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Three YEAR STAY

**An Analysis of the Duties of the Irish State Relevant to  
the Development and Sale of Electricity from Onshore  
Wind**

Thesis submitted for the Degree of Doctor of Philosophy (Ph.D.)  
2014

Eva Barrett



THESIS

10916

PhD in Law

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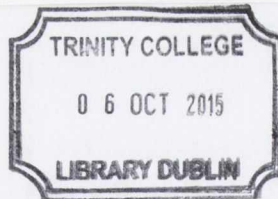
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## Acknowledgements

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I would also like to warmly thank the Irish Research Council, the Irish Association of Law Teachers and the International Bar Association's Energy, Petroleum and Natural Resources Law & Policy Education Trust respectively, for awarding me with an Irish Research Council Government of Ireland Scholarship in 2011; an Irish Association of Law Teachers Scholarship for the Annual Conference in 2012; and the Willoughby Prize in 2013. These awards meant a great deal to me, both professionally and personally.

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(University Of Denver, Sturm); Marian Troy (SSE Renewables); Jude Byrne (Coillte); Helen Donoghue (IIEA); Professor John Fitzgerald (Economic and Social Research Institute); Eamon Ryan (leader of the Green Party and former Minister for Communications, Energy and Natural Resources); Dr Brian Motherway (Sustainable Energy Association of Ireland); Aidan O' Brien (EirGrid); Franke Groome (EirGrid); Dr Chris Taylor (University of Bradford); Niels Ladefoged (the European Commission); Owen Ryan (Department of Environment, Community and Local Government); Denis Cagney (Commission for Energy Regulation); Professor John Sweeney (Maynooth University); and my colleagues on the committee of Energy Law Ireland.

The usual disclaimer (which I once unintentionally described as '*the useful disclaimer*' to the huge appreciation of my very kind and generous proof-readers) applies.

This thesis discusses the law as it stood on 30 December 2014.

# Research Methodology

## 1. Overview, Methodology Applied and Research Questions

This thesis seeks to analyse *'the duties of the Irish State which are relevant to the development and sale of electricity from onshore wind.'* While it might be more traditional to have one core research question, the subject-matter of the thesis lends itself more naturally to the following three questions:

- (i) What legal duties placed on the Irish government are relevant to the generation and sale of electricity from onshore wind?
- (ii) Has Ireland fulfilled these duties (and if not, are solutions available)?
- (iii) What consequences follow any failures, which have been discovered?

In a nutshell, it is concluded that while Ireland's commitment to developing renewable energy is highly commendable, its underlying strategy has unintentionally caused multiple breaches of EU law and is unlikely to deliver the levels of renewable energy necessary to fulfil Ireland's overarching legal obligations. This is believed to be due to the failure of the Irish government to conduct a full and careful analysis of the surrounding legal environment prior to finalising its 10 year onshore wind development strategy, an oversight which has left Ireland exposed to the risk of the public and private enforcement actions, discussed in the thesis.

As is evident from this deduction, the subject matter of this thesis is concerned with *'law as grounded in observation, experience, experiment or investigation.'*<sup>1</sup> Consequently, the research methods applied have mainly been empirical. While these will be discussed further below, it is thought necessary to first acknowledge that as focused research has not previously been conducted into the duties of the Irish State, relevant to the development and sale of electricity from onshore wind (or a sufficiently similar topic to warrant a section to distinguish this thesis from previous publications; or show how the findings either confirm or contradict previous studies) the thesis does not contain a literature review section.

---

<sup>1</sup> Caroline Morris and Cian Murphy, 'Legal Research Methodologies' in Caroline Morris and Cian Murphy, *Getting a PhD in Law* (1<sup>st</sup> edn, Hart Publishing, 2011).



## 2. How Research Was Conducted

In the initial stages of the thesis, research was conducted by reading general textbooks and articles on energy, competition and environmental law and policy (which are listed in the bibliography) and examining relevant planning, environmental, competition, consumer and energy legislation, case-law and policy documents (at international, European and national levels). A large number of the textbooks which were read, were obtained either by reviewing them for the International Journal of Law and Management or through inter-library loans from universities in the UK and the US.

Following the initial general reading stage, I spent a large amount of time discussing the planning and development markets with practising lawyers (such as Ross Moore, A&L Goodbody); academics (such as Professor Yvonne Scannell, Trinity College Dublin) and wind developers (such as Jude Byrne, Coillte). Following this, much time was spent reading, discussing and analysing the theories which form part of competition law and policy including the objectives of providing economic efficiency and welfare, and perfect competition and efficiency. (My understanding of this area was also greatly enhanced through teaching the economic and legal aspects of competition law seminars in Trinity College Dublin.) This was followed by more targeted research into the theories which support market separation for energy markets, and the requirements and origins of the universal service obligation. In addition, I was privileged to discuss the discoveries and workings of the Intergovernmental Panel on Climate Change group and their reports with Professor John Sweeney (Ireland's leading expert on climate change).

In working through the online resources available, the following websites were particularly useful:

- those of the European Commission, the Directorate General for Energy, the United Nations, the Commission for Energy Regulation, ESB Networks and EirGrid;
- [curia.europa.eu](http://curia.europa.eu); [justis](http://justis); [westlaw.ie](http://westlaw.ie); [westlaw.uk](http://westlaw.uk); [heinonline](http://heinonline); Court Service of Ireland website and science direct.

Throughout the course of the thesis, I made a careful and detailed analysis of all primary and secondary resources, considered relevant to its central questions. I also



attended public lectures such as the lecture organised by the Spirit of Ireland organisation on Wind and Hydro Energy on 25 June 2010; the Demand Side Vision for Ireland 2020 lectures; the various workshops run by the Commission for Energy Regulation and the Transforming Ireland Seminar Series (organised jointly by Trinity College Dublin, University College Dublin and Dublin City Council). In more recent times, I was also involved in developing and running the lectures and seminar series on energy law and policy for Energy Law Ireland, and the Institute of International and European Affairs (where I worked as the energy and environmental policy analyst with responsibility for setting and running the ESB and EirGrid energy lecture series until January 2014).

To gain additional perspective on Irish onshore wind generated electricity, I have discussed different aspects of the thesis in many informal meetings over the course of the four years with market participants; engineers, academics and energy law and policy experts including: Ron Van Eyrck (European Commission); Marie O' Dea (then of Bord Gais); Montserrat Breda; Lynn Craig and David Naughton (then of Endesa); Jude Byrne (Coillte); John Fingleton (Fingleton & White); Dr Bilun Mueller (formerly of Trinity College Dublin); Professor Don C Smith (University Of Denver Sturm); Marian Troy (SSE Renewables); Ross Moore (A&L Goodbody Solicitors); Helen Donoghue (formerly of the European Commission and currently the Institute of International and European Affairs); Professor John Fitzgerald (Economic and Social Research Institute); Eamon Ryan (leader of the Green Party and former Minister for Communications, Energy and Natural Resources); Dr Brian Motherway (Sustainable Energy Association of Ireland); Aidan O'Brien (EirGrid); Franke Groome (EirGrid); Niels Ladefoged (the European Commission); Owen Ryan (Department of Environment, Community and Local Government); Denis Cagney (Commission for Energy Regulation) and Professor Yvonne Scannell (Trinity College Dublin).

In addition, I presented chapters 1, 2, 3, 4 and 5 (in full or in part) at: Maynooth University's Law Faculty Colloquium Series (2014); the Irish Association of Law Teachers Conferences (2011 and 2014); the University College London-King's College London Environmental Law Symposium (2013); the Future of European Law & Policy Conference at the University of Birmingham (2012); the University College Cork Law and Environment Conference (2014); the 4th Annual Postgraduate Research Symposium on Environmental Law, University College Cork (2012) and the Scottish Young Legal Researchers Colloquium, University of Dundee (2011) and gained

formative and useful feedback from the various participants at each of these conferences and workshops.

Much of the research conducted in this thesis has benefited from the suggestions and comments of the anonymous referees of the Journal of Energy and Natural Resources Law and the Dublin University Law Journal. Thus, the research which supports chapters 1 and 2 benefited from the additional expertise of the anonymous reviewers of the article *Through the Looking Glass: Greenhouse Gas Regulation in the EU and the US, Blood Brothers Separated at Birth Both Facing the Heat* (which was published in the Journal of Energy & Natural Resources Law in August 2013 and was awarded the International Bar Association's Willoughby Award for 2013); chapters 3 and 4 benefited from the additional consideration of the expert reviewers of the article *In Sowing the Wind How Ireland Could Reap the Whirlwind' - A Case Against Irish Wind Development(s)* (which has been accepted for publication and is forthcoming in the Journal of Energy & Natural Resources Law in February 2015); and chapter 6 from the additional consideration of the expert reviewers of the article '*Getting the Price Right' Could a reintroduction of temporary price controls solve the problem of increasing renewable energy in Ireland while simultaneously guaranteeing affordable electricity to domestic consumers?*, (which was published in the Dublin University Law Journal in December 2014).

Finally to make the thesis more accessible and user friendly, time was spent both sourcing and creating tables, figures and charts to clearly illustrate and communicate key aspects and central findings to the reader.

To summarise, over a four year period I read, discussed and analysed the theories which drive many energy laws and policies; reviewed the secondary and primary resources available; attended relevant industry events; discussed industry developments with key market participants and tested the findings of this thesis by presenting these to industry and academic peers and colleagues at conferences and through the anonymous peer-review publication process. I have also created and sourced tables, figures and charts to quickly and clearly communicate key aspects of the thesis to the reader.



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# Chapter 1 Wind Power: What It Is, Where It Came From and the Reasons for the Renewed Interest at Global, Regional and National Levels

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## 1. Introduction



On 1 July 2010, the Irish government pledged that by 2020, 40 per cent of Irish electricity would be produced from renewable energy, and primarily onshore wind.<sup>1</sup> This pledge was made in Ireland's national renewable energy action plan and submitted to the European Commission. It was designed to further the achievement of a number of legal obligations under both EU and International Law including: Ireland's legal obligation to the EU to increase renewable energy by 16 per cent<sup>2</sup> and Ireland's international legal obligations to increase renewable energy and decrease emissions.<sup>3</sup> It was, and continues to be a monumental commitment. It requires the injection of huge amounts of capital to develop an onshore wind generated electricity market. In

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<sup>1</sup> Department of Communications, Energy & Natural Resources, 'National Renewable Energy Action Plan. Ireland. Submitted under Article 4 of Directive 2009/28/EC' (Government of Ireland, 1 July 2010) < <http://www.dcenr.gov.ie/NR/rdonlyres/03DBA6CF-AD04-4ED3-B443-B9F63DF7FC07/0/IrelandNREAPv11Oct2010.pdf>> accessed 29 October 2014.

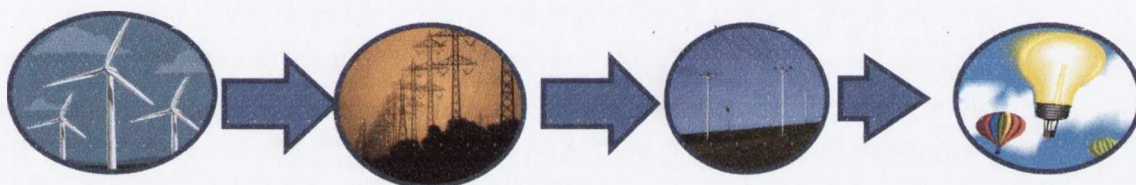
<sup>2</sup> Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16 ('the Renewable Energy Directive'), annex II.

<sup>3</sup> Under the United Nations Framework Convention on Climate Change (UNFCCC), the EU and Ireland agreed to establish programmes containing measures to mitigate climate change by addressing emissions and removal of greenhouse gases and by facilitating adequate adaptation to climate change. See: United Nations Framework Convention on Climate Change (adopted 5 September 1992, entered into force 21 March 1994) 1771 UNTS 107 (the 'UNFCCC'). In 2005, pursuant to the Kyoto Protocol Ireland became legally obliged to promote the research, promotion and use of renewable forms of energy and to maintain its greenhouse gases at a level of 13 per cent above an agreed baseline between 2008 and 2012. See: Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 (the 'Kyoto Protocol'), article 2 and Commission Decision 2006/944/EC of 14 December 2006 determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC [2006] OJ L 358/87.



addition, it requires immense change to smoothly incorporate this intermittent resource into existing markets.

Consequently, the development of onshore wind generated electricity brings many legal challenges. These challenges present themselves at each phase of development: from the generation of wind in the remote areas where it is at its most productive, to its transmission from these remote locations along high voltage transmission lines,<sup>4</sup> to its conversion to lesser voltages to be transported along distribution lines,<sup>5</sup> to its sale to households and businesses. As is shown in the figure below, following the intervention of the EU, each successive phase now constitutes a separate, but connected electricity market, i.e. generation, transmission, distribution and sale (consumer).



**Figure 1: Successive phases of electricity development**

In this thesis it is proposed that the central challenges facing the wind energy sector in these markets should have been identified at the outset, following a full and careful analysis of the surrounding legal environment before the strategy was finalised. Had such an analysis taken place, it is felt that many of the problems discussed herein along with the ensuing consequences could have been identified at an early stage and either removed or significantly reduced.<sup>6</sup>

<sup>4</sup> Transmission is defined at EU level as: *'the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply'* in Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ 5 L 211/5 ('the third liberalisation directive'). However, the distinction between transmission and distribution has been made more clear in Irish documents such as 'Grid 25' wherein transmission was described in the following terms: *'The bulk transmission system, comprising circuits at 220 kV or higher, represents the motorways and dual carriageways of the electricity transport system.'* Source: EirGrid, 'Grid 25. A Strategy for developing Ireland's Electricity Grid for a Sustainable and Competitive Future' (EirGrid, 2009) < <http://www.eirgrid.com/media/Grid%2025.pdf> > accessed 17 September 2014.

<sup>5</sup> Distribution is defined at EU level as *'the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply'* in the third liberalisation directive (n4).

<sup>6</sup> Moreover, as mentioned in the Abstract and Research Methodology this does not appear to be an isolated incident of the Irish government failing to analyse the surrounding legal environment before finalising a far-reaching and complex policy requiring significant market changes. The offshore wind sector provides another compelling example. Although, Ireland



This did not, however, take place and consequently it is felt that many of the problems, which beset Irish onshore wind development, stem from this failure. To provide some examples (which will be discussed further in later chapters), had such an exercise been undertaken, Ireland's national renewable energy action plan could have been subjected to the requirements of the SEA Directive<sup>7</sup> (potentially engendering a long-term increase in public support);<sup>8</sup> the problems known to exist in the development market could have been acknowledged and addressed to a certain extent through targeted legislation at an earlier stage; the transmission system could have been separated from the activities of generation and supply (thereby increasing competition in the development and supply markets) and the continued<sup>9</sup> use of temporary well-defined price controls could at least have been considered as a means to provide a general level of affordability to electricity consumers. However, such matters were not considered in the lead-in to Ireland's finalisation of its strategy to develop onshore wind generated electricity<sup>10</sup> and possibly as a result, Ireland is now exposed to the public and private law enforcement mechanisms discussed in chapter 7.

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initially pledged that offshore wind would also contribute to the Ireland's renewable electricity targets in its national renewable energy action plan, this statement ignored the fact that a suitable legislative framework was not in place to support expedient offshore wind development. Five years later, this framework is still being developed. As a result offshore wind has been limited to making no more than a nominal contribution to Ireland's renewable electricity targets. A contemporary example of the Irish government's continuing failure to consider the surrounding legal environment when devising energy policy and making significant market changes is currently taking place. On 24 September 2014, the government announced it had established a steering group to advise on its latest energy policy paper, the White Paper. Unsurprisingly, no lawyers were appointed to take part. See: Department of Communications, Energy and Natural Resources Law, 'Minister White announces Steering Group to advise on Energy Policy Paper' (Government of Ireland, 24 September 2014) <<http://www.dcenr.gov.ie/Press+Releases/2014/Minister+White+announces+Steering+Group+to+advise+on+Energy+Policy+Paper.htm>> accessed 17 December 2014.

<sup>7</sup> Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/0030 ('the SEA Directive').

<sup>8</sup> As it has been found by to have done in the context of the Aarhus Convention see: Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) *Modern Law Review* 1, 82-87. See further chapter three.

<sup>9</sup> Note: the long-term use of price controls is not advocated but the use of price controls in line with the guidance provided by the CJEU, as will be discussed further in chapter 6.

<sup>10</sup> Note: While the national renewable energy action plan (n1) is a complex document drafted based on the template provided by the Commission, which responds to the mandatory questions provided, it does not consider the unique characteristics of the Irish energy markets in any great detail or seek to mitigate against any future legal problems that the development of this intermittent resource might have. Moreover, an exercise of this nature was not undertaken in any preceding policy documents to consider the development of onshore wind in Ireland.



As it would be impossible to provide an in-depth analysis of every legal duty and challenge which the Irish government is facing in each successive electricity market,<sup>11</sup> this thesis will analyse Ireland's wind energy strategy as follows. Chapter three will consider Ireland's national renewable energy action plan (along with the decision making processes which led to its finalisation) as the document to detail Ireland's strategy to develop onshore wind up until 2020 and the point at which, it is felt such analysis could have taken place.

Chapters four, five and six will then consider the concurrent related legal duties required from the Irish government in three of Ireland's electricity markets (as those which have generated the most interesting and least considered legal difficulties). These markets are generation, transmission, and sale. Finally chapter seven will conclude by analysing Ireland's vulnerability to public and private EU law challenges, should it be found to have failed to fulfil the duties, which have previously been discussed in this thesis (as consequences of this initial oversight).

However, before embarking on this in-depth study of Ireland's onshore wind generated electricity market, it is first necessary to place the subject in context by considering both the global factors which prompted the recent drive to develop renewable energy in the EU; and the European framework within which the Irish onshore wind generated electricity markets operate. While chapter two will canvass the latter subject, this chapter will analyse the global factors which prompted the recent drive to develop renewable energy and onshore wind by first providing a brief overview of the nature and history of wind power, and then analysing security of energy supply and global warming as the two global issues to place renewable energy and wind energy development high on the international and European political agendas.

## **2. Wind Power**

### **2.1. A Brief Overview: How it Works**

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<sup>11</sup> For an analysis of the legal problems which generally accompany wind farm development see: Helle Tegner Anker, Birgitte Egelund Olsen and Anita Rønne, 'Wind Energy and the Law: A Comparative Analysis' (2009) 27 *Journal of Energy and Natural Resources Law* 2, 145-178; Helle Tegner Anker, Birgitte Egelund Olsen and Anita Rønne (eds.) *Legal Systems and Wind Energy. A Comparative Perspective* (1<sup>st</sup> edn, Wolters Kluwer, 2009).

Wind is a form of solar energy which is caused by three successive elements: the uneven heating of the atmosphere by the sun, the irregularities of the earth's surface, and the rotation of the planet.<sup>12</sup> The term 'wind power' or 'wind energy' is used to describe the process by which wind is used to generate mechanical power or electricity. Wind power plants, or wind farms are clusters of wind turbines used to produce electricity. Today's wind turbines use blades to collect the wind's kinetic energy. To describe the process at its most basic, the wind flows over the blades creating a lift, like the effect on airplane wings, which causes them to turn. The blades are connected to a drive shaft which turns an electric generator to produce electricity. A cable carries electricity at high voltages from the generator to transmission lines.<sup>13</sup> It is transported along transmission lines,<sup>14</sup> later reduced to safer voltage levels, and then transported along distribution lines to homes and small businesses.

Wind energy is produced at wind speeds of about 8 to 16 miles per hour (mph). If wind speeds reach levels higher than 55 mph, the turbines automatically shut down as at these speeds the blades could be damaged.<sup>15</sup> All in all, this means that turbines usually generate electricity 30-40 per cent of the time, in a few areas possibly generating up to 50 per cent of the time.<sup>16</sup> As wind speed increases with altitude and over open areas (with no windbreaks) wind farms tend to be developed at the top of smooth, rounded hills, open plains, shorelines, and mountain gaps.

As noted by the IPCC panel in 2011 (and illustrated in figure 2) modern wind turbines have evolved from small, simple machines to large, highly sophisticated devices.<sup>17</sup> Wind turbine rotors can now exceed 80 m in diameter and are usually positioned on towers exceeding 80 m in height.<sup>18</sup> Taking global figures, an average commercial wind

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<sup>12</sup> The Capitol.Net, *Government Series. Energy: Wind* (1<sup>st</sup> edn, TheCapitol.Net, Inc, 2010) 7.

<sup>13</sup> *Ibid.*, 3.

<sup>14</sup> See the definition provided for transmission by the third liberalisation directive (n4).

<sup>15</sup> US Department of Energy, Wind Program. 'The Inside of a Wind Turbine' (US Department of Energy, 17 January 2013) <[http://www1.eere.energy.gov/wind/inside\\_a\\_wind\\_turbine.html](http://www1.eere.energy.gov/wind/inside_a_wind_turbine.html)> accessed 10 June 2013.

<sup>16</sup> Daniel Yergin, *The Quest* (1<sup>st</sup> edn, Allen Lane, 2011) 609. See also: Marco Piredda. 'Natural gas and renewables: a complementary future' in Jean-Michel Glachant, Nicole Ahner and Leonardo Meeus (eds.), *EU Energy Innovation Policy Towards 2050* (1<sup>st</sup> edn, Claeys & Casteels, 2012) 197.

<sup>17</sup> Ottmar Edenhofer, Ramón Pichs-Madruga, Youba Sokona, Kristin Seyboth, Patrick Matschoss, Susanne Kadner, Timm Zwickel, Patrick Eickemeier, Gerrit Hansen, Steffen Schlömer, Christoph von Stechow (eds.) *IPCC special report on renewable energy sources and climate change mitigation* (Cambridge University Press, Cambridge, United Kingdom and New York, USA, 2011) 539.

<sup>18</sup> *Ibid.*



turbine stands at approximately 120 m.<sup>19</sup> These increases in height and rotor diameter were designed to increase the capacity of the turbines to generate electricity and today commercial wind farms on average generate between 1.5 and 2 MW of electricity (see figure 3).<sup>20</sup> As is shown in figure 4, this is more than enough electricity to power 250 homes.<sup>21</sup>

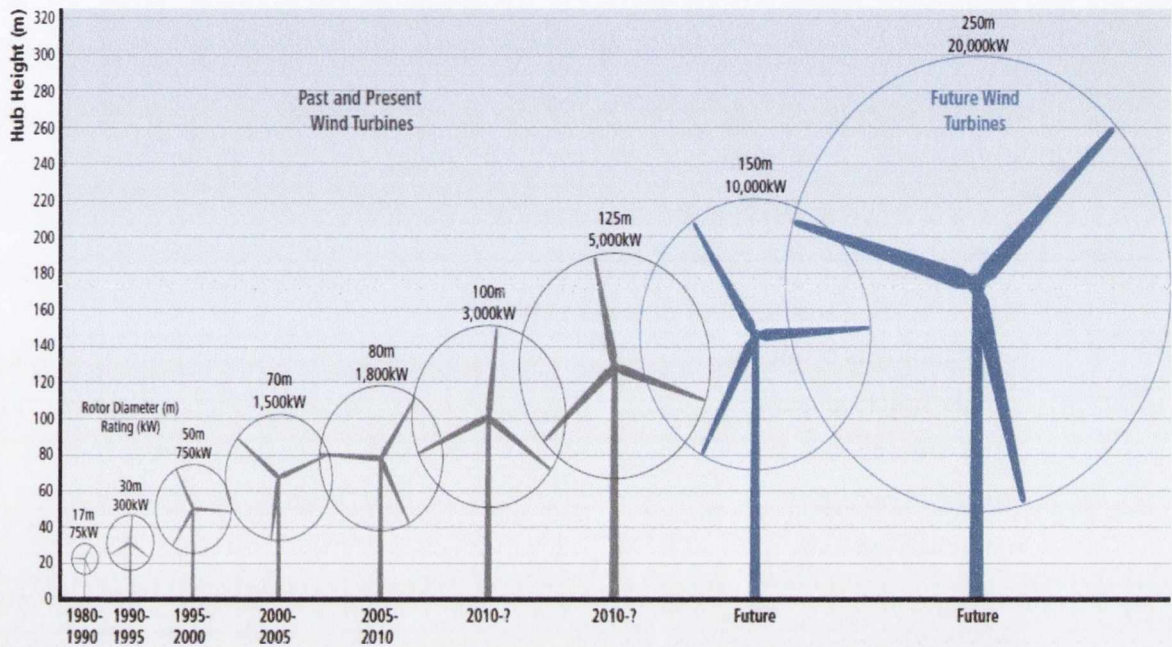


Figure 7.6 | Growth in size of typical commercial wind turbines (Design by NREL).

Figure 2: Turbine height and rotor diameter<sup>22</sup>

<sup>19</sup> Wind watch, 'FAQ -Size' (Wind watch) <<http://www.wind-watch.org/faq-size.php>> accessed 10 June 2013.

<sup>20</sup> European Wind Energy Association, 'Wind Energy Statistics and Targets' (EWEA, 2014)< <http://www.wind-watch.org/faq-size.php>>accessed 18 December 2014; International Energy Agency, 'IEA Annual Report 2013: Ireland' (IEA, 2013)< [http://www.ieawind.org/annual\\_reports\\_PDF/2013/Ireland.pdf](http://www.ieawind.org/annual_reports_PDF/2013/Ireland.pdf)> accessed 12 November 2014.

<sup>21</sup> Foster Burns, 'How Many Megawatts of Wind Power Does Each American Need?' (Oil and Energy Daily, 9 January 2014)< <http://www.oilandenergydaily.com/2014/01/19/megawatt/>> accessed 12 November 2014.

<sup>22</sup> Ottmar Edenhofer, Ramón Pichs-Madruga, Youba Sokona, Kristin Seyboth, Patrick Matschoss, Susanne Kadner, Timm Zwickel, Patrick Eickemeier, Gerrit Hansen, Steffen Schlömer, Christoph von Stechow (eds.) *IPCC special report on renewable energy sources and climate change mitigation* (Cambridge University Press, Cambridge, United Kingdom and New York, USA, 2011) 553. Note: This infographic is reproduced by kind permission of the IPCC.

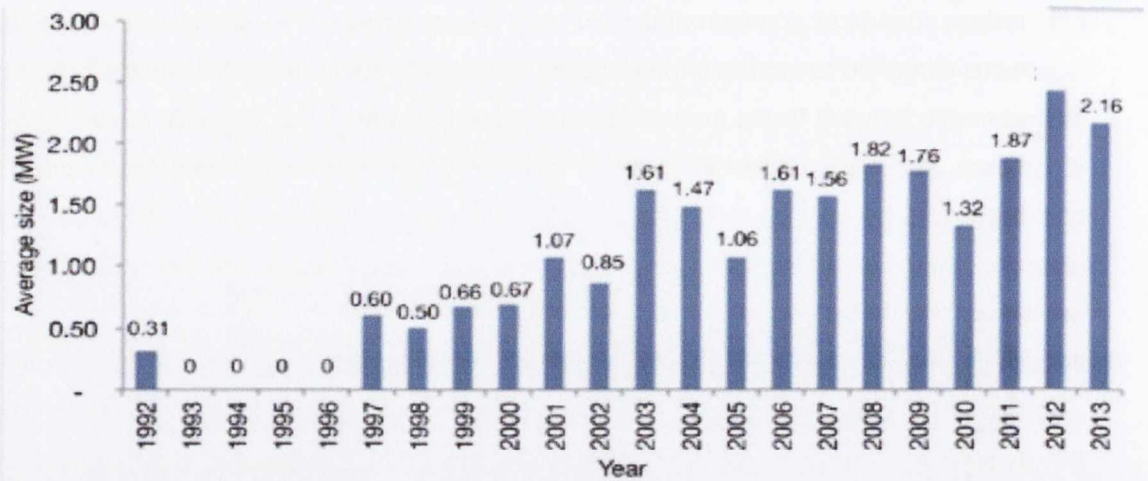


Figure 5. Average wind turbine power in MW 1992–2013

Figure 3: Average turbine power in MW<sup>23</sup>

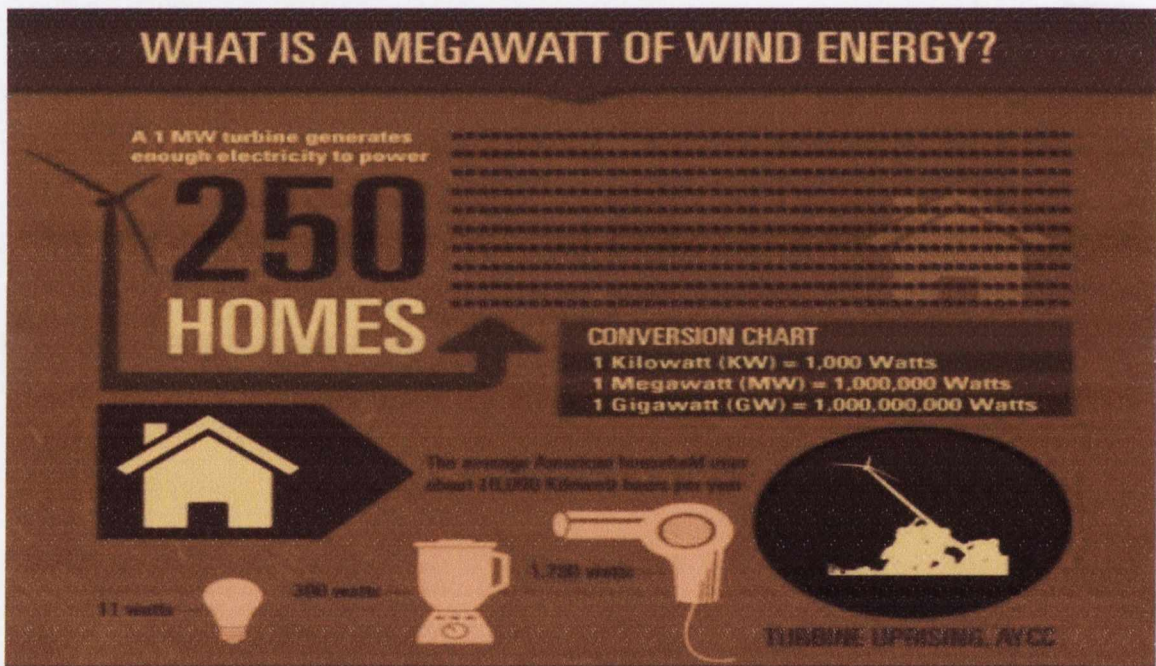


Figure 4: What is a megawatt of wind energy?<sup>24</sup>

## 2.2. A Brief History: Where it came from and where it is now

Today wind power is popularly perceived as both a clean and affordable source of energy, capable of generating clean electricity at rates comparable with conventional

<sup>23</sup> *Ibid.*

<sup>24</sup> Foster Burns (n21) Note: This infographic is reproduced by kind permission of Oil and Energy Daily.



energy sources.<sup>25</sup> Due to its perceived advantages it is one of the most utilised renewable energy resources for electricity generation.<sup>26</sup> However, wind energy is not new; its use can be traced back well over 5,000 years.<sup>27</sup> Since early recorded history, people have been harnessing the power of wind; wind energy propelled boats along the Nile River in 5000 B.C. and by 200 B.C. simple windmills were used to pump water in China, while vertical axis windmills with woven reed sails were used to grind grain in Persia and the Middle East.<sup>28</sup>

While wind power is not new, it was not until 1887 that the first modern wind turbine was built.<sup>29</sup> The acceptance and incorporation of renewable electricity generated from windmills took some time thereafter.<sup>30</sup> In 1887, Charles Brush (a rival of Thomas Edison) built an 18m wind mill and used it to supply electricity to his mansion in Cleveland<sup>31</sup> using a low speed, high solidity wind turbine of 12 KW.<sup>32</sup> For convenience sake, Brush later abandoned this project and connected his house to the city's centrally generated electricity system. At the same time, a British inventor, James Blyth developed a system to use wind powered electricity to charge batteries for his household lighting.<sup>33</sup> Although Blyth offered his surplus power to the people of Marykirk to light the village's main street, he was turned down as at the time electricity was thought to be the work of the devil.<sup>34</sup>

Industrialisation was a double edged sword for wind power. It led to a gradual decline in the use of windmills as they were replaced by other technologies. Conversely, it also sparked an interest in the development of larger more efficient windmills (to become known as wind turbines) to generate electricity. By 1890 wind turbines using modern airfoils (or blades) had already appeared in Denmark.<sup>35</sup> Fifty years later the largest wind turbine of the time (standing at approximately 53m) began operating on a Vermont hilltop known as Grandpa's Knob. This turbine used an upwind rotor with stall

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<sup>25</sup> Tabassum-Abbasi, M. Premalatha, Tasneem Abbasi and S. A. Abbasi, 'Wind Energy: Increasing Deployment, Rising Environmental Concerns' (2014) 31 *Renewable and Sustainable Energy Reviews* C, 270.

<sup>26</sup> *Ibid.*

<sup>27</sup> John K Kaldellis and Dimitrios Zafirakis, 'The Wind Energy Revolution: A Short Review of A Long History' (2011) 36 *Renewable Energy*, 1887.

<sup>28</sup> The Capitol.Net (n12) 1

<sup>29</sup> Yergin (n16) 592.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Kaldellis (n27) 1887.

<sup>33</sup> Tabassum-Abbasi (n25) 273.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

regulation operating at a low speed (as opposed to the downwind rotor with variable pitch regulation which had been used theretofore)<sup>36</sup> and fed electric power to the local utility network for several months during World War II.<sup>37</sup> On the other side of the Atlantic, Denmark overcame disruptions to its energy supply during both world wars, by depending on offshore wind generated electricity.

Despite the scientific advances, which were made to improve the efficiency of turbines at this time, interest in large scale wind power generation declined after World War II as the world moved to use more convenient, reliable and efficient fossil fuels to meet all its energy needs.<sup>38</sup> In general, just small scale wind turbines (for remote area power systems or for battery recharging) remained in use until the oil shocks of 1973 and 1979 and global warming<sup>39</sup> propelled wind energy back on to the energy stage as a more attractive alternative to fossil fuel powered electricity generation.

As this brief history demonstrates, as electricity can be generated from a host of different primary resources, interest in wind energy is continually affected by the availability and price of other resources. This continues to be the case today as will be considered in part three of this chapter.<sup>40</sup> However, while interest in wind energy may well continue to fluctuate globally, the technology involved is sufficiently advanced to make wind a viable inclusion in national energy portfolios. This has been the result of a number of regional supports and advancements, which ranged from tax credits and supports made available in the US (and more particularly in California) during the 1980s, to the Danish technological advancements which led to the modern (and more durable) wind turbine.

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<sup>36</sup> *Ibid.* Note: There are two different ways of regulating the power output of a wind turbine, namely pitch regulation and stall regulation. In pitch regulated wind turbines the wind turbine power is regulated by setting an appropriate pitch angle for the rotor blades of the rotor. By setting the pitch angle, the machine can be operated with the optimum rotor speed in a wide range of wind speeds. However, wind turbines usually operate in a turbulent wind field. A pitch regulated wind turbine operating in such a turbulent wind field at high wind speed may experience negative lift on a part of the rotor blade's airfoil. Conversely in stall regulated wind turbines the limitation of power is regulated by setting an appropriate rotor speed. Setting the rotor speed is done by inducing a stall at the rotor blades. The pitch angles of the rotor blades are fixed in such machines. For stall regulated wind turbines it is known to use turbulators at the leading edge of a rotor blade's airfoil profile in order to reduce stall vibrations. See: Patentdocs, 'History of Invention' (Advameg Inc, 2010) <<http://www.faqs.org/patents/app/20090028718#ixzz3MGW5vwul>> accessed 18 December 2014.

<sup>37</sup> The Capitol.Net (n12) 2.

<sup>38</sup> Tabassum-Abbasi (n25) 273.

<sup>39</sup> *Ibid.*

<sup>40</sup> Note: When fuel prices fell after World War II, interest in wind turbines also decreased. Later, when the price of oil skyrocketed in the 1970s, so did worldwide interest in wind energy. See generally Yergin (n16).



Nevertheless, the problem of intermittency (which led Charles Brush to abandon his domestic wind project in favour of conventional electricity) has survived requiring the supplementation of wind with other fuels (as outlined below) or the use of innovative solutions to permit Member States to successfully incorporate wind energy into the national energy portfolio. In the EU, electricity is considered an essential service.<sup>41</sup> It cannot be stored but must be continuously produced to ensure that demand meets supply at all times. As an intermittent resource, wind can only ever be available to a maximum level of 50 per cent of the time. Thus, for many electricity markets (including Ireland) wind generated energy must be supplemented by other controllable electricity generating resources, such as coal, gas and oil. This can add significantly to the costs incurred in producing wind generated electricity, as will be further discussed in chapter 6.

Studies undertaken in Spain, a country with a large amount of installed wind power, provide a good example of how this principle operates in practice. In Spain, installed wind capacity rose from 10 GW to 20 GW between 2007 and 2012. Despite this wealth of installed capacity, the contribution of wind power to electricity production varied immensely, depending on different weather conditions. When these were favourable, wind production could cover 50 per cent of Spanish electricity demands, however when unfavourable, wind power would only account for approximately 1 per cent of total electricity production. Thus, Spain relies heavily on having an adequate supply of back up controllable electricity capacity at the ready.<sup>42</sup>

An alternative (and cheaper)<sup>43</sup> strategy to keep the electricity continuously flowing in states which seek to rely on intermittent energy resources such as wind, is to increase their connection to other markets, thereby allowing both markets to trade electricity continuously. The theory behind this is that as the unavailability of renewable resources can occur in different regions at different times, with a sufficiently connected global or regional market, states can import electricity when there is a dearth and export when there is a surplus, thus reducing the need to have back up controllable electricity capacity at the ready.

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<sup>41</sup> Case C-393/92 *Municipality of Almelo and Others* [1994] ECR I-1477.

<sup>42</sup> Marco Piredda (n16) 197.

<sup>43</sup> Note: In this context cheaper means cheaper in the long-run, taking all costs including the hidden costs of adapting to climate change into account.

As described by the Commission two elements are necessary to advance this strategy: *‘for power to be traded and transported smoothly across borders, physical wires or pipelines (‘the hardware’) ...[is] needed, on the one hand, and a clear, commonly applied regulatory framework (‘the software’) on the other. However, transmission grids as well as regulatory frameworks have grown nationally, with the understandable focus to optimise the national system. These now need to be forged together in regional and EU-wide systems.*<sup>44</sup>

To support the delivery of the first element, the Commission has proposed to extend the current 10 per cent interconnection<sup>45</sup> target to 15 per cent by 2030.<sup>46</sup> Moreover in October 2013, it adopted a list of 248 infrastructure projects eligible to benefit from more efficient permit granting procedures and financial support from the EU’s Connecting European Facility Fund (a fund worth approximately €5.85 billion).<sup>47</sup> Five sets of projects designed to further connect Ireland to mainland Europe were on this list including: an interconnector to be constructed between La Martyre, France and Great Island or Knockraha and infrastructure to further connect Ireland and the UK (to support the contribution of Irish renewable energy projects to the UK’s energy mix).<sup>48</sup>

The second element (described by the Commission as the software) is more difficult to put in place. Here what is required is the development of national markets supported by regulatory frameworks which are sufficiently similar to facilitate continuous intra-day electricity trading. To assist the development of this component, a ‘*Target Model*’ was designed at EU level to harmonise cross border trading rules and, by implication, national market designs.<sup>49</sup> While the detailed codes underpinning the Target Model have been finalised and will shortly become binding,<sup>50</sup> Ireland is unlikely to be able to

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<sup>44</sup> European Commission, ‘Commission Staff Working Document, Trends and Developments in European Energy Markets 2014’ [2014] COM (2014) 634 final, 7.

<sup>45</sup> Note: The third liberalisation directive (n4) defines an interconnector as the equipment used to link electricity systems.

<sup>46</sup> Commission (n44).

<sup>47</sup> *Ibid.*

<sup>48</sup> European Commission, ‘Projects of Common Interest’ (Commission, 14 October 2013) <[http://ec.europa.eu/energy/infrastructure/pci/doc/2013\\_pci\\_projects\\_country.pdf](http://ec.europa.eu/energy/infrastructure/pci/doc/2013_pci_projects_country.pdf)> accessed 14 November 2014.

<sup>49</sup> Single Electricity Market Committee, ‘Proposals for Implementation of the European Target Model for the Single Electricity Market Consultation Paper’ (Single Electricity Market, 24 January 2012) SEM 12-004, 1-6.

<sup>50</sup> European Commission, ‘Draft Commission Regulation (EU) No XXX of XXX establishing a Guideline on Capacity Allocation and Congestion Management’ (Commission, 2014) <[http://ec.europa.eu/energy/gas\\_electricity/electricity/doc/204108-cacm\\_formal\\_proposal\\_for\\_comitology.pdf](http://ec.europa.eu/energy/gas_electricity/electricity/doc/204108-cacm_formal_proposal_for_comitology.pdf)> accessed 18 December 2014.



trade electricity on an intra-day basis until at least December 2017,<sup>51</sup> as a derogation from the obligation to conform with this model was granted to Ireland and Northern Ireland (due to the magnitude of change required for the Irish market to conform to the new model).<sup>52</sup>

Despite the changes required to facilitate the efficient incorporation of wind into national electricity systems, it has become viewed as a more and more favourable alternative to fossil fuels (both locally and globally) as fluctuating prices, disturbances in supply and increasing greenhouse gas emissions have prompted States to look to alternative resources to fulfil their energy needs. Globally wind generated 2.5 per cent of the world's electricity needs in 2013;<sup>53</sup> for the same period the International Energy Agency stated that 3.86% of the electricity generated by their 29 members<sup>54</sup> was produced from wind.<sup>55</sup> Europe was the leading developer of wind energy in 2013 (with 121,474 MW), followed by Asia (with 115,927 MW) and North America (with 70,811 MW).<sup>56</sup> The factors leading to this interest in wind development will be considered in the paragraphs which follow.

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<sup>51</sup> Note: At present the Irish electricity market operates on a day-ahead basis and cannot currently participate in half-hourly electricity trading with European energy markets. See: Single Electricity Market Committee (n49).

<sup>52</sup> Single Electricity Market Committee (n49).

<sup>53</sup> Global Wind Energy Council, 'Wind in Numbers' (Global Wind Energy Council, 2013) < <http://www.gwec.net/global-figures/wind-in-numbers/> > accessed 13 November 2014.

<sup>54</sup> The International Energy Agency is described on its website as '*an autonomous agency*' with has 29 members including: Australia; Austria; Belgium; Canada; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Japan; Republic of Korea; Luxembourg; The Netherlands; New Zealand; Norway; Poland; Portugal; Slovak Republic; Spain; Sweden; Switzerland; Turkey; United Kingdom; United States. Source: International Energy Agency, 'What we do' (IEA, 2014) < <http://www.iea.org/aboutus/> > accessed 13 November 2014.

<sup>55</sup> International Energy Agency, 'IEA Wind Annual Report for 2013' (IEA, 2013) < [http://www.ieawind.org/annual\\_reports\\_PDF/2013.htm](http://www.ieawind.org/annual_reports_PDF/2013.htm) > accessed 13 November 2014.

<sup>56</sup> Global Wind Energy Council, 'Annual Market Update 2013' (GWEC, 9 April 2014) < [http://www.gwec.net/wp-content/uploads/2014/04/GWEC-Global-Wind-Report\\_9-April-2014.pdf](http://www.gwec.net/wp-content/uploads/2014/04/GWEC-Global-Wind-Report_9-April-2014.pdf) > accessed 13 November 2014, 17.

### 3. The Global Factors which Led to an Increased Drive to Develop Renewable Energy in the EU and Ireland

#### 3.1. Global Energy Resources, the EU and Ireland

Unlike other electricity generating fuels, wind energy itself, is free. Furthermore it is carbon neutral, safe,<sup>57</sup> infinite and freely available in many regions (such as the EU) and countries (such as Germany, Spain and Ireland),<sup>58</sup> which are otherwise poor in indigenous energy resources, depending largely on external energy producers. For instance, in 1995,<sup>59</sup> Ireland's wind energy resources were described as follows:

*[d]ue to Ireland's geographical location, on the downwind side of the Atlantic Ocean, in the region of prevailing south-westerly winds, the Irish coastline is exposed to one of the most vigorous wind climates in the world. In a study on Ireland's renewable energy resources... the feasible wind energy resource... is estimated at 179 GW, or 40 times Ireland's current installed capacity.<sup>60</sup>*

As energy supply and price have long been subject to shocks emanating from events in individual countries,<sup>61</sup> States (such as Ireland) and regions such as the EU have a strong motivation to obtain a greater degree of energy independence thereby reducing their vulnerability to price fluctuations and supply interruptions. At present, Ireland is heavily reliant on energy imports; in 2013, 63.9 per cent of Ireland's electricity generation came from imported fuels (natural gas accounted for 48 per cent; coal for

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<sup>57</sup> As such, it can be contrasted with nuclear energy (which is accompanied by the significant danger of nuclear accident such as that experienced in Chernobyl in 1986 or Fukushima in 2010) or shale gas extraction. On the repercussions of nuclear accident: see the discussion of the Chernobyl incident in Deveraux F McClatchey, 'Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters, 1986-1996' (1995-1996) 25 Georgia Journal of International and Comparative Law, 659-680; on the risks of shale gas extraction see further: AEA, 'Report for the European Commission. Support to the identification of potential risks for the environment and human health arising from hydrocarbons operations involving hydraulic fracturing in Europe' (Commission AEA/R/ED57281, 10 August 2012) <<http://ec.europa.eu/environment/integration/energy/pdf/fracking%20study.pdf>> accessed 17 November 2014; AEA, 'Climate Impact of Potential Shale Gas Production in the EU' (Commission AEA/R/ED57412, 30 July 2012) <[http://ec.europa.eu/clima/policies/eccp/docs/120815\\_final\\_report\\_en.pdf](http://ec.europa.eu/clima/policies/eccp/docs/120815_final_report_en.pdf)> accessed 17 November 2014.

<sup>58</sup> *Ibid.*

<sup>59</sup> European Commission, 'ALTENER Report- Total Renewable Energy Resource in Ireland' (1995) Report XVII/4.1030/T4/95/IRL (Commission, March 1997).

<sup>60</sup> Renewable Energy Strategy Group, 'Strategy for Intensifying Wind Energy Deployment' (Government of Ireland, 2003) 18.

<sup>61</sup> Robert Kolb, 'Geopolitical Threats to World Energy Markets' (2011) 36 The Journal of Social, Political, and Economic Studies 2, 154-196.



16 per cent and oil for 0.2 per cent).<sup>62</sup> With the successful indigenous development of wind, Ireland could gain some insulation from energy disruptions and price fluctuations.

As the world's largest energy importer, the EU has a similar motivation to promote wind development.<sup>63</sup> As discussed by Vinois (2012) approximately 90 per cent of all oil; 65 per cent of all gas; and high percentages of coal and uranium were imported into the EU in 2012<sup>64</sup> with Russia acting as the EU's primary energy supplier on all counts (responsible for supplying 30 per cent of all oil, 24 per cent of all gas, 20 per cent of all coal, and 40 per cent of all enriched uranium, consumed in the EU).<sup>65</sup>

Consequently, the EU and its Member States remain acutely vulnerable to disruptions in energy supplies, as has been most dramatically demonstrated by the oil crises of 1973–74, 1978–79 and 2008;<sup>66</sup> the gas crises of 2006 and 2009;<sup>67</sup> the 2003 Italian electricity blackout (which originated in Switzerland); the November 2006 electricity blackout (which originated in Northern Germany and spread throughout Western Europe to Portugal).<sup>68</sup> As discussed by the then-Director General of DG Energy, Philip Lowe, these crises highlighted the vulnerability of the EU to disruptions in energy supply.<sup>69</sup>

The gas crisis of 2006 provides a good case study. In 2006, supply to more than a dozen Member States was disrupted, due to disputes between the Ukraine, a transit country and the Russian Federation. In 2006 these disputes led to a two day 20 per cent decrease of gas supply through the Brotherhood pipeline (which connects Russia, the Ukraine and Slovakia to Western Europe).<sup>70</sup> This reduction resulted in a chain

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<sup>62</sup> Commission for Energy Regulation, 'Electricity Security of Supply Report 2014 Submitted to the European Commission Pursuant to Directive 2009/72/EC and Directive 2005/89/EC' (Commission for Energy Regulation, 2014) <<http://www.cer.ie/docs/000266/CER14741%20Electricity%20SoS%20Report%20Final%202014.pdf>> accessed 14 November 2014.

<sup>63</sup> Commission (n44) 14.

<sup>64</sup> Jean-Arnold Vinois, 'The security of energy supply, one of three pillars of the European energy policy' in Jean-Michel Glachant, Nicole Ahner and Adrien De Hauteclocque (eds.), *EU Energy Law & Policy Yearbook 2012* (1<sup>st</sup> edn, Claeys & Casteels, 2013)119.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> Philip Lowe, 'Improving Europe's energy security: the key issues' in Jean-Michel Glachant, Nicole Ahner and Leonardo Meeus (eds.), *EU Energy Innovation Policy Towards 2050* (1<sup>st</sup> edn, Claeys & Casteels, 2012) 100.

<sup>70</sup> European Commission, 'Assessment Report of Directive 2004/67/EC on Security of Gas Supply, Commission Staff Working Document Accompanying Document to the Proposal for a

reduction in national supplies to Hungary (-30 per cent), Slovakia, the Czech Republic and Austria (-20 per cent), Italy (-15 per cent), Poland (-10 per cent), and Germany (-6 per cent).<sup>71</sup> Later in 2009, similar disputes led to disruptions in supply amounting to a reduction of 28 per cent of all gas imports from Russia, lasting for 14 days.<sup>72</sup> As Philip Lowe stressed interruptions of this nature have very strong impacts on the economy, and cause extraordinarily large costs for businesses, and households.<sup>73</sup>

In addition to their vulnerability to supply disruptions (such as those discussed above) the EU and Ireland are also exposed to price spikes originating from disturbances in individual countries, such as those which emanated from Libya in 2011.<sup>74</sup> As noted by Kolb (2011):

*'In early 2011, the price of crude oil rose by 62 per cent in a single month, rocketing from \$75 to \$120 per barrel as protests and revolts shook an arc of Arab countries. The price of crude jumped six per cent on a single day, February 21, in response to sudden and dramatic unrest in Libya. This strong price reaction occurred even though Libya only accounts for about two per cent of annual world oil production.'*<sup>75</sup>

This vulnerability will subsist as long as Ireland and the EU remain dependent on sources of energy which are concentrated in relatively few countries. In a world where oil is mainly produced in the volatile Middle East, and the largest proven oil reserves are located in faraway nations such as Venezuela, Saudi Arabia, Canada, Iran, Iraq and Kuwait,<sup>76</sup> future disruptions to oil supply and price spikes remain likely. Gas and coal bring similar issues with Iran and Russia controlling the largest proven gas reserves and the US, China, and Russia controlling the largest proven coal reserves.<sup>77</sup> Thus, there is a strong impetus for the EU to move away from fossil fuels, to the greatest extent possible, to focus more on renewable energy resources.

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Regulation of the European Parliament and the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC.' [2009] COM(2009) 363, 44.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid*, 6.

<sup>73</sup> Lowe (n69).

<sup>74</sup> Note: The list of the top six exporters of crude oil to the EU changed between 2010 and 2012 with Saudi Arabia, Libya and Nigeria exporting more to the EU than Norway which was previously second only to Russia in terms of crude oil exports. *Source*: Commission (n44).

<sup>75</sup> Kolb (n56).

<sup>76</sup> British Petroleum, 'Statistical Review of World Energy 2014' (British Petroleum, June 2014) <<http://www.bp.com/en/global/corporate/about-bp/energy-economics/statistical-review-of-world-energy.html>> accessed 13 November 2014.

<sup>77</sup> *Ibid.*



## Fossil Fuel Demanded for Import and Available for Export, 2010 and 2030, Projected

	Percentage of Consumption Demanded for Import (Negative values indicate proportion of consumption available for export.)		Millions of Metric Tons of Oil or Equivalent Demanded for Import (Negative values indicate tons available for export.)	
	2010	2030	2010	2030
North America	37.53	30.55	387	291
Asia Pacific	68.37	82.88	854	1475
Europe & Eurasia	6.07	6.84	55	59
Oil Middle East	-235.51	-229.58	-829	-1153
Africa	-226.58	-166.71	-333	-345
S & C America	-37.77	-29.29	-97	-105
	2010	2030	2010	2030
Natural North America	2.19	1.53	17	13
Gas Asia Pacific	14.19	19.56	70	204
Europe & Eurasia	7.20	11.76	72	145
Middle East	-22.98	-13.28	-80	-98
Africa	-102.94	-141.52	-97	-263
S & C America	-9.63	-8.17	-13	-20
	2010	2030	2010	2030
Coal North America	-4.62	-11.39	-26	-52
Asia Pacific	1.72	2.36	40	79
Europe & Eurasia	9.04	-1.38	43	-6
Middle East	89.64	85.18	8	8
Africa	-35.81	-29.66	-38	-48
S & C America	-116.60	-105.15	-29	-37

Source: BP, "BP Energy Outlook 2030," January 2011, London. Data are available at: [www.bp.com](http://www.bp.com). Accessed April 16, 2011.

**Table 1: Distribution of energy resources and projected demand of the main regions until 2030<sup>78</sup>**

With global energy demand increasing and States and regions increasingly competing for energy supplies, the wisdom of a policy which seeks to develop indigenous resources, and reduce imports is evident. The impact of increasing levels of energy demand (which is expected to further increase by more than one-third in the period leading to 2035)<sup>79</sup> is already being felt in the EU. Due to the high prices Japan and Korea pay for Liquefied Natural Gas (LNG) (approximately 60 per cent higher than the average price of LNG imports to the EU), imports of LNG to the EU fell by 30 per cent in 2012.<sup>80</sup>

<sup>78</sup> *Ibid.* Note: this table is reproduced by kind permission of the BP Group.

<sup>79</sup> European Commission, 'Energy challenges and policy Commission contribution to the European Council of 22 May 2013' (Commission, 7 May 2013)

<[http://ec.europa.eu/europe2020/pdf/energy2\\_en.pdf](http://ec.europa.eu/europe2020/pdf/energy2_en.pdf)> accessed 17 November 2014.

<sup>80</sup> *Ibid.*

As competition increases for all externally located energy resources, reports have also surfaced that coal reserves may not be as abundant as generally assumed or reported. To observers of energy markets this statement might at first appear odd given the surplus of cheap coal currently available to Europe (as the high consumption of shale gas in the US has released US coal for export to Europe).<sup>81</sup> Nevertheless, the statement is true, as will be discussed below.

In 2013 the *BP Statistical Review of World Energy* placed China's proven reserves for anthracite and bituminous coal at 62,200 million tonnes.<sup>82</sup> In 2012, China's proven reserves for anthracite and bituminous coal were also reported as 62,200 million tonnes. On the whole, the same figure has been reported in *the BP Statistical Review* as China's proven reserves for anthracite and bituminous coal each year since 1992.<sup>83</sup> This figure had remained unchanged, unqualified, and unexplained despite China's increasing yearly production of coal in this period.<sup>84</sup> For example in 2013, China was reported as having produced 1,825 million tonnes (oil equivalent) of commercial solid fuels including anthracite and bituminous coal.<sup>85</sup> The figure for 2002 was 775.2 million tonnes.<sup>86</sup>

This is an example of the poor quality data which led the authors of 'Coal: Resources and Future Supply' to conclude that *'there is probably much less coal to be burned than most people think'* and to estimate that global coal production will peak at around 2025.<sup>87</sup> This is not the only report, generated in the last ten years, which warns that

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<sup>81</sup> Note: as observed by the Commission (2013), *'Another effect of the US shale gas boom is the increasing use of CO2 emitting coal in Europe's power plants. The high consumption of gas in the US frees up US coal for export to Europe. EU consumption and imports of coal (hard coal and lignite) have increased by, respectively, 2% and almost 9% over the first 11 months of 2012, relative to the same period in 2011. In the UK and Spain, coal consumption (hard coal and lignite) increased by 28% in the first 11 months of 2012; France's coal consumption grew by 16% and Germany's by 3%. The largest growth was seen in Ireland (doubling of coal consumption in the first 11 months of 2012) and Portugal (+38%)'*. Source: Commission (n79) 2.

<sup>82</sup> British Petroleum, 'BP Statistical Review of World Energy June 2013' (British Petroleum, June 2013) <[www.bp.com/statisticalreview](http://www.bp.com/statisticalreview)> accessed 14 June 2014.

<sup>83</sup> See: B. Kavalov and S. D. Peteves (DG Joint Research Centre and the Institute for Energy) 'The Future of Coal' (Commission, February 2007) <[http://ie.jrc.ec.europa.eu/publications/scientific\\_publications/2007/EUR22744EN.pdf](http://ie.jrc.ec.europa.eu/publications/scientific_publications/2007/EUR22744EN.pdf)> accessed 23 June 2013; Energy Watch Group, 'Coal Resources and Future Production' (Energy Watch Group EWG-Paper No.1/07, Final Version 28032007, 10 July 2007) <[http://energywatchgroup.org/wp-content/uploads/2014/02/EWG\\_Report\\_Coal\\_10-07-2007ms1.pdf](http://energywatchgroup.org/wp-content/uploads/2014/02/EWG_Report_Coal_10-07-2007ms1.pdf)> accessed 14 June 2013.

<sup>84</sup> See generally: British Petroleum, 'World Energy Outlook' (British Petroleum, 2014) <<http://www.bp.com/en/global/corporate/about-bp/energy-economics/energy-outlook.html>> accessed 17 November 2014.

<sup>85</sup> British Petroleum (n82).

<sup>86</sup> See generally n84.

<sup>87</sup> Energy Watch Group (n83) 4.



coal supplies are not as plentiful as previously thought. A report prepared by Kavalov and Peteves of the Institute for Energy, for the European Commission's Joint Research Centre, also declared that: *'the world could run out of economically recoverable (at current economic and operating conditions) reserves of coal much earlier than widely anticipated.'*<sup>88</sup>

Consequently, in seeking to develop indigenous renewable energy resources, the EU is attempting to further two complementary policies at once. It is seeking to decrease Member State dependence on external energy resources and vulnerability to price spikes and disruptions in supply, while simultaneously decreasing EU emissions to prevent the average global temperature from rising above 2 degrees Celsius, the temperature above which significant economic and ecological damage is predicted.

Producing renewable electricity is a major pillar of both these EU policies for two main reasons. Wind power can be produced in the EU and is carbon neutral. This is in stark contrast with fossil fuels, which must generally be imported, and produce large amounts of CO<sub>2</sub> when burned, with oil releasing the most CO<sub>2</sub> emissions, followed by coal and gas (which produces 30 per cent less CO<sub>2</sub> than oil, and 40-60 per cent less CO<sub>2</sub> than coal, when burned).<sup>89</sup> Furthermore as electricity is the sector with the greatest potential to reduce greenhouse gas emissions, it is of central importance in the global strategy to stop global warming, a topic which will be analysed in greater detail below.

## **3.2. Global Warming**

### **3.2.1. The Theory of Global Warming and its Origins**

Global warming was first identified as a problem by US scientists. The term was originally coined by Wallace Broecker (Professor of Geology at Columbia University) in 1975 in an article entitled 'Climate Change: Are We on the Brink of a Pronounced Global Warming?' In this article he suggested that rising levels of carbon dioxide in the stratosphere would lead to a pronounced warming of the planet and a rise in temperatures beyond that experienced in the last 1,000 years.<sup>90</sup> The article post-dated

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<sup>88</sup> Kavalov and Peteves (n83) 5.

<sup>89</sup> Alex Forbes 'How Gas Can Change the World' (European Energy Review Online, 9 December 2009) < <http://www.europeanenergyreview.eu/site/pagina.php?id=1532> > accessed 14 June 2013.

<sup>90</sup> Wallace Broecker, 'Climate Change – Are We on the Brink of a Pronounced Global Warming?' (1975) 189(4201) Science 460–463. See further: Yergin (n11) 428–452.



a suggestion by the US President's Science Advisory Committee that global temperatures might be changing as a result of human activities.<sup>91</sup>

Today it has generally been accepted, that since the beginning of the Industrial Revolution (in 1760) human activities which increase greenhouse gases,<sup>92</sup> have largely been responsible for an increase in the average global temperature. It has also been accepted that by the end of the 21st century, the average surface temperature globally will increase by between 1.8 degrees centigrade and 4 degrees centigrade. This widely held belief is supported by the reports of Intergovernmental Panel on Climate Change (IPCC), a group of international experts convened by the United Nations Environment Programme and the World Meteorological Organization in 1988, to provide the world with a clear scientific view on climate change and its potential impacts.<sup>93</sup> The IPCC published its First Assessment Report in 1990,<sup>94</sup> its Second Assessment Report in 1995,<sup>95</sup> its Third Assessment Report in 2001,<sup>96</sup> its Fourth Assessment report in 2007<sup>97</sup> and its Fifth Assessment in 2013.<sup>98</sup> The IPCC have outlined how significant economic and ecological damage will ensue if the average global temperature is permitted to rise above 2 degrees centigrade.<sup>99</sup>

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<sup>91</sup> See generally: Eva Barrett, 'Greenhouse Gas Regulation in the EU and the US: Blood Brothers Separated at Birth Both Facing the Heat' (2013) 21 *Journal of Energy and Natural Resources Law* 3, 287-311; Cinnamon Carlane, *Climate Change Law and Policy* (1st edn, Oxford University Press 2010), 7.

<sup>92</sup> In this thesis the term greenhouse gases can be taken to refer to the six gases included in Annex A to the Kyoto Protocol (n3) i.e. carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride.

<sup>93</sup> Intergovernmental Panel on Climate Change, 'Organization' (IPCC, 2014) <<http://www.ipcc.ch/organization/organization.shtml#UbiYpJxi33U>> accessed 14 November 2014.

<sup>94</sup> Intergovernmental Panel on Climate Change, 'First Assessment Report 1990 (FAR)' (Cambridge University Press, 1990) <[http://ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml#1](http://ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1)> accessed 14 November 2014.

<sup>95</sup> Intergovernmental Panel on Climate Change, 'Second Assessment Report: Climate Change 1995 (SAR)' (Cambridge University Press, 1995) <<http://ipcc.ch/pdf/climate-changes-1995/ipcc-2nd-assessment/2nd-assessment-en.pdf>> accessed 14 November 2014.

<sup>96</sup> Intergovernmental Panel on Climate Change, 'Third Assessment Report: Climate Change 2001 (TAR)' (Cambridge University Press, 2001) <[http://ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml#1](http://ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1)> accessed 14 November 2014.

<sup>97</sup> Intergovernmental Panel on Climate Change, 'Fourth Assessment Report: Climate Change 2007 (AR4)' (Cambridge University Press, 2007) <[http://ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml#1](http://ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1)> accessed 14 November 2014.

<sup>98</sup> Intergovernmental Panel on Climate Change, 'Fifth Assessment Report: Climate Change 2013 (AR5)' (Cambridge University Press, 2013) <[http://ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml#1](http://ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1)> accessed 14 November 2014.

<sup>99</sup> See: IPCC, 'The Regional Impacts of Climate Change: An Assessment of Vulnerability' (Cambridge University Press, 1997)



While scientists are generally cautious in their predictions, the following are some potential future consequences which have been identified as likely. Glaciers will melt and sea levels will rise resulting in the submergence of lowland areas including parts of the US Gulf Coast, the Eastern seaboard, and much of the Netherlands, Belgium and Bangladesh. Colder conditions are expected in the North Atlantic as the global ocean circulation system changes. The number and strength of tropical cyclones will increase. Twenty per cent to thirty three per cent of all plant and animal species are expected to become extinct. Water availability is likely to decrease further in areas such as the African Sahel, western-north America, south America, south Africa, the Middle East and western Australia. Warmer conditions will lead to the spread and growth of infectious diseases.<sup>100</sup>

In June 2013, the International Energy Agency (IEA) published a special report<sup>101</sup> which summarised contemporary opinions on the subject as follows:

*'There is broad international acceptance that stabilising the atmospheric concentration of greenhouse gases at below 450 parts per million (ppm) of carbon-dioxide equivalent (CO<sub>2</sub>-eq) is consistent with a near 50% chance of achieving the 2 °C target, and that this would help avoid the worst impacts of climate change. Some analysis finds, however, that the risks previously believed to be associated with an increase of around 4 °C in global temperatures are now associated with a rise of a little over 2 °C, while the risks previously associated with 2 °C are now thought to occur with only a 1 °C rise (Smith, et al., 2009). Other analysis finds that 2 °C warming represents a threshold for some climate feedbacks that could significantly add to global warming (Lenton, et al., 2008).'*<sup>102</sup>

The report also described consequences of global warming which had already occurred. These include a rise in sea level of approximately 15-20cm, and a reduction of over 50 per cent of the Artic Ocean's summer ice-sheet coverage. More worryingly

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<<http://www.ipcc.ch/ipccreports/sres/regional/index.php?idp=0>> accessed 12 June 2013; European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions. Winning the Battle Against Climate Change' [2005] COM (2005) 39, final, annex I.

<sup>100</sup> *Ibid.*

<sup>101</sup> International Energy Agency, 'World Energy Outlook Special Report 2013: Redrawing the Energy Climate Map' (IEA, 10 June 2013)<[www.worldenergyoutlook.org/energyclimatemap](http://www.worldenergyoutlook.org/energyclimatemap)> accessed 22 June 2013.

<sup>102</sup> *Ibid.*, 14.

the report indicated that CO<sub>2</sub> levels had reached 400 ppm in May 2013, and warned that without additional action, a further increase in long-term temperatures of 2.8 to 4.5 degrees Celsius appeared to be in prospect, with most of the increase occurring in this century.<sup>103</sup>

In the most recent World Energy Review, the International Energy Agency echoed these warnings stating that CO<sub>2</sub> emissions are now set to grow by one-fifth by 2040 putting the world on track for a 3.6 degree temperature rise.<sup>104</sup> They also cautioned that the entire carbon budget permissible under a two degrees scenario was set to be consumed by 2040, stressing that: *'[s]ince emissions are not going to drop suddenly to zero once this point is reached, it is clear that the two degrees objectives requires urgent action'*.<sup>105</sup>

Just as the preceding paragraphs have discussed the most recent scientific reports on global warming, the paragraphs below will analyse the international framework which developed to mitigate against it. In addition they will analyse the role of the EU within this framework, its legal obligations, and the core regional laws and policies it has promulgated to decrease greenhouse gas emissions (by increasing renewable energy and wind development). By this means, it is hoped that some further context will be provided to the discussion of Ireland's onshore wind generated electricity market which will follow.

### **3.2.2. The Global Framework to Combat Global Warming, the EU and Ireland**

Since climate change mitigation talks began, the EU has been a supporter of the idea that emissions must be reduced by quantifiable amounts<sup>106</sup> in an effort to keep the earth's global temperature from rising above 2 degrees, and thus avoid as many of the consequences listed above as is possible. The earliest institutional documents which suggest an EU interest in the problem of global warming are a European Parliament

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<sup>103</sup> *Ibid.*

<sup>104</sup> Sonja van Renssen, 'Five take-home messages from the IEA's World Energy Outlook 2014' (Energy Post, 13 November 2014) <<http://www.energypost.eu/five-take-home-messages-ieas-world-energy-outlook-2014-2/>> accessed 17 November 2014.

<sup>105</sup> *Ibid.*

<sup>106</sup> Carlane (n 91) 7.



Resolution of 1986,<sup>107</sup> a Commission Communication of 1988,<sup>108</sup> and a Council Resolution of 21 June 1989 on the greenhouse effect and the Community.<sup>109</sup> Soon after, in June 1990, the European Council urged *'all countries to introduce extensive energy efficiency and conservation measures and to adopt as soon as possible targets and strategies for limiting emissions of greenhouse gases'* and requested concrete proposals from the Commission *'in particular, measures relating to carbon dioxide emissions, with a view to establishing a strong Community position in preparation for the second World Climate Conference.'*<sup>110</sup>

In 1996, the Council of Ministers stated it believed that *'global average temperatures should not exceed 2°C above pre-industrial level,'*<sup>111</sup> a belief which was founded on the basis of the findings of the 2<sup>nd</sup> Assessment Report of the IPCC.<sup>112</sup> In 1998, the EU made its first legally binding commitment to reduce emissions and increase renewable energy by quantifiable amounts when the 15 countries who were Member States of the European Union, and the delegation representing the EU, signed the Kyoto Protocol<sup>113</sup> and thereby agreed to abide by the strict legislative regulation of greenhouse gases by both the European Union and the United Nations.<sup>114</sup> The Protocol came into force in 2005, designed to implement the primary objective of the United Nations Framework Convention on Climate Change (UNFCCC) and stabilise greenhouse gas *'at a level which would prevent dangerous anthropogenic interference with the climate system'*. Through its provisions supported by the concept of *'common but differentiated responsibility'* developed countries, listed in Annex I agreed to reduce global emissions by 5 per cent below 1990 levels between 2008 and 2012.<sup>115</sup>

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<sup>107</sup> European Parliament, 'Measures to combat the rising concentration of CO<sub>2</sub> in the atmosphere. Resolution on measures to counteract the rising concentration of carbon dioxide in the atmosphere (the 'greenhouse' effect)' [1986] Doc. A2-68/86, OJ C 255/29.

<sup>108</sup> European Commission, 'Draft Council Resolution on the greenhouse effect and the Community.' [1988] COM (88) 656 final.

<sup>109</sup> Council, 'Council Resolution of 21 June 1989 on the greenhouse effect and the Community' [1989] OJ C 183/03.

<sup>110</sup> Department of Environment, Food and Rural Affairs and Department of Energy and Climate Change, 'Review of the Balance of Competences Call for Evidence Environment and Climate Change: Legal Annex' (Department of Environment, Food and Rural Affairs and Department of Energy and Climate Change, 2013) <[https://consult.defra.gov.uk/eu/balance\\_of\\_competences](https://consult.defra.gov.uk/eu/balance_of_competences)> accessed 22 June 2013.

<sup>111</sup> Commission (n99) 3. Comment made at the 1939<sup>th</sup> Council Meeting, Luxembourg, 25 June 1996.

<sup>112</sup> Intergovernmental Panel on Climate Change (n95).

<sup>113</sup> Kyoto Protocol (n3).

<sup>114</sup> Anne-Sophie Tabau and Sandrine Maljean-Dubois, 'Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union' [2010] 21 European Journal of International Law 3: 749-763.

<sup>115</sup> Kyoto Protocol (n3) article 3(1).



As an Annex I Party, the EU as a whole committed to a joint target of 8 per cent greenhouse gas reduction,<sup>116</sup> the overall target to be spread among the 15 Member States which were part of the EU at the time.<sup>117</sup> Under this system (which is often referred to as the 'European Bubble')<sup>118</sup> some EU Member States could increase their emission levels according to their lower level of development and industrialisation, others were obliged to maintain them at the same level, and still others were obliged to decrease them. For example: Ireland as a Member State in the second category was obliged to maintain its greenhouse gases at 13 per cent above 1990 levels until 2012, while the UK, as a country in the third category was obliged to reduce its greenhouse gases by 12.5 per cent below 1990 levels. In addition to the flexibility mechanisms which States could use to supplement other initiatives taken to reach their targets, (i.e. the International Carbon Market,<sup>119</sup> the Clean Development Mechanism<sup>120</sup> and Joint Implementation)<sup>121</sup> article 2 of the Kyoto Protocol provided a more direct range of measures to ensure achievement of Member State goals. These included the **enhancement of energy efficiency**<sup>122</sup> and the **research, promotion and use of renewable forms of energy.**<sup>123</sup>

In 2001, the United States (the largest emitter of global greenhouse gases at that time) withdrew from UNFCCC and Kyoto process. With the withdrawal of the US, the EU took up the role of climate action leader. It ratified the Protocol early, secured the involvement of key emitters to ensure the Protocol could come into effect<sup>124</sup> (i.e. Japan (4 June 2002), Russia (18 November 2004) and later Australia (12 December 2007)) and put domestic structures in place to ensure EU attainment of its 8 per cent target. These domestic structures built on previous initiatives such as the EU's greenhouse

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<sup>116</sup> The target was to reduce its greenhouse gases below a particular base year. For the EU-15 the base year for carbon dioxide, methane and nitrous oxide is 1990. For hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride (fluorinated gases) 12 Member States have selected 1995 as the base year whereas Austria, France and Italy have chosen 1990. As the EU inventory is the sum of Member State inventories, the EU 15 base year estimates for fluorinated gas emissions also include emissions from deforestation for the Netherlands, Portugal and the United Kingdom.

<sup>117</sup> Kyoto Protocol (n3) article 4. In the EU, this was achieved through the implementation of: Commission Decision 2006/944/EC (n3) which determined the respective emission levels allocated to Member States.

<sup>118</sup> *Ibid.*

<sup>119</sup> Kyoto Protocol (n3) article 7

<sup>120</sup> *Ibid.*, article 6.

<sup>121</sup> *Ibid.*, article 12.

<sup>122</sup> Emphasis added.

<sup>123</sup> Emphasis added.

<sup>124</sup> Note: the Kyoto Protocol required ratification by 55 States, including those countries that contributed 55 per cent of 1990 emissions, before it could enter into full force and effect.



gas monitoring system which had been in place since 1993.<sup>125</sup> In 2003 a regional emission trading scheme (the EU ETS) was launched, designed to target selected industries and oblige them to reduce their CO<sub>2</sub> emissions through making their participation in the scheme mandatory.<sup>126</sup> Kyoto targets were made enforceable on Member States under EU as well as international law through the enactment of Decision 2006/944/EC.<sup>127</sup>

In signing the Kyoto Protocol the European Union and its Member States agreed to abide by the international compliance mechanism provided for in Article 18 of the Kyoto Protocol, which established a compliance committee made up of a plenary, a bureau and two branches: the facilitative branch and the enforcement branch. The facilitative branch was established to provide advice and promote compliance by parties with their respective commitments. The enforcement branch, on the other hand, was established to be responsible for determining whether an Annex I Party was non-compliant with: (i) its emissions targets, (ii) the methodological and reporting requirements for greenhouse gas inventories and (iii) the eligibility requirements required to participate in the flexibility mechanisms.

When the Kyoto Protocol was initially signed, it was expected that a second commitment period could be agreed to run from 2013. Accordingly the enforcement measures outlined in the Protocol reflected this expectation. Thus, where the enforcement branch determined a Party had not met its greenhouse gas target, the rules stipulated that it could declare the Party to be non-compliant and require it to make up the difference between its actual emissions and its emission target during the second commitment period, with the added penalty of reducing emissions by approximately a further 30 per cent. The Party could also be declared to be ineligible to trade on the international carbon market. In addition the enforcement branch could find a participating Party had fallen foul of the methodological and reporting requirements, or the flexibility mechanism eligibility requirements. In this case the defaulting Party could be suspended from international trading until they had submitted a Compliance Action Plan which remedied identified problems.<sup>128</sup>

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<sup>125</sup> Decision (EEC) 93/389 of 24 June 1993 for a monitoring mechanism of Community CO<sub>2</sub> and other greenhouse gas emissions [1993] OJ L 167/ 31.

<sup>126</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32.

<sup>127</sup> Commission Decision 2006/944/EC (n3).

<sup>128</sup> UNFCCC, 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December

In 2007, the EU published a policy document entitled '*Limiting Global Climate Change to 2 Degrees Celsius*'. This document built on the earlier 2005 Communication '*Winning the Battle Against Climate Change*', describing the continuing EU position on global warming and climate change, and identifying key objectives for the future as follows:

*'The EU's objective is to limit global average temperature increase to less than 2°C compared to pre-industrial levels. This will limit the impacts of climate change and the likelihood of massive and irreversible disruptions of the global ecosystem. The Council has noted that this will require atmospheric concentrations of GHG to remain well below 550 ppmv CO<sub>2</sub> eq. By stabilising long-term concentrations at around 450 ppmv CO<sub>2</sub> eq. there is a 50 % chance of doing so. This will require global GHG emissions to peak before 2025 and then fall by up to 50 % by 2050 compared to 1990 levels. The Council has agreed that developed countries will have to continue to take the lead to reduce their emissions between 15 to 30 % by 2020. The European Parliament has proposed an EU CO<sub>2</sub> reduction target of 30 % for 2020 and 60 to 80 % for 2050.'*<sup>129</sup>

It also proposed that:

*'...the EU pursues in the context of international negotiations the objective of 30 % reduction in greenhouse gas emissions by developed countries by 2020 (compared to 1990 levels). This is necessary to ensure that the world stays within the 2°C limit. Until an international agreement is concluded, and without prejudice to its position in international negotiations, the EU should already now [sic] take on a firm independent commitment to achieve at least a 20 % reduction of GHG emissions by 2020, by the EU emission trading scheme (EU ETS), other climate change policies and actions in the context of the energy policy. This approach will allow the EU to demonstrate international leadership on climate issues. It will also give a signal to industry that the ETS will continue*

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2005 Addendum Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session' (30 March 2006) FCCC/KP/CMP/2005/8/Add.3.

<sup>129</sup> European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions. Limiting Global Climate Change to 2 Degrees Celsius. The way ahead for 2020 and beyond' [2007] COM (2007) 2, final, 2.



*beyond 2012 and will encourage investment in emission reduction technologies and low carbon alternatives.*<sup>130</sup>

To guarantee the attainment of a 20 per cent reduction of greenhouse gases by 2020 and demonstrate international leadership in the process, the EU strengthened the requirements placed by the Kyoto Protocol on its Member States, through the adoption of a Climate and Energy Legislative Package in 2009.<sup>131</sup> In so doing particular emphasis was placed on the role of renewable energy in emission reduction;<sup>132</sup> reflecting an EU wide recognition of the power sector as the sector capable of producing the largest reductions of emissions, with the potential to almost fully eliminate CO<sub>2</sub> emissions by 2050 (and the added potential to generate sufficient levels of competitively priced renewable electricity to largely replace the fossil fuels used in transport and heating).<sup>133</sup>

Consequently, in 2009 the EU's Climate and Energy Package was introduced to set ambitious specific legally binding renewable energy and emission reduction targets for Member States of the EU (designed to run until 2020).<sup>134</sup> The Package comprises four pieces of complementary legislation designed to support regional targets of: a 20 per cent share of renewable energy; 20 per cent less greenhouse gas emissions and a 20 per cent improvement in energy efficiency,<sup>135</sup> (the 20-20-20 targets).

Thus the Package was designed to take an integrated approach to climate and energy policy by reforming the EU ETS,<sup>136</sup> setting national binding emission reduction targets

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<sup>130</sup> *Ibid.*

<sup>131</sup> The Climate and Energy legislative package consists of four pieces of legislation: (1) Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63 (2) Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide [2009] OJ L 140/114 (3) Decision No. 406/2009/EC of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136 ('Effort Sharing Decision') and (4) Renewable Energy Directive (n2).

<sup>132</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 20 20 by 2020 - Europe's climate change opportunity' [2008] COM(2008) 13 final.

<sup>133</sup> European Commission, 'DG Climate Action: A Sectoral Perspective' (Commission, 11 November 2014) < [http://ec.europa.eu/clima/policies/roadmap/perspective/index\\_en.htm](http://ec.europa.eu/clima/policies/roadmap/perspective/index_en.htm)> accessed 14 November 2014.

<sup>134</sup> The Climate and Energy legislative package (n131).

<sup>135</sup> European Commission, 'Climate Action, The 2020 climate and energy package' (Commission, 11 November 2014) < [http://ec.europa.eu/clima/policies/package/index\\_en.htm](http://ec.europa.eu/clima/policies/package/index_en.htm)> accessed 14 November 2014. Note: the energy efficiency target is aspirational, rather than legally binding.

<sup>136</sup> Directive 2009/29/EC (n131).



for the sectors not covered by the ETS,<sup>137</sup> establishing a legal framework for carbon capture and storage,<sup>138</sup> setting an aspirational regional energy efficiency target and legally binding national renewable energy targets.<sup>139</sup> As this thesis is chiefly concerned with emission reduction as a motivating factor in the EU's drive to promote renewable energy development, the focus in the paragraphs which follow will be given to the EU's renewable energy targets (rather than its emission reduction targets).<sup>140</sup>

In determining how to achieve the regional renewable energy goal, the EU chose to fix a set renewable energy target for the EU as a region, supported by legally binding national targets. In so doing, EU leaders recognised the special contribution that renewable energy could make to the twin goals of reducing emissions and improving energy security.<sup>141</sup> In formulating the level of renewable energy targets allocated to specific Member States, the following considerations were taken into account: the different national starting points and potentials, including the existing level of renewable energies and national energy mixes (particularly low-carbon technologies). Thus, the Commission devised the following methodology to calculate individual targets: half of the additional effort required to reach the 20 per cent renewable energy target was shared equally between Member States; the other half was modulated according to GDP per capita. Final targets were also modified to take into account a proportion of the efforts already made by those Member States that have achieved a certain increase in their share of renewable energy.<sup>142</sup>

As acknowledged by the Commission (in a policy document which preceded the Climate and Energy Package):

*'The options for developing renewable energy vary from one Member State to another. Some have potential in wind power, others in solar power or in biomass. Member States are best placed to choose where to put the emphasis. But with lead times for bringing renewable energy on stream so long and investors needing certainty, it is important for Member States to have a clear vision of where they intend to act. Member States will each put forward a*

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<sup>137</sup> Effort Sharing Decision (n131).

<sup>138</sup> Directive 2009/31/EC (n131).

<sup>139</sup> Renewable Energy Directive (n2).

<sup>140</sup> Note: The greenhouse gas reduction target allocated to Ireland by the Climate and Energy Legislative Package's Effort Sharing Decision (n126) was to reduce the greenhouse gases not subject to regulation by the EU ETS by 20 per cent below 1990 levels by 2020.

<sup>141</sup> Commission (n131).

<sup>142</sup> *Ibid.*



*national action plan, setting out how they intend to meet their targets and allowing for progress to be monitored effectively.*<sup>143</sup>

Thus on 13 May 2009, the Renewable Energy Directive came into effect as an important part 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, and with further Community and international greenhouse gas emission reduction commitments beyond 2012.'*<sup>144</sup>

The Renewable Energy Directive allocated specific national renewable energy targets to Member States as shown in the table below. For Ireland, the allocated obligation was to attain a 16 per cent share of renewable energy in final energy consumption. Like all Member States, Ireland was also obliged to submit a national renewable energy action plan providing sectoral targets (for heating and cooling, transport and electricity)<sup>145</sup> and a trajectory towards the attainment of the 16 per cent goal. As shown in figure 7 below, in Ireland's national renewable energy action plan, the Irish government pledged that 40 per cent of its electricity (estimated to be between 4630 MW and 5800 MW)<sup>146</sup> would be generated from renewable energy resources and primarily onshore wind by 2020. Ireland's national renewable energy action plan will be more fully discussed in chapters 2 and 3.

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<sup>143</sup> Commission (n131).

<sup>144</sup> Renewable Energy Directive (n2) recital 1.

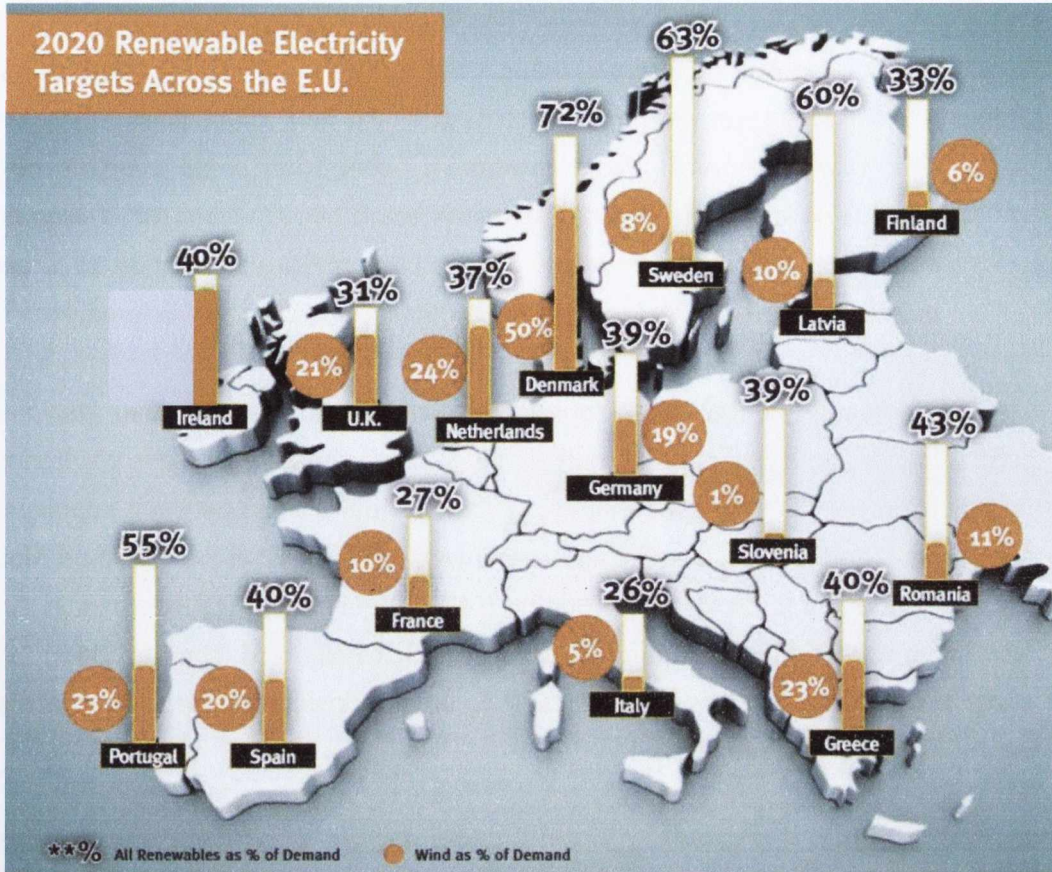
<sup>145</sup> National Renewable Energy Action Plan (n1).

<sup>146</sup> *Ibid.* Note: the precise number of MW required cannot be concretely predicted as figures fluctuate depending on demand and economic growth projections. Thus, as can be seen in this thesis estimates vary slightly from year to year.

	Share of renewable energy in 2005	Target for share of renewable energy by 2020
Belgium	2,2%	13 %
Bulgaria	9,4 %	16 %
Czech Republic	6,1 %	13 %
Denmark	17,0 %	30 %
Germany	5,8 %	18 %
Estonia	18,0 %	25 %
Ireland	3,1 %	16 %
Greece	6,9 %	18 %
Spain	8,7 %	20 %
France	10,3 %	23 %
Italy	5,2 %	17 %
Cyprus	2,9 %	13 %
Latvia	32,6 %	40 %
Lithuania	15,0 %	23 %
Luxembourg	0,9 %	11 %
Hungary	4,3 %	13 %
Malta	0,0 %	10 %
Netherlands	2,4 %	14 %
Austria	23,3 %	34 %
Poland	7,2 %	15 %
Portugal	20,5 %	31 %
Romania	17,8 %	24 %
Slovenia	16,0 %	25 %
Slovak Republic	6,7 %	14 %
Finland	28,5 %	38 %
Sweden	39,8 %	49 %
United Kingdom	1,3 %	15 %

**Table 2: Targets allocated by the renewable energy directive**





Source: The National Renewable Energy Action Plans (NREAP) January, 2012  
 Note: The Danish wind target was increased subsequently in quarter 2 of 2012

Figure 5: Wind targets across the EU<sup>147</sup>

The Climate and Energy Legislative Package was supported by a number of policy documents which detailed further how these targets were to be achieved across the EU. For instance, in 2007 the Commission had outlined how it foresaw wind power as key to these goals in the Communication *'Investing in the Development of Low Carbon Technologies (SET-Plan)'*.<sup>148</sup> This Communication detailed how the EU aimed to deliver a 60-80 per cent cut in greenhouse gases by 2050 compared to 1990 levels by reinventing its energy system as a low carbon model. In so doing it outlined how technology and the efficient use of resources would be the key to its success, and launched a number of initiatives to focus research and development on six areas (including wind, and the development of electricity infrastructure) described as key to ensuring the successful transition to a low carbon energy market.

<sup>147</sup> EirGrid Group (n4) 11. Note: this infographic is reproduced by kind permission of EirGrid.  
<sup>148</sup> European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 22 November 2007 entitled: "A European strategic energy technology plan (SET Plan) - Towards a low carbon future' COM(2007) 723 final.



In 2009, the Commission developed these ideas further to stress that although a large amount of investment was needed, the return would be fully competitive.

*'The total public and private investment needed in Europe over the next 10 years is estimated as €6 bn. The return would be fully competitive wind power generation capable of contributing up to 20% of EU electricity by 2020 and as much as 33% by 2030. More than 250 000 skilled jobs could be created.'*<sup>149</sup>

The complementary development of electricity infrastructure was further identified as central to creating a real internal market, integrating a massive increase of intermittent energy sources (like wind) and managing complex interactions between suppliers and customers. The Commission estimated that investments of €2 billion would be required between 2009 and 2019 to ensure that by 2020, 50 per cent of the networks in Europe were able to seamlessly integrate renewable electricity and operate along 'smart' principles, effectively matching supply and demand, and supporting the internal market for the benefit of citizens.<sup>150</sup>

In addition to the domestic initiatives and investments designed to reduce the EUs greenhouse gases, the EU has continued to push for international legally binding commitments from other nations. Above all, the EU has been an active voice in negotiations designed to finalise an agreement with legally binding targets to run after the expiry of the Kyoto Protocol in 2012. Although further commitment periods had originally been envisaged, these represented no more than an agreement to agree, with no fall-back provision if agreement could not be reached.<sup>151</sup> Negotiations to finalise a successor agreement began at the Conference of Parties 13 (COP 13) in 2007. What emerged is referred to as the Bali Roadmap. This formalised the setting up of an Ad Hoc Working Group (AHWG) on Long-term Cooperative Action under the UNFCCC and an AHWG on Further Commitments for Annex I Parties under the Kyoto Protocol.<sup>152</sup>

Later COP meetings also failed to produce a legally binding agreement to run from 2012. The Copenhagen Accord (which was signed in December 2009) was also a non-

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<sup>149</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Investing in the Development of Low Carbon Technologies (SET-Plan)' COM(2009) 0519 final.

<sup>150</sup> *Ibid.*

<sup>151</sup> Liz Bossley, 'Dealing with Reality' (2012) 5 Journal of World Energy Law and Business, 4, 345-365.

<sup>152</sup> *Ibid.*



binding document. However, it did have significance. It noted that any future increase in the average global temperature should be kept below 2 degrees Celsius when compared to pre-industrial times, and was signed by 114 countries, including the largest four greenhouse gas emitters: China, the USA, Russia and India.<sup>153</sup> Furthermore, under the Copenhagen Accord, the EU gave a public commitment to continue with the EU ETS in a bid to fulfil its pledge to reduce greenhouse gases by 20 per cent by 2020 (to be increased to 30 per cent should other developed nations make similar pledges).<sup>154</sup>

Progress at COP 17 in Durban in December 2011 was also modest but noteworthy. Although a treaty with specific interim targets for all Parties could not be finalised, a commitment was given to adopt a further agreement by 2015 to run from 2020 with emission reductions for both developed and developing countries,<sup>155</sup> with negotiations scheduled to secure this agreement in Le Bourget, France in 2015.<sup>156</sup> Moreover, the EU along with a small number of other developed countries (excluding Russia, Japan and the US) formally agreed to a second commitment period of the Kyoto Protocol to run from 1 January 2013.<sup>157</sup> To achieve rapid clarity, the parties to this second period were required to turn their economy-wide targets into quantified emission reduction objectives and submit them for review by 1 May 2012.<sup>158</sup> At COP 18 in Doha in December 2012 the legalities were finalised to amend the relevant provisions of the Kyoto Protocol and initiate this second period (2013-2020).<sup>159</sup> More recently, at Lima it

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<sup>153</sup> *Ibid.* Note: the Copenhagen Accord also provided for developed countries to invest \$30 billion between 2010 and 2012, with the allocation of funds to be balanced between adaptation and mitigation actions. The developed countries would further commit to a goal of \$100 billion per year by 2020, with a significant portion of that funding flowing through a new Copenhagen Green Climate Fund (GCF).

<sup>154</sup> Letter on behalf of the European Union to the Executive Secretary of the UNFCCC (28 January 2010) <[http://unfccc.int/files/meetings/cop\\_15/copenhagen\\_accord/application/pdf/europeanunioncphaccord\\_app1.pdf](http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/europeanunioncphaccord_app1.pdf)> accessed 4 November 2012

<sup>155</sup> UN Conference of the Parties, 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action' (15 March 2012) FCCC/CP/2011/9/Add.1, 2.

<sup>156</sup> See generally: Eva Barrett, 'Climate Change. Location: Stockholm. Destination: Le Bourget' (Dublin, 16 October 2013) <<http://www.iiea.com/blogosphere/climate-change-location-stockholm-destination-le-bourget>> accessed 14 November 2014.

<sup>157</sup> United Nations Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol Sixteenth session, 'Consideration of further commitments for Annex I Parties under the Kyoto Protocol' (10 December 2011) FCCC/KP/AWG/2011/L.3/Add.1.

<sup>158</sup> United Nations Climate Change Secretariat, 'Durban conference delivers breakthrough in international community's response to climate change' (UN Media Release, 11 December 2011) <[http://unfccc.int/files/press/press\\_releases\\_advisories/application/pdf/pr20111112cop17final.pdf](http://unfccc.int/files/press/press_releases_advisories/application/pdf/pr20111112cop17final.pdf)> accessed 23 March 2013.

<sup>159</sup> United Nations, 'Nations take 'essential' next step in climate change fight' (UN Press Release, 8 December 2012) <<http://www.cop18.qa/en-us/news/singlestory.aspx?id=297#sthash.KeiQAZfl.dpuf>> accessed 17 November 2014.



was decided that all countries would make (unbinding) greenhouse gas reduction pledges beyond their current undertakings by March 2015 in preparation for the finalisation of a further agreement in France in 2015.<sup>160</sup>

Although global negotiations lost momentum in the years which followed the expiry of the Kyoto Protocol's first commitment period in 2012,<sup>161</sup> recent developments at both regional and global levels could serve to re-invigorate the process (thereby providing additional stability to the renewable energy market) in the lead in to 2015's negotiations. At regional level, on the 22 January 2014 the Commission published its Climate and Energy Policy Framework for 2030 (in preparation for negotiations in 2015).<sup>162</sup> This Framework included (i) a binding regional target to reduce greenhouse gases by 40 per cent below 1990 levels by 2030 (to be supported by individual national targets at a later date) and (ii) an aspirational regional target to reach a 27 per cent share of renewable energy by 2030.<sup>163</sup> Reform of the EU ETS was advocated through the introduction of a market stability reserve to operate from 2021 and to automatically adjust the number of auctioned allowances following a pre-defined set of rules.<sup>164</sup> The Framework was agreed by the 28 EU leaders at the European Council on 24 October 2014.<sup>165</sup>

At global level, on 11 November 2014, the US and China issued a joint announcement reaffirming that they were committed to working together and with other countries to adopt a further protocol (or other legally binding instrument) to combat climate change. The joint announcement stated that they were both committed to reach an ambitious 2015 agreement, albeit one which '*reflects the principle of common but differentiated responsibilities and respective capabilities in light of different national circumstances*'.

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<sup>160</sup> UN Conference of the Parties, 'Lima call for climate action, Decision /CP.20 (advanced unedited version)' <

[http://newsroom.unfccc.int/media/167536/auv\\_cop20\\_lima\\_call\\_for\\_climate\\_action.pdf](http://newsroom.unfccc.int/media/167536/auv_cop20_lima_call_for_climate_action.pdf)> accessed 18 December 2014.

<sup>161</sup> Kyoto Protocol (n3).

<sup>162</sup> European Commission, 'A policy framework for climate and energy in the period from 2020 to 2030' [2014] COM(2014) 15 final

<[ec.europa.eu/energy/consultations/doc/com\\_2013\\_0169\\_green\\_paper\\_2030\\_en.pdf](http://ec.europa.eu/energy/consultations/doc/com_2013_0169_green_paper_2030_en.pdf)> accessed 29 January 2014.

<sup>163</sup> Eva Barrett, 'Off Target. The EU's Climate and Energy Policy Framework for 2030' (Dublin, 1 February 2014) < <http://www.irishenvironment.com/commentary/eva-barrett-off-target-the-eus-climate-and-energy-policy-framework-for-2030/>> accessed 14 November 2014.

<sup>164</sup> *Ibid.*

<sup>165</sup> European Council, 'Conclusions' (European Council, 24 October 2014) < [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/145397.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/145397.pdf)> accessed 14 November 2014.



In addition, the statement added that:

*'The United States intends to achieve an economy-wide target of reducing its emissions by 26%-28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%. China intends to achieve the peaking of CO2 emissions around 2030 and to make best efforts to peak early and intends to increase the share of non-fossil fuels in primary energy consumption to around 20% by 2030. Both sides intend to continue to work to increase ambition over time.'*<sup>166</sup>

While these commitments could hardly be regarded as 'ambitious'<sup>167</sup> when considered in light of the commitments required to prevent the significant economic and ecological damage predicted if the average global temperature is permitted to rise above 2 degrees,<sup>168</sup> they represent a positive development (and were recognised as such by media worldwide in the lead-in to the most recent negotiations in Lima).<sup>169</sup> Admittedly, from the statement it appears that China will continue to insist on the allocation of targets based on the principle of common but differentiated responsibilities (a position which led to negotiation deadlocks in the past) nevertheless, the joined statement is a positive development. It shows a readiness on behalf of the worlds' two greatest greenhouse gas emitters to re-engage in negotiations and could even signal their readiness to reach a compromise.

As these events demonstrate, there is both a global and a regional drive to reduce greenhouse gases by moving to a low-carbon energy market. Although the commitments most recently proposed by the US, China and the EU are not ambitious enough (either individually or in combination) to contain global emissions to the extent necessary to prevent the global temperature from rising above 2 degrees, they are a step in the right direction. Moreover, they indicate an acknowledgment of the seriousness of the problem and the necessity to move away from CO2 emitting energy resources. In this manner, they have provided renewable energy developers and

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<sup>166</sup> The White House Office of the Press Secretary, 'US –China Joint Announcement on Climate Change' (The White House Office of the Press Secretary, 11 November 2014) <<http://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>> accessed 18 November 2014.

<sup>167</sup> IPCC (n99).

<sup>168</sup> *Ibid.* See also: Commission (n99) annex I.

<sup>169</sup> See for example: Clifford Coonan, 'China and US agree to co-operate on climate change Deal boosts hopes for accord at UN climate change talks in Paris next year on cutting emissions' *Irish Times* (Dublin, 13 November 2014) 7.

governments with a clear signal that the international and regional policies and laws which support and promote renewable energy development are likely to survive (as the need to move away from CO2 emitting energy resources becomes ever more urgent).

At regional level, the EU has further sought to provide Member States (and renewable energy developers) with added confidence in the durability of its renewable energy development policies, through its production of long-term strategies. Thus, the Communication (2010) '*Energy 2020 A strategy for competitive, sustainable and secure energy*' described the key focus points of EU energy policy up until 2020.<sup>170</sup> The Commission's later Communication (2011) '*A Roadmap for moving to a competitive low carbon economy in 2050*' detailed the key challenges that Europe would face in moving to a low carbon economy by 2050 and its strategy to confront and face these challenges head on.<sup>171</sup> Here, it was noted that in February 2011 the European Council had reconfirmed the EU objective of reducing greenhouse gas emissions by 80-95 per cent by 2050 compared to 1990 (in order to keep climate change below 2°C) in line with the position endorsed by world leaders in the Copenhagen and Cancun Agreements. It was further acknowledged that this policy was in line with the commitment to deliver long-term low carbon development strategies which were included in these agreements.

These documents also demonstrate the focus given to the electricity sector as a central component in the EU's greenhouse gas reduction policies. The Commission Roadmap describes the extent of the EU's regional ambitions to reduce CO2 emissions in the power sector, projecting that these could be reduced by 7 per cent by 2005, 54-68 per cent by 2030, and 93-99 per cent by 2050<sup>172</sup> (with the reductions to be achieved through a significant use of renewables, many of which have variable output, i.e. wind). The Roadmap further describes the EU's move to a low-carbon internal market as absolutely necessary for the EU's security of supply.<sup>173</sup>

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<sup>170</sup> European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions. Energy 2020 A strategy for competitive, sustainable and secure energy.' [2010] COM (2010) 0639 final.

<sup>171</sup> European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions. A Roadmap for moving to a competitive low carbon economy in 2050' [2011] COM 112 final.

<sup>172</sup> *Ibid*, 2.

<sup>173</sup> *Ibid*, 17.



The complementary long-term goals of reducing emissions and increasing security of energy supply continue to be central motivating forces in the EU's drive to promote renewable energy. This is evident both from the Impact Assessment which preceded the Climate and Energy Legislative Package and the Impact Assessment to accompany the more recent Climate and Energy Policy Framework for 2030. In 2008, the motivations behind the Climate and Energy Legislative Package were outlined as follows:

*'Overall it can be concluded that reducing greenhouse gas emissions and increasing renewable energy ...makes the EU considerably less dependent on imports of oil and gas. Next to positive trade balance effects, this reduces the exposure of the EU economy to rising and volatile energy prices, inflation, geopolitical risks and risks related to inadequate supply chains that are not matching the global demand growth.'*<sup>174</sup>

Similar aims were targeted by the Climate and Energy Policy Framework for 2030 which described the challenges it sought to contribute to overcoming them as follows:

*'(1) The EU's present policies are not sufficient to reach the EU's long term climate objective in the context of necessary reductions by developed countries as a group to reduce GHG emissions by 80-95% in 2050 compared to 1990. In the context of international climate negotiations, the EU will need to come forward with a position, including its own ambition level ahead of 2015. This challenge is therefore interlinked with international climate change mitigation efforts.*

*(2) The EU's medium-to long-term security of energy supplies remain an issue due to a persisting energy import dependence on sometimes politically instable regions and reliance on fossil fuel usage which in the long term will be incompatible with the EU's climate objectives ...Gradual depletion of the EU's conventional fossil fuel resources together with expectation of continued high and volatile fossil fuel import prices puts pressure on parts of EU industry.*

*(3) The EU's energy system needs significant investments in energy infrastructure and electricity generation to ensure its medium to long term*

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<sup>174</sup> European Commission, 'Commission Staff Working Document Impact Assessment Document accompanying the Package of Implementation measures for the EU's objectives on climate change and renewable energy for 2020' [2008] COM (2008)16, 15.

*viability and sustainability. Long investment cycles mean that infrastructure funded in the near term will still be in place several decades from now...Authorities, regulators, energy system operators, investors and manufacturers of innovative low carbon technology therefore need urgently a clear and coherent climate and energy policy framework that creates predictability and reduced regulatory risk.*

*(4) Current policies aiming at achieving a more sustainable economy and energy system, which may reduce costs and avoid damages in the longer run, are expected to contribute to short to medium term cost increases, which give rise to concerns about the affordability of energy of households and the competitiveness of EU energy prices in an international context.<sup>175</sup>*

These assessments clearly demonstrate the long-term motivations behind the EU's efforts to promote renewable energy development. In addition, the most recent Impact Assessment identifies two further challenges (how to incentivise investment in infrastructure and how to provide households with electricity affordability) which accompany renewable energy, and particularly onshore wind development. While this chapter has focused on the global factors which prompted the recent drive to develop renewable energy in the EU, these challenges will be considered in more depth in the chapters 5 and 6.

#### **4. Conclusion**

Wind energy has come a long way since its use to propel boats along the river Nile in 5000 B.C.<sup>176</sup> This has partially been the result of continuing improvements in the technology used (such as those which led to renewable electricity generation in Marykirk<sup>177</sup> and Cleveland in 1887,<sup>178</sup> and those which allowed wind generated electricity to contribute to energy supply in the US and Denmark during World War

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<sup>175</sup> European Commission, 'Commission Staff Working Document Impact Assessment Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A policy framework for climate and energy in the period from 2020 up to 2030' [2014] COM(2014) 15 final, 31.

<sup>176</sup> The Capitol.Net (n12) 1

<sup>177</sup> Tabassum-Abbasi (n25) 273.

<sup>178</sup> Yergin (n16) 592.



II).<sup>179</sup> More recently, further innovation has led to the development of larger more efficient wind farms with the potential to significantly contribute to national energy mixes and to provide a viable alternative electricity generating fuel.

While technological advancements have enabled the greater use of wind energy, there has also been a renewed interest in its use. There are two reasons for this. The first is that use of wind energy can contribute to security of energy supply in regions and States (like the EU and Ireland) which are otherwise poor in indigenous resources. For the EU and Ireland, wind energy has the potential to insulate them from disruptions in energy supply (such as those which followed the oil crises)<sup>180</sup> and wholesale market price spikes (such as those which emanated from Libya in 2011).<sup>181</sup> Both the EU and Ireland are energy importers. In 2013, the EU was named as the world's largest energy importer.<sup>182</sup> In the same year, Ireland imported 64 per cent of the fuels used to generate its electricity (with gas providing 54.2 per cent of Ireland's electricity and the UK providing 91 per cent of Ireland's gas).<sup>183</sup> Increasing the wind power used in electricity generation would significantly reduce these imports.

The second reason for the renewed interest in wind energy is that it has the potential to significantly reduce the greenhouse gases emitted by the power sector, reducing these by 7 per cent by 2005, 54-68 per cent by 2030, and 93-99 per cent by 2050.<sup>184</sup> As such it could contribute considerably to the global aim of stabilising the concentration of greenhouse gases at below 450 ppm (a concentration which would provide a 50 per cent chance of keeping the global temperature from rising above the 2 degrees Celsius target, the temperature above which significant economic and ecological damage is predicted).<sup>185</sup>

The goal to reduce greenhouse gas emissions has been high on the EU's political agenda since its accession to the UNFCCC<sup>186</sup> and its Kyoto Protocol.<sup>187</sup> Consequently, the EU developed a regional legislative and policy framework to promote renewable energy development (for resources such as onshore wind) and reduce greenhouse gas

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<sup>179</sup> The Capitol.Net (n12) 2.

<sup>180</sup> Jean-Arnold Vinois (n64).

<sup>181</sup> Lowe (n69).

<sup>182</sup> Commission (n44) 14.

<sup>183</sup> Commission for Energy Regulation (n62).

<sup>184</sup> Commission (n171).

<sup>185</sup> International Energy Agency (n99).

<sup>186</sup> UNFCCC (n3).

<sup>187</sup> Kyoto Protocol (n3).

emissions. For renewable energy development, the centre-piece of this framework is the Renewable Energy Directive of 2009.<sup>188</sup> Pursuant to this, Member States became obliged to reach specific national renewable energy targets by 2020 and to submit national renewable energy action plans providing sectoral targets and a trajectory towards the attainment of these goals. In Ireland's national renewable energy action plan, the Irish government pledged that 40 per cent of its electricity (between 4630 MW and 5800 MW)<sup>189</sup> would be generated from renewable energy resources, primarily onshore wind, by 2020.<sup>190</sup>

While the international negotiations designed to reach a further international agreement on climate change (to succeed the UNFCCC's Kyoto Protocol) have become stalled in recent years, there have been some positive. On 22 January 2014, the EU published its Climate and Energy Framework for 2030.<sup>191</sup> This Framework includes regional 2030 targets: to reduce emissions by 40 per cent and reach a 27 per cent target of renewable energy consumption, and was agreed by EU Council on 24 October 2014.<sup>192</sup> Furthermore, on 14 December 2014 a pledge was made by all nations to submit non-legally binding greenhouse gas reduction targets by March 2015 in preparation for 2015's climate negotiations in Paris.<sup>193</sup>

This was preceded by a joint statement from the US and China on 11 November 2014, in which they committed to accepting binding emission reduction targets (with the US committed to reducing its emissions by 26 – 28 per cent below a baseline year of 1990 in 2025 and China committed to peak its emissions by 2030).<sup>194</sup> These events demonstrate a renewed global and a regional drive to reduce greenhouse gases by moving to a low-carbon energy market, thereby providing further market certainty to wind developers and national governments.

Although the future success of global efforts to keep the global temperature from rising above 2 degrees Celsius cannot be predicted, it seems clear that the regional drive to

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<sup>188</sup> Renewable Energy Directive (n2).

<sup>189</sup> *Ibid.* Note: the precise number of MW required cannot be concretely predicted as figures fluctuate depending on demand and economic growth projections. Thus, as can be seen in this thesis estimates vary slightly from year to year.

<sup>190</sup> Department of Communications, Energy & Natural Resources (n1).

<sup>191</sup> European Commission, 'Public Consultation, Green Paper on a 2030 framework for climate and energy policies' (Commission, 27 March 2013) <[ec.europa.eu/energy/consultations/20130702\\_green\\_paper\\_2030\\_en.htm](http://ec.europa.eu/energy/consultations/20130702_green_paper_2030_en.htm)> accessed 29 January 2014.

<sup>192</sup> Commission (n6).

<sup>193</sup> UN Conference of the Parties (n160).

<sup>194</sup> The White House Office of the Press Secretary (n166).



move to renewable energy resources will survive. This drive led Ireland to submit a national renewable energy action plan detailing its strategy to develop an onshore wind generated electricity market on 1 July 2010,<sup>195</sup> a strategy which will be more fully considered in chapters 2 and 3 of this thesis. Just as this chapter has sought to place the subject in a global context (by considering both the international factors which prompted the recent drive to develop renewable energy in the EU) chapter two seeks to place the subject in a European context by analysing the European framework within which the Irish onshore wind generated electricity markets operate.

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<sup>195</sup> Department of Communications, Energy & Natural Resources (n1).

## Chapter 2 The European Framework Promoting and Regulating the Development of Irish Onshore Wind

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### 1. Introduction



Increasing competition for energy resources, price fluctuations, insecurity of energy supply and global warming have each motivated the EU to promote renewable energy development. While these factors impact on Ireland, Irish energy law and policy generally takes its lead from the EU. This Irish position evolved as the EU assumed greater responsibility for these areas, which culminated in the introduction of articles 130r, 130s and 130t EEC Treaty on environmental action in 1987<sup>1</sup> and the introduction of article 4(2)(i) TFEU on energy in 2009.<sup>2</sup>

As has been discussed in the preceding chapter, Ireland and the EU have definite reasons to wish to develop renewable energy. However, as a member state of the EU, there are also legal reasons for Ireland's decision to develop onshore wind generated electricity. These stem from the overarching '*duties*' placed on Ireland or the '*Irish State*' by EU law, and the particular duty placed on Ireland to reach a 16 per cent share of renewable energy consumption by the Renewable Energy Directive,<sup>3</sup> which led the Irish government to pledge to produce approximately 40 per cent of Ireland's electricity from onshore wind in its national renewable energy action plan in 2010.<sup>4</sup>

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<sup>1</sup> Through the Single European Act [1986] OJ L 169 ('the Single European Act') as introduced to Irish law through the: Tenth Amendment of the Constitution Act, 1987.

<sup>2</sup> Through the Treaty of Lisbon [2007] OJ C 306 ('the Lisbon Treaty'), as introduced to Irish law by the Twenty-eighth Amendment of the Constitution Act, 2009.

<sup>3</sup> Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16 (the 'Renewable Energy Directive').

<sup>4</sup> Department of Communications, Energy & Natural Resources, 'National Renewable Energy Action Plan. Ireland. Submitted under Article 4 of Directive 2009/28/EC' (DCENR, 1 July 2010)



This chapter seeks to place this pledge in context by considering the laws which promoted the decision and the legal framework governing Irish onshore wind generated electricity. Thus, part one will consider the meaning attributed to the terms Ireland and the Irish State; Ireland's membership of the EU and the duties which flow from this membership; part two will consider EU action in the energy field, and the specific EU energy laws to prompt Ireland's decision to develop its onshore wind generated electricity market.

## 2. The Overarching Duty Placed on Ireland as a Member State of the EU from which all other Duties discussed in this Thesis Emanate

### 2.1. The meaning of 'Ireland' or the 'Irish State' in this thesis

Despite the evolution of the Irish wholesale electricity market to operate on an all island basis in 2007 (the Single Electricity Market or SEM), the Irish and UK electricity markets (i.e. the development,<sup>5</sup> transmission,<sup>6</sup> distribution<sup>7</sup> and sale markets)<sup>8</sup> remain distinct entities subject to regulation by their respective governments. Consequently, in

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< <http://www.dcenr.gov.ie/NR/rdonlyres/03DBA6CF-AD04-4ED3-B443-B9F63DF7FC07/0/IrelandNREAPv11Oct2010.pdf>> accessed 29 October 2014, 6.

<sup>5</sup> In this thesis the development market refers to the generation or wholesale market where electricity is produced by power stations. The Commission has defined this market as covering: 'the production of electricity at power stations and the import of electricity through interconnectors for purpose of resale to retailers or, to a lesser extent, directly to large industrial end-users' See: *EDP/ENI/GDP* (Case COMP/M.3440) Commission Decision 2004/C 209/6 [2004] OJ C 209/06; *E.ON/MOL* (Case COMP/M.3696); *EdF/AEM/Edison* (Case COMP/M.3729); *-Vattenfall/Elsam and Energi E2* (Case COMP/M.3867). See further: European Commission Competition DG, 'DG Competition Report on Energy Sector Inquiry 10 January 2007' Sec (2006) 1724. See also: Emmanuel Cabau, 'The relevant product market – Electricity' in Christopher Jones (ed.) *EU Energy Law Volume II EU Competition Law and Energy Markets* (2011, Claeys & Castells, 3<sup>rd</sup> edn).

<sup>6</sup> Transmission is defined at EU level as: 'the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply' in Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ 5 L 211/5 ('the third liberalisation directive'). However, the distinction between transmission and distribution has been made more clear in Irish documents such as 'Grid 25' wherein transmission was described in the following terms: 'The bulk transmission system, comprising circuits at 220 kV or higher, represents the motorways and dual carriageways of the electricity transport system.' Source: EirGrid, 'Grid 25. A Strategy for developing Ireland's Electricity Grid for a Sustainable and Competitive Future' (EirGrid, 2009) < <http://www.eirgrid.com/media/Grid%2025.pdf>> accessed 17 September 2014.

<sup>7</sup> Distribution is defined at EU level as 'the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply' in the third liberalisation directive (n6).

<sup>8</sup> In this thesis, the sale market refers to the market for supply to final customers, who are free to choose their electricity supplier. These customers can be distinguished from very large consumers (i.e. those connected directly to the transmission grid or directly supplied by generators). See Cabau (n5)14.



this thesis, the term 'Irish State' and 'Ireland' are given their ordinary meaning and used to refer to the 26 counties of Ireland (excluding Antrim, Armagh, Down, Fermanagh, Derry or Londonderry and Tyrone) with the analysis limited to considering the overarching target allocated to the Irish government and the duties of relevance to this in three of Ireland's successive electricity markets (development, transmission and sale).<sup>9</sup>

In defining the bodies included within the term 'State', the word is given the meaning attributed to it by the CJEU. Consequently, it includes a broad range of entities such as tax authorities;<sup>10</sup> local or regional authorities;<sup>11</sup> constitutionally independent authorities responsible for the provisions of a public service<sup>12</sup> and public authorities providing public services.<sup>13</sup> Accordingly when the term Ireland or Irish State is used in this thesis, it means the State, including its governmental, legislative, executive and judicial organs<sup>14</sup> or bodies:

*'...whatever [their] legal form, which [have] been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and [have] for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.'*<sup>15</sup>

The central test to determine whether a body or organ can be considered an emanation of the Irish State is whether sufficient levels of 'control' exist. The CJEU has said it will find control where:

*'... the system concerned involves a particularly precise legal framework which lays down a set of rules determining the way in which ...[the entity in question] must perform the public functions ...with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with, where appropriate by means of the issuing of orders*

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<sup>9</sup> See the definitions at n5, n6, n7 and n8 above. Note: the distribution market was excluded from examination in this thesis to enable full focus to be given to the more substantial problems of the other markets.

<sup>10</sup> Case 8/81 *Becker* [1982] ECR 00053; Case C-221/88 *ECSC v Acciaierie e Ferriere Bussent (in liquidation)* [1990] ECR I-495.

<sup>11</sup> Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839.

<sup>12</sup> Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

<sup>13</sup> Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

<sup>14</sup> Bunreacht na hÉireann (the Irish Constitution) article 6.

<sup>15</sup> Case C-188/89 *Foster v British Gas* [1990] ECR I-3313, para 20.



or the imposition of fines, it may follow that those entities do not have genuine autonomy vis-à-vis the State, even if the latter is no longer in a position, following privatisation of the sector in question, to determine their day-to-day management.<sup>16</sup>

Applying this formula to the Irish energy markets, it is clear that a number of the central players in the energy market, which are discussed in this thesis, are included within the term 'Irish State'.<sup>17</sup> These include: the ESB Group, the state owned group of energy companies (which is the distribution system operator,<sup>18</sup> transmission asset owner<sup>19</sup> and began as a vertically integrated energy company operating as a monopoly in each successive market from 1927 to 1999);<sup>20</sup> the Minister for Communications, Energy and Natural Resources;<sup>21</sup> the Minister for the Environment, Heritage and the Local Community;<sup>22</sup> the Irish courts of last instance;<sup>23</sup> the Ervia group (the state owned group of companies, formerly known as Bord Gáis Éireann, with responsibility for the delivery of gas and water infrastructure and services in Ireland, and a former onshore wind developer);<sup>24</sup> An Bord Pleanála (which was set up in 1977 by the Local Government

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<sup>16</sup> Case C-279/12, *Fish Legal, Emily Shirley v Information Commissioner* [2013] ECR I-0000 (unreported), para 71.

Note: In analysing the requirements necessary for 'control' to be shown in the Irish High Court, Birmingham J considered the following factors to be relevant to his determination of whether the Motor Insurance Bureau of Ireland (an entity set up in 1955 by an agreement between the Government and the companies underwriting motor insurance in Ireland for the purpose of compensating victims of road traffic accidents caused by uninsured and unidentified vehicles) could be considered an emanation of the state: '...aspects such as the operation of a veto on the alteration on the memorandum and articles as well as the entitlement of the Minister to give a binding direction in the event of a disagreement between a claimant and the bureau are indicative of a significant level of State control.' *Farrell v Whitty* [2008] IEHC 124, para 13.4.

<sup>17</sup> Note: The Commission for Energy Regulation, the Irish Energy Regulator and EirGrid, the Irish transmission system operator, are not considered as falling within the definition for Irish State, as two entities which are unlikely to be found to be subject to the control of the State.

<sup>18</sup> See generally: Electricity (Supply) Act 1927, Number 27 of 1927; Electricity Regulation Act 1999, Number 23 of 1999 (as amended); European Communities (Internal Market in Electricity) Regulations, 2000, SI Number 445 of 2000.

<sup>19</sup> As endorsed by the: European Commission, 'Commission Decision of 12.4.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC –Ireland–Eirgrid / ESB' [2013] C(2013) 2169 final ('the Commission Decision on Ireland's Exemption from the Third Liberalisation Directive').

<sup>20</sup> Pursuant to the Energy (Miscellaneous Provisions) Act 2012, Number 3 of 2012 which defines the distribution system operator to be 'the company formed pursuant to Regulation 3 of the European Communities (Internal Market in Electricity) (Electricity Supply Board) Regulations 2008, S.I. 280 of 2008, under the name of ESB Networks Ltd., or any company duly replacing it'; See also: *McCord v ESB* [1980] ILRM 153, for a discussion of the position of the ESB in Irish society in 1980.

<sup>21</sup> The Irish Courts accepted that a government minister could be included in the term State in: *Teresa Tate v the Minister for Social Welfare Ireland and the AG* [1995] IR 418.

<sup>22</sup> *Ibid.*

<sup>23</sup> Case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica italiana* [2006] ECR I-05177.

<sup>24</sup> Note: on 26 March 2014 Centrica bought Bord Gáis Éireann's wind farm business for 1.1 billion. See: Mark Paul, 'Centrica buys Bord Gais power plant and customer base for half price



(Planning and Development) Act, 1976<sup>25</sup> with responsibility for the determination of appeals under the Planning and Development Act 2000, as amended)<sup>26</sup> and the local planning authorities.<sup>27</sup>

As is evident, a large number of the entities which will be discussed herein are included within the term 'Irish State'. As this thesis entails a study of the central duties imposed upon these parties, which are relevant to the development and sale of onshore wind generated electricity, the paragraphs which follow will consider the legal basis for these duties, which originates from article 4(3) TEU (known as the duty of sincere cooperation).<sup>28</sup> Ireland agreed to accept this duty on becoming a member of the European Coal and Steel Community (ECSC),<sup>29</sup> the European Atomic Energy Community (Euratom)<sup>30</sup> and the European Economic Community (EEC)<sup>31</sup> in 1973.<sup>32</sup> However, similar to the European Union itself, the obligations of membership and the means used to fulfil its requirements have since evolved as will be analysed in the paragraphs which follow. Accordingly, these will discuss Ireland's membership of the EU, the meaning of the term 'duty' as used in this thesis, the principal duty placed on Ireland as a Member State of the EU and the laws which empower the Irish government to fulfil the core requirements of EU Membership.

## 2.2. Ireland's membership of the EU

On 8 June 1972, Ireland became a member state of what was then the European Communities. This followed a national referendum on 10 May 1972 in which 83 per

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at [euro]210m: UK company gets almost 700,000 customers effectively for free' *Irish Times* (Dublin, 26 Mar 2014) 2.

<sup>25</sup> Number 20 of 1976.

<sup>26</sup> This was fully accepted by the Irish courts in relation to local authorities (and by implication, their appellate body) in: *Coppinger v Waterford County Council* [1998] 4 IR 220 which cited the following EU cases to support its determination: *Case 148/78 Pubblico Ministero v. Ratti* [1990] ECR. 1629; *Becker (n10)*; *Marshall (n13)*; *Johnston (n12)*; *Case C-106/89 Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.* [1990] ECR. 4135; *Foster (n15)*; *Fratelli (n10)*.

<sup>27</sup> *Ibid.*

<sup>28</sup> Treaty on European Union [2012] OJ C 326/13 ('TEU').

<sup>29</sup> Treaty establishing the European Coal and Steel Community [1951] ('ECSC Treaty').

<sup>30</sup> Treaty establishing the European Atomic Energy Community [1957] ('Euratom Treaty').

<sup>31</sup> Treaty establishing European Economic Community [1957] ('EEC Treaty').

<sup>32</sup> Gavin Barrett, 'Why Does Ireland Have All Those European Referendums? A Look at Article 29.4 of the Irish Constitution' (Institute of International and European Affairs, Economic Governance Paper 4)<

<http://www.iiea.com/ftp/Publications/IIEA%20Economic%20Governance%20Paper%204%20v2%20%281%29.pdf> > accessed 19 November 2014,1.



cent of those voting voted in favour of membership.<sup>33</sup> As noted in Byrne and McCutcheon,<sup>34</sup> this required the amendment of Article 29 of the Irish Constitution (Bunreacht na hÉireann) to enable the State to ratify a Treaty of Accession<sup>35</sup> to three international organisations: the European Coal and Steel Community (ECSC),<sup>36</sup> the European Atomic Energy Community (Euratom)<sup>37</sup> and the European Economic Community (EEC).<sup>38</sup> The effect of the amendment was to authorise Ireland to join these Communities through the insertion of article 29.4.3 into the Irish Constitution, which read as follows:

*'The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the European Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.'*<sup>39</sup>

Paradoxically, this provision was simultaneously considered to be both narrowly drafted and to have gone further than necessary to effect Irish membership of the three Communities.<sup>40</sup> This was because article 29.4.3 limited the Communities' powers to the spheres governed by the Treaties (or to matters concerning economics, nuclear energy and coal and steel) subject to one limited exception. Further powers could be given to the Communities, either directly or indirectly, pursuant to then-article 235 of the EEC Treaty,<sup>41</sup> which allowed the Council, under certain circumstances to unanimously adopt any measure to further the objectives of the Treaty, even if no

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<sup>33</sup> *Ibid.*

<sup>34</sup> Raymond Byrne, Paul McCutcheon, Claire Bruton and Gerard Coffey, Byrne and cCutcheon on the Irish Legal System (5th edn, Bloomsbury, 2009) 725.

<sup>35</sup> Treaty of Accession of Denmark, Ireland and the United Kingdom (Adaptation decision (1973) [1973] OJ L 2/1.1.1973.

<sup>36</sup> ECSC Treaty (n29).

<sup>37</sup> Euratom Treaty (n30).

<sup>38</sup> EEC Treaty (n31).

<sup>39</sup> This was done by the Third Amendment of the Constitution Act, 1972, Number 3 of 1972, section 1.

<sup>40</sup> See John Temple Lang, 'Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty' (1972) 2 Common Market Law Review, 167.

<sup>41</sup> EEC Treaty (n31).

express power existed under the Treaty to adopt the measure in question.<sup>42</sup> Consequently, at the time article 29.4.3 was contrasted to the more widely drafted provisions designed to effect EU membership in the Netherlands, West Germany, Italy and Luxembourg.<sup>43</sup>

In considering the effect of article 29.4 on Irish law (in the first Irish case to consider Ireland's liability for breaching EU law) Carroll J succinctly described article 29.4 as:

*'the conduit pipe through which community law became part of domestic law. The Constitution was amended to enable accession to the community, the European Communities Act 1972 was passed and the Treaty of Accession was agreed, and thereby the whole body of community law, past, present and future was incorporated into domestic law. But community law did not thereby become constitutional law or statute law. It is still community law governed by community law but with domestic effect. And it is in that form that it is part of domestic law.'*<sup>44</sup>

Despite this, article 29.4 was also considered to have gone much further than was necessary to effect membership of the Communities. This was because it ensured that any Community legislation which was incompatible with the Constitution would be beyond challenge on constitutional grounds in the Irish courts.<sup>45</sup> By this means, laws, acts or measures by the Communities or their institutions are prevented from being deprived of legal force within the State and from being invalidated on constitutional grounds if they are '*necessitated*' by the obligations of membership, a word which will be further analysed below.

Since its first amendment in 1972, article 29.4 has been amended a further six times to allow Ireland to continue its participation in the EU,<sup>46</sup> as the EU has altered the essential scope or objectives of the Communities through successive treaties and increased its influence over various matters. While several referenda have been deemed necessary to determine whether the Irish government could be permitted to accede to successive EU treaties (as shown in table 1), two are of particular relevance to this thesis, as having extended the powers of the EU to include energy and

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<sup>42</sup> Temple Lang (n40) 169.

<sup>43</sup> *Ibid.* 167.

<sup>44</sup> *Teresa Tate v the Minister for Social Welfare Ireland* (n21).

<sup>45</sup> *Ibid.*

<sup>46</sup> See generally: *Crotty v an Taoiseach* [1987] IR 713.



environmental matters. The first was the referendum which preceded the tenth amendment to the Irish Constitution which allowed Ireland to accede to the Single European Act.<sup>47</sup> The second was the referendum which preceded the twenty eighth amendment to the constitution to allow Ireland to accede to the Lisbon Treaty.<sup>48</sup> Both will be briefly discussed below.

In 1986, the coming into force of the Single European Act<sup>49</sup> (which extended the use of qualified majority voting by the Council and the competences of the European Community to include environmental matters)<sup>50</sup> was delayed because the Irish Supreme Court ruled in *Crotty v an Taoiseach*<sup>51</sup> that the Single Act was incompatible with Bunreacht na hÉireann, and a referendum to alter the Constitution was necessary. The background to the case was that in late 1986, after the Irish legislation approving the Single European Act had been passed, but before the Act had been ratified by the Irish Government, Mr. Crotty, an economist, began proceedings in the High Court in which he asked for an injunction restraining the Government from depositing the instrument of ratification,<sup>52</sup> to allow the court to consider the constitutionality of the European Communities (Amendment) Act, 1986.

Although the injunction was granted by the High Court, the case was later dismissed. On appeal to the Supreme Court, it was determined by Walsh, Henchy and Hederman JJ. (with Finlay C.J. and Griffin J. dissenting) that as Title III of the SEA would bind the State to concede part of its sovereignty in its relations with other states and to conduct foreign policy without regard to the requirements of the common good, the ratification proposed by the Government was impermissible in the absence of authorisation by the Constitution.<sup>53</sup> Consequently, following *Crotty v an Taoiseach*,<sup>54</sup> where a Treaty is considered to oblige the State to concede part of its sovereignty a referendum is required. Subsequent to the judgment, 69.9 per cent voted in favour of the Treaty<sup>55</sup> and the Tenth Amendment of the Constitution Act, 1987 was passed to allow Ireland to accede to the Treaty.

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<sup>47</sup> Single European Act (n1).

<sup>48</sup> Twenty-eighth Amendment of the Constitution Act, 2009 (n2).

<sup>49</sup> Single European Act (n1).

<sup>50</sup> John Temple Lang, 'The Irish Court Case Which Delayed the Single European Act: *Crotty v An Taoiseach* and Others' (1987) 24 *Common Market Law Review* 4, 709-718.

<sup>51</sup> *Crotty v an Taoiseach* (n46).

<sup>52</sup> Temple Lang (n50).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Crotty v an Taoiseach* (n46).

<sup>55</sup> John Temple Lang (n50).

In 2008, somewhat less dramatically, it was determined that a referendum would also be required to allow Ireland to accede to the Treaty of Lisbon (a far reaching Treaty, which amongst other matters,<sup>56</sup> gave an explicit commitment to promoting international action to combat climate change in the provisions on Union environmental policy<sup>57</sup> and created a new legal base for Union action through the introduction of a shared competence as regards services of general economic interest in Article 14 TFEU<sup>58</sup> and energy policy in Title XXI TFEU).<sup>59</sup>

On 12 June 2008 the Irish electorate voted against the Lisbon Treaty (which was the eventual compromise agreed by EU leaders in the aftermath of the rejection of the Constitutional Treaty by popular referendums in France and the Netherlands in 2005).<sup>60</sup> Following an extensive discussion of the options open to the Irish government to allow them to ratify the Lisbon Treaty, a second referendum was held.<sup>61</sup> Prior to the second referendum, the Irish government sought a strengthened declaration to provide assurance to the Irish people on the rights to life, family and education (as guaranteed by the Irish constitution) and taxation and military neutrality.<sup>62</sup>

This was initially provided by two separate sets of measures as well as a declaration by the Irish government setting out its understanding of the legal effect of the Lisbon Treaty (which were included in the annexes to the conclusions of the European Council meeting of June 2009 and later added to the Lisbon Treaty as the Protocol on Article 40.3.3 of the Constitution of Ireland).<sup>63</sup> Subsequently, on 2 October 2009, the Lisbon Treaty was passed by a majority of 67.1 per cent<sup>64</sup> and the Twenty-eighth Amendment of the Constitution Act, 2009 was passed to allow Ireland to ratify the treaty.

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<sup>56</sup> See generally: Michael Dougan, 'The Treaty of Lisbon, Winning Minds Not Hearts' (2008) 45 *Common Market Law Review* 3, 617-703.

<sup>57</sup> Article 191(1) Treaty on the Functioning of the European Union (Consolidated version 2010) [2010] OJ C 83, 30.3.2010 ('TFEU').

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> John O'Brennan, 'Ireland says No (again): the 12 June 2008 Referendum on the Lisbon Treaty' (2009) *Parliamentary Affairs*, 1-20.

<sup>61</sup> See generally: Grainne De Burca, 'If at First You Don't Succeed: Vote, Vote Again: Analysing the Second Referendum Phenomenon in EU Treaty Change' (2011) 5 *Fordham International Law Journal* 33, 1483-1484.

<sup>62</sup> *Ibid.*

<sup>63</sup> Treaty of Lisbon (n2). See also: Brussels European Council, Presidency Conclusions (2009) Annexes 1-3, EU Bull no.6, 14-17.

<sup>64</sup> RTE News, 'Ireland votes yes to Lisbon Treaty' (RTE News, 3 October 2009) <<http://www.rte.ie/news/2009/1002/122507-eul Lisbon1/>> accessed 23 November 2014.



Including the two referenda on the Lisbon Treaty, and the referendum on the Single European Act, nine Irish referenda have been held on article 29.4 of the Irish Constitution. As noted by Barrett (2013):

*'The extent of the process of change is testified to by the fact that what we may call the 'European clauses' in the Irish Constitution have now expanded to over eight separate subsections (now numbered Article 29.4.3° to Article 29.4.10°).<sup>65</sup>*

Although the original article 29.4.3 was removed from the Constitution in 2009, articles 29.4.5 and 29.4.6 contain its core principles. These are reproduced below.

*'5° The State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 ("Treaty of Lisbon"), and may be a member of the European Union established by virtue of that Treaty.*

*6° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—*

*i the said European Union or the European Atomic Energy Community, or institutions thereof,*

*ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or*

*iii bodies competent under the treaties referred to in this section,*

*from having the force of law in the State'.<sup>66</sup>*

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<sup>65</sup> Barrett (n32) 2.

<sup>66</sup> Note: as stressed by Barrett: 'These subsections facilitated rather than effected Irish entry to the European Union created by the Treaty of Lisbon. Actual access to the new Union was effected by the process of ratification, culminating in the depositing of the instrument of Irish ratification of the Treaty of Lisbon with the Italian Government on 23 October 2009, and the entry into force of the Lisbon Treaty on 1 December 2009.' Gavin Barrett, 'The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution' (2012) *Irish Jurist*, 132-171.



Year	Event
1952	European Coal and Steel Community, ECSC ( <i>entry into force</i> )
1958	EC Treaty, creating the European Economic Community, EEC ( <i>entry into force</i> )
1958	European Atomic Energy Community, Euratom ( <i>entry into force</i> )
1967	Merger Treaty ( <i>entry into force</i> )
1973	Ireland (UK and Denmark) join the ECSC, EEC & Euratom
1987	Single European Act ( <i>entry into force</i> )
1987	<i>Crotty v an Taoiseach</i> [1987] IR 713.
1993	Treaty on European Union ( <i>entry into force</i> )
1998	Euro is introduced (with the UK and Denmark opting out).
1999	Treaty of Amsterdam ( <i>entry into force</i> )
June 2001	People of Ireland vote against the Nice Treaty in the national referendum.
October 2002	Following the Seville Declaration, 63 per cent vote in favour of the Nice Treaty
2003	Treaty of Nice ( <i>entry into force</i> )
2004	The Treaty establishing a Constitution for Europe - <u>never came into force.</u>
June 2008	People of Ireland vote against the Lisbon Treaty in the national referendum
October 2009	Following the obtainment of a number of legal guarantees, 67 per cent of the people of Ireland vote for the Lisbon Treaty
2009	Treaty of Lisbon ( <i>entry into force</i> )

**Table 3: Snapshot of the main events to shape Ireland’s relationship with the EU**

### 2.3. The meaning of the word ‘duty’ in this thesis

Thus (the heavily amended) article 29.4 of the Irish Constitution allows Ireland to fully participate in the EU.<sup>67</sup> This in turn gives rise to a number of general duties or obligations on the part of the Irish State. As described by the CJEU ‘*in permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation [or duty] to respect its rules.*’<sup>68</sup> In this thesis, the principal rules which are discussed are contained in directives which either support, frame or impact upon the Irish wind energy sector (i.e. the Renewable Energy Directive;<sup>69</sup> the SEA Directive;<sup>70</sup> the EIA Directive;<sup>71</sup> the Birds<sup>72</sup> and Habitats Directives<sup>73</sup> and the Third

<sup>67</sup> Barrett (n32) 2.

<sup>68</sup> Case 39/72 *Commission v Italy* [1973] ECR 101, paras 24 and 25

<sup>69</sup> the Renewable Energy Directive (n3).

<sup>70</sup> Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/0030 (the ‘SEA Directive’).

<sup>71</sup> The most recent revised version of which is: Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1. (the ‘EIA Directive’).



Liberalisation Directive).<sup>74</sup> Each of these directives place key duties on the Irish State which are relevant either to onshore wind development or renewable electricity sale. While the specific duties imposed will be discussed in greater detail in chapters 3–7 of the thesis, the paragraphs below will consider the meaning of the term ‘duty’ as it is understood in EU law and used throughout this thesis.

Black’s Law Dictionary defines the term ‘duty’ as legal obligation which is owed or due to another and that needs to be satisfied; that which one is bound to do and for which there is a corresponding right.<sup>75</sup> As described by William L Prosser:

*‘There is a duty if the court says there is a duty; a law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability’.*<sup>76</sup>

While there are numerous other definitions of the term duty, Black’s is the one which fits best with the term as used in this thesis. In this context, the term ‘*duty*’ is used to refer to member states obligations under EU law, whereby by virtue of EU membership, States (such as Ireland) are conferred benefits and rights and consequently must abide by principles broadly outlined by the Treaties and further detailed by legislative acts of the institutions as interpreted by the CJEU.

#### **2.4. The principal duty which arises from Ireland’s membership of the EU**

The main duty placed on states (such as Ireland) by virtue of their membership of the EU is the duty of sincere cooperation as currently outlined by article 4(3) of the TEU<sup>77</sup> (previously Article 10 EC and before this Article 5 of the EEC Treaty). In its original form, as article 5 EEC it was solely addressed to member states and stated:

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<sup>72</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7 (the ‘Birds Directive’).

<sup>73</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206/7 (as last amended by Directive as last amended by Directive 2006/105/EC [2006] OJ L 363/368 (the ‘Habitats Directive’).

<sup>74</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L 211/5 (the ‘third liberalisation directive’).

<sup>75</sup> Bryan A Garner (ed.) *Black’s Law Dictionary* (12<sup>th</sup> edn, Thomson Reuters, 2014).

<sup>76</sup> William L Prosser, ‘Palsgraf Revisited’ (1953) 52 Michigan Law Review 1, 15.

<sup>77</sup> TEU (n28).

*'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.'*<sup>78</sup>

In 2009, this became reworded to extend the obligation to the Community and the institutions<sup>79</sup> in article 4(3) TEU which states:

*'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.'*

*The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

*The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'*<sup>80</sup>

As worded, the duty of sincere cooperation requires member states to take all appropriate measures to ensure fulfilment of obligations arising out of the Treaties or out of action taken by the institutions, facilitating the achievement of the Community's (or Union's) tasks and refraining (or abstaining) from any measure which could jeopardise the attainment of the objectives of the Treaties.<sup>81</sup> The broader application of this obligation is reinforced by article 24(3) TEU under which member states are

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<sup>78</sup> EEC Treaty (n31).

<sup>79</sup> Note: the Court had already extended the principle of cooperation by this time, by ruling that the Community Institutions and Member States have reciprocal duties of cooperation within Community spheres. See: Case 94/87 *Commission v Germany* [1989] ECR 00175 paras 6-8; Joined Cases 358/85 & 51/86 *France v European Parliament* [1988] ECR 4821 para 34; Case 52/84 *Commission v Belgium* [1986] ECR para 89; Case 44/84 *Hurd v Jones* [1986] ECR 29, para 38; Case 230/81 *Luxembourg v European Parliament* [1983] ECR 255, para 37.

<sup>80</sup> TFEU (n57).

<sup>81</sup> See: Case C-374/89 *Commission v Belgium* [1991] ECR I-367; Case C-35/88 *Commission v Greece* [1990] ECR I-3125; Case C-48/89 *Commission v Italy* [1990] ECR I-2425; Case 272/86 *Commission v Greece* [1988] ECR 4875; Case 240/86 *Commission v Greece* [1988] ECR 1835.



obliged to support the EU's external and security policy '*actively, unreservedly and in a spirit of loyalty and mutual solidarity*'.<sup>82</sup>

In 1997, Temple Lang described the obligation as the 'core Constitutional law of the Community'.<sup>83</sup> In 2000 he described its impact as:

*'[having given] rise to some of the most important principles of Community law, such as the duty and power of national courts to give effective protection to the rights granted by Community law, the duty to give direct effect to directives against the State, the duty to interpret national law so as to be compatible with Community law, the right to judicial review, and the duties not to interfere with the effectiveness of Community competition law or with the working of the common agriculture policy.'*<sup>84</sup>

Later, in 2008, Temple Lang further described the nature of the obligation then contained in article 10 EC (now article 4(3) of the TEU, previously Article 10 EC and before this Article 5 of the EEC Treaty).<sup>85</sup> Rather than considering its function with regard to the relationship between member states and the EU, he considered its application and use by the CJEU to enforce EU law. In this context he described the obligation contained in article 4(3) as one which did not create any wholly new duties, or duties not wholly related to those which were already binding on member states or to which they had neither agreed in principle (by agreeing to the measure, policy or objective which Article 10 obliges it not to frustrate) nor become bound through majority voting or under the Treaties themselves.<sup>86</sup>

When considered in a narrow sense as the Treaty basis for Ireland's cooperation with the central laws which are relevant to the development and sale of onshore wind generated electricity, the requirements of this article can be sub-divided into four separate duties: (i) a duty to adopt measures to correctly transpose directives into

<sup>82</sup> Paul Craig and Gráinne de Búrca, *EU Law Text, Cases and Materials* (2011, Oxford University Press, 5<sup>th</sup> edn), 359.

<sup>83</sup> John Temple Lang, 'The core of the constitutional law of the Community – Article 5 EC' in Gormley (ed.) *Current and future perspectives in EC competition law* (1<sup>st</sup> edn, Kluwer Law International 1997), 41-72.

<sup>84</sup> As quoted by Matej Accotto and Stefan Aleptnig, 'The Principle of Effectiveness: Rethinking its Role in Community Law' (2007) 11 *European Public Law* 3, 386.

<sup>85</sup> EEC Treaty (n31). See: John Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC' (2008) 31 *Fordham International Law Journal*, 1517.

<sup>86</sup> John Temple Lang (n85) 1517.

national law;<sup>87</sup> (ii) a duty to ensure the conformity of national law with the treaties and directives, decisions and regulations adopted by the EU institutions;<sup>88</sup> (iii) a duty to ensure the correct application of EU law by administrative bodies<sup>89</sup> and (iv) a duty to accord supremacy to EU law.<sup>90</sup>

Thus, the obligation contained in article 4(3) TEU provides the basis for Ireland's cooperation with the specific obligations placed upon it by the provisions of the Renewable Energy Directive,<sup>91</sup> the SEA Directive,<sup>92</sup> the EIA Directive,<sup>93</sup> the Birds<sup>94</sup> and Habitats Directives<sup>95</sup> and the Third Liberalisation Directive.<sup>96</sup> Just as the paragraphs above have considered the duty of sincere cooperation, the paragraphs which follow will consider the relevant provisions of the European Communities Act 1972<sup>97</sup> which empower the Irish government to fulfil this duty of sincere cooperation by both adopting measures to correctly transpose directives into national law and ensure the conformity of national law with the treaties and directives, decisions and regulations by dis-applying conflicting legislation.

## **2.5. The European Communities Act 1972 as the principal law empowering the Irish government to fulfil the core requirements of EU Membership (as outlined in article 4(3) TEU)<sup>98</sup>**

To facilitate Ireland's fulfilment of the requirements of article 4(3) TEU, section 2 of the European Communities Act 1972<sup>99</sup> was enacted to provide that:

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<sup>87</sup> See: *Ibid*, 1936; Case C-53/10 *Land Hessen v. Franz Mücksch OHG* [2011] ECR I-8311, para 29. See generally: Sacha Prechal, *Directives in EC Law* (2005, Oxford University Press, 1<sup>st</sup> edn); Paul Craig, 'The legal effects of directives: policy, rules and exceptions' (2009) 34 *European Law Review* 3, 349-369. Note: as will be discussed further in chapter 7: the CJEU has held that that administrative practices are not sufficient to transpose a directive as they could be changed according to the whim of the authorities and lacked the appropriate publicity. See: Case 160/82 *Commission v Netherlands* [1982] ECR 4637; Case 102/79 *Commission v Belgium* [1980] ECR 1473.

<sup>88</sup> Temple Lang (n85) 1936-1938.

<sup>89</sup> *Ibid*, 1930.

<sup>90</sup> Case 32/84, *Van Gend & Loos NV v Inspecteur der Invoerrechten en Accijnzen, Enschede* [1985] ECR 00779.

<sup>91</sup> the Renewable Energy Directive (n3).

<sup>92</sup> the SEA Directive (n70).

<sup>93</sup> the EIA Directive (n71).

<sup>94</sup> the Birds Directive (n72).

<sup>95</sup> the Habitats Directive (n73).

<sup>96</sup> the third liberalisation directive (n74).

<sup>97</sup> European Communities Act, 1972, Number 27 of 1972. Note: this has amended a number of times, most notably (for the discussion above) by the European Communities Act 2007, Number 18 of 2007.

<sup>98</sup> TEU (n28).



[f]rom the 1st day of January 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties.'

The combined effect of the constitutional amendment contained in article 29.4 of Bunreacht na hÉireann and the introduction of Community law (including what is now article 4(3) TEU) into the domestic legal order by s.2 of the European Communities Act 1972 was described by one judicial commentator as being:

*'as if the people of Ireland had adopted Community law as a second but transcendent Constitution, with the difference that Community law is not to be found in any single document – it is a living, growing organism, and the right to generate it and give it conclusive judicial interpretation is reserved to the institutions of the Community and its Court'*.<sup>100</sup>

While section 2 of the Act permits the introduction of EU law into the Irish legal system (as is required by article 4(3) TEU)<sup>101</sup> section 3 of the European Communities Act 1972, as amended and section 4 of the European Communities Act 2007<sup>102</sup> provide Government Ministers with additional means to do so. Section 4 allows statutory instrument making powers in existing legislation to be used to give effect to EU law if the obligations imposed on the State under the European act concerned relate, in whole, to matters to which that provision relates.<sup>103</sup> Consequently, since 2007, a government minister has had the power to issue statutory instruments to give effect to EU law which contain *'such incidental, supplementary and consequential provisions as appear necessary'*.<sup>104</sup>

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<sup>99</sup> European Communities Act, 1972 (n97).

<sup>100</sup> Henchy J. writing extrajudicially in 'The Irish Constitution and the EEC' (1977) 1 Dublin University Law Journal 20, 23.

<sup>101</sup> TEU (n28).

<sup>102</sup> the European Communities Act 2007 (n97).

<sup>103</sup> the European Communities Act 2007 (n97).

<sup>104</sup> *Ibid.* See also section 5 of the the European Communities Act, 1972 (n97) which as Fahey notes at 65, operates to retrospectively validate all statutory instruments that might have been perceived as constitutionally frail. See: Elaine Fahey, *EU Law in Ireland* (1<sup>st</sup> edn, Clarus Press, 2011). Section 5 provides: '(1) Every statutory instrument made before the passing of this Act— (a) under a provision of a statute that did not provide for the exercise of the power conferred by that provision for the purpose of giving effect to a European act, and (b) that purported to give effect to a European act, shall, in so far as it purported to give such effect, have statutory effect as if it were an Act of the Oireachtas. (2) If subsection (1) would, but for this subsection, conflict with a constitutional right of any person, the operation of that subsection shall be subject to such limitation as is necessary to secure that it does not so conflict but shall otherwise be of full force and effect.'



Section 3 provides Government Ministers with the power to issue regulations containing 'such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary'<sup>105</sup> to implement EU measures. The provision also provides Ministers with the power to issue provisions which repeal, amend or apply other law as appears necessary to the Minister to implement EU measures. This power has been described as 'remarkably broad'.<sup>106</sup>

Unsurprisingly both the powers afforded to government ministers through the European Communities Act 1972 and article 29.4 of the Constitution have generated much case-law and diversity of opinion as to the correct test to be applied to determine when the use of power to issue delegated legislation was permissible (*i.e.* when Ministers are permitted to issue a statutory instrument, obviating the need for the Oireachtas to pass an Act to implement EU law)<sup>107</sup> and the extent to which the use of such power is permissible (*i.e.* what can be included in such a statutory instrument).<sup>108</sup>

Subtly differing formulae were initially provided by the judges of the superior courts to determine the scope of the power conferred on Ministers to enact regulations as 'necessitated by the obligations of membership of the European Union'.<sup>109</sup> While the matter is considered to a certain extent unresolved,<sup>110</sup> some elucidation can be gleaned from the judgments in *Maher v Minister for Agriculture and Food*.<sup>111</sup> In this case Keane CJ mapped out the general approach taken by each of the judges presiding over this case to the question of when proceeding by way of a statutory instrument could be in conflict with the legislative role of the Oireachtas (the national parliament and body solely and exclusively responsible for law-making in Ireland, consisting of the President and an upper and lower house with its powers outlined by Article 15 of the Constitution) stating:

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<sup>105</sup> European Communities Act, 1972 (n97).

<sup>106</sup> Alice Walsh, Oireachtas Scrutiny of EU Legislation: Still a Work in Progress After 40 Years.' (2013) *The Irish Jurist* 2, 138-165.

<sup>107</sup> See generally Barrett (n66); Fahey (n104). See also: Murphy J in *Lawlor v The Minister for Agriculture* [1990] 1 IR at 370; Murphy J in *Greene v Minister for Agriculture* [1990] 2 IR at 25; Lynch J in *Condon v Minister for Agriculture (Unreported)* High Court 12 October 1990; [1993] *Irish Journal of European Law* 151. See also: Finlay CJ in *Crotty v an Taoiseach* (n46) at 486.

<sup>108</sup> See generally Barrett (n66); Fahey (n104); See also: Denham J in *Meagher v Minister for Agriculture* [1994] IR at 360; Keane CJ in *Maher v Minister for Agriculture and Food* [2001] 2 IR 180; McCracken J in *Sam McCauley Chemists v the Pharmaceutical Society of Ireland* [2008] IR 21.

<sup>109</sup> See generally n104 and n105.

<sup>110</sup> See Fahey (n104).

<sup>111</sup> See: *Maher v Minister for Agriculture and Food* (n108).



*'[O]ne can initially decide whether the making of the regulation in the form of a statutory instrument rather than an Act of the Oireachtas was 'necessitated' by the obligations of membership. If it was, then it is clearly unnecessary to consider whether it is in conflict with Article 15.2 or, for that matter the Articles guaranteeing the private property rights of the applicants. Alternatively, one can determine first whether it violates either Article 15.1 or the private property rights or both of them. If the latter course were adopted, and the conclusion were reached that no breach of the Constitution had been established, it would be unnecessary to consider whether enactment in the form of a regulation rather than by an Act was necessitated by the obligations of membership.'*<sup>112</sup>

As noted by Barrett (2011), the second route was that taken by each of the judges to assess the validity of the use of the statutory instrument in that particular case.<sup>113</sup> In his general consideration of the use of statutory instruments to implement EU law, Keane CJ opined:

*'[I]t is almost beyond argument that the choice of a statutory instrument as a vehicle for the detailed rules rather than an Act was not in any sense necessitated by the obligations of Community membership. There would appear to be no difference in principle between the obligation on a member state to implement a directive and the corresponding obligation under a regulation, such as the European Communities Regulation in the present case, to adopt detailed rules for the implementation of specified parts of the regulation. In each case, while the member state is obliged to implement the directive or the specified part of the regulation, the choice of form and method for implementation is clearly a matter for the member state.'*<sup>114</sup>

In his judgment, Fennelly J (as supported by Keane CJ and Murray, Denham and Murphy JJ) identified the test of whether recourse to a statutory instrument would be precluded as being:

*'whether the scope of the discretion conferred by Community law in regulations which become part of national law was so independent of principles and*

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<sup>112</sup> *Ibid*, 181.

<sup>113</sup> Barrett (n66).

<sup>114</sup> See: *Maher v Minister for Agriculture and Food* (n108), 181.

*policies laid down by those Community regulations as to place the State in conflict with article 15.2.1 of the Constitution.*<sup>115</sup>

The preceding paragraphs have analysed the overarching duty placed on Ireland by reason of its membership of the EU (to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community); the meaning of the term 'duty' as it is used in this thesis and the legal framework which empowers Ireland to fulfil this obligation; the paragraphs which follow will move beyond this framework to examine the development of specific laws and policies, designed to promote renewable energy and onshore wind development in member states such as Ireland.

### **3. The Development of a European Framework Designed to Promote the Development of Renewable Energy**

#### **3.1. The Development of Energy and Environmental Treaty Bases**

The original EEC Treaty (which Ireland acceded to in 1973) did not refer to energy or environmental issues. One reason why energy was not expressly dealt with in the EEC Treaty was because in 1957 (when the Treaty of Rome was agreed), the principal source of energy in Europe was coal and at the time the regulation of coal was covered by the ECSC Treaty. In addition, nuclear energy was governed by the Euratom Treaty.<sup>116</sup> Beyond the specific areas covered by the ECSC and Euratom treaties, the original six Member States of the EEC considered that trade in other sources of energy, such as oil, would be covered by areas of substantive law, such as the free movement of goods.<sup>117</sup> This remained the case until express provision was made for

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<sup>115</sup> *Maher v Minister for Agriculture and Food* (n108) 260; Note: In so doing he articulated a modified version of the general test provided by the Supreme Court in *Cityview Press Limited v Comhairle Oiliana* [1980] IR 381,399; to determine the validity of executive delegated legislation: 'In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to "principles and policies" which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand if it be within the permitted limits— there is no unauthorised delegation of legislative power'. See further: *Browne v Ireland* [2003] 3 IR 205; *Kennedy v Attorney General* [2007] 2 IR 45.

<sup>116</sup> Department of Energy & Climate Change, 'Review of the Balance of Competences between the United Kingdom and the European Union: Energy Report' (Gov.UK, 22 July 2014) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/332794/2902398\\_BoC\\_Energy\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332794/2902398_BoC_Energy_acc.pdf)> accessed 25 November 2014, 16.

<sup>117</sup> *Ibid*, 25.



competence on energy to be shared between the EU and its member states by article 194 TFEU.<sup>118</sup>

Environment, on the other hand, was included in the competences of the EU at an earlier date. This was despite the fact that during its initial years any environmental provisions in EEC legislation were incidental to the primary aim of ensuring the free movement of goods.<sup>119</sup> It was only in the 1970s that developed countries worldwide recognised that the environmental problems caused by their industrialised economies, including issues such as cross-border pollution, could only be addressed by more wide-ranging environmental legislation.<sup>120</sup> Until the Single European Act came into force in 1987, environmental policy developed in the absence of any specific environmental Treaty base, primarily through the use of Articles 100 EEC (now article 114 TFEU on the Single Market) and 235 EEC (now article 352 TFEU providing default powers).<sup>121</sup> Article 100 EEC could only be used to address differences in national environmental rules which affected the functioning of the common market, while Article 235 EEC was a catch-all provision which allowed legislation to be made which was '*necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers*'.<sup>122</sup> Both Articles required unanimous voting in Council.<sup>123</sup>

In 1987 the Single European Act amended the EEC Treaty and introduced specific Treaty powers for EU environmental action (through articles 130r, 130s and 130t EEC). These powers could be exercised by the Council acting unanimously or, where the Council so decided, by qualified majority voting (article 130s EEC). The European Parliament had a right to be consulted on proposals. Member States retained the right to maintain or introduce more stringent protective measures, provided that such measures were compatible with the Treaty. Although these environmental powers have since been amended several times<sup>124</sup> they have not been significantly altered in scope.

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<sup>118</sup> *Ibid.*

<sup>119</sup> Department for Environment, Food & Rural Affairs and Department of Energy & Climate Change, 'Environment and climate change, review of balance of competences: final report' (Gov.UK, 13 February 2014) <<https://www.gov.uk/government/consultations/eu-and-uk-action-on-environment-and-climate-change-review>> accessed 25 November 2014, 19.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> For example in 2009 when the Treaty of Lisbon (n2) created an explicit commitment to promoting international action to combat climate change in the provisions on Union environmental policy through article Article 191(1) TFEU (n57).



### 3.2. The Initial EU Framework Designed to Encourage Renewable Electricity (and Onshore wind) Development

As will be remembered from chapter one, since climate change mitigation talks began, the EU has been a keen supporter of the idea that emissions must be reduced by quantifiable amounts<sup>125</sup> in an effort to keep the earth's global temperature from rising above 2 degrees. Accordingly in 1998 by ratifying the Kyoto Protocol<sup>126</sup> the EU made an international commitment to reduce its emissions by 8 per cent below an agreed base year<sup>127</sup> between 2008 and 2012. To achieve this goal, the EU specifically agreed to **reduce emissions, enhance energy efficiency and increase renewable energy**.<sup>128</sup> While the EU began to develop a legal framework to decrease emissions early (using article 130s of the EEC Treaty as a legal base, to develop a Community wide scheme to monitor greenhouse gases)<sup>129</sup> the associated legislative drive to increase renewable energy took longer. In fact, the first legal act specifically designed to increase renewable electricity was not passed until 2001<sup>130</sup> (using articles 130s and 100a EC Treaty as its legal bases). Furthermore as the targets it included were more aspirational than obligatory, the EU's early renewable energy policy was relatively unsuccessful in many member states, and it was not until 2009 that renewable energy development began in earnest across the entire region.

Even though the legislative drive to increase renewable energy began in 2001, the policy drive began much earlier. In 1986, the Council listed the promotion of renewable

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<sup>125</sup> Cinnamon Carlane, *Climate Change Law and Policy* (1st edn, Oxford University Press 2010), 7.

<sup>126</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 ('the Kyoto Protocol'), article 2.

<sup>127</sup> The target was to reduce its greenhouse gases below a particular base year. For the EU-15 the base year for carbon dioxide, methane and nitrous oxide the base year is 1990. For hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride (fluorinated gases) 12 Member States have selected 1995 as the base year whereas Austria, France and Italy have chosen 1990. As the EU inventory is the sum of Member State inventories, the EU 15 base year estimates for fluorinated gas emissions also include emissions from deforestation for the Netherlands, Portugal and the United Kingdom.

<sup>128</sup> Kyoto Protocol (n123) article 3(1) Note: Emphasis added.

<sup>129</sup> Decision (EEC) 93/389 of 24 June 1993 for a monitoring mechanism of Community CO<sub>2</sub> and other greenhouse gas emissions [1993] OJ L 167/ 31.

<sup>130</sup> Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity from renewable energy sources in the internal electricity market, [2001] OJ L 283/33 (the 'Renewable Electricity Directive'). Against this some renewable energy measures were introduced in 1996 by articles 8(3) and 11(3) of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1996] OJ L 27/ 20.



energy sources among its energy objectives.<sup>131</sup> Later in 1996 the Commission issued a Green Paper on Renewable Energy<sup>132</sup> which suggested the adoption of a regional indicative target to attain a 12 per cent share of renewable energy in gross consumption by 2010.<sup>133</sup> The target was endorsed by the Council in its Resolution on the matter in 1997.<sup>134</sup> For its part, the European Parliament suggested a greater goal of 15 per cent share of renewables by 2010, and called on the Commission to submit specific measures including the setting of individual member state targets.<sup>135</sup>

The idea of adopting a regional target of a 12 per cent share of renewable energy was retained in the Commission's White Paper (1997), which later led to the proposal and subsequent adoption of the Renewable Electricity Directive in 2001.<sup>136</sup> In its analyses, this White Paper identified wind energy as having the potential to produce a regional increase of 40 GW of renewable energy (for the 15 states who were members of the EU, the EU15) by 2010.<sup>137</sup> Interestingly, the White Paper also identified a number of barriers to renewable energy development which have survived to cause problems for Irish onshore wind development.

These barriers were the lack of a coherent and transparent EU strategy for renewable energy penetration<sup>138</sup> and the lack of a long-term stable framework for renewable energy development.<sup>139</sup> In relation to the latter, it was noted that a long-term stable framework for renewable energy development would have to be devised concurrently with the internal energy market, if renewables were to be given any realistic chance to access the national energy markets.<sup>140</sup> Given this acknowledgment, the exemption provided to Ireland to refrain from implementing the market separation requirements of the third liberalisation directive (a decision, which will be analysed in chapter five) appears even more curious.

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<sup>131</sup> Council resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States [1986] OJ C 241/01.

<sup>132</sup> European Commission, 'Communication from the Commission, Energy for the Future: Renewable Sources of Energy. Green Paper for a Community Strategy' [1996] COM(96) 576.

<sup>133</sup> *Ibid.*

<sup>134</sup> Council Resolution of 27 June 1997 on renewable sources of energy [1997] OJ C 210/40, 11 July 1997.

<sup>135</sup> Christopher Jones, 'Introduction' in Paul Hodson, Christopher Jones and Hans Van Steen (eds.) *EU Energy Law Volume III Book One Renewable Energy Law and Policy in the European Union* (Claeys & Casteels, 2007, 1<sup>st</sup> edn), 2.

<sup>136</sup> the Renewable Electricity Directive (n130).

<sup>137</sup> European Commission, Communication from the Commission - Energy for the future: renewable sources of energy - White Paper for a Community strategy and action plan [1997] COM (1997) 0599 final, 40.

<sup>138</sup> *Ibid.*, 8.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

Described at the time as 'the single most globally important case of legislation for wind energy',<sup>141</sup> the Renewable Electricity Directive was enacted in 2001.<sup>142</sup> Amongst other objectives, it sought to remove these barriers to the greatest possible extent. Naturally, its adoption was of particular relevance to wind development sectors across Europe. In this overall context, the Directive's indicative national targets and reporting mechanisms were of particular importance. Ireland, for example, was assigned a target of attaining a 13.2 per cent share in renewable electricity consumption by 2010. In addition, from 2002 the Irish government was obliged to adopt reports every 5 years which: (i) set national indicative targets for renewable electricity consumption in Ireland for the following 10 years, and (ii) described measures taken at a national level to ensure their achievement.<sup>143</sup> Moreover from 2003 Ireland (as a member state) was also required to publish a report every two years which analysed the country's success in reaching these goals. For its part the Commission was required to publish its conclusions on member state reports, along with proposals for further actions, every two years from 2004.<sup>144</sup>

Despite these reporting requirements, no documents are publically available to detail Ireland's progress toward its target and just one document is publicly available to provide details of Ireland's strategy to achieve its 13.2 per cent target.<sup>145</sup> While this document does not specifically focus on onshore wind development, it provides detail of the Irish government's aim of reaching between 9 and 12 per cent of renewable electricity by 2005<sup>146</sup> and states that the potential contribution from wind will be ascertainable at a later date following the conclusion of ongoing studies by the Irish regulator, the Commission for Energy Regulation.<sup>147</sup>

In addition to its reporting provisions, the Renewable Electricity Directive was notable for a number of other reasons which will be outlined below. It established 'guarantees

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<sup>141</sup> Tyler Hagenbuch, 'Establishing an Aggressive Legal Framework for the Future of Wind Energy in Europe' 42 *Vanderbilt Journal of Transnational Law*, 1595-1630.

<sup>142</sup> the Renewable Electricity Directive (130).

<sup>143</sup> *Ibid*, article 3(3).

<sup>144</sup> *Ibid*, article 3(4).

<sup>145</sup> Department of Communications, Marine and Natural Resources, 'Report on a proposed national programme to increase the gross consumption of "green electricity". - Compliance with Directive 2001/77/EC (Article 3.2)' (Government of Ireland, 2002) <<http://www.dcenr.gov.ie/NR/rdonlyres/A7A8BB51-A7F5-47F8-B890-ABCDB5EA490/0/CompliancewithDirective2001.doc>> accessed 25 November 2014.

<sup>146</sup> *Ibid*, 6.

<sup>147</sup> *Ibid*.



of origin' for renewable electricity.<sup>148</sup> It placed an obligation on member states to evaluate the authorisation procedures applied to renewable energy plants (including wind turbines) with a view to: reducing the regulatory and non-regulatory barriers applied, streamlining and expediting the procedures, and ensuring that the rules were objective, transparent, and non-discriminatory.<sup>149</sup> As part of the latter obligation, member states were obliged to submit a report, indicating where action had been taken. It also permitted member states to allow transmission system operators and distribution system operators to give priority to renewable energy plants when dispatching generating stations (in so far as the national electricity system would permit).<sup>150</sup>

While the legislation was ambitious in its aims, it lacked much implementable detail and so many of the problems (which had been identified as barriers to renewable and wind energy development) survived. In its first report on member state progress to meet national goals in 2004, the Commission came to three overall conclusions. The first was that the national targets adopted by each member state were consistent with the national reference values listed in Annex I to the Renewable Electricity Directive. The second was that the 2010 target would not be met under current policies and measures. The third was that the main reason why the target would not be met was that production of electricity from biomass had not been as high as had been originally anticipated.<sup>151</sup>

Although overall conclusions were disappointing, wind energy development surpassed expectation and was described as a success story in the Commission's report. However, a caveat was added to this description; it was noted that the successful development of wind was not the result of a common European effort. The Commission stated that while earlier installation projections would clearly be exceeded (with industry suggesting that 75 GW could be installed by 2010) this would be the result of the effort of a limited number of member states. It also recognised that the final result for 2010 (including the attainment of the 12 per cent target) would depend

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<sup>148</sup> the Renewable Electricity Directive (n130) article 5.

<sup>149</sup> *Ibid*, article 6.

<sup>150</sup> *Ibid*, article 7.

<sup>151</sup> European Commission, 'Communication from the Commission to the Council and the European Parliament, The share of renewable energy in the EU. Commission Report in accordance with Article 3 of Directive 2001/77/EC, the evaluation of the effect of legislative instruments and other Community policies on the development of the contribution of renewable energy sources in the EU and proposals for concrete actions.' [2004] COM (2004)366 final.

on the efforts of those member states (including Ireland) where wind energy had not taken off yet.

Finally, it noted that the experience of Germany, Spain and Denmark indicated that the successful expansion of wind power would benefit from: the removal of administrative barriers through the implementation of uniform planning procedures and licensing systems; the guarantee of fair grid access and non-discriminatory tariffs; and least-cost network planning and an attractive long-term financial framework.<sup>152</sup> Each of these suggestions is of relevance to the challenges analysed herein, particularly by chapters four, five and six (which consider: (i) the problems of the Irish planning and licensing systems which result from the *Derrybrien*<sup>153</sup> and *Wild Birds decisions*,<sup>154</sup> and are impeding the efficient development of onshore wind; (ii) the problem of introducing competition to the profitable segments of the electricity market, thereby guaranteeing fair grid access, non-discriminatory tariffs, and least-cost network planning in the absence of a truly independent transmission operator; and (iii) the problem of continuing to provide an attractive long-term financial framework to encourage the development of renewable electricity while simultaneously providing households with a general level of electricity affordability).

In 2006, the Commission issued its next major publication on progress in renewable energy development in its Renewable Energy Roadmap (2007).<sup>155</sup> The Roadmap reported that the indicative 12 per cent target set by the Renewable Electricity Directive would not be met, stating that the EU was only likely to reach a 10 per cent share in renewable electricity by 2010. It described the underlying reasons for this as follows. Fossil fuels had an unjustified advantage over renewables. There were numerous administrative problems associated with renewable energy development. Opaque and discriminatory rules governed grid access, and there was a general lack of information at all levels.<sup>156</sup>

Overall, the Roadmap was designed to combat these problems through creating a long-term vision for renewable energy sources in the EU. It proposed a legally binding

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<sup>152</sup> *Ibid.*

<sup>153</sup> Case C-215/06 *Commission v Ireland* [2006] ECR I-10787 ('the *Derrybrien Wind decision*').

<sup>154</sup> Case C-418/04 *Commission v Ireland* [2007] ECR I-10997 ('the *Wild Birds decision*').

<sup>155</sup> European Commission, 'Communication from the Commission to the Council and the European Parliament. Renewable Energy Road Map. Renewable Energies in the 21<sup>st</sup> century: building a more sustainable future' [2006] COM(2006)848 final.

<sup>156</sup> *Ibid.* 4.



target of 20 per cent for renewable energy by 2020, and laid out a pathway for mainstreaming renewables into European energy policies and markets. The Roadmap emphasised that targets needed to be '*clearly defined, focused and mandatory*' to be effective, concluding that the 12 per cent renewable electricity target had been a good political target but had proven insufficient to develop the renewable energy sector.<sup>157</sup> Thus, the Roadmap paved the way for the mandatory targets included in the Climate and Energy Legislative Package.<sup>158</sup>

In 2009, the Commission produced its last report under the Renewable Electricity Directive<sup>159</sup>. This indicated that while renewable energy had again increased, this was mainly the result of a significant growth in wind energy in a limited number of member states, and the 12 per cent target could not be met without additional supplementary measures.<sup>160</sup> The Report also stated that approximately 61 infringement proceedings had been initiated against member states since 2004 on foot of this directive alone,<sup>161</sup> with Ireland responsible for 4.<sup>162</sup> In conclusion, the Commission found that the poor progress and sheer volume of infringement proceedings implied that the legal framework was not sufficiently strong.

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<sup>157</sup> *Ibid*, 10.

<sup>158</sup> The Climate and Energy legislative package consists of four pieces of legislation: (1) Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63 (2) Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide [2009] OJ L 140/114 (3) Decision No. 406/2009/EC of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136 ('Effort Sharing Decision') and (4) the Renewable Energy Directive (n3).

<sup>159</sup> European Commission, 'Communication from the Commission to the Council and the European Parliament, The share of renewable energy in the EU. Commission Report in accordance with Article 3 of Directive 2001/77/EC, the evaluation of the effect of legislative instruments and other Community policies on the development of the contribution of renewable energy sources in the EU and proposals for concrete actions.' [2009] COM(2009) 192 final.

<sup>160</sup> In 2011 it was reported that electricity generated from renewable energy sources had contributed almost one fifth (19.9 %) of the EU-27's gross electricity consumption and thus had missed the 21 per cent target. Source: European Commission Eurostat, 'Renewable energy statistics' (Commission, September 2012) <[http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Renewable\\_energy\\_statistics#Consumption](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Renewable_energy_statistics#Consumption)> accessed 10 July 2013.

<sup>161</sup> Note: there is some disparity in the Report as to the number of infringement procedures initiated. See Commission (n159) 5 and 7.

<sup>162</sup> Note: While a large number of infringement proceedings were launched, none of them appeared before the CJEU.



### 3.3. The Duty to Develop Renewable Energy (and Onshore Wind) as required by the Climate and Energy Legislative Packages' Renewable Energy Directive

#### 3.3.1. A Closer Look at the Renewable Energy Directive

On 23 January 2008, the Commission issued a proposal for a directive to remedy the problems discussed above.<sup>163</sup> This proposal was later finalised to become part of the Climate and Energy Legislative Package, a far-reaching package with four legislative instruments. Thus, the Climate and Energy Legislative Package placed a large number of overarching obligations on member states to reduce their greenhouse gases, and increase renewable energy and energy efficiency. To achieve a regional aim of decreasing emissions by 20 per cent below 2005 levels by 2020, and increase renewable energy by 20 per cent by the same year, member states were each allocated national legally binding targets. Although increasing energy efficiency to 20 per cent was also an EU goal, at this time member states were not set national legally binding targets for energy efficiency.<sup>164</sup>

The new renewable energy target was much more ambitious than the earlier indicative renewable electricity target. This time, in legislating to increase renewable energy, the new Directive obliged member states to **increase renewable energy as part of the EU's total energy needs**<sup>165</sup> rather than focusing more narrowly on electricity production. For Ireland this meant a renewable energy target of attaining a 16 per cent share of renewable energy consumption by 2020. This binding renewable energy target supplemented and expanded the indicative target of 13.2 per cent renewable electricity consumption, which had previously been allocated to Ireland by the Renewable Electricity Directive.<sup>166</sup> Although Ireland had exceeded its original target and was reported as having attained a 17.6 per cent share in renewable electricity consumption in 2011,<sup>167</sup> Ireland is unlikely to reach the 16 per cent target. While some of the central reasons for this will be discussed in chapters 4, 5 and 6 of this thesis, an

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<sup>163</sup> European Commission, 'Proposal for a directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources' [2008] COM (2008) 19 final.

<sup>164</sup> Note since this time however, the following directive was enacted: Directive 2012/27/EU on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/1

<sup>165</sup> Emphasis added.

<sup>166</sup> Renewable Electricity Directive (n65).

<sup>167</sup> Sustainable Energy Authority of Ireland 'Renewable Energy in Ireland 2011' (SEAI, June 2012) <[www.seai.ie/Publications/.../Renewable\\_Energy\\_in\\_Ireland\\_2011.pdf](http://www.seai.ie/Publications/.../Renewable_Energy_in_Ireland_2011.pdf)> accessed 9 July 2013.



additional cause is the increased ambition of this target, a topic, which will be considered below.

The Renewable Energy Directive's energy targets are calculated as percentages of the renewable energy consumed in final energy. Final energy can be defined as the amount of energy delivered to the final consumer for energy purposes (i.e. electricity or heat). It is the energy available to users (such as industry, transport, households, and services including public services, agriculture, forestry and fisheries) following its conversion from primary energy. Generally final energy can be taken to be less than primary energy, because it is measured after the transformation losses in heat and power stations. However, in the variant used in the Directive, gross final energy consumption is measured before losses in transmission and distribution. Accordingly it includes the energy used by the heat and electricity industries themselves.<sup>168</sup>

In addition to setting targets such as the 16 per cent target allocated to Ireland (with the calculations as outlined above) the Renewable Energy Directive<sup>169</sup> provided member states with some flexibility as to the permissible methods of attaining these targets. It contained a method to allow statistical transfers of specified amounts of renewable energy from one member state to another,<sup>170</sup> and a method to allow a member state to invest in the production of renewable energy in another member state,<sup>171</sup> or (under different rules) a third country,<sup>172</sup> with the energy produced counted towards the investing State's target.

To further support the increase of renewable energy to the levels desired, the Renewable Energy Directive also strengthened the duty on member states to dispatch renewable electricity by placing a legal requirement on member states to guarantee priority access to renewable electricity (in so far as the secure operation of the national electricity system would permit).<sup>173</sup> It also placed a requirement on member states to take steps to ensure that the national rules concerning the authorisation, certification and licensing procedures applied to renewable plants and their associated

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<sup>168</sup> Hans van Steen 'The determination and enforceability of national renewable energy targets' in Paul Hodson (ed). *Volume III - Book One Renewable Energy Law and Policy in the European Union* (1<sup>st</sup> edn, Claeys & Casteels, 2010) 62.

<sup>169</sup> Renewable Energy Directive (n3).

<sup>170</sup> Renewable Energy Directive (n3) article 6.

<sup>171</sup> *Ibid*, article 7.

<sup>172</sup> *Ibid*, article 9.

<sup>173</sup> *Ibid*, article 16(c).

transmission and distribution network infrastructures were '*proportionate and necessary*'.<sup>174</sup>

### 3.3.2. The Renewable Energy Directive's Monitoring and Enforcement Provisions

In addition to being more difficult to achieve, the renewable energy goals set by the Renewable Energy Directive are legally binding. This places member states (such as Ireland) who fail to meet their targets, at risk of facing costly infringement penalties. However, although the final targets included in Annex I of the Directive are binding, they are only binding as far as the level of renewable energy in 2020 is concerned. To counterbalance this, the Directive also established a system to monitor member state progress in the years preceding 2020, and to penalise member states who begin to fall too far behind in renewable energy development. As outlined by Hans van Steen (Head of the Unit of Renewables and Carbon Capture and Storage at DG Energy, the European Commission), it would not have been enough for the Commission to solely have the power to launch infringement proceedings against member states who had failed to achieve their national targets after 2020, as by that time it would be too late.<sup>175</sup>

Consequently, Article 3(2) of the Renewable Energy Directive includes an indicative trajectory of levels (benchmarks) to be achieved between 2010 and 2020 in four two-year periods.<sup>176</sup> Interestingly the wording of article 3(2) was hotly debated in the negotiations that led to the final text of the Renewable Energy Directive, with some member states fearing that the original proposed text could make the indicative

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<sup>174</sup> *Ibid*, article 13(1). Note: Emphasis added.

<sup>175</sup> Hans van Steen (n168) 62.

<sup>176</sup> *Ibid*. Note: For example In 2011 Ireland, reported a 6.7 per cent share of renewable energy. Source: Eurostat 'Renewable Energy. Share of Renewable Energy up to 13 per cent of Energy Consumption in the EU 27 in 2011' (Article 65/2013, 26 April 2013) [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/8-26042013-AP/EN/8-26042013-AP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/8-26042013-AP/EN/8-26042013-AP-EN.PDF)> accessed 9 July 2013.



trajectory binding.<sup>177</sup> This claim was, however, disputed by the Commission. The final text, which was very close to the original proposal,<sup>178</sup> reads as follows:

*'member states shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in Part B of Annex I.'*

As was noted by Hans Van Steen, the Directive does not define 'effectively designed measures' but it is obvious that they need to include appropriate renewable energy support schemes, and that they could logically also be expected to include the measures outlined in articles 13 (administrative schemes, regulations and codes), 14 (information and training), 15 (guarantees of origin), and 16 (grid access and operation) of the Directive. The result is that infringement proceedings can be brought in the run up to 2020, on foot of a failure to meet the indicative trajectory benchmarking levels if failures were also found in other areas (a conclusion which is supported by Ireland's recent referral to the CJEU for breaching a number of provisions of the Renewable Energy Directive, as will be further discussed in chapter seven).<sup>179</sup> As outlined by Hans van Steen in 2010:

*'...it would appear that a Member State which is falling behind in its indicative trajectory in terms of its share of renewable energy and at the same time fails [in some other way to fulfil certain requirements of the Renewable Energy Directive such as a failure] to streamline and expedite administrative measures as required by Article 13(1) would be at risk of an infringement procedure.'*<sup>180</sup>

This monitoring system is further supported by the requirement for member states to submit national renewable energy action plans, which provide detail on how member states propose to attain their national targets. National renewable energy action plans are best described as compulsory plans which member states are obliged to submit to

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<sup>177</sup> Note: Article 3(2) of the Renewable Energy Directive was described as potentially providing the basis for infringement proceedings, however, it was also described as unsuitable to deal with all but the grossest cases of failure to work towards the targets. Source: *Ibid*, 64. While Ireland is currently the subject of infringement proceedings for failures in relation to articles 3(2) and article 3(4) of the Renewable Energy Directive, Ireland is being prosecuted for its transposition failures rather than its failures to meet the indicative trajectory targets. See: Case C-236/14, *Commission v Ireland* [2014] OJ L 140/16.

<sup>178</sup> The originally proposed text read as follows: 'Member States shall introduce appropriate measures to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in Part B of Annex I'. (n163).

<sup>179</sup> Hans van Steen (n168) 65.

<sup>180</sup> *Ibid*.

the Commission, to provide detail on the additional instruments which member states have employed to ensure that growth in renewable energy takes place at an appropriate pace. The first national renewable energy action plans were required by 30 June 2010. Article 23 requires member states to submit a report to the European Commission on the national progress made in renewable energy development by 31 December 2011, and every two years thereafter.

Article 4(4) requires member states, whose share of renewable energy falls below the first benchmark level outlined in the indicative trajectory, to submit an amended plan to the Commission by 30 June the following year.<sup>181</sup> This plan must set out '*adequate and proportionate measures to rejoin, within a reasonable timetable, the indicative trajectory*'. Article 4(5) states that the Commission may issue a recommendation to a member state in relation to a national renewable energy action plan or an amended national renewable energy action plan. While this provision does not place any obligation on the Commission to communicate or make public its evaluation of national renewable energy action plans, it also does not prevent the Commission from taking other action (including issuing infringement proceedings) in response to a sub-standard national renewable energy action plan should it judge this to be necessary.

### **3.3.3. Ireland's national renewable energy action plan and onshore wind**

On 1 July 2010, the Irish government submitted its national renewable energy action plan. In this plan the government pledged that 40 per cent of Irish electricity would be produced from renewable energy, and primarily onshore wind.<sup>182</sup> Admittedly, the Irish government had previously announced this 40 per cent target in its budget in 2009 stating:

*'The previous government adopted a target that 33% of electricity consumed would be from renewable sources by 2020. Today I can now confirm that the government has agreed...to increase this target to 40%. The target is underpinned by analysis conducted in the recent All Island Grid Study which found that a 40% penetration is technically feasible, subject to upgrading our electricity grid and ensuring the development of flexible generating plant on the*

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<sup>181</sup> Note: article 4(4) Renewable Energy Directive (n3) which provides that the Commission may adopt a decision releasing the Member State from submitting an amended plan where that Member State has not met the indicative trajectory by a limited margin.

<sup>182</sup> Department of Communications, Energy & Natural Resources (n4).



electricity system. The study concludes that this higher level of renewable electricity would reduce our carbon emissions from electricity by 25% over the business as usual scenario, a saving of around 5 million tonnes.<sup>183</sup>

In including this 40 per cent renewable electricity target in the national renewable energy action plan, the target became subject to the enforcement and monitoring mechanisms outlined by the Renewable Energy Directive (discussed above). In addition to pledging to reach this 40 per cent target, the national renewable energy action plan also included the government's aim to reach a 10 per cent share of electric vehicles in the transport sector by 2020. To provide detail on how these targets were to be achieved, the national renewable energy action plan included Ireland's estimated trajectories of renewable energy for the heating and cooling (*res-h&c*) electricity (*res-e*) and transport (*res-t*) sectors in the years preceding 2020. These figures included the following trajectories to meet the Irish governmental pledges and also to meet the (lesser) targets set by the Commission (*res minimum trajectory*):

### 3.2 Sectoral targets and trajectories

Table 3: National 2020 target and estimated trajectory of energy from renewable sources in heating and cooling, electricity and transport

	2005	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
RES- H&C <sup>15</sup> (%)	3.5%	4.3%	4.9%	6.1%	6.9%	7.7%	8.9%	9.7%	10.1%	10.5%	11.2%	12.0%
RES-E <sup>16</sup> (%)	6.9%	20.4%	24.6%	25.3%	30.5%	31.0%	32.4%	32.2%	33.8%	37.5%	37.3%	42.5%
RES-T <sup>17</sup> (%)	0.0%	3.0%	3.9%	4.6%	5.1%	5.5%	5.9%	6.6%	7.4%	8.1%	8.8%	10.0%
Overall RES share <sup>18</sup> (%)	3.1%	6.6%	8.1%	9.0%	10.5%	11.0%	11.8%	12.2%	12.9%	14.0%	14.4%	16.0%

As part B of Annex I of the Directive	2011-2012	2013-2014	2015-2016	2017-2018	2020
RES minimum trajectory <sup>19</sup> (%)	5.69%	6.98%	8.92%	11.51%	16%
RES minimum trajectory (ktoe)	739	930	1,217	1,599	2,263

Table 4: Interim targets outlined in Ireland's national renewable energy action plan<sup>184</sup>

Ireland's national renewable energy action plan is a complex 165 page document, designed to provide detail of Ireland's strategy to meet both its interim and final renewable energy targets. The document was drafted (based on a template provided

<sup>183</sup> Mr John Gormley TD, 'Budget 2009, Dail Statement by Mr John Gormley TD, Minister for the Environment, Heritage and Local Government' (Speech to the Dail, 15 October 2008) <<http://www.eirgrid.com/media/Carbon%20Budget.pdf>> accessed 27 November 2014, 7.

<sup>184</sup> Department of Communications, Energy & Natural Resources (n4), 11.



by the European Commission)<sup>185</sup> to provide detail on such matters as: Ireland's national renewable energy policy; Ireland's expected final energy consumption between 2010 and 2020; the measures designed to achieve the allocated and pledged targets and all policies and measures designed to promote the use of renewable energy resources.

In describing how Ireland intended to reach its targets, the national renewable energy action plan acknowledged the role which Irish onshore wind had played in Ireland's energy mix stating that the significant growth in electricity from renewable sources in recent years was largely attributable to onshore wind and outlined the role it was initially expected to play in contributing to Ireland's achievement of its 16 per cent target, as reproduced below:

**Table 10 Modelled Scenario**

Estimation of total contribution (installed capacity, gross electricity generation) expected from each renewable energy technology in Ireland to meet the binding 2020 targets and the indicative interim trajectory for the share of energy from renewable resources in electricity 2010-2014

The data in this modelled scenario is influenced of necessity to a significant degree by planned Gate 3 generation. Technologies in the R&D category (e.g. wave and tidal) are not included in the Gate. However as noted at 4.2.6 (b), CER 09/099 is a new policy which sets out how small, renewable, low carbon generation can access the grid outside the Gate 3 process. Possibilities using CER 09/099 are reflected only to a limited degree in the modelled scenario, hence the low figures for certain technologies. Reports on the NREAP will be submitted on a biennial basis and the modelled scenario can be updated at that time to reflect technology and other developments that may occur in the interim. In the meantime, the non modelled Export scenario version of Table 10 which follows offers an alternative development trajectory, without the constraints built into the modelled scenario.

	2005		2010		2011		2012		2013		2014	
	MW	GWh	MW	GWh	MW	GWh	MW	GWh	MW	GWh	MW	GWh
<b>Hydro:</b>	234	760	234	701	234	703	234	701	234	698	234	728
<1MW	18		18		18		18		18		18	
1MW-10MW	20		20		20		20		20		20	
>10MW	196		196		196		196		196		196	
<i>Of which is pumping</i>	0	0	0	0	0	0	0	0	0	0	0	0
Geothermal	0	0	0	0	0	0	0	0	0	0	0	0
Solar:	0	0	0	0	0	0	0	0	0	0	0	0
<i>photovoltaic</i>												
<i>Concentrated solar power</i>												
Tide, Wave, Ocean	0	0	0	0	0	0	0	0	0	0	0	0
Wind: <sup>186</sup>	494	1,588	2,088	4,817	2,325	5,965	2,370	6,189	2,794	7,478	2,907	7,758
<i>Onshore</i>	469		2,052	4,701	2,289	5,848	2,334	6,073	2,542	6,663	2,656	6,942
<i>offshore</i>	25		36	116	36	116	36	117	252	815	252	816
Biomass:	20	116	77	347	81	393	84	479	131	839	134	864
<i>Solid</i>	2	8	15	28	19	73	22	158	69	519	72	544
<i>biogas</i>	18	108	62	320	62	320	62	321	62	320	62	320
<i>Bioliquids</i>	0	0	0	0	0	0	0	0	0	0	0	0
<b>Total</b>	<b>748</b>	<b>2,465</b>	<b>2,399</b>	<b>5,866</b>	<b>2,640</b>	<b>7,060</b>	<b>2,688</b>	<b>7,369</b>	<b>3,159</b>	<b>9,014</b>	<b>3,275</b>	<b>9,348</b>
<i>Of which CHP</i>	2	13	5	37	6	42	7	47	7	51	8	51

**Table 5: The initial projections on Irish onshore wind's potential contributions to Ireland's renewable electricity targets<sup>186</sup>**

<sup>185</sup> Commission Decision of 30 June 2009 establishing a template for National Renewable Energy Action Plans under Directive 2009/28/EC of the European Parliament and of the Council [2009] OJ L 182/33.

<sup>186</sup> Department of Communications, Energy & Natural Resources (n4), 137.



These projections have changed since the submission of this strategy on 1 July 2010 and commercial onshore wind is now expected to contribute more fully to Ireland's achievement of its 40 per cent national renewable electricity target.<sup>187</sup> One reason for this is Irish offshore wind development is yet to take off;<sup>188</sup> to date just one offshore wind development is producing renewable electricity<sup>189</sup> and the Irish legislative and policy framework to support offshore wind is still in development.<sup>190</sup> Consequently, focus has been firmly fixed on onshore wind as the primary method for Ireland to achieve its 40 per cent renewable electricity target,<sup>191</sup> with discussions on offshore wind fixed on its capacity for export to the UK.<sup>192</sup>

### 3.3.4. Progress to date and Future Predictions

In January 2012, Ireland submitted its first progress report on its national renewable energy action plan.<sup>193</sup> This was a year after the deadline as stipulated by article 22 of the Renewable Energy Directive. Furthermore, the Irish government have yet to make public any subsequent progress reports. The first progress report showed that Ireland

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<sup>187</sup> Pat Rabbitte T.D, 'Midlands Wind Energy Opportunities: an initiative of 'Creating the New Midlands Economy' (Speech by Pat Rabbitte T.D., Minister for Communications, Energy and Natural Resources, Tullamore, Co Offaly) 8 March 2013 <<http://www.dcenr.gov.ie/Corporate+Units/Press+Room/Speeches/2013/New+Midlands+Economy+Conference+Speech.htm>> accessed 27 November 2014.

<sup>188</sup> As noted on the National Offshore Wind Ireland Website: '*The only offshore wind farm constructed to date is the first phase of the Arklow Bank project, the first phase of a 500MW project.*'; National Offshore Wind Association of Ireland, Offshore Wind Ireland' (National Offshore Wind Association of Ireland, 2014)< <http://www.nowireland.ie/offshore-wind-ireland.html>> accessed 27 November 2014.

<sup>189</sup> *Ibid.* While work was recently initiated to develop a framework to support the development of offshore wind in Ireland through the publication of a National Offshore Renewable Energy Development Plan and a Strategic Environmental Assessment in February 2014 and the publication of a General Scheme of Maritime Area and Foreshore Amendment Bill 2013 at present many problems exist to prevent any significant contribution from offshore wind to Ireland's renewable electricity generation mix.

<sup>190</sup> While work was recently initiated to develop a framework to support the development of offshore wind in Ireland through the publication of a National Offshore Renewable Energy Development Plan and a Strategic Environmental Assessment in February 2014 and the publication of a General Scheme of Maritime Area and Foreshore Amendment Bill 2013 at present many problems exist to prevent the contribution of offshore wind to Ireland's renewable electricity generation mix.

<sup>191</sup> Pat Rabbitte (n187).

<sup>192</sup> See for example: Tim O'Brien, '[euro]15bn investment and jobs put on hold' *Irish Times* (Dublin, 14 Apr 2014) 3.

<sup>193</sup> Department of Communications, Energy and Natural Resources, 'National Renewable Energy Action Plan (NREAP) IRELAND First Progress Report Submitted under Article 22 of Directive 2009/28/EC January 2012' (DCENR, January 2012)< <http://www.dcenr.gov.ie/NR/rdonlyres/B611ADDD-6937-4340-BCD6-7C85EAE10E8F/0/IrelandfirstreportonNREAPJan2012.pdf>> accessed 27 November 2014.

had failed to reach the interim targets which were set for 2009 and 2010 (to attain 20.4 per cent renewable electricity by producing 4140 MW of energy from wind). For 2010, Ireland had installed just 1389 MW of wind (with just 25 MW produced from offshore resources).<sup>194</sup>

**The sectoral (electricity, heating and cooling, and transport) and overall shares of energy from renewable sources<sup>1</sup>**

	2009	2010
RES-H&C <sup>2</sup> (%)	4.3%	4.4%
RES-E <sup>3</sup> (%)	13.7%	14.8%
RES-T <sup>4</sup> (%)	1.8%	2.4%
Overall RES share <sup>5</sup> (%)	5.0%	5.5%
<i>Of which from cooperation mechanism<sup>6</sup> (%)</i>	n/a	n/a
<i>Surplus for cooperation mechanism<sup>7</sup> (%)</i>	n/a	n/a

**Table 6: Progress towards the 40 per cent renewable electricity target in 2009 and 2010<sup>195</sup>**

Moreover, on 27 March 2013, the Irish Minister for Communications, Energy and Natural Resources, Pat Rabbitte gave a speech which described the gap that existed between the 3,521 MW renewable electricity target pledged (the estimated 40 per cent target, based on projected demand) and the then present level of wind development (1,826.5 MW) to state:

*'In terms of the 2020 renewable electricity target, [Ireland is] 630MW behind where the National Renewable Energy Action Plan has outlined [it] should be in 2012. The target will not be achieved without an increase in wind energy build from an historic average of 180MW per year to at least 250MW per year.'*<sup>196</sup>

In 2013, the Commission issued its first Renewable Energy Progress Report.<sup>197</sup> Overall, this Report was positive, finding that there was a: *'generally solid initial start at EU level but with slower than expected removal of key barriers to renewable energy growth'*.<sup>198</sup> Despite its relatively positive introduction, an overall warning note was

<sup>194</sup> *Ibid*, 3.

<sup>195</sup> Department of Communications, Energy and Natural Resources Law (n193),2.

<sup>196</sup> Pat Rabbitte, Minister for Communications, Energy and Natural Resources, Speech at the Irish Wind Energy Associations Annual Conference, Dublin, 27 March 2013.

<sup>197</sup> European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Renewable energy progress report' [2013] COM(2013) 0175 final.

<sup>198</sup> *Ibid*, 2.



sounded, with the report maintaining a less optimistic outlook for 2020 and identifying wind energy as a potential future problem stating:

*'The failure to comply with national plans is most evident in the wind sector. According to Member State plans, wind capacity is expected to reach 213 GW in 2020 (169 GW onshore, and 44 GW offshore)...Despite the recent strong growth in the onshore wind industry of recent years, Member States' plans for onshore wind production 354 TWh may fall short. Further efforts will be needed to reinforce measures and improve infrastructure, or only an estimated 210 TWh might be achieved.'*<sup>199</sup>

In connection with these projections, the Commission made some general observations and some insightful criticisms. In general it noted that until such time as Europe has achieved an open and competitive single energy market, with market failures corrected and external costs internalised, policy measures would be needed to boost the growth of renewable energy. In particular the electricity grid, and renewable energy supports schemes were recognised as requiring supporting policy measures. More precisely deficiencies were acknowledged in the authorisation processes applied to renewable plants, as contributing to the slow growth of renewables. In this regard, the Commission stated its analysis of member states' 2011 progress reports had indicated that growth in removing the administrative barriers was still limited and slow, with many member states failing to even address administrative reforms in their reports. On this point, the Commission warned that it would continue to investigate member states' progress in removing these barriers, and launch infringement proceedings where member states failed to act.

In its consideration of individual member state progress Ireland was recognised as one who had surpassed the first interim target for renewable energy, as provided by the Renewable Energy Directive.<sup>200</sup> However, this positive statement conceals less than positive underlying facts. Although Ireland has met the first Directive set target, Ireland failed to meet the 6.6 per cent renewable energy target set by the Irish government in its national renewable energy action plan for 2010.<sup>201</sup> Furthermore, a consultancy

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<sup>199</sup> *Ibid.*, 4.

<sup>200</sup> Renewable Energy Directive (n3); Ireland was noted as having a 5.8 per cent share of renewable energy rather than the required 5.7 per cent share. See: Commission (n197).

<sup>201</sup> ECOFYNS, 'Report for the Commission. Renewable Energy Progress and Biofuels Sustainability' (ECOFYNS Report for the Commission, September 2012) <



report prepared for the Commission in 2012, found that Ireland had missed this target by more than 10 per cent, and was unlikely to meet the remaining targets outlined in its national renewable energy action plan for 2020.

Member State	2005 RES share	2010 RES share	1 <sup>st</sup> interim target	2020 RES target
Austria	23.3%	30.1%	25.4%	34%
Belgium	2.2%	5.4%	4.4%	13%
Bulgaria	9.4%	13.8%	10.7%	16%
Cyprus	2.9%	5.7%	4.9%	13%
Czech Republic	6.1%	9.4%	7.5%	13%
Germany	5.8%	11.0%	8.2%	18%
Denmark	17%	22.2%	19.6%	30%
Estonia	18%	24.3%	19.4%	25%
Greece	6.9%	9.7%	9.1%	18%
Spain	8.7%	13.8%	10.9%	20%
Finland	28.5%	33%	30.4%	38%
France	10.3%	13.5%	12.8%	23%
Hungary	4.3%	8.8%	6.0%	13%
Ireland	3.1%	5.8%	5.7%	16%
Italy	5.2%	10.4%	7.6%	17%
Lithuania	15%	19.7%	16.6%	23%
Luxembourg	0.9%	3%	2.9%	11%
Latvia	32.6%	32.6%	34.0%	40%
Malta	0%	0.4%	2.0%	10%
Netherlands	2.4%	3.8%	4.7%	14%
Poland	7.2%	9.5%	8.8%	15%
Portugal	20.5%	24.6%	22.6%	31%
Romania	17.8%	23.6%	19.0%	24%
Sweden	39.8%	49.1%	41.6%	49%
Slovenia	16.0%	19.9%	17.8%	25%
Slovakia	6.7%	9.8%	8.2%	14%
UK	1.3%	3.3%	4.0%	15%
<b>EU</b>	<b>8.5%</b>	<b>12.7%</b>	<b>10.7%</b>	<b>20%</b>



Progress towards the first interim target:

>2% above interim target

<1% from or <2% above interim target

>1% below interim target

**Table 7: Member state progress towards overarching interim targets<sup>202</sup>**

The reason given for this prediction was that the renewable energy growth rate in Ireland was lower than the average growth rate required to reach the renewable energy targets outlined in Ireland's national renewable energy action plan. In assessing Ireland's compliance with the Renewable Energy Directive's<sup>203</sup> rules on administrative procedures, the report found Ireland to be in need of improvement.<sup>204</sup> In this regard, the report criticised Ireland for either having failed to inform the Commission of the enactment of a national law designed to remove administrative barriers,<sup>205</sup> or having failed to remove administrative barriers.

#### 4. Conclusion

On 1 July 2010, Ireland submitted its national renewable energy action plan to provide detail as to how it intended to fulfil its legal obligation to reach a 16 per cent share of renewable energy consumption by 2020.<sup>206</sup> In the plan which the Irish government submitted, it pledged to produce 40 per cent of Ireland's electricity from renewable energy resources, mainly from onshore wind.<sup>207</sup> It is now projected that the entire 40 per cent will be met by Ireland's onshore wind generated electricity sector.<sup>208</sup>

While chapter one considered the international developments which led to the renewed interest in green energy in Ireland and the EU; this chapter has placed this pledge in context by considering the laws which promoted the decision and the legal framework governing Irish onshore wind generated electricity. Thus, the meaning attributed to the terms Ireland and the Irish State, Ireland's membership of the EU and the duties which

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<sup>202</sup> Commission (n197).

<sup>203</sup> Renewable Energy Directive (n3).

<sup>204</sup> ECOFYNS (n201).

<sup>205</sup> *Ibid*, 15.

<sup>206</sup> Department of Communications, Energy & Natural Resources (n4).

<sup>207</sup> *Ibid*.

<sup>208</sup> Pat Rabbitte (n187).

flow from this membership have been considered, along with EU action in the energy field, and the specific EU energy laws to prompt Ireland's decision to develop its onshore wind generated electricity market.

As is evident from Ireland's first progress report on its national renewable energy action plan, Ireland is failing to meet its interim renewable electricity targets.<sup>209</sup> This is attributable to a number of factors. While the increased ambition of the target (when compared to the targets set by the Renewable Electricity Directive)<sup>210</sup> is one, there are other causes impeding Irish onshore wind development (which potentially spring from a general failure to conduct a thorough analysis of the surrounding legal environment). These will be examined in chapters 4, 5 and 6 of this thesis. However, chapter 3 will first analyse the Irish onshore wind development strategy 2010-2020 (as outlined in the national renewable energy action plan)<sup>211</sup> and the decision making-process which led to its finalisation, as the potential origin of many of the problems which survive in renewable electricity's development and sale markets.

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<sup>209</sup> Department of Communications, Energy and Natural Resources Law (n193).

<sup>210</sup> Renewable Electricity Directive (n130).

<sup>211</sup> Department of Communications, Energy & Natural Resources (n4).



## Chapter 3 The Irish Onshore Wind Policy

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### 1. Introduction



Although renewable energy is not new in Ireland,<sup>1</sup> onshore wind is relatively so, having first supplied electricity to the Irish market in 1992.<sup>2</sup> At that time Ireland's commercial wind energy sector consisted of a sole wind farm at Bellacorrick, Co. Mayo which was then generating 6.45 MW of renewable electricity.<sup>3</sup> Since then, Ireland's wind energy sector has grown and onshore wind now accounts for over 2,000 MW of Ireland's generation market (with wind plants situated in 22 counties across Ireland).<sup>4</sup> Clearly, there has been significant expansion in the sector. This is expansion which is set to increase, with wind expected to contribute more and more to the future Irish and European electricity markets of 2020,<sup>5</sup> 2030<sup>6</sup> and 2050.<sup>7</sup>

The growth of the Irish onshore wind energy sector has been driven by motivating factors at two separate levels; each of which will be separately discussed. First, international and European legislative and policy instruments have acted as strong drivers for change at state level. As has been discussed in chapter one, international

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<sup>1</sup> In the 1930s the generation of electricity was almost 100 per cent renewable, based on the hydro power of the Shannon river, harnessed at the Ardnacrusha plant. See: Renewable Energy Strategy Group, 'Strategy for Intensifying Wind Energy Deployment' (Government of Ireland, 2003), 17.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Department of Communications, Energy and Natural Resources, 'Green Paper on Energy Policy in Ireland, May 2014' (Government of Ireland Dublin, 8 May 2014), 58.

<sup>5</sup> European Commission, 'Communication from the Commission to the Council and the European Parliament. Renewable Energy Road Map. Renewable Energies in the 21st century: building a more sustainable future' [2006] COM(2006)848 final.

<sup>6</sup> European Commission, 'Green Paper. A 2030 Framework for Climate and Energy Policies' [2013] COM (2013) 169 final.

<sup>7</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A Roadmap for moving to a competitive low carbon economy in 2050' [2011] COM (2011) 112 final.



instruments such as the UNFCCC,<sup>8</sup> the Kyoto Protocol,<sup>9</sup> the Copenhagen Accord,<sup>10</sup> the Durban Platform for Enhanced Action<sup>11</sup> and the Lima Call for Climate Action<sup>12</sup> placed the spotlight firmly on climate change, providing overarching objectives for greenhouse gas reductions and renewable energy consumption.<sup>13</sup> These overarching objectives were later converted into detailed laws and policies by the EU. However, through targeted laws and policies (such as the Climate and Energy Legislative Package)<sup>14</sup> the EU has moved beyond the goals allocated to it at global level and created its own regional framework designed to reduce greenhouse gases and increase renewable energy.

Secondly, at market level favourable financial supports have provided wind developers with a strong motive to develop.<sup>15</sup> Ireland's first commercial wind project is an example

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<sup>8</sup> United Nations Framework Convention on Climate Change (adopted 5 September 1992, entered into force 21 March 1994) 1771 UNTS 107 (the 'UNFCCC').

<sup>9</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 (the 'Kyoto Protocol').

<sup>10</sup> Decision 2/CP.15, Copenhagen Accord in Report of the Conference of Parties on its fifteenth session held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session, FCCC/CP/2009/11/Add.1 (30 March 2010) 4 (the 'Copenhagen Accord').

<sup>11</sup> Decision 1/CP.17, Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011, Addendum, Part Two: Action taken by the Conference of the Parties at its seventeenth session Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, FCCC/CP/2011/9/Add.1 (15 March 2012) 2 (the 'Durban Platform').

<sup>12</sup> UN Conference of the Parties, 'Lima call for climate action, Decision /CP.20 (advanced unedited version)' <[http://newsroom.unfccc.int/media/167536/auv\\_cop20\\_lima\\_call\\_for\\_climate\\_action.pdf](http://newsroom.unfccc.int/media/167536/auv_cop20_lima_call_for_climate_action.pdf)> accessed 18 December 2014.

<sup>13</sup> Note: energy efficiency was part of the 20-20-20 targets of the EU's 2009 Climate and Energy Legislative Package, however, while the renewable energy and emission reduction targets are legally binding, the energy efficiency targets are not. There have been further legal and policy developments in the area of energy efficiency since this time and in 2012 the following directive was enacted: Directive 2012/27/EU on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/1.

<sup>14</sup> This legislative package consists of four pieces of legislation: (1) Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63 (2) Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide [2009] OJ L 140/114 (3) Decision No. 406/2009/EC of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136 (the 'Effort Sharing Decision') and (4) Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16 (the 'Renewable Energy Directive').

<sup>15</sup> Financial supports in the earlier years included EU programmes such as the VALOREN and THERMIE programmes. See further: Council Regulation (EEC) No 3301/86 of 27 October 1986 instituting a Community programme for the development of certain less-favoured regions of the Community by exploiting endogenous energy potential (Valoren programme) [1986] OJ L 305/6; Council Decision of 23 November 1994 adopting a specific programme for research and



of a project supported by the early financial incentives provided by the EU in the 1990s.<sup>16</sup> The following decade, financial incentives were offered at national level. This trend has continued and the national schemes currently operating in Ireland are the Alternative Energy Requirement (AER)<sup>17</sup> and Renewable Energy Feed in Tariff (REFIT).<sup>18</sup> These schemes have been driven by both international and regional legislation such as the UNFCCC's Kyoto Protocol<sup>19</sup> and the EU's Renewable Electricity Directive.<sup>20</sup> However, while the UNFCCC's Kyoto Protocol<sup>21</sup> and the Renewable Electricity Directive<sup>22</sup> kick-started Ireland's onshore wind industry; it was the Climate and Energy Legislative Package of 2009<sup>23</sup> which truly breathed life into the sector.

The Climate and Energy Legislative Package was a far reaching legislative package, specifically designed to ensure that Member States increased renewable energy and decreased emissions by allocated percentages by 2020. Although the Package contains four primary pieces of legislation, the two most important (in the context of Ireland's onshore wind energy sector) are the Effort Sharing Decision<sup>24</sup> and the Renewable Energy Directive.<sup>25</sup> As will be remembered, these place Ireland under

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technological development, including demonstration, in the field of non-nuclear energy (1994 to 1998) [1994] OJ L 334/87.

<sup>16</sup> Renewable Energy Strategy Group (n1), 17.

<sup>17</sup> As described in Ireland's first progress report on its renewable energy action plan: '*Under AER, there were six calls for tenders (AER I – AER VI) between the mid 1990s and 2003. AER applications were invited from prospective generators to build, own and operate new wind, hydro, biomass and waste to-energy facilities. All applications were ranked on the basis of bid price per kilowatt-hour supplied. Successful applicants could enter into Power Purchase agreements (PPAs) of up to 15 years with the Public Electricity Supplier (ESB).*' See: Department of Communications, Energy & Natural Resources, 'National Renewable Energy Action Plan. Ireland. Submitted under Article 4 of Directive 2009/28/EC' (DCENR, 1 July 2010) <  
<http://www.dcenr.gov.ie/NR/rdonlyres/03DBA6CF-AD04-4ED3-B443-B9F63DF7FC07/0/IrelandNREAPv11Oct2010.pdf>> accessed 21 August 2014 ('National renewable energy action plan').

<sup>18</sup> As described in Ireland's national renewable energy action plan: '*REFIT (Renewable Energy Feed In Tariff) is a feed in tariff scheme. The REFIT scheme is a competition for the allocation of support for the construction of certain categories of renewable generation. The scheme allows RES-E generators to secure the necessary investor confidence to finance debts. RES-E generators enter into 15 year power purchase agreements with suppliers at negotiated and fixed prices. Via the Public Service Obligation (PSO) levy mechanism, REFIT compensates participating retail electricity suppliers according to the REFIT terms and conditions for the net additional costs attributable to their participation in the scheme and purchase of electricity from the relevant generators in the REFIT scheme.*' See: National Renewable energy action plan (n17).

<sup>19</sup> the Kyoto Protocol (n9).

<sup>20</sup> Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L 283/33 (the 'Renewable Electricity Directive').

<sup>21</sup> the Kyoto Protocol (n9).

<sup>22</sup> the Renewable Electricity Directive (n19).

<sup>23</sup> the Climate and Energy Legislative Package (n13).

<sup>24</sup> the Effort Sharing Decision (n13(3)).

<sup>25</sup> the Renewable Energy Directive (n13(4)).



obligations to achieve a 16 per cent target of renewable energy consumption by 2020<sup>26</sup> and a complementary emission reduction target of 20 per cent reduced emissions (below 2005 levels) by 2020.<sup>27</sup> Pursuant to article 4 of the Renewable Energy Directive, Ireland was further required to submit a national renewable energy action plan detailing how the government intended to reach the 16 per cent renewable energy target by 2020.

In the national renewable energy action plan which Ireland submitted the government pledged that in order to reach this 16 per cent target, approximately 40 per cent of Ireland's electricity would be generated by onshore wind by 2020.<sup>28</sup> This decision (to expand Ireland's wind sector to generate 40 per cent renewable electricity) is central to this thesis. It forms the foundation for the modern Irish onshore wind energy sector and is the main motivating factor behind this sector's expansion. Moreover, the national renewable energy action plan (which documented the decision) provided the original blueprint for the growth of the wind energy sector.

However, while this document outlined a significant number of laws and policies likely to directly stimulate and aid onshore wind development, it is clear that inadequate attention was given to ensuring that Ireland's onshore wind strategy was developed in harmony with pre-existing laws and policies (such as the Aarhus Convention<sup>29</sup> and the SEA Directive).<sup>30</sup> Moreover, laws and policies likely to indirectly affect renewable energy development (such as the market separation requirements of the third liberalisation directive)<sup>31</sup> or directly affected by onshore wind development (such as the obligation to provide affordable electricity)<sup>32</sup> were not considered in Ireland's national renewable energy action plan<sup>33</sup> or any of the policy documents discussing onshore wind development in Ireland. Arguably as a result, the Irish government is facing the problems discussed herein and Ireland is exposed to the infringement proceedings

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<sup>26</sup> the Renewable Energy Directive (n13(4)) annex I.

<sup>27</sup> the Effort Sharing Decision (n13(3)) annex II.

<sup>28</sup> National Renewable energy action plan (n17).

<sup>29</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447; 38 ILM 517 (1999) ('the Aarhus Convention').

<sup>30</sup> Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/0030 (the 'SEA Directive').

<sup>31</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ 5 L 211/5 ('the third liberalisation directive').

<sup>32</sup> As required by the third liberalisation directive (n51) and Article 191(1) Treaty on the Functioning of the European Union (Consolidated version 2010) [2010] OJ C 83, 30.3.2010 ('TFEU'), Article 14 and Protocol 26

<sup>33</sup> National Renewable energy action plan (n17).



discussed in chapter 7. Thus, this chapter will analyse the decision (and decision making processes) which led Ireland to focus on onshore wind in its national renewable energy action plan as a means to meet its legal obligations.

Disturbingly, the decision rests on unstable ground. On the 29 June 2012, the decision making procedures which led to the finalisation of Ireland's national renewable energy action plan were found to be in breach of international law.<sup>34</sup> Worse (as will be considered in the course of this chapter) it is highly likely that these procedures are also in breach of EU law, a proposition which will, shortly, be considered in the High Court.<sup>35</sup> This is because a national renewable energy action plan could easily be a plan which falls within the realm of the SEA<sup>36</sup> as one which sets the framework for the future development consent of wind farm and infrastructure projects, containing mandatory measures which Member States are obliged to implement and monitor.

EU case-law<sup>37</sup> indicates that a judgment to this effect could have considerable consequences for specific Irish wind projects (most likely those yet to be commenced) which were authorised to implement the Irish renewable energy action plan. Moreover, it is likely to have strong adverse consequences for the wind energy sector generally. Consequently, this topic will be fully analysed in this chapter (which is designed to begin the story of the modern commercial Irish onshore wind market).

While chapters one and two placed the Irish decision to develop onshore wind in an international and European context, this chapter analyses the decision itself, as documented in Ireland's national renewable energy action plan. This is done by considering the background to the decision, analysing the Irish national renewable energy action plan and the consequences of a finding that this plan was finalised in breach of EU law. In this manner, chapter three paves the way for the chapters which follow, which either consider the impact of this decision on a particular electricity sub-

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<sup>34</sup> Compliance Committee, Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union, (adopted on 29 June 2012) <[http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece\\_mp\\_pp\\_c.1\\_2012\\_12\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece_mp_pp_c.1_2012_12_eng.pdf)> accessed 8 December 2013 ('the Swords Decision').

<sup>35</sup> *Pat Swords v Department of Communications, Energy & Natural Resources* High Court Record No. 2013/4122P ('Pat Swords Application for Judicial Review'). Note: at the time of writing this was listed for hearing on 3 March 2015.

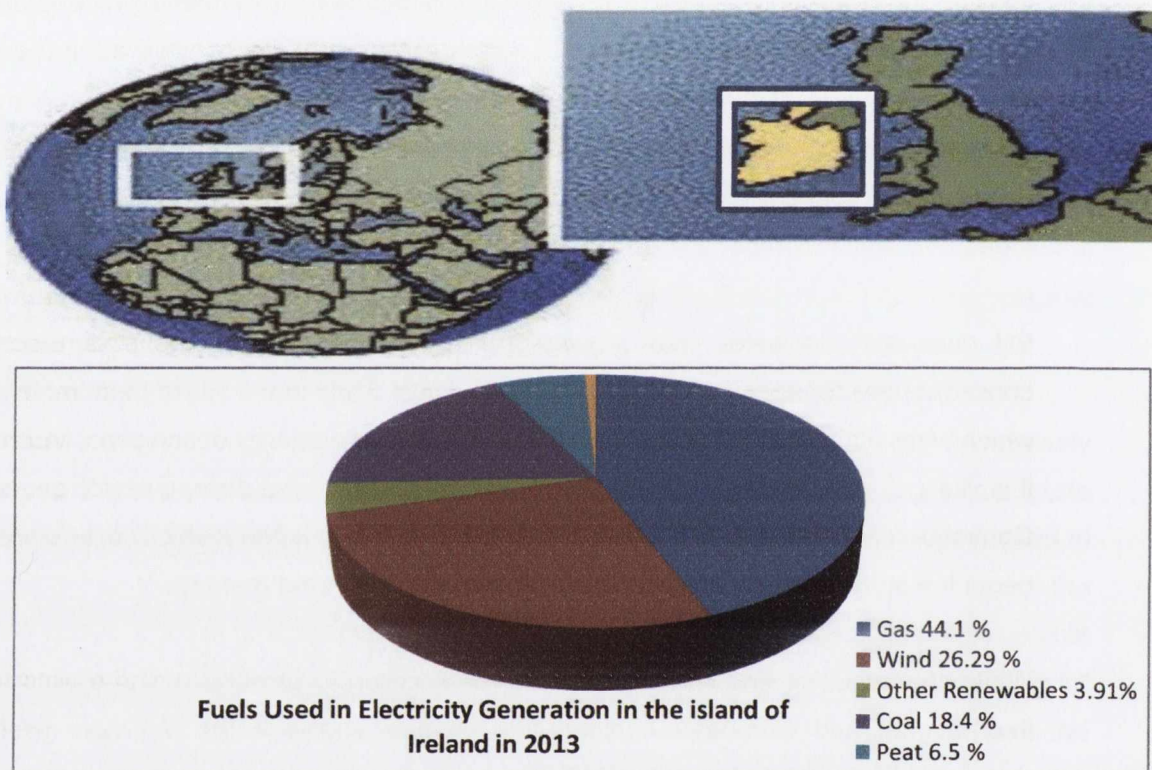
<sup>36</sup> the SEA Directive (n30).

<sup>37</sup> Case C-41/11 *Inter-Environnement Wallonie ASBL v Region Wallonne* [2012] ECR I-0000 ('Inter-Environnement Wallonie [2012]').

market or the problems which the organisation of a specific sub-market could have for the Irish government's successful development of onshore wind.

## 2. Background to the Decision to Expand the Irish Commercial Onshore Wind Sector

### 2.1. Ireland's wind market in context



**Figure 6: Fuels used in electricity generation in the island of Ireland in 2013<sup>38</sup>**

Although wind energy currently accounts for 26.29 per cent of electricity generation in Ireland, Irish wind energy is relatively new.<sup>39</sup> The first commercial Irish wind farm at Bellacorrick began supplying electricity to the Irish grid in 1992.<sup>40</sup> It remained the only wind farm providing electricity to the public until 1997, when a further six were commissioned with a combined generation capacity of 44 MW. By 2000, a further five

<sup>38</sup> Figures taken from: Commission for Energy Regulation, 'Fuel Mix Disclosure and CO2 Emissions 2013' (Commission for Energy Regulation, 9 July 2014) CER/14/297, 7.

<sup>39</sup> Department of Communications, Energy and Natural Resources (n2).

<sup>40</sup> *Ibid.*



wind farms had been built, with a combined installed capacity of 69.49 MW. At this point, wind energy was producing just 1 per cent of Ireland's electricity needs.<sup>41</sup>

Despite its modest beginnings, its youth, and the high costs and long lead in times associated with onshore wind development,<sup>42</sup> the sector has experienced significant growth. This growth has mainly been in response to global and regional developments. For example, globally, pursuant to the Kyoto Protocol,<sup>43</sup> Ireland became legally obliged to promote the research, promotion and use of renewable forms of energy in 2005<sup>44</sup> and to maintain its greenhouse gases<sup>45</sup> at a level of 13 per cent above an agreed baseline between 2008 and 2012.<sup>46</sup> In 2006 these obligations were made doubly enforceable on Ireland under EU and International law through the enactment of Decision 2006/944/EC.<sup>47</sup>

Regionally, the EU has also been active in seeking to promote increased renewable energy and reduced emissions. In 2001, the EU enacted the Renewable Electricity Directive<sup>48</sup> which established a political EU-wide target of 12 per cent renewable electricity consumption by 2010, with Member States allocated additional individual political targets. For Ireland this was to reach a 13.2 per cent share of renewable electricity consumption by 2010. However, while many of these external developments

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<sup>41</sup> Sustainable Energy Authority of Ireland, 'Renewable Energy in Ireland 2011' (Sustainable Energy Authority of Ireland, 2012) <  
[http://www.seai.ie/Publications/Statistics\\_Publications/Renewable\\_Energy\\_in\\_Ireland\\_2011.pdf](http://www.seai.ie/Publications/Statistics_Publications/Renewable_Energy_in_Ireland_2011.pdf)  
> accessed 31 December 2013, 16.

<sup>42</sup> International Energy Agency (IEA) Wind Implementing Agreement Task 26, 'The Cost of Wind Energy' (International Energy Agency, May 2012)<  
[http://www.ieawind.org/index\\_page\\_postings/WP2\\_task26.pdf](http://www.ieawind.org/index_page_postings/WP2_task26.pdf)> accessed 5 September 2013.

<sup>43</sup> the Kyoto Protocol (n9).

<sup>44</sup> the Kyoto Protocol (n9) article 2.

<sup>45</sup> In this article the term greenhouse gases can be taken to refer to the six gases included in Annex A to the Kyoto Protocol (n9) i.e. carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride.

<sup>46</sup> The target was to reduce its greenhouse gases below a particular base year. For the EU-15 the base year for carbon dioxide, methane and nitrous oxide the base year was 1990. For hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride (fluorinated gases) 12 Member States (including Ireland) selected 1995 as the base year whereas Austria, France and Italy chose 1990. Note on the on 9 October 2013, the Irish Environmental Protection Agency confirmed that Ireland had successfully met its Kyoto target to keep its greenhouse gases at 13 per cent above its 1990 levels at the Royal Irish Academy in Dublin.

<sup>47</sup> Commission Decision 2006/944/EC of 14 December 2006 determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC, [2006] OJ L 358, 87. See further: Anne-Sophie Tabau and Sandrine Maljean-Dubois, 'Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union' (2010) 21 *European Journal of International Law* 3, 749-763.

<sup>48</sup> the Renewable Electricity Directive (n20).

occurred during the noughties, much of the preparatory work for the expansion of the wind energy sector was done by the Renewable Energy Strategy Group in 1999.

The Renewable Energy Strategy Group was a panel of government officials, economists and energy experts<sup>49</sup> formed to develop a strategy for the increased contribution of renewable energy to Ireland's generation market. Its terms of reference were set out in the Green Paper on Sustainable Energy, wherein it was stated that the Group would analyse:

- the economic costs of promoting a green electricity market;
- the economic and technical barriers to green electricity production;
- the international benchmarks for trade costs, delivery times and quality of service;
- the obligations in other green electricity markets;
- the grid connection issues including capacity, price and delivery times;
- the technical limits of the electricity grid including priority solutions to particular weaknesses and bottlenecks;
- the electricity market factors likely to impede or obstruct the development of a green electricity market including top up and spill, transmission and metering;
- the planning support issues including any emerging trends or weaknesses in planning consent applications; and
- the factors impeding local and community based green electricity generating schemes.<sup>50</sup>

While no information is available in the public forum as to when the group was directed or decided to narrow its focus to primarily consider onshore wind development, in 2003, it published a *Strategy for Intensifying Wind Energy Deployment*.<sup>51</sup> The document provided some limited insight into why onshore wind; specifically commercial onshore wind farms have become the renewable energy resource of choice in Ireland. It referenced a study undertaken by the European Commission,<sup>52</sup> and outlined how:

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<sup>49</sup> Members of the Renewable Energy Strategy Group included parties from the Economic and Social Research Institute; the Irish Energy Centre; the Department of Public Enterprise; the Department of the Environment and Local Government; the Department of Enterprise, Trade and Employment for Northern Ireland; the Irish Planning Institute; City and County Managers Association; the Electricity Supply Board, industry and University College Cork.

<sup>50</sup> Renewable Energy Strategy Group (n1).

<sup>51</sup> *Ibid.*

<sup>52</sup> European Commission, 'ALTENER Report- Total Renewable Energy Resource in Ireland' (1995) Report XVII/4.1030/T4/95/IRL (Commission, March 1997).



[d]ue to Ireland's geographical location, on the downwind side of the Atlantic Ocean, in the region of prevailing south-westerly winds, the Irish coastline is exposed to one of the most vigorous wind climates in the world. In a study on Ireland's renewable energy resources... the feasible wind energy resource... is estimated at 179 GW, or 40 times Ireland's current installed capacity.<sup>53</sup>

Furthermore, it stated: 'The Group feels that large scale wind farms should be encouraged to achieve efficient deployment of wind energy, and to avoid a proliferation of grid connections.'<sup>54</sup> In the report the level of interest in the wind market was assessed, by considering applications made for planning authorisations, and applications for the support mechanisms that were in place at the time. In this regard it is important to note that while Ireland's early financial support mechanisms were open to a variety of different types of energy, at the time onshore wind provided by far the greatest number of applications.<sup>55</sup>

Interestingly, at approximately the same time as the Renewable Energy Strategy Group released its report on *Wind Energy Deployment*, the Department of Communications, Energy and Natural Resources was engaged in a further review of the sector having launched a consultation document entitled '*Options for Future Renewable Energy Policy, Targets and Programmes*' in December 2003.<sup>56</sup>

Collectively, the Department had received 46 responses. In November 2005, (among the important points raised by respondents) it was noted that:

[s]everal respondents submitted that the direct and indirect costs and benefits of RES-E electricity should be measured and quantified in a holistic manner. A wide range of factors were submitted by respondents for consideration when undertaking a rigorous cost benefit analysis of RES-E on the island. Notwithstanding this, very few respondents provided actual costed estimations for these factors.<sup>57</sup>

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<sup>53</sup> Renewable Energy Strategy Group (n1) 18.

<sup>54</sup> Renewable Energy Strategy Group (n1) 6.

<sup>55</sup> Renewable Energy Strategy Group (n1) 13.

<sup>56</sup> Department of Communications, Energy and Natural Resources, 'Options for Future Renewable Energy Policy, Targets and Programmes' (Government of Ireland, 23 November 2003) < <http://www.dcenr.gov.ie/NR/rdonlyres/ED2F01EC-A647-4311-8CC1-AFF320880777/0/Cosultationdocumentfinal19Dec2003.doc> > accessed 19 October 2013.

<sup>57</sup> Sustainable Energy Working Group, 'Summary of Consultation Responses to All-Island Energy Market: Renewable Electricity – A 2020 Vision' (Sustainable Energy Authority of Ireland,

In response to the specific question ‘What type of plant should be promoted through appropriate financial, regulatory and / or planning policies?’ it was noted that most respondents acknowledged that onshore wind energy was likely to be the main contributor to additional renewable electricity generation until 2020. However despite this, different respondents were acknowledged to have expressed preferences for the promotion of a wide variety of different renewable energy plant types. Overall onshore wind was found to be the clear favourite (followed by offshore wind, biomass and ocean energy)<sup>58</sup> and in 2009, without having conducted a rigorous cost benefit analysis, Ireland formally pledged that onshore wind would be the primary resource supported in Ireland’s renewable energy sector in its national renewable energy action plan.<sup>59</sup>

## 2.2. The Renewable Energy Directive, National Renewable Energy Action Plans and the Irish National Renewable Energy Action Plan

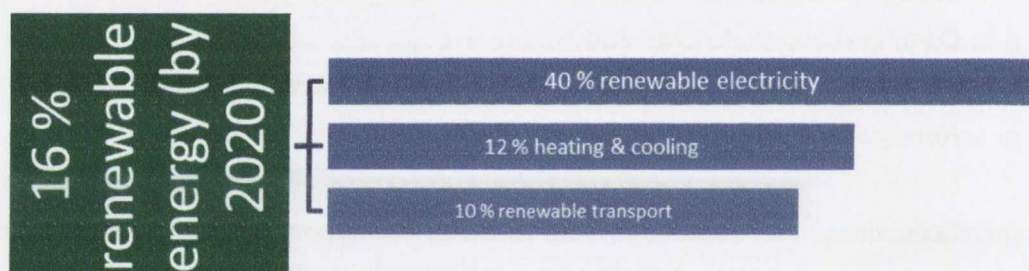


Figure 7: Ireland's renewable energy target broken down into sectors<sup>60</sup>

The Renewable Energy Directive<sup>61</sup> came into force on 25 June 2009 as part of the Climate and Energy Legislative Package. As described in article 1, its objectives were to:

*‘[establish] a common framework for the promotion of energy from renewable sources... [to set]... mandatory national targets for the overall share of energy*

29 November 2005)< <http://www.dcenr.gov.ie/NR/rdonlyres/70AD4492-6217-49BF-A2EE-B288C6DEA429/0/2020visionsummaryofconsultationresponses.pdf>> accessed 19 October 2013, 5.

<sup>58</sup> *Ibid*, 19.

<sup>59</sup> National renewable energy action plan (n17).

<sup>60</sup> Figures taken from Ireland’s national renewable energy action plan (n17).

<sup>61</sup> the Renewable Energy Directive (n13 (4)).



*from renewable sources in gross final consumption of energy and for the share of energy from renewable sources in transport...[to lay down] rules relating to statistical transfers between Member States, joint projects between Member States and with third countries, guarantees of origin, administrative procedures, information and training, and access to the electricity grid for energy from renewable sources.*<sup>62</sup>

Accordingly, annex I of the directive allocated overarching national renewable energy targets to Member States, to be achieved by 2020. To ensure the development of renewable energy at an appropriate pace to meet the 2020 targets, article 3(2) provided interim indicative targets for the four two-year periods leading up to 2020. The monitoring and enforcement of targets was to be further supported by national renewable energy action plans along with articles 4(4) and 4(5) of the Renewable Energy Directive. National renewable energy action plans were required from each Member State by 30 June 2010, to provide detail on how specific national targets were to be achieved by describing existing and additional measures, to be put in place to ensure renewable energy developed at an appropriate pace to reach both the 2020 and indicative interim targets.

Article 4(4) of the Renewable Energy Directive requires a Member State whose share of renewable energy falls below the indicative trajectory to submit an amended plan to the Commission by June of the following year. Article 4(5) states that the Commission may make a recommendation to a Member State in relation to a national renewable energy action plan or an amended national renewable energy action plan. This article does not preclude the EU taking further measures to ensure renewable energy is developed appropriately; in fact authors such as Hans van Steen (currently the Head of Unit of DG Energy in the European Commission) have stated:

*'it would appear that a Member State which is falling behind in its indicative trajectory in terms of its share of renewable energy and at the same time fails [in some other way to fulfil certain requirements of the Renewable Energy Directive such as a failure] to streamline and expedite administrative measures as required by Article 13(1) would be at risk of an infringement procedure.'*<sup>63</sup>

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<sup>62</sup> the Renewable Energy Directive (n13 (4)) article 1.

<sup>63</sup> Paul Hodson, Christopher Jones and Hans Van Steen (eds), *EU Energy Law Volume III-Book One Renewable Energy Law and Policy in the European Union* (1<sup>st</sup> edn, Claeys & Casteels, 2010) 65.

The Irish government submitted its national renewable energy on 26 July 2010. Prior to its submission this 165 page plan had been the subject of both a two week consultation with the general public and a two week consultation with targeted stakeholders.<sup>64</sup> As required by the template provided by the Commission,<sup>65</sup> the plan contained sectoral targets and trajectories (for heating and cooling, transport and electricity). Those which relate to renewable electricity are replicated below (with attention drawn to the 31 per cent renewable electricity target for 2014, which is a long way from the 19.6 per cent renewable electricity which has actually been incorporated into the system<sup>66</sup>):

Years	2014	2015	2016	2017	2018	2019	2020
Renewable Electricity %	31	32.4	32.2	33.8	37.5	37.3	42.5
Overall Renewable Energy Share %	11	11.8	12.2	12.9	14	14.4	16

Years	2013-2014	2015-2016	2017-2018	2020
Renewable Energy Minimum Trajectory %	6.98	8.92	11.51	16

**Table 8: Ireland's renewable energy trajectory until 2020<sup>67</sup>**

In addition to these targets and trajectories, the national renewable energy action plan also contained a section outlining existing and planned future measures designed to ensure the achievement of stated targets. Interestingly (in the context of chapters five and six) while financial support schemes such as the AER and REFIT were included

<sup>64</sup> the Swords decision (n34).

<sup>65</sup> Commission Decision 2009/548/EC of 30 June 2009 establishing a template for National Renewable Energy Action Plans under Directive 2009/28/EC of the European Parliament and of the Council [2009] OJ L 182/33.

<sup>66</sup> Department of Communications, Energy and Natural Resources (n4) 7.

<sup>67</sup> National Renewable energy action plan (n17).



among the 38 measures described,<sup>68</sup> the measures implemented to reorganise Ireland's electricity markets (and thereby encourage new players to enter the generation and supply markets) were not included in the national renewable energy action plan.<sup>69</sup>

Moreover, while answers were provided to direct questions such as: '*Are there unnecessary obstacles or non-proportionate requirements detected related to authorisation, certification and licensing procedures applied to plants and associated transmission and distribution network infrastructure for the production of electricity, heating or cooling from renewable sources...? If so, what are they?*'<sup>70</sup> and '*How is it ensured that transmission and distribution grids will be developed with a view to integrating the targeted amount of renewable electricity while maintaining the secure operation of the electricity system?*',<sup>71</sup> no mention was made of the problems which existed in the Irish development market following the *Derrybrien*<sup>72</sup> and *Wild Birds*<sup>73</sup> decisions (discussed further in chapter 4) and no analysis was given to the impact which including the cost of Ireland's financial supports schemes and the cost of developing Ireland's electricity infrastructure in the electricity prices charged to consumers could have.

On 13 January 2012, Ireland submitted its first progress report on its national renewable energy action plan. In this report the government indicated that it had reached a 14.8 per cent share of renewable electricity consumption in 2010 (primarily accounted for by 1364 MW of onshore wind).<sup>74</sup> This figure is a long way behind the 20.4 per cent target for 2010 originally provided in Ireland's national renewable energy action plan. The progress report also contained a list of 22 new measures, which had been introduced in 2009, 2010 and 2011 to promote renewable energy development and ensure its development in line with the targets outlined.<sup>75</sup> While a second progress

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<sup>68</sup> National Renewable energy action plan (n17).

<sup>69</sup> *Ibid.*

<sup>70</sup> National Renewable energy action plan (n17), 36.

<sup>71</sup> National Renewable energy action plan (n17), 73.

<sup>72</sup> Case C-392/96 *Commission v Ireland* [1999] ECR I-05901; (2) Case C-427/07 *Commission v Ireland* [2011] ECR I-00873. ('*Derrybrien wind decision*').

<sup>73</sup> Case C-418/04 *Commission v Ireland* [2007] ECR I-10997 ('*the Wild Birds decision*').

<sup>74</sup> Department of Communications, Energy & Natural Resources, 'National Renewable Energy Action Plan National Renewable Energy Action Plan (NREAP) Ireland First Progress Report Submitted under Article 22 of Directive 2009/28/EC' (Government of Ireland, 2012) <<http://www.dcenr.gov.ie/NR/rdonlyres/B611ADDD-6937-4340-BCD6-7C85EAE10E8F/0/IrelandfirstreportonNREAPJan2012.pdf>> accessed 21 August 2014

<sup>75</sup> *Ibid.*

report was required from the government in January 2014, to date this has not been made public.

Considering the level of detail required in national renewable energy action plans and progress reports, it is easily conceivable that these plans could be described as containing mandatory measures which Member States are obliged to implement and monitor under EU law. Consequently, in addition to having been developed in breach of international law (as will be discussed below) Ireland's national renewable energy action plan was also most likely developed in breach of the EU's SEA Directive.<sup>76</sup> If the latter statement is found to be correct by the Court of Justice of the European Union (CJEU), it could have far-reaching consequences for the wind development sector. Each statement will be considered in turn.

### 3. Ireland's wind policy in breach of international and EU law: From the Aarhus Convention<sup>77</sup> to the SEA Directive<sup>78</sup>

#### 3.1. Ireland's wind policy (as outlined in its national renewable energy action plan) in breach of international law



**Figure 8: Ireland's wind policy in breach of international law**

On 29 June 2012 it was decided that the decision-making processes which led to the finalisation of Ireland's national renewable energy action plan had breached international law and specifically, the Aarhus Convention.<sup>79</sup> Although the complaint was made against the EU as Ireland was not a party to the Convention at the time,<sup>80</sup> the

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<sup>76</sup> SEA Directive (n30).

<sup>77</sup> the Aarhus Convention (n29).

<sup>78</sup> the SEA Directive (n30).

<sup>79</sup> the Swords decision (n34)

<sup>80</sup> While Ireland was not a party to the Convention at this time, the Aarhus Convention had been a part of the EU legal order since 2005 and as a Member State of the EU, Ireland was bound to give effect to the rights guaranteed by the Convention to the extent that these rights were part



decision also had significance for Ireland. The initial complaint alleged a number of breaches of the Aarhus Convention<sup>81</sup> by the EU in the preparation and finalisation of Ireland's wind policy.<sup>82</sup> However, the final decision focused entirely on one central allegation. This was that Ireland had implemented a massively expensive renewable energy programme (predominantly focused on onshore wind energy) without fulfilling its legal obligation to first engage in public consultation (as required by articles 3 and 7 of the Aarhus Convention,<sup>83</sup> which will briefly be discussed below).

The Aarhus Convention entered into force on 30 October 2001 and it currently has 39 signatories and 46 parties.<sup>84</sup> It was signed by the European Community and subsequently approved by Council Decision 2005/370 in 2005.<sup>85</sup> Ireland was the last Member State to ratify the Aarhus Convention on 20 June 2012. Consequently, at the time Mr Pat Swords lodged a complaint against Ireland for breaching the Aarhus Convention,<sup>86</sup> Ireland was not a party to it.<sup>87</sup>

The tripartite objectives of the Aarhus Convention<sup>88</sup> are contained in article 1, which obliges Contracting Parties to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters. Further detail on these obligations is contained later in the Convention. Article 4 places an obligation on public authorities to provide access to information in response to reasonable requests from the public. Article 5 requires Contracting States to ensure that public authorities possess, update and provide current, accessible environmental information to the public. Article 9 requires Contracting Parties to ensure that any person who considers that his or her request for information was ignored, wrongfully refused or inadequately answered has access to a review procedure.

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of EU law. See: Áine Ryall, 'Beyond Aarhus Ratification: What Lies Ahead for Irish Environmental Law' (2013) 18 *Irish Planning and Environmental Law Journal* 1, 19.

<sup>81</sup> the Aarhus Convention (n29).

<sup>82</sup> See generally: United Nations Economic Commission for Europe, 'European Union ACCC/C/2010/54' (UNECE, 2010) <<http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html>> accessed 21 August 2014.

<sup>83</sup> the Aarhus Convention (n29).

<sup>84</sup> See generally: United Nations Economic Commission for Europe, 'Aarhus Convention' (UNECE, 2014) <<http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention.html>> accessed 21 August 2014.

<sup>85</sup> Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L 124/1.

<sup>86</sup> See n82.

<sup>87</sup> Áine Ryall (n80) 19.

<sup>88</sup> the Aarhus Convention (n29).

The Aarhus Convention's public participation provisions are contained in articles 6 (public participation on specific activities), 7 (public participation concerning plans, programmes and activities), and 8 (public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments).<sup>89</sup> The most important in the context of this chapter is article 7, which has two distinct legal regimes for policies and plans and programmes. The regime for plans and programmes (such as the Irish national renewable energy action plan) is for Contracting States to:

*'...make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.'*<sup>90</sup>

As part of this obligation, Contracting States are required to provide early opportunities for public participation and to include '*reasonable time-frames*' for different phases, allowing sufficient time to provide information to the public to permit them to '*prepare and participate effectively*' in environmental decision-making processes. As a Contracting State the EU is further required to ensure that due account is taken of the outcome of the public's participation in reaching its final decision and to introduce proper enforcement measures to establish and maintain a clear, transparent and consistent framework to implement the Convention.

To support the implementation of this article (and the other provisions of the Convention), article 15 of the Convention made provision for the finalisation of '*non-confrontational, non-judicial and consultative*' arrangements to review compliance with the provisions of the Convention.<sup>91</sup> This article was elaborated upon in October 2002, when an eight member strong Aarhus Convention Compliance Committee (ACCC) was established with a mandate which included the consideration of submissions, referrals and communications (including those from members of the public) on the compliance or implementation of the Aarhus Convention and the issue of recommendations. On the 15 October 2010, Mr Pat Swords lodged his communication with the ACCC, which

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<sup>89</sup> See further: Jerzy Jendroska, 'Public participation in the preparation of plans and programs: some reflections on the scope of obligations under Article 7 of the Aarhus Convention' (2009) 6 *Journal for European Environmental & Planning Law* 4, 495-515.

<sup>90</sup> the Aarhus Convention (n29).

<sup>91</sup> *Ibid.*



alleged that the EU was in breach of its obligations under the Aarhus Convention. The ACCC published its findings on 29 June 2012 (in the 'Swords decision').<sup>92</sup>

In summary, these findings were that the EU had breached article 3 and article 7 for failing to provide an appropriate framework within which to ensure and enforce public participation in respect of national renewable energy action plans. In this regard, the ACCC noted that the EU had put a legal framework in place to ensure public participation in the development of national renewable energy action plans, but found this to be inadequate. In considering this framework the ACCC took account of the relevant recitals and articles of the Renewable Energy Directive<sup>93</sup> and the national renewable energy action plan template itself.<sup>94</sup> It recognised that Recital 90 of the Renewable Energy Directive required the implementation of the Directive to reflect (where relevant) the provisions of the Aarhus Convention. It noted the wording of article 4 which required Member States to adopt national renewable energy action plans using the template and fulfilling the stipulations of the Commission in Decision 2009/548/EC,<sup>95</sup> and the text of the national renewable energy action plan template itself, which required Member States to indicate how regional and/or local authorities and/or cities as well as stakeholders were involved in the preparation of the plan, and to explain the public participation carried out in the preparation of the plan.<sup>96</sup>

It noted that evidence had been provided which maintained that both a targeted consultation and a two-week long consultation with the wider public had been undertaken to fulfil the requirements of article 7.<sup>97</sup> Citing an earlier decision taken against Lithuania,<sup>98</sup> this timeframe was found to be unreasonable for *'the public to prepare and participate efficiently'* taking into account the complexity of the plan. While this decision did not carry with it any penalties, it was of consequence for Ireland and the EU primarily for the following reasons. It drew attention to the inadequacies of the framework which the EU had put in place to ensure that the decision making processes which led to the finalisation of Member State national renewable energy action plans

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<sup>92</sup> the Swords decision (n34).

<sup>93</sup> Renewable Energy Directive (n13(4)).

<sup>94</sup> Commission Decision (n65).

<sup>95</sup> *Ibid.*

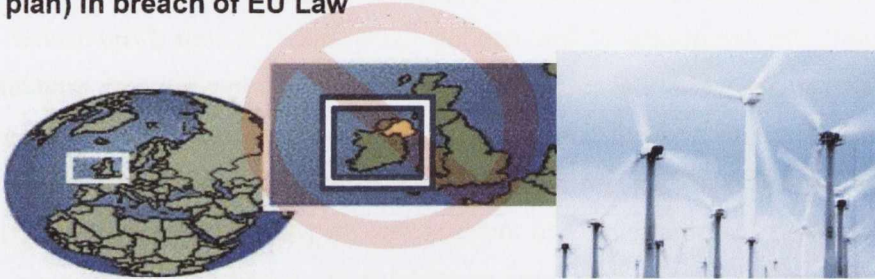
<sup>96</sup> *Ibid.*

<sup>97</sup> Aarhus Convention (n29).

<sup>98</sup> Compliance Committee, Findings and recommendations with regard to communication ACCC/C/2006/16 by Association Kazokiskes Community (Lithuania) concerning decision-making on the establishment of a landfill in Kazokiskes (adopted on 7 March 2008) <[http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf)> accessed 21 August 2014.

adhered to the public participation requirements of the Aarhus Convention. In so doing, it drew attention to the SEA Directive<sup>99</sup> as the EU legislation, which gives effect to article 7 of the Aarhus Convention<sup>100</sup> on plans and programmes. Finally, it placed the spotlight very squarely on the decision making procedures which had led to the Irish national renewable energy action plan (the sole document to comprehensively detail Ireland's strategy to develop renewable energy until 2020), so much so that these will be the subject of future judicial review proceedings before the High Court, in a second challenge to the Irish national renewable energy action plan brought by Mr Pat Swords.<sup>101</sup>

### 3.2. Ireland's wind policy (as outlined in its national renewable energy action plan) in breach of EU Law



**Figure 9: Ireland's wind policy in breach of EU law**

The Swords decision<sup>102</sup> was a seminal one, but not just for its determination on the EU's non-compliance with articles 3(1) and 7 of the Aarhus Convention.<sup>103</sup> A second, more serious general breach had been alleged, with consequences for numerous national renewable energy action plans across Europe.<sup>104</sup> In his initial complaint Pat

<sup>99</sup> SEA Directive (n30).

<sup>100</sup> Aarhus Convention (n29).

<sup>101</sup> Pat Swords Application for Judicial Review (n35).

<sup>102</sup> the Swords decision (n34).

<sup>103</sup> the Aarhus Convention (n29).

<sup>104</sup> Note: It is outside the scope of this thesis to conduct a full study on the public consultation measures which took place in each of the 28 Member States prior to the finalisation of their individual national renewable energy action plans, however, an analysis of the 28 national renewable energy action plans which were submitted to the Commission and specifically the answers given in response to part 5.4 of the national renewable energy action plan template '*Please explain the public consultation carried out for preparation of this Action Plan*' reveals that of the 28 Member States it is likely that just 9 Member States (Estonia, France, Greece, Malta, Portugal, Romania, Slovenia, Sweden and Britain) may have given the public 'an early and effective opportunity' to allow the public the opportunity to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure' as is required by the SEA Directive.



Swords had alleged that Ireland had breached the SEA Directive<sup>105</sup> for failing to ensure that a comprehensive assessment of the plan, and the potential alternatives open to Ireland to fulfil its renewable energy obligations had been undertaken. Although legal reasoning to support the allegation was not made in the course of the proceedings, the question will soon be the subject of judicial review proceedings before the Irish High Court.<sup>106</sup> The following analysis outlines why Ireland's national renewable energy action plan (and most likely numerous other national renewable energy action plans) should have undergone such an assessment, and why the national renewable energy action plan was in breach of the provisions of the SEA Directive.

The objective of the SEA Directive is:

*'to provide ...a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that...an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.'*<sup>107</sup>

In the explanatory memorandum accompanying the proposal which preceded the SEA Directive, the European Parliamentary Committee (led by rapporteur Mr Per Gahrton) described its background. It was noted that in 1993 the Commission had submitted a report (to the European Parliament and the Council) on the implementation and effectiveness of the Environmental Impact Assessment (EIA) Directive.<sup>108</sup> Although the report demonstrated considerable progress had been made by the Member States in implementing the EIA Directive, one of its conclusions was that project-stage assessments took place too late in the decision-making procedure to enable all the significant issues to be addressed. In particular it was found that only limited provisions existed in most of the Member States to integrate environmental assessment procedures into the decision making procedures relating to plans and programmes.

The report also recognised that the EIA device had been criticised by authors such as Dr Annica Kronsell as '*a technocratic method that did not question the need for a*

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<sup>105</sup> the SEA Directive (n30).

<sup>106</sup> Pat Swords Application for Judicial Review (n35).

<sup>107</sup> SEA Directive (n30) article 1.

<sup>108</sup> The most recent revised version of which is: Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1. (the 'EIA Directive').

*project progressing through the assessment*.<sup>109</sup> It also noted that Dr Kronsell had instead suggested placing the focus on Strategic Environmental Assessment as one way of securing a more effective approach, the rationale being that a SEA could represent more of an actual prevention effort, as it permits the questioning of projects themselves. In the period which preceded the adoption of the SEA Directive, the European Parliamentary Committee further elaborated on the primary objective of the SEA Directive as follows:

*'At present, under Community law, an Environmental Impact Assessment must be carried out before major individual construction projects are authorized. However, there is currently no assessment of the background plans and programmes (adopted at municipal, regional or national level) which set the framework within which individual projects are undertaken. This directive is intended to plug that gap. It proposes the establishment of a Strategic Environmental Assessment for development plans and programmes.'*<sup>110</sup>

Following lengthy negotiations, the SEA Directive was finally adopted in June 2001, with an implementation deadline of 21 July 2004.<sup>111</sup> Since this date, certain plans and programmes which are subject to preparation or adoption by an authority at national, regional, or local level, and are required by legislative, regulatory, or administrative provisions are subject to the Directive's requirements to: (i) undergo an assessment which considers the environmental implications of the plan or programme and the alternative options open to the government to fulfil their renewable energy obligations and (ii) make this environmental report along with the draft plan available to both the public and authorities concerned to give them an early and effective opportunity to express their opinions on the draft plan or programme in order that due account may be taken of those opinions.

Article 3 prescribes which plans and programmes must undergo an environmental assessment. Article 3.2 (a) states that this includes all plans and programmes which

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<sup>109</sup> Annica Kronsell, 'Greening the EU, Power practices, resistances and agenda setting' (Lund University Press, Sweden: 1997) <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=18152&fileId=1503596>> accessed 30 December 2013.

<sup>110</sup> See generally: European Parliament, 'Legislative Observatory 1996/0304(COD)' (European Parliament, 1996) <<http://www.europarl.europa.eu/oeil/popups/summary.do?id=560225&t=e&l=en>> accessed 21 August 2014.

<sup>111</sup> Aine Ryall, *Effective Judicial Protection and the Environmental Impact Assessment in Ireland* (1<sup>st</sup> edn, Hart Publishing, 2009) 69.



set the framework for future development consent of listed projects, including wind farms projects or infrastructure. In paragraph 3.28 of the non-binding Commission guidelines on the Implementation of the SEA Directive (2004) it was stated that such plans or programmes could include: '*sectoral plans and programmes which in broad terms identify the location of subsequent development within that sector.*'<sup>112</sup> In this regard the guidelines stressed that it would be necessary in each case to consider the extent to which future decisions on projects were conditioned by the plan or programme.

The Irish Regulations which transpose the SEA Directive's requirements<sup>113</sup> require environmental assessments to be carried out prior to the finalisation of all plans and programmes including local area plans, regional planning guidelines, planning schemes (or their variations or amendments), which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism and town and country planning or land use, and which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive. In addition, all plans or programmes (which fall within the parameters of the SEA Directive), which are not directly connected with or necessary to the management of a European site but, either individually or in combination with other plans are likely to have a significant effect on any such site, must have fulfilled the requirements of the SEA Directive in advance of their finalisation.

Numerous guidelines have been published to support and guide the Irish planning authorities in correctly applying the SEA procedures, and in 2012 the Environmental Protection Agency conducted a '*Review of the Effectiveness of SEA in Ireland*'.<sup>114</sup> This Review indicated that the SEA Directive had been overlooked or misapplied in relation to the preparation of government plans in certain sectors. Specifically the Review

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<sup>112</sup> European Commission, 'Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment' (Commission, 2004) <[http://ec.europa.eu/environment/eia/pdf/030923\\_sea\\_guidance.pdf](http://ec.europa.eu/environment/eia/pdf/030923_sea_guidance.pdf)> accessed 21 August 2013.

<sup>113</sup> The Planning and Development (Environmental Assessment of Certain Plans and Programmes) Regulations 2004, S.I. 435 of 2004; The Planning and Development (Strategic Environmental Assessment) Regulations 2004, S.I. 436 of 2004; The European Communities (Environmental Assessment of Certain Plans and Programmes (Amendment)) Regulations 2011, S.I. 200 of 2011; The Planning and Development (Strategic Environmental Assessment) (Amendment) Regulations 2011, S.I. 201 of 2011.

<sup>114</sup> Environmental Protection Agency, 'Review of Effectiveness of SEA in Ireland Key Findings & Recommendations' (Environmental Protection Agency, 2012) <<http://www.epa.ie/pubs/advice/ea/SEA%20EFFECTIVENESS%20REVIEW%20MAIN%20REPORT%202012.pdf>> accessed 22 August 2014, 42.



stated that certain plans were '*wrongly being screened out or not screened at all*',<sup>115</sup> i.e. that the determination of whether implementation of a plan would be likely to have significant effects on the environment was either not being considered at all or was wrongly being evaluated for certain sectors. This seems to have been the case for the decision-making procedures which led to the finalisation of Ireland's national renewable energy action plan, as will be further analysed below.

On 10 February 2010 (a number of months preceding the due date for submission of the national renewable energy action plans) the Irish Department of Communications, Energy and Natural Resources sent an email to the European Commission questioning whether an environmental assessment would be required for the Irish national renewable energy action plan. The reply came a week after Ireland's national renewable energy action plan had become due for submission.<sup>116</sup> In this, the Directorate Generals for Energy and the Environment stated that '*whether or not [a national renewable energy action plan] requires a SEA depends on the specific content of the plan*' and where a Member State had decided not to include mandatory measures within its national renewable energy action plan, an SEA would not be required. Additionally, it was stressed that when implementing national renewable energy action plans through more specific plans setting the framework for future development consent of plans, environmental assessments would have to be carried out.<sup>117</sup>

In a letter dated the 19 April 2011, the Department of Environment, Heritage and the Local Community laid out its reasons for not submitting the Irish national renewable energy action plan to the SEA process: the national renewable energy action plan itself did not determine new policy, as policy on renewable energy had developed from factors such as the Irish Government's White Paper, the 2009 Carbon Budget, the Alternative Energy Programme and the Irish Renewable Energy Feed in Tariff. Furthermore the Department affirmed that strategies such as (i) Grid 25, the framework within which EirGrid (the Irish electricity transmission system operator) planned to build a more cost effective and efficient transmission system to cater for increasing amounts of renewable generation and (ii) the draft Offshore Renewable Development Plan had been the subject of the SEA process.<sup>118</sup> However, legal problems can be identified with

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<sup>115</sup> *Ibid.*

<sup>116</sup> United Nations Economic Commission for Europe (n82) Annex II attachment: Letter from the Irish Administration to the European Commission 10.01.12.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*



both the advice from the Commission and Ireland's response when considered in light of the recent *Inter-Environnement* [2010]<sup>119</sup> case and what could be said to be the dual purpose of national renewable energy action plans: to provide in-depth detail of the specific measures designed to increase national renewable energy levels (which are subject to enforcement and monitoring from the Commission) and to detail an overarching framework for the future development consent of projects designed to increase these national renewable energy levels.

In *Inter-Environnement* [2010]<sup>120</sup> the Court determined that an action plan (falling within the definition of plans and programmes outlined by the SEA Directive) which was required by the Nitrates Directive<sup>121</sup> to protect waters from pollution from agricultural sources, fell within the scope of article 3(a) of the SEA Directive and so would be required to go through the processes outlined by the SEA Directive. In coming to this conclusion the Court of Justice of the European Union (CJEU) based its reasoning on three key factors. First, the action plan concerned contained specific mandatory measures which Member States were required to implement and monitor.<sup>122</sup> Second, action plans required on foot of the Nitrates Directive<sup>123</sup> are excluded from the public participation requirements of the Public Participation Directive,<sup>124</sup> on the grounds that they are instead required to comply with the public participation requirements of the SEA Directive.<sup>125</sup> Accordingly, it would be inconsistent for such action plans to fall within the scope of the SEA provisions on public participation but not those requiring an environmental assessment.<sup>126</sup> Finally, the fact that such action plans were adopted by legislation did not exclude them from the scope of the SEA Directive once they were action plans (required by the Nitrates Directive) which Member States were obliged to implement and monitor. In this regard it was noted that for such action plans, the competent authorities were obliged to periodically review the measures and actions to

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<sup>119</sup> Joined Cases C-105/09 and C-110/09 *Terre wallonne ASBL and Inter-Environnement Wallonie ASBL v Région wallonne* [2010] ECR I-05611 ('*Inter-Environnement* [2010]').

<sup>120</sup> *Ibid.*

<sup>121</sup> Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1 ('the Nitrates Directive').

<sup>122</sup> *Inter-Environnement* [2010] (n119) para. 48.

<sup>123</sup> the Nitrates Directive (n121).

<sup>124</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC - Statement by the Commission [2003] OJ L 156/17 ('the Public Participation Directive').

<sup>125</sup> SEA Directive (n30).

<sup>126</sup> *Inter-Environnement* [2010] (n119), para. 40.

ascertain whether they were appropriate and, where necessary, to revise the action programmes.<sup>127</sup>

In their consideration of whether the action plan in question fell within article 3.2 (a) and *set the framework for the future development consent of listed projects*,<sup>128</sup> both the CJEU and Advocate General Kokott placed a large degree of emphasis on the precision and enforceability of the measures it included. However, the Court (whose judgment was binding) focused its judgment entirely on the case at hand and did not provide detail on the broader general question of when action plans set the framework for the future development consent of listed projects. The Advocate General (whose Opinion is persuasive rather than binding) did, however, give some thought to this question. She determined that through including the phrase, '*setting the framework for the future development consent of listed projects*' in the SEA Directive, the primary concern of the legislature was the degree to which a plan or programme set the framework for projects and other activities, either with regard to location, nature, size and operating conditions or by allocating resources. In this context AG Kokott stressed (in particular) that the effect of the action plan was important.<sup>129</sup>

She also advocated taking a broad approach to the interpretation of article 3 of the SEA Directive. In particular she opined that all preparatory measures, which could result in the implementation of projects with significant effects on the environment, should be assessed in order to take these effects into account.<sup>130</sup> The following example was provided to place this statement in context:

*'An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road-construction project. For this reason, it should be considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included.'*<sup>131</sup>

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<sup>127</sup> *Inter-Environnement* [2010] (n119) para. 36

<sup>128</sup> Emphasis added.

<sup>129</sup> In relation to the AG see: *Inter-Environnement* [2010] (n119) Opinion of AG Kokott, paras. 80-82.

<sup>130</sup> *Inter-Environnement* [2010] (n119) Opinion of AG Kokott, para.35.

<sup>131</sup> *Ibid*, para. 33.



Consequently, following either the line of reasoning of the CJEU or the Advocate General, the Irish national renewable energy action plan would seem to fall within the ambit of the SEA Directive as a plan which contains mandatory precise measures designed to increase renewable energy levels, which Member States were required to implement and monitor. Moreover, as both policy documents and financial plans or programmes are excluded from the ambit of the SEA Directive,<sup>132</sup> Ireland's national renewable energy action plan was the only official document systematically detailing Ireland's plan to develop wind energy which could have been made subject to the requirements of the Directive. It is submitted here that given this fact, it should have been made the subject of an assessment which considered the environmental implications of the plan, and the alternative options open to the government to fulfil their renewable energy obligations.

In addition, this environmental report along with the draft plan should have been made available to both the public and the authorities concerned to give them:

*... "an early and effective opportunity" to express their opinions on the draft plan or programme concerned and on the accompanying environmental report. In order that due account may be taken of those opinions by the authority envisaging the adoption of such a plan or programme, Article 6(2) makes clear, first, that such opinions must be received before the adoption of that plan or that programme and, secondly, that the authorities to be consulted and the public affected or likely to be affected must be given sufficient time to evaluate the envisaged plan or programme and the environmental report upon it and to express their opinions in that regard.*"<sup>133</sup>

If this interpretation of *Inter-Environnement* [2010] is accepted, then in addition to determining that the EU had breached articles 3 and 7 of the Aarhus Convention, the *Swords decision*<sup>134</sup> also drew attention to a further omission in the preparation of Ireland's national renewable energy action plan. The proposed plan should have undergone an environmental assessment and fulfilled the public participation obligations of the SEA Directive. As a result, if the pending application for judicial review<sup>135</sup> is successful, the Irish government could be obliged to suspend or annul the national renewable energy action plan (or certain aspects of it), until a replacement

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<sup>132</sup> As was recognised by the Irish High Court in: *Kavanagh v Ireland* [2007] IEHC 296.

<sup>133</sup> Case C 474/10 *Department of the Environment for Northern Ireland v Seaport (NI) Ltd* [2011] ECR I-10227, para.46.

<sup>134</sup> *Swords decision* (n34).

<sup>135</sup> Pat Swords Application for Judicial Review (n35).

national renewable energy action plan (which has undergone an environmental assessment) could be put in place as was required by the CJEU in comparable circumstances in *Inter-Environnement Wallonie* [2012].<sup>136</sup>

#### **4. Potential consequences of these failures of the onshore wind policy and the likelihood of a High Court ruling condemning the plan**

##### **4.1. Potential consequences**

*Inter Environnement Wallonie* [2012]<sup>137</sup> provides some insight into the potential consequences of a judgment that a plan or programme should have been submitted to an environmental assessment process but was not. Here the CJEU upheld a previous ruling it had made in *Wells*<sup>138</sup> to find that where a plan or programme had been adopted to fulfil the requirements of an EU directive, in breach of the obligation to carry out an environmental assessment, the national court was under an obligation to annul or suspend the plan or programme.<sup>139</sup> In its judgment it was stressed that the fundamental objective of the SEA Directive would be disregarded if national courts did not adopt appropriate measures for preventing such a plan or programme, *including projects to be realised under that programme*<sup>140</sup> from being implemented in the absence of an environmental assessment.<sup>141</sup>

Notwithstanding this, the CJEU provided the referring court with an exceptional authorisation to maintain certain effects of the contested plan or programme in place, subject to the following stipulated conditions being fulfilled. The contested plan or programme correctly transposed the directive it was enacted to transpose. The annulment of the contested plan or programme and the adoption and entry into force of a new plan or programme would not enable the adverse environmental effects of the first annulled decision to be avoided. The annulment of the first plan or programme would result in a legal vacuum which would be harmful to the environment. The effects

<sup>136</sup> *Inter-Environnement Wallonie* [2012] (n37).

<sup>137</sup> *Ibid.*

<sup>138</sup> Case C-201/02 *Wells* [2004] ECR I-723, para 65 ('*Wells*').

<sup>139</sup> *Inter-Environnement Wallonie* [2012] (n37) para 47.

<sup>140</sup> Emphasis added.

<sup>141</sup> *Inter-Environnement Wallonie* [2012] (n37) para 47.



of the contested plan or programme would only be maintained as long as was strictly necessary to remedy the irregularity.<sup>142</sup>

This case makes it clear that, at the very least, were Ireland's national renewable energy action plan found to have fallen foul of the requirements of the SEA Directive, the Irish government would be obliged to replace it with a new proposed plan which was subjected to the requirements of the SEA Directive. It is unclear whether aspects of the national renewable energy action plan (such as wind projects which had been constructed on foot of the plan) would be permitted to be maintained, pending the implementation of new plan. It is likely, however, that while these would be allowed to remain, projects yet to be commenced would experience protracted delays and uncertainty. This could lead to many such projects never reaching completion due to overstretched finances. This, in turn, could ultimately lead to Ireland failing to meet its 2020 targets and facing costly infringement proceedings.

Moreover, as has often been detailed by scholars in the context of the Aarhus Convention,<sup>143</sup> including the public in environmental decision-making processes is accepted as beneficial. Including differing perspectives can improve the design of law and policy. It can increase the likelihood of the law or policy to achieve stated objectives. It can engender an acceptance of the solution which is finally decided upon, and increase education and awareness of its justifications.<sup>144</sup> However, these benefits did not follow the formulation of the Irish national renewable energy action plan.<sup>145</sup> As was discussed by the ACCC in *the Swords decision*,<sup>146</sup> the public were not included in any meaningful way in the decision-making processes which led to its finalisation.

In recent years, the development associated with the Irish wind policy has become unpopular. Irish newspapers<sup>147</sup> and current affairs programmes<sup>148</sup> abound with reports

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<sup>142</sup> Tobias Locke, 'Are there exceptions to a Member States duty to comply with the requirements of a Directive?: Inter-Environnement Wallonie' (2013) 50 *Common Market Law Review* 1, 217–230.

<sup>143</sup> For example: Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 *Modern Law Review* 1, 82–87.

<sup>144</sup> *Ibid.*

<sup>145</sup> National Renewable energy action plan (n17).

<sup>146</sup> *Swords decision* (n34).

<sup>147</sup> See for example: Vincent Browne, 'EirGrid pylon plan shows contempt for the people' *Irish Times* (Dublin, 8 January 2014) 14; Frank McDonald, 'Rural Ireland rises up against EirGrid plans to build several hundred pylons in southeast: EirGrid say such grid reinforcement is necessary to ensure supply in future' *Irish Times* (Dublin, 16 November 2013) 9; Ronan McGreevy, 'Opposition mounts to wind turbine plans on noise and aesthetic grounds: Study does little to placate locals who point to size of turbines researched' *Irish Times* (Dublin, 9 Apr



condemning the development associated with wind development or outlining local concerns which reflect a growing widespread opposition.<sup>149</sup> While significant opposition was originally primarily focused on the (since failed) plan to export renewable electricity to the UK, it has recently spilled over to include infrastructure<sup>150</sup> and wind development for domestic consumption.<sup>151</sup> This has given rise to large levels of concern in the wind development market.<sup>152</sup>

While Irish wind development began long before the preparation of Ireland's national renewable energy action plan, the national renewable energy action plan is the only official document systematically detailing Ireland's plan to develop wind energy from 2010 until 2020. As such it represented an opportunity for the government to engender public support for its long-term plan to develop wind energy by including the public in the decision making process and listening to and addressing any legitimate concerns which were raised. This opportunity was not taken and although it will never be possible to categorically prove that this lack of adequate public involvement (and documentation of detailed analysis to support the decision to primarily focus on onshore wind) are among the causes for this unpopularity, it is suggested here that this is the case.

While it is acknowledged that much opposition to wind was initially focused on the plan to export, it is also suggested that this opposition is traceable to the flawed environmental decision-making procedures, which supported the original development of Ireland's national renewable energy action plan.<sup>153</sup> This is proposed for the following reason. The concerns which were originally raised by the public to oppose the failed joint project's wind developments included depreciating property values, the visual impact of turbines on the landscape, shadow flicker, and noise. These concerns

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2013) 8; Michael O' Reagan, 'Planned turbines put the wind up locals' *Irish Times* (Dublin, 20 June 2013) 8.

<sup>148</sup> Prime time examines plans for wind in rural areas (RTE, 23 September 2013) <<http://www.rte.ie/news/player/2013/0923/10201359-prime-time/>> accessed 1 January 2014; Prime time examines the expansion of Ireland's electricity grid, the pylons and the arguments for and against (RTE, 19 November 2013).

<sup>149</sup> Frank McDonald, 'Kelly seeks to overturn wind energy restrictions in Donegal' *Irish Times* (Dublin, 4 August 2014) 5; Frank McDonald, 'Council directed to remove wind farm restrictions' *Irish Times* (Dublin, 3 March 2014) 5.

<sup>150</sup> See generally: Vincent Browne; Frank McDonald (n125).

<sup>151</sup> See: *Kelly v An Bord Pleanála* [2014] IEHC 400.

<sup>152</sup> This concern was acknowledged and discussed by then Minister for Energy Pat Rabbitte in the questions and answers which followed his keynote address, delivered at the launch of the EirGrid Group's *Annual Renewable Report 2013. Towards a Smart Sustainable Energy Future* at the Westbury Hotel on 28 November 2013.

<sup>153</sup> National Renewable energy action plan (n17).



related to wind development and would have survived regardless of the final destination of the green electricity. As such they could have been addressed had Ireland's national renewable energy action plan fulfilled the requirements of the SEA Directive.<sup>154</sup> At this point policy could have been formulated (following the best practice of other Member States)<sup>155</sup> to ensure an appropriate response was taken to address any legitimate concerns raised.

As the matter stands as a result of Ireland's failure to comply with the SEA Directive<sup>156</sup> or the Aarhus Convention,<sup>157</sup> the market rests on an unstable foundation and no evidence can be produced that supporting wind is actually the best option for Ireland to fulfil its renewable energy obligations up to 2020. Such evidence could have been made available had Ireland's national renewable energy action plan<sup>158</sup> fulfilled the requirements of the SEA Directive.<sup>159</sup> Had such requirements been fulfilled, it is likely that much opposition (both to wind developed for domestic consumption and for export) could have been avoided at the outset.

Furthermore, a convincing and reasoned response could have been made to any remaining opposition that: (i) due consideration had been taken of both sides of the debate for and against wind development and (ii) wind had been chosen as the most viable option to fulfil Ireland's obligations to reduce greenhouse gases and increase renewable energy. However, these requirements were not fulfilled, and as a result Ireland's onshore wind policy (along with its wind developments), remain open to much

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<sup>154</sup> the SEA Directive (n30).

<sup>155</sup> I.e. Germany and Denmark; In Germany, 70% of business tax revenue from wind energy projects is transferred to the community where the wind project is located and 30% to the communities where the operators are registered. Denmark has taken deliberate steps to analyse social acceptance barriers and to ensure that national policy is congruent with other strategies to increase social acceptance. For example, the Danish Energy Agency funded a multi-year study on Low Frequency Noise from Wind Turbines (Delta 2010) and Denmark's 2008 Renewable Energy Act (REA 2008) offers critical components included for the specific purpose of facilitating social acceptance. The Renewable Energy Act specifically gives local citizens the option to invest in up to 20% of project equity; provides funds to local authorities to enhance local scenic and recreational values; and creates a fund to support early-stage project development activities (e.g., wind resource assessment, environmental assessment, negotiation of turbine purchase contracts, organisation of local meetings) among local wind turbine owners' associations. A fourth scheme on compensation of value to real property loss is currently under revision. See further: International Energy Agency, 'Expert Group Summary on Recommended Practices on Social Acceptance of Wind Energy Projects' (International Energy Agency, 2013) <  
[http://www.socialacceptance.ch/images/RP\\_14\\_Social\\_Acceptance\\_FINAL.pdf](http://www.socialacceptance.ch/images/RP_14_Social_Acceptance_FINAL.pdf)> accessed 1 August 2014.

<sup>156</sup> the SEA Directive (n30).

<sup>157</sup> the Aarhus Convention (n29).

<sup>158</sup> National Renewable energy action plan (n17).

<sup>159</sup> the SEA Directive (n30).

criticism, in addition to the exposure which the policy faces to a legal challenge seeking its revocation or suspension.

#### 4.2. The likelihood of a ruling against the plan

Much could turn on the approach of the Irish courts to an application for the judicial review of the decision-making procedures which led to the adoption of Ireland's national renewable energy action plan, such as that which is currently pending before the High Court.<sup>160</sup> Consequently, the Irish case-law (which preceded *Inter-Environnement Wallonie [2012]*)<sup>161</sup> and the most recent UK ruling to consider the application of the SEA Directive<sup>162</sup> to plans will briefly be considered below.

Before the judgment of the CJEU in *Inter-Environnement Wallonie [2012]*,<sup>163</sup> questions on whether the application of the SEA Directive should have been applied to certain plans had appeared before the Irish High Court on just two occasions. In 2007, the Court was asked to consider whether the plans which led to the decisions to develop a new major prison development and a new Central Mental Hospital for the State could fall within the ambit of the SEA Directive.<sup>164</sup> In determining that they could not, (as financial or budgetary plans, which did not '*set the framework for the future development consent of listed projects*'), Smith J. stated: '*In my judgment a plan is envisaged as a framework against which decisions are made concerning development consents: e.g. a development plan sets a framework against which individual planning permissions for specific projects are to be granted.*'<sup>165</sup>

Smith J. also referred to paragraph 3.24 of the European Commission's (non-binding) guidelines, which discussed the meaning of the phrase '*setting the framework for projects and other activities*' by illustrating the methods by which a framework could be set e.g. by stipulating location, nature, size or operating conditions of projects or the allocation of resources. This decision was followed in 2012 by Birmingham J., when determining that the Ballinasloe Town Enhancement Scheme could not be considered to be a plan within the meaning of the SEA Directive as the Scheme: '*did not provide a*

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<sup>160</sup> Pat Swords Application for Judicial Review (n35).

<sup>161</sup> *Inter-Environnement Wallonie [2012]* (n37).

<sup>162</sup> the SEA Directive (n30).

<sup>163</sup> *Inter-Environnement Wallonie [2012]* (n37).

<sup>164</sup> *Kavanagh v Ireland* (n132).

<sup>165</sup> *Ibid.*



*back-drop or framework against which future development consent applications [would] be judged in the meaning of the Directive, but [was] a once-off operative project'.<sup>166</sup>*

More recently in January 2014, a judicial review came before the UK's Supreme Court, where the Court was asked to consider whether the decision making process which led to the command paper, *'High Speed Rail: Investing in Britain's Future – Decisions and Next Steps'* should have been preceded by a strategic environmental assessment.<sup>167</sup> In this potentially persuasive decision, it was determined that the command paper was not a plan within the meaning of the SEA Directive.

In coming to this decision, the UK's Supreme Court held that to be considered a plan (which set the framework for the future development consent of projects) the law required the plan to do more than exert influence in the ordinary sense of the word. Lord Carnwath (with whom the majority agreed) held that what was required was for the plan to set the criteria by which the application was to be determined.<sup>168</sup> In particular, he stated that for a plan to *'set the framework for the future development consent of listed projects'* the plan must have a *'sufficiently potent factual influence'*, which was such as to constrain subsequent consideration, and to prevent appropriate account being taken of all the environmental effects which might otherwise be relevant.<sup>169</sup> Lord Reed (with whom the court was in unanimous agreement) referred to paragraph 3.23 of the Commission's guidance paper which referred to such as a plan as one which:

*'contains criteria or conditions which guide the way the consenting authority decides an application for development consent. Such criteria could place limits on the type of activity or development which is to be permitted in a given area; or they could contain conditions which must be met by the applicant if permission is to be granted; or they could be designed to preserve certain characteristics of the area concerned (such as the mixture of land uses which promotes the economic vitality of the area).'<sup>170</sup>*

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<sup>166</sup> *Ballinasloe Chamber of Commerce Ltd v Ballinasloe Town Council* [2012] IEHC 273.

<sup>167</sup> *Buckinghamshire County Council and Others & Ors. (Claimants) v Secretary Of State For Transport (Defendant) High Speed Two Limited (Interested Party)* [2014] UKSC 3 (*'Buckinghamshire County Council'*).

<sup>168</sup> *Buckinghamshire County Council* (n167) para 37.

<sup>169</sup> *Ibid*, para 40.

<sup>170</sup> *ibid*, para 124.

While these decisions assist in interpreting the phrase '*plan which sets the framework for the future development consent of listed projects*', unfortunately they do not provide a conclusive answer as to how the Irish High Court will view the Irish national renewable energy action plan or what the consequences will ultimately be for wind projects, which were or are to be developed as a result. This is primarily because national renewable energy action plans are unusual and detailed documents. The 165 page Irish national renewable energy action plan<sup>171</sup> documents the Irish government's decision to primarily focus on wind to fulfil Ireland's renewable energy obligations. Furthermore, it provides sectoral trajectories for renewable energy development between 2010 and 2020, in addition to describing existing law and policy and future law and policy (pledged for introduction at a later date) which is designed to ensure the development of renewable energy at an appropriate pace to meet the overarching and interim renewable energy targets.

As such, while Ireland's national renewable energy action plan appears to fit comfortably within the definition of '*plan*' when considered in light of the wording and spirit of the SEA Directive, the dual purpose of national renewable energy action plans and the recent ruling of the CJEU in the *Inter-Environnement Wallonie* [2012]<sup>172</sup> case, it does not fall within the more restrictive requirement for plans, which had previously been outlined by the Irish High Court, i.e. it could not be said that the Irish national renewable energy action plan establishes either a precise '*framework against which decisions are made concerning development consents*' or a precise '*framework against which individual planning permissions for specific projects are to be granted*'. However, it is clear that the national renewable energy action plan does have influence on the grant of individual wind farm planning permissions, even when considered in light of the expansive meaning given to the term by the UK's Supreme Court. Moreover, as the Irish High Court decisions which have been discussed preceded the *Inter-Environnement Wallonie* [2012] case, in this instance the final decision of the High Court cannot be accurately predicted.

Thus, until the court has ruled on this matter, Ireland's attainment of its 2020 targets will remain even more unpredictable than previously thought and (as initially highlighted by the Swords decision) the Irish wind development market will continue to rest on an unstable foundation. Consequently, much risk will remain in this market, at least until a conclusive decision can be handed down. Moreover, depending on the

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<sup>171</sup> National renewable energy action plan (n17).

<sup>172</sup> *Inter-Environnement Wallonie* [2012] (n37).



content of this decision, further weightier problems could follow. With a decision that Ireland's national renewable energy action plan does not fall within the ambit of the SEA Directive, the wind development sector can rest at ease. Conversely, a decision that Ireland's national renewable energy action plan falls within the ambit of the SEA Directive will spark the legal requirement to annul or suspend the plan, with further consequences likely for projects proposed or developed to implement the plan.

## 5. Conclusion

Irish wind development has come a long way since its humble beginnings in Bellacorrick in 1991.<sup>173</sup> This has been partially the result of the support schemes designed to support it; partially the result of the government policies designed to increase it and partially the result of a regional and global drive to reduce greenhouse gases, increase renewable energy and ensure a greater degree of security of energy supply. However, despite the increase in wind development in Ireland, significant problems exist which could thwart both the continuation and overall success of the policy. These emanate from the fact that the wind plan for 2009-2020 (as outlined in Ireland's national renewable energy action plan)<sup>174</sup> was formulated in breach of the SEA Directive.<sup>175</sup> The public were not appropriately included in the decision making process which led to the finalisation of the policy, and no cost-benefit analysis can be produced to demonstrate that wind is in fact the most viable option for Ireland to achieve its emission reduction and renewable energy goals.

In legal terms this has left the policy open to legal challenge seeking its suspension or revocation. A successful challenge of this nature would result in greater delays, and increase the risk and uncertainty which developers face in the Irish wind development market. In practical terms, it is argued here that the lack of public involvement in the formulation of the Ireland's national renewable energy action plan and the lack of documents (such as a cost/benefit analysis) to support the decision to focus primarily on onshore wind, has significantly increased the local public opposition to wind, which currently grips the country.

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<sup>173</sup> Renewable Energy Strategy Group (n1), 17.

<sup>174</sup> National Renewable energy action plan (n17).

<sup>175</sup> the SEA Directive (n30).

The extensive consequences of these omissions include a lack of stability in the Irish wind market, a lack of analysis to support the decision to promote onshore wind, and an increase in the risks associated with investing in such a legally unstable market. This unstable foundation merely increased the risk and legal uncertainty, which were already present in the wind development market, resulting from poor permitting procedures which have left many individual Irish wind developments vulnerable to either legal challenge or enforcement proceedings for breaches of either the EIA,<sup>176</sup> or the Birds<sup>177</sup> and Habitats<sup>178</sup> Directives. This market will be the subject of chapter four, which evaluate Ireland's fulfilment of its duties in the first of the Ireland's progressive wind energy markets, the Irish wind development market.

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<sup>176</sup> the EIA Directive (n108).

<sup>177</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7 (the 'Birds Directive').

<sup>178</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206/7 (as last amended by Directive as last amended by Directive 2006/105/EC [2006] OJ L 363/368 (the 'Habitats Directive').



## Chapter 4 The Irish Onshore Wind Development Market

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### 1. Introduction



In 2010, the Irish government took a monumental decision. This decision was to fulfil Ireland's legal obligation to reach a 16 per cent share of renewable energy consumption<sup>1</sup> by converting a significant share of Ireland's electricity to onshore wind generation by 2020.<sup>2</sup> This decision was also designed to ensure a simultaneous reduction of greenhouse gases.<sup>3</sup> The decision was monumental for a number of reasons. In 2009, Ireland did not have a significant onshore wind generated electricity market. In fact, at that time renewable energy (mainly generated from onshore wind) was contributing just 4.9 per cent to Ireland's energy consumption levels.<sup>4</sup> Furthermore, when the decision was taken in 2010, the Irish government was well aware that many constructed wind developments had been built in breach of EU law and so should potentially have been the subject of demolition and restoration orders. Thus, the decision was highly ambitious.

In taking the decision, the Irish government undertook to create a significant onshore wind generated electricity market and to effect the many changes necessary to do so. This meant the creation of a framework designed to promote the construction of large scale commercial wind farms, increased infrastructure and the integration of

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<sup>1</sup> Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16 (*'the Renewable Energy Directive'*) Annex I.

<sup>2</sup> EirGrid Group, 'EirGrid Group Annual Renewable Report 2013. Towards a Smart Sustainable Energy Future' (Eirgrid, 28 November 2013) <<http://www.eirgrid.com/media/EirGridAnnualRenewableReport2013.pdf>> accessed 9 December 2013, 12.

<sup>3</sup> Decision No. 406/2009/ EC on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136 (*'the Effort Sharing Decision'*) Annex II.

<sup>4</sup> Sustainable Energy Authority of Ireland, 'Energy in Ireland 1990-2009, 2010 Report' (SEAI, 3 December 2010) <[http://www.seai.ie/Publications/Statistics\\_Publications/Energy\\_in\\_Ireland/Energy\\_in\\_Ireland\\_1990-2009.pdf](http://www.seai.ie/Publications/Statistics_Publications/Energy_in_Ireland/Energy_in_Ireland_1990-2009.pdf)> accessed 1 March 2014.



intermittent electricity into the Irish electricity market. In addition it meant creating a new market designed to meet Ireland's renewable energy objectives, while simultaneously complying with additional duties placed on Ireland by environmental, competition and consumer law.

This latter aspect has caused significant problems in three of Ireland's electricity markets (development, transmission and supply). While the problems of the transmission and supply markets will be considered in chapters 5 and 6 of this thesis, this chapter will focus on the problems of the development market. In this market issues have arisen as Ireland has both struggled and failed to remedy past breaches of EU environmental law (generating problems which were unacknowledged in its national renewable energy action plan), while at the same time seeking to maintain and increase onshore wind development at the levels necessary to achieve its pledged targets.<sup>5</sup> As will be considered in this chapter the consequences include much legal uncertainty, a reduced pace of renewable energy development and continuing breaches of EU environmental law (specifically the Environmental Impact Assessment (EIA),<sup>6</sup> Birds<sup>7</sup> and the Habitats<sup>8</sup> Directives).

The topic will be approached as follows. Part two will discuss the implementation and application of the EIA Directive<sup>9</sup> in Ireland; the CJEU decision which found that Ireland had breached the EIA Directive<sup>10</sup> and the direct consequences of the finding for Irish wind development and the development market. Similarly part three will consider the implementation and application of the Birds<sup>11</sup> and Habitats<sup>12</sup> Directives in Ireland; the

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<sup>5</sup> See: the Renewable Energy Directive, Annex II and Department of Communications, Energy & Natural Resources, 'National Renewable Energy Action Plan. Ireland. Submitted under Article 4 of Directive 2009/28/EC' (DCENR, 1 July 2010) <<http://www.dcenr.gov.ie/NR/rdonlyres/03DBA6CF-AD04-4ED3-B443-B9F63DF7FC07/0/IrelandNREAPv11Oct2010.pdf>> accessed 21 August 2014 ('national renewable energy action plan').

<sup>6</sup> The consolidated version is Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 026, 28/01/2012, 1-26 ('the EIA Directive'). Note: this has since been amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1.

<sup>7</sup> The codified version is: Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 207 ('the Birds Directive').

<sup>8</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206/7 (as last amended by Directive as last amended by Directive 2006/105/EC [2006] OJ L 363/368 ('the Habitats Directive').

<sup>9</sup> the EIA Directive (n5).

<sup>10</sup> Case C-215/06 *Commission v Ireland* [2006] ECR I-10787 ('the Derrybrien Wind decision').

<sup>11</sup> the Birds Directive (n6).



CJEU decision that Ireland had breached these directives<sup>13</sup> and the direct consequence of this finding for wind development and the wind development market. Finally part four will analyse the overall implications of these judicial decisions for the future success of Ireland's renewable energy strategy.

## 2. The EIA Directive and the Irish Wind Development Market

### 2.1. Overview

As shown in figure 1 below, there are a number of key stages to setting up a commercial wind farm in Ireland. At the outset, developers must ascertain whether the wind speed is suitable (wind speeds of 8 metres per second or higher are classed as ideal; in general a site must have a minimum annual average wind speed of about 22.53 km per hour).<sup>14</sup> Next, the developer should determine if there is access to the infrastructure system close by (i.e. within 15 km) and if the proposed development could affect communication systems.<sup>15</sup> At this point the developer should secure access to the land and undertake a project feasibility study (Suitable sites are usually at an elevation of 200 metres or greater or are located close to the coast, without obstacle allowing turbines to face a southerly or south westerly direction).<sup>16</sup>

If sufficient levels of wind are present and the feasibility study is positive,<sup>17</sup> developers have the option of applying directly to An Bord Pleanála (the Irish planning authority) for planning permission under the Strategic Infrastructure Development Act 2006 (if the wind farm has more than 25 turbines or an output greater than 50 MW)<sup>18</sup> or to the local planning authority under section 34 of the Planning and Development Act 2000.<sup>19</sup> If planning permission is granted, developers can then apply to the Commission for

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<sup>12</sup> the Habitats Directive (n7).

<sup>13</sup> Case C-418/04 *Commission v Ireland* [2007] ECR I-10997 ('the Wild Birds decision').

<sup>14</sup> Teagasc, 'Wind Farms' (Teagasc Fact Sheet 49, May 2006) <[http://www.teagasc.ie/ruraldev/docs/factsheets/49\\_WINDFARM.pdf](http://www.teagasc.ie/ruraldev/docs/factsheets/49_WINDFARM.pdf)> accessed 10 September 2014.

<sup>15</sup> *Ibid.*

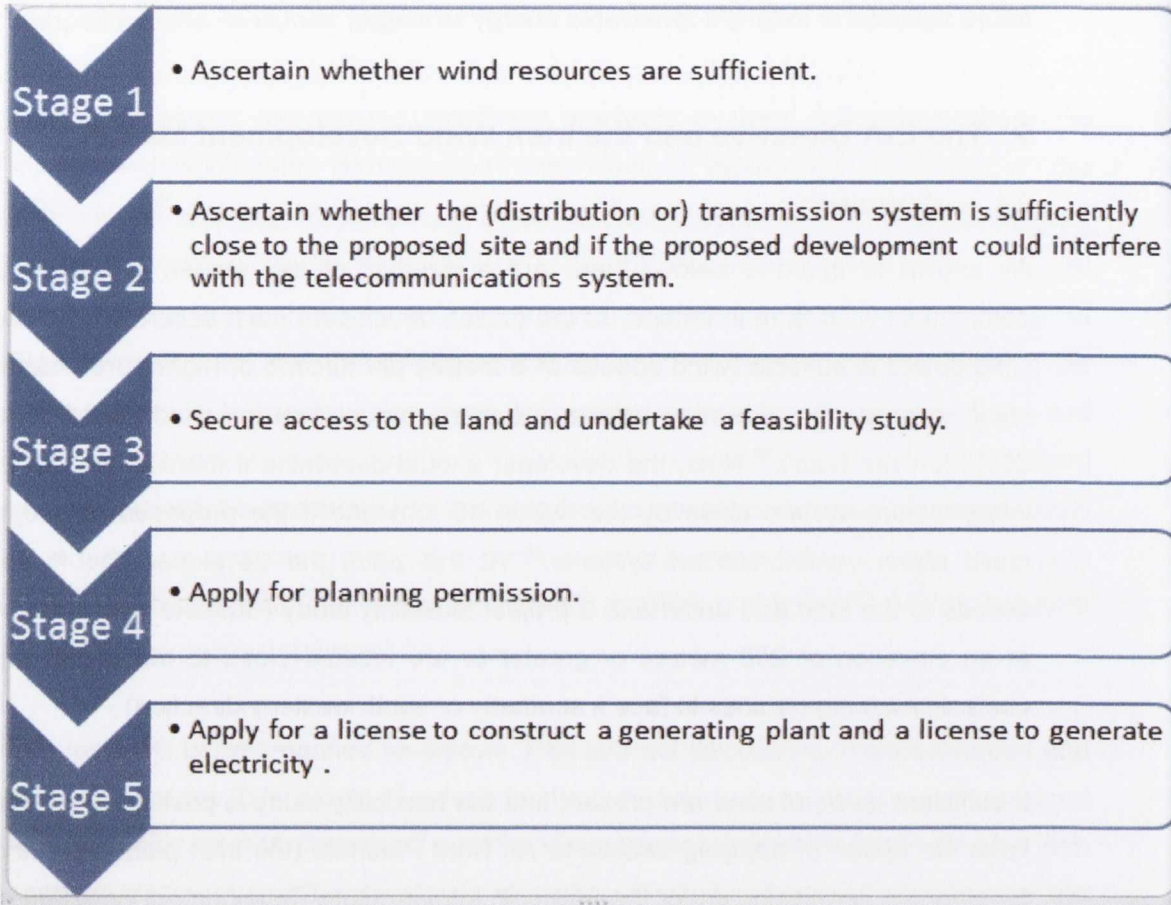
<sup>16</sup> *Ibid.*

<sup>17</sup> Note: At this point wind developers would also be well advised to check whether the relevant local authority has a Renewable Energy Strategy in place and to be aware of the proposed amendments to the Wind Development Guidelines 2006 contained in: Department of the Environment, 'Proposed Revisions to Wind Energy Development Guidelines 2006 Targeted Review in relation to Noise, Proximity and Shadow Flicker –December 11<sup>th</sup> 2013' (Government of Ireland, December 2013)<<http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownload,34769,en.pdf>> accessed 11 September 2014.

<sup>18</sup> Planning and Development (Strategic Infrastructure) Act 2006, Number 27 of 2006, Seventh Schedule.

<sup>19</sup> Planning and Development Acts 2000 (as amended), Number 30 of 2000.

Energy Regulation for a license to construct a generating plant and a license to generate electricity.



**Figure 10: Main stages in wind energy development**

To fulfil the requirements associated with obtaining planning permissions, commercial wind developers must meet two further important obligations (calculated to further the ideals of sustainable development).<sup>20</sup> The first is mandatory and has been for Irish wind developments since 1999.<sup>21</sup> Proposed commercial wind developments must

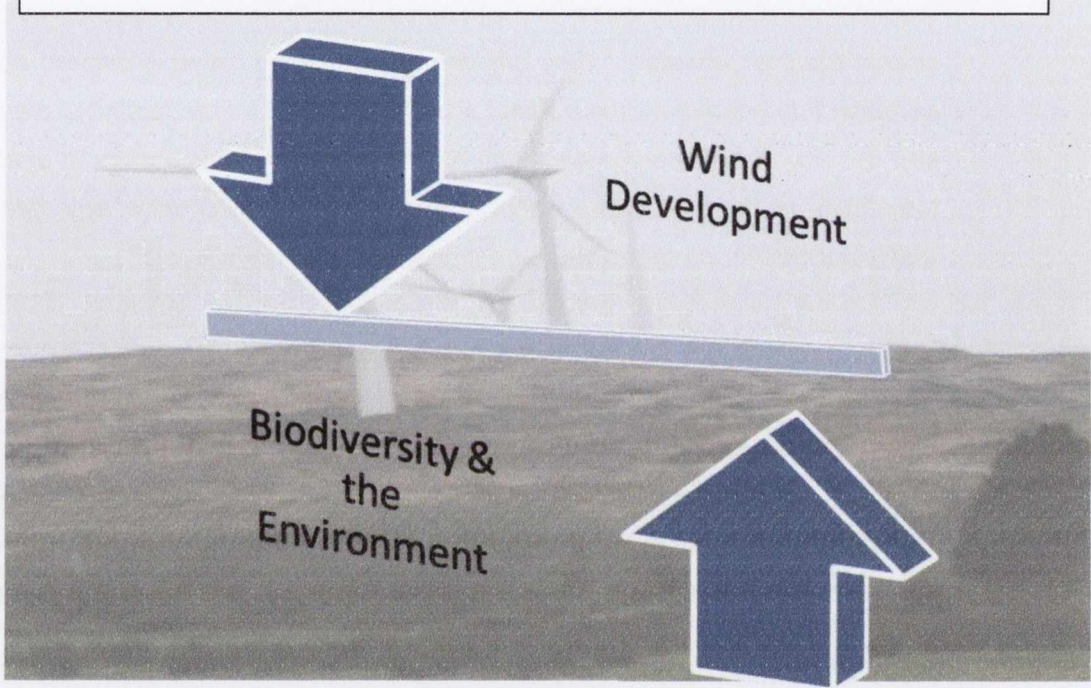
<sup>20</sup> See generally Áine Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Oxford and Portland Oregon, 2009 1<sup>st</sup> edn) chapter 2 and specifically page 28, where Professor Ryall states: 'EIA is one regulatory mechanism with the potential to strengthen the role of planning law and policy in the pursuit of sustainable development'. See also Yvonne Scannell et al, *The Habitats Directive in Ireland* (Centre for Environmental Policy and Law, 1999) chapter 1 and specifically page 10 where Professor Scannell states: 'The Habitats Directive has the potential to contribute significantly to sustainable land management and sustainable development as envisaged in the Treaty of Rome.'

<sup>21</sup> Pursuant to the European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1999, S.I. 93 of 1999.



progress through an environmental impact assessment. The second depends on the proposed location of the development. If it is in, near, or likely to affect an area designated as a Natura 2000 site<sup>22</sup> pursuant to the Birds<sup>23</sup> or Habitats Directives,<sup>24</sup> the proposed wind development is required to progress through an appropriate assessment.<sup>25</sup> As the law underpinning both environmental impact assessments and appropriate assessments is of central importance to commercial wind development in Ireland, it will be examined in the chapter, beginning an analysis of the law relating to the EIA Directive, in the paragraphs below.

**BALANCING WIND DEVELOPMENT & BIODIVERSITY AND THE ENVIRONMENT**



**Figure 11: Balancing Wind Development and Biodiversity and the Environment**

The EIA Directive is a cornerstone of European Community environmental protection policy.<sup>26</sup> It became law in 1985 (following almost a decade of deliberation)<sup>27</sup> and was

<sup>22</sup> A Natura 2000 site forms part of an EU wide network of nature protection areas established under the Habitats Directive (n8). The aim of the network is to assure the long-term survival of Europe's most valuable and threatened species and habitats. It is comprised of special areas of conservation designated by Member States under the Habitats Directive, and special protection areas designated under the Birds Directive (n7). See further: DG Environment, 'Natura 2000 network' (Commission, 22 August 2014) <[http://ec.europa.eu/environment/nature/natura2000/index\\_en.htm](http://ec.europa.eu/environment/nature/natura2000/index_en.htm)> accessed 18 September 2014.

<sup>23</sup> the Birds Directive (n7).

<sup>24</sup> the Habitats Directive (n8) article 5(3).

<sup>25</sup> Ryall (n20) 1.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*,35.

designed to introduce general principles for the assessment of the environmental effects of proposed plans and projects.<sup>28</sup> In particular, it was designed to promote the good management of the planning procedures, which were applicable to private and public activities likely to have significant effects on the environment.<sup>29</sup> In the Recitals to the proposed directive the justifications for this goal were placed in the context of the time:

*“...the 1973 and 1977 Action Programmes of the European Communities on the Environment provide that 'the best environmental policy is preventing the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects'; ...they affirm that 'effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes' and that 'it is therefore necessary to evaluate the effects on the quality of life and on the natural environment of any measure that is adopted or contemplated at national or Community level';”<sup>30</sup>*

Wind development was not subject to the requirements of the EIA Directive, when it became law in 1985.<sup>31</sup> In fact commercial wind farms were not included within the ambit of the EIA Directive until they were added to Annex II in 1997.<sup>32</sup> Despite this initial oversight, all Irish commercial wind farms have been required to progress through an environmental assessment and fulfil the requirements of the EIA Directive since 1999.<sup>33</sup> These requirements, along with the central objective of the EIA Directive will be considered further below.

The EIA Directive<sup>34</sup> requires an environmental assessment to be undertaken for public and private projects<sup>35</sup> which are likely to have significant effects on the environment (by

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<sup>28</sup> European Commission, Proposal for a Council Directive concerning the assessment of the environmental effects of certain public and private projects [1980] OJ C 169/14, Recital 8.

<sup>29</sup> *Ibid.*

<sup>30</sup> Commission (n28) Recital 5.

<sup>31</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40.

<sup>32</sup> Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1997] OJ L 73/5.

<sup>33</sup> European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1999, S.I. 93 of 1999.

<sup>34</sup> the EIA Directive (n5).

<sup>35</sup> Note: the term project refers to works and physical interventions. See Case C-2/07 *Paul Abraham and Others v Région wallonne and Others* [2008] ECR I-01197, para 20.



reason of their nature, size or location)<sup>36</sup> before they are consented to. The results of the environmental assessment (along with its required consultations) must be taken into consideration in the development consent procedure.<sup>37</sup> An assessment is obligatory for projects listed in Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kv or more and a distance of more than 15km (infrastructure which is directly relevant to wind development). Other projects listed in Annex II are not automatically assessed.

Member States can decide to submit projects to environmental impact assessment on a case-by-case basis or according to thresholds or criteria (i.e. size), location (i.e. sensitive ecological areas) or potential impact (i.e. surface affected, duration).<sup>38</sup> However, it is settled case law that where Member States have decided to establish thresholds and/or criteria, there is a limit to the discretion which is afforded to them. Accordingly, projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment before consent is given.<sup>39</sup> Thus, even where a particular project falls below the threshold set, where this project is likely to have a significant impact on the environment by virtue of its intrinsic characteristics, Member States are obliged to 'screen' this project to determine whether an environmental impact assessment is required.<sup>40</sup>

The EIA Directive has been amended four times in total (in 1997,<sup>41</sup> 2003,<sup>42</sup> 2009,<sup>43</sup> and 2014).<sup>44</sup> It was also consolidated in 2011.<sup>45</sup> The first directive to amend the EIA

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<sup>36</sup> Note: As discussed in the Commission Guidance on the CJEU's decisions on the EIA Directive, 'Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the EIA Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.' See further: European Commission, 'Environmental Impact Assessment of Projects. Rulings of the Court of Justice' (Commission, 2013) <[http://ec.europa.eu/environment/eia/pdf/eia\\_case\\_law.pdf](http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf)> accessed 4 January 2013.

<sup>37</sup> the EIA Directive (n6), article 8.

<sup>38</sup> *Ibid*, article 3.

<sup>39</sup> Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50; *Abraham and Others* (n35) paragraph 37.

<sup>40</sup> In this regard the Court has held that a Member State which established those thresholds and/or criteria at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would likewise exceed the limits of that discretion, unless all the projects excluded could, when viewed as a whole, be regarded as not likely to have significant effects on the environment. Case C-66/06 *Commission v Ireland* [2008] ECR I-00158\*; Case C-392/96 *Commission v Ireland* [1999] ECR I-05901 paragraph 75 and the case-law cited).

<sup>41</sup> the EIA Directive 1997 amendments (n32).

<sup>42</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes



Directive, Directive 97/11/EC<sup>46</sup> brought it in line with the Espoo Convention on EIA in a Transboundary Context.<sup>47</sup> It widened the scope of the EIA Directive by increasing the types of projects covered, the number of projects requiring mandatory environmental impact assessments (Annex I)<sup>48</sup> and the number of projects potentially requiring assessment. Following its enactment, wind developments were added to Annex II. Directive 97/11/EC also provided for new screening arrangements, including new screening criteria (at Annex III) for Annex II projects and established minimum information to be provided by developers in their environmental assessments.

In Ireland a threshold was initially set for wind developments by the European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1999<sup>49</sup> which required '*Installations for the harnessing of wind power for energy production (wind farms) with more than 5 turbines or having a total output greater than 5MW*' to go through the environmental impact assessment process. This obligation applied from 1 May 1999 and continues to apply today through Section 176 of the Planning and Development Act 2000 (as amended)<sup>50</sup> and regulation 93 and schedule 5, of the Planning and Development Regulation, 2001 (as amended).<sup>51</sup> Consequently all Irish commercial wind developments (which by their nature inevitably have more than 5 turbines or generation power of greater than 5MW) are required to go through an environmental impact assessment.<sup>52</sup>

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relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/ 17.

<sup>43</sup> Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L 140/114.

<sup>44</sup> Directive 2014/52/EU (n6)

<sup>45</sup> *Ibid.*

<sup>46</sup> the EIA Directive 1997 amendments (n32).

<sup>47</sup> Convention on EIA in a Transboundary Context; 1989 UNTS 309; 30 ILM 1461 (1991) ('*the Espoo Convention*').

<sup>48</sup> As described by Professor Scannell, Annex I was expanded to cover 21 categories of projects instead of 9. See Yvonne Scannell, 'Observations on Environmental Assessment in Theory and in Practice' (2002) 24 Dublin University Law Journal, 124-174

<sup>49</sup> European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1999 (n33).

<sup>50</sup> The Planning and Development Act 2000 (n19).

<sup>51</sup> The Planning and Development Regulations 2001, S.I. 600 of 2001, as amended.

<sup>52</sup> Note: Schedule 7 of the Planning and Development Regulation 2001 (as amended) (n51) sets out the criteria for determining whether a development (including a sub-threshold wind development) could be likely to have significant effects on the environment.



The second directive to amend the EIA Directive, Directive 2003/35/EC<sup>53</sup> did so to align its provisions on public participation with those of the Aarhus Convention on public participation in decision-making and access to justice in environmental matters.<sup>54</sup> The third directive, Directive 2009/31/EC amended Annexes I and II, by adding projects related to the transport, capture and storage of carbon dioxide (CO<sub>2</sub>).<sup>55</sup> In June 2010, the EIA Directive was the subject of further review<sup>56</sup> and amendment through the enactment of Directive 2014/52/EU.<sup>57</sup> Overall, this directive mainly clarifies and describes the procedural elements of the updated environmental impact assessment process. By 16 May 2017, Member States will be required to transpose the directive and to simplify their various environmental assessment procedures, introducing timelines for the various elements of the environmental assessment process (amongst other obligations).<sup>58</sup>

Ireland has had a turbulent relationship with the EIA Directive.<sup>59</sup> Nationally, judges and leading academics have acknowledged the complexity of the Irish law which was passed to implement its requirements. In 2004 Professor Scannell described the effort required to express the Irish law on the EIA Directive in an accessible manner as 'a legislative paperchase',<sup>60</sup> and quoted Fennelly J. who had described it as follows:

*'Complex is the mildest term that can be applied. It is regrettable that rules of law intended to regulate processes in which individual members of the public are supposed to be able to take part cannot be written in a more accessible form.'*<sup>61</sup>

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<sup>53</sup> Directive 2003/35 (n42).

<sup>54</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447; 38 ILM 517 (1999) (*'the Aarhus Convention'*).

<sup>55</sup> Directive 2009/31 (n43).

<sup>56</sup> European Commission, 'Public consultation on the Review of the Environmental Impact Assessment (EIA) Directive (Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended)' (Commission, 2010) <<http://ec.europa.eu/environment/consultations/eia.htm>> accessed 4 January 2013.

<sup>57</sup> European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment' [2012] COM(2012) 628 final.

<sup>58</sup> For a general overview see: Tom Flynn 'Developments in European Planning Law' (2014) *Irish Planning and Environmental Law* 2, 74-83.

<sup>59</sup> EIA Directive (n6)

<sup>60</sup> Yvonne Scannell, 'Environmental Impact Assessment in Irish Law' (2004) 26 *Dublin University Law Journal*, 200-234.

<sup>61</sup> See fn 2, *O'Connell v EPA* [2003] 2 ILRM 397 at 313, in Scannell (n20).



Regionally, Ireland has been the subject of five sets of infringement proceedings for breaches concerning either the implementation or application of the EIA Directive.<sup>62</sup> Two cases in particular, *the Derrybrien Wind*<sup>63</sup> and *Demolition Works*<sup>64</sup> have had significant direct and indirect consequences for Irish wind development. Not only have these cases left many of its existing and emerging commercial wind developments vulnerable to challenges (seeking the revocation of their development consents/ their removal/compensation) for having been constructed in breach of the EIA Directive,<sup>65</sup> they (along with the two other successful infringement proceedings,<sup>66</sup> and *the Wild Birds decision*)<sup>67</sup> have had a definite chilling effect on wind development in Ireland.<sup>68</sup> Although the economic downturn and the availability of grid connections<sup>69</sup> have also been large contributing factors to low levels of wind development, legal uncertainty has acted as a definite deterrent to development.<sup>70</sup> Legal uncertainty of the law on environmental impact assessments has existed for two main reasons. First, both the Irish and EU law on environmental impact assessment is complex and contained in

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<sup>62</sup> (1) Case C-392/96 *Commission v Ireland* [1999] ECR I-05901; (2) *the Derrybrien Wind decision* (3) Case C-66/06 *Commission v Ireland* [2009] ECR I I-00158; (4) Case C-50/09 *Commission v Ireland* [2011] ECR I-00873 ('*Demolition Works*'); (5) Case C-216/05 *Commission v Ireland* [2006] ECR I-10787.

<sup>63</sup> *the Derrybrien Wind decision* (n9).

<sup>64</sup> *Demolition Works* (n62(4)).

<sup>65</sup> the EIA Directive (n6).

<sup>66</sup> In four of the five cases taken some aspect of Ireland's transposition of the EIA Directive was condemned. (See n62) The fifth case was Case C-216/05 *Commission v Ireland* [2006] ECR I-10787 in the Irish practice of requiring the payment of an administrative fee from members of the public wishing to participate in the decision making procedures governed by the EIA Directive was found not to have breached article 6(2) of the Directive.

<sup>67</sup> *Wild Birds decision* (n13).

<sup>68</sup> For example in addition to the cases which are discussed in the main text of this article, in 1999 (see n62(1)) and 2011 (See n62(4)). Ireland also faced proceedings which generated uncertainty, and required further corrective legislation (of impact to the wind development market in Ireland). In 1999, Ireland was found to have breached the EIA Directive for exceeding the limits of its discretion under Articles 2(1) and 4(2) of the Directive by establishing criteria and/or thresholds taking account only of the size of projects, without also taking their nature and location into consideration. By this means the Court determined that the Irish government had permitted developers to circumvent the objective of the legislation by splitting individual projects which were likely to have significant effects on the environment, to avoid having to progress through the environmental impact assessment process. In 2011, it was determined that gaps existed in the Irish transposing legislation which meant that in specific cases where both the Environmental Protection Agency and the planning authorities were involved in the permitting process it could be possible for a development falling within the ambit of the directive to become authorised without progressing through the environmental impact assessment process. Moreover it was determined that the Irish legislation applied to this situation did not oblige the relevant bodies to liaise in any meaningful way in the permitting process to ensure that requirements of the EIA Directive were fulfilled by the developer in question.

<sup>69</sup> International Energy Association, 'Ireland' (IEA, 2013) <[http://www.ieawind.org/annual\\_reports\\_PDF/2012/Ireland.pdf](http://www.ieawind.org/annual_reports_PDF/2012/Ireland.pdf)> accessed 5 September 2013.

<sup>70</sup> The Irish Academy of Engineering, 'Review of Ireland's Energy Policy in the Context of the Changing Economy' (The Irish Academy of Engineering, June 2009) <[http://www.iae.ie/site\\_media/pressroom/documents/2009/Jun/24/Review\\_of\\_Irelands\\_Energy\\_Policy\\_-\\_June\\_2009.pdf](http://www.iae.ie/site_media/pressroom/documents/2009/Jun/24/Review_of_Irelands_Energy_Policy_-_June_2009.pdf)> accessed 9 January 2014.



numerous legislative instruments and interpreted by a considerable amount of case-law.<sup>71</sup>

Second, as Irish law on the EIA Directive was found to be incompatible with EU law on a series of occasions, there have been periods during which this legal uncertainty was increased (for example during the infringement proceedings and subsequent to condemning judgments before remedying national legislation had been passed).<sup>72</sup> Partially as a result the number of additional Irish wind turbines developed in 2012 was the lowest since 2008.<sup>73</sup> While development levels increased marginally (by 133 MW) in 2013,<sup>74</sup> average wind deployment remained below the level required to achieve the national 2020 electricity targets.<sup>75</sup> The findings of the CJEU in *Derrybrien wind*<sup>76</sup> and *Demolition works*<sup>77</sup> along with their direct consequences will be considered below.

## 2.2. Ireland's Wind Developments in Breach of the EIA Directive

Although an application initiating proceedings was first lodged in 5 December 1996, it was almost 12 years before the CJEU delivered its seminal judgment on wind development in Ireland (*the Derrybrien wind decision*).<sup>78</sup> The case concerned both Ireland's general application and implementation of the EIA Directive<sup>79</sup> and the permitting procedures applied to the '*largest terrestrial wind-energy development in Ireland and one of the largest in Europe*', the Derrybrien wind farm.<sup>80</sup> In the course of the proceedings the following flaws in Irish commercial wind permitting, and Irish planning and development law were identified. Ireland has failed to '*screen*' proposed works, as was required by the EIA Directive. In other words, Ireland had failed to ensure that steps were taken to ascertain whether proposed works were likely to have

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<sup>71</sup> See generally: Ryall (n20).

<sup>72</sup> On the problems of interpreting transposing national law in light of the EU directives it was designed to implement see generally: Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *European Law Review* 349

<sup>73</sup> International Energy Association (n69).

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Derrybrien Wind* (n9).

<sup>77</sup> *Demolition Works* (62(4)).

<sup>78</sup> *Derrybrien Wind* (n9).

<sup>79</sup> EIA Directive (n31).

<sup>80</sup> *Derrybrien Wind* (n9), para 87.

significant effects on the environment, and if so were obliged to proceed through an environmental impact assessment before development consents were granted.<sup>81</sup>



**Figure 12: Derrybrien wind farm, Co Galway**

(Source: [www.esb.ie](http://www.esb.ie))

The Irish practice of retention planning was found to have entirely negated the effectiveness of the EIA Directive by allowing developers to apply for planning permission after the project had been constructed.<sup>82</sup> The Irish enforcement regime (which granted discretionary powers to the Irish authorities to prevent and stop unauthorised development, and allowed the regularisation of unauthorised developments as long as enforcement proceedings had not been commenced) was found to be inadequate.<sup>83</sup>

In considering the permitting procedures applied to the Derrybrien wind farm further deficiencies in the Irish planning procedures became apparent. The facts of this case made it particularly controversial given that on 16 October 2003 a landslide occurred when a mass of peat was dislodged from an area under development, polluting a nearby river and causing the death of approximately 50,000 fish and lasting damage to Irish spawning beds.<sup>84</sup> The Commission claimed that Ireland did not take all the measures necessary to ensure that the development consents relating to the wind farm and associated works were preceded by an environmental impact assessment. Furthermore it alleged that the environmental impact assessments which were carried out for various parts of the development were deficient.

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<sup>81</sup> Note a similar procedure also referred to as '*screening*' applies to the process to ascertain whether works are subject to the requirements of the Birds (n7) and Habitats (n8) Directives.

<sup>82</sup> *Derrybrien Wind decision* (n9) paras 74 and 76.

<sup>83</sup> *Ibid*, paras 74.

<sup>84</sup> For details of subsequent damages awarded: See *Curley v Hibernian Wind Power Ltd & Ors* [2010] IEHC 265.



In its judgment the Court noted that the applications for consent for the first two phases of construction were submitted in December 1997, before wind farms were officially added to the Annex I or II to the EIA Directive. However, it found that as these two phases of construction included elements (such as extraction of peat and certain minerals) which were covered by the Directive at that time, they should have undergone an environmental impact assessment. In the course of the proceedings it became evident that the Irish authorities had based their decision on whether different aspects of the Derrybrien wind farm works were subject to the requirements of the EIA Directive, on a simple determination as to whether the works in question were minor or major aspects of wind farm construction.<sup>85</sup> Where the works were considered minor, no further consideration was given to the individual characteristics of the construction involved or whether the works '*were likely to have significant effects on the environment by virtue inter alia, of their nature, size or location*'.<sup>86</sup>

In its determination, the Court held that it was irrelevant that the works in question were minor aspects of the wind farm construction; their specific characteristics meant that they were likely to have significant effects on the environment and so should have undergone an environmental impact assessment. In relation to the third phase of construction the Court found that (i) an environmental impact assessment should have been conducted before approval was given to change the type of turbines to be used, (ii) an environmental impact assessment should have been conducted prior to the issue of approval for the third stage of construction, and (iii) an environmental impact assessment should have been conducted before the deforestation which took place in 2003.

Furthermore, at the time when the *Derrybrien wind decision* was handed down, the case showed that it had been accepted practice in Ireland for a developer to submit the sole environmental impact statement conducted, along with his/her consent application, to fully satisfy the requirements of the EIA Directive.<sup>87</sup> No requirement was placed on the planning authority to conduct its own assessment of the potential environmental impacts of the proposed development/works. This practice was

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<sup>85</sup> *Derrybrien Wind decision* (n9), para 68.

<sup>86</sup> *Derrybrien Wind decision* (n9).

<sup>87</sup> EIA Directive (n31).

criticised in the *Derrybrien wind decision*<sup>88</sup> and later found to be in breach of the EIA Directive<sup>89</sup> in further infringement proceedings in *Demolition Works* in 2011.<sup>90</sup>

### 2.3. Direct Consequences for the Irish Wind Development Market and Irish Wind Developments

Following each of these decisions the Irish government became subject to a legal duty to take all general or particular measures, within its sphere of competence, to remedy each identified failure to ensure that adequate environmental impact assessments (as provided for by the EIA Directive) were undertaken.<sup>91</sup> In this instance, it was a dual duty. First, to prevent similar issues arising in the future, the government was obliged to enact legislation to remedy the failings which had been identified, and all relevant parties were obliged to interpret existing laws and rules in line with the judgments which had been handed down. Second, the government was obliged to consider whether (or what) action needed to be taken against existing wind developments (which had been constructed in breach of the EIA Directive) to make good any harm caused by each failure to carry out an environmental impact assessment.<sup>92</sup>

EU case-law provides some guidance as to the action which should have followed these judgments. Case-law indicates that it is for the Member State in question to determine whether a consent already granted can be revoked or suspended in order to subject the project in question to an assessment of its environmental effects.<sup>93</sup> In an oft quoted paragraph from the *Derrybrien wind decision*, the CJEU has stressed that:

*'[w]hile Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to*

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<sup>88</sup> *Derrybrien Wind decision* (n9), para. 109.

<sup>89</sup> EIA Directive (n31).

<sup>90</sup> *Demolition Works* (62(4)).

<sup>91</sup> European Commission, 'Environmental Impact Assessment of Projects Rulings of the Court of Justice' (Commission, 14 March 2013) <[http://ec.europa.eu/environment/eia/pdf/eia\\_case\\_law.pdf](http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf)> accessed 9 December 2013, 10.

<sup>92</sup> Case C-201/02 *Wells* [2004] ECR I-723 ('*Wells*') para 66.

<sup>93</sup> On the subject of 'inverse direct effect' which this proposition gives rise to: see n92 and Robert McCracken, 'EIA, SEA and AA, present position: where are we now?' (2010) *Journal of Environmental and Planning Law* 12, 1515-1532.



*circumvent the Community rules or to dispense with applying them, and that it should remain the exception.*<sup>94</sup>

Following the *Derrybrien wind*<sup>95</sup> and *Demolition works decisions*,<sup>96</sup> Ireland took certain actions to prevent future breaches of the EIA Directive taking place. First, to remedy the breaches found by the CJEU in the *Derrybrien wind decision* (three months after the judgment) a Circular was sent to each of Ireland's local planning authorities.<sup>97</sup> The Circular informed the local authorities of the Court's decision. It prohibited the further grant of retention planning. It instructed the local authorities to issue a formal notice to the effect that any retention planning consent granted after the date of the judgment would now be invalid; and outlined the remedial measures which were proposed to implement the Court's decision. It was stated that these would remove the possibility of retention for unauthorised development which should have been the subject of an environmental impact assessment, and revoke the 7 year time limit within which enforcement action could be taken against an unauthorised development. However, it was not until 23 March 2011, that legally binding legislation<sup>98</sup> took effect to remove the possibility of a grant of retention planning to developments, which should have been the subject of environmental impact assessments.<sup>99</sup>

Second, to remedy the breaches found by the CJEU in the *Demolition Works decision*,<sup>100</sup> five months subsequent to the judgement a new section 172 of the Planning and Development Act 2000 was commenced.<sup>101</sup> This section specifically requires planning authorities to carry out an environmental assessment of proposed developments which fall within the ambit of the EIA Directive. Furthermore, during the course of the proceedings which led to the *Demolition works decision* a new section 171A was also inserted into the Planning and Development Act 2000<sup>102</sup> to provide a definition of environmental impact assessment. Assistance in interpreting these new provisions was later provided through the publication of the Department of the

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<sup>94</sup> *Wells* (n92) para. 57.

<sup>95</sup> *Derrybrien Wind* (n9).

<sup>96</sup> *Demolition Works* (n62(4)).

<sup>97</sup> Circular PD6/08.

<sup>98</sup> The Planning and Development (Amendment) Act 2010, Number 30 of 2010, section 23(c).

<sup>99</sup> The Planning and Development (Amendment) Act 2010, Number 30 of 2010, section 23(c), commenced by Planning and Development (Amendment) Act 2010 (Commencement) Order 2011 S.I. 132 of 2011.

<sup>100</sup> Planning and Development Act 2000 (n19).

<sup>101</sup> As inserted by s. 54 of the Planning and Development (Amendment) Act 2010 (n98), with effect from August 19, 2010.

<sup>102</sup> As inserted by s.53 of the Planning and Development (Amendment) Act 2010 (n98), with effect from August 19, 2010.

Environment's 'Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment' in March 2013.<sup>103</sup>

While these measures were a move in the right direction; they could not be described as timely and their compliance with EU law could not be described as complete. The finalisation of legally binding corrective measures to remedy the breaches first identified in *Derrybrien wind*<sup>104</sup> did not take place until 23 March 2011, almost three years after the decision. In the intervening period a non-legally binding circular filled the vacuum.<sup>105</sup> Furthermore, despite the fact that criticisms were levelled at the Irish practice of accepting developer-conducted environmental impact statements as completely satisfying any requirement to conduct an environmental impact assessment by the CJEU in 2008, it was not until August 2010 that Irish planning authorities became obliged to conduct their own environmental impact assessments.<sup>106</sup>

Worse, there is no publicly available record of any consideration having been given to whether the development consents which had already been granted prior to 3 July 2008 (the date *Derrybrien wind* was decided) should have been revoked or suspended 'as having offered the persons concerned the opportunity to circumvent the Community rules'.<sup>107</sup> While it is acknowledged that it would have been at best impractical and at worst illegal (under Irish planning law)<sup>108</sup> to seek to revoke consents from developments which were constructed or largely constructed on 3 July 2008, works which were consented to, but not yet commenced on this date were in a different category. Accordingly, those which fell within the remit of the EIA Directive<sup>109</sup> should have been required to undergo an environmental impact assessment following the judgment. However, no such obligation was ever imposed.

This omission has left these developments (in addition to all those constructed prior to July 2008, and all developments up until 2011), which were consented to based solely

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<sup>103</sup> Department of the Environment, Community and Local Government, 'Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment' (Government of Ireland, March 2013) <<http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownload,32720,en.pdf>> accessed 8 September 2013.

<sup>104</sup> *Derrybrien Wind decision* (n9).

<sup>105</sup> This practise of implementing EU law through circulars has been criticised by leading academics such as Professors Scannell and Ryall (See generally: n20).

<sup>106</sup> See generally n102.

<sup>107</sup> *Wells* (n92) para. 57.

<sup>108</sup> the Irish Planning and Development Act 2000, as amended (n19) section 160 (6) (a), (*the seven year safety rule*).

<sup>109</sup> the EIA Directive (n31).



on developer conducted environmental impact statements, open to legal challenge from an individual<sup>110</sup> seeking remedies such as: (i) the revocation or suspension of a consent already granted or (ii) monetary compensation. In this regard it is worth noting that the case of *Wells*<sup>111</sup> has long since removed the argument for rejecting such claims for breaching the principle of 'inverse' direct effect.<sup>112</sup> Thus, a challenge of this nature could be pitted against one of two parties. It could be taken as a claim of state liability against the planning authority (as an emanation of the State),<sup>113</sup> which consented to the wind development in question. Alternatively it could be taken against the developer, where this party was a State or Semi-State company.

For wind developers the situation under EU law is precarious. Despite the fact that the CJEU has consistently found consent suspension or revocation to be a matter for the domestic legal order of each Member State, (based on the principles of equivalence and effectiveness), such an order cannot be ruled out. Depending on the circumstances of the case (and most likely the stage of construction of the development and the impact it has had on population and human health; biodiversity; land, soil, water, air, climate and material assets, cultural heritage and the landscape)<sup>114</sup> if a claimant fulfilled the three conditions required for a claim for state liability, a strong case could be made for the suspension of previously granted

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<sup>110</sup> Note: in *Cosgrave v An Bord Pleanála* [2004] 2 IR 435, Kelly J. found that the reliefs sought relating to the question of the transposition of the directives into Irish law could not be raised by way of judicial review. In so doing Kelly J. approved Morris J's judgment in *Lancefort Ltd. v An Bord Pleanála* [1997] 2 ILRM 508, suggesting, however, that plenary proceedings were not ruled out in circumstances where an applicant wished to test the way in which the directives were implemented. The issue of whether the EIA Directive had been correctly transposed into Irish law was raised shortly after *Cosgrave* in judicial review proceedings in *Martin v An Bord Pleanála* (No 2) [2004] IEHC 368, Smyth J. ultimately determined that it was not necessary for him to 'embark on a consideration of or to make any determination on the correctness, application or otherwise of the decision in *Cosgrave v An Bord Pleanála* (unreported 21st April 2004, Kelly J) or the decision of Morris J. in *Lancefort Ltd. v An Bord Pleanála* [1997] 2 ILRM'. In dismissing the application he determined that the contention that the law of the State does not truly and properly transpose the Directives is equivalent in general legal terms to challenging the constitutionality of a statute or statutory instrument, suggesting, however, that he would be open to considering the certification of a question to the Supreme Court.

<sup>111</sup> *Wells* (n92).

<sup>112</sup> *Wells* (n92) and Robert McCracken (n93).

<sup>113</sup> See further: Case C-188/89 *Foster v British Gas* [1990] ECR I-03313.

<sup>114</sup> Note: Depending on the circumstances of a claim for state liability, a respondent could seek to invoke the use of 'the seven year safety rule' as provided for by section 160 (6) (a) of the Irish Planning and Development Act 2000, as amended (n19) if this would be applicable to the situation under Irish law, however, there is no guarantee that such an argument would be accepted as compatible with the case-law of the CJEU.



consents and the restoration of the land concerned, as a penalty equivalent to that provided for under Irish planning law for unauthorised developments.<sup>115</sup>

Furthermore, even if consent suspension or revocation were not ordered, State or Semi-State developers or planning authorities could be obliged to provide compensation<sup>116</sup> where an individual claimant (who had suffered damage from a development constructed in breach of the EIA Directive) could satisfy the three conditions for state liability. Moreover this compensation could even include the value of material assets:

*'in circumstances where exposure to noise...has significant effects on individuals, in the sense that a home affected by that noise is rendered less capable of function and the individual's environment, quality of life and health are affected, a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment'.<sup>117</sup>*

This passage should be of particular concern to wind developers, as a frequent complaint of home-owners in the vicinity of wind turbines is that their right to the quiet enjoyment of their homes has been affected by the noise and shadow flicker caused by the rotating turbines.<sup>118</sup> In a more recent (potentially persuasive) case, the Danish Court awarded plaintiffs DKK 500,000 (€67,172.70) in compensation for the loss occasioned to them as a result of noise pollution and property value depreciation caused by the erection of eight wind turbines close to their home.<sup>119</sup> A similar challenge, successfully taken against Irish wind developments could drain developer resources and act as a further restraint on future investment in wind.

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<sup>115</sup> Planning and Development Act 2000 (as amended) (n19), sections 154 and 160 (*on unauthorised developments*).

<sup>116</sup> Case C-420/11 *Jutta Leth v Republik Österreich and Land Niederösterreich* [2013] ECR I-0000 (*not yet published*).

<sup>117</sup> *Ibid*, para 35.

<sup>118</sup> In this regard see: International Agency Wind Task 28 'Social Acceptance of Wind Energy Projects' (IEA, May 2012) <[http://www.ieawind.org/index\\_page\\_postings/June%207%20posts/task%2028%20final%20report%202012.pdf](http://www.ieawind.org/index_page_postings/June%207%20posts/task%2028%20final%20report%202012.pdf)> accessed 9 December 2013; Gerald O'Connor, 'Wind turbines in the Midlands' *Irish Times* (Dublin, 19 March 2013) 15.

<sup>119</sup> *Rigmor Nielsen og Erik Nielsen v Bindesbøl Vind ApS* [2014] UfR 2014.1861V; Søren Stenderup Jensen, 'High Court rules on compensation for noise from wind turbines' (Wind Action, 1 September 2014) <<http://www.windaction.org/posts/41138-high-court-rules-on-compensation-for-noise-from-wind-turbines#.VBHV5WPP-f4>> accessed 11 September 2014.



To date just four cases have been decided by the Irish High Court which alleged breaches of the EIA Directive in wind farm development.<sup>120</sup> However, each of these cases concerned either the factual content of the environmental impact assessments in question, or the remit of responsibilities required from the government entities in question. Interestingly, however, on 17 June 2014, Mr Justice Michael Peart granted permission, on an ex-parte basis, to a couple (Klaus Balz and Hanna Heuback, of Bear No Gaoithe, Inchigeelagh, Co Cork) to bring a challenge seeking the judicial review of a decision by an Bord Pleanala to grant planning permission to Cleanrath Windfarm Ltd. The application was granted to challenge the decision as having been arrived at in breach of: (i) the EIA Directive<sup>121</sup> for failing to carry out an environmental impact assessment within the meaning of the directive and (ii) the Birds and Habitats directives for failing to carry out an appropriate assessment (required pursuant to the Habitats Directive for developments likely to affect the Gearagh Special Area of Conservation and the Mullaghanish to Musheramore Special Protection Areas).<sup>122</sup> The hearing was scheduled for 10 December 2014 however, at the time of writing details on the outcome of the case had not been published.<sup>123</sup>

The position of wind developments (in breach of the EIA Directive) is far less exposed under Irish planning law. The general rule under Irish planning law is that enforcement proceedings can only be taken by the relevant planning authorities against developments where they are considered to be unauthorised, a definition which excludes development which was granted a planning permission **which has not been revoked**<sup>124</sup> where the development was carried out in compliance with the permission granted.<sup>125</sup>

Accordingly, if the Irish planning authorities wish to bring enforcement proceedings against such a development under the general enforcement provisions of the Planning and Development Act 2000<sup>126</sup> the original planning permission would have to be

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<sup>120</sup> *O'Grianna v An Bord Pleanala, Cork County Council and Framore Limited* [2014] Unreported, High Court 12 December 2014; *Keane v An Bord Pleanala* [2012] IEHC 324; *Usk and District Residents Association Limited v An Bord Pleanala and Others* [2009] IEHC 346; and *Derrybrien Co-operative Society Limited v Saorgus Energy Ltd. & Others* [2005] IEHC 485.

<sup>121</sup> EIA Directive (n6).

<sup>122</sup> Ann O' Loughlin, 'Landowners challenge windfarm approvals' *The Examiner* (Cork, 18 June 2014) 3.

<sup>123</sup> See: *Balz & Anor v Bord Pleanala* High Court Record No. 2013/450. Note: on 21 December 2014 details of the outcome of the hearing had not yet been released on the Court Service of Ireland websites or on the Justis and Westlaw databases.

<sup>124</sup> Emphasis added.

<sup>125</sup> Planning and Development Act 2000, as amended, (n19) section 2.

<sup>126</sup> *Ibid.*

revoked. Section 160 of the Planning and Development Act 2000,<sup>127</sup> provides additional comfort to affected developers. It provides that enforcement action cannot be taken through the courts against certain developments (including wind developments authorised in breach of the EIA Directive) following the expiry of seven years from their commencement<sup>128</sup> (*'the seven year safety rule'*).

Irish planning law does, however, pay some lip service to the EU law requirement to nullify the unlawful consequences of its breaches of EU law, through its introduction of the concept of *'substitute consent'*.<sup>129</sup> As part of this construct, developers can apply or be served notice requiring them to submit a *'remedial environmental impact assessment'* and (if successful in their application) obtain permission to retain previously authorised developments (constructed in breach of either the EIA,<sup>130</sup> or Birds<sup>131</sup> and Habitats<sup>132</sup> Directives). However, as the enforcement penalties for failure to comply with the relevant sections apply solely to failure to comply with a served notice,<sup>133</sup> little incentive exists for a developer (who has become aware that the development in question was improperly permitted) to make a voluntary application. In 2011 just one application had been made for substitute consent and this was made for *Derrybrien wind farm*, on foot of a notice served in October 2011.<sup>134</sup> It was later withdrawn by the planning authorities on 25 November 2011. Since then, just one further application was made for substitute consent for a wind farm situated in Co Cork.<sup>135</sup>

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<sup>127</sup> *Ibid.*

<sup>128</sup> As provided for by section 160 (6) (a) of the Irish Planning and Development Act 2000, as amended (see n19) *Note: section 46 of the Planning and Development Act 2000, as amended does give the planning authorities the power in exceptional circumstances to serve a notice on a developer (other than one of an unauthorised development) requiring the removal or alteration of a particular structure or the discontinuance of its use.*

<sup>129</sup> Planning and Development Act 2000, as amended, (n19), sections 177B and 177C.

<sup>130</sup> the EIA Directive (n6).

<sup>131</sup> the Birds Directive (n7).

<sup>132</sup> the Habitats Directive (n8).

<sup>133</sup> Planning and Development Act 2000, as amended (n19), section 177O.

<sup>134</sup> Case number SJ0001: Co. Galway (05316). *Note: an additional Letter of Formal Notice was sent to Ireland in respect of the Derrybrien wind case in March 2010. See further: Friends of the Irish Environment, 'Ongoing EU Environmental Cases Against Ireland October 2012' (Friends of the Irish Environment, October 2012)* <[http://www.friendsoftheirishenvironment.net/cmsfiles/files/library/ongoing\\_eu\\_infringment\\_s.pdf](http://www.friendsoftheirishenvironment.net/cmsfiles/files/library/ongoing_eu_infringment_s.pdf)> accessed 31 August 2013.

<sup>135</sup> Case number PL04 .LS0016 Co. Cork (lodged on the 27 May 2014). This information is based on searches of an Bord Pleanála's website which were conducted on 15 September 2014. See: <http://www.pleanala.ie/>



As demonstrated Irish wind developments face legal uncertainty. Under EU law, all developments constructed in breach of the EIA Directive,<sup>136</sup> are open to a legal claim seeking either consent revocation or compensation. Under Irish law they are also exposed until they benefit from the seven year safety rule.<sup>137</sup> Until then, they are open to enforcement proceedings where the following two conditions are fulfilled. The Irish planning authorities serve them a notice requiring them to submit a remedial environmental impact assessment and they do not complete the process satisfactorily. While action in this regard has been low to date, there is no guarantee that this will continue to be the case.

The number of wind developments likely to be affected by this is relatively large. Between 1999 and August 2008 (when the *Derrybrien wind* decision<sup>138</sup> was handed down) 52 planning permissions were granted to both large and small wind farms with accompanying environmental impact statements.<sup>139</sup> During the same time period approximately 10 planning permissions were granted to commercial wind farms (those with more than 5 turbines) without accompanying environmental impact statements.<sup>140</sup> Between August 2008 and March 2011 (following the decision of the CJEU in *Demolition works*<sup>141</sup> and the enactment of corrective measures through the Planning and Development (Amendment) Act 2010)<sup>142</sup> approximately 19 planning permissions were granted to both large and small wind farms with accompanying environmental impact statements.<sup>143</sup> Wind developments constructed in breach of the Birds and Habitats Directives face similar uncertainties, following the *Wild birds decision*.<sup>144</sup> The interaction of these directives with wind development and the relevant jurisprudence will be analysed below.

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<sup>136</sup> the EIA Directive (n6).

<sup>137</sup> the Irish Planning and Development Act 2000, as amended (n19) section 160 (6) (a).

<sup>138</sup> *Derrybrien Wind decision* (n9)

<sup>139</sup> See generally: Compliance Committee, Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union, (adopted on 29 June 2012) < [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece\\_mp\\_pp\\_c.1\\_2012\\_12\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece_mp_pp_c.1_2012_12_eng.pdf).>accessed 8 December 2013 ('*the Swords Decision*') and <http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html> (Annex II, Appendix I and II).

<sup>140</sup> *Ibid.*

<sup>141</sup> *Demolition Works* (n62(4)).

<sup>142</sup> the Planning and Development (Amendment) Act (n98).

<sup>143</sup> *Ibid.*

<sup>144</sup> *Wild Birds decision* (n13).

### 3. The Birds and Habitats Directives and the Irish Wind Development Market

#### 3.1. Overview

The procedures outlined in the Birds<sup>145</sup> and Habitats<sup>146</sup> Directives have become more and more relevant to the permitting procedures applied to wind developments in Ireland. Since the determination of the CJEU in 2007 that Ireland had breached both directives,<sup>147</sup> the number of areas which have been designated as subject to the protections outlined in these directives has increased.<sup>148</sup> In addition the protections themselves have been amplified. In 2011, when a large number of additional sites had been designated as 'protected',<sup>149</sup> Professor Scannell noted that approximately:

*'50 per cent of proposed wind farm projects [were] situated in areas classified as Special Conservation Areas or areas with other environmental designations'<sup>150</sup> where obtaining planning permissions is always difficult for bureaucratic and genuine environmental reasons'.<sup>151</sup>*

In January 2014, the Irish National Parks and Wildlife Service listed approximately 19,200 sq. km as designated protected areas within the Natura 2000 network.<sup>152</sup> Many of these protected sites are close to the most suitable areas for commercial wind development. For example a study undertaken in June 2014 indicates that 115 of the 587 protected Irish Natura 2000 sites are within 5 km of Irish wind turbines; and 228 of these sites are within 10 km of Irish wind turbines.<sup>153</sup> Consequently, the regulation required to ensure the protection of wild birds has increased in many of the most suitable wind development sites in Ireland. As can be imagined, this has had

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<sup>145</sup> Birds Directive (n7).

<sup>146</sup> Habitats Directive (n8).

<sup>147</sup> Wild Birds decision (n13).

<sup>148</sup> Yvonne Scannell, 'Renewable Energy Policies, Programmes and Progress in Ireland' (2011) 29 *Journal of Energy and Natural Resources Law* 2, 155-176.

<sup>149</sup> Pursuant to the Birds (n7) and Habitats (n8) Directives.

<sup>150</sup> Emphasis added.

<sup>151</sup> Scannell (n148).

<sup>152</sup> National Parks and Wildlife Service, 'Special Protection Areas' (NPWS, January 2014) <<http://www.npws.ie/protectedsites/specialprotectionareasspa/>> accessed 15 September 2014; National Parks and Wildlife Service, 'Special Areas of Conservation' (NPWS, January 2014) <<http://www.npws.ie/protectedsites/specialprotectionareasspa/>> accessed 15 September 2014.

<sup>153</sup> Colin Broderick, 'How many Natura 2000 sites are within 5-10km of Wind Turbines in Ireland?' (*Rusty's Waffle*, 10 June 2014) <<http://rustyswaffle.tumblr.com/post/86529638960/how-many-natura-2000-sites-are-within-5-10km-of-wind>> accessed 7 July 2014.



consequences for the wind development industry, which will be considered, following a brief analysis of the relevant directives.

### 3.1.1. The Birds Directive

For some time after the initiation of the European Community's environmental policy in 1972, at regional level nature's only protection was the protection offered by the directives on water and air pollution.<sup>154</sup> At this time, whether wildlife habitats were protected or traversed with new roads was essentially left open to Member States.<sup>155</sup> In 1979, however, the EU took the first step towards mitigating of Member States discretion in protecting birds and their habitats with the Birds Directive,<sup>156</sup> which obliged Member States to:

*'take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level'*<sup>157</sup>

While the Birds Directive lays down a range of measures for the protection and management of all wild birds (including measures on trade, hunting and capture of wild birds) a key element is protection of habitats.<sup>158</sup> Article 4 (1) requires Member States to classify *'the most suitable territories in number and size as Protection Areas'* for the conservation of certain species of wild birds. The relevant species for which special protection areas must be classified are:

- all those species listed in Annex I to the Directive. As stated by Conor Linehan (2005) the common factor here is that these are all species considered at any particular time to be endangered, whether in danger of extinction, or otherwise

<sup>154</sup> For an overview see: Ludwig Kramer, 'The Interdependence of Community and Member State Activity on Nature Protection within the European Community' (1993) 20 Ecology Law Quarterly 1, 25-46

<sup>155</sup> Andre Nollkaemper, 'Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests' (1997) 9 Journal of Environmental Law 2, 275.

<sup>156</sup> Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L 103/1 ('the Birds Directive 1979').

<sup>157</sup> *Ibid*, Article 2.

<sup>158</sup> Conor Linehan, 'Developments in Relation to Protected Areas' (University College Cork, 2005) < <http://www.ucc.ie/law/events/environ05papers/linehan.doc> > accessed 5 January 2014,6.

vulnerable or under threat by reason of their distribution, small population size or changes to their habitats;<sup>159</sup> and

- regularly occurring migratory species whose vulnerability and need for special protection, as Article 4(2) emphasises, derives from factors such as their breeding and moulting needs along with staging posts and migratory routes.<sup>160</sup> In this regard Member States are obliged to pay particular attention to the protection of wetlands and particularly to wetlands of international importance.<sup>161</sup>

Before the amendment of the Birds Directive by the Habitats Directive in 1992, article 4(4) required Member States *'to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting birds in so far as these would be significant having regard to the objectives of the article'*.<sup>162</sup> The initial strength of this article became evident with the decision of the CJEU in *Leybucht*<sup>163</sup> where the CJEU determined that a Special Protection Area could only be reduced in size for exceptional reasons (which were *'superior to the general interest represented by the ecological objective of the directive'*<sup>164</sup> such as the need to prevent catastrophic flooding and endangerment of human life) but not to take account of general economic or recreational requirements (such as the economic interests of fishermen).<sup>165</sup>

Following this case, commentators such as David Baldock (Institute for European Environmental Policy, London) described how:

*'Many Member States [had] been alarmed by the Court's judgment [as in] ...most parts of the Community national or regional legislation designed to protect SPAs allow[ed] a considerable degree of latitude for the authorities concerned to consider what [could] be regarded as nonessential interests when deciding on possible developments on sites.'*<sup>166</sup>

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<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> the Birds Directive (n7) article 4(2). Note: The European Communities (Conservation of Wild Birds) Regulations 1985 (S.I. 291 of 1985) designated the first four special protection areas in Ireland, the schedule of which has been amended as more special protection areas have been designated.

<sup>162</sup> the Birds Directive 1979 (n156).

<sup>163</sup> Case C-57/89 *Commission v Germany* [1991] ECR I-924 (*'Leybucht'*).

<sup>164</sup> *Ibid.*, para 22.

<sup>165</sup> *Ibid.*

<sup>166</sup> David Baldock, 'Status of Special Protection Areas for the Protection of Wild Birds' (1992) 4 *Journal of Environmental Law* 1, 139-144



In analysing the case for the *Journal of Environmental Law* in 1992, he described how Member States were then seeking to promptly amend the Directive through the Commission's proposals for a Council Directive on the protection of natural and semi-natural habitats and of wild fauna.<sup>167</sup> This plan succeeded and on 22 July 1992 the Habitats Directive was published in the Official Journal; to effectively modify the ruling of the CJEU in *Leybucht*.<sup>168</sup>

### 3.1.2. The Habitats Directive

The Habitats Directive<sup>169</sup> was designed to extend many of the principles of the Birds Directive<sup>170</sup> to a much wider range of species and habitats. Thus, one of the central requirements of the Habitats Directive is for Member States to designate Special Areas of Conservation in line with the procedures outlined in the Directive. Similar to the Birds Directive's Special Protection Areas, within the Special Areas of Conservation, conservation measures are applied to maintain or restore listed natural habitats, and/or the populations of the listed species at a favourable conservation status.

During the negotiations which preceded the finalisation of the Habitats Directive, certain Member States (including the UK) proposed amendments to explicitly amend the text of the *Birds Directive* so as to permit projects of a social and economic nature to be taken into account in considering the management of special protection areas, where an overriding public interest was concerned.<sup>171</sup> Thus, the Court's ruling in *Leybucht*<sup>172</sup> was effectively modified.

Overall, the Habitats Directive required Member States to take appropriate steps to avoid:

*'...the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far*

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<sup>167</sup> *Ibid.*

<sup>168</sup> *Leybucht* (n163).

<sup>169</sup> the Habitats Directive (n8).

<sup>170</sup> See generally: Scannell (n20) chapter 3; European Commission, 'Designation of Special Areas of Conservation' (Commission, 14 May 2012) <[http://ec.europa.eu/environment/nature/legislation/habitatsdirective/docs/commission\\_note.pdf](http://ec.europa.eu/environment/nature/legislation/habitatsdirective/docs/commission_note.pdf)> accessed 18 September 2014.

<sup>171</sup> Baldock (n166).

<sup>172</sup> *Leybucht* (163).

*as such disturbance could be significant in relation to the objectives of this Directive'*

, and thereby facilitated the creation of a coherent European ecological network of special areas of conservation under the title Natura 2000.<sup>173</sup>

The Habitats Directive foresaw this Natura 2000 network, as including sites hosting the natural habitat types listed in Annex I to the Habitats Directive<sup>174</sup> and habitats of the species listed in Annex II to the Habitats Directive as well as the Special Protection Areas designated by Member States pursuant to the Birds Directive.<sup>175</sup> The central change made by the Habitats Directive to the Birds Directive was to modify the absolutism of the protections which it afforded to wild birds by repealing the Birds Directive's original article 4(4) and replacing it with articles 6(2), 6(3) and 6(4) of the Habitats Directive.<sup>176</sup>

Consequently, (subsequent to the enactment of the Habitats Directive) a plan or project which is not directly connected with or necessary for the management of an special area of conservation or a special protection area '*but likely to have a significant effect thereon*' either individually or in combination with other plans or projects, must be made subject to an appropriate assessment. This assessment must evaluate the implications of the plan or project for the site in view of the site's conservation objectives. In the final analysis such a plan or project can only be permitted to proceed if it can be ascertained that '*it would not adversely affect the integrity of the site concerned*', or in spite of a negative assessment, if it can satisfy the requirements of article 6(4).

Article 6(4) outlines the limited circumstances in which a plan or project which was the subject of a negative assessment can be allowed to proceed. The first is where the plan or project is proposed in a protected area which does not host a priority natural habitat type and/or a priority species. In this instance where the plan or project is required for imperative reasons of overriding public interest, including those of a social or economic nature and the Member State has taken all compensatory measures necessary to ensure that the overall coherence of Natura 2000 will be protected, the plan or project can be permitted to proceed.

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<sup>173</sup> the Habitats Directive (n8) article 3.

<sup>174</sup> *Ibid.*

<sup>175</sup> the Birds Directive (n7).

<sup>176</sup> the Habitats Directive (n8), article 7.



However, in circumstances where the site in question hosts a priority natural habitat type and/or a priority species, the only considerations which can be raised to allow a plan or project to proceed are those relating to: (i) human health or public safety, (ii) beneficial consequences of primary importance for the environment or (iii) other imperative reasons of overriding public interest, further to an opinion from the Commission.<sup>177</sup> In a recent case to consider both (i) the protections to be applied to sites, proposed but not yet designated as '*protected*' pursuant to the Habitats Directive and (ii) the criteria to be applied to determine the likelihood that a proposed plan or project could adversely affect the integrity of such sites, the CJEU clarified a number of points.

It found that once a Member State has notified a candidate site (using the process outlined by the Habitats Directive),<sup>178</sup> the Directive's protections applied at least until the Commission's decision.<sup>179</sup> Moreover, the Court stressed the importance of the precautionary approach<sup>180</sup> in determining the likely effects of a proposed plan or project on a site where the affected habitat was a priority habitat type.<sup>181</sup> It held that if the competent authority concluded that:

*'the plan or project will lead to the irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site... the view should be taken that such a plan or project will adversely affect the integrity of the site... Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of*

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<sup>177</sup> See further: Case C-258/11 *Peter Sweetman v An Bord Pleanála* [2013] ECR I-0000 (not yet published) ('Sweetman [2013]').

<sup>178</sup> Habitats Directive (n8).

<sup>179</sup> Sweetman [2013] (n177) paras 46 and 39.

<sup>180</sup> Article 191(2) of the Treaty on the Functioning of the European Union (Consolidated version 2010) [2010] OJ C 83, 30.3.2010 ('TFEU') provides the current basis for this approach in relation to the environment providing that:

*'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.'* See further: Jose Luis da Cruz Vilaga, 'The Precautionary Principle in EC Law European Public Law' 10 European Public Law 2, 369-406.

<sup>181</sup> *Ibid*, para 48.

*her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs in accordance with the Directive.*<sup>182</sup>

In providing her Opinion on the case, Advocate General Sharpston had stated:

*'It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is "why was this particular site designated and what are its conservation objectives?"'*<sup>183</sup>

The complex stages involved in determining whether a plan or project, not directly connected with or necessary to the management of a Natura 2000 site, can be authorised, are summarised in the illustration provided below.

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<sup>182</sup> *Peter Sweetman v An Bord Pleanála* (n177), para 56.

<sup>183</sup> *Sweetman v An Bord Pleanála* (n177) Opinion of AG Sharpston, para. 56. Note this paragraph was cited with approval by Justice Finlay Geoghegan in the Irish High Court in *Kelly v An Bord Pleanála* [2014] IEHC 400, para 43.



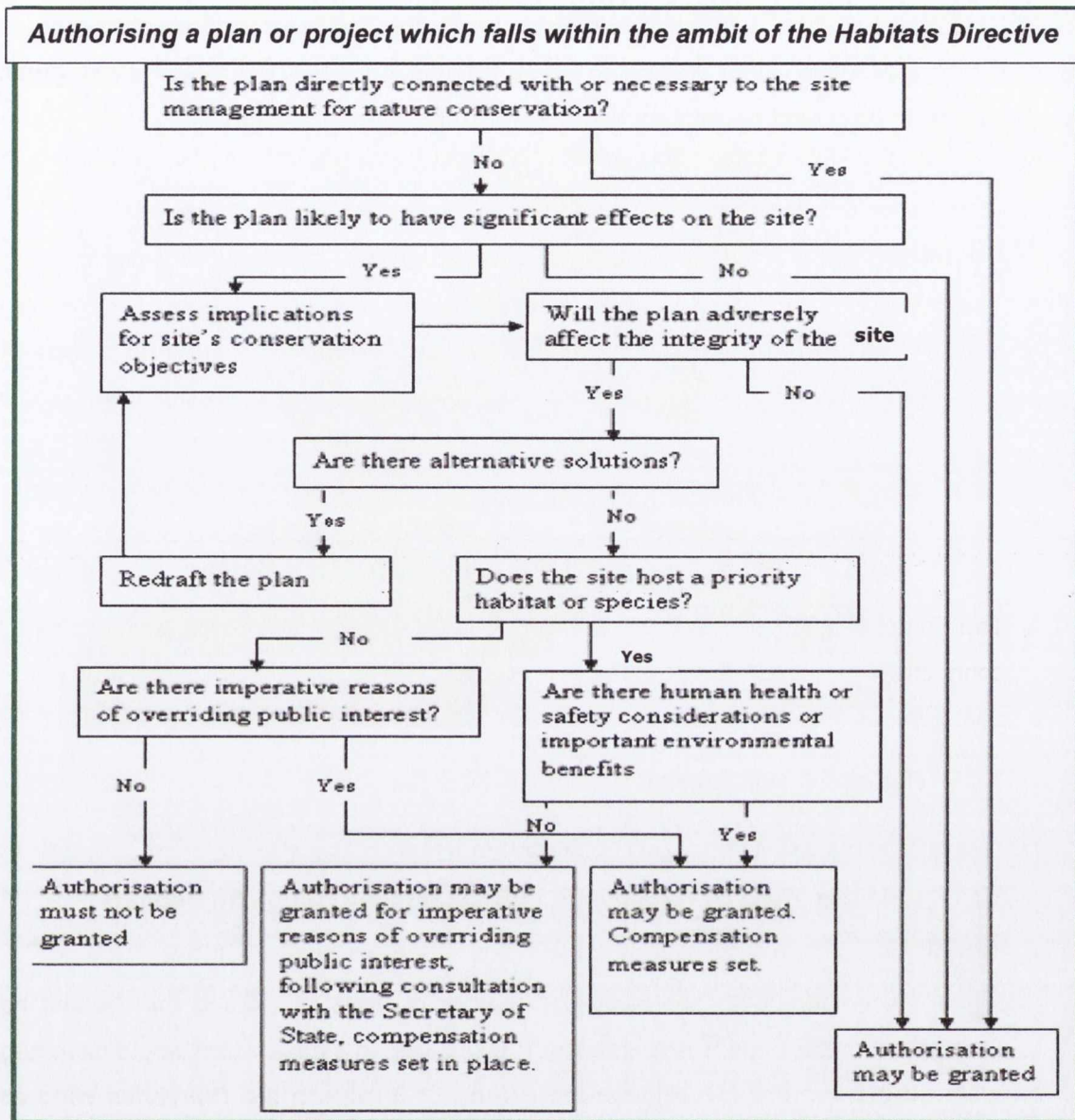


Figure 13: Appropriate Assessment Flowchart<sup>184</sup>

(Source: <http://www.newforest.gov.uk/media/articleimage/6/m/Flow1.gif>)

Following the *wild birds decision* and the addition of the hen harrier to Annex I of the Birds Directive (a relatively rare bird which is widely distributed across Ireland often with an estimated breeding population of just 128-172 pairs in Ireland)<sup>185</sup> and the

<sup>184</sup> Note: the illustration provided outlines the steps required to gaining authorisation for a project which falls within the ambit of the Habitats Directive in the UK, while the steps are largely the same in Ireland, in Ireland the authorisation would be granted for imperative reasons of overriding public interest following consultation with the Minister for the Environment, Community and Local Government rather than the Secretary of State.

<sup>185</sup> See Plan Forbio, 'Optimum scenarios for Hen Harrier conservation in Ireland' (University College Cork Online report, April 2012) <  
<http://www.ucc.ie/en/media/research/planforbio/pdfs/HEHHARRIERExecutiveSummary.pdf>>acc

designation of 6 Irish special protection areas designed for their protection (some in highly productive wind areas);<sup>186</sup> this jurisprudence has become of even greater interest to Irish wind developers and the wind development market.



**Figure 14: Hen Harrier**

(Source: <http://www.photographyireland.net/hen-harrier-t51670.html>)

### **3.2. Ireland's Wind Developments in Breach of the Birds and Habitats Directives**

On 13 December 2007, the Second Chamber of the CJEU found that Ireland had breached both the Birds<sup>187</sup> and Habitats<sup>188</sup> Directives, in a case which would have huge ripple effects for wind development in Ireland.<sup>189</sup> Similar to the *Derrybrien wind and Demolition works decisions*, the decision highlighted major deficiencies in Irish environmental and planning law relating to Ireland's compliance with the Birds and Habitats Directives (of direct relevance to wind development). Ireland had failed to classify 42 of the 140 sites identified by the Court as requiring designation as special protection areas, this fact was undisputed.<sup>190</sup>

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essed 5 January 2014. Note: in response to an email sent by the author on 15 September 2014 to ascertain if the results of University College Cork's study on the impact of wind development on hen harriers was shortly to be realised, Professor John O'Halloran stated that it was hoped that the study would be published early in 2015 but due to contractual obligations University College Cork were unable to release any information on the results of the study in the interim.

<sup>186</sup> See Broderick (n153); see also Sustainable Energy Authority of Ireland, 'SEAI Wind Atlas Mapping' (SEAI, 2014) <<http://maps.seai.ie/wind/>> accessed 5 January 2014.

<sup>187</sup> the Birds Directive (n7).

<sup>188</sup> the Habitats Directive (n8).

<sup>189</sup> *Wild Birds decision* (n13).

<sup>190</sup> *Wild Birds decision* (n13), para 75.



Following this line of reasoning, the Court determined that Ireland had failed to designate suitable sites as special protection areas to protect birds (including the kingfisher and the corncrake)<sup>191</sup> and to classify sufficient territory to protect additional named birds within Ireland's designated special protection areas. In making this decision the Court relied heavily on the *Review of Ireland's important Bird Areas* which was drawn up in 1999 and published in 2000.<sup>192</sup> The implementing measures for the Birds and Habitats Directives were found to be insufficient for failing to protect wild birds both present in areas by Ireland's designated special protection area network, and outside this network. In this regard, the Commission gave the specific example of the hen harrier (a relatively rare bird which breeds on low hills between April and August and is currently in decline, a fact which has speculatively been attributed to increased wind development in Ireland).<sup>193</sup>

The CJEU criticised the Irish measures designed to designate, and trigger protections in designated areas, (the European Communities (Natural Habitats) Regulations 1997, S.I. 94 of 1997. It noted that protections for designated sites were only activated following the issue of a notice outlining restricted activities, and that many such notices had simply not been issued.<sup>194</sup> The injunctive powers of the Minister were also condemned for becoming exercisable only after harmful activities had commenced and deterioration had occurred.<sup>195</sup> Additional criminal law provisions pleaded as sufficient to implement the Birds Directive were found to be insufficient to constitute a clear and precise implementation.

Significantly, the Irish practice of considering an environmental impact assessment as equivalent to an appropriate assessment was condemned. Here, the Court distinguished the binding nature of the appropriate assessment procedure from the non-binding nature of the environmental impact assessment procedure<sup>196</sup> to find that Ireland had authorised specific programmes (in this case aquaculture programmes) in violation of the requirements of the Birds<sup>197</sup> and Habitats<sup>198</sup> Directives. It also distinguished another major requirement of the appropriate assessment procedure that

<sup>191</sup> *Ibid*, paras. 111 (*kingfisher*) and 123 (*corncrake*).

<sup>192</sup> *Ibid*, para 54.

<sup>193</sup> Coillte, 'Hen harrier' (Coillte Webpage) <  
[http://www.coillte.ie/coillteforest/environment/nature\\_conservation/biodiversity\\_action\\_plans/hen\\_harrier/](http://www.coillte.ie/coillteforest/environment/nature_conservation/biodiversity_action_plans/hen_harrier/)> accessed 2 September 2013.

<sup>194</sup> *Wild Birds decision* (n13), para 206.

<sup>195</sup> *Ibid*, para 208.

<sup>196</sup> *Wild Birds decision* (n13), para 231.

<sup>197</sup> Birds directive (n7).

<sup>198</sup> Habitats directive (n8)



Member States take the cumulative effect of proposed plans or projects into account when determining whether they could be permitted as not adversely affecting the integrity of a designated site.<sup>199</sup> Following the case, on 10 December 2009, the Irish Department of Environment, Heritage and Local Government published Guidelines for Planning Authorities on the Appropriate Assessment of Plans and Projects<sup>200</sup> and in 2010<sup>201</sup> and 2011<sup>202</sup> legislation was enacted designed to remedy the implementation defects identified in the judgment.<sup>203</sup>

### 3.3. Direct Consequences for the Irish Wind Development Market and Irish Wind Developments

This decision placed a large proportion of Irish wind developments in a precarious situation under EU law. At the time of the *Wild Birds decision*<sup>204</sup> many productive wind sites in Ireland were situated in or near sites which should have been subject to the protections outlined in the Birds and Habitats Directives, but were not. Even before the decision of the CJEU in *Wild Birds*, a relatively high number of locations had been identified as protected sites, subject to the (albeit limited) protections afforded by national law. For instance before any remedial measures were taken to address the deficiencies identified in the *Wild Birds* case, it had been recorded that there were approximately 6 National Parks,<sup>205</sup> 78 Nature Reserves,<sup>206</sup> 7 Refuges for flora and

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<sup>199</sup> *Wild Birds decision* (n13), para 238.

<sup>200</sup> Department of Environment, Heritage and Local Government, 'Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities' (Government of Ireland, 2009) <<http://www.npws.ie/media/npws/publications/codesofpractice/AA%20Guidance%2010-12-09.pdf>> accessed 8 September 2013.

<sup>201</sup> In 2010 the Planning and Development (Amendment) Act 2010 (n98) was enacted to introduce a new Part XAB into the Planning and Development Act 2000 (n19) to substantially update Irish legislation in line with the direction of the CJEU. Amongst other changes made, it enhanced the Irish provisions on the appropriate assessment procedure, it introduced the concept of '*substitute consent*', it strengthened certain enforcement provisions and removed the possibility for developments which should have been required to undergo an environmental impact assessment/appropriate assessment to apply for retention planning

<sup>202</sup> In 2011 the European Communities (Birds and Habitats) Regulations, S.I. 477 of 2011 were enacted. These Regulations repealed the European Communities (Natural Habitats) Regulations 1997, and provided the Minister with the extensive powers to select areas as candidate special protection areas and establish conservation objectives for 'European sites', a term defined in the Regulations to include special protection areas, candidate special protection areas, special areas of conservations and candidate special areas of conservations at each phase of designation. They also provided further detail to the Irish environmental impact assessment and appropriate assessment procedures.

<sup>203</sup> *Wild Birds decision* (n13).

<sup>204</sup> *Wild Birds decision* (n13).

<sup>205</sup> Made without a legislative basis.

<sup>206</sup> Made by Establishment Order pursuant to section 15 of the Wildlife Act 1976.



fauna,<sup>207</sup> 155 National Heritage Areas, over 400 special areas of conservation<sup>208</sup> and 82 special protection areas.<sup>209</sup>

Since the *Wild Birds decision*,<sup>210</sup> this has expanded considerably. In January 2014, the National Parks and Wildlife Service reported that 140 of Ireland's 154 special protection area sites had been protected by Statutory Instrument and furthermore, it was expected that each of the sites included on the list (of special protection area sites) would be protected by Statutory Instrument in the coming months.<sup>211</sup> In addition to the increase in designated sites, Irish wind developments adjacent to these sites (which are likely to impact on the sites conservative objectives) are also considered to be subject to the requirements of the directives.<sup>212</sup> Moreover, it is established case-law that even where a Member State had failed to designate an area as a special protection area, the obligation placed on Member States to avoid pollution or disturbances affecting birds within these sites continues to apply.<sup>213</sup>

The case of *Open-Cast Mining*<sup>214</sup> provides guidance on the position and level of exposure of continuing projects (i.e. operational wind developments) permitted in violation of the Birds<sup>215</sup> and Habitats<sup>216</sup> Directives under EU law. The decision is useful for its consideration of both the requirements of the appropriate assessment procedure and the continuance of invalidly permitted projects. In considering the appropriate assessment procedure the CJEU determined that an assessment could not be considered appropriate if it contained gaps and lacked the complete, precise and definitive findings and conclusions necessary to remove all reasonable scientific doubt

<sup>207</sup> National Parks and Wildlife Service, 'Wildlife, Habitats & the Extractive Industry' (Dublin, 2010) <  
[http://www.noticenature.ie/files/Notice%20Nature%20quarry%20brochure%20web\\_1.pdf](http://www.noticenature.ie/files/Notice%20Nature%20quarry%20brochure%20web_1.pdf)>  
accessed 3 September 2013.

<sup>208</sup> Note in September 2011, it was reported by the National Parks and Wildlife Service that there were 424 special areas of conservation. See: National Parks and Wildlife Service Notice Nature, 'Special Areas of Conservation (SAC)' (NPWS, 2011) <  
[http://www.npws.ie/media/npwsie/content/files/SAC\\_datasheets\\_Sept\\_11.xls](http://www.npws.ie/media/npwsie/content/files/SAC_datasheets_Sept_11.xls)> accessed 3 September 2013.

<sup>209</sup> Note at that time it was recorded that Ireland had 153 Special Protection Areas for Birds, 82 of which have been advertised and notified in accordance with the requirements of the Birds Directive. The remaining 71 special protection area sites were to be notified during 2010. Source: National Parks and Wildlife Service, 'Special Protection Areas' (NPWS, 2014) <  
<http://www.npws.ie/protectedsites/specialprotectionareasspa/>> accessed 18 September 2014.

<sup>210</sup> *Wild Birds decision* (n13).

<sup>211</sup> National Parks and Wildlife Service (n208, n209).

<sup>212</sup> Case C-355/90, *Commission v Spain* [1993] ECR I-04221 ('*Santona Marshes*').

<sup>213</sup> *Ibid.*

<sup>214</sup> C-404/09 *European Commission v Kingdom of Spain* [2011] ECR I-11853 (*Open-Cast Mining*).

<sup>215</sup> Birds Directive (n7).

<sup>216</sup> Habitats Directive (n8).



as to the effects of the works proposed on the special protection area concerned.<sup>217</sup> (By this logic, no Irish commercial wind developments permitted before 2011 would have assessments which could be considered appropriate.)

Next the Court considered the position of the projects, focusing on their effects on the conservation objectives of the site, and on the species requiring protection. Here, the Court determined that by allowing a situation which caused significant disturbance to one of the sites in question for at least four years, Spain omitted to take in good time, the measures necessary to bring those disturbances to an end.<sup>218</sup> Drawing on this, it would appear that where an operational Irish wind development is challenged<sup>219</sup> and it can be shown that that development has caused significant disturbance to a habitat type or species or bird whose preservation would have justified the designation of a Natura 2000 site, Ireland would be legally obliged to bring the disturbance to an end in good time. This obligation '*to bring the disturbance to an end in good time*' includes the requirement '*to adopt the necessary measures to prevent the deterioration of habitats, including the habitats of species, and the disturbances caused to species*'. Accordingly, the consequences for wind developers could range from a direction to cease operating at particular times of the year, to an order for the removal of the wind development and the restoration of the site concerned.

The position under Irish law is less exposed for constructed developments. Similar to developments improperly permitted under the EIA Directive,<sup>220</sup> developments constructed in breach of the Birds<sup>221</sup> and Habitats<sup>222</sup> Directives are eligible to benefit from the seven year safety rule.<sup>223</sup> Developers can also apply to regularise developments, or be served notice to do so, following the procedures outlined for 'substitute consent'. By contrast to the procedure used for developments in breach of the EIA Directive, here the application is obliged to be accompanied by a remedial

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<sup>217</sup> *Open Cast Mining* (n214), para 100.

<sup>218</sup> *Ibid*, para. 152.

<sup>219</sup> To date, there have been just two cases (*McBride v Galway Corporation* [1998] 1 IR 185; *O'Connell v. Environmental Protection Agency* [2003] 1 IR 530) to consider whether adequate appropriate assessments were conducted within the meaning of the Birds and Habitats Directives and the transposing Irish regulations. However, as each of these have turned on the facts of the case or the factual content of the assessments conducted, they do not shed any further light on the likely judgment of the Irish courts in such a potential challenge. Note: a challenge to an operational wind farm would most likely have to also be initiated by plenary summons. See generally: n 106.

<sup>220</sup> EIA Directive (n6).

<sup>221</sup> Birds Directive (n7).

<sup>222</sup> Habitats Directive (n8).

<sup>223</sup> section 160 (6) (a) of the Irish Planning and Development Act 2000 (n19).



natura impact statement<sup>224</sup> and undergo an appropriate assessment. Similar to the procedure used for developments in breach of the EIA Directive, potential enforcement penalties against such developments are only triggered by a failure to comply with a served notice.<sup>225</sup> Accordingly, again there is little incentive for developers to draw attention to irregularities by making a voluntary application and to date, no developers have done so.<sup>226</sup>

While these developments are less exposed under Irish law, it does not alter the fact that all Irish wind developments constructed in or near special protection areas before 2011 remain vulnerable to legal challenge until they can benefit from the seven year safety rule.<sup>227</sup> Similar to developments constructed in breach of the EIA Directive,<sup>228</sup> a wind development constructed in breach of the Birds<sup>229</sup> and Habitats<sup>230</sup> Directives could also be declared unauthorised and consequently be subject to the Act's general enforcement proceedings.<sup>231</sup> In addition, if a developer fails to comply with a notice, requiring him or her to submit a remedial natura impact statement, additional enforcement penalties could be triggered.<sup>232</sup> Following the enactment of the European Communities (Environmental Liability) Regulations 2008,<sup>233</sup> developments constructed in breach of the Birds and Habitats Directive which can be shown to have knowingly or recklessly caused harm to protected species or natural habitats after 1 April 2009, can be obliged to remedy the harm caused in line with the stipulations of Ireland's Environmental Protection Agency.

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<sup>224</sup> See: Regulation 4 of the Planning and Development (Amendment) (No. 3) Regulations 2011, S.I. 476 of 2011, and the Planning and Development Act 2000, as amended (n19) section 177 G.

<sup>225</sup> the Planning and Development Act 2000, as amended (n19), section 177O

<sup>226</sup> Note: this statement is made based on searches conducted on <http://www.pleanala.ie/> on 18 September 2014.

<sup>227</sup> As provided for by section 160 (6) (a) of the Irish Planning and Development Act 2000, as amended (see n19).

<sup>228</sup> EIA Directive (n6).

<sup>229</sup> Birds Directive (n7).

<sup>230</sup> Habitats Directive (n8).

<sup>231</sup> Again this assumes that it would not be considered to fall within exceptional circumstances provided for by section 46 of the Planning and Development Act 2000 (n19).

<sup>232</sup> Planning and Development Act 2000, as amended (n19) section 177O.

<sup>233</sup> S.I. 547 of 2008.

#### 4. Overall Implications for the Future Success of Ireland's Onshore Wind Policy

The *Wild Birds*<sup>234</sup> and *Derrybrien wind*<sup>235</sup> decisions have had a large ripple effect with numerous consequences. Many Irish commercial wind developments (constructed prior to 2011) are vulnerable to legal challenge for having been constructed in breach of either of the EIA<sup>236</sup> or Birds<sup>237</sup> and Habitats<sup>238</sup> Directives. The regulation required to construct wind farms in Ireland has increased and wind development has become a less attractive prospect as growing timelines have resulted in growing costs, risk and budgetary uncertainties. As a result of the increased regulation and legal uncertainty it has become more difficult to accurately predict when a project will be completed and plan its budget accordingly.

For example, following the *Derrybrien*<sup>239</sup> and *Demolition works*<sup>240</sup> decisions the Irish planning authorities became obliged to remedy the breaches of the EIA Directive<sup>241</sup> which had occurred, to ensure that they also prepared an environmental impact statement, to consider the effects of the project in question on the environment. As the procedure no longer merely involves the submission of an environmental impact statement by the developer, but also involves the preparation of a second statement and the examination of both by the relevant authority prior to the grant of a development consent; a lot more depends on the process, which by necessity has become more time-consuming and complex.

Following the *Wild birds decision*<sup>242</sup> the time required to permit developments falling within the ambit of the Birds and Habitats Directives also increased, as the Irish government updated its permitting procedures to ensure that appropriate assessments took place where required, rather than merely accepting environmental impact assessments as sufficient to fulfil the requirements of the Birds and Habitats Directives.

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<sup>234</sup> *Wild Birds decision* (n13).

<sup>235</sup> *Derrybrien wind decision* (n9).

<sup>236</sup> EIA Directive (n6).

<sup>237</sup> Birds Directive (n7).

<sup>238</sup> Habitats Directive (n8).

<sup>239</sup> *Derrybrien Wind* (n9).

<sup>240</sup> *Demolition Works* (n62(4)).

<sup>241</sup> EIA Directive (n6).

<sup>242</sup> *Wild Birds decision* (n9).



In addition a number of final consents were stalled, as the permitting bodies sought to ensure that they had fulfilled the requirements of these directives. One clear example of this occurred on foot of Regulations 42 (2) and 42 (3) of the European Communities (Birds and Habitats) Regulations 2011, S.I. 477 of 2011.

These Regulations placed a requirement on all public authorities to carry out a screening for an appropriate assessment before consent to the project could be given. They also gave each of the public authorities involved in the permitting process the power to require a natura impact statement. As all commercial wind farms must undergo a two stage permitting procedure prior to construction (i) to obtain a planning permission from An Bord Pleanála or the local planning authority; and (ii) an Authorisation to Construct a Generating Station and a License to Generate Electricity from the Commission for Energy Regulation, some developers who had progressed through the first stage of the consent procedure faced extensive delays, as the second authority sought to ensure that appropriate assessments were conducted appropriately, where required.

In 2009 (following *the Derrybrien and the Wild birds decisions*) a report by the Irish Academy of Engineering on Irish Energy Policy highlighted some of their effects on the wind development market stating:

*'It is difficult to have any confidence in the ability of Ireland's planning, regulatory and legal framework to facilitate the delivery of new [wind] energy projects on time or on budget. Large infrastructural projects in Ireland cannot be planned and completed in a predictable economic timeframe. The risk return calculations for such projects are currently little better than a lottery...Indeed ...Ireland is viewed as a high risk location for such large scale international investment precisely because of the unpredictability of its permitting processes...'*<sup>243</sup>

*The Wild birds decision*<sup>244</sup> in particular, is also likely to affect future investment in commercial wind development. Since the decision, the appropriate assessment procedure has been implemented, protections have been strengthened, and the number of special protection areas designated in Ireland has increased considerably. This has made it more difficult for developers to secure planning permission in or near

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<sup>243</sup> The Irish Academy of Engineering (n70).

<sup>244</sup> *Wild Birds Decision* (n13).

these sites. Furthermore, following the enactment of the European Communities (Environmental Liability) Regulations 2008<sup>245</sup> it has become even less attractive to develop in or near protected sites, or continue with operations likely to affect protected species and their habitats. As discussed, these Regulations make damage caused, knowingly or recklessly, to protected species or natural habitats since 1 April 2009 an offence under Irish law, which developers will be obliged to remedy in line with the stipulations of Ireland's Environmental Protection Agency.

Partially as a result, in 2012 the number of additional Irish wind developments was the lowest since 2008<sup>246</sup> and the average wind deployment has remained below the level required to achieve the national 2020 electricity targets.<sup>247</sup> On 27 March 2013, the then Irish Minister for Communications, Energy and Natural Resources, Pat Rabbitte gave a speech which described the gap that existed between the projected 3,521 MW renewable electricity target pledged (the 40 per cent target) and the then present level of wind development (1,826.5MW)<sup>248</sup> to state:

*'In terms of the 2020 renewable electricity target, [Ireland is] 630MW behind where the National Renewable Energy Action Plan has outlined [it] should be in 2012. The target will not be achieved without an increase in wind energy build from an historic average of 180MW per year to at least 250MW per year.'*<sup>249</sup>

In 2013, Ireland missed this revised target by over 110 MW. With a successful challenge to either Ireland's national renewable energy action plan or to any of its larger commercial wind developments, the gap between these projections and the level of renewable electricity actually generated is likely to increase further. Ireland's failure to meet its renewable electricity targets is also affecting Ireland's emission levels and Ireland is now predicted to fail to meet its emission reduction targets from 2016 onward.<sup>250</sup> Moreover, as the 40 per cent renewable electricity target was originally devised as the contribution required from the electricity sector to attain Ireland's legally

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<sup>245</sup> The European Communities (Environmental Liability) Regulations 2008 (n233).

<sup>246</sup> International Energy Association (n69).

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> Pat Rabbitte, Minister for Communications, Energy and Natural Resources, Speech at the Irish Wind Energy Associations Annual Conference, Dublin, 27 March 2013.

<sup>250</sup> See: Environmental Protection Agency, 'Greenhouse gas emissions projections for the period 2010 to 2020' (Environmental Protection Agency, 14 April 2011) <<http://www.epa.ie/newsandevents/news/previous/2011/name,47795,en.html>> accessed 8 September 2013.



binding 16 per cent renewable energy target, Ireland is currently off target to reach this goal.<sup>251</sup>

## 5. Conclusion

As was discussed in chapter three, in 2010 Ireland submitted its national renewable energy action plan.<sup>252</sup> In essence this document constituted the sole comprehensive plan (required by law) to outline Ireland's renewable energy strategy up until 2020, and provide detail of Ireland's strategy to meet a legally binding target of 16 per cent in renewable energy consumption by 2020.<sup>253</sup> In it Ireland gave a political pledge to convert 40 per cent of its electricity market to onshore wind generation and indicated its willingness to become a renewable electricity exporter (either through a statistical transfer of electricity or through developing joint projects with other Member States).<sup>254</sup> However, as has been discussed in the course of this chapter and chapter three, problems are evident which threaten these ambitions, which were not taken into account when formulating the plan, and Ireland's wind policy and most of its commercial wind developments (namely those constructed before 2011) are open to legal challenge for having breached EU law.

The problems faced by the wind industry in the development market are two-fold. As outlined in chapter three, the market rests on an unsolid foundation, and no evidence can be produced to demonstrate that supporting wind is the best option for Ireland to fulfil its renewable energy obligations up to 2020. Such evidence could potentially have been gathered had the strategies outlined in Ireland's national renewable energy action plan been the subject of more deliberate focused analysis. Moreover, due to the omission of the Irish government to fully analyse the surrounding legal environment, the national renewable energy action plan did not fulfil the requirements of the SEA Directive,<sup>255</sup> leaving it vulnerable to a legal challenge seeking its revocation or suspension.

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<sup>251</sup> National renewable energy action plan (n5).

<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/0030 ('the SEA Directive').

Compounding this instability, following the *Derrybrien wind*<sup>256</sup> and *Wild birds*<sup>257</sup> decisions a large proportion of individual Irish wind developments can be identified as vulnerable to legal challenge or enforcement proceedings (for having been developed in breach of either the EIA,<sup>258</sup> or the Birds<sup>259</sup> and Habitats<sup>260</sup> Directives). In this instance a successful challenge could result in an order requiring the challenged development's removal and the restoration of the surrounding area. Alternatively compensation could be awarded. As such, Irish wind developers are in a precarious position.

Furthermore, as the regulation and the delays experienced in obtaining permits for wind developments have increased, future Irish wind development is a much less attractive prospect. The overall consequence is that Ireland is unlikely to meet its 40 per cent renewable electricity share<sup>261</sup> or attain a 16 per cent renewable energy share.<sup>262</sup> These consequences are serious (as will be considered in the course of chapter 7). While it is unclear if Irish wind development can recover in the interim, it is clear that there is a large potential for law suits.

This chapter has discussed the legal uncertainty which exists within the Irish wind development market; the level of legal exposure facing wind developments which were constructed prior to 2011; the increased regulation generally applied to wind development; and the potential for this heightened regulation to deter future wind development and impede Ireland reaching its legally binding targets. While this chapter has focused intently on the Irish wind development market (to analyse the core legal problems, known to exist in 2009 but not taken into account in the finalisation of Ireland's national renewable energy action plan), the next will analyse Ireland's regulation of the transmission market. It will build on this chapter to consider whether Ireland's recent decision to allow the ESB Group to retain ownership of the transmission system is legally permissible, why Ireland's strategy to develop onshore wind generated electricity should have influenced this decision, and to discuss why it could act as a further deterrent to the development of onshore wind generated electricity by impeding the growth of effective competition in the Irish development and (consumer) sales markets.

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<sup>256</sup> *Derrybrien Wind decision* (n9).

<sup>257</sup> *Wild Birds decision* (n13).

<sup>258</sup> EIA Directive (n6).

<sup>259</sup> Birds Directive (n7).

<sup>260</sup> Habitats Directive (n8).

<sup>261</sup> International Energy Agency (n69).

<sup>262</sup> *Ibid.*



## Chapter 5 Separation of the Irish Electricity Markets

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### 1. Introduction



As has been considered in the last chapter, large scale wind development requires early planning, large levels of investment and much market transformation to be successful. This transformation is required at each phase of electricity development, from construction of electricity generating plants, to electricity transportation (through transmission and distribution systems) to customer supply.



**Figure 15: Phases of electricity development**

While the last chapter considered the duties of the State in relation to the construction of renewable energy plants, this chapter will consider the main duty placed on the Irish State to restructure its progressive electricity markets<sup>1</sup> and in so doing to facilitate the simultaneous development and incorporation of renewable electricity into Ireland's electricity markets.

Specifically this chapter will analyse the choice taken by Ireland to fulfil its duty to separate the activities of transmission from development and supply. In so doing, the chapter will primarily focus on the separation of the transmission system from other electricity functions to consider the reasons why energy market restructuring is so important to energy markets generally and specifically to commercial onshore wind

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<sup>1</sup> Note: the phrases '*progressive electricity markets*' or '*successive electricity markets*' are used to describe the traditional electricity markets which developed to allow a state-owned entity to operate as a monopoly in an all-encompassing national energy market, where each activity relating to electricity production (from development to transmission to distribution to supply) progressed into the next.



development; the steps taken by the EU and Ireland to gradually separate transmission from other functions; and why the recent Irish decision (which was endorsed by the Commission in April 2013)<sup>2</sup> to permit the largest energy group in Ireland, the ESB group to retain ownership of the Irish transmission system (along with the distribution system) is incompatible with EU law.<sup>3</sup>

## 2. Why Restructuring Energy Markets is Important

Restructuring electricity markets is vital to the development and consumption of renewable energy, and the reduction of emissions. As will be considered below, the traditional market structures which developed in Ireland and across mainland Europe, prior to EU intervention were not designed to foster competition (necessary to encourage new renewable energy developers to enter the market) or energy efficiency.<sup>4</sup> Moreover, due to the inefficiencies of these traditional market structures, infrastructure suffered<sup>5</sup> as the market evolved to support conventional energy resources which were centralised and did not require the levels of investment necessary for renewable intermittent energy (which is typically constructed in remote locations, and requires interconnection for its successful incorporation).<sup>6</sup>

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<sup>2</sup> European Commission, 'Commission Decision of 12.4.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC –Ireland–Eirgrid / ESB' [2013] C(2013) 2169 final ('the Commission Decision on Ireland's Exemption from the Third Liberalisation Directive').

<sup>3</sup> Note: As will be discussed in chapter 7 this decision could be the subject of an article 259 TFEU infringement procedure, however, it is important to note that it could also be subject to judicial review by the CJEU as part of an article 263 TFEU challenge on 'grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of powers.' It is not unheard of for such measures to be annulled; in fact in a study conducted by Takis Tridimas and Gabriel Gari it was found that between 2000 and 2005, 16 measures adopted by the Commission were annulled and 16 further measures were partially annulled leading the authors to the conclusion that 'the overwhelming majority of actions for judicial review initiated before the ECJ were aimed at controlling the validity of measures adopted by the Commission, in particular, Commission decisions.' See: Takis Tridimas and Gabriel Gari, 'Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)' (2010) 35 *European Law Review* 2, 131-173.

<sup>4</sup> As noted by Professor Cameron, the advantages associated with competition include: allocative efficiency; innovation; cost reduction and progress. See Peter Cameron, *Competition in Energy Markets Law and Regulation in the European Union* (2<sup>nd</sup> edn, Oxford University Press, 2007) 5.

<sup>5</sup> A problem recognised by the Commission in the proposal which led to the third liberalisation directive. See: European Commission, 'Proposal for a Council Directive concerning common rules for the internal market in electricity, proposal for a Council Directive concerning common rules for the internal market in natural gas' [1992] COM(91) 548 final, 7.

<sup>6</sup> As outlined by Paul Gorecki, 'The Internal EU Electricity Market: Implications for Ireland' (2011) (Economic and Social Research Institute, 2011) ESRI Research Series 23.



Consequently, although EU level restructuring of electricity markets is mainly concerned with the 'completion of the internal energy market',<sup>7</sup> the restructuring of electricity markets is also vital to renewable energy development, both to attract renewable developers to national markets and to restructure markets to successfully incorporate the clean energy generated. Thus, Ireland's strategy to develop onshore wind generated electricity should have influenced the choice taken by the Irish government on how best to separate its transmission system from the activities of generation and supply.

However, onshore wind development was not mentioned in the decision-making documents (which were made public),<sup>8</sup> which preceded Ireland's decision to apply for an exemption to permit the ESB group to retain ownership of the transmission system. Furthermore, the duty to separate the transmission system from the activities of generation and supply (and the decision as to how best to do so), was not discussed as relevant to onshore wind development in any of the policy documents to discuss

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*'Interconnection and wind generated electricity complement each other. This reflects the fact that wind is a variable source of electricity generation. If the wind speed is too low or too high wind cannot be used to generate electricity, in the latter case for safety reasons (EirGrid, 2009b, p. 16). Furthermore, when the wind does generate electricity in Ireland, the wind pattern tends to be similar across the island (ibid, p. 16). As a result, if there is no wind generated electricity in (say) the southwest due to wind speed it is unlikely to be offset by wind generating electricity in another part of Ireland. Thus, the higher the level of wind generated electricity, the greater the requirement for back-up generation capacity for when the wind speed is too low or too high. This is expensive: electricity available at short notice often is high cost and less efficient. Interconnection is one method of resolving this dilemma, since electricity can be imported from Great Britain and beyond when the wind does not blow or blows too hard. Furthermore, interconnection has an added advantage. When wind generated electricity's share of all electricity reaches certain limits it is curtailed off the system. With interconnection this surplus can be exported.'* Note: In this study it was estimated that additional interconnector capacity of between 1,000MW and 3,000MW over and above Ireland's existing Moyle interconnector and the East West Interconnector would be needed to successfully incorporate wind energy and lower the price of electricity in Ireland.

<sup>7</sup> Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1996] OJ 27/20 ('the first liberalisation directive') recital 2.

<sup>8</sup> Frontier Economics, 'Transmission Asset Analysis, Report prepared for the Minister for Communications, Energy and Natural Resources' (Frontier Economics London, January 2011) <<http://www.dcenr.gov.ie/NR/rdonlyres/7781AA66-9ED5-468C-995C-4340900B1597/0/FrontierReportonElectricityTransmissionAssetsPublished.pdf> > accessed 1 December 2014; LECG, 'Implementing the Third Energy Directive in Ireland' (LEGC: London, 23 April 2010) <<http://www.esbesop.ie/ESB%20ESOP%20Final%20Report%20Apr10.pdf> > accessed 8 July 2014.



Ireland's onshore wind strategy.<sup>9</sup> Nevertheless, the duty is of particular importance to onshore wind development as the smooth incorporation of onshore wind generated electricity requires a radical overhaul of traditional market structures. This is because of the nature of electricity and the market structures which evolved prior to EU intervention, which will briefly be reconsidered below.

Electricity has a number of unique characteristics which makes it a very distinct market. These are as follows. The electricity sector is investment intensive, discouraging the entry of new competitors. Electricity cannot be stored and so it must be managed to ensure that supply matches demand at all times. Electricity is dangerous and so it requires high levels of regulation to guarantee its safe supply. The production of electricity involves activities which develop in successive phases (generation or production; followed by transmission,<sup>10</sup> distribution<sup>11</sup> and supply) and only certain parts of the electricity market (i.e. generation and sale) are profitable.<sup>12</sup> Consequently due to these features, national European electricity markets originally developed as progressive monopolies on vertically integrated lines, where a state-owned entity operated as a monopoly in each of the progressive markets, from generation to transmission to distribution to supply.<sup>13</sup> The premise of this traditional market model was neatly summarised by Professor Peter Cameron as follows:

*'[t]he activities of all ... participants were guided by a single basic idea: large power stations generate electricity in large quantities and deliver it by wire to*

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<sup>9</sup> See further: chapters 2 and 3.

<sup>10</sup> Transmission was defined as: *'the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply'* in Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ 5 L 211/5 ('the third liberalisation directive'). However, the distinction between transmission and distribution has been made more clear in Irish documents such as 'Grid 25' wherein transmission was described in the following terms: *'The bulk transmission system, comprising circuits at 220 kV or higher, represents the motorways and dual carriageways of the electricity transport system.'* Source: EirGrid, 'Grid 25. A Strategy for developing Ireland's Electricity Grid for a Sustainable and Competitive Future' (Dublin, 2009) <<http://www.eirgrid.com/media/Grid%2025.pdf>> accessed 17 September 2014.

<sup>11</sup> Distribution was defined in the third liberalisation directive (n8) as: *'the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply'*.

<sup>12</sup> Carlos Padros and Endrius Cocciolo, 'Security of Energy Supply: When Could National Policy Take Precedence Over European Law' (2010) 31 Energy Law Journal 1, 32.

<sup>13</sup> Christopher Jones (ed.) *EU Energy Law Volume I The Internal Energy Market The Third Liberalisation Package* (3rd edn, Claeys & Casteels, 2010). See also: Cameron (n4) 7.



*every user in the area, continuously adjusting the total amount being generated to match the total amount being used at any instant.*<sup>14</sup>

This traditional market model posed two major problems. The first was that it was recognised that if it were left untouched it would impede the eventual realisation of a single energy market.<sup>15</sup> The second connected problem was that by its nature this model forecloses markets to competition (thereby preventing renewable energy development) and further precludes the development of sufficient levels of infrastructure to incorporate any renewable electricity generated. This is because vertically integrated undertakings have little incentive to invest in new transmission infrastructure (which, as has been previously discussed, is vital to the successful incorporation of intermittent renewable energy such as onshore wind), as increased transmission capacity could allow generators from neighbouring countries or distant areas to compete with generators owned by the vertically integrated undertaking.<sup>16</sup>

Moreover, apart from flat refusal, vertically integrated undertakings can use a wide variety of tactics to hinder access by competing generators to the network and limit competition. They can impose discriminatory requirements. They can cross-subsidise their generated activities and recover their losses from high transmission fees; they can charge unreasonably high access and service fees; they can give commercially valuable inside information to their affiliated generators.<sup>17</sup>

As noted by Professor Kim Talus in 2006:

*'the energy sector is a network dependent sector where the control of the transmission system means control of virtually the entire market. In order to have an effectively functioning internal market for electricity, positive action is necessary. This means in addition to abolishing import and export barriers, it is*

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<sup>14</sup> Peter Cameron (n4) 7.

<sup>15</sup> Leigh Hancher, 'Delimitation of Energy Law Jurisdiction: the EU and its Member States: From Organisational to Regulatory Conflicts' (1998) 16 *Journal of Energy and Natural Resources Law*, 45.

<sup>16</sup> European Commission DG Competition, 'DG competition report on energy sector inquiry' [2007] SEC (2006) 1724.

<sup>17</sup> Silvester Van Koten and Andreas Ortmann, 'The unbundling regime for electricity utilities in the EU: A case of legislative and regulatory capture?' (2008) 30 *Energy Economics*, 3128-3140.

*necessary to provide free access to the network by all eligible parties, and ...to have sufficient interconnector capacity available'.<sup>18</sup>*

In the context of the internal energy market, the test for 'control' is as follows:

*'Control shall be constituted by 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;(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking'.<sup>19</sup>*

As one of the important features of the electricity market is that the network is a natural monopoly, the primary concern that market liberalisation seeks to address is that the network operator will use its network monopoly position to offer preferential terms to its own service provider, foreclosing rivals access and distorting competition<sup>20</sup> by using any of the tactics previously discussed. While general competition rules may be better suited to prevent State owned companies from excluding competitors from markets where competition is freely attainable and sustainable, they cannot prevent a State owned company's exclusionary behaviour where entry barriers are high, which is the case of the natural monopoly in the electricity sector.<sup>21</sup> As outlined by Dr Vassiliki Koumpli:

*'[sector specific rules for the liberalisation of the electricity market] ...aim at removing barriers to entry to the market and to the free choice and switch of supplier (ex ante regulation), whereas competition law applies to ensure that state barriers that are being removed by the Electricity Directives are not replaced by the anti-competitive behaviour of market operators (ex post regulation).<sup>22</sup>*

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<sup>18</sup> Kim Talus, 'First Interpretation of Energy Market Directives by the European Court of Justice – Case C-14/03, Vereniging voor Energie' (2006) 24 Journal of Energy and Natural Resources Law 1, 40.

<sup>19</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

<sup>20</sup> Vassiliki Koumpli, 'Competition Rules or Sector Specific Regulation for the Liberalisation of the European Electricity Markets? With Reference to the English, Greek and German Third Party Access Regimes' (2007) 25 Journal of Energy and Natural Resources Law 2, 172.

<sup>21</sup> *Ibid*, 173.

<sup>22</sup> Vassiliki Koumpli (n20) 172.



The successful operation of both *ex ante* and *ex post* regulation are essential to the development and incorporation of renewable electricity into national energy markets. To effect significant *ex ante* regulation in the electricity sector and thereby foster competition in the market, there are three recognised models of ownership unbundling which are designed to separate transmission and generation from other activities. An overview of these is as follows. The first is administrative unbundling (or Chinese walls) where all parties involved keep separate accounts for network management on the one hand and for commercial activities in the sphere of generation and supply on the other. The second is legal unbundling where network management and commercial activities are placed in separate legal bodies. The third, which is the most far-reaching, is ownership unbundling, where a separate company to that which manages the commercial activities, owns the shares in the network manager – and thus controls the network management.<sup>23</sup>

In seeking to employ these *ex ante* methods to gradually introduce competition to national electricity markets through the adoption of its first,<sup>24</sup> second<sup>25</sup> and third liberalisation directives<sup>26</sup> the EU is working under the assumption that the introduction of competition to electricity markets and the completion of the internal energy market will lead to reduced energy costs and a greater security of energy supply to the direct benefit of individual consumers,<sup>27</sup> and the removal of barriers to intra-Community trade, allowing new competitors (particularly renewable energy developers) to enter national markets.<sup>28</sup>

### **3. A Case in Point: Electricity Supply Board Dominance in the Irish National Electricity Market**

The Irish electricity market is a prime example of an electricity market which developed as a progressive monopoly where a state owned, vertically integrated undertaking, the Electricity Supply Board (ESB) held a dominant position in each segment of the

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<sup>23</sup> Barbara Baarsma, Michiel de Nooij, Weero Koster and Cecilia van der Weijden, 'Divide and rule. The economic and legal implications of the proposed ownership unbundling of distribution and supply companies in the Dutch electricity sector' (2007) 35 Energy Policy, 1785-1794.

<sup>24</sup> the first liberalisation directive (n7).

<sup>25</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC OJ [2003] L 176/37 ('the second liberalisation directive').

<sup>26</sup> the third liberalisation directive (n10).

<sup>27</sup> European Commission, 'The Internal Energy Market' [1988] COM (88) 238 final.

<sup>28</sup> See generally: Christopher Jones (n13) 1-14.



market. ESB's market dominance began in 1927 with the enactment of the Electricity Supply Act 1927<sup>29</sup> which established the ESB as a corporate body to control and develop Ireland's electricity network.<sup>30</sup> At that time:

*'more than 300 different suppliers were concerned with generating and supplying electricity in different parts of the country, including 16 local authorities and five major companies'.<sup>31</sup>*

All of these were incorporated into or supplanted by the ESB. From 1927 to 1999 the ESB group had a statutory monopoly of the transmission, distribution and sale of electricity to the Irish public. Moreover, by 1999 the ESB had successfully acquired virtually all plants generating electricity in Ireland. During this time the ESB had the sole power to make orders affecting market participants and to issue permits to those wishing to generate, distribute and supply electricity. As a result entry to the generation market was effectively foreclosed.<sup>32</sup>

In addition to having no competitors in each of these markets, the ESB had further disincentives to efficient operation. Section 21(2) of the Electricity Supply Act<sup>33</sup> required the ESB to operate on a break even basis and as the ESB's operations were and continue to be regulated by specific Acts of the Oireachtas, it was obligatory for proposals for price increases to be pre-approved by the Government. In January 1995 the Minister for Transport Energy and Communications told the Dail that an ESB application for a price increase had been with the Department for seven years.<sup>34</sup>

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<sup>29</sup> Electricity (Supply) Act 1927, Number 27 of 1927.

<sup>30</sup> *Note:* The ESB is a state owned enterprise, majority owned by the Irish government with the Minister for Finance and the Minister for Communications, Energy and Natural Resources holding 85 per cent and 10 per cent respectively of ESB's issued share capital. The remaining 5 per cent is of issued share capital is owned by an Employee Share Ownership Trust (ESOP).

<sup>31</sup> Electricity Supply Board, 'Foundation of the ESB' (ESB, 2012) <<http://www.esb.ie/main/about-esb/foundation-of-esb.jsp>> accessed 8 July 2013.

<sup>32</sup> Competition Authority, 'Discussion Paper No. 3. Proposals for the Electricity Supply Industry in Ireland: Comments on the Consultation Paper published by the Department of Transport, Energy and Communications' (Competition Authority, November 1997) <[http://www.tca.ie/images/uploaded/documents/Discussion\\_Paper\\_3.pdf](http://www.tca.ie/images/uploaded/documents/Discussion_Paper_3.pdf)> accessed 8 July 2012, 9.

<sup>33</sup> Electricity (Supply) Act 1927 (n29).

<sup>34</sup> On 21 February 1995 in response to the questions 'Will the Minister confirm that he has received an application for an increase in electricity charges to householders and industry? Has he made a decision on whether to grant that price increase sought by the ESB?' Minister Lowry stated 'An application for a price increase has been with my Department for more than seven years. No decision will be taken on price increases until the necessary restructuring and rationalisation of the ESB has been undertaken. Considerable progress has been made. There is tremendous co-operation between management, workforce, unions and my Department. I would like to bring it forward as soon as possible. However, it is important not to have a time-



While figures on the levels of investment made in infrastructure during ESB's monopoly years are not publically available,<sup>35</sup> it is generally accepted that little investment was made during this time; a fact which is supported by the levels of investment now required (estimated to be approximately €4 billion between now and 2025)<sup>36</sup> and the power cuts in rural areas which were a regular occurrence of the 80s and 90s.

The initial problem with applying the Treaty rules on free movement and undistorted competition to the electricity sector (and electricity markets such as Ireland's) was that the Treaties left considerable scope to the Member States to determine how to organise this sector.<sup>37</sup> This was in part because of Article 345 TFEU<sup>38</sup> (formerly Article 295 EC and, before that, Article 222 EEC) which states that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership. It was also because of article 106 (1) TFEU<sup>39</sup> (formerly Article 86(1) EC and before that article 90(1) EC) whereby Member States are permitted to confer exclusive and special rights on undertakings as long as those rights are not in breach of the Treaty rules on free movement and competition.<sup>40</sup>

However, notwithstanding these provisions, during the late 1980s and 1990s the Commission began to challenge the existence of monopolies (similar to the ESB) and the exclusive rights which had been granted to them on the grounds that they made the existence of a European market for these goods impossible.<sup>41</sup> In 1991, in a challenge to a Commission decision in *French Republic v the Commission*<sup>42</sup> the Court

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*scale but to allow the meaningful discussions which have taken place to continue until they reach a satisfactory conclusion'. Source: Houses of the Oireachtas, 'Dail Debates Ceisteanna—Questions. Oral Answers. - National Energy Policy. Tuesday, 21 February 1995', Dail Eireann Debate 449(4), 871.*

<sup>35</sup> Various representatives of ESB were contacted during 2014 to gain specific figures on investment during this period but to date the information has not been released.

<sup>36</sup> EirGrid (n10).

<sup>37</sup> Leigh Hancher (n15) 46.

<sup>38</sup> Article 191(1) Treaty on the Functioning of the European Union (Consolidated version 2010) [2010] OJ C 83, 30.3.2010 ('TFEU').

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Christopher Jones (n13) 2. See further: Case C-157/94 *Commission of the European Communities v Kingdom of the Netherlands* [1997] ECR I-05699; Case C-158/94 *Commission of the European Communities v the Italian Republic* [1997] ECR I-05789; Case C160/94 *Commission of the European Communities v the Kingdom of Spain* [1997] ECR I-05851.

<sup>42</sup> Case C-202/88 *French Republic v Commission of the European Communities* [1991] ECR I-01223.

held that the conferral of exclusive rights and not just their exercise could be subject to judicial review<sup>43</sup> stating:

*'The fact that Article 90(1) of the Treaty presupposes the existence of undertakings which have special or exclusive rights cannot be construed as meaning that such rights are necessarily compatible with the Treaty. They must be assessed in relation to different rules of the Treaty to which Article 90(1) refers.'*<sup>44</sup>

Following a certain degree of legal uncertainty as to the extent of Member State powers to structure their electricity sectors,<sup>45</sup> in 1989 Member States took to the negotiating table to agree on the text of a Directive requiring progressive market opening in the electricity sector.<sup>46</sup> The final result was Directive 96/92/EC,<sup>47</sup> the first liberalisation directive which officially came into effect on 1 February 1997, with the majority of Member States given until 1 February 1998 to implement its measures.<sup>48</sup>

### **3.1. The First Liberalisation Directive and the Irish Electricity Market**

The proposal which preceded this directive identified certain barriers to the completion of the internal market. In most Member States the arrival of new entrants to the electricity industry was obstructed. The prevailing relationships between production, transmission, distribution and supply did not allow anything more than limited competition. Undertakings did not face competition in their markets and so continued to act as monopolists. Electricity infrastructures and network interconnectors were frequently insufficient, impeding economically justified trade.<sup>49</sup>

The first liberalisation directive was to be a first step towards solving these problems. Overall it aimed to stimulate competition in electricity supply in three main ways. First, it required Member States to open up the generation markets to competition fully

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<sup>43</sup> Leigh Hancher, 'European Energy Market – Rhetoric or Reality?' (1990) 11 *Energy Law Journal*, 229.

<sup>44</sup> *French Republic v Commission* (n42) para 2.

<sup>45</sup> *Ibid.*

<sup>46</sup> Leigh Hancher, 'Slow and Steady Wins the Race: Europe's Long March to Electricity Market Liberalization' (1997) *The Electricity Journal* November, 95.

<sup>47</sup> the first liberalisation directive (n7).

<sup>48</sup> *Ibid.*

<sup>49</sup> European Commission, 'Proposal for a Council Directive concerning common rules for the internal market in electricity, proposal for a Council Directive concerning common rules for the internal market in natural gas' [1991] COM(91) 548 final, 7.



(using an authorisation procedure); or partially by allowing participants to tender where new capacity was required (using a tendering procedure).<sup>50</sup> Second, it required a certain degree of management and accounting unbundling of the various functions that had traditionally been performed by vertically integrated undertakings. Third, it required some form of grid access for third parties or 'eligible customers'. Member States were permitted to choose between three different options to provide grid access which were outlined in articles 17 (regulated access) and 18 (single buyer and single buyer with buy-back option) of the Directive.<sup>51</sup> However, as noted by Professor Hancher, ultimately the provisions on access merely gave participants the right to negotiated access rather than a right to access as such.<sup>52</sup>

In addition to its central requirements, the first liberalisation directive contained a number of other notable provisions. It required a partial supply market opening (i.e. the largest consumers were to be given the right to choose supplier),<sup>53</sup> separation (or unbundling) and transparency of accounts<sup>54</sup> and national regulation of electricity markets.<sup>55</sup> It also permitted Member States to require the system operator to give priority to generators producing renewable electricity when determining which generators to dispatch.<sup>56</sup>

Under the provisions of the first liberalisation directive, Ireland was granted an additional year within which to transpose the Directive. Ireland's transposing act, the Electricity Regulation Act 1999<sup>57</sup> was brought into force on the 14 July 1999.<sup>58</sup> It created the Irish regulator for electricity, the Commission for Electricity Regulation (now known as the Commission for Energy Regulation) to undertake a number of advisory functions under the control of the Minister for Public Enterprise:<sup>59</sup> to grant or refuse to

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<sup>50</sup> See: Leigh Hancher (n46). To paraphrase Professor Hancher, the latter option had flaws in that where this option was chosen the relevant authorities were required to arrange a form of tendering procedure in which would-be suppliers could compete to build the necessary additional capacity. Important matters such as how 'new' capacity was to be defined and who was to make the determination were not dealt with. This was an unfortunate omission because the Directive could be interpreted as allowing a Single Buyer in a Member State or the entity responsible for power procurement and/or transmission system operation to carry out both tasks.

<sup>51</sup> Leigh Hancher (n15) 52.

<sup>52</sup> *Ibid.*

<sup>53</sup> the first liberalisation directive (n7) article 19.

<sup>54</sup> *Ibid.*, article 14(3).

<sup>55</sup> *Ibid.*, article 22.

<sup>56</sup> *Ibid.*, article 8(3).

<sup>57</sup> Electricity Regulation Act 1999, Number 23 of 1999 (as amended)

<sup>58</sup> Electricity Regulation Act 1999 (Commencement) Order 1999 (SI Number 213 of 1999).

<sup>59</sup> Electricity Regulation Act 1999 (n57) sections 8 and 9.

grant licenses to electricity companies seeking to supply or generate electricity,<sup>60</sup> to modify any licenses granted,<sup>61</sup> to determine the customers who would be eligible to choose their supplier of electricity (from 19 February 2000),<sup>62</sup> to examine ESB's proposed charges for final customers, their underlying costs and to issue directions to ESB in relation to the nature or amount of any charge.<sup>63</sup>

A second piece of Irish legislation, the European Communities (Internal Market in Electricity) Regulations 2000,<sup>64</sup> was also enacted to fully transpose the first liberalisation directive.<sup>65</sup> The European Communities (Internal Market in Electricity) Regulations 2000 came into effect on 1 July 2006. These Regulations required integrated electricity companies to keep separate accounts for their generation, transmission, distribution and supply activities (and where appropriate, consolidated accounts for other, non-electricity related activities) with a view to avoiding discrimination, cross-subsidisation and distortion of competition.<sup>66</sup> The ESB was also required to designate a division to act as distribution system operator.<sup>67</sup>

The Regulations contained far-reaching provisions in relation to the operation of the transmission system. Although ESB was to retain ownership of the transmission system and responsibility for maintenance and construction work, an independent transmission system operator (known as EirGrid) was to be licensed. This independent entity was to operate, maintain and develop the electricity transmission system and to explore and develop opportunities for interconnection with other systems, with the relationship governed by an Infrastructure Agreement.<sup>68</sup> This Agreement was to be put in place no later than six months following the making of the Regulations (or if so requested at a later date as requested by the Commission for Energy Regulation).

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<sup>60</sup> *Ibid*, section 14.

<sup>61</sup> *Ibid*, sections 19 and 20.

<sup>62</sup> *Ibid*, sections 27, 28.

<sup>63</sup> *Ibid*, section 34.

<sup>64</sup> European Communities (Internal Market in Electricity) Regulations, 2000, SI Number 445 of 2000.

<sup>65</sup> the first liberalisation directive (n7).

<sup>66</sup> European Communities (Internal Market in Electricity) Regulations, 2000 (n64) regulation 27(2).

<sup>67</sup> *Ibid*, regulation 22(1)(a).

<sup>68</sup> *Ibid*, regulation 18.



The Regulations also placed two important obligations on the ESB: 'to refrain from discriminating unfairly between persons or classes of persons, or between system users or classes of system users, particularly in favour of its subsidiaries, associated or affiliated undertakings, joint ventures or shareholders',<sup>69</sup> and 'preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its functions under these Regulations unless required to disclose such information in accordance with the law'.<sup>70</sup>

Despite the expectation that the Infrastructure Agreement would be in place not later than 6 months after the making of the European Communities (Internal Market in Electricity) Regulations, 2000 the Infrastructure Agreement was not finalised until 2006.<sup>71</sup> This was due to the protracted and entrenched nature of the negotiations between the ESB group, EirGrid (the transmission system operator) and the Commission for Energy Regulation on the division of responsibilities between the ESB group and EirGrid.<sup>72</sup> One of the most contested responsibilities was who would ultimately be responsible for review of any construction undertaken (project review).<sup>73</sup> Following threatened legal action,<sup>74</sup> much negotiation<sup>75</sup> and a compromise reached on the morning allocated for the hearing,<sup>76</sup> this was eventually allocated to EirGrid.

Under the finalised Infrastructure Agreement<sup>77</sup> (as shown in the table below) EirGrid was solely responsible for feasibility studies, developing an indicative programme for project stages, obtaining planning permissions and project review. The ESB group and EirGrid shared joint responsibility for conducting the preliminary work for procurement and the issue of declarations of fitness and the commission and hand-over of projects.

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<sup>69</sup> *Ibid*, regulation 20

<sup>70</sup> *Ibid*, regulation 21.

<sup>71</sup> Commission for Energy Regulation 'TSO Licences' (Commission for Energy Regulation, 2006)<[www.cer.ie/en/electricity-transmission-network-licences.aspX](http://www.cer.ie/en/electricity-transmission-network-licences.aspX)>accessed: 8 July 2013.

<sup>72</sup> See: Arthur Beesley, 'Electricity reserve may run short next winter, warns EirGrid' *Irish Times* (Dublin, 17 February 2001) 17; Arthur Beesley, 'Regulator Takes Eirgrid to Court' *Irish Times* (Dublin, 28 January 2002) 14; Arthur Beesley, 'Demands on stock values by ESB staff' *Irish Times* (Dublin, 11 July 2001) 15; Arthur Beesley, 'EirGrid faces legal threat on ESB role' *Irish Times* (Dublin, 19 December 2001); 19; Arthur Beesley, 'Regulator takes EirGrid to court' *Irish Times* (Dublin, 28 January 2002) 14.

<sup>73</sup> *Ibid*.

<sup>74</sup> *EirGrid v Commission for Energy Regulation* 2002/80 JR.

<sup>75</sup> Mary Carolan and Una McCaffrey, 'Energy regulator and EirGrid reach settlement' *Irish Times* (Dublin, 16 Oct 2002) 17.

<sup>76</sup> *Ibid*.

<sup>77</sup> ESB and Eirgrid Infrastructure Agreement (16 March 2006)<<http://www.cer.ie/GetAttachment.aspx?id=5e99e283-ba62-4709-ac96-8b91ef749da7>>accessed 8 July 2013.

The ESB group was solely responsible for the detailed design of projects to develop the transmission system, specification of the construction to be undertaken and the construction itself.

	Stage	Party Responsible
1.	<b>Conduct planning/feasibility studies</b>	Transmission System Operator (EirGrid)
2.	<b>Develop indicative programme for project stages</b>	Transmission System Operator (EirGrid)
3.	<b>Advance to planning permission</b>	Transmission System Operator (EirGrid)
4.	<b>Preliminary work for procurement</b>	Transmission System Operator and/or Transmission Asset Owner (EirGrid & ESB Group)
5.	<b>Prepare project detailed design and specification</b>	Transmission Asset Owner (ESB Group)
6.	<b>Construct project</b>	Transmission Asset Owner (ESB Group)
7.	<b>Project review</b>	Transmission System Operator (EirGrid)
8.	<b>Issue declaration of fitness, commission and hand-over</b>	Transmission Asset Owner and/or Transmission System Operator (ESB Group/& EirGrid)

**Figure 16: Table of division of responsibilities between ESB and EirGrid following the first liberalisation directive**

Bearing the legal test for control in mind as:

*'constituted by 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;(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking',<sup>78</sup>*

<sup>78</sup> Council Regulation (EC) No 139/2004 (n19).



it could not be said that the ESB group had relinquished control of the transmission system at this time.

Unsurprisingly Ireland's implementing measures were heavily criticised by various parties. In 2013 Professor Talus described them as '*a virtual spearhead of liberalization of the electricity sector*'.<sup>79</sup> In an earlier critique of the failure of this system to deliver competition or efficiency, John Evans (speaking on behalf of the Irish Competition Authority) stated:

*'On the one hand, we are denied the efficiency gains that a regulated vertically integrated monopoly electricity utility can potentially deliver. On the other hand, we are denied the benefits that effective competition can deliver. Instead, because of the manner in which the Directive has been implemented, we have a regulated, nominally vertically separated, dominant undertaking which brings none of the proven benefits of competition but which costs, apart from the efficiency losses associated with separation, additional wasted resources in terms of the increased regulatory burden.'*<sup>80</sup>

There were two reasons for his criticism. The first was that despite the introduction of both the Electricity Regulation Act 1999<sup>81</sup> and the European Communities (Internal Market in Electricity) Regulations, 2000<sup>82</sup> ESB continued to dominate the generation market. The second was that due to the ineffectiveness of the Directive's provisions, it remained difficult for competitors (both in Ireland and abroad) to obtain access to the distribution and transmission systems.<sup>83</sup> As part of his speech John Evans noted that ESB maintained between 85 and 90 per cent of installed generation capacity in the State. While certain commitments had been made to shed generation capacity, ESB was under no legal obligation to do so. Moreover he noted that there had been only two new additions to generating capacity in the relevant period and of these one was a 70/30 venture between ESB and Statoil.<sup>84</sup>

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<sup>79</sup> Kim Talus, *EU Energy Law and Policy A Critical Account* (1<sup>st</sup> edn, Oxford University Press, 2013) 34.

<sup>80</sup> John Evans 'Competition Authority Policy and Enforcement in the Irish Electricity Sector: Implications of Recent Market Developments' (Speech to the SMi Energy Conference, 27 November 2003), 6.

<sup>81</sup> Electricity Regulation Act 1999 (n57).

<sup>82</sup> the European Communities (Internal Market in Electricity) Regulations, 2000 (n64).

<sup>83</sup> Leigh Hancher (n15) 52.

<sup>84</sup> Note: The ESB/ Statoil arrangement was the subject of an investigation by the Commission and the Commission for Energy Regulation in 2002 where the Commission considered whether the creation of a joint venture with Statoil would remove Statoil as a potential competitor from

### 3.2. The Second Liberalisation Directive<sup>85</sup> and the Irish Electricity Market

At a European level, the first liberalisation directive was recognised to have had limited success in introducing any meaningful level of competition to electricity markets. In 1998 Professor Hancher predicted that the first liberalisation directive would more than likely fail to stimulate competition, partially due to the broad provisions of the Directive and partially due to avoidance by particular Member States, stating:

*'[t]he new Electricity Directive is a framework in the loosest sense of the word: its objectives are laid down in very general terminology and moreover, Member States are given a substantial degree of choice in how they go about introducing more competition into their electricity markets. Indeed that margin is so substantial that it would seem possible for the determined anti-market countries to avoid introducing any meaningful degree of competition at all'.<sup>86</sup>*

The first directive had always been intended to operate as a framework directive and so in 2001 the Commission introduced proposals for a second liberalisation directive. This repealed the first liberalisation directive and was enacted in 2003, with an Irish implementation deadline of 1 July 2007.<sup>87</sup> The second liberalisation directive considerably strengthened the business separation requirements of its predecessor. It required Member States to ensure that a transmission system operator (which was part of a vertically integrated undertaking) was independent in terms of its legal form, organisation and decision-making from activities not related to transmission.<sup>88</sup> An identical provision was to be applied to any national distribution system operator, which was part of a vertically integrated undertaking.<sup>89</sup> While these obligations strengthened the unbundling requirements of the first liberalisation directive they were somewhat weakened by the clarification which followed that:

*'[t]hese rules shall not create an obligation to separate the ownership of assets ...from the vertically integrated undertaking'.<sup>90</sup>*

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the Irish market. A number of commitments were given by both parties to address the Commission's concerns. See: Peter Cameron (n4) 312.

<sup>85</sup> the second liberalisation directive (n25).

<sup>86</sup> Leigh Hancher (n15) 51.

<sup>87</sup> Note: Some provisions were to be implemented by 2004.

<sup>88</sup> the second liberalisation directive (n25) article 10(1).

<sup>89</sup> *Ibid*, article 15(1).

<sup>90</sup> *Ibid*, articles 10(1) and 15(1).



In addition to the strengthened unbundling requirements, Member States were to designate one or more regulatory bodies (to be wholly independent from the electricity industry) to ensure non-discrimination, effective competition and the efficient functioning of the market.<sup>91</sup> Access to transmission and distribution systems was now to be based on published tariffs, applicable to all eligible parties and applied objectively without discrimination between system users.<sup>92</sup> Regulatory bodies were to be wholly independent from the interests of the electricity industry and to particularly monitor listed matters such as: the level of market competition and transparency; the terms, conditions and tariffs for connecting new producers of electricity to guarantee that these were objective, transparent and non-discriminatory; and the time taken by distribution and transmission undertakings to make connections and repairs.<sup>93</sup>

Further market opening was also required by the second liberalisation directive.<sup>94</sup> From 1 July 2004, all non-household customers were to be free to choose a supplier. From 1 July 2007, all household customers were to be free to choose a supplier. In addition, Regulation 1228/2003<sup>95</sup> was enacted to further support the development of competition, by regulating the compensation/charges to be paid to transmission system operators for hosting electricity generated in other Member States and transported over their networks.<sup>96</sup> In Ireland, the Directive was implemented by the European Communities (Internal Market in Electricity) Regulations 2005<sup>97</sup> and the European Communities (Internal Market in Electricity) Regulations 2006.<sup>98</sup>

These Regulations required significant structural changes to ESB to ensure the protection of commercially sensitive information obtained by the transmission system operator or distribution system operator in the exercise of their functions. These changes were effected through the establishment of ESB Networks as a separate entity from ESB Customer Supply (to act as distribution system operator and

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<sup>91</sup> *Ibid*, article 23(1)

<sup>92</sup> *Ibid*, article 20

<sup>93</sup> *Ibid*, article 23.

<sup>94</sup> *Ibid*.

<sup>95</sup> Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L 176/1.

<sup>96</sup> This was implemented in Ireland by the European Communities (Cross Border Electricity Network Access) Regulations 2005, S.I. 287 of 2005.

<sup>97</sup> European Communities (Internal Market in Electricity) Regulations 2005, S.I. 60 of 2005.

<sup>98</sup> European Communities (Internal Market in Electricity) Regulations 2006, S.I. 524 of 2006.



distribution asset owner)<sup>99</sup> and the ring-fencing of operations relating to data management and central registration of market participants.<sup>100</sup> The Regulations also provided for a strengthening of the powers of the regulator, the enhancement of security of supply provisions and better levels of consumer protection. Consumer protection was to be particularly targeted by the licensing of a Public Electricity Supplier to meet all reasonable requests to supply electricity, and a Supplier of Last Resort to supply electricity to customers who were originally supplied by a supplier, who for some reason could no longer supply customers, or following a direction from the Commission for Energy Regulation to the Supplier of Last Resort.<sup>101</sup>

The first Public Electricity Supplier licence was granted to ESB Customer Supply in 2006. As no expressions of interest were received for the role of Supplier of Last Resort, at the end of 2005 ESB Customer Supply was also designated as Supplier of Last Resort. Consequently, the ESB group became responsible for offering electricity to customers who were not invited to become customers by other suppliers and for supplying customers of other licensed suppliers where they were unwilling or unable to discharge their contractual obligations. By this time, the market had been fully opened to competition in that all customers could freely choose a supplier<sup>102</sup> and the power of the Commission for Energy Regulation to examine and issue directions as to the ESB group's proposed tariffs for final customers and their underlying costs was updated to reflect ESB's position as Public Electricity Supplier.<sup>103</sup>

In 2006, the government published a green paper,<sup>104</sup> which reviewed the operation of the Irish energy market. It was acknowledged that as a small market subject to scale restrictions; with limited interconnection, limited supplies of indigenous fuel resources, and environmental and policy considerations limiting the generation fuel mix available, Ireland was not a prime location for energy related investment. Options for the future direction of the market were also considered. In summary, the paper considered the

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<sup>99</sup> European Communities (Internal Market in Electricity) Regulations 2005 (n97) regulation 10.

<sup>100</sup> Commission for Energy Regulation, 'Governance Procedures for the Liberalised Retail Electricity Market A Consultation Paper' CER/05/040 (Commission for Energy Regulation, 9 March 2005) <<http://www.cer.ie/docs/000357/cer05040.pdf>> accessed 23 February 2014.

<sup>101</sup> European Communities (Internal Market in Electricity) Regulations 2005 (n97).

<sup>102</sup> S.I. 623 of 2003 Electricity Regulation Act 1999 (Eligible Customer) (Consumption of Electricity) Order 2003.

<sup>103</sup> The European Communities (Internal Market in Electricity) Regulations 2005 (n97) regulation 3.

<sup>104</sup> Department of Communications, Marine and Natural Resources, 'Towards a Sustainable Energy Future for Ireland' (Government of Ireland, 2006) <<http://www.dcenr.gov.ie/NR/rdonlyres/54C78A1E-4E96-4E28-A77A-3226220DF2FC/30378/EnergyGreenPaper1October2006.pdf>> 6 June 2012.



splitting up of the ESB group's generating plants; the establishment of a state owned land-bank of current and potential generating sites to incentivise the development of new generation capacity; the benefits of interconnection and network unbundling. It identified economic competitiveness, security of supply and environmental sustainability as three pillars of Irish energy policy which could only be achieved by the development of a competitive electricity market.<sup>105</sup>

More interesting than the green paper, however, was the response it elicited from the Irish Competition Authority,<sup>106</sup> in which the Competition Authority urged the Government to commit to structural reform of the electricity sector by (i) splitting ESB generation into a number of competing groups of electricity plants, (ii) taking the ownership of Ireland's electricity grid away from the ESB group and (iii) promoting competitive outcomes in the design of all-island wholesale market structures. The Competition Authority repeated and confirmed the government's assertion that Ireland was not an attractive location for investment in energy, or in energy-intensive industries and stressed that this could only be addressed by structural solutions stating that:

*[Structural solutions] are the best way of ensuring a competitive energy market in Ireland. Approaches which do not provide for structural separation will be sub-optimal and will fail to address the problems correctly identified by the Government in the Green Paper.*<sup>107</sup>

In its assessment it also identified the Irish electricity trading system, which existed at the time, as a barrier to market entry. This has since been addressed. At that time though, the market operated at two levels. In the primary market generators could directly negotiate bi-lateral contracts with suppliers. This was supported by a secondary imbalance market, to trade out any discrepancies between electricity supply and demand which occurred outside of the bilateral contracts. However, it was replaced on 1 November 2007 with the Single Electricity Market,<sup>108</sup> which will briefly be described below.

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<sup>105</sup> *Ibid.*

<sup>106</sup> Competition Authority, 'Towards an Energy Future for Ireland Submission to the Department of Communications, Marine and Natural Resources' Submission S/06/009 (Competition Authority, 1 December 2006) <[http://www.tca.ie/images/uploaded/documents/S\\_06\\_009%20Energy%20Green%20Paper.pdf](http://www.tca.ie/images/uploaded/documents/S_06_009%20Energy%20Green%20Paper.pdf)> accessed 23 February 2014.

<sup>107</sup> *Ibid.*, 5.

<sup>108</sup> All Island Project, 'The Single Electricity Market' (All Island Project, 16 June 2012) <[http://www.allislandproject.org/en/SEM\\_overview.aspx](http://www.allislandproject.org/en/SEM_overview.aspx)> accessed 1 March 2014.

The Single Electricity Market operates as a gross mandatory pool market or spot market, into which all electricity generated on or imported onto the island of Ireland (including Northern Ireland) must be sold, and from which all wholesale electricity for consumption on or export from the island of Ireland must be purchased.<sup>109</sup> Generators bid into the market for their scheduled dispatch quantities, with the cheapest possible generators run to meet demand across the island. Generators also receive separate payments for the provision of available generation capacity through a capacity payment mechanism and constraint payments for differences between the market schedule and the system dispatch. Suppliers (to electricity customers) purchasing energy from the pool pay the system marginal price<sup>110</sup> for each trading period along with capacity costs and systems charges,<sup>111</sup> as can be seen in the illustration below.

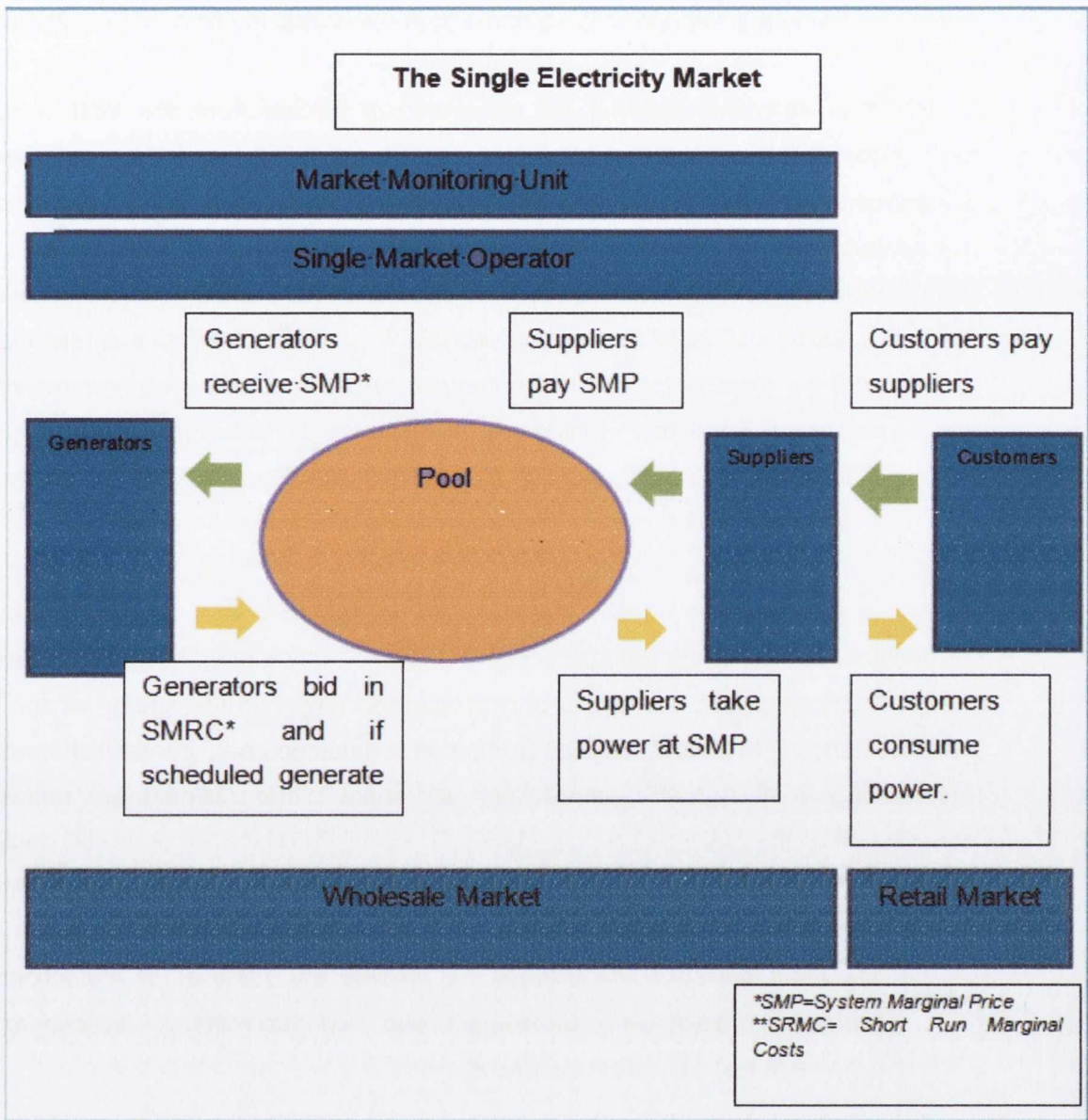
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<sup>109</sup> See: Electricity Regulation (Amendment) (Single Electricity Market) Act 2007, Number 5 of 2007.

<sup>110</sup> The System Marginal Price (SMP) is defined in the Trading and Settlement Code as the price at which one MWh of electricity is sold under the Code in any given Trading Period, as calculated in accordance with Sections 4, 5 and 6 of the Code. See: Utility Regulator and Commission for Energy Regulation, 'The Single Electricity Market (SEM) Trading and Settlement Code Version 2.0' (SEMO, 31 May 2007) AIP/SEM/07/224.

<sup>111</sup> Commission for Energy Regulation, 'Annual Report 2009' (Commission for Energy Regulation, 2009) CER/11013, 33.





**Figure 17: The operation of the Single Electricity Market<sup>112</sup>**

Although the establishment of the Single Electricity Market has increased transparency and market access by breaking the link between generation and supply, in 2006 (prior to its launch) it was acknowledged that the Single Electricity Market could *'not on its own address the problems of sole or joint dominance'*.<sup>113</sup>

<sup>112</sup> *Ibid.*

<sup>113</sup> Competition Authority (n106) 7.

In relation to separation of transmission responsibilities between the ESB Group and EirGrid, the Competition Authority agreed with an assessment given by Deloitte that:

*'It is important that the full separation of EirGrid from the ESB Group is completed as soon as possible. The delays in full separation have had a negative effect on the perceptions of market participants and investors in the operation of the Irish electricity sector... Only a truly independent TSO [transmission system operator] or, for that matter, DSO [distribution system operator] will send the correct signals to potential market entrants that all generating plant[s] will be treated equally, as the motivation for discriminating in favour of incumbent generators is removed by structural measures, and investment is incentivised. If the system operator remains linked to the incumbent power provider, this has a chilling effect on the market.'*<sup>114</sup>

Overall, the second liberalisation directive was not regarded as a success in bringing competition to the energy markets of the EU and in 2007 Competition Commissioner Neelie Kroes described the results of a competition report on the energy sector<sup>115</sup> as 'disappointing'.<sup>116</sup> In Ireland the ESB Group had maintained an 83 per cent share of the generation market in 2005<sup>117</sup> and 53 per cent share of the business and residential sub-sectors of the customer supply market.<sup>118</sup> As such Ireland, in particular could be identified as a Member State which had confirmed Dr Koumpli's assertion in 2007 that:

*'the main goals of liberalisation as regards the removal of restrictions on competition, such as ...transparent and non-discriminatory access to the network [were]... far from being achieved.'*<sup>119</sup>

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<sup>114</sup> *Ibid*, 25.

<sup>115</sup> Commission DG Competition (n16). See also: Patrick Ryan, 'A Re-energised Approach to a Competitive European Electricity Market' (2009) 27 *Journal of Energy and Natural Resources Law* 1, 49.

<sup>116</sup> Neelie Kroes, 'More competitive energy markets: building on the findings of the sector inquiry to shape the right policy solutions' (Neelie Kroes, Speech 07/04 given on 10 January 2007) <[http://ec.europa.eu/commission\\_barroso/kroes/speeches\\_en.html](http://ec.europa.eu/commission_barroso/kroes/speeches_en.html)> accessed 17 July 2014.

<sup>117</sup> Department of Enterprise, Trade and Employment, 'Irish Electricity Market Principal Challenges Discussion Paper' (Government of Ireland, 15 April 2005) <<http://www.djei.ie/publications/trade/2005/electricitymarket.pdf>> accessed 1 September 2014.

<sup>118</sup> ESB, 'Annual Report 2006' (ESB, 2006)<<http://www.esb.ie/main/about-esb/annual-report-2006.jsp>> accessed 17 July 2014.

<sup>119</sup> Vassiliki Koumpli (n20).



### 3.3. The Third Liberalisation Directive and the Irish National Electricity Market

#### 3.3.1. An Assessment of the Irish Electricity Market as it existed in 2009

Prior to the publication of the third liberalisation directive in the Official Journal on 14 August 2009, the Irish national electricity market had undergone significant change. This 'progressive' market (which had consisted of the generation, transmission, distribution and retail markets, with each market progressing into the next) had been separated in four. In 1999, a regulator, the Commission for Energy Regulation, had been appointed to preside over these markets.<sup>120</sup> An interconnector, the Moyle interconnector (comprising converter stations at Co. Antrim and Ayrshire, Scotland and undersea and underground electric lines to connect the Northern Ireland and UK electrical transmission systems) had been operational since 2002, adding a further potential 400 MW to the Irish electricity system.<sup>121</sup>

The Single Electricity Market, a new system for trading and sale of wholesale electricity had been established, which had been praised by the presiding Commissioner for Energy, Andris Piebalgs as '*a significant contribution to the construction of the internal energy market.*'<sup>122</sup> EirGrid had been appointed as transmission system operator and the ESB group had been the subject of a number of regulatory decisions and structural changes designed to reduce their market dominance and introduce transparency to the national market. For example: ESB had been divided into heavily ring-fenced business units including: ESB Power Generation, ESB Networks (which owned, but did not operate the transmission network and was both distribution network owner and operator), and ESB Customer Supply.<sup>123</sup>

By 2009, some competition had been introduced to the generation and retail markets. Eight competitors had entered the generation market where the ESB group owned 50 per cent of the dispatchable generation assets<sup>124</sup> and controlled approximately 40 per

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<sup>120</sup> Electricity Regulation Act 1999 (n57) section 9.

<sup>121</sup> Laura Malaguzzi Valeri, 'Welfare and competition effects of electricity interconnection between Ireland and Great Britain' (ESRI, 26 November 2008) ESRI Research Series 232. Note: at the end of 2012, an East West electricity interconnector also went live adding a further potential 500 MW to the Irish electricity system.

<sup>122</sup> Paul Conlon, 'The Integration of Electricity Markets in Ireland under the ISO Model' (ESB International, 8 February 2010) <<http://www.esbi.ie/news/pdf/White-Paper-Integration-Electricity-Markets.pdf>> accessed 1 March 2014.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

cent of the market.<sup>125</sup> A significant reduction in the ESB group's generation market share had been achieved through the finalisation of an *Asset Management Agreement* made between the Commission for Energy Regulation and the ESB Group on 27 April 2007.<sup>126</sup> In this agreement the ESB Group agreed to: (i) sell 208MW of peaking capacity, (ii) close or divest 1,300 MW of existing power plant and (iii) sell generation sites at Shannonbridge and Lanesboro and further generation sites with capacity of 1,000 MW.<sup>127</sup>

Competition had also been introduced to the four Irish retail markets (consisting of the domestic market for householders, the large energy user group, medium sized energy user market and the small business market). However, although almost 500,000 domestic electricity customers had switched from ESB Customer Supply to either Airtricity or Bord Gáis, ESB Customer Supply still held approximately 77 per cent of the domestic electricity market in February 2009.<sup>128</sup> In 2013, the ESB Group still held 63.24 per cent of the customer market.<sup>129</sup>

Consequently, despite the introduction of a small level of competition, the Irish retail and generation markets could hardly have been called '*effectively competitive*' in the lead up to publication of the third electricity directive in the official journal. To explain why requires a succinct analysis of the meaning of the term '*effectively competitive*' when considered in relation to electricity markets. As this thesis is concerned with competition in the generation and supply markets, these markets will be the focus of this brief consideration.

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<sup>125</sup> See: Competition Authority, 'Competition in the Electricity Sector' (Competition Authority, December 2010) < <http://per.gov.ie/wp-content/uploads/Document-112-7-12-10.pdf> > accessed 1 March 2014.

<sup>126</sup> Commission for Energy Regulation and ESB Asset Strategy Agreement (27 April 2007) <<http://www.cer.ie/GetAttachment.aspx?id=84559ccb-ad26-4da1-aea4-179d920a61bf>>accessed 8 July 2012

<sup>127</sup> *Ibid.* For details of how this was achieved see further: Commission for Energy Regulation '2008 Regulator's Annual Report to the European Commission' (Commission for Energy Regulation, September 2009) CER/09/161.

<sup>128</sup> Energy Solutions, 'Competition in Ireland's Electricity Market' (Energy Solutions, 16 June 2010) < [http://www.energysolutions.ie/Competition\\_in\\_Ireland%E2%80%99s\\_Electricity\\_Market/Default.443.html](http://www.energysolutions.ie/Competition_in_Ireland%E2%80%99s_Electricity_Market/Default.443.html) > accessed 17 July 2014.

<sup>129</sup> Commission for Energy Regulation, 'Electricity & Gas Retail Markets Report Q3 2013' (Commission for Energy Regulation, 2014) CER/14/043, <<http://www.cer.ie/docs/000646/CER14043%20Q3%202013%20Retail%20Market%20Report.pdf>> accessed 22 December 2014.



Generally speaking, when examining levels of competition in a particular market, the definition of the relevant market (in terms of product and geography) is important. Market definition in Ireland is relatively straightforward. Electricity is the product market as electricity has no real substitute. For instance electricity alone can produce conventional lighting.<sup>130</sup> Moreover, due to the small and isolated nature of the Irish electricity market, the relevant geographic market continues to be the island of Ireland.<sup>131</sup> (This assertion is in line with earlier Commission decisions on the geographical scope of electricity markets.)<sup>132</sup>

As discussed, the product market can be further sub-divided. In this chapter we are concerned with two markets. The first, the development/ generation market, has been determined by the Commission to 'cover the production of electricity at power stations and the import of electricity through interconnectors for purpose of resale to retailers or, to a lesser extent, directly to large industrial end-users'.<sup>133</sup> When analysing whether operators have market power giving them scope to influence prices, the Commission looked in particular at two specific products (one year forward products and day ahead products) sold on power exchanges and brokers' platforms since they provide the main public price indicators in electricity markets.<sup>134</sup>

As these markets are complicated debate surrounds the market percentage which signals market dominance in the generation market or a:

*'...position of economic strength... which ... [would enable an undertaking] to prevent effective competition being maintained... by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers'.<sup>135</sup>*

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<sup>130</sup> Emmanuel Cabau 'The Relevant Product Market – Electricity' in Christopher Jones (ed.) *EU Energy Law Volume II. EU Competition Law and Energy Markets* (3<sup>rd</sup> edition, Claeys & Casteels, 2011).

<sup>131</sup> This is since the introduction of the Single Electricity Market in 2007.

<sup>132</sup> *Grupo VillarMir/ENbw/Hidroelectrica del Cantabrico* (Case COMP/M.2434) Commission Decision 2004/135/EC, [2004] OJ L 48/86; *EDP/ENI/GDP* (Case COMP/M.3440) Commission Decision 2005/801/EC, [2005] OJ L302/69, Recital 77.

<sup>133</sup> See: *EDP/ENI/GDP* (Case COMP/M.3440) Commission Decision 2004/C 209/6 [2004] OJ C 209/06; *E.ON/MOL* (COMP/M.3696); *EdF/AEM/Edison* (COMP/M.3729); *Vattenfall/Elsam and Energi E2* (COMP/M.3867). See further: European Commission Competition DG, 'DG Competition Report on Energy Sector Inquiry 10 January 2007' Sec (2006) 1724.

<sup>134</sup> European Commission Competition DG (n133).

<sup>135</sup> See further: Case 27/76 *United Brands Company and United Brands Continentaal v Commission* [1978] ECR 207, paragraph 65; Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, paragraph 38.



In general competition law terms, the Commission has stated that its experience suggests that dominance is not likely if the undertaking's market share is below 40 per cent in the relevant market.<sup>136</sup> However, in electricity markets detailed and complex analysis is required which takes additional factors into account, such as a plant's ability to set the wholesale price, the number of players in the market and the level of concentration in the market.<sup>137</sup> Moreover, if using percentage thresholds to determine dominance, past experience indicates that lower thresholds may be more appropriate to determine dominance in the electricity generation market. One of the reasons identified for the Californian energy crisis was the use of a 20 per cent market share threshold as evidence that a generator lacked 'market dominance' in the generation market.<sup>138</sup> This was a value which was argued to be too high to determine dominance in the generation market<sup>139</sup> for the reasons outlined by Diana Moss below:

*'Electricity is a virtually nonstorable commodity, the demand for which must be continuously matched with supply to ensure reliability. Demand varies significantly over a typical day and year producing a potentially large number of time-differentiated product markets. There may be significant incentives to exercise market power during peak periods when transmission constraints bind and generating resources are scarce but little or none during off-peak periods when neither condition holds. Market power therefore can be exercised for fleeting periods, but with significant adverse effects on consumers'.<sup>140</sup>*

In addition, despite the generous support schemes which had been put in place, in 2009, renewable energy constituted just 4.9 per cent of final consumption in the country,<sup>141</sup> potential further proof of the limited competition in the Irish generation market and the existence or perception of market barriers to new entrants.

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<sup>136</sup> European Commission, 'Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009) OJ C045/7.

<sup>137</sup> European Commission Competition DG (n133).

<sup>138</sup> Diana Moss, 'Electricity and Market Power: Current Issues for Restructuring Markets (A Survey)' (2006) 1 Environmental and Energy Law & Policy Journal 11, 17.

<sup>139</sup> Timothy Duane, 'Regulation's Rationale: Learning from the California Energy Crisis' [2003] 19 Yale Journal on Regulation 471, 514.

<sup>140</sup> Diana Moss (n138) 18.

<sup>141</sup> Sustainable Energy Authority of Ireland, 'Energy in Ireland 1990-2009, 2010 Report' (SEAI, Dublin, 3 December 2010) <[http://www.seai.ie/Publications/Statistics\\_Publications/Energy\\_in\\_Ireland/Energy\\_in\\_Ireland\\_1990-2009.pdf](http://www.seai.ie/Publications/Statistics_Publications/Energy_in_Ireland/Energy_in_Ireland_1990-2009.pdf)> accessed 1 March 2014.



The percentage thresholds advocated for application to the electricity supply market also vary,<sup>142</sup> an alternative method often used by the Commission to measure competition in the supply market has been to determine how concentrated a particular market is on the Herfindahl-Hirschman Index.<sup>143</sup> In addition in this market, the Commission has indicated that as well as considering the number of customers contracted to a particular supplier it is also important to look at the length of the particular contract. In using the Herfindahl-Hirschman Index as an indicator, the Irish customer supply markets have consistently been found to be *'highly concentrated'*.<sup>144</sup> (This market will be considered in more detail in chapter 6). It was against this backdrop that the third liberalisation directive was enacted with its central goal of *'improving and integrating competitive electricity markets in the Community'*.<sup>145</sup>

### 3.3.2. The Third Liberalisation Directive

As was discussed by Emmanuel Cabau (Senior Policy Officer at the European Commission) at the time of the second liberalisation directive, there was already a general recognition that the full separation of transmission from the activities of retail and generation was required to ensure that the network was operated in a manner likely to promote a competitive market.<sup>146</sup> However, this was not proposed at the time for two reasons. At the time this would not have been acceptable to all or even a qualified majority of Member States. Second it was felt that until all other options had been tried and demonstrated to be inadequate, such a drastic measure might be in breach of the principles of subsidiarity and proportionality as going beyond what was demonstrably necessary to achieve its stated aim.<sup>147</sup>

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<sup>142</sup> In Ireland the threshold used by the Irish Commission for Energy Regulation in relation to the customer supply market was 60 per cent. See: Commission for Energy Regulation, 'Deregulation of Domestic Market Decision' (CER/11/041, 4 March 2011). This is very different to the 40 per cent threshold generally used by the Commission.

<sup>143</sup> European Commission, 'Energy Markets in the European Union in 2011' [2011] Staff Working Document SWD(2012) 368 final, 81. As outlined on page 81 of the Staff Working Document: 'The HHI (Herfindahl-Hirschman Index) is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers (the higher the index, the more concentrated the market)'.

<sup>144</sup> Christopher Jones (ed.) *EU Energy Law Volume II. EU Competition Law and Energy Markets* (3<sup>rd</sup> edition, Claeys & Casteels, 2011).

<sup>145</sup> The Third Liberalisation Directive (n10) article 1.

<sup>146</sup> Emmanuel Cabau 'Unbundling of Transmission System Operators' in Christopher Jones (n13), 91.

<sup>147</sup> *Ibid.* Note: EU interference with property rights in breach of these principles could more easily be challenged as being in breach of article 345 TFEU (n38) (formerly Article 295 EC and,

In considering the issues which remained following the first and second liberalisation directives, it was determined that legal unbundling did not suppress the conflict of interest that stems from vertical integration. With legal unbundling there is a strong risk that networks will still be seen as strategic assets serving the commercial interests of the integrated entity, not the overall interests of network customers<sup>148</sup> as:

*'a company that remains vertically integrated has an in-built incentive both to under-invest in new networks (fearing that such investments would help competitors to thrive in "its" home market) and - wherever possible - to privilege its own sales companies when it comes to network access. This damages the EU's competitiveness and its security of supply and prejudices the attainment of its climate change and environmental objectives.'*<sup>149</sup>

In the Impact Assessment conducted by the Commission in support of further liberalisation of the electricity sector, the Commission concluded that the inherent conflict of interest which existed in vertically integrated companies in command of national transmission systems was almost impossible to control by regulatory means, and impossible to monitor without excessively burdensome and intrusive regulation.<sup>150</sup> It therefore considered more effective market separation was needed and a legislative proposal was made with two options for further market separation in September 2007.<sup>151</sup>

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before that, Article 222 EEC). As will be recalled this article states that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

<sup>148</sup> *Ibid*, 91.

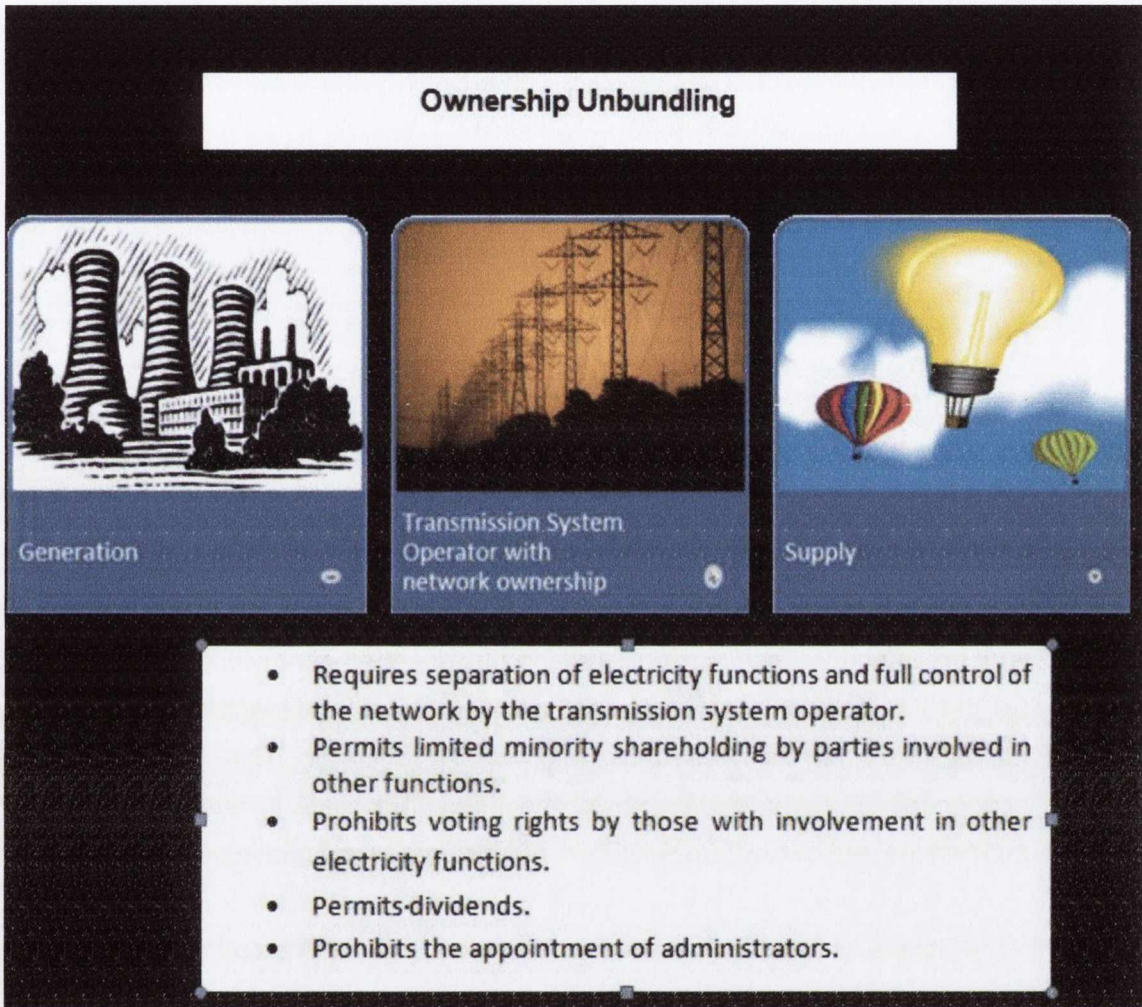
<sup>149</sup> European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity', COM (2007) 528 final, 5.

<sup>150</sup> European Commission, 'Commission Staff Working Document Accompanying the Legislative Package on the Internal Market for Electricity and Gas. Impact Assessment,' COM(2007) 528 final, COM (2007) 529 final, COM(2007) 530 final, COM (2007) 531 final, COM(2007) 532 final, SEC (2007) 1180, 32,74 ('*the Impact Assessment*').

<sup>151</sup> Cabau 'Unbundling of Transmission System Operators' in Christopher Jones (n13), 92.



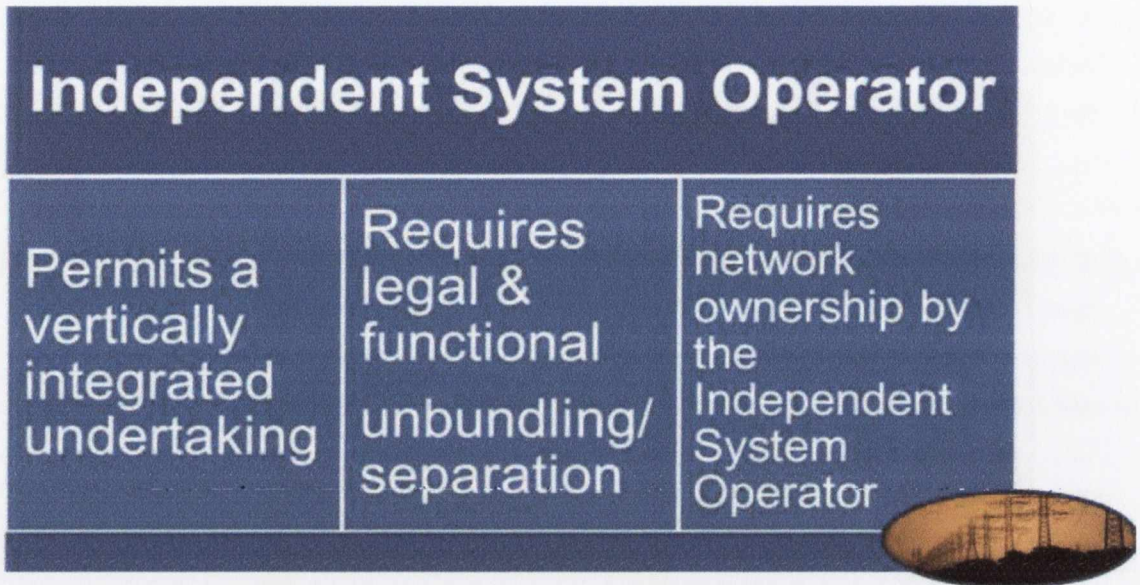
### 3.3.2.1. Ownership Unbundling



**Figure 18: Snapshot of ownership unbundling**

The first option outlined was ownership unbundling which required the separation of the ownership of the transmission system from any supply and generation activities. The above chart evolved from Emmanuel Cabau's extremely useful overview of the unbundling options, to provide a quick snapshot of the requirements of full ownership unbundling.

### 3.3.2.2. Independent System Operator



**Figure 19: Snapshot of Independent System Operator option**

The second option is known as the Independent System Operator, which enables vertically integrated companies to retain the ownership of network assets but requires that the transmission network itself is managed by an Independent System Operator that performs all the functions of a network operator. This model requires the Independent System Operator to be independent at least in terms of its legal form, organisation and decision making from other activities not relating to transmission.

In the course of negotiations within the Council, two further options were added: the Independent Transmission Operator option and the option to be exempted from the unbundling requirements.<sup>152</sup>

<sup>152</sup> Cabau 'Unbundling of Transmission System Operators' in Christopher Jones (n13), 93, 104.  
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3.3.2.3. The Independent Transmission Operator option

Independent Transmission Operator		
Permits a vertically integrated undertaking	Requires a supervisory body, autonomy, independent management, a compliance officer and investments	Requires network management by the Independent Transmission Operator

Figure 20: Snapshot of Independent Transmission Operator option

The Independent Transmission Operator option was added to allow transmission system operators to remain part of integrated undertaking provided they fulfilled detailed rules on autonomy, independence and investment. This option allows the supplier and the network operator to remain within the same company group but requires it to own the network and requires compliance with strong rules to guarantee its independence. According to the Directive in order to qualify for the Independent Transmission Operator or Independent System Operator options the transmission system must have belonged to a vertically integrated undertaking on the 3 September 2009 and so it is not possible to reverse a situation where there had been ownership unbundling to avail of the Independent Transmission Operator or Independent System Operator options.<sup>153</sup>

<sup>153</sup> European Commission, 'Commission Staff Working Paper. Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas. The Unbundling Regime', (Commission, 22 January 2010) <[http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/implementation\\_notes/2010\\_01\\_21\\_the\\_unbundling\\_regime.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_unbundling_regime.pdf)> accessed: 6 June 2012. Note: On 13 October 2014, the Commission published its Report on the ITO Model, as it was required to do by the third liberalisation directive. Overall it determined that it was too early to draw definite conclusions on the functioning of the model and the actual independence of ITOs in practice. Moreover, while it determined that the Commission was of the impression that in general the rules required for



### 3.3.2.4. Exemption Option

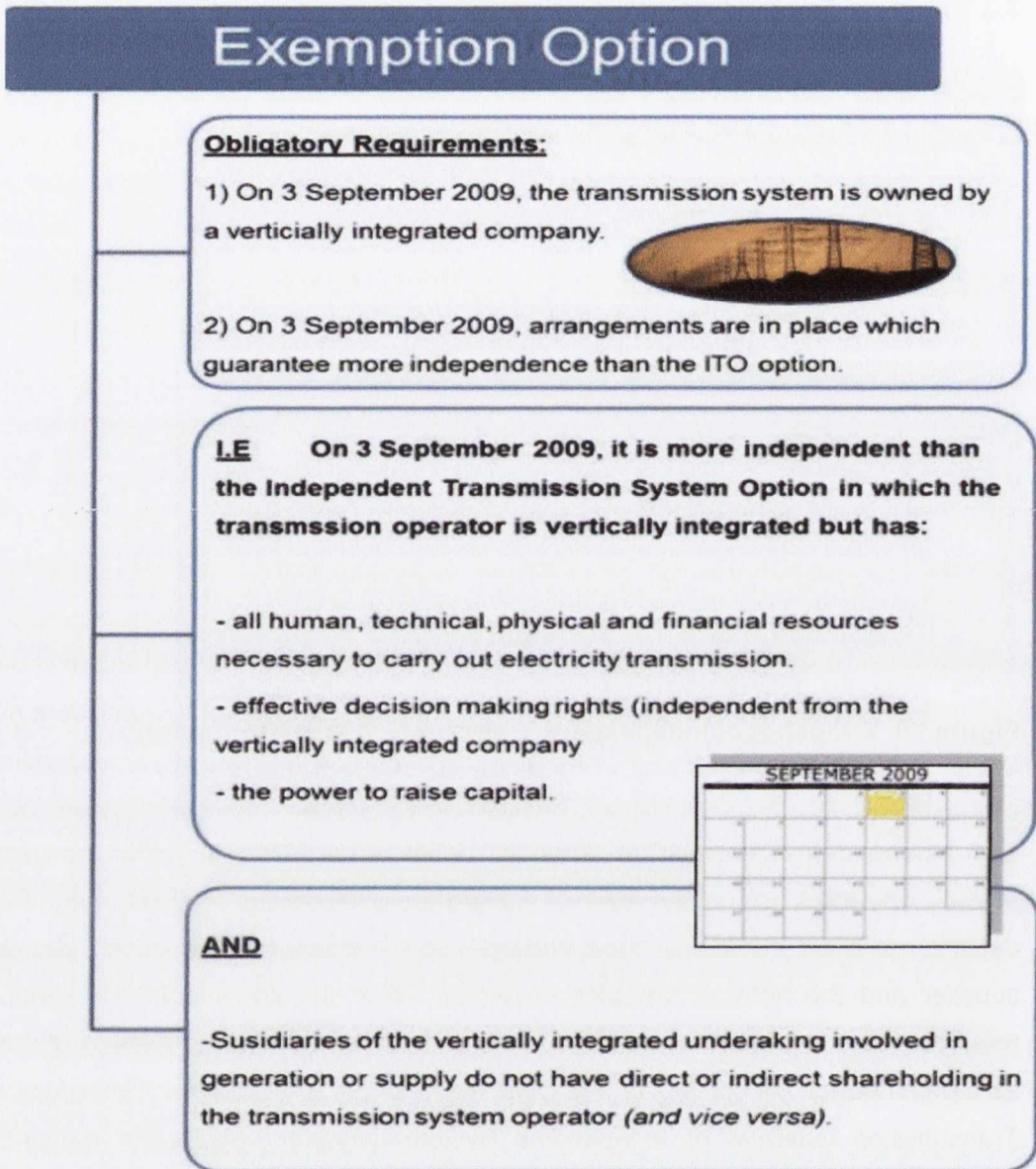


Figure 21: Snapshot of the exemption option

Independent Transmission Operator certification had been implemented, it noted that one Regulator had highlighted that it was ultimately impossible for the national regulatory authorities to fully assess whether an Independent Transmission Operator was in fact acting independently in carrying out its day to day activities. Source: European Commission, 'Commission Staff Working Document Report on the ITO Model Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Progress towards completing the Internal Energy Market' [2014] COM (2014) 634 final, 7,12.



As outlined in recital 17 of the third liberalisation directive:

*'[w]here, on 3 September 2009, an undertaking owning a transmission system is part of a vertically integrated undertaking, Member States should therefore be given a choice between ownership unbundling and setting up a system operator or transmission operator which is independent from supply and generation interests.'*<sup>154</sup>

In writing about article 9(9) option Cabau (2010) described it as the option designed to provide an '*à la carte*' unbundling solution.<sup>155</sup> As this option was the one chosen by Ireland, it will be considered in more detail than the preceding three.

The option to remain exempt from further unbundling requirements is subject to three important qualifications. First, the structure of the transmission system operator and the regulatory framework should guarantee more effective independence of the transmission system operator than the arrangements required for the Independent Transmission Operator option. Second, this structure and regulatory framework should be in place on 3 September 2009 (the date of entry into force of the third liberalisation directive). Third, the transmission system must belong to a vertically integrated undertaking on 3 September 2009.

Chapter V of the third liberalisation directive outlines the criteria of the Independent Transmission Operator model. As an appreciation of the exact terms used is essential to any discussion of Ireland's application for an exemption, it is considered useful to reproduce some of its core requirements outlined in articles 17 and 18 below:

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<sup>154</sup> the third liberalisation directive (n10).

<sup>155</sup> Cabau 'Unbundling of Transmission System Operators' in Christopher Jones (n13).

**'Article 17**

1. *Transmission system operators shall be equipped with all human, technical, physical and financial resources necessary for fulfilling their obligations under this Directive and carrying out the activity of electricity transmission, in particular:*

*(a) assets that are necessary for the activity of electricity transmission including the transmission system, shall be owned by the transmission system operator;*

*(b) personnel, necessary for the activity of electricity transmission, including the performance of all corporate tasks, shall be employed by the transmission system operator;*

*(c) leasing of personnel and rendering of services, to and from any other parts of the vertically integrated undertaking shall be prohibited. A transmission system operator may, however, render services to the vertically integrated undertaking as long as:*

*(i) the provision of those services does not discriminate between system users, is available to all system users on the same terms and conditions and does not restrict, distort or prevent competition in generation or supply; and*

*(ii) the terms and conditions of the provision of those services are approved by the regulatory authority;*

*(d) without prejudice to the decisions of the Supervisory Body under Article 20, appropriate financial resources for future investment projects and/or for the replacement of existing assets shall be made available to the transmission system operator in due time by the vertically integrated undertaking following an appropriate request from the transmission system operator...'<sup>156</sup>*

**'Article 18**

1. *Without prejudice to the decisions of the Supervisory Body under Article 20, the transmission system operator shall have:*

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<sup>156</sup> the third liberalisation directive (n10).



(a) *effective decision-making rights, independent from the vertically integrated undertaking, with respect to assets necessary to operate, maintain or develop the transmission system; and*

(b) *the power to raise money on the capital market in particular through borrowing and capital increase.*

2. *The transmission system operator shall at all times act so as to ensure it has the resources it needs in order to carry out the activity of transmission properly and efficiently and develop and maintain an efficient, secure and economic transmission system.*

3. *Subsidiaries of the vertically integrated undertaking performing functions of generation or supply shall not have any direct or indirect shareholding in the transmission system operator. The transmission system operator shall neither have any direct or indirect shareholding in any subsidiary of the vertically integrated undertaking performing functions of generation or supply, nor receive dividends or any other financial benefit from that subsidiary.*

4. *The overall management structure and the corporate statutes of the transmission system operator shall ensure effective independence of the transmission system operator in compliance with this Chapter...*<sup>157</sup>

Two options exist as to how to apply these provisions. The first is to consider the independence of any applicant arrangements which were in place on 3 September 2009 against the Independent Transmission Operator model using a detailed line-by-line comparison. This approach did not find favour as it was more difficult to satisfy<sup>158</sup> and would have been in conflict with the 'purposive' approach widely accepted as a standard method of interpreting EU directive provisions. The second is to apply the purposive approach, which will briefly be analysed below.

The requirement to interpret and implement directives in a purposive manner springs from *Von Colson*,<sup>159</sup> where the court held that:

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<sup>157</sup> *Ibid.*

<sup>158</sup> Frontier Economics (n8) 131-139.

<sup>159</sup> Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] ECR-01891. See further: Alan Dashwood, *Wyatt and Dashwood's European Union Law* (6<sup>th</sup> edn, Hart Publishing, 2011) 239-244; TC Hartley, *The Foundations of European Union Law. An Introduction to the Constitutional and Administrative Law of the European Union* (7<sup>th</sup> edn, Oxford University Press, 2010) 234-238; Paul Craig and Grainne De Burca, *EU Law Text, Cases and Materials* (5<sup>th</sup> edn, Oxford University Press, 2011) 200-207; Sacha Prechal, *Directives in EC Law* (2<sup>nd</sup> edn, Oxford: Oxford University Press, 2005) 180-210; Gerrit Betlem, 'The Doctrine of Consistent Interpretation- Managing Legal Uncertainty' (2002) 22 Oxford

*'The member States' obligation arising from a directive to achieve the result envisaged by the directive...all the authorities of the Member States must interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.'*<sup>160</sup>

This interpretative obligation was further extended in *Marleasing*<sup>161</sup> where the Court further developed the doctrine stating:

*'[I]n applying national law whether the provisions in question were adopted before or after the directive the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive.'*<sup>162</sup>

Since *Marleasing* this paragraph has been cited over 130 times with approval; in Ireland the doctrine has been fully accepted and in 1998 Hamilton CJ observed that it was well established that:

*'national or domestic courts in interpreting a provision of national law designed to implement the provisions of a directive, should interpret their national law in light of the wording and purpose of the directive in order to achieve the result envisaged by the directive.'*<sup>163</sup>

While each of the four options (including the exemption option) provide for different degrees of structural separation, as stressed by Cabau (2010)<sup>164</sup> each of them is required to be *'effective in removing any conflict of interests between producers, suppliers and transmission system operators'*<sup>165</sup> and *'the incentive for vertically integrated undertakings to discriminate against competitors as regards network access*

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Journal of Legal Studies 3, 397-418; Nick Maltby 'Case Comment *Marleasing*: what is all the fuss about?' (1993) 109 Law Quarterly Review 301-311; Albert Albers-Llorens, 'Keeping Up Appearances: The Court of Justice and the Effects of EU Directives', A. (2010) 69 The Cambridge Law Journal 3, 455-458.

<sup>160</sup>Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1992] ECR I-04135.

<sup>161</sup>*Ibid.*

<sup>162</sup>*Ibid.*

<sup>163</sup>*Nathan v Bailey Gibson Ltd* [1998] 2 IR 162.

<sup>164</sup>Cabau 'Unbundling of Transmission System Operators' in Christopher Jones (n11) 93.

<sup>165</sup>the third liberalisation directive (n10) recital 12.



and investment'<sup>166</sup> and 'create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime.'<sup>167</sup> These goals support the Directive's overarching aims in relation to competition which are stated in recitals 19 and 57, 'to guarantee fair competition, sufficient investment, access for new market entrants and the integration of electricity markets' and to foster 'capacity for new electricity generation ...in order to allow consumers to take full advantage of the opportunities of a liberalised internal market in electricity'.

### 3.3.3. Ireland's Application for an Exemption from the Unbundling Requirements of the Third Liberalisation Directive

The third liberalisation directive was implemented in Ireland through the enactment of the European Communities (Internal Market in Electricity) Regulations 2010,<sup>168</sup> the European Communities (Internal Market in Electricity and Gas)(Consumer Protection) Regulations 2011<sup>169</sup> and the European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011.<sup>170</sup> ESB Networks was once again licensed as the distribution system operator in Ireland,<sup>171</sup> a position which had been subject to legal, functional and accounting unbundling under the Directive. In addition, on 6 February 2012 the Single Electricity Market Committee (the decision making authority on all Single Electricity Market matters) published a guidance paper outlining the process for application for certification for an exemption from the requirements of the third electricity directive in Ireland.<sup>172</sup>

As outlined in the paper (which provides some non-binding clarifications on the requirements of the third liberalisation directive), an exemption from the requirements of the third liberalisation directive could be granted following the successful progression through three stages. First, a positive decision was required from the

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<sup>166</sup> *Ibid*, recital 11.

<sup>167</sup> *Ibid*, recital 12.

<sup>168</sup> Number 450 of 2010.

<sup>169</sup> Number 463 of 2011.

<sup>170</sup> Number 570 of 2011.

<sup>171</sup> European Communities (Internal Market in Electricity and Gas) (Consumer Protection) Regulations of 2011, S.I. 463 of 2011 and the European Communities Regulations 2008, S.I. 280 of 2008.

<sup>172</sup> Commission for Energy Regulation and the Utility Regulator for Electricity Gas Water, 'TSO Certification ROI Guidelines' (SEM-12-005, 6 February 2012).

Commission for Energy Regulation. Second, a supporting decision from the European Commission was required. Third, the Commission for Energy Regulation was required to make a third and final determination, informed by the decision of the European Commission. A deadline of 2 April 2012 was set for applications to the Commission for Energy Regulation. On 2 April ESB made an application for exemption from the requirements of the third liberalisation directive. This application has since been granted in a decision<sup>173</sup> which is considered here to be contrary to a teleological reading of the Directive.

From a short-medium term perspective, there are practical justifications for Ireland's application for an exemption from the unbundling requirement of the third liberalisation directive. The unbundling requirements of the second liberalisation directive were costly, having required an expensive duplication of systems (and an increase in bureaucracy) within the ESB Group. At the time of the entry into force of the third liberalisation directive, ESB Networks was both the Irish distribution system operator (charged with maintenance and construction of the distribution system) and the entity charged with transmission construction under the ESB/Eirgrid *Infrastructure Agreement*. Grid construction and maintenance was one area where systems and expertise had not yet been duplicated. Applying for an exemption meant that these responsibilities could continue to rest with ESB Networks, which by this time had built up significant expertise and had a strong reputation in this area.

ESB's wish to retain the asset value of the transmission system is another reason for this application. As the ESB Employee Share Ownership Plan (ESOP) hold a 5 per cent share of the ESB in trust, removing the ownership of the transmission system from the ESB Group could have been argued to be in violation of the property rights of ESB's employees, as guaranteed by the Irish Constitution.<sup>174</sup> Consequently further unbundling would have resulted in definite costs (in relation to infrastructure maintenance and construction) along with the potential added costs from lawsuits.

From a medium-longer term perspective, the application was surprising. In 2009, renewable energy constituted just 4.9 per cent of final energy consumption<sup>175</sup> (just

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<sup>173</sup> The Commission Decision on Ireland's Exemption from the Third Liberalisation Directive (n2).

<sup>174</sup> Bunreacht na hEireann, article 23. See further: Gerard Hogan and Gerry Whyte, *The Irish Constitution* (4<sup>th</sup> edn, Lexis Nexis, 2004) chapter 7.7.

<sup>175</sup> Sustainable Energy Authority of Ireland, 'Energy in Ireland 1990-2009, 2010 Report' (SEAI, Dublin, 3 December 2010)<



below one third of the energy needed to meet Ireland's 2020 target). Given that the transfer of the transmission system from the ESB Group to EirGrid had consistently been identified as necessary to increase competition in the generation market and eliminate the real or imagined '*fear of discrimination*' as a market barrier to entry into this market, it is surprising that this application was made, particularly in light of the very low levels of renewable energy which existed in the country at the time.<sup>176</sup> However, it is considered even more surprising that the application was successful given the spirit and wording of the Directive, the ESB group's continued dominance in the generation market, and the lack of 'real'<sup>177</sup> and effective competition in the Irish electricity retail markets, as will be discussed below.

While the doctrine has generally been considered in relation to the interpretation of national law in light of provisions of EU law directives, it is clear that individual provisions of a directive must be interpreted in light of the wording and purpose of the Directive, rather than on a literal line-by-line basis. Thus, the approach taken by Ireland was based on a cumulative reading of the relevant provisions which led the Irish government to the conclusion that the Irish arrangements guaranteed more independence than a situation where the transmission assets were owned by a vertically integrated (and in their view independent) company equipped with all the human, technical, physical and financial resources necessary for carrying out the activity of electricity transmission. Accordingly the Irish government asserted that the arrangements which were in place on the 3 September 2009 offered more effective independence than the Independent Transmission Operator model as (i) EirGrid was legally separate from supply and generation and (ii) EirGrid had a significant role in decision-making where under the Independent Transmission Operator model a vertically integrated company could still discriminate against potential competitors.

Despite these assertions, on even a cursory reading of the Chapter V provisions, it is difficult to see how Ireland was permitted to obtain an exemption from the unbundling requirements of the third liberalisation directive. As drafted article 9(9) requires that the system which is the subject of an application for an article 9(9) exemption must be more independent than the Independent Transmission Operator model and must have been in place on 3 September 2009. A number of situational flaws can be identified

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[http://www.seai.ie/Publications/Statistics\\_Publications/Energy\\_in\\_Ireland/Energy\\_in\\_Ireland\\_1990-2009.pdf](http://www.seai.ie/Publications/Statistics_Publications/Energy_in_Ireland/Energy_in_Ireland_1990-2009.pdf)> accessed 1 March 2014.

<sup>176</sup> Sustainable Energy Authority of Ireland (n4).

<sup>177</sup> By real, what is meant is competition which can exist independent of regulatory control.

(and are shown in the figure below) which would seem to render the Irish transmission model less independent than the Independent Transmission Operator model.



# Division of Irish Transmission Activities

ESB GROUP	EIRGRID	ESB GROUP and EIRGRID
-Project design	-Conduct planning	-Preliminary work for procurement
-Project specification	-Indicative programme	
-Construction	-Advance to planning permission	-Issue of declaration of fitness
	-Project Review	

## MAIN INDEPENDENT TRANSMISSION OPERATOR MODEL INDEPENDENCE REQUIREMENTS

### PROBLEMS WITH THE IRISH ARRANGEMENTS

#### 1) Resources

*(Independence of Transmission System Personnel & Services)*

- ESB Networks not fully separate (in managerial or operational terms) from other ESB activities.

#### 2) Decision Making

*(Effective & Independent)*

- ESB Networks managed by a 5 member board with a requirement that just 2 be independent from the ESB Group.
- Use of 'Executive Director Team' composed of all directors of the ESB Group (including ESB Networks) to review the ESB Group's plans and policies.
- Both EirGrid and the ESB Group are owned by the Irish State with shareholder rights exercised by the Department of Communications, Energy and Natural Resources and the Department of Public Expenditure and Reform.

#### 3) Capital

*(Ability of Transmission System Operator to raise)*

- The ability of EirGrid to raise capital is arguably diminished by its inability to list its transmission system as an asset.

#### 4) Shareholding

- ESB Employee Share Ownership Plan (ESOP) had a 5 percent shareholding of ESB (including the transmission system).

#### 5) Structure and Statutes of Transmission System Operator

- See arrangements detailed for Decision Making



**Figure 22: Snapshot comparing the independence of Ireland's transmission system operation against the Independent Transmission Operator Requirements**

Even though the Irish transmission system was operated by EirGrid on 3 September 2009, the Infrastructure Agreement (which outlined the respective responsibilities and powers of EirGrid and the ESB group in relation to the transmission system) gave ESB Networks significant powers over the *'human, technical, physical and financial resources necessary'* to carry out the operation of electricity transmission. Thus, in 2009, ESB Networks had sole responsibility for: the detailed design of projects to develop the transmission system; the specification of the projects to be undertaken and the construction itself. In addition the ESB group also retained joint control of the preliminary work necessary for procurement, the issue of the declaration of fitness, commission and handover.

This retention of power by ESB Networks is problematic because of the ESB group's composition on 3 September 2009. Although ESB Networks was legally separate to the ESB Group on 3 September 2009, it was not fully separate (in managerial or operational terms) from other ESB activities on this date. At this time, the ESB group was responsible for employing staff associated with the transmission assets and it was acknowledged that there had been sharing of services, including IT and human resources services between ESB Networks Limited, the ESB Networks business unit and the wider ESB Group.<sup>178</sup> Consequently, this arrangement could not be said to be more independent than the requirements imposed on Member States seeking to avail of the Independent Transmission System model (which prohibit the leasing and rendering of services to and from other parts of the vertically integrated company; and require the employment of personnel required for transmission system business by the transmission system operator).

The ESB group's composition also causes problems for the requirement for the transmission system operator to have effective and independent decision making rights. On 3 September 2009, just two fifths of the ESB Networks board were required to be independent from the ESB Group. Moreover the ESB Group made use of an *'Executive Director Team'* composed of all directors of the ESB Group (including ESB Networks) to review the ESB Group's plans and policies. Added to these problems

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<sup>178</sup> Commission Decision on Ireland's Exemption from the Third Liberalisation Directive (n2) 8.



shareholder rights were exercised over both entities jointly by the Department of Communications, Energy and Natural Resources and the Department of Public Expenditure and Reform.

In addition to these structural issues, two further problems can be identified with the independence of the Irish arrangements, both of which relate to the retained ownership of the transmission system by the ESB group. First, choosing not to transfer the transmission system to EirGrid (thereby enabling EirGrid to list it as an asset on its balance sheet), could be argued to reduce the ability of EirGrid to raise capital, a point which was raised in the independent consultancy report which considered Ireland's options to comply with the third liberalisation directive.<sup>179</sup> Consequently EirGrid's power *'to raise money on the capital market in particular through borrowing and capital increase'* could be argued to have been impaired by this decision.

Second, on 3 September 2009 ESB group employees held a 5 per cent share in the ESB group, a shareholding which included the transmission system and all ESB operations. This would again appear to reduce the independence of the Irish arrangements and fly in the face of the prohibition on subsidiaries of the vertically integrated undertaking having direct or indirect shareholding in the transmission system operator. However, notwithstanding these issues on 12 April 2013 the Commission issued its decision that (conditional upon Ireland fulfilling certain requirements) Ireland should be granted an exemption from the requirements of the Third Electricity Liberalisation Directive.<sup>180</sup> This decision will briefly be considered below.

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<sup>179</sup> Frontier Economics (n8).

<sup>180</sup> Commission Decision on Ireland's Exemption from the Third Liberalisation Directive (n2).

### **3.3.4. Commission Decision that Ireland Should be Granted an Exemption from the Requirements of the Third Liberalisation Directive**

On 12 April 2013, the Commission issued a 15 page decision which concluded by stating:

*'The arrangements in place in relation to the vertical integration and operation of the transmission system belonging to ESB as clearly set out in CER's [Commission for Energy Regulation's] preliminary decision if effectively implemented could clearly guarantee more effective independence of the transmission system operators than the provisions of Chapter V of Directive 2009/72/EC'.<sup>181</sup>*

This decision is curious. In coming to this conclusion, the Commission did not measure the exact arrangements which were in place on 3 September 2009 against a hypothetical Independent Transmission Operator model (as it was required to do by the third liberalisation directive).<sup>182</sup> Instead it considered a set of future hypothetical arrangements (which the Irish Commission for Energy Regulation pledged to oversee) against the Independent Transmission Operator model. This is curious given that in its decision the Commission clearly recognises the need to look at the situation as it existed on 3 September 2009 (even providing a superficial summary of the arrangements in place at that time) but then focuses on analysing whether a set of future hypothetical arrangements will provide greater independence than the Independent Transmission Operator model in its final analysis.<sup>183</sup>

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<sup>181</sup> Commission Decision on Ireland's Exemption from the Third Liberalisation Directive (n2) 14.

<sup>182</sup> third liberalisation directive (n10); Commission (n153).

<sup>183</sup> Commission Decision on Ireland's Exemption from the Third Liberalisation Directive (n2) (n2) paragraphs 11, 18, 37.



## 4. Conclusion

It is difficult to understand why the Commission authorised this exemption given the objectives which the Directive was passed to meet and the specific wording of article 9 (9). This wording originally led commentators to believe that the article could only have exceptional application because of the clearly stated requirement to consider whether the national arrangements, which were in place on 3 September 2009, guaranteed more effective independence of the transmission system operator than the Independent Transmission Operator option. It was opined that to ignore the stated date of '3 September 2009' had the potential to make the very precise regulatory framework imposed by the Independent Transmission Operator and Independent System Operator frameworks meaningless<sup>184</sup> by allowing Member States to opt for article 9(9) as the easy option.

While it is clear why unbundling must be undertaken gradually, it is unclear why Ireland was not obliged to comply with either the Independent System Operator option or to undertake full ownership unbundling. At an Irish level, while the fiscal reasons for the decision are clear (and were discussed in detail in the report commissioned by the government on its unbundling options)<sup>185</sup> it is difficult to understand why this decision was not seen as a golden opportunity by the Irish government to combat surviving problems in the Irish progressive electricity markets, which have prevented effective and real competition from emerging in its generation and supply markets (further supporting its decision to develop and incorporate significant levels of onshore wind generated electricity).

One explanation for the decision is that these matters were simply not considered in any great detail in the deliberations which preceded it<sup>186</sup> because (similar to the decision making which led to the national renewable energy action plan)<sup>187</sup> a full and careful analysis of the surrounding legal environment, along with the potential implications of the decision did not take place. Consequently, its potential impact on Ireland's onshore wind development strategy was simply not considered. Admittedly,

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<sup>184</sup> Emmanuel Cabau 'Unbundling of Transmission System Operators' in Christopher Jones (n13) 104.

<sup>185</sup> Frontier Economics (n8).

<sup>186</sup> Frontier Economics (n8); LEGC (n8).

<sup>187</sup> See chapters 2 and 3.

while such an analysis might not have changed the decision which was ultimately taken, with the benefit of such analysis there could at least have been a discussion of its possible implications for onshore wind development. However, this did not take place. Consequently, the ESB Group has been given a continuing advantage in the Irish progressive electricity markets (one which is likely to be perceived by competitors as a barrier to entry into the development and sale markets and to impede the development of competition).

As has been recognised by various commentators and discussed in the course of this chapter, control of the transmission system gives a major advantage in electricity markets.<sup>188</sup> Being able to list it as an asset is a significant benefit to any undertaking. Conversely, not being able to list it as an asset is a disadvantage to any transmission system operator seeking to raise funds to further develop infrastructure, a fact which was acknowledged by the authors of the government commissioned report on Ireland's options to comply with the third liberalisation directive who stated: '[With full ownership unbundling] Eirgrid is likely to be in a stronger position to build further interconnection without the need for additional equity.'<sup>189</sup> EirGrid had also outlined the disadvantages of leaving the transmission system with the ESB group stating:

*'transmission is the key enabler of competition in any electricity market and ESB's ownership and control over transmission reinforces their dominance across the industry and places them at an advantage over their competitors.'*<sup>190</sup>

Even from a brief analysis of the Irish electricity market it would appear clear that its underlying structures support the dominance of the ESB group in the generation and supply markets acting as a barrier to new market entrants. These structures are likely to prevent the development of real, meaningful competition and the advantages which it brings to consumers, a problem of huge importance in a market in which electricity prices are rising as the market evolves to develop and incorporate large levels of intermittent electricity, a topic which will be discussed further in chapter six of this thesis.

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<sup>188</sup> See Talus(n18) and Koumpli(n20).

<sup>189</sup> Frontier Economics (n8).

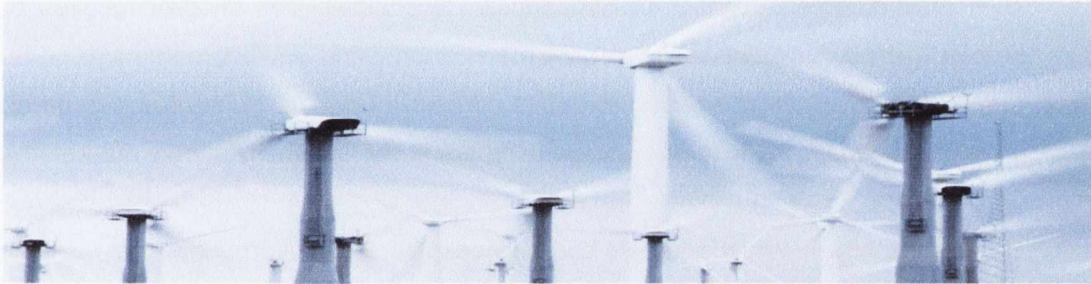
<sup>190</sup> *Ibid*, 26.



## Chapter 6 The Duty to Provide Affordable Electricity to Domestic Consumers in the Supply Market

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### 1. Introduction



As was discussed in the last chapter, large scale wind development requires much market transformation to be successful. To implement a successful wind energy development strategy, it is important to develop an in-depth awareness of the laws and policies likely to impact upon wind energy's expansion at the outset. Contrariwise, it is equally important to develop an in-depth awareness of any concurrent laws, likely to be affected by the implementation of such a far-reaching policy.

As was discussed in chapter 3, this awareness was not developed by the Irish government. A full, careful analysis of the surrounding legal environment did not take place. Consequently, the duty to submit Ireland's national renewable energy action plan to the requirements of the SEA Directive<sup>1</sup> was never seriously contemplated;<sup>2</sup> the market conditions which followed the *Derrybrien*<sup>3</sup> and *Wild Birds*<sup>4</sup> decisions were not taken into account to realistically determine how best to reach any targets set (or to set more achievable targets); and Ireland's duty to develop renewable electricity and increasing importance of fostering competition was not borne in mind, when decisions were taken to alter Ireland's core electricity market structures.

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<sup>1</sup> Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/0030 (the 'SEA Directive').

<sup>2</sup> In this regard see chapter 3 generally and more particularly: United Nations Economic Commission for Europe, 'European Union ACCC/C/2010/54' (UNECE, 2010) <<http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html>> accessed 21 August 2014. Annex II attachment: Letter from the Irish Administration to the European Commission 10.01.12.

<sup>3</sup> Case C-427/07 *Commission v Ireland* [2011] ECR I-00873. ('*Derrybrien Wind*').

<sup>4</sup> Case C-418/04 *Commission v Ireland* [1997] ECR I-10997 ('*the Wild Birds decision*').



While each of these matters threaten the expedient development and incorporation of Irish onshore wind generated electricity, the onshore wind strategy itself is also impacting upon concurrent laws and policies. As will be discussed in this chapter, in seeking to financially support onshore wind, the Irish government could well be transgressing laws designed to promote consumer welfare and to guarantee a general level of affordable electricity to households. Specifically this chapter focuses on the problem which decisions taken to promote onshore wind development have generated for an Irish government seeking to fulfil a concurrent duty to guarantee a general level of electricity affordability to domestic customers in the electricity supply market.<sup>5</sup>

In the electricity supply market electricity prices are rising. Worryingly, they are rising to the point where a general level of 'affordability' (as is required by EU law) can no longer be guaranteed to consumers. As will be considered in this chapter, this is largely due to the underlying costs and decisions taken to develop onshore wind. As electricity prices will most likely continue to rise and effective competition has not and is not likely to develop to provide affordability/naturally reduce prices, it is suggested that the Irish government would be justified in imposing temporary price controls on the Irish domestic electricity market to meet its duty to guarantee a general level of affordability to domestic consumers (while continuing to develop onshore wind).

This subject will be approached as follows, part one will begin by placing the subject in context by considering the legal obligations placed on Member States in relation to electricity supply (e.g. to guarantee 'affordable' electricity to consumers, to introduce competition to electricity's supply and development/production markets as a means to guarantee affordability, and to increase domestic renewable energy consumption). Admittedly, the legal obligations to introduce competition to electricity's supply and development/production markets and to increase domestic renewable energy consumption have been canvassed in earlier chapters. However, the focus in this chapter is different. While the obligations are re-visited, they are viewed from a different angle with the discussion focused on their impact upon the obligation to provide 'affordability'.

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<sup>5</sup> The electricity supply/retail market refers to the final electricity market where electricity is provided to end users. This market can be further divided into four separate relevant markets including Large Energy Users, Medium-Sized Business including Public Lighting, Small Business and Domestic. The focus of this chapter is on the domestic supply market. This concerns the part of the supply market which provides electricity to households, who are free to choose their supplier. For general information on this market and its place amongst other electricity markets see: Christopher Jones (ed.) *EU Energy Law Volume II, EU Competition Law and Energy Markets* (2<sup>nd</sup> edn, Claeys & Casteels, 2007).



Part two of this chapter will evaluate onshore wind development in Ireland, particularly focusing on the choices taken to support this development, and the impact which they have on electricity prices. This will be followed by a critical assessment of the domestic electricity markets in Ireland, along with further analysis of the reasons why effective competition has not developed, and is unlikely to develop or deliver affordability to the Irish retail<sup>6</sup> market in the near future. Finally, part three will consider similar markets, where price controls were accepted by the Court of Justice of the European Union (CJEU) as justified to protect consumers from overly high prices, to support the overall case for a re-application of price controls to the Irish domestic electricity market.

## **2. The legal obligations placed on Member States to guarantee 'affordable' electricity to consumers; to introduce competition to electricity's supply and production/generation markets and to increase domestic renewable energy consumption.**

### **2.1. Overview**

Ireland's energy policy has become increasingly driven by the EU's regional goals, 'to ensure affordable prices, industrial competitiveness, security of supply and [the] achievement of [its] climate and environmental objectives'.<sup>7</sup> These goals have evolved over time in response to changing national, regional and global circumstances. During the 1980s and the early 1990s electricity companies were mainly regulated at national level. This changed, however, with the adoption of the first liberalisation directive in 1996; a directive which was designed to be the first step towards a gradual introduction of competition to national electricity markets. While a legal requirement for electricity affordability was not included in this directive, its successors, the second and third liberalisation directives have each required Member States to ensure that household customers were granted a right to 'reasonable' electricity prices.

During roughly the same period (the late 1990s) a regional drive to increase renewable energy consumption and greenhouse gas reduction also began in the EU, when the European Community (along with its Member States) ratified the United Nations

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<sup>6</sup> Note: The terms retail and supply will be used interchangeably in this chapter and refer to the final electricity market where electricity is provided to end users.

<sup>7</sup> European Council, 'Conclusions of the European Council Meeting' [2014] General Secretariat of the Council, EUCO 7/1/14, para. 15.



Framework Convention on Climate Change (UNFCCC).<sup>8</sup> In so doing they agreed to establish regional programmes containing measures designed to address emissions by sources, remove greenhouse gases using sinks and facilitate adequate adaptation to climate change.<sup>9</sup> These commitments were later strengthened in 1998 when the 15 countries who were Member States of the European Union at the time and the delegation representing the EU signed the UNFCCC's Kyoto Protocol<sup>10</sup> and thereby gave a regional commitment to reduce greenhouse gases by 8 per cent (below an agreed baseline) between 2008 and 2012,<sup>11</sup> and to implement and/or elaborate on policies to research, promote, develop and increase the use of renewable energy within the EU.<sup>12</sup> As has been discussed in chapter one, while the Kyoto Protocol has since expired, the EU continues to take a central role in international climate negotiations<sup>13</sup> and to enforce the requirements of its Climate and Energy Legislative Package,<sup>14</sup> which were designed to increase renewable energy levels (thereby also decreasing greenhouse gases) until 2020.

The EU has sought to further its goals (to introduce competition as a means of guaranteeing affordability to household customers and to increase renewable energy levels) through the adoption of successive targeted laws, (discussed in chapter five) which place specific requirements on Member States to regulate and restructure national electricity markets. Although Ireland enacted much legislation to fulfil these

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<sup>8</sup> United Nations Framework Convention on Climate Change (adopted 5 September 1992, entered into force 21 March 1994) 1771 UNTS 107 (the 'UNFCCC').

<sup>9</sup> *Ibid*, article 4(1)(b).

<sup>10</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 ('the Kyoto Protocol').

<sup>11</sup> The target was for each Contracting Party to reduce its greenhouse gases below a particular base year. For the EU-15 the base year for carbon dioxide, methane and nitrous oxide the base year is 1990. For hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride (fluorinated gases) 12 Member States have selected 1995 as the base year whereas Austria, France and Italy have chosen 1990. As the EU inventory is the sum of Member State inventories, the EU 15 base year estimates for fluorinated gas emissions also include emissions from deforestation for the Netherlands, Portugal and the United Kingdom.

<sup>12</sup> the Kyoto Protocol (n13), article 2.1(a)(iv).

<sup>13</sup> See further: Cinnamon Carlane, *Climate Change Law and Policy* (1st edn, Oxford University Press 2010); Eva Barrett, 'Through the Looking Glass: Greenhouse Gas Regulation in the EU and the US, Blood Brothers Separated at Birth Both Facing the Heat' (2013) 31 *Journal of Energy and Natural Resources Law* 3, 287-311.

<sup>14</sup> This legislative package consists of four pieces of legislation: (1) Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63 (2) Directive 2009/31/EC on the geological storage of carbon dioxide [2009] OJ L 140/114 (3) Decision No. 406/2009/EC on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136 ('the Effort Sharing Decision') and (4) Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16 ('the Renewable Energy Directive')



requirements, effective competition has not and is unlikely to develop in the Irish energy market, and the underlying cost of developing renewable energy in Ireland is increasing. Consequently, it is submitted that a short term regulatory intervention is required to guarantee affordability. To appreciate why, it is necessary to consider the specific obligations placed on Member States in relation to electricity supply.

## 2.2. The Requirement to Guarantee Affordability in Electricity Supply



Figure 23: Electricity supply

In addition to its physical characteristics, as a Service of General Economic Interest,<sup>15</sup> electricity carries with it a number of universal service obligations which can be described in a general context, as encompassing:

*'...the right of everyone to access certain services considered as essential ...[imposing] obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price.'*<sup>16</sup>

Interestingly, the term '*universal service*' originally emerged from telephone policy debates in the United States in 1907. At this time the term was used to argue for the desirability of interconnecting systems into a unified, non-fragmented service, as part of the American Telephone & Telegraph (AT&T) slogan '*one system, one policy, universal service*'.<sup>17</sup> The underlying argument was that a monopoly-run, interconnected phone system with regulated prices would provide far greater social benefits than network competition and so should be exempted from certain anti-trust laws. In 1921 the Willis-Graham Act both exempted telephone companies from antitrust laws and

<sup>15</sup> Case C-393/92 *Municipality of Almelo and Others* [1994] ECR I-1477.

<sup>16</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - White Paper on services of general interest'[2004] COM (2004) 374 final, para. 16.

<sup>17</sup> Gary Madden, 'Economic Welfare and Universal Service' (2010) 34 *Telecommunications Policy* 1-2, 110-116.

provided the basis for universal service policy as a universal subscription interconnection rather than universal household telephone penetration. The concept was later broadened by the Communications Act of 1934 as an obligation:

[to make] ...available, so far as possible, to all the peoples of the US, rapid, efficient, nationwide and worldwide wire and radio communication services with adequate facilities at reasonable charges.<sup>18</sup>

In 1996, the US concept of universal service in telecommunications was further broadened through the enactment of the Telecommunications Act<sup>19</sup> to include new services, and to enhance the protection available to new groups of subscribers such as schools, libraries, and health care providers.<sup>20</sup>

Similar to certain other concepts originating from US antitrust law, the concept 'universal service' travelled across the Atlantic to become enshrined in EU law. 'Universal service' is now undeniably a major and indispensable pillar of EU policy on services of general economic interest (SGEI) or market services including telecommunications, postal services, transport and energy, which are subjected to specific public service<sup>21</sup> obligations.

In 2003, universal service obligations were formally applied to the electricity sector by article 3 of the second liberalisation directive.<sup>22</sup> Although this directive was later replaced by the third liberalisation directive, article 3(3) of the third liberalisation directive, entitled 'Public Service Obligations and Consumer Protection' also placed universal service obligations on Member States, in other words Member States were obliged to ensure:

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<sup>18</sup> *Ibid.*

<sup>19</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 US Code; §§ 254.

<sup>20</sup> Robert G. Harris and C. Jeffrey Kraft, 'Meddling Through: Regulating Local Telephone Competition in the United States' (1997) 11 *Journal of Economic Perspectives* 4, 57.

<sup>21</sup> No definition exists for public service obligations but as outlined by Anthony Doherty in the context of electricity 'public service' means 'the guaranteeing, through regulatory standards, measures or requirements, of levels of consumer or environmental protection that might otherwise not be maintained through the simple operation of the market mechanism.' See further: Anthony Doherty, 'Retail market development and public service objectives' in Christopher Jones (ed.) *EU Energy Law Volume I The Internal Energy Market The Third Liberalisation Package* (3<sup>rd</sup> edn, Claeys & Casteels 2010), Chapter 10. See also: European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions A Quality Framework for Services of General Interest in Europe' [2011] COM (2011) 900 final, 4.

<sup>22</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L 176 , 15/07/2003, 37 ('the second liberalisation directive').



*'that all household customers, and, where Member States deem it appropriate, small enterprises...enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices.'*<sup>23</sup>

While article 3(3) did not specifically use the term 'affordability', it is submitted that it is included in the overall concept of universal service prescribed by the third liberalisation directive, through article 3(3)'s requirement for 'reasonable prices'. Further evidence of this requirement for affordability in electricity supply can be found in article 3(2) which states that Member States may impose public service obligations relating to security of supply, regularity, quality and price of supply on electricity companies as entities providing a Service of General Economic Interest.

The general requirement to guarantee affordability in electricity supply was given Treaty recognition in 2009 with the coming into force of Article 14 of the TFEU<sup>24</sup> and Protocol 26.<sup>25</sup> Collectively these recognised that 'a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights', was part of the mission of the Services of General Economic Interest concept. Thus, it seems clear that 'affordability' is required in electricity supply. The existence of this requirement is supported by the judgment of the Grand Chamber in *Federutility*,<sup>26</sup> where the Court determined that Member States were entitled to intervene to maintain the price of gas supply to final consumers at a reasonable level, as pursuing a 'general economic interest'.<sup>27</sup> In his preceding Opinion (which was followed by the Court) Advocate General (AG) Ruiz-Jarabo Colomer, had listed the requirements of Services of General Economic Interest as follows:

*'Continuity, universality and equality; and today we would usually add transparency and affordability of the service to these time-honoured rules.'*<sup>28</sup>

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<sup>23</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2010] OJ L 211, 14.8.2009, 55, ('the third liberalisation directive'), article 3(3).

<sup>24</sup> Treaty on the Functioning of the European Union, [2012] OJ C 326/47 ('TFEU').

<sup>25</sup> *Ibid*, Protocol 14.

<sup>26</sup> Case C-265/08 *Federutility and Others v Autorità per l'energia elettrica e il gas* [2010] ECR I-03377 ('*Federutility*').

<sup>27</sup> *Ibid*, Opinion of AG Ruiz-Jarabo Colomer, para 47.

<sup>28</sup> *Federutility* (n26). Opinion of AG Ruiz-Jarabo Colomer, para. 55. The requirement for affordability is further supported by the following policy documents: European Commission, 'Communication from the Commission. Services of General Interest' [1996] COM (96) 443 final, 1; European Commission, 'Green Paper on Services of General Interest' [2003] COM (2003) 270 final, 16; European Commission, 'Communication from the Commission to the European



The requirement to guarantee 'affordability' is challenging, as no definition of affordability is provided by either EU legislation or case-law.<sup>29</sup> Despite this, it is generally accepted that it operates on two levels, which will each be examined in turn. The first level of affordability is specifically required for vulnerable consumers who cannot afford electricity under normal market (or monopoly) conditions.<sup>30</sup> Both the second and third liberalisation directives contain a large number of provisions which are targeted at ensuring the provision of reasonably priced electricity to vulnerable customers. In this context, Article 3 and Annex A to the third liberalisation directive provide detail on the protections to be afforded to vulnerable customers. These include implementing appropriate measures (such as through national energy action plans or social security benefits) to ensure that electricity is provided to vulnerable customers and granting vulnerable customers a higher level of protection, with disconnection prohibited in critical times.

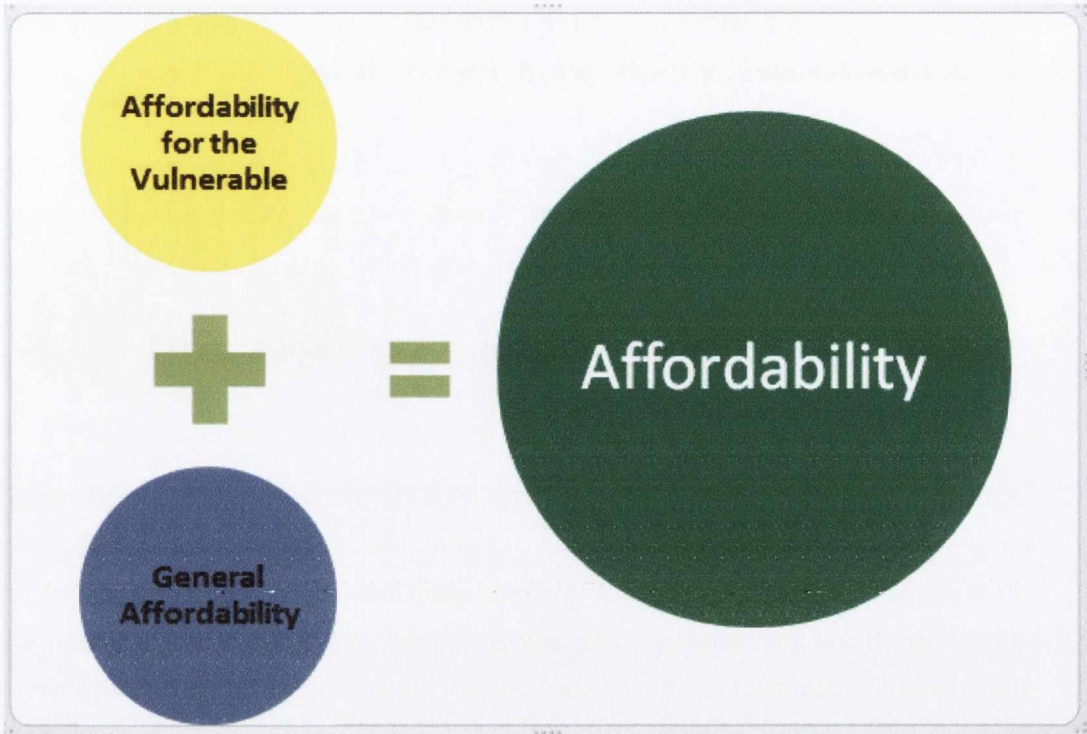
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Parliament, the Council, the European Economic and Social Committee and the Committee of Regions A Quality Framework for Services of General Interest in Europe' [2011] COM (2011) 900 final, 4.

<sup>29</sup> The closest the Court of Justice of the European Union (CJEU) has come to considering the matter was in *Federutility* (n26) where the Court found Italian legislation which permitted the Italian Energy Regulator to set 'reference prices' for the supply of gas, based on actual costs, compatible with EU law. Here the court determined that reference prices were permissible to guarantee 'reasonable prices' to the consumer, taking account of the balance which Member States must strike between seeking to meet the objective of liberalisation and that of the necessary protection of final consumers. The term 'reference prices' was not, however, defined in Italian legislation and no consideration was given to the meaning of the term 'affordability' by the Court. While the Court has previously discussed 'excessively high prices' in cases such as C-180/01 *NALOO v Commission* [2001] ECR II-515.C-172/01; *International Power (anciennement National Power) v Commission* [2003] ECR I – 11425; the consideration of the term was limited to its meaning in the wholesale energy market and the context of what are now Articles 101 and 102 TFEU and very much applied to the facts of each of the cases at hand. In considering the meaning of 'excessively high prices' in other sectors the Court has employed various cost based/ comparator tests, however, these cases were again limited to a consideration of the term 'excessively high prices' in the context of articles 101 and 102 TFEU rather than a 'right to affordability' (which arguably has a very different meaning which should be determined by reference to the buyer, rather than the seller/producer). On this case law see generally: Richard Whish and David Bailey, *Competition Law* (7<sup>th</sup> edn, Oxford University Press, 2012) 721-723.

<sup>30</sup> Marija Bartl, 'The Affordability of Energy: How Much Protection for Vulnerable Customers?' (2010) 33 *Journal of Consumer Policy* 3, 227. See also: the third liberalisation directive (n23), recitals 37, 45, 50, 53 and articles 3(7), 3(8) and 36(h).





**Figure 24: Simple overview of the idea of affordability**

The second level is a general level of affordability for all consumers.<sup>31</sup> As this aspect of affordability is both greatly affected by onshore wind development and problematic for the Irish government,<sup>32</sup> it is the focus of this chapter. In this context, general affordability has been described as an economic category, having to do with the ability (rather than the willingness) of certain consumers or consumer groups to pay for a minimum level of service. At its simplest it can be measured as the share of monthly household income which is spent on the utility.<sup>33</sup> The European Bank for Reconstruction and Development benchmark for the general affordability of utilities (including electricity, gas and water) is that together they should not exceed 25 per cent of all household expenditure.<sup>34</sup>

<sup>31</sup> *Ibid.*

<sup>32</sup> Ireland has social welfare packages (such as the household benefits package and fuel allowance) and legislation in place, which are designed to ensure affordability and added protection for the vulnerable customer. See further: the European Communities (Internal Market in Electricity and Gas) Regulations 2011, S.I. 463 of 2011; Citizens Information, 'Household Benefits Package' (Citizen's Information, 24 April 2013) <[http://www.citizensinformation.ie/en/social\\_welfare/social\\_welfare\\_payments/extra\\_social\\_welfare\\_benefits/household\\_benefits\\_package.html](http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/extra_social_welfare_benefits/household_benefits_package.html)> accessed 26 September 2013.

<sup>33</sup> Samuel Fankhauser and Sladjana Tepic, 'Can poor consumers pay for energy and water? An affordability analysis for transition countries.' (European Bank for Reconstruction and Development, Online Working Paper No. 92, 2005) <<http://www.ebrd.com/downloads/research/economics/workingpapers/wp0092.pdf>> accessed 28 December 2014.

<sup>34</sup> *Ibid.*



### 2.3. The Requirement to Introduce Competition to Electricity's Supply and Production/Generation Markets as a Means to Provide Affordability



**Figure 25: Supply and generation markets**

The EU's main policy to facilitate a general level of affordability for all customers is to ensure effective competition exists in national electricity markets.<sup>35</sup> The policy to introduce competition to electricity markets was (and continues to be) based on the widely held belief that effective competition and a more integrated European energy market would naturally lead to reduced energy costs to the direct benefit of individual consumers,<sup>36</sup> and the removal of barriers to intra-Community trade, thereby allowing electricity users to enjoy the benefits of competition (such as more freedom of choice, and reduced price disparities between Member States).<sup>37</sup> These assumptions are in line with the general theories which support competition policy whereby competition is viewed as a long-term means of producing either cost reflective or reduced retail prices, and increasing standards of service, as companies are forced to compete to increase their customer base.<sup>38</sup>

In the absence of effective competition, EU legislation permits the use of regulated tariffs or price caps to guarantee affordability, once reported to the Commission and fulfilling the following conditions. They must be clearly defined, transparent, non-discriminatory, verifiable, and guarantee equal access for EU electricity companies to national consumers.<sup>39</sup> They must also uphold the principle of proportionality, taking into account the balance which Member States must meet between the objective of market liberalisation and the objective of protecting final consumers. However, as the problems associated with price caps (which are thought to reinforce oligopolistic

<sup>35</sup> the third liberalisation directive (n23), recitals 37, 45, 50, 53 and articles 3(7), 3(8) and 36(h).

<sup>36</sup> European Commission, 'The Internal Energy Market' [1988] COM (88) 238 final, 5.

<sup>37</sup> European Commission, 'Proposal for a Council Directive concerning common rules for the internal market in electricity' [1991] COM (91) 548, 3.

<sup>38</sup> See generally: Christopher Jones (ed.) *EU Energy Law Volume I The Internal Energy Market The Third Liberalisation Package* (3<sup>rd</sup> edn, Claeys & Casteels, 2010) 1-14.

<sup>39</sup> the third liberalisation directive (n23), article 3(2). See further: Anthony Doherty (n21).



market structures) are well-documented,<sup>40</sup> price caps are generally frowned upon and regarded as permissible for a limited period only, pending the introduction of effective competition.<sup>41</sup>

As the primary means of providing affordability, the EU has sought to introduce competition to generation and supply markets gradually, through the provisions of the first,<sup>42</sup> second<sup>43</sup> and third liberalisation directives.<sup>44</sup> As discussed in chapter five, the aim of these directives is to unbundle or separate progressive electricity markets, to introduce competition to the potentially profitable market segments, and advance the completion of an EU internal energy market. The central obligations placed on Member States, which were designed to lead to effectively competitive electricity markets will be briefly outlined below.

To quickly recap, the first liberalisation directive<sup>45</sup> required new generation facilities to be constructed on the basis of an authorisation or tendering procedure,<sup>46</sup> thereby allowing new players to enter the generation market. A network access regime was put in place such that Member States could choose one of three systems (negotiated access, single buyer access or single buyer with buy back option) to ensure that generators could fairly access the distribution and transmission systems. The directive also sought to begin the process of separating transmission and distribution (the natural monopoly segments of the electricity market) from generation and supply.

Accordingly, it required the designation of a distribution systems operator<sup>47</sup>. It also required transmission system operators to be independent in terms of management

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<sup>40</sup> See: Richard Whish and David Bailey (n29) 718-720; Damien Geradin, 'The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector' (2005) 1 *Journal of Competition Law & Economics* 2, 415; James Bushnell, 'California's electricity crisis: a market apart?' (2004) 9 *Energy Policy* 32, 1049.

<sup>41</sup> See *Federutility* (n26) para 47. In general terms see also: Case C-58/08 *Vodafone v Secretary of State* [2009] ECR I-04999, Opinion of AG Maduro, para. 42 wherein in giving an opinion in favour of the application of price controls to roaming networks in the mobile phone sector the AG stated: '*While price controls should always be assessed carefully...the limited duration of these controls and their aim of correcting a market failure that competition rules were not in a position to address makes them more readily acceptable*'.

<sup>42</sup> Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L 27/20 ('the first liberalisation directive').

<sup>43</sup> the second liberalisation directive (n22).

<sup>44</sup> the third liberalisation directive (n22).

<sup>45</sup> the first liberalisation directive (n42).

<sup>46</sup> *Ibid*, article 4.

<sup>47</sup> *Ibid*, article 10.



and accounting from generation and distribution activities.<sup>48</sup> Those responsible for the daily management of the national transmission system could no longer hold managerial positions in generation and distribution activities.<sup>49</sup>

The second liberalisation directive required Member States to open up their national supply markets to competition incrementally to permit all customers to choose between suppliers from 1 July 2007,<sup>50</sup> with limited derogations allowed for small isolated systems or micro-isolated systems.<sup>51</sup> Although it was not explicitly stated in the Directive, this was generally accepted to mean that from 1 July 2007 price controls should be removed for electricity, with the price for the supply determined solely by the operation of supply and demand.<sup>52</sup>

Finally, the third liberalisation directive sought to complete the unbundling process.<sup>53</sup> It reinforced the unbundling rules for Distribution System Operators<sup>54</sup> and provided Member States with four implementation models to progress the effective separation of supply and generation activities from network operations. Pursuant to its provisions Member States were obliged to implement one of the three following options:

- (i) ownership unbundling,
- (ii) the independent system operator, or
- (iii) the independent transmission operator.

Alternatively Member States were permitted to apply for an exemption from the requirements of the directive if they fulfilled certain criteria outlined in the directive, including having arrangements in place on 3 September 2009, which were considered

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<sup>48</sup> the first liberalisation directive (n42), article 7 and 14(3).

<sup>49</sup> This directive (n42) was implemented in Ireland through the European Communities (Internal Market in Electricity) Regulations, 2000, S.I. 445 of 2000 and Electricity Regulation Act 1999 (Public Service Obligations) Order 2002, S.I. 217 of 2002. *For general information on the liberalisation directives see: Kim Talus, EU Energy Law and Policy A Critical Account* (1<sup>st</sup> edn, Oxford University Press, 2013) Chapter three; Patrick Ryan, 'A Re-energised Approach to a Competitive European Electricity Market' [2009] 27 *Journal of Energy and Natural Resources Law* 1, 42-65.

<sup>50</sup> the second liberalisation directive (n22), article 21. This directive was implemented in Ireland through the European Communities (Internal Market in Electricity) Regulations 2005, S.I. 60 of 2005.

<sup>51</sup> the second liberalisation directive (n22), article 26.

<sup>52</sup> Similar to the understanding for the gas sector as outlined in *Federutility* (n26).

<sup>53</sup> The requirements of the third liberalisation directive (n23) were implemented in Ireland through the European Communities (Internal Market in Electricity and Gas) (Consumer Protection) Regulations 2011, S.I. 463 of 2011; European Communities (Internal Market in Electricity) Regulations 2010, S.I. 450 of 2010 and the European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011, S.I. 570 of 2011.

<sup>54</sup> See generally: Jones (n38), 185.



to be more effective in guaranteeing the independence of the transmission system than the arrangements specified by the directive.<sup>55</sup> As was considered in detail in chapter five, this was the option availed of by the Irish government, whereby the transmission system operator, EirGrid and the state owned electricity company, the ESB Group, applied for an exemption from the requirements of the directive to permit the ESB Group to retain ownership of the transmission system and remain the Transmission Asset Owner. This exemption was granted in April 2013<sup>56</sup> in a decision which is likely to further support the dominance of the ESB group in Ireland's development/production and supply markets as a *perceived*<sup>57</sup> barrier to market entry.

Generally, despite the overall aims of the directives and the far-reaching nature of the provisions seeking to secure their achievement, effective competition of a level sufficient to guarantee a general level of affordable electricity, has not been introduced to the Irish domestic retail market. In fact, the price of electricity in Ireland has been steadily increasing since the removal of price controls from the domestic retail market in 2011, a fact which was recently recognised in the Commission's Communication '*Energy prices and costs in Europe*'.<sup>58</sup> Prior to this, in 2013 the Sustainable Energy Authority of Ireland reported that Irish electricity prices had increased by 20.7 per cent since 2010<sup>59</sup> and the Commission identified Irish electricity prices (excluding taxes) as among the three highest in the EU in 2011.<sup>60</sup>

Strangely, despite Ireland's rising electricity prices, in 2011 the Commission for Energy Regulation issued its decision that the Irish retail market was effectively competitive and so price controls could be removed. This determination was despite the fact that in

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<sup>55</sup> the third liberalisation directive (n23) article 9(9).

<sup>56</sup> European Commission, 'Commission Decision of 12.4.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC –Ireland–EirGrid / ESB' [2013] C(2013) 2169 final.

<sup>57</sup> Emphasis added.

<sup>58</sup> See: European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Energy prices and costs in Europe' [2014] COM (2014) 21/2; in this Communication the impact of wind on electricity prices is also recognised on page 2 wherein it states: '*Moves to decarbonise electricity generation have led to [a] strong growth in wind and solar power in particular, which has had a major impact on grids and energy production costs*'.

<sup>59</sup> Sustainable Energy Association of Ireland, 'Electricity & Gas Prices in Ireland 2nd Semester (July – December) 2012' (SEAI, June 2013) <[http://www.seai.ie/Publications/Statistics\\_Publications/EPSSU\\_Publications/Price\\_Directive\\_2nd\\_Semester\\_2012\\_.pdf](http://www.seai.ie/Publications/Statistics_Publications/EPSSU_Publications/Price_Directive_2nd_Semester_2012_.pdf)> accessed 11 August 2014.

<sup>60</sup> European Commission, 'Energy Markets in the European Union 2011' SWD(2012) 368 final.

2011, Ireland's retail market<sup>61</sup> was considered to be highly concentrated on the Herfindahl-Hirschman Index, <sup>62</sup> an evaluation which had been made at European level based on information, which had been submitted by the Commission for Energy Regulation from its monitoring of the domestic market between July and September 2010.

In 2010, there were two independent suppliers who first entered the market in 2009. The first (Airtricity) had 12.09 per cent of the domestic market, while the second (Bord Gáis Energy, now known as Ervia) had 23.98 per cent of the market. The Electricity Supply Board (ESB) Group had a market share of 63.6 per cent, with customer switching between January and December 2010 at a level of approximately 20.94 per cent. The domestic market share of Electric Ireland (the ESB Group's rebranded electricity supplier) currently stands at approximately 62.18 per cent in terms of customer numbers, or 56.34 per cent in terms of MWhs (or electricity generated and sold),<sup>63</sup> thus the ESB's position in this market can still be classified as a dominant one, or one which demonstrates a:

*'...position of economic strength... which ... [would enable] it to prevent effective competition being maintained... by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers'.<sup>64</sup>*

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<sup>61</sup> Since the establishment of the Single Electricity Market (SEM) in 2007 which created a joint Irish and Northern Irish electricity market, in geographical terms this is considered to cover the area encompassing the whole of the island of Ireland.

<sup>62</sup> European Commission (n60) 81. As outlined on page 81 of the Staff Working Document: *'The HHI (Herfindahl-Hirschman Index) is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers (the higher the index, the more concentrated the market).'*

<sup>63</sup> Commission for Energy Regulation, 'Electricity & Gas Retail Markets Report Q2 2014 Information Paper' (Report, 13 November 2014) CER/14/768.

<sup>64</sup> See further: Case 27/76 *United Brands Company and United Brands Contineental v Commission* [1978] ECR 207, paragraph 65; Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, paragraph 38.



## Domestic Market Share

CER 14/768 Electricity & Gas Retail Markets Report Q2 2014

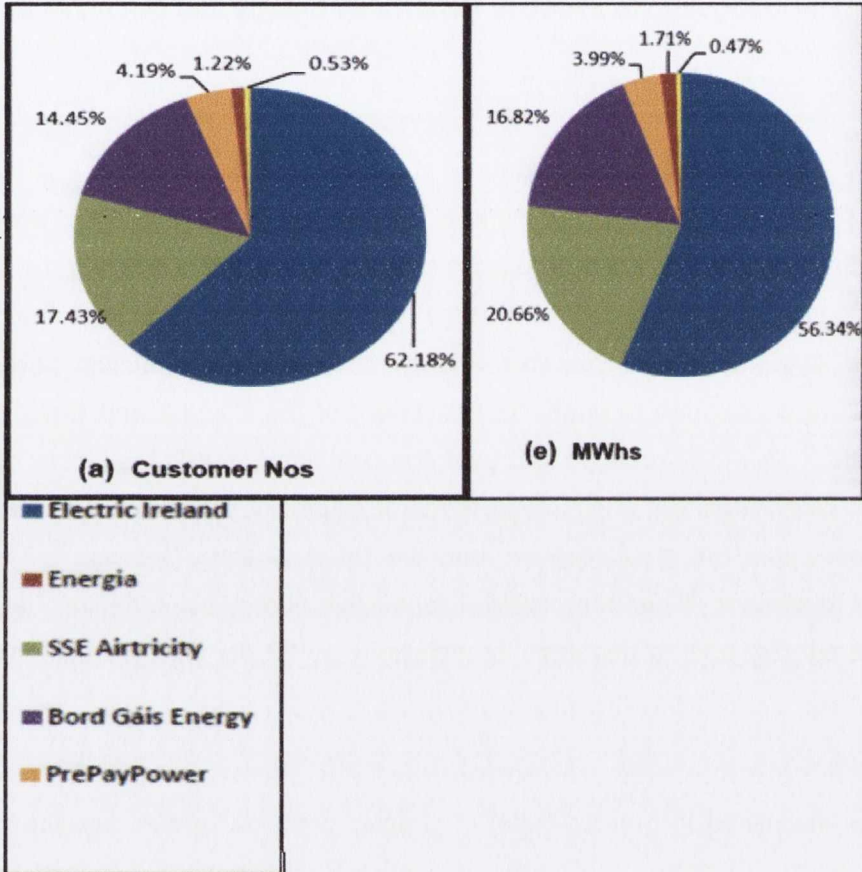


Figure 26: Electricity Domestic Retail Market 2014 (Market Shares in Customer Numbers and MWhs)<sup>65</sup>

The ESB Group's dominance in the retail market is reinforced by the ESB group's continued ownership of the transmission and distribution systems and its 46 per cent share of the plants operating in the development/production market.<sup>66</sup> The latter market share could be large enough to be considered a position of dominance in the

<sup>65</sup> Commission for Energy Regulation (n63).

<sup>66</sup> ESB, 'Innovations for Generations. Annual Report and Accounts 2013' (ESB, 13 March 2014) < <http://www.esb.ie/main/about-esb/annual-report-2013.jsp> > accessed 11 August 2014. Note: at the time of writing, more recent figures for the development market were not yet available.

generation market, as was discussed in chapter five.<sup>67</sup> Consequently, notwithstanding the determination of the Commission for Energy Regulation, effective competition cannot be said to have taken hold to naturally reduce the electricity prices charged to customers in the Irish domestic retail market. Moreover the cost of electricity production has also risen as Ireland has sought to fulfil the requirement to increase renewable energy production, a requirement which will be revisited below.

#### **2.4. The Obligation to Increase Renewable Energy and Decrease Emissions**

As an area of shared competence between the European Union and the Member States,<sup>68</sup> the latter retain a large degree of control over their national energy portfolios<sup>69</sup> and, as a result, their electricity markets. Notwithstanding this retained control, in 2009 the EU strengthened softer measures which had been designed to address the greenhouse gases released in energy production, and assigned Member States specific legally binding renewable energy, and emission reduction targets.<sup>70</sup> These targets were assigned through the enactment of the Climate and Energy Legislative Package.<sup>71</sup> As will be recalled, this package contains four primary pieces of legislation, the two most important of which (in terms of electricity production and this thesis) are the Renewable Energy Directive<sup>72</sup> and the Effort Sharing Decision.<sup>73</sup> These require Ireland to attain a 16 per cent share of renewable energy consumption<sup>74</sup> and to meet a complementary goal to decrease its emissions by 20 per cent (below 2005 levels) by 2020.<sup>75</sup>

As was discussed in greater detail in chapter one, the targets assigned to Member States by the Climate and Energy Legislative Package were designed to act as the EU's contribution to keeping the earth's global temperature from rising above 2

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<sup>67</sup> See also: Diana Moss, 'Electricity and Market Power: Current Issues for Restructuring Markets (A Survey)' (2006) 1 *Environmental and Energy Law & Policy Journal* 11, 17.

<sup>68</sup> TFEU (n24) article 4(i).

<sup>69</sup> TFEU (n24) article 194(2).

<sup>70</sup> In 2001 the EU had previously begun to address the greenhouse gases released in energy production through soft measures such as those outlined in Directive 2001/77/EC which set aspirational targets for renewable electricity consumption by 2010. See: Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33 ('the Renewable Electricity Directive').

<sup>71</sup> the Climate and Energy Legislative Package (n14).

<sup>72</sup> the Renewable Energy Directive (n14(4)).

<sup>73</sup> the Effort Sharing Decision (n14(3)).

<sup>74</sup> the Renewable Energy Directive (n14(4)) annex I.

<sup>75</sup> the Effort Sharing Decision (n14(3)) annex II.



degrees, and thus avoid as many of the potential consequences outlined by the Intergovernmental Panel on Climate Change in their successive Assessment Reports as possible.<sup>76</sup> They were also designed to ensure that the EU honoured its continuing commitments under the UNFCCC<sup>77</sup> and to show the EU's willingness to lead by example, and thereby advance the successful agreement of a global treaty on climate action to succeed the Kyoto Protocol.<sup>78</sup>

In the national renewable energy action plan, which Ireland submitted, the government officially pledged that 40 per cent of Irish electricity would be produced from renewable energy, primarily from onshore wind.<sup>79</sup> It also provided detail on existing and proposed measures which were designed to increase renewable energy in Ireland. Accordingly, the national renewable energy action plan provided detail on the main scheme initially run in 2006<sup>80</sup> which the government proposed implementing again, the Renewable Energy Feed In Tariff (REFIT). REFIT granted successful renewable energy generators 10-15 year power purchase agreements with suppliers at fixed and negotiated prices.<sup>81</sup> These prices were then supported by a public service obligation levy mechanism paid for by all electricity consumers through their electricity bills. To date, three REFIT schemes have been implemented by the Irish government and are all supported by a public service obligation levy mechanism.

As a result, although Ireland's dependence on externally sourced gas<sup>82</sup> continues to have an impact on national electricity prices, Irish electricity prices have been steadily

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<sup>76</sup> See for example: European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions. Winning the Battle Against Climate Change' [2005] COM (2005) 39, final, 3. Comment made at the 1939<sup>th</sup> Council Meeting, Luxembourg, 25 June 1996.

<sup>77</sup> See: the Renewable Energy Directive (n14(4)) recital 1. See also: Cinnamon Carlane (n13).

<sup>78</sup> *Ibid.*

<sup>79</sup> Department of Communications, Energy & Natural Resources, 'National Renewable Energy Action Plan. Ireland. Submitted under Article 4 of Directive 2009/28/EC' [2010] <<http://www.dcenr.gov.ie/NR/rdonlyres/03DBA6CF-AD04-4ED3-B443-B9F63DF7FC07/0/IrelandNREAPv11Oct2010.pdf>> accessed 15 August 2014.

<sup>80</sup> As approved by European Commission, State aid N 571/2006 – Ireland RES-E support programme.

<sup>81</sup> Like the AER Schemes, the REFIT schemes are designed to operate for a period of up to 15 years. As was stated in: Ireland's *Application for State Aid Notification, Renewable (Energy Sourced Electricity) Support Scheme*, this was to: (i) 'minimise the aid intensity' as renewable energy development has significant sunken costs which the REFIT scheme sought to cover, in addition to making renewable energy development economically viable, and to (ii) 'facilitate long term financial planning'. See generally: <http://www.dcenr.gov.ie/NR/rdonlyres/F8DF5A6F-DC92-44B5-917F-7481ADC19373/0/partIIIIII.pdf>.

<sup>82</sup> In 2013, 63.9 per cent of Ireland's electricity generation came from imported fuels (with natural gas accounting for 48 per cent; coal for 16 per cent and oil for 0.2 per cent). See: Commission for Energy Regulation, 'Electricity Security of Supply Report 2014 Submitted to the European Commission Pursuant to Directive 2009/72/EC and Directive 2005/89/EC' (Dublin,

rising to include the additional cost of developing and incorporating renewable energy resources into successive electricity markets to meet Ireland's renewable energy targets. These price increases are unlikely to be addressed by market competition for two reasons. First, the cost of developing renewable energy in Ireland is included in the prices charged by all electricity companies; in fact in 2012 it was acknowledged to be responsible for much of the increase in price,<sup>83</sup> with the profit margins charged by utilities presently unpublished (as market sensitive information) and thought to be relatively low<sup>84</sup> (acting as a further disincentive to new market entrants).

Secondly, even if these profit margins are not relatively low, which is doubtful<sup>85</sup> competition is unlikely to decrease them, as effective competition has not developed in the Irish domestic market and is unlikely to do so until the geographical size of Ireland's electricity market is increased. Certain characteristics of the Irish market (such as its isolated nature, its historic development, its small size, and consumer loyalty to the ESB group) continue to act as barriers to the development of effective competition. Consequently these factors contribute to the situation which currently exists in Ireland, whereby costs are increasingly resulting in overly high consumer prices (or a market failure) which competition rules are not in a position to address.<sup>86</sup>

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2014) <  
<http://www.cer.ie/docs/000266/CER14741%20Electricity%20SoS%20Report%20Final%202014.pdf>> accessed 14 November 2014.

2013 Report' (SEAI, December 2013) <  
[http://www.seai.ie/Publications/Statistics\\_Publications/Energy\\_in\\_Ireland/Energy\\_in\\_Ireland\\_1990\\_-\\_2012\\_Report.pdf](http://www.seai.ie/Publications/Statistics_Publications/Energy_in_Ireland/Energy_in_Ireland_1990_-_2012_Report.pdf) > accessed 11 August 2014.

<sup>83</sup> Electric Ireland, 'Price Change October 1 2012', (Customer Information, September 2012)<<https://www.electricireland.ie/ei/residential/price-plans/1st-october-price-change.jsp#ex-q1>> accessed 15 August 2014.

<sup>84</sup> Competition Authority, 'Price Discrimination & Customer Protection in the De-regulated Electricity Market. Submission to the Commission for Energy Regulation' (March 2011) Submission S/11/004.

<sup>85</sup> *Ibid.*

<sup>86</sup> For a comparative situation, where price controls were permitted to address overly high prices which competition rules are not in a position to address see: *Vodafone* (n41).



### **3. The Connection between Ireland's Renewable Energy Development Policy and the Increase in Irish Electricity Prices**

#### **3.1. Ireland's Renewable Energy Development Policy and Financial Support Schemes**

In 2010 Ireland submitted its national renewable energy action plan providing a comprehensive description of Ireland's plan to increase wind development, and thereby meet its 16 per cent renewable energy target (and 20 per cent emission reduction target). In this plan Ireland made a pledge to provide 40 per cent of the country's national electricity needs from renewable resources (and primarily onshore wind) by 2020. To allow the Commission to assess the steps either taken or proposed to reach allocated targets, Ireland's national renewable energy action plan provided substantial detail on the support mechanisms, legislation and policies either implemented or proposed to ensure their achievement. The REFIT scheme and the Alternative Energy Requirement (AER) programmes were the two main financial mechanisms outlined by Ireland, which were designed to incentivise investment in renewable energy development.

The AER programme was a tendering scheme with six competitions which ran between 1995 and 2003. Under the terms of the scheme, renewable energies (such as large-scale wind, small-scale wind, offshore wind, biomass, biomass combined heat and power (chp), biomass anaerobic digestion and hydro) could compete to place the lowest bid in a given competition, and thereby secure a 10 or 15 year power purchase agreement with the ESB, the government owned electricity supply company, recently rebranded as Electric Ireland).

Under this scheme the successful renewable energy generators are paid a fixed price for electricity from Electric Ireland, which in turn, is entitled to compensation from the public service obligation levy if the revenue it receives for selling the electricity is less than what it paid the renewable generators. Conversely Electric Ireland must return money to the public service obligation in the event of overcompensation. The public service obligation levy is paid for by all electricity consumers through their electricity



bills. The AER scheme has been closed to new applicants since 2003.<sup>87</sup> For the 2014/2015 period, 128 MW of renewable electricity (i.e. approximately 0.14 per cent of Ireland's electricity needs) will be supported pursuant to its terms.<sup>88</sup>

The AER scheme was supplanted by REFIT I in 2006. This was implemented to further a political target, attributed to Ireland in 2001 by the Renewable Electricity Directive<sup>89</sup> of reaching a 13.2 per cent share of renewable electricity by 2010. To date there have been three successive REFIT schemes (I-III).<sup>90</sup> Under the terms of these schemes, successful renewable energy developers are paid a fixed price for every kilowatt hour of electricity they produce. The premium between the cost of the tariff and the actual market price of the electricity is again paid for by the consumer, through the public service obligation tariff included in the final price charged for all electricity in Ireland. Consequently as more renewable generation plants (which were accepted to the scheme) become operational, the cost of the public service obligation tariff will rise.<sup>91</sup>

REFIT I was open to developers of large onshore wind, small wind, hydro, biomass landfill gas, and other biomass projects. REFIT II was launched in 2010 with participation limited to onshore wind, hydro and biomass landfill gas projects. REFIT III solely concerns biomass technologies. Commercial offshore wind has not been supported by REFIT II or III.<sup>92</sup> On foot of REFIT II and III the amount of renewable electricity supported and subsequently the cost of the public service obligation levy will

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<sup>87</sup> Department of Communications, Energy & Natural Resources, 'Alternative AER Requirement Programme 2005' (Overview of the Irish Renewable Energy Policy, 2005) <[www.dcenr.gov.ie/NR/rdonlyres/.../0/AERProgramme2005.doc](http://www.dcenr.gov.ie/NR/rdonlyres/.../0/AERProgramme2005.doc)> accessed 26 September 2013.

<sup>88</sup> Commission for Energy Regulation, 'Public Service Obligation Levy 2014/2015' (28 July 2014) CER/14/361.

<sup>89</sup> the Renewable Electricity Directive (n70).

<sup>90</sup> Like the AER Schemes, the REFIT schemes have been granted for up to 15 years. As was stated in: Ireland's *Application for State Aid Notification, Renewable (Energy Sourced Electricity) Support Scheme*, this was to: (i) 'minimise the aid intensity' as renewable energy development has significant sunken costs which the REFIT scheme sought to cover, in addition to making renewable energy development economically viable, and to (ii) 'facilitate long term financial planning. See generally: <http://www.dcenr.gov.ie/NR/rdonlyres/F8DF5A6F-DC92-44B5-917F-7481ADC19373/0/partIIIIII.pdf>.

<sup>91</sup> For example for the 2014/2015 period the Commission for Energy Regulation noted: "Overall the amount of renewable generation, mostly wind, estimated to receive the PSO levy next year is 138 MW more than the current year (due to REFIT 2 primarily), hence increasing the levy." See: Commission for Energy Regulation, 'Public Service Obligation Levy 2014/2015' (28 July 2014) CER/14/361. A regularly made criticism of such schemes is that there is no accurate way to predict exactly how expensive the scheme will be over time. See: Tyler Hagenbuch, 'Establishing an Aggressive Legal Framework for the Future of Wind Energy in Europe' (2009) 42 *Vanderbilt Journal of Transnational Law*, 1595-1630.

<sup>92</sup> Department of Communications, Energy and Natural Resources, 'Refit' (Renewable Energy Division, 25 September 2013) <<http://www.dcenr.gov.ie/Energy/Sustainable+and+Renewable+Energy+Division/REFIT.htm>> accessed 25 September 2013.



increase significantly in the coming years.<sup>93</sup> For the 2014/2015 period, 1,874 MW of renewable electricity (i.e. approximately 2.11 per cent of Ireland's electricity needs) will be supported through the REFIT schemes.<sup>94</sup>

Section 39 of the Electricity Regulation Act 1999<sup>95</sup> provides the legal basis for public service obligation levy in Ireland. Pursuant to both section 39 and the Electricity Regulation Act 1999 (Public Service Obligations) Order 2002<sup>96</sup> the Irish Regulator for electricity and gas, the Commission for Energy Regulation<sup>97</sup> is responsible for calculating and certifying the costs associated with the public service obligation and sets the associated levy for the required period. The focus in this chapter is given to the 2012/2013 period, as a more detailed breakdown of the electricity price components is available for the period.<sup>98</sup> However, it is important to note that electricity prices have continued to rise since the end of 2013 and are projected to continue to rise for the foreseeable future.<sup>99</sup>

In 2012/2013 the public service obligation levy for electricity averaged out at a monthly charge of €2.63 per month of the bill paid by all domestic electricity customers. For the period between 1 October 2013 and 30 September 2014 the public service obligation was increased and averaged out at a monthly charge of approximately €4.22 per month of the bill paid by all domestic electricity users.<sup>100</sup> Accordingly the public service obligation added approximately €50 to the annual residential electricity bill for 2013. In the 2012/2013 period renewables accounted for 41 per cent of the public service

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<sup>93</sup> The Electricity Regulation Act 1999, Number 23 of 1999.

<sup>94</sup> Commission for Energy Regulation (n91).

<sup>95</sup> Electricity Regulation Act 1999 (n93).

<sup>96</sup> Electricity Regulation Act 1999 (Public Service Obligations) Order 2002, S.I. 217 of 2002.

<sup>97</sup> Established pursuant to Part II of the Electricity Regulation Act 1999 (n93).

<sup>98</sup> Note: Focus is given to the 2013 period as information on the level of the transmission use of service charges and the distribution use of service charges could not be ascertained for the 2014 period. A request for this information was first lodged with EirGrid on 13 August 2014. Representatives of EirGrid later responded to let it be known that the requested information was not available/would not be made available at this time.

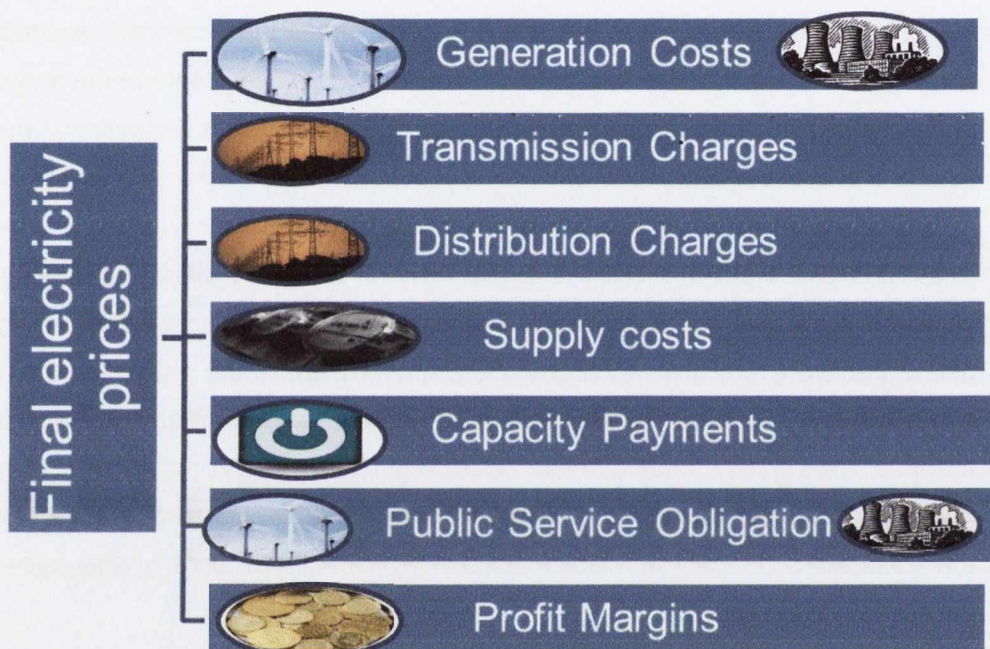
<sup>99</sup> On 9 September 2013 it was reported that the Commission for Energy Regulation had confirmed that an additional €300million would be needed to ensure that Ireland could meet its 40 per cent target, which would ultimately be passed onto consumers. See: Barry O' Halloran, '[euro] 300m to reach wind energy goal: Regulator publishes cost of incentives needed for State's 40% renewable target' *Irish Times* (Dublin, 9 September 2013) 2. Also, it has been stated that if either of the proposed upgrades to the electricity system (planned to run from Newbridge to Cork and known as Grid Link, and planned to run from north-west Mayo to Flagford, Co. Roscommon and known as Grid West) are placed under ground (an option which is currently being explored and will be determined in January 2015) that this could lead to an estimated 3 per cent increase in household electricity bills for the next 50 years. See generally: Mark Hillard, 'Burying Power Lines Cost Warning' *Irish Times* (Dublin, 12 December 2013) 7.

<sup>100</sup> Commission for Energy Regulation, 'Public Service Obligation Levy 2013/2014' (31 July 2013) CER/13/168.



obligation levy. Capacity (a charge also linked to renewable energy) accounted for 19 per cent, while supporting Ireland's peat plants accounted for the remaining 39 per cent of the public service obligation payment.<sup>101</sup>

In addition to the costs added by the public service obligation levy, the final electricity prices charged to residential consumers also include certain permissible additional costs designed to ensure the secure operation of the electricity system, and the smooth incorporation of the intermittent electricity provided by wind energy to retail customers. Thus the final electricity prices charged to domestic customers include the following:



**Figure 27: Breakdown of main costs included in final electricity prices**

- (i) generation costs,<sup>102</sup>
- (ii) transmission charges (also known as transmission use of system tariffs) or the charges levied by EirGrid, as the transmission system operator, for transporting electricity from the generating stations through the transmission grid to the distribution system or to the customer's premises (for the small number of customers directly connected to the transmission system),

<sup>101</sup> *Ibid.*

<sup>102</sup> These costs are determined in the wholesale market (by the bids made by electricity generators, with the permitted costs controlled by the terms of the generator's 'License to Generate', and Single Electricity Market's 'Bidding Code of Practice'). See chapter 5, figure 17 for an overview of the operation of this market. Note: on 23 February 2013 the Supreme Court determined that the levy payable by generators under the Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010 could also be included. See further: *Viridian Power Limited v Commissioner for Energy Regulation* [2012] IESC 13.



- (iii) distribution charges (also known as distribution use of system tariffs) or the charges which suppliers pay to transport electricity from the transmission grid along the distribution system to the customer,<sup>103</sup>
- (iv) supply costs, i.e. including the cost of procuring energy, administration costs and customer accounting and service costs,
- (v) capacity payments (a payment of €500 million per annum<sup>104</sup> split between predictable electricity generators and paid to incentivise them to remain on standby ready to generate electricity, to ensure demand meets supply at all times, i.e. if unexpected failures in generation occur or if intermittent generators such as wind cannot generate as anticipated),
- (vi) the public service obligation levy (discussed above in relation to renewable energy) which also operates to support peat generators and generators providing electricity under the terms of competitions run to ensure security of supply, and
- (vii) profit margins, which are unknown but thought to be low, as will be discussed below.

In addition to the public service obligation levy, capacity payments and transmission use of service and distribution use of service charges are directly concerned with facilitating an increase in renewable electricity consumption. In the case of the capacity payment mechanism, it is specifically designed to support the incorporation of intermittent renewable electricity into Ireland's electricity markets. The transmission use of system and distribution use of system charges, on the other hand, were increased to allow the transmission system operator, EirGrid, and the transmission asset owner and distribution system operator, ESB Networks, to recover the cost of developing an electricity system which could transport renewable electricity from the remote locations where wind is at its most productive to the locations where it is required. This upgrade plan is known as the 'Grid 25' scheme (and has been estimated to cost in the region of €4 billion).<sup>105</sup> It has been agreed that most of the cost of Grid 25

<sup>103</sup> Commission for Energy Regulation, 'Factsheet: Electricity Prices in Ireland' (2010) CER/10062.

<sup>104</sup> Single Electricity Market Operator, 'Demand Side Units in the SEM' (SEMO Publications, June 2013) <<http://www.sem-o.com/Publications/General/Demand%20Side%20Units%20in%20the%20SEM.ppt>> accessed 17 August 2014.

<sup>105</sup> EirGrid, 'Grid 25. A Strategy for developing Ireland's Electricity Grid for a Sustainable and Competitive Future' (EirGrid, 2009) <<http://www.eirgrid.com/media/Grid%2025.pdf>> accessed 17 September 2013. See further: Barry O'Halloran, 'Network costs drive electricity price rise' *Irish Times* (Dublin, 8 September 2012) 3.



will be passed on to the final customers through the transmission use of system and distribution use of system charges.<sup>106</sup> Consequently in 2013, system improvements accounted for an increase of 3.5 per cent to domestic prices.<sup>107</sup>

Since 2011, the year when domestic retail price controls for electricity were removed, there has been a steady increase in the electricity prices charged to consumers. For instance, in 2013, the SEAI released a report which showed that in the second quarter of 2012, the price of electricity for households increased for all levels of consumption, ranging from between 6 per cent to 8 per cent.<sup>108</sup> Admittedly, a proportion of these increases were attributable to a rise in the wholesale price charged for gas and oil imports.<sup>109</sup> However, two thirds of the price rise in retail price in the fourth quarter of 2012 was due to renewable energy development.<sup>110</sup> As can be imagined (without regulatory intervention) these renewable energy development costs will mean significant increases to household bills now and in the future.

Nevertheless, it is worth noting that in the long-term (i.e. in the next 10-15 years) renewable energy costs are expected to decrease as the Irish electricity system (including its interconnection/ electricity system linkage with mainland Europe) becomes updated, and the Irish electricity market conforms to the European target model.<sup>111</sup> The effect of this market evolution should be twofold. First it should increase

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<sup>106</sup> For the period 2011 – 2015, the Commission for Energy Regulation approved an expenditure of €1.45 billion for the transmission system (Commission for Energy Regulation, 'Public Service Obligation Levy 2012/2013' (Decision Paper, 1 August 2012) CER/10/20611) and €2.3 billion for the distribution system (Commission for Energy Regulation, Mid-Term review of WACC applying to the Electricity TSO and TAO and ESB Networks Ltd for 2014 to 2015' (Decision Paper, 31 January 2014) CER/10/198).

<sup>107</sup> Barry O'Halloran (n105).

<sup>108</sup> Sustainable Energy Authority of Ireland (n59).

<sup>109</sup> In relation to the increase in retail prices charged from 1 October 2012, Electric Ireland stated as follows:

*'The increase in regulatory costs accounts for approximately two thirds (3.6 per cent) of the overall 5.9 per cent increase. Electric Ireland has managed to maintain the balance of the increase, which is due to the cost of fuel being impacted by the weak Euro, to a minimum (2.3 per cent).'* Electric Ireland, 'Price Change October 1 2012', (Electric Ireland, September 2012) <<https://www.electricireland.ie/ei/residential/price-plans/1st-october-price-change.jsp#ex-q1>> accessed 24 September 2013.

<sup>110</sup> *Ibid.*

<sup>111</sup> The European Target Model is a model electricity market with features designed to provide for cross border capacity allocation and congestion management. Detailed legally binding rules that give legal effect to this target model have been finalised See: European Commission, 'Draft Commission Regulation (EU) No XXX of XXX establishing a Guideline on Capacity Allocation and Congestion Management' (Commission, 2014) <[http://ec.europa.eu/energy/gas\\_electricity/electricity/doc/204108-cacm\\_formal\\_proposal\\_for\\_comitology.pdf](http://ec.europa.eu/energy/gas_electricity/electricity/doc/204108-cacm_formal_proposal_for_comitology.pdf)> accessed 18 December 2014. The EU Electricity Target Model is not consistent with the Irish SEM in its current form. In recognition of this ACER (the European Agency for the Co-operation of Energy Regulators) has agreed to provide a



the geographical size of the Irish electricity market, thereby allowing it to develop and support effective competition as part of a larger European energy market. Secondly it should reduce the costs included in electricity supply by allowing Ireland to efficiently export intermittent electricity when there is a surplus and import electricity when there is a deficit, thereby ultimately negating the need for a capacity payment mechanism.

As market sensitive information, details on the profit made by electricity supply companies are not readily available. However, these are unlikely to have had much input into the recent rise in electricity prices, as they are thought to be relatively low.<sup>112</sup> Conversely, evidence shows that renewable energy development is contributing to higher electricity prices and these prices are already affecting Irish households. According to figures released by the Irish League of Credit Unions on 22 October 2012, approximately 40 per cent of Irish people were left with €100 or less to spend at the end of the month, having paid their essential utility bills. The survey also showed that 18 per cent of adults had no money left; 7 per cent had less than €20, and 14 per cent had less than €50.<sup>113</sup>

In 2013 these figures seemed to improve with approximately 38 per cent of Irish people left with €100 or less to spend at the end of the month, having paid their essential utility bills.<sup>114</sup> The 2013 survey also showed that 14 per cent of adults had no money left, 7 per cent had less than €20 and 13 per cent had less than €50 per cent.<sup>115</sup> However, detracting from what appeared to be a slight improvement in some figures, the survey also noted that while percentages had improved, the volumes of people surveyed had increased and overall those with €100 or less has increased by 20,000.<sup>116</sup>

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derogation for the island of Ireland to meet the Target Model by 2017. See: Energy Ireland, 'Implementing the Target Model: Challenges for Ireland' (Energy Ireland, 2013) <<http://www.energyireland.ie/events/electricitymarket/index.php>> accessed 25 September 2013.

<sup>112</sup> The Competition Authority has consistently described electricity as a high volume low profit business. See: Competition Authority, 'Price Discrimination & Customer Protection in the De-regulated Electricity Market. Submission to the Commission for Energy Regulation' (Competition Authority Submission, March 2011) Submission S/11/004.

<sup>113</sup> Irish League of Credit Unions, 'Third Irish League of Credit Unions 'What's Left' Tracker 2012' (Irish League of Credit Unions, 20 October 2012) <<http://www.creditunion.ie/communications/news/2012/title,7005,en.php>> accessed 26 September 2013.

<sup>114</sup> Irish League of Credit Unions, 'Second ILCU What's Left Tracker of 2013' (Irish League of Credit Unions, 24 September 2013) <<http://www.creditunion.ie/communications/news/2013/title,7773,en.php>> accessed 13 August 2014.

<sup>115</sup> *Ibid.*

<sup>116</sup> Irish League of Credit Unions (n113).



Although these surveys included rent and mortgage payments in their calculations, the figures show that electricity prices may no longer be considered 'affordable' for many Irish consumers. This is particularly so, when measured against the European Bank for Reconstruction and Development benchmark which requires utility bills to be less than 25 per cent of all household expenditure. This increasing lack of affordability was also recognised by the National Economic and Social Council in December 2012.<sup>117</sup>

Consequently, as the state-owned electricity company, Electric Ireland, currently holds a domestic market share of 62.18 per cent in terms of customer numbers, or 56.34 per cent in terms of GWhs (or electricity generated and sold),<sup>118</sup> a strong case could be made that as effective competition has not been successfully introduced to the Irish domestic retail market and is unlikely to reduce electricity prices in the short – medium term, temporary price controls should be re-instated to correct the market failure which is causing overly high prices. The reasons why effective competition has not developed in the Irish electricity development or supply market (and is unlikely to do so in the near future) will be examined below.

### **3.2. The Reasons Why Effective Competition Has Not Developed and Why the Current Market Structure is Unlikely to Provide a General Level of Electricity Affordability in the Near Future**

As only certain parts of the overall electricity market are profitable, but all are essential to final supply, electricity markets in Europe developed as progressive monopolies with a state-owned entity dominating each progressive market from generation to transmission to distribution to supply.<sup>119</sup> In this regard, Ireland was no exception and the Electricity Supply Board (ESB) was established in 1927<sup>120</sup> as the State owned corporate body<sup>121</sup> responsible for controlling and developing Ireland's electricity

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<sup>117</sup> National Economic and Social Council, 'Ireland and the Climate Change Challenge: Connecting "How Much" with "How To"' (NESC, December 2012) <<http://www.environ.ie/en/Publications/Environment/ClimateChange/FileDownload,32467,en.pdf>> accessed 23 September 2013, 76.

<sup>118</sup> Commission for Energy Regulation (n63).

<sup>119</sup> Competition Authority, 'Discussion Paper No. 3. Proposals for the Electricity Supply Industry in Ireland: Comments on the Consultation Paper published by the Department of Transport, Energy and Communications' (Competition Authority, November 1997) <[http://www.tca.ie/images/uploaded/documents/Discussion\\_Paper\\_3.pdf](http://www.tca.ie/images/uploaded/documents/Discussion_Paper_3.pdf)> accessed 18 August 2014.

<sup>120</sup> The Electricity Supply Act 1927, Number 27 of 1927.

<sup>121</sup> The ESB is a state owned enterprise, majority owned by the Irish government with the Minister for Finance holding 85 per cent and the Minister for Communications, Energy and



network. At that time 'more than 300 different suppliers were concerned with generating and supplying electricity in different parts of the country, including 16 local authorities and five major companies'<sup>122</sup> all of which were incorporated into or supplanted by the ESB.

As the ESB was statutorily set up as a monopoly with a duty to operate on a break even basis<sup>123</sup> no incentive existed to decrease costs or to invest in infrastructure, a factor which has contributed greatly to the current costs included in electricity prices. The position of the ESB Group was also recognised in the case-law of the period. Specifically, in *McCord v ESB [1980]* O'Higgins CJ noted the position of the ESB Group in the national electricity market stating:

*'Over the years since its establishment... [the ESB Group] has carried out... [its] statutory functions with regard both to the supply and control of electricity to such an extent that it now exercises a virtual monopoly in relation to this essential source of energy and power.'*<sup>124</sup>

Though the ESB Group's 'not for profit' obligation was repealed in 2001,<sup>125</sup> essentially the price charged by ESB for electricity in the domestic market was controlled/capped for 80 years (i.e. between 1927 and 2001, and between 2005<sup>126</sup> and 2011).<sup>127</sup> Moreover, ESB's dominant status in each of the progressive markets was also virtually unchallenged for most of this period. By 1999 ESB had successfully acquired virtually all of Ireland's generating plants. ESB also had the sole power to make orders affecting market participants and to issue permits to those wishing to generate, distribute and supply electricity so that new entry into the generation business was effectively foreclosed.<sup>128</sup>

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Natural Resources holding 10 per cent of ESB shares. The remaining 5 per cent is owned by an Employee Share Ownership Trust.

<sup>122</sup> Electricity Supply Board 'Foundation of the ESB' (ESB, 2012) <<http://www.esb.ie/main/about-esb/foundation-of-esb.jsp>> accessed 16 September 2013.

<sup>123</sup> The Electricity Supply Act 1927 (115), s. 21(2).

<sup>124</sup> *James McCord v ESB [1980]* ILRM 153.

<sup>125</sup> Electricity Supply (Amendment) Act 2001, Number 9 of 2001.

<sup>126</sup> European Communities (Internal Market in Electricity) Regulations 2005 (n50), regulation 17(1) (h).

<sup>127</sup> Commission for Energy Regulation, 'Review of the Regulatory Framework for the Retail Electricity Market Domestic Market Deregulation', (Review, 4 March 2011) CER/11/041.

<sup>128</sup> Competition Authority (n112) 9.

Until 1996, electricity was considered to be of such importance that it was thought not to be subject to the normal EC rules of competition.<sup>129</sup> At this point, however, the EU began to intervene in national electricity markets with the first of its liberalisation directives, which took some initial steps toward dividing national progressive electricity markets (including generation, transmission, distribution and supply) to introduce competition to the profitable parts (generation and supply). This directive was implemented in Ireland through two pieces of legislation: the European Communities (Internal Market in Electricity) Regulations, 2000,<sup>130</sup> and Electricity Regulation Act 1999 (Public Service Obligations) Order 2002.<sup>131</sup>

As discussed, the Electricity Regulation Act 1999 (Public Service Obligations) Order 2002 provided the legislative basis for the Commission for Energy Regulation to calculate and verify the costs associated with the public service obligation and sets the associated levy for the required period. The European Communities (Internal Market in Electricity) Regulations, 2000 provided the legislative basis for the establishment of a transmission system operator and the rules which were to govern its operation. They also required the establishment of a distribution system operator (as a separate division of the ESB Group) and outlined rules to govern its operation. As part of the requirements of the Regulations, licenses were required for the transmission system operator, distribution system operator and for the generation and supply of electricity. Additional regulatory responsibilities were also allocated to the Commission for Electricity Regulation (now known as the Commission for Energy Regulation) and the separation of accounts for integrated electricity undertakings became mandatory.

The first liberalisation directive was later followed by the second liberalisation directive in 2003. This was implemented in Ireland through the European Communities (Internal Market in Electricity) Regulations 2006<sup>132</sup> and the European Communities (Internal Market in Electricity) Regulations 2005<sup>133</sup> which built on the requirements of the European Communities (Internal Market in Electricity) Regulations, 2000 to enhance

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<sup>129</sup> In the period which led up to the enactment of the first liberalisation directive, all operations associated with state-owned electricity monopolies were generally considered to fall within the exemption provided for, for Services of General Economic Interest, by Article 90 of the Treaty establishing the European Community. This was prior to a number of cases brought by the Commission in the 1990s. See generally: Kim Talus, *EU Energy Law and Policy A Critical Account* (1<sup>st</sup> edn, Oxford University Press, 2013) and Wolf Sauter, 'Services of General Economic Interest and Universal Service in EU Law', (Social Science Research Network, 2008) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1136105](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136105)> accessed 7 June 2012.

<sup>130</sup> S.I. 445 of 2000.

<sup>131</sup> Electricity Regulation Act 1999 (Public Service Obligations) Order 2002 (n49).

<sup>132</sup> S.I. 524 of 2006.

<sup>133</sup> the European Communities (Internal Market in Electricity) Regulations 2005 (n50).



the responsibilities of the Commission for Energy Regulation in matters of information provision, consultation and monitoring and provision of security of supply and place further restrictions on the day-to day operations of the distribution system operator and transmission system operator with the objective of increasing their independence.

The 2005 Regulations also provide the basis for the designation of a Public Electricity Supplier (an entity charged with meeting all reasonable requests to supply electricity, with its prices set by the Commission for Energy Regulation); the designation of a Supplier of Last Resort (an entity charged with supplying electricity to customers where the original supplier failed or ceased to supply electricity or the Commission for Energy Regulation issued a direction requiring supply) and the Commission for Energy Regulation's power to grant or refuse licenses. An added requirement of the Regulations is for separate accounts to be kept for generation, transmission, distribution and supply activities for all electricity undertakings.

In 2007, to further the development of the internal energy market, Ireland and Northern Ireland joined their electricity markets to form the Single Electricity Market or the SEM. Following this, the requirements of the third liberalisation directive were implemented through the following Irish legislation: the European Communities (Internal Market in Electricity and Gas) (Consumer Protection) Regulations 2011,<sup>134</sup> European Communities (Internal Market in Electricity) Regulations 2010,<sup>135</sup> and the European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011.<sup>136</sup> Pursuant to this legislation the following changes were implemented. Additional protections were afforded to vulnerable customers (a term defined to include customers who are critically dependent on electrically powered equipment, including life protecting devices, assistive technologies to support independent living and medical equipment, or those who are particularly vulnerable to disconnection during the winter months, for reasons of advanced age or physical sensory, intellectual or mental health). The Commission for Energy Regulation was granted additional powers and responsibilities and an application procedure was put in place to allow Ireland to apply for an exemption from the requirements of the third liberalisation directive.

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<sup>134</sup> the European Communities (Internal Market in Electricity and Gas) (Consumer Protection) Regulations 2011 (n53).

<sup>135</sup> Number 450 of 2010.

<sup>136</sup> the European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011 (n53).



As legislation designed to separate progressive electricity markets to introduce effective competition to generation and supply markets, these directives were not overly successful. While it is true that the markets were separated, and new parties entered the generation and supply markets to challenge the ESB group, the group has maintained a strong presence in both markets, and in particular in the supply market. In the generation market, its market share has been reduced to 40 per cent,<sup>137</sup> mainly in response to two regulatory measures imposed by the Commission for Energy Regulation. The first was a Commission for Energy Regulation-ESB Asset Management Agreement, which obliged the ESB Group to divest itself of a certain proportion of its generating plants. The second obliged the ESB group to separate its remaining generation capacity into separately run companies; thereby reducing the group's overall market power and allowing other entities to gain some competitive advantages.<sup>138</sup>

Conversely, despite the measures implemented to reduce the ESB group's domestic retail market share, this has remained relatively high at 62.18 per cent in terms of customer numbers, or 56.34 per cent in terms of MWhs (or electricity generated and sold).<sup>139</sup> This is despite the fact that ESB's retail prices were subject to Commission for Energy Regulation control until April 2011 (to facilitate the entry of competitors into the marketplace). In April 2011 controls were removed as the Commission for Energy Regulation determined the market was 'effectively competitive'. The criteria used as a benchmark to determine that 'competitiveness' had been reached were as follows:

- (i) there were at least three active suppliers present in the market,
- (ii) there were a minimum of two independent suppliers with a minimum share of 10 per cent GWh each,
- (iii) Electric Ireland controlled a market share of 60 per cent or less, and
- (iv) customer switching rates were greater than 10 per cent.

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<sup>137</sup> The Commission has stated that its experience suggests that dominance is not likely if the undertaking's market share is below 40 per cent in the relevant market. Source: European Commission, 'Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009) OJ C045/7.

<sup>138</sup> On 11 April 2013, the CER published a decision paper and a modified ESB Generation Licence allowing for the horizontal generation integration of ESB. See: Single Electricity Market, 'Modified ESB Generator License' (Ireland Generation Licences, April 2013) <<http://www.allislandproject.org/en/generation.aspx?article=f51097ff-25d3-40dd-8c73-48264829e2b2>> accessed 26 September 2013.

<sup>139</sup> Commission for Energy Regulation (n63).



The Commission for Electricity Regulation also made the removal of price controls conditional on ESB's re-branding of its retail branch, which has since become known as Electric Ireland.

Despite this determination that the domestic retail market is effectively competitive,<sup>140</sup> with an indisputable geographical scope, no potential substitute product, and a highly concentrated measure on the Herfindahl-Hirschman Index, it is unlikely that Ireland's domestic retail market could ever be considered competitive in a traditional sense.<sup>141</sup> There are many reasons why the three liberalisation directives failed to introduce effective competition to this market. Those which are likely to prevent competition developing in the near future are analysed below. The size and isolation of Ireland's national electricity markets,<sup>142</sup> and the limited profits to be made, make the domestic retail market incapable of supporting more than a handful of electricity competitors, until the national market evolves. This will continue to be the case until at least 2017 when the Irish electricity market conforms to the European target model, thereby enabling Ireland to efficiently trade electricity as part of a larger market. Most likely, however, it will be later still, when the construction of further interconnection (or the lines and stations which link the networks of Member States) is complete.

Furthermore, the historic development of the Irish national market, which supported and reinforced the dominance of the ESB group (between 1927 and 2009<sup>143</sup> and beyond) created a continuing and strong customer loyalty and confidence in the status quo, as evidenced by the low customer switching rates.<sup>144</sup> This, along with the ESB group's role as transmission asset owner and distribution system operator, supports and reinforces the group's market power and overall dominance in the domestic retail market. For these reasons, effective competition is unlikely to develop in the market of

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<sup>140</sup> Commission for Energy Regulation (n127).

<sup>141</sup> See generally: Alison Jones and Brenda Sufrin, *Competition Law*, (4<sup>th</sup> edn, Oxford University Press, 2011) 1-19; Joanna Goyder and Albertina Albors-Llorens, *Goyder's EC Competition Law*, (5<sup>th</sup> edn, Oxford University Press, 2009) 8-23; Massimo Motta, *Competition Policy: Theory and Practice* (1<sup>st</sup> edn, Cambridge: Cambridge University Press, 2004).

<sup>142</sup> Ireland's electricity grid is connected to Northern Ireland via one major interconnector (the Louth to Tandragee interconnector consisting of a 275kv double circuit overhead line with an approximate capacity of 500MW). In turn, the Northern Ireland electricity grid is linked to Britain via the Moyle interconnector which runs between Islandmagee, Co Antrim and Auchencrosh, Ayrshire, Scotland. There are also two 11kv standby North-South interconnectors (Strabane to Letterkenny and Enniskillen to Corraclassy). Plans do exist, however to increase cross-border interconnection between Northern Ireland and the Republic of Ireland with a 400kv interconnector. Source: Irish Wind Energy Association, *Energy Ireland Yearbook 2013* (bmf Business Services: 2013) 95.

<sup>143</sup> The year when Airtricity and Bord Gais Energy first entered the domestic retail market.

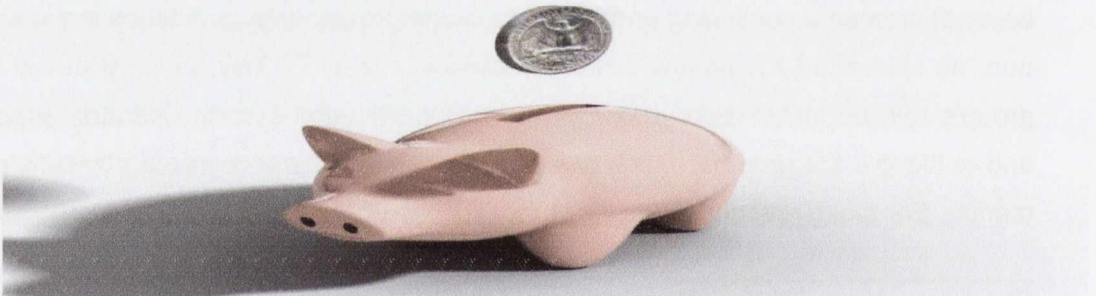
<sup>144</sup> Commission for Energy Regulation (n127).

its own accord. In addition, in a market this size surplus competition-driven regulation could lead to market distortions rather than increased consumer benefits. For example, if ESB's market share is further reduced by regulatory means, it could result in shared market dominance between the three companies (the ESB group, Airtricity and Bord Gáis Energy, now known as Ervia) or an oligopoly where these companies:

*'realise that their individual decisions on the level of output will have a certain influence on market price, and that their decisions on either output or price will induce a reaction from their competitors...'*<sup>145</sup>.

While it cannot be predicted with certainty, this could result in a market where monopolistic prices and output prevail.<sup>146</sup> Consequently it is submitted that until the national market evolves to operate as part of a larger European electricity market, or renewable energy costs can be reduced, price controls should be re-instated to guarantee affordability. This case for price controls is supported by two decisions of the CJEU (*Vodafone v Secretary of State*<sup>147</sup> and *Federutility*).<sup>148</sup> These decisions concerned markets with similar characteristics to those of the Irish domestic electricity market. Accordingly both cases will be examined (together with the conditions required for the price controls in question) in part four of this chapter.

#### **4. A Case for the Re-introduction of Temporary Price Controls?**



**Figure 28: Price controls**

Price controls can be defined as government mandated minimum or maximum prices that can be charged for specified goods. In addition to their initial usage in markets

<sup>145</sup> Juan F. Briones Alonso, 'Economic assessment of oligopolies under the Community Merger Control Regulation', (1995) 4 European Competition Law Review 3 <[http://ec.europa.eu/competition/speeches/text/sp1995\\_033\\_en.html](http://ec.europa.eu/competition/speeches/text/sp1995_033_en.html)> accessed 25 September 2013.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Vodafone* (n41).

<sup>148</sup> *Federutility* (n26).



considered to be natural monopolies (such as electricity and gas markets), they have also been used to control inflation, to restrain windfall or monopoly profits and to ensure a commodity can be provided at a reasonable price.<sup>149</sup> While price controls are accepted as legitimate methods to ensure consumer protection,<sup>150</sup> the use of price controls to distort competition is well recognised in EU case law. In this regard the CJEU has been quick to act where prices were fixed at a level that placed imported products at a disadvantage, when compared to identical national products.<sup>151</sup>

Common consensus on the application of price controls to electricity markets is that their use should generally be avoided. In electricity markets, this is because electricity price controls are frequently blamed for the rolling black-outs, which occurred in California between 2000 and 2001.<sup>152</sup> It has been argued that these price controls (which were applied to the wholesale market) resulted in a situation where demand outstripped supply, as insufficient incentive existed for companies to invest in additional generation. This situation led some commentators, including the US Federal Energy Regulatory Commissioner Curt Hebert, to decide that '*price-caps in general do more harm than good*'.<sup>153</sup> Other commentators, however, have pointed out that the price controls which were in operation at this time, were but one in a series of factors (including gross failures by the regulatory authority) which ultimately led to the Californian electricity crisis.<sup>154</sup>

While it cannot be denied that price controls have drawbacks, it is submitted here that: when structured appropriately and applied as temporary measures, they can be appropriate and effective to correct a market failure which is resulting in overly high prices. This proposition has been accepted by the CJEU in relation to two markets directly comparable to the electricity domestic retail market: the roaming mobile phone and gas markets. In both cases the Court found that price controls were acceptable as a temporary solution designed to correct a market failure resulting in overly high prices

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<sup>149</sup> Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3<sup>rd</sup> edn, Oxford and Portland, Oregon, 2012) 105.

<sup>150</sup> *Ibid.*

<sup>151</sup> Joined Cases 80/85 and 159/85 *Edah* [1986] ECR 3359, paragraph 11. See also Case 65/75 *Tasca* [1976] ECR 291; Case 82/77 *Van Tiggele* [1978] ECR 25; and Case C-287/89 *Commission v Belgium* [1991] ECR I-2233, paragraph 17.

<sup>152</sup> James Bushnell, 'California's electricity crisis: a market apart?' (2004) 9 *Energy Policy* 32, 1049.

<sup>153</sup> *Ibid.*

<sup>154</sup> See: Frank A. Wolak, 'Diagnosing the California Electricity Crisis' (2003) 16 *The Electricity Journal* 7, 11–37.

which competition was not in a position to address. As such, both cases will be analysed below.

#### 4.1. *Vodafone v Secretary of State*<sup>155</sup>

On 27 June 2007, the Roaming Regulation which imposed a maximum cap on EU-wide roaming charges was enacted. It was challenged by Vodafone and other mobile phone operators before the English High Court and a number of questions were referred to the CJEU for clarification. Although these questions concerned the validity of the Roaming Regulation's legal base in EU law, and the compatibility of an EU wide price control with the principles of proportionality and subsidiarity, the decision of the Court and the reflections of the Advocate General shed some much needed light on the acceptability of price controls to address a market failure. Accordingly, the aspects of the case relevant to the application of price controls to the Irish domestic retail market will be analysed below.

In considering the validity of the Roaming Regulation, AG Maduro looked at the background to its enactment and the market in question. He noted that the regulatory framework which was in place was insufficient to permit national regulators to address the problems which were arising. In this instance he found that the framework in question might in fact be adding to the problem. He also noted that the issue of high prices had been raised on numerous occasions and determined that:

*'Having identified market failures and social costs existing in the context of the harmonised regulatory regime and, in fact, arising from such regulatory regime the Community legislature must, for the reasons noted above...have the power to address this situation and to provide powers either at national or Community level to change a regulatory framework it found to be working ineffectively'*<sup>156</sup>.

He then proceeded to consider the price controls themselves, stipulating that although price controls should always be carefully assessed (due to the extreme nature of their impact on the market), the limited duration of the controls in question and their aim of correcting a market failure that competition rules were not in a position to address made them more readily acceptable. In finding the price controls outlined by the

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<sup>155</sup> *Vodafone* (n41).

<sup>156</sup> *Vodafone* (n41), Opinion of AG Maduro, para 25.



Roaming Regulation to be valid he noted the existence of a 'sunset clause' which would ensure that the interventions in question were periodically reviewed.

The Court followed the Advocate General's Opinion in its conclusion but not its reasoning, which addressed the questions through an analysis of the Roaming Regulation and the legislation which preceded it. However, in one interesting and relevant passage the Court considered the price controls at issue, holding that in light of the importance of consumer protection within the context of Article 95(3) EC (the legal basis of the Roaming Regulation):

*'intervention that is limited in time in a market that is subject to competition, which makes it possible, in the immediate future, to protect consumers against excessive prices, such as that at issue, even if it might have negative economic consequences for certain operators, is proportionate to the aim pursued.'*<sup>157</sup>

#### 4.2. *Federutility*<sup>158</sup>

*Federutility* was a case which concerned the application of price controls in the gas sector after the date on which EU law stated that all customers were to be free to choose their supplier. As gas and electricity markets are both natural monopolies which were opened up to competition at the same time, with almost identical legislation, the case is of great significance for the electricity sector. Its facts are as follows. In April 2010, *Federutility*, along with a number of other gas companies challenged the Italian gas and electricity regulator's decision to keep price controls in place after 2007. They argued that as EU law determined that 1 July 2007 was the date after which all customers were to be free to choose their gas suppliers, price controls should have been removed as and from this date. First of all, the Court stressed that although it was not explicitly stated in the second gas directive<sup>159</sup> from 1 July 2007 the price for the supply of natural gas should be determined solely by the operation of supply and demand. It based this finding on a teleological reading of the recitals of the directive which indicated that the directive was designed to achieve a total liberalisation of the market, allowing all suppliers to freely deliver their products to suppliers.

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<sup>157</sup> *Ibid*, para 69.

<sup>158</sup> *Federutility* (n26).

<sup>159</sup> Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L 176/57.

Nevertheless, the Court proceeded to consider the provisions relating to public service obligations, and the price of supply. It found that it followed from the second gas directive that:

*'Member States [were allowed] to assess whether, in the general economic interest, after 1 July 2007, it is necessary to impose on undertakings operating in the gas sector public service obligations in order, in particular, to ensure that the price of the supply of natural gas to final consumers is maintained at a reasonable level having regard to the reconciliation which Member States must make, taking account of the situation in the natural gas sector, between the objective of liberalisation and that of the necessary protection of final consumers.'*<sup>160</sup>

It followed this by underlining the importance of compliance with the principle of proportionality. Here, the Court considered two aspects to the principle. First it considered duration, stressing that an intervention of this nature must be limited in duration to what was strictly necessary to achieve its objective and must not make permanent a measure which, by its nature would represent an obstacle to the realisation of an operational internal market. Here, the Court stated that labelling the measure 'temporary' would not be enough. Periodic re-examinations would be required, at close intervals which had regard to the development of the sector. Second, the Court considered its purpose, stressing that it was for the national court to consider whether legislation such as that at issue fulfilled a requirement. In this regard, the Court stated:

*'the observations submitted to the Court in these proceedings indicate that the purpose of defining "reference prices" ...is to limit the impact of the increase in the price of petroleum products on international markets, which, in a context where competition on the natural gas market is not effective, especially on the wholesale market, would in the absence of intervention have a major impact on the sale price offered to final customers. It is for the referring court to verify whether that is the case, taking account in particular of the objective of establishing a fully operational internal market for gas and of the investments necessary in order to exert effective competition in the natural gas sector.'*<sup>161</sup>

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<sup>160</sup> *Federutility* (n26), para 32.

<sup>161</sup> *Federutility* (n26).para 37.



The AG's Opinion provided further clarification on the matters which could be considered as justifying proportionate intervention in the general economic interest:

*'Against this background, it follows that the objective of preventing undesirable and disproportionate price rises which would be detrimental to consumers constitutes grounds for 'general economic interest' which, provided the directive's other conditions are met, would justify public intervention in respect of prices for the supply of natural gas.'*<sup>162</sup>

In discussing the nature of the controls to be applied, the Court held it would be necessary to limit the application of the price controls to the price component directly influenced upwards and to ensure that any application of price controls did not lead to the imposition of a financial burden on some undertakings, such as those not involved in the business of producing/ importing gas.

Finally, the CJEU concluded by summarising the conditions which were mandatory for the imposition of price controls. The intervention must be limited in duration to what was strictly necessary to achieve the objective of pursuing the general economic interest. The intervention must not go beyond what was necessary to achieve the objective pursued in the general economic interest. The requirement of proportionality must be assessed with regard to the scope of the measures and its beneficiaries. The measure must be clearly defined, transparent, non-discriminatory and verifiable, guaranteeing equal access for all EU gas companies to consumers.

### **3.3 The Application of Temporary Price Controls to the Irish Domestic Retail Market**

Both *Vodafone v Secretary of State*<sup>163</sup> and *Federutility*<sup>164</sup> demonstrate that the application of temporary price controls may be acceptable to address a market failure where competition has been introduced but has been ineffective to address rising consumer prices. However, they also establish that to be compliant with EU law, price controls must fulfil the conditions of being temporary, clearly defined, transparent, non-discriminatory, verifiable and guaranteeing equal access for EU electricity companies

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<sup>162</sup> *Ibid.* Opinion of AG Ruiz-Jarabo Colomer, para. 56.

<sup>163</sup> *Vodafone* (n41).

<sup>164</sup> *Federutility* (n26).

to national consumers.<sup>165</sup> In addition, the controls must respect the principles of proportionality and not go beyond what is strictly necessary. As shown by the Vodafone case this could be demonstrated by regular price control reviews and a 'sunset clause'.

Both the roaming mobile phone and Italian gas markets bear resemblances to the Irish domestic electricity market. Competition had been introduced to both but had been ineffective to address the rising prices charged to customers. This had resulted in consumer detriment. In the mobile phone market it was detriment which could not be addressed sufficiently or in time at national level and so the EU intervened with price controls. In the Italian gas market, as competition was ineffective to address the rising price of gas in the short-term, the State intervened to guarantee affordability for consumers.

In light of the reasoning applied in these cases, and the power afforded to the Irish regulator to address rising prices in the domestic electricity market, it is proposed that price controls should be put in place in this market to guarantee a general level of affordability to consumers and fulfil the Irish government's duty to provide universal service (while simultaneously seeking to develop renewable energy). As is clear from the cases above, were this course of action to be taken, much consideration would be required to determine the form which such a price control should take, and how the costs associated with renewable energy development could be met without further consumer detriment, or imposing a disproportionate financial burden on certain undertakings.

## 5. Conclusion

Ireland's electricity market is in transition. It is being transformed to simultaneously incorporate renewable energy and develop effective competition. At the same time the Irish government remains under a legal obligation to guarantee 'affordable' electricity to customers in the domestic market. This is an obligation which was given recognition in 2009 through the enactment of Article 14 TFEU<sup>166</sup> and Protocol 26,<sup>167</sup> and as part of

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<sup>165</sup> Emphasis added.

<sup>166</sup> TFEU (n24)

<sup>167</sup> *Ibid.*



the universal service obligation contained in the third liberalisation directive.<sup>168</sup> It is an obligation which operates at two levels, with specific affordability required for the vulnerable who cannot afford electricity under normal market or monopoly conditions, and general affordability required for all consumers. The second layer (as examined in the chapter) is proving problematic, as increasing costs, mainly emanating from the development of onshore wind, are included in the final prices charged to all customers in Ireland.

Despite the extensive legislation enacted at European level to introduce competition to successive electricity markets and thereby enable Member States to ensure affordability within their territory, competition has not developed in the Irish domestic retail market. In this market Electric Ireland continues to have a position of dominance with a market share of 62.18 per cent in terms of customer numbers, or 56.34 per cent in terms of MWhs (or electricity generated and sold).<sup>169</sup>

This is the consequence of a number of factors, (such as the isolated nature of the Irish national electricity market, its historic development, its small size, and consumer loyalty to the ESB group) which are likely to prevent the development of effective competition until Ireland's electricity market evolves to become part of a larger European electricity market. In the meantime, in the absence of effective competition, a case has been made in this chapter for the re-introduction of temporary (well-defined) price controls. It is felt that these would provide a solution to the problem of overly high electricity prices in Ireland, as they have done in the roaming mobile phone and Italian gas markets.

As described at the outset, the focus of this chapter is somewhat different to those which preceded it. Similar to previous chapters, it analysed the decisions taken which affect Ireland's duty to develop renewable energy, however, the focus shifted. Instead of considering the impact of these decisions on the likelihood of Ireland meeting its renewable energy obligations, this chapter did something different. Chapter six, considered the effect of the decisions taken to promote renewable energy on the Irish government's concurrent duty to guarantee electricity affordability to domestic customers. In finding that this duty had not been fulfilled (and like those discussed in chapters 3, 4, 5 and 6, overlooked in the initial development of the onshore wind strategy by the Irish government), the chapter paved the way for the concluding

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<sup>168</sup> The third liberalisation directive (n23).

<sup>169</sup> Commission for Energy Regulation (n63).

chapter, chapter seven, which analyses whether (and to what extent) liability could attach to a determination that the Irish State has failed to fulfil the main legal duties canvassed in chapters three, four, five and six.



## Chapter 7 An evaluation of the likely impact of Ireland's failure to fulfil the legal duties relevant to the development and sale of onshore wind generated electricity

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### 1. Introduction



Establishing a large onshore wind generated electricity market requires in-depth planning to be successful. In the initial stages, a complete and careful analysis of the surrounding legal environment (including laws and policies likely to impact upon this goal) is required. Following this, new laws and policies can be created to promote onshore wind development. Having progressed through the initial planning stages, these can be developed in harmony with equally important existing laws and policies. Finally, when promulgating laws and policies in other connected areas, the overarching goal of establishing this market can be taken into account and promoted.

While the Irish government clearly put thought into devising new laws and policies to directly promote onshore wind development,<sup>1</sup> a *full*<sup>2</sup> and careful analysis of the surrounding legal environment did not take place. As a result, certain core laws and policies indirectly impacting upon this sector, (some of which guarantee rights to Irish consumers) were overlooked.<sup>3</sup> This has had two main outcomes. First, these oversights have ultimately slowed down onshore wind energy development to the extent that Ireland is likely to fail to reach its 2020 renewable energy target and is also

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<sup>1</sup> Department of Communications, Energy & Natural Resources, 'National Renewable Energy Action Plan. Ireland. Submitted under Article 4 of Directive 2009/28/EC' (DCENR, 1 July 2010) <  
<http://www.dcenr.gov.ie/NR/rdonlyres/03DBA6CF-AD04-4ED3-B443-B9F63DF7FC07/0/IrelandNREAPv11Oct2010.pdf>> accessed 29 October 2014.

<sup>2</sup> Emphasis added

<sup>3</sup> As discussed in previous chapters, although the problems inherent in the wind development market caused by Ireland's initial failures to correctly transpose the EIA, Birds and Habitats Directives were well known at the time, they were not considered or discussed in Ireland's national renewable energy action plan.



failing to meet its interim trajectory targets.<sup>4</sup> Second (as discussed in preceding chapters) Ireland has breached equally important, connected legal duties including those placed upon it by the SEA directive,<sup>5</sup> the EIA directive,<sup>6</sup> the Birds<sup>7</sup> and Habitats<sup>8</sup> directives and the third liberalisation directive.<sup>9</sup>

While the preceding chapters have analysed Ireland's failures to fulfil specific duties (relevant to the development and sale of onshore wind generated electricity) contained in the directives mentioned above, this chapter evaluates the potential legal consequences of these failures. In so doing it looks at the EU public law sanctions which could be applied to Ireland for the breaches of EU law outlined; the reasons for the increase in the application of such public law pecuniary penalties and the likelihood that Ireland will be sanctioned. It then proceeds to explore the EU law's private law remedies<sup>10</sup> available to individual claimants seeking restitution for identified wrongs resulting from these breaches.<sup>11</sup>

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<sup>4</sup> Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16 (the 'Renewable Energy Directive') annex I.

<sup>5</sup> Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/0030 ('SEA Directive').

<sup>6</sup> The most recent revised version of which is: Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1. (the 'EIA Directive').

<sup>7</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L OJ L 20/7 (the 'Birds Directive').

<sup>8</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206/7 (as last amended by Directive as last amended by Directive 2006/105/EC [2006] OJ L 363/368 (the 'Habitats Directive').

<sup>9</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ 5 L 211/5 ('the third liberalisation directive').

<sup>10</sup> Note: While the Irish remedy of Judicial Review is also available to challenge the procedure which led to the finalisation of Ireland's national renewable energy action plan, this has already been considered in chapter 3. See further: *Pat Swords v Department of Communications, Energy & Natural Resources* High Court Record No. 2013/4122P (*'Pat Swords Application for Judicial Review'*).

<sup>11</sup> Note: On detailed analysis of each of the breaches of EU legislation documented in this thesis, it was considered that none could satisfy all of the criteria required for direct effect, (i.e. that the provisions in question were clear, precise, unconditional; the deadline for their transposition had passed and they either had not been transposed or were inadequately transposed into national law). Consequently, it is considered that this private law remedy is unlikely to be available to individuals in the context of the breaches identified in this thesis. In relation to the transposition of the EIA and Habitats Directives see *McGrath Limestone Works Ltd v An Bord Pleanála* [2014] IEHC 382, wherein Charleton J. recently commented on the remedial measures taken to fully transpose the EIA and Habitats Directives following the *Derrybrien Wind Decision* stating: '*Both Directives are replete with fine detail. The implementing national measures mirror those provisions... Very little in the way of discretion was left to the Oireachtas*'. Similarly, it is also considered that the provisions of the Birds Directive (discussed in this thesis) have now been fully transposed into EU law.



## 2. Public Law Enforcement Mechanisms Available to the EU to Challenge and Penalise Ireland's Breaches of EU Law

Although each breach, which has been discussed in this thesis, is different, they can all either be challenged under article 258 or 259 TFEU, or directly sanctioned pursuant to article 260 TFEU, as outlined in the table below. In this table, Ireland's failures to fulfil various provisions of EU law, which are relevant to the development and sale of wind generated electricity, are listed in the order they have been discussed herein. However, in the analysis which follows, they will be analysed by reference to the categories within which they fall by reference to articles 258, 259 or 260 TFEU.

Actions exposed to challenges under article 258 (or 259) TFEU	Actions exposed to challenges under article 260 TFEU
1) Failure to meet the indicative trajectory targets provided by the Renewable Energy Directive and possible future failures to meet the 2020 allocated targets (discussed in chapters 2 and 3).	1) Inadequate implementation of the Renewable Energy Directive: failure to transpose a number of provisions, including the requirement for Member States to introduce measures designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in the Renewable Energy Directive (mentioned in chapter 2).
2) Breach of article 3 of the SEA Directive (discussed in chapter 3).	2) Breach of the obligation to take all measures necessary to comply with the judgment delivered by the Court in the <i>Derrybrien wind</i> (discussed in chapter 2).
3) Breach of the third liberalisation directive for failing to meet the conditions required to apply for an exemption from its unbundling requirements (discussed in chapter 5).	3) Breach of the obligation to take all measures necessary to comply with the judgment delivered by the Court in <i>Wild Birds</i> (discussed in chapter 2).
4) Failure to provide a general level of electricity affordability to household consumers (discussed in chapter 6).	4) Inadequate implementation of the Third Electricity Liberalisation Directive: failure to notify the measures transposing the provisions relating to the rules on the unbundling of transmission system operators and transmission systems into Irish law (discussed in chapter 5).

**Table 9: Public law enforcement mechanisms applicable to the breaches found in this thesis**



The four EU law breaches, discussed in this thesis, which are exposed to an article 258 TFEU challenge are: the failure to meet the indicative trajectory targets provided by the Renewable Energy Directive;<sup>12</sup> the potential future failure to meet the 2020 target allocated to Ireland by the Renewable Energy Directive;<sup>13</sup> the failure to submit the national renewable energy action plan to the requirements of the SEA directive<sup>14</sup> and the failure to provide a general level of affordability to household consumers.<sup>15</sup> As a decision endorsed by the Commission,<sup>16</sup> Ireland's resolution to avail of the exemption option provided for by the third liberalisation directive is unlikely to be challenged by the Commission pursuant to article 258 TFEU or pursuant to an article 260(3) TFEU challenge.<sup>17</sup> However, it is important to note that it could still be challenged before the Court by another Member State using the mechanism provided for in article 259 TFEU.<sup>18</sup>

Should an action be initiated in respect of any of these breaches, the Irish State would only face pecuniary penalties if it first failed to comply with the recommendations made by the Commission within the timelines specified by its Reasoned Opinion (a process which could take over 2 years),<sup>19</sup> then failed to comply with a subsequent judgment by the Court that article 258 TFEU had been breached and finally was made the subject of an article 260(2) TFEU challenge.

Against this (as shown in table 9) the remaining four breaches, discussed in this thesis, are directly exposed to the pecuniary penalties provided for by articles 260(2) and

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<sup>12</sup> Note: Ireland has already been referred to the CJEU for failures to notify sufficient measures transposing the renewable energy directive into Irish law. Case C-236/14, *Commission v Ireland* [2014] OJ L 140/16.

<sup>13</sup> Renewable Energy Directive (n4).

<sup>14</sup> SEA Directive (n5).

<sup>15</sup> As required by Article 14 and Protocol 26 of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47 ('TFEU') and article 3 of the third liberalisation directive (n9).

<sup>16</sup> European Commission, 'Commission Decision of 12.4.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC –Ireland–Eirgrid / ESB' (2013) C(2013) 2169 final ('the Commission Decision').

<sup>17</sup> As noted by the European Commission, this new mechanism can be used both for (i) a total failure to notify any measures to transpose a directive and (ii) in cases in which there is only partial notification of transposition measures. Such a case might occur either where the transposition measures notified do not cover the whole territory of the Member State or where the notification is incomplete with respect to the transposition measures corresponding to a part of the directive. See: European Commission, 'Communication from the Commission — Implementation of Article 260(3) of the Treaty'[2011] OJ C 12/1 (15 January 2011).

<sup>18</sup> TFEU (n15). Note: as discussed in chapter 5 this decision could also be the subject of judicial review by the CJEU as part of an article 263 TFEU (n15) challenge on 'grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of powers.'

<sup>19</sup> Han Somsen, 'Discretion in European Community Environmental Law: An Analysis of ECJ Case Law' (2003) 40 *Common Market Law Review* 6, 1413 – 1453.



article 260(3) TFEU. These include Ireland's failure to transpose the Renewable Energy Directive's<sup>20</sup> provisions on member state interim trajectory targets into Irish law; Ireland's failure to take all measures necessary to comply with the judgments delivered by the Court in the *Derrybrien wind*<sup>21</sup> and *Wild Birds*<sup>22</sup> decisions; and Ireland's failure to notify its laws transposing the provisions relating to the rules on the unbundling of transmission system operators and transmission systems into Irish law.

This chapter will examine the potential consequences of both the existing and potential future breaches. To place the topic in context, this chapter will analyse articles 258 and 260 TFEU,<sup>23</sup> focusing specifically on their legal evolution and purpose, and their potential application to the breaches found herein and outlined above. Article 259 TFEU will also be briefly considered. Next, the general application of these articles to the energy sector will be evaluated, to demonstrate why the threat of sanctions is more real now (particularly in the energy and environmental sectors)<sup>24</sup> than it was in the past.

## 2.1. Article 258 TFEU (ex article 169 EC, then article 226 EC)

Currently, a Member State in breach of EU law may be brought before the Court of Justice by the Commission using the infringement procedure outlined by article 258 TFEU<sup>25</sup> or by another Member State, using the more rarely utilised article 259 TFEU.<sup>26</sup> The infringement procedure has been part of EU law since the EEC Treaty entered into

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<sup>20</sup> the Renewable Energy Directive (n4).

<sup>21</sup> Case C-427/07 *Commission v Ireland* [2011] ECR I-00873. ('*Derrybrien Wind*')

<sup>22</sup> Case C-418/04 *Commission v Ireland* [1997] ECR I-10997 ('*the wild birds decision*').

<sup>23</sup> TFEU (n15).

<sup>24</sup> As will be discussed in the course of this chapter, breaches in these sectors have been described as serious by the CJEU and there has been a significant increase in the number of cases being taken. For example: in its *Annual Report on Monitoring the Application of EU Law (2013)*, the Commission noted that most of the penalty proposals for the late transposition of directives had been made in the policy area of energy. See: European Commission, 'Report from the Commission 31<sup>st</sup> Annual Report on Monitoring the Application of EU Law(2013)' [2014] COM(2014)612 final,3.

<sup>25</sup> TFEU (n15)

<sup>26</sup> Article 259 TFEU has never been used in environmental/ energy cases. As of the 15 October 2014 there have been just six cases brought pursuant to this article which made it to the Registry of the Court. Of these six, two were withdrawn which left just four cases before the CJEU. See: C-364/10 *Hungary v Slovakia* [2012] ECR I—00000 (*unreported*); Case 141/78 *France v UK* [1979] ECR 2923; Case C-388/95 *Belgium v Spain* [2000] ECR I-3123; Case C-145/04 *Spain v UK* [2006] ECR I-7917. The two withdrawn cases were: Case 58/77 *Ireland v France* (*no reference available*) and C-349/92 *Spain v UK* (*no reference available*). See: Levante Borzsak, *The Impact of Environmental Concerns on the Public Enforcement Mechanism under EU Law* (1<sup>st</sup> edn, Wolters Kluwer, 2011). See further: 141; Stephen Weatherhill, *Cases and Materials on EU Law* (2014, Oxford University Press, 11<sup>th</sup> edn) 81.

force in 1958.<sup>27</sup> In one of its first cases in the 1960s, the CJEU described the infringement procedure as the '*the ultima ratio enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of Member States*'.<sup>28</sup> While this statement remains true, as will be discussed below, the penalties which follow the finding of a breach of EU law have been strengthened over time to provide Member States (like Ireland) with greater incentives to correctly transpose, apply and enforce EU law.

Infringement procedures under article 258 TFEU may be initiated as follows:

*'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*  
*If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'*

Accordingly, the Commission enjoys the discretion to choose how to deal with a suspected infringement of EU law.<sup>29</sup> The Court has described the Commission's power to initiate the infringement procedure pursuant to article 258 as a '*right*' and has particularly stressed that it is not a '*duty to apply to the Court of Justice for a declaration that the alleged breach of obligations has occurred*'.<sup>30</sup> The Court has also held that the Commission's objectives in pursuing an action are irrelevant; the Court's role in an article 258 TFEU proceeding is restricted to deciding whether or not the Member State in question has failed to fulfil the objectives as alleged.<sup>31</sup>

The Court has also consistently recognised the limitations placed on the Commission in its judgments, acknowledging that the Commission does not have investigative powers of its own, remaining largely reliant on the information provided to it by

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<sup>27</sup> Weatherhill (n26) 81.

<sup>28</sup> Luca Prete and Ben Smulders, 'The Coming of Age of Infringement Proceedings' (2010) 47 Common Market Law Review 1, 9. See also: Case 29/59 *Netherlands v High Authority* [1960] ECR 355.

<sup>29</sup> Stephen Weatherhill, *Cases and Materials on EU Law* (11<sup>th</sup> edn, Oxford University Press, 2014) 86.

<sup>30</sup> Case 247/87 *Star Fruit Co v Commission* [1989] ECR 291, para 12.

<sup>31</sup> Case 416/85 *Commission v United Kingdom* [1988] ECR 3127, para 9.



complainants, private or public bodies and Member States.<sup>32</sup> In view of these limitations and the Commission's discretion to initiate infringement procedures, it is important to recognise at the outset that the Commission may not initiate infringement proceedings against Ireland for breaching each of the duties analysed by this thesis. Furthermore, Ireland's decision to avail of an exemption from the third liberalisation directive is unlikely to be challenged by another Member State (judging by the low rate of use of this article to date).<sup>33</sup> Nevertheless, the initiation of proceedings in respect of some (if not all) of the infringements discussed, remains a strong possibility and for the sake of completeness the law which would apply in each scenario will be discussed below.

As noted by Nigel Foster (2010), article 258 TFEU is silent as to what constitutes the failure to fulfil an obligation under the Treaties or the breach of an EU law duty,<sup>34</sup> however, it is clear that a broad range of activities will be considered to fall within the ambit of article 258 TFEU.<sup>35</sup> Worryingly for Ireland, the effects of a failure to fulfil an obligation need not be far-reaching or significant to be the subject of an infringement proceeding. In *Commission v Denmark* it was stated:

*'It is clear that the infringement alleged ...is of limited scope and has negligible practical consequences. However, as the Court has held (see Case C-209/89 Commission v Italy [1991] ECR I-1575, paragraphs 6 and 19; Case C-404/99 Commission v France [2001] ECR I-2667, paragraph 51), an action against a Member State for failure to fulfil its obligations is objective in nature and, consequently, where a Member State fails to fulfil its obligations under the Treaty or under secondary legislation, the infringement exists regardless of the frequency or the scale of the circumstances complained of.'*<sup>36</sup>

Case law demonstrates that proceedings are designed to bring about a change of behaviour where a breach of EU law is found, using a process intended to be objective and aimed to clarify the legal situation in question, without moral judgment.<sup>37</sup> Craig and

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<sup>32</sup> See: Case C-494/01 *Commission v Ireland* [2005] ECR I-03331, para 43 and the case law quoted therein.

<sup>33</sup> See n26.

<sup>34</sup> Nigel Foster, *EU Law Directions* (2010, Oxford University Press, 2<sup>nd</sup> Ed) 169.

<sup>35</sup> *Ibid.*

<sup>36</sup> Case C-226/01 *Commission v. Denmark* [2003] ECR I-1219; see also: Case C-157/03 *Commission v Spain* [2005] ECR I-2911, para 44; Case C-348/97 *Commission v Germany* [2000] ECR I-4429, para 62; Case 166/82 *Commission v Italy* [1984] ECR 459, para 24.

<sup>37</sup> Case 7-71 *Commission v France* [1976] ECR 1026, Opinion of AG Roemer.



De Burca (2011) identify five broad categories of Member State breaches which have been challenged pursuant to article 258 TFEU. Three of the categories identified are relevant to the breaches identified by this thesis and are reproduced in table 2 below.<sup>38</sup> These are: (i) breach of the obligation of sincere cooperation under article 4(3) TEU;<sup>39</sup> (ii) inadequate implementation of EU law; and (iii) systematic or persistent breaches.<sup>40</sup> Accordingly, the case-law relating to each will be examined and applied to the breaches analysed in this thesis (and included in table 2) in the paragraphs which follow.

General Breaches Challengeable Under Article 258 TFEU (Relevant to this Thesis)	Breaches (Discussed in the Preceding Chapters) Falling within these Categories
1) Breach of the obligation of sincere cooperation under article 4(3) TEU.	<ul style="list-style-type: none"> <li>• Failure to introduce sufficient measures to ensure the achievement of the interim targets set by the Renewable Energy Directive.</li> <li>• Failure to submit Ireland's national renewable energy action plan to the requirements of the SEA Directive.</li> <li>• Failure to separate the transmission system from the activities of development and supply as required by the third liberalisation directive.</li> <li>• Failure to provide households with a general level of electricity affordability.</li> </ul>
2) Inadequate implementation of EU law.	<ul style="list-style-type: none"> <li>• Ireland's transposition of the third electricity liberalisation directive provisions on unbundling.</li> </ul>
3) A general and persistent practice of breaching an area of EU law.	<ul style="list-style-type: none"> <li>• For present and potential future breaches of the Renewable Energy Directive.</li> <li>• Ireland's failures to comply with the EIA Directive.</li> </ul>

**Table 10: Breaches challengeable by article 258 TFEU by category**

<sup>38</sup> Note the fourth and fifth categories identified by Craig and De Burca are: Breaches with interfere with EU external relations and Action by the Courts of a Member State. These have been omitted as they were not considered to be categories within which the infringements identified would naturally fall. See: Paul Craig and Gráinne de Búrca, *EU Law Text, Cases and Materials* (5<sup>th</sup> edn, Oxford University Press, 2011), 429-432.

<sup>39</sup> Treaty on European Union [2012] OJ C 326/13 ('TEU').

<sup>40</sup> Craig and de Búrca (n37).



### 2.1.1. The Obligation of Sincere Cooperation

The Court has consistently held that Member States are under a general duty of sincere cooperation, expressed in Article 4(3) TEU (previously Article 10 EC and earlier Article 5 of the EC Treaty), which implies taking all appropriate measures to ensure fulfilment of obligations arising out of the Treaties or out of action taken by the institutions, facilitating the achievement of the Community's (or Union's) tasks and refraining (or abstaining) from any measure which could jeopardise the attainment of the objectives of the Treaties.<sup>41</sup> Thus, another Member State could easily take a case against Ireland alleging that Ireland had failed to fulfil its duty of sincere cooperation, by applying for an exemption from the third liberalisation directive, in breach of the conditions required for that exemption as outlined in that directive. Should such a case be initiated, article 259 TFEU clearly states that even where the Commission does deliver an opinion within three months of the complaint being brought before it, the matter can still be brought before the Court.<sup>42</sup>

Case-law demonstrates that a Member State can be the subject of an article 259 or 258 TFEU proceeding for either its action or inaction. This was made clear in *Commission v France*<sup>43</sup> in 1997 when the Court found that a Member State could infringe an obligation under the EC Treaty by failing to adopt or by adopting insufficient measures to combat conduct engaged in by individuals, which was jeopardising the implementation of certain provisions of the Treaty. In so doing it held that article 5 EC imposed a general obligation of loyal cooperation and assistance on Member States towards the community, and when read in conjunction with specific duties (such as those to free movement of goods), had the power to infer an obligation on Member States to combat actions by individuals to jeopardise the attainment of EU law objectives.

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<sup>41</sup> See: Case C-374/89 *Commission v Belgium* [1991] ECR I-367; Case C-35/88 *Commission v Greece* [1990] ECR I-3125; Case C-48/89 *Commission v Italy* [1990] ECR I-2425; Case 272/86 *Commission v Greece* [1988] ECR 4875; Case 240/86 *Commission v Greece* [1988] ECR 1835.

<sup>42</sup> Article 259 TFEU (n15) clearly states: 'A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union. Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.'

<sup>43</sup> Case C-265/95 *Commission v France* [1997] ECR I-06959.



As a Member State which has: (i) failed to introduce sufficient measures to ensure the attainment of its interim renewable energy targets;<sup>44</sup> (ii) failed to submit its national renewable energy action plan to the requirements of the SEA Directive<sup>45</sup> and then failed to take any actions to remedy the oversight;<sup>46</sup> (iii) failed to take appropriate measures to ensure the fulfilment of obligations arising out of the third liberalisation directive;<sup>47</sup> and (iv) is failing to provide households consuming electricity with a general level of affordability (thereby breaching Article 14 and Protocol 26 of the TFEU<sup>48</sup> and article 3 of the third liberalisation directive),<sup>49</sup> this judgment should be of particular concern to Ireland.

While three of these breaches (the breaches of the renewable energy directive,<sup>50</sup> the third liberalisation directive<sup>51</sup> and the failure to provide households with a general level of electricity affordability) are traceable to circumstances in the national system, this is unlikely to be accepted as a defence by the Court. In comparable circumstances the Court has held that: '*Apprehension of internal difficulties cannot justify a failure by a Member State to apply Community law correctly*'.<sup>52</sup> This line of reasoning has been consistently stressed and it is now settled case law that:

*'a Member State may not plead provisions, practices or circumstance existing in its legal system in order to justify a failure to comply with obligations and time limits laid down in Community directives'*.<sup>53</sup>

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<sup>44</sup> As discussed in chapter three, to ensure the development of renewable energy at an appropriate pace to meet the 2020 targets, article 3(2) provided interim indicative targets for the four two-year periods leading up to 2020. The monitoring and enforcement of targets was to be further supported by national renewable energy action plans along with articles 4(4) and 4(5) of the Renewable Energy Directive. See: Renewable Energy Directive (n4).

<sup>45</sup> SEA Directive (n5) articles 3,4,5,6,8 and 9.

<sup>46</sup> To suspend or annul the plan pending its assessment following the Court's ruling in Case C-41/11 *Inter-Environnement Wallonie ASBL v Region Wallonne* [2012] ECR I-0000 (*unreported*).

<sup>47</sup> third liberalisation directive (n9).

<sup>48</sup> TFEU (n15).

<sup>49</sup> third liberalisation directive (n9).

<sup>50</sup> renewable energy directive (n4).

<sup>51</sup> third liberalisation directive (n9).

<sup>52</sup> Case C-265/95 *Commission v France* [1997] ECR I-06959; para 55; See also: Case C-52/95 *Commission v France* [1995] ECR I-4443, para 38.

<sup>53</sup> Case C-326/97 *Commission v Belgium* [1998] ECR I-6107; Case C-298/97 *Commission v Spain* [1998] ECR I-3301; Case 215/83 *Commission v Belgium* [1985] ECR 1039; Case 280/83 *Commission v Italy* [1984] ECR 2361; Case 160/82 *Commission v Netherlands* [1982] ECR 1791.



### 2.1.2. Inadequate Implementation of EU Law

In an article, published in 2010 and written before the introduction of penalties for failure to notify measures transposing directives by article 260 (3) TFEU,<sup>54</sup> Prete and Smulders (2010) noted that a significant percentage of the cases which had appeared theretofore were the result of the deficient, incomplete or incorrect transposition of directives.<sup>55</sup> In such cases the Court has held that administrative practices are not sufficient to transpose a directive as they could be changed according to the whim of the authorities and lacked the appropriate publicity.<sup>56</sup> Consequently, Ireland is unlikely to have an acceptable defence for failing to transpose (and notify the Commission of its transposing measures) for the third liberalisation directive prior to the deadline provided by the directive (3 March 2011).<sup>57</sup>

Even where legislation has been passed to transpose the EU law provisions in question (as happened in this case on 11 November 2011 with the enactment of the European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011) case-law indicates the transposition must be correct and complete. Thus in an action for failure to fulfil obligations resulting from the incorrect or incomplete transposition of a directive, the Court is concerned with the way in which a particular directive has been transposed, and not with the actual result of the application of the legislation transposing it. The question to be determined is whether the legislation itself harbours the insufficiencies

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<sup>54</sup> Note: the changes made by the Treaty do not affect disputes regarding the adequacy of transposing measures. As outlined by the Commission: 'It must be pointed out that the failure covered by Article 260(3) concerns both the total failure to notify any measures to transpose a directive and cases in which there is only partial notification of transposition measures. Such a case might occur either where the transposition measures notified do not cover the whole territory of the Member State or where the notification is incomplete with respect to the transposition measures corresponding to a part of the directive. Where the Member State has provided all necessary explanations on how it believes it has transposed the entire directive, the Commission may consider that the Member State has not failed to meet its obligations to notify transposing measures, and therefore Article 260(3) does not apply. Any dispute regarding the sufficiency of the transposition measures notified or the rules of law existing in national law will be dealt with under the normal procedure on the correct transposition of the directive, under Article 258 of the Treaty.' Source: European Commission, 'Communication from the Commission — Implementation of Article 260(3) of the Treaty' [2011] OJ C 12/1 (15.01.11).

<sup>55</sup> Luca Prete and Ben Smulders (n28).

<sup>56</sup> Case 160/82 *Commission v Netherlands* [1982] ECR 4637; Case 102/79 *Commission v Belgium* [1980] ECR 1473.

<sup>57</sup> The third liberalisation directive (n9) article 49. Note: on 11 November 2011, Ireland passed legislation to outline the procedures relating to the designation of the transmission system operator, however, this was after the deadline of 3 March 2011 and to date no legislation has been notified to the Commission to transpose the ownership structures relating to Ireland's infrastructure into law. See: European Communities (Internal Market in Electricity) (Certification and Designation of the Transmission System Operator) Regulations 2011 S.I. 570 of 2011.



or defects alleged by the Commission, not its actual effects with regard to specific projects.<sup>58</sup>

In general, the aim of infringement proceedings is not just to put an end to the identified breach, but also to bring about a change in behaviour on the part of the recalcitrant State and to prevent any repetition.<sup>59</sup> This is apparent from the evolution of the law in this area which developed to allow the Court to impose monetary sanctions to provide real consequences for breaches of EU law<sup>60</sup> (a subject which will be more closely examined in section 2.2) and to hear actions alleging a '*general and persistent breach*' of EU law in specific areas,<sup>61</sup> a topic which will be considered below.

### 2.1.3. A General and Persistent Practice of Breaching an Area of EU Law

As outlined by Wennerås (2006), whether there is a general and persistent practice of breaching a particular area of EU law, must be examined by taking account of the number of infringements, the extent to which they occur at different localities (i.e. whether they are wide-spread), and their duration.<sup>62</sup> In allowing the Commission to bring its first case against a Member States for its 'general and persistent' breaches of the Waste Directive in 2005, the Court stated that '*nothing prevented*' the Commission from seeking (in parallel to a finding of infringements in individual instances) a declaration that those infringements were evidence of a general and persistent practice.<sup>63</sup>

In finding that there had been a general and persistent practice of breaching the Waste Directive in Ireland,<sup>64</sup> the Court noted that a number of Irish local authorities had displayed tolerance towards unauthorised operations relating to significant quantities of waste in numerous places in Ireland, often over very long periods, '*failing to take appropriate measures to ensure that such operations ceased and were effectively punished and to prevent their recurrence.*'<sup>65</sup> Since this seminal judgment, judgments

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<sup>58</sup> Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paras 59 and 60.

<sup>59</sup> Case C-276/99 *Germany v Commission* [2001] ECR I-8055, paras 24, 25 and 32.

<sup>60</sup> Roland Bieber and Francesco Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014) 51 *Common Market Law Review* 4, 1057-1092.

<sup>61</sup> Case C- C-494/01 *Commission v Ireland* [2005] ECR I-03331.

<sup>62</sup> *Ibid.*

<sup>63</sup> See: Pål Wennerås, 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements Lump Sums and Penalty Payments' (2006) 43 *Common Market Law Review* 1, 31-62. See also: *Commission v Ireland* (n60).

<sup>64</sup> *Ibid.*

<sup>65</sup> *Commission v Ireland* (n61) para 129.



finding general and persistent practices evidencing multiple breaches of the Waste Directive were also found against *Greece*,<sup>66</sup> *Italy*<sup>67</sup> and *France*.<sup>68</sup>

Applying the logic outlined above, this mechanism could potentially be used against Ireland for a general and persistent practice of breaching the EIA Directive (a directive which Ireland was found to have breached on four separate occasions)<sup>69</sup> were the Commission to challenge Ireland for failing to take all the measures necessary to comply with the judgment previously delivered in *Derrybrien*.<sup>70</sup> A more likely scenario, however, would be for the Commission to initiate a case under article 260(2) TFEU. This would enable it to immediately propose sanctions against Ireland for its failure to comply with the CJEU's previous judgement.

Conceivably, Ireland could also be challenged for persistently breaching the Renewable Energy Directive.<sup>71</sup> As will be discussed later in this chapter, Ireland has recently been referred to the CJEU for breaching this directive.<sup>72</sup> In the event that Ireland is found to have made the alleged infringements, fails to meet its interim trajectory targets, and its 2020 renewable energy target,<sup>73</sup> the Commission could easily take a case against Ireland alleging that these breaches display a general and persistent practice of failing to fulfil the obligations required by the Renewable Energy Directive.<sup>74</sup>

The preceding paragraphs have considered the breaches, identified by this thesis, which are exposed to an article 258 TFEU proceeding. The following paragraphs will build on this foundation and analyse the development and purpose of the specific sanctions of article 260 TFEU to contextualise the likelihood of their being used to penalise the infringements identified by this thesis. While the majority of the infringements discussed in the preceding paragraphs cannot be penalised with article 260 TFEU sanctions (until they have first been condemned by the Court pursuant to

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<sup>66</sup> Case C-502/03 *Commission v Greece* [2005] ECR I-0000 (*unreported*).

<sup>67</sup> Case C-135/05 *Commission v Italy* [2007] ECR I-03475.

<sup>68</sup> C-423/05 *Commission v France* [2007] ECR I-00047\*.

<sup>69</sup> (1) Case C-392/96 *Commission v Ireland* [1999] ECR I-05901; (2) Case C-427/07 *Commission v Ireland* [2011] ECR I-00873. ('*Derrybrien Wind*') (n21) (3) Case C-66/06 *Commission v Ireland* [2009] ECR I I-00158; (4) Case C-50/09 *Commission v Ireland* [2011] ECR I-00873 ('*Demolition Works*').

<sup>70</sup> *Derrybrien wind decision* (n21).

<sup>71</sup> Renewable Energy Directive (n4).

<sup>72</sup> Commission Press Release (n12); Case C-236/14, *Commission v Ireland* [2014] OJ L 140/16.

<sup>73</sup> Renewable Energy Directive (n4), annex I.

<sup>74</sup> *Ibid* (n4).



article 258 TFEU), four breaches are already exposed to the sanctions outlined in article 260 (2) and (3) TFEU. These are shown in table 11 and will be discussed in the next section.

Types of Sanctions Available Pursuant to Article 260 TFEU	Criteria for Application	Actions punishable by the Sanctions of Article 260 TFEU
General monetary sanctions:	<ul style="list-style-type: none"> <li>• Seriousness of the infringement</li> <li>• Duration of the infringement</li> <li>• Need to ensure that the penalty would act as a deterrent to further infringements</li> </ul>	See below.
1) Lump Sum	<ul style="list-style-type: none"> <li>• There is a need to ensure the effective prevention of future repetitions of similar infringements (e.g. where numerous judgments have been handed down against a Member State for failures to fulfil obligations in an area of law).</li> <li>• The criteria used to determine this are:               <ol style="list-style-type: none"> <li>1) length of time the breach has persisted since the judgment in which it was initially established and</li> <li>2) the public and private interests affected by the Member State's failures to bring the breach to an end.</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>• Available to punish Member States who have not taken the steps necessary to comply with a previous judgment: e.g. available to penalise Ireland for failing to take the measures necessary to comply with the Derrybrien and Wild Birds decisions.</li> <li>• Available to punish a failure to fulfil the obligation to notify measures transposing a directive: e.g. available to penalise Ireland for failing to notify the measures transposing the provisions relating to the rules on the unbundling of transmission system operators and transmission systems into Irish law.</li> <li>• Available to punish a failure to fulfil the obligation to notify measures transposing a directive: e.g. available to penalise Ireland for failing to notify the measures transposing the provisions relating to the Renewable Energy Directive's interim trajectory targets into Irish law.</li> </ul>
2) Penalty Payment	<ul style="list-style-type: none"> <li>• There is a need to induce a Member States to put an end to a breach as soon as possible.</li> <li>• The failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts.</li> </ul>	<ul style="list-style-type: none"> <li>• Available to punish Member States who have not taken the steps necessary to comply with a previous judgment: e.g. available to penalise Ireland for failing to take the measures necessary to comply with the Derrybrien, Demolition Works or Wild Birds decisions.</li> <li>• Available to punish a failure to fulfil the obligation to notify measures transposing a directive: e.g. available to penalise Ireland for failing to notify the measures transposing the provisions relating to the rules on the unbundling of transmission system operators and transmission systems into Irish law.</li> <li>• Available to punish a failure to fulfil the obligation to notify measures transposing a directive: e.g. available to penalise Ireland for failing to notify the measures transposing the provisions relating to the Renewable Energy Directive's interim trajectory targets into Irish law.</li> </ul>

**Table 11: Overview of Sanctions**

## 2.2. Article 260 TFEU (ex-article 228 EC Treaty)

### 2.2.1. The Evolution of Public Law Sanctions

Although the Commission has had the option to initiate infringement procedures since the entry into force of the EEC Treaty in 1958, tangible deterrents to disobedience did not become part of the EU's legal order until the entry into force of the Treaty on



European Union in 1993.<sup>75</sup> Prior to this, the only sanction available to the Court was to require Member States to *'take the necessary measures to comply with the judgment of the Court of Justice'*.<sup>76</sup> As described by Kilbey (2010) where a Member State failed to comply with a judgment, the only avenue open to the Commission was to initiate a second case pursuant to article 171 EEC (then 228 EC, now 260 TFEU) which could only lead to a second judgment requiring the Member State to remedy its infringement.<sup>77</sup>

While such actions were few in the early days of the Community, their number increased during the 1980s.<sup>78</sup> By the time of the Inter-Governmental Conference that led to the EU Treaty, signed in Maastricht in 1992, it was clear that the Community could no longer rely on Member States being shamed into compliance.<sup>79</sup> Consequently, (then-in-force) article 171 EEC was amended by the TEU to allow the Commission (subject to approval from the CJEU) to impose sanctions on Member States who had failed to comply with a prior judgment against them.<sup>80</sup>

In August 1996 (long before the expiry of the date of entry into force of the first electricity liberalisation directive) the Commission published a memorandum setting out how it proposed to deal with financial penalties under article 171 EC. The memorandum stated that article 171 EC offered a choice between two types of pecuniary sanction, a lump sum or a penalty payment and that as the basic object of the whole infringement procedure was to secure compliance as rapidly as possible, the penalty payment was considered to be the most appropriate instrument for achieving it. It stated, however, that it did not follow, that a lump sum could not be imposed.<sup>81</sup>

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<sup>75</sup> In 1993 (then-in force) article 171 EC was amended to allow the Court to impose a penalty payment or lump sum on a Member State, which had failed to comply with a previous judgment within the timeline specified by the Commission. See TEU (n39).

<sup>76</sup> TEU (n39).

<sup>77</sup> Ian Kilbey, 'The Interpretation of Article 260 TFEU (ex article 228 EC)' (2010) 35 *European Law Review* 3, 370-386.

<sup>78</sup> Tunjica Petrašević and Marina Dadić, 'Infringement Procedures Before the Court of Justice of the EU' (2013) 29 *Pravni vjesnik* 1 (April) 78.

<sup>79</sup> As noted by Kilbey (n77), *'as the Commission's submission to the ICG notes, the number of cases referred to the ECJ was excessive, with 12 cases in the three years prior to the conference needing a second referral to the ECJ for non-compliance with an earlier judgment finding that the state had infringed EEC legislation'* See: Kilbey (n25). See also: Ian Kilbey, 'Financial Penalties Under Article 228(2) EC: Excessive Complexity?' (2007) 44 *Common Market Law Review* 3, 743-759.

<sup>80</sup> *Ibid.*

<sup>81</sup> European Commission, 'Information from the Commission - Memorandum on applying Article 171 of the EC treaty' [1996] OJ C 242/6-8.

In setting out the general criteria proposed to determine the amount of the financial penalties, the Commission listed the following: the seriousness of the infringement, its duration and the need to ensure that the penalty would act as a deterrent to further infringements.<sup>82</sup> In classifying infringements it was stated that attacks on fundamental rights and on the four fundamental freedoms enshrined in the Treaty should be regarded as serious.<sup>83</sup> In 1997, the Commission gave further guidance on how seriousness would be determined stating that the following elements would be taken into account: the importance of the Community provisions which had been infringed giving rise to the original judgment (i.e. the nature and scope of the laws in question rather than their position in the hierarchy of norms); the effects of the infringement on general and particular interests; and the clarity (or ambiguity) of the rule which has been infringed.<sup>84</sup> It also identified potentially mitigating factors, such as a Member State putting measures in place which they believed to be adequate, which were not considered to be so by the Commission<sup>85</sup> (distinguishing these from cases where the Member State had failed to take any steps to comply with EU law), and potentially aggravating factors, such as where the breach in question concerned established (and accepted) law.

This document also provided the Commission's method of calculating penalty payments. As clearly described by Kilbey (2007) this was to be a uniform flat rate per day multiplied by two coefficients that reflected the seriousness and duration of the infringement. The total was then to be multiplied by a factor taking into account the Member State's ability to pay a financial penalty, with a mathematical formula using the Member State's gross domestic product and their number of votes in the Council (the 'n' factor).<sup>86</sup>

While elements of the formula have been updated to reflect changes in gross domestic product and inflation, in general it remains the same. The most recent update occurred in September 2014.<sup>87</sup> Following this, the standard flat rate for the penalty payment

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<sup>82</sup> Kilbey (n79) 747.

<sup>83</sup> Commission (n81).

<sup>84</sup> European Commission, 'Method of calculating the penalty payments provided for pursuant to article 171 of the EC Treaty' [1997] OJ C 063/2-4.

<sup>85</sup> *Ibid.*

<sup>86</sup> Kilbey (n79) 747.

<sup>87</sup> European Commission, Communication from the Commission Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceeding' [2014] C(2014) 6767 final (Commission, 17 September 2014) <[http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/C\\_2014\\_6767\\_en.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/C_2014_6767_en.pdf)> accessed 20 October 2014.



became fixed at €660 per day and the standard flat rate for the lump sum payment is fixed at €220 per day. Ireland's 'n' factor currently stands at 2.59 and the minimum lump sum payment which can be imposed upon it is set at €1,428,000. (Thus Ireland currently has the 10<sup>th</sup> lowest minimum lump sum payment of the EU's Member States).<sup>88</sup>

In 2000, in its first case pursuant to article 171 (2) of the EC Treaty (which had been amended by the Treaty on European Union in 1993 to provide the Court with the power to impose monetary penalties on Member States), the Court stressed that the importance of immediate and uniform application of Community law meant that the process of compliance must be initiated at once and completed as soon as possible. In imposing a penalty payment (€20,000 for each day of delay in implementing the measures necessary to comply with its previous judgment, from the date of the delivery of its second judgment) it stated that the penalty payment proposed by the Commission could not be considered a penal sanction, because it was to be imposed to influence future conduct.<sup>89</sup>

Later in 2005 the Court held it was possible to impose both a penalty payment and a lump sum simultaneously. This finding was made despite the express wording of article 228 (2) EC which provided for the imposition of either a lump sum or penalty payment and the fact that the Commission had not proposed the imposition of a lump sum. In *Commission v France*<sup>90</sup> the Court followed the Opinion of AG Geelhoed to find that recourse to both types of penalty provided for in Article 228(2) EC was not precluded, in particular where the breach of obligations had continued for a long period and would be inclined to persist. In providing a justification for the imposition of both penalties AG Geelhoed cited the earlier case of *Commission v Italy*<sup>91</sup> stating:

*'in permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a state unilaterally to break, according to its own conception of national interest, the equilibrium between the advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discrimination at the expense of their nationals.*

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<sup>88</sup> *Ibid.*

<sup>89</sup> Case C-387/97 *Commission v Greece* [2000] ECR I-05047, para 41.

<sup>90</sup> Case C-304/02 *Commission v French Republic* [2005] ECR I-06263.

<sup>91</sup> Case 39/72 *Commission v Italy* [1973] ECR 101, paras 24 and 25.

*This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the very root of the Community legal order'.<sup>92</sup>*

Following this case, the Commission published a further Communication to update and clarify the basis on which the Commission would calculate the amount of the financial sanctions proposed (whether lump sum or penalty payments or both).<sup>93</sup> This Communication replaced earlier Commission Communications of 1996<sup>94</sup> and 1997.<sup>95</sup> Paradoxically, having taken its lead from the Court and assumed the right to push for stronger and more meaningful sanctions, the Commission maintained its stated practice of withdrawing cases from the consideration of the Court where the Member State remedied its infringement until 2007<sup>96</sup> (the year the first judgment was handed down pursuant to article 226 EC for infringements in the energy sector).<sup>97</sup>

In 2009 two further refinements were made, when article 228 EC (analysed below) was recast as article 260 TFEU by the Lisbon Treaty. First the pre-litigation stage of issuing a reasoned opinion was removed,<sup>98</sup> considerably reducing the bureaucracy and time required to obtain sanctions against Member States. Since the entry into force of the Lisbon Treaty, where the Commission considers that a Member State has not fully complied with a judgment of the CJEU, just one pre-litigation procedural step is required to initiate an article 260 TFEU proceeding. (A letter of formal notice requesting the Member State to submit its observations must be sent by the Commission. However, where the Commission is not satisfied with the Member State's observations or where the Member State does not reply, the Commission can simply refer the matter directly to the Court). On average, it was projected that this would speed up the procedure reducing its average duration to between eight and eighteen months.<sup>99</sup>

Second, a new paragraph 3 was added to article 260 TFEU to create a completely new instrument allowing the Commission to petition the Court to impose a lump sum or

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<sup>92</sup> *Ibid*, paras 24 and 25; he also referred to: Case 128/78 *Commission v United Kingdom* [1979] ECR 419, para 12.

<sup>93</sup> European Commission, 'Communication from the Commission. Application of Article 260 of the Treaty on the Functioning of the European Union' [2005] SEC(2005) 1658.

<sup>94</sup> Commission (n81).

<sup>95</sup> Commission (n84), 2.

<sup>96</sup> Kilbey (n77).

<sup>97</sup> Case 358/05 *Commission v Spain* [2007] ECR I-00088\* (*internal market in electricity*).

<sup>98</sup> European Commission, 'Communication from the Commission — Implementation of Article 260(3) of the Treaty' [2011] OJ C 12/1 (15.01.11).

<sup>99</sup> Commission (n98).



penalty payment at the infringement proceedings stage, where a Member State failed to fulfil its obligation to notify the national measures transposing a particular directive.<sup>100</sup> Reducing late transposition had long been an established priority of the Commission's policy.<sup>101</sup> In 2007 the Commission stated: '*Priority should be attached to those infringements which present the greatest risks, widespread impact for citizens and businesses... These categories cover: non-communication of national measures transposing directives or other notification obligations.*'<sup>102</sup>

The preceding paragraphs have considered the evolution of the sanctions to demonstrate why sanctions were not readily applied to Member States who breached EU law in the past. The following paragraphs will build on this foundation to consider the purpose behind each sanction to support the analysis of their likely application to the infringements identified in this thesis. Finally, this section will conclude with an analysis of the application of the EU enforcement sanctions to the energy sector to demonstrate that there is growing likelihood of Member States (like Ireland) facing sanctions for infringements which might have been overlooked in the past.

### **2.2.2. The Purpose behind the Lump Sum Payment & the Penalty Payment and their Potential Application to the Breaches Identified by This Thesis**

In *Commission v France*, the Court clearly distinguished between the purposes behind lump sum and penalty payment sanctions stating:

*'Unlike penalty payments, which have a persuasive function as regards the ongoing breach and are intended to prevent its continuing after judgment has been delivered by the Court pursuant to Article 228 EC, lump sum payments, which are payable regardless of the approach adopted by the Member State concerned to that breach once such a judgment has been delivered, are intended rather to penalise the past behaviour of that Member State. They are thus designed to deter and prevent the repetition of similar infringements. The threat of such a penalty being imposed is likely, in particular, to encourage a Member State to comply with the original judgment establishing its failure to*

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<sup>100</sup> *Ibid.*

<sup>101</sup> Commission (n24).

<sup>102</sup> European Commission, 'A Europe of results – Applying Community law', COM (2007) 502 final, 9.

*fulfil obligations as soon as possible and, in particular, before proceedings are initiated before the Court a second time.*<sup>103</sup>

In practice, where numerous judgments have been handed down against a Member State for failures to fulfil obligations in an area of law, the Court is likely to find that the Member State in question has been persistently trying to avoid its EU obligations in that particular area and require the payment of a lump sum.<sup>104</sup> In considering the circumstances which could warrant the imposition of a lump sum in *Commission v France*, AG Mazak stated that a lump sum sanction was imposed to punish a Member State for its past behaviour in failing to comply with a particular judgment where that behaviour was characterised by additional aggravating circumstances (to be convincingly established) which exacerbated the Member State's failure to promptly and fully comply with that judgment, stating:

*'While such additional aggravating circumstances cannot be exhaustively listed in advance, they should in my view include a Member State's failure to cooperate with the Commission in a bona fide manner in order to bring the infringement to an end in a timely manner. In addition, a lump sum sanction may be warranted where public and private interests are affected to an unacceptable extent by a Member State's infringement...Moreover, where an infringement impinges on a matter of compelling Community interest or compromises a fundamental Community principle, such additional aggravating circumstances may more readily be found by the Court and a lump sum sanction accordingly imposed.'*<sup>105</sup>

While the Court did not refer directly to these paragraphs, it followed the AG's Opinion to impose a lump sum penalty of €10 million on the French republic, stating that where a Member State repeatedly engages in unlawful conduct in such a manner in a specific sector governed by Community rules, this may be an indication that effective prevention of future repetition of similar infringements of Community law would require the adoption of a dissuasive measure, such as a lump sum payment. In deciding whether the imposition of a lump sum was appropriate, the Court held that factors to be taken into account included the length of time the breach of obligations had persisted since the initial judgment and the public and private interests involved stating that:

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<sup>103</sup> Case C-121/07 *Commission v France* [2008] ECR I-09159.

<sup>104</sup> Case C-374/11 *Commission v Ireland* [2012] ECR I-0000 (unreported) para 49.

<sup>105</sup> C-121/07 *Commission v France* [2008] ECR I-09159, para 76.



*'where failure to comply with a judgment of the Court is likely to harm the environment and endanger human health, the protection of which is, indeed, one of the Community's environmental policy objectives, as is apparent from Article 174 EC, such a breach is of a particularly serious nature... The same applies, in principle, where the free movement of goods continues to be hindered, in breach of Community law, notwithstanding the existence of a judgment of the Court establishing an infringement in that respect.'*<sup>106</sup>

The importance of the environment was more recently stressed in *Commission v Luxembourg*<sup>107</sup> and *Commission v Belgium*.<sup>108</sup> In these respective cases the Court imposed a lump sum penalty of €2 million for an infringement lasting just under 4 years<sup>109</sup> and a lump sum penalty of €10 million for an infringement which lasted 9 years, stating:

*'where failure to comply with a judgment of the Court is likely to harm the environment, the protection of which is one of the European Union's policy objectives, as is apparent from Article 191 TFEU, such a breach is of a particularly serious nature'*.<sup>110</sup>

While the question of whether breaching secondary legislation designed to ensure either the functioning of the energy market (or the other objectives outlined in article 194 TFEU) has yet to be considered, it is likely that such a breach would also be considered serious. As opined by AG Mazak in *Azienda*, the TEU and TFEU do not establish any priority between the Union's environmental policy and its energy policy.<sup>111</sup> Article 194(1) TFEU provides that the Union's energy policy shall have regard to the need to preserve and improve the environment. Article 191(1) TFEU refers to the objective of combating climate change. Consequently, depending on the nature of the breach and its effects on public and private interests, continuing or persistent breaches of secondary legislation enacted on either of these legal bases (such as the breaches of the Renewable Energy Directive, the EIA Directive and the Third Liberalisation

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<sup>106</sup> C-121/07 *Commission v France* [2008] ECR I-09159, para 77. See also: Case C-387/97 *Commission v Greece* [2000] ECR I-5047, para 94, and Case C-278/01 *Commission v Spain* [2003] ECR I-14141.

<sup>107</sup> Case C-576/11 *Commission v Luxembourg* [2013] ECR I-0000 (unreported).

<sup>108</sup> Case C-533/11 *Commission v Belgium* [2013] ECR I-0000 (unreported).

<sup>109</sup> *Commission v Luxembourg* (n107).

<sup>110</sup> *Commission v Belgium* (n108) para 56.

<sup>111</sup> Case C-2/10 *Azienda v Regione Puglia* [2011] ECR I-06561, Opinion of AG Mazak, para 47.

Directive currently exposed to article 258 procedures) could easily be considered serious.<sup>112</sup>

Applying this logic to the breaches currently vulnerable to article 260 TFEU proceedings, it seems Ireland could well be penalised with a substantial lump sum payment for failing to take all the measures required to comply with the judgments handed down by the CJEU in 2006 in *Derrybrien wind*<sup>113</sup> and in 2007 in *Wild Birds*.<sup>114</sup> Specifically, a sanction could be applied against Ireland for failing to consider whether (or what) action should have been taken against existing wind developments (which had been constructed in breach of the EIA or the Birds Directives) to make good any harm caused by each failure to carry out either an environmental impact or appropriate assessment.

Conversely, unless Ireland fails to bring the infringement to an end and aggravating circumstances are pleaded, it would seem unlikely that a lump sum payment would be imposed to sanction Ireland for failing to transpose the Renewable Energy Directive's<sup>115</sup> provisions on interim trajectory targets or the provisions relating to the rules on the unbundling of transmission system operators and transmission systems. Moreover, in the event that the Commission solely proposes a penalty payment as a sanction, the Commission will withdraw its action if the Member State notifies the transposition measures required to put an end to the infringement. This can be contrasted with cases where the Commission has proposed both sanctions.<sup>116</sup> The paragraph which follows will briefly consider the penalty payment sanction.

The imposition of a penalty payment is only justified in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts.<sup>117</sup> As such it is designed to incentivise prompt and full compliance with an earlier judgment of the Court. Having determined that a penalty payment is appropriate, the Court will then use the following criteria to determine the amount of payment required: the duration of the infringement, its degree of seriousness and the ability of the Member State concerned to pay.<sup>118</sup>

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<sup>112</sup> *Ibid.*

<sup>113</sup> *Derrybrien wind decision* (n21).

<sup>114</sup> Commission (n98) 19.

<sup>115</sup> Renewable Energy Directive (n4).

<sup>116</sup> Commission (n98) 19.

<sup>117</sup> Case C-610/10 *Commission v Spain* [2012] para 96; Case C-496/09 *Commission v Italy* [2011] ECR I-0000, para 42.

<sup>118</sup> *Commission v Ireland* (n104).



For the purpose of applying these criteria, the Court will again have regard to the effects that the non-compliance in question is having on the public and private interests at issue and the urgency of the need for the Member State to comply with its obligations.<sup>119</sup> Thus whether Ireland could be sanctioned with penalty payments for failing to comply with the judgments handed down by the Court in *Derrybrien*<sup>120</sup> or *Wild Birds*<sup>121</sup> and for failing to transpose (and notify the Commission of its transposing measures) for the third liberalisation directive will largely depend on the prevailing circumstances at the time the judgment is given.

### 2.3. The Application of Articles 258 TFEU and 260 TFEU to the Energy Sector (with added focus given to the electricity sector)

At the time of writing just 19 judgments (initiated pursuant to article 258 TFEU) had been handed down in the energy sector. Of these 6 concerned the gas sector;<sup>122</sup> 9 concerned miscellaneous matters (such as the energy performance of buildings, energy saving and petroleum stocks);<sup>123</sup> and just 5 concerned electricity.<sup>124</sup> No article 260 TFEU sanctions have been applied to the energy sector. Given the consistent criticisms levelled by the Commission at the implementation of legislation designed to create internal electricity and gas markets, these low figures might be surprising, were it not for the inadequacy of the former infringement procedures and available sanctions, and the length of time required to penalise in-compliant Member States.

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<sup>119</sup> *Ibid*, para 37.

<sup>120</sup> *Derrybrien wind* (n21).

<sup>121</sup> *Wild Birds decision* (n22).

<sup>122</sup> These figures come from searches conducted on 16 October 2014. The 7 gas cases are as follows: Case C-198/12 *Commission v Bulgaria* [2014] ECR I-0000 (*unreported*); Case C-475/08 *Commission v Belgium* [2009] ECR I-11503; Case 354/05 *Commission v Luxembourg* [2006] ECR I-00067\*; Case 353/05 *Commission v Luxembourg* [2006] ECR I-00100\*; Case C-64/03 *Commission v Germany* [2004] ECR I-03551; Case C-259/01 *Commission v France* [2002] ECR I-11093.

<sup>123</sup> Case C-67/12 *Commission v Spain* [2014] ECR I- 00000 (*unreported*); Case C-345/2 *Commission v Italy* [2013] ECR I-00000 (*unreported*); Case C-264/09 *Commission v Slovakia* [2012] ECR I-08065 (*internal market in electricity*); Case C-169/06 *Commission v Greece* [2010] OJ C 221/21; Case C-22/09 *Commission v Luxembourg* [2009] ECR I-00177\*; Case C-342/07 *Commission v Greece* [2008] ECR I-00007\*; Case 388/06 *Commission v France* [2007] ECR I-00050\*; Case C-398/98 *Commission v Greece* [2001] ECR I-7915; Case C-374/89 *Commission v Belgium* [1991] ECR I-00367.

<sup>124</sup> Case C-164/11 *Commission v France* [2012] ECR I -0000 (*unreported*) (*taxation of energy products and electricity*); Case C-264/09 *Commission v Slovakia* [2011] ECR I-08065 (*investment contract*); Case C-474/08 *Commission v Belgium* [2008] ECR I-00175\* (*internal market in electricity*); Case C274/08 *Commission v Sweden* [2008] ECR I-10647 (*internal market in electricity*); Case 358/05 *Commission v Spain* [2007] ECR I-00088\* (*internal market in electricity*).

*Derrybrien wind* provides a good example.<sup>125</sup> Although an application initiating proceedings was first lodged in 5 December 1996, it was almost 12 years before the CJEU delivered its judgment.<sup>126</sup>

While criticisms have been levelled at Member States for their inadequate and late transpositions and applications of energy law since the introduction of the first electricity<sup>127</sup> and gas<sup>128</sup> liberalisation directives, few infringement proceedings have been launched. In 2001, the Commission identified numerous problems with Member State implementation of the first electricity directive (as can be seen in the tables below), in particular identifying Belgium, Ireland and France as Member States who had failed to implement to first electricity liberalisation directive in time; and France and Germany as Member States against whom infringement procedures had been launched for non-implementation of the directive and inadequate implementation of the directive.<sup>129</sup> Nevertheless, none of these cases appeared before the CJEU. Of the two Member States criticised for failing to fulfil obligations relating to the first gas liberalisation directive,<sup>130</sup> both appeared before the CJEU and both were found to have breached the directive.<sup>131</sup>

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<sup>125</sup> *Derrybrien Wind* (n21).

<sup>126</sup> *Ibid.*

<sup>127</sup> Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1996] OJ 27/20 ('the first liberalisation directive').

<sup>128</sup> Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ 204/1 ('the first gas liberalisation directive').

<sup>129</sup> European Commission, 'Commission Staff Working Paper. First benchmarking report on the implementation of the internal electricity and gas market' (2001) SEC (2001) 1957.

<sup>130</sup> the first gas liberalisation directive (n128).

<sup>131</sup> Case C-64/03 *Commission v Germany* [2004] ECR I-03551; Case C-259/01 *Commission v France* [2002] ECR I-11093.



### Implementation of the Electricity Directive

	Declared market opening	Full opening date	Unbundling of TSO <sup>132</sup>	Regulator	Network tariffs 2001	Balancing market	Biggest three generator share (%)
Austria	100%	2001	L	ex-ante	high	Y	68
Belgium	35%	2007	L	ex-ante	medium	N	97 (2)
Denmark	90%	2003	L	ex-post	low	Y	75 (2)
Finland	100%	1997	O	ex-post	low	Y	54
France	30%	none	M	ex-ante	medium	planned	98
Germany	100%	1998	M	nTPA	high	planned	63
Greece	30%	none	M	ex-ante	n.a.	N	100 (1)
Ireland	30%	2005	L	ex-ante	medium	N	97 (1)
Italy	45%	none	L	ex-ante	medium	planned	79 (2)
Neth	33%	2003	L	ex-ante	medium	Y	64
Portugal	30%	none	L	ex-ante	high	N	85
Spain	54%	2003	L	ex-ante	high	Y	79
Sweden	100%	1998	O	ex-post	low	Y	77
UK	100%	1998	O	ex-ante	low	Y	44

#### KEY

- = structures are unsatisfactory
- = structures are satisfactory
- = structures cannot be judged
- L = legal
- O = ownership
- M = management
- Y = yes
- N = no

Table 12: Implementation of the First Electricity Liberalisation Directive<sup>132</sup>

<sup>132</sup> Commission (n129). Note: It is beyond the scope of this chapter to explain/discuss this table in detail so it is used purely to illustrate the amount of problems that existed with Member States implementation of the first electricity liberalisation directive.

### Measures Adopted By Member States in Implementing Directives

Electricity						Gas				
	Market opening	eligibility threshold	100% in/by	Unbundling transmission	Network access	Market opening	eligibility threshold	100% in/by	Unbundling transmission	Network access
Austria	100%	-	2001	Legal	Reg.	49%	25mcm	2002	Accounts	Neg.
Belgium	35%	20Gwh	2007	Legal	Reg.	59%	5mcm	2006	Accounts	Reg.
Denmark	90%	1 Gwh	2003	Legal	Reg.	30%	35mcm	-	Legal	Reg.
Finland	100%	-	1997	Ownership	Reg.	Derogation				
France	30%	c. 16 Gwh	-	Management	Reg.	20% <sup>[1]</sup>	25mcm	-	Accounts	Reg.
Germany	100%	-	1999	Management	Neg.	100%	-	2000	Accounts	Neg.
Greece	30%	100 Gwh	-	Management	Reg.	Derogation				
Ireland	30%	4 Gwh	2005	Legal	Reg.	75%	2 mcm	2005	Management	Reg.
Italy <sup>[2]</sup>	45%	20 Gwh	-	Legal	Reg.	96%	0.2mcm	2003	Legal	Reg.
Lux	Derogation					51%	15mcm	2007	Accounts	Reg.
Neth	33%	20 Gwh	2004	Legal	Reg.	45%	10mcm	2004	Accounts	Neg.
Portugal	30%	9 Gwh	-	Legal	Reg.	Derogation				
Spain	54%	1 Gwh	2003	Legal	Reg.	72%	3mcm	2003	Legal	Reg.
Sweden	100%	-	1998	Ownership	Reg.	47%	25mcm	2006	Accounts	Reg.
UK	100% <sup>[3]</sup>	-	1998	Ownership	Reg.	100%	-	1998	Ownership	Reg.

source: DG Energy and Transport (shaded boxes indicate infringement procedures)

**Table 13: Implementation of the First Gas and Electricity Directives<sup>133</sup>**

Following the expiry of the deadline for Member States to transpose and apply the provisions of the second gas and electricity directives, while Member States fulfilment of their obligations were described as ‘disappointing’, infringement procedures were initiated against just two Member States (Ireland and Portugal). However, after 2005 (the year in which the Court decided it was allowed to sanction Member States with both a lump sum and penalty payment)<sup>134</sup> there was a visible change in the willingness of the Commission to initiate and pursue sanctions for breaches of EU law. In 2006, an additional 14 Member States were further named as being subject to infringement proceedings (including Estonia, Greece, Spain, Luxembourg, France, Italy, Latvia, Lithuania, Luxembourg, Malta, Austria, Poland, Finland and Sweden) and in 2007 and 2008 three judgments were made against Belgium, Sweden and Spain for breaching the second electricity directive;<sup>135</sup> and two against Belgium and Luxembourg for breaching the second gas directive.<sup>136</sup>

<sup>133</sup> *Ibid*, 9.

<sup>134</sup> *Commission v French Republic* (n90).

<sup>135</sup> Case C-474/08 *Commission v Belgium* [2008] ECR I-00175\*; Case C-274/08 *Commission v Sweden* [2008] ECR I-10647; Case 358/05 *Commission v Spain* [2007] ECR I-00088\*.

<sup>136</sup> Case C-475/08 *Commission v Belgium* [2009] ECR I-11503; Case 354/05 *Commission v Luxembourg* [2006] ECR I-00067\*.



While recent reports point to more failures by Member States to transpose and apply the third energy liberalisation packages,<sup>137</sup> they also demonstrate a greater willingness on behalf of the Commission and the Court of Justice to initiate infringement procedures and follow through with penalties. Since Ian Kilbey's extremely useful study (detailing 12 cases taken pursuant to article 260 TFEU) in 2010,<sup>138</sup> 16 additional judgments have been handed down on various alleged breaches of EU law<sup>139</sup> and in 2013, the Commission stated that it had launched 761 new infringement procedures.<sup>140</sup>

Even more interesting in the context of this thesis, in its *Annual Report on Monitoring the Application of EU Law (2013)*, the Commission noted that most of the penalty proposals for the late transposition of directives had been made in the policy area of energy.<sup>141</sup> Furthermore, since the introduction of the third energy package, the Commission has referred 8 Member States, (including Ireland) to the CJEU for failing to fully transpose the internal market rules.<sup>142</sup> In Ireland's case, this was for failing to transpose the provisions relating to the unbundling of transmission system operators and transmission systems (an infringement, with a proposed daily penalty of €20,358, which is more fully discussed in chapter 5 of this thesis).<sup>143</sup>

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<sup>137</sup> See for instance the Commission Staff Working Document (2011) (n97) wherein it was stated, 'So far the results of the transposition of the Third package in the Member States have not been reassuring. By 1 June 2011, no Member State had yet notified transposition measures to the Commission, although 4 Member States had filed partial notification. Only in a few Member States had draft legislation been submitted to Parliament for adoption, while in other few Member States the government had been empowered by the Parliament to adopt the necessary transposition measures, but the measures themselves had not yet been adopted. Overall the state of implementation of internal market legislation at national level is disappointing, with still many open infringements under the second package.'

<sup>138</sup> Kilbey (n77).

<sup>139</sup> This is based on searches conducted on 17 October 2014: Case C-184/11 *Commission v Spain* [2014] ECR I-0000 (unreported); Case C-292/11P *Commission v Portugal* [2014] ECR I-0000 (unreported); Case C-95/2 *Commission v Germany* [2013] ECR I-0000 (unreported); Case 270/11 *Commission v Sweden* [2013] ECR I-0000 (unreported); Case C-496/09 *Commission v Italy* [2013] ECR I-0000 (unreported); Case C-576/11 *Commission v Luxembourg* [2013] ECR I-0000 (unreported); Case C-533/11 *Commission v Belgium* [2013] ECR I-0000 (unreported); Case C-529/09 *Commission v Spain* [2013] ECR I-0000 (unreported); Case C-374/11 *Commission v Ireland* [2012] ECR I-0000; Case C-325/12 *Commission v Portugal* [2012] ECR I-0000 (unreported); Case C-462/12 *Commission v Hungary* [2012] ECR I-0000 (unreported); Case C-279/11 *Commission v Ireland* [2012] ECR I-0000 (unreported); Case C-610/10 *Commission v Spain* [2012] ECR I-0000 (unreported); Case C-185/11 *Commission v Slovenia* [2012] ECR I-0000 (unreported); Case C-407/09 *Commission v Greece* [2011] ECR I-0000 (unreported); Case C-241/11 *Commission v Czech Republic* [2011] ECR I-0000 (unreported).

<sup>140</sup> Commission (n24).

<sup>141</sup> *Ibid.*, 6.

<sup>142</sup> European Commission, 'Commission refers Ireland to Court for failing to transpose EU rules' (Press release, IP/14/155) <[http://europa.eu/rapid/press-release\\_IP-14-155\\_en.htm](http://europa.eu/rapid/press-release_IP-14-155_en.htm)> accessed 16 October 2014.

<sup>143</sup> *Ibid.*



This greater readiness to refer Member States to the CJEU for transposition failings (using the new mechanism provided for in article 260(3) TFEU) is clearly identifiable across the energy sector, with the Commission having also referred Ireland,<sup>144</sup> Austria,<sup>145</sup> Poland<sup>146</sup> and Cyprus<sup>147</sup> to the CJEU for failures to transpose the Renewable Energy Directive.<sup>148</sup> In Ireland's case the action has been brought pursuant to 260 TFEU for a number of failings including:

- (i) failing to meet the requirement to introduce measures designed to ensure that the energy produced from renewable sources equals or exceeds that shown in the indicative trajectory outlined by the directive;
- (ii) failing to meet the requirement to introduce measures designed to reduce the administration required to set up a renewable electricity generating plant;
- (iii) failing to meet the requirement to introduce measures designed to ensure that the tariffs charged by transmission system operators and distribution system operators for the transmission and distribution of electricity from plants using renewable energy sources reflect realisable cost benefits and
- (iv) failing to meet the requirement to introduce measures designed to oblige transmission system operators and distribution system operators to make public their rules on infrastructure system development costs and charges.

Interestingly in its referral, the Commission proposed the imposition of a penalty payment of €25,447.50 per day.<sup>149</sup>

As has been discussed in the preceding paragraphs the instruments which can be applied to motivate the application and transposition of EU law (in this case energy law) have been significantly strengthened in recent years. As a result, the use of infringement procedures has increased and more prosecutions are likely. This is particularly so in the energy law sector, with energy concerns ranking high on the political agenda. As stressed by Commissioner Oettinger in January 2014:

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<sup>144</sup> Case C-236/14, *Commission v Ireland* [2014] OJ L 140/16.

<sup>145</sup> C-663/13 *Commission v Austria* (action brought on 13 December 2013).

<sup>146</sup> C-320/13 *Commission v Poland* (action brought on 12 June 2013).

<sup>147</sup> Case C-386/13 *Commission v Cyprus* (action brought on 5 July 2013)

<sup>148</sup> Commission (n12); See also European Commission, 'January infringements package: main decisions' (Commission, 23 January 2014) < [http://europa.eu/rapid/press-release\\_MEMO-14-36\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-14-36_en.htm?locale=en) > accessed 19 October 2014.

<sup>149</sup> *Commission v Ireland* (n144).



*'It is essential that all the Member States implement the renewable energy legislation. Renewables are vital for the security of supply and European economic growth. They are key in mitigating global climate change.'*

This increased enthusiasm for employing articles 258 and 260 TFEU should be of great concern to the Irish state given the various infringements which have been identified in this thesis, the increased penalties which can be applied, and the growing enthusiasm of the Commission and the Court in invoking them. While pecuniary penalties remain but a distant possibility for the infringements identified as vulnerable to an article 258 TFEU challenge, they could be much closer for those which are exposed to proceedings under article 260 TFEU.

Given the significance of the penalties which can be applied, it is thought that there is now a much greater incentive to comply with EU law than there might have been before. Moreover, just as these breaches can be challenged under public law mechanisms, they can also be challenged by individuals seeking to vindicate their rights using private law mechanisms. Although the hurdles to successful private law challenges are substantial, similarly real remedies exist for successful applicants, which will be analysed in the paragraphs which follow.

### **3. The Private Law Enforcement Mechanism Available to Individuals to Challenge and Penalise Ireland's Breaches of EU Law**

There are two routes for tackling action that is contrary to EU law.<sup>150</sup> The first, the European-level infringement procedure under Articles 258 and 260 TFEU has been analysed and applied to the breaches identified in this thesis in the preceding paragraphs. The second operates at national level. While the correct application and enforcement of EU law can often be achieved by national courts using a number of mechanisms including: the doctrines of 'direct effect',<sup>151</sup> 'indirect effect'; the Article 267 TFEU preliminary reference,<sup>152</sup> and the doctrine of 'state liability'; the focus here will be on 'state liability'; as the most suitable mechanism available to provide individuals with

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<sup>150</sup> Stephen Weatherhill (26).

<sup>151</sup> Note: On the unavailability of the 'doctrine of direct effect' as a remedy permitting individuals to rely directly on the EU law provisions identified by this thesis as not transposed or incorrectly transposed into Irish law see n11.

<sup>152</sup> TFEU (n15).



redress for four of the breaches previously identified in this thesis (and shown in table 14 below).<sup>153</sup>

Criteria for state liability	Potentially qualifying breaches
<ol style="list-style-type: none"> <li>1. The rule of law infringed must be intended to confer rights on individuals.</li> <li>2. The breach must be sufficiently serious.</li> <li>3. There must be a direct causal link between the breach of the obligation resting on the Member State and the damage sustained.</li> </ol>	<ul style="list-style-type: none"> <li>• Breach of the requirements of the SEA Directive <i>(i.e. thereby breaching the rights guaranteed to the public to have the effects of the national renewable energy action plan on the environment assessed and to express their opinion thereon).</i></li> <li>• Failure to require developers to progress through an environmental impact assessment, until (at least) 2011 <i>(i.e. thereby breaching the rights guaranteed to the public to have the effects of relevant projects on the environment assessed and to express their opinion thereon).</i></li> <li>• Breach of the third liberalisation directive for failing to fully transpose the third liberalisation directive and for failing to meet the conditions required to apply for an exemption from its unbundling requirements <i>(i.e. thereby potentially breaching article 34 TFEU and the third liberalisation directive, which has as its objective the elimination of discrimination in the operation of the network and in the incentives for vertically integrated undertakings to invest adequately in their networks).</i></li> <li>• Failure to provide a general level of affordability to consumers <i>(i.e. breaching a consumer's right to universal service as guaranteed by the Third Liberalisation Directive and the Treaties).</i></li> </ul>

**Table 14: State liability and the breaches identified by this thesis**

### 3.1. The Doctrine of 'State Liability'

<sup>153</sup> Note: State liability is considered to be the most suitable mechanism to provide individuals with a remedy for the breaches outlined above because (as was discussed in n11) upon detailed analysis of each of the breaches of EU legislation documented in this thesis, it was considered that none could satisfy all of the criteria required for direct effect, (i.e. that the provisions in question were clear, precise, unconditional; the deadline for their transposition had passed and they either had not been transposed or were inadequately transposed into national law). Consequently, as direct effect is unlikely to be available to individuals in the context of the breaches identified in this thesis, state liability is considered to be the most suitable mechanism to provide individuals with redress.



As noted by Lock (2012) although many of the weaknesses of the infringement procedure have been addressed over the years, private enforcement (and in particular the doctrine of state liability) is regarded as having the potential to substantially complement it.<sup>154</sup> Much like the doctrine of direct effect, the doctrine of state liability was not set out in the Treaty and so, can be aptly described as '*the child of creative jurisprudence*'.<sup>155</sup> Eilmansberger (2004) describes how the Court had confirmed in *Russo* in 1976,<sup>156</sup> that a Member State could be liable to an injured party if it had caused damage by an infringement of Community law, noting, however, that the judgment never became an authority for the existence of a Community right to damages.<sup>157</sup>

The judgment which has been accepted as the authority for the existence of Community right to damages is in the case of *Francovich v Italy*.<sup>158</sup> In this case the Court followed the Opinion of AG Mischo to find that while the substance of the provisions in question were not sufficiently clear, precise and unconditional to be directly effective, they were capable of being relied upon by the claimants in an action for damages, grounded on Italy's failure to implement the directive in question.

In coming to this conclusion the Court identified three conditions which had been satisfied, which it considered necessary to ground an action for damages based on a claim of state liability. The first was that the result prescribed by the directive entailed the grant of rights to individuals. The second was that it was possible to identify the content of those rights on the basis of the provisions of the directive. Finally, a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties was required.<sup>159</sup> In providing a basis for the existence of State liability as a matter of principle, the Court referred to the obligations of Article 5 of the EC Treaty (which included the requirement for Member States to nullify the unlawful consequences of a breach of Community law), the need to ensure the effectiveness of EU law and previous case law, which supported the idea of the EU legal system as one in which enforceable rights were conferred on individuals stating:

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<sup>154</sup> Tobias Lock, 'Is Private Enforcement of EU Law a Myth? An Assessment 20 Years After *Francovich*' (2012) 49 *Common Market Law Review* 5, 1677.

<sup>155</sup> Weatherhill (n26) 81.

<sup>156</sup> Case 60/75 *Carmine Antonio Russo v AIMA* [1976] ECR 45, para 9.

<sup>157</sup> Thomas Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *Common Market Law Review* 5, 1223.

<sup>158</sup> Joined Cases C-6/90 and C-9/90 *Francovich v Italy* [1991] ECR I-5403, para 40.

<sup>159</sup> *Ibid.*

*'It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 Van Gend en Loos [1963] ECR 1 and Case 6/64 Costa v ENEL [1964] ECR 585).'*

The conditions necessary to establish state liability were updated in *Brasserie du Pêcheur SA and Factortame*.<sup>160</sup> In these joint cases the Court held that the principle of state liability could be found, in any case in which a Member State breached Community law, whatever the organ of the State whose act or omission was responsible for the breach. The Court also refined and updated the three conditions necessary to establish a successful claim for damages based on state liability. The rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.<sup>161</sup>

Where these conditions were satisfied the Court held the State was required to make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability.<sup>162</sup> The following paragraphs will consider each of the three main conditions (reproduced in the figure below) in turn, applying the relevant case-law to each to the infringements identified in this thesis. This will be followed by an analysis of the Irish case law on damages and causation, two areas still governed by national law.<sup>163</sup>

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<sup>160</sup> Cases C-46 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

<sup>161</sup> *Ibid*, para 74.

<sup>162</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 (n158) paras 55 to 57; See also: Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 100; Case C-302/97 *Konle* [1999] ECR I-3099, para 58; Case C-392/93 *British Telecommunications* [1996] ECR I-163, para 41; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, para 49.

<sup>163</sup> Trevor C Hartley, *The Foundations of European Union Law An Introduction to the Constitutional and Administrative Law of the European Union* (8<sup>th</sup> edn, Oxford University Press, 2014), 252.





**Figure 29: Criteria necessary to ground a claim for damages based on state liability**

### 3.1.1. The Rule of Law Must Be Intended to Confer Rights on Individuals

One of the key requirements of liability is that the rule of law infringed must be intended to confer rights on individuals.<sup>164</sup> This requirement has generated voluminous amounts of literature.<sup>165</sup> As discussed by Prechal (2005)<sup>166</sup> and Van Gerven (2000)<sup>167</sup> the Court

<sup>164</sup> Josephine Steiner, *Steiner & Woods EU law* (11<sup>th</sup> edn, Oxford University Press, 2011) 203.

<sup>165</sup> The following are just a few examples of the articles specifically addressing this topic: Agnė Vaitkevičiūtė, 'Member States Liability in Damages for the Breach of European Union Law-Legal Basis and Conditions for Liability' (2011) 18 *Jurisprudence* 1, 49-68; Sacha Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) 17 *European Business Law Review* 2, 299-316; Walter Van Gerven, 'Remedies for Infringements of Fundamental Rights' (2004) 10 *European Public Law* 2, 261-284; Eilmansberger (n157); Walter Van Gerven, 'Of Rights, Remedies and Procedures'(2000) 37 *Common Market Law Review* 3, 501-536; Walter Van Gerven, 'Bridging the Unbridgeable: Community Law After Francovich and Brasserie' (1996) 45 *International and Comparative Law Quarterly* 3, 507-544.

<sup>166</sup> Sacha Prechal, *Directives in EC Law* (2005, Oxford University Press, 1<sup>st</sup> edn), 97.

has never clearly indicated what it means by the term 'right'. In Community law the term 'right' was discussed in *Becker*<sup>168</sup> and can be described as follows:

*'It refers to the general right, and accompanying remedy concept, to have a court set aside national measures which conflict with the requirements of a directive, but may also refer to a specific right which a directive grants to specific parties, and which together with other conditions gives arise...to a right and an accompanying remedy for compensation.'*<sup>169</sup>

As observed by Prechal (2005) the term, as analysed in *Becker* has various different meanings depending on the context in which it is used.<sup>170</sup> Van Gerven provides a more general useful definition: *'the concept of rights refers... to a legal position which a person recognized as such by the law...may have and which in its normal state can be enforced by that person against... others before a court of law by means of one or more remedies'*.<sup>171</sup>

Just as the definition of the term 'right' is somewhat ambiguous in Community law, so too is the case-law providing detail on when a particular provision will be considered to confer rights on individuals. The first category of provisions which have been found to confer rights on individuals is, however, clear-cut. Provisions, which have been found by the CJEU to be directly effective, can confer rights on individuals.<sup>172</sup> So, for example in *Brasserie*, the Court held that it was manifest that article 34 TFEU (which prohibits quantitative restrictions and measures having equivalent effect) was capable of being intended to confer rights on individuals.

Applying this reasoning to the breaches identified by this thesis, were a case to be taken for any damages resulting from: (i) Ireland's failure to apply the provisions of the SEA Directive<sup>173</sup> to its national renewable energy action plan or (ii) its failure to assess the effects of specific wind developments on the environment (providing the public with an opportunity to express their opinions thereon) as required by the EIA Directive,<sup>174</sup> it

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<sup>167</sup> Van Gerven (2000) (n165).

<sup>168</sup> Case 8/81 *Becker* [1982] ECR 53, para 25.

<sup>169</sup> Prechal (n166) 97.

<sup>170</sup> *Ibid.*

<sup>171</sup> Van Gerven (2000) (n165) 507.

<sup>172</sup> Van Gerven (2004) (n165) 267.

<sup>173</sup> SEA Directive (n5).

<sup>174</sup> EIA Directive (n6).



is likely that the Court would follow its earlier ruling in *Leth*<sup>175</sup> to find that the first condition for a finding of state liability had been met. Both directives are intended to confer rights on individuals.<sup>176</sup>

The second category where provisions will be deemed to confer rights on individuals also appears relatively clear-cut. This is where the right in question is clearly discernible from a literal reading of the articles of the queried directive. So for example in *Fuß*<sup>177</sup> the Court invoked an explicit reference to the safety and health of workers in Article 6(b) of the Working Time Directive 2003/88<sup>178</sup> to conclude that the minimum requirements contained therein conferred rights on workers.<sup>179</sup> Thus, it would appear that Ireland's failure to uphold the right to universal service as required by the third liberalisation directive and the Treaties could fall within this category<sup>180</sup> thereby satisfying the first condition necessary to claim damages for state liability.<sup>181</sup>

The third category is less clear. This is where the provision in question is found to create rights for the benefit of individuals despite the inapplicability of the doctrine of direct effect and the literal wording of the provision.<sup>182</sup> The reasoning which will be applied to rights allegedly falling within this particular category was most famously considered in *Peter Paul v Germany*.<sup>183</sup> This case concerned a preliminary reference from Germany wherein the German Bundesgerichtshof asked whether Directive 94/19<sup>184</sup> or the other banking directives<sup>185</sup> gave depositors the right to require banking

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<sup>175</sup> Case C-420/11 *Jutta Leth v Republik Österreich and Land Niederösterreich* [2013] ECR I-0000 (*not yet published*). In this case the Court referred to its earlier ruling in *Wells* to find that the EIA Directive conferred a right on the individuals concerned to have the environmental effects of the project under examination assessed by the competent services and to be consulted in that respect.

<sup>176</sup> EIA Directive (n6) and SEA Directive (n5).

<sup>177</sup> Case C-429/09 *Fuß v Stadt Halle* [2010] ECR I-12167 ('*Fuß*').

<sup>178</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

<sup>179</sup> *Fuß* (n177) para 50.

<sup>180</sup> It is acknowledged that while the right to universal service is clear from a reading of the second and third liberalisation directives, as has been discussed in chapter 6, there is scope to argue that the requirement for affordability, as the term is understood by this thesis, is not inherent in the requirements of the directives or the Treaties.

<sup>181</sup> Note: the right to universal service in the context of the third liberalisation directive was recently discussed, albeit in a different context in Cases C-359/11 and C-400/11 *Alexandra Schulz v Technische Werke Schussental GmbH und Co. KG, and Josef Egbringhoff* [2014] ECR I-0000 (*not yet reported*) in paras 45-47 wherein the Court found that the overall right included further rights such as: transparency of the contract terms and conditions, the right to terminate the supply contract and challenge adjustments to the price of supply.

<sup>182</sup> *Prechal* (n165).

<sup>183</sup> Case C-222/02 *Peter Paul and Others v Bundesrepublik Deutschland* [2003] ECR I-9428.

<sup>184</sup> Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes [1994] OJ 1994 L135/5.



supervisory authorities to take measures, which could ground a claim for State liability for damage suffered by an individual as a result of breaches of Community law attributable to the State.<sup>186</sup> In giving her Opinion AG Stix-Hackl took a methodical approach to answering the question of whether the directives in question conferred rights on an individual. With regard to the first directive she stated:

*'the [First Banking Coordination] Directive constitutes no more than a first step towards the achievement of a common market for credit institutions, designed, in particular, to achieve overall supervision of a credit institution operating in several Member States'.<sup>187</sup>*

Accordingly, she found that it could not be considered to confer rights on individuals. In considering the other directives, the AG first considered the relevant articles of each of the directives to find that there was no discernible right which conferred rights on individuals to have supervisory measures taken. In considering whether a right could be inferred from the recitals to these directives the AG stated:

*'In this regard, it must be pointed out that recitals in general have limited effect. Their effect is not so far-reaching as to enable an individual to derive rights from one or several recitals. Rights of individuals can be established only by a provision in the substantive part of a directive, which in addition must meet the conditions for having direct effect'.<sup>188</sup>*

While this observation was not referred to by the Court in its subsequent judgment and has not since found favour, the Court similarly decided that the directives in question were not intended to confer rights on individuals. In so doing it took a three pronged approach to the question. As described by Lock, first it adopted a literal approach holding that the directives do not expressly grant such a right to depositors.<sup>189</sup> Next, it employed a systematic argument by referring to the limits of the EU's competence under Article 64(2) TFEU to adopt harmonizing measures on the movement of capital, which restricted the adoption of measures solely to those considered necessary.

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<sup>185</sup> First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions [1977] OJ L 322/30; Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions [1989] OJ L124/16; Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780 [1989] OJ L 386/1.

<sup>186</sup> *Peter Paul v Germany* (n183).

<sup>187</sup> *Ibid*, Opinion of the AG, para 122.

<sup>188</sup> *Ibid*, Opinion of the AG, para 132.

<sup>189</sup> Tobias Lock (154), 1690.



Consequently, as an individual's right to effective supervision was not strictly necessary to achieve the objective of the directives, this right was held not to be conferred by them.<sup>190</sup> Finally, the Court considered the purpose of the provisions, stating the directives only laid down a minimal protection for depositors, which would also be guaranteed where supervision was defective. As a result, it determined the right to supervision was not conferred on individuals by the legislation in question.

This case can be contrasted with (the more recent) *Danske Slagterier*,<sup>191</sup> in which the Court permitted the claimants to rely on article 34 TFEU, as granting rights which had been defined and given concrete expression by the directives in question, holding:

*'As is apparent from the wording of the title of Directive 89/662 and of the first recital in its preamble, that directive was adopted with a view to the completion of the internal market, and so was Directive 91/497 amending Directive 64/433, as made clear by the third recital in the preamble to Directive 91/497. The free movement of goods is thus one of the objectives of those directives, which, through the elimination of the differences existing between the Member States with regard to health requirements for fresh meat, are designed to encourage intra-Community trade. The right conferred by Article 28 EC is thus defined and given concrete expression by those directives.'*<sup>192</sup>

In light of this case-law it appears that there is no uniform test to be applied to determine whether non-directly effective provisions will confer rights on individuals; with the test to be applied depending very much on the facts of the case at hand. However from *Danske Slagterier*,<sup>193</sup> it appears that were the other conditions for state liability satisfied, a case could be taken by competitors of the ESB group claiming damages from Ireland for breaching the rights conferred on them by article 34 TFEU and given concrete expression in directive 2009/72/EC using arguments similar to those put forward in *Danske Slagterier*.<sup>194</sup>

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<sup>190</sup> *Ibid*, 1690.

<sup>191</sup> Case C-445/06 *Danske Slagterier v Bundesrepublik Deutschland* [2009] ECR I-02119.

<sup>192</sup> *Ibid*, para 23.

<sup>193</sup> *Ibid*.

<sup>194</sup> *Ibid*.

### 3.1.2. A Sufficiently Serious Breach

The second requirement necessary to ground a claim for damages based on state liability is that the breach in question is sufficiently serious. In some cases where the national authority enjoys no discretion under EU law, the simple breach of EU law will be sufficiently serious to incur liability.<sup>195</sup> Chalmers et al.(2014) identify four categories of cases where breaches of EU law will be found to be sufficiently serious to incur liability:<sup>196</sup> a failure to transpose<sup>197</sup> or a clearly incorrect transposition of a directive;<sup>198</sup> breach of an order of the CJEU;<sup>199</sup> breach of settled case law,<sup>200</sup> and breach of a provision of EU law whose interpretation leaves no room for reasonable doubt.<sup>201</sup> Thus, it would appear that Ireland's failure to transpose the provisions on unbundling in the third liberalisation directive will qualify automatically as a sufficiently serious breach of EU law. The other infringements discussed will be examined below.

Where case-law has made the essence of an obligation clear, a sufficiently serious breach will be found where the Member State disregards the ruling or rulings in question. Thus, in *Thomas Hogan and Others v Minister for Social and Family Affairs* [2013]<sup>202</sup> the Court determined that Ireland had brought about a sufficiently serious breach of Directive 2008/94<sup>203</sup> by failing to properly transpose Article 8, regard being had to its earlier ruling clarifying the essence of the provision in *Robins and Others* in 2007.<sup>204</sup> Similarly in *Larsy* the Court held that a breach of Community law will be sufficiently serious if it has persisted despite a preliminary ruling from the Court from which it is clear that the conduct in question constituted an infringement.<sup>205</sup>

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<sup>195</sup> Joined cases C-178/94, C-179/94 and C-188/94 *Dillenkofer and others v Germany* [1996] ECR I-4845.

<sup>196</sup> Damien Chalmers, Gareth Davies and Giorgio Monti, *European Union Law Text and Materials* (3<sup>rd</sup> edn, Oxford University Press, 2014) 331.

<sup>197</sup> *Dillenkofer* (n195).

<sup>198</sup> Case C-278/05 *Robins v Secretary of State for Work and Pensions* [2007] ECR I-1053; *Danske Slagterier v Germany* (n191).

<sup>199</sup> Case C-398/11 *Hogan v Minister for Social and Family Affairs* [2013] ECR I-0000 (unreported); *Brasserie du Pecheur v Germany* (n160); *R v Secretary of State for Transport, ex parte Factortame (No.3)* [1996] ECR I-1029.

<sup>200</sup> *Fuß* (n179).

<sup>201</sup> Case C-452/06 *R v Licensing Authority of the Department of Health ex parte Synthon* [2008] ECR I-7681; Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749; Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493; Case C-188/00 *Larsy v INASTI* [2001] ECR I-5063.

<sup>202</sup> *Hogan and Others v Minister for Social and Family Affairs* (n199).

<sup>203</sup> Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/3.

<sup>204</sup> *Robins v Secretary of State for Work and Pensions* (198).

<sup>205</sup> *Larsy v INASTI* (n201).



The position differs where the requirements of a provision have become gradually clear through a series of judgments. In these circumstances the Court will have regard to this fact in assessing whether the rule breached was sufficiently clear and precise to render the breach serious.<sup>206</sup> In light of the rulings of the CJEU in the *Derrybrien*<sup>207</sup> and *Demolition cases*<sup>208</sup> a failure to require specific developments to progress through the environmental impact assessment process could meet the requirement of being a sufficiently serious breach.

Conversely, the Irish government's failure to submit Ireland's national renewable energy action plan to the requirements of the SEA Directive is unlikely to be found to be a sufficiently serious breach. Considering the ambiguity of the CJEU's ruling in *Inter-Environnement*<sup>209</sup> and the fact that at least 19 other Member States did not think it necessary to submit their national renewable energy action plans to the requirements of the SEA Directive,<sup>210</sup> this breach is thought unlikely to satisfy the second condition.

In areas where there is a margin for discretion, breach of EU law alone will be insufficient. In these instances the test is whether the national authority concerned manifestly and gravely disregarded the limits on its discretion.<sup>211</sup> As noted by Weatherhill (2014) the question to be asked is whether there was a lack of legal clarity at the material time.<sup>212</sup> To ascertain whether this was the case, the Court will take the following factors into account:

*'the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community*

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<sup>206</sup> Case C-446/06 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753; para 217.

<sup>207</sup> *Derrybrien Wind* (n21).

<sup>208</sup> *Demolition Works* (n59).

<sup>209</sup> *Inter-Environnement Wallonie* (n46).

<sup>210</sup> As discussed in chapter 3, an analysis of the 28 national renewable energy action plans which were submitted to the Commission and specifically the answers given in response to part 5.4 of the national renewable energy action plan template '*Please explain the public consultation carried out for preparation of this Action Plan*' reveals that of the 28 Member States it is likely that just 9 Member States (Estonia, France, Greece, Malta, Portugal, Romania, Slovenia, Sweden and Britain) may have given the public '*an early and effective opportunity [to allow the public the opportunity]...to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure*' as is required by the SEA Directive.

<sup>211</sup> Chalmers (196) 331.

<sup>212</sup> Weatherhill (n26) 155.

*institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.'*

Applying this reasoning to (i) Ireland's failure to meet the conditions necessary to apply for an exemption from the unbundling requirements; and (ii) Ireland's failure to provide a general level of affordability to consumers, it would appear that neither of these breaches is likely to be found to be sufficiently serious, given the margin of discretion left to the Irish government to implement the provisions in question. Admittedly, however, this cannot be predicted with absolute certainty.

### **3.1.3. A Direct Causal Link between the Breach of the Obligation resting on the State and the Damage Sustained by the Injured Parties**

Although the CJEU has briefly discussed the third condition on a number of occasions, it is settled case law that it is for the national court to ascertain whether the loss and damage claimed flows sufficiently directly from the breach of EU law by the Member State.<sup>213</sup> As it would be impossible to accurately consider all the hypothetical circumstances resulting from the breaches analysed in this thesis which could lead to damage, the following paragraphs will consider the general principles identified by academics, the CJEU and the Irish superior courts to determine the criteria necessary to find a direct causal link in claims for damages resulting from state liability.

Recent EU case-law shows that the requirement for a '*direct causal link*' is likely to bar many actions for damages. As noted by Chalmers (2014), if no direct burden is imposed by the Member State on the claimant, it will only be in exceptional circumstances that that loss will be found to have occurred.<sup>214</sup> Thus in *Danfoss*, oil companies passed an excise duty on oil illegally levied on them by Denmark onto Danfoss when it bought oil from them. Danfoss sued the Danish state which claimed that it should, instead have sued the oil companies. The Court agreed stating:

*'To that end, it should be observed that a national legal system, such as that concerned in the main proceedings, under which a direct causal link can be established only as between the levying by the State of a duty which is not due,*

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<sup>213</sup> *Test Claimants in the Thin Cap Group Litigation* (n206) para 122; *AGM-COS.MET* (n201) para 83; *Brasserie du Pêcheur and Factortame* (n160) para 65.

<sup>214</sup> Chalmers (n196) 332.



*on the one hand, and the damage suffered by the taxable person, on the other, may not interpret that requirement in such a way as to make it virtually impossible or excessively difficult to obtain compensation for the damage suffered...However...if it were to prove impossible or excessively difficult for the taxable person to compensate the purchaser who bore the financial burden of the duty unduly paid and passed on to him for the damage suffered – in particular, in the case of the insolvency of the taxable person – the principle of effectiveness requires that the purchaser be able to bring his claim for reimbursement against the State directly, without that State being legitimately able to rely on the lack of a direct causal link between the levying of the duty which was not due and the damage suffered by the purchaser.*<sup>215</sup>

Conversely, in *Leth* the Court held that pecuniary damage could be the direct economic consequence of the environmental effects of public or private projects (which should have been made the subject of an environmental impact assessment but were not) covered by the objective of protection outlined in the directive.<sup>216</sup> In its judgment the Court stated that while causation was a matter for national courts, in circumstances where exposure to noise had significant effects on individuals (in the sense that a home affected by that noise was rendered less capable of fulfilling its function and the individuals' environment, quality of life and, potentially, health were affected) a decrease in the pecuniary value of that house could be a direct economic consequence of the environmental effects of that project, capable of being compensated by damages. The Court distinguished this heading of damage from other types of economic damage, which did not have their direct source in the environmental effects covered by the directive.

In early literature considering the issue of causation in state liability (and the permissible defences) Van Gerven (1996) suggested that reference should be made to the CJEU's case-law relating to article 215 of the EEC Treaty, paragraph two.<sup>217</sup> Article 215 EEC (since replaced by article 288 EC and now article 340 TFEU) paragraph 2 states that in the case of non-contractual liability the Community must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions in the performance of their duties. In this regard the

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<sup>215</sup> Case C-94/10 *Danfoss* [2011] ECR I-09963, paras 36 and 38.

<sup>216</sup> *Leth* (n175).

<sup>217</sup> Van Gerven (2000) (n165).



CJEU has held that the article did not create an obligation 'to make good every harmful consequence, even a remote one, of unlawful legislation.'<sup>218</sup>

In the case-law (referred to by Van Gerven) which detailed events likely to break the chain of causation in an action grounded on article 215 EEC, the Court determined a complainant's behaviour and failure to mitigate matters or avoid damage could be taken into account in assessing damages.<sup>219</sup> Similarly, it found that the wrongful conduct of third parties was capable of breaking the chain of causation stating:

*'In fact there is a break in the chain of causation only if an alien cause intervenes between the alleged wrongful act or omission and the damage claimed to follow from it.'*<sup>220</sup>

The approach advocated by Van Gerven found support in the Irish High Court in *BUPA Ireland v The Health Insurance Authority & ors*.<sup>221</sup> In this case (which was the second judgment handed down by the Irish superior courts on a direct claim for state liability in EU law),<sup>222</sup> the High Court was asked to consider if, due to the Irish government's incorrect transposition of the Third Non-Life Directive<sup>223</sup> (and subsequent introduction of a scheme which was incompatible with this directive), the claimants had an entitlement to damages as a result of the damage sustained by them.

This damage consisted of losses sustained by BUPA, a private health insurance provider, who had entered the Irish insurance market to compete with VHI, the State

<sup>218</sup> Case C-45/79 *Maïseries alsaciennes v Council* [1979] ECR 3091, para 21.

<sup>219</sup> In reducing the damages awarded in Case 145/83 *Adams v Commission* [1985] ECR 3539, para 54 the Court stated: 'Consequently, the applicant himself contributed significantly to the damage which he suffered. In assessing the conduct of the Commission on the one hand and that of the applicant on the other, the Court considers it equitable to apportion responsibility for that damage equally between the two parties.'

<sup>220</sup> Joined cases 116 and 124/77 *G. R. Amylum NV and Tunnel Refineries Limited v Council and Commission of the European Communities* [1979] ECR 03497.

<sup>221</sup> *BUPA Ireland v The Health Insurance Authority & ors* [2013] IEHC 103 (7 March 2013).

<sup>222</sup> While the conditions necessary for State Liability has been discussed *obiter* in the Irish Superior Courts in cases such as: *Davis Joinery Ltd & Companies Acts* [2013] IEHC 353; *Rooney v Minister for Agriculture and Food & ors* [2010] IESC 55; *An Blascaod Mor Teo v. Commissioners of Public Works (No. 4)* [2000] 3 IR 565; *Kennedy & Ors v Minister for Agriculture & Ors* [2011] IEHC 187; just two cases have directly addressed state liability: *BUPA Ireland Ltd & anor v The Health Insurance Authority and ors* (n219) and *Teresa Tate v the Minister for Social Welfare Ireland and the AG* [1995] IR 418. Interestingly, despite the reference from the Irish High Court for a determination on the criteria for state liability in insolvency proceedings in *Hogan & Ors v Minister for Social and Family Affairs & Ors* 2010/2922P to the CJEU and the subsequent judgment in Case C-398/11 (n181), no judgment is available for this case and so it is thought that it settled privately.

<sup>223</sup> Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) [1992] OJ L 228/1.



owned Irish insurance provider. In seeking to mitigate against prospective future loss, BUPA had disposed of its business for a value less than it would have had, in the absence of the scheme. However, while the scheme was designed to impose payment obligations on insurers, BUPA had never actually made any payments, before the scheme was quashed. This case is illuminating for the judge's reasoning on the causal requirements necessary to successfully claim damages as a result of state liability.

In considering the causal link necessary, Cooke J. drew analogies with the case-law of the CJEU pursuant to article 340 TFEU. In doing so, he cited *Holcim v Commission*<sup>224</sup> and *Dumortier v Council*<sup>225</sup> as authorities for the proposition that in EU law (just as in Irish law) the causal link between the event in question and the damage suffered could be broken by the intervention of some new act or event. He noted that in *Holcim* the Court had determined that the undertaking in question could not claim compensation for costs it had incurred in relation to the provision of a bank guarantee, because the loss it sustained was the consequence of the undertaking's own decision not to comply with its obligation to pay the fine.

He also cited similar passages from *Dumortier*<sup>226</sup> to support the proposition that an independent decision taken by a claimant affected by an unlawful legislative measure, when taken voluntarily for its own commercial reasons, will be sufficient to break the necessary causal link between the unlawful measure and the loss sustained. Using the reasoning applied in these cases, he determined that in deciding to sell its business at a loss BUPA had broken the chain of causation.

*BUPA Ireland v The Health Insurance Authority & ors.*<sup>227</sup> provides a good insight into the methodology which will be applied by the Irish Courts to determine whether a direct causal link can be found. In the absence of concrete examples, it is thought impossible to meaningfully evaluate the level and types of damages which could follow the infringements found by this thesis. However, it is possible to detail the line of reasoning which will be followed by the Court to assess damages. Consequently, the following paragraphs will briefly consider *Tate v the Minister for Social Welfare*<sup>228</sup>, as the first judgment delivered by the Irish Courts to discuss state liability grounded in EU Law and the case-law and academic analysis which has followed.

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<sup>224</sup> Case T-28/03 *Holcim v Commission* [2007] ECR I-2941.

<sup>225</sup> C-64/76 *Dumortier v Council* [1976] ECR 3094.

<sup>226</sup> *Dumortier* (n225).

<sup>227</sup> *BUPA* (n222).

<sup>228</sup> *Tate* (n222).

#### 3.1.4. Damages and the Irish Courts

In *Tate v the Minister for Social Welfare*, Carroll J granted damages to the plaintiffs for the State's failure to implement article 4 of Directive 7/79/EEC (on equal treatment for men and women in the matters of social security) in time to meet the deadline stipulated by the directive, and the subsequent incomplete transposition of article 4 of the directive. In considering the nature of community law Carroll J analysed the nature of the wrong which had been committed by the State to classify the wrong in question as its own breach, the breach of a duty to implement a directive, akin to a breach of constitutional duty but also akin to a tort.

As a result, she determined that the reliefs claimable were subject to the limitations of the Statute of Limitations Act 1957 as amended (with arrears and cause of action subject to a 6 year bar). In fully considering the types of damages which could be awarded, she determined that what the claimants were entitled '*to have the same rules applied to them as applied to married men in the same circumstances*' deciding that the claimants were to be awarded the same sums as would have been paid to married men in the same situation between the date when the directive should have been implemented and the date when it was; and compensation for the delay in payment (this was to be calculated by applying the Consumer Price Index to the payments which should have been received).

Carroll J classified the wrong which had been committed by the State as the breach of a constitutional duty akin to a tort. Consequently, litigants seeking to vindicate their EU law guaranteed rights have been placed in a similar position to those seeking to vindicate constitutional rights. The uneasy relationship which exists between tort and constitutional law, as a result of the inconsistent approach taken by the Irish Courts to claims seeking to vindicate constitutionally guaranteed rights, was analysed by Professor William Binchy in 2011.<sup>229</sup> As discussed by Binchy (2011) one of the problems which such litigants face is the difficulty of how to frame their claim in the absence of a consistent approach from the superior courts in Ireland to claims seeking to protect constitutionally guaranteed rights.<sup>230</sup>

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<sup>229</sup> William Binchy, 'Meskill, the Constitution and Tort Law' (2011) 18 *Dublin University Law Journal* 1, 339-368.

<sup>230</sup> *Ibid.*



Notwithstanding the anomalies identified by Binchy, the Courts seem to proceed on the basis that the compensatory principles applicable to determine the level of damages awardable to torts should govern claims for infringements of constitutional rights.<sup>231</sup> This is the reasoning applied in *Tate*,<sup>232</sup> and seems to have been accepted in *BUPA*.<sup>233</sup> Consequently, by analogy (in the absence of guiding principles from the CJEU on the issue of damages) it is likely that a similar approach will be taken to assess the damages awardable to claims grounded in state liability for breaches of EU law with the heads of damages allowable to be '*that sum of money which will put the party who has ...suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.*'<sup>234</sup> However, as the causes of action identified in this thesis are hypothetical with many types of loss possible, it is considered outside the ambit of the thesis to seek to identify and assess the level and types of damages which could be awardable by the Court as stemming from these wrongs.

#### 4. Conclusion

Wind power has come a long way since its humble origins as a propeller of boats in 5000 B.C.<sup>235</sup> As a result of technological advances, it has the capacity to significantly contribute to electricity production and thereby decrease greenhouse gas emissions and increase security of energy supply, two objectives which have been of central importance to the EU since the 1980s.<sup>236</sup> In a recent attempt to progress these objectives, the EU put a far-reaching framework in place, to require Member States to

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<sup>231</sup> *Ibid*, 352.

<sup>232</sup> *Tate* (n222).

<sup>233</sup> *BUPA* (n222).

<sup>234</sup> Kelly J. in *Glencar Exploration p.l.c. v Mayo County Council (No. 2)* [2002] 1 IR 84; quoting *McGregor on Damages* (15th Ed., 1988) at p. 7 where the governing principle outlined by Blackburn L.J. was endorsed by Harvey McGregor.

<sup>235</sup> The Capitol.Net, *Government Series. Energy: Wind* (1<sup>st</sup> edn, TheCapitol.Net, Inc, 2010) 1.

<sup>236</sup> When the UN General Assembly formally launched negotiations on a Framework Convention on Climate Change: see United Nations General Assembly, Resolution 45/212 (1990) GAOR 71st Plenary Meeting. See also: European Parliament, 'Measures to combat the rising concentration of CO<sub>2</sub> in the atmosphere. Resolution on measures to counteract the rising concentration of carbon dioxide in the atmosphere (the 'greenhouse' effect)' [1986] Doc. A2-68/86, OJ C 255/29; European Commission, 'Draft Council Resolution on the greenhouse effect and the Community.' [1988] COM (88) 656 final; Council, 'Council Resolution of 21 June 1989 on the greenhouse effect and the Community' [1989] OJ C 183/03.

develop renewable energy.<sup>237</sup> As part of this framework Ireland was allocated an overarching target to reach a 16 per cent share of renewable energy consumption by 2020<sup>238</sup> (along with supporting interim trajectory targets). Ireland's main strategy to meet its overarching target is to produce 40 per cent of its electricity from onshore wind.<sup>239</sup>

Although the consumption of onshore wind generated electricity has increased since the finalisation of Ireland's onshore wind development strategy in 2010, problems exist both with the strategy itself and in the development, transmission and sales markets which are likely to impede the expansion of the sector to the extent necessary to reach the targets outlined. Some of these problems are the direct consequence of the government's efforts to develop renewable electricity at an expedient pace; some indirectly impact upon renewable energy development; however, all could have been addressed and either removed or significantly reduced had the government conducted a thorough analysis of the surrounding legal environment when finalising its 10 year strategy to expand its onshore wind sector.

The failure to conduct this analysis appears to have had consequences at two separate levels. At strategy level the national renewable energy action plan is exposed to a legal challenge seeking its suspension or revocation (for having been developed in breach of the SEA Directive)<sup>240</sup> and to significant public opposition. As was discussed in chapter three, this opposition might not be present (or could have been significantly reduced) had the national renewable energy action plan met the requirements of the SEA Directive,<sup>241</sup> and been finalised following an environmental assessment and properly-conducted consultations with the general public, stakeholders and interested parties.

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<sup>237</sup> This legislative package consists of four pieces of legislation: (1) Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63 (2) Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide [2009] OJ L 140/114 (3) Decision No. 406/2009/EC of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136 (the 'Effort Sharing Decision') and (4) Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and the Renewable Energy Directive (n4).

<sup>238</sup> the Renewable Energy Directive (n4) annex I.

<sup>239</sup> Department of Communications, Energy & Natural Resources (n1).

<sup>240</sup> the SEA directive (n5).

<sup>241</sup> *Ibid.*



At project/market level this lack of analysis has (arguably) resulted in continuing contraventions of legislation relevant to Irish onshore wind generated electricity, such as the EIA,<sup>242</sup> Birds,<sup>243</sup> Habitats<sup>244</sup> and third liberalisation directives.<sup>245</sup> Admittedly the initial contraventions of the EIA,<sup>246</sup> Birds,<sup>247</sup> and Habitats<sup>248</sup> directives were identified and condemned long before the finalisation of the wind strategy in 2010, however, the negative effect of these contraventions were significantly augmented by the combination of inaction, disregard and delay on the part of the Irish government. Consequently, the uncertainty which resulted from this has slowed down and impeded wind development and the renewable electricity targets stipulated in the national renewable energy action plan (which either disregarded or overlooked the real and present problems of the development market) are probably far too ambitious to be attainable.

More generally, market structures which could have been advanced to support the development and inclusion of onshore wind generated electricity into Ireland's energy markets have remained stagnant. The third liberalisation directive provided the government with a golden opportunity to establish structures capable of supporting real and effective competition, thereby increasing the government's likelihood of reaching its targets. In choosing how to implement the directive, the government could have chosen to further separate its markets, and remove any remaining barriers to market entry such as the potential for the ESB Group to discriminate against competitors as regards network access and investment.<sup>249</sup> However, the onshore wind strategy appears to have been overlooked in the decision making process which led the Irish government to apply and be exempted from the unbundling requirements of the directive (a move considered to be both in breach of the third liberalisation directive and capable of further impeding onshore wind development).

The lack of analysis which preceded the finalisation of the Irish onshore wind strategy has also impacted upon consumers in more visible ways. The decision to include the ever-increasing costs of renewable energy development in the electricity prices charged to household consumers (as documented by the national renewable energy

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<sup>242</sup> the EIA directive (n6).

<sup>243</sup> the Birds directive (n7).

<sup>244</sup> the Habitats directive (n8).

<sup>245</sup> the Third Liberalisation Directive (n9).

<sup>246</sup> the EIA directive (n6).

<sup>247</sup> the Birds directive (n7).

<sup>248</sup> the Habitats directive (n8).

<sup>249</sup> *Ibid*, recital 11.

action plan) has meant that the Irish government is more than likely breaching its obligation to provide a general level of affordability in electricity supply. Had a full and careful analysis of the surrounding legal environment taken place before the onshore wind strategy was finalised, the further use of temporary well-defined price controls could have been considered to provide affordability. However, this and the other matters outlined above were not discussed in the lead-up to the finalisation of the plan and possibly as a result of this lack of analysis Ireland has breached a number of equally important concurrent laws and is failing to develop sufficient levels of renewable energy to satisfy the requirements of the Renewable Energy Directive. As a result, Ireland is exposed to the private and public law enforcement mechanisms, outlined in this chapter.

Consequently, if an individual were to seek monetary redress for the infringements discussed, compensation could be awarded if the damage in question was shown to be the direct result of a breach of EU law. While the requirement to demonstrate a '*direct causal link*' could be a significant obstacle, depending on the facts of the case, the following infringements appear actionable: Ireland's breaches of the SEA Directive<sup>250</sup> in the finalisation of the national renewable energy action plan; Ireland's continuing breaches of the EIA Directive<sup>251</sup> through its specific failures to require individual developments to progress through the environmental impact assessment process; Ireland's failure to provide consumers with affordable electricity in breach of the Article 14 and Protocol 26 of the TFEU<sup>252</sup> and article 3 of the third liberalisation directive,<sup>253</sup> and Ireland's breaches of the unbundling requirements of the third liberalisation directive.<sup>254</sup> However, in the absence of concrete facts, it is impossible to assess if these breaches could fulfil all the criteria necessary to bring a successful action grounded in state liability.

By contrast, all of the infringements identified in this thesis are vulnerable to public law enforcement proceedings (including the four infringements of article 258 or 259 TFEU, and the four infringements of article 260 TFEU). Moreover, as the sanctions applicable have been considerably strengthened (by both the courts<sup>255</sup> and the Lisbon Treaty)<sup>256</sup> and there is a demonstrably increased appetite for bringing proceedings (with two

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<sup>250</sup> the SEA directive (n5).

<sup>251</sup> the EIA directive (n6)

<sup>252</sup> TFEU (n15).

<sup>253</sup> the Third Liberalisation Directive (n9).

<sup>254</sup> *Ibid.*

<sup>255</sup> *Commission v French Republic* (n90).

<sup>256</sup> See generally: *Commission* (n98).



infringement procedures already initiated in respect of Ireland's breaches of the renewable energy<sup>257</sup> and the third liberalisation<sup>258</sup> directives). Consequently, Ireland could well face real and punishing sanctions in the near future.

All in all, while Ireland's commitment to developing renewable energy is highly commendable, the underlying strategy has unintentionally caused multiple breaches of EU law and is unlikely to deliver the levels of renewable energy necessary to fulfil the requirements of the Renewable Energy Directive.<sup>259</sup> As has been discussed in the course of this thesis, this is believed to be due to the failure of the Irish government to conduct a full and careful analysis of the surrounding legal environment, an oversight which has left Ireland exposed to the risk of the public and private enforcement actions, previously discussed.

Due to this initial oversight, Irish onshore wind generated electricity will almost certainly continue to generate significant legal and political challenges as wind generated electricity levels increase and the global, regional and national reasons for renewable energy development become more pressing and apparent. While many of the problems identified herein cannot now be easily and effortlessly removed, by documenting these, the thesis provides a comprehensive case-study of the reasons to conduct a full and careful analysis of the surrounding legal environment, before finalising a far-reaching market changing strategy (even in the absence of a specific legal requirement to do so).

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<sup>257</sup> Renewable Energy Directive (n4).

<sup>258</sup> Third Liberalisation Directive (n9).

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## **22. US Law**

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