Energy Disputes

Contributing editors
William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado and Ayaz Ibrahimov

2018

GETTING THE DEAL THROUGH

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Norton Rose Fulbright

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Energy Disputes*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on India.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado and Ayaz Ibrahimov of Norton Rose Fulbright LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2018

Ireland

Garret Farrelly and Nicola Dunleavy
Matheson

General

1 Describe the areas of energy development in the country.

The principal areas of energy development in Ireland are renewable energy, in particular onshore wind and, to a lesser extent, offshore oil and gas.

The Irish government continues to seek to attract oil and gas companies to explore Ireland's relatively underexplored offshore. The significant activity in the 2015 Atlantic Margin Licensing Round (pursuant to which exploration permits for acreage in the Irish offshore are offered), which was managed by the Petroleum Affairs Division of the Department of Communications, Climate Action and Environment (DCCAE) (formerly the Department of Communications, Energy and Natural Resources) following on from the 2011 Atlantic Margin Licensing Round, was encouraging. The quantity of applications for the 2015 Atlantic Margin Licensing Round exceeded all previous records.

In relation to onshore wind, the first commercial wind farm in Ireland was commissioned in 1992. As of 2017, the installed capacity of wind generation reached 2,878MW. The peak recorded wind power output was 2,815MW, delivered on 11 January 2017. Based on data published on EirGrid's and ESB Network's websites (as of September 2016) there are 445MW of wind generation contracted for connection before the end of 2016 and a further 1,357MW by the end of 2017.

2 Describe the government's role in the ownership and development of energy resources. Outline the current energy policy.

The electricity transmission system is owned by the Electricity Supply Board (ESB), a state-owned company, pursuant to section 14(2B) of the Electricity Regulation Act 1999 (as amended) (the 1999 Act). The operation of the transmission system is undertaken by EirGrid plc (EirGrid) which is also a state-owned entity as outlined in section 14(2A) of the 1999 Act. The electricity distribution network is owned by the ESB and the licence to act as distribution system operator is solely granted pursuant to section 14(2C) of the 1999 Act to ESB Networks Limited, an independent subsidiary of the ESB as is stipulated by the European Communities (Internal Market in Electricity) (Electricity Supply Board) Regulations 2008.

The Irish electricity generation and supply market is now fully liberalised since the implementation of full retail competition on 19 February 2005. The establishment of the all-island wholesale single electricity market (SEM) on 1 November 2007 implemented radical reforms in the Irish electricity sector. As a result, the role of market operator for the island of Ireland is now conducted pursuant to a joint venture agreement between EirGrid and the system operator of Northern Ireland, collectively known as the single electricity market operator.

The gas transmission and distribution system of Ireland is owned by Ervia and operated by Gas Networks Ireland, both of which are state-owned entities. The Irish government (through the Petroleum Affairs Division of the DCCAE) regulates offshore oil and gas but does not take ownership in petroleum discoveries. The exploitation of resources is permitted. The government has actively sought to promote investment in Ireland's indigenous oil and gas resources through favourable fiscal terms for petroleum activities. The current fiscal terms in part reflect this policy objective and also reflect the level of technical challenge and risk inherent in the exploration of Ireland's offshore.

The Finance Act 2015 increased the maximum marginal tax rate on oil and gas field exploration in Ireland from 40 to 55 per cent. The overall marginal increase will incorporate corporation tax and the new Petroleum Production Tax (PPT).

The PPT replaces the profit resources rent tax introduced by the Finance Act 2008. The PPT ensures that discoveries made under future exploration licences will be subject to a higher tax rate resulting in an increased revenue stream for the Irish state. In addition, this increased financial return will accrue to the government at an earlier point in time, which will result in higher income security from lucrative offshore resources.

Government policy in the Irish energy sector is driven principally by the Minister for Communications, Climate Action and Environment (the Minister) and by the relevant EU directives and regulations. In December 2015, the DCCAE published a White Paper on the future of energy policy in Ireland. The White Paper is based around the three energy policy pillars of security of supply, competitiveness and sustainability, and also the important contribution that energy policy makes to facilitating economic growth and job creation. The themes being introduced in the White Paper are: the importance of the citizen in having an input to energy-related developments in their areas as well as an input into wider energy policy; continuing to work towards a largely decarbonised energy system by 2050; and continuing to provide certainty for investors as well as positioning Ireland at the heart of innovation for the high-tech solutions that will enable Ireland to move away from dependence on fossil fuels. More specifically, there will be improved domestic grant schemes and a new support scheme will be established for the development of renewable energy technologies with a particular focus on efficient heating systems.

In 2006, the DCCAE published the requirements for participation in the Renewable Energy Feed-in Tariff (REFIT) scheme. The REFIT programme was designed to provide price certainty to renewable electricity generators as well as contributing to Ireland's 2020 renewable energy production goals by supporting electricity generation powered by biomass, hydropower or wind. In 2012 and 2013, the government approved the REFIT 2 and 3 schemes, further incentivising the construction of renewable energy generation projects.

The DCCAE recently closed two public consultations – the first on the Renewable Heat Incentive, a proposed heating support mechanism to help Ireland meet its renewable energy obligations, and the second on the Renewable Electricity Support Scheme (RESS), a proposed support scheme for renewable technologies designed to help Ireland meet its renewable electricity obligations. RESS will involve a significant departure from the previous REFIT schemes. In particular, the Floating Feed-In Premium (FIP), capacity auction and community engagement proposals are being closely watched by industry. It is expected that technology neutral capacity auctions under RESS will mean that onshore wind energy will continue to make an important contribution to meeting Ireland's renewable energy targets, but can also be complemented by other technologies to meet Ireland's renewable energy ambitions. The timing for finalising RESS is not yet clear and will likely depend on the public feedback to the consultation. In addition, the scheme is still subject to EU state aid and Irish government approval.

Commercial/civil law – substantive

3 Describe any industry-standard form contracts used in the energy sector in your jurisdiction.

Joint operating agreements for offshore oil and gas projects in Ireland are often based on model form agreements such as the Oil and Gas UK and Association of International Petroleum Negotiators model agreements.

In Ireland, amended international industry form contracts are used in relation to commodity trading. Regulated standard form contracts are used for electricity connection agreements with ESB Networks and EirGrid as well as Gas Networks Ireland (see question 2). In addition, amended International Federation of Consulting Engineers (FIDIC) standard form contracts are also commonly used in the energy sector, though bespoke forms of design and construction contracts may be used for large thermal generation projects.

4 What rules govern contractual interpretation in (non-consumer) contracts in general? Do these rules apply to energy contracts?

The Irish approach to contractual interpretation is derived from case law. Irish courts have held that the task of contractual interpretation is to ascertain the intention of the parties from the language the parties have used, considered in light of the surrounding circumstances, the 'factual matrix', and the object of the contract.

The Irish courts have held that contractual interpretation is the meaning the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract. Such background knowledge includes anything that would have affected the way in which the language of the contract would have been understood by a reasonable person. The courts have also held that words should be given their 'natural and ordinary meaning'. Irish courts generally exclude the previous negotiations of the parties and their declarations of subjective intent.

5 Describe any commonly recognised industry standards for establishing liability.

It is becoming increasingly commonplace for service providers and contractors to agree to perform their obligations under contracts in the energy sector in Ireland to the standards of a reasonable and prudent operator (RPO), a definition that is largely based on the definition of RPO (or reasonable and prudent industry operator) in regulated industry contracts such as electricity and gas connection agreements. Failure to perform obligations to the RPO standard would often constitute a material breach of the contract entitling the counterparty to terminate the contract as well as giving rise to any other remedies triggered by the termination.

Energy sector contracts typically include an express provision to hold a breaching party liable to the non-breaching party for its negligent acts or omissions that cause damage or loss to the counterparty. Liability limitations for a breaching party are often excluded where the loss or damage to the non-breaching party has been caused by the wilful misconduct of the breaching party. Currently, under Irish law the meaning of gross negligence, while frequently used in commercial contracts in the energy sector to establish liability, is not well settled and there have been conflicting judgments in the Irish courts.

6 Are concepts of force majeure, commercial impracticability or frustration, or other concepts that would excuse performance during periods of commodity price or supply volatility, recognised in your jurisdiction?

These concepts are recognised in Ireland.

7 What are the rules on claims of nuisance to obstruct energy development? May operators be subject to nuisance and negligence claims from third parties?

Yes, operators may be subject to nuisance and negligence claims from third parties. A party wishing to make a claim of nuisance regarding an energy development must follow the general rules applicable to nuisance claims. A claimant would usually bring a civil action for the tort of nuisance and have to show that actual damage (ie, a civil wrong) has arisen as a result of an interference without lawful justification with the claimant's use and enjoyment of his or her property. The same is true for negligence, which requires a claimant to show that the defendant was negligent by establishing that a duty of care (ie, a legally recognised obligation to conform to a certain standard of behaviour to protect others against unreasonable risks) exists, that the defendant failed to conform to the required standard, that the claimant suffered actual loss or damage to its recognised interests and that there was a causal connection between the defendant's conduct and the resulting injury to the claimant.

Complaints in relation to shadow flicker (where the blades of a wind turbine cast a shadow over a window in a nearby property and the rotation of the blades causes this shadow to flicker on and off) and noise can arise in respect of developments of wind farms. These and other types of complaints can also be pursued as part of a challenge to planning permission or by a planning injunction as well as through nuisance or negligence claims.

Planning conditions are usually attached to grants of planning permission in relation to shadow flicker and noise. In setting conditions, the planning authorities have regard to Guidelines, issued by the Department of the Environment (now the Department of Housing, Planning, Community and Local Government (DHPCLG)) in 2006. The Guidelines describe the causes of shadow flicker and recommend that offices and dwellings near wind farms be exposed to no more than 30 minutes of shadow flicker per day (or 30 hours per year). The Guidelines also note that two types of noise are emitted from wind farms, namely mechanical and aerodynamic noise, and recommend that an 'appropriate balance' be achieved between power generation and noise impact, following an assessment of the development's impact on neighbouring noise-sensitive locations. The Guidelines are currently undergoing a review, the outcome of which is awaited.

8 How may parties limit remedies by agreement?

Liquidated damages, exclusion of certain losses (eg, indirect or consequential loss), caps on liability and exclusive remedy provisions are all employed in Irish contracts to exclude or limit liability. The inclusion of any of these provisions needs to be considered on a case-by-case basis and in particular in the context of consumer contracts where special rules may apply.

9 Is strict liability applicable for damage resulting from any activities in the energy sector?

Strict liability may apply where energy sector activities cause environmental damage. By way of one example only, there is the potential for strict liability for environmental damage that has significant adverse effects on protected species and natural habitats, water or land under the European Communities (Environmental Liability) Regulations 2008, as amended, which implement EU Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.

Commercial/civil law – procedural

10 How do courts in your jurisdiction resolve competing clauses in multiple contracts relating to a single transaction, lease, licence or concession, with respect to choice of forum, choice of law or mode of dispute resolution?

In relation to choice of law, Regulation (EC) No. 593/2008, commonly known as the Rome I Regulation, governs the law applicable to contractual obligations in civil and commercial matters, with certain exceptions. The Rome I Regulation provides that a contract shall be governed by the law chosen by the parties and that the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. Where the parties have not chosen an applicable law, the law governing the contract will be determined according to rules set out in article 4 of the Rome I Regulation.

In relation to choice of forum, article 25 of Regulation (EU) No. 1215/2012, commonly known as the Recast Brussels Regulation, states that if parties to a commercial transaction have agreed that a court or courts of a member state are to have jurisdiction to settle any disputes, that court or those courts shall have jurisdiction. This jurisdiction is exclusive unless the parties have agreed otherwise. If there is no choice, the default rules set out in the Recast Brussels Regulation

apply, which include that a defendant who is domiciled in a member state should generally be sued in the courts of its domicile.

If there are apparently conflicting indications as to the choice of jurisdiction for the resolution of disputes, Irish courts have suggested that focusing on the requirement to give business efficacy to commercial contracts may assist in construing the contract. However, there is very little Irish case law on this point. There is English case law, which is of persuasive effect in the Irish courts, which has found that the essential task of the courts is to construe a jurisdiction agreement in light of the transaction as a whole. Whether a dispute as to jurisdiction falls within one or more related agreements depends on the intention of the parties as revealed by the agreements.

In relation to resolving conflicts as to the mode of dispute resolution, the Arbitration Act 2010 provides that the courts cannot give an arbitral tribunal jurisdiction over individuals or entities that are not a party to an arbitration agreement. There is also no power to join different arbitration proceedings, unless the relevant arbitration agreements so provide or the various parties agree to a joinder.

11 Are stepped and split dispute clauses common? Are they enforceable under the law of your jurisdiction?

Stepped and split dispute clauses are used in Ireland. Their inclusion depends on the type of agreement and the parties to the agreement.

The enforceability of these clauses depends on the specificity with which the clause is drafted. For example, a clause requiring mediation as a first step may be enforceable if it is sufficiently specific (eg, it includes a mediation procedure, a process for the appointment of a mediator and a time frame).

12 How is expert evidence used in your courts? What are the rules on engagement and use of experts?

Expert opinion evidence is permitted in Irish courts. An opinion may be given by a witness who has expertise in a particular area that is relevant to the issues in the case. The purpose of this testimony is to provide the judge (or jury in criminal matters and in a very limited range of civil cases) with the necessary specialist criteria for testing the accuracy of their conclusions, and enables them to form their own independent judgment by applying these criteria to the facts proven in evidence.

The two main requirements that a party must satisfy in order to be allowed to use expert evidence in court are that: it must be shown that the expert evidence is necessary, relevant and has probative value; and it must be established that the witness is a qualified expert.

As a general rule, expert evidence will be allowed in relation to all matters that are outside the scope, knowledge and expertise of the court. There is no admissibility test that would require the party to demonstrate that the expert evidence proposed to be used can be considered to be founded on a sufficiently reliable basis. New rules have applied to the use of expert evidence in High Court litigation since October 2016. Where a party intends to call expert evidence they must disclose that intention in either their statement of claim or their defence. The field of expertise and the matters on which the expert evidence is intended to be offered must also be stated. The expert evidence that is to be offered must be restricted to those matters that are reasonably required to allow the court to determine the proceedings and the default position is that parties can only offer evidence from one expert in a particular field of expertise on a particular issue. The court can also make various directions in relation to expert evidence. For example, it can direct the fields in which expert evidence is to be provided, fix the time for the delivery or exchange of expert reports or direct that a joint single expert be appointed.

Expert reports must be disclosed to the other party prior to the trial. When a party is served with an expert's report it may put a list of written questions to that expert. Any answers that are provided are treated as part of that expert's report. If an expert refuses to answer a question then the court can order that the party that instructed that expert cannot rely on the parts of that expert's report at which the question was directed. The court can direct that the parties' experts meet privately before trial and prepare a joint report that lists all of the matters on which they agree and disagree. At trial, the court can also direct that a 'debate among experts' take place. This process is very rare, but would involve all of the relevant experts giving testimony at the same time, by listing the issues on which they agree and disagree and then, if directed by the court, debating the matters on which they disagree. There is no questioning by legal representatives during this process. Once this process has finished, the court may allow examination and cross-examination of the experts by legal representatives.

Expert evidence will be required in order to explain and prove foreign law. Where an issue of foreign law arises it must be proved as a fact by the testimony and competence of expert witnesses shown to possess the skill and knowledge required for stating, expounding and interpreting that law.

13 What interim and emergency relief may a court in your jurisdiction grant for energy disputes?

A party seeking interim or emergency relief can apply to court for an injunction. An injunction is a court order that restrains a party from doing a particular thing or act, or that requires a party to do a particular thing or act. Temporary injunctions are either 'interim' or 'interlocutory' in nature. Interim injunctions, granted on an ex parte basis (which means that only one party is heard in court), are only granted in cases of urgency and will generally only remain in force for a short period. Interim injunctions will generally only be granted when a court considers that the other party, if unrestrained, might cause irreparable or immeasurable damage. Interlocutory injunctions are granted after a hearing with all parties present and, while temporary in nature, will generally last until the court makes some further order and in most cases until a full trial of the action. There is no injunctive relief that is particular to energy disputes.

14 What is the enforcement process for foreign judgments and foreign arbitral awards in energy disputes in your jurisdiction?

To enforce any foreign arbitral award, an application for leave to enforce is made to the Irish High Court under the Rules of the Superior Courts. The application is made on notice to the other party to the arbitration, the respondent. An applicant commences such an application by filing an originating notice of motion. The notice must be supported by written evidence on affidavit setting out the basis on which the applicant alleges that the Irish High Court has jurisdiction to enforce the arbitral award. The notice and affidavit must be served on the respondent at least 14 days before the date on which the application to enforce the arbitral award is to be heard. The respondent may file a replying affidavit that should set out concisely the grounds on which the respondent is relying to resist the application to enforce the award. Under the Arbitration Act 2010, there is no appeal from a High Court decision on the recognition or enforcement of an arbitral award.

The respondent may, as a preliminary matter, contest the jurisdiction of the Irish courts and apply to set aside the service of the notice. This 'set aside' application is usually heard and determined as a preliminary issue.

As regards recognition of judgments, the Recast Brussels Regulation streamlines the recognition and enforcement of judgments across the EU. The procedure governing the enforcement of a foreign judgment in cases subject to the Recast Brussels Regulation is contained in the Rules of the Superior Courts. The Rules of the Superior Courts provide that an application for the enforcement of a judgment to the High Court must be made on affidavit together with: the original judgment or a certified copy; and a standard form certificate provided by court officials in the member state in which judgment was given, containing details of the judgment.

The High Court will declare the judgment enforceable if the requirements of the Recast Brussels Regulation are met. The judgment then has the same force and effect as a judgment of the Irish High Court.

For foreign judgments not covered by the Recast Brussels Regulation, there are a number of prerequisites to be met under Irish common law in order for a court to enforce and recognise a foreign judgment, including: the judgment must be for a definite sum, that is a definite monetary value; the judgment must be final and conclusive and unalterable by the court that pronounced it; and the judgment must be given by a court of competent jurisdiction.

A foreign court must have had 'jurisdiction' under Irish conflict of law rules to hand down final judgment.

15 Are there any arbitration institutions that specifically administer energy disputes in your jurisdiction?

There is no arbitration institute in Ireland that specifically administers energy disputes.

16 Is there any general preference for litigation over arbitration or vice versa in the energy sector in your jurisdiction?

Arbitration is used in the energy sector, as are other modes of dispute resolution, including mediation, expert determination and litigation. As arbitration proceedings are generally confidential and not reported, it is difficult to assess whether there is a general preference for litigation over arbitration in the Irish energy sector. Under the Arbitration Act 2010, the High Court or Circuit Court may, if it thinks appropriate and the parties consent, adjourn proceedings to enable the parties to consider whether any or all of the matters in dispute might be resolved through arbitration.

17 Are statements made in settlement discussions (including mediation) confidential, discoverable or without prejudice?

Irish law provides for the concept of 'without prejudice' privilege, which means that oral and written statements made during negotiation towards the genuine settlement of a dispute are inadmissible in subsequent court or other proceedings relating to the same subject matter. 'Without prejudice' communications become open to disclosure in later proceedings if a settlement agreement has been agreed and there is any conflict as to the meaning of the settlement agreement.

18 Are there any data protection, trade secret or other privacy issues for the purposes of e-disclosure/e-discovery in a proceeding?

The fact a document or communication might be deemed confidential does not mean it is privileged from disclosure. In some cases, the courts lessen the effects of disclosure of confidential documents by ordering that those documents be delivered in a redacted form only. The principles in relation to redaction are as follows:

- In order for discovery or disclosure to be appropriate, the documents or materials sought must be shown to be relevant.
- If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.
- The court is required to exercise some balance between the likely materiality of the documents concerned with the issues that are anticipated to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials. In that context, the confidence of third parties may be given added weight.
- In attempting to balance those rights, the court can seek to fashion an appropriate order designed to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of confidence are asserted.

A lawyer-only discovery exercise (sometimes called a 'confidentiality club') is relatively unprecedented in Ireland, though it can arise in very exceptional cases. The exceptions in Ireland that we are aware of include a recent patent case and one executive privilege case. In each case, a court order facilitated the lawyer-only process (including in-house lawyers in the 'confidentiality club' in the patent case).

Irish data protection legislation provides that any restrictions contained in the legislation in relation to the disclosure of personal data do not apply if the disclosure is required by any rule of law or court order. In general the courts seek to balance the interests of privacy and confidentiality with the effective administration of justice.

19 What are the rules in your jurisdiction regarding attorney–client privilege and work product privileges?

The right of a party not to disclose communications with its lawyer is considered to be a necessary part of the administration of justice in Ireland. There are two types of legal professional privilege in Ireland: legal advice privilege and litigation privilege.

Key elements of legal advice privilege are:

- there must be a communication between a lawyer and his or her client or vice versa;
- the communication arises in a professional relationship; and
- the communication must be made for the purpose of seeking or providing legal advice.

Litigation privilege protects from disclosure confidential communications made for the dominant purpose of being used in connection with existing or contemplated litigation. The document must have been created when litigation is apprehended or threatened. Unlike legal advice privilege, litigation privilege can protect communications between clients, lawyers, third-party witnesses and experts for the purposes of litigation.

The dominant purpose is a matter for objective determination by the court and does not only depend on the motivation of the person who caused the document to be created.

20 Must some energy disputes, as a matter of jurisdiction, first be heard before an administrative agency?

Parties who have a statutory right to be connected to the transmission or distribution system under the 1999 Act have a right under section 34(6) to refer a dispute with (as applicable) the distribution or transmission system operator (TSO) to the Commission for Regulation of Utilities (CRU) for resolution. The scope of disputes can extend to a connection request refusal, the terms of a connection offer, the charges proposed or other matters relating to the connection. It is the responsibility of all parties involved to adhere to the process outlined in the 1999 Act including generators, the system operators, and the CRU itself.

Disputes will be determined by the CRU, provided that:

- the dispute is with respect to connection or use of the distribution or transmission system network;
- the party seeking connection demonstrates that there is material matter in dispute and that reasonable efforts have been made to resolve the matter prior to bringing it to the CRU; and
- the parties request the CRU to resolve the dispute.

In order to secure compliance with a determination made under section 34(6) of the 1999 Act, the CRU may, under section 34(7) of the 1999 Act, apply in a summary manner on notice to the High Court for an order requiring compliance with the determination of the CRU made under this section.

Under the 1999 Act, the CRU also has the power to determine certain disputes between gas transmission, gas distribution, LNG or gas storage system operators regarding certain matters as prescribed in that Act, including terms and conditions of access as well as tariffing for the gas network.

Under the Gas Act 1976 (as amended) (the Gas Act), the CRU is also the competent authority tasked with settling certain disputes between certain operators of facilities in the gas market in relation to third-party access to downstream gas pipelines, LNG facilities and gas storage facilities as prescribed by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009. Under the Gas Act (as amended), the Minister is the competent authority to decide third-party access disputes relating to upstream pipelines as well as certain disputes with road authorities in relation to the construction, maintenance and repair of gas pipelines by Ervia.

Regulatory

21 Identify the principal agencies that regulate the energy sector and briefly describe their general jurisdiction.

The CRU is Ireland's independent energy regulator. The CRU has a wide range of economic, customer protection and safety functions in the energy sector. The stated aim of the CRU's economic role is to protect the interests of energy customers, maintain security of supply, and to promote competition covering the generation and supply of electricity and supply of natural gas. Although the Minister has principal responsibility for the creation of energy policy, the regulation of the energy sector is within the remit of the CRU. The Minister reserves the right to give directions to the CRU. These directions extend to the public service obligations that the CRU is required to impose on licence holders and the criteria with which an application for an authorisation or a licence may be granted. The functions carried out by the CRU include the issuing of licences and authorisations, determining electricity tariffs, advising the Minister on the effect of electricity generation, the promotion of competition in the market and ensuring the security of supply to consumers. In addition, the CRU jointly regulates the SEM with its counterpart in Northern Ireland, the Utility Regulator.

The CRU has a significant range of enforcement powers. The Electricity Distribution System Owner and Operator as well as the Transmission System Owner and Operator are also licensed by the CRU. Under sections 23 and 24 of the 1999 Act, the CRU can issue a direction to a licensee to comply with its licence or authorisation conditions. Anyone intending to supply electricity, build a generating station or generate electricity must be licensed by the CRU as per section 14 and section 16 of the 1999 Act. Any subsequent decision made by the CRU may be appealed to the Minister within 28 days.

In the first instance, the Minister will establish a panel for the purposes of hearing the appeal that will have all powers of the CRU conferred on it that are necessary to carry out the appeal function. The board will be afforded certain powers of the High Court that relate to the attendance of witnesses, the production of documents and the board may confirm the refusal to grant a licence or authorisation with or without conditions.

An application for judicial review may also be made in respect of decisions made by the Minister or the CRU. Such an application must be made promptly or within two months of the decision, or in certain cases, within three months. Under section 32(2) of the 1999 Act, leave to bring a judicial review application will only be granted if the High Court is satisfied that there are substantial grounds supporting the fact that the decision is invalid or that it ought to be quashed.

22 Do new entrants to the market have rights to access infrastructure? If so, may the regulator intervene to facilitate access?

Any individual is eligible to apply to EirGrid in order to obtain a connection to the electricity transmission system provided that any offer from the TSO to gain access to the network must be subject to the individual becoming an eligible customer or obtaining a licence or authorisation to construct a generating station pursuant to section 16 of the 1999 Act. An application to gain access to the transmission system that is operated by the TSO is refused where it would be in breach of the Grid Code, the 1999 Act or the regulations under the 1999 Act, where the applicant does not undertake to be bound by the terms of the Grid Code or where the CRU is satisfied that it would not be in the public interest as stated by section 34(4) of the 1999 Act. The same rules apply for the permission to use and refusal of access to the distribution network, and any individual is eligible to apply in order to utilise the distribution infrastructure. Individuals are eligible to apply to the system operator of the gas network for connection agreements to connect to that network.

Third-party access to existing gas infrastructure is governed by section 10(A)(6) of the Gas Act. The CRU may require a pipeline operator to expand its system in order to accommodate new entrants to the market. If an eligible customer applies to the pipeline operator to have the operator transport his or her gas on his or her behalf on the operator's pipeline, the operator may not refuse unless it does not have sufficient capacity on the network and it is uneconomical, or the eligible customer has no connection to the pipeline and the customer is not willing to bear the cost of such connection.

A range of authorisations are required in relation to the development of offshore infrastructure. Pursuant to section 5 of the Continental Shelf Act, the consent of the Minister is required to erect or remove structures in any Continental Shelf Designated Area. Section 40 of the Gas Act stipulates that ministerial consent is required in order to construct and operate upstream pipelines. No person may undertake the exploration for petroleum in any area in Ireland unless the relevant licence has been granted to them by the Minister.

23 What is the mechanism for judicial review of decisions relating to the sector taken by administrative agencies and other public bodies? Are non-judicial procedures to challenge the decisions of the energy regulator available?

The mechanism for judicial review proceedings against administrative agencies and other public bodies is governed by the relevant legislation and the Rules of the Superior Courts. The first procedural step in seeking judicial review of an administrative decision is generally to seek leave for judicial review from the Irish High Court. An application for leave is to be made 'promptly' and in any event within three months from the date on which grounds first arose, or within any shorter period specified by the relevant legislation. A judgment of the Supreme Court during 2016 confirmed that the requirement to issue proceedings within three months of the ground first arising will ordinarily be interpreted very strictly. However, the court has an exceptional discretion to extend the time limits if it is satisfied that there is good reason.

Leave applications are generally made by public, ex parte application before the High Court, which means that only the side seeking leave is required to appear. At leave stage, it is necessary to satisfy the court that the applicant for judicial review has sufficient interest in the proceedings and an arguable case. The court may, for any good and sufficient reason, direct that the application for leave shall be heard on notice to any other relevant party.

A party who wishes to oppose an application for judicial review is required to file opposition papers. The case generally proceeds to an oral hearing before the court. The court may in certain circumstances combine the application for leave and the substantive application for judicial review.

Following the substantive hearing, the court can make a variety of orders that may include quashing or setting aside the decision of the administrative agency or public body, and possibly requiring the decision to be remade; compelling the administrative agency or public body to take certain steps; or a declaration as to the interpretation of the law.

There is a non-judicial procedure to challenge certain decisions of the CRU. Two categories of person may appeal against a CRU decision to an appeal panel:

- a person whose application for a licence or an authorisation is refused; and
- a person who is holder of a licence or an authorisation and who wishes to appeal against a decision of the CRU:
- to modify the licence or authorisation concerned; or
- to refuse to modify the licence or authorisation concerned.

An appeal panel is constituted on a case-by-case basis by the Minister in consultation with the Competition and Consumer Protection Commission. It consists of at least three people. The appeal panel has all the powers and duties necessary to carry out the functions of the appeal panel, to summon witnesses, administer oaths and compel the production of documents. We are not aware of such an appeal panel ever having been constituted in the energy sector at the time of writing. A decision of the appeal panel may only be challenged by way of judicial review.

24 What is the legal and regulatory position on hydraulic fracturing in your jurisdiction?

Hydraulic fracturing has been prohibited in Ireland with effect from 6 July 2017, pursuant to the Petroleum and Other Minerals Development (Prohibition of Onshore Hydraulic Fracturing) Act 2017.

25 Describe any statutory or regulatory protection for indigenous groups.

There is no legislation specifically relating to energy that provides statutory protection for indigenous groups.

26 Describe any legal or regulatory barriers to entry for foreign companies looking to participate in energy development in your jurisdiction.

Ireland is in general an open economy and many foreign companies participate in energy development. There are a number of possible barriers to entry for companies looking to participate in energy development in Ireland including the following:

- The ownership and operation of the gas and electricity networks in Ireland is reserved for state-owned enterprises and to date has not been open to competition.
- Key electricity transmission infrastructure and certain onshore wind farms are not progressing for reasons of social acceptability and, as noted above, the exploitation of non-conventional onshore gas resources is currently prohibited while the conclusions of the EPA-led report on the impacts of such activities on the environment and human health are assessed.
- In relation to the development of energy infrastructure, there is a complex and multi-layered planning, approval and permitting system in Ireland.

Update and trends

Integrated Single Electricity Market (I-SEM)
The wholesale electricity market in Ireland is the Single Electricity Market (SEM). It is an all-island market, meaning that the SEM combines two separate jurisdictional electricity markets – Ireland and Northern Ireland. It operates as a mandatory gross pool, with an ex-post, island-wide system marginal price for each 30-minute trading period. There is a separate capacity payments mechanism.

The SEM is currently being redesigned and will be replaced by the integrated Single Electricity Market or I-SEM in May 2018 (as currently scheduled). The purpose of I-SEM is to implement the European Target Model, which is comprised of binding EU network codes which apply to all member states. The current capacity remuneration mechanism will be replaced with a formal capacity market in the I-SEM. The SEM's day-ahead and forward scheduling process will be replaced with a formal day-ahead market (DAM), an intraday market (IDM) and a balancing market. The DAM will be a pan-European market which establishes a forward position for all market participants. The IDM will be based on a European model. The balancing market is the last hour before delivery where the TSOs take control and dispatch power plants up and down to ensure the system demand equals system generation (the balancing market).

One of the key changes in I-SEM is that 'balance responsibility' will shift from the TSOs (ie, EirGrid plc (EirGrid) in Ireland and SONI Limited (SONI) in Northern Ireland, as the licensed TSOs) to generators. In I-SEM, it is expected that wind generators will trade volumes in the DAM and IDM based on forecasts and any imbalances due to forecast error or outage will be cleared in the balancing market at a single imbalance price.

Any generators that are out of balance after the IDM closes will be exposed to the imbalance price, which will be determined by the market operator (the Single Electricity Market Operator or SEMO, which is a contractual joint venture between EirGrid and SONI) based on the balancing actions related to matching supply with demand.

Participants in the market have not yet been in a position to accurately estimate what their balancing costs will be following I-SEM go-live in May 2018. This regulatory uncertainty is widely recognised as a material commercial risk by financial institutions and investors in the renewable energy sector in Ireland but transactions (both M&A and project financings) have continued to complete and close notwithstanding this uncertainty.

Renewable Energy Support Scheme (RESS)
As noted above in response to question 2, the DCCAE recently closed a public consultation on the Renewable Electricity Support Scheme (RESS), a proposed support scheme for renewable technologies designed to help Ireland meet its renewable electricity obligations.

RESS will involve a significant departure from the previous REFIT support schemes. In particular, the Floating Feed-In Premium (FIP), capacity auction and community engagement proposals are being closely watched by industry. It is expected that technology neutral capacity auctions under RESS will mean that onshore wind energy will continue to make an important contribution to meeting Ireland's renewable energy targets, but can also be complemented by other technologies to meet Ireland's renewable energy ambitions.

The timing for finalising RESS is not yet clear and will likely depend on the public feedback to the consultation. In addition, the scheme is still subject to EU state aid and Irish government approval.

27 What criminal, health and safety, and environmental liability do companies in the energy sector most commonly face, and what are the associated penalties?

Companies in the energy sector may face possible criminal, health and safety, and environmental liability under a number of regimes at the instance of regulators such as the CRU, the Health and Safety Authority and the Environmental Protection Agency, and, in more serious cases, at the instance of the Director of Public Prosecutions.

The functions of the CRU have been outlined in question 21. The CRU has a number of powers under which it can issue court proceedings. For example, the CRU is the national regulatory authority in Ireland for the wholesale energy market. The CRU may appoint officers to investigate market abuse offences by companies and can prosecute summary offences in this area. The type of prosecutions generally taken by the CRU to date have been against individuals for illegally undertaking gas works while not registered.

The Health and Safety Authority is the Irish statutory body responsible for enforcing occupational health and safety law in Ireland. The HSA has issued advice in respect of the wind energy sector, noting in particular the health and safety rules that apply to the design and construction of wind farms and also the EU and Irish regulations that govern the design, manufacture and operation of wind turbines and associated machinery.

The penalties for most breaches of health and safety legislation consist of a maximum fine of €3 million or two years' imprisonment or both for the most serious offences.

The Environmental Protection Agency can also prosecute for environmental law offences under the Environmental Protection Agency Act. Companies and individuals can face fines for serious offences of up to €15 million, imprisonment for a term not exceeding 10 years or both (although we have not to date seen penalties of this scale in Ireland). A number of other environmental regulators can prosecute offences under a range of other environmental legislation.

Other

28 Describe any actual or anticipated sovereign boundary disputes involving your jurisdiction that could affect the energy sector.

There are no actual or anticipated Irish sovereign boundary disputes that could affect the energy sector.

29 Is your jurisdiction party to the Energy Charter Treaty or any other energy treaty?

Yes. See question 30.

30 Describe any available measures for protecting investors in the energy industry in your jurisdiction.

As a member of the European Union, Ireland is bound by European Union law and investment protection measures are contained in a number of European Union directives. Foreign investors can also rely on the various protections under European Union law to the extent that such protections are available to domestic investors.

Ireland is party to a number of treaties that provide investor protection, including the Energy Charter Treaty (ECT). This treaty is a multilateral treaty that establishes a legal framework in order to promote long-term cooperation in the energy field between states. The ECT contains investment protection provisions that each contracting party assumes towards investors of other contracting parties. It allows any such investor to bring an arbitration claim directly against an ECT contracting party for breach of the protections provided for under the ECT in relation to its investment.

Judicial review is a form of High Court proceedings that can be taken against a decision of a public body, for example, the CRU, if the decision involves an exercise of discretion. In a judicial review, the High Court will examine the decision to determine whether it was properly taken in accordance with the relevant legislation. In general, the High Court does not consider whether the decision of the public body is correct, rather the High Court considers whether the decision was made correctly. If the decision was not made in the proper manner, the High Court can declare the decision to be invalid. In particular, where an expert body appointed by statute is making a decision that the statute gives it the power to make, the High Court may defer to the expertise of that body and will not look at the merits of the decision as long as the High Court is satisfied that the decision was lawfully made.

31 Describe any legal standards or best practices regarding cybersecurity relevant to the energy industry in your jurisdiction, including those related to the applicable standard of care.

The numerous obligations to keep information and data confidential and secure to which businesses are subject can arise in a wide variety of circumstances: under legislation, regulation, common law and equitable principles, and as a matter of contract.

Businesses that find themselves subject to cybercrime may therefore be exposed to sanctions and claims for damages where the attack exposes a failure to meet those confidentiality and security obligations. Similarly, failure to implement internal policies and procedures to protect information and data properly can give rise to claims. Such claims may be brought by customers arising out of alleged breaches of duties owed to those customers, in particular under contract and common law duties of care, and under Irish data protection legislation.

While technological protections are clearly a key element in implementing strong cybersecurity, businesses cannot approach cybersecurity as a purely IT issue. Cybersecurity is increasingly considered a board-level issue, in light of the significant impact on business of a serious cybersecurity breach. The board will have responsibility for the overall security policy, which should address various aspects of cybersecurity, be they technological, procedural or legal. From a technological perspective, there are few legally mandated standards or solutions that are required to be implemented, and for good reason, in order to minimise the risk of those requirements becoming rapidly outdated.

Industries that are rich in personal data are obliged to take 'appropriate security measures' against unauthorised access to and use of personal data. Some guidance is given in the Data Protection Acts as to what those appropriate security measures might be, not through specification of strict requirements, but by directing that data controllers may have regard to the state and costs of technological developments, and obliging them to ensure that the level of security implemented is appropriate both to the nature of the data and the harm that might result from the breach.

The Irish Data Protection Commissioner has published a breach code of conduct which, while not obligatory, is generally observed and deals with notification both to the Data Protection Commissioner and to affected individuals. The General Data Protection Regulation, which shall apply from 25 May 2018 throughout the European Union, will make reporting of breaches mandatory, and will be combined with significant sanctions of up to the higher of 4 per cent of an enterprise's worldwide turnover or €20 million.

In 2015, the DCCAE published Ireland's National Cybersecurity Strategy outlining Ireland's approach to data protection, an important publication given Ireland's position as a major global hub for leading technology companies. The Strategy establishes the National Cybersecurity Centre, advanced methods of protection for government departments and a legislative framework to give effect to the provisions of the Budapest Convention on Cybercrime and EU Directives on attacks against information systems.

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