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|---|---|
| Title: Special administration regime for investment firms Lead department or agency: HM Treasury Other departments or agencies: | Impact Assessment (IA) |
| | IA No: |
| | Date: 03/12/2010 |
| | Stage: Final proposal |
| | Source of intervention: Domestic |
| | Type of measure: Secondary legislation |
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Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

The failure of Lehman Brothers undermined confidence in the banking system as a whole, requiring governments around the world to provide exceptional levels of financial assistance to the global financial system. Specifically, the failure of Lehman Brothers International Europe (LBIE) raised concerns that the UK's insolvency regime could not handle an investment bank default, which clearly has impacts on financial stability. The Government is committed to improving the UK's legal framework where the LBIE experience has highlighted the need for reform in order to enhance financial stability.

What are the policy objectives and the intended effects?

The policy objective is to improve financial stability by increasing the confidence of market participants in the effectiveness of the UK's insolvency regime. This is to be achieved by the introduction of a new special administration regime (SAR) for investment firms, with special administration objectives for administrators. These special administration objectives should help ensure that client assets and money held on trust by an investment firm can be returned as quickly as possible and that trades that the failed firm has entered into can be resolved effectively to ensure clarity for affected counterparties. It is also important that creditors remain sufficiently protected.

What policy options have been considered? Please justify preferred option (further details in Evidence Base)

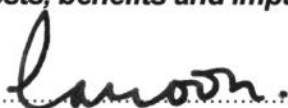
The Government is proposing a special administration regime. The SAR has been extensively consulted on - with the responses to three consultation papers taken into account. The Government has also worked closely with an Investment Banking Advisory Panel of industry experts to develop the legislation. The option to do nothing has been considered; however, the failure of Lehman Brothers clearly demonstrated areas where the UK's insolvency regime could be strengthened in respect of investment firms.

| | |
|--|--------------------------------|
| When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved? | It will be reviewed 02/2013 |
| Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review? | Yes |

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:.....



Date:

6/12/10

Summary: Analysis and Evidence

Policy Option 1

Description:

| Price Base Year | PV Base Year | Time Period Years | Net Benefit (Present Value (PV)) (£m) | | |
|-----------------|--------------|-------------------|---------------------------------------|-------|----------------|
| | | | Low: | High: | Best Estimate: |

| COSTS (£m) | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---------------|---|--|----------------------------|
| Low | 0 | 0 | 0 |
| High | 0 | 0 | 0 |
| Best Estimate | | | |

Description and scale of key monetised costs by 'main affected groups'
 No costs to market participants as a result of this proposal. These are legislative changes that will aim to provide greater legal clarity to help overcome specific obstacles to the effective resolution of investment firms as discussed in the evidence base. There are no anticipated costs to the Authorities as a result of these measures, as there are existing processes in place.

Other key non-monetised costs by 'main affected groups'
 No other key non-monetised costs.

| BENEFITS (£m) | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Benefit (Present Value) |
|---------------|---|--|-------------------------------|
| Low | n/a | n/a | n/a |
| High | n/a | n/a | n/a |
| Best Estimate | n/a | n/a | n/a |

Description and scale of key monetised benefits by 'main affected groups'
 It is not possible to quantify the monetised benefits, but improved resolution arrangements for investment firms will benefit clients, counterparties and creditors of the failed firm by lessening the length of the administration. Clients should receive their trust property back sooner. Cooperation between the administrators and market infrastructure bodies to resolve failed trades or open positions should be improved, which will benefit counterparties and unsecured creditors.

Other key non-monetised benefits by 'main affected groups'
 The aim is to provide administrators with clarity and direction to resolve the firm, without needing to approach the court on a frequent basis. These adjustments to current insolvency law will aim to make the process less expensive and less disruptive for an investment firm, its clients, creditors and the market. In addition to the above benefits there are unquantifiable benefits associated with a financial sector with a better resolution process, such as improved investor confidence.

| Key assumptions/sensitivities/risks | Discount rate (%) |
|--|-------------------|
| The most significant risk of the SAR is that it might not be in the best interests of all creditors of the investment firm. This is because the SAR has additional objectives for the administrator, including returning client assets. However, the Government expects that no creditor will be materially affected by the SAR, as provisions such as the setting of bar dates should allow for a shorter administration period. These savings in administration expenses will ultimately benefit all the creditors. Similarly, in the event of a large and complex investment firm insolvency, the Government expects several administrators to be appointed to focus on each of the special administration objectives. This should mean that there will be no deterioration of focus on the needs of creditors. | N/A |

| Impact on admin burden (AB) (£m): | Impact on policy cost savings (£m): | In scope |
|-----------------------------------|-------------------------------------|----------|
| New AB: n/a | Policy cost savings: | Yes/No |
| AB savings: n/a | | |
| Net: n/a | | |

Enforcement, Implementation and Wider Impacts

| | | | | | |
|---|----------------|-------------|--------------------|---------------|--------------|
| What is the geographic coverage of the policy/option? | United Kingdom | | | | |
| From what date will the policy be implemented? | 11/02/2011 | | | | |
| Which organisation(s) will enforce the policy? | Not applicable | | | | |
| What is the annual change in enforcement cost (£m)? | 0 | | | | |
| Does enforcement comply with Hampton principles? | Yes | | | | |
| Does implementation go beyond minimum EU requirements? | No | | | | |
| What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent) | Traded: n/a | | Non-traded: n/a | | |
| Does the proposal have an impact on competition? | No | | | | |
| What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable? | Costs: n/a | | Benefits: n/a | | |
| Annual cost (£m) per organisation (excl. Transition) (Constant Price) | Micro n/a | < 20 n/a | Small n/a | Medium n/a | Large n/a |
| Are any of these organisations exempt? | No | No | No | No | No |

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

| Does your policy option/proposal have an impact on...? | Impact | Page ref within IA |
|--|--------|--------------------|
| Statutory equality duties¹ Statutory Equality Duties Impact Test guidance | No | |
| Economic impacts | | |
| Competition Competition Assessment Impact Test guidance | No | |
| Small firms Small Firms Impact Test guidance | No | |
| Environmental impacts | | |
| Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance | No | |
| Wider environmental issues Wider Environmental Issues Impact Test guidance | No | |
| Social impacts | | |
| Health and well-being Health and Well-being Impact Test guidance | No | |
| Human rights Human Rights Impact Test guidance | No | |
| Justice system Justice Impact Test guidance | No | |
| Rural proofing Rural Proofing Impact Test guidance | No | |
| Sustainable development Sustainable Development Impact Test guidance | No | |

¹ Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

| No. | Legislation or publication |
|-----|---|
| 1 | Developing Effective Resolution Arrangements for Investment Banks, HM Treasury, May 2009 |
| 2 | Establishing Resolution Arrangements for Investments Banks, HM Treasury, December 2009 |
| 3 | Resolution of Investment Banks: Summary of Consultation Responses, HM Treasury, July 2010 |
| 4 | Special Administration Regime for Investment Firms, HM Treasury, September 2010 |

+ Add another row

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

| | Y ₀ | Y ₁ | Y ₂ | Y ₃ | Y ₄ | Y ₅ | Y ₆ | Y ₇ | Y ₈ | Y ₉ |
|----------------------------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Transition costs | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Annual recurring cost | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total annual costs | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Transition benefits | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a |
| Annual recurring benefits | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a |
| Total annual benefits | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a |

* For non-monetised benefits please see summary pages and main evidence base section



Microsoft Office
Excel Worksheet

Evidence Base (for summary sheets)

Special administration regime for investment firms

Introduction

This section sets out the assumptions supporting this impact assessment.

Problem under consideration

The failure of Lehman Brothers undermined confidence in the banking system as a whole, requiring governments around the world to provide exceptional levels of financial assistance to the global financial system. While this action has led to stabilisation in the short term, governments must now enact substantive reforms to ensure that, in future, a similar failure does not have the same impact on financial stability.

Rationale for intervention

Investment firms are a core part of financial markets, and among other things, play a critical role in providing market liquidity. A freezing of credit markets and a substantial strain on financial stability have followed the recent failures of investment firms, along with the failure of retail banks.

The Government believes that there is a strong case for a SAR for investment firms to ensure that there is minimum disruption to financial markets as a result of their insolvency. The Government believes that current insolvency legislation under the Insolvency Act 1986, while generally robust and flexible, presents specific legal constraints for the effective resolution of large and complex investment firms. To leave the insolvency regime for investment firms unchanged would mean that an administration of an investment firm would be conducted under the Insolvency Act 1986 and would leave unresolved the issues which have been demonstrated in the Lehman Brothers insolvency.

Policy objective

The policy objective is to create a SAR in the form of an administration procedure. The aim is to provide administrators with clarity and direction to resolve the firm, without needing to approach the court on a frequent basis. These adjustments to current insolvency law will aim to make the process less expensive and less disruptive for an investment firm, its clients, creditors and the market.

Scope

Currently a firm is within scope of the SAR if it satisfies the following conditions:

- (a) has permission under Part 4 of the Financial Services and Markets Act 2000 (FSMA) to carry on at least one of the following regulated activities:
 - safeguarding and administering investments;
 - dealing in investments as principal; or
 - dealing in investments as agent;
- (b) holds client assets; and
- (c) is incorporated in, or formed under, the law of any part of the UK.

The Government intends to use the order-making power in section 232 of the Banking Act 2009 to clarify that the term "client assets" in condition (b) also includes client money. This clarification is to ensure that a firm which holds client money or client assets is within scope of the SAR if it satisfies the other conditions. The exception to this are firms which hold client money related to insurance activities. These firms will be excluded as the SAR is meant to apply to investment firms. There are no costs associated with this Order.

Costs/benefits

There are no significant ongoing or one-off direct costs associated with the SAR. The December 2009 consultation paper, *"Establishing resolution arrangements for investment banks"*, set out the assumption that the costs of introducing a SAR were negligible. There has been no serious contention of this assumption apart from the highlighting by some respondents of the potential costs resulting from planning for or risk assessing the new administration regime. This might occur where market participants have to obtain new legal opinions. However, responses to the December consultation paper did not give any indication of the scale of these costs.

This impact assessment will now assess the respective costs and benefits of each of the main aspects of the SAR including:

- special administration objectives;
- bar date for claims to client assets;
- allocating shortfalls pro rata;
- the FSA's power of direction; and
- continuity of service arrangements.

Special administration objectives

The SAR will create three special administration objectives which administrators will have a duty to follow:

- Objective 1 is for the administrator to ensure the return of client money or assets as soon as is reasonably practicable;
- Objective 2 is for the administrator to ensure timely engagement with market infrastructure bodies and the Authorities; and
- Objective 3 is for the administrator to either rescue the investment bank as a going concern, or wind it up in the best interest of the creditors.

Costs

None of these statutory objectives entail any direct costs. It is possible that unsecured creditors may be indirectly affected by the new special administration objectives 1 and 2. However, the Government believes that this is unlikely because the SAR will:

- speed up the agreement of unsecured claims, because unsecured claims of clients will be clarified through the imposition of a bar date;
- expedite the distribution process for unsecured creditors on the basis that the unsecured claims can be determined more quickly; and
- reduce the level of unsecured claims as certain claims of clients for consequential and indirect losses are netted off through the bar date and distribution of client assets process.

Benefits

The benefits of the special administration objectives include:

- greater certainty and clarity for administrators over the objectives against which they are liable;
- increased focus on the return of client assets, which is not currently a statutory requirement on administrators;
- increased focus on communicating with the Authorities and market infrastructure providers; and
- a cut-off date for client, affiliate and third party claims to client assets through the imposition of a bar date. Objective 1 also allows the administrator to allocate any shortfalls which are revealed by the bar date pro rata on a stock line basis among the affected clients.

These benefits are not quantifiable, as it would depend on the specific circumstances of the administration. For example, if a firm that held significant amounts of client assets entered administration, then it is likely that the benefits of the SAR in reducing the length of the administration and ensuring that clients receive their assets back quicker are more substantial than if a firm held fewer client assets.

Where respondents have commented on the benefits of such a regime it has generally been felt that in the case of LBIE the existence of such a regime for administrators would have reduced the time spent on identifying and returning client assets, thereby benefiting the estate in terms of cost savings (albeit unquantifiable).

Establish bar dates for claims to client assets

It is hard for an administrator to start returning client assets until they have complete information on all claims to the assets. Not having a cut-off bar date after which the administrator can start reconciling claims causes there potentially to be a severe delay in the return of client assets.

The Government is proposing to give an administrator within the SAR the option of setting a bar date if the records of the insolvent firm do not give a clear indication of what clients and third parties are owed.

The bar date should allow for:

- sufficient time for the fact of administration to be publicised;
- sufficient time for affected clients to calculate and submit their claims; and
- practical difficulties in establishing claims, particularly where arrangements are complex.

Costs

The cost of the bar date would be on the client or third party to submit a claim for the assets. However, this is a process that is usually undertaken in complex insolvencies anyway, so the Government considers the costs to be negligible. The Government consulted in the December paper on the costs of the bar date proposal being negligible and no alternative costs were proposed.

There is the possibility that a late claimant may find that they only have an unsecured claim against the estate for the value of their assets. This could arise where there is a shortfall in a particular stock line and the administrator has already distributed all the assets of that particular stock line it possesses following the bar date.

A late claimant is not allowed to challenge the distribution of the administrator as long as it is conducted in good faith. This is to give certainty to clients who receive back their assets that they will not be challenged at a later date by a third party for the return of those assets. The potential cost of a client having a unsecured shortfall claim rather than a proprietary claim is unquantifiable as it depends on the size of the shortfall and whether or not the client's unsecured claim is eventually paid in full.

To reduce the possibility of there being a late claimant there are safeguards. For example, the administrators need to advertise the bar date widely, set a reasonable timeframe for submission of claims, and proactively approach any client who is on the books and records of the firm as having a potential claim.

In addition, no distribution can be made by the administrator following the bar date until the creditor committee has approved the administrator's distribution plan and court approval has been obtained.

Benefits

The benefits of the bar dates proposal would be that the administrator should be able to reconcile and return client assets much faster than the current insolvency regime allows. However, this is unquantifiable as it depends on the circumstances of the administration.

Increase clarity over the allocation of shortfalls in an omnibus account

There is currently a lack of clarity in insolvency law over how shortfalls in client securities held in an omnibus account should be allocated to clients. This uncertainty can delay the return of client assets, and increase the costs of administration.

The Government understands that it would be beneficial if there were certainty for clients and administrators as to how shortfalls should be allocated post-insolvency by an administrator. By providing clarity, it is believed that the length of administration can be reduced and clients can have their securities returned to them quicker, which will result in a less costly administration for creditors.

Costs

The cost of this proposal is that clients may be prevented from putting in tracing claims to their assets, as the SAR would allow the administrator to allocate shortfalls pro rata if they felt it was necessary to meet their first special administration objective of returning client assets as soon as is reasonably practicable.

This could lead to clients bearing shortfalls which actually belong to another client. This cost is mitigated by the fact that the administrator will not necessarily allocate any shortfall pro rata. If it were a fairly simple administration, with clear records which allow the shortfall to be traced to a particular client, then the administrator would be expected to do so. The cost of this proposal is not quantifiable, as it depends on the circumstances of the administration. For example, if there are shortfalls in many stock lines, then the cost is potentially greater than if the shortfall is only in one stock line. It also depends on how large the shortfall is, and the amount of assets held.

Benefits

The benefit of this option is that it potentially speeds up the return of client assets and reduces the cost of the administration. Again this is unquantifiable.

It is expected that the wider impact of allowing administrators to allocate shortfalls pro rata would be greater confidence in the UK insolvency regime for managing the return of client assets. The faster return of client assets will also help the clients of a failed investment firm remain solvent.

The FSA's power of direction

One aspect of the SAR is that the FSA (after consultation with HM Treasury and the Bank of England) has the power to direct the administrator to prioritise certain objectives over others. This direction from the FSA would give administrators an additional defence to undertake certain actions which otherwise they may be reluctant to do, due to concerns over their personal liability.

Costs

In the event of an extremely complex insolvency, there is a possibility that the Authorities may be more involved in the administration than usual, and this could add some additional burden. However, this is unquantifiable. It would be expected that any additional costs to the Authorities would be mitigated against by the improvement in market conditions and a more managed wind-up of the firm following their intervention.

Benefits

The FSA's power of direction could prevent a "log jam" situation whereby the administrators are unable to take the necessary actions to wind-up the firm. This benefit is unquantifiable, as it depends on the circumstances of the administration.

Continuity of service arrangements

The Government is seeking to ensure that suppliers of services which are key to the effective administration of the firm and to the meeting of the special administration objectives cannot withdraw their services until the administrator has had time to make suitable alternative arrangements. The SAR adapts the provisions of section 233 of the Insolvency Act 1986 to require continuity of supply of IT and other key services. When an investment firm goes into administration, the administrator may request the continuation of a service contract, and the supplier cannot make it a condition of the supply, or do anything that would have the effect of imposing that condition, that any outstanding charges owed by the firm to the supplier and incurred before the date of administration are paid.

The continuity of supply provisions are being expanded to include:

- computer hardware or software or other hardware used by the investment bank in connection with the trading of securities or derivatives;
- financial data;
- infrastructure permitting electronic communication services;
- data processing;
- secure data networks provided by an accredited network provider; or
- access to a relevant system by a sponsoring system participant.

Costs

The Government believes that there will be negligible costs to this proposal because the supplier can stop providing a supply if:

- 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;
- the administrator consents to the termination; or
- the supplier has the permission of the court, which may be given if the supplier can show that the continued provision of the supply shall cause the supplier to suffer hardship.

Benefits

The benefits of this proposal are significant, as it is essential that the core operational services that the administrator requires to resolve the firm are accessible and are not withdrawn at the start of the administration. However, this benefit is unquantifiable as it depends on the circumstances of the administration.

Risks and assumptions

The most significant risk of the SAR is that it might not be in the best interests of all creditors of the investment firm. This is because the SAR has additional objectives for the administrator, including returning client assets. However, the Government expects that no creditor will be materially affected by the SAR, as provisions such as the setting of bar dates should allow for a shorter administration period. These savings in the expenses related to administration will ultimately benefit all the creditors of the firm.

Similarly, in the event of a large and complex investment firm insolvency, the Government expects several administrators to be appointed to focus on each of the special administration objectives. This should mean that there will be no deterioration of focus on the needs of creditors.

Impact on small firms and competition

The Government believes that there will be no impact on small firms and competition, as the main feature of the SAR is new special administration objectives for insolvency practitioners which do not impose any burdens on firms.

Summary and preferred option with description of implementation plan

The preferred option is establishing a special administration regime for investment firms. This would be achieved by making and laying regulations under the powers in section 233 of the Banking Act 2009. This power expires on 11 February 2011. The SAR regulations are subject to affirmative draft procedures. Now the responses to the consultation have been considered, the final draft of regulations, subject to Ministerial approval, will be laid before Parliament. This measure will be for HM Treasury to take forward.

In addition, there will be a separate Order amending the scope of the SAR as set out in section 232 of the Banking Act. This Order will also be subject to the affirmative draft procedure.

The SAR will also have accompanying insolvency rules for the regulations. These will be subject to the negative procedure.

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

| |
|---|
| <p>Basis of the review: [The basis of the review could be statutory (forming part of the legislation), it could be to review existing policy or there could be a political commitment to review]; For legislative measures, section 236 of the Banking Act 2009 provides for HM Treasury to review the special administration regime insolvency regulations within two years of them coming into force. The review must consider how far the regulations are achieving the objectives specified in section 233(3) and whether the regulations should continue to have effect</p> |
| <p>Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?] See Basis of Review section above</p> |
| <p>Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach] See Basis of the review section above</p> |
| <p>Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured] See Basis of the review section above</p> |
| <p>Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives] See Basis of the review section above</p> |
| <p>Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection of monitoring information for future policy review] See Basis of the review section above</p> |
| <p>Reasons for not planning a PIR: [If there is no plan to do a PIR please provide reasons here] n/a</p> |