c) for any purpose relating to any other function of ING which relates to its functions under this Order.

## **PART 3**

### **FINANCIAL SERVICES COMPENSATION SCHEME**

#### **Sum to be paid to ING following the transfer**

9.—(1) Deposits Management (Heritable) is liable to pay (as soon as practicable after the effective time) to ING an amount equal to the aggregate amount of the liabilities transferred to ING under article 3 less £1,000,000.

(2) The Treasury shall subsequently make the necessary adjustments such that Heritable obtains the benefit of the reduction of £1,000,000 referred to in paragraph (1) less the total of all costs and liabilities incurred by Deposits Management (Heritable) in performing its obligations under this Order or the first Order.

#### **Amendments to Part 3 of the first Order**

10.—(1) Part 3 of the first Order (Financial Services Compensation Scheme) shall be amended as follows.

(2) In article 13 (sums to be paid to Deposits Management (Heritable) following the transfer), insert at the end—

“(7) The liability referred to in paragraph (1)(a) shall be assessed by the FSCS and, in so doing, the FSCS may calculate, by any methodology or approach it considers appropriate, the total amounts of compensation that would have been paid to all eligible claimants, if (and to the extent that) it considers that the costs of ascertaining the entitlement to and amount of compensation by reference to each qualifying claimant would exceed or be disproportionate to the benefit of doing so.”

(3) In paragraph (3) of article 15 (liability of Heritable to the FSCS and the Treasury) —

- (a) after “administration” in each place where it occurs insert “or liquidation”;
- (b) substitute for “would have been provable”, “the FSCS is entitled to recover”.

#### **Balancing payments**

11.—(1) Any payment which is required to be made pursuant to article 13(5) of the first Order by or to Deposits Management (Heritable) after the effective time shall be made by or, as the case may be, to ING.

(2) Deposits Management (Heritable) shall have no obligation to make or, as the case may be, right to receive any such payment.

#### **Payment by the FSCS to ING**

12. Any payment by the FSCS to ING pursuant to article 11 shall for the purposes of article 14(a) of the first Order be deemed to be a payment by the FSCS to Deposits Management (Heritable) under article 13(5) of the first Order.

### **FSCS power to require information**

**13.—**(1) The FSCS may, by notice in writing given to ING, require it—

- (a) to provide specified information or information of a specified description; or
- (b) to produce specified documents or documents of a specified description.

(2) Paragraph (1) only applies to information and documents the provision or production of which the FSCS considers to be necessary (or likely to be necessary) for the exercise of its functions under or by virtue of this Order or the first Order.

(3) Subsections (2), (4), (5) and (7) of section 219 of the 2000 Act (scheme manager's power to require information) apply to a requirement imposed under paragraph (1) as if it were a requirement imposed under that section.

### **Statutory immunity**

**14.** For the purposes of section 222 (statutory immunity) of the 2000 Act the scheme manager's functions shall include any acts or omissions carried out by the FSCS pursuant to or in connection with this Order.

## **PART 4**

### **MISCELLANEOUS**

### **Transitional provisions**

**15.** Part 4 of the first Order (except for article 22) shall apply from the effective time with the substitution for references to Deposits Management (Heritable) of references to ING.

### **Services and facilities**

**16.** The agreement dated 8th October 2008 between the Treasury and ING relating to the provision of transitional services by Heritable to ING shall bind Heritable as if it were a party.

### **Business continuity**

**17.—**(1) During the transitional period, any person who provides to Heritable, pursuant to any contract or agreement, services or facilities which are reasonably required by Heritable to perform its duties under or pursuant to this Order or the agreement referred to in article 16 shall—

- (a) provide such services to Heritable for the benefit of ING; or
- (b) if so requested by Heritable, provide such services direct to ING.

(2) No such person shall, without the consent of the Treasury or permission of the Court, during the transitional period, terminate or modify any such contract or agreement, or treat it as terminated or modified, by virtue or in connection with the requirement under this article to provide services or facilities to or for the benefit of ING.

### **Modification to Authority's rule-making power**

**18.—**(1) Subsections (1) and (1A)(a) of section 138 of the 2000 Act (general rule-making power) have effect as if modified by inserting after "protecting the interests of consumers"—

"or for the purposes of, to facilitate or in consequence of, a transfer under section 6 or 8 of the Banking (Special Provisions) Act 2008".

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(a) Subsections (1A) to (1C) were inserted by S.I. 2006/2975.

(2) Section 148(2)(a) of the 2000 Act (modification or waiver of rules) shall also apply in relation to ING—

- (a) in the absence of an application by a person subject to rules made by the Authority; and
- (b) without any requirement for the consent of such a person.

(3) Section 148(4)(b) of the 2000 Act shall not prevent the Authority from modifying or waiving rules in relation to ING under section 148 of that Act provided that the Authority is satisfied that the modification or waiver is necessary for the purposes of, to facilitate or in consequence of the transfer.

#### **Modification to Authority's duty to consult on rule changes**

**19.**—(1) Section 155(7) of the 2000 Act (consultation) has effect as if modified by adding at the end—

“or if it is making rules for the purposes of, or to facilitate or in consequence of, a transfer under section 6 or 8 of the Banking (Special Provisions) Act 2008.”

(2) Section 157 of the 2000 Act (guidance) has effect as if modified by adding after subsection (3)—

“(3A) Section 155(7) applies to proposed guidance as it applies to proposed rules with the modification made by article 19 of the Transfer of Rights and Liabilities to ING Order 2008.”.

#### **Transfer of data**

**20.** Any transfer of data under this Order is not to be taken to breach any restriction on disclosure of information, however imposed.

8th October 2008

*Frank Roy*  
*Dave Watts*  
Two of the Lords Commissioners of Her Majesty's Treasury

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(a) Subsection (2) was substituted by S.I. 2007/1973.  
(b) Subsection (4)(a) was amended by S.I. 2007/1973.

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order is made under the Banking (Special Provisions) Act 2008 (c.2) (“the 2008 Act”) and provides for certain rights and liabilities to be transferred to ING. The transferred rights and liabilities are those, relating to certain accounts, which were transferred to Deposits Management (Holding) by virtue of the Heritable Bank plc Transfer of Certain Rights and Liabilities Order 2008 (S.I 2008/2644) (“the first Order”).

Article 3 gives effect to the transfer and makes provision in relation to rights and obligations in relation to depositors and in relation to interest on deposits transferred.

Articles 4 and 5 make provision to ensure the effectiveness of the transfer and article 6 ensures that third-party rights do not become exercisable by virtue of the transfer.

Article 7 provides for references in documents relating to Heritable Bank Plc to be treated as references relating to ING.

Article 9 makes provision for payment by Deposits Management (Heritable) of the aggregate amount of the liabilities transferred to ING, less a stipulated amount.

Article 10 makes amendments to the first Order in relation to the Financial Services Compensation Scheme.

Article 15 applies Part 4 of the first Order (except article 22), which relates to where Heritable Bank Plc is placed in administration, as if references to Deposits Management (Heritable) were references to ING.

Article 16 provides for an agreement made between the Treasury and ING relating to transitional services to bind Deposits Management (Heritable).

Articles 18 and 19 modify the Financial Services Authority’s rule-making power and its duty to consult on rule changes.

Article 20 makes provision that the transfer of data under the Order is not to be taken as a breach of any restriction on disclosure.

An Impact Assessment of the effect of this instrument on the costs to business has been prepared. It may be obtained from the Financial Stability Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. It is also available on HM Treasury’s website ([www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk)). Copies of the document have been placed in the libraries of both Houses of Parliament.

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