



EUROPEAN COMMISSION

Brussels, 18.09.2013  
C(2013) 5832 final

PUBLIC VERSION

This document is made available for  
information purposes only.

**Subject: State aid SA.37030 (2013/N) – Ireland  
Sale of State assets**

Sir,

## **1. Procedure**

- (1) Following pre-notification contacts with the Commission which Ireland had initiated in July 2013, on 29 August 2013, Ireland notified the Commission of the abovementioned measure.

## **2. Description**

- (2) In 2001, Ireland notified the Commission of a compensation scheme related to certain public service obligations imposed on the Electricity Supervisory Board (ESB). By letter dated 30 October 2001 (N 6/A/2001)<sup>1</sup>, the Commission considered the compensation scheme as compatible with the Treaty<sup>2</sup> (hereinafter “initial decision”).

---

<sup>1</sup> OJ C 77, 28.3.2002, p. 26.

<sup>2</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this

Mr. Eamon Gilmore T.D.  
Minister for Foreign Affairs,  
Department of Foreign Affairs  
80, St. Stephen's Green,  
Dublin 2,  
IRELAND

- (3) The notified measure is a modification of this compensation scheme. The modification solely consists of the transfer of the compensation to a new beneficiary.

## **2.1 The original scheme**

- (4) In the initial decision, the Commission approved a scheme by which Ireland would compensate ESB, the incumbent electricity operator owned by the Irish State, for the costs incurred in discharging certain public service obligations.
- (5) The public service obligations concern the building and the operation of two new peat-fired generation stations.
- (6) Irish law required ESB to have at its disposal each year a certain quantity of electricity generated out of peat, equivalent to the quantity of electricity that would have been generated with 15% of the overall primary energy necessary to produce the electricity consumed in Ireland in one year.
- (7) After having examined different scenarios for meeting its target of peat-fired electricity generation, ESB settled for the most economical option, which consisted in accelerating the closure of six existing stations and in building two new and more efficient stations.
- (8) This translated into five separate public service obligations to be imposed on ESB:
  - (a) to build and to commission two new peat stations in Lough Ree and West Offaly;
  - (b) to take the output of the two stations until 2019;
  - (c) to fuel the new stations with peat bought from Bord na Móna, the dominant producer of peat in Ireland, on terms equivalent to the Fuel Supply Agreement between that company and Edenderry Power Ltd., another undertaking generating electricity from peat;
  - (d) to take the output of the old peat stations until they were decommissioned;
  - (e) to purchase the output of the peat station owned by Edenderry Power Ltd.
- (9) Given that the cost for generating electricity in the two new stations was and still is above the average market price for electricity, ESB is not able to completely recover its costs through the market.
- (10) Therefore, Ireland proposed to set up a scheme for the compensation of the share of the costs that ESB could not cover by selling electricity. This share is equivalent to the difference between ESB's costs for discharging the public service obligations (i.e. the costs for taking the electricity output of the old

---

Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

stations, for removal of the old stations, for the building of the new stations, for taking the electricity output of the new stations and for taking the output of the Edenderry Power station) and ESB's revenues out of the public service obligations.

- (11) The exact costs are computed each year by the Commission for Electricity Regulation (CER), the Irish regulator. A distinction is made between uncontrollable costs, which are certified by the CER as incurred (local rates, use of system charges, the cost of peat supplied by Bord na Móna), and controllable costs (payroll, materials, operation and maintenance of the stations). These latter costs, whose behaviour ESB can influence, are measured against a benchmark (projections made at the time when the public service obligations were initially imposed) and may be subject only to partial compensation, depending on how efficient ESB is in discharging its obligations. Efficiency gains are not left to ESB, but reduce the incurred costs and thus the amount of compensation.
- (12) In determining the costs, the CER first makes an estimate about the costs which will be incurred to discharge the public service obligations in the coming year, an estimate which is corrected *ex post* by increasing or reducing the compensation accordingly.
- (13) The costs are recovered through a levy imposed on all subscribers to the electricity grid and collected by the State-owned Transmission System Operator (TSO)<sup>3</sup>. The levy is based on the capacity of the grid connection.

## **2.2 The proposed transfer of the public service obligations**

- (14) Following the financial crisis of 2008, Ireland has entered an agreement on a Programme of financial support with the European Commission, the International Monetary Fund and the European Central Bank. The financing needs have been assessed as amounting to EUR 85 billion, to which Ireland is to contribute EUR 17.5 billion<sup>4</sup>.
- (15) To finance this contribution, Ireland has committed to realising proceeds of up to EUR 3 billion from State asset disposals. To that effect, the Irish Government has requested ESB to make proposals on the sale of non-strategic power generation capacity, with a view to obtaining up to EUR 400 million.
- (16) ESB has identified the two peat stations mentioned above. In order for the sale to realise the highest possible price, the two stations need to be transferred together with those public service obligations attached to them, described above in recital (8) under letters (a), (b), (c) and (d), and the respective compensation

---

<sup>3</sup> According to publicly available information, EirGrid is the State-owned TSO in Ireland (see <http://www.cer.ie/en/electricity-transmission-network-overview.aspx>).

<sup>4</sup> Council Implementing Decision 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland, OJ L. 30, 4.2.2011, p. 34.

scheme. The public service obligation mentioned in recital (8) letter (e) is not concerned by the proposed transfer.

- (17) The change in the ownership of the stations, and thus in the identity of the entrusted undertaking, will be the only change made to the public service obligations described above in recital 8 and the compensation scheme.
- (18) Ireland has confirmed that the sale of the stations will be conducted in accordance with the principles of openness, transparency, objectivity, fairness and non-discrimination which underlie both the public procurement Directives and the Treaty.

### **3. Assessment**

#### **3.1 Presence of State aid**

- (19) In its initial decision (recitals 20 *et seq.*), the Commission noted that the compensation granted to ESB for discharging the public service obligations was selectively advantageous to ESB and that it was likely to have an effect on trade between Member States and to lead to a distortion of competition. This assessment regarding the presence of an economic advantage, its selectivity and its impact on competition and trade remains valid and is unaltered by the notified modification.
- (20) As for the involvement of State resources, the Commission held that in view of the *PreussenElektra* ruling<sup>5</sup>, the compensation mechanism could be seen as being “essentially equivalent to one in which the CER would order each contributor to pay the corresponding sums directly to ESB”, without being “more than an obligation imposed by the State on customers to transfer certain sums to one undertaking” (recitals 25 *et seq.*). This view must be revised in the light of the case law: Given that the levy, which is the source of financing of the compensation scheme, is being collected by the State-owned TSO, the funds are controlled by the State and therefore constitute State resources<sup>6</sup>. Furthermore, the definition and entrustment of the public service obligations, as well as the establishment of the levy intended to compensate for it, result from legal acts adopted by Ireland. The aid is, therefore, imputable to the Irish State.
- (21) Therefore, the compensation granted for discharging the public service obligations is aid granted through State resources, in the sense of Article 107(1) TFEU.

#### **3.2 Lawfulness of the aid**

- (22) In order for an alteration to an existing scheme to qualify as new aid which should be notified within the meaning of Article 1 c) and Article 2 (1) of

---

<sup>5</sup> Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099, paragraphs 54 *et seq.*

<sup>6</sup> Case C-206/06 *Essent Netwerk Noord BV* [2008] ECR I-5497, paragraphs 65 *et seq.*

Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 108 of the TFEU<sup>7</sup>, the alteration to the system must be substantial. A transfer of the public service obligations and associated compensation to a new provider represents a change of identity of the beneficiary and can be considered as a substantial alteration of the aid scheme, which is intended indeed for a single beneficiary<sup>8</sup>.

- (23) By notifying the Commission of the proposed modification of the compensation scheme prior to its implementation, Ireland has complied with its obligation under Article 108(3) TFEU.

### **3.3 Compatibility with the internal market**

- (24) In the initial decision (recitals 29 *et seq.*), the Commission held that the compensation scheme relating to the public service obligations described above was compatible with Article 106(2) TFEU.

- (25) While this assessment had been based on the Treaty provision itself, in 2011, the Commission adopted the European Union framework for State aid in the form of public service compensation (2011)<sup>9</sup> (SGEI Framework).

- (26) The Commission finds that the modification of the scheme is in line with the provisions of the SGEI Framework.

#### *3.3.1 Existence of a service of general economic interest*

- (27) Points 12 and 13 of the SGEI Framework require the existence of “a genuine and correctly defined service of general economic interest”. In its initial decision (recitals 38 *et seq.*), the Commission held that the public service obligations imposed on ESB to base a part of its electricity generation on domestic peat constituted an obligation to fulfil a service of general economic interest (SGEI) relating to the security of electricity supply.

- (28) The Commission notes that this SGEI for security of supply purposes, which was not manifestly erroneous, was based on a financing regime providing for a continued operation of the two plants until 2019. The obligations were and remain defined as including the building, commissioning and operation of the two power stations, as set out in recital 8 above, which were set up on this basis and which are now planned for sale. The entrustment of the public service

---

<sup>7</sup> OJ L 83, 27.3.1999, p. 1, as amended, ultimately by Council Regulation (EU) No 734/2013, OJ L 204, 31.7.2013, p.15.

<sup>8</sup> Concerning the concept of modification of aid, see Case C-138/09 *Todaro Nunziatina* [2010] ECR I-4561, paragraphs 46-47; Case C-346/03 and C-529/03 *Atzeni* [2006] ECR I-1875, paragraph 51; Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 48; Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 13. See also the opinion of AG Trabucchi in Case 51/74 *Van der Hulst* [1975] ECR 79, at point 7.

<sup>9</sup> OJ C 8, 11.1.2012, p. 15.

obligations to a new operator does not modify the justification of the entrustment.

- (29) Therefore, the Commission sees no reason to depart from its initial assessment, as far as the operation of the two plants in the case at hand until 2019 is concerned, and thus concludes that the SGEI relating to the security of electricity supply is genuine and correctly defined in the present case, for the same reasons explained in the initial decision (recitals 38 to 41). This assessment is without prejudice to the assessment of any other case featuring circumstances different from the ones examined here.

### 3.3.2 *Entrustment act and duration*

- (30) Points 15 and 16 of the SGEI Framework require a formal act of entrustment specifying, *inter alia*, the content and duration of the public service obligations, the entrusted undertaking, and the description of the compensation mechanism. The duration of the entrustment needs to be justified in view of objective criteria (point 17 of the SGEI Framework).
- (31) The public service obligations were imposed on ESB through the statutory instrument S.I. 217 named “Electricity Regulation Act 1999 (Public Service Obligations) Order 2002”. S.I. 217 specifies the content of the public service obligations, their respective duration, as well as the parameters for calculating the compensation. The duration of 15 years is appropriate in view of the lifetime of this kind of plants.
- (32) Ireland has informed the Commission that a statutory instrument of equal status, effect and substantially identical content would be executed in order to transfer the public service obligations to the prospective purchaser (likely by just amending S.I. 217 to substitute the purchaser’s name for that of ESB). The Commission therefore considers that the requirements in points 15 to 17 of the SGEI framework are met.

### 3.3.3 *Compliance with Directive 2006/111/EC and Union procurement rules*

- (33) Ireland has underlined that the CER’s estimate of the costs specifically incurred in the discharge of the public service obligations is made public. Ireland has also declared that an open, transparent, objective, fair and non-discriminatory sales process would be conducted.
- (34) The Commission considers this to be in accordance with the requirements in points 18 and 19 of the SGEI Framework. Indeed, the publication of the CER’s estimates (which include *ex post* adjustments) ensures that the amounts of aid made available to ESB for discharging the public service obligations are open to consultation, in line with Article 1(1) of Directive 2006/111/EC<sup>10</sup>.

---

<sup>10</sup> Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

- (35) As regards compliance with EU procurement rules, the Commission notes the declaration of Ireland to the effect that the sale of the power plants will be conducted in accordance with the principles of openness, transparency, objectivity, fairness and non-discrimination which underlie both the public procurement Directives and the Treaty. In that respect, the Commission notes that the entrustment of ESB and the transfer to a new buyer constitute either a service concession or a service contract, depending on the existence or lack of a substantial operating risk on behalf of the service provider. Therefore, the sale should be conducted in a way that complies with the relevant Treaty principles and Court case law relating to service concessions, or, if applicable, with the detailed procedural rules of the public procurement directives applicable to service contracts.

#### 3.3.4 Amount of compensation

- (36) According to point 21 of the SGEI Framework, the “compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit”. In the initial decision (recitals 43 *et seq.*), the Commission found the compensation granted to ESB to be proportionate to the costs incurred by discharging the public service obligations.
- (37) The compensation mechanism is based on the cost allocation methodology, meaning that the compensation is determined as the difference between the cost to ESB of generating the peat-fired electricity and the total revenues derived by ESB from selling this electricity to customers.
- (38) Given that the cost allocation method focuses only on the public service obligations as such (and the costs and revenues of fulfilling them), an assessment based on this method is easily severable from the actual operator and therefore appears to be suited for an assessment where the future operator is not yet known. Moreover, it is the methodology which was approved by the Commission in the initial decision, on the basis of a 15-year support period until the end of 2019. Applying the cost allocation methodology would therefore ensure the highest degree of continuity. In contrast, the net avoided cost methodology, which is described in point 27 of the SGEI Framework as the preferred methodology, is based on a comparison of a given provider’s situation with and without the public service obligations to fulfil. However, for such an assessment to be meaningful in the case at hand, the identity and the activities of the future provider would need to be known already, which is not the case. Therefore, it appears to be duly justified to apply the cost allocation methodology, in line with points 27 *et seq.* of the SGEI Framework.
- (39) The Commission also held that the rate of return was in line both with the standard rate of return undertakings in the electricity sector would expect from this kind of investment and with the rate of return the CER was applying in its yearly electricity market price estimate (recital 50). This assessment is still valid. In particular, Ireland has indicated that ESB’s actual rate of return has in fact been slightly lower.

- (40) The compensation mechanism distinguishes between uncontrollable costs, which are fully compensated, and controllable costs, which may only be compensated to some extent, depending on efficiency. Therefore, the compensation mechanism also features efficiency incentives.
- (41) Moreover, the undertaking concerned is required to separately account for the costs incurred in discharging the public service obligations.
- (42) Finally, Ireland has highlighted that each year, in order to prevent overcompensation, the CER makes, on the basis of information communicated by ESB, an *ex ante* estimate of the costs to be incurred in providing the service of general economic interest in the following year. This estimate is then corrected *ex post* on the basis of the actual data, with the possibility for the CER to deduct any excessive compensation from the compensation in the following year.
- (43) The Commission is therefore satisfied that the mechanism of calculating the compensation is in line with the SGEI Framework.

#### 3.3.5 *Impact on competition and trade*

- (44) Points 51 *et seq.* of the SGEI Framework, and in particular point 59, provide for additional requirements in case of exceptional circumstances where the aid is likely to give rise to serious competition distortions and to affect trade to such an extent as would be contrary to the interest of the Union.
- (45) These exceptional circumstances are not present here: the plants will pass from ESB, the incumbent which totals 48% of national generation capacity in Ireland, to a purchaser which is expected with near certainty to have a lower market share than ESB on the Irish market. Therefore, the sale of the two peat stations is likely to actually have some positive pro-competitive effects.

#### 3.3.6 *Transparency and reporting requirements*

- (46) Ireland has indicated that the content and duration of the public service obligations as well as the identity of the currently entrusted undertaking have been published in S.I. 217, while the identity of the purchaser will be published in a subsequent statutory instrument. The amounts of aid granted are annually published in the CER's decision paper.
- (47) Ireland has also confirmed that it would report to the European Commission in accordance with point 62 of the SGEI Framework.



### 3.3.7 Conclusion on the compatibility with the internal market

- (48) The notified modification of the compensation scheme being in line with the conditions set out in the SGEI Framework, it is compatible with the internal market.

### 3.4 Compatibility with other Treaty provisions

- (49) In accordance with the case law of the Court and the Commission's case practice, parafiscal charges and levies which are imposed on the consumption of a product (e.g. electricity) regardless of whether it is domestic or imported, but the proceeds of which only benefit domestic production, are not compatible with Articles 30 or 110 TFEU.
- (50) In the case at hand, the levy intended to compensate the respective owner of the two peat plants for discharging public service obligations (which is a domestic producer) is not based on the consumers' electricity consumption, but on the basis of their connection capacity. Therefore, the levy does not affect the electricity consumption as such, and it does not in particular discriminate against imported electricity, as noted by the Commission in its initial decision, at recital 58 *et seq.* thereof.

## 4. Conclusion

The Commission has accordingly decided to consider the new aid consisting of the transfer of the public service obligation to a future buyer and operator of the two peat fired power plants concerned to be compatible with the Treaty on the Functioning of the European Union. This conclusion is without prejudice of any possible future assessment of the actual process of sale and transfer of the plants which is planned to be undertaken by Ireland.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
1049 Brussels  
Belgium  
Fax No: +32 2 29 61242

Yours faithfully,  
For the Commission

Joaquín ALMUNIA  
Vice-President