

WATER ACT 2014

EXPLANATORY NOTES

COMMENTARY

Part 1

Water Industry Chapter 4

Retail Exit: Non-Household Premises

Section 42: Retail exit: non-household premises

178. [Section 42](#) enables the Secretary of State to make regulations (“exit regulations”) to allow an undertaker whose area is wholly or mainly in England to apply to exit the non-household retail market for that area. The regulations could include provisions about determining an exit application, for transferring the relevant non-household business to an eligible licensee or licensees and about the operation of a retail exit area after the exit has taken place. The regulations could require an undertaker to exit both the water and sewerage retail markets at the same time. The regulations could also include provisions for protecting the household and non-household customers affected by the exit.
179. Subsections (4) and (5) of section 42 allow exit regulations to set out the functions that would be affected by retail exit and what undertakers would therefore be prohibited from doing in an area affected by retail exits.

Section 43: Application for retail exit

180. [Section 43](#) allows exit regulations to set out the procedure for an application for retail exit (an “exit application”). The regulations would have to require the relevant undertaker to apply to the Secretary of State when making an exit application. This would mean that the Secretary of State could refuse permission for an undertaker to exit. This section also includes a non-exhaustive list of other procedural matters that might be included in the regulations, such as who must be consulted before making an exit application, the grounds for the Secretary of State to refuse the application and conditions that may be imposed by the Secretary of State before granting an exit application.
181. The grounds on which an application can be refused under the regulations might include the public interest, the interests of non-household customers or other customers, the costs associated with transferring part of the relevant undertaker’s undertaking and grounds relating to the licensee to which part of the undertaking will be transferred. For example, this might include the licensee’s share of the relevant market or the licensee’s capacity to take on the relevant customers.
182. The regulations may provide for the Secretary of State to impose conditions, for example, to ensure that customers are protected following an exit application, for example by requiring the sharing of proceeds from a transfer, or that customers are no worse off as a result of the exit.

183. Subsection (5) could be used to leave types of premises or customers, such as premises about to be demolished or customers on the point of moving to a new provider, out of the retail exit process. Regulations under subsection (6) about disclosing information could be used to help ensure that the same or similar charging arrangements are available to customers after a retail exit happens.

Section 44: Eligible licensees

184. **Section 44** allows exit regulations to require a relevant undertaker to specify in its exit application the eligible licensee or licensees to which it proposes to transfer part of its undertaking. The regulations may also allow Ofwat to direct one or more eligible licensees to accept a transfer. Regulations under subsection (3) would give an eligible licensee an opportunity to opt out in a particular case.
185. An “eligible licensee” would be a licensee that, first, has a water supply licence with a retail authorisation; a sewerage licence with a retail authorisation; or both; and, secondly, has elected to be an eligible licensee. This is because there may be licensees that do not wish to take on so many customers at once and they may therefore elect not to be an “eligible licensee”.
186. The regulations could also make provision for Ofwat to publish a code about eligibility and how it conducts assessments on whether a licensee is an eligible licensee, with which Ofwat must comply when making these assessments. It would also be possible for exit regulations to make provision about transfers from a relevant undertaker to an eligible licensee that is associated with it.

Section 45: Transfer of undertaking

187. **Section 45** allows exit regulations to provide for a scheme for transferring property, rights and liabilities where an exit application has been granted. A transfer scheme would need to deal with charges to undertakers’ non-household customers, previously covered under Chapter 1 of Part 5 of the WIA. The scheme could treat a liability to pay under statute as being a liability under an agreement.

Section 46: Operation of retail market

188. **Section 46** allows exit regulations to include the following provision:
- provision that requires an undertaker to impose on the licensee charges that enable the licensee to fulfil its obligations under the agreements transferred from the undertaker;
 - provision that requires a water supply or sewerage licensee providing services under its licence in a retail exit area to provide specified services. These might, for example include, functions relating to the interim duties in section 63AC or 110L (amended by section 31 and inserted by section 32);
 - provision that requires the agreement between an undertaker and the water supply or sewerage licensee to be such as would enable the licensee to carry out specified services imposed on it;
 - provision about the functions of a relevant undertaker in relation to a retail exit area, which may include modifying or disapplying the undertaker’s interim duty to provide water or sewerage services;
 - provision that applies the special administration regime in certain circumstances to a licensee providing services in a retail exit area, which might mean, for example, that the special administration regime would affect licensees that had a significant share of the market;

- provision that requires relevant undertakers and licensees to provide certain specified information to customers, Ofwat, or the Secretary of State; and
- provision that requires Ofwat to record certain information in its public register.

Section 47: Operation of retail market: charges etc

189. **Section 47** allows exit regulations to require licensees to produce schemes containing terms and conditions that would apply to transferred customers in the absence of agreed terms and conditions. This would enable a form of ongoing price regulation of licensees to be introduced where customers are transferred to licensees where they have not chosen to switch to one.
190. The regulations would be able to provide for the schemes to make different provision for different purposes or areas; for publication of the schemes; and for the licensees to send a copy of the schemes to Ofwat. The regulations could also allow Ofwat to direct that the terms or conditions be modified and require the licensee to comply with this direction. This might include making such a direction enforceable under section 18 of the WIA.
191. The regulations could also require Ofwat to issue a code about providing services. This code could include provisions about the terms and conditions contained in the scheme; provision for licensees to inform customers about the schemes before they agree to other terms and conditions; provision allowing Ofwat to direct the licensee to act in accordance with the code if it is not doing so; and for the direction to be enforceable under section 18 of the WIA.
192. The regulations could also allow Ofwat to issue and enforce rules about the charges that a licensee might impose in relation to a retail exit area and, where relevant, rules about the schemes. The regulations may provide for the rules to make different provision for different purposes or areas; for Ofwat to direct a licensee to comply with the rules; for the directions to be enforceable by Ofwat; for the Secretary of State to issue guidance on the content of the rules; and for the Secretary of State to veto the rules so that Ofwat has to change them. These provisions broadly mirror the arrangements for undertakers producing charges schemes in accordance with rules produced by Ofwat under section 143 of the WIA (as amended by section 16 of this Act).

Section 48: Exit applications: further provision

193. **Section 48** allows exit regulations to control what a relevant undertaker's conditions of appointment say about making exit applications. In particular, the regulations may prevent the inclusion of a provision that would require a relevant undertaker to make an exit application. The regulations could also include a requirement for Ofwat or the CMA to seek the Secretary of State's consent before exercising their functions in a way that might require a relevant undertaker to make an exit application.

Section 49: Modification of appointment and licence conditions

194. **Section 49** provides that the regulations may allow Ofwat to modify the appointment conditions of a relevant undertaker or the licence conditions of a water supply or sewerage licensee where this is necessary or expedient in consequence of a transfer of a part of the undertaker's undertaking to the licensee. This might be because an undertaker is no longer required to carry out a particular function in the area. It is intended that modifications would be made more easily than the provisions of the WIA would allow.
195. The regulations may also allow Ofwat to make consequential changes following these modifications. They might require Ofwat to obtain the Secretary of State's consent to a modification and might set the time period during which modifications can be made. The time period could not exceed one year after the transfer has taken place.

Section 50: General directions

196. **Section 50** enables exit regulations to permit the Secretary of State to publish a statement from time to time with general directions for Ofwat and the CMA. The general directions would affect functions that could be used to secure that a relevant undertaker makes an exit application.
197. The regulations might require the Secretary of State, when drafting the statement, to have regard to Ofwat's duties under section 2(1)(b) of the WIA, the general duties of the CMA, the protection of consumers and any other matters as the Secretary of State sees fit. The regulations might also require the Secretary of State, before publishing the statement, to consult and the statement is subject to a negative resolution procedure.

Section 51: Exit regulations: general

198. This section allows for exit regulations to provide for duties and powers of various persons to be modified and added to. It also allows regulations to amend or repeal provisions in Acts (including Acts or Measures of the Assembly). It also allows the regulations to make provision conferring powers to make subordinate legislation.

Section 52: Interpretation

199. This section defines certain terms used in Chapter 4 of Part 1.

Section 53: Procedure

200. **Section 53** makes provision for consultation before exit regulations are made, and for the affirmative procedure to apply to exit regulations.