
July 2016

Trust in water

Eligibility guidance on whether non-household customers in England and Wales are eligible to switch their retailer: consultation responses and decisions

www.ofwat.gov.uk

0 f w a t

About this document

This document sets out our decision following a consultation on our eligibility guidance for assessing whether customers in England and Wales are currently eligible to be supplied by a licensed water supplier (**WSL**) and/or will be eligible to be provided with water and/or sewerage services by a water and/or sewerage licensee (**WSSLS**) when the new retail market opens in April 2017.

Our eligibility guidance is an update to our earlier 2011 guidance which was re-issued in August 2015. It provides guidance on whether customers in England and Wales are, or will be, eligible to switch their water and/or wastewater service provider. The Water Act 2014 (WA14) makes significant changes to the water supply licensing regime, but assessments as to the eligibility of customers to switch supplier is relevant to both the pre-WA14 WSL regime and the post-WA14 WSSL regime, and therefore we provide guidance for both regimes within this document.

Contents

About this document.....	2
1. Executive summary.....	4
2. Our considerations and responses.....	6
2.1 Information for customers	6
2.2 Determination.....	6
2.3 Default position and billing	7
2.4 Definition of household premises	8
2.5 Importance of council tax and business rates	9
2.6 Discretion for companies to use other data sources	10
2.7 Farms.....	11
2.8 Issues repeated from the supplementary guidance consultation.....	11
2.9 Inconsistency issues	12

2.10	Legal advice.....	13
2.11	Wales.....	13
2.12	Text alterations	14

1. Executive summary

Eligibility guidance

This document addresses the responses we received to our consultation on the eligibility guidance for assessing whether customers in England and Wales are currently eligible to switch WSL and will be eligible to switch to a WSSL in April 2017. In some instances, it has been more appropriate to address the responses raised in our response document on the supplementary guidance. The revised eligibility guidance has been published today, in accordance with s17DA of the WA14.

This eligibility guidance is intended to apply to holders of both a WSL and WSSL. Ofwat is empowered under the WIA91 to provide guidance for both WSLs and WSSLs on certain matters relevant to eligibility¹.

As the revisions to our eligibility and our supplementary guidance comment, to some degree, on the extent of premises for which the household/non-household assessment is to be made, under section 17A(9) of, Paragraphs 4 and 7 of Schedule 2A to, and Paragraph 2 of Schedule 2B to the WIA91, it will require the approval of the Secretary of State, having consulted the Welsh Ministers.

Consultation process

In December 2015, Market Operator Services Limited (MOSL) facilitated a workshop with the industry to discuss the eligibility principles for premises in relation to the non-household market. MOSL then sought comment on a list of issues that required clarification. These issues were subsequently submitted to Ofwat for feedback and next steps. We prepared a working paper based on the discussion at the MOSL workshop and subsequently held our own workshop with the industry in January 2016.

¹ Ofwat is empowered under section 17A(9) of the WIA91 to provide guidance for WSLs and under Schedules 2A and 2B to the WIA91 to provide guidance for WSSLs on certain matters relevant to eligibility.

Following this workshop we issued draft supplementary guidance which built on the outcome of those discussions and reflected further development of our thinking thereafter.

The supplementary guidance was produced and was released for consultation between 10 March 2016 and 7 April 2016.

Alongside the consultation for the supplementary guidance we also issued an updated version of our eligibility guidance. In total we had responses from 15 stakeholders.

Having considered responses on the eligibility guidance and revised supplementary guidance from stakeholders we have developed the final eligibility guidance and supplementary guidance and have gained approval from the Secretary of State having consulted Welsh Ministers before publication.

The following documents have now been published.

- Response document from consultation on revised eligibility guidance (this document).
- Response document from consultation on draft supplementary guidance;
- Final eligibility guidance document.
- Final supplementary guidance document.

2. Our considerations and responses

This section summarises our position in the consultation on the eligibility guidance, the comments we received and our final position having considered these comments.

2.1 Information for customers

Ofwat position in consultation

Ofwat publishes the eligibility guidance and it is publicly accessible.

Stakeholder comments

One stakeholder commented that the eligibility guidance could be made more customer friendly ahead of market opening.

Our conclusions

We have included an example process flowchart/decision tree to show how to determine the eligibility of premises in the eligibility guidance. We will also explore the possibility of putting this flowchart on the Open Water website.

2.2 Determination

Ofwat position in consultation

Ofwat outlined in section 5 of the eligibility guidance its power to determine eligibility and whether a proposed supply of water or proposed provision of a sewerage service would be in accordance with a companies licence.

Stakeholder comments

One stakeholder raised the importance of a consistent, clear, timely determinations process that is subject to appeal, where required.

Our conclusions

The determination process for eligibility will follow the same structure as other areas where Ofwat has powers of determination.

Once a referral is received, we will assess our role and ability to determine the matter. Where we open a case we will do so with a view to gathering information to carry out our investigation and make a determination.

Generally we will issue a draft determination to allow an opportunity for the parties to comment before issuing a final determination.

Further information on disputes, complaints and investigations can be found on Ofwat's website and as part of our Standards of Service for Resolving Customer Disputes².

2.3 Default position and billing

Ofwat position in consultation

Ofwat, as part of the eligibility guidance, made it clear that principal use is the determining factor for eligibility and suggested several examples (such as council tax and business rates) which could be used to identify principal use.

² <http://www.ofwat.gov.uk/regulated-companies/investigations/>
<http://www.ofwat.gov.uk/regulated-companies/investigations/making-a-complaint/>

Stakeholder comments

Two stakeholders felt that there should be a default position for eligibility into the market where it is difficult to determine principal use. One felt the premises should be included in the market as the default position and the other felt they should not.

One stakeholder suggested that where they currently send separate bills, even if premises are supplied through one supply point, they intend to put them into the market as separate premises.

Our conclusions

We have provided further clarification and included flow diagrams in our eligibility guidance and supplementary guidance to assist appointed companies, licensees and customers to determine the extent of premises and their eligibility. Given our powers in this area, we do not consider it appropriate to have a default position which does not involve examination of evidence as to the extent of premises and their principal use. If the principal use is not as a home then the property is a non-household.

Where a company supplies several premises through a single supply point these premises should be treated as a single set of premises. We do not consider separate billing to be an appropriate basis on which to determine the extent of premises. However, we would be happy to consider other evidence as to the basis on which premises have been disaggregated beyond a single supply point, to determine whether the premises could be appropriately treated as separate.

2.4 Definition of household premises

Ofwat position in consultation

We did not comment on the differences between the definition of household premises under section 17C and that used in the PR14 price control

Stakeholder comments

One stakeholder noted that in the recently published regulatory accounting guidelines the “definition of households and non-households is different to that set out in section 4 of ‘Guidance on assessing whether customers in England and Wales

are eligible to switch their water and waste water retailer'. They suggested that in the medium term these definitions should be aligned assuming mitigation could be put in place for any effects this would have where the result was not revenue neutral.

Our conclusions

Our PR14 final determinations were based around a definition of residential and business premises used in our June 2011 return reporting requirements, which in turn uses the definitions of residential and business customers in the regulatory accounting guidelines (RAGs).

In our recent business retail price review 2016³ we outlined that we will update the definition of eligible customers used in the RAGs in due course.

2.5 Importance of council tax and business rates

Ofwat position in consultation

We suggested that council tax and business rates could be a useful tool in determining whether premises had their principal use as as home in both the eligibility guidance and supplementary guidance.

Stakeholder comments

Two stakeholders suggested that business rates and council tax should be considered as the 'primary proxy' or 'first approximation' for determining eligibility as the guidance suggests that further work is required to determine eligibility beyond this assessment.

³ http://www.ofwat.gov.uk/wp-content/uploads/2016/03/gud_pro20160518pr16methodology.pdf

Our conclusions

Where there is liability for business rates it is also important to consider whether there is also liability for council tax as the premises could then be considered mixed use. Therefore one should not take precedence over the other.

We are aware of the factors affecting classifications for both business rates and council tax and we do not consider they are incompatible. We consider that stakeholders should use both definitions to determine principal use.

2.6 Discretion for companies to use other data sources

Ofwat position in consultation

The guidance is designed to assist in the determination of eligibility. Ofwat has suggested the use of council tax and business rates in its guidance documents as an aid for the identification of principal use.

Stakeholder comments

One stakeholder commented that there should always be some discretion where there are issues or a gap in guidance.

Another stakeholder commented that the supplementary guidance at step 2 on determining principal use (i.e. where the principal use is considered apparent) was of value as it allowed the opportunity to use existing company data to support eligibility assessment and thereby drive a better confidence in the outcome.

Our conclusions

The guidance is designed to assist in determination of eligibility. Given the wide variety of examples we expect stakeholders to undertake reasonable endeavours to identify eligibility.

As part of the supplementary guidance we have outlined in further detail the process for determining eligibility in more challenging cases. We have also allowed flexibility in the eligibility process for the use of other data. If the principal use is not as a home then the property is a non-household.

Where there are **significant** difficulties in establishing eligibility and **evidence** can be provided that a reasonable effort has been made to identify the eligibility of premises, licensees and potential customers of a licensee may come to Ofwat for a determination under section 17E of the Water Industry Act 1991 (WIA91). Given the publication of both the eligibility guidance and the supplementary guidance we would expect issues to occur only in **exceptional** circumstances.

2.7 Farms

Ofwat position in consultation

We did not include a specific example for farms in the supplementary guidance.

Stakeholder comments

As part of the eligibility consultation, one stakeholder raised the difficulty companies may have in using business rates to classify farms because, unless they have diversified into non-agricultural activities, they would not be entered onto the rating list and will not have a VOA letter. They suggested that other factors such as VAT registrations may be useful in helping define eligibility.

Our conclusions

We have included a specific example for farms and made reference in our flow diagram to the use of any other reasonable criteria or data that could identify principal use, such as VAT registration, current billing categorisation (household/non-household) etc.

2.8 Issues repeated from the supplementary guidance consultation

Ofwat position in consultation

We have set out our position in the supplementary guidance.

Stakeholder comments

Comments from stakeholders that were included both in relation to the supplementary guidance consultation and the eligibility guidance consultation included:

- adding a glossary of terms;
- separating supplies;
- having a single eligibility guidance document rather than separate supplementary guidance;
- universities; and
- temporary sites for developers.

Our conclusions

We have responded to these comments as part of our response to the supplementary guidance consultation.

2.9 Inconsistency issues

Ofwat position in consultation

As part of our consultations on the eligibility guidance and supplementary guidance we asked stakeholders to highlight if they thought there were any inconsistencies between the two documents.

Stakeholder comments

Stakeholders were generally supportive of the position detailed in the consultation on the revised eligibility guidance and did not consider there were any inconsistencies between the WIA91 and the two eligibility documents.

Our conclusions

We will continue to ensure consistency across the documents during their final development to aid stakeholders in determining eligibility.

2.10 Legal advice

Ofwat position in consultation

A licensee or prospective licensee should seek its own legal advice if it is unsure whether a customer's premises are eligible.

Stakeholder comments

One stakeholder highlighted that licensees may have concerns about seeking potentially costly legal advice ahead of, or instead of, talking to Ofwat where eligibility cannot be determined easily.

Our conclusions

Each licensee is responsible for assessing the eligibility of premises it supplies. Where a household has been incorrectly placed into the market and then attempts to switch supplier, the onus is on the receiving supplier to assess the premises and refuse the transfer if the premises is not eligible.

We are open to discussion with stakeholders about eligibility and the issues they face, the addition of the supplementary guidance should aid stakeholders in determining eligibility.

It is not possible for Ofwat to offer legal advice to stakeholders. Where stakeholders consider that they need legal advice, this should be sought independently of Ofwat.

2.11 Wales

Stakeholder comments

One stakeholder commented on Wales, highlighting that whilst they thought the eligibility guidance was clear and comprehensive there could be a further distinction between the situation in areas served by companies based wholly or mainly in England, and in areas served by companies based wholly or mainly in Wales.

Our conclusions

We will continue to make reference to the distinctions between England and Wales.

2.12 Text alterations

Stakeholder comments and our conclusions

Text alteration/suggestion	Response
<p>P.10/11 – under the “retail authorisation for water supply” and the “retail authorisation for sewerage licences” the guidance states that the holder may supply eligible customers and “persons associated with the licensee, or the licensee”. It is not clear what Ofwat is trying to achieve with its statement about “persons associated with the licensee”. We presume that this is to allow Retailers associated with an incumbent water company to ‘self-supply’ that water company’s premises, however the current drafting appears to imply that household customers associated with the licensee could be supplied. We suggest that Ofwat amends the statement to read “persons associated with the licensee to the extent eligible, or the licensee”.</p>	<p>We have amended to provide further clarity. We note that "persons associated with the licensee" is defined in the WIA91 (as amended by the WA14).</p>
<p>We suggest that it may be appropriate to refer to section 17DA in the sections of the guidance relating to Ofwat’s obligations to issue guidance as this section came into force on 1 January 2016.</p>	<p>Where appropriate we have added references to Ofwat’s obligations under section 17DA.</p>
<p>Page 10/11 – “the supply to that customer will use the supply system of the relevant appointed water company” is stated twice in the list of bullets under ‘a wholesale authorisation for water supply licences’ (once on p.10 and once on p.11).</p>	<p>This has been corrected.</p>
<p>Page 11, third bullet point should read, “the supply is in accordance” rather than “the supply is accordance”.</p>	<p>This has been corrected.</p>
<p>Page 12, Footnote 3 has been deleted however the reference number is still included in the text at the end of paragraph one of Section 1.2.</p>	<p>The unnecessary footnote reference in section 1.2 has been removed from the text.</p>
<p>One stakeholder suggested that we change the word "should" to “may” in paragraph one of Section 3.1. They believed the use of the word should is fine when considering the extent of premises for the supply of water however, it is not appropriate when considering the provision of waste water services. This is due to situations</p>	<p>Changing the wording to ‘may’ changes the intent of the document when assessing the extent of properties.</p> <p>As stated in the guidance, we consider that every property that is assessed separately for the purposes of Council Tax and business rates – or that would be if the property were not</p>

where water is provided via a single shared measured supply and water charges are billed to an owner/managing agent (for example, of a shopping centre/office block) who then subsequently recovers the cost through the service charge. Whereas, the sewerage charges are charged directly to the occupiers of each unit based on an unmeasured tariff, which is usually rateable value or site area based. They therefore suggested that we either replace the word 'should' with 'may' or write separate sections for water and sewerage services.

exempt – should be treated as a separate set of premises for the purpose of assessing eligibility, even if the separate premises are billed on a different basis.

The extent of premises (as with eligibility) should be assessed separately for water and sewerage services as there may be multiple Providers. As with Eligibility, in the majority of cases both service providers are likely to come to the same conclusion about the extent of premises.

However, there may be instances where water supply and sewerage supply systems operate differently based on the extent of premises. For customer ease of understanding, we encourage retailers to take a consistent approach where possible.