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Statutory Consultation: SoLR Levy Offset

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Foreword

As part of our wider work to strengthen the financial resilience of the retail energy market and mitigate the impact of supplier failures on consumers, in February 2024 we launched a policy consultation on introducing the 'SoLR Levy Offset'.

If a supplier fails, one option open to Ofgem is to appoint a 'Supplier of Last Resort', or SoLR. This safety net makes sure that consumers' gas and electricity supplies are not disrupted. Customers do not need to find a new supplier as Ofgem will switch their accounts to a new supplier without any interruption. It also ensures that that if domestic customers' account balances are in credit, they will get back every pound they held in credit with their old supplier.

This SoLR takes on the customers of the failed supplier, and may incur costs in onboarding and supplying energy to these customers. SoLRs can claim for these costs through the 'Last Resort Supply Payment' process, often referred to as the 'SoLR levy claims' process. SoLR levy costs are initially paid to SoLRs by the distribution networks, but through adjustments to network charges the costs are ultimately paid for by domestic energy customers.

The SoLR Levy Offset would place an obligation on suppliers to enter into a deed of undertaking to pay to the networks the amount of any SoLR levy claim in the event that the supplier failed.

A new obligation would be placed on the networks to take reasonable steps to recover the amounts owed to them under this deed, by making a claim in the insolvency process of the failed supplier. The networks' claims would be paid alongside other unsecured creditors and before shareholders receive a return on their investment. Any money

successfully claimed by the networks would then ultimately be returned to consumers via reduced network charges.

We believe the SoLR Levy Offset could achieve significant benefits for consumers. We are now consulting on the changes required to the gas and electricity supply licences, and the gas and electricity distribution licences, to implement the proposals.

The consultation closes on 17 October 2024 and we welcome views from a range of organisations including suppliers, distribution networks, consumer groups, charities, government bodies, the insolvency sector, and trade associations. We also welcome responses from other stakeholders and the public.

This document outlines the scope, purpose and questions of the consultation and how you can get involved. Once the consultation is closed, we will consider all responses and publish our decision. We want to be transparent in our consultations. We will therefore publish the non-confidential responses we receive alongside a decision on next steps on our website at ofgem.gov.uk/consultations

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Contents

Statutory Consultation: SoLR Levy Offset ... 1
Foreword ... 1
Contents ... 3
Executive Summary ... 5
Context and general information about this consultation ... 7
The 2021 energy crisis and our response ... 7
The SoLR process ... 8
The SOLR Levy Offset ... 9
Consulting on the SoLR Levy Offset ... 9
How to respond to this consultation ... 10
Summary of consultation questions ... 10
How to respond ... 10
Your response, your data and confidentiality ... 10
General feedback ... 11
How to track the progress of the consultation ... 11
Implementation ... 12
2. SoLR Levy Offset (SLO) ... 13
Questions ... 13
Overview of SoLR Levy Offset ... 13
Summary of consultation responses ... 14
Party as creditor ... 14
Feedback received ... 15
Impact on the networks: administrative burden ... 16
Impact on the networks: finances and accounting ... 17
Impact on the networks: costs ... 18
Network expertise in the insolvency process ... 18
Other feedback on party as creditor ... 19
Networks claiming for CCBs ... 20
Creditor status ... 20
Impact on consumers: expected benefits of the SoLR Levy Offset ... 21
Gas hedges/asset control ... 23
Impact on suppliers: signing the deed ... 23
Impact on the SoLR appointment process ... 24
Impact on the SoLR levy process: decision making ... 25
Impact on the SoLR levy process: timings ... 25
Insolvency claims: estimating the claim ... 27
Insolvency claims: CCBs ... 27
Deed of undertaking ... 28
3. SoLR Levy Claims Process ... 29
Questions ... 29
Multi-claim process ... 29
Recovery of Excess ... 30

SoLRs recouping from the insolvency process 31
Suppliers 32
Networks 33
Appendices 34
Appendix 1 – Privacy notice on consultations 35
Appendix 2– Impact assessment 37
Appendix 3 Deed of Undertaking 42

Executive Summary

The energy crisis of winter 2021 and the supplier failures that followed exposed significant weaknesses in the financial resilience of the retail energy market. In response to the costs and other impacts caused by the crisis, we have developed and implemented a broad package of policy measures. These measures are designed to deliver a combination of benefits and tackle one or more consumer harms in line with our Consumer Interests Framework.[1] Today in this statutory consultation we are consulting on the licence changes needed to implement an additional measure – the Supplier of Last Resort (SoLR) Levy Offset, or SLO.

All of the measures we have introduced since winter 2021 and our proposed SLO are aimed at tackling the 'moral hazard' whereby owners and shareholders of suppliers were incentivised to adopt risky business models knowing that consumers would carry the burden of risk in the event of a supplier failing. Secondly, the measures should ensure that suppliers are more financially resilient, better placed to manage future shocks and deliver the innovation and services that customer need. Thirdly, the measures are designed to reduce the amount of money at risk of ending up as cost that is mutualised across consumers in the event of a supplier failing.

We have already established an enhanced Financial Responsibility Principle,[2] changing the culture of reporting by placing the onus on suppliers to identify issues early, mitigate their business-specific risks, and look longer-term as to how they will comply with their obligations.

We also introduced requirements for suppliers to have sufficient capital so that they have a financial buffer to absorb significant but plausible shocks.[3] In addition, we introduced a requirement for suppliers to ringfence their Renewables Obligation receipts attributable to domestic supply,[4] ensuring these receipts are insolvency remote to reduce the cost of mutualisation in the event of failure. We also introduced new rules to allow for the ringfencing of Customer Credit Balances in certain circumstances to further enhance suppliers' financial resilience and reduce the amount of money at risk of mutualisation in the case of a supplier at risk of failure.

[1] See Ofgem's Forward Work Programme, pp. 8
[2] Decision on Strengthening Financial Resilience (ofgem.gov.uk)
[3] Strengthening Financial Resilience- Minimum Capital Requirement and Ringfencing CCBs by Direction (ofgem.gov.uk)
[4] Decision on Strengthening Financial Resilience (ofgem.gov.uk)

We also introduced rules requiring suppliers to own or have sufficient control over their material economic and operational assets.[5] This was designed to remove a likely impediment in the case of a supplier failure resulting in a Special Administration Regime where key assets needed to run the business may not be available, and reduce the amount of any mutualised cost in the event of a Supplier of Last Resort being appointed to take on the customers of a failed supplier.

To supplement the package of measures we have already implemented, we consulted on proposals to introduce the SLO in February 2024.[6] The proposal in our February consultation set out how electricity and gas network companies would effectively be inserted into the insolvency waterfall as unsecured creditors and be able to recover available value from a failed supplier, with this value ultimately being returned to consumers.

We have since reviewed responses to this consultation. To better understand the tangible benefits of the SLO, we have also assessed what recovery could potentially have been achieved under the SLO for previous supplier failures and found that in the majority of cases, an amount would have been recoverable. Of the previous supplier failures we reviewed, there were 14 cases where a distribution has been made, or officeholders have provided an expected distribution. If the SLO had been in place prior to these failures, we estimate that this would have achieved a recovery of around 60% of the total paid to SoLRs for the otherwise unrecoverable costs they incurred as a result of acting as a SoLR when taking on the customers of these failed suppliers, excluding Customer Credit Balances (CCBs).[7]

Based on the rationale underpinning our original proposals, having considered the views and evidence we have received in response to our initial consultation, and this additional assessment of potential benefits, we remain firmly of the view that we should proceed with implementing the SLO subject to this statutory consultation where we are seeking feedback on the draft licence changes needed to implement the SLO. In this consultation we are also seeking feedback on additional licence changes needed to formalise existing SOLR levy processes.

Pending the outcome of this statutory consultation, we intend publishing a decision later this year with changes taking effect 56 days after the decision is published.

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[5] Decision on licence requirements for supplier control over material assets (ofgem.gov.uk)
[6] SoLR Levy Offset Consultation February 2024 (ofgem.gov.uk)
[7] As CCBs can already be claimed by SoLRs in the administration process, to avoid the potential for SoLRs and the networks to duplicate claims, we are proposing that CCBs would not be included in the networks' creditor claim.

Context and general information about this consultation

The 2021 energy crisis and our response

1.1 Since the start of the energy crisis in Autumn 2021, 30 retail energy suppliers have failed. The cost of ensuring continued energy supply to the domestic customers of those failed suppliers has amounted to £2.35 billion so far.[8] This does not include the cost of the Bulb Special Administration, the final costs of which are yet to be determined.[9]

1.2 In response to the costs and other impacts caused by the crisis, we have since developed a broad package of policy measures. These measures are designed to deliver a combination of benefits and tackle one or more consumer harms in line with our Consumer Interests Framework. Firstly, they are aimed at tackling the 'moral hazard' whereby owners and shareholders of suppliers were incentivised to adopt risky business models knowing that consumers would carry the burden of risk in the event of a supplier failing. Secondly, the measures should ensure that suppliers are more financially resilient and better placed to manage future shocks. Thirdly, the measures are designed to reduce the amount of money at risk of ending up as cost that is mutualised across consumers in the event of a supplier failing.

1.3 We have already introduced the following measures:

- An enhanced 'Financial Responsibility Principle' placing stronger obligations on suppliers to ensure they manage their finances in a responsible way [10]
- Capital adequacy requirements meaning that suppliers must hold sufficient capital within their business [11]
- Requirements for suppliers to ringfence Renewables Obligation receipts attributable to domestic supply [12]
- Powers to direct suppliers to ringfence their Customer Credit Balances in certain circumstances [13]

[8] This figure is not yet finalised as we are continuing to process claims from Suppliers of Last Resort appointed during this period. Decision letter faster levy process (ofgem.gov.uk)
[9] committees.parliament.uk/publications/44731/documents/222220/default/
[10] Decision on Strengthening Financial Resilience (ofgem.gov.uk)
[11] Decision on introducing a minimum capital requirement and ringfencing customer credit balances by direction | Ofgem
[12] Decision on Strengthening Financial Resilience | Ofgem
[13] Decision on introducing a minimum capital requirement and ringfencing customer credit balances by direction | Ofgem

- Licence conditions requiring suppliers to have ownership or sufficient control over their material economic and operational assets [14]

1.4 In addition to these measures, we have also been developing the SoLR (Supplier of Last Resort) Levy Offset or SLO which is the subject of this consultation.

The SoLR process

1.5 When suppliers want to exit the retail energy market, we expect them to do so in an orderly fashion (in line with Standard Licence Condition 4B[15]). They will usually attempt to transfer their customers to another supplier through a trade sale in the first instance.

1.6 Where suppliers leave the market in an urgent or unplanned way, for example due to serious financial difficulties and where a trade sale cannot be achieved, we have powers we can use to step in and protect consumers. These powers include appointing a SoLR, which is another licenced supplier that takes on the customers of the failed supplier.

1.7 A SoLR can make a claim to us for the otherwise unrecoverable costs it incurs when taking on the customers of a failed supplier. These claims are known as a Last Resort Supply Payment (LRSP) claim, often referred to as a 'SoLR levy claim'. Once we have assessed and consented to the claim, the costs are initially covered by the electricity and gas distribution networks (referred to as 'the networks' in this document) However, ultimately domestic energy consumers in Great Britain pay for the SoLR levy costs, as the costs initially paid by the networks are subsequently recovered through increases in network charges that appear on consumers' energy bills.

1.8 At the same time, an insolvency officeholder (the administrator and/or liquidator) will typically realise the assets of the failed supplier. The value of these assets will usually be used to pay creditors and the costs of the insolvency process. Where there is remaining value in a company, this remainder is usually distributed to the failed supplier's shareholders.

1.9 This scenario – whereby shareholders benefit from surplus value held by a failed supplier - reflects the moral hazard associated with consumers rather than shareholders carrying the burden of risk associated with a supplier failure. It means that consumers meet the costs associated with supplier failure, even

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[14] Decision on statutory consultation on supplier control over material assets | Ofgem

[15] See the Gas Supply Standard Licence Conditions (ofgem.gov.uk) and Electricity Supply Standard Consolidated Licence Conditions (ofgem.gov.uk)

where there is still value held by the failed supplier which should, in our view, be used to meet these costs.

The SOLR Levy Offset

1.10 To address these issues and supplement the package of measures we have already implemented, we consulted on proposals to introduce the SLO In February 2024[16]. These proposals would require that suppliers enter into arrangements that would, in the event that the supplier fails and a SoLR has to be appointed, create an obligation on the failed supplier to pay the networks the amount of the SoLR levy claim (except Customer Credit Balances[17]). There would be a contractual debt due from the failed supplier owed to the networks for the costs of the SoLR levy claim. The networks would be able to claim as a creditor of the failed supplier in the insolvency process. The networks' claims would be paid alongside other unsecured creditors and before shareholders receive a return on their investment. Any money successfully claimed by the networks would then ultimately be returned to consumers via reduced network charges.

Consulting on the SoLR Levy Offset

1.11 We received 29 responses to our February 2024 consultation. Two were from consumers, three from insolvency practitioners, 10 from networks, eight from suppliers, five from consumer groups and one from other industries. We are grateful for all those that took the time to respond to the consultation. We provide more detail on the responses received, and our conclusions, in the following chapters.

1.12 After reviewing all the responses to the consultation, we are minded to proceed with the SLO subject to this statutory consultation. We continue to believe that the benefits to consumers through reducing the moral hazard and the potential to recover mutualised costs will far outweigh the impacts of implementation.

1.13 The purpose of this statutory consultation is to gather feedback on the licence changes that would be needed to implement the SLO. We are also consulting on some ancillary changes needed to formalise existing processes used to recover monies through a series of claims for a single SOLR process (the multi-claim process), and to recover any excess payments made to SoLRs during the claims process.

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[16] SoLR Levy Offset Consultation February 2024 (ofgem.gov.uk)

[17] This is because, as noted in the Executive Summary, CCBs can already be claimed by SoLRs in the administration process. To avoid the potential for SoLRs and the networks to duplicate claims, we are proposing that CCBs would not be included in the networks' creditor claim.

How to respond to this consultation

1.14 This consultation closes on 17 October 2024. Following this consultation period, we will review and consider responses received from stakeholders. We anticipate publishing a decision later this year.

1.15 We welcome feedback on the licence conditions and the documents included in the statutory consultation.

1.16 Please send any general feedback comments to stakeholders@ofgem.gov.uk.

Summary of consultation questions

1.17 Do you have any comments on the draft licence changes we are proposing?

How to respond

1.18 We want to hear from anyone interested in this consultation. Please send your response to solrlevyteam@ofgem.gov.uk.

1.19 We will publish non-confidential responses on our website at www.ofgem.gov.uk/consultations.

Your response, your data and confidentiality

1.20 You can ask us to keep your response, or parts of your response, confidential. We'll respect this, subject to obligations to disclose information, for example, under the Freedom of Information Act 2000, the Environmental Information Regulations 2004, statutory directions, court orders, government regulations or where you give us explicit permission to disclose. If you do want us to keep your response confidential, please clearly mark this on your response and explain why.

1.21 If you wish us to keep part of your response confidential, please clearly mark those parts of your response that you *do* wish to be kept confidential and those that you *do not* wish to be kept confidential. Please put the confidential material in a separate appendix to your response. If necessary, we'll get in touch with you to discuss which parts of the information in your response should be kept confidential, and which can be published. We might ask for reasons why.

1.22 If the information you give in your response contains personal data under the General Data Protection Regulation (Regulation (EU) 2016/679) as retained in domestic law following the UK's withdrawal from the European Union ("UK GDPR"), the Gas and Electricity Markets Authority will be the data controller for the purposes of GDPR. Ofgem uses the information in responses in performing its statutory functions and in accordance with section 105 of the Utilities Act 2000. Please refer to our Privacy Notice on consultations, see Appendix 1.

1.23 If you wish to respond confidentially, we'll keep your response itself confidential, but we will publish the number (but not the names) of confidential responses we receive. We won't link responses to respondents if we publish a summary of responses, and we will evaluate each response on its own merits without undermining your right to confidentiality.

General feedback

1.24 We believe that consultation is at the heart of good policy development. We welcome any comments about how we've run this consultation. We'd also like to receive your answers to these questions:

1. Do you have any comments about the overall process of this consultation?
2. Do you have any comments about its tone and content?
3. Was it easy to read and understand? Or could it have been better written?
4. Were its conclusions balanced?
5. Did it make reasoned recommendations for improvement?
6. Any further comments?

Please send any general feedback comments to stakeholders@ofgem.gov.uk

How to track the progress of the consultation

You can track the progress of a consultation from upcoming to decision status using the 'notify me' function on a consultation page when published on our website. Choose the notify me button and enter your email address into the pop-up window and submit. ofgem.gov.uk/consultations

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Once subscribed to the notifications for a particular consultation, you will receive an email to notify you when it has changed status. Our consultation stages are:

Upcoming > **Open** > **Closed** (awaiting decision) > **Closed** (with decision)

Implementation

Pending the outcome of this statutory consultation, we intend publishing a decision later this year with changes taking effect 56 days after the decision is published. If we proceed to implement the SLO, we will at the point of decision liaise with suppliers to ensure that each supplier completes and returns a deed of undertaking[18] such that the SLO can take immediate effect.

[18] The deed was published with our policy consultation and a copy is at Appendix 3 below.

2. SoLR Levy Offset (SLO)

The SLO would create a contractual debt due from the failed supplier to the networks for the costs of the SoLR levy claim made by the incoming SoLR. The networks would claim as a creditor of the failed supplier in any insolvency process, with the claim being paid alongside other unsecured creditors and before shareholders receive a return on their investment. In this chapter we discuss the feedback received to our policy consultation where we set out our initial proposals for the SLO, and our response to this feedback.

Questions

Do you have any comments on the draft licence changes we are proposing?

Overview of SoLR Levy Offset

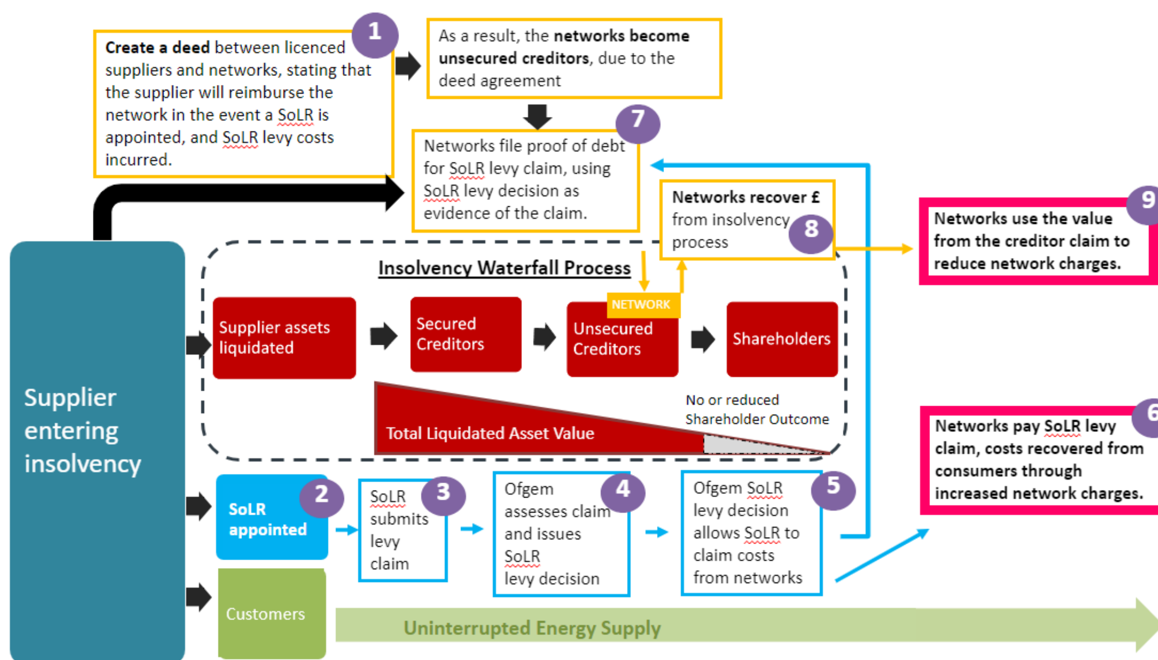
2.1 In February 2024, we consulted on the SLO.[19] The proposals would create a way for gas and electricity distribution networks to recover funds from a failed supplier through the insolvency process. Any amount recovered from the failed supplier would be returned to consumers through lower future network charges, resulting in lower energy bills. To give the arrangements effect we would need to introduce new licence conditions for both suppliers and networks and these licence changes are the subject of this statutory consultation.

2.2 The new supplier licence conditions would require all suppliers to enter into a deed under which the supplier would agree (by way of an undertaking) to pay to the network the amount of SoLR levy costs claimed from the network by a SoLR. As CCBs can already be claimed by SoLRs in the administration process and to avoid the potential for SoLRs and the networks to duplicate claims for CCBs, we are proposing that CCBs would not be included in the networks' creditor claim. These new licence conditions would apply to all current and future licenced suppliers.

2.3 The new network licence conditions would create a duty for the networks to take all reasonable steps to recover the costs due to them under the deed of undertaking entered into by the failed supplier. The conditions would also provide for money recovered under the deed to be applied to a reduction of network charges.

[19] SoLR Levy Offset Consultation February 2024 (ofgem.gov.uk)

Figure 1: SoLR Levy Offset



Summary of consultation responses

2.4 We received 29 consultation responses and have published non-confidential responses alongside this document. Responses were received from a range of stakeholders including suppliers, networks, insolvency practitioners, charities and consumer groups and members of the public.

2.5 The vast majority of responses were supportive of the policy intent. Respondents across the different stakeholder groups all recognised the impact of SoLR levy costs on consumers and the need to mitigate these. They also agreed with the principle that suppliers should carry more responsibility for the costs if they fail.

2.6 Responses provided useful feedback on the detail and design of the proposals, and identified impacts for us to consider on consumers, the networks, the SoLR appointment and SoLR Levy processes, the insolvency process, and suppliers. We have summarised the responses below, and our response to the feedback received.

Party as creditor

What we consulted on

2.7 In our consultation, we set out proposals for the networks to be creditors of the failed supplier and be able to make a claim as such in the failed supplier's insolvency process. We explained our view that creating a debt due to the

networks is the most effective method to implement this policy and identified two key reasons for this.

2.8 Firstly, the networks are already involved in the process, as SoLRs submit claims to the networks up to the amount that Ofgem has consented to. This creates a natural place for the debt to sit, since the networks must pay the levy claim to the SoLR and as a result the cost 'crystalises' with the networks. Secondly, there is a strong level of continuity where networks are concerned (which is not the case for suppliers) in that the number and identities of networks do not change frequently.

2.9 In the consultation we considered other parties that could be creditors and asked for feedback on our preferred option of the networks being creditor.

Feedback received

2.10 We received a mixture of responses to this question. Several respondents, including the majority of suppliers that responded, agreed that the networks were best placed to be creditor. However, several networks felt that SoLRs would be best placed. One supplier suggested that another party should be considered, such as the National Energy System Operator (NESO, previously referred to as the Future System Operator, FSO).[20]

2.11 All of the networks that responded to the consultation did not believe that they were best placed to act as creditor. They suggested that there were potential barriers to implementing the policy, highlighted perceived impacts of the policy on their businesses, and potential benefits of other parties being creditors. These points are covered in more detail in the sections below.

Article 18 EU Regulation 2019/943

2.12 One of the arguments put forward by some of the networks was that the proposal could contravene Article 18 of the EU Regulation 2019/943 ("Article 18").[21] The relevant part of this Regulation provides that:

2.13 "Charges applied by network operators for access to networks, including charges for connection to the networks, charges for use of networks, and, where applicable, charges for related network reinforcements, shall be cost-reflective, transparent, take into account the need for network security and flexibility and

[20] NESO will be the independent, public corporation responsible for planning Britain's electricity and gas networks and operating the electricity system. For more info see: [Becoming the National Energy System Operator (NESO) | ESO (nationalgrideso.com)]

[21] [REGULATION (EU) 2019/ 943 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL - of 5 June 2019 - on the internal market for electricity (europa.eu)]

reflect actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator and are applied in a non-discriminatory manner. Those charges shall not include unrelated costs supporting unrelated policy objectives."

2.14 Some of the networks contended that the SLO could represent "unrelated policy costs".

Our position on feedback received

2.15 We do not agree that Article 18 prohibits network companies being creditors under the SLO, and subsequently adjusting their charges to account for any sums recovered from failed suppliers.

Impact on the networks: administrative burden

Feedback received

2.16 Several networks said that it would be inefficient for them to be creditor, as each network would need to submit its claim to the officeholder of the failed supplier. These networks felt that this would be less efficient and create more cost than if a single party submitted a claim.

Our position on feedback received

2.17 We note the argument that it may represent a reduced burden for another single party to be creditor. However, our priority in determining the best party to be creditor is to identify the party that has the best chance of a successful claim, delivering the most benefits to customers. We believe this to be the networks.

2.18 Further, if another party was to be creditor, an additional step would be needed in the process. Any SoLR levy claim would need to be submitted to the networks and become a valid claim before any recoveries are made from the failed supplier. If a party other than the networks was creditor, funds recovered from the failed supplier would need to be redistributed to consumers through the networks. This would create a different type of administrative burden on involved parties. With the networks as creditor, this step is not required.

2.19 We recognise that the networks being creditor means that more claims would be submitted than if a single party was to be creditor. However, we do not think that overall, this creates an unduly high burden on the individual networks or creates significant additional costs, especially when considering that having alternative parties as creditor would require an extra step in the process.

Impact on the networks: finances and accounting

Feedback received

2.20 Some networks identified that the SLO may impact their accounting and finances:

- This included concerns that networks would have to record the SoLR levy costs as a 'debt' in their books, leading to unintended consequences. Further, networks asked whether this would be considered a 'bad debt', and potentially have broader unintended impacts, such as a negative impact on their credit rating.
- Some networks also requested that consideration be given to the existing price control conditions to ensure that these are not adversely impacted by the SoLR Levy Offset process.

Our position on feedback received

2.21 We set out in paragraph 5.12 of our policy consultation[22] that

"We envisage that under the proposed model, the networks would pay SoLRs in line with the process that is currently followed; claims consented to by Ofgem and made by an agreed date each year would mean that payments commence in April of the following year. We would also expect that networks start recovering the costs of the claims (through network charges, which are ultimately passed on to customers) in line with the current process. To clarify; this model does not require networks to wait until the insolvency process of the failed supplier is complete before starting to recover the amounts consented to through use of system charges. This does mean that any amount recovered from the insolvency process would need to be deducted from use of system charges at the next point annual charges are set following receipt of any amount from the failed supplier."

2.22 To clarify, we are not expecting networks to wait until the insolvency process is complete before they can adjust network charges to recover those costs. The SLO proposals do not place networks at risk for the SoLR levy costs until the outcome of the insolvency process of the failed supplier is concluded.

2.23 We consider that the networks would not need to enter the SoLR levy debt into their accounts until and if an amount is received from the insolvency of the failed supplier. We do not see any reason why the networks could not then represent any recovery as a revenue, temporarily increasing their cash balance, before then

[22] SoLR Levy Offset Policy Consultation | Ofgem

adjusting their allowed revenue by the same amount. This would mean that total revenue remains the same (it is cost neutral).

2.24 In our view, a bad debt expense would only arise if the network company had previously recorded the debt and was then unable to recover it in full. We do not think that the networks need to record debt in such a way for the SLO.

2.25 We recognise the points raised that we would need to ensure that the networks are not faced with barriers in carrying out this role due to price control conditions. We will continue to work with the networks to mitigate any potential barriers or risks around the price control conditions.

Impact on the networks: costs

Feedback received

2.26 Some of the networks made a case for the SoLR Levy Offset process to be 'cost-neutral'. That is, the networks should be able to recover the costs they reasonably incur when playing their role in the SLO.

Our position on feedback received

2.27 We agree with this, and in our earlier consultation we confirmed that this is our policy intention. Our view is that any reasonable costs incurred by gas networks can be recovered using the existing miscellaneous pass-through mechanism. For electricity networks, we have proposed amendments to the relevant licence conditions to allow the electricity networks to recover costs incurred.

Network expertise in the insolvency process

Feedback received

2.28 Some of the networks stated that they do not necessarily have expertise or experience of the insolvency process. Two main points were made in relation to this. Firstly, some networks queried whether the SoLR would be better placed to be creditor in the SLO process, as SoLRs are often already involved in the insolvency of the failed supplier, through their claims for CCBs (as noted above under paragraph 2.2). Secondly, some networks requested that only a reasonable expectation would be placed on them. These networks were concerned that they may face barriers to making a claim, or their claim may not be successful. They were concerned that the expectations placed on them were fair and reflective of their level of expertise in the insolvency process.

Our position on feedback received

2.29 We recognise that the SLO would place new expectations on the networks. However we do not consider that the networks require specialist expertise to claim the debt from the failed supplier and engage in the failed supplier's

insolvency process. If networks do need to procure specialist expertise, then they will be able to recover reasonably incurred costs (as set out in paragraph 2.27).

2.30 We have carefully considered the wording of the draft licence conditions, in light of the feedback from the networks regarding the expectations placed on them. As set out in the draft licence conditions published alongside this consultation,[23] we are proposing that the networks must make a claim unless Ofgem directs them not to. This provides some discretion if circumstances arise that mean it would not be in consumer interests for the networks to make a claim. In addition, the licence conditions set out that (unless Ofgem has directed them not to claim), networks would need to take all reasonable steps to recover sums due to them through the SLO. This sets a clear expectation of the networks while allowing for situations in which the networks may face significant barriers to progressing a claim, and where it becomes apparent that further progressing a claim is not in consumer interests.

Other feedback on party as creditor

Feedback received

2.31 Some of the networks suggested that the SoLR should undertake the role of creditor. They argued that this would have benefits including lower administrative burden, and that SoLRs are already involved in and have expertise in the insolvency process (through their claims for CCBs, as noted under paragraph 2.2).

2.32 As noted above, one supplier suggested that Ofgem consider further the FSO/NESO undertaking the role of paying SoLRs approved claims, recovering that value through Transmission Network Use of System Charges (TNUoS) and using the same route to repay any amounts recovered through the Offset.

2.33 One consumer group response queried whether there was a potential conflict of interest for the networks to act as a creditor in an insolvency process under the SLO, as well as potentially as creditor for other costs.

Our position on feedback received

2.34 Having considered all the feedback received and considered the different parties that could be creditor, we remain of the view that the networks should be the creditor. Our view is that the networks being creditors in the SLO represents the least complex, and most robust possible formulation of the claim. This represents a greater chance of a successful claim and ultimately of the SLO benefitting consumers. Further, any funds recovered by another party as creditor would need

[23] See proposed modification to Condition 48: Last Resort Supply: Payment Claims, 7C for gas transporters and Condition 38: Last Resort Supply: Payment Claims, D1 for electricity distributors.

to be redistributed to consumers through the networks, in the same way that SoLR levy costs are paid for. This would create an additional administrative step.

2.35 On the specific point regarding a potential conflict of interest for the networks, we consider that the draft licence conditions help to mitigate this risk. This is because the conditions would require that networks take all reasonable steps to recover sums due under the SLO. Further, intentionally not doing so (in order, for example, to preserve value for a separate claim the network company has) could leave networks in breach of this licence condition.

Networks claiming for CCBs

Feedback received

2.36 Some suppliers suggested that if networks are a creditor under the SLO, they should also take on responsibility for CCB claims. Currently SoLRs claim for CCBs, as explained at paragraph 2.2 above).

Our position on feedback received

2.37 Although this is outside of the scope of this consultation, we can confirm that we are not proposing to do this.

2.38 The basis on which the SoLRs claim for costs is already in place.[24] We consider that it would be unnecessary to make changes to an already established creditor claim from SoLRs for CCBs. There are already established routes for cost recovery of CCBs, and the SLO would provide a new mechanism for costs that cannot currently be recovered from the failed supplier.

2.39 In addition, we note that SoLRs may submit claims to the insolvency for CCB costs which the SoLR has not submitted a claim for under the SoLR levy. SoLRs may cover some or all of the CCB costs themselves, and we consider that introducing a network claim for CCBs, which may run alongside a SoLR claim for CCBs, would not be practically beneficial or feasible.

Creditor status

What we consulted on

2.40 In our consultation we proposed that networks would be unsecured creditors in the insolvency waterfall.

2.41 We recognised that establishing a claim for the networks which ranks further up the insolvency waterfall, as secured creditors, may have unintended consequences. This could include negative consequences for suppliers, such as

[24] Following the case of Croxen & Others v GEMA & Others [2022] EWHC 2826.

more difficulty in attracting investment or higher borrowing costs. Additionally, we noted that it may be difficult for networks to achieve secured creditor status where a supplier already has secured lending and where bespoke arrangements could be required.

2.42 However, we also understand that networks being unsecured creditors could have an impact on other unsecured creditors, particularly in the event of a significant SLO claim.

Feedback received

2.43 Respondents had a variety of views on the most appropriate creditor status. The majority of respondents across different stakeholder groups agreed that unsecured status was most appropriate. However, some networks and a consumer group were concerned that unsecured status may limit potential return.

Our position on feedback received

2.44 Having considered the responses, we remain of the view that the networks ranking as unsecured creditors represents the best balance. It will limit the potential effects on other parties associated with secured creditor status while still allowing a reasonable prospect of recovering some of the costs of the SoLR levy claim.

2.45 There was a further theme related to creditor status raised in responses. Several respondents across different stakeholder groups stated that further detail would be useful to understand the returns that might be achieved with our proposal for unsecured creditor ranking. We have covered this below (paragraphs 2.47-2.53).

Impact on consumers: expected benefits of the SoLR Levy Offset

Feedback received

2.46 Several respondents across different stakeholder groups asked for more data on the potential benefits that the SLO might achieve for consumers.

Our position on feedback received

2.47 Prior to the February 2024 consultation, we had reviewed publicly available insolvency officeholders' reports filed at Companies House. In our consultation we stated that this information indicated that unsecured creditors have, or will, receive a distribution in the majority of insolvency processes relating to the suppliers that failed since Autumn 2021.

2.48 We have undertaken an updated review of officeholders' reports to explore the returns to unsecured creditors in supplier failures. We extended this to cover all supplier failures (including those prior to Autumn 2021) where a SoLR was

appointed and a SoLR levy claim was made. This allowed us to estimate, had the SLO been in place, what distribution might have been expected for the networks.

2.49 As of May 2024, the data showed that:

- Out of 36 supplier failures that we reviewed, 29 have, or are expected to, result in a distribution to unsecured creditors. Of those, a distribution has been made in six cases and a distribution is expected in 23 cases.
- Of those 23 cases which are still ongoing and in which a distribution to unsecured creditors is expected, in 15 cases no estimated distribution has been provided by the officeholder.
- Of the 14 cases in which a distribution has been made to unsecured creditors, or an expected amount has been provided by the officer holder, the average (mean) distribution is 30.7 pence in the pound.
- In two of those cases, unsecured creditors are expected to receive payment in full.[25]
- The actual or expected distributions to unsecured creditors ranges from 0 pence in the pound (no payment to unsecured creditors), to 100 pence in the pound (payment in full).

2.50 To illustrate the potential impact of the SLO, had it been in place prior to these failures:

- In the two cases, unsecured creditors received payments in full. If the SLO had been in place, this could have resulted in a recovery of the full amount paid to SoLRs through the SoLR levy process, excluding CCBs.
- In the 14 cases where a distribution has been made, or officeholders have provided an expected distribution, if the SLO had been in place, we estimate could have resulted in a recovery of around 60% of the costs paid to SoLRs through the SoLR levy process, excluding CCBs.

2.51 It is important to note that the SoLR Levy Offset would add another unsecured creditor claim, and therefore would have a diluting impact on the distribution to other unsecured creditors. Further, the asset control provisions we have implemented[26] could have a positive impact on the amount available to be

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[25] People's Energy and Orbit Energy.
[26] Decision on licence requirements for supplier control over material assets (ofgem.gov.uk)

distributed to creditors. Therefore, the analysis should be understood as providing illustrative amounts only.

2.52 Notwithstanding that the amount that may be recovered is uncertain, our analysis provides good evidence that the SLO could play an important role in mitigating the impact of supplier failure on consumers and could lead to the recovery of significant sums of money.

2.53 The SLO also addresses the unfairness that currently exists within the system, as currently failed suppliers impose (non-CCB) costs on industry parties and ultimately consumers where there is currently no mechanism by which those failed suppliers can be required to contribute, even if there are funds available. Further, shareholders may receive a return on their equity in these circumstances, and we anticipate that this may be an outcome in a small number of the insolvency processes.

Gas hedges/asset control

Feedback received

2.54 Several of the networks queried the impact on the SLO if gas suppliers do not own their hedges and where these hedges are instead owned by gas shippers.

Our position on feedback received

2.55 We expect that the value of hedges should be accessible to a supplier, even in instances where they are contracting with a shipper. SLC 4A.2 states that:

'the licensee must have Sufficient Control over the Material Economic and Operational Assets used or needed to run its supply business'

2.56 Meanwhile SLC4B.5 states that:

'where the licensee uses a Material Economic and Operational Asset to meet obligations under this condition, the licensee must have Sufficient Control over it'.

2.57 Hedges fall under the definition of a Material Economic and Operational Asset. These assets should therefore be accessible during the insolvency process of a failed supplier and for the purposes of the SLO, regardless of the commercial arrangements a gas supplier may have with a gas shipper.

Impact on suppliers: signing the deed

Feedback received

2.58 A small number of suppliers identified that signing the deed would require suppliers to enter into open-ended liabilities. Two key points were made. Firstly, any potential future SoLR levy amount would be unknown at the point the deed

was signed. Secondly, the supplier would have no control of the amount that may be claimed by the SoLR and consented to by Ofgem. Suppliers considered that signing the deed could therefore pose a risk to them.

Our position on feedback received

2.59 We have not identified any tangible impacts on supplier finances of signing an open-ended deed. The deed will only take effect should the supplier fail, a SoLR appointment is required, and a SoLR levy claim is made. In many cases, suppliers exit the market in an orderly way, and no SoLR appointment is required. The signing of the deed will not impact such orderly market exits.

2.60 Further, the deed needs to remain open-ended to allow the opportunity to recover the full costs imposed on consumers through the SoLR levy process. Any action to cap or limit the liability would act directly against the policy intent.

Impact on the SoLR appointment process

Feedback received

2.61 Some suppliers expressed their concerns that the SLO could negatively impact the SoLR bidding process. They argued that in the past, suppliers contributed towards the cost of becoming a SoLR to reduce the impact on consumers. The responses suggested that with the SLO in place, potential SoLRs may change their behaviours and stop absorbing costs because these could be recovered later through the insolvency process instead.

Our position on feedback received

2.62 We do not believe there is a significant risk that the SLO would impact SoLR bidding behaviour. Our preference will always be to appoint a SoLR that waives the right to claim under the SoLR Levy when acquiring customers of the failed supplier. When a supplier bids to become a SoLR, these bids are confidential to ensure a fair competition. Therefore, if a supplier wants to succeed in being appointed as SoLR it should place a bid that offers the best outcome for consumers. Suppliers bidding to be SoLR will be motivated to cover some or all costs to ensure a successful bid regardless of the potential amounts that the networks may recover through the SLO.

2.63 Further, although the SLO creates a mechanism to recover money from the failed supplier, the actual amount recovered will vary. At the time a potential SoLR submits its bid, the costs that might be recovered through the SLO will be unknown. This means that a SoLR motivated by a desire to reduce the impact on consumers will still likely volunteer to cover some or all of the costs incurred.

Impact on the SoLR levy process: decision making

Feedback received

2.64 A small number of respondents inquired whether failed suppliers should be involved in the SoLR levy decision making process. They noted that suppliers would be required to sign the deed, and the liability would depend on the amount consented to be recovered by the SoLR. This links to the point above regarding the supplier taking on an 'open-ended' liability. Those respondents considered that allowing the failed supplier to have some involvement in the SoLR Levy decision making process could mitigate some of the risk to the failed supplier.

Our position on feedback received

2.65 There is already a high level of assurance for the failed supplier around the decision-making process. Ofgem assesses claims made by SoLRs, according to a set process and following publicly available guidance. Further, SoLRs must provide evidence of the costs incurred, together with an audit and signed declaration from the SoLR's board of directors or the financial director, that the information provided in the claim is true, accurate and not misleading in any material respect to support their claim.

2.66 As part of the SoLR levy claims process, we publish our minded-to positions on claims received, and engage with stakeholders through a consultation process. This provides an opportunity for interested parties, including the failed supplier, to be involved in the decision-making process. Once a decision is made, this is also published.

2.67 We do not consider that failed suppliers should be further involved in the SoLR levy decision making process because information provided by the SoLR is likely to be commercially sensitive and confidential. It would not be appropriate for this information to be shared with the failed supplier.

Impact on the SoLR levy process: timings

What we consulted on

2.68 As set out in Figure 1 at page 14 above, the failed supplier's insolvency process would be taking place in parallel with the SoLR levy claim process.

Feedback received

2.69 Some respondents across different stakeholder groups were concerned that:

- The SoLR levy and insolvency timelines do not necessarily align.

- Delaying the SoLR levy decision until completion of the insolvency process (if this was intended) could have an impact on SoLRs' finances, as well as the SoLR bidding and appointment process.
- The time currently allowed for SoLRs to make SoLR levy claims could cause delays to the insolvency process (potentially resulting in distributions to other creditors being delayed).

Our position on feedback received

2.70 We intend that the SoLR levy and SLO processes operate in such a way to ensure that the potential issues raised above are avoided.

2.71 We are not proposing that SoLRs would need to wait until the outcome of the insolvency process is known to submit a SoLR levy claim. Delays to SoLRs receiving payments for the costs incurred could increase their working capital costs and could also act as a disincentive to suppliers to bid to be a SoLRs.

2.72 Instead, we are proposing that the SoLR needs to submit a claim in good time to allow the networks to use the SoLR levy decision as proof of debt to submit to the officeholder of the failed supplier.

2.73 In our experience, the insolvency process of a failed supplier can take several years. Current licence conditions provide for SoLR levy claims to be made within five years, or within a time otherwise specified by Ofgem. If claims take up to the full five years to be made, there is a risk that the failed supplier's insolvency process will have come to an end and/or asset realisations distributed to creditors by the insolvency officeholder, meaning that there will be no assets from which the network's claims can be paid.

2.74 To account for this, we may need to direct SoLRs to submit an initial claim within a set period of time, at which point we would expect that SoLRs would be able to claim for the majority of costs incurred. Ensuring that an initial claim is received in this timeframe should avoid any risk of delay to the insolvency process.

2.75 However, we know that SoLRs may not always be able to evidence all costs, and/or may not have incurred all costs, by the point at which they need to submit this initial claim. Therefore, we would allow SoLRs to submit a further claim or claims at a later date, for any costs they are unable to evidence in the initial claim.

2.76 This would be in line with the multi-claims process we introduced in 2021 for SoLR levy claims. This process is explained in more detail in Section 3, paragraphs 3.1 – 3.6.

2.77 As we explain further in Section 3 below, in this statutory consultation we are proposing changing supplier licences to formalise the multi-claim process (which is currently set out in deeds of undertaking from SoLRs).

Insolvency claims: estimating the claim

What we consulted on

2.78 In paragraph 3.31- 3.32 of the policy consultation, we referred to practitioners 'estimating' the value of the claim. We stated that:

As the amount of the debt will be unknown until a SoLR levy claim is made, the insolvency office holder will need to estimate the amount of the debt and revise the estimate when further information as to the value of the debt becomes available. As SoLR directions typically last 6 months we would expect the SoLR to be in a position to submit an initial claim shortly after the end of that period….. We would therefore expect the networks to be able to file a proof of debt early on in the insolvency with the amount of the claim to be confirmed and then update the proof as SoLR levy claims are made.

Feedback received

2.79 Insolvency practitioners noted that they would not be able to estimate the value of the claim.

Our position on feedback received

2.80 To clarify, we expect that if insolvency practitioners would need to estimate the value of the claim prior to the initial claim being submitted and a decision made, the estimate may need to be £0 initially. However as noted above in paragraph 2.74 we would set a timeframe for the submission of the initial claim which could be used to inform a more accurate estimate; following receipt of the initial claim and a decision by Ofgem, the networks would be able to file a proof of debt in the insolvency. The insolvency practitioner at this point could revise the estimate of the claim.

Insolvency claims: CCBs

What we consulted on

2.81 As noted above at paragraph 2.2, our intention is that networks' claims under the SLO do not include CCBs.

Feedback received

2.82 Some feedback from different stakeholder groups noted the need for clarity on the portion of the overall SoLR levy costs consented to that the networks would be claiming for as under our proposals, this would not include CCBs.

Our position on feedback received

2.83 We are proposing that the deed of undertaking and licence conditions reflect that the networks' claims would be limited to non-CCB costs. We will work with insolvency practitioners and the networks to support the process – including to ensure that SoLR levy decision documents are clear on the non-CCB costs that have been consented to (which we are proposing the networks use as a proof of debt).

Deed of undertaking

What we consulted on

2.84 We shared a copy of the draft Deed in our policy consultation. This is also included in Appendix 3 of this consultation.

Feedback received

2.85 Some feedback from different stakeholder groups identified that the deed should be clear that the SLO only covers non-CCB SoLR levy costs.

Our position on feedback received

2.86 The drafting of the deed sets out that the

2.87 'Last Resort Supply Payment Liability' "means the aggregate amount of any Valid Claims made by a SoLR excluding the cost incurred by the SoLR in honouring Customer Credit Balances".

2.88 Therefore, we consider that the deed is clear that the amount the supplier is liable to pay the networks under the SLO does not include CCB costs. A copy of the deed is at Appendix 3 below.

3. SoLR Levy Claims Process

Alongside consulting on licence changes needed to implement the SLO, we are also consulting on ancillary changes needed to formalise amendments to the SoLR Levy process. In this chapter we set out these changes, including proposals to formalise and make permanent the process for multiple claims to be made and obligations and protocols for suppliers to follow to repay excess claims.

Questions

Do you have any comments on the draft licence changes we are proposing?

Multi-claim process

3.1 We introduced a 'multi-claim process' in autumn 2021 to ensure that the SoLR process could continue to protect consumers through challenging market conditions. This process reduced the time taken for SoLRs to submit SoLR levy claims, for us to make decisions on those claims, and for SoLRs to recover costs through Last Resort Supply Payments (LRSPs).[27]

3.2 The multi-claim process means a SoLR can submit an initial claim to facilitate the faster recovery of costs incurred, followed by subsequent claims for any further costs. As part of this the SoLR enters into a true-up agreement with us which ensures that once all costs are incurred and evidenced, the full amount recovered reflects the amount that meets our criteria.

3.3 In May 2023, we published an open letter on proposals to end the multi-claim process.[28] Having considered the views of respondents, we decided that we would maintain the multi-claim process until at least after winter 2023/24,[29] and review the policy and market conditions in 2024. Of the five responses received, none were actively opposed to the multi-claim process. Two gave qualified support for ending the multi-claim process, while a further two were against us ending it.

3.4 If we introduce the SLO, we consider that the multi-claim process needs to be made permanent. This is because requiring SoLRs to submit a single SoLR levy claim within a set timeframe, to allow a proof of debt to be submitted in in the insolvency process, introduces the risk that SoLRs would not be able to evidence

[27] Decision letter on supplier of last resort levy claims | Ofgem
[28] Letter on ending temporary SoLR levy claim process | Ofgem
[29] Decision on ending the temporary Last Resort Supply Payment claim process | Ofgem

the full otherwise unrecoverable costs incurred (and would therefore not be able to successfully claim for those costs through the SoLR levy process).

3.5 Using the multi-claim process a SoLR could make an initial claim, which could form the basis of the proof of debt in an insolvency process, and then follow this up with a true-up claim which would increase the claim made under the proof of debt. Using the multi-claim process would not prevent SoLRs claiming for all otherwise unrecoverable costs incurred, some of which may not be known in the immediate period after appointment.

3.6 We therefore propose making the multi-claims process permanent and formalising this process by amendments to the licence conditions.

Recovery of Excess

3.7 As noted above, as part of the temporary multi-claim process, SoLRs submit an initial claim. This can be followed by subsequent claims before a final true-up claim. If a SoLR has received an excess payment in any of these claim submissions, the SoLR must repay an amount equal to that excess payment including any interest incurred to consumers through network charges. This requirement is included in the true-up agreement entered into by Ofgem and SoLRs.

3.8 In our December 2023 decisions,[30] we directed two SoLRs to pay back money (including interest) which had been paid at an interim stage of the true-up process based on estimated costs, which proved in due course to have been higher than the actual costs incurred by the SoLRs.

3.9 The mechanism for making this repayment was established following discussion with the affected SoLRs and the relevant networks. In a reversal of how SoLR levy payments are made to SoLRs (where SoLRs recover money from the networks over a period of 12 months) it was agreed that the two SoLRs would pay money back to the networks, which would then use the payments to adjust network charges.

3.10 At the time of these excess repayments, networks accepted a single payment from the affected SoLRs as being appropriate in these cases. However, they stressed that they did not wish for this to set a precedent for future excess repayments. We understand that networks were concerned that there may be accounting impacts of doing so. We will therefore, work on a case-by-case basis

[30] Decisions on Last Resort Supply Payment Claims 2023 | Ofgem

with SoLRs and networks on repayment of excesses to achieve the optimum outcome for consumers and the most practical approach when it comes to the scheduling of excess repayments.

3.11 We now propose to formalise and clarify the process for making excess repayment via changes to the SLCs and have published draft licence changes alongside this consultation.

3.12 To clarify, the changes to the SLCs will see the requirement for the repayment of excess claims including interest. We have drafted SLCs to retain flexibility over the time period for repayments on a case-by-case basis. This is due to differing amounts of money that will be required to be repaid, which may necessitate different approaches.

SoLRs recouping from the insolvency process

3.13 To ensure that customers of a failed supplier do not suffer financial loss with respect to any credit balance they accrued while with the failed supplier, appointed SoLRs are able to claim for covering the costs of honouring these credit balances through a SoLR levy claim. Since the start of the energy crisis in 2021, most appointed SoLRs have made SoLR levy claims for CCBs.[31] SoLRs appointed since autumn/winter 2021 have, to date, had over £290m SoLR levy costs attributable to CCBs consented to.

3.14 As well as being able to make SoLR levy claims for CCBs, SoLRs can submit a creditor claim to the officeholder of the failed supplier for CCBs that the SoLR has honoured. This was formalised in a legal judgement in 2022 when the court determined that where CCBs have been honoured by SoLRs then the SoLR will have a claim in the insolvency.[32]

3.15 Where we consent to SoLR levy claims for CCBs, that consent is subject to the outcome of the administration process of the failed supplier. That is, SoLRs can in the first instance claim the amounts consented to through the SoLR levy, but any amounts subsequently received from the officeholder of the failed supplier in relation to their creditor claim must then be returned to consumers.

3.16 The administration and eventual liquidation process of a failed energy supplier can take a long time. Most of the suppliers who failed in autumn/winter 2021 are still going through this process and therefore creditors (including the appointed

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[31] Under SLC 9.4(b) a SoLR can claim 'any sums paid or debts assumed by the licensee to compensate any customer in respect of any CCBs' - Electricity Supply SLC amendments (ofgem.gov.uk)

[32] Legal judgment Croxen & Ors v Gas and Electricity Markets Authority & Ors [2022] EWHC 2826 (Ch)

SoLRs) have to wait until the process is complete to receive a creditor distribution. As well as not knowing the timing of creditor distributions, creditors will not know what percentage of their claim they will ultimately receive. The amounts creditors receive can range from failed supplier to failed supplier. In some cases, this may be one hundred percent of the claim, in other cases a reduced percentage of the claim, and in some cases no distribution at all.

3.17 Some SoLRs have indicated to us that they have received distributions from officeholders of failed suppliers, and we expect others to follow. As stated above, (for the most part) SoLRs have already been compensated for this, therefore they will need to repay the creditor distribution for their CCB creditor claim to consumers. Below we set out our preferred mechanism by which SoLRs should do this with respect to CCBs and any other element of a SoLR's creditor claim that has been claimed via the SoLR levy.[33]

Suppliers

3.18 SoLRs must tell us when they have been advised they will receive a distribution from the officeholder of the failed supplier. This will include information on how much they are expecting to receive and when they expect to receive any distribution. Following this, SoLRs will confirm to us when they have received funds from the officeholder, the exact amount, and if this is a final award or if a further distribution is expected.

3.19 As with the recovery of excess SoLR Levy payments (paragraphs 3.7-3.12), our preferred process is to have SoLRs return money through the networks. We expect that for most repayments this will begin the April following the setting of network charges.[34] The SoLR will retain any money they have received until it can be accounted for at the next charge setting period. e.g. If a SoLR received a distribution in January, then it would be accounted for when network charges are set in December of that year and payment would commence the following April.

3.20 We believe it is in the best interest of consumers that where SoLRs receive creditor distributions from failed suppliers, interest is applied until the amounts are paid back. The application of interest will help to reduce the overall cost of the SoLR levy to consumers. SoLRs already gain a benefit from the fact they are allowed to make LRSP claims for CCBs. In other cost categories, where SoLRs can recover the cost through other means we would not allow the claim, but this does

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[33] See claims from SoLRs relating to 'administrator withheld funds' - Decisions on Last Resort Supply Payment Claims 2023 | Ofgem

[34] Network charges for Gas and Electricity are set in December.

not apply to CCBs. In addition, when SoLRs receive a creditor distribution, they may have this for a significant period before payments begin. SoLRs will see benefit from this additional money they have already been compensated for through their SoLR Levy claim. Therefore, the application of interest is required to ensure that the overall burden of the SoLR levy on consumers is limited as far as possible, without causing detriment to SoLRs.

3.21 We believe that in terms of the interest rate to be applied there should be a 'no gain, no detriment' principle. SoLRs should not gain from having the return of CCBs in their accounts before repayment, neither do we wish to penalise SoLRs. Interest rates are constantly changing and what may have applied a few years ago is different to today. Therefore, we are of the view that instead of setting a fixed interest rate applying to all cases, we will work on a case-by-case basis to establish the applicable interest rate. We recognise that as with other components of the SoLR Levy Claims process a degree of flexibility is required to ensure the best outcome for consumers, while also best allowing for the 'no gain, no detriment' principle to be met.

Networks

3.22 We expect networks to facilitate payments from SoLRs and in turn adjust network charges to reflect this. Payments (including interest) from SoLRs would be accounted for when setting network charges and networks would begin to receive payments from SoLRs from the following April. We do not expect networks to readjust charges if they have already been set.

3.23 As with our proposed position on repayment of excess SoLR levy claims we propose working with SoLRs and networks on a case-by-case basis to determine if the amount to be repaid should be via a single payment or over a series of monthly payments.

Appendices

Index

Appendix	Name of appendix	Page no.
1	Privacy notice on consultations	35
2	Impact assessment	37
3	Deed of undertaking	42

Appendix 1 – Privacy notice on consultations

Personal data

The following explains your rights and gives you the information you are entitled to under the General Data Protection Regulation (GDPR).

Note that this section only refers to your personal data (your name address and anything that could be used to identify you personally) not the content of your response to the consultation.

1. The identity of the controller and contact details of our Data Protection Officer

The Gas and Electricity Markets Authority is the controller ("Ofgem"). The Data Protection Officer can be contacted at dpo@ofgem.gov.uk.

2. Why we are collecting your personal data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

3. Our legal basis for processing your personal data

As a public authority, the GDPR makes provision for Ofgem to process personal data as necessary for the effective performance of a task carried out in the public interest. i.e. a consultation.

4. With whom we will be sharing your personal data

None.

5. For how long we will keep your personal data, or criteria used to determine the retention period.

Your personal data will be held for six months after the project is closed.

6. Your rights

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right to:

- know how we use your personal data
- access your personal data
- have personal data corrected if it is inaccurate or incomplete

- ask us to delete personal data when we no longer need it
- ask us to restrict how we process your data
- get your data from us and re-use it across other services
- object to certain ways we use your data
- be safeguarded against risks where decisions based on your data are taken entirely automatically
- tell us if we can share your information with 3rd parties
- tell us your preferred frequency, content and format of our communications with you
- to lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at https://ico.org.uk/, or telephone 0303 123 1113.

7. Your personal data will not be sent overseas

8. Your personal data will not be used for any automated decision making.

9. Your personal data will be stored in a secure government IT system.

10. More information

For more information on how Ofgem processes your data, click on the link to our "ofgem privacy promise".

Appendix 2– Impact assessment

In our policy consultation, we published an impact assessment (IA). We have recreated this IA below.

We have not received substantive new evidence from stakeholders to lead us to update the IA or to consider that the overall impacts previously identified have changed.

We have however continued to consider all impacts as we have developed the SLO proposal as set out in chapter 2 of this document. In particular, in chapter 2 we set out further analysis demonstrating the potential monetary impacts of the proposal.

Impact on consumers

1. We consider that the SoLR Levy Offset would have a net positive impact on consumers as it presents an opportunity to reduce the cost impact on consumers of supplier failure. Since the start of the energy crisis in Autumn 2021, energy consumers have experienced increases in their bills of approximately £83, as a direct result of SoLR levy claims. Introduction of this policy means that networks could reclaim SoLR levy costs and then reduce their charges. This would ultimately feed through to consumers through reductions in energy bills. Based on information available from insolvency office holders' reports, we anticipate that unsecured creditors have, or will, receive a distribution in the majority of insolvency processes relating to suppliers that failed since Autumn 2021[35].

2. However, there exists, in any insolvency situation, the possibility that a creditor may receive very little or no financial outcomes. If the creditor claim does not receive a financial outcome, this would result in the full costs of the SoLR being mutualised across domestic energy consumers, with no future offset forthcoming. Therefore the benefits that will be achieved are uncertain. Noting that the amount that may be recovered is uncertain, our view is that introducing the SoLR Levy Offset provides the opportunity to recover some amount. It addresses the unfairness that currently exists within the system, as currently failed suppliers impose costs on industry parties and ultimately consumers where there is currently no mechanism by which they can be required to contribute, even if there are funds available. Further, shareholders may receive a return on their equity in these circumstances, and we anticipate that this may be an outcome in

[35] Information obtained from insolvency office holders' reports filed at Companies House.

a small number of the insolvency processes relating to suppliers that failed since Autumn 2021[36].

3. The insolvency process of an energy supplier can be complex and take a long time. While this does not present a risk to the policy it does mean that any intended benefit to energy consumers will not be realised until the administration and/or liquidation process is complete. Due to this timing, the consumers that receive any return through the SoLR Levy Offset may not be the same as those that initially paid for the SoLR levy claim, or consumers may not recover in the same proportions as they paid. Despite this, we still consider that compared to the current situation, there is consumer benefit to the SoLR Levy Offset even where there is a lengthy insolvency process. We also think that the SoLR Levy Offset addresses the current unfairness that exists within the system. Under the proposals, the networks will rank as an unsecured creditor, and so no distribution can be made to shareholders until this liability is discharged in full. Consequently, shareholders would not benefit from the failure of a supplier whereas the costs of failure are mutualised across the market and potentially ultimately paid for by consumers

Impact on consumers: public sector equality duty

4. As a public body, Ofgem is subject to the requirements of the public sector equality duty, as set out in section 149 of Equality Act 2010 (PSED). This means we must look for ways to eliminate discrimination, advance equality of opportunity and foster good relations between people who share protected characteristics, and those who do not. In our equality, diversity and inclusion strategy we state: "As the regulator of the energy sector, we recognise the real-life impact of the work that we do and the decisions we make." In developing this policy, we have due regard to the impact on vulnerable consumers.

5. If we implemented the SoLR Levy Offset, we consider that vulnerable consumers will in effect pay less to cover the costs associated with SoLR levy claims, due to the potential reduction in overall costs passed on to customers through network charges. We will continue to explore the impact on consumers as this work develops.

Impact on networks

6. We recognise that the SoLR Levy Offset would necessitate action from the networks and place new requirements on them. However, we expect the time and

[36] As above, information obtained from insolvency office holders' reports filed at Companies House.

cost of claiming the debt from the failed supplier and engaging in the failed supplier's insolvency process to be minimal and proportionate to the benefits of LRSP costs that will be offset by any recoveries achieved. The proposed modifications to the networks licence conditions will only require the networks to take reasonable steps to recover sums due.

7. There would be two primary areas where networks need to undertake new activity. Claiming the debt from the failed supplier and "proving" for the debt in the failed supplier's insolvency process; and applying money from the failed supplier to reduce network charges.
8. To claim or "prove" the debt in an insolvency process, networks would need to complete and sign a standard form (provided by the insolvency office holder to known creditors) including the capacity in which they are claiming, details of the amount claimed, particulars of the debt and details of any document under which the debt arises. We do not envisage that this will be a time-consuming or costly task for networks.
9. The insolvency office holder may call for the creditor to produce other evidence of their claim, which the networks would need to respond to. However, Ofgem's consent to the SoLR levy claim will evidence the amount of the debt and the deed itself will evidence the network's entitlement to it. The insolvency office holder may reject a proof of debt, and in this event, the creditor is able to challenge this decision by making a court application within 21 days of the decision. We have proposed a mechanism for creating a claim that is a simple and clear as possible so as to minimise this risk.
10. On balance, recognising that introducing this process would have an impact on the networks in that it would require their active engagement with the failed supplier and its insolvency process, we think that overall, the impact is not significant; it is likely to be a straightforward administrative process in the majority of cases. We welcome views on this.
11. The deed would contain no obligations on the networks, and so they would not need to sign it and would be a party to it for the purpose of receiving the benefit of it only. Therefore, the process of setting up the deeds should not require any burden for networks.
12. Until the point a SoLR levy claim is made, networks have little to do with the current SoLR levy claim process. We do not see any change in the role of networks here. We envisage that under the proposed model, the networks would

pay SoLRs in line with the process that is currently followed; claims consented to by Ofgem and made by an agreed date each year would mean that payments commence in April of the following year. We would also expect that networks start recovering the costs of the claims (through network charges, which are ultimately passed on to customers) in line with the current process. To clarify; this model does not require networks to wait until the insolvency process of the failed supplier is complete before starting to recover the amounts consented to through use of system charges. This does mean that any amount recovered from the insolvency process would need to be deducted from use of system charges at the next point annual charges are set following receipt of any amount from the failed supplier.

Impact of the SoLR Levy Offset on timing of SoLR levy claims

13. As set out in section 3 above, there is an interaction between the timings of SoLR levy claims and the SoLR Levy Offset process. If we were to implement the SoLR Levy Offset process we envisage that we may need to direct SoLRs to submit an initial claim within a set period of time, and that we would need to make the multi-claim process permanent. We may introduce changes to supplier licences to include the multi claim process.

14. We understand that any change to the timeframes and process for SoLR levy claims will have an administrative impact on SoLRs. It may also have an impact on the resources we require to process these claims, given that we may need to make decisions more quickly once a SoLR levy claim is received.

Impact on suppliers

15. We also recognise that there may be impacts on suppliers more broadly (which would relate to all suppliers, including those that are not acting as SoLRs):

- There would be an administrative burden involved in setting up the deeds. However, we expect that this this would be a one-off activity (though, if we find that the deed does not achieve the intended outcome for any reason, we may need to mandate an amended version): all existing suppliers would need to sign the deed, and new entrants to the market would need to sign the deed prior to or shortly after being licensed. To minimise this burden, we will provide a standard form and instructions for sending the deed to the networks such that this should be an administrative exercise for suppliers. The proposed ranking of networks as unsecured creditors is based on our intent not to disrupt secure credit which could impact the associated cost of capital. Therefore, we are not proposing that the

debt should be secured. We do not think that an unsecured creditor claim would have a significant impact on secured creditors, but welcome views on this point.

- We have considered whether 'gaming risks' exist. Whilst in theory the debt to the networks being unsecured credit could lead to equity holders trying to game the financing structures (for example choosing to swap equity for debt as a supplier approaches insolvency), in practice the measures that we have recently put in place such as supplier capital targets, which introduces common minimum capital requirements for domestic suppliers, should make it more unlikely, and such arrangement may also be potentially challengeable by insolvency office holders.

Monitoring/resource requirement

16. Ofgem staff resource will be required for implementation, and there may be some future need for monitoring of compliance with the deed, monitoring of insolvency procedures where a SoLR has been appointed and similar administrative tasks. However, we do not think that this is a significant additional resource burden above the resources already required within Ofgem to appoint SoLRs and assess SoLR levy claims.

Environmental impact

17. We have not identified any environmental impact of these proposals.

Appendix 3 Deed of Undertaking

Below is a copy of the draft Deed of Undertaking that suppliers would sign. This was included in the policy consultation and feedback received is discussed under Section 2 (paragraphs 2.86-2.88) above. No changes have been made since the policy consultation.

DEED OF UNDERTAKING TO GAS TRANSPORTERS/ELECTRICITY DISTRIBUTORS

[two separate deeds required for gas/electricity supply]

Executed for the purpose of Standard Licence Condition [ ] of the [Gas/Electricity] Supply Licence.

This DEED OF UNDERTAKING is entered into on………………………………………….

By [ ] (the "**Supplier**") a company registered in England and Wales/Scotland under company registration number [ ] and whose registered office is at [ ]

In favour of each of:

(1) [ ]

(2) [ ]

(3) [ ]

(each a ["**Gas Transporter**"/"**Electricity Distributor**"] and together the ["**Gas Transporters**"/"**Electricity Distributors**"]))

WHEREAS

Pursuant to standard licence condition [ ] of the [gas/electricity] supply licence the Supplier is required to give the [Gas Transporters/Electricity Distributors] a binding undertaking in the specified terms.

NOW THIS DEED WITNESSES as follows:

1**. Interpretation**

1.1. For the purposes of this Deed:

Authority means the Gas and Electricity Markets Authority

Customer Credit Balances has the meaning in SLC 9 (claims for last resort supply payment).

Condition means the giving of a Last Resort Supply Direction.

Insolvency Process means the Supplier entering into administration under schedule B1 of the Insolvency Act 1986 or being wound up (whether voluntarily or by order of the court), having a receiver appointed over any of its assets (including administrative receiver), a company voluntary arrangement under Part 1 of the Insolvency Act 1986, a restructuring plan or scheme of arrangement under Parts 26 and 26A of the Companies Act 2006 or entering into a procedure in any jurisdiction with a similar effect to any of these processes.

Last Resort Supply Direction means a direction given by the Authority that specifies or describes the premises or persons to be supplied with [gas/electricity]

in accordance with SLC 8 (obligations under last resort supply direction) where such premises or persons were, prior to such direction taking effect, supplied with [gas/electricity] by the Supplier.

Last Resort Supply Payment Liability means the aggregate amount of any Valid Claims made by a SoLR excluding the cost incurred by the SoLR in honouring Customer Credit Balances.

SLC means standard licence condition of the Supply Licence and incorporated in the Supply Licence by reference in it and "SLCs" shall be construed accordingly.

SoLR means the holder of a Supply Licence to whom a Last Resort Supply Direction has been given.

Supply Licence means a licence granted by the Authority pursuant to [section 7A(1) of the Gas Act 1986/section 6(1)(d) of the Electricity Act 1989] to a person authorising it to supply [gas/electricity] to premises.

Valid Claim(s) has the meaning in SLC 9 (claims for last resort supply payment).

1.2. Unless the context otherwise requires

1.2.1. any reference to SLCs is a reference to that SLC as modified, supplemented, transferred or replaced from time to time.

1.2.2. any reference to any document is to be construed as a reference to that document as it may have been or may in the future be amended, varied, supplemented, restated or novated.

1.2.3. any reference to any statute or statutory instrument includes any enactment replacing or amending it or any instrument, order or regulation made under it and also includes any past statutory provisions (as from time to time modified or re-enacted) which such provision has directly or indirectly replaced.

1.2.4. clause headings are for reference only and shall not be taken into consideration in interpretation.

2. Undertaking

2.1. The Supplier undertakes to each [Gas Transporter/Electricity Distributor] that, upon the occurrence of the Condition, the Supplier will pay to the [Gas Transporter/Electricity Distributor] the amount of any Last Resort Supply Payment Liability.

2.2. This Deed will continue in force notwithstanding any Insolvency Process.

2.3.Subject to paragraph 2.5, the undertaking in paragraph 2.1 is irrevocable until and unless the supplier gives each of the [Gas Transporters/Electricity Distributors] a replacement binding undertaking in compliance with any requirement under SLC [ ].

2.4. Subject to paragraphs 2.3 and 2.5, the undertaking in paragraph 2.1 is irrevocable both before and after the occurrence of any Insolvency Process in relation to the Supplier.

2.5. If the Supplier ceases to hold a Supply Licence in circumstances where a Last Resort Supply Direction is not made as consequence of such cessation, the undertaking will cease to have effect.

2.6.All sums payable by the Supplier under this Deed shall be paid free and clear of any deductions, withholdings, set-offs or counterclaims.

3. Miscellaneous

3.1. The Supplier shall be liable under this Deed as a sole principal debtor and not as surety, and it shall not be discharged and its liability shall not be affected by anything which would discharge it or affect its liability as surety.

3.2. This Deed is in addition to any security or surety in favour of a [Gas Transporter/Electricity Distributor] and may be enforced without first having recourse under any such security or surety.

3.3. No failure or delay by a [Gas Transporter/Electricity Distributor] in exercising any right, power or remedy in connection with this Deed will operate as a waiver of it, and no single or partial exercise of it will preclude any other or further exercise of it or the exercise of any other such right, power or remedy.

3.4. The right, powers and remedies provided in this Deed are cumulative and not exclusive of any other rights, powers or remedies.

3.5. No waiver, compounding or compromise of any liability of, or time or indulgence given to the Supplier by a [Gas Transporter/Electricity Distributor] (in its

absolute discretion) shall prejudice or affect a [Gas Transporter's/Electricity Distributor's] rights against the Supplier.

3.6. Except as otherwise provided herein this Deed contains the whole agreement between the parties relating to the subject matter of this Deed at the date hereof to the exclusion of any terms implied by law which may be excluded by contract.

3.7. No variation of this Deed shall be effective unless in writing and signed by or on behalf of each of the parties and agreed in advance by the Authority in writing.

3.8.Subject to paragraph 3.9, this Deed is personal to the parties and the rights and obligations of the parties may not be assigned or otherwise transferred.

3.9.A [Gas Transporter/Electricity Distributor] may assign its rights under this Deed to another [gas transporter/electricity distributor] with the agreement in writing of the Authority.]

3.10. The Deed shall be governed by and construed in accordance with English law; and courts of England are to have exclusive jurisdiction in relation to any dispute arising out of or in connection with this Deed.

[Execution Block

EXECUTED AS A DEED.......]