Eligibility guidance on whether business customers in England and Wales are eligible to switch their retailer – DRAFT

Castle Water Limited's comments

Introduction

This is the response of Castle Water Limited ("**Castle**", "**we**") to the above draft document issued for consultation by Ofwat on 7 February 2022 (the "**Guidance**"). We welcome the intent of the revisions, whilst noting that the Guidance does not address a number of real-world variations on the themes and scenarios that are set out.

As requested, we provide below our thoughts on the three questions set out in the Statutory Notice. However, since issues of eligibility frequently overlap, we address these questions in the sequence of the Guidance. We hope this is helpful.

1. Introduction

The statement that:

> *'In all cases, and for all aspects of eligibility, it is the retailer rather than the wholesaler that must ensure that the premises of a potential business customer is eligible for the business retail market.'*

does not reflect the terms of the Codes, where the Wholesaler bears responsibility for, among other things, wholesaler-led deregistration of premises from the NHH market.

There are many instances where a Wholesaler site visit is required. The Guidance should recognise that, as we assume, it does not override the Operational Terms of the Wholesale-Retail Contract.

2.2 How to establish the extent of premises

We agree in principle that:

> *'Premises can include buildings or land'*

But many anomalies arise in connection with land. For example, there are many fountains in business parks where there is no resident landlord, no agreement as to who is responsible for bills, and no occupier or occupiers of the land who will accept responsibility. Moreover, the Wholesaler will understandably decline to deregister these 'premises'.

We suggest that this is added to the Scenarios on the basis either that the landlord is the 'occupier' for these purposes, or in the alternative that the occupiers of the business park are jointly and severally liable for the SPID if one exists (albeit that the latter option raises its own enforceability issues}; and that, in the absence of a SPID, the fountain is a gap site for which the landlord or occupiers are responsible.

The Guidance should also consider the application of the principle of one supply point per distinct premises to the life cycle of a SPID, particularly in relation to building demolition and redevelopment.

A SPID attaching to a premises that is then demolished is often retained for purposes of temporary building supply, but the market data not updated accordingly. In particular, a Wholesaler will insist on retaining the SPID as a whole rather than remove a service component, on the basis that the SPID must be either registered in full or deregistered in full. Likewise, when a redevelopment takes place one SPID might be retained but not supplemented or updated to reflect that a number of retail or other commercial premises, for example, might now be served.

The onus should be on the Wholesaler in these circumstances to ensure proper co-ordination between its Developer Services and Wholesale Services.

As many companies claim that because they have a small business rates exemption they are not in the non-household ("**NHH**") market, we welcome the phrase in parenthesis in the statement that:

> *'Accordingly, in general, we consider that every property that is assessed separately for the purposes of council tax and business rates – or that would be assessed separately if the property were not exempt from such rates – should be treated as a separate premises for the purpose of establishing whether the premises constitutes one or more properties.'*

The Guidance ought, however, to consider the situation where a separate premises identifier such as a UPRN or VOA is not complemented by, or may conflict with, a business rates entry. For example, we encounter confusion on the part of customers that benefit from a small business exemption from business rates and are in a mixed use premises: in these circumstances the business rates paid may be less than the council tax, but the undiscounted business rates would be higher. The size of the business occupier can also determine the amount of rates paid – an occupier which is part of a large chain will pay more in business rates than a small standalone business.

We welcome the restatement of a core principle of the WRC, since it is often lost in the detail of individual cases:

> 'In general, under the Wholesale Retail Code (WRC), each individual non-household premises should be supplied via its own supply point'

We encourage Ofwat to hold up to the light of this principle the examples that Ofwat sets out in the Guidance, and those we give in this commentary. It applies beyond the context of joint billing. A key example of this is the statement that:

> *'In certain circumstances, it may be justifiable for a retailer to supply several non-household properties through a single supply point – for example, because they are supplied via a private distribution network (for example, such as on certain industrial estates) and there is evidence of a joint billing agreement. In such circumstances, these properties should be treated as a single premises.'*

This statement omits consideration of several issues that we have struggled to resolve adequately.

- First, the term 'private distribution network' is undefined. It is susceptible to (mis)use by Wholesalers, and is often (mis)used by them, as an excuse for resolving what are essentially gap sites (the resolution chosen by Ofwat in a specific case of exactly this kind). The guidance given in that case ought to be reflected in this Guidance, as it remains a source of contention with certain other Wholesalers and thus of potential requests for determination.

- Second, 'evidence' of a joint billing agreement is frequently contested – for example, as being constituted by a service charge, a historical practice or an unwritten (mis)understanding.

- Third, even if 'evidence' of a joint billing agreement exists, its enforceability is frequently disputed. It may be with the previous incumbent, so predate the opening of the NHH market and going against the principle that there should be a SPID for each premises. It may involve premises that are not, or are no longer, NHH premises, implying that in mixed use cases billing agreements may override whether a property is eligible.

- Fourth, and in any event, the parties to such an agreement have often changed, such that the customer is prevented from switching supplier. This goes against the primary duty and principle to protect the interests of existing *and future* customers. Although Ofwat states that the Retailer may seek, and Wholesaler must consider, registration of individual supply points the customer may not willingly enter into contention with the counterparty (say, the landlord).

We consider that these situations should be addressed the Guidance and Scenarios.

2.3.1 Principal use

As noted above, the Guidance needs to recognise that the various forms of premises identifiers may not provide a consistent or definitive answer and that, *absent* a site visit, a degree of judgment will be needed. We also note the limited value of the billing categorisation to which the Guidance refers in this and the following section on mixed use (with which questions of 'extent' often overlap), as this is essentially what is in dispute in such cases.

2.3.2 Mixed use premises

Among the many instances of 'shared supply' situations we encounter, we frequently find premises consisting of a shop with flat(s) above where there is a single meter for the shop, the shop is permanently closed and the occupier(s) of the flat(s) deny responsibility for any or all metered consumption.

The question therefore arises whether these are in fact still mixed use premises. Marking the whole premises vacant or deregistering the Supply Point ("SPID") is clearly not a sufficient answer since consumption is continuing. The Guidance should make it clear whether, in these circumstances, the *de facto* principal use remains NHH, the Wholesaler can continue to invoice the Retailer, and the Retailer bill the occupier(s) of the flat(s) on an assessed basis.

2.4,1 How to resolve disputes about eligibility

Noting the limited types of issue that Ofwat states it expects to see, these nonetheless continue to occur in multitudes. Accordingly, and given all efforts to resolve them informally, Ofwat sees only a fraction of the tip of the iceberg. The role of Ofwat in determining these matters in appropriate cases therefore remains important.

In this context, we note Ofwat's reference to:

> 'Where there are issues with backdating an account, dur to the eligibility status of a premises changing, it is for the relevant parties to agree on a reasonable date to backdate the eligibility status, factoring in when the issue of eligibility was first raised.'

We would not wish this to be construed as meaning that this issue would never be among those that Ofwat could determine; or that there is a presumption that factors other than when the issue was first raised are not relevant. Some more specifics would be helpful - for example, the relationship with the restrictions on Unplanned Settlement Runs; the back-billing restrictions in the Customer Protection Code of Practice; and where it proves to have predated market opening.

Castle Water Limited

28 February 2022.