

GETTING THE DEAL THROUGH

Electricity Regulation

in 31 jurisdictions worldwide

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Policy

- 1** What is the governmental policy and legislative framework for the electricity sector?

Overall policy responsibility for the sector lies with the minister for communications, energy and natural resources. In this capacity, the minister is advised by a range of other statutory bodies including the Commission for Energy Regulation (CER) and Sustainable Energy Ireland (SEI).

The principal legislation governing the electricity industry in the Republic of Ireland is the Electricity Regulation Act 1999, as amended (1999 Act), which provides for the establishment of a regulatory framework for the introduction of competition in the generation and supply of electricity in the Republic of Ireland and established the CER as the national regulatory authority responsible for overseeing the liberalisation of Ireland's energy sector and granting licences for the generation, transmission, distribution and supply of electricity.

Government policy in the Irish electricity sector is driven principally by the relevant EC directives. The European Communities (Internal Market in Electricity) Regulations 2000 (the 2000 Regulations) completed the transposition of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (Directive 96/92/EC). The European Communities (Internal Market in Electricity) Regulations 2005 (the 2005 Regulations) were promulgated to transpose the requirements of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (Directive 2003/54/EC).

The Irish electricity sector has undergone fundamental reform with the establishment on 1 November 2007 of a single electricity market (SEM) encompassing the Republic of Ireland and Northern Ireland. Key characteristics of the SEM include a gross mandatory pool with central commitment, a single system marginal price and the introduction of transmission-constraint payments and capacity payments. The Energy (Miscellaneous Provisions) Act 2006 and the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007 provide the legal basis for the SEM in Ireland, including establishment of a SEM Committee in the CER.

A March 2007 government white paper, *Delivering a Sustainable Energy Future for Ireland*, proposes future development of the energy sector for 2007 to 2020 around the central pillars of increasing security, sustainability and competitiveness of energy supply.

Organisation of the market

- 2** What is the organisational structure for the generation, transmission, distribution and sale of power?

Ireland is in the process of liberalising its energy sector and significant steps have been taken at a regulatory level to facilitate competition in generation and supply. In practice, however, this has not translated into significant numbers of new market entrants. The current state of the market is as follows:

- **Generation:** full competition has been introduced in the generation sector in Ireland. However, the dominant state-owned incumbent Electricity Supply Board (the ESB) still owns or controls a substantial majority of installed generating capacity. Much of the independently owned generation in Ireland has been contracted to the ESB through a range of government-sponsored support mechanisms for renewable energy, indigenous fuel sources and additional capacity for security of supply. The latest renewable energy support programme does, however, support electricity suppliers other than the ESB in purchasing electricity generated by renewable sources and the government white paper of 2007 includes the aim of reducing the ESB's market share to 40 per cent in generation in an all-island (Republic of Ireland and Northern Ireland) context by 2010. The only large-scale independent power plants not contracted to the ESB and supported by public service obligation levies are the Viridian-owned 343MW CCGT Huntstown Power Plant and the 401MW CCGT Huntstown Phase II Power Plant (commissioned in 2002 and 2007 respectively). Various actors have recently indicated an intention to enter the market, the most significant of which is Bord Gáis Éireann, with its plans for a 445MW CCGT generation station at Whitegate, County Cork.
- **Transmission:** the transmission system is owned by the ESB. On 1 July 2006, a newly established independent state-owned company, EirGrid, took over the role of transmission system operator (TSO) and market operator. Pursuant to section 14(2A) of the 1999 Act, only EirGrid may be granted a licence as TSO, and pursuant to section 14(2B) of the 1999 Act, only the ESB may be granted a licence as transmission asset owner.
- **Distribution:** the distribution system is owned and operated by the ESB. Pursuant to section 14(2C) of the 1999 Act, only the ESB may be granted a licence as distribution system operator (DSO). The government aims to effect the legal unbundling of the ESB DSO and to require it to operate under a risk-related rate of return with savings from lower network tariffs and shareholder dividends being passed to final customers.

- Supply: full retail contestability was introduced on 19 February 2005. Customers do not have to change from the ESB Public Electricity Supplier, but a significant number of larger customers have chosen to do so, with Energia (a Viridian Group subsidiary), Airtricity, ESB Independent Energy and Bord Gáis Éireann being active in this market. No independent suppliers offer electricity to residential customers.

Regulation of electricity utilities – power generation

- 3** What governmental or administrative authorisations are required to construct and operate generation facilities?

The key administrative authorisation required to construct a generation facility is an authorisation to construct or reconstruct a generating station issued by the CER pursuant to section 16 of the 1999 Act. The criteria to which the CER may have regard in determining an application for such an authorisation are prescribed under the Electricity Regulation Act 1999 (Criteria for Determination of Authorisations) Order 1999 (SI No. 309 of 1999) and the 2005 Regulations (the latter amending section 18 of the 1999 Act). Other authorisations such as planning permission are also required.

The key administrative authorisation required to operate a generation facility is a licence to generate electricity issued by the CER pursuant to section 14(1)(a) of the 1999 Act. Other operational permits such as an integrated pollution prevention and control licence are also required.

The CER may modify licences or authorisations with or without the consent of the holder. Standard-form licences and authorisations have been published by the CER. On 30 August 2007, the CER published simplified authorisation and licensing procedures for generators with capacities less than 1MW and less than 10MW.

- 4** What are the policies with respect to interconnection of generation to the transmission grid?

In accordance with Directive 2003/54/EC, the 1999 Act requires the TSO to offer transparent and non-discriminatory terms for connection to and use of the transmission system. The CER may issue directions to the TSO specifying connection terms from time to time, including in relation to matters to be specified in a connection agreement or use of system agreement, the terms and conditions of a connection offer, the manner in which costs will be shared between the TSO and connection applicants and the time for making or refusing to make a connection offer.

As a result of a number of CER directions, Ireland now operates a shallow connection charging policy and, to give an incentive to the TSO to complete the necessary deep reinforcement works, generators are granted 'deemed firm' access to the system after prescribed time periods after which the generators will be paid constraint payments if they are constrained off.

A Grid Code was submitted by the ESB, approved by the CER pursuant to the 2000 Regulations in 2001, and recently amended in preparation for the SEM. A Distribution Code was submitted by the ESB and approved by the CER in 2000. In 2004, the CER also approved a separate operating code within the Grid Code which is only applicable to wind generators, with a view to addressing technical difficulties in connecting wind to the grid. In 2006, the CER directed the TSO to postpone dealing with new connection applications until after it had dealt with applications in respect of 1,300MW of wind energy. Completion of processing of these applications is expected by the end of 2007.

- 5** Does the governmental policy or legislation foster power generation based on alternative energy sources such as renewable energies or combined heat and power?

The 1999 Act requires the minister and the CER, when carrying out their duties, to have regard to the need to promote the use of and support research and development in relation to renewable, sustainable or alternative forms of energy. Examples of support for generation based on alternative energy sources such as renewable energies or combined heat and power include:

- Renewable Energy Feed in Tariff (REFIT): in 2006 the Department of Communications, Marine and Natural Resources (DCMNR) (now Department of Communications, Energy and Natural Resources (DCENR)) published terms and conditions for participation in REFIT, a €119 million programme to support construction of in excess of 400MW of renewable generation from 2006 to 2010. The programme supports electricity generation powered by biomass, hydropower or wind and follows on from the six alternative energy requirement (AER) programmes, which began in 1993. REFIT differs from the AER programmes in that it involves a fixed 'feed in' support for each technology rather than least cost support determined by competitive process. For the first time, the purchase price of the electricity can be negotiated between generators and suppliers, and suppliers other than ESB are entitled to financial support to purchase electricity generated.
- Group processing: to facilitate processing of applications for connection of wind generation to the grid, in 2006 the CER directed system operators to process 1,300MW of such applications in two batches, collectively known as 'Gate 2'. Following the expected completion of the rollout of Gate 2 offers by December 2007, the CER envisages further batch processing under 'Gate 3'.
- Planning: the Planning and Development (Strategic Infrastructure) Act 2006 amends the Planning and Development Act 2000 so that planning applications for wind farms with more than 50 turbines or an output of greater than 100MW may be made directly to An Bord Pleanála (the Planning Board, which otherwise hears appeals) (rather than local authorities) if the board considers that the project is of strategic, economic or social importance; contributes substantially to fulfilling the National Spatial Strategy or regional planning guidelines; or would have a significant effect on the area of more than one planning authority. In addition, new Wind Energy Development Guidelines for Planning Authorities were issued in 2006 by the minister for the environment, heritage and local government.
- Priority dispatch: the 1999 Act requires the TSO to give priority to generating stations using renewable, sustainable or alternative energy sources.
- CHP: since 2003, CHP suppliers have been required to balance only 95 per cent of their demand in their first year of trading, allowing a 5 per cent margin of error in recognition of the difficulty of balancing a supplier's demand on a certain date at a certain time. CHP generators are required to balance 92 per cent of their rated capacity of sales to CHP suppliers with its CHP tradeable quantity, again recognising a CHP generator's outage probability. Innovative schemes in CHP may apply for support under a capital grants scheme rolled out in 2006.

Regulation of electricity utilities – transmission

- 6** What governmental or administrative authorisations are required to construct and operate transmission networks?

The key administrative authorisation required to operate a transmission network is a licence to discharge the functions of the TSO in accordance with the 2000 Regulations, issued by the CER pursuant to section 14(1)(e) of the 1999 Act. Pursuant to section 14(2A) of the 1999 Act only EirGrid may be granted a licence as TSO.

The key administrative authorisation required to construct a transmission network is a licence to discharge the functions of the transmission asset owner in accordance with the 2000 Regulations, issued by the CER pursuant to section 14(1)(f) of the 1999 Act. Pursuant to section 14(2B) of the 1999 Act only the ESB may be granted a licence as transmission asset owner.

- 7** Who is eligible to obtain transmission services and what requirements must be met to obtain access?

Any person is entitled to apply to the TSO for connection to the transmission system, provided that if the person is not an eligible customer or does not hold a licence under section 14 of the 1999 Act or an authorisation to construct or reconstruct a generating station under section 16 of the 1999 Act, any offer from the TSO must be subject to the person becoming an eligible customer or obtaining a licence or authorisation.

The only circumstances in which the TSO can refuse to make a connection offer to an applicant are set out in section 34(4) of the 1999 Act and include: where the CER is satisfied that it is not in the public interest; where it would result in a breach of the 1999 Act, the Regulations made under the 1999 Act, the Grid Code or any condition of any licence or authorisation; or where the applicant does not undertake to be bound by the terms of the Grid Code.

Following consultation with the TSO and DSO, the CER issued a decision on 6 October 2004 in relation to the terms for connection to and use of the transmission and distribution systems. Key features of the decision are that:

- subject to certain limited exceptions, all connection offers shall be made within 70 business days of receipt of a complete application and all connection offers shall be valid for a period of 70 business days; and
- all connection applicants shall be required to post a capacity bond of €10,000 per MW as a condition precedent to offer acceptance.

- 8** Are there any governmental incentives to encourage expansion of the transmission grid?

Given that the ownership and operation of the transmission grid in Ireland is not open to competition, no such governmental incentives exist. An 'All-Island Grid Study' focusing on development of the grid for optimal fuel diversity is currently under way.

- 9** Is there any tariff or other regulation regarding the rates and terms for the provision of transmission services?

Charges for connection to and use of the transmission system are determined by the CER pursuant to section 35 of the 1999 Act on the basis of statements prepared for the approval of the CER by the ESB. Pursuant to section 34(1) of the 1999 Act, the ESB

must also comply with directions of the CER in relation to the terms and conditions of connection to and use of the transmission system. A person who is entitled to access, or claims to be entitled to access, to the transmission system may dispute the terms of any connection offer or proposed charges pursuant to section 34(6) of the 1999 Act by bringing the dispute before the CER, and the ESB is bound by any determination of the CER in this regard.

- 10** Which entities are responsible for assuring reliability of the transmission grid and what are their authorities and responsibilities?

Under regulation 8 of the 2000 Regulations, the TSO has the exclusive function of operating and ensuring the maintenance of and, if necessary, developing a safe, secure, reliable, economical and efficient electricity transmission system. This includes the TSO planning for the long-term ability of the transmission system to meet reasonable demands for the transmission of electricity and contributing to the security of supply through adequate planning and operation of transmission capacity and system reliability.

Under regulation 18 of the 2000 Regulations, the TSO and transmission system owner shall enter into an infrastructure agreement, which shall among other things provide for the maintenance and development of the transmission system. The Infrastructure Agreement between EirGrid and ESB was approved by the CER and came into effect in 2006. There are conditions in the respective licences granted by the CER to the TSO and transmission system owner relating to the reliability of the transmission grid and these conditions can be enforced by the CER.

Under condition 15 of the TSO licence, the TSO shall, following consultation with the distribution system operator and the transmission system owner, establish transmission system security and planning standards which are subject to the approval of the CER. The TSO shall be responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in accordance with such standards.

Under condition 8 of the TSO licence, the TSO shall prepare a development plan for the development of the transmission system in order to guarantee security of supply for the following five calendar years, such plan being revised annually and subject to CER approval.

Under regulation 28 of the 2005 Regulations, the CER is under a duty to monitor security of supply of electricity which includes the monitoring of the quality and level of maintenance of the transmission networks and taking such measures as it considers necessary to protect security of supply.

Regulation of electricity utilities – distribution

- 11** What governmental or administrative authorisations are required to construct and operate distribution networks?

The key administrative authorisation required to construct or operate a distribution network is a licence to discharge the functions of the distribution system operator issued by the CER pursuant to section 14(1)(g) of the 1999 Act. Pursuant to section 14(2C) of the 1999 Act, only the ESB may be granted a licence as distribution system operator.

- 12** Who is eligible to obtain access to the distribution grid and what requirements must be met to obtain access?

Any person is entitled to apply to the ESB for connection to the distribution system, provided that if the person is not an eligible customer, does not hold a licence under section 14 of the 1999

Act or an authorisation to construct or reconstruct a generating station under section 16 of the 1999 Act, any offer from the ESB must be subject to the person becoming an eligible customer or obtaining a licence or authorisation.

The only circumstances in which the ESB may refuse to make a connection offer to an applicant are set out in section 34(4) of the 1999 Act and include where the CER is satisfied that it is not in the public interest; where it would result in a breach of the 1999 Act, the Regulations made under the 1999 Act, the Distribution Code or any condition of any licence or authorisation; or where the applicant does not undertake to be bound by the terms of the Distribution Code.

13 Is there any tariff or other regulation regarding the rates or terms for the provision of distribution services?

Charges for connection to and use of the distribution system are determined by the CER pursuant to section 35 of the 1999 Act on the basis of statements prepared for the approval of the CER by the ESB. From 2006, customers are charged 50 per cent of the cost of connection to the distribution system. The remaining 50 per cent is collected from the general customer through Distribution Use of System tariffs. Pursuant to section 34(1) of the 1999 Act, the ESB must also comply with directions of the CER in relation to the terms and conditions of connection to and use of the distribution system. A person who is entitled to access to, or claims to be entitled to access to, the distribution system may dispute the terms of any connection offer or proposed charges pursuant to section 34(6) of the 1999 Act, and the ESB is bound by any determination of the CER in this regard.

Regulation of electricity utilities – sales of power

14 What governmental or administrative authorisations are required for the sale of power to customers and which authorities grant such approvals?

The CER has the authority under the 1999 Act to grant three different licences to supply electricity to customers:

- a licence to supply eligible customers under section 14(1)(b);
- a licence to supply all final customers with electricity from 'green' sources under section 14(1)(c); and
- a licence to supply all final customers with electricity produced using combined heat and power under section 14(1)(d).

15 Is there any tariff or other regulation regarding power sales?

There is a tariff on electricity supplied by the ESB public electricity supplier (PES), which supplies the franchise market, namely, customers that have chosen not to change supplier. In line with governmental policy to reduce ESB PES's share in competitive sectors of the retail electricity market, in 2006 the CER ended tariff regulation for a sector of the large industrial market. Under the 2005 Regulations, conditions of a PES licence shall include conditions relating to the terms for the supply of electricity and require that the PES meet all reasonable requests to supply electricity. The CER may invite expressions of interest from licensed suppliers to act as supplier of last resort and, subject to public consultation, may designate the PES as the supplier of last resort. In designating a supplier of last resort, the CER may include terms and conditions in respect of the duration of supply, termination of supply, price, charging methodology and any other

matters which the CER considers necessary for the purpose of the supply of electricity to a final customer by the supplier of last resort. The CER appointed ESB PES (known as ESB Customer Supply) as supplier of last resort in the SEM.

16 To what extent are electricity utilities that sell power subject to public service obligations?

The minister may direct the CER to impose public service obligations in relation to the security of supply, regularity, quality and price of supplies, environmental protection (including energy efficiency and climate protection) and use of indigenous energy sources on the ESB or holders of licences to generate or to supply electricity. Extensive use has been made of this power with public service obligations imposed in relation to renewable support, indigenous fuel sources and for security of supply. To date, only the ESB has been subject to public service obligations.

Regulatory authorities

17 Which governmental or administrative authorities determine regulatory policy with respect to the electricity sector?

Overall policy responsibility for the electricity sector lies with the minister. However, responsibility for day-to-day regulation of the sector rests with the CER. In the context of the SEM, the CER is required to liaise closely with its counterpart in Northern Ireland, the Northern Ireland Authority for Utility Regulation.

18 What is the scope of each regulator's authority?

The CER's roles include establishing arrangements for trading in electricity, determining electricity tariffs, issuing licences and authorisations, approving terms of access to the distribution and transmission systems and resolving disputes in respect of the same, advising the minister on the effect of electricity generation in relation to sustainability and international agreements and the development of the electricity industry, promotion of competition and renewable energy generation, ensuring security of supply and protecting the interests of final customers. Recent amendments to the 1999 Act give the CER power to take all actions it considers necessary to participate in the SEM and provide for the CER's objectives and functions as they relate to the SEM.

19 How is each regulator established and to what extent is it considered to be independent of the regulated business and of elected officials?

The CER is the independent national regulatory authority and is entirely independent of the ESB. However, the minister retains certain reserve powers to give directions to the CER. These include directions in respect of the criteria in accordance with which an application for an authorisation may be determined by the CER, public service obligations which the CER is required to impose on licence and authorisation holders and the definitions of combined heat and power, and renewable, sustainable or alternative sources of energy.

20 To what extent can decisions of the regulator be challenged or appealed, and to whom? What are the grounds and procedures for appeal?

Decisions of the CER on the granting of an electricity supply licence under section 14 or an authorisation to construct a generating station under section 16 of the 1999 Act, decisions of the

CER on modification of the terms of such a licence or authorisation already granted and determinations or directions made by the CER in respect of disputes regarding terms of access being made by the TSO or DSO can be appealed to the minister within 28 days of the making of the decision.

The minister must then set up an independent appeal panel which will have all the powers and duties of the CER that are necessary to carry out its function. The panel will have certain powers of the High Court in relation to production of documents and attendance of witnesses and may confirm the refusal to grant a licence or authorisation or direct the CER to grant a licence or authorisation with or without conditions. In the case of modification of a licence or authorisation the appeal panel may either confirm the modification or direct the CER not to make it.

Provision is also made for application for judicial review through order 84 of the Rules of the Superior Courts. Such an application must be made promptly or in any event within two months of the decision in question. The application for leave to apply for judicial review will only be granted if the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed. An application for judicial review may be made in respect of decisions of either the minister or the CER.

Acquisition and merger control – competition

21 Which governmental body or bodies have the authority to approve or disapprove mergers or other changes in control over businesses in the sector or acquisition of utility assets?

From 1 January 2003, mergers and acquisitions involving companies that conduct business on the island of Ireland and which fall within the terms of the merger provisions contained in the Competition Act 2002 must be notified to the Irish Competition Authority and may only be implemented following clearance from the Competition Authority.

22 What criteria and procedures are applied with respect to the review of mergers, acquisitions and other transfers of control? How long does it typically take to obtain a decision approving or disapproving the transaction?

The Competition Act provides that a merger or acquisition occurs if two or more undertakings, previously independent of one another, merge or one or more undertakings acquire control of another undertaking. The Competition Act also applies to certain asset acquisitions. The first two tests are modelled on the EC Merger Control Regulation. In addition, full-function joint ventures, namely, a joint venture that will perform on an indefinite basis all the functions of an autonomous economic entity, constitute a merger under the Competition Act.

A merger or acquisition is notifiable where, in the most recent financial year, the worldwide turnover of each of two or more of the undertakings involved is not less than €40 million, each of two or more of the undertakings involved in the merger or acquisition carries on business in any part of the island of Ireland and the turnover in Ireland of any one of the undertakings involved is not less than €40 million. Previously, the concept of 'carrying on business in the island of Ireland' caught many foreign to foreign transactions, but from 12 December 2006, the Competition Authority has operated a *de minimis* test so that only undertakings which have a physical presence in the island of Ireland coupled with any sales to customers located in the island of Ireland or undertakings which make sales of at least €2 million

to customers in the island of Ireland now satisfy the test. Mergers involving media businesses are subject to further notification requirements. The Competition Act also provides that mergers or acquisitions that do not satisfy the financial thresholds may nonetheless be notified to the Competition Authority voluntarily by any of the parties involved.

The obligation to notify arises when a merger or acquisition is agreed or will occur if a public bid that is made is accepted. If the transaction is notifiable, each of the undertakings involved must notify the Competition Authority within one month of the conclusion of the agreement or the making of the public bid. In general, a notification is made jointly by the undertakings involved.

The Competition Authority must issue a determination within one month after receipt of the notification or, where the Competition Authority requests information within the first month, one month after receipt of the requested information (this date is known as the 'appropriate date'). The time limit of one month is extended to 45 days where the parties submit proposals. The Competition Authority will publish its determination within two months of notification on its website with due regard for commercial confidentiality setting out its reasons to approve the transaction. If the Competition Authority cannot conclude at the end of the first phase that the transaction will not substantially restrict competition in goods or services in the state, the Competition Authority will carry out a full investigation leading to a second phase determination. This decision must be taken within four months of the appropriate date. An appeal on a point of fact or law may be taken to the High Court in relation to a second-phase determination prohibiting a merger or allowing it subject to conditions. An appeal may be taken from a decision of the High Court to the Supreme Court on a point of law only.

23 Which governmental or administrative authorities have the power to prevent or prosecute anti-competitive or manipulative practices in the electricity sector?

Competition law in Ireland is contained in the Competition Act and enforced through proceedings in the Irish courts. Proceedings may be taken by the Irish Competition Authority, the director of public prosecutions and private parties.

The Competition Authority can undertake investigations of suspected infringements of the Competition Act either on its own initiative or on foot of a complaint. The Competition Authority cannot take a binding decision of its own establishing an infringement of the Competition Act; rather, the Competition Authority must take either civil or criminal proceedings in the courts to establish an infringement of the Competition Act.

Under the 1999 Act, the CER must have regard to the need to promote competition in the supply of electricity. The CER must also monitor licensees to ensure that they conform to all conditions and requirements of their licences. Under the terms of the standard licence to supply electricity, a licensee, which is in a dominant position in the market for supply of electricity and which also has a generation business, is prohibited from giving or receiving cross-subsidies between the licensee's supply business and any other business of the licensee. A dominant supplier is also prohibited from predatory pricing or discrimination in supply. The standard licence to generate electricity also contains a prohibition on cross-subsidies and discriminatory pricing, which is applicable to licensees in a dominant position in the market for the generation of electricity.

The Competition Authority has entered into a cooperation agreement with the CER. The stated purposes of the agreement are to facilitate cooperation between the Competition Authority and the CER in the performance of their respective functions in so far as they relate to issues of competition between undertakings; to avoid duplication of activity by the Competition Authority and the CER; and to ensure as far as practicable consistency between decisions made or other steps taken by the Competition Authority and the CER.

24 What substantive standards are applied to determine whether conduct is anti-competitive or manipulative?

Irish competition law is modelled on European Community competition law. In particular, the competition rules contained in sections 4 and 5 of the Competition Act are based on articles 81 and 82 of the EC Treaty, respectively.

Section 4(1) of the Competition Act prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition in Ireland. Section 6 of the Competition Act provides that an undertaking that enters into or implements an agreement or decision or engages in a concerted practice that is prohibited by section 4(1) or article 81(1) of the EC Treaty shall be guilty of a criminal offence. However, an agreement that falls within section 4(1) but which satisfies certain conditions set out in section 4(5), which are the same as criteria set out in article 81(3) of the EC Treaty, is not prohibited.

Section 5(1) of the Competition Act prohibits the abuse by one or more undertakings of a dominant position in trade for any goods or services in Ireland or any part of Ireland. Section 7(1) provides that an undertaking that acts in a manner prohibited by section 5(1) or by article 82 of the EC Treaty, shall be guilty of a criminal offence. A dominant position is not defined in the Competition Act, although it has been interpreted by the Irish High Court, which has applied the test of dominance developed by the Court of Justice of the European Communities.

25 What authority does the governmental body have to preclude or remedy anti-competitive or manipulative practices?

The competition rules are enforced through proceedings in the Irish courts. The proceedings can be taken by the Competition Authority, the director of public prosecutions and private litigants. As noted above, the Competition Authority, unlike the European Commission for the purposes of the application of EC competition law, does not have the power to adopt its own binding decisions or to unilaterally imposed fines. This inability to impose a decision does not preclude the Competition Authority from investigating alleged infringements of competition law or from using their extensive powers of investigation which includes the ability to conduct unannounced visits to premises and private dwellings and the compelling of individuals to attend at the offices of the Competition Authority and to answer questions under oath.

The Competition Act introduced a distinction between certain types of agreements which may be taken to infringe section 4(1). The Competition Act created what is known as a 'hard-core' offence. The Competition Act provides that hard-core offences will be presumed to have as their object the restriction of competition unless the defendant can prove otherwise. Hard-core offences can attract the imposition of prison terms for a

maximum of five years, thus making such an offence arrestable.

In addition to prison terms on conviction on indictment of a hard-core offence, an undertaking may be liable to a penalty of up to €4 million or 10 per cent of its turnover in the last financial year. In relation to all other criminal offences an undertaking may be liable to a maximum fine of €3,000 on summary conviction or a maximum fine of €4 million or 10 per cent of the turnover in the last financial year on conviction on indictment. All other types of infringements of section 4(1) and section 5(1) may result in civil proceedings and criminal proceedings but cannot result in arrest or the imposition of prison terms.

The CER may direct the holder of a licence or authorisation to construct or reconstruct a generating station, or to take such measures as are necessary to cease the contravention of a condition or to prevent a future contravention.

International

26 Are there any special requirements or limitations on acquisitions of interests in the electricity sector by foreign companies?

There are no special requirements or limitations on acquisitions of interests in the electricity sector by foreign companies.

27 What rules apply to cross-border electricity supply, especially interconnection issues?

The only electricity interconnector between the island of Ireland and Great Britain is the 500MW DC Moyle Interconnector, which began operation in April 2002. Available capacity is offered in annual and monthly auctions. It is planned to have a new interconnector between Ireland and Wales. The transmission systems between Ireland and Northern Ireland are connected by a twin circuit 275kV AC connection, almost thirty miles in length. A second North-South circuit is currently under construction. Pursuant to recent amendments to the 1999 Act the CER may grant authorisations to construct an interconnector, with section 16(1) of the 1999 Act prohibiting construction of an interconnector unless an appropriate authorisation has been granted.

Capacity on the existing North-South circuit is auctioned annually, in 1MW tranches, by the transmission system operators in Ireland (EirGrid) and Northern Ireland (SONI). Successful bidders in the capacity auction pay a capacity charge for each MW tranche acquired based on the market clearing price for the auction, and are required to enter into an interconnector auction agreement with the ESB. Successful bidders that do not hold a licence under section 14 of the 1999 Act or a licence in Northern Ireland must apply to the TSO to become a party to the trading and settlement code. Only parties to the trading and settlement code may make nominations to the TSO.

In 2006 the CER directed changes to interconnector trading rules. Instead of capacity being allocated according to nominations made against long-term capacity entitlements, it is now allocated pro rata based on such entitlements.

Transactions between affiliates

28 What restrictions exist on transactions between electricity utilities and their affiliates?

Where the licensee is in a dominant position in the market for the supply of electricity and the licensee also owns a generation business, the standard electricity supply licence prohibits the giving or receiving of cross-subsidies between the licensee's business of the supply of electricity, authorised by the licence, and any other

business of the licensee or of an affiliate or related undertaking of the licensee.

Where the licensee is in a dominant position in the market for the generation of electricity, the standard electricity generation licence prohibits the giving or receiving of cross-subsidies between the licensee's business of the generation of electricity, authorised by the licence, and any other business of the licensee or of an affiliate or related undertaking of the licensee. General competition principles relating to transactions between dominant companies and affiliates are also relevant.

29 Who enforces the restrictions on utilities dealing with affiliates and what are the sanctions for non-compliance?

According to the 1999 Act, it is the responsibility of the CER to enforce the terms and conditions of a supply or generation licence. If the CER believes that the conditions of a licence are being contravened, it may in the first instance issue a direction to the licensee to refrain from specified practices and then apply to the High Court for an order requiring compliance with the direction.

If the CER decides not to issue a direction it may issue a determination that a licensee has committed a specified breach. Both directions and determinations in relation to contravention of licence conditions are to be notified to the licensee and published in a national newspaper. Ultimately, the CER has the power to revoke a licence if the licensee fails to comply with a direction, a determination or an order.

Update and trends

The reorganisation of the electricity sector to form a single electricity market across the island of Ireland continues to be the most significant recent development. Other trends and developments include:

- continued planning of new infrastructure including an East–West interconnector and a second North–South interconnector with Northern Ireland;
- government policy aimed at reduction of ESB's market share in generation, ESB PES market share in supply, and increased independence of the TSO; and
- industry plans for new conventional and renewable generation.

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