



**Decision to accept binding commitments from
Bristol Water plc**

23 March 2015

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1. Executive summary

- 1.1. Ofwat has concurrent powers with the Competition and Markets Authority (**CMA**) to investigate potential infringements of the prohibition in Chapter II of the Competition Act 1998 (**the Act**) and/or Article 102 of the Treaty on the Functioning of the European Union (**TFEU**).
- 1.2. In March 2013, Ofwat opened an investigation into Bristol Water plc (**Bristol Water**). This followed complaints from two self-lay organisations¹ (**SLOs**), Aquamain Limited (**Aquamain**) and Energetics Design & Build (**Energetics**), which alleged that Bristol Water was using its dominant position² to discriminate against SLOs and hence restrict competition in the related new water connections market³. In addition to responding to the two specific complaints, Ofwat considered that the allegations raised issues of strategic significance for the water and wastewater sector in England and Wales, given that the new water connections market is one of only a few areas of competition in the market in the sector.
- 1.3. During the early stages of its investigation, Ofwat identified four competition concerns related to Bristol Water's conduct (including pricing and non-pricing behaviours) that could potentially restrict entry and expansion of competitors in the new water connections market in Bristol Water's area.
- 1.4. In July 2013, Bristol Water notified Ofwat that it wished to offer commitments to address the concerns. Bristol Water offered a comprehensive set of commitments in January 2014.
- 1.5. Between 22 May and 18 July 2014, Ofwat [consulted on its intention to accept binding commitments from Bristol Water plc](#) under the Act. These commitments were offered to address competition concerns that Bristol

¹ A self-lay organisation is a contractor or multi-utility infrastructure provider that provides water supply infrastructure for developers.

² As a result of its appointment under the Water Industry Act 1991 as the monopoly water company for a defined geography, Bristol Water is the only body able to provide certain, non-contestable services necessary to providing new water connections.

³ The new water connections market comprises the contestable services required to provide new water mains and service pipes to provide a water supply for domestic use. Further background information on this contestable market can be found in chapter 4 of Ofwat's notice of its intention to accept binding commitments from Bristol Water:

http://www.ofwat.gov.uk/mediacentre/ibulletins/prs_ib1214brlsl0.

Water's conduct (including pricing and other behaviours) could potentially be restricting the entry and expansion of competitors in the contestable provision of new water connections in Bristol Water's area of appointment.

- 1.6. Ofwat received seven responses to its public consultation. These came from one of the complainants, Energetics; three customer representative bodies (the Consumer Council for Water; the Home Builders Federation; and Fair Water Connections); two water and wastewater companies (Business Stream and United Utilities); and a private consultancy company (David W Heath Ltd). These responses included:
- comments on the specific issues relating to Bristol Water's conduct and its proposed commitments; and
 - more general comments about the effectiveness of the new water connections market in the water and wastewater sector and Ofwat's role.
- 1.7. On the whole, none of the responses raised concerns that, if implemented, the framework of commitments offered by Bristol Water would not address the competition concerns identified. Respondents noted that some improvements were already visible and taking effect as a result of Bristol Water having already started to implement the proposed commitments.
- 1.8. A number of respondents said that the commitments' monitoring arrangements were unclear. The consultation had also sought views on the types of information Bristol Water should provide to Ofwat to evidence its implementation of and compliance with the commitments. Between the closure of the consultation and our final decision, Ofwat has required Bristol Water to strengthen and further detail how and when it will provide updates to Ofwat to demonstrate its implementation and ongoing compliance with the commitments.
- 1.9. Some respondents noted that they considered the competition concerns identified in this case were also relevant to other water and wastewater companies in the sector, but they noted that this case alone would be unlikely to fully address the significant issues for the wider sector. Ofwat is alert to this concern and will consider opening further investigations where it has reasonable grounds for suspecting an infringement of competition law and

where it satisfies Ofwat's prioritisation principles⁴. Alternatively, Ofwat may use its relevant powers under the Water Industry Act 1991 (**WIA91**) in a manner which is best calculated, among other things, to protect the interests of consumers, wherever appropriate by promoting effective competition. Before using its enforcement powers under the WIA91 Ofwat will consider whether it would be more appropriate to proceed under the Act.

- 1.10. Having considered the consultation responses, Ofwat is satisfied that the commitments offered by Bristol Water:
- address the competition concerns identified;
 - are capable of being implemented effectively and within a short period of time; and
 - would not undermine deterrence if accepted.
- 1.11. In line with its prioritisation principles, Ofwat also considers that accepting the commitments represents the most appropriate and timely use of Ofwat's resources. The alternative of not accepting the commitments and continuing the investigation would require significant additional resource (potentially over several years). It would also limit the case's strategic relevance in relation to both the existing new water connections market and the expansion of the non-household retail market in 2017.
- 1.12. Ofwat's decision to accept binding commitments is not a decision on the legality or otherwise on the conduct of Bristol Water under the investigation either prior to acceptance of the commitments or once the commitments are in place. It is important to note that Ofwat's decision is made on the particular facts of this case, and this decision does not affect Ofwat's ability to come to a different conclusion in a similar case in the future.
- 1.13. This document sets out Ofwat's final decision on this case. As a result of accepting the commitments, Ofwat has closed its investigation with no decision made on whether or not Bristol Water infringed Chapter II of the Act. Acceptance of the commitments does not prevent Ofwat at a future point from continuing its investigation; making a decision; or giving a direction in circumstances where Ofwat has reasonable grounds for:

⁴ For further information on how Ofwat prioritises its Competition Act 1998 cases please refer to: http://www.ofwat.gov.uk/competition/ca98/prs_inf_100920ca98priority.pdf

- considering that there has been a material change of circumstances since the commitments were accepted;
- suspecting that Bristol Water has failed to adhere to one or more of the terms of the commitments; or
- suspecting that information which led Ofwat to accept the commitments was incomplete, false or misleading in a material particular⁵.

1.14. Furthermore, acceptance of the commitments does not prevent Ofwat from taking further enforcement action in relation to any different alleged abuses of dominance in related markets which may come forward and raise competition concerns and where there may be harm to consumers.

⁵ Section 31B(4) of the Act.

2. Background to this decision

The complaints

- 2.1. In January and February 2013, Ofwat received two complaints from accredited SLOs regarding the conduct of Bristol Water, the company appointed under section 6 of the WIA91 as the water undertaker⁶ (otherwise known as the ‘water company’) for its specified area of appointment.
- 2.2. Aquamain alleged that Bristol Water was abusing its dominant position as an appointed water company to apply dissimilar cost offerings for equivalent transactions in providing new connections infrastructure. Aquamain claimed that this was due to:
- Bristol Water’s treatment of costs in the calculation of the asset payment for self-laid infrastructure being different to its treatment of costs when calculating the requisition charge for works provided by Bristol Water⁷; and
 - how Bristol Water applied the income offset provided for in each of these calculations.
- 2.3. Aquamain also alleged that Bristol Water was abusing its dominant position by introducing a requirement for SLOs to pay a surety for self-laid mains and service connections⁸. Aquamain claimed that both of these issues resulted in the requisition option appearing cheaper to developers than the self-lay option, making it difficult for SLOs to compete with Bristol Water’s own developer services business.
- 2.4. Energetics alleged that Bristol Water was abusing its dominant position as the area’s appointed water company by introducing a requirement for SLOs to pay

⁶ The legal term for a company that has an appointment (otherwise known as a licence) to supply water services to a specific geographic area of England and Wales is a ‘water undertaker’.

⁷ The methods for calculating both the requisition charge and the asset payment are prescribed in the Water Industry Act 1991. Both account for the costs reasonably incurred in providing works and an offset of income received by the water company as a result of newly connected premises.

⁸ Bristol Water was requiring SLOs to provide a surety or security payment of 10% of the value of the works they self-laid. Bristol Water would hold this for a defined retention period to use to remedy any defects that arose in the self-laid works during that period. The remainder would be returned to the SLO at the end of the retention period.

sureties for self-laid mains and service connections. Energetics alleged that this behaviour was damaging Energetics' opportunities to trade within Bristol Water's area.

- 2.5. Both complaints alleged that Bristol Water was abusing the dominant position afforded by its appointment for a particular area under the WIA91 from its core upstream regulated business (to supply water services and non-contestable services required for the provision of new connections infrastructure) in the related market of provision of downstream contestable services for new water connections. The complainants alleged that Bristol Water was doing this by discriminating in the price and non-price terms it applied for its services, offering, for equivalent transactions, different terms to SLOs compared with its own downstream contestable services to provide new water connections (that is, its developer services business).
- 2.6. Such behaviours could have an exclusionary effect on competition by making the offer of Bristol Water's developer services business more attractive to developer customers than that SLOs could offer. This could restrict the entry and expansion of SLOs in the provision of contestable new connections services in Bristol Water's area. The abuse of a dominant position, in the market where there is dominance or a related market, is prohibited by Chapter II of the Competition Act 1998 (**the Act**) and Article 102 of the Treaty on the Functioning of the European Union (**the TFEU**)⁹.

Ofwat investigation

- 2.7. Ofwat has concurrent powers with the Competition and Markets Authority (**CMA**)¹⁰ to investigate potential infringements of the prohibition in Chapter II of the Act and/or Article 102 of the Treaty on the Functioning of the European Union (**TFEU**) so far as relating to “**commercial activities connected with**

⁹ In Ofwat's notice of intention to accept the commitments there were references to Article 102 TFEU. However, despite the possible implication from these references that Ofwat used its Article 102 TFEU functions, for the avoidance of doubt, in this case Ofwat only used its Chapter II functions and did not use any functions under the TFEU.

¹⁰ The Competition and Markets Authority assumed the functions of the previous Office of Fair Trading and the Competition Commission on 1 April 2014. Further information about the CMA can be found at: <https://www.gov.uk/government/organisations/competition-and-markets-authority>

the supply of water or securing a supply of water or with the provision or securing of sewerage services”¹¹.

- 2.8. On 11 March 2013, Ofwat launched a formal investigation under section 25 of the Act, on the basis that there were reasonable grounds to suspect that Bristol Water had infringed Chapter II of the Act¹².
- 2.9. Providing new water connections is currently one of only a few areas of competition in the water and wastewater sector. Ofwat considered opening this case to be strategically significant since the level playing field and competition compliance issues it raises are relevant to the sector as a whole. Water and wastewater companies’ understanding and management of these issues will be key to the effectiveness of both existing and new areas of competition in the sector arising as a result of the pro-competition clauses in the Water Act 2014¹³. When Ofwat opened its investigation, it considered that this could potentially bring direct benefits to SLOs and their customers in Bristol Water’s area, as well as indirect benefits for customers in other areas arising from the awareness and deterrence effects the case could have for the wider sector.
- 2.10. In order to gather further evidence for its investigation, Ofwat served notices under section 26 of the Act to Bristol Water on 28 March 2013 and to Aquamain and Energetics on 10 April 2013. Having received responses to these between April and June 2013, Ofwat identified four competition concerns regarding potentially exclusionary conduct by Bristol Water, including pricing and other behaviours. These concerns were:
- 1) **Potential leveraging of a dominant position in upstream services to harm effective competition for downstream services.** Bristol Water is a vertically integrated business that is both dominant in the provision of the

¹¹ See section 31 of the WIA91.

¹² Press notice of case opening: http://www.ofwat.gov.uk/mediacentre/ibulletins/prs_ib0413ca98slc.

¹³ Further background information on the changing competition landscape in the water and wastewater sector can be found in chapter 4 of Ofwat’s notice of its intention to accept binding commitments from Bristol Water: http://www.ofwat.gov.uk/mediacentre/ibulletins/prs_ib1214brlslo. The Water Act 2014 will bring significant reforms to the water sector. Amongst other measures it will enable all non-household customers in England to switch their water and wastewater retailer; make it easier for water companies to trade water; and allow businesses to provide new sources of water or wastewater treatment services. Further details about the Water Act 2014 can be found at: <https://www.gov.uk/government/policies/reforming-the-water-industry-to-increase-competition-and-protect-the-environment/supporting-pages/reform-of-the-water-market-the-new-water-bill>.

non-contestable upstream services necessary for SLOs to compete in Bristol Water's area of appointment and a competitor of SLOs in providing downstream contestable services for new connections. This vertical integration creates the potential and incentive for Bristol Water to leverage its dominance in upstream services into the provision of downstream services, so as to foreclose effective competition. The alleged practices detailed in concerns 2–4 below raise concerns about whether potential future leveraging by Bristol Water could give rise to further, different practices which could have anti-competitive effects. Ofwat attached particular weight to this concern and considered that any commitments proposed by Bristol Water should address concerns about potential further, different leveraging practices.

- 2) **Differences in the treatment of costs in the calculation of self-lay and requisition quotations which can result in the amount presented to the customer as being recovered by Bristol Water being less for the requisition than the self-lay option.** This conduct has the potential to exclude equally efficient operators from competing against Bristol Water's developer services business. Differences in Bristol Water's quotations were driven by differences in Bristol Water's calculation of the requisition charge and asset payment values¹⁴, in particular as a result of:
- a. differences in the costs included in the calculations depending on whether it was requisitioned or self-laid, despite the works entailed being the same and the limited differences in the legal provisions for these two calculations; and
 - b. the exclusion of the costs of non-contestable off-site works from the total costs reasonably incurred against which income is offset within the asset payment calculation for self-laid mains, despite providing the income offset against the entirety of the contestable and non-contestable works in the equivalent requisition charge calculation.
- 3) **The additional charges Bristol Water required of SLOs without a clear objective justification for and transparency around the reasons for the charges, the level of the charges and differences in their application between SLOs.** The evidence gathered suggests that Bristol Water was levying a range of charges for self-laid infrastructure as

¹⁴ The methods set out in the Water Industry Act 1991 for calculating the requisition charge and asset payment broadly mirror each other.

part of the commissioning of the upstream services that SLOs need in order to compete in providing downstream services. These charges included a requirement to provide Bristol Water with a security payment or surety in respect of the SLO's works (to cover the possibility of defects) and a range of administrative fees in relation to applications and inspections. There may be justification for additional charges where additional services are provided. But where the service provided was equivalent Bristol Water did not always apply these charges in the same way to its own downstream services. These additional charges could increase costs for SLOs and put them at a disadvantage when competing with Bristol Water to provide developer services business. This has the potential to prevent the entry and expansion of equally efficient operators in providing downstream services.

- 4) **Bristol Water's interactions with SLOs in terms of communicating information to SLOs and developers on the processes and the prerequisite requirements they need to satisfy in order to access the upstream services provided by Bristol Water.** The complaints and evidence reviewed highlighted concerns that Bristol Water's conduct with SLOs may have included applying non-price constraints on the ability of SLOs to enter and expand in the provision of downstream services. The alleged conduct included:
- a. limited or no communication of changes in information requirements for particular services;
 - b. difficulties SLOs experienced in finding public information on expected processes and levels of services;
 - c. delays in Bristol Water's provision of information and upstream services impacting on the work schedule of SLOs; and
 - d. examples of Bristol Water choosing to or requiring that they liaise directly with the SLO's developer customer rather than via the SLO (which is Bristol Water's customer), for whom the developer is their customer.

The commitments offered

- 2.11. Ofwat held a series of meetings with Bristol Water to explain its competition concerns. On 5 July 2013, Bristol Water notified Ofwat that it wished to offer commitments to address Ofwat's competition concerns. Ofwat outlined its competition concerns in writing to Bristol Water on 12 July 2013. Ofwat

highlighted some concerns with the draft commitments offered by Bristol Water and in January 2014 Bristol Water offered a comprehensive set of commitments against the competition concerns Ofwat had identified.

2.12. Ofwat paused its investigation during its discussions with Bristol Water about the proposed commitments. This pause allowed the discussions to focus on the appropriateness of the proposed commitments; to progress the commitments process as quickly as possible; and to avoid abortive work in the event that the commitments were accepted as binding. As a result, at the point of pausing the investigation Ofwat had not:

- gathered complete evidence from the parties;
- completed its market definition exercise; nor
- reached any decision on whether Bristol Water had infringed Chapter II of the Act.

2.13. However, Ofwat is satisfied that it has gathered sufficient information to enable it to assess whether accepting binding commitments would be appropriate in the circumstances of this particular case, and whether the commitments offered by Bristol Water would address the competition concerns identified.

2.14. The accepted commitments are set out in full in appendix 1 of this document. They comprise five headline commitments and a further commitment relating to reporting and providing information to Ofwat. Each of the five headline commitments are structured as a principle followed by a series of specific actions. In summary, the five commitments offered by Bristol Water are as follows.

- **Calculation and presentation of costs of new infrastructure (Commitment 1 – section A1.3 in appendix 1).** Bristol Water will take all reasonable steps to ensure that the costs quoted for providing water infrastructure on a new development are calculated in a way which does not cause undue preference to, or unduly discriminate against, either the self-lay option or the requisition option, and which is consistent with relevant legislation¹⁵ (**Relevant Legislation**) and Bristol Water's licence (**Licence**). In particular, the specific actions

¹⁵ Defined as being the WIA91 and the Act.

mean Bristol Water will provide consistency and greater transparency in its treatment of costs when calculating quotations for requisition charge and self-lay asset payments.

- **Broad equivalence of new development charges (Commitment 2 – section A1.4 in appendix 1).** Bristol Water will take all reasonably practicable steps to ensure that charges applied to SLOs, or charged in circumstances where mains and/or service connections are being self-laid, are broadly equivalent to charges applied for equivalent services in the context of the requisition of mains and/or service connections, and that they do not cause undue preference to, or unduly discriminate against, SLOs or act in a way which is inconsistent with the requirements contained in the Relevant Legislation and the Licence. For example, the specific actions mean Bristol Water will ensure that its charges are equivalent where the service or transaction is equivalent, regardless of whether it is provided for requisition or self-lay.
- **Interaction with self-lay organisations (Commitment 3 – section A1.5 in appendix 1).** Bristol Water will, using its best endeavours and acting in good faith, take all reasonably practicable steps to ensure that in its dealings with developers and SLOs it does not cause undue preference to, or unduly discriminate against, SLOs or act in a way which is inconsistent with the Relevant Legislation and the Licence. For example, as a specific action Bristol Water will respond to pre-development enquiries within the same timeframes regardless of whether they are made by developers or SLOs.
- **Policies and procedures (Commitment 4 – section A1.6 in appendix 1).** Bristol Water will, using its best endeavours and acting in good faith, take all reasonably practicable steps to provide external and internal policies and procedures relating to the provision of infrastructure for new developments which are clear and easily understood and do not cause undue preference or undue discrimination, and which are compliant with the obligations contained in the Relevant Legislation and the Licence. For example, as a specific action Bristol Water will update its internal and external policy and procedure documents to ensure they reflect the commitments and do not cause any undue preference or discrimination.
- **Internal structure and processes (Commitment 5 – section A1.7 in appendix 1).** Bristol Water will, using its best endeavours and acting

in good faith, take all reasonably practicable steps to ensure that its approach to the provision of services relating to the provision of water mains infrastructure for new developments is not structured in such a way that it causes undue preference to, or unduly discriminates against, SLOs or acts in a way which is inconsistent with Relevant Legislation and the Licence. For example, the specific actions mean Bristol Water will change its organisational structure and processes to demonstrate a clearer distinction between its wholesale and retail functions, and the contestable and non-contestable services it provides. These changes will better recognise SLOs as customers of Bristol Water's non-contestable upstream services, and as Bristol Water's competitors in downstream services¹⁶.

- 2.15. In addition to the five headline commitments, Bristol Water offered an additional commitment related to the reporting and provision of information to Ofwat to demonstrate compliance with the Commitments (section A1.8 in appendix 1). Further detail on the development of this commitment is set out in paragraphs 4.22 to 4.28 below.

Notice of intention to accept binding commitments

- 2.16. Paragraph 2 of Schedule 6A of the Act requires Ofwat to give notice if it proposes to accept binding commitments, inviting representations from interested parties. In line with this requirement, Ofwat [publically consulted on its intention to accept the binding commitments](#) between 22 May and 18 July 2014. This was an extended consultation period given the significance of the case's issues for the wider sector. The consultation was run alongside the early phases of Bristol Water's proposed implementation timetable (further detail is set out in paragraph 3.9 below). This meant interested parties could reasonably consider whether those commitments which Bristol Water had already started to implement were visible and having their intended effect.

- 2.17. The remainder of this document is structured as follows.

- Chapter 3 summarises the responses made to Ofwat's consultation.

¹⁶ As a result of the sector's price control process (PR14), these downstream contestable services sit within both Bristol Water's wholesale and retail price controls.

- Chapter 4 sets out Ofwat's responses to the comments and concerns raised by the respondents.
- Chapter 5 sets out Ofwat's conclusion and final decision.

3. Responses to the notice of intention to accept binding commitments

- 3.1. When consulting on its intention to accept the commitments offered by Bristol Water, Ofwat particularly welcomed interested parties' views on:
- a. whether the commitments addressed the competition concerns identified by Ofwat for this case;
 - b. the efficacy of the commitments in the context of the day-to-day operations of water companies, SLOs and developer customers;
 - c. the visibility and effectiveness of those elements of the commitments that Bristol Water was implementing with immediate effect;
 - d. the type(s) of information that Bristol Water should provide to Ofwat to evidence its implementation of, and compliance with, the commitments; and
 - e. what types of evidence and/or indicators Ofwat might consider in order to assess whether the appropriate conditions were in place to allow for effective competition in the provision of contestable services for new connections in Bristol Water's area of appointment.
- 3.2. Ofwat received seven written responses to its consultation. These came from one of the complainants, Energetics; three representative bodies (the Consumer Council for Water; the Home Builders Federation; and Fair Water Connections¹⁷); two water and wastewater companies (United Utilities and Business Stream¹⁸); and one private consultancy company (David W Heath Ltd). In addition, Aquamain (the case's other complainant) provided verbal comments to Ofwat.
- 3.3. Due to the relevance of the case to the wider sector, the consultation responses included comments on both the specifics of Bristol Water's conduct and proposed commitments and on more general matters relevant to the water and wastewater sector as a whole. Both sets of issues raised by the responses are summarised below, but only the former are directly relevant to

¹⁷ Fair Water Connections is a membership association representing 14 self-lay organisations, including the two complainants in this case, Aquamain and Energetics.

¹⁸ United Utilities is an appointed company under the WIA91. Business Stream is an appointed water supply retailer operating in the Scottish and English markets.

Ofwat's decision as to whether to accept binding commitments from Bristol Water.

- 3.4. Ofwat has carefully considered the comments and concerns expressed in the responses to its public consultation. Ofwat's responses and its reasons for accepting the commitments as binding are set out in chapter 4 below.

Consultation responses related to accepting the proposed commitments as binding

Whether the commitments address the competition concerns identified

- 3.5. Generally, none of the consultation responses raised concerns that, once fully implemented, the commitments offered by Bristol Water would not address the competition concerns that Ofwat had identified. Fair Water Connections endorsed the concerns that had been identified and stated that the framework of commitments offered by Bristol Water should stimulate change and, when fully implemented, should address the concerns identified. However, Fair Water Connections expressed concerns that Bristol Water's delivery to date against their proposed commitments and implementation dates did not give it confidence that all of the concerns would be addressed in practice (further details on Fair Water Connections specific concerns regarding implementation are set out in paragraph 3.11 below).
- 3.6. Business Stream stated that the commitments proposed by Bristol Water provide an appropriate and sensible solution to the competition concerns raised by the SLO and that they are a prerequisite for there to be a genuine level playing field in the new water connections market in Bristol Water's area. Business Stream in particular endorsed the functional separation proposed by Commitment 5. The Consumer Council for Water noted that it is a positive step that Commitments 1 and 2 encourage Bristol Water to levy charges that are more consistent and more transparent.
- 3.7. Fair Water Connections and Business Stream both noted that addressing the concerns and delivery of a genuinely competitive market for new connections in Bristol Water's area would depend on the detail and effectiveness of the delivery of the high-level commitments.
- 3.8. Business Stream asked what ongoing governance arrangements would be put in place to ensure the policies and procedures described in Commitment 4 are

adhered to and that any new ones developed would also meet the same standards. It also highlighted the importance of details of implementation regarding some of the practical realities of the functional separation proposed in the commitments, such as:

- IT systems;
- management structure;
- KPIs;
- access to customer data; and
- office space.

The visibility and effectiveness of those commitments already being implemented

3.9. When Ofwat published its notice of its intention to accept binding commitments on 22 May 2014, the commitments proposed by Bristol Water had not been legally accepted by Ofwat and hence were not binding nor enforceable. However, Bristol Water had proposed and started to deliver against an implementation timetable, ahead of any decision by Ofwat to accept the commitments. Bristol Water's proposed timetable provided for:

- Commitment 1 to be in place by 1 June 2014;
- Commitment 2 to be in place by 1 April 2014;
- Commitment 3 to be in place by 31 January 2014;
- Commitment 4 to be in place by 1 May 2014, subject to further updates to reflect the new structure provided by Commitment 5; and
- Commitment 5 to be in place by 30 November 2014.

3.10. Fair Water Connections acknowledged that since Ofwat's investigation was initiated Bristol Water had made a number of changes, resulting in it being more responsive to its SLO customers and SLOs being in a better position to compete against Bristol Water. Fair Water Connections also confirmed that some of the commitments were already in place and visible. Both Fair Water Connections and Aquamain confirmed that they had experienced a number of changes and improvements in Bristol Water's interaction with SLOs as customers.

3.11. Fair Water Connections confirmed that it considered Commitments 1 and 3 to be sufficiently in place, but stated that, in its view, Commitments 2 and 4 had yet to be delivered. Fair Water Connections also expressed the view that Bristol Water was not delivering what they termed the "extended remit" of

Commitment 2 in relation to honouring “all the requirements of the relevant legislation”. They stated that an example of this was where Bristol Water had levied administration charges on service connections without justification for the amount recovered¹⁹. Fair Water Connections also stated that there had been situations where Bristol Water had charged developers outside of the asset value calculation for capacity of “**earlier mains**” used by their development²⁰; and where Bristol Water had not offered payments for upsizing mains used to supply subsequent development.

- 3.12. In relation to Commitment 4, Fair Water Connections noted that Bristol Water had not updated the policies and procedures on its website by the start of May 2014. It also stated that it was a major omission for these documents not to provide any commitment to “guaranteed standards of service” for non-contestable and “control point” activities which they considered to be vital to supporting competitive service delivery. Fair Water Connections acknowledged that it was premature to comment on the delivery of Commitment 5 regarding Bristol Water’s organisational structure, but observed that supporting the new structure by staff training and development did not yet appear to have been addressed.
- 3.13. Fair Water Connections said it considered Bristol Water to have failed to honour the implementation dates that Bristol Water had proposed and that that delivery failure was not being addressed by any deterrent sanctions. In Fair Water Connections’ view, this risked discrediting Ofwat’s approach as it neither imposed the need for Bristol Water to change its practices nor provided an adequate indicator to other water companies about the need for them to ensure they have compliant practices. Fair Water Connections also expressed the view that a further cultural shift was required within Bristol Water if it was to fully embrace competition and noted that it was not confident that the relevant teams within Bristol Water had the capability to deliver “best practice” charging or to take ownership of implementing the commitments.

¹⁹ This concern related to other, separate complaints Fair Water Connections and its members have raised with Ofwat under sections 51B and 51C of the Act concerning water companies including administrative costs in the costs reasonably incurred that they recover from customers and/or requiring administration charges as part of self-lay agreements. Ofwat has set out its view on charging for new connections in the following webpage:
<http://www.ofwat.gov.uk/regulating/newconnections/charging>.

²⁰ This reflects Competition Concern 2 in terms of the exclusion of non-contestable works from the calculation of the asset payment.

Monitoring implementation and ongoing compliance

- 3.14. A number of the consultation responses noted that the monitoring arrangements for the commitments were unclear. The Consumer Council for Water questioned whether the commitments overall would go far enough to address the competition concerns identified because Ofwat's approach to monitoring and enforcing the commitments was unclear. It stated that Ofwat should clarify how it will ensure that Bristol Water complies with the commitments, since without the prospect of robust enforcement it questioned whether there will be any change within Bristol Water or to the wider sector's practices. Business Stream asked what performance measures would be published on an ongoing basis to demonstrate applications from SLOs are being processed on the same timescales as Bristol Water's own retail business.
- 3.15. In response to Ofwat's consultation question regarding what types of information Bristol Water should provide to evidence implementation and compliance, Fair Water Connections suggested that Bristol Water report to Ofwat when it has implemented each commitment, with evidence and a monthly close out report should any delivery milestones slip. It also proposed a range of indicators it considers should be regularly reported by Bristol Water, including details of:
- the number and value of connections being provided through self-lay and the number of self-lay applications that convert to the requisition option;
 - complaints figures;
 - document changes and notification timescales; and
 - details of consultations with developer and SLO customers.

Whether Ofwat should accept binding commitments

- 3.16. Generally, none of the respondents to the consultation explicitly stated that they felt that Ofwat should not accept the binding commitments. However, the Home Builders Federation and Fair Water Connections expressed their view that Ofwat's action against Bristol Water had not been assertive enough. The Home Builders Federation expressed its view that a more robust and serious reprimand of Bristol Water would be appropriate and its concern that not doing so sends an inappropriate message to the rest of the sector. It stated that a failure to reprimand Bristol Water in this way suggests competition is not important to Ofwat and that Ofwat is powerless to stimulate effective

competition. Fair Water Connections stated that Ofwat's approach to dealing with the alleged abuse by Bristol Water had been discredited by Bristol Water not delivering against its implementation timetable, and this non-delivery not being addressed by any deterrent sanctions.

- 3.17. United Utilities was the only respondent to explicitly note that it saw no reason to object to Bristol Water's proposed commitments. It agreed that accepting them would not undermine deterrence and that delivery in the relatively short timescales proposed would mean direct and immediate benefits for customers while avoiding the costs and delays associated with pursuing a full investigation and resolution.

Consultation responses related to sector-wide issues

Wider sector practice

- 3.18. The consultation responses from David W Heath Ltd, Fair Water Connections, Energetics and the Home Builders Federation noted that they have each experienced the same or similar competition concerns as those identified in this case when working with other water and wastewater companies. Examples cited by David W Heath Ltd included what it considers to be breaches of the Act due to overcharging for services; application of non-equivalent prices for the same services; and refusals to provide developers with asset payment quotations. United Utilities acknowledged that as one of the sector's few areas of competition a level playing field between statutory water companies and SLOs is important and that competition issues in this area could potentially be serious and significant.
- 3.19. Responses from Fair Water Connections and Energetics acknowledged that it is important that this case, and any acceptance of commitments, send a clear message to the wider sector of the need to review and improve the ways in which water and wastewater companies enable competition via self-lay. David W Heath Ltd also noted that the action Ofwat has taken will send the right message to other water and wastewater companies.
- 3.20. The responses from the Consumer Council for Water, the Home Builders Federation and David W Heath Ltd stated that by themselves, the commitments offered by Bristol Water are unlikely to address fully the strategic issues for the wider sector. However, the Consumer Council for Water recognised that it may not be appropriate to pursue these wider points

in the context of this specific case. It noted that it may be necessary for Ofwat to consider taking further action under different legislation to address concerns regarding the wider new water connections market, including concerns regarding variations between different companies' policies for charging for self-lay. It suggested that Ofwat could monitor and review how the new water connections market progresses after this investigation to understand the effect of the commitments on the wider market.

- 3.21. The responses from United Utilities and Business Stream noted the growing importance of level playing field issues for the sector in light of the Water Act 2014. United Utilities supported the recognition in Ofwat's consultation that there are different business structures and approaches to self-lay activity adopted by different companies in the sector. They welcomed the principle set out in Ofwat's consultation that companies should determine the best way to structure themselves while achieving compliance with competition law – in that respect, they acknowledged that Bristol Water's commitment regarding its organisational structure was not intended to be a sector-wide solution. Business Stream asked whether the structural proposals in the commitments would apply in relation to all contestable retail services.

Ofwat's role

- 3.22. The consultation response from David W Heath Ltd welcomed the action Ofwat has taken by opening this case in order to draw attention to the need for water companies to comply with the Act. The response also welcomed the fact that this case demonstrated both the serious view Ofwat takes of an abuse of a dominant position and the action it intends to take under the Act.
- 3.23. David W Heath Ltd and the Home Builders Federation noted that competition concerns such as those considered in this case have been raised with Ofwat in the past and not pursued. Both respondents considered this to have resulted in a failure to deter water and wastewater companies from such practices.
- 3.24. Fair Water Connections suggested that Ofwat should routinely collate data about the value of new assets water companies adopt and the number of self-lay connections that are installed as part of its ongoing analysis of the new water connections market. It noted that such data could be used to determine how Bristol Water is performing against "best practice" companies and the industry average and that alongside data provided by Bristol Water this would

enable Ofwat to establish whether effective competition is occurring in Bristol Water's area.

4. Ofwat's response to the comments and concerns raised in the consultation responses

4.1. Ofwat has considered carefully the responses received to its consultation and remains satisfied that:

- accepting commitments is the most appropriate approach in this particular case; and
- the commitments offered by Bristol Water will address the competition concerns identified.

4.2. In light of the CMA's guidance regarding the acceptance of binding commitments²¹, Ofwat's prioritisation principles²² and the consultation responses, Ofwat considers accepting binding commitments:

- will ensure an effective resolution is put in place in a relatively short period of time;
- will not undermine deterrence in the sector; and
- is the most appropriate use of Ofwat's resources at this time given its prioritisation principles.

4.3. This chapter sets out Ofwat's response to the comments and concerns raised by responses to the consultation and Ofwat's resulting reasons for accepting the commitments.

Accepting binding commitments in this case

4.4. In line with the CMA's guidance and Ofwat's prioritisation principles, when assessing the appropriateness of accepting binding commitments, Ofwat considered key points such as the seriousness of any possible abuse; whether accepting commitments would undermine deterrence; and what

²¹ Ofwat is required to have regard to the CMA's (formerly the Office of Fair Trading's) guidance as to the circumstances in which it may be appropriate to accept commitments. This guidance can be found at: <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases> and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284436/oft407.pdf

²² For further information on how Ofwat prioritises its Competition Act 1998 cases please refer to: http://www.ofwat.gov.uk/competition/ca98/prs_inf_100920ca98priority.pdf

would be the most effective means of addressing the identified competition concerns.

- 4.5. When considering the seriousness of the possible abuse in this case, based on the initial information available, Ofwat was aware that, for example, by definition, Bristol Water would be dominant in a market which could be described as the **“upstream market”** (comprising the non-contestable supply and maintenance of water infrastructure in its area of appointment). It also appeared that Bristol Water had a very significant share of what might be a **“downstream market”** (the new water connections market, comprising the contestable services to provide new water mains and service pipes to provide a water supply for domestic use in Bristol Water’s area of appointment). The allegations raised a number of possible breaches of the relevant sections of competition law, relating to one of only a few areas of current competition in the market in the sector. Ofwat considered those comments in response to the consultation which expressed concerns about Ofwat not being more assertive than accepting commitments in this case.
- 4.6. In this particular case, Ofwat concluded that, on balance, accepting commitments would be appropriate. In particular, Ofwat considers that accepting the commitments provides for the most timely and resource efficient solution to addressing both the specific concerns raised by the complainants and the wider competition concerns identified by Ofwat’s initial investigation of Bristol Water.
- 4.7. Ofwat considers that accepting commitments would not undermine deterrence in this market. The case itself has served to reinforce a deterrence effect across the water and wastewater sector, raising awareness and discussion of competition compliance issues and the effectiveness of the new water connections market. These are issues that may not have been fully considered by some water and wastewater companies. A number of the consultation responses highlighted the message this case has sent to the wider sector and one response specifically noted that the action taken by Ofwat will send the right message to other water and wastewater companies. The breadth and relatively quick implementation of the commitments also means they are likely to have a greater and earlier benefit for customers, through deterrence, than might otherwise be achieved by pursuing a full investigation and enforcement action. This is particularly the case because of the commitments’ timing in relation to the expansion of the non-household retail market in 2017. Ofwat considers that this benefit outweighs any potential loss of deterrence from not completing a full investigation.

- 4.8. As set out in Ofwat's consultation and chapter 2 above, when Bristol Water offered commitments under the Act to address Ofwat's competition concerns Ofwat paused its investigation such that discussions could focus on the appropriateness of the proposed commitments; progressing the commitments process as quickly as possible; and avoiding abortive work in the event that the commitments were accepted as binding. At that point in time, Ofwat had not gathered all of the necessary evidence from the parties; completed its market definition exercise; nor reached any decision on whether Bristol Water had infringed Chapter II of the Act.
- 4.9. Ofwat's prioritisation principles are clear that, for example, Ofwat will only decide to continue an investigation or take particular enforcement action if it is satisfied that the resources required are proportionate to the expected benefits (taking into account any risk that they may not be achieved). There would therefore be a significant amount of further work to undertake (requiring substantial resources and potentially taking several years) if Ofwat were to reject the commitments offered by Bristol Water and pursue a full investigation with a view to enforcement action. In any case, it seems unlikely that any such enforcement action would have an output which covered all of the detailed points addressed by the commitments and delivered that output in the relatively short timescales that are key to the relevance of this case for the wider sector. Ofwat considers that the likelihood of such use of significant additional resources delivering material additional benefit when compared with the commitments was outweighed by the immediate certainty in accepting, and fewer resources needed to consider and accept, the commitments . Ofwat's prioritisation principles also note that Ofwat should consider the alternative uses to which the relevant resources could be put. When considering this point Ofwat was particularly mindful of the work required towards the implementation of the Water Act 2014, including the opening of new competitive markets in 2017 and beyond, and the potential to use other regulatory tools to improve competition in the new water connections market.
- 4.10. Ofwat was also mindful of:
- the fact that the vast majority of the consultation responses received did not raise material concerns about Ofwat accepting commitments in this case;
 - the specific actions which Bristol Water has already completed, which have further increased the wider sector's awareness of ensuring competition compliance in relation to the relevant market relatively quickly; and

- relevant case law, which expressly confirms that, for example, commitments play an important role in competition enforcement, providing a more rapid solution to the competition problems, commitments may go further in their scope than could be established by any infringement decision, and commitments will not require great resources for investigation and assessment and in this sense rest on “procedural economy”²³.

4.11. Accordingly, Ofwat considers that accepting the commitments would be more appropriate than the alternative of not accepting the commitments and pursuing the investigation further. However, it is important to note that Ofwat’s decision is made on the particular facts of this case, and this decision does not affect Ofwat’s ability to come to a different conclusion in a similar case in the future.

4.12. Acceptance of the commitments does not prevent Ofwat at a future point from continuing its investigation, making a decision or giving a direction in circumstances where Ofwat had reasonable grounds for:

- considering that there has been a material change of circumstances since the commitments were accepted;
- suspecting that Bristol Water has failed to adhere to one or more of the terms of the commitments; or
- suspecting that information which led Ofwat to accept the commitments was incomplete, false or misleading in a material particular²⁴.

4.13. Furthermore, acceptance of the commitments does not prevent Ofwat from taking further enforcement action in relation to any different alleged abuses of dominance in related markets which may come forward and raise competition concerns and where there may be harm to consumers.

Accepting the specific commitments proposed by Bristol Water

4.14. None of the responses to Ofwat’s notice of its intention to accept binding commitments raised concerns that the framework of commitments offered by Bristol Water, if implemented, would not address the competition concerns identified. As a result, Ofwat has not seen any evidence that would change its

²³ See paragraphs 35 to 42 of CAT (2014 CAT 16) (Skyscanner Limited v CMA).

²⁴ Section 31B(4) of the Act.

view that the proposed commitments address the specific competition concerns identified in the case.

- 4.15. Fair Water Connections did raise concerns relating to Bristol Water's implementation to date against its proposed timetable and its resulting confidence in Bristol Water's ability to fully implement the proposed commitments. This, alongside other consultation responses concerning the lack of clarity on monitoring arrangements, resulted in Ofwat seeking further detail and assurance from Bristol Water to ensure robust monitoring and compliance reporting arrangements (see paragraphs 4.16 to 4.30 below).

Monitoring implementation and ongoing compliance

- 4.16. A number of the consultation responses noted that the arrangements for monitoring and enforcing the commitments were unclear. In addition, Fair Water Connections' consultation response expressed concerns that Bristol Water's implementation of the proposed commitments to date had not met Bristol Water's proposed timetable.
- 4.17. It is important to recognise that until this final decision, the commitments offered by Bristol Water have not been legally binding and hence enforceable under the Act. However, Ofwat has considered how Bristol Water has implemented the proposed commitments to date in reaching both its draft (Ofwat's notice of its intention to accept binding commitments) and final decisions to accept binding commitments.
- 4.18. In light of the complaints received against it and Ofwat opening its investigation, Bristol Water made a number of changes to its approach to working with SLOs. In response to the specific complaints that prompted Ofwat's investigation in March 2013, Bristol Water:
- ceased requiring the payment of sureties in June 2013;
 - repaid all sureties held in July 2013;
 - revised its approach to the calculation of self-lay asset values in June 2013; and
 - introduced a new budget quotation template with effect from September 2013.
- 4.19. Bristol Water has since taken further steps to implement its offered commitments, ahead of them being accepted as binding. Understandably, Bristol Water chose to implement those commitments related to its

organisational structure later, due to both the time it takes to effect such people-related changes and to manage the risk of Ofwat not accepting the commitments as binding. However, it should be noted that several of the responses to Ofwat's consultation confirmed that changes resulting from the implementation of the commitments were already starting to be visible and improving the arrangements for SLOs working with Bristol Water.

- 4.20. With a view to both understanding the progress of implementation to date and to agreeing ongoing monitoring arrangements, Ofwat received monitoring reports and supporting evidence from Bristol Water in both July and November 2014. Ofwat is satisfied that all of the commitments Bristol Water expected to be in place by the date of its monitoring report in November 2014 were in place. Ofwat recognises that implementing some of these changes (in particular, updates to external-facing policy documents) were delayed when compared with the timetable proposed by Bristol Water. Bristol Water state that this was largely due to them anticipating linking them to joint work under way across the sector. However, Ofwat is satisfied that the delays were not material and that these commitments are now in place.
- 4.21. As of the date of its monitoring report of 18 November 2014, Bristol Water's outstanding proposed commitments related to implementing the organisational structure changes required under Commitment 5 (which Bristol Water proposed to implement by the end of November 2014). Once in place, this restructure would also require Bristol Water to revisit a number of the other commitments, particularly in relation to updating policies and procedures to reflect the new structural arrangements. Bristol Water has subsequently updated Ofwat on its progress with the new structure and confirmed that the new arrangements were in place as of 1 December 2014. Ofwat has required Bristol Water to provide a further monitoring report a month after the formal acceptance of the commitments. This will enable assurance that the new structure and related policy and procedure updates are in place.
- 4.22. Bristol Water's offered commitments (the text of which was included in Ofwat's notice of its intention to accept binding commitments) included a commitment that it shall **“from time to time as agreed with Ofwat, report in writing to Ofwat setting out the steps it has taken in fulfilling these commitments and provide to Ofwat any information and documents which Ofwat reasonably considers necessary in relation to, or in connection with, the implementation and/or enforcement of and/or the compliance with these commitments”**. Reflecting this commitment offered by Bristol Water, Ofwat's consultation specifically sought interested parties' views on:

- what types of information Bristol Water should provide to Ofwat to evidence both Bristol Water's implementation of and compliance with the commitments; and
 - what types of evidence and/or indicators Ofwat might consider in order to assess whether appropriate conditions are in place to allow effective competition for new connections in Bristol Water's area of appointment.
- 4.23. During and following the consultation period, Ofwat has required Bristol Water to strengthen and further detail the content, frequency and assurance arrangements for the monitoring information Bristol Water will provide to Ofwat as part of this commitment. These discussions have been informed by the comments received through the consultation (as set out in chapter 3 above).
- 4.24. As a result of these discussions, Bristol Water's monitoring reports to Ofwat will include two key elements.
- **Implementation of commitments** – details of the operational steps that Bristol Water has taken to put each of the commitments in place – that is, to ensure a state of compliance with the commitments (with the provision of appropriate supporting evidence materials).
 - **Ongoing compliance** – details of the arrangements Bristol Water has put in place to provide assurance of its ongoing compliance with the commitments for the remainder of the time they are in force.
- 4.25. In setting out its implementation of the offered commitments to date, Bristol Water has confirmed to Ofwat that it has put in place a number of tools to ensure its compliance with the commitments is visible, enduring and embedded in its day-to-day operational activities. These include:
- using standardised documentation;
 - regular staff training and updates;
 - introducing quality control checks for quotations;
 - having commitments compliance as a standing agenda item for team meetings; and
 - seeking regular engagement and feedback from developer and SLO customers.
- 4.26. Bristol Water has also put in place a number of new assurance and governance arrangements to ensure that its compliance with the commitments

is independently audited and appropriately owned and assured by Bristol Water's senior management team and board. These arrangements include the following.

- Designation of a member of Bristol Water's executive team²⁵ as the **'Commitments Compliance Officer'** – this individual will have general responsibility for overall compliance with the commitments, including ensuring that the introduction of any new policies, procedures and/or charges are in line with the commitments. This role will be responsible for the ongoing monitoring and reporting on the commitments.
- **External assurance of compliance** – Bristol Water has commissioned regular independent audits of the commitments. On a quarterly basis, these will audit representative samples of development projects (for example, samples of budget quotation, application of charges and pre-development enquiries) to confirm compliance with the commitments. The external auditor will provide a report to the Commitments Compliance Officer detailing the outcome of the review. This will form part of the wider monitoring report provided to Ofwat, alongside updates on implementation from the in-house teams. To the extent that the external review identifies any non-compliance with the commitments, this will be addressed appropriately by Bristol Water and details provided to Ofwat (although this will not prejudice Ofwat's ability to take relevant appropriate action for the original non-compliance, as appropriate).
- **Board oversight and assurance** – the Commitments Compliance Officer will report to Bristol Water's Board on commitment compliance and monitoring issues. Compliance with the commitments will be a standing item on the agenda for Bristol Water's regular Board meeting and it will receive a copy of the external audit report for review and approval.

4.27. Bristol Water will provide its first monitoring report a month after formal acceptance of the commitments and then on a quarterly basis.

²⁵ Initially, this will be Bristol Water's General Counsel, but may subsequently be re-designated within the Executive Team.

- 4.28. This strengthened proposal reflects both the seriousness of competition compliance and the importance of board ownership and assurance. The text of the commitments (set out in section A1.8 of appendix 1) has been updated, from that included in Ofwat's notice of its intention to accept commitments, to reflect and embed these more detailed monitoring commitments. As set out in paragraph 4.12 above, if at a later date Ofwat has reasonable grounds (through the monitoring report and/or complaints from interested parties) to think that Bristol Water is not adhering to the commitments, we can decide to release Bristol Water from the commitments and open a new investigation.
- 4.29. While Bristol Water has a significant role to play in creating the conditions for effective competition in its area of appointment, Ofwat recognises that the emergence of competitors is also likely to be influenced by a range of other factors outside of Bristol Water's control, including:
- wider economic conditions;
 - the nature of development sites in the area; and
 - the commercial focus and appetite of potential competitors.
- 4.30. In agreeing the monitoring arrangements for the commitments, Ofwat has sought for Bristol Water to focus on monitoring the operational activities within its control. However, Ofwat is alert to the need for wider monitoring and comparison of the progress of self-lay across the sector as a whole and has started to work with the sector to gather more information and intelligence on this (see paragraph 4.36 below).

Ofwat response to sector-wide issues

- 4.31. Ofwat is alert to the fact that the issues raised by this case may also be relevant to the practices of other water and wastewater companies in England and Wales. Ofwat specifically chose to open this case both due to the convergence of two similar complaints that gave reasonable grounds for suspecting an infringement of the Act, and because it recognised the wider strategic significance of the issues involved and the potential deterrence benefits to the wider sector.
- 4.32. Ofwat appreciates that this case alone will not address concerns about the wider sector, nor was it the purpose of the investigation to do so. Ofwat and water and wastewater companies will need to do more to consider and ensure competition law compliance within the sector, both in relation to the existing new water connections market and in terms of the sector's preparations for

future contestable markets. Ofwat expects discussions about effective competition and level playing field issues to increase as preparations progress for the expansion of the non-household retail market in 2017 and the longer-term introduction of upstream reforms. It is also likely that Ofwat's enforcement action in this area will increase due to greater opportunities for competition and the referral of concerns related to any of the sector's contestable markets.

- 4.33. Ofwat will use its regulatory tools to highlight and address specific competition compliance issues as appropriate. Ofwat will also be expecting all water and wastewater companies to take ownership of this issue.
- 4.34. Ofwat will consider opening further CA98 investigations where it has reasonable grounds for suspecting an infringement of competition law and where it satisfies Ofwat's prioritisation principles in terms of being an effective and appropriate use of our resources relative to other strategic priorities, including required regulatory activities under the WIA91.
- 4.35. Ofwat also has a range of other regulatory tools (including under the WIA91), to address issues such as some of those identified in this case. When exercising its key powers and duties under WIA91, Ofwat must do so in the manner which Ofwat considers is best calculated, among other things, to protect the interests of consumers, wherever appropriate by promoting effective competition. In practice, Ofwat's tools range from informal dialogue with companies and customers and issuing guidance through to making determinations and taking enforcement action. In some circumstances, these may deliver more effective and more timely solutions and benefits than opening an investigation under the Act. However, before taking relevant formal enforcement steps under WIA91 Ofwat is under a duty to consider whether it would be more appropriate to proceed under the Act.
- 4.36. Competition compliance is just one of a number of issues interested parties raise with Ofwat in relation to the new water connections market. Charging arrangements and levels of service are other frequently referred concerns. Ofwat wrote to all appointed water and wastewater companies in July 2014 to highlight the importance of the new water connections market and the need for the sector to deliver better customer experiences. This letter also sought a range of information and data on companies' activities in the new connections

market. In September 2014, Ofwat published an information notice²⁶ and related webpages setting out its expectations for the provision of, and charging for, new connections services. This highlighted companies' obligations regarding competition law compliance. These steps and wider work by Government have stimulated water and wastewater companies to focus on, and start to deliver, improvements. In 2015, Ofwat will be working with stakeholders to develop new charging rules for new connections, following the provision for them in the Water Act 2014.

²⁶ http://www.ofwat.gov.uk/regulating/prs_in1416newconnections.pdf

5. Conclusion

- 5.1. Ofwat has considered the responses it received to its consultation on accepting binding commitments.
- 5.2. In line with its powers under the Act, Ofwat is satisfied that accepting commitments is appropriate in this particular case and the commitments offered by Bristol Water address the competition concerns Ofwat identified in this case. Therefore, Ofwat has decided to accept the commitments set out in appendix 1 of this document. The commitments will be binding and enforceable under section 31E of the Act.
- 5.3. The commitments are set out in appendix 1. This text includes minor amendments from the version set out in the notice of our intention to accept binding commitments. The amendments include:
- removal of the proposed timetable for implementation of the commitments (since these dates have now passed);
 - adding further details of the monitoring arrangements agreed with Bristol Water (as explained in paragraphs 4.24 to 4.27 above); and
 - legal drafting changes related to Bristol Water acting (in)consistently with Relevant Legislation and their Licence, to make it clearer that there would be no breach of the commitments where legislation and /or its licence required it to approach something in a particular way; and
 - updating the 'Commencement and Duration' section of the Commitments to replace a fixed date for releasing the commitments (31 March 2017, as proposed in the original commitments text) with an arrangement by which the commitments will endure until such a point that they are reviewed and it is agreed with Ofwat that there are reasonable grounds for them to be amended, terminated or replaced. This amendment reflects the significant changes that are under way within the water and wastewater sector, particularly in relation to the expansion of the non-household retail market and subsequent upstream market reform. The amendment better reflects the fact that these changes may well be relevant to the need for the commitments (at least in their current form) in the future, and the fact that the exact detail and timescales of these changes are uncertain to some extent. However, in practice, if it is appropriate to review the need for the commitments around the time of the expansion of the non-household retail market, Ofwat is open to doing this.

- 5.4. Under the Act Ofwat would have to undertake a further consultation on the amended commitments text, unless Ofwat considered that these amendments were not material, or did not differ in any material respect from the previous version of the commitments²⁷. Similarly, CMA guidance notes that, where there are material changes to the proposed commitments, interested parties should have a further opportunity to comment on them²⁸. However, Ofwat does not consider these amendments to be material changes and has therefore not carried out a further consultation on the amended commitments text.
- 5.5. Acceptance of the commitments means that Ofwat has now closed its investigation with no decision made on whether or not Bristol Water infringed Chapter II of the Act.

²⁷ Part 1 of Schedule 6A of the Act.

²⁸ Paragraph 10.121 of “Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases” states that this consultation period should be at least six working days: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288636/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf

Appendix 1: Commitments given by Bristol Water pursuant to section 31A of the Competition Act 1998

Bristol Water plc (Bristol Water) gives to the Water Services Regulation Authority (Ofwat), without in any way acknowledging or accepting that it has infringed applicable competition law, the following commitments (the Commitments) under section 31A(2) of the Competition Act 1998 in order to meet Ofwat's concerns as set out inter alia in Ofwat's letter to Bristol Water dated 12 July 2013 and in Ofwat's notice of its intention to accept bindings commitments from Bristol Water dated 22 May 2014.

A1.1 Interpretation

The Interpretation Act 1978 shall apply to these Commitments as it does to Acts of Parliament.

In these Commitments the word “**including**” shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word and the word “**include**” and its derivatives shall be construed accordingly.

For the purpose of these Commitments, the following terms shall have the meaning ascribed to them below.

Asset Payment means the payment made by Bristol Water in the event that the mains are self-laid.

Basic Supply Strategy Enquiry means a basic enquiry which contains sufficient information to enable Bristol Water to provide an enquirer with an indication of the scope of the works needed to supply a development. No designs or Budget Quotation are provided.

Budget Quotation means the document setting out the budget costs for requisitioning and self-laying the infrastructure that is the subject of a Preliminary Mains Design Enquiry.

Charges Scheme means Bristol Water's Charges Scheme setting out connection, disconnection, development and infrastructure charges which is updated annually and published in April.

Commuted Sum means the payment required by Bristol Water from a developer in the event that mains are requisitioned.

Licence means Bristol Water's Instrument of Appointment.

Pre-Development Enquiry means either a Basic Supply Strategy Enquiry or a Preliminary Mains Design Enquiry.

Preliminary Mains Design Enquiry means a detailed enquiry which contains sufficient information to enable Bristol Water to provide an enquirer with a preliminary design for all of the required mains, and a Budget Quotation for their installation.

Relevant Charges means the charges identified in **A1.9**.

Relevant Legislation means the Competition Act 1998 and the Water Industry Act 1991.

Requisition means the installation, by Bristol Water or its designated contractor, of non-contestable and/or contestable water infrastructure (including mains and service connections) for new developments.

Schedule of Rates means the agreed rates for specified work items to be carried out by the Term Contractor as set out in the Term Contract for network maintenance and associated works.

Self-Lay means the laying of contestable water infrastructure (including mains and service connections) for new developments by the developer itself, or by an SLO appointed by the developer.

Self-Lay Organisation (SLO) means an entity engaged in the laying of water mains and service connections on behalf of developers.

Sureties means the self-lay sureties described in the 2013-14 Charges Scheme.

Term Contract means the contract to provide repair and maintenance services to Bristol Water for network maintenance and associated works, including the delivery of new connections when requisitioned from Bristol Water.

Term Contractor means the contractor appointed by Bristol Water under the Term Contract.

Working Day means any day of the week other than a Saturday or a Sunday or any day that is a public holiday in England.

A1.2 Commencement and duration

These Commitments shall take effect from the date that, having been signed by Bristol Water, Ofwat's acceptance of such Commitments is notified to Bristol Water.

Nothing in this provision will prevent either party from requesting an amendment to, or early termination of, the Commitments (or requesting new commitments to substitute for the Commitments) at any point in time in light of, for example, changed market circumstances or legislative requirements.

Both Ofwat and Bristol Water recognise that changes are under way within the sector that may have relevance to the Commitments, in particular with regards to the expansion of the non-household retail market and subsequent upstream reforms. As and when appropriate, Bristol Water and Ofwat will meet to discuss whether the Commitments should be amended, terminated or replaced by new commitments in light of such sector changes.

A1.3 Calculation and presentation of cost of new infrastructure

Principle

Bristol Water will take all reasonable steps to ensure that the costs quoted for the provision of water infrastructure on a new development are calculated in a way which does not cause undue preference to, or unduly discriminate against, either the self-lay option or the requisition option, and which is consistent with all Relevant Legislation and the Licence.

Specific actions

In particular, Bristol Water will:

- a. calculate self-lay asset values by reference to the total installation cost of all relevant contestable work and all relevant non-contestable work (including the proportion of any broader non-contestable schemes that are being undertaken to meet the needs of multiple developments and/or existing customers) that is attributable to the development in question;
- b. ensure that Budget Quotations provided in response to a Preliminary Mains Design Enquiry contain information relating to both the self-lay and the requisition options, unless specifically requested by the entity that submitted the Preliminary Mains Design Enquiry to do otherwise; and
- c. take all reasonably practicable steps to ensure that the cost information provided by Bristol Water allows developers to make an informed choice between the self-lay and requisition options. To achieve this, Bristol Water will:
 - i. engage with developers and SLOs to discuss the form and the content of the Budget Quotation as part of an informal consultation process; and
 - ii. taking into account the views expressed during the consultation, produce a Budget Quotation which is clear and easily understood, allows the self-lay and requisition options to be compared through the provision of equivalent information for each option, and explains any differences between the cost of the two options.

A1.4 Broad equivalence of new development charges

Principle

Bristol Water will take all reasonably practicable steps to ensure that charges applied to SLOs, or charged in circumstances where mains and/or service connections are being self-laid, are broadly equivalent to charges applied for equivalent services in the context of the requisition of mains and/or service connections, and that they do not cause undue preference to, or unduly discriminate against, SLOs or act in a way which is inconsistent with the requirements contained in Relevant Legislation and the Licence.

Specific actions

In particular, Bristol Water will:

- a. stop requiring the payment of sureties by SLOs in respect of mains laying and service connections;
- b. ensure any and all sureties held by Bristol Water will be, or have been, returned to the SLOs, with the payment of interest where applicable;
- c. ensure equivalent application of charges where services provided are equivalent, regardless of whether the mains and/or service connections are being self-laid or requisitioned;
- d. review the calculation of the Relevant Charges as part of the annual revision of the Charges Scheme to ensure that the Relevant Charges:
 - i. charged in a self-lay context are broadly equivalent to the charges applied in a requisition context;
 - ii. do not cause undue preference or undue discrimination; and
 - iii. are compliant with the Relevant Legislation and Licence; and
- e. provide an explanation of the purpose of each Relevant Charge, including what each one covers, and why each is charged, in the appropriate policy document(s). In particular, these explanations will be included in:
 - i. the external facing self-lay policy, as revised in accordance with Commitment A1.6b; and
 - ii. the 2014-15 Charges Scheme, and subsequent annual versions.

A1.5 Interaction with self-lay organisations

Principle

Bristol Water will, using its best endeavours and acting in good faith, take all reasonably practicable steps to ensure that in its dealings with developers and SLOs it does not cause undue preference to, or unduly discriminate against, SLOs or act in a way which is inconsistent with Relevant Legislation and the Licence.

Specific actions

In particular, Bristol Water will:

- a. respond to Pre-Development Enquiries made by SLOs in a way which does not cause undue preference to, or unduly discriminate against, SLOs and in a way which is consistent with Relevant Legislation and the Licence. In particular, Bristol Water will:
 - i. set out clear timeframes for the handling of, and response to, Pre-Development Enquiries in its external policy and procedural documents;
 - ii. ensure that those timeframes apply equally to all equivalent enquiries; and
 - iii. ensure that the nature of the information provided by Bristol Water in response to Pre-Development Enquiries is broadly equivalent;
- b. take all reasonably practicable steps to ensure that Bristol Water does not improperly use any information which it holds by virtue of its position as the appointed water company for the Bristol Water area, or information which it is given by third parties in order to comply with its statutory obligation to offer requisition services for mains and/or service connections, in a way which unduly distorts competition, causes undue preference or undue discrimination or is inconsistent with Relevant Legislation and the Licence. In particular, Bristol Water will ensure that:
 - i. the Term Contractor and those Bristol Water staff preparing quotations for contestable works are not provided with, or given access to, any information relating to a particular development held by Bristol Water on terms which differ from those on which equivalent information would be provided to an SLO in equivalent circumstances;
- c. remove any requirements from the self lay application form for the developer to counter-sign the form, unless it can be clearly demonstrated that there is an objective justification for the consent of the developer to be obtained;
- d. seek to ensure that once an SLO has been appointed for a particular development, all communications pertinent to that development will be directed to the appropriate party(ies), taking into account the roles performed by the parties involved in that particular development and any relevant instructions received by Bristol Water from the parties concerned;

- e. ensure that the obligations imposed on, and the services provided to, SLOs by Bristol Water in regard to the self-lay of mains and/or service connections are:
 - i. broadly equivalent to obligations imposed and services provided by Bristol Water in connection with the requisition of mains and/or service connections;
 - ii. clearly communicated and easily understood;
 - iii. do not cause undue preference to, or unduly discriminate against, SLOs; and
 - iv. are consistent with Relevant Legislation and the Licence; and
- f. For the avoidance of doubt, nothing in these Commitments will impose an obligation on Bristol Water to disclose to anyone any information, documents or materials which are provided to Bristol Water by third parties as part of a Pre-Development Enquiry, unless required to do so by legislation or the Licence.

A1.6 Policies and procedures

Principle

Bristol Water will, using its best endeavours and acting in good faith, take all reasonably practicable steps to produce external and internal policies and procedures relating to the provision of infrastructure for new developments which are clear and easily understood, do not cause undue preference or undue discrimination, and which are compliant with the obligations contained in Relevant Legislation and the Licence.

Specific actions

In particular, Bristol Water will:

- a. amend and update its public and internal policy documents and relevant forms to reflect those commitments as identified herein which have immediate effect;
- b. review the existing external policy documents relating to the provision of infrastructure for new developments, namely the Developers' Charter, the Addendum to the National Code of Practice and the Self-Lay Policy, and

relevant forms utilised by developers, SLOs and their agents, in order to produce materials which:

- i. set out the relevant information in a clear and simple way;
 - ii. take into account the views expressed and suggestions made by customers, including developers, SLOs and their agents;
 - iii. enable developers, SLOs, and their agents to understand the service standards applicable to procedures under the self-lay and requisition options;
 - iv. do not cause undue preference or undue discrimination; and
 - v. are compliant with Relevant Legislation and the Licence;
- c. ensure that the external policy documents, and any relevant forms or other information, are easily identifiable and accessible;
- d. review the existing internal policy and procedural documents relating to the provision of infrastructure for new developments in order to produce materials and procedures which:
- i. ensure equivalent treatment of equivalent transactions;
 - ii. do not cause undue preference or undue discrimination; and
 - iii. are compliant with Relevant Legislation and the Licence; and
- e. in the event of any changes being made to Bristol Water's policies and procedures in the future, in so far as they relate to self-lay, amend any relevant documents and publish revised versions within 20 working days of the changes being made.

A1.7 Bristol Water's internal structure and processes

Principle

Bristol Water will, using its best endeavours and acting in good faith, take all reasonably practicable steps to ensure that its approach to the provision of services relating to the provision of water mains infrastructure for new developments (referred to by Ofwat as '**Developer Services**') is not structured in such a way that it causes undue preference to, or unduly discriminates against, SLOs or acts in a way which is inconsistent with Relevant Legislation and the Licence. In particular, Bristol Water will:

- a. ensure that Bristol Water's Development Services team (which provides specific services to developers and SLOs) involved in the provision of Developer Services is distinct from the team responsible for the letting and management of the Term Contract;
- b. ensure that the Development Services team involved in the provision of Developer Services does not have any direct decisive influence over the selection and appointment of the Term Contractor;
- c. ensure that the Term Contractor is not directly involved in the production of the Budget Quotation, with the exception of the provision of cost information for work items which are not covered by the Schedule of Rates;
- d. adopt an internal operational structure broadly equivalent to that set out in **A1.10**, which provides for two distinct and separately staffed functions, namely the Wholesale Interface and Retail Interface. These functions will have the following roles and responsibilities:
 - i. the Retail Interface will be created and will operate as the main interface with developers, their agents and any other customers in relation to new mains connections (**'Retail Interface Customers'**);
 - ii. the Retail Interface will respond to Pre-Development Enquiries from Retail Interface Customers in accordance with the timescales and standards set out in Bristol Water's public policies and procedures and in these Commitments;
 - iii. in order to respond to Pre-Development Enquiries, the Retail Interface will engage with the Wholesale Interface;
 - iv. the Wholesale Interface will operate as the main interface with the Retail Interface, SLOs and their agents, and other entities performing an equivalent retail function in relation to new mains connections (**'Wholesale Interface Customers'**);
 - v. the Wholesale Interface will be responsible for the assessment of the capacity of the network, identification of the infrastructure requirements for the proposed development, and calculation of the estimated installation cost, Commuted Sum and Asset Payment. Where necessary, the Wholesale Interface will interact with, and request services and obtain information from, other departments within Bristol Water;
 - vi. the Wholesale Interface will respond to Pre-Development Enquiries from Wholesale Interface Customers in accordance with the timescales

- and standards set out in Bristol Water's public policies and procedures and in these Commitments;
- vii. the internal procedures relating to the activities of the Wholesale Interface and the Retail Interface will reflect the timescales and standards set out in Bristol Water's public policies and procedures and in these Commitments; and
 - viii. for the purpose of ongoing compliance with Commitments A1.7a and A1.7b, the Wholesale Interface and Retail Interface are equivalent to the Development Services team and will comply with those commitments accordingly;
- e. introduce the role of Network Site Agents, who will be responsible for oversight and management of the delivery of works in relation to any new development; and
 - f. amend and update its public and internal policy, procedures and associated documents and forms to reflect the revised structure and in a way which is consistent with the principles set out in Commitment A1.6b, c, d.

A1.8 Reporting and provision of information

Bristol Water shall:

- a. provide written monitoring reports to Ofwat:
 - i) demonstrating the steps it has taken in complying with these Commitments; and
 - ii) providing assurance of its ongoing compliance with the Commitments.

The first of these monitoring reports will be provided a month after the acceptance of the Commitments and then on a quarterly basis until such a time that Ofwat agrees this reporting frequency can be reduced or removed.

- b. provide to Ofwat any supporting information and documents which Ofwat reasonably requests in relation to, or in connection with, the Commitments (including, for example, the implementation and/or compliance with these Commitments).

- c. Ensure independent, third party assurance of Bristol Water’s compliance with the Commitments, with that assurance to be reported to Bristol Water’s Board and included in the monitoring reports provided to Ofwat.
- d. Designate a member of its Senior Management Team as the **Commitments Compliance Officer**, who will have general responsibility for: ensuring compliance with the Commitments; preparing the monitoring reports; and reporting the monitoring reports to Bristol Water’s Board such that the reports have the Board’s assurance before their submission to Ofwat.

A1.9 Relevant Charges

The Relevant Charges are those identified in the table below.

Name of charge	Brief explanation
Application Fee	The application fee charged by Bristol Water is set out in the Charges Scheme. It is a fee charged to cover the costs of assessing the network capacity, determining the point of connection, designing the mains and/or checking the design provided by the SLO, preparing the quotation, and other administrative work associated with progressing the application.
Re-Design Fee	Re-design fees are charged in circumstances where material amendments are required to a point of connection plan, mains design or quotation (eg, to reflect updated or revised plans).
Administration Charge	<p>The administration charge is charged in relation to each new connection. It is intended to cover the cost of the ‘back-office’ functions carried out by Bristol Water in order to record each new connection within its systems. This includes tasks such as:</p> <ul style="list-style-type: none"> • processing the application to connect; • updating the connection information on Bristol Water’s systems, including the “as laid” information and meter details for billing purposes; • providing any necessary quotations for the cost of connection; and • inspection by the technical liaison officers of the installation of the customer’s part of the pipe, which is installed by the developer. <p>For self-lay, this is listed as a stand-alone administration charge. An amount for administration costs is also charged in the</p>

Name of charge	Brief explanation
	requisition option, as a component of the connection charge.

The names used herein are accurate at the time that these Commitments were entered into. The names of the Relevant Charges, and the explanatory comments, may change from time to time.

A1.10 Operational structure for Bristol Water’s developer services function

