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Consultation on the Rules of Court for the water and sewerage special administration regime

December 2008



Llywodraeth Cynulliad Cymru
Welsh Assembly Government



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This document is available on the Defra website:
<http://www.defra.gov.uk/corporate/consult/water-admin/index.htm>

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Introduction

What this consultation concerns

1.1 This consultation paper seeks your views on the draft Water Industry (Special Administration) Rules 2009 statutory instrument clarifying the court arrangements and the roles of the petitioners, special administrator, creditors and the court itself as outlined in sections 23 to 24 and Schedules 2 and 3 of the Water Industry Act 1991 (WIA91) which apply special procedures should one of the following water companies become insolvent or otherwise fail:

- a water undertaker;
- a sewerage undertaker;
- a qualifying licensed water supplier (i.e. a new entrant holding a combined licence and supplying water designated as a strategic supply).

1.2 The special procedures are intended to ensure that, if a water company were to face formal insolvency, customers would continue to receive water and sewerage services.

How to respond

1.3 We would like to receive responses to the questions on page seven. A list of the organisations that we approached directly for views is on the Defra website, but we welcome views from all interested parties or individuals.

1.4 We need to receive your responses **by 20 March 2009**. Please send them:

- by email (in Word or Rich Text) format to
special.admin@defra.gsi.gov.uk; or
- by post to

David S Jones
Water Availability & Quality Programme
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Area 2C
Ergon House
Horseferry Road
London
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Consultees in Wales should also copy their responses:

- by email (in Word or Rich Text) format to
water@wales.gsi.gov.uk; or

- by post to

Olwen Minney
Water Policy Branch
Climate Change & Water Division
Welsh Assembly Government
Cathays Park
Cardiff
CF10 3NQ

1.5 In your responses please:

- explain who you are, and where relevant who you represent, and include your name and address;
- order your comments under the relevant question; and
- include a summary of your comments if they are more than three pages long.

1.6 In line with Defra's policy of openness, at the end of the consultation period copies of the responses we receive will be made publicly available through the Defra Information Resource Centre, Lower Ground Floor, Ergon House, Horseferry Road, London SW1P 3JR. If you do not consent to this, you must clearly request that your response be treated confidentially. Any confidentiality disclaimer generated by your IT system in email responses will not be treated as such a request. You should also be aware that there may be circumstances in which Defra or the Welsh Assembly Government will be required to comply with their obligations under the Freedom of Information Act and the Environmental Information Regulations.

Next steps

1.7 All the responses received by the deadline will be analysed and a summary placed on the Defra website.

1.8 After consideration of the responses, the proposed final version of the Water Industry (Special Administration) Rules ("the Rules") will be laid before Parliament. If the draft Rules are required before they get laid before Parliament, the courts can have regard to them as if they had legally come into force, and require relevant parties to apply them.

Code of practice on written consultations

1.9 This consultation paper has been produced in accordance with the Better Regulation Executive guidance on written consultations as set out at <http://www.berr.gov.uk/files/file47158.pdf>. This includes:

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Background

2.1 Ofwat ran exercise Blue Sky in January 2003 to expose the issues surrounding a water company with severe financial problems and promote thinking on how regulators would respond. One issue that was identified for further consideration was the special administration regime and, in particular, the absence of Rules for the sector.

2.2 In Future Water – the Government's Water Strategy for England¹ Defra announced that it was considering introducing Rules for water companies and looking at other aspects of the special administration regime, such as the financial arrangements and changes required to bring the WIA91 in line with other sectors. This consultation therefore fulfils one of these obligations. We are planning to use the forthcoming draft Flood and Water Bill to take forward changes to the WIA91 to bring the regime into line with modern insolvency practices.

2.3 In common with other regulated sectors such as energy and rail, there is a special administration regime within water legislation that lays down the procedures that must be followed in the event of a company becoming insolvent or is otherwise failing to such an extent that it is no longer appropriate for it to continue operating.

2.4 Insolvency normally arises when a company cannot, or is unlikely to be able to, pay its debts. An insolvency practitioner appointed as administrator or

¹ <http://www.defra.gov.uk/environment/water/strategy/index.htm>

administrative receiver may continue to trade a company after their appointment, if there are sufficient funds and it is in the interests of creditors to do so. In either procedure all or part of the company's business may be sold as a going concern or, in an administration only, a compromise can be agreed with creditors. However, normal insolvency procedures can bring closure of a company's business and sale of its assets. Such an outcome with a water company could mean parts of its network could be closed and its assets sold off for other purposes. In the event of a water company getting into severe difficulty, the WIA91 requires the courts to put it into special administration and avoid this problem by requiring the essential assets and infrastructure to be transferred to one or more companies.

2.5 However, the special administration regime for water companies differs from most other sectors in that it is also used as an enforcement tool in the event that a water company is failing in its statutory functions to such an extent that a transfer to a new owner is seen as the only option to protect the interests of customers. The special administration regime can therefore be used where:

- there has been or likely to be a serious contravention of an undertaker's principal duties;
- there has been or is likely to be a serious contravention of an enforcement order issued section 18 of WIA91;
- an Inspector's report under the Companies Act 1989; and
- an undertaker cannot or will not participate in arrangements for an inset appointment under section 7 of WIA91.

2.6 The WIA91 provides that rules may be made under section 411 of the Insolvency Act 1986 to provide for matters relating to special administration. Rules may be made for the purpose of the process, procedure and forms for use in special administration proceedings.

2.7 Functions contained in Section 411 of the Insolvency Act 1986 are not devolved to the Welsh Ministers. Accordingly the Welsh Ministers have no functions in relation to the making of the draft Rules. However, the Welsh Ministers do have roles and responsibilities in regards to water companies wholly or mainly in Wales, which is why the Welsh Assembly Government is also part of this consultation exercise.

Draft Rules of Court

3.1 The draft Rules in the Annex cover a wide range of issues, including:

- service of court petitions;
- statement of affairs and proposals to creditors;
- meetings;
- arrangements for the special administrator;
- court procedure and practice;
- proxies and representation; and
- forms to be used during the special administration.

3.2 The draft Special Administration Rules applies the Insolvency Rules 1986² with modifications. The Insolvency Rules provide rules of court procedure to underpin the administration procedure. For this reason, the Special Administration Rules are in many ways similar to the administration procedures which can apply to 'normal' companies facing insolvency. In modifying the Insolvency Rules we have had regard to the Rules adopted for the railway sector³, and have adapted these to take account of the special features of the English and Welsh water industry.

3.3 While the drafting of these Rules has been based on other Rules, we would welcome comments on the wording and on the procedures and forms that we are proposing to adopt for the water sector. In particular, we would like to hear from consultees where they think that we may be proposing unnecessary burdens on the various parties to the court proceedings.

Question 1

Are you content that the procedures in the draft Rules sufficiently cover all that is required by the courts, petitioners, special administrator, creditors and stakeholders to carry out their responsibilities effectively?

Question 2

Have you any comments on the language and presentation of the draft Rules and its forms?

Question 3

Do the draft Rules accurately reflect the unique features of the regulation of English and Welsh water companies?

Question 4

Are we imposing any unnecessary burdens on the various parties?

Impact Assessment

4.1 An Impact Assessment has not been prepared for these Rules as they have minimal impact on business and none on charities or voluntary bodies and would only impact on public bodies in exceptional circumstances. The policy to have a special administration procedure was established by the WIA91 Act, and these Rules simply provide detail as to how the procedure is to be applied to a water company.

²

<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/uk/legislation.htm>

³ http://www.opsi.gov.uk/si/si2001/uksi_20013352_en.pdf