
DRAFT STATUTORY INSTRUMENTS

2003 No.

The Energy (Northern Ireland) Order 2003

**PART VI
ENFORCEMENT**

Introductory

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41.—(1) This Part has effect in relation to the enforcement of—

- (a) relevant conditions of gas and electricity licences;
- (b) relevant requirements; and
- (c) (in the case of an electricity licence holder who is a public electricity supplier) the standards of performance prescribed under Article 42 of the Electricity Order.

(2) In this Part—

“relevant conditions”, in relation to any licence holder, means any condition of his licence;

“relevant requirement” means—

- (a) in relation to an electricity licence holder, any duty or other requirement imposed on him by or under—
 - (i) any of Articles 12, 19 to 26, 43(3), 44(3), 45A or 45B of the Electricity Order;
 - (ii) an order made under Article 27(4)(b); or
 - (iii) Part VII;
- (b) in relation to a gas licence holder, any duty or other requirement imposed on him by or under an order made under Article 27(4)(b).

Orders for securing compliance

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42.—(1) Subject to paragraphs (2), (5) and (6) and Article 43, where the Authority is satisfied that a licence holder is contravening, or is likely to contravene, any relevant condition or requirement, it shall by a final order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.

(2) Subject to paragraphs (5) and (6), where it appears to the Authority—

- (a) that a licence holder is contravening, or is likely to contravene, any relevant condition or requirement; and
- (b) that it is requisite that a provisional order be made,

the Authority shall (instead of taking steps towards the making of a final order) by a provisional order make such provision as appears to it requisite for the purpose of securing compliance with that condition or requirement.

(3) In determining for the purposes of paragraph (2)(b) whether it is requisite that a provisional order be made, the Authority shall have regard, in particular—

- (a) to the extent to which any person is likely to sustain loss or damage in consequence of anything which, in contravention of the relevant condition or requirement, is likely to be done, or omitted to be done, before a final order may be made; and
- (b) to the fact that the effect of the provisions of this Article and Article 44 is to exclude the availability of any remedy (apart from under those provisions or for negligence) in respect of any contravention of a relevant condition or requirement.

(4) Subject to paragraphs (5) and (6) and Article 43, the Authority shall confirm a provisional order, with or without modifications, if—

- (a) it is satisfied that the licence holder to whom the order relates is contravening, or is likely to contravene, any relevant condition or requirement; and
- (b) the provision made by the order (with any modifications) is requisite for the purpose of securing compliance with that condition or requirement.

(5) The Authority shall not make a final order or make or confirm a provisional order in relation to a licence holder if it is satisfied—

- (a) that the duties imposed on it by Article 12 or 14 preclude the making or, as the case may be, the confirmation of the order; or
- (b) that the most appropriate way of proceeding is under the Competition Act 1998 (c. 41).

(6) The Authority is not required to make a final order or make or confirm a provisional order if it is satisfied—

- (a) that the licence holder has agreed to take and is taking all such steps as it appears to the Authority for the time being to be appropriate for the licence holder to take for the purpose of securing or facilitating compliance with the condition or requirement in question; or
- (b) that the contraventions were, or the apprehended contraventions are, of a trivial nature.

(7) Where the Authority is satisfied as mentioned in paragraphs (5) and (6), it shall—

- (a) serve notice that it is so satisfied on the licence holder; and
- (b) publish the notice in such manner as it considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.

(8) A final or provisional order—

- (a) shall require the licence holder to whom it relates (according to the circumstances of the case) to do, or not to do, such things as are specified in the order or are of a description so specified;
- (b) shall take effect at such time, being the earliest practicable time, as is determined by or under the order; and
- (c) may be revoked at any time by the Authority.

(9) In this Part—

“final order” means an order under this Article other than a provisional order;

“provisional order” means an order under this Article which if not previously confirmed in accordance with paragraph (4), will cease to have effect at the end of such period (not exceeding three months) as is determined by or under the order.

Procedural requirements

43.—(1) Before it makes a final order or confirms a provisional order, the Authority shall give notice—

- (a) stating that the Authority proposes to make or confirm the order and setting out its effect;
- (b) setting out—
 - (i) the relevant condition or requirement for the purpose of securing compliance with which the order is to be made or confirmed;
 - (ii) the acts or omissions which, in the Authority’s opinion, constitute or would constitute contraventions of that condition or requirement; and
 - (iii) the other facts which, in its opinion, justify the making or confirmation of the order; and
- (c) specifying the period (not being less than 21 days from the date of publication of the notice) within which representations or objections with respect to the proposed order or proposed confirmation may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(2) A notice under paragraph (1) shall be given—

- (a) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them; and
- (b) by serving a copy of the notice, and a copy of the proposed order or of the order proposed to be confirmed, on the licence holder to whom the order relates.

(3) The Authority shall not make a final order with modifications, or confirm a provisional order with modifications, except—

- (a) with the consent to the modifications of the licence holder to whom the order relates; or
- (b) after complying with the requirements of paragraph (4).

(4) The requirements mentioned in paragraph (3) are that the Authority shall—

- (a) serve on the licence holder to whom the order relates such notice as appears to it requisite of its proposal to make or confirm the order with modifications;
- (b) in that notice specify the period (not being less than 21 days from the date of the service of the notice) within which representations or objections with respect to the proposed modifications may be made; and
- (c) consider any representations or objections which are duly made and not withdrawn.

(5) As soon as practicable after making a final order or making or confirming a provisional order, the Authority shall—

- (a) serve a copy of the order on the licence holder to whom the order relates; and
- (b) publish the order in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it.

(6) Before revoking a final order or a provisional order which has been confirmed, the Authority shall give notice—

- (a) stating that the Authority proposes to revoke the order and setting out its effect; and
- (b) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed revocation may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(7) If, after giving a notice under paragraph (6), the Authority decides not to revoke the order to which the notice relates, it shall give notice of its decision.

(8) A notice under paragraph (6) or (7) shall be given—

- (a) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them; and
- (b) by serving a copy of the notice on the licence holder to whom the order relates.

Validity and effect of orders

44.—(1) If the licence holder to whom a final or provisional order relates is aggrieved by the order and desires to question its validity on the ground—

- (a) that its making or confirmation was not within the powers of Article 42; or
- (b) that any of the requirements of Article 43 have not been complied with in relation to it,

he may, within 42 days from the date of service on him of a copy of the order, make an application to the High Court under this Article.

(2) On any such application the High Court may, if satisfied that the making or confirmation of the order was not within those powers or that the interests of the licence holder have been substantially prejudiced by a failure to comply with those requirements, quash the order or any provision of the order.

(3) Except as provided by this Article, the validity of a final or provisional order shall not be questioned by any legal proceedings whatever.

(4) The obligation to comply with a final or provisional order shall be a duty owed to any person who may be affected by a contravention of the order.

(5) Where a duty is owed under paragraph (4) to any person, any breach of the duty which causes that person to sustain loss or damage shall be actionable at the suit of that person.

(6) In any proceedings brought against a licence holder under paragraph (5), it shall be a defence for him to prove that he took all reasonable steps and exercised all due diligence to avoid contravening the order.

(7) Without prejudice to any right which any person may have under paragraph (5) to bring civil proceedings in respect of any contravention or apprehended contravention of a final or provisional order, compliance with any such order shall be enforceable by civil proceedings by the Authority for an injunction or for any other appropriate relief.

Financial penalties

Financial penalties

45.—(1) Where the Authority is satisfied that a licence holder has contravened or is contravening any relevant condition or requirement, the Authority may, subject to Article 47, impose on the licence holder a penalty of such amount as is reasonable in all the circumstances of the case.

(2) Where the Authority is satisfied that an electricity licence holder who is a public electricity supplier has failed or is failing to achieve any standard of performance prescribed under Article 42 of the Electricity Order, the Authority may, subject to Article 47, impose on the licence holder a penalty of such amount as is reasonable in all the circumstances of the case.

(3) The Authority shall not impose a penalty on a licence holder under paragraph (1) or (2) where it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998 (c. 41).

(4) Before imposing a penalty on a licence holder under paragraph (1) or (2) the Authority shall give notice—

- (a) stating that it proposes to impose a penalty and the amount of the penalty proposed to be imposed;
- (b) setting out the relevant condition or requirement or the standard of performance in question;
- (c) specifying the acts or omissions which, in the opinion of the Authority, constitute the contravention or failure in question and the other facts which, in the opinion of the Authority, justify the imposition of a penalty and the amount of the penalty proposed; and
- (d) specifying the period (not being less than 21 days from the date of publication of the notice) within which representations or objections with respect to the proposed penalty may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(5) Before varying any proposal stated in a notice under paragraph (4)(a) the Authority shall give notice—

- (a) setting out the proposed variation and the reasons for it; and
- (b) specifying the period (not being less than 21 days from the date of publication of the notice) within which representations or objections with respect to the proposed variation may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(6) As soon as practicable after imposing a penalty, the Authority shall give notice—

- (a) stating that it has imposed a penalty on the licence holder and its amount;
- (b) setting out the relevant condition or requirement or the standard of performance in question;
- (c) specifying the acts or omissions which, in the opinion of the Authority, constitute the contravention or failure in question and the other facts which, in the opinion of the Authority, justify the imposition of the penalty and its amount; and
- (d) specifying a date, no earlier than the end of the period of 42 days from the date of service of the notice on the licence holder, by which the penalty is required to be paid.

(7) The licence holder may, within 21 days of the date of service on him of a notice under paragraph (6), make an application to the Authority for it to specify different dates by which different portions of the penalty are to be paid.

(8) Any notice required to be given under this Article shall be given—

- (a) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them;
- (b) by serving a copy of the notice on the licence holder; and
- (c) by serving a copy of the notice on the Council.

(9) No penalty imposed by the Authority under this Article may exceed 10 per cent. of the turnover of the licence holder (determined in accordance with provisions specified in an order made by the Department).

(10) Any sums received by the Authority by way of penalty under this Article shall be paid into the Consolidated Fund.

Statement of policy with respect to penalties

46.—(1) The Authority shall prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount.

(2) In deciding whether to impose a penalty, and in determining the amount of any penalty, in respect of a contravention or failure the Authority shall have regard to its statement of policy most recently published at the time when the contravention or failure occurred.

(3) The Authority may revise its statement of policy and where it does so shall publish the revised statement.

(4) Publication under this Article shall be in such manner as the Authority considers appropriate for the purpose of bringing the matters contained in the statement of policy to the attention of persons likely to be affected by them.

(5) The Authority shall undertake such consultation as it considers appropriate when preparing or revising its statement of policy.

Time limits on the imposition of financial penalties

47.—(1) Where no final or provisional order has been made in relation to a contravention or failure, the Authority may not impose a penalty in respect of the contravention or failure later than the end of the period of 12 months from the time of the contravention or failure, unless before the end of that period—

- (a) the notice under Article 45(4) relating to the penalty is served on the licence holder under Article 45(8), or
- (b) a notice relating to the contravention or failure is served on the licence holder under Article 51(2).

(2) Where a final or provisional order has been made in relation to a contravention or failure, the Authority may not impose a penalty in respect of the contravention or failure unless the notice relating to the penalty under Article 45(4) was served on the licence holder under Article 45(8)—

- (a) within three months from the confirmation of the provisional order or the making of the final order, or
- (b) where the provisional order is not confirmed, within six months from the making of the provisional order.

Interest and payment of instalments

48.—(1) If the whole or any part of a penalty is not paid by the date by which it is required to be paid, the unpaid balance from time to time shall carry interest at the rate for the time being prescribed under Article 127 of the [Judgments Enforcement \(Northern Ireland\) Order 1981 \(NI 6\)](#).

(2) If an application is made under paragraph (7) of Article 45 in relation to a penalty, the penalty is not required to be paid until the application has been determined.

(3) If the Authority grants an application under that paragraph in relation to a penalty but any portion of the penalty is not paid by the date specified in relation to it by the Authority under that paragraph, the Authority may where it considers it appropriate require so much of the penalty as has not already been paid to be paid immediately.

Appeals

49.—(1) If the licence holder on whom a penalty is imposed is aggrieved by—

- (a) the imposition of the penalty;

(b) the amount of the penalty; or
(c) the date by which the penalty is required to be paid, or the different dates by which different portions of the penalty are required to be paid,
the licence holder may make an application to the High Court under this Article.

(2) An application under paragraph (1) must be made—

- (a) within 42 days from the date of service on the licence holder of a notice under Article 45(6), or
- (b) where the application relates to a decision of the Authority on an application by the licence holder under Article 45(7), within 42 days from the date the licence holder is notified of the decision.

(3) On any such application, where the court considers it appropriate to do so in all the circumstances of the case and is satisfied of one or more of the grounds falling within paragraph (4), the court—

- (a) may quash the penalty;
- (b) may substitute a penalty of such lesser amount as the court considers appropriate in all the circumstances of the case; or
- (c) in the case of an application under paragraph (1)(c), may substitute for the date or dates imposed by the Authority an alternative date or dates.

(4) The grounds falling within this paragraph are—

- (a) that the imposition of the penalty was not within the power of the Authority under Article 45;
- (b) that any of the requirements of paragraphs (4) to (6) or (8) of Article 45 have not been complied with in relation to the imposition of the penalty and the interests of the licence holder have been substantially prejudiced by the non-compliance; or
- (c) that it was unreasonable of the Authority to require the penalty imposed, or any portion of it, to be paid by the date or dates by which it was required to be paid.

(5) If an application is made under this Article in relation to a penalty, the penalty is not required to be paid until the application has been determined.

(6) Where the court substitutes a penalty of a lesser amount it may require the payment of interest on the substituted penalty at such rate, and from such date, as it considers just and equitable.

(7) Where the court specifies as a date by which the penalty, or a portion of the penalty, is to be paid a date before the determination of the application under this Article it may require the payment of interest on the penalty, or portion, from that date at such rate as it considers just and equitable.

(8) Except as provided by this Article, the validity of a penalty shall not be questioned by any legal proceedings whatever.

Recovery of penalties

50. Where a penalty imposed under Article 45(1) or (2), or any portion of it, has not been paid by the date on which it is required to be paid and—

- (a) no application relating to the penalty has been made under Article 49 during the period within which such an application can be made, or
- (b) an application has been made under that Article and determined,

the Authority may recover from the licence holder, as a civil debt due to it, any of the penalty and any interest which has not been paid.

Power to require information

Power to require information

51.—(1) Where it appears to the Authority that a licence holder—

- (a) may be contravening, or may have contravened, any relevant condition or requirement, or
- (b) (in the case of an electricity licence holder who is a public electricity supplier) may be failing or may have failed to achieve any standard of performance prescribed under Article 42 of the Electricity Order,

the Authority may, for any purpose connected with such of its functions under this Part as are exercisable in relation to that matter, serve a notice under paragraph (2) on any person.

(2) A notice under this paragraph is a notice signed on behalf of the Authority and—

- (a) requiring the person on whom it is served to produce, at a time and place specified in the notice, to the Authority or to any person appointed by the Authority for the purpose, any documents which are specified or described in the notice and are in that person's custody or under his control; or
- (b) requiring that person, if he is carrying on a business, to furnish, at a time and place and in the form and manner specified in the notice, to the Authority such information as may be specified or described in the notice.

(3) No person shall be required under this Article to produce any documents which he could not be compelled to produce in civil proceedings in the High Court or, in complying with any requirement for the furnishing of information, to give any information which he could not be compelled to give in evidence in any such proceedings.

(4) A person who without reasonable excuse fails to do anything required of him by notice under paragraph (2) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) A person who intentionally alters, suppresses or destroys any document which he has been required by any notice under paragraph (2) to produce shall be guilty of an offence and shall be liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to a fine.

(6) If a person makes default in complying with a notice under paragraph (2), the High Court may, on the application of the Authority, make such order as the court thinks fit for requiring the default to be made good; and any such order may provide that all the costs of and incidental to the application shall be borne by the person in default or by any officers of a company or other body or association who are responsible for its default.