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DRAFT STATUTORY INSTRUMENTS

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**2006 No.**

**The Water and Sewerage Services  
(Northern Ireland) Order 2006**

**PART III**

**APPOINTMENT AND REGULATION OF UNDERTAKERS**

**CHAPTER II**

**ENFORCEMENT AND INSOLVENCY**

*Enforcement orders*

**Orders for securing compliance with certain provisions**

**30.**—(1) Subject to paragraph (2) and Articles 31 and 32, where in the case of any company holding an appointment under Chapter I an enforcing authority is satisfied—

- (a) that that company is contravening—
  - (i) any condition of the company's appointment in relation to which it is the relevant enforcement authority; or
  - (ii) any statutory or other requirement which is enforceable under this Article and in relation to which it is the relevant enforcement authority; or
- (b) that that company is likely to contravene any such condition or requirement,

it shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.

(2) Subject to Article 31, where in the case of any company holding an appointment under Chapter I—

- (a) it appears to an enforcement authority as mentioned in sub-paragraph (a) or (b) of paragraph (1); and
  - (b) it appears to that authority that it is requisite that a provisional enforcement order be made,
- the enforcement authority may (instead of taking steps towards the making of a final order) by a provisional enforcement order make such provision as appears to it requisite for the purpose of securing compliance with the condition or requirement in question.

(3) In determining for the purposes of paragraph (2)(b) whether it is requisite that a provisional enforcement order be made, an enforcement authority shall have regard, in particular, to the extent to which any person is likely to sustain loss or damage in consequence of anything which, in contravention of any condition or of any statutory or other requirement enforceable under this Article, is likely to be done, or omitted to be done, before a final enforcement order may be made.

(4) Subject to Articles 31 and 32, where an enforcement authority has made a provisional enforcement order, it shall confirm the order, with or without modifications, if—

- (a) it is satisfied that the company to which the order relates—
    - (i) is contravening any condition or statutory or other requirement in relation to which it is the enforcement authority; or
    - (ii) is likely to contravene any such condition or requirement; and
  - (b) the provision made by the order (with any modifications) is requisite for the purpose of securing compliance with that condition or requirement.
- (5) An enforcement order—
- (a) shall require the company to which it relates (according to the circumstances of the case) to do, or not to do, such things as are specified in the order or are of a description so specified;
  - (b) shall take effect at such time, being the earliest practicable time, as is determined by or under the order; and
  - (c) may be revoked at any time by the enforcement authority which made it.
- (6) For the purposes of this Article and the following provisions of this Order—
- (a) the statutory and other requirements which are enforceable under this Article in relation to a company holding an appointment under Chapter I are such of the requirements of any statutory provision as—
    - (i) are imposed in consequence of that appointment; and
    - (ii) are made so enforceable by that statutory provision;
  - (b) the Authority shall be the relevant enforcement authority in relation to the conditions of an appointment under Chapter I; and
  - (c) the relevant enforcement authority in relation to each of the statutory and other requirements enforceable under this Article shall be—
    - (i) the Department;
    - (ii) the Authority; or
    - (iii) either of the above,according to whatever provision is made by the statutory provision by which the requirement is made so enforceable.

“enforcement authority” means—

- (a) the Department; or
- (b) the Authority;

“enforcement order” means a final enforcement order or a provisional enforcement order;

“final enforcement order” means an order under this Article other than a provisional enforcement order;

“provisional enforcement order” means an order under this Article which, if not previously confirmed in accordance with paragraph (4), will cease to have effect at the end of such period (not exceeding 3 months) as is determined by or under the order.

In this Article and the following provisions of this Chapter—

(8) Where any act or omission constitutes a contravention of a condition of an appointment under Chapter I or of a statutory or other requirement enforceable under this Article, the only remedies for that contravention, apart from those available by virtue of this Article, shall be those for which express provision is made by or under any statutory provision and those that are available in respect of that act or omission otherwise than by virtue of its constituting such a contravention.

### Exceptions to the duty to enforce

**31.**—(1) An enforcement authority shall not be required to make an enforcement order in relation to any company, or to confirm a provisional enforcement order so made, if it is satisfied—

- (a) that the contraventions were, or the apprehended contraventions are, of a trivial nature;
- (b) that, in such circumstance or subject to such conditions as may be prescribed, the company has given, and is complying with, an undertaking to take all such steps as it appears to the enforcement authority for the time being to be appropriate for the company to take for the purpose of securing or facilitating compliance with the condition or requirement in question; or
- (c) that the duties imposed on the enforcement authority by Part II preclude the making or, as the case may be, the confirmation of the order; or
- (d) that the most appropriate way of proceeding is under the Competition Act 1998 (c. 41).

(2) The requirement to comply with an undertaking given for the purposes of paragraph (1)(b) shall be treated as a statutory requirement enforceable under Article 30—

- (a) by the Department; or
- (b) with the consent of or in accordance with a general authorisation given by the Department, by the Authority.

(3) Where an enforcement authority, having notified a company that it is considering the making in relation to the company of an enforcement order or the confirmation of a provisional enforcement order so made, is satisfied as mentioned in sub-paragraph (a), (b), (c) or (d) of paragraph (1), it shall—

- (a) serve notice that it is so satisfied on the company;
- (b) publish a copy of the notice in such manner as it considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them; and
- (c) in a case where the enforcement authority is satisfied as mentioned in the said sub-paragraph (b), serve a copy of the notice and of the undertaking given for the purposes of that sub-paragraph on the other enforcement authority.

(4) The requirements of paragraph (3) shall not apply, in the case of any proposed order or confirmation in respect of a direction under Article 294, to the extent that the Secretary of State directs that they should not be complied with in the interests of national security.

### Procedure for enforcement orders

**32.**—(1) Before making a final order or confirming a provisional order, an enforcement authority shall give notice—

- (a) stating that it proposes to make or confirm the order and setting out its effect;
- (b) setting out—
  - (i) the relevant condition or requirement for the purpose of securing compliance with which the order is to be made or confirmed;
  - (ii) the acts or omissions which, in the enforcement authority's opinion, constitute or would constitute contraventions of that condition or requirement; and
  - (iii) the other facts which, in its opinion, justify the making or confirmation of the order; and
- (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed order or proposed confirmation may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(2) A notice under paragraph (1) shall be given—

- (a) by publishing the notice in such manner as the enforcement authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them; and
- (b) by serving a copy of the notice, and a copy of the proposed order or of the order proposed to be confirmed, on the company to which the order relates and on the other enforcement authority.

(3) An enforcement authority shall not make a final order with modifications, or confirm a provisional order with modifications, except—

- (a) with the consent to the modifications of the company to which the order relates; or
- (b) after complying with the requirements of paragraph (4).

(4) The requirements mentioned in paragraph (3) are that the enforcement authority shall—

- (a) serve on the company to which the order relates such notice as appears to it to be requisite of its proposal to make or confirm the order with modifications;
- (b) in that notice specify the period (not being less than 28 days from the date of the service of the notice) within which representations or objections with respect to the proposed modifications may be made; and
- (c) consider any representations or objections which are duly made and not withdrawn.

(5) As soon as practicable after making an enforcement order or confirming a provisional order, the enforcement authority shall—

- (a) serve a copy of the order on the company to which the order relates and on the other enforcement authority; and
- (b) publish such a copy in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it.

(6) Before revoking a final enforcement order or a provisional order which has been confirmed, the enforcement authority shall give notice—

- (a) stating that it proposes to revoke the order and setting out its effect; and
- (b) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed revocation may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(7) If, after giving a notice under paragraph (6), the enforcement authority decides not to revoke the order to which the notice relates, it shall give notice of that decision.

(8) A notice under paragraph (6) or (7) shall be given—

- (a) by publishing the notice in such manner as the enforcement authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them; and
- (b) by serving a copy of the notice on the company to which the order relates and on the other enforcement authority.

(9) The requirements of the preceding provisions of the Article shall not apply, in the case of any order in respect of contravention of a direction under Article 294, to the extent that the Secretary of State directs that they should not be complied with in the interests of national security.

### **Validity and effect of enforcement orders**

**33.**—(1) If the company to which an enforcement order relates is aggrieved by the order and desires to question its validity on the ground—

- (a) that its making or confirmation was not within the powers of Article 30; or
- (b) that any of the requirements of Article 32 have not been complied with in relation to it,

the company may, within 42 days from the date of service on it of a copy of the order, make an application to the High Court under this Article.

(2) On any such application the High Court may, if satisfied that the making or confirmation of the order was not within those powers or that the interests of the company have been substantially prejudiced by a failure to comply with those requirements, quash the order or any provision of the order.

(3) Except as provided by this Article, the validity of a final or provisional order shall not be questioned by any legal proceedings whatsoever.

### **Effect of enforcement order**

**34.**—(1) The obligation to comply with an enforcement order shall be a duty owed to any person who may be affected by a contravention of the order.

(2) Where a duty is owed under paragraph (1) to any person, any breach of the duty which causes that person to sustain loss or damage shall be actionable at the suit of that person.

(3) In any proceedings brought against a company in pursuance of paragraph (2), other than proceedings in respect of so much of a contravention of any order as consists in a breach of the duty imposed by virtue of Article 108(1)(a), it shall be a defence for the company to prove that it took all reasonable steps and exercised all due diligence to avoid contravening the order.

(4) Without prejudice to any right which any person may have by virtue of paragraph (1) to bring civil proceedings in respect of any contravention or apprehended contravention of an enforcement order, compliance with any such order shall be enforceable by civil proceedings for an injunction or for any other appropriate relief at the suit of the body which is the relevant enforcement authority in relation to the condition or requirement compliance with which was to be secured by the order.

### *Financial penalties*

### **Financial penalties**

**35.**—(1) Where the Authority is satisfied in the case of any company holding an appointment under Chapter I that the company—

- (a) has contravened or is contravening any condition of the appointment; or
- (b) has failed or is failing to achieve any standard of performance prescribed under Article 66(2) or 150(2),

the Authority may, subject to Article 37, impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.

(2) Where an enforcement authority is satisfied in the case of any company holding an appointment under Chapter I that the company has contravened or is contravening any statutory or other requirement which is enforceable under Article 30 and in relation to which it is the relevant enforcement authority, the enforcement authority may, subject to Article 37, impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.

(3) Before imposing a penalty on a company under paragraph (1) or (2) an enforcement authority shall give notice—

- (a) stating that it proposes to impose a penalty and the amount of the penalty proposed to be imposed;
- (b) setting out the relevant condition or requirement or the standard of performance in question;
- (c) specifying the acts or omissions which, in the opinion of the enforcement authority, constitute the contravention or failure in question and the other facts which, in the opinion of the enforcement authority, justify the imposition of a penalty and the amount of the penalty proposed; and
- (d) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed penalty may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(4) Before varying any proposal stated in a notice under paragraph (3)(a) the enforcement authority shall give notice—

- (a) setting out the proposed variation and the reasons for it; and
- (b) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed variation may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(5) As soon as practicable after imposing a penalty, the enforcement authority shall give notice—

- (a) stating that it has imposed a penalty on the company and its amount;
- (b) setting out the condition, requirement or standard of performance in question;
- (c) specifying the acts or omissions which, in the opinion of the enforcement authority, constitute the contravention or failure in question and the other facts which, in the opinion of the enforcement authority, justify the imposition of the penalty and its amount; and
- (d) specifying a date, no earlier than the end of the period of 42 days from the date of service of the notice on the company, by which the penalty is required to be paid.

(6) The company may, within 28 days of the date of service on it of a notice under paragraph (5), make an application to the enforcement authority for it to specify different dates by which different portions of the penalty are to be paid.

(7) Any notice required to be given by an enforcement authority under this Article shall be given—

- (a) by publishing the notice in such manner as the enforcement authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them;
- (b) by serving a copy of the notice on the company to which it relates;
- (c) by serving a copy of the notice on the Council; and
- (d) by serving a copy of the notice on the other enforcement authority.

(8) Any sums received by an enforcement authority by way of penalty under this Article shall be paid into the Consolidated Fund.

(9) The power of an enforcement authority to impose a penalty under this Article is not exercisable in respect of any contravention or failure before the coming into operation of this Article.

(10) No penalty imposed by an enforcement authority under this Article may exceed 10 per cent. of the turnover of the company (determined in accordance with provisions specified in an order made by the Department subject to negative resolution).

(11) An enforcement authority shall not impose a penalty under this Article where it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998 (c. 41).

### **Statement of policy with respect to penalties**

**36.**—(1) Each enforcement authority shall prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount.

(2) In deciding whether to impose a penalty, and in determining the amount of any penalty, in respect of a contravention or failure the enforcement authority shall have regard to its statement of policy most recently published at the time when the contravention or failure occurred.

(3) An enforcement authority may revise its statement of policy and where it does so shall publish the revised statement.

(4) Publication under this Article shall be in such manner as the enforcement authority considers appropriate for the purpose of bringing the matters contained in the statement of policy to the attention of persons likely to be affected by them.

(5) An enforcement authority shall undertake such consultation as it considers appropriate when preparing or revising its statement of policy.

### **Time limits on the imposition of financial penalties**

**37.**—(1) Where no final or provisional order has been made in relation to a contravention or failure, an enforcement authority may not impose a penalty in respect of the contravention or failure later than the end of the period of 12 months from the time of the contravention or failure, unless before the end of that period—

- (a) the notice under Article 35(3) relating to the penalty is served on the company under Article 35(7); or
- (b) a notice relating to the contravention or failure is served on the company under Article 261(2).

(2) Where a final or provisional order has been made in relation to a contravention or failure, an enforcement authority may not impose a penalty in respect of the contravention or failure unless the notice relating to the penalty under Article 35(3) was served on the company under Article 35(7)—

- (a) within 3 months from the confirmation of the provisional order or the making of the final order; or
- (b) where the provisional order is not confirmed, within 6 months from the making of the provisional order.

### **Interest and payment of instalments**

**38.**—(1) If the whole or any part of a penalty is not paid by the date by which it is required to be paid, the unpaid balance from time to time shall carry interest at the rate for the time being prescribed under Article 127 of the [Judgments Enforcement \(Northern Ireland\) Order 1981 \(NI 6\)](#).

(2) If an application is made under paragraph (6) of Article 35 in relation to a penalty, the penalty is not required to be paid until the application has been determined.

(3) If the enforcement authority grants an application under that paragraph in relation to a penalty but any portion of the penalty is not paid by the date specified in relation to it by the enforcement authority under that paragraph, that authority may where it considers it appropriate require so much of the penalty as has not already been paid to be paid immediately.

## Appeals

**39.**—(1) If the company on which a penalty is imposed is aggrieved by—

- (a) the imposition of the penalty;
- (b) the amount of the penalty; or
- (c) the date by which the penalty is required to be paid, or the different dates by which different portions of the penalty are required to be paid,

the company may make an application to the High Court under this Article.

(2) An application under paragraph (1) must be made—

- (a) within 42 days from the date of service on the company of a notice under Article 35(5); or
- (b) where the application relates to a decision of an enforcement authority on an application by the company under Article 35(6), within 42 days from the date the company is notified of the decision.

(3) On any such application, where the High Court considers it appropriate to do so in all the circumstances of the case and is satisfied of one or more of the grounds falling within paragraph (4), that Court—

- (a) may quash the penalty;
- (b) may substitute a penalty of such lesser amount as that Court considers appropriate in all the circumstances of the case; or
- (c) in the case of an application under paragraph (1)(c), may substitute for the date or dates imposed by the enforcement authority an alternative date or dates.

(4) The grounds falling within this paragraph are—

- (a) that the imposition of the penalty was not within the power of the enforcement authority under Article 35;
- (b) that any of the requirements of paragraphs (3) to (5) or (7) of Article 35 have not been complied with in relation to the imposition of the penalty and the interests of the company have been substantially prejudiced by the non-compliance; or
- (c) that it was unreasonable of the enforcement authority to require the penalty imposed, or any portion of it, to be paid by the date or dates by which it was required to be paid.

(5) If an application is made under this Article in relation to a penalty, the penalty is not required to be paid until the application has been determined.

(6) Where the High Court substitutes a penalty of a lesser amount it may require the payment of interest on the substituted penalty at such rate, and from such date, as it considers just and equitable.

(7) Where the High Court specifies as a date by which the penalty, or a portion of the penalty, is to be paid a date before the determination of the application under this Article it may require the payment of interest on the penalty, or portion, from that date at such rate as it considers just and equitable.

(8) Except as provided by this Article, the validity of a penalty shall not be questioned by any legal proceedings whatsoever.

## Recovery of penalties

**40.** Where a penalty imposed under Article 35(1) or (2), or any portion of it, has not been paid by the date on which it is required to be paid and—

- (a) no application relating to the penalty has been made under Article 39 during the period within which such an application can be made; or



(b) an application has been made under that Article and determined,  
the enforcement authority may recover from the company, as a civil debt due to it, any of the penalty and any interest which has not been paid.

### *Special administration orders*

#### **Meaning and effect of special administration order**

**41.**—(1) A special administration order is an order of the High Court made in accordance with Article 42 or 43 in relation to a company holding an appointment under Chapter I of this Part and directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed, by a person appointed by the High Court—

- (a) for the achievement of the purposes of such an order; and
  - (b) in a manner which protects the respective interests of the members, creditors and customers of the company.
- (2) The purposes of a special administration order made in relation to any company shall be—
- (a) the transfer to another company, or (as respects different parts of the area to which the company's appointment relates, or different parts of its undertaking) to two or more different companies, as a going concern, of so much of the company's undertaking as it is necessary to transfer in order to ensure that the functions which have been vested in the company by virtue of its appointment may be properly carried out; and
  - (b) the carrying out of those functions pending the making of the transfer and the vesting of those functions in the other company or companies (whether by virtue of the transfer or of an appointment or variation which replaces the former company as a relevant undertaker).
- (3) The Department may by regulations—
- (a) make provision for applying provisions of the [Insolvency \(Northern Ireland\) Order 1989 \(NI 19\)](#) (with or without modifications) in relation to a special administration order or an application for such an order;
  - (b) make consequential or supplementary provision (including provision modifying other statutory provisions) in relation to special administration orders.
- (4) Schedule 1 shall have effect for enabling provision to be made with respect to cases in which a company is replaced by another as a relevant undertaker without an appointment or variation under Chapter I of this Part in pursuance of a special administration order.
- (5) In this Article “business” and “property” have the same meanings as in the [Insolvency \(Northern Ireland\) Order 1989 \(NI 19\)](#).

#### **Special administration orders made on application of Department or Authority**

- 42.**—(1) If, on an application made to the High Court—
- (a) by the Department; or
  - (b) with the consent of the Department, by the Authority,
- that Court is satisfied in relation to any company which holds an appointment under Chapter I that any one or more of the grounds specified in paragraph (2) is satisfied in relation to that company, that Court may make a special administration order in relation to that company.
- (2) The grounds mentioned in paragraph (1) are, in relation to any company—
- (a) that there has been, is or is likely to be such a contravention by the company of any principal duty, not being a contravention in respect of which a notice has been served under

paragraph (3) of Article 31, as is serious enough to make it inappropriate for the company to continue to hold its appointment;

- (b) that there has been, is or is likely to be such a contravention by the company of the provisions of any enforcement order which—
  - (i) is not for the time being the subject-matter of proceedings brought by virtue of Article 33(1); and
  - (ii) if it is a provisional enforcement order, has been confirmed,
 as is serious enough to make it inappropriate for the company to continue to hold its appointment;
- (c) that the company is or is likely to be unable to pay its debts;
- (d) that, in a case in which DETI has certified that it would be appropriate, but for Article 43, for it to petition for the winding up of the company under Article 104A of the [Insolvency \(Northern Ireland\) Order 1989 \(NI 19\)](#) (winding-up on grounds of public interest), it would be just and equitable, as mentioned in that Article, for the company to be wound up if it did not hold an appointment under Chapter I; or
- (e) that the company is unable or unwilling adequately to participate in arrangements certified by the Department or the Authority to be necessary by reason of, or in connection with, a proposal for the making by virtue of Article 14(4)(d) of any appointment or variation replacing a company as a relevant undertaker.

(3) Notice of any application under this Article for a special administration order shall be given forthwith to such persons and in such manner as may be prescribed by rules made under Article 359 of the [Insolvency \(Northern Ireland\) Order 1989 \(NI 19\)](#); and no such application shall be withdrawn except with the leave of the High Court.

- (4) For the purposes of this Article a company is unable to pay its debts if—
  - (a) it is a limited company which is deemed to be so unable under Article 103 of the [Insolvency \(Northern Ireland\) Order 1989 \(NI 19\)](#) (definition of inability to pay debts); or
  - (b) it is an unregistered company which is deemed, by virtue of any of Articles 186 to 188 of that Order, to be so unable for the purposes of Article 185 of that Order (winding up of unregistered companies).

(5) In this Article “principal duty”, in relation to a company, means a requirement imposed on the company by Article 65 or 149.

#### **Power to make special administration order on winding-up petition**

**43.** On an application made to any court for the winding up of a company which holds an appointment under Chapter I —

- (a) the court shall not make a winding-up order in relation to the company; but
- (b) if the court is satisfied that it would be appropriate to make such an order if the company were not a company holding such an appointment, it shall, instead, make a special administration order in relation to the company.

#### *Restrictions on voluntary winding up and insolvency proceedings*

#### **Restrictions on voluntary winding up and insolvency proceedings**

- 44.—**(1) Where a company holds an appointment under Chapter I—
- (a) the company shall not be wound up voluntarily;

- (b) no administration order or appointment of an administrator shall be made in relation to the company under Schedule B1 to the [Insolvency \(Northern Ireland\) Order 1989 \(NI 19\)](#);
  - (c) no appointment shall be made under Part IV of that Order (receivers and managers) in relation to the company; and
  - (d) no other step shall be taken by any person to enforce any security over the company's property except where that person has served 14 days' notice of his intention to take that step on the Department and on the Authority.
- (2) In this Article “security” and “property” have the same meanings as in Parts II to VII of the [Insolvency \(Northern Ireland\) Order 1989 \(NI 19\)](#).