

## Our Enforcement Procedure

### 1. Introduction

1.1 We are Northern Ireland's cross-utility regulator. We are both an independent economic and customer services regulator and a non-ministerial government department.

1.2 We were established under the Energy (Northern Ireland) Order 2003 (the **Energy Order**). Under the Energy Order and the Water & Sewerage Services (Northern Ireland) Order 2006 (the **Water Order**), we are responsible for the regulation of gas, electricity, water and sewerage related services in Northern Ireland.

1.3 We expect licensed companies to abide by their respective licence conditions and appropriate legislation. However, on occasion where these conditions have been alleged to have been breached we have a number of powers under the relevant legislation to take enforcement action against a company for a breach of licence or a failure to comply with specified legislation. In particular we have the following powers:

- to make an enforcement order,
- to impose a financial penalty,
- to revoke a licence.

1.4 We also have powers relating to the enforcement of competition law under the Competition Act 1998 (the **Competition Act**) in relation to commercial activities connected with the electricity, gas and water sectors. Our powers for breaches of competition law include:

- the power to direct a company to modify or terminate agreements or to modify or cease particular conduct,
- the power to impose a financial penalty.

1.5 The procedures set out below will be followed by us when investigating potential contraventions and when giving formal consideration to whether it would be appropriate to take enforcement action.

1.6 Our procedure does not apply in respect of any enforcement decision in relation to the all-Ireland Single Electricity Market.

A flowchart providing a high level summary of the major stages and the possible outcomes of our enforcement procedure is included at Appendix 1; this document should be read in conjunction with the flow chart.

## 1.7 Please note:

- ***We will seek to adhere to the procedures outlined but, for the avoidance of doubt, our Enforcement Procedure does not in itself impose requirements on or purport to fetter our discretion.***
- ***Our Enforcement Procedure will be reviewed from time to time in order to ensure our procedures are relevant and up to date.***

## 2. Principles and approach

2.1 Our approach to enforcement is driven by our objectives to protect the interests of consumers and secure that companies comply with their obligations. Our procedures for investigating any potential non-compliance and deciding to take enforcement action have been designed having regard to the 5 principles of good regulation. We aim to be:

- targeted,
- proportionate,
- transparent,
- consistent, and
- accountable.

2.2 We recognise that enforcement action and the preceding investigation can be a time consuming and resource intensive process for both parties. We aim to approach enforcement action in the most efficient and effective way.

2.3 Where a company is found not to be complying with its obligations our policy is to take whatever action we judge as most appropriate in all the circumstances to secure compliance with the obligations and ensure that incidents of non-compliance are not likely to recur. This need not always involve formal enforcement action. We may also rely on alternative and informal means; including accepting any undertakings offered by a company to secure compliance.

2.4 Enforcement action is most likely to be required where a contravention is ongoing or otherwise following a serious contravention or a number of contraventions. In appropriate cases we may seek to address issues in relation to potential contraventions and address compliance through a more informal dialogue with the relevant company but without undertaking a formal investigation or taking formal enforcement action.

2.5 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.

2.6 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.

2.7 We expect that a company which is being investigated, or is subject of any formal enforcement action, will be candid and co-operative, assisting us in our processes and providing us with full and frank information in a timely manner.

2.8 A company which is aware that it has contravened, is contravening, or is likely to contravene any relevant condition or requirement will also be encouraged by us to admit the actual or potential contravention and bring forward proposals for informal resolution at the earliest stage.

### 3. **Our Enforcement Process**

3.1 Every case will be different and we will consider the most appropriate process to be followed in the particular circumstances. We will progress all investigations in a timely manner. We will endeavour to adhere to the shortest timescales possible taking into account the need to follow the appropriate processes and procedures. The length of time that different steps of the process will take will vary from case to case. This is why, instead of setting general time limits, we will give an individual timeline in every case.

3.2 In certain circumstances the urgency of a particular case may mean that it is not possible to follow our process in full. An example of this may be where it appears to us that a company is in serious contravention of a relevant requirement and it is appropriate for us to make a provisional enforcement order to prevent a person sustaining serious loss or damage.

3.3 In addition, the type of contravention being investigated may have a bearing on the enforcement process. For example, where the contravention relates to competition law, we will need to communicate and work with the Competition and Markets Authority (the **CMA**) at various points during the enforcement process.

3.4 However, the process we will generally follow when considering whether or not to take enforcement action is set out below.

### **Step 1 – Initial consideration (see flowchart at Appendix 1)**

- 3.5 There are a number of ways in which we may come to investigate a company on the basis that it may have contravened or be contravening a condition of its licence or a provision of other relevant legislation. For example:
- our monitoring and investigations may bring to light information which we consider suggests that a company is contravening or likely to contravene a requirement,
  - the company itself may report the contravention,
  - a complaint from a third party may bring to light information which we consider suggests that a company may have contravened a requirement,
  - a whistleblower from within the company may allege that a contravention of a relevant requirement has taken place.
- 3.6 In the light of the above we will first consider whether the information does in fact suggest a contravention of a condition of the company's licence or a provision of the relevant legislation – such that we could have the power to take enforcement action. This will include a consideration of the legal tests for enforcement action (set out in section 7 below) and the particular requirements in the licence and/or the legislation.
- 3.7 In certain circumstances we may consider it appropriate to raise informal queries with the company or third parties to help inform our understanding of the issue. This may be the case where the information obtained is unclear or to fill in the gaps where the information is incomplete.

### **Step 2 – Decision to investigate or not**

- 3.8 When deciding whether a matter should be formally investigated we will consider a number of the following factors:
- the nature and seriousness of the contravention,
  - 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,
  - whether or not any non-statutory intervention to date has resulted, or is likely to result, in a resolution of the contravention,
  - 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,
- any other relevant issues.

3.9 In certain circumstances, we may determine that the most appropriate means of ensuring that the company complies with its obligations is to pursue the matter informally rather than undertaking a formal investigation or formal enforcement action. The steps involved in such informal dialogue with the company will depend upon the particular issues involved.

### **Step 3 – Initial notification and formal investigation**

3.10 When we decide to undertake a formal investigation into a potential contravention by a company we will send an initial notification to the company. The initial notification will include:

- details of the potential contravention by the company which is being considered by us,
- an outline of the process which we will follow and proposed timescales for the next stage in the process,
- contact details for the lead investigation officer.

3.11 At the same time as, or shortly after this initial notification, we will generally serve an information notice on the company requiring that the company provide further information and/or documentary evidence to enable us to determine whether or not a contravention has taken/is taking place.

3.12 This information notice may be a notice served under Article 51 of the Energy Order or Article 261 of the Water Order.

3.13 The default position in the Energy Order and the Water Order is that any financial penalty must be imposed within 12 months from the date of the contravention or failure (or within 12 months of the end of a contravention or failure which has been ongoing for a period of time). However, where we have served such an information notice on the company within that 12 month period, the default time limit no longer applies and a financial penalty may be imposed at a later date.

3.14 Where the potential contravention relates to competition law we will liaise with the CMA and, where we investigate, the information notice will be served under Section 26 of the Competition Act.

3.15 We expect companies to co-operate in full with our investigation. While we aim to make any requests for information as clear as possible if the company wishes to clarify any part of the information notice it should use the details provided to contact the investigation team.

3.16 Where we serve an information notice we will state in the notice the date by which we require the company to respond.

- 3.17 We will take any failure to comply with an information notice very seriously. Failure to comply with such a notice without reasonable excuse constitutes a criminal offence as does intentionally altering, suppressing or destroying any document which has been requested in such a notice. Any person who commits such an offence may be liable to a fine (or even to imprisonment in some cases).
- 3.18 We will review the company's response to the information notice including any submissions which the company has made in relation to the potential contravention.
- 3.19 We may require further information or documentary evidence from the company, for example, to clarify particular points. If this is the case, we will serve further information notices on the company as appropriate.
- 3.20 In addition to the power to serve an information notice, we have other investigative powers such as the power to enter premises (under Section 27 of the Competition Act). We will use these powers where appropriate as part of our investigation.

#### **Step 4 – Decision on proceeding or not to a formal determination**

- 3.21 Once our investigation team is satisfied that it has sufficient information we will make a decision as to how to proceed.
- 3.22 We may decide that the case should not proceed further. While we will decide each case on its own facts we may decide not to proceed where for example:
- the evidence we have collected suggests that no relevant condition or requirement has been contravened by the company or that the contravention was trivial,
  - it would be inappropriate to do so for instance because another regulatory body is already taking enforcement action against the company for the same contravention or is best placed to do so,
  - the contravention relates to compliance with an industry code and an industry body is taking action against the company for the same contravention,
  - the company has admitted to a contravention of a relevant requirement and has given (and is following) an undertaking which we are satisfied will rectify any failing and ensure that it does not recur.
- 3.23 If we decide that the case should not proceed we will notify the company and will, in appropriate cases, publish a notice of the decision on our website.
- 3.24 Alternatively where, for example, the factors outlined in paragraph 3.8 do not apply we may decide the case should be continued so that a formal determination on enforcement action can be made.

### **Step 5 – Statement of case and response**

- 3.25 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. The statement of case will include the following:
- any specific requirement which our investigation team considers has been contravened and the reason(s) why this is the case,
  - a summary of the background to the investigation,
  - our investigation team's understanding (from consideration of the evidence) of the relevant facts of the case,
  - copies of the evidence which the investigation team considers to be relevant to the facts of the case.
- 3.26 In addition, if our investigation team has a recommendation to make as to what it would consider to be appropriate enforcement action, this will be contained in the statement of case.
- 3.27 When we send the statement of case to the company we will make clear that the company may make written representations in response to the statement of case and will provide a time period for the company to make representations.
- 3.28 The company will normally have 28 days to respond to the statement of case. However, this will not always be appropriate and in certain circumstances a different period may be specified (for example, due to the urgency of the case).
- 3.29 In certain cases, 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 get an opportunity to update its response.
- 3.30 When it has considered the company's response to the statement of case it is open to our investigation team to decide that the case should not proceed to formal determination. If this is the case we will notify the company of the decision.

### **Step 5C – Appointment of Enforcement Committee**

- 3.31 In all other cases, we will need to make a formal determination. Our 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.
- 3.32 Our Enforcement Committee may be either our Board or an ad hoc committee of our Board established for the purposes of making a formal determination on enforcement action in that particular case. 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.

- 3.33 Where our Enforcement Committee is an ad hoc committee it will be comprised of individuals selected by our Chair (following recommendations, where possible, from our Chief Executive) from a list of persons who are authorised to sit on an Enforcement Committee.
- 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.

**Step 5D – Consideration by the Enforcement Committee**

- 3.35 Once the investigation team has decided that the case should proceed to a determination our Enforcement Committee will give directions on the procedure which will be followed before it makes its determination including how any preliminary or interim issues will be dealt with and the dates by which any relevant actions should occur. The company will be notified of these directions.
- 3.36 If it becomes appropriate for our Enforcement Committee to vary the directions at any point the company will be notified of the varied directions.
- 3.37 Our Enforcement Committee will consider the statement of case and any response to the statement of case. If our Enforcement Committee considers that it needs any further information from the company in order to make any of its determinations, it may request further information in a further information notice. Our Enforcement Committee may also request information from our investigation team or any relevant third parties.
- 3.38 It may also be appropriate for our Enforcement Committee to invite representations on any particular issues from the company, our investigation team and/or any relevant third parties.
- 3.39 If the investigation team or a third party provides further information or makes representations to our Enforcement Committee following such a request, the information or representations will generally be provided to the company and the company given an opportunity to comment.
- 3.40 In certain cases, to ensure that the relevant issues are fully explored, our Enforcement Committee may decide that it is appropriate for there to be a hearing at which the company and our investigation team are both invited to answer questions and, where appropriate, to make representations. Our Enforcement Committee may also invite third parties to attend all or part of the hearing to answer questions or to make representations. Minutes will be taken of any hearing held.
- 3.41 In any such hearing, our Enforcement Committee will adopt an investigative rather than an adversarial approach.

3.42 Once our Enforcement Committee is satisfied that it has received sufficient evidence and appropriate representations it will be the role of our Enforcement Committee to give due consideration to the evidence and representations and to 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 for us to take enforcement action and, if so, what enforcement action should be taken? (Our powers in relation to enforcement action are summarised at the end of this document.)

### **Step 6 – Preliminary determination and representations**

3.43 Our Enforcement Committee will notify the company of its preliminary determination (or particular aspects of it) and give the company a period of time to make representations in relation to our preliminary determination. In these cases, it may also be appropriate for particular third parties to be invited to make representations. Our Enforcement Committee will give due consideration to any representations before making its determination.

### **Step 7 – Determination**

3.44 Our Enforcement Committee's determination will be notified to the company. It will also be published on our website unless we consider that there is a good reason why it should not be published.

3.45 Once our Enforcement Committee has made its determination we will then follow any statutory procedure which needs to be followed before the determination is implemented. For example, where our Enforcement Committee is proposing to make a final Enforcement Order Article 43 of the Energy Order requires there to be a period of consultation before the Enforcement Order is made.

3.46 Where we invite representations on or objections to a proposal for enforcement action, these will be passed to our Enforcement Committee. Our Enforcement Committee will duly consider any representations or objections (which are duly made and not withdrawn) before making a final determination on enforcement action.

## **4 Our Enforcement Committee**

4.1 Our Enforcement Committee is independent of our investigation team which has worked on a particular case and will form an independent view on the case.

4.2 Our Enforcement Committee will generally be comprised of 3 members who will be Board members or senior employees of the Utility Regulator.

However, in certain cases, it may be appropriate for the Enforcement Committee to be larger or smaller than this. For example:

- in certain cases, as stated at 3.32 above, our Enforcement Committee may be our full Board;
- in certain cases which are particularly urgent our Enforcement Committee may only have one member.

4.3 When the members of our Enforcement Committee are appointed one of its members will be appointed as the chair.

4.4 Decisions of our Enforcement Committee will be made by consensus.

4.5 The Enforcement Committee may take legal or other advice in the course of its work.

## **5 Undertakings and alternative resolution**

5.1 Where we have commenced a formal investigation into a company for a contravention of a requirement it is open to either us or the company to propose a means of alternative resolution such as that the company give an undertaking as an alternative to formal enforcement action.

5.2 Such proposals will be assessed on the basis of our principal objective and general duties and the principles of best regulatory practice. They are likely to be most appropriate in cases in which they would be a quicker and more proportionate way of responding to the breach while still effectively protecting the interests of consumers and of the market.

5.3 While we may make, or invite a company to make, such proposals in any appropriate case we encourage a company which is being investigated to bring forward proposals of its own without any need for prompting. A company will be given appropriate credit for making an early admission of a breach and bringing forward proposals for alternative resolution which avoid the need for the matter to be subject to a formal determination. Even where a case has proceeded to the stage at which our Enforcement Committee has been constituted such proposals may still be made and will be considered.

5.4 The most common mode of alternative resolution is likely to be an undertaking given by the company to us. This may be a statutory undertaking (under Article 31 of the Water Order), other formal undertaking or some other assurances where the company agrees to take all such steps as it appears to us to be appropriate for the company to take for the purpose of securing or facilitating compliance with the requirement in question.

5.5 For an undertaking to be an alternative to formal enforcement action both we and the company must agree the terms of the undertaking.

5.6 Other means of alternative resolution might include the payment of compensation to customers who have been adversely affected by non-

compliance or other ways of providing redress or of remediating a situation so that a company does not benefit from its breach and that any harm done by it is, so far as practicable, alleviated.

- 5.7 A means of alternative resolution may be proposed by a company at any stage during our investigation or enforcement process. However, while we will carefully consider any such proposal the fact that a company proposes such an approach will not necessarily mean that we will not proceed to take formal enforcement action.
- 5.8 If the company fails to comply with the terms of an undertaking or other commitment which it has given we may take separate enforcement action against the company in relation to the original matter under investigation. Where a statutory undertaking is given by a company in lieu of an Enforcement Order being made (under Article 31 of the Water Order), we may be able to take enforcement action against the company directly for the failure to comply with the terms of the undertaking.

## **6 Complaints, disputes and appeals**

- 6.1 As noted above, in some cases, we may obtain information following a complaint against a company by a third party who may suggest that a company is contravening a licence condition or other relevant requirement.
- 6.2 Where a complaint, appeal or dispute has been referred to us we will deal with the complaint, appeal or dispute in accordance with our *Policy on Resolution of Complaints, Disputes and Appeals and Guide for Applicants*.
- 6.3 In particular, as a direct result of EU Directives aimed at improving the way internal markets in energy are structured, we were given the legal authority to act as a dispute resolution authority for certain matters in relation to electricity and gas. Our complaints policy sets out a number of procedures (with specified timescales) which we are required by EU law to follow.
- 6.4 In relation to water, the Water Order gives us the power to determine relevant complaints, disputes and certain appeals relating to water and sewerage services.
- 6.5 The complaint, appeal or dispute may suggest that it would be appropriate for us to take enforcement action in relation to the issue of the complaint or a related issue. We will consider whether to undertake further investigation or enforcement action in the particular circumstances of the case. In some cases, where we have already had a detailed understanding of the matter following the complaints process, we may be satisfied that there is sufficient evidence of a contravention to proceed directly to the preparing of a statement of case and the appointment of our Enforcement Committee for the case.

## 7 The Legal Framework

7.1 Our enforcement powers are summarised in the table below and outlined in more detail, including exceptions, in the sections following the table.

### *Enforcement Power*

### *Circumstances of use*

#### **Enforcement Order**

Shall be used where we are satisfied that a company is contravening, or is likely to contravene, any relevant condition or requirement

#### **Financial Penalty**

May be used where –

1. We are satisfied that a company has contravened or is contravening any relevant condition or requirement or any provision of a Community Regulation, or
2. We have made a decision that an agreement or conduct has infringed certain provisions of competition law.

#### **Revocation of licence**

For electricity licence holders and gas licence holders may be used in accordance with the terms as to revocation set out in the particular licence.

For a company holding a licence for water and sewerage services may be used in accordance with Article 14 of the Water Order and the conditions of the relevant licence.

#### **Direction requiring parties to an agreement to modify or terminate that agreement**

May be used if we have made a decision that an agreement infringes certain provisions of competition law

#### **Direction requiring a company to modify or cease particular conduct**

May be used if we have made a decision that the conduct in question certain provisions of competition law

### *Enforcement Orders*

7.2 Article 42(1) of the Energy Order states that where we are satisfied that a company is contravening, or is likely to contravene, any relevant condition or

requirement, we shall by a final order make such provision as is requisite for the purpose of securing compliance.

- 7.3 Article 42(2) states that where it appears to us that a company is contravening, or likely to contravene, a relevant condition or requirement and it is requisite that a provisional order be made instead of making a final order, we shall by provisional order make such provision as appears to it requisite for the purpose of securing compliance.
- 7.4 A provisional order shall be confirmed by us (with or without modifications) if we are satisfied that the company is contravening, or is likely to contravene, any relevant condition or requirement and the provision made by the order is requisite for the purpose of securing compliance.
- 7.5 If a provisional order is made and not confirmed, it will cease to have effect at the end of such period (not exceeding three months) as is determined by or under the order.
- 7.6 There are certain exceptions to these duties where we are not required to make a final or provisional order. These include the following:
- where the company has agreed to take and is taking all such steps as it appears to us to be appropriate for the company to take to secure or facilitate compliance,
  - where the contraventions were of a trivial nature.
- 7.7 Article 30(1) and Article 30(2) of the Water Order set out similar provisions in relation to our enforcement power to make final orders and provisional orders in the water and sewerage services sector (including specified exceptions).
- 7.8 In particular, Article 30(1) states that, where we are satisfied that a company is contravening, or is likely to contravene, any condition of the company's licence or any statutory or other requirement we shall by a final order make such provision as is requisite for the purpose of securing compliance.
- 7.9 Article 30(2) states that, where it appears to us that a company is contravening, or is likely to contravene, any condition of the company's licence or any statutory or other requirement and it is requisite that a provisional order is made instead of making a final order, we shall by provisional order make such provision as appears to it requisite for the purpose of securing compliance.
- 7.10 Article 31(1) provides certain exceptions to these duties, where we are not required to make a final or provisional order. These include the following:
- where the company has given and is complying with a statutory undertaking to take all such steps as it appears to us to be appropriate for the company to take to secure or facilitate compliance,
  - where the contraventions were of a trivial nature.

- 7.11 Where a decision has been taken to make a final Enforcement Order or confirm a provisional Enforcement Order, Article 43 of the Energy Order and Article 32 of the Water Order set out a statutory procedure which must be followed before the order can be made/confirmed.

#### *Financial Penalties*

- 7.12 Article 45(1) of the Energy Order states that where we are satisfied that a company has contravened or is contravening any relevant condition or requirement or any provision of a Community Regulation, we may impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.
- 7.13 As well as this, Article 45(2) of the Energy Order states that where we are satisfied that an electricity licence holder (who is an electricity distributor or an electricity supplier) or a gas licence holder has failed or is failing to achieve any standard of performance prescribed under the relevant legislation, we may impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.
- 7.14 We generally have a limited time following the contravention or failure to impose a penalty. Generally, where no provisional or final order has been made in relation to a contravention or failure, we may not impose a penalty more than 12 months from the time of the contravention or failure unless during that period we have done one of the following:
- 7.15 Where a final order has been made in relation to the contravention or failure the penalty notice relating to the contravention or failure must generally be served on the company within 3 months from the making of the final order.
- 7.16 Where a provisional order has been made in relation to the contravention or failure, the penalty notice relating to the contravention or failure must generally be served on the company within 3 months from the confirmation of the provisional order by the Utility Regulator or, if the provisional order is not confirmed, within 6 months from the making of the provisional order.
- 7.17 Article 35(1) and Article 35(2) of the Water Order set out similar provisions in relation to our enforcement power to impose financial penalties in the water and sewerage services sector (including a general time limit for imposing a penalty).
- 7.18 Article 35(1) of the Water Order states that, where we are satisfied that a company has contravened or is contravening any condition of its licence or has failed or is failing to achieve the standard of performance prescribed under the relevant legislation, we may impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.
- 7.19 Article 35(2) of the Water Order states that, where we are satisfied that a company has contravened or is contravening any relevant statutory or other

requirement, we may impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.

- 7.20 Where a decision has been taken to impose a financial penalty, Article 45 of the Energy Order and Article 35 of the Water Order set out a statutory procedure which must be followed before the penalty can be imposed (as set out in our policy on financial penalties).
- 7.21 Where a decision has been taken to impose a financial penalty, Article 45 of the Energy Order and Article 35 of the Water Order set out a statutory procedure which must be followed before the penalty can be imposed (as set out in our policy on financial penalties).
- 7.22 Article 46 of the Energy order and Article 36 of the Water Order require us to prepare and publish our policy with respect to the imposition of penalties and the determination of their amount (see our policy *on financial penalties*).
- 7.23 As indicated in our policy, we are first required to decide whether a company has contravened or is contravening any relevant condition of its licence or other requirement, or has failed to achieve any standard of performance set in accordance with specified provisions of the Energy Order. We will use the process outlined in the proceeding sections of this procedure in making that decision.
- 7.24 Once satisfied that a relevant contravention or failure has occurred our Enforcement Committee will decide whether a penalty should be imposed and, if so, at what level using the process described with reference to the factors it outlines.

#### *Revocation of licence*

- 7.25 In certain circumstances we have the power to revoke a company's licence where it has failed to comply with certain requirements. For electricity licence holders and gas licence holders, the circumstances where this power is available are set out in the terms as to revocation in the particular licence. For a company holding a licence for water sewerage services, a termination may only be made in accordance with Article 14 of the Water Order and the relevant licence conditions. We will follow any procedure set out in the licence and any relevant legislation.

#### *Competition powers*

- 7.26 We have powers relating to the enforcement of competition law under the Competition Act in relation to commercial activities connected with the generation, transmission, distribution or supply of electricity, the conveyance, storage or supply of gas, the supply of water or the provision of sewerage services.
- 7.27 In these areas, we are entitled to exercise concurrently with the CMA the functions of that body under the provisions of Part 1 of the Competition Act.

- 7.28 In accordance with Section 32 of the Competition Act, if we have made a decision that an agreement infringes certain provisions of competition law, we may give to such persons as we consider appropriate such a direction as we consider will bring the infringement to an end. Such a direction may require parties to an agreement to modify or terminate the agreement.
- 7.29 In accordance with Section 33 of the Competition Act, if we have made a decision that conduct infringes certain provisions of competition law, we may give to such persons as we consider appropriate such a direction as we consider will bring the infringement to an end. Such a direction may require a person to modify or cease the conduct in question.
- 7.30 In accordance with Section 36 of the Competition Act, if we have made a decision that an agreement or conduct has infringed certain provisions of competition law, we may require the company concerned to pay a financial penalty in respect of the infringement.

## Our Policy with respect to Financial Penalties

### Background

- 1.1 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).
- 1.2 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 10% of the turnover of the regulated person/licence holder.<sup>1</sup> [In the alternative, as per Article 45(9)(b) of the Energy Order, where the regulated person is or is part of a vertically integrated undertaking and the relevant condition or requirement to which the contravention relates is imposed on a vertically integrated undertaking pursuant to the Electricity Directive (2009/72/EC) or the Gas Directive (2009/73/EC), a penalty imposed shall not exceed 10% of the turnover of the vertically integrated undertaking.]
- 1.3 The Orders require us to prepare and publish an up to date statement of our policy financial penalty and to the determination of our amounts. This statement has been prepared to revise the original statement which applied only to the imposition of penalties under the Energy Order. This statement now therefore adopts a cross-utility approach to make provision for the Utility Regulator’s role and responsibilities in respect of the imposition of financial penalties and the determination of their amount as regards any holder of a licence for water or sewerage services in Northern Ireland.
- 1.4 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.
- 1.5 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

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<sup>1</sup> 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 service licence holder.

out in our Enforcement Action Procedure which supplements these statutory requirements.

- 1.6 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 the policy set out below which has been framed in light of those principal objectives and general duties.

### **Financial Penalties – General Principles**

- 2.1 Penalties must be reasonable in the circumstances of the case and should also be such as to provide an adequate incentive both to the company in question and to other companies in the sectors we regulate to comply.
- 2.2 With respect to gas and electricity the power to impose effective, proportionate and dissuasive penalties is an important means of ensuring national compliance with the duties of a regulator under EU law and, in particular, of ensuring that consumer protection measures are effective and enforced.<sup>2</sup>
- 2.3 Dependent upon whether a proposed financial penalty is intended to be imposed upon a gas or electricity regulated person, or a water or sewerage services licence holder, we will need to consider the relevant legislative provisions as set out in either the Energy Order or Water Order as the case may be.
- 2.4 Recognising that the relevant provisions within the Orders are similar but essentially different there are nevertheless three common questions which we are required to address prior to imposing a financial penalty on each type of regulated person/licence holder which it regulates. These are:
- Are we satisfied that the regulated person/licence holder has contravened or is contravening any relevant condition or requirement, or has failed to achieve any standard of performance set in accordance with the relevant provisions of the Orders?
  - If so is it appropriate to impose a financial penalty?
  - If so, what amount is reasonable in all the circumstances of the case?
- 2.5 We adhere to the principles of best regulatory practice as set out by the Better Regulation Executive – namely those principles which state that regulatory action should be transparent, consistent, accountable, targeted and proportionate.

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<sup>2</sup> Articles 41(1)(d) of the Gas Directive (2009/73/EC); Articles 37(1)(n) and 37(4)(d) of the Electricity Directive (2009/72/EC)

## **PROCEDURAL GUIDANCE AND FACTORS RELEVANT TO THE IMPOSITION OF A PENALTY**

### **Stage 1: Substantiating a breach**

- 3.1 Before deciding to impose a financial penalty under the Energy Order we must be satisfied that the regulated person/licence holder has contravened or is contravening any relevant condition of its licence or other requirement or has failed to achieve any standard of performance set in accordance with specified provisions of the Energy Order. In deciding firstly whether a condition or requirement is a relevant condition or requirement secondly whether there has been a contravention of that condition or requirement, and thirdly whether there has been a failure to achieve a standard of performance, we will seek to obtain all relevant evidence to substantiate the breach in question and will fully explain the basis for final decisions made on a case by case basis.
- 3.2 Before deciding to impose a financial penalty under the Water Order we must be satisfied that the licence holder has contravened or is contravening any condition of its licence (its instrument of appointment) or that it has failed or is failing to achieve any standard of performance set in accordance with specified provisions of the Water Order (and prescribed in separate regulations) or has contravened any other enforceable requirement under the Order. We will seek to obtain all relevant evidence to substantiate the breach in question and will fully explain the basis for final decisions made on a case by case basis.

## **GENERAL FACTORS**

### **Stage 2: Whether to impose a penalty or not**

- 4.1 Once satisfied that a contravention or failure of service (or a contravention of any relevant requirement or any provision of a Community Regulation as defined by Article 45(11) of the Energy Order) has occurred or is occurring we will have to decide whether a financial penalty should be imposed and at what level.
- 4.2 We will take full account of the particular facts and circumstances of the contravention, failure or breach under consideration. We will also take full account of any representations or objections made to it by interested parties by seeking either written or oral submissions as necessary in the case.
- 4.3 When considering whether to impose a penalty or not the following factors will be considered:
- the nature and seriousness of the contravention,
  - the level of culpability the company has for the contravention,
  - 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,
- whether or not any non-statutory intervention to date has resulted, or is likely to result, in a resolution of the contravention,
- 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,
- the likely effect of a financial penalty including whether a financial penalty may deter contraventions in the future,
- any other relevant issues.

### **Stage 3: Fixing the broad banding of a penalty**

5.1 Once it has been decided that a financial penalty should be imposed we must consider the appropriate level. Any penalty must be reasonable in the circumstances of the case. Factors relevant to decisions on the broad level of a penalty will likely include (but not be limited to).

- the culpability of the company,
- the seriousness of any contravention or failure,
- the degree of nuisance, harm or increased cost incurred by consumers or other market participants or the environment,
- any gain (financial or otherwise) made by the licensee.

### **Stage 4A: Fixing the specific banding of a penalty: Aggravating Factors**

6.1 Having considered the broad banding into which a proposed penalty may fall, other factors may be taken into consideration in order to set a more specific banding for the financial penalty under consideration. Aggravating factors tending to lead to an increase in the level of any penalty may include (but not be limited to):

- repeated or continued contravention or failure after either becoming aware of the contravention or failure or becoming aware of our investigation,
- the involvement of senior management in any contravention or failure,
- knowingly or recklessly submitting false information to us,
- unduly delaying the submission of information to us,
- the absence of any evidence of internal mechanisms or procedures intended to prevent contravention or failure,
- the extent of any attempt to conceal the contravention or failure from us,
- length of time for which the contravention continued,
- number of customers or competitors affected,
- previous conduct of licensee;
- any other relevant factor.

## **Stage 4B: Fixing the specific banding of a penalty: Mitigating Factors**

7.1 Mitigating factors tending to decrease the level of any penalty would include (but not be limited to):

- the extent to which the regulated person/licence holder in question had taken steps to avoid contraventions or failures, either specifically or by maintaining an appropriate compliance policy with suitable management supervision,
- appropriate action to remedy the contravention or failure,
- evidence that the contravention or failure was genuinely accidental or inadvertent or outside management control,
- the extent to which the regulated person/licence holder in question had compensated those affected,
- proactive reporting of the contravention or failure to us,
- co-operation with our investigation, and
- any other relevant information.

7.2 Having considered, to the extent appropriate, the factors listed above and all of the circumstances of the matter under consideration, we will determine an appropriate amount for a financial penalty. We will ensure that the amount we determine is not more than 10% of the turnover (as determined in accordance with established rules and accounting practice set down in the relevant secondary legislation) of the regulated person/licence holder in question.

## **REVISION OF THE STATEMENT OF POLICY**

8.1 We will from time to time revise our policy in accordance with the Orders as the case may be. Any revised policy will be published.