HM Treasury

Insolvency changes for payment and electronic money institutions: consultation

December 2020

HM Treasury

Insolvency changes for payment and electronic money institutions: consultation

December 2020

This publication is available at: www.gov.uk/official-documents.

Any enquiries regarding this publication should be sent to us at public.enquiries@hmtreasury.gov.uk

ISBN: 978-1-911680-15-4

PU: 3057

Contents

Chapter 1
Introduction

1.1 Payments in the UK have seen rapid change over recent years with people increasingly using card, mobile and electronic wallets to make payments. These changes offer opportunities for UK businesses and consumers, with many making payments faster, cheaper and more securely. However, and as will always be the case with a rapidly changing technological landscape, they also present new challenges and risks.

1.2 The Payment Institutions (PIs) and Electronic Money Institutions (EMIs) providing these services have diverse business models that range from small money remittance firms to non-bank current account providers targeting SMEs, the under-banked, and the digital generation. Consumers and businesses are increasingly using PIs and EMIs as their transactional banking provider to, among other things, access their salaries and savings as well as make payments.

1.3 Given the pace of change, an HM Treasury-led Payments Landscape Review was announced in June 2019. As a first part of this Review, a Call for Evidence was launched, which asked questions about the opportunities, gaps and risks that need to be addressed to ensure that the UK remains at the cutting edge of payments technology. This Call for Evidence closed on 20 October and the Government is now considering the responses and will publish its response in due course.

1.4 However, there is evidence that the existing insolvency process for PIs and EMIs is suboptimal with regards to consumers. Recent administration cases involving PIs and EMIs have taken years to resolve in some cases, with customers left without access to their money for prolonged periods and receiving reduced monies after the cost of distribution. In six recent cases of PIs and EMIs in insolvency proceedings (of which three started in 2018), only one has so far returned funds to customers.

1.5 The Government is therefore proposing to introduce changes that will help protect customers in the event of a PI or EMI being put into insolvency. As these changes can be delivered relatively quickly and could mitigate harms from any future insolvencies, the Government believes it is appropriate to progress these changes before the conclusion of the Payments Landscape Review is published. This will in turn strengthen confidence in the payment and e-money sectors by improving customer and market outcomes.

1.6 To address the shortcomings of the current insolvency regime, the Government proposes introducing a bespoke Special Administration Regime (SAR) for PIs and EMIs.

1.7 The proposed SAR is intended to have the following key features:

- an explicit objective on the special administrator to return customer funds as soon as reasonably practicable
- a bar date for client claims to be submitted to speed up the distribution process
- a mechanism to facilitate the transfer of customer funds to a solvent institution
- a post-administration reconciliation to top-up or drawdown funds to or from the safeguarding process
- provisions for continuity of supply to minimise disruption
- rules for treatment of shortfalls in the institutions' safeguarding accounts
- rules for allocation of costs
- an explicit objective on the special administrator for timely engagement with payment systems and authorities

1.8 The Financial Services and Markets Act 2000 (FSMA) Part 24 provides the Financial Conduct Authority (FCA) with specific powers to protect consumers in an insolvency process of an FCA authorised firm. While the Payment Services Regulations 2017 (PSRs) and Electronic Money Regulations 2011 (EMRs) incorporate some FSMA insolvency provisions, we propose extending the full suite of provisions to PIs and EMIs so that the FCA has the same rights to participate and protect consumers in an insolvency process for PIs and EMIs, as it does for other FCA supervised firms.

1.9 Subject to certain exclusions, the scope of the proposed SAR covers all PIs and EMIs, by reference to the PSRs and EMRs respectively. The scope of the proposed application of Part 24 FSMA powers would be to all PIs and EMIs entering the standard insolvency process.

1.10 This consultation seeks views on the introduction of a SAR for PIs and EMIs and the proposal to extend the remaining provisions of FSMA Part 24 to PIs and EMIs.

1.11 Two annexes are attached providing details of the draft regulations for the proposed SAR. The regulations will create the new regime. On 17 December the Government will publish a further annex with details regarding rules for the proposed SAR. The rules will be closely related to the Investment Bank SAR rules with minor modifications.

1.12 Responses are requested by 23:59 on 14 January 2021. For responses specifically on proposals for the rules published on 17 December, we will take responses for a further two weeks until 23:59 on 28 January 2021. The Government cannot guarantee that responses received after these dates will be considered.

1.13 This document is available electronically at www.gov.uk/treasury. You may make copies of this document without seeking permission. Printed copies of the document can be ordered on request from the address below.

1.14 Responses can be sent by email to pemisar@hmtreasury.gov.uk. Alternatively, they can be posted to:

Resilience and Resolution
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

1.15 When responding, please state whether you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make clear who the organisation represents and, where applicable, how the views of members were assembled.

Processing of personal data and confidentiality

This notice sets out how we will use your personal data, and your rights under the Data Protection Act 2018 (DPA).

Your data (Data Subject Categories)

The personal information relates to members of the public, parliamentarians, and representatives of organisations or companies.

The data we collect (Data Categories)

Information may include the name, address, email address, job title, and employer of the correspondent, as well as their opinions. It is possible that respondents will volunteer additional identifying information about themselves or third parties.

Purpose

The personal information is processed for the purposes of obtaining the opinions of members of the public and representatives of organisations and companies, about departmental policies, proposals, or generally to obtain public option data on an issue of public interest.

Legal basis of processing

The processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the HM Treasury. The task is consulting on departmental policies or proposals, or obtaining opinion data, in order to develop good effective policies.

Who we share your responses with (Recipients)

Information provided in response to a consultation may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004 (EIR).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Treasury.

Where someone submits special category personal data or personal data about third parties, we will endeavour to delete that data before publication takes place.

Where information about respondents is not published, it may be shared with officials within other public bodies involved in this consultation process to assist us in developing the policies to which it relates. Examples of these public bodies appear at: https://www.gov.uk/government/organisations.

As the personal information is stored on our IT infrastructure, it will be accessible to our IT contractor NTT. NTT will only process this data for our purposes and in fulfilment with the contractual obligations they have with us.

How long we will hold your data (Retention)

Personal information in responses to consultations will generally be published and therefore retained indefinitely as a historic record under the Public Records Act 1958.

Personal information in responses that is not published will be retained for three calendar years after the consultation has interest.

Special categories data

Any special categories of data may be processed if such data is volunteered by the respondent.

Basis for processing special category data

Where special category data is volunteered by you (the data subject), the legal basis relied upon for processing it is: The processing is necessary for reasons of substantial public interest for the exercise of a function of the Crown, a Minister of the Crown, or a government department.

This function is consulting on departmental policies or proposals, or obtaining opinion data, to develop good effective policies.

Your rights

You have the right to:

- request information about how your personal data are processed, and to request a copy of that personal data
- request that any inaccuracies in your personal data are rectified without delay
- request that your personal data are erased if there is no longer a justification for them to be processed
- in certain circumstances (for example, where accuracy is contested) request that the processing of your personal data is restricted
- object to the processing of your personal data where it is processed for direct marketing purposes
- data portability, which allows your data to be copied or transferred from one IT environment to another

How to submit a Data Subject Access Request (DSAR)

To request access to personal data that HM Treasury holds about you, contact:

HM Treasury Data Protection Unit
G11 Orange
1 Horse Guards Road
London
SW1A 2HQ
dsar@hmtreasury.gov.uk

Complaints

If you have any concerns about the use of your personal data, please contact us via this mailbox: privacy@hmtreasury.gov.uk

If we are unable to address your concerns to your satisfaction, you can make a complaint to the Information Commissioner, who is an independent regulator. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

0303 123 1113

casework@ico.org.uk

Chapter 2
Scope and objectives

2.1 To address shortcomings with the current insolvency regime, the Government proposes introducing a bespoke SAR for PIs and EMIs. Following the success of The Investment Bank Special Administration Regulations 2011 (Investment Bank SAR), the Government proposes utilising it as a model for this new regime, with appropriate amendments to reflect the operational and regulatory differences between the sectors.

2.2 The Investment Bank SAR was introduced in 2011 following the insolvency of Lehman Brothers. Litigation in this case raised questions around the handling of client money and custody assets following its insolvency, which resulted in it taking several years for a meaningful return of client assets. The introduction of the SAR had a significant impact on the outcomes for clients and the market in insolvencies with recent cases demonstrating a return of client assets within the first year of the firm's insolvency.

2.3 We propose to introduce the key tools in the Investment Bank SAR in the proposed SAR for PIs and EMIs. The key tools of the Investment Bank SAR include:

- an explicit objective for the return of client assets as soon as reasonably practicable
- a bar date for client claims to be submitted to speed up the distribution process
- provisions for continuity of supply to minimise disruption
- an explicit objective for timely engagement with market infrastructure bodies and authorities

The main adjustments to the Investment Bank SAR that the Government proposes to incorporate into the PI and EMI SAR are set out below.

Scope and objectives

2.4 The proposed SAR for PIs and EMIs is expected to have the following key objectives:

- to return customer funds as soon as is reasonably practicable;
- to facilitate timely cooperation with payment systems and authorities; and
- to rescue the institution as a going concern or wind it up in the best interests of the creditors.

2.5 Subject to the exclusions below, the new regime will be applied to all PIs and EMIs by reference to the PSRs and EMRs. This is to ensure that the regime captures institutions that are potentially receiving and safeguarding customer funds either as required by the PSRs and EMRs or, in the case of small PIs, voluntarily doing so. Therefore, on insolvency, the regime will capture all funds and assets that form part of the asset pool under the safeguarding regime.

2.6 The new regime will not apply to institutions which are credit institutions, credit unions, or municipal banks. The special administration (bank insolvency) orders and special administration (bank administration) orders in the Investment Bank SAR will also not be extended to the PI and EMI SAR. PIs and EMIs are not able to undertake deposit taking services and therefore will not be subject to the bank insolvency or bank administration procedures.

SAR Objective 1

2.7 Under the Investment Bank SAR, a special administrator has an explicit objective to return client assets as soon as is reasonably practicable ('Objective 1'). The special administrator has the option to transfer the assets to a solvent firm (so that the business can continue) or return assets back to the clients.

2.8 The PI and EMI SAR will apply this objective to insolvent PIs and EMIs. This will improve outcomes for customers by requiring the administrator to return customer funds as soon as practicable. However, the scope of this objective will be expanded to introduce certain distribution principles tailored to PIs and EMIs. For example, we propose a requirement in the PI and EMI SAR for the special administrator to take reasonable steps to constitute the asset pool given the different safeguarding methods used by PIs and EMIs and determine entitlements to customer funds owed by the PI or EMI before returning customer funds as part of this objective (as further explained below). The legislation will clarify that the special administrator can recover their costs for this process.

SAR Objective 2

2.9 Under the Investment Bank SAR, a special administrator has an explicit objective to cooperate with market infrastructure bodies and authorities ('Objective 2').

2.10 Payment transactions executed by PIs and EMIs often take place through payment systems and other payment infrastructure. In the event of an institution's insolvency, it is vital that the special administrator works with such bodies to stop or complete inflight payment transactions for customers. This will help to increase the speed of returning customer funds and minimise disruption for the market.

2.11 The PI and EMI SAR will amend this objective to include an explicit provision for the special administrator to cooperate in a timely manner with payment systems and other payment infrastructure.

SAR Objective 3

2.12 The PI and EMI SAR will replicate the Investment Bank SAR objective to rescue the institution as a going concern or wind it up in the best interests of the creditors ('Objective 3')

Powers of the appropriate regulator to direct priority of the SAR Objectives

2.13 Regulation 16 of the Investment Bank SAR enables the appropriate regulator to direct the special administrator to prioritise one objective (for example, Objective 1) over other objectives in certain circumstances. This provision will be included in the PI and EMI SAR.

Small Institutions

2.14 There will be limitations in the application of the new regime to small PIs and small EMIs that undertake payment services unrelated to the issuance of e-money. SAR Objective 1 (return of client assets as soon as reasonably practicable) will relate only to the return of "relevant funds" that are voluntarily safeguarded by small payment institutions (or, in relation to funds unrelated to the issuance of e-money) small EMIs in accordance with the PSRs. Those small PIs which are not voluntarily safeguarding will, however, be subject to the remaining elements of the new regime, including Objective 2 and Objective 3 and the application and modification of Schedule B1 of the Insolvency Act 1986.

Box 2.A: Special Administration Regime for Payment and Electronic Money Institutions

1 Do you have any comments on the proposal to introduce a Special Administration Regime for Electronic Money and Payment Institutions?

Chapter 3

Return of customer funds in insolvency

3.1 The PI and EMI SAR will replicate the Investment Bank SAR by providing a special administrator with the objective to return customer funds as soon as reasonably practicable (SAR Objective 1). However, the provisions in the PI and EMI SAR on the distribution of customer funds and the treatment of asset pools will be tailored to reflect the differences between the PI and EMI sectors and investment banks.

3.2 The PSRs and EMRs provide the safeguarding regime for PIs and EMIs but, unlike the detailed provisions contained in the Client Assets Sourcebook (CASS) for investment firms, these regulations contain only high level provisions on the treatment of customer funds in the event of an institution insolvency.

3.3 Certain distribution principles will therefore be codified in the PI and EMI SAR to ensure the special administrator has sufficient certainty on the actions to take when returning customer funds and a reduced need to go to Court for directions. The proposed distribution principles are set out in more detail below.

Trigger of the asset pool

3.4 The current definition of "insolvency event" in the PSRs and EMRs refers to defined insolvency procedures. We propose amending this to include "the entry of an institution into special administration". This will ensure that all customer funds and assets safeguarded by the institution are required to be pooled so that they can be ringfenced for distribution to customers or transferred to a solvent institution. This is consistent with other insolvency events under the PSRs and EMRs.

3.5 We are aware that this amendment may mean that PIs and EMIs will need to change their contractual arrangements in respect of insolvency events. This is likely to be relevant for institutions that safeguard using the insurance or guarantee method.

Reconciliation

3.6 The Investment Bank SAR requires the special administrator, immediately after being appointed, to conduct a post-administration client money reconciliation (based on the reconciliation method previously adopted by the firm in accordance with CASS 7) and to make a transfer to or from the firm's client bank accounts following that reconciliation.

3.7 This policy will be applied in the PI and EMI SAR, whereby the special administrator will be required, immediately after being appointed, to

conduct a post-administration reconciliation (based on the reconciliation method previously adopted by the institution) and to make a transfer to or from the institution's safeguarding accounts following that reconciliation. This will include performing any transfers between client and institution accounts that the institution would have made, but not to rectify or change previous transactions. Where the institution has not previously performed a reconciliation, this requirement will not apply to the special administrator.

Constitution of the asset pool

3.8 Constitution of the asset pool is a separate process to post-administration reconciliation, and it will take place after the post-administration reconciliation process. The PI and EMI SAR will require the special administrator to undertake reasonable efforts to include any customer funds and assets identifiable in any other accounts held by the institution in the asset pool (e.g. relevant funds that were not properly segregated). If there are no such identifiable balances then there is no obligation to move funds from other accounts into the asset pool. We are not aware of any ways in which this could disturb creditor assets given that identifiable money in non-segregated accounts is already part of the trust that contains the property and interests that belong to clients.

3.9 The PI and EMI SAR will additionally include a provision stating that where an institution has used the insurance or guarantee method, there will be a duty on the special administrator to take the necessary steps to ensure that the relevant policy or guarantee provisions are exercised to enable pay-out of proceeds for the asset pool. This will enable the special administrator to prioritise constituting the asset pool (amongst dealing with creditor claims) as part of SAR Objective 1.

3.10 The PI and EMI SAR will not prescribe a specific treatment of interest earned on the asset pool after the firm enters special administration. The treatment of such interest may already be governed by contractual arrangements between the firm and its customers and, in the case of EMIs, by the EMRs (regulation 45).

3.11 The PI and EMI SAR rules will clarify that the special administrator can recover their expenses for constituting the asset pool. Such expenses will come out of the asset pool (rather than the creditor estate). This is consistent with the existing policy on distribution costs under the PSRs and EMRs.

Duty to identify and determine entitlements to customer funds

3.12 The PSRs and EMRs currently require that claims of clients are paid from the asset pool in priority to all other creditors. However, there are no provisions on identifying and valuing entitlements to customer funds owed by the PI or EMI in the PSRs or EMRs respectively. This may create uncertainty for the special administrator on how to establish and calculate client claims.

3.13 The PI and EMI SAR will therefore include a duty on the special administrator to:

- identify the payment service's users and e-money holders who have an entitlement to customer funds

- determine the amount of each payment service's users and each e-money holder's entitlement to customer funds at the precise point the institution entered special administration

Costs

3.14 The Investment Bank SAR requires relevant costs caused by breaches of the client money rules to be borne by the general estate. This provision will be applied in the PI and EMI SAR but amended to refer to breaches of the safeguarding requirements in the PSRs and EMRs (rather than the client money rules). This will clarify that the costs caused by breaches of the safeguarding requirements in the PSRs and EMRs will be required to be borne by the general estate.

Treatment of shortfalls

3.15 In the event of a PI or EMI insolvency, there may be a loss in the asset pool. This is because distribution costs will be deducted from the asset pool, and there may be a shortfall between the amount of customer funds held by the institution and the total amount due to clients. The PSRs and EMRs do not prescribe the treatment of shortfalls on insolvency.

3.16 For investment firms, the CASS rules require shortfalls to be borne pro rata to all clients. The PI and EMI SAR will also require shortfalls arising after insolvency to be borne pro rata across all customers within the asset pool.

3.17 Customers of PIs and EMIs do not currently benefit from FSCS coverage for losses incurred due to a shortfall in the asset pool. An intention under the PI and EMI SAR provision is to clarify that nothing in the regulation affects any right of a user or holder to claim against the general estate for losses incurred as a result of distribution costs and shortfalls in the asset pool.

Bar dates and distribution plan

3.18 The PI and EMI SAR will enable the special administrator to set deadlines for client claims and make interim distributions which cannot be disturbed by future claims (a 'soft' bar date). It will enable the special administrator to set a final deadline after which any remaining assets can be moved to the general estate and close the client estate (a 'hard' bar date). In both cases, the special administrator will be able to set a bar date by issuing a bar date notice.

3.19 The legislation will clarify the form of the bar date notice and that every person who submits a relevant claim bears the cost of making their claim (similar to the Investment Bank SAR). The legislation is also expected to require the special administrator to take reasonable steps to notify all customers who have an entitlement of the fact that they may have a valid claim for relevant funds, prior to the hard bar date taking effect. The legislation is expected to outline minimum customer contact required for this process.

3.20 According to the Investment Bank SAR, after setting a soft bar date, the special administrator is required to draw up a distribution plan in accordance with insolvency rules for the return of client assets. However, this

requirement in the rules currently only appears to apply to custody assets (and not client money).

3.21 The distribution plan is a useful tool for returning client assets in a timely manner. Following this, the PI and EMI SAR will extend the Investment Bank SAR rules to allow the special administrator of a PI or an EMI to draw up a distribution plan for returning customer funds.

Box 3.A: Return of customer funds in insolvency

2 Do you have any comments on the proposed distribution principles?

Chapter 4
Transfer provisions

Transfers

4.1 The Government is proposing applying the transfer provisions in the Investment Bank SAR (post 2016 review) to PIs and EMIs, where a transfer would be to another firm. This will enable the special administrator to do a swift transfer by removing some of the restrictions that usually occur when transferring customer funds and contracts (for example, obtaining client consent).

4.2 The proposed PI and EMI SAR will enable both whole and partial business transfers as provided for by the Investment Bank SAR. However, the PI and EMI SAR will contain some minor amendments to the conditions for using the whole transfer mechanism in respect of the liabilities that are transferred under this mechanism. Specifically, it will not require the transfer of liabilities from the insolvent institution unless they relate to the property rights of the assets being transferred.

4.3 Given that set-off and netting arrangements are not applicable to PIs and EMIs, the proposed PI and EMI SAR is unlikely to contain the set-off and netting arrangements found in the Investment Bank SAR.

Arrangements with agents and distributors

4.4 Many PIs and EMIs provide payment services through agents. If a special administrator is looking to transfer the business of an insolvent PI or EMI, they will need to consider any agency arrangements and whether these need to be re-registered to facilitate the transfer. Therefore, the Government is proposing a provision in the PI and EMI SAR that enables these arrangements to be novated without the special administrator having to obtain consent from the agent for a whole business transfer. This will help to ensure a swift transfer of business.

4.5 EMIs may also engage distributors to distribute and redeem e-money. The Government is therefore proposing to include a provision in the PI and EMI SAR that enables these arrangements to be novated without the special administrator having to obtain consent from the distributor for a whole business transfer.

4.6 The proposed PI and EMI SAR will contain the existing Investment Bank SAR provisions on novation of contracts.

Box 4.A: Transfer provisions

3 Do you have any comments on the proposed transfer provisions?

Chapter 5

Part 24 of the Financial Services and Markets Act

5.1 Part 24 of FSMA provides the FCA with specific powers to participate and protect consumers in an insolvency process of an FCA supervised firm.

5.2 Currently the EMRs incorporate some, but not all of, the FSMA insolvency provisions. We propose extending the full suite of provisions to PIs and EMIs so that the FCA has the same rights to participate and protect consumers in an insolvency process for PIs and EMIs as it does for other FCA supervised firms. The proposed powers are set out in more detail below.

Voluntary arrangements

5.3 The FCA will have the power to participate in proceedings for both company and individual voluntary arrangements and make representations at meetings of creditors. The FCA will also have the power to participate in proceedings for trust deeds for creditors in Scotland.

Administration orders

5.4 The FCA currently have the power to apply to the court to place EMIs and authorised PIs in administration. This power will be extended to include small PIs as the FCA may be involved in such insolvencies, particularly where they hold customer funds.

5.5 The FCA will have the power to participate in proceedings for administrations and make representations at meetings of creditors. In addition, the FCA will also have to consent to the appointment of an administrator by a company or its directors.

Receivership

5.6 The FCA will have the power to participate in proceedings relating to receivers and to attend and make representations at meetings of creditors and receive reports.

Voluntary winding up

5.7 The FCA will have the power to participate in proceedings for voluntary winding up and make representations at meetings of creditors.

Winding-up petitions

5.8 The FCA are currently able to apply to the court for winding up an EMI or authorised PI. This will be extended to small PIs because the FCA may be involved in such insolvencies, particularly where they hold customer funds.

Liquidation

5.9 The FCA will have the power to participate in court proceedings and hearings in relation to a liquidation, and to attend and make representations at meetings of creditors.

Bankruptcy

5.10 The FCA will be able to apply to the court for a bankruptcy order against an individual (for example, a small PI sole trader). The FCA's powers are currently limited to individuals that are or have been an authorised person, or are in breach of the general prohibition.

5.11 The FCA will have the power to participate in proceedings for bankruptcies and to attend and make representations at meetings of creditors and receive reports.

Provisions against debt avoidance

5.12 The FCA will be able to ask the court to set aside transactions which appear to have been entered into to defraud creditors (for example, where assets are transferred as a gift, or sold at less than their full value, with the intention of putting them beyond the reach of creditors).

Illegal activity

5.13 When engaged with an institution, the relevant administrators, receivers, liquidators and insolvency practitioners are required to report to the FCA without delay if it thinks the company (or partnership) is carrying (or has carried) on a regulated activity in contravention of the general prohibition or credit-related regulated activity in contravention. This will be extended to include contraventions of Regulation 138 of the PSRs and Regulation 63 of the EMRs. This will enable the FCA to intervene where the institution has undertaken illegal activities.

Box 5.A: Part 24 of the Financial Services and Markets Act

4 Do you have any comments on the proposal to extend the remaining provisions of Part 24 of FSMA to Electronic Money and Payment Institutions?

Annex A

Details of draft regulations

Draft Regulations laid before Parliament under section 235(2) of the Banking Act 2009 as applied and modified by regulation 24A and paragraph 4 of Schedule 2ZA to the EMR 2011 and regulation 23A and paragraph 4 of Schedule 3A to the PSR 2017, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2021 No.

FINANCIAL SERVICES AND MARKETS

The Payment and Electronic Money Institution Special Administration Regulations 2021

Made - - - -	*[ ]*
Laid before Parliament	*[ ]*
Coming into force - -	*[ ]*

The Treasury make these Regulations in exercise of the powers conferred by sections 233 and 234 of the Banking Act 2009([1]) as applied and modified by regulation 24A and paragraphs 2 and 3 of Schedule 2ZA to the Electronic Money Regulations 2011([2]) ("EMR 2011") and regulation 23A and paragraphs 2 and 3 of Schedule 3A to the Payment Services Regulations 2017([3]) ("PSR 2017").

The Treasury has consulted in accordance with section 235(3) of that Act as applied and modified by regulation 24A and paragraph 4 of Schedule 2ZA to the EMR 2011 and regulation 23A and paragraph 4 of Schedule 3A to the PSR 2017.

A draft of these Regulations has been laid before and approved by a resolution of each House of Parliament in accordance with section 235(2) of that Act as applied and modified by regulation 24A and paragraph 4 of Schedule 2ZA to the EMR 2011 and regulation 23A and paragraph 4 of Schedule 3A to the PSR 2017.

([1]) 2009 c. 1.

([2]) S.I. 2011/99. Regulation 24A and Schedule 2ZA were inserted by S.I. 2020/1275.

([3]) S.I. 2017/752. Regulation 23A and Schedule 3A were inserted by S.I. 2020/1275.

Citation

1. These Regulations may be cited as the Payment and Electronic Money Institution Special Administration Regulations 2021.

Commencement

2. These Regulations come into force on [ ].

Extent

3. These Regulations extend to England and Wales, Scotland and Northern Ireland.

Definitions

4. The following definitions apply to these Regulations or may be seen at the places indicated—

Word or expression	*Meaning*
the BA 2009	The Banking Act 2009
the DA 1986	The Company Directors Disqualification Act 1986([4])
the FSMA 2000	The Financial Services and Markets Act 2000([5])
the IA 1986	The Insolvency Act 1986([6])
the EMR 2011	The Electronic Money Regulations 2011
the PSR 2017	The Payment Services Regulations 2017
administrator (except in the expression administrator under Schedule B1)	person appointed in accordance with regulation 7
asset pool (in the case of electronic money institutions)	(a) in the case of funds received for the execution of payment transactions which are not related to the issuance of electronic money, see regulation 23(18) of the PSR 2017([7]), or (b) in any other case, see regulation 24(4) of the EMR 2011
asset pool (in the case of payment institutions)	see regulation 23(18) of the PSR 2017
authorised payment institution	see regulation 2(1) of the PSR 2017
Authorities	the Bank of England, the Treasury and the FCA

([4]) 1986 c. 46.

([5]) 2000 c. 8.

([6]) 1986 c. 45.

([7]) Regulation 23 of the Payment Services Regulations 2017 applies to funds received by an electronic money institution for the execution of payment transactions which are not related to the issuance of electronic money by virtue of regulation 20(6) of the Electronic Money Regulations 2011.

contributory	has the same meaning as in the IA 1986 (see section 79 of that Act)
court	(a) in England and Wales, the High Court, (b) in Scotland, the Court of Session, and (c) in Northern Ireland, the High Court
electronic money	has the same meaning as in the EMR 2011 (see regulation 2(1) of those Regulations)
electronic money institution	see regulation 2(1) of the EMR 2011
FCA	Financial Conduct Authority
holder	electronic money holder
insolvency rules	rules made under section 411 of the IA 1986 as applied and modified by regulation [ ]
institution	payment institution or electronic money institution
institution's own bank accounts	includes any account, other than a relevant funds account, opened by the administrator for the purposes of the special administration
Objective 1	has the meaning given in regulation in 12(2)
Objective 2	has the meaning given in regulation in 12(3)
Objective 3	has the meaning given in regulation in 12(4)
payment institution	authorised payment institution or small payment institution
payment system	has the same meaning as in the Banking Act 2009 (see section 182 of that Act)
payment system operator	has the same meaning as in the Banking Act 2009 (see section 183 of that Act)
payment transaction	has the same meaning as in the PSR 2017 (see regulation 2(1) of those Regulations)
prescribed	prescribed by insolvency rules
relevant funds (in the case of electronic money institutions)	(a) in the case of funds received for the execution of payment transactions which are not related to the issuance of electronic money, see regulation 23(1) and (2) of the PSR 2017 (b) in any other case, see regulation 20(1) of the EMR 2011
relevant funds (in the case of payment institutions)	see regulation 23(1) and (2) of the PSR 2017

relevant funds account	account which an institution maintains in order to safeguard relevant funds
relevant funds claim	claim, of a user or holder, for the return of relevant funds
safeguard (in the case of electronic money institutions)	(a) in the case of relevant funds received for the execution of payment transactions which are not related to the issuance of electronic money, has the same meaning as in the PSR 2017 (see regulation 23 of those Regulations), or (b) in any other case, has the same meaning as in the EMR 2011 (see regulations 20 to 22 of those Regulations)
safeguard (in the case of payment institutions)	has the same meaning as in the PSR 2017 (see regulation 23 of those Regulations)
Schedule B1	Schedule B1 to the IA 1986
Schedule B1 administration	the administration procedure set out in Schedule B1
securities	financial instruments as defined in regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003
small electronic money institution	see regulation 2(1) of the EMR 2017
small payment institution	see regulation 2(1) of the PSR 2017
special administration	has the meaning given in regulation 6
special administration objectives	Objective 1, Objective 2 and Objective 3
special administration order	has the meaning given in regulation 7
statement of proposals	statement of proposals drawn up by the administrator in accordance with— (a) Schedule B1, paragraph 49 (as applied by regulation [ ]), or (b) where the FCA has given a direction, regulation [ ]
user	payment service user (see regulation 2(1) of the PSR 2017)
voluntarily safeguarded (in the case of small electronic money institutions)	voluntarily safeguarded pursuant to regulation 20(6) of the EMR 2011 and regulation 23(16) of the PSR 2017
voluntarily safeguarded (in the case of small payment institutions)	voluntarily safeguarded pursuant to regulation 23(16) of the PSR 2017

Other interpretation

5.—(1) In these Regulations, any reference to an institution being unable to pay its debts is to be read in accordance with section 93(4) of the BA 2009.

(2) In these Regulations, "fair" is to be read in accordance with section 93(8) of the BA 2009.

(3) Expressions used in these Regulations and in the IA 1986 have the same meaning as in that Act.

(4) Expressions used in these Regulations and in the Companies Act 2006 have the same meaning as in that Act.

Overview

6.—(1) These Regulations set out a procedure to be known as payment institution or electronic money institution special administration.

(2) The main features of special administration are that—

(a) an institution enters the procedure by court order,

(b) the order appoints an administrator,

(c) special administration objectives apply, and the administrator is to pursue those objectives in accordance with the statement of proposals,

(d) in other respects the procedure is the same as for Schedule B1 administration, subject to modifications and the inclusion of certain liquidation provisions of the IA 1986, and

(e) Part 24 of FSMA 2000 (which confers powers on the FCA in relation to insolvency proceedings) applies, subject to modifications.

(3) Regulation 12(10) provides that regulations 12(2) and (6) and 13 to 23 (which all relate to Objective 1) do not apply in relation to certain funds not being voluntarily safeguarded by small payment institutions and small electronic money institutions.

(4) Regulation [ ] and Schedule [ ] set out how references to enactments in these Regulations are to be read in respect of Northern Ireland.

Special administration order

7.—(1) A special administration order is an order appointing a person as the administrator of an institution.

(2) A person is eligible for appointment as administrator under a special administration order if they are a qualified person (within the meaning of section A54(1) of the IA 1986) in relation to the institution.

(3) An appointment may be made only if the person has consented to act.

(4) For the purpose of these Regulations—

(a) an institution is "in special administration" while the appointment of the administrator has effect,

(b) an institution "enters special administration" when the appointment of the administrator takes effect,

(c) an institution ceases to be in special administration when the appointment of the administrator ceases to have effect in accordance with these Regulations, and

(d) an institution does not cease to be in special administration merely because an administrator vacates office (by reason of resignation, death or otherwise) or is removed from office.

Application for order

8.—(1) An application to the court for a special administration order may be made to the court by—

(a) the institution,

(b) the directors of the institution,

(c) one or more creditors of the institution,

(d) the designated officer for a magistrates' court in the exercise of the power conferred by section 87A of the Magistrates' Courts Act 1980 (fines imposed on companies),

(e) a contributory of the institution, subject to paragraph (7),

(f) a combination of persons listed in sub-paragraphs (a) to (e),

(g) the Secretary of State, or

(h) the FCA.

(2) Where an application is made by a person other than the FCA, the FCA is entitled to be heard at—

(a) the hearing of the application for a special administration order, and

(b) any other hearing of the court in relation to the institution under these Regulations.

(3) An application must nominate a person to be appointed as the administrator.

(4) As soon as is reasonably practicable after making the application, the applicant must notify—

(a) a person who gave notice to the FCA in accordance with Condition 1 of regulation 11, and

(b) such other persons as may be prescribed.

(5) An application may not be withdrawn without the permission of the court.

(6) In paragraph (1)(c), "creditor" includes a contingent creditor and a prospective creditor.

(7) A contributory ("C") is not entitled to make an application for a special administration order unless either—

(a) the number of members is reduced below 2, or

(b) the shares in respect of which C is a contributory, or some of them, either were originally allotted to C, or have been held by C and registered in C's name, for at least 6 months during the 18 months before the commencement of the special administration, or have devolved on C through the death of a former holder.

Grounds for applying

9.—(1) In this regulation—

(a) Ground A is that the institution is, or is likely to become, unable to pay its debts,

(b) Ground B is that it would be fair to put the institution into special administration, and

(c) Ground C is that it is expedient in the public interest to put the institution into special administration.

(2) The FCA or a person listed in regulation 8(1)(a) to (f) may apply for a special administration order only if they consider that Ground A or Ground B is met.

(3) The Secretary of State may apply for a special administration order only if it appears to the Secretary of State that Grounds B and C are met.

(4) The sources of information on the basis of which the Secretary of State may reach a decision on Ground C include those listed in section 124A(1) of the IA 1986 (petition for winding up on grounds of public interest).

Powers of the court

10.—(1) On an application for a special administration order the court may—

(a) grant the application in accordance with paragraph (2);

(b) dismiss the application;

(c) adjourn the hearing (generally or to a specified date);

(d) make an interim order;

(e) on the application of the FCA, treat the application as an administration application by the FCA under Schedule B1 in accordance with section 359(1) of FSMA 2000;

(f) make any other order which the court thinks appropriate.

(2) The court may make a special administration order if it is satisfied that the institution is incorporated in, or formed under the law of any part of, the United Kingdom and—

(a) on the application of persons listed in regulation 8(1)(a) to (e) or the FCA, that Ground A or Ground B in regulation 9 is satisfied, or

(b) on the application of the Secretary of State, if satisfied that Grounds B and C in regulation 9 are satisfied.

(3) Where the application for a special administration order is made by members of the institution as contributories on the basis that Ground B in regulation 9 is satisfied, the court, if it is of the opinion that—

(a) the applicants are entitled to relief either by a special administration order being made in respect of the institution or by some other means, and

(b) in the absence of any other remedy it would be fair that the special administration order be made in respect of the institution,

must make a special administration order.

(4) But paragraph (3) does not apply if the court is also of the opinion that an alternative remedy is available to the applicants and that they are acting unreasonably in applying for a special administration order instead of pursuing that other remedy.

(5) A special administration order takes effect in accordance with its terms.

Notice to FCA: other proceedings

11.—(1) Insolvency proceedings other than special administration may not be commenced in respect of an institution unless all of Conditions 1 to 4 are satisfied.

(2) Commencing other insolvency proceedings means, for the purposes of paragraph (1)—

(a) making an application for an administration order,

(b) presenting a petition for winding up,

(c) proposing a resolution for voluntary winding up, or

(d) appointing an administrator under Schedule B1.

(3) Condition 1 is that the FCA has been notified (as the case may be) that—

(a) an application for an administration order has been made,

(b) a petition for a winding up order has been presented,

(c) a resolution for voluntary winding up has been proposed by the institution, or

(d) a resolution for the appointment of an administrator under Schedule B1 has been proposed.

(4) Condition 2 is that a copy of the notice complying with Condition 1 has been filed (in Scotland, lodged) with the court (and made available for public inspection by the court).

(5) Condition 3 is that—

(a) the period of 2 weeks, beginning with the day on which the notice is received by the FCA, has ended, or

(b) the FCA has informed the person who gave the notice that it consents to the proceedings to which the notice relates going ahead.

(6) Condition 4 is that no application for a special administration order is pending.

(7) Where the FCA receives notice under Condition 1, it must inform the person who gave the notice, within the period in Condition 3—

(a) whether or not it consents to the proceedings to which the notice relates going ahead,

(b) whether or not it intends to apply for those (or alternative) proceedings itself, or

(c) whether it intends to apply for a special administration order.

(8) Arranging for the giving of the notice in order to satisfy Condition 1 may be treated as a step with a view to minimising the potential loss to the institution's creditors for the purpose of section 214 of the IA 1986 (as applied by regulation [ ]).

Special administration objectives

12.—(1) The administrator has the following special administration objectives.

(2) Objective 1 is to ensure the return of relevant funds as soon as is reasonably practicable in accordance with regulations 13 to 23, subject to paragraph (10).

(3) Objective 2 is to ensure timely engagement with payment system operators and the Authorities in accordance with regulation 24.

(4) Objective 3 is to either—

(a) rescue the institution as a going concern, or

(b) wind it up in the best interests of the creditors.

(5) The order in which Objectives 1 to 3 are listed in this regulation is not significant.

(6) The administrator is entitled to deal with and return relevant funds in whatever order the administrator thinks best achieves Objective 1.

(7) The administrator must commence work on each objective immediately after appointment, prioritising the order of work on each objective as the administrator thinks fit, in order to achieve the best result overall for users or holders and creditors.

(8) The administrator must set out, in the statement of proposals made under paragraph 49 of Schedule B1 (as applied by regulation [ ]), the order in which the administrator intends to further pursue the objectives once the statement has been approved.

(9) The administrator must work to achieve each objective, in accordance with the priority afforded to the objective, as quickly and efficiently as is reasonably practicable.

(10) Paragraphs (2) and (6) and regulations 13 to 23 do not apply to funds received by—

(a) a small payment institution, or

(b) in the case of funds received for the execution of payment transactions that are not related to the issuance of electronic money, a small electronic money institution,

where those funds were not being voluntarily safeguarded by that institution when it entered special administration([8]).

Objective 1 – initial reconciliation

13.—(1) The administrator must carry out a reconciliation immediately after appointment, subject as follows.

(2) The purpose of the reconciliation is—

(a) to identify any shortfall or excess in an asset pool, according to the institution's own records, which it would have settled, had it not entered special administration, and

(b) to settle this with the institution's own bank accounts.

(3) The administrator must carry out the reconciliation using the method adopted by the institution when it last carried out a reconciliation to identify any shortfall or excess in the asset pool and to settle that shortfall or excess ("last reconciliation").

(4) Paragraph (1) does not apply where the administrator cannot identify any occasion on which the institution carried out a reconciliation of that kind.

([8]) See regulation 23 of the Payment Services Regulations 2017, which applies to funds received by an electronic money institution for the execution of payment transactions which are not related to the issuance of electronic money by virtue of regulation 20(6) of the Electronic Money Regulations 2011.

(5) The reconciliation must be based on the records and accounts of the institution as they stood immediately after the last reconciliation.

(6) The administrator must take no further account—

(a) of money received by the institution, or

(b) of payments, transfers or transactions made by the institution,

of which account was taken in the last reconciliation.

(7) The administrator must take account of—

(a) money received by the institution, and

(b) payments, transfers and transactions made by the institution,

after the institution's last reconciliation and before the appointment of the administrator.

(8) The administrator must, where amount A exceeds amount B, transfer an amount equal to, or as close as possible to, the difference from the institution's own bank accounts to an appropriate relevant funds account.

(9) The administrator must, where amount B exceeds amount A, transfer an amount equal to the difference from the asset pool to the institution's own bank accounts.

(10) "Amount A" means the total amount of relevant funds which the institution is required to safeguard, according to its own records and accounts.

(11) "Amount B" means the total amount of relevant funds which are being safeguarded.

(12) In paragraph (11), the reference to "amount" is—

(a) in the case of liquid assets, a reference to the amount of the cash proceeds of realising those assets without delay, and

(b) in the case of insurance policies or guarantees, to be determined in accordance with the method adopted at the last reconciliation.

Objective 1 – constitution of asset pool

14.—(1) The administrator must take the following steps relating to the constitution of an asset pool—

(a) as soon as reasonably practicable after the reconciliation under regulation 13, or

(b) where regulation 13(4) applies, as soon as reasonably practicable after appointment.

(2) The administrator must—

(a) take reasonable steps to identify any relevant funds held as funds in the institution's own accounts, and

(b) transfer those funds into an appropriate relevant funds account.

(3) The administrator must, where relevant funds are held in the asset pool in the form of liquid assets—

(a) liquidate those assets, and

(b) deposit the cash proceeds in an appropriate relevant funds account.

(4) But paragraph (3) does not apply where the administrator thinks that Objective 1 would be better achieved by continuing, during any period, to hold the relevant funds in the form of liquid assets.

(5) The administrator must, where relevant funds are covered by insurance policies or guarantees, take any steps which are necessary to ensure that, subsequently, at the appropriate time—

(a) claims may be made for the cash proceeds of those policies or guarantees without delay, and

(b) those cash proceeds are deposited in an appropriate relevant funds account without delay.

(6) Nothing in this regulation prevents an administrator from subsequently repeating any of the steps in this regulation, in pursuit of Objective 1.

Objective 1 – monitoring and maintaining asset pool

15.—(1) The administrator must monitor any funds, liquid assets or insurance policies or guarantees held within an asset pool.

(2) That duty includes a duty to compare, from time to time, the institution's internal accounts and records with those of any third party with custody or control over funds or liquid assets held within an asset pool.

(3) The administrator may decide when and how often to perform that comparison depending on—

(a) the circumstances of the institution,

(b) the scale, frequency and nature of activity after its entry into special administration.

(4) The administrator must also maintain any funds, liquid assets or insurance policies or guarantees held within an asset pool.

(5) The administrator must, in carrying out their duty under paragraph (4), have regard to—

(a) whether the asset pool includes funds, liquid assets or insurance policies or guarantees,

(b) the currencies in which funds are held and those in which users or holders have a right to be paid,

(c) whether Objective 1 may be best achieved by changing, at any given time, the currency in which any funds are held,

(d) whether Objective 1 may be best achieved by liquidating, at any given time, liquid assets,

(e) the risk of any third party connected with the asset pool failing,

(f) the general risks of fraud, misuse, negligence or poor administration, and

(g) any other matter which the administrator thinks is relevant.

Objective 1 – post-administration receipts

16.—(1) This regulation applies to relevant funds received by an institution while it is in special administration.

(2) The administrator may only hold the funds in a relevant funds account which does not (or will not) contain relevant funds held when the institution entered special administration.

(3) The account mentioned in paragraph (2) includes an account which existed when the institution entered special administration.

(4) The administrator must promptly return the relevant funds to the user or holder, less any costs of returning them so far as provided in insolvency rules.

Objective 1 – determining claim entitlements

17.—(1) The administrator must, in respect of an asset pool, as soon as reasonably practicable after appointment, determine—

(a) the identity of every user or holder on behalf of whom the institution was required to safeguard, or voluntarily safeguarded, relevant funds, and

(b) for each such person, the amount of relevant funds which it was required to safeguard, or voluntarily safeguarded.

(2) The determination under paragraph (1) must relate to the precise time at which the institution entered special administration.

(3) The administrator may, where making that determination, have regard to the particulars of—

(a) any transactions involving the institution,

(b) the institution's internal records or systems,

(c) any payment systems which the institution participates in (whether directly or indirectly),

(d) any internal or external records involving the institution,

(e) any agency, distribution or outsourcing arrangements the institution has entered into, or

(f) any information obtained through the bar date or hard bar date process set out in regulations 20 and 21 respectively.

(4) Nothing in this regulation prevents an administrator from subsequently revising any determination under paragraph (1), in pursuit of Objective 1.

Objective 1 – overriding principles of distribution

18.—(1) A user's or holder's entitlement to a distribution of relevant funds from an asset pool must be determined by reference to the amount of relevant funds which that person is entitled to claim against the institution (see regulation 17).

(2) Regulation 19 makes provision about entitlements to a distribution of relevant funds where there is a shortfall in an asset pool.

(3) Relevant funds claims are to be paid from an asset pool in priority to all other claims.

(4) Paragraph (3) is subject to paragraphs (5) and (6) and regulation 21(4).

(5) Relevant funds claims do not take priority over the costs of distribution so far as provided in insolvency rules.

(6) Relevant funds claims do not take priority over any third party's fees and expenses for operating a relevant funds account in so far as the party has a right of set off or a security right against the funds for the fees or expenses.

Objective 1— shortfalls in asset pool

19.—(1) This regulation applies if the administrator becomes aware —

(a) that the amount of relevant funds available for distribution in an asset pool is less than the total amount liable to be paid under relevant funds claims for that asset pool, and

(b) that shortfall cannot be remedied—

(i) by taking any of the steps mentioned in regulation 14 relating to the constitution of the asset pool, or

(ii) by the resolution of ongoing disputes.

(2) The administrator must, in making the distribution, ensure that the shortfall referred to in paragraph (1) be borne pro rata by all users or holders for whom the institution holds relevant funds within the asset pool.

(3) Paragraph (2) is subject to regulations 20 and 21.

(4) Nothing in this regulation affects any right of a user or holder to claim the shortfall borne under paragraph (2) in other ways.

(5) An administrator may not, where an electronic money institution has two asset pools (see regulation 20(6) of the EMR 2011), offset any shortfall in one asset pool against any relevant funds or assets held in the other.

Objective 1 – bar date

20.—(1) The administrator may, if they think it necessary in order to expedite the return of relevant funds from an asset pool, set a bar date for the submission of relevant funds claims.

(2) A bar date must be set by a notice.

(3) A reasonable time must be given after the notice has been published for persons to be able to calculate and submit relevant funds claims in accordance with insolvency rules.

(4) The administrator must, as soon as reasonably practicable after the bar date, make a distribution of relevant funds from the asset pool to persons who are entitled them under their claims.

(5) The administrator must, so far as is reasonably practicable, include within that distribution any person who submits a relevant funds claim after the bar date, but before the return of relevant funds after that date.

(6) The administrator must, when determining the amount to be distributed, make allowance (by way of a subsequent distribution) for the entitlement to the return of relevant funds of persons who have not—

(a) made a relevant funds claim, and

(b) received any payment under a previous relevant funds claim.

(7) No payment or part of any payment made to any person under the distribution may be recovered for the purpose of meeting a late relevant funds claim where the administrator has returned relevant funds after the bar date.

(8) The restriction in paragraph (7) does not apply where—

(a) relevant funds were returned to a person by the administrator in bad faith in which that person was complicit, or

(b) a person to whom relevant funds were returned is later found to have made a false relevant funds claim.

(9) The administrator must include a person in a subsequent distribution from the asset pool where that person meets both Condition 1 and Condition 2.

(10) Condition 1 is that the person makes a relevant funds claim which is received after the bar date other than a claim received after that date from a person who is included within the distribution under paragraph (4).

(11) Condition 2 is that the person would have participated in the distribution under paragraph (3) if the relevant funds claim mentioned in paragraph (10) had been submitted before the return of relevant funds after the bar date.

Objective 1 – hard bar date

21.—(1) The administrator may set a hard bar date for the submission of final relevant funds claims after setting a bar date under regulation 20, if they think it necessary in order to further expedite the return of relevant funds from an asset pool.

(2) A bar date must be set by a notice.

(3) The administrator may not set a hard bar date without the approval of the court given on application by the administrator.

(4) The priority afforded to relevant funds claims under the following provisions does not apply to those made after the hard bar date—

(a) regulation 18(3), and

(b) any provision of the safeguarding provisions.

(5) Nothing in paragraph (4) affects any priority afforded to any relevant funds claim apart from under regulation 18(3) or any provision of the safeguarding provisions.

(6) "Safeguarding provisions" means—

(a) regulation 23 of the PSR 2017, in the case of the following relevant funds—

(i) those received by a payment institution, or

(ii) those received by an electronic money institution for the execution of payment transactions which are not related to the issuance of electronic money, or

(b) regulations 20 to 24 of the EMR 2011, in the case of relevant funds received by an electronic money institution apart from those in sub-paragraph (a)(ii).

(7) No interest is payable on the debt for which a person makes a claim mentioned in paragraph (5), except under paragraph (8).

(8) Interest is payable on such part of the debt which remains after deduction of the total amount which the person would have received by way of a distribution from the asset pool if the claim had been a final relevant funds claim received by the administrator on or before the hard bar date.

(9) A notice under this regulation must—

(a) specify the hard bar date,

(b) state that after the end of that day the administrator may transfer to the institution's own bank accounts any remaining relevant funds held in the asset pool, and

(c) state that after the end of that day the priority afforded to relevant funds claims under regulation 18(3) does not apply but that that does not affect any priority afforded to any relevant funds claim apart from under regulation 18(3) or any provision of the safeguarding provisions.

Objective 1 – hard bar date: powers of the court

22.—(1) On an application under regulation 21(3) for the approval of the court to set a hard bar date the court may—

(a) make an order approving the setting of a hard bar date,

(b) adjourn the hearing of the application conditionally or unconditionally, or

(c) make any other order that the court thinks appropriate.

(2) The court may make an order under paragraph (1)(a) only if—

(a) it is satisfied that the administrator has taken all reasonable measures to identify and contact persons who may be entitled to the return of relevant funds, and

(b) it considers that if a hard bar date is set there is no reasonable prospect that the administrator will receive claims for the return of relevant funds after that date.

Objective 1 – interest on unsecured claims

23.—(1) This regulation applies where—

(a) a debt arises from a liability of the institution to return relevant funds,

(b) the user or holder has not submitted a relevant funds claim, and

(c) the user or holder makes a claim for payment of the debt.

(2) The user or holder is not entitled to interest on the debt for the period commencing on the date on which the institution entered special administration, except interest on such part of the debt which remains after deduction of the total amount which the user or holder would have received on a relevant funds claim.

Objective 2 – payment systems: engagement

24.—(1) The administrator must work with—

(a) a payment system operator to—

(i) facilitate the operation of that operator's rules or arrangements,

(ii) resolve issues arising from the operation of those rules or arrangements, and

(iii) facilitate the transfer, settlement or prompt cancellation of non-settled payments, and

(b) the Authorities and the Payment Systems Regulator([9]), to facilitate any actions they propose to take as a consequence of a special administration order being made in respect of the institution.

(2) In paragraph (1), "work with" means to—

([9]) Established under section 40 of the Financial Services (Banking Reform) Act 2013.

(a) comply, as soon as reasonably practicable, with a written request from a payment system operator or from any of the Authorities and the Payment Systems Regulator for the provision of information or the production of documents (in hard copy or in electronic format) relating to the institution,

(b) allow a payment system operator or any of the Authorities and the Payment Systems Regulator, on reasonable request, access to the facilities, staff and premises of the institution for the purposes set out in paragraph (1),

but no action need be taken in accordance with this paragraph to the extent that, in the opinion of the administrator, such action would lead to a material reduction in the value of the property of the institution.

(3) In the event that the administrator receives a request under paragraph (2) from a payment system operator based overseas, no action needs to be taken in accordance with paragraph (2) if that request conflicts with a request from any of the Authorities and the Payment Systems Regulator.

(4) Where a payment system operator has made a request of the type referred to in paragraph (2), that operator must provide the administrator with such information as the administrator may reasonably require in pursuit of Objective 2.

(5) Under this regulation a person or body may not be required to provide any information—

(a) which they would be entitled to refuse to provide on grounds of legal professional privilege in proceedings in the High Court or on grounds of confidentiality of communications in the Court of Session, or

(b) if such provision by the body holding it would be prohibited by or under any enactment.

Continuity of supply

25.—(1) This regulation applies where, before the commencement of special administration, the institution had entered into arrangements with a supplier for the provision of a supply to the institution.

(2) After the commencement of special administration, the supplier—

(a) may not terminate a supply unless—

(i) any charges in respect of the supply, being charges for a supply given after the commencement of special administration, remain unpaid for more than 28 days,

(ii) the administrator consents to the termination, or

(iii) the supplier has the permission of the court, which may be given if the supplier can show that the continued provision of the supply will cause the supplier to suffer hardship, and

(b) may not make it a condition of a supply, or do anything which has the effect of making it a condition of the giving of a supply, that any outstanding charges in respect of the supply, being charges for a supply given before the commencement of special administration, are paid.

(3) Where, before the commencement of special administration, a contractual right to terminate a supply has arisen but has not been exercised, then, for the purposes of this regulation, the commencement of special administration causes that right to lapse and the supply may only be terminated if a ground in paragraph (2)(a) applies.

(4) Any provision in a contract between the institution and the supplier that purports to terminate the agreement if any action is taken to put the institution into special administration is void.

(5) Any expenses incurred by the institution on the provision of a supply after the commencement of special administration are to be treated as necessary disbursements in the course of the special administration.

(6) In this regulation—

"accredited network provider" means a person accredited with a relevant system who operates a secure data network through which the institution communicates with the relevant system;

"commencement of special administration" means the making of the special administration order,

"relevant system" has the meaning set out in regulation 2(1) of the Uncertificated Securities Regulations 2001,

"sponsoring system participant" has the meaning set out in regulation 3 of the Uncertificated Securities Regulations 2001 (in the definition of "system participant"),

"supplier" means the person controlling the provision of a supply to the institution under a licence, sub-licence or other arrangement, and includes a company that is a group undertaking in respect of the institution, but does not include payment system operators;

"supply" means a supply of—

(a) services relating to the safeguarding of relevant funds;

(b) computer hardware or software or other hardware used by the institution,

(c) financial data,

(d) infrastructure permitting electronic communication services,

(e) data processing,

(f) secure data networks provided by an accredited network provider, or

(g) access to a relevant system by a sponsoring system participant,

but does not include any services provided for in the contract between the institution and the supplier beyond the provision of the supply.

[Further provisions, similar to regulations 10B to 10G and 15 to 27 of and Schedules 3 to 6 to SI 2011/245, and further provisions applying and modifying parts of the FMSA 2000, are explained in the consultation document and are not included in this collection of illustrative provisions.]

Annex B

Further details of draft regulations

B.1 Provisions that the Government proposes to incorporate into the PI and EMI SAR and that are not discussed in Annex A are set out below. The below makes reference to Regulations 10B to 10G and Regulations 15 to 27 of The Investment Bank Special Administration Regulations 2011 and to Part 24 of the Financial Services and Markets Act.

Transfer of client assets

B.2 As per Regulations 10B to 10G of the Investment Bank SAR (Regulation 8 of The Investment Bank (Amendment of Definition) and Special Administration (Amendment) Regulations 2017), transfer provisions are intended to be applied to the PI and EMI SAR. These provisions would enable the special administrator to do a swift transfer by removing some of the restrictions that usually occur when transferring customer funds and contracts (e.g. obtaining client consent). The proposed transfer provisions would not require FCA consent to a transfer.

B.2.1 The proposed PI and EMI SAR transfer provisions will enable both whole and partial business transfers as provided for by the Investment Bank SAR. However, the proposed PI and EMI SAR will contain some minor amendments to the conditions for using the whole transfer mechanism.

B.2.2 The whole transfer mechanism in the Investment Bank SAR currently requires a transfer of "all liabilities of the investment bank". However, we understand that in practice all transfers of firms in the Investment Bank SAR to date have generally been 'partial' transfers because the transferee is unlikely to take on all liabilities of the insolvent firm (instead they have looked to take all, or substantially all, of the client money and/or custody assets along with the client relationships). We are not aware of any whole business transfers that have occurred to date under the SAR and this may be because a whole business transfer requires the transfer of all liabilities of the investment firm.

B.2.3 We recognise that some liabilities need to be transferred as part of the safeguards for protecting property rights using the transfer mechanism - in particular, liabilities associated with client assets, novation of contracts and enabling clients to request the return of any "novated" assets by the transferee firm (i.e. 'reverse transfers'). Therefore, the conditions for using the whole transfer mechanism in the proposed PI and EMI SAR are not intended to require transferring liabilities of the insolvent firm unless they relate to the property rights of the assets being transferred.

B.2.4 The proposed PI and EMI SAR is intended to contain the existing Investment Bank SAR provisions on novation of contracts. The proposed PI and EMI SAR is

intended to further contain reverse transfer provisions that mirror Regulation 10C of the Investment Bank SAR.

B.2.5 The proposed PI and EMI SAR is unlikely to contain the set-off and netting arrangements found in Regulation 10D of the Investment Bank SAR. This is because our understanding is that set-off and netting arrangements are not applicable to PIs and EMIs.

B.2.6 Many PIs and EMIs provide payment services through agents. If a special administrator is looking to transfer the business of an insolvent PI or EMI, they will need to consider any agency arrangements and whether these need to be re-registered to facilitate the transfer. This may delay the transfer process. Therefore, the Government proposes a provision in the PI and EMI SAR that would enable these arrangements to be novated without the special administrator having to obtain consent from and re-register the agents for whole business transfers.

B.2.7 EMIs may also engage distributors to distribute and redeem e-money. An EMI cannot provide payment services through a distributor and distributors do not have to be registered by the FCA. Therefore, the Government proposes a provision in the PI and EMI SAR that enables these arrangements to be novated without the special administrator having to obtain consent from the distributor for a whole business transfer.

B.2.8 The provisions that allow agent and distributor arrangements to be novated is expected to be achieved by the special administrator having the power to:

- transfer the contracts between the PI/EMI and its agent/distributor; and
- amend the contractual arrangements between the agent/distributor and the underlying customers that are related to the issuance of e-money/provision of payment services.

General powers, duties and effect

B.3 As per Regulation 15 of the Investment Bank SAR, the PI and EMI SAR will contain a provision that applies the relevant provisions of the Insolvency Act 1986 with modification where necessary.

B.3.1 This new provision will mirror the general powers, duties and effect regulation in the Investment Bank SAR.

FCA direction

B.4 As per Regulation 16 of the Investment Bank SAR, the PI and EMI SAR will contain a provision that enables the appropriate regulator to direct the special administrator to prioritise one objective (e.g. SAR Objective 1) over other objectives in the SAR.

B.4.1 This new provision will mirror the FCA direction regulation in the Investment Bank SAR. It will specify that this direction may only be given if the FCA is satisfied that the giving of the direction is necessary, having regard to the public interest in:

- the stability of the financial systems of the United Kingdom or
- the maintenance of public confidence in the stability of the financial markets of the United Kingdom.

B.4.2 Further, the provision will specify that before giving such a direction the FCA must consult the Treasury and the Bank of England.

Administrator's proposals in the event of FCA direction

B.5 As per Regulation 17 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that provides for the drawing up of the statement of proposals in the event of the FCA having given a direction.

B.5.1 This new provision will mirror the regulation in the Investment Bank SAR concerning the administrator's proposals in the event of FCA direction.

Revision of proposals in the event of FCA direction

B.6 As per Regulation 18 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that provides for the revision of the statement of proposals in the event of the FCA having given a direction.

B.6.1 This new provision will mirror the regulation in the Investment Bank SAR concerning the revision of proposals in the event of FCA direction.

FCA direction withdrawn

B.7 As per Regulation 19 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that provides for the revision of the statement of proposals in the event of the FCA having withdrawn its direction.

B.7.1 This new provision will mirror the regulation in the Investment Bank SAR concerning FCA direction withdrawal.

Responsibility for certain costs of the administration

B.8 Regulation 19A of the Investment Bank SAR (Regulation 15 of The Investment Bank (Amendment of Definition) and Special Administration (Amendment) Regulations 2017) requires costs caused by breaches of the client money rules to be borne by the general estate.

B.8.1 SAR Regulation 19A will be applied in the PI and EMI SAR but amended to refer to breaches of the safeguarding requirements in the PSRs and EMRs (rather than the client money rules). This will clarify that the costs caused by breaches of the safeguarding requirements in the PSRs and EMRs will be required to be borne by the general estate.

B.8.2 As per Regulation 19A (1) of the Investment Bank SAR, the proposed PI and EMI SAR will contain a provision requiring that where the administrator considers that relevant costs have been incurred in consequence of a failure by the PI or EMI to comply with safeguarding requirements, the administrator must:

- seek the agreement of the creditors' committee as to the amount incurred in consequence of the default, or
- if there is no creditors' committee or the administrator is unable to agree that amount with the creditors' committee, they must apply to the court for an order fixing the amount.

Successful rescue

B.9 As per Regulation 20 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that provides for the ending of special administration in the event that the administrator has pursued the first part of Objective 3 (rescue the firm as a going concern) and thinks that it has been sufficiently achieved.

B.9.1 This new provision will mirror the successful rescue regulation in the Investment Bank SAR.

Dissolution or voluntary arrangement

B.10 As per Regulation 21 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that provides for the ending of special administration in the event that:

- the administrator believes that Objectives 1 and 2 have been sufficiently achieved and
- the administrator pursues the second part of Objective 3 (to wind up the firm in the best interests of the creditors).

B.10.1 This new provision will mirror the regulation in the Investment Bank SAR concerning dissolution or voluntary arrangement.

Special administration order as an alternative order

B.11 As per Regulation 22 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that provides for a special administration order to be made as an alternative order to a winding up petition or an administration order under Schedule B1 to the Insolvency Act 1986.

B.11.1 This new provision will mirror the regulation in the Investment Bank SAR concerning special administration order as an alternative order.

Disqualification of directors

B.12 As per Regulation 23 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that modifies the Company Directors Disqualification Act 1986 to apply in respect of special administration.

B.12.1 This new provision will mirror the disqualification of directors regulation in the Investment Bank SAR.

Limited liability partnerships

B.13 As per Regulation 24 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that states that where a firm is formed as a limited liability partnership, a Schedule concerning the application of these Regulations to limited liability partnerships has effect.

B.13.1 This new provision will mirror the limited liability partnerships regulation in the Investment Bank SAR.

Partnerships

B.14 As per Regulation 25 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that states that where a firm is formed as a partnership, a Schedule concerning the application of these Regulations to partnerships has effect.

B.14.1 This new provision will mirror the partnerships regulation in the Investment Bank SAR.

Northern Irish equivalent enactments

B.15 As per Regulation 26 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that states that in the application of these Regulations to Northern Ireland, a reference to an enactment is to be treated as a reference to the equivalent enactment having effect in relation to Northern Ireland. There will be a Schedule showing the enactments referred to in these Regulations together with the equivalent Northern Ireland enactments.

B.15.1 This new provision will mirror the regulation in the Investment Bank SAR concerning the Northern Irish equivalent enactments.

Modifications and consequential amendments to legislation

B.16 As per Regulation 27 in the Investment Bank SAR, the PI and EMI SAR will contain a provision that states that a Schedule concerning modifications and consequential amendments has effect.

B.16.1 This new provision will mirror the regulation in the Investment Bank SAR concerning modifications and consequential amendments to legislation.

Special administration (bank insolvency)

B.17 This provision will be removed.

Special administration (bank administration)

B.18 This provision will be removed.

Application of these Regulations to limited liability partnerships

B.19 As per Schedule 3 of the Investment Bank SAR, the PI and EMI SAR will contain provisions which modify the regulations to capture LLPs in the regime.

B.19.1 The new provisions will mirror Schedule 3 in the Investment Bank SAR.

Application of these Regulations to partnerships

B.20 As per Schedule 4 of the Investment Bank SAR, the PI and EMI SAR will contain provisions which modify the regulations to capture partnerships in the regime.

B.20.1 The new provisions will mirror Schedule 4 in the Investment Bank SAR.

Table of enactments referred to in these Regulations together with the equivalent enactment having effect in relation to Northern Ireland

B.21 As per Schedule 5 of the Investment Bank SAR, the PI and EMI SAR will contain a list of the enactments referred to in the Regulations with their Northern Irish equivalents and any necessary modifications.

B.21.1 The new provision will mirror Schedule 5 in the Investment Bank SAR.

Part 24 of the Financial Services and Markets Act

B.22 Part 24 (sections 355 to 379A) of the Financial Services and Markets Act 2000 (FSMA) provide the FCA with specific powers to participate and protect consumers in an insolvency process of an FCA supervised firm (FSMA insolvency provisions).

B.22.1 Currently, paragraph 9 of Schedule 6 to the PSRs and paragraph 7 of Schedule 3 to the EMRs incorporate some provisions (sections 359, 367 and 368) but not all the FSMA insolvency provisions. We will extend the full suite of provisions to PIs and EMIs so that the FCA has the same rights to participate and protect consumers in an insolvency process for PIs and EMIs as it does for other FCA supervised firms.

B.22.2 The Government will extend the below provisions to PIs, EMIs or small PIs.

Voluntary arrangements

B.23 Sections 356, 357 and 358 of Part 24 FSMA will be extended to PIs and EMIs. These provisions provide the following powers:

- Section 356 provides the FCA the power to participate in proceedings for company voluntary arrangements and make representations at meetings of creditors
- Section 357 provides the FCA the power to participate in proceedings for individual voluntary arrangements and make representations at meetings of creditors and
- Section 358 provides the FCA the power to participate in proceedings for trust deeds for creditors in Scotland.

Administration orders

B.24 Section 359 of Part 24 FSMA enables the FCA and PRA to apply to the court to place a firm in administration and currently applies to EMIs and authorised PIs. This provision will be extended to small PIs.

B.24.1 Section 361 of Part 24 FSMA requires an administrator to report to the FCA and PRA without delay if it thinks the company (or partnership) is carrying (or has carried) on a regulated activity in contravention of the general prohibition or credit-related regulated activity in contravention. This provision will be extended to activity that is in contravention of Regulation 138 of the PSRs and Regulation 63 of the EMRs.

B.24.2 Sections 362 and 362A will be extended to PIs and EMIs. These provisions do the following:

- Section 362 provides the FCA and PRA the power to participate in proceedings for administrations and make representations at meetings of creditors and
- Section 362A requires the consent of FCA and PRA (as appropriate) to the appointment of an administrator by a company or its directors.

Receivership

B.25 Section 363 of Part 24 FSMA enables the FCA and PRA to participate in proceedings relating to receivers and to attend and make representations at meetings of creditors and receive reports. This provision will be extended to PIs and EMIs.

B.25.1 Section 364 of Part 24 FSMA requires a receiver to report to FCA and PRA without delay if it thinks the company is carrying on or has carried on a regulated activity in contravention of the general prohibition or credit-related regulated activity in contravention. This provision will be extended to activity that is in contravention of Regulation 138 of the PSRs and Regulation 63 of the EMRs.

Voluntary winding up

B.26 Section 365 of Part 24 FSMA provides the FCA and PRA with the power to participate in proceedings for voluntary winding up and make representations at meetings of creditors. This provision will be extended to PIs and EMIs.

Winding-up petitions

B.27 Section 367 of Part 24 FSMA enables the FCA to apply to the court for winding up an EMIs or authorised PIs. This will be extended to small PIs.

Liquidation

B.28 Section 370 of Part 24 FSMA requires a liquidator to report to the FCA and PRA without delay if it thinks the company is carrying on or has carried on a regulated activity in contravention of the general prohibition or credit-related regulated activity in contravention. This will be extended to activity that is in contravention of Regulation 138 of the PSRs and Regulation 63 of the EMRs.

B.28.1 Section 371 of Part 24 FSMA provides the FCA and PRA with the power to participate in proceedings for liquidations and to attend and make representations at meetings of creditors. This provision will be extended to PIs and EMIs.

Bankruptcy

B.29 Section 372 of Part 24 FSMA enables the FCA and PRA to apply to the court for a bankruptcy order against an individual. This provision will be extended to PIs and EMIs. The FCA's powers are currently limited to individuals that are or have been an authorised person, or are in breach of the general prohibition

B.29.1 Section 373 of Part 24 FSMA requires an IP to report to the FCA and PRA without delay if it thinks the individual is carrying (or has carried) on a regulated activity in contravention of the general prohibition or credit-related regulated activity in contravention. This provision will be extended to activity that is in contravention of Regulation 138 of the PSRs and Regulation 63 of the EMRs.

B.29.2 Section 374 of Part 24 FSMA provides the FCA and PRA with the power to participate in proceedings for bankruptcies and to attend and make representations at meetings of creditors and receive reports. This provision will be extended to PIs and EMIs.

Provisions against debt avoidance

B.30 Section 375 of Part 24 FSMA enables the FCA to ask the court to set aside transactions which appear to have been entered into to defraud creditors (that is, where assets are transferred as a gift, or sold at less than their full value, with the intention of putting them beyond the reach of creditors). This provision will be extended to PIs and EMIs.

HM Treasury contacts

This document can be downloaded from www.gov.uk

If you require this information in an alternative format or have general enquiries about HM Treasury and its work, contact:

Correspondence Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 5000

Email: public.enquiries@hmtreasury.gov.uk