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Government response to the consultation on the Rules of Court for the water and sewerage special administration regime

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Llywodraeth Cynulliad Cymru
Welsh Assembly Government



Department for Environment, Food and Rural Affairs
Nobel House
17 Smith Square
London SW1P 3JR
Telephone 020 7238 6000
Website: www.defra.gov.uk

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Information about this publication is available from:

Defra
Water Availability & Quality Programme
Area 2C Ergon House
Horseferry Road
London SW1P 2AL
Telephone 0207 238 5989
Email: special.admin@defra.gsi.gov.uk

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Introduction

1.1 The public consultation on the draft Water Industry (Special Administration) Rules 2008 statutory instrument (“the draft Rules”) was published on 17 December 2008 and closed on 20 March 2009.

1.2 The consultation was seeking views on the court arrangements and the roles of petitioners, the special administrator, creditors and the court itself as outlined in the special administration provisions of the Water Industry Act 1991 which apply special procedures should a statutory water company become insolvent or fail to meet its statutory obligations. The special procedures are intended to ensure that, if a water company were to face such difficulties, customers would continue to receive essential water and sewerage services.

1.3 This paper summarises the responses to the consultation, indicating views on the Government’s approach and the main points emerging from the responses.

The consultation

2.1 Notification of the consultation was sent to a wide variety of water stakeholders and other relevant interested parties, including those with an interest in insolvency and court procedures.

2.2 The consultation documentation was also made available on the Defra and Welsh Assembly Government websites. Any individual or organisation could respond by post or electronic mail.

Summary of responses

3.1 Overall there were five responses to the consultation. These came from:

- Blake Laphorn solicitors (on behalf of Bournemouth & West Hampshire Water plc);
- City of London Law Society – Insolvency Law Committee (CLLS);
- Companies House;
- Environment Agency; and
- Insolvency Service.

3.2 The Government is grateful to all the respondents and has taken on board a number of suggested changes to the draft Rules. Comments made on individual rules and the Government’s responses are in the table in the Annex.

3.3 We received some comments from the CLLS and the Environment Agency which were not related to the draft Rules themselves, but were relevant to the primary legislation. The Government is currently consulting on proposals to change the primary legislation that is to be taken forward in the

Flood and Water Management Bill¹. We will therefore consider the relevant points raised in light of responses made to the Bill consultation.

Summary of responses to individual questions

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?

4.1 The CLLS said that the draft Rules were equivalent in scope to other special administration regimes, except they did not:

- make any provisions for differences in notices, etc that would be required for foreign entities;
- include a general rule stating that the general practice and CPR will apply, with modifications where necessary; or
- include requirements for sealed copies of orders to be sent to the special administrator.

4.2 While the WIA91 makes a provision for foreign entities in special administration, it also requires all water and sewerage undertakers and licensed water suppliers to be limited companies (or statutory water companies in case of older water-only undertakers, but all of these are now limited companies). Therefore water companies will always have registered offices in Great Britain regardless of the nationality of their owners. This is not necessarily the case for entities subject to other special administration regimes.

4.3 The CPR (“Court Proceeding Rules”) automatically apply to court proceedings whenever there are no other rules to replace them. However, the Government agrees that a general rule should be added to be consistent with other rules.

4.4 On sealed copies, the provisions within the draft Rules reflect a request from Companies House to help it simplify its procedures. Provisions requiring “sealed” or “office” copies make processing more difficult for Companies House and will potentially increase the risk of the orders and forms being rejected upon receipt. The Government has also responded to a Companies House request to replace various references in the draft Rules with “copy”. However, on the advice of the Insolvency Service, we have retained the need for sealed copies when the court issues special administration orders to the special administrator.

Question 2: Have you any comments on the language and presentation of the draft Rules and its forms?

4.5 The CLLS was concerned that there was a lack of consistency between the use of language in the draft Rules and those for other regimes. The

¹<http://www.defra.gov.uk/corporate/consult/flood-water-bill/index.htm>

Government recognises that the use of different language for what are similar regimes could potentially cause confusion for the parties to the special administration. However, wording needs to take account of the unique features of the regulatory framework of the water and sewerage sectors (e.g. the devolutionary nature of regulation) and reflect the way that the primary legislation was drafted. We have nevertheless taken on board some of the suggestions for changes made by respondents to bring the drafting into line with other special administration regimes (see Annex).

Question 3: Do the draft Rules accurately reflect the unique features of the regulation of English and Welsh water companies?

4.6 The CLLS commented that there were inconsistencies between those persons who are entitled to receive notice of a petition, examine proxies, examine the court file and receive notice of a change in administrator. The Government was mindful of the potential burdens on the courts of the procedures and limited rights of certain interested parties to receive notices, etc. However, we felt it was important to give key stakeholders (the Environment Agency, Drinking Water Inspectorate and the Consumer Council of Water) the right to receive notice of a petition and the right to examine court papers in order to satisfy themselves that the environment and consumers' interests are being protected, but did not feel it was necessary for them to receive all notices. The Government envisages that these parties would be kept informed of developments by the petitioner (i.e. the relevant minister or Ofwat).

Question 4: Are we imposing any unnecessary burdens on the various parties?

4.7 There were no substantive answers to this question outside of the general comments on consistency between different rules and those comments included in the attached Annex.

ANNEX

Respondents' comments on individual Rules

Rule Number (consultation version)	Respondent	Respondent's Comment	Government Response
3	CLLS	It is unclear why it is necessary to limit the definition of Insolvency Rules to the Rules as in force prior to 15 September 2003: this approach was not used in the PPP Rules (which were also enacted after the Enterprise Act but are based on the original regime).	We will be retaining the existing definition as we think that this is a helpful reference and will leave no doubt about which set of insolvency rules we are applying.
8	CLLS	The term "so far as the deponent knows" replaces the term "to the best of [the deponent's] knowledge and belief used in the other special administration regime rules. It is unclear whether as a consequence; this is intended to impose a lesser standard on the petitioner.	Agreed. There was no intention to impose a lesser standard in these Rules. We will therefore amend this Rule.
8(5)(b)	CLLS	This provision is unnecessary as Section 26 of the WIA91 is different in scope to Section 62 of the Railways Act 1993; under the Act, the court cannot sanction a voluntary winding up.	Agreed. This Rule has been deleted.
8(5)(c)	CLLS	The provision is unnecessary as Section 26 of the WIA91 is different in scope to Section 62 of the Railways Act 1993. Although Section 26 does not specifically prevent an application for an ordinary administration order (although this would appear to be the intention) it does prevent such an order being made.	Agree. This Rule has been deleted.
8(6)	CLLS	This Rule imposes a lesser obligation on the petitioner than that found in Rule 2.3(6) of the Railway Rules or Rule 5(6) of the PPP Rules, for example.	Agree that petitioner should be required to provide all information that it knows will assist the court. We have therefore used same form of words as the PPP Rules.
10	CLLS	This Rule does not limit its application to property situated in England and Wales (which limitation is included in other special administration regime rules).	The Rules only apply to water companies in England and Wales, so additional wording is unnecessary.
14	CLLS	The Rules require the court to be satisfied that a person has an interest justifying his appearance; the PPP Rules, Energy Rules and Railway Rules permit the court to allow the appearance of a person where he may have such an interest. The Rules would	Agreed. We have changed wording to be consistent with other special administration regimes and to reduce the additional burden.

		impose a greater burden on the courts in determining the interests of a person seeking to appear at a hearing.	
17(2)	Insolvency Service	The Rules should specify how many sealed copies should be produced by the court, see rule 2.10(4) Insolvency Rules 1986 (“the 1986 Rules”).	Agreed. Four copies will be required (one for special administrator, one for Companies House, one for the petitioner and one for either the minister or Ofwat (whoever is not the petitioner)).
17(2)(b)	CLLS	The Rules permit advertisement "in whatever other way" the water administrator thinks most likely to ensure that the <i>water company's</i> creditors become aware of the order. This is in contrast to other administration regime rules that require newspaper advertisement only	Agreed. This Rule will be amended to only require a newspaper advertisement.
17, 18, WAT7, WAT8 & WAT9	Companies House	In subsection 17(5) of the Rules the requirement is for an “office” copy of the order to be sent to the Registrar of Companies in accordance with s21(2) of the Insolvency Act together with form WAT8. We have tried to simplify the Companies Act requirements so that only a “copy” is required. A requirement for an “office” copy makes our processing more difficult and will increase rejection rates of the form. We would advise the rule requires just a copy of the order, with the consequent amendment to the form WAT8. Similar comment for Rule 18.	Agreed. See paragraph 4.4.
20(2)(b)	CLLS	It is unclear why it is necessary for a water administrator to give notice to the water company the subject of the water administration, where the water administrator himself will have day-to-day control of that entity.	Agreed. This requirement will be removed.
23-25	CLLS	Each of these Rules requires notice to be given to the petitioner. If it is intended that this refer to either the Secretary of State or the Authority (depending on the petitioner), we think it would be clearer if that were stated. As drafted this could also refer to the creditor that originally presented a winding-up petition, which we do not believe to be the intention.	The “petitioner” in the case of these Rules is the relevant minister or Ofwat. We will replace this reference with “the Secretary of State or Welsh Ministers, as necessary”. The Rule already requires Ofwat to be sent a notice regardless of whether or it is the petitioner.
24	Companies House	A death in office of a Special Administrator requires a notice to be sent to the Registrar of Companies but no specific form has been prescribed for this purpose. Companies House would prefer a form as again it would ease our examination process and prevent	We think that WAT10 could be adapted to issue such a notice.

		unnecessary rejection of any notice received.	
27	CLLS	Rule 27 refers to the water administrator determining that "a person" is required to submit a statement of affairs, without limiting such power to those persons specified in Section 22 of the Insolvency Act 1986. This is contrast with the drafting of the other special administration regime rules we have reviewed which all refer back to Section 22.	Agreed. The Rule will be changed to refer back to section 22 of the Insolvency Act 1986.
27-29	CLLS	Rules 28 and 29 refer to a statement of affairs or affidavit of concurrence being delivered "as soon as reasonably practicable" but Section 22 imposes a time limit, which can be extended by the agreement of the administrator. This is inconsistent with the reference to Section 22(6) in Rule 27, and inconsistent with the wording of other special administration regime rules.	Agreed. These Rules contradict section 22 of the Insolvency Act 1986 and will be changed.
31(11)	CLLS	This Rule is more restrictive than the equivalent provision in the Railway Rules (Rule 3.4(7)), the PPP Rules (Rule 18(9)) or the Energy Rules (Rule 18(7)).	It was not our intention to be more restrictive. We are therefore amending this Rule.
33 & WAT15	Companies House	Form WAT15 in the annex has an instruction to send the form to the Registrar of Companies, it is not clear if this is intended to be a copy of the abstract or the original.	This wording is common to that used in the other special administration regimes.
40-41	CLLS	We question whether it would be better not to specify fees in the body of the Rules, to make it easier to adjust such fees from time to time. This is approach taken in other rules reviewed.	The approach in the draft Rules is the same as the approach taken in the PPP Insolvency Rules
46 & 61	Insolvency Service	The person presiding over a meeting is known as the Chairman throughout insolvency proceedings. Changing the title here may be confusing to users of the Rules (NB Form WAT20 still refers to "Chairman").	Gender-neutral drafting is Government policy. The reference in Form WAT20 has been changed to "Chair".
54(3) & 67	CLLS	As drafted, the reference to section 323 Companies Act is erroneous as the new provision does not take the same form as section 375 Companies Act 1985 and excludes references to creditors' meetings. We suggest this is addressed in the same manner as in Rule 88 of the PPP Rules.	Agreed. We have replicated Rule 88 of the PPP Rules.
65(2)	CLLS	Rule 65(2) is unnecessary if the wording after the first comma is included in Rule 65(1)(a) (or vice versa).	We have retained the existing wording as this appears to be consistent with other rules and makes it clear that rejected creditors have no right to

			inspect proxies.
81	Blake Laphorn solicitors	We do not understand the wording of rule 81 in Chapter 3 is entitled "Access to Court Records" and rule 81 is entitled "CPR rules not to apply". One would expect, therefore, that the wording of the rule itself would disapply certain aspects of CPR, but it does not. Instead, it says "CPR Part 5 (other than rules 5.4 B and 5.4 C) apply to documents filed in special administration proceedings." At first sight, therefore, this suggests that all of CPR Part 5 applies, but that rules 5.4 B and 5.4 C are being disapplied. However, rules 5.4 B and 5.4 C relate to the provision of documents from court records to parties to the proceedings and to non-parties to the proceedings.	This has been corrected to indicate that CPR5 does not apply.
112	CLLS	Rule 112 implies that Part 18 CPR and an application under Part 8 should run consecutively whereas the Railway Rules, Energy Rules and PPP Rules allow concurrent applications. We consider that the approach in the other special administration rules is correct as it reducing the administrative and cost burden on administrators and other parties.	Agreed. The draft Rules have been amended to adopt the approach taken in the PPP Rules.
New Rule	Insolvency Service	There does not appear to be an equivalent to Rule 12.8 in the 1986 Rules, regarding the proof of the insolvency practitioner's security.	Agreed. A new Rule will be added.
WAT6	Insolvency Service	In removing the other available trade classifications from the equivalent form in the 1986 Rules, Form 2.5, Defra needs to be satisfied that none of the alternative classifications could apply to a company that could enter water special administration.	WIA91 requires water companies to be limited companies that only carry out the functions of an undertaker or licensed water supplier. We are therefore satisfied that only the "46" classification applies.