



Re: Consultation Paper on Generator Financial Reporting in the SEM – SEM-11-106

Endesa Ireland welcomes the opportunity to respond to the *Consultation Paper on Generator Financial Reporting in the SEM*.

Endesa Ireland acknowledges that stakeholders may wish to know about the financial performance of generators operating in the SEM but considers that the majority of this data is currently available to the RAs and to the public. The additional information which the RAs have proposed to collect and publish is commercially sensitive and sufficient justification has not been given for its collection or release to third parties, this is discussed further below.

Endesa Ireland notes that under s9BD of the Electricity Regulation Act 1999 and the SEM Order, the RAs' actions must be '*transparent, accountable, proportionate, consistent and targeted only at cases where action is needed*'. Endesa Ireland does not believe that the proposals contained in this paper are proportionate or that it has been shown that the proposal is targeted at cases where action is needed. For the reasons set out in this response, Endesa Ireland considers that the proposals are unjustified. Given SEM design, Endesa Ireland does not consider it can be convincingly argued that this information is needed.

In short, Endesa Ireland considers that generators provide sufficient information to the RAs in their audited accounts, which are also available to the public. We consider that the design of the SEM, particularly bidding rules, are sufficiently restrictive on generators to ensure that they do not earn supra-normal profits. Endesa Ireland is unsettled by the statements throughout this consultation paper that the RAs would use the proposed information to inform policy-making in the SEM. This creates regulatory uncertainty, and undermines confidence in SEM design. The proposals made in this Consultation Paper seem reminiscent of a fully regulated power generation sector with price control and regulated tariffs where income is fixed, but guaranteed. Endesa Ireland considers that if the RAs wish to make such a retrospective move then the SEM market should be dismantled; we see no reason to justify providing detailed data on CfD positions or fuel-related operating costs

Endesa Ireland agrees with the SEM Committee's comments in section 5.2 of the paper that clear market rules and transparency in the SEM have played a part in encouraging investments in new generation capacity over the last few years. However, we do not agree that it is a 'natural extension' of this approach for the 'RAs to publish a greater level of information on the profitability of generators operating in the market via a report detailing annual profits across key generators'. Endesa Ireland considers that the proposed 'natural extension' is not necessary as it is accepted that sufficient transparency already attracts new investment, and that the proposal goes too far by infringing upon a company's right to confidentiality for commercially sensitive data.¹

Similarly, it is stated in section 5.4 of the paper that it is important to gather "as much data as practicable" on the profitability of generators in the SEM – Endesa Ireland disagrees with this statement and argues that it is important to gather as much information as is *relevant and*

¹ Endesa Ireland disagrees with the RAs' statement that the protection of customers' interests is the principal objective of the RAs. CER has a number of duties; we are not aware of any legislation giving precedence to a particular duty.

appropriate. Endesa Ireland considers that the current requirement to submit annual accounts is the appropriate level of information; and in this regard refers to the rule applicable to all Companies that annual accounts are published by the CRO – additional requirements should not be placed on energy generation companies.

Endesa Ireland notes the RAs' comments that it will be possible to compare generator profits in the SEM with profits earned by generators in Great Britain, but questions whether this would be a legitimate comparison given the differences between the markets and jurisdictions. Generators in GB are not bound by the SEM BCoP and are therefore able to make greater profits than generators in the SEM. Furthermore, the proposal in this consultation paper goes significantly further than requirements in the UK by requesting information on CfD revenue and requiring information by generation site.² In Spain, a market bearing more similarities to the SEM, this level of information is not required by the Regulator, rather, annual accounts are provided by energy undertakings.

Proposed reporting requirements

At the outset, Endesa Ireland notes that the financial statements sent to the RAs under Condition 2 of the generation licence relate to the 'Generation Business', which is defined as the 'licensed business of the Licensee and any affiliate or related undertaking of the Licensee in the generation of electricity or the provision of Ancillary Services'. A number of the elements listed in the reporting template do not fall under this definition and should not therefore be included (for example, CfD revenue and Other Revenue may not be included in the generation business). On this basis, we consider that the RAs' proposal goes further than foreseen by the licence. In addition, this may result in a discrepancy between the information provided in the template and the financial statements due to their different scopes.

Condition 12 of the SEM Generation Licence refers to furnishing further information to the Commission, but only where the Commission requires this information 'for the purpose of performing the functions assigned or transferred to it by or under the Act'. Endesa Ireland considers that information relating to CfDs and Other Revenue does not fall under this licence requirement as the RAs do not have functions in respect of those activities under the Act.

Endesa Ireland considers that even if a generator presents aggregated information, the size of the SEM market and generators' portfolios mean that contract prices for individual stations/products can be inferred. Endesa Ireland feels that it is problematic to require a financial reporting template for each generation site as contract prices are even clearer. Also, in some cases it is not fully accurate to allocate costs to a particular station (eg impairment) and presentation under the headings proposed would not necessarily align with the annual reports as assumed by the RAs at section 5.3.

As to the reporting template proposed in section 6.1, Endesa Ireland makes the following points:

1. Endesa Ireland considers that the RAs should arrange to collect data on volume of electricity sold, revenue from the SEM Pool and Revenue from Capacity Payments for **all** generators from SEMO as they already collate this information. Where this imposes

² <http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/Final%20Guidance%20publication%20EH.23.05.pdf>

further costs on SEMO these should be included in its allowed revenue and thereby socialised.

2. As discussed above, revenue from Contracts for Difference is outside of the RAs' scope; Endesa Ireland does not believe that the RAs should request this information as the market is not regulated and the information is commercially sensitive. In addition, these contracts will not necessarily align with the generators' financial year and may span multiple years or part of a year; thus comparing different generators' submissions will not compare like with like. Using part data is problematic and reflects business decisions taken at different points in time. See discussion on commercial sensitivity below.
3. Generator revenues that have been earned outside of the market do not fall within the scope of the generation licence. Endesa Ireland does not consider that the RAs should request this information.
4. Fuel-related operating costs are extremely commercially sensitive and should not be requested or published for the reasons outlined below. In addition, there is a level of interpretation regarding Fuel Related Operating Costs which might include price paid, 'take or pay' conditions, how a plant is managed, fuel degradation over time and how predictable and frequent the running of the station is. Fuel could be purchased in one financial year and used in another. Each of those considerations could give a skewed picture of fuel costs and profits.
Endesa Ireland requests further discussion on what is meant by a generator's 'net carbon position' and considers this may be commercially sensitive and not within the RAs' remit.
5. Non-fuel related Operating Costs, such as generator procurement, are considered to be commercially sensitive and should not be requested or published. In addition, this information may not be relevant to SEM pricing.
6. Endesa Ireland considers that the RAs should collect from the TSO and publish as separate items information on Ancillary Services Payments and Generator Performance Incentives/Penalties by station and number of events as these areas of the market are not sufficiently transparent. Endesa Ireland also considers that revenues from Constraints Payments should be collected from SEMO and published by station to provide clarity to this aspect of the market.
7. Information on EBITDI, EBIT and Net Profit is already available from financial statements submitted under Condition 2 of the licence to generate.

Thus information to be provided under points 1 and 6 can be provided by SEMO and the TSO for all generators and information under point 7 is already provided by generators. Endesa has argued that the other points of information should not be sought, and should absolutely not be published. For this reason, Endesa Ireland does not consider that generators should be required to submit any additional information than the information which is presently submitted. Furthermore, the additional information that the RAs are seeking to be published can be provided by the System and Market Operators for all generators registered in the market, eliminating the need for a minimum threshold.³

³ If there is to be a threshold deciding to whom any new reporting requirements are to apply, Endesa Ireland considers that this should be based on minimum expected generation or total turnover as this is more indicative of the impact these generators have on the market than generation capacity. Furthermore, if, as stated, the RAs wish to use this information to inform policy, similar information on all generators should be analysed so that impacts on all generators can be assessed.

Commercial Sensitivity/Confidentiality

Endesa Ireland considers that it is absolutely inappropriate to publish information on Contracts for Difference, Fuel Related Operating Costs and Non-fuel Operating Costs. This information is extremely commercially sensitive; the required publication of such commercially sensitive data could in fact have a negative effect on competition, as competitors would not be willing to enter the market with these requirements in situ. In addition, many commercial contracts CfDs, fuel and other commodities contain confidentiality clauses which prohibit the disclosure of this information. For these reasons, Endesa Ireland considers that this information for existing contracts should not be published under any circumstances. We also consider that potential counterparties would be deterred by conditions allowing publication of this information as it would release information which they consider commercially sensitive and which may impact on their relationships and negotiations with other parties. We feel that this may reduce contracting options and negotiating options for SEM market participants which would have negative consequences for SEM customers and market participants. As parties who do not require licences may be active in CfD markets, the proposed information requirements on licensees and proposed publication of sensitive information as outlined above could potentially create information asymmetries between competitors, as discussed above.

Endesa Ireland refers to Article 30 of Directive 2009/72/EC concerning common rules for the internal market in electricity which states that:

Right of access to accounts

1. Member States or any competent authority they designate, including the regulatory authorities referred to in Article 35, shall, insofar as necessary to carry out their functions, have right of access to the accounts of electricity undertakings as set out in Article 31.

2. Member States and any designated competent authority, including the regulatory authorities, shall preserve the confidentiality of commercially sensitive information. Member States may provide for the disclosure of such information where this is necessary in order for the competent authorities to carry out their functions.

In addition, Endesa Ireland points out that Article 12 of the *REMIT Regulation (1227/2011)*, which has the *raison d'être* of improving transparency in wholesale markets, provides that ACER should maintain the confidentiality of information it receives under the Directive, as should Member States and their agencies. That Article also provides that commercially sensitive information may only be made publicly available '*provided that commercially sensitive information on individual market participants or individual transactions or individual market places are not disclosed and cannot be inferred*'. In addition the Article states that '*Information shall be published or made available in the interest of improving transparency of wholesale energy markets and provided it is not likely to create any distortion in competition on those energy markets*'.

This illustrates that under the European legislative scheme access to accounts is viewed as an 'above minimum' requirement rather than a baseline and that RAs are charged with preserving the confidentiality of commercially sensitive information. The REMIT Regulation is aimed at increasing integrity and transparency of wholesale energy markets in order to foster open and fair competition for the benefit of final customers of energy, yet the Regulation respects the principle that commercially sensitive information must remain confidential and accepts that excessive transparency can distort competition. Endesa Ireland submits that the present proposals by the RAs infringe this principle and should not proceed.

Endesa Ireland notes that sub-condition 2(2)(5)(c) of the SEM generation licence provides that annual accounts of licensees are to be published *with the exception of the part of such statements which show separately the amounts charged, apportioned or allocated and describe the bases of charge or apportionment or allocation respectively*. This shows that the RAs accept that commercially sensitive elements should not be published.

Section 9BB of the 1999 Act prohibits the CER from disclosing or publishing information received by it under any provision of the law of Northern Ireland or a licence or authorisation or licence granted in Northern Ireland unless disclosure is required by law or the disclosure is made to facilitate performance of functions under the Act. Endesa Ireland does not consider that these tests are met by the proposal at hand.

Finally, Article 63 of the Energy (Northern Ireland) Order 2003 restricts the disclosure of information obtained under the Order except in certain circumstances; Endesa Ireland does not believe that these circumstances are met by the proposal in question.

Freedom of Information Guidance

Endesa Ireland considers it instructive to consider how, if this information was held by the Commission, a Freedom of Information request for that information would be dealt with. Under section 27(2) of the Freedom of Information Act 1997, which deals with commercially sensitive information, a request shall be refused if the record requested contains:

- (a) trade secrets of a person other than the requester concerned,
- (b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or
- (c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

Section 27(3) provides that the above does not apply 'in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under section 7 concerned'.

Freedom of information guidance states that trade secrets may include data on previous customer purchases, which would cover information proposed to be published under this proposal.⁴ It is clear that the information proposed to be published by the RAs would also include information that could prejudice the competitive position of electricity generators (as

⁴ <http://foi.gov.ie/12-10-commercially-sensitive-information/>

per subsection(c)) and could prejudice the conduct or outcome of contractual or other negotiations (subsection (d)). Endesa Ireland does not see that there is a public interest in publishing this information and therefore submits that the RAs adopt this standard in making a decision on whether to publish information in respect of generators' financial positions.

Damaging to Competition

Endesa Ireland considers that the publication of the level of information proposed by the RAs may be damaging to competition. In this regard we refer to the European Commission's consultation on Guidelines of Fundamental Electricity Data Transparency⁵ which states that 'transparency can, in particular on concentrated markets, also facilitate anti-competitive behaviour'. In particular, this document makes reference to the the European Commission's *Guidelines on horizontal co-operation agreements*⁶, which states:

58. However, the exchange of market information may also lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors (2). The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination⁷.

Endesa Ireland considers that this type of restriction of competition is a real danger under the proposals of the RAs and for this reason must not be implemented. We are convinced that the information which the RAs are considering publishing would enable undertakings to be aware of their competitors' market strategies.

Higher Level Impacts

Endesa Ireland is also concerned that the publication of the information proposed to be included in the reporting template may inappropriately impact on the value of the company itself, or its parent company, for example on the share price of a publicly quoted company. In addition the cost of capital for a company may be affected by such publication.

Endesa Ireland notes that publicly listed companies must release financial information to the market in a specified manner and is concerned that the proposals in question may not be compatible with this process or may put an additional burden on such companies. The Irish Stock Exchange's (ISE) Listing Rules provide, where annual results are to be published, that the ISE may authorise the omission of certain information where disclosure of such information would be contrary to the public interest or seriously detrimental to the listed company, provided that it would not be likely to mislead the public. Endesa Ireland considers that the information which the RAs propose publishing in this consultation is seriously detrimental to a listed company for the reasons outlined above and believes that publication is not required by the public interest.

⁵ http://ec.europa.eu/energy/gas_electricity/consultations/20110916_electricity_en.htm

⁶ Official Journal 2011/C 11/01 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>

⁷ This principle was also established in Case C-7/95 P, *John Deere*, paragraph 88.



Conclusion

Endesa Ireland does not support the proposals made by the RAs as it is considered that sufficient information is currently provided by generators in their annual accounts and that additional information on volumes of electricity sold, SEM pool revenue and capacity payments can be obtained from SEMO. .

Endesa Ireland considers that the proposals to collect additional information do not accord with the legislative requirement that the RAs' activities be proportionate and targeted only at cases where action is needed. Given the features of SEM design, we consider that collection of the proposed additional information is not justified and undermines confidence in SEM design. Proposals to publish information other than what is already made public cause confidentiality and commercial sensitivity concerns and also have the potential to damage competition.