



## Decision on Modification of ESB's Generation Licence

DOCUMENT TYPE:	<b>Decision Paper</b>
REFERENCE:	<b>CER/13/097</b>
DATE PUBLISHED:	3 <sup>rd</sup> April 2013
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**Abstract:** In order give effect to the horizontal integration of ESB generation businesses, as already decided on by the SEM Committee, ESB submitted to the CER a proposed modified Generation Licence. This proposed ESB Generation Licence was published for public consultation on 14<sup>th</sup> February 2013.

No objections to the proposed licence changes were received by the CER. Accordingly, the modified ESB licence, published with this paper, has taken effect and the horizontal integration of ESB's generation businesses is allowed from 1<sup>st</sup> April 2013.

### **Target Audience:**

Electricity generators and suppliers.

### **Related Documents (please see links):**

<http://www.cer.ie/en/electricity-generation-current-consultations.aspx?article=c16a4ac8-5407-4673-b8d7-272998691758>

<http://www.allislandproject.org/GetAttachment.aspx?id=c2bff403-1ba2-4358-ae3a-8a9a26afc26b>

<http://www.allislandproject.org/GetAttachment.aspx?id=6efc77bd-73d6-43b9-a227-d67127383bab>

<http://www.allislandproject.org/GetAttachment.aspx?id=4865f5be-2152-4dd3-a56f-66f3249e384d>

<http://www.allislandproject.org/GetAttachment.aspx?id=fd2b05ff-b0ee-443d-87db-01b1ac4fe27a>

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## 1. Purpose of this Paper

In order to give effect to the horizontal integration of ESB generation businesses, as already publically consulted on and then decided on by the SEM Committee<sup>1</sup>, ESB submitted to the CER a proposed modified Generation Licence. The CER is the body responsible for giving effect to any licence change.

A proposed modified licence to allow for the horizontal integration of ESB's generation businesses, to take effect from 1<sup>st</sup> April 2013, was published for public consultation on 14<sup>th</sup> February 2013, in accordance with section 19 and 20 of the Electricity Regulation Act, 1999, as amended.

The consultation closed on 19<sup>th</sup> March 2013. No comments or objections to the proposed licence were received by the CER. Accordingly, as per Irish legislation, the modified ESB Generation Licence, published with this paper, has taken effect. This means that the horizontal integration of ESB generation businesses is allowed from 1<sup>st</sup> April 2013.

A background and details related to the issue is provided in the following sections of this paper.

## 2. Background

Since November 2007, the Commission for Energy Regulation (CER) and the Northern Ireland Authority for Utility Regulation (or Utility Regulator), together referred to as the Regulatory Authorities, have jointly regulated the all-island wholesale electricity market known as the Single Electricity Market (SEM), covering both Northern Ireland and the Republic of Ireland. The decision-making body which governs the SEM is the SEM Committee, consisting of the CER, the Utility Regulator as well as an independent member (who also has a deputy).

In 2010 the Regulatory Authorities, on behalf of the SEM Committee, commenced a review of market power and contract liquidity in the SEM. As part of this project the RAs appointed consultants, CEPA, to undertake an independent review of market power and liquidity in the SEM, including in relation to ESB's proposals to integrate its generation and supply businesses.

CEPA's report, along with an RA cover paper, was published for public consultation from 16<sup>th</sup> December 2010 through to 22<sup>nd</sup> March 2011<sup>2</sup>. The SEM Committee then considered the CEPA paper and the public responses to it. It also considered ESB's new "partial vertical integration proposal" received in June 2011 and CEPA's subsequent report on that proposal.

## 3. Previous Consultation - ESB Generation Integration

On 25<sup>th</sup> November 2011 the SEM Committee published a draft decision (SEM-11-089)<sup>3</sup>, along with a report from CEPA, for public consultation. This consultation covered a number

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<sup>1</sup> The SEM Committee is established in Ireland and Northern Ireland by virtue of Section 8A of the Electricity Regulation Act 1999 as inserted by Section 4 of the Electricity Regulation (Amendment) Act 2007, and Article 6 (1) of the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 respectively.

<sup>2</sup> Please see: <http://www.allislandproject.org/GetAttachment.aspx?id=c2bff403-1ba2-4358-ae3a-8a9a26afc26b> and <http://www.allislandproject.org/GetAttachment.aspx?id=6efc77bd-73d6-43b9-a227-d67127383bab>

<sup>3</sup> Please see: <http://www.allislandproject.org/GetAttachment.aspx?id=4865f5be-2152-4dd3-a56f-66f3249e384d>

of different areas related to the market power and liquidity project, including the SEM market power mitigation measures.

One of the proposals in this draft decision, related to the SEM market power mitigation measures, was to allow the horizontal integration of ESB's generation businesses from October 2012, though not the vertical integration of its generation and supply businesses. The proposal to allow the horizontal integration of ESB's generation businesses was made on the basis that:

- CEPA stated in the December paper that, with current market rules, *“the operational horizontal separation of ESB seems to have little value in promoting competition, whilst adding some cost to ESB, and thus an operational integration should be considered”*. Thus CEPA believed that horizontal ring-fencing could be removed because the operational efficiency benefits in doing so might be worth the small market power risk, given market rules in place. There would not be the higher market power risks associated with full vertical integration of ESB's generation and supply businesses;
- ESB could make generation cost savings from horizontal integration, with low market power risks for the end customer. Any efficiency gain would be welcome, especially in the current economic climate; and,
- Horizontal integration would significantly increase the quantity of Directed Contracts (DCs) available to eligible market participants, due to ESB's market share in the spot market increasing. The increase in DC volumes would increase the proportion of total contracts made available that are regulated by the RAs, thereby reducing ESB's contract market power.

#### **4. Previous Decision - ESB Generation Integration**

Most respondents to the November 2011 paper did not raise any objection to the proposed horizontal integration of ESB generation.

Taking account of its duties and objectives, and comments received as part of this consultation process, the SEM Committee published its decision on the issues raised as part of the market power and liquidity project on 1<sup>st</sup> February 2012, in SEM-12-002<sup>4</sup>. Among other matters, and in keeping with earlier consultation, the SEM Committee decided to allow for the horizontal integration of ESB generation activities from October 2012.

#### **5. Proposed Modification to ESB's Generation Licence**

In order give effect to the horizontal integration of ESB generation businesses, as already publically consulted on and then decided on in SEM Committee decision SEM-12-002, ESB submitted to the CER, a proposed modified Generation Licence. The CER is the body responsible for giving effect to any licence change.

On 14<sup>th</sup> February 2013 the CER published the proposed modified Generation Licence for public consultation, in accordance with section 19 and 20 of the Electricity Regulation Act, 1999 (“the Act”). A CER consultation paper was published with the proposed licence – please see the following link for information:

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<sup>4</sup> Please see: <http://www.allislandproject.org/GetAttachment.aspx?id=fd2b05ff-b0ee-443d-87db-01b1ac4fe27a>

The proposed key changes in the licence to facilitate the horizontal integration of ESB's generation business from 1<sup>st</sup> April 2013 were as described below.

- The definitions of “affiliate”, “business”, “regulated business” and “related undertaking” were amended to, from 1<sup>st</sup> April 2013, exclude any affiliate and/or related undertakings of ESB whose business is solely a generation business. This has the effect of providing that the “Prohibition of cross-subsidies” and “Separation of Generation Business” licence conditions (i.e. conditions 5 and 6) do not relate to activities between ESB's Generation Licence and another affiliate and/or related undertakings which is solely a Generation business, thereby allowing for ESB horizontal generator integration from April 2013.
- Additional wording in condition 6 of the ESB Generation Licence was proposed. The intention of this wording was to allow ESB's generation business (provided for in the licence) to integrate with any other ESB generation businesses, including a generation business abroad, while providing that the “Prohibition of anti-competitive behaviour”, “Prohibition of cross-subsidies” and “Separation of Generation Business” licence conditions (i.e. conditions 4, 5 and 6) shall also apply to a generation business abroad – solely in relation to matters which could distort competition in the SEM as a result of any dealings between ESB's generation business and a plant abroad and a supply business on the island of Ireland. As an example, this would legally prevent a situation where SEM contract information would transfer from ESB Generation in Ireland to an ESB plant in Great Britain (as allowed via horizontal generator integration) and then from there to a supply business on the island of Ireland. This would constitute a form of vertical integration between ESB's generation and supply business on the island of Ireland (via an ESB plant abroad), in contravention of the intention of the SEM Committee. For clarity, and as referred to in the wording, this condition only applies to issues that could distort competition in SEM arising from any dealings to/from the licensee, its plant abroad and a supply business on the island - it does not apply to the activities of that ESB plant abroad with respect to any other ESB businesses (supply or otherwise) outside the island of Ireland.
- Therefore the above proposed changes would allow for ESB generator horizontal integration in Ireland and facilitate integration with any other ESB generation businesses outside Ireland, from 1<sup>st</sup> April 2013. These changes would not provide for any other form of integration including, for example, any form of vertical integration between ESB's generation and supply businesses. This is in accordance with SEM-12-002, in which the SEM Committee already decided to allow for the horizontal integration of ESB generation activities but not any form of vertical integration.
- Schedule 1, which specifies the generation stations to which the licence applies, was updated to include all ESB generation stations that it wholly owns in Ireland – the biggest plant additions (by MW) are the Aghada and Synergen CCGT plants. By virtue of the above definition changes, ESB can also integrate with any other generation business owned by it inside or outside Ireland.

The Regulatory Authorities and the SEM Committee's lawyers reviewed various previous drafts of ESB's proposed modified Generation Licence and were satisfied that the proposed version was in accordance with SEM-12-002.

## **6. Decision regarding ESB's Generation Licence**

In accordance with the statutory procedure for modifying a licence, specified in sections 19 and 20 of the Act as amended by the Electricity Regulation (Single Electricity Market) Act 2007 and set out in Appendix 1 to this paper, the CER published a consultation paper and ESB's proposed modified Generation Licence, for public consultation, on 14<sup>th</sup> February 2013.

The nature of the Generation Licence modification and the reasons for it were provided in the consultation paper - see section above also - as required under Section 20 (2) of the Act.

In accordance with section 20 (4), a notice regarding this proposed licence modification was published in "The Irish Times" and "The Belfast Gazette" in February 2013, and a copy of this notice was also sent to ESB and the Minister for Communications, Energy and Natural Resources.

No comments or objections to the proposed licence were received by the CER by the comments close date of 19<sup>th</sup> March 2013.

Given that no final (i.e. not withdrawn) objections were made to the proposed licence modification, as per Section 20 (6) of the Act, the modified ESB Generation Licence has taken effect - the licence is published with this decision paper. This means that the horizontal integration of ESB generation businesses is allowed from 1<sup>st</sup> April 2013.

## APPENDIX 1

### Unofficial Version

Section 19 and 20 of the Electricity Regulation Act 1999  
(as amended by the Electricity (Regulation)(Single Electricity Market) Act 2007

#### Modification of licence or authorisation.

**19.—**(1) Where the holder of a licence or an authorisation so requests the Commission may modify the conditions or requirements of the licence or authorisation.

(2) Where the Commission is of the opinion that a licence or an authorisation should be amended it may do so with or without the consent of the holder of the licence or the authorisation, as the case may be.

(3) Where the Commission is of the opinion that a modification of a condition or requirement of a licence or an authorisation is a modification of a class required by an order of the Minister made under *section 39 or 40* the Commission may modify the conditions or requirements of the licence or authorisation concerned without the consent of the holder of that licence or authorisation, as the case may be.

#### Procedures to be followed before modifying licences or authorisations.

**20.—**(1) *Subsections (2) to (6)* shall apply to all modifications of a licence or an authorisation other than a modification made to give effect to an order under *section 39 or 40*.

(2) Before modifying a licence or an authorisation the Commission shall issue a notice—  
(a) stating that it proposes to make such modification,  
(b) stating the nature of such modification and the reasons therefor, and  
(c) specifying the period (being not less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modification may be made.

(3) The Commission shall consider any representations or objections which are made under *subsection (2)* and not withdrawn.

(4) A notice under *subsection (2)* shall be given—  
(a) by publishing the notice in a newspaper circulating in the State, *and (where the proposed modification relates to the Single Electricity Market) in Northern Ireland,*<sup>5</sup>and  
(b) by serving a copy of the notice on the holder of the licence or authorisation.

(5) The Commission shall send a copy of a notice issued under *subsection (2)* to the Minister who shall arrange, without undue delay, to provide a copy of the notice to the Oireachtas library.

(6) Where, within the period specified in *subsection (2)(c)*, no objections or representations are made or such objections or representations as are made in that period are subsequently

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<sup>5</sup> As inserted by section 16 of the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007

withdrawn, the modification of the licence or authorisation concerned shall have effect accordingly.

(7) Where objections or representations made within the period specified in *subsection (2)(c)* are not withdrawn—

(a) the Commission may either accept or reject such objections or representations, in whole or in part, and the modification shall have effect accordingly, or

(b) where it is satisfied that sufficient grounds exist to warrant a public hearing, the Commission may cause such a public hearing to be held.

(8) Where the Commission rejects any objections or representations made under this section without a public hearing being held, the reasons for the rejection and the refusal of a public hearing shall be notified to the persons who made those objections or representations and the proposed modification shall be effected in accordance with *section 22(3)*

*(9) Where a modification relates to the Single Electricity Market, the Commission shall have due regard in exercising its functions under this section and sections 21 to 23 to the desirability of similar modifications (including similar modifications in Northern Ireland) having effect at the same time.*<sup>6</sup>

Please note:

This is an unofficial version of the Electricity Regulation Act. Please refer to the original version of the legislation for the definitive:

- the full text of the Electricity Regulation Act 1999 is available (subject to a disclaimer) at: <http://www.irishstatutebook.ie/pdf/1999/en.act.1999.0023.pdf>
- section 20 has been amended by Section 16 of the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007 is available (subject to a disclaimer) at: <http://www.irishstatutebook.ie/2007/en/act/pub/0005/sec0016.html>

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<sup>6</sup> As inserted by section 16 of the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007