



By email to solrlevyteam@ofgem.gov.uk

Our Ref: SoLRLevy2024
Date: 5 April 2024

Dear Sirs

SoLR Levy Policy Consultation (the Consultation)

This is the response of the Insolvency Lawyers' Association's Technical Committee to the Consultation.

By way of background, the ILA provides a forum for approximately 500 full, associate, overseas and academic members who practise restructuring and insolvency law. The membership comprises a broad representation of regional and City solicitors, barristers, academics and overseas lawyers. The Technical Committee of the ILA is responsible for identifying and reporting to members on key developments in case law and legislative reform in the insolvency and restructuring market place.

Representatives of the Technical Committee attended the helpful workshop held on 7 March 2024.

We understand the policy which underpins the proposal set out in the Consultation, and the desire to minimise the cost to consumers resulting from increased network charges imposed as a result of the SoLR Levy. We note that the proposals are designed in conjunction with the introduction of new resilience measures which are targeted at reducing the risk of future failures and may be a more effective way of protecting consumers.

We also note that the Consultation itself does not provide any details relating to how the money recovered will be applied and will result in a reduction of the network charges. We understand that this is to be dealt with by the new Electricity Distributor and Gas Transporter licence conditions. We are therefore unable to comment on how effective those conditions might be in achieving the policy aims, other than that it is intended to reduce overall network charges.

President:
Vice-President:
Registered Office:
website:

Daniel Bayfield KC
David Gray
C/O Westcotts LLP 26-28 Southernhay East Exeter Devon EX1 1NS
ilauk.com

Insolvency Lawyers' Association Limited (By Guarantee)
Registered in England No.2406222

We note that the Consultation itself recognises that at best the SoLR Levy Offset presents 'an opportunity to reduce the cost impact' on consumers of supplier failure, but the benefits are 'uncertain' and potentially provide only an opportunity to 'recover some amount'. This is of course dependent upon there being some value available in the insolvent supplier's estate. It is unclear as to whether the costs of implementing the changes set out in the proposal would result in real benefits to consumers.

It is worth noting that there is already an established order of priority that arises in the context of a formal insolvency, with creditors (including consumers) ranking ahead of shareholders. This means that where a SoLR is appointed, the creditor claims in the insolvent supplier entity will always rank ahead of the shareholders. It may be that certain businesses are organised in group structures, where each entity in the group is treated as a separate legal entity. This might mean that there are circumstances where the regulated supplier does not own valuable contracts and assets, and these would therefore not be available to the insolvent supplier. Introducing a mechanism to allow the SoLR Levy Offset would therefore not be of benefit to consumers in the insolvent supplier if there are no available assets for distribution in the estate of the insolvent supplier. We understand that other measures have been introduced that, for example, require licensees to have sufficient control of assets and obligations regarding the ring fencing of credit balances. These may be better suited to address the potential unfairness that may be perceived to arise in the event of the appointment of a SoLR.

Our brief response focusses on the issues raised by Q3, 4, and 5, and highlights a number of the points raised in the workshop.

Q3. What are your views on the proposed option of network companies being creditor, as opposed to other alternatives?

We consider that the option of network companies being creditors is not necessarily straightforward and may not necessarily achieve the policy aims in terms of reducing the costs to consumers. As mentioned above it is dependent on recoveries being available in the insolvent supplier's estate.

In terms of the proposed options set out in the set out in the Consultation, making individual network companies creditors for the purpose of claiming the SoLR Levy Offset might be a workable solution to potentially make some form of recovery. However, we are also of the view that this proposal is not without its complexities in terms of how the levy is calculated and claimed, especially as it carves out claims for customer balances (CB) which may continue to be claimed separately by the SoLR.

It was suggested at the workshop that the office-holder would be able to rely upon Ofgem's assessment of the costs subject to any later 'true up' mechanism, but, while this might be helpful, the office-holder would still have to consider the claims and approve or reject them within the insolvency process. This means that the Ofgem assessment adds an additional step in the proving process. It is also worth noting that while the purpose of the Consultation appears to be aimed at preventing a return to shareholders where others are out of pocket, the Levy Offset would arise in every case where (i) a supplier's licence is revoked and a SoLR appointed, and (ii) a levy claim is made and consented to by Ofgem. It is not dependent on a surplus being available to shareholders so it has the potential to dilute the share of other creditors in circumstances where there is no surplus.

The Consultation also identified the potential timing/delay issues. In terms of the calculation of the contingent claims, it would be unfortunate if the complexities of introducing the SoLR Levy Offset resulted in additional costs and recoveries to all creditors, to the extent that it reduces and delays the dividend payable (see further below).

President: Daniel Bayfield KC
Vice-President: David Gray
Registered Office: C/O Westcotts LLP 26-28 Southernhay East Exeter Devon EX1 1NS
website: ilauk.com

Insolvency Lawyers' Association Limited (By Guarantee)
Registered in England No.2406222

It is suggested that the network companies would also be able to recover their costs in claiming (see paragraph 3.15) but it is unclear how this would be provided for: in ordinary circumstances, the cost of proving in a formal insolvency would be met by the creditors themselves, rather than fall to the insolvent estate.

We note that there is limited mention of the special administration regime that is also available to failed suppliers. While we appreciate that this regime is aimed at the resolution of larger suppliers with the costs of that process borne by the taxpayer, operationally it might be a less cumbersome and already prioritises consumer interests, potentially avoiding a direct impact on consumers, when compared with the funding mechanism used in the SoLR and this proposal to create a SoLR Levy Offset. We appreciate, however, that special administration may not always be preferable in the event of a supplier failure.

Q4. What are your views on the creditors ranking in the insolvency waterfall as unsecured creditors and do you think another classification would be more appropriate?

If the proposal is to be pursued, we agree for the reasons set out in the Consultation; in particular, the potential for disruption to existing financing arrangements, future investment and borrowing costs, and that the networks' claim in an insolvency process should be limited to being unsecured creditors. To seek to give another ranking through, for example, consensual arrangements with secured creditors would, as the Consultation identifies, be cumbersome and potentially disruptive, discouraging investment and potentially limiting growth. Seeking to impose any preferential status would also, in our view, require express statutory provision, which would mean that it would be subject to the parliamentary process, and would not have any immediate effect in terms of the impact on consumers.

Q5. What are your views on the creditor claim being contingent on a valid claim being made by a SoLR for a LRSP? Do you think that the creditor claim could be formulated or calculated in another way?

As we understand it from the proposal (paras 2.7 and 2.8), the determination of the SoLR levy is a two stage process: (a) an assessment by Ofgem of the claim by the SoLR against the published criteria, followed by Ofgem's decision document, which is also a public document; and (b) a consent document from Ofgem providing a legal basis for the SoLR to make a claim against the relevant networks for payment (within the stated deadlines) to the SoLR.

We observe that, as pointed out in the course of the workshop, the insolvency office-holder will have no participation in, or visibility on, the determination process. The potential claim by the SoLR for the levy will not be ascertainable, unlike other unsecured claims, from the failed supplier's own financial records. We therefore do not think that the scenario posited in para 3.31 of the Consultation is realistic or workable, namely that the office-holder will need to estimate the amount of the claim and revise the estimate when further information is provided. At best, an office-holder will have access to previous determinations which might provide some estimation. We do not think, however, that this is a task which can realistically be asked of the office-holder.

We also note the possibility that any determination by Ofgem is potentially subject to judicial review, at the behest of the SoLR or the affected networks. This is not a process in which the failed supplier or its office-holder would have any involvement, but it would undoubtedly potentially impact on the administration of the failed supplier's estate, not least in terms of timing, as to which we comment further below.

General Comments

As highlighted in comments made during the workshop, it will be key to the effective implementation of the proposal to have:

- (a) Certainty regarding the status of the claim as a provable debt. Whilst we see no obvious ground on which the claim, which depends upon the terms of the deed, would not be provable, as highlighted by stakeholders in the workshop, the introduction of a new unsecured claim (with consequent impact on other creditors, namely secured creditors in relation to the prescribed part, and other unsecured creditors whose own position would be diluted) might lead to objections, to increased costs to the estate in dealing with those objections and possibly to applications for directions from the court (with consequent costs and delay). We note that it is not intended to have retrospective effect in relation to suppliers that are already in a formal insolvency process, but it is unclear how this would operate in practice.
- (b) Certainty of the amounts payable (and certainty that there is no duplication with any claim by the SoLR for CCBs). We note in this regard from the Consultation that the determination by Ofgem will clearly identify these separate elements. As highlighted in the workshop, office-holders will need to satisfy themselves that the claim is valid, and in the amounts claimed. It would be helpful for clear guidance to be issued so that office-holders, and other creditors, can clearly understand the determination process.
- (c) Certainty regarding timing: we note that currently the final determination of the levy may take as long as five years (although the initial determination process is stated to typically take six months). This is not, in our view, compatible with the general overriding requirement for an insolvency process to be conducted expeditiously. A delay in a final determination of all creditor claims, as well as in a distribution to cater for the levy, could in our view be prejudicial to other unsecured creditors. We note that the current multiclaim process is intended to be made permanent. Whilst this may expedite an initial (but not final) determination, it may not address the need identified above for an expeditious finalisation of the failed supplier's affairs.

We also note that a claim by the networks to recover the SoLR levy may mean that the SoLR, as a *pari passu* ranking unsecured creditor, does not recover 100% of CCBs (in the event of the ring fencing not being effective) and the relevant amounts would then need to be passed on to consumers, as currently happens.

We have not provided comments on the draft deed appended to the Consultation. It is, however, worth noting that the proposal to include a 'no set off' provision would not be compatible in a formal liquidation which operates on a mandatory basis, and also would not be effective in the context of administration where the administrator has provided notice to make a distribution to creditors.

We would be pleased to discuss any aspect of our response further.

Yours sincerely

Inga West

**Chair
Technical Committee
Insolvency Lawyers' Association**

President: Daniel Bayfield KC
Vice-President: David Gray
Registered Office: C/O Westcotts LLP 26-28 Southernhay East Exeter Devon EX1 1NS
website: ilauk.com

Insolvency Lawyers' Association Limited (By Guarantee)
Registered in England No.2406222