

**EXPLANATORY MEMORANDUM TO**  
**THE INSOLVENCY (MORATORIUM) (SPECIAL ADMINISTRATION FOR**  
**ENERGY LICENSEES) REGULATIONS 2020**

**2020 No. 943**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments,

**2. Purpose of the instrument**

- 2.1 This instrument modifies how the moratorium regime in Part A1 of the Insolvency Act 1986 applies in respect of certain energy companies (referred to as “relevant energy companies” in this Explanatory Memorandum): “protected energy companies” (companies that hold an electricity distribution or transmission licence or a gas transporter licence), the “smart meter communication licensee” and “energy supply companies” (companies that hold an electricity or gas supply licence). Its primary purpose is to require a relevant energy company to notify the Secretary of State and the Gas and Electricity Markets Authority (“Ofgem”) when it applies for, enters, extends or ends a moratorium so as to inform the Secretary of State’s decision as to whether to apply for a special administration order in respect of the company under an energy special administration regime.
- 2.2 This instrument also modifies Part A1 restrictions on enforcement and legal proceedings during a moratorium so as to enable Ofgem to institute, carry out or continue any legal process, without needing the permission of the court, in relation to such a company.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 The instrument is a made affirmative instrument which will come into force on the day after the day on which it is made. While affirmative instruments are not subject to the ‘21-day rule’, the Department has considered whether it could provide for a 21-day period between the making and coming into force of this instrument. The Department concluded that the urgency justifying using the made affirmative procedure also justifies commencing the instrument as soon as possible after it is made. The coronavirus pandemic has significantly increased financial pressures on energy companies, which will become more acute in autumn and winter 2020 (e.g. electricity suppliers are liable for significant payments under the c.£6bn Renewables Obligation scheme which are due by the end of October 2020). The modifications made by this instrument must come into force without delay to assist the Secretary of State and Ofgem in considering whether to apply for special administration for any energy company to protect consumers. Additionally, the Department does not consider the instrument has the effects of an affirmative instrument in relation to which the

JCSI has indicated it would expect a 21-day period to be given (e.g. an instrument that imposes new duties that are significantly more onerous than before or requires those affected to adopt different patterns of behaviour)<sup>1</sup>.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 The territorial application of this instrument includes Scotland.
- 3.3 The power under which this instrument is made enables the instrument to make provision for England and Wales and Scotland (see section A50(1) of the Insolvency Act 1986).

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is England and Wales and Scotland.
- 4.2 The territorial application of this instrument is England and Wales and Scotland.

**5. European Convention on Human Rights**

- 5.1 The Minister for Business, Energy and Clean Growth Kwasi Kwarteng has made the following statement regarding Human Rights:

“In my view the provisions of the Insolvency (Moratorium) (Special Administration for Energy Licensees) Regulations 2020 are compatible with the Convention rights.”

**6. Legislative Context**

- 6.1 The Corporate Insolvency and Governance Act 2020 (“the 2020 Act”) inserted Part A1 into the Insolvency Act 1986 introducing a moratorium regime for companies in financial distress.
- 6.2 The 2020 Act also inserted section A50 into the Insolvency Act 1986, which enables regulations to be made to modify the application of Part A1 in relation to a company for which there is a special administration regime. Energy special administration regimes for protected energy companies, the smart meter communication licensee and energy supply companies are contained in the Energy Act 2004, the Smart Meters Act 2018 and the Energy Act 2011 respectively.
- 6.3 This instrument will modify the application of Part A1 in relation to these energy companies. This instrument is the first use of the section A50 power.

**7. Policy background**

*What is being done and why?*

- 7.1 Ofgem is the independent regulator for the gas and electricity markets. It regulates the gas and electricity sectors principally via licensing regimes. Ofgem’s principal objective when carrying out its licensing functions is to protect the interests of existing and future consumers.
- 7.2 The energy special administration regimes have special objectives which are different to the usual objectives of administration: they are designed to ensure the uninterrupted

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<sup>1</sup> For example, as noted in the Joint Committee on Statutory Instruments, Thirty-third Report of Session 2017-19, <https://publications.parliament.uk/pa/jt201719/jtselect/jtstatin/192/19203.htm>.

and safe operation of essential services (e.g. supply of electricity) when a company becomes insolvent. Energy special administration has not, so far, been invoked.

7.3 The moratorium regime will give financially distressed companies breathing space from their creditors, to enable the company to pursue a rescue or restructure. The company's existing management remain in control during the moratorium period, but a monitor is appointed to oversee the moratorium. A monitor must be a licenced insolvency practitioner.

7.4 If a relevant energy company enters or has applied to enter a moratorium, the Secretary of State and Ofgem will want to consider whether to apply for a special administration order for the company. This instrument will ensure that the Secretary of State will be promptly notified of any moratorium or proposed moratorium for a relevant energy company, so that an application for a special administration order can be made if necessary.

7.5 A relevant energy company in a moratorium will continue to trade and operate as a licensed and regulated entity. The instrument will ensure that, during the moratorium, Ofgem can continue to engage in legal processes in relation to relevant energy companies in exercise of its regulatory and enforcement powers, including to enforce licence obligations and revoke licences, without having to seek the court's permission. This will enable Ofgem to undertake legal processes without delay where this is necessary to protect the interests of consumers. The Department will continue to keep the effects of the moratorium regime on the energy special administration regimes under review.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

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

## **9. Consolidation**

9.1 No consolidation is needed as this instrument modifies the application of, but does not amend, primary legislation.

## **10. Consultation outcome**

10.1 The modifications made by this instrument support existing Government policy in relation to the moratorium regime and the energy special administration regimes, so there has been no policy consultation. The moratorium regime was the subject of consultation prior to that Act being made<sup>2</sup>. Likewise, the energy special administration regimes were consulted on prior to their introduction<sup>3</sup>.

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<sup>2</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/736207/ICG - Government response doc - 24 Aug clean version with Minister s photo and signature AC final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736207/ICG_-_Government_response_doc_-_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC_final.pdf)

<sup>3</sup> [https://www.legislation.gov.uk/ukia/2010/303/pdfs/ukia\\_20100303\\_en.pdf](https://www.legislation.gov.uk/ukia/2010/303/pdfs/ukia_20100303_en.pdf)

<https://www.ofgem.gov.uk/ofgem-publications/59643/3774-dtienergynetwork.pdf>

<https://smartenergycodecompany.co.uk/latest-news/beis-smip-consultation-on-establishing-a-mechanism-for-recouping-smart-meter-communication-licensee-administration-costs/>

## **11. Guidance**

- 11.1 The Government has published guidance on the moratorium regime<sup>4</sup> and information on the special administration regime for energy supply companies<sup>5</sup>. Ofgem will set out to licensees how they should give notice and documents to Ofgem and the Secretary of State about a moratorium.

## **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 An Impact Assessment has not been prepared for this instrument because analysis has shown the impact falls below the threshold for producing an Impact Assessment. Any burdens that this instrument places on businesses are assessed to be extremely low. The instrument requires the directors or monitor for relevant energy companies to notify the Secretary of State and Ofgem when the company applies for, enters, extends or ends a moratorium, and to provide a copy of the supporting documents filed with the court.

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small business.
- 13.3 The basis for the final decision on what action to take to assist small businesses is the assessment that any burdens from this instrument (giving notice and copies of documents to the Secretary of State and GEMA) are extremely low. Any burdens would arise only if a relevant energy company enters a moratorium.

## **14. Monitoring & review**

- 14.1 This instrument does not contain a review provision. The Minister for Business, Energy and Clean Growth Kwasi Kwarteng has made the following statement regarding the duty in the Small Business, Enterprise and Employment Act 2015 to include a review provision: “In my view, a review provision is not appropriate for this instrument because any burdens that this instrument places on businesses are assessed to be extremely low and only arise if a relevant energy company enters or has applied to enter a moratorium.”
- 14.2 However, the Department will keep this instrument under review along with any effects of the moratorium regime on the energy special administration regimes.

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<sup>4</sup> <https://www.gov.uk/guidance/applying-for-a-moratorium-under-the-corporate-insolvency-and-governance-act-2020>

<sup>5</sup> <https://www.ofgem.gov.uk/publications-and-updates/memorandum-understanding-energy-supply-company-administration>

## **15. Contact**

- 15.1 Steven May at the Department for Business, Energy and Industrial Strategy Telephone: 0300 068 2889 or email: [steven.may@beis.gov.uk](mailto:steven.may@beis.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Jane Walker, Deputy Director for energy markets and affordability, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Rt. Hon. Kwasi Kwarteng at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.