



HM Treasury

Insolvency changes for payment and electronic money institutions: consultation (supplementary annex)

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Preface

This is a supplementary annex to the [consultation on proposed insolvency changes for payment and electronic money institutions, published 2nd December 2020](#). It consists of one chapter detailing the draft rules that will accompany the regulations that will introduce the Special Administration Regime for payments and electronic-money firms. Please see the [consultation document](#) for a description of the main policy proposals, rationale and details on how to respond to this consultation.

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Annex C

Details of draft rules

C.1 Provisions that the Government proposes to incorporate into the PI and EMI SAR Rules are set out below.

C.1.1 Save where otherwise set out herein, a reference to a “Rule” or “the Rules” is to the Rules of the Investment Bank Special Administration Regime (the “Investment Bank SAR”).

General comments

Enabling powers

C.2 The rules governing the PI and EMI SAR (the “PI and EMI SAR Rules”) are to be made in the exercise of powers under Sections 411(1A)(a), (2), (2C) and (3) of the Insolvency Act 1986, as applied by the PI and EMI SAR Regulations.

Bank of England involvement

C.3 Pursuant to the Investment Bank SAR Rules, the Bank of England will only be involved in the special administration process for an investment bank to the extent that such investment bank is subject to a special administration (bank insolvency) or special administration (bank administration) order. As PIs and EMIs do not undertake deposit taking activities, the Bank of England’s involvement in a special administration of a PI or an EMI will be omitted from the PI and EMI SAR Rules. The Bank of England will however still constitute an “Authority” with whom the administrators must engage if required in pursuit of Objective 2.

Transfer of relevant funds

C.4 To the extent not addressed in the PI and EMI SAR Regulations, the PI and EMI SAR Rules will set out further details regarding the transfer (and reverse transfer) of relevant funds.

The PI and EMI SAR Rules

Part 1: Introductory provisions

C.5 As is the case with Rules 1 to 4 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out provisions relating to citation, commencement, extent and interpretation.

C.5.1 As per Rule 3 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will be applied to England and Wales. HMT are currently in discussion with devolved administrations on whether SAR Rules should be created for Scotland and Northern Ireland.

C.5.2 Rule 5 of the Investment Bank SAR Rules is not applicable to the PI and EMI SAR as any application for a special administration (bank insolvency) order or a special administration (bank administration) order would fall outside of the PI and EMI SAR.

Part 2: Application for order

Application for special administration order

C.6 As per Rules 6 to 16 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out the procedure for applying to court for a special administration order.

Application for a special administration (bank insolvency) order

C.7 Rules 17 to 36 of the Investment Bank SAR Rules set out the procedure for applying to court for a special administration (bank insolvency) order. As PIs and EMIs do not undertake deposit taking activities, these Rules will be omitted from the PI and EMI SAR Rules.

Application for a special administration (bank administration) order

C.8 Rules 37 to 50 set out the procedure for applying to court for a special administration (bank administration) order. As PIs and EMIs do not undertake deposit taking activities, these Rules will be omitted from the PI and EMI SAR Rules.

Part 3: Process of special administration

Notice of appointment and statement of affairs

C.9 As with Rule 51 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will include an obligation on the administrator to advertise and notify certain relevant parties of his or her appointment.

C.9.1 The PI and EMI SAR Rules will, as do Rules 52 to 53 of the Investment Bank SAR Rules, contain a right for the special administrator to require a “relevant person” to prepare and submit a statement of affairs of the PI or EMI’s affairs. In the case of the PI and EMI SAR Rules, the particulars to be included in such statement of affairs will need to be an amended version of those prescribed in the Investment Bank SAR Rules. They will instead need to include items such as: (i) names and addresses of users or holders of the institution; (ii) details as to the amount of relevant funds held; (iii) details of the safeguarding option(s) employed by the

institution; (iv) details of the accounting method(s) used by the institution; (v) details of other creditors; and (vi) detail of any security interests held by a creditor.

C.9.2 Provisions similar to Rules 3.30 and 3.31 of the IR16 will be incorporated in the PI and EMI SAR Rules to set out the content to be included in the statement of affairs and the statement of concurrence.

C.9.3 Rules 55 to 58 of the Investment Bank SAR Rules will also be incorporated into the PI and EMI SAR Rules with limited modifications.

Statement of proposals

C.10 As per Rule 59 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out the particulars to be included in the administrator's statement of proposals. In addition to the matters set out in Rule 59 of the Investment Bank SAR Rules, the administrator will be required to set out in their proposals (i) details of the safeguarding option employed by the institution; and (ii) whether any reconciliation has yet been undertaken by the administrator (whether pursuant to regulation 13 or 15(2) of the PI and EMI SAR Regulations or otherwise). Further modifications will need to be made to the equivalent of Rule 59 of the Investment Bank SAR Rules as the special administration (bank administration) and special administration (bank insolvency) regimes are not relevant in the context of the PI and EMI SAR regime.

C.10.1 Rule 60 of the Investment Bank SAR Rules, which allows for limited disclosure of the statement of proposals, will also be incorporated into the PI and EMI SAR Rules with limited modifications.

Initial meeting to consider proposals

C.11 Rules 61 to 64 of the Investment Bank SAR Rules contemplate a physical initial meeting being convened following the investment bank's entry into special administration in order to: (i) establish a creditors' committee; and (ii) approve the statement of proposals prepared by the administrator. In order to ensure consistency between the Investment Bank SAR and PI and EMI SAR regimes, the same rules will be incorporated into the PI and EMI SAR Rules and there will be no discretion to employ the deemed consent procedure or the qualifying decision procedure in seeking approval of the administrator's statement of proposals.

C.11.1 Following Rule 63(3) of the Investment Bank SAR Rules, the creditors of a PI or EMI and its users or holders should vote separately on whether to approve the administrator's proposals.

C.11.2 There will be no entitlement for the FSCS to vote on the administrator's statement of proposals in the PI and EMI SAR Rules as FSCS coverage is currently unavailable to users of PIs and holders of EMIs.

C.11.3 As per the Investment Bank SAR Rules, there will be no requirement to obtain creditor approval of the administrator's statement of proposals where a direction is given by the FCA.

Meetings generally

C.12 As with Rules 68 to 84 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will contain provisions setting out the procedural requirements for convening meetings, including notice and quorum requirements.

C.12.1 Rules 76 and 77 of the Investment Bank SAR Rules set out the process for convening a requisitioned meeting requested under paragraph 56(1) of Schedule B1 of the Insolvency Act 1986 and will also be included in the PI and EMI SAR Rules.

Entitlement to vote at meetings

C.13 As per Rules 85, 87, 88 and 89, the PI and EMI SAR Rules will contain provisions setting out the entitlement for creditors to vote and the calculation of their voting rights.

C.13.1 Rule 86 of the Investment Bank SAR Rules outlines the voting rights of the FSCS. PIs and EMIs do not benefit from FSCS coverage, and so this rule will be omitted from the PI and EMI SAR Rules.

C.13.2 Rules 90 and 91 of the Investment Bank SAR Rules set out the entitlement for clients to vote where the insolvent institution holds client assets (which includes client money) on their behalf as well as the calculation method for such clients' voting rights. Hence these provisions will also apply to the PI and EMI SAR Rules with certain modifications (e.g. to reflect that the only form of client assets held by a PI or EMI are client money, being "relevant funds"). Following the Investment Bank SAR Rules, where a user or holder suffers a shortfall as a result of there being insufficient relevant funds in the asset pool available for distribution, and to the extent that such user or holder claims for such shortfall as an unsecured creditor in accordance with PI and EMI SAR Regulation 19(4), that user or holder will also be entitled to vote as creditor up to the value of the shortfall. Correspondence and remote attendance

C.13.3 Following Rules 97 to 101 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will contain provisions describing the process by which written resolutions may be used by the administrators instead of convening a meeting, the ability to hold meetings which allow for remote attendance and remedies where persons have been excluded from meetings that are held remotely.

Records, returns and reports

C.14 The PI and EMI SAR Rules will, as do Rules 102 and 103 of the Investment Bank SAR Rules, contain provisions setting out the requirement to keep minutes and records of all meetings.

The creditors' committee

C.15 Following Rules 104 to 121 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will contain provisions setting out (i) how a creditors' committee is to be constituted (ii) the functions of such committee and (iii) the formalities for decision-making by the committee.

Progress reports

C.16 As with Rules 122 and 123 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will contain provisions setting out the administrator's obligations regarding the compilation and issuance of progress reports.

Proxies and corporate representation

C.17 As per Rules 124 to 130 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will contain provisions regarding the use of proxies and company representation.

Disposal of charged property

C.18 As per Rule 131 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will contain a provision regarding applications made to dispose of charged property.

C.18.1 Rule 132 of the Investment Bank SAR Rules relates to deposit-taking institutions. PIs and EMIs cannot undertake deposit taking activities, and so this rule will be omitted from the PI and EMI SAR Rules.

Part 4: Expenses of the special administration

C.19 Rules 133 to 137 of the Investment Bank SAR Rules set out how the expenses of the special administration should be paid and whether from the institution's own assets or the asset pool, together with the order of priority of such expenses. Similar provisions will be included in the PI and EMI SAR Rules with certain modifications, including but not limited to:

- an amendment to the equivalent of Rule 134 of the Investment Bank SAR Rules to make clear that costs incurred by the administrator in consequence of a breach of the safeguarding regime will be paid out of the institution's own assets to the extent these have been agreed by the creditors' committee or approved by the court in accordance with the equivalent of Regulation 19A of the Investment Bank SAR Regulations and
- an amendment to the equivalent of Rule 135 of the Investment Bank SAR Rules to state expressly that the administrator is entitled to recover from the asset pool the costs of constituting, reconstituting and reconciling the asset pool together with any shortfall in respect of expenses incurred by the administrator in consequence of a breach of the safeguarding regime and which have not been met out of the institution's own assets.

C.19.1 Certain rules contained in Part 4 of the Investment Bank SAR Rules will be inapplicable to small PIs who have elected not to safeguard voluntarily in accordance with regulation 23(16) of the Payment Services Regulations 2017.

C.19.2 Following Rule 137 (Allocation of expenses to be paid from client assets) of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out how expenses are to be allocated between asset pools where more than one asset pool has been constituted by the administrator in respect of that institution. This will only be relevant in the limited instances where an institution carries on both PI and EMI functions and therefore has two separate asset pools for each type of business.

C.19.3 Rule 137(2) of the Investment Bank SAR Rules provides that where there is a shortfall in the amount of assets to be returned to a client, that shortfall is to be treated as a debt owed to the client. This is consistent with the intention to allow for clients to claim as unsecured creditors for the amount of any shortfall suffered as

a result of there being insufficient relevant funds in the asset pool available for distribution.

C.19.4 An additional rule is also required in this part to deal expressly with the allocation of costs and expenses incurred in connection with returning post-insolvency receipts which for the avoidance of doubt are to be allocated on an individual user / holder basis (rather than mutualised basis across all users / holders).

Part 5: Objective 1

Setting a bar date (soft bar date and hard bar date)

C.20 Notwithstanding that Rules 138(1) to (5) of the Investment Bank SAR Regulations will be largely replicated in the PI and EMI SAR Regulations, similar provisions will also be included in the PI and EMI SAR Rules. This is consistent with the Investment Bank SAR which sets out the bar date notice requirements at Regulation 12E of the Investment Bank SAR Regulations as well as in Rule 138 of the Investment Bank SAR Rules. Notice of a bar date is to be given to all persons whom the administrator believes to have a right to assert a security interest or other entitlement over the client assets. Given relevant assets are trust assets however, in respect of which a trust arises upon receipt of funds, security would not attach to such assets.

C.20.1 As the administrator is unable to set a hard bar date without the permission of the court, and the court must be reasonably satisfied that (i) the administrator has taken all reasonable measures to identify and contact persons who may be entitled to the return of relevant funds (please see comments below at paragraph 5.4 in regards to the reasonable measures to be taken by the administrator) and (ii) there is no reasonable prospect that the administrator will receive any further claims for relevant funds after such date, before approving the setting of a bar date, Rules 138 (6) and (7) which allow for a claimant or the FCA to submit a request to submit a claim following the bar date will not be replicated in the PI and EMI SAR Rules in respect of hard bar dates as this could undermine certainty and be disruptive to the distribution process which has otherwise been sanctioned by the court.

C.20.2 Following Rules 139 to 142, the PI and EMI SAR Rules will set out the contents of a claim for relevant funds, provide that the costs for making a claim will lie with the claimant and set out the position where a new administrator is appointed.

C.20.3 Authorised and small PIs that voluntarily safeguard are only required to safeguard funds that are received from or for the benefit of payment service users, or from payment service providers, for the execution of a payment transaction for a payment service user ("Payment Transactions") and authorised and small EMIs that voluntarily safeguard are only required to safeguard funds that are received for Payment Transactions or which are received in exchange for electronic money that has been issued. They may in some instances receive amounts of money from users or holders that relate to both payment and non-payment services (see regulation 23(2) of the Payment Services Regulations 2017 and regulation 20(3) of the Electronic Money Regulations 2011). Where the precise amount attributable to payment services and subject to the safeguarding requirements is unknown, the institution must make a reasonable estimation of the amount that it has received for a payment transaction and safeguard that portion only. Reconciling this information

may give rise to discrepancies between the administrator and the user or holder when constituting the asset pool. Additional rules will be included in the PI and EMI SAR Rules to set out the process for determining a claim that is in dispute.

Further notification

C.21 Following Rule 143 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will include a requirement for the administrator to notify, after the bar date (whether soft bar date or hard bar date) has passed, any users or holders that have not made a claim where the administrator expected them to do so.

Distribution plan

C.22 Following Rules 144 to 147 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out (i) the particulars to be included in any distribution plan prepared by the administrator for the return of relevant funds which are comprised in the asset pool, (ii) the means of seeking approval for the distribution plan and (iii) the treatment of late claimants.

C.22.1 Certain modifications will however need to be made to the Investment Bank SAR Rules included in this Chapter to reflect that (i) PIs and EMIs do not hold any client assets other than relevant funds, and (ii) relevant funds that are received by an authorised EMI, small EMI in relation to unrelated payment services, authorised PI or small PI which has elected to safeguard voluntarily are subject to a trust immediately upon receipt and therefore will not be subject to any third party security interest.

Closing of the asset pool

C.23 Given the lack of distribution rules in place for PIs and EMIs, provisions similar to CASS rules 7A.2.6.AR to 7A.2.6.FR, which set out 'reasonable measures' that the administrator needs to take before a hard bar takes effect, will be incorporated into the PI and EMI SAR Rules. These provisions would:

- address the position in respect of relevant funds that are disclaimed
- set out the reasonable steps that an administrator must take to notify claimants that they have a valid claim to the asset pool prior to the bar date taking effect and
- allow the administrator to use allocated but unclaimed (or disclaimed) entitlements and unallocated relevant funds towards a shortfall in the asset pool after payment of costs.

Part 6: Distributions to creditors

Application

C.24 As with Rules 148 to 151 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out how distributions are to be made to creditors (other than secured creditors), the ranking of such debts, and how unsold assets are to be divided amongst the institution's creditors.

Proofs of debt

C.25 Following Rules 152 to 159 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out how a creditor is to prove in the special administration, the procedure for submitting proof of debt, the costs of proving, and how the

administrator may evaluate submitted proofs of debt together with the process for appealing any determination made by the administrator.

Quantification of claims

C.26 As in Rules 160 to 186 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out how creditors' claims should be treated with certain modifications. For example, rights granted to the Bank of England and the FSCS to partake in the quantification process as a result of an institution being placed into special administration (bank insolvency) or special administration (bank administration) will be omitted as these insolvency processes are irrelevant in the context of the PI and EMI SAR regime.

Part 7: The administrator

Powers of the administrator

C.27 As per Rules 187 to 195 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out the powers of the administrator, including the power of disclaimer which is available to a special administrator pursuant to the Investment Bank SAR.

Fixing of remuneration

C.28 Following Rule 196 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will include provisions concerning the fixing of remuneration. To the extent not clarified in the equivalent of Rules 134 and 135 of the Investment Bank SAR Rules, this rule will need to be amended to make clear that (i) costs incurred by the administrator in consequence of a breach of the safeguarding regime will be paid out of the institution's own assets, and (ii) costs incurred by the administrator in constituting, reconstituting and reconciling the asset pool will be paid out of the asset pool.

C.28.1 Rules 197 and 198 of the Investment Bank SAR Rules relate to instances where a special administration (bank insolvency) or special administration (bank administration) is underway and will be omitted from the PI and EMI SAR Rules.

C.28.2 As per Rules 199 to 205 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out details in regards to (i) how remuneration can be revised, (ii) the course of action where remuneration is considered excessive, (iii) the review of remuneration, and (iv) apportionment of remuneration if a new administrator takes office, in each case with certain limited modifications.

Replacing the administrator

C.29 Following Rules 206 to 219 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out the procedures for replacing an administrator with certain limited modifications.

C.29.1 Rules 213, 214 and 217 of the Investment Bank SAR Rules relate to instances where special administration (bank insolvency) or special administration (bank administration) has been made and will be omitted from the PI and EMI SAR Rules.

Part 8: End of special administration

C.30 Following Rules 220 to 224 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out the procedure by which a special administration can be brought to an end.

Part 9: Court procedure and practice

C.31 As in Rules 225 to 277 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out the specific procedural requirements in relation to court proceedings. The Insolvency Rules Committee will be consulted in due course in finalising the detail of the PI and EMI SAR Rules.

Part 10: Prohibited names

C.32 As per Rules 278 to 282 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will set out the process for obtaining court consent where a prohibited name is to be used and also details of the exceptions to Section 216 of the Insolvency Act 1986.

Part 11: Provisions of general effect

C.33 Following Rules 283 to 325 of the Investment Bank SAR Rules, the PI and EMI SAR Rules will contain provisions of general effect with certain limited modifications.

C.33.1 Rule 327 of the Investment Bank SAR Rules permits the relevant “Authority” to intervene when proceedings have been initiated to wind up the institution or appoint an administrator and convert such insolvency proceedings to a special administration. A similar provision will be included in the PI and EMI SAR Rules. It will give the FCA step in rights on the occurrence of an insolvency event in relation to the institution, including if the institution is a small PI that does not voluntarily safeguard.

Part 12: General interpretation and application

C.34 The PI and EMI SAR Rules will contain certain provisions of interpretation, based on Rules 328 to 334 of the Investment Bank SAR Rules,

Schedule 1: Punishment of offences

C.35 The PI and EMI SAR Rules will contain a schedule setting out the punishment of offences in terms similar to the Schedule to the Investment Bank SAR Rules

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