

19 May 2016

Trust in water

# **Response document – consultation on Ofwat’s statutory notices to modify company appointments and licences to remove the in- area trading ban**

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## About this document

This document sets out the results of our consultation on the statutory notices to remove the in area trading ban from company appointments and licences.

Ofwat issued a formal consultation on the proposal to modify company appointments and licences to remove the in-area trading ban on 3<sup>rd</sup> March 2016. The formal consultation contained the required Notices under both section 13 of the Water Industry Act 1991 (WIA91) in respect of modification of Condition R of the Instrument of Appointment (IoA), and section 17J of the WIA91 in respect of modification of Condition 7 of the standard conditions of the Water Supply Licence (WSL).

This document sets out the results of that consultation. We summarise the responses received, how we have considered the points made in the responses and the conclusions that we have reached.

Under section 13 of WIA91, we are able to modify the conditions of a company’s appointment if it agrees to the proposed modification. All appointees consented to the proposed change to Condition R of the Instrument of Appointment. Under section 17J we are able to modify the standard conditions of a WSL if no licensee has objected or those who have objected represent less than 20% by volume of water supplied by all licensees in a 12 month period prior to issuing the Notice. No WSL holders objected to the proposed change to Condition 7 of the standard conditions of the WSL. We will therefore proceed to implement both changes, writing to each individual company to notify them of the changes.

To implement the changes to appointments and licences we need to issue notices under section 195A of WIA91. We anticipate that the section 195A notices will be sent the week commencing 16 May 2016 and the implementation date for the changes will be 19 May 2016.

## Contents

Background to the formal consultation on the removal of the in-area trading ban	3
1. Consultation responses to proposed modification of Condition R of the Instrument of Appointment	5
2. Consultation responses to modification of Condition 7 of the standard conditions of the Water Supply Licence	8
3. Conclusion and next steps	10

## Background to the formal consultation on the removal of the in-area trading ban

The in-area trading ban (IATB) prevents:

- a. appointees from selling or otherwise making available water or other assets to a related licensed water supplier; and
- b. licensed water suppliers from selling water to a related undertaker, or carrying out relevant activities in the area to which that water undertaker’s appointment relates.

This means licensees that are related to an undertaker may only supply eligible non-household (business, charity and public sector) customers outside that undertaker’s geographic area.

The IATB was introduced in response to concerns that incumbent undertakers would dominate the newly competitive sectors of the non-household retail market. The Water Act 2003 placed a duty on both Ministers and Ofwat to ensure that licensees did not carry out activities in the area of undertakers with whom they were connected. The Enterprise and Regulatory Reform Act subsequently repealed this statutory duty in 2013. Further, DEFRA’s retail exit consultation in December 2014 set out the benefits of removing the IATB and stated that Ofwat would consult on the necessary changes in licences.<sup>1</sup>

If the IATB were not removed, this would prevent the market design envisaged by the Water Act 2014 being realised. Any retailers associated with one of the existing companies would not be able to compete on a national basis, reducing the degree of competition in the new market. Removal of the IATB prior to the opening of the new market helps to ensure that wholesalers and retailers can complete the necessary preparations in time for market opening and avoids potential duplication of costs.

Ofwat issued a [formal consultation](#) on the proposal to modify company licences to remove the in-area trading ban (IATB) on 3<sup>rd</sup> March 2016. The formal consultation contained the required Notices under both section 13 of the WIA91 in respect of modification of Condition R of the Instrument of Appointment, and section 17J of the

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<sup>1</sup> Page 13, [Retail exits consultation document](#), December 2014, DEFRA, December 2014.

WIA91 in respect of modification of Condition 7 of the standard conditions of the Water Supply Licence.

Alongside the formal consultation, we also issued an [Information Notice 16/01](#) setting out our expectations for company compliance codes. These codes must make clear that where undertakers trade with their associate licensees, they should do so on a non-discriminatory basis and ensure that information is only used for the purposes for which it was obtained.

Section 2 of this document summarises the responses received in regard to the proposed modification to the Instrument of Appointment. Section 3 then summarises the responses in respect of the proposed modification to the standard conditions of the Water Supply Licence. Finally, Section 4 sets out the conclusions and next steps.

# 1. Consultation responses to proposed modification of Condition R of the Instrument of Appointment

## 1.1 Summary of responses from regional undertakers

Under section 13 of WIA91, we are able to modify the conditions of a company’s appointment if it agrees to the proposed modification. We received responses from all 19 companies, summarised in Table 1 below. Eighteen of the responses accepted the proposal. Southern Water would only support the proposal if all other appointees consented, to ensure consistency. Since all other appointees consented, we are entitled to consider that Southern Water has also consented. We discuss the points made by that company further below.

**Table 1: Responses from regional undertakers to proposed modification of Condition R**

Company	Headline response	Additional comments
Anglian Water Services Limited	Consent - agree to modification	-
Dŵr Cymru	Consent - support removal of IATB	Dŵr Cymru stated in its response that it intends to apply for WSSL and so the removal of IATB will have some impact in Wales
Northumbrian Water Limited	Consent - confirm agreement	-
Severn Trent Water Limited	Consent - proposed changes accepted	-
Southern Water Services Limited	Consent – conditional on the basis that all other appointees have consented to modification to ensure consistency	IN16/01 may not achieve level of control that will be in place at market opening
South West Water Limited	Consent - content	-
Thames Water Utilities Limited	Consent - accept modification	-
United Utilities Water Limited	Consent	-
Wessex Water Services Limited	Consent - Board agreed to accept proposed change	-
Yorkshire Water Services Limited	Consent - no objections	-
Affinity Water	Consent - accept proposed modification	-
Bournemouth Water Limited	Consent - content	-
Bristol Water plc	Consent - accept modification	-

<b>Company</b>	<b>Headline response</b>	<b>Additional comments</b>
Cholderton and District Water Company Limited	Consent - no objections	-
Dee Valley Water plc	Consent - confirm acceptance	-
Portsmouth Water Limited	Consent - confirm acceptance	-
South East Water Limited	Consent - confirm acceptance	-
South Staffordshire Water	Consent - formally accepts the proposed changes	-
Sutton and East Surrey Water	Consent - agree to proposed modification	-

Note: No responses were received from stakeholders who are not already appointment or licence holders

## **1.2 Additional comments and our response**

### **1.2.1 Concern that removal of IATB was premature**

Southern Water was concerned that lifting of the IATB was premature. It was concerned that even perceived undue preference towards an associated retailer would discourage entry. It suggested that the requirement on incumbents to review and publish their Condition R compliance code set out in IN16/01 would not place the same levels of control on trading between undertakers and their associates that would be present at market opening.

The company noted that at market opening, there will be prescribed market processes, equitable access to market data, plus the stapling condition applied through Schedule 8 of the Market Arrangements Code to ensure equivalent market processes and contracts are applied to integrated businesses. The removal of the IATB at this time would allow retailers associated with incumbent companies to negotiate national contracts fully anticipating the future level playing field arrangements which will be in place at market opening.

Although we agree with the company about the importance of a level playing field, we are satisfied that the current arrangements do provide sufficient protections against inappropriate behaviour. IN16/01 reminded companies that associated licensees must not receive preferential treatment and that information must only be used for the purposes for which it was obtained. So contract negotiations with customers that take place ahead of – or indeed after – market opening, should see any retailers who wish to do so competing on the merits of their own knowledge and

service offers. The existing access codes will also continue to apply to any switching of currently eligible customers that takes place ahead of the new market opening.

### 1.2.2 Impact of IATB removal in Wales

Dŵr Cymru stated that it intended to apply for a Water and Sewerage Supply Licence (WSSL) and asserted that the comment in the consultation document that the removal of the IATB would have not have any practical effect in Wales may not be correct.

As we explained in the consultation, the Enterprise and Regulatory Reform Act repealed the legislation requiring the IATB in 2013. The consultation considered both the removal of the IATB and its timing, in particular whether the IATB should be removed ahead of retail market opening to assist those undertakers considering exit (which will not be available to Welsh undertakers. Since the WSSL will not take effect until market opening and neither of the Welsh undertakers has an associated licensee with a WSL, we continue to consider that the removal of the IATB will have no practical effect in Wales until April 2017 but will have such an effect thereafter if a Welsh undertaker proceeds with obtaining a WSSL which has a restricted retail authorisation.

## 1.3 Responses from small undertakers

Table 2 summarises the responses from small undertakers. All respondents consented to the proposed modification to Condition R.

**Table 2: Summary of responses from small undertakers to proposed modification of Condition R**

Company	Headline response	Additional comments
Albion Water Ltd	Consent - no objection	-
Independent Water Networks Ltd	Consent - no objection	-
SSE Water Ltd	Consent - accept proposal (not currently switched on)	
Peel Water Networks Ltd	Consent - no issues	-
Veolia Water Projects Ltd	Consent - no comment to make	-

Note: No responses were received from stakeholders who are not already appointment or licence holders



## 2. Consultation responses to modification of Condition 7 of the standard conditions of the Water Supply Licence

### 2.1 Summary of responses from Water Supply Licensees

The removal of the IATB also requires a change to condition 7 of the standard conditions of the current Water Supply Licence. Under section 17J of WIA91, we are able to modify the standard licence conditions if no licensee has objected or those who have objected, represent less than 20% by volume of water supplied in a 12-month period prior to issuing the Notice proposing the change.

Table 3 summarises the responses received from WSL holders. All 12 WSL holders confirmed either acceptance or that they did not object to the change. This allows the change to proceed.

**Table 3: Summary of responses from Water Supply Licensees to proposed modification of Condition 7**

Company	Headline response	Additional comments
Avon Valley Water Limited	No objection - content	-
Anglian Water Business (National) Limited	No objection - accept modification to condition	-
Kelda Water Services (Retail) Limited	No objection	-
NWG Business Limited	No objection - confirm agreement	-
Peel Water Limited	No objection	-
Scottish Water Business Stream Ltd	No objection - accept proposed change to own licence	IN16/01 reduces some of risks to level playing field, but close monitoring remains important – very beneficial to maintain dialogue with Ofwat on this
Source for Business	No objection - content	-
Sutton and East Surrey Water Services Limited	No objection - accept modification	-
Severn Trent Select Limited	No objection - proposed changes accepted	-
Thames Water Commercial Services Limited	No objection - accept modification	-
United Utilities Water Sales Ltd	No objection	-

Company	Headline response	Additional comments
Water 2 Business Limited	No objection	-

Note: No responses were received from stakeholders who are not already appointment or licence holders

## 2.2 Additional comments and Ofwat’s response

### Monitoring of level playing field

One company commented that while they welcomed our comments in respect of the company compliance codes in IN16/01, close monitoring remained important to help ensure the achievement of a level playing field.

We agree with the importance of the level playing field and that the situation needs to be kept under review as the preparations for the new market progress. In IN16/01 we explained that, while we did not think that our compliance guidance needed to be amended at the time, we would keep this under review and consider how our work over the summer to open the retail market in April 2017 impacts on our compliance guidance. We also stated that we would take into account the steps taken by companies in response to IN16/01 and any evidence that suggests changes are needed.

Every company that is required to produce a compliance code responded to IN 16/01 confirming that they had already published an updated code or would do so shortly. This included companies that had not previously published their compliance code before IN 16/01 was issued. We consider that this greater transparency is helpful. We have also been encouraged by the responses we received which indicate that companies understand the increasing importance of these documents and the need to review them on a regular basis.

As part of our targeted review of market participants’ readiness for retail market opening we plan to undertake some further work over the summer to identify the extent of understanding and coverage generally of matters relating to the creation of a level playing field.

### **3. Conclusion and next steps**

We consider that the consultation responses satisfy the consent requirements of section 13 WIA91 on the proposed change to Condition R of the Instrument of Appointment. Similarly, the responses met the “no objection” requirements of section 17J on the proposed change to Condition 7 of the standard conditions of the WSL. We will therefore proceed to implement both changes, writing to each individual company to notify them of the changes.

We anticipate that the section 195A notices will be sent week commencing 16 May 2016 and the implementation date for the changes will be 19 May 2016.