



STATUTORY INSTRUMENTS.

S.I. No. 16 of 2015



EUROPEAN COMMUNITIES (INTERNAL MARKET IN NATURAL
GAS AND ELECTRICITY) (AMENDMENT) REGULATIONS 2015

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GAS AND ELECTRICITY) (AMENDMENT) REGULATIONS 2015

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EUROPEAN COMMUNITIES (INTERNAL MARKET IN NATURAL GAS AND ELECTRICITY) (AMENDMENT) REGULATIONS 2015

I, ALEX WHITE, Minister for Communications, Energy and Natural Resources, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving further effect to Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009¹ and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009², hereby make the following regulations:

PART 1

PRELIMINARY AND GENERAL

Citation and commencement

1. (1) These Regulations may be cited as the European Communities (Internal Market in Natural Gas and Electricity) (Amendment) Regulations 2015.

(2) Regulation 29(2) comes into operation on the network transfer date.

Interpretation

2. (1) In these Regulations—

“Act of 1976” means Gas Act 1976 (No. 30 of 1976);

“Act of 1999” means Electricity Regulation Act 1999 (No. 23 of 1999);

“Agency” means the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009³;

“authorised officer” means an authorised officer appointed under section 11 (as amended by section 44 of the Water Services (No. 2) Act 2013 (No. 50 of 2013)) of the Act of 1999;

“assets” means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description (including money), and includes securities, choses in action and documents;

“Commission” means the Commission for Energy Regulation;

¹OJ No. L 211, 14.08.2009, p. 55

²OJ No. L 211, 14.08.2009, p. 94

³OJ No. L 211, 14.08.2009, p. 1

Notice of the making of this Statutory Instrument was published in “Iris Oifigiúil” of 23rd January, 2015.

“control” means any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by—

- (a) ownership or the right to use all or part of the assets of an undertaking, or
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking;

“court” means the High Court;

“customers”, in relation to a gas transmission system, means wholesale customers and, where the context so requires, includes final or end customers;

“determination” means determination under section 25 of the Act of 1999;

“distribution system”, in relation to natural gas, means a system for the transport of natural gas through local or regional pipelines with a view to its delivery to customers;

“Electricity Market Directive” means Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009¹;

“Electricity Market Regulation” means Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009⁴;

“electricity transmission system operator” has the meaning assigned to “transmission system operator” in point (4) of Article 2 of the Electricity Market Directive, and includes an interconnector operator;

“Ervia” means the body formerly known as Bord Gáis Éireann;

“gas transmission system” means a system for the transport of natural gas through a high pressure pipeline, other than an upstream pipeline, with a view to delivering natural gas to customers;

“gas transmission system operator” has the meaning assigned to “transmission system operator” in point (4) of Article 2 of the Natural Gas Market Directive;

“interconnector operator” means the holder of a licence under section 14(1)(i) of the Act of 1999;

“LNG” means liquefied natural gas;

“Minister” means the Minister for Communications, Energy and Natural Resources;

“Natural Gas Market Directive” means Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009²;

¹OJ No. L 211, 14.08.2009, p. 15

“Natural Gas Market Regulation” means Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009⁵;

“network transfer date” means the date appointed by the Minister in accordance with section 15 of the Gas Regulation Act 2013 (No. 39 of 2013);

“operate” includes maintain and develop;

“publish” includes publish on the internet;

“system user” means a natural or legal person supplying to, or being supplied by, a transmission or distribution system;

“ten-year network development plan”, in relation to the gas transmission system operator, means the national plan prepared and submitted, or required to be prepared and submitted, in accordance with Regulation 11;

“third country” means a country which is not a member of the European Union;

“vertically integrated undertaking” means—

(a) an electricity undertaking or group of electricity undertakings where—

(i) the same person is, or the same persons are, entitled, directly or indirectly, to exercise control, and

(ii) the undertaking or group of undertakings perform at least—

(I) one of the functions of transmission or distribution of electricity, and

(II) one of the functions of generation or supply of electricity,

or

(b) a gas undertaking or group of gas undertakings where—

(i) the same person is, or the same persons are, entitled, directly or indirectly, to exercise control, and

(ii) the undertaking or group of undertakings perform at least—

(I) one of the functions of transmission, distribution, LNG, or storage of natural gas, and

(II) one of the functions of production or supply of natural gas.

(2) A word or expression that is used in these Regulations and is also used in the Natural Gas Market Directive or the Electricity Market Directive has, unless the context otherwise requires, the same meaning in these Regulations as it has in those Directives, as the case may be.

⁵OJ No. L 211, 14.08.2009, p. 36

PART 2

UNBUNDLING OF GAS TRANSMISSION SYSTEMS AND GAS TRANSMISSION SYSTEM
OPERATORS*Scope of Part 2*

3. (1) This Part shall apply to all undertakings which own or operate a gas transmission system in the State.

(2) Each undertaking that owns a gas transmission system shall be, and act as, a gas transmission system operator.

(3) (a) Where 2 or more undertakings which own gas transmission systems have created a joint venture that acts as a gas transmission system operator in 2 or more Member States for the gas transmission systems concerned, it shall be deemed to be a gas transmission system operator for the purposes of paragraph (2).

(b) No other undertaking may be part of the joint venture, referred to in subparagraph (a), unless it has been approved under Article 14 of the Natural Gas Market Directive as an independent system operator or as an independent transmission operator for the purposes of Chapter IV of that Directive.

(4) The same person or persons shall not directly or indirectly—

(a) exercise control over an undertaking performing any of the functions of production or supply of natural gas, and

(b) exercise control or any right over a gas transmission system operator or a gas transmission system.

(5) The same person or persons shall not directly or indirectly—

(a) exercise control over a gas transmission system operator or a gas transmission system, and

(b) exercise control or any right over an undertaking performing any of the functions of production or supply of natural gas.

(6) The same person or persons shall not, while directly or indirectly exercising control or any right over an undertaking performing any of the functions of production or supply of natural gas, appoint—

(a) members of the board of directors of,

(b) members of the bodies legally representing, or

(c) persons responsible for the management of,

an undertaking which is a gas transmission system operator or is a gas transmission system.

(7) The rights referred to in paragraphs (4), (5) and (6) shall include, in particular, the following:

- (a) the power to exercise voting rights in an undertaking;
- (b) the power—
 - (i) to appoint members of the board of directors of,
 - (ii) to appoint persons responsible for management of, or
 - (iii) to appoint members of the bodies legally representing, an undertaking;
- (c) the holding of a majority share in an undertaking.

(8) The same person shall not simultaneously be a member of the board of, or a body legally representing, an undertaking—

- (a) performing any of the functions of production or supply of natural gas, and
- (b) which is a gas transmission system operator or a gas transmission system.

(9) For the purpose of these Regulations, where the person referred to in paragraph (4), (5), (6) or (8) is a public body, 2 separate public bodies exercising control—

- (a) over a gas transmission system operator or over a gas transmission system, in one instance, and
- (b) over an undertaking performing any of the functions of production or supply of natural gas, on the other,

shall be deemed not to be the same person or persons.

Prohibition of certain transfers and sharing services

4. (1) The following shall not be transferred from a gas transmission system operator which was part of a vertically integrated undertaking to an undertaking performing any of the functions of production and supply of natural gas:

- (a) commercially sensitive information, referred to in Article 16 of the Natural Gas Market Directive, held by the gas transmission system operator, obtained in the course of carrying out its activities or with respect to its own activities;
- (b) the staff of such an operator.

(2) An undertaking performing any of the functions of—

- (a) gas production or supply, or
- (b) electricity generation or supply,

shall not, directly or indirectly, take control of or exercise any right over a gas transmission system operator to which Article 9(1) of the Natural Gas Market Directive applies.

(3) Where, in the opinion of the Commission, an undertaking contravenes paragraph (2) the Commission may apply to the court for a compliance order in accordance with Regulation 24.

Interpretation — Part 2

5. In this Part—

- (a) an undertaking performing “any of the functions of production or supply of natural gas” includes undertakings performing any of the functions of generation and supply within the meaning of the Electricity Market Directive;
- (b) the terms “transmission system operator” and “transmission system” shall include “transmission system operator” and “transmission system” within the meaning of the Electricity Market Directive.

PART 3

CERTIFICATION AND DESIGNATION OF GAS TRANSMISSION SYSTEM OPERATORS

Requirement to apply for certification

6. (1) A gas transmission system operator shall, prior to commencing any gas transmission system operations, make an application to the Commission for the certification pursuant to this Part.

(2) Nothing in these Regulations shall prevent Ervia, or a subsidiary of Ervia, operating as a gas transmission system operator between the commencement of these Regulations and the date of its certification in accordance with this Regulation.

(3) A gas transmission system operator shall notify the Commission, in writing, of any proposed transaction which may require a reassessment of their compliance with Part 2.

Certification and designation of gas transmission system operators

7. (1) The Commission shall establish and operate a certification procedure to assess compliance by gas transmission system operators with the requirements of Part 2.

(2) The certification procedure, referred to in paragraph (1), shall apply in the following circumstances:

- (a) upon receipt of an application by a gas transmission system operator pursuant to Regulation 6(1);
- (b) upon notification by a gas transmission system operator pursuant to Regulation 6(3);
- (c) on the Commission's own initiative where—
 - (i) it has knowledge that a planned change in rights or influence over a gas transmission system operator may lead to a contravention of Regulation 3, or
 - (ii) it has reason to believe that such a contravention may have occurred;
- (d) upon a reasoned request from the European Commission.

Decision in respect of certification

8. (1) The Commission shall adopt a preliminary decision on the certification of a gas transmission system operator not later than 4 months from the date of receipt of the following:

- (a) an application by a gas transmission system operator, pursuant to Regulation 6(1);
- (b) a notification by a gas transmission system operator, pursuant to Regulation 6(3);
- (c) a request from the European Commission, referred to in Regulation 7(2)(d).

(2) Where, after the expiry of the 4 month period referred to in paragraph (1), the Commission has not adopted a preliminary decision, a tacit decision to grant the certification shall be deemed to be adopted.

(3) A preliminary decision of the Commission or a tacit decision shall not become effective until the procedure referred to in paragraphs (4) and (5) has been completed.

(4) The Commission shall notify its preliminary decision or a tacit decision without delay to the European Commission and shall provide the European Commission with all the relevant information with respect to the decision.

(5) Not later than 2 months—

- (a) of the date of receiving an opinion of the European Commission pursuant to Article 3(1) of the Natural Gas Market Regulation, or
- (b) where the European Commission has not provided such an opinion in the timeframes set out in Article 3(1) of the Natural Gas Market Regulation, of the date of expiry of the timeframe concerned,

the Commission shall adopt its final decision on the certification taking account of the opinion of the European Commission, where provided.

(6) The Commission shall adopt and publish its final decision in the Official Journal of the European Union along with the European Commission’s opinion, where provided.

(7) The Commission may request from a gas transmission system operator and undertakings performing any of the functions of production or supply any information relevant for the fulfilment of its tasks under this Regulation.

(8) Each gas transmission system operator shall provide all such additional information as the Commission, pursuant to paragraph (7), or the European Commission, may request in writing which is relevant to the fulfilment of the Commission’s tasks under this Regulation.

(9) The Commission shall preserve the confidentiality of commercially sensitive information received by it pursuant to this Regulation.

(10) In this Regulation—

“final decision” means a final decision adopted by the Commission on the certification of a gas transmission system operator under paragraph (5);

“preliminary decision” means a preliminary explicit decision of the Commission on the certification of a gas transmission system operator under paragraph (1);

“tacit decision” means a deemed decision referred to in paragraph (2).

Designation of gas transmission system operators

9. (1) The certification of a gas transmission system operator by the Commission shall be deemed to be a designation.

(2) A designation of a gas transmission system operator by the Commission shall be—

(a) notified by the Commission in writing to—

(i) the operator concerned, and

(ii) the European Commission,

and

(b) published by the Commission in the Official Journal of the European Union, along with the European Commission’s opinion, where provided.

Certification in relation to third countries

10. (1) Where certification is requested, pursuant to Regulation 6, by a gas transmission system owner or a gas transmission system operator, which is controlled by a person or persons from a third country or third countries—

- (a) the Commission shall notify the European Commission in writing, and
- (b) the certification procedure in this Regulation shall apply.

(2) The Commission shall also notify the European Commission in writing, without delay, of any circumstances that would result in a person or persons from a third country or third countries acquiring control of an existing gas transmission system or an existing gas transmission system operator.

(3) A gas transmission system operator shall notify the Commission in writing of any circumstances that would result in a person or persons from a third country or third countries acquiring control of the gas transmission system or the gas transmission system operator in the State.

(4) Following a request under paragraph (1) or a notification under paragraph (3), the Commission shall adopt a preliminary decision on the certification of a gas transmission system operator to which this Regulation applies not later than 4 months from the date of notification to it by the gas transmission system operator concerned.

(5) The Commission shall refuse to adopt a preliminary decision where it has not been demonstrated that—

- (a) the entity concerned complies with the requirements of these Regulations, and
- (b) granting the certification will not put at risk the security of energy supply in the State or in the European Union.

(6) In considering the security of energy supply for the purposes of paragraph (5)(b), the Commission shall take into account—

- (a) the rights and obligations of the European Union, with respect to the third country concerned, arising under international law, including any agreement concluded with one or more third countries to which the European Union is a party and which addresses the issues of security of energy supply,
- (b) the rights and obligations of the State, with respect to the third country concerned, arising under agreements concluded with it, insofar as they are in compliance with European Union law, and
- (c) any other relevant facts and circumstances of the case and the third country concerned.

(7) The Commission shall notify the preliminary decision to the European Commission, in writing without delay, together with all the relevant information with respect to that decision.

(8) The Commission shall, before it adopts a final decision on the certification to which this Regulation applies, request an opinion from the European Commission on whether—

- (a) the entity concerned complies with the requirements of Article 9 of the Natural Gas Market Directive, and
- (b) granting the certification would put at risk the security of energy supply to the European Union.

(9) Not later than 2 months—

- (a) of the date of receiving an opinion of the European Commission pursuant to Article 3(1) of the Natural Gas Market Regulation, or
- (b) where the European Commission has not provided such an opinion in the timeframes set out in Article 3(1) of the Natural Gas Market Regulation, of the date of expiry of that timeframe,

the Commission shall adopt its final decision on the certification of the gas transmission system operator taking account of the opinion of the European Commission, where provided.

(10) The Commission may refuse certification in accordance with this Regulation where granting the certification puts at risk the State's security of energy supply or the security of energy supply of another Member State.

(11) (a) The Commission's final decision and the European Commission's opinion, where provided, shall be published simultaneously in the Official Journal of the European Union.

(b) Where the Commission's final decision diverges from the European Commission's opinion, the Commission shall provide and publish, together with that decision, the reasoning underlying such divergence.

(12) Nothing in this Regulation shall prevent the Commission or the Minister from exercising, in compliance with European Union law, national legal controls to protect legitimate public security interests.

(13) In this Regulation—

“preliminary decision” means a preliminary decision adopted by the Commission on the certification of a gas transmission system operator in accordance with paragraph (4);

“final decision” means a final decision adopted by the Commission on the certification of a gas transmission system operator in accordance with paragraph (9);

“opinion” means the opinion of the European Commission requested in accordance with paragraph (8);

“third country” means a country which is not at the relevant time a Member State.

PART 4

GAS TRANSMISSION SYSTEM OPERATOR TO PREPARE NATIONAL TEN-YEAR NETWORK DEVELOPMENT PLAN

National ten-year network development plan

11. (1) In order to allow the Commission to assess the medium-term investment plans of gas transmission system operators as regards consistency with the European Union ten-year network development plan, gas transmission system operators shall, on an annual basis, prepare and submit to the Commission a ten-year network development plan with respect to investment in its gas transmission network system.

(2) A plan shall—

(a) be based on existing, and forecasted, supply and demand, having consulted all the relevant stakeholders, and

(b) contain efficient measures in order to guarantee the adequacy of the gas transmission system and security of supply and, in particular, it shall—

(i) indicate to market participants the main infrastructure with respect to the gas transmission system that needs to be built or upgraded over the subsequent 10 years,

(ii) contain all the investments already decided and identify new investments which have to be executed in the subsequent 3 years, and

(iii) provide for a timeframe for all investment projects.

(3) When preparing a plan, a gas transmission system operator shall make reasonable assumptions about the evolution of the production, supply, consumption and exchanges with other countries, taking into account investment plans for regional networks and networks within the European Union, as well as investment plans for storage and LNG regasification facilities.

(4) (a) The Commission shall consult all actual or potential system users regarding a plan in an open and transparent manner.

(b) Persons or undertakings claiming to be potential gas transmission system users may be required to substantiate such claims.

(c) The Commission shall publish the result of the consultation process including, in particular, potential needs for investments.

(5) The Commission shall examine whether a plan—

- (a) covers all potential needs for investments identified during the consultation process, and
- (b) is consistent with the European Union ten-year network development plan.

(6) Where any doubt arises as to the consistency of a plan with the European Union ten-year network development plan, the Commission shall consult the Agency and, following such consultation, the Commission may require the gas transmission system operator concerned to, and if required the operator shall, amend its plan.

(7) The Commission shall monitor and evaluate the implementation of the plan.

(8) In circumstances where the gas transmission system operator, other than for overriding reasons beyond its control, does not execute an investment, approved by the Commission, which under its plan, was to be executed in the following 3 years, the Commission shall take at least one of the following measures to ensure that the investment in question is made where such investment is still relevant on the basis of the most recent plan:

- (a) require the gas transmission system operator to execute the investment in question;
- (b) arrange for a tender procedure open to any investors for the investment project in question to be carried out.

(9) Where the Commission has made use of its powers under paragraph (8)(b), it may oblige the gas transmission system operator to agree to one or more of the following:

- (a) financing of the investment by a third party;
- (b) construction of the investment by a third party;
- (c) the construction of the new assets by the gas transmission system operator;
- (d) the operation of the new assets by the gas transmission system operator.

(10) A transmission system operator shall—

- (a) provide the investors referred to in paragraph (8)(b) with all information needed to realise the investment,
- (b) connect new assets, referred to in paragraph (9), to the transmission network, and
- (c) generally make its best efforts to facilitate the implementation of the investment project, referred to in paragraph (8).

(11) The relevant financial arrangements in relation to the matters referred to in paragraphs (8) and (9) shall be subject to approval by the Commission.

(12) Where the Commission has made use of its powers under paragraph (8), the charges approved by the Commission, under section 10A of the Act of 1976, shall cover the costs of the investments in question.

(13) In this Regulation—

“European Union ten-year network development plan” means the plan referred to in Article 8(3)(b) of the Natural Gas Market Regulation;

“plan” means the national ten-year network development plan prepared and submitted to the Commission pursuant to paragraph (1).

PART 5

UNBUNDLING OF ELECTRICITY TRANSMISSION SYSTEMS AND ELECTRICITY TRANSMISSION SYSTEM OPERATORS

Scope of Part 5

12. (1) This Part shall not apply to an undertaking while it is certified under Article 9(9) of the Electricity Market Directive.

(2) Subject to paragraph (1), each undertaking that owns an electricity transmission system shall be, and act as, an electricity transmission system operator.

(3) (a) Where 2 or more undertakings which own electricity transmission systems have created a joint venture that acts as an electricity transmission system operator in 2 or more Member States for the electricity transmission systems concerned, it shall be deemed to be an electricity transmission system operator for the purposes of paragraph (2).

(b) No other undertaking may be part of the joint venture, referred to in subparagraph (a), unless it has been approved under Article 13 of the Electricity Market Directive as an independent system operator or as an independent transmission operator for the purposes of Chapter V of that Directive.

(4) The same person or persons shall not directly or indirectly—

(a) exercise control over an undertaking performing any of the functions of generation or supply of electricity, and

(b) exercise control or any right over an electricity transmission system operator or an electricity transmission system.

(5) The same person or persons shall not directly or indirectly—

(a) exercise control over an electricity transmission system operator or an electricity transmission system, and

- (b) exercise control or any right over an undertaking performing any of the functions of generation or supply of electricity.

(6) The same person or persons shall not, while directly or indirectly exercising control or any right over an undertaking performing any of the functions of generation or supply of electricity, appoint—

- (a) members of the board of directors of,
- (b) members of the bodies legally representing, or
- (c) persons responsible for the management of,

an undertaking which is an electricity transmission system operator or electricity transmission system.

(7) The rights referred to in paragraphs (4), (5) and (6) shall include, in particular, the following:

- (a) the power to exercise voting rights in an undertaking;
- (b) the power—
 - (i) to appoint members of the board of directors of,
 - (ii) to appoint persons responsible for management of, or
 - (iii) to appoint members of the bodies legally representing,

an undertaking;

- (c) the holding of a majority share in an undertaking.

(8) The same person shall not simultaneously be a member of the board of, or a body legally representing, an undertaking—

- (a) performing any of the functions of generation or supply of electricity, and
- (b) which is an electricity transmission system operator or an electricity transmission system.

(9) For the purpose of these Regulations, where the person referred to in paragraph (4), (5), (6) or (8) is a public body, 2 separate public bodies exercising control over—

- (a) an electricity transmission system operator or over an electricity transmission system, in one instance, and
- (b) an undertaking performing any of the functions of generation or supply of electricity, on the other,

shall be deemed not to be the same person or persons.

Prohibition of certain transfers and sharing services

13. (1) The following shall not be transferred from an electricity transmission system operator which was part of a vertically integrated undertaking to an undertaking performing any of the functions of generation and supply of electricity:

- (a) commercially sensitive information, referred to in Article 16 of the Electricity Market Directive, held by the electricity transmission system operator, obtained in the course of carrying out its activities or with respect to its own activities;
 - (b) the staff of such an operator.
- (2) An undertaking performing any of the functions of—
- (a) electricity generation or supply, or
 - (b) gas production or supply,

shall not, directly or indirectly, take control of or exercise any right over an electricity transmission system operator to which Article 9(1) of the Electricity Market Directive applies.

(3) Where, in the opinion of the Commission, an undertaking contravenes paragraph (2) the Commission may apply to the court for a compliance order in accordance with Regulation 24.

Interpretation

14. In this Part—

- (a) an undertaking performing “any of the functions of generation or supply of electricity” includes undertakings performing any of the functions of generation and supply within the meaning of the Natural Gas Market Directive;
- (b) the terms “transmission system operator” and “transmission system” shall include “transmission system operator” and “transmission system” within the meaning of the Natural Gas Market Directive.

PART 6

CERTIFICATION AND DESIGNATION OF ELECTRICITY TRANSMISSION SYSTEM OPERATORS

Requirement to apply for certification

15. (1) Prior to an undertaking being designated and approved as a transmission system operator under these Regulations, it shall be certified according to the procedures under this Part.

(2) An electricity transmission system operator shall notify the Commission, in writing, of any proposed transaction which may require a reassessment of their compliance with—

- (a) Part 5, or
- (b) their certification under Article 9(9) of the Electricity Market Directive.

Certification and designation of electricity transmission system operators

16. (1) (a) The Commission shall establish and operate a certification procedure to assess compliance by electricity transmission system operators with the requirements of Article 9 of the Electricity Market Directive.

(b) The certification procedure referred to in subparagraph (a) shall apply to an application for certification and designation of—

- (i) a transmission system operator under Article 9(9) of the Electricity Market Directive, and
- (ii) a transmission system operator under Part 5.

(2) The certification procedure, referred to in paragraph (1), shall apply in the following circumstances:

- (a) upon receipt of an application by an electricity transmission system operator pursuant to Regulation 15(1);
- (b) upon notification by an electricity transmission system operator pursuant to Regulation 15(2);
- (c) on the Commission's own initiative where—
 - (i) it has knowledge that a planned change in rights or influence over an electricity transmission system operator may lead to a contravention of Regulation 15, or
 - (ii) where it has reason to believe that such a contravention may have occurred;

(d) upon a reasoned request from the European Commission.

(3) A person certified to be a transmission system operator under Regulation 3 of the European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011 (S.I. No. 570 of 2011) shall, notwithstanding the revocation of those Regulations by Regulation 29, be deemed on the commencement of these Regulations to be a person certified under this Part.

Decision in respect of certification

17. (1) The Commission shall adopt a preliminary decision on the certification of an electricity transmission system operator not later than 4 months from the date of receipt of—

- (a) an application by an electricity transmission system operator, pursuant to Regulation 15(1);
- (b) a notification by an electricity transmission system operator, pursuant to Regulation 15(2);
- (c) a request from the European Commission, referred to in Regulation 16(2)(d).

(2) Where, after the expiry of the 4 month period referred to in paragraph (1), the Commission has not adopted a preliminary decision, a tacit decision to grant the certification shall be deemed to be granted.

(3) A preliminary decision of the Commission or a tacit decision shall not become effective until the procedure referred to in paragraphs (4) and (5) has been completed.

(4) The Commission shall notify its preliminary decision or a tacit decision without delay to the European Commission and shall provide the European Commission with all the relevant information with respect to the decision.

(5) (a) Not later than 2 months—

- (i) of the date of receiving an opinion of the European Commission pursuant to Article 3(1) of the Electricity Market Regulation, or
- (ii) where the European Commission has not provided such an opinion in the timeframes set out in Article 3(1) of the Electricity Market Regulation, of the date of expiry of the timeframe concerned,

the Commission shall adopt its final decision on the certification taking account of the opinion of the European Commission, where provided.

- (b) Where the Commission has provided a notification to the European Commission pursuant to Article 9(10) of the Electricity Market Directive and the European Commission has taken a decision relating to the certification of a transmission system operator under Article 9(9) of that Directive, the Commission shall comply with the decision of the European Commission.

(6) The Commission shall adopt and publish its final decision in the Official Journal of the European Union along with the European Commission's opinion, where provided.

(7) The Commission may request from an electricity transmission system operator and undertakings performing any of the functions of generation or supply any information relevant for the fulfilment of its tasks under this Regulation.

(8) Each electricity transmission system operator and undertakings performing any of the functions of generation or supply shall provide all such additional information as the Commission, pursuant to paragraph (7), or the European Commission, may request in writing which is relevant to the fulfilment of the Commission's tasks under this Regulation.

(9) The Commission shall preserve the confidentiality of commercially sensitive information received by it pursuant to this Regulation.

(10) In this Regulation—

“final decision” means a final decision adopted by the Commission on the certification of an electricity transmission system operator under paragraph (5);

“preliminary decision” means a preliminary explicit decision of the Commission on the certification of an electricity transmission system operator under paragraph (1);

“tacit decision” means a deemed decision referred to in paragraph (2).

Designation of electricity transmission system operators

18. (1) The certification of an electricity transmission system operator by the Commission shall be deemed to be a designation.

(2) A designation of an electricity transmission system operator by the Commission shall be notified by the Commission in writing to the European Commission and published in the Official Journal of the European Union.

Certification in relation to third countries

19. (1) Where certification is requested, pursuant to Regulation 15, by an electricity transmission system owner or an electricity transmission system operator, which is controlled by a person or persons from a third country or third countries—

(a) the Commission shall notify the European Commission in writing, and

(b) the certification procedure in this Regulation shall apply.

(2) The Commission shall notify the European Commission in writing, without delay, of any circumstances that would result in a person or persons from a third country or third countries acquiring control of an existing electricity transmission system or an existing electricity transmission system operator.

(3) An electricity transmission system operator shall notify the Commission in writing of any circumstances that would result in a person or persons from a

third country or third countries acquiring control of the electricity transmission system or the electricity transmission system operator in the State.

(4) Following a request under paragraph (1) or a notification under paragraph (3), the Commission shall adopt a preliminary decision on the certification of an electricity transmission system operator to which this Regulation applies not later than 4 months from the date of notification to it by the electricity transmission system operator concerned.

(5) The Commission shall refuse to adopt a preliminary decision where it has not been demonstrated that—

- (a) the entity concerned complies with the requirements of these Regulations, and
- (b) granting the certification will not put at risk the security of energy supply in the State or in the European Union.

(6) In considering the security of energy supply for the purposes of paragraph (5)(b), the Commission shall take into account—

- (a) the rights and obligations of the European Union, with respect to the third country concerned, arising under international law, including any agreement concluded with one or more third countries to which the European Union is a party and which addresses the issues of security of energy supply,
- (b) the rights and obligations of the State, with respect to the third country concerned, arising under agreements concluded with it, insofar as they are in compliance with European Union law, and
- (c) any other relevant facts and circumstances of the case and the third country concerned.

(7) The Commission shall notify the preliminary decision to the European Commission, in writing without delay, together with all the relevant information with respect to that decision.

(8) The Commission shall, before it adopts a final decision on the certification to which this Regulation applies, request an opinion from the European Commission on whether—

- (a) the entity concerned complies with the requirements of Article 9 of the Electricity Market Directive, and
- (b) granting the certification would put at risk the security of energy supply to the European Union.

(9) Not later than 2 months—

- (a) of the date of receiving an opinion of the European Commission pursuant to Article 3(1) of the Electricity Market Regulation, or
- (b) where the European Commission has not provided such an opinion in the timeframes set out in Article 3(1) of the Electricity Market Regulation, of the date of expiry of that timeframe,

the Commission shall adopt its final decision on the certification of the electricity transmission system operator taking account of the opinion of the European Commission, where provided.

(10) The Commission may refuse certification in accordance with this Regulation where granting the certification puts at risk the State's security of energy supply or the security of energy supply of another Member State.

(11) (a) The Commission's final decision and the European Commission's opinion, where provided, shall be published simultaneously in the Official Journal of the European Union.

(b) Where the Commission's final decision diverges from the European Commission's opinion, the Commission shall provide and publish, together with that decision, the reasoning underlying such divergence.

(12) Nothing in this Regulation shall prevent the Commission or the Minister from exercising, in compliance with European Union law, national legal controls to protect legitimate public security interests.

(13) In this Regulation—

“preliminary decision” means a preliminary decision adopted by the Commission on the certification of an electricity transmission system operator in accordance with paragraph (4);

“final decision” means a final decision adopted by the Commission on the certification of an electricity transmission system operator in accordance with paragraph (9);

“opinion” means the opinion of the European Commission requested in accordance with paragraph (8);

“third country” means a country which is not at the relevant time a Member State.

PART 7

POWERS OF COMMISSION AND ENFORCEMENT

Definitions — Part 7

20. In this Part—

“gas transmission system operator” means a transmission system operator designated pursuant to Part 3;

“electricity transmission system operator” means a transmission system operator designated pursuant to Part 6.

Commission — powers and obligations

21. (1) Subject to paragraph (3), the Commission shall monitor the operations of the following:

- (a) the operator of a gas transmission system;
- (b) the operator of an electricity transmission system;
- (c) the owner of an electricity transmission system.

(2) The Commission shall ensure—

- (a) that gas transmission system operators comply with the requirements of these Regulations and the Natural Gas Market Directive,
- (b) that electricity transmission system operators comply with the requirements of these Regulations and the Electricity Market Directive, and
- (c) that electricity transmission owners comply with the requirements of these Regulations and the Electricity Market Directive.

(3) In performing its monitoring obligations under paragraph (1), the Commission shall ascertain the following:

- (a) whether a gas transmission system operator is conducting its operations in a manner consistent with Part 2 and with its designation under Part 3;
- (b) whether an electricity transmission system operator is conducting its operations in a manner consistent with the Part 5 and with its designation under Part 6;
- (c) whether an owner of an electricity transmission system is conducting its operations in a manner consistent with Article 9(9) of the Electricity Market Directive.

(4) Where the Commission forms the opinion that—

- (a) a gas transmission system operator is not conducting its operations in a manner consistent with Part 2 or its designation under Part 3,
- (b) an electricity transmission system operator is not conducting its operations in a manner consistent with Part 5 or its designation under Part 6, or
- (c) an owner of an electricity transmission system is not conducting its operations in a manner consistent with Article 9(9) of the Electricity Market Directive,

the Commission shall, by notice in writing to the party concerned, require it to take such measures to rectify the situation as the Commission specifies in the notice within such time period, if any, specified in the notice.

(5) A notice under paragraph (4) may include a requirement directing a party concerned to modify its operations to such extent, and in such respects, as are specified in the notice.

(6) A relevant party to whom a notice under paragraph (4) is given shall comply with a requirement, if any, imposed on it in accordance with paragraph (5) within such time period (if any) specified in the notice.

(7) Where, in the opinion of the Commission, an undertaking fails to comply with paragraph (6) the Commission may apply to the court for a compliance order in accordance with Regulation 24.

(8) The Commission may, subject to the protection of the confidentiality of any information which the Commission considers confidential, publish, in such manner as it thinks fit, any notification given by it under this Regulation.

Commission — complaints

22. (1) Any party having a complaint against—

- (a) a gas transmission, or distribution, system operator,
- (b) a gas storage operator, or
- (c) an LNG operator,

in relation to that operator's obligations under these Regulations, may refer the complaint to the Commission in accordance with section 9(1D) of the Act of 1999.

(2) Any party having a complaint against an electricity transmission system operator in relation to the matters specified in section 9(1B) of the Act of 1999 in relation to electricity, may refer the complaint to the Commission in accordance with section 34(6)(b) of the Act of 1999.

Commission — powers of enforcement

23. (1) The Commission shall, with respect to—

- (a) an owner of an electricity transmission system, or
- (b) an electricity or gas transmission system operator, following its certification, designation, approval and licensing,

have the following powers in enforcing these Regulations:

- (i) to approve investment in the transmission system to ensure compliance with market conditions;

(ii) to carry out inspections, including inspections with or without prior notice, on the premises of—

(I) an electricity transmission system owner, or

(II) an electricity or gas transmission system operator,

so as to ensure compliance with that operator's obligations under these Regulations.

(2) Where an authorised officer in the exercise of the powers under paragraph (1) is prevented from entering any place, where he or she believes that there are records relevant to the obligations of the operator concerned, the officer may apply to a judge of the District Court for a warrant under this Regulation authorising the entry by the officer into the place concerned.

(3) Without prejudice to the powers conferred on an authorised officer by or under any provision of these Regulations, an authorised officer may, for the purposes of an investigation into an offence under these Regulations apply to a judge of the District Court for a warrant in relation to any place.

(4) If, on the hearing of an application under paragraph (2) or (3), a judge of the District Court is satisfied on sworn information of the officer that he or she—

(a) has been prevented from entering any place, or

(b) has reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence under these Regulations is to be found in any place,

that judge may issue a warrant under the judge's hand authorising an authorised officer accompanied, if the judge considers it appropriate to so provide, by such number of members of the Garda Síochána as may be specified in the warrant, at any time within 4 weeks from the date of issue of the warrant, to enter, if need be by force, the place and exercise any of the powers referred to in these Regulations.

Commission — application to court for compliance order

24. (1) Where the Commission is of the opinion that a person to whom this Part applies has contravened, is contravening or is about to contravene, or has failed, is failing or is about to fail to comply with—

(a) a provision of these Regulations,

(b) a condition or a requirement of a licence of a person referred to in Regulation 21(1), or

(c) a determination, or a requirement or direction imposed or given under a provision of these Regulations,

the Commission may apply to the court for a compliance order against the person.

- (2) An application shall be in writing and shall specify the following:
 - (a) the provision, condition, determination, requirement or direction that has been, is being or is about to be contravened or has not been, is not being or is about not to be complied with;
 - (b) the acts or omissions that, in the Commission's opinion, constitute or would constitute the contravention or failure to comply.
- (3) (a) An application may not be heard unless the court is satisfied that the person concerned has been served with a copy of the application.
 - (b) On being served with a copy of the application, that person becomes the respondent to the application and is entitled to appear and be heard at the hearing of the application.
- (4) (a) The court may, as it thinks fit, on the hearing of the application make an order compelling compliance with the provision, condition, determination, requirement or direction, or refuse the application.
 - (b) An order of the court compelling compliance may stipulate—
 - (i) that the provision, condition, determination, requirement or direction must be complied with immediately or may specify a reasonable time limit for compliance, and
 - (ii) appropriate and proportionate measures aimed at ensuring compliance.
- (5) An application shall be by motion on notice and the court, when dealing with the matter, may make such interim or interlocutory orders as it considers appropriate.
- (6) The court shall not deny any interim or interlocutory relief referred to in paragraph (5) solely on the basis that the Commission may not suffer any damage if such relief were not granted pending conclusion of the action.
- (7) (a) An application for an order under paragraph (1) may include an application for an order to pay to the Commission such amount not exceeding—
 - (i) 10 per cent of the annual turnover of a gas transmission system operator, or
 - (ii) 10 per cent of the annual turnover of either the electricity transmission system owner or the electricity system operator, as appropriate,

by way of financial penalty, as the Commission may propose as appropriate in the light of the non-compliance.

- (b) In deciding on such an application referred to in paragraph (7)(a), the court shall decide the amount, if any, of the financial penalty which should be payable and shall not be bound by the amount proposed by the Commission.
- (c) Any financial penalty ordered by the court to be paid by a person under this paragraph shall be paid to, and retained by, the Commission as income.
- (d) In deciding what amount, if any, should be payable, the court shall consider the circumstances of the non-compliance, including—
 - (i) its duration,
 - (ii) the effect on other electricity or natural gas undertakings,
 - (iii) the submissions of the Commission on the appropriate amount,
 - (iv) the amount of any fine imposed by a court in respect of a prosecution relating to the same matter,
 - (v) any undue hardship which the penalty may cause to the business of the person, and
 - (vi) any excuse or explanation submitted to the court by the respondent for the non-compliance.

(8) In this Regulation “application” means an application to the court for a compliance order in accordance with paragraph (1).

PART 8

CONSEQUENTIAL AMENDMENTS TO NATURAL GAS AND ELECTRICITY LEGISLATION

Amendment of Gas Act 1976

25. (1) Section 2 of the Act of 1976 is amended—

- (a) by deleting the definition of “ITO”,
- (b) by inserting after the definition of “harbour authority” the following:

“ ‘industrial customer’ means large industrial and commercial customers with a peak hourly demand greater than 50 Megawatt and a connection pressure of 16 barg or above;”, and
- (c) by inserting after the definition of “natural gas” the following:

“ ‘Natural Gas Market Directive’ means Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009⁶;

‘Natural Gas Market Regulations’ means European Communities (Internal Market in Natural Gas and Electricity) Regulations 2015 (S.I. No. 16 of 2015);”.

(2) Section 10A (as amended by Regulation 39 of European Communities (Internal Market in Natural Gas and Electricity) Regulations 2011 (S.I. No. 630 of 2011)) of the Act of 1976 is amended—

- (a) in subsection (9), by substituting “Article 41 of the Directive” for “Article 25 of the Directive”, and
- (b) by inserting after subsection (20) the following:

“Take-or-Pay Gas Commitments

(21) (a) The Commission may, on a case by case basis, grant a temporary derogation from Article 32 of the Natural Gas Market Directive, where the holder of a licence considers that allowing an application for third party access would cause serious economic and financial difficulties because of take-or-pay commitments of the licence holder under one or more gas purchase contracts.

(b) Applications for a derogation, referred to in paragraph (a), may be made to the Commission by the holder of a licence either before or after the holder of the licence has refused third party access to the gas network system, but must be made promptly and without delay where the licence holder has refused access.

(c) Applications, referred to in paragraph (b), shall be accompanied by all relevant information on the nature and extent of the difficulties and on the efforts undertaken by the licence holder to resolve the difficulties.

(d) When making a decision to grant or refuse to grant a derogation under this subsection, the Commission shall take into account in particular the following criteria:

- (i) the objective of achieving a competitive gas market;
- (ii) the need to fulfill public-service obligations within the meaning of Article 3 of the Natural Gas Market Directive and to ensure security of supply;
- (iii) the position of the natural gas undertaking concerned in the gas market and the actual level of competition in that market;

⁶OJ No. L 211, 14.08.2009, p. 94

- (iv) the seriousness of the economic and financial difficulties encountered by natural gas undertakings and transmission undertakings or eligible customers;
 - (v) the dates of signature and terms of the contract or contracts in question, including the extent to which they allow for market changes;
 - (vi) the efforts made to find a solution to the difficulties;
 - (vii) the extent to which, when accepting the take-or-pay commitments in question, the licensee could reasonably have foreseen, having regard to the provisions of the Natural Gas Market Directive, that serious difficulties were likely to arise;
 - (viii) the level of connection of the gas network system with other network systems and the degree of interoperability of those systems;
 - (ix) the effects the grant of the derogation would have on the functioning of the internal market in natural gas.
- (e) The Commission may, following assessment of an application under this subsection, grant a temporary derogation if it considers that alternative solutions are not reasonably available.
- (f) The Commission shall notify the European Commission promptly of any decision to grant a temporary derogation and shall submit to the European Commission all relevant information with respect to the proposed derogation.
- (g) Information, referred to in paragraph (f), may be submitted to the European Commission in an aggregated form.
- (h) Where a request is made by the European Commission to the Commission to withdraw or amend its decision to grant a temporary derogation, the Commission shall comply with such a request within 4 weeks of receiving such a request.
- (i) Licensees that have not been granted a temporary derogation under paragraph (e) shall not refuse access to the system because of take-or-pay commitments accepted in a gas purchase contract.
- (j) Serious difficulties shall in any case be deemed not to exist when the sales of natural gas do not fall below the level of minimum offtake guarantees contained in gas-purchase take-or-pay contracts or in so far as the relevant gas-purchase take-or-pay contract can be adapted or the natural gas undertaking is able to find alternative outlets.”.

Amendment of Electricity Regulation Act 1999

26. (1) Section 2(1) (as amended by section 4(1) of the ESB (Electronic Communications Networks) Act 2014 (No. 5 of 2014)) of the Act of 1999 is amended—

(a) by inserting after the definition of “electric plant” the following:

“ ‘electricity derivative’ means a financial instrument referred to in point 5, 6 or 7 of Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004⁷, where that instrument relates to electricity;”,

(b) by inserting after the definition of “electricity production from combined heat and power” the following:

“ ‘electricity supply contract’ means a contract for the supply of electricity, but does not include an electricity derivative;”,

(c) in the definition of “useful heat” by substituting “or cooling;” for “or cooling.”, and

(d) by inserting after the definition of “useful heat” the following:

“ ‘wholesale customer’ means a natural or legal person purchasing electricity for the purpose of resale inside or outside the system where he or she is established.”.

(2) Section 9 (as amended by the European Communities (Internal Market in Natural Gas and Electricity) Regulations 2011 (S.I. No. 630 of 2011)) of the Act of 1999 is amended—

(a) in subsection (1)—

(i) by substituting for paragraph (dc) (inserted by Regulation 3 of the European Communities (Internal Market in Electricity) Regulations 2010 (S.I. No. 450 of 2010)) the following:

“(dc) where the Commission determines it to be necessary under paragraph (db), to—

(i) examine the charges and the costs underlying such charges for electricity which have been supplied by the Board,

(ii) examine any proposal by the Board to alter charges for the supply of electricity,

(iii) examine the charges and the costs underlying such charges for natural gas which have been supplied in

⁷OJ No. L 39, 28.04.2006, p. 2

accordance with the licence granted to Bord Gáis Energy or its assignees,

- (iv) examine any proposal by Bord Gáis Energy or its assignees to alter charges for the supply of natural gas,
- (v) issue directions or approvals to the Board or Bord Gáis Energy or its assignees, in relation to either or both the nature or the amount of any charge or proposed charge for the supply of electricity or natural gas as relevant, to such class or classes of final customers as the Commission may specify, and
- (vi) publish a notice on the Commission’s website of any directions or approvals issued under subparagraph (v) stating the nature of the direction and the reasons for it,”

- (ii) by substituting for paragraph (dn) (inserted by Regulation 40 of the European Communities (Internal Market in Natural Gas and Electricity) Regulations 2011 (S.I. No. 630 of 2011)) the following:

“(dn) where applicable, to monitor technical cooperation between electricity transmission system operators and third-country electricity transmission system operators, and

(do) to review and approve, as appropriate, the criteria determined by the electricity transmission system operator to underpin the dispatch of generation installations and the use of interconnectors and such criteria shall—

- (i) be objective, published, applied in a non-discriminatory matter, and be without prejudice to the supply of electricity on the basis of existing contractual obligations ensuring the proper functioning of the internal market in electricity, and

- (ii) take into account the economic precedence of electricity from available generation installations or interconnector transfers and the technical constraints on the system,”

- (iii) by inserting after paragraph (fa) the following:

“(faa) to ensure that any information obtained from another regulatory authority in regard to a cross-border issue under the Natural Gas Market Directive, the Natural Gas Market Regulation, the Electricity Market Directive or the Electricity Market Regulation is treated confidentially to the same extent that is required of the other regulatory authority,” and

(iv) by inserting after paragraph (fd) the following:

“(fe) to request the opinion of the Agency on the compliance of a decision, taken by another regulatory authority on a cross border trade issue, with guidelines referred to in the Natural Gas Market Regulation, the Natural Gas Market Directive, the Electricity Market Regulation or the Electricity Market Directive,

(ff) where it considers that a decision relevant for cross-border trade taken by another regulatory authority does not comply with the guidelines referred to in paragraph (fe), to, if it considers it necessary, inform the European Commission within 2 months of the taking of the decision by that other regulatory authority,

(fg) where, following a request to the Agency by another regulatory authority in regard to a decision made by the Commission on a cross-border trade issue, the European Commission has requested the Commission to withdraw its decision, to comply with any such decision within a period of 2 months and to inform the European Commission accordingly,” and

(b) in subsection (1D) by deleting the following:

“or

(ii) any dispute between Bord Gáis Éireann and the ITO in respect of their obligations under the Natural Gas Market Directive,”

(3) Section 14 of the Act of 1999 is amended by inserting after subsection (2G) the following:

“(2H) The holder of an electricity supply licence under subsection (1)(b) and (1)(h) shall maintain for not less than 5 years and make available on a request being made by the Commission, the Competition and Consumer Protection Commission or the European Commission all relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.

(2I) The data referred to in subsection (2H) shall include details on the characteristics of relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.

(2J) The Commission may decide to make available to market participants elements of this information provided that commercially sensitive

information on individual market players or individual transactions is not released. This subsection shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004⁸.

(2K) The obligations on undertakings under subsection (2H) with respect to transactions by them in electricity derivatives with wholesale customers and transmission system operators shall not apply until the European Commission has adopted Guidelines, referred to in Article 40 of the Electricity Market Directive, defining the methods and arrangements for record keeping as well as the form and content of the data to be kept by undertakings.

(2L) In the event that the authorities referred to in subsection (2H) require access to data kept by entities falling within the scope of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004, the authorities responsible under that Directive shall provide them with the required data.”.

(4) Section 34 (as amended by Regulation 40(7) of the European Communities (Internal Market in Gas and Electricity) Regulations 2011 (S.I. No. 630 of 2011)) of the Act of 1999 is amended by substituting for subsection (6) the following:

“(6) (a) Any dispute between the transmission system operator or the distribution system operator and any person who is, or claims to be, a person to whom the transmission system operator or the distribution system operator, as the case may be, is obliged to make an offer for connection to and use of the transmission system or distribution system, as the case may be, whether as to the terms and conditions (including proposed charges) or otherwise, shall, upon the application of such person, be determined by the Commission, and the Commission shall issue a direction regarding its determination and the transmission system operator or the distribution system operator, as the case may be shall comply with and be bound by any such direction.

(b) Any dispute between a transmission system operator or a distribution system operator in regard to duties under the Electricity Market Directive and a person as respects matters specified in section 9(1B) in relation to electricity shall, upon the application of such person, be determined by the Commission, and the Commission shall issue a direction regarding its determination and such direction shall be binding on all parties concerned.

(c) (i) The Commission shall issue the determination referred to in paragraphs (a) and (b) within 2 months from the date of the receipt of the complaint.

⁸OJ No. L 145, 30.04.2004, p. 1

- (ii) The period referred to in subparagraph (i) may be extended by 2 months where the Commission seeks additional information in the matter, and such further extension as may be consented to by the applicant.
- (iii) Where the applicant concerns connection tariffs for major new generation facilities, the period concerned may be extended by the Commission without the consent of the applicant.
- (d) In the event of cross border disputes, the Commission has jurisdiction if the transmission system operator licensed under section 14(1)(e) is the system operator which refuses use of or access to the transmission system.”.

Amendment of Gas (Interim) (Regulation) Act 2002

27. The Gas (Interim) (Regulation) Act 2002 (No. 10 of 2002) is amended—

(a) in section 2(1), by—

- (i) deleting the definition of “ITO”,
- (ii) inserting after the definition of “distribution pipeline”:

“ ‘distribution system’, in relation to natural gas, means a system for the transport of natural gas through local or regional pipelines with a view to its delivery to customers;”,

(iii) inserting after the definition of “LNG” the following:

“ ‘LNG facility’ has the meaning assigned to it in point 11 of Article 2 of the Natural Gas Directive;”,

and

(iv) by inserting after the definition of “transmission pipeline” the following:

“ ‘transmission system’, in relation to natural gas, means a system for the transport of natural gas through a high pressure pipeline, other than an upstream pipeline, with a view to delivering natural gas to customers;”,

(b) in section 16 (as amended by the European Communities (Internal Market in Natural Gas and Electricity) Regulations 2011 (S.I. No. 630 of 2011))—

(i) by substituting for subsection (1) the following:

“ (1) The Commission may grant or refuse to grant to a person a licence to undertake in the State all or any of the following activities:

- (a) the supply of natural gas;
 - (b) the shipping of natural gas;
 - (c) the ownership and operation of a transmission system;
 - (d) the ownership and operation of a distribution system;
 - (e) the operation of a natural gas storage facility;
 - (f) the operation of an LNG facility.”,
- (ii) in subsection (1C)(a), by substituting “approved, certified and designated” for “approved and designated”,
- (iii) by inserting after subsection (1D) the following:

“ (1E) Without prejudice to its balancing obligations, a transmission system operator shall be prohibited from applying for a licence in respect of the activities mentioned in subsection (1)(a) or (b).

(1F) The holder of a licence under subsection (1)(a) shall keep for not less than 5 years and make available on a request being made by the Commission, the Competition and Consumer Protection Commission or the European Commission all relevant data relating to all transactions in gas supply contracts and gas derivatives with wholesale customers and transmission system operators as well as storage and LNG operators.

(1G) The data referred to in subsection (1F) shall include details of relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled gas supply contracts and gas derivatives.

(1H) The Commission may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004⁹.

(1I) The obligations on undertakings under subsection (1F) with respect to transactions by them in gas derivatives with wholesale customers and transmission system operators as well as storage and LNG operators shall not apply until such time as the European Commission has adopted Guidelines, referred to

⁹OJ No. L 145, 30.04.2004, p. 1

in Article 44 of the Natural Gas Market Directive, defining the methods and arrangements for record keeping as well as the form and content of the data to be kept by undertakings.

(1J) In the event that the authorities referred to in subsection (1F) require access to data kept by entities falling within the scope of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004, the authorities responsible under that Directive shall provide them with the required data.”,

(iv) in subsection (13)—

(I) by substituting for paragraph (ab) the following:

“ (ab) in the case of a holder of a licence under subsection (1)(a) or (1)(b), operate, maintain and develop under economic conditions such facilities or systems as required for the purpose of carrying out the activity for which it is licensed with due regard to the environment and public safety,”,

(II) by substituting for paragraph (e) the following:

“ (e) in the case of the holder of a licence under subsection (1)(c) take steps to prevent the disclosure in a discriminatory manner of commercially advantageous information about its own activities and shall not, if applicable, disclose any commercially sensitive information to the remaining parts of the undertaking of which it is part, unless this is necessary for carrying out a business transaction,”,

(III) by substituting for paragraphs (f) and (fa) the following:

“ (f) in the case of a holder of a licence under subsection (1)(c), (d), (e) or (f) provide users of the system or facility with the information they need for efficient access to, including use of, the system,”,

(IV) in paragraph (k) by substituting “Commission.” for “Commission, and”, and

(V) by deleting paragraph (l),

and

(v) in subsection (14) by substituting “Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009¹⁰” for “Regulation (EC) No. 1775/2005 of the European Parliament

¹⁰OJ No. L 211, 14.08.2009, p. 36

and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks”.

Amendment of European Communities (Internal Market in Electricity) Regulations 2000

28. The European Communities (Internal Market in Electricity) Regulations 2000 (S. I. No. 445 of 2000) are amended—

(a) in Regulation 2(1)—

(i) by inserting after the definition of ‘Minister’ the following:

“ ‘related undertaking’ means—

- (a) affiliated undertakings, within the meaning of Article 41 of the Seventh Council Directive 83/349/EEC of 13 June 1983¹¹,
- (b) associated undertakings, within the meaning of Article 33(1) of that Directive, or
- (c) undertakings which belong to the same shareholders;”

and

(ii) by inserting after the definition of “subsidiary” the following:

“ ‘system user’ means a natural or legal person supplying to, or being supplied by, a transmission or distribution system;”

(b) in Regulation 8(1)—

(i) by substituting for subparagraph (d) the following:

“(d) in accordance with—

- (i) the conditions in the licence granted in accordance with section 14(1)(e) of the Act of 1999,
- (ii) the grid code prepared under section 33 of the Act of 1999, and
- (iii) any Regulations made by the Commission under section 9(1)(d) of the Act of 1999, including any requirements which the Commission may impose on the transmission system operator in relation to the role of—
 - (I) system operator, or
 - (II) market operator,

¹¹OJ No. L 193, 18.07.1983, p. 1

to operate a system of dispatch and use of interconnectors on objective, economical and technical criteria, approved by the Commission, and applied in a non-discriminatory manner, without prejudice to the supply of electricity on the basis of existing contractual obligations and those criteria shall take into account the economic precedence of electricity from available generating installations or interconnector transfers and the technical constraints on the system.”,

and

(ii) by substituting for subparagraphs (h) and (i) the following:

“(h) to charge for the connection to and use of the transmission system in accordance with section 35 of the Act of 1999 and these Regulations;

(i) to offer terms and enter into agreements, where appropriate, for connection to and use of the transmission system with all those using and seeking to use the transmission system; and

(j) to provide information necessary for effective competition and the efficient functioning of the market. This information shall be made publically available and shall be without prejudice to preserving the confidentiality of commercially sensitive information.”,

(c) by substituting for Regulation 12 the following:

“Restriction on disclosure of commercially sensitive information by transmission system operator

12. (1) Without prejudice to any obligation to disclose information in accordance with law to which it is subject, a transmission system operator—

(a) shall preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its functions under these Regulations and the Act of 1999,

(b) shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner,

(c) shall not disclose any commercially sensitive information to the generation or supply parts of the Board, or any other person to whom a licence is issued under section 14(1) of the Act of 1999, unless it is necessary for carrying out a business transaction, and

(d) shall not in the context of sales or purchases of electricity by related undertakings, misuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.

(2) A person that fails to comply with paragraph (1) commits an offence and is liable, on summary conviction, to a class A fine or to imprisonment for a term not exceeding 6 months, or to both.”, and

(d) by substituting for Regulation 21 the following:

“Restriction on disclosure of commercially sensitive information by transmission system owner

21. (1) Without prejudice to any obligation to disclose information in accordance with law to which it is subject, a transmission system owner—

(a) shall preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its functions under these Regulations and the Act of 1999,

(b) shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner, and

(c) shall not disclose any commercially sensitive information to the generation or supply parts of the Board unless it is necessary for carrying out a business transaction.

(2) To ensure compliance with paragraph (1), a transmission system owner, in the performance of its functions under these Regulations, shall not use joint services, such as joint legal services, other than for administrative or IT functions, with the remaining parts of the undertaking.

(3) A person that fails to comply with paragraph (1) commits an offence and is liable, on summary conviction, to a class A fine or to imprisonment for a term not exceeding 6 months, or to both.”.

PART 9

REVOCATIONS

Revocations

29. (1) The following are revoked:

(a) the European Communities (Transit of Natural Gas) Regulations 1991 (S.I. No. 343 of 1991);

(b) the European Communities (Transit of Natural Gas) (Amendment) Regulations 1996 (S.I. No. 169 of 1996);

- (c) the European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011 (S.I. No. 570 of 2011); and
 - (d) other than Part 8, the European Communities (Internal Market in Natural Gas and Electricity) Regulations 2011 (S.I. No. 630 of 2011).
- (2) The following are revoked on the network transfer date:
- (a) other than Part 5, the European Communities (Internal Market in Natural Gas) (BGÉ) Regulations 2005 (S.I. No. 760 of 2005); and
 - (b) other than Regulation 9(b) and (c), the European Communities (Internal Market in Natural Gas) (BGÉ) (Amendment) Regulations 2007 (S.I. No. 377 of 2007).



GIVEN under my Official Seal,
19 January 2015.

ALEX WHITE,
Minister for Communications, Energy and Natural Resources.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

These Regulations transpose—

- (i) EU Directive 2009/73/EC concerning common rules for the internal market in natural gas, and
- (ii) EU Directive 2009/72/EC concerning common rules for the internal market in electricity.

The Regulations set out the unbundling rules which apply to gas transmission systems and transmission system operators and electricity transmission systems and transmission system operators.

Other provisions provide for the—

- Certification procedures to be administered by the Commission for Energy Regulation (CER) in regard to the certification of the gas transmission system operator and the electricity transmission system operator,
- Revocation of European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011 (S.I. No. 570 of 2011) and restatement of the certification procedures to be administered by the CER in regard to the certification of the electricity transmission system operator,
- Strengthening of the independent role of the Commission for Energy Regulation (CER),
- Imposition of obligations on the gas transmission system operator in regard to the submission of 10 Year Network Development Plans and the undertaking of investment in the transmission system,
- Rules in respect of the preservation of the confidentiality of commercially sensitive information by transmission systems owners and operators,
- Revocation of the European Communities (Internal Market in Natural Gas and Electricity) (Amendment) Regulations 2011 (S.I. No. 630 of 2011) with the exception of Part 8,
- Repeal and amendment of electricity and gas legislation to provide for the enhancement of the CER's monitoring function in regard to the regulation of the electricity and gas markets. In its enforcement role CER is provide with powers, when making application to the High Court for a compliance order, to recommend a level of fines to

the court where there is non-compliance by either the electricity or gas transmission system operator or owner,

- Imposition of obligations on the CER and on transmission system operators to co-operate with counterparts in other Member States and to preserve confidentiality of information,
- Reporting obligations on CER and TSOs, and
- Rules in regard to third party access to gas pipelines.

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nó trí aon díoltóir leabhar.

DUBLIN
PUBLISHED BY THE STATIONERY OFFICE
To be purchased from
GOVERNMENT PUBLICATIONS,
52 ST. STEPHEN'S GREEN, DUBLIN 2.
(Tel: 01 - 6476834 or 1890 213434; Fax: 01 - 6476843)
or through any bookseller.

€8.89



Wt. (B31072). 305. 1/15. Clondalkin. Gr 30-15.