
November 2016

Trust in water

Consultation on the Wholesale Retail Code

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About this consultation

At the moment only a small number of business, charity and public sector (“business”) customers across England and Wales can choose their water retailer and most business customers must use services provided by the monopoly water companies. The Water Act 2014 (WA14) will allow eligible business customers to choose their supplier of water and wastewater retail services from April 2017.

This means that for business customers who use the water supply or sewerage system of an appointed company whose area is wholly or mainly in England, the market will be extended to include all business, charity and public sector customers (‘business customers’). However, for those who use the water supply or sewerage system of an appointed company whose area is wholly or mainly in Wales, the market will not be extended, reflecting the different policy position of the Welsh Government which retains the 50ML threshold.

A new legal and regulatory framework is being put in place to facilitate the new business retail market, and provide the necessary market governance. This framework includes a number of codes which together set out the rules for the new market.

This consultation focuses on the Wholesale Retail Code (WRC). The WRC has been restructured and incorporates the Wholesale Contract creating in effect a code which is a s66D or s117E agreement. The WRC is a key element of the regulatory framework for the new business retail market as it sets out the relationship between Wholesalers and Retailers and how the market will operate.

The WRC has been developed through detailed consultation with the industry over a period of nearly two years and has been subject to change control by the Interim Code Panel (ICP) since August 2015.

In this document, we are formally consulting on the restructured WRC. We are seeking feedback from respondents on whether any further changes are needed to the WRC before it comes into effect at Market Opening in April 2017.

The WRC applies to all Licensee and Appointees in England and Wales. We intend to introduce a derogations process to relieve Licensees and Appointees from compliance with obligations in the WRC, which they can demonstrate to our satisfaction are disproportionate in effect and unduly burdensome on the business. As a consequence this document should be considered together with our proposed policy on [derogations](#).

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1. Responding to this consultation

We welcome your comments on the Wholesale Retail Code by **Friday 16 December 2016**.

Please submit email responses to retailmarketopening@ofwat.gsi.gov.uk, with the subject **“WRC Consultation”** or post them to:

WRC Consultation
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, 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 legislative or regulatory requirements, such as 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.

2. Overview of legal framework

2.1 Scope of this consultation

Sections 66DB and 117G of the Water Industry Act 1991 require Ofwat to undertake a formal consultation in accordance with these provisions before the WRC can be issued. This consultation is that formal consultation and it has been sent to all the persons required by these statutory provisions.

Subject to responses to this consultation, including any statutory response from the Secretary of State or Welsh Ministers who we will have discussions with during the consultation period, we plan to issue the WRC by Market Opening 2017.

2.2 The retail market codes

There are a number of codes which together set out the rules for the new business retail market. Some of these codes are required by legislation (WRC, Interim Supply Code and Retail Exit Code) and some will be required under obligations contained in companies' Instruments of Appointment (IoAs) and Water and Sewerage Supply Licences (WSSLs) (Market Arrangements Code (MAC) and Customer Protection Code of Practice). The WRC and the MAC form a key part of the regulatory framework. In addition to this Consultation there will be a separate consultation on the MAC. The other market codes – Interim Supply Code, Retail Exit Code and Customer Protection Code of Practice – are outside of the scope of either of these consultations.

2.3 Market Architecture Hierarchy

The legal framework makes limited provision for the hierarchy of documents for the purposes of a licensee or appointee seeking to comply with its obligations or in the event of conflict, particularly as regards the various new codes which could all fall within the definition of "Law". Ofwat has determined that a hierarchy in the legal framework which sets out the precedence of these documents for all interpretation purposes is required. Text has been added to Schedule 1 part 1 of the Wholesale Contract which sets out the hierarchy in case of conflict, and the definition of "Law" has been amended consistent with the position on hierarchy.

The text that has been added deals with the situation where there is any conflict between any of the codes with the statutory provisions or the Licences or Appointments, the order of precedence shall be:

- (i) any Law other than any Appointment, any Licence, the Market Arrangements Code, the Wholesale Retail Code, the Interim Supply Code, the Retail Exit Code and the Customer Protection Code of Practice;
- (ii) any Appointment or Licence;
- (iii) the Market Arrangements Code;
- (iv) the Wholesale-Retail Code;
- (v) the Interim Supply Code and the Retail Exit Code;
- (vi) the Customer Protection Code of Practice.

The intention is that Licensees and Appointees will be better able to ensure compliance with their obligations and Ofwat will be better able to enforce compliance with those obligations where appropriate. With regards to the hierarchy for interpretation as regards the Charging Rules and the WRC the intention is that the Charging Rules take precedence over the provisions in the WRC.

3. The Wholesale Retail Code

3.1 Revised Structure of the WRC

The constituent parts of the WRC have been consulted upon widely through the Open Water programme and Ofwat has also had the benefit of the input of the ICP on changes to those constituent parts since the last consultation. This has brought into sharp focus the need for Ofwat to create a legal structure for the constituent parts of the WRC, including the Wholesale Contract, within the proposed legal framework and make this clear in both the WRC itself and the instrument which issues the WRC under sections 66DA(1) and 117F(1). The draft Designation Document which will be used by Ofwat to issue the WRC is included in this Consultation.

Ofwat has amalgamated the Wholesale Contract into the WRC in effect making the WRC the form of the Wholesale Contract. This has been done for two principal reasons: (1) the Open Water Programme had recommended to Ofwat that Ofwat take steps to ensure the integrity of the market by managing the extent to which participants could contract “outside” the terms of the WRC; and (2) experience from the change processes followed by the ICP showed that there was merit in the Wholesale Contract being clearly part of the WRC and not just an optional template which could be adopted by Wholesalers and Retailers.

The six parts of the WRC which have hitherto been consulted on as separate documents have been incorporated as Parts 1 to 6 within Schedule 1 of the Wholesale Contract.

The restructured WRC comprises the following :

The Wholesale Contract which includes

1. Schedule 1 Terms and Conditions of a Wholesale Contract
 - a. Schedule 1 Part 1 Objectives, Principles and Definitions
 - b. Schedule 1 Part 2 Business Terms
 - c. Schedule 1 Part 3 Operational Terms
 - d. Schedule 1 Part 4 Market Terms

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- e. Schedule 1 Part 5 Code Subsidiary Documents
 - f. Schedule 1 Part 6 Forms
2. Schedule 2 Contracting Retailer information
 3. Schedule 3 Contracting Wholesaler information
 4. Schedule 4 Relevant terms of an approved Derogation

3.2 Wholesale Retail Code

The WRC is a statutory code made under sections 66DA and 117F of the Water Industry Act 1991. The WRC is the form of agreement to be entered into by all Wholesalers with those Retailers for whom it is providing wholesale services under a s66D or s117E Agreement. Additional terms and conditions of the Wholesale Contract are contained in Schedule 1 and are more particularly set out in Parts 1 to 6 of that Schedule. Parts 1 to 6 of Schedule 1 to the Wholesale Contract contain the documents previously published as WRC Parts 1 to 6, as detailed in section 3.1 above. The WRC includes the requirements placed on Wholesalers and Retailers for the operation of the market and contains the processes which informed the design and construction of the Central Market Operating System (CMOS).

The draft WRC has been developed under a change control process managed by the ICP since 2015. The current version of the WRC includes changes proposed by Ofwat, Market Operator Services Limited (MOSL) and market participants and recommended to Ofwat by the ICP.

The version of the WRC which accompanies this Consultation has been further amended as a consequence of the restructure of the WRC and the additional text required to implement the hierarchy of the legal framework. These are the amendments shown in tracked changes.

3.3 Wholesale contract

The Wholesale Contract has been amended as a consequence of the restructure of the WRC to allow it to be incorporated into the revised structure. The principal amendments have been to ensure the recitals accurately reflect the revised structure and any references to the WRC or Wholesale Contract similarly reflect that revised structure. As stated in section 3.4 above the WRC is in effect the agreement to be entered into where a Wholesaler and a Retailer intend to enter into a s66D or 117E agreement.

Our current proposal is that all Wholesale Contracts required for Market Opening will be signed when the MAC Framework Agreement is signed, ahead of Market Opening. We are planning to develop a Programme Note which will provide more detail on transitional arrangements later in the year.

4. The development of the WRC and Wholesale Contract

The WRC and Wholesale Contract were originally developed by the Open Water Programme based on, and learning lessons from, the documents which form the framework for the competitive market in Scotland.

The Market Blueprint

The WRC and Wholesale Contract have been in active development since 2014. They were first mentioned in the The Market Blueprint, an initial consultation by Open Water published in January 2014. Details of the market blueprint and its development can be found [here](#).

The WRC and Wholesale Contract went through a number of detailed consultations during 2014 and 2015, as set out below.

Market Architecture Plan (MAP1)

The Market Architecture Plan (MAP1) was consulted on in July 2014. The results of the consultation are published [here](#). MAP1 set out the principles behind the design of the market architecture, how companies and market participants would interact and how the WRC would develop and operate. This is important as the principles behind the development of market codes by industry ensure that all parties have an involvement and interest in the efficient operation of the market. This ensures that lessons are learnt, codes are efficient and the regulatory burden is minimised whilst ensuring efficient market operation.

Market Architecture Plan 2 (MAP2)

The second Market Architecture Plan (MAP2) was consulted on in December 2014. The results of the consultation are published [here](#). MAP 2 built on MAP1, further developing the market codes and architecture. It also considered the structure and interactions with the price review and how this would affect the operation of retail markets, data cleansing, and interaction with the systems, governance of the market architecture, the setting and structure of wholesale tariffs which are vital for market operation and payment credit and terms. The responses to the MAP2 consultation contained significant feedback on the WRC and how it should develop. This included how it would operate, what activities were included, how these activities should occur, the differences and similarities with the Scottish codes and how the legal framework would work.

Market Architecture Plan 3 (MAP3)

Market Architecture Plan (MAP3), which included of a full set of revised code technical / documents was published by MOSL in May 2015. The MAP 3 publication (which came as a result of engagement through MAP2 and beyond) consisted of the fullest update / review and publication of documents to date. These documents provided a clear set of amended / updated WRC and WRC subsidiary documents in track change version for market participants to have clear visibility of the discussion and amendments / updates that had been made. MAP3 is published [here](#).

The market codes have been agreed with the Drinking Water Inspectorate (DWI) and Environment Agency.

Post MAP3

Intensive work through 2015 on the 'page turn' exercise as well as numerous workshops produced the version of the WRC used for the development of the Central Market Operating System ('CMOS'), see [here](#).

Workshops held over 2015 considered a large number of the issues and the paperwork of these meetings and the reasons behind the existing drafting is available [here](#).

The development of the MOSL CMOS system and its interaction with the WRC involved the creation of both a [Pre Vendor MAP](#) and a [Post Vendor MAP](#).

5. Open Governance under the Interim Code Panel

Role of the ICP

MAP2 introduced the provisions for an [Interim Code Panel](#) (“ICP”). The ICP was established in the summer of 2015 just before the publication of MAP3. It was set up to consider and recommend changes to the WRC and MAC in the period between publication of the Pre-Vendor Market Architecture Plan (MAP) and the establishment of the Panel in accordance with the provisions in the MAC. The ICP deals solely with changes to the WRC and MAC, a subset of the role of the Panel to be established under the MAC, and conducts its business in line with the relevant MAC provisions. Its terms of reference are [here](#).

Composition of the ICP

It was felt that the detailed and technical changes presented by the development of the CMOS system would require a level of expert input best served by a cross section of industry experts. Hence the ICP is made up of a Chair appointed by Ofwat and two independent members appointed by the Chair and six members elected by Wholesalers and Retailers. All members speak as experts and do not represent the views of their employers nor the constituency which voted for them.

Governance during CMOS development

As the system build continued, the ICP provided a transparent, adaptable process which could consider the impact of changes to the WRC and MAC on the development and operational capability of CMOS as well as the wider implications to market participants’ systems. The ICP process has enabled the WRC and MAC to be changed without impeding the development of CMOS.

Proposing changes to the codes

Ofwat, MOSL and market participants have proposed changes to the market codes. The ICP’s core remit was to make recommendations to Ofwat to either accept or reject the proposed changes to the WRC and the MAC. The formal baseline documents for this process were the versions that were included in the Pre-Vendor MAP, with any proposed changes to these falling to the ICP to consider.

This open governance has given stakeholders the ability to raise changes and challenge each individual change.

Recommending and deciding on changes to the codes

The ICP only makes recommendations as to whether or not proposed changes to the Codes should be made. Ofwat decides whether or not proposed code changes are to be implemented. In total, over 60 changes have been approved by Ofwat. The code changes approved by Ofwat are published [here](#).

The key criteria which govern the ICP's recommendations in respect of any change proposal are the Objectives and Principles set out in the Codes.

ICP Secretariat

MOSL provides secretariat services to the ICP, including the ICP Secretary. In fulfilling this role, MOSL maintains and controls the code documentation, incorporating changes once they have been agreed by Ofwat.

Further information about the ICP can be found in MOSL's Information Note [ICPIN01](#).

6. Consultation Questions

Consultation Questions

We would be grateful for comments on the issues raised in Sections 3.1 to 3.3 and the associated drafting together in particular whether the WRC is in a form ready to be issued by Ofwat and whether the draft Designation Document is acceptable. In addition we would welcome any suggested improvements to the WRC for the purposes of Market Opening.

The WRC comprises many individual documents and to aid our consideration of your comments or suggested drafting it would be helpful if you could ensure that you make a full reference to the document where you are making a comment or suggesting a change

In addition, you should explain the rationale for the comment or suggested change together with your view on whether the change is needed prior to Market Opening and why. You should also explain why this change has not been raised earlier to the ICP or indeed whether this change has already been considered by the ICP.

7. Next steps

We welcome responses from stakeholders to the proposals set out in this consultation document. **The deadline for responses is Friday 16 December 2016.** We will also be consulting during this period with the Secretary of State and Welsh Ministers as regards their powers under sections 66DB and 117G.

If there are significant changes as a consequence of comments received from stakeholders (including the Secretary of State and the Welsh Ministers), we may need to undertake a specific consultation before we can issue the WRC. Once the WRC is issued in accordance with the Designation Document the only change that will be made to the WRC prior to Market Opening is one which is demonstrated to be critical to the functioning of the Market at Market Opening in April 2017.

We will assess all suggestions for changes to be made to the WRC on a range of criteria including how critical the changes are to the functioning of the Market in April 2017. We will balance any requirements to make a change with the impact on the central systems and the Market Opening date. Once the WRC is issued in accordance with the Designation Document the only change that will be made to the WRC prior to Market Opening is one which is demonstrated to be critical to the functioning of the Market at Market Opening in April 2017.

Changes identified which are not critical for Market Opening will be considered by the Panel once it is established under the MAC .