



## Decision to accept binding commitments from Severn Trent PLC, Severn Trent Water Limited and Severn Trent Laboratories Limited

### Executive summary

In August 2012 Ofwat consulted on its intention to accept, from Severn Trent PLC (**Severn Trent**) and its relevant subsidiaries, binding commitments under the Competition Act 1998 (the **Act**). These commitments were offered to address potential concerns that certain contracts entered into by Severn Trent had been priced below cost.

These potential concerns were raised by Ofwat following a complaint from ALcontrol UK Limited (**ALcontrol Laboratories**). ALcontrol Laboratories alleged that the below cost pricing had been funded by a cross subsidy to Severn Trent Laboratories from its sister company, Severn Trent Water Limited (**Severn Trent Water**). That is, that Severn Trent PLC may have leveraged its dominance in one market to commit an infringement in another.

Ofwat received a limited number of responses to its consultation. These included ALcontrol Laboratories, who objected to the proposal to accept the commitments, and the Consumer Council for Water, who sought a number of clarifications.

As part of its strategy, Ofwat is committed to harnessing the benefits that can be delivered through effective competition. This means that Ofwat will support markets that can operate effectively and deliver benefits to consumers and will take all necessary steps to protect those markets.

Having considered the representations Ofwat considers that the potential competition concerns can be addressed through accepting the commitments that Severn Trent has offered. In particular, the nature of the commitments mean that the structural link that has given rise to the potential competition concerns will be removed. Ofwat also considers that this decision represents the best use of its resources at this time.

This document sets out Ofwat's final decision on this case.

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## 1. Background to this decision

Ofwat [consulted on its intention to accept binding commitments](#) from Severn Trent PLC, Severn Trent Laboratories and Severn Trent Water on 8 August 2012. This chapter describes the background to the consultation.

### 1.1 The complaint

Ofwat received a complaint from ALcontrol Laboratories alleging that Severn Trent Laboratories had won contracts to supply water analysis services to South Staffordshire Water and Yorkshire Water by pricing below any relevant measure of cost. The complaint alleged that this infringed Chapter 2 of the Competition Act 1998.

ALcontrol Laboratories also alleged that the below cost pricing had been funded by higher levels of pricing by Severn Trent Laboratories to Severn Trent Water, Severn Trent Laboratories' sister company. ALcontrol Laboratories considered that the result was the withdrawal of a competitor from the market, thereby substantially reducing competition in the market and increasing Severn Trent Laboratories' market power.

The complaint related to the market for water analysis services. Appointed water undertakers (in England and Wales) are required to collect and analyse samples of the water they supply to ensure that it meets relevant drinking water quality standards. This includes a requirement to have the samples analysed by a laboratory which has a system of quality control that is subject to independent oversight. This could be carried out in-house or under contract by an external laboratory such as Severn Trent Laboratories.

This case concerned an allegation of predation and cross subsidy which prompted Ofwat to consider whether it may be the case that there was some leveraging of market power from a water company's core regulated business into another market, namely the market for water analysis services. Ofwat's principal concern was that the structural link between Severn Trent Water and Severn Trent Laboratories may have facilitated this leveraging.

### 1.2 The commitments offered

On 8 March 2012, Severn Trent approached Ofwat with an offer of commitments which it considered addressed Ofwat's potential competition concerns. Following a period of negotiation between Severn Trent and Ofwat, Ofwat [consulted on its intention to accept these binding commitments](#) from Severn Trent PLC, Severn Trent Laboratories and Severn Trent Water.

Although Ofwat was investigating the pricing of the contracts of Severn Trent Laboratories with South Staffordshire Water and Yorkshire Water, no conclusions had been reached on whether the pricing of the Yorkshire Water or the South Staffordshire Water contracts was below cost. Also, due to the timing of the offer of commitments by Severn Trent, Ofwat had not carried out any detailed work nor had it reached any conclusions on market definition and dominance in this case.

The consultation set out the commitments that Severn Trent had proposed. These are in substance unchanged and set out in Annex 1.

In summary these commitments:

- require Severn Trent Water to in-source its water analysis services and rescind its contract with Severn Trent Laboratories;
- require Severn Trent Group to divest the remainder of Severn Trent Laboratories (and put in place arrangements to, as far as possible, ensure an expedient sale); and
- preclude Severn Trent (or any associate company) from operating as a commercial water analysis services provider.

Ofwat considered that the proposed commitments fully addressed its potential competition concerns and can be implemented effectively. Taking into account all the circumstances of this case Ofwat considered that it was therefore appropriate to accept commitments.

Ofwat consulted on its intention to accept commitments on 8 August 2012. The consultation period closed in September 2012. Chapter 2 describes the responses to the consultation and Chapter 3 sets out Ofwat's responses to the points raised by the respondents. Chapter 4 sets out Ofwat's conclusions.

## **2. Responses to the notice of intention to accept commitments**

Ofwat received 2 substantive responses and 1 request from Yorkshire Water for certain information to be treated as confidential. ALcontrol Laboratories, the initial complainant in this investigation, objected to Ofwat's intention to accept commitments and the Consumer Council for Water, the statutory consumer organisation representing water and sewerage consumers in England and Wales, sought clarifications on several points.

The issues raised by these responses are summarised below.

## 2.1 ALcontrol Laboratories

ALcontrol Laboratories objected to Ofwat's intention to accept commitments. It considered that commitments offered were insufficient and did not comply with section 31A(2) of the Act or the OFT's Guidance published under section 31D of the Act. ALcontrol Laboratories argued:

- that the circumstances of the case are not exceptional at all, and, in any event, not sufficiently exceptional to justify departing from the OFT's general rule that commitments are not appropriate in predatory pricing cases;
- that Ofwat not completing its investigation, and therefore not making a decision, would undermine the deterrence effect of the Act;
- that the commitments do not fully address Ofwat's competition concerns, and in particular do not address Severn Trent Laboratories' dominant position or the wider harm caused to the water analysis market. For the commitments to fully address Ofwat's competition concerns they would need to be "sufficient to restore competition to the relevant market so as to negate or reverse the anti-competitive conduct." The response considered that "far from addressing competition concerns, these commitments would entrench the adverse effects on competition that have arisen as a result of STL's unlawful conduct"; and
- that the commitments could not be implemented effectively as Severn Trent Laboratories may not survive as an independent business (by virtue of the potential below-cost prices contained in the Yorkshire Water contract).

Ofwat has carefully considered these objections and its reasons are provided in section 3 below for accepting the commitments.

## 2.2 The Consumer Council for Water

The Consumer Council for Water (CCWater) sought clarity on a number of issues.

- CCWater agreed with Ofwat's decision not to include in the commitments a requirement for Ofwat to approve the purchaser of Severn Trent Laboratories. CCWater did however seek confirmation that Ofwat would assess whether the purchaser of Severn Trent Laboratories would create similar structural links (as with Severn Trent Water) and, if so, put in place systems to ensure there is no predatory pricing.
- CCWater sought an assurance that where there are structural links between a water company and a commercial laboratory that there are systems in place

to prevent any opportunity for predatory pricing and that the transfer pricing rules that govern regulated water companies are being observed.

- CCWater was concerned about the possibility that customers of Severn Trent Water had overpaid for Severn Trent Laboratories' services and that without reaching any conclusions on the case this would not be dealt with. CCWater sought an assurance that Severn Trent Water's customers had not overpaid.

Ofwat notes that CCWater has not objected to its proposal to accept commitments in this case and that the issues that it has raised are not related to Ofwat's decision to accept the commitments. Ofwat's response is however set out in section 3.4 below.

### **3. Ofwat's response to the concerns raised during the consultation**

We have carefully considered the responses made by ALcontrol Laboratories and CCWater to our consultation and we are satisfied that accepting the proposed commitments will fully address our potential competition concerns and that this is the best use of our resources.

In this chapter we set out our reasoning for accepting the commitments and also consider each point raised by Alcontrol Laboratories and the Consumer Council for Water in their responses.

#### **3.1 OFT guidance and Ofwat's decision to accept commitments.**

In its response ALcontrol Laboratories raised a number of concerns, as set out in Chapter 2, around the appropriateness of accepting commitments in this case. In particular it stated that the circumstances of the case were not sufficiently exceptional as to support a decision to accept commitments in a case involving allegations of potential predatory pricing.

As set out in the consultation document, we considered carefully the OFT's guidance on the acceptance of commitments. The consultation noted that Ofwat was required to have regard to the OFT's guidance when considering whether to accept any commitments offered to it and that we had considered the guidance carefully. As part of our decision-making process, we also discussed its proposals to accept commitments in this case with the OFT.

The OFT guideline on enforcement<sup>1</sup> states that it is appropriate to accept binding commitments in cases where it is satisfied that the commitments offered fully address competition concerns, where it is satisfied that the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time.

The guideline notes that the OFT will not accept, other than in very exceptional circumstances, binding commitments in cases involving secret cartels between competitors which include price-fixing, bid-rigging (collusive tendering), establishing output restrictions or quotas, sharing markets, and/or dividing markets. Nor will the OFT accept binding commitments in cases involving serious abuse of a dominant position. As a general rule, predatory pricing will be considered to be a serious abuse. Whether commitments are appropriate will be assessed on a case-by-case basis, taking account of all the circumstances of the case.

The guideline also states that the OFT will not accept binding commitments in circumstances where compliance with and the effectiveness of any binding commitments would be difficult to discern, and/or where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.

Ofwat has had regard to this guidance in reaching our decision. It is important to note that as a concurrent competition authority the decision to accept commitments is at our discretion. In this case we carefully considered whether pursuing the case would be of benefit and have concluded that there are special features of this case which means that it is appropriate for us to use our discretion and to take a different decision to the guidance that is offered by the OFT.

In its response to the consultation ALcontrol Laboratories argued that the circumstances of the case are not sufficiently exceptional to justify departing from the OFT's general rule that commitments are not appropriate in predatory pricing cases. In the consultation document Ofwat explained that the commitments being offered, and therefore the circumstances of the case, were sufficiently exceptional to justify its proposal.

As set out in the consultation document, Ofwat explained that the structural divestment offered by Severn Trent makes this an exceptional case in so much that it permanently removes, in an effective and clear manner, a potential avenue for leveraging market power between contestable and non-contestable markets.

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<sup>1</sup> OFT 407, [http://www.of.gov.uk/shared\\_of/business\\_leaflets/ca98\\_guidelines/of407.pdf](http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of407.pdf)

Further, Ofwat found no evidence that Severn Trent intentionally sought to exclude competitors in the water analysis market. If evidence of intention had been found it is not likely that Ofwat would have considered commitments to be appropriate in this case

Finally, Ofwat considers that the commitment made by Severn Trent to divest itself of its analytical laboratories testing business represents in Ofwat's view the best possible outcome for customers in this case at this particular time. Proceeding with the case to a final decision is, in Ofwat's view, unlikely to produce a better outcome but would consume a considerable additional amount of Ofwat's resources. Given the need to carefully consider its administrative priorities and the effectiveness of the offered commitments in addressing the competition concerns Ofwat has identified, Ofwat's view is that accepting these commitments represents the best use of its resources at this time.

Ofwat remains satisfied that, in these circumstances, the acceptance of commitments in this case is not rendered inappropriate simply by virtue of an allegation of predatory pricing. In particular, the removal of the structural link between Severn Trent Water and Severn Trent Laboratories make the circumstances of this case sufficiently exceptional to accept commitments.

### **3.2 Deterrence effect and our decision**

ALcontrol Laboratories also argued that it would undermine the deterrence effect of the Act if Ofwat did not complete its investigation and make a decision on whether there was an infringement.

Ofwat is satisfied that its decision to accept commitments and to close its investigation will not undermine deterrence. In the particular circumstances of this case Ofwat's decision to open, to pursue the investigation and to address its potential concerns by accepting a significant business divestiture will assist in promoting compliance with competition law and with the promotion of competition. By articulating its potential competition concerns this decision will also act as a signal of the types of issues in relation to which Ofwat will take steps to protect effective competition.

### **3.3 Addressing the competition concerns**

Finally, ALcontrol Laboratories has argued that the commitments do not fully address Ofwat's competition concerns, and in particular do not address Severn Trent Laboratories' dominant position, or restore competition to the relevant market so as to "negate or reverse the anti-competitive conduct".



In the consultation Ofwat explained that the commitments offered by Severn Trent removed the ability to leverage dominance from one economic market to another. As a result Ofwat considered that they addressed its potential competition concerns.

Ofwat remains satisfied that the commitments fully address the potential concerns raised during its investigation. The commitments would have two particular effects on the market that address Ofwat's potential concerns.

Firstly, the divestment of Severn Trent Laboratories removes the structural link with Severn Trent Water (and hence eliminates the possibility that cross subsidy could take place).

Secondly, the divestment of Severn Trent Laboratories follows the cessation of its contract to supply Severn Trent Water. This reduces substantially its scale and market share<sup>2</sup> and therefore addresses any concern associated with its potential dominance. In the context of this potential dominance, Ofwat also notes that there does not appear to be substantial geographic or entry constraints.

Drinking water analysis involves the examination of samples in order to test for compliance with a range of chemical and micro-biological parameters. For many of these parameters there are time limits within which the analysis must be carried out.

These limits could impose geographical constraints on the companies wishing to outsource their services. The majority of time limits imposed on samples are at least 6 hours (with most being at least 24 hours). This suggests that samples could travel a reasonable distance and potentially to other laboratories.

Ofwat also notes that there is evidence of entry from related markets involving a similar public safety testing and analysis regime, in particular food testing

Ofwat does not agree that for commitments to be acceptable they would need to "restore the market." In this Ofwat notes the recent decision of Ofgem which noted that "issues such as loss of market share of competitors or loss of opportunity for competitors are outside the scope of commitments."<sup>3</sup>

ALcontrol Laboratories argued that the commitments could not be implemented effectively as Severn Trent Laboratories may not survive as an independent

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<sup>2</sup> By total number of samples analysed by Severn Trent Laboratories, the samples associated with Severn Trent Water amount to between 25% and 50% of total samples.

<sup>3</sup> Ofgem, **Decision to accept binding commitments from Electricity North West Limited over connection charges**, May 2012, paragraph 4.10

business (by virtue of the potential below-cost prices contained in the Yorkshire Water contract).

In the consultation Ofwat considered that the commitments could be implemented effectively. As a structural remedy, the commitments are capable of being implemented effectively and to a clear and expedient time frame. The commitment to divest is supported by arrangements that would, in the event that Severn Trent could not complete the sale, require the appointment of a trustee with the power to sell the business on Severn Trent's behalf.

Ofwat understands that Severn Trent has, at the time of this decision, initiated the sales process associated with the commitments. This is consistent with Severn Trent delivering its obligation under the commitments according to the specified time frames. The progress of this process indicates that Severn Trent Laboratories is, in principle, a viable business and that there is no inherent reason why the sale cannot be completed and the commitments met.

Ofwat remains satisfied that the proposed commitments can be implemented effectively.

### **3.4 Ofwat's response to the issues raised by CCWater**

In this section Ofwat considers the issues raised by CCWater. CCWater agreed with Ofwat's decision not to include in the commitments a requirement for Ofwat to approve the purchaser of Severn Trent Laboratories. CCWater did however seek confirmation that Ofwat would assess whether the purchaser of Severn Trent Laboratories would create similar structural links (as with Severn Trent Water) and, if so, put in place systems to ensure there is no predatory pricing.

Further, CCWater sought an assurance that where there are structural links between a water company and a commercial laboratory that there are systems in place to prevent any opportunity for predatory pricing and that the transfer pricing rules that govern regulated water companies are being observed.

Ofwat does not consider that it is necessary to put in place ex ante measures associated with the sale of Severn Trent Laboratories even where the sale may create structural links with a water company. Structural links of this type will not in every circumstance give rise to competition concerns. If evidence is received that demonstrates anti-competitive behaviour in this market Ofwat will, subject to its administrative priorities at that time, take appropriate action.

Related to this, Ofwat will continue to enforce the transfer pricing obligations that Water and Sewerage companies in England and Wales are subject to as a result of their licence conditions.

If the sale of Severn Trent Laboratories does, for any reason, give rise to competition concerns these would be dealt with under merger control. In particular, if the OFT considered that the acquisition of Severn Trent Laboratories may give rise to a substantial lessening of competition it could take action. Ofwat would co-operate with any such merger investigation.

CCWater was concerned about the possibility that customers of Severn Trent Water had overpaid for Severn Trent Laboratories' services and sought an assurance that customers had not overpaid.

The investigation has not reached any conclusions on whether a cross subsidy took place, and hence whether Severn Trent Water and its customers "overpaid" for water analysis services. Ofwat's objective in considering commitments is to address potential competition concerns.

If an investigation were to identify an infringement, Ofwat's enforcement powers under the Act are very specific and are not intended to be, nor are capable of being, used by Ofwat to compensate customers affected by infringements.

Those who believe they may have suffered harm due to an infringement under the Act can, of course, bring private actions for damages. Ofwat also notes that the Department of Business Innovation and Skills is currently considering how improved redress can be provided to customers who suffer as a result of an infringement.

## 4. Conclusion

Ofwat has carefully considered the responses to its consultation and has had regard to all the circumstances of this case, in particular its powers under the Act and the guidance of the OFT. Ofwat acknowledges that cases involving allegations of predatory pricing would not normally be cases in which commitments would be appropriate.

Ofwat considers that the circumstances of this case, as set out above and in particular the nature of the commitments offered, are sufficiently exceptional as to make the case appropriate for commitments. Ofwat is satisfied that the commitments offered by Severn Trent address the potential competition concerns in this case.

In [Delivering Sustainable Water – Ofwat’s Strategy](#), Ofwat set out a commitment to harness market forces for the benefit of customers. In particular this included a commitment to monitor markets to make sure they operate effectively and efficiently and to take action where they do not. Ofwat’s decision in this case gives effect to this as it removes a key threat to competition in the water analysis market.

Ofwat has therefore decided to accept the commitments by means of a formal commitments decision. For the avoidance of doubt, a decision by Ofwat to accept binding commitments does not amount to or imply that Ofwat has reached any conclusions as to the legality or otherwise of the conduct of Severn Trent and its subsidiaries under investigation.

The commitments are unchanged in substance from those that were consulted on in August and can be found in Annex 1.

The commitments take effect on 17 January 2012. Ofwat may, at its discretion, exercise its power under section 31A(4)(b) of the Act to release Severn Trent from these commitments.

## Appendix 1: Commitments text

### Commitments given by Severn Trent Plc, Severn Trent Laboratories Limited and Severn Trent Water Limited to Ofwat pursuant to section 31A of the Competition Act 1998

**Note: Some information in this text has been redacted for reasons of commercial confidentiality.**

Severn Trent Plc (Severn Trent), the parent company of Severn Trent Laboratories Limited (Severn Trent Laboratories) and Severn Trent Water Limited (Severn Trent Water) gives to the Water Services Regulation Authority (Ofwat), without in any way acknowledging or accepting any infringement of competition law by Severn Trent, Severn Trent Laboratories or Severn Trent Water, the following commitments (the Commitments) under section 31A(2) of the Competition Act 1998 in order to meet Ofwat's concerns as set out in Ofwat's consultation on the intention to accept binding commitments dated 8 August 2012 (the Consultation).

#### 1. Interpretation

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

References in these Commitments to any English law term for any legal status, interest, concept or thing shall in respect of any jurisdiction other than England and Wales be deemed to include what most nearly approximates in that jurisdiction to the English law term.

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:

the Act means the Enterprise Act 2002.

Affiliate of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on and any enterprise that

the second person carries on from time to time would be regarded as being under common control for the purposes of section 26 of the Act.

**Associated Person** means a person or persons associated with Severn Trent within the meaning of section 127(4) of the Act and includes any Subsidiary of such a person or persons.

**Bridgend Facility** means the laboratory facility and all associated offices and other premises at Bridgend occupied by Severn Trent Laboratories.

**Business** has the meaning given by section 129(1) and (3) of the Act.

**Confidential Information** means any business secrets, know how, commercially sensitive information, intellectual property or other information of a confidential or proprietary nature.

**Control** shall be construed in accordance with section 26 of the Act, and in the case of a body corporate, a person shall be deemed to Control it if he holds, or has an interest in, shares of that body corporate amounting to 10 per cent or more of its issued share capital or carrying an entitlement to vote at meetings of that body corporate of 10 per cent or more of the total number of votes which may be cast at such meetings.

**Divestment Business** means the business of Severn Trent Laboratories as newly configured following the steps envisaged at paragraph 3.

**Divestment Period** means the period of [REDACTED]  
[REDACTED]  
[REDACTED]

**Divestment Purchaser** means the proposed purchaser of the Divestment Business.

**First Transfer Period** means the period for the transfer of non Severn Trent Water analysis out of Bridgend to be completed by [REDACTED]

**Group of Interconnected Bodies Corporate** has the meaning given in section 129(2) of the Act; references to a Group of Interconnected Bodies Corporate shall be to the Group of Interconnected Bodies Corporate as constituted from time to time.

**Interest** includes shares, an interest in shares and any other interest carrying an entitlement to vote at shareholders' meetings; and for this purpose "an

interest in shares” includes an entitlement by a person other than the registered holder, to exercise any right conferred by the holding of these shares or an entitlement to Control the exercise of such right.

**Mutual Aid** means analytical services provided at the request of water undertakers in the United Kingdom on a reasonable endeavours basis during periods in which such water undertakers do not use either their laboratories or the laboratories of their outsourced analytical service providers to carry out the analysis requested as a result of a temporary inability to carry out such analysis to the standards required under the Water Quality (Water Supply) Regulations 2010 or equivalent statutory requirements.

**Non Severn Trent Water Analysis** means any analytical services (including but not limited to physical, chemical, microbiological and cryptosporidium analysis and any related services or work) carried out by Severn Trent Laboratories for customers other than Severn Trent Water save in respect of analysis requested under Mutual Aid.

**Second Transfer Period** means the period for the in-sourcing by Severn Trent Water of potable water analysis to be completed by [REDACTED]

**Subsidiary** shall be construed in accordance with section 1159 of the Companies Act 2006, unless otherwise stated.

**Trustee** means the person appointed pursuant to paragraph 5 to carry out the Trustee functions.

**Trustee Functions** means the functions set out in paragraph 7.

**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.

## **2. Commencement and duration**

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

### **3. Transfer of potable water analysis from Severn Trent Laboratories to Severn Trent Water**

- 3.1 Severn Trent Laboratories will, using its best endeavours and acting in good faith, as soon as reasonably practicable transfer all Non Severn Trent Water Analysis undertaken by Severn Trent Laboratories at the Bridgend Facility to other facilities owned or occupied by Severn Trent Laboratories. This process will leave the Bridgend Facility as a facility which carries out analytical services exclusively for the physical and chemical analysis of potable water samples for Severn Trent Water and for providing Mutual Aid.
- 3.2 The transfer of the Non Severn Trent Water Analysis will be effected by the end of the First Transfer Period.
- 3.3 Severn Trent Water will, using its best endeavours and acting in good faith, as soon as reasonably practicable in-source all water analysis services. Severn Trent Water will in-source these services by setting up a laboratory at Church Wilne for cryptosporidium analysis and by acquiring the Bridgend Facility to carry out chemical and physical analysis, subject to appropriate valuation for the purposes of compliance with Condition K of Severn Trent Water's Instrument of Appointment.
- 3.4 This in-sourcing by Severn Trent Water will be effected by the end of the Second Transfer Period.

### **4. Divestment of Severn Trent Laboratories**

- 4.1 Severn Trent will, using its best endeavours and acting in good faith, as soon as reasonably practicable effect to the satisfaction of Ofwat the divestment of the newly configured Severn Trent Laboratories business (the "Divestment Business") by the end of the Divestment Period.
- 4.2 Without prejudice to the generality of paragraph 4.1 above, Severn Trent will use reasonable endeavours to ensure the transfer of the contract to supply analytical services to Yorkshire Water with the Divestment Business.
- 4.3 Severn Trent will satisfy Ofwat that any Divestment Purchaser is independent of and unconnected to Severn Trent and the Group of Interconnected Bodies Corporate to which Severn Trent belongs and any Associated Person or Affiliate of Severn Trent or such Group of Interconnected Bodies Corporate.
- 4.4 Severn Trent shall be deemed to have complied with all the commitments in relation to divestment set out in this clause 4 once it has entered into a legally



binding agreement or agreements with a purchaser to sell the Divestment Business provided that the completion of the sale and purchase of the Divestment Business contemplated by such agreement or agreements takes place within a period not exceeding [REDACTED] after all the necessary approvals and consents from third parties have been obtained.

- 4.5 If Severn Trent considers that it will be unable to fulfil any of the commitments in relation to divestment set out in this paragraph 4, it will give written notice to Ofwat to that effect, and in that event will submit for consideration by Ofwat alternative proposals that Severn Trent considers will still meet Ofwat's competition concerns as set out in the Consultation.
- 4.6 Severn Trent will submit to Ofwat alternative proposals for meeting Ofwat's competition concerns. Subject to any prior obligation on Ofwat's part to consult, Ofwat shall accept those alternative proposals in lieu of the commitments to divestment contained in this paragraph 4 if the alternative proposals meet Ofwat's competition concerns as set out in the Consultation. If Ofwat considers those alternative proposals do not meet these concerns, then (and only then) the provisions of paragraphs 5 to 9 inclusive shall have effect.

## **5. Appointment of a Trustee**

- 5.1 The provisions of paragraphs 5.2 to 5.7 below shall apply only if:
- 5.1.1 Severn Trent is unable to satisfy its commitments to divest the Divestment Business in accordance with paragraph 4 above; and
  - 5.1.2 having submitted alternative proposals for consideration by Ofwat, Ofwat shall have notified Severn Trent in writing that those proposals do not meet Ofwat's competition concerns as set out in the Consultation and therefore Ofwat can not accept those alternative proposals.
- 5.2 Within 15 Working Days of Ofwat notifying in writing Severn Trent that it must do so, Severn Trent shall propose to Ofwat for approval:
- 5.2.1 the names of at least two individuals to exercise the Trustee Functions; and
  - 5.2.2 the full terms of a mandate in accordance with which the Trustee shall carry out the Trustee Functions.

- 5.3 Severn Trent and/or any individuals nominated pursuant to paragraph 5.2 shall satisfy Ofwat that, save as required or permitted by Ofwat:
- 5.3.1 such nominated individuals are each EU nationals with the necessary qualifications to carry out their mandates, and employees or partners of an investment bank, bank, building society or law firm or accountancy firm with an established reputation either nationwide or in a substantial part of the UK or in another EU member state;
  - 5.3.2 such nominated individuals are each independent of Severn Trent and of the Group of Interconnected Bodies Corporate to which Severn Trent belongs and of any Associated Person or Affiliate of Severn Trent or of such Group of Interconnected Bodies Corporate and of any Divestment Purchaser and, in the reasonable opinion of Severn Trent, are appropriate to be appointed as Trustee; and
  - 5.3.3 such nominated individuals neither are nor are likely to become exposed, either directly or indirectly, to a conflict of interest that impairs or may be likely to impair their objectivity or independence in discharging the Trustee Functions.
- 5.4 Within 20 Working Days of Ofwat approving, at its discretion, one or more of the persons nominated by Severn Trent and their proposed mandates pursuant to paragraph 5.2 above, and subject to any modifications Ofwat deems necessary for the Trustee to carry out the Trustee Functions, Severn Trent shall use its best endeavours to appoint from the persons so approved one person to carry out the Trustee Functions in accordance with the mandate approved by Ofwat pursuant to paragraph 5.2.
- 5.5 In the event that:
- 5.5.1 Severn Trent fails to propose any person or persons in accordance with paragraph 5.2 above; or
  - 5.5.2 none of the persons proposed by Severn Trent pursuant to paragraph 5.2 is approved by Ofwat; or
  - 5.5.3 Severn Trent is unable for any reason to appoint within the time limit stipulated in paragraph 5.4 any such person following approval by Ofwat,
  - 5.5.4 Severn Trent shall use its best endeavours to appoint from persons nominated by Ofwat one person to carry out the Trustee Functions on

the terms of a mandate approved by Ofwat. Severn Trent shall use its best endeavours to make such appointment within seven Working Days of receiving the nominations from Ofwat.

- 5.6 The appointment of the Trustee pursuant to paragraph 5.4 or 5.5 shall be irrevocable unless:
- 5.6.1 a conflict of interest that impairs or may be likely to impair the objectivity or independence of the Trustee in discharging the Trustee Functions arises;
  - 5.6.2 the Trustee ceases to perform the Trustee Functions; or
  - 5.6.3 Ofwat is otherwise satisfied that there is good cause for the appointment to be terminated in advance of the satisfactory fulfilment of the Trustee Functions.
- 5.7 In the event that the appointment of the Trustee is terminated in accordance with paragraph 5.6 above, Severn Trent shall, if requested to do so in writing by Ofwat, use its best endeavours to appoint from persons nominated by Ofwat one person to carry out the Trustee Functions in accordance with such mandate as is approved by Ofwat. Severn Trent shall use its best endeavours to make such appointment within seven Working Days of receiving the nominations from Ofwat. Where required by Ofwat, the outgoing Trustee shall continue as Trustee until a new Trustee is in place and a full handover of all relevant information has taken place.

## **6. The mandate**

- 6.1 The terms of the mandate proposed by Severn Trent pursuant to paragraph 5.2 above shall, as a minimum, contain all provisions necessary to enable the Trustee to carry out the Trustee Functions including, without limitation to the generality of this paragraph:
- 6.1.1 an exclusive, irrevocable mandate to sell the Divestment Business as required by paragraph 7.1 below to a purchaser or purchasers at no minimum price and on such reasonable terms and conditions as the Trustee considers appropriate to effect an expedient sale;
  - 6.1.2 a mandate to take any other steps necessary for, or incidental to, the Trustee's mandate under paragraph 6.1.1 above;

- 6.1.3 a comprehensive power of attorney to the Trustee (including the authority to grant sub-powers of attorney to the Trustee's officers, employees and agents) to enable it to take all steps necessary or appropriate to effect the sale of the Divestment Business;
- 6.1.4 a mandate to comply with any orders and / or directions given by Ofwat; and
- 6.1.5 a mandate to appoint at Severn Trent's expense such advisers as the Trustee reasonably considers necessary or appropriate in connection with the performance of the Trustee Functions.

## **7. Functions of Trustee**

- 7.1 The Trustee shall seek to procure, within such period as may be specified in writing by Ofwat, the completion of the sale of the Divestment Business at no minimum price and on such reasonable terms and conditions as the Trustee considers appropriate to effect an expedient sale.
- 7.2 Pending the divestment of the Divestment Business pursuant to paragraph 7.1 above, the Trustee shall monitor Severn Trent's compliance with its obligations under paragraphs 8.1 and 8.2 of these Commitments and shall take such measures as it considers necessary to ensure such compliance.
- 7.3 The Trustee may give written directions to Severn Trent to take such steps as may be specified or described in the directions for the purpose of securing Severn Trent's compliance with its obligations under these Commitments or enabling the Trustee to carry out the Trustee Functions. The Trustee may not require Severn Trent to accept any actual or contingent liability towards a purchaser or otherwise in connection with the divestment of the Divestment Business which would be unusual in scope, duration or financially having regard to the price and usual market practice in relation to similar disposals.
- 7.4 The Trustee shall, as soon as reasonably practicable, comply at all times with any reasonable instructions or written directions made by Ofwat for the purposes of carrying out or securing compliance with the Commitments (or any matter incidental thereto) and shall provide to Ofwat such information and reports in relation to the carrying out of the Trustee Functions as Ofwat may require. The Trustee shall promptly report in writing to Ofwat if the Trustee concludes on reasonable grounds that Severn Trent is failing to comply with any of its obligations under these Commitments.

7.5 For the purpose of fulfilling the Trustee Functions, the Trustee shall not be bound by instructions of Severn Trent nor shall the Trustee Functions be extended or varied in any way by Severn Trent save with the prior express written consent of Ofwat.

## **8. Obligations of Severn Trent following appointment of Trustee**

8.1 Severn Trent shall not give any instruction or request to the Trustee which conflicts with the Trustee Functions.

8.2 Severn Trent shall take all such steps as are reasonably necessary to enable the Trustee to carry out the Trustee Functions, including but not limited to:

8.2.1 complying with such written directions as the Trustee may from time to time give pursuant to paragraph 7.3 above; and

8.2.2 providing the Trustee with all such assistance and information as it may reasonably require in carrying out the Trustee Functions.

## **9. Remuneration of Trustee**

9.1 Severn Trent shall pay the Trustee a reasonable remuneration for the services it provides in carrying out the Trustee Functions, and shall pay the Trustee in a way that does not impede the independent and effective fulfilment of the Trustee Functions, which shall be set out in the Trustee's mandate referred to in paragraph 6 above.

## **10. Interim action**

10.1 Pending a divestment of the Divestment Business in accordance with the provisions of these Commitments, or acceptance by Ofwat pursuant to paragraph 4.6 of alternative proposals put forward by SVT to meet Ofwat's competition concerns as set out in the Consultation, SVT shall ensure that, without accepting any duty to make any substantial capital investment additional to investment arrangements in place at the date these Commitments take effect, the Divestment Business will continue to provide services to fulfil its contractual commitments and that sufficient resources are made available to the Divestment Business for this purpose.

## 11. Continued separation

11.1 Except with the prior written consent of Ofwat, following a divestment of the Divestment Business, Severn Trent or any member of the Group of Interconnected Bodies Corporate to which Severn Trent belongs:

11.1.1 shall not, directly or indirectly, hold, acquire, re-acquire or use:

11.1.1.1 any Interest in that Divestment Business;

11.1.1.2 any Interest in any company carrying on or having Control of that Divestment Business; or

11.1.1.3 other than in the ordinary course of business, any of the assets of that Divestment Business;

11.1.2 shall not, directly or indirectly, hold:

11.1.2.1 any Interest in any business providing analytical services similar to those provided by the Divestment Business;

11.1.2.2 any Interest in any company carrying on or having Control of such a business; or

11.1.2.3 other than in the ordinary course of business, any assets of such a business;

11.1.3 shall procure that no employee or director of Severn Trent or of any member of the Group of Interconnected Bodies Corporate to which Severn Trent belongs, for so long as they are an employee or director of Severn Trent or of any member of the Group of Interconnected Bodies Corporate to which Severn Trent belongs, holds or is nominated to any directorship or managerial position in that Divestment Business or any company or other undertaking utilising or having Control of that Divestment Business without Ofwat's prior written consent;

11.1.4 shall not participate in the formulation of, or (other than in the ordinary course of business) influence or attempt to influence, the policy of that Divestment Business or any company or other undertaking carrying on or having Control of that Divestment Business; and

11.1.5 shall not enter into or carry out any agreement or arrangement with any person, if the carrying out of the agreement or arrangement is intended

to result or will result in any Associated Person or Affiliate of Severn Trent or of any member of the Group of Interconnected Bodies Corporate to which Severn Trent belongs directly or indirectly acquiring that Divestment Business or doing any of the things listed in subparagraphs 11.1.1, 11.1.2 or 11.1.3 above.

## **12. Reporting and provision of information**

12.1 Pending the divestment of the Divestment Business in accordance with the provisions of these Commitments, or acceptance by Ofwat pursuant to paragraph 4.6 of alternative proposals submitted by Severn Trent to meet Ofwat's competition concerns as set out in the Consultation, Severn Trent 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 Severn Trent, Severn Trent Laboratories and Severn Trent Water shall furnish promptly to Ofwat such information as Ofwat considers necessary in relation to or in connection with the implementation and/or enforcement of and/or the compliance with these Commitments, including for the avoidance of doubt, any Confidential Information.

## **13. Extension of time limits**

13.1 Ofwat may, in response to a written request from Severn Trent, or otherwise at its own discretion, grant an extension to any time period referred to in these Commitments.