

# Consultation on derogations guidance

## About this consultation

This document is our consultation on our proposed approach to derogations which is set out in our '[Draft derogations guidance](#)' document. A derogation is a direction from Ofwat which relieves a licensee or appointee from compliance with certain of its obligations in the Wholesale-Retail Code (WRC).

At the moment only a small number of business customers across England and Wales can choose their water retailer and most customers must use services provided by the monopoly water companies.

The UK Government is committed to opening an expanded retail market in April 2017 that will provide choice to all eligible business, charity and public sector customers (business customers) in England and Wales. A new legal and regulatory framework is being put in place to facilitate the market, and to provide the necessary market governance.

The current 50 million litre threshold will be retained and the restriction of competition to retail water supply only will continue for customers who are supplied using the supply systems of appointed companies whose areas are wholly or mainly in Wales. This reflects the different policy position of the Welsh Government.

The water sector has worked with us to develop the WRC which sets out the processes that will govern the retail market for the supply of water and wastewater services to business customers. This statutory code will govern the operational arrangements between wholesalers and retailers, the requirements wholesalers and retailers have to follow in maintaining the central register at the Market Operator and the business terms which will apply to their relationship.

As part of our duties as an economic regulator it is important that we consider proportionality when we monitor company compliance with the WRC.

Given the different scale and sizes of companies within the water sector it is possible that instances will occur where certain companies will consider compliance with the obligations in the WRC to be disproportionate or where short term compliance is not possible. In these instances derogations from compliance with certain obligations can be useful.

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## Responding to this consultation

We welcome your comments on the draft derogations guidance by **Monday 26 September 2016**. Please find below a number of questions to aid you in structuring your response to this consultation.

### Consultation questions

We would be grateful for consultation responses on the draft derogations guidance. In particular, we would welcome responses to the following questions:

1. Do you agree with the proposed structured approach to derogations from compliance with obligations in the WRC?
2. Do you agree with the criteria outlined in the guidance?
3. We do not propose to allow applications for derogations from obligations in the Market Arrangements Code (MAC). If you disagree with this proposal please detail the circumstances when a specific derogation from obligations in the MAC would be required? There is also the potential that areas identified by companies could also be considered as an amendment rather than a derogation if it has the potential to improve proportionality.

Please submit email responses to [retailmarketopening@ofwat.gsi.gov.uk](mailto:retailmarketopening@ofwat.gsi.gov.uk), with the subject '**Consultation on derogations guidance**' or post them to:

Consultation on derogations guidance  
Retail Market Opening Programme  
Ofwat  
21 Bloomsbury Street  
London  
WC1B 3HF

We will publish responses to this consultation on our website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk), unless you indicate that you would like your response to remain unpublished. Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with access to information legislation – primarily the Freedom of Information Act 2000 (FoIA), the Data Protection Act 1998 and the Environmental Information Regulations 2004.

If you would like the information that you provide to be treated as confidential, please be aware that, under the FoIA, there is a statutory 'Code of Practice' which deals, among other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that we can maintain confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on Ofwat.

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## **1. Overview**

As part of our role as the economic regulator we are required to consider the proportionality of the obligations with which we expect companies across the water sector to comply. The extension of the business retail market for companies whose areas are wholly or mainly in England is a significant shift for the water sector and companies must remain compliant with their obligations.

To ensure that compliance with those obligations and any consequent enforcement action remains proportionate, we are proposing a formal process under which companies apply for relief from complying with certain obligations.

We are carrying out this consultation to allow stakeholders to comment on our approach to derogations from obligations in the WRC.

Our intention is to give market participants the flexibility available in other markets through a process which has sufficient information supporting a derogation request to ensure we take decisions efficiently without that process being too burdensome for market participants.

### **1.1 What is a derogation from the market codes?**

A derogation is a direction from Ofwat which relieves a licensee or appointee from its obligation to comply with certain obligations in the market codes.

### **1.2 When may a derogation be required?**

There may be occasions when a licensee or appointee is not in a position to comply with an obligation in the WRC.

For example, a company may consider that compliance with such obligations is a disproportionate burden in its particular circumstances which may have an impact on its ability to run its business and provide services to customers. As such, the company may consider it appropriate to apply to us for a derogation from the obligation to comply with particular provisions of the WRC.

Below are some further examples of the circumstances when a derogation may be sought by a company:

- to mitigate the consequences of non-compliance with obligations in the WRC due to unforeseen (short term) circumstances;
- to mitigate the consequences of non-compliance with obligations in the WRC in the short term while a vital piece of water/sewerage infrastructure is being repaired or serviced;
- to mitigate the consequences of non-compliance with obligations in the WRC while changes to the market codes are being made and where unforeseen issues have arisen;
- to allow a small company time to ensure it meets the requirements of the market operator's performance framework within the WRC (CSD 0002); and
- to ensure proportionality for a company with a small number of eligible customers; and
- retrospective derogations will not be granted by Ofwat.

We will consider the extent to which the situation warrants enforcement action being taken and we will consider the timing, notification, and remedial action, the completeness of the information provided and scale of the breach.

### **1.3 Derogations process**

We consider that, while we are proposing a framework for derogations and unless a derogation from compliance with an obligation is granted by us, all licensees and appointees are expected to comply with the obligations set out in the WRC. As such:

- derogations will not be granted retrospectively and a previous failure to comply with obligations included in a derogation could result in enforcement action;
- a derogation will be granted to an individual licensee or appointee and cannot be transferred;
- a derogation will generally be for a fixed period of time and will have an expiry date (except in rare circumstances where a derogation is granted for an indefinite period)
- derogations will be reviewed and performance towards compliance monitored;
- derogations will only be granted in respect of obligations set out in a specific provision of the WRC and as detailed in the derogation and all remaining obligations in the WRC must continue to be complied with;
- a derogation should not provide a licensee or appointee with a competitive advantage and will only be granted where such an advantage is perceived following an assessment by Ofwat of measures that can be applied to offset that advantage; and
- where a licensee or appointee has failed to comply with its obligations, but has remedied the matter before an application for a derogation could reasonably be

made, a retrospective derogation will not be granted by us. We will still consider whether enforcement action is proportionate in the circumstances.

## 1.4 Engagement

Prior to this consultation, as part of the process of developing our approach to derogations, we engaged with small companies and Welsh companies over a period of approximately six months through a series of workshops to understand their concerns and any potential issues with compliance with the WRC and its subsidiary documents. This identified a number of points such as the need for the process not to be too over burdensome, issuing guidance and ensuring transparency all of which have been considered whilst drafting the derogations guidance/process.

If you wish to find further details about the objectives or outcomes of these workshops please read our [‘The proportionate application of the market architecture to Welsh and small companies’](#) briefing sheet.

## 1.5 Next steps

We welcome responses from stakeholders to the proposals set out in this consultations document and the draft derogations guidance. This will help us to refine our proposed approach to both the derogations process and the associated guidance. **The deadline for responses is Monday 26 September 2016.**

Once we have considered responses to the consultation, we plan to develop final derogations guidance which we will publish on our website.



Ofwat (The Water Services Regulation Authority) is a non-ministerial government department. We regulate the water sector in England and Wales. Our vision is to be a trusted and respected regulator, working at the leading edge, challenging ourselves and others to build trust and confidence in water.

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