
Legal framework for retail market opening

The Water Act 2014 will allow eligible business, charity and public sector customers to choose their supplier of water and wastewater retail services from April 2017. Retail services include things like billing and customer services.

Currently only about 26,000 customers across England and Wales can choose their retailer – and only for their water supply service. Others have to receive their water supply and sewerage services from monopoly companies appointed to deliver both wholesale and retail water and sewerage services ('undertakers'). In the future, holders of water supply and/or sewerage licences ('licensees') will buy wholesale services from undertakers and sell these on with retail services to customers. Individual eligible customers will also be able to buy wholesale services and self-supply themselves with retail services.

The new market will rely on a number of legal documents to work (the 'legal framework') – ranging from legislation to non-statutory guidance. The diagram on the following page sets out the different elements of the legal framework for the new retail market – and who is responsible for creating these. Below we also describe each of the legal documents in more detail.

The legal framework will evolve as more provisions of the Water Act 2014 come into force, or the new market is set up. For example, various powers exist for the Secretary of State to issue further regulations, such as regulations for the licensing arrangements between England and Wales and Scotland.

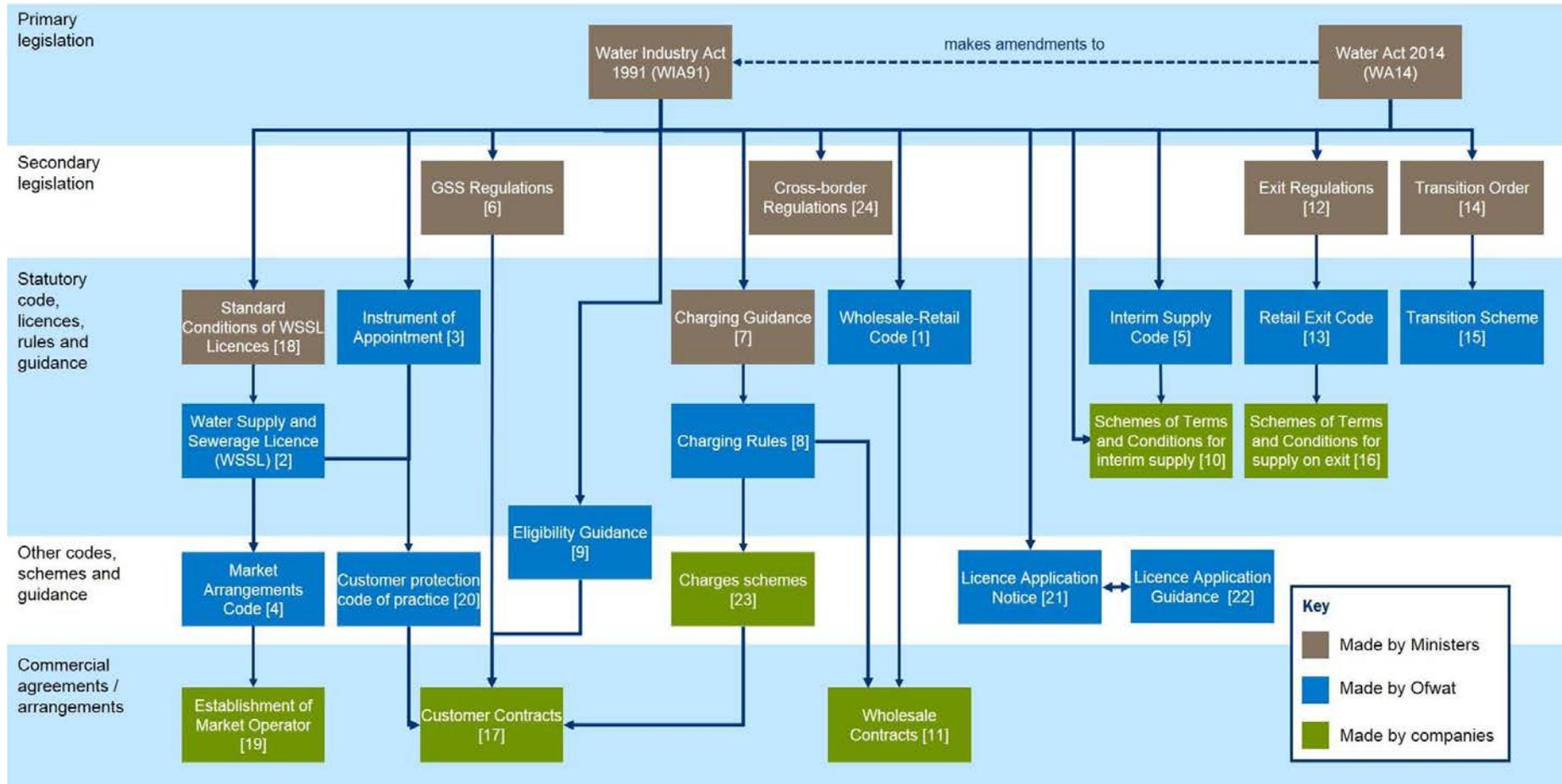
We have also not included:

- the equivalent legal framework for the existing market in Scotland although efforts are being made to achieve a seamless cross-border market; or
- other relevant legislation, such as the Competition Act 1998.

Amended February 2017:

This document has been reviewed and changes have been made to the glossary section. A paragraph has been added at the top of page 3, explaining the hierarchy set out in the various codes to deal with any conflicts between these (as was explained in the November 2016 consultation documents on the WRC and the MAC). Current entries numbered 1, 6, 11, 12 and 13 have been replaced with revised definitions of these instruments.

Figure 1 Diagram of the legal framework



In addition to the interdependencies between the various parts of the legal framework set out in the diagram above, further provision will be made in relevant documents for an order of precedence between different documents in the event of conflict. This “legal hierarchy” is particularly important in relation to the various code documents for which no obvious order of precedence is established as a matter of law, and in relation to which there is greater potential for cross-over. In the event of a conflict, the earlier document in the following list will take priority over the latter: (i) any law (denoted as primary and secondary legislation in the top two rows in the above diagram), (ii) any Instrument of Appointment or Water Supply and Sewerage Licence, (iii) the Market Arrangements Code, (iv) the Wholesale-Retail Code, (v) the Interim Supply Code and Retail Exit Code, (vi) the Customer Protection Code of Practice.

1. Wholesale-Retail Code (WRC) – Code to be issued by Ofwat under sections 66DA and 117F of the WIA91 which prescribes the standard form “Wholesale Contract” (together with its various schedules and appendices and including business terms, operational terms and market terms) which is to be entered into by undertakers (who operate water and/or sewerage systems) and licensees (who use those systems to supply water to customers). Ultimately this is enforceable by Ofwat under the WIA91 (section 18).

2. Water Supply and Sewerage Licences – Document authorising a Licensee to supply water and/or sewerage services to eligible non-household customers, incorporating standard conditions (18), designated by the Secretary of State. If a licensee fails to comply with its licence conditions, enforcement action may be taken against it and, ultimately, its licence may be revoked.

3. Instrument of Appointment – Document authorising an undertaker to operate a water and/or sewerage network in a specified area, subject to conditions contained in the relevant instrument.

4. Market Arrangements Code (MAC) – Non-statutory code, to be established by conditions in Water Supply and Sewerage Licences (2) and Instruments of Appointment (3), to set up arrangements for how the market will operate, including the setting up of a panel to help oversee the codes of practice and any changes to these. Licensees and undertakers will be responsible for the establishment of the market operator (19), to administer the market and become members of it.

5. Interim Supply Code (ISC) – Code to be issued by Ofwat under sections 63AF and 110O of the WIA91 which regulates what happens to the customers of a licensee which ceases to supply them. It will establish a process for licensees to opt in to be interim suppliers, and to be allocated customers if there is a cessation of supply. It may also set out terms to be included in statutory schemes (see (10)

below) and requirements for communications with customers. Ultimately this is enforceable by Ofwat under the WIA91 (section18).

6. Guaranteed Standards Regulations – Currently the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008 imposes compulsory standards on undertakers that they must meet in delivering services to customers (known as the ‘guaranteed standards scheme’). Ofwat made proposals for these to be amended and supplemented by new regulations made under sections 38ZA and 95ZA to extend the application of some required standards to licensees. Licensees can be required to make payments to customers where their services to customers have failed to comply with these standards. Amending Regulations affecting Licensees whose customers use the systems of Undertakers wholly or mainly in England will be made by Defra.

7. Charging Guidance – Guidance issued by the Secretary of State or Welsh Ministers (as appropriate) to which Ofwat must have regard when making charging rules (8).

8. Charging Rules – Rules made by Ofwat which regulate various charges that undertakers are allowed to impose on various parties. Ofwat must issue rules which apply to charges to licensees for use of water or sewerage networks and may also issue rules which cover charges to customers under charges schemes. Further rules may also be issued in relation to other charges as further provisions of the WA14 are commenced by the Secretary of State and/ or the Welsh Ministers.

9. Eligibility Guidance – Guidance issued by Ofwat to help customers, undertakers and licensees interpret the statutory rules defining which customers are eligible to switch their licensee or self-supply.

10. Schemes of Terms and Conditions for Interim supply – Schemes, which must be made by licensees who are eligible to provide an interim supply (see Interim Supply Code (5)) under section 63AC and/or section110L. Such schemes must contain the terms and conditions to apply in the event that Ofwat directs a licensee to provide an interim supply, where no other terms and conditions have been agreed with the customer. The Interim Supply Code may specify terms and conditions that licensees must include in such schemes.

11. Wholesale Contracts – Contracts between a licensee and an undertaker which set out the services the wholesaler will provide to the retailer and the commercial terms on which they will be provided. Pursuant to sections 66DA and 117F of the WIA91, these contracts will need to be in the form set out as the Wholesale Contract in the WRC.

12. Exit Regulations – Regulations (currently the Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016) made by the Secretary of State and allowing undertakers whose areas are wholly or mainly in England to apply to stop providing a retail service to eligible non-household customers and establish the process by which customers will be transferred to one or more eligible licensees.

13. Retail Exit Code (REC) – Code to be made by Ofwat as required by the Exit Regulations (12) (regulation 30, required pursuant to section 47(3) WA14) setting out the contract terms which will apply where customers are transferred to an eligible licensee under the scheme made by the Exit Regulations. Ultimately this is enforceable by Ofwat under the WIA91 (section 18).

14. Transition Order – Secondary legislation made by the Secretary of State that allows a Transition Scheme (15).

15. Transition Scheme – A temporary regulatory structure under a Transition Order to transfer existing holders of water supply licences, including combined licences, to the new legal framework.

16. Schemes of Terms and Conditions of supply on exit – Documents which must be made by licensees who are providing or proposing to provide services to eligible non-household customers in areas where the undertaker applies to stop providing retail services (see exit regulations (12)). The schemes must set out the terms and conditions that will apply to such services in the absence of agreed terms and conditions. The retail exit code (13) may specify terms and conditions to be included in such schemes.

17. Customer Contracts – Contracts between licensees and the end users of water and/or sewerage services, which may be on terms agreed between the licensee and end user, on terms under one or more of the schemes referred to above, or otherwise incorporating or having regard to relevant provisions of the proposed Customer Protection Code of Practice (20) and Guaranteed Standards Regulations (6).

18. Standard Conditions – conditions of Water Supply and Sewerage Licences (2) designated by the Secretary of State as standard so that they are included in all relevant licences.

19. Establishment of Market Operator – the Market Arrangements Code (4) and the Wholesale Retail Code (1) anticipate there being a body established to administer those codes, known as the market operator. The formation, operation

and funding of such a body is required to be undertaken by licensees and undertakers.

20. Customer Protection Code of Practice – a proposed code of practice to be established pursuant to a condition of Water Supply and Sewerage Licences (2) and potentially also a condition of Instruments of Appointment (3) containing key customer protection obligations.

21. Licence Application Notice – Notice made by Ofwat under section 17F of the WIA91 which determines the requirements which relate to applications for Water Supply and Sewerage Licences (2) including information on the licence application process and information to be provided by prospective licensees.

22. Licence Application Guidance – Ofwat guidance on applying for Water Supply & Sewerage Licences (2) containing information on the licence application process, information to be provided by prospective licensees and the assessment process.

23. Charges Schemes – schemes made by undertakers pursuant to section 143 WIA91 which fix charges to be paid for services provided by the undertaker and make provision for payment of those charges. These schemes are amongst those which must comply with Charging Rules (8).

24. Cross-Border Regulations – The Water Supply and Sewerage Licences (Cross-Border Applications) Regulations 2016 made under section 17FA of the WIA91 (with a mirroring order made by the Scottish Government under paragraph 1A of Schedule 2 of the Water Services etc. (Scotland) Act 2005) which provide for licence applicants to make an application for licences in England & Wales and Scotland to Ofwat or the Water Industry Commission for Scotland (WICS) and have it considered by both.