

## **Protocol on the Disclosure of Commercially Sensitive Information**

### **Background**

ESB has been issued with a number of licences in accordance with the Electricity and Gas Regulation Acts, 1999 to 2002, S.I. 445 of 2000, and S.I. 60 of 2005. The licences contain specific conditions considered by the CER to be appropriate to ESB's position as a vertically integrated utility in the electricity market. These conditions place restrictions on the sharing of commercially sensitive information and the movement of staff, among other issues.

The CER attaches particular importance to the protection of commercially sensitive information, and for that reason it has been agreed with CER that specific guidelines in this regard should be established in order to give third parties the necessary assurance that commercially sensitive information is properly protected.

### **Business Unit Ringfencing Obligations**

Each licensed business/Business Unit, acting in its capacity as such, has in place the necessary ringfencing and business separation requirements approved by the CER. These requirements include:

- Accounting separation
- Complete and effective management separation
- Premises separation
- Code of Conduct for the Transfer of Staff
- IT & Communications Systems/Access separation
- Communication of licence obligations to staff
- Protection of commercially sensitive information
- Requirement for specific Trust and Confidence Agreements where appropriate.

These requirements are supplemented by the Annual Compliance Reporting process to the CER.

The Board will adhere to the code of conduct regarding the transfer of staff from ESB Power Generation to Customer Supply and vice versa, and from either business to any other business of the Board.

The Board will also ensure that all communications between the various licensed businesses, as referred to by this protocol and other ringfencing arrangements, will be conducted as if each business was a stand-alone entity.

### **Consequences of Breaches of Ringfencing**

Failure to comply with licence conditions, including ringfencing requirements, may result in the loss of a licence or the imposition of further licence requirements on ESB. In addition ESB could in some cases be open to challenge under competition law.

ESB's Code of Business Ethics sets out clearly the responsibility of all employees in relation to the treatment of confidential matters and the observance of legal and regulatory obligations. Breaches of the Code of Ethics are a disciplinary matter.

### **Corporate Governance**

ESB is potentially liable for any given decision taken in its name by any of its constituent Business Units. Therefore, all information required by Corporate Centre functions as inputs to Group policies and for the evaluation of the structure, position and prospects of ESB in the markets in which it is active, will continue to be available from the Business Units. The information provided will be used to develop corporate understanding of major issues affecting the Group as a whole and with a view to advising the Chief Executive and the Board of ESB in relation to these matters and enabling them to implement actions to comply with corporate governance obligations. This permits the Board to observe the established principles of good corporate governance and in particular the Government's Code of Practice for the Governance of State Bodies (relevant summary extracts attached at Annex 1 and Annex 2 to this Protocol).

### **Ringfencing Obligations on the Corporate Centre Functions**

In addition to the Board's standard governance obligations, compliance with licence conditions applicable to relevant businesses/Business Units will require implementation of specific supplementary measures to protect commercially sensitive information made available to the Corporate Centre. Therefore, the following additional measures are to be put in place with immediate effect:

#### **1. Briefing of Board Members**

The Secretary to the Board will ensure that all Board members are formally advised of ESB's licence obligations and in particular of the requirement to protect commercially sensitive information. In this context, commercially sensitive information includes but is not limited to:

- any information about non-ESB entities the disclosure of which in contravention of licence conditions would materially prejudice the commercial interest of that entity or any third party.

- any information about ESB's own activities the disclosure of which outside the relevant licensed business/Business Unit in a discriminatory manner could confer unfair commercial advantage or disadvantage.

## **2. Communication between Corporate Centre Functions and licensed business**

The Corporate Centre functions will not partake in day-to-day commercially-sensitive discussions or communications with ESB Customer Supply or ESB Power Generation where those discussions and communications concern both ESB Customer Supply, ESB Power Generation and/or other market participants, unless requested or approved to so by the CER.

This provision does not apply in the case of communications concerning ESB's non-market activities and market and non-market corporate governance obligations.

## **3. Classification of Documents**

As outlined above, Corporate Centre functions and the Board will continue to be able to receive all appropriate documents for approval/review in accordance with normal corporate governance requirements. However, in order to ensure observance of the requirements set down in legislation and licences, where information in a document provided to the Corporate Centre/the Board is commercially sensitive and therefore should not be shared or discussed across Business Units, the paper (and all drafts of it) should be marked with the caption "Commercially Sensitive Information, Circulation Restricted to.....[e.g. ESB Corporate, ESB Networks etc]". This will ensure that Board members on receipt of papers, and management during its preparation or distribution, are reminded of the ringfencing obligations in relation to access to the paper and discussion of its contents. It is the responsibility of the business unit which is the originator of the paper to ensure that it bears the appropriate caption.

## **4. Dissemination of Documents**

It will be the responsibility of the Company Secretary's office to ensure that Board papers which carry a ringfencing caption will only be circulated to those businesses entitled to be included in the circulation list.

An Executive Director who is not entitled to receive a Board paper will not participate in the post monthly Board meeting briefing in respect of that agenda item.

If commercially sensitive documentation is incorrectly distributed in contravention of the ringfencing obligations, the receiver must:

- Immediately delete or destroy the information
- Not use the information for any purpose
- Inform the sender of the breach
- Bring the matter to the attention of Manager, Group Regulatory Compliance
- Inform the Head of Regulatory Affairs.

The Board's compliance officer shall, in its Annual Compliance Report, present details of events when documents were distributed incorrectly. Further information on such events will be supplied to the CER on request.

## **5. Decision Making**

Deliberations on any commercial matter which is exclusively the province of ESB's Power Generation business, ESB Customer Supply business or ESB Networks as the case may be, will be conducted by and decisions taken within the relevant Business Unit or in accordance with established ESB procedures governing the exercise of delegated authority levels.

If there is any doubt as to whether a proposed action could be or might be perceived to be contrary to licence obligations, the advice of Group Legal or Manager, Group Regulatory Compliance should be sought. The Group Regulatory Compliance Officer will keep a record of when such advice is sought. This record will be sent to the Commission upon request.

## **Term of Protocol**

This Protocol shall be reviewed and amended by the Commission, in consultation with the appropriate parties, to ensure consistency with the principles resulting from Regulatory Authorities' review of licensing arrangements in the Single Electricity Market (SEM).

**Appendix 1 - Extracts from the Code of Conduct for the Governance of State Bodies as laid by the Minister for Finance before both Houses of the Oireachtas in April 2002**

- The Board should retain full and effective control over the State body.
- The Board should have a formal schedule of matters specifically reserved to it for decision to ensure that the direction and control of the body is firmly in its hands. This schedule should include, at least, the following:
  - significant acquisitions, disposals and retirement of assets of the State body or its subsidiaries. The schedule should specify clear quantitative thresholds for contracts above which their approval is required;
  - major investments and capital projects, delegated authority levels, treasury policy and risk management policies;
  - approval of terms of major contracts;
  - policy on determination of senior management remuneration;
  - approval of annual budgets and corporate plans;
  - production of annual reports and accounts;
  - appointment, remuneration and assessment of the performance of the Chief Executive.
- The non-executive Directors should bring an independent judgment to bear on issues of strategy, performance, resources, key appointments, and standards of conduct.
- The Directors should review annually the effectiveness of the body's system of internal controls, including financial, operational and compliance controls and risk management.
- The Board should be supplied, in a timely fashion, with information which is of a suitable quality to enable Board members to satisfactorily discharge their duties.

## **Appendix 2 – Brief Description of how Corporate Governance is Exercised**

Normal corporate governance is exercised in part through the establishment of organisation structures and authorities and in part through the establishment of best practice business processes.

### Organisation and Authority

- Appointment of a Board of Directors with separation between the roles of Chief Executive and Chairman.
- Establishment of Executive Functions in each business line charged with operating and developing that specific business line.
- Establishment of Corporate Functions (Finance, Legal, Regulatory, HR etc) to advise the Board and the Chief Executive on matters emerging within any specific business line.
- The establishment of matters reserved to the Board and a structured and proportionate delegation of authority to the Executive Functions and Corporate Functions.
- Establishment of Audit Functions and Regulatory Compliance Function to ensure compliance with internal and external requirements.

### Business Process

- A Corporate Strategy which determines at a high level the overall strategic objective and priorities facing the Company over a given period of time - approved by the Board.
- A Corporate Planning process which ensures that a Corporate Plan is developed, generally on an annual basis, on a coherent and consistent basis across the Company as a whole and in accordance with the agreed Corporate Strategy.
- Decisions which are required to be taken by any individual business and which are within plan and within delegated authorities will be taken by that Business Unit.
- Decisions which are required to be taken by any individual business and which are outside the plan and/or outside of delegated authorities will be subject to scrutiny and challenge by the Corporate Functions prior to execution.
- Audit of decision making to ensure that processes are being adhered to.