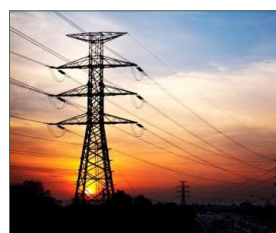


Decision Paper on Enforcement Procedures and Financial Penalties Policy

March 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

A consultation on our proposals for our new Enforcement Procedure and updated financial fundamental penalties policy was issued on 9 July 2015 and responses were to be received by 9 October 2015. The purpose of that consultation was to obtain stakeholder feedback on the fundamental principles contained within our new enforcement procedure and updated financial penalties policy.

This Decision Paper reviews the responses to the consultation paper and provides the Utility Regulator's position.

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 introduction of the Enforcement Procedure will bring us in line with other sector Regulators and provide reassurance to stakeholders that we are focused on legislative and licence compliance.

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1. Executive summary

The Utility Regulator issued a consultation on our proposed new Enforcement Procedure and updated Financial Penalties Policy on 9 July 2015. The responses have been summarised in this Decision Paper. The responses have been considered by the Utility Regulator and our position on the issues is provided in this Decision Paper.

2. Introduction and background

1. Effective and timely enforcement is of vital importance in order to ensure customer protection in line with promoting functional 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.
2. We are currently in the process of drafting a new competition procedure, working alongside the Competition and Markets Authority (CMA) to ensure consistency and alignment with other sectoral Regulators. This procedure will also be consulted on in due course.
3. The objective of this enforcement procedure is to create an informative procedural document which is transparent and identifies a clear process so that stakeholders know what to expect of the process if they are being investigated or having enforcement action taken against them.
4. The attached enforcement procedure outlines the process which we will follow when investigating potential licence or legislative contraventions and when giving formal consideration to whether it would be appropriate to take enforcement action. These procedures apply in conjunction with any procedural requirements set out in the relevant legislation or licences.
5. The objective of this enforcement procedure is to create an informative procedural document which is transparent and identifies a clear process so that stakeholders

3. Structure of decision paper

6. The paper will be made up of the following sections:
 - enforcement procedures;
 - taking enforcement action;
 - consideration and determination;
 - financial penalties policy; and
 - conclusion and next steps.

4. Purpose of paper

7. On 9 July 2015 the Utility Regulator published a consultation paper on our proposed new enforcement procedure and updated financial penalties policy. The purpose of this paper is to:
- provide details on the approach the Utility Regulator will follow when engaging its enforcement procedures and applying its financial penalty policy;
 - discuss the responses to the consultation; and
 - provide details on next steps and timeframe for implementation.

5. Enforcement procedure

8. When deciding whether or not to take enforcement action we will always first carry out an appropriate investigation to establish the facts and also the impact of any non-compliance. We will endeavour to adhere to the shortest timescales possible, whilst taking account of the need to follow appropriate processes and procedures.
9. Our approach to investigating possible breaches 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. For this purpose, we will adopt a robust process in accordance with the following principles:
 - a company will be advised if we decide to undertake a formal investigation,
 - a company will be given clear information about the issues being investigated and allowed a reasonable time to respond to any questions,
 - a company will be notified as to the person managing the investigation and will be kept informed of progress,
 - a company will be able to approach us at any time in the process to seek clarification, or to offer undertakings in relation to remedial action and future compliance, or other informal means of resolution,
 - 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.

10. Our Enforcement Procedure will apply to all of our enforcement functions, with the exception of enforcement decisions in relation to the all-Ireland Single Electricity Market. This is explained in Section 1. As we noted in the consultation, the Enforcement Procedure will apply in conjunction with any procedural requirements set out in the relevant legislation or licences.
11. Our Enforcement Procedure does not set out any particular time within which a company must respond to an information request. A decision will be made on what time period will be appropriate in any particular case. We appreciate that it is important to allow companies sufficient time to compile information which is requested and that this can often be a significant task (in particular in a large organisation).
12. Our Enforcement Procedure (at 3.28) does provide that a company will normally have 28 days to respond to a statement of case. We consider this to be a reasonable standard period. Again, we consider that there should be flexibility for us to determine that a shorter or longer period would be appropriate in a particular case.

6. Taking enforcement action

13. When deciding whether or not to investigate an issue, and subsequently whether to take formal enforcement action, we will have particular regard to the following considerations:
- the level of harm (or potential harm) to consumers which could be caused by the contravention;
 - the level of harm (or potential harm) to competition within the electricity, gas or water sector as appropriate;
 - the strength of the evidence which is available,
 - duration of the contravention;
 - whether or not the company has committed similar contraventions in the past;
 - whether or not enforcement action has been taken against a company in the past for a similar contravention;
 - 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 an investigation;
 - the likely effect of enforcement action including whether taking enforcement action could deter contraventions in the future;
- and
- any other relevant issues.
14. Following the consultation we can confirm our policy is that companies should be encouraged to willingly disclose a contravention (or potential contravention) to us. We will take into account proactive reporting of a contravention in considering what action to take in relation to any contravention (and proactive reporting is listed as a mitigating factor in our Policy with Respect to Financial Penalties).

15. In some case, whether a matter has been disclosed by the company may be relevant consideration when we consider whether or not to investigate the matter (being relevant to the nature and seriousness of the contravention). However, it will often be the case that disclosure by the company will not impact on whether or not an investigation should be carried out, even though it may impact on the nature of the investigation.

7. Consideration and determination

16. If we decide to proceed to a formal determination, our investigation team will prepare a statement of case, which will be issued to the company.
17. The company may make written representations in response to the statement of case and 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 generally get an opportunity to update its response.
18. Having considered the company's response the decision will be made as to whether or not to proceed to formal determination or not. In cases where formal determination is required the first step will be to appoint an enforcement committee to make the determination. The statement(s) of case and any responses will be passed to the enforcement committee for its consideration.
19. Once appointed, our enforcement committee will consider the statement(s) of case and any relevant responses. The committee will also have the power to seek additional information, invite representations or request a hearing.
20. Once the enforcement committee has received sufficient evidence and appropriate representations, it will give due consideration to the evidence and representations and then make a determination on:
 - the relevant facts of the case,
 - whether or not the company has contravened or is likely to contravene a licence condition or relevant statutory requirement,
 - if there has been or is likely to be a contravention, whether it

would be appropriate to take enforcement action and, if so, what enforcement action should be taken.

21. The enforcement committee's determination will be notified to the company and will be published on our website, unless we consider that there is a good reason why it should not be published.
22. We consider that our procedure on whether to publish a decision that a case should not proceed on our website should be flexible, so that an appropriate decision can be made in the circumstances of a particular case. In some cases, it may be that information is in the public domain about a company's potential contravention and it may be appropriate for us to publish a notice that we do not consider that there is a case to answer.
23. Our Enforcement Procedure (at 3.32) states that our 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. The enforcement committee will generally be comprised of three members.
24. We consider that our executive board members and senior employees have the appropriate fair-mindedness and impartiality that it is appropriate for them to be included in the list of potential members of the enforcement committee. In addition, we consider that limiting potential members of an enforcement committee may be unmanageable in terms of ensuring the availability of an appropriate committee, in particular in urgent cases.
25. There may be cases where it would be appropriate for an undertaking to be published on our website. In some cases, other stakeholders may be able to assist in reporting to us on whether or not an undertaking is being complied with. However, we do not consider that this will be appropriate in

all cases. There may be some undertakings which, because of the nature of the regulatory requirements they relate to, are very detailed and cover specific details of a company's business (some of which may be confidential). In these cases, it may not be appropriate for an undertaking to be published.

26. We propose to amend the Enforcement Procedure to cover publication of undertakings and details of other alternative resolution. In particular, we propose that to state that we will consider whether or not an undertaking (or details of the undertaking) or the details of alternative resolution should be published in any particular case.

8. Financial penalties policy

27. The Energy (Northern Ireland) Order 2003, as amended (“the Energy Order”) provides that in certain circumstances we may impose a financial penalty on any electricity or gas regulated person. The Water & Sewerage Services (Northern Ireland) Order 2006 (“the Water Order”) provides that in certain circumstances we may impose a financial penalty on any relevant undertaker (ie a company appointed as a licence holder for the provision of water or sewerage services).
28. Both Orders provide that the amount of a penalty must be reasonable in all the circumstances of the case and that it must not exceed ten percent of the turnover of the regulated person/licence holder.¹
29. We cannot impose a penalty on a regulated person/licence holder under the Orders where we are satisfied that the most appropriate way of proceeding is under the Competition Act 1998. We have powers to investigate and fine a company under the Competition Act 1998. If our investigation proves to be one that should be investigated under Competition Act powers then that route will be chosen. We will take this into account throughout our procedures and deliberations.
30. The Orders lay out procedural requirements which will be followed by us in relation to the imposition of penalties. We will also follow the procedure set out in our Enforcement Action Procedure, which supplements these statutory requirements.

¹ Meaning 10% of *applicable* turnover in the preceding business year - as supplemented and determined in accordance with the Electricity and Gas (Determination of Turnover for Penalties) Order (Northern Ireland) 2005 in the case of electricity and gas licence holders and the Water Industry (Determination of Turnover for Penalties) Order (Northern Ireland) 2007 in the case of penalties imposed on a water or sewerage services licence holder.

31. We will make any decision in relation to the imposition of a penalty in line with the legal framework provided by the principal objective and general duties in relation to gas, electricity (including the single wholesale market for electricity) and water as relevant. We shall also have regard to our Financial Penalties Policy which has been framed in light of those principal objectives and general duties.
32. We appreciate that setting the amount of any financial penalty is a complex issue and that there is more than one way to address it. In our Policy, we have sought to set out the factors that we will consider in arriving at the amount of a penalty, rather than setting out any predetermined range which will be applied to particular breaches. We consider that this is the most appropriate approach to ensure that we are able to determine the amount of a penalty which is most appropriate given the circumstances of the particular case.
33. We will continue to keep our Policy under review, in particular in light of what we learn from any financial penalties we impose and the approaches taken by other regulatory bodies.
34. Our Enforcement Procedure states that we will seek to adhere to the procedures set out in it when investigating potential contraventions and when giving formal consideration to whether it would be appropriate for us to take enforcement action, but that we are not required to follow the procedures and may not do so in all cases (1.5 – 1.7). This includes imposing financial penalties. We consider that this sets out an appropriate position, allowing us to follow a robust procedure and adapt to the circumstances of any particular case. We therefore do not propose to make this change to the Policy.

35. Where we have a statutory power to impose a financial penalty on a company, we have a corresponding statutory duty to pay any sums received in payment of a penalty into the Consolidated Fund. We are under a legal obligation to do so and so it is not be possible for sums paid as a financial penalty to us to be paid directly to customers.
36. In setting the amount of any financial penalty we impose, we will consider the degree of cost incurred by consumers (see 5.2 of the Policy). We will be mindful of any payment of compensation to customers by a company and such payments may lead to a reduction in the amount of any penalty we impose.

9. Conclusion and next steps

37. The attached Enforcement Action Procedure should now be deemed to be in effect.
38. The development of our Financial Policy is an ongoing work stream and a key component of our Forward Work Programme 2016-2017. It is anticipated that further consultations on the development of our Policy will take place in 2016.

Annex 1 - Respondents to the consultation process

The following responses were received to the consultation and are available to view on our website – www.uregni.gov.uk

- 1. Northern Ireland Water**
- 2. Energia**
- 3. firmus energy**
- 4. The Consumer Council for Northern Ireland**