

ANNEXE 2

PRIMARY AUTHORITY TERMS AND CONDITIONS

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1. INTERPRETATION

1.1 In this Agreement the following words and phrases have the meanings given below:-

Agreement	means this Agreement together with the Application for Primary Authority Nomination, and the documents which are referred to herein;
Charges	means the charges for the provision of the Services, as set out in the Application for Primary Authority Nomination;
Commercially Sensitive Information	means the subset of Confidential Information: (a) which is provided by the Regulated Person to the Authority and is marked confidential; and/or (b) that constitutes a trade secret;
Confidential Information	means any information which has been designated as confidential by either party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which relates to the business, affairs, properties, assets, trading practices, Services, developments, trade secrets, intellectual property rights, know-how, personnel, customers and suppliers of either Party, all personal data and sensitive personal data within the meaning of the Data Protection Act 1998 and the Commercially Sensitive Information;
Environmental Information Regulations	means the Environmental Information Regulations 2004;
FOIA	means the Freedom of Information Act 2000 and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation;
Group of Companies	means in relation to a Regulated Person its subsidiaries and its holding companies (and any subsidiaries of such holding companies) ("subsidiary" and "holding company" being interpreted in accordance with s 736 Companies Act 1985 (as amended));
Information	shall have the meaning as set out in s 84 of FOIA;
BRDO	means the Better Regulation Delivery Office;
Legal Requirements	means: <ul style="list-style-type: none">any act, statutory instrument, by-law, obligation of the European Community or ordinance in force

from time to time to which a either party is subject;

- the common law and the law of equity as applicable to the parties from time to time;
- any binding court order, judgment, decree or requirement;
- any applicable industry code, policy or standard enforceable by law; or
- any applicable direction, guidance, policy, rule or order that is binding on a party and that is made or given by any regulatory body having jurisdiction over a party or any of that party's assets, resources or business, including but not limited to any local or supranational agency, inspectorate, minister, ministry, official or public or statutory person,

in any jurisdiction that is applicable to this Agreement;

Local Authority	shall have the meaning as set out in Part 2 of RESA
Primary Authority	shall be construed in accordance with RESA;
Relevant Function	shall have the same meaning as set out in Part 2 of RESA, and more specifically the categories of relevant functions (as defined in BRDO's Guidance) listed or referred to in the Application for Primary Authority Nomination;
Request for Information	shall have the meaning set out in FOIA or any apparent request for information under FOIA or the Environmental Information Regulations;
Revocation Notice	a notice issued by BRDO pursuant to s 26 (5) RESA revoking the nomination of the Authority as the Primary Authority for the Regulated Person in relation to any or all of the Relevant Functions;
RESA	means the Regulatory Enforcement and Sanctions Act 2008;
Services	means: <ul style="list-style-type: none">• the giving of advice and guidance to the Regulated Person and other Local Authorities pursuant to s 27 (1) RESA;• if applicable, directing an enforcing authority not to take enforcement action pursuant to s 28 (2) RESA;• if applicable, making an inspection plan in accordance with s 30 RESA;• such other services as the Authority is required to carry out in the discharge of its functions under

RESA or any other Legal Requirement in respect of the Relevant Functions; and

- such other services as the parties agree shall be provided by the Authority under this Agreement.

1.2 The clause headings in this Agreement are for the convenience of the parties only and shall not limit or govern or otherwise affect its interpretation in any way.

1.3 A reference to any statutory or legislative provision includes a reference to that provision as modified, replaced, amended and/or re-enacted from time to time and any subordinate legislation made under it.

1.4 References to the masculine in this Agreement include the feminine, and the singular includes the plural and vice versa.

2. **SCOPE AND CONDITION PRECEDENT**

2.1 The Regulated Person and the Authority have agreed that the Authority shall be the Primary Authority for the Regulated Person for the Relevant Functions.

2.2 For the avoidance of doubt, nothing in this Agreement shall:

2.2.1 fetter the Authority's discretion to exercise any right or obligation which it is entitled to exercise at law; nor

2.2.2 require the Authority to act or cease to act in any way which is contrary to any Legal Requirement.

2.3 The parties agree to provide BRDO with all advice and support that it may reasonably require in carrying out its functions pursuant to RESA.

2.4 This Agreement shall be conditional on BRDO nominating the Authority as the Regulated Person's Primary Authority pursuant to s 25 (1) RESA (the "**Nomination**"). Both parties agree to use their reasonable endeavours to attain the Nomination. It shall be a condition precedent of this Agreement that the Nomination be awarded and this Agreement (with the exception of this Clause 2.4) shall be of no force and effect until such time as the Nomination is made.

2.5 The parties will review this Agreement at the expiry of every 12 month period from and including the date of Nomination ("**Review**") and consider whether it accurately reflects the relationship between the Authority and the Regulated Person.

2.6 Any proposed amendments to the agreement arising from the Review should be dealt with in accordance with Clause 16.

3. **AUTHORITY'S OBLIGATIONS**

3.1 The Authority agrees that it shall provide the Services and act as the Regulated Person's Primary Authority in relation to the Relevant Functions subject to the provisions of this Agreement.

3.2 The Authority agrees that the Services shall be provided:

3.2.1 by suitably qualified staff and in a professional and courteous manner;

3.2.2 with reasonable skill and care;

- 3.2.3 in accordance with any timescales agreed between the parties (but time shall not be of the essence in relation to the delivery of the Services by the Authority under this Agreement);
 - 3.2.4 in accordance with RESA; and
 - 3.2.5 without prejudice to Clause 3.2.4, in accordance with all Legal Requirements.
- 3.3 In the event that an enforcing authority (as defined in s 28 (1) RESA) notifies the Authority that the enforcing authority intends to take enforcement action ("Action") (as defined in s 28 (5) RESA) against the Regulated Person, the Authority shall:
- 3.3.1 review the advice and guidance it has previously given to the enforcing authority and the Regulated Person to determine whether the Action is inconsistent with that advice and guidance; and
 - 3.3.2 notify the enforcing authority through BRDO's Primary Authority IT system that it may proceed where the Authority determines that the Action is not inconsistent with advice and guidance previously given by the Authority; or
 - 3.3.3 direct the enforcing authority not to take the Action through BRDO's Primary Authority IT system within the timescales in s 28 (2) RESA where the Authority determines that the Action is inconsistent with advice and guidance previously given; or
 - 3.3.4 refer the Action to BRDO within the timescales in the Regulatory Enforcement and Sanctions 2008 (Procedure for References to LBRO) Order 2009;

For the avoidance of doubt, nothing in this provision shall fetter in any way the Authority's discretion to take whatever action it deems appropriate in the circumstances.

4. **REGULATED PERSON'S OBLIGATIONS**

- 4.1 The Regulated Person shall:
- 4.1.1 co-operate with the Authority in relation to the provision of the Services;
 - 4.1.2 inform the Authority as soon as reasonably practicable of any material change affecting the Regulated Person (or its Group of Companies) that may impact upon the Services or the volume of Services required;
 - 4.1.3 provide information to the Authority with regard to its requirements for Services which is accurate in all material respects;
 - 4.1.4 provide the Authority with reasonable notice of its requirements for provision of the Services; and
 - 4.1.5 act reasonably in performing its obligations under this Agreement.
- 4.2 The Regulated Person agrees that it will provide the Authority and its employees, representatives and agents with such information and assistance as the Authority may reasonably require in order to enable or facilitate the Authority duly and punctually to comply with its obligations under this Agreement.
- 4.3 The Regulated Person agrees to provide the Authority with an electronic address at which it consents to receive any notices under s 28 (3) of RESA and to notify the Authority of any changes to that address,

4.4 If and to the extent that the Regulated Person breaches this Agreement and the Authority is unable to perform any obligation as a direct result of such breach or any other act or omission by the Regulated Person, any such breach by the Authority of its obligations shall not constitute a breach of this Agreement and the Authority shall be entitled to rely on such breach by the Regulated Person as relieving it from the performance of its obligations to the extent that and for so long as such default by the Regulated Person precludes or restricts performance by the Authority of its obligations under this Agreement but not further or otherwise.

5. **CHARGES & PAYMENT**

5.1 The Regulated Person shall pay the Authority the Charges in consideration of the provision of the Services.

5.2 The Authority shall be entitled to invoice the Regulated Person for the Charges as set out in the Application for Primary Authority Nomination.

5.3 The Regulated Person shall pay any amounts owing within 60 days from the date of the Authority's invoice.

5.4 The Charges shall be exclusive of VAT (if applicable).

5.5 The Regulated Person shall pay all sums to the Authority without set-off, deduction or any withholding whatsoever. Notwithstanding this, in the event of a bona fide dispute in relation to any invoice (of which the Regulated Person has notified the Authority in writing prior to the due date for payment) the Regulated Person shall be entitled to withhold only the amount relating to the specific element of the invoice which is in dispute until such time as the dispute is resolved.

5.6 If the Regulated Person fails to pay on the due date any amount which is payable to the Authority under this Agreement then (subject to Clause 5.5 above) that amount shall bear interest from the due date until payment is made in full, both before and after judgement, at 4 per cent per annum over the base rate of Lloyds TSB Bank PLC (or any successor to its business) from time to time.

5.7 The parties acknowledge that the Charges are intended to reflect the cost to the Authority of providing the Services. Therefore, should there be a change affecting either party that materially impacts on (or could be expected to have a material impact on) the cost to the Authority of providing the Services it shall notify the other as soon as reasonably practicable and the parties shall discuss in good faith any amendment to the Charges that may be required.

6. **DURATION AND TERMINATION**

6.1 Subject to Clause 2.4, this Agreement shall come into force on the date of Nomination and shall continue in force unless and until it is terminated in accordance with its terms.

6.2 This Agreement shall terminate automatically in relation to any Relevant Function for any Regulated Person if BRDO issues a Revocation Notice in relation to that Relevant Function and Regulated Person pursuant to s 26 (5) RESA.

6.3 A Regulated Person or the Authority shall be entitled to request BRDO to issue a Revocation Notice in relation to all or any number of the Relevant Functions for a Regulated Person by giving the other party at least two months written notice.

6.4 Notwithstanding Clause 6.3, a Regulated Person or the Authority shall be entitled to request BRDO to issue a Revocation Notice in relation to all or any number of the Relevant Functions for a Regulated Person if:-

6.4.1 the other commits any material and adverse breach of any of the provisions of this Agreement and, in the case of such a breach which is capable of remedy, fails to remedy the same within 30 days after receipt of a written notice giving particulars of the breach and requiring it to be remedied;

6.4.2 the Regulated Person:

- (a) has any act or step (whether by application to the court or otherwise) taken in respect of it by any person seeking to appoint a trustee in bankruptcy, administrator, liquidator, receiver or administrative receiver which is not discharged within 7 days or takes any such act or step itself;
- (b) is unable to meet its debts as they fall due or makes a composition or arrangement with its creditors;
- (c) suffers any analogous event to those specified in Clauses 6.4.2 or (b) under the laws of a jurisdiction other than that of England and Wales; or
- (d) ceases, or threatens to cease, to carry on business,

6.4.3 the Authority is dissolved or ceases to exist.

6.5 No party will request BRDO to issue a Revocation Notice in relation to all or any number of the Relevant Functions other than in the circumstances set out in Clause 6.3 or 6.4.

6.6 If a party requests BRDO to issue a Revocation Notice under Clause 6.4, it shall give the other written notice of such request as soon as reasonably practicable.

6.7 Notwithstanding Clauses 6.3 and 6.4, termination of this Agreement in relation to any Relevant Function for any Regulated Person shall only take effect when BRDO issues a Revocation Notice in relation to that Relevant Function and Regulated Person. Until such Revocation Notice is given, the Agreement shall continue in full force and effect.

7. CONSEQUENCES OF TERMINATION

7.1 Termination of this Agreement for any reason shall be without prejudice to any right or remedy of any party which may have accrued prior to such termination.

7.2 Termination or expiry of this Agreement shall not affect those provisions which impliedly or expressly continue following termination or expiry.

7.3 On any termination or expiry of this Agreement, each party shall return any Confidential Information or other materials belonging to the other to that other party as soon as reasonably practicable.

7.4 On termination of this Agreement, the Authority shall provide such support as may be reasonably required to transfer the Services to any other Primary Authority. The Regulated Person agrees that it shall pay the Authority's costs that it incurs in providing such support.

7.5 If this Agreement is terminated in relation to any specific Regulated Person, the Agreement shall continue in full force and effect in relation to the other Regulated Persons.

8. **SCOPE OF ADVICE AND LIABILITY**

8.1 The parties agree that:

8.1.1 the fundamental reason for the provision of advice by the Authority is to promote consistent interpretation;

8.1.2 the interpretation and guidance provided by the Authority is open to scrutiny by both BRDO and the Courts;

8.1.3 the advice and guidance provided by the Authority may not prevent enforcement action in the future;

8.1.4 the advice or guidance provided by the Authority may become obsolete, and

8.1.5 the duty in relation to compliance remains with the Regulated Person.

8.2 Except as expressly stated in this Agreement, all terms, conditions, warranties and representations that would otherwise be applied or implied (by statute or otherwise) in, or in relation to, this Agreement are excluded to the fullest extent permissible in law.

8.3 Neither party excludes or limits liability to the other party for fraud, nor for death or personal injury caused by its negligence (as defined in the Unfair Contract Terms Act 1977), nor for any other liability for which it is not possible to exclude or limit liability by operation of law.

8.4 The Authority's liability to the Regulated Person arising out of or in connection with this Agreement or RESA (whether in contract, tort, negligence or otherwise) shall be limited in any year to the amount paid by the Regulated Person in that year for the Services.

8.5 Without prejudice to Clause 8.3, in no event shall either party be liable to the other under or in connection with this Agreement or RESA (whether in contract, tort, negligence or otherwise) for any indirect or consequential loss or damage, or for any of the following losses (whether direct or indirect):

8.5.1 any loss of profits;

8.5.2 loss of business;

8.5.3 loss of opportunity;

8.5.4 loss of revenue;

8.5.5 loss of goodwill;

8.5.6 loss of anticipated contracts; and/or

8.5.7 loss of anticipated savings.

8.6 Subject to Clause 8.3, the Regulated Person agrees that no individual member of the Authority's staff shall have any liability to the Regulated Person (whether in contract or in tort, including negligence) arising out of the provision of the Services where that individual honestly believed that the act complained of was within their powers or that their duties required or entitled them to do that act and they have acted reasonably (and the Regulated Person shall not bring any claim against such individual member of the Authority's staff in such circumstances).

9. **CONFIDENTIALITY**

9.1 Each party:-

9.1.1 shall treat all Confidential Information belonging to the other party as confidential and safeguard it accordingly; and

9.1.2 shall not disclose any Confidential Information belonging to the other party to any other person without the prior written consent of the other party, except to such persons and to such extent as may be necessary for the performance of the Agreement or except where disclosure is otherwise expressly permitted by the provisions of the Agreement.

9.2 Both parties shall take all necessary precautions to ensure that all Confidential Information obtained from the other party under or in connection with the Agreement:

9.2.1 is given only to such of the staff and professional advisors or consultants engaged to advise it in connection with the Agreement as is strictly necessary for the performance of the Agreement and only to the extent necessary for the performance of the Agreement;

9.2.2 is treated as confidential and not disclosed (without prior approval) or used by any staff or such professional advisors or consultants otherwise than for the purposes of the Agreement.

9.3 Neither party shall use any Confidential Information it receives from the other party otherwise than for the purposes of the Agreement.

9.4 The provisions of Clauses 9.1 to 9.3 shall not apply to any Confidential Information received by one party from the other:

9.4.1 which is or becomes public knowledge (otherwise than by breach of this clause);

9.4.2 which was in the possession of the receiving party, without restriction as to its disclosure, before receiving it from the disclosing party;

9.4.3 which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;

9.4.4 is independently developed without access to the Confidential Information;
or

9.4.5 which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure, including any requirements for disclosure under the FOIA or the Environmental Information Regulations pursuant to Clause 10.

9.5 Nothing in this clause shall prevent the Authority:

9.5.1 disclosing any Confidential Information for the purpose of the examination and certification of the Authority's accounts; or

9.5.2 disclosing any Confidential Information obtained from the Regulated Person:

(a) to any government department or any other Local Authority. All government departments or Local Authorities receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other government departments or other Local Authorities on the basis that the information is confidential

and is not to be disclosed to a third party which is not part of any government department or any Local Authority; or

- (b) to any person engaged in providing any services to the Authority for any purpose relating to or ancillary to the Agreement;

provided that in disclosing information under sub-paragraph (b) the Authority discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.

10. **FREEDOM OF INFORMATION**

10.1 The Regulated Person acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with the Authority (at the Regulated Person's expense) to enable the Authority to comply with these Information disclosure requirements.

10.2 The Authority shall be responsible for determining at its absolute discretion whether the Commercially Sensitive Information and/or any other Information:

10.2.1 is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations;

10.2.2 is to be disclosed in response to a Request for Information, and in no event shall the Regulated Person respond directly to a Request for Information unless expressly authorised to do so by the Authority.

10.3 The Regulated Person acknowledges that the Authority may, acting in accordance with the Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part 1 of FOIA (issued under s 45 of the FOIA, November 2004), be obliged under the FOIA or the Environmental Information Regulations to disclose Information:

10.3.1 without consulting with the Regulated Person; or

10.3.2 following consultation with the Regulated Person and having taken its views into account.

10.4 The Regulated Person acknowledges that any lists, schedules or notices provided by it outlining Confidential Information are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with Clause 10.3.

11. **DISPUTE RESOLUTION**

11.1 The parties shall attempt in good faith to negotiate a settlement to any dispute between them arising out of or in connection with the Agreement and such efforts shall involve the escalation of the dispute to the finance director (or equivalent) of each party.

11.2 Nothing in this dispute resolution procedure shall prevent the parties from seeking from any court of the competent jurisdiction an interim order restraining the other party from doing any act or compelling the other party to do any act.

11.3 The performance of the Agreement shall not be suspended, cease or be delayed by the existence of a dispute and the parties shall comply fully with the requirements of the Agreement at all times.

12. **ASSIGNMENT/SUB-CONTRACTING**

This Agreement is personal to the parties and the Regulated Person shall not assign or sub-contract any of the Regulated Person's rights and obligations under this Agreement without the prior written consent of the Authority.

13. **SEVERABILITY**

In the event that any of the terms of this Agreement are determined by any competent authority to be invalid or unenforceable to any extent, such term shall to that extent be severed from the body of this Agreement which shall continue to be valid and enforceable to the fullest extent permitted by law.

14. **ENTIRE AGREEMENT**

This Agreement sets out the entire agreement and understanding between the parties and supersedes all prior agreements and understandings relating to its subject matter. No party has entered into this Agreement in reliance upon any representation, warranty or undertaking of any other party which is not set out or referred to in this Agreement.

15. **STATUS OF PARTIES**

15.1 Nothing in this Agreement shall be construed as establishing or implying a partnership or joint venture between the parties or shall be deemed to constitute either party as the agent of the other or to allow either party to hold itself out as acting on behalf of the other.

15.2 Where the Regulated Person is more than one party;

15.2.1 the obligations of the Regulated Person shall be joint and several;

15.2.2 references to the Regulated Person shall be deemed to be a reference to each individual person listed in the Application for Primary Authority Nomination.

16. **VARIATION & CHANGE CONTROL**

16.1 If either party wishes to request a change to this Agreement (a "**Change**"), it shall issue a written notice to the other detailing the change proposed (a "**Change Request**").

16.2 Within seven working days of receipt of the Change Request, the parties shall meet to discuss:-

16.2.1 the likely impact of the Change;

16.2.2 the desirability of the Change;

16.2.3 the work required to achieve the Change; and

16.2.4 the impact of the Change on the Charges.

16.3 If the parties agree the Change, the Change shall not be implemented until the parties have agreed and signed a written agreement (Change Agreement).

16.4 Neither this Agreement nor any of its terms or conditions can be varied or waived unless expressly agreed in writing and signed by or on behalf of the Authority and the Regulated Person.

16.5 The parties should provide BRDO with a copy of any Change Agreement within seven working days of the Change Agreement being signed by the parties.

17. THIRD PARTY RIGHTS

17.1 Subject to Clause 8.6 which is intended to be directly enforceable by the Authority's staff, this Agreement is not intended to create any benefit, claim or rights of any kind whatsoever enforceable by any person who is not a party to this Agreement. Accordingly, the parties confirm that no term of this Agreement (other than Clause 8.6 which is intended to be directly enforceable by the Authority's staff) is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement.

17.2 Notwithstanding Clause 17.1, the Authority and the Regulated Person shall be entitled to vary or rescind this Agreement (under Clauses 2.4, 6 and 16) without giving notice or seeking the consent of any third party.

18. NOTICES

Any notice to be given hereunder shall be in writing. Any notice to be given to the Authority or the Regulated Person shall be sufficiently served either if delivered personally or sent by recorded delivery post to the address set out in this Agreement (or such other address in the United Kingdom as the addressee may from time to time notify for the purposes of this Clause). Any notice if posted shall be deemed to have been served at the time when in the ordinary course of post such notice would have been received and if delivered by hand shall take effect on delivery.

19. GOVERNING LAW AND JURISDICTION

This Agreement is governed by the law of England and Wales and subject to Clause 10 the parties submit to the exclusive jurisdiction of the English and Welsh courts over any matter or claim arising under or in connection with this Agreement.