

Guidance on the application of the Utility Regulator's competition powers

Consultation

June 2016



About the Utility Regulator

The Utility Regulator is the independent non-ministerial government department responsible for regulating Northern Ireland's electricity, gas, water and sewerage industries, to promote the short and long-term interests of consumers.

We are not a policy-making department of government, but we make sure that the energy and water utility industries in Northern Ireland are regulated and developed within ministerial policy as set out in our statutory duties.

We are governed by a Board of Directors and are accountable to the Northern Ireland Assembly through financial and annual reporting obligations.

We are based at Queens House in the centre of Belfast. The Chief Executive leads a management team of directors representing each of the key functional areas in the organisation: Corporate Affairs; Electricity; Gas; Retail and Social; and Water. The staff team includes economists, engineers, accountants, utility specialists, legal advisors and administration professionals.

Our Mission

Value and sustainability in energy and water.

Our Vision

We will make a difference for consumers by listening, innovating and leading.

Our Values

Be a best practice regulator: transparent, consistent, proportional, accountable, and targeted

Be a united team

Be collaborative and co-operative

Be professional

Listen and explain

Make a difference

Act with integrity

Abstract

This paper sets out proposals for guidance relating to the application of competition powers which is attached at annex 1. The guidance seeks to clarify the relationship between sectoral regulation and competition law. In addition, it aims to promote awareness of how competition law applies to the electricity, gas and water and sewerage industries in Northern Ireland and the importance of compliance.

Audience

This document is likely to be of interest to regulated companies in the energy and water industry, government and other statutory bodies and consumer groups with an interest in the energy and water industries.

Consumer impact

The adoption of this guidance will bring us in line with other sector Regulators and provide reassurance to stakeholders that we are focused on legislative and licence compliance.

Contents page

Section	Page
Introduction	2
Concurrent jurisdiction between the UR and the CMA	5
Responding to complaints	6
Our prioritisation principles	6
Information gathering	7
Opening a formal investigation	8
Outcomes of an investigation	9

1. Introduction

Purpose of this paper

- 1.1 The objective of this paper is to seek views from all consultees on the fundamental principles contained within our Guidance on the application of the Utility Regulator's competition powers.
- 1.2 Effective and timely enforcement is of vital importance in order to ensure customer protection in line with promoting functioning markets. We currently have a number of statutory powers to take enforcement action against a company for a breach of licence or a failure to comply with specified legislation. The proposed Guidance should be read in conjunction with our Enforcement Procedure.
- 1.3 Our powers relating to the enforcement of competition law derive from the Competition Act 1998 (the Competition Act), and from April 2014 as a result of Schedule 14 to the Enterprise and Regulatory Reform Act 2013, we are under an obligation, before exercising our direct regulatory powers of licence enforcement, to consider whether it would be more appropriate to proceed under the Competition Act.
- 1.4 The attached Guidance contains general information designed to inform stakeholders about how we undertake and apply our competition powers and duties in relation to electricity, gas and water and sewerage services in Northern Ireland.

1.5 It also sets out what businesses should expect if they are subject to investigation or enforcement action and the routes available to them to challenge our decisions.

Next Steps

1.6 Following consideration of the responses to this consultation we will publish a final version of our Guidance.

1.7 Responses to this consultation paper should be submitted no later than 5pm on 5 August 2016. Responses should be sent to:

Stephen Abram
Utility Regulator
Queens House
14 Queens Street
Belfast
BT1 6ER

stephen.abram@uregni.gov.uk

1.8 Individual respondents may ask for their responses (in whole or in part) not to be published, or that their identity should be withheld from public disclosure. Where either of these is the case, we will ask respondents to supply the redacted version of the response that can be published.

1.9 As a public body and non-ministerial government department, we are

required to comply with the Freedom of Information Act (FOIA). The effect of the FOIA may be that certain recorded information contained in the consultation responses is required to be put in the public domain. Hence, it is now possible that all responses made to consultations will be discoverable under FOIA, even if respondents ask us to treat responses as confidential. It is therefore important that respondents take account of this and in particular, if requesting that we treat their responses as confidential.

- 1.10 This paper is available in alternative formats such as audio, Braille etc. If any alternative format is required please contact our office and we will be happy to assist.

2. Concurrent jurisdiction between the UR and the CMA

2.1 The Utility Regulator has concurrent competition powers with the Competition and Markets Authority (the CMA)¹ under both the UK and EU prohibitions and the market provisions in respect of electricity, gas, and water and sewerage services in Northern Ireland.

2.2 This means that, alongside the CMA, we can:

- enforce the UK competition prohibitions in Chapter I and II of the Competition Act and, where trade between EU Member States may be affected, the equivalent EU competition prohibitions in Article 101 and Article 102 of the Treaty on the Functioning of the European Union (the TFEU);
- undertake market studies under Part 4 (market studies and market investigations) of the Enterprise Act 2002 (the Enterprise Act);
- make market investigation references under Part 4 of the Enterprise Act; and
- undertake investigations into super-complaints under Part 1 of the Enterprise Act.

2.3 The intention of the most recent competition legislation² is to strengthen the primacy of general competition law and improve the coordination between the CMA and the UR. Where a matter raises issues that fall within ours and the CMA's concurrent jurisdiction, we and the CMA will

¹ Prior to 1 April 2014, the competition prohibitions and the market provisions were applied and enforced in the UK by the CMA's predecessors, the Office of Fair Trading (OFT) and the Competition Commission (CC).

² Enterprise and Regulatory Reform Act 2013 (ERRA13) and the Competition Act 1998 (Concurrency) Regulations 2014 (Concurrency Regulations).

closely cooperate to avoid duplication, ensure transparency and maximise our complimentary skills and expertise whilst promoting competitive outcomes for the benefit of consumers.

3. Responding to complaints

3.1 Before we commence an investigation, a sector review or a market study, we carry out an initial inquiry to determine whether there is an issue to address.

3.2 We may gather further information (usually without using our formal information gathering powers) to help us decide whether to undertake any subsequent work.

3.3 We generally do not publish details of inquiries, or comment publicly on inquiries. To the extent we are permitted to do so, we may discuss inquiries with other stakeholders where we believe that they may be able to provide information or other assistance to help us decide whether to undertake any subsequent work.

4. Our prioritisation principles

4.1 The Utility Regulator has finite resources and we cannot investigate every compliant or possible infringement of competition law of which we are made aware of. We must therefore prioritise which work, including enforcement activity, to undertake.

4.2 We will decide on a case-by-case basis whether to open an investigation. In deciding whether to investigate a possible infringement of competition law, we will have regard to a number of factors, including:

- the likely impact of investigation in terms of direct and indirect consumer benefit that investigation may bring;
- the significance of the case (including in terms of the possible deterrent effect of an investigation into the decision);
- the risks involved in taking on a case (i.e. the likelihood of a successful outcome);
- whether other tools are available that would be more appropriate to achieve the same or a better outcome; and
- the resources required to carry out the investigation.

4.3 These criteria are illustrative, rather than exhaustive. Before launching any CA98 investigation we will consult the CMA, and discuss whether it (or possibly another concurrent regulator) should lead the investigation.

5. Information gathering

5.1 We aim to be transparent in the way we carry out our competition investigation and enforcement work. This:

- ensures fairness for parties which are directly affected by our work;
- allow other interested persons an opportunity to participate where appropriate;
- contribute to robust, properly evidenced, and effective outcomes, for which we are accountable; and

- enhances the value of work by making it more meaningful and accessible to electricity, gas and water and sewerage services stakeholders in Northern Ireland, including consumers.

6. Opening a formal investigation

6.1 If a complaint is likely to progress to a formal investigation, the case is allocated an Investigation Team, which includes:

- a designated Manager, who leads the case team and is responsible for the day-to-day running of the case;
- a Director, who directs the case and is accountable for delivery of high quality timely output; and
- a Senior Responsible Officer (SRO), who is responsible for authorising the opening of a formal investigation and taking certain decisions, including, where the SRO considers there is sufficient evidence, authorising the issue of a Statement of Objections.³ Or for closing an investigation where the Investigation Team has found insufficient evidence of a competition breach, or in accordance with our Prioritisation Principles.

6.2 For these purposes, the decision to open a formal investigation means deciding whether the legal test⁴ which allows the UR to use formal investigation powers has been met and whether the case continues to fall within the UR casework priorities.

³ The roles of the Team Leader, Director and Senior Responsible Officer will be consistent with those set out in the 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA) which is available to view at www.gov.uk/cma.

⁴ Under section 25 of the CA98 the UR may conduct an investigation where there are reasonable grounds for suspecting that competition law has been breached (or, in the case of an agreement, that the relevant prohibition would be breached were the agreement not to benefit from an individual exemption or should any applicable block or parallel exemption be capable of being cancelled or withdrawn by the UR).

7. Outcomes of an investigation

7.1 There are a range of possible outcomes during and following an investigation, which include amongst other things:

- using the prioritisation principles, close a case in order to make best use of our finite resources;
- making a no grounds for action decision where there is insufficient evidence of an infringement;
- giving directions to bring an infringement (which has been proven) to an end;
- giving interim measures directions during an investigation;
- accepting binding commitments offered to us;
- considering settlements offered to us;
- imposing financial penalties on undertakings for infringing Article 101, Article 102, the Chapter I and/or Chapter II prohibitions; and
- applying for directors' disqualification orders.