



CONSULTATION ON THE UR'S CONSULTATION ON REVISING  
THEIR ENFORCEMENT PROCEDURE & FINANCIAL PENALTIES  
POLICY

SSE AIRTRICITY RESPONSE TO  
THE UTILITY REGULATOR

APRIL 2018

## INTRODUCTION

SSE Airtricity welcomes the opportunity to comment on the Utility Regulator's (UR) consultation on revising their enforcement procedure and financial penalties policy.

SSE Airtricity supports the publication of the revised enforcement procedure and financial penalties policy. Given the serious nature of enforcement investigations and the potential impact on the operations on a company being investigated, transparency on the processes to be undertaken is critical. We appreciate the URs efforts to achieve full transparency and this should help increase cooperation and trust throughout an investigation.

We welcome most of the proposed changes in the URs consultation and we believe that each will serve to provide even further transparency and clarity to all Licensee's. In the following sections we provide our thoughts on the proposals and make some other observations.

## SSE AIRTRICITY COMMENTS

### PUBLICITY

SSE Airtricity welcomes the clarifications around what and when information on investigations will be published. From a corporate perspective, it is extremely important to be aware of anything that might be published about a company.

While we welcome the proposed clarifications, SSE Airtricity does not agree that any issues at an initial investigation stage should be published. At this stage of an investigation there is no evidence of an issue or non-compliance so we do not understand why a notice would be published. This could result in possible inaccurate or misleading negative publicity about a Licensee which we do not believe would be the intention of the UR particularly because no issue has been found at this stage. Additionally we are also concerned that the prospect of publication of a notice at this stage might dis-incentivise certain licensees from raising potential issues with the Utility Regulator. In Great Britain, Ofgem will only publish information once the Enforcement Oversight Board has decided to invest enforcement team resources investigating a case in line with their prioritisation criteria. We believe that the UR should take a similar approach and publish information only if a case reaches Enforcement Action Stage 1.

The proposal to publish information at the early stages and at every stage of an investigation will likely have an unintended negative impact on the market as a whole. This could be a significant issue because the publication of notices will likely lead to a lot of publicity and could potentially impact on switching and overall consumer confidence in the market.

Point 2.7 of Annex 1 states: *'Where practical we will inform the company concerned that we intend to publish information about their case on our website.'* Given the potential significant commercial impact associated with the publication of any information on a commercial entity we believe that the company concerned should be informed by default, not only 'where practical'.

We would also welcome some clarity in relation to point 2.8 which states that where a company believes that information provided is confidential, that the company should provide a non-confidential version of the document to the UR. We assume this is to ensure that the UR is fully aware of what is and is not confidential so that they can appropriately tailor any information on a

published notice, but we would request some clarity on this. Furthermore, we request clarity on point 2.9 which suggests that the UR might decide to publish personal information (in accordance with the FOIA, DPA and the EIR). We believe that companies need to be fully informed of any potential information that will be published and that they receive sufficient time to respond and raise any potential valid concerns with the UR. In this respect, we suggest that the timeline proposed around notification to companies prior to publication (i.e. one day in advance) is reviewed on a case by case basis.

The updated proposed procedure states that information will be published by the UR when they decide to open a formal investigation. This information will include: the name of the company, the licence conditions /requirement being investigated and a summary of the licence conditions. SSE Airtricity does not believe that the licence conditions being investigated should be disclosed at this point. This is because there is a possibility that as the investigation proceeds and more information comes to light, the investigation details might change. Furthermore, there is a possibility that ultimately a company will be found to have not breached any of the named licence conditions. We note that in the Ofgem procedure, they will consider if there is reason not to publish information at this point in the investigation. We would also point out that Ofgem does not publish information at this stage by default and only decides whether to publish this information after a case-by-case assessment. Ofgem also states in part 4.9 of its Guidelines that:

*When we publish the opening of a case on our website we will make clear that this does not imply that we have made any finding(s) about non-compliance*

We believe that a similar note should be included in any notice published by the UR prior to the closure of an investigation.

## **AIM OF THE REVISED ENFORCEMENT APPROACH AND PROCEDURE**

In the revised Enforcement Procedure, point 2.3 states that the aim of the UR's enforcement work is to protect the interests of consumers and to secure that regulated companies comply with their obligations. SSE Airtricity fully supports this as a key aim of the procedure. Given that a statutory objective of the Utility Regulator is to promote competition, we propose that another aim is added in this area to ensure that competitive market conditions persist to the benefit of customers and market participants.

## PRIORITISATION PRINCIPLES

The UR proposes to use prioritisation principles in deciding whether enforcement action is the appropriate course of action and sets out several proposed principles that could be used. SSE Airtricity supports the use of principles and the transparency that this would provide to any Licensee involved. However, we note that the proposed list of principles is not reflected in the enforcement policy approach and procedure document in Annex 1. SSE Airtricity suggests that the principles that will be applied should be included in this Document for complete transparency.

While we believe the principles should be stipulated in the Procedure, we do not think the list can be limited to these because there may be other unanticipated principles that could apply to a specific case. Ofgem's Enforcement Guidelines, which have been referenced by the UR in their consultation paper, include a specific section detailing the non-exhaustive prioritisation criteria list (parts 3.36 – 3.49)<sup>1</sup>.

The list of principles proposed by the UR does not appear to take account of a situation where a Licensee might have proactively raised a potential issue with the UR, and we propose that this is added. This might help encourage proactive disclosure and cooperation by Licensees.

## ALTERNATIVE RESOLUTION

SSE Airtricity welcomes the proposed inclusion of the possibility of Alternative Resolution in the enforcement procedure. We believe that companies that cooperate should be afforded the opportunity to propose alternative resolutions.

Under the 'Initial Enquiry Stage' the UR suggests that a possible outcome is that the Investigation team might decide to open an investigation. This will be decided if it is deemed that none of the other possible outcomes are appropriate<sup>2</sup>. We would like more clarity around what possible cases could fall

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<sup>1</sup> Ofgem, October 2017, Enforcement Guidelines:

[https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement\\_guidelines\\_october\\_2017.pdf](https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement_guidelines_october_2017.pdf)

<sup>2</sup> As set out in 3.32: A. there is no case to answer and close the case; B. The issue is minor and has been or can be solved quickly and easily by the company and the case subsequently closed; C. the case can be resolved by means of alternative resolution.

into this outcome category. We believe that any cooperating company should be afforded the opportunity to propose an alternative resolution. We would request clarity on whether this only applies where a company has not resolved a minor issue or has not proposed any viable alternative resolution.

## SETTLEMENT

We welcome the proposal to provide for a settlement process in the enforcement procedure and also the introduction of settlement 'windows'. This information provides transparency and clarity to Licensees in relation to how or when any opportunity for settlement will occur.

We request clarity in relation to point 3.57. There appears to be an inconsistency in relation to this point and how it is reflected in the flowchart. In the flowchart it is not clear that the Enforcement Committee will be involved if a case has been settled.

## ANNEX 2: REVISED FLOWCHART

SSE Airtricity has a few suggestions for the Enforcement Procedure Flowchart. We support the inclusion of a flowchart for ease of reference. However, we find the proposed revised flowchart confusing to follow. We suggest that the UR considers a different presentation format and we propose that the flowchart could be presented with the use of 'swim lanes' setting out each stage and step by step actions for each party involved. A column indicating where information might be possibly published could also be included.

We also have set out below a number of other small suggestions in relation to the flowchart that we think would help ensure full clarity.

- We suggest that Enforcement action stage 1 is separated from Enforcement action stage 2.
- We believe that the flowchart should include every action and summarise actions that must be completed by all parties, and any indicative times lines associated with each action. In the revised flowchart, not all action points are detailed (e.g. UR communications that will be issued to the Licensee under investigation).
- The flowchart also does not detail the actions that the licensed party under investigation must undertake at each stage. While it would seem obvious where action will be required, we believe that action

points should be included to ensure the flowchart is complete. For example, in Enforcement Action Stage 1 and Stage 2, the following is stated: *C. serve Summary of Initial findings and invite written representations*. From reading the full procedure we understand that the company should submit representations on the SIF, and *after this* the Settlement Committee discusses and provides the settlement mandate. We do not think this is fully clear in the flowchart that this is the case.

- We also suggest that the flowchart makes reference to the prioritisation activity that will be undertaken by the UR and how it interlinks with the 'initial enquiry stage'.

## OTHER PROPOSALS

While SSE Airtricity welcomes most of the proposed changes, we have a number of further suggestions that we believe will provide even further clarity to all stakeholders.

### SELF-REPORTING

The URs 'prioritisation principles' appear to only apply to the UR in their evaluation of whether to undertake an investigation. SSE Airtricity believes Licensees need to know if this also applies to a supplier in their decision on whether to bring a potentially immaterial issue to the URs attention.

In its consultation paper the UR states that it has looked at 'best practice including how Ofgem's enforcement procedure operates'. In Ofgem's guidelines<sup>3</sup>, a section on 'Self-reporting' is included in the area of Opening a case. In this Ofgem states that they '*strongly encourage companies to promptly self-report potential breaches that may give rise to material harm to consumers, the market or to Ofgem's ability to regulate*'. Currently in NI it is unclear what the URs expectations are in relation to the type of potential issues that Licensees should/should not bring to the URs attention. Without clarity it means that potentially every customer complaint must be reported to

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<sup>3</sup> Ofgem, October 2017, Enforcement Guidelines:  
[https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement\\_guidelines\\_october\\_2017.pdf](https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement_guidelines_october_2017.pdf)



the UR. SSE Airtricity suggests that the UR creates guidance on ‘self-reporting’ to ensure that the most impactful or material issues are raised with them. This would help ensure that the UR becomes aware of the most material issues and can focus on these rather than on potential issues where no customer harm was caused. Such guidance would also provide a lot of clarity to Licensee’s and would assist them in their assessment of potential issues. We believe that this guidance would also be applicable to the REMM Statement of Licence Compliance that must be completed and submitted each year by Suppliers and Networks.

#### PROPOSALS ON PROCEDURE

We propose that the procedure includes steps for the company to inform the UR of the names of the Suppliers key regulatory contacts for the course of the investigation. We support the fact that the UR will communicate information on their team to the company but we believe that this should extend to suppliers. This will ensure the UR knows exactly who they need to deal with and will ensure that these individuals will be included in every correspondence related to the investigation (e.g. settlement notices, final determination, etc.) so that they can be actioned appropriately.

A collaborative approach is necessary to ensure that the UR receives the relevant information and in this vein timelines for the production of information/ responses/ representations must be flexible and must take into consideration the efforts required by the investigated party to collate and validate the information. This will ensure that quality is not affected by the desire to stick to strict set deadlines. We believe there needs to be scope for the investigated party to raise issues related to these timelines during any response stage. While we appreciate that the enforcement procedure states ‘up to 21 days’ in the area of the SIF response, to ensure complete clarity we propose that the UR includes reference to the fact that the timelines will be reviewed as information is being collated.

SSE Airtricity notes that the UR states that they will give an individual timeline in every case, however we propose that the UR introduces steps in each stage which would see the UR informing the company of when a company should expect further communication from the UR. This would assist any company under investigation to plan resources requirements in advance of receiving the relevant communication.



## CONCLUSION

SSE Airtricity again welcomes the opportunity to comment on the Utility Regulator's (UR) consultation on revising their enforcement procedure and financial penalties policy. We fully support the objective to ensure transparency in relation to enforcement and penalties.

While we welcome most proposals, we have raised some concerns in relation to the timing and the content of published notices. SSE Airtricity does not support the publication of a notice at the initial stage and we also question the inclusion of information on licence condition numbers in any notice issued prior to investigation completion.

In this response we have also requested clarifications on a number of points and we have made some proposals, for example the introduction of a section on 'self-reporting'.

SSE Airtricity is happy to engage further with the UR in relation to these or any matters identified in this response.