

POSTAL SERVICES ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Special Administration

Summary and background

289. **Part 4** of the Act contains provisions for a special administration regime, the purpose of which is to ensure that the objective of the administrator is to secure the continued provision of the universal postal service should a privately-owned Royal Mail (or any other universal service provider) be at risk of entering insolvency proceedings.
290. This follows precedents in the water and energy sectors.

Postal administration orders

Section 68: Postal administration orders

291. A postal administration may only be commenced by an order of the court. Subsection (1) sets out the meaning of a postal administration order. The order appoints a person (the “postal administrator” - see subsection (2)) to manage the affairs, business and property of a company which is a universal service provider for the duration of the postal administration.
292. Subsection (3) gives the postal administrator an overarching objective by requiring them to manage the company’s affairs, business and property and exercise their functions to achieve the objective of the postal administration which is set out in section 69.
293. Subsection (4) clarifies that for a postal administration order applying to a foreign company, the references in this section to affairs, business and property are references to those conducted and located in the UK.

Section 69: Objective of a postal administration

294. This section sets out the objective of a postal administration.
295. Subsection (1) states that the objective is to secure that:
- a) a universal postal service is provided in accordance with the standards set out in the universal postal service order (issued by OFCOM under section 30); and
 - b) the postal administration is brought to an end by one or more of two specified means.
296. Those means are expressed in subsection (2) as
- a) the rescue as a going concern of the company subject to the postal administration order; and

- b) relevant transfers.
297. A relevant transfer, as stated in subsection (3), is a transfer as a going concern of so much of the business of the company as is appropriate for the purpose of achieving the objective of the postal administration order. The transfer can be to a single company or, as respects different parts of the business, there may be transfers to more than one company.
298. Subsection (4) provides that one of the ways by which relevant transfers can be effected is through a “hive down”. A hive down is:
- a) a transfer of the undertaking (or part of the undertaking) of the company subject to the postal administration order, to a wholly owned subsidiary of that company; and
 - b) a transfer to a company of securities of a wholly-owned subsidiary to which there has been a transfer in paragraph (a).
299. Subsection (5) places limits on the extent to which relevant transfers can be used to achieve the objective of the postal administration. These emphasise that, where practicable and consistent with the objective of the postal administration, a rescue of the company as a going concern is to be preferred to transfers. Transfers can only be used to extent that:
- a) the rescue as a going concern of the company is not reasonably practicable or is not reasonably practicable without the transfers;
 - b) the rescue of a company as a going concern will not achieve the objective of the postal administration or will not do so without the transfers;
 - c) the transfers would produce a result for the company’s creditors as a whole that is better than the result that would be produced without them; or
 - d) the transfers would, without prejudicing the interests of the company’s creditors as a whole, produce a result for the company’s members as a whole that is better than the result that would be produced without them.
300. In deciding on what course of action to adopt, the postal administrator will be under a duty to act in a way which, so far as it is consistent with the objective of protecting provision of the universal service, best protects the creditors (see section 72 (3)).

Section 70: Applications for postal administration orders

301. This section sets out the process for applications to the court for postal administration orders.
302. Subsection (1) makes it clear that only the Secretary of State or OFCOM (with the consent of the Secretary of State) can make an application for a postal administration order.
303. When applying for such an order the applicant must give notice, as soon as is practicable, of the application to a number of people as follows:
- a) every person who has appointed an administrative receiver of the company;
 - b) every person who is or may be entitled to appoint an administrative receiver of the company;
 - c) every person who is or may be entitled to appoint an administrator because they hold a floating charge over the company (as permitted under paragraph 14 of Schedule B1 to the Insolvency Act 1986); and

- d) other persons who may be prescribed by the postal administration rules (these are rules that can be made under section 411 of the Insolvency Act 1986 – see section 73(3)).

Section 71: Powers of the court

- 304. The section sets out the powers of the court on hearing an application from the Secretary of State or OFCOM for a postal administration order. Subsection (1) states that the Court may:
 - a) make the order;
 - b) dismiss the application;
 - c) adjourn the hearing conditionally or unconditionally;
 - d) make an interim order;
 - e) treat the application as a winding-up petition and make any order of the court could make under section 125 of the Insolvency Act 1986; and
 - f) make any other order which it thinks appropriate.
- 305. The powers in subsection (1) mirror those for a normal administration as set out in paragraph 13(1) of Schedule B1 to the Insolvency Act 1986.
- 306. Under subsection (2), the court may only make a postal administration order if it is satisfied that:
 - a) the company is unable, or is likely to be unable, to pay its debts; or
 - b) it would be just and equitable (disregarding the objective set out in section 69) to wind up the company in the public interest on a petition from the Secretary of State under section 124A of the Insolvency Act 1986 (and the Secretary of State has certified that (disregarding that objective) a petition for such a winding up would be appropriate – see subsection (3)).
- 307. Section 124A(1) of the Insolvency Act 1986 states:

“(1) Where it appears to the Secretary of State from -

 - (a) any report made or information obtained under Part XIV of the Companies Act 1985 (company investigations, etc.),
 - (b) any report made under section 94 or 177 of the Financial Services Act 1986 or any information obtained under section 105 of that Act.
 - (c) any information obtained under section 2 of the Criminal Justice Act 1987 or section 52 of the Criminal Justice (Scotland) Act 1987 (fraud investigations), or
 - (d) any information obtained under section 83 of the Companies Act 1989 (powers exercisable for purpose of assisting overseas regulatory authorities),

that it is expedient in the public interest that a company should be wound up, he may present a petition for it to be wound up if the court thinks it just and equitable for it to be so.”
- 308. Subsection (4) makes it clear that the court cannot make a postal administration order if the company is already in administration (under Schedule B1 to the Insolvency Act 1986) or has gone into liquidation (as defined in section 247(2) of the Insolvency Act 1986).
- 309. Subsection (6) explains that where the court makes an interim order it may restrict the exercise of a power of the company or its directors, or make provision to confer

discretion on a person qualified to act as an insolvency practitioner in relation to the company.

310. Subsection (7) sets out that in the case of a foreign company, the restrictions would relate to powers of the company or the directors within the UK or in relation to the company's UK affairs, business and property.
311. Subsection (8) sets out that for the purposes of this section, the test for whether a company (registered or unregistered) is unable to pay its debts is the same as that which applies under the Insolvency Act 1986.

Section 72: Postal administrators

312. This section sets out the status of a postal administrator of a company and how that administrator should exercise his or her powers.
313. Subsection (1) states that a postal administrator is an officer of the court, and in exercising and performing powers and duties in relation to the company, is the company's agent.
314. Subsection (2) provides that the postal administrator is under a duty to perform their functions as quickly and as efficiently as is reasonably practicable.
315. Subsection (3) states that the postal administrator of a company must exercise and perform powers and duties in the way which, so far as it is consistent with the objective of the postal administration to do so, best protects:
- a) the interests of the company's creditors as a whole, and
 - b) subject to those interests, the interests of the company's members as a whole.
316. Subsection (4) clarifies that the postal administrator has to be qualified to act as an insolvency practitioner in relation to the company.
317. Subsection (5) deals with a situation where the court appoints two or more persons as the postal administrator of a company.

Section 73: Conduct of administration, transfer schemes etc

318. This section introduces Schedule 10 which contains provisions applying the provisions of Schedule B1 to the Insolvency Act 1986, and certain other enactments, to postal administration orders and Schedule 11 which contains provisions for transfer schemes to achieve the objective of a postal administration. A version of Schedule B1 to the Insolvency 1986 Act as modified to apply to postal administration is available on the BIS website¹.
319. Subsection (3) applies the power to make rules under section 411 of the Insolvency Act 1986 to Part 4 of the Act so that detailed procedural rules for a postal administration can be made in the same way that they are for a normal administration.
320. However, under subsection (4) the duty to consult the Insolvency Rules Committee about the rules is disapplied in the case of a postal administration.

Restrictions on other insolvency procedures

321. Sections 74 to 78 prevent a postal administration from being frustrated by prior orders of various kinds being granted before the Secretary of State or OFCOM have been given an opportunity to apply for a postal administration order, or by other steps being taken when a postal administration order has been made or an application is outstanding.

¹ <http://www.bis.gov.uk/policies/business-sectors/postal-services/postal-services-bill-2010>

Section 74: Winding up orders

322. This section applies if a person other than the Secretary of State petitions for the winding-up of a universal service provider and sets out how the court should act in certain circumstances.
323. Subsection (2) provides that the court is not to exercise its powers on a winding-up petition (for example, the power to grant the winding up order – see subsection (4)) unless:
- a) notice of the petition has been served on the Secretary of State and OFCOM, and
 - b) a period of at least 14 days has elapsed since the service of the last of those notices to be served.
324. The notice and 14 day period are intended to avoid a winding up order being granted before the Secretary of State and OFCOM have been given an opportunity seek a postal administration order.
325. If an application for a postal administration order is made before the winding-up order is made (that is, within the 14 day period), subsection (3) allows the court to exercise its powers under section 71 (for example, to make a postal administration order) instead of exercising its powers on the petition for the winding up order.
326. Subsection (4) clarifies that references in this section to the court's powers on a winding-up petition are to:
- a) its powers under section 125 of the Insolvency Act 1986 (for example, to make a winding up order or dismiss the petition etc.) other than its power of adjournment, and
 - b) its powers under section 135 of the Insolvency Act 1986 (for example, to appoint a provisional liquidator).

Section 75: Voluntary winding up

327. This section prevents a universal service provider passing a resolution for voluntary winding up without the permission of the court and sets out conditions on which the court could give permission to allow the voluntary winding up of the company.
328. Subsection (3) stipulates that the court is not to grant permission unless:
- a) notice of the application has been served on the Secretary of State and OFCOM, and
 - b) a period of at least 14 days has elapsed since the service of the last of those notices to be served.
329. If an application for a postal administration order is subsequently made before permission is granted, subsection (4) allows the court to exercise its powers under section 71 to make a postal administration order (instead of granting permission).

Section 76: Making of ordinary administration orders

330. This section applies if a person other than the Secretary of State makes an ordinary administration application in relation to a company which is a universal service provider. It sets out how the court should act in such circumstances.
331. Subsection (2) states that the court must dismiss the application for ordinary administration if a postal administration order is in force in relation to the company, or has been made in relation to the company but is not yet in force.

332. If a postal administration order has not been made, subsection (3) requires that, on hearing the ordinary administration application, the court must not exercise its powers under paragraph 13 of schedule B1 to the Insolvency Act 1986 (other than its power of adjournment) unless:
- a) notice of the application has been served on the Secretary of State and OFCOM;
 - b) a period of at least 14 days has elapsed since the service of the last of those notices to be served; and
 - c) there is no application for a postal administration order which is outstanding.
333. [Paragraph 13](#) of Schedule B1 relates to the powers of the court on hearing an ordinary administration application (for example, to make an administration order, dismiss the application etc.).
334. Subsection (4) explains that paragraph 44 of Schedule B1 to the Insolvency Act 1986 Act (which provides for an interim moratorium under which legal proceedings cannot be taken against the company except with the permission of the court) does not prevent, or require the permission of the court for, the making of an application for a postal administration order.
335. On the making of a postal administration order in relation to a company, subsection (5) requires the court to dismiss any outstanding ordinary administration application made in relation to the company.

Section 77: Administrator appointments by creditors etc

336. This section deals with circumstances where secured creditors or directors of a universal service provider or the company itself seek to appoint an administrator under paragraphs 14 or 22 of Schedule B1 to the Insolvency Act 1986 (powers to appoint administrators).
337. Subsection (2) states that a person may not take any step to make such an appointment when:
- a) a postal administration order is in force in relation to the company;
 - b) a postal administration order has been made in relation to the company but is not yet in force; or
 - c) an application for a postal administration order in relation to the company is outstanding.
338. Subsection (3) sets out that in any other case, an appointment of an administrator takes effect only if each of the conditions in subsection (4) are met. The conditions are:
- a) that a copy of every document in relation to the appointment that is filed or lodged with the court has been served on the Secretary of State and OFCOM;
 - b) that a period of 14 days has elapsed since the service of the last of those copies to be served;
 - c) that there is no outstanding application to the court for a postal administration order in relation to the company; and
 - d) that the making of an application for a postal administration order in relation to the company has not resulted in the making of a postal administration order which is in force or is still to come into force.
339. Subsection (5) makes it clear that paragraph 44 of Schedule B1 to the Insolvency Act 1986 Act (interim moratorium) does not prevent, or require the permission of the court for, the making of an application for a postal administration order at any time before the appointment takes effect.

Section 78: Enforcement of security

340. This section prevents a person taking any step to enforce a security over property of a company which is a universal service provider unless:
- a) notice of the intention to do so has been served on the Secretary of State and OFCOM; and
 - b) a period of at least 14 days has elapsed since the service of the last of those notices to be served.
341. In the case of a foreign company which is a universal service provider, subsection (2) clarifies that the reference to the property of the company is to its property in the United Kingdom.

Financial support for companies in administration

Section 79: Grants and Loans

342. This section sets out the conditions on which the Secretary of State can make grants or loans to a universal services provider in postal administration.
343. Subsection (2) enables the Secretary of State, with the consent of the Treasury, to make grants or loans to the universal service provider of amounts that the Secretary of State considers to be appropriate for achieving the objective of the postal administration.
344. Subsection (3) provides in general terms that the grants or loans may be made in whatever manner, and on whatever terms, the Secretary of State considers appropriate. Subsections (4) and (5) specify some of the terms which may be included, namely terms requiring:
- a) the whole or a part of the grants to be repaid to the Secretary of State if there is a contravention of the other terms on which they are made;
 - b) the loans to be repaid at such times and by such methods as the Secretary of State may, with the consent of the Treasury, from time to time direct; and
 - c) interest to be paid on the loans at such rates and at such times as the Secretary of State may, with the consent of the Treasury, from time to time direct.

Section 80: Indemnities

345. This section applies if a postal administration order has been made in relation to a company that is a universal service provider. It enables the Secretary of State, with the consent of the Treasury, to indemnify specified “relevant persons”, for example the postal administrator, his employees, partners, fellow employees (see subsection (11)) in respect of liabilities incurred or loss or damage sustained in connection with the exercise of the postal administrator’s powers and duties.
346. Subsection (4) requires the Secretary of State to lay a statement before Parliament as soon as practicable after agreeing an indemnity under this section.
347. Subsection (5) provides for repayment by the company of any sums paid by the Secretary of State in consequence of the indemnity and for the payment of interest on outstanding sums.
348. Subsection (7) clarifies that the company does not have to repay sums paid by the Secretary of State for indemnifying a person in respect of a liability to the company.
349. If a sum has been paid out under an indemnity agreed under this section, the Secretary of State must lay a statement relating to that sum before Parliament as soon as practicable after the end of the financial year in which the sum is paid out; and, where there is an

obligation on the company to repay the relevant sums, after the end of each subsequent financial year until the company has discharged the liability (including interest).

350. Subsection (10) provides that the Secretary of State can only agree to indemnify persons in respect of liabilities, loss and damage incurred or sustained by them as “relevant persons”; but can agree to indemnify persons who subsequently become “relevant persons” for example by becoming an employee of the postal administrator.
351. Subsection (11) defines the meaning of “relevant persons” for the purposes of this section, namely:
- a) the postal administrator;
 - b) an employee of the postal administrator;
 - c) a partner or employee of a firm of which the postal administrator is a partner;
 - d) a partner or employee of a firm of which the postal administrator is an employee;
 - e) a partner of a firm of which the postal administrator was an employee or partner at a time when the order was in force;
 - f) a body corporate which is the employer of the postal administrator;
 - g) an officer, employee or member of such a body corporate; and
 - h) a Scottish firm (as defined in section 85) which is the employer of the postal administrator or of which the postal administrator is a partner.

Section 81: Guarantees where postal administration order is made

352. This section enables the Secretary of State, with the consent of the Treasury, to give guarantees in relation to a universal service provider in postal administration.
353. Subsection (2) states that the Secretary of State may guarantee while a postal administration order is in force:
- a) the repayment of any sum borrowed by the company;
 - b) the payment of interest on any sum borrowed by the company; and
 - c) the discharge of any other financial obligation of the company in connection with the borrowing of any sum.
354. Subsection (4) requires the Secretary of State to lay a statement of the guarantee before Parliament as soon as practicable after giving a guarantee under this section.
355. If sums are paid out by the Secretary of State under a guarantee given under this section, subsection (5) requires that the company must pay the Secretary of State:
- a) such amounts in or towards the repayment to the Secretary of State of those sums as the Secretary of State may, with the consent of the Treasury, direct; and
 - b) interest on amounts outstanding under this subsection at such rates as the Secretary of State may, with the consent of the Treasury, direct.
356. If a sum has been paid out under a guarantee given under this section, under subsections (7) and (8), the Secretary of State must lay a statement relating to that sum before Parliament as soon as practicable after the end of the financial year in which the sum is paid out; and after the end of each subsequent financial year until the company has discharged the liability (including interest).

Modifications of regulatory conditions etc

Section 82: Regulatory powers exercisable during postal administration

357. This section sets out the regulatory powers available to the Secretary of State during a postal administration.
358. Subsection (1) provides that the section applies only if a postal administration order has been made.
359. Subsections (2) and (3) provide that the Secretary of State can make an order to modify the universal postal order made by OFCOM under section 30 following consultation with OFCOM and anyone else the Secretary of State considers appropriate and under subsection (4), if such an order is made, the Secretary of State rather than OFCOM must notify the European Commission of the modification.
360. Subsections (5) and (6) provide that, in a special administration situation, the Secretary of State can amend the minimum requirements for the universal postal service in section 31. The order is subject to approval after being made (which means it must be laid before Parliament after being made and ceases to have effect unless it is approved by a resolution of each House of Parliament within 28 days – see section 89 for further details) and may include necessary or expedient consequential amendments to Part 3.
361. Subsection (7) provides that the Secretary of State can modify or revoke any regulatory condition on any postal operator if the Secretary of State considers it appropriate to do so for, or in connection with, achieving the objective of the postal administration.
362. Subsection (8) extends the power under subsection (7) to include the making of incidental, consequential or transitional modifications.
363. Subsection (9) requires the Secretary of State to consult the person whose condition is being modified or revoked, OFCOM and anyone else he thinks appropriate before making a modification.
364. Subsections (10) and (11) provide that any modification or revocation of a regulatory condition must be published by the Secretary of State in such a manner as the Secretary of State considers appropriate.
365. Subsection (12) provides that the provisions in Part 3 (including the duty to secure the provision of universal postal service) apply in relation to the modification or revocation by the Secretary of State of regulatory conditions, with the exception of paragraph 3 of Schedule 6 (which relates to the publication by OFCOM of modifications etc) and sections 57 to 60 (which relate to appeals). In a special administration situation, decisions by the Secretary of State modifying or revoking regulatory conditions would be subject to judicial review by the courts.
366. Subsection (13) provides that the power conferred by subsection (2) (to modify the universal postal order) or (5) (to amend section 31) may only be exercised when a postal administration order is in force.
367. Subsection (14) provides that any duty to consult under this section may be met by consultation that took place prior to the making of the postal administration order.

Section 83: Regulatory conditions to secure funding of postal administration order

368. This section outlines how the Secretary of State can modify regulatory conditions to secure the funding of a postal administration.
369. Subsection (1) provides that a modification made under section 82 can include a modification to a price control provision contained in a regulatory condition for the purpose of raising funds.

370. Subsection (2) specifies that the modified condition may require the person on whom it is imposed to pay funds to specified persons for the purpose of making good any shortfall (as defined in subsection (5)) in the property available to meet the expenses of the postal administration.
371. Subsection (3) provides that the modified condition may require that the person in receipt of the funds as result of this section uses those funds towards discharging any shortfall.
372. For the purposes of this section, subsection (4) defines a price control provision as a provision as to the tariffs as mentioned in section 36(4) (designated USP condition: tariffs), or a provision as to prices that may be charged for or in connection with the giving of access under an access condition (within the meaning of Part 3 of this Act).
373. For the purposes of this section, subsection (5) defines a 'shortfall' in meeting the expenses of postal administration as the property of the company being insufficient to meet the costs of the administration. It also defines making payment to make good the shortfall as discharging 'relevant debts' which cannot otherwise be met out of the available property.
374. Subsection (6) defines 'relevant debts'. These include obligations to repay the grants, loans, sums paid out under indemnity and sums paid out under guarantees under sections 79, 80 and 81.

Supplemental provision of Part 4

Section 84: Modification of this Part under Enterprise Act 2002

375. This section provides that the power to modify or apply enactments conferred on the Secretary of State by:
- a) sections 248 and 277 of the Enterprise Act 2002 (amendments consequential on that Act); and
 - b) section 254 of that Act (power to apply insolvency law to foreign companies);
- includes power to make consequential modifications of this Part of the Act. The Secretary of State can make such modifications as he or she considers appropriate in connection with any other provision made under any of the specified sections of the Enterprise Act. (The Enterprise Act 2002 made substantial changes to the regime for ordinary administration and inserted Schedule B1 into the Insolvency Act 1986.)

Section 86: Partnerships

376. Subsection (1) gives a power to the Lord Chancellor to make an order with the concurrence of the Secretary of State and the Lord Chief Justice (or a nominee), to apply (with or without modifications) any provision of Part 4 to partnerships (excluding Scottish firms). Subsection (5) gives the Secretary of State a power to make such an order in relation to Scottish firms. (Partnerships in Northern Ireland are dealt with under section 87).

Section 87: Northern Ireland

377. This section contains provision about the application of this Part to Northern Ireland.

Section 88: Review of Part 4

378. This section provides for there to be a review of the provisions of Part 4 within 5 years after the provisions of the Part generally come into force. The Secretary of State must set out the conclusions of the review in a report and lay the report before Parliament. The report must, in particular, set out the objectives intended to be achieved by the regulatory system established by the provisions; assess the extent to which the

*These notes refer to the Postal Services Act 2011
(c.5) which received Royal Assent on 13 June 2011*

objectives have been achieved; and assess whether those objectives remain appropriate and, if so, whether they could be achieved by a system that imposed less regulation.