

Information notice

IN 16/10 November 2016

ofwat

This is a formal document that alerts our stakeholders to a change in the way that we regulate the water sector in England and Wales.

Statutory Transfer Schemes for Retail Exit at Market Opening

At the moment only a small number of eligible business, charity and public sector customers (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 customers in England and Wales. For customers who are supplied using the supply systems of appointed companies whose areas are wholly or mainly in Wales the current 50ML threshold will be retained and the restriction of competition to retail water supply only will continue, reflecting the different policy position of the Welsh Government.

On the opening of the expanded retail market and thereafter, Undertakers whose areas are wholly or mainly in England will be able to exit the business retail market and transfer their retail business customers to a holder of a water supply and sewerage licence (Acquiring Licensee).

As part of the retail exit process, Undertakers can transfer property, rights and liabilities to an Acquiring Licensee using a Transfer Scheme to ensure such property and assets in England and Wales and rights or liabilities under the law of England and Wales are effectively transferred. An example of where a Transfer Scheme may be used is where certain property, rights and liabilities would not otherwise be transferable without the renegotiation of terms and conditions.

The Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016 (the Regulations) deal with all aspects of Retail Exit including Transfer Schemes. The Regulations require that Special Agreements with customers must be transferred using a statutory Transfer Scheme. In all other circumstances, statutory Transfer Schemes are optional.

This information note sets out Ofwat's approach to considering Transfer Schemes sent to Ofwat for approval and which will be effective at Market Opening. This is to help undertakers understand the data and assurance requirements that Ofwat will expect to receive from them in order to determine whether to approve or modify a scheme.

What is a Transfer Scheme

For these purposes a Transfer Scheme is a legal instrument which may be used by an Exiting undertaker to transfer property, rights and liabilities to an Acquiring Licensee. Where Special Agreements are being transferred to an Acquiring Licensee, the Exiting Undertaker must use a Transfer Scheme.

The effect of a Transfer Scheme is to ensure at the date it takes effect that all property, rights or liabilities and any interests, rights or liabilities created are legally transferred.

A Transfer Scheme may only deal with property in England and Wales and rights and liabilities arising under the law of England and Wales.

The Government anticipated that a Transfer Scheme could be used to transfer agreements which would otherwise require a renegotiation of terms and conditions to be transferable. Since the use of a Transfer Scheme may override renegotiation rights the Government considered it important that Transfer Schemes be approved by Ofwat before they are effective.

Ofwat will not approve a Transfer Scheme before the Secretary of State has granted permission for the Undertaker to exit the non-household retail market and the Acquiring Licensee must have consented to the Scheme.

Ofwat may modify a Scheme before approving it but only if the Exiting Undertaker and Acquiring Licensee(s) consent to any modification. Ofwat may require the Exiting Undertaker or an Acquiring Licensee to provide further information or assistance for the purposes of enabling it to decide whether to approve or modify a Transfer Scheme.

Requirements of a Transfer Scheme

A Transfer Scheme will come into force on a specified date. That date cannot be before the Exit Date (the date from which the Exiting Undertaker will no longer be able to provide retail services to customers in its area).

Schedule 1 to the Regulations provides that a Transfer Scheme may include provisions for:

- a) the identification of property, rights or liabilities to be transferred either by specifying or describing them or by setting out a way by which they may be identified;
- b) the division of property, rights or liabilities between the Exiting undertaker and the acquiring licensee and where such division has been made, make incidental modifications of the interests, rights or liabilities of third parties;
- c) payments to be made by an Acquiring Licensee for anything transferred or created;

- d) incidental, supplementary or consequential matters; and
- e) rights and liabilities under a contract of employment to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 to apply.

Special Agreements

For the purposes of pre Market Opening, Transfer Scheme Special Agreements are arrangements made under section 142(2)(b) of the WIA91 between an Undertaker and customers that include charges provisions that are not provided by the Undertaker's charges scheme.

Special Agreements relevant to the customers being transferred on exit must be transferred by the Exiting Undertaker to an Acquiring Licensee using a Transfer Scheme.

Whilst Special Agreements will continue to exist in the expanded business retail market, we acknowledge that it is for the Exiting Undertaker and Acquiring Licensee to decide whether these contractual arrangements are to be transferred. There is nothing to prevent an Exiting Undertaker re-negotiating contracts or withdrawing arrangements ahead of an exit or an Acquiring Licensee seeking changes following an exit provided the parties acknowledge the resultant contractual risk.

Any lapsed or dormant Special Agreements need not be transferred by a Transfer Scheme unless the parties agree that they should.

In the absence of any other agreement the customer will be supplied by the Acquiring Licensee under one of its schemes of terms

and conditions. These schemes of terms and conditions are a backstop to protect a customer in these circumstances. Further details can be found in the [retail exit code](#).

Our role in the approval of Transfer Schemes

The Regulations make Ofwat responsible for approving Transfer Schemes.

The timescale for approval of Transfer Schemes prior to Market Opening following the exit decision by Defra, is short.

Consequently Ofwat has established a self-certification approval process whereby applications for approval of a Transfer Scheme are supported by:

- [Assurance Statement by an Exiting Undertaker](#)
- [Consent and Assurance Statement by an Acquiring Licensee](#)

The Statement to be completed by an Acquiring Licensee includes the required statement of consent to the Transfer Scheme. These Statements need to be signed by a duly authorised signatory.

The purpose of these Statements is to ensure that the Exiting Undertaker has included all the Special Agreements, other contracts and items referred to in schedule 1 relevant to the customers being transferred and can continue to finance and run the residual business. For the Acquiring Licensee we are seeking assurance that nothing in the Exit process, or as a result of the Transfer Scheme, will prevent the Licensee from being able to meet its obligations following the transfer to it of

customers on Exit. Provision is also made for the Acquiring Licensee to consent to the Transfer Scheme.

There are already some assurances in place as part of either the exit application process or the WSSL application process but as part of our duties we have identified some additional assurances that will be required.

Early visibility of Transfer Schemes prior to confirmation of the Exit Date could be beneficial to everyone concerned and we encourage Exiting Undertakers to share a draft of their Transfer Scheme as soon as they are able.

When Exiting Undertakers submit the final form of their Transfer Scheme to us for approval, they should append this to their completed Assurance Statement and include the Consent and Assurance Statement provided to them by any relevant Acquiring Licensee.

Publication of Transfer Scheme Approval

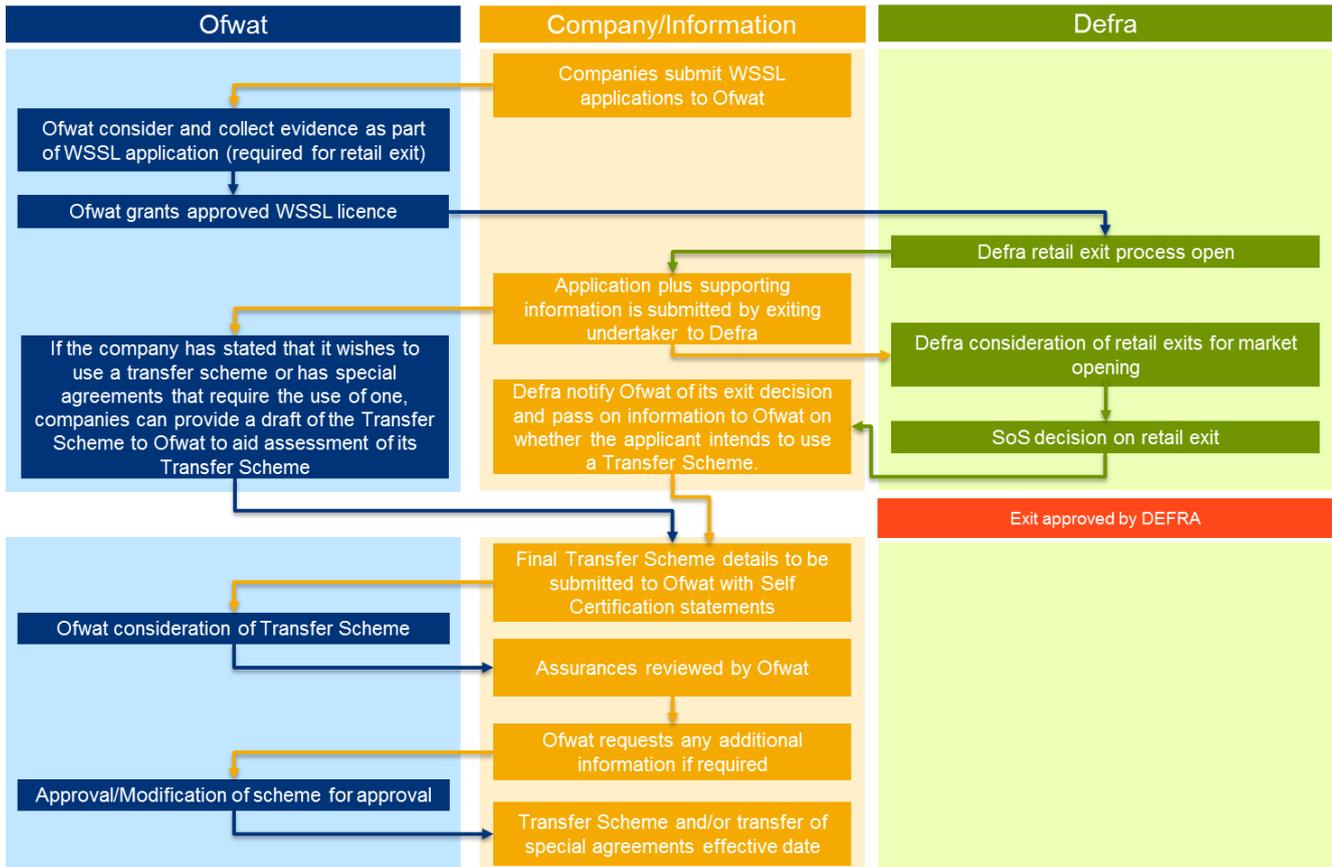
Confirmation of our approval of each Transfer Scheme will be published on the [Approved Transfer Schemes](#) page our website. The confirmation will simply identify the Parties as we do not propose to publish any Transfer Schemes.

Timing, process and principles

Below is an outline of the Transfer Scheme Approval process and associated timings prior to market opening in April 2017.

Timing	Expected process
November and December	Exiting Undertakers shares early draft of Transfer Scheme and supporting information with Ofwat
January and February	Transfer Scheme submitted to Ofwat for approval; further information sought as required.
February and March	Ofwat Approval

Transfer scheme approval process



Assurance Statements

Companies already provide Ofwat and Defra with a number of assurances and Ofwat's additional assurance requirements build on those assurances.

The WSSL application process requires assurance on a retailer's ability to manage increases in customers from transfers following exit. This assurance is supported by a business plan and Certificate of Adequacy.

The Defra retail exit process also requires assurances from both Undertakers and

Acquiring Licensees. Defra requires information on the transfer of customers (and whether a statutory Transfer Scheme will be used), how customers will be notified, measures to ensure a seamless process for customers, and confirmation of the Acquiring Licensee's participation in the supplier for first and last resort pools.

The additional assurances we require are as follows:

- (a) for the Acquiring Licensee we are seeking assurance that nothing in the Exit process, or as a result of the Transfer Scheme, will prevent the Licensee from being able to meet its

obligations following the transfer to it of customers on Exit. Provision is also made for the Acquiring Licensee to consent to the Transfer Scheme;

- (b) the Exiting Undertaker's assurance that they will be able to meet their IoA obligations following exit, for example adequate financial and management resources and facilities to manage their residual business;
- (c) confirmation that the property, rights or liabilities being transferred are relevant to the customers being transferred; and
- (d) confirmation that all relevant Special Agreements are included in the Transfer Scheme and that these Special Agreements have been adequately transferred to the Acquiring Licensee.

More information

[Retail exit code](#)

[Approved transfer schemes](#)

[Assurance Statement: by Exiting Undertaker in support of application for approval of a Transfer Scheme](#)

[Consent and Assurance Statement: by Acquiring Licensee in support of application for approval of a Transfer Scheme](#)

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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