



The Insolvency
Service

The Insolvency (Protection of Essential Supplies) Order 2015

Guidance for insolvency
practitioners and suppliers

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A BIS SERVICE

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1. Introduction

- 1.1 The purpose of this guidance is to provide clarity to insolvency practitioners and suppliers of “essential services” on the provisions contained within the Insolvency Act 1986, as amended by the Insolvency (Protection of Essential Supplies) Order 2015¹ (the “Order”). The Order was made in March 2015 and comes into effect on 1 October 2015.
- 1.2 The Order was made under powers in the Enterprise and Regulatory Reform Act 2013² to ensure that insolvency practitioners rescuing struggling businesses are better able to secure the continuation of supplies that are essential to the continuation of a business.
- 1.3 The amendments made by the Order apply to England, Wales and Scotland in so far as they are concerned with the supply of essential services in corporate insolvency. The provisions with respect to personal insolvency apply to England and Wales only.
- 1.4 The Order amends sections 233 and 372 of the Insolvency Act 1986 to extend the list of suppliers prevented from compelling the payment of charges incurred before the insolvency as a condition of continuing supply. Section 233 applies in corporate insolvency procedures and section 372 where an individual is subject to a bankruptcy order or a voluntary arrangement is approved by their creditors.
- 1.5 The Order also inserts new provisions (section 233A for administration and company voluntary arrangements and section 372A for individual voluntary arrangements where the supply is to a business carried on by the individual, or by a firm of partnership or which the individual is or was a member) into the Insolvency Act 1986. These provisions prevent suppliers of essential goods or services from relying on their insolvency-related contractual terms to charge higher prices or terminate the contract, or indeed do any other thing, just because a business enters into administration³ or a voluntary arrangement⁴. In doing so, the suppliers will be under a continuing contractual obligation to supply the essential goods or services to the business during the insolvency.

¹ The Order can be viewed at: <http://www.legislation.gov.uk/ukSI/2015/989/article/1/made>

² Part 6 Sections 92 - 95

³ Administration is a procedure to facilitate the rescue and rehabilitation of insolvent but potentially viable companies and/or their businesses and provides a company with a breathing space during which time a rescue package can be put in place.

⁴ A voluntary arrangement allows a company, an individual or a partnership to reach a binding agreement with their creditors about payment of all, or part of, their debts over an agreed period.

These new provisions only apply to contracts entered into on or after 1 October 2015.

1.6 However, the new sections, as inserted by the Order, provide safeguards for suppliers of essential goods or services. In particular, they enable the suppliers to:

- terminate the supply, unless an insolvency office-holder personally guarantees the payment of any charges in respect of the continuation of the supply;
- terminate the contract where an insolvency office-holder consents to the termination;
- terminate the contract where a court grants permission for the termination if the court is satisfied that the continuation of the contract would cause the supplier hardship;
- terminate the contract where any charges in respect of the supply that are incurred after the company enters administration or the voluntary arrangement takes effect are not paid within the period of 28 days beginning with the day on which payment is due.

1.7 We consider it likely that charges incurred under an actual contract continued at the discretion of the administrator will be expenses of an administration.

2. “Essential supplies”

2.1 The provisions seek to ensure the supply of “essential supplies” during insolvency. These supplies are those specifically listed in sections 233 and 372 of the Insolvency Act 1986 and, after the amendments made by the Order, broadly cover the supply of:

- Electricity
- Gas
- Water
- Communications services
- “Information Technology Supplies”

2.2 This list of specified essential supplies has been extended by the Order. The scope of sections 233 and 372 were previously limited to statutory undertakers and similar bodies. The amendments extend the list to a wider list of specified private suppliers of utilities. In particular, it will cover “on-sellers” of utilities, who are an intermediary between the supplier of gas, electricity etc. and the insolvent business. This would include a landlord supplying utilities to a tenant.

2.3 Essential supplies have also been extended to cover supplies for the purpose of enabling or facilitating anything to be done by electronic means (i.e. “information technology supplies”). This list includes-

- point of sale terminals;
- computer hardware and software;
- information, advice and technical assistance in connection with the use of information technology;
- data storage and processing;
- website hosting.

2.4 Other supplies which may also colloquially be referred to as information technology supplies (such as services for internet access, broadband or email), are also covered by virtue of being a communications service, and hence are not explicitly specified in section 233 or 372.

2.5 The provisions do not force a business to continue accepting the supply of essential supplies, except in accordance with their obligations under contract. The parties may terminate the contract by mutual consent.

3. Information to be given to suppliers

3.1 Insolvency office-holders are urged to make contact with essential suppliers at the earliest possible time and as soon as reasonably practicable in order to notify them of the insolvency.

3.2 In addition to the general notification of the insolvency, it is likely to be conducive to the efficient supply of the essential service if office-holders inform suppliers of intended future use and keep them up to date on any further changes in the supply needs of the business during the insolvency. This is particularly important in relation to the supply of gas and electricity where energy suppliers purchase energy from the wholesale market (in the short, medium and long term) and can incur significant financial losses if they are unable to forecast customer consumption.

3.3 All notices to essential suppliers are in addition to any statutory information office-holders are already required to provide creditors of the business⁵.

⁵ Schedule B1 paragraphs 46 and 47 Insolvency Act 1986

4. Difference between “supply” and “contract”

- 4.1 The provisions in sections 233A and 372A include safeguards to enable a supplier to terminate the supply or contract respectively, when a supplier may not rely on insolvency-related terms. Those provisions distinguish between a supplier’s right to terminate the supply and right to terminate the contract.
- 4.2 The right to terminate “supply” refers to the contractual provision as part of a contract to a supply of essential goods or services, whilst reference to the “contract” refers to a contract in its entirety, which may include a supply of essential goods or services, but may also include other provisions.
- 4.3 As such, when a supplier exercises its right to terminate the supply, the supplier will cease to be under the contractual obligation to supply, even if they are not capable of withdrawing the physical supply immediately for practical reasons or due to the operation of other legislation. Likewise, under these provisions the supplier would not need to terminate the contract and then subsequently also terminate the supply separately.
- 4.4 The term “supply”, as used in the Insolvency Act 1986 and the Order, is not intended to affect the meaning of the definition of “supply” in the Gas Act 1986 and Electricity Act 1989, and is without prejudice to the requirements imposed under those Acts.

5. Meaning of “insolvency-related terms”

- 5.1 The new provisions prevent suppliers from relying on their insolvency-related contractual terms to charge higher prices or terminate the contract, or do any other thing, just because a business enters into administration or a voluntary arrangement.
- 5.2 “Insolvency-related terms” in this context will only cease to have effect where a business enters administration or a voluntary arrangement. The supplier could still rely on other (non-insolvency-related) contractual terms for the purpose of terminating the contract.
- 5.3 A supplier may also continue to rely on the insolvency related terms insofar as they relate to other insolvency procedures, e.g. bankruptcy or liquidation.
- 5.4 Insolvency-related terms do not include events which are indirect consequences of the company entering into administration or a voluntary arrangement, such as a change in consumption or downgraded credit rating.