

NOTICE OF THE WATER SERVICES REGULATION AUTHORITY'S PROPOSAL TO MAKE A FINAL ENFORCEMENT ORDER TO TOR WATER LIMITED

This document provides notice under section 20(1) of the Water Industry Act 1991 (the '**Act**') that the Water Services Regulation Authority (the '**Authority**') proposes to make a final enforcement order (the '**Order**') to Tor Water Limited ('**Tor Water**') under section 18(1) of the Act, to secure its compliance with the directions issued on 29 May 2019, and which came into effect on 30 May 2019, under sections 66DA and 117F of the Act (the '**Direction**'); and the Water Supply and Sewerage Licence Standard Conditions, Part A, Conditions 4 and 8 (the '**SLCs**'). The draft Order is attached in Annex 1.

Section 5 explains how to make representations or objections on the draft Order. The deadline for making them is 9am on Monday 19 August 2019, which is 21 days after publication of the notice] (21 days after the publication of this notice, in accordance with section 20(1)(c) of 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 Act.

1. Introduction

1.1. Tor Water

1.1.2 The Authority granted Tor Water a Water Supply Licence with a retail authorisation and a Sewerage Licence with a retail authorisation on 29 June 2018 (together for the purpose of this document the '**Licence**') in accordance with Sections 17A and 17BA of the Act. The Licence came into force on 30 June 2018. The Licence permits Tor Water to supply eligible business, charity and public sector customers in England with **Water Retail Services** and **Sewerage Retail Services**¹.

1.2. The Wholesale Retail Code

1.2.1. The Authority issued the Wholesale Retail Code (the '**Code**') pursuant to sections 66DA and 117F of the Act. The Code prescribes the standard terms for wholesale contracts (the '**Wholesale Contract**') between **Contracting Wholesalers** and **Contracting Retailers** (as defined in the Code).

1.2.2. Part D of Schedule 1 Part 2 Business Terms of the Code (the '**Business Terms**') sets out the requirements for, and when, the Contracting Retailer should pay the Contracting Wholesaler the **Wholesale Charges** (as defined in the Code).

¹ For the purpose of this document, Water Retail Services and Sewerage Retail Services have the same meaning as set out in the [Wholesale Retail Code](#).

1.2.3. Part E of the Business Terms sets out the terms relating to contractual default and termination and specifies the circumstances in which a Contracting Retailer may become a **Defaulting Trading Party** (as defined in the Code) in respect of a particular Wholesale Contract. These include where there is outstanding late payment (section 10.1.1), a persistent failure to pay (section 10.1.2), and where the Contracting Retailer has become a Defaulting Trading Party under another Wholesale Contract (section 10.1.15).

1.3. The Direction

1.3.1. Under sections 66DA(4) and 117F(4) of the Act, if the Authority considers that a water supply licensee and/or sewerage licensee is not acting as required by the Code, it may direct the licensee to do, or not to do, a thing specified in that direction.

1.3.2. Between October 2018 and the issue of the Direction on 29 May 2019 the Authority received eleven notifications from a Contracting Wholesaler that Tor Water had become a Defaulting Trading Party under the Code as a result of failing to pay a Contracting Wholesaler in accordance with the Business Terms.

1.3.3. As a result the Authority issued [the Direction](#) to Tor Water. The Direction required Tor Water to:

- (a) Pay any outstanding, and undisputed, invoices or statements (at the time of the issue of the Direction) to any relevant Contracting Wholesaler in accordance with Sections 9 and 10 of the Business Terms by no later than 28 June 2019;
- (b) Pay any future undisputed invoices and statements to any relevant Contracting Wholesaler in accordance with Sections 9 and 10 of the Business Terms;
- (c) Whilst it remained a Defaulting Trading Party, and during any future period should it become a Defaulting Trading Party:
 - (i) not provide Water Retail Services and/or Sewerage Retail Services to Eligible Premises that it does not already provide these services to;
 - (ii) Not seek to register any new Eligible Premises under the Code;
 - (iii) Notify MOSL that it is subject to the prohibitions in i) and ii) above; and
- (iv) By Friday 31 May, or a later date agreed with the Authority, include a notification in a prominent position on the homepage of its website, in terms approved by the Authority, stating that it is not currently providing Water Retail Services and/or

Sewerage Retail Services to Eligible Premises and/or Non-Household Customers. It must be clear in any communications as to the reasons why it is not currently providing services to additional Eligible Premises and/or Non-Household Customers.

- 1.1.3 The [notice](#) accompanying the Direction also identified issues relating to Tor Water's compliance with SLC 4 and SLC 8 of the SLCs. As described below, Tor Water has not complied with the Direction or dealt with the issues relating to its compliance with SLC 4 and SLC 8, including in responding to a further information request issued to Tor Water under SLC 8 on 3 July for response by 10 July.
- 1.1.4 Tor Water paid the invoices for which it had been classed as a Defaulting Trading Party when the Direction was issued on 29 May, fulfilling requirement a) of the Direction set out above. Requirements b) and c) above of the Direction are enduring and continue to have effect.

1.4. SLC 4

- 1.4.1. Under SLC 4, paragraph (1) a licensee must provide the Authority with a certificate of adequacy by 1st April each year (an '**Annual Certificate**'), and any additional certificate of adequacy requested by the Authority under that condition (an '**Additional Certificate**'). By these, the licensee must certify that it has, and will have for the following 12 months, all necessary arrangements in place, including management, financial, technical, operational and other resources needed or securing that it is able to meet its obligations under SLC 3.
- 1.4.2. SLC 3 requires a licensee to ensure that all necessary arrangements have been made for securing that its ability to continue to meet its licence and statutory obligations relating to its licensed activities, and that it has sufficient product and public liability insurance to cover those activities.
- 1.4.3. SLC 4, paragraph (4) enables the Authority to require licensees to supplement certificates submitted under this condition by such verification reports, as may be reasonably required.
- 1.4.4. Under SLC 4, paragraph (5) a licensee must notify the Authority immediately it becomes aware that it would not be able to provide a certificate under SLC 4 if required to do so, or anticipates a change of circumstances which would prevent it from being able to provide such a certificate.

1.5. SLC 8

1.5.1. SLC 8 requires a licensee to provide the Authority with such information as it may by notice reasonably require for the purpose of carrying out its functions under the Act or the Water Act 2014, subject to prescribed restrictions.

1.6. Section 18 of the Act

1.6.1. Subject to subsection (2) and sections 19 and 20 of the Act, under section 18(1) of the Act, where the Authority is satisfied that a licensee is contravening or is likely to contravene any condition of its licence, including the SLCs, or any statutory or other requirement enforceable under section 18, it has a duty to make, by final enforcement order, such provision as is requisite for securing compliance with that condition or requirement.

1.6.2. Sections 66DA(6) and 117F(6) of the Act state that it is a duty of a licensee to comply with a direction under subsection (4), and this duty is enforceable by the Authority under section 18 of the Act.

1.7. Consequences of non-compliance with the Order

1.7.1. A failure to comply with the Order may result in the revocation of the Licence.

1.8. Policy

1.8.1. Ofwat has published its [approach to enforcement](#), which sets out its duties with respect to enforcement, and the approach we take to using our enforcement powers. The companies we regulate must comply with their statutory and licence obligations. If a company fails to comply with its obligations, we will take appropriate action to incentivise and secure compliance.

1.8.2. When we consider the appropriate action to take, we consider the effects of the contravention on the company's customers, customers in general and the regulatory framework (paragraph 27). In line with our risk-based approach to regulation, we take a stepped approach (paragraph 7), first exploring informal regulatory action with the company concerned where that is the most appropriate means of making sure it meets its obligations. If this does not achieve the desired result, we make take formal regulatory action, including enforcement. Where we take enforcement action we expect it to act as an incentive on the company in question to change its behaviour so that it becomes compliant. Imposing an enforcement order indicates to the company in question, and to others in the sector, that certain behaviours are not acceptable and are sufficiently serious to attract a formal sanction (paragraphs 22 -24).

1.8.3. In this case informal regulatory action was initially pursued through engagement with Tor Water. This was followed by us issuing a direction to secure compliance with the Code. As detailed below, Tor Water has continued to be in breach of its obligations, resulting in the further escalation of our intervention and the decision to take enforcement action.

2 Contraventions of legal obligations

2.1 Introduction

2.1.1 The Authority considers that the acts and omissions identified below constitute contraventions of SLC 4 and 8 and the Direction, and, together with the other facts summarised below, mean that it is requisite to make the Order.

2.2 Failure to comply with the Direction

2.2.1 As of the date of this Notice, we consider Tor Water to be in breach of paragraph 3.2.1, sub-paragraphs (b) and (c) of the Direction for the following reasons.

Failure to comply paragraph (b) of the Direction

2.2.2 Since the payment made on 28 May 2019, Tor Water has failed subsequently to pay Wholesale Charges to three Contracting Wholesalers in accordance with section 9 and 10 of the Business Terms. The Authority was notified on 9 July 2019 that Tor Water had become a Defaulting Trading Party under one Wholesale Contract. As a result, it has also become a Defaulting Trading Party under its other Wholesale Contracts by virtue of section 10.1.15 of the Business Terms.

2.2.3 In addition, the Authority received a notification from a second Contracting Wholesaler on 11 July 2019 that Tor Water had become a Defaulting Trading Party under its Wholesale Contract through late payment (section 10.1.1) and a persistent failure to pay (section 10.1.2) invoices due under that contract. This Contracting Wholesaler has also issued a notice of intention to terminate its Wholesale Contract with Tor Water in accordance with section 11 of the Business Terms.

2.2.4 The Authority therefore considers Tor Water to have failed to comply with paragraph 3.2.1, sub-paragraph (b) of the Direction to pay any future undisputed invoices and statements to any relevant Contracting Wholesaler in accordance with sections 9 and 10 of the Business Terms.

Failure to comply paragraph (c) of the Direction

- 2.2.5 At the point at which Tor Water became a Defaulting Trading Party again, the requirements of paragraph 3.2.1, sub-paragraph (c) of the Direction were re-engaged. The Authority reminded Tor Water of these obligations on 9 July 2019.
- 2.2.6 However, Tor Water has yet to post the notification required by paragraph 3.2.1, sub-paragraph (c)(iv) of the Direction on its website that it is not currently providing Water Retail Services and/or Sewerage Retail Services to Eligible Premises and/or Non-Household Customers that it does not already provide these services to. In addition, contrary to paragraph 3.2.1, sub-paragraph (c)(iii) of the Direction, it has not yet notified MOSL that it is subject to the prohibitions in relation to acquiring new customers whilst remaining a Defaulting Trading Party.

2.3 SLC 4 – Failure to notify the Authority of Change of Circumstances and failure to provide the Annual Certificate

SLC 4 paragraph 1

- 2.3.1 On the 6 March 2019, the Authority sent a reminder to licensees, including Tor Water, that the Annual Certificate for the period between 1 April 2019 to 31 March 2020 was due to be provided by no later than 1 April 2019. Tor Water failed to submit its Annual Certificate by 1 April 2019 as required by SLC 4.
- 2.3.2 On 3 July 2019, the Authority reminded Tor Water of its obligation to provide the Annual Certificate. The certificate remains outstanding. Nor has the Authority received a notification under SLC 4 paragraph (5) notifying it of reasons why Tor is unable to provide such a certificate.

SLC 4 paragraph 4

- 2.3.3 On 6 February 2019, the Authority issued Tor Water with a request under SLC 4 for an Additional Certificate and supporting verification report by 20 February 2019. Tor Water did not comply with this deadline and the Authority sent a reminder on 21 February. Tor Water provided the Additional Certificate on 22 February 2019 but did not provide the supporting verification report within the deadline resulting in a number of reminders. Tor Water has subsequently provided inconsistent and incomplete information in response to this formal request.
- 2.3.4 On 3 July 2019, alongside the reminder to Tor Water of its obligations to provide the Annual Certificate, the Authority also requested a supporting verification

report to it to be submitted to it by 10 July 2019. The supporting verification report remains outstanding.

SLC 4 paragraph 5

- 2.3.5 Since receipt of Tor Water's Additional Certificate, two Contracting Wholesalers have separately notified the Authority at various times that Tor Water has become a Defaulting Trading Party under their Wholesale Contracts. The Authority has received fifteen such notifications in total. In two instances this has led one Contracting Wholesaler to issue two separate notices of an intention to terminate a Wholesale Contract. The most recent of these was issued by South West Water on the 12 July 2019 and remains extant.
- 2.3.6 These circumstances call into question Tor Water's ability to finance its statutory duties, noting in particular that sub-paragraph (b) of paragraph 3.2.1 of the Direction (requiring Tor Water to comply with the payment provisions of sections 9 and 10 of the Business Terms) is itself a statutory duty under Sections 66DA(6) and 117F(6) of the Act. In light of this, the Authority would expect Tor Water either to provide robust rebuttal evidence and a firm plan to return to compliance, or to notify the Authority under SLC 4 paragraph (5) with details of the circumstances calling into question the adequacy of its resources to meet its obligations under SLC 3. Tor Water has provided no such comfort and made no such notification.

2.4 SLC 8 – Failure to respond to Requests for Information from the Authority

- 2.4.1 The Authority issues requests for information in accordance with SLC 8 for a number of reasons, including general requests for market monitoring purposes, and targeted requests when information is required from a specific licensee. Tor Water has been the subject of both types of request.
- 2.4.2 The Authority issued Tor Water with a request for information for market monitoring purposes on 13 December 2018, to be provided by 15 February 2019. Tor Water failed to meet this deadline. Despite being reminded of the obligation on four separate occasions following the deadline, with the final reminder being sent on 8 April 2019 and the Authority receiving a response from Tor Water that the information would be received by the end of that week, it has, as of the date of this Notice, failed to provide the information.
- 2.4.3 When the Authority requested Tor Water to provide an Additional Certificate and supporting verification report on 6 February 2019, it also requested additional information under SLC 8 to be provided by 20 February 2019. Tor

Water did not meet this deadline, and has subsequently provided inconsistent and incomplete information in response to this formal request.

2.4.4 In consequence, on 3 July 2019, alongside a further reminder to provide its outstanding Annual Certificate, the Authority issued a request to Tor Water for a verification report under SLC 4 paragraph (4) and another request under SLC 8 to provide information, amongst other things, on its financial standing. The deadline for this request was 10 July 2019. This request was not met and remains outstanding.

3 Considerations in relation to Ofwat’s proposal to make a final enforcement order

3.1 The Authority’s status as enforcement authority

3.1.1 The Authority is the enforcement authority in relation to the SLCs applicable to Tor Water’s Licence.

3.1.2 Sections 66DA and 117F of the Act confirm that the Authority is the enforcement authority in relation to the Direction.

3.2 Section 19 of the Act

3.2.1 The Authority does not consider that any of the exceptions to the duty to enforce are relevant in this case.

OFWAT THEREFORE PROPOSES MAKING A FINAL ENFORCEMENT ORDER UNDER SECTION 18(1) OF THE ACT IN THE TERMS SET OUT IN THE ATTACHED DRAFT ORDER ADDRESSED TO TOR WATER LIMITED

4 Effects of proposed Order

4.1 Under the Order Tor Water will be required to:

- (a) Provide the outstanding Annual Certificate under SLC 4 paragraph (1), or notification of why it cannot provide such a certificate under SLC 4 paragraph (5);
- (b) Provide the supporting outstanding verification report required under SLC 4 paragraph (4) and the outstanding information requested under SLC 8 on 3 July 2019 by the Authority;
- (c) Cease to be a Defaulting Trading Party, bringing itself into and continue in compliance with sections 9 and 10 of the Business Terms; and

- (d) Unless and until it complies with (c):
 - a. Notify MOSL of the restrictions that apply to it under the Direction in relation to the provision of Water Retail Services and/or Sewerage Retail Services to new Eligible Premises that it does not already provide these services to; and
 - b. Post the notification required by the Direction on its website in relation to the provision of Water Retail Services and/or Sewerage Retail Services to new Eligible Premises.

4.2 Under section 22 of the Act the Order would also have the following effects:

- (a) The obligation to comply with an enforcement order shall be a duty owed to any person who may be affected by a contravention of the Order.
- (b) Where a duty is owed by 4.2(a) above to any person, any breach of the duty which causes that person to sustain loss or damage shall be actionable at the suit of that person.
- (c) In any proceedings brought against any company in the pursuance of 4.2(b) above, other than proceedings in respect of so much of a contravention of any order as consists in a breach of a duty imposed by virtue of section 68(1)(a) or (1A)(a) of the Act, it shall be a defence for the person to show that the person took all reasonable steps and exercised all due diligence to avoid contravening the order.
- (d) Without prejudice to any right which any person may have by virtue of 4.2(a) above to bring civil proceedings in respect of any contravention or apprehended contravention of an enforcement order, compliance with any such order shall be enforceable by civil proceedings by the relevant enforcement authority for an injunction or any other appropriate relief.

5 How to make representations or objections

5.1.1 Representations or objections on the proposed Order should be made so as to be received by Ofwat by 9am on Monday 19 August 2019.

5.1.2 Representations should be sent to the following address:

Email: enforcement@ofwat.gov.uk

OR by post to: Market Outcomes & Enforcement
Ofwat
Centre City Tower

7 Hill Street
Birmingham
B5 4UA

- 5.1.3 We will publish copies of representations and objections we receive in response to this notice on our website, unless the person making them indicates that they would like their response to remain unpublished.
- 5.1.4 Information provided in response to this Notice, including personal information may be published or disclosed in accordance with access to information legislation – primarily the Freedom of Information Act 2000 (FoIA), the Data Protection Act 2018, and the Environmental Information Regulations 2004.
- 5.1.5 If persons making representations or objections to this Notice would like the information they provide to be treated as confidential, please be aware that under the FoIA, there is a statutory ‘Code of Practice’ which deals amongst other things, with obligations of confidence. In view of this, it would be helpful if in making representations or objections it is explained why you regard the information provided as confidential. If we receive a request for disclosure of the information we will take full account of this explanation, but we cannot give an assurance that we can maintain confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on Ofwat.

Dated: 26 July 2019

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



Duly authorised for that purpose by the Authority

OFWAT HEREBY MAKES A FINAL ENFORCEMENT ORDER UNDER SECTION 18(1) OF THE ACT IN RELATION TO TOR WATER LIMITED AS SET OUT BELOW

[Draft] Final Enforcement Order in relation to Tor Water Limited

This document constitutes a [draft] final enforcement order (the '**Order**') given by the Water Services Regulation Authority (the '**Authority**') to Tor Water Limited (the '**Licensee**') under section 18(1) of the Water Industry Act 1991, as amended (the '**Act**').

Except as otherwise provided in this Order, words and expressions used in this Order have the same meaning as they have in the Wholesale Retail Code (the '**Code**').

On [XXXX] Ofwat gave notice under section 20 of the Act of its proposal to make an order under section 18(1) of the Act in relation to the Licensee (the '**Notice**').

The purpose of this Order is to secure compliance by the Licensee with its obligations under its Water Supply Licence and Sewerage Licence (together for the purpose of this document the '**Licence**'), and its statutory obligations under section 66DA and 117F of the Act.

As set out in the Notice:

- a) the Licensee has contravened its Licence by failing to comply with the Water Supply and Sewerage Licence Standard Conditions, Part A, Conditions 4 and 8; and
- b) the Licensee has contravened its statutory obligations by failing to comply with a direction issued by the Authority on 29 May 2019 under sections 66DA and 117F of the Act (the '**Direction**'). In accordance with sections 66DA(6) and 117F(6) of the Act it is a duty of the Licensee to comply with the Direction, and this duty is enforceable by the Authority under section 18 of the Act.

This Order takes effect as of [XXXX]

1. The Licensee is required to comply with its obligations under Part A of the Water Supply and Sewerage Standard Licence Conditions (the '**SLCs**'), to the satisfaction of the Authority, by:
 - a. providing the annual certificate as required by SLC 4 paragraph (1). If the Licensee is unable to provide the annual certificate, it must set out its reasons for this as required by SLC 4 paragraph 5;

Annex 1 – Draft Enforcement Order

- b. providing the verification report requested under SLC 4 paragraph (4) and the information requested under SLC 8 on 3 July 2019 by the Authority;
 - c. complying with all future requests for information and verification reports under SLC 4 paragraph (4) and SLC 8 within the prescribed deadlines.
2. The Licensee is required to comply with its obligations under the Direction by:
 - a. ceasing to be a Defaulting Trading Party;
 - b. paying any undisputed invoices and statements to any relevant Contracting Wholesaler in accordance with sections 9 and 10 of the Business Terms of the Code; and
 - c. whilst it is at any time a Defaulting Trading Party:
 - i. not providing Water Retail Services and/or Sewerage Retail Services to Eligible Premises that it does not already provide these services to;
 - ii. not seeking to register any new Eligible Premises under the Code;
 - iii. notifying the market operator, MOSL, that it is subject to the prohibitions in i) and ii) above; and
 - iv. including a notification in a prominent position on the home page of its website, in terms approved by the Authority, stating that it is not currently providing Water Retailer Services and/or Sewerage Retail Services to Eligible Premises and/or Non-Household Customers that it is not currently providing these services to. For the avoidance of doubt, the Licensee must be clear in any communications as to the reasons why it is not currently providing services to additional Eligible Premises and/or Non-Household Customers.
3. The Licensee must comply with the obligations by no later than 5pm on [XXXX].
4. A failure to comply with this Order may result in the revocation of the Licence.

Dated:

Signed on behalf of the Authority by []

Duly authorised for that purpose by the Authority