



TSO CERTIFICATION IRELAND

Guidance Paper

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1. Background

The European Communities (Internal Market in Electricity) (Certification and Designation of Transmission System Operator) Regulations 2011 (Statutory Instrument – SI 570 of 2011)¹ (‘the Regulations’) requires that a person who is licensed as a transmission system operator in Ireland under Section 14(1)(e) of the Electricity Regulation Act 1999, or a transmission system owner under Section 14(1)(f) must ensure that he is certified as a transmission system operator in accordance with the procedures under the legislation at all times when he acts under the authority of that licence.

These requirements transpose into Irish law the obligations of Directive 2009/72/EC (‘the Directive’) of the European Parliament and of the Council of 13 July 2009.² The purpose of this paper is to invite application for certification and advice on the information to be submitted in order to enable assessment of the application.

SI 570 of 2011 outlines the requirement for the transmission system operator or the transmission system owner in Ireland to apply to the Commission for Energy Regulation (CER) to be certified as a transmission system operator (Section 3 (1)). The CER is required carry out a certification process under Section 4 (1):

“The Commission (CER) shall establish and operate a certification procedure to ensure compliance by the transmission system operator and the transmission system owner with the requirements of Article 9 of the Directive.”

Section 5 of the Regulations require the CER to make a preliminary decision in relation to certification of a transmission system operator, to notify its decision to the European Commission and to adopt and publish a final decision on certification consistent with the requirements of the Directive.

The SEM Committee of the Commission for Energy Regulation decided in November 2011³ that the issue of TSO certification in Ireland was a ‘SEM matter’. Consequently, decisions as to the exercise of the CER’s functions in relation to this issue are being taken on its behalf by the SEM Committee. References to the CER in this document should be read in that context, unless otherwise stated. This decision was consistent

¹ Please refer to the following link:

<http://www.irishstatutebook.ie/2011/en/si/0570.html>

² Please refer to the following link:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0055:0093:EN:PDF>

³ Please refer to the minutes of SEM Committee meeting No. 47 at the following link:

http://www.allislandproject.org/en/SEM_meeting_minutes.aspx?article=36fe7ee7-7a4d-4cde-ba47-b77cdcc5d24c

with the SEM Committee's decision of May 2011⁴, that TSO certification in Northern Ireland is a 'SEM matter'.

On 5 December 2011, the SEM Committee published its guidelines for the certification of the transmission system operator in Northern Ireland – SEM-11-103(i)⁵. The guidance provided in this document reflects the views of the SEM Committee as at January 2012⁶ and has been developed to be consistent with SEM-11-103(i) to the extent possible, given the differences in legislation between Ireland and Northern Ireland.

It should not be taken as indicative of the views of any other body, including the Department of Communications, Energy and Natural Resources and the European Commission, as to the matters discussed. This document is also subject to revision in order to take into account developments following January 2012 including any decisions taken, or any opinions or guidance provided, by other bodies such as the European Commission or the courts.

2. Grounds for Certification

Section 4 (1) of the Regulations requires the CER to carry out a certification procedure for the transmission companies in Ireland in line with the requirements of Article 9 of Directive 2009/72/EC. Article 9 provides four grounds for certification: ownership unbundling, independent system operator in accordance with Article 13 of the Directive, independent transmission operator under the provisions of Chapter V of the Directive and derogation from ownership unbundling on the grounds in paragraph (9) of Article 9 of the Directive.

The requirements for compliance with ownership unbundling are outlined in Article 9, paragraph 1. Paragraph 8 provides that where on 3 September 2009, the transmission system belonged to a vertically integrated undertaking (VIU), as was the case in Ireland, a Member State may decide not to apply paragraph 1, allowing for designation of an Independent System Operator (ISO) under the requirements of Article 13 or an

⁴ Please refer to the minutes of SEM Committee meeting No. 39 at the following link:
http://www.allislandproject.org/en/SEM_meeting_minutes.aspx?article=36fe7ee7-7a4d-4cde-ba47-b77cdcc5d24c

⁵ Please refer to the following link:
http://www.allislandproject.org/en/transmission_current_consultations.aspx?article=ee4464ea-1c6a-423c-a3dc-1f07c9561290&mode=author

⁶ SEM Committee Meeting minutes Number 49 to be published shortly.

Independent Transmission Operator (ITO) under the requirements of Chapter V of the Directive.

In addition, Article 9 (9) of the Directive allows for the following:

Where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter V (Independent Transmission Operator), a Member State may decide not to apply paragraph 1 (of Article 9 – Ownership Unbundling).

Commission Staff Working Paper SEC (2011) 1095⁷ provides practical guidance on how the European Commission will treat and assess notifications by National Regulatory Authorities of preliminary decisions and the information necessary for its assessment of the decisions.

Applicants should set out the grounds for their application with reference to the circumstances that warrant the application. If not applying under the first certification ground of full ownership unbundling set out in Article 9 of the Directive, applicants should explain why they are not eligible on this ground. Where the applicant is not making an application on the grounds of full ownership unbundling the Regulations allow application under the ISO model, the ITO model and under paragraph (9) of Article 9 of the Directive. Applicants should set out their eligibility for the particular model chosen for their application.

Those considering submitting applications for certification on the basis of either the second, third or fourth grounds for certification should note that the SEM Committee considers that (having regard to the purpose of the Directive, as reflected in particular in recital (16) of the preamble) these grounds may be available only in respect of a transmission system which remains within the ownership of the same VIU which owned it on 3 September 2009.

3. Procedure for Certification – General

Commission Staff Working Paper SEC (2011) 1095 provides a questionnaire which describes the information, including general information, necessary for the assessment of the preliminary decisions of the certification procedure for Ownership Unbundling,

⁷ Please refer to the following link:

http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/sec_2011_1095.pdf

ISO and ITO models. It does not provide specific guidance on the information requirements of an application on the second ground of the Regulations.

The second ground, allowing for a derogation from the ownership unbundling requirement for the purpose set out in recital (16) of the Directive, provides for certification in the event that, on 3 September 2009, the transmission system belongs to a VIU and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter V of the Directive.

The format and content of the ITO checklist set out in Commission Staff Working Paper SEC (2011) 1095, in addition to the purpose and requirements set out in recital (16) and Chapter V of the Directive, are therefore useful cross-checks for the purposes of the evidentiary requirements for an application for derogation on the grounds in paragraph (9) of Article 9 of the Directive. Where the applicant is not able to meet any individual requirement of the ITO checklist and Directive, it would be expected that the applicant would provide evidence showing that the arrangements in place are nonetheless such as to guarantee more effective independence of the transmission system operator.

In undertaking the task of assessing applications under Article 9 (9) regard will be taken not only to the provisions of Article 9 (9) and Chapter V but also to the surrounding context as articulated in the preamble to the Directive (and in particular recitals (11), (12), (16) and (19)) and also the European Commission's own Staff Working Paper on the Unbundling Regime dated 22 January 2010.⁸ Extracts from these recitals plus additional notes are contained in Appendix A.

4. Procedure for Certification – Article 9(9) Derogation

The arrangements in place at 3 September 2009 are subject to test and the applicant must submit evidence for those arrangements. However, it will also be necessary for the applicant to address any significant or material changes to these arrangements since that date. This will require full description of changes, their impact on the eligibility for the Article 9(9) derogation taking account of its stated purpose, the grounds for certification and full and complete provision of evidence of these changed arrangements. The onus is on the applicant to demonstrate eligibility in the circumstances as they exist.

⁸ Please refer to the following link:

http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_unbundling_regime.pdf

An assessment of the effectiveness of Article 9 (9) arrangements (and the relative effectiveness of those arrangements as compared with the provisions of Chapter V of the Directive) should be principally concerned with the following areas, address the following questions and provide evidence that may include, but not be limited to, the following:

1. Resources:

Does the applicant have the necessary human, technical, financial and physical resources to carry out its tasks and functions?

Evidence may include a description of tasks as set out by Articles 12 and 22 of the Directive; description of human resources including terms and conditions of employment; organisation chart; unbundled accounts; asset register; certification of ownership of assets, and descriptions of technical and physical resources.

2. Organisation, Governance and Incentives:

How effective are the arrangements in ensuring that TSO functions are performed independently of any VIU concerned? How effective are the arrangements in removing the incentive for the VIU concerned to discriminate against competitors as regards network access and investment?

Evidence may include a Group Chart of the applicant within the VIU showing shareholdings and activities; membership, powers, governance documentation and minutes of the Supervisory Body; Compliance Plan and the identity, job description and employment conditions of the Compliance Officer; copies of standard procurement and tendering procedures/policies/contract terms; certification of separation of IT systems etc.; description of the communication strategy, corporate identity, branding and premises, and details of auditors to the applicant and VIU.

3. Information:

How effective are the arrangements in preventing the VIU concerned obtaining access to information relating to the performance of TSO functions?

Evidence may include corporate policies and procedures and contracts of employment.

4. Regulation:

How effective are the arrangements in terms of producing a regulatory regime which is transparent and efficient and not overly onerous for the National Regulatory Authority?

Evidence may include description of the arrangements for compliance and how these may fulfill the requirements to be transparent and not overly onerous for the National Regulatory Authority.

In reaching a decision on relative effectiveness, consideration will be given to the overall effects achieved by the arrangements in question and not simply the individual effects of each of the matters highlighted above. The onus is on the applicant to demonstrate that there is more effective independence guaranteed by the arrangements in question.

The questions are therefore indicative of those that might be addressed and provide only examples of the evidence that might be provided to substantiate responses. The applicant may also wish to address questions arising from the ISO model in its demonstration of the effective independence of the overall arrangements pertaining to transmission system operation in Ireland. These questions and those relevant to the other grounds for certification are contained in the Commission Staff Working Paper SEC (2011) 1095.

In particular the applicant should fully describe the arrangements in place governing the operation of the transmission system and the roles of related transmission licensees. If required, it may consult with all related licensees so that it can fully evidence the respective roles, tasks and responsibilities of those involved in electricity transmission.

Applications should contain sufficient information and analysis to enable a complete understanding of the arrangements, be contained within a single document and allow an informed decision to be made without reference to any other information or documentation. The applicant should therefore consider provision of all information relevant to the grounds for certification without limit to that specifically required by the questions raised in the Directive, Commission Staff Working Paper (2011) 1095 or others referenced above. The information should nevertheless be suitably focused on the relevant issues.

The applicant should clearly identify any information in the application which is considered to be confidential and for each piece of information identified provide an explanation as to why that information is confidential. The application should be authorised by an appropriate Director of the company confirming that the documentation contained is true and complete and that any event or circumstance which may affect the basis of certification will be notified to the CER.

This guidance note is not a substitute for the requirements of the Directive or the Regulations. The CER reserves the right to request additional information or clarification under Section 5 (7) of the Regulations.

5. Process for Certification

The Directive, the Regulations and the Commission Staff Working Paper (2011) 1095 set out (or authorise the CER to determine) the process, including timescales, to be followed in assessment of an application:

- Applications must be made in writing within eight weeks of publication of this guidance dated Monday 6 February 2012 and should address the issues raised in this Guidance, the Regulations, Directive and Working Paper referred to above and contain the information required as evidence to support certification. The closing date for applications is therefore close of business Monday 2 April 2012.
- The applicant shall provide a copy of the application to any related transmission licensees when the application is being made to the CER;
- A related licensee may make such representations on the application for certification as it thinks fit to the CER, which shall have regard to any representations made and what, if any, qualification measures should be taken. Such representations must be made within 21 days of receipt of the application, with a copy also provided to the applicant.
- The CER may request any further information (from the applicant, a related transmission licensee and undertakings performing any of the functions of generation or supply) as it considers relevant to the application. Such information must be provided by the date specified in the request.
- The CER will, within four months beginning with the day on which it receives an application for certification, make a preliminary decision as to whether it should certify the applicant. This period may be extended if further information has been requested and not supplied by the date specified. The period may be extended by the amount of the delay.

After making the preliminary decision the CER shall notify the applicant, related transmission licensee(s), the Department of Communications, Energy and Natural Resources and the European Commission of its preliminary decision promptly and provide the European Commission with all relevant information with respect to that decision.

The European Commission has two months in which to examine the decision and deliver its opinion. The European Commission may also request the European Agency for the Cooperation of Energy Regulators (ACER) to provide

its opinion of the decision, in which case the period may be extended by a further two months.

- Within two months of receiving the opinion of the European Commission the CER shall adopt a final decision regarding certification taking account of the opinion of the European Commission. In the absence of an opinion the European Commission shall be deemed to not have raised concerns regarding the preliminary decision.
- Where an application for derogation on the grounds in paragraph (9) of Article 9 of the Directive has been made, the European Commission rather than the CER will take the final decision as outlined under Article 3 (6) of Regulation (EC) No. 714/2009.

Appendix A

- Recital (11) notes that, "Only the removal of the incentive for VIUs to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. For that reason, the European Parliament, in its resolution of 10 July 2007 on prospects for the internal gas and electricity market [...] referred to ownership unbundling at transmission level as the most effective tool by which to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market";

According to recital (12), "Any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime and should not create an overly onerous regulatory regime for national regulatory authorities";

Recital (16) states that, "The setting up of a system operator or a transmission operator that is independent from supply and generation interests should enable a VIU to maintain its ownership of network assets whilst ensuring effective separation of interests, provided that such independent system operator or such independent transmission operator performs all the functions of a system operator and detailed regulation and extensive regulatory control mechanisms are put in place"; and

Recital (19) states that, "the full effectiveness of the independent system operator or independent transmission operator solutions should be ensured by way of specific additional rules. The rules on the independent transmission operator provide an appropriate regulatory framework to guarantee fair competition, sufficient investment, access for new market entrants and the integration of electricity markets. Effective unbundling through the independent transmission operator provisions should be based on a pillar of organisational measures and measures relating to the governance of transmission system operators and on a pillar of measures relating to investment, connecting new production capacities to the network and market integration through regional cooperation. The independence of the transmission operator should also, inter alia, be ensured

through certain 'cooling-off' periods during which no management or other relevant activity giving access to the same information as could have been obtained in a managerial position is exercised in the VIU. The independent transmission operator model of effective unbundling is in line with the requirements laid down by the European Council at its meeting on 8 and 9 March 2007".

The requirements of the European Council referred to in recital (19) are contained in the 'Energy Policy for Europe' action plan agreed by the Council , which includes the following statement: "Taking note of the Commission's internal market report and the final report following the sector inquiry on the gas and electricity markets, with the aim of increasing competition, ensuring effective regulation and encouraging investment to benefit consumers, the European Council: [...] taking account of the characteristics of the gas and electricity sectors and of national and regional markets, agrees on the need for: • effective separation of supply and production activities from network operations (unbundling), based on independently run and adequately regulated network operation systems which guarantee equal and open access to transport infrastructures and independence of decisions on investment in infrastructure; [...]"

- According to the Commission's interpretative note (22 January 2010, pages 4/5), "Although [the OU, ISO and ITO] models provide for different degrees of structural separation of network operation from production and supply activities, each of them is expected to be effective in removing any conflict of interests between producers, suppliers and transmission system operators. This means that they should remove the incentive for VIUs to discriminate against competitors as regards access to the network, as regards access to commercially relevant information and as regards investments in the network. The three models should create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime (recitals 11 and 12 Electricity Directive and recitals 8 and 9 Gas Directive). This requirement for effective separation should provide general guidance for the interpretation of the unbundling rules of the Directives".