



Department
for Environment
Food & Rural Affairs

Consultation on Draft Regulations: ‘The Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations’

Summary of responses and the government’s response

May 2016



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Introduction

The Water Act 2014 (“WA14”) received Royal Assent on 14 May 2014. It enabled reform of the water sector, including by extending the scope for competition in the market for non-household retail services. During the passage of the Water Bill, the government brought forward amendments designed to enable companies to voluntarily exit the retail market (‘retail exit’). The government is committed to ensuring that undertakers who wish to exit the market can do so when the retail market opens in April 2017.

The exit provisions in the WA14 enable the government to introduce Regulations that allow undertakers to exit the competitive part of the retail market with the consent of the Secretary of State. Those companies choosing to exit the non-household retail market will be able to transfer their non-household customers to a licensee. The various legal duties relating to the provision of retail services to such customers will be removed from the exiting undertaker, or revised at the point of exit. It was recognised in the parliamentary debates during the passage of the Water Bill that the detailed policy on how to implement the exit provisions would need to be developed in consultation with all interested parties.

Following Royal Assent of the WA14 we undertook a process of detailed engagement with the water industry, consumer groups and Ofwat to inform the development of the policy on exits. On 10 December 2014 we published our first consultation on the retail exits policy which ran until 18 February 2015. A summary of responses and the government response¹ was published in July 2015.

A second consultation² was launched in July 2015 on a draft of the Regulations and a draft application form. This followed up a commitment made by government to Parliament during the passage of the Water Bill through Parliament to consult widely on the exit Regulations before they are laid in Parliament. The consultation ran from 23 July 2015 until 15 October 2015.

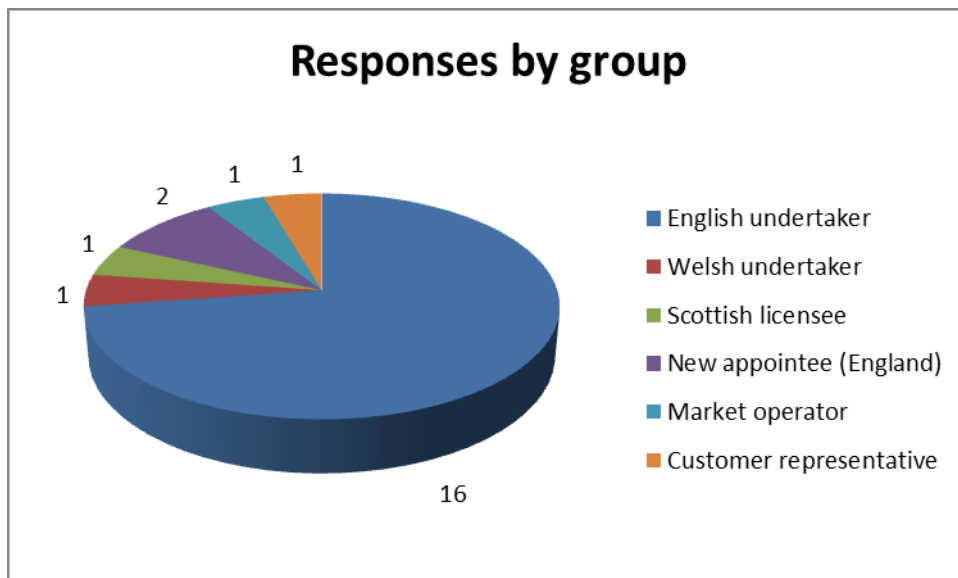
Summary and next steps

The consultation posed 16 questions. In total there were 22 responses to the consultation of which 19 were from undertakers (including two new appointees and one Welsh undertaker). The other respondents were the Consumer Council for Water (CCWater), Market Operator Systems Limited (MOSL) and one Scottish licensee.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447851/retail-exit-consult-sum-resp.pdf

² <https://consult.defra.gov.uk/water/retail-exits-regulations>

Figure 1: number of responses to the consultation by group



All the undertakers that responded were broadly supportive of the overall approach we have taken in the draft Regulations and provided detailed responses to some or all of the questions. CCWater was also broadly supportive of our proposals but made suggestions about strengthening customer protections in some areas.

The Welsh undertaker noted that the exit Regulations would not apply to it and did not provide any responses to the questions. The Scottish licensee did not provide detailed responses but made a general comment that it was important that there were no disincentives for undertakers to exit (e.g. different licence conditions being applied to acquiring licensees that are not also applied to other licensees).

MOSL provided useful comments on our proposals and confirmed that they can be delivered through the market operator and code processes.

The government is grateful to all those that provided written responses and participated in workshops, etc. These responses have provided us with assurance that we are taking the right approach and have provided us with useful information to improve the drafting of the regulations and the application form.

Next steps

Alongside this response we have laid the Regulations in Parliament under the affirmative resolution procedure for statutory instruments. Subject to the approval of Parliament, the Regulations will come into force on 3 October 2016.

Responses to individual questions and the government's response

Part 1 – Citation, commencement and interpretation

Question 1: Do you agree that premises that are not located within an undertaker's area of appointment but are served by their water or sewerage infrastructure ('cross-border premises') should be considered part of that undertaker's exit area?

This question related to our proposal that non-household premises that are outside of an exiting undertaker's area of appointment but connected to that undertaker's infrastructure should be transferred to an acquiring undertaker along with in-area premises.

All the English undertakers and CCWater responded and agreed that cross-border premises should be transferred. However, two undertakers said that the drafting should be amended so that it refers to premises receiving retail services or customers that are liable for charges (these responses are also relevant to the answers for question 3). Four undertakers (including one of the new appointees) were concerned that the definition of cross-border premises should not capture the premises of customers of new appointees operating within an existing undertaker's area of appointment or other bulk supply arrangements.

CCWater commented that it might be difficult to determine which premises belong to which undertaker due to inaccurate or incomplete asset location records.

MOSL said that the definition of cross-border premises was consistent with one it is using but noted that it was aware of some premises that are supplied water by two wholesalers (e.g. premises receiving a potable water supply from one undertaker and a non-potable supply from another and therefore subject to more than one water supply retail arrangement).

The government is grateful for this input on what is a complex issue. Regulations 2(2) and 2(3) in the draft Regulations are under the interpretation section and should be read with regulation 7 (exit application to identify customers' premises) and other relevant parts of the draft Regulations. The undertaker must frame its **application** in such a way as to capture all eligible premises that are or could be entitled to receive water supply and/or sewerage services from it so that Defra can understand what is being proposed where there is to be more than one acquiring licensee. The undertaker will be prevented from providing retail services to these premises after the exit so it is important that all eligible premises are captured. This will include temporarily vacant premises, premises under construction, disconnected premises, etc, which will be part of the transfer. However, it will not include premises served by a new appointee as these are using the supply system of the new appointee.

Question 2: Do you have any other comments on Part 1 (Citation, interpretation and commencement etc.) of the Regulations?

Most respondents did not provide any further comments on the definitions in Part 1. Two undertakers suggested that there should be additional definitions setting out the meanings of “retail” and “wholesale” so that the responsibilities between acquiring licensees and exited undertakers in the non-household market could be spelt out. However, one of these respondents said it would be comfortable with such definitions being set out elsewhere (e.g. in licence conditions and/or in the Water Industry Act 1991 (‘WIA91’)).

The government has been careful not to use legislation to define the boundary between wholesale and retail and this has been the case in drafting the exit Regulations. The duties of undertakers and licensees with respect to customers are set out in legislation and their appointments/licences and furthermore Ofwat has defined retail and wholesale services through the price review without the need for legislation. The exit Regulations would not be the right place to define wholesale and retail because they can only apply to exit areas rather than the whole of England and Wales; it would therefore be more appropriate to consider changes to primary legislation if there is a need to define the boundary in the future. However, the government is not currently persuaded that the case for such changes has been made.

Part 2 - Exit applications

Question 3: Do you have any comments on our approach to exit applications as set out in the Regulations?

There was widespread support for our proposal for a simple and light touch application process which will provide certainty for undertakers and licensees, but there were a number of points raised about the detail.

A number of respondents queried the introduction of a power for the Secretary of State to refuse an exit application on public interest grounds. The government has developed its exit policy with a clear expectation that the Secretary of State will accept all applications that meet its light-touch requirements. Introducing a public interest test provides the means for a future Secretary of State to take a different policy approach. This is an important principle. The public interest test provides the flexibility for a future Secretary of State to refuse an application if she determined that the exit could have a direct impact on the welfare or well-being of the general public in contrast to the interests of the parties to the exit application. This is the same test which is applied to the approval of transfer schemes made under Schedule 2 to the WIA91. There is no intention to try and second guess decisions that might be made by others (e.g. the CMA in relation to competition law, etc), but it is important that the Secretary of State has the ability to refuse applications if issues arise. However, the government recognises the point that has been made about the need to minimise uncertainty for those planning to exit in time for market opening. **We will therefore introduce more transparency to the applications process by applying a**

duty on the Secretary of State to publish a notice confirming her decisions to accept or refuse any exit applications.

Some undertakers and CCWater had concerns around the identification of premises that were similar in certain respects to comments made under question one. CCWater in particular wanted customers to be able to appeal decisions to transfer their premises (e.g. if they were transferred in error).

An application does not have to name all the individual premises to be transferred to a licensee but must find a way to describe which premises are being transferred if there is more than one acquiring licensee. This means that if an undertaker is exiting to a single acquiring licensee it would explain that responsibility for all eligible non-household premises in its area of appointment would be transferred to that licensee. If, however, the exit involves more than one acquiring licensee, then the application would have to accurately describe what premises are to be transferred to which licensee. We do not believe that we should be prescriptive about how premises should be described for the purposes of the application process in case we unwittingly preclude some types of transfers going ahead, etc.

Owners and occupiers of premises and other undertakers or licensees with an interest in premises in an exit area can challenge decisions to include or exclude premises from a transfer. Ofwat would make a determination under regulation 19 if a customer or undertakers or licensees want to challenge a decision to transfer or not transfer premises as part of an exit. **We will be amending regulation 19 to allow Ofwat to require undertakers and licensees with an interest in premises to provide relevant information which will help Ofwat to make a determination about the status of the premises.**

One undertaker was concerned about the condition in regulation 11 which would require an undertaker to consent to make changes to its appointment or an acquiring licensee to similarly consent to a change to its licence as a condition of the Secretary of State accepting an exit application. The concern was that Ofwat should not be able to do this without first consulting the undertaker or licensee. One undertaker made a similar comment in relation to regulations 23 and 26 under its response to question 9.

The government agrees that there should be a level of consultation with the holder of an appointment or licence before changes are imposed and believe that Ofwat would do this in practice. However, **we have removed the reference to conditions relating to appointment changes from regulation 11 and have inserted conditions requiring acquiring licensees to opt into the supplier of last resort regime. We have also amended the Regulations so that Ofwat will have a duty to consult the holder of an appointment or licence before exercising the power in regulation 25 or 28 to modify the appointment or licence.**

Question 4: Do you think our approach to customer communications is appropriate and proportionate?

All the English undertakers and CCWater supported our approach to customer communications but had comments on the detail. Two English undertakers disagreed that exiting undertakers should have to provide details of the retail market to its non-household customers when a similar duty was not being put on undertakers that do not choose to exit. The power to make the exit Regulations does not extend to applying duties on undertakers that do not intend to exit.

One other English undertaker said that the information to be provided on alternative suppliers should be limited to that available to other customers in non-exit areas and another questioned whether the undertaker is best placed to provide information on the terms and conditions that would be applicable to transferred customers.

One English undertaker questioned the proposal for the exiting undertaker to publish a notice concerning the making of an exit application on its website. The respondent thought it was unlikely that anyone would see it. CCWater noted that most non-household customers, but particularly micro-businesses and sole traders, are unlikely to trawl an undertaker's website looking for information about exits. The government agrees that not everyone will see such a notice, but we think this is a proportionate approach. The main communication with customers will be through communications under regulations 12 and 25 before and after an exit.

One English undertaker was concerned about the requirement for an exiting undertaker to contact customers at least two months before the exit date, citing concerns that there could be delays in making an exit decision ahead of market opening. Another asked what constituted "reasonable steps" when notifying customers about the exit under regulation 12(2).

Defra has set out a clear timeline for dealing with applications from undertakers wishing to exit before market opening and does not anticipate any delays. Undertakers should be mindful of the two month customer notification when planning to submit their applications and Defra will undertake to deal with them as quickly as possible.

The government is reluctant to specify on the face of the Regulations how an undertaker should contact its customers. The intention behind the "reasonable steps" wording is to acknowledge that it may not be possible to ensure that all customers that are to be transferred can be individually contacted ahead of an exit (e.g. if the business owner is away or the premises are temporarily unoccupied and the owner is not known to the undertaker). It would be reasonable for customers that use e-billing or have provided an email address to be contacted by email and those that receive paper bills should expect a communication through the post or a leaflet through their letterboxes. However, a notice on the website or in a local newspaper would not be a reasonable way to communicate with customers when explaining future terms and conditions, what will happen to outstanding complaints, etc.

On this last point, one English undertaker said that it would be more appropriate for acquiring licensees to explain what terms will be applicable following an exit or for the undertaker and licensee to send a joint communication. We think that the exiting undertaker should do this because we want customers to make an informed choice about whether they want to be transferred or switch to another licensee ahead of the exit. The acquiring licensee may not be in a position to contact an undertaker's customers ahead of an exit and may not take possession of such details until much further along the process of a transfer. There is nothing to prevent the undertaker and licensee sending joint communications but they will still have to send communications before and after the exit.

Question 5: What are your views on the draft exit application form?

Most English undertakers said that the application form was simple and clear to understand. Five undertakers suggested that Defra should provide guidance on the answers that it will want to see and three in particular wanted clearer advice on describing premises that are to be transferred where there is more than one acquiring licensee. The government does not want to be too prescriptive about how the key questions should be answered as we only require a high level description of what premises are being transferred to which acquiring licensee. Exiting undertakers and acquiring licensees will be more than welcome to discuss applications with the Defra team before they are submitted.

Six of the undertakers and CCWater questioned our proposal that undertakers should have to state their reasons for wanting to exit. This proposal is to address a particular concern raised during the passage of the Water Bill through Parliament that undertakers should not be forced to separate by a competition authority (e.g. as a remedy for displaying undue preference for its own retail business or other anti-competitive behaviour). We need to be sure that the exit is voluntary and is in the best interests of the business and its customers. Defra will want some general assurance e.g. that the exit has the support of the board and that the proposed exit fits with the undertaker's business plans.

Part 3 - Transfer of undertaking

Question 6: The Regulations currently set out that the use of a statutory transfer scheme for transferring undertakings from an undertaker to an acquiring licensee as part of an exit will be optional, except for customers with special agreements. Do you agree with this?

There were mixed views about this but the majority of respondents agreed with our approach. Four undertakers had concerns or comments about this proposal. Two undertakers thought that those that did not intend to use transfer schemes should make some assurances that customers would be protected following an exit (e.g. an additional question in the application form). One undertaker thought that requiring Ofwat to approve transfer schemes, where these were used, introduced an element of risk to the parties preparing for an exit.

The government does not want to place obstacles in the way of undertakers and licensees that are able to transfer the non-household retail business by means other than a transfer scheme. As one undertaker noted, it may be that some transfers of assets could take place between associates ahead of an exit and it would not be appropriate for such transfers to be subject to a scheme. The government believes that most exits will involve a transfer scheme as it is possible for the transfer to include certain service contracts that would not otherwise be transferable without renegotiation of terms and conditions. Nevertheless this is a choice for the companies to make. We note the concern about requiring Ofwat to approve transfer schemes, but since transfer schemes can override re-negotiation rights it is important that they go through a statutory approval process. Defra has been working with Ofwat to ensure that it has sufficient resources in place to approve transfer schemes for those wishing to exit at retail market opening.

There were concerns raised by four undertakers relating to the compulsory use of transfer schemes for special agreements. One undertaker asked what constituted a special agreement and two others noted that some historic special agreements were included in legislation (e.g. Local Acts). One respondent said that the parties to special agreements should be able to discuss the best way to transfer them or be able to modify them before or after the exit. Two more said that special agreements should not be transferred to the acquiring licensees and should remain with the exiting undertaker (the wholesaler) and there were questions about whether such transferred customers would be able to switch to an alternative licensee after an exit. One undertaker also said that lapsed agreements should not be transferred.

Special agreements are arrangements made under section 142(2)(b) of the WIA91 between an undertaker and customers that include provisions that are not provided by the undertaker's charges scheme. These are usually written contracts but might include unwritten arrangements with individual customers (e.g. some larger customers are allocated account managers or provided additional services by the undertaker without having formally made an agreement with those customers). Special agreements will therefore exist in the retail market and will be recorded on MOSL's database. There is nothing to prevent an exiting undertaker re-negotiating contracts or withdrawing arrangements ahead of an exit or an acquiring undertaker seeking changes following an exit, but either party will have to bare any contract risks resulting from a re-negotiation or cancellation of an agreement. Any lapsed or dormant special agreements need not be transferred by transfer scheme unless the parties agree that they should. The customer will be subject to the deemed contract in the absence of any other agreement.

The WA14 provides Ofwat with duties in new sections 66E(3) and 117I(3) (as inserted by Schedules 2 and 4 respectively) which will require special agreement charges to be set so that customers can switch regardless of whether the undertaker has exited or not. The exiting undertaker will not be able to provide retail services following an exit. Therefore all non-household customers will have to be transferred even if the special agreements involve payments to the wholesale side of the business (e.g. where additional charges relate to paying an additional infrastructure charge).

Nothing in the responses has persuaded us that transfer schemes should not be used to transfer special agreements from an undertaker to an acquiring licensee. The government considers that this is the best way to minimise disruption to customers during an exit. We are grateful to those undertakers that have raised the issue of special agreements that are enshrined in legislation. **We will be amending the exit Regulations so that the Secretary of State will be able to amend or repeal retail provisions in Local Acts at the request of the undertaker and with the agreement of the acquiring licensee or licensees.** This will be modelled on a similar power under Schedule 2 to the WIA91 where provisions under local enactments can be transferred from one undertaker to another following a merger.

We have also amended Schedule 1 to the Regulations to limit the use of transfer schemes to property that is in England and Wales and rights and liabilities under the law of England and Wales. This is because the powers under the retail exit provisions in the WA14 do not extend beyond England and Wales.

Question 7: Do you have any other comments on Part 3 (Transfer of undertaking) of the Regulations?

There were various points made on a range of issues. Three undertakers questioned whether it was appropriate to transfer outstanding complaints to an acquiring licensee as provided for under regulation 17. However, two other undertakers welcomed the clarity regulation 17 provides. One undertaker said that complaints relating to the wholesale business should remain with the undertaker. CCWater queried whether customers would be content with the handling of an existing complaint being transferred to another party.

The government believes it is right that outstanding complaints relevant to the provision of retail services at the time of the exit should be transferred to the acquiring licensee. Regulation 17 requires complaints relevant to the provision of retail services to customers to be transferred, but not those that relate to the wholesale side (e.g. complaints about an undertaker's work on private land, etc). This provides undertakers with an incentive to quickly resolve complaints before they exit and provides the acquiring licensee with an opportunity to get to know some of their customers and, where appropriate, negotiate a better tailored retail service for the customer. However, issues around liability or indemnity and the sharing of information relevant to resolving complaints are a matter for the parties concerned (e.g. in the transfer scheme or transfer contract) and to this end regulation 18 confirms that exiting undertakers are able to provide information to acquiring licensees that would assist in resolving complaints.

Two undertakers thought it would be helpful if the exit Regulations confirmed that sales proceeds arising from retail exit will be treated as non-regulated income. The power to make exit Regulations does allow us to make some provision as to the application of money received by the undertaker, but we intend to leave it to Ofwat to decide such matters as part of its price review methodology.

One undertaker had some comments about the treatment of debt. Defra has previously said that bad debt should transfer to the acquiring licensee because chasing outstanding payments is primarily a retail function. Furthermore, from 3 April 2017, it will be the licensee³ rather than the undertaker that will decide whether the premises of switched or transferred customers will be disconnected for non-payment. It therefore seems appropriate that the licensee becomes responsible for any outstanding debt at exit so that it can decide the appropriate course of action it should take if the customer continues to default following an exit. However, matters relating to liability for ongoing bad debt are ultimately for the undertaker and acquiring licensee to determine. An undertaker would be entitled to write-off some bad debt to smooth the transition or take account of the level of bad debt when setting the value of the retail business.

One other undertaker noted that licensees will have powers to direct undertakers to disconnect customers for non-payment, but wanted to know whether the licensee will have the same powers of entry as an undertaker to read meters. The WA14 does not provide licensees with powers to enter premises to read meters or for any other purposes. It is expected that licensees will include provisions around meter reading in their agreements with their customers. However, where there are difficulties, licensees may make agreements with the undertaker for meters to be read either by the undertaker itself or by the licensee through an authorisation issued by the undertaker to the licensee. This is provided for under section 172 of WIA91.

Part 4 - Effect of exit

Question 8: These Regulations seek to establish our policy objective of a deemed contract being in place following an exit for all customers who did not previously have a negotiated contract with their undertaker. Do you think that regulations 27 & 28 will secure adequate protection for both transferred customers and licensees following an exit?

Eleven undertakers responded positively to this question while a further three gave neutral responses. Two undertakers disagreed. CCWater noted that at the time of writing they had not seen Ofwat's proposals for its retail exit code⁴ which fleshes out the approach to deemed contracts for transferred customers without formal agreements. Ofwat launched a public consultation on its approach which ended on 7 March.

Two undertakers said that deemed contracts schemes should be introduced for all licensees in all areas where licensees operated, not just in exit areas. The government agrees that deemed contracts offer protection to customers and licensees where a

³ Paragraph 60 of Schedule 7 to the WA14 makes this change.

⁴ <http://www.ofwat.gov.uk/consultation/deemed-contracts-policy-conclusions-and-consultation-on-draft-retail-exit-code/>

negotiated licence expires or there are no provisions in place that enable such contracts to be rolled-over, etc. However, in non-exit areas the customer would be served by the undertaker if the contract expires and the customer and licensee no longer wished to maintain a commercial relationship. The government believes that customers in non-exit areas are adequately protected and placing licensees under additional duties outside of exit areas would be disproportionate given the undertaker's wider supply duties. In any case the exits Regulations can only make changes to the law in respect of exit areas.

One undertaker was concerned about regulation 27(7) which requires a licensee's retail exit scheme to include provisions that allow each transferred customer to be billed and pay by the same methods as it did before the exit. The undertaker said that the acquiring licensee should be able to make changes to its terms over time. The government agrees that licensees should be able to make changes to its billing and payment processes as technology evolves and best practices in such systems are adopted. However, the primary objective of regulation 27(7) is to ensure that transferred customers are not inconvenienced as a direct result of the exit. A licensee would be well within its rights to offer incentives to entice customers away from their pre-exit billing and payment methods and move customers away from deemed contracts onto more favourable terms and conditions that better serve their customers.

Question 9: Do you have any other comments on Part 4 of the Regulations (effect of exit)?

One undertaker asked whether cross-border premises (see question 1) would have to be served by the acquiring licensee in perpetuity with regard to access to the deemed contract and supplier of last resort regime. This is not the case. The WA14 will remove a loophole that has meant that cross-border premises would not be able to switch from an undertaker to a licensee because the current WSL only allows switches to take place where a customer is served using the undertaker's supply system **and** is in that undertaker's area of appointment. With the removal of that loophole customers with cross-border premises will be entitled to switch to a licensee of its choice or be transferred to a licensee as part of an exit or under the interim supply regime.

Parts 5 & 6 - Identifying a water supplier in a retail exit area and identifying a provider of sewerage services in a retail exit area

Question 10: How far do you agree with our new proposals on switching customers' rights to deemed contract terms and conditions?

Ten undertakers and CCWater agreed that customers in exit areas that switch or negotiate a contract should be able to apply to Ofwat to be allocated to an alternative licensee and be served on the published deemed contract if they decide they no longer want to

participate in the competitive market. Two undertakers were neutral in their responses, while four disagreed.

Of those that disagreed some thought the right to apply for an alternative licensee should be time limited (e.g. for one year following exit or up to 2020). The government's objective was to introduce some equivalency with customers in non-exit areas where customers that participate in the competitive market are able to return to the undertaker and be served under its published charges scheme. We do not expect a great many customers to take advantage of this provision, which represents a small extension to the supplier of first resort regime. However, Defra is obliged to review the exit Regulations every five years once they are in force and this is one area on which the first review will focus.

Question 11: Can you see any ways to improve these proposals and reduce administrative complexity further?

Three undertakers offered suggestions around making it easier for customers to switch. For example, time-limiting customer contracts or making all licensees take on customers that want to switch (e.g. licence conditions similar to those in Scotland which require licensees to accept all customers that want to be served under standard contracts). One undertaker said that there should be a centralised website (similar to "Scotland on Tap") which sets out details and contact points of potential suppliers.

These are all helpful suggestions, but they do not address the point that customers that switch in an exit area may have not found the competitive market to their liking and may want a quick and efficient way to be transferred to a new supplier. As the market matures we may need to re-assess how to populate the supplier of first resort pool with licensees but for the time being we think that those licensees that are not acquiring licensees should decide whether or not they want to join the pool. On a centralised website, Ofwat will be required under regulations 41 and 56 to publish lists of licensees in the pool which will be available on its website.

Question 12: Do you agree with the approach for identifying a provider for water and sewerage services in a retail exit area?

All but one undertaker agreed with our approach under our supplier of first resort proposals. However, four undertakers raised some issues about how the proposals might work in practice. One thought that the requirements should be covered in the market codes while one said that all requests for a new connection should be made by a licensee and another was concerned about who would be liable to pay the connection charges.

The government's view is that the arrangements for new connections in exit areas need to be on the face of legislation because the WIA91 is quite prescriptive about responsibilities around new connections and who will be liable for charges. While the market codes provide for the relationship between wholesalers and retailers, legislation sets out the rights and responsibilities of customers in relation to new connections. The agreement between the customer and licensee (once appointed) can decide who will take on

responsibility for managing the new connection but, generally speaking, the undertaker and the customer will be the parties to the new connection arrangement and the undertaker will be able to bill the customer directly even though it will not be able to bill it for retail services.

Question 13: Are there any further points which you would like to make about Parts 5 (Identifying a water supplier in a retail exit area) & 6 (Identifying a provider of sewerage services in a retail exit area)?

Three respondents mentioned the requirement for acquiring licensees to be automatically enrolled in the pool. Two undertakers said that certain licensees should be able to opt out of the supplier of first resort pool while CCWater and one undertaker wanted clarity on who was in and who was out (e.g. what is a “niche” licensee?). The government thinks that the default position should be that all acquiring licensees should be in the pool, but **we are amending the exit Regulations so that acquiring licensees can be excluded from the pool if Ofwat decides that it would not be appropriate for that licensee to be included.**

Part 7 - Consequential amendments and review

Question 14: Do you agree with the consequential amendments listed? And do you think any further changes are required to WIA91?

There were only three substantive responses to this question. One was from CCWater and two from undertakers. The respondees thought that the amendments to the WIA91 absolved exited undertakers from making new supply arrangements with non-household customers in their areas. This is not the case and these amendments need to be read alongside WIA91 provisions relating to the connection rights of licensees, new appointees and under the self-lay regime.

Question 15: Is there anything else you would like to comment on around Part 7 (Consequential Amendments and Review)?

Two undertakers provided comments. One undertaker thought that the Regulations may need reviewing before the five years mentioned in regulation 60(3). This is a standard review provision that must be included in new statutory instruments that impose burdens on business. The government would of course review or amend the Regulations ahead of or between the five year review periods if issues necessitating this were to arise.

The other undertaker asked what was meant by a statement in Annex B that said that the current legal framework would have to be unwound. This was referring to the unpicking of the current legal requirement on undertakers to provide a fully integrated service to all premises within their area of appointment by virtue of the removal of the ability for the exited undertaker to provide retail services to non-household customers in its area. An exited undertaker will be prevented from directly billing such customers and would no

longer be obliged to provide customer-facing services; these would instead be provided by a licensee under a retail authorisation.

Issues not covered by the draft Regulations consulted on

Question 16: Do you agree with the government's proposed policy approach to mergers between an exited undertaker and an un-exited undertaker? Please explain the reasons for your answer.

This question was about our proposal to prevent Ofwat making changes to appointments when an exited undertaker merges with an unexited undertaker. Nine undertakers and CCWater agreed with our proposal while five had some comments. Three undertakers thought that the proposal was unduly restrictive with one saying that there should be a right for an exited undertaker to revert to being an unexited undertaker (e.g. by compulsory transferring customers back from an acquiring licensee or allowing customers to voluntarily switch back to the undertaker) and another saying that a single appointment should be able to cover exited and unexited areas.

The government has made it clear that an exit must be total and that it is non-reversible. It is not possible for an undertaker to only partly exit its area of appointment and it therefore follows that a single undertaker's appointment could not cover one exited area and one non-exited area. **The government therefore proposes to issue a supplemental general authorisation under section 6(1)(b) of the WIA91 confirming that Ofwat may not amend an exited undertaker's appointment in order to enable it to cover unexited areas within its area of appointment in the event of a merger.**

We recognise that this raised questions about situations where exited undertakers that are new or inset appointees wish to add a new site to their appointments. **We have therefore amended the exit Regulations so that any new sites added to an exited new appointee's appointment can be treated as exit areas.**

Annex A: glossary

Acquiring licensee – A licensee that has acquired transferred customers after an undertaker has exited the retail market.

Associate licensee – A licensee that has been established by an undertaker so that it can participate in the retail market. This term is used to distinguish these licensees from the licensees set up by new businesses entering the market and from the in-area non-household retail arms of undertakers.

Charges scheme – a document published by an undertaker which sets out its water and/or sewerage charges for its customers that do not have special agreements.

Codes – The mechanism by which Ofwat will regulate the various agreements that undertakers as wholesalers make with licensees and its own retail business in the new competitive markets.

Deemed contract – A contract that is deemed to apply between any non-household customer and the licensee that serves them where the customer has not negotiated a separate contract with that licensee.

Exit Regulations – Any Regulations made by the Secretary of State under the powers in Chapter 4 of Part 1 of the Water Act 2014.

Exited area – The area of appointment of an undertaker that has exited the retail market.

Exited/exiting undertaker – An undertaker that has voluntarily exited the non-household retail market.

In-area premises – Non-household premises in the undertaker's area of appointment.

Licensee – An entity that is licensed to provide retail services to the end customer in the competitive market. This includes an associate licensee set up by an undertaker as well as a licensee that is set up by new businesses entering the market. This document also uses the term “retailer” to refer to these entities.

Retail – Customer-facing services, for example billing, meter reading and call centre services. The full list of retail services for the purposes of the competitive market is outlined in the Ofwat price review methodology.

Retailer – An entity that provides retail services to the end-user customer in the competitive market. This is the collective term to describe licensees and the retail arms of unexited undertakers.

Retail exit – Where an undertaker exits the competitive part of the retail market with the consent of the Secretary of State. This reform will mean that those undertakers choosing to exit the non-household retail market will be able to transfer their non-household

customers to a licensee and that various legal duties relating to the provision of retail services to such customers will be modified or removed.

Special agreements – contracts or agreements between undertakers and non-household customers with terms that are not generally provided for in the undertaker's charges scheme.

Supplier of First Resort – A licensee who is assigned any non-household customer that arises in an exited area and has not chosen an alternative licensee themselves.

Supplier of Last Resort – A licensee or an unexited undertaker who is assigned the non-household customer(s) of a licensee that has left the market.

Switch – Where a non-household customer chooses to switch from either their undertaker or an acquiring licensee to another licensee for the provision of certain retail services. From April 2017, the expansion of retail competition will mean that non-household customers in England will be able to switch their retail service provider—whether or not their undertaker has chosen to exit the retail market.

Transfer schemes – Agreements between an exiting undertaker and acquiring licensee that transfers special agreements, assets and liabilities relevant to the non-household retail business to the acquiring licensee

Transferred customer – A customer that has been transferred to an acquiring licensee in an undertaker's area of appointment after the undertaker has exited the retail market.

Undertaker – A company that has statutory powers and duties to supply water and/or sewerage services to premises within an appointed geographical area under the Water Industry Act 1991. It is also responsible for maintaining and operating the public water supply and/or sewerage networks.

Water Act 2014 – A piece of primary legislation that amended the Water Industry Act 1991 to expand retail competition. It also contains a broad enabling power to make Regulations that will allow undertakers to apply to the Secretary of State to exit the non-household retail market.

Wholesale – The inputting of water to, or the removal of sewage from, the network. This does not include distribution services.

Water Industry Act 1991 – This is the main piece of primary legislation that concerns the regulation of the water industry, including water and sewerage services.

Annex B: amended draft application form

Application to the Secretary of State to withdraw from the non-household retail market

A. Applicant details

1. Name of undertaker:

Please provide the legal name of your organisation, as it is registered with the regulator Ofwat.

2. Address of undertaker:

3. Details of area of appointment:

4. Is your area of appointment either wholly or mainly in England? Yes No

Please note that this application process is only open to companies that are wholly or mainly in England.

5. Are you a Water and Sewerage Company (WaSC) or a Water only Company (WoC)?

WaSC WoC

Both WaSCs and WoCs are eligible to apply to exit the market. If you are a WaSC, the Regulations require that you must exit from the market for both water and sewerage retail services to non-household customers.

6. Contact details of a company representative who can be contacted about this application.

Please include representative's name, job title, office address (if different from the address given above), email address and telephone number.

B. Reasons for exit application

7. Please briefly outline your company's reasons for wanting to exit the non-household retail market.

The Secretary of State wishes to understand the high-level reasons behind your application to exit, how it will support your company's business plan. We do not require detailed facts or figures to support your reasons for exit. Please use the box below as a guide and no more than 500 words.

Draft form

C. Information about acquiring licensee(s)

Please ensure that you include a 'Letter of support' from all acquiring licensees with your application. Requirements for the letter are set out in Annex A.

8. How many acquiring licensees will be involved in this exit?

Note: Undertakers are able to exit to one acquiring licensee or more than one. If there is more than one acquiring licensee please complete this section for one of the acquiring licensees, and the additional space in Annex A for any others.

9. Name of acquiring licensee:

Please provide the legal name of the acquiring licensee, as registered with the regulator Ofwat.

10. Address of acquiring licensee:

11. Does the acquiring licensee hold a relevant Water Supply and/or Sewerage licence with retail authorisation(s)?

Yes

No

Evidence of licence:

Please provide evidence that the acquiring licensee holds the appropriate licence, issued by Ofwat. These should not be self-supply licences. You may provide this evidence by inserting a link to the licence on Ofwat's website in the box above.

12. Does the acquiring licensee hold an appropriate Certificate of Adequacy:

Yes

No

Evidence of certificate:

Please also provide evidence that the licence includes a Certificate of Adequacy that reflects the resources that would be required were the proposed transfer to go ahead. This is required as part of Ofwat's licencing process to indicate that the licensee can take on the additional customers as part of an exit without either the existing or new customers suffering as a result of a lack of resources.

D. Information about proposed exit arrangements

Exit date

13. On what date do you propose to withdraw from the non-household retail market?

Please give an exact date. This is necessary to provide clarity about when the legal duties will transfer from the undertaker to licensee if an exit application is approved. This date must be at least 5 months from the date of your application. It must not be before 3 April 2017. You may change the exit date to a later date by notifying the Secretary of State in writing. Any new date must fall within 2 months beginning with the exit date specified here.

Premises to be transferred: only applicable where you are planning to exit to more than one acquiring licensee. If you are planning to exit to a single licensee, please proceed to section E.

14. Please outline how the premises that are to be transferred to the acquiring licensees as part of the exit will be able to be identified.

This should be a general description of the area and/or class of non-household premises that are to be transferred to each acquiring licensee, for example: all non-household premises in area x; all manufacturing premises in the existing undertaker's area, etc. Please do not send any customer information directly to Defra.

Transfer of customers

15. Will you be preparing a statutory transfer scheme as provided under the exit Regulations?

- Yes, for special agreements only
- Yes, for the whole or part of the non-household business
- No - please complete the box below

If you answer no, please complete the box below to outline how you intend to transfer your customer base to the acquiring licensee.

Please note that the exit Regulations require that special agreements with customers must be transferred through a statutory transfer scheme, which has been approved by Ofwat. No exit can go ahead until this approval has been provided.

Transfer schemes may only be used to transfer: (i) property that is in any part of England and Wales; and (ii) rights or liabilities under the law of England and Wales.

The information you provide in answer to this question may be shared with Ofwat for planning purposes.

E. Customer notification of an exit

The government wants the customers of an exiting undertaker to have a positive experience of the process. This section asks how you and the acquiring licensee(s) will comply with the customer communication requirements in the Regulations and make sure that customers are fully aware of the arrangements and options available to them.

16. Please outline how you and the acquiring licensee(s) intend to communicate with your customers about your proposed exit from the non-household retail market.

Draft form

F. Ensuring a seamless process for customers

This section asks how you and the acquiring licensee(s) will comply with the requirements in the Regulations to ensure that customers continue to receive a retail service that is fit for purpose until the exit date.

17. Please outline the measures you have in place to ensure that customers will continue to receive a retail service that is fit for purpose until the exit date.

You may wish to include details of any other steps you will take to ensure that your customers have a positive experience of your exit.

Draft form

G. Supplier of First Resort Pool and Supplier of Last Resort Panel

The Supplier of First Resort (SoFR) pool and Supplier of Last Resort (SoLR) panel are groups of licensees which will provide essential services in supporting the new competitive market. Members of the SoFR pool will be directed to take on customers by Ofwat where that customer fails to name a licensee when requesting a new connection or where a switched customer wants to be re-allocated. The SoLR panel will be directed to take on customers where another licensee is no longer able to supply its customers.

18. If you are exiting to a single acquiring licensee please tick all boxes that apply:

- The acquiring licensee understands that the Regulations require it to be in the **SoFR** pool for the exit area
- The acquiring licensee is already a member of the **SoLR** panel
- The acquiring licensee has or will apply to become a member of the **SoLR** panel.

Please complete question numbers 19-24 only if you are exiting to more than one acquiring licensee.

Supplier of First Resort Pool

19. Please provide the name(s) of the acquiring licensee(s) who will be participating in the Supplier of First Resort pool.

Please note that all acquiring licensees in exit areas must participate in the Supplier of First Resort Pool unless a licensee only holds a self-supply licence or the business model of the licensee makes it inappropriate for a licensee to join the pool (e.g. if Ofwat agrees that the licensee intends to only serve a certain class of customer).

20. Will any of the acquiring licensees not be participating in the Supplier of First Resort Pool?

Yes No

If yes, go to question 21; if no, go to question 23

21. If yes, is this because the acquiring licensee holds a self-supply licence?

Yes No

If yes, go to question 23; if no, go to question 22

22. If no, please provide evidence that Ofwat has confirmed that it would not be appropriate for the licensee to join the pool.

Supplier of Last Resort Panel

23. Please provide the name(s) of the acquiring licensee(s) who will be participating in the Supplier of Last Resort panel.

*Please note that **at least one** acquiring licensee in each retail exit must participate in the Supplier of Last Resort Panel.*

24. Will any of the participating acquiring licensees not be opting into the Supplier of Last Resort panel?

Yes No

If yes, go to question 25; if no, go to section H

25. **If yes**, please provide the names of each acquiring licensee who will not be opting in.

H. Declaration

I, in my capacity as an authorised representative of

.....
(*the undertaker*), declare that the information in the application form above is true to the best of my knowledge and belief. I confirm that my company will fulfil all the statutory obligations relating to retail services for non-household customers until (*the date of the exit*).

I understand that my application may be passed to Ofwat for planning purposes.

Signature

Date

For any questions on this form or for any further guidance, please contact RetailExitsConsultation@defra.gsi.gov.uk or call Defra's Water Services team on 020 802 63003.

Annex A – information to submit along with your application

1– Letter of support from acquiring licensee(s)

Please attach to your application a letter of support from each acquiring licensee. This should cover the following:

- Agreement that the exit arrangements as outlined in the application are correct.
- Confirmation that the acquiring licensee will fulfil the statutory obligations relating to providing a retail service to all customers acquired through the exit.
- Information about how the acquiring licensee will communicate with the customers they will be acquiring.
- Details of the measures which the acquiring licensee will have in place to ensure that all customers receive a fit for purpose retail service from the exit date onwards.
- Information about any other measures which the acquiring licensee will take to ensure that customers have a positive experience of the exit.

2 – Additional acquiring licensee (s)

Please complete this section if more than one acquiring licensee will be involved in the exit. You can copy and paste these boxes as many times as needed if there will be more than two acquiring licensees.

Acquiring licensee two

Name of acquiring licensee:

Please provide the legal name of the acquiring licensee, as registered with the regulator Ofwat.

Address of acquiring licensee:

Does the acquiring licensee hold a relevant Water Supply and/or Sewerage licence with retail authorisation(s)?

Yes

No

Evidence of licence:

Please provide evidence that the acquiring licensee holds the appropriate licence, issued by Ofwat. These should not be self-supply licences. You may provide this evidence by inserting a link to the licence on Ofwat's website in the box above.

Does the acquiring licensee hold an appropriate Certificate of Adequacy:

Yes

No

Evidence of certificate:

Please also provide evidence that the licence includes a Certificate of Adequacy that reflects the resources that would be required were the proposed transfer to go ahead. This is required as part of Ofwat's licencing process to indicate that the licensee can take on the additional customers as part of an exit without either the existing or new customers suffering as a result of a lack of resources.

Annex C: list of respondents

Thank you to all respondents:

Affinity Water
Anglian Water
Bournemouth Water
Bristol Water
Castle Water
Consumer Council for Water
Dee Valley Water
Independent Water Networks Limited
Market Operator Services Limited
Northumbrian Water
Portsmouth Water
Severn Trent
South East Water
South Staffs Water
South West Water
Southern Water
SSE
Sutton and East Surrey
Thames Water
United Utilities
Wessex Water
Yorkshire Water