

NOTICE OF THE WATER SERVICES REGULATION AUTHORITY'S PROPOSAL TO MAKE A FINAL ENFORCEMENT ORDERS AND ITS REASONS FOR ISSUING DIRECTIONS TO TOR WATER LIMITED

1. Introduction

- 1.1. 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 the final enforcement orders (the '**Orders**') to Tor Water Limited ('**Tor Water**') under section 18(1) of the Act to secure its compliance with:
- (a) its duties under sections 66DA(4) and 117F(4) of the Act to comply with the Authority's [directions issued to it on 29 May 2019](#) under sections 66DA and 117F of the Act (the '**Direction**'); and
 - (b) the [Water Supply and Sewerage Standard Licence Conditions](#), Part A and Part B (the '**SLCs**').
- 1.2. The draft Orders are attached in Annex 1.
- 1.3. It also gives notice of the Authority's reasons for issuing further directions to Tor Water under sections 66DA and 117F of the Act (the '**Further Directions**') to secure its compliance with section 15 of the Business Terms of the [Wholesale Retail Code](#) (the '**Code**').
- 1.4. A copy of the Further Directions is attached in Annex 2.
- 1.5. The Authority published a [notice of a proposal to make a final enforcement order](#) against Tor Water and accompanying reasons (together the '**Original Proposal**') on 26 July 2019. In the light of representations received on the Original Proposal and further analysis of information received, the Authority has identified evidence of additional contraventions to those in the Original Proposal. It is therefore publishing this notice of a revised proposal and accompanying reasons to make final enforcement orders against Tor Water (together the '**Revised Notice**').
- 1.6. The Authority has also identified evidence that Tor Water is in breach of section 15 of the Business Terms of the Code and has today issued the Further Directions to Tor Water to secure its compliance with those

provisions. Section 8 provides notice of the Authority's reasons for issuing the Further Directions.

- 1.7. Section 9 explains how to make representations or objections on the draft Orders. The deadline for making representations is 31 January 2020 (which is not less than 21 days after the publication of this Revised Notice, in accordance with section 20(1)(c) of the Act).
- 1.8. Except as otherwise provided in this Revised Notice, words and expressions used in this Notice have the same meaning as they have in the Act.

2. Background

Legal provisions

- 2.1. The Authority granted Tor Water licences with retail authorisations under sections 17A and 17BA of the Act to use the systems of water and sewerage undertakers (the '**Wholesaler**') to supply eligible customers in England with water retail and sewerage retail services (together the '**Licence**'). The Licence came into force on 30 June 2018 and is subject to the SLCs.
- 2.2. SLC A3 requires a licensee to ensure that all necessary arrangements have been made for securing that it is and continues to be able 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.
- 2.3. Under SLC A4, 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 the management, financial, technical, operational and other resources needed for securing that it is able to meet its obligations under SLC A3.
- 2.4. SLC A4, paragraph (4) enables the Authority to require licensees to supplement certificates submitted under this condition by such verification reports as may be reasonably required.
- 2.5. SLC A4, paragraph (5) requires a licensee to notify the Authority immediately if it becomes aware that it would not be able to provide a certificate under

- SLC A4 if required to do so, or anticipates a change of circumstances which would prevent it from being able to provide such a certificate.
- 2.6. SLC A8 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.
- 2.7. SLC A9 requires each licensee to pay a share of the estimated costs of the Authority and the Consumer Council for Water, bodies which have customer protection at the heart of their functions. A licensee is required to pay the annual licence fee by no later than the thirtieth day after the day on which the Authority serves notice on it. SLC A10(2)(f) provides grounds for the revocation of a licence where the annual licence fee is not paid.
- 2.8. SLC B1 requires a licensee to be a party to and comply with the [Market Arrangements Code](#) (the '**MAC**'). The MAC prescribes arrangements for how the market will operate, and the responsibilities that rest with licensees in relation to the Market Operator, MOSL.
- 2.9. SLC B2 requires a licensee to comply with the [Customer Protection Code of Practice](#) (the '**Customer Code**'). This code contains key customer protection obligations imposed on all licensees including the Minimum Information Requirements (as defined in the Customer Code) that licensees must provide to customers, including as part of their bills and terms and conditions of supply, and the obligation for licensees to participate in Redress Schemes (as defined in the Customer Code).
- 2.10. The terms upon which a licensee purchases water or sewerage services from Wholesalers to enable it to supply its own customers are governed by the [Wholesale Retail Code](#) (the '**Code**') which the Authority issued pursuant to sections 66DA and 117F of the Act on 1 April 2017.
- 2.11. Schedule 1 Part 2 [Business Terms](#) of the Code (the '**Business Terms**') at Part D governs the payment terms for such services.
- 2.12. Part E of the Business Terms specify the circumstances in which a licensee may become a Defaulting Trading Party (as defined in the Code) under a particular Wholesale Contract (as defined by the Code). These include where there is outstanding late payment (section 10.1.1); a persistent failure to pay (section 10.1.2); a persistent breach of the Wholesale Contract (section 10.1.11); and where the licensee has become a Defaulting Trading

Party under another Wholesale Contract (section 10.1.15). Section 11, paragraph 2 of the Business Terms, entitles Wholesalers to terminate the Wholesale Contract with a licensee on notice if the licensee becomes a Defaulting Trading Party under the Code.

- 2.13. Sections 66DA(4) and 117F(4) of the Act permit the Authority to direct licensees to do or desist from specified things if they are not acting as required by the Code. Sections 66DA(6) and 117F(6) of the Act provide that licensees have a duty to comply with any such direction which is enforceable by the Authority under section 18 of the Act.
- 2.14. Section 18(1) of the Act provides that, subject to section 18(2) and sections 19 and 20, where the Authority is satisfied that a licensee is contravening or is likely to contravene a licence condition or statutory requirement enforceable under section 18, it must make requisite provision for securing compliance with that condition or requirement through a final enforcement order.
- 2.15. Failure to comply with a final enforcement order which is not the subject of a legal challenge under section 21(1) of the Act is one of the circumstances listed in SLC A10 under which the Authority may revoke a licence granted under section 17A and/or section 17BA of the Act.

The Direction

- 2.16. Between October 2018 and the issue of the Direction on 29 May 2019 the Authority repeatedly received notifications from South West Water that Tor Water had become a Defaulting Trading Party under the Code as a result of failing to pay it in accordance with the Business Terms.
- 2.17. 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 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 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) it must not provide Water Retail Services and/or Sewerage Retail Services (as defined in the Code) to Eligible Premises (as defined in the Code) that it does not already provide these services to;
 - (ii) it must not seek to register any new Eligible Premises under the Code;
 - (iii) it must notify MOSL that it is subject to the prohibitions in i) and ii) above; and
 - (iv) it must 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 (as defined in the Code) that it is not currently providing services to. 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.
- (d) Provide a monthly compliance statement to the Authority confirming compliance with requirements (a) to (c) above.

2.18. The [reasons notice](#) accompanying the Direction also identified issues relating to Tor Water's compliance with SLC A4 and SLC A8, including its failure to submit an Annual Certificate and requested information (including a verification report for the Annual Certificate), and in providing incomplete or inconsistent information to requests for information from the Authority.

3. The Authority's Original Proposal to make a final enforcement order

3.1. Tor Water did not comply with the Direction and did not address the Authority's concerns relating to SLC A4 and SLC A8, so the Authority published the Original Proposal to seek to bring Tor Water into compliance with the Direction and the Licence. As required by Section 20(1) of the Act, the Original Proposal invited interested parties to make representations or objections on the draft enforcement order to the Authority by 19 August 2019.

3.2. Under the Original Proposal Tor Water would have been required to:

Comply with the Licence by:

- (a) providing the outstanding Annual Certificate under SLC A4(1), or notification of why it cannot provide such a certificate under SLC A4 paragraph (5);
- (b) providing the supporting outstanding verification report required under SLC A4(4) and the outstanding 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 A4(4) and SLC 8 within the prescribed deadlines;

Comply with its obligations under the Direction by:

- (d) ceasing to be a Defaulting Trading Party, bringing itself into and continuing to be in compliance with sections 9 and 10 of the Business Terms; and
- (e) Unless and until it complied with (d):
 - (i) notifying 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
 - (ii) posting the notification required by the Direction on its website in relation to its provision of Water Retail Services and/or Sewerage Retail Services to new Eligible Premises.

4. Responses to the Original Proposal

- 4.1. The Authority received three responses to the Original Proposal, from a Wholesaler, a licensee and the Consumer Council for Water. The Authority did not receive a representation about the Original Proposal from Tor Water.
- 4.2. The Wholesaler and the Consumer Council for Water supported the Original Proposal.
- 4.3. The licensee acknowledged Tor Water's failings in terms of prompt payment and compliance. Its response focused on Tor Water's failure to pay in accordance with the Code. It asked the Authority to recognise Tor Water's

recent actions to stabilise its business and meet its obligations, and asked the Authority to provide Tor Water with enough time for these measures to deliver results. It argued that this would probably enable Wholesalers to receive full payments and be better for Tor Water's customers.

- 4.4. The licensee registered concern that the Authority was "considering forcing a viable retailer out of business, especially a niche business providing regionally based services as surely these are the type of business the market was supposed to promote". It also claimed that South West Water was exacerbating cash flow issues for smaller licensees by offering them an inadequate range of credit support facilities.

5. The Authority's reasons for issuing the Revised Notice

- 5.1. Having reviewed the representations on the Original Proposal, and in light of further evidence and developments, the Authority considers that it is necessary to issue this Revised Notice. The Authority sets out below the breaches which it considers demonstrate that Tor Water is contravening, or is likely to contravene its licence or other requirements, and other facts that it considers justify the making of the Orders. The Authority has included details of past breaches where it considers that they may give rise to a risk of future breaches, or how they otherwise support the issue of the Revised Notice.
- 5.2. Although Tor Water has now provided the information and the Annual Certificate that were outstanding at the date of the Original Proposal, it is still contravening the Direction and the Licence.
- 5.3. The evidence summarised below of persistent breaches of the Direction, ongoing breaches of the Licence and past breaches which have only been rectified following the Authority's intervention, also indicates that Tor Water has not had and does not have the necessary arrangements in place required by SLC 3 to meet its Licence and statutory obligations.
- 5.4. As a result, in the Authority's view, Tor Water was not in a position to provide an Annual Certificate to the Authority under SLC 4(1), as it did on 12 August 2019, that it had all necessary arrangements in place, including the management, financial, technical, operational and other resources needed for securing that it is able to meet its obligations under SLC A3. Instead, it should have provided a notice under SLC 4(5) specifying why it was unable to do so.
- 5.5. We group our findings on these past and ongoing breaches as follows:

- Contraventions of the Direction;
- Ongoing and past Licence contraventions related to non-payment of amounts due;
- Licence contraventions related to customer protection and the particular obligations associated with running a regulated business;
- Conclusions in relation to SLC 3;
- Conclusions in relation to the Annual Certificate provided on 12 August 2019; and
- Consequences for the Revised Notice.

5.6. **Contraventions of the Direction**

Ongoing breach of paragraph 3.2.1(b) of the Direction to comply with the payment terms of 9 and 10 of the Business Terms

- 5.6.1. Prior to issuing the Direction, the Authority had repeatedly received notifications that Tor Water had become a Defaulting Trading Party for non-payment of various Wholesale Charges. Annex 3 sets out when Tor Water has been classed as a Defaulting Trading Party by South West Water and when Tor Water subsequently settled amounts due.
- 5.6.2. Paragraph 3.2.1(a) of the Direction required Tor Water to pay any outstanding, and undisputed, invoices or statements to any relevant Wholesaler in accordance with Sections 9 and 10 of the Business Terms by no later than 28 June 2019. On 28 June 2019, Tor Water notified the Authority that whilst it had secured the funds to make the relevant payment it had been sent by CHAPs and so there would be a delay in the receipt of the payment. Tor Water informed South West Water of this who confirmed to the Authority on 1 July 2019 that it had received the payment.
- 5.6.3. Tor Water submitted its first monthly compliance statement under the Direction on 29 June 2019, in which it stated that it “is also in a good position to continue to remain a non-defaulting trading party due to more capital being available and a careful restructure of costs and invoicing”.

- 5.6.4. On 11 July 2019 the Authority was notified that Tor Water had become a Defaulting Trading Party again¹. Tor Water paid the relevant Wholesale Charges on 26 July 2019. The Authority published the Original Proposal on 26 July 2019.
- 5.6.5. The Authority received a notification from South West Water on 13 August 2019 stating that Tor Water had become a Defaulting Trading Party with respect to an undisputed invoice due for payment on 18 July 2019². Tor Water informed the Authority on 28 August 2019 that it had paid the relevant Wholesale Charges.
- 5.6.6. On 12 September 2019, the Authority received a notification from South West Water stating that Tor Water had again become a Defaulting Trading Party for an undisputed invoice due for payment on 16 August 2019³. The Authority was informed on 1 October 2019 that Tor Water had paid the relevant Wholesale Charges.
- 5.6.7. On 11 October 2019, the Authority received a further notification from a Wholesaler stating that Tor Water had again become a Defaulting Trading Party for an undisputed invoice due for payment on 17 September 2019⁴. The Authority was informed on 28 October 2019 that Tor Water had paid the relevant Wholesale Charges.

¹ The Authority was also informed by another Wholesaler that Tor Water had not paid outstanding Wholesale Charges in accordance with sections 9 and 10 of the Business Terms. It purported to serve notice under section 20 of the Business Terms by email on Tor Water. However, as it failed to post the notice, and it miscalculated the notice period, the notice was invalid, and so even though Tor Water did not settle these charges until 29 Business Days after they were due it did not become a Defaulting Trading Party in respect of them.

² The Authority was informed by two other Wholesalers that Tor Water had not paid outstanding Wholesale Charges in accordance with sections 9 and 10 of the Business Terms. One of the Wholesalers purported to serve notice under section 20 of the Business Terms by email on Tor Water. However, as it failed to post the notice, and it miscalculated the notice period, the notice was invalid, and so even though Tor Water did not settle these charges under 27 Business Days after they were due it did not become a Defaulting Trading Party in respect of them.

³ The Authority was informed by two other Wholesalers that Tor Water had not paid outstanding Wholesale Charges in accordance with sections 9 and 10 of the Business Terms. One of the Wholesalers purported to serve notice under section 20 of the Business Terms by email on Tor Water. However, as it failed to post the notice, and it miscalculated the notice period, the notice was invalid, and so even though to date Tor Water has not settled these charges in full it did not become a Defaulting Trading Party in respect of them.

⁴ The Authority was informed by two other Wholesalers that Tor Water had not paid outstanding Wholesale Charges in accordance with sections 9 and 10 of the Business Terms. One of the Wholesalers purported to serve notice under section 20 of the Business Terms by email on Tor Water. However, as it failed to post the notice, and it miscalculated the notice period, the notice was invalid, and so even though to date Tor Water has not settled these charges it did not become a Defaulting Trading Party in respect of them.

- 5.6.8. On 13 November 2019, the Authority received a further notification from South West Water stating that Tor Water had again become a Defaulting Trading Party for an undisputed invoice due for payment on 18 October 2019⁵. The Authority was informed on 29 November 2019 that Tor Water had paid the relevant Wholesale Charges.
- 5.6.9. On 11 December 2019, the Authority received a notification from Wessex Water stating that Tor Water had become a Defaulting Trading Party for an undisputed invoice due for payment on 18 November 2019. On 12 December 2019, South West Water provided the Authority with a notification that Tor Water had again become a Defaulting Trading Party for an undisputed invoice due for payment on 18 November 2019. The Authority was informed on 6 January 2020 that Tor Water had paid the relevant Wholesale Charges to South West Water. To date, it is the Authority's understanding that some of the relevant Wholesale Charges remain outstanding with Wessex Water.
- 5.6.10. Tor Water has now failed to comply with the Direction by becoming a Defaulting Trading Party in all seven months since its issue. These failures have resulted in one Wholesaler issuing it with seven separate termination notices. Termination has only been avoided by Tor Water settling the amounts precipitating the termination notice whilst failing to make other outstanding payments.
- 5.6.11. In summary Tor Water therefore remains non-compliant with paragraph 3.2.1(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.

Resolution of cash flow problems to avoid becoming a Defaulting Trading Party

- 5.6.12. Tor Water told the Authority in an email of 26 July 2019 and in its 12 August verification report in support of its Annual Certificate that it was in discussions with three Wholesalers over possible alternative credit and extended payment terms. It claimed these would alleviate its cash flow problems and enable it to operate without becoming a Defaulting Trading Party each month.

⁵ The Authority was informed by another Wholesaler that Tor Water had not paid outstanding Wholesale Charges in accordance with sections 9 and 10 of the Business Terms. The miscalculation of the notice period meant that the notice was invalid, and so even though to date Tor Water has not settle these charges it did not become a Defaulting Trading Party in respect of them.

- 5.6.13. Section 9, paragraph 2.1 requires a licensee to select how it will pay its Primary Charges. It can choose Pre-Payment, Post Payment or Alternative Payment Terms (as defined in the Code). Licensees are permitted to amend their selection from Pre-Payment to Post-Payment, and vice versa in accordance with this paragraph. Section 9, paragraph 11.5 and Schedule 3 of the Business Terms permits licensees and Wholesalers to agree Alternative Eligible Credit Support for all or part of the Credit Support Amount. Section 9, paragraph 2.4 and Schedule 3A of the Business Terms permits licensees and Wholesalers to agree Alternative Payment Terms, being terms other than the standard payment terms provided in the Code. Wholesalers are not obliged to agree bespoke terms with licensees, but must negotiate reasonably and in good faith and must not act anti-competitively if they have already agreed such terms with another licensee.
- 5.6.14. The licensee respondent to the Original Proposal, in setting out its opinions, argued that had Tor Water not been operating predominantly in South West Water's area and if it had been offered Alternative Credit Terms it would not have the same cash flow issues, as it would be able to pay in arrears rather than in advance.
- 5.6.15. The Business Terms provide a specified range of credit support options that South West Water is obliged to accept, providing prescribed key terms as set out in the Code are met. During 2018, the Authority commissioned an independent review of the credit arrangements in the business retail market to establish whether the existing arrangements created barriers to entry, and in particular had an undue impact on smaller licensees operating in the business retail market. That review concluded that there was insufficient evidence to suggest that the range of credit arrangements in the Code created barriers to entry in and of themselves, or that any specific intervention for smaller licensees was warranted at that time. The Authority has since approved a modification to the Code to increase the scope of the credit options available to licensees.
- 5.6.16. As detailed at paragraph 5.6.13 above, the Business Terms require Wholesalers to be open to negotiations with licensees for Alternative Credit and/or Payment Terms. Both parties must negotiate reasonably and in good faith, having specific regard to the Code principles of non-discrimination and no barriers to entry. Negotiations need not necessarily lead to agreement if the requested terms are unreasonable. If South West Water had not complied with these provisions towards Tor Water then the Authority has powers to require compliance. However, to date, we have

not been supplied with any substantiated evidence to this effect, and note that in any event, the failure by Tor Water to pay its outstanding invoices is not isolated to South West Water.

- 5.6.17. We understand that Tor Water has asked South West Water for both Alternative Eligible Credit Support under Schedule 3 of the Business Terms and Alternative Payment Terms under Schedule 3A of the Business Terms.
- 5.6.18. One request, which South West Water responded to on 8 August 2019, was to allow Tor Water to switch to Post Payment credit terms; for a waiver of the “security requirement”; and for this arrangement to be kept in place for a six-month fixed term. South West Water refused this request, stating that any Schedule 3 Agreement must be available to all eligible licensees. As there was no “restrictive criteria”, all licensees in the market would have the right to trade on these terms with South West Water. It considered that adding eligibility criteria to make the agreement exclusive to Tor Water would be both discriminatory and anti-competitive. The Unsecured Credit Allowance needed per month would, in South West Water’s opinion, result in exposure of material terms when it looked at the financial implications of providing this level of credit to all licensees operating in its area.
- 5.6.19. The other request, which South West Water responded to on 22 August 2019, was to allow Tor Water a 17-day extension to the Code’s payment terms with no credit support or security to be provided in return. South West Water again declined the request on the basis that, as Tor Water had previously been notified, it could not agree to any waiver of credit support requirements where there were no “restrictive criteria”. In the absence of an acceptable credit support proposal from Tor Water to support the Schedule 3A payment terms request, South West Water therefore considered that it was unable to proceed.
- 5.6.20. Whilst negotiations have been ongoing with the two other Wholesalers, to date we understand that alternative arrangements have not been agreed. As a result the Authority has insufficient grounds to consider that Tor Water will be likely to comply with paragraph 3.2.1(b) of the Direction in future months and an enforcement order remains required to secure compliance with the Direction.
- 5.6.21. The Authority considers this pattern of repeated non-payment to be unsustainable. It poses risks for Tor Water’s customers, who risk losing

credit balances if a Wholesaler exercises its right to terminate its Wholesale Contract for non-payment, and for Wholesalers and the wider retail market which bear the costs of non-payment of defaulted invoices and rely on the certainty of Trading Parties (as defined by the Code) complying with their legal obligations under the Code.

Breaches of paragraph 3.2.1(c) of the Direction regarding notices to customers and MOSL related to the ban on acquiring new customers whilst remaining a Defaulting Trading Party

- 5.6.22. Whilst Tor Water is a Defaulting Trading Party, Paragraph 3.2.1(c)(i) prohibits it from taking on new Eligible Premises; Paragraph 3.2.1(c)(iii) requires it to notify MOSL that it is not permitted to serve or seek to register new Eligible Premises; and Paragraph 3.2.1(c)(iv) requires it to notify customers prominently on the homepage of its website, in terms approved by the Authority, that it is not currently providing services to additional Eligible Premises and/or Non-Household Customers.
- 5.6.23. Tor Water was a Defaulting Trading Party when the Direction was issued, and under the Direction it was required to make the relevant notifications by 31 May 2019.
- 5.6.24. Following agreement of suitable text with the Authority (on the latter's prompting), Tor Water posted the notification to potential customers on its homepage on 31 May. It did not, however, separately notify MOSL.
- 5.6.25. Tor Water removed the notification when it ceased to be a Defaulting Trading Party. A Wholesaler notified the Authority on 9 July 2019 that Tor Water had become a Defaulting Trading Party under its contract. This was in error as there had been a miscalculation over notice periods, although on 11 July 2019 Tor Water subsequently became a Defaulting Trading Party over payments due under contract with South West Water. Tor Water confirmed in an email on 10 July 2019 that it would reinstate a website notification, but did not do so. In an email of 21 August 2019 Tor Water noted that when it had posted the notification in July it had crashed the website.
- 5.6.26. Tor Water subsequently settled the outstanding amount, but became a Defaulting Trading Party again on 13 August 2019. On 14 August 2019, the Authority established that Tor Water had added a pop-up notification to its website, which appeared when first visiting it from a computer or laptop, but which disappeared once clicked and did not reappear on

subsequent visits. The pop-up was not visible when visiting the website using a handheld device. These measures had not been agreed with the Authority and did not comply with the notice requirements under the Direction for a clearly visible notice on the homepage, not a pop-up which was only temporarily visible and only then from certain devices.

- 5.6.27. The Authority explained to Tor Water in an email on 21 August 2019 why it considered that its pop-up did not comply with the Direction and asked it to address these shortcomings. Tor Water said that it would try to resolve the problem on the same day. However no changes have been made to date, and Tor Water's notification remains a temporary pop-up, not visible on hand-held devices.
- 5.6.28. The website notification requirement in the Direction seeks to protect new customers from the risks associated with contracting with a licensee whose Wholesale Contract(s) are at risk of termination for non-payment of Wholesale Charges. Tor Water's continued failure to comply with the Direction's requirement to have a prominent notification on its homepage visible in all formats whilst a Defaulting Trading Party undermines the efficacy of this customer protection. Despite Tor Water's assurances, its reinstatement of the pop-up notice in September, October, November and December when it has again become a Defaulting Trading Party indicates that this issue is unlikely to be resolved without the Orders.
- 5.6.29. Tor Water notified MOSL of its Defaulting Trading Party status on 12 August 2019, but has failed to notify MOSL in any other month since then. The purpose of the notification was to alert MOSL when the new customer prohibition in the Direction applied to ensure a new customer was not registered to the system inadvertently, and it is concerning that Tor Water has failed to be transparent with MOSL about when these terms apply to it.

Failure to provide monthly compliance statements to the Authority on its conformity with the Direction (paragraph 3.2.1(d) of the Direction)

- 5.6.30. Tor Water is required to provide a monthly statement to the Authority confirming that it has complied with the requirements of the Direction. In response to a reminder from the Authority on 27 June 2019, Tor Water submitted its compliance statement on 29 June 2019. However, it has failed to submit any statements since then. Nor has it provided information as to how and when it would bring itself back into compliance with the Direction.

5.7. Ongoing and past licence contraventions related to non-payment of amounts due

Delayed payment of charges due under the MAC in breach of SLC B1, now remedied

- 5.7.1. Tor Water is required by SLC B1 to be a party to and comply with the MAC. Section 10 of the MAC requires licensees to pay any annual Market Performance Framework (MPF) charges incurred by them, and to pay monthly Market Operator Charges which reimburse MOSL's operating costs. Tor Water incurred a MPF charge of £40 due in April 2019. Tor Water also incurred Market Operator Charges amounting to just over £1,200 for July, August, October and November 2019 which were not paid on time.
- 5.7.2. In its response to a request for information of 9 October 2019, Tor Water told the Authority that it was disputing the MPF Charge (which suspends its obligation to pay), and that it intended to clear the Market Operator Charges by the end of October 2019.
- 5.7.3. Tor Water did not pay the Market Operator Charges owed up to October 2019, and instead accrued a further outstanding charge for November 2019. The Authority understands that all outstanding MPF and Market Operator Charges were paid on the 29 November 2019 up to four months after the charges originally became due.

Delayed payment of licence fee in breach of SLC A9, now remedied

- 5.7.4. The Authority invoiced Tor Water for its annual licence fees (totaling £2,878) on 4 June 2019, for payment, in accordance with SLC A9, by 4 July 2019. When the amount became overdue, the Authority sent informal reminders followed, on 19 July, by a formal demand under SLC A10(f) for payment within 14 days. It was only after the Authority confirmed to Tor Water in a conference call on 9 August 2019 that the purpose of the Original Proposal was to bring Tor Water into compliance with its Licence and statutory obligations, and the issue of the Original Proposal would not automatically result in the revocation of the Licence that it paid its licence fees on 14 August.
- 5.8. **Licence contraventions related to customer protection and the particular obligations associated with running a regulated business**

Breach of SLC B2 relating to the requirements of the Customer Code on customer information and terms and conditions

- 5.8.1. Under section 4.1.4 of the Customer Code, any information which licensees provide to their customers must be complete, accurate and not misleading. Section 7.1.2 of the Customer Code requires licensees' written terms and conditions of supply to be in plain and clear language.
- 5.8.2. Tor Water provided the Authority with its terms and conditions of supply on 28 March 2019 in response to a request for information and has confirmed that these are the terms for all of its service offerings. Having reviewed these terms, the Authority does not consider them to comply with sections 4.1.4 and 7.1.2. of the Customer Code for the various reasons set out below:
- (a) Key terms are not defined, for instance clause 4.1.2 of its terms and conditions, which requires a customer to comply with various defined obligations but without providing the associated definitions.
 - (b) Provisions refer to Scottish legislation, which does not apply for customers Tor Water might acquire under the Licence, whilst there are no references to the Act, which does apply.
 - (c) There are misleading and incorrect provisions. For example, the definition of 'Eligible Property' makes no reference to relevant parts of the Act or the Authority's eligibility guidance, but instead refers Tor Water's customers to the Local Government Finance Act 1992 which is irrelevant. Further, section 9 of its terms and conditions state that Tor Water is entitled to disconnect premises, and it would be entitled to temporarily disconnect premises if its customer refuses to allow access to a meter. The Act and Part I of the Operational Terms of the WRC set out the process for disconnections and when they may be permissible. Only Wholesalers and Accredited Entities (as defined in the WRC) are able to disconnect premises, and grounds do not include where a customer refuses to allow access to a meter.
 - (d) The email address provided to enable customers to complain about Tor Water's service is the email address of another company.

- 5.8.3. The Authority raised its concerns about the email address with Tor Water on 9 October 2019. Tor Water explained that the relevant Wholesaler referred to in its terms and conditions had indicated, at the point of market entry, that it was happy for business customers to contact it directly. Tor Water considered that including the email address in its terms and conditions seemed logical and an extra tier of support for customers. The Authority sought confirmation from the relevant Wholesaler which stated that it had no record of offering or agreeing to this arrangement, and noted that the email domain had transferred to an alternative company on market opening.
- 5.8.4. In the same correspondence Tor Water confirmed that it will re-evaluate its current terms and conditions, including changing the email address for customer complaints, but considered that at the time of creation they were fit for purpose. To date, the Authority has not been provided with any evidence that this is being undertaken. As a result, the Authority concludes that Tor Water is likely to remain in breach of SLC B2.

Breach of SLC B2 relating to the requirements of the Customer Code for a Redress Scheme

- 5.8.5. Section 10.4 of the Customer Code requires all licensees to:
- “... have in place or participate in a Redress Scheme that is readily accessible to and effective for its Non-Household Customers”.
- 5.8.6. During the licence application process, Tor Water confirmed to the Authority that it would join an endorsed mediation scheme such as WATRS and abide by its judgements. In response to the Authority’s request for information on 9 October Tor Water confirmed that it had inadvertently failed to progress its WATRS application. On 15 October 2019, following additional queries from the Authority, Tor Water said that it was grateful for the reminder and had re-engaged with WATRS. It confirmed that it would be submitting its application form to WATRS on 15 October 2019 and was liaising with WATRS’s project manager. To date the Authority has not been provided with any evidence that Tor Water now has a Redress Scheme in place and it is not currently listed as a participating company on WATRS’s website.

Failures to respond to requests for information in breach of SLC A8

- 5.8.7. On 13 December 2018 the Authority issued a request for information under SLC A8 to all licensees to provide information to enable it to report on the functioning of the business retail market and inform the exercise of its functions to facilitate the market. Tor Water failed to provide a response to this request, despite being sent four reminders. Because the opportunity to use this requested information has now passed, the Authority is not pursuing this ongoing breach in the Orders.
- 5.8.8. At the date of the Original Proposal, Tor Water had failed to respond to the Authority's information request of 3 July 2019 in relation to its resources, and this was the subject of one of the proposed enforcement orders. On 12 August 2019 Tor Water provided the outstanding information. Tor Water has since responded to two further requests for information close to the deadline. The Authority is cautiously encouraged by this improvement in performance, and discusses below its revised proposals in relation to ongoing compliance with SLC A8.
- 5.8.9. As discussed below, the Authority remains concerned, however, about the reliability of the information it receives from Tor Water, and is also concerned about ongoing failures to provide the compliance reports required under the Direction.

Breach of SLC A3(1)(b) to have in place sufficient product and public liability insurance

- 5.8.10. SLC A3(1)(b) requires licensees to have sufficient product and public liability insurance in place for the activities authorised by its Licence. Section 15 of the Business Terms requires each party to the Code to have in place at all times during the Supply Period (as defined in the Code) public liability insurance in relation to their activities under the Code of not less than £5,000,000 for any one incident and unlimited as to the number of incidents.
- 5.8.11. On 9 October 2019 the Authority asked Tor Water under SLC A8 to provide details of its product and public liability insurance. On 15 October 2019 Tor Water provided the Authority with its Public, Professional and Employers liability insurance statement which covered the period from 15 October 2019 to 14 October 2020. However, the statement only indicates that Tor Water is insured for public liability for up to £1,000,000 in total. In addition, the policy describes Tor Water's trade / business of telemarketing / telesales. It is not clear, therefore whether the policy covers its public liability in relation to its wider activities as a water and

sewerage service supplier, for instance visiting third party premises for sales, marketing and meter reading purposes.

- 5.8.12. The Authority asked Tor Water what it had had in place prior to 15 October 2019. Tor Water said that it did not have a relevant insurance policy in place before 15 October 2019. It claimed that the initial location of its offices (in a shared business park) meant that it did not need to purchase separate insurance. It did not, however, provide any evidence of what this policy actually covered, for instance, whether it would have covered Tor Water's offsite activities, or third party liabilities in respect of water supplied, or who could make claims under it. In any event, as Tor Water moved from this site to other office premises in February 2019, it had no relevant insurance at all to cover for its activities between February and October 2019.
- 5.8.13. Even where there is no express obligation on a company to hold public liability insurance, in the way there is under the SLCs and the Code, it is widely considered to be an important cover for companies to have in place because it offers protection against legal liability for injury to third parties or damage to their property. The Authority is very concerned that Tor Water was only prompted conscientiously to consider its obligations under SLC A3(1)(b) following the Authority's own intervention, and still holds inadequate insurance both in relation to activities covered and (in respect of its obligations under Section 15 of the Business Terms) the amount covered.

5.9. **Compliance with legal obligations: SLC A3**

The Authority's increasing concerns about Tor Water's resources and the request for an Additional Certificate

- 5.9.1. By the beginning of 2019, the Authority was becoming increasingly concerned about Tor Water's persisting status as a Defaulting Trading Party, and what that might indicate about its underlying financial adequacy and how it was being managed. The Authority was aware that Tor Water's customers paid in advance, and was particularly concerned that these payments might be in jeopardy if a Wholesaler did exercise its right to terminate its Wholesale Contract.
- 5.9.2. On 1 February 2019 the Authority had a conference call with Tor Water, to obtain more information on the company's resources, how these had changed since Tor Water's licence application, and what it was doing to

resolve its cashflow issues. It also asked about Tor Water's payment arrangements with customers because Tor Water had not responded to a request for information as part of the Authority's market monitoring function. Tor Water said that it had not had the resources to deal with the information request.

5.9.3. Tor Water told the Authority that it had changed its management structure and support staff from that envisaged in its licence application. Its financing sources had also changed. In the application it had envisaged most of its working capital coming from Crowdfunding. It told the Authority that this was no longer being pursued as it "was not suitable". Instead Tor Water was in the process of obtaining a new shareholder investor, the remaining shortfall being met from existing shareholders through the proceeds of a property sale and a bank loan. Tor Water also said that it was working up a weekly payment plan with Wholesalers to clear outstanding amounts.

5.9.4. In light of these responses, on 6 February 2019 the Authority sent Tor Water a formal information request under SLC A8 to confirm the information provided on the conference call and provide supporting evidence. It also asked for details of Tor Water's current terms and conditions of supply with customers. Tor Water had told the Authority that its customers were on prepayment terms. The Authority asked it about how it was treating those prepayments. The Authority also asked Tor Water to provide an Additional Certificate under SLC A4(1) accompanied by a verification report under SLC A4(3). The Authority reminded Tor Water that if its resources meant that it was not in the position to provide the Additional Certificate, SLC A4(5) required it to notify the Authority of that fact. All responses, the Additional Certificate and the verification report were required by 20 February 2019.

5.9.5. Despite remaining a Defaulting Trading Party Tor Water provided the Additional Certificate on 22 February 2019, by which its authorised signatory certified on its behalf: "that, having made appropriate enquiries into the licensee's resources:

- (a) all of the arrangements required for Tor Water to meet its obligations mentioned in SLC A3 are in place; and
- (b) Tor Water has, and will have until 31 March 2020 all the management, financial, technical, operational and other resources needed for securing that it is able to meet the obligations mentioned in SLC A3."

- 5.9.6. After reminders from the Authority Tor Water sent the verification report and response to the SLC A8 information request on 4 March 2019. The report stated that “Tor Water has not encountered any significant management, technical, operational or other resources [sic] in the last 7 months of trading”. It said it was becoming more efficient as a result of accounting and operational improvements and was seeking the advice of other retailers.
- 5.9.7. It said that it had “identified that the original plan [in its licence application] with a capital of [redacted] as a bank balance was not enough to allow a business to survive in this market. [Tor Water] has managed to secure some funding to get it to where it is, but it recognises more significant capitalisation is needed. As mentioned, [Tor Water] is crowdfunding with a target of [redacted] in April 2019. [Tor Water] has also approached its new bankers [redacted] with a view to securing some short-term capitalisation to help it through the next few months. There is also the sale of the flat owned by the sole director of TOR that should provide additional short-term capital in the next 6 weeks...[it] has just had [redacted] of funding that it has used to clear most of its outstanding wholesale bill with [one Wholesaler].” It later clarified that this was a shareholder investment.
- 5.9.8. Tor Water stated that it expected a bank facility of [redacted] to be in place by the third week of March (this transpired to be a corporate credit card). The report also mentioned money from friends and family “to support Tor [Water] over the next 2 months”. Tor Water stated that it was committed to clearing the just under [redacted] it owed to South West Water by the end of March and said it had just under [redacted] available for March.
- 5.9.9. [Redacted number of customers and customer forecasts]Tor Water confirmed that its current customers paid in advance (it was on prepayment terms with its Wholesalers). However, it said that it was in the process of implementing a different methodology, which would include moving customer deposits into an interest-bearing “ring-fenced account” to protect the amounts should it “suffer a significant issue” and cease trading.
- 5.9.10. In response to a request for an update on the ring-fencing of customer prepayments, Tor Water stated on 24 April 2019 that it was now proposing to reimburse all prepayment amounts to customers by August 2019.

5.9.11. The information provided through this exercise, particularly Tor Water's acknowledgement that it needed more working capital and the uncertainties of obtaining it, increased the Authority's concerns about Tor Water's financial health. As indicated in Annex 3, although Tor Water did settle its February invoice and a substantial amount of its April invoice with South West Water in April 2019, several other invoices remained unpaid, so that Tor Water remained a Defaulting Trading Party until after the Original Proposal was issued.

The Annual Certificate and verification report

5.9.12. Tor Water's Annual Certificate under SLC A4(1) for 2019-20 was due on 1 April. It was reminded of this on 6 March 2019.

5.9.13. In the meantime, Tor Water continued to default on payments to Wholesalers, including those summarised in Annex 3 and remained a Defaulting Trading Party, liable to contract termination in the event that the relevant Wholesaler chose to exercise its termination rights under the Business Terms. This led the Authority to issue the Direction on 28 May 2019. As described above, Tor Water did settle the outstanding sums that were causing it to be a Defaulting Trading Party at that time, but subsequently defaulted on later invoices and failed to post the notice for required by the Direction on its website regarding new customers. This, together with the failure to provide the verification report, led the Authority to publish the Original Proposal.

5.9.14. Tor Water subsequently sent the Authority an Annual Certificate on 12 August 2019, by which its authorised signatory certified on its behalf: "that, having made appropriate enquiries into the [I]licensee's resources:

- (a) all of the arrangements required for Tor Water to meet its obligations mentioned in SLC A3 are in place; and
- (b) Tor Water has, and will have until 31 March 2020 all the management, financial, technical, operational and other resources needed for securing that it is able to meet the obligations mentioned in SLC A3."

5.9.15. The Annual Certificate was accompanied by responses which purported to verify the statements made in the Annual Certificate (the Authority had originally requested this information in the request for information under SLC A8 of 3 July 2019).

- 5.9.16. In its response, Tor Water said that it had paid its outstanding invoices in June, “using an invoice factoring facility for that month”, with additional funds being provided through “private lending through friends and family and also monies already in the accounts of [Tor] Water”. It said that it intended to remain a non-Defaulting Trading Party⁶, and had contingency plans for this.
- 5.9.17. In particular it claimed that “more capital was imminently available through the sale of a property owned by the majority shareholder of [Tor Water]... The majority shareholder of [Tor Water] is in the process of finalising a significant PPI claim that will result in another [redacted] being injected into [Tor] Water...we are in the process of engaging with [redacted] bank who ... have experience with [licensees] in this market space...”.
- 5.9.18. Tor Water explained that it had “shelved” its Crowdfunding plans as “it would introduce too many shareholders into a business that is still trying to get to grips with the oddities and peculiarities of the non-household market... Also, and more to the point, recent enforcement actions of the regulator has [sic] destroyed several avenues of investment and adversely impacted others”.
- 5.9.19. As an additional contingency measure Tor Water also said: “reducing the operating cost of [Tor Water] in the way we have done so will maintain our service levels and virtually wipe out all the overhead costs thereby enabling the business to grow slowly and steadily.” It reported that it had reduced overheads by moving to smaller offices and reducing staffing levels to one paid headcount, with three personnel working unpaid and the IT manager role reduced to an ad hoc basis. It had also cancelled subscriptions and memberships; was evaluating aligning its billing cycling to that of the settlement runs; was holding meetings with its “three active [W]holesalers”; was “identifying a banker who has the appetite and experience for supporting a retail water business”; and was seeking advice from MOSL and its credit committee.
- 5.9.20. It said that two of its current active Wholesalers were prepared to extend Tor Water’s payment terms, although South West Water was “unwilling to offer any constructive input as to what would suit them best”. “[Tor Water] has asked South West Water to consider a similar solution tabled by [the

⁶ Tor Water was asked to explain its statement to the Authority of 29 June where it stated that “Tor Water is in a good position to continue to remain a non-defaulting trading party due to more capital being available to the business and a careful restructure of its costs and invoicing”.

other Wholesalers] of extending the payment time by approximately 15 days. [Tor Water] is awaiting a response”⁷.

- 5.9.21. Tor Water had recently moved to bank at [redacted], but the bank was now “hesitant to help despite their early assurances in interest and support”. However, it said that it had had introductions with [redacted] bank which it was due to meet at the end of August 2019. Tor Water believed “this could provide a capital guarantee to enable credit terms with [W]holesalers”.
- 5.9.22. Tor Water said that it was no longer considering appointing a financial director as this would not help with the company’s regulatory and wholesale relationships⁸. Instead “[Tor Water] has identified an individual known across the non-household market who can bring a combination of expertise and skill that is needed to manage the regulator and other non-customer interactions. This is being developed at this time”.
- 5.9.23. In the same correspondence, Tor Water confirmed that it had [redacted] individual customers and that the value of customer deposits it held was unchanged from when the Authority previously asked. It stated it is no longer asking for customer deposits and “are negotiating with some of our clients on how we repay this”. In response to the Authority’s enquiry about whether it was still Tor Water’s plan that it “will refund all customer deposits in August 2019 and no longer request a month’s payment in advance”, Tor Water stated that “there may have been a misunderstanding in the communication that this question is based upon”. Instead it confirmed that the payback of the 1-month payment it had previously required from customers was to start “at the end of August when our first customers have been with us for a year meaning that it isn’t one hit, it is spread out over the next 10 months.”
- 5.9.24. Nevertheless Tor Water went on to state it was “able to say it has the management, financial, technical, operational and other resources to meet its obligations until March 2020”.

Conclusions on SLC A3

- 5.9.25. Despite Tor Water’s assertions in the Additional Certificate and Annual Certificate, the Authority considers that the evidence provided, together

⁷ Paragraphs 5.6.16-5.6.18 sets out South West Water’s response to Tor Water’s requests.

⁸ Tor Water had informed the Authority in its response to the request for information under SLC A8 of 6 February 2019 that it was considering appointing an individual in the capacity of finance director or non-executive director.

with Tor Water's compliance record on financial and other management matters, indicate that it does not currently have arrangements in place sufficient to secure that it is and continues to be able to meet its obligations under its Licence and any statutory requirement. There are currently shortcomings in both its financial arrangements and its management's approach to regulatory understanding and compliance, as further detailed below.

Financial arrangements

- 5.9.26. As detailed in Annex 3, Tor Water has defaulted on almost all of its Wholesale Charges with South West Water since entering the market, most recently on 12 December 2019. To date these amounts have eventually been settled, but in the last seven months only after South West Water has served a termination notice and in some instances after the relevant notice period had passed. This is not sustainable.
- 5.9.27. Despite the funding injections and cost cutting measures that Tor Water reported in its submissions, there has been no evidence of an improvement to its cashflow since the Direction was issued. As Tor Water itself reports, it is still seeking to resolve the working capital issues which underlie its payment record⁹. To date, it has not secured enhanced payment terms with any of its Wholesalers (who are not, in any event, necessarily obliged to agree them).
- 5.9.28. The business retail market can only function effectively and provide real benefits to customers if all market participants comply with the Code – persistent, unchallenged default undermines its integrity and raises risks and associated costs for all Trading Parties. The Act enables the Authority to direct compliance if licensees are in breach, as it did with the Direction, and to enforce such directions. Tor Water has yet to demonstrate that it has the financial arrangements necessary to enable it to comply with the Code and the Direction. Its track record in paying its licence fees under SLC A9 and its Market Charges under SLC B1 further evidences its difficulties in complying with its financial obligations.

Management's approach to compliance

⁹ In correspondence with the Authority on 26 November 2019 Tor Water indicated that it was looking into a government backed investment fund, and that additional funding would be made available in approximately four weeks from the majority shareholder in the company.

- 5.9.29. We are encouraged that Tor Water has responded to the last two information requests the Authority has issued under SLC A8, and hope that this will continue. However this notice describes how Tor Water has breached five requirements of the Direction, has four ongoing breaches of the Licence, and two breaches of the Licence which were only remedied after the Authority intervened. Several of these breaches relate to customer or third party protections and remain outstanding or are only partially resolved. It is not clear to the Authority that Tor Water properly understands the purpose behind these protections or the importance of compliance. Its track record to date suggests that for the most part it has only considered compliance issues when prompted to do so by the Authority.
- 5.9.30. When applying for its licence, Tor Water was asked to demonstrate that it would have the resources and expertise to comply with its regulatory requirements. It told the Authority that it was going to appoint a particular individual who had worked on the establishment of the business retail market as its CEO. Tor Water's business plan stated that the CEO was "an absolute cornerstone in the shaping of the company and the direction it takes" and that he would be "responsible for the oversight of the day-to-day business". The Authority has since been told that the identified individual only provides occasional consultancy advice of up to half a day a month.
- 5.9.31. We are glad that Tor Water is starting to take steps to better understand its obligations. However its compliance record, taken with Tor Water's submission of an Annual Certificate despite reporting outstanding material gaps in its management structure and financial issues jeopardising compliance with its statutory duties indicates serious shortcomings in its management's understanding of and its ability to fulfil its licence and statutory obligations.
- 5.10. **Conclusions in relation to the Annual Certificate provided on 12 August 2019 and Tor Water's obligations under SLC A4(5)**
- 5.10.1. Under SLC A4(5), if a licensee becomes aware that it is unable to certify the matters required by SLC A4, or anticipates a change of circumstances which would prevent it from being able to provide such a certificate, it must immediately notify the Authority of this fact.
- 5.10.2. The Authority considers that Tor Water is in breach of SLC A3. It also considers that the factors which have led it to this conclusion were clearly

evident when Tor Water submitted its Annual Certificate, as demonstrated in the information supplied in verification. Tor Water was not in a position to certify under SLC A4(1) that it had the requisite management or financial resources available. It should have been aware of this fact. In the absence of providing additional evidence of measures to address these issues, it should have provided the Authority with a notification under SLC A4(5) as indicated in the Original Proposal, instead of an Annual Certificate which is not supported by the facts.

6. Appropriate action in this case

- 6.1. Section 18 of the Act imposes a duty on the Authority to, by final enforcement order, make such provision as is requisite for the purpose of securing compliance with a person's licence or any statutory or other requirement where it is satisfied that a person holding a licence is contravening them. The Authority is the enforcement authority in relation to the SLCs applicable to Tor Water's Licence. Section 66DA and 117F of the Act confirm that the Authority is the enforcement authority in relation to the Direction.
- 6.2. The Authority does not consider that any of the exceptions to the duty to enforce are relevant in this case.
- 6.3. The Authority has published its [approach to enforcement](#), which sets out its duties with respect to enforcement, and the approach it will take to using its enforcement powers. The companies it regulates must comply with their statutory and licence obligations. If a company fails to comply with its obligations, the Authority will take appropriate action to incentivise and secure compliance.
- 6.4. When it considers the appropriate action to take, it considers the effects of the contravention on the company's customers, customers in general and the regulatory framework (paragraph 27). In line with its risk-based approach to regulation, it takes 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, it may take formal regulatory action, including enforcement. Where it takes enforcement action the Authority expects 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).

- 6.5. In this case informal regulatory action was initially pursued through engagement with Tor Water. This was followed by the Authority issuing the Direction to secure compliance with the Code. It also requested the Additional and Annual Certificates and further information from Tor Water.
- 6.6. As summarised above, the Authority is satisfied that Tor Water is contravening and/or is likely to contravene (due to the historic breaches outlined above) the conditions of its Licence and statutory requirements detailed below, and that the Authority is therefore required by its duty under section 18(1) to propose enforcement action in order to secure Tor Water's compliance with:
- Paragraph 3.2.1(b) of the Direction to comply with the payment terms of 9 and 10 of the Business Terms;
 - Paragraph 3.2.1(c) of the Direction to notify customers and MOSL in relation to the ban on acquiring new customers whilst remaining a Defaulting Trading Party;
 - Paragraph 3.2.1(d) of the Direction to provide monthly compliance statements to the Authority on its conformity with the Direction;
 - SLC A3 for failure to have necessary arrangements in place to secure compliance with its licence and statutory obligations, and failing to have adequate public liability insurance in place that covers all of its licensed activities;
 - SLC A4(5) for failing to notify the Authority immediately on becoming aware that it was not in a position to certify the adequacy of its resources as required by SLC A4(1);
 - SLC B1 for failure to pay amounts due under the MAC within prescribed deadlines;
 - SLC B2 relating to the requirements of the Customer Code on customer information and terms and conditions; and
 - SLC B2 relating to the requirements of the Customer Code for a Redress Scheme.

- 6.7. The Authority welcomes Tor Water's recent improved performance in responding to SLC A8 information requests but remains concerned, given its overall compliance issues, that its performance will deteriorate absent an enforcement order at least for the medium term.
- 6.8. The Authority considers that in issuing this Revised Notice it is acting consistently with its duties under the Act, in particular its duty under section 2(2A)(d) of the Act "to secure that the activities authorised by the licence of a water supply licensee or sewerage licensee and any statutory function imposed on it in consequence of the licence are properly carried out" and to protect the interests of consumers by seeking to ensure that in the round that licensees honour their obligations under their licence in all respects.
- 6.9. The Authority therefore considers that the making of this Revised Notice is necessary to secure compliance by Tor Water of its statutory and licence obligations and is appropriate action to take in this case.
- 6.10. This Revised Notice also identifies that the Licensee is in breach of the requirements of section 15 of the Business Terms of the Code to have in place at all times during the Supply Period (as defined in the Code) public liability insurance of not less than £5,000,000 for any one incident and unlimited as to the number of incidents. The Authority has separately issued the Further Directions to secure compliance with this requirement, and provides notice of its reasons for doing so in section 8 below.

THE AUTHORITY THEREFORE PROPOSES MAKING FINAL ENFORCEMENT ORDERS UNDER SECTION 18(1) OF THE ACT IN THE TERMS SET OUT IN ANNEX ONE

7. Effects of the proposed Orders

- 7.1. The Authority proposes to make a number of self-standing Orders. Following the closure of this consultation and taking account of any representations made on it, the Authority may make some or all of the Orders.
- 7.2. Tor Water has now been on notice of the Authority's concerns about its compliance with its statutory and licence obligations for several months. Orders to address compliance failings of SLC A4 and A8 and the Direction were proposed in the Original Proposal of 26 July 2019. The Authority therefore considers that it is reasonable to impose short deadlines for compliance with the Orders (and in some cases for them to apply immediately), and also necessary to protect customers and the integrity of the Business Retail Market.

7.3. Under the Orders Tor Water will be required to:

- (a) Reconsider within a week of the final enforcement orders being issued whether to provide a notification to the Authority under SLC A4(5) of its inability to certify the adequacy of its resources providing the Authority with its reasoning should it conclude that this is not required. Thereafter, Tor Water must keep its duty to provide a notification under SLC A4(5) under review;
- (b) provide the Authority with and, once approved, implement a detailed compliance plan. The plan must demonstrate, with clear actions and milestones, the steps Tor Water will take to cease be in breach of SLC A3 and remain thereafter in compliance with SLC A3. If the Authority approves the compliance plan Tor Water must implement it within the agreed timescales;
- (c) comply with all future requests for information and verification reports under SLC A4 paragraph (4) and SLC A8 within the prescribed deadlines;
- (d) comply with its obligations under SLC B1, by paying any future undisputed charges within the prescribed deadlines;
- (e) comply with its obligations under SLC B2 by meeting its obligations under the Customer Code, including developing and providing revised terms and conditions to existing and new customers that are compliant with sections 4.1.4 and 7.1.2 of the Customer Code and putting in place or participating in a Redress Scheme;
- (f) comply with its obligations under SLC A3 paragraph (1)(b) to have adequate public liability insurance in place that covers all of its licensed activities (this proposed order will not be made if the Licensee has complied with the Further Directions within the notice period);
- (g) comply with its obligations under the Direction by:
 - (i) ceasing to be a Defaulting Trading Party;
 - (ii) paying any undisputed invoices and statements to any relevant Wholesaler in accordance with sections 9 and 10 of Schedule 1, Part 2 Business Terms of the Code;
 - (iii) whilst it is at any time a Defaulting Trading Party:

- a. not providing Water Retail Services and/or Sewerage Retail Services to Eligible Premises that it does not already provide these services to;
- b. not seeking to register any new Eligible Premises under the Code;
- c. notifying the market operator, MOSL, that it is subject to the prohibitions in i) and ii) above; and
- d. including a notification in the form of a static banner or header in a prominent position on the home page of its website (including those viewed on hand held devices), 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 that it is not currently providing these services to. The inclusion of a pop-up notification on Tor Water's website will not meet the requirements of the Orders. Tor Water 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;

(iv) providing a monthly compliance statement to the Authority confirming compliance with the Direction.

7.4. A failure to comply with the Orders may result in the revocation of the Licence.

7.5. Under section 22 of the Act the Orders will 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 Orders.
- b. Where a duty is owed by virtue of paragraph 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 pursuance of paragraph 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 Orders.

- d. Without prejudice to any right which any person may have by virtue of paragraph 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.

8. The Authority's reasons for issuing the Further Directions

- 8.1. The Authority describes at paragraphs 5.8.10 to 5.8.13 above how the details of the public liability insurance provided by Tor Water do not comply with either SLC A3(1)(b) as to the scope of activities covered or section 15 of the Business Terms of the Code as to both the scope of activities and the amount of liability covered. In view of the risk this imposes on third parties described in paragraph 5.8.13 as to the amount covered as well as the scope of activities covered, the Authority considers that it is appropriate to direct Tor Water to remedy its breach of the Code as soon as reasonably possible.
- 8.2. It has therefore issued directions for appropriate insurance to be in place by 17 January 2019. The Authority is also proposing to impose an Order on Tor Water to provide evidence of public liability insurance which covers the totality of its licensed activities (and not just telemarketing / telesales) within a week of the date of the Order. This Order will not be imposed, however, if Tor Water complies with the Further Directions in the meantime.

9. How to make representations or objections on the proposed Orders

- 9.1. Representations or objections on the proposed Orders should be made so as to be received by the Authority by 31 January 2020.
- 9.2. Representations should be sent to the following address:

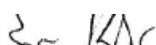
Email: enforcement@ofwat.gov.uk

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

Birmingham
B5 4UA

- 9.3. We may 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.
- 9.4. Information provided in response to this Revised 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.
- 9.5. If persons making representations or objections to this Revised Notice would like the information they provided 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 the Authority.

Dated: 9 January 2020



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

Duly authorised for that purpose by the Authority

Annex 1 – Draft Enforcement Orders

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

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

This document constitutes the [draft] final enforcement orders (the '**Orders**') 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**').

Each of the Orders set out in this document is self-standing.

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

On [xxxx] The Authority gave notice under section 20 of the Act of its proposal to make these orders under section 18(1) of the Act in relation to the Licensee (the '**Notice**').

The purpose of these Orders 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 and/or is likely to contravene its Licence by failing to comply with the following Water Supply and Sewerage Licence Standard Conditions (the '**SLCs**'):
 - i) Part A: Conditions 3, 4 and 8; and
 - ii) Part B: Conditions 1 and 2.

- b) the Licensee has contravened and/or is likely to contravene 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.

Unless the Order specifies a different deadline, the Licensee must comply with each of these Orders immediately.

1. The Licensee must, within [one week] of the date of these Orders, reconsider whether to notify the Authority under SLC A4(5) of its inability to certify the adequacy of its resources under SLC A4, providing the Authority with its reasoning should it conclude that this is not required. Thereafter, at all times, the Licensee must keep its duty to provide a notification under SLC A4(5) under review;
2. The Licensee must, within [one month of the date of these Orders], submit to the Authority for its approval, a detailed proposal identifying the steps it will take, and the timeframe within which it will take each such step, by which it will by [6 months from the date of these Orders] have remedied all the issues identified in section 5.9 of the Notice which currently cause it to be in breach of SLC A3. The proposal will include detailed proposals for how Tor Water's management will ensure ongoing compliance with its statutory, Licence and Code obligations, and a detailed plan for how it will address its financial position so that it has sufficient working capital available to it at all times to be in a position to comply with its statutory, Licence and Code obligations. If the proposal is approved, the Licensee must then take each of the steps identified within the requisite timeframe in accordance with its agreed terms. If the Authority rejects the proposal, the Licensee must, within [2 weeks] of the Authority notifying it in writing of the reasons for its rejection, submit a revised detailed proposal which in the Authority's opinion adequately addresses all of the shortcomings identified in the rejection notice. If that revised proposal is approved, the Licensee must then take each of the steps identified within the requisite timeframe in accordance with its agreed terms;
3. The Licensee must comply with all future requests for verification reports under SLC A4, paragraph (4) within the deadline prescribed in the request.
4. The Licensee must comply with all future requests for information under SLC A8 within the deadline prescribed in the request.
5. The Licensee must pay any future undisputed charges within the deadlines prescribed in the MAC in accordance with SLC B1.
6. The Licensee must revise its terms and conditions to existing and new customers within [within one month of the date of these Orders] so that they address the issues referred to in the Notice and more generally comply with sections 4.1.4 and 7.1.2 of the Customer Code;

7. Within one week of the date of these Orders, the Licensee must either:
 - a. provide evidence to the Authority that it has put in place or is participating in a Redress Scheme as defined in the Customer Protection Code of Practice; or
 - b. provide the Authority with a detailed plan, setting out the steps and timeframe in which it will carry out those steps, of how it will establish or participate in such a Redress Scheme within [two months of the date of these Orders]. The Licensee must then take each of the steps set out in the plan within the requisite timeframe.

8. Within one week of the date of these Orders, the Licensee must provide evidence to the Authority that it has in place public liability insurance to cover all of its activities as a licensed water and sewerage services supplier.

9. The Licensee must 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 Schedule 1, Part 2 Business Terms of the Code;

 - 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 the form of a static banner or header in a prominent position on the home page of its website (including those viewed on hand held devices), 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 that it is not currently providing these services to. For the avoidance of doubt the inclusion of a pop-up notification on its website does not meet the requirements of this

Order and Tor Water 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; and

- d. providing a monthly compliance statement to the Authority confirming compliance with the Direction.

10. A failure to comply with the Orders may result in the revocation of the Licence.

Dated:

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

Duly authorised for that purpose by the Authority

Annex 2 – Copy of the Further Directions

DIRECTIONS FROM THE WATER SERVICES REGULATION AUTHORITY TO TOR WATER LIMITED UNDER SECTIONS 66DA AND 117F OF THE WATER INDUSTRY ACT 1991

1. Interpretation

Unless otherwise specified:

- (a) terms capitalised in this direction are defined in the Wholesale Retail Code (the “**Code**”); and
- (b) references to sections are references to sections of the Code.

2. Background

- 2.1 The Water Services Regulation Authority (the “**Authority**”) has issued the Code pursuant to sections 66DA and 117F of the Water Industry Act 1991 (the “**Act**”). The Code prescribes the standard form Wholesale Contract (together with its various schedules and appendices, including the Business Terms, Operational Terms and Market Terms) which is to be entered into by Contracting Wholesalers and Contracting Retailers.
- 2.2 Under sections 66DA(4) and 117F(4) of the Act, if the Authority considers that a water supply licensee 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 that direction.
- 2.3 On 29 June 2018, the Authority granted the company to whom these Directions are addressed (the “**Licensee**”) a water supply licence with a retail authorisation in accordance with Section 17A of the Act and a sewerage licence with a retail authorisation in accordance with Section 17BA of the Act.
- 2.4 The Licensee is a Contracting Retailer for the purposes of the Wholesale Contract.
- 2.5 Under Section 4 (Wholesale Retail Code) of the Wholesale Contract the Contracting Retailer agrees and undertakes to comply with its obligations and duties to the Contracting Wholesaler and the Market Operator pursuant to and in accordance with the Wholesale Contract.

- 2.6 Section 15 of Part G of Schedule 1 Part 2 Business Terms (the “**Business Terms**”) of the Code sets out insurance requirements that must be maintained by the Contracting Retailer and Contracting Wholesaler as follows:

“Each Party shall, at all times during the Supply Period, effect and maintain with insurers authorised and regulated by the Prudential Regulation Authority and the Financial Conduct Authority under the Financial Services Act 2012 public liability insurance of not less than £5,000,000 for any one incident and unlimited as to the number of incidents, and shall, upon request, produce to the other Party documentary evidence that the above insurance is and remains in place.”

- 2.7 On 9 October 2019 the Authority asked the Licensee under Condition 8 of Part A of the Water Supply and Sewerage Standard Licence Conditions to provide details of its product and public liability insurance. On 15 October 2019, the Licensee provided the Authority with its Public, Professional and Employers liability insurance statement which covered the period from 15 October 2019 to 14 October 2020.

- 2.8 This statement indicates that the Licensee is insured for public liability up to £1,000,000 in total. This does not meet the requirement of the Business Terms of insurance of not less than £5,000,000 for any one incident and unlimited as to the number of incidents. In addition, the insurance statement provided describes the Licensee’s trade / business as telemarketing / telesales. It does not therefore sufficiently evidence that the policy covers its public liability in relation to the full range of its activities as a Licensee, for instance visiting third party premises for sales, marketing and meter reading purposes.

3. Direction under sections 66DA and 117F of the Water Industry Act 1991

3.1 Commencement and Duration

- 3.1.1 These Directions shall take effect from 10 January 2020.

- 3.1.2 These Directions shall remain in effect until such time as the Authority directs otherwise.

3.2 Actions for Tor Water Limited

- 3.2.1 The Authority hereby directs that:

- (a) the Licensee must comply with Section 15 of the Business Terms of the Code and obtain and maintain the requisite type and level of insurance by no later than 17 January 2020. Evidence of this insurance being in place must be provided to the Authority by 17 January 2020,
- (b) the Licensee must ensure that all future insurance policies comply with Section 15 of the Business Terms.

3.2.2 In accordance with section 66DA(6) and 117F(6) of the Act it is the duty of the Licensee to comply with these Directions. This duty is enforceable by the Authority under Section 18 of the Act.

Dated: 9 January 2020



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

Duly authorised for that purpose by the Authority

Annex 3**South West Water: Defaulting Trading Party Notifications**

Settlement Run	Payment Due Date	Date Tor Water classed as a Defaulting Trading Party	Date termination notice issued	Invoice Amount exceeds £,5000 (excl. VAT)	Date Paid
September 18 P1	17 August 2018	n/a	n/a	Yes	12 September 2018
October 18 P1	17 September 2018	10 October 2018	n/a	Yes	Part payment: 25 October 2018
August 18 R1	30 September 2018	24 October 2018	n/a	Yes	Part payment: 25 October 2018
November 18 P1	18 October 2018	n/a	n/a	Yes	Part payment: 25 October 2018
September 18 R1	30 October 2018	23 November 2018	n/a	Yes	Cleared in two payments: 11 and 18 January 2019
December 18 P1	19 November 2018	13 December 2018	n/a	Yes	31 January 2019
October 18 R1	30 November 2018	2 January 2019	n/a	No	18 January 2019
August 18 R2	30 November 2018	2 January 2019	n/a	No	25 January 2019
January 19 P1	14 December 2018	15 January 2019	n/a	Yes	18 February 2019
September 18 R2	30 December 2018	25 January 2019	n/a	No	31 January 2019
February 19 P1	18 January 2019	14 February 2019	n/a	Yes	26 June 2019

Settlement Run	Payment Due Date	Date Tor Water classed as a Defaulting Trading Party	Date termination notice issued	Invoice Amount exceeds £,5000 (excl. VAT)	Date Paid
March 19 P1	15 February 2019	13 March 2019	n/a	Yes	1 July 2019
January 19 R1	2 March 2019	28 March 2019	n/a	No	1 July 2019
November 18 R2	2 March 2019	28 March 2019	n/a	No	17 June 2019
April 19 P1	18 March 2019	n/a	n/a	Yes	Cleared in 4 payments: 5, 11 and 12 April and 17 June 2019
February 19 R1	30 March 2019	n/a	n/a	No	3 April 2019
May 19 P1	15 April 2019	14 May 2019	n/a	Yes	1 July 2019
June 19 P1	17 May 2019	12 June 2019	12 June 2019	Yes	17 June 2019
July 19 P1	17 June 2019	11 July 2019	11 July 2019	Yes	26 July 2019
August 19 P1	18 July 2019	13 August 2019	13 August 2019	Yes	28 August 2019
September 19 P1	17 August 2019	12 September 2019	13 September 2019	Yes	27 September 2019
October 19 P1	17 September 2019	11 October 2019	11 October 2019	Yes	28 October 2019
November 19 P1	18 October 2019	13 November 2019	13 November 2019	Yes	28 November 2019
December 19 P1	18 November 2019	12 December 2019	12 December 2019	Yes	6 January 2020