

EXPLANATORY MEMORANDUM TO
THE WATER INDUSTRY (SPECIAL ADMINISTRATION) (ENGLAND AND WALES) RULES 2024

2024 No. 229

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs (Defra) and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to revoke the Water Industry (Special Administration) Rules 2009 and to apply to the water industry, with modifications provided for in the instrument, the Insolvency Rules 2016.

2.2 The Rules provide the detail of the court procedure which should apply in relation to a special administration. The current Rules are outdated and would require the special administrator to communicate by letter and to have in-person meetings only. As such, this instrument revokes them and recasts the rules applicable to water industry insolvency based on the Insolvency Rules 2016 to allow, among other things, for modern communication methods, e.g., emails, virtual meetings.

3. Matters of special interest to Parliament

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument (that is the jurisdictions of which the instrument forms part of the law) is England and Wales.

4.2 The application of this instrument (that is where the instrument produces a practical effect) is also England and Wales.

5. European Convention on Human Rights

5.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 This instrument is made, in exercise of powers conferred by section 411 of the Insolvency Act 1986 as applied by regulation 49 of the Water Industry (Special Administration) Regulations 2024, for the purposes of provision made by or under sections 23 to 26 of the Water Industry Act 1991.

6.2 This instrument applies the Insolvency Rules 2016, subject to modifications provided for in the instrument, to water industry companies in respect of which a court has made, or may make, a special administration order.

- 6.3 A water industry company is one mentioned in section 23(1) of the Water Industry Act 1991 as being a company holding an appointment under Chapter 1 of Part II of that Act, or a qualifying water supply licensee under that Act.
- 6.4 A special administration order is an order of the High Court made in accordance with the Water Industry Act 1991.

7. Policy background

What is being done and why?

- 7.1 Special administration is a process in which the objectives under a normal administration are modified to include public interest objectives. The process typically enables an insolvent company, which provides vital public services (e.g., water, energy, rail) to be put into special administration with a requirement that the public service will be provided pending rescue or transfer to new owners. This contrasts with a normal administration, where the appointed administrator is generally focused on the creditors' interests. The Government prepares for all eventualities to ensure the uninterrupted provision of vital public services. There is a high bar for implementing a Special Administration Regime (SAR) and it is a tool to be used when other options have been exhausted.
- 7.2 There is no universal SAR legislative framework, rather each vital public service is governed by their own distinct SAR, e.g., the water industry special administration regime (WISAR), the Energy Supply Companies Special Administration Regime (introduced by the Energy Act 2011). This is because SAR legislative frameworks typically adapt general insolvency law to ensure it provides for the specifics of their industry.
- 7.3 The WISAR comes into play when a water industry company becomes insolvent ('an insolvency SAR') or fails to carry out its statutory functions or licensed activities to such an extent that it is inappropriate for the water industry company to hold its appointment or licence ('a performance SAR'). The WISAR is seen as the ultimate enforcement tool in the case of performance SARs, and in both insolvency and performance SARs ensures consumers are protected from the impacts of financial distress and that water and wastewater services will continue to be provided.
- 7.4 The Secretary of State or the regulator, the Water Services Regulation Authority "Ofwat", with the Secretary of State's consent, may apply to the High Court for a special administration order, and, if granted, a special administrator is appointed to manage the water industry company. In the case of a water company wholly or mainly in Wales, Welsh Ministers are the relevant authority, rather than the Secretary of State. In the case of a qualifying water supply licensee (within the meaning of the WIA) whose licence gives it a supplementary authorisation, the Secretary of State or Ofwat must consult the Welsh Ministers ahead of applying for the special administration order. Under these Rules, the Secretary of State, Ofwat and the Welsh Ministers, as appropriate, have a role in relation to documentation and court hearings under the WISAR.
- 7.5 While the special administration order is in force, the affairs, business, and property of the water industry company will be managed by a person appointed by the High Court on the proposal of Ofwat or Defra pending either the transfer of the relevant parts of the water industry company's undertaking to another water industry company or companies or the rescue of the water industry company.

- 7.6 There have been significant updates to the Insolvency Act 1986 since it came into force. Most notable updates to the insolvency and restructuring legislative regimes were made by the Enterprise Act 2002, the Small Business, Enterprise and Employment Act 2015, the Corporate Insolvency and Governance Act 2020 and the Insolvency (England and Wales) Rules 2016 (which revoked the Insolvency Rules 1986). A series of legislative updates, including via these Rules, are now being made to the WISAR to ensure it is aligned with the most up-to-date insolvency and restructuring legislation.

Explanations

Why is it being changed?

- 7.7 Given the recent market instability in the energy and banking sectors and the need for HMG intervention in certain instances, e.g., Bulb's special administration, Defra reviewed its powers should a water or sewerage undertaker or qualifying water supply licensee become insolvent or not meet its statutory duties, and the government have to apply for a special administration order. This work highlighted the need for modernisations. As such the Defra Secretary of State is commencing and implementing these provisions to bring the WISAR in line with other SAR regimes.

What will it now do?

- 7.8 We are introducing these Rules to allow a special administrator to use more modern communication methods e.g. emails and virtual meetings because current Rules allow a special administrator to communicate via letter and in-person meetings only. These changes mean the WISAR aligns with other modernisations such as standard insolvency forms and allows virtual voting. The reforms ensure the WISAR aligns with modern practices which will be beneficial to administrators if ever required.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

- 9.1 No need to consolidate arises as a result of this instrument. The Department has published an informal 'Keeling Schedule' showing how the Insolvency Rules 2016 should be read where applied and as modified by this instrument.

10. Consultation outcome

- 10.1 There has been no consultation on this instrument since it brings water industry special administration into line with current insolvency legislation and existing Rules.

11. Guidance

- 11.1 No guidance has been prepared for this SI as it brings Water Industry Special Administration in line with current insolvency legislation and existing Rules. The Department has published an informal 'Keeling Schedule' showing how the Insolvency Rules 2016 should be read where applied and as modified by this instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because the level of impact for this particular SI is minimal (net present value of the SI over a 10-year evaluation period is likely less than £55,000).

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Minister Moore MP, Parliamentary Under Secretary of State for Defra has made the following statement:

“The inclusion of a review provision for the purposes of s.28(2)(a) of the Small Business, Enterprise and Employment Act 2015 is not considered appropriate for these Rules, hence this statement is made in accordance with s.28(2)(b) of that Act. Having had regard to the guidance promulgated under s.31(4) of that Act, the inclusion of a review provision in these Rules is considered disproportionate taking into account the economic impact the Rules are likely to have on any qualifying activity since its use is expected to be infrequent. However, the Rules will be kept under regular review to keep pace with changes in the Water Industry Act 1991 and the general insolvency rules.”

15. Contact

- 15.1 Craig White at the Department for Environment, Food and Rural Affairs email: craig.white@defra.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Hannah Lammas at the Department for Environment, Food and Rural Affairs email: Hannah.lammas@defra.gov.uk can be contacted with any queries regarding the instrument.
- 15.3 Davide Minotti Deputy Director for Special Projects, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.
- 15.4 Minister Moore Parliamentary Under Secretary of State, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.