Title: Payment and Electronic Money Institution Insolvency (Amendment) Regulations 2023	De minimis assessment
SI (Statutory Instrument) No: UKSI 2023/1399	**Date: 20/10/2023**
Other departments or agencies: **None**	**Type of regulation:** **Domestic**
Contact for enquiries: **Edward.Henley@hmtreasury.gov.uk**	**Date measure comes into force:** Click here to enter a date.
Cost of Preferred (or more likely) Option Under £5m	**Equivalent Annual Net Direct Cost to Business per year** (EANDCB in 2019 prices) **None**

1. What is the problem under consideration? Why is Government intervention necessary?

The Payment and Electronic Money Institutions Special Administration Regime (pSAR) aims to facilitate a faster and more efficient return of funds to customers in the event of insolvency. The Regulations provide the overarching principles of the Special Administration Regime. By introducing these Regulations, an administrator will have clarity over the processes which need to be followed in winding up a Payment Institution (PI) or Electronic Money Institution (EMI) if such circumstances were to arise in Scotland and Northern Ireland.

The payment and electronic money sectors have expanded rapidly over the last decade. However, some recent administration cases involving these types of firms in England and Wales have taken significant time to resolve with customers left without access to their money for a prolonged period and receiving reduced monies after the cost of distribution.

The Government decided intervention through legislation was necessary and introduced the Payment and Electronic Money Institution Insolvency Regulations 2021 ("the Regulations 2021"), the Payment and Electronic Money Institution Insolvency (England and Wales) Rules 2021 and the Payment and Electronic Money Institution Insolvency (Scotland) Rules 2022.

Given that the insolvency process for PIs/EMIs is set out in legislation, changes to the insolvency process for these sectors must be made through additional legislation. The Regulations will be amended by this SI to apply to Scottish Limited Liability Partnerships (LLPs – a type of business structure) and PIs/EMIs in Northern Ireland. Due to differences in insolvency law, the original Regulations 2021 did not extend to Scottish LLPs or to Northern Ireland. The latest Regulations are consistent with the Government's intention when it produced the Regulations 2021 to extend the regime across the whole of the UK.

2. What are the policy objectives and the intended effects?

This legislation will extend the pSAR to Scottish LLPs and Northern Irish PMIs/EMIs. The pSAR will give insolvency practitioners administering insolvent PIs/EMIs in Scotland and Northern Ireland an expanded toolkit to keep the firm operational while prioritising the return of client assets to customers. This will lead to fewer potentially disruptive insolvencies, ensuring a prompt return of assets to customers and reduce the cost of distribution if a firm were to be established in Scotland or Northern Ireland.

The pSAR utilises the Investment Bank Special Administration Regime (IBSAR) as a model for this new regime. The IBSAR is a well-established and well-received regime for investment firms and has been in place since 2011. Appropriate amendments have been made when drafting the pSAR to reflect the operational and regulatory differences between investment banks and PIs/EMIs and to take into account Scottish and Northern Irish Insolvency law. Key provisions of the regime include:

- bespoke objectives for an insolvency practitioner to ensure the return of customer funds as soon as reasonably practicable, to engage with the relevant authorities and to either rescue or wind-up the institution in the best interests of creditors;
- continuity of supply provisions that will allow an insolvency practitioner to keep the firm's key functions operational for customers;
- provisions to ease the transfer of business processes such that a new firm can take on the incumbent's business and provide continuity for customers and;
- bar date provisions to allow the insolvency practitioner to set a deadline for consumers to claim and thus enable an earlier distribution of customer funds.

3. What policy options have been considered, including any alternatives to regulation? Please justify preferred option

The only alternative policy option available is to not modify the insolvency Regulations for Scottish LLPs and Northern Irish firms so as to mirror the provisions already established in England, Wales and for Scottish companies. However, not taking action would mean that if one of these firms were to enter into insolvency consumers would be subject to suboptimal insolvency processes. This option is not considered practical as it would lead to suboptimal insolvency processes for customers and higher costs of distribution and maintain a disparity across England, Wales, Scotland and Northern Ireland.

4. Please justify why the net impacts (i.e., net costs or benefits) to business will be less than £5 million a year.

The below lays out the costs and benefits of introducing the Regulations to Scottish LLPs and Northern Irish institutions.[1]

Costs

It is estimated that there will be zero annual direct costs to business, with some one-off and ad hoc direct costs. Ad hoc direct costs are defined as costs that are neither annual nor one-off and may occur when necessary or needed. There are no significant ongoing or one-off direct costs associated with the Regulations. The reasoning for this estimation is as follows:

Direct costs

Insolvency practitioner's familiarisation

- There is a one-off direct cost to insolvency practitioners of familiarising themselves with the Regulations. The introduction of the pSAR for Scottish LLPs and Northern Ireland utilises existing insolvency legislation and creates parity as far as possible with the existing Regulations which apply in England and Wales. Following the FCA's methodology for calculating familiarisation costs[2], we estimate a one-off cost of £3,994 would arise for insolvency practitioners (4 compliance staff to read ~33 pages of legal text [approx. 2.6 days each – 20.8 hours] at a cost of £48[3] per hour).

[1] This impact assessment is in part based on the impact assessment which was produced when legislating for the Regulations 2021 which can be found at https://www.legislation.gov.uk/uksi/2021/716/pdfs/uksiod_20210716_en.pdf

[2] Taken from FCA publication on analysing costs and benefits of our policies, which can be found at https://www.fca.org.uk/publication/corporate/how-analyse-costs-benefits-policies.pdf

[3] Estimate taken from England and Wales Rules Impact Assessment, which can be found at https://www.legislation.gov.uk/uksi/2021/1178/pdfs/uksiod_20211178_en.pdf

- There are only approximately 25 PI/EMI firms in Scotland and 19 in Northern Ireland, with the number of insolvencies varying significantly based on market conditions and firm specific issues. According to FCA data from May 2023, none of the 25 Scottish firms within scope are LLPs, and so may already be within scope of the original pSAR Regulations. However, it is plausible that companies could in future be structured as LLPs, and therefore applying the regime to Scottish LLPs will help to future proof the regime.
- If each insolvency resulted in a different insolvency practitioner being appointed, then it would be possible for multiple insolvency practitioners to be affected. However, there are only a limited number of insolvency practitioners capable of resolving complex financial services firms and even in a year with a significant number of insolvencies the number of insolvency practitioners needing to familiarise themselves with these Regulations is likely to be fewer than ten. Therefore, the estimated cost would be, at most, approximately £39,940 as the total one-off familiarisation costs for that year.

PIs/EMIs and creditors

- Costs to PIs/EMIs or creditors may arise if they chose to apply for a special administration order to be placed into special administration. However, the cost would vary on a case-by-case basis depending on the size and complexity of the institution. The cost of applying for a special administration order would also not necessarily be a cost paid by the institution or its creditors. The parties that can apply for a special administration order include: the institution; the directors of the institution; one or more creditors of the institution; the designated officer for Scottish and Northern Irish court; the Secretary of State; and the FCA.

Consumers

- Costs may arise for consumers or third parties as the bar date and hard bar date provisions require them to pay to submit claims for relevant funds. However, this is usually undertaken in complex insolvencies already, so the additional costs are considered to be negligible. There is the possibility that if a consumer does not submit a relevant funds claim before the bar date, they may find that they only have an unsecured claim against the general estate for the value of their relevant funds rather than a relevant funds claim against the asset pool. The potential cost of a late claimant having an unsecured claim against the estate rather than a relevant funds claim is unquantifiable because it depends on the size of the shortfall and whether or not the consumer’s unsecured claim is eventually paid in full. However, to reduce the possibility of there being a late claimant, there are safeguards included for the bar date and hard bar date provisions.
- The pSAR provides that any shortfall in the asset pool be borne pro rata by all consumers that hold relevant funds within the asset pool, which could lead to consumers bearing shortfalls which may have been borne by other consumers in different circumstances. The cost of this proposal is not quantifiable, as it depends on the circumstances of the administration, for example, how large the shortfall is.

Insolvency practitioners and transferees

- Ad hoc direct costs to insolvency practitioners may arise as the pSAR provides the FCA with certain powers to direct the administrator. These costs cannot be quantified, and it is expected that the cost would be outweighed by the positive impact of a more managed wind-up of the institution following the FCA’s intervention.
- Ad hoc costs to the insolvency practitioner and transferee may arise from the pSAR transfer provisions requiring certain contractual undertakings from the transferee. These are expected to be small additional administrative costs.

Indirect costs

PIs/EMIs and creditors

- It is possible that unsecured creditors might indirectly be affected by the objectives to ensure the return of relevant funds as soon as is reasonably practicable (Objective 1) and to ensure timely engagement with payment system operators, the Payment Systems Regulator and the Authorities (Objective 2). This is, however, considered to be unlikely because the pSAR is intended to speed up the agreement of unsecured claims and expedite the distribution process for unsecured creditors.
- Creditors may indirectly be affected by the pSAR provisions that relate to safeguarding failures by PIs/EMIs. Costs that are incurred because of a failure by the institution to safeguard relevant funds are to be paid out of the institution's assets, which in turn may worsen the position of creditors. However, this cost is unquantifiable because it depends on the circumstances of the administration, for example, the amount of costs incurred by the institution failing to safeguard relevant funds.

Transferees, agents and distributors

- Indirect costs to the transferee may arise from the contractual requirements in the transfer provisions, including that the transferee will notify within 14 days agents, distributors and users and holders whose relevant funds have been transferred. This cost is unquantifiable because it depends on the circumstances of the administration, for example the number of users and holders whose relevant funds have been transferred, but it is expected to be a minimal administrative cost. Additionally, the transfer provisions provide in a partial property transfer agreement and in certain circumstances, the transferee must aim to make good any shortfall in the amount of relevant funds to be transferred that the institution in administration is required to safeguard. This cost is unquantifiable because it depends on the circumstances of the administration.
- Agents/distributors may be indirectly affected by the provisions in the pSAR that, under certain circumstances in a transfer, allow the requirement to obtain consent from agents/distributors to be overridden and the contracts novated. If they are not content with the transfer, agents/distributors have the right to cancel the contract. However, this may mean that the agent/distributor incurs an exit charge or fees, depending on the terms and conditions of the contract. This indirect cost is unquantifiable because it depends on the circumstances of the administration.

Benefit

It is not possible to quantify the monetised benefits of the Regulations as these will depend on the specific circumstances of the administration, but improved insolvency arrangements for PIs/EMIs will lead to the following benefits:

- The pSAR will provide greater certainty and clarity for administrators over the objectives against which they are liable, without needing to approach the Court on a frequent basis. For example, it codifies the treatment of the asset pools and principles of distributions to provide the insolvency practitioner with sufficient certainty on the actions to take when pursuing Objective 1 (to ensure the return of relevant funds as soon as is reasonably practicable). There is further likely to be a reduced need for Court direction due to provisions such as the allocation of pSAR costs. The pSAR also provides the FCA with certain powers to direct the administrator to prevent a situation whereby the administrators are unable to take the necessary actions to wind-up the firm.
- The pSAR benefits consumers and creditors by providing that the administrator, with certain exceptions, identifies and settles any shortfall or excess in an asset pool and by requiring the administrator to take reasonable steps to transfer any identifiable relevant funds held in other accounts to an appropriate relevant funds account. It also requires any shortfall in the asset pool to be borne pro rata by all consumers, which has the

potential to speed up the return of relevant funds and reduce the cost of administration. Further, the post-administration receipts provisions both provide certainty to insolvency practitioners and customers on the treatment of these funds and again has the potential to reduce the time in which the post-administration receipts will be returned to the user or holder.

- The introduction of bar date and hard bar date provisions will allow the administrator to reconcile and return relevant funds much faster than the current insolvency regime allows.
- The continuity of service provisions will ensure that the core operational services that the administrator needs to resolve the institution are accessible and are not withdrawn at the start of the administration. Additionally, the transfer provisions facilitate the rapid transfers of relevant funds and assets to a solvent firm. These provisions allow consumers, whose relevant funds have been transferred, to have continuity of service and faster access to their relevant funds, as these will not be part of protracted insolvency proceedings. Any consumers whose assets are not transferred may benefit from a smaller pool of relevant funds, which will be quicker to distribute, and creditors may benefit from any proceeds from a transfer.

5. Please confirm whether your measure could be subject to call-in by BRE (Better Regulation Executive) under the following criteria. If yes, please provide a justification of why a full impact assessment is not appropriate:

a) **Significant distributional impacts (such as significant transfers between different businesses or sectors)**
None

b) **Disproportionate burdens on small businesses**
None

c) **Significant gross effects despite small net impacts**
None

d) **Significant wider social, environmental, financial or economic impacts**
None

e) **Significant novel or contentious elements**
None

Sign-off for de minimis assessment: SCS

I have read the de minimis assessment and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

SCS of Banking Assets and Resolution Strategy

Signed: ***George Barnes*** Date: 12/10/2023

SCS of Better Regulation Unit

Signed: ***Phil Witcherley*** Date: 13/10/2023

Sign-off for de minimis assessment: Minister

I have read the de minimis assessment and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

Andrew Griffith MP, Financial Secretary to the Treasury

Signed: ***Andrew Griffith*** Date: 20/10/2023