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COMMISSION DECISION

of 12.4.2013

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC – Ireland – Eirgrid / ESB**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/72/EC concerning common rules for the internal market in electricity¹, and in particular, Article 9(10) thereof,

Having regard to Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity², and in particular, Article 3(6) thereof,

Whereas:

1. Introduction

- (1) Directive 2009/72/EC sets out rules which aim at ensuring the effective separation of networks from the activities of production and/or supply and removing any conflict of interests between producers and/or suppliers, on the one hand, and network operators, on the other hand, generally known as unbundling.
- (2) In Ireland, the functions of transmission system operation are currently shared between the Electricity Supply Board (hereafter "ESB"), the owner of the transmission assets and a vertically integrated undertaking (VIU), and Eirgrid plc (hereafter, "Eirgrid"), an independent company legally responsible for carrying out the functions of transmission system operator except for ownership and maintenance of the transmission system.
- (3) Both ESB and Eirgrid are owned by the Irish State with shareholder rights being exercised by the Minister of Public Expenditure and Reform and the Minister of Energy.
- (4) ESB is a statutory corporation established under the Electricity (Supply) Act 1927. ESB owns the transmission and distribution systems in Ireland and is active in generation and supply, as well as providing engineering and other services on a commercial basis. ESB is a vertically integrated undertaking (hereafter "VIU") within the meaning of Directive 2009/72/EC.
- (5) ESB is an electricity and gas supplier through its ring-fenced business unit Electric Ireland. Electric Ireland acts as public electricity supplier and electricity supplier of last resort, which places additional responsibilities on it not required of other suppliers. Nonetheless, Electric Ireland is not subject to price regulation and generally acts as a normal supplier on a competitive market.

¹ OJ L 211, 14.08.2009 p. 55.

² OJ L 211, 14.08.2009 p. 15.

- (6) ESB power generation is likewise a ring-fenced business of ESB. ESB power generation is subject to various regulatory decisions designed to mitigate its dominant position in the Single Electricity Market (hereafter, "SEM") in place between Ireland and Northern Ireland.
- (7) ESB Networks limited is a legally separate company responsible for the management of the transmission and distribution assets. ESB Networks limited does not have any significant assets or personnel, all of which lie completely with ESB in a ring-fenced business unit ESB Networks.
- (8) ESB also owns NIE plc, the owner of the transmission assets and distribution system operator in Northern Ireland.
- (9) Eirgrid is a commercial semi-state company, that is it is a publicly owned company, which holds the licence for transmission system operation in Ireland, and also owns and operates the interconnector between Great Britain and Ireland as well as owning SEMO which carries out the market operator function for SEM. Additionally Eirgrid owns SONI limited which acts as system operator in Northern Ireland.
- (10) Eirgrid is independent of ESB, with the relationship between the two companies confined to their common public ownership.
- (11) Article 9(9) of Directive 2009/72/EC allows arrangements already in place on 3 September 2009 to be retained if they ensure more effective independence of the transmission system operator than the rules provided for under the independent transmission operator unbundling model set out in Articles 17 to 23 of Directive 2009/72/EC.
- (12) ESB applied to the Commission for Energy Regulation (hereafter "CER"), the national regulatory authority for Ireland, for the arrangements in Ireland to be certified in accordance with Article 9(9) of Directive 2009/72/EC. The application was considered by a special joint subcommittee (hereafter, "the SEM Committee") of the CER and the Northern Ireland Authority for Utility Regulation which acts as the decision making body for both authorities in matters relating to the operation of SEM.
- (13) On 15 February 2013 CER notified its preliminary certification decision to the Commission. CER's assessment is that the system of legislation, licence obligations, enforcement powers and the involvement of Eirgrid in transmission system operation arrangements applying in Ireland brings benefits compared to the independent transmission operator model, and therefore allows for certification under Article 9(9) of Directive 2009/72/EC. Furthermore, CER proposes that this system be clarified and enhanced in certain respects to further improve the independence of system operation in Ireland.
- (14) Pursuant to Article 10(6) of Directive 2009/72/EC, the Commission must verify that the arrangements being certified clearly guarantee more effective independence than the independent transmission operator model. Article 3(6) of Regulation (EC) No 714/2009 requires CER to comply with the decision of the Commission in relation to certification.
- (15) This Decision relates only to the arrangements applying in relation to ESB's transmission assets. In relation to the East West interconnector, the Commission notes that interconnectors are transmission assets and are subject to certification, as transmission system operators in the jurisdiction in which they operate. Although to date no separate application has been made for certification in this respect for [BUSINESS SECRET] as the operator of the East West Interconnector, the

Commission expects an application for certification to be made in due course to CER and Ofgem, the relevant national regulatory authorities.

2. Unbundling requirements of Directive 2009/72/EC

2.1 Three unbundling models

- (16) Directive 2009/72/EC sets out three models of unbundling for transmission system operators. These are:
- full ownership unbundling, which requires the appointments of the owner of the transmission system as transmission system operator and its independence from production or supply interests.
 - the independent system operator model under which an undertaking with production or supply interests may continue to own the transmission system, but appoints an independent entity to carry out all the functions of the transmission system operator.
 - the independent transmission operator model under which an undertaking with production or supply interests may continue to own the transmission system, but with stringent ring fencing provisions based on a pillar of organisational measures and a pillar of measures related to investment. These are complemented *inter alia* by cooling off periods governing the movement of staff between the transmission system operator and the production or supply functions of the vertically integrated undertaking.
- (17) Each model should deliver effective unbundling, albeit with a different mix of structural and regulatory solutions.

2.2 Article 9(9)

- (18) Article 9(9) of Directive 2009/72/EC provides that Member States may chose not to apply any of the three models described above, only where on 3 September 2009 the transmission system belonged to a vertically integrated undertaking and at that date arrangements were in place which guarantee more effective independence of the transmission system operator than the specific provisions concerning the independent transmission operator model.
- (19) Article 9(10) of Directive 2009/72/EC requires the Commission to verify that the arrangements in place clearly guarantee more effective independence than the independent transmission operator model. The regulatory authority must follow the decision of the Commission in this respect.³
- (20) The Commission is required to assess whether the requirements of Article 9(9) are met and verify the effectiveness of the arrangements. The Commission considers it appropriate to assess the effectiveness of the independence of transmission system operation by taking into particular consideration the aim of the unbundling rules of Directive 2009/72/EC,⁴ as well as the role and tasks of the transmission system

³ See Article 3(6) of Regulation (EC) No 714/2009.

⁴ Recital 12 of Directive 2009/72/EC makes clear that "any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime". Without such effective unbundling there will continue to be an inherent risk of discrimination in the operation of the network and in the incentives for vertically integrated undertakings to invest adequately in their networks.

operator, set out therein,⁵ since the application of Article 9(9) should always ensure that the aim of Directive 2009/72/EC is fully achieved.

2.3 Effective independence under the independent transmission operator model

- (21) The independent transmission operator model requires the establishment of an independent separate legal entity within the vertically integrated undertaking. Recital (19) of Directive 2009/72/EC indicates that the rules on the independent transmission operator aim to provide an appropriate regulatory framework to guarantee fair competition, sufficient investment, access for new market entrants and the integration of electricity markets, four specific outcomes which should result in effective independence and unbundling. It goes on to explain that effective unbundling and independence of the independent transmission operator provisions is based on:
- a pillar of organisational measures and measures relating to the governance of transmission system operators;
 - a pillar of measures relating to investment, connecting new production capacities to the network and market integration through regional cooperation; and
 - *inter alia*, ‘cooling-off’ periods during which no management or other relevant activity giving access to the same information as could have been obtained in a managerial position is exercised in the vertically integrated undertaking.
- (22) The detailed requirements of the independent transmission operator model, set out in Chapter V of Directive 2009/72/EC (Articles 17 to 23), address the barriers that vertical integration presents to fair competition, sufficient investment, access for new market entrants and the integration of electricity markets.
- (23) The main provisions of the independent transmission operator model are:
- Article 17 of Directive 2009/72/EC sets out the essentials of legal and functional unbundling which must apply under the independent transmission operator model. As well as being responsible for carrying out the general tasks of a transmission system operator, the independent transmission operator model creates an explicit requirement that additional tasks are attributed to the transmission system operator. Not only must personnel necessary for the activity of the transmission operation be employed by the transmission system operator, there is also a prohibition on the leasing (secondment) of personnel from the vertically integrated undertaking. The transmission system operator is also not allowed to share IT systems or equipment, share premises or security systems with the vertically integrated undertaking.
 - Article 18 provides for the independence of the independent transmission operator. It includes the ability to raise capital itself on the capital markets.
 - Article 19 provides for the independence of the staff and management of the transmission system operator. In particular persons responsible for

⁵ See, for example, Article 12 of Directive 2009/72/EC for the tasks of transmission system operators. These include, *inter alia*, ensuring the long term ability of the system to meet reasonable demands for electricity, contributing to security of supply, managing flows on the system, ensuring non-discrimination between users of the system, providing users with the information they need for efficient access to the system. These tasks involve both short and long term activities, as well as investment in new transmission infrastructure and facilitating other investments in generation. A transmission system operator should efficiently integrate these activities to minimise the costs for system users.

management or members of the administrative bodies of the independent transmission operators may have no other professional position or interest with the vertically integrated undertaking. Their remuneration may not depend on the activities of the vertically integrated undertaking, and there is a minimum four year cooling off period before they can take up employment with the vertically integrated undertaking.

- Article 20 establishes a Supervisory Body which is responsible for decisions of the independent transmission operator relating to decisions which may have a significant impact on the value of the assets of the shareholders in the transmission system operator. It may not be involved in the development of the network development plan. The same independence obligations applying to the majority of the management of the independent transmission operator apply to one half, minus one, of the Supervisory Body.
 - Article 21 establishes a compliance officer, appointed by the Supervisory Body and approved by the national regulatory authority, to whom the independence obligations applying to the management of the independent transmission operator apply as well. The compliance officer may not have any other professional links with the vertically integrated undertaking. The compliance officer is responsible for reporting on the compliance of the independent transmission operator with its obligations. The compliance officer attends meetings of both the supervisory board and of management or administrative bodies of the independent transmission operator.
 - Article 22 requires the independent transmission operator to develop a ten year network development plan, which is monitored and evaluated by the national regulatory authority. The national regulatory authority has the power to require the independent transmission operator to execute the investments or take other measures to ensure the investment is made and can compel the independent transmission operator to increase its capital. The national regulatory authority can require the independent transmission operator to agree to the financing or construction of the investment by any third party.
 - Article 23 sets out in detail the obligations of the independent transmission operator relating to connecting new generation to its transmission system.
- (24) In summary, despite being owned by a vertically integrated undertaking, the independent transmission operator is an independent entity whose management and/or members of its administrative bodies and employees have no interest in the performance of the vertically integrated undertaking and who may not work for the vertically integrated undertaking after leaving the independent transmission operator before the expiry of a cooling off period. The vertically integrated undertaking has no influence on, or visibility of, operation of the transmission system, granting of new connections or network planning issues.
- (25) The vertically integrated undertaking's interests are looked after by a supervisory board, which is primarily concerned with decisions which may have a significant impact on the value of the assets of the shareholders in the independent transmission operator. However, the national regulatory authority has the power to compel the independent transmission system operator to increase its capital, including by taking on new investors.

- (26) A compliance officer, who is fully independent of the vertically integrated undertaking, oversees this system. In particular it can report to the national regulatory authority any problems which arise. This reporting aims to facilitate the intervention of the national regulatory authority to compel new investments.

3. The Irish Arrangements

- (27) The Irish arrangements have their origin in the Electricity Regulation Act, 1999 and arrangements established in 2000 in accordance with secondary legislation (SI 445 of 2000) as well as subsequent legislation and regulatory decisions.
- (28) Under the Electricity Regulation Act, 1999 CER has powers of direction and the power to issue and modify licences as it considers necessary, subject to public consultation and judicial review.
- (29) The system as currently applied in Ireland was established in 2006 when Eirgrid was formally appointed transmission system operator and the licence obligation on ESB, as transmission asset owner, to enter into an Infrastructure Agreement with Eirgrid as transmission system operator became effective.

3.1 Transmission system operation in Ireland

3.1.1 Real time operation

- (30) Eirgrid is responsible for real time operation of the transmission systems. This means it is responsible for all dispatch decisions relating to individual power stations and the procurement of all ancillary services for the transmission system in Ireland. ESB has no role in relation to real time operation.

3.1.2 Access and charging

- (31) Eirgrid is responsible for determining the methodology of charges for access to the transmission system (transmission network use of system charges and balancing services use of system charges) subject to the control of CER. Eirgrid collects charges from all system users. Revenues due to the ESB for the use of their systems are collected by Eirgrid before being transferred to ESB.

3.1.3 New connections

- (32) Eirgrid has overall responsibility for managing requests for connection to the system in Ireland and acts as the interface with system users. Eirgrid determines the planning assumptions upon which connection offers are made and makes all connection offers.
- (33) ESB is responsible for carrying out the works necessary to effect new connections.

3.1.4 Investments

- (34) Eirgrid is responsible for planning investments for the Irish transmission system and ensuring that system security and quality of service standards are met.
- (35) ESB is responsible for actually effecting the plans developed by Eirgrid and is under a legal obligation to do so. In case of delay or default, Eirgrid has rapid step in rights to arrange to the work to be undertaken by an approved contractor by direction of the CER.

3.1.5 Summary

- (36) In summary, the Irish Arrangements have the effect of putting Eirgrid in charge of most functions of transmission system operation in Ireland. Eirgrid is responsible for the day to day operation of the Irish transmission system. ESB has a limited role

regarding connections, effectively confined to carrying out the actual necessary work but does not interact with system users. Eirgrid plans the Irish system with ESB responsible only for financing and carrying out the necessary developments.

4. Assessment

- (37) The arrangements described above were in place on 3 September 2009, and continue to be in place. ESB was part of a vertically integrated undertaking on 3 September 2009 and continues to be so.

4.1 Ensuring independence in the Irish arrangements: ESB

- (38) The Article 9(9) test requires that effective independence be in place for all aspects of transmission system operation. This means that ESB Networks must be able to perform its transmission related functions independently.
- (39) As the Article 9(9) test is in comparison to the independent transmission operator model, it is appropriate to assess the rules governing ESB Networks in comparison to the rules applying to independent transmission operators.

4.1.1 Assets, equipment, staff and identity and independence of ESB

- (40) ESB retains legal ownership of the transmission system and is holder of the transmission asset owner licence. The transmission asset owner licence requires that transmission asset ownership functions as a separate business. ESB Networks Limited, a legally separate company, manages the transmission asset business.
- (41) Condition 18 of ESB's transmission asset owner licence requires that a separate division of ESB carries out the transmission asset owner functions.
- (42) ESB Networks Limited is a legally separate company. ESB is required under a regulatory approved asset management agreement to provide ESB Networks Limited with all resources necessary for the discharge of the functions of the transmission asset owner.
- (43) ESB employs the staff associated with the transmission assets business other than the management of ESB Network Limited. Those ESB staff engaged in transmission related activities are employed within the ESB Networks business unit, for which ESB Networks Limited has operational and managerial responsibility. Ring-fencing provisions apply to ESB Networks Limited and to the ESB networks business unit.
- (44) As part of their business separation, the ESB Networks business unit and ESB Networks Limited do not share any facilities (including physical premises) or IT systems with the other ESB entities. With regard to other resources required to carry out transmission related activities, hitherto, there has been some sharing of services, including IT and Human Resources services, between ESB networks Limited, the ESB Networks business unit, and the wider ESB group. However, CER proposes to use its powers to phase this out and ensure that ESB Networks procures its own services.
- (45) In summary, the allocation of transmission related tasks to ESB Networks Limited involves the legal unbundling of the transmission activities in managerial terms, other than transmission asset ownership and employment of the staff.
- (46) Independence in terms of assets, equipment, staff and identity are central to the ring-fencing needed to ensure full independence of transmission activities. One of the important provisions in the Third Package is to ensure that in each of the three standard unbundling models, all transmission related activities, including asset ownership, be carried out within legally separate bodies.

- (47) The importance of this separation is most obvious in relation to asset ownership. A legally separate owner of transmission assets reduces the capacity of the vertically integrated undertaking to encumber those assets, as opposed to the financial rights accruing to the vertically integrated undertaking as a consequence of its ownership of the legally separate entity. The creation of a legally separate entity which owns transmission assets furthermore facilitates the financing of necessary network expansion precisely because it allows for the identification of the assets, separately from any other activities of the vertically integrated undertaking, which can act as security for this investment. The potential for independence in financing of the transmission function is a key element of ensuring independence in transmission system operation.
- (48) CER proposes to make explicit rules relating to the financial viability of the transmission asset owner licensee, including obligations to maintain an investment grade credit rating, a requirement to certify that it has sufficient resources to finance transmission capital developments. The Commission fully recognises the positive effect that such measures can have, but notes that unless accompanied by a legal separation of transmission assets and generation and supply interests there could be a risk of conflating the financial health of the different businesses. Moreover a separate legal entity should be able to raise capital itself, if necessary, as is the case with the independent transmission operator model.
- (49) The importance of ensuring that all aspects of transmission system operation, including the maintenance and construction activities carried out by ESB, are carried out by suitably separated legal entities can be seen in various Commission Opinions⁶. This concern applies not only to the ownership of transmission assets in the present case, but also to the employees carrying out maintenance and similar works who should be employed by a legally separated networks entity.

4.1.2 *Independence of the staff and management*

- (50) The management of ESB Networks limited is comprised of the ESB Networks limited board, including a Managing Director. This board is responsible for operational decisions and preparation of financial plans. This board currently consists of 5 members. The Articles of Association of ESB Networks Limited specify that two directors shall not be employees, contractors or consultants of ESB or its subsidiary companies and shall be independent of the interests of ESB. CER proposes to use its existing powers to increase this such that independent members at all times comprise a majority of board membership.
- (51) The Managing Director may not be employed by any other part of ESB and reports directly to the ESB Chief Executive⁷. Other non-independent members of the Board may hold executive positions with ESB; currently the ESB Executive Director Finance & Commercial, and the ESB Company Secretary are members of the ESB Networks limited Board. However, these Board members may not have involvement in day to day operations of generation or supply.
- (52) ESB Networks Limited Board members, including the Managing Director, are appointed by ESB under terms determined by ESB in accordance with the Code of Practice for Governance of State Bodies.

⁶ Commission's Opinion on e-Control's draft certification decision for TAG (C(2013)649) and Commission's Opinion on e-Control's draft certification decision for BOG (C(2013)963)

⁷ The transmission asset owner licence also envisages the possibility of reporting to the ESB board.

- (53) The performance targets of ESB Networks Directors or its senior managers may not be linked to the performance of ESB as a group. The Commission considers that the decoupling of performance targets from group wide performance should extend to decisions as to whether to implement a bonus system for ESB Networks and the size of any bonus pool.
- (54) CER considers, and the Commission agrees, that rewards, related to the small shareholding by all ESB staff in ESB, are not material in the context of the limited role of ESB in transmission system operation.
- (55) Hitherto, an "Executive Director Team" has met at ESB Group level, comprised of the directors of the various business units of ESB, including generation and supply, to review the policies and plans being implemented within the group, and the structure position and prospects of ESB in the various markets in which it is active. This has included participation from ESB Networks. CER proposes to use its existing powers to ensure that this involvement is ceased, and that instead a coordinating mechanism be put in place for interactions between ESB and ESB Networks along the lines in place in the Scottish arrangements and those applying in the independent transmission operators model. The Commission strongly supports the use of these powers by CER, and considers that the coordinating meetings between ESB and ESB Networks should be confined to specifically network finance related topics.
- (56) Senior Management of ESB Networks Limited and personnel employed in the ESB Networks business unit are subject to ring-fencing rules and a code of conduct. In particular, both ESB and ESB Networks limited are required by licence to implement a code of conduct on the transfer and/or movement of employees between the networks related business and the other business of ESB. The code of conduct must be reported to the CER and is subject to the general obligation to comply with directions of the CER.
- (57) The preliminary certification decision states that the CER intends to formalise the existing approach whereby such staff transfers are made subject to "cooling-off periods". The Commission welcomes this. As noted in regard to the Scottish transmission companies, the fact that the licence allows a cooling off period to be defined on a case by case basis provides important protection against influence being exerted by the vertically integrated undertaking. The Commission considers that the rules of Directive 2009/72/EC applicable to the independent transmission operator model represent the appropriate cooling off periods.
- (58) The transmission asset owner is obliged by legislation to preserve the confidentiality of commercially sensitive information. Furthermore, the licences applying to ESB and ESB networks also cover access to and exchange of information including undertakings by individual employees regarding the non-disclosure of information whether within or outside ESB.
- (59) Matters relating to commercially sensitive information are also addressed in the Code of Conduct and a protocol for the Disclosure of Commercially Sensitive Information which applies to ESB group.
- (60) In consequence, separate platforms for handling of such information have been implemented. As noted earlier, CER intends to use its existing powers to ensure that existing or remaining shared services between ESB and ESB Networks are phased out.

4.1.3 Supervisory Body

- (61) The role of the Supervisory Body envisaged by the independent transmission operator model is not replicated in the Irish arrangements. In part this reflects Irish legal traditions of maintaining a unitary board structure, and in part the role of ESB as transmission asset owner responsible for financing the transmission assets.
- (62) In the independent transmission operator model the Supervisory Body is concerned with decisions which affect the financial interests of the shareholders within the transmission system operator. In part this role is replaced by the direct obligation on ESB to make funds available to ESB Networks limited for the realisation of required investments.
- (63) If the role of the transmission asset owner is established within a fully legally unbundled entity, then a majority independent board of ESB networks can contribute to a stronger degree of independence than the supervisory body under the independent transmission operator model.

4.1.4 Compliance officer and compliance programme

- (64) ESB Networks is responsible for drawing up a compliance programme to specify how it will implement business separation and non-discrimination obligations. CER has the power to issue binding directions to ESB and ESB networks in relation to how compliance is ensured.
- (65) Both ESB Networks limited and ESB as transmission asset owner are required by licence to appoint a compliance officer who is responsible, inter alia, for ensuring compliance of the transmission asset owner with business separation obligations
- (66) According to the transmission asset owner licence the Compliance officer reports exclusively to the Chief Executive Officer and/or the board of directors on compliance matters. A compliance report is submitted to the CER annually, though it is open to the CER to request a compliance report at such times as it requires.
- (67) The compliance officer's role is to ensure the compliance programme is implemented and adhered to at all times by requiring the manager of each area within ESB Networks to report in relation to compliance with all areas of the compliance programme, by briefing all staff and senior management on the compliance programme requirements, and by reviewing the compliance programme when required.
- (68) Unlike in the independent transmission operator model, the compliance officer does not report on availability of finances required for new investments. However, the Commission would accept that these matters are addressed by the infrastructure agreement between Eirgrid and ESB and other provisions related to financing of new infrastructure. In particular, Eirgrid is in a position to bring to the attention of CER issues which would fall to a compliance officer in an independent transmission operator.
- (69) [BUSINESS SECRET] compliance officer for ESB Networks [BUSINESS SECRET] not [BUSINESS SECRET] meet the independence requirements for a compliance officer for an independent transmission operator.
- (70) CER indicates in their preliminary decision that they will use their existing powers to make the appointment of the compliance officer subject to regulatory approval. The Commission considers that it is of particular importance that CER be satisfied as to the independence of the nominated person before approving their appointment.

4.1.5 Network development and powers to make investment decisions

- (71) ESB is obliged to have all sufficient resources to ensure that they are able to properly and efficiently carry out the transmission business and to comply with their obligations under the transmission licence. CER proposes in its preliminary decision to require ESB to maintain an investment grade credit rating and clarify the obligation of ESB to give priority to funding network investments. Furthermore, it has to be ensured that a distinction is made between ESB debt raised to finance network infrastructure and other debt raised to finance other VIU activities.
- (72) The Commission recognises that such obligations can help ensure access to finance for, and thus the independence of, the transmission activities. Nonetheless, the effectiveness of such steps is best ensured when transmission activities are carried out within a distinct legal entity. In particular, this helps ensure that adverse market conditions for the generation or supply business do not cause a breach of obligations. It also facilitates the network business raising capital on the capital markets with the assets as security.
- (73) The Commission also notes that while there are *legal* obligations upon ESB to carry out and finance the network planning developed by Eirgrid, the important question is how this would operate in *practice* if ESB were facing financial difficulties. Both the independent transmission system operator and independent transmission operator models provide for the possibility of investments being undertaken by other parties to address concerns about the possibility of the networks business being deprived of funding because of the interests of the VIU.
- (74) CER considers the probability of such an eventuality occurring to be negligible, pointing to continued funding during the recent period of restricted market access for the Irish State and, by extension, State owned undertakings. Furthermore, CER points out that the legal obligations on ESB to fund the agreed investment plans are absolute, and that, if necessary, ESB would be obliged to dispose of generation or supply assets to fund the required transmission investments.
- (75) Finally, CER sets out that step in powers exist under which Eirgrid can compel the necessary works to be carried out. CER proposes to use its existing powers to strengthen this by formalising the arrangements under which network charges can be dedicated to paying for works implemented under these step-in rights.

4.1.6 *Connection of new plants to the system*

- (76) Eirgrid is responsible for all interactions with system users and manages the overall connection process. Nonetheless, the actual physical connection to the system, and market access, is effected by ESB, overseen by Eirgrid.
- (77) ESB is not entitled to refuse access to the system and must provide all necessary information to Eirgrid to allow it to assess applications for new connection.

4.2 **Ensuring independence in the Irish arrangements: Eirgrid**

4.2.1 *Eirgrid's exercise of step-in rights*

- (78) The Commission considers that the effect of Eirgrid's step-in rights when ESB fails to deliver investments is to allow for third party financing of new infrastructure. However, the Commission also notes that existing law in Ireland means that only ESB may legally own transmission assets which are not classified as interconnectors under Irish law.
- (79) The Commission considers that this restriction could have a negative impact on the effectiveness of the step-in rights. Therefore, the Commission considers that should it

be necessary for Eirgrid to exercise its step-in rights, one of the options open to it should be to construct, own and operate the assets itself as is the case with the East West interconnector.

4.2.2 *Common State Ownership*

- (80) The Commission recognises that almost all tasks of transmission system operation rest with Eirgrid and that it was specifically established in order to ensure maximum independence in carrying out those tasks.
- (81) Both Eirgrid and ESB are owned by the Irish State. Shareholder rights are exercised by the Department of Communications Energy and Natural Resources (hereafter "DCENR") and the Department of Public Expenditure and Reform.
- (82) In a note to CER on ESB and Eirgrid, DCENR states that "It is a basic tenet of the relationship between the State as Shareholder and Commercial State bodies (the category to which both ESB and EirGrid belong) that the autonomy of the respective Boards is fully respected and that there is no interference with day to day operational and commercial decisions or activities. This 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".
- (83) Where a transmission system operator is owned by a Member State or another public body, if two separate public bodies exercise control over the transmission system operator and over other State owned or controlled undertakings performing generation or supply, they are deemed not to be the same person or persons. This is in line with the principle of neutrality between public and private ownership.
- (84) The Commission Staff Working Paper of 22 January 2010 on the unbundling regime provides interpretation of these provisions and the Commission set out further considerations on the topic of separation within the State in its opinion on the certification of Energinet.dk (C(2012) 88 final). In that Opinion the Commission noted in particular the fact that Energinet.dk was controlled by a separate Minister than the Minister exercising rights in relation to State owned companies active in generation or supply.
- (85) In the present case, the Commission considers that ensuring effective independence of transmission system operation requires that the exercise of rights in relation to appointments and the exercise of strategic direction of Eirgrid be explicitly attributed to a separate public body than that which controls ESB.

4.3 Conclusion

- (86) The key difference between the arrangements applying in Ireland and the independent transmission operator model is the role of ESB in the functions of the transmission system operator alongside the role of Eirgrid.
- (87) Eirgrid has shown the ability to independently develop transmission infrastructure by completing the East West Interconnector. In order to allow Eirgrid to effectively exercise its step-in rights, Ireland should extend Eirgrid's rights to invest in new infrastructure to cases where ESB is in delay or default of its obligations.
- (88) Eirgrid brings a level of independence and responsibility to transmission system operation in Ireland which would not be present in the independent transmission operator model. By clarifying that rights in relation to Eirgrid are exercised by a public

body which does not exercise any rights over generation or supply businesses, Ireland can guarantee this independence in the future.

- (89) The different approach taken in the Irish arrangements and the limited role of ESB compared to the independent transmission operator can justify that there are different rules applicable to ESB than apply in the independent transmission operator model.
- (90) The ringfencing rules applying to ESB networks are strict and in many respects comparable to those applying in the independent transmission operator model. The Commission welcomes the intention of CER to use its powers to enhance the financial independence and ring-fencing provisions applicable to the transmission asset owner. The Commission also notes that extensive powers which continue to be available to CER, including updating the applicable licences and the issuing of directions to the transmission asset owner, which can be taken when appropriate to further strengthen individual elements in the Irish arrangements.
- (91) While CER recognises the potential benefits of the establishment of all transmission activities within a legally distinct entity, it considers that the regulatory rules applying to ESB Networks business unit in the context of the Irish arrangements to be effective. However, the Commission considers that splitting the transmission function between ESB Networks (the business unit) and ESB Networks limited (the legal entity) could serve to undermine the effectiveness of the Irish arrangements, by blurring the lines between transmission activities and generation and supply activities. This could be addressed by situating all of the roles of ESB as transmission asset owner within a single legally distinct entity which employed all staff in transmission related activities and owned the transmission assets.
- (92) On the basis of the above, the Commission considers that, if effectively implemented, the Irish arrangements which share the tasks of transmission system operation between Eirgrid and ESB can deliver more effective independence than the independent transmission operator model. The changes necessary to ensure that the Irish arrangements are effectively implemented in the future can and should be made within a reasonable period of time, taking account of the possible need for legislative change and the current difficult situation as regards financing pertaining in Ireland.
- (93) CER should monitor and assess whether the necessary steps are being taken to ensure these changes are implemented in a reasonable period of time.

HAS ADOPTED THIS DECISION:

Article 1

The arrangements in place in relation to the vertical integration and operation of the transmission systems belonging to ESB as set out in CER's preliminary decision if effectively implemented could clearly guarantee more effective independence of the transmission system operators than the provisions of Chapter V of Directive 2009/72/EC and therefore meet the requirements of Article 9(9) of Directive 2009/72/EC.

Eirgrid shall be certified as the transmission system operator for Ireland.

To ensure that the arrangements in place are implemented effectively CER shall monitor and assess that within a reasonable period of time:

- Eirgrid in its organisation fully meets the requirements of Article 9(1) and Article 9(6) of Directive 2009/72/EC such that the public body which exercises control over it does not

exercise rights in or have control over undertakings performing the activities of generation or supply,

- Eirgrid has the right to develop and own transmission assets where ESB is in delay or default of its obligations under the infrastructure agreement, and
- The licence to act as transmission asset owner has been transferred to ESB Networks limited or another legally separate entity in the ESB group which owns the transmission assets and employs all ESB staff involved in transmission related activities.

Article 2

This Decision is addressed to the Commission for Energy Regulation

Done at Brussels, 12.4.2013

For the Commission

Siim KALLAS

Vice-President

CERTIFIED COPY
For the Secretary - General

Jordi AYET PUIGARNAU
Director of the Registry