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Your Ref

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Re: Priority Dispatch and Access - The Legal Position

Dear Michael

I refer to the above matter and to our phone conversation last week.

You have asked me to issue a summary on the legal aspects of priority dispatch and access.

Background:

As you are aware the principles of priority dispatch and access are most recently set out in Directives 2009/28/EC of 23 April 2009 (the "Directive"). Under Article 28 of the Directive it entered into force on the 20th day after its publication in the Official Journal of the European Union. I understand that the Directive was published in the Official Journal on 5 June 2009. You will also note that under Article 27 Member States must transpose the Directive into national law by 5 December 2010.

I think it is important to note the policy background of this Directive and, indeed, what its stated purpose is.

The main policy objectives are set out in recital 1 of the Directive which states,

"The control of European energy consumption and increased use of energy from renewable sources, together with energy savings and increased energy efficiency, constitute important parts of the package of measures needed to reduce greenhouse gas emissions and comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change ..."

In recital 25 it also goes on to state that

"one important means to achieve the aim of this Directive is to guarantee the proper functioning of national support schemes...in order to maintain investor confidence and allow Member States to design effective national measures for target compliance".

In recital 26 it further states that

"it is desirable that energy prices reflect external costs of energy production and consumption, including, as appropriate, environmental, social and health care costs"

In recital 60 of the Directive it goes on to state that,

"Priority access to the grid provides an assurance given to connected generators of electricity from renewable energy sources that they would be able to sell and transmit the electricity from renewable energy sources in accordance with connection rules at all times whenever the source becomes available. In the event that the electricity from renewable energy sources is integrated into the spot market, guaranteed access ensures that all electricity sold and supported obtains access to the grid, allowing the use of a maximum amount of electricity from renewable energy sources from installations connected to the grid. However, this does not imply an obligation on the part of Member States to support or introduce purchase obligations for electricity from renewable sources".

Finally, under recital 61 it states the following:

"In certain circumstances it is not possible fully to ensure transmission and distribution of electricity produced from renewable energy sources without affecting the reliability or safety of the grid system. In such circumstances it may be appropriate for financial compensation to be given to those producers. Nevertheless, the objectives of this Directive require sustained increase in the transmission and distribution of electricity produced from renewable energy sources without affecting the reliability or safety of the grid system. To this end, Member States should take appropriate measures in order to allow a higher penetration of electricity from renewable energy sources, inter alia, by taking into account the specificities of various resources and resources which are not yet storable. ... In order to accelerate grid connection procedures, Member States must provide for priority connection or reserve connection capacities for new installations producing electricity from renewable energy sources".

I have quoted extensively from the recitals in the Directive in order to demonstrate the central thrust of the policy behind the Directive. From this, it is clear that the main policy considerations in implementing this Directive are to increase the use of energy from renewable sources and to enable the European Union to comply with its climate change obligations under the Kyoto Protocol.

To this end Article 16.1 of the Directive states:

"Member States shall take the appropriate steps to develop transmission and distribution grid infrastructure, intelligent networks, storage facilities and the electricity system in order to allow the secure operation of the electricity system as it accommodates the further development of electricity production from renewable energy sources".

Under Article 16.2(b) it goes on to state:

"Member States shall also provide for either priority access or guaranteed access to the grid system of electricity produced from renewable energy sources".

And in Article 16.2(c) it goes on to say:

"Member States shall ensure that when dispatching electricity generating installations, transmission system operators shall give priority to generating installations using renewable energy sources in so far as the secure operation of the national electricity system permits and based on transparent and non-discriminatory criteria".

In Article 16.2 it is stated that the above commitments are only subject to the requirement to maintain the reliability and safety of the grid by the system operator.

Legal Analysis:

Under the well known rules of interpretation of legislation, terms must be given their ordinary meaning unless they are defined in some other fashion or are terms of art which have a particular industry meaning.

Having reviewed the recitals to the Directive as set out above and the language of Article 16, it is clear that the European Union through this Directive intends that renewable energy generators are given priority access to the national grid and priority dispatch of their electricity on to that national grid over and above other generators of electricity save where the secure operation of the national electricity system does not permit such priority access and dispatch.

It is important to note that the Directive stresses the need to take into account the holistic cost of generating electricity and also that the main policy objectives are not simply economic but also include environmental and healthcare issues as set out above. To this end I would draw your attention to recital 61 which suggests that financial compensation ought to be paid if renewable energy generators are curtailed save where the curtailment is necessary for safety and reliability reasons. You might also note the reference to this concept in Article 16.2 (c) of the Directive

Furthermore, the European Court of Justice had ruled, in *Inter-Environnement Wallonie* (Case C- 129/96) that Member States are under a negative obligation to refrain, during the period after adoption of a directive but before the time limit for implementation has expired "from taking any measures liable seriously to compromise the result prescribed by the directive". Therefore, the requirements of the Directive must be taken into consideration as part of this consultation.

Finally, I note that the Directive has to be implemented into Irish Law on or prior to 5 December 2010. Having regard for the principle of Direct Effects (as set out in the *Van Duyn -v- Home Office* (1974 ECR1337)) I would be of the view that post 5 December 2010 persons within the Irish State would enjoy rights under the Directive against any emanation

of the State in the event that this Directive is either not implemented into Irish Law or is not implemented correctly into Irish Law.

Single Electricity Market Consultation Paper dated 8 July 2009 regarding Principles of Dispatch and the Design of the Market Schedule in the Trading and Settlement Code:

I confirm that I have reviewed the above consultation paper and in particular paragraph 4.8 dealing with priority dispatch. In paragraph 4.8 two scenarios are suggested, the first being "Absolute Priority" and the second being "Qualified Priority".

In the section relating to Qualified Priority, two possible arguments are set out to support the notion that the principle of priority dispatch set out in the new Directive is of a qualified nature. The first is in relation to the legal principle of proportionality and the second suggests that the priority dispatch principle should not be read in isolation to the rest of the Directive. The authors of the consultation paper go on to state that the Directive has other requirements including (1) The TSO does not have an obligation to purchase electricity (2) that no particular price is guaranteed and (3) that the system operation is a valid factor to take into account.

While I would agree that the priority dispatch principle is not absolute as "secure operation" and the "reliability and safety" of the grid must be taken into account, I see no validation in the rest of the Directive to suggest that other factors need or can be taken into account. The overwhelming purpose of the Directive is to promote the use of renewable energy within the European Union for the reasons set out above. As a result, I believe that while the second argument has some merit to it, it is an over simplistic view of the law.

Furthermore, I do not believe that the legal principle of proportionality is appropriately used in the consultation paper. The legal principle of proportionality is a civil law concept and is typically used to challenge EU decisions which extend beyond the requirements of the various European Treaties. Therefore, the main circumstance in which this principle is evoked is where individual rights have been restricted through legislative action over and above what is required by the European Union Treaties. The second circumstance is where a penalty imposed by European Law is excessive.

As a result, I struggle to see why the Regulatory Authorities, as a policy implementer, would use this legal principle to interpret a European Directive which is reflective of existing Irish Government policy.

In the section dealing with Absolute Priority the authors of the consultation paper state that "it is arguable that the requirement for Member States to give priority in dispatching generation for renewable energy sources is absolute." They also go on to state that this would imply certain scenarios occurring.

For the reasons I have set out above I do not believe that the principle of priority dispatch is absolute. However, I feel obliged to respond to the 4 scenarios suggested in the paper and I have set these responses out below:



1. **"There is no need for the renewable generator to have a prior purchaser"** – the Directive has made clear that there is no obligation on a system operator to buy electricity. Further, given the structure of the single electricity market I see no practical relevance to this point.
2. **"The system operator may not take merit order into account when dispatching renewable, even if they are expensive"** – clearly the single electricity market will set the price by which electricity is bought and sold. Therefore, reference to "expensive" electricity is not appropriate. However, I would be of the view that in a "tie-break" situation, electricity from a renewable generator ought to be dispatched in priority to any other form of electricity generated.
3. **"The system operator would take any action to run a renewable generator or prevent dispatching it down... even if this meant for example incurring large start up costs"** – from a review of the new Directive I believe that this is a correct statement of the legal position save obviously where secure operation and/or the reliability and safety of the grid could not be maintained.
4. **It implies an obligation to build huge amounts of transmission system and invest heavily in static equipment to provide the necessary reactive compensation, inertia, etc.** – it is quite clear under Article 16.1 of the Directive that Member States are obliged to take appropriate steps to develop transmission and electricity grid infrastructure in order to allow secure operation of the electricity system as it accommodates the increased development of renewable energy sources. It can be safely assumed that these "appropriate steps" do not include an obligation to build out the grid beyond what is required to meet EU renewable energy targets.

Conclusion:

As set out above I believe the intent and wording of the Directive is clear and gives Priority Access and Priority Dispatch to renewable generators save in the case where secure operation and/or reliability and safety of the grid can not be maintained. Whilst the consultation paper suggests other "scenarios" that might qualify that principle, I would be of the view that these "scenarios" are taken out of context and should be viewed in the light of the clear wording of the Directive.

I would also be of the opinion that from an overview of the Consultation Paper, the authors appear not to take sufficient cognisance of the legislative framework in which a single electricity market operates. Admirably, its authors are focused on the efficiencies that might be achieved if the rules were amended. However, this focus does not appear to take into account the binding obligations of the EU Legislative Framework.

On the basis of the principle set down in the Inter-Environnement Wallonie (Case C-129/96), I also believe it would be difficult for the Regulatory Authorities to ignore the clear policy intentions of the Directive even before it is transposed into Irish law.



Finally, it is clear that Governments when implementing the Directive should guarantee the proper functioning of national support schemes in order to maintain investor confidence and allow Member States to design effective national measures for meeting the mandatory EU targets on renewable energy generation. I would be of the view that investor confidence in the Irish market must be maintained during this consultation also.

Yours sincerely

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