



## **Response by Energia to Utility Regulator Consultation**

***Draft Forward work programme 2018/2019-  
'Our business plan for the final year of our Corporate  
Strategy 2014-2019'***

16<sup>th</sup> February 2018

## Introduction

Energia welcomes the opportunity to respond to the Utility Regulator's consultation on Draft Forward Work Programme 2018/2019. The publishing of the forward work programme in consultation format is a welcome approach and affords stakeholders the opportunity to contribute to its development. Whilst there are a number of significant projects being undertaken by the UR in the coming period, the absence from the programme of the development of a dedicated appeals mechanism is a significant shortcoming. Such a mechanism is both a legal requirement and is necessary for the efficient functioning of the market. It is also consistent with previous industry requests.

Energia are calling for the inclusion of a dedicated appeals mechanism in the UR's Forward Work Programme (FWP).

## Appeals Mechanism

The need for an appeals mechanism has become more and more apparent as the markets have evolved and as significant redesigns such as ISEM have occurred. To complete a wholesale redesign of the market without allowing those who are most affected by the changes, a route to challenge decisions is troubling. An appeals mechanism should be viewed as a necessity and a complimentary piece to the regulatory process that strengthens it rather than weakens it. As it stands the absence of an appeals mechanism is damaging to the sector and the market as it represents a safety net that is missing. The addition of a mechanism will bolster the regulatory process (rather than undermine it) by reviewing decisions that may have a detrimental effect on the market or strengthen a decision by upholding it. Whilst the need for a mechanism is apparent there is also a requirement under the 3<sup>rd</sup> energy package:

*“Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.”<sup>1</sup>*

Currently, the only avenues open to stakeholders is a Judicial Review or Licence Appeal. UR decisions will not always result in a change to the stakeholder's licence but can still have a material impact on the market or directly on the stakeholder. Due to its limited scope a licence appeal cannot be used as a market appeals mechanism. Similarly a Judicial Review does not represent an appropriate or cost-effective way of challenging a decision. Judicial review is not concerned with the merits, or otherwise, of the decision but with the decision-making process and is therefore not an appeal of a decision but rather is a review of the manner in which the decision was arrived at. Judicial Reviews to the High Court are costly and this barrier may act to restrain or preclude affected parties from pursuing this route. It may have the effect of discriminating between industry participants because of the quantum of impact versus relative affordability by different business sectors (e.g.

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0072&from=EN>

networks have more resources to support a challenge compared with suppliers who operate in a much lower margin business). The failure to distinguish between “process” appeals to the Courts and “on merit” appeals to an independent expert body and, as a consequence, not having in place an effective (or any) appeals mechanism to the substance of regulatory decisions is a major defect of the current regime and is in breach of EU requirements.

In the context of Northern Ireland, bearing in mind the current requirement of the Third Energy Package Energy Markets Directive and the proposed continuation of these requirements in the Clean Energy Package Energy Market Directive, as well as the nature of energy matters more generally, we regard there to be a necessity for a wider standard of review than currently exists. This should be available, on reasonably qualified grounds, to challenge *all* regulatory decisions and not just those specific to price controls and licence modifications. It should also bear in mind the cross-jurisdictional nature of the Single Electricity Market (SEM).

We are therefore calling for the UR to take the first steps towards the introduction of an appropriate appeals mechanism, bearing in mind the relevant legal requirements and good practice, by including a commitment to develop such a mechanism in the FWP.