



Electric Ireland Response:
**Consultation on revising URs enforcement procedure
and financial penalties policy**

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Response to Consultation Questions

Q a. The clarity of the annexed documents

Very clear

Q b. The aim of the revised enforcement procedure;

Electric Ireland acknowledge and are supportive of UR's aim to provide additional clarity to all regulated parties as outlined 2.3 – 2.4 in Annex 1.

Q c. The concept of alternative resolution and how it fits into the procedure

Electric Ireland are supportive of the concept of alternative resolution. However, particularly in relation to the initial enquiry stage, we would advocate that such resolution would allow for resolution on a without-prejudice basis, i.e. where a participant can provide material challenge to the initial outline of facts and where there is clear disagreement on the facts of the information available at that point. For clarity we are keen to establish that a participant is presumed to be compliant until demonstrated to be otherwise.

In this context, we therefore think the second step in the initial enquiry stage should provide for where a participant, without prejudice, could be given the opportunity to hear an outline of the allegations being made and would be offered the opportunity to respond and challenge at this stage before the decision is made to proceed, whether to alternative resolution or to issue closure or to the enforcement action stage.

We believe further consideration needs to be given to the following potential scenarios:

- Where there may be ambiguity in the presentation and interpretation of the “facts” of any particular case. For example, where the balance of evidence is arguably insufficient to merit a definitive finding one way or the other and where the balance of arbitration lies in this situation.
- Determining the criteria for what constitutes the boundary between a “go” and “no-go” decision

- Determining the criteria for what constitutes a minor case as against a case which should proceed e.g. what constitutes proportionality.
- We do not agree with publication in any situation where there is a determination of no case to be answered or where a decision is made not to proceed based on a determination of reasonable ambiguity

Q d. The concept of settlement and how it fits into the procedure

The flow chart is not clear on whether UR can re-visit the penalty at the “Settlement committee decision on contravention and minded to on penalty “ stage after the draft penalty has been signed off by the company at the previous stage.

Q e. The proposed settlement windows and discounts

Electric Ireland are broadly supportive of the intent in this area.

We note that the concept of two windows presupposes that those companies who dispute a resolution at the first settlement window on some/identified legitimate grounds (not necessarily rejecting fully that there is a case to be answered) could be harshly penalised for taking this position. For clarity, if a company enters the second settlement window on grounds which are subsequently found to be reasonable or acceptable then some flexibility should be allowed in relation to the applicable discount available at this stage of the procedure. In this case that the level of the discount can be altered upwards (within a defined range, say up to a further 10%? or in certain circumstances right up to the 40% allowable at first settlement window).

The enforcement action stage does not allow for a scenario whereby the company successfully challenges the basis of the statement of initial findings. There is no step in the process as currently documented which would terminate the process at that point with no findings against the company and with no publication applying. This gap highlights the need for caution in publishing at earlier stages in the process particularly where the decision is taken to publish at the step D in the Enforcement Action Stage: “Investigation team decision to

open an investigation” on the basis of initial findings, where the company has had no reasonable opportunity to challenge.

Q f. UR’s proposals with respect to publication.

As per comments in previous sections we are concerned at proposals for publication where the potential implications for the company and/or company reputation/brand could be unjust/unwarranted/catastrophic/disproportionate/-damaging/excessive etc particularly where interim findings may not be conclusive. There may also be implications for the covenants in our financing facilities. We strongly believe, therefore, that publication should not take place until all evidence is available, where due process has been followed and the presumption of compliance/innocence prevails until final determination is decided. For the avoidance of doubt we mean where the company has signed an acceptance of liability relating to a case stated by the UR and/or at the final stage of the process i.e. the “Make and publish final decision on enforcement order, penalty” step in Enforcement Action Stage 3.

It should be noted that any publishing on UR’ s website is effectively a public announcement which is likely to attract/engage the attention of the wider media interest and in some cases in a sensationalist fashion. There is also the possibility that a competitor or a vexatious complainant might use such publication in an opportunistic fashion.

Issues resolved by alternative resolution where no case has been opened should not be published in our view.

We would also expect the Regulator to inform a company before the closing of a case is published on websites or announcements made to the media.

Comments on proposed financial penalties policy

In so far as the consultation references the liability of a VIU, it is our understanding that this reflects the existing position under Article 45(9)(b) of the Energy Order, and is not intended to

confer any new or extended power on the Utility Regulator. It is our interpretation of Article 45(9)(b) that this relates to any breach of the the unbundling requirements applicable to transmission and distribution businesses (and required separation from generation and supply interests of the VIU), and associated obligations, under Directive 2009/72/EC. It is expected that any enforcement of the legislative provisions would reflect the intent of the EU legislators in this regard.

In the interests of clarity, it would be useful if the Utility Regulator could confirm the above understanding. Further, if the Utility Regulator is in a position to provide additional guidance in relation to the type of situation where this might be invoked, that would again be very useful.