HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

23rd Report of Session 2016–17

Draft West of England Combined Authority Order 2017

Includes 2 Information Paragraphs on 2 Instruments

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Secondary Legislation Scrutiny Committee

The Committee was established on 17 December 2003 as the Merits of Statutory Instruments Committee. It was renamed in 2012 to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee's terms of reference are set out in full on the website but are, broadly, to scrutinise —

> (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
>
> (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of these specified grounds:

> (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
>
> (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
>
> (c) that it may inappropriately implement European Union legislation;
>
> (d) that it may imperfectly achieve its policy objectives;
>
> (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
>
> (f) that there appear to be inadequacies in the consultation process which relates to the instrument.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Baroness Andrews	Lord Hodgson of Astley Abbots	Lord Rowlands
Lord Bowness	Baroness Humphreys	Baroness Stern
Lord Goddard of Stockport	Rt Hon. Lord Janvrin	Rt Hon. Lord Trefgarne *(Chairman)*
Lord Haskel	Baroness O'Loan	

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Information and Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Twenty Third Report

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft West of England Combined Authority Order 2017

Date laid: 16 January 2017

Parliamentary procedure: affirmative

This draft Order proposes the establishment of the West of England Combined Authority across the local government areas of Bath and North East Somerset, Bristol City and South Gloucestershire. It provides for the Combined Authority to have a directly elected Mayor, with the first election taking place on 4 May 2017. It seems clear that this model for the devolution of functions does not enjoy the same level of support across all the areas potentially concerned. North Somerset Council which, with the other three councils, gave initial agreement to the Devolution Deal, decided not to ratify it three months later; and even among the three councils which ratified the Deal, support varies significantly, with more respondents in Bath and North East Somerset disagreeing with key proposals than agreeing.

We draw this instrument to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

1. The Department for Communities and Local Government (DCLG) has laid this draft Order with an Explanatory Memorandum (EM). It proposes to establish the West of England mayoral Combined Authority (WEMCA) across the local government areas of Bath and North East Somerset, Bristol City and South Gloucestershire. It also provides for governance arrangements, including that the WEMCA area is to have a directly elected Mayor, with the first election taking place on 4 May 2017.

West of England Devolution Deal

2. DCLG explains that in March 2016 the Government and the leaders of four councils—Bath and North East Somerset, Bristol City, North Somerset, and South Gloucestershire—agreed the West of England Devolution Deal ("the Deal"). However, in June 2016, North Somerset Council decided not to ratify the deal: the remaining three councils have proceeded to implement the Deal without North Somerset Council. The Deal provides the potential for further devolution over time and for the reform of public services to be led by WEMCA. In June, the three constituent councils published a governance review and a scheme setting out proposals for a mayoral combined authority. Following that review, this Order makes provision to establish WEMCA and to grant it functions covering transport, housing and planning, and economic development.

Consultation

3. DCLG says that the constituent councils undertook a consultation on these proposals for six weeks from 4 July to 15 August 2016. The consultation was organised both digitally and through paper copies which were available in public buildings such as libraries, citizen service points, one-

stop shops and other local hubs. In addition, supporting communication activity was carried out across the areas of the three councils to involve key stakeholders and residents. 1,894 digital responses and 117 paper responses were received. DCLG says that the responses indicated a preference for the establishment of the mayoral combined authority to improve decision-making and accountability; and says that the Government consider that the positive responses to specific questions regarding the mayoral model clearly demonstrate local support for both the establishment of, and devolution of funding, powers and responsibilities to, WEMCA.

4. DCLG acknowledges that written feedback to the consultation highlighted concern about the cost of the new model, and the view that it represented a new unnecessary tier of local governance; and that reference was made to the recent referendum in Bath and North East Somerset where residents voted against having a mayor. Its responses to these concerns are that:

   - it considers that any costs of the model would be wholly proportionate to the powers and additional budgets being devolved, including an investment fund of £30 million per year for 30 years;
   - the model is essential to provide the governance and accountability for these devolved powers and budgets; and
   - a new combined authority mayor, exercising powers over a wide area, is wholly different from an elected mayor to lead a local authority as was proposed for Bath and North East Somerset.

5. As DCLG notes, the constituent councils produced a summary of the consultation responses (in August 2016).[1] This is a commendably detailed document, which throws further light on the proposals and their reception locally.

6. By way of historical background, the summary explains that, in 1996, Avon County Council was replaced by four unitary authorities: Bath and North East Somerset, Bristol, North Somerset and South Gloucestershire. It states that the perception of "a return to Avon" and the introduction of a "metro mayor" were two of the key reasons given by North Somerset for its rejection of the devolution agreement. As to more recent history, the summary says that, in a 2012 referendum, Bristol voted to adopt a directly elected mayor governance model, and it has recently elected its second Mayor. By contrast, a referendum held in Bath and North East Somerset in March 2016 saw a rejection of the directly elected mayor governance model by an overwhelming majority of 79% of voters.

7. In the July–August 2016 consultation, 471 responses were received from Bath and North East Somerset, 685 from Bristol and 531 from South Gloucestershire.[2] The summary makes it clear that, on key issues, there were differences in views in the different council areas. While there was an overall majority (55%) in support of the WEMCA, Bath and North East Somerset had similar numbers of respondents agreeing (44%) and disagreeing (45%) with the proposal, South Gloucestershire had more respondents agreeing

1 http://www.westofenglanddevolution.co.uk/wp-content/pdf/BD8633-Summary%20of%20Consultation%20Responses%20D3.pdf

2 A further 66 responses were from 13 other local authority areas and the remaining 258 had missing or incomplete postcodes.

(50%) than disagreeing (37%), and Bristol had 70% of respondents in agreement (with only 20% disagreeing).

8. As regards a consultation question as to whether a mayor would provide increased accountability and transparency for decisions affecting the region, overall only 47% of respondents agreed, while 38% disagreed and 14% were unsure. By council area, 52% of Bath and North East Somerset respondents disagreed (37% agreed); 45% of South Gloucestershire respondents agreed (40% disagreed); while 58% of Bristol respondents agreed (26% disagreed). The summary comments that respondents in Bristol were more frequently supportive of proposals compared to Bath and North East Somerset and South Gloucestershire.

Conclusion

9. It seems clear that the model for devolution of functions to a West of England Combined Authority does not enjoy the same level of support across all the areas potentially concerned. North Somerset Council decided not to ratify the Devolution Deal only three months after it had been agreed with the Government; and even in the areas of the three councils which ratified the Deal, support varies significantly, with more respondents in Bath and North East Somerset disagreeing with key proposals than agreeing.

Draft Nursing and Midwifery (Amendment) Order 2017

10. The original Order considered in our 22nd Report has been withdrawn and replaced with a revised draft which we considered this week.[3] The changes made amended the commencement provisions and did not alter the substance of the proposed legislation. The commentary in our 22nd Report therefore still applies.

3 22nd Report, session 2016–17 (HL Paper 101).

INSTRUMENTS OF INTEREST

Draft Investment Bank (Amendment of Definition) and Special Administration (Amendment) Regulations 2017

11. In the Explanatory Memorandum (EM) to these Regulations, HM Treasury (HMT) says that the Banking Act 2009 ("the 2009 Act") gives it the power, by regulations, to modify the law of insolvency in its application to investment banks and to establish a new procedure for such banks where they are unable to pay their debts, or winding-up would be fair. The Investment Bank Special Administration Regulations 2011 (SI 2011/245), together with special insolvency rules and the Financial Conduct Authority's Client Asset Sourcebook rules, comprise the Special Administration Regime (SAR). In line with the statutory requirement that the Regulations should be reviewed within two years of coming into force, Mr Peter Bloxham published a review in January 2014 which recommended that the SAR should be retained and proposed reforms to strengthen it.

12. This instrument implements key recommendations of the review in order to speed up and simplify the process of SAR administrations. In amending SI 2011/245, the Regulations extend and strengthen the bar date mechanism in the SAR, and remove restrictions on the transfer of clients' assets and contracts associated with a business transfer. We obtained additional information from HMT about the background to, and effects of, these Regulations, which we are publishing as Appendix 1. We note in particular HMT's decision not to publish a summary of responses to its 2016 consultation, on the ground that it has provided details of responses in the EM to the Regulations; we are not persuaded that this approach complies with the Government's consultation principles.

Protocol on the Privileges and Immunities of the Unified Patent Court (Cm 9405)

13. Currently businesses seeking protection for their inventions across Europe can either apply for separate patents at national offices or make a single application to the non-EU European Patent Office (EPO). The EPO grants a European patent with effect in up to 38 European countries but has to be enforced separately in each national court, which is both expensive and time-consuming for firms. A new Unitary Patent has been devised to be more streamlined and defensible by a single action at the Unitary Patent Court (UPC) through all of the current 25 participating countries (this does not at present include Spain, Croatia or Poland). The UPC is a non-EU patent court under international law and the EU is not a signatory of the protocol. The Central Division of the UPC will be in Paris with specialist technical sections in London (chemicals, life sciences and pharmaceuticals) and Munich (mechanical technologies). It is anticipated that this will attract an additional £30 million of legal services work to London and will benefit UK firms by somewhere in the region of £15 million per year in reduced patent fees and litigation costs.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft instruments subject to affirmative approval

Pension Schemes Act 2015 (Judicial Pensions) (Consequential Provision) Regulations 2017

Investment Bank (Amendment of Definition) and Special Administration (Amendment) Regulations 2017

Nuclear Industries Security (Amendment) Regulations 2017

Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017

Deregulation Act 2015, the Small Business, Enterprise and Employment Act 2015 and the Insolvency (Amendment) Act (Northern Ireland) 2016 (Consequential Amendments and Transitional Provisions) Regulations 2017

Guaranteed Minimum Pensions Increase Order 2017

Nursing and Midwifery (Amendment) Order 2017

Social Security Benefits Up-rating Order 2017

Social Security (Contributions) (Rates, Limits and Thresholds Amendments and National Insurance Funds Payments) Regulations 2017

Draft instruments subject to annulment

Isles of Scilly (Electoral Changes) Order 2017

Instruments subject to annulment

Cm 9405	Protocol on Privileges and Immunities of the Unified Patent Court
SI 2017/21	Employment and Support Allowance (Consequential Amendment) (Police Injury Benefit) Regulations 2017
SI 2017/27	Legal Services Act 2007 (Designation as a Licensing Authority) Order 2017
SR 2017/18	Income Support (Work-Related Activity) and Miscellaneous Amendments Regulations (Northern Ireland) 2017

APPENDIX 1: DRAFT INVESTMENT BANK (AMENDMENT OF DEFINITION) AND SPECIAL ADMINISTRATION (AMENDMENT) REGULATIONS 2017

Additional Information from HM Treasury

Q1: Why did more than two years elapse between the January 2014 publication of the Bloxham review and the March 2016 launch of consultation? As regards the 2016 consultation, has HM Treasury published a summary of consultation responses?

A1: The Treasury gave careful consideration to the 72 recommendations made in the Bloxham review. The recommendations, many of which were complex and technical in nature, covered the SAR [Special Administration Regime] as a whole, including areas under the responsibility of other stakeholders such as the Financial Conduct Authority and the Bank of England. The Treasury worked closely with the financial authorities in order to ensure that any changes worked in tandem with each other; and tested them with industry, including with the Banking Liaison Panel, to ensure they provide affected parties with additional legal clarity. These steps enabled the Treasury to review the legal and policy implications of the recommendations in detail and deliver draft legislation in March 2016.

The Treasury will not be publishing a summary of responses to its 2016 consultation. The explanatory memorandum, which was laid alongside the Regulation, sets out an explanation for the decisions taken.

Q2: How does HMT's decision not to publish a summary of this consultation comply with the Cabinet Office principles?

A2: The Treasury considered the Cabinet Office principles and took the decision to explain the policy decisions in what we considered was the most appropriate format.

The Treasury consulted on the Investment Bank Special Administration Regime in March 2016 and received eight responses from relevant industry participants. During the consultation period, the Treasury held bilateral discussions with administrators who have experience of the SAR as well as industry bodies representing firms which would be eligible for the SAR, firms which may be clients, creditors or counterparties of such firms, and firms which may purchase the failed investment firm. The areas raised in the consultation were largely technical in nature, and were taken into account when deciding on the policies to take forward. In the Impact Assessment and Explanatory Memorandum accompanying the legislation, the Treasury provides a summary of the key responses.

In addition, the Treasury consulted the Banking Liaison Panel on specific aspects of the SAR, particularly the transfer of the business of a failed investment firm that has entered the SAR and provisions needed to protect set off and netting arrangements in the case of transfers of part of the failed firm's business. The BLP provided the Treasury with official advice on these issues. The Treasury will be publishing the BLP's formal advice on the relevant webpage, which can be read alongside the public minutes from the BLP which contain a summary of the discussion on the SAR.

Q3: Please explain more fully why the definition of "investment bank" is being amended. Does this amendment bring a significantly greater number of institutions within the scope of the latest Regulations, by comparison with the 2011 Regulations?

A3: The Treasury has amended the definition of "investment bank" to bring managers and depositories of Alternative Investment Funds (AIF) and Undertakings for Collective Investments in Transferable Securities (UCITS), if they hold client assets, back into scope of the SAR. They had fallen out of scope as an unintended consequence of the legislation which implemented the Alternative Investment Fund Managers Directive (AIFMD). This amendment restores the scope of the SAR to the scope envisaged when the SAR was originally introduced in February 2011.

One of the conditions for a firm to be subject to the SAR is that it must have permission, under Part 4A of the Financial Services and Markets Act 2000, to carry on the regulated activity of safeguarding and administering investments or dealing in investments as principal or agent.

The AIFMD implementing legislation excluded firms from a requirement to hold specific permissions in two cases. First, firms permitted to manage an AIF or a UCITS were excluded from needing a separate permission to carry on any other regulated activity in connection with or for the purposes of the management function. Second, firms permitted to act as a trustee or depositary of an AIF or a UCITS were excluded from needing to hold a separate permission to carry on the activity of safeguarding and administering investments in relation to acting as an AIF or a UCITS trustee or depositary.

These exclusions effectively removed from the scope of the SAR any AIF or UCITS manager, trustee or depositary which, because of the AIFMD exclusions, did not meet the conditions for entry to the SAR but which held client assets. The amendment to the definition of "investment bank" ensures that such a firm is within the scope of the SAR by extending the SAR condition to refer to the activity of an AIF or UCITS manager, trustee or depositary.

There are no costs associated with bringing these firms within the SAR since a firm would only bear costs at the point of failure. The benefits of investment firms being wound up under the SAR, as compared to non-SAR administration, include a quicker return of assets to clients and a more efficient administration process, reducing costs for both clients and creditors. As set out in the impact assessment which accompanied this Regulation, it is estimated that this amendment will bring the total number of firms within the scope of the SAR to approximately 1000. Without this amendment the total number would have been approximately 700[4].

Q4: Please clarify more fully what the difference is between a "bar date" and a "hard bar date".

A4: A bar date, as distinct from a hard bar date, is a deadline for clients to submit claims for the return of their assets when invited to do so by an administrator for the purpose of making a distribution of assets. It enables an administrator to distribute client assets in accordance with the prescribed procedure (which for client money is in FCA rules, and for custody assets is in the SAR insolvency rules). It gives certainty over the group of claimants for an upcoming distribution, ensuring that a distribution of assets or money by the administrator can progress smoothly without disruption from late claimants.

4 http://www.legislation.gov.uk/ukdsi/2017/9780111152980/impacts

The existing bar date mechanism in the SAR is known as a soft bar date because it allows a client who has failed to claim custody assets in a distribution to maintain the right to receive custody assets from any later distribution. By contrast, a hard bar date gives clients a final opportunity to claim a distribution of assets and, if they do not submit a claim before the hard bar date, entitles them to pursue their property rights by making an unsecured claim as creditor on the client estate.

The introduction of a soft bar date for client money distribution, and a hard bar date (following the use of a soft bar date) for client money and custody asset distribution, aims to resolve an inefficiency in previous SAR administrations whereby administrators have been left with a residue of client assets they have been unable to return. This prevented administrators from closing out the client estate effectively and efficiently.

Introducing a hard bar date, after which the administrator can start making a final reconciliation of claims and assets, aims to reduce delay in achieving the statutory objective of returning of client assets as soon as is reasonably practicable. It will allow administrators to transfer residual assets, or the proceeds of their disposal, to the bank's general estate and to close the client estate earlier than would otherwise have been feasible. This will lead to a faster administration and lower total costs for both clients and creditors.

Q5: What steps will be taken to communicate the fixing of a "bar date"? Will such communication include ordinary members of the public?

A5: Draft regulation 12E of the Special Administration Regime (SAR: inserted by regulation 12 of the draft SI) sets out procedural and communication requirements for the administrator when setting a bar date. The administrator would need to communicate the bar notice (by which the bar date is set) to clients of whom the administrator is aware, persons who the administrator believes hold security over assets, the FCA and in specified cases, the PRA and the Bank of England. Also, to ensure the setting of the bar date is communicated more widely, the notice must be advertised in the Gazette, the UK's official public record and in such other ways as to ensure that the notice is seen by as many eligible claimants as is practicable.

Q6: Please explain more fully why the Government cannot legislate to provide the mechanisms to enforce the duty to cooperate (not least since this proposal seems to be well supported by respondents).

A6: The Bloxham review and the Treasury consultation document both proposed introducing a duty on banks, custodians and counterparties to cooperate in providing information or supplying documents to the administrator. This was intended to speed the return of client assets. Since then, the Treasury has been considering whether the duty would be enforceable by the administrator of an investment bank or by the FCA if a bank, custodian or counterparty did not comply with it.

Banks, custodians and counterparties already have contractual and statutory obligations to provide information and documents needed for the special administration. Further, section 236 of the Insolvency Act 1986 enables the court, on application by the special administrator, to require any person with information or documents required for the SAR proceedings to produce them. Consequently, although it was initially felt that it would be helpful to spell out a duty to cooperate in the SAR, such a duty would, strictly speaking, have no

effect unless the SAR also provided a specific remedy for non-compliance, which would be no more effective than section 236. The Treasury concluded it would be inappropriate to have a duty to cooperate spelled out without any specific means of securing compliance or to create such a duty together with a specific regulatory remedy given the existing obligations and remedies relating to the provision of information and documents by third parties.

18 and 23 January 2017

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 31 January 2017, a Member declared the following interest:

Investment Bank (Amendment of Definition) and Special Administration (Amendment) Regulations 2017

Lord Janvrin

Senior Adviser, HSBC Private Bank (UK) Ltd (from 3 March 2016)

Attendance:

The meeting was attended by Lord Bowness, Lord Hodgson of Astley Abbotts, Lord Janvrin, Baroness O'Loan, Lord Rowlands, Baroness Stern and Lord Trefgarne.