

## Our Enforcement Policy Approach and Procedure

### 1. Introduction

1.1 We are Northern Ireland's cross-utility regulator. We are both an independent economic and customer services regulator and a non-ministerial government department.

1.2 We were established under the Energy (Northern Ireland) Order 2003 (the **Energy Order**<sup>1</sup>). Under the Energy Order, the Electricity (Northern Ireland) Order 1992, the Gas (Northern Ireland) Order 1996, ~~and~~ the Water & Sewerage Services (Northern Ireland) Order 2006 (the **Water Order**), the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007<sup>2</sup> and the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007 (Electricity Act), we are responsible for the regulation of gas, electricity, water and sewerage services in Northern Ireland.

1.3 We expect regulated companies<sup>3</sup> to abide by their respective licence<sup>4</sup> conditions and/or the applicable legislation. However, if we are satisfied that a company is contravening or has contravened or is likely to contravene a relevant condition or requirement<sup>5</sup>, we have a number of powers under the relevant energy and water legislation to take enforcement action against the regulated company. In particular we have the following powers:

- to make an enforcement order,
- to impose a financial penalty and/or restitution order.

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<sup>1</sup> Prior to 2003 the electricity and gas sectors were regulated by the Director General for Electricity Supply and the Director General for Gas Supply respectively.

<sup>2</sup> [2007 No. 913 \(N.I. 7\) SEM Order](#)

<sup>3</sup> 'Regulated company' means both licence holders and exemption holders.

<sup>4</sup> In the context of water and sewerage services the reference to licence includes an appointment as a water or sewerage undertaker.

<sup>5</sup> See Art. 41, 41A, and 41B of the Energy Order and Art. 30 of the Water Order.

- 1.4 A failure to comply with an enforcement order and/or a failure to pay the financial penalty can be enforced through legal proceedings<sup>6</sup> and/or lead to revocation of licence<sup>7</sup>.
- 1.5 The procedures set out below are the procedures that will generally be followed by us when investigating potential contraventions and when giving formal consideration to whether it would be appropriate to take enforcement action.
- 1.6 A flowchart providing a high level summary of the major stages and the possible outcomes of our enforcement procedure is included at appendix 1; this document should be read in conjunction with the flowchart.
- 1.7 ~~This procedure does not apply in respect of matters or decisions that are within the jurisdiction of the SEM Committee in relation to the all-Ireland Single Electricity Market.~~
- 1.8 Similarly, this procedure does not apply to the enforcement of competition law under the Competition Act (1998) (the **Competition Act**) in relation to commercial activities connected with the electricity, gas and water sectors. We have published separate guidance for such cases and this is available on our website. Our powers in the area of competition law include:
- the power to direct a company to modify or terminate agreements or to modify or cease particular conduct,
  - the power to impose a financial penalty.
- 1.9 However, if as we investigation a case new issues emerge which relate to the application of competition law, we will evaluate whether it is appropriate to apply our competition law procedure in respect of those issues.

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<sup>6</sup> See Art. 44(7) and Art. 50 of the Energy Order and Art. 34(4) and Art. 40 of the Water Order.

<sup>7</sup> The terms of the licence set out the circumstances in which a licence can be revoked. In the case of a water undertaker or a sewerage undertaker revocation of licence can only occur with the consent of the Department of Infrastructure (see 14(2) of The Water and Sewerage Services (Northern Ireland) Order 2006.

1.10 Please note:

- We will seek to adhere to the procedure outlined but, for the avoidance of doubt, this Enforcement Procedure does not in itself impose requirements on the UR or purport to fetter our discretion.
- This Enforcement Procedure also applies to SEM Market Monitoring Unit enquiries, and investigations which may have commenced prior to the publication of these guidelines.
- Our Enforcement Procedure will be reviewed from time to time in order to ensure our procedures are relevant and up to date.

## 2. Principles and Approach

- 2.1 Our procedures for investigating any potential contravention and deciding to take enforcement action have been designed having regard to the 5 principles of good regulation. We aim to be:
- targeted,
  - proportionate,
  - transparent,
  - consistent, and
  - accountable.
- 2.2 Our approach to investigating any potential contravention and making enforcement related decisions is designed to be rigorous, thorough, evidence-based and fair so as to ensure that the outcomes reached are proportionate and consistent.

### *Aim of Enforcement Work*

- 2.3 The aim of our enforcement work is to protect the interests of consumers and to secure that regulated companies comply with their obligations.
- 2.4 We see enforcement action as a key part in changing the behaviour of companies by acting as a deterrent. We expect that the enforcement action we take will act as an incentive on the individual company in question to change its behaviour. In addition, the action we take will also make it clear to other companies where their own behaviour may need to change and incentivise compliance best practice more generally.

### *Publicity*

- 2.5 To this end publicising our investigations and the final decisions we take is an important part of our enforcement approach.

- 2.6 Where cases are closed following the Initial Enquiry Stage either because there is no case to answer or the breach identified was minor and has been resolved, we will not publish the details of this case.
- 2.7 Where a case is closed following the Informal Inquiry Stage because alternative resolution has been agreed, we will not publish information about the case on our website as a news item but we will publish information about the case in a Utility Regulator publication such as the Annual Report. The information to be published will illustrate why alternative resolution was appropriate at the Initial Enquiry Stage and will include the name of the licensee, the potential contravention involved and the alternative resolution agreed – including the amount of any charitable donation (if any) and who it was paid to.
- 2.8 However, the investigation team’s decision to open an investigation, thereby formally commencing an enforcement, and anything subsequently published during the enforcement process will be placed on our website and published as a news item. This means it will be sent to anyone who has signed up to receive news items from our website. Sections 3 and 4 explain when we will publish information and what will be published at each stage of the procedure, once we have formally commenced an enforcement (see paragraphs 3.23, 4.14, 4.46, 4.55 and 4.57).
- 2.9 We recognise that companies may be concerned about what we may publish about their case. When considering what to publish we will take account of the need to maintain confidentiality where appropriate. We will inform the company concerned that we intend to publish information about their case on our website. We will do this one day in advance of publication and at that stage will provide them with a copy of what will be published for information only.
- 2.10 Where information is provided to us via a complaint from a third party (which could include another licensee) or a whistle-blower, we may need to disclose that information either to the company under investigation or to others connected to the subject matter of the complaint. Where information is

confidential or where a complainant does not wish it to be disclosed, this should be made clear, including the reasons why, in writing.

- 2.11 We will consider any request to treat information as confidential on a case by case basis and make our own assessment in line with the applicable legislation. However, it should be noted that information provided to us, including personal information, may be subject to publication or disclosure. This is in accordance with the access to information regimes; primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA), the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR)<sup>8</sup>, and the Environmental Information Regulations 2005 (EIR).

#### *Prioritisation Principles for Our Enforcement Work*

- 2.12 We recognise that enforcement action and any formal investigation can be a time consuming and resource intensive process for both the Utility Regulator and the company under investigation. In each case before proceeding to enforcement action we will consider whether it is the appropriate course to take, and prioritisation principles will be used for this purpose. These are set out at para. 2.14 below.
- 2.13 We may apply prioritisation principles as appropriate at different stages, for example when considering whether a case can be resolved by means of alternative resolution, when deciding whether to formally commence an enforcement, and when deciding whether to continue with a case.
- 2.14 The prioritisation principles below are non-exhaustive (set out in no particular order) and we may consider other factors where relevant, taking account of the specific facts of the case and the applicable legal framework –
- a) the resources required to carry out the investigation and the availability of such resources;

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<sup>8</sup> Applicable from 25 May 2018.

- b) the likely impact of the investigation in terms of the direct and indirect consumer benefit that investigation may bring;
- c) the significance of the case (including strategic fit with Utility Regulator's corporate strategy objectives, the seriousness of the contravention, the level of harm to consumers, the duration of the contravention);
- d) whether other tools are available that would be more appropriate to achieve the same or a better outcome;
- e) whether taking enforcement action could deter contraventions in the future, including whether the case will have a more general deterrent effect; and
- f) whether we are the most appropriate body to carry out a formal investigation or whether another body is better placed, is already carrying out or has already carried out such investigation

*Expectation of a company being investigated*

2.15 We expect that a company which is being investigated, or is subject of any enforcement action, will be candid and co-operative, assisting us in our processes and providing us with full and frank information in a timely manner.

2.16 We strongly encourage a company which is aware that it has contravened, is contravening, or is likely to contravene any relevant condition or requirement to self-report this to us at the earliest stage, providing as much detail as possible and setting out the steps it has taken or intends to take to remedy the actual or potential contravention.

2.17 Self-reporting which is prompt, accurate and comprehensive and where the company can demonstrate steps taken by it to remedy the issue in a manner designed to avoid repeat contraventions will, in most cases, count in the company's favour; where the case is suitable for alternative resolution to make that more likely or to be reflected in the level of any financial penalty<sup>9</sup>.

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<sup>9</sup> See mitigating factors at section 3.22 of our Policy with respect to Financial Penalties.

*Proportionate approach to investigations*

- 2.18 We aim to approach enforcement action in the most efficient and effective way. Where there is evidence that a company is not complying with its obligations, our policy is to take whatever action we judge as most appropriate in all the circumstances to secure compliance with the obligations and ensure that incidents of non-compliance are not likely to recur.
- 2.19 In appropriate cases, therefore, we may consider and accept an alternative resolution offered by a company to secure compliance. Alternative resolution is explained in section 3.14 – 3.26 below and see also section 4 for more detail on how it fits into the procedure.
- 2.20 Where we consider that alternative resolution is not suitable or appropriate, the case may still be settled by agreement. Settlement is explained in sections 3.27 – 3.31 below see also section 4 (Enforcement Procedure Stage II) for more detail on how it fits into the procedure.



### 3. Enforcement Process – General Overview

3.1 The process is generally comprised of two parts – an Initial Enquiry Stage and the Enforcement Procedure.

3.2 During the Initial Enquiry Stage the UR will assess the issue and gather further information as required. If the case is not resolved during this stage a formal investigation will be opened and the Enforcement Procedure will commence.

3.23.3 The Initial Enquiry Stage will be led by the relevant team within the UR i.e Retail Market Monitoring Unit, Wholesale Market Monitoring Unit, etc.

3.33.4 The Enforcement Procedure has four stages and can lead to a final determination on enforcement and/or the imposition of a financial penalty:

- Enforcement Procedure Stage I – Formal Investigation
- Enforcement Procedure Stage II – Settlement by Agreement
- Enforcement Procedure Stage III – Contested Cases
- Enforcement Procedure Stage IV – Final Decision on Enforcement

3.43.5 The process, including the stages of the Enforcement Procedure, are explained in more detail in section 4 and in the accompanying flowchart.

3.53.6 During the process we will ensure that:

- a) a company will be advised if we decide to formally commence an enforcement and undertake a formal investigation;
- b) a company will be given clear information about the issues being investigated and allowed a reasonable time to respond to any questions;
- c) once we have formally commenced an enforcement, a company will be notified as to the person managing the investigation and will be kept informed of progress at appropriate points. At this stage the company should also inform the Utility Regulator of the names of the company's key regulatory contacts for the investigation;

- d) we will respond to requests for clarification within a reasonable timeframe; and
- e) we will accede to reasonable requests for face-to-face meetings to discuss any issues relating to the process and a company will always have a fair opportunity to make representations before any decisions are made

### *Timetable*

3.63.7 We will progress all investigations in a timely manner. We will endeavour to adhere to the shortest timescales possible taking into account the need to follow the appropriate processes and procedures. The length of time that different steps of the process will take will vary from case to case, and may for example be affected by the timeliness, completeness and quality of information provided by the company under investigation. This is why, instead of setting general time limits, we will give an individual indicative timeline in every case.

3.73.8 In certain circumstances the urgency of a particular case may mean that it is not possible to follow our process in full. An example of this may be where it appears to us that a company is in serious contravention of a relevant requirement, such that alternative resolution is not suitable or it is appropriate for us to make a provisional enforcement order to prevent a person sustaining serious loss or damage. The Utility Regulator may make an enforcement order at any stage in the process.

### *Information Notice*

3.83.9 We may serve an information notice on the company, requiring that the company provide further information and/or documentary evidence to enable us to determine whether or not a contravention has taken/is taking place or is likely to take place. An information notice may be served at any time, including during the Initial Enquiry Stage and once we have formally commenced an enforcement.

3.93.10 An information notice may be a notice served under Article 51 of the Energy Order or Article 261 of the Water Order. Where we serve an information notice we will state in the notice the date by which we require the company to respond.

3.403.11 We expect companies to co-operate in full with our investigation. While we aim to make any requests for information as clear as possible, if the company wishes to clarify any part of the information notice it should use the details provided to contact the investigation team.

3.443.12 We will take any failure to comply with an information notice, either in part or in full, very seriously. Failure to comply with such a notice without reasonable excuse constitutes a criminal offence as does intentionally altering, suppressing or destroying any document which has been requested in such a notice<sup>10</sup>. Any person who commits such an offence may be liable to a fine (or even to imprisonment in some cases).

3.423.13 We will review the company's response to the information notice including any submissions which the company has made in relation to the potential contravention or any proposals it has made for alternative resolution.

3.433.14 We may require further information or documentary evidence from the company, for example, to clarify particular points. If this is the case, we will serve further information notices on the company as appropriate.

#### *Alternative resolution*

3.443.15 Alternative resolution will not result in a formal finding by the Utility Regulator (i.e. such that it involves the Utility Regulator exercising its enforcement powers) that a company is contravening or has contravened or is likely to contravene a condition or requirement. Therefore it is likely to be most appropriate in cases in which it would be a more proportionate way of

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<sup>10</sup> Article 51(4) of the Energy (NI) Order 2003.

responding to the contravention while still effectively protecting the interests of consumers and of the market, and deterring future contraventions.

3.153.16 Alternative resolution may take different forms depending on the circumstances of the case and more than one form may be necessary to fully resolve a particular case.

3.163.17 Alternative resolution might, for example, include payments to affected customers or to other voluntary organisations (e.g. charities).<sup>11</sup> However, there may be other ways of providing redress or of remediating a situation so that a company does not benefit from contravening any relevant condition or requirement and that any harm done by it is, so far as practicable, alleviated. Additionally the company might need to agree to independent audits of compliance to provide assurance that the issue investigated will not recur.

3.173.18 The company might propose a voluntary undertaking or provide some other assurance that the company will take all the steps as it appears to us to be appropriate for the purpose of securing or facilitating compliance with the requirement in question. The Water Order makes provision for the company to provide a statutory undertaking in lieu of an enforcement order being made (under Article 31 of the Water Order).

3.183.19 In appropriate cases we may make, or invite a company to make, proposals for alternative resolution. However, in all cases we encourage a company that is being investigated to bring forward proposals of its own without any need for prompting as early as possible. Proposals for alternative resolution may be brought forward during the Initial Enquiry Stage and during the Enforcement Action Stage I. Once the Summary of Initial Findings has been served on the company no further proposals for alternative resolution will be considered.

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<sup>11</sup> Where alternative resolution includes payments to a voluntary organisation, such as a charity, the Utility Regulator will determine which organisation(s), receive the payment.

3.193.20 Any proposals for alternative resolution put forward by a company must include steps to comprehensively address the full extent of all issues under investigation, and include steps to ensure the contravention is not repeated. In short the company must show a real commitment to resolve the issue under investigation and prevent repeat contraventions. Where customers have suffered detriment and/or the company has made any gain as a result of the issue under investigation, proposals for alternative resolution must also set out how this will be rectified.

3.203.21 Before we accept any proposal for alternative resolution, we will need to be satisfied that the proposal fully addresses our concerns, that the company has identified all the necessary steps to put things right and prevent repeat contraventions, and that the company will act promptly to implement these steps. In some cases we may request that the company independently audits the steps it takes pursuant to its plan for alternative resolution.

3.213.22 The terms of the alternative resolution must be agreed in writing by both the company and the Utility Regulator. Once the alternative resolution is agreed between the company and the investigation team, the case will be closed (aside from monitoring implementation of the alternative resolution requirements). There will not, as explained above, be a formal finding by the Utility Regulator that the company is contravening or has contravened or is likely to contravene any condition or requirement.

3.223.23 Details of cases resolved by alternative resolution in the Initial Enquiry Stage will not be published as a new item on our website (see para. 2.7 above).

3.233.24 However, where cases are resolved by alternative resolution in Enforcement Action Stage I, we will publish information in the form of a news alert on our website. The information published will illustrate why alternative resolution was appropriate at Enforcement Action Stage I and will include the name of the licensee, the potential contravention involved and the alternative resolution agreed - including the amount of any charitable donation (if any) and

who it was paid to. Before publishing anything about alternative resolution on our website we will inform the company concerned.

3.243.25 We will monitor the company to ensure the alternative resolution steps are implemented to the timescales proposed. If this does not occur the case may be re-opened and the enforcement process will resume. Where the alternative resolution was previously agreed at the Initial Enquiry Stage, the procedure is likely to recommence with a decision to open a formal investigation into the case. Where the alternative resolution was previously agreed as the outcome of the formal investigation (i.e. within Stage I of the enforcement procedure), the procedure is likely to recommence with the preparation of a SIF.

3.253.26 Where a statutory undertaking is given by a water company we may be able to take enforcement action against the company directly for the failure to comply with the terms of the undertaking.

3.263.27 Cases which are not suitable for alternative resolution or where the UR does not accept the alternative solution proposed by the company, will proceed to be considered under our statutory enforcement powers and a formal finding made as to whether a contravention has occurred - which will be made public.

#### *Settlement by agreement*

3.273.28 Settlement by agreement is possible only in cases where a financial penalty is in prospect. Cases where the investigation team consider that an enforcement order is required or (in water) statutory undertakings are proposed, will not be suitable for settlement and the investigation team will instead write to the company setting out the process that will be followed.

3.283.29 To settle a case a company must admit to all the contraventions that are under investigation at that point in the process. The company must also agree not to challenge or appeal any finding by the UR that a company is contravening or has contravened or is likely to contravene a condition or requirement, or the decision as to the amount of the financial penalty. There is no obligation on a

company to settle – it is a voluntary process. However, cases settled by agreement will still need to fulfil the relevant statutory requirements, including public consultation on the amount of any potential financial penalty.

3.293.30 A Settlement Committee will decide on whether a settlement mandate is to be offered to the company. Any such settlement mandate will include a discount from the amount of financial penalty that may otherwise potentially be imposed in the absence of settlement. The discount reflects the fact that cases settled by agreement will follow a streamlined administrative procedure allowing the case to be concluded earlier (compared to a contested case) saving resources for both the company and the Utility Regulator and ensuring that redress for customers is available earlier than would otherwise be the case. The earlier the settlement agreement is signed the greater the discount will be.

3.303.31 There will be two windows wherein the company can indicate it wishes to settle - the company will have the duration of each window to sign a settlement agreement. In return for admitting the contravention, a case settled in the first window will result in a discount of 40% and a case settled in the second window a discount of 20%. The discounts are set out in the Financial Penalties Policy which also provides that monies to be recovered from the company (as a consequence of any gain to the company or detriment to consumer from the contravention investigated) will not be discounted.

3.313.32 Once the settlement agreement has been signed the Utility Regulator will not revisit the penalty unless this becomes necessary by virtue of the statutory consultation on the financial penalty. However, settlement does not prevent us from taking future action if further contraventions occur or if the actions agreed by the company to reach settlement are not carried out. Companies should take their own legal or other advice before settling a case.

#### *Contested cases*

3.323.33 If at any point settlement discussions break down or the company indicates that it does not wish to settle the case, the Utility Regulator will

consider the case as contested and a new committee (i.e. an Enforcement Committee) will be convened to determine the outcome of the case.

3.333.34 The investigation team will prepare a final statement of case for the Enforcement Committee and the Enforcement Committee will make its decisions based on the final statement of case and the supporting evidence. To ensure the Enforcement Committee is independent and unbiased it will not see any admissions previously made by the company in the course of settlement discussions but will consider the issues afresh. This also means that the Enforcement Committee will form its own view on the amount of any penalty and/or whether an enforcement order may be required. The Enforcement Committee will not be bound by the penalty amount stated in any draft penalty notice previously shared with the company during the settlement process.



## 4. Enforcement Process Stages

- 4.1 There are a number of ways in which we may come to investigate a company on the basis that it may be contravening or has contravened or is likely to contravene a condition or requirement. For example:
- our monitoring and investigations may bring to light information which we consider suggests that a company is contravening, has contravened, or is likely to contravene a condition or requirement;
  - the company itself may report the contravention;
  - a complaint from a third party may bring to light information which we consider suggests that a company is contravening, has contravened, or is likely to contravene a condition or requirement; or
  - a whistleblower from within the company may allege that a contravention of a relevant requirement has taken place.
- 4.2 Irrespective of how the information about possible contraventions comes to light, we will consider whether the information does in fact suggest a contravention of a condition or requirement such that we need to commence the Initial Enquiry Stage of the enforcement procedure.

### **INITIAL ENQUIRY STAGE**

- 4.3 The Initial Enquiry Stage ~~involves the establishment of an investigation team that will begin to assess the issue and gather further information as required~~ will be carried out by the relevant investigation team (as outlined in 3.3 above).
- 4.4 The investigation team will also consider the legal tests for enforcement action (set out in section 7 below) and the particular requirements in the licence and/or the legislation.
- 4.5 Where the Initial Enquiry Stage is commenced we will notify the company concerned so that it is clear to it that the first stage of the enforcement procedure has been commenced and of the potential contraventions being considered.

- 4.6 During this stage we may seek information from the company or third parties, e.g. to help inform our understanding of the issue, where the information obtained is unclear, or to fill in the gaps where the information provided to or obtained by us is incomplete. So, for example, where the Consumer Council has submitted information which it has obtained from the company (e.g. because of its involvement in investigating a complaint) we are unlikely to need to request that information again from the company. The information notice may be a notice served under Article 51 of the Energy Order or Article 261 of the Water Order.
- 4.7 The investigation team may apply the prioritisation principles<sup>12</sup> at any point during the Initial Enquiry Stage.
- 4.8 During the Initial Enquiry Stage we envisage that there will be informal discussions with the company such that the company will be aware of the issues under consideration and have a chance to respond to them.
- 4.9 It is open to the company to agree or accept (at any stage during this Initial Enquiry Stage) that it is contravening, has contravened or is likely to contravene any relevant condition or requirement and to put forward proposals for alternative resolution for consideration by the investigation team.
- 4.10 The company will be notified of the outcome of the Initial Enquiry Stage by the investigation team. The possible outcomes from this stage are that:
- a) there is no case to answer and close the case; or
  - b) the issue is minor and has been or can be solved quickly and easily by the company and the case subsequently closed; or
  - c) the case can be resolved by means of alternative resolution; or
  - d) none of the above are appropriate and a decision is made to formally commence an enforcement in respect of the issue.

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<sup>12</sup> See para. 2.14 above.

- 4.11 Details of cases resolved by alternative resolution in the Initial Enquiry stage will not be published as a news alert on our website (see para. 2.7 above).
- 4.12 When deciding whether we should formally commence an enforcement in respect of a issue, we will consider the prioritisation principles. If the investigation team decides it is appropriate to formally commence an enforcement the issue moves into the next stage of the procedure – Enforcement Procedure Stage I.

### **ENFORCEMENT PROCEDURE STAGE I – FORMAL INVESTIGATION**

- 4.13 Where we decide to formally commence an enforcement we will send an initial notification to the company. The initial notification will include:
- details of the potential contravention by the company which is being considered by us;
  - an outline of the process which we will follow and proposed timescales for the remaining stages in the process; and
  - contact details for the lead investigation officer.
- 4.14 Details of all cases opened for formal investigation will also be published on our website. These will include the name of the company under investigation, the licence conditions or requirement for which compliance will be investigated, and a brief summary of those conditions or requirements. In addition, when we publish a notification on our website that we have formally commenced an enforcement, we will make it clear that this does not imply that we have made any findings about non-compliance.
- 4.15 The investigation team will conduct further investigation and develop their initial findings in this stage. For this purpose an information notice may be served under Article 51 of the Energy Order or Article 261 of the Water Order.
- 4.16 The company may put forward proposals for alternative resolution at any stage and these will be considered by the investigation team.

- 4.17 The investigation team may apply the prioritisation principles at any point during this Stage I.
- 4.18 The company will be notified of the outcome of Stage I by the investigation team. The possible outcomes from this stage are that:
- there is no case to answer and close the case; or
  - the case can be resolved by means of alternative resolution; or
  - neither of the above are appropriate and the case will proceed to the making of a formal determination on enforcement action (whether through settlement or otherwise).
- 4.19 If we decide that there is no case to answer and close the case, we will notify the company and will publish a notice of the decision on our website (in the form of a news alert).
- 4.20 Similarly, where cases are closed following alternative resolution in Enforcement Action Stage I, we will publish information in the form of a news alert on our website. The information published will illustrate why alternative resolution was appropriate at Enforcement Action Stage I and will include the name of the licensee, the potential contravention involved and the alternative resolution agreed - including the amount of any charitable donation (if any) and who it was paid to. Before publishing anything about alternative resolution on our website we will inform the company concerned.

#### **ENFORCEMENT PROCEDURE STAGE II – SETTLEMENT BY AGREEMENT**

- 4.21 Where the outcome of Stage I is that the case should be continued so that a formal determination on enforcement action can be made **and** where the appropriate form of enforcement action is considered to be a financial penalty, Stage II commences.
- 4.22 The first step in Stage II is that the investigation team will prepare a preliminary Summary of Initial Findings (SIF) and invite written representations on it from

the company giving it a period of not less than 21 days to make any such representations. The Utility Regulator will also convene a Settlement Committee for the purposes of deciding whether settlement is appropriate and, if so, determining a settlement mandate.

4.23 The preliminary SIF will, as a minimum, include the following:

- background to the investigation (e.g. why investigation was opened, what the investigation entailed, etc.);
- the specific condition(s) or requirement(s) which the investigation team considers a company is contravening, has contravened, or is likely to contravene, an assessment of the evidence and information supporting the contravention/likely contravention and an outline of the reason(s) why this is the case;
- the relevant facts of the case derived from consideration of the evidence;
- an initial assessment of the gain to the company (if any) and the detriment to customers (if any) arising from or in respect of the issues under investigation; and
- the investigation team's conclusions on each relevant breach and period of such breach.

4.24 Following receipt of written representations on the preliminary SIF the investigation team will finalise the Summary of Initial Findings and seek a settlement mandate from the Settlement Committee.

4.25 Once the mandate is decided upon by the Settlement Committee, the company will be informed of the level of the proposed financial penalty and the time period for the first and second settlement windows, and provided with the relevant draft documents, namely the draft settlement agreement, the draft penalty notice and draft press release<sup>13</sup>. Once these documents are provided to the company the first settlement window will open. The company will be advised when the

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<sup>13</sup> This means that we will seek to reach agreement with the company on the penalty amount that will appear in the penalty notice. The company will also have an opportunity to comment on the content of any draft press notice but the final decision as to what will be published in the press notice will be made by the Utility Regulator.

window opens and is to close. Where the company confirms that it is willing to enter into settlement discussions, the investigation team will commence settlement discussions with the company. We will generally consider settlement in all cases where the company is willing to do so.

- 4.26 We will not enter into partial settlements with companies, whereby the company admits to some contraventions but continues to contest others.
- 4.27 Settlement discussions will take place on a 'without prejudice' basis. Consequently, if a settlement agreement is not reached and the case becomes contested, neither the company nor the Utility Regulator can rely on admissions or statements made during these discussions.
- 4.28 In order to advance settlement discussions we will need to have sufficient information to assess the nature and extent of the contravention and the harm caused and we may ask the company for information to help us assess this at any stage.
- 4.29 Where a settlement is subsequently agreed to by the company, the Settlement Committee will remain in place and make all subsequent decisions in the case. See section 5 for further information on the Settlement Committee.
- 4.30 If the company wishes to settle it must sign a formal settlement agreement, the template for which will be provided by the Utility Regulator. Cases settled in the first window will attract a 40% discount as set out in the Utility Regulator's Financial Penalties Policy<sup>14</sup>.
- 4.31 If the settlement agreement is signed by the end of the first window, the process will move to the final stage, Enforcement Action Stage IV (see below). Where cases are settled by agreement, the Settlement Committee will make the final

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<sup>14</sup> Where the Financial Penalties Policy to be applied in respect of the contravention does not provide for the application of a settlement discount, the company's agreement to settle within the relevant settlement window will be considered by the Utility regulator as a mitigating factor for the purposes of determining the quantum of the financial penalty.

decision, i.e. following consideration of any responses to the statutory consultation on the financial penalty, on the financial penalty. Statement of case and response.

### *Settlement of case and response*

- 4.32 If a settlement is not agreed in the first window we will on a preliminary basis consider the case to be contested and the investigation team will prepare a draft statement of case which will be issued to the company. The draft statement of case will, as a minimum include the following:
- the specific condition(s) or requirement(s) which the investigation team considers a company is contravening, has contravened, or is likely to contravene and the reason(s) why this is the case;
  - a summary of the background to the investigation;
  - the relevant facts of the case derived from consideration of the evidence;
  - copies of the evidence, which the investigation team considers to be relevant to the facts of the case.
- 4.33 When we send the statement of case to the company we will make clear that the company may make written representations in response to the statement of case and will provide a time period for the company to make representations.
- 4.34 The company will normally have 28 days to respond to the statement of case. However, this will not always be appropriate and in certain circumstances a different period may be specified (for example, due to the urgency of the case).
- 4.35 In certain cases, it may then be appropriate for an updated statement of case to be prepared and sent to the company in which case the company will get an opportunity to update its response.
- 4.36 When the draft Statement of Case is issued to the company the second settlement window will open and the company will be advised when it will close (this will typically be when written representations on the draft Statement of Case are due to be submitted to the Utility Regulator). If the company wishes

to settle in the second window it must sign a formal settlement agreement and the company will have the duration of the second window to sign a settlement agreement.

- 4.37 Cases settled in the second window will attract a 20% discount as set out in the Utility Regulator's Financial Penalties Policy<sup>15</sup>. As before, such cases will move to the final Stage, Enforcement Action Stage IV (see below). That is, where cases are settled by agreement, the Settlement Committee will make the final decision, i.e. following consideration of any responses to the statutory consultation on the financial penalty, on the financial penalty.
- 4.38 If settlement is not reached in the second window, the investigation team will proceed to finalise the statement of case to reflect any written representations that may have been made by the company and the process will move to Stage III – Contested Cases/Enforcement Orders.

### **ENFORCEMENT PROCEDURE STAGE III – CONTESTED CASES/ ENFORCEMENT ORDERS**

#### *Appointment of Enforcement Committee*

- 4.39 This Stage III applies where –
- Stage II has been followed and a settlement is not agreed by the close of the second settlement window, the case will be treated as being formally contested by the company.
  - A financial penalty was not considered an appropriate in respect of the circumstances of the case and any enforcement action to be taken is by the making of an enforcement order.

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<sup>15</sup> Where the Financial Penalties Policy to be applied in respect of the contravention does not provide for the application of a settlement discount, the company's agreement to settle within the relevant settlement window will be considered by the Utility Regulator as a mitigating factor for the purposes of determining the quantum of the financial penalty.



- 4.40 In both cases, the investigation team will have prepared, taken representations from the regulated company on and finalised a statement of case (in accordance with or along the lines set out in paragraphs 4.32 to 4.38 above).
- 4.41 At this point in the process the Utility Regulator will appoint an Enforcement Committee to make the determination. The Enforcement Committee may be either an ad-hoc committee comprising members of the Utility Regulator Board and/or senior staff or established for the purposes of making a formal determination on enforcement action in that particular case. The Board's decision as to whether or not to appoint an ad-hoc committee will be made on the basis of manageability in each particular case. In the case of matters of the SEM, where inquiry/investigations are delegated to the UR as the relevant authority, the Enforcement Committee will comprise members of the UR Senior Leadership Team and/or UR Board.
- 4.42 Where the Enforcement Committee is an ad-hoc committee it will be comprised of individuals selected by our Chair (following recommendations, where possible, from our chief executive) who are authorised to sit on an enforcement committee.
- 4.43 The Enforcement Committee may give directions on the procedure which will be followed before it makes its determination, including how any preliminary or interim issues will be dealt with and the dates by which any relevant actions should occur. The company will be notified of these directions.
- 4.44 If it becomes appropriate for the Enforcement Committee to vary the directions at any point the company will be notified of the varied directions.
- 4.45 The Enforcement Committee will consider the updated statement of case and all of the other documents relating to the case.
- 4.46 Once it has considered the above documents it is open to the Enforcement Committee to decide that it does not consider there to be a contravention and that the case should not proceed to a formal determination. If this is the case

we will notify the company of the decision and publish a notification of this outcome as a news alert on our website.

- 4.47 If the Enforcement Committee considers that it needs any further information from the company in order to make any of its determinations, it may serve a further information notice. The Enforcement Committee may also request information from the investigation team or any relevant third parties.
- 4.48 It may also be appropriate for our Enforcement Committee to invite representations on any particular issues from the company and/or any relevant third parties, and clarification on the statement of case from the investigation team.
- 4.49 Where the investigation team provides clarification, or a third party provides further information or makes representations to our Enforcement Committee on request, the clarification and/or representations will be provided to the company and the company given an opportunity to comment.
- 4.50 In certain cases, to ensure that the relevant issues are fully explored, our Enforcement Committee may decide that it is appropriate for there to be a hearing at which the company and our investigation team are both invited to answer questions and, in the case of the company, to make representations. Our Enforcement Committee may also invite third parties to attend all or part of the hearing to answer questions or to make representations. Minutes will be taken of any hearing held and will be provided to the company.
- 4.51 In any such hearing, the Enforcement Committee will adopt an investigative rather than an adversarial approach.
- 4.52 Once the Enforcement Committee is satisfied that it has received sufficient evidence and appropriate representations, it will be the role of the Enforcement Committee to give due consideration to the evidence and representations and to then make a determination on:
- the relevant facts of the case;

- whether or not the company has contravened, is contravening, or is likely to contravene a licence condition or relevant statutory requirement; and
- if there is, has been, or is likely to be, a contravention, whether it would be appropriate for us to take enforcement action and, if so, what enforcement action should be taken. (Our powers in relation to enforcement action are summarised at the end of this document.)

*Enforcement Committee - Preliminary determination and representations*

4.53 The Enforcement Committee will notify the company of its preliminary determination and give the company a period of time to make representations in relation to our preliminary determination. This is not necessary in a settled case where the agreement has already been reached.

**ENFORCEMENT PROCEDURE STAGE IV – FINAL DETERMINATION ON ENFORCEMENT**

4.54 In both settled and contested cases we will follow any statutory procedure which needs to be followed before the final decision is implemented.

4.55 We are required to consult before imposing a financial penalty or before confirming a provisional order or making a final order. Where consultation is required we will invite representations on our proposals and give interested parties an appropriate period to comment. The consultation will be published on our website as a news alert.

4.56 The Settlement Committee or the Enforcement Committee (as appropriate) will duly consider any representations or objections (which are duly made and not withdrawn) before making a final determination on enforcement action.

4.57 All responses made and our final decisions will also be published on our website as a news alert.

## **5. Constitution of a Settlement Committee and an Enforcement Committee**

- 5.1 Each Settlement Committee and Enforcement Committee established for the purposes of determining any case, is independent of the investigation team which has worked on a particular case and will form an independent view on the case.
- 5.2 Each committee will generally be comprised of 3 members, who will be Board members or senior employees of the Utility Regulator. However, in certain cases, it may be appropriate for the committee to be larger or smaller than this. For example:
- in more complex cases, our Enforcement/Settlement Committee may be comprised of more than 3 members ; or
  - in certain cases which are less complex or particularly urgent, our Enforcement/Settlement Committee may only have one member.
- 5.3 Once the membership of the Enforcement/Settlement Committee for the case has been appointed we will inform the company of the names of members of the committee and give the company an opportunity to make representations on this which we will take into account.
- 5.4 When the members of each committee are appointed one of its members will be appointed as the chair. Decisions of each committee will be made by consensus.
- 5.5 Each committee may take legal or other advice in the course of its work.
- 5.6 Any person that is a member of a Settlement Committee established for any particular case shall not also be a member of any Enforcement Committee that may be established for that same case.

## 6. Complaints, disputes and appeals

- 6.1 As noted above, in some cases, we may obtain information following a complaint against a company by a third party who may suggest that a company is contravening or has contravened or is likely to contravene a licence condition or other relevant requirement.
- 6.2 Where a complaint, appeal or dispute has been referred to us in our role as dispute settlement authority we will deal with the complaint, appeal or dispute in accordance with our Policy on Resolution of Complaints, Disputes and Appeals and Guide for Applicants.
- 6.3 In particular, as a direct result of EU Directives aimed at improving the way internal markets in energy are structured, we were given the legal authority to act as a dispute resolution authority for certain matters in relation to electricity and gas. Our complaints policy sets out a number of procedures (with specified timescales) which we are required by EU law to follow.
- 6.4 In relation to water, the Water Order gives us the power to determine relevant complaints, disputes and certain appeals relating to water and sewerage services.
- 6.5 The complaint, appeal or dispute may suggest that it would be appropriate for us to take enforcement action in relation to the issue of the complaint or a related issue. We will consider whether to undertake further investigation and/or take enforcement action in the particular circumstances of the case. In some cases, where we already have a detailed understanding of the matter following the complaints process, we may be satisfied that there is sufficient evidence a company is contravening or has contravened or is likely to contravene a condition or requirement to proceed directly to the preparing of a Summary of Initial Findings.

## 7. The Legal Framework

7.1 Our enforcement powers are summarised in the table below and outlined in more detail, including exceptions, in the sections following the table.

Enforcement Power	Circumstances of use
<b>Enforcement order</b>	Shall be used where we are satisfied that a company is contravening, or is likely to contravene, any relevant condition or requirement.
<b>Financial penalty</b>	May be used where we are satisfied that a company has contravened or is contravening any relevant condition or requirement or any provision of a Community Regulation.
<b>Revocation of licence</b>	<p>For electricity licence holders and gas licence holders, may be used in accordance with the terms as to revocation set out in the particular licence.</p> <p>For a company holding a licence for water and sewerage services may be used in accordance with article 14 of the Water Order and the conditions of the relevant licence.</p>

### *Enforcement Orders*

7.2 Article 42(1) of the Energy Order states that where we are satisfied that a company is contravening, or is likely to contravene, any relevant condition or

requirement, we shall by a final order make such provision as is requisite for the purpose of securing compliance.

- 7.3 Article 42(2) states that where it appears to us that a company is contravening, or likely to contravene, a relevant condition or requirement, and it is requisite that a provisional order be made instead of making a final order, we shall by provisional order make such provision as appears to it requisite for the purpose of securing compliance.
- 7.4 A provisional order shall be confirmed by us (with or without modifications) if we are satisfied that the company is contravening, or is likely to contravene, any relevant condition or requirement and the provision made by the order is requisite for the purpose of securing compliance.
- 7.5 If a provisional order is made and not confirmed, it will cease to have effect at the end of such period (not exceeding three months) as is determined by or under the order.
- 7.6 There are certain exceptions to these duties, where we are not required to make a final or provisional order. These include the following:
- where the company has agreed to take and is taking all such steps as it appears to us to be appropriate for the company to take to secure or facilitate compliance; or
  - where the contraventions were of a trivial nature.
- 7.7 Article 30(1) and Article 30(2) of the Water Order set out similar provisions in relation to our enforcement power to make final orders and provisional orders in the water and sewerage services sector (including specified exceptions).
- 7.8 In particular, Article 30(1) states that, where we are satisfied that a company is contravening, or is likely to contravene, any condition of the company's licence or any statutory or other requirement, we shall by a final order make such provision as is requisite for the purpose of securing compliance.

- 7.9 Article 30(2) states that, where it appears to us that a company is contravening, or is likely to contravene, any condition of the company's licence or any statutory or other requirement and it is requisite that a provisional order is made instead of making a final order, we shall by provisional order make such provision as appears to it requisite for the purpose of securing compliance.
- 7.10 Article 31(1) provides certain exceptions to these duties, where we are not required to make a final or provisional order. These include the following:
- where the company has given and is complying with a statutory undertaking to take all such steps as it appears to us to be appropriate for the company to take to secure or facilitate compliance, or
  - where the contraventions were of a trivial nature.
- 7.11 Where a decision has been taken to make a final enforcement order or confirm a provisional enforcement order, Article 43 of the Energy Order and Article 32 of the Water Order set out a statutory procedure which must be followed before the order can be made/confirmed.

### *Financial Penalties*

- 7.12 Article 45(1) of the Energy Order states that where we are satisfied that a company has contravened or is contravening any relevant condition or requirement or any provision of a Community Regulation, we may impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.
- 7.13 As well as this, Article 45(2) of the Energy Order states that where we are satisfied that an electricity licence holder (who is an electricity distributor or an electricity supplier) or a gas licence holder has failed or is failing to achieve any standard of performance prescribed under the relevant legislation, we may impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.



- 7.14 We generally have a limited time following the contravention or failure to impose a penalty. Generally, where no provisional or final order has been made in relation to a contravention or failure, we may not impose a penalty more than 12 months from the time of the contravention or failure unless during that period the we have done one of the following:
- served a penalty notice relating to the contravention or failure on the company; or
  - served an information notice on the company requesting further information in relation to the contravention or failure.
- 7.15 Where a final order has been made in relation to the contravention or failure the penalty notice relating to the contravention or failure must generally be served on the company within 3 months from the making of the final order.
- 7.16 Where a provisional order has been made in relation to the contravention or failure, the penalty notice relating to the contravention or failure must generally be served on the company within 3 months from the confirmation of the provisional order by the Utility Regulator or, if the provisional order is not confirmed, within 6 months from the making of the provisional order.
- 7.17 Article 35(1) and Article 35(2) of the Water Order set out similar provisions in relation to our enforcement power to impose financial penalties in the water and sewerage services sector (including a general time limit for imposing a penalty).
- 7.18 Article 35(1) of the Water Order states that, where we are satisfied that a company has contravened or is contravening any condition of its licence or has failed or is failing to achieve the standard of performance prescribed under the relevant legislation, we may impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.
- 7.19 Article 35(2) of the Water Order states that, where we are satisfied that a company has contravened or is contravening any relevant statutory or other

requirement, we may impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.

- 7.20 Where a decision has been taken to impose a financial penalty, Article 45 of the Energy Order and Article 35 of the Water Order set out a statutory procedure which must be followed before the penalty can be imposed (as set out in our policy on financial penalties).
- 7.21 Article 46 of the Energy Order and Article 36 of the Water Order require us to prepare and publish our policy with respect to the imposition of penalties and the determination of their amount (see our policy on financial penalties).
- 7.22 As indicated in our policy, we are first required to decide whether a company has contravened or is contravening any relevant condition of its licence or other requirement, or has failed to achieve any standard of performance set in accordance with specified provisions of the Energy Order. We will use the process outlined in the proceeding sections of this procedure in making that decision.
- 7.23 Once satisfied that a relevant contravention or failure has occurred our Enforcement Committee will decide whether a penalty should be imposed and, if so, at what level. The Financial Penalties Policy will be used for this purpose.

*Revocation of licence for non-compliance with enforcement action*

- 7.24 Non compliance with enforcement action can lead to revocation of licence. For electricity licence holders and gas licence holders, the circumstances where the power to revoke a licence is available are set out in the terms as to revocation in the particular licence. For a company holding a licence for water and sewerage services, a termination may only be made in accordance with Article 14 of the Water Order and the relevant licence conditions. Where we propose revocation of licence for non-compliance with enforcement action, we will follow any procedure set out in the licence and any relevant legislation.