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Tuesday 3rd December 2019

Dear Mr Proudfoot,

Supplier Licensing Review: Ongoing requirements and exit arrangements

I write as President of R3, the insolvency and restructuring trade body, with regards to Ofgem's Supplier Licensing Review, to provide some thoughts on the analysis and recommendations contained in the consultation document relating to the work of office holders in energy supplier insolvencies.

By way of background, R3 is the association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices. Our members have direct experience of insolvencies and their impact on individuals and businesses across the UK.

Although we are not responding to the consultation in full, we hope it is helpful for us to provide feedback on the analysis and recommendations concerning 'Exit Arrangements', based on feedback from R3 members who have been appointed as office holders in energy supplier insolvencies.

Overview

R3 recognises the importance of ensuring that, when energy suppliers become insolvent, the customer experience is one that is both fair and prompt. We appreciate the intentions behind the consultation, and our members are familiar with the uncertainty and unease that can be caused for customers in insolvency situations, particularly for those individuals in difficult financial situations.

However, we are concerned that the consultation, while well intentioned, lacks consideration of insolvency practitioners' statutory duties when acting as office holders, and does not recognise the practical difficulties that office holders often face in dealing with insolvent energy suppliers. We expand on these challenges below.

To this end, we would welcome the opportunity to meet Ofgem to discuss the points raised in this letter in more detail. We hope that by improving dialogue, understanding and engagement between Ofgem and the insolvency and restructuring profession, all stakeholders will be able to have greater confidence in the framework for dealing with insolvent energy suppliers.

Details

The statutory and regulatory framework around energy supplier insolvencies

One key point underlying concerns about customer experience relates to the different regulatory frameworks that apply to the collection of debts from customers pre- and post-insolvency: upon the insolvency of an energy supplier, it ceases to be a regulated utility provider and other regulatory frameworks come into play. When a

supplier enters an insolvency procedure, an insolvency practitioner will be appointed as an office holder (either as an administrator or liquidator) and will operate under a different set of statutory and regulatory requirements to those of the energy supply sector.

While the consultation refers in passing to the "different set of duties administrators have under insolvency legislation", it is important to emphasise just how important these duties are for office holders. The consultation also implies that the regulatory framework for insolvency practitioners is lacking.

The UK's insolvency regulatory framework is well-established and the insolvency and restructuring profession is subject to close scrutiny by its regulators. The profession is also expected to abide by strict ethical guidelines at all times. A key point to bear in mind when considering the actions of insolvency practitioners is that when appointed to act as an 'office holder' in an administration, liquidation or voluntary arrangement, they have a duty to maximise returns to the company's whole body of creditors. Indeed, an insolvency practitioner's primary duty is to the creditors of the insolvent company as a whole, and every decision taken about an insolvent company is made with the ultimate benefit of creditors in mind. To attach blame to office holders for their approach to collecting debts is to ignore the statutory and regulatory framework in place that they must adhere to. Failure to adhere to these duties – unless alternative duties are in place as part of a Special Administration Regime – would lead to regulatory penalties for an insolvency practitioner, potentially including the loss of their licence to practice. It would be more appropriate to focus on improving the way different regulatory frameworks interact, rather than criticising office holders for trying to navigate between competing regulatory demands.

That said, insolvency practitioners are aware of the stresses of the insolvency process and will seek to work with all stakeholders to manage the process sensitively and effectively. If a creditor or any stakeholder believes that an insolvency practitioner has acted improperly, they should contact the insolvency practitioner's regulator via the Insolvency Service's Complaints Gateway.

The role of Ofgem as a creditor

R3 members have noted that Ofgem is not only a major stakeholder in energy supplier insolvencies, but it is often a creditor itself. This means that Ofgem can vote for office holder proposals, vote to replace an office holder, and has as an opportunity to directly support the smooth running of an insolvency process. Feedback from R3 members, however, is that Ofgem can appear to be reluctant to play a proactive role following the appointment of an office holder. While, technically, Ofgem's role as a regulator comes to an end once a Supplier of Last Resort (SoLR) transfer has taken place and the energy supplier's licence has been terminated following its insolvency, there is still an important role to be played by Ofgem in insolvencies, both as a key stakeholder in the industry (with the power to encourage other stakeholders to engage more positively in the process) and as a creditor.

Practical issues facing administrators

It is important to recognise the unique practical challenges faced by an office holder in an energy supplier insolvency. It is the difficulty of resolving these challenges that can lead to some of the issues identified in the consultation, including the "significant delays in final billing" (Paragraph 5.6) flagged in some cases. It is for these reasons that it would be difficult for office holders to achieve the recommendation that they should "take all reasonable steps to send final bills within six weeks of the end of a supply contract." Practical challenges do need to be taken into consideration by Ofgem, and we were disappointed to see that recognition of these challenges appeared to be absent from the consultation document.

Ultimately, an office holder is picking up the pieces at a financially distressed company. They may be appointed with little prior notice, and they may inherit systems and processes which are not fit for purpose. The office holder did not put these systems in place; they are there to try and achieve the best outcome in the circumstances. Regulatory support would help them do this.

It is also worth noting that the interests of office holders, the SoLR and Ofgem are aligned: given their statutory and regulatory requirements, it is in office holders' interests to finalise customers' final bills as quickly as possible. Doing so would allow the insolvency process to progress faster, keeping costs down and protecting creditor returns.

Key challenges faced by officer holders in energy supplier insolvencies include:

- The quality of data held by the insolvent energy suppliers and across the wider sector can often be poor, leading office holders to take additional time to obtain accurate and reliable information regarding customer billing positions, at the same time as trying to ascertain the financial situation of the insolvent company over which they have been appointed.

- R3 members have commented that the time taken by a SoLR, as the new supplier, to provide meter readings (either industry reads or customer actual reads) to office holders can take well over six weeks. At this point, there is a further process of agreeing readings within tolerances, and a multitude of reasons that mean many readings need to be reworked. This must take place before office holders begin to create and issue final bills, which are in turn heavily reliant on the insolvent company's billing systems to produce. It is the weakness of these systems which is often one of the causes of financial distress for the company in the first place. Further, R3 members have commented that Ofgem does not seem to appreciate the significant practical difficulties of maintaining the infrastructure of the insolvent company to support the finalisation process. This is in addition to the pressure of having the SoLR rely heavily on the office holder's work in this regard to support its own role as the new supplier, particularly in the early stages of the switch-over.

- The process of managing the release of such a high number of bills and managing customer queries and disputes with what is left of the company's staff can be difficult. Depending on the number of customers to deal with, and in some cases there can be tens or even hundreds of thousands of accounts, the six week timeframe to finalise customer bills suggested by Ofgem would appear to be simply unrealistic in most cases. Even if final bills could be readily prepared within six weeks of appointment, the issuance of these requires careful phasing. In the event that these are issued too quickly, a heightened level of enquiries will ensue. If, as is likely, the retained infrastructure is insufficient to cope with the volume of calls that is generated, this will result in increased customer frustration and complaints.

The Supplier of Last Resort regime

Another key issue cited by R3 members who have worked on energy supplier insolvencies concerns the role of the SoLR. As noted above, the SoLR plays a key role in enabling office holders to manage the insolvency process effectively and to deal with customers in a way that is fair and prompt. R3 members have commented on a number of SoLR issues, including the way they are appointed, how this is announced, and how SoLRs operate.

Given the importance of SoLRs to office holders, prospective office holders will seek to work with the SoLR at as early a stage as possible, in order to smooth out any issues that could affect customer experience. This work can take place in advance of the start of an insolvency procedure. The process of appointing, and then announcing, a SoLR can make this process difficult, however.

When it comes to the *appointment* of the SoLR, insolvency practitioners have limited involvement in this process and may only know the identity of the new provider 24 hours before the switch. This latter point can lead to delays in starting the processing of ascertaining and collecting the debt, as interaction between the SoLR and office holders (including the sharing of information and records) cannot begin until the identity of the SoLR is known to the prospective office holder. As SoLRs bid for this work and there is no rota system for appointing SoLRs, it is difficult for prospective office holder to lay the groundwork for effective engagement with the SoLR until after the insolvency procedure has started. There would be benefit to both the SoLR and prospective office holder in engaging at an earlier stage of the process.

Conversely, the early *announcement* of a SoLR can cause additional stress and confusion for customers. R3 members have commented that the announcement of a SoLR in advance of the transfer taking effect, often with office holders not yet appointed, can lead customers to seek to open new accounts with other energy suppliers. Given the administrative difficulties in reconciling these accounts, this can put strain on the administrators, SoLR and the other suppliers. R3 members say they have seen examples of Ofgem's early announcements causing IT and other key suppliers to terminate services to an energy supplier, as it is believed the energy supplier has ceased to trade; this has caused significant operational issues for the energy supplier continuing to support customers during this period before formally entering an insolvency process.

In addition, the SoLR process cannot be started until the failed supplier has announced the process to its employees. This causes an avoidable level of confusion and uncertainty, with employees understandably seeking direction about future employment and payment of wage arrears that the directors are unable to provide.

It may be helpful, where possible, to delay the announcement of the SoLR to all stakeholders – customers, employees and suppliers - until after the SoLR and office holder have had a chance to interact and establish a shared action plan.

R3 members have also commented on the financial standing of some successor suppliers themselves, citing one that had become insolvent only six months after taking on a significant volume of an insolvent supplier's customers.

Debt collection

As well as noting the point above concerning an office holder's desire to process final bills as soon as possible, office holders are also mindful of the need to treat customers in a fair and sensitive way. Indeed, office holders will usually have a policy (on a firm or practice basis) relating to the way that they will collect debt, outlining the steps they will take to understand why a customer may struggle to pay a debt, as well as how they will manage these situations.

Although not all are, some insolvency practitioners will be regulated by the FCA in respect of providing debt advice and debt collection – or will refer to FCA regulated debt collectors when seeking to recover debts. In any case, given the sensitive nature of this work, insolvency practitioners will at least be mindful of the FCA's 'Treating Customers Fairly' requirements.

Notwithstanding the fact that Ofgem has no regulatory authority in the area of insolvency, R3 members have noted that it would be helpful to explore and agree a framework with Ofgem in respect of debt collection in cases of energy supplier insolvencies. Such a framework could provide clarity where currently office holders have to navigate overlapping regulatory frameworks. Given Ofgem's regulatory purview, discussions regarding such a framework may require the involvement of the insolvency regulators. R3 would be very happy to facilitate such discussions.

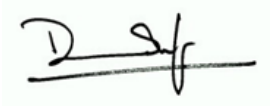
Alternative solutions

Noting Ofgem's regulatory remit, one potential way of ensuring a more uniform customer experience across energy supplier insolvencies, suggested by some R3 members, would be to transfer responsibility for final billing customers and debt collection to the SoLR; given the SoLR's role in taking-on the ongoing supply of the insolvent company's customers, this could provide for a more straight-forward financial reconciliation process. Although the detail of this suggestion needs to be worked out – for example, how the debts collected by the SoLR would then be allocated to the estate of the insolvent company, and the level of commission granted to the SoLR for carrying out this work – this could provide all parties with greater certainty in future cases and alleviate Ofgem concerns about entities unregulated by themselves carrying out debt collection work.

We hope that the information set out above provides some greater context as to the practical issues facing insolvency practitioners when appointed as office holders in energy supplier insolvencies. As above, we would be very keen to meet with Ofgem to discuss these points in greater detail as well as how, working together, experiences for customers in these situations can be improved.

If you would like to meet us or if you have any other queries, please contact R3's Public Affairs Manager, James Jeffreys, at james.jeffreys@r3.org.uk, or on 020 7566 4220.

Yours sincerely,



Duncan Swift
R3 President