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IRELAND

LAW AND PRACTICE:

p.3

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Law and Practice

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IRELAND LAW AND PRACTICE

Contributed by Matheson **Authors:** Garret Farrelly, Rachel Ahern, Owen Collins

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Authors



Garret Farrelly is a partner and head of the Energy and Infrastructure Group in Matheson. He advises on all aspects of projects and project financing, from PPPs to privately-financed electricity, oil and gas field developments and privatisations as well as electricity, gas and telecommunications network infrastructure. Garret's experience includes electricity and gas market regulation and trading, project development, M&A and financing in the conventional and renewable electricity sectors as well as the mining and upstream / downstream oil and gas sectors. Garret has extensive experience in the renewables sphere (with a particular focus on wind farms) having advised on the financing, sale and purchase of onshore and offshore wind farms in Ireland, Great Britain and Europe. Garret is a frequent speaker at Energy and Natural Resources conferences and regularly contributes articles to specialist publications.



Rachel Ahern is a solicitor specialising in Energy and Infrastructure.



Owen Collins is a solicitor specialising in Energy and Infrastructure.

1. General Structure and Ownership of the Power Industry

1.1 Principal Law Governing the Ownership and Structure of the Power Industry

The Irish electricity market has been fully liberalised since the implementation of full retail competition on 19 February 2005. The all-island (ie, Ireland and Northern Ireland) wholesale single electricity market (the "SEM"), introduced on 1 November 2007, radically reformed the Irish electricity sector. In SEM, the market operator for the island of Ireland is a joint venture between the Irish transmission system operator, EirGrid plc, and the Northern Irish transmission system operator, SONI Limited. They are collectively known as the single electricity market operator ("SEMO").

In accordance with EU Directive 2009/72/EC (as implemented in Ireland by a number of statutory instruments), the structure of the Irish electricity market has in recent years

undergone a significant shift as an Irish commercial semi-state company, the Electricity Supply Board (the "ESB") previously involved in generation, transmission and distribution has been "unbundled".

Generation

Any person or company who has received an authorisation to construct and a licence to generate from the energy regulator in the Republic of Ireland ("ROI") – the Commission for Regulation of Utilities (the "CRU") – may generate electricity in the ROI. Holders of such licences are identified in **1.2 Principal State-Owned or Investor-Owned Entities**, below.

Transmission

The electricity transmission system is owned by the ESB, a state-owned company, pursuant to Section 14(2B) of the Electricity Regulation Act 1999 (as amended) (the "1999 Act").

Pursuant to Section 14(2A) of the 1999 Act, the operation of the transmission system in the ROI is undertaken by EirGrid plc (which is also a state-owned entity) on a monopoly basis. In addition to the 1999 Act, the key legislation governing the regulation of EirGrid plc is the European Communities (Internal Market in Electricity) Regulations, 2000 (as amended), Statutory Instrument 445/2000.

Before unbundling, the ESB was a vertically integrated entity.

Distribution

Distribution of electricity in Ireland is overseen by the ESB, as regulated and licensed by the CRU pursuant to Section 14(2C) of the 1999 Act. ESB is licensed by the CRU as owner of the electricity distribution network, known as the “distribution asset owner” (the “DAO”), and an independent subsidiary company of the ESB, ESB Networks Designated Activity Company (“ESB Networks DAC”), is the licensed operator of the network, known as the “distribution system operator” (the “DSO”). This is as stipulated by the European Communities (Internal Market in Electricity) (Electricity Supply Board) Regulations 2008.

Supply

Any person or company who intends to supply electricity to a final customer in the ROI requires a supply licence from the CRU. Holders of such licences are identified in **1.2 Principal State-Owned or Investor-Owned Entities**, below.

Regulation

The Minister for Communications, Climate Action and the Environment (the “Minister”) is tasked with overall responsibility of the ROI energy sector at an executive and political level and the creation of energy policy.

The CRU is the ROI’s independent energy regulator and regulates the energy sector. The CRU has a wide range of economic, customer protection and safety functions in the energy sector. Under the 1999 Act, the CRU has a number of statutory duties, including the duty to protect the interests of energy customers, maintain security of supply and promote competition in relation to the generation and supply of electricity and supply of natural gas.

The CRU’s functions include the issuing of licences and authorisations, determining electricity tariffs, advising the Minister on the effect of electricity generation, the promotion of competition in the market and ensuring the security of supply to consumers. Together with an independent member and a deputy independent member, the CRU through three CRU representatives also jointly regulates the SEM with its Northern Irish counterpart, the Northern Ireland Authority for Utility Regulation (the “Utility Regulator”) through three Utility Regulator representatives. This

all-island regulator is called the Single Electricity Market Committee (“SEMC”).

1.2 Principal State-Owned or Investor-Owned Entities

The following is a list of the principal entities in the Irish electricity market in their respective sectors:

Generation

- Bord Gáis Energy Limited;
- ESB Power Generation;
- SSE Airtricity Limited;
- Viridian Energy Limited;
- Tynagh Energy Limited;
- Brookfield Renewable Ireland Limited;
- Bord na Móna plc.

A list of all holders of generation licences is on the CRU’s website (www.cru.ie).

Transmission

EirGrid plc (state-owned) is the body responsible for the operation, maintenance and development of the Irish electricity transmission network. As noted above, EirGrid plc is the only body authorised to do so in the ROI (pursuant to the 1999 Act).

Distribution

ESB Networks DAC (state-owned) is the body responsible for the operation, maintenance and development of the Irish electricity distribution network. ESB Networks DAC is the only body authorised to do so in Ireland (pursuant to the 1999 Act).

Retail

There are currently 12 retail electricity suppliers in Ireland; the list is maintained by the CRU and copied below for reference. They are (in alphabetical order):

- BE Energy;
- Bord Gáis Energy Limited (owned by Centrica plc, which was acquired by Centrica from Bord Gáis Éireann – the previous state-owned monopoly in the gas sector before it was privatised by the Irish State);
- Viridian Energy Limited – its retail arm trades as Energia;
- Electric Ireland, the retail division of the ESB;
- Flogas Natural Gas;
- LCC Power Limited, trading as Go Power;
- Just Energy (Ireland) Limited;
- Panda Power Limited;
- New Measured Power Limited, trading as Pinergy;
- Prepaypower Limited;
- SSE Airtricity Limited, owned by SSE plc;
- Vayu Limited.

However, a significant number of other companies with supply licences operate in the non-retail space; for example, it has become common for a wind farm development company to have a “sister” or subsidiary affiliated company with a supply licence that the generation company trades the power from the wind farm with – this is known as “supplier-lite”.

1.3 Foreign Investment Review Process

Restrictions

Ireland is an open economy, with many foreign companies investing in the energy sector. While there are no specific restrictions for foreign investors, there are a number of possible hurdles to investment of which foreign investors should be aware, including the following:

- electricity network ownership and operation in Ireland is reserved (by statute) for state-owned enterprises and has not been opened to competition from private entities (foreign or domestic);
- in recent years, social acceptability has increasingly been an issue in the ROI and strategically important electricity transmission infrastructure, as well as certain onshore wind farm projects, have been challenged, delayed and in some cases not progressed as a result of opposition to such developments in some areas.

Protections

Foreign investors are subject to the same protection under Irish law as domestic investors. All investors – foreign and domestic – in the Irish market receive the benefit of EU, international and domestic protections, including access to domestic courts. As with most EU Member States, international law is recognised and applied in the ROI. The ROI is also a signatory and contracting party to the Energy Charter Treaty.

There are no special incentives or protections to encourage foreign investment in the energy sector in the ROI.

1.4 Principal Law Governing the Sale of Power Industry Assets

General consumer and competition law applies to potential amalgamations and mergers in the Irish energy sector. The Competition and Consumer Protection Commission (the “CCPC”) is the body responsible for enforcing competition law and merger control in the ROI. The main governing legislation is the Competition Acts 2002 to 2017 (the “Competition Act”).

The merger control regime is mandatory where the following financial thresholds are met:

- the turnover in Ireland of the undertakings is not less than EUR50 million; and

- the turnover in Ireland of two or more of the undertakings is not less than EUR3 million.

In this scenario, the CCPC must be notified of the proposed merger or acquisition in advance. Failure to notify is a criminal offence under Irish law and, furthermore, the transaction will be deemed void under Irish law.

The undertakings involved in the proposed transaction must submit a merger filing to the CCPC accompanied by a filing fee of EUR8,000. Subject to certain exceptions, a Phase 1 clearance determination must generally be issued by the CCPC within 30 working days of submission of the filing. A Phase 2 clearance determination must be issued within 120 working days (again with certain exceptions). While the legislation does not explicitly provide for it, it is possible for parties and the CCPC to expedite this timeline.

The general clearance test for companies to satisfy is whether the result of the merger or acquisition would substantially lessen competition in markets for goods or services.

As noted below in **2.4 Principal Laws Governing Market Concentration Limits**, the CRU can also intervene in the sale of a company with a generation licence to either (i) revoke the licence to generate, or (ii) to request a further change in control, if it deems that the new owner of the licensee does not have the necessary financial or technical credentials/capabilities. The areas of transmission and distribution are statutory monopolies by virtue of EirGrid plc and ESB being the only entities granted the necessary licences under the 1999 Act.

If wind farm generation companies are in receipt of support under one of the REFIT renewable subsidy schemes, there is a requirement to notify the Department of Communications, Climate Action and Environment (the government department in the ROI responsible for administering the REFIT schemes) of a change of control of the wind farm generation company as soon as possible after the change of control occurs. In addition, there is a change of control consent required from EirGrid under EirGrid plc’s transmission grid connection agreement if as a result of the change in control of the generation company, there is a material diminution in the creditworthiness of the generator as a result of the sale. There is also a change of control consent required from ESB Networks DAC under its distribution grid connection agreement in certain circumstances (where the owner of the generator company that is being sold also owns an adjacent wind farm).

1.5 Central Planning Authority

Each of the CRU, the TSO and the ESB (as the licensed transmission asset owner (“TAO”) under Section 14(2B) of the 1999 Act) have responsibilities in this regard. Regulation

8 of the European Communities (Internal Market in Electricity) Regulations 2000 (the “2000 Regulations”) provides that it is a function of the TSO: to operate and ensure the maintenance of and develop a safe, secure, reliable, economical and efficient electricity transmission system; to explore and develop opportunities for interconnection of its system with other systems and to plan the long-term ability of the transmission system to meet reasonable demands for the transmission of electricity. These functions are reflected in the TSO licence granted by the CRU. Functions of the TAO include providing the TSO with such information as the TSO requires to ensure the secure and efficient operation, development and maintenance of the transmission system as well as maintenance of the transmission system.

The TSO and TAO are party to an infrastructure agreement pursuant to Regulation 18 of the 2000 Regulations. This agreement is approved by the CRU and, among other things, governs the maintenance and development of the transmission system by the TSO and TAO.

The CRU has a duty under Regulation 28 of SI No 60/2005 – European Communities (Internal Market in Electricity) Regulations 2005, to monitor security of supply of electricity. This includes monitoring of the level of expected future demand, the quality and maintenance of the transmission networks and the balance between supply and demand and taking the measures it considers necessary to protect security of supply. Where the TSO is of the view that security of supply is threatened or is likely to be threatened it shall advise the CRU and make recommendations to the CRU on measures necessary.

1.6 Material Changes in Law or Regulation

The wholesale electricity market in Ireland combines two separate jurisdictional markets across the island of Ireland, namely the ROI and Northern Ireland, and is known as the Single Electricity Market (SEM).

The SEM has been redesigned and will be replaced by the Integrated Single Electricity Market (“I-SEM”) on 1 October 2018 (as currently scheduled) when the revised arrangements “go live”. The purpose of I-SEM is to implement the European Target Model, which is comprised of binding EU network codes which apply to all EU member states. The target model is designed to integrate the SEM with European electricity markets, enabling the free flow of energy across borders. I-SEM was enabled under primary legislation in the ROI – the Energy Act 2016. The revised SEM arrangements in I-SEM include: the current capacity remuneration mechanism being replaced with a formal capacity market (which has been state-aid approved by the European Commission); and the SEM’s day-ahead and forward scheduling process will be replaced with a formal day-ahead market (“DAM”), an intraday market (“IDM”) and a balancing market. The

DAM will be a pan-European market which establishes a forward position for all market participants. The IDM will be based on a European model. The balancing market is the last hour before delivery where the TSOs take control and dispatch power plants up and down to ensure the system demand equals system generation.

Market participants’ licences have also been amended for I-SEM following public consultations (including the TSO licence, the market operator licence as well as licences for generators and suppliers).

1.7 Announcements Regarding New Policies Grid Connection Policy

The CRU recently introduced a new grid connection policy, the Enduring Connection Policy – Stage 1 (“ECP-1”).

ECP-1 is aimed at resolving the current backlog of grid connection applications under the previous grid connection policy, a significant number of which are generally accepted to be speculative in nature.

ECP-1 will provide for approximately 1,000 MW of new connection offers as part of the 2018 batch. However, it is possible that this number might increase. This number does not include previous applications which may have chosen to “fold in” to ECP-1 (the addition of which is expected to increase the expected volume of capacity to 2,600 MW).

The 2018 batch will be open to three categories of applicants:

- new applicants;
- applicants who have qualified for EirGrid’s DS3 Programme to provide system services – eg, Fast Frequency Response (FFR) and/or Primary Operating Reserve (POR); and
- existing applicants under the previous grid connection policy.

ECP-1 will have a material impact on the development of generating assets. In particular, the previous connection policy struggled to separate viable projects from speculative connection applications. If ECP-1 achieves its stated aim, viable projects will be identified and given connection offers, allowing them to proceed with the development and financing of their projects. Grid connection delays are frequently cited as a key issue in both project development and project financing and, if ECP-1 works as intended, then these delays will be reduced. Other changes brought about by ECP-1 may negatively affect developers – for example, changes in rules around capacity relocation are likely to seriously affect the continuation of certain projects.

Support Schemes in I-SEM

The Department of Communications, Climate Action and Environment recently published its final decision on the

interaction between existing renewable energy support schemes (ie, the AER and REFIT schemes) and the upcoming revised wholesale electricity market, I-SEM.

REFIT schemes provided renewable energy generators with price certainty in the form of a floor price tariff. This tariff is calculated using a “reference price”. This floor price protection directly conflicts with an emphasis in I-SEM on all generators being “balance responsible” and this decision looks to reconcile this conflict.

The key parts of the decision can summarised as follows:

- wind generation (above 5 MW) – the market revenue calculation under REFIT will be based on the lower of (i) a blend of 80% of the day-ahead market price and 20% of the balancing market price, and (ii) the day-ahead market price;
- wind generation (below 5 MW) – the market revenue calculation under REFIT will be based on the lower of (i) a blend of 70% of the day-ahead market price and 30% of the balancing market price and (ii) the day-ahead market price;
- other generation (peat, hydro, biomass) – the market revenue calculation for peat, hydro and biomass generators supported by the PSO levy will be based on the day-ahead market price;
- The above market revenue calculations will only take into account capacity market revenues and not capacity market costs.

REFIT-supported projects were project financed on the basis that REFIT would provide price certainty. The department’s decision to impose balancing responsibility on these projects (as the price achieved in the balancing market will now form part of the reference price) introduces new risk to these projects which has, understandably, been strongly resisted by industry.

It remains to be seen how this new uncertainty will be handled by these projects. However, negotiations on amendments to PPAs in the market to deal with I-SEM are ongoing and the PPAs will now also need to be amended to take account of this decision. It is likely that the finance documents for many project financed REFIT projects will also need to be updated in light of this decision (as well as the introduction of I-SEM).

Nonetheless, the industry has been aware for some time now that the department was considering imposing some balance responsibility on REFIT projects. This decision means that PPA amendments can largely be finalised (although it would be strongly preferable if the CRU’s detailed regulatory decision paper addressing the changes to REFIT in light of this decision was also now available to generators and suppliers). In addition to the publication of the CRU’s decision

paper, the next key milestone for renewable projects is the requirement to notify the CRU of changes to their PPAs by 17 August 2018 (extended from April 2018 by this decision of the CRU).

1.8 Unique Aspects of the Power Industry

The SEM is an all-island wholesale electricity market which covers two separate jurisdictions – the Republic of Ireland and Northern Ireland.

At the time of writing, there are a number of potential issues which may arise following the SEM’s alignment with the EU Target Model in October 2018, as currently scheduled (known as the integrated single electricity market, or I-SEM). One of the potential consequences of the UK’s Brexit is that it could result in the SEM becoming an electricity market located in both an EU jurisdiction (the ROI) and a non-EU jurisdiction (Northern Ireland, which is part of the UK).

One possibility is that the SEM could cease to exist following Brexit (although this is unlikely given the extensive cross-border infrastructure and contractual arrangements in place as well as generally strong political support for the SEM), including lower power prices in the Northern Irish market than was the case prior to the introduction of the SEM in 2007.

Another possibility is that Northern Ireland will be designated as a “special zone” within the UK where the electricity market aligns with EU rules and legislation, resulting in regulatory divergence with the rest of the UK. However, one stumbling block in this scenario is that Northern Ireland’s parliament, the Northern Ireland Assembly (commonly known as “Stormont”), does not at the time of writing have the power to adopt EU legislation.

Another issue is whether the Courts of Justice of the European Union (the “CJEU”) would have the authority to enforce EU law in Northern Ireland in connection with the SEM. This would likely be politically divisive as one of the key aims of Brexit is the removal of the CJEU’s jurisdiction over the UK. One possible solution would be for some form of special tribunal to be set up to deal with SEM disputes.

2. Market Structure, Supply and Pricing

2.1 Structure of the Wholesale Electricity Market

As mentioned above in 1.1 **Principal Law Governing the Ownership and Structure of the Power Industry**, the Irish wholesale electricity market is known as the “Single Electricity Market” or SEM. The SEM is an all-island market – that is, it includes the two separate jurisdictions of the Republic of Ireland and Northern Ireland.

Energy Market

SEM (as it is currently designed) provides for a mandatory centrally traded pool with an ex post, island-wide system marginal price for each 30-minute trading period and a separate capacity payments mechanism. The market price is determined by the market operator, SEMO, but the price is set by generators bidding their short-run marginal costs as per the terms and conditions of their generation licence.

The key legislation that governs the structure and function of SEM are the 1999 Act and the 2000 Regulations.

Capacity Market

There is a capacity remuneration mechanism and an energy market in SEM.

In relation to the capacity market, generators in SEM are currently entitled to receive capacity payments in return for plant availability, which is remunerated through an annual capacity payment sum (known as the “capacity pot”) as set by the CRU and the Utility Regulator. Generators receive a share of the capacity pot on a weighted basis (which reflects the relative scarcity, and corresponding value, of generation capacity at various times). In 2017 and 2018, the annual capacity payment sum was EUR519,227,150 and EUR546,116,160, respectively. As noted above, the current capacity remuneration mechanism will be replaced by a capacity market when I-SEM goes live (currently scheduled to be 1 October 2018).

The capacity market in I-SEM will be managed under the Capacity Market Code (“CMC”) and the Trading and Settlement Code (“TSC”). All generators with generating units/demand side units with a capacity above a certain size, all interconnectors, all suppliers and EirGrid plc and SONI Limited will be required by their industry licences to enter into (or accede to) a multilateral framework agreement to comply with the CMC, and to comply with the TSC. Additionally, parties who are proposing to build new generating units or new interconnectors may elect to accede to the CMC. The capacity market will be administered by EirGrid and SONI in their capacity as “system operators” under the CMC and pursuant to the powers given to them under their respective TSO licences. The arrangements (other than settlement) governing the capacity market in I-SEM will be covered under the CMC. The settlement arrangements for the capacity market will be covered under the TSC.

The capacity market is characterised by physical capacity obligations on generator units (ie, generators and demand side units) to continue to deliver physical generation and demand-side capacity to the transmission system in return for capacity payments, which are funded by capacity charges on suppliers. These charges on suppliers essentially promote the availability of sufficient capacity to meet demand. The capac-

ity market includes performance incentives (ie, difference charges, which we understand are similar to performance incentives that exist for the physical capacity obligations in the capacity markets in Great Britain and France) linked to the prevailing prices in the energy market as a means to reflect the periods of scarcity and also to ensure that scheduled outages are taken at times of lower scarcity (eg, during the summer).

The CMC provides for a series of capacity auctions to secure capacity for a particular capacity year. Usually, there will be a T-4 auction four years ahead of a particular capacity year, and another (a T-1 auction) the previous year. There can, however, be interim auctions. Ahead of each capacity auction, the system operators are required to run a rigorous qualification process to identify the plant which can be bid into the auction, and the relevant (physical) capacity of the plant for the purposes of the auction process. The owners of existing generator units and demand side units above a certain size, existing interconnectors and proposed interconnectors which will come on stream prior to the start of the capacity year must apply for the unit/interconnector to be qualified. It is possible for them to apply to opt out of the qualification process (and the subsequent auction), but only in very limited cases, (eg, where the plant is being closed or mothballed).

After the qualification process is over, the regulatory authorities provide a demand curve to the system operators. The demand curve essentially sets the amount of capacity which should be acquired through the auction. The system operators determine any applicable localised capacity requirements arising from constraints on the system which must be satisfied in addition to the overall amount to be acquired with the approval of the regulatory authorities. These parameters are provided to auction participants ahead of the auction. The system operators then conduct the auction. Participants are required to offer into the auction their existing capacity, and may offer into the auction their new capacity. Capacity offers specify a series of prices for different quantities of capacity. The CMC contains detailed rules for determining the outcome of the auction, so as to optimise the outcome. This is not straightforward, because in some circumstances participants may be submitting offers relating to more than one capacity year, and their offers may be flexible or inflexible.

After a capacity auction, the system operators will determine, in respect of each unit successfully participating in the auction, its level of “awarded capacity” and the applicable price (generally, but not always, the auction clearing price). In respect of new capacity which has been successful in the auction, the system operators will also agree an implementation plan to ensure the plant is available for the capacity year. A failure to achieve the milestones in the implementa-

tion plan can ultimately lead to termination of the awarded capacity and payment of liquidated damages. Details of each unit's "awarded capacity" and other information is then entered into the Capacity and Trade Register to be used for settlement under the TSC.

With regard to the relevant payment flows, on a monthly basis over the capacity year participants with awarded capacity are entitled to receive a "capacity payment" based on the auction price and suppliers are required to pay a "capacity charge" to recover those capacity payments. When the market price of electricity exceeds the "strike price" determined in accordance with the TSC there are two consequences, as described below.

- Participants with awarded capacity will be required to pay a difference charge to SEMO. The difference charge is equal to the market price less the strike price, multiplied by the nominal amount of electricity capacity that the successful generator was awarded in the auction (scaled accordingly to match the demand in the period). If the participant's plant is available and bid into one of the energy markets during that high-priced period (as it is required to use reasonable endeavours to do under the CMC), then the participant would be able to meet this obligation using any market revenue it earns from doing so. If the relevant plant is not available, the participant is exposed to imbalance settlement in the balancing market (but there are "stop-loss limits" to protect its financial exposure).
- Suppliers will receive a "difference payment" from SEMO. The difference payment is equal to the relevant market price less the strike price, multiplied by the suppliers' net demand in that market in a set of prescribed imbalance settlement periods. For suppliers, this has the effect of capping their exposure during high-priced periods at the strike price.

The aggregate capacity charge paid by suppliers will generally equal the aggregate capacity payments paid to participants with awarded capacity. The aggregate difference charges paid by participants with awarded capacity will generally equal the aggregate difference payments paid to suppliers (with a number of exceptions). Any difference in such charges and payments is accounted for via a socialisation fund which is funded by suppliers, by a levy or multiplier set annually.

System/Ancillary Services

In addition to revenues in the capacity market and energy market, certain participants may also be eligible to receive payments from EirGrid plc and SONI Limited (in their capacity as TSOs) for providing system services (also known in the market as "ancillary services"). These services are currently being procured from eligible participants on an interim basis. In order to ensure that the 2020 renewable targets are achievable, EirGrid plc and SONI Limited (in

their capacity as TSOs) have to manage the integration of very high levels of instantaneous renewable penetration on the island of Ireland. This integration will require significant investment in the grid infrastructure in Ireland. Investment in grid infrastructure in order to minimise curtailment is mandated under Article 16 of the 2009 RES Directive. In order to increase the percentage of instantaneous demand that may be securely served by intermittent generators, EirGrid plc is operating a programme known as "Delivering a Secure, Sustainable Electricity System" ("DS3"). The DS3 programme includes the procurement from eligible participants of certain system/ancillary services (including frequency response and operating reserve). In addition to thermal generators, renewable generators (such as wind) are eligible to provide certain of these services.

Please see **1.6 Material Changes in Law or Regulation**, above, for an overview of the key impending changes to the structure and function of SEM.

2.2 Imports and Exports of Electricity

There is an EU target of achieving interconnection of at least 10% of installed electricity production capacity for all Member States, which Ireland has met. The ROI currently has one operational interconnector, with further interconnectors proposed.

East West Interconnector (Operational)

The East West Interconnector ("EWIC") is a 500 MW high-voltage twin-circuit direct current link between the electricity transmission grids of the ROI and Great Britain. EWIC has been in operation since 2013 and is owned by EirGrid Interconnector DAC ("EIDAC"), a subsidiary of EirGrid plc. Pursuant to Section 14(1)(j) of the 1999 Act, the CRU has granted EIDAC a licence to transport electricity across and maintain EWIC.

EWIC is capable of transmitting electricity in either direction, therefore allowing market participants to trade electricity in both directions between the SEM and the BETTA market (in the UK). Participants are offered access to EWIC's capacity through a combination of explicit and implicit auctions. The full import and export capacity is broken into capacity products to facilitate market participants' efficient management of their energy portfolio on a short and long-term basis. Power flow across EWIC is dependent on the trading activity in the explicit and implicit auctions and are effectively determined by participants who trade on EWIC, dictated by certain factors (including supply, demand, prices in each of SEM and BETTA as well as participants' own energy portfolio positions).

Currently, market participants have access to EWIC capacity through auctions. In I-SEM, however, trading capacity on EWIC may only be effected through the sale and purchase

of what are known as FTRs (“financial transmission rights”). Power flow on EWIC will be dependent on the trading activity in explicit and implicit auctions.

Celtic Interconnector (Proposed)

EirGrid plc has a statutory obligation to explore and develop opportunities for further interconnection as part of its role as TSO. In 2009, the Interconnector Economic Feasibility Report prepared by EirGrid plc identified an interconnector with France as one such opportunity. This is known as the Celtic Interconnector and is being planned as a joint venture between EirGrid plc and their counterpart in France, RTE. The project, an EU Project of Common Interest, is still in its consultation phase; updates can be found at www.eir-gridgroup.com.

North South Interconnector (Proposed)

Finally, a 400 kV interconnector – connecting the grids of Northern Ireland and the ROI – is proposed and is currently in the development stage. This is known as the North South Interconnector. At the date of writing, there are a number of ongoing legal challenges in the Irish courts in respect of the permitting of the North South Interconnector. As with the existing 275 kV AC connection between the ROI and Northern Ireland, it is currently proposed that the capacity on the North South Interconnector will be allocated by implicit auction. Again, it is an EU Project of Common Interest; further information can be found at www.eirgridgroup.com.

Greenlink (Proposed)

Greenlink is a proposed new 500 MW subsea electricity interconnector linking the power markets in the ROI and Great Britain. It is being developed by a private company called Element Power and is an EU Project of Common Interest, planned for commissioning in 2023. The project is now at an advanced stage of development and at the time of writing it is expected to receive full regulatory approval.

It will be interesting to follow the developments in the UK as it may be possible that, post-Brexit, there will be no operational interconnector in the ROI with an EU jurisdiction until such time as the Celtic Interconnector is built.

2.3 Supply Mix for the Entire Market

The latest electricity supply mix figures can be found in the Energy in Ireland 1990-2016 report, published in 2017 by the Sustainable Energy Authority of Ireland (“SEAI”).

The breakdown in 2016 (the most recent year for which there is data) was as follows:

- natural gas – 48.5%;
- renewables – 15.6% (comprising wind at 11%, hydro at 1.2% and other renewables at 3.3%);
- coal – 22.9%;

- peat – 10.8%;
- oil – 1.7%;
- hydro – 3%; and
- other (biomass, biogas and wastes) – 0.5%.

This puts the renewable electricity generation figure at close to 25%. About 32% of this renewable electricity was generated from Irish sources including wind, peat, hydro and other renewable sources (biomass, biogas and wastes). There has been some progress in reducing greenhouse gas emissions from electricity generation, with an almost 50% reduction in the carbon intensity of electricity production between 1990 and 2015. Since 2014 there has been a small but steady increase in the figures relating to renewable sources, particularly wind. However, the ongoing use of coal and peat exacerbates this growth (see **3.2 Principal Law and/or Policies Relating to the Early Retirement of Carbon-Based Generation**, below).

2.4 Principal Laws Governing Market Concentration Limits

There are no specific concentration limits in respect of one entity’s percentage of the electricity supply market. However, EU-driven merger control and other competition law rules (detailed above in **1.4 Principal Law Governing the Sale of Power Industry Assets**) would likely be used by the CCPC to prevent any entity from achieving a position of market dominance that might negatively impact on competition. Price regulation of the ESB in the business and domestic electricity sectors was removed in October 2010 and April 2011 respectively. At that point, the ESB’s retail arm was re-branded as Electric Ireland, as mandated by the CRU.

2.5 Agency Conducting Surveillance to Detect Anti-Competitive Behaviour

As mentioned above in **1.4 Principal Law Governing the Sale of Power Industry Asset**, the CCPC is the body responsible for enforcing competition law in Ireland and is therefore the primary agency charged with detecting anti-competitive behaviour in accordance with the Competition Act.

In addition, the 1999 Act obliges the CRU to monitor competition in the electricity supply sector and empowers the CRU to take any action that it deems necessary to prevent market distortions and to ensure that customers benefit from competition (Section 9(1)(da) and (db)). The 1999 Act also separately charges the CRU with ensuring non-discrimination and effective competition in the electricity market by monitoring a number of items in particular (including, for example, ensuring that the TSO and DSO fulfil their functions).

3. Climate Change Laws and Alternative Energy

3.1 Principal Climate Change Laws and/or Policies Renewable Energy Directive (2009/28/EC) & NREAP

Pursuant to the EU Renewable Energy Directive (2009/28/EC) (the “2009 Directive”), Ireland has a set target of 16% of Ireland’s total energy consumption to come from renewable energy sources by 2020. The Irish Government have committed to this target being met by 40% from renewable electricity, 12% from renewable heat and 10% from renewable transport.

Article 4 of the 2009 Directive requires each Member State to adopt a National Renewable Energy Action Plan (NREAP) to be submitted to the European Commission. The NREAP sets out the Member State’s national targets and demonstrates how the Member State will meet its overall national target established under the Directive. Ireland’s fourth and most recent progress report was submitted in February 2018 and is available to read at www.dccae.gov.ie.

It has been widely reported and it is generally accepted that Ireland will be one of the few EU member states that will not meet its renewable electricity targets by 2020 (mainly due to lack of progress with its targets in the renewable heat and renewable transport sectors), potentially opening Ireland up to significant fines.

EU Energy Efficiency Directive 2012, Climate Action and Low Carbon Development Act 2015 & NEEAP

The second of the EU’s most significant directives on climate change and energy was introduced in 2012. The EU Energy Efficiency Directive 2012 (2012/27/EU) was introduced to help bridge the gap between existing framework directives and national energy efficiency measures.

Within Ireland, this led to the publication of the Climate Action and Low Carbon Development Act 2015, which sets out the legal framework on how Ireland plans to meet these targets, and established the Climate Change Advisory Council which conducts evidence-based analysis on how best to respond to climate change in Ireland. The directive further requires Member States to submit a National Energy Efficiency Action Plan (NEEAP) every three years. Ireland’s fourth NEEAP was produced in early 2017. It provides a comprehensive overview on the progress made towards targets, as well as measures, policies and strategies in place to ensure targets are met. Ireland’s national 2020 targets are to improve energy efficiency by 20% – however, the public sector has been charged with improving its efficiency by 33% (this latter initiative being supported by the Public Sector Energy Efficiency Strategy, published last year).

Emission Trading Scheme (ETS)

The European Union’s cap-and-trade mechanism – the Emission Trading Scheme (ETS) – also operates in Ireland. This scheme imposes quotas on the quantity of permissible emissions from specific large installations such as electricity-generating stations. Quotas are lowered each year to drive change towards renewable and carbon-neutral technology. However, it is each individual installation and its associated company, and not the state that carries the costs of compliance.

3.2 Principal Law and/or Policies Relating to the Early Retirement of Carbon-Based Generation

There are no current programmes or laws that mandate the early retirement of carbon-based generation. However, the Irish Government has introduced a number of incentives for renewable electricity generation (detailed above in **2.1 Structure of the Wholesale Electricity Market**) which are expected to continue to reduce Ireland’s dependence on carbon-based generation.

Three peat-fuelled power plants and one coal generation plant remain operational in Ireland, operated by Bord na Móna and ESB Power Generation respectively. These plants have been the focus of much of the climate debate in Ireland, although some argue that the closing of such power stations will not help Ireland meet reduction targets. As technology improves, CO₂ reduction targets become more onerous and alternative energy sources become more viable options, these plants will become uneconomic and will either close or operate under a different configuration. However this process of transition will take some time to phase out given the size of these plants and the complexity of their operations. For example, the coal-fired power plant (Moneypoint) is Ireland’s largest electricity generation station and represents a significant portion of Ireland’s generation capacity, providing 915 MW of output.

At the time of writing, there is some scrutiny on the current subsidy for peat-fired electricity generation in the context of the decarbonisation of electricity generation. The Public Service Obligation subsidy supports a peat generation capacity of 250 MW at an estimated cost of EUR110 million, compared to supports for a renewable generation capacity of 3,334 MW at an estimated cost of EUR351 million.

The new capacity remuneration mechanism in I-SEM was also designed to provide exit signals to inefficient plants.

3.3 Principal Law and/or Policies to Encourage the Development of Alternative Energy Sources

The Irish Government has put in place a number of programmes to encourage the development of alternative energy sources.

AER

The Alternative Energy Requirement programme (“AER”), which ran between 1995 and 2003, was the first market support for renewable energy by the Irish Government.

Under AER, renewable energy generators tendered for contracts of fixed amounts of capacity. Winning bidders were entitled to a 15-year power purchase agreement under which the ESB bought the output at the bid price.

REFIT

The most successful of these in the ROI is the Renewable Energy Feed-in Tariff (“REFIT”). REFIT is managed by DCCAE and was introduced to support the development of renewable electricity in Ireland. There have been a number of phases (REFIT 1, REFIT 2 and REFIT 3) introduced consecutively to continue to encourage renewable energy development. Notably, solar generation was not supported under REFIT.

REFIT is funded by the Public Service Obligation (PSO) which is paid by all electricity consumers as a levy on their electricity bills. The scheme provides electricity suppliers with a guaranteed reference price (or floor price) and a balancing payment. There is some variance in these amounts depending on the size and type of the project and which phase of REFIT the project qualified for. However, for example, the 2018 REFIT reference price for a REFIT 2 wind energy project above 5MW is EUR69.99 per MWh and the balancing payment is EUR9.90 per MWh.

REFIT support lasts for 15 years, but applications have now been closed with effect from 31 December 2015; as such, the backstop date for REFIT support is 31 December 2032. Existing applicants have until 31 December 2019 to “connect” as defined in the REFIT terms and conditions published by DCCAE, as clarified on a number of occasions (this includes turbines being delivered onsite) and until 31 March 2020 to put in place a power purchase agreement (PPA).

Upcoming Programmes

The DCCAE recently introduced the Support Scheme for Renewable Heat (“SSRH”) intended to support the replacement of fossil fuel heating with renewable energy heating.

SSRH involves two mechanisms: (i) a support to incentivise moving from fossil fuels to biomass or anaerobic digestion (AD), and (ii) a grant to support investment in renewable heating systems using heat pumps.

SSRH will be administered by the Sustainable Energy Authority of Ireland (“SEAI”), who are currently developing terms and conditions to govern the programme.

The DCCAE also recently closed a public consultation on the long-awaited proposed successor to REFIT – the Renewable Energy Support Scheme (“RESS”).

In contrast to REFIT, RESS will involve a floating feed-in premium (FIP) instead of a feed-in tariff, which will provide significantly less price certainty to developers and investors. The proposed capacity auction and community engagement provisions are also being closely watched by the industry. The DCCAE has indicated that RESS capacity auctions will likely be technology-neutral. In this scenario, we would expect that onshore wind energy will continue to dominate the Irish renewable landscape. However, at the time of writing, we understand that both the offshore wind sector and the solar industry in particular have lobbied for the possibility of technology-specific auctions to encourage more diversity in the renewable generation mix in the ROI.

We understand that, at the time of writing, RESS is due for consideration by the Irish Government before it is sent to the EU for state-aid approval.

Provisions for Renewable, Sustainable and Alternative Forms of Energy

A number of provisions of the 1999 Act encourage the development of alternative energy. For example, the CRU is obliged to require the system operator to give priority to generating stations using “renewable, sustainable or alternative energy sources” when selecting generating stations (ie, priority dispatch) and to encourage research and development into generation using “renewable, sustainable and alternative forms of energy”.

DCCAE and the CRU are also obliged in carrying out their duties to promote the use of “renewable, sustainable or alternative forms of energy”. This term is defined quite broadly and the Minister can decide to amend it to include further sources.

There are also a number of EU-driven programmes that encourage the development of alternative or renewable energy in the Irish market – for example, the EU Emissions Trading System (ETS).

4. Generation**4.1 Principal Laws Governing the Construction and Operation of Generation Facilities**

The 1999 Act is the primary piece of legislation that governs the construction and operation of generation facilities in Ireland.

Section 16(1) of the 1999 Act prohibits any person from constructing a generating station without an authorisation to do

so from the CRU; the permit issued by the CRU is called an “authorisation to construct”. Pursuant to Section 14 of the 1999 Act, a licence from the CRU is required to any person wishing to generate electricity; the permit from the CRU is called a “licence to generate electricity”.

Constructing a generating station without the necessary authorisation can lead to a fine of up to EUR130,000 under the 1999 Act. Generating electricity without a licence can lead to a fine of up to EUR1,904 under SI No 445/2000 – European Communities (Internal Market in Electricity) Regulations, 2000.

4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities

Section 17 of the 1999 Act provides that the CRU may set out the process for applications for, inter alia, authorisations to construct and licences to generate. The application from an applicant applying for a permit from the CRU must be accompanied by a fee, the amount of which is dependent on the installed capacity of a generating station. For example, the current application fee for an authorisation to construct a generating station with an installed capacity of 5-15 MW is EUR100.

SI No 309/1999 – Electricity Regulation Act, 1999 (Criteria For Determination of Authorisations) Order, 1999 sets out the relevant criteria to be considered by the CRU in deciding whether or not to grant an authorisation to construct. For example, the CRU must be satisfied that no activity carried out under the authorisation to construct would adversely affect the safety and security of the electricity system.

Based on our experience, authorisations to construct and licences to generate can be issued by the CRU within four to eight weeks of receipt of a completed application (to the satisfaction of the CRU).

4.3 Terms and Conditions Imposed in Approvals to Construct and Operate Generation Facilities

Persons holding an authorisation to construct and/or a licence to generate are subject to a number of obligations under those licences as set out in the licence terms and conditions, which are enforced by the CRU. For example, licensees are obliged to notify the CRU of any change in control of the licensee as soon as practicable after it occurs. If the CRU deems that the new owner of the licensee does not have the necessary financial or technical credentials, the CRU can revoke the licence or request a further change in control. It is therefore common practice for applicants to request a change of control approval before the transaction completes.

The CRU issues detailed guidance to licensees and the full set of conditions is contained in SI 384/2008 – Electricity Regu-

lation Act 1999 (Section 14(1A)) Order 2008 (in respect of licences to generate), and in SI No 383/2008 – Electricity Regulation Act 1999 (Section 16(3A)) Order 2008 (in respect of authorisations to construct).

The statutory conditions in respect of an authorisation to construct are as follows:

- Condition 1 is an interpretative provision clarifying that a reference to “authorised person” refers to a person authorised to construct a generating station by the CRU;
- Condition 2 provides that the order (ie, the statutory instrument) will continue in force until revoked by the CRU;
- Condition 3 provides that an authorised person must not commence construction of a generating station until “all necessary planning authority and statutory consents, permissions or approvals” have been acquired;
- Condition 4 notes that an authorised person must comply at all times with any such consents, permissions or approvals;
- Condition 5 provides that an authorised person must complete construction and commissioning of the generating station no later than five years from the date of authorisation – it is possible for the CRU to extend this period;
- Condition 6 requires an authorised person to provide the CRU with information that it may require in order for the CRU to perform its functions under the 1999 Act;
- Condition 7 prohibits the assigning or transfer of an authorisation without the prior written consent of the CRU – consent will only be granted where the CRU is satisfied that the assignee has the necessary technical and financial capabilities;
- Condition 8 provides that the CRU can revoke an authorisation by giving not less than 30 days’ notice in writing on the occurrence of certain circumstances (eg, if the authorised person becomes insolvent or if the authorised person fails to comply with certain directions).

It is possible for a holder of an authorisation to construct to request that the CRU modify the conditions of the authorisation pursuant to Section 19 of the 1999 Act. The process for making any such modifications is set out in Section 20 of the 1999 Act. This process includes the CRU issuing a newspaper notice in relation to the proposed modification and the potential for a public hearing in relation to objections to the proposed modification.

There are similar conditions in the licence to generate. A copy of terms and conditions of a standard licence to generate electricity is available on the CRU’s website (www.cru.ie).

4.4 Proponent’s Eminent Domain, Condemnation or Expropriation Rights

The 1999 Act provides holders of an authorisation to construct with a number of powers in relation to land access

and use, by granting such persons equivalent rights as were provided to the ESB under the Electricity (Supply) Act 1927 (as amended) (the “1927 Act”).

Section 45 of the 1927 Act allows the ESB (and by virtue of an order by the CRU under Section 47 the 1999 Act, holders of an authorisation to construct) certain statutory compulsory purchase order (CPO) powers by issuing an order.

Where an order has been made, the necessary land CPO rights can be exercised subject to providing one month’s notice, or in relation to an occupied dwelling house, three months’ notice in writing specifying the details of the rights intended to be acquired (see Section 17 of the Electricity (Supply) (Amendment) (No 2) Act, 1934 Electricity (Supply) (Amendment) (No 2) Act, 1934).

Compensation will be determined either by reference to the Acquisition of Land (Assessment of Compensation) Act, 1919 or, more likely in practice based on our experience, by mutual agreement.

Section 53 of the 1927 Act allows for the placing of electrical lines “above or below ground across any land not being a street, road, railway or tramway”. Section 49 of the 1999 Act allows for the CRU to consent to holders of an authorisation to construct exercising wayleaving powers under Section 53 of the 1927 Act.

Note that receiving consent from the CRU does not provide applicants with any planning permission to undertake works, which must be separately considered and obtained by the relevant local authority or, depending on the project being constructed, the Irish National Planning Board (*An Bord Pleanála*).

The CRU last year published a short guidance note and application forms in relation to Sections 48 and 49 of the 1999 Act.

In considering whether or not to grant consent to the holder of an authorisation, the CRU will in practice have regard to whether wayleaving powers are reasonable (ie, is there a less draconian measure which could be used, or has communication already been made with the landowners).

Section 51 of the 1927 Act allows the ESB to break up any street, road, railway or tramway for the purpose of laying electrical lines. These powers can also be granted by the CRU to the holder of an authorisation pursuant to Section 48 of the 1999 Act.

It is also possible, of course, for any necessary land rights to be obtained by agreement with the relevant landowners.

4.5 Requirements for Decommissioning

For planning permissions issued in the last ten years or so, decommissioning is typically provided for in the planning permission conditions granted by the local authority or the national planning board (*An Bord Pleanála*) and can therefore vary from county to county as well as depending on the nature of the generation facility (some older projects did not have a decommissioning obligation in their planning permissions). The condition for newer projects will typically, at a minimum, specify that all visible traces of the generation facility need to be removed, but the nature of any potential bonds, liabilities or other items is entirely dependent on the planning permission conditions.

The CRU looks to anticipate decommissioning costs as part of its generation licence application form which requires applicants to detail anticipated substantial capital outflows, including major decommissioning costs.

5. Transmission

5.1 Regulation of Construction and Operation of Transmission Lines and Associated Facilities

5.1.1 Principal Laws Governing the Construction and Operation

The European Communities (Internal Market in Electricity) Regulations 2000 to 2011 (the “2000 Regulations”) and Electricity Regulation Act 1999 (as amended) (the “1999 Act”) govern the construction and operation of transmission licences and associated facilities.

The key authorisations required to operate and construct the transmission system are: (i) the licence to discharge the functions of transmission system operator granted by the CRU pursuant to Section 14(1)(e) of the 1999 Act which pursuant to Section 14(2A) of the 1999 Act shall only be granted to EirGrid; and (ii) the licence to discharge the functions of the transmission system owner pursuant to Section 14(1)(f) of the 1999 Act which, pursuant to section 14(2B) of the 1999 Act, shall only be granted to ESB. The 1999 Act also provides for specific circumstances in which the CRU may permit another person to construct direct lines.

Duties and functions of the TSO and transmission system owner are set out in the 2000 Regulations.

5.1.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Transmission Facilities

As set out above in 5.1.1 **Principal Laws Governing the Construction and Operation**, only the entities specified in the 1999 Act may be granted a licence to discharge the func-

tion of a transmission system owner or a licence to discharge the function of transmission system operator.

Section 37 of the 1999 Act provides that the CRU may, in limited circumstances, grant permission to construct a direct line (an electric line which is used or is to be used to carry electricity for the purpose of supply) not connected to the transmission system when initially constructed, for the purpose of facilitating the supply of electricity. The CRU shall not grant permission unless either (i) the applicant has made an application for connection to and use of the transmission system (see **5.2.1 Principal Laws Governing the Provision of Transmission Service, Regulation of Transmission Charges and Terms of Service**, below) and such application was refused on grounds of lack of capacity, or (ii) a certain dispute in relation to terms of connection and use of the transmission system has been presented to the CRU for determination. The applicant must be holder of an electricity supply licence or an authorisation to construct or reconstruct a generating station or be an eligible customer (ie, an end-consumer). The direct line may supply the owner's own premises or subsidiaries or eligible customers.

5.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate Transmission Facilities

The transmission system operator licence granted by the CRU to EirGrid pursuant to Section 14(1)(e) of the 1999 Act requires EirGrid to discharge the functions of a transmission system operator in accordance with the 2000 Regulations. The TSO licence includes extensive conditions including conditions in relation to the requirement to prepare and submit a plan for the development of the transmission system to the CRU, prepare a procedure for use of Irish interconnectors with other systems and submit to the CRU for approval, scheduling and dispatch, economic procurement of assets, transmission system security and planning standards and duty of non-discrimination.

The transmission system owner licence granted by the CRU to ESB, pursuant to Section 14(1)(f) of the 1999 Act, contains extensive conditions including in relation to the acquisition of direct lines under Section 37 of the 1999 Act, economic procurement of assets and services, disposal of transmission assets, transmission system security and planning standards, facilitating the discharge of the TSO functions and the duty of non-discrimination.

Permission to construct a direct line under Section 37 of the 1999 Act (see **5.1.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Transmission Facilities**, above) requires compliance with certain technical and other conditions to the extent specified by the CRU. Where there is a connection made between a direct line and the transmission system, the CRU may direct the owner of a

direct line to transfer ownership of such to the ESB on such terms as may be agreed (including in relation to compensation) between the ESB and the owner of the direct line.

5.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

Section 45 of the 1927 Act allows the ESB certain statutory compulsory purchase order (CPO) powers by the making of a special order. Where an order has been made, the necessary land rights can be exercised subject to providing one month's notice, or in relation to an occupied dwelling house, three months' notice in writing specifying the details of the rights intended to be acquired (see Section 17 of the Electricity (Supply) (Amendment) (No 2) Act, 1934).

Compensation will be determined by reference to the Acquisition of Land (Assessment of Compensation) Act, 1919 or, more likely in practice, by mutual agreement.

Section 53 of the 1927 Act allows the ESB to place electrical lines "*above or below ground across any land not being a street, road, railway or tramway*". Section 51 of the 1927 Act allows the ESB to break up any street, road, railway or tramway for the purpose of laying electrical lines. These powers may also be granted by the CRU to the holder of permission to construct a direct line under Section 37 of the 1999 Act in certain circumstances.

The transmission owner licence of ESB requires it to provide access to its land and premises to the TSO in order to allow the TSO to discharge its functions.

It is also possible, of course, for any necessary land rights to be obtained by agreement with the relevant landowners.

5.1.5 Transmission Service Monopoly Rights

In Ireland, EirGrid is the monopoly transmission system operator in accordance with Section 14(2A) of the 1999 Act. EirGrid is a state-owned company. ESB Networks Designated Activity Company (a subsidiary of ESB) is the monopoly transmission system owner in accordance with Section 14(2B) of the 1999 Act.

On 22 May 2013, EirGrid plc was certified by the CRU as the electricity transmission system operator for Ireland pursuant to the European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011 (SI No 570 of 2011). The CRU decision in this regard concluded that the arrangements for the ownership and operation of the Irish electricity transmission system satisfied the requirements in relation to the independence of transmission system operation from electricity generation and supply.

As mentioned in **5.1.1 Principal Laws Governing the Construction and Operation**, there are specific circumstances in which the CRU may permit another person to construct direct lines.

5.2 Regulation of Transmission Service, Charges and Terms of Service

5.2.1 Principal Laws Governing the Provision of Transmission Service, Regulation of Transmission Charges and Terms of Service

Provision of Transmission Service and Terms of Service

The 1999 Act and the 2000 Regulations govern the provision of transmission services and the regulation of transmission charges and terms of service.

The functions of EirGrid, as TSO, are set out in Regulation 8(1) of the 2000 Regulations and are as follows:

“(a) to operate and ensure the maintenance of and, if necessary, develop a safe, secure, reliable, economical and efficient electricity transmission system, and to explore and develop opportunities for interconnection of its system with other systems, in all cases with a view to ensuring that all reasonable demands for electricity are met and having due regard for the environment;

(b) to ensure the availability of all ancillary services which are necessary for the transmission system operator to carry out its duty outlined in subparagraph (a) insofar as this availability is independent from any other transmission system with which its system is interconnected.;

(c) to plan the long term ability of the transmission system to meet reasonable demands for the transmission of electricity;

(ca) to contribute to security of supply through adequate planning and operation of transmission capacity and system reliability;

(d) in accordance with –

(i) the conditions in the licence granted in accordance with section 14(1)(e) of the Act of 1999,

(ii) the grid code prepared under section 33 of the Act of 1999, to operate a system of dispatch and use of interconnectors on objective, non-discriminatory, economical and technical criteria, without prejudice to the supply of electricity on the basis of existing contractual obligations;

(iii) any Regulations made by the Commission under section 9(1)(d) of the Act of 1999, including any requirements which

the Commission may impose on the transmission system operator in relation to the role of –

(I) system operator, or

(II) market operator;

(e) to develop, adhere to, maintain and review, modify and publish procedures for the use of interconnectors with other systems;

(f) to provide to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient operation, co-ordinated development and inter-operability of the interconnected system;

(fa) to provide all those using and seeking to use the transmission system with the information they need, on a timely basis, for efficient access to the transmission system;

(g) otherwise to comply with any other regulation or directions applicable to it made by the Commission under these Regulations or under the Act of 1999;

(h) to charge for the connection to and use of the transmission system in accordance with Section 35 of the Act of 1999 and these Regulations; and

(i) to offer terms and enter into agreements, where appropriate, for connection to and use of the transmission system with all those using and seeking to use the transmission system.”

Section 33 of the 1999 Act requires a Grid Code in relation to the transmission system to be published, subject to the approval of the CRU (“Grid Code”). The CRU may from time to time give directions in relation to the matters to be specified in the Grid Code. The Grid Code is a technical document which establishes the rules governing the operation, maintenance and development of the transmission system and sets out procedures governing the actions of all transmission system users. Certain provisions of the Grid Code, particularly those in relation to scheduling and dispatch, are governed jointly by EirGrid and SONI Limited, the TSO in Northern Ireland.

Pursuant to Section 34(1) of the 1999 Act, the TSO shall offer to enter into an agreement for connection or use of the transmission system with any person who makes an application for such. However, this is subject to compliance with the terms and conditions specified in directions given to the TSO by the CRU in relation to access to the transmission system. Notably, the CRU frequently exercises this power to issue directions in relation to connection policy.

Section 34(4) of the 1999 Act sets out the only circumstances where the TSO shall not be required to provide a connection offer including where: the CRU is satisfied that it is not in the public interest; to do so would be likely to be in breach of the 1999 Act, regulations made under the 1999 Act, the Grid Code or any licence or authorisation granted under the 1999 Act; or the applicant does not undertake to be bound by the Grid Code.

Section 34(3) further provides that an offer made to a person who does not hold a licence to generate or supply electricity under Section 14 of the 1999 Act or an authorisation to construct or reconstruct a generating station under Section 16 of the 1999 Act, shall be subject to the grant of a licence or authorisation to that person or that person becoming an “eligible customer”.

Following consultation with relevant stakeholders, the CRU issued a decision in relation to Enduring Connection Policy Stage One (ECP-1) on 27 March 2018. The CRU concluded that current connection policies were “no longer fit-for-purpose” and need to be re-set and the purpose of the decision is to conclude the first phase of CRU’s development of an enduring connection policy in Ireland. The decision includes a set of key policy decisions with the principal objective to allow projects which are “shovel-ready” to have an opportunity to connect to the network, along with laying the foundations for future, more regular batches of connection.

Transmission Charges

Section 35 of the 1999 Act governs charges for connection to and use of the transmission system. It requires that the TSO must prepare a statement setting out the basis upon which charges are imposed for use of and connection to the transmission system. The CRU may give directions to the TSO in respect of the basis for the charges. The TSO shall submit the statement to the CRU for approval and the statement shall not take effect until it is approved by the CRU subject to any modifications as the Commission considers appropriate.

Section 35(4) of the 1999 Act provides that a charge for connection to or use of the transmission system shall be calculated so as to enable the TSO to recover the appropriate proportion of the costs directly or indirectly incurred in carrying out any necessary works and a reasonable rate of return on the capital represented by such costs. The CRU shall determine what constitutes an “appropriate proportion” and a “reasonable rate of return”.

Transmission revenue is collected by the TSO and is distributed between the TSO and ESB in accordance with an infrastructure agreement between the parties pursuant to the 2000 Regulations.

5.2.2 Establishment of Transmission Charges and Terms of Service

Transmission Charges

As set out in 5.2.1 **Principal Laws Governing the Provision of Transmission Service, Regulation of Transmission Charges and Terms of Service**, above, the 1999 Act governs charges for connection to and use of the transmission system and approval by the CRU of such charges.

As part of its current transmission charging policy, the CRU implements a five-year price review regime which sets the transmission revenue that can be collected from transmission use of system customers during a given five-year period.

As part of the price review process the CRU considers business cases put forward by the TSO outlining its required spend in the upcoming five-year period and reviews the expenditure incurred during the previous five-year period to assess them for efficiency. Following this, the CRU publishes a consultation paper setting out the CRU’s proposals in relation to the level of revenue that should be recovered over the next five-year period and responses are welcome from the public. Following consideration of responses received during the consultation process, a final decision is published by the CRU. Within each price review period, the CRU sets the customer tariffs for use of transmission system on an annual basis to ensure the most up-to-date information is captured and to allow for adjustments to reflect over-recovery or under-recovery in previous tariff years.

The CRU sets the rate of return allowed to the transmission utilities of the course of a price review. This return, known as the “weighted average costs of capital” is set by the CRU with assistance from its economic advisors to allow the regulated company to make a fair but not excessive return on its capital investments over the price review period.

The current price review for electricity relates to the period from January 2016 to December 2020. This provides that transmission revenue is set at a level that would allow an efficient business to finance its activities and is determined by a combination of benchmarking against organisations in other countries and examining the specific underlying costs of the TSO and ESB.

Terms of Service

Pursuant to Section 34(2) of the 1999 Act the CRU may give directions to provide for: the matters to be specified in an agreement for connection to or use of the transmission system; the terms and conditions upon which an offer for connection to the transmission system is made; and the methods for determining the proportion of costs to be borne by each of the applicants for connection and the TSO. The CRU has utilised this power to approve the forms of agreement for

connection to or use of the transmission system that are required to be offered by the TSO to new and existing customers. Such forms of agreement if they are to be amended are subject to a public consultation process.

The terms and conditions relating to access to the transmission system are set out in a number of documents including the connection and use of system agreement, Grid Code, relevant CRU decisions and electricity licences and authorisations.

Challenge to a Decision of the CRU

As described in the regulatory process for setting transmission charges and terms of service set out above, both processes provide an opportunity for public comment during the consultation process.

An application for judicial review may be made in respect of decisions made by the CRU. Such an application must be made promptly and in any event within two months of the decision, or in certain cases, within three months. Under Section 32(2) of the 1999 Act, leave to bring a judicial review application will only be granted if the High Court is satisfied that there are substantial grounds for supporting the fact that the decision is invalid or that it ought to be quashed.

In relation to terms of service, pursuant to Section 29 of the 1999 Act, there is a non-judicial procedure to challenge certain decisions of the CRU. Two categories of person may appeal against a CRU decision to an appeal panel: (i) a person whose application for a licence or an authorisation is refused; or (ii) a person who is holder of a licence or an authorisation and who wishes to appeal against a decision of the CRU to modify the licence or authorisation concerned or to refuse to modify the licence or authorisation concerned. An appeal panel is constituted on a case-by-case basis by the Minister. A decision of the appeal panel may only be challenged by way of judicial review.^{5.2.3 Open Access Transmission Service}

Section 34(8) of the 1999 Act provides that the TSO must not discriminate unfairly between any person or classes of persons where providing for use of the transmission system or where offering terms for the carrying out of works for the purpose of connection to the transmission system.

As set out in **5.1.1 Principal Laws Governing the Construction and Operation**, there are very limited circumstances in which a TSO is not required to make a connection offer.

6. Distribution

6.1 Regulation of Construction and Operation of Electric Distribution Facilities

6.1.1 Principal Laws Governing the Construction and Operation of Electric Distribution Facilities

As is the case with generation and transmission, the distribution of electricity in Ireland is governed by the 1999 Act (as amended). The CRU grants a licence to a Distribution System Operator (“DSO”) under section 14(1)(g) of the 1999 Act. This licence is known as the DSO Licence and is the relevant approval needed to discharge the functions relating to the electricity distribution network in Ireland, including the construction and operation of distribution facilities and networks. Pursuant to section 14(2C) of the 1999 Act, only a subsidiary of the ESB may be granted a licence from the CRU to act as distribution system operator. The subsidiary which has been granted the DSO Licence by the CRU is ESB Networks Designated Activity Company (“ESBN”). Accordingly, it is ESBN acting as the DSO which is responsible for the construction and operation of the distribution system.

Details of other approvals required are set out across a number of sources including the DSO Licence and the Distribution Code, which are discussed in Q31.

Holders of electricity generation licences may also make a request to the DSO to construct certain parts of the grid connection works connecting to the distribution “contestably” under their distribution grid connection agreement with ESBN. Such contestable works must be performed in accordance with ESBN’s specification. A similar right exists in respect of transmission grid connection agreements.

6.1.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Distribution Facilities

The process for the approval of the DSO Licence is covered above in **6.1.1 Principal Laws Governing the Construction and Operation of Distribution Facilities**. Other necessary considerations and requirements relating specifically to planning, construction and operation of facilities are set out within the DSO Licence and separately, the Distribution Code. The CRU has extensive powers to issue directions in relation to these approvals and rules.

DSO Licence

ESBN’s functions under the DSO Licence include planning, construction, maintenance, operation, metering of customer end-use and provision of data to electricity supply companies.

Focusing on construction of facilities – Condition 11 of the DSO Licence – provides that ESBN must operate and develop

the distribution system in accordance with the Distribution System Security and Planning Standards. These standards aim to ensure that the distribution system is developed in an orderly and cost-effective manner in order to deliver a safe, secure and reliable distribution system having due regard to the environment. Again, the CRU retains ultimate regulatory/supervisory authority, with Condition 11.5 providing that the CRU may issue directions requiring ESBN to revise the Distribution System Security and Planning Standards.

Condition 14 of the DSO Licence stipulates that ESBN must maintain a code of practice in relation to access to land and/or premises which must be followed by any person acting on its behalf.

Distribution Code

ESBN are required to maintain a separate distribution code governing the technical aspects relating to connection to and operation of the Irish electricity distribution system, in accordance with Section 33 of the 1999 Act. Again, this distribution code is subject to the approval of the CRU. It is divided into five parts, covering the legal framework (the distribution general conditions), planning and design requirements (the distribution planning code), technical details (distribution connection conditions), operational matters (distribution operating code) and data requirements (the distribution data registration code).

At a high level, there are various steps involved including acquiring an ordnance survey map and site plan of the relevant site, completing an application form and returning this application form with the relevant payment amount. Note that connection applications under the new grid connection policy (ECP-1) have closed recently and so we understand that new connection applications are not being accepted as at the time of writing.

6.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate

As stated in Section 14 of the 1999 Act, the licences for construction and operation of electric distribution facilities are subject to such terms and conditions as may be specified in the DSO licence.

Part one of the DSO Licence deals with terms. Part two deals with conditions, with 35 conditions listed in total. It is generally required that the ESBN's actions under these conditions must be approved by the CRU.

Condition 1 is an interpretative provision, which also clarifies that reference to the "Board" refers to the ESB.

Condition 2 deals with connection to and use of the distribution system, noting that the ESBN shall comply with any directions or determinations given to it by the CRU.

Condition 3 governs what the operation agreements in place should aim to achieve, including to promote efficient running of the distribution system; operation agreements must be approved by the CRU before they can be entered into.

Condition 4 notes that the ESBN can procure assets and services that are necessary to discharge its obligations under the 1999 Act.

Condition 5 requires that the ESBN maintain a register of all relevant assets, and that these assets will not be disposed or relinquished if it would adversely affect the activities of ESB in relation to the distribution system.

Condition 6 details the procedure for disposal of assets or if they are to be used for an additional purpose.

Condition 7 ensures that the ESB must take all reasonable steps to prevent and detect the theft of electricity or interference with metering equipment. It provides that the ESB must prepare a code of practice for revenue protection and detail the procedure used to ensure the accurate recording of electricity consumption and production.

Condition 8 is a provision relating to meter registration and the Meter Point Registration Service that ESBN must establish.

Condition 9 details the services that ESBN must provide to customers, suppliers and the TSO, including the provision of metering and data services.

Condition 10 states that, if requested, the ESBN must prepare a capacity statement which must include details of present and future circuit capacity, forecast power flows and loading on the part or parts of its distribution system specified in the request.

Condition 11 provides that the ESBN must prepare a document outlining distribution system security and planning standards in consultation with the TSO which must then be approved by the CRU. The ESBN shall be responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in accordance with these standards.

Condition 12 outlines the ESBN's duty in relation to non-discrimination.

Condition 13 details the report that the ESBN must prepare for measuring performance of the distribution business and the standard that it should impose to ensure that performance targets are met.

Condition 14 requires that a code of practice is prepared by ESBN in relation to access to land and/or premises.

Condition 15 requires that a customer service code and complaints handling procedure is prepared by ESBN.

Condition 16 provides that the codes detailed at Condition 7, 14 and 15 (as well as any procedures) must be complied with and must be periodically reviewed, including at the request of the CRU. No changes can be made to codes or procedures otherwise than in accordance with Condition 16.

Condition 17 outlines ESBN's obligation to keep a record of its general operation of the arrangements mentioned in Conditions 7, 8, 9, 13, 14 and 15.

Condition 18 gives detail in relation to the separation of the distribution business from all other ESB entities, affiliates or shareholders in order to maintain the full managerial and operational independence of the DSO, as required by the 1999 Act.

Condition 19 relates to the rules around the accounts and account reporting for the distribution business.

Condition 20 prohibits the ESBN from giving any direct or indirect subsidies or cross-subsidies to any affiliate, related undertaking or shareholder of ESBN.

Condition 21 gives detail on the procedure for the handling of commercially sensitive or confidential information.

Condition 22 relates to the payment by ESBN to the CRU of levies determined under a levy order. This is an order made by the CRU under paragraph 16 of the Schedule 1 to the 1999 Act, which is imposed for the purpose of the CRU recouping expenses incurred in the discharge of its functions under the 1999 Act.

Condition 23 states that the ESB must comply with any public service obligation (“PSO”) imposed on it by the CRU. PSOs are obligations that relate to the general public interest and under Section 39 of the 1999 Act. PSOs in this context may include obligations relating to (i) security of supply, (ii) regularity, quality and price of supplies, (iii) environmental protection, and (iv) use of indigenous energy sources.

Condition 24 provides that the ESBN shall furnish to the TSO any information that may be reasonably required to ensure the secure and efficient operation, co-ordinated development and inter-operability of the distribution and transmission systems.

Condition 25 provides that the ESBN shall procure and furnish such information that the CRU may consider relevant in light of these conditions or for the purpose of carrying out its own assigned functions.

Condition 26 relates to the ESBN’s obligation to adopt and comply with the distribution code.

Conditions 27 and 28 relate to the ESBN’s obligation to comply with any applicable provisions of the grid code and the trading and settlement code, respectively.

Condition 29 relate to the ESBN’s obligation to comply with any applicable Irish and EU laws. This includes any legislative provision, common law, order, direction, licence, decision, rule or code. This condition also requires ESBN to keep a record of its compliance, and establishes that any cost associated with compliance shall be the responsibility of the licensee.

Condition 30 requires the ESBN’s compliance with all applicable Irish and EU environmental laws.

Condition 31 details the health and safety requirements required of the ESBN. The ESBN must take all reasonable steps to protect persons and property from injury or damage that may be caused in the course of the operation of the distribution business.

Condition 32 places an onus on the ESBN to act at all times in a manner calculated to secure that it has sufficient

resources to enable it to carry on the distribution business and to comply with its associated obligations.

Condition 33 states that the CRU will decide on any dispute that arises between the DAO (ESB) and the DSO (ESBN).

Condition 34 outlines the ESBN’s obligation to establish a “retail market code” in relation to the operation of the electricity retail market.

Finally, Condition 35 outlines that the ESBN shall prepare and submit to the CRU for approval a plan to be called the “retail market system development plan”, for the development of the retail market systems over five calendar years. This must be revised and approved annually in order that the information will continue to be accurate in all material respects.

The conditions in the DSO Licence are subject to modification or amendment in accordance with Sections 14(3), 14(6) (a) and 19 of the 1999 Act. The procedure to follow before a modification can be made is set out at Section 20 of the 1999 Act.

In relation to grid connection agreements for connecting generation facilities to the distribution system, the terms and conditions of the agreement consist of a connection agreement and a set of general conditions. The connection agreement and general conditions are subject to public consultation and are amended from time to time.

6.1.4 Proponent’s Eminent Domain, Condemnation or Expropriation Rights

Section 45 of the 1927 Act allows the ESB certain statutory compulsory purchase order (CPO) powers by issuing an order. Where an order has been made, the necessary land rights can be exercised subject to providing one month’s notice, or in relation to an occupied dwelling house, three months’ notice in writing specifying the details of the rights intended to be acquired; see Section 17 of the Electricity (Supply) (Amendment) (No 2) Act, 1934. Compensation will be determined by reference to the Acquisition of Land (Assessment of Compensation) Act, 1919 or, more likely in practice, by mutual agreement. Section 53 of the 1927 Act allows for the placing of electrical lines “above or below ground across any land not being a street, road, railway or tramway”. Section 51 of the 1927 Act allows the ESB to break up any street, road, railway or tramway for the purpose of laying electrical lines. It is possible also of course for any necessary land rights to be obtained by agreement with the relevant land-owners. 6.1.5 Distribution Service Monopoly Rights

Pursuant to Section 14(2C) of the 1999 Act, only a subsidiary of the ESB may be granted a licence from the CRU to act as distribution system operator (“DSO”) in Ireland, meaning

that entity (currently ESBN) maintains a monopoly over the operation of the distribution system. Please note that this excludes Northern Ireland, which has a separate distribution system operator licensed by the regulator in Northern Ireland.

6.2 Regulation of Distribution Service, Charges and Terms of Service

6.2.1 Principal Laws Governing the Provision of Distribution Service, Regulation of Distribution Charges and Terms of Service

The 1999 Act governs the provision of the distribution service, and ESBN and CRU are the relevant bodies. ESBN prepares the distribution charges in accordance with Section 35 of the 1999 Act, and as part of its functions listed in Section 9(dc) and Section 35 of the 1999 Act, the CRU can review and issue directions to the ESBN in respect of these charges. This process is outlined below in **6.2.2 Establishment of Distribution Charges and Terms of Service**.

6.2.2 Establishment of Distribution Charges and Terms of Service

Transmission and distribution charges account for approximately 29% of the overall cost of electricity in Ireland. Section 35 of the 1999 Act sets out the principles for establishing distribution system charges. It provides that the ESB must prepare a statement setting out the basis upon which charges are imposed for connection to and use of its distribution system. The CRU may give directions from time to time in respect of the basis of such charges. This can include directions relating to the methods, the form of charging, the form and extent of information that the ESB must provide, and other procedural aspects.

Pursuant to Section 35(4), the charges for connection to and use of the distribution system are calculated so as to enable the ESB to recoup an appropriate proportion of the costs directly or indirectly incurred in carrying out any neces-

sary works, and a reasonable rate of return on the capital represented by such costs. It is solely the CRU that determines what constitutes an “appropriate proportion” and a “reasonable rate of return”. The CRU then approves the ESB statement of charges in accordance with Section 36 of the 1999 Act.

Another important aspect of the determination of distribution charges is the CRU’s “price review in electricity”. The CRU conducts a periodic revenue review every five years to determine the revenues that the ESB may collect from electricity customers in order to cover the cost of providing the network and earn a fair return on the capital invested in the business. The current review covers the period 2016 to 2020 and sets out the total allowed revenues over that period. The CRU sets the amount of revenue by examining both the specific underlying costs of the ESB and its efficiency, and benchmarking against international companies in this field. It considers the business case put forward by ESBN which outlines its spending, as well as seeking the views of the public. The process is quite transparent and all associated submissions are published on their website. The approved revenue for the ESB is collected from suppliers via a distribution use of system charge (DUoS) per unit of electricity that they buy, which is then passed on to final customers in their electricity bills.

The appeal process to challenge CRU decisions in relation to setting rates is derived from Section 29 of the 1999 Act. The ESB can request the establishment of an appeal panel against the decision by the Minister for Communications, Climate Action and the Environment, in consultation with the Competition and Consumer Protection Commission. All appeals are determined within six months.

Finally, Section 34(8) of the 1999 Act provides that the ESB shall not discriminate unfairly between persons or classes of persons when providing for use of the distribution system or where offering terms for the carrying out of works for the purpose of connection to the distribution system.

Matheson

70 Sir John Rogerson’s Quay
Dublin 2
Ireland

Tel: 00 353 1 232 2000
Email: Garret.farrelly@matheson.com
Web: www.matheson.com

The logo consists of the word "Matheson" in a white serif font, centered within a solid black rectangular box.