



Energy for
generations

ESB GT response to the Utility Regulator Consultation on revising 'Our Enforcement Policy Approach and Procedure'

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Contents

1. Introduction.....	3
2. Executive summary	3
3. Consultation Purpose	5
4. Response to consultation.....	6
4.1 Reason & Justification	6
4.2 Legislation Amendment	7
4.3 Jurisdictional Consistency.....	8
4.4 Existing Frameworks	8
4.5 Financial Penalties.....	9
4.6 Unclear Wording.....	10
4.7 Alignment with Regulatory Principles.....	10

1. INTRODUCTION

ESB Generation and Trading (ESB GT) welcomes the opportunity to respond to the Consultation on revising 'Our Enforcement Policy Approach and Procedure' in Northern Ireland.

As part of ESB GT's current portfolio in Northern Ireland, we operate the Coolkeeragh site in the northwest of the region on which sits a combined-cycle gas turbine (CCGT) unit and an open-cycle gas turbine (OCGT) unit with a joint capacity totalling 455 MW.

2. EXECUTIVE SUMMARY

ESB GT supports key principles of good regulation which aim to be targeted, proportionate, transparent, consistent, and accountable. We recognise that these principles enable a level playing field for all and a clear and transparent process that can be followed.

We question many aspects of the consultation, its alignment with the principles advocated, the potential consequences and find no basis as to why this change should be made, with this being the case we cannot support the proposals outlined in the consultation.

ESB GT concerns are summarised below:

1. **Justification:** There is no reason or justification given for why now is the "*appropriate time*" to make these changes. We cannot see in the underpinning legislation as to where it references an "appropriate time to amend"
2. **Legislative Amendments:** ESB GT are not clear on whether the proposed changes are consistent with the legislative provisions referred to The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007. To the extent any inconsistency arises, legislative changes should be made as appropriate and necessary in advance of the proposed changes taking effect.
3. **Jurisdictional Issues:** Further detail and clarity should be provided on the jurisdictional scope and remit of the UR in the context of the proposed changes, including in the context of matters relating to enquiries of the Market Monitoring Unit (MMU).
4. **Evidence:** We cannot see evidence as to why there is a need to make this amendment now and what has changed, in either legislation or market behaviours, from June 2018 when the enforcement policy was last revised.

5. **Timing:** There is a lack of clarity around when the enforcement procedure will start i.e. when in the process. There already is an existing framework in place to capture enforcement that is sufficient.
6. **Disproportionate:** The current financial penalties policy related to any of the types of licence breaches that can occur, leave potential large fines and a significant increase in regulatory risk and uncertainty.

We understand that this consultation sets out to achieve/deliver based on regulatory principles, however, we do not feel it does so for the following reasons:

1. **Targeted:** We do not believe that this document will target the SEM's nuances specifically compared to the other utilities or businesses where this currently applies.
2. **Transparent:** In our view there is not a sufficient level of detail contained in the consultation in relation to the purpose and scope of the proposed amendments. Subsequently ESB is not clear on the potential relevant and implications of the proposed changes.
3. **Consistent:** We do not believe this provides jurisdictional consistency in an all-island market
4. **Accountable:** We do not believe there is a clear mechanism where UREGNI can be held accountable for their decisions

Further to the principles of good regulation, we see a misalignment with these principles as set out in the consultation document and enforcement procedure. Regulators have a duty to be transparent. It is unfair on licence holders if matters are not clear. It is also not clear how generator licence holders will be affected by this implementation and on this point, we would seek clarity from UREGNI on this.

ESB GT's fundamental question why URGNI has proposed to introduce this change now and therefore do not support this. In fact, this increases regulatory risk for investors and participants without the necessary drivers, and reasoning being clearly outlined and evidenced.

3. CONSULTATION PURPOSE

ESB GT understands that the UREGNI has an “Enforcement Policy Approach and Procedure” document¹ for the purposes of being a best practice regulator. Whilst not required by statute, UREGNI follow this procedure in the interest of transparency and assisting market participants in understanding what to expect should they find themselves under investigation.

The following section sets out the legislative background as we consider it relevant to the document and the proposed amendment.

Background

2007 - The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 is created where one of the “non relevant” is “prosecution of licencing offences” – Reference to SEM excluded

2016 - The original Enforcement Policy Approach and Procedure was consulted upon in October 2015 with a decision published in March 2016. The SEM is excluded in this document.

2018 - The enforcement document was then revised in June 2018. The SEM is excluded in this document.

2023 - UREGNI commented at the that time the decision was taken *“not apply the procedure to matters or decisions in relation to the Single Electricity Market (SEM) as the Integrated Single Electricity Market (I-SEM) undergoing design and implementation. With the I-SEM now live for several years it has been decided by the UREGNI to consult that it is now the “appropriate time” to amend the procedure to ensure that all companies and participants in Northern Ireland remain compliant with their legislative and legal obligations.”*

Proposed amendment

“The proposed amended procedure includes the relevant legislation which underpins SEM in Northern Ireland. The SEM Committee (SEMC) is the governing body, or Authority, under The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007. The SEM Order determines the relevant and non-relevant functions of the SEMC. Under Article 6, sub-section 5 of the SEM Order, and within the

¹ [Consultation on revising Enforcement Policy Approach and Procedure | Utility Regulator \(uregni.gov.uk\)](https://www.uregni.gov.uk/consultation-on-revising-enforcement-policy-approach-and-procedure)

Electricity (Northern Ireland) Order 1992, the SEMC do not have the function of Article 8(3) of the Electricity (Northern Ireland) Order 1992 (prosecution of licencing offences)”.

We recognise that as part of the proposed amendment the following steps will be taken to implement this change:

1. The amendment proposed is the removal of paragraph 1.7 of the procedure which states *“procedure does not apply in respect to matters or decisions that are with the jurisdiction of the SEM Committee in relation to the all-island Single Electricity Market”*
2. Minor amendments to other sections for clarity, notably in section 1.10 of the procedure *“This Enforcement Procedure also applies to SEM Market Monitoring Unit enquiries which may have commenced prior to the publication of these guidelines”.*
3. *“The proposed amended procedure includes the relevant legislation which underpins SEM in Northern Ireland.” -*

We understand that the proposed amendment to the UR Enforcement Policy Approach and Procedure is designed to remove the omission of the SEM from the procedure, however, we question why this is necessary and find no legitimate rational and are therefore we are not in a position to support the proposal. Specifically, we are opposed to the following elements:

We seek clarity on the process as to why and how these amendments are proposed to be undertaken and implemented.

4. RESPONSE TO CONSULTATION

In the below, ESB GT sets out its main arguments as to why we do not support this change.

4.1 Reason & Justification

ESB GT question the reasoning and justification for the need to amend the enforcement document to include matters relating to the SEM. The Electricity (Single Wholesale Market) (Northern Ireland) Order

2007² which underpins the Enforcement Policy Approach and Procedure. Since the legislation was adopted it has excluded the SEM from licence prosecution. Therefore in the case where a change was made to the procedure, there would be an inconsistency between the legislation and the policy the change does not 'address' the issue as stated. Specifically, SEM is defined as a “*non-relevant*”. This has never been changed throughout the lifespan of the order, and there is no indication in the legislation that there is an envisioned requirement for amendments in the future.

The original enforcement document was first consulted upon in October 2015 with a decision published in March 2016³. In this document it states “*Our procedure does not apply in respect of any enforcement decision in relation to the all-Ireland Single Electricity Market*” which is reflective of the existing legislation. This line remained in the decision paper. The next revision to this from February 2018 and final decision in June 2018⁴ when the SEM was specially excluded. No justification was given at that time to say the procedure would be amended in the future. The “Appropriate time” is not mentioned in the legislation as part of this (2023) consultation, no clear factual evidence has been provided as to what has changed and to why now has been deemed “*appropriate*” time to amend this document other than “*I-SEM has bedded in and considered as the Single Electricity Market (SEM) once again, it is now appropriate to amend the procedure in order to ensure all companies and participants in Northern Ireland remain compliant with their legislative and licence obligations.*” It can be argued that now is not the appropriate time to make such changes considering the volatility within the SEM and the issues with security of supply which indicate that the SEM has not fully bedded in.

ESB GT have concerns as to why and how it was decided there is evidence now the “*appropriate*” time to amend this procedure? This is not written in legislation. We also seek clarity on whether UREGNI are also seeking to amend the underpinning order(s) for this procedure?

4.2 Legislation Amendment

If the policy is changed but legislation doesn't reflect this, we do not believe that any enforcement is possible. It is unclear from the consultation if UREGNI are also seeking to amend the underpinning legislation? “*The proposed amended procedure includes the relevant legislation which underpins SEM in Northern Ireland.*” ESB GT seek clarity on this point and also if UREGNI have the vires to amend legislation, as the procedure cannot override the legislation. Further to this, we seek clarity if any

² [The Electricity \(Single Wholesale Market\) \(Northern Ireland\) Order 2007 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

³ [Utility Regulator's Enforcement Procedure comes into effect | Utility Regulator \(uregni.gov.uk\)](https://www.uregni.gov.uk)

⁴ [Decision on revising our Enforcement procedure and Financial Penalties Policy | Utility Regulator \(uregni.gov.uk\)](https://www.uregni.gov.uk)

change to legislation would have an implications or impact on existing structure which licence holders should be aware of.

4.3 Jurisdictional Issues

UREGNI have not provided any detail in relation to the jurisdictional scope and remit of their in the context of the proposed changes, including in the context of matters relating to enquiries of the Market Monitoring Unit (MMU).

We assume that it is proposed that, as a result of these changes, any inquiry that is subject of the enforcement procedure which relates to an NI plant for example would fall to be dealt with by UREGNI e.g. because the relevant suspected breach arose in the NI jurisdiction. We are of the view that this is a point which should be specifically clarified by UREGNI, including in the context of matters arising relating to an MMU inquiry.

Given that the SEM is an all-island market, albeit the Regulatory Authorities (RA's) are jurisdictionally split, ESB GT holds licences in both jurisdictions, we believe it is prudent that enforcement and penalties procedures in each jurisdiction⁵ be closely aligned which we do not feel with the proposed amendment bringing the SEM into scope of the existing UR enforcement procedure does so. We have concerns as to whether a consistent approach in the treatment will be taken to enforcement across all market participants in Northern Ireland and again also on an all-island basis.

ESB GT believes it is prudent that there is jurisdictional alignment with regards to enforcement and penalties in the SEM. This proposed amendment does not do this. We also seek clarity on whether amendment will lead to a change in scope of the MMUs current function

4.4 Existing Frameworks

ESB GT notes that an enforcement process is already be possible through the Competition Act however this procedure does not apply to the enforcement of competition law under the Competition Act (1998) in relation to commercial activities connected with the electricity sectors however, for cases like this there is a separate guidance to which the UR have powers⁶ to direct a company to modify or terminate agreements or to modify or cease particular conduct, the power to impose a financial penalty

⁵ [CRU Compliance and Enforcement Policy Statement | CRU.ie](https://www.cru.ie/en/2018/06/20/cru-compliance-and-enforcement-policy-statement/)

⁶ [Guidance on the application of the UR's competition powers | Utility Regulator \(uregni.gov.uk\)](https://www.uregni.gov.uk/guidance-on-the-application-of-the-ur-s-competition-powers/)

and have concurrent powers with the Competition Markets Authority (CMA). The intersection between the policies is unclear

ESB GT also notes, with regards to Regulation on Wholesale Energy Market Integrity and Transparency (REMIT)/Market Abuse Regulation (MAR), it is unclear if enforcement for a REMIT/MAR breach will fall under the amended enforcement policy. Given that this is a key overarching existing regulation within the SEM. It is imperative that it is transparent as to where this would sit in the Enforcement Procedure

This indicates that there is already an enforcement framework in place and there is an unclear interaction with REMIT/MAR.

4.5 Financial Penalties

With the CMA procedure and the UR procedure, upon which now will be in scope due to this amendment, financial penalties may not be proportional to some alleged offence seen in the SEM. *“Consider complaints about anti-competitive behaviour and where necessary, take action to stop it. Where we find a business is acting anti-competitively, we can impose financial penalties of up to 10% of the business' worldwide turnover”*. The UR financial penalties framework⁷ which will now be in scope also state amount of up to 10% of the business turnover for potential penalties. *“It will ensure that the amount it determines is not more than 10 per cent of the turnover”*

This means that there are potentially large fines for any breach and with no precedence set before to benchmark any penalties. No clear definition on what kinds of exposure a participant is open to with any potential breaches, this increased exposure and increases risk. This turn increases uncertainty, and this may deter new investment entry. We seek further clarity if the financial penalties framework which will come into scope is underpinned by The Energy (Northern Ireland) Order 2003⁸? Article 45(2)(a) in this states that a financial penalty can currently be imposed onto *“electricity supplier”*, however there is no reference to a generator and as such they are not covered.

Potential for excessive and disproportionate financial penalties to come into scope. ESB GT also seeks clarity as to whether there is already scope to currently impose a financial penalty or if this will require a change to legislation?

⁷ [Microsoft Word - NIAUR Revised Statement of Policy on Financial Penalties -... \(uregni.gov.uk\)](#)

⁸ [The Energy \(Northern Ireland\) Order 2003 \(legislation.gov.uk\)](#)

4.6 Unclear Wording

Considering the process as a whole, on point 4.5 *“Initial Enquiry Stage” - “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”*. Later in the procedure the four stages that can lead to a final determination on enforcement and/or the imposition of a financial penalty are stated.

- 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

“ENFORCEMENT PROCEDURE STAGE I – FORMAL INVESTIGATION follows the end of the Initial Enquiry Stage “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”.

It is unclear as to at which step is the first stage of the enforcement process

4.7 Alignment with Regulatory Principles

The SEM is excluded in this document on the good regulatory principle as stated in the consultation document⁹.

1. **Targeted:** The proposed changes to bring the wholesale SEM into an existing framework used over water, gas, retail electricity companies do not address target the wholesale SEM specifically and address the nuances compared to other sectors. It is not appropriate for SEM due to its cross jurisdictional nature and other interlinking regulations. The SEM hasn't been included from the beginning. No evidence provided for the need for this
2. **Proportionate:** Bringing the financial penalties framework into scope and the use of other financial penalties frameworks give the ability for large or unlimited fines to be imposed on generators without any thresholds, guidance or precedence on value giving the ability to impose disproportionate penalties.

⁹ [UREGNI Consultation \(uregni.gov.uk\)](http://uregni.gov.uk)

3. **Transparent:** There are aspects that are unclear as to when the enforcement process will begin. It is also not clear how licence holders will be affected by this implementation and on this point, we would seek clarity on these items.
4. **Consistent:** As the SEM is an all island market but split jurisdictionally, there needs to be a consistent approach between both RA's. Concerns if this enforcement document will be applied equally to all market participants
5. **Accountable:** The existing framework is designed to hold market participants to account for their actions a potential breach but there needs to be a clear mechanism as to where the UREGNI can be held accountable for their process, and it should be clearly defined in the steps.

ESB GT fundamental question why URGNI has proposed to introduce this change now and therefore do not support this for the reasons outlined above. In particular, the justification for this change, the legislative changes needed and the judgement inconsistency this will create.