

09 April 2018
Roisin McLaughlin
The Utility Regulator
14 Queens Street
Belfast
BT1 6ER

Dear Roisin,

Thank you for the opportunity to respond to the consultation on the Utility Regulator's (UR) proposed revisions to its Enforcement Procedure and Financial Penalties Policy. Firmus energy actively engaged with the UR in 2015 on this matter and welcomes the opportunity again to assist in the proposed revision of this approach and procedural document.

Firmus energy's original consultation response (09 October 2015) underlined a number of high-level considerations that we believed were key to implementing a practical and effective Enforcement Procedure. These included, but were not limited to:

- Any enforcement procedure and financial penalties policy should be fair-minded and transparent.
- Investigation of possible breaches and the making of enforcement related decisions, should be a rigorous, thorough, evidence-based and fair process so as to ensure that the outcomes reached are proportionate and consistent.
- Consideration should be given to whether the company voluntarily came forward and willingly disclosed its contravention.
- Formal procedure may be necessary at times, but initiating less time consuming, informal and alternative means, including accepting any undertakings offered by a company to secure compliance, should be seen as a more preferable option when applicable.
- Proposed additional narrative stating that no financial penalty will be imposed on any company without the UR first conducting an investigation in line with its enforcement procedure document. This will give assurance to energy companies that any fines imposed will be the result of a fair-minded and fully considered process.

Firmus energy continues to support these criteria and believe they remain relevant today.

Aim of the Revised Enforcement Policy Approach and Procedure

The Utility Regulator has stated that its approach to enforcement is "*driven by its objectives to protect the interests of consumers and secure that companies comply with their legislative and licence obligations*". In addition, the UR also states that [they] "*...see enforcement action as a key part in changing the behaviour of companies by acting as a deterrent.*"

As an organisation that consistently exceeds its regulatory Standards of Performance targets in customer service, and receives consistently low numbers of Consumer Council for Northern Ireland Stage 2 complaints, firmus energy does not require an additional deterrent to continue to behave in the interests of consumers and to achieve high regulatory standards.

However, the scope of the policy aims could be extended further to include the protection of the industry and the energy providers and stakeholders within it. This is especially relevant to the Northern Ireland natural gas industry, given the relatively immature status of its networks.

Prioritisation Principles

The UR has proposed to use prioritisation principles as its guide to considering whether enforcement is an appropriate course of action to take. We are supportive of this technique and acknowledge its use by the CMA and in other regulated areas.

It is important to note, however, that the specific details of the prioritisation principles have not yet been proposed by the UR and the consultation paper only provides examples of possible prioritisation principles. We believe it is important to establish a set of prioritisation principles for this procedure, and would welcome further engagement with the UR once a draft set of principles has been prepared.

Prioritisation Principles and Provisional Enforcement Orders

We note that the new revised Enforcement Procedure (Annex 1) and flowchart (Annex 2) states, para 3.3, “...*The UR may make an enforcement order at any stage in the process*”

It is important that this assertion is appropriately aligned to the final prioritisation principles agreed.

Whilst firmus energy recognises that there may be instances when this provisional enforcement action is appropriate, firmus energy also believes it should be implemented in a fair and transparent manner that is determined through clear narrative within the Approach to Enforcement document and relevant prioritisation principles.

Publicity

Firmus energy recognises that the current Approach to Enforcement document does not adequately deliver the required scope, detail or clarity on matters relating to publicity. As such, we support the UR's decision to revise the document and acknowledge the requirement to increase transparency to consumers and stakeholders.

We note however that the proposed revisions rely on the company under scrutiny, at the outset of the initial investigation, to provide information that is redacted appropriately should it be required for publication. This presents the possibility for legitimate censoring oversights from the company. To ensure commercially sensitive material or information bound by the Data Protection act is not mistakenly published, we would welcome structured engagement

between the UR and the relevant company prior to any publication. Such transparency is vital to ensure only the relevant material is published.

In addition, it is essential that the UR shares the content of the publication in a timeframe that permits the company to give adequate consideration to its detail. At present the proposed 'one day courtesy' is insufficient as it provides no opportunity for considered review of the publication's content. Firmus energy suggest that a two week period would permit a responsible organisation to undertake internal Senior Management sign-off processes in a timely manner.

Alternative Resolution and Publication

Firmus energy welcomes the opportunity for companies to terminate any enquiry by accepting an alternative resolution approved by the UR in the initial enquiry stage. By undertaking the determined task, the company is afforded an opportunity to be cleared of any wrong-doing and there will be no suggestion that it has contravened its Licence. As stated in the proposed para 3.17, "*...the case will be closed*".

Given these proposals we note the UR's intent, to then publish the company's name, details of the issue investigated, and resolution solution elements. Firmus energy believes this action would be in conflict with the initial clearance of any wrong-doing. If, as the UR states (para 3.17), "*There will not be a finding that the company is contravening or has contravened or is likely to contravene any condition or requirement*" and that "*the case is closed*", then we propose that there should be no accompanying publication on the UR website.

Enforcement Committee

The Revised Approach to Enforcement document sets out in paras 4.1 – 4.5, the details surrounding the formation of the Enforcement Committee and the Settlement Committee. The current approach affords a notable element of engagement, with the relevant company being allowed to make representations regarding the make-up of the committee members. (Para 3.34)

3.34 Once the membership of our Enforcement Committee for the case has been appointed we will inform the company of the names of members of the Enforcement Committee and give the company an opportunity to make representations on this which we will take into account.

This engagement, however, has now been removed and the UR has also included a provision that the Enforcement Committee may only have a single member. We would note that the proposed para 4.3 states "*...Decisions of our enforcement committee will be made by consensus*". This of course would be impossible given a committee comprising of one person.

Firmus energy does not believe a committee of one person to be appropriate in matters of such gravitas. Furthermore we believe that the company should be informed of who is on the enforcement committee (as per the current procedure). This transparency is vital for ensuring a fairhanded approach.

The UR states in the proposed para 4.5 that, “*The approach described in this section will apply equally to the Settlement Committee*”

The concerns described above, in relation to the Enforcement Committee, are equally applicable to the Settlement Committee.

We believe the UR’s current drafting might facilitate a situation where it is the same single person acting as the Enforcement Committee and also the Settlement Committee. We do not believe this to be appropriate.

Other Observations

In addition to the specific comments above, firmus energy would welcome further clarification on the following areas that are not addressed in the Approach to Enforcement document.

Provisional Enforcement Order. In the event of the UR putting a provisional enforcement order in place, in what ways (if any), does the investigation and enforcement procedure change? Furthermore, are there provisions for compensation or restitution should the allegations of licence contravention be unfounded?

Investigation Team, Enforcement and Settlement Committees. We have highlighted our concerns with the make-up of these committees, but we would also welcome the UR’s publication of the processes they undertake to arrive at the composition of these committees.

Timelines. Firmus energy recognises that each case will be individually distinctive and subsequently the estimated timelines will change based on the extent of contravention and the details of said contravention. Nevertheless, we would request the UR considers the benefit of a ‘backstop’ timeline. This would be a maximum period of time within which the process should be investigated and concluded. By putting in place a period, such as 1 year, it encourages parties to work quickly and efficiently.

Right to Appeal. We would welcome the inclusion within the Revised Enforcement Policy Approach and Procedure, and the procedural flowchart, of a section detailing an appeals process.

* * *

We trust our response is helpful and would welcome formal feedback regarding the suggestions put forward in this response. We look forward to our continued involvement in this policy development process.

Yours sincerely,



Peter McClenaghan
Regulatory Affairs Manager