

# Power in The Wind

The Role of Law, Policy and Regulation in the Promotion and  
Development of Wind Energy: The Uncertain Pursuit of  
Ireland's 2020 Renewable Electricity Target as a Case Study

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## Declaration

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10 October 2017



# The Role of Law, Policy and Regulation in the Promotion and Development of Wind Energy: The Uncertain Pursuit of Ireland's 2020 Renewable Electricity Target as a Case Study

## Summary

Employing the uncertain pursuit of Ireland's 2020 renewable electricity target as a case study, this thesis examines the role of law, policy and regulation in the promotion and development of wind energy. Specifically, this thesis seeks to highlight, examine, and understand, the reasons why Ireland (a country with one of the best wind regimes in Europe), is facing difficult challenges in meeting its 2020 national renewable electricity target, with knock on consequences for its European Union (EU) target of 16% of gross final consumption of energy from renewable energy sources by 2020; and the possibility of incurring significant compliance costs (estimated at Euro 65m-150m), in respect of each percentage point by which Ireland misses the 16% figure.

Given the extent of EU policy and regulatory intervention aimed at securing specific renewable energy outcomes for individual Member States, the principal question posited in this thesis is how an ostensibly considered, detailed, all-embracing, and at times prescriptive body of EU legal instruments can potentially fail to secure, over a reasonable timeframe, what is on the face of it, a clearly defined purpose in one of the smallest, and most isolated energy markets in the EU. The answer to this question, it is submitted, does not lie in any uncertainty as to the scope of the overall purpose to be achieved. This thesis reveals that the answer lies in part, with innate, and fundamental flaws in the EU's legislative schemes for the promotion of renewable energy and market liberalisation; in part with the manner of transposition of those legislative schemes in Ireland; but for the most part, the answer lies first and foremost with acts, omissions and failings, on the part of the State, and key actors in the Irish electricity market motivated, in many instances, by purposes that have conflicted with renewable objectives; and secondly, with the conflict that has emerged between wind farm development and protection of the environment considerations. The detailed findings put forward in this thesis in support of this overarching conclusion can be summarised under four broad contributory factor headings namely: energy law and policy failings (chapters 1-3); regulatory action and inaction (chapters 3-5); subversion of energy policy (chapters 3-5); and the conflict between wind energy and protection of the environment considerations (chapters 6-7).

The nature of energy markets is such that it is impossible to give due consideration to or gain an understanding of many aspects of such markets, without recourse to economic and technical,

literature and data. However, notwithstanding the ineluctable incorporation of economic and technical shadings, the overall scheme and substance of this research and thesis is coloured predominantly by legal and policy perspectives. This thesis does not seek to question the correctness of an EU policy that seeks to pursue decarbonisation in the interests of climate change, or indeed an Irish policy that seeks to implement that policy through the preferment of wind generation. The focus of this thesis is to scrutinise the effectiveness of, and the role played by, law and regulation in securing the desired outcomes of that policy.

To track Ireland's progression towards its targets, it has been necessary to have recourse to various non-legal publications including publications of an economic, financial and technical nature, as well as a myriad of Irish and EU documents. Beyond this, much of the research for this thesis has involved reviewing and considering the substantial body of energy legislation, market rules, industry codes, regulatory decisions, and consultation papers that have emerged in the EU and Ireland since the EU's market liberalisation process commenced over 20 years ago. Electricity law is predominantly a creature of statute. Research has therefore focussed heavily on primary and secondary legislation, and the various EU Directives, Regulations, and Treaty provisions that underpin Irish domestic legislation. Despite the heavily regulated, complex and risky nature of the electricity market, the multiplicity of participants with competing interests, trades and opportunities for gain as well as loss, there has been a dearth of legal actions before the Irish courts on electricity related matters. There is however evidence that this is changing, and a body of case law is starting to emerge. This case law is examined with specific focus on the approach of the judiciary to this complex area where deference to regulators and expert bodies, is the accepted position. If historically there has been an absence of case law in the electricity sector, the same cannot be said about regulatory decisions, with determinations of the Commission for Energy Regulation (CER); and the all-island Single Electricity Market Committee (SEMC) dominating the legal and regulatory landscape. This research has focussed heavily on the processes leading up to key regulatory decisions, the decisions themselves; and in appropriate instances, judicial review proceedings. This thesis considers the principal question under a series of chapter titles. Areas where it is demonstrated that policy or law has been successful in furthering the position of wind energy are contrasted with areas where there has been less success, with a view to highlighting differences in approach or emphasis that may prove to be determinative in the final analysis.

Finally, this study is approached from the perspective and the experiences of someone who has been involved in the legal aspects of energy regulation and project development both domestically and internationally for over two decades and has had an active involvement in the development of the Irish electricity market since the commencement of liberalisation.

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My work on this thesis commenced under the careful supervision of Dr. Bilun Müller of Trinity College Dublin, and I am very grateful to her for her sincerity, reassurance, and support in the early stages of this journey. Following Dr. Müller's return to Germany, I was placed in the experienced and accomplished hands of Professor Alex Schuster, and I am eternally grateful to him for his guidance, patience, and constructive feed-back on my work as it progressed through many drafts towards completion.

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*For My Wife*  
*Caroline MC Garvey*



# Chapter 1: Introduction

*'Ignoranti quem portum nullus suus ventus est.'*<sup>1</sup>

## Power in the Wind

In the period from 2000 to 2015, the share of electricity derived from renewable sources in Ireland has risen from 4.8% to 25.3%.<sup>2</sup> The greater part of this increase can be attributed to the period since 2003, and to wind generated electricity specifically, which now accounts for 22.8% of the increase.<sup>3</sup> In 1990, wind generated electricity made no contribution to gross electricity consumed in Ireland; by 2000 it accounted for no more than 1%, but by 2015 it represented 21.1%.<sup>4</sup> Graphs illustrating the increase in installed wind generation capacity show a gradual upward trend commencing in the late 1990s; gaining a greater upward trajectory from the mid-2000s.<sup>5</sup> At the close of 2016, total installed wind generation capacity stood at 2,796 megawatts (MW).<sup>6</sup> If the success of deployment of wind generating assets in Ireland is measured by reference to the rate of installed capacity over time, then it is difficult to argue that Ireland's drive towards a sustainable and renewable future, has not been a successful one. A different, and somewhat more precise, yardstick is however employed in the measurement of success, or failure in this context namely, European Union (EU) mandated binding targets<sup>7</sup> for each Member State, including Ireland.

The First Renewable Energy Directive set indicative targets at a European Community (Community), and Member State level, for electricity produced from renewable energy sources in total electricity consumption by 2010.<sup>7</sup> At a Community level, the indicative target was 21%, while Ireland was set a target of 13.2%; a target that was met even if the Community did not meet its target.<sup>8</sup> The Second Renewable Energy Directive followed this duality of approach with two important changes; higher and more ambitious targets, that were binding at a Community, and

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<sup>1</sup>If one does not know to which port one is sailing, no wind is favourable' Seneca the Younger, *Epistulae Morales ad Lucillum*, no 71, sect 3; trans. Philip Gaskell, *Landmarks in Classical Literature* (Chicago Fitzroy Dearborn, 1999) 151.

<sup>2</sup> SEAI, *Energy in Ireland 1990-2015, 2016 Report* (November 2016) 32.

<sup>3</sup> In 2015 wind generated electricity accounted for over 80% of renewable electricity. See: SEAI, *Renewable Electricity in Ireland 2015-2016 Report* (August 2016) 3; and DCCA, *National Mitigation Plan* (July 2017) 37.

<sup>4</sup> SEAI (n 2).

<sup>5</sup> *ibid* 33.

<sup>6</sup>DCCA (n 3) 37. For up to date wind data see: EirGrid, *Smart Grid Dash Board* <<http://smartgriddashboard.eirgrid.com/#roi/wind>> accessed 14 March 2017.

<sup>7</sup> Council and Parliament Directive 2001/77/EC of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33, art 3.

<sup>8</sup> Government of Ireland, *National Renewable Energy Action Plan (NREAP)-Submitted under Article 4 of Directive 2009/28/EC* (2010) 5.

Member State level. Under the Directive, the overall Community target is for 20% of all energy (gross final consumption), to be derived from renewable sources by 2020.<sup>9</sup> The achievement of this target is supported by the imposition of individual binding targets on each Member State. Ireland must achieve 16% of gross final consumption of energy from renewable energy sources by 2020.<sup>10</sup> Separately by 2020, 10% of all transport energy must come from renewable energy sources.<sup>11</sup> The National Renewable Energy Action Plan (NREAP), prepared by Ireland pursuant to, and in the format required by, Article 4(1) of the Second Renewable Energy Directive, reflects the overriding binding target of 16%, and notes that it will be achieved by drawing on contributions from renewable energy in each of three sectors. Thus, three sub-targets for the share of energy from renewable sources in each of: electricity (40%) (RES-E Target); transport (10%) (RES-T Target); and heating (12%) (RES-H Target), consumed in 2020 are specified.<sup>12</sup>

Wind generated electricity has long been at the centre of Ireland's plan to meet the overall 16% EU binding target, and the non-binding domestic RES-E Target.<sup>13</sup> This thesis is solely focussed on Ireland's management of, and approach to, this wind energy aspect of the 2020 renewable target obligations.

## Outlining the Problem

The research for this thesis initially focussed on charting the course followed by Irish policy and law makers working under the pervasive umbrella of EU policy and law, with a view to garnering a better understanding of how they succeeded in creating an environment so conducive to the development of wind generation, against a background where, as recently as 1999, a single

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<sup>9</sup> Council and Parliament Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16, art 3(1) and Annex I. See also: Sarah White, Deputy Secretary General, DCENR, 'Meeting Ireland's Renewable Energy Targets' (16 April 2012) <<http://webcache.googleusercontent.com/search?q=cache:YsNGLmvG0KgJ:www.iiea.com/documents/sar-a-white-powerpoint+&cd=1&hl=en&ct=clnk&gl=ie>> accessed 7 September 2017.

<sup>10</sup> *ibid.* See also: DCENR, *Draft Renewable Electricity Policy and Development Framework-Draft Strategic Environmental Assessment Scoping Report 2016* <<http://www.dccae.gov.ie/en-ie/energy/consultations/Documents/24/consultations/Draft%20Strategic%20Environmental%20Assessment%20Scoping%20Report.pdf>> accessed 3 October 2017.

<sup>11</sup> *ibid.*

<sup>12</sup> Government of Ireland (n 8) 5-6. The RES-E Target of 40% (renewable electricity); and RES-H Target of 12% (heating), are not binding at an EU level. Ireland has adopted these sub-targets as a means to achieving the overall binding EU target of 16% of gross final consumption of energy from renewable energy sources by 2020. The RES-T Target of 10% (transport) is binding at an EU level.

<sup>13</sup> *ibid.* It is acknowledged that Ireland has one of the best wind regimes in Europe especially on the north and west coasts (See: Houses of the Oireachtas, Oireachtas Library and Research Service 'Wind Energy-How does it fit into Ireland's hope for a green future?' (2014) 3 Spotlight 6 <[http://data.oireachtas.ie/ie/oireachtas/libraryResearch/2014/2014-04-30\\_spotlight-wind-energy-how-does-it-fit-into-ireland-s-hope-for-a-green-future\\_en.pdf](http://data.oireachtas.ie/ie/oireachtas/libraryResearch/2014/2014-04-30_spotlight-wind-energy-how-does-it-fit-into-ireland-s-hope-for-a-green-future_en.pdf)> accessed 2 October 2017; and DCENR (n 10) 23-25.

vertically integrated undertaking, the Electricity Supply Board (ESB), held a virtual monopoly on the production, transmission, and supply of electricity in Ireland; and the level of installed wind powered generation was all but nominal.

With the passage of time however, a different narrative is beginning to emerge, and the final port of call for the current phase of Irish renewable energy policy now seems less certain. As the 2020 date for compliance with targets looms larger on the horizon, it is becoming apparent that there is a real possibility that Ireland will not meet its targets, and will incur very significant costs as a consequence.<sup>14</sup> It is notable that a similar picture is emerging in at least three other Member States.<sup>15</sup> By the end of 2015, renewable energy contributed 9.1% of energy consumption, against a 2020 target of 16% (a shortfall of 6.9%), whilst the share of electricity from renewable sources was 25.3%, against a 2020 target of 40% (a shortfall of 14.7%).<sup>16</sup> In 2015 over 80% of renewable electricity was wind generated.<sup>17</sup> Since the targets are based on gross final consumption of energy, they are not fixed and automatically adjust with consumption. Thus, between 2008 and 2012, gross final consumption of energy fell by 9.2%, mostly as a consequence of the economic crisis.<sup>18</sup> However, with recovery of the economy, the demand for energy has grown, and gross final consumption of energy in 2015 was 4.4% higher than in 2012.<sup>19</sup> Additional installed renewable energy plant is therefore required, and it is estimated that a wind generation build rate of 250-300 MW (or roughly 125 wind turbines), per annum is required to meet the 40% RES-E Target.<sup>20</sup> The per annum build rate has varied considerably since 2000, and whilst the overall

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<sup>14</sup> The European Commission has noted that a number of Member States including Ireland may have to look to co-operation mechanisms such as statistical transfers to secure target compliance. The Commission estimate that Ireland will miss its target by .5%. See: Commission 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions-Renewable Energy Progress Report' COM (2017) 57 final 9-10, 17. Domestic commentators seem less optimistic. One commentator has reported that experts believe the shortfall will be as wide as 3%. See: Simon Rowe, 'Ireland's race against time to avoid €360m EU renewables fine' *independent.ie* (14 June 2017) <<http://www.independent.ie/business/irelands-race-against-time-to-avoid-360m-eu-renewables-fine-35502638.html>> accessed 14 June 2017; and 'Paul O'Donoghue, 'Ireland is expected to miss its Renewables Target-and Cop a Multimillion Euro Bill' *the journal.ie* (February 11 2017)<<http://www.thejournal.ie/ireland-eu-2020-energy-fines-2-3231942-Feb2017/>> accessed 14 March 2017.

<sup>15</sup> The three Member States are Luxembourg, the Netherlands, and the United Kingdom: See Commission (n 14) 10; and O'Donoghue (n 14).

<sup>16</sup> SEAI (n 3) 3; and DCCAE (n 3) 37. At the end of 2015 Ireland's RES-H Target compliance stood at 6.5% against a 2020 target of 12%; while Ireland's RES-T Target compliance stood at 5.7% against a 2020 target of 10%. See: DCCAE (n 3) 37.

<sup>17</sup> SEAI (n 3) 3.

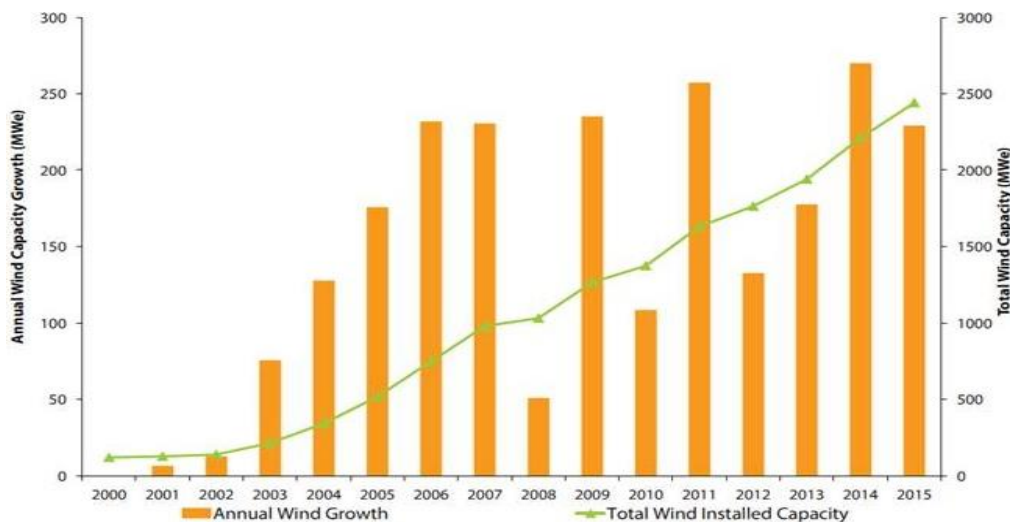
<sup>18</sup> *ibid* 10.

<sup>19</sup> *ibid*.

<sup>20</sup> *ibid* 14-15. DCCAE note in Ireland's National Mitigation Plan that there is a requirement to install between 780 MW and 1180 MW of renewable capacity if the 2020 RES-E Target is to be met, and that this will require an increased rate of installation (See: DCCAE (n 3) 37). The Climate Change Advisory Council notes that an additional 1,600 MW must be installed before 2020, and that an increased rate of installation is required (See: Climate Change Advisory Council, *Periodic Review Report 2017* (12 July 2017) 11.

trend is upward, it is notable that in 2015 (one of the highest years), new installed capacity was 229 MW. Whilst not insignificant, this is less than what is required if targets are to be met. The 2016 position shows evidence of improvement at 356 MW. At the other end of the spectrum, 2008 had one of the lowest build rates (less than 50 MW), a fact attributed by the Sustainable Energy Authority of Ireland (SEAI), to lack of finance, and uncertainty surrounding State aid clearance for the Renewable Energy Feed in Tariff (REFIT) Support Scheme.<sup>21</sup> If the pursuit of Ireland’s 2020 targets is an uncertain one, so too is the level of cost or fines failure will attract. In 2016, the Energy Minister estimated that the cost of failure for the Irish taxpayer will be in the region of Euro 100-150 million for each percentage point by which Ireland fails to meet the 16% target.<sup>22</sup> These figures show that a delay, for whatever reason, in the completion of a windfarm of say 25-30 MW, or 10% of the estimated targeted annual build rate can have a material impact on the overall total for the year, the ultimate 2020 RES-E Target, and the cost to Ireland.

**Figure 1: Installed Wind Generating Capacity 1990-2015<sup>23</sup>**



<sup>21</sup> SEAI (n 3) 14-15. The impact of uncertainty in support schemes and the economic crisis on wind development is considered at chapter 4 (*Financing the Winds of Change-Irish Financial Support Schemes*).

<sup>22</sup> See response from Denis Naughton, T.D., and Minister for Communications, Climate Change and Environment to a question posed by Timmy Dooley T.D., about the level of ‘fines that will be realised’ if Ireland fails to meet 2020 targets: Dáil Deb 6 December 2016, vol 931, No.3. More recently, DCCA has stated that it is open to Member States that fail to meet targets to purchase credits through the Statistical Transfers mechanism provided for in Article 6 of Second Renewable Energy Directive. However, as a market for such credits does not yet exist, the likely cost of such purchases is, as yet, unknown. SEAI has estimated that the cost may be in the range of €65 million to €130 million for each percentage point that Ireland falls short of the overall 16% target. (See: DCCA (n 3) 37). IWEA put the cost, in terms of EU fines, at Euro 600m (See: Engineers Ireland, ‘IWEA Chief says Ireland will miss EU target and faces €600m fine’ *Engineers Journal* (23 May 2017) <<http://www.engineersjournal.ie/2017/05/23/iwea-ireland-eu-renewables-target/>> accessed 7 October 2017).

<sup>23</sup> This graph appears in SEAI (n 3), where it is noted that the source of the data is EirGrid.



**Figure 2: Progression Towards Ireland’s RES-E Target and Ireland’s Overall 16% EU Target 1990-2015<sup>24</sup>**

Year	1990	2000	2005	2010	2011	2012	2013	2014	2015	2016/20
RES-E Target (40% by 2020) – % achieved	5.3%	4.8%	7.2%	14.6%	17.4%	19.7%	21%	22.9	25.3%	?
Overall Second Renewable Energy Directive Target (16% by 2020) – % achieved	2.3%	2%	2.8%	5.6%	6.5%	7.1%	7.6	8.6%	9.1%	?

**Figure 3: Ireland’s Progress Towards 2020 Targets-Year End 2015 Status (All Sectors)<sup>25</sup>**

Sector	Expected Renewable Energy Share (RES) in 2020	Position as at 31 December 2015	Shortfall against 2020 Target
Electricity: RES-E (Non-binding)	40%	25.3%	14.7%
Heat: RES-H (Non-binding)	12%	6.5%	5.5%
Transport: RES-T (Binding)	10%	5.7%	4.3%
Ireland’s Overall EU 2020 Target (Binding)	16%	9.1%	6.9%

### Question for Study

What has emerged from this state of affairs is a much more interesting question for study namely, how an ostensibly considered, detailed, all-embracing, and at times prescriptive body of EU legal instruments, and decisions, can potentially fail to secure, over a reasonable period of time, what

<sup>24</sup> Compiled from data presented by: SEAI (See: SEAI (n 3) 20); and DCCAIE (See: DCCAIE (n3) 37-38).

<sup>25</sup> Compiled from data presented by DCCAIE (See: DCCAIE (n 3) 37).

is on the face of it, a clearly defined purpose in one of the smallest, and most isolated energy markets in the EU. This superseding question gives rise to several subsidiary questions, the answers to which have a bearing on the principal question. First among these is whether there is any uncertainty as to what the overall purpose or objective to be achieved is. Secondly, it is necessary to investigate whether, purpose and objective apart, there is some innate and fundamental flaw in the EU's legislative scheme, or in the manner of its transposition in Ireland; and finally, it is necessary to consider whether any act or omission, or series of acts or omissions, on the part of the State (including agencies of the State), or other actors in the electricity market or wider society, have advertently or inadvertently subverted the overall objective to be achieved, and if so with what purpose or motive.

## Overview of Arguments

Law, policy, and regulation have played a very significant role in securing a position for wind generated electricity in the Irish electricity market. The multitude of wind turbines installed across the rural landscape are built on a foundation of, and supported by a myriad of, policy, legal and regulatory interventions that have convinced domestic and international investors, financial institutions, developers, technology suppliers, and others, that unlocking Ireland's enormous wind potential can be a rewarding enterprise for all concerned. Yet, notwithstanding all this tangible evidence of success and activity, Ireland is struggling to meet a new capacity build rate that will ensure that it meets its RES-E Target of 40% of electricity from renewable sources by 2020, with knock on consequences for its 16% Community target. A review of Ireland's NREAP reveals, under a heading titled 'Measures for achieving the targets' an impressively long list (38 in total), of legal, financial, fiscal, regulatory, technical, and other adjustments aimed at removing barriers, and furthering the position of renewable energy, including wind generation.<sup>26</sup> This list is followed by an even lengthier exposition of the specific domestic measures introduced 'to fulfil the requirements under' key provisions of the Second Renewable Energy Directive.<sup>27</sup> What the NREAP does not contain is a list of the things Ireland is not doing, is doing with a lack of enthusiasm, or will not do, in furtherance of meeting its targets. This of course is not required, but anyone reviewing the many things that Ireland has enumerated in its NREAP could be forgiven for failing to see the wood from the trees and believing that meeting 2020 targets must be a foregone conclusion, given the armoury of instruments available to tackle obstacles, and encourage investment and development.

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<sup>26</sup> Government of Ireland (n 8) 13-20.

<sup>27</sup> *ibid* 21 ff.

This thesis identifies several fundamental problems with implementation of EU climate change objectives in an Irish context. The first concerns the mechanisms for the advancement of these objectives. In this thesis, it is argued that notwithstanding clear published policy imperatives, underpinned by a seemingly comprehensive EU legislative scheme that includes defined mandatory targets, EU policy objectives for Ireland in the area of renewable energy are unlikely to be achieved because, in allocating responsibility for achievement of these objectives, the level of discretion apportioned to Ireland as a Member State, as well as the level of trust and confidence inherent in that allocation was too generous, and reflects a deference to the principles of subsidiarity and proportionality that is not aligned with the core policy objectives around climate change abatement, and completion of the internal market for electricity. The second problem (which flows from the first), concerns Ireland's response to unbundling of electricity networks, an acknowledged enabler of investment in renewable development. In this thesis, it is argued that Ireland, in failing to implement Full Ownership Unbundling (FOU) of the Transmission System for reasons of political expediency, has put in place an avoidable, and unnecessarily complex regulatory framework, that has slowed renewable energy development in Ireland. The third problem concerns the emerging, and somewhat ironic conflict between sustainability objectives on the one hand, and EU driven protection of the environment considerations on the other. Put simply, setting aggressive targets for renewable energy penetration with its inevitable requirement for visible impacts on the landscape, has given rise to conflict between the developers of energy infrastructure (including wind generation), and citizens, newly empowered by EU legal instruments and Court of Justice of the European Union (CJEU) decisions, that guarantee more absolute and unqualified rights of access to, and participation in, decision making, and to judicial review of administrative decisions. In this thesis, it is argued that while the State has put in place a regulatory framework aimed at ensuring a more efficient process for the permitting of strategic infrastructure (including large-scale wind developments), this legislation has been critically undermined by a number of factors including: a definition of strategic infrastructure that is far too narrow; a lack of resources and expertise at Ireland's principal planning body, An Bord Pleanála (ABP); a failure on the part of the State to correctly implement EU environmental requirements; and a degree of inconsistency in the exercise of judicial discretion in the context of judicial review of planning decisions.

Drawing together these arguments, and the myriad of sub-arguments that flow with relative ease from them, ultimately leads one to the central argument in this thesis which is that, whilst Ireland has, under European direction and supervision, succeeded in creating a policy, legal and regulatory environment that has enabled wind generation to secure a not insignificant foothold in the Irish electricity market, Ireland's difficulty ultimately rests with a small number key policy

and regulatory choices, decisions, and failings, predominantly, though not exclusively, at a national level, that for the most part are, or were at a point in time, avoidable. Together these choices, decisions, and failings conspire to ensure that Ireland is highly unlikely to meet its 2020 RES-E Target, and therefore, its binding EU 16% target, with the result that the Irish tax payer will be faced with significant financial costs and/or fines.

## Existing Knowledge

Much has been written, and published, on the topic of barriers to the development of renewable energy. The published literature focusses for the most part on identifying and explaining the nature of barriers, and highlighting what is required by way of policy, legal, technical, or financial measures to overcome the obstacles identified. The fact that the Second Renewable Energy Directive specifically targets, many of the known, and accepted barriers suggests a strong understanding of what is required in terms of a suite of measures to place renewable generation on a level playing field with conventional generation.

Specific legislative intervention is generally seen as a prerequisite. Ottinger sees a clear role for legislation in creating a level playing field for new generation technologies.<sup>28</sup> Wawryk sees the role of government, and the law, as one of ensuring that there is not only a level playing field in deregulated electricity markets for renewable generators, but also as providing education, information and protection for consumers.<sup>29</sup> These themes are very much reflected in EU legislation including the Second Renewable Energy Directive. Xi, Runlin and Dong in their review of strategy, policy and law for the promotion of renewable energy resources in China, suggest that China should look to international best practice as a guide to determining the nature of legislation that should be introduced in China, noting that experience in other jurisdictions suggests that specific renewable energy laws are necessary.<sup>30</sup> Whilst it is therefore generally accepted in published literature that specific legislation is required to create a level playing field for renewable generation, few commentators consider the detail, drafting, purpose and intent of the legislative provisions themselves, or how they interact with other provisions that may contain

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<sup>28</sup> Richard L. Ottinger, 'Legal Frameworks for Energy for Sustainable Development' in Adrian J. Bradbrook, Rosemary Lyster, Richard L. Ottinger, and Wang Xi (eds), *The Law of Energy for Sustainable Development* (IUCN Academy of Environmental Law Research Studies, Cambridge University Press 2005) 103.

<sup>29</sup> Alexandra S. Wawryk, 'Green Pricing and Green Power Marketing: Demand-Side Mechanisms for Promoting "Green Power" in Deregulated Electricity Markets' in Adrian J. Bradbrook, Rosemary Lyster, Richard L. Ottinger, and Wang Xi (eds), *The Law of Energy for Sustainable Development* (IUCN Academy of Environmental Law Research Studies, Cambridge University Press 2005) 154.

<sup>30</sup> Wang Xi, Mao Runlin, and Maggie Dong, 'Strategy, Policy, and Law Promoting Renewable Energy Resources in China' in Adrian J. Bradbrook, Rosemary Lyster, Richard L. Ottinger, and Wang Xi (eds), *The Law of Energy for Sustainable Development* (IUCN Academy of Environmental Law Research Studies, Cambridge University Press 2005) 302.

competing objectives. Ross, a notable exception, examines in some detail the evolution of the treatment of the concept of sustainable development in legislation promulgated by the United Kingdom (UK), Scottish, and Northern Ireland parliaments in recent years.<sup>31</sup> Following a relatively detailed analysis of Danish energy policy, and the factors that were supportive of wind generation in Denmark, Hansen affords an overview of the principal legislative provisions by summarising the evolution of the legislation, and the principal incentives provided for.<sup>32</sup> Extracts of selected legislation are annexed to the paper, but there is no significant in-depth legal analysis of the provisions. Hansen's paper was published before the Second Renewable Energy Directive, and so does not address its requirements or impact.

There is some published literature on the role the judiciary can play in advancing sustainable and renewable objectives. The literature considers in broad terms the dual role of the judiciary as the guardians of sustainability obligations on the one hand; and on the other, their role in reviewing administrative decisions of State agencies. Decleris for example, in his study of the law of sustainable development, reflects in some considerable detail on the case law of the Greek Court of the Fifth Section of the Council of State, and concludes that the judiciary in Greece are the custodians of legal obligations that underpin sustainable development.<sup>33</sup> Ross also sees a role for the courts, and the judiciary, in the area of sustainability through enforcement, and judicial review of administrative decisions.<sup>34</sup> In Ireland, the role the judiciary can play in sustainable and renewable development, is becoming more discernible in light of the myriad of recent judicial review cases concerning proposed wind energy developments. This issue is considered in detail in chapter 7 (*Social Acceptability: A Judicial Eye at the Centre of the Perfect Storm*).

The restructuring of electricity markets, and the unbundling of vertically integrated monopolies, has been the subject of several research papers many of which consider the benefits of electricity market restructuring from the perspective of encouraging new market entrants (including renewables), in generation and supply, and thus competition. Published research also considers the link between unbundling, and the ability of new technology (such as wind generation technology), to gain a foot-hold in a market and compete on a level playing field with conventional fossil fuel technology.<sup>35</sup> There would seem to be a general consensus that if new market entrants,

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<sup>31</sup> Andrea Ross, *Sustainable Development Law in the UK, From rhetoric to reality?* (Earthscan 2012).

<sup>32</sup> Rikke Munk Hassen, 'Legislative measures for promotion of renewable energy: Wind development in Denmark as a case study' in Adrian J. Bradbrook, and Richard L. Ottinger (eds), *Energy Law and Sustainable Development* (IUNCH Environmental Law Programme, IUNCH-The World Conservation Union 2003) 115.

<sup>33</sup> Michael Decleris, *The Law of Sustainable Development, General Principles: A Report Prepared for the European Commission* (European Communities 2000) 5.

<sup>34</sup> Ross (n 31) 198.

<sup>35</sup> See: Peter A. Bradford, 'Some Environmental Lessons from Electricity Restructuring' in Adrian J. Bradbrook, Rosemary Lyster, Richard L. Ottinger, and Wang Xi (eds), *The Law of Energy for Sustainable Development* (IUCN Academy of Environmental Law Research Studies, Cambridge University Press 2005)

and new generation technology, are to gain a foot-hold in electricity markets that are dominated by monopolistic vertically integrated incumbents, those markets need to be restructured, and market power needs to be addressed. Pollitt notes the link between the requirement for investment in transmission networks to accommodate large amounts of intermittent wind capacity, and the impediment to this inherent in the vertically integrated utility model, where the incumbent monopoly utility has no incentive to make the necessary investment to accommodate competition from new non-conventional technology.<sup>36</sup> This topic is considered further in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*).

The challenges for renewable technology in emerging competitive markets have been documented in several studies. Barton, for example has looked at the legal design of electricity markets and considers how that design can assist or hamper energy sustainability.<sup>37</sup> Barton notes that ‘Legislation and regulatory activity is eminently justified to pursue social justice or environmental sustainability, and the free operation of market forces must be subordinate to those objectives.’<sup>38</sup> Beck and Martinot, argue that the wholesale competitive market may be a challenging place for new renewable technologies, and for numerous technical and financial reasons they may find it difficult to compete with conventional technology.<sup>39</sup> Lyster sees difficulties for renewable energy technologies in competing in restructured competitive markets where incumbent conventional generators benefit from historical advantages and subsidies.<sup>40</sup> The creation of a market for wind generated electricity and access to that market, is considered in chapter 5 (*Prioritising the Wind-The Role of Policy, Law and Independent Regulation*).

Barriers to the development of renewable energy more generally have been the subject of several studies. Ottinger and Zalcmann, have surveyed the position in a number of jurisdictions, including India, and European and Scandinavian countries. They have listed amongst the barriers to the development of renewable resources: the lack of information by the public and key stakeholders concerning costs and benefits; the lack of knowledge on the part of developers of the energy and

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407, 407-408; Michael Pollitt, and ESRC Electricity Policy Research Group, University of Cambridge, ‘The arguments for and against ownership unbundling of energy transmission networks’ (2007) CWPE 0737 and EPRG 0714 3; Fredric Beck and Eric Martinot, ‘Renewable Energy Policies and Barriers’, *Encyclopaedia of Energy*, (2004) vol 5, 365; Rosemary Lyster, ‘The Implications of Electricity Restructuring for a Sustainable Energy Framework: What’s Law Got to Do with It?’ in Adrian J. Bradbrook, Rosemary Lyster, Richard L. Ottinger, and Wang Xi (eds), *The Law of Energy for Sustainable Development* (IUCN Academy of Environmental Law Research Studies, Cambridge University Press 2005) 415, 419.

<sup>36</sup> Pollitt (n 35).

<sup>37</sup> Barry Barton, ‘Electricity Market Liberalisation and Energy Sustainability’ in Adrian J. Bradbrook, Rosemary Lyster, Richard L. Ottinger, and Wang Xi (eds), *The Law of Energy for Sustainable Development* (IUCN Academy of Environmental Law Research Studies, Cambridge University Press 2005) 449.

<sup>38</sup> *ibid* 465.

<sup>39</sup> Beck and Martinot (n 35) 378.

<sup>40</sup> Lyster (n 35) 421.

related social needs of rural communities; the failure to accurately compare the price of renewables with conventional generation technologies; a predisposition towards fossil fuel technology over newer renewable technology; difficulties with financing; and the need for research and development.<sup>41</sup>

The topic of social acceptance has also been considered in several recent studies. Ellis for example, has identified the lack of social acceptance of wind energy projects as the principal obstacle to the future development of wind energy in Ireland.<sup>42</sup> Grid access too has been the subject of a number of studies including at an EU level in the context of the WindBarriers Project, which found that the barriers encountered by developers during the grid connection process are, for the most part, related to a lack of clear information on available grid connection capacity, a lack of planning for future grid extensions and reinforcement, insufficient grid capacity; and issues such as land ownership and Environmental Impact Assessment (EIA).<sup>43</sup> On the topic of administrative barriers more generally, the WindBarriers Project reveals that the obstacles faced by developers during the permitting stage of development are often connected to the approval, and scope of the EIA, adherence with spatial planning, the number of authorities involved, and the involvement of other stakeholders (NGOs, community opposition, etc.), in the permitting process.<sup>44</sup> Costs associated with the permitting process, transparency, and the absence of deadlines were also considered as potential obstacles.<sup>45</sup> WindBarriers included Ireland among those EU countries that are performing significantly above the EU average in, authority approach, or the attitude of authorities, in dealing with permitting applications.<sup>46</sup> It is submitted that much has changed since this finding was made in 2010. A new line of case law that has emerged since then has highlighted significant resource and expertise issues at An Bord Pleanála (ABP), that have resulted in considerable avoidable costs and delays for developers, and undermined investor confidence in the planning process. These issues are discussed in detail in chapter 7 (*Social Acceptability-A Judicial Eye at The Centre of the Perfect Storm*).

Gururaja in his paper on the principal barriers to financing renewable energy projects, notes that renewable energy projects are often perceived to be more expensive and riskier, with a

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<sup>41</sup>Richard L. Ottinger, and Fred Zalcman, 'Legal measures to promote renewable and energy efficiency resources' in Adrian J. Bradbrook and Richard L. Ottinger (eds), *Energy Law and Sustainable Development* (IUNCH Environmental Law Programme, IUNCH-The World Conservation Union 2003) 79.

<sup>42</sup> Geraint Ellis, and SQW, *A review of the context for enhancing community acceptance of wind energy in Ireland: A Report Commissioned by the Sustainable Energy Authority of Ireland* (Queen's University Belfast, June 2012).

<sup>43</sup> European Wind Energy Association (EWEA), *Wind Barriers, Administrative and grid access barriers to wind power* (July 2010) 8.

<sup>44</sup> *ibid* 8.

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid* 29.

requirement for longer term project finance debt, and are often promoted by ‘environmental radicals’ and financially weak developers.<sup>47</sup>

There is a considerable body of published literature on the nature of support mechanisms for renewable energy. Much of the literature compares and contrasts, the different mechanisms employed across various jurisdictions rather than considering in detail any particular jurisdiction. Hansen’s review of the position in Denmark is one notable exception.<sup>48</sup> Xi, Runlin and Dong see government support as ‘a basic financial means for the promotion of the renewable energy industry.’<sup>49</sup> Such support can, in their view, be provided through government subsidies, tax policy, low interest loans, credit guarantees, and preferential prices for renewable energy products.<sup>50</sup> Irish financial support schemes are considered in detail in chapter 4 (*Financing the Winds of Change-Irish Financial Support Schemes*).

The role of government in the area of environmental protection was highlighted as far back as 1987 in the Brundtland Report<sup>51</sup> which notes that ‘the major central economic and sectoral agencies of governments should now be made directly responsible and fully accountable for ensuring that their policies, programmes, and budgets support development that is ecologically as well as economically sustainable.’<sup>52</sup> This theme is continued in the Rio Declaration where it is noted that: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’<sup>53</sup> Ross has considered the UK’s evolution towards Environmental Policy Integration (EPI), and the ‘broader ideal of putting sustainable development at the heart of Government.’<sup>54</sup> In an Irish context, Diamond, employing Liberatore’s Integration Table,<sup>55</sup> has concluded that it can be determined that Ireland had, in the period up to 2009 (so before the Second Renewable Energy Directive, and the Third Package Directive<sup>56</sup>), endeavoured to ‘assimilate and prioritise wind

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<sup>47</sup> Jayaro Gururaja, ‘Financing Energy for Sustainable Development’ in Adrian J. Bradbrook, Rosemary Lyster, Richard L. Ottinger, and Wang Xi (eds), *The Law of Energy for Sustainable Development* (IUCN Academy of Environmental Law Research Studies, Cambridge University Press 2005) 226-227.

<sup>48</sup> Hassen (n 32) 115.

<sup>49</sup> Xi, Runlin, and Dong (n 30) 302.

<sup>50</sup> *ibid* 320-323.

<sup>51</sup> Brundtland Commission, *Our Common Future (the Brundtland Report)* (World Commission on Environment and Development (WCED) 1987).

<sup>52</sup> *ibid* 314.

<sup>53</sup> United Nations General Assembly, Rio Declaration on Environment and Development (UNGA, 1992), Principle 4.

<sup>54</sup> Ross (n 31) 139.

<sup>55</sup> Angela Liberatore, ‘The integration of sustainable development objectives into EU policy-making-Barriers and prospects’ in Susan Baker, Maria Kousis, Dick Richardson, and Stephen Young (eds), *The Politics of Sustainable Development-Theory, policy and practice within the European Union* (1997 London, Routledge) 107.

<sup>56</sup> Council and the Parliament Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.



energy across the three key areas' namely economic, grid connection, and planning but 'repeating themes of 'established organisational reluctance, economic objectives, and concern for competition resulted in the overall dilution of EPI on wind energy policy.'<sup>57</sup>

In summary therefore, the barriers to the development of renewable energy appear to be well understood both in an Irish, and international context, as are the nature and extent of measures that are required to overcome those barriers. What is less understood is the effectiveness of the Second Renewable Energy Directive, and the Third Package Directive in overcoming the barriers to, and encouraging, wind development. Also, though the emergence of a conflict between environmental and sustainable objectives has been noticed for some years now; how this conflict is evolving in the legal and policy sphere, and its potential impact on Ireland's ability to meet its 2020 RES-E Target, has not been examined in any great detail to date.

## New Area of Law

Energy law, of which the law relating to electricity is but one part, and the law relating to renewable energy a further sub-division of that part, draws on a multitude of legal practice areas and disciplines. To be a practitioner of energy law, is to be a practitioner of administrative law, constitutional law, EU law, the law of contract, and on occasion, the law of tort, and the law of property.<sup>58</sup> Electricity law is not a new academic area or specialism, and whilst the current legal framework that governs the Irish electricity market is relatively new, and continues to evolve, laws governing the industry have existed since the establishment of the State and before. The nature of electricity law is however predominately statutory. This is not to say that there is no case law concerning electricity. As early as the late 19<sup>th</sup> century, the Privy Council, in an appeal from the Supreme Court of Cape Colony was asked to consider whether the escape of electricity from a tramway cable which caused interference with signals gave rise to a cause of action under the Common Law of the Colony.<sup>59</sup> In more recent times, a body of case law concerning electricity, and electricity undertakings, has emerged in the areas of mergers and acquisitions, control of dominance; and EU unbundling requirements. These cases, which are predominantly European Union, have been the subject of some academic debate and discussion. Other lines of case law, more relevant to this study, are however also emerging and these are highlighted and discussed in this thesis. In this thesis, it is for example, argued that a new area of law is emerging in the

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<sup>57</sup> Colm Diamond, 'The effects of Environmental Policy Integration on wind energy policy-a comparative case study of Ireland and Denmark' (2009) IJPP 6.

<sup>58</sup> On the nature of electricity see: Ken Moon, 'Intangibles as Property and Goods' (July 2009) NZLJ 228; and Jane Ball, 'The Boundaries of Property Rights in English Law-Report to the XVIIIth International Congress of International Law' (July 2006) EJCL 1.

<sup>59</sup> *Eastern and South African Telegraph Company v Cape Town Tramway Company* [1902] AC 381. See also: E.A. Whittuck, 'Electricity and its Responsibilities in Roman-Dutch law' (1903) (5) 1JSTOR 137.

recent case law concerning the application of Protocol 1, Article 1 of the European Convention on Human Rights, in the sphere of energy, where the provision has been successfully employed in the superior courts in England and Wales to protect investment in renewable energy technology following the unlawful curtailment of government financial support schemes introduced to encourage the investment.<sup>60</sup> There is also some evidence in recent case law of a greater questioning of the accepted position in judicial review of judicial deference to An Bord Pleanála (ABP), and this is also explored further below.<sup>61</sup> It also is argued that a new regulatory framework must now be written to provide for the export of wind generated electricity from Ireland, where that electricity is carried on networks owned, and operated by entities other than the ESB and EirGrid, and suggestions in this regard are considered below.<sup>62</sup> Finally, this thesis examines the effectiveness of the EU's flagship legal instrument, the Second Renewable Energy Directive, as a mechanism for delivering EU mandated renewable energy targets in Ireland.

## Contribution of Thesis

The present state of knowledge concerning the role of law and policy in the promotion of renewable energy is summarised above. This thesis contributes to, and advances that corpus of knowledge at several levels; both from a theoretical and applied perspective.

This thesis presents a new perspective. Published literature has not yet examined, in any meaningful way, the effectiveness of one of the EUs flagship climate change instruments, the Second Renewable Energy Directive, in securing in a market with some, or all, of the principal characteristics of the Irish electricity market, one of its primary purposes namely, the attainment of specified national targets for renewable energy. This thesis highlights fundamental flaws in the design of the Second Renewable Energy Directive, its interaction with EU market liberalisation rules and Irish national legislation and submits that these deficiencies have contributed to the uncertainty and regulatory failure exposed and explored in this thesis.

This thesis offers a structured combined analysis of legal and policy initiatives aimed at furthering the position of wind energy, at an optimum point in time when there is still an opportunity to take steps to mitigate the potential costs to the Irish economy of failure, if not eliminate them in their entirety. This thesis, unlike much of the published literature, is not an *ex-post* academic discourse on what should have been done with the benefit of hindsight; rather it highlights contributing factors to the regulatory failure that is currently in motion, in real time, which if adjustments are made, may make a difference to the ultimate 2020 outcome. In this respect, this

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<sup>60</sup> These cases are discussed in chapter 4 (*Financing the Winds of Change-Irish Financial Support Schemes*).

<sup>61</sup> See chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*).

<sup>62</sup> See chapter 6 (*Gone with the Wind-Ireland's Proposed Wind Energy Export Projects*).

thesis has a real time measurable value over and above any theoretical value that it may contribute, to the shaping of energy policy, and the design of regulation in the future.

Although this thesis is grounded in the legal dominion, it has significant and tangible societal and economic relevance for policy makers, regulators, and electricity consumers over and above mere legal theory. Should Ireland fail to meet its 2020 EU 16% target, the cost in mere compliance terms to the economy and society has been estimated to be in the region of Euro 65m-150m per percentage point deficit. The fact of leaving Ireland exposed to this possibility or, should Ireland actually fail to meet its target, and incur any significant percentage of the estimated cost, is a very relevant issue at a time when the demand for funding for critical services in Ireland is extreme. The possibility of such an outcome brings into focus the shortcomings and contradictions in, and politically motivated preservation of the vested interest approach to, Irish energy policy and regulation that is highlighted in this thesis. The societal relevance is however broader as this thesis also highlights the lack of deference paid by policy makers to electricity consumers, when the interests of the latter come into conflict with the vested State interests identified in this thesis.

Published literature confirms that the success of deployment of renewable energy is inexorably tied to the structure of the subject electricity market. This thesis considers the cumulative legal and policy impacts of almost two decades of government and regulatory decisions concerning the structural arrangements in the Irish electricity market, and employs the outcome of this review of historical decisions as an evidential basis for calling into question the respective roles, and the interactions of, the Energy Minister, the Commission for Energy Regulation (CER), the Single Electricity Market Committee (SEMC); and the Competition and Consumer Protection Commission (CCPC) in a way that no other published literature has done to date. This review demonstrates, amongst other things, that: the views of the CCPC on key aspects of the structure of the Irish electricity market around the role of ESB have been systematically ignored by successive administrations for almost 20 years; that CER and SEMC, while happy to regulate ESB's position in the market, have sought shelter behind the policy-regulatory divide argument when the politically difficult issue of the structural disaggregation of ESB has arisen; and that successive Energy Ministers have been allowed to construct and maintain an unnecessary, complex, and sub-optimal regulatory structure that secures incumbent state interests to the detriment of (amongst other things), renewable energy development. This thesis contributes to existing published literature on the role, importance, and effectiveness of independent regulation, and the extent of the *de facto* independence enjoyed by CER and SEMC is examined to an extent not previously undertaken.

This thesis also contributes to the wider discussion on the future of European energy policy and, by extension, Irish energy policy. The conflict that has emerged between policy and legislation aimed at furthering the role of renewable energy on the one hand, and EU legislation aimed at protecting the environment on the other is addressed in some published literature. This thesis employs recent Irish and Court of Justice of the European Union (CJEU) case law to add to this body of literature, up to date evidence to suggest that firm targets and deadlines for renewable penetration and permitting regimes that prescribe timeframes for obtaining planning permission and other key permits, cannot co-exist, and are utterly inconsistent with, the 'wide access to justice' provisions of EU environmental law. Further, this thesis foresees a rewriting of Irish procedural rules around *locus standi* to bring those rules into line with the requirements of EU environmental law as interpreted by the CJEU and that this outcome will have a significant adverse impact on Ireland as a place to invest in renewable energy, and perhaps wider consequences for essential infrastructure, and by extension the economy. This thesis demonstrates that EU energy law, and EU environmental law, cannot continue to co-exist in parallel worlds that more often than is desirable collide in the courts of Member States, or in the CJEU.

This thesis is also important as it counters the narrative that is developing in Irish policy documents and that seeks to lay the responsibility for failure to achieve the required annual wind farm development rates necessary to meet the 2020 RES-E Target at the door of social opposition. This thesis demonstrates that whilst social opposition is a major contributing factor, it is far from being the sole cause, and to the extent that it is a cause, a portion of blame for this lies at the door of policy makers who have failed to address the issue satisfactorily.

It has been suggested by at least one commentator that to eradicate problems with the implementation of the internal market in electricity, the EU should pursue a fourth energy package around the issue of unbundling of electricity networks. The findings of this thesis are important as they demonstrate that any such initiative, in an Irish context at least, would be futile, would ultimately fail, and would merely add to the already vast corpus of broadly redundant EU legislation in the area. This thesis demonstrates that the EU ideal of Full Ownership Unbundling is itself a flawed concept when employed in an electricity market such as Ireland where the State retains ownership of electricity generation and supply undertakings in addition to networks.

Finally, it is intended that this thesis will be of immediate assistance to policy and law makers in so far as it highlights the futility at an EU level of introducing, and at a Member State level of accepting, measures to achieve an outcome by a fixed date that is tied to a financial penalty without fully understanding or acknowledging the political, institutional, societal, and economic

constraints within which the measures will operate, and in this respect parallels can be drawn with the current difficulties in Ireland with implementation of the Water Framework Directive.<sup>63</sup>

## Methodology and Approach

The nature of energy markets is such that it is impossible to give due consideration to, or gain an understanding of many aspects, without recourse to economic, and technical literature and data. This is an unavoidable feature of this study. Notwithstanding this, the overall approach to this research and thesis is predominantly from a legal and policy perspective. Where reference is made to technical and economic literature, no attempt is made to second guess any conclusions reached, though every effort has been made to incorporate and refer to, the findings of leading and reputable technical and economic organisations, and persons in the field of study, as well references to differing opinions where appropriate. This thesis does not seek to question the correctness of a now long-standing EU policy that seeks to pursue decarbonisation in the interests of climate change, or indeed an Irish policy that seeks to implement that policy through the preferment of wind generation. This thesis rather assumes that these decisions represent a collective assessment and agreement as to the best way forward for European and Irish energy policy. The focus of this thesis is to scrutinise the effectiveness of, and the role played by law and regulation in securing the desired outcomes of that policy. This thesis also reaches no conclusions on the politically sensitive, and economically challenging question of the *cost* of wind generated electricity to electricity consumers on the island of Ireland, though it is noted that O' Mahony has recently considered the impact of wind generation on the spot price of electricity using simulation and empirical models, revealing that both 'models result in cost savings as a result of wind generation on the Irish system' and that the level of these 'savings is non-trivial'<sup>64</sup>

This study is approached from the perspective and the experiences of someone who has been involved in the legal aspects of energy regulation and project development both domestically and internationally for over two decades and has had an active involvement in the development of the Irish electricity market since the commencement of liberalisation in 1999.

The principal question posed in this thesis relates to Ireland's renewable energy targets as specified in the Second Renewable Energy Directive, and Ireland's NREAP. To track Ireland's progression towards meeting these targets, it has been necessary to have recourse to various non-legal publications. SEAI has been a particularly useful source of reliable data on Ireland's

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<sup>63</sup> Council and Parliament Directive 2006/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy [2006] OJ L327/1.

<sup>64</sup> Amy O'Mahoney, 'Electricity Markets and Renewables: Emissions, Costs and Fuel Diversity' (PhD thesis, Trinity College Dublin 2013) 112.

progression towards its 2020 targets. Recourse has also been had to publications of EirGrid, the Commission for Energy Regulation (CER), the Economic and Social Research Institute (ESRI); the Organisation for Economic Co-operation and Development (OECD); and the International Energy Agency (IEA) for technical, financial and economic data. Though domestic policy publications are a fundamental part of the renewable energy narrative, in this thesis they are not employed as a primary source of financial, technical or economic data; rather they are considered to be a formalised statement of intent derived from successive Programmes for Government, or party-political positions. Similarly, policy documents produced by industry groups (including wind lobby groups), as well as trade associations are not, due to their acknowledged, and understandable industry, or sector bias, considered to be primary sources of financial, technical or economic data, though they often provide excellent summaries of otherwise complex arrangements, and positions.

Much of the basic research for this thesis has involved reviewing the substantial volume of energy legislation, market rules, industry codes, regulatory decisions, and consultation papers that have emerged in Ireland since the market liberalisation process commenced in the late 1990s. Electricity law, and renewable energy law specifically, is predominately a creature of statute. Research has therefore focussed heavily on primary and secondary legislation and the various EU Directives, Regulations and Treaty provisions that underpin Irish domestic legislation. One of the greatest challenges for those considering Irish domestic energy legislation is the absence of a consolidated version of the Electricity Regulation Act 1999 (ERA). The ERA has been extensively amended by primary and secondary legislation since its enactment, and the lack of a published consolidated version is the source of much frustration and confusion for lawyers, industry, and curious citizens generally.

Despite the heavily regulated, complex and risky nature of the Irish electricity market, the multiplicity of participants with competing interests, trades and opportunities for gain as well as loss, there has been a dearth of legal actions before the Irish courts on electricity, or indeed energy related matters. There is however evidence that this is changing, and a body of case law is starting to emerge. This is particularly so for cases concerning the permitting of wind energy developments. This emerging case law is examined under the various chapter headings with specific focus on the approach of the judiciary to this complex area where deference to regulators and expert bodies such as ABP and CER is often (but not always), the accepted position.

If historically there has been an absence of case law in the electricity sector, the same cannot be said about regulatory decisions, with determinations of the CER and the Single Electricity Market Committee (SEMC) dominating the legal and regulatory landscape. This research has focussed

heavily on the processes leading up to regulatory decisions, the decisions themselves; and in appropriate instances, judicial review, over the past two decades. Regulatory decisions, determinations, directions, and consultation documents issued by CER and SEMC can be found on their respective web sites, details of which (together with other important web sites), can be found at Appendix 8 to this thesis. On 2 October 2017, and in accordance with section 4 of the Energy Act 2016, the Commission for Energy Regulation (CER) changed its name to the Commission for Regulation of Utilities (CRU). Notwithstanding this change, and to avoid confusion in this thesis (the substantial body of consultation papers and decisions referred to, and analysed in, this thesis and published since 1999 are all published in the name of the CER), the designation CER is employed. CRU has confirmed that the new CRU web site will contain all historical documents published by CER.

The energy sector perhaps more than any other sector is inundated with acronyms. Policy documents, regulatory papers, industry codes, and even on occasion legislative provisions, contain many acronyms that are now so well understood by participants in the sector that they have in many instances replaced the elongated form. To assist the reader, a full list of Abbreviations employed in this thesis is included at Appendix 1. In addition, each defined term is explained within the text of this thesis on its first use.

This research considers the principal question under a series of chapter headings. Areas where it is demonstrated that the application of policy or law, or the interpretation of law, has been successful in furthering the position of wind energy are contrasted with areas where there has been less success, with a view to highlighting differences in approach or emphasis that may prove to be determinative in the final analysis.

## **Overview and Purpose of Chapters**

This thesis considers Ireland's lengthy and uncertain pursuit of its 2020 renewable electricity target under a series of separate, but interrelated chapter headings. While certain themes permeate several chapters, and others stand alone, all themes converge at point in time (which for this research is 10 October 2017), and around the central research question in this thesis namely:

How an ostensibly considered, detailed, all-embracing, and at times prescriptive body of EU legal instruments, and decisions, can potentially fail to secure, over a reasonable period of time, what is on the face of it, a clearly defined purpose in one of the smallest, and most isolated energy markets in the EU.

As noted above, this superseding question gives rise to several subsidiary questions, the answers to which have a bearing on the principal question. Firstly, whether there is any uncertainty as to what the overall purpose or objective to be achieved is. Secondly, it is necessary to investigate whether, purpose and objective apart, there is some innate and fundamental flaw in the EU's legislative scheme, or in the manner of its transposition in Ireland; and finally, it is necessary to consider whether any act or omission, or series of acts or omissions, on the part of the State (including agencies of the State), or other actors in the electricity market or wider society, have advertently or inadvertently subverted the overall objective to be achieved, and if so with what purpose or motive. These subsidiary questions are also examined, where appropriate, under each of the chapter headings.

Chapter 2 (*Targeting Renewables*), is intended to provide a brief overview of the origins of EU and Irish, law and policy around renewable energy, and to provide background, and set the scene for the principal topics discussed in subsequent chapters. The chapter also considers EU competency around energy matters, and the principles of subsidiarity and proportionality, and key aspects of this thesis, including the issue of whether deference to the principles of subsidiarity and proportionality in this instance has led to a regulatory failure in Ireland that has made the pursuit of Ireland's 2020 renewable electricity targets an uncertain venture.

Chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), considers the legal unbundling of networks, an acknowledged enabler of renewable energy. The purpose of this chapter is twofold. The topic of unbundling is selected for review not simply because of its relevance and importance to renewable energy, but also because the manner of its qualified implementation in Ireland serves to illustrate how deference to the principle of subsidiarity leaves loopholes, or lesser alternatives that can be exploited at a Member State level, that can ultimately lead to regulatory failure and the subversion of key Community objectives; and in an Irish context specifically, to significant uncertainty in the pursuit of the 2020 RES-E Target. This chapter highlights the difficulties for Member States in implementing measures couched in optionality in the face of opposition from historical and entrenched vested interests. Because the legislative scheme for unbundling of network assets, as provided for in the Third Package Directive, left several options open to Member States, Ireland, for reasons of political expediency, dressed up as economic necessity, could avoid difficult choices, default on published energy policy, and subvert the spirit of the EU measure. In this chapter, it is argued that failure to adopt the most extreme form of ownership unbundling, and all the complexity and inefficiency that flows from that failure, may be a contributing factor to Ireland failing to meet 2020 RES-E Target and its binding Community 16% target, and in advance of that gives rise to considerable uncertainty.



Chapter 4 (*Financing the Winds of Change-Irish Financial Support Schemes*), considers the important role played by financial support schemes in the deployment of wind generation technology in Ireland, and the significant contribution that domestic and international investment secured with the aid of support schemes, has and will make, towards the achievement of Ireland's 2020 RES-E Target. Financial support schemes have in fact fuelled the pursuit of Ireland's 2020 RES-E Target and removed one principal obstacles to development namely, uncertainty around financing. The central argument in this chapter is that, despite the level of discretion left to Member States in Articles 2 and 3 of the Second Renewable Energy Directive, as to the nature of support schemes that can be deployed in furtherance of renewable energy targets, support schemes in Ireland have been structured, deployed and operated to maximum effect, and with little fuss, because they did not require any concessions by, or diminish the rights and entitlements of, vested incumbent interests, since the burden of the schemes (if indeed such a burden exists), was placed on electricity consumers. The EU principle of subsidiarity in this specific context did not, unlike network unbundling discussed in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), lead to regulatory failure even in the context of Ireland's economic collapse where opportunities for cost saving policy reversals were actively sought and encouraged. Continuing this theme, this chapter considers the legal consequences of policy reversals in the UK and elsewhere following the economic collapse and argues that any curtailment of the levels of support granted to wind energy in Ireland would, even if it were legally permissible, have undermined further Ireland's ability to meet its targets. The subversion of energy policy (in this instance renewable energy policy) for non-energy purposes theme, discussed in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), and chapter 5 (*Prioritising the Wind-The Role of Policy, Law and Independent Regulation*), is also considered in this chapter, where it is argued that both the pursuit *per se*, and the manner of the pursuit, of peat fired power stations in Ireland, not only flies in the face of what the EU is seeking to achieve by way of decarbonisation objectives, but also needs to be viewed from the perspective of both cost to the electricity consumer, and Single Electricity Market (SEM) impacts due to its priority dispatch status (peat fired generation receives preferential treatment, and is dispatched ahead of other conventional generation that does not benefit from the same advantage), as a matter of law. It is also argued in this chapter that Ireland, in structuring its principal financial support scheme for renewable energy (REFIT), to exclude windfarm developments located in Ireland (the output of which would count towards Ireland's targets if built), but connected to the grid in Northern Ireland; has not only infringed the Second Renewable Energy Directive, and EU free movement rules, but also prevented the development of these projects with knock on consequences for Ireland's targets. Since Ireland and Northern Ireland together operate a single electricity market for the island of Ireland, it is argued that considering Brexit, and the proposed

greater physical integration of networks north and south of the border, the governments on both sides of the border should adopt a consistent policy on renewable energy including cross border access to support schemes. This would facilitate the development of wind projects in border regions though it is now unlikely that any such initiative would contribute to Ireland's 2020 RES-E Target and the binding 16% EU target.

Chapter 5 (*Prioritising the Wind: The Role of Policy, Law and Independent Regulation*), considers the issue of grid and market access for wind technology and its electrical output. These topics are selected for consideration because timely and efficient grid, and market access for new technology have presented the greatest challenges for renewable technology including wind. In this chapter, it is argued that, notwithstanding the Herculean challenge for wind generating technology in securing both grid and market access for output, and the challenges this presented for Ireland in terms of meeting 2020 targets, EU mandated independent regulation has played a very important role in removing impediments, delays and uncertainties around grid and market access and ensuring that these issues alone are unlikely to contribute in a significant way to any shortfall in meeting renewable electricity targets. It is also suggested that the approach to policy and regulation around grid and market access stands in stark contrast to the approach to environmental permitting and planning permission discussed at chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*).

Chapter 6 (*Gone with The Wind: Ireland's Proposed Wind Energy Export Projects*), considers Ireland's ill-conceived, and ultimately ill-fated proposal to export significant quantities of wind-generated electricity to Great Britain under the umbrella of the Joint Projects mechanism provided for in Article 7 of the Second Renewable Energy Directive. The purpose of this chapter is to illustrate how a failure at a policy level to make a clear distinction between the very substantial and visible infrastructure required for the export proposals, and the infrastructure required for domestic electricity production from wind that would count towards Ireland's targets, has had adverse social acceptance consequences for the latter in circumstances where the former was never likely to be realisable in the timeframe envisaged due to the complete absence of a statutory, or regulatory framework for the projects, or investment in garnering social acceptance for them. In summary, it is argued that Government have allowed an ill-conceived proposal to prejudice Ireland's ability to meet 2020 renewable electricity targets with enduring consequences.

Chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*), considers aspects of social acceptability of wind generation and related infrastructure from the unique perspective of Ireland's judicial and quasi-judicial institutions. The purpose of this chapter is to highlight how

the emerging, and not insignificant, opposition to wind generation in Ireland is making the pursuit of Ireland's 2020 RES-E Target a highly uncertain endeavour and will undoubtedly be one of the determining contributors in the event of Ireland's failure to meet that target and its binding EU target. The purpose of the chapter extends to providing a unique insight into how Ireland's renewable energy policy is being systematically dismantled in the courts. In this chapter, it is argued that whilst Ireland put in place a statutory framework to expedite the development of wind generation infrastructure, this initiative was undermined by the fact that An Bord Pleanála (ABP), the main instrument of that policy, was allowed to continue to operate without the necessary resources or expertise, against a background of ever more increasing European oversight and regulation of the environmental impact of infrastructure development, and a surge in planning related litigation. This chapter also casts a critical eye on the role of the judiciary in the permitting of critical infrastructure and seeks to highlight how decisions (avoidable and unavoidable), of the Irish superior courts are having significant adverse consequences for Ireland in its race to meet its 2020 RES-E Target. Finally, this chapter explores the emerging conflict between renewable energy development objectives, and EU legislation aimed at protection of the environment, and how this conflict is adding considerably to the uncertain pursuit of Ireland's 2020 RES-E Target.

The reader should note that the issues considered in this chapter are for the most part considered from the perspective of those that support the development of wind farms as a means to Ireland meeting its 2020 targets. It is not however the objective of this chapter, or this thesis, to advance the case for permitting wind developments without anything less than full planning and environmental assessment and approval in accordance with all applicable law; rather it is argued in this chapter and thesis more generally, that the advancement of renewable energy policy, and other policies that are dependent on critical infrastructure, requires a fit for purpose permitting regime that delivers a final outcome (for or against the proposed development), in a reasonable timeframe.

Chapter 8 (*Conclusions on Thesis Themes and Central Question*), summarises the principal findings of the thesis, and tests those findings against the yardstick of the argumentation and evidence accumulated in the preceding seven chapters.

## Chapter 2: Targeting Renewables

*The instrument that the Riksdag and other national parliaments have been allocated in order to stop the EU from helping itself to more power than the treaty allows-the subsidiarity review-is a paper tiger. Its teeth are not sharp enough to stop unjustified transfers of power to Brussels.*<sup>65</sup>

### Finding a Basis to Legislate

Beginning with the First Electricity Directive in 1996,<sup>66</sup> the EU set about re-writing the energy laws of Member States. That initiative, and interventions that followed, have variously targeted (amongst other topics), market liberalisation, security of supply, and climate change. In the intervening period since 1996, and with the benefit of hindsight, experience, and sector wide investigations, legislative interventions have been refined, recast, or replaced by progressively more far reaching, and binding legal instruments. The repeal, replacement, and recasting of directives over time, with more voluminous, prescriptive and intrusive instruments betrays a growing sense of confidence by EU legislators in their ability to legislate in the energy sector in pursuit of EU ideals.

The EU's legal basis for legislating in the energy sector is to be found in several treaty provisions and since 2009, is expressly provided for in Article 194 TFEU.<sup>67</sup> While Article 194(1) makes certain aspects of energy policy a shared competence with Member States; Article 194(2) includes some notable exceptions including, reserving to a Member State the right to select between fuel sources. The latter freedom is however somewhat constrained by the requirements of the Second Renewable Energy Directive which, amongst other things, mandates the achievement of specified ambitious renewable energy targets, and therefore, forces a preferment of renewable fuels such as wind. The EU has on occasion had recourse to other treaty provisions as a legal basis for legislating in the energy sector. Prior to Article 194 TFEU, those treaty provisions that dealt with internal market competence were employed.<sup>68</sup> The basis for both the First, and Second

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<sup>65</sup>Anne-Marie Pålsson, 'The EU Principle of Subsidiarity an Empty Promise' (2013) 5 <[https://issuu.com/eudalliance/docs/amp\\_subsidarity\\_an\\_empty\\_promise\\_2](https://issuu.com/eudalliance/docs/amp_subsidarity_an_empty_promise_2)> accessed 29 September 2017.

<sup>66</sup>Council and Parliament Directive 1996/92/EC of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L027/20.

<sup>67</sup> For a discussion of TFEU, art 194 see: Ernesto Bonafé, *Towards a European Energy Policy-Resources and Constraints in EU Law* (LAP Lambert Academic Publishing 2012) 12.

<sup>68</sup> TFEU, art 114. For a discussion of the EU's competency in the energy sector see: Kim Talus, *Introduction to EU Energy Law* (Oxford University Press 2016) 11-14.

Renewable Energy Directives can be found in treaty provisions pertaining to environmental considerations.<sup>69</sup>

These Treaty provisions do not however confer a free rein on EU law makers.<sup>70</sup> In areas such as energy, where the EU's competence is not exclusive, the principles of subsidiarity and proportionality rule.<sup>71</sup> The former dictates that the EU may only act 'if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States ... but can rather, by reason of the scale or effects of the proposed action, be better achieved at [EU] level'<sup>72</sup> Under the principle of proportionality, the 'content and form of an [EU] action shall not exceed what is necessary to achieve the objectives of the Treaties.'<sup>73</sup> In view of the scale of the renewable energy objectives that the EU was seeking to achieve (a Community target of 20% share of renewable energy sources in final energy consumption) by a date specific (2020), the case for Community (as opposed to Member State) action was not a difficult one to make. The more difficult question to answer, and which relates to the issue of proportionately, is how far the Community action needed to go. Imposing mandatory targets suggests a high degree of control in the Community instrument. It is submitted that whilst this is indeed the case, simply mandating an outcome (targets), without greater intervention and control over the key steps needed to achieve that outcome (including in the areas of network unbundling and administrative procedures), has undermined the effectiveness of the Community action. In summary, it is submitted that too much discretion was left with Member States, and the Community action did not go as far as was necessary to achieve the objectives of the Treaties.

## Renewable Energy Directives

The First Renewable Energy Directive set an indicative target of 21% share of electricity from renewable sources in total EU electricity consumption by the year 2010, as well as national indicative targets for each Member State.<sup>74</sup> Though the Directive notes the correlation between binding targets for Member States, and the achievement of overall Community targets; binding

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<sup>69</sup> EC, art 175 (1) (now TFEU, art 192(1)). For a discussion of how environmental policy provisions provide an 'indirect legal basis' for energy measures see: Bonafé (n 67) 11.

<sup>70</sup> For a discussion of the competency of the EU to legislate in the energy sphere see: Bonafé (n 67) 10-13.

<sup>71</sup> TEU, art 5. See Trevor C. Hartley, *The Foundations of European Union Law* (8th edn, Oxford University Press 2014) 122-128.

<sup>72</sup> TEU, art 5(3).

<sup>73</sup> *ibid* art 5 (4). For a discussion of the principle of proportionality see: Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, ex parte Fedesa* [1990] ECR I-4023.

<sup>74</sup> First Renewable Energy Directive, art 3. An indicative target of 13.2 % was set for Ireland. For a discussion of the impact of the First Renewable Energy Directive see: Commission, 'Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources' COM (2008) 30 final 2008/0016 (COD) 2.

targets were not imposed on Member States.<sup>75</sup> In setting targets for greater renewable penetration, the Directive opts for indicative targets.<sup>76</sup> The Directive also looked to the broader framework for renewable energy, and acknowledged that barriers to greater renewable penetration in Member States was an issue that required to be addressed. Thus, the Directive made express provision for the evaluation of national support schemes and called for a consideration of whether there should be a community framework for support schemes for renewable energy.<sup>77</sup> The Directive also targeted the efficiency, objectivity and transparency of national permitting measures, as well as the framework for network access for renewables.<sup>78</sup>

The First Renewable Energy Directive was replaced in 2009 by the Second Renewable Energy Directive.<sup>79</sup> In framing the new more comprehensive legislative measure, which now contained mandatory targets, the European Commission (Commission) noted:

The purpose of mandatory national targets is to provide certainty for investors and to encourage continuous development of technologies which generate energy from all types of renewable sources. Deferring a decision about whether a target is mandatory until a future event takes place is thus not appropriate.<sup>80</sup>

In the subsidiarity analysis the Commission noted that the proposal could not be ‘sufficiently achieved’ by Member States for several reasons including, most notably, that real progress can only be achieved with instruments that specify targets.<sup>81</sup> Observing that the European Council had concluded that the EU needed to collectively achieve a 20% share of renewable energy sources in final energy consumption by 2020, the Commission believed that ‘Leaving action to the Member States would put the achievement of this share at risk’ and ‘create investor uncertainty as to the objectives to be reached and the pathway towards these objectives.’<sup>82</sup> On the issue of proportionality, the Commission noted that the approach was proportionate as ‘the level of ambition of the target requires co-ordinated action.’<sup>83</sup> Notwithstanding this the

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<sup>75</sup> First Renewable Energy Directive, recital 4. See also: Parliament ‘Resolution on Electricity from Renewable Energy Sources and the Internal Electricity Market’ (SEC (1999) 470-C5-0342/1999-2000 (COS)) 30 March 2000 OJ C 378, 29.12.2000, 89.

<sup>76</sup> First Renewable Energy Directive, recital 5.

<sup>77</sup> *ibid* art 4.

<sup>78</sup> *ibid* arts 5-6.

<sup>79</sup> Bonafé has queried the appropriateness of using EC art 175(1) (which requires support of a qualified majority of Member States) (now art 192 (1) TFEU), and argues that since the Directive has such a ‘significant impact’ on the energy mix of Member States, art 175 (2) (which requires unanimity) (now art 192 (2) TFEU), was more appropriate. See: Bonafé (n 67) 168.

<sup>80</sup> First Renewable Energy Directive, recital 14.

<sup>81</sup> Commission (n 74) 9.

<sup>82</sup> *ibid*.

<sup>83</sup> *ibid*.

Commission felt that Member States retained significant discretion to prefer renewable energy in a way that was best suited to national circumstances.<sup>84</sup>

The relationship between the Second Renewable Energy Directive and its predecessor cannot be defined simply by reference to the transition from indicative targets to binding targets; the Second Renewable Energy Directive goes much further and translates the concise narrative of the earlier Directive into a much more comprehensive framework for the achievement of the new mandatory targets. Member States are not left to their own devices in the pursuit of their specific targets; they must prepare action plans, and report on progress, and subject themselves to scrutiny, and make adjustments in the event that they deviate from their specified trajectory.<sup>85</sup> The possibility of using national support schemes to achieve targets is acknowledged as well as co-operation initiatives between Member States, and between Member States and third countries.<sup>86</sup> Member States are required to ensure that national administrative procedures, regulations, and codes are proportionate and necessary.<sup>87</sup> They are required to take steps to ensure (amongst other things) that: there is co-ordination between licensing bodies; that there are transparent timetables for determining planning applications; that administrative procedures are streamlined and expedited and less burdensome in the case of smaller projects.<sup>88</sup> There are also new and more comprehensive provisions concerning access to, and operation of networks.<sup>89</sup>

On the face of it the Second Renewable Energy Directive would seem to encapsulate all that was necessary in terms of guidance, direction and compulsion. This however is not the case; the Second Renewable Energy Directive is not a complete package and relies heavily on the Third Package Directive to deliver the ‘necessary framework for achieving the objective of a well-functioning internal market.’<sup>90</sup> The Third Package Directive however, with all its complexity and ingenuity around possible ownership and operation models for network assets is, from an Irish perspective at least, nothing more than a non-abridged theoretical guide to the intricate detail of the myriad of options available and which, in the final analysis, extends to an option to do nothing at all which is succinctly captured in Article 9(9). Ireland’s election to avoid full ownership unbundling of the Transmission System, an acknowledged enabler of renewable energy development, undermines the Second Renewable Energy Directive, and illustrates that contrary to views expressed, the principle of subsidiarity does indeed have an effective bite.<sup>91</sup> The

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<sup>84</sup> *ibid.*

<sup>85</sup> Second Renewable Energy Directive, art 4.

<sup>86</sup> *ibid* art 3; arts 6-11.

<sup>87</sup> *ibid* 13 (1).

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid* art 16.

<sup>90</sup> Third Package Directive, recital (7).

<sup>91</sup> Pállson (n 65).

extensive latitude offered to Member States around network unbundling in the Third Package Directive does not fit well with the tighter rein exercised by EU lawmakers in the Second Renewable Energy Directive especially in the area of targets. That is not to say that the Third Package Directive is completely blind to renewable energy. Apart from a number of cursory references in the recitals and specific references at Articles 7(2) (j) and 36 (d)-(e), the Directive, at Article 15(3), makes express reference to, and reinforces priority dispatch for renewable energy provided for, in Article 16 of the Second Renewable Energy Directive.<sup>92</sup>

## Subsidiarity, Proportionality and Regulatory Failure

Craig and De Búrca have highlighted two issues relevant to subsidiarity when looking at it from a political perspective.<sup>93</sup> The first concerns the level of control subsidiarity requirements confer on national parliaments in scrutinising EU proposed legislative measures.<sup>94</sup> It is submitted that in an Irish context both the Third Package Directive (in the area of network unbundling), and the Second Renewable Energy Directive (in the areas of support schemes, and administrative procedures), left considerable control with Ireland as a Member State. The second issue raised by Craig and De Búrca concerns the possibility that ‘subsidiarity can lead to regulatory failure.’<sup>95</sup> Citing the sovereign debt and banking crises as examples of a regulatory failure arising from ‘too much regulatory autonomy left to Member States’ the authors note that, ‘While there are surely instances where matters could be better regulated at national level, there are also many instances where giving effect to subsidiarity ... leads to regulatory failure.’<sup>96</sup>

Because of the degree of dependence, the achievement of renewable outcomes places on there being a well-functioning internal market as outlined above, it is necessary to look at both the Third Package Directive and the Second Renewable Energy Directive when considering the nature and extent of the regulatory failure in Ireland. The Third Package Directive did not mandate full ownership unbundling of transmission assets; rather it included it as a preferred option alongside lesser options that were friendlier to vertically integrated utilities. Ireland was thus able to avoid full ownership unbundling (an acknowledged enabler of grid investment and new market entrants), and instead put in place a highly complex and inefficient split ownership-operation model for the Transmission System. The consequences of this for grid investment and timely connection of wind generation assets is considered in detail in chapter 3 (*Unbundling the*

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<sup>92</sup> Third Package Directive, recitals (6); and (43).

<sup>93</sup> Paul Craig and Gráinne De Búrca, *EU Law, Text, Cases and Materials* (6<sup>th</sup> edn, Oxford University Press 2001) 98.

<sup>94</sup> *ibid.* See also Pállson (n 65) and Philipp Kiiver, *The Early-Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge 2012).

<sup>95</sup> Craig and De Búrca (n 93) 98.

<sup>96</sup> *ibid* 98-99.



*Opportunity for Irish Wind Generation Technology*). Thus, the regulatory failure arising from Ireland's sub-optimal implementation of the Third Package Directive in effect, cross-defaulted into the Irish Second Renewable Energy Directive implementation framework by (amongst other things), slowing down the rate of wind farm connections to the grid, with the result that a second and more manifest failure to meet 2020 targets now seems imminent. Thus, in an Irish renewable energy context, the degree of regulatory failure arising from the level of discretion imparted to Ireland under both directives will be measured in monetary terms by the compliance cost incurred, to the extent that this cost is attributable to a failure to meet the RES-E Target. This thesis does not however suggest that the entirety of the regulatory failure to meet targets is attributable to Irish failings around network unbundling, rather it is argued that it is a contributing factor. One must also have regard to the issue of social acceptability, and Ireland's failings around administrative procedures and permitting which are discussed in chapter 7 (*Social Acceptability- A Judicial Eye at the Centre of the Perfect Storm*), where issues of subsidiarity and proportionality are also considered in the context of Article 13 of the Second Renewable Energy Directive.

These failings can be contrasted with Ireland's approach to support schemes for renewables. Article 3 of the Second Renewable Energy Directive left considerable discretion with Member States as to the nature and extent of support schemes employed to encourage investment in, and development of, renewable energy projects. As will be demonstrated in chapter 4 (*Financing the Winds of Change-Irish Renewable Energy Support Schemes*), Ireland's approach to support schemes has been highly successful in furthering the interests of wind energy. It is argued in this thesis that regulatory failure did not manifest itself in this area for two reasons. In the first instance, the Public Service Obligation (PSO) mechanism employed did not seek to impose any non-recoverable cost on, or seek to diminish the rights and entitlements of, the vested interests of ESB, its employees or shareholders including its Employee Share Ownership Plan (ESOT) beneficiaries. Secondly, and unlike the position with domestic water charging in Ireland, there is a long history in Ireland of consumers being metered for and paying for electricity. By tagging the PSO Levy onto existing electricity bills, its potential status as a new tax or charge, was less obvious to the average consumer, and did not attract the same level of attention from populist anti-austerity movements.

These conclusions beg the question as to what level of discretion should have been left to Ireland. In summary, on the issue of subsidiarity and proportionality, it is argued in this thesis that no discretion should have been left to Member States on the issue of network unbundling. Full Ownership Unbundling, the Commission's preferred option should have been mandated. A much more explicit link should have been made between the targets specified in the Second Renewable Energy Directive and the requirement for absolute separation of the transmission network.

Targets and penalties were clearly not sufficient motivation for Ireland to do what was necessary. It is also argued in chapter 7 (*Social Acceptability: A Judicial Eye at the Centre of the Perfect Storm*), that Ireland has failed to comply with the requirements of Article 13(1) of the Second Renewable Energy Directive and that, this failure is in part at least, attributable to the level of discretion inherent in that Article around efficient permitting of infrastructure development.

## Origins of Renewable Energy in Ireland

The pursuit of renewable energy in Ireland pre-dates Ireland's membership of the EU. In 1929 when the Ardnacrusha Hydro-Electric Power Station (86 MW) was commissioned it was, at that time, the largest plant of its kind in the world. Further hydro schemes followed, and it was not long before a significant proportion of Ireland's watercourse potential was harnessed for electrical production purposes. Notwithstanding Ireland's vast wind resource, Ireland came late to wind generated electricity.<sup>97</sup> The first commercial wind generation plant was not commissioned until 1992. The 6.45 MW Bellacorrick wind farm in County Mayo, was developed with assistance from the EU pursuant to the VALOREN programme.<sup>98</sup> Progress was slow, and it was not until 1997 that an additional 44 MW of capacity was added; this time under the Government sponsored Alternative Energy Requirement (AER) Programme,<sup>99</sup> and the EU THERMIE Programme.<sup>100</sup> It was acknowledged at an early stage that renewable energy could not compete on a level playing field with conventional generation technologies.<sup>101</sup> To address this issue, the AER Programme was used to encourage investment in, and the development of, renewable energy generating capacity between 1993 and 2006. By 2000 there were twelve operational wind farms in Ireland with a total installed capacity of 69.49 MW. The development of these projects took place against a domestic and European policy background that was becoming increasingly more supportive of renewable sources of energy, and wind in particular.

In November 1996, the European Commission adopted a Green Paper on renewable energy setting out its views on the importance of renewable sources of energy in the Community context as well as the challenges faced by the sector, and priorities for development.<sup>102</sup> The following

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<sup>97</sup>Renewable Energy Strategy Group (RESG), *Strategy for Intensifying Wind Energy Deployment*, (ISBN 0-7076-9225-3, 2000) 17. For the legislative basis for State involvement in hydro generation and distribution of electricity generated in this manner see: The Shannon Electricity Act 1925.

<sup>98</sup> Council Regulation (EEC) 3301/86 of 27 October 1986 instituting a Community programme for the development of certain less favoured regions of the Community by exploiting indigenous energy potential (Valoren programme) [1986] OJ L305/10-31.

<sup>99</sup> See chapter 4 below (*Financing the Winds of Change-Irish Financial Support Schemes*).

<sup>100</sup> RESG (n 97) 17.

<sup>101</sup> *ibid* 27.

<sup>102</sup> Commission, 'Communication from the Commission-Energy for the Future-Green Paper for a Community Strategy' COM (1996) 576 final.

year, and after extensive consultation, the European Commission published a White Paper and Action Plan on the subject.<sup>103</sup> The policy objective stated in that Plan was to double the contribution of renewable energy to EU energy supply from 6% to 12% by 2010. In 1996, the Irish Government published its own thoughts on the subject in a policy paper that set (by current day standards), relatively modest targets for connection of wind generation assets of 30 MW per annum for the period 2000-10.<sup>104</sup> A further Government Paper in 1997 confirmed these targets.<sup>105</sup>

When in 1999 the Government published its Green Paper on Sustainable Energy, its position was unequivocal even if its ambition was overstated: 'An ambitious approach will be adopted to increase the role of renewable sources of energy in the power generation sector.'<sup>106</sup> The approach outlined in the Green Paper included 11 positive steps for the advancement of wind generated electricity in Ireland. Amongst the list was a new, and increased target of 500 MW of new generating capacity from renewable energy sources for the period 2000-2005.<sup>107</sup> It was anticipated that the majority of this increase would come from wind generated electricity. Other steps included the establishment of a Renewable Energy Action Group; the adjustment of the existing AER Programme to take into consideration experiences of the earlier AER competitions; the sale of renewable electricity directly to final customers; the encouragement of the development of renewable electricity at a local community level; guaranteed grid access for certain projects; and the employment of tax incentives and support schemes.<sup>108</sup> Whilst a number of the steps itemised were nothing more than a statement of what, in any case was or would soon be, mandated by European law, the proposed methodology constituted a real statement of intent by the then Government that Ireland was, at a policy level at least, about to embark on a renewable and sustainable path.

The principal catalyst for the 1999 Green Paper was the Government's need to take steps to ensure that Ireland could meet the commitment it had given to the European Union to limit the growth of greenhouse gas emissions to 13% of Ireland's 1990 emission levels for certain greenhouse gasses. The Kyoto Protocol to the United Nations Framework Convention on Climate Change had established mandatory targets for developed nations for the period 2008-2012. Under the Protocol, the European Union had agreed to reduce its emissions of 6 specified greenhouse gasses; and Ireland, as part of the European Union's own internal burden sharing

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<sup>103</sup> Commission, 'Communication from the Commission-Energy for the Future: Renewable sources of energy-White Paper for a community strategy and action plan' COM (1997) 599 final.

<sup>104</sup> Department of Public Enterprise (DPE), *Renewable Energy-A Strategy for the Future* (1996).

<sup>105</sup> DPE, *Sustainable Development-A Strategy for Ireland* (1997).

<sup>106</sup> DPE, *Green Paper on Sustainable Energy* (1999) 6.

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

arrangements, agreed to limit emissions of the specified gasses to 13% above 1990 levels.<sup>109</sup> In Ireland's Second National Communication pursuant to the UN Framework Convention on Climate Change, Ireland listed alternative and renewable sources of energy amongst its proposed measures for dealing with climate change.<sup>110</sup> The 1999 Green Paper also highlighted the connection between the binding targets to be achieved, and the nature of the measures that would be required to that end.<sup>111</sup> Looking back on this policy now, almost 20 years since it was written, and in light of the social resistance to wind that has emerged, it is interesting to note that social acceptability, for so long taken for granted, was part of the original policy basis for deployment of renewable generating technology:

Government Policy is to create the circumstances and conditions that will stimulate the deployment of renewable sources of energy where they have the prospect of being economically and socially attractive and to facilitate research, development and demonstration of emerging renewable energy technologies.<sup>112</sup>

Implicit in this statement was the preferment of wind generation technology over other forms of renewable energy technology. This preferment was justified by virtue of the fact that, in the context of AER Programme competitions up to that point in time, onshore wind had proved to be the most competitive technology of the technologies available.<sup>113</sup>

The Renewable Energy Strategy Group (RESG) was tasked with the development of a strategy for increasing the contribution of onshore wind generation to overall electricity generation.<sup>114</sup> It was believed that this strategy would assist Government in meeting national targets in the period up to 2005 and 'inform future decisions regarding targets for the period 2005-2010'.<sup>115</sup> The Group highlighted what were then perceived to be (and in most respects would ultimately be confirmed to be), the principal constraints to the development of wind generation in Ireland.<sup>116</sup>

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<sup>109</sup> The specified 6 greenhouse gasses are carbon dioxide, methane, nitrous oxide, sulphur hexafluoride, perfluorocarbons, and hydrofluorocarbons. For Ireland's responses in the period 1995-1997 under arts 4 and 12 of the United Nations, Framework Convention on Climate Change, to Ireland's obligations pursuant to the Convention see: Department of Environment (DOE), 'Ireland Climate Change, CO<sup>2</sup> Abatement Strategy' (1995 Stationary Office Dublin) <<http://unfccc.int/resource/docs/natc/irenc1.pdf>> accessed 27 May 2017; DOE, 'Ireland's Second National Communication under the United Nations Framework Convention' <<http://unfccc.int/resource/docs/natc/irenc2.pdf>> accessed 27 May 2017.

<sup>110</sup> *ibid* 4.

<sup>111</sup> DPE (n 106).

<sup>112</sup> *ibid* 119.

<sup>113</sup> *ibid* 111.

<sup>114</sup> RESG (n 97) 17.

<sup>115</sup> *ibid* 5.

<sup>116</sup> *ibid*.

Favourable policy and continuation of the AER Programme led to increased interest in investing in, and developing wind generating plants. RESG noted that while only 168 expressions of interest were received for AER I in 1994, three years later 279 were received for AER III, and there was also evidence of increased planning application activity.<sup>117</sup> The findings of RESG demonstrate that the market was responding to the policy incentives put in place by Government. It would however become clear very quickly that the Government could not drive the level of development in the direction of the specified targets using financial incentives alone. A much more sophisticated approach was required to deal with technical, administrative, regulatory and economic barriers. In retrospect, whilst the RESG did not identify the principal obstacles and barriers to the development of wind generation with any great degree of granularity, their lengthy report did set out the primary areas where difficulties did at that time exist, and where further and more complex problems would emerge as the level of wind penetration grew. The factors that RESG identified as having the potential to assist or hinder the development of wind generation in Ireland included: the availability of a fit for purpose network and market mechanism; the availability of planning permission for turbines and grid connection assets; and access to finance.<sup>118</sup>

The policy articulated in the 1999 Green Paper, and other papers that preceded it were undoubtedly very supportive of renewable energy and wind generation even if the targets were not terribly ambitious. Prior to 2001, policy documents were written around what were very modest targets. The enactment of the First and Second Renewable Energy Directives (and the latter in particular), heralded a very different prospect for renewable energy targets in Ireland, with much more aggressive, and ultimately binding targets. If these targets were to be met then a level of sophistication in response, actions and co-ordination beyond positive policy statements was required. The reality, as will be seen from the chapters that follow, is that the certainty of the pursuit evident in the early policy documents, somewhat ironically, if not concerningly, wanes once Ireland commits to ambitious binding targets.

## Chapter Conclusion and Application to Thesis Themes and Questions

Should Ireland ultimately meet its 2020 RES-E Target, and its binding Community target of 16% of gross final consumption of energy from renewable energy sources by 2020, the foundation stones upon which this pillar of energy policy success was constructed, will be found in the detail of various EU Directives and Regulations. Should Ireland, on the other hand, fail to meet these targets, it is submitted that the responsibility for this failure, in part at least, will lie with the

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<sup>117</sup> *ibid* 19.

<sup>118</sup> *ibid*.

architects of the two principal instruments that underpin renewable energy policy, the Second Renewable Energy Directive, and the Third Package Directive, and the EU principles of subsidiarity and proportionality that informed the content and drafting of these instruments and set the scene for the plethora of uncertainty that flows from them. The nature and extent of the regulatory failure revealed in this chapter, together with the consequences that flow from it for Ireland's pursuit of its RES-E Target, will be explored in detail in the chapters that follow.

## Chapter 3: Unbundling the Opportunity for Irish Wind Generation Technology

*'Before 1999 the generation transmission and supply of electricity in Ireland was a straightforward affair familiar in one degree or another to most people. The E.S.B. (Electricity Supply Board) a public monopoly generated transmitted and supplied electricity to all customers in this jurisdiction.'*<sup>119</sup>

### Network Unbundling and Wind Generation Technology

In the 2007 Government White Paper 'Delivering a Sustainable Energy Future for Ireland', the then Energy Minister, noted that a single ownership model, where the ownership and operation of the Transmission System would vest in a single entity, EirGrid, would 'enable more efficient and timely integration of renewable energy on to the grid system.'<sup>120</sup> The Minister highlighted the importance of the proposed transfer, or Full Ownership Unbundling (FOU) of ESB's transmission assets, for Ireland, acknowledging that it was 'critical for delivery of our ambitious renewable energy targets.'<sup>121</sup> Notwithstanding the Minister's assessment, FOU of ESB's transmission assets did not occur. As discussed in chapter 1 (*Introduction*), Ireland is struggling to achieve the annual development rate for wind energy necessary to meet its 2020 RES-E Target, and it now seems unlikely that Ireland will meet that target with knock-on consequences for Ireland's obligation to achieve 16% of gross final consumption of energy from renewable sources by 2020. The purpose of this chapter is to examine the policy, and legal reasons behind Ireland's failure to implement the FOU model provided for in the Third Package Directive, and to consider how this failure is contributing to the uncertain pursuit of Ireland's 2020 RES-E Target and may ultimately be a contributing factor in Ireland failing to meet that target.

In this chapter, it is argued that the manner of implementation of network unbundling in Ireland, serves to illustrate how deference to the EU principles of subsidiarity and proportionality leaves loopholes, or lesser alternatives that can be exploited at a Member State level, that can ultimately lead to regulatory failure, and the subversion of key Community objectives. This chapter also highlights the difficulties for Member States in implementing measures couched in optionality in the face of opposition from historical and entrenched vested interests. Because the legislative scheme for unbundling, as provided for in the Third Package Directive, left several options open

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<sup>119</sup> Hardiman J in *Viridian Power Limited and Huntstown Power Company Limited v The Commission for Energy Regulation* [2012] IESC 13. The Electricity Supply Board (ESB) is a statutory corporation established under the Electricity (Supply) Act 1927 (as amended).

<sup>120</sup> DCENR, *Government White Paper, Delivering a Sustainable Energy Future for Ireland* (2007) 48.

<sup>121</sup> *ibid.*

to Member States, Ireland, for reasons of political expediency, dressed up as economic necessity, could avoid difficult choices, default on published energy policy, and subvert the spirit of the EU measure. The outcome for Ireland is at best considerable uncertainty as to the achievement of its 2020 RES-E Target, and at worst, ultimately failing to do so.

Unbundling seeks to ensure that vertically integrated monopolies engaged in the transmission and distribution of electricity on the one hand, and in the production and/or supply of electricity on the other hand, do not use their ownership and/or control of their electricity network assets to prevent or make it difficult for third parties (renewable or otherwise), to get access to those networks. Unbundling is fundamentally about fairness or making sure that access to electricity networks for users is non-discriminatory, and that the necessary investment in those networks is not only made but is made for the benefit of all. The CJEU, in *Staat der Netherlands v Essent NV*, held that European law unbundling rules are so fundamental to the attainment of the internal market that they take precedence over fundamental freedoms such as the free movement of capital.<sup>122</sup>

Implementation of network unbundling in Ireland has been a complex and protracted business, informed as much by political expediency and organisational self-interest, as any other considerations. Notwithstanding the accepted network investment and competition benefits that can flow from the unbundling of electricity networks, and the acknowledged link between those benefits and the successful preferment of renewable energy, the promotion and development of renewable energy has not, for the most part, been a key determining factor in Ireland's approach to compliance with European mandated unbundling rules.<sup>123</sup> Any doubts in this regard were dispelled in 2010, when a published Government policy in favour of the most extreme version of unbundling namely, full ownership unbundling or FOU, was reversed in favour of a *status quo* Article 9(9) derogation from the most recent unbundling requirements as set out in the Third Package Directive. FOU of ESB's transmission assets was rejected notwithstanding that the Government had previously endorsed it as an essential requirement if electricity prices were to be reduced and, significantly in the context of the central issue examined in this thesis, investment in the electricity network was to occur to the extent required to support Ireland's drive towards meeting 2020 renewable targets.<sup>124</sup> At that time it was also accepted in an independent study, that FOU of ESB's Transmission System in favour of EirGrid may lead to

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<sup>122</sup> Cases C-105-107/12 *Staat der Netherlands v Essent NV* EU:C:2013:677.

<sup>123</sup> For a discussion of the competition and network benefits of unbundling see: Pollitt (n 35) 3; and Energy Community, 'Background Paper on the main elements of the Third Package for implementation in the Contracting Parties' (ANNEX1/28<sup>th</sup> PHLG/28-02-2013) <[http://www.mzhe-ks.net/repository/docs/PHLG\\_THIRD\\_PACKAGE.pdf](http://www.mzhe-ks.net/repository/docs/PHLG_THIRD_PACKAGE.pdf)> accessed 29 September 2017.

<sup>124</sup> DCENR (n 120) 48.



quicker connection times for wind generators and, as a result, assist Ireland in meeting its 2020 targets.<sup>125</sup>

Since the emergence of unbundling as a requirement in the First Electricity Directive, Ireland's response at a policy level has been greatly influenced by several competing, and ultimately irreconcilable objectives, and policy considerations. It is indeed arguable that in the absence of EU intervention, Ireland would not, for political, economic, and other considerations, have pursued a course of functional, managerial, and operational disaggregation of ESB in the interests of furthering competition, renewable or sustainable objectives, or indeed at all. Rather than dealing with the issue of ESB's influence over networks once and for all through a structural disaggregation solution, Ireland has from the outset pursued a course of partial unbundling supported by a complex, and highly inefficient web of contractual arrangements, legislative provisions, interlinked licences, compliance statements, and industry codes. Therefore, a disproportionately high level of regulatory oversight is required with associated cost. The arrangements now in place reflect a hard-won compromise arrived at over time to accommodate on the one hand, the historically dominant position of ESB and its trade unions and, on the other, the minimum legally required to give effect to the unbundling requirements mandated by a succession of EU Directives. Environmental and sustainability considerations, and wind generation specifically, have been mere secondary considerations in the commercial, legal and political tussle that has taken place between the key stakeholders since liberalisation of the Irish electricity market was first mooted almost two decades ago.

The current arrangement is that the Transmission System is owned by ESB (ESB is the Transmission Asset Owner or TAO), but it is operated, under licence from the CER, by a separate and independent legal entity wholly owned by the State and known as EirGrid (EirGrid is the Transmission System Operator or TSO). Ownership and operation of the Distribution System resides within the ESB corporate family cloaked in a complex web of legal structures, contracts mandated by regulation, licence conditions, and periodic compliance statements. Significant regulatory oversight is required in both instances. Thorsch in her thesis on the liberalisation and restructuring of the Irish electricity market has argued that a system of unbundling where the TSO does not own the transmission assets is 'very complex, costly, time consuming and leads to duplication of roles/work.'<sup>126</sup> Thorsch ultimately argues against unbundling in Ireland because as the CER 'makes the important decisions, unbundling is not necessary and is simply a costly

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<sup>125</sup> Frontier Economics, *Transmission Asset Analysis, Report Prepared for the Minister for Communications, Energy and Natural Resources* (January 2011) 4.

<sup>126</sup> Ellen Thorsch, 'Liberalisation and Restructuring of the Electricity Industry: Is Regulatory Uncertainty the Weakest Link? The Devil is in the detail. Focus-Republic of Ireland (PhD thesis, Trinity College Dublin 2012) 74.

exercise of giving the appearance of independence to market participants, which is not borne out in reality.<sup>127</sup> In this chapter, whilst the ‘appearance of independence’ argument is accepted and further explored, the notion that unbundling is not required, is not accepted whether the CER is the decision maker, or otherwise. This chapter examines the effectiveness of Irish unbundling arrangements through the eyes of new market entrants specifically in the wind generation sector. It is submitted that the unbundling arrangements that exist are fundamentally flawed, complex, and unnecessary if viewed from the perspective of anyone other than ESB, and its allied interests, but notwithstanding all the shortcomings that have been engineered, and wilfully built into the arrangements, the arrangements are the key that has opened the door to a not insubstantial renewable generation component developed by new market entrants. This level of development would not have occurred but for unbundling, because unbundling has given new market entrants a degree of confidence in the market, and enabled, though an independent TSO, investment in the network. This chapter argues that, had there not been a regulatory failure around network unbundling in Ireland, and had Ireland implemented the most extreme version of network unbundling, Ireland would be better placed to meet its 2020 targets. Thorsch’s view that unbundling is not necessary because the CER makes all the ‘important decisions’ is also challenged in this chapter. It is true, as is demonstrated in chapter 5 (*Prioritising the Wind: The Role of Policy, Law and Independent Regulation*), that the CER and SEMC have led the way in securing network and market access for wind generation at an operational level. What this chapter, and chapter 5 demonstrate, however is that, the CER cannot always be relied upon to make tough decisions in the interests of consumers, or new market entrants where the topic for discussion concerns the ownership, business, and activities of ESB, otherwise known as the grey and misty domain where policy (a matter for the Energy Minister), and regulation (a matter for the CER/SEMC), converge or overlap.

Thus, it is argued that it is not correct to conclude that renewable energy, and wind generation in particular, has not benefited from the partial unbundling of ESB that has been implemented in Ireland to date; it undoubtedly has. While the current arrangement has, and continues to be the subject of criticism from many independent commentators, the reality, as highlighted in chapter 1 (*Introduction*), is that there has been a significant increase in the level of installed wind generation capacity over the past decade.<sup>128</sup> Specifically how much of this is directly attributable

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<sup>127</sup> *ibid* 75.

<sup>128</sup> For a discussion as to why Ireland should pursue FOU see: Competition Authority, *Discussion Paper No. 3, Proposals for the Electricity Supply Industry in Ireland: Comments on the Consultation Paper published by the Department of Transport, Energy and Communications* (November 1997); Competition Authority, *Submission to the Commission for Energy Regulation-A Regulatory Approach to ESB Dominance* (S/04/001 2004); Department of Jobs, Enterprise and Innovation, Press Release, ‘*Competition Authority Says More Competition in Irish Energy Market would Benefit Consumers*’ (Dublin, 25 September 2009); Competition

to the fact of partial unbundling is unclear, but it is undoubtedly a relevant consideration. Important questions however remain unanswered. Had Ireland implemented European unbundling requirements more quickly, and efficiently or indeed, had Ireland pursued the European Commission's preferred unbundling model of FOU for the Transmission System, would the level of installed wind generation capacity in Ireland be higher, and has Ireland's reluctance or inability to implement FOU left Ireland with a sub-optimal regulatory framework' and more significantly, at risk of failing to meet its 2020 targets? At best, it is submitted that it has created considerable uncertainty in the pursuit of Ireland's RES-E Target and by extension Ireland's ability to meet its 16% EU target.

## Network Unbundling as a Catalyst for Network Investment and Wind Generation

The unbundling of vertically integrated monopolies in the energy sector has been at the centre of European energy policy and regulation for many years, and is seen as one of the essential enablers of competition in the electricity generation and supply sectors, and importantly from a wind generation perspective, investment in electricity networks.<sup>129</sup> In an Irish context, the potential for competition in the generation sector from wind technology was, and is, constrained by the inability of the electricity networks to accommodate large scale intermittent wind generation.<sup>130</sup> For Ireland to secure significant investment in, and competition from wind generation, it was, and will continue to be necessary to ensure that appropriate and timely investment in the network was made and will continue to be made.<sup>131</sup>

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Authority, *Submission to the Business Regulation Forum-Reducing the Burden of Regulation on Business* (S/06/004 2006); Competition Authority, *Competition Benefits Everyone* (November 2009); Competition Authority, *Submission to the Review of the Regulatory Framework for the Retail Electricity Market-Proposals on a Roadmap for Deregulation* (S/10/001 2010); Competition Authority, *Competition in the Electricity Sector* (December 2010); Competition Authority, *Submission to the Consultation on Market Power and Liquidity in the SEM* (S/11/03 2011); Competition Authority, *Submission-CER Consultation on Market Monitoring in the Electricity and Gas Retail Markets CER/13/302* (S/14/003 2014); and Competition Authority, *Submission to the Green Paper on Energy Policy in Ireland* (S/14/05 2014).

<sup>129</sup> Pollitt (n 35).

<sup>130</sup> For a discussion of Irish Transmission and Distribution issues, and issues associated with historic underinvestment see: Deloitte, *Review of the Electricity Sector in Ireland, Final Report* (9 December 2005) 35-37 <<http://www.dcenr.gov.ie/NR/rdonlyres/9A6C3D87-502F-4577-B019-77B46B8B690D/0/DeloitteReportOctober2006.pdf>> accessed 5 June 2015. See also Forfás, 'Electricity Benchmarking Analysis' (December 2006) <[http://edepositireland.ie/bitstream/handle/2262/71212/forfas061214\\_electricity\\_benchmarking\\_analysis.pdf?sequence=1&isAllowed=y](http://edepositireland.ie/bitstream/handle/2262/71212/forfas061214_electricity_benchmarking_analysis.pdf?sequence=1&isAllowed=y)> accessed 29 September 2017. For a discussion of the difficulties in balancing the variability of wind generation see: Frontier Economics, *International Support for Onshore Wind, A Report Prepared for DECC* (June 2013) 109 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/205620/international\\_support\\_onshore\\_wind\\_frontier.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205620/international_support_onshore_wind_frontier.pdf)> accessed 8 June 2015.

<sup>131</sup> For details of the nature and extent of the investment required in the Irish Transmission System see: EirGrid, *Grid 25-A Strategy for the Development of Ireland's Electricity Grid for a Sustainable and Competitive Future* (2008).

Much of the debate and published literature concerning Irish wind development is preoccupied with two adjectives: ‘intermittent’ and ‘unpredictable’ and it is these two characteristics that, from a networks perspective at least, set wind generation technology apart from conventional fossil fuel technology. The experience in Ireland demonstrates that ensuring that parties other than the incumbent monopoly have the legal right to access the electricity network is only the starting point, and does not get one very far if the network they are seeking access to is either, not fit for *their* specific purpose, or the process of getting access to the network is protracted and/or weighted against the applicant. In the early days, new market entrants in the wind sector were very much focussed on the latter, but it is the technical reality of the former, that has presented, and continues to present, challenges for the sector.<sup>132</sup> It is accepted that, timely and efficient access at a reasonable cost to the grid is a key factor in the assessment of the viability of any proposed power generation project, whether it is for renewable or conventional technology.<sup>133</sup>

In Ireland, as in many developed economies, the expansion of network assets progressed in parallel with advances in conventional generation technology and was taken forward in a co-ordinated fashion by a single integrated monopoly utility, ESB. Sites were chosen by reference to population and proximity to fuel sources. Peat fired power stations were built near peat bogs, gas fired plants were located close to the expanding gas transmission network; and coal fired power stations close to State owned ports through which coal was imported. Ireland’s earliest renewable generation plant, the hydro stations built by ESB, were located at optimum locations on major waterways. The advent of wind generation in Ireland had the potential to change all of this, but a network built to support conventional generation technology with a controllable and available fuel supply and predictable output did not fit well with technology driven by an intermittent and unpredictable fuel source and variable output.<sup>134</sup> There was also a significant difficulty in so far as the electricity network was at its weakest in the areas of highest wind potential along the west coast, leading RESG to conclude at an early stage, that there was a

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<sup>132</sup> *ibid.* See also: SEMC, *DS3 System Services Procurement Design and Emerging Thinking, Decision Paper* (SEM-14-108 2014).

<sup>133</sup> RESG (n 97).

<sup>134</sup> For a discussion of the challenges of connecting large amounts of intermittent wind to the Transmission System see: Morgan Brazilian, Eleanor Denny, Mark O’Malley, ‘Wind Engineering Journal-Challenges of Increased Wind Penetration in Ireland’ <<http://www.tara.tcd.ie/bitstream/2262/55298/1/Wind%20Engineering%20Journal%20-%20Challenges%20of%20Increased%20Wind%20Penetration.pdf>> accessed 23 April 2014; OECD Environment Directorate International Energy Agency, *International Energy Technology, Collaboration and Climate Change Mitigation, Case Study 5: Wind Power Integration into Energy Systems* (2005); Garrad Hassan, ‘Study into the impacts of increased levels of wind penetration on the Irish electricity systems: First Interim Report for the Commission for Energy Regulation and OFREG’ (2002) <[http://www.regie-energie.gc.ca/audiences/3526-04/MemoiresParticip3526/Memoire\\_CCVK\\_18\\_InterimWindStudy.pdf](http://www.regie-energie.gc.ca/audiences/3526-04/MemoiresParticip3526/Memoire_CCVK_18_InterimWindStudy.pdf)> accessed 23 April 2014.

significant capacity shortage on the network, that investment was required, and that this would be critical for new market entrants.<sup>135</sup>

Without an express legal requirement to do so, or appropriate commercial incentives, it is difficult and indeed understandable, to see why ESB, a commercially focussed, highly successful vertically integrated utility, with a large fleet of conventional generation and compatible networks, would make the necessary investment in those networks to enable the development of wind generation by third parties who would, once connected, become competitors. In 2000, ESB National Grid (ESBNG), the then TSO designate, identified the challenges surrounding the connection of renewables to the electricity network both in terms of the investment that would be required to accommodate wind, and the security and continuity of supply issues that connecting large amount of intermittent wind generating technology to the network would give rise to.<sup>136</sup> These concerns were echoed by RESG.<sup>137</sup>

The Irish Transmission System is small and isolated comprising a mere 6,500 KM of high voltage underground cables, and overhead lines together with more than 100 transmission stations.<sup>138</sup> Initially, the majority of new wind projects connected to the Distribution System, a system comprised of 160,000,000 Kilometres of lower voltage overhead lines and underground cables as well as 235,000 transformers.<sup>139</sup> Projects now connect to both systems, but the overhead lines and underground cables that make up the Transmission System are not, located in areas of high wind availability along the west coast. Significant investment in network development is therefore required to harness the west coast wind potential.

The link between the unbundling of vertically integrated monopolies such as ESB, and the ability of new technology to gain a foothold in a market and compete on a level playing field with incumbent conventional fossil fuel technology, is well documented.<sup>140</sup> Pollitt in his paper on ownership unbundling notes the link between the requirement for investment in transmission

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<sup>135</sup> RESG (n 97) 61.

<sup>136</sup> For a discussion of ESB National Grid's concerns see: ESB National Grid, *Report on Wind Capacity Acceptance* (reproduced at: RESG (n 97) Appendix H).

<sup>137</sup> RESG (n 97) 56.

<sup>138</sup> For a map of the Transmission System see: EirGrid Group, *'Transmission System Geographic Map- January 2016'* <<http://smartgriddashboard.eirgrid.com/assets/All-IslandTransmissionMap.pdf>> accessed 29 September 2017. For a description of the Transmission System see: ESB Networks, *'Our Infrastructure'* <<https://www.esbnetworks.ie/who-we-are/our-networks>> accessed 19 April 2017.

<sup>139</sup> ESB Networks (n 138).

<sup>140</sup> Pollitt (n 35) 3; Energy Community (n 123); and Neelie Kroes, 'Improving Competition in European Energy Markets Through Effective Unbundling' (2007) 31 *Fordham International Law Journal* 1387. For an example of market abuses arising from an entity having control over both TSO functions and generation assets see: Commission, 'Commission Decision of 26 XI 2008 relating to a proceeding under art 82 of the EC Treaty and art 54 of the EEA Agreement (Cases/COMP 39.388-German Electricity Wholesale Market and COMP/39.389-German Electricity Balancing Market).

networks to accommodate large amounts of intermittent wind capacity, often located some distance away from the existing network, and the impediment to this inherent in the vertically integrated utility model where the incumbent monopoly utility has no incentive to make the necessary investment to accommodate new technology *per se* or competition from new non-conventional technology.<sup>141</sup> Intermittent wind generation requires back-up support, from conventional generation for periods when there is insufficient wind, and investment in new network infrastructure is required to take wind generated power from areas of high wind on the west coast, to the demand centres predominantly on the east coast.<sup>142</sup> Unbundling therefore has the potential to ensure necessary network investment is made not only for the benefit of conventional generation, but also for wind and other renewables.

In Ireland, the reforms that began with the First Electricity Directive commenced the process of putting in place a framework that sought to move critical decision making around investment in, and development of the electricity network, away from ESB management structures motivated by non-network considerations, and thus allowed network development to respond to policy targets aimed at increased wind penetration, and financial support mechanisms introduced to encourage developers into the market.

### Network Unbundling and the Possibility of Competition from Wind Generation

In his analysis of the lessons of electricity restructuring Bradford identifies several issues that have the potential to dampen the development of competition and technological advancement in electricity markets. Bradford sees market power as something that will ‘not only stifle the potential price benefits of competition; it will also retard technological innovation and the development of markets that encompass the provision of energy efficiency.’<sup>143</sup> This is because the ‘incumbents are not culturally predisposed to compete. New entrants face large capital requirements as well as essential facilities (such as transmission lines) and data bases that are under the control of their potential competitors.’<sup>144</sup> In other words, if new market entrants, and new generation technology, are to gain a foothold in electricity markets that are dominated by monopolistic vertically integrated incumbents, those markets need to be restructured, and market power needs to be addressed.<sup>145</sup> This was the position in Ireland in 1999 when the process

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<sup>141</sup> Pollitt (n 35) 3.

<sup>142</sup> For a discussion of these concerns see: RESG (n 97) 22; and John Leahy, ‘Gate 3 Grid Connection Group Processing Approach, An Analysis’ (MSc Energy Management thesis, Dublin Institute of Technology 2010).

<sup>143</sup> Bradford (n 35) 411.

<sup>144</sup> *ibid.*

<sup>145</sup> For examples of how vertically integrated network owners can use their dominant position to discriminate in favour of their own generation and supply businesses see: Frontier (n 125) 101. In Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, the CJEU graphically outlines at paragraphs [67]-[129] how the structure of United Brands Company in the relevant

of opening up the Irish electricity market commenced. The many faces of ESB dominance, and the variety of hurdles that it presented to market entry included its ownership of a substantial portfolio of generation plant across a range of fuel, and technology classes. This plant included base load plant that operated constantly, mid-merit plant that adjusted output in line with demand fluctuations, and peaking plant that operated at peak demand times only; all of which enabled ESB to respond to each segment of daily, and seasonal demand. ESB had overtime, secured the best generation site locations with proximity to fuel (peat, coal, water, and gas), as well as network infrastructure. In the supply market, ESB and the ESB brand, had not only a dominant position from a market share perspective, it also held, through the historical strength of its brand and service level offering, the confidence of business, and retail consumers.<sup>146</sup>

It is important to reiterate the words of Hardiman J in *Viridian Power Limited v The Commission for Energy Regulation*.<sup>147</sup> Before the ERA, the generation, transmission and supply of electricity in Ireland was a ‘straightforward affair familiar in one degree or another to most people. The E.S.B. ... generated, transmitted and supplied electricity to all customers in this jurisdiction.’ From the mid-1990s on however, things started to become considerably less straight forward for companies like ESB, as the position of large, State owned, vertically integrated utilities were for the first time challenged. In the intervening period these monopolies have struggled with varying degrees of success to hold on to their dominance in the electricity generation and supply sectors, while their ownership and control of network assets has become more and more difficult to justify, in the face of European Union measures aimed at increased competition in the generation and supply of electricity.<sup>148</sup> The desire for competition was not confined to the encouragement of new market entrants to compete with the incumbent monopolies across familiar technologies. The drive for increased competition also coincided with an increased awareness at European level of the potential role renewable energy could play in enabling the European Community meet decarbonisation targets. Incumbent monopolies were faced with a world where they had to

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market enabled it to foreclose competition. The CJEU noted that the dominant position referred to in art 86 EC (now art 102 TFEU), ‘relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.’ This is the coveted position that dominant electricity undertakings such as ESB (which had the added advantage of a statutory monopoly that placed it a dominant position), held at the commencement of liberalisation, and which unbundling seeks to address. The dominance test laid down in *United Brands* was followed in *Case 85/76 Hoffmann-La Roche AG v Commission* [1979] ECR 461.

<sup>146</sup> For a discussion on ESB’s dominance see: Deloitte (n 130).

<sup>147</sup> *Viridian Power Limited v The Commission for Energy Regulation* (2012) IESC 13.

<sup>148</sup> For a discussion of the problems of vertical integration between non-competitive and competitive activities, and the incentive and ability to restrict competition and remedies for addressing these problems see: OECD, *Restructuring Utilities for Competition, Competition and Regulatory Reform* (2001); and Michael Albers, ‘Energy Liberalisation and EC Competition Law’ (28<sup>th</sup> Annual Conference of Antitrust Law and Policy, Fordham, 26 October 2001) <[http://ec.europa.eu/competition/speeches/text/sp2001\\_028\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2001_028_en.pdf)> accessed 21 April 2014.

compete not only on familiar territory around conventional technology of which they had a large portfolio, but also in the arena of new renewable technologies including wind of which they had little or none.

The emergence of unbundling at a European level coincided with Ireland's desire to harness abundant national wind resources for electricity production. It should have followed that these two policy imperatives would complement each other, and to a certain extent they did. In the early days however, unbundling as a tool for advancing the cause of renewable penetration, and competition from renewables, was not over emphasised as a matter of policy. Unbundling was seen as something that had the potential to facilitate competition, and network investment in the broadest sense for the benefit of all market entrants, and not necessarily innovative technology alone. Investment in the network allowed new generation (conventional and renewable), into the market to compete. As the problem of grid access for wind became more understood and acute, and the need for, and level of investment in the network more obvious, Irish energy policy started to make a more express link between removing ESB's ownership and control of the Transmission System, and Ireland meeting renewable targets.<sup>149</sup> Meeting renewable targets has however never been a primary reason put forward in favour of unbundling. It has always been a secondary consideration behind competition in the general sense, the need to reduce electricity prices, and the requirement to comply with EU unbundling rules.<sup>150</sup>

It is now accepted by independent commentators that there is competition in the Irish electricity generation market.<sup>151</sup> This competition includes an ever-increasing portfolio of new market entrants in the wind generation sector. Though EU legislation has many examples of measures aimed at specifically promoting and encouraging renewable energy, the network unbundling rules prescribed by EU legislation are, on the face of it, technology neutral. To the extent that full or partial unbundling facilitates new market entrants, and competition, it should in theory do so across all technology classes.<sup>152</sup> Liberating networks from the ownership and control of a dominant incumbent electricity undertaking with generation and supply activities, should allow new market entrants in the generation sector the possibility of competing with the dominant

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<sup>149</sup> Noel Dempsey, T.D., and Minister for Communications, Energy and Natural Resources-speech at the launch of the Government's Energy White Paper, 'Delivering a Sustainable Energy Future for Ireland' (12 March 2007). See also: Deloitte (n 130).

<sup>150</sup>DCENR (n 120).

<sup>151</sup> Competition Authority, *Submission by the Competition Authority to the Consultation on Market Power and Liquidity in the SEM* (S/11/003 2011) 6; IEA, *Energy Policies of IEA Countries, Ireland 2007 Review* (2007) 96.

<sup>152</sup> For a consideration of the impact of partial unbundling in the Belgian electricity market see: Guido Pepermans and Bert Willems, 'The potential impact of cross-ownership in Transmission: An application to the Belgian Electricity Market' (January 2005) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=809125](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=809125)> accessed 11 June 2015.



undertaking as unbundling aims to give all generators, including the dominant generator, equal access to the network. In markets like Ireland, where the electricity network evolved to support conventional, rather than new intermittent generation technology such as wind, it followed that network unbundling had the potential to play a further important role in ensuring that those responsible for network ownership, and operation, made the necessary investment in the network, not only to allow market entry by, and competition from, conventional technology, but also to make the network compatible with large volumes of intermittent wind generation technology. Ireland's policy to promote wind generation should therefore have benefited from European endeavours to diminish the control electricity generation and supply monopolies had over networks.

## Overview of European Network Unbundling Requirements

There are a number of different types of unbundling to be found in European legislation ranging from mere separation of people, systems and information flows at one end of the spectrum, to full ownership unbundling of network assets at the other end.<sup>153</sup> Unbundling at its simplest seeks to ensure that vertically integrated monopolies such as ESB in Ireland, that are involved in both the transmission and distribution of electricity on the one hand, and in the production and/or supply of electricity on the other hand, do not use their ownership or operational control of their electricity network assets to prevent or make it difficult for third parties to get access to those networks. Unbundling is thus concerned with making sure that access to networks for users is non-discriminatory, and that the necessary investment in those networks is not only made but is made, for the benefit of all.<sup>154</sup>

The objective of the First Electricity Directive, as far as unbundling of transmission functions is concerned, was to secure the operational independence of the transmission activity of vertically integrated undertakings, otherwise known as undertakings performing two or more of the functions of generation, transmission, and distribution of electricity.<sup>155</sup> ESB as it then was, fell within both the definition and the requirement.<sup>156</sup> The separation that was required was not however, deep. The requirement, as it applied in the case of Ireland, was to ensure that the system operator was independent 'at least in management terms' from other activities not

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<sup>153</sup> See: Pollitt (n 35) 3; and Energy Community (n 123). For an overview of different unbundling models see: NPC and Westminster Foundation for Democracy 'Parliamentary Oversight Over Energy Markets Policies in the Countries of the Western Balkans, Toolkit for Members of Parliament and Parliamentary Staff' (November 2014) 19-22 <<http://www.npcbalkan.net/admin/doc/5150EnergyMarkets-Toolkit%20EN.PDF>> accessed 8 June 2015.

<sup>154</sup> Energy Community (n 123).

<sup>155</sup> First Electricity Directive, recital 30.

<sup>156</sup> For a discussion of the need to reform ESB and the vertically integrated utility model in Ireland see: Deloitte (n 130).

relating to the transmission system. It was therefore necessary to ring-fence ESB's transmission function from its other activities of generation and supply.<sup>157</sup> As a Member State, Ireland was also required to designate, or require ESB to designate, a system operator to be responsible for operating, ensuring the maintenance of, and if necessary developing the Transmission System.<sup>158</sup> A similar requirement applied in respect of the Distribution System.<sup>159</sup>

The designation and embryonic form of independence bestowed on transmission system operators, and to a lesser extent, distribution system operators, meant that the influence of vertically integrated undertakings, motivated by conflicting economic and financial considerations aimed at optimising the transmission and distribution systems for the benefit of their own generation and supply activities was, if not eliminated, somewhat reduced. The development was also an essential part of the necessary framework for third party access to networks. In Ireland's case, the third parties would include international conventional power developers, as well as renewable generation developers. Under the revised framework new market entrants seeking connection to the Transmission System, or the Distribution System, approached the newly designated 'independent' system operators.<sup>160</sup> Once Irish wind generators connected to the Transmission System or the Distribution System, the First Electricity Directive offered the possibility, though not the guarantee, of priority dispatch.<sup>161</sup>

The unbundling mandated by the Second Electricity Directive was deeper, and more defined than the earlier Directive reflecting a concern at a European Union level that more effective measures were required to deal with dominance.<sup>162</sup> This new impetus at a European level coincided with the start of liberalisation of the electricity market in Ireland, and the beginning of the drive towards greater wind penetration. On network access, it was recognised that for competition to function in the market, access to networks must be non-discriminatory, transparent and fairly priced. The First Electricity Directive had mandated management ring-fencing for transmission operator functions. The Second Electricity Directive took the separation a stage further, and required that distribution and transmission systems be operated through legally separate entities.<sup>163</sup> Specifically, the requirement was that when network assets are both owned by, and operated by, a vertically integrated undertaking, system operators should be given effective

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<sup>157</sup> First Electricity Directive, art 7(6).

<sup>158</sup> *ibid* art 7(1).

<sup>159</sup> *ibid* art 10(2).

<sup>160</sup> *ibid* art 17(5).

<sup>161</sup> *ibid* articles 8(3), 11(3).

<sup>162</sup> Council and Parliament Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37, recital 2; and European Parliament Resolution of 6 July 2000 on the European Commission's second report to the Council and the European Parliament on the state of liberalisation of energy markets (A5-0180/2000).

<sup>163</sup> Second Electricity Directive, arts 10, 15.

decision-making powers in relation to assets that are necessary to maintain, operate and develop the networks. In short, the independence of distribution and transmission system operators must be guaranteed.<sup>164</sup>

The Second Electricity Directive avoided the thorny, and politically sensitive issue of ownership unbundling.<sup>165</sup> Clearly the most effective step to guarantee the independence of transmission and distribution from generation and supply considerations, would be to mandate that the distribution and transmission assets could not be owned or controlled by an entity that was also concerned with electricity generation and supply activities. This however would have been a step too far for national governments, and the interests of large European utilities, whose balance sheets were historically inflated by large scale revenue generating distribution and transmission assets. The Second Electricity Directive explicitly allowed vertically integrated undertakings like ESB to retain ownership of such assets. The compromise was that they were required to house them in separate legal entities from their generation and supply activities.<sup>166</sup>

### Ireland's Response to European Network Unbundling Requirements

Commencing with the ERA, in the period from 1999 to 2008, a series of domestic measures were introduced to give effect to the EU's progressive unbundling requirements. The European Communities (Internal Market in Electricity) Regulations 2000, SI 2000/445 (the 2000 Regulations), finalised the process of transposition of the First Electricity Directive that had commenced with the ERA, while The European Communities (Internal Market in Electricity) Regulations 2005, SI 2005/60 (the 2005 Regulations); and The European Communities (Internal Market in Electricity) (Electricity Supply Board) Regulations 2008, SI 2008/280, transposed the requirements of the Second Electricity Directive into Irish law.

The 2000 Regulations provided for the establishment of a new, wholly owned, State company known as EirGrid. EirGrid was to be separate both in terms of ownership and management from ESB, and was to be the Transmission System Operator (TSO). Critically, ownership of the Transmission System was to remain with ESB. The 2000 Regulations made provision for the transfer of the TSO functions of ESB to EirGrid. This transfer, and assumption of the TSO functions by EirGrid, was expressed to be conditional upon ESB and EirGrid agreeing a Transfer Agreement

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<sup>164</sup> *ibid* recital 8.

<sup>165</sup> For a discussion of the nature of unbundling requirements see: *Case C-274/08 Commission v Sweden* [2009] ECR I-10647. The Commission argued that Sweden had failed to adopt appropriate measures to ensure that the requirements for a functional division between electricity transmission activities and electricity generation activities in a vertically integrated undertaking were adopted as required by the Second Electricity Directive, art 15(2)(b) and (c). The Court held that the general requirements of Swedish company law alone were not sufficient in the absence of specific measures to ensure compliance.

<sup>166</sup> Second Electricity Directive, recitals 8 and 10.

pursuant to which the assets, resources and staff of ESB that were required to perform the TSO functions would transfer to EirGrid and an Infrastructure Agreement to contractually regulate the parties' future relationship. In practical terms, ESB would cede control of the interface between the Transmission System, and those seeking to connect to it and use it, including prospective developers of wind generation assets, but importantly would still sit behind EirGrid. This 'independence' would ensure that new market entrants did not have to seek access to the Transmission System from their principal competitor in the fledging liberalised market. The then Chairman of EirGrid saw the development as essential for competition, and a positive signal to new market entrants.<sup>167</sup>

The transfer contemplated by the 2000 Regulations did not proceed smoothly and there were significant delays in concluding the Transfer Agreement and Infrastructure Agreement.<sup>168</sup> As a result, EirGrid did not officially assume its role as TSO until 1 July 2006. In the interim, transitional arrangements applied pursuant to which ESB through ESB Networks, made resources available to ESB National Grid (a division of ESB), to enable ESB National Grid to perform the function of TSO. Ownership and operation of the Transmission System remained within the ESB corporate family. Notwithstanding policy and legislation, EirGrid waited on the side-lines, and was thus a bystander in the critical period from the enactment of the 2000 Regulations up to July 2006 when EirGrid was finally allowed to assume the mantle of TSO. Some of the most important decisions from a wind generation perspective, were made during this period. It is difficult to determine the precise impact (if any), the delay in establishing EirGrid as TSO had on the implementation of renewable generation policy. If the issuance of new grid connection offers to developers is used as the measure, then one could conclude that the stalemate that arose between ESB and EirGrid did have an adverse impact. Because of a CER imposed moratorium, no new connection offers were issued to wind developers between December 2003, and May 2005. The moratorium, which is discussed in chapter 5 (*Prioritising the Wind: The Role of Policy, Law and Independent Regulation*), was called by ESB as Transmission System Operator (TSO), and Distribution System Operator (DSO) for system security, and reliability reasons due to the large amount of wind seeking connections to the grid. Would this moratorium have been put in place if EirGrid was TSO? The answer is undoubtedly yes. The issues associated with greater wind penetration were acknowledged by many independent commentators at the time.<sup>169</sup> Would the moratorium have

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<sup>167</sup> Eddie O'Kelly, Chairman, EirGrid, *Address to Joint Oireachtas Committee on Communications, Marine and Natural Resources* (28 June 2004) 2-3. The Infrastructure Agreement is available on-line at: <https://www.cru.ie>

<sup>168</sup> For a summary of the difficulties that arose in seeking to transfer the TSO business to EirGrid including details of areas where there were protracted negotiations, and judicial review proceedings taken by EirGrid see: O'Kelly (n 167); and CER, *Annual Report* (2001) 17.

<sup>169</sup> For example, see: Brazilian, Denny and O'Malley (n 134).

been lifted more quickly if EirGrid was in control? Again, the answer is that it probably would not. The lifting of the moratorium and removal, or sidestepping, of the issues that gave rise to it in the first instance had, as highlighted in chapter 5, much more to do with the key role of the CER in ensuring that all stakeholders (including TSO and DSO), actively and constructively engaged in the process of finding, and implementing solutions. The issues that arose around finalisation of the Transfer Agreement and the Infrastructure Agreement were undoubtedly an unnecessary distraction during this critical time. What is surprising is that the Government allowed two State entities to engage in costly and protracted negotiations and ultimately litigation, in an area where Government policy was clear, and the Oireachtas had legislated.

The functions ultimately bestowed on EirGrid in its capacity as TSO are set out in considerable detail in legislation, and licence conditions.<sup>170</sup> As TSO, EirGrid's central function is to operate the Transmission System. Under the terms of its licence ESB, as owner of the Transmission System, has a positive obligation to facilitate the discharge by EirGrid, of its TSO functions.<sup>171</sup> ESB must, for example, maintain the system, and carry out construction work in accordance with EirGrid's Development Plan.<sup>172</sup> ESB must also provide EirGrid with such information as may be necessary for EirGrid to carry out its functions.<sup>173</sup> ESB is obliged to provide information to the CER, and the latter can call on the ESB to provide information to it.<sup>174</sup> ESB must provide assistance to, and cooperate with EirGrid in the development and review of the Transmission System Security and Planning Standards prepared by EirGrid, and ESB must comply with these standards to the extent relevant to it.<sup>175</sup>

As ownership of the Transmission System remains with ESB, the ESB/EirGrid interface requires significant explanation and demarcation. In particular, and to further regulate the interface, the licences held by ESB and EirGrid require each to enter into an Infrastructure Agreement with the other to regulate access to the Transmission System.<sup>176</sup> The express purpose of the Infrastructure Agreement is to enable EirGrid to perform its TSO functions under legislation and the terms of its licence.<sup>177</sup> Similar, and equally complex arrangements<sup>177</sup> have been put in place in relation to the

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<sup>170</sup> See: The 2000 Regulations; The 2005 Regulations; and the Transmission System Operator Licence granted to EirGrid, 29 June 2006. See also: European Communities (Internal Market in Electricity) (Amendment) Regulations 2002, SI 2002/145; and European Communities (Internal Market in Electricity) (Amendment) Regulations 2003, SI 2003/328. For a precursor to the 2000 Regulations see: Electricity Regulation Act, 1999 (Trading Arrangements in Electricity) Regulations 2000, SI 2000/49, reg 5.

<sup>171</sup> Transmission System Owner Licence granted to ESB, 25 June 2001, Condition 9(1)-(5).

<sup>172</sup> The 2000 Regulations, reg 19.

<sup>173</sup> *ibid* (n 171) Condition 18.

<sup>174</sup> *ibid* Condition 19.

<sup>175</sup> *ibid* Condition 8(1)-(3).

<sup>176</sup> The 2000 Regulations, reg 18.

<sup>177</sup> Transmission System Owner Licence granted to ESB, 25 June 2001, Condition 2(1). The complexity and confusion that flows from the Infrastructure Agreement is evident from the decision of Barrett J in *North*

Distribution System. The principal difference being that the DSO, ESB Networks Limited, remains part of the ESB corporate group, and has not been subject to the same separation process as the operator of the Transmission System, EirGrid. The history of the relationship between the DAO and DSO is outwardly at least, considerably more harmonious than the relationship between ESB and EirGrid.

Thorsch in her study of liberalisation and restructuring of the Irish electricity market conducts a very thorough review of the Infrastructure Agreement, concluding that aspects of the agreement provide ESB ‘with considerably stronger rights than what has been set out in Regulation 18.’<sup>178</sup> This begs the question as to how the Infrastructure Agreement was approved by the CER. Further, Thorsch sees the Infrastructure Agreement as an instrument of uncertainty that gives rise to barriers to entry: ‘The agreement has a significant anti-competitive impact because of the potential barriers to entry and regulatory uncertainty it creates in lack of control to the Transmission System Operator and uncertain imbalanced delineation roles.’<sup>179</sup> But what are the implications for wind? Thorsch’s work does not for the most part concern itself with wind generation. She does however note that through the agreement ESB controls ‘the timing and construction of maintenance works.’<sup>180</sup> The implications of this from a wind development perspective are profound and are discussed later in this chapter but in summary, it is submitted that the complex interface outlined above, coupled with inefficient processes and procedures built into the agreement, all add up to considerable additional cost and delay for wind developers, and thus add to the uncertainty of Ireland’s pursuit of its 2020 RES-E Target. Thorsch’s most concerning finding from a regulatory perspective is that because of the Infrastructure Agreement, the statutory exclusivity and independence conferred on EirGrid as TSO does not, in reality, exist because ‘Instead of the Transmission System Owner being bound to comply with the directions of the Transmission System Operator, the reverse appears to be the case.’<sup>181</sup>

## The Emergence of the Third Energy Package and Full Ownership Unbundling

The Second Electricity Directive had imposed requirements of legal and functional unbundling as from 1 July 2004. The European Commission’s subsequent energy sector inquiry identified numerous serious shortcomings in the EU internal energy market. In its communication on the results of the inquiry, the Commission took the view that notwithstanding the existing unbundling

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*East Pylon Pressure Campaign Ltd v An Bord Pleanála* [2017] IEHC 338 where the court, reviewing the Infrastructure Agreement, had to decide who, as between ESB and EirGrid, was ‘constructing’ the development in question, and who was ‘carrying out the development.’

<sup>178</sup> Thorsch (n 126) 147.

<sup>179</sup> *ibid* 153.

<sup>180</sup> *ibid* 148.

<sup>181</sup> *ibid* 152.

provisions, new market entrants were still not getting effective network access. Network operators continued to be suspected of discriminating in favour of their own affiliated entities. Vertical integration was preventing investment, and operational decisions being taken in the interests of the networks, rather they were taken for the benefit of generation and supply activities.<sup>182</sup> The results of the Commission's competition investigations into individual companies launched in the wake of the sector inquiry, confirmed these concerns. In response, the Commission proposed a third package of energy liberalisation measures which initially included FOU of transmission systems, from generation and supply activities, as a universal solution.<sup>183</sup> Following resistance from some Member States, the Commission subsequently proposed a watered down Independent System Operator (ISO) model as an alternative. An Independent Transmission Operator (ITO) model then emerged as a third, and more vertically integrated utility friendly option. Both the ISO and ITO models allow the vertically integrated utility to retain ownership of the transmission assets. As if these lesser options were not enough, the FOU requirement was finally and completely undone by the inclusion of a third possible derogation in Article 9(9) of the Third Package Directive.<sup>184</sup> This latter derogation allowed Member States to preserve the status quo that existed in their jurisdiction on 3 September 2009 subject to certain conditions.<sup>185</sup> Notwithstanding the menu options ultimately made available to Member States, the Commission's preferred option remained FOU:

Economic evidence shows that ownership unbundling is the most effective means to ensure choice for energy users and encourage investment. This is because separate network companies are not influenced by overlapping supply/generation interests as regards investment decisions. It also avoids overly detailed and complex regulation and disproportionate administrative burdens.<sup>186</sup>

As these developments were unfolding in Europe, the Irish Government itself seemed to be finally waking up to the problems of vertical integration. In a 2005 Report, prepared for the Energy Minister, one of the central recommendations was the full ownership unbundling of the Transmission Asset Owner (TAO), Distribution Asset Owner (DAO) and Distribution System

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<sup>182</sup> Commission, 'Communication from the Commission-Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)' COM (2006) 851 final, para 19.

<sup>183</sup> Third Package Directive.

<sup>184</sup> *ibid.*

<sup>185</sup> For an explanation of each option and the Article 9(9) derogation see: Energy Community (n 123).

<sup>186</sup> Commission (n 182) 14. For studies on the benefits of ownership unbundling see: Pollitt (n 35); and Energy Community (n 123); Machiel Mulder and Victoria Shestalova., 'Costs and benefits of vertical separation of the energy distribution industry: the Dutch case' (2006) (1) 2 Competition and Regulation in Network Industries, 197; and R. Kunneke and T. Fens, 'Ownership Unbundling in electricity distribution: the Case of the Netherlands' (2007) 35 Energy Policy 1920-1930.

Operator (DSO) functions of ESB.<sup>187</sup> The Government Green Paper of 2006 for the first time expressed serious concerns that the institutional arrangements were not delivering competition in the generation and supply sectors. The paper specifically pointed to the actual, and perceived dominance of ESB and its large portfolio of price setting plant as a barrier to entry, and something that was hindering the development of competition for the benefit of consumers. In the absence of structural change there would be no real downward pressure on electricity prices, no incentive for new entrants, and deep regulation.<sup>188</sup> Concluding that the case for change was ‘compelling’ and notwithstanding the protracted difficulties encountered in the delivery of the EirGrid project, the issue of structural change was now firmly on the policy agenda.<sup>189</sup> FOU as a policy was confirmed in the White Paper that followed in March 2007.<sup>190</sup> The Government’s concerns were shared by the Competition Authority, and the Authority also came out strongly in favour of FOU.<sup>191</sup> The various reasons put forward by the Authority included the fact that, as the level of capital outlay in respect of the networks was anticipated to increase so that the networks could be taken to more remote areas, the cost of funding that expansion would become an increasingly significant element of the price of electricity paid by consumers.<sup>192</sup> On the regulatory arrangements that had been put in place over the preceding decade to deal with ESB’s dominance, and the ability of the CER to regulate the issue, the Authority’s assessment was aligned with that of the Government:

Regardless of the best efforts of regulators to ringfence certain monopoly functions from its more competitive activities, there still exists an implicit assumption among competitors that the ESB has certain financial and information advantages over its competitors.<sup>193</sup>

Both the Government and the Authority were of the view that the regulatory approach to ESB’s dominance had failed, and a structural disaggregation approach would be required in the future.

## Network Ownership Unbundling as an Aid to Achieving Renewable Targets

In the 2007 Government White Paper ‘Delivering a Sustainable Energy Future for Ireland’, the then Energy Minister, noted that a single ownership model where the ownership and operation of the Transmission System would vest in a single entity, EirGrid, would ‘enable more efficient

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<sup>187</sup> See: Deloitte (n 130).

<sup>188</sup> Department of Communications, Marine and Natural Resources, *Green Paper, Towards a Sustainable Energy Future for Ireland* (2006) 19.

<sup>189</sup> *ibid* 18.

<sup>190</sup> DCENR (n 120) 48.

<sup>191</sup> Competition Authority, *Competition in the Electricity Sector* (December 2010).

<sup>192</sup> *ibid* 8.

<sup>193</sup> *ibid*.



and timely integration of renewable energy on to the grid system.<sup>194</sup> The Minister highlighted the importance of the proposed transfer for Ireland acknowledging that it was ‘critical for delivery of our ambitious renewable energy targets.’<sup>195</sup> The Minister expressed his confidence that the Government’s ‘ambition will be matched by the response of the stakeholders-structural change in the market requires leadership, resolve and pragmatism from the industry.’<sup>196</sup> The 2007 White Paper also contained a number of other measures supportive of renewable, and sustainable energy objectives, including continued endorsement of support schemes, ambitious renewable penetration targets, research, and measures aimed at securing greater public acceptance. While some of these measures were embraced, and implemented, the Minister and his successor, did not in the end find the ‘leadership, resolve and pragmatism’ required to secure FOU of the Transmission System.

Whether the failure to implement FOU, a policy which the Minister himself had accepted was critical to Ireland achieving its renewable targets, will ultimately contribute to Ireland failing to meet its 2020 RES-E Target remains to be seen but it seems likely. In its submission to Frontier Economics (Frontier) as part of the latter’s investigation of the options for Ireland for Third Package compliance, EirGrid argued that one of the benefits of FOU was that it would result in renewable energy resources being connected to the Transmission System at a faster rate.<sup>197</sup> Frontier accepted that FOU may lead to faster connection of renewables noting that:

If this were to be the case it would support Ireland’s 2020 targets, lead to faster emission reductions in Ireland and possibly reduce system costs depending on the level of interconnection and the evolution of fuel and carbon prices.<sup>198</sup>

This would not however appear to have been a key consideration in overall assessment of the options, and the subsequent Government decision to abandon FOU in favour of an Article 9(9) derogation. This is surprising given Ireland’s challenging targets, the financial consequences of failure to meet those targets, and the position taken, and arguments advanced by the Competition Authority, and indeed the Government itself in both the 2006 Green Paper, and the 2007 White Paper. The reversal of the policy also ignored independent assessments that favoured FOU as a desirable and necessary step for Ireland.<sup>199</sup>

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<sup>194</sup> DCENR (n 120) 48.

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.*

<sup>197</sup> Frontier (n 125) 4.

<sup>198</sup> *ibid.* 26.

<sup>199</sup> Frontier (n 125) 101.

## Policy Dilution and Possible Implications for Irish Wind Generation

Given the views of the Competition Authority, the findings of the Government's consultants,<sup>200</sup> the clear policy statement that FOU was required to address fundamental flaws in the Irish electricity market, and to ensure that Ireland met its renewable targets, why did the Government seek to have that published policy validated by an independent third party, and ultimately, based on the report prepared by that party, abandon it? In the 2007 Government White Paper the then Minister called for 'leadership, resolve and pragmatism' on the issue of structural change.<sup>201</sup> Now a Green Party Energy Minister was seeking to have the earlier policy decision externally assessed, or was the Minister in the face of unsurmountable opposition to the FOU proposal simply seeking a justification for abandoning it?

Can the Irish Government's policy reversal be categorised as 'organisational reluctance'<sup>202</sup> to see through a difficult decision or was it a case of the Government responding to the unfavourable economic circumstances of the time. It is submitted that it was very much the former, but in the event aided by the latter. In addition to FOU, the 2007 White Paper set out several other measures aimed at assisting renewable energy including support schemes. The financial burden of these somewhat softer measures could be passed on to consumers without the need to disturb or burden entrenched vested interests, and consequently the Government had a free hand and these measures were for the most part implemented.<sup>203</sup> FOU of the Transmission System was not implemented. Arguably, it was not because it purported to confer benefits on consumers at the expense of vested interests. These interests included the employees of ESB and their trade union representatives, the ESB ESOT; and importantly the Government as shareholder. One of the principal arguments against privatisation of strategic public assets is that it leaves the consumer at the mercy of profiteering shareholders. Where regulation is inadequate, or there is a regulatory failure, this is a genuine concern. However, if as in the case of Ireland it has been determined that something (FOU in this case), is very much in the interest of consumers, the failure to implement this because it undermines the position of the State as shareholder, or State employees as employees or as shareholders, then the distinction between public and private ownership becomes less clear, and the justification for public ownership less obvious.<sup>204</sup>

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<sup>200</sup> Deloitte (n 130).

<sup>201</sup> DCENR (n 120) 48.

<sup>202</sup> Diamond (n 57) 6.

<sup>203</sup> For a discussion of these measures see chapter 4 (*Financing the Winds of Change-Irish Financial Support Schemes*).

<sup>204</sup> For a discussion of why profits of a regulated entity should be used for the benefit of consumers and not shareholders see: Dieter Helm, 'Regulatory credibility and the irresistible urge to meddle' (16 April 2015) 3-5 <<http://www.dieterhelm.co.uk/regulation/regulation/regulatory-credibility-and-the-irresistible-urge-to-meddle/>> accessed 20 May 2015.

In its defence, the State would argue that in this instance independent assessment had shown that the cost of FOU was too high in the circumstances. The complexity of the position the Government found itself in on the issue of FOU is evident from the Terms of Reference (TOR), issued by the Government and pursuant to which Frontier was engaged to carry out its independent assessment of the options available to Ireland for compliance.<sup>205</sup> The Minister's rationale for seeking an assessment of Government policy from an independent consultant, retained and paid for by the Exchequer, was stated to be that: 'transmission unbundling involves the resolution of complex technical, financial and operational issues at a time when both ESB and EirGrid are also faced with immediate significant national challenges across a range of industry and business issues.'<sup>206</sup>

The TOR however, betray the fact that what was at play was more self-interest, than national or consumer interest. The TOR highlights the totality of the competing interests the Energy Minister was seeking to align. Rather than simply requiring the consultant to provide the Government with an expert independent view on the core issue, the TOR reads more like a heavily negotiated and agreed terms of reference issued by the parties to an intractable dispute, to an agreed arbitrator, rather than expert, for resolution.

At the outset the TOR sets the scene noting that the Energy Policy Framework 2007-2020, and the Programme for Government of 13 June 2011 had both 'endorsed the case for a process of structural change in the electricity sector.'<sup>207</sup> The aim of actions agreed by Government was expressed to be the creation of conditions that would deliver 'more competition, more consumer choice and support, greater innovation in the electricity market, and aim to ensure the strategic development of the state-owned distribution and transmission networks.'<sup>208</sup> The TOR further records that the Energy Policy Framework contained as a key step the establishment of EirGrid as a National Transmission Grid Company.<sup>209</sup> The transmission assets of ESB were, in the interests of competition, consumers and greater innovation to be transferred to the new transmission company.

The TOR however made it clear that consumers were not the only constituency whose interests required consideration. Any analysis of the issue also required, as a consequence of successive

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<sup>205</sup>DCENR, *Electricity Transmission Assets Analysis, Request for Tender* (December 2009); Frontier Economics (n 125) 141.

<sup>206</sup>Frontier (n 125) 12. Frontier's detailed report (in part redacted), was published in January 2011.

<sup>207</sup> Frontier (n 125) 141. The Programme for Government was unequivocal stating: 'Beginning with the handover of ESB's transmission assets to EirGrid, we will create a new 'Smart Grid' company with ultimate full ownership and responsibility for the development of Ireland's electricity and gas networks.'

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid.*

Partnership Agreements with Trade Unions, a ‘full process of engagement with the management and unions of both ESB and EirGrid and the ESB’s Employee Share Ownership Trust (ESOT).’<sup>210</sup> The TOR superimposed on the published Government Policy a rider that it was the clear intention of that policy that the issue of structural change should be approached in a manner that ensured that ‘the strategic future of both ESB and EirGrid as strong viable semi-state entities, as well as protecting the position of the State and the members of the Employee Share Ownership Plan (ESOP) as shareholders.’<sup>211</sup>

Though the TOR proceeded to set out in some considerable detail the nature of the tasks and analysis that the consultant was required to complete as part of its assessment, it is clear from the TOR as written that the wider interests of consumers and the economy could not be allowed to prevail unchecked over the interests of the State and the ESOP as shareholders, and the Trade Unions. A clearly articulated published policy on structural change in the interests of competition and renewable objectives was in fact no policy at all.

Once the scene had been set the TOR proceeded to require the consultant to consider the impact of FOU and other options on a wide range of matters including renewable generation. It is however clear from the overall tenor of the document that these were mere secondary considerations. Anticipating the response of certain stakeholders, the TOR secured their position at the table by making it clear that some submissions received during the consultation process may ‘suggest courses of action that diverge from Government policy.’ Nevertheless, the consultant was to take account of such positions in its analysis. Following completion of the analysis the consultant was required to identify the option or options, in addition to FOU, which in the consultant’s assessment would also be appropriate in the Irish and all-island electricity market contexts.

The TOR clearly highlights the inadequacies in the approach to policy formulation and implementation in the energy sector by laying bare the trade-offs that must be made to secure the support of vested interests to change, and in this respect, parallels can be drawn with the position in Britain where according to Helm:

It has been fashionable-and consistent with the British administrative approach-to set broad public interest objectives for public bodies, and then leave the key individuals and their boards to internalise the trade-offs. The result is one which maximises flexibility and minimises the scope for judicial review, but in practice

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<sup>210</sup> *ibid.*

<sup>211</sup> *ibid.*

the wide discretion granted allows for considerable divergence from the overall objectives in pursuit of the institutions' own interest.<sup>212</sup>

In Ireland, the Energy Minister had committed the State to ambitious renewable targets for 2020.<sup>213</sup> It was accepted by Government that FOU may assist Ireland in meeting those targets. The Energy Minister has a statutory duty to have regard to the need to promote competition in the generation and supply of electricity, a duty that FOU also had the potential to further.<sup>214</sup> The Energy Minister also has a statutory duty to have regard to the need to promote the use of renewable energy; a duty that undoubtedly sits well with renewable targets and FOU.<sup>215</sup> However, these duties which require the Minister to '*have regard to the need to*' do certain things are secondary to an overall duty to carry out functions and exercise statutory powers in a manner which the Minister considers protects the interests of final customers of electricity.<sup>216</sup> It is unclear whether these '*final customers*' are the '*final customers*' of today who may want lower electricity bills and do not wish to pay a premium for expensive green electricity; or the final customers of some version of the near or distant future who may need renewable wind energy because of a scarcity or high cost of fossil fuels. It is suggested that the requirement to have regard to sustainability in assessing choices suggests the latter. Inevitably, all of this imprecision means that matters of environment and sustainability, which are in any case secondary matters, can be easily subordinated to more current and intractable problems. Should any person seek to judicially review a decision of the Energy Minister or the CER, each has such a wide degree of discretion in the way in which they weigh and balance the different considerations mandated by the Oireachtas, that no judge would be likely to second guess a decision of either. Judicial review in respect of substantive, as opposed to procedural faults, is therefore very difficult if not impossible, or as Helm put it:

The classic case is in utility regulation, where the broad object of the consumer interest leaves open trade-offs in respect of the environment, short term bills, investment and social issues. As a general rule, precision in the specification of objectives is most likely to minimise the scope for pursuing institutional self-interest.<sup>217</sup>

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<sup>212</sup> Dieter Helm, 'Memorandum of Evidence, House of Commons Environmental Audit Committee Inquiry, The Structure and Operation of Government and the Challenges of Climate Change' (20 June 2007) <<http://www.dieterhelm.co.uk/energy/climate-change/the-structure-and-operation-of-government-and-the-challenges-of-climate-change/>> accessed 19 May 2015.

<sup>213</sup> Government of Ireland (n 8).

<sup>214</sup> ERA, s 9(4)(a)(i).

<sup>215</sup> ERA, s 9(4)(a)(vi).

<sup>216</sup> ERA, s 9(3)(c).

<sup>217</sup> Helm (n 212) 3.

The Herculean task facing a plaintiff is apparent from dicta of Cooke J in *Shannon LNG v The Commission for Energy Regulation*.<sup>218</sup> Reviewing the authorities,<sup>219</sup> Cooke J noted that:

It is also important, in the view of the Court, to bear in mind that where a regulatory authority is required to take decisions involving policy choices and considerations such as the formulation of commercial strategies and the assessment of future trends in demand, supply or prices, the decision will not necessarily be “wrong” to the extent of being unlawful simply because another approach can be shown to be possible or preferable. There may be more than one perfectly acceptable solution and it is the expert regulatory authority and not the court to which the judgment as to the appropriate choice is delegated.

The question however remains; how can the Energy Minister, bearing in mind his overall statutory duty to protect the interests of final customers of electricity, legitimately bring into the arena for consideration, the non-statutory interests of ESB employees, their representatives, the State as shareholder; and the ESB ESOT?

### Organisational Self-Interest as an Obstacle to Wind Generation Policy

There is a long and well documented history in Ireland of trade union hostility to structural change within State companies and to the operating environment of State companies, and this is not confined to the energy sector.<sup>220</sup> The reality is that institutional change in the public sector cannot happen without significant engagement with trade unions, and ultimately costly financial and/or policy concessions.<sup>221</sup> Hard policy choices tend to be resolved in favour of preserving the status quo, and even when difficult policies are ultimately implemented it is often the case that significant time, resources, and costs are expended in implementing something that has been mandated by the Oireachtas and shown to be in the interests of consumers or the wider economy. Despite EU and domestic legislation requiring the establishment of EirGrid as an independent TSO, the transfer of TSO functions from ESB to EirGrid, and the conclusion of contractual and other arrangements to facilitate this took six years.<sup>222</sup> This is the environment in which renewable energy policy must compete. Following its designation as TSO in 2006, and

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<sup>218</sup> *Shannon LNG v The Commission for Energy Regulation* [2013] IEHC 568.

<sup>219</sup> *Director of Investigation and Research v Southam Inc.* [1997] 1 SCR 748; and *Orange Ltd v Director of Telecoms* (No. 2) [2000] 4 IR 159 (SC).

<sup>220</sup> See for example: Chris Dooley, ‘Minister to hold talks with Unions on Aer Rianta’ *The Irish Times* (Dublin, 16 July 2003).

<sup>221</sup> In its 2005 review Deloitte highlighted the need for dialogue with ESB unions and staff as a key element in achieving successful transition in the electricity market. See: Deloitte (n 130).

<sup>222</sup> For a discussion of the difficulties in concluding the Infrastructure Agreement and Transfer Plan see: O’Kelly (n 167).

notwithstanding the difficulties in establishing EirGrid, the 2007 White Paper on Sustainable Energy went on to propose that EirGrid would not only be the owner and operator of the transmission assets, it would become the national networks company.<sup>223</sup> It was also proposed that ESB should sell several aged power stations with a view to reducing its market share in generation. At the time it was reported that a majority of the ESB trade unions had voted to take industrial action in the event that ESB, under the direction of the Minister, pursued the transfer of the transmission assets, or the closure, or sale of the aged power stations.<sup>224</sup> The fact that management at ESB were required as a matter of law to comply with the instructions of the shareholder was acknowledged, but as management were broadly aligned with the trade unions in opposition to the transfer and the sale, the Minister was undoubtedly in a difficult position.<sup>225</sup> Acknowledging that management was legally bound to comply with its shareholder's direction, the trade unions instead looked to partnership agreements that had been put in place between ESB and the trade unions arguing that what was proposed was in breach of such agreements.<sup>226</sup> Though the trade unions objected to both the asset transfer and the asset sale/closure, their principal objection would seem to have been to the asset transfer.<sup>227</sup> The partnership agreements relied on by the trade unions were entered into in 1992 after a strike at ESB.<sup>228</sup> The unions also challenged the role and remit of the CER, arguing that regulatory decisions were responsible for higher prices, and not labour costs. The AT&GWU trade union's proposals included removal of the CER's ability to fix prices, and abolition of the PSO levy that supported renewable energy.<sup>229</sup> Separately the unions called for ESB to be permitted to build a new gas fired power station at Aghada.<sup>230</sup> The disposal of aged generation assets by ESB was completed in 2009. ESB commissioned a new 430 MW Combined Cycle Gas Turbine (CCGT) Power Plant at Aghada in

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<sup>223</sup> DCENR (n 120).

<sup>224</sup> Brian Sheehan, 'Green Party Minister Defers Electricity Asset Transfer' EuroWORK, European Observatory of Working Life' (20 April 2008) <<http://eurofound.europa.eu/observatories/eurwork/articles/green-party-minister-defers-electricity-assets-transfer>> accessed 25 May 2017.

<sup>225</sup> *ibid.*

<sup>226</sup> *ibid.*

<sup>227</sup> See for example: Stephen Rodgers, 'Ryan Postpones ESB System Switch' *Irish Examiner* (14 March 2008); and Stephen Rodgers, 'ESB union anger over company break up' *Irish Examiner* (16 March 2007). The asset sales were aimed at bringing ESB's share of the generation market below 40%.

<sup>228</sup> Cost and Competitiveness Review (CCR) and the Programme for Competitiveness and Transformation (PACT). For a discussion of the background to these agreements see: Brian Sheehan 'Four-year agreement in state electricity company' (EuroWORK, European Observatory of Working Life, 20 April 2006) <<http://eurofound.europa.eu/observatories/eurwork/articles/four-year-agreement-in-state-electricity-company>> accessed 25 May 2017.

<sup>229</sup> RTE News, 'ESB wants changes to Regulator's Role' (14 March 2007) <<http://www.rte.ie/news/business/2007/0314/86783-esb/>> accessed 25 May 2017.

<sup>230</sup> RTE News 'ESB Union wants New Power Plant' (26 January 2007) <<http://www.rte.ie/news/business/2006/1113/82469-esb/>> accessed 25 May 2015.

2010. The transfer of the Transmission assets from ESB to EirGrid did not proceed, and the policy was abandoned.

This policy reversal and the trade-offs that occurred clearly demonstrates that any policy measure that has the potential to lessen the financial position or prospects of ESB employees, their trade unions or the ESB ESOT, irrespective of the actual, or purported benefits of the measure in question for consumers, the environment, or the economy, cannot be implemented without the consent of ESB employees, their unions, and the ESB ESOT. In effect, therefore there is a limit as to how far policy makers, and indeed the Oireachtas can go in pursuit of energy policy objectives including wind energy policy. This in turn raises serious concerns as to power of the Government, and indeed the Oireachtas, to set national policy objectives in the energy sector. It also calls into question not only the ownership and governance structures of Irish State owned commercial enterprises, but the more fundamental issue of whether the State should, in the interests of consumers, have any role in the ownership or governance of Ireland's gas and electricity networks, if the full benefits of that ownership cannot be captured and exploited for the benefit of consumers.

The powerful position of employees and their trade unions who can threaten to turn out the lights as well as the robust legal position enjoyed by the ESOPs are a very effective shield in defending the vertically integrated utility from any national or European measure that is not absolute in its terms or gives a Member State options for domestic implementation. Gorecki et al, have correctly questioned the uniqueness of the Irish ESOP structures in State bodies noting that 'it is not entirely clear what the rationale for this transfer of wealth from society at large to a select group of individuals who happen to be lucky enough to work for that state-owned firm.'<sup>231</sup>The Third Package Directive, notwithstanding its preference for FOU, contained a number of lesser options for national implementation, and in doing so gave political reluctance and expediency a safe harbour in the face of employee, trade union, and ESOP opposition.

It has been suggested by some commentators that national rather than European authorities are best placed to effectively deal with problems in the internal energy market due to the different characteristics of individual markets.<sup>232</sup> Diathesopoulos correctly disputes this view on the basis *inter alia* that to accept it would rule out any EU intervention due to the principle of subsidiarity which requires the EU to abstain from taking any step where the matter at issue can be addressed

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<sup>231</sup> Paul K. Gorecki, Sean Lyons and Richard S. J. Tol, 'Public Policy Towards the Sale of State Assets in Troubled Times: Lessons from the Irish Experience' (2011) (19) 3 Utilities Policy 193.

<sup>232</sup> Michael Hunt 'Ownership Unbundling: The Main Legal Issues in a Controversial Debate' in Bram Delvaux, Michael Hunt, and K. Talus (eds), *EU Energy Law and Policy Issues* (Brussels Euro Confidential 2008) 71.



more effectively at Member State level.<sup>233</sup> Diathesopoulos also notes that because the Third Package Directive did not impose the FOU model on Member States; rather the fact that Member States could select the most appropriate option from a menu of options that included FOU, demonstrates that the 'EU's initiative was not meant to displace national initiatives but to offer solutions for the goal of the internal market, from which Member States will be free to choose what fits best to their national objectives.'<sup>234</sup> In Ireland, the Government selected FOU as the most appropriate option to deal with a serious internal market concern, but could not implement it so the optionality conferred by the Third Package Directive offered a way out in the form of a *status quo* derogation. It is submitted that this form of subsidiarity does not further European objectives, rather it wastes significant time and resources in pursuit of an ideal the implementation of which from the outset is patently impossible. Indeed, the approach taken in respect of the Third Package Directive stands in stark contrast to the position taken in the Second Renewable Energy Directive in relation to mandatory targets.<sup>235</sup> In this case, the Commission in its subsidiarity analysis took the position that leaving it to Member States to ensure that the EU collectively achieved a 20% share of renewable energy sources in final consumption by 2020 was not appropriate for a number of reasons, including the fact that leaving it to Member States would simply leave the target at risk.<sup>236</sup> In this thesis it is argued that the EU's failure to mandate FOU has had the effect of undermining and putting at risk the achievement of Ireland's 2020 targets.

Opposition to the FOU initiative also came from the ESB ESOT which held 5% of the capital of ESB on behalf of its members.<sup>237</sup> The ESOT argued that the transfer would, amongst other things, erode the value of ESB and thus shareholder value; would be costly to implement, and was not required as EirGrid already successfully operated the transmission assets independently.<sup>238</sup> The pursuit of forced FOU undoubtedly has the potential to severely erode asset value and property rights.<sup>239</sup> In the event that it is pursued in the public interest because it will advance competition and other objectives such as sustainability, the only question that remains is whether

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<sup>233</sup> Michael D. Diathesopoulos, 'Ownership Unbundling in EU & Legal Problems' (29 December 2010) 8 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1732212](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1732212)> accessed 11 June 2015.

<sup>234</sup> *ibid* 9.

<sup>235</sup> Second Renewable Energy Directive, art 3.

<sup>236</sup> Commission (n 74) 9.

<sup>237</sup> The ESOT commissioned LECG Ltd., to do an independent assessment of FOU relative to a status quo arrangement: See LECG 'Implementing the Third Energy Directive in Ireland, Options For the Transmission Network, Final' (23 April 2010) <<http://www.esbesop.ie/ESB%20ESOP%20Final%20Report%20Apr10.pdf>> accessed 25 May 2017.

<sup>238</sup> See: RTE News 'ESOP to Oppose ESB Curbs' (16 March 2007) <<http://www.rte.ie/news/business/2007/0316/86869-esb/>> accessed 25 May 2017.

<sup>239</sup> For a detailed analysis of this issue see: Diathesopoulos (n 233).

compensation should be paid to the losers.<sup>240</sup> Those that would argue against compensation would consider the payment of compensation to be socially unacceptable. Those that would argue for compensation would (apart from legal arguments based on the inviolability of property rights), argue that a transfer without compensation would give rise to uncertainty in the market, damage credit ratings, make it more difficult for state enterprises to borrow money; and prove costly to implement. Lapuerta in his paper on forced ownership unbundling asks whether the cost in political, and other terms of moving to FOU or ‘the perfect world’ is too high and concludes that it is not, noting that for ‘anyone who believes in competition, there is no compelling synergy between the ownership of transmission infrastructure and supply activities.’<sup>241</sup> EirGrid argued that the transmission assets should be transferred to it at 50% of their Regulatory Asset Base (RAB) value at the time of vesting.<sup>242</sup> ESB, not surprisingly, argued that if a transfer was to occur it would need to be at fair market value.<sup>243</sup> The ESOT for its part expected to be fully compensated for the diminution in the value of its capital stock arising from any transfer.<sup>244</sup> As no transfer ultimately occurred, the issue of appropriate compensation did not arise. It is however questionable whether the need to pay, and level of compensation payable, should be a factor to be taken in to account in determining the cost of FOU, or a measure like FOU. Notwithstanding that the assets in question are held in a separate ring-fenced legal entity, they are also ultimately owned by the State, and paid for by electricity consumers. If the State cannot move State assets around for the benefit of consumers, the environment, and the economy, then it is arguable that the central justification for public rather than private ownership does not exist, and privatisation into a carefully, and robustly regulated environment, would be a preferred option for the assets. The Energy Minister could then pursue policy, including renewable and sustainable policy without reference to considerations that seek to undermine that policy.

On the issue of property rights Diathesopoulos concludes, following a review of Protocol 1, Article 1 of the European Convention on Human Rights, Article 17.1 of the Charter of Fundamental Rights of the European Union; and ECtHR jurisprudence, that all three-permit interference in the furtherance of public interest.<sup>245</sup> Subject only to the issue of compensation he sees no issue of

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<sup>240</sup> For a discussion of FOU and compensation see: Inigo Del Guayu, Gunther Kuhne and Martha Roggenkamp, ‘Unbundling in Germany and in German constitutional protection’ in Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden (eds), *Property and the Law in Energy and Natural Resources*, (Oxford University Press 2010) 344; and Diathesopoulos (n 233).

<sup>241</sup> Carlos Lapuerta, ‘The cost of moving to a perfect world: Forced Ownership Unbundling in the Natural Gas and Electricity Sectors’ (September, 2007) 4 <[http://www.brattle.com/system/publications/pdfs/000/004/778/original/The\\_Costs\\_of\\_Moving\\_to\\_a\\_Perfect\\_World\\_Lapuerta\\_Sept\\_2007.pdf?1378772129](http://www.brattle.com/system/publications/pdfs/000/004/778/original/The_Costs_of_Moving_to_a_Perfect_World_Lapuerta_Sept_2007.pdf?1378772129)> accessed 25 May 2017.

<sup>242</sup> Frontier (n 125) 2.

<sup>243</sup> *ibid.*

<sup>244</sup> *ibid* 38.

<sup>245</sup> Diathesopoulos (n 233) 22-25.

compatibility between forced FOU, and fundamental property rights. Had this issue been raised along with Article 43 of the Constitution it is certain that, given the public interest considerations at stake, an Irish court would not have accepted breach of fundamental property rights as a defence to FOU. The issue of compensation is perhaps less clear. If, as is likely, it was to be determined that compensation must be paid in such circumstances, it raises serious issues as to the continued appropriateness of allowing ESOT type structures in Irish State enterprises. The State should be free, in the public interest, to move State assets from one State pocket to another, accepting the diminution in value in one, in favour of an increase in the other, or a wider societal benefit.

### The State as Shareholder as an Obstacle to Wind Generation Policy

The conflicts and trade-offs that inevitably arise from State involvement in ownership, regulation and policy setting for State owned enterprises have been considered by the OECD.<sup>246</sup> OECD takes, what would seem to be the obvious position, that there must be a clear separation between organs of State involved in ownership of State enterprises, and organs of State involved in functions like regulation that may influence the situation of State owned enterprises.<sup>247</sup> In Ireland the CER fulfils the role of independent regulator in the energy sector.<sup>248</sup> Regulatory determinations are therefore apart from ownership and policy considerations, though at times it can be difficult to see a clear distinction between what is a matter of policy, and a matter of regulation.<sup>249</sup> The ownership/policy divide in the energy sector in Ireland is thus considerably more opaque and its effectiveness merits further consideration.<sup>250</sup> Ownership of ESB is divided between the Minister for Public Enterprise (85%); the Energy Minister (10%); and employees of ESB (5% through an Employee Share Ownership Trust (ESOT)). 95% of the issued capital stock of ESB is therefore held by the State. As holders of capital stock the Ministers enjoy certain rights and powers akin to those of shareholders in limited liability companies.<sup>251</sup> These rights are

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<sup>246</sup> See: OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (2005).

<sup>247</sup> *ibid* 12.

<sup>248</sup> ERA, s 8-s 10A.

<sup>249</sup> In 2001 the Energy Minister (as policy maker), introduced three Policy Directives (DPE, *General Directive concerning Service Pricing for Gas Transmission Entry/Exit at Inch* (6 November 2001); DPE, *General Directive concerning Service Pricing for Gas Transmission Entry/Exit between Scotland and the Republic of Ireland* (6 November 2001); and DPE, *General Directive concerning Service Pricing for Gas Transmission Onshore Network* (6 November 2001); all expressly aimed at encouraging new Entry Points on the Irish Natural Gas Transmission Network by insulating users of those Entry Points from the high costs of the BGE owned and controlled Moffatt Entry Point. In 2012, the CER (as regulator) reversed the 'policy' by imposing a cross subsidy on new Entry Points in favour of the BGE Moffat Entry Point (See: CER, *The Regulatory Treatment of the BGE Interconnectors and Future Gas Transmission Regime, Decision Paper* (CER/12/087 2012); and CER, *Gas Entry/Exit Tariff Methodology, Decision Paper* (CER/15/140 2015).

<sup>250</sup> In its 2005 review Deloitte found that, ESB operated with 'a high degree of autonomy' compared to State owned enterprises in other jurisdictions. See: Deloitte (n 130).

<sup>251</sup> Electricity (Supply) (Amendment) Act 2001, s 3 (as amended).

supplemented by a range of additional rights, and vetoes contained in legislation which include the right to appoint the Chairman and Board, with the exception of four worker directors appointed by the Energy Minister under specific worker participation legislation.<sup>252</sup> Director and CEO remuneration is also determined by the Energy Minister and the Minister for Public Enterprise in conjunction with the Minister for Finance.<sup>253</sup> The Energy Minister can also remove board members.<sup>254</sup> ESB borrowings, capital expenditure, and investment decisions are all subject to Ministerial approval which can be refused or conditional.<sup>255</sup>

The position in respect of EirGrid is not wholly dissimilar. 100% of the issued capital of EirGrid is held by the State. The Minister for Public Enterprise holds 99%, and the remaining shares are held directly or on trust for the Energy Minister. The legislation pertaining to EirGrid confers controls and vetoes like those that apply in the case of ESB. Both ESB, and EirGrid are also subject to the Code of Practice for the Governance of State Bodies which gives the Ministers further rights and controls over the activities of the entities.<sup>256</sup> In addition to these powers and vetoes, the Energy Minister is also responsible for, and has explicit and sweeping statutory powers under the ERA and other legislation pertaining to the energy sector, and energy policy. The Energy Minister can issue policy directions to the CER on a range of matters.<sup>257</sup> A sub-set of the policy role is the determination of policy around renewable energy.<sup>258</sup>

As majority shareholder in both ESB and EirGrid, the State is thus able to exercise control and rights over entities involved in generation and supply (ESB) and transmission activities (EirGrid). Despite all the paraphernalia of separation and independence contained in legislation, licences, codes and agreements, key decisions on critical matters such as capital expenditure, borrowing and investment are ultimately determined by no more than two or three Ministers who bring proposals to a single Cabinet for consideration. Is it realistic to expect that independence and separation can be preserved when competing, or indeed conflicting proposals from the regulated entities come before Ministers or Cabinet for a decision? The reality is that on important matters the independence and separation imposed by European legislation on the day to day workings of asset owners and operators evaporates, as the requirement for a key decision is elevated up

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<sup>252</sup> See Worker Participation (State Enterprises) Act 1977.

<sup>253</sup> Electricity (Supply) Act 1927, s 2(7) (as amended).

<sup>254</sup> *ibid.*

<sup>255</sup> See: Electricity (Supply) (Amendment) Act 1954, s 4 (1)(2); and Electricity (Supply) (Amendment) Act 1982, s 2-s 6.

<sup>256</sup> Department of Public Expenditure and Reform, Code of Practice for the Governance of State Bodies (2016). Pursuant to the Electricity Regulation (Amendment) (EirGrid) Act, 2008, EirGrid cannot borrow without the consent of the Energy Minister or the Minister for Finance (s 6); and cannot incur expenditure for capital purposes without the consent of the Energy Minister (s 7).

<sup>257</sup> ERA, s 10A. See also Energy (Miscellaneous Provisions) Act, 2006, s 7.

<sup>258</sup> ERA, s 10A(1)(b).

through the corporate and civil service hierarchy. Even if it could be shown that independence can, and is, preserved and that decisions are not influenced by other competing considerations, there remains the issue of perception. If the perception of conflict or discrimination at the TSO/TAO level is relevant, then it is also relevant at shareholder level. All dividends declared and paid by both ESB and EirGrid find their way to the Exchequer.<sup>259</sup> In recent years ESB has paid substantial dividends to the Exchequer, receipts which in the context of Ireland's economic difficulties have undoubtedly proved useful.<sup>260</sup>

If preserving the earning value of cash generating utilities is a key factor in Government decision making, how then can one conclude that Ireland can meet the independence requirements of Article 9(1)(b) in respect to the FOU or ISO models under the Third Package? The answer lies in the Third Package Directive itself. Article 9(6) addresses this issue by allowing common State ownership of generation/supply activities and transmission, if they are housed in distinct public bodies.<sup>261</sup> It is submitted that this provision conveniently ignores the reality that all key decisions and conflicts are ultimately made and resolved by a small number of Ministers at cabinet meetings. In the European Commission's decision of 2013 in respect of the ESB/EirGrid arrangements, the Commission noted that shareholder rights in respect of both ESB and EirGrid were vested in the Energy Minister and the Minister for Public Enterprise. The Department of Communications, Energy and Natural Resources (DCENR) had submitted that:

It is a basic tenet of the relationship between the State as Shareholder and Commercial State bodies ..... that the autonomy of the respective Boards is fully respected and there is no interference with day to day operational and commercial decisions or activities. The relationship conducted at arm's length allows sufficient flexibility to facilitate smooth running of the companies' business operations, while observing the primacy of the State's role in approving the corporate and strategic direction of the companies, including major investment programmes.<sup>262</sup>

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<sup>259</sup> See Electricity (Supply) (Amendment) Act 2001, s 7 (as amended).

<sup>260</sup> See: Brendan Ellison, 'State Asset Briefing' <<http://per.gov.ie/wp-content/uploads/10.-State-Assets-Briefing.pdf>> accessed 25 May 2017.

<sup>261</sup> For a discussion of how ownership unbundling should be applied to publicly owned entities see: European Regulators Group for Electricity and Gas (ERGEG) '3<sup>rd</sup> Legislative Package Input, Paper 1: Unbundling' (Ref: co7-SER-13-06-1-PD 5 June 2007). See also: Commission, 'Commission Staff Working Document. Ownership Unbundling-The Commission's Practice in Assessing the Presence of a Conflict of Interest Including in the Case of Financial Investors' SWD (2013) 177 final.

<sup>262</sup> Commission, 'Commission Decision of 14 December 2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC-Ireland-EirGrid/ESB' [2013] C (2013) 2169 final 13. See also: The European Communities (Internal Market in Natural Gas and Electricity) (Amendment) Regulations

The Commission did not accept this and took the view that for EirGrid to have effective independence, the exercise of rights in relation to appointments, and the exercise of strategic direction of EirGrid should be unambiguously assigned to a distinct public body other than that which controls ESB.<sup>263</sup> Whilst this may go some small way towards addressing the issue, it is submitted that, it is not the answer and that, true independence of the TSO/TAO functions can only be achieved if generation and supply components are removed from State ownership, and anything less than this is really only a matter of form over substance, or mere window dressing.

## The Preference for a Regulatory Approach and Implications for Wind Generation

When it comes to dealing with the issue of dominance in the Irish electricity market, Ireland has shown a clear preference for a regulatory rather than a structural approach. At a high level the argument goes that, to the extent that the dominant position enjoyed by a vertically integrated monopoly such as ESB is, or is perceived to be, an obstacle to market entry, it follows that it will have a chilling effect on competition, including competition from wind generation. Ireland has chosen to address this concern and others, through a complex set of regulatory measures, and regulatory intervention. The steady growth in the level of installed wind generation, as well as the anticipated level of future projects evident from the number of connection offers sought and made, as well as the number of planning applications in the planning system would indicate that any concerns about the dampening effect of ESB dominance or hold on the network is unfounded. It would also suggest that the decision to pursue a regulatory approach was and remains correct. To argue this however is to ignore Ireland's targets. Renewable penetration is growing, but not at the rate it needs to, and there is considerable uncertainty as to whether 2020 targets will be met.

In this respect, it is also submitted that the level of installed generation, and anticipated level of new projects, should not be used to measure the effectiveness of Ireland's approach to dominance, or an endorsement of the regulatory framework put in place to manage it. The experience in Ireland demonstrates how the long-term irreversibility of certain key decisions, made at the outset of a market restructuring process, can ultimately prove to be an obstacle to subsequent policy choices including policies that prefer renewable energy. If one accepts that

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2015, SI 2005/16 which deals with (inter alia), the transposition of Third Package unbundling requirements in Ireland.

<sup>263</sup> *ibid.* An analogy can be drawn between the controls the State, through Government Ministers has reserved for itself in the electricity sector and the position of Irish Water where Eurostat noted 'the considerable element of controls that government has (through Ministers) in all sorts of decisions.' The statutory controls in that instance '.. could be seen as providing evidence of government operational control, aside of and in addition to the mere traditional shareholders' control with respect to the strategic orientations (so to derive benefits).' See: Commission-EUROSTAT 'Sector Classification of Irish Water' 27 July 2015.

Ireland's 2020 targets for renewable penetration are very ambitious, then the key issue is whether these targets are achievable in the context of the regulatory framework Ireland has adopted. As Ireland will undoubtedly persist with regulation over structural change at least in the period to 2020, there will be no opportunity to assess whether full structural disaggregation of ESB would achieve a better outcome. If Ireland does meet its 2020 RES-E Target, which now seems unlikely, the debate may be all but academic.

Ireland's preference for a regulatory solution has not been without its detractors, and chief amongst them has been the Competition Authority (now the Competition and Consumer Protection Commission). The Authority does not consider regulation and intervention as an effective proxy for actual competition in the market. Since the opening of the Irish electricity market was first mooted almost two decades ago, the Authority has consistently stated that the only effective solution is a complete disaggregation of ESB into its constituent elements. Without this, new market entrants, which include wind generation developers, will not be able to effectively enter the market and compete. For wind generation, timely and cost-effective access to the electricity networks is seen as critical. For this reason, the Authority have consistently argued that ESB should have no role in transmission or distribution.<sup>264</sup> OECD have advocated a similar position expressly highlighting ESB's continued role in transmission as a potential obstacle to investment.<sup>265</sup>

The decision to move forward based on a regulatory, rather than a structural, approach was very much a conscious one as the link between unbundling and the encouragement of competition in the Irish electricity sector was identified early on.<sup>266</sup> This link was also very much at the forefront of issues raised by prospective new market entrants, including wind developers. The Government itself in its 1999 Green Paper noted the potential obstacle that a dominant monopoly may present but considered that a regulatory, rather than a structural disaggregation approach, was the answer while acknowledging that it may be necessary to take steps to encourage the use of renewables.<sup>267</sup>

Notwithstanding the misgivings of the Competition Authority and others, the Government proceeded to put in place the intricate regulatory framework necessary to regulate ESB's

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<sup>264</sup> Competition Authority (n 128).

<sup>265</sup> OECD, *Economic Surveys: Ireland 2013* 25. See also response of Minister for Communications, Energy and Natural Resources, Pat Rabbitte T.D., to a question posed by John McGuinness T.D., Dáil Deb 24 October 2013, vol 818, No. 3.

<sup>266</sup> See for example Susan Scott and Frank J. Convery, 'Energy Privatisation in Ireland' in Frank J. Convery and Moore Mc Dowell (eds), *Privatisation: Issues of Principle and Implementation in Ireland* (Gill and Macmillian 1990) 151-155.

<sup>267</sup> DPE (n 106) 47.

dominance, rather than simply transferring network assets to a new state company and leaving ESB free to pursue generation and supply activities, or conversely leaving network assets with ESB, and either privatising generation and supply, or transferring generation and supply activities to another state company. It is submitted that the reason, or reasons for this policy choice are no different from the reasons why the policy on FOU was abandoned. The Government, in effect elected to follow the path of least resistance and ensured that ESB and its trade unions facilitated the minimum necessary to satisfy the requirements of European Union law in return for a continued role in network activities.

When, in 1997 the Government published a consultation paper setting out its proposals for the electricity industry in Ireland,<sup>268</sup> the then Director of Competition Enforcement at the Competition Authority was critical of the lack of attention given in the paper to the issues at stake, a criticism that with the benefit of hindsight seems justified.<sup>269</sup> The Director was of the view that it would have been better to have carried out a full appraisal of the costs of the two options under consideration in advance of taking a final decision as to whether the ESB should continue as a vertically integrated utility.<sup>270</sup> The Director also noted that the separation of transmission and distribution from those elements that are not natural monopolies would help to eliminate some of the difficulties associated with regulating the sector.<sup>271</sup>

The shortcomings of the regulatory approach came to the surface very quickly. A mere five years after key decisions around the regulation of ESB had been made it was determined by the Government's own consultants that the approach had failed:

Although regulatory effort has been extensive, we believe this approach has inherent limitations for reasons of information asymmetry between the regulator and ESB; ex-post nature of many aspects of regulation enforcement; incremental ways in which ESB can exercise dominance which may not be identified individually as material by CER or Competition Authority; and limited powers of CER in its role.<sup>272</sup>

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<sup>268</sup> Department of Transport, Energy and Communications, *Proposals for the Electricity Supply Industry in Ireland* (May 1997).

<sup>269</sup> Competition Authority, *Discussion Paper No. 3, Proposals for the Electricity Supply Industry in Ireland: Comments on the Consultation Paper published by the Department of Transport, Energy and Communications* (November 1997) 23.

<sup>270</sup> *ibid* 24.

<sup>271</sup> *ibid*.

<sup>272</sup> Deloitte (n 130).



The Competition Authority also continued to express its concern that regulation in Ireland was influenced too heavily by incumbent monopolies.<sup>273</sup> The Authority noted that it had ‘identified a number of instances where businesses are prevented from entering markets due to regulations championed by incumbents designed solely and specifically to limit competition.’<sup>274</sup> Rather than assist with liberalisation and competition, the regulation of the electricity market in Ireland had hindered the growth of competition to the detriment of both consumers and business.<sup>275</sup> Rejecting the notion that regulation could be an effective proxy for competition, the Competition Authority saw legislation as one of the principal barriers as it had been structured in such a way as to check the powers of the CER, and bolster the position of the dominant monopoly ESB.<sup>276</sup> The Authority also considered that ESB’s ownership of the electricity network assets gave it a significant advantage over its competitors. The blend of risk free regulated network assets with an assortment of riskier generation assets gave it an overall more balanced position from a risk perspective, and thus assisted it when it went to the markets to raise finance.<sup>277</sup> There remained, notwithstanding the level of separation that had occurred ‘an implicit assumption among competitors that the ESB has certain financial and informational advantages over its competitors.’<sup>278</sup> The Competition Authority noted that while utilities that are natural monopolies have the opportunity to raise debt finance in the markets at a lower cost than companies engaged in generation or supply activities, there was a counter concern that such utilities may not be predisposed towards making the necessary network investment because it would benefit competitors that they would need to share the network with.<sup>279</sup> As significant investment was needed in the transmission network, transferring ownership of the network to EirGrid would mean that there would be greater accountability on the part of EirGrid in terms of both management and raising finance.<sup>280</sup>

Why then in view of the sentiments expressed by very credible independent observers and the positive legislative duties imposed on both the Energy Minister and CER to have regard to the need to promote competition in the generation and supply of electricity, has the Energy Minister persisted with a regulatory approach?<sup>281</sup> Frontier in its review of the options for Ireland accepted in principle the views of the Competition Authority; ESRI and OECD in relation to the general

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<sup>273</sup> Competition Authority, *Submission to the Business Regulation Forum-Reducing the Burden of Regulation on Business* (S/06/004 2006).

<sup>274</sup> *ibid* 1.

<sup>275</sup> *ibid* 10.

<sup>276</sup> *ibid*.

<sup>277</sup> Competition Authority, *Competition in the Electricity Sector* (December 2010) 8.

<sup>278</sup> *ibid*.

<sup>279</sup> *ibid*.

<sup>280</sup> *ibid*.

<sup>281</sup> ERA, s 9(4)(a)(i).

competition benefits that can flow from FOU, and in its assessment went about seeking specific evidence of those benefits.<sup>282</sup> Whilst accepting that ownership of a transmission system can give a vertically integrated utility the capacity to discriminate in favour of its own competitive businesses, Frontier found no evidence of that discrimination in Ireland. On the contrary, EirGrid had demonstrated itself to be a ‘strong and independent’ TSO.<sup>283</sup> This in turn considerably diminished the possibility of ESB positively discriminating in favour of its own business interests if it were minded doing so. EirGrid was in control of all ‘relevant’ decision making.<sup>284</sup> A point strongly disputed by EirGrid. It is argued below that this conclusion does not stand up to scrutiny.

The case for FOU was also not advanced by the fact that neither the Competition Authority nor the CER could produce any evidence of discrimination in the Irish market. In fact the CER’s Roadmap for Deregulation provided evidence to the contrary.<sup>285</sup> On the issue of whether ownership of the electricity network by ESB had the potential to deter new entrants from investing in the Irish market due to the necessity to connect to a network owned by ESB, it was noted that while ESB still had a 40% share in the generation market, it was faced with competition from other significant new entrants and many other smaller operators.<sup>286</sup> In addition, EirGrid’s 2010-2016 Generation Adequacy Report indicated a surplus of 700 MW in all scenarios for the forthcoming seven years as a result of (amongst other things), new generation commissioning.<sup>287</sup> Significantly from the perspective of wind generation, EirGrid had noted that there was ‘.. significant interest in the construction of additional windfarms’ beyond what could actually be accommodated on the network.<sup>288</sup>

In Frontier’s assessment, the evidence was clear that there had been a significant level of new market entrants in both the renewable and conventional components of the generation market, leading Frontier to conclude:

Looking to the future, given the current economic conditions, the level of surplus capacity and the queue of renewable generation waiting to get on the system, it is unlikely that ownership unbundling will lead to significant additional entry or investment in the short to medium term. Beyond that point, we obviously cannot

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<sup>282</sup> Frontier (n 125) 102.

<sup>283</sup> *ibid.*

<sup>284</sup> *ibid.*

<sup>285</sup> *ibid.* 103.

<sup>286</sup> *ibid.* 104.

<sup>287</sup> *ibid.*

<sup>288</sup> EirGrid, *Generation Adequacy Report 2010–2016* (2009) 37.

predict what will occur, and it may be the case that ownership unbundling would lead to greater entry in the future.<sup>289</sup>

The significant level of new market entry by wind developers as well as the anticipated level of new entrants evidenced by the number of applications was used to counter the argument that FOU would facilitate greater competition. It is questionable whether the level of applications in the queue for a connection offer can give a true picture of future entry for wind generation when, so many new connections are dependent on ongoing and future investment in the electricity networks, and the successful outcome of the DS3 initiative.<sup>290</sup>

The role of the Competition Authority and CER in this context also requires closer examination. Pursuant to section 34(1) of the Competition Act 2002, the Authority and the CER entered into a co-operation agreement to govern relations between them in respect of competition law matters. The agreement allows for (amongst other things), the exchange of information and allows each party to forbear to act when it considers the other is investigating or exercising its competition powers in a matter.<sup>291</sup> If the Competition Authority could produce no evidence in this instance of discrimination in the Irish market then it begs the question as to why the Authority insisted, and continues to insist, on FOU in its annual reviews.<sup>292</sup> The reality however is that even if the Competition Authority and/or the CER did have such evidence (and there is no suggestion that either did), it is highly unlikely that either could, or would produce it in the context in question, and outside a formal investigation.

The effectiveness of the Competition Authority and CER and their decision making also needs to be considered. How can the Competition Authority insist so strongly on FOU as an adjunct of effective competition while the CER remains broadly passive on the issue? Bradford in his study of electricity market restructuring, identifies the establishment of an independent regulator as essential, but not on its own sufficient to ensure that the proposed electricity restructuring proceeds to plan. The quality of the decision making of the regulatory agency is also key.<sup>293</sup> CER was established as an independent regulator in 1999, and notwithstanding its express statutory duty around competition, the CER has at times seemed reluctant to push the unbundling agenda. This is a theme explored by the Competition Authority when it expressed concern at the way CER

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<sup>289</sup> Frontier (n 125) 105.

<sup>290</sup> SEMC (SEM 14/108 2014) (n 132). In 2011, the System Operators launched their DS3 Programme aimed at resolving wind related network issues. DS3 is discussed further in chapter 5 (*Prioritising the Wind-The Role of Policy, Law and Independent Regulation*).

<sup>291</sup> See now: Competition and Consumer Protection Act 2014, s 19.

<sup>292</sup> Competition Authority (n 128).

<sup>293</sup> Bradford, (n 35) 413. For the role of regulators in electricity market restructuring see also: Lyster (n 35) 419; and Beck and Martinot (n 35) 365.

was seeking to regulate ESB. When in 2004 the CER published a Consultation Paper on the issue of ESB dominance it accepted that while structural disaggregation was the best option for addressing dominance, there were a number of difficulties with that approach when compared with an approach based on regulatory oversight and intervention.<sup>294</sup> The difficulties highlighted by CER included the fact that primary legislation would be required for a structural solution as it did not have the statutory power to mandate disaggregation; a structural solution would be costly to implement, and would not be achieved in time for market opening; and as ESB had a large portfolio of generation assets it would still have market dominance following disaggregation of the transmission and distribution assets. CER did however acknowledge that a regulatory approach was far from perfect. Yet the arguments put forward by the CER were unconvincing and not intractable, and it is not surprising that the Competition Authority, in their response to the CER's Consultation Paper, took serious issue with both the CER's approach and conclusions.<sup>295</sup> Noting that a number of studies had identified ESB's dominance, and the potential for discrimination in the Irish market, as 'significant obstacles to the development of effective competition in the electricity sector' the Authority called for a 'full vertical separation of the ESB into its component parts in a legal, operational and commercial sense.'<sup>296</sup> The Competition Authority also made a number of important observations at that time that raised serious questions about CER's ability to effectively regulate ESB as well as CER's independence. The Competition Authority questioned the appropriateness of a regulatory approach to the dominance of ESB, and as evidence cited ESB's 'willingness to produce a paper for the CER about how it thinks it should be regulated, particularly as the ESB's claims (in its own paper) about its future predicted market share are not tested or challenged.'<sup>297</sup> The Authority concluded:

As a matter of public policy, it seems inappropriate that this kind of consideration should sway the direction of policy, particularly in a sector as important in the long run as the electricity sector is to both consumers and business alike.<sup>298</sup>

Though CER consistently strives to be seen to comply with its statutory mandate to be an independent regulator, the dependence CER places on contributions and submissions from the utilities it regulates was, and to a certain extent remains, a source of concern for new market

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<sup>294</sup>CER, *A Regulatory Approach to ESB Dominance* (4 February 2004) <<http://www.cer.ie/docs/000433/cer04053.pdf>> accessed 20 April 2017.

<sup>295</sup> Competition Authority, *Submission to the Commission for Energy Regulation-A Regulatory Approach to ESB Dominance* (S/04/001 2004).

<sup>296</sup> *ibid* 1-2. See also: Competition Authority, *Submission to the Commission for Energy Regulation-Irish Electricity Trading Arrangements Second Options Paper* (S/03/002 2003); and Competition Authority, *Submission to the Department of Communications, Marine and Natural Resources on the Draft Electricity Bill* (S/02/005 2002).

<sup>297</sup> Competition Authority (n 295) 3.

<sup>298</sup> *ibid*.

entrants because it feeds the perception of regulatory capture. There was a need for ESB to make a submission, and indeed no one could legitimately question ESB's right to do so. However, the Authority rightly believed that the CER should be 'leading the way forward with its own independent set of proposals.'<sup>299</sup> CER accepted that the regulatory approach would place long term demands on it that would give rise to additional costs and resources. The Authority saw structural disaggregation as the long-term answer to this even if it would be initially costly.<sup>300</sup>

As the number of new market entrants in the Irish electricity market has increased, and with the growth in the power of representative bodies such as the Irish Wind Energy Association (IWEA), and others, there is no doubt but that the nature and extent of engagement from industry in relation to key policy and regulatory issues in the wind sector, and electricity sector more generally, has increased both in terms of level and quality of engagement, and at times this engagement has been successful in securing reversals of preferred policy and regulatory positions and indeed decisions. But it is also true to say that the absence in the early days from the Irish market of major international power utilities with operating assets in Ireland allowed Government to proceed for the most part unchallenged with a policy and regulatory framework that was far from ideal.

Failure to adopt the suggested approach of the Competition Authority was undoubtedly a lost opportunity. When a review was ultimately undertaken over ten years later it was arguably much more difficult to justify the abandonment of the detailed structural and regulatory framework put in place to deal with the issue of ESB's dominance. The assessment became more a judgment of the effectiveness of what had been put in place, rather than an assessment of what was the most desirable model going forward. It is somewhat ironic that the Government in 1999 acknowledged in dealing with the issue of dominance that it was necessary to take into account the 'long term largely irreversible' nature of decisions, and then proceed to implement an entire regulatory framework built around regulating ESB's special position rather than dealing with it once and for all through a structural disaggregation approach.<sup>301</sup> But this is exactly what the Government did, and by the time Government acknowledged in 2007 that ownership of the Transmission System should be transferred away from ESB it was arguably too late and too costly to implement FOU.

There is also a lack of consistency evident in the approach of the Competition Authority itself. In 2010, the Authority cleared the acquisition of Northern Ireland Electricity plc (NIE) by ESB. NIE

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<sup>299</sup> *ibid*, 4.

<sup>300</sup> *ibid*.

<sup>301</sup> DPE (n 106) 55.

was the licenced owner of both the transmission and distribution system in Northern Ireland. A separate jurisdiction, but nevertheless a single legal and economic electricity market.<sup>302</sup> The Authority found that as each transmission and distribution network was legally confined to its own jurisdiction, there was no horizontal overlap between the parties' transmission and distribution systems.<sup>303</sup> This conclusion would seem to ignore the legal framework contained in legislation, licences and industry codes in both jurisdictions that expressly ties the networks and principal actors in the two jurisdictions together from an operational perspective. Indeed, it could be argued that the legal separation of the networks through legislation, licences and codes in both jurisdictions is a mere legal fiction created solely to address the fact that there are 2 separate legal jurisdictions, and post-acquisition the distinction becomes even more blurred. The principal concern of the Authority seemed to be that following completion of the acquisition, ESB would have access to, and would be able to exploit commercially sensitive information in a manner that would prevent, restrict or distort competition.<sup>304</sup> ESB's generation business could use the information obtained from NIE to the detriment of its competitors. The Authority sought and obtained assurances from ESB that it would not seek from NIE, and would ensure that NIE did not provide, commercially sensitive information that NIE received in the discharge of its functions relating to the planning, development, and maintenance of the electricity network in Northern Ireland.<sup>305</sup> As ESB would have required Ministerial approval for the transaction, the fact that it was sanctioned also highlights the significant conflict between the then published policy on FOU in Ireland, and the Government's willingness to allow ESB to build its dominance on the island further.

The Competition Authority continues to call for the structural separation of ESB, but it is now highly unlikely that there will be any departure from the status quo.<sup>306</sup> It is also unlikely that there will be any advancement in EU unbundling requirements in the short term at least.

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<sup>302</sup> The transaction had been notified by the parties pursuant to the Competition Act 2002.

<sup>303</sup> See William Fry 'Competition Authority clears ESB's purchase of Northern Ireland Electricity with commitments' (26 May 2011) <<http://www.williamfry.com/newsandinsights/news-article/2011/07/15/the-competition-authority-clears-esbs-purchase-of-northern-ireland-electricity-with-commitments>> accessed 20 February 2015.

<sup>304</sup> Competition Authority, Press Release, *Competition Authority Clears the Acquisition of NIE by ESB with commitments* (29 October 2010).

<sup>305</sup> *ibid.*

<sup>306</sup> Competition Authority, *Submission to the Consultation on Market Power and Liquidity in the SEM* (S/11/03 2011); and Competition Authority, *Submission to the Green Paper on Energy Policy in Ireland* (S/14/05 2014) 10.

## Implications of Split Ownership-Operation Model on Wind Generation Examined

At the centre of all the corporate, contractual, policy and regulatory complexity outlined above is the split ownership-operation model where ESB owns, and EirGrid operates, the Transmission System. This model necessitates a complex legal, technical, and commercial interface arrangement between the parties, and considerable regulatory oversight by the CER. It is at, and in this interface, that some of the most acute problems for prospective wind generation projects reside, and where the potential adverse implications for Ireland's 2020 targets can be best explained and understood.

The arrangement which defines the TAO/TSO interface is encapsulated in the 2000 Regulations, the 2005 Regulations, a series of licence conditions, and an Infrastructure Agreement. All this intricacy could be circumvented if ownership and operation of the Transmission System was vested in a single entity but considering developments over the past decade this is unlikely to happen unless it is unequivocally mandated by EU law which also seems unlikely. From the perspective of wind energy this means that industry is reliant on the CER ensuring that the artificial, and reluctant partnership between the EirGrid (TSO) and ESB (TAO) delivers in a timely and efficient fashion, the necessary investment, and works necessary for Ireland to meet its 2020 RES-E Target. It is submitted that the arrangements that exist were crafted not with efficiency in mind; rather they have been designed to secure the position of ESB as asset owner whilst at the same time satisfy the European Commission that the requirements of the Third Package Directive have been met, even if the requirements of the Second Renewable Energy Directive will not.

The complex detail of the TAO/TSO interface is beyond this thesis, but in summary, EirGrid operates the Transmission System without reference to ESB, and with oversight from CER, is solely responsible for setting the methodology for charges for access to the system.<sup>307</sup> Matters however get somewhat more convoluted in two areas that are of interest to wind generation namely, new connections and grid investment. The interface between a prospective generator seeking connection, and the transmission system location to which connection is sought, is managed by EirGrid who makes the connection offer to the applicant. Works that are necessary to construct the new connection are within ESB's remit. EirGrid, and the applicant are therefore dependant on ESB's performance. As far as investment is concerned, while EirGrid is responsible for planning the development of the Transmission System, ESB must finance and implement the development of the system in accordance with EirGrid's Development Plan. In summary therefore, rather than proceeding with the planning and construction of the necessary works

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<sup>307</sup> The 2000 Regulations, regs 5, 34 and 35.

directly, EirGrid must, through the convoluted framework provided for in the Infrastructure Agreement, engage with, and secure the cooperation of ESB, who in turn secures that the work is done. Each day, and each resource (people and capital), that this engagement or system of consents, approvals or sign-offs between the parties ties up, is added to the work programme, and constitutes an unnecessary delay or duplication. Even if it could be demonstrated that both parties were working at maximum efficiency, and fully in compliance with their obligations under the Infrastructure Agreement, the very existence of the Infrastructure Agreement, and the additional party (ESB), in the time and cost equation, raises a presumption of delay, duplication, and inefficiency across the thousands of MWs required to meet Ireland's RES-E Target.

In addition to the TAO/TSO Interface, a second and arguably more complex interface, embedded within the ESB corporate family has been allowed to gestate over time by policy makers, and the regulator. The Transmission Asset Owner (TAO) Licence held by ESB requires ESB to locate the transmission asset functions covered by the licence in a separate business. ESB achieves this using two distinct vehicles. ESB Networks Limited, a subsidiary of ESB, manages the transmission asset business. An Asset Management Agreement in place between ESB and ESB Networks Limited ensures that ESB provides its subsidiary with the resources necessary to enable it to perform the functions of the TAO. ESB staff engaged in transmission related activities are housed in a business unit within ESB itself, known as the ESB Networks Business Unit. This unit is managed by ESB Networks Limited. The net effect of this is that, to the extent that transmission functions fall to be performed by ESB, they are unbundled to ESB Networks Limited, except for the ownership of the asset, and the employment of staff engaged on transmission related activities. Ring-fencing arrangements are in place in relation to both ESB Networks Limited and the ESB Business Unit.

The CER has acknowledged that it would be better to have all ESB transmission related activities in a single entity, but nevertheless considered the regulatory arrangements that apply to ESB to be effective. Not surprisingly this determination has not survived European Commission scrutiny. The Commission reached the manifestly obvious conclusion that splitting the transmission functions between a business unit (ESB Networks Business Unit) on the one hand, and a separate legal entity (ESB Networks Limited) could 'serve to undermine the effectiveness of the Irish arrangements, by blurring the lines between transmission activities and generation and supply activities.'<sup>308</sup> The Commission noted that this could be better addressed by locating all of the roles of ESB as TAO in a separate legal entity that employed all the necessary staff and owned the transmission assets.<sup>309</sup>

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<sup>308</sup> Commission (n 262) 14.

<sup>309</sup> *ibid.*



Notwithstanding that the 2000 Regulations set out in considerable detail the TSO functions of EirGrid as TSO, the precise nature of EirGrid's role has been a contentious issue. What was, and perhaps still is at issue, is the matter of control. The 2000 Regulations made the transfer of TSO functions from ESB to EirGrid conditional on the parties agreeing a Transfer Agreement and Infrastructure Agreement. The former was to be the vehicle for transfer of people and resources from ESB to EirGrid; the latter the contract that would set out the rules of engagement for the new TAO/TSO interface. The six-year delay in establishing EirGrid arose from the failure of ESB and EirGrid to conclude these agreements, compounded by the failure of CER as regulator to effectively use its statutory powers to impose a solution that reflected the legislation. Negotiation of the Infrastructure Agreement was described by the Chairman of EirGrid as 'intense and difficult'.<sup>310</sup> When CER sought to impose a solution by issuing a Direction to EirGrid and ESB, EirGrid took the position that it could not comply, and the CER proceeded to enforce the Direction in the High Court in 2002.<sup>311</sup> EirGrid responded by seeking to judicially review the CER's Direction. EirGrid's reluctance centred around the fact that certain key functions allocated to EirGrid by the 2000 Regulations were being retained by ESB with the support of the Minister and CER.<sup>312</sup> EirGrid were not alone in their concerns. The Competition Authority also expressed concern about the level of control ESB was seeking to retain through the Infrastructure Agreement.<sup>313</sup> Specifically, the Authority's concerns included: the extent of the role ESB was to continue to have in construction activities; the requirement that ESB and EirGrid enter into a specific development agreement for each new project; the absence of penalties on ESB for failure to perform save in relation to maintenance activities; the effectiveness of the step-in rights available to EirGrid in respect of ESB failure to perform; and the lack of a clear delineation of liability as between ESB and EirGrid.<sup>314</sup> The Authority did not see the agreement as one between 'equal parties'.<sup>315</sup> Attempts were made to reach an out of court settlement and compromise acceptable to all parties was finally reached on the day of the court hearing. Notwithstanding this agreement, the Infrastructure Agreement was not signed until 1 July 2006.<sup>316</sup> It was reported that the parties

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<sup>310</sup> O'Kelly (n 167).

<sup>311</sup> CER, *Transmission Infrastructure Agreement Principles Paper* (CER/01/059 2001).

<sup>312</sup> See: Mary Carolan, 'EirGrid to target Reeves Direction' *The Irish Times* (Dublin, 16 February 2002).

<sup>313</sup> Competition Authority, Press Release 'Competition Authority Calls for Extensive Powers for EirGrid' 27 June 2001.

<sup>314</sup> Competition Authority, 'Response to CER /01/059 Transmission Infrastructure Agreement Principles Paper' <<http://ccpc.ie/sites/default/files/Pre-02%20%28004%29%20Electricity%20Transmission.pdf>> accessed 6 June 2015; and Competition Authority, 'Response on Commission for Energy Regulation's Draft Direction on the Infrastructure Agreement between ESB and EirGrid' (17 October 2001) <<http://www.ccpc.ie/sites/default/files/Pre-02%20%28005%29%20Electricity%20Agreement.pdf>> accessed 6 June 2015.

<sup>315</sup> *ibid* 2.

<sup>316</sup> For a report of what was agreed see: Mary Carolan, 'Energy regulator and EirGrid reach settlement' *The Irish Times* (Dublin, 16 October 2002).

were subjected to significant pressure to reach agreement.<sup>317</sup> Negotiation of the Transfer Agreement with ESB staff also proved to be a significant obstacle.<sup>318</sup>

In the interim the TSO/TAO functions evolved further by virtue of the 2005 Regulations, though the Competition Authorities' concerns about the delineation of functions were not allayed. The Authority concluded that the approach was sub-optimal and noted that only full separation could incentivise investment, reduce the regulatory burden; and permit each entity to concentrate on its core activities.<sup>319</sup> As discussed above, Thorsch, has raised serious concerns about the existence and contractual balance in the Infrastructure Agreement and echoes many of the concerns raised by the Competition Authority.<sup>320</sup> Some of these issues and concerns were revisited in the context of Third Package Directive implementation.

Implementation of the Third Package Directive presented a further opportunity to highlight some of the deficiencies of the split ownership-operation model and in that context, many of the problems at the forefront of the debate were relevant from the perspective of renewables and wind. EirGrid's argument that FOU would lead to reduced duplication in the areas of client engineering costs; costs associated with implementation of the Infrastructure Agreement; and elimination of duplicate programme management co-ordination, was accepted.<sup>321</sup> EirGrid also successfully demonstrated that a single ownership-operation model could deliver constraint cost savings.<sup>322</sup> Frontier's assessment was less supportive of EirGrid's argument that by giving EirGrid sole control of the transmission assets and associated costs, EirGrid could deliver savings of 5% on capital expenditure. If EirGrid's position was that it did not have all the information that it required to make the best decisions, then EirGrid should look to the contractual rights it had under the Infrastructure Agreement and request information from ESB to enable it to perform its functions.<sup>323</sup> EirGrid had submitted that despite its contractual entitlements it was still not getting the information it required. It was acknowledged that there had been issues but it was noted by Frontier that 'it is not clear to us that all avenues have been explored in resolving these concerns.'<sup>324</sup> If EirGrid had taken the issue to CER, and CER had concluded that EirGrid was likely to make sub-optimal decisions that would cost consumers, it was likely that CER would intervene and ensure that ESB complied with the terms of the Infrastructure Agreement.<sup>325</sup> Frontier also

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<sup>317</sup> *ibid.*

<sup>318</sup> For a discussion of the difficulties see: O'Kelly (n 167) and CER (n 168).

<sup>319</sup> The Competition Authority (n 273) 12.

<sup>320</sup> Thorsch's concerns are discussed at page 50 above.

<sup>321</sup> Frontier (n 125) 45.

<sup>322</sup> *ibid.*

<sup>323</sup> *ibid.*

<sup>324</sup> *ibid* 51.

<sup>325</sup> *ibid* 51.

found that, in view of the level of work that the CER had put into the then most current Price Review exercise, it was unlikely that CER would have allowed significant capital expenditure to have been incurred because of shortfalls in information supplied by ESB to EirGrid.<sup>326</sup> EirGrid's argument that FOU could reduce operational costs through maintenance optimisation failed for similar reasons.<sup>327</sup> Frontier noted that the issue had not been raised with CER, and that CER were unaware that such significant savings were not being achieved due to ESB's failure to provide information to EirGrid.<sup>328</sup>

The underlying assumption in all of this is that the Infrastructure Agreement is an arms-length enforceable contract negotiated by equals. Even if it is, it is submitted that it can never be more than a record of what was documented in 2006 between the two entities because it is express Government policy that State bodies should exercise restraint in pursuing legal options against each other. Government policy, perhaps motivated in part by the ESB/EirGrid protracted dispute, is that State agencies should pursue a benign and harmonious existence and refrain from engaging in litigation with one another. Section 8.48 of the long-standing and recently revised, Code of Practice for the Governance of State Bodies, in addition to a requirement to inform parent departments of the existence of legal disputes, is very explicit in this respect:

8.48 Where a legal dispute involves another State body, unless otherwise required by statute, every effort should be made to mediate, arbitrate or otherwise resolve before expensive legal costs are incurred. State bodies should pursue the most cost effective course of action in relation to legal disputes.<sup>329</sup>

In the context of a dispute between the Health Service Executive, and the Health Information and Quality Authority (HIQA) (a regulatory agency), the then Minister for Health is reported to have taken this one step further by declaring that State bodies should not litigate against each other.<sup>330</sup> Even more concerning in that context is the fact that one of the parties (HIQA) was a regulator. The suggestion that EirGrid should rely on its contractual remedies when it is not getting what it requires from ESB must be considered in that context. The Infrastructure Agreement provides documentary evidence of compliance with regulation or window dressing, and arguably little more. The policy against litigation between State entities and agencies also potentially raises

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<sup>326</sup> *ibid* 52.

<sup>327</sup> *ibid* 55.

<sup>328</sup> *ibid*.

<sup>329</sup> Department of Public Expenditure and Reform (n 256) 51.

<sup>330</sup> See: Aiofa Carr and Paul Cullen, 'Government Agencies should not sue each other, Varadkar says' *The Irish Times* (Dublin, 23 March 2015).

serious concerns regarding the perception of independence of CER, itself a State agency, in its regulation of State owned entities.

In the context of the Frontier review, EirGrid also challenged the effectiveness of the connection process under the split model. Referencing lack of certainty on connection dates, EirGrid contended that giving EirGrid full oversight and control of new developments from start up to commissioning would decrease the costs to developers (including wind developers), by between 20 and 25 basis points.<sup>331</sup> With sole control, EirGrid could ensure delivery.<sup>332</sup> Frontier disagreed noting that it would not be advisable, and would indeed be risky for EirGrid to offer applicants for connection a guaranteed connection date before planning permission and land access was secured.

Significantly for wind generation, EirGrid argued that under a FOU model they could bring forward wind connections by approximately 6 months.<sup>333</sup> This would be achieved by streamlining acceptance, review, clarification, dispute and other processes under the Infrastructure Agreement. It was accepted that the EirGrid proposals were technically possible and that any issue of higher risks was one for the CER.<sup>334</sup> But a structural approach was not required. Ireland had a ‘strong track record in delivering renewable capacity.’<sup>335</sup> Approximately 15% of Ireland’s electricity consumption was attributable to renewable sources making it a world leader in wind power.<sup>336</sup> CER had advised that connection offers were issuing in accordance with schedule.<sup>337</sup> CER’s own price review document noted that the principal cause of delay in the delivery of transmission infrastructure was in the areas of planning and land access. The changes that EirGrid proposed could be implemented without structural change, though regulatory intervention from CER was likely to be required because of ‘ESB Network’s profound objections.’<sup>338</sup> Of course if ESB had no role in transmission related activities there would be no scope for objections, profound or otherwise, or need for regulatory intervention. It was also noted that discussions with market participants had revealed a high level of dissatisfaction at the existing arrangements. There was in ‘particular, a sense that at times it can be difficult to get full co-operation from ESB and EirGrid.’<sup>339</sup> Nevertheless, ‘most participants agreed that the key barriers to transmission capex were to be found in relation to planning and land access.’<sup>340</sup> If Ireland fails to meet its targets

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<sup>331</sup> Frontier (n 125) 61.

<sup>332</sup> *ibid* 61-62.

<sup>333</sup> *ibid* 72.

<sup>334</sup> *ibid* 71.

<sup>335</sup> *ibid* 81.

<sup>336</sup> *ibid* 82.

<sup>337</sup> *ibid* 77.

<sup>338</sup> *ibid* 82.

<sup>339</sup> *ibid* 77.

<sup>340</sup> *ibid* 77.

and incurs substantial compliance costs or penalties, then this specific issue, and the solutions proffered by EirGrid will undoubtedly be a prime suspect meriting further investigation.

In summary, the split model and the complexities and shortcomings of the Infrastructure Agreement undoubtedly leaves EirGrid exposed to ESB non-performance should that arise. Non-performance could be attributable to any number of events or circumstances including labour strikes; inability to access funds, disagreements as to interpretation of obligations etc. For the reasons discussed above the Infrastructure Agreement cannot be considered the optimum tool for securing performance. But as demonstrated above, it is not simply a question of performance, the very existence of the Infrastructure Agreement, and the procedures and processes encapsulated in it, gives rise to delays and inefficiencies.

In the context of ESB's application for the TSO/TAO arrangements in Ireland to be certified pursuant to Article 9(9) of the Third Package Directive, CER made proposals aimed at further securing the position of the transmission assets. CER proposed that ESB should maintain an investment grade rating, and that a distinction should be drawn between ESB borrowings to finance infrastructure development, and debt raised to fund other activities.<sup>341</sup> CER also proposed that ESB's obligation to invest in network assets should be clarified.<sup>342</sup> The European Commission was however not convinced, and expressed the view that it would be better if all transmission related activities were housed in a single entity in the ESB group as this would facilitate the raising of funds and the giving of security.<sup>343</sup> The European Commission were also concerned that the step-in rights available to EirGrid in the event of an ESB default were not effective since, as a matter of Irish law, only ESB can own transmission assets.<sup>344</sup> In the view of the European Commission EirGrid should be permitted to construct, own and operate transmission assets.<sup>345</sup> In raising this issue the European Commission briefly shone a light on one of the more curious aspects of the Irish regulatory framework. When it comes to the ownership and operation of the Transmission and Distribution System, Irish law not only provides for the licencing of ownership and operation activities by CER, it also tells CER who the licences must be given to. The position of the ESB group as TAO, DAO and DSO and EirGrid as TSO are each hardwired into legislation, and CER has no ability to withdraw a licence even if it were minded doing so.<sup>346</sup> The way the legislative provisions specifically require the CER to grant licences to entities pre-determined by

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<sup>341</sup> Commission (n 262) 12-13. For details of the certification procedure and role of the CER see: European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011, SI 2011/570.

<sup>342</sup> *ibid.*

<sup>343</sup> *ibid.*

<sup>344</sup> *ibid.*

<sup>345</sup> *ibid.*

<sup>346</sup> See: ERA, s 14(1)(f); s 14(2)(B); s 14(1)(g); s 14(2)(C); s 14 (2)(k); and s 14(2)(2DA).

the Minister and enshrined in primary legislation requires closer scrutiny. No doubt it would be fair to ask who else could, or would, perform these functions; and who else could the CER have granted the licences to at that point in time. But any such observations miss the point that CER is itself designated by statute as an independent regulator, a role which includes the evaluation of electricity undertakings for licencing purposes and subject to such evaluation the grant of electricity licences. Were the CER ever minded withdrawing any of these licences it could not lawfully do so, and perhaps that was the intention of the draughtsman in preparing the legislation. Such legislative designations also make any future privatisation of network assets much more difficult.

#### Fourth Time Lucky, or a Case of ‘plus ça change, plus c'est la même chose’<sup>347</sup>

In 2015, the European Commission set out its ambition for the European Union to become ‘the number one in renewables’ in world terms.<sup>348</sup> Acknowledging that attainment of this goal is dependent on energy markets and grids that are ‘fit for renewables’ the Commission linked the achievement of it to the implementation of existing legislation and new rules.<sup>349</sup> There is however no reference to new initiatives around network unbundling. Whilst there is an acknowledgement by the Commission of the need to ‘ensure investor confidence’, the Communication also recognises the reality of the investment environment that now exists for renewables, and firmly places responsibility for overcoming obstacles and barriers to development with the persons making the investment decisions:

Investment decisions in renewable electricity have to take into account the physical realities of resource availability and of the grid; public acceptance; consumption location and administrative barriers.<sup>350</sup>

Barrett has argued that deficiencies and inconsistencies in the European unbundling regime and the manner of its implementation at Member State level could be addressed through the introduction of a ‘better designed’ fourth energy package.<sup>351</sup> Barrett has suggested that Member States could be given a choice between FOU or (subject to preconditions concerning

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<sup>347</sup> ‘The more things change, the more they are the same.’ Jean-Baptiste Alphonse Karr, *Les Guêpes* (January 1849) (6<sup>th</sup> Series 1859).

<sup>348</sup> Commission, ‘Energy Union Package. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions and the European Investment Bank. A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’ [2015] COM (2015) 80 final.

<sup>349</sup> *ibid.*

<sup>350</sup> *ibid.*

<sup>351</sup> Eva Barrett, ‘A case of who will tell the emperor he has no clothes?-market liberalization, regulatory capture and the need for further improved electricity market unbundling through a fourth energy package’ (2016) 9 *Journal of World Energy Law and Business* 1-16, 14.

independence requirements), ISO options.<sup>352</sup> It is submitted that the last thing the corpus of European energy law now needs is yet another set of unbundling rules and attendant tests around independence and effectiveness. If we have learned anything from the first three energy packages, it is that at a Member State level, the degree of ingenuity in, and enthusiasm for, devising and crafting complex and opaque corporate, contractual, and regulatory structures aimed at securing the most literal of compliance with EU requirements is boundless, and any new initiative that involves options or measurement is bound to fail, but not before years of debate, cost, and uncertainty, to add to what has gone before. But even if FOU were to be mandated, a serious question arises as to whether FOU can ultimately deliver for renewable developers and/or consumers in Ireland where the State continues to be a shareholder in network, generation, and supply activities, and continues to find itself in a politically conflicted position. It is submitted that, should there be a fourth package, then there should be a single option, namely FOU with a rider that a Member State cannot be involved in network activities (transmission and distribution), in addition to generation and supply activities, even where the network activities sit in a separate legal entity held by a separate Minister or public body. In an Irish context, this would require the privatization of all electricity generation and supply activities under the control of State owned enterprises including ESB. The question that remains to be answered then is whether a fourth energy package would assist Ireland in, and bring certainty to, the pursuit of its 2020 targets? The answer is undoubtedly that it would not, due to the length of time it would take to secure agreement on such a package and ultimately implement it. If, however, the Irish Government were to decide to privatize the State-owned generation and supply businesses then all the complexity around, and uncertainty and conflicts arising from, ownership and operation of the network assets would be finally removed. This could be achieved without any Fourth Package and in a much timelier fashion, and whilst it is unlikely at this late stage to make a material difference for 2020 target compliance, it would place Ireland in a much better position for 2030 and beyond.

## Chapter Conclusion and Application to Thesis Themes and Questions

This chapter highlights the difficulties for Member States in implementing EU measures couched in optionality in the face of opposition from historical and entrenched vested interests. Because the legislative scheme for unbundling of network assets, an acknowledged enabler of renewable energy development, left several options open to Member States, Ireland, for reasons of political

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<sup>352</sup> *ibid* 15.

expediency, dressed up as economic necessity, could avoid difficult choices, default on published energy policy, and subvert the spirit of the EU measure.

In this chapter, it is argued that failure to adopt the most extreme form of ownership unbundling, and all the complexity and inefficiency that flows from that failure, may be a contributing factor to Ireland failing to meet its 2020 RES-E Target, and in advance of that gives rise to considerable uncertainty. This chapter highlights how a deficiency in the Third Package Directive around unbundling has potentially undermined one of the key objectives of the Second Renewable Energy Directive.

In this chapter it is also argued that the complex and carefully constructed regulatory arrangement in Ireland surrounding ownership and operation of electricity networks is sub-optimal, unnecessary, and constitutes both a delay and cost impediment to the connection of wind generation technology to the grid, a delay which may contribute to Ireland missing its 2020 RES-E Target and consequently, its 16% binding EU target. This chapter reveals that the arrangements have been crafted and refined over a lengthy period by key actors in the Irish electricity market to facilitate and preserve the position of Ireland's historic electricity monopoly, its shareholder, employees, and trade unions.

The shortcomings of the split ownership-operation transmission model from the perspective of wind generation have been rehearsed and dismissed, and it now seems unlikely that this model will be undone in the medium term. To the extent that Ireland fails to meet mandatory 2020 targets however, and the shortcomings of the model highlighted by EirGrid and others can be shown to be contributing factors, then to the cost of this complex, skilfully crafted and inefficient arrangement can be added the financial consequences of Ireland's failure to meet 2020 targets.



## Chapter 4: Financing the Winds of Change-Irish Financial Support Schemes

*'..., the fact that a national support scheme is designed to favour directly the production of green electricity, rather than solely its consumption, can be explained, in particular, by the fact that the green nature of the electricity relates only to its method of production, and that, accordingly, it is primarily at the production stage that the environmental objectives in terms of the reduction of greenhouse gases can actually be pursued. By contrast ....., once the green electricity has been allowed into the transmission or distribution system, it is difficult to determine its specific origin and, accordingly, its systematic identification at consumption stage as green electricity is difficult to put into practice.'*<sup>353</sup>

### Subsidies and Subsidiarity

In the event that Ireland ultimately misses the mark on its 2020 RES-E Target and as a consequence, its 16% binding EU target, it is submitted that this will not be because of a lack of, or indeed inadequacy in the quantum of, financial support or subsidies for renewable energy, rather it will be because of a failure to overcome barriers to the deployment of wind generation that financial subsidies do not, and cannot be expected to address including, the historical lack of investment in grid infrastructure, the ever more ubiquitous dark shadow of social opposition to wind turbines and energy infrastructure more generally, and the subversion of community objectives by domestic actors. Conversely, if Ireland does meet its 2020 targets, then it will be due, in a very significant part, to the level and duration of financial support that has, to date, been made available to participants in the sector by the Irish electricity consumer through State sponsored and administered support schemes. Irish support schemes for renewable energy, and wind energy in particular, have fuelled the pursuit of Ireland's 2020 renewable energy targets by removing, to a very great extent, uncertainty around access to, duration, and levels of financing for projects.

The purpose of this chapter is to examine the effectiveness of support schemes in attracting investors, and capital (debt and equity), for Irish wind energy projects, and to demonstrate that, in circumstances where politics, and vested incumbent interests are not engaged by a proposal, it follows that the EU principles of subsidiarity, and proportionality will not necessarily lead to regulatory, or policy failure of the type identified in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*). Recital 29 of the Second Renewable Energy Directive

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<sup>353</sup> Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2015] 1 CMLR 10.

acknowledges the latitude Member States have in the design of national support schemes when it notes that for ‘the proper functioning of national support schemes it is vital that Member States can control the effect and cost of their national support schemes according to their different potentials’ and at the same time sets out the aim of the Directive to ‘guarantee the proper functioning of national support schemes ....., in order to maintain investor confidence and allow Member States to design effective national measures for target compliance.’

The central argument in this chapter is that, despite the level of discretion left to Member States in Articles 2 and 3 of the Second Renewable Energy Directive, as to the nature of support schemes that can be deployed in furtherance of renewable energy targets, support schemes in Ireland have been structured, deployed and operated to maximum effect, and with little fuss, because they did not require any concessions by, or diminish the rights and entitlements of, vested incumbent interests, since the burden of the schemes (if indeed such a burden exists or should arise), was placed on electricity consumers, and politically difficult choices avoided. The outcome from a regulatory success/failure perspective, can thus be contrasted with the outcome on network unbundling discussed in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*). The uncertainty for new entrants created by the approach to unbundling can be contrasted with the high degree of certainty built into the support scheme framework and which has formed the basis for long term financing, and assured return on investment for the owners of operational projects.

This chapter also considers a number of subsidiary issues including: the legal consequences of policy reversals motivated by the economic crises, and potential impacts for 2020 renewable energy targets; the subversion of energy policy (in this instance renewable energy policy), for non-energy purposes by domestic actors; and the impact of Ireland’s unlawful exclusion of windfarm developments located in Ireland (the output of which would count towards Ireland’s 2020 targets if built), but connected to the grid in Northern Ireland, from the benefit of Irish support schemes.

## Gold on Them Thar Hills: The Value of Irish Support Schemes

Whilst in Ireland there may not, in the words of Colonel Mulberry Sellers, be ‘gold in them thar hills’,<sup>354</sup> the development of renewable generation in Ireland has shown that there may well be ‘gold on them thar hills.’ Over the past two decades the incentives provided for in the principal support schemes for onshore wind generation have proved to be a very effective lure in attracting

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<sup>354</sup> Mark Twain, *The American Claimant*, (Charles L. Webster 1882). In 2008, it was reported that Airtricity, a wind development company established in 1999, was sold for Euro 1.8 billion in net cash. See: Joe Brennan ‘Airtricity boss to net €45M following sale of company’ *The Irish Times* (Dublin, 5 May 2008).

domestic, and international capital to Ireland's nascent wind generation sector. It is not an overstatement to say that the development of Irish wind generation assets has, at times, been pursued with a degree of fervour reminiscent of the Klondike gold rush of the late 19<sup>th</sup> century. The nature and duration of the support available has unlocked the door to credit and facilitated participation by a wide spectrum of interests in the Irish electricity market, ranging from hitherto sheep farmers in rural, and not so rural parts of Ireland, who lease land, and commonage for turbine sites, to Wall Street bankers and lawyers who finance and document transactions. Unlike many of the participants in the Klondike experience, developers of, and investors in Irish wind generation assets, underpinned by a generous and stable consumer funded levy have not, for the most part, gone home empty handed. The 15 year financial underpinning has allowed project debt to be repaid on schedule, and provided attractive returns on equity invested.<sup>355</sup> Against a backdrop of economic upheaval, policy reversals, and support abatements in jurisdictions such as Spain, and the Czech Republic, Ireland's principal renewable support scheme continued largely unchanged through the turmoil of the economic crisis.<sup>356</sup> Whilst internationally there has been some reluctance on the part of pension funds, and other institutional investors, to participate in green asset investments, it is notable that assets of renewable infrastructure funds listed on the London Stock Exchange, include Irish based wind assets developed and financed, under the Irish support framework.<sup>357</sup>

Ireland has, in its pursuit of greater wind generation penetration, deployed a suite of technical, legal and economic measures that are almost as diverse in nature as they are extensive.<sup>358</sup> Notwithstanding this diversity in approach, the core principle, or foundation stone that underpins Ireland's policy to construct an ever increasing number of wind turbines has, and continues to be, a commitment to socialise any additional cost associated with the technology across the electricity consumers of Ireland, and the reimbursement of that cost, to the extent it arises, to investors.

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<sup>355</sup> For a discussion of the attractiveness of Irish Infrastructure Assets (including wind) see: Patrick Bourke, Irish Life, Investment Managers, 'Irish Infrastructure & Irish Property Seminar' (4 September 2014).

<sup>356</sup> Spain is one of several countries where investors in wind and solar projects are pursuing government for breach of the Energy Charter Treaty arising from the withdrawal of, or adverse adjustment to, support schemes for renewables.

<sup>357</sup> See: Renewable Infrastructure Group Limited (TRIG), 'Acquisition of 25.3 MW Wind Farm in Ireland' (London Stock Exchange, 28 November 2014). For a discussion of the challenges for institutional investors in the green infrastructure sector see: OECD, *The Role of Banks, Equity Markets and Institutional Investors in Long-Term Financing for Growth and Development, Report for G20 Leaders* (February 2013); and OECD, *Long Term Investors & Green Infrastructure, Policy Highlights from Intitutional Investors and Green Infrastructure Investments: Selected Case Studies* (2013).

<sup>358</sup> See: Government of Ireland (n 8) 13.

Recognizing and quantifying the cost to the Irish electricity consumer of the Public Service Obligation (PSO) Levy introduced to support wind generation has been the subject of much debate.<sup>359</sup> DCCAIE (previously styled DCENR), has administered AER and REFIT, the two principle support schemes for renewable energy in operation since the mid-1990s. In the recent National Mitigation Plan, DCCAIE, referencing previous attempts by SEAI, CER, EirGrid, and Government Departments, at quantifying the impact of support schemes on electricity system costs, set aside those studies as they had not employed the same fossil fuel assumptions as those employed in the National Mitigation Plan itself; it was not possible to 'use existing studies to understand the impact of the AER and REFIT.'<sup>360</sup> DCCAIE then outlines the complexities, and length of time it will take to complete a new robust study. What is remarkable about this state of affairs is not that it is a complex business, or that it will take time to complete the work, it is that after two decades DCCAIE acknowledges in the National Mitigation Plan that it does not have an acceptable measure of the electricity system costs of support schemes it has designed and administered over that lengthy period. This casts a long shadow over the use of earlier data as a basis for justifying regulatory decisions favourable to renewable energy. DCCAIE has undertaken to complete a study on the impact of support schemes on electricity costs by 2019.<sup>361</sup>

Whatever the financial cost, the quantum, and certainty of the financial support on offer in Ireland has, up to this point, proved to be highly effective. Though from time to time there are negative observations from business and consumer groups concerning the cost of the renewables aspect of the PSO Levy, broadly speaking the approach and associated cost has been accepted by electricity consumers.<sup>362</sup>

Whilst an earlier support framework known as the Alternative Energy Requirement (AER) was the subject of some justified criticism by industry and others, and whilst these schemes lacked ambition and were only moderately successful, the support schemes available, when looked at across the entire period since the mid-1990s, have been more than reasonably successful in achieving their stated goals and would, if not constrained by grid limitations and other factors, conceivably have achieved much more.

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<sup>359</sup> See: Conor Devitt and Laura Malaguzzi Valeri, *The Effect of Refit on Irish Electricity Prices* (2011) ESRI Working Paper No. 374; and CER, *Public Service Obligation Levy 2015-2016, Decision Paper* (CER 15/142 2015).

<sup>360</sup> DCCAIE (n 3) 51-52.

<sup>361</sup> *ibid.*

<sup>362</sup> For a discussion of the social acceptability and social cost aspects of feed-in-tariffs see: Reinhard Haas, Gustav Resch, Christian Panzer, Sebastian Busch, Mario Ragwitz and Anne Held, 'Efficiency and effectiveness of promotion systems for electricity generation from renewable energy sources-Lessons from EU countries' (2010) <[http://publik.tuwien.ac.at/files/PubDat\\_193135.pdf](http://publik.tuwien.ac.at/files/PubDat_193135.pdf)> accessed 22 February 2016.

Notwithstanding the success of the support schemes deployed, there are however several themes concerning, or arising out of, Ireland's approach to support schemes for renewables that warrant closer scrutiny. First amongst these is the role played by ESB in the implementation of the schemes themselves and whether this role, which many would argue was unavoidable, served to sustain ESB's position in the electricity market at a time when undoing ESB's monopoly position across generation and supply was not only a requirement of European Union Law, but also necessary if Ireland was to transition to a functioning competitive market. In addition to the role played by ESB in the administration of the schemes, ESB itself has also been permitted to benefit from the schemes as a recipient of PSO support for its own wind business.<sup>363</sup> This access would also seem to fly in the face of an enduring European policy that has sought to reduce the dominance of vertically integrated utilities in the generation sector.

ESB's involvement aside, there is also the issue of the Government's contradictory, and counterintuitive parallel pursuit at a policy level of both peat fired generation, and renewable generation as *must run plant*, in each case underwritten by the Irish electricity consumer. This inherent contradiction is blatantly manifest in Ireland seeking (in the same document submitted to the European Commission) and obtaining, State aid approval for a PSO Levy for renewable generation (including wind), and the generation of electricity from the burning of peat.<sup>364</sup>

Access to support schemes is a further area that merits some consideration, not because access has (with one notable, and arguably highly discriminatory exception, which has prevented the development of projects in border counties where they would connect to the grid in Northern Ireland), been overly restrictive, rather because the bar for access to support was, at least in the early days, set at a very low level, allowing developers access to support without any real assessment of the suitability (by the applicant, or the public authority responsible for administering the scheme), of the project in a wider sense. Support schemes have conferred financial viability on projects irrespective of their individual merit from a broader market, or national networks perspective.<sup>365</sup> In effect the capacity, and generosity of support schemes have been set not by reference to any measure linked to suitability of locations or grid capacity, but by

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<sup>363</sup>For details of ESB's wind business see: ESB Generation Asset Map: <<https://esb.ie/our-businesses/generation-energy-trading-new/generation-asset-map> > accessed 27 September 2017.

<sup>364</sup> Ireland, *Notification of Public Service Obligations to be imposed on ESB* (November 2000). For further details of relevant documents including the PSO Notification of November 2000, see: CER, *Public Service Obligation Levy 2011/2012-Proposed Decision Paper* (CER 11/097 2011) 1-2.

<sup>365</sup> For a discussion of the issues associated with allowing generating plant that is not of real time value to the operation of the system see chapter 5 (*Prioritising the Wind-The Role of Policy, Law and Independent Regulation*).

reference to arbitrary renewable targets, and an annual build rate multiplier or annual development rate necessary to achieve these targets.

## Subsidising the Wind: The Nature of Irish Financial Support Schemes

It is not disputed that the capital intensive nature of wind generation means that State intervention is essential to secure investment in the sector, and this is likely to continue to be the case in the short to medium term at least.<sup>366</sup> Economic support mechanisms are viewed as an important tool in assisting wind generation technology to achieve competitiveness, and thus overcome one of the key barriers to the deployment of the technology.<sup>367</sup> The European Commission views the requirement for subsidies for renewable energy as an essential and inevitable response to manifold failures and impediments that include: market and regulatory deficiencies, insufficient competition, unfair competition from conventional fossil fuels, a failure to fully internalise external costs such as security of supply and harmful greenhouse gasses when costing conventional generation; and grid access obstacles.<sup>368</sup>

Support schemes are given a very broad definition in Article 2(k) of the Second Renewable Energy Directive, and Member States are given a correspondingly broad discretion as to how they structure them, even to the extent that schemes that have been found to violate one of the core principles of the EU Treaty, the free movement of goods, have been held by the CJEU to be both justified, and proportionate.<sup>369</sup> Viewed from a global perspective, State intervention takes many forms.<sup>370</sup> In Ireland, while tax incentives have been successfully employed, the predominant, and preferred approach has been one of revenue support through legislatively mandated, and centrally collected and distributed, consumer funded subsidies.<sup>371</sup>

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<sup>366</sup> Gerard Marata, Olegario Soldevila Ferrer, Jeff W Dorrill and Erin Larkin Watkins, 'Renewable Energy Incentives in the United States and Spain: Different Paths-Same Destination?' (2010) 28 4JENRL, 439.

<sup>367</sup> For a discussion of the role of support mechanisms in overcoming barriers to the development of renewable generation see: Hassen (n 32); Ottinger and Zalcman (n 41); Peter Mak Kui-Nang and Friedrich Solatu, 'Policy Options' in Adrian J. Bradbrook, Rosemary Lyster, Richard L. Ottinger and Wang Xi (eds), *The Law of Energy for Sustainable Development* (IUCN Academy of Environmental Law Research Studies, Cambridge University Press 2005) 211; and Xi, Runlin and Dong (n 30).

<sup>368</sup> Commission, 'Staff Working Document, European Commission Guidance for the design of renewable support schemes, Accompanying the document, Communication for the Commission, Delivering the Internal Market in Electricity and making the most of public intervention' SWD (2013) 439 final, 3.

<sup>369</sup> Second Renewable Energy Directive, art 2 (k). See also: Case C-573/12 *Ålands* (n 353). The *Ålands* case is discussed in detail later in this chapter.

<sup>370</sup> International Renewable Energy Agency, *Renewable Energy Country Profiles: European Union* (2013).

<sup>371</sup> For a discussion of the difference between support frameworks that target increased revenues and those that seek to lower developer's net costs see: Marata (n 366). Support schemes that are based on tax credits may not be as attractive to certain institutional investors such as pension funds due to the latter's tax-exempt status. See: David Nelson and Brendan Pierpont, *The Challenge of Institutional Investment in Renewable Energy, Climate Policy Initiative* (CPI Report, March 2013). In Ireland, the legislative basis for PSO funded support schemes is to be found in ERA, s 39. See also: Electricity Regulation Act, 1999 (Public

Specific tax incentives apart, Ireland has, since 1993, operated two support schemes aimed at encouraging, and facilitating investment in renewable energy, including energy derived from wind generation technology. The first of these initiatives, known as the Alternative Energy Requirement (AER), imposed on the State owned vertically integrated monopoly ESB, an obligation to purchase electricity from specified green generators for a period of 15 years, at a guaranteed price set by the generator.<sup>372</sup> The developers awarded an ESB Power Purchase Agreement (PPA) were selected through a competitive process based on the lowest guaranteed price bid.<sup>373</sup> Up to the liberalisation of the electricity market, the additional costs to ESB of the AER 15 year PPAs imposed on it were recovered by ESB from final electricity consumers as part of the State fixed electricity tariffs.<sup>374</sup> After liberalisation, the mechanism for recovery of additional costs was adjusted, and allowed for the transfer of the electricity consumer levy through the TSO, and then on to ESB as compensation for the additional cost of renewable energy. The certainty of counterparty, and cash flow, given by the long term PPA offered by ESB, a State-owned enterprise with a substantial balance sheet, instilled investor confidence, and provided a vehicle for securing long term debt finance for projects.<sup>375</sup>

When Ireland ultimately sought State aid approval for the AER programme in 2000, the justifications for the PSO levy to be imposed on ESB were expressed to be the development of a ‘native renewable energy industry, and for reasons of environmental protections.’<sup>376</sup> Also

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Service Obligations) Order 2002, SI 2002/217; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2002, SI 2002/614; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2004, SI 2004/174; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2005, SI 2005/380; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) (no. 2) Order 2005, SI 2005/511; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2007, SI 2007/582; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) (no. 2) Order 2007, SI 2007/583; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2008, SI 2008/284; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2009, SI 2009/444; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2010, SI 2010/532; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2011, SI 2011/513; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2012, SI 2012/438; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2013, SI 2013/421; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2014, SI 2014/603; Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2015, SI 2015/556; and Electricity Regulation Act, 1999 (Public Service Obligations) (Amendment) Order 2016, SI 2016/600.

<sup>372</sup> For an overview of the early stages of AER see: Fergal O’Leary, Brian Ó Gallachóir, and Martin Howley, SEI, *Renewable Energy in Ireland, Trends and Issues 1990-2002* (August 2004) 19-20.

<sup>373</sup> In the period 1994-2005, DCENR conducted six tender competitions (AER I-VI). AER II was aimed at Waste to Energy; and AER IV at Combined Heat and Power (CHP).

<sup>374</sup> The additional cost was measured as the difference between, on the one hand, the price paid for electricity from the renewable generators pursuant to AER PPAs; and on the other hand, the price at which ESB could have sold the electricity so acquired in the market. Because such a market price would not exist prior to the complete liberalisation of the Irish electricity market, the CER instead set a reference price based on a Best New Entrant (BNE) formula.

<sup>375</sup> See: DPE (n 106).

<sup>376</sup> Ireland (n 364) 9, 19.

emphasised in the State aid notification was the potential contribution renewable generation could make towards harmful emission reduction, and meeting Kyoto Protocol targets.<sup>377</sup> Reflecting the Government view that support is a policy and not regulatory matter, the principal support schemes to date have been designed and administered by DCENR (now DCCAE), under the auspices of the Energy Minister. No qualitative findings were made in relation to applications for AER support. Tenders were judged solely on prices bid, with the objective of ensuring that the cost to the consumer for the operation of the renewable source was as low as possible.<sup>378</sup>

The stated objective of AER I was to ensure that 75 MW of new renewable electricity generation was secured across an assortment of technologies.<sup>379</sup> Seven wind generation projects were successful in the competition, equating to 45.8 MW.<sup>380</sup> In 1996, a Government policy document on renewable energy called for an additional 100 MW of installed renewable capacity.<sup>381</sup> AER III, which had an original aggregate capacity target across a range of technologies of 100 MW, followed.<sup>382</sup> Recognising that some of the projects successful in the competition might not ultimately proceed, the capacity ceiling was raised to 158.75 MW when it came to the award of PPAs. In the small wind category (under 5 MW), the specified target was 25 MW but contracts for 36.51 MW were awarded. In the large wind category (over 5 MW), the specified target was 65 MW, but contracts for 100.82 MW were awarded.<sup>383</sup> The concern about the prospect of projects selected not proceeding materialised, and in the wind categories only 6 projects, amounting to a combined capacity of 37.51 MW, were built. The reasons for projects not progressing included delays in permitting, and site specific issues.<sup>384</sup> To assist projects with planning delays DCENR extended the deadline by which projects were required to be operational by 12 months.<sup>385</sup> Industry view AER III as both a failure, and more importantly as an illustration of why a competitive tender process based approach is not the most appropriate for securing operational capacity.<sup>386</sup> The process failed to deliver operational projects because the prices bid to win (price being the key determining factor), were unrealistic and projects could not as a consequence proceed as finance could not be raised.<sup>387</sup> In 1999 Government launched a new policy initiative

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<sup>377</sup> *ibid* 23-24.

<sup>378</sup> DCENR, *Alternative Energy Requirement Programme* (2005) 1.

<sup>379</sup> Ireland (n 364) 25-26.

<sup>380</sup> Commission, 'State aid No N 826/01-Ireland, Alternative Energy Requirement I-IV' COM (2002) 5 final. See also: Commission, 'State aid N/55301-Ireland, Aid to promote renewable energy sources in Ireland' COM (2002) 3 final.

<sup>381</sup> DPE (n 104).

<sup>382</sup> Ireland (n 364) 26-27.

<sup>383</sup> DCENR (n 378) Appendix I.

<sup>384</sup> *ibid*.

<sup>385</sup> *ibid*.

<sup>386</sup> IWEA, 'Response to the DG Competition Draft Guidelines on Environment and Energy Aid for 2014-2020' (14 February 2014) 5.

<sup>387</sup> *ibid*.



that called for a much more ambitious additional 500 MW of renewable energy by 2005.<sup>388</sup> Following the work of RESG, adjustments were made to competition rules to ensure a greater level of build-out of projects successful in the competitions.<sup>389</sup>

When AER V was launched in May 2001, a target of 200 MW was set for large scale wind (over 3 MW capacity). To ensure that this specified target would be met, contracts with a cumulative capacity of 318.3 MW were awarded to successful applicants. In the small wind category (under 3 MW capacity), a target of 40 MW was not met and contracts of a combined capacity of 37.795 were offered.<sup>390</sup> On this occasion the failure of successful projects to proceed to construction was attributed to (amongst other things), a fall in investor confidence following the removal of a Government tax incentive, an outcome that serves as a good illustration of the sensitivity of investors, and financial institutions to unwelcome policy interventions, or reversals.<sup>391</sup> AER VI brought to a close the DECNR's AER Programme. A total of 48 contracts with a combined capacity of 365 MW (including two 25 MW offshore wind projects), were awarded though this included 152 MW carried over from AER V.<sup>392</sup>

With the stated objective of ensuring that the electricity consumer 'incurs the smallest price increase on their electricity bills through the operation of a PSO levy..',<sup>393</sup> the DCENR structured the AER series of competitions in a manner that required no qualitative assessment of projects to be made. Contracts were simply awarded to tenderers with the lowest price bid in each technology category.<sup>394</sup> This approach certainly found favour with the European Commission when it came to the State aid assessment of the AER Programme as the approach 'ensured that the support granted was the smallest support necessary to allow the construction of the plants.'<sup>395</sup> By structuring the competitions in this fashion however, the DCENR unwittingly excluded projects that could be financed because the price bid in respect of them was not the lowest, and proceeded with a number of projects that could never be built because the price bid in respect of them was too low to support investment or third party financing, a fact subsequently acknowledged by the Minister when the AER Programme was concluded.<sup>396</sup>

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<sup>388</sup> DPE (n 106).

<sup>389</sup> RESG (n 97).

<sup>390</sup> DCENR (n 378) Appendix I.

<sup>391</sup> O'Leary (n 372) 19-20.

<sup>392</sup> DCENR (n 378) Appendix I.

<sup>393</sup> *ibid* 1.

<sup>394</sup> *ibid* 1.

<sup>395</sup> Commission (n 380) 6.

<sup>396</sup> Pat Rabbitte T.D., and Minister for Communications Energy and Natural Resources response to questions from Catherine Murphy T.D, Dáil Deb 21 September 2011, vol 741, No. 1.

Limiting the assessment of bids solely to prices bid was a mistake, but it is also surprising that security in the form of a bond or guarantee, was not sought and obtained, from the successful bidders to secure the performance of their obligations. This certainly would have been resisted by the wind lobby, but it would have been international best practice for procurements of this nature, and indeed was successfully employed by the CER in another context.<sup>397</sup> The requirement to post security in the form of a bond or guarantee would have focussed the minds of those bidding, on project economics; and a call on such security would have been an appropriate penalty in respect of projects that did not proceed otherwise than for specified events outside the control of the developer. The exclusion of viable projects in favour of unrealisable ones held back the rate of development. As the AER framework progressed there was a movement away from price as the sole determining factor, and this theme followed through into the REFIT framework that ultimately superseded the AER programme. To ensure a greater degree of certainty around the prospects of projects awarded contracts, both AER V and AER VI imposed a number of minimum conditions requiring applicants to have valid planning permissions, evidence of site ownership or a leasehold interest, as well as certain regulatory permits.

In 2005, Ireland moved to a new support mechanism for renewable energy based on a fixed feed-in tariff system.<sup>398</sup> Incorporating the minimum conditions of the AER Programme, as well as an additional requirement that applicants held a grid connection offer, the Renewable Energy Feed-In Tariff (REFIT) programme sought, in its simplest terms, to deliver a minimum price in respect of electricity derived from certain renewable sources, including wind. Where a licenced supplier (no longer limited to ESB), entered a PPA with a wind generator, the supplier is for a period not exceeding 15 years compensated if the market price for electricity generated by the wind generator is below a specified reference price. In other words, the supplier is compensated for having paid too much to the renewable generator by reference to the market price. The reference price is subject to annual, upwards only, Consumer Price Index (CPI) indexation.<sup>399</sup> The most recent REFIT scheme closed to new applicants on 31 December 2015. Government has committed

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<sup>397</sup> See: CER, *Response to Comments Received on Guidelines for the Competition to Award Contracts between ESB (Electricity Supply Board) and Third-Party Generators* (CER/03/121 2003).

<sup>398</sup> DCENR, *Renewable Energy Feed in Tariff (RE-FIT-2006), A Competition for Electricity Generation from Biomass, Hydro and Wind* (2006) 8. For State aid approval see: Commission, 'State aid no N 571/2006 Ireland, RES-E support programme' COM (2007) 4317 final; Commission, 'State aid SA.31236 (2011/N)-Ireland Renewable Feed In Tariff' COM (2012) 8 final; and Commission, 'State aid SA.31861 (2011/N)-Ireland Biomass electricity generation' COM (2001)3265 final.

<sup>399</sup> For an overview of REFIT see: DCENR, 'REFIT Schemes and Supports' <<http://www.dcenr.gov.ie/energy/en-ie/Renewable-Energy/Pages/Refit-Schemes-Landing-Page.aspx>> accessed 2 March 2016.

to putting a replacement scheme in place.<sup>400</sup> For the PSO period 2016/2017, REFIT 1 and REFIT 2 will provide support to 2,644 MW of renewable energy generated by 194 projects.<sup>401</sup>

## Calculating the Cost of a Conflicting and Counterintuitive Policy Agenda

The PSO Levy that underpins AER and REFIT projects appears as a separate item on electricity bills provided to customers by their suppliers. If the PSO Levy is removed or subtracted from the total electricity cost payable in a billing period, then the amount of the bill is, in simple number terms, reduced. At a basic level then the mere fact of the PSO Levy for wind is a cost to the electricity consumer. The issue of cost in this context is however far from simple. Research has shown that whether or not there is an actual cost to the consumer associated with the PSO Levy to support wind generation, depends on a number of variables including the level of installed wind generating capacity, and the price at a particular moment in time of conventional fossil fuels. When the price of conventional fossil fuels is high, the cost impact that the PSO support for wind has on the wholesale price of electricity is less and visa-versa.<sup>402</sup> Some would argue (correctly it is submitted), that when comparing the cost of renewable generation with conventional generation, the cost assessment of the former should extend to an examination of the external costs to society, and human health and well-being of burning fossil fuels.<sup>403</sup> Regrettably this is an exercise that has to date proved to be beyond the curiosity of even the most enthusiastic of policy makers, and legislators in Ireland. It has been suggested that until such time as policy internalises the public cost of fossil fuels (pollution, health impacts, etc.), wind generation will not be in a position to compete on a level playing field.<sup>404</sup>

As discussed earlier in this chapter, recognizing and measuring the cost to Irish electricity consumers of the renewable PSO Levy introduced and maintained in furtherance of Irish wind

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<sup>400</sup> DCENR, *Ireland's Transition to a Low Carbon Energy Future 2015-2030* (2015) 9.

<sup>401</sup> CER, *Public Service Obligation Levy 2016/2017-Decision Paper* (CER/16/183 2016) 10-13. The proposed levy for 2017/2018 will support 3334 MW of renewable energy (CER, *Public Service Obligation Levy 2017/18-Proposed Decision Paper* (CER/17/115 2017) 12.

<sup>402</sup> Devitt (n 359). For a discussion of the impact of greater wind penetration on the wholesale price of electricity and the merit order effect on the cost of subsidies see: IEA, *Deploying Renewables 2011, Best and Future Policy Practice* (2011) 114. A report by the Council of Europe Energy Regulators (CEER) suggests that Irish support schemes have proven to be more cost effective than schemes in other jurisdictions. See: CEER, *Status Report of Renewable and Energy Efficiency Support Schemes in Europe in 2012 and 2013* (Ref C14-SDE-44-03 15 January 2015). In the National Mitigation Plan 2017 (ibid (n 3)), DCCAE has questioned the value of previous studies on the electricity system cost impacts of Irish support schemes and committed to completing a new more robust study by 2019. See discussion at pp. 87-88 above.

<sup>403</sup> Ottinger and Zalcman (n 41).

<sup>404</sup> See: Manuel Fuentes, 'Barriers and incentives to wind energy development' "Seguridad Energética en América Latina: Energía Renovable como Alternativa Viable" (Reunion Ministerial Iberoamericana, Uruguay, 26-27 de Septiembre de 2006) <[https://www.unido.org/fileadmin/user\\_media/unido.org\\_Spanish/Regional\\_Office\\_Uruguay/uruguay/presentaciones/12\\_Manuel\\_Fuentes\\_Energia\\_Eolica.pdf](https://www.unido.org/fileadmin/user_media/unido.org_Spanish/Regional_Office_Uruguay/uruguay/presentaciones/12_Manuel_Fuentes_Energia_Eolica.pdf)> accessed 22 February 2016.

generated electricity, and indeed the PSO for electricity more generally, has been the subject of much debate.<sup>405</sup> The wind lobby has argued, and no doubt will continue to argue, that the PSO for wind generation does not give rise to any cost to the electricity consumer since wind generation dislodges more expensive conventional fossil fuel generation, and thus depresses the wholesale price of electricity or the System Marginal Price (SMP). The argument runs that if the very fact of the PSO Levy is a cost to the electricity consumer, it is because it is also used to support State owned peat fired generators, and certain conventional power plants.<sup>406</sup> It is this latter point that is perhaps the more interesting one, and the one that warrants closer scrutiny, at least in so far as it relates to the PSO imposed on ESB in respect of peat fired electricity generation, and the peculiar policy conflict this presents when viewed alongside renewable and sustainable objectives.

**Figure 4: PSO Levy Costs 2015-2016<sup>407</sup>**

Technology Category	Total PSO 2015-2016 (Euro (Millions))
Renewables	180.9
Peat	121.9
Security of Supply	47.3
PSO CfDs	-9.3
Other	-15.5
<b>Total</b>	<b>325.3</b>

<sup>405</sup> See: Devitt (n 359); CER (CER/15/142 2015) (n 359); and Competition Authority (n 128). See also pp. 87-88 above.

<sup>406</sup> IWEA, 'The 2014/15 PSO Levy and Irish Wind Energy' <<http://www.iwea.com/contentFiles/news/PSO%20Briefing%20Note%2028072014%20FINAL.pdf>> accessed 23 October 2015. See also: Eoin Clifford and Mathew Clancy, 'Impact of Wind Generation on Wholesale Electricity Costs in 2011, Report Prepared for EirGrid and SEAI' <[http://www.seai.ie/Publications/Statistics Publications/Energy Modelling Group Publications/Impact of Wind Generation on Wholesale Electricity Costs in 2011.pdf](http://www.seai.ie/Publications/Statistics%20Publications/Energy%20Modelling%20Group%20Publications/Impact%20of%20Wind%20Generation%20on%20Wholesale%20Electricity%20Costs%20in%202011.pdf)> accessed 23 October 2015; and Redpoint, Wind Skillnet and IWEA, 'The impact of wind on pricing within the Single Electricity Market' (February 2011). For a contrary, if not terribly well substantiated, view see: Wind Aware Ireland, 'Putting Paid to the Lie that wind energy is a cheap source of electricity' <<http://www.windawareireland.com/cheap-wind-energy/>> accessed 23 October 2015.

<sup>407</sup> See: CER (CER/15/142 2015) (n 359).

When in 2000 the Government notified the European Commission of its intention to impose a PSO on ESB in accordance with Article 3 of the First Electricity Directive, and section 39 of the ERA, in respect of both peat and renewable generation, it acknowledged that ‘market forces alone would not incentivise the ESB to have available to it generation using peat and renewable energy as primary energy sources’ because of the market and power developer preference for the more competitive gas-fired generation units.<sup>408</sup> A number of questions flow from this supposition. Firstly, why did ESB (and indeed Ireland), need to have electricity generated by peat fired and renewable generators available to it? If renewable, and peat technology were not competitive, then why pursue either, and what justification was there for imposing the additional cost of such technologies (one of which was environmentally fated), on the electricity consumer? The answer given in the case of renewable energy was that it was to ‘help protect the environment by promoting the use of renewable energy sources.’<sup>409</sup> The Peat PSO on the other hand was justified on the basis of security of supply, fuel diversity, and use of indigenous energy sources.<sup>410</sup>

The economic and environmental cost of Ireland’s peat fired power stations have been considered by others, and it is notable that many of the arguments put forward by Government to the European Commission in support of a PSO for peat generation were convincingly disproved by the time the plants themselves were commissioned, five years later. Fitzgerald et al., have examined and questioned the correctness of linking security of supply objectives to a fuel and technology that will be subjected to greater emission penalties into the future.<sup>411</sup> In the same year that the new peat plants became operational, there were calls from the ESRI for the plants to be closed, or converted so that they could burn biomass.<sup>412</sup> More recently, Tuohy et al., have questioned the appropriateness of the ‘must run’ status conferred on peat (a preferential status also conferred on renewables), from a societal and economic perspective.<sup>413</sup> They have persuasively argued that peat fired plants do not need to run all the time to address security of supply concerns, rather it is the existence and availability of the plants that is important, and even then their role (due to their small output), would be limited.<sup>414</sup> If security of supply was such a critical issue then this does not sit well as a justification for proceeding with a set of peat

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<sup>408</sup> Ireland (n 364) 1.

<sup>409</sup> *ibid.*

<sup>410</sup> *ibid.*

<sup>411</sup> John Fitzgerald, Mary Keeney, Niamh McCarthy, Eoin O’Malley and Sue Scott, *Aspects of Irish Energy Policy* (2005) ESRI Policy Research Series No. 57, 80.

<sup>412</sup> *ibid* 111.

<sup>413</sup> Aidan Tuohy, Morgan Brazilian, Ronan Doherty, Brian Ó Gallachóir; and Mark O’Malley, ‘Burning Peat in Ireland: An Electricity Market Dispatch Perspective’ (2009) <<http://researchrepository.ucd.ie/handle/10197/2301>> accessed 20 January 2016.

<sup>414</sup> *ibid* 20. Priority Dispatch and *Must Run Status* for wind and peat fired plant is discussed further at chapter 5 (*Prioritising the Wind-The Role of Policy, Law and Independent Regulation*).

generation plants that would take circa 5 years to deliver. It is however evident from the Government's State Aid Notification to the European Commission that while security of supply and fuel diversity would be the stated justifications for a PSO Levy to enable generation from the burning of peat to proceed in Ireland, there were other more immediate social, and political considerations that helped to shape and drive the policy to its inevitable conclusion.

In 1999 there were 2,451 people employed in the Midlands in the peat industry and the Government acknowledged the dependence that Midland communities had on the industry.<sup>415</sup> The Peat PSO would 'coincidentally serve the additional State objectives of stemming heavy migration from small urban/rural centres to Dublin, and preserve the national peat industry which operates in the economically deprived Midlands.'<sup>416</sup> Additionally, and remarkably, the Government brought to the Commission's attention the Tripartite Agreement between the Government, ESB and Trade Unions representing ESB workers which, according to the Government, 'now means that forty percent (40%) of the market will be opened in 2002 and 100% of the Irish electricity market will be open to competition around 2005'.<sup>417</sup> The choreography is neatly summed up in the Government's own précis:

ESB has considered how it can fulfil its PSOs in a manner that is cost effective and offers the optimum protection to the environment, and is consistent with the agreement which the Government concluded on 17 February 2000 with the ESB and Trade Unions representing its staff. With respect to peat-fired generation, it has been decided that the solution lies in a restructuring of peat-fired generation in Ireland.<sup>418</sup>

The nature of the Peat PSO imposed on ESB was for the monopoly to have 'available to it electricity generated from generation stations, which use as their primary fuel source peat harvested within the State, in an amount no greater than fifteen percent (15%) of the overall primary energy necessary to produce the electricity consumed in the State in any year.'<sup>419</sup> The obligation in respect of renewables was to have 'available to it electricity generated from stations, chosen by competitive process, which use as their primary energy fuel source certain renewable, sustainable or alternative forms of energy.'<sup>420</sup> An analysis of the cost of the continued operation of the six existing aged peat plants conducted by ESB 'clearly' demonstrated to the Government that the most economical way to proceed was to decommission the 6 existing ESB

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<sup>415</sup> Ireland (n 364) 1.

<sup>416</sup> *ibid* 5.

<sup>417</sup> *ibid* 1.

<sup>418</sup> *ibid* 2.

<sup>419</sup> *ibid* 1.

<sup>420</sup> *ibid*.

peat fired plants and replace them with 2 new more efficient plants.<sup>421</sup> Notwithstanding that the Government had just completed a successful procurement for the design, financing, building and operation of the Edenderry 118 MW Peat Fired Power Station (a competition won by a consortium led by Finnish Utility, Fortum), and notwithstanding that the renewable PSO would only be available for sustainable, renewable or alternative technologies selected through a competitive process, no competition was run for the new peat fired power stations, and ESB was permitted to proceed with the investment including the decommissioning of the 6 aged plants.

Concerns about the conflicting duality in Government policy making around the PSO for renewables and peat were not simply relevant at the time but have resonated ever since and will continue to do so until the 15-year Peat PSO expires for all plants. In the interval, there has been much debate on the future viability of the plants in a post PSO world where decarbonisation has become a central plank of energy policy. Absent significant investment, the consensus would seem to be that the plants will not be economically viable and will need to be closed or converted when the PSO ends, a fact acknowledged by ESB before the plants were built.<sup>422</sup>

The European Commission in its assessment did not concern itself with the profound illogicality it was presented with and looked at the proposed peat PSO separately from the renewable PSO. The Commission concluded that it could not rule out the possibility that the proposed Peat PSO scheme may include State aid within the meaning of Article 87 (1) of the EC Treaty. In the event that it did the Commission was of the opinion that it may benefit from an authorisation as a compensation for a service of general economic interest under Article 86(2), in light of Articles 3(2) and 8(4) of the First Electricity Directive.<sup>423</sup> Article 3(2) allowed Member States to impose on ‘undertakings operating in the sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price

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<sup>421</sup> *ibid* 6. For the PSO status of Ireland’s peat fired power stations see: CER (CER/16/183 2016) (n 401); and DCCA, *National Mitigation Plan 2017* (n 3) 48.

<sup>422</sup> Ireland (n 364) 22. See also: Tim O’Brien, ‘ESB to retain two major turf-fired power plants’ *The Irish Times* (Dublin, 14 May 2015). See also CER (CER/16/183 2016) (n 401) 13, where it is noted that the peat PSO support for the Edenderry Peat Fired Power Plant has now ended and the plant now co-fires peat with biomass and receives PSO support under REFIT 3 in respect of the latter. DCCA in the *National Mitigation Plan 2017* ((n 3) 48), notes that Edenderry ceased to benefit from the Peat PSO in December 2015 but that the plant receives PSO benefit under REFIT in respect of 30% of the plant dedicated to biomass co-firing. The *National Mitigation Plan 2017* further notes that the Peat PSO in respect of Lough Ree and West Offaly will expire in 2019. It is however noted that these plants may also turn to co-firing and benefit from REFIT PSO support in respect of the biomass element (See: DCCA, *National Mitigation Plan 2017* (n 3) 48). According to The *National Mitigation Plan 2017* (DCCA (n 3) 48), Bord Na Móna proposes to have ceased harvesting peat for electricity production by 2030. Ireland’s contradictory approach to climate change will thus continue for another decade or more.

<sup>423</sup> Commission, ‘State aid No N 6/A/2001-Ireland, Public Service Obligations imposed on the Electricity Supply Board with respect to the generation of electricity out of peat’ COM (2001)3265 fin.

of supplies and to environmental protection.’ While Article 8(4) of the First Electricity Directive acknowledged that a Member State:

... may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.

The key relevant criterion in Articles 3(2), and 8(4) is ‘security of supply’. The fact that the measure imposed may additionally, or in the words of the Irish Government ‘coincidentally’, serve other purposes of a social nature such as stemming migration or securing the future of the Irish peat industry is not relevant. If security of supply is the only relevant criterion, then the Government’s preferment of a peat solution over other fuel options is open to question. In 2003 the Government, in the face of yet another imminent generation capacity shortfall, sought and received authorisation from the European Commission to impose a PSO Levy on ESB to facilitate investment by 2 separate consortia (selected pursuant to an open competition), in 2 new CCGT Power Plants with a combined capacity of 531 MW.<sup>424</sup> There would seem to be no reason why this more environmentally acceptable solution, the cost of which was validated, and underpinned by an independent, transparent and objective competitive process, could not have been deployed two years earlier, and at a time when there was significant interest shown by international developers in building new CCGT facilities in Ireland. Adequacy of natural gas would not have been an issue as the Government had sanctioned the building of the Second Gas Transmission Interconnector between Ireland and Moffatt, Scotland.<sup>425</sup> This alternative approach would also have addressed in part, and critically at a much earlier time, the policy to reduce ESB’s dominance in the electricity generation sector. Any justification based on fuel diversity is also difficult to sustain given the size of the peat plants in an overall market context. The equivocal nature of the European Commission assessment of the Peat PSO is also very unsatisfactory. The Commission found that it could not ‘rule out the possibility that the scheme **may** include State aid in the meaning of Article 87 (1) of the EC Treaty’, and in the event that it does fall within the scope of Article 87 (1) of the EC Treaty it ‘**may** benefit from an authorisation as compensation for

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<sup>424</sup> Commission, ‘State aid N 475/2003-Ireland, Public Service Obligation in respect of new electricity generation capacity for security of supply’ COM (3003) 4488 fin.

<sup>425</sup>The Second Gas Transmission Interconnector was commissioned in 2002. See: Colm McCarthy, ‘Interconnector Tariffs and Competition in the Irish Gas Market, Report for Shannon LNG’ (December 2011) <[http://www.cer.ie/docs/000252/cer12087\(15\).pdf](http://www.cer.ie/docs/000252/cer12087(15).pdf)> accessed 1 February 2016.



a service of general economic interest' pursuant to Article 86(2) of the EC Treaty (emphases added).

The Government's duality of approach allowed, on the one hand (and in the interest of environmental protection), for the conferral of a must run status on renewable generation supported by a consumer funded PSO Levy, but tagged on to this cost (if indeed it can be shown to be a cost), was the additional cost (taking into account as one must the external social and environmental overheads), of a must run status for a fuel and technology that is the very antithesis of all that is renewable and sustainable. If, as is suggested in the State Aid Notification, that the opening up of the Irish electricity market to new entrants (a matter mandated by European law), together with a PSO for renewable energy grounded in EU energy policy, were in some way conditional on ESB, and ESB Trade Union agreement, then the cost of the PSO for renewables cannot be looked at in isolation, and must be considered as including the cost of the PSO for peat. The PSO levy for peat generation can thus be classified as the additional cost to electricity consumers (which includes business consumers striving to be competitive), and the economy inherent in doing business with an incumbent monopoly where for political, social, and historical reasons policy makers are unable, or unwilling, to make hard decisions, and State agencies with responsibility for competition, and regulation are either powerless to intervene because they do not have the legislative tools to do so, or simply and conveniently allow such matters to progress under the dark umbrella of policy and politics. Given that the secondary stated justification for the Peat PSO was the 'stemming heavy migration from small urban/rural centres to Dublin', it is somewhat ironic that some years later those seeking to develop large scale wind generation in the Midlands have argued that it would contribute significantly to the local community through employment.<sup>426</sup>

Establishing a direct correlation between Ireland's pursuit of peat fired generation, and Ireland's failure to meet its 2020 renewable energy targets will no doubt be difficult should Ireland fail to meet its targets. The issue is however relevant to several of the subsidiary issues explored. In the first instance, it highlights the fact that for Ireland to make progress on renewable energy objectives including wind generation, it was necessary to reward incumbent interests, at the cost of electricity consumers, market liberalisation, and the environment. Secondly, the issue of the cost of the Peat PSO has been conveniently bolted onto the Renewable PSO, and as such has fuelled the anti-wind lobby debate surrounding the cost of wind to consumers.

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<sup>426</sup> See: Charlie Taylor, 'Windfarm Investment could lead to 35,000 New Jobs' *The Irish Times*, (Dublin, 19 February 2014). For a discussion of employment outcomes of the wind industry more generally see: Siemens and IWEA, 'An Enterprising Wind, An economic analysis of the job creation potential of the wind sector in Ireland' <<https://www.esri.ie/pubs/BKMNEXT250.pdf>> accessed 8 February 2016.

## New Market Entrants and the Dominant Monopoly at Every Turn

ESB has played a central role in the support scheme framework established and operated in Ireland to secure investment in renewable technology, and in particular wind generation technology. This is not surprising and is indeed consistent with the fact that ESB has generally been centre stage on each, and every occasion that Government has sought to pursue policy objectives in, and through, the electricity market. New market entrants to the Irish electricity market have been met with a different face of ESB, at every turn and crossroads on the long, winding and often uneven road to establishing a foothold in the Irish market. The ESB presence in any given market segment flows in most cases from ESB's historical position as the dominant monopoly in the market, but there have been instances where ESB have been encouraged, or allowed to occupy a coveted position as part of the complement of compromises built up over time to allow particular aspects of market liberalisation to proceed, or to ensure that the State's shareholding in the State company is not devalued.

Ireland set about liberalising its electricity market in February 2000 in accordance with the requirements of the First Electricity Directive. In 2001 ESB's installed generation capacity stood at 4526.5 MW.<sup>427</sup> At the outset of the liberalisation process ESB was the sole supplier of electricity in the market. Significant steps were therefore required to secure new market entrants in the generation and supply segments of the market. These new market entrants would include renewable generators and supply undertakings that would include 'green power' in their portfolio offering for consumers. A review of the decisions taken since the liberalisation process commenced almost 2 decades ago shows that for every significant measure implemented to assist new market entrants (including renewable generators), establish themselves in the Irish market, there was a counterbalancing, and often politically motivated policy decision that favoured the incumbent monopoly ESB, and made market entry actually and/or perceptibly more difficult for new entrants including wind generation.

One of the most significant challenges at the outset of the market liberalisation process was the creation of an independent supply sector to compete with the ESB supply business. It would take a number of years for new market entrants in the generation sector to plan and build independent generation facilities. New market entrants in the supply sector would not therefore have access to power for the customers bases they were seeking to build. Several important steps were taken at an early stage by CER, the new regulator. Perhaps most significantly, agreement was secured from ESB to make available through an auction process ESB generation

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<sup>427</sup> Commission (n 423).

capacity to the emerging independent supply sector. These Virtually Independent Power Producer (VIPP) auctions allowed new licenced suppliers to enter the market and sell the power they secured at auction to the new customer bases that they were building to the detriment of ESB's market share. Curiously, though not surprisingly, ESB was permitted by the CER to participate in the VIPP auctions through a newly established supply business known as ESB Independent Energy (ESB IE).<sup>428</sup>

To facilitate the AER Support Framework, and in the absence of any other party in the market that would have been an acceptable counterparty from an investor, and credit perspective, the Government required ESB to enter into 15-year PPAs with renewable generators that were successful in the AER competitive process. The European Commission found that this arrangement did not qualify as State aid to ESB within the meaning of Article 87(1) of the EC Treaty, even though monies collected from electricity consumers transited through ESB on their way to AER PPA contract holders. This finding was based on the Commission's conclusion that ESB was not over compensated for the additional costs it incurred in facilitating the framework, and as such derived no competitive advantage from its role in the framework.<sup>429</sup> The Commission also noted that ESB was not permitted to sell the electricity as 'green' power.<sup>430</sup> By the time the AER Programme concluded in 2006, and was replaced by the REFIT Programme, credible alternative independent supply undertakings had entered the Irish market. The support framework was adjusted, and whilst ESB could continue to be a counterparty to a REFIT PPA, and be compensated for any additional cost arising, other independent suppliers in the market were also entitled to do so.<sup>431</sup>

Whilst the role played by ESB in the AER Framework was perhaps unavoidable and was in any case found not to constitute a State aid to ESB; from an electricity market standpoint, it needs to be considered in the broader context of the progression that was taking place in the Irish electricity market at that time. In parallel with the sanctioning of the AER Programme, the European Commission also authorised the Government's 15-year Peat PSO that allowed ESB to retire existing ESB owned peat fired power stations and build new ones. In addition, and again following a clearance from the European Commission, ESB became the power purchaser or off-taker for the newly built 118 MW Edenderry peat fired Power Station. When in 2003, the CER launched its Capacity 2005 Competition to secure the building of 531 MW of additional CCGT generation capacity, ESB was the default counterparty for the 10-year Contract for Differences or

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<sup>428</sup> See chapter 5 (*Prioritising the Wind-The Role of Policy Law and Independent Regulation*).

<sup>429</sup> Commission (n 380) 10-11.

<sup>430</sup> *ibid* 10.

<sup>431</sup> Commission, 'State aid no N 571/2006 Ireland, RES-E support programme' COM (2007) 4317 final, 2.

CADA, offered to the 2 successful bidders in that competition. ESB had been excluded from bidding in the competition to build the generators. Once again, the European Commission concluded that ESB did not derive any competitive advantage from the proposal, and therefore there was no State aid within the meaning of Article 87(1) of the EC Treaty.<sup>432</sup> ESB has, in addition to 2-new peat fired power stations (Lough Ree and West Offaly), been allowed to proceed with a number of major generation capacity projects all of which required, and were granted Ministerial approval. As Ireland was about to embark on the EU mandated market liberalisation process, ESB was permitted to participate in a joint venture to develop a new 408 MW CCGT Power Plant which was commissioned in 2002.<sup>433</sup> The European Competition Commissioner had expressed concern that the joint venture had been granted a grid connection at a time when others had to wait due to grid constraints.<sup>434</sup> Government also sanctioned the development by ESB of its own 430 MW CCGT at Aghada, in County Cork. This decision, which is examined in detail at chapter 5 (*Prioritising the Wind-The Role of Policy, Law and Independent Regulation*), was also not without controversy and was seen at the time as an indication that Government was not serious about competition and was subordinating the interests of consumers to its own political interests, and the interests of ESB and its unions.<sup>435</sup> Finally in this context, it is again worth referring to the Government's position on network unbundling which is considered at chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*).

This drawn-out list of decisions, and inevitable outcomes, highlights the fact that while the Irish electricity consumer has been required to underwrite a policy to secure the position of uneconomic renewable generation in the market, policy makers have consistently made significant decisions that have individually and cumulatively operated against the letter and spirit of that policy, as well as European Union law, policy and regulation aimed at market liberalisation, competition, and decarbonisation. In effect, these decisions have served not only to preserve,

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<sup>432</sup> The European Commission noted that although the CER publicly advertised for suppliers to come forward and assume the role of CADA counterparties none did so. The Commission took this as an indication that there was no competitive advantage to suppliers. See: Commission (n 424) 10. See also: Electricity Regulation Act 1999 (Public Service Obligations) (Amendment) Order 2007 SI 2007/582; and Electricity Regulation Act 1999 (Public Service Obligations) (Amendment) (No. 2) Order 2007 SI 2007/583.

<sup>433</sup> See: ESB, 'ESB Dublin Bay Power' <<https://www.esb.ie/our-businesses/generation-energy-trading-new/generation-asset-map#dublin-bay-power>> accessed 25 May 2017. For concerns raised about the impact of the ESB-Statoil joint venture see: Arthur Beesley, 'ESB-Statoil Deal may lead to Plant Closure' *The Irish Times* (Dublin, 16 March 2001); and Arthur Beesley, 'EU Cites ESB Subsidiary for Illegality' *The Irish Times* (Dublin, 22 January 2001).

<sup>434</sup> See: Response of Mary O'Rourke T.D., and Minister for Public Enterprise to a question from Seymour Crawford T.D., asking if she had received correspondence from the European Commissioner confirming that the grid connection was granted in breach of European Union law, *Dáil Deb* 13 February 2001, vol 530, No. 3.

<sup>435</sup> John McManus, 'Aghada Deal Suggests ESB has the Power' *The Irish Times* (Dublin, 22 January).

but also to enhance the position of ESB in the market against a tide of European policy and regulation aimed at diminishing the market share of incumbent monopolies.

### Europeanisation or Hibernicization of Support Schemes: A Policy too far?

When the European Commission comments on the Europeanisation of support schemes, it has in mind not only the convergence of pan-European support schemes, but also the transitioning of renewable sources towards a more competitive and integrated internal electricity market.<sup>436</sup> In the Commission's vision of a perfect market world, market integration will deliver 'renewables growth at least cost to society'.<sup>437</sup> The Commission wants Member States to make their support schemes available to renewable electricity generated in other Member States, in line with projected market integration and the actual flow of electricity.<sup>438</sup> These sentiments however do not find support in recent decisions of the CJEU even if they are consistent with one of the fundamental founding principles of the Community namely, the free movement of goods.<sup>439</sup> In the European Commission's 2014 State aid Guidelines, the Commission acknowledges that Member States may wish to have a co-operation mechanism in place before allowing renewable electricity generated in another Member State benefit from renewable support schemes available in their own territory because electricity produced in the exporting Member State will not count towards the importing State's national target under the Second Renewable Energy Directive.<sup>440</sup>

To date, and despite the significant legal, and economic convergence of the electricity markets north and south of the Irish border, there has been no convergence of support schemes for renewable energy on the island of Ireland. The 2006 Memorandum of Understanding between the Irish and UK Governments which provided the framework for the establishment of the SEM also noted that it was intended that the new single market on the island of Ireland would (amongst other things), 'facilitate the participation of renewable energy generators in the market.'<sup>441</sup> The continued ring-fencing of Irish support for renewables along territorial lines, and without reference to the SEM is curious, and arguably legally difficult to justify. Equally questionable, but perhaps easier to justify, is the continued support for distinct national schemes

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<sup>436</sup>Commission (n 368) 22.

<sup>437</sup> *ibid* 22-23.

<sup>438</sup> *ibid* 23. The European Commission sees Norway and Sweden's joint support schemes as a possible framework for others to follow.

<sup>439</sup> Case C-573/12 *Ålands* (n 353); and Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmarkt* ECLI:EU:C:2014:2192.

<sup>440</sup> Commission, 'Communication from the Commission, Guidelines on State aid for environmental protection and energy' 2014-2020 (2014/C 200/01), [122].

<sup>441</sup> Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (6 December 2006) 2.

in a European context. Issues of illegality aside, the REFIT 2 Scheme Terms and Conditions serve to illustrate the absurdity of having, on the one hand a single electricity market, and on the other hand, separate and distinct support schemes for renewable electricity which constitutes, and ever-increasing component of the power traded in that market.

In drafting the Terms and Conditions for REFIT 2 in 2012, the DCENR included an express reference in the eligibility criteria to the ‘Irish grid’.<sup>442</sup> Lack of precision in the drafting begs the question as to whether the reference is to the transmission and distribution systems operated by the Irish DSO (ESB Networks), and the Irish TSO (EirGrid plc), in each case under licence from CER, or whether it could also include, the transmission and distribution networks in Northern Ireland. Even if the drafting is somewhat ambiguous, the intent is clear, with the result that a hypothetical windfarm of say 50 MW output, located on the Irish side of the North/South border, but connected to the network just across the border in Northern Ireland, would not qualify for REFIT 2 even though, under the terms of the Second Renewable Energy Directive, the electricity generated by the windfarm would count towards Ireland’s 2020 renewable targets as it is produced in Ireland. The result is that the windfarm does not get built, and the contribution to Irish targets does not materialise.

Though the issue of the location of consumption (as opposed to the location of production), is not relevant in this context, it is nonetheless interesting that the electricity produced by the hypothetical wind farm must (as a matter of law in both Ireland and Northern Ireland), be sold into the SEM. It is also interesting in this context to consider that the transmission wires on both sides of the border are owned by ESB, and operated in the south by EirGrid, and in the north by SONI, a subsidiary of EirGrid. There is also a degree of physical interconnection between the networks in both jurisdictions, and thus there is a theoretical possibility that the electricity generated in Ireland but delivered to the electricity network in Northern Ireland could ultimately be consumed in Ireland.

Given all of this physical, economic, and legal integration it is difficult to see how the DCENR (now DCCAE), can legally justify the exclusion from REFIT 2 of this sub-set of potential plants located in Ireland but (for good technical, economic and environmental reasons), connected in Northern Ireland. The plant would not qualify for support in Northern Ireland, and thus effectively falls into the gap between two jurisdictions when it comes to financial support. It is submitted that the exclusion of projects constructed in Ireland but connected to the electricity network in Northern Ireland from the ambit of REFIT 2, or indeed any support scheme that might supersede REFIT, is

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<sup>442</sup> DCENR, *Renewable Energy Feed in Tariff 2012, A Competition for Electricity Generation from Onshore Wind, Hydro and Biomass Landfill Gas Technologies 2010-2015* (2012) 4.

unlawful and contrary to EU Law. As far as the reason for the exclusion is concerned, it is perhaps tied into a political concern that Irish electricity consumers would be underwriting the cost of renewable generating plant located in Ireland, the output of which is consumed outside Ireland notwithstanding that the output of the plant would contribute to Irish targets. Given that the plant would contribute to Ireland's targets this justification is flawed since, if Ireland fails to meet its 2020 targets, the cost will fall to Irish tax payers.

The issue of the exclusion of the hypothetical windfarm has not come before the courts in Ireland, and with the conclusion of REFIT 2 is unlikely to do so save to the extent that the restriction is carried over in any scheme that replaces REFIT which seems likely, though there is now also the further complexity of Brexit. Some of the complex legal issues that can arise from the transmission of renewable electricity across national frontiers have however been considered in the few cases that have come before the CJEU, and most notably in the case of *Ålands Vindkraft AB*.<sup>443</sup> The facts, in summary, are as follows. Ålands Vindkraft AB, a Finnish entity, operated wind farms on the Ålands Islands in Finnish territorial waters. The turbines were connected via lengthy transmission cables to the electricity network in Sweden. When Ålands Vindkraft AB applied to the Swedish Energy Agency for support in the form of Green Certificates in respect of the project, the application was refused on the basis that the electricity generated on the Ålands Islands could not benefit from Swedish Green Certificates. Such certificates were only available to projects that generated electricity within Swedish national territory. In the Swedish national courts, Ålands Vindkraft AB argued that the Swedish support framework violated the free movement of goods principles of Article 34 TFEU, because the scheme was only available to the producers of green electricity based in Sweden. Imported electricity was excluded, and thus discriminated against.

The Swedish national court referred the issue to the CJEU. Advocate General Bot in his opinion found that the Swedish framework was consistent with the provisions of the Second Renewable Energy Directive. Nevertheless, he concluded that the exclusion of imported electricity violated the principle of free movement of goods in Article 34 TFEU.<sup>444</sup> The CJEU agreed, the Directive did not mandate that Member States must extend the benefit of national support schemes to electricity produced in another Member State. The court also agreed that the exclusion of imported electricity from the benefit of the scheme had the potential to hinder imports of electricity produced in other Member States, and thus constituted a restriction on the free movement of goods. As electricity was a 'good' within the meaning of Articles 34 and 35 TFEU, it should be able to circulate unhindered within the market. In this instance, however the CJEU

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<sup>443</sup> Case C-573/12 *Ålands* (353).

<sup>444</sup> *ibid.*

found that the restriction could be justified based on the public interest objectives of protecting the environment, health, and life and fighting climate change.

The facts of the Ålands case differ in one material respect from the case of the hypothetical windfarm located in Ireland but connected to the grid in Northern Ireland, as the latter is assumed for this analysis not to be seeking, and thus was not refused, support by the authorities in Northern Ireland. Nevertheless, the general principles set down in the Ålands case give some guidance as to how the CJEU would approach the exclusion of the hypothetical windfarm from REFIT 2 or any similarly drawn scheme, and assuming in a post Brexit world the principle of free movement of goods is preserved.

In part, the focus in the Ålands case was on the meaning of Articles 2(k), and 3(3) of the Second Renewable Energy Directive. REFIT 2 would undoubtedly fall within the broad definition of support schemes provided for in Article 2(k). The territorial discretion given by Article 3(3) to Member States to decide the ‘extent to which they support energy from renewable sources which is *produced* in a different Member State’ (emphasis added), would not apply in the hypothetical Irish example because the electricity is produced in Ireland, and the windfarm is not seeking, and was not refused support in Northern Ireland. The fact that the output may be consumed in Northern Ireland, or in Ireland is irrelevant. This is the key issue that distinguishes the decision in the Ålands case from the hypothetical example on the issue of compatibility with the Directive. On the issue of consumption (wherever that might actually be), the CJEU noting that it was irrelevant concluded:

.... as regards the fact that the mandatory national targets, to which the support schemes referred to in Article 3(3) of Directive 2009/28 are to contribute, are identified in Article 3 (1) of the directive in terms of the proportion of green energy in the ‘final consumption’ of energy, it should be noted that, under Article 5(1) and (3) of the directive, that consumption is in reality calculated by reference to the volume of green electricity ‘produced’ in a Member State.

The Second Renewable Energy Directive, as interpreted by the CECJ does not therefore appear to give Ireland the right to establish a support scheme that excludes generating plant located in Ireland but connected to the electricity network in Northern Ireland. Even if it could be shown that this exclusionary aspect of REFIT 2 is consistent with the Second Renewable Energy Directive, there would remain the issue of compatibility with Articles 34 and 35 TFEU. In the example of the hypothetical windfarm, electricity produced in Ireland is taken across the border to a connection point in Northern Ireland and this arguably constitutes an export from an Irish perspective, and an import from a Northern Irish perspective. However, once connected to the network in



Northern Ireland, the electricity is traded in the SEM, and there is therefore a theoretical possibility that the electricity could be used by consumers on the southern side of the border, and thus amount to an import. In the Ålands case the route of the power was much simpler, it left Finland, the State of production and was ultimately consumed in Sweden.

Article 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect. Article 35 TFEU has a similar prohibition in respect of exports. Measures having equivalent effect to quantitative restrictions on imports, or exports include national measures that are ‘capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.’<sup>445</sup> In the Ålands case the CJEU found that the Swedish measure constituted a measure having equivalent effect to quantitative restrictions on imports, and as such was incompatible with Article 34.<sup>446</sup> The electricity generated by the hypothetical windfarm would be traded in the same economic market as a windfarm located in Ireland, but connected to the grid in Ireland. If we assume that the windfarm in the hypothetical example cannot be built without REFIT 2 support (an assumption that would reflect reality), and must for technical, economic and environmental reasons relating to proximity, connect to the network in Northern Ireland, the provisions of REFIT 2 that exclude the windfarm from the ambit of the support arguably contravene both Article 34 (restriction on the import of electricity from Northern Ireland), and Article 35 (restriction on the export of electricity to Northern Ireland) TFEU.

What (if any) objective justification could the State proffer in its defence of this restriction? In the Ålands case, the CJEU’s meanders its way through a series of acceptable justifications without actually clearly settling on any particular one. The Court noted that it was settled case law that a national law or practice that contravenes Articles 34 or 35 TFEU may be justified on the basis of one of the grounds expressly listed in Article 36 or by ‘overriding requirements.’ Calling up earlier case law that had established that national measures which are capable of hindering intra-Community trade can be justified by superseding requirements relating to the protection of the environment, the CJEU further noted that the Swedish measure in question was aimed at promoting renewable energy, and this in turn contributed to reducing harmful emissions.<sup>447</sup> The court considered the role played by renewable energy in furthering compliance with the Kyoto Protocol, and environmental commitments that flowed from other treaties the EU had signed up to.<sup>448</sup> Last but not least, the court looked at the correlation between the increase in renewable

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<sup>445</sup> *ibid*; Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837; and Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099.

<sup>446</sup> Case C-573/12 *Ålands* (353).

<sup>447</sup> *ibid*.

<sup>448</sup> *ibid*.

energy and the protection of human, flora and fauna health and life, all matters included in the public interest grounds listed in Article 36 TFEU.<sup>449</sup>

This lack of precision in the analysis of the CJEU in the Ålands case has been the subject of some notable criticism.<sup>450</sup> Applying the courts analysis to the objectionable component of REFIT 2 and the exclusion of the hypothetical project, it is difficult to see how any of these justifications could be used in defence of the discriminatory exclusion of the wind farm and as a justification for the REFIT 2 term that excludes it. All environmental, health and life justifications fall away as the hypothetical windfarm is located in Ireland and its output would count towards Ireland's national targets. There is however one potential justification for the approach taken in REFIT 2 that requires closer examination, and this is the issue of cost control. In the Ålands case the CJEU noted in passing that the EU legislature in recital 25 to the Second Renewable Energy Directive had highlighted that: '.... Member States can control the effect and costs of their national support schemes according to their different potentials.'

This aspect of the Ålands case was also cited in passing by the CJEU in *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmarkt*.<sup>451</sup> It is submitted that the requirement that wind projects must be connected to the Irish grid (which for these purposes would not include the network in Northern Ireland), arises from a concern at a political, and policy level that it would not be acceptable for Irish electricity consumers to fund the construction and operation of Irish based wind assets where the output of such assets is exported to the UK on transmission infrastructure that bypasses the State owned transmission and distribution networks and is used by consumers in Britain. In the words of the Minister, spoken in the context of proposed renewable export projects for the export of Irish wind generated electricity to Great Britain:

It will be necessary to ensure that Irish consumers do not have to foot the bill for renewable electricity that is exported to the UK..... In the event that renewable power was being exported to the UK, for example, it would be necessary to ensure that the costs associated with new transmission infrastructure to export

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<sup>449</sup> *ibid.*

<sup>450</sup> Etinne Durand and Malcolm Keay, 'National Support for Renewable Electricity and the Single Market in Europe' (The Oxford Institute For Energy Studies, August 2014) 4-5 <<http://www.oxfordenergy.org/2014/08/national-support-for-renewable-electricity-and-the-single-market-in-europe-the-aland-vindkraft-case/>> accessed 10 February 2016.

<sup>451</sup>Joined Cases C-204/12 to C-208/12 *Essent* (n 439). The Court broadly followed the decision in Case C-573/12 *Ålands* (n 353). For a critical review of the court's judgment in *Essent* see: Filippo Fontanelli, 'The Essent Judgment-Another Revolution in the Case Law on Free Movement of Goods' (19 September 2014) <<http://eulawanalysis.blogspot.ie/2014/09/the-essent-judgment-another-revolution.html>> accessed 11 February 2016.

the power and the cost of a support scheme for renewable developers is paid for by UK consumers, rather than Irish consumers who would not be benefitting from either the power or the renewable value of the electricity.<sup>452</sup>

The Irish-Great Britain energy export projects are discussed in detail at chapter 6 (*Gone with the Wind-Ireland's Proposed Wind Energy Export Projects*). At this juncture, it is sufficient to highlight that a distinction needs to be drawn between generators built in Ireland solely for the purpose of generating renewable electricity to export across the Irish Sea to Great Britain on the one hand, and the case of our hypothetical windfarm the electrical output of which is traded in the SEM. Even if justification could be found for the exclusionary measure in the way the CJEU weighs and balances the permissible list of justifications in Article 36 TFEU, it is very difficult to see how it could stand up to scrutiny in the case of the hypothetical windfarm when looked at from the perspective of proportionality. The decision in the Ålands case is very instructive in this regard. In its proportionality analysis, the court noted that the Swedish scheme focussed on production, and not on consumption. Once the electricity entered the electricity network it was difficult to identify its character and therefore 'systematic identification at the consumption stage as green electricity is difficult to put into practice.'<sup>453</sup> The CJEU also considered that the EU legislature had allocated mandatory national targets to Member States in respect of renewable energy. Whilst these arguments served to demonstrate that the approach taken by the Swedish authorities to renewable energy generated outside Sweden was both justified and proportionate, in the case of Ireland they have the opposite effect because the green electricity is generated in (or produced), in Ireland and Ireland (and Irish residents) get the credit from an environmental, health, welfare and targets perspective for it.

Durand and Keay in their critical assessment of the decision in the Ålands case take issue with the reference by the court to the review of the principle of proportionality conducted by the CJEU in the earlier judgment in *PreussenElektra*.<sup>454</sup> They correctly point out that the decision in *PreussenElektra* was expressly qualified by the CJEU by reference to the stage of development of the European electricity market at the time of the *PreussenElektra* decision. Since the decision in *PreussenElektra*, the European electricity market has evolved in the direction of a single integrated electricity market. This evolution, they contend was not considered in the Ålands case when the Court reaffirmed *PreussenElektra* and its focus on the place of production. Durand and Keay conclude that 'in relation to renewable electricity, environmental considerations trump

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<sup>452</sup>Pat Rabbitte T.D., and Minister for Communications, Energy and Natural Resources, response to a question from Joe Higgins T.D., Dáil Deb 10 October 2012, vol 778, No 1.

<sup>453</sup> Case C-573/12 *Ålands* (n 353).

<sup>454</sup> Case C-379/98 *PreussenElektra* (n 445).

other principles of European law.<sup>455</sup> This observation is well made, and if there is ever a challenge to REFIT 2 (or now more likely to a successor scheme with a similar exclusionary provision), by a windfarm in the position of our hypothetical wind farm, this alternative argument would also present a strong basis for striking down the offending exclusion. In this alternative approach to the hypothetical windfarm the court would look at the fact that since the decision in *PreussenElektra*, the EU legislature had passed and Member States (including Ireland) have implemented, or are implementing, a series of Directives and Regulations aimed at creating a much more integrated single electricity market for Europe where electricity can be traded and flow with greater ease across national boundaries.<sup>456</sup> Strong support for this approach to the free movement issue in the context of restrictions on the free movement of electricity and related benefits across national boundaries can be found in the Opinion of Advocate General Bot in both *Ålands* and *Essent*.<sup>457</sup> In an Irish context it is also striking that in 2007 Ireland legally and economically took significant steps to unify the markets of Ireland and Northern Ireland into a single mandatory pool known as the Single Electricity Market or SEM. To the extent therefore that the REFIT 2 Terms and Conditions or any replacement scheme restricts the trading of power between Ireland and Northern Ireland, it is difficult to see how this can be a justified or indeed a proportionate measure.

Perhaps the bigger issue facing Ireland and indeed all Member States is how nationally ring-fenced support schemes can continue to be justified or indeed reconciled with the European ideal of a perfect market where electricity and associated benefits can be freely traded across boundaries. It is also ironic from an Irish perspective that politicians and policy makers are content to have consumers underwrite the construction and operation of what they perceive is environmentally friendly renewable generation in circumstances where the wider community is increasingly regarding such development with less and less enthusiasm because of the perceived impact the proliferation of turbines is having on the landscape, wild life, and attractiveness of local communities as a place to live. This topic is discussed in detail in chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*). The difficulty from an Irish perspective is that whilst our wind potential is very significant, finding a market for it may ultimately be a challenge if it cannot be exported. If a market is secured in the UK or elsewhere, the issue will not simply be one of who pays for the investment but more fundamentally the social

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<sup>455</sup> Durand (n 450).

<sup>456</sup> These measures would include: The Second Electricity Directive; The Third Electricity Directive; Parliament and Council Regulation (EC) 1228/2003 of 26 June 2003 on conditions of access to the network for cross-border exchanges in electricity [2003] OJ 2003 L176/1; and Parliament and Council Regulation (EC) 714/2009 of 13 July 2009 on conditions of access to the network for cross-border exchanges in electricity and repealing Regulation No 1228/2003 [2009] OJ 2009 L 211/15.

<sup>457</sup> Case C-573/12 *Ålands* (n 353); and Joined Cases C-204/12 to C-208/12 *Essent* (n 439).

acceptability of having thousands of wind turbines on the Irish landscape feeding electricity demand in not only Northern Ireland, but potentially in Great Britain as well.

Recent CJEU case law represents a blow to the European ideal of greater European integration in energy markets at a time when regulators and policy makers across Europe are busy pursuing that very ideal in the form of the Target Model.<sup>458</sup> Support mechanisms that may have worked in a pre-liberalised environment do not fit well with the EU objective of a single market.<sup>459</sup> It cannot be said that there is a true single market on the island of Ireland until such time as all electricity traded in that market is given non-discriminatory access irrespective of the location of production. As renewable energy (and wind energy in particular), gains an ever greater foothold in the market and makes up an ever more significant component of the electricity traded in the market and as both jurisdictions are seeking greater physical integration through interconnection, the removal of national barriers (which bring about distortions to the market), on both sides of the border become more important and more difficult to justify even if there is any justification that can be credibly put forward after the establishment of the SEM.<sup>460</sup> With a so called *hard* Brexit now a possibility, the issue of an all-Island approach to support schemes is perhaps a secondary consideration when the continued existence and functioning of the SEM itself is now open to question. On the principal issue under consideration, what can be concluded is that the unlawful exclusion of wind farms, such as the hypothetical one discussed above, may have an impact on Ireland failing to meet its 2020 targets.

### The Cost of the Wind and Policy U-Turns in the Context of an Economic Crises

The economic catastrophe that derailed the Irish and global economy in 2008 resulted in an unprecedented scrutiny of, and abatement, if not elimination, of costs in the Irish public and private sectors and the electricity sector has not escaped the scrutiny element of this at least.<sup>461</sup> The economic crises has checked enthusiasm at a policy level for what is perceived as more costly renewable energy in many jurisdictions including Spain, Portugal and Germany.<sup>462</sup> In addition,

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<sup>458</sup> See: European Network of Transmission System Operators for Electricity (entso-e), *Overview of Internal Electricity Market-related project work* (13 October 2014).

<sup>459</sup> For a discussion of why support mechanisms that may have been appropriate in regulated markets may not be appropriate in deregulated competitive markets see: Wawryk (n 29).

<sup>460</sup> For a discussion of issues associated with national renewable energy subsidy schemes in the EU see: Karel Beckman, 'Exclusive: The end is near-national renewable energy subsidy schemes in the EU' (Energy Post, February 26 2014) <<http://www.energypost.eu/end-near-national-renewable-energy-subsidy-schemes-eu/>> accessed 22 February 2016.

<sup>461</sup> For a discussion of support scheme costs in Germany and attempts to reduce same see: Matthias Lang, 'The 2014 German Renewable Energy Sources Act revision-from feed-in tariffs to direct marketing to competitive bidding', (2015) 33 2JENRL, 131; and Spiegel, 'Germany Forced to Cancel Climate Programmes', *Spiegel On-Line International* (18 March 2013) <<http://www.spiegel.de/international/germany/germany-cancels-trio-of-climate-programs-amid-funding-shortfall-a-889483.html>> accessed 8 February 2016.

<sup>462</sup> Frontier (n 130) 25.

there is evidence that the crisis in the debt markets has resulted in a slower deployment of projects due to difficulties in accessing finance.<sup>463</sup> The Irish Academy of Engineering in its investigation of Irish energy policy in the new world of economic disorder concluded in relation to the policy to increase wind generation that ‘in the context of the country’s current economic difficulties such a policy is fundamentally misguided and will significantly damage Ireland’s competitiveness in the short term.’<sup>464</sup> The Academy was of the opinion that the REFIT Support Scheme should be reviewed because it is ‘price inflating and lacks incentive to produce wind power more economically.’<sup>465</sup>

Hand in hand with the level of subsidy available in a market, prospective investors and their credit committees look to the track record of the prospective host State around regulatory and policy stability. A history of sudden changes to support schemes and/or tax incentives and retrospective ones in particular, can seriously undermine investor confidence in a market, and send out broader signals of how a government will treat investors in an economy more generally when things change.<sup>466</sup> In light of the Academy’s legitimate concerns about competitiveness perhaps a more appropriate and considered course to have advanced might have been to suggest that energy-intensive industries that were making a significant contribution to Ireland’s ailing economy should have had an exemption from, or a reduced contribution towards, renewable energy costs.<sup>467</sup> Denmark has, for example, introduced a scheme to lessen the financial burden of PSO obligations for energy intensive businesses. Recognising that PSO payments (which include a renewable element), can have a negative impact on the competitiveness of energy intensive businesses, the scheme is aimed at meeting part of the PSO payment obligation of the applicant business.<sup>468</sup> In the Government’s most recent Energy White Paper, price competitiveness for

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<sup>463</sup> *ibid* 112.

<sup>464</sup> The Irish Academy of Engineering, ‘Energy Policy and Economic Recovery 2010-2015’ (2011) 26 <[http://www.iae.ie/site\\_media/pressroom/documents/2011/Apr/06/IAE\\_Energy\\_Report\\_Web2\\_05.04.2011.pdf](http://www.iae.ie/site_media/pressroom/documents/2011/Apr/06/IAE_Energy_Report_Web2_05.04.2011.pdf)> accessed 3 February 2016.

<sup>465</sup> *ibid* 5.

<sup>466</sup> For an investor perspective see: Teresa O’Flynn, Blackrock Renewable Power, ‘Getting the Investment Equation Right’ (IWEA Spring Conference 2015); and Donal Murphy, National Treasury Management Agency, ‘Investing in the Future Power System, Ireland’s Strategic Investment Fund’ (2015). For a European perspective on the impact in the renewable energy sector on investor confidence of the economic crises, legal, policy and regulatory changes and uncertainty see: Commission (n 368) 4.

<sup>467</sup> For details of countries (including Germany), that apply exemption for certain energy intensive industries see: CEER, *Status Report of Renewable and Energy Efficiency Support Schemes in Europe in 2012 and 2013* (Ref C14 - SDE- 44- 03 15 January 2015) 16-17 and Annex 6.

<sup>468</sup> Nicolaj Kleist, ‘New Subsidy Scheme for electricity intensive businesses, International Law Office’ (November 2015) <<http://www.internationallawoffice.com/Newsletters/Energy-Natural-Resources/Denmark/Bruun-Hjejle/New-subsidy-scheme-for-electricity-intensive-businesses>> accessed 2 March 2016.

business which ‘provides employment and creates wealth’ and for households is listed amongst Ireland’s policy objectives.<sup>469</sup> Following the approach in Denmark may assist with this objective.

Even if the Government was at the time minded to revise REFIT (and it is submitted that from a policy perspective this could have material adverse consequences not just for renewables but for the wider economy), the issue of its legal entitlement to do so would have been a central consideration, and it is submitted that in reality the Government would have had little scope to do so, and would undoubtedly have left itself open to substantial legal claims by disgruntled investors if it did. Recent UK case law is instructive in this regard.

It is in the nature of energy markets that they are constantly in a state of transition. The decision in *Breyer Group Plc v Department of Energy and Climate Change (DECC)* lays down some welcome and important markers for regulators and policy makers as to what is permissible interference with the rights of investors who have come into a market following a stated and published government policy targeting them and their capital.<sup>470</sup>

The *Breyer* litigation concerned a Feed-In Tariff (FIT) Scheme introduced under statute in 2010 in the United Kingdom to encourage members of the public and wider community to participate in the generation of electricity by certain low carbon technologies. The Scheme was a considerable success, and concerns as to affordability, and overcompensation quickly arose. To address the perceived concerns, DECC published a proposal that the eligibility date for the scheme should be brought forward, and thus limit the number of applicants that could qualify because they would not have operational projects before the new closing date (DECC Proposal). Coulson J noted that, because of the proposed change, ‘hundreds, if not thousands, of installations which would otherwise have been completed by the April 2012 cut-off date were abandoned.’<sup>471</sup> The claimants’ submitted that the DECC Proposal had a disastrous impact on their business, and they sought damages pursuant to Protocol 1, Article 1, of the European Convention on Human Rights (ECHR) which provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general

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<sup>469</sup> DCENR (n 400) 27.

<sup>470</sup> *Breyer Group Plc v Department of Energy and Climate Change* (2014) EWHC 2257 (QB). For a review and analysis of the case see: Michael O’Connor, ‘*Breyer Group plc & Others v Department of Energy & Climate Change*: a cautionary tale for Policy Makers and Regulators and possible implications for Irish I-SEM Design’ (25 August 2014) <<http://www.lexology.com/library/detail.aspx?g=f8e0fa87-0f10-4deb-9768-adc27cd8c3e0>> accessed 3 February 2016.

<sup>471</sup> *ibid* (n 470). See also: *The Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28.

principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The claimants contended that the DECC Proposal was an unjust interference with the peaceful enjoyment of their possessions and that these ‘possessions’ included their customer contracts (both concluded and unsigned), the marketable goodwill of their businesses, and their legitimate expectation of an entitlement under the statutory scheme. Coulson J held that concluded contracts may be classified as assets, and it followed therefore that they were possessions under Protocol 1, Article 1, ECHR. Central to his finding was the ‘*indicia of possessions*’ concept as stated in *Murungaru v Secretary of State for the Home Department*,<sup>472</sup> namely that the tangibility, assignability, transmissibility and capability of a thing to be realised for an economic value enables that thing or possession to be described as an ‘asset’. Importantly, though arguably not surprisingly, the judge found that unsigned contracts did not meet the Murungaru test, and therefore were not possessions. The DECC Proposal had rendered concluded contracts incapable of being performed, thereby causing a clearly identifiable loss. Non-concluded contracts, on the other hand, were not yet assets of an economic value capable of realisation, and therefore could not be defined as ‘possessions’ and protected by Protocol 1, Article 1, ECHR. In considering the claimant’s assertion of a right to damages for loss of goodwill, Coulson J drew a distinction between a currently subsisting easily identifiable sources of income; and future income or profit incapable of precise identification or capitalisation. If a loss of marketable goodwill could be capitalised, it would be prima facie protected as a ‘possession’ under Protocol 1, Article 1, ECHR, but loss of goodwill for the future was not recoverable as it fell into the category of a future profit. Coulson J noted that ‘sensibly distinguishing’ between marketable goodwill and future profit is a ‘Herculean task’. Applying the logic that ‘marketable goodwill’ is an asset with a monetary value (rather than an expected stream of future income), Coulson J thus categorised the concluded contracts as ‘marketable goodwill’ which were protected ‘possessions’ and thus entitled recovery. Non-concluded contracts were not yet realisable assets, and could not amount to possessions. The latter difficulty could not be overcome using the doctrine of legitimate expectation as non-concluded contracts could not be considered to be an adequate property right to which a legitimate expectation could fasten. On appeal, Dyson MR (in a judgment followed by Ryder LJ and Richards LJ), concurred with Coulson J on the issue of possessions and the manner

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<sup>472</sup> *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2009] INLR 180.



in which Coulson J had classified contracts into existing enforceable contracts, and possible future contracts.<sup>473</sup>

Coulson J found the DECC Proposal to be an interference with the claimants' possessions within the meaning of Protocol 1, Article 1, ECHR as it prevented concluded contracts from being fulfilled. DECC's contention that it was a mere 'proposal' was rejected. Coulson J followed an earlier ruling that a judicial review challenge could be directed at actions (such as the DECC Proposal), that are no more than steps on the way to the substantive finding (i.e., any ultimate decision to curtail the FIT Scheme). The proposal was held to be a 'careful and deliberate' state action causing material consequences and could therefore be classified as a wrongful interference within the meaning of Protocol 1, Article 1, ECHR. On appeal Dyson MR agreed that the DECC Proposal interfered with the claimants' Protocol 1, Article 1 rights.

Coulson J ruled that the interference could not be justified firstly because, DECC's action was legally impermissible and as a matter of principle, an unlawful act was not capable of justification; and secondly, having considered the circumstances, the judge felt that a 'fair balance' would never have been achieved by the DECC Proposal unless those that suffered financially as a result of their reliance upon it were compensated. On appeal Dyson MR disagreed that the very fact of making the DECC Proposal was contrary to domestic law as, in his view, one of the objectives of a consultation process was to enable the 'consultees to identify legal and substantive objections to the proposals.' Dyson MR did however agree with Coulson's conclusion on the issue of fair balance. The claimants were entitled to damages to put them back into the position they would have been in had the wrongful interference not occurred. It followed that the claimants were entitled to recover damages for concluded contracts rendered un-performable, but not un-concluded contracts.

The judgments of Coulson J and Dyson MR would undoubtedly be persuasive should a similar issue come before the courts in Ireland. The European Convention on Human Rights Act, 2003 provides at section 3(1) that:

Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

There is therefore a statutory duty on the Minister, the CER and the SEMC to perform their statutory duties in a manner that is compatible with the ECHR. Pursuant to section 3(2) of the 2003 Act, where a person has suffered injury, loss or damage as a result of a contravention of

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<sup>473</sup> *The Department of Energy and Climate Change v Breyer Group PLC* [2015] EWCA Civ 408.

section 3(1), that person may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention. It is notable that the REFIT Rules published by the DCENR require applicants to enter into Grid Connection Agreements and PPAs at a very early stage in the development process and certainly well in advance of the commercial operations date of the asset. Developers would also typically enter into Turbine Supply Contracts and other construction and financing arrangements well in advance of operations commencing. There are also specified back-stop dates by which the asset must be operational. Consequently, in the event that any change to the REFIT Rules rendered any such contracts incapable of being performed, a remedy may be pursued under Protocol 1, Article 1, ECHR. Alternatively, or in addition, and depending on the precise nature and extent of the change, the possibility of a claim for an unjust attack on property rights under Article 40.3.2<sup>o</sup> of the Constitution could also be raised.

There will always be winners and losers in energy market change scenarios. The judgement in the *Breyer* lays down an important marker with regard to the rights of investors who have come into a market, in pursuit of a published government policy targeting them and their capital and inviting them to invest that capital in pursuit of a certain activity in return for a pre-set return over a period of years. Across Europe the Energy Charter Treaty is also being employed by disgruntled investors in the renewable energy sector who have suffered loss as a consequence of policy U-turns, many of which have supposedly been necessitated out of, a re-evaluation of the appropriateness of certain support schemes in light of the economic malaise of recent years.<sup>474</sup>

Whilst the Government has not sought to alter the bargain inherent in REFIT, nor indeed the earlier AER Programmes, this does not mean that there have not been changes that have undermined or eroded the support available. In 2014, the Valuation Office, as part of its initiative to revise the valuation of commercial property in the State, led some to conclude in relation to the process in County Limerick that the exercise resulted in an increase in the commercial rates for wind farms in the order of 218%-250%.<sup>475</sup> Changes of this nature have undoubtedly the

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<sup>474</sup> See: Volcicu-Ionescu SCA, 'Energy Charter Treaty Claims: Spain wins First Case in Arbitration' (January 28 2016) <<http://www.lexology.com/library/detail.aspx?g=56483dbf-aa32-4f52-a415-1f52492ad218>> accessed 4 February 2016; and Norton Rose Fulbright, 'Renewable Energy Policy Changes lead Damages Claims' (June 2014) <<http://www.nortonrosefulbright.com/knowledge/publications/150539>> accessed 4 February 2016. For a discussion of the impact of the financial crisis on Spain's Feed-in Tariff Framework see: Marata (n 366).

<sup>475</sup> See commentary of Brendan McGrath and other industry participants and investors in: Sunday Indo Business, 'Rate Revaluation a dark cloud on wind farms' *Sunday Independent* (Dublin, 12 July 2015) <<http://www.independent.ie/business/rate-revaluation-a-dark-cloud-on-wind-farms-31369034.html>> accessed 29 September 2017; and Gale Force Energy, 'Irish Government Needs to Balance Rates Increases with EU Commitments' (20 June 2015) <<http://www.gaelforceenergy.com/blog/?cat=3>> accessed 29 September 2017. See also: Patrick Conroy, Managing Valuer, 'National Revaluation Project' (May 2015) <<http://slideplayer.com/slide/4890356/>> accessed 8 February 2016.

potential to seriously erode the return from operational wind farms with a corresponding erosion in investor confidence when it comes to new development opportunities. A further example of concern for the wind industry is the regulatory approach taken to the issue of curtailment which again is seen by industry as something that undermines REFIT support.<sup>476</sup>

The European Commission for its part has put forward as best practice the need for clear ‘commitments to avoid changes that alter the return on investments already made and undermine investors’ legitimate expectations.’<sup>477</sup> Whilst this is undoubtedly to be welcomed it may be difficult to fully reconcile it with the Commission’s other guiding principle that support schemes should be designed to allow for flexibility to take into account changes in the cost of technology, and the need to ensure that support is kept to the minimum necessary.<sup>478</sup>

Had Ireland sought to reverse, or diminish the levels of support available under Irish support schemes, it is submitted that the likely impact on development and Ireland’s targets would have been catastrophic and even if any such policy change was ultimately found to be unlawful, the very fact of the attempted change and period of uncertainty whilst the matter was before the courts, would most likely have brought development to a standstill.

## When the Gold Rush Ends and the Future of State Aid for Irish Wind Generation

Is there a future for Irish wind energy without State aid? The Government’s Strategy for Renewable Energy 2012-2020 has positioned the growth of renewable energy at the heart of Irish energy policy.<sup>479</sup> The Second Renewable Energy Directive presented Ireland with legally binding targets. For the period 2020-2030, the Climate and Energy Framework 2014 has set headline targets of a 40% reduction in greenhouse gas emissions; an increase in EU energy from renewable sources to 27%; and an indicative target of 27% energy efficiency.<sup>480</sup> Against this policy backdrop and target commitments, it is notable that REFIT 2 closed to new applications on 31 December 2015, and consequently a new support scheme is required to cover the period to 2020 and beyond. Without an appropriate support scheme, the deployment of capacity required to meet the mandatory targets may not be met. The process of designing a new scheme to replace REFIT

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<sup>476</sup> Curtailment is discussed at chapter 5 (*Prioritising the Wind-The Role of Policy, Law and Independent Regulation*).

<sup>477</sup> Commission (n 368) 5.

<sup>478</sup> *ibid.*

<sup>479</sup> DCENR, *Strategy for Renewable Energy 2012-2020* (2012).

<sup>480</sup> Commission, ‘Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, A Policy Framework for climate and energy in the period from 2020 to 2030’ COM (2014) 15 final. Ireland’s National Mitigation Plan notes that it is not intended that the 2030 targets would be translated into binding targets at a Member State level. See: DCCA (n 3) 38.

commenced in July 2015 when Government launched a consultation paper on the issue.<sup>481</sup> The Government have acknowledged that whatever new scheme is adopted it will need to be consistent with latest European Commission guidance on State aid and take account of the fact that the SEM is in a state of transition as it moves towards the Integrated Single Electricity Market or I-SEM.

In 2014, the European Commission adopted new State aid guidelines which include, amongst other things, a framework for investment and operating aid for the production of energy from renewable sources.<sup>482</sup> As a guiding principle, aid for renewables should contribute to integrating renewable electricity in the electricity market.<sup>483</sup> The 2014 Guidelines apply in the period to 2020.<sup>484</sup> It is noted that, as it is anticipated that in the period 2020-2030, renewable energy sources will become 'grid competitive' leading to a phasing out of subsidies, the 2014 Guidelines will bridge the gap in the transition to a 'cost-effective delivery through market-based mechanisms'.<sup>485</sup> The 2014 Guidelines foresee that auctioning, competitive bidding processes or other market instruments that are open to all renewable energy producers on an equal footing will ensure that subsidies are reduced to a minimum in view of their complete phasing out.<sup>486</sup>

Much of what is provided for in the 2014 Guidelines is to be welcomed and can be considered as a timely shake-up of the existing rules. The 2014 Guidelines are also timely from an Irish perspective as REFIT 2 has now closed. The new support scheme or schemes that emerge will need to be aligned with the 2014 Guidelines. Specifically, State aid schemes for renewables will now only be authorised by the European Commission for a period of 10 years.<sup>487</sup> This is to be contrasted with 15 years for AER and REFIT. In an energy market where there is constant change and evolution, and where technology is developing at a relatively rapid pace, this shorter timeframe is to be welcomed as it will ensure that technology that is overtaken by more efficient solutions (technological or otherwise), will not be allowed to continue in the market economically propped up by costly subsidies imposed on consumers and business. This will undoubtedly force developers to secure their economic return over a shorter period which may have short term economic cost implications. In its Communication, the Commission emphasised the need for support schemes to be designed in a manner that ensures that there is sufficient flexibility for

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<sup>481</sup> DCENR, *Renewable Electricity Support Scheme, Technology Review Consultation* (July 2015).

<sup>482</sup> Commission, 'Communication from the Commission, Guidelines on State aid for environmental protection and energy' 2014-2020 (2014/C 200/01).

<sup>483</sup> *ibid* 3.3.1, para 123.

<sup>484</sup> *ibid* 3.3.1, para 108.

<sup>485</sup> *ibid*.

<sup>486</sup> *ibid* para 109.

<sup>487</sup> *ibid* para 121.

adjustments to take account of changes in development costs of renewable technologies and in a manner, that seeks to financially minimise support.<sup>488</sup>

To incentivise market integration of renewable electricity, the 2014 Guidelines require that the beneficiaries of the aid sell their electricity directly into the electricity market and are subject to market obligations and consequently have greater market exposure and risk.<sup>489</sup> With this in mind and with effect from 1 January 2016, support schemes must, subject to limited exemptions, be based on an additional amount or premium above the electricity market price.<sup>490</sup> This requirement means that schemes such as the Irish REFIT programme which is based on a feed-in tariff approach will need to be replaced. Whilst the Commission sees many advantages to a feed-in tariff approach from a developers perspective (including insulation from market price risk and simplicity), the Commission believes that feed-in tariffs keep renewable developers out of the market and thus are an impediment to the development of large liquid markets and make the task of tariff setting and adjusting more difficult.<sup>491</sup> It is also arguable that while the simplicity of a feed-in tariff approach may be attractive for less sophisticated market participants, it should not come at a cost to consumers. The Commission's expectation that tariffs need to have 'built-in cost-based or expected cost-based reductions in tariff levels for new installations (in line with learning curves and expected future cost reductions in various technologies)' as well as planned 'volume based tariff reductions for new installations, dependant on when they are approved, connected or commissioned'<sup>492</sup> is generally to be welcomed as it should ensure that the industry is not allowed to sit unresponsively on a level of consumer fed PSO support that has the potential to grow more and more burdensome with the passage of every year.

If there is a difficulty with what the Commission is seeking to achieve it will be in the detailed implementation. The Commission wants schemes to include 'automatic degressive elements' and be 'complemented by a built-in revision mechanism'.<sup>493</sup> Even with upfront clarity and transparency as to how tariff variations will occur during the lifetime of the support, it may prove difficult to convince investors and funders that arbitrary changes will not follow as predictably as night follows day. In an Irish context, the suspicion will immediately arise that the discretion inherent in any such mechanisms will be an effective shield to any subsequent judicial review of decisions to alter support schemes. The proposals will not apply to existing aid granted under

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<sup>488</sup> Commission (n 368) 4.

<sup>489</sup> Commission (n 482) 3.3.2.1 (a) para 124. See also: Commission (n 368) 5.

<sup>490</sup> Commission (n 482) 3.3.2.1 (a) para 124.

<sup>491</sup> Commission (n 368) 12.

<sup>492</sup> *ibid* 13.

<sup>493</sup> *ibid* 20.

REFIT and, to the extent still current, AER projects. In its defence and as demonstrated in this chapter, Ireland has not in the past sought to make arbitrary changes to support schemes.

The guidance also requires that, generators must be subject to standard balancing responsibilities unless no liquid intra-day market exists.<sup>494</sup> Member States must also put in place measures to ensure that there is no incentive on renewable generators to generate electricity under negative prices.<sup>495</sup> Subject to some specified exceptions, and with effect from 1 January 2017, State aid for energy from renewable sources must, in principle be granted in a competitive bidding process which must be open to all generators from renewable sources on a clear, transparent and non-discriminatory basis.<sup>496</sup> Industry have expressed concern about this approach citing the failure of the AER tendering process as an example of why competitive processes for allocation of aid does not work.<sup>497</sup> Whilst IWEA are correct that the AER process failed to deliver operational projects because prices bid were unrealistic and projects could not proceed because debt and equity finance could not be raised, it is submitted that this issue could have been successfully addressed in the context of the AER process and in the future by imposing a penalty on the successful applicant for the support if the project does not materialise in the committed timeframe for reasons other than force majeure. It is also the case that the degree of sophistication in the industry, and in the institutions providing funding, has significantly increased since the early days of the AER schemes and developers and their financial teams are now much more adept at project appraisal and determining the level of support required to make the economic return they require from their investment.

In the recent National Mitigation Plan, DCCAIE noted the factors that would inform the design of the next phase of support for renewable energy in Ireland:

A new PSO-funded RESS is currently being designed. Key design considerations of the new scheme will include its cost effectiveness, the overall quantum of renewable generation supported, renewable technologies supported, the increased levels of community and citizen participation and the delivery of broader energy policy ambitions. Clarity on the scheme, which will be subject to Government and EU State Aid approval, is expected in 2017.<sup>498</sup>

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<sup>494</sup> Commission (n 482) 3.3.2.1 (b), para 124.

<sup>495</sup> Commission (n 482) 3.3.2.1 (c), para 124.

<sup>496</sup> Commission (n 482) para 126. In the transitional phase 2015-2016, Member States were required to commence the implementation of competitive bidding procedures for 5% of new renewable generation capacity.

<sup>497</sup> IWEA (n 386) 5.

<sup>498</sup> DCCAIE (n 3) 51.

## Re-writing the Remit of the Regulators-Alignment of Responsibility with Expertise

Support schemes fall within the domain of policy rather than regulation and consequently the CER does not see itself as having any discretion over PSO policy or the terms and conditions of support schemes.<sup>499</sup> By extension therefore, SEMC, as regulator of the SEM, does not have any role even where the very existence, terms and conditions of the support available can have an impact on the SEM. The availability of PSO support whether it is for peat, renewables, or conventional generation can have a very material impact on matters such as competition, free movement of energy, and security of supply; and consequently, it is arguable the role of the CER should extend beyond mere administration of support schemes and into the structuring and the setting of terms and conditions as well. The role of SEMC, as regulator of the SEM should be similarly extended. The Government in its most recent Energy White Paper has set as one of its objectives a review of the institutional framework for energy and an examination of the mandate of the CER.<sup>500</sup> In this context, a devolution of all of the detailed structuring as well as the setting of terms and conditions of future support schemes to CER would be appropriate. Government could continue to set the broad policy requirement for support schemes but otherwise the capacity, duration, targeted technology categories and any minimum conditions should be set by CER and SEMC following industry consultation. The Energy Minister could reserve the right to issue a policy direction to the CER if required. This approach would be more aligned with the position set out in the most recent EU Commission State Aid Guidelines which call for a much more sophisticated and flexible approach to setting the terms and conditions for support schemes up to 2020, and their eventual phasing out beyond that. Conferring responsibility for support schemes on CER would also be consistent with its role as market regulator and the increasing demands from the European Commission and others for support schemes to work within, and not outside the electricity market. In view of concerns about the cost to the electricity consumer of the PSO for renewable and non-renewable generation, it would also make sense for the CER to assume the suggested role in view of its statutory obligation to protect consumers.<sup>501</sup> To the extent that support scheme issues can have an impact on SEM, these issues would be elevated to the SEMC, a much more appropriate forum for consideration of the SEM impact of such schemes.

The Competition and Consumer Protection Commission (previously the Competition Authority), has raised concerns about the cost of renewables and separately the need to structurally

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<sup>499</sup> See for example: CER (CER /15/142 2015) (n 359).

<sup>500</sup> DCENR (n 400) 12.

<sup>501</sup> ERA, s 9(3)(c).

unbundle ESB in the interests of competition.<sup>502</sup> ESB has been removed from its exclusive central role as PPA counterparty for renewables though it can still benefit from support for its own business. The number of AER plants with ESB as counterparty is also reducing as PPAs come to the end of their 15-year term. It is therefore perhaps arguable that there is little to be gained in looking back on decisions made in this context. Nevertheless, in the event that any new PSO measure is proposed involving ESB or indeed any other State enterprise then this should not be simply a matter of policy or politics, and the proposal should be reviewed by the CER, SEMC and Competition and Consumer Protection Commission to ensure that when looked at in isolation, or in conjunction with past measures, or other future proposals under consideration, it does not serve to bolster the position of ESB or other State interest from an actual or perception perspective to the detriment of competition from renewables or otherwise. In this respect, the Competition and Consumer Protection Commission have noted that the ‘cost implications of individual policy decisions should be recognised in the formulation of future energy policy.’<sup>503</sup>

## Chapter Conclusion and Application to Thesis Themes and Questions

This chapter considers the important role played by financial support schemes in the deployment of wind generation technology in Ireland, and the significant contribution that domestic and international investment secured with the aid of support schemes, has and will make, towards the achievement of Ireland’s 2020 targets. Financial support schemes have, in a very positive way, fuelled the pursuit of Ireland’s 2020 RES-E Target, and removed one of the principal obstacles to development namely, uncertainty around financing.

In the context of the central question posed in this thesis, this chapter highlights the fact that, despite the level of discretion left to Member States in Articles 2 and 3 of the Second Renewable Energy Directive, as to the nature of support schemes that can be deployed in furtherance of renewable energy targets, support schemes in Ireland have been structured, deployed and operated to maximum effect, and with little fuss, because they did not require any concessions by, or diminish the rights and entitlements of, vested incumbent interests, since the burden of the schemes, was placed on electricity consumers.

The EU principle of subsidiarity in this specific context did not, unlike network unbundling example discussed in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), lead to regulatory failure even in the context of Ireland’s economic collapse where opportunities for cost saving policy reversals were actively sought and encouraged.

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<sup>502</sup> Competition Authority, *Submission to the Green paper on Energy Policy in Ireland (S/14/05 2014)* 8, 13.

<sup>503</sup> *ibid* 13.



The subversion of energy policy (in this instance renewable energy policy) for non-energy purposes theme, discussed in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), and chapter 5 (*Prioritising the Wind-The Role of Policy, Law and Regulation*), is also considered in this chapter, where it is argued that both the pursuit *per se*, and the manner of the pursuit, of peat fired power stations in Ireland, not only flies in the face of what the EU is seeking to achieve by way of decarbonisation objectives, but also needs to be viewed from the perspective of both cost to the electricity consumer, and SEM impacts due to its priority dispatch status as a matter of law. Establishing a direct correlation between Ireland's pursuit of peat fired generation, and Ireland's failure to meet its RES-E Target will be difficult should Ireland fail to meet its targets. The issue is however relevant to several of the subsidiary issues explored. In the first instance, it highlights the fact that for Ireland to make progress on renewable energy objectives, including wind generation, it would seem that it was necessary to reward incumbent interests, at the cost of electricity consumers, market liberalisation, and the environment. Secondly, the issue of the cost of the Peat PSO has been conveniently bolted onto the Renewable PSO, and as such has fuelled the anti-wind lobby debate surrounding the cost of wind to consumers.

It is also argued in this chapter that Ireland, in structuring its principal support scheme (REFIT), to exclude windfarm developments located in Ireland (the output of which would count towards Ireland's targets if built), but connected to the grid in Northern Ireland; has not only infringed the Second Renewable Energy Directive, and EU free movement rules, but also prevented the development of these projects with knock on consequences for Ireland RES-E Target and potentially its 16% binding EU target.

## Chapter 5: Prioritising the Wind-The Role of Policy, Law and Independent Regulation

*Effective regulation needs to be independent of both the industry and government but at the same time it requires a thorough understanding of the regulated industry, and sensitivity to political currents. And independence is also earned: earned through the quality of the analysis, insights and solutions that the regulator offers; and earned through the long term benefits delivered to consumers. Of course, the regulator suffers from an asymmetry of information: the regulated firms will inevitably know far more about their business than the regulator. But through careful research and analysis, the regulator can know more about the industry as a whole and how it works than the individual firms within it.*<sup>504</sup>

### The Challenges of Grid and Market Access for Wind Generation

The preponderance of technical and regulatory problem solving, consultation and discussion concerning wind generation in Ireland has, since the late 1990s, been concerned with grid and market access. Almost two decades after the nascent TSO that initially resided within ESB first raised concerns about grid security and reliability arising from increased wind penetration, and a policy shift that signalled an aspiration to have even more wind connected to the grid, the conundrum continues to exercise the CER, System Operators, and the industry in general. Market access for wind generated electricity has similarly proved to be a considerable technical, economic, and regulatory challenge, with the evolution from the simple proposition of a bilateral contract to buy and sell output, to a gross mandatory pool, and the prospect of even more complexity in the transition to I-SEM that is on the horizon.<sup>505</sup>

This chapter considers the issue of grid and market access for wind generation technology and its electrical output and more specifically, the effectiveness of regulation in these areas. These topics are selected for consideration because, timely and efficient grid, and market access for new technology have, until the emergence of social acceptability considerations, presented the greatest challenges for renewable technology, including wind. In this chapter, it is argued that, notwithstanding the Herculean challenge for generators employing wind generation technology,

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<sup>504</sup>David Currie, 'The Case for The British Model of Independent Regulation 30 Years On' (The Currie lecture given by CMA Chairman David Currie to The Cass Business School (London 21 May 2014). See also: Dieter Helm, 'The Scope and Limits of Competition and Regulation in the Irish Electricity Market' <[https://www.esri.ie/pubs/QEC2003Spr\\_SA\\_Helm.pdf](https://www.esri.ie/pubs/QEC2003Spr_SA_Helm.pdf)> accessed 1 May 2017; and Paul K. Gorecki, 'Policy Paper: Economic Regulation; Recentralisation of Power or Improved Quality of Regulation?' (2011) 42 2ESR 177, 199.

<sup>505</sup> SEMC, *Integrated Single Electricity Market, SEM Committee Decision on High Level Design* (SEM-14-085a 2014).

in securing both grid and market access for electrical output; EU mandated independent regulation has played a very important role in ensuring that these issues alone are now unlikely to contribute in a material way to any shortfall in meeting Ireland's RES-E Target. It is also suggested that the approach to policy and regulation around grid and market access stands in stark contrast to the approach to environmental and planning permitting discussed at chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*).

The central proposition of this chapter is that Ireland would not have achieved the level of grid and market access for wind generated electricity attained to date in the absence of EU policy and law mandating wholesale changes to the Irish electricity market, given the way the market was operated and allowed to develop un-regulated with a single vertically integrated monopoly (ESB), for over 70 years. A cursory review of the ERA reveals little that cannot be traced (in many instances verbatim), back to an EU Directive or Regulation. The genealogy of Ireland's post-liberalisation electricity law has in fact been written and can be found outside the State, and from the perspective of Irish electricity consumers, it is all the better for that fact. A review of Irish energy policy documents of the past two decades leads one to the same inexorable conclusion. Whilst on the face of it these policy documents give a strong impression that renewable energy, and wind energy in particular, has been the preferred choice of successive governments, it is submitted that whilst this may have been the position initially, Irish policy enthusiasm for renewable energy, has over the past decade at least, been fuelled by EU policy and law directed at the attainment of particular outcomes, and not by some home-grown desire to decarbonise or displace imported fossil fuels or indigenous peat, though the latter justifications feature prominently in the Irish renewable energy policy narrative. In short, Irish energy policy is enthusiastic about renewable energy because it is legally required to be so, and Irish law facilitates it for the same reason, where Irish policy making is not so curtailed or constrained, it naturally reverts to type and has at as its core philosophy, the protection of incumbent State owned or controlled interests.

An examination of Irish energy policy from the late 1990s to date, as revealed by key decisions concerning the institutional arrangements in the Irish electricity market, and the State's approach to EU mandated liberalisation, reveals a determined desire on the part of successive administrations to preserve, to the greatest extent permissible, and grow where possible, incumbent state-owned interests in the electricity sector to the exclusion of new market entrants. The fact that the deployment of wind generation technology has been so successful is a testament to the effectiveness of European Union law and policy in the sphere.

The contamination of Irish energy policy by shareholder and other vested interest concerns is, as discussed in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), and chapter 4 (*Financing the Winds of Change-Irish Financial Support Schemes*), an inevitable side effect of a domestic policy that mandates continued State ownership of enterprises that are involved in the generation and supply of electricity and the ownership and operation of networks. Unlike Cuchulain's illusory struggle with the 'invulnerable tide,'<sup>506</sup> Ireland's struggle against the EU tide of market liberalisation has, for all its subtlety, been both real and effective. Two decades after the commencement of the EU market liberalisation initiative, ESB continues to own both the Transmission and Distribution Systems;<sup>507</sup> operating the latter, and exercising a strong degree of contractual influence over the development and maintenance of the former; and it continues to hold significant shares in the electricity generation and supply markets.<sup>508</sup> Of course, if each of the key decisions that have culminated in this outcome are examined in isolation, a point in time justification, or legal basis for that decision, can for the most part be found in the documentary record. It is however the cumulative effect of these decisions that tells the full story. By choosing to regulate the monopoly rather than pursue a disaggregation solution at the outset, Ireland has put a limit on the potential benefits of liberalisation.

Notwithstanding this policy reluctance at a domestic level to fully embrace liberalisation and competition, the market liberalisation programme heralded by the First Electricity Directive and its successors has nevertheless played a fundamental role in the move to dismantle ESB's absolute monopoly on the generation and supply of electricity, as well as curbing its control over the transmission and distribution systems, and in doing so has opened the door for new market entrants; renewable and otherwise, allowing them to gain a foothold in, and successfully compete in, the Irish market. It is beyond doubt that all the key drivers for achieving grid and market access for wind in Ireland (independent regulation, grid access, priority dispatch, mandatory targets etc.), are creatures of the EU fundamentally alien to the Irish market when they arrived in the body of the various EU electricity and renewable energy directives. The level of success of these and other EU measures has been commensurate with the degree of absoluteness in which they

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<sup>506</sup> William Butler Yeats, 'Cuchulain's Fight with The Sea' *United Ireland* (11 June 1892) 28.

<sup>507</sup> See chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*).

<sup>508</sup> ESB's share of the SEM electricity generation market in 2016 was 47% and it had a share of 37% in the SEM electricity supply market (See: ESB, *Working Together-Annual Report and Financial Statements 2016*). According to the European Commission, in 2014 ESB held a 55% share of the electricity generation market in the Republic of Ireland (See Commission, 'Country Report-Ireland' (2014) <[https://ec.europa.eu/energy/sites/ener/files/documents/2014\\_countryreports\\_ireland.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2014_countryreports_ireland.pdf) > accessed 5 June 2017. In the Republic of Ireland electricity supply market ESB (Electric Ireland), retains a domestic market share of 57.65% in terms of customer numbers, and 52.7 % in MWhs terms. At that time, ESB's closest competitor held 14.75 % and 17.27% respectively (See: CER, *Electricity and Gas Retail Market Report Q2 2016* (CER /16/306 2016) 21.

are cast. As submitted in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), full ownership unbundling of the Transmission System, an acknowledged enabler for renewable generation, was not implemented in Ireland because lesser options were available to the State, and the State, for reasons of political expediency dressed up as economic necessity, exploited this weakness in the legislative scheme. On the other hand, the absolute requirement to have an independent regulator, and the mandatory renewable targets imposed on Member States, have each played a very important role in advancing the position of wind farms because such requirements could not, for the most part, be directly undermined by government policy, or shareholder and trade union self-interest. The fact that mandatory targets are passively (and no less effectively), undermined by policy and regulatory failures around environment and planning issues, is discussed in chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*).

As the end of the 2020 policy cycle approaches, and the level of wind generated electricity connected to the grid increases, conflicts between that policy and other considerations have emerged. As discussed in chapters 6 (*Gone with the Wind-Ireland's Proposed Wind Energy Export Projects*); and chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*), just as the pursuit of renewable energy targets in furtherance of sustainability objectives has brought the instruments of that policy into conflict with EU environmental law, and environmentally minded citizens; the relentless and inflexible pursuit by the EU of renewable energy targets, a pursuit which has so greatly assisted wind development in Ireland, has seen the emergence of another conflict; this time between, on the one hand, the interests of electricity consumers and on the other, the commercial interests of the Irish wind industry, and investors and financial institutions that support that industry. This conflict is very apparent in the processes leading up to, and in the myriad of decisions of the regulator, since the emergence of the SEM in 2007.

### **Creating a Legal Framework for Grid and Market Access**

Before considering the issues outlined above, it is instructive to briefly consider the European and Irish legal framework for grid and market access for wind generated electricity. In the world pre-liberalisation, ESB was not required to provide third parties with access to its network, electricity consumers could, for the most part, only look to ESB for their electricity requirements, and there was no independent regulator. EU policy and legislation concerned itself with these issues and the extent to which they are addressed in Irish legislation reflects this concern. As discussed in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), at the level of Irish domestic legislation, absolute requirements at an EU level translate (for the most part), into

absolute requirements at the domestic level, while qualified requirements at an EU level translate into debate, and more often than not lead to obscurity.

In the First Renewables Directive, the ‘obligations’ that seek to secure the position of wind in each of the key stages in the journey to market for wind generated electricity (grid access, priority dispatch, and guaranteed transmission), are qualified and essentially recast by reference to the capability of the national electricity network.<sup>509</sup> Thus, where the Member State is obliged to ‘ensure that transmission system operators and distribution system operators ... guarantee the transmission and distribution of electricity produced from renewable sources,’<sup>510</sup> the absolute language of this requirement is qualified by reference to the ‘maintenance and reliability of the grid.’<sup>511</sup> Similarly, the obligation on TSOs to give priority dispatch to renewable generators is only where the ‘national electricity system permits.’<sup>512</sup> The obligation to confer ‘priority access to the grid system’ to renewable generators is expressed as a mere possibility, the formula being ‘may’ rather than an absolute ‘shall.’<sup>513</sup> Though Article 7 of the First Renewable Energy Directive contains additional obligations concerning access to standards and information, transparency, non-discrimination, reporting, and costs for access (all of which have played an important role in securing grid and market access for wind generation), it is submitted (from an Irish perspective at least), that Article 7 reflects the reality as it then was, and to an extent remains, namely that absent substantial investment, connection to the Irish grid for intermittent and variable wind generated electricity has, and will, remain problematic. Though Article 16 of the Second Renewable Energy expands the obligations of Member States somewhat and seeks to ensure that Member States ‘take steps’ to develop networks that can accommodate greater renewable penetration, the core qualifications remain unaltered.<sup>514</sup>

Irish domestic legislation mirrors EU legislation and does not confer priority access to the grid for renewable generators (including wind). Access to the network is open to all applicants who satisfy the criteria specified in the ERA.<sup>515</sup> Section 34 enables CER to issue directions to the System Operators in relation to the terms of connections as well as a power to make directions in relation to the basis upon which charges are made for use of, and connection to the networks. The circumstances in which the System Operators can refuse to permit a connection are also specified

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<sup>509</sup> First Renewable Energy Directive, art 7.

<sup>510</sup> *ibid* art 7(1).

<sup>511</sup> *ibid*.

<sup>512</sup> *ibid*.

<sup>513</sup> *ibid*.

<sup>514</sup> Second Renewable Energy Directive, art 16(1)-16(2). Article 16 is transposed into Irish law by the European Union (Renewable Energy) Regulations 2014, SI 2014/483, reg 4.

<sup>515</sup> ERA, s 33, s 34, and s 34A.

in the legislation and are technology neutral.<sup>516</sup> The most noteworthy ground in this context allows the System Operator to refuse to enter a connection agreement where it ‘demonstrates to the satisfaction of the [CER] that it is not in the public interest to provide additional capacity....’<sup>517</sup>

The ERA contains a myriad of other provisions (mostly reflective of EU electricity sector legislation), pertaining to the planning, development, maintenance, and operation of grid infrastructure, and the trading of electricity, as well as the licensing and monitoring by the CER of the System Operators and the Market Operator. For the reasons discussed at chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), attempting to impose a logical and legally robust hierarchy on the many functions, powers, and duties of the CER elucidated in the ERA is difficult. Provisions in the legislation aimed at furthering renewable energy and environmental objectives, compete for position with other equally opaque provisions that call for competition in the electricity market, or emphasise security, continuity or quality of supply. The importance of provisions pertaining to renewable energy thus move up and down the legislative order in-tune with the policy baton of the then current Energy Minister, and the advice provided by the System Operators and the CER. The fact that renewable energy targets have been mandated by EU law has, over the past decade or so, secured the position of renewable energy, and conferred a degree of immunity on it, in the face of other political, policy, or regulatory considerations.

In the current context, the following legislative provisions also merit consideration as they feature in the introductions to, and form a basis for, many of the regulatory decisions in the areas of grid and market access. CER is under a duty to carry out its functions and exercise its powers in a manner which the CER ‘considers protects the interests of final customers of electricity....’<sup>518</sup> As discussed at chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), the legislation does not specify whether these are the customers of today, tomorrow or some distant time in the future, or indeed in alternative versions of that future. The distinction is, for the reason discussed elsewhere, important when it comes to the relationship between the upfront cost of investment and the ultimate beneficiaries of the return on that investment.<sup>519</sup> In carrying out the duty that is imposed on CER by sub-section (3), the CER must have regard to several requirements including the need to ‘promote the continuity, security and quality of supplies of electricity’ and ‘promote the use of renewable, sustainable and or alternative forms of energy.’<sup>520</sup> Further, in

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<sup>516</sup> *ibid* s 34(4).

<sup>517</sup> *ibid* s 34(4)(a).

<sup>518</sup> ERA, s 9(3).

<sup>519</sup> See p. 57 above.

<sup>520</sup> ERA, s 9(4).

performing these and other duties specified in section 9(4)(a), the CER must, pursuant to section 9(4)(b) ERA, have regard to a number of specified objectives including: to integrate large and small scale production of electricity from renewable resources in both transmission and distribution networks in the most cost effective way; to facilitate access to the network for electricity generation, in particular removing barriers that could prevent access for new market entrants and renewable energy sources; to increase the efficiencies in system performance; and to foster security of supply.

Section 9(5) ERA is also noteworthy and provides that, without prejudice to subsections 9(3) and 9(4), the CER has a duty to (amongst other things), take account of the protection of the environment;<sup>521</sup> and encourage research and development into methods of generating electricity from renewable sources.<sup>522</sup> Section 9(5) contains the core obligation concerning priority dispatch placing a duty on the CER to require that the TSO gives ‘priority to generating stations using renewable, sustainable or alternative energy sources when selecting generating stations.’<sup>523</sup>

Following the introduction of the SEM in 2007, and the establishment of SEMC (with representatives from CER and the Northern Ireland Authority for Utility Regulation (NIAUR)), as the cross-border regulator of the SEM and SEM Matters,<sup>524</sup> the exercise by the regulatory authorities (RAs), CER and NIAUR, of their respective functions in relation to such matters was elevated to SEMC. When reflecting on their duties in the context of renewable energy, the RAs concluded that while they each had similar duties in relation to SEM Matters, the protection of consumers in both jurisdictions through the promotion of effective competition was singled out as the principal duty.<sup>525</sup> Both however are conscious of the fact that in carrying out their functions they must also have regard to other things including, the effect on the environment in both jurisdictions and the need, where appropriate, to promote the use of energy from renewable sources as well as obligations imposed by EU Directives concerning renewables.<sup>526</sup> The existence of legally binding renewable targets has meant that the ‘where appropriate’ formula has been interpreted in line with the legal requirements. The continuation of North-South co-operation and symmetry in electricity matters in a post Brexit world will undoubtedly be open to question as the ability to align two markets potentially driven by separate policy imperatives may prove

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<sup>521</sup> ERA, s 9(5)(a).

<sup>522</sup> ERA, s 9(5)(d)(i).

<sup>523</sup> ERA, s 9(5)(e).

<sup>524</sup> Pursuant to ERA, s 8A(5), a matter is a *SEM Matter* if SEMC ‘determines that the exercise of a relevant function of the [CER] in relation to that matter materially affects or is likely to materially affect, the Single Electricity Market.’ A mirror provision in respect of NIAUR is contained in The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007, art 6(3). NIAUR is also known as the Utility Regulator (UR).

<sup>525</sup> SEMC, *Wind Generation in the SEM-Policy for Large Scale, Intermittent Non-Diverse Generation, Discussion Paper* (SEM-08-002 2008) 14.

<sup>526</sup> *ibid.*



difficult. Up to now however, the regulation of the cross jurisdictional arrangement that is the SEM has worked well, a fact recognised by many commentators.<sup>527</sup>

In regulating the SEM, the RAs do not see their role as extending to putting in place explicit support mechanisms for wind generation, rather their concern is with the SEM itself and system operation issues.<sup>528</sup> As discussed in chapter 4 (*Financing the Winds of Change-Irish Financial Support Schemes*), the introduction, design, and operation of support mechanisms is considered a matter of policy for the governments on the island of Ireland. Yet it is this distinction that is at the root of many of the difficulties that have arisen and continue to arise in respect of wind generation. On the one hand, there is the explicit, enduring, and aggressive policy, to support renewables, and wind in particular, and on the other hand there are the system and operational challenges that need to be understood, and overcome, if the policy is to be delivered on. For the RAs, ‘the principles of equity, cost minimisation, reward for value, competitiveness, transparency and security of supply ... serve to guide decision making regarding the treatment of wind...’<sup>529</sup> SEMC see these principles as determining, amongst other things: how wind generation is rewarded in the SEM as well as payments for capacity, ancillary services and constraints. Decisions regarding support outside the SEM, and thus outside the jurisdiction of the RAs, are in SEMC’s view a matter for government.<sup>530</sup> Yet, a review of many of the decisions of SEMC, highlights that this compartmentalisation is difficult to sustain in practice because a blunt and unyielding policy to pursue wind generation at seemingly any cost is difficult to align with a duty to protect consumers, and this tension is very evident in SEMC’s epic 5 year consultation on the topic of *Wind in the SEM* which is discussed below.

## The Emergence of an Independent Regulator

Much has been written concerning the nature of, and the extent to which, deficiencies in the Irish grid have presented a serious obstacle to the penetration of wind generation technology in Ireland, and how that obstacle might be overcome, and the extent to which it has.<sup>531</sup> Notwithstanding the difficulties and limitations of the Irish grid, a significant level of wind generating electricity plant has already been connected to that grid with even higher levels of

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<sup>527</sup> See: John Fitzgerald and Laura Malaguzzi Valeri, *Irish Energy Policy: An Analysis of Current Issues* (2014) ESRI Research Series No. 37, 45.

<sup>528</sup> SEMC (SEM-08-002 2008) (n 525) 2.

<sup>529</sup> *ibid.*

<sup>530</sup> *ibid.* 9.

<sup>531</sup> For an overview of the development of the Irish grid see chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*). See also: RESG (n 97); Simon Grimes, ‘Connection of Embedded Generation to ESB Distribution Network’ (IWEA Annual Conference, 1998); and Paul Smith, Paul Cuffe, Simon Grimes, Tony Hearne, ‘Ireland’s approach for the connection of large amounts of renewable generation’ (IEEE Power and Energy Society Meeting, 2010).

connection contracted wind under construction or awaiting other permits such as planning.<sup>532</sup> Similarly, renewable electricity has established itself as a not insignificant component in the fuel mix disclosed by suppliers pursuant to the Fuel Mix Disclosure Regulations.<sup>533</sup> Significant investment, together with regulatory, economic, and technical adjustments have been made over the past 20 years to achieve these outcomes.<sup>534</sup>

Prior to the establishment of CER as independent regulator in 1999, Ireland did not have a regulator in the energy sector. Through extensive legislative enactments commencing in the 1920s, the Oireachtas put in place a corpus of law that enabled and empowered ESB to deliver the policy objective of electrification of the Irish State. While the State put in place the necessary policy and legislative framework, and occupied the role of shareholder in ESB, the role of independent regulator did not naturally emerge. At the point in time when the CER was established to oversee liberalisation in 1999, wind generated electricity's share of the electricity generation and supply markets was both nominal, and wholly dependent on ESB for grid and market access.

What role has the CER played in achieving positive outcomes for wind, and has the CER gone far enough in delivering on its statutory mandate for renewable energy in the form of wind generation? The CER frequently reminds the market of its status as 'independent' regulator, yet the statutory underpinning of this duty is far from obvious as it is secreted away in a schedule to the ERA.<sup>535</sup> The nature of the obligation too is far from clear as the CER's duty to be independent in the performance of its functions is expressed to be 'subject to this Act' leading one to conclude that there may be provisions in the ERA that sanction a lack of independence in certain circumstances.<sup>536</sup> A much more absolute form of independence is however mandated by the Directives. Thus, the Second Electricity Directive, which required Member States to establish regulatory authorities, mandated that these authorities shall be 'independent from the interests of the electricity industry.'<sup>537</sup> The Third Package Directive goes further, and requires Member

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<sup>532</sup> As of September 2016, 2,500 MW of wind generation had been connected to the network with a further 3,500 MW contracted. In addition, applications for a further 15,500 MW had been received by the System Operators. See: CER, *Connection Policy Transitional Arrangements, Decision Paper* (CER/16/284 2016) 1.

<sup>533</sup> CER, *Fuel Mix Disclosure and CO<sup>2</sup> Emissions 2015* (CER/16/246 2016). It should be noted that since suppliers can purchase electronic renewable guarantees of origin, the renewable share indicated for suppliers in this report exceeds the amount of renewable generating sources in Ireland.

<sup>534</sup> See for example: EirGrid (n 131).

<sup>535</sup> ERA, Schedule 1(9). Pursuant to the Energy Act 2016, s 4, the name of the CER is to change to the Commission for the Regulation of Utilities, and this change occurred on 2 October 2017.

<sup>536</sup> *ibid.*

<sup>537</sup> Second Electricity Directive, art 23.

States to ‘guarantee the independence of the regulatory authority’ and must ‘ensure that it exercises its powers impartially and transparently.’<sup>538</sup>

In the context of intricate energy markets the issue of independence of the regulator is multifaceted and requires, amongst other things: independence from market participants; independence from system operators and other entities that make the market work; and independence from the State as both policy maker, and shareholder in State owned enterprises that operate in the sector and have the potential to return significant dividends to the exchequer. The Third Package Directive addressed the obvious shortcomings of the ‘electricity industry’ formula of the Second Electricity Directive wording when it extended the requirement for independence to ensuring that the staff of the regulatory authority and persons responsible for the management of the regulator ‘act independently from market interest’ and critically, ‘do not seek to take direct instructions from any government or other public or private entity when carrying out the regulatory tasks.’<sup>539</sup> It is submitted that the use of the word ‘direct’ in this context is both superfluous and unfortunate. The Directive goes further by providing that the regulatory authority must be able to take ‘autonomous decisions, independently from any political body.’<sup>540</sup> The independence provisions of the Third Package Directive are not however without qualification. The express requirement not to take direct instruction from public or private entities when carrying out its regulatory functions is expressed to be ‘without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties’ specified in Article 37 of the Directive.<sup>541</sup> The 1999 Act interprets this as permitting the Energy Minister to issue general policy directions to the CER.<sup>542</sup>

How independent has the CER been in presiding over the transition from a market with a small renewable component (mostly hydro), dominated by a single State-owned vertically integrated utility, to a market that aims to have a renewable component of 40% of electricity consumed to be from renewable sources by 2020? A review of milestone CER decisions in the areas of grid and market access for wind generated electricity since the inception of independent regulation in Ireland in 1999 reveals a high degree of independence on the part of the CER when dealing with the position of: new market entrants (including new technologies), versus incumbents (and their

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<sup>538</sup> Third Package Directive, art 35(4). For a discussion of the Third Package independence requirements see: Gorecki, (n 504) 199.

<sup>539</sup> Third Package Directive, art 35(4)(b)(i)-(ii).

<sup>540</sup> Third Package Directive, art 35(4).

<sup>541</sup> Article 37 contains an extensive list of duties and powers that must fall within the remit of the regulatory authority.

<sup>542</sup> ERA, s 10A.

different technologies), new market entrants *inter se*; and market participants (existing and prospective), and the System Operators. It is submitted that this independence which is evident in the assessment of options, the questioning of positions; and pursuit of inclusivity and transparency in decision making, has played a very important role in building confidence in the Irish electricity market as a place to invest, and securing grid and market access for wind. There have however been occasions when CER has perhaps not been as vocal, or as questioning, as it should, and as one would expect, and these instances are discussed further below. For present purposes, it is submitted that the common denominator in these latter cases is ESB.

For wind, the important role CER could play was evident early on. Immediately following the establishment of CER in 1999, the new regulator found itself having to preside over a series of issues that individually and collectively presented significant obstacles for a nascent wind industry that was highly sceptical that the new regulatory and institutional framework would work against incumbent interests and create a level playing field for their new technology. What is apparent from the initial interactions between CER, the System Operators and industry on operational grid related issues (institutional issues are discussed elsewhere<sup>543</sup>), is a degree of transparency, oversight, questioning and challenging of positions taken by the System Operators that had hitherto been absent from the Irish energy market, and undoubtedly served to build market, and stakeholder confidence in the new regulator.

First amongst these issues for determination by the CER was the allocation of the cost of grid connection for prospective applicants. In 2000, the cost of connecting wind turbines to the grid was estimated to be in the order of 15% of the overall capital cost.<sup>544</sup> Initially a majority of new wind farms connected to the Distribution System; connections to the Transmission System being more expensive and only facilitated when the criteria for connecting to the Distribution System could not be met or when a connection to the Transmission System presented a lower cost alternative.<sup>545</sup> Because the TSO pursued a *deep* connection policy (the applicant seeking the connection was required to pay for all the connection assets that would not have been required if the applicant's generating plant or network connection point did not exist), the cost of the connection was considerably greater. The alternative *shallow* connection policy required the applicant to pay only for the specific connection assets required to connect the applicant's generating plant. Recognising that this policy choice on the part of the TSO constituted a barrier to entry for both wind and conventional technology alike, the CER, in one of its earliest regulatory

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<sup>543</sup> See chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*); and pp 147-151 and pp 154-155 below.

<sup>544</sup> RESG (n 97) 57.

<sup>545</sup> *ibid* 59. For a discussion of the technical challenges of connecting wind turbines to the Transmission System see: RESG (n 97) 58-61.

interventions, directed the ESB as TSO, pursuant to section 35 ERA, to facilitate all connections to the Transmission System on the basis of a *shallow* connection policy.<sup>546</sup> The CER, highlighting the importance of an independent regulator, and garnering the confidence of new market entrants with a prompt and emphatic response, expressed its belief that ‘deep connection charges were difficult and arbitrary to apply in practice making them discriminatory and non-cost reflective.’<sup>547</sup> Though this decision did benefit wind generation, it would be a mistake to include it on any list of regulatory interventions aimed at addressing barriers to wind development as it also greatly assisted international conventional power developers considering investing in new power generation assets in Ireland at that time. Nevertheless, the decision was an important early statement of intent by the CER and gave confidence to new market entrants (including wind developers), that the new regulator was willing to disrupt the *status quo* in the interests of new market entrants and competition.

Across the decisions reviewed there is little evidence of CER using its statutory Ministerial advisory functions<sup>548</sup> to openly and actively challenge government policy, or openly seek policy changes for the benefit of market participants, rather the CER has for the most part sought to regulate within the confines of its broad and express legislative mandate, and by employing the generous level of discretion inherent in that mandate to achieve outcomes that are broadly consistent with published government policy of the time. The important issue of contestability of connections to the network is perhaps an exception. From the perspective of the developer of a generation asset, wind or conventional, the concept of contestability has at its core two simple philosophies. The first is a belief that the developer should have the right to construct, or arrange to have constructed, their own connection to the network. The second is a belief that in so doing there will be substantial cost and programme savings to the project. Looked at from the perspective of network owners and operators, contestability brings with it a loss of control, a loss of opportunity, and a loss of revenue. Where the network owners and operators are public enterprises, contestability is, in effect, the ending of a monopoly right or a privatisation of the design, procurement, and construct function for the subject connection assets.

Contestability in respect of connections to the Transmission System has been an option for developers since 2000, but was only introduced in respect of the Distribution System in 2009.<sup>549</sup>

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<sup>546</sup> CER, *CER Direction to ESB in relation to connections to the transmission network* (1999).

<sup>547</sup> CER, *Annual Report 1999*.

<sup>548</sup> ERA, s 9.

<sup>549</sup> The 2000 Regulations, reg 33; European Communities (Internal Market in Electricity) Regulations 2009, SI 2009/226, reg 2. For the detailed rules relating to contestability see: CER, *Contestability for Distribution and Transmission Level Connections to the Electricity System, Decision Paper* (CER /10/056 2010); and CER, *Group Processing Approach for Renewable Generator Connection Applications, Connection and Pricing Rules, Direction to System Operators* (CER/05/049 2005).

When developers, concerned about how costly DSO built connections were in comparison to other alternatives, lobbied the CER to seek the legislative changes necessary to extend contestability of connections to the Distribution System, CER noted that it had ‘advocated such an extension to the Minister.’<sup>550</sup> The necessary legislative change followed.<sup>551</sup> That however was not the end of the matter, and in and through, subsequent consultations and decisions the CER played an important role in defining the nature and extent (including cost aspects), of the contestability rights secured by developers.<sup>552</sup> The CER helped to disentangle, and lay bare the legitimate concerns of the System Operators concerning the safety, reliability and efficient operation of the networks from concerns which stemmed from the simple loss of control inherent in contestability.<sup>553</sup> Thus for example, on the issue of the point in time when a developer should commit to a contestable, or non-contestable approach, the DSO wanted the developer to commit three months prior to receipt of a connection offer because, as the DSO argued, it did not have sufficient resources to manage a process that allowed developers the freedom to elect for a contestable or non-contestable approach right up to commencement of construction of the connection assets. The DSO also raised legal and reputational issues, suggesting that a failure by the developer to adhere to planning conditions, or local authority requirements, might result in legal liability for the DSO, or may damage the DSO's relationship with local authorities and impact on other works. Developers argued that the DSOs position constituted a significant barrier to contestability because not all developers were able to commit to contestability at such an early stage. The CER did not accept the DSO's arguments as to practice, liability, and reputation.<sup>554</sup> In the CER's view, the significant costs involved would mean that all parties would have similar incentives to ensure that best practice was followed in the areas of compliance with health and safety standards and planning permission requirements.

## Divergent Views and Moratorium on Grid Access

Resolving the *deep* versus *shallow* cost and contestability issues in favour of new market entrants that included wind developers was merely the tip of the iceberg in the titanic struggle facing wind generated electricity in gaining grid access. Considerable investment in the network was required to make the network fit for the wind purpose, a fact recognised as far back as 1995 by a Government Working Group on *Grid Connection Issues Related to Renewable Energies*, and

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<sup>550</sup>CER (CER /05/049 2005) *ibid*.

<sup>551</sup> European Communities (internal Market in Electricity) Regulations 2009, SI 2009/226.

<sup>552</sup> See: ESB National Grid, *Contestability and Connection Assets* (March 2002); EirGrid, *Contestability of Connection Assets* (16 October 2007) 3.

<sup>553</sup>See: IWEA, 'Response to the Distribution System Operator Proposals for facilitating contestable connections to the distribution electricity network' (2009); and CER (CER/10/056 2010) (n 549).

<sup>554</sup> CER (CER/10/056 2010) (n 549) 8-13.

subsequently by RESG.<sup>555</sup> The investment required would however take time, and aligning the quantum and timing of the investment and network development with the level of activity generated by the Government led incentives for wind, would prove challenging. In 2000, installed wind generation capacity was 69.49 MW; by 2005 it was projected to be 601 MW.<sup>556</sup>

When differences began to emerge as to the level of wind generated electricity the network could accept due to lack of historical investment, developers and their representative bodies, took the not surprising position that the level of acceptance was at the higher end, with IWEA suggesting that the limit was as high as 20%.<sup>557</sup> In contrast, the TSO considered that the then proposed targets for wind penetration were problematic in the context of grid security and reliability, and made a very compelling case in this regard.<sup>558</sup> Notwithstanding the divergent views on limits, there was an accepted position that substantial investment in the electricity network was required, and yet renewable policy did not abate and the slow but steady connection of turbines continued leading the CER in late 2003 to impose a moratorium, at the request of the System Operators, on the issue of new connection offers.<sup>559</sup> As a result, no new connection offers issued between December 2003, and May 2005. Four years earlier the TSO, in its submission on the Government's Green Paper on Sustainable Energy,<sup>560</sup> highlighted the importance of ensuring that power system considerations were considered by policy makers when setting targets for the development of Ireland's wind resource.<sup>561</sup> The TSO set out a very compelling case against greater wind penetration, detailing negative impacts for the environment and new conventional CCGT plant, and the security and reliability of the Transmission System.<sup>562</sup> The TSO recommended that the total installed capacity of wind generation on the system should not exceed 400 MW pending the resolution of various technical issues.<sup>563</sup> The Government's Green Paper on Sustainable Energy had set a target of 500 MW from all renewable sources for the period 2000-2005.<sup>564</sup> Between 1999 and 2003, the TSO continued to make its concerns known.<sup>565</sup> Nevertheless, the policy remained in place and in 2003 the number of applicants seeking wind connections to the network increased significantly. In November 2003, the TSO formally sought approval from the

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<sup>555</sup> RESG (n 97).

<sup>556</sup> See Figure 4 below.

<sup>557</sup> RESG (n 97) 65.

<sup>558</sup> For a discussion of ESB National Grid's concerns see: ESB National Grid, *Report on Wind Capacity Acceptance*, reproduced at: RESG (n 97) Appendix H.

<sup>559</sup> Brian P. Ó Gallachóir, Eamon J. McKeogh, 'Wind Energy and Security of Supply, The Wind Farm Grid Connection Moratorium in Ireland' (2004); Brian P. Ó Gallachóir, 'The Grid Connection Moratorium in Ireland' (Proceedings of the European Wind Energy Conference 2004 November 22-25 London' (2004).

<sup>560</sup> DPE (n 106).

<sup>561</sup> ESB National Grid, *Input to Green Paper on Sustainable Energy* (1 July 1999) 1.

<sup>562</sup> *ibid* 3-4.

<sup>563</sup> *ibid* 4.

<sup>564</sup> DPE (n 106) 6.

<sup>565</sup> ESB National Grid, *Interim Policy on Wind Connections* (28 November 2003) 3-4.

CER of an interim policy to cease wind generation connections to the network until the concerns raised by the TSO were addressed.<sup>566</sup>

**Figure 4: Wind connections (MW) in Republic of Ireland (Situation on 21 November 2003).<sup>567</sup>**

	Transmission (MW)	Distribution (MW)	Total (MW)	Cumulative Total (MW)
<b>Connected</b>	39	127	166	166
<b>Signed Agreements</b>	305	228	534	700
<b>Live Offers</b>	32	43	75	775
<b>Applications in Process</b>	144	279	422	1197
<b>Applications being checked</b>	83	15	98	1295

The TSO argued that imposing a temporary moratorium on wind connections pending resolution of technical issues would not jeopardise Ireland’s ability to meet its 2010 renewable energy target of 13.2% of electricity from renewable sources.<sup>568</sup> The TSO’s list of technical matters that required resolution was lengthy and pending resolution of these issues the TSO requested the CER to immediately direct the System Operators to cease issuing connection offers on wind generation connections.<sup>569</sup> The CER, while acknowledging the TSOs concerns, was also cognisant of the fact that the interim remedial measures proposed by the TSO would have serious implications for wind generators. The CER had to satisfy itself that the measures sought by the TSO were both necessary and proportionate to the threat to system reliability posed by the level of proposed wind generation connections. Reluctant to approve an emergency measure without cautioning the market and, notwithstanding the degree of urgency expressed by the TSO, CER embarked on a public consultation on the issue and on an exceptional basis only agreed to the TSO ceasing to

<sup>566</sup> Letter from Kieran O'Brien, ESB National Grid to Tom Reeves, CER (1 December 2003); ESB National Grid (n 565).

<sup>567</sup> Table taken from ESB National Grid’s paper, *Interim Policy on Wind Connections* (n 565), which accompanies ESB National Grid’s letter to the CER of 1 December 2003. The Table is reproduced at: CER, *Wind Generator Connection Policy, Direction by the Commission for Energy Regulation* (CER/04/245 2004).

<sup>568</sup> ESB National Grid (n 565) 2.

<sup>569</sup> *ibid* 7. Such a direction was necessary as the TSO and DSO each had a statutory duty, subject to limited exceptions, to make connection offers when sought, and consequently could not refuse to make an offer (ERA, s 34(1)).



issue offers on wind connections for the remainder of 2003.<sup>570</sup> CER also allowed the DSO to cease issuing connection offers in respect of the Distribution System for the same period. Subject to industry consultation and achieving progress on policy issues leading to longer term policy proposals, the CER subsequently agreed to extend the moratorium to 31 March 2004.

In the context of the consultation, Sustainable Energy Ireland (SEI) accepted that the questions raised by the TSO were valid but conscious no doubt of the significant negative impact that the TSO proposals might have on the further deployment of wind energy, SEI reminded CER that any decision on the issue must take into account Irish electricity legislation, and the long term electricity requirements arising from Irish Government policy on renewable energy.<sup>571</sup> In this regard, CER was required to give careful consideration to the manner in which the CER reconciled its statutory duties not to discriminate unfairly between holders of, and applicants for, licences and authorisations, and to have regard to the need to promote the use of renewable, sustainable or alternative forms of energy on the one hand, with the requirement to have regard to promoting the continuity, security and quality of electricity supply on the other.<sup>572</sup> SEI also reminded CER that the imminent transposition of the Second Renewable Energy Directive into Irish law, and its requirement that transmission and distribution system operators guarantee the transmission and distribution of renewable electricity.<sup>573</sup>

The CER was not content that the moratorium should continue indefinitely and the TSO and DSO set about bringing forward proposals to deal with the issues raised in the TSO Interim Policy Paper.<sup>574</sup> In dealing with those proposals CER drew a distinction between those things that were of legitimate concern to the TSO, and those that were not; between solutions that were reasonable and necessary, and those that were disproportionate; and between issues that needed to be resolved immediately, and those that could be resolved over time.<sup>575</sup> On 9 July 2004, the CER directed the System Operators pursuant to section 34(1) of the ERA, to recommence the processing of connection offers subject to certain criteria proposed by the TSO, and accepted by the CER being fulfilled.<sup>576</sup>

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<sup>570</sup> Letter from Tom Reeves, Commissioner for Energy Regulation to Kieran J. O'Brien 'Re: ESBNG Proposal to Limit New Wind Connections' (3 December 2003).

<sup>571</sup> SEI, *Submission in Response to CER Consultation on Wind Generation-System Security Issues* (19 December 2003) 5.

<sup>572</sup> *ibid.*

<sup>573</sup> *ibid.*

<sup>574</sup> ESB National Grid (n 565).

<sup>575</sup> CER (CER/04/245 2004) (n 567) 7.

<sup>576</sup> CER (CER/04/245 2004) (n 567).

One criterion proposed by the TSO was that future connection offers to the network would be made on the basis that the output of a wind farm may be constrained for system reasons.<sup>577</sup> The CER considered that this criterion was necessary and proportionate, and in doing so let the genie out of the bottle (albeit unavoidably), on one of the most contentious and complex technical and regulatory issues ever too manifest itself in the Irish electricity market. Despite lengthy consideration and consultation that would follow, this genie would remain at large for some considerable time.<sup>578</sup>

Balancing the competing interests and objectives of policy makers, industry, and the System Operators proved to be a delicate and complex exercise for the CER against a background where there was no precedent for such questioning, examination and balancing of competing interests in the Irish market. In issuing a Direction pursuant to section 34(1) ERA, on the criteria proposed by the TSO for lifting the moratorium, the CER was guided by a number of considerations including: the CER's express statutory functions and duties; the CER's duty to uphold EU obligations such as those set out in the Second Renewable Energy Directive; Government policy in the area of renewable energy; TSO network concerns; and importantly, the views of industry.<sup>579</sup>

CER considered that any obligations or restrictions on wind generators seeking connections should be necessitated by the need to protect system stability and reliability, and any such measures would need to be proportionate to the potential threat posed by a continuation of the projected increase in wind connections.<sup>580</sup> CER expressly ignored the economic impact on conventional generation of increased wind penetration, though in the long run CER accepted that this would need to be addressed.<sup>581</sup>

On 23 December 2004, the moratorium on issuing new offers was lifted.<sup>582</sup> Throughout the period the moratorium was in place, there was a significant build-up of applications for wind generation connections. When the formal moratorium was imposed, the number stood at 1640 MW; by the time it was lifted the number stood at 2494 MW.<sup>583</sup> CER acknowledged that this build up was

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<sup>577</sup> *ibid* 9.

<sup>578</sup> *ibid* 10.

<sup>579</sup> *ibid* 6.

<sup>580</sup> *ibid*.

<sup>581</sup> *ibid* 7.

<sup>582</sup> Letter from Tom Reeves, Chairperson; and Michael Tutty, Commissioner, CER, to Kieran O'Brien, Managing Director, ESB National Grid, re 'Direction on Resuming Connection Offers to Wind Generators' (23 December 2004); and Letter from Tom Reeves, Chairperson and Michael Tutty, Commissioner, CER to John Shine, Executive Director, ESB Networks, re 'Direction on Resuming Connection Offers to Wind Generators' (23 December 2004).

<sup>583</sup> CER, *Background Paper to Direction on Resuming Connection Offers to Wind Generators* (CER/04/380 2004).

triggered in part by the introduction of the moratorium itself.<sup>584</sup> Developers had in effect engaged in a form of *panic buying* ahead of the introduction of the moratorium. The System Operators were directed by the CER to give immediate priority to issuing connection offers to 34 applicants whose applications were deemed complete on 3 December 2003, the date the initial phase of the moratorium was imposed. These 34 applications would, in accordance with CER Directions, be treated as a group for connection processing purposes in line with a new strategic approach to processing of applications by wind developers for connection to the network.

The moratorium and the technical reasons that gave rise to its introduction were a significant test of Ireland's new regulatory framework. All the principal stakeholders were engaged with the issue, and it was the first real test of the new regulatory arrangements on an issue of significance. The System Operators supported by new statutory and licence functions and powers could slow down and ultimately bring to a halt the connection process pending agreement on a way forward that they were satisfied did not compromise network security and reliability. The delicate balancing act performed by the CER ensured that the policy on greater wind penetration would be delivered on, at least in the short to medium term. It was also a victory for industry and their representative bodies. The moratorium was ended in the quickest time possible in the circumstances and CER ensured that all stakeholders had an opportunity to make their views known through the consultation process. If there were a loser, then it was undoubtedly conventional plant owners. An economic consideration of the impact of greater wind penetration on conventional electricity generating plant was deferred. It is also true to say that the speedy resolution of the issue was greatly assisted by the deferral for future consideration of the constraint issue. Following the lifting of the moratorium the flood of accepted connection applications and offers accepted by developers had the effect of driving the development curve upwards at a rate previously not witnessed.

The approach taken by the CER in dealing with the issues raised by the System Operators was the subject of some criticism. Gallachóir and McKeogh, suggested that an alternative method could have been adopted to avoid the introduction of the moratorium. In particular, the technical concerns that gave rise to the moratorium could have been addressed earlier; projects could have been allowed to continue at the risk of the developer; and developments could have been permitted to proceed in geographical areas where the technical issues raised by the System Operators did not arise.<sup>585</sup> It is undoubtedly the case that the technical concerns could have been addressed earlier. However, allowing projects to proceed at the risk of the developer is unlikely to have worked in practice, since institutions providing debt finance, the principal source of

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<sup>584</sup> *ibid* 2.

<sup>585</sup> Brian P. Ó Gallachóir and Eamon J. McKeogh (n 559); and Brian P. Ó Gallachóir (n 559).

funding for many developers, would not have funded projects where there was so much uncertainty on a critical component. It is accepted that there may have been parties in the market such as ESB or other State entities that may have been willing to deploy capital in these circumstances but there appears to be no evidence of this.

According to Ó Gallachóir and McKeogh, the delay caused by the moratorium had the effect of adding significantly to the risks associated with wind farm development in Ireland. Planning permissions lapsed while the moratorium continued and undermined the continued economic viability of some projects. Whilst this was undoubtedly the case for the individual projects effected, the level of development that followed the lifting of the moratorium would suggest that the moratorium did not have a lasting impact and more importantly a framework for future connections emerged. What Ó Gallachóir and McKeogh did correctly identify however was the uncertainty that the level of constraints may have on wind farms into the future.<sup>586</sup>

## Opening the Gates: A Strategic Approach to Allocation of Grid Capacity

Regulating the flood of connection applications that followed the lifting of the moratorium was the next challenge for the CER. A mechanism had been identified to allow the processing, and issuance of grid connection applications to recommence in a limited fashion, but the network constraints remained. Since the lifting of the moratorium, CER has overseen the implementation of two distinct processes for managing connection offers; a Group Processing Approach (GPA); and a Non-Group Processing Approach (NGPA), and both have been very successful in achieving their objectives.<sup>587</sup> The NGPA focussed on small renewable and low-carbon technologies that met certain specified public interest criteria, and allows for the processing of qualifying applications for connection on a separate and chronological basis.<sup>588</sup> The GPA was aimed at larger renewable and conventional technologies.<sup>589</sup> Under this process all renewable generator connections would

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<sup>586</sup> Brian P. Ó Gallachóir and Eamon J. McKeogh (n 559) 4.

<sup>587</sup> CER (CER/16/284 2016) (n 532).

<sup>588</sup> CER, *Treatment of Small, Renewable and Low Cost Generators Outside the Group Processing Approach - Decision Paper* (CER /09/099 2009).

<sup>589</sup> ESB National Grid, ESB Networks, *Group Processing Approach for Renewable Generator Connection Applications: Joint TSO DSO Proposal to CER* (30 September 2004); Áilis Martin, Simon Grimes, Tony Hearne, 'Rapid Integration of Wind Energy in Ireland Group Processing of Connection Applications' (10 May 2007); CER (CER/04/380 2004) (n 583); Brian P. Ó Gallachóir, 'Group Processing Approach for RES-E Connection Application Report to IWEA on Workshop Findings' (2004); CER, *Direction on Resuming Connection Offers to Wind Generators* (CER/04/381 2004); Letter from Tom Reeves, Chairperson and Michael Tutty, Commissioner, CER to Kieran O'Brien, Managing Director, ESB National Grid, re 'Direction on Resuming Connection Offers to Wind Generators' (23 December 2004); Letter from Tom Reeves, Chairperson and Michael Tutty, Commissioner, CER to John Shine, Executive Director, ESB Networks, re 'Direction on Resuming Connection Offers to Wind Generators' (23 December 2004); CER, *DSO's Proposed Standard Pricing Approach for Generators* (CER/05/004 2005); EirGrid, *Quarterly Review of the Irish Electricity Market* (Issue 10, Spring 2005) 4; CER *Group Processing Approach For Renewable Generator Connection Applications-Connection and Pricing Provisions, Proposed Direction to System Operators* (CER/05/010

be processed by the System Operators in a series of sequential batches or gates (a GPA Gate). All applications deemed by the System Operators to be submitted, and complete by a specified date, would be processed together in a single GPA Gate. Then, having regard to the geographic locations of the applications received; and the extent to which connections would interact with each other, the System Operators would draw up a list of sub-groups within a GPA Gate. Members of each sub-group in a GPA Gate would have their applications considered together. Three GPA Gates emerged with sub-groups within each. Following a review of the extent of any network reinforcements that would be required by the TSO, the System Operators would determine the method of connection for the sub-group, and connection offers would be issued to the members of the sub-group. The eligibility criteria for inclusion in each of the three GPA Gates that emerged was specified by CER in the decisions underpinning each Gate.<sup>590</sup> On the philosophy of the GPA approach, the CER has noted the GPA represented ‘the most practical and efficient way of dealing with the huge demand for network capacity from renewable generators.’<sup>591</sup> It is difficult to argue against this.

By late 2016, CER could report that GPA Gate 3 had facilitated the issuance of 6,000 MWs of connection offers to successful applicants; 2000 MW of which were conventional, with the balance of approximately 4000 MW, comprising mostly wind. This outcome has led CER to conclude that: subject to the successful delivery of the DS3 Programme<sup>592</sup> ‘the volume of renewable generation connected, and still to be connected is expected to meet the 2020 renewable electricity target.’<sup>593</sup> Gate 3 was specifically structured with Ireland’s 2020 renewable targets in mind, and based on take-up it would seem that it has been highly successful.<sup>594</sup> The fact that other issues such as: inefficiencies in the planning process (including planning for grid connection assets); delays in the design and construction process for grid connection works inherent in the split ownership-operation transmission model; and lack of financing, may result in some of the projects that have received connection offers not proceeding, and Ireland failing

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2005); Grattan Healy and Others (On behalf of the Ballycadden Group), Letter to David Naughton, CER, 24 February 2005 <<http://www.cer.ie/docs/000071/cer05062.pdf>> accessed 24 April 2014; CER (CER/05/049 2005) (n 549); CER *Criteria for Gate 3 Renewable Generator Offers and Related Matters* (CER/08/260 2008); CER, *Direction on Conventional Offer Issuance Criteria and Matters Related to Gate 3* (CER/09/191 2009); and CER (CER/09/099 2009) (n 588).

<sup>590</sup>CER, *Criteria for Gate 2 Renewable Generators Connection Offers* (CER/06/071 2006); CER, *Gate 2 Criteria- Final Direction to System Operators* (CER/06/112 2006); CER, *Gate 2 Criteria-Changes Made, Comments Received and Commission Response to Proposed Direction* (CER/06/113 2006); CER (CER/08/260 2008) (n 589); and CER (CER/09/191 2009) (n 589).

<sup>591</sup> CER (CER/05/049 2005) (n 549).

<sup>592</sup> See below at pp 152-53.

<sup>593</sup> CER, (CER/16/284 2016) (n 532) 1-3. In addition, as at the date of the CER *Decision Paper* in October 2016, the CER noted that the System Operators had received a further 15,000 MW of applications for renewable connections (wind and solar generation), and that the System Operators had indicated that this level of additional renewable connections could not be accommodated.

<sup>594</sup> CER (CER/16/284 2016) (n 587) 14.

to meet its 2020 RES-E Target, is a separate matter, and should not detract from the success of the GPA process, and GPA Gate 3 in particular.<sup>595</sup>

Leahy in his detailed analysis of the GPA, and GPA Gate 3 concluded that the GPA is ‘a fair and transparent system that will have a positive effect on energy costs and Ireland’s security of energy supply’. Whilst there are shortcomings in the GPA (many of which are highlighted by Leahy), it is difficult to see how else the rush for capacity could be managed in the circumstances. GPA Gate 3 has closed leaving the future of connection policy somewhat uncertain. One of CER’s most recent consultation initiatives has signalled a new direction for connection policy, reflective of a shift in policy more generally, and a world without targets to inform regulatory decision making.<sup>596</sup>

Whilst the GPA process was employed initially to manage a dearth of applications for renewable and principally wind connections, and placed considerable attention on fairness, and transparency as between those applicants, the position and treatment of conventional developers during this period merits some consideration in this context, not least because of the impact large capacity conventional connections can have on the connection of renewables. The CER’s preferment of large scale conventional generation ahead of renewable generation has on more than one occasion been questioned; the suggestion being that any such preferment was contrary to the requirements of the Second Renewable Energy Directive, and the requirement for renewable energy to be afforded priority, or guaranteed access to the network.<sup>597</sup> For the most part the CER has justified all decisions that could lead to a subordination of wind to conventional, on the basis of the CER’s duties in respect of security of supply. When a concern emerged early in the GPA process that a CER proposal would lead to the preferment of conventional generation, and allow it to connect ahead of wind the CER retorted by observing that:

[T]he Commission has clear duties under Regulation 28 of the new Statutory Instrument, SI 60 of 2005, for security of electricity supply. To carry out this duty in particular, it is considered necessary to retain some level of discretion in relation to the treatment of conventional generating plant, when such discretion is exercised for the wider public interest, such as security of supply.<sup>598</sup>

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<sup>595</sup> For a discussion of issues that may undermine the success of Gate 3 see: CER, *Review of Connection Offer Policy: Initial Thinking and Proposed Transitional Arrangements* (CER/15/284 2015).

<sup>596</sup> *ibid* 13-14. See also: DCCA (n 3) 45.

<sup>597</sup> See for example: CER (CER/09/191 2009) (n 589) 16.

<sup>598</sup> CER (CER/05/049 2005) (n 549).

When subsequently CER commenced a consultation process on GPA Gate 2, aspects of what the CER proposed, including a proposal that wind connections be capped, were not well received by the wind industry, and it was suggested that conventional applications were being allowed to leap frog renewable applications.<sup>599</sup> The difficulty the CER faced was that an application had been made in June 2005 by ESB to develop a 425 MW CCGT plant at Aghada. ESB's application did not fall within GPA, though the CER had directed the System Operators to consult with the CER should they receive any applications from conventional generators that could impact on wind connections, and CER reserved the right to make a direction to the System Operators in respect of such application.<sup>600</sup>

Having regard to its statutory functions, CER found that the ESB proposal could not be allowed to proceed to the disadvantage of GPA renewable generators on the basis of a security of supply justification because the TSO data had not highlighted any such requirement.<sup>601</sup> Likewise, the proposal could not be sanctioned on the basis of promoting competition due to ESB's dominance in generation, and other sub-markets.<sup>602</sup> CER considered that it would have been discriminatory if ESB's proposal were sanctioned ahead of, and to the disadvantage of, renewable generators in the GPA.<sup>603</sup> On the issue of CER's duty to promote renewables, CER came to the rather obvious conclusion that giving ESB's proposal priority would not advance that duty.<sup>604</sup> Consequently, CER directed the TSO that the ESB application in respect of Aghada should not be given any priority over renewable applications.<sup>605</sup> Absent an independent regulator, it is difficult to see how this decision to prioritise the connection of renewables ahead of the plans of the incumbent State owned dominant monopoly would have been made even if there was a firm renewables policy in place.

This however was not the conclusion of the matter as two further conventional applications<sup>606</sup> were referred by the TSO to CER in early 2006 giving CER reason again to return to the ERA, and its statutory functions. Since the CER's decision on ESB's Aghada proposal, circumstances in the market had altered and CER had available to it the most recent Generation Adequacy Report

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<sup>599</sup> CER, *Criteria for Gate 2 Renewable Generator Connection Offers* (CER/05/225 2005). For a summary of the responses see: CER (CER/06/071 2006) (n 590) Appendix 1.

<sup>600</sup> CER (CER/06/112 2006) (n 590) 14.

<sup>601</sup> CER (CER/06/071 2006) (n 590) 29.

<sup>602</sup> *ibid.*

<sup>603</sup> *ibid.*

<sup>604</sup> *ibid.*

<sup>605</sup> A copy of CER's letter of 7 July 2005 from Denis Cagney, Director of Networks, CER, to Andrew Cook, Head of Grid, Commercial and Development, ESB National Grid, which sets out the CER's reasoning behind its Direction is reproduced at: CER (CER/06/071 2006) (n 590) Appendix 3.

<sup>606</sup> Mountlawn Ltd (454 MW CCGT); and State owned BGE (445 MW CCGT).

(GAR) prepared by the TSO for the period 2006-2012.<sup>607</sup> Published after the CER's decision on Aghada, the GAR noted that new conventional fully dispatchable plant was required for a number of reasons, and most notably because more conventional generation was required by way of back-up for the increasing level of intermittent wind generation.<sup>608</sup> Without making any decision on the outstanding applications, CER directed the TSO to proceed on the assumption that an additional 800 MW of conventional capacity would be required, and this should be taken into account in the Gate 2 connections process. CER however did note that the processing by the TSO of connection applications from conventional developers' independent of ESB would satisfy the CER's competition objectives in the generation market. Construction of a plant by ESB could only be contemplated in circumstances where ESB offered 'offsetting measures ... which could be reasonably seen as contributing to the objective of promoting competition.'<sup>609</sup> This latter wording may have sown the seeds for the future development of Aghada.

CER also relied on studies indicating that a new conventional plant in the south west would not, cause significant constraining off, of wind and would not delay the processing of GPA Gate 2 connection offers.<sup>610</sup> In a subsequent direction, CER directed the TSO to proceed with a connection offer to a new market entrant for a 445 MW CCGT plant in Co. Louth. The CER based this decision on the enhancement of competition, and the fact that the CCGT plant would not have a disproportionate impact on renewable energy.<sup>611</sup> In these decisions we see the CER weighing, and balancing its statutory duties concerning security of supply, competition, protection of the environment, and the promotion of renewables. In a somewhat curious decision aimed at reducing ESB's share of the electricity generation market, CER subsequently allowed ESB, in return for agreeing to divest itself of (amongst other things), certain aged power generation assets and sites, to proceed with the Aghada development.<sup>612</sup> It is difficult to understand why an independent CER permitted such an arrangement and allowed itself to be a party to it. The CER subsequently came to the following conclusion about ESB's continued

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<sup>607</sup> EirGrid, *Generation Adequacy Report, Transmission System Operator Ireland 2006-2012* (November 2005).

<sup>608</sup> CER (CER/06/071 2006) (n 590) 12-14; and CER (CER/06/112 2006) (n 600) 15.

<sup>609</sup> *ibid* 16-17.

<sup>610</sup> *ibid* 17.

<sup>611</sup> See: CER (CER /08/260 2008) (n 589) 50.

<sup>612</sup> In 2006 CER entered into an agreement with ESB aimed at reducing ESB's market share in the Irish electricity generation market (See: Agreement Between CER and ESB (27 April 2007) <<http://www.cer.ie/docs/000919/cer07056.pdf>> accessed 16 January 2017; CER, 'Announcement on CER-ESB Detailed Agreement on Asset Strategy' (1 May 2007) <<http://www.cer.ie/docs/000919/cer07055.pdf>> accessed 16 January 2017; and CER, *Announcement on CER-ESB Detailed Agreement on Asset Strategy* (29 June 2007) <<http://www.cer.ie/docs/000856/cer07093.pdf>> accessed 16 January 2017). For a discussion of the divestment strategy and market power see: Paul K. Gorecki, 'Ensuring Compatibility of the All-Island Electricity System with the Target Model: Fitting a square peg into a round hole?' (2013) 52 *Energy Policy* 677.



dominance in the generation market without any acknowledgment of the role it had played in allowing ESB to proceed with the development of a 430 MW CCGT plant at Aghada:

The following [graph] shows the relatively concentrated nature of the SEM that still exists, despite the entry of new generation since SEM go-live in November 2007. ESB still has a relatively high generation market share—for 2013 as a whole ESB had circa 46% of the generation market and this trend has broadly continued in 2014. The continuing concentrated nature of the SEM necessitates (SIC) the need for regulatory market power mitigation measures, in the absence of a structural solution to significantly reduce ESB's market share.<sup>613</sup>

It is clear that CER considered the matter of divestment as one of policy, and not regulation in the interests of competition, or any other interest it is tasked with furthering under the ERA when it noted:

The Irish Government's White Paper on energy, which sets out Ireland's energy policy framework to 2020, provides for the divestment and re-powering of certain ESB generating plant. This is in order to aid security of supply, the integration of renewable generation, liberalisation of the electricity market and the promotion of competition.<sup>614</sup>

The CER's decision to allow the ESB proposal to proceed is difficult to rationalise alongside the listed statutory and policy imperatives.<sup>615</sup> CER rather curiously, and in contrast to its clear statements about the importance of creating a competitive market, seems to have considered the divestment as a 'necessary "*quid pro quo*" to allowing ESB build a new plant in Aghada.'<sup>616</sup> Surely a policy and regulatory approach that mandated unconditional divestment would have been preferable in the circumstances though as is submitted in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), the Government's approach to securing concessions from ESB has very often been met with a requirement to make a concession in return. In an interesting epilogue to this saga, in March 2007, CER agreed with NIAUR's predecessor OFREG, that CER would not, subject to security of supply considerations, authorise the construction by ESB of any new conventional power stations after Aghada with a commercial

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<sup>613</sup> CER, *CER Response to Government Consultation on Green Paper for Energy Policy in Ireland* (2014) 12 <<http://www.cer.ie/docs/000988/CER14556%20CER%20Response%20to%20Government%20Energy%20Green%20Paper%20Consultation%20-%20FINAL.pdf>> accessed 16 January 2017.

<sup>614</sup> CER (CER /09/191 2009) (n 589) 43.

<sup>615</sup> In addition to a connection offer from the TSO, the proposal to build would have required an Authorisation to Construct a Generating Station from CER pursuant to ERA, s 16.

<sup>616</sup> CER (CER /09/191 2009) (n 589) 43.

operations date before 2013.<sup>617</sup> More recently, in the context of the work of the Department of Finance sponsored Review Group on State Assets and Liabilities, CER Commissioner Dermot Nolan (on behalf of CER), noted that:

Despite the level of competition achieved, ESB is still the major player in the market and CER (together with our northern counterpart NIAUR) have continued to impose special conditions on them to ensure they do not abuse the market power.<sup>618</sup>

The Commissioner cautioned against a sale of ESB assets to a single buyer, and especially so if the sale was to an existing generator in the market, as it would result in a transition from a State owned enterprise (ESB) with market power, to a privately owned enterprise having the same market power, concluding that the ‘exercise of market power is generally harmful to consumers.’ While the CER has controlled the use of ESB’s market power up to now, it could be more difficult to do so for a private company.<sup>619</sup> The CER’s preference was for a sale of the assets in lots to new market entrants, or a gradual disposal of assets to a party not already in the market. The Commissioner noted that:

The CER understands that potential fears about lack of competition can sometimes be exaggerated, but a rough “rule of thumb” that, as a result of asset disposals, no firm would have more than 30% of the total all-island generation market might be reasonable.<sup>620</sup>

The Commissioner’s findings are somewhat at odds with ESRI who have highlighted some difficulties with breaking up ESB’s generation assets.<sup>621</sup> ESRI agrees that converting a public generation undertaking with market power into a private generation undertaking with the same dominant influence would make it difficult to regulate as there ‘is no way that the CER could force divestiture on companies, such as EDF in GB, who have very large portfolios of generation relative to the size of the Irish market.’<sup>622</sup> This misses the point because as matters stand CER have no power to force ESB divestiture and divestment has only been achieved with the agreement of ESB, its trade unions, ESOT and the Energy Minister. ESRI also consider that the desire of generator undertakings to hold a large portfolio of plant may be as much about creating

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<sup>617</sup> Addendum dated 22 March 2007 to the Memorandum of Understanding dated 23 August 2004 and made between CER and OFREG.

<sup>618</sup> Letter from Dermot Nolan, Commissioner, CER to Colm McCarthy, Review Group on State Assets and Liabilities, Department of Finance (23 September 2010).

<sup>619</sup> *ibid.*

<sup>620</sup> *ibid.*

<sup>621</sup> Fitzgerald and Valeri (n 527) 51-52.

<sup>622</sup> *ibid.*

economies of scale as it is about seeking to exercise market power and ‘Forcing all players to be companies with a single generator would, as a result, raise the operating costs to the system.’<sup>623</sup> Whilst CER was not seeking such an extreme outcome (the 30% market share advocated by CER in an Irish context would equate to a number of generating units), when one considers that CER has, through its continued licensing of new ESB conventional and renewable generating capacity, assisted ESB in retaining a market share well above 30%, the Commissioner’s position is somewhat at odds with how matters have evolved.<sup>624</sup> This does not mean that CER has not sought to control ESB’s market power. In SEM, market power is controlled through a myriad of regulatory instruments including, market bidding principles, the use of directed contracts, and a dedicated Market Monitoring Unit within SEMC. In the context of the transition from SEM to I-SEM which is discussed below, ESRI have cautioned that if the issue of market power is ‘not effectively addressed in I-SEM, the new market is likely to deliver higher prices than the current wholesale market.’<sup>625</sup> The debate is thus likely to continue.<sup>626</sup>

When a proposed direction for GPA Gate 3 Connection Offers was published in 2008, the CER, mindful of the then Government’s policy target of 33% of electricity consumption from renewable generation, set a capacity limit of 3,000 MW for the gate.<sup>627</sup> In a further proposed direction later that year the CER revised upwards the gate capacity limit to 3,900 MW to reflect the fact that the Government had, in the interim increased the RES-E Target for 2020 from 33% to 40%.<sup>628</sup> In its final Direction<sup>629</sup> on the matter CER directed the System Operators to issue connection offers to renewable generators up to the specified capacity of 3,900 MW and in

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<sup>623</sup> *ibid* 52.

<sup>624</sup> In addition to the new ESB conventional generation plant at Aghada (435 MW-Commissioned 2010); Dublin Bay Power/Synergen (410 MW-Commissioned 2002); Lough Ree (100 MW-Commissioned 2004); West Offaly (135 MW-Commissioned 2004); ESB has also developed a wind portfolio through its subsidiary Hibernia Wind Limited. According to ESB’s Wind Strategy, by 2020 ESB will be ‘delivering one-third of its electricity from renewable generation and will achieve carbon net-zero by 2035. Wind energy has been the driving force behind this expansion, through the development of wind farms in Ireland and the United Kingdom.’ <<https://www.esb.ie/our-businesses/generation-energy-trading-new/wind-energy/wind-farm-strategy>> accessed 28 February 2017. ESB also holds renewable and conventional generation assets in Northern Ireland. See: ESB, ‘Generation Asset Map’<<https://www.esb.ie/our-businesses/generation-energy-trading-new/generation-asset-map>> accessed 10 June 2017.

<sup>625</sup> *ibid* (n 527) 52.

<sup>626</sup> In 2016 ESB generated 47% of SEM electricity (See: ESB (n 508)). In 2011 ESB had a generation capacity share of 34.4% and a generation share of 43.3% (See: Darragh Walsh and Laura Malaguzzi Valeri, *Gaming in the Irish Single Electricity Market and Potential Effects on Wholesale Prices* (2014) ESRI Working Paper No. 488, 20. For a discussion of market power concerns and the impact of independent wind and interconnection on concentrations of thermal generation capacity in Ireland see: Valeria Di Cosmo and Muireann Á. Lynch, *Competition and the Single Electricity Market: Which Lessons for Ireland?* (2015) ESRI Working Paper No. 497, 21.

<sup>627</sup> CER, *Criteria for Gate 3 Renewable Generator Connection Offers* (CER /08/118 2008).

<sup>628</sup> CER, *Criteria for Gate 3 Renewable Generator Connection Offers and Related Matters-Proposed Direction to the System Operators* (CER /08/226 2008).

<sup>629</sup> *ibid*.

accordance with Grid 25, the TSO's strategic plan for the development of the Transmission System.<sup>630</sup> In this context, CER noted that a significant number of conventional applications had been received by the System Operators.<sup>631</sup> Whilst acknowledging the importance of these connections from a competition perspective, CER was mindful of the impact that granting connection offers to such conventional plant would have on wind generation, and embarked on a process that would determine and limit the capacity of conventional generation to be connected in the period to 2025.<sup>632</sup> In a series of papers leading up to the publication of a final direction in December 2009, CER engaged in a detailed consultation as to the criteria that would apply in determining the conventional generation applications that would receive a connection offer in parallel with the Gate 3 renewable connection offers.<sup>633</sup> CER ultimately placed a capacity limit of 3,400 MW on conventional generation; a limit which was set by reference to the number of conventional generation projects required to meet security of supply requirements in the period to 2025. Further, a 'small steps' approach would be adopted for connecting this conventional generation to avoid 'locking in' the grid to a particular technology in that period, and to allow for an assessment of the position as the take-up rates for Gate 3 wind connection offers became more apparent.<sup>634</sup> Explaining its decision to limit conventional capacity to the level required to meet the public interest criteria of security of supply CER noted that:

Processing all of the circa 6,000 MW of conventional connection applications received by the date of the Gate 3 direction for offer issuance would be a cause for concern because: It would mean that more conventional applicants than are necessary to provide public interest benefits, such as the country's security of supply, would be issued with an offer ahead of renewable applicants who applied for connection beforehand and which are not in Gate 3. It could be argued that this would be unfairly discriminatory to these prior renewable applicants .....<sup>635</sup>

In 2011, the System Operators launched their DS3 Programme aimed at resolving wind related network issues. Its legislative basis can be found in Article 16(2) of the Second Renewable Energy Directive which requires Member States to ensure that 'appropriate grid and market-related operational measures are taken in order to minimise the curtailment of electricity produced from renewable sources'<sup>636</sup> and that System Operators report to regulatory authorities on measures

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<sup>630</sup> EirGrid (n 131).

<sup>631</sup> CER (CER /08/260 2008) (n 611).

<sup>632</sup> *ibid.*

<sup>633</sup> See: CER (CER /09/191 2009) (n 589).

<sup>634</sup> *ibid.* 4.

<sup>635</sup> *ibid.* 33.

<sup>636</sup> art 16(2)(c). See also: European Union (Renewable Energy) Regulations 2014, SI 2014/483, reg 4(3).

taken to curtail renewable energy in the interests of grid security and to highlight which ‘corrective measures’ they propose to implement to prevent inappropriate curtailments.<sup>637</sup> DS3 was preceded by a series of studies that highlighted that increased wind penetration was conditional on a parallel delivery of grid infrastructure.<sup>638</sup> The focus of the DS3 Programme is thus to ensure that the network can operate securely against a background of increased penetration of non-synchronous renewable generation, and it is thus considered to be a fundamental element in Ireland and Northern Ireland achieving 2020 renewable energy targets.<sup>639</sup> SEMC plays an important oversight role in relation to the DS3 Programme.<sup>640</sup>

## The Emergence of a Market for Wind

The ERA heralded the commencement of the gradual erosion of ESB’s monopoly in the supply of electricity in the State which had its origins in the Electricity (Supply) Act 1927. Prior to the introduction of the SEM in 2007, transitional trading arrangements were put in place pursuant to a Ministerial Policy Direction issued under section 9(1)(a) ERA. This market was bilateral in nature and incorporated a mechanism that allowed participants to trade electricity and balance their uncontracted electricity requirements with ESB Power Generation (ESBPG). The key roles of market operator, system operator, and settlement administrator were performed by ESB NG, a division of ESB. One of the key features of the early days of this market was an absence of independent generation (renewable or otherwise), as new market entrants were slow to enter the market. This meant that suppliers only had access to ESB generated electricity. As discussed at chapter 4 (*Financing the Winds of Change-Irish Financial Support Schemes*), renewable generators entering the market under the AER Programmes were required to enter PPAs with ESB, and so ESB became the market for their electrical output. With a view to creating competition in the electricity supply market, and to facilitate the entry of new suppliers CER, commencing in 2001, held several Virtual IPP Capacity Auctions (VIPPs) pursuant to which ESB generated power was made available to new independent suppliers. Suppliers successful in the auction were able to use the ESB generation capacity they had secured to supply eligible customers, and thus get experience of the supply market, and build a customer base. If the

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<sup>637</sup> art 16(2)(c). See also: European Union (Renewable Energy) Regulations 2014, SI 2014/483, reg 4(4).

<sup>638</sup> See: DCENR and DETI, *All Island Grid Study* (January 2008); and updated the following year (see: Ecofys, *All Island Renewable Grid Study Updated to Include Demand Side Management* (March 2009)<[http://www.ecofys.com/files/files/dsm\\_aigs\\_final\\_vs1031march09\[1\].pdf](http://www.ecofys.com/files/files/dsm_aigs_final_vs1031march09[1].pdf)> accessed 22 September 2017; EirGrid (n 131); EirGrid and SONI, *All Island TSO Facilitation of Renewable Studies* (2009); and EirGrid and SONI, *Ensuring a Secure, Reliable and Efficient Power System in a Changing Environment* (2011).

<sup>639</sup> EirGrid and SONI, *Delivering a Secure Sustainable Electricity System (DS3)-Programme Overview* (2015) 2.

<sup>640</sup> See: SEMC, *DS3 System Services-Pöyry Paper on Procurement Options-SEM Committee Cover Note* (SEM-14-007 2014).

purpose of VIPP was to encourage new market entrants in the supply sector, then one curious aspect of the process requires highlighting. As stated earlier in this thesis, CER permitted ESB to establish a new ‘independent’ supply business known as ESB Independent Energy (ESBIE). ESBIE was allowed to participate in, and was successful in, the VIPP auctions, including a Green VIPP.<sup>641</sup> So whilst VIPP played an important role in opening the door for independent suppliers (including green suppliers<sup>642</sup>), to enter the Irish market, the approach facilitated, and managed by CER once again failed to exclude the dominant influence of ESB, leading OECD to note (when commenting on the VIPP measure as a CER tool for controlling the behaviour of ESB) that ‘23 per cent of the users that have switched have moved to the VIPP owned by the ESB, so that only a discount is effectively involved.’<sup>643</sup> There is also evidence that financial institutions providing debt in the sector were against ESB’s inclusion in the VIPP process as it served to further ESB’s dominance.<sup>644</sup>

The establishment of ESBIE needs to be considered in the broader context of what was occurring at that time. In the period leading up to the commencement of liberalisation in 2000, ESB, the sole licensed supplier of electricity in the State, concerned itself with putting in place contractual arrangements to tie large customers to the monopoly following liberalisation, and make it more difficult for new market entrants to secure a foothold in the market.<sup>645</sup> That anti-competitive initiative was thwarted following intervention by the Competition Authority. According to OECD, the Competition Authority had received a complaint concerning a clause ESB had inserted in supply contracts with larger customers.<sup>646</sup> The clause required the customer to give ESB details of any new offer it received (apart from the supplier’s name), and give ESB an opportunity to adjust its pricing. The customer could only switch away from ESB, if ESB failed to match, or beat the lower price and in that instance the customer had to give ESB 6 months’ notice of termination.

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<sup>641</sup> See: CER and NCB, ‘Issues Facing Those Considering Investing in the Irish Electricity Market-A Report by NCB Corporate Finance to the Commission for Energy Regulation’ 26 <<http://www.cer.ie/docs/000597/cer0249.pdf>> accessed 7 February 2017; and OECD, *Regulatory Reform in Ireland, Regulatory Reform in Electricity, Gas, Pharmacies and Legal Services* (2001) 17. The successful bidders in a ‘Green’ VIPP auction held on 6 October 2000 were ePower Limited (a privately owned new market entrant); and ESB Independent Energy (a member of the State owned ESB Group). ePower abandoned the Irish market 18 months after it commenced trading, citing the challenges of competing in the market as the reason. See: Arthur Beesley, ‘O’Brien’s ePower to Close in October after Losses of 6m’ *The Irish Times* (Dublin, 2 August 2001).

<sup>642</sup> See for example: CER, *Invitation to Bid in the Green VIPP 2006/2007 Auction* (29 May 2006) <<http://www.cer.ie/docs/000363/cer06099.pdf>> accessed 7 February 2017.

<sup>643</sup> OECD, *Economic Surveys, Ireland 2003* (27 May 2003).

<sup>644</sup> *ibid* CER and NCB (n 641) 27.

<sup>645</sup> *ibid*.

<sup>646</sup> Competition Authority, *Competition Authority Annual Report* (1998) 16-17.

ESB ultimately agreed to delete the clause and allow a customer to terminate on giving 3 months' notice.<sup>647</sup>

It would however be a mistake to focus entirely on ESB's dominant position in the market at this time without also understanding that ESB, a State-owned and controlled enterprise, was an instrument of Irish government policy. So, while EU legislation was mandating competition in the generation and supply of electricity, and the parliamentary draughtsman and the Oireachtas were actively engaged with putting a legislative framework in place to facilitate this, ESB, with the express consent of the State, its shareholder, was actively engaged in building new generation capacity, and establishing an 'independent' wholly owned electricity supply business to sit alongside, and compete under the powerful ESB brand with new market entrants. All these arrangements were of course subject to passive, if not actual, oversight by the Competition Authority, the CER, and EU authorities, and proceeded on that basis, but that does not erase or reconcile the obvious contradiction between what EU law and policy was seeking to achieve, and what the Irish State was doing in practice. The reality of this situation is perhaps best summarised by Gorecki when he notes that, 'there is evidence that when the State retains public control in a sector that regulatory outcomes favour the incumbent.'<sup>648</sup>

The position of ESBIE in the new market, and its arrangement with the newly built Synergen CCGT plant, was also a cause for concern for new market entrants.<sup>649</sup> The Minister had allowed ESB to proceed, in conjunction with Statoil, with the construction of a new 400 MW CCGT plant near Dublin. The justification for allowing ESB and its partner to proceed was a concern over security of supply,<sup>650</sup> but this concern could equally have been met by running an international competition inviting International Power Producers (IPPs) to construct the required plant. It was reported that the EU ultimately allowed the project to proceed on the basis that the output would be made available to independent suppliers.<sup>651</sup> Amongst the arrangements entered into by the plant was a contract with ESBIE to purchase output from the plant.

The transitional arrangements outlined above as well as the VIPP auction process continued until the introduction of SEM in 2007. The single wholesale electricity market for the island of Ireland (or SEM as it has come to be known), has its origins in a Memorandum of Understanding (MOU)

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<sup>647</sup> OECD, *Regulatory Reform in Ireland, Regulatory Reform in Electricity, Gas, Pharmacies, and Legal Services* (2001) 15.

<sup>648</sup> Gorecki (n 504) 185.

<sup>649</sup> CER and NCB (n 641) 29-30.

<sup>650</sup> *ibid* 29.

<sup>651</sup> *ibid*; and Commission, 'Commission Clears Irish Synergen Venture between ESB and Statoil following Strict Commitments' (Brussels, 31 May 2002) <[http://europa.eu/rapid/press-release\\_IP-02-792\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-02-792_en.htm?locale=en)> accessed 7 February 2017.

entered into between the CER and NIAUR in 2004.<sup>652</sup> In the memorandum the parties, in addition to a commitment to co-operate in the establishment of a single wholesale electricity market for the island of Ireland, also committed to ‘co-operating in developing a consistent market approach to the development of renewable energy sources...’<sup>653</sup> SEM Go-Live occurred on 1 November 2007, and since that date, and subject to a *de-minimis* exception, all electricity (green or otherwise), generated and supplied must be traded through the new wholesale market.<sup>654</sup> While the SEM High Level Design (SEM HLD) that followed the MOU, afforded special treatment to renewable generation, defining the extent of that special treatment beyond the general principles elucidated would prove to be a complex and protracted endeavour that would take several years. The key principle applicable to wind in the SEM HLD re-affirmed wind’s priority dispatch status obligations at law.<sup>655</sup>

## Wind in the SEM-Tying Down the Future

The advent of the SEM, and the new All Island regulatory arrangement for the new market, heralded a noticeable shift in regulatory emphasis in the treatment of wind generation. If in the period leading up to the establishment of SEM, the regulatory effort was concentrated on securing grid access for wind, and the position of wind generation relative to conventional generation; in the new world order of the SEM we see a regulator that is, on the face of it at least, much more focussed on the value and cost of wind infrastructure to the electricity consumer. We also see a regulator that is noticeably less decisive, and perhaps less confident, in the face of a wind industry that can quote chapter and verse from government policy documents and EU Directives that confirm not only that having ever more wind generation in the market is desirable, it is also a legal obligation. Amongst the objectives specified by the RAs for the design of the SEM was a requirement that a market could not be designed specifically around renewable electricity production but that the selected market design should facilitate the participation of renewable energy generation.<sup>656</sup>

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<sup>652</sup> CER and NIAUR, Memorandum of Understanding in relation to the All Island Electricity Market (23 August 2004) <<http://www.cer.ie/docs/000433/cer04275.pdf>> accessed 7 February 2017. For the legislative basis in Ireland see: Energy Regulation (Amendment) (Single) Electricity Market) Act 2007; and Electricity Regulation Act 1999 (Single Electricity Market) Regulations 2007, SI 2007/406.

<sup>653</sup> CER and NIAUR (n 652) [14].

<sup>654</sup> Generators with an MEC of less than 10 MW have an option not to participate in SEM.

<sup>655</sup> The RAs concluded that the *priority dispatch* called for in First Renewable Energy Directive, art 7 should be interpreted as meaning that there would be no impediment to renewable generators exporting their electrical output save for reasons of system security and stability.

<sup>656</sup> For a discussion of the ‘Evolutionary and Revolutionary Options’ surrounding the move from SEM to ISEM see: SEMC, *Proposals for the Implementation of the European Target Model for the Single Electricity Market-Consultation Paper* (SEM-12-004 2012).



SEMC notably emphasised that in designing the new market it was important not to ‘tie down the future’ but the reality is that the future had already been tied down by a domestic target mandating 40% of electricity from renewable sources by 2020 in support of the EU’s 16% binding target. It is perhaps for this reason that the Socratic questioning that is so characteristic of SEMC’s lengthy and complex *Wind in The SEM* consultation and decision-making process yielded little more than the ire of the wind industry, endorsements of the *status quo*, and decisions that had to be withdrawn soon after arriving in the wind industry’s collective inbox and recast with greater deference to wind policy.

Whether this alteration in approach is reflective of the fact that CER was now regulating in conjunction with NIAUR through SEMC, or whether it is because an independent TSO had finally emerged from ESB in 2006 is difficult to tell. Certainly, in the world post-SEM Go-Live there is evidence of much greater regulatory and market confidence in the TSO as is evident from (amongst other things), SEMC reliance on the workings and reports of the TSO in its decision making. It is also true that the lifting of the grid connection moratorium, and imposition of the gate process for wind connections had resulted in a flood of grid applications and new connections signalling a strong prospect that a significant level of new connected wind generation was about to arrive in the market. There was now a belief that wind, with all its intermittency and variability, would soon secure a significant market share, and while there was still a need to prefer wind, it also needed to be regulated. If, as it appears, the wind industry had become accustomed to the CER’s supportive approach in the period leading up to SEM Go-Live, what was to follow was undoubtedly a surprise. The difficulty for CER and by extension SEMC, was that the freedom to regulate was restricted by a policy and legal regime that mandated the preferment of onshore wind seemingly at any cost. Many of the lengthy consultation documents in the *Wind in the SEM* suite therefore serve as little more than evidence of regulatory oversight and as an educational tool as to the arguments for and against, different regulatory options and positions.

To reflect policy, and the requirements of the Second Renewable Energy Directive, the pre-cursor to the detailed SEM rules (the SEM HLD), afforded special treatment to renewable generation in the new market.<sup>657</sup> Notwithstanding this, defining and refining the extent of that special treatment beyond the general principles elucidated in the SEM HLD would prove to be a complex, protracted, and at times adversarial endeavour that would, for many issues, take several years to conclude. Indeed, resolution of some of the issues did not occur before the announcement that SEM itself would need to be re-designed.

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<sup>657</sup> CER and NIAER, *Single Electricity Market (SEM)-Proposed High Level Design* (AIP SEM 06/05 2006) 47.

Not long after the establishment of SEM, it was indicated that the detailed rules that had been included in the new SEM Trading and Settlement Code (SEM TSC) were to be subjected to regulatory scrutiny. The wind industry was surprised with the suddenness of this; CER had, if not held the pen on the drafting of the SEM TSC months earlier, approved of the document, and was now seeking to reopen what the wind lobby felt were the settled fundamentals of the new market. Early in 2008 the CER, in conjunction with NIAUR, and acting through the auspices of the SEMC, embarked on what, at that point at least, would be the longest running and perhaps most controversial and complex consultations since the establishment of the CER. The consultation commenced with a lengthy, and technically complex Discussion Paper, the stated objective of which was the promotion of discussion around certain difficulties arising from the increasing levels of wind generation being deployed across the island of Ireland, and potential solutions to these issues.<sup>658</sup>

The Discussion Paper did promote discussion, though perhaps not of the kind the RAs had in mind. Respondents to the paper accused the RAs of ‘negative bias against wind’ and of ‘undue focus’ on wind generation within the paper, the latter being a somewhat curious observation given the title of the Discussion Paper.<sup>659</sup> Other respondents expressed the view that aspects of the Discussion Paper were ‘demonstrably unbalanced and discriminatory’ and likely to lead to ‘decisions that unduly discriminate against wind.’<sup>660</sup> The reason for this perhaps is that the Discussion Paper for the first time signalled a clear willingness on the part of the regulator to raise difficult, but nevertheless legitimate, questions about the cost of accommodating a large portfolio of wind generation in the market. The wind industry had become accustomed to the CER advancing the position of wind through its decisions and directions on grid access but now, in the context of market access and participation, the CER, in conjunction with NIAUR, were posing difficult questions about the cost, efficiency and unintended consequences of wind. These questions were not intended to be rhetorical reveries, rather they called for an active response from the market and this was forthcoming. The RAs for their part acknowledged the concern of the industry and sought to appease and to move forward with the process.<sup>661</sup>

The RAs were also very keen to distance themselves from any suggestion that the Discussion Paper was in any way ‘pre-emptive of the outcome of the consultation process.’<sup>662</sup> Yet, while this is undoubtedly the case, the tone of the Discussion Paper and some of the papers that followed was both questioning and somewhat argumentative, and this perhaps also gave rise to a sense

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<sup>658</sup> SEMC (SEM-08-002 2008) (n 525).

<sup>659</sup> *ibid* 16-17.

<sup>660</sup> *ibid*.

<sup>661</sup> *ibid*.

<sup>662</sup> *ibid* 18.

that the regulatory environment for wind was about to become less favourable. Thus, while SEMC was willing to acknowledge that market design could not be blind to Ireland's 2020 renewable energy consumption targets, the regulators could not 'blindly' pursue the renewable consumption objective when designing or revising market rules.<sup>663</sup> Other policy objectives such as efficiency, cost minimisation to end customers, fairness to all market participants, stability and long term security of supply were all legitimate matters that had to be taken into account by the regulators in framing market design.<sup>664</sup> SEMC did however accept, and acknowledge, that SEM design 'must, as a minimum, not be configured in such a way as to be seen to actively frustrate the realisation of the 2020 mandatory renewable targets.'<sup>665</sup>

Outside of SEM, the industry was facing many challenges and SEMC was conscious of this. The lack of private finance due to the economic crisis, and emerging difficulties with planning permission were giving rise to a level of market uncertainty that had, according to SEMC, 'put a premium on regulatory decision making that was stable, predictable, flexible and adaptable.'<sup>666</sup> Ironically SEMC's own endless questioning, consulting and decision process brought with it, its own uncertainty. Whilst acknowledging a need for stability, SEMC noted that regulators should not attempt to 'tie down the future.'<sup>667</sup> The 'doctrine of stability could not be pursued at all costs.'<sup>668</sup> A cautious approach would be adopted in deciding whether to re-examine the basics of the market, but they would be reconsidered if the circumstances required it.<sup>669</sup>

The central theme of the Discussion Paper and documents that followed was the value and cost of wind. Wind's short run marginal cost (SRMC), would drive conventional generation out of the market schedule, and cause it to be re-classified as back-up generation to support wind. Yet, this requirement to have extensive back-up conventional generation would reduce the perceived economic and environmental benefits of wind.<sup>670</sup> The increase in wind penetration would lead to

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<sup>663</sup> SEMC, *Principles of Dispatch and the Design of the Market Schedule in the Trading and Settlement Code -SEM Committee Proposed Position Paper and Request for Further Comment* (SEM-10-060 2010) 3.

<sup>664</sup> *ibid* 3.

<sup>665</sup> *ibid* 4.

<sup>666</sup> *ibid* 3.

<sup>667</sup> *ibid*.

<sup>668</sup> *ibid*.

<sup>669</sup> *ibid*.

<sup>670</sup> SEMC (SEM-08-002 2008) (n 525) 11-12. EirGrid defines SRMC as follows: 'The instantaneous variable cost for a power plant to provide an additional unit of electricity, i.e. the cost of each extra MW it could produce excluding its fixed costs. The SRMC reflects the opportunity cost of the electricity produced, which is the economic activity that the generator forgoes to produce electricity. For example, in the case of a generator fuelled by gas, the opportunity cost includes the price of gas on the day that it is bidding in, because if the generator was not producing electricity it could sell its gas in the open market.' See: EirGrid, *All-Island Generation Capacity Statement 2016-2025* (February 2016) 5 <[http://www.eirgridgroup.com/site-files/library/EirGrid/Generation Capacity Statement 20162025 FINAL.pdf](http://www.eirgridgroup.com/site-files/library/EirGrid/Generation%20Capacity%20Statement%2020162025%20FINAL.pdf)> accessed 9 October 2017. Wind generated electricity has no fuel cost.

greater payments to conventional generation to compensate it in circumstances where it was necessary to constrain it in favour of wind. This cost, and the increasingly inefficient schedule and dispatch of conventional generation would erode the marginal benefits of wind generation.<sup>671</sup> There was also the problem that wind generators were less capable of providing reactive power and system inertia than conventional generation.<sup>672</sup> All of this led the RAs to question ‘whether all wind should be taken in all circumstances where technically feasible, irrespective of the ultimate cost to the consumer.’<sup>673</sup>

The issues (12 in number), listed for resolution by the RAs in the Discussion Document and the anticipated timeframe for resolution was very ambitious. One gets the impression from reading the document that the SEMC, in their first major regulatory intervention around wind generation in the SEM, had in mind a *big bang* solution to the challenges that increasing wind penetration presented and would continue to present. If this were the intended outcome, it did not come to pass as many of the issues identified for determination became the subject of protracted consultation and were either not resolved, were overtaken by time and events, or it was agreed with the market that the *status quo* should prevail. Thus, on the complex issue of scheduling and dispatch, SMEC was forced to accept the position put forward by market participants that the approach to the resolution of the issue needed to be a holistic one reflecting what was happening in other work streams. On the issues more generally, SMEC ultimately accepted that all identified issues did not need to be resolved on an ‘all in the one go basis’ rather they could be dealt with progressively and so it was.<sup>674</sup>

As stated above, the *Wind in The SEM* consultation was concerned with at least 12 separate, but in most instances, interrelated issues. Two decisions that illustrate how SEMC failed to satisfactorily conclude its lengthy consultation, and deliberations are the decision concerning the divergence between the SEM market schedule (devised ahead of the trading period to which it relates), and actual dispatch of generators in real time to meet electricity demand in the trading period; and the decision concerning the over allocation of inframarginal rents in favour of wind generating plant that was not contributing to real time dispatch but was included in the market schedule. The issue on the former was whether, the schedule should, in the interests of electricity consumers, be altered when deviations were manifest.<sup>675</sup> Increasing wind penetration was

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<sup>671</sup> *ibid.*

<sup>672</sup> *ibid* 11.

<sup>673</sup> *ibid* 12.

<sup>674</sup> SEMC (SEM-10-060 2010) (n 663) 4.

<sup>675</sup> SEMC, *Principles of Dispatch and the Design of the Market Schedule in the Trading and Settlement Code-Consultation Paper* (SEM-09-073 2009); and SEMC (SEM-08-002 2008) (n 525).

causing a divergence to emerge between the market schedule, and actual dispatch, because wind generation plant included in the market schedule was not always the plant actually dispatched to meet demand in real time by the System Operators due to constraints, and other technical considerations. In such cases, conventional generation had to be called up to fill the gap. Plant included in the market schedule received its bid price, and infra-marginal rent (a form of bonus), irrespective of dispatch, thus placing wind in a very favourable financial position where it was essentially remunerated for not contributing. The issue for the RAs was whether these infra-marginal rents which were used as an incentive to encourage investment in new efficient plant should be reserved through the market schedule, for plant that was of real time benefit to the system. Rewarding wind generation that was not contributing in real time was not efficient, and imposed a financial burden on consumers. The RAs argued that demand for electricity should be met at the least cost of production.<sup>676</sup> Following a review and assessment of responses from the market, SEMC abandoned the idea, and instead proposed that a framework would be developed to assess the level of material harm to customers that could potentially arise as a result of divergence.<sup>677</sup> When SEMC ultimately issued its decision on the issue, almost three years after the *Wind in the SEM* consultation commenced, it concluded that there was no need to take any action on the issue at that point, as the movement towards the Target Model meant that there would be no fundamental changes in the SEM design pending agreement on the Target Model, unless changes are required on 'grounds of material harm.'<sup>678</sup> Thus, a considerable amount of time was spent pursuing what on the face of it seemed to be an important issue for consumers, yet the consultation was allowed to drift, and ultimately result in what effectively amounted to a non-decision. In the interim the wind industry benefited from the continuation of the *status quo* though perhaps not the regulatory uncertainty.

SEMC reached a similar non-conclusion on the issue of allocation of infra-marginal rents.<sup>679</sup> SEMC had raised a well argued concern that generators with non-firm grid access were given access to and were available in the market schedule. This allowed them to compete for the infra-marginal rents and dispatch at an early stage, and thus encouraged early market entry by developers.<sup>680</sup> As a result, infra-marginal rents could be over allocated to plant located behind an export

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<sup>676</sup> SEMC (SEM-09-073 2009) (n 675) 18.

<sup>677</sup> *ibid*; and SEMC (SEM-10-060 2010) (n 663).

<sup>678</sup> SEMC, *Principles of Dispatch and the Design of the Market Schedule in the Trading and Settlement Code-SEM Committee Decision Paper* (SEM-11-062 2011) 1.

<sup>679</sup> Infra-marginal rent is the difference between the SEM SMP (set by the marginal plant in each trading period), received by generators for a trading period, and the price individual generators bid into SEM ahead of the trading periods. Generators retain this difference, and as such it acts as an incentive for efficient plant such as wind with low system marginal costs to enter the market. As wind generation has a near zero marginal cost there is potential for significant infra-marginal rent upside from a SMP set by less efficient conventional plant.

<sup>680</sup> SEMC (SEM-09-073 2009) (n 675) 22

constraint (and consequently unable to contribute to demand), to the disadvantage of plant located on the import side of that constraint, giving the wrong signal to developers. SEMC wanted the market schedule to reflect the type of plant mix that is routinely required to satisfy customer demand at least cost.<sup>681</sup> Modelling analysis had suggested that unless the issue was addressed by 2020, the misallocation of infra-marginal rents to the wrong plant types would result in the incentive required to encourage developers to invest in efficient plant being reduced by Euro 277m per annum.<sup>682</sup> SEMC also noted that allowing generation into the market schedule that could not be dispatched also had the consequence that the System Marginal Price (SMP), and thus the infra marginal rents paid to all generators that had made it on to the market schedule, would be reduced. In the short term SEMC accepted that this would benefit consumers, but the effect of a lower infra-marginal rent regime would be to drive investment away from ‘high capital low operating cost’ plant and towards ‘low capital high operating’ cost plant, and consequently increase costs to consumers in the longer-term.<sup>683</sup> The allocation of infra-marginal rents (a reward), to generating plant that could not be dispatched would incentivise generators (renewable and non-renewable), to invest in generating plant that was not, or not yet, capable of being accommodated by the Transmission System.<sup>684</sup> Consequently, Ireland’s emission targets would not be addressed because the plant was not used, while consumers were paying for plant that was not capable of meeting actual demand.<sup>685</sup> In light of these considerations, SEMC concluded that it was important to ensure that the SEM gave the correct signals to both renewable and conventional plant, and that a correlation was maintained between the market schedule, and actual dispatch. To give effect to this, SEMC proposed that the RAs should seek to ensure that generating units are of value to the real time operation of the system, and where necessary to make the required changes to the SEM rules.<sup>686</sup> Notwithstanding the compelling evidenced based position put forward by SEMC’s, SEMC’s preferred option for dealing with the issue was strongly resisted by the market, leading SEMC to ultimately decide that the issue was one that did not merit immediate attention, and that a review would in any case occur in the medium term in the context of the movement towards the Target Model. SEMC not only decided that there would be no change, it also felt the need to formally take off the table its preferred option stating that it no longer had one. In framing its decision, SEMC made reference to the fact

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<sup>681</sup> *ibid* 21.

<sup>682</sup> *ibid* 22.

<sup>683</sup> *ibid* 27.

<sup>684</sup> *ibid*.

<sup>685</sup> *ibid*.

<sup>686</sup> SEMC (SEM-09-073 2009) (n 675) 28.

that respondents to the consultation had made the point that almost all respondents ‘expressed strong disagreement’ with SEMC’s preferred option for dealing with the issue.<sup>687</sup>

## Wind in the SEM-Defining Priority Dispatch

*Wind in the SEM* also presented SEMC with a reason to explore, in an Irish context, the requirement to give renewable energy priority dispatch. Priority dispatch was enshrined in Irish law for some considerable time before the RAs had to grapple in any meaningful way with what the principle actually meant in practice. Priority dispatch at its simplest is a mechanism whereby renewable generation (or other forms of generation selected by national authorities), receives preferential treatment, and is dispatched ahead of generation that does not benefit from the same advantage. The TSO had been implementing priority dispatch since 2000, and when the SEM was introduced the principle was incorporated into the SEM TSC.

In the context of the *Wind in the SEM* debate, SEMC acknowledged that the *status quo* had not given rise to any conflict since the levels of renewable generation in the market were not significant, and as the short run marginal cost (SRMC), of wind was near zero, wind generators would in all probability have been dispatched ahead of other more costly forms of generation.<sup>688</sup> With the expected increase in wind generation, the issue for SEMC was the extent of the priority dispatch that would be conferred on generators that enjoyed priority dispatch status as a matter of law.<sup>689</sup> The key issue was whether such generators would benefit from a standard of priority dispatch that was absolute, or qualified, in one or more respects. A high level of priority dispatch for wind could lead to significant costs for the electricity consumer as turning down more costly conventional generation in favour of wind would result in high start-up costs when it was necessary to bring that conventional generation back in to the market (for example, when there was reduced or no wind to drive wind turbines).<sup>690</sup> The answer to this conundrum lay in Article 16(2) of the Second Renewable Energy Directive which provides that:

Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities: ... (c) Member States shall ensure that when dispatching electricity generating installations, transmission system operators shall give priority to generating installations using renewable energy sources in so far as the secure operation of the national electricity system permits and

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<sup>687</sup> SEMC (SEM-11-062 2011) (n 678).

<sup>688</sup> SEMC (SEM-09-073 2009) (n 675) 43. See also EirGrid (n 670) 5.

<sup>689</sup> *ibid.*

<sup>690</sup> *ibid* 43.

based on transparent and non-discriminatory criteria. Member States shall ensure that appropriate grid and market-related operational measures are taken in order to minimise the curtailment of electricity produced from renewable energy sources...

SEMC noted that giving Article 16(2)(c) an absolute interpretation with the only permissible exceptions being safety and security of supply, would be to attribute to renewable generation (including wind) ‘a price of minus infinity’<sup>691</sup> such that the System Operator would be required to dispatch it in every case irrespective of cost (including higher start-up costs arising from conventional generation having to shut down and re-start, and investment in grid infrastructure), except where safety or security required otherwise.<sup>692</sup> SEMC however found a basis for a less than absolute interpretation of the principle of priority dispatch in the legal principle of proportionality:

.. measures adopted must be appropriate, necessary to achieve a legitimate objective, and that where a choice exists between a number of appropriate measures the least onerous should be adopted and the disadvantages caused must not be disproportionate to the aims pursued.<sup>693</sup>

Support could also, in SEMC’s view, be garnered from other provisions of the Directive including the recitals:

This would mean that statements elsewhere in the directive and recitals about the renewable generation requiring to have a buyer, the TSO not being obliged to purchase, no particular price being guaranteed and system operation being a valid factor to take into account (as well as safety and security) should all be read with Article 16(2)(c) delivering a general requirement to give reasonable priority in dispatching generation from renewable sources.<sup>694</sup>

It is submitted that this interpretation with all its reasonableness, and practical common sense does not stand up to legal scrutiny. The language of Article 16(2)(c) is clear, there is no need to embark on a quest to find guidance elsewhere in the Directive. Article 16(2)(c) provides expressly for a sole permitted derogation concerning the ‘secure operation’ of the grid, and leaves no scope for any other. In the consultation that followed supporters of an absolute interpretation of the principle of priority dispatch argued with some confidence that the matter was purely a legal one,

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<sup>691</sup> *ibid* 44.

<sup>692</sup> *ibid* 44-45.

<sup>693</sup> *ibid* 45.

<sup>694</sup> *ibid* 45.



and while Article 16(2)(c) permitted a qualified interpretation by reference to technical matters, there was no qualification by reference to economic considerations.<sup>695</sup> The legal position was supported by the now familiar refrain that, anything less than an absolute interpretation would result in creating obstacles to the development of wind generation projects, and reduce the likelihood of targets being achieved.<sup>696</sup> SEMC was persuaded:

....it is inherent in the priority dispatch requirements that, given their ultimate objective to facilitate increased output from renewable generating stations in the context of mandatory renewables targets, dispatch of such generation is a de facto exception to the principle of economic precedence generally applied in the context of the internal market in energy.<sup>697</sup>

In light of the above conclusion which is clearly consistent with the requirements of the Directive, the decision ultimately taken by SEMC is somewhat surprising. SEMC concluded that it would adhere to an absolute interpretation of priority dispatch, and economic factors would only be taken into account in exceptional circumstances.<sup>698</sup> SEMC was concerned that ‘in exceptional circumstances applying priority dispatch without any consideration of costs, either in financial terms or in terms of environmental impacts, might not make sense.’<sup>699</sup> Whilst this conclusion is difficult to argue with in terms of common sense, it does fly in the face of the clear wording of the Directive. SEMC did however add that such economic factors would only come into play in exceptional circumstances, and in a way that would not pose a threat to the achievement of renewables targets.<sup>700</sup>

On the matter of a priority dispatch hierarchy, SEMC also decided that generators that benefited from mandatory dispatch status as a matter of EU Law must be given priority over generators that benefited from priority dispatch status solely at the discretion of the Member State. So in Ireland, wind generators would be given priority ahead of peat fired power stations.<sup>701</sup> In implementing a priority dispatch hierarchy SEMC has correctly given renewables priority over conventional (including peat) fired generation, but not over interconnectors.<sup>702</sup> It has been argued

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<sup>695</sup> SEMC (SEM-10-060 2010) (n 663) 36-38.

<sup>696</sup> *ibid.*

<sup>697</sup> *ibid* 38.

<sup>698</sup> SEMC (SEM-11-062 2011) (n 678) 2.

<sup>699</sup> SEMC (SEM-10-060 2010) (n 663) 38.

<sup>700</sup> SEMC (SEM-11-062 2011) (n 678) 15.

<sup>701</sup> *ibid* 2.

<sup>702</sup> SEMC (SEM-11-062 2011) (n 678) 17.

by some that subordinating wind to interconnectors is contrary to Article 16(2), and it is submitted that this argument is correct.<sup>703</sup>

## Wind in the SEM-Constraint and Curtailment

SEMC in its priority dispatch hierarchy decision had resolved the issue as far as wind verses non-renewable generation was concerned, but the much more interesting issue of the priority of wind *inter se* when it was necessary to constrain or curtail wind remained unresolved. In this context there was a real possibility that the wrong decision would impact on development rate and put Ireland's targets at risk. In March 2013, more than five years after SEMC had published its *Wind in the SEM* Discussion Paper, SEMC delivered its long awaited final pronouncement on the Treatment of Curtailment in Tie-break Situations.<sup>704</sup> The simplicity and apparent fairness of SEMC's decision betrays the intricacy of the issue itself, and the lengthy and meandering history of consultation and decision making leading up to it. The decision has two distinct elements. Firstly, in the event of a tie-break (i.e. where there was no deciding factor that would allow the System Operator make a priority dispatch decision), all wind farms irrespective of whether they had firm or non-firm access to the grid would be scaled back pro-rata. Secondly, there would be a cessation of Dispatch Balancing Cost (DBC) payments (a form of compensation for wind underwritten by electricity consumers), for curtailment in tie-break situations by 1 January 2018.

SEMC's decision and the process leading up to it is important for many reasons (not least for the further elucidation of the meaning of priority dispatch), but for present purposes, principally because it highlights the virtual regulatory impossibility of delivering on an absolute statutory mandate to protect the interests of consumers, against a background of a binding EU mandate the requires 16% of gross final consumption of energy to be from renewable sources by 2020, and a domestic RES-E Target of 40% of electricity from renewable sources also by 2020; both of which seem to require a pursuit of wind generation seemingly irrespective of cost.

Before considering in detail SEMC's decision on The Treatment of Curtailment in Tie-break Situations, it is necessary to briefly consider a number of preliminary matters pertinent to the issue, the process, and the decision. The first relates to the definition of, and distinction between,

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<sup>703</sup>See: Grattan Healy, 'EU Issues for renewables in Ireland' (12 February 2013) <[http://www.ierne.ie/ierne Wind Energy Consulting Ltd/Publications files/EU%20issues%20for%20renewables%20in%20Ireland 1.pdf](http://www.ierne.ie/ierne%20Wind%20Energy%20Consulting%20Ltd/Publications%20files/EU%20issues%20for%20renewables%20in%20Ireland%201.pdf)> accessed 28 February 2017; and IWEA, 'IWEA Position Paper on Priority Dispatch' <<http://webcache.googleusercontent.com/search?q=cache:fbeFTFNsZQJ:www.iwea.com/index.cfm/page/iweapolicydocuments%3Ftwfld%3D191%26download%3Dtrue+%&cd=1&hl=en&ct=clnk&gl=ie>> accessed 27 September 2017. For a discussion of the commercial implications for wind when it is curtailed by electricity imports over interconnectors see: Fitzgerald and Valeri (n 527) 25.

<sup>704</sup> SEMC, *Treatment of Curtailment in Tie-Break Situations-Decision Paper* (SEM-13-010 2013).

the concepts of constraint and curtailment.<sup>705</sup> In the context of the consultation, it was argued by some that the two were distinct, and thus to treat them in the same fashion was a breach of SEMC's statutory duty not to discriminate.<sup>706</sup> SEMC had however noted in other contexts that it was not always possible to distinguish between the two issues.<sup>707</sup> For the purposes of this analysis *constraint* is considered to arise when wind generation must be dispatched down due to network limitations, while *curtailment* is considered to arise when wind generation must be dispatched down due to power system limitations.<sup>708</sup>

The next preliminary issue involves a re-visiting of the issue of the 'absoluteness' of priority dispatch discussed above. SEMC accepted that it would adhere to an absolute interpretation of priority dispatch and economic factors would only be considered in exceptional circumstances.<sup>709</sup> As noted above this 'exceptional circumstances' proviso does not sit well with the wording of Article 16(2)(c) of the Second Renewable Energy Directive. When, in advance of its decision on the Treatment of Curtailment in Tie-break Situations, it became apparent that DBC payments (compensation) for wind generation in curtailment situations, were to be removed by SEMC, some including Daly and Scally, argued that Article 16(2)(c), and Recital 61 of the Second Renewable Energy Directive placed an obligation on Member States to compensate wind generators for curtailment.<sup>710</sup> It is submitted that this interpretation of priority dispatch is not supported by the wording of Article 16(2)(c) which makes no reference to compensation, and Recital 61 which, while it does make such a reference, it clearly sees it as being optional, and in any case, based on dicta in *Gunnar Nilsson* that 'the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question ...'<sup>711</sup> is not legally binding. Therefore, whilst there is undoubtedly a Directive requirement to take steps to minimise curtailment, outside of domestic market rules (the SEM TSC), there is no legal obligation to compensate wind generators for the adverse revenue impacts of curtailments.

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<sup>705</sup> See: EirGrid and SONI, *Definition of Curtailment and Constraint* (Version 1.0 February 2013).

<sup>706</sup> SEMC, *Treatment of Curtailment in Tie-Break Situations-Consultation Paper* (SEM-12-028 2012) 11.

<sup>707</sup> SEMC, *Treatment of Price Taking Generation in Tiebreaks in Dispatch in the Single Electricity Market and Associated Issues-Clarification Note* (SEM-11-086 2011); and SEMC, *Treatment of Price Taking Generation in Tiebreaks in Dispatch in the Single Electricity Market and Associated Issues-Decision Paper* (SEM-11-105 2011).

<sup>708</sup> EirGrid, *Annual Renewable Energy Constraint and Curtailment Report 2015* (14 June 2016) 1.

<sup>709</sup> SEMC (SEM-11-062 2011) (n 678) 2.

<sup>710</sup> Philip Daly, Sean Scally, *Curtailment of Wind Energy in Tie Break Situations* (5 November 2012) <<http://www.lexology.com/library/detail.aspx?g=8b38b047-a41f-4dcd-b9f2-d5810b18846b>> accessed 1 February 2017. See also: Philip Daly and Sean Scally, *The Curtailment of Wind Energy in Tie Break Situations* (1 March 2013) <<http://www.lexology.com/library/detail.aspx?g=1a85aacf-c1c9-4b97-8473-27736aa76ae2>> accessed 1 February 2017.

<sup>711</sup> Case C-162/97 *Nilsson* [1998] ECR I-7477.

If therefore there is no legal obligation (outside the contractual provisions in the SEM TSC), and SEMC's overriding duty is to protect the interests of consumers on the island of Ireland,<sup>712</sup> then this begs the question as to why it took SEMC five years to decide to remove the requirement, and why the wind industry was given a further 5 years to become accustomed to the change. The answer lies in part in the fact that SEMC, like CER, must in performing its central function to protect consumers, have regard to second order considerations enshrined in legislation including the promotion of renewable energy.<sup>713</sup> But the answer is also to be found in the fact that when the Second Renewable Energy Directive specified mandatory targets for Member States, the policy to promote renewables in effect, became law, and in the period to 2020 consumer interest requirements are subordinated to this overriding requirement.<sup>714</sup> The debate around the treatment of curtailment pitted wind generation against wind generation, the latter against conventional generation; and wind generation against the consumer. The conflict to be resolved by SEMC was thus not solely a conflict of policy versus regulation. SEMC could come down on the side of wind, but wind could still lose depending on whether it had a firm grid connection or not, and depending on whether it was operational, or still at the planning stage.

SEMCs starting point was to propose that, where it was necessary to de-load wind generating plant following the application of the principle of priority dispatch, such de-loading should be done on a pro-rata basis.<sup>715</sup> No regard would be had to whether the plant had firm or non-firm access to the grid. In the consultation that followed the wind lobby raised the spectre of bankability of wind projects in development, and the commercial viability of projects that had already secured finance. Generators with firm access to the grid argued that projects with firm access should be given priority over those that did not. Developers, and market participants that did not have firm access to the grid were concerned about the future of their projects and prospects, and thus argued for a *pro-rata* approach.<sup>716</sup>

SEMC concluded that supporting projects with firm grid access would enhance investor confidence, and result in the completion of more projects which in turn would result in further progress towards 2020 targets. SEMC thus decided that, if following the application of the principles of priority dispatch the System Operators are still faced with a tie break situation, then renewable generators with firm access to the network should have priority over renewable

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<sup>712</sup> SEMC (SEM-08-002 2008) (n 525).

<sup>713</sup> ERA, s 9(4).

<sup>714</sup> See: Michael O'Connor and Peter McLay, 'Weathering the Storm, Irish Regulators Tackle Excess Wind', Mondaq (16 October 2012) <<http://www.mondaq.com/ireland/x/201598/Renewables/Weathering+The+Storm+Irish+Energy+Regulators+Tackle+Excess+Wind>> accessed 1 February 2017.

<sup>715</sup> SEMC (SEM-10-060 2010) (n 663) 56.

<sup>716</sup> SEMC (SEM-11-062 2011) (n 678) 25.

generators that did not, and as between generating units that had firm access to the network, date order would be the determining factor with the generating unit having the earlier date being given priority.<sup>717</sup> This *grandfathering* approach made no distinction between constraint and curtailment, but it made a significant distinction between generators with firm connection offers and those without. This was not however the end of the matter and further consultation ensued leading to a further decision in December 2011.<sup>718</sup> In this decision, SEMC adjusted its position and decided to apply the *grandfathering* approach to both constraint and curtailment. Thus, where it was necessary for the System Operator to constrain or curtail wind generation, this would be done on a firm access quantity basis.<sup>719</sup> This meant that wind generators with non-firm connections to the grid would be turned down before those with firm connections.

This Decision, to the extent that it related to curtailment, was not well received by the wind lobby; forcing SEMC to acknowledge that the consultation process leading up to it was ‘deficient’ and, to withdraw that part of the decision that related to curtailment.<sup>720</sup> SEMC embarked on a further, more robust and searching, consultation where the merits of a *grandfathering* (Option 1) versus a *pro rata* (Option 2) approach were examined against the backdrop of SEMC statutory functions north and south of the border, and against a lengthy set of criteria that included: the impact on the consumer of DBC costs; facilitation of 2020 renewable targets; efficiency of market entry signal; stability of investment environment; and consistency of treatment for constraints and curtailment.<sup>721</sup>

SEMC also brought forward 2 further options, a *temporary pro-rata option* (Option 3) that involved employing a *pro-rata* approach up to the 40% renewables targets on the island of Ireland, and thereafter moving to a *grandfathering* approach. In the event of curtailment, all wind generation (whether with firm or non-firm grid access), would be turned down pro-rata until the target was reached and after that, wind farms with non-firm grid access would be turned down before wind farms with firm grid access.<sup>722</sup> The advantages put forward in support of this option included the fact that it would encourage market entry by new wind generators, and thus assist with the achievement of targets. Also, the increase in wind generated electricity would serve to depress the market price of electricity or SMP by driving less efficient and more expensive

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<sup>717</sup> *ibid.*

<sup>718</sup> SEMC (SEM-11-062 2011) (n 678) 26; SEMC, *Treatment of Price Taking Generation in Tie Breaks in Dispatch in the Single Electricity Market and Associated Issues* (SEM-11-063 2011); SEMC (SEM-11-086 2011) (n 707); and SEMC (SEM-11-105 2011) (n 707).

<sup>719</sup> *ibid* 16-18.

<sup>720</sup> SEMC, *SEM Committee Communication* (29 March 2012) <<https://www.cer.ie/docs/001101/SEM12018%20SEM%20Committee%20Communication%20of%2029%20March%202012.pdf>> accessed 1 March 2017.

<sup>721</sup> SEMC (SEM-12-028 2012) (n 706) 5.

<sup>722</sup> *ibid* 12.

conventional plant out of the market. Any increased costs to consumers would be adjusted post achievement of targets on the reversion to a *grandfathering* approach as generators that did not have firm grid access would not receive compensation from that point.

Alternatively, SEMC proposed a *pro-rata with no compensation* option (Option 4), shifting the entirety of the financial burden of curtailment away from the electricity consumer and placing it on the wind generators. In the event of curtailment, all wind generators (irrespective of whether they had firm grid access or not), would be turned down pro-rata with no compensation for the curtailment event. SEMC seemed concerned with the fundamental change in policy that was implicit in this suggested approach. It had been a fundamental principle in the SEM that wind generators with firm grid access, would receive compensation when turned down in curtailment scenarios, and this was something taken into account by investors when assessing project viability. Against this, SEMC noted that investors should not be given a guarantee that policy would never change, especially when SEMC considered its overall objectives, and particularly those relating to consumer protection on the island.<sup>723</sup>

Notwithstanding this detailed and searching deliberation, SEMC did not make a final decision on the issue until almost one year later, in March 2013.<sup>724</sup> In the interim, EirGrid published a paper which examined the impact of the four options proposed by SEMC on the level of DBC payable, and on the curtailment of wind farms with non-firm grid access.<sup>725</sup> Not surprisingly, EirGrid concluded, amongst other things, that the most significant savings were associated with Option 4 (*pro-rata with no compensation* option).<sup>726</sup>

Against the background of the EirGrid study, SEMC was able to put a proposed final decision to the market.<sup>727</sup> It was clear to SEMC that addressing curtailment through a *grandfathering* approach did not deliver against the five criteria that the SEMC had set at the outset.<sup>728</sup> The new approach would take into account market feedback on the practicability of immediately ceasing DBC payments, a reasonable timeframe for achieving this, and regulatory certainty.<sup>729</sup>

SEMC's final decision was issued on 1 March 2013, five years after SEMC commenced consultation on the issue.<sup>730</sup> The decision differed somewhat from that proposed because in the interim, the wind lobby argued that the proposal to end DBC payments was discriminatory against

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<sup>723</sup> *ibid* 15.

<sup>724</sup> SEMC (SEM-13-010 2013) (n 704).

<sup>725</sup> EirGrid, *Effect of Tie-break Options on DBC and Curtailment* (28 Sept 2012) 4.

<sup>726</sup> *ibid*.

<sup>727</sup> SEMC, *Treatment of Curtailment in Tie-Break Situations-Proposed Decision Paper* (SEM-12-090 2012) 41.

<sup>728</sup> *ibid* 42.

<sup>729</sup> *ibid*.

<sup>730</sup> SEMC (SEM-13-010 2013) (n 704) 3.

wind generators, constituted a material alteration to the SEM HLD, and undermined the legitimate expectations of investors. The revised and final decision was a pro rata curtailment of all wind generation (with firm and non-firm grid access) in tie break situations; and a cessation of compensation for curtailment as of 1 January 2018.<sup>731</sup> SEMC had proposed a methodology of linking the cessation of compensation with a ‘renewable penetration threshold/date threshold.’<sup>732</sup> In the proposed decision, SEMC had suggested that the limit would be set as: the earlier of the confirmed achievement of 75% of the 40% renewable target on the island of Ireland, or 1 January 2016.<sup>733</sup> Once the TSOs had confirmed that the limit had been reached, the amount of money available for compensation for curtailment would be reduced by 25% annually in the following four years. Respondents expressed the view that it was unlikely that 75% of the renewable target would be met by 2016, and 2017 was too early to commence the reduction in available compensation.<sup>734</sup> SEMC, citing its duty to protect consumers, took the position that, with more wind on the system, there would be more curtailment and an increase in compensation; which was not sustainable. SEMC was adamant that consumers could not be asked to continue to meet the cost of alleviation measures post 2020, as they had already invested considerably in mitigating curtailment for the benefit of wind generators.<sup>735</sup> The final decision simply provided a date certain by which compensation would end, giving generators sufficient time to adjust their business models.<sup>736</sup> SEMC also noted that wind generators that benefited from first mover advantage, and got an early foothold in the market, could not have reasonably expected that the market would remain static.<sup>737</sup>

SEMC did not agree that the proposed decision discriminated against wind generation, making the obvious point that wind had priority dispatch in the SEM, and only had its output reduced after conventional generation. Curtailment only affected wind because all non-priority generating plant is turned down first for system security reasons ahead of wind.<sup>738</sup> Generators that do not add to the problem of curtailment, and who may have already had their output reduced to accommodate greater volumes of wind generated electricity on the system, should not in addition, have to share the risks associated with curtailment.

In its detailed analysis of its Decision, SEMC noted that in 2020 the saving in DBC costs would amount to approximately Euro 13m; while a *pro-rata* approach to curtailment would expedite

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<sup>731</sup> *ibid* 4-5; 23-24.

<sup>732</sup> *ibid* 9.

<sup>733</sup> SEMC (SEM-12-090 2012) (n 727).

<sup>734</sup> SEMC (SEM-13-010 2013) (n 704) 10.

<sup>735</sup> *ibid*.

<sup>736</sup> *ibid* 13.

<sup>737</sup> *ibid*.

<sup>738</sup> *ibid* 14-15.

the connection of non-firm wind generators to the system, and thereby facilitate the achievement of 2020 targets to an extent that a *grandfathering* approach based on firm access quantity would not.<sup>739</sup> In addition, by removing compensation for curtailment from 1 January 2018, this would have the effect of promoting efficiency because it would ensure that wind farms whose financial viability is dependent on indefinite compensation for curtailment would not connect to the system.<sup>740</sup>

SEMC acknowledged that the cessation of DBC compensation payments was a change of policy but nevertheless, the requirement for stable investment criteria was met because the new mechanism provided a ‘stable and certain environment for investment.’<sup>741</sup> The compromise that ultimately emerged around the treatment of curtailment sought to address the 2020 policy targets, and SEMC’s duty to protect consumers.

## Towards I-SEM-Evolution or Revolution

As a market, the SEM has for the most part been a success both generally, and for wind generation specifically. IWEA has noted that ‘although not perfect, the SEM has delivered on many of its stated objectives.’<sup>742</sup> Notwithstanding the success of SEM as a market, and as a statement of what can be achieved in terms of North-South co-operation, the all island electricity market is now undergoing a further lengthy, and complex transition from SEM to what has become known as I-SEM. The latter is the all island response to the requirements of the Target Model.<sup>743</sup> The current scheduled date for I-SEM-Go Live is 23 May 2018.<sup>744</sup> There has been much debate around the

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<sup>739</sup> *ibid* 26-27.

<sup>740</sup> SEMC (SEM-13-010 2013) (n 704) 28. On 30 May 2017 SEMC extended the date to 23 May 2018. See: SEMC, *Notice to Industry in relation to SEM-13-010 Decision on Treatment of Curtailment in tie-break situations* (SEMC 30 May 2017).

<sup>741</sup> *ibid*.

<sup>742</sup> IWEA, ‘IWEA Comments on the Integration of the SEM with the European Target Market Model’ (20 April 2012) 4.

<sup>743</sup> Parliament and Council Regulation (EC) 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15. For a discussion of the re-design of the SEM to comply with the Target Model see: Di Cosmo and Lynch (n 626); and Fitzgerald and Valeri (n 527). For a discussion of possible implications for Ireland see: Paul K. Gorecki, *The Internal EU Electricity Market: Implications for Ireland* (2011) ESRI Research Series No. 23. See also: Energy Act 2016, s 7-8. The purpose of I-SEM is to integrate the all island electricity market with electricity markets in Europe and facilitate the trade of electricity across European borders. See: EirGrid, *Quick Guide to the Integrated Single Electricity Market-The I-SEM Project Version 1* (2016) <<http://www.eirgridgroup.com/uuid/f110639e-9e21-4d28-b193-ed56ee372362/EirGrid-Group-I-SEM-Quick-Guide.pdf>> accessed 7 October 2017.

<sup>744</sup> See: ESP Consulting, *Stocktake Report*, Prepared for SEMC, (October 2016) <<https://www.semcommittee.com/news-centre/i-sem-project-update-stocktake-report>> accessed 6 February 2016.



design of the market rules for I-SEM, and whether the transition from SEM should be one of ‘evolution’ or ‘revolution.’<sup>745</sup>

SEMC has noted that, in making its decision on the design in accordance with its statutory functions, it sought to ‘maximise benefits for consumers in the short term and long term, while ensuring security of supply and meeting environmental requirements.’<sup>746</sup> For SEMC the High-Level Design for I-SEM should promote ‘where appropriate the use of energy from renewable energy sources, ..’ and this is the key consideration. One respondent to SEMC’s consultation on the issue, doubtless concerned about the vagueness of the term ‘appropriate’ in the circumstances, sought clarification from SEMC. The latter confirmed that the term merely mirrored the statutory powers conferred on the RAs.<sup>747</sup> The degree of appropriateness will thus be determined by any policy objectives that will apply post 2020.<sup>748</sup>

There are many questions as to how wind generation will ultimately cope in I-SEM.<sup>749</sup> In SEM, policy imperatives served to dampen regulatory enthusiasm for change. The mandatory targets were the *immovable object*. In the early days of I-SEM design, when Ireland’s targets, and targets in Northern Ireland were a distant sight on the 2020 horizon, SEMC acknowledged that the ‘ambitious targets as committed to by Departments in both Ireland and Northern Ireland’ would be a ‘consideration’ in the re-design of I-SEM, and that the High-Level Design as drafted was consistent with that objective.<sup>750</sup> Almost 5 years on, and with I-SEM now scheduled to reach Go-Live on 23 May 2018, the I-SEM as envisaged in the High-Level Design will have a very brief overlap with Ireland’s 2020 renewable targets objective. Nevertheless, if there is concern about any aspect of I-SEM (and concerns have been raised and SEMC has sought to address them), this may dampen enthusiasm for current investment in wind, with knock-on consequences for 2020 targets. The question must thus arise as to the exact nature of the ‘consideration’ SEMC will need to have to renewable policy in the post 2020 era and, in the absence of ambitious renewable targets, will there be more scope for regulation in the absolute interest of the consumers on the island of Ireland? If so, then this will colour investor risk assessment. The appropriateness of promoting renewable generation may thus in I-SEM be less of a regulatory imperative, or in the

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<sup>745</sup> SEMC (SEM-12-004 2012) (n 656). See also: Gorecki, ‘Ensuring Compatibility of the All-Island Electricity System with the Target Model: Fitting a square peg into a round hole?’ (2013) 52 Energy Policy 677.

<sup>746</sup> SEMC (SEM-14-085a 2014) (n 505) 3.

<sup>747</sup> SEMC, *SEM Committee Decision on Implementation of the European Target Model for the Single Electricity Market-Next Steps Response Paper* (SEM-13-009 2013) 6.

<sup>748</sup> *ibid* 39.

<sup>749</sup> For a discussion of the re-design of the SEM to comply with the Target Model see: Di Cosmo and Lynch (n 626) 15, 19-20.

<sup>750</sup> SEMC (SEM-13-009 2013) (n 747) 11.

words of one commentator ‘Market participants represent their own commercial interests whereas SEM Committee’s role is to act as custodian of the interests of consumers.’<sup>751</sup>

There is also the issue of Brexit. Much emphasis was placed in early SEMC documents on the alignment of policy on renewables both north and south of the Irish border, and the potential for renewable exports, as a basis for giving comfort to the wind lobby that I-SEM High-Level design needed to be supportive of wind generation.<sup>752</sup> Absent policy alignment and targets, and with the UK exit from the EU now a virtual though perhaps not an immediate certainty, the case for a preferment of wind, in market rule design, is less compelling, and over and above priority dispatch requirements, wind may thus be obliged to compete on its merits. Therefore, when SEMC lists as a recommendation for I-SEM that a ‘market cannot be designed specifically around renewable generation, the selected wholesale market design should promote renewable energy sources and facilitate government targets for renewables’,<sup>753</sup> in the absence of targets, the recommendation is nothing more than a statement of SEMC’s statutory functions. Further, when SEMC decides that it will ‘adhere to an “absolute” interpretation of priority dispatch whereby economic factors are taken into account only in exceptional circumstances and only where this can be done in a manner that does not threaten the delivery of renewable targets’,<sup>754</sup> it is promising to do nothing more than comply with the law on priority dispatch (though as submitted above, it has misinterpreted the requirement), and government policy.

Therefore, while the overlap between the requirement to meet 2020 targets and I-SEM operation will be just over two years, should investors take a view now that the position of wind in I-SEM is materially less favourable or uncertain, this may have an impact on the development rate needed to meet 2020 targets.<sup>755</sup> This matter is further complicated by the uncertainty that flows from the UK Government approach to Brexit.

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<sup>751</sup> Sheenagh Rooney, SEM Manager, ‘Implementing Target Model in SEM-Next Steps’ (13 March 2013) <<http://www.energyireland.ie/download/euelectricitymarket/sheenaghRooney.pdf>> accessed 6 February 2017.

<sup>752</sup> SEMC (SEM 13/009 2013) (n 747) 11. DCCAE has stated that ‘Maintaining the SEM across the Island of Ireland’ is a priority in the context of the UK decision on Brexit (See: DCCAE (n3) 45). SEMC has stated that ‘while the development of I-SEM and DS3 are designed to fulfil the goals of greater European energy market integration and sustainability, there are good economic reasons for the all-island market which exist independently of European law and policy’ (SEMC, *SEM Committee meeting 30 June 2016* (5 July 2016)).

<sup>753</sup> SEMC (SEM 13/009 2013) (n 747) 13.

<sup>754</sup> *ibid* 37.

<sup>755</sup> For concerns with I-SEM from a wind generation perspective see: IWEA, ‘IWEA Response to SEM Committee Consultation on the I-SEM Capacity Remuneration Mechanism Detailed Design Third Consultation Paper (SEM-16/010)’ (27 April 2016); and Ciaran O’Brien, Brookfield Renewable Group, ‘The I-SEM Balancing Market’ (13 December 2016) <[https://www.bradyplc.com/images/Downloads/ISEM\\_Presentations/Ciarn\\_OBrien-Balancing\\_in\\_I-SEM.pdf](https://www.bradyplc.com/images/Downloads/ISEM_Presentations/Ciarn_OBrien-Balancing_in_I-SEM.pdf)> accessed 2 May 2017.

## Chapter Conclusion and Application to Thesis Themes and Questions

In considering the central question advanced in this thesis, this chapter reflects on the critical issues of grid and market access for wind technology and its electrical output; issues which have historically presented the greatest challenges for renewable technology, including wind. The principal conclusion in this chapter is that, notwithstanding the Herculean challenge for wind generating technology in securing both grid and market access for electrical output, and the challenges this presented for Ireland in terms of meeting 2020 targets, EU mandated independent regulation, and grid and market access provisions, have played a very important role in removing impediments, delays, and uncertainties around grid and market access, and ensuring that these issues alone are now unlikely to contribute in a significant way to any shortfall in meeting renewable electricity targets. This chapter reveals a sharp contrast in the approach taken by the State and its agencies to the issues considered in this chapter, and the approach to environmental permitting and planning permission discussed at chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*).

On grid and market operational matters, a review of CER and SEMC decisions since 2009 clearly shows time and time again that, in weighing and balancing competing interests as part of the decision-making process, the regulators opted for outcomes that furthered the development of wind generation technology in the interests of ensuring that Ireland would meet its 2020 targets. CER and SEMC have, guided by the requirement to meet targets, created a framework in Ireland that has allowed wind generation to secure actual, and contracted grid connection, of a level that is considered will be sufficient to meet Ireland's 2020 RES-E Target. The fact that some of this contracted capacity may not be built due to the planning and social opposition issues highlighted at chapter 7 (*Social Acceptance-A Judicial Eye at the Centre of the Perfect Storm*); or delays that flow from the inefficient TAO-TSO split interface model identified in chapter 3 (*unbundling the Opportunity for Irish Wind Generation Technology*); or for any of the other of the reasons identified in this thesis, does not detract from this conclusion.

Consistent with the findings of chapters 3 (*unbundling the Opportunity for Irish Wind Generation Technology*), and 4 (*Financing the Winds of Change-Irish Renewable Energy Support Schemes*), this chapter further exposes the difference, or contradiction in regulatory approach and attitude that is evident from a comparison of decisions concerning the regulation of operational matters such as grid and market access on the one hand, and on the other hand decisions on institutional arrangements in the market and specifically, around ESB's position in the electricity market. Though these latter decisions have given rise to complex regulatory outcomes, this chapter (and chapters 3 and 4), disclose the fact that the regulatory voice is all but silent around many of the

decisions themselves. Perhaps the reason for this can be found in the legally mandated policy-regulatory divide, but it is strongly arguable that this artificial and malleable distinction is not consistent with the Third Package Directive requirement that regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly.

Yet notwithstanding this inconsistency in regulatory approach, having an independent regulator to act as a moderator between the competing interests of market participants, System Operators, and consumers, has given confidence to new market entrants that rules will be applied in a fair, transparent, and non-discriminatory fashion, even if domestic policy or practice continues to prefer incumbent interests. On the issue of grid and market access in particular, whilst SEMC could be criticised for the manner in which the *Wind in The SEM* consultation, and decision-making process proceeded, it is submitted that after much soul searching and uncertainty, the correct balance was ultimately achieved between the interests of the consumer, and the wind industry against a background of binding targets. If the 2020 RES-E Targets is not met, it will not be because of a want of regulatory ingenuity or effort on the part of CER and SEMC in dealing with grid and market access issues.

## Chapter 6: Gone with the Wind-Ireland's Proposed Wind Energy Export Projects

*And all over the countryside, he knew, on every crest and hill, where once the hedges had interlaced, and cottages, churches, inns, and farmhouses had nestled among their trees, wind wheels similar to those he saw and bearing like vast advertisements, gaunt and distinctive symbols of the new age, cast their whirling shadows and stored incessantly the energy that flowed away incessantly through all the arteries of the city.*<sup>756</sup>

### Exporting the Wind

The recently proposed production of wind generated energy in the Irish Midlands and the intended onward transmission of that energy across our international boundary with the UK for consumption in GB has proved to be a controversial enterprise notwithstanding the identified, and potentially not insignificant economic rewards of such an initiative for the Irish economy.<sup>757</sup> Taking renewable energy across national boundaries allows for the sharing of renewable benefits, but it also means that by importing renewable energy a state can, in effect, export the requirement to build wind turbines and related infrastructure to the production State, and with it politically damaging social opposition to the building of such infrastructure. Though the proposed Irish export projects did not proceed for a variety of reasons, it is this social opposition aspect, and the failure to recognise and address it that would have ultimately, and inevitably, prevented the projects proceeding in the desired timeframe had all other obstacles been overcome. Though the projects are now at best suspended, the legacy of social opposition to them, and by association conventional wind development lives on.

The purpose of this chapter is to illustrate how a failure at a policy level to make a clear distinction between the very substantial and visible infrastructure required for the export proposals, and the infrastructure required for domestic electricity production from wind that would count towards Ireland's targets, has had adverse social acceptance consequences for the latter, in circumstances where the former was never likely to be realisable in the timeframe envisaged due to the complete absence of a statutory, or regulatory framework for the projects, or investment in garnering social acceptance for them. In summary, Government have allowed an ill-conceived proposal to prejudice Ireland's ability to meet 2020 targets with enduring consequences.

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<sup>756</sup> Herbert G. Wells, *The Sleeper Awakes*, Commemorative Edition (University of Nebraska Press, Lincoln and London 2000) 154.

<sup>757</sup> See for example: Jamie Smyth, 'Ireland to Export Green Energy to the UK' *Financial Times* (London, 24 January 2013).

In April 2014, a mere 12 months after the Irish Government signed a landmark memorandum of understanding with the Government of the United Kingdom, directed at exploring the prospect for large scale energy trading between the two nations,<sup>758</sup> the Irish Energy Minister pronounced that due to economic, policy and regulatory difficulties, as well as a failure on the part of the UK Government to make the necessary decisions, delivery by 2020 of an Irish based large scale wind export project was no longer a credible proposal.<sup>759</sup> The opportunity, as those promoting the projects saw it, was simple. Ireland's wind resource far exceeded its national requirement, and so could be used to generate renewable electricity that could be sold to, and paid for by, consumers in Great Britain, and thus assist the UK in meeting its 2020 targets. By importing renewable electricity the anti-wind lobby in the UK could be side-stepped, and Ireland's economy would benefit across a number of headings from general and specific taxation, to employment, and long term logistical and service support opportunities for the projects.<sup>760</sup> Up to the point where the Minister made his announcement not inconsiderable capital had been deployed by developers by way of preparatory and feasibility work in developing a number of proposals, all in anticipation of a favourable outcome from the discussions between the governments.<sup>761</sup>

Ireland's failed proposal to export wind energy has left a few important questions unanswered. Was the wind energy export project as originally conceived ever a realistic proposition; a misconceived rather than a missed opportunity? Was the heralded enormous commercial opportunity the only casualty of the failed initiative, or are there wider and more concerning consequences and legacy issues for energy policy and regulation, energy infrastructure, and onshore wind targets in particular, that flow from the proposed enterprise, and the manner in which it was taken forward? Finally, what now is to be the future, if any, for wind energy exports from Ireland to neighbouring jurisdictions, and does the decision of the UK electorate to take the UK out of the European Union preclude the possibility of an Irish-GB energy export project in the foreseeable future?

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<sup>758</sup>Memorandum of Understanding between the Minister for Communications, Energy and Natural Resources of Ireland and the Department of Energy and Climate Change of the United Kingdom on Co-operation in the Energy Sector (24 January 2013).

<sup>759</sup>Pat Rabbitte T.D., and Minister for Communications, Energy and Natural Resources, 'Announcement Re: Wind Energy Export Projects' (13 April 2014 Dublin).

<sup>760</sup> For a discussion of the economic benefits of energy exports for Ireland see: IWEA, 'Exports Policy, A Renewables Development Policy for Ireland' (September 2012) <<http://www.iwea.com/contentFiles/Documents%20for%20Download/Publications/IWEA%20Policy%20Documents/Export%20Document.pdf> > accessed 30 May 2017; and Pöyry and Cambridge Econometrics, 'The Value of Wind to Ireland, A Report to the Irish Wind Energy Association' (March 2014) <[http://www.poyry.co.uk/sites/www.poyry.co.uk/files/41x187872\\_economicbenefitsofwind\\_v7\\_0.pdf](http://www.poyry.co.uk/sites/www.poyry.co.uk/files/41x187872_economicbenefitsofwind_v7_0.pdf)> accessed 30 May 2017.

<sup>761</sup> See for example: Mainstream 'Mainstream welcomes signing of Ireland-UK intergovernmental energy export MOU' <<http://mainstreamrp.com/mainstream-welcomes-signing-of-ireland-uk-intergovernmental-energy-export-mou/>> accessed 23 June 2016.

It is submitted that notwithstanding the positive economic case persuasively put forward in support of wind energy exports, seeking to take these enormous projects forward on the basis of a flimsy policy foundation, in an almost complete legal and regulatory vacuum, and crucially without addressing social acceptability issues around them, has had a significant dampening effect on enthusiasm for the development of wind projects more generally in Ireland, made the pursuit of Ireland's 2020 RES-E Target considerably more uncertain; and may well be a material contributing factor in Ireland ultimately failing to meet its binding EU 16% target. For the future, there is a requirement to design and put in place a policy and regulatory framework for energy exports. Considering the decision of the United Kingdom to leave the European Union it is unlikely for reasons of political, policy, economic, and regulatory uncertainty that an Irish-GB energy export project will rise from the Brexit flames in the short to medium term, but this is not a reason for ignoring the possibility and failing to put in place an appropriate policy and legal framework especially as Ireland looks to greater connectivity with France. It is submitted however that, considering the harm done by the proposed export projects to the social acceptability of wind generated electricity more generally, any further work on this initiative should not occur before 2020.

### Creating a Policy Basis for Exporting Irish Wind Generated Electricity

The possibility of trading renewables, and joint projects to assist British and Irish Council (BIC) members meet renewable energy targets, was noted in 2011.<sup>762</sup> Subsequent to this in May 2012, the Energy Minister and DCENR published a detailed strategy document for renewable energy more generally for the period 2012-2020.<sup>763</sup> Central to this published strategy are five strategic goals, the first of which provides for 'progressively more electricity from on-shore and off-shore wind power for the domestic and export markets.'<sup>764</sup> Whilst this clear statement of intent on the part of the Minister was undoubtedly music to the ears of the wind industry, it is submitted that it was the beginning of an unfortunate tying together at a policy level of the domestic and export markets for Ireland's wind resource. The failure to keep the domestic and export projects separate at a policy level caused confusion in communities and was used by the opponents of wind development to further their cause to not insignificant effect. Further, this association of domestic and export markets in the period 2012-2020 could only be warranted if Ireland was assured that it could attain its 2020 RES-E Target because if there was any concern that Ireland

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<sup>762</sup> British Irish Council, *An All Islands Approach to Energy Resources: Discussion Paper*, British-Irish Council Summit, London 20 June 2011 <<https://www.britishirishcouncil.org/sites/default/files/file%20attachments/20110620%20Energy%20Grid%20BIC%20Summit%20Discussion%20Paper%20-%20AIA.pdf>> accessed 8 June 2016.

<sup>763</sup> DCENR (n 479).

<sup>764</sup> *ibid* 9.

could not reach its target, then any discussion of exports was, or should have been, moot but the Minister was unequivocal on this point when he expressed his confidence that Ireland would meet its 2020 national targets from renewable sources and wind in particular.<sup>765</sup>

What the Minister failed to anticipate was the negative, and potentially long-lasting impact that the proposed large wind export projects would have on the deliverability of projects aimed at the domestic market and national targets. It is submitted that, for the reasons set out below, the Minister's confidence was tenuous at best, and that the unhelpful juxtaposition of domestic renewable generation with renewable generation for export may well be identified as a central contributing factor in any *ex post* analysis should Ireland fail to achieve its 2020 targets. The Minister's endorsement of the export opportunity was not without qualification as it was expressed to be subject to economic, regulatory, cost benefit, and technical analysis.<sup>766</sup> Subject to these qualifications, and to ensuring that there would be no cost to the Irish consumer, the Minister's policy document charted the essential steps as ensuring that the necessary legal, planning and infrastructural framework was put in place to exploit the export opportunity.<sup>767</sup>

Whilst one cannot question the Minister's desire to underpin a potentially significant commercial opportunity for the State with a favourable policy statement, the difficulty arises from the failure to keep separate the pursuit of increased domestic production in furtherance of domestic climate change objectives and mandatory targets on the one hand, and on the other the pursuit of a large, complex and speculative opportunity. When the enormity of the project specific proposals for the export projects were revealed, and those who vigorously oppose the use of rural landscapes for wind development, or indeed any other development, succeeded, with the assistance of print and social media, to conjure up and sustain for all to see, an apocalyptic vision of the Irish Midlands covered in a forest of gigantic menacing wind turbines, the future for the wind export projects seemed doomed and by extension and association, the social opposition to these projects ultimately contaminated projects for domestic production and consumption as well as other essential energy infrastructure.

### Exporting Irish Wind in a European Legal Context

The Second Renewable Energy Directive contemplates energy trading both real, and virtual and expressly provides for a series of mechanisms directed at enabling Member States to actively cooperate in the race to meet 2020 renewable targets. A rudimentary framework for each mechanism, which focusses for the main part on the avoidance of double counting and

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<sup>765</sup> *ibid* 10.

<sup>766</sup> *ibid* 11, 14.

<sup>767</sup> *ibid* 14.



Commission approval, is set out in the Directive. Three possibilities are contemplated, Statistical Transfers (Article 6); Joint Support Schemes (Article 11); and Joint Projects (Articles 7-10), and it is Ireland's ill-timed and brief flirtation with the latter that is the subject of this chapter.

Article 7 of the Directive permits two or more Member States to 'cooperate on all types of joint projects relating to the production of electricity, heating or cooling from renewable energy sources.' This broadly drawn provision is specifically extended to co-operation involving private enterprises. The reporting requirements stipulate (amongst other things), that the quantity of electricity produced by the identified project in a Member State, and that is to count towards the target of another Member State be specified.<sup>768</sup> This quantity is then deducted, for the purpose of measuring target compliance, from the production of the Member State where the electricity is generated, and added to the quantity of the Member State that is to receive the benefit of the quantity.<sup>769</sup> The underlying rationale for the co-operation mechanisms is simple. Some Member States are better suited for reasons of geography, social acceptability, and other economic factors to the production of renewable energy and once their own targets have been, or are likely to be secured, they should be able to look to the commercial opportunities that may exist to assist other Member States who are less likely, or indeed unlikely, to achieve their targets.<sup>770</sup> The possibility of increased cross border trade in electricity also sits well with the desire to have a more integrated European energy market, and the principles of free movement enshrined in European law and policy.

It is against this background that between 2012 and 2014 a position was taken in the Irish market and embraced by Government, that Ireland's wind potential was such, that not only could Ireland meet its own targets, but it could assist Great Britain meet its targets. The Second Renewable Energy Directive leaves it to Member States to settle the commercial detail of any arrangements concluded, and to ensure that there is a legal, regulatory, and technical framework to enable the identified project and cross-border bargain to be delivered.<sup>771</sup>

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<sup>768</sup> Second Renewable Energy Directive, art 7(3)(b).

<sup>769</sup> *ibid* art 8(3).

<sup>770</sup> For a discussion of the background to renewable trading see: Peter Sherry, Redpoint, 'Ireland-UK Renewable Trade, Towards an Intergovernmental Agreement' (24 April 2013) <[https://webcache.googleusercontent.com/search?q=cache:GILFahBRRsJ:https://www.ucc.ie/en/media/research/hmrc/forums/fourthforum/presentations/PeterSherryBaringa\\_HMRCpresentation\\_Cork\\_24April.pptx+&cd=2&hl=en&ct=clnk&gl=ie](https://webcache.googleusercontent.com/search?q=cache:GILFahBRRsJ:https://www.ucc.ie/en/media/research/hmrc/forums/fourthforum/presentations/PeterSherryBaringa_HMRCpresentation_Cork_24April.pptx+&cd=2&hl=en&ct=clnk&gl=ie)> accessed 29 April 2016. See also: British-Irish Council (n 762).

<sup>771</sup> For a discussion of the different options for implementation of the cooperation mechanisms set out in the Second Renewable Energy Directive see: Corinna Klessmann, Patrick Lamers, Mario Ragwitz and Gustav Resch, 'D4 Report, Design options for cooperation mechanisms under the new European Renewable Energy Directive' Intelligent Energy Europe (IEE) <[http://www.reshaping-res-policy.eu/downloads/D4\\_report\\_design-options-RES-flexibility-mechanisms.pdf](http://www.reshaping-res-policy.eu/downloads/D4_report_design-options-RES-flexibility-mechanisms.pdf)> accessed 29 April 2016. See also: British-Irish Council (n 762).

## An Outline of the Proposed Energy Export Projects

The actual projects proposed to be taken forward under the umbrella of the Directive mechanisms and the Minister's policy declaration fell into two groupings: off-shore wind generation projects and onshore wind generation projects, and it is the latter that are the focus of this analysis though in fact both met with a similar fate. Much was written and published concerning the detail of, and economic benefits of, the separate proposals for the development of large onshore wind parks by at least 3 separate promoters. At a high level, what all three had in common was scale and location, and broadly speaking the epicentre of all three was the peatlands of the Midlands. One project promised to be a 'catalyst for economic recovery in the Midlands.'<sup>772</sup> This proposal envisaged the building of 750 wind turbines or '40 wind farm clusters' across five Midland counties, and the transmission of the renewable electricity generated on newly built underground cables across Ireland to the east coast, then across the Irish Sea to a connection, or connection points, with the electricity grid in GB.<sup>773</sup> The promoter anticipated a full statutory process of assessment and associated consultation. Capital spend was estimated at Euro 8bn, and significant emphasis was placed on the financial benefits for landowners, local authorities and communities.<sup>774</sup> Another equally ambitious developer launched its energy export project in 2012 and expected to be exporting to the GB grid in 2017.<sup>775</sup> Of an equally grand scale and also based around generating sites in the Midlands, the project set about signing option agreements with hundreds of local land owners as well as commencing the statutory and regulatory processes both in Ireland and in GB. The benefits of the project as outlined were not dissimilar to the other proposal.<sup>776</sup> A third significant energy export project for the Midlands was announced by State owned Bord Na Móna.<sup>777</sup> The significance of the proposed projects is evident from the designation of one of the proposals by the European Commission as a Project of Common Interest (PCI).<sup>778</sup> The impact locally of any one of these three initiatives would undoubtedly be significant, the cumulative impact was palpable. The benefits of the proposals

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<sup>772</sup> See: Greenwire, 'Greenwire Project' <<http://greenwire.ie/>> accessed 3 May 2016.

<sup>773</sup> See: Greenwire, 'Greenwire Project Summary' <<http://greenwire.ie/greenwire-wind-energy/project-summary>> accessed 3 May 2016.

<sup>774</sup> See: Greenwire, 'Greenwire Project' <<http://greenwire.ie/greenwire-wind-energy>> accessed 3 May 2016.

<sup>775</sup> See: Mainstream (n 761).

<sup>776</sup> *ibid.*

<sup>777</sup> See: Ed Carty, 'Bord Na Móna Unveils Billion Euro Wind Energy Export Project for Offaly and Kildare' *Independent* (24 October 2013); and Bord Na Móna, Export Project, Press Statement <<http://www.bordnamona.ie/company/news/articles/export-project-press-statement/>> accessed 16 June 2016.

<sup>778</sup> See: Commission, 'Projects of Common Interest' (2014) 27 <[http://ec.europa.eu/energy/sites/ener/files/documents/2013\\_pci\\_projects\\_country.pdf](http://ec.europa.eu/energy/sites/ener/files/documents/2013_pci_projects_country.pdf)> accessed 9 June 2016.

for local communities and local and national economies was clearly highlighted by the promoters and each was absolutely aligned with the 2012 published Government policy for energy exports.

### Perceived Benefits and Economic Justification

The perceived benefits and underlying rationale put forward for a joint Irish-GB Project are probably best summarised by Sherry.<sup>779</sup> Ireland has an excellent wind resource, and notable significant wind export potential over and above what was required to meet 2020 targets; onshore wind development in Ireland was low risk and there was a potential to create a significant number of jobs, and generate tax revenue from the associated inward investment.<sup>780</sup> GB had to contend with the cost to consumers of more expensive and challenging off-shore wind projects, while the ability to build less costly onshore wind projects was constrained.<sup>781</sup> On the economic justification (from a GB perspective), Sherry concluded that Irish onshore wind connected to the GB electricity network had ‘the potential to be competitive against relatively expensive offshore wind, the UK’s marginal renewable technology’.<sup>782</sup> Pöyry and Cambridge Econometrics have also painted a very positive picture of Ireland’s wind export potential from a climate change and economic benefit perspective.<sup>783</sup> These assessments may now need to be re-examined in light of the UK’s Brexit outcome.

### Memorandum of Understanding or Misunderstanding?

On 24 January 2013, the Governments of Ireland, and the United Kingdom entered into a Memorandum of Understanding (MOU) with the stated objective of exploring the potential for the trade of renewables between the two jurisdictions.<sup>784</sup> The Governments also committed to an Inter-governmental agreement within 12 months. The MOU is thin on detail, but this would follow in the substantive agreement. Nevertheless, the work programme agreed to by the Governments in the MOU covered the principal headings one would expect including: an examination of the costs and benefits of energy trading; consideration of the different mechanisms contemplated by the Second Renewable Energy Directive, as well as economic, legal, regulatory and permitting issues including the licencing of generation in Ireland, connection options and constraints, and the regulatory treatment of connection assets.<sup>785</sup> The difficulty at

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<sup>779</sup> *ibid* Sherry (n 770). See also Jennings O’Donovan, ‘Economic Impact Issues for a CBA on the Export of On-Shore & Off-Shore Wind Energy’ (September 2013, KHSK Economic Consultants) and IWEA (n 760).

<sup>780</sup> *ibid* Sherry (n 770). For a detailed discussion of employment potential and supply chain opportunities see: IWEA (n 760) 13-17.

<sup>781</sup> *ibid*.

<sup>782</sup> *ibid*.

<sup>783</sup> Pöyry and Cambridge Econometrics (n 760) 8.

<sup>784</sup> *ibid* (n 758).

<sup>785</sup> *ibid* Annex.

this point is the failure on the part of the two Governments to expressly acknowledge how unrealistic the 2020 target date was. Whilst one could not expect developers and promoters to pour cold water on potential opportunities, anyone with actual experience of Irish regulatory, planning and environmental systems and processes, could not have had confidence in the achievability of what was proposed within the timeframes anticipated.

## Framework and Consultation

Ten months after the signing of the MOU, and following up on the Energy Minister's commitment to examine and consult on the energy export opportunity, DCENR launched a public consultation to assist with the formulation of a Renewable Energy Export Policy and Development Framework and a Strategic Environmental Assessment (SEA).<sup>786</sup> The fact that this key step took 10 months to launch can perhaps be taken as either an indication of the lack of seriousness on the part of the Minister and his Department as to the reality of the opportunity, or a lack of understanding as to what was required to deliver such an immense proposition in such a short timeframe. The process as outlined in the DCENR's Information Document envisaged a 3-stage progression to culminate in the publication of a draft Renewable Energy Export Policy and Development Framework; and Natura Impact Statement and public consultation on these in the 2<sup>nd</sup> and 3<sup>rd</sup> quarters of 2014. Whilst in any other context this timeframe would have been reasonable and sensible, and whilst any shorter period would have lacked credibility, as each month passed it was undoubtedly becoming clearer that the window of opportunity for energy exports by 2020 was slowly but surely closing. The studies to be procured by DCENR under the review process were not to be substitutes for the normal planning process. Each development would still need to secure its own planning permission. It is true that the scale of the developments proposed would most likely have brought them within the remit of the Planning and Development (Strategic Infrastructure) Act 2006 (SIA 2006), and as such they would go directly to ABP, and thus benefit from a more efficient planning process.<sup>787</sup> Nevertheless, when one considers that no applications for planning would be submitted pending the publication of the final policy document for the energy exports, and bearing in mind that the average time frame for strategic infrastructure planning, even where there are no appeals, is several months, and the possibility of the other legal and permitting challenges outlined below, it is highly unlikely that the 2020 deadline for operational projects of

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<sup>786</sup> DCENR, *Renewable Energy Export Policy and Development Framework, Public Consultation Stage 1, Information Document* (October 2013).

<sup>787</sup> Developments comprising in excess of 50 wind turbines or having an electrical output in excess of 50 MWs must, if they are designated as strategic infrastructure, apply to An Board Pleanála for planning permission. See: PDA 2000, s 37(A)(1), and Seventh Schedule (Infrastructure Developments for the purposes of s 37A and s 37B).

the magnitude contemplated would have been realised.<sup>788</sup> Nevertheless the Minister, DCENR, as well as the developers, and regulators continued to pursue the possibility.

To enlighten the shaping of the Renewable Energy Export Policy and Development Framework, the Energy Minister proposed, in addition to a public consultation, to complete a Strategic Environmental Assessment (SEA) and a Habitats Directive Assessment (or Appropriate Assessment (AA)), under the Habitats Directive.<sup>789</sup> The stated purpose of the Renewable Energy Export Policy and Development Framework was expressed to:

1. *Set out a clear national policy context for the export of renewable energy;*
2. *Broadly identify strategic areas in Ireland for renewable energy generation for export;*
3. *Provide guidance to planning authorities, including An Bord Pleanála, when considering any proposals for renewable energy export;*
4. *[Provide] ... [G]uidance to planning authorities, in consultation with the Department of the Environment, Community and Local Government, on the preparation of appropriate development contribution schemes for such types of development.*<sup>790</sup>

The inclusion of item 1 on the purposes list suggests that the Minister's earlier published policy on renewable exports was in some way lacking, while item 2 was in practical terms redundant because the developers in the market had already settled on sites (which sites would in any case be validated or not in the project specific planning approval), leaving items 3 and 4 as the matters that in reality were the true matters for consideration and resolution. The Information Document then moves from purpose to principle, and proceeds to set out a series of principles underlying the proposed policy and development framework including:

1. *Maximising the sustainable use of low carbon renewable energy resources;*

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<sup>788</sup> Bord Na Móna estimated that a planning application for its proposed project would need to be submitted by H1 2015 if the 2020 deadline was to be met. The fact that the detail of the asset configuration was required for the application further complicated matters. See Bord Na Móna, 'Response to Consultation on Regulation' (17 February 2014) 3 <[https://www.ofgem.gov.uk/sites/default/files/docs/2014/04/bord\\_na\\_mona\\_response\\_non\\_gb\\_consultation\\_jan14.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2014/04/bord_na_mona_response_non_gb_consultation_jan14.pdf)> accessed 24 May 2016. See also: Letter from Jude Byrne, Director, Wind Energy, Coillte to Matthew Grant, Ofgem (16 January 2014) <[https://www.ofgem.gov.uk/sites/default/files/docs/2014/04/coillte\\_response\\_non\\_gb\\_consultation\\_jan14.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2014/04/coillte_response_non_gb_consultation_jan14.pdf)> accessed 8 June 2016.

<sup>789</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.

<sup>790</sup> DCENR (n 786) 2-3.

2. *Any trading of renewable energy between member states must be sustainable in the long term and reduce dependence on fossil fuels;*
3. *Fostering economic growth and increasing investment and employment opportunities;*
4. *Achievement of Irish renewable energy targets not to be compromised;*
5. *No net cost burden on the Irish consumer;*
6. *Long term improvements to infrastructure in Ireland;*
7. *Any infrastructure built is to facilitate interconnection to other European member states, either immediately or in the future, with minimum disruption;*
8. *Protection of the natural, built and cultural environment, particularly residential amenity, to be a priority; and*
9. *Provision of real community gain or benefit to be essential.*<sup>791</sup>

The inclusion of principles 1-2 is curious as the projects would not lead to an increase in the use of renewable sources of energy in Ireland, and they would not lead to a reduction in Ireland's dependence on fossil fuels, imported or otherwise, while item 3 should have been a given, considering the scale of the projects. Likewise, considering the Minister's confidence on the issue of target achievement, item 4 should not have been a concern for the State even if it was for more objective and informed constituencies. Looked at simply, principle 5 was a political guarantee and included to reassure Irish consumers that they would not be funding GB electricity consumers. Considering the direct and exclusive nature of the connections proposed by developers, it is difficult to see how principles 6-7 could be met; yet in the timeframe it is difficult to see how anything other than direct and exclusive connections could have been delivered. Principles 8-9 follow the earlier stated purposes at 3 and 4 and are the core issues dressed up in this context as principles.

If the above two lists were not enough, a further list, this time of topics for consideration, included economic benefit;<sup>792</sup> the nature of the resource (wind, wave, tidal, bio-energy and solar), that

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<sup>791</sup> *ibid* 3.

<sup>792</sup> *ibid* 9. DCENR had commenced a Cost Benefit Analysis.

should be considered for inclusion in exports; the study area;<sup>793</sup> grid options (to ensure that new infrastructure would complement existing networks); community gain; and environmental aspects. The Information Document noted that the Department was developing a policy for community gain and that this would feed into the export policy.<sup>794</sup> The closing date for responses to the initial consultation was 22 November 2013 giving those who wished to respond little more than one month to do so.<sup>795</sup>

A sound policy framework was not the only matter that required to be addressed. If the proposed energy export projects were large and complex, then developer and investor expectations as to regulatory certainty and certainty of financial support were by necessity equally large and complex. Investors and developers required, amongst other things, regulatory and or contractual assurances as to firm financial access to transmission assets, as well as compensation for transmission outages or constraint/curtailment and an enduring support scheme.<sup>796</sup> Reconciling these expectations with what may or may not be available following Government negotiations on an Intergovernmental Agreement and finalisation of the precise regulatory structure and alignment of the assets would prove to be a major undertaking.

## Opposition and Failure to Reach an Inter-Governmental Agreement

Opposition to the export projects was marked and fell into two broad constituencies; those who for environmental and amenity reasons objected to the use of the Irish landscape for the siting of large wind turbines and associated infrastructure, and those who argued that Ireland should not allow private enterprise and international investors to exploit Ireland's wind resource for the benefit of their shareholders and GB electricity consumers. The former based their opposition on a long list of perceived ills and calamities including the impact of turbine proximity on home and property values, human and animal health concerns, environmental and habitat damage as well as general illegality.<sup>797</sup> The latter saw the scale of the energy export opportunity as something that should be reaped for the community at large and not solely, or indeed at all, for shareholders

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<sup>793</sup> *ibid* 8-9. The initial study area was confined to the Republic of Ireland. Environmentally sensitive areas were to be noted and excluded. Consideration was also to be given to proximity of proposed infrastructure to load centres so that transmission losses could be minimised. It was also noted that 'residential amenity' would be a key factor in determining locations.

<sup>794</sup> The Information Document also noted that DCENR in conjunction with the Department of the Environment, Community and Local Government and SEAI were conducting a review of the Wind Energy Planning Guidelines 2006 to deal with issues such as noise, separation distance and shadow flicker. These guidelines were to be finalised mid-2014. See: DCENR (n 786) 9.

<sup>795</sup> *ibid* 6. In the event approximately 1,400 submissions were received (See: DCENR (n 10) 9).

<sup>796</sup> See for example: Bord Na Móna (n 788).

<sup>797</sup> For a relatively full summary of opposition issues see: Lakelands Windfarm Information Group <<http://lwig.net/>> accessed 13 June 2016. See also: Caroline O' Doherty, 'Export Plan for Wind Energy Dumped' *Irish Examiner* (14 April 2014).

or landowners, whether members of the community or otherwise.<sup>798</sup> There was much focus on the issue of community gain, and the potential, and need to extract meaningful contributions for communities.<sup>799</sup>

Opposition TD's in Dáil Éireann sought to use the fact that the export projects were being delayed allowing for policy development, as a reason why all wind development, export and domestic, should be stalled.<sup>800</sup> Revisions to the Wind Energy Planning Guidelines 2006 issued under section 28 of the Planning and Development Act 2000 (PDA 2000), had been promised since 2013 to address issues such as proximity to dwellings, noise and shadow flicker. The absence of the revised guidelines was, and continues to be, a central theme in the opposition to windfarm development and is considered in detail elsewhere.<sup>801</sup>

Though much work appears to have been done by representatives of both governments and regulators on both sides of the Irish Sea, an inter-governmental agreement did not in the end materialise. In April 2014, the Energy Minister outlined the potential opportunity that had been economically validated on the Irish side, and finally acknowledged the reality of the 2020 timeframe:

Economic analysis conducted on the Irish side clearly indicates that under agreed policy and regulatory conditions, renewable energy trading can deliver significant economic benefits to Ireland and the UK, as well as being attractive to developers. However, this will not happen automatically. Renewable energy trading has to be designed to work. Following further discussions between my Department and the Department of Energy and Climate Change in the UK since the Summit between the Taoiseach and Prime Minister Cameron in early March, I am confirmed in the view that given the economic, policy and regulatory

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<sup>798</sup> Caelainn Barr, 'Estimates of Jobs and Economic Benefits from Ireland-UK Project are Up in the Air' *The Irish Times* (Dublin, 8 April 2013).

<sup>799</sup> Lúgh Braonáin, 'UK and Ireland's Green MOU: an opportunity for wider community benefits' (24 January 2013) <<http://www.energyco-ops.ie/uk-and-irelands-green-energy-mou-an-opportunity-for-wider-community-benefits/>> accessed 9 June 2016. See also DCENR summary of submissions received in response to its consultation process (DCENR (n 10)) 9.

<sup>800</sup> See: Brian Stanley T.D., Dáil Deb 23 October 2013, vol 818 No. 2. See also Pat Rabbitte, TD., and Minister for Communications, Energy and Natural Resources; and Jack Wall TD., Dáil Deb 6 February 2014, vol 829 No.3.

<sup>801</sup> See chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*) below. See also: Department of Environment, Heritage and Local Government, 'Planning Guidelines for Wind Development' <<http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Planning/FileDownload%2C1633%2Cen.pdf>> accessed 6 June 2017.



complexities involved, and the key decisions yet to be taken by the UK, delivery by 2020 of a Midlands Wind Export Project is not now a realistic proposition.<sup>802</sup>

In some camps the Minister's announcement was seen as a victory for those who had campaigned against the projects.<sup>803</sup> In reality however, the Minister's announcement was grounded in the failure to reach agreement with the UK Government, and whilst energy exports would not now be pursued for 2020, both the Irish Government on the basis of analysis done, and some of the developers concerned continue to believe in the opportunity beyond the original timeframe.<sup>804</sup> As a consequence of this deferral the organised campaigners against the projects were left with a hollow victory that they had little difficulty in claiming as their own.

### Policy and Legal Deficits as a Contributing Factor

The extent of the policy and legal deficits that required to be addressed if the wind energy export projects were to proceed was confounding and it is not an overstatement to say that what was required was a completely new regulatory framework. None of the three proposals discussed above involved EirGrid or ESB in the ownership and operation of the network assets involved. Yet, as a matter of Irish law, should the proposed extensive network wires that were required, be categorised as transmission or distribution assets, then parties' other than ESB or EirGrid could not, as a matter of Irish law, be licenced to own, or operate them. Categorising the assets as an *interconnector* to avoid this difficulty was also not an option due to the definition of *interconnector* under Irish law. As output from the wind generators could only legally be made available in the SEM, by-passing the market with a direct connection to the GB market was also not allowed and finally, essential way-leaving powers would not, under Irish law, have been available to the developers. These examples highlight how fanciful the initiative was, and how reckless it was for the State to pursue it in a manner that put 2020 renewable targets at risk.

The issue of social acceptance of Irish wind energy development is considered more fully at chapter 7 (*Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm*). In recent years, and especially in the aftermath of the economic crisis, political championing of major infrastructure projects, particularly in the energy sector, has waned considerably in response to the populist agendas of new political movements or extreme anti-austerity parties that have found traction with communities who perceive that they have been abandoned by the hitherto

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<sup>802</sup> Pat Rabbitte T.D., and Minister for Communications, Energy and Natural Resources (n 759).

<sup>803</sup> See: Rónán Duffy, 'It's Official: The Government has cancelled its Midlands Wind Energy Export Plan' *thejournal.ie* (13 April 2014).

<sup>804</sup> Paul Melia, 'Proposals for Giant Wind Farms are Shelved' *The Irish Independent* (7 March 2014); Caroline O'Doherty, 'Export Plan for Wind Energy Dumped' *The Irish Examiner* (14 April 2014); and Geoff Percival, 'Plug Pulled on 6bn Energy Project' *The Irish Examiner* (20 July 2014).

political establishment. Local representatives and candidates who in the past supported legislation aimed at encouraging and expediting renewable energy projects, and wind in particular, have for reasons of political expediency become some of the most vocal opponents of wind farms in their local communities.<sup>805</sup> The role played by opposition, as well as members of the then existing government parties in campaigns against energy infrastructure and the need for a ‘new political consensus’ to get energy policy ‘back on track’ is a theme pursued by the Green Party in their response to the Department’s Green Paper on Energy Policy.<sup>806</sup> The reality of this period has been one where policy makers and civil servants have been busy writing voluminous policy documents broadly supportive of renewable energy and setting renewable objectives while the foot soldiers of the political establishment and would be members of Dáil Éireann have on the ground done their best to undermine that policy in the race to secure local support and votes. The problem is not unique to Ireland. Indeed, in the context of the energy export projects themselves, one UK based commentator under the heading ‘*Wind farm nimbyism means 10,000 jobs just went to Ireland*’, expressed the view that the level of opposition to wind in the UK seems greater than it is because ‘campaigners concerns have been amplified by certain segments of the press and championed by several government ministers, including the Energy Minister..’<sup>807</sup> This is the environment that the energy export projects not only found themselves in, but due to their size and ambition they became the perfect example for social opposition of all that was wrong about onshore wind development. The projects did not proceed because of the failure to agree an intergovernmental agreement with the UK Government. Political resolve to drive these projects forward was thus not tested. It is submitted that this resolve would not, in the event, have materialised and that the absence of an appropriate legal and regulatory framework would have made it impossible for any material onshore Ireland wind project to have commenced commercial exports to the GB grid before 2020.

The economic case for wind exports has however been convincingly argued and will no doubt continue to be, albeit that it will need to be re-evaluated in the post Brexit world.<sup>808</sup> Without the pressure of the looming and unrealistic 2020 target for commercial exports, and in the political, policy and legal vacuum of the immediate post Brexit world, there now exists an opportunity for

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<sup>805</sup> See for example: Fianna Fáil, ‘Policy Paper on Wind Energy’ <<https://www.fiannafail.ie/download/rural-ireland/Wind%20Policy.pdf>> accessed 14 June 2016; and Fianna Fáil, ‘Policy Paper, Energy in Ireland’ (April 2015) <[https://www.fiannafail.ie/download/cost-of-living/ENERGY%20POLICY%20130415\(2\).pdf](https://www.fiannafail.ie/download/cost-of-living/ENERGY%20POLICY%20130415(2).pdf)> accessed 14 June 2016.

<sup>806</sup> Green Party, ‘Submission to the Department of Communications, Energy and Natural Resources Public Consultation on the Green Paper on Energy Policy in Ireland’ (31 July 2014).

<sup>807</sup> Reg Platt, ‘*Wind farm nimbyism means 10,000 jobs just went to Ireland*’ Institute for Public Policy Research (25 January 2013) <<http://www.newstatesman.com/economics/2013/01/wind-farm-nimbyism-means-10000-jobs-just-went-ireland>> accessed 9 June 2016.

<sup>808</sup> See: Pöyry and Cambridge Econometrics (n 760).

Government to build political consensus and work with communities, and other stakeholders to put an appropriate policy and development framework in place for energy exports. It is however submitted that whilst there may be good reasons why Government should revive its Renewable Energy Export Policy and Development Framework and Strategic Environmental Assessment process,<sup>809</sup> and see it through to conclusion over a reasonable timeframe that allows for debate and the building of consensus, this should not be done before 2020 to avoid further adverse impacts for domestic wind developments. There is also the issue of resourcing and expertise at ABP discussed at chapter 7 (*Social Acceptance-A Judicial Eye at the Centre of the Perfect Storm*). Had the export projects proceeded to planning, it is submitted ABP would not, in light of the issues highlighted at chapter 7, have been in a position to deal with such vast projects and the level of opposition to them and this would have further compromised achievement of Ireland's 2020 targets. If there are to be renewable energy exports of the scale contemplated post 2020, to build trust in the process, the framework development should proceed without regard or reference to any specific development or developer, with the views of developers, industry bodies and other stakeholders being collated and assessed through a public consultation process managed by CER, and not DCCA.

It has been submitted by the Green Party that one of the reasons that public confidence in the energy export initiative diminished was because the project had become 'viewed as a private and exclusive project.'<sup>810</sup> In the opinion of the Green Party, any future initiative should proceed under public ownership and the transmission assets should be fully unbundled in favour of EirGrid. Whilst there is some weight in the suggestion that some did view the projects as private and exclusive, the solution is not to seek to bring the projects forward exclusively under public ownership, rather it is for Government and regulators to be seen to be acting, and to actually set policy and regulation, in an open, transparent and non-discriminatory fashion, and in furtherance of national and social objectives.

In this context the Green Party have also questioned the sale by the State of wind farms developed by State owned companies such as Bord Gáis Éireann (BGE) and contended that there is scope for public ownership of generating assets in a regulated competitive market.<sup>811</sup> It is submitted that, for the reasons set out in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), the only effective form of unbundling of Irish transmission and distribution assets is the full privatisation of ESB's generation and supply business leaving the State through EirGrid to own, develop, maintain and operate the Transmission System; and ESB

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<sup>809</sup> DCENR (n 786).

<sup>810</sup> Green Party (n 806) 4.

<sup>811</sup> Green Party (n 806) 3-4.

to own, develop, maintain and operate the Distribution System. As far as public ownership of future export opportunities is concerned, there is undoubtedly a case for the involvement of EirGrid, but the size, complexity and financial burden of these projects calls for significant private participation as well, perhaps (though not exclusively) through joint ventures. Absent full unbundling of electricity networks, all State investment in export networks should be housed in EirGrid as both owner and operator and not in or through any other Irish State enterprise.<sup>812</sup> Outside of State involvement, the full rigour of the unbundling rules and full ownership unbundling should be applied to any and all transmission network investment whether the new transmission assets connect the transmission networks of Ireland and the counterparty State or not.

In an Irish context if one looks at the typical asset set of generation, transmission and interconnection and then seeks to apply the existing suite of licences mandated by the ERA in an export scenario, one very quickly reaches the conclusion that the legislation as written (even with the most purposive statutory interpretation), and the standard licences that issue under that legislation do not (for the most part), contemplate physical energy exports of the kind and scale anticipated by the Joint Projects mechanism set out in the Second Renewable Energy Directive. The precise nature of the changes to the Irish legal and regulatory set-up that are required to facilitate the large-scale trade of wind generated electricity with Britain or France or elsewhere will ultimately be dictated by the specific circumstances of any proposed arrangement. The decision of the United Kingdom to leave the European Union also complicates matters though the precise nature and extent of that complication from an energy law perspective will take some time to unravel. Notwithstanding this, there are a core set of regulatory and legal conundrums and choices that should have been properly explored and addressed in anticipation of actual projects. Many of the issues are so fundamental that they require to be addressed irrespective of the counterparty jurisdiction, and in most envisaged asset set configurations and scenarios and so merit investigation and resolution in advance of identified opportunities.

Much of the focus in GB, and indeed in Ireland, prior to the decision not to proceed with the energy export projects was on seeking to align desired asset configurations with existing licence categories and whilst this is understandable in the particular circumstances, it is clearly not ideal as it leads one potentially to a position where one is seeking to put a very large square peg into anything but a corresponding form. The fundamental regulatory questions raised during the process and which remain for the most part unanswered, would, if the process had advanced,

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<sup>812</sup> For a discussion of ownership and operation of cross border transmission assets in the context of the Irish-GB energy exports projects see: EirGrid, *Regulation of transmission connected non-GB generation to the GB electricity transmission system, A response by EirGrid* (January 2014) 19.

undoubtedly have found their way into the due diligence reports and on to the agenda of credit and risk committee meetings in financial institutions and investor organisations in London, New York and elsewhere.

In Ireland, the licensing of generation, transmission system ownership and operation are particularly difficult from an energy export perspective when one looks at the detail of the underlying statutory provisions. The following examples serve to illustrate the extent of the problem. The carriage of electricity on wires away from the wind turbines would undoubtedly fall within the broad definition of ‘transmission’ as it is defined in the ERA.<sup>813</sup> As discussed in chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), the ownership and operation of transmission assets is reserved for State-owned enterprises ESB and EirGrid respectively, and the legislation does not contemplate the granting of a licence to any other party, State-owned or otherwise.<sup>814</sup> Subject to the discussion below concerning interconnectors, there is therefore no legal basis for any entity other than ESB to own transmission infrastructure, or for any entity other than EirGrid to operate such infrastructure. At a policy level therefore, and subject again to the observations below concerning interconnectors, if energy exports are to be permitted utilising transmission assets that are developed and sit apart from the existing transmission and distribution networks, and outside the ownership and operational control of ESB and EirGrid, then primary legislation will be required to facilitate this. With this in mind and to address the curious licencing arrangement that exists under Irish law that TSO and TAO licences cannot be revoked because they cannot be granted to any party other than the incumbents, the statutory monopoly that ESB and EirGrid enjoy in respect of ownership and operation of transmission assets should be lifted and CER should be empowered to grant licences to appropriately qualified, financed, and fully unbundled third parties to own and operate transmission infrastructure.

Structuring any export arrangement around ESB and EirGrid ownership and operation may be equally problematic where the power generated is not routed through the SEM and there would undoubtedly be *vires* issues when one considers that the functions of EirGrid as TSO, and ESB as TAO, are written with the Irish Transmission System in mind albeit with some significant regard for the cross-border requirements of the SEM and EirGrid’s role as owner and operator of the

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<sup>813</sup> ERA, s 2(1) defines transmission as ‘*the transport of electricity by means of a transmission system, that is to say, a system which consists, wholly or mainly, of high voltage lines and electric plant and which is used for conveying electricity from a generating station to a substation, from one generating station to another, from one substation to another or to or from any interconnector or to final customers..*’

<sup>814</sup>See: ERA, s 14(2A) and the 2000 Regulations reg 5(1) in respect of the licence to discharge the functions of the transmission system operator and ERA, s 14(2B); and the 2000 Regulations reg 6(1) in respect of the licence to discharge the functions of the transmission system owner.

East West Interconnector. The connection of large scale generation assets would also be problematic from the perspective of the Group Processing of Gate Process discussed at chapter 5 (*Prioritising Wind-The Role of Policy, Law and Independent Regulation*), to the extent that these arrangements continue beyond 2020.

The possibility of the assets connecting the generating assets in Ireland with the GB transmission system being classified as an interconnector and licenced as such was also considered in the context of the energy export projects and prompted a question as to the definition of the term ‘interconnector’ as a matter of Irish, GB and European Union law. The proposed connection of non-GB generation assets to the GB transmission system was an unprecedented event, and gave rise to a series of novel and complex issues and considerations in that jurisdiction also.<sup>815</sup> Ofgem in its consultation on the issue of the regulation of transmission assets connecting non-GB generation to the GB electricity transmission system, set out a number of asset configurations ranging from simple direct and exclusive connections to more complex configurations.<sup>816</sup> A central issues for the consultation and the responses it elicited, were difficulties of alignment and interpretation of the proposed asset configurations with applicable European, UK and Irish law. As a matter of GB domestic law, Ofgem concluded that pursuant to section 4 (3E) of the Electricity Act 1989, a line that connects a non-GB generating asset to the GB electricity network was an interconnector. As far as applicable European law was concerned, Ofgem took the preliminary view that ‘assets connecting non-GB generation to the GB electricity transmission system fall within the definition of interconnection in the Electricity Regulation.’<sup>817</sup> Article 2(1) of the Electricity Regulation defines an interconnector as a ‘.. transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States.’<sup>818</sup> Whilst the Ofgem interpretation could be correct in a given factual scenario, the proviso that the connecting asset tie together the national transmission systems of Member States must be satisfied. While different views were expressed as to the interpretation of Article 2(1) in the responses to the consultation, the plain meaning would seem obvious, and in an Irish-GB context, in the absence of an actual physical connection to the ESB owned, and EirGrid operated transmission system, the connecting assets could not, as a matter of European Union law, be considered to be an interconnector.<sup>819</sup>

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<sup>815</sup> Ofgem, *The Regulation of Transmission connection non-GB generation to the GB electricity transmission system, Consultation* (18 November 2013) 4.

<sup>816</sup> *ibid* 15-16.

<sup>817</sup> *ibid* 19-22.

<sup>818</sup> Regulation (EC) No 714/2009 (n 743) art 2(1).

<sup>819</sup> For a discussion of the interpretation of art 2(1) of Regulation (EC) No 741/2009 see: Bord Na Móna (n 788); and IWEA, ‘IWEA Response to Ofgem Consultation, The Regulation of Transmission connection non-GB generation to the GB electricity transmission system’ (17 January 2014)

The customary practice, where a UK interconnector licence was issued, was for a corresponding licence to be issued in the counterparty State.<sup>820</sup> This was an issue for the CER as regulator in Ireland, but could the assets be classified as an interconnector for the purpose of Irish law? Though the ERA does provide for the possibility of an interconnector that is not owned and operated by ESB and/or EirGrid, and is not part of the transmission system, utilising the relevant provisions in an energy export scenario may be problematic assuming one gets over the difficulty highlighted above in relation to the requirement that the asset connects the transmission networks of Member States.<sup>821</sup>

Ofgem also had to consider how the generation assets and collector station(s) that would be located outside GB would be regulated and whilst this was a matter for the host State (Ireland in the case of the energy export projects), there would be GB requirements pertaining to, amongst other things, system safety that would require to be addressed given the direct connection to the GB network.<sup>822</sup> As with transmission there are a number of difficulties with the applicable requirements for generating assets including a requirement that a person who holds a generating licence issued by the CER pursuant to ERA, section 16 must, where the installed generation capacity exceeds 10 MW, make electricity generated available to the SEM.<sup>823</sup> Any route to market that by-passes SEM, would thus seem to be in conflict with this licence requirement. As it is likely that any energy export project will entail extensive cable laying and associated infrastructure development necessary to take the electricity from the generation sites to the Irish foreshore, statutory powers of compulsory land acquisition,<sup>824</sup> compulsory wayleave acquisition<sup>825</sup> and road opening<sup>826</sup> that are legally available to electricity undertakings (holders of CER licences issued under the ERA), will need to be available to project developers. Given some of the uncertainties outlined above as to the categorisation of generating and transmission assets used in an export scenario, the availability of some, or all, of the essential ancillary powers in the Electricity (Supply) Act 1927 is far from certain and could be a fruitful avenue for judicial review by opponents of the developments. The above is just a sample of the legal uncertainties and difficulties that exist and would need to be resolved. In addition, there are also complex regulatory challenges both for Ireland as host state, and any state receiving the exported power, around such matters as the

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[https://www.ofgem.gov.uk/sites/default/files/docs/2014/05/iwea\\_response\\_non\\_gb\\_consultation\\_jan\\_14.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2014/05/iwea_response_non_gb_consultation_jan_14.pdf) accessed 24 May 2016.

<sup>820</sup> Ofgem (n 815) 17.

<sup>821</sup> See: ERA, s 2(A); and ERA, s 16A.

<sup>822</sup> Ofgem (n 815) 17.

<sup>823</sup> Electricity Regulation Act 1999 (Single Electricity Market) Regulations 2007, SI 2007/406, reg 19.

<sup>824</sup> Electricity (Supply) Act 1927, s 45.

<sup>825</sup> Electricity (Supply) Act 1927, s 53.

<sup>826</sup> Electricity (Supply) Act 1927, s 51(1).

allocation of capacity on any interconnection assets; and issues of cost recovery for associated Irish and/or counterparty state network reinforcement that may be required.<sup>827</sup>

## Exporting Wind Post Brexit

On 23 June 2016, the UK voted to leave the European Union.<sup>828</sup> The UK will now undergo a lengthy process of determining the extent to which the extensive corpus of EU law that is currently part of the laws of Northern Ireland, Scotland, England and Wales will continue to apply. Following completion of the legal formalities surrounding the UK's exit, matters such as binding renewable energy targets, State aid, regulatory unbundling, and free movement of goods (including electricity), will all be matters for the government of the UK, and its constituent devolved elements without reference to any European institution. The extent to which there is a movement away from core European policy and regulation in the energy sector remains to be seen though some change is inevitable. Even before Brexit, there was strong evidence that renewable energy sources were under pressure in the UK from an administration that was growing increasingly disinterested in the sector in favour of other energy sources including nuclear energy.<sup>829</sup> In the short to medium term the UK is likely to abandon hard targets for renewables but in the longer term evolving obligations under international treaties are likely to push the UK back in the direction of renewable and sustainable development and energy sources, and this in turn may open the door to a market for Irish wind generated electricity in the UK. Absent this market Ireland must look further afield to France.<sup>830</sup>

In the meantime, DCCAE has undertaken to develop, in conjunction with the TSOs on the island of Ireland and private developers a regulatory policy for electricity interconnectors and to have this completed by 2020.<sup>831</sup> As discussed above, this should be deferred to the post 2020 period

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<sup>827</sup> See for example: Ofgem (n 815).

<sup>828</sup> See text of Prime Minister David Cameron's speech following the UK referendum of 23 June 2016: <[http://www.nytimes.com/2016/06/25/world/europe/david-cameron-speech-transcript.html?\\_r=0](http://www.nytimes.com/2016/06/25/world/europe/david-cameron-speech-transcript.html?_r=0)> accessed 25 June 2016.

<sup>829</sup> See: Joshua S. Hill, 'UK Government Renewable Energy Policy Leaving "Investors And Consumers Baffled" EY States' (17 September 2015) <<http://cleantechnica.com/2015/09/17/uk-government-renewable-energy-policy-leaving-investors-consumers-baffled-ey/>> accessed 25 June 2016; Joshua S. Hill, 'Policy Shifts Movement in EY's Latest Renewable Energy Country Attractiveness Index' <<http://cleantechnica.com/2015/09/16/policy-shifts-drive-movement-eyes-latest-renewable-energy-country-attractiveness-index/>> (16 September 2015) accessed 25 June 2016; and Damien Carrington, 'Government finally admits it is subsidising nuclear-while cutting help for renewables' *The Guardian* (22 October 2015).

<sup>830</sup> For a discussion of the benefits on interconnection with France see: EirGrid Group, *Grid Link*, <<http://www.eirgridgroup.com/the-grid/projects/grid-link/the-project/>> accessed 25 June 2016.

<sup>831</sup> DCCAE (n 3) 46. See also DCENR (n 10) 10-13, where DCENR has included amongst the principles of the newly proposed Renewable Electricity Policy and Development Framework a requirement to 'maximise the sustainable use of renewable electricity resources in order to develop progressively more renewable electricity for the domestic and potential, future export markets' and accepted that due to the 'economic, policy, and regulatory complexities involved, any potential delivery of renewable energy export is



when great care will need to be given to ensuring that public consultation is inclusive of community interests and views.

## Chapter Conclusion and Application to Thesis Themes and Questions

Ireland's proposed export projects for wind generated electricity did not give rise to any uncertainty in legal terms as to what was to be achieved from an Irish renewable energy target perspective. Ireland's 2020 targets would remain the same whether the projects proceeded or not. The export initiative has however contributed significantly to the uncertainty of the pursuit of Ireland's 2020 RES-E Target. This chapter highlights how a failure at a policy level to make a clear distinction between the very substantial and visible infrastructure required for the export proposals, and the infrastructure required for domestic electricity production from wind that would count towards Ireland's targets, has had adverse social acceptance consequences for the latter, and made the pursuit of Ireland's 2020 renewable electricity targets a considerably more uncertain one. The State has, at best inadvertently, and at worst recklessly, allowed an ill-conceived proposal to prejudice Ireland's ability to meet its 2020 RES-E Target by creating significant uncertainty around the environmental and planning permitting for domestic wind energy projects that have the potential to contribute towards Ireland's renewable energy targets. As will be seen in the chapter that follows, the social acceptance consequences of the unfortunate juxtaposition of the proposed export projects with projects for domestic consumption continue to resonate.

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realistically a post-2020 proposition.' It is intended that the new framework will set out the 'principles and conditions for potential export projects...' (ibid (n 10) 17).

## Chapter 7: Social Acceptability-A Judicial Eye at the Centre of the Perfect Storm

*Neither the Directive nor the Regulations ordain that there shall be no permission granted because there are some environmental risks, for if that were the case all construction activity would have to cease. The object is rather to identify and assess the range of risks presented by the development application, identifying where appropriate risk mitigation measures.<sup>832</sup>*

### Stirring up the Perfect Storm

In the approximate 20-year period following the emergence of commercial wind generation in Ireland in the mid-1990s, wind technology and associated development found favour with the Irish political establishment, and subject to EU direction and guidance, a supportive policy emerged and endured. The market, spurred on by these positive signals, and generous financial supports hardwired into legislation and underwritten by electricity consumers, invested millions of euro in the development of wind farms together with the systems and infrastructure necessary to produce and trade green power. Consumers also embraced green power, particularly large demand users keen to be perceived to be addressing the global climate change conundrum that they were, and are, inextricably associated with.<sup>833</sup> Though there were instances of opposition to specific developments, the community was either broadly supportive, or broadly indifferent, to the gradual rollout of wind turbines and associated infrastructure across the landscape. A 2003 SEAI study into the nation's acceptability of wind-generated power undoubtedly represents the high water mark of acceptability as far as surveying and documenting the phenomenon is concerned.<sup>834</sup> The study found that 'the overall attitude to wind farms is almost entirely positive' with more than 80% believing wind energy to be a 'very or fairly good thing' and, furthermore that, 'two-thirds of Irish adults are either very or fairly favourable to having a wind farm built in their locality, with little evidence of a 'Not In My Back Yard' effect'.<sup>835</sup> In 2004, leading authorities in the field concluded that planning 'is no longer a barrier to wind energy deployment in Ireland,

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<sup>832</sup> *Keane v An Bord Pleanála* [2012] IEHC 324 [23] (Hogan J).

<sup>833</sup> See for example Munster Joinery's on site wind generation project and background to the company's statement that 'The installation will easily achieve annual savings of over 9,000 tonnes of carbon emissions showing Munster Joinery's commitment to protecting our environment': <<http://www.munsterjoinery.ie/index.jsp?p=100&n=112&a=582> > accessed 19 September 2016; and David Weston, 'New Apple Data Centres Powered Renewables' Wind Power Monthly (23 February 2015) <<http://www.windpowermonthly.com/article/1335128/new-apple-data-centres-powered-renewables>> accessed 19 September 2016.

<sup>834</sup> SEI, *Attitudes Towards the Development of Windfarms in Ireland* (2003) 2.

<sup>835</sup> *ibid.*

as evidenced by the number of wind farms with planning permission.<sup>836</sup> A decade later, and admittedly with an express disclaimer that there was a dearth of up to date evidence, Frontier Economics concluded that there appeared to be a ‘reasonable level of public support for onshore wind’ in Ireland.<sup>837</sup>

The position today could not be more altered. Whilst the market continues to show interest in Irish wind energy, and a supportive policy remains the official position, there is now at a local level, a virtual cross-party political coalition against wind development, and social acceptance of wind in communities is at a very low ebb and continues to recede at a prompt pace. It is not an over statement to say that wind development now finds itself at the centre of the perfect storm.<sup>838</sup> The reasons for this transformation in attitude towards wind development are well documented, as are the many suggested approaches to regaining community trust and support.<sup>839</sup>

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<sup>836</sup> O’Leary (n 372) 20.

<sup>837</sup> Frontier (n 130) 110.

<sup>838</sup> Sebastian Junger, *The perfect storm: a true story of men against the sea*, (Norton, New York 1997). One commentator has reported that an estimated two-thirds of new wind farm developments are the subject of court actions. See: Rowe (n 14).

<sup>839</sup> For a discussion of the environmental impacts of onshore wind and useful UK, Danish and German comparisons see: Samuela Bassi, Alex Bowen and Sam Fankhauser, ‘The Case for and Against Onshore Wind Energy in the UK’, Policy Brief (June 2012 Grantham Research Institute on Climate Change and The Environment and the Centre for Climate Change Economics and Policy) <<http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2014/03/PB-onshore-wind-energy-UK.pdf>> accessed 18 November 2016. See also: Robert Horbaty, Operating Agent, IEA Wind Task 28, ‘Task 28 Within IEA and RD&D Wind: Social Acceptance of Wind Energy Projects: Winning Hearts and Minds, Expert Exchange Day’, Galway Bay Hotel, Galway (29 September 2010) <<http://www.socialacceptance.ch/images/Horbaty.pdf>> accessed 12 September 2017; SLR, ‘Wind Energy, The Challenge of Community Engagement and Social Acceptance in Ireland’ (February 2014) <[http://files.nesc.ie/nesc\\_reports/en/139\\_additional1\\_SLR\\_National\\_Report.pdf](http://files.nesc.ie/nesc_reports/en/139_additional1_SLR_National_Report.pdf)> accessed 4 October 2016; SLR, ‘International Practices to Support Community Engagement and Acceptance’ (February 2014) <[http://files.nesc.ie/nesc\\_reports/en/139\\_additional2\\_SLR\\_International\\_Report.pdf](http://files.nesc.ie/nesc_reports/en/139_additional2_SLR_International_Report.pdf)> accessed 4 October 2016; National Economic & Social Council, *Wind Energy in Ireland, Building Community Engagement and Social Support* (July 2014 No 139) <[http://files.nesc.ie/nesc\\_reports/en/139\\_Wind\\_Energy\\_Main\\_Report.pdf](http://files.nesc.ie/nesc_reports/en/139_Wind_Energy_Main_Report.pdf)> accessed 4 October 2016; The Renewable Energy Partnership, ‘To catch The Wind, The Potential for Community Ownership of Windfarms in Ireland’ (2004) <[http://www.wdc.ie/wp-content/uploads/reports\\_To-Catch-the-Wind.pdf](http://www.wdc.ie/wp-content/uploads/reports_To-Catch-the-Wind.pdf)> accessed 4 October 2016; EWEA, ‘Wind Energy The Facts, Community Acceptance of Wind Energy’ <<http://www.wind-energy-the-facts.org/index-71.html>> accessed 5 October 2016; IWEA, ‘Good Neighbour-IWEA Best Practice Principles in Community Engagement and Community Commitment’ (March 2013); Eoin O’Neill, ‘Spatial Planning and social barriers to onshore wind energy deployment’ (2012) <[http://www.seai.ie/News\\_Events/Previous\\_SEAI\\_events/Eoin\\_O\\_Neill.pdf](http://www.seai.ie/News_Events/Previous_SEAI_events/Eoin_O_Neill.pdf)> accessed 5 October 2016; Comhar SDC and Trinity College Dublin, ‘Community Renewable Energy in Ireland: Status, barriers and potential options, Policy Paper (November 2011) <[http://files.nesc.ie/comhar\\_archive/Comhar%20Papers/Comhar\\_Paper\\_11\\_2011.pdf](http://files.nesc.ie/comhar_archive/Comhar%20Papers/Comhar_Paper_11_2011.pdf)> accessed 18 November 2016; Ecorys Research and Consulting (in consortium with Eclareon, EREC and Golder Associates), *Assessment of non-cost barriers to renewable energy growth in EU Member States-AEON, Report for DG Energy and Transport* (10 May 2010 DG TREN N0. TREN/D1/48-2008, Final Report) 29; Linda Fox-Rogers, Enda Murphy and Berna Grist, ‘Legislative Change in Ireland: a Marxist political economy

The focus of this chapter is on narrower aspects of the social acceptance debate; the role of the judiciary in resolving the conflict between the opponents, and proponents of wind farms when disputes concerning wind infrastructure come before the superior courts; how failings at ABP, Ireland's independent planning board, are contributing in a very significant, and avoidable way to development uncertainty and the obstacles faced by wind energy developers and policy makers; selected aspects of the emerging conflict between Ireland's renewable and sustainable policy, and European Union law and policy on protection of the environment; and how, in light of recent decisions of the superior courts that are discussed in this chapter, legal access to justice provisions may well prove to be the death knell for Ireland's 2020 renewable policy objectives at least as far as wind generation is concerned.

These aspects have been selected for study for the purpose of demonstrating the central supposition of this chapter which is that the legal environment for wind development in Ireland is now so altered and so uncertain, that there must be a high probability that Ireland will not achieve its 2020 RES-E Target and as a result miss its EU binding target of 16% of gross final consumption of energy from renewable sources, and if, at a policy level, Ireland continues to pursue wind development targets in the period to 2020 (which it must), and beyond 2020 (which remains to be determined<sup>840</sup>), then a fundamental change of approach to the permitting of energy infrastructure, including wind, is required. It is also submitted that the continuation of inflexible mandatory renewable targets (European or otherwise), as drivers of development, is fundamentally incompatible with evolving law and policy (which is mostly European in origin), around environmental protection. The issues highlighted below are better understood when looked at in the context of what is required from a wind generation build rate perspective for Ireland to achieve its targets:

The 2020 target of 40% RES-E is likely to require a total of 3,500-4,000 MW of onshore renewables generation capacity, compared to the 2,500 MW available at end December 2014, of which wind generation accounted for 2,200MW. To achieve our target, the average rate of build of onshore wind generation will need to increase to up to 260 MW per year. The current rate of build is about 170 MW per year.<sup>841</sup>

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critique of planning law' (2009) 82 6TPR 639; DCENR, *Government Policy Statement on the Strategic Importance of Transmission and Other Energy Infrastructure* (17 July 2012); and DCENR (n 400).

<sup>840</sup> SEAI, *Ireland's Energy Targets, Progress, Ambition and Impacts-Summary for Policy Makers* (April 2016); and DCENR (n 400).

<sup>841</sup> DCENR (n 400) 54.

As is highlighted in chapter 1 (*Introduction*), at the end of 2015, the revised required build rate was determined to be 250-300 MW per annum.

## Standing Firm Against the Wind-An Overview of the Social Acceptance Debate

Before considering the issues outlined above, it is necessary to look briefly at the broader social, political, and legal context. Much has been written and published on the issue of social acceptability and wind.<sup>842</sup> Ellis has convincingly argued that governments, including the governments on the island of Ireland, have ‘neglected the views of communities in the drive to increase onshore wind power’<sup>843</sup> and, that the upper limit for wind generated energy will be set not by grid deficits or available wind resource, but by the level of social acceptance of wind turbines ultimately achieved.<sup>844</sup> It is difficult to take issue with this conclusion save to add that perhaps the initial positive level of acceptance in Ireland, as evidenced by the SEI 2003 study,<sup>845</sup> led to a level of complacency amongst policy makers and indeed developers, each of whom proceeded oblivious to the storm that was brewing in their backyard. As the number of turbines increased, and the promoter’s announcements heralded ever more ambitious and grand projects, a concern took hold and started to germinate and grow in rural communities as to where all of this would ultimately end. The large-scale Energy Export Projects discussed at chapter 6 (*Gone with the Wind-Ireland’s Proposed Wind Energy Export Projects*), are undoubtedly a watershed moment in the development of Irish wind energy and the level of opposition to that initiative has unquestionably contaminated the positive and benign environment that existed for wind into the future.<sup>846</sup>

Whilst official government policy towards wind has not altered, significant levels of cross-party opposition to wind can be found at a local level amongst elected and prospective public representatives who not only voice opposition as a means to secure support, but who go further and actively and creatively work against actual projects.<sup>847</sup> Ellis, and indeed others, have

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<sup>842</sup> SEAI (n 840).

<sup>843</sup> Geraint Ellis, ‘Community Acceptance and the Future of Wind Energy’ (2014) Issue 15 Jan-Feb Eolas 14.

<sup>844</sup> *ibid.*

<sup>845</sup> SEI (n 834).

<sup>846</sup> For a discussion of how the mismanagement of a proposed large-scale testing project at Osterlid, Denmark led to significant levels of anti-wind opposition in Denmark that went beyond the specific project see: Ellis (n 843) 16.

<sup>847</sup> Fianna Fail, the party that historically presided over and implemented a favourable policy for wind, now questions whether, due to its unpredictability, it can provide the level of security of supply required and argue that sources such as offshore wind which, albeit has a higher construction cost, are preferable because turbines are not located in or adjacent to population centres. See: Fianna Fáil, ‘Policy Paper-Energy in Ireland Policy’ (April 2015) <<https://www.fiannafail.ie/download/ENERGY%20POLICY%20130415.pdf>> accessed 16 November 2016. Sinn Féin have called for a moratorium on wind development until their vision of how a planning system should work for the benefit of communities as set out in its Wind Turbine

concluded that the social acceptance conundrum can only be resolved through community engagement and rather than suppressing opposition, government should focus on involving the public in the development of energy policy.<sup>848</sup> Whilst it is accepted that this is perhaps the only option in the medium to long term, given the level of opposition, it is difficult to see how any level of engagement irrespective of how timely, constructive or conciliatory, can recover the situation as far as the 2020 targets are concerned.

It would be unfair to categorise all court outcomes that find for objectors, and against wind developers, as ‘anti-wind.’ There are undoubtedly developments that should not be permitted for valid environmental reasons, or because procedures have not been followed, or assessments conducted correctly. On the other hand, it would be equally wide of the mark to suggest that all objectors have as their sole, or primary objective, the protection of the environment or the preservation of some greater humanitarian ideal associated with saving the planet. It is submitted that the clear majority are motivated by desires inextricably tied to their own personal situation, the preservation of the value of their property and noise, visual and/or shadow flicker impacts that wind turbines may have on their enjoyment, economic and otherwise of that property.<sup>849</sup> Any positive outcome for the environment that may manifest itself if they are successful is merely incidental. Concerns about environmental impact are merely employed to assist the case against. This subjectivity was undoubtedly foremost in the mind of Haughton J when he observed:

To an extent, whether a proposed development has a significant impact is a subjective judgment, although in the case of a local planning authority or the Board it is a collective decision and there are guidelines that must be considered..... Regardless of what view the Court may take of the positioning and likely visual impact of these turbines, there was evidence before the Board in relation to visual impact and in particular a series of photo montages which allowed it to come to the decision it did.<sup>850</sup>

The law and evolving European and Irish jurisprudence seems less and less concerned with the distinction between opposition motivated by a concern of impairment of one’s personal rights, and opposition motivated by a concern for broader environmental impacts. The citizen is encouraged to assume the role of guardian of the environment in their own back yard and beyond

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Regulation Bill 2014 becomes law. See: Sinn Fein, ‘Submission to the Green Paper on Energy’ (2014) <[http://www.sinnfein.ie/files/2014/SF\\_Energy\\_Submission\\_2014\\_web.pdf](http://www.sinnfein.ie/files/2014/SF_Energy_Submission_2014_web.pdf)> accessed 18 November 2016.

<sup>848</sup> Ellis (n 843).

<sup>849</sup> For a valuable study on the visual impact of wind turbines on house prices in England and Wales see: Stephen Gibbons, ‘Gone with the Wind: Valuing the Visual Impacts of Wind Turbines through House Prices’ (April 2014 SERC Discussion Paper 159).

<sup>850</sup> *People Over Wind v An Bord Pleanála* [2015] IEHC 271.

and is facilitated by access to justice regimes that are the absolute anathema of inward investment, business and development. *Actio popularis* is the reality even if it is not yet acknowledged as the absolute rule of law.<sup>851</sup> The *Not in My Back-Yard* lobby, or in the words of Henchy J in *Cahill v Sutton*<sup>852</sup> 'the crank, the obstructionist, the meddlesome, the perverse [and] the officious man of straw' hand in hand with Morris J's 'genuinely and honestly concerned'<sup>853</sup> person have learned to trawl the internet, Irish and EU legislation and policy documents and to ably employ the legal protection afforded to habitats and specific flora and fauna to fatally delay wind developments, and if not have them struck down, take them beyond the window of commercial opportunity. This incessant quest by objectors and their advisers to discover new avenues of attack to halt or delay proposed wind developments which they fundamentally believe are inimical to their own interests, and the interests of the community and the environment they may or may not inhabit, has taken the Irish judiciary into the dense undergrowth that is the minutiae of Irish and European planning and environmental legislation, codes, guidelines and technical standards. The judiciaries' own perspective on this issue can be found in the judgment of Fennelly J in *O'Connell v The Environmental Protection Agency* when he observed that: 'It is necessary to steer through what counsel has aptly described as a statutory maze to uncover the effect of the regulations implementing the State's European Union obligations.'<sup>854</sup> As discussed further below, a review of recent Irish and European case law concerning the permitting of wind also highlights that there has been a gross misunderstanding of the import of certain vaguely drawn provisions of the Aarhus Convention<sup>855</sup> and the EIA Directive<sup>856</sup> by Member States, and that the CJEU is employing this loosely drawn and imprecise language to undo express and more

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<sup>851</sup> See: UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (The Aarhus Convention) signed by the European Community on 25 June, 1998 and ratified 17 February 2005, art 9(3).

<sup>852</sup> *Cahill v Sutton* [1980] IR 269 (SC) 284.

<sup>853</sup> *Lancefort Ltd v An Bord Pleanála* [1997] 2 IRLM 508 (HC) 513.

<sup>854</sup> *O'Connell v The Environmental Protection Agency* [2003] IESC 14, [2003] IR 530.

<sup>855</sup> *ibid* (n 851).

<sup>856</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40. The EIA Directive 1985 was amended three times as follows: (i) Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1997] OJ L73/5; (ii) Parliament and Council Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17; and (iii) Parliament and Council Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L140/114. The EIA Directive 1985 (as amended) was collated and codified by Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1 (EIA Directive 2011). The EIA Directive 2011 was amended by Parliament and Council Directive 2014/52/EU of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1.

precise controls that Member States believed that they had reserved for the national legislature and courts. These cases illustrate that the CJEU is encroaching on national procedural rules to an extent, it would seem, not contemplated by Member States.

A review of Irish case law highlights that Irish court outcomes in cases concerning opposition to wind developments fall broadly into three categories. In many instances the judiciary have succeeded in skilfully slashing their way through the detail and the complexity of the regulations and guidelines and have emerged out the other side with a judgment that honours the spirit, if not always the letter, of the law, while at the same time avoiding the imposition of some of the more draconian remedies sought by the objectors.<sup>857</sup> In other instances, such is the force of the legal argument proffered or procedural deficit unveiled, that the court is left with no option but to accede to the objector's request, and in these instances, it is often the case that the blame and inevitable cost lies squarely at the door of the developer, its advisers, and more often than is desirable, ABP itself.<sup>858</sup> It is these system or developer failures, that bring unwelcome and unnecessary attention to the sector, and provides *professional* objectors with easy victories that objectively cannot be argued with, and a degree of credibility they would otherwise not have. There is however a third category of cases where the judiciary, in the face of a decision that requires the exercise of a discretion, proceed to exercise that discretion in a manner that, on the face of it at least, appears to fly in the face of both logic and reason, and be overly and unnecessarily sympathetic to the position of the applicant objector to the detriment of developers, energy policy, and common sense.

If the opponents of wind have proved their ingenuity and resourcefulness in finding ever more obscure legal grounds for challenging wind developments in the courts,<sup>859</sup> legal commentators too have not been shy in delving into legislation and case law and conjuring up spectres of wholesale retrospective and prospective illegality and non-compliance with European law of a scale that would keep even the most speculative of risk takers or financiers awake at night. Barrett has submitted that, as the very policy that underpins Ireland's wind agenda and most of its operational wind farms were completed in breach of several European Union Directives, the 'policy itself and many individual wind developments are vulnerable to legal challenges or

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<sup>857</sup> See: *Buckley (No. 1) v An Bord Pleanála* [2015] IEHC 572; and *Carroll v An Bord Pleanála* [2016] IEHC 90.

<sup>858</sup> See: *Kelly v An Bord Pleanála* [2014] IEHC 400, 422. The decision in *O'Grianna v An Bord Pleanála* [2014] IEHC 632 (discussed below), has had a profound impact on windfarm development rates but objectively it is difficult to argue that the case put forward by the objectors was anything other than compelling and legally unimpeachable.

<sup>859</sup> See: Brendan Slattery, 'Decision Making on Energy Infrastructure: Can An Bord Pleanála be trusted to carry out EIA?' <<https://www.ucc.ie/en/media/academic/law/events/2016/BrendanSlattery.pdf>> accessed 19 November 2016, for a discussion of how applicants 'stretch to incorporate a ground for challenge based on the EIA Directive in order to secure the "heads I win, tails you lose" protection afforded...'



enforcement proceedings seeking their removal.<sup>860</sup> Of course this would deliver the ultimate victory to those who oppose wind development in Ireland, but in the meantime the focus of objection for opponents of wind tends to be more project specific, and no less effective for that. Ryall in her detailed study on effective judicial protection has raised many questions concerning the compatibility of Irish legal and procedural rules in the areas of: *locus standi*; costs for litigants; and the applicable standard of judicial review of administrative decisions by the judiciary, with the requirements of the Aarhus Convention<sup>861</sup> and the EIA Directive,<sup>862</sup> concluding that there are ‘formidable obstacles to access to justice in planning and environmental matters in Ireland.’<sup>863</sup> It is submitted that recent case law discussed below suggests otherwise, and that the floodgates are in fact opening to an extent that is contrary to the best interests of energy policy and the economy, and this flood of litigation may well be the single greatest contributor to Ireland ultimately failing to meet its 2020 targets and is, in the meantime, a source of much uncertainty.

### Kelly v An Bord Pleanála: The Case for Judicial Oversight at An Bord Pleanála

Legal challenges to planning decisions for the most part find their way to the High Court consequent upon a decision or determination by ABP, Ireland’s independent planning body.<sup>864</sup> It is submitted that, considering the critical function ABP performs in the context of Irish renewable energy policy, and the Irish economy more generally, when viewed through the prism of unfortunate and avoidable outcomes, there is an urgent requirement to ensure that not only should there be the possibility of judicial review of decisions of ABP, there is also a need to have judicial oversight of the decision making process at ABP itself. The separation of powers and functions mandated to exist between ABP and the judiciary, and the prospect that change was conceivably on the horizon, was highlighted in 2009 by McMahon J in the *Klohn v An Bord Pleanála*:

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<sup>860</sup> Eva Barrett, ‘In sowing the wind, how Ireland could reap the whirlwind—a case against Irish wind developments’ (2015) 33 1 JENRL, 59; and Eva Barrett, ‘Problems of the Irish Wind Energy Sector from the Aarhus Convention to the Strategic Environmental Assessment (SEA) Directive’ (2014) IPELJ. For a, less stark view on the status of windfarms completed allegedly in breach of the EIA Directive see: Slattery, *ibid*. See also: *Swords v Minister for Communications, Energy and Natural Resources* [2016] IEHC 503, where Keane J granted an order that the plaintiffs challenge to the validity of Ireland’s adoption of its NREAP, be struck out on grounds of delay.

<sup>861</sup> *ibid* (n 851).

<sup>862</sup> *ibid* (n 856).

<sup>863</sup> Áine Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland*, (Hart Publishing 2009) 194.

<sup>864</sup> For a summary of the role of ABP in the context of permitting energy projects see: Philip Green, Assistant Director of Planning, An Bord Pleanála, ‘Permitting of Energy Projects, Role of An Bord Pleanála’ (Presentation to Engineer’s Ireland Conference, October 2014) <<https://www.engineersireland.ie/Engineersireland/media/SiteMedia/cpd/training/Seminars%20temp/Permitting%20of%20Energy%20Projects/Philip-Green.pdf>> accessed 4 October 2016.

It is recognized in cases such as this that the Court in reviewing the Board's decision will not interfere with the bona fide exercise of its discretion in these matters. It is not the Court's function to second-guess the Board and substitute its own decision for that of the Board. The legislature, in its wisdom, vested the power to make such a decision in a body which has expertise and experience in these matters. Such a body is much better qualified and in a much better position to make such technical decisions in this specialized area than the Court, which has to rely on expert evidence to inform it in these cases. The courts will only interfere in such decisions where they appear so irrational that no reasonable authority or decision maker in this position would have made such a determination...Although the attitude has been criticized as being over-deferential, this judicial restraint is now well-established in our jurisprudence. Whether it will have to be reassessed in future because of more recent EU Directives in this area remains to be seen.<sup>865</sup>

Ryall has considered in detail whether the degree of judicial deference shown by the judiciary to ABP is compatible with the standard of review specified in the EIA Directive and laments the lack of 'guidance on the correct standard of review to be applied by the national courts in cases involving Community law.'<sup>866</sup> In the recent case of *People Over Wind v An Bord Pleanála*, Haughton J reiterated the somewhat limited role of the court in reviewing the workings of ABP when he observed that:

The Court is acutely conscious that any wind farm, particularly one with as many turbines as the proposed development, will have an effect on the visual amenity of the site and surrounding area. Local planners and the Board must however have regard to national, regional and local policy guidelines aimed at achieving a renewable energy target of 16% of overall energy consumption by 2020. This is in line with Ireland's international obligations to meet the requirements of the Kyoto Protocol. The local planning authorities and the Board have the unenviable task of taking the decisions that will facilitate the implementation of this policy but which will also inevitably have a visual impact. While some residents may not be unduly concerned, others will understandably be deeply unhappy at the effect on their lives, home or property. However, provided the planning

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<sup>865</sup> *Klohn v An Bord Pleanála* [2008] IEHC 111 [37], [2009] 1IR 59. For a recent restating of this position see the judgment of Haughton J in *Michael Alen-Buckley and Giancarla Alen-Buckley v An Bord Pleanála* (HC, 26 September 2017) [17].

<sup>866</sup> *ibid* (n 863) 113.

authority/the Board takes into account all relevant considerations, the law, including the EIA Directive as implemented into Irish Law, allows the granting of permissions where the proposed development will have visual impact, even a significant impact.<sup>867</sup>

Haughton J's 'all relevant considerations' proviso has, as the case law considered below highlights, proved to be a fruitful avenue for opponents of wind development, and secured for the judiciary, a much more active role in the planning process for wind development than the above extract would suggest. It is submitted that whilst the current distinct roles as between ABP and the courts should be maintained on the basis that the predominance of the necessary technical expertise lies with the ABP and not the judiciary, recent case law is highlighting serious shortcomings in the way ABP is conducting its business to the detriment of climate change policy and investors, and with undoubtedly adverse consequences for Ireland's RES-E Target.

Section 110 of the Planning and Development Act 2000 (PDA 2000), places with the chairperson of ABP responsibility for 'ensuring the efficient discharge of the business of the Board' and 'arranging the distribution of the business of the Board amongst its members.' Historically, the position of chairperson was required to be filled by a High Court judge, or former member of the judiciary, but this requirement was abandoned. The case for reverting to the former position in addition to establishing within ABP a credible legal division, has been persuasively made in recent case law involving scrutiny of decisions of ABP concerning wind generation development. Yet notwithstanding compelling evidence that ABP is failing to appreciate, and apply European Union law, the suggestion that the chairperson of ABP should be a High Court judge was dismissed in a recent comprehensive organisational review of the ABP completed by an Independent Review Group (APB Review Group) under the chairmanship of Gregory Jones QC.<sup>868</sup> The stated purpose of the review was to ensure that ABP was well placed to 'achieve its legislative mandate' taking into account a number of factors including, projected growth in the level of construction activity, growing complexity in legislation, an increase in planning and environmental related litigation, and the conferral of additional functions on ABP.<sup>869</sup> The somewhat unenviable position that ABP

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<sup>867</sup> *People Over Wind v An Bord Pleanála* [2015] IEHC 271 [116].

<sup>868</sup> Independent Review Group (ABP Review Group), *Organisational Review of An Bord Pleanála* (February 2016). An Implementation Group has been established to address the issues raised in the Organisational Review. See: Department of Housing, Planning, Community and Local Government, and An Bord Pleanála, 'Organisational Review of An Bord Pleanála, Terms of Reference and Plan for Implementation (November 2016) <<http://www.pleanala.ie/publications/2017/ReviewImplementationPlanJan17.pdf>> accessed 9 May 2017.

<sup>869</sup> *ibid* 5-6.

occupies in the Irish planning arrangements is precisely pin pointed by the ABP Review Group in their Report:

An Bord Pleanála operates at the confluence of two major public policy concerns, the achievement of sustainable development and the preservation and protection of the environment. Neither area of public policy is static; the concepts of sustainable development and environmental protection are evolving and can be defined and updated using different mechanisms at the international, EU, national, regional and local levels. Society's changing understanding of these concepts manifests in new and altered policies and laws. It is the role of An Bord Pleanála to apply policy and law in determining appeals, applications, and schemes in complex and changing circumstances.<sup>870</sup>

If, as the APB Review Group states, the role of ABP is to 'apply policy and law' then it is submitted that in the context of wind energy development it has shown that while it does seek to apply policy, its unfamiliarity at times with substantive and procedural aspects of the law, and European Union law in particular, utterly undermines that policy because as is evident from the case law, ABP's failure to take decisions, in a manner consistent with law, has resulted in significant uncertainty, cost, delay, and failure for those seeking to implement renewable energy policy through development. Case management by ABP has introduced an unquantifiable element of uncertainty and cost into the development process. Whilst the 256-page report shows considerable deference towards the Board, and at times the language is almost apologetic in its tone, with no less than 101 recommendations, the report paints a picture of an organisation that is clearly no longer fit for purpose, and has been left behind by the ever-evolving complexity and quantum of European and domestic law and regulations in the areas of sustainability and the environment. Most recommendations put forward by the ABP Review Group are to be welcomed, though it is submitted that some of the findings and recommendations concerning the governance and legal expertise and resources at ABP do not go far enough and will not effectively address shortcomings highlighted in the Report and in judgments of the courts. Notwithstanding these shortcomings, the Report is a very useful and full summary of all the issues at ABP that need to be addressed including governance, organisational structure, resources, expertise, training, IT systems as well as internal procedures, reporting and guidance. The ABP Review Group acknowledged that the evolving nature of policy, increased complexity in legislation, and level of planning related litigation arising from alleged breaches of directives, as well as the access to justice provisions of the Aarhus Convention<sup>871</sup> all present significant

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<sup>870</sup> *ibid* 25.

<sup>871</sup> *ibid* (n 851).

challenges for ABP.<sup>872</sup> On the issue of ABP's ongoing contribution to that litigation, the Group noted:

Additionally, issues continue to arise around the Environmental Impact Assessment Directive in An Bord Pleanála's decision-making. Alleged inadequacies concerning the reasoning of the Board, particularly when departing from the recommendations of inspectors, have also been raised by respondents to this Review as a factor which has contributed to increased litigation.<sup>873</sup>

Perhaps one of the best illustrations of the challenge European Union law, as interpreted by the CJEU, is presenting for ABP can be found in the case of *Kelly v An Bord Pleanála*.<sup>874</sup> The decision of Finlay Geoghegan J in *Kelly* falls squarely into that category of cases where there has been a fundamental system failure at ABP. Despite the existence of clear CJEU guidance in several judgments,<sup>875</sup> ABP failed to carry out a proper Appropriate Assessment (AA), as required by the Habitats Directive.<sup>876</sup> In the action *Kelly*, the applicant, sought orders of *certiorari* to quash decisions of ABP to grant planning permission in respect of two large wind farms (16 and 19 turbines). Even though the Inspectors appointed by ABP pursuant to section 146(1) PDA 2000, had in both instances recommended that permission be refused, ABP granted permission. In her judgment, Finlay Geoghegan J held that ABP had failed to carry out an AA in line with the requirements of Article 6(3) of the Habitats Directive,<sup>877</sup> and as explicated by several decisions of the CJEU.<sup>878</sup> Finlay Geoghegan J set out in a very clear and meticulous fashion the detail of the requirements which must be met for an AA to be carried out lawfully.<sup>879</sup> Finlay Geoghegan J's findings do not inspire confidence in the workings of the Inspectorate or ABP:

There is no evidence before the court of an assessment conducted by the Board (or through its Inspector) which meets the criteria .... and identifies, in the light of the best scientific knowledge in the field, all aspects of the proposed development which, by itself, or in combination with other plans or projects which affect the European sites and contains complete, precise and definitive findings and conclusions which the Board considers capable of removing all

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<sup>872</sup> ABP Review Group (n 868) 29-32.

<sup>873</sup> *ibid* 30-31.

<sup>874</sup> *Kelly v An Bord Pleanála* [2014] IEHC 400. For the substantive terms of the order see: *Kelly v An Bord Pleanála* [2014] IEHC 422.

<sup>875</sup> Case C-127/02 *Waddenzee* [2004] ECR I-7405; Case C-404/09 *Commission v Spain* [2011] ECR I-11835; and Case C-258/11 *Sweetman v An Bord Pleanála* [2013] ECLI:EU:C:2013:220.

<sup>876</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] L206/7.

<sup>877</sup> *ibid*.

<sup>878</sup> *ibid* (n 875).

<sup>879</sup> *Kelly v An Bord Pleanála* [2014] IEHC 400 [40].

reasonable scientific doubt as to the effects of the proposed development on the integrity of a number of Natura 2000 sites close to the site of the proposed development.<sup>880</sup>

Finlay Geoghegan J also found that ABP had failed to give reasons for its determination as required by section 177V(5) PDA 2000. In a subsequent supplemental judgment, Finlay Geoghegan J remitted the matter back to ABP for determination, and thus inevitably, and unavoidably prolonged the period of uncertainty for the developer.<sup>881</sup>

The decision in *Kelly v An Bord Pleanála* was followed by Barton J in *Baltz v An Bord Pleanála*.<sup>882</sup> In this instance an application for planning for an 11-turbine wind development had been refused by the local planning authority. On appeal, the Inspector recommended that planning should issue save in respect of a small number of turbines to be excluded based on visual and residential amenity. ABP, as was its right, did not follow the Inspector's recommendation and allowed planning for the entire development.<sup>883</sup> On the issue of the sufficiency of the main reasons given by ABP for not excluding the turbines that the Inspector recommended be excluded, Barton J did not hold anything back in his assessment of ABP's performance and decision making prowess or process noting that '..... the obligations placed on the Board cannot be satisfied by recourse to an uninformative if technically correct formula' and the 'bald statement by the Board that it did not consider it necessary to omit any turbine ..... is particularly uninformative.'<sup>884</sup> Highlighting an inconsistency in both approach and standards, Barton J found that the shortcomings in the way ABP reached its decision and explained that decision stood in sharp contrast to the decision of ABP considered in *People Over Wind* where Haughton J found that ABP had properly considered the issues raised by the Inspector.<sup>885</sup> Barton noted that in the case before Haughton J, ABP had conducted a 'proper AA which "engaged"' with all observations and included sufficient findings, examination and analysis' and ABP's determination was properly and clearly set out in the decision.<sup>886</sup> Barton J explained that if ABP wanted to avoid challenges to its decisions, it needed to deal specifically with any aspect of the Inspector's report with which it disagreed and give a rational explanation that was informative of the conclusion reached. As in the case before Finlay

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<sup>880</sup> *ibid* [67].

<sup>881</sup> *Kelly v An Bord Pleanála* [2014] IEHC 422.

<sup>882</sup> *Baltz v An Bord Pleanála* [2016] IEHC 134. For a further example of the application of the test set out in *Kelly* see: *North Kerry Wind Turbine Awareness Group v An Bord Pleanála* [2017] IEHC 126; and *North Kerry Wind Turbine Awareness Group v An Bord Pleanála* [2017] IEHC 250.

<sup>883</sup> *Baltz v An Bord Pleanála* [2016] IEHC 134 [15].

<sup>884</sup> *ibid* [169]-[170].

<sup>885</sup> *People Over Wind v An Bord Pleanála* [2015] IEHC 271.

<sup>886</sup> *ibid* [266].

Geoghegan J in *Kelly*,<sup>887</sup> Barton J found that ABP had not met the required standard and an AA was not conducted in accordance with the law:

The requirements and test, exemplified in *Kelly* are, in my judgment, neither satisfied by the report of the Inspector nor the decision of the Board either separately or when read together. Accordingly, it is not possible for the Court to determine whether the AA which the Board purported to carry out met the legal test required by the judgements of the CJEU and the decisions of this court. In the absence of the Inspector making and recording complete, definitive and precise findings and conclusions necessary to meet the standard required, which the Board would have been entitled to expressly accept, it was necessary and open to the Board to do so in its decision in a way which makes it plain that the obligations placed upon it in relation to the carrying out and completion of an AA were satisfied.<sup>888</sup>

Whilst the decisions of Finlay Geoghegan J in *Kelly* and Barton J in *Baltz* unquestionably fall in to the category of decisions where judicial oversight has ensured that determinations that may have an impact on the environment are lawfully made; when looked at from the perspective of the developer, the judgments make difficult and frustrating reading. Should the developers in question ultimately secure planning from ABP there would remain the possibility of judicial review of those decisions, and therefore more cost and delay. These cases also paint a very negative picture of Ireland as a place to do business, and this has undoubted negative consequences for wind development, Ireland's 2020 targets, and the wider economy. It is submitted that to avoid outcomes such as this, the dearth of legal expertise at ABP needs to be immediately and comprehensively addressed.<sup>889</sup> The ABP Review Group found that: 'the current absence of in-house legal advice and lack of specialist support in the craft of drafting of decisions, orders and directions continues to represent a major weakness of the decision-making process.'<sup>890</sup> This conclusion is reflective of the case law discussed above. The APB Review Group have recommended that while ABP should continue to engage external solicitors, it should employ at least one barrister or solicitor of at least seven years post qualification experience with suitable relevant expertise.<sup>891</sup> Yet the Group have also concluded that neither the chairman of

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<sup>887</sup> *Kelly v An Bord Pleanála* [2014] IEHC 400.

<sup>888</sup> *Baltz v An Bord Pleanála* [2016] IEHC 134 [237]-[239]. The test applicable to Appropriate Assessments as set out by Finlay Geoghegan J was considered and by followed by Haughton J in *Michael Alen-Buckley and Giancarla Alen-Buckley v An Bord Pleanála* (HC, 26 September 2017).

<sup>889</sup> The lack of legal resources at ABP is in part at least attributable to budgetary constraints consequent upon the economic recession that enveloped Ireland. See APB Review Group (n 868) 134-135.

<sup>890</sup> ABP Review Group (n 868) 135.

<sup>891</sup> *ibid.*

ABP nor any other board member need have any legal expertise.<sup>892</sup> In light of the failings highlighted and the fact that so much of ABP's work involves ensuring that correct procedures are in place and followed in applying law and policy in reaching and documenting decisions, it is submitted that the chairperson should be a High Court judge or person of similar qualification. In addition, at least one and possibly two ordinary members of the Board should have a strong background in planning and environmental law. The ABP Review Group discounted the value of mandating that ordinary members have specific qualifications and expertise because to do so would 'change the whole nature of the Board.'<sup>893</sup> It would, in their view result in one group of experts, the Inspectorate, submitting a report to another group of experts, ABP, a circumstance that would render the latter redundant.<sup>894</sup> Yet the *status quo* is little better as it is clear that the report of the expert Inspector is subject to scrutiny and change by the non-expert ABP member with the result that in many cases the matter ultimately ends up before another group of experts, the judiciary in the High Court. If the ordinariness of the ordinary members is sacrosanct, then perhaps the issue can be addressed by a combination of requiring that the chairperson be a High Court judge or someone of equivalent standing, and at the same time ABP is given the necessary resources and support to build a credible expert in-house legal division. In this regard, the suggestion that ABP employ an in-house counsel of at least seven years standing is to be welcomed, but such a person will require support and it is submitted that rather than incurring costs and engaging external solicitors and counsel, ABP should transition to a position where it has its own in-house legal division where a store of relevant legal knowledge, experience, expertise, and excellence can be built and nurtured. Considering the importance of planning outcomes for Ireland's energy policy and the future of the Irish economy, those investing in that economy should not have to wait in a queue for the High Court to inform ABP as to how it should conduct its affairs and meet its statutory mandate. Considering the importance of efficient planning outcomes in the wind energy sector in the context of 2020 targets it is submitted that it may already be too late to recover from the damage that has been done and deficiencies in the planning system may well be counted amongst the principal reasons why Ireland failed to meet its targets if indeed it does so fail. The suggested new legal division would operate in parallel with the suggested new Environmental Division that the APB Review Group has recommended, though it is submitted that the former would be a permanent division of lawyers engaged by ABP.<sup>895</sup>

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<sup>892</sup> *ibid* 56-57.

<sup>893</sup> *ibid* 54-55.

<sup>894</sup> *ibid*.

<sup>895</sup> *ibid* 67.



Slattery, in his defence of ABP,<sup>896</sup> poses the questions: ‘Can An Bord Pleanála be trusted to carry out EIA?’ and ‘Does the report answer the question about whether the Board is fit for purpose?’. He answers by concluding that, while the Report does not answer the fitness for purpose question directly ‘it certainly includes ample authority for the suggestion that the Board can be trusted to carry out EIA and AA.’<sup>897</sup> It is submitted that it is not helpful to confuse the issue of trust with the issue of fitness for purpose. Nowhere in the Terms of Reference<sup>898</sup> is there a mention of trust or mistrust in ABP. It is submitted that there is trust in the independence of ABP and the Report absolutely confirms this when it uses words like ‘impartiality’ and ‘integrity’.<sup>899</sup> Slattery contends that ‘None of the recommendations give reasons for mistrust of the Board when carrying out EIA and AA’<sup>900</sup> and that there is plenty of evidence from the case law that the Board carries out its statutory mandate in accordance with the law.<sup>901</sup> If the words competency, or fitness for purpose are substituted for ‘trust’ which it is submitted they should be, then there is ample evidence in the case law of failings on the part of the Inspectorate and ABP in carrying out EIAs and AAs. It is also submitted that the very fact of the existence of this case law is evidence of a problem though, as discussed below, and as alluded to by Slattery,<sup>902</sup> the increase in the number of challenges may also be attributable to the costs regime in section 50B of the PDA 2000, and as examined later in this chapter, the extremely low threshold *locus standi* rules. Nevertheless, objectors are finding grounds for challenge based on failings of ABP, and this must be recognised and addressed. Issues such as favourable cost and *locus standi* regimes from an objector’s perspective are not a defence, they are just further contributing factors.

In considering the extent of the issue, cases where the courts find in favour of ABP should not be discounted. The decisions in *Buckley (No. 1) v An Bord Pleanála*<sup>903</sup> and *Carroll v An Bord Pleanála*<sup>904</sup> are cases in point. Both concerned section 172(1H) PDA 2000 which provides that in carrying out an EIA the local planning authority or ABP may ‘have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.’ In both cases the applicants for judicial review had argued that ABP had not ‘adopted’ the Inspector’s report because rather than follow the statutory formula and use the term ‘adopt’ ABP had used the term ‘noted.’<sup>905</sup> In *Buckley*, Cregan J rightly found that this was not fatal as the

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<sup>896</sup> Slattery (n 859).

<sup>897</sup> *ibid* 2.

<sup>898</sup> ABP Review Group (868) 5-7.

<sup>899</sup> *ibid* 18.

<sup>900</sup> Slattery (n 859) 2.

<sup>901</sup> *ibid* 9.

<sup>902</sup> *ibid* 2.

<sup>903</sup> *Buckley (No. 1) v An Bord Pleanála* [2015] IEHC 572. See also: *Buckley (No.2) v An Bord Pleanála* [2015] IEHC 590.

<sup>904</sup> *Carroll v An Bord Pleanála* [2016] IEHC 90.

<sup>905</sup> *ibid* [82].

matter was one of substance. Rejecting the applicants ‘narrow, linguistic proposition’ he held that ‘the legal requirement on ABP to adopt an EIA is one of substance. He was satisfied that, in substance, ABP did carry out an EIA through its Inspector and that it adopted the Inspector’s report.’<sup>906</sup> Significantly, Cregan J noted that:

It is unfortunate that the Board used the word “noted” rather than the word “adopted” (as is set out in the legislation) because if it had used the word “adopted” this argument could never have been made by the Applicants.<sup>907</sup>

This it is submitted is the key issue. Even though ABP had in substance complied with the legal obligation, a procedural oversight in the drafting of its decision gave the applicants a ground for challenge. *Buckley* cannot therefore be considered as a victory for ABP or the developer, as the case should never have arisen; at least on the ground in question. But this was not a one-off decision or oversight. In *Carroll v An Bord Pleanála*,<sup>908</sup> a case concerning a 29-turbine windfarm, Fullam J., reached a similar conclusion on the ‘noted’ versus ‘adopted’ argument. Slattery’s review of the case law leads him to the conclusion that: ‘Each of these illustrates how the Board carefully complies with the requirements for assessment and how the courts have tested and verified that the work done complies with Irish and EU law,’<sup>909</sup> It is submitted that this misses the point. These avoidable ‘victories’ still have cost and delay implications for developers and Ireland’s targets, and give opponents of development encouragement and cast a dark shadow of uncertainty on the Irish planning regime.

### Callaghan v An Bord Pleanála-Anatomy of a Challenge

If one is looking for a manual that provides instruction as to how the Irish planning and legal system can be successfully engaged as a willing accessory in endeavours to frustrate windfarm development, then one has only to take a cursory look at the many judgments, in the now almost epic saga concerning the Emlagh Windfarm at Kells, Co. Meath. The case clearly highlights the challenges that developers, investors and energy policy makers face, and leads one inexorably to ask the question: how can Ireland leave itself open to the possibility of costs and penalties by agreeing to ambitious renewable energy targets without putting in place an efficient mechanism to enable developers to secure a final and binding planning outcome (win or lose), within a reasonable timeframe?

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<sup>906</sup> *Buckley (No. 1) v An Bord Pleanála* [2015] IEHC 572 [105].

<sup>907</sup> *ibid* [106].

<sup>908</sup> *Carroll v An Bord Pleanála* [2016] IEHC 90.

<sup>909</sup> Slattery (n 859) 9.

In Emlagh, the objector secured from the High Court, with questionable ease, the keys to the door of a legal labyrinth from which the judiciary, ABP, and the developer are unlikely to emerge for the foreseeable future. The Emlagh development as originally conceived comprised of 46 turbines. The scale of the project was subsequently revised down to 25 turbines and retitled the Castletownmoore project. Whilst there is a lot that can be learned from the judgments in *Callaghan* for both detractors and developers, several of the rulings in the suite provide a useful insight into the way the judiciary set about weighing the competing interests of the developer, and the objector. This sub-set of judgments demonstrate that, where there is a judicial discretion to be exercised, the judiciary do not always strike the right balance between, on the one hand, the legitimate commercial interests of developers, and the acknowledged policy contribution projects they are seeking to have permitted can have if completed and, on the other hand, the opposing interests of objectors to those projects. The individual judgments are considered below, but by way of a statement of lessons to be learned from a developer's perspective at least, victory in a majority of engagements before the courts does not ensure an ultimate victory in the campaign to have a project permitted. In the commercial and financial world that functions outside the courts where firm deadlines are set for access to State aid supported schemes, State owned and operated networks, and turbine manufacturer schedules, the maxim *tempus fugit* reigns supreme. The legal system and the courts operate in a different time continuum where *tempus repit* is the order of the day. The consequence of this, which is plainly evident from the case law, is that where an objector can shepherd his complaints or concerns into the courts, he will in many instances succeed even without winning a single foray because mere delay will deliver the outcome sought. In *Callaghan*, the objector did win a single foray in circumstances where it is strongly arguable that he should not, and the adverse consequences for the project, the sector in general, and policy inevitably followed.

What *Callaghan* highlights is that legal and procedural arguments advanced by, and on behalf of objectors, with even the most tenuous of connections to proposed wind infrastructure are getting a sympathetic hearing before courts by some members of the judiciary who seem reluctant to throw caution to the wind, have confidence in their own reasoning and judgment, and find that the rights of objectors have in certain circumstances, and for reasons of strategic national interest been circumscribed by the Oireachtas, and this is so even where the objector in question is not in any way prejudiced, and is in fact otherwise more than adequately catered for from a legal perspective. A summary of the various actions in *Callaghan* is set out in the table below though it is expected that the list will require further expansion.

**Figure 5: Emlagh Windfarm Litigation Summary (2015-2017)**

Date, Citation, Court and Judge(s)	Subject Matter of Proceedings	Parties to Proceedings	Notice Party(s)	Decision of the Court
20 February 2015. [2015] IEHC 235. HC. McGovern J.	Application by Callaghan to the High Court for Discovery and a Protective Costs Order.	Applicant: John Callaghan.  Respondent: ABP and AG.	Element Power Ireland Limited; and Element Power Ireland and North Meath Windfarm Limited.	Application refused. McGovern J found that the application amounted to a ' <i>fishing exercise based on mere assertions...</i> '
11 June 2015. [2015] IEHC 357. HC. Costello J.	Callaghan applied to the High Court for leave to seek judicial review of a decision by ABP to designate a planned application for a proposed wind farm at Emlagh to be strategic infrastructure development, within the meaning of section 37A PDA 2000.	As above.	As above.	Applicant refused leave to seek judicial review.
24 July 2015. [2015] IEHC 493. HC. Costello J.	Callaghan applied to the High Court for a certificate for leave to appeal the decision of Costello J of 11 June, 2015 (see above), pursuant to section 50A(7) PDA 2000.	As above.	As above.	High Court certified that the applicant may appeal Costello J's decision of 11 June 2015 (see above), on a single point of law of exceptional public importance.
9 December 2015. Unreported. CA. Finlay Geoghegan J.	Application by Callaghan for a stay on all proceedings before ABP relating to the proposed Emlagh Windfarm.	As above.	As above.	Application refused.

12 October 2015.  [2015] IEHC 618.  HC.  Costello J.	Application for costs.	As above.	As above.	Deferred.
15 December 2015. [2015] IESCDT 60.  SC.  Denham C.J.  Dunne J.  Charleton J.	Callaghan applied to the Supreme Court for leave to appeal the judgment of Costello J of 11 June 2015 directly from the High Court to the Supreme Court pursuant to Article 34.5.4 of the Constitution, by-passing the Court of Appeal (A ' <i>Leapfrog Appeal</i> ').	As above.	As above.	The application was refused as the Supreme Court found that the constitutional threshold for leave to appeal directly from the High Court to the Supreme Court was not satisfied.
15 December 2015. [2015] IESCDT 62.  SC.  Denham C.J.  Dunne J.  Charleton J.	Application by Callaghan to the Supreme Court for leave to appeal.	As above.	As above.	Supreme Court declines an order allowing an appeal to the Supreme Court under Article 34.5.3 <sup>o</sup> of the Constitution from the judgment of the Court of Appeal (Finlay Geoghegan J) delivered ex tempore on 9 December 2015.
23 May 2016.  Unreported.  HC.  Binchy J.	Application by Callaghan to the High Court for a stay on the operation of the decision of ABP to designate the project as strategic infrastructure development, within the meaning of section 37A PDA 2000.	As above.	As above.	Application for stay refused.

<p>21 July 2016. [2016] IEHC 488. HC. Binchy J.</p>	<p>Application by Callaghan to the High Court for a stay on the operation of the decision of ABP to designate the project as strategic infrastructure development, within the meaning of section 37A PDA 2000.</p>	<p>As above.</p>	<p>As above.</p>	<p>Application for stay granted in part. ABP allowed to receive a planning application and process it, but not decide on it.</p>
<p>21 December 2016. [2016] IECA 398. CA. Hogan J. Geoghegan J. Irvine J.</p>	<p>Court of Appeal hearing of Costello J's certified point of law (See decision of Costello J of 24 July 2015 above).</p>	<p>As above.</p>	<p>As above</p>	<p>The Court of Appeal found that the exclusion of Callaghan from the preliminary stage of the strategic infrastructure process did not materially, or practically affect the rights of Callaghan such that it was necessary for ABP to entertain submissions from him before reaching their decision on SIA designation. The Court of Appeal held that Costello J's certified point of law be answered in the negative.</p>
<p>13 March 2017. [2017] IESCDET 32. SC. Clarke J. Mac Menamin J. Laffoy J.</p>	<p>Application by Callaghan for leave to appeal, under Article 34.5.3 of the Constitution, the decision of the Court of Appeal of 21 December 2016 (See above) on the grounds <i>inter alia</i> that the decision of the Court of Appeal involved a matter of general public importance.</p>	<p>As above.</p>	<p>As above.</p>	<p>Leave to appeal to the Supreme Court granted. The Supreme Court found that the decision of the Court of Appeal involved a matter of general public importance.</p>

15 May 2017. [2017] IEHC 312. HC. Costello J.	Application to vary or discharge the stay order granted by Binchy J on 21 July 2016 (see above).	As above.	As above	Application moot as the stay had lapsed on 21 December 2016, the date of the decision of the Court of Appeal, as Binchy J had linked the stay order to that outcome.
27 July 2017. [2017] IESC 60. SC. Clarke J. Mac Menamin J. Dunne J.	Trial of an issue as to the proper scope of appeal to Supreme Court, leave to appeal having been granted on 13 March 2017 (see above).	As above.	As above.	Appellant to be confined to issues which can fairly be said to arise within the scope of the appeal as identified in the determination of the Supreme Court in granting leave to appeal.

Callaghan’s quest to ensure that the Emlagh project did not get off the ground commenced with a very extensive application for discovery against the developer, and the project that McGovern J, relying on dicta of Kelly J in *Sheehy v Ireland*,<sup>910</sup> dismissed as ‘largely a fishing exercise based on mere assertions by the applicant.’<sup>911</sup> In the same judgment, McGovern J refused to grant the applicant a protective costs order. Then followed two utterly irreconcilable decisions of Costello J delivered less than two weeks apart. These decisions serve to vividly illustrate the difficulties with the issue of judicial discretion and how it can, when exercised inappropriately, confound not only developers, but make the most speculative of investors and risk takers pause for thought and ultimately have broader adverse consequences for energy policy and the economy.

The first of the hearings before Costello J concerned an application for leave to seek judicial review of a decision of ABP to notify the developer of the Emlagh project, that in ABP’s opinion, the proposed development was Strategic Infrastructure Development (SID), and as such fell within the scope of section 37A(2)(a) and (b) PDA 2000, as inserted by section 3 of the SIA 2006.<sup>912</sup> The significance of this finding was that the required application for planning permission for the project should be made to ABP pursuant to section 37E PDA 2000, and not the local planning authority; the purpose of the legislation being to expedite the planning process for strategic projects. The applicant contended that the proposed turbines, which were 167m high, would be

<sup>910</sup>*Sheehy v Ireland* (HC, 30th July 2002).

<sup>911</sup> *Callaghan v An Bord Pleanála* [2015] IEHC 253 [7].

<sup>912</sup> *Callaghan v An Bord Pleanála* [2015] IEHC 357.

visible from his home (4.8km distant), and would affect the health and wellbeing of himself and his family.

The applicant argued (amongst other things), that the procedure leading to ABP issuing its opinion was conducted in a manner that precluded any participation by himself or the public in the process leading to the issuance of the ABP's SID designation opinion. ABP's decision gave rise to both substantive and procedural effects, and therefore he contended that he had a constitutional right to fair procedures in the matter. The applicant also argued that the EIA Directive had not been properly transposed into Irish law as the mechanism prescribed by section 37A PDA 2000, failed to ensure that there is effective public participation in the decision-making process at a time when all options are still open to the decision maker.<sup>913</sup>

The developer had requested ABP to determine whether the development proposals constituted SID within the meaning of PDA 2000. The pertinent statutory scheme set out in section 37A did not provide for any public consultation on the issue, and ABP came to its opinion, in accordance with the statutory regime, following consultation with the developer. In a detailed, reasoned, and persuasive judgment, Costello J concluded that the SID designation opinion of ABP was an opinion based on limited information submitted by the developer solely for determining to whom the planning application should be made and was in no way determinative of the EIA or planning process. The subsequent planning application and any decision of ABP as to the grant or refusal of planning were separate and distinct matters from the earlier SID designation process.<sup>914</sup> In effect, what the applicant sought overturned, was an opinion, and not a decision, which would come at the next stage in the process, if the developer saw fit to submit an actual planning application to ABP.<sup>915</sup>

On the issue of fair procedures, Costello J found that what the applicant enjoyed as a matter of Irish law was a right to '... participate in the planning process and to affect the outcome of the planning application process.'<sup>916</sup> To protect the applicant's rights, it was not necessary that the applicant be heard at the pre-application stage. The applicant's right to participate in the planning process was only triggered when the application for planning was submitted and the statutory scheme provided adequate and clear protection from that point in time on.<sup>917</sup> The applicant's right to participate in the planning process was in no way impeded or curtailed by virtue of his exclusion from the pre-application stage and so the substantive effect suggested by the applicant

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<sup>913</sup> *ibid* [31].

<sup>914</sup> *ibid* [65].

<sup>915</sup> For a discussion of the perceived disquiet surrounding the impact of the SIA 2006 on issues such as public participation, transparency and fairness in planning matters see: Ryall (n 863) 16.

<sup>916</sup> *Callaghan v An Bord Pleanála* [2015] IEHC 357 [69].

<sup>917</sup> *ibid* [70].



did not arise.<sup>918</sup> Costello J accepted that the decision of ABP under section 37 could have procedural effects since if ABP concluded that the development constituted SID, one procedure applied, alternatively if ABP concluded the development did not constitute SID, a different procedure applied. But again, the procedural effects of ABP's decision did not impair or curtail the applicants right to participate in the process.<sup>919</sup>

On the issue of failure to correctly transpose the EIA Directive into Irish law, Costello J found that the statutory scheme satisfied the test laid down by the CJEU in *Križan v. Slovenská inšpekcia životneho prostredia*,<sup>920</sup> namely that it is for the domestic courts to 'determine whether the national procedures ensure that at the time the public may participate in the process that all options and solutions remain possible and that the public may effectively influence the outcome of the decision-making process.'<sup>921</sup> Costello J found support for her conclusion in the judgment of the CJEU in *Commission v Germany*<sup>922</sup> where it was held by the Court that the public participation provisions of the EIA Directive are triggered as and from the date when the formal application for the consent in question is submitted and not earlier. Costello J ultimately found that the applicant had not established substantial grounds for setting aside the decision of ABP, nor were there substantial grounds for declaring that the EIA Directive had not been transposed properly into Irish law.

Notwithstanding the above conclusions, less than two weeks later in the context of an application for a certificate for leave to appeal by the applicant, Costello J, whilst confirming that she had not changed her view, in effect did a *volte-face* and granted the certificate. Costello J took the position that had the applicant an entitlement to take part in the pre-application stage, a right she acknowledged was not conferred on him by the statute, then this would be a matter of exceptional public importance, and it was appropriate in the public interest that an appeal should be permitted. On the issue of the significance of the project and the commercial interests of the developer Costello J noted:

.... a certificate for leave to appeal should be granted. In my judgment this is so even taking into account the contribution the proposed development, if carried out, would make to the State's renewable energy targets and the risk that the

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<sup>918</sup> *ibid* [72].

<sup>919</sup> *ibid* [74]. The developer submitted a planning application to ABP in respect of the development. Despite a favourable opinion from the ABP's Inspector, planning for the development was ultimately refused by ABP in February 2015.

<sup>920</sup> C-416/10 *Križan v Slovenská inšpekcia životneho prostredia* [2013] ECR ECLI:EU:C:2013:8.

<sup>921</sup> *Callaghan v An Bord Pleanála* [2015] IEHC 357 [81].

<sup>922</sup> C-431/92 *Commission v Germany* [1995] ECR 1-2189.

project might fail entirely on commercial grounds by reason of the delay inherent in an appeal against my judgment.<sup>923</sup>

In effect Costello J set aside established policy considerations as well as the commercial concerns of the developer in the interests, not of the environment, but rather a concern that the applicant's right to fair procedures, a right she had already held did not exist, might be prejudiced. Costello J also acknowledged that the clear intention of the Oireachtas in the case of judicial review of decisions made under planning legislation was that these cases would be determined by the High Court and that in most cases there would be no appeal.<sup>924</sup> For this reason, the 'jurisdiction to grant a certificate to appeal should be exercised sparingly.'<sup>925</sup> Rather than throwing caution to the wind, Costello J concluded that she was satisfied that the point raised was of exceptional public importance, and that an appeal was in the best interests of the public.

It is submitted that in this instance the grant of a certificate for leave to appeal was not appropriate, and the matter should have been finally determined by the High Court. It is difficult to see how a higher court could reach a different conclusion on the statutory scheme, a conclusion Costello J did not resile from in the subsequent hearing. This was not an instance where the rights of the applicant were ignored (blatantly or otherwise), or overridden by the system or the developer. The statutory mechanism did not provide for the applicant's involvement in the pre-application stage, but he was not prejudiced because his right to participate at the planning application stage was not circumscribed in any way. Callaghan raised no issues on the merits of ABP's decision, rather he confined his concerns about the windfarm to visual impact and health and wellbeing issues; all matters that he could raise once the application phase had commenced. In fact, as noted in the judgment of Costello J, he did not raise any issues once the right to do so crystallised following submission by the developer of the actual planning permission. Similarly, ABP was found not to have pre-determined any matter and could revisit all the information submitted at the pre-application stage at the subsequent application phase. Further, the applicant himself resided almost 5km from the nearest turbine and was not in immediate vicinity to it. On the other hand, it was acknowledged by both the Court and the Inspector that due to its size in terms of MW output, the windfarm could make a considerable impact from the perspective of Ireland meeting its 2020 targets; which targets are also a matter of exceptional public importance considering the penalties that can be levied on Ireland if the

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<sup>923</sup> *Callaghan v An Bord Pleanála* [2015] IEHC 493 [29].

<sup>924</sup> *ibid* [10].

<sup>925</sup> *ibid*.

State fails to reach the targets. It was also accepted that any delay could have an adverse impact on the commercial viability of the development.

Where an applicant succeeds in this manner in getting an appeal to the Court of Appeal (or now in more limited circumstances, the Supreme Court), an applicant can, by the delay, succeed in achieving his overall objective since even if the developer is successful in the appeal the deadline for receiving PSO funded financial support may have passed leaving the project economically defunct. The result is a meaningless and costly legal victory for the developer and a win for the objector who by the time the judgment is finally issued by the superior court may well have moved on to the next project. Considered from the perspective of the objector, the maxim *justice delayed is justice denied* could not be further from the truth as the greater the delay, the greater the likelihood that the subject project will fail, and the objective of the objector is secured irrespective of the success of his legal arguments or the outcome of the case. The illogicality of outcome in *Callaghan* could have been avoided if Costello J had given more weight to the dicta of McKechnie J in *Kenny v An Bord Pleanála*:

When leave is refused, it is, I feel, so refused by reason of and resulting from the decision of the court which must mean that the threshold of substantial grounds had not been established. Otherwise leave should be granted. If this is so, I ask how logically can it then be said, that within the same decision, one can have on the other hand, a failure to establish substantial grounds and yet, on the same material, whether this be fact, inference or law, have a point of law of exceptional public importance? If such a point exists, surely the ground thereof must meet the required threshold and therefore leave should be granted. If the court is not so satisfied how can such a point emerge? No matter what standard is applied to the existence of 'substantial grounds', it cannot be less than that applicable to establishing a point of law of exceptional public importance. Assuming that a court would not incorporate into its judgment such a point, on any basis other than that which falls squarely within the ratio of the case, and assume, reasonably I feel, that such a point must derive in seeing how at the same time, leave can be refused and yet a certification follow.<sup>926</sup>

Costello J it is submitted, wrongly sidestepped McKechnie J's remarks by simply concluding that if a different view were taken of the underlying facts a different conclusion could be reached.<sup>927</sup>

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<sup>926</sup> *Kenny v An Bord Pleanála* [2001] 1 IR 407.

<sup>927</sup> *Callaghan v An Bord Pleanála* [2015] IEHC 493 [26].

In *Buckley (No. 2) v An Bord Pleanála*,<sup>928</sup> a case concerning 22 wind turbines, Cregan J refused to grant a certificate for leave to appeal his earlier decision in *Buckley (No. 1) v An Bord Pleanála*<sup>929</sup> pursuant to section 50A(7) PDA 2000. The section restricts the granting of leave to appeal to cases where the court ‘certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to’ the superior court. Cregan J in reviewing the authorities noted the dicta of Mac Menamin J in *Glancre Teoranta v An Bord Pleanála* in relation to the section:

It is clear that the statutory regime which has been devised by the legislature indicates an interest to ensure that the planning process is not to be hampered by a completely unrestricted access to the court which may cause harmful delays. I am satisfied that it is a restriction to be lifted only in exceptional cases.<sup>930</sup>

Cregan J distilled from the authorities no less than ten principles that apply when considering whether the statutory restriction should be lifted in any case, including the following two principles that are particularly pertinent in this context:

4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court...

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases.

Considering the consistent dicta of the courts that the restriction should only be lifted in very limited circumstances, it is difficult to understand how Costello J could have granted leave. Substantial grounds were resoundingly absent, and the public interest was also absent because the applicant’s right to participate in the planning process was yet to arise. On the other hand, the public benefit inherent in the contribution the project might make to Ireland’s energy targets was, if not ignored, dismissed. Costello’s flawed approach can be contrasted with that of Cregan

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<sup>928</sup> *Buckley (No.2) v An Bord Pleanála* [2015] IEHC 590.

<sup>929</sup> *Buckley (No. 1) v An Bord Pleanála* [2015] IEHC 572.

<sup>930</sup> *Glancre Teoranta v An Bord Pleanála* [2006] IEHC 150.

J (above), and also with that of Clark J, in *Arklow Holidays Ltd v An Bord Pleanála*.<sup>931</sup> As Clark J explains:

The requirement that the court be satisfied "that it is desirable in the public interest that an appeal should be taken to the Supreme Court" is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance. . . . On that basis, even if it can be argued that the law in a particular area is uncertain, the court may not, on the basis, inter alia, of time or costs, consider that it is appropriate to certify the case for the Supreme Court.

So even if it were arguable that the law was uncertain (which it was not), Costello J should have had regard to timing and cost considerations. Costello J's judgment in *Callaghan* seriously undermines one of the cornerstone legislative enactments, the SIA 2006, aimed at the expeditious delivery of strategic infrastructure including wind developments, and as such undermines the State's sustainability and environmental objectives. Pending a final determination of this issue, it not only calls into question the status of numerous other developments participating in the SIA process, but it also has significant potential to delay development and bring into question Ireland's ability to deliver on its 2020 targets. The consequences of Costello J's decision continue to reverberate for the specific project, and for the wind industry more generally.

It was not until subsequent instalments in the Emlagh saga that the true commercial impact of the delay that flowed from the decision of Costello J became apparent. Not satisfied with his victory before Costello J, Callaghan sought a stay on all proceedings before ABP relating to the project.<sup>932</sup> When the matter came before Finlay Geoghegan J, she refused to grant the stay having duly considered the prejudice each of the parties would suffer if she found in favour of the other.<sup>933</sup> A key determining factor in her deliberations was the fact that the developer risked losing the benefit of the REFIT 2 Support Scheme as a consequence of the delay that would ensue as the scheme required projects to be operational by a specified backstop date.

When ABP ultimately made its decision on the Emlagh application in February 2015 it refused permission. The developer immediately followed this decision to refuse with a fresh application for a smaller 25 MW windfarm, a sub-set of the earlier proposal, at Castletownmoor, Co.

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<sup>931</sup> *Arklow Holidays Ltd v An Bord Pleanála* [2006] IEHC 102.

<sup>932</sup> Note: That appeal was listed for hearing in the Court of Appeal on 4 October 2016. Judgment was not delivered until December 2016; a further leave to appeal was granted in March 2017.

<sup>933</sup> *Callaghan v An Bord Pleanála* (CA, 9 December 2015).

Meath.<sup>934</sup> Callaghan again requested ABP to allow him to participate in the SID designation process and called on ABP to refrain from progressing matters pending the Court of Appeal's judgment in the original matter in respect of which Costello J gave leave to appeal. ABP proceeded as before, leaving Callaghan to seek various reliefs against ABP by way of judicial review. After the proceedings were instituted ABP conferred SID status on the Castletownmoore project. Pending a hearing in respect of that matter Binchy J granted Callaghan a temporary stay on ABP's decision.<sup>935</sup> When the matter again came before Binchy J, he had to decide whether he should set aside that stay.<sup>936</sup> The practical effect of the stay was to prevent ABP from acting upon its decision that the Castletownmoor development constituted SID and receiving and considering any planning application that would follow pending a decision on the certified point of law by the Court of Appeal. The developer for its part argued that unless ABP was free to consider and rule on the planning application, they would suffer irreversible damage. Callaghan contended that he would be prejudiced if ABP was permitted to process the planning application in advance of a determination by the Court of Appeal on the central issue. Binchy J found one material difference between the facts as presented to him, and the facts that prevailed when Finlay Geoghegan J., considered the matter initially.<sup>937</sup> In the interim and due to delays, the project no longer qualified for REFIT 2 support. Before Finlay Geoghegan J the developer had placed significant emphasis on this risk contending that further delay could materially prejudice their position and cause the project to miss the REFIT 2 deadline and in the event it did. Finlay Geoghegan J weighed the potentially material commercial prejudice that the developer might suffer against the potential inconvenience that Callaghan would suffer by having to initiate a second judicial review application and refused to grant the stay.

In the proceedings before Binchy J, the developer could no longer rely on the 'loss of REFIT 2' argument. The developer was however able to raise other commercial considerations including the fact that multinationals were looking for suppliers of wind energy for data centres and a new support scheme was expected to be available from 2016. Further delay would prejudice the developer's ability to participate in these commercial opportunities for a period equal to the duration of the stay. The developer also highlighted the not insignificant costs incurred on the project up to that date and the fact that, should the project get planning permission by the end of 2016, the output of the project would be available in time to contribute to Ireland's 2020 targets. In reflecting on the matter Binchy J looked to the test laid down by Clarke J in *Okunade*

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<sup>934</sup> Project size had been a determining factor in the Emlagh application.

<sup>935</sup> *Callaghan v An Bord Pleanála* (HC, 23 May 2016).

<sup>936</sup> *Callaghan v An Bord Pleanála* [2016] IEHC 488.

<sup>937</sup> *Callaghan v An Bord Pleanála* (CA, 9 December 2015).

*v Minister for Justice*.<sup>938</sup> Applying the different elements of this test, Binchy J found that considering the point of exceptional public importance certified for determination by the Court of Appeal, Callaghan had an arguable case. On the question of where the greatest risk of injustice lay, Binchy noted that a decision of the Court of Appeal was not likely to issue for a further seven or eight months and so, if the stay continued, it would ‘impact significantly upon the orderly implementation of an administrative measure, which it may be observed was designed to speed up the planning process for development qualifying as SID’.<sup>939</sup> On the issue of the public interest, Binchy J noted both the policy and the background to the legislative scheme:

It is the stated policy of the Oireachtas to pursue the development of renewal energy and wind power, in particular. Specific objectives have been set for the year 2020. Section 37 of the Act of 2000 was subsequently inserted into that Act, specifically to facilitate the fast tracking of developments deemed to comprise strategic infrastructure. It is clear therefore that there is a public interest in the orderly operation of the scheme.<sup>940</sup>

Additional factors which might heighten the risk to the public interest identified included the fact that the project would if completed, contribute 2% to the State’s 2020 renewable energy targets; a not insignificant contribution when considered in the context of the required development rate discussed at chapter 1 (*introduction*), if targets are to be met. Binchy J found that the consequence for Callaghan in circumstances where the stay was lifted, and the Court of Appeal subsequently found in his favour, would be that Callaghan would need to institute fresh judicial review proceedings but that he would undoubtedly win. On the matter of damages Binchy J noted that ‘The applicant did not volunteer any undertaking as to damages and, in any event, it seems very unlikely that any undertaking he might give would be realistic.’<sup>941</sup> Binchy J felt that he must attribute some weight to the fact that Costello J had found against Callaghan’s on all grounds. Considering all this Binchy J concluded that the continuation of the stay would give rise to the greater risk of injustice. There was a very real prospect that the developer would suffer loss if the stay continued.<sup>942</sup> REFIT 2 support was no longer available to the developer but there were other commercial possibilities at risk and a period where the project would be precluded from accessing these prospects directly attributable to the fact of the stay. By contrast, if the stay was lifted and the developer secured planning before the outcome of the case before the Court of Appeal, the planning permission would be vulnerable to being set aside though Callaghan would have to

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<sup>938</sup> *Okunade v Minister for Justice* [2012] 3 IR 152 (SC) 193.

<sup>939</sup> *Callaghan v An Bord Pleanála* [2016] IEHC 488 [27].

<sup>940</sup> *ibid.*

<sup>941</sup> *ibid.*

<sup>942</sup> *ibid.*

institute judicial review proceedings to secure this end. Binchy J, did however, note that should Callaghan be required to commence proceedings before the Court of Appeal outcome, he would be doing so ‘on the blind’, as he would not know if he would be successful when the matter came to be determined by the Court of Appeal, leading Binchy J to conclude that there ‘is therefore a degree of risk and expense associated with those proceedings, which for an ordinary member of the public can not be discounted as being insignificant. He would not face that risk if the existing stay is left in place.’<sup>943</sup> Taking this into account Binchy J held that the stay should be set aside but only to the extent necessary for the developer to submit a planning application and for ABP to process it but not decide on. At a point in time when ABP can decide, it would have to notify the parties and it was open to them to make a further application to the court if they wished. Binchy J left it open to the developer to bring to the attention of the court any ‘specific commercial prejudices’ arising up to the point when APB was ready to make a decision.<sup>944</sup> In the absence of any such specific prejudice the stay would remain in place up until the date of delivery of the judgment of the Court of Appeal on the certified point of exceptional public importance.<sup>945</sup>

The nature of the application before Binchy J, and Finlay Geoghegan J (applications to stay), differed from that before Costello J (leave to appeal).<sup>946</sup> Though the outcome before Binchy J is arguably flawed to the extent that any restriction was placed on ABP pending the outcome of the Court of Appeal hearing on the point certified, the credence given by Binchy J, and Finlay Geoghegan J to the commercial prejudice that may be suffered by the developer is to be welcomed. It is submitted that insufficient emphasis and weight was given to those considerations by Costello J when the certificate of leave to appeal was granted. The series of judgments in the Callaghan challenge lay bare the reality that contrary to popular belief, the citizen is very much empowered, and has access to a wide array of legal avenues to challenge, delay, and frustrate energy policy.

When the Court of Appeal ultimately issued its judgment in the matter in December 2016, it held that the point certified by Costello J should be answered in the negative.<sup>947</sup> Hogan J opened his judgment by noting that ‘For my part I consider that Costello J. was entirely correct in the conclusions which she reached and I am accordingly of the view that the certified point should be

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<sup>943</sup> *ibid* [32].

<sup>944</sup> *ibid* [33].

<sup>945</sup> *ibid*.

<sup>946</sup> In *Buckley (No. 2) v An Bord Pleanála* [2015] IEHC 590, Cregan J, (at para [10]), noted the difference between the applicable standards. In an application for a stay pending an appeal, the applicant must show that there are *bona fide grounds* of appeal, while in a s 50 application for a certificate of leave to appeal, the applicant must satisfy the statutory requirement that there be a point of law of exceptional public importance and the guidance from the applicable case law.

<sup>947</sup> *Callaghan v An Bord Pleanála* [2016] IECA 398.



answered in the negative.<sup>948</sup> Hogan J found that the exclusion of Callaghan from the preliminary stage of the strategic infrastructure process did not materially or practically affect the rights Callaghan enjoyed such that it was necessary for ABP to entertain submissions from him before reaching their decision on SIA designation.<sup>949</sup> On appeal by Callaghan, the Supreme Court granted leave to appeal the decision of the Court of Appeal to the Supreme Court on the basis that the decision of the Court of Appeal concerned a matter of general public importance.<sup>950</sup> The matter thus continues. In July 2017 ABP refused permission for the Castletownmoor Windfarm Project. It remains to be seen whether this outcome will be appealed by the developer or whether a revised application is submitted.

### O’Grianna v An Bord Pleanála-Judicial Intrusion on Established Commercial Practice

If the long list of decisions in the *Callaghan* litigation are a cause for dismay for the wind industry, the 2014 decision of Peart J in the case of *O’Grianna v An Bord Pleanála*<sup>951</sup> is undoubtedly the decision that has caused the most consternation amongst developers and the wider wind industry in recent years. Yet this decision for all the attention it has garnered, is much more difficult to question from a legal standpoint, and notwithstanding the difficulty it has caused for industry and targets, the outcome should not really have been a surprise to advisers to industry or ABP. In his decision, Peart J not only saw fit to set aside long standing commercial and development practice, but potentially also created yet another hurdle to Ireland meeting its 2020 targets. The degree of uncertainty for the industry created by the decision will take several years to fully understand and quantify, by which time it may be academic. What is lamentable in this instance is that the objectionable and indeed unlawful project splitting unveiled by Peart J did not arise from any deliberate or conscious attempt by the developer to repackage a single project as two projects with the objective of avoiding a mandatory cumulative assessment as required by the EIA Directive,<sup>952</sup> rather the splitting was the result of the accepted state of affairs that the grid component of the development was outside the control of the developer, and within the remit of statutory undertakings.

The long-established development practice in the electricity sector was that planning permission required for the generating assets (turbines and supporting infrastructure and works), would be taken forward separately from any planning permission required for the grid connection assets.

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<sup>948</sup> *ibid* [4].

<sup>949</sup> *ibid* [63].

<sup>950</sup> *Callaghan v An Bord Pleanála* [2017] IESCDET 32. Subsequent to granting leave to appeal, the Supreme Court made a determination on the scope of the appeal (See: *Callaghan v An Bord Pleanála* [2017] IESC 60.)

<sup>951</sup> *O’Grianna v An Bord Pleanála* [2014] IEHC 632.

<sup>952</sup> *ibid* (n 856).

The reason for the distinction was not simply based on custom and practice or indeed mere convenience. The grid connection assets lay outside the control of the developer with ESB Networks or EirGrid and though these statutory undertakings have a good record in securing consents, aligning a development programme with the open ended ‘programme’ offered by the statutory undertakings is challenging. Though the developer has a connection agreement with ESB Networks or EirGrid, the design and specification for the grid connection which would form the basis for the planning application for the grid connection assets, are a matter for the statutory undertakings. In *O’Grianna*, Peart J held that this practice amounted to project splitting in breach of the EIA Directive<sup>953</sup> because ABP had not assessed the cumulative impact of all the required works before granting the permission for the generating assets. Applying for permission before the cumulative assessment could be completed was premature, since the grid connection and the turbine works were essential elements of a single development, the EIA Directive required that the developer submit an EIS for the development as a whole, so that a cumulative assessment could be carried out.

The wind turbine development on its own serves no function if it cannot be connected to the national grid. In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the [EIA]Directive.<sup>954</sup>

Several arguments were advanced by ABP and the developer as to why the two phases of the development should not be viewed as a single project and somewhat more convincingly as to why it was, in any case irrelevant, as the window of opportunity for a cumulative assessment was not closed and could not be closed until the separate planning application for the grid connection was considered by the appropriate planning authority. In fact, the planning permission granted for the turbines contained an express condition (Condition 4) which stated that: ‘This Permission shall not be construed as any form of consent or agreement to a connection to the National Grid. Reason: In the interest of clarity.’ Peart J dismissed Condition 4 as it did not in fact prevent the construction of the turbines. This of course is correct, but nevertheless Condition 4 was not insignificant as it was ABP’s way of making it clear that the developer was not, in the words of the applicants, seen to have ‘a foot in the door’ when it came to the subsequent application. ABP’s view, was that when the application for planning permission for the grid connection was submitted the cumulative effects would then be assessed. ABP argued that this pragmatic approach in no way undermined the purpose of the Directive as a cumulative assessment would ultimately occur. Peart J however was not persuaded and seemed concerned that the developer

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<sup>953</sup> *Callaghan v An Bord Pleanála* [2016] IECA 398 [32].

<sup>954</sup> *ibid* [27].

would be severely prejudiced if he decided to proceed with the construction of the turbines in circumstances where the subsequent cumulative assessment was averse to his position, and permission for the grid connection refused. This however was surely a risk for the developer to take and not a matter the court should have any concern for. Condition 4 of the Planning Permission had laid down a clear marker for the developer that planning permission for the grid connection was a separate matter. Peart J also had little sympathy for ABP and the developer position that the grid connection design etc., was outside the control of the developer and no proposals had yet been received from ESB Networks. The fact that this precise scenario and the potential for a second planning application in respect of a grid connection was contemplated by the Wind Energy Planning Guidelines 2006 was also not determinative of the matter and Peart J concluded that the planning permission issued by ABP should be quashed.

In a subsequent judgment, Peart J allowed the matter to be remitted to ABP so that ABP could conduct an EIA that reflected the findings of the court in the earlier judgment. This was resisted by the applicants who argued that it was necessary to prepare an entirely new EIA and recommence the process. The court took the view that in the interests of fairness and justice, if ABP believed it could carry out an EIA that accorded with the judgment, if the matter was remitted to it for a new decision, then ‘this Court should not lightly reject such an application to remit in favour of simply quashing the decision simpliciter with the result that the application goes back to square one.’<sup>955</sup>

The impact of *O’Grianna* is undoubtedly far reaching and the judgment acts as a legal brake on the development process for all developments at the planning and permitting stage. The practical effect of the decision in *O’Grianna* is that any developer applying for planning permission must now include in the application details of all works that are to form part of the ultimate project and this includes the grid works over which the developer has no control. Perhaps the issue of uncertainty as to the grid works could be addressed by the developer submitting an EIS with a series of options or grid scenarios for ABP to include in its cumulative assessment at the point in time that the application for planning permission for the turbines is submitted. This would undoubtedly have cost and timing issues and would involve ABP considering options that may never be implemented but there would appear to be nothing in the judgment of Peart J that requires all aspects of a project to be the subject of a single planning application.<sup>956</sup> Chapter 3

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<sup>955</sup> *O’Grianna v An Bord Pleanála* [2015] IEHC 248 [9].

<sup>956</sup> *ibid*, Slattery (n 859) 13. This particular conclusion has given rise to a series of judicial determinations. In *Keane v An Bord Pleanála* [2012] IEHC 324 [15] Hogan J, upheld ABP’s EIA assessment of two haul routes and two potential access routes included in an EIS. In *Michael Alen-Buckley and Giancarla Alen-Buckley v An Bord Pleanála* (HC, 26 September 2017) [34], Haughton J, referred to the decision of Hogan J in *Keane*, and held that it was clear from the decision of Peart J in *O’Grianna* that whilst a cumulative assessment

(*Unbundling the Opportunity for Irish Wind Generation Technology*) discusses the complex and highly inefficient corporate and contractual arrangement that exists between the Transmission Asset Owner-TAO (ESB) and Transmission System Operator-TSO (EirGrid); and between the Distribution Asset Owner-DAO (ESB) and Distribution System Operator-DSO (ESB Networks). The decision in *O’Grianna* and the delays in the development process that flow from it, present yet another reason why the DSO and TSO should not be beholden to ESB in matters of grid planning, development, construction or maintenance since as outlined in chapter 3, the split ownership-operation model adds further unnecessary complication and delay to the process.

Peart J’s decision in *O’Grianna* can be contrasted with his decision in the case of *Baile v Kilvinane Wind Farm Limited*.<sup>957</sup> That case concerned a relatively small wind development with a long, and somewhat convoluted, planning history. Following receipt of planning permission for 5 wind turbines from ABP, the developer made several adjustments to the height of the turbines, length of blades and location of the turbines within the site. On each occasion, the developer sought a *letter of comfort* in respect of the proposed changes, and on each occasion, this was forthcoming, and the developer proceeded to implement the changes. Three turbines were constructed but several years later ABP determined that the alterations did not come within the ambit of the original planning permissions and as such, and since the development as constructed, was not exempt development, the development was unauthorised. The developer sought judicial review of this decision but in the interim a separate action was taken by another adjoining land owner, seeking a mandatory injunction pursuant to section 160 PDA 2000, requiring the developer to

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under the EIA Directive was required in respect of both the grid works and the wind farm, the entire project did not need to be the subject of a single planning application. This was the position taken by McGovern J in *O’Grianna* (No 2) [2017] IEHC 7 [41], where the judge employed the decisions of the Supreme Court in *O’Connell v Environmental Protection Agency* [2003] 1 IR 530, and *Martin v An Bord Pleanála* [2008] 1 IR 336, as a basis for concluding that an EIA can be carried out at ‘a stage where partial consent for part of an overall project has been given.’ Support for this approach is also to be found in the judgment of Baker J in *Daly v Kilronan* [2017] IEHC 308 [44]. McGovern J, in *North Kerry Wind Turbine Awareness Group v An Bord Pleanála* [2017] IEHC 126 [9], stated that there was no necessity to include the grid connection in the planning application for the wind turbines, rather the details of the grid connection were required to enable a full EIA to be carried out by ABP. It remains to be seen if this will be the end of this particular argument. The current draft of the proposed revised Planning Guidelines for Wind Development proposes that ‘Best practice would suggest that an integrated planning application that combines grid interconnection information together with details of the wind energy development should be submitted to the planning authority. However, if this is not possible, then the planning authority should agree in advance with the developer the information on the grid connection that they consider necessary to enable them to fully assess a planning application for the wind energy project, and which the developer is in a position to furnish.’ (17-18). See: Department of Environment, Heritage and Local Government, *Planning Guidelines* <<http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Planning/FileDownload%2C1633%2Cen.pdf>> accessed 6 June 2017. For the implications of the *O’Grianna* decision on wind development and targets see for example: Ann O’Loughlin, ‘Sligo Windfarm Works Halted following High Court Ruling, *Breaking News.ie*’ (12 May 2017) <<http://www.breakingnews.ie/ireland/sligo-windfarm-works-halted-following-high-court-ruling-789450.html>> accessed 23 May 2017.

<sup>957</sup> *Baile v Kilvinane Wind Farm Limited* [2013] IEHC 509.

cease operating the project, the removal of the turbines, and the reinstatement of the site. Peart J found that the developer had acted in good faith and had consulted the planning authority in advance of implementing any changes. In these circumstances, an order under section 160 would be 'draconian indeed.'<sup>958</sup>

### Grace v An Bord Pleanála-Towards *Actio Popularis* for Judicial Review

The Law and procedure governing *locus standi* in judicial review of planning decisions has, in the past decade or so, undergone a degree of legislative and judicial re-working, initially to accommodate a policy that mandated a more efficient fast tracked planning regime to keep pace with Ireland's economic growth,<sup>959</sup> and more latterly to reflect access to justice requirements mandated by the EIA Directive<sup>960</sup> and the Aarhus Convention.<sup>961</sup> Despite a reasonable degree of judicial restraint in the granting of leave to challenge decisions of ABP by way of judicial review, what now appears to be emerging, or will undoubtedly emerge following the seminal decision in *Commission v Germany*,<sup>962</sup> is not encouraging for wind development or indeed infrastructure development in general.

The issue of *locus standi* in judicial review in planning matters has been the subject of both legislative intervention, and many judicial determinations including, in a wind farm development context, the decision of Fullam J in *Grace v An Bord Pleanála*.<sup>963</sup> In that instance, Fullam J denied standing to two applicants seeking to challenge a planning decision in circumstances where neither had participated in the original planning process, and neither proffered a reasonable explanation for their non-participation. The Supreme Court granted leave to appeal directly from Fullam J's judgment under Article 34.5.4 of the Constitution on several points including:

Whether the jurisprudence of this Court on the question of standing in environmental matters requires to be revised in the light of recent judgments of the Court of Justice and, if so, the application of any such revised jurisprudence to the facts of this case.<sup>964</sup>

For the reasons discussed below, when the Supreme Court ultimately issued its decision on the matter, it not only avoided answering the question posed, but also remarkably conferred standing

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<sup>958</sup> *ibid* [47].

<sup>959</sup> See: Ryall (n 863) 15. See also: Fox-Rogers, Murphy and Grist, (n 839) 668 where the authors conclude that: 'By focussing on legislative change in one area of state responsibility-the planning process-we have elucidated the inherent bias of recent changes towards favouring private capital.'

<sup>960</sup> *ibid* (n 856).

<sup>961</sup> *ibid* (n 851).

<sup>962</sup> C-137/14 *Commission v Germany* [2015] ECLI:EU:C:2015:683.

<sup>963</sup> *Grace v An Bord Pleanála* [2015] IEHC 593.

<sup>964</sup> *Grace v An Bord Pleanála* [2016] IESCDT 29.

on one of the applicants and in doing so has, opened the floodgates to a much broader constituency of potential litigants, and greatly increased the prospects of Ireland failing to meet its 2020 RES-E Target.<sup>965</sup>

In 2012 a leading legal commentator noted that the law surrounding *locus standi* in planning matters was very much ‘*in a state of flux*’.<sup>966</sup> That commentator sees section 50 PDA 2000, as an example of a ‘legislative foray’ into the realm of law that is more usually made by judges.<sup>967</sup> Section 50A(3) of the Act, mandates that a court shall not grant leave to appeal unless it is satisfied (amongst other things), that the applicant has a *sufficient interest* in the matter which is the subject of the application. The section as originally drawn appeared, on the face of it at least, to set a higher standard as the court was required to be satisfied that the applicant had a *substantial interest* in the matter.<sup>968</sup> Considering the matter at a point in time before both section 50 and Ord. 84 r.20 (4) were aligned around the ‘*sufficient interest*’ formula, the same legal commentator helpfully summarised the emerging and somewhat conflicting legal position as follows:

Following the 1986 reforms, Ord. 84 r.20(4) now provides that leave to apply for judicial review shall not be granted unless the applicant “has a sufficient interest in the matter to which the application relates”. . . . ., the effect of a similar change in the English Rules of Court has been stated to permit an *action popularis* (or “citizen’s action”) in suitable cases and the Supreme Court has also appeared to take this view in respect of the standing requirements in Ord. 84 r.20(4).<sup>969</sup> Nevertheless, . . . ., in addition to the rather extreme case of *Cahill v Sutton*,<sup>970</sup> there is also a line of contemporary case law emerging which shows a move away from what might be termed an ultra-liberal approach.<sup>971</sup>

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<sup>965</sup> *Grace v An Bord Pleanála* [2017] IESCDET 10.

<sup>966</sup> David Gwynn Morgan, *Hogan and Morgan’s Administrative Law*, (4th edn, Round Hall 2012) 592.

<sup>967</sup> *ibid.*

<sup>968</sup> This change was necessitated by the Aarhus Convention (*ibid* (n 851)). See Environment (Miscellaneous Provisions) Act 2011; and Berna Grist, *An Introduction to Irish Planning Law*, (2nd edn, Institute of Public Administration 2012) 63-64. See also Ryall (n 863) 246-247 for a useful discussion on the interpretation of ‘*substantial interest*’ versus ‘*sufficient interest*’ and the judgment of Clark J in *Sweetman v An Bord Pleanála* [2007] IEHC 153.

<sup>969</sup> The author here referred to comments of Keane CJ in *Mulcreavy v Minister for Environment* [2004] IESC 5, [2004] 1 IR 72, 78.

<sup>970</sup> *Cahill v Sutton* [1980] IR (SC) 269.

<sup>971</sup> The author here cited *Shannon v McGuinness* [1999] 3 IR 274; *Construction Industry Federation v Dublin City Council* [2005] 2 IR 496 (SC); *Lennon v Limerick City Council* [2006] IEHC 112; *John Paul Construction v Minister for Environment, Heritage and Local Government* [2006] IEHC 255; *O’Brien v Dun Laoghaire Rathdown County Council* [2006] IEHC 177; and *Harding v Cork County Council (No. 2)* [2008] IESC 28.

The legal case for bringing Irish planning and environmental law and procedure into line with this ‘ultra-liberal approach’ to meet the access to justice spirit and objectives of the Aarhus Convention and EIA Directives that have followed the requirements of the Convention, has been set out with some considerable conviction by Ryall.<sup>972</sup> Ryall, a proponent of the ultra-liberal approach, sees Irish legislation as presenting ‘formidable obstacles to access to justice in planning matters....’<sup>973</sup> It is however submitted that there is an alternative view that current *locus standi* rules for judicial review of planning decisions constitute a considerable obstacle to the permitting of legitimate wind development and indeed energy infrastructure generally, and act as an unreasonable, unwarranted and costly restraint on the fulfilment of Irish and European policy objectives on renewable energy. The rules do not strike an appropriate or fair balance between, the interests of third parties (groups or individuals), and the interests of developers, investors, electricity consumers, and the broader economy. In the middle of these seemingly irreconcilable interests is ABP, with limited resources and forced to defend a multiplicity of often-speculative self-serving actions against developments which, even if they are found to have no merit, take up time and resources that could otherwise be dedicated to processing applications that may be critical from an economic or social perspective. With clear signals of an increase in construction activity and evidence of a surge in planning related litigation,<sup>974</sup> there is an urgent need to bring much greater clarity to some of the more nebulous concepts in the legislation that provide encouragement to opponents of development to mount endless challenges to projects, and if *locus standi* rules can no longer be relied on to keep the barbarians from the gate, then the focus needs to turn to ways of disarming them, and depriving them of their cause of action.<sup>975</sup>

Whilst any tightening of the rules would undoubtedly be a welcome advance from a developer and investor perspective, it may be, for the reasons set out below, that this pursuit of the ideal world might, considering recent and evolving EU case law and now Irish Supreme Court jurisprudence, no longer be a realistic proposition, and that holding on to the *status quo* with all its shortcomings may be the best that can be expected, but even this is no longer certain. What is certain is that the *locus standi* rules as written and interpreted by the courts are proving to be an increasingly more challenging obstacle to wind development in Ireland, a significant contributor to uncertainty, and call into question the achievability of Ireland’s 2020 RES-E Target.

Recent jurisprudence of the CJEU almost certainly has the very real potential to make the development process lengthier, costlier, and considerably less certain. If, and it seems inevitable

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<sup>972</sup> Ryall (n 863).

<sup>973</sup> *ibid*, 194.

<sup>974</sup> ABP Review Group (n 868) 6.

<sup>975</sup> *ibid*.

that it will, the judgments of the CJEU in *Commission v Germany*<sup>976</sup> and in other recent cases are to bring about an unwelcome, though perhaps not entirely unexpected, re-writing of Irish procedural rules governing judicial review to ensure alignment with the access to justice provisions of the Aarhus Convention<sup>977</sup> and European Union Directives, then it would seem that ABP and its decision-making process will stand diminished and that developers, the judiciary, and the courts will be at the mercy of procedural ‘rules’ that are the very antonym of efficiency, certainty and commercial enterprise. The idea that Irish domestic rules were on a collision course with the new European standards was highlighted by Ryall as far back as 2009 when she lamented upon Ireland’s failure (at that time), to fully embrace the emerging ideal of greater access to justice.<sup>978</sup>

The decisions of the High Court, and Supreme Court, in *Grace v An Bord Pleanála*,<sup>979</sup> not only serve to highlight the difficulties from a developer’s perspective with the current regime as explicated with some clarity by Fullam J, and further refined by Clarke J, and O’Malley J in the Supreme Court, but they also offer a useful, if not disquieting, glimpse of what is at stake should Irish jurisprudence continue to realign itself with European requirements including CJEU case law.

The *Grace* case concerned the *locus standi* of two applicants pursuing judicial review of a decision of ABP, one (Grace) living near the proposed wind development, the other (Sweetman), an environmentalist, living a considerable distance away. The applicants sought an order of *certiorari* to quash a decision to grant planning permission issued by ABP on appeal from a decision of North Tipperary County Council. The thrust of the applicant’s challenge centred on the adequacy of the AA and EIA, though the applicants were also required to seek a declaration that they each had *sufficient interest* for the purposes of section 50 PDA 2000 (as amended),<sup>980</sup> even though neither participated in the decision-making process before North Tipperary County Council or ABP.

Fullam J noted that whilst there was no exact definition of the phrase *sufficient interest* in the PDA 2000, or in the Rules of the Superior Courts,<sup>981</sup> and notwithstanding that the task of providing a definition was left to Member States, guidance must be had from the public participation aspects of the EIA Directive<sup>982</sup> which Fullam J., noted called for public participation in both

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<sup>976</sup> C-137/14 *Commission v Germany* (n 962).

<sup>977</sup> *ibid* (n 851).

<sup>978</sup> Ryall (n 863) 17.

<sup>979</sup> *Grace v An Bord Pleanála* [2015] IEHC 593; *Grace v An Bord Pleanála* [2016] IESCDET 29; and *Grace v An Bord Pleanála* [2017] IESCDET 10.

<sup>980</sup> Environment (Miscellaneous Provisions) Act 2011, s 20.

<sup>981</sup> Rules of the Superior Courts, Ord. 84.

<sup>982</sup> *ibid* (n 856).



decision-making procedures (Article 6), and judicial review of decisions (Article 11). Article 6(4) of the EIA Directive provides:

The public concerned shall be given early and effective opportunities to participate in the environmental decision making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.<sup>983</sup>

Article 11 of the EIA Directive,<sup>984</sup> which reflects Article 9 (*Access to Justice*) of the Aarhus Convention,<sup>985</sup> provides:

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a *sufficient interest*, or alternatively;

(b) maintaining *the impairment of a right*, where administrative procedural law of a Member State requires this as a pre-condition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions, subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decision, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, *consistently with the objective of giving the public concerned wide access to justice*. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being

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<sup>983</sup> Article 6(4) reflects the requirements of Article 6 (*Public Participation in Decisions on Specific Activities*) of the Aarhus Convention.

<sup>984</sup> Previously art 10a.

<sup>985</sup> *ibid* (n 851).

impaired for the purpose of point (b) of paragraph 1 of this Article.....

(4).....(5).... [*Emphasis added*].

Fullam J's review of the relevant provisions of the Directive and applicable Irish and European case law led him to outline several propositions as follows: -

1. The Directive requires effective public participation and consultation with authorities likely to be concerned by a development, in the decision-making process.
2. While the Directive envisages wide access to justice at the subsequent stage of judicial review, that access is conditional on members of the public concerned demonstrating (a) sufficient interest or (b) maintaining the impairment of a right. Such conditions should not be so restrictive as to render the remedy ineffective.
3. Failure to participate in the decision-making process should not, of itself, be determinative of the issue of *locus standi*.
4. "Wide access to justice" does not mean 'open house'.
5. A person who seeks to raise an issue at review stage which he could have raised during the decision-making process must provide a cogent explanation for his non-participation.
6. The applicant must show that the issue proposed to be raised at judicial review could not have been advanced prior to the making of the decision impugned.
7. The applicant must show that the interest concerned is personal to him and is not vicarious or general and it must be shown that such interest is adversely affected or in danger of being so affected.<sup>986</sup>

Fullam J found that the applicants, Grace and Sweetman, had not provided any explanation for their non-participation at the decision-making stage, they had not shown that the issues sought to be raised at judicial review could not have been advanced prior to the decision of ABP, and they had not shown an impairment of any rights personal to them. In such circumstances 'it would be manifestly unjust to the respondents' to grant the declaration sought by the applicants.<sup>987</sup> In

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<sup>986</sup> *Grace v An Bord Pleanála* [2015] IEHC 593 [59].

<sup>987</sup> *ibid* [81].

the subsequent decision of the Supreme Court (discussed below), the court ignored this, and conferred standing on one of the applicants.<sup>988</sup>

Though Fullam J's decision has been superseded by the joint decision of Clarke J and O'Malley J in the Supreme Court, his judgment merits consideration for its forensic analysis of applicable Irish and European legislative provisions and European case law.<sup>989</sup> Fullam J highlighted and examined the distinction between the initial decision making process before the local authority and/or ABP (proposition 1 above), and the subsequent review process or judicial review before the courts (propositions 2 -7 above) noting that: 'In practical terms, public access to the decision making process is unlimited, whereas access to the review procedure is conditional on having a sufficient interest.'<sup>990</sup> The Court of Appeal judgment in the case of *Callaghan v An Bord Pleanála*, which concluded (though the matter is subject to a further appeal), that exclusion of public involvement in the SID designation process does not amount to a breach of fair procedures further clarifies the extent of public involvement.<sup>991</sup> Notwithstanding that decision, there is no doubt but that consultation around, and participation in, decision making processes are (subject to one possible qualification outlined below), adequately catered for both as a matter of law and practice, and it is submitted that it is difficult to see how such rights could be embellished without rendering the development process utterly unworkable. In *Callaghan v An Bord Pleanála*, Costello J confirmed the broad parameters of the right enjoyed as a matter of Irish law when she explained that what the entitlement amounted to was a right to:

.... participate in the planning process and to affect the outcome of the planning application process. This is a right that applies to any person or company residing anywhere in the State. It is not related to the individual's property rights or right to health or bodily integrity.<sup>992</sup>

The Irish public are very much, in the words of Article 6.4 of the EIA Directive: '.. entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.'<sup>993</sup> Public participation in decision making and consultation is considered further below, but for the purposes of Article 6 of the Aarhus Convention<sup>994</sup> it is submitted that, and will be demonstrated below that, public rights of participation in, decision making processes concerning, energy

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<sup>988</sup> *Grace v An Bord Pleanála* [2017] IESCDT 10.

<sup>989</sup> In the Supreme Court, little emphasis was placed on European case law.

<sup>990</sup> *Grace v An Bord Pleanála* [2015] IEHC 593 [58].

<sup>991</sup> See above at page 218 and page 228.

<sup>992</sup> *Callaghan v An Bord Pleanála* [2015] IEHC 357 [69].

<sup>993</sup> *ibid* (n 856).

<sup>994</sup> *ibid* (n 851).

infrastructure are, to the detriment of efficient development, very much guaranteed as a matter of Irish law.

One area that does however merit further consideration is the right of third parties to appeal the decision of a local planning authority to ABP. The uniqueness and problems associated with Ireland's extensive rights of third party appeal to ABP in respect of planning decisions of local authorities, did not go unnoticed by the ABP Review Group in presenting their assessment of ABP:

Third party rights of appeal have an obvious impact upon the caseload of An Bord Pleanála. Perceived delays caused to economic development by third party appeals also means that concerns of overseas investors, unfamiliar with the concept, often need to be carefully managed. Some Respondents to this Review have suggested that the rights of third party appeal should be restricted in some way, particularly in order to discourage those third party appeals which may be seen as anticompetitive or 'vexatious.'<sup>995</sup>

Subject to limited exceptions, the right of appeal to ABP in respect of a planning decision of a local planning authority is statutorily restricted to the applicant, and any third party that made a submission in respect of the application to the local planning authority within the prescribed timeframes.<sup>996</sup> Restricting third parties (i.e. parties other than the applicant for the planning permission), from appealing the decisions of local planning authorities to ABP itself would undoubtedly be a welcome improvement from a development and inward investment perspective. One respondent to the ABP Review Group submitted that a *locus standi* test based on geographical proximity to the proposed development or the potential impact of the proposed development on the third party should be employed.<sup>997</sup> The ABP Review Group, noting that ABP possessed the power to dismiss vexatious, frivolous, and appeals without merit, took the position that an examination of this issue was beyond the scope of their review. Because ABP considers any appeal on a *de novo* basis, that is, as if the application had been made to ABP in the first place, it is arguable that precluding a party that did not participate in the process before the local authority from taking an appeal to ABP is contrary to Article 6(4) of the EIA Directive because the public are prevented from expressing 'comments and opinions' at a time when 'all options are open' to ABP due to the fact that it is considering the issue *de novo*.<sup>998</sup> This argument would be

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<sup>995</sup> ABP Review Group (n 868) 91.

<sup>996</sup> PDA 2000, s 37.

<sup>997</sup> See reference to Dublin Airport Authority response of 18 November 2016 in ABP Review Group Report at footnote 113, ABP Review Group (n 868) 91.

<sup>998</sup> When an appeal comes before ABP, it must consider it as if the application for planning had been submitted to ABP at the outset, and not the local planning authority. For a discussion of *de novo* appeal

consistent also with the fact that ABP is not, when it is considering the appeal, tied to the subject matter of the appeal, a matter noted by the ABP Review Group in the context of a suggestion that ABP should in an appeal on a *de novo* basis restrict its consideration to the subject matter of the appeal only:

In the Review Group's judgement, it would be undesirable in terms of good administration for An Bord Pleanála to be so constrained. This would mean that An Bord Pleanála might be obliged not to uphold a third-party appeal in circumstances where it considers the development proposal before it to be unsound in some other way, or should be modified by the imposition of a condition, unrelated to the original grounds of appeal. This could be particularly problematic where An Bord Pleanála considered that an application for the development under consideration breached an aspect of EU law, such as the Environmental Impact Assessment Directive or the Habitats Directive, but this was not a ground of the third-party appeal.<sup>999</sup>

Considering jurisprudence of the Irish courts, and the emerging jurisprudence of the CJEU, it is submitted that as unattractive as it may be from a development perspective, the ABP Review Group assessment reflects the legal position, and that the focus should be on restricting access to judicial review rather than to the original decision-making process, including an appeal from a decision of a local planning authority to ABP. This should ensure greater inclusivity in appraisal and decision-making and assist in exposing issues that may at a later stage be the subject of a judicial review.

Propositions 2-7 of Fullam J's judgment are concerned with judicial review of decisions of ABP and so fall within the ambit of the access to justice provisions of the Aarhus Convention<sup>1000</sup> and Directive provisions such as of Article 11 of the EIA Directive, and Article 25 of the Industrial Emissions Directive.<sup>1001</sup> As far as these are concerned it is submitted that once the requirement for effective public consultation and participation in the decision-making process have been observed, access by third parties to judicial review needs, in an ideal world, to be restricted to a much greater extent than that contemplated in Fullam J's list of propositions concerning the same. The issue is whether any such further restriction is permissible or, whether in fact the restrictions in the propositions as elucidated by Fullam J need to be reconsidered and redrawn

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basis see: An Bord Pleanála, 'Guide to Making a Planning Appeal' <[http://www.pleanala.ie/guide/appeal\\_guide.htm](http://www.pleanala.ie/guide/appeal_guide.htm)> accessed 22 October 2016; and Grist (n 968) 57.

<sup>999</sup> ABP Review Group (n 868) 92.

<sup>1000</sup> *ibid* (n 851) art 9.

<sup>1001</sup> Parliament and Council Directive 2010/75/EU of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] L334/17.

considering CJEU case law, and the Supreme Court decision of Clarke J and O'Malley J in *Grace*, which is considered below.

Article 11 of the EIA Directive and similar provisions in other Directives which deal with access to review bodies appear on the face of it to leave a considerable amount of discretion with Member States on the issue of *locus standi* and this now seemingly mistaken impression is very much reflected in the submissions of Member States Germany and Austria in *Commission v Germany*<sup>1002</sup> and other Member States in the cases discussed below. Article 11 of the EIA Directive expressly leaves it to Member States to determine what constitutes a *sufficient interest* and *impairment of a right*, though in so doing the Member State must act in a way that is consistent with 'the objective of giving the public concerned wide access to justice.'<sup>1003</sup> It is this latter rider that is now being employed by the Commission and the CJEU to re-write national procedural rules and erode the express discretion that Member States believed they had retained in the wording of Article 11 and mirror provisions in other Directives. Ryall considered the rider as an attempt 'to rein in Member State discretion' suggesting that while its meaning was unclear, it called for 'a liberal attitude to standing.'<sup>1004</sup> As will be seen from the case law reviewed below this interpretation has now found favour with the CJEU.

The CJEU has shown that it will intervene where it considers that national standing rules are overly restrictive. In *Djurgarden-Lilla Vartans Miljoskyddsforening v Stockholms kommun*,<sup>1005</sup> the CJEU found that a Swedish rule that required that an NGO, which had in that instance participated in the decision-making process phase, had to have no less than 2,000 members to participate in the subsequent review procedure was an unlawful restriction on the right of access to justice. The CJEU rejected the Swedish contention that its domestic rules offered extensive opportunities to participate in the decision making process phase.<sup>1006</sup>

In *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*<sup>1007</sup> the CJEU had to consider the nature of the right that an environmental NGO could submit was impaired. The court held that the EIA Directive<sup>1008</sup> prohibited national laws that prevented

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<sup>1002</sup> C-137/14 *Commission v Germany* (n 962).

<sup>1003</sup> EIA Directive, art 11(3). For a useful discussion of the background to this proviso see Ryall (n 863) 62.

<sup>1004</sup> Ryall (n 863) 68.

<sup>1005</sup> Case C-263/008 *Djurgarden-Lilla Vartans Miljoskyddsforening v Stockholms kommun* [2009] ECR I-9967. For a discussion of this case see: James Maurici, 'Access to Justice-Review Procedures and Costs' in Charles Banner (ed), *The Aarhus Convention-A Guide for UK Lawyers* (Hart Publishing, Oxford and Portland Oregon 2015) 141.

<sup>1006</sup> *ibid* [49].

<sup>1007</sup> C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* [2011] EU:C:2011:289. See also: Maurici (n 1005).

<sup>1008</sup> Parliament and Council Directive 2003/35/EC 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard

environmental NGOs, from pleading before national courts, in cases challenging a decision sanctioning projects likely to have significant effects on the environment, a breach of a European Union law intended to protect the environment, because that law protects only the interests of the general public, and not the interests of individuals. The court noted that, whilst looked at as a whole Article 10a of the EIA Directive<sup>1009</sup> left Member States with ‘a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the conditions for the admissibility of actions ...’ this was not true of the final two sentences of the third paragraph of Article 10 (a):

By providing that the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) of Directive 85/337 are to be deemed sufficient and that such organisations are also to be deemed to have rights capable of being impaired, those provisions lay down rules which are precise and not subject to other conditions.<sup>1010</sup>

The practical effect of the German measure in question was that an NGO could not seek, and German courts could not embark on, a judicial review of an administrative decision simply on the basis that it contravened a legal provision protecting the environment, they could only do so where they could in addition identify a substantive individual right that was, or was at risk of, being impaired.<sup>1011</sup> Put simply the CJEU held that the NGO did not have to occupy the site next door to the development or show that its own rights had been impaired. It was sufficient that it could show that there was a breach or potential breach of an environmental provision. On the special role played by NGOs the Court noted that:

Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.<sup>1012</sup>

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to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17, art 10a (now art 11, EIA Directive).

<sup>1009</sup> This is now 11(4). For an explanation of the evolution of the EIA Directive from 1985 to 2014 see (n 856).

<sup>1010</sup> C-115/09 *Bund für Umwelt und Naturschutz Deutschland* (n 1007) [57].

<sup>1011</sup> See: Opinion of Advocate General Sharpston, C-115/09 *Bund für Umwelt und Naturschutz Deutschland* [35].

<sup>1012</sup> C-115/09 *Bund für Umwelt und Naturschutz Deutschland* (n 1007) [44].

Germany argued that this conclusion was tantamount to saying that Article 10a of the EIA Directive allowed an *actio popularis* which it clearly did not as the *actio popularis* provision of the Aarhus Convention (Article 9(3)) was not yet in force. Advocate General Sharpston felt that this argument allowed a Member State to have a procedural rule to the effect that no party (individual or NGO), could bring proceedings asserting an infringement of an enactment that sought solely to protect the environment (i.e. no impairment of rights of the individual or NGO).<sup>1013</sup> The outcome of the decision of the CJEU is however that an action that has the character of an *actio popularis* is permissible where the applicant is a qualifying NGO.

Ryall had expressed a concern that Member States could employ the discretion vested in them to set the qualifying criteria for environmental NGOs as a way of depriving NGOs of the benefit of the favourable *locus standi* rules for environmental NGOs conferred by the EIA Directives.<sup>1014</sup> The decisions in *Bund für Umwelt und Naturschutz Deutschland*<sup>1015</sup> and *Djurgarden*<sup>1016</sup> both validate this concern and show the CJEU's response to it. The equivalent Irish requirement looks not to membership of the environmental body, but rather to whether the body 'during the period of 12 months preceding the date of the application, pursued those aims or objectives.'<sup>1017</sup> Is this requirement consistent with the access to justice requirements of the Aarhus Convention and the EIA Directives or is it overly restrictive? The answer is that, notwithstanding that it is an eminently sensible requirement, it is possibly over restrictive at least in so far as it lays down a period of 12 months.

In *Gemeinde Altrip*<sup>1018</sup> the CJEU held that Article 10a of the EIA Directive<sup>1019</sup> does not prevent national courts from refusing to recognise impairment of a right if it is established that it is 'conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant.'<sup>1020</sup> The CJEU did however note that it was not permissible for the national courts procedural rules to place the burden of proof on the applicant seeking judicial review.<sup>1021</sup>

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<sup>1013</sup> *ibid* (n 1011) [41].

<sup>1014</sup> Ryall (n 863) 68.

<sup>1015</sup> C-115/09 *Bund für Umwelt und Naturschutz Deutschland* (n 1007).

<sup>1016</sup> Case C-263/008 *Djurgarden* (n 1005).

<sup>1017</sup> PDA 2000, s 50A(3)(b)(ii).

<sup>1018</sup> C-72/12, *Gemeinde Altrip* [2013] EU:C:2013:712. See also Áine Ryall, Access to Justice in Environmental Matters at a National Level and Aarhus Convention (2013) 3 <<http://environmentaljustice.ie/wp-content/uploads/2014/01/Aine-Ryall-ICEL-AEAI-paper-Dublin-13-September-20131.docx>> accessed 22 May 2017.

<sup>1019</sup> Now art 11 of the EIA Directive.

<sup>1020</sup> C-72/12, *Gemeinde Altrip* (n 1018) [57].

<sup>1021</sup> *ibid* [52].



Failure to participate in the decision-making process up to the point where planning is granted is not, as a matter of Irish law and procedural rules, determinative of itself of the issue of *locus standi*,<sup>1022</sup> though there is a strong argument that it should be so to avoid the types of injustice highlighted by Keane J in *Lancefort Limited v An Bord Pleanála* (No.2):

But it would, in my opinion, be a significant injustice to a party in the position of the notice party to be asked to defend proceedings on the ground of an alleged irregularity which could have been brought to the attention of all concerned at any time prior to the granting of permission, but which was not relied on until the application was made for leave to bring the proceedings.<sup>1023</sup>

It is submitted that opponents of a development well intended or not should not by accident or design be permitted to sit on the fence and raise issues after a decision has been made with a view to using the court process to delay or frustrate a development. A person should not be permitted to raise a new issue at review stage where that issue could have been raised during the decision-making process. Neither Keane J in *Lancefort* nor Fullam J in *Grace* advocated such a forceful proposition. Fullam J's propositions 3-7 very much leave the door open to the silent objector sitting on the fence observing events and waiting for his moment to intervene with maximum dramatic effect and consequent damage. He does however need to have a 'cogent explanation' for the court and show that the issue could not have been raised before the planning decision had been made. Would these soft restrictions fall foul of CJEU case law? Again, it is submitted that they may well do so particularly considering the decision in *Commission v Germany* discussed below.<sup>1024</sup>

*Commission v Germany* concerned the compatibility with European Union law of certain German legislative measures aimed at regulating review of administrative decisions by individuals. The decision of the CJEU re-writes German law and has potentially far-reaching consequences for both policy makers and developers in Ireland. Schomerus sees the case as 'A further step in a line of ECJ-judgments, leading to a European administrative and court procedure law.'<sup>1025</sup> In *Commission v Germany*, the CJEU held (amongst other things), that by restricting the standing of persons to bring proceedings and the scope of the review by the German courts to 'objections which have already been raised within the time limit set during the administrative procedure

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<sup>1022</sup> *Chambers v An Bord Pleanála* [1992] 1 IR 134 (SC).

<sup>1023</sup> *Lancefort Limited v An Bord Pleanála* (No.2) [1999] IR 270, 315 (SC).

<sup>1024</sup> C-137/14 *Commission v Germany* (n 962).

<sup>1025</sup> Thomas Schomerus, 'The Case of the German Act on Access to Courts in Environmental Matters (Umweltrechtbehelfsgesetz) (C-137/14)' (Aarhus Convention Task Force on Access to Justice, Geneva, 14-15 June 2016).

which led to the adoption of the decision',<sup>1026</sup> Germany had failed to fulfil its obligations under Article 11 of the EIA Directive<sup>1027</sup> and, Article 25 of the Industrial Emissions Directive.<sup>1028</sup> The Commission had argued that the German restriction constituted:

... a disproportionate obstacle to the right of the public concerned to challenge the legality of administrative decisions in the areas covered by those directives. The national legislation providing for that restriction accordingly runs counter to the principle of access to justice and restricts the effective legal protection of that public. The EU legal order does not allow the admissibility of pleas raised during legal proceedings to be made subject to the fact that they were previously raised in the administrative procedure.<sup>1029</sup>

The Commission had further submitted that as judicial review is an independent review process, all the facts must be before the court so that the court can carry out a 'full assessment of the decision' and the 'admissibility of the pleas in law cannot be limited to pleas which have already been put forward in the short period prescribed for raising objections during the administrative procedure.'<sup>1030</sup> Germany for its part submitted that Articles 11 and 25 of the Directives permitted Member States to retain their own procedures in this regard and that the German measures were aimed at ensuring legal certainty and efficient administrative procedures.<sup>1031</sup> The measures ensued that applicants for judicial review did not tactically withhold their objection during the administrative decision making process and reserve it for the court procedure phase.<sup>1032</sup> If this was permitted it would call into question the function of 'reconciling interests, which was a key aspect of the earlier phase.'<sup>1033</sup> The CJEU disagreed:

As regards the argument concerning the efficiency of administrative procedures, although it is true that the fact of raising a plea in law for the first time in legal proceedings may, in certain cases, hinder the smooth running of that procedure, it is sufficient to recall that the very objective pursued by Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested

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<sup>1026</sup> Umwelt-Rechtsbehelfsgesetz, Paragraph 2(3); and Verwaltungsverfahrensgesetz, Paragraph 73(4).

<sup>1027</sup> *ibid* (n 856).

<sup>1028</sup> *ibid* (n 1001).

<sup>1029</sup> C-137/14 *Commission v Germany* (n 962) [69].

<sup>1030</sup> *ibid* [70].

<sup>1031</sup> *ibid* [71].

<sup>1032</sup> *ibid* [72].

<sup>1033</sup> *ibid*.

decision in its entirety. None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings.<sup>1034</sup>

This dictum of the CJEU has curtailed the letter and intent of the German legislative provisions. The national legislature is confined to restricting admissibility where the submission is abusive or made in bad faith. There is little comfort for national administrations in the Opinion of Advocate General Wathelet either. In his view, the two permissible conditions in Article 11 of the EIA Directive, and Article 25 of the Industrial Emissions Directive, regulating admissibility of an action (a sufficient interest in bringing the action or the impairment of a right), were there to ‘prevent individuals from bringing *actio popularis* to challenge the legality of administrative decisions covered by the directives at issue.’<sup>1035</sup> AG Wathelet acknowledged the difficulty inherent in allowing new issues to surface at a late stage in the proceedings but these arguments around the effectiveness of procedures were subordinate to the issue of wide access to justice:

As regards the argument concerning the effectiveness of administrative procedures, although it is true that the possibility of raising ‘objections’ for the first time during legal proceedings may be ‘problematic’, it is sufficient to recall that the actual objective pursued by Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 is to ensure wide access to courts of law. The EU legislature has clearly given more weight to that objective than to the effectiveness of administrative procedures, with a view to contributing to preserving, protecting and improving the quality of the environment and human health.<sup>1036</sup>

When *Grace v An Bord Pleanála*<sup>1037</sup> returned to the Supreme Court, the outcome could not have been more detrimental for the wind industry, Ireland’s 2020 RES-E Target, or infrastructure permitting in general. In a joint judgment of the court, Clarke J and O’Malley J, on the one hand avoided any in-depth analysis of whether Irish procedural rules required to be re-written to bring them into line with CJEU jurisprudence; and on the other delivered a judgment that was very much aligned with the decision in *Commission v Germany*.<sup>1038</sup> Supported by CJEU dicta in

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<sup>1034</sup> *ibid* [80]-[81].

<sup>1035</sup> Case C 1- 137/14 *Commission v Germany* [n 962], Opinion of AG Wathelet [49].

<sup>1036</sup> *ibid* [119].

<sup>1037</sup> *Grace v An Bord Pleanála* [2016] IESCDT 29.

<sup>1038</sup> Case C 1- 137/14 *Commission v Germany* [n 962].

*Gruber*,<sup>1039</sup> the justices noted that, subject to the ‘wide access to justice’ caveat in Article 11, Member States have a wide margin of discretion in setting standing requirements.<sup>1040</sup> The justices also noted that identifying those with standing to challenge may in certain circumstances be relatively easy as those with the ‘sufficient interest’ will be clearly identifiable.<sup>1041</sup> In environmental cases the position may be different because the nature of the challenge may be such that it may ‘encompass a wider (and potentially significantly wider) group of persons or bodies and may give rise to greater questions of difficulty in determining where the limits of standing may lie.’<sup>1042</sup>

Reviewing the authorities, and drawing on the dicta of Henchy J in *Cahill v Sutton*,<sup>1043</sup> the justices noted that as a general principle ‘the starting point is that the decision or measure under challenge must be said to give rise to an actual or imminent “injury or prejudice” to the challenger or that the challenger has been or is in danger of being “adversely affected”.’<sup>1044</sup> On the issue of the standing of persons who did not participate in the substantive hearing before ABP, the justices were very much persuaded by the fact that while section 50(4) PDA 2000 had required that an applicant for judicial review must have participated in the planning process, or alternatively demonstrate that there were “good and sufficient reasons” for not so participating; section 13 SIA 2006 had removed that requirement, with the effect that a failure to participate was not necessarily determinative of the issue of standing.

On reviewing *Chambers v An Bórd Pleanála*,<sup>1045</sup> and *Mulcreevy v Minister for the Environment*,<sup>1046</sup> the justices found that ‘in the absence of a specific statutory measure introduced in respect of environmental cases, the general principle permitted, at least in some circumstances, persons to be held to have standing even though they did not participate in the process.’<sup>1047</sup> The decision in *Mulcreevy* was particularly relevant as the applicant in that instance, who resided in Kerry, was held to have standing to challenge the validity of a statutory instrument permitting works to be carried out on a national monument even though the monument in question was located in Dublin. *Mulcreevy*, according to the justices seemed to ‘suggest that the nature of the measure under challenge may be such as to confer a right to challenge on a very wide range of persons

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<sup>1039</sup> Case-570/13 *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten* [2013] ECLI:EU:C:2015:231.

<sup>1040</sup> *Grace v An Bord Pleanála* [2016] IESCD 29 [4.3]-[4.4].

<sup>1041</sup> *ibid* [4.8].

<sup>1042</sup> *ibid* [4.9].

<sup>1043</sup> *Cahill v Sutton* [1980] IR 269 (SC).

<sup>1044</sup> *Grace v An Bord Pleanála* [2016] IESCD 29 [5.4].

<sup>1045</sup> *Chambers v An Bórd Pleanála* [1992] 1 IR 134 (SC).

<sup>1046</sup> *Mulcreevy v Minister for Environment* [2004] 1 IR 72 (SC).

<sup>1047</sup> *Grace v An Bord Pleanála* [2016] IESCD 29 [6.5].

(and possibly, in some cases, on all persons not motivated by bad faith or the like).<sup>1048</sup> The justices dismissed the view that *Lancefort Ltd v An Bórd Pleanála* (No. 2),<sup>1049</sup> was authority for the proposition that prior participation (or an appropriate explanation for non-participation), was a prerequisite for standing in judicial review in planning cases though they accepted that the case did suggest that prior participation may be a relevant factor. Even if *Lancefort* could be considered as an authority for a general principle that participation, or a cogent explanation for non-participation was determinative, the case now needed to be looked at considering the evolution of the legislative framework. The express statutory requirement for prior participation provided for in PDA 2000 was removed by SIA 2006 so that ‘it can no longer be held that *Lancefort* provides authority for any general preclusion of standing in the absence of prior participation or an appropriate explanation for the lack of it.’<sup>1050</sup>

Summing up the justices noted that the case law suggested that a ‘a reasonably liberal approach is taken to the sort of interest which must be potentially affected in order to confer standing in environmental cases.’<sup>1051</sup> On the issue of mere proximity, the justices noted that a person could have an interest by virtue of proximity to a proposed development and that that degree of proximity would be measured by the scale of the development and the potential impact on the legitimate interests of people living or working there, or having contact with the area.<sup>1052</sup> Additionally, the justices noted that it was appropriate to have regard ‘to the nature and general importance of the site or amenities sought to be protected.’<sup>1053</sup> This was because proposed developments that ‘have the potential to have a material and significant effect on the environment generally or raise questions of particular national or international importance (such as the national monument involved in *Mulcreevy*), may confer standing on a much wider range of persons.’<sup>1054</sup> Summing up the position under Irish law, and without an assessment of compatibility with European law, the justices noted that:

.. standing in environmental cases involves a broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in

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<sup>1048</sup> *ibid* [6.7].

<sup>1049</sup> *Lancefort Limited v An Bord Pleanála* (No.2) [1999] IR 270, 315 (SC).

<sup>1050</sup> *Grace v An Bord Pleanála* [2016] IESCDET 29 [6.8].

<sup>1051</sup> *ibid* [6.9].

<sup>1052</sup> *ibid*.

<sup>1053</sup> *ibid* 6.10].

<sup>1054</sup> *ibid*.

question. Furthermore, that broad assessment should have regard, in an appropriate case, to the legitimate interest of persons in seeking to ensure appropriate protection of important aspects of the environment or amenity generally.<sup>1055</sup>

When it came to assess the compatibility of the Irish rules with European law, the justices managed to side-step the issue and any potential requirement for a reference to the CJEU on the question by finding that Grace had the requisite standing, notwithstanding her failure to participate at the decision-making stage. The factors that were for the justices determinative of the issue included the fact that the proposed development site was protected under European law, and that the protection of such sites involved ‘the legitimate interests of, arguably, every citizen.’<sup>1056</sup> In addition, the site’s designation was due to the fact that it was a habitat for the hen harrier, a protected species, and as such, the site concerned ‘the type of amenity value which is not necessarily confined only to those who reside in its immediate proximity.’<sup>1057</sup> The justices noted that:

It seems to us that the nature of a protected site is relevant to the question of standing. Where that site—in this case a habitat of a relatively rare bird that avoids areas of human activity—is such that it is unlikely that any person can demonstrate that the proposed development will have any direct effect on their own affairs including their enjoyment of an amenity, the interpretation of the requirement of “sufficient interest” should be interpreted with a view to the necessity to protect the site against adverse effects. The legal protection of such sites could otherwise be gravely weakened.<sup>1058</sup>

The justices did however acknowledge that both the Aarhus Convention, and the EIA Directive, allowed member states to impose restrictions on standing. This the justices concluded meant that while a failure to participate in the planning process did not disqualify a person from having standing, it could be a factor that is considered. This would be the case particularly where the person did not have a close proximity to the proposed development site or ‘an established connection with a particular amenity value’ which might be impaired by the development.<sup>1059</sup> Participation in the process on the other hand would confer standing.<sup>1060</sup> Neither Grace or

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<sup>1055</sup> *ibid* [6.11].

<sup>1056</sup> *ibid* [8.2].

<sup>1057</sup> *ibid* [8.3].

<sup>1058</sup> *ibid*.

<sup>1059</sup> *ibid* [8.5].

<sup>1060</sup> *ibid*.

Sweetman had put forward any cogent explanation for non-participation leading the justices to note that:

The more general and more important the amenity which may be at stake then the wider range of persons who may well be able to show that they have an interest in the amenity of the area which is the subject of the proposed development. The nature of the legal challenge intended to be mounted will be relevant also. For example, a person who cannot show proximity to a proposed wind farm and did not participate in the process is unlikely to have standing to make an argument more properly raised by a person more directly affected. In our view a challenger who has not previously participated and cannot show any direct personal prejudice must satisfy the leave judge that the point being made is one directed solely to the purpose of the special protection of the site.<sup>1061</sup>

When the criteria were applied to Grace, the court found she had standing because she resided close to the site, she had chosen to live in the locality due to its unspoilt nature, rich biodiversity, wildlife, and history. She was also involved with a number of local voluntary groups concerned with sustainable energy and tourism, and she believed that the work of these groups would be adversely impacted by the proposed development.<sup>1062</sup> Yet with all this involvement in the locality she had failed to engage with the planning process. The court found that the position of Sweetman was less clear. He did not have the physical proximity with the site, and though he was concerned with environmental matters, he did not provide evidence of any interest in the specific amenity value that would be impaired by the development, and he gave no explanation as to his non-participation.<sup>1063</sup> Because the Court found that Grace had standing, the merits could be heard, and so it was not necessary to reach a decision on Sweetman's standing. The judges noted that 'had he participated in the permission granting process or given the Court some cogent explanation for non-participation, then it would have been much easier to resolve the standing question in his favour.'<sup>1064</sup> When the court turned its attention to the merits, it concluded that the issues raised concerning Articles 6(3) and 6(4) of the Habitats Directive required the resolution of an issue of EU law which was not an *acte clair* and so referred the matter to the CJEU for its opinion and the delay, cost and uncertainty for the project with potential implications for targets continue.

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<sup>1061</sup> *ibid* [8.8].

<sup>1062</sup> *ibid* [8.9].

<sup>1063</sup> *ibid* [8.10].

<sup>1064</sup> *ibid* [8.11].

The Supreme Court decision in *Grace* will undoubtedly have profound consequences for wind energy development and Ireland's targets as well as Ireland's attractiveness as a place to do business. Perhaps one of the greatest difficulties with the decision is the lack of credence given to the manifestly unjust outcome that Fullam J sought to avoid. The decision brings to a planning process that is already struggling to cope, the spectre of chaos and uncertainty inherent in a process that has no meaningful procedural rules as to finality. The uncertainty that flows from the decision of the Supreme Court in *Grace* was noted and considered by Haughton J in a separate challenge taken by Sweetman to another windfarm project. It was submitted in those proceedings that the decision of the Supreme Court in *Grace* on the issue of *locus standi* did not alter existing jurisprudence.<sup>1065</sup> Haughton J took a different view noting that 'the Supreme Court was adding to exiting jurisprudence and giving new guidance that will result in more applicants having sufficient interest to seek judicial review.'<sup>1066</sup> On the issue of uncertainty, Haughton J noted that by not addressing the standing of Sweetman in that context:

The Supreme Court has therefore left open the question as to whether a person with a general interest in environmental matters, but insufficient proximity or connection to/or specific interest in the amenity value of the site of the proposed development, may have *locus standi* under Irish law as an exceptional case. In so doing the court has also not sought to resolve the question as to whether Irish law should be disapplied or reinterpreted to ensure compliance with "wide access to justice" under Article 11 if a person such as Mr. Sweetman does not have standing under domestic law under the principles now enunciated by the court. Thus while modernising the law, providing useful guidance, and bringing a measure of certainty to the issue of standing in environmental challenges, the decision has also left considerable uncertainty.

Immediately following, and in reliance of the decision in *O'Grianna v An Bord Pleanála*<sup>1067</sup> the applicant in *People Over Wind v An Bord Pleanála*,<sup>1068</sup> seeing an opportunity, sought to introduce into the proceedings a new, and previously unmentioned ground concerning the grid connection for the project and project splitting. Haughton J held that the new ground fell outside the grounds in respect of which leave to appeal had been granted and that consequently the applicants were not, under the procedural rules, entitled to pursue it. The applicant argued (amongst other things), that there was an overriding obligation on the court, arising out of European Union law,

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<sup>1065</sup> *Sweetman v An Bord Pleanála* [2017] IEHC 133. For background to this decision see: *Sweetman v An Bord Pleanála* [2017] IEHC 46.

<sup>1066</sup> *Sweetman v An Bord Pleanála* [2017] IEHC 133 [19].

<sup>1067</sup> *O'Grianna v An Bord Pleanála* [2014] IEHC 632.

<sup>1068</sup> *People Over Wind v An Bord Pleanála* [2015] IEHC 271



to consider the grid connection issue even though it had not been fully pleaded, and this obligation arose irrespective of the wording of section 50 PDA 2000 or, Order 84 of the Rules of the Superior Courts. Haughton J disagreed concluding that procedural rules were a matter for domestic law. Noting that the EIA Directive specifically followed the Aarhus Convention, and the specific wording of Article 11(1) and (2) Haughton J explained:

This provision clearly reflects the intention of the EU that member states should determine within their own domestic legal system procedural provisions governing the judicial review. There is clearly nothing in the provisions in the PDA 2000 or Ord. 84 that would prevent or impair the applicants' right to have raised the point concerning grid connection which they say is encompassed by the terms of their Statement of Grounds.<sup>1069</sup>

In *Buckley (No. 2) v An Bord Pleanála*,<sup>1070</sup> Cregan J refused to allow the applicant to introduce new grounds concerning breach of constitutional rights and rights under the Aarhus Convention as a basis for arguing that points of law were points of exceptional public importance and in the public interest for the purpose of section 50 PDA 2000. Cregan J had recourse to the dicta of Noonan J in *Ross v An Bord Pleanála* where he stated:

Accordingly, it would appear that the applicants now seek to appeal on a ground in respect of which no leave to apply for judicial review was granted. I cannot conceive how an appeal could lie in such circumstances. It would be an unusual state of affairs, to say the least, if an appellate court were asked to determine an appeal on the basis of a point that was never even pleaded, less still the subject matter of a grant of leave.<sup>1071</sup>

These restrictions on applicant's rights to raise new issues late on in the proceedings will all need to be looked at considering the Supreme Court's decision in *Grace* and the CJEU decision in *Commission v Germany* and the mantra of 'wide access to justice' and it would seem that a re-writing of Irish court procedures is inevitable notwithstanding that Article 9(3) of the Aarhus Convention, *actio popularis*, has not as yet been formally adopted into domestic law.

## The Conflict between Wind Energy Development and The Environment

It is evident from the case law discussed above that a serious conflict has emerged between what the Second Renewable Energy Directive is seeking to achieve, and EU Directives aimed at

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<sup>1069</sup> *ibid* [31].

<sup>1070</sup> *Buckley (No. 2) v An Bord Pleanála* [2015] IEHC 590.

<sup>1071</sup> *Ross v An Bord Pleanála* [2015] IEHC 484.

protecting the environment. This conflict did not suddenly emerge at a point in time, but just as the Irish Government should not be permitted to use the conflict as a justification for Ireland struggling or failing to meet targets, the European Commission should not be permitted to apportion the entire responsibility for the failure of Member States to meet targets, to the Member States in question. As discussed in chapter 1 (*introduction*), the Second Renewable Energy Directive is a flawed instrument masquerading as it does as a one-stop all embracing measure for the attainment of EU renewable policy at a Member State level. As is demonstrated in chapters 2 (*Targeting Renewables*) and 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*), the Directive is fatally blind to the internal market requirements and shortcomings of the Third Package Directive. Similarly, the Directive is blind to the requirements of EU Directives aimed at the protection of the environment.

Article 13(1) of the Second Renewable Energy Directive requires Member States to (amongst other things) ensure that ‘licensing procedures including spatial planning are clearly co-ordinated and defined, with transparent timetables for determining planning and building applications’<sup>1072</sup> and that ‘administrative procedures are streamlined and expedited...’<sup>1073</sup> Ireland has, in its NREAP, set out in considerable detail an impressive list of the national measures that Ireland considers addresses the requirements of Article 13(1);<sup>1074</sup> yet when one considers the case law discussed above it is clear that the Irish planning regime is the very antonym of efficiency and is in reality devoid of defined and transparent timetables. In part, the reason for this regulatory failure rests with the issue of subsidiarity and proportionality. Article 13(1), despite its insistence on Member States ‘ensuring’ that processes are efficient and transparent, does not set a timetable itself for the granting or refusal of planning permission. Recognising the differences between Member States, this detail is left to national authorities. But even if Article 13(1) had been more prescriptive and mandated a timeframe, it is very difficult to see how this could be reconciled with the ‘wide access to justice’ provisions of the Aarhus Convention or the EIA Directive. There is little evidence in Ireland that European initiatives to resolve this conflict have been effective.<sup>1075</sup>

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<sup>1072</sup> Article 13(1)(a).

<sup>1073</sup> Article 13(1)(b).

<sup>1074</sup> Government of Ireland (n 8) 21-46.

<sup>1075</sup> See: Commission, ‘Wind Energy Developments and Natura 2000-Guidance Document’ (European Union 2011). The Commission has proposed that a time limit for permitting renewable energy sources will be included in a recast directive. See: Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the promotion of energy from renewable sources (recast)’ COM (2016) 767 final/2; and Commission, ‘Clean energy for all-The Revised Renewable Energy Directive’ <[https://ec.europa.eu/energy/sites/ener/files/documents/technical\\_memo\\_renewables.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/technical_memo_renewables.pdf)> accessed 18 June 2017. See also Second Renewable Energy Directive, recital (90).

Does this failure or conflict at an EU level give Ireland a defence to its own failure to put in place a planning permitting regime that strikes an appropriate balance between the policy and legal requirements of the Second Renewable Energy Directive, and the policy and legal imperatives of EU Directives around Environmental protection? The answer is, not fully. Ireland was, as far back as 2010, very much aware of the existence of this conflict, and has in the interim done little by way of effective intervention to deal with the issue and what steps Ireland has taken, or attempted to take, have been delayed or tied up with political opposition.<sup>1076</sup> Ireland's National Mitigation Plan 2017 also offers little by way of instilling confidence that issue of social acceptability can be satisfactorily addressed in time to make a difference to 2020 target compliance. The now usual refrains, adjusted where necessary to reflect the passage of time: that the Draft Wind Energy Guidelines will be finalised (now by 2018); that 'approaches to community ownership will be finalised' (now by 2017); and that there is a need for 'effective community engagement', are all included in the Plan, but seem to have advanced little since all of these things were added to the critical list several years ago.<sup>1077</sup> Ireland's Climate Change Advisory Council notes the need for new policies, but is equally vague as to what specifically is required when it notes: 'Policies enabling increased community engagement and more efficient and effective planning and regulation may aid timely deployment.'<sup>1078</sup>

### Element Power Ltd v An Bord Pleanála-Findings of *Ultra Vires* in a Policy Vacuum

The timely judgment of Haughton J, in *Element Power Ltd v An Bord Pleanála* issued as this chapter, and this thesis, is in its final draft, draws together in a succinct and helpful way, many of the themes discussed, and conclusions reached in this chapter and graphically illustrates the gargantuan task that lies ahead if Ireland is to meet its 2020 RES-E Target.<sup>1079</sup>

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<sup>1076</sup> In 2013, proposed revisions to the Wind Energy Planning Guidelines 2006 aimed at addressing community acceptance issues were published, but as of 7 October 2017 they had not been finalised. See: Department of Housing, Planning, Community and Local Government 'Minister Coveney and Minister Naughton announce key development in the review of the Wind Energy Development Guidelines' (13 June 2017) <<http://www.housing.gov.ie/planning/guidelines/wind-energy/coveney-and-naughton-announce-key-development-review-wind-energy-development-guidelines>>accessed 15 June 2017. See: Philip Ryan, 'Government rolls out strict new wind turbine rules but keeps minimum 500m set back distance near homes' *The Irish Times* (Dublin, 15 June 2017); and Harry McGee 'Windfarm Guidelines delayed due to European Ruling' *The Irish Times* (Dublin, 12 December 2016).

<sup>1077</sup> DCCAЕ (n 3) 43-44. Recent positive developments have included the finalisation of the Code of Practice for Wind Energy Development in 2016 (See: DCCAЕ, *Code of Practice for Wind Energy Development in Ireland Guidelines for Community Engagement* (21 December 2016)<<http://www.dccae.gov.ie/documents/Code%20of%20Practice%20community%20engagement.pdf> > accessed 13 September 2017; and the amendment of ERA, s 9 to include a requirement that grid connection policy has regard to community energy projects (See: Energy Act 2016, s 11).

<sup>1078</sup> Climate Change Advisory Council (n 20) 11.

<sup>1079</sup> *Element Power Ltd v An Bord Pleanála* (HC, 28 September 2017). See also: Aodhan O' Faolain, 'Court quashes planning authority refusal of Kildare-Meath wind farm' *The Irish Times* (Dublin, 28 September 2017).

The decision in *Element Power* concerns a refusal by ABP to grant planning permission to Element Power Ltd., for a 47-turbine wind farm to be developed on the Meath-Kildare border.<sup>1080</sup> The proposed windfarm is large with an estimated capacity of 125 MW, and consequently it is very material in the context of Ireland's 2020 targets. In March 2015, ABP had designated the proposed development strategic infrastructure within the meaning of section 37A of the PDA 2000. In October 2016, ABP refused to grant planning permission for the development for a number of reasons including the fact that 'in the absence of any wind energy development strategy with a spatial dimension or of wind energy strategies at a local level .... the development of a large scale wind farm would be premature pending the adoption of such strategies...'<sup>1081</sup> The developer sought an order of *certiorari* quashing ABP's decision to refuse to grant planning permission for the development. The applicant argued that ABP should not have had regard to the fact that (amongst other things) policy was in a state of flux, or that neither the proposed revisions to the Wind Energy Planning Guidelines 2006,<sup>1082</sup> nor the draft Strategic Environmental Assessment Scoping Report for Renewable Energy Policy and Development Framework (2016) had been finalised.<sup>1083</sup> Haughton J agreed, draft documents did not represent 'existing policy or objectives of the government' as contemplated by the legislation that defined the parameters of what ABP and its Inspectorate could have regard to.<sup>1084</sup> The decision to refuse the grant of planning permission was *ultra vires* as it had taken into account 'irrelevant considerations.'<sup>1085</sup> Haughton J held that the decision should be remitted back to ABP for reconsideration.

Relying on dicta of Clarke J in *Tristor Ltd v The Minister for the Environment*<sup>1086</sup> Haughton J noted that ABP was required to operate within the 'corners of the statutory framework established under European law and the relevant domestic legislation, particularly the 2000 Act and planning regulations, existing statutory guidelines, and local policy as set out in existing county development plans.'<sup>1087</sup> There was nothing in the statutory scheme, including the applicable sections of the PDA 2000, that permitted ABP to have regard to draft or preliminary documents, or scoping documents even if such documents will likely lead to new government policy.<sup>1088</sup> In

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<sup>1080</sup> For a description of the proposed project see: [elementpower <https://www.elementpower.com/portfolio/maighne >](https://www.elementpower.com/portfolio/maighne) accessed 29 September 2017. Element Power Ltd., is also the developer involved in the Emlagh and Castletownmoore Windfarm Projects discussed earlier in this chapter.

<sup>1081</sup> *Element Power Ltd v An Bord Pleanála* (HC, 28 September 2017) [5].

<sup>1082</sup> See *ibid* (n 801) and (n 1076).

<sup>1083</sup> DCENR (n 10). The purpose of the Strategic Environmental Assessment Scoping Report for Renewable Energy Policy and Development Framework (2016) is, amongst other things, stated to be to provide guidance to ABP, planning authorities, developers, and the public on large scale renewable energy projects,

<sup>1084</sup> *Element Power Ltd v An Bord Pleanála* (HC, 28 September 2017) [64].

<sup>1085</sup> *ibid* [72].

<sup>1086</sup> *Tristor Ltd v The Minister for the Environment* [2010] IEHC 397.

<sup>1087</sup> *Element Power Ltd v An Bord Pleanála* (HC, 28 September 2017) [48]-[49].

<sup>1088</sup> *ibid* [49]-[52].

*Ebonwood v Meath County Council*<sup>1089</sup> Peart J had noted that it was essential that developers should have ‘certainty and precision’ as to the criteria that would be applied in assessing their planning application and this applied in this instance also.<sup>1090</sup> Haughton J held that, by refusing planning permission on the grounds of prematurity, ABP had effectively taken ‘upon itself the creation of planning policy for the area’ and this was not permissible.<sup>1091</sup> The obligation of ABP was to consider the application in the context of existing law, policy and guidelines, and not proposals for change.

Whilst the decision in *Element Power* is further evidence of a lack of understanding by ABP of the law and its role as an instrument of settled policy; the decision also highlights the level of confusion and uncertainty that has arisen from the significant policy vacuum that in turn has emerged from the failure on the part of the government to finalise critical policy documents and guidelines around key planning issues for renewable energy. This confusion and uncertainty is undoubtedly making the pursuit of Ireland’s 2020 targets a difficult pursuit.

## Chapter Conclusion and Application to Thesis Themes and Questions

The introductory section to the ‘Decarbonising Electricity Generation’ chapter in Ireland’s recently published National Mitigation Plan contains the following ostensibly clear statement:

Assuming applications relating to the construction of renewable generation plants that are already permitted are built out before 2020, Ireland will meet its 40% renewable electricity obligation.<sup>1092</sup>

The statement is not supported by any data and it is not clear if it is referring to proposed plant that has obtained a grid connection offer only, or whether it extends to proposed plant that is fully permitted. On the next page, the following seemingly contradictory statement is included:

While Ireland has a pipeline of projects in place to achieve 40% renewable electricity by 2020, reaching this milestone is becoming increasingly challenging, with a need to ensure timely deployment by facilitating increased community acceptance, and more efficient and effective planning and regulation.<sup>1093</sup>

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<sup>1089</sup> *Ebonwood v Meath County Council* [2004] 3 IR 34, 49. See also dicta of Widgery J, in *Myton Ltd v The Minister for Housing and Local Government* (1965) 16 P. & C.R 240.

<sup>1090</sup> *Element Power Ltd v An Bord Pleanála* (HC, 28 September 2017) [53].

<sup>1091</sup> *ibid* [54].

<sup>1092</sup> DCCA (n 3) 35.

<sup>1093</sup> *ibid* 40.

It would seem therefore that some projects covered by the initial statement have yet to receive final planning for grid and/or generation assets. The concern however is not simply about the need for consistency or clarity in national policy documents (though this would be welcomed). With less than 4 years remaining to achieve Ireland's 2020 renewable electricity target, this chapter reveals that uncertainty as to the outcome has permeated all aspects of the pursuit, from policy statements, to deliberations of the courts, and all the way down to the permitting of grid connection assets for turbines, and the turbines themselves.

In addressing the principal question posited in this thesis, this chapter has demonstrated that not only is social opposition to wind generation developments one of the most significant challenges facing Ireland in its pursuit of its 2020 renewable electricity targets, but it also highlights that the issue of social acceptance is complex and cannot be simply explained away as mere nimbyism on the part of individuals or communities. The issue of social acceptability is not simply one of ensuring there is engagement with communities as policy documents would suggest. This chapter has revealed how multiple failings at a political, policy, institutional, and legal level have not only contributed to social opposition but have ensured that it has grown exponentially with attendant consequences for Ireland's 2020 RES-E Target and Ireland's 16% binding EU target.

In addressing the principal question, chapter 6 (*Gone with the Wind-Ireland's Proposed Wind Energy Export Projects*) highlights how the State has contributed to the uncertainty around Ireland achieving its 2020 renewable electricity targets through its failure to keep wind generation projects that would contribute to domestic targets, separate in fact as well as in the minds of communities, from proposed large-scale wind energy export projects. This chapter further reveals that the statutory framework put in place to expedite the development of strategic infrastructure including large scale wind generation infrastructure, has been critically undermined by the fact that ABP, the main instrument of that policy, is allowed to continue to operate without the necessary resources or expertise, against a background of ever more increasing European regulation of the environmental impact of infrastructure development, and a surge in planning related litigation. The case law explored in this chapter also demonstrates that the failings at ABP are having an impact beyond the realm of strategic infrastructure, and are contributing to uncertainty, cost and delays around the planning process for wind development and related connection infrastructure more generally, and irrespective of whether proposed developments falls within the legal definition of strategic infrastructure or not.

It is argued in this chapter that Ireland has failed to implement, and is in fact in breach of, Article 13 (1) of the Second Renewable Energy Directive requirements that call for transparent timetables for determining planning applications, and procedures that are streamlined and

expedited, due to the level of administrative errors and lack of understanding of EIA and other requirements evident from the case law considered in this chapter; and that require lengthy and costly court interventions to resolve. There is, in reality, an absence of a *de-facto* final planning decision back-stop date, and this is likely to be a major contributing factor should Ireland fail to meet its 2020 targets. It is suggested in this chapter that weaknesses in the State's planning regime in this respect are reflective of the lack of precision and prescription in the language of Article 13 (1) of the Second Renewable Energy Directive. Yet even if Article 13(1) had been more prescriptive and mandated a timeframe, this chapter reveals that it is very difficult to see how this could be reconciled with the 'wide access to justice' provisions of the Aarhus Convention or the EIA Directive. Quite apart from these State and institutional failings and flaws in the legislative scheme, there is also ample evidence of politicisation of wind energy policy in local communities and this is also contributing to the levels of social opposition to wind developments.

This chapter also highlights that failings in the planning system are not only attributable to the State and law makers, but that courts are also playing their part in creating uncertainty. In many instances the outcomes are unavoidable due to errors and omissions on the part of ABP and its Inspectorate, or due to developer mistakes, but there are also instances where applicants seeking to challenge decisions, or the permitting process, are unnecessarily being allowed to undermine the planning process for wind development.

In considering the principal question, this chapter also explores the emerging conflict between renewable energy development objectives, and EU legislation aimed at protection of the environment, and reveals how this conflict is adding considerably to the uncertain pursuit of Ireland's 2020 renewable electricity targets. In this chapter, it is argued that the use of inflexible mandatory renewable targets, as drivers of development, is fundamentally incompatible with evolving law and policy around environmental protection. A review of recent Irish and European Union case law concerning the permitting of wind developments highlights that there has been a serious misunderstanding of the import of certain vaguely drawn provisions of the Aarhus Convention, and the EIA Directive by Member States, and that the CJEU is employing this loosely drawn, and imprecise language to undo express and more precise controls that Member States believed they had reserved for their national legislatures, and courts. What is certain is that the *locus standi* rules as written and interpreted by the courts are proving to be an increasingly more challenging obstacle to wind development in Ireland and call into question the achievability of Ireland's 2020 renewable electricity targets. Recent jurisprudence of the CJEU almost certainly has the very real potential to make the development process lengthier, costlier, and considerably less certain.

It is estimated that two-thirds of all projects under development are now subject to legal proceedings. Ireland's NREAP sees wind generation as the principal component in Ireland's plan to meet its RES-E Target. Considering the many intractable problems highlighted in this chapter including: recent Irish and CJEU judgments, the ongoing difficulties and challenges faced by ABP, the politicisation of wind development policy; and the seemingly unresolvable conflict between renewable energy development objectives and EU legislation aimed at protecting the environment; it is submitted that the reliance on wind development to meet binding EU targets is, and was, misplaced.



## Chapter 8: Conclusions on Thesis Themes and Central Question

*'Just then they came in sight of thirty or forty windmills that rise from that plain. And no sooner did Don Quixote see them that he said to his squire, "Fortune is guiding our affairs better than we ourselves could have wished. Do you see over yonder, friend Sancho, thirty or forty hulking giants? I intend to do battle with them and slay them. With their spoils we shall begin to be rich for this is a righteous war and the removal of so foul a brood from off the face of the earth is a service God will bless.'*<sup>1094</sup>

### Question for Study Revisited

The Question for Study posited for consideration in the introductory chapter to this thesis asks, in the context of Ireland's pursuit of its 2020 renewable electricity targets, how an ostensibly considered, detailed, all-embracing, and at times prescriptive body of EU legal instruments, and decisions, can potentially fail to secure, over a reasonable period of time, what is on the face of it, a clearly defined purpose in one of the smallest, and most isolated energy markets in the EU. As mentioned at the outset, this superseding question gives rise to several subsidiary questions, the answers to which have a bearing on the principal question. First among these is whether there is any uncertainty as to what the overall purpose or objective to be achieved is. Secondly, it is necessary to investigate whether, purpose and objective apart, there is some innate and fundamental flaw in the EU's legislative scheme, or in the manner of its transposition in Ireland; and finally, it is necessary to consider whether any act or omission, or series of acts or omissions, on the part of the State (including agencies of the State), or other actors in the electricity market or wider society, have advertently or inadvertently subverted the overall objective to be achieved, and if so with what purpose or motive.

This final chapter draws together the findings and conclusions of the preceding chapters and offers a comprehensive response to the research question outlined above and the further questions that flow from it.

### Wind Generation in Ireland-The Measure of Success or Failure

#### ***Finding Failure in Success***

The mandating of binding renewable energy targets for Ireland for 2020, and the acceptance of these targets and attendant consequences for failure, by Ireland, has meant that since 2009 at least, the final destination for Irish renewable energy policy for the period to 2020 has been very

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<sup>1094</sup> Miguel De Cervantes, *Don Quixote de la Mancha*, (D Appleton & Company 1866) 59.

clear. Though the EU has proffered many sign posts and directional markers along the way, and has required Ireland to report on its progress and adjust its course if necessary, the ultimate route to getting to the destination is left to Ireland. In this context, Ireland has opted to prefer wind generated electricity over other forms of renewable technology, and onshore wind over offshore. With one of the best wind regimes in Europe, the outcome from a target compliance perspective should arguably have been beyond doubt. As 2020 approaches, and with more than a mere glimmer of failure on the horizon, it is now opportune to question and examine the effectiveness of Ireland's approach, choices, and decisions from a policy, legal and regulatory perspective.

In the period from 2000 to 2015, the share of electricity derived from renewable sources in Ireland has risen from 4.8% to 25.3%.<sup>1095</sup> In 1990, wind generated electricity made no contribution to gross electricity consumed; by the end of 2015 it represented 21.1%.<sup>1096</sup> Thus, in a relatively short period of time, Ireland has transitioned from an electricity market dominated by fossil fuels to a market with a significant, and growing, renewable component. This transformation has required wholesale policy, legal and regulatory adjustments. It is submitted that these adjustments, and the technical, economic, and financial changes that flow from them, would not have occurred in the absence of EU legislation mandating change. But for the fact that Ireland is struggling to meet its 2020 renewable electricity targets, and is in fact unlikely to do so, with significant financial consequences for Irish tax payers, it would be difficult to argue that Ireland's policy to increase renewable generation in pursuit of mandated European targets has not been successful. However, as the EU's 2020 renewable energy targets are binding, with significant financial consequences for failure to meet them, the 2020 targets must be the yardstick by reference to which the success or failure of policy and regulatory intervention is measured in this context.

### ***Ireland On-course to Miss 2020 Targets***

With less than 4 years remaining, and if Irish electricity demand increases in-line with expectations, Ireland meeting its RES-E Target is simply a case of completing the development of an approximate number of MWs per annum; currently estimated to be between 250 MW and 300 MW. It is submitted that based on published historical and current build-rate data, Ireland is on course to miss its RES-E Target; and consequently, its EU target of 16% of gross final consumption of energy from renewable energy sources. Each MW delayed by legal challenges (and it is estimated that two thirds of projects under development are subject to legal

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<sup>1095</sup> SEAI, (n 2) 32.

<sup>1096</sup> *ibid* (n 2).

challenges),<sup>1097</sup> lack of timely connection (due for example to inefficient and burdensome interactions between the DAO/TSO and ESB), lack of finance (due to the economic crisis or otherwise), or policy or regulatory deficiencies (including a dysfunctional planning system), reduces Ireland's chances of meeting the targets. In addition, because developers have finite resources (capital and people), and a defined appetite for risk, any delays in getting a decision (positive or negative), in respect of grid connection or planning, not only excludes the subject project from the reckoning, but it also means that the developer is not pursuing other projects that may contribute to targets if they are completed within the timeframe.

### ***Principal Reasons for Failure Summarised***

This thesis has sought to highlight, examine, and understand the reasons why Ireland (a country with one of the best wind regimes in Europe), is facing difficulties in meeting its 2020 commitments under a series of separate but connected headings. Given the extent of EU policy and regulatory intervention aimed at securing specific mandatory renewable outcomes for individual Member States, and collectively for the Community, and as noted above, the principal question posed asks how an ostensibly considered, detailed, all-embracing, and at times prescriptive body of EU legal instruments, and decisions, can potentially fail to secure, over a reasonable period of time, what is on the face of it, a clearly defined purpose in one of the smallest, and most isolated energy markets in the EU.

The answer to the research question, it is submitted, does not lie in any uncertainty as to what the overall purpose or objective to be achieved is. This has been clear from the outset and is recorded in Annex I to the Second Renewable Energy Directive. This thesis demonstrates that the answer lies in part, with innate, and fundamental flaws in the EU's legislative scheme; in part with the manner of transposition of that legislative scheme in Ireland; but for the most part, the answer lies first and foremost with acts, omissions and failings, on the part of the State, and key actors in the electricity market motivated, in many instances, by purposes that have conflicted with renewable objectives; and secondly, with the conflict that has emerged between wind farm development and protection of the environment considerations; a conflict that the State has done little to resolve and much to foster. The findings put forward in this thesis in support of this overarching conclusion are summarised below under four broad headings.

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<sup>1097</sup> Rowe (n 14).

## Energy Law and Policy as a Contributing Factor

### ***The Influence of European Law and Policy***

As far as the origins of Irish electricity law is concerned, a cursory review of the ERA and the multitude of secondary instruments introduced to implement EU requirements in Ireland, reveals little that cannot be traced (in many instances verbatim), back to an EU Directive or Regulation. The genealogy of Ireland's post-liberalisation electricity law (renewable or otherwise), has in fact been written, and can be found outside the State. A review of Irish energy policy documents of the past two decades leads one to the same inexorable conclusion. Whilst on the face of it these policy documents give a strong impression that renewable energy, and wind energy in particular, has been the preferred choice of successive governments, it is submitted that whilst this may have been the position initially, Irish policy enthusiasm for renewable energy, has over the past decade at least, been fuelled by EU policy and law directed at the attainment of particular outcomes, and not by some home-grown desire to decarbonise or displace imported fossil fuels, though the latter justifications feature prominently in the Irish renewable energy policy narrative. Irish energy policy is enthusiastic about renewable energy because it is legally required to be so, and Irish law facilitates and entertains it for the same reason.

Should Ireland ultimately meet its specified 2020 targets, as unlikely as this now seems, the foundation stones upon which this pillar of energy policy success was constructed, will be found in the detail of various EU Directives and Regulations. Should Ireland, on the other hand, fail to meet its 2020 targets, it is submitted that the responsibility for this failure, in part at least, will lie with the architects of the two principal instruments that underpin renewable energy policy, the Second Renewable Energy Directive, and the Third Package Directive and the EU principles of subsidiarity and proportionality that informed the content and drafting of these instruments.

### ***Subsidiarity, Proportionality, and Regulatory Failure***

It is submitted that deference to the EU principles of subsidiarity and proportionality has led to a regulatory failure in Ireland. From the perspective of wind generation, the two most important EU legal instruments are the Second Renewable Energy Directive, and the Third Package Directive. Over and above the issue of targets, the former seeks to address the known and accepted obstacles to renewable penetration: grid and market access, excessively complex and inefficient permitting and administrative procedures; and information deficits. The latter mandates greater regulatory independence and offers the possibility of full ownership independence of networks from conflicting supply and generation considerations. Both directives, in deference to the principles of subsidiarity and proportionality, offer a level of

discretion to Member States as to the way the objectives of the Directives are secured and in doing so they open the door to opportunity for Member States to subvert EU policy and regulatory failure. As evidence of Ireland availing of this opportunity one has only to view (to the extent that viewing is permitted), the highly complex, highly inefficient, and monopolistically ingenious, contractual and regulatory matrix put in place around the transmission and distribution networks, for the benefit, not of electricity consumers or renewable energy interests, but historical vested interests, rights and entitlements.

Whilst the Second Renewable Energy Directive expressly sets about legislating for the known barriers to renewable development it is not a complete package and relies heavily on the Third Package Directive to deliver the ‘necessary framework for achieving the objective of a well-functioning internal market.’<sup>1098</sup> It is submitted that this nexus is fatally understated. The Third Package Directive, with all its complexity and ingenuity around possible ownership and operation models for network assets is, from an Irish perspective at least, nothing more than a homage to complexity or a non-abridged theoretical guide to the intricate detail of the many options available to address a significant internal market problem, and which, in the final analysis, extends to an option to do nothing at all, which is succinctly captured in Article 9(9). Ireland’s election to avoid full ownership unbundling of the Transmission System, an acknowledged enabler of renewable energy development, undermines the Second Renewable Energy Directive. The extensive latitude offered to Member States in the Third Package Directive does not fit well with the tighter rein exercised by EU lawmakers in the Second Renewable Energy Directive especially in the area of targets. In Ireland, Government selected FOU as the most appropriate option to deal with a serious internal market concern, but could not implement it, so the optionality conferred by the Third Package Directive offered a way out in the form of a *status quo* derogation. It is submitted that this form of subsidiarity does not further European objectives, rather it wastes significant time and resources in pursuit of an ideal the implementation of which from the outset is patently impossible. It is difficult to quantify what this outcome ultimately means for Irish wind generation, but if Ireland does not meet its targets, a failure to take steps that it was accepted by Government, would speed up renewable grid connections will undoubtedly be a factor for consideration.

This regulatory failure that stems from subsidiarity and proportionality considerations is also evident in Ireland’s approach to the level of discretion conferred by Article 13(1) of the Second Renewable Energy Directive which requires Member States to ensure that ‘licensing procedures including spatial planning are clearly co-ordinated and defined, with transparent timetables for

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<sup>1098</sup> Third Package Directive, recital (7).

determining planning and building applications'<sup>1099</sup> and that 'administrative procedures are streamlined and expedited...'<sup>1100</sup> Ireland has, in its NREAP, set out in considerable detail an impressive list of the national measures that Ireland considers addresses the requirements of Article 13(1); yet when one considers the case law discussed at chapter 7 (*Social Acceptability: A Judicial Eye at the Centre of the Perfect Storm*), it is clear that the Irish planning regime is the very antonym of efficiency and is in reality devoid of defined and transparent timetables. In part, the reason for this regulatory failure rests with the principles of subsidiarity and proportionality. Article 13(1), despite its insistence on Member States 'ensuring' that processes are efficient and transparent, it does not set a timetable itself for the granting or refusal of planning permission. Recognising the differences between the Member States this detail is left to national authorities. The Commission in its 2017 Progress Report has accepted that Ireland is one of the Member States that has a 'Maximum time limit for procedures.'<sup>1101</sup> Ireland has no doubt pointed out that timeframes are provided for in its procedural scheme for planning, but as the sample of case law examined in chapter 7 highlights, there is, in substance, no time limit and what the Commission has recorded in its 2017 Progress Report is a matter of form, not substance and certainly not an example of a way forward for other Member States.

## Regulatory Action and Inaction as Contributing Factors

### ***The Policy versus Regulation Divide***

The Third Package Directive notes that energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly.<sup>1102</sup> This begs the question as to what are 'all relevant regulatory issues'. In particular, where does policy end and regulation begin? The distinction, and demarcation are important as this thesis demonstrates that in Ireland regulatory decision making around pure operational issues is considerably less influenced by external non-relevant factors. This thesis also demonstrates that the independent regulatory body, the CER, imposed on the Irish market by EU directive requirements, has through its questioning of positions, market and stakeholder engagement, and quality of decision making, played a pivotal role in securing grid, and market access for wind generated electricity, both of which are essential to Ireland's 2020 commitments. On the other hand, it has been shown that at a policy level, the State, while capable of agreeing to aggressive renewable targets, and the financial consequences of failure to meet these targets, it is incapable of implementing all the adjustments necessary to ensure targets are met and

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<sup>1099</sup> art 13(1)(a).

<sup>1100</sup> art 13(1)(b).

<sup>1101</sup> Commission (n 14) 11-12.

<sup>1102</sup> Third Package Directive, recital (34).

penalties avoided. A review of policy choices and decisions, as well as regulatory decisions highlights that, at times it can be difficult to see a clear distinction between, what is a matter of policy, and a matter of regulation.

Two areas that are very much relevant to the principal question examined in this thesis and that have been expressly reserved for the remit of policy, and the Energy Minister, are the identity of, and licensing of, network owners and operators and the structure, terms and conditions of support schemes for the promotion of renewable energy. The former is very much a regulatory issue while the latter, as is demonstrated in the thesis, gives rise to significant regulatory consequences. This thesis shows that due to State ownership of key actors in the electricity sector, the policy/regulatory divide in the electricity sector in Ireland is considerably opaquer than it should be and does not operate exclusively for the benefit of electricity consumers, which it should. In the same manner that the CER considers applications and grants licences where appropriate to generators, suppliers and other market participants, CER should have full regulatory control over the owners and operators of the transmission and distribution systems, and section 14 ERA should be amended to remove references to both EirGrid and ESB. The holders of all regulatory licences should be determined by CER, and not pre-determined by legislation. Further, the detailed design, terms and conditions of future support schemes should be within the remit of CER and SEMC. The broad policy parameters for support schemes can remain with the Energy Minister, but in view of the growing complexity of the market, and the unintended consequences that can arise, it is more appropriate that the design and administration of support schemes should lie with the agency that has the most appropriate expertise and experience.

The State's control over the nature, extent and detail of support schemes is, with the exception perhaps of the exclusion of projects built in Ireland but connected in Northern Ireland, unlikely to be a determining factor in any *ex post* examination of Ireland's failure to meet its targets, if indeed there is such a failure. The States' unwillingness to cede licensing control of network ownership and operation to the CER is, of itself, also unlikely to be a determining factor but it needs to be considered in the wider context of unhealthy State interference in the energy market.

### ***Regulatory Decision Making on Market Access and Operation***

As far as market operational matters are concerned, a review of CER and SEMC decisions since 2009 clearly shows time and time again that, in weighing and balancing competing interests as part of the decision-making process, the regulators opted for outcomes that furthered the development of wind generation in the interests of ensuring that Ireland would meet its targets. A review of regulatory decisions of CER and SEMC reveals an acute concern with meeting renewable targets that permeates regulatory decisions of the period. This concern has had the

effect of subordinating not only the interests of conventional generators, but at times the interests of consumers also, to wind interests; a fact which is best illustrated by the delay in ending compensation for curtailment (funded by consumers), due to concerns that such a change would have a dampening effect on the rate of development of wind generation, and prejudice the attainment of targets. CER and SEMC have, guided by the requirement to meet targets, created a framework in Ireland that has allowed wind generation to secure actual, and contracted grid connection, of a level that is considered will be sufficient to meet Ireland's 2020 RES-E Target.

### ***Regulatory Inaction as a Contributing Factor***

In circumstances where EU requirements are less prescriptive, or provide for options, certain key Irish policy decisions, and Ministerial consents around the institutional arrangements in the market, and the position of the dominant incumbent (ESB), betray a persistent willingness on the part of the State to assist in furthering the interests of ESB, at a time when EU law and policy was seeking to ensure that European electricity markets opened-up to competition from new renewable, and conventional technologies, and market participants. Though these decisions have given rise to complex regulatory outcomes, the regulatory voice is all but absent around many of the decisions themselves. Perhaps the reason for this can be found in the policy-regulatory divide, but it is strongly arguable that this artificial, malleable distinction is not consistent with the Third Package Directive requirement that regulators need to be able to take decisions in relation to *all relevant regulatory issues* if the internal market in electricity is to function properly. The consequences of this regulatory silence and relevance to Ireland's difficulties in meeting its targets are considered further below.

### ***Overall Conclusion on the Contribution of the Regulator***

Notwithstanding the inconsistency in regulatory approach highlighted above, having an independent regulator to act as a moderator between the competing interests of market participants, System Operators, and consumers, has given confidence to new market entrants that rules would be applied in a fair, transparent and non-discriminatory fashion, even if domestic policy or practice continued to prefer incumbent interests. On the issue of grid and market access in particular, whilst SEMC could be criticised for the manner in which the *Wind in The SEM* consultation, and decision-making process proceeded, it is submitted that in the end, and after much uncertainty, the correct balance was achieved between the interests of the consumer, and the wind industry against a background of binding targets. If the 2020 targets are not met, it will not be because of a want of regulatory ingenuity or effort on the part of CER and SEMC in dealing with grid and market access issues. It is submitted that the structure of the Irish regulatory arrangements where CER and NIAUR regulate through SEMC, and SEM Matters (as defined in



ERA, s 8A(5)), fall within the exclusive jurisdiction of SEMC, lends itself to greater regulatory independence in decision making as CER and NIAUR are individually constrained by the other, and legislation in the other's jurisdiction, in terms of what matters are relevant in decision making and are thus less likely to be motivated by political or policy considerations relevant only in their specific jurisdiction, and this outside influence or control has undoubtedly assisted wind generation.

## **Subversion of Renewable Energy Policy as a Contributing Factor**

### ***The Influence of Binding Targets on Government Policy***

The influence of binding targets on Government policy and Ministerial decision making is considerably less pronounced than that evident in decisions of the regulators in the context of market operational matters. Whilst the requirement to meet targets has undoubtedly influenced the nature and extent of Ireland's very successful policy on financial support schemes, Government policy in the areas of project permitting, network unbundling, and investment decisions of State owned enterprises, has been the complete antithesis of what is required in these areas to advance wind renewable development to the extent required to meet the targets that the Irish Government committed Ireland to.

### ***Network Unbundling Policy as a Contributing Factor***

Full ownership unbundling of the Transmission System, an acknowledged enabler of renewable energy, was not implemented in Ireland because of entrenched vested interests even though it was acknowledged that it would speed up the connection of wind generation assets. The complex and carefully constructed regulatory arrangement in Ireland surrounding ownership and operation of electricity networks is sub-optimal, unnecessary, and constitutes both a delay and cost impediment to the connection of wind generation technology to the grid, a delay which may contribute to Ireland missing its 2020 targets. This thesis demonstrates that the arrangements have been crafted and refined over a lengthy period to facilitate and preserve the position of Ireland's historic electricity monopoly, its shareholder, employees, and trade unions. The Third Package Directive and the manner of its implementation in Ireland demonstrates that unless EU law makers can bring forward and secure agreement on a clear, concise and unqualified measure that mandates absolute legal separation of network assets from generation and supply interests at an operational, management, and shareholder level, then there should be no further legislative initiatives in this area. One of the reasons for Ireland doing a *volte face* on full ownership unbundling (notwithstanding its earlier policy position that it was essential to support Ireland's drive to meet 2020 targets), was stated to be the costs associated with disentangling ESB's

ownership of the transmission assets in-favour of EirGrid. The costs of failing to meet mandatory 2020 renewable energy targets are estimated to be Euro 65-150 million for each percentage point failure. Ireland can achieve all the benefits of unbundling through a complete privatisation of State owned generation and supply interests leaving EirGrid, and the network owning elements of ESB, to focus solely on investment in the networks in the interests of electricity consumers, and whilst it is submitted that this is now unlikely to assist with Ireland's 2020 targets, it may better position Ireland with respect to climate change objectives post 2020, and the proposed direct connections to the electricity networks of continental Europe which are now essential in a post Brexit world.

### ***Split Ownership-Operation Model***

The shortcomings of the split ownership-operation transmission model from the perspective of wind generation have been rehearsed and dismissed, and it now seems unlikely that this model will be undone in the medium term. To the extent that Ireland fails to meet mandatory 2020 targets however, and the shortcomings of the model highlighted by EirGrid and others can be shown to be contributing factors, then to the cost of this complex and inefficient arrangement can be added the financial consequences of Ireland's failure to meet 2020 targets. All the intricacy and inefficiency of the existing model could be circumvented if the ownership and operation of the Transmission System was vested in a single entity. Adherence to the *status quo* means that industry is reliant on, and must fund the CER's regulatory effort, in ensuring that the artificial, and reluctant partnership, between the EirGrid (TSO) and ESB (TAO) delivers the necessary investment, and works, in the timely fashion that is required for Ireland to meet 2020 targets.

### ***State Ownership of Electricity Market Actors as a Contributing Factor***

One of the principal arguments against privatisation of strategic public assets is that it leaves the consumer at the mercy of profiteering shareholders, and certainly where regulation is inadequate or there is a regulatory failure, this is a legitimate concern. If as in the case of Ireland it has been determined by Government, the Competition and Consumer Protection Commission, and others that something (Full Ownership Unbundling of the Transmission System in this instance), is very much in the interest of consumers, or network investment in furtherance of renewable policy, the failure to implement this degree of unbundling because it undermines the position of the State as shareholder, or State employees as employees or as shareholders, then the distinction between public and private ownership becomes less clear. Similarly, it is submitted that it is nonsensical for Ireland to be a party to, and commit Irish electricity consumers to underwrite, the decarbonisation of the economy and at the same time commit those same consumers to

underwrite the burning of peat in the interests of creating jobs, the sustainability of which are as questionable as the fuel consumed in the power stations built to burn it. Similarly, at a time when EU energy policy was vigorously pursuing greater competition in energy markets, successive Irish Governments have approved large scale conventional power plant developments by State owned enterprises. The Irish State has, in effect, manufactured its own State-owned 'competition' in the sector to the exclusion of new market entrants. Clearly, whilst there may not always be energy in politics, there has been a considerable amount of politics in Irish energy.

If Ireland fails to meet its 2020 targets, then the cost of this failure and the contradictory Government policy that has contributed to it, will fall to Irish tax payers, and may be very significant. It is submitted that the benefits of State ownership of network assets in Ireland are overstated, and that consideration should be given to a private, or combined public-private ownership model, where the ability of the State to make energy policy decisions in the interest of energy consumers or climate change, or other social objectives is not manipulated or subverted by non-energy considerations, and the State through strong, focussed, and independent regulation manages the network owners/operators through the statutory framework and licencing function. The same end could be achieved through a full privatisation of all State-owned electricity and supply enterprises leaving the State free to re-structure the ownership and operation of electricity networks around a more efficient, de-politicised, and integrated model that serves the electricity consumer, the economy, and social objectives such as decarbonisation; and not narrow stakeholder constituencies that hold coveted positions and attendant rights by virtue of outdated legislative schemes and structures around how electricity markets and structures should be deployed, owned and managed.

### ***Politicisation of Wind Planning Guidelines***

Ireland introduced proposed revisions to the Wind Energy Planning Guidelines 2006 in 2013 aimed at addressing serious and entrenched community acceptance issues around wind farm development, but as of 7 October 2017 they had not been finalised. The delay in finalising the guidelines has led to intense political debate in rural communities as well as a certain degree of uncertainty, all of which has materially contributed to, and empowered opposition to, wind farm development and generated concern in communities as to what the future may hold. Inaction on the revisions to the Wind Energy Planning Guidelines 2006 can be contrasted with the State's reckless enthusiasm for Ireland's proposed large-scale energy export projects which, in the absence of any legal or regulatory framework, could never have been completed in the timeframe envisaged. The failure to clearly distinguish wind projects aimed at domestic production for domestic consumption and target compliance, from the large-scale export projects has had

serious implications for the social acceptability of the former, and knock-on consequences for Ireland's targets.

## The Conflict between Wind Energy and Protection of the Environment

### *The Workings of ABP as a Contributing factor*

A survey of recent judgments of the superior courts highlights that failures at ABP are resulting in delays and unnecessary cost to wind energy developments. Each MW delayed reduces Ireland's annual build rate by an equivalent amount with easily translatable consequences for Ireland's targets. If shortcomings identified in case law are to be addressed and avoidable errors eliminated from the planning process in time to make a discernible difference for 2020, then there is an urgent need for immediate reform at ABP.

The case for reform of ABP has been convincingly made by the findings (including 102 recommendations), of the ABP Review Group in their 2016 Report. It is submitted that certain recommendations of the ABP Review Group concerning the legal resources, and expertise available to ABP do not go far enough. The proper and efficient functioning of ABP is central to ensuring that there is an appropriate balance between the interests of the environment on the one hand, and on the other, the interests of the wider economy which includes a requirement for a functioning and sustainable energy market. At present, the planning regime for energy infrastructure is not efficient, and is open to exploitation by opponents of energy infrastructure developments who can use the error ridden and inefficient process to dampen enthusiasm for, and render economically unviable, wind energy projects, long before a final decision of the superior courts, or the CJEU can validate or invalidate a decision of ABP. This is not to suggest that ABP should (even if it was legally permissible to do so), rubber stamp all applications for planning for wind related infrastructure, rather the argument is that the planning process, including appeals, should deliver a final outcome in a reasonable timeframe. Having a proper functioning, resourced and efficient ABP is a first step in ensuring this.

Article 13 of the Second Renewable Energy Directive calls for Member States to ensure that there are 'transparent timetables for determining planning and building applications'<sup>1103</sup> and that 'administrative procedures are streamlined and expedited at the appropriate level.'<sup>1104</sup> It is submitted that Ireland is in breach of these requirements due to the level of administrative errors and lack of understanding of EIA requirements evident from the case law and that require lengthy and costly court interventions to resolve. There is, in reality, an absence of a *de-facto* final

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<sup>1103</sup> art 13(1)(a).

<sup>1104</sup> art 13 (1)(b).

planning decision back-stop date, and this is likely to be a major contributing factor should Ireland fail to meet its targets.

### ***Role of the Judiciary in advancing Policy***

Arguments around the contribution that specific wind development projects would make to meeting Ireland's renewable energy targets have been advanced in judicial review proceedings as a response to applicants seeking to have planning decisions struck down. The judiciary, in considering the issue of public interest have, on occasion, had regard to Ireland's 2020 targets and have noted that the statutory scheme established by SIA 2006, and aimed at the expeditious delivery of strategic infrastructure including wind developments, has as its purpose the fast tracking of strategic developments in the public interest. The dicta of Binchy J in *Callaghan v An Bord Pleanála*<sup>1105</sup> is notable in this respect. Notwithstanding this, the unfortunate and unnecessary decision of Costello J in *Callaghan v An Bord Pleanála*<sup>1106</sup> seriously undermines the SIA 2006, and as such undermines the State's sustainability and environmental objectives. Pending determination by the Supreme Court, this decision not only calls into question the status of numerous other developments participating in the SIA process, but it also has significant potential to delay development and bring into question Ireland's ability to deliver on its 2020 targets.

### ***The Conflict between Wind Generation Development and the Environment***

A review of emerging case law highlights that the legal environment for permitting wind development in Ireland is no longer fit for purpose, and is so altered that there must be a high probability, in view of the aggressive build rate required to meet Ireland's targets and the level of developments finding their way into the courts, that Ireland will not achieve its 2020 RES-E Target. It is estimated that two-thirds of all projects under development are now subject to legal proceedings. Ireland's NREAP sees wind generation as the principal component in Ireland's plan to meet its targets. Considering recent Irish and CJEU judgments, and ongoing difficulties and challenges faced by ABP, it is submitted that the reliance on wind development to meet binding EU targets is, and was, misplaced. If at a policy level Ireland continues to pursue wind development targets in the period to 2020 (which it must), and beyond 2020 (which ultimately remains to be determined), then a fundamental change of approach to the permitting of energy infrastructure, including wind, is required. It is submitted that the continuation of inflexible mandatory renewable targets (European or otherwise), as drivers of development, is

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<sup>1105</sup> *Callaghan v An Bord Pleanála* [2016] IEHC 488.

<sup>1106</sup> *Callaghan v An Bord Pleanála* [2015] IEHC 493.

fundamentally incompatible with evolving law and policy (which is mostly European in origin), around environmental protection.

If wind generation is to remain a cornerstone of Ireland's energy policy to 2020 and beyond, then it is submitted that planning for wind developments should, to a greater extent than is currently contemplated by SIA 2006, by-pass local planning authorities, and go directly to a reformed and enhanced ABP for determination. If ABP is vested with the necessary resources and expertise, then it will be best placed to deal with the growing complexity in planning and environmental legislation. If the threshold for *locus standi* continues to be further liberalised (which seems likely), then an enhanced ABP should ensure that a greater proportion of decisions are reached in compliance with legal requirements, and thus, to the extent that ABP has found it appropriate to give approval, deprive opponents of development of legal arguments, even if they have the standing, and resources to pursue an action. In addition, the infrastructure arrangements as between TAO and TSO, and DAO and DSO need to be reconsidered from a regulatory perspective with a view to removing all inefficiencies inherent in these unnecessarily complex arrangements, and shortening the timeframe for development considering the decision in *O'Grianna v An Bord Pleanála*.<sup>1107</sup> Finally, in those cases where there is an application for leave to appeal, a decision of the High Court to a higher court, there is a greater need for consistency and restraint by the judiciary in considering whether to grant such leave.

### ***Failure to Understand EU Directives-A Contributing Factor?***

A review of recent Irish and European Union case law concerning the permitting of wind developments highlights that there has been a serious misunderstanding of the import of certain vaguely drawn provisions of the Aarhus Convention, and the EIA Directive by Member States, and that the CJEU is employing this loosely drawn, and imprecise language to undo express and more precise controls that Member States believed that they had reserved for their national legislatures and courts. What is certain is that the *locus standi* rules as written and interpreted by the courts are proving to be an increasingly more challenging obstacle to wind development in Ireland and call into question the achievability of Ireland's 2020 RES-E Target. Recent jurisprudence of the CJEU almost certainly has the very real potential to make the development process lengthier, costlier, and considerably less certain.

Article 11 of the EIA Directive, and similar provisions in other directives which deal with access to review bodies, appear on the face of it to leave a considerable amount of discretion with Member States on the issue of *locus standi* and domestic procedural rules generally. This now mistaken

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<sup>1107</sup>*O'Grianna v An Bord Pleanála* [2014] IEHC 632.

impression is very much reflected in the submissions of Member States such as Germany, and Austria in *Commission v Germany*.<sup>1108</sup> Article 11 of the EIA Directive expressly leaves it to Member States to determine what constitutes a *sufficient interest* and *impairment of a right*, though in so doing the Member State must act in a way that is consistent with ‘the objective of giving the public concerned wide access to justice.’<sup>1109</sup> It is this latter rider that is now being employed by the Commission, and the CJEU to re-write national procedural rules and erode the express discretion that Member States believed they had retained in the wording of Article 11, and mirror provisions in other Directives. Case law such as *Grace v An Bord Pleanála*,<sup>1110</sup> *People Over Wind v An Bord Pleanála*<sup>1111</sup> and *Buckley (No. 2) v An Bord Pleanála*<sup>1112</sup> suggests that an opening of the gates to a broader constituency of litigants, consequent upon a loosening of *locus standi* and other procedural rules, is eminent. To the extent that the fear of this happening has not already done so, any such outcome is likely to have profound negative consequences for Ireland’s 2020 renewable energy targets. If, and it seems inevitable that it will, the judgments of the CJEU in *Commission v Germany*<sup>1113</sup> and in other recent cases are to bring about an unwelcome, though perhaps not entirely unexpected, re-writing of Irish procedural rules governing judicial review to ensure alignment with the access to justice provisions of the Aarhus Convention and European directives, then it would seem that ABP and its decision-making process will stand diminished, and that wind energy developers, the judiciary, and the courts will be at the mercy of procedural ‘rules’ that are the very antonym of efficiency, certainty and commercial enterprise.

### ***Failure to Implement EU Directives-A Contributing Factor?***

Whilst the impact of the decision in *O’Grianna v An Bord Pleanála*<sup>1114</sup> is not surprising from a legal perspective, it undoubtedly has far reaching implications, and acts as a legal brake on the development process for all wind energy developments at the planning and permitting stage. The practical effect of the decision in *O’Grianna* is that any developer applying for planning permission must now include in the application, details of all works that are to form part of the ultimate project, and this includes the grid works over which the developer has no control. Perhaps the issue of uncertainty as to the grid works could be addressed at a practical level by the developer submitting an EIS with a series of options or grid scenarios for ABP to include in its cumulative assessment at the point in time when the application for planning permission for the turbines is

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<sup>1108</sup> C-137/14 *Commission v Germany* (n 962).

<sup>1109</sup> EIA Directive, art 11(3).

<sup>1110</sup> *Grace v An Bord Pleanála* [2016] IESCDT 29.

<sup>1111</sup> *People Over Wind v An Bord Pleanála* [2015] IEHC 271.

<sup>1112</sup> *Buckley (No. 2) v An Bord Pleanála* [2015] IEHC 590.

<sup>1113</sup> C-137/14 *Commission v Germany* (n 962).

<sup>1114</sup> *O’Grianna v An Bord Pleanála* [2014] IEHC 632.

submitted. This approach would undoubtedly have both cost and complexity issues associated with it and would involve ABP considering options that may never be implemented, but there would appear to be nothing in the judgment of Peart J that requires all aspects of a project to be the subject of a single planning application. Chapter 3 (*Unbundling the Opportunity for Irish Wind Generation Technology*) considers the complex and highly artificial and inefficient corporate, and contractual arrangement that exists between the TAO (ESB), and TSO (EirGrid) and between DAO (ESB), and DSO (ESB Networks). The decision in *O’Grianna* and the consequent delays in the development process present yet another reason why the DSO and TAO should not be beholden to ESB in matters of grid planning, development, construction or maintenance. Finally, and as discussed above, by failing to put in place a fit for purpose planning regime, Ireland is also arguably in breach of Article 13 of the Second Renewable Energy Directive.

## Epilogue

On 10 October 2017, SEAI published its latest findings on Ireland’s progress towards meeting 2020 targets.<sup>1115</sup> Based on current trajectories, and without policy intervention, Ireland is on course to miss all of its 2020 renewable energy targets. The gap in respect of the overall 16% binding EU target is anticipated to be approximately 2.8%.<sup>1116</sup> At a sectorial level, the shortfalls are projected to be RES-E (37%, against a target of 40%); RES-H (9%, against a target of 12%); and RES-T (8%, against a target of 10%). SEAI have also noted that due to increased demand for energy attributable to Ireland’s economic recovery, meeting national renewable energy targets may not be sufficient to meet the overall EU target. If Ireland does meet its RES-E Target it may still miss its overall binding target if the deficits in the other sectors are not eliminated. If the 40% RES-E Target is to be met, then SEAI note that renewable electricity generation needs to increase at a rate of over 11% per annum (currently 8%); and if all of this increase is to come from onshore wind development, it would require an annual build rate of between 300 MW and 350 MW of new installed capacity, against an annual average of 200 MW in the period from 2011-2015.<sup>1117</sup> Considering the findings in this thesis and the problems and failings highlighted, achieving this annual level of installation seems highly improbable.

The uncertain pursuit of Ireland’s RES-E Target and binding EU 16% renewable target thus continues. In plotting its course, Ireland has not, for the most part, sought a favourable wind; rather it has courted a suite of crosswinds in its facile attempts to reconcile complex social, economic, institutional, and political considerations, with the absoluteness of its 2020 EU commitment. Now very much in the doldrums on the issue of target compliance, only the most

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<sup>1115</sup> SEAI, *Ireland’s Energy Projections-Progress to Targets, Challenges and Impacts* (2017).

<sup>1116</sup> *ibid* 4.

<sup>1117</sup> *ibid* 6.



optimistic of observers would take the view that Ireland can now get there by any means other than pure chance and coincidence.

## Appendix 1: Abbreviations

AA	Appropriate Assessment.
Aarhus Convention	UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.
ABP	An Bord Pleanála.
ABP Review Group	The Independent Review Group, under the Chairmanship of Gregory Jones QC, tasked with conducting an organisational review of An Bord Pleanála and reporting in February 2016.
AER	Alternative Energy Requirement.
AG	Attorney General.
AT&GWU	Amalgamated Transport and General Workers Union.
Base Load Power Plant	A power plant that operates and produces electrical output constantly except when shut down for maintenance, and due to technical faults.
BGE	Bord Gáis Éireann.
BNE	Best New Entrant.
CADA or CfD	Capacity and Differences Agreement.

CCGT	Combined Cycle Gas Turbine.
CEER	Council of European Energy Regulators.
CER	Commission for Energy Regulation. On 2 October 2017 the CER changed its name to the Commission for the Regulation of Utilities (CRU).
CHP	Combined Heat and Power.
CJEU	Court of Justice of the European Union.
Commission	European Commission.
Community	European Community.
CPI	Consumer Price Index.
DAO or Distribution Asset Owner	ESB (Networks Division) in its capacity as Distribution Asset Owner or DAO pursuant to ERA, s 14(1)(k).
DBC	Dispatch Balancing Costs-a form of compensation for wind generators underwritten by consumers.
DCCAIE	Department of Communications, Climate Action and Environment.
DCENR	Department of Communications, Energy, and Natural Resources. Now restyled as the Department of Communications, Climate Action and Environment (DCCAIE).

DECC	Department of Energy and Climate Change (UK).
DETI	Department of Enterprise, Trade & Investment (NI).
Distribution	The transport of electricity by means of a distribution system to final customers (See further ERA, s 2(1).
Distribution System	The electric lines which with the approval of the CER may be specified as part of the Distribution System including any electrical plant, transformers and switch gear which is used for conveying electricity to final customers.
DHPLG	Department of Housing, Planning and Local Government.
DOE	Department of Environment.
DPE	Department of Public Enterprise.
DSO or Distribution System Operator	ESB Networks Limited in its capacity as Distribution System Operator or DSO pursuant to ERA, s 14(1)(g) and s 14(2)(2C).
DS3	EirGrid's 'Delivering a Secure, Sustainable Electricity System' programme.
EC	European Community.
ECHR	European Convention on Human Rights.

ECtHR	European Court of Human Rights.
EIA	Environmental Impact Assessment.
EIA Directive	<p>Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 (EIA Directive 1985). The EIA Directive 1985 was amended 3 times as follows: (i) Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1997] OJ L73/5; (ii) Parliament and Council Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17; and (iii) Parliament and Council Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L140/114. The EIA Directive 1985 (as amended) was collated and codified by Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1 (EIA Directive 2011). The EIA Directive</p>

	2011 was amended by Parliament and Council Directive 2014/52/EU of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1.
EirGrid	The public limited company established pursuant to the 2000 Regulations, reg 34.
Energy Minister	The Irish Government Minister for the time responsible for energy matters.
entso-e	European Network of Transmission System Operators for Electricity.
EPI	Environmental Policy Integration.
ERA	Electricity Regulation Act 1999.
ERGEG	European Regulators' Group for Electricity and Gas.
ESRI	Economic and Social Research Institute.
ESB	Electricity Supply Board.
ESB IE	ESB Independent Energy.
ESBNG	ESB National Grid.
ESB Networks Ltd	A wholly owned subsidiary of ESB.
ESB Networks	A business division of ESB.

ESB PG	ESB Power Generation.
ESOT	Employee Share Ownership Trust.
EU	European Union.
EWEA	European Wind Energy Association.
First Electricity Directive	Council and Parliament Directive 1996/92/EC of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L027/20.
First Renewable Energy Directive	Council and Parliament Directive 2001/77/EC of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33.
FIT	Feed-in Tariff.
FOU	Full Ownership Unbundling.
Frontier	Frontier Economics.
GAR	Generation Adequacy Report.
GB	Great Britain (but not including NI).
Generator	The holder of a licence under ERA, s 14(1)(a).
Generating Station	A station for the generation of electricity as defined in ERA, s 2(1).

GPA	Group Processing Approach.
Habitats Directive	Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.
HLD	High Level Design.
HIQA	Health Information and Quality Authority.
IEA	International Energy Agency.
Infrastructure Agreement	The agreement between EirGrid in its capacity as TSO and ESB in its capacity as TAO entered into on 16 March 2006 pursuant to the 2000 Regulations, reg 18.
IPP	Independent Power Producer.
IREA	International Renewable Energy Agency.
I-SEM	Integrated Single Electricity Market.
island of Ireland	The Republic of Ireland and Northern Ireland.
ISO	Independent System Operator.
ITO	Independent Transmission Operator.
IWEA	Irish Wind Energy Association.
Load Following Power Plant	See Mid-Merit Power Plant.



Market Operator	EirGrid in its capacity as market operator licenced pursuant to ERA, s 14(1)(j).
Member State	Member State of the EU.
Mid-Merit Power Plant or Load Following Power Plant	A power plant that adjusts its electrical output in line with fluctuations in electrical demand.
MOU	Memorandum of Understanding.
MW	Megawatt (1,000 kilowatts).
NGO	Non-governmental organisation.
NIAER	Northern Ireland Authority for Energy Regulation (Now NIAUR).
NIAUR	Northern Ireland Authority for Utility Regulation also known as the Utility Regulator (UR).
NREAP	National Renewable Energy Action Plan.
Network or Networks	The Transmission System and the Distribution System together.
NGPA	Non-Group Processing Approach.
OECD	Organisation for Economic Co-operation and Development.

OFREG	Office for the Regulation of Electricity and Gas. Former regulator in Northern Ireland, now NIAUR.
Peaking Power Plant	A power plant that operates only during peak electricity demand periods.
PCI	Projects of Common Interest.
PDA 2000	Planning and Development Act 2000.
PPA	Power Purchase Agreement.
Priority Dispatch	Priority dispatch at its simplest is the mechanism whereby renewable generation (or other forms of generation selected by national authorities), receives preferential treatment, and is dispatched ahead of generation that does not benefit from the same advantage.
PSO	Public Service Obligation.
RAB	Regulatory Asset Base.
RAs	The Regulatory Authorities in Ireland and Northern Ireland namely, CER (now styled CRU) and NIAUR.
REFIT	Renewable Energy Feed in Tariff.
RES-E	Renewable Energy Sources.

RES-E Target	40% of electricity from renewable sources by 2020.
RES-H Target	12% of heating energy to come from renewable sources by 2020.
RES-T Target	10% of transport energy from renewable sources by 2020.
SEAI	Sustainable Energy Authority of Ireland (previously Sustainable Energy Ireland or SEI), established pursuant to the Sustainable Energy Act 2002.
SEA	Strategic Environmental Assessment.
SEI	Sustainable Energy Ireland (now Sustainable Energy Authority of Ireland or SEAI).
Second Electricity Directive	Council and Parliament Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] L176/57.
Second Renewable Energy Directive	Council and Parliament Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources in the internal electricity market and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16.
SEM or Single Electricity Market	The single wholesale electricity market for the island of Ireland introduced in 2007.

SEMC	Single Electricity Market Committee.
SIA 2006	Planning and Development (Strategic Infrastructure) Act 2006.
SID	Strategic Infrastructure Development.
Single Electricity Market Trading and Settlement Code or SEM TSC	The Trading and Settlement Code for the SEM provided for in the Electricity Regulation Act 1999 (Single Electricity Market) Regulations 2007, SI 2007/406, reg 4.
SMP	System Marginal Price.
SONI	SONI Limited, a company incorporated in Northern Ireland under company number NI038715.
SRMC	Short Run Marginal Cost.
State	Ireland.
Supplier	A person licensed under s 14 (1)(b), (c) or (d) ERA to supply electricity.
Support Scheme	A support scheme to aid the development of renewable energy.
System Operators	The TSO and the DSO.
TAO or Transmission Asset Owner	ESB as the owner of the Transmission System, licenced pursuant ERA, s 14(1)(f).
TEU	Treaty on European Union.

TFEU	Treaty on the Functioning of the European Union.
Third Package Directive	Council and Parliament Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.
Transmission	The transport of electricity by means of a transmission system (See further ERA, s 2(1)).
Transmission System	The system of electric lines comprising wholly or mainly high voltage lines and electric plant and which is used for conveying electricity: from a generating station to a sub-station, from one generating station to another, from one sub-station to another, or to or from any Irish interconnector, or to final customers.
TSO or Transmission System Operator	EirGrid as the operator of the Transmission System, licenced pursuant to ERA, s 14(1)(e).
UK	United Kingdom.
UR	Utility Regulator (Northern Ireland). Also known as NIAUR.
VIPP	Virtual Independent Power Producers.
Water Framework Directive	Council and Parliament Directive 2006/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy [2006] OJ L327/1.

2000 Regulations	European Communities (Internal Market in Electricity) Regulations, 2000, SI 2000/445.
2005 Regulations	European Communities (Internal Market in Electricity) Regulations 2005, SI 2005/ 60.

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## Appendix 8: Table of Web Sites

Agency for the Co-operation of Energy Regulators (ACER): <a href="https://www.acer.com">https://www.acer.com</a>
An Bord Pleanála (ABP): <a href="http://www.pleanala.ie">http://www.pleanala.ie</a>
British Irish Council: <a href="https://www.britishirishcouncil.org">https://www.britishirishcouncil.org</a>
Climate Change Advisory Council: <a href="http://www.climatecouncil.ie">http://www.climatecouncil.ie</a>
Commission for Energy Regulation (CER): See Commission for the Regulation of Utilities (CRU).
Commission for the Regulation of Utilities (CRU): <a href="https://www.cru.ie">https://www.cru.ie</a>
Competition Authority: See Competition and Consumer Protection Commission (CCPC).
Competition and Consumer Protection Commission (CCPC): <a href="https://www.ccpc.ie">https://www.ccpc.ie</a>
Council of European Energy Regulators (CEER): <a href="https://www.ceer.eu/">https://www.ceer.eu/</a>
Department of Communications, Climate Action and the Environment (DCCAE): <a href="http://www.dccae.gov.ie">http://www.dccae.gov.ie</a>
Department of Housing, Planning and Local Government (DHPLG): <a href="http://www.housing.gov.ie">http://www.housing.gov.ie</a>
EirGrid: <a href="http://www.eirgridgroup.com">http://www.eirgridgroup.com</a>
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Organisation for Economic Co-operation and Development (OECD): <a href="http://www.oecd.org/about">http://www.oecd.org/about</a>
SEM Committee (SEMC): <a href="https://www.semcommittee.com">https://www.semcommittee.com</a>
Single Electricity Market Operator (SEMO): <a href="http://www.sem-o.com">http://www.sem-o.com</a>
Sustainable Energy Authority of Ireland (SEAI): <a href="https://www.seai.ie">https://www.seai.ie</a>
System Operator Northern Ireland (SONI): <a href="http://www.soni.ltd.uk">http://www.soni.ltd.uk</a>
Utility Regulator (UR) (also known as NIAUR): <a href="https://www.uregni.gov.uk">https://www.uregni.gov.uk</a>
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