



**Response by Energia to Commission for
Energy Regulation Consultation Paper
CER/11/040**

***Price Discrimination & Customer Protection in the
Deregulated Electricity Market***

21 March 2011

1. Introduction

Energia welcomes the opportunity to respond to the Commission for Energy Regulation's (CER's) consultation paper on price discrimination and customer protection in the deregulated electricity market. This consultation is considered to be closely aligned with the concurrent CER consultation on the role of the Public Electricity Supplier (PES) and the Supplier of Last Resort (SoLR) in a deregulated market and as such the views expressed therein, where appropriate, should similarly be read in response to this consultation.

Notwithstanding the number of recent consultations issued by CER in relation to the deregulated electricity market, the timing of these consultations could possibly call into question the adherence by CER to its primary objective of protecting customers, by, where possible, promoting effective competition. In this instance, as evidenced by the somewhat after the fact nature of these consultations, the CER's haste to price deregulate the retail electricity market in the absence of a clearly defined and agreed policy of how to deal with the residual issues of such an action introduces price competition into the market while uncertainty remains over the potential impacts of this on customers.

Bearing in mind these introductory comments, the remainder of this response moves to address the specific question posed in the consultation paper on the issue of whether an obligation of non-discrimination is warranted in the deregulated market.

2. An obligation of non-discrimination

Q. Do you think that a further obligation of non-discrimination is warranted in the deregulated market? If so, do you think that this obligation should be applied to Electric Ireland, or to all suppliers in the market? Is this policy conducive to market stability and to the development of competition? Outline reasons for agreement or disagreement. Are there alternative methods that should be considered to ensure that all customers can benefit from competition in the deregulated market?

It is Energia's considered view that there is no need for a further obligation of non-discrimination in the deregulated market, that being an obligation over and above that contained in the PES licence. In summary this view is based on a number of factors;

- There is already a non-discrimination clause in ESB/Electric Ireland's PES licence, this is to be retained¹;
- Relevant comparison with the GB market are limited and should be considered in the context of both markets;
- Alternative and appropriate alternatives exist to dealing with concerns in relation to specific customer segments in the market, e.g. customers receiving Free Electricity Allowance (FEA);

¹ Notwithstanding comments included in response to CER/11/039.

- The imposition of a non-discrimination clause would likely be harmful to competition in the emerging retail market and would likely increase the overall cost of serving the market;
- CER's regulatory oversight and customer protection initiatives may be sufficient to, both directly and indirectly, address concerns expressed over price discrimination; and,
- Legal and regulatory powers already exist to address anti-competitive concerns, however monitoring of this is required for proper and appropriate enforcement.

Addressing each of these issues in turn, Energia are supportive of the retention of the PES role in the market following deregulation and as such, given the PES role is a licence requirement of the incumbent, a non-discrimination clause would remain in place for the incumbent in the market to mitigate against the potential adverse impacts of them exercising their significant market power. It is considered somewhat risible that CER consider a firm with market share of approximately 60% to "...still possibly having a degree of residual market power". In general, a market share in excess of 50% is considered to be consistent with the characterisation of a dominant firm, although this could conceivably be the case with a market share as low as 40%². Therefore, in the absence of strong evidence to the contrary, ESB/Electric Ireland are to be considered to be dominant in the market and appropriate measures should be in place to mitigate this significant market power. The basis for price deregulation in this market is uncertain, a view forwarded by the Competition Authority in response to the Deregulation Roadmap (Electricity).

Reference in the consultation paper to the market and regulatory experience in Great Britain (GB) is to a degree informative but in this context threatens to distract attention by drawing inappropriate parallels between the GB and Irish markets. There is no out of area discrimination in the Irish market, nor is it likely. The Irish market is substantially smaller than that in GB but notwithstanding this, there are a comparable number of suppliers competing for the respective customer bases;

- Ireland – 6/7 suppliers for 4 million customers
- Great Britain – 'Big 6' suppliers for 25 million customers.

In relation to concerns relating to specific groups of customers, specifically FEA customers, Government has recourse to a number of alternatives to providing this scheme. Work in this area has previously been undertaken by the relevant Government Departments and will no doubt continue with the possibility of competitively offering the portfolio of FEA customers to competitive tender. This possibility, along with the non-discrimination clause in the PES licence, would safeguard such customers and significantly diminish the case for an additional non-discrimination clause on all market participants.

Energia view on the imposition of a general non-discrimination clause is that it would be harmful to the relatively new and emerging competition in the electricity market, as

² Office of Fair Trading, Abuse of a Dominant Position, Dec 2004.

well as being a possible barrier to potential new entrants. New entrants are typically forced to incur significant up-front costs to acquire new customers and achieve a minimum scale of operation, following this period firms will seek to recoup some of this additional cost, a non-discrimination clause may limit or preclude a firm's ability to do so and as such act as a barrier to new entry. Furthermore, such clause in all suppliers' licences would reduce price competition, limit new product development and innovation, and likely lead to an overall increase in the costs paid by consumers.

Through its proposed customer initiatives and market monitoring function, CER can both directly monitor pricing behaviour in the market and, through the initiatives, educate and encourage customers to switch. Correctly targeted initiatives will address those considered to form part of a large inert customer base of the incumbent. As already noted, more appropriate alternatives to dealing with inert customers covered under schemes such as FEA should be pursued in respect of addressing such concerns.

Finally, CER have stated, in relation to the customer initiatives, "[T]hese measures do not directly address the potential for Electric Ireland, as the incumbent supplier, to leverage a competitive advantage amongst active switchers from the remaining largely inert customer base." In relation to this issue, it is Energia's considered view that despite the possible shortcomings in CER's proposed customer initiatives for dealing with the potential for the incumbent to abuse its dominant position in the market in the manner outlined, such behaviour is explicitly prohibited under competition law and as such CER and/or other interested parties have recourse to Irish and European competition Directives, case law and the court to remedy such behaviour. Notwithstanding this, proper enforcement of competition law in respect of abuse of dominance does require CER to undertake an effective monitoring role, a role that should be considered paramount in the deregulated market.

Therefore, in summary Energia does not support the introduction of a general non-discrimination clause, such a clause would adversely affect existing and potential competition in the market. ESB/Electric Ireland's role as PES should be retained and through the non-discrimination element of this licence their dominant position in the market will be mitigated. Nonetheless, competition law should prevent ESB/Electric Ireland for exercising their dominance and adversely affecting competition. Finally, we caution that care is required when drawing comparisons with other markets with appropriate (and not just nearby) comparisons used to appropriately inform the relevant policy context in Ireland.