

Legacy Charging Arrangements

Irish Water Process

Effective Date: January 2021



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1. EXECUTIVE SUMMARY

This Process sets out how Irish Water will review and assess Legacy Charging Arrangements so as to allow Irish Water to make a determination as to whether it is legally bound to honour such arrangement(s).

The CRU has published its Decision Paper on Irish Water's Non-Domestic Tariff Framework¹ which sets out the tariff framework which will generally apply to all of Irish Water's non-domestic customers. It is acknowledged that there are a small number of historical Legacy Charging Arrangements which may contain terms that are at variance to the provisions set out in Irish Water's Non-Domestic Tariff Framework.

In its Decision Paper on Irish Water's Non-Domestic Tariff Framework, the CRU stated the following:

"Customers on legacy legally binding contracts

It is acknowledged that there may be a small number of legacy arrangements that currently exist. These legacy arrangements may include historical agreements or contracts entered into by a customer with a Local Authority, which may include legally binding bespoke provisions relating to the provision of water and/or wastewater services.

The CRU does not have legal powers to assess or approve legacy legal agreements or contracts made between Local Authorities and non-domestic customers. However, to ensure that Irish Water carry out its functions in an open and transparent manner, and to protect the interests of all non-domestic customers, the CRU has asked Irish Water to set up a process to deal with customers who claim to have an existing agreement or contract for the provision of water and wastewater services.

This process will allow Irish Water to make a determination as to whether it is legally bound to honour an individual agreement or contract and communicate this to customers. Any disputes that may arise between the customer and Irish Water will be a matter for both parties to resolve. This process should clearly set out how a customer can submit an application to Irish Water and what is required. It should also set out a reasonable timeframe within which Irish Water will assess an application and provide its determination to a customer".

This Irish Water Process is published in response to the CRU's Decision Paper and in an effort to set out clearly how Irish Water will make a determination as to whether it is legally bound to honour a Legacy Charging Arrangement.

Irish Water is committed to developing a clear, open, transparent and fair process in respect of its review and assessment of such Legacy Charging Arrangements. In particular, Irish Water is aware of its duty to act rationally, proportionately and in a non-

¹ www.cru.ie/wp-content/uploads/2019/07/CRU19074-CRU-Decision-Paper-Irish-Waters-Non-Domestic-Tariff-Framework-1.pdf

discriminatory manner in respect of its review and assessment of Legacy Charging Arrangements.

This Process outlines all of the steps that an Applicant should follow in order to apply to Irish Water to have a Legacy Charging Arrangement assessed and determined. This Process also briefly outlines how Irish Water will review and assess each Legacy Charging Arrangement and how Irish Water will interact and communicate with Applicants in relation to Legacy Charging Arrangements.

In summary, Irish Water will consider itself bound by a Legacy Charging Arrangement where all of the following criteria are fulfilled:

- i. the Applicant can demonstrate to Irish Water that the Legacy Charging Arrangement has clear terms (including in relation to price) which set out the basis on which a water services authority was to supply water and/or provide waste water services; and
- ii. the Applicant can demonstrate to Irish Water that consideration for money or money's worth was provided to the water services authority for the supply of water and/or the provision of waste water services on those terms; and
- iii. the rights and liabilities in the Legacy Charging Arrangement have transferred to Irish Water pursuant to sections 12, 13 or 14 of the Water Services (No. 2) Act 2013; and
- iv. Irish Water is satisfied that on the balance of probabilities the evidence provided establishes the existence and the terms of the Legacy Charging Arrangement.

The Process(es) set out in this document will be applied consistently by Irish Water and will not have any regional or local variations.

This Process relates to Legacy Charging Arrangements only and does not have any bearing on, or relevance to, the other matters set out in Irish Water's Non-Domestic Tariff Framework.

Irish Water expects that there will only be a very small number of Applications made to it in relation to Legacy Charging Arrangements and that the vast majority of Irish Water's non-domestic customers will transition to the standard tariffs that are set out in the Irish Water Non-Domestic Tariff Framework. The strict legal criteria under which a Legacy Charging Arrangement will be assessed are set out below and should be reviewed in full. However it is important to bear in mind that every Applicant will need to demonstrate to Irish Water how the provisions set out in the Legacy Charging Agreement are now binding on Irish Water. To do so they will need, amongst other things, to establish that the Legacy Charging Agreement has been specifically transferred to Irish Water by way of a Ministerial Order or that the Legacy Charging Agreement relates to land or other property which has vested in Irish Water by way of a Ministerial Order.

This Process relates only to the supply of water and/or the provision of standard waste water services but it does not relate to the discharge of trade effluent (as that term is referred to in the Irish Water Non-Domestic Tariff Framework). It is acknowledged that there may be some customers who claim to have existing special arrangements (and prices) in relation to the discharge of trade effluent. In accordance with the terms of the Irish Water's Non-Domestic Tariff Framework such existing trade effluent arrangements shall not be changed until such time as a new CRU approved trade effluent tariff comes

into operation. It is envisaged that, at such time, a similar type process to this Process will be implemented for any customers who seek to continue to avail of their existing arrangements in relation to trade effluent. In any determination in relation to a Legacy Charging Arrangement Irish water will make it clear whether it considers that any part of the Legacy Charging Arrangement relates to trade effluent which is not part of this Process (and which will not be subject to a determination under this Process).

2. GLOSSARY OF TERMS USED IN THIS PROCESS DOCUMENT

“Applicant” means the person or entity who has submitted an Application Form to Irish Water in respect of a Legacy Charging Arrangement (or on whose behalf the Application Form has been submitted).

“Application” means a formal request by an Applicant, by way of submission of an Application Form, to Irish Water for a determination to be made in relation to a Legacy Charging Arrangement.

“Application Form” means the application form associated with this Process which is to be submitted by the Applicant to Irish Water in respect of a Legacy Charging Arrangement.

“Irish Water’s Non-Domestic Tariff Framework” means the CRU approved tariff framework which will apply to Irish Water’s non-domestic customers².

‘Legacy Charging Arrangement’ means a contract, commitment or other similar arrangement which an Applicant claims existed prior to 1 January 2014³ as between the Applicant and a water services authority⁴, containing bespoke provisions relating to the provision of water and/or wastewater services⁵ which, the Applicant claims, are binding on Irish Water (but does not include any part of such contract, commitment or other similar arrangement that relates to trade effluent)

“Process” means the Irish Water process(es) as set out in this document.

This Process sets out the steps that an Applicant must follow and that Irish Water will implement in respect of Irish Water’s assessment as to whether the rights and liabilities set out in a Legacy Charging Arrangement have transferred to Irish Water.

² Which is, at the date of publication of this Process, to become effective on 1 May 2021.

³ i.e before the transfer of functions from water services authorities to Irish Water pursuant to the Water Services (No.2) Act 2013.

⁴ Or any predecessor to a water services authority.

⁵ Often in relation to the charge to be levied in respect of the provision of water and/or wastewater services.

3. GUIDING PRINCIPLES

There are a number of guiding principles that will inform Irish Water's review of all Applications in respect of Legacy Charging Arrangements. These are set out below.

- The Applicant has a right to a fair and impartial consideration of its Application.
- The Applicant has a right to provide Irish Water with all of the information that it considers relevant in respect of its Application and to have all of that information impartially assessed by Irish Water.
- The Applicant has a right to understand the criteria under which its Application will be assessed.
- The Applicant has a right to receive reasons in respect of any determination that is made by Irish Water.
- The Applicant has a right to have a determination made by Irish Water internally reviewed by Irish Water.
- The Applicant will be given the opportunity to fully present its claim, including reasonable time to consider and respond fully to any correspondence or queries from Irish Water. The Applicant will, so far as is reasonably practicable, be given an opportunity to put forward all supporting information and documentation in respect of its Application. The Applicant should advise Irish Water as soon as possible if it is of the view that it has not been afforded this opportunity.

4. CRITERIA UNDER WHICH A LEGACY CHARGING ARRANGEMENT WILL BE ASSESSED

Irish Water in assessing a Legacy Charging Arrangement will consider whether all of the following criteria have been met:

- i. whether the Applicant has demonstrated that the Legacy Charging Arrangement has clear terms (including in relation to price) which set out the basis on which a water services authority was to supply water and/or provide waste water services; and
- ii. whether the Applicant can demonstrate that consideration⁶ for money or money's worth was provided to the water services authority for the supply of water and/or the provision of waste water services on those terms; and
- iii. whether the rights and liabilities in the Legacy Charging Arrangement have transferred to Irish Water pursuant to sections 12, 13 or 14 of the Water Services (No. 2) Act 2013; and
- iv. whether Irish Water is satisfied that on the balance of probabilities the evidence provided establishes the existence and the terms of the Legacy Charging Arrangement.

When (i), (ii), (iii) and (iv) have all been established to the satisfaction of Irish Water it will be determined that the rights and liabilities set out in a Legacy Charging Arrangement have transferred to Irish Water.

When (i), (ii), (iii) or (iv)⁷ have not been established to the satisfaction of Irish Water it will be determined that the rights and liabilities set out in a Legacy Charging Arrangement have not transferred to Irish Water. In such circumstances the Applicant will be charged for the provision of water services in accordance with Irish Water's Non-Domestic Tariff Framework⁸.

Criteria (iii) refers to sections 12, 13 or 14 of the Water Services (No. 2) Act 2013. These sections are replicated in Appendix 1 but an Applicant may wish to obtain independent legal advice in respect of their interpretation and meaning.

In circumstances in which a Legacy Charging Arrangement relates both to (a) water supply and (b) waste water services, it is possible that Irish Water might make a different determination in respect of (a) and (b). If this does occur the Applicant will be advised of this when the determination issues.

⁶ Consideration is a legal concept but, in this context, broadly means the price that was paid for the supply of water on the terms set out in the Legacy Charging Arrangement.

⁷ Each of the 4 criteria must be established in full. It is not sufficient for some but not all of the criteria to be established.

⁸ When that becomes operative (if it is not operative as at the date of the determination).

5. STAGES OF THE APPLICATION ASSESSMENT PROCESS

There are 5 broad stages to the Application assessment process:-

Stage 1: Submission of completed Application Form:

The first step in the process is for the Applicant to submit an Application Form (and, if relevant, any supporting documents) to Irish Water. The Application Form is available on Irish Water's website and details as to how the Application Form should be submitted to Irish Water are contained within it.

Irish Water will only consider those submissions that are made pursuant to the Application Form.

Timing: *The Application Form must be submitted to Irish Water no later than six months from the first demand for payment being made by Irish Water pursuant to the terms of the Water Charges Plan that implements Irish Water's Non-Domestic Tariff Framework or no later than six months from the alleged transfer of the rights pursuant to sections 12, 13 or section 14 of the Water Services (No 2) Act 2013, whichever is later. Applications received outside of this timeframe will not be considered.*

Stage 2: Review of Application Form by Irish Water:

Following receipt of the Application Form Irish Water will make contact with the Applicant if it requires further supporting particulars or information (or a site visit) in respect of the matters set out in the Application Form (see Stage 3 below) prior to moving to Stage 4 of the Process.

If Irish Water does not require further supporting particulars or information (or a site visit) in respect of the matters set out in the Application Form then Irish Water will immediately proceed to Stage 4 of this Process.

Stage 3: Further particulars/information/site visit (if considered necessary):

If considered necessary Irish Water will request further supporting particulars or information from the Applicant prior to moving to stage 4 of the Process (and Irish Water may also seek a site visit). The Applicant will be given a reasonable time period by which to respond to any such request(s) (and to permit a site visit). Irish Water's request(s) for further information and particulars will be clear and the onus is on the Applicant to provide Irish Water with all the evidence it requires to review and properly consider the Legacy Charging Arrangement.

There shall be no limit to the number of times such further and better particulars and information (and site visits) can be requested by Irish Water. However Irish Water is committed to only seeking such further particulars and information and carrying out site visits where it is deemed necessary.

When Irish Water is satisfied with the particulars and information that have been provided to it (and/or is satisfied with the site visit that has been carried out) it will move immediately to Stage 4 of this Process. There is no obligation on Irish Water (although it may do so if it so wishes) to move to Stage 4 of this Process if it is not satisfied with the particulars and information that have been provided to it (and/or is not satisfied with the site visit that has been carried out).

Stage 4: Irish Water issues a written determination

Prior to making its determination Irish Water will consider all of the information and particulars provided to it by the Applicant pursuant to this Process (and any relevant observations from a site visit). The review of the information and particulars will be conducted thoroughly, impartially and objectively.

A determination will be made by Irish Water and issued in writing to the Applicant. Reasons for the determination will be given to the Applicant.

Irish Water will endeavour to make a determination within 2 months of Irish Water moving to stage 4 of this Process (and the determination will issue to the Applicant as soon as possible thereafter). The determination will set out whether or not Irish Water considers that the the rights and liabilities set out in a Legacy Charging Arrangement have transferred to Irish Water (in whole or in part).

The Applicant will be advised of the entitlement to seek a review of the determination.

Stage 5: Review of Determination

The Applicant has the right to seek a review of the determination issued to it under Stage 4 of the Process. The Applicant must seek such a review no later than 14 days following the issue of the determination to it (excluding the date of issue). The request for a review of the determination should be made in writing to Irish Water and accompanied by (a) a copy of the determination sought to be reviewed and (b) any further or additional material or information the Applicant seeks to have considered as part of the review. The request for a review should be sent by email to business@water.ie or by post to Irish Water, PO Box 860, South City Delivery Office, Cork City and clearly headed 'Request for Review following the issue of a determination by Irish Water in relation to a Legacy Charging Arrangement'.

The review will be completed expeditiously by Irish Water (and the outcome of the review will issue to the Applicant as soon as possible thereafter). If Irish Water seeks further or additional supporting documents or information from the Applicant in respect of the review then the review will be completed expeditiously from the date of the last submission of such information.

The review will be carried out by a person or persons not involved in the prior assessment of the Application.

Following the review the Applicant will be advised as to whether the determination made at Stage 4 above has been confirmed or quashed. If the determination has been quashed the Applicant will be advised as to whether an alternative determination has been made (and if so, what that alternative determination is).

6. MISCELLANEOUS

In the event that any determination issued by Irish Water indicates that the rights and liabilities as set out in the Legacy Charging Arrangement have not transferred to Irish Water (and such determination is not sought to be reviewed or, alternatively, is confirmed on review), the Applicant will be charged for, and liable to pay for, water services on basis of and in accordance with Irish Water's Non-Domestic Tariff Framework, as from the date of commencement of the Irish Water's Non-Domestic Tariff Framework. Any payments that have been made in accordance with the Legacy Charging Agreement, as from the date of commencement of Irish Water's Non-Domestic Tariff Framework, will be used to offset the liability (or part of the liability, as the case may be) that arises under Irish Water's Non-Domestic Tariff Framework. Any amount that remains unpaid after the application of payments made pursuant to the Legacy Charging Agreement will be a debt due to Irish Water, recoverable in the normal way.

In the event that any determination issued by Irish Water indicates that the rights and liabilities as set out in the Legacy Charging Arrangement have transferred to Irish Water, the following provisions shall apply:

- Irish Water reserves all its rights in relation to the Legacy Charging Arrangement, including any right(s) it may have to vary the terms or to terminate any such Legacy Charging Arrangement.
- The Applicant will, for the time being, be charged in accordance with the terms and provisions of the Legacy Charging Arrangement as opposed to Irish Water's Non-Domestic Tariff Framework. In the event that the Applicant was moved to Irish Water's Non-Domestic Tariff Framework before the determination was made, Irish Water will revert to the charging arrangements in the Legacy Charging Arrangement and issue a revised bill. Any monies paid by the Customer in excess of the monies payable pursuant to the Legacy Charging Arrangement will be refunded (or used to offset any arrears in the Customer's account). Such a refund will not apply to any period of time where the rights and liabilities set out in the Legacy Charging Arrangement had not legally transferred to Irish Water under the Water Services (No.2) Act 2013.
- All outstanding arrears on the basis of the Legacy Charging Arrangement must be paid by the Applicant to Irish Water.

Irish Water will endeavour to treat all of our correspondence and dealing with the Applicant as confidential (unless we have a legal or other obligation to disclose them to a third party).

Every effort will be made by Irish Water to adhere to the timelines as set out in this Process. However, the timelines may be extended at Irish Water's discretion in exceptional circumstances. In particular, Irish Water may need to carry out site visits in relation to

matters set out in the Application Form and such site visits may lead to timelines being extended.

This Process is intended to be a living document which may be updated and amended from time to time.

For the manner in which Irish Water treats your personal data, please see our Privacy Notice on <https://www.water.ie/privacy-notice/> or by requesting a copy from our Data Protection Officer.

Appendix One

Sections 12, 13 and 14 of the Water services (No.2) Act 2013

Transfer of property of water services authorities

12. (1) The Minister may, on or after the transfer day, from time to time, by order, appoint a day (in this Part referred to as a "property vesting day") for the purposes of this section and different property vesting days may be so appointed in relation to—

(a) different water services authorities, and

(b) different property or class or classes of property of a water services authority.

(2) An order under this section shall designate such property, or such class or classes of property, of a water services authority as the Minister may determine.

(3) The Minister may request a water services authority to furnish him or her with such information as he or she may require for the purposes of his or her deciding whether or not to make an order under subsection (1).

(4) A water services authority shall comply with a request under subsection (3) not later than 3 months from its having received the request.

(5) On a property vesting day any land designated by the order by which that property vesting day was appointed and all rights, powers and privileges relating to or connected with such land shall, without any conveyance or assignment, stand vested in Irish Water for all the estate or interest therein that, immediately before that day, was vested in the water services authority concerned, but subject to all trusts and equities affecting the land continuing to subsist and being capable of being performed.

(6) On a property vesting day all property (other than land), including choses-in-action, designated by the order by which the property vesting day was appointed that immediately before that day, was vested in the water services authority concerned shall, without any assignment, stand vested in Irish Water.

(6A) The vesting of any property (including land or an interest in land) in Irish Water, on a property vesting day, is not to be considered as a disposal of the property by the water services authority concerned, but as a transfer to Irish Water⁹.

(7) Every chose-in-action vested in Irish Water by virtue of subsection (6) may, on and after the property vesting day concerned, be sued on, recovered or enforced by Irish Water in its own name, and it shall not be necessary for Irish Water or the water services authority concerned to give notice to any person bound by the chose-in-action of the vesting effected by that subsection.

(8) Any moneys received by a planning authority in accordance with section 48 or 49 of the Act of 2000 and vested in Irish Water pursuant to an order under this section, shall be expended by Irish Water for the purposes of the provision of water services in the functional area of that planning authority.

(9) Section 183 of the Act of 2001 shall not apply to the vesting of land under this section.

(10) In this section—

“borough council” means a body specified in Chapter 1 of Part 1 of Schedule 6 to the Act of 2001;

“town council” has the same meaning as it has in the Act of 2001;

“water services authority” includes a town council and a borough council.

Transfer of rights and certain liabilities, and continuation of leases, licences and permissions granted by water services authorities

13. (1) All rights and liabilities of a water services authority—

(a) subsisting immediately before a property vesting day, and

(b) arising by virtue of any contract or commitment (expressed or implied) relating to any land or other property designated by the order under section 12 that appointed that day,

shall on that day stand transferred to Irish Water.

(2) Every right and liability transferred by subsection (1) to Irish Water may, on and after the property vesting day on which the right or liability stood transferred, be sued on, recovered or enforced by or against Irish Water in its own name, and it shall not be necessary for Irish Water or the water services authority concerned to give notice of its transfer to any person.

⁹ Inserted by S10 of the Water Services Act 2014.

(3) Every lease, licence, wayleave or permission granted by a water services authority in relation to land or other property vested in Irish Water by or under this Act, and in force immediately before the property vesting day concerned, shall continue in force as if granted by Irish Water.

Transfer of other liabilities

14. (1) The Minister may, from time to time, appoint a day by order for the purposes of this section, and different days may be so appointed in relation to—

(a) different water services authorities, or

(b) different contracts or commitments (expressed or implied) to which a water services authority is a party.

(2) All rights and liabilities of a water services authority—

(a) subsisting immediately before such day as may be appointed by order under this section, and

(b) arising by virtue of any contract or commitment (expressed or implied) designated by that order,

shall on that day stand transferred to Irish Water.

(3) Every right and liability transferred by subsection (2) to Irish Water may, on and after the day on which the right or liability stood transferred, be sued on, recovered or enforced by or against Irish Water in its own name, and it shall not be necessary for Irish Water or the water services authority concerned to give notice of its transfer to any person.