

NOTICE OF OFWAT'S DECISION TO ISSUE A DIRECTION TO TOR WATER LIMITED UNDER SECTIONS 66DA AND 117F OF THE WATER INDUSTRY ACT 1991

29 MAY 2019

This document sets out the reasons for the decision by the Water Services Regulation Authority (“**Ofwat**”) to issue a direction to Tor Water Limited (“**Tor**”) under sections 66DA and 117F of the Water Industry Act 1991 (the “**Act**”).

Except as otherwise provided in this Notice, words and expressions used in this Notice have the same meaning as they have in the Wholesale Retail Code (the “**Code**”)

1. The relevant provisions and policy in this case

- 1.1 The purpose of the direction was to secure compliance by Tor with sections 66DA and 117F of the Act by requiring payments due to relevant Contracting Wholesaler(s) under Wholesale Contract(s) to be paid. In doing so, Ofwat considered that it has fulfilled the requirement for it to exercise its powers and duties under section 2(1) of the Act to:
 - (a) further the consumer objective; and
 - (b) to secure that the activities authorised by the licence for a water supply licensee or sewerage licensee and any statutory functions imposed on it in consequence of the licence are properly carried out.
- 1.2 Sections 66DA and 117F of the Act confirm that Ofwat may issue one or more codes in respect of section 66D and section 117E agreements respectively. Ofwat has issued the Code in compliance with these sections.
- 1.3 Under sections 66DA(4) and 117F(4) of the Act, if Ofwat considers that a water supply and/or sewerage licensee is not acting as required by the Code, it may give the licensee a direction to do, or not to do, a thing specified in the direction.
- 1.4 Ofwat has issued its [approach to enforcement](#), which whilst not specifically detailing how Ofwat will issue directions, does set out the stepped approach that has been taken in this case (paragraph 37), and the principles of best regulatory practice which have been considered, namely proportionality, accountability, consistency, targeting only cases in which action is needed, and transparency (paragraph 6).

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- 1.5 Informal regulatory action has been pursued in this case, prior to Ofwat taking the step of issuing a direction for compliance with the Code, and consideration has been given to the prioritisation of this case with a view to protect customers. In line with our approach to enforcement our aim is to secure Tor's compliance with its statutory and licence obligations, and change its behaviour, so that customers' interests are protected. Further, Ofwat considers that in issuing the direction it will prevent similar cases occurring in the future by reminding licensees of the importance of complying with their obligations under the Code and the Act.

2. Breach of the Code

- 2.1 Ofwat is satisfied, in the specific circumstances of this case, that:

2.1.1 Tor is not acting as required by the Code as it has failed to pay invoices issued by Contracting Wholesaler(s) in accordance with Section 9 of Schedule 1, Part 2: Business Terms (the "**Business Terms**") of the Code;

2.1.2 Tor has been properly classed as a Defaulting Trading Party by a Contracting Wholesaler in accordance with Section 10.1.1 of the Business Terms of the Code as it has failed to pay an undisputed amount of more than five thousand pounds (£5000) (exclusive of VAT) properly due by it under the Wholesale Contract;

2.1.3 Tor has repeatedly failed to pay an undisputed amount of more than five thousand pounds (£5,000) (exclusive of VAT) properly due by it under the Wholesale Contract, meaning that it is repeatedly classed as a Defaulting Trading Party; and

2.1.4 Tor can be classed as a Defaulting Trading Party in accordance with Section 10.1.2 as it has persistently failed to pay an undisputed amount properly due. It has failed to pay for a third time having failed on two occasions in the previous twelve Month period, the Contracting Wholesaler has issued notice to it to remedy the non-payment on at least two of those occasions and those amounts remain outstanding.

3. Considerations in relation to issue of direction

- 3.1 Ofwat considers that it is requisite to issue a direction against Tor pursuant to sections 66DA and 117F of the Act. Ofwat has broad powers to issue a direction where it considers that a licensee is not acting in accordance with

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the Code. In reaching its decision that there has been a breach of the Code, and this breach warrants the issue of a direction, Ofwat has considered the following factors:

3.2 Breach of the Code and Defaulting Trading Party

3.2.1 Ofwat has evidence that Tor has repeatedly failed to pay invoices issued by Contracting Wholesaler(s) in accordance with section 9 of the Business Terms of the Code.

3.2.2 Ofwat has evidence that Tor is a Defaulting Trading Party for the purpose of section 10.1.1 of the Business Terms of the Code. Whilst Tor is not unique in its failure to comply with 10.1.1 of the Business Terms, whereby there has been a failure to make required payments within the prescribed time periods, no other Contracting Retailer has, on a repeated basis over a significant period, failed to meet its obligations under the Business Terms of the Code to pay undisputed outstanding amounts resulting in them being classed as a Defaulting Trading Party on a reoccurring basis.

3.2.3 Further, Ofwat has evidence that Tor is a Defaulting Trading Party for the purpose of section 10.1.2 of the Business Terms of the Code. It has for a third time failed to pay an amount properly due by it under the Wholesale Contact, having already failed on two occasions in the previous twelve Month period. A relevant Contracting Wholesaler has issued a notice to it to remedy the non-payment on at least two of those occasions, and those sums remain outstanding.

3.3 Failure to comply with the Water Supply and Sewerage Licence Standard Conditions

3.3.1. Ofwat has requested information from Tor on 13 December 2018, 6 February 2019 and 8 March 2019 under the Water Supply and Sewerage Licence Standard Conditions (the “**SLC**”). SLC 8 allows Ofwat to request information from licensees where it is reasonably required for the purpose of carrying out its functions under the Act or the Water Act 2014. This information should be provided in such form and manner, at such time and place, and be accompanied by or supplemented by such explanations, as Ofwat may reasonably require. Tor has either failed to respond to Ofwat's requests for information (and has not provided reasons for this); has responded after the deadline set in the request for information (without requesting and securing agreement from Ofwat to do so); or has provided incomplete or inconsistent information in the responses it has provided.

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3.3.2. All licensees have an obligation under the SLC 4 to submit a prescribed certificate to Ofwat by no later than 1st April each year (the “**Certificate of Adequacy**”). This Certificate of Adequacy requires a licensee to provide assurances to Ofwat that, in particular, it has, and will have, for the following year, all the management, financial, technical, operational and other resources needed or securing that it is able to meet the obligations mentioned in condition 3. Despite being reminded of this obligation on 6 March, Tor has not provided Ofwat with the required Certificate of Adequacy. This is significant because, in the absence of this assurance and in light of the default notifications we currently do not have sufficient assurance that Tor has the necessary resources to fulfil its obligations under its Licences and the Act.

3.1 Ofwat’s duties under the Act

3.1.1 Ofwat’s duties under section 2(1) of the Act, especially in relation to:

- (a) furthering the consumer objective; and
- (b) to secure that the activities authorised by the licence for a water supply licensee or sewerage licensee and any statutory functions imposed on it in consequence of the licence are properly carried out.

3.1.2 The repetition and severity of the breaches of section 9 of the Business Terms of the Code resulting in Tor being classed as a Defaulting Trading Party in accordance with section 10.1 of the Business Terms of the Code (which provides for potential causes for contract termination under the Code), and the failure to comply with the SLCs means that, in this instance, Ofwat considers that it is appropriate to take steps to protect the interests of consumers by imposing a restriction on the transfer of new premises to Tor until it has paid the undisputed sums owed in accordance with the Code.

4. Appropriate action in this case

4.1 Ofwat has carefully considered whether issuing a direction in this case is appropriate, taking account of Ofwat’s approach to enforcement, which whilst detailing the issue of directions in itself, does indicate the approach Ofwat will take in considering formal enforcement action, of which the issue of a direction should be included.

4.2 As is demonstrated by paragraph 3 above, Ofwat has attempted to use informal action to engage with Tor on numerous occasions to understand and

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address the concerns identified above. Whilst some engagement has been possible, it has been limited and provided insufficient assurance in relation to the concerns outlined above.

- 4.3 Further, the evidence obtained by Ofwat of the repeated and severe breaches of the Code, and ongoing concerns about Tor's failure to comply with the SLCs means that Ofwat considered that formal action should be taken. It is in the interest of ensuring compliance with the Code and protecting consumers that we issued a direction on 29 May 2019, which included imposing a restriction on Tor from providing services to additional Eligible Premises whilst it remains a Defaulting Trading Party. This is because late payment is a potential cause for termination of its Wholesale Contract(s) under the Code. Limiting the extent to which Non-Household Customers are exposed to the risks associated with a potential contract termination for late payment is appropriate in these circumstances.
- 4.4 Prior to issuing the direction, Ofwat shared a draft of the direction and this notice document to allow it a short opportunity to comment on the facts set out before they were finalised and formally issued.

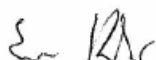
5 Effects of direction

- 5.1 Tor is required to pay any outstanding and future undisputed invoices or statements to any relevant Contracting Wholesaler in accordance with the Code.
- 5.2 Tor is not permitted to provide Water Retail Services and/or Sewerage Retail Services to Eligible Premises that it does not already provide these services to whilst it is, or if it becomes in the future, a Defaulting Trading Party in accordance with the Business Terms of the Code.
- 5.3 Tor must include a notification in a prominent position on the home page of its website in terms approved by Ofwat stating that it is not currently providing Water Retail Services and/or Sewerage Retail Services to Eligible Premises and/or Non-Household Customers that it is not currently providing these services to. This is to notify potential customers of Tor that, at this time, it is not permitted to offers services to additional Eligible Premises.
- 5.4 In accordance with Section 1.1.3(f) of Schedule 1, Part 4: Market Terms of the Code, and 3.1.1 of the Market Arrangements Code, the Market Operator (MOSL) shall comply with the direction issued by Ofwat, and where

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necessary, prevent the Transfer of Supply Points receiving Water Services or Sewerage Services to Tor until Ofwat confirms that this is no longer applicable. Where a request for the Transfer of Supply Points has been made prior to 30 May 2019, these will be unaffected for the purposes of this Direction.

Dated: 29 May 2019

A handwritten signature in black ink, appearing to read 'E. Kelso'.

**Signed on behalf of the Authority by Emma Kelso, Senior Director
Markets & Enforcement**

Duly authorised for that purpose by the Authority