



DETERMINATION OF MERGER NOTIFICATION M/20/005 – ESB/COILLTE (JV)

Section 21 of the Competition Act 2002

Proposed establishment of a joint venture between the Electricity Supply Board and Coillte Cuideachta Ghníomhaíochta Ainmnithe

Dated 10 December 2020

Introduction

1. On 12 February 2020, in accordance with section 18(1)(a) of the Competition Act 2002, as amended (“the Act”), the Competition and Consumer Protection Commission (the “Commission”) received a notification of the proposed creation of a joint venture between the Electricity Supply Board (“ESB”) and Coillte Cuideachta Ghníomhaíochta Ainmnithe (“Coillte”) (the “Proposed Transaction”).

The Proposed Transaction

2. Prior to completion of the Proposed Transaction, Coillte intends to establish a wholly-owned subsidiary (“DevCo”) to which, upon completion of the Proposed Transaction, Coillte’s renewable energy division would be transferred.
3. The Proposed Transaction will be implemented pursuant to the following agreements:
 - A draft Business Transfer Agreement (“BTA”) between Coillte and DevCo, [...], pursuant to which Coillte’s renewable energy division and its associated assets, goodwill, and staff will be transferred to DevCo.
 - A Share Purchase Agreement (“SPA”) between ESB Wind Development Limited (“ESB Wind”), a wholly-owned subsidiary of ESB, and Coillte dated 22 November 2019. Pursuant to the SPA, ESB Wind will acquire a 50% shareholding in DevCo from Coillte.



- ESB Wind and Coillte will incorporate a jointly controlled holding company (“HoldCo”) to which ESB Wind and Coillte will assign all of the shares of DevCo.
 - An agreed form Shareholders Agreement (“SHA”) between Coillte, ESB Wind, DevCo, and HoldCo. The SHA will govern the management of HoldCo and its subsidiaries, including how decisions will be taken in respect of material issues affecting the JV.
 - A Lease Option Framework Deed (“LOFD”) between Coillte and DevCo pursuant to which HoldCo and DevCo (together, the “Joint Venture” or “JV”) will obtain certain rights over Coillte-owned land.
4. Following implementation of the Proposed Transaction, ESB and Coillte (together, the “Parties”) will each hold a 50% shareholding in HoldCo, and thus will each exercise joint control of HoldCo. Following implementation of the Proposed Transaction, HoldCo will be the 100% shareholder of DevCo.

The Undertakings Involved

ESB

5. ESB is a vertically-integrated energy corporation established by statute¹ with operations at all levels of the energy sector in the State.
6. ESB is majority-owned by the Government of Ireland through the Minister for Public Expenditure and Reform (85%) and the Minister for the Environment, Climate, and Communications (10%). The remaining 5% shareholding is held by the trustees of an Employee Share Ownership Plan.
7. ESB’s business activities consist of the following:
- Generation and wholesale supply of electricity: ESB generates and sells electricity on the all-island Integrated Single Electricity Market (“I-SEM”). ESB’s generation and trading business develops, operates and trades the output of ESB’s electricity generation assets. ESB’s generating portfolio consists of 5,558MW of electricity generation assets across the I-SEM and Great Britain. ESB’s existing electricity

¹ ESB was established by the Electricity (Supply) Act 1927 and operates under the ESB Acts 1927 to 2014.



generation assets are principally thermal and hydro sourced. On the island of Ireland, ESB has interests in seven operational thermal plants (four natural gas, two peat and one coal and oil plant) with total installed capacity of 3,272MW, and five hydropower plants with total installed capacity of 221MW. On the island of Ireland, ESB also owns and operates onshore wind farms with total installed capacity of 669MW.

- Electricity transmission and distribution: ESB is the licensed Transmission Asset Owner (“TAO”) and Distribution Asset Owner (“DAO”) in the State and in Northern Ireland (the latter through its subsidiary, Northern Ireland Electricity Networks Limited (“NIE Networks”). ESB is also the holder, via its subsidiary ESB Networks DAC (“ESB Networks”) and NIE Networks, of distribution system operator (“DSO”) licences in the State and Northern Ireland respectively.² ESB’s functions as TAO, DAO, and DSO are strictly ring-fenced from all other functions of ESB, including its electricity generation and retail supply business.
- Retail supply of electricity and natural gas: ESB is also engaged in the retail supply of electricity to end-users on the island of Ireland under the brand *Electric Ireland* and in Great Britain (under the brand *ESB Energy*). Electric Ireland is also active in the retail supply of natural gas to end-users on the island of Ireland.
- Energy efficiency consulting: ESB Smart Energy Services business unit assists businesses to reduce their energy costs (through energy management, lighting as a service, battery storage, heating solutions and demand side response).
- Electric vehicles: ESB owns and operates public charging infrastructure for electric vehicles in the State.
- Telecoms: ESB, through its wholly-owned subsidiary ESB Telecoms Limited, provides wholesale services such as leased lines and physical infrastructure access, as well as retail end-to-end business connectivity services, in the telecoms sector in the State. ESB is also a 50% shareholder in its joint venture with Vodafone, SIRO, which offers

² These licences are issued to ESB by the Commission for Regulation of Utilities (“CRU”) in the State and the Utility Regulator of Northern Ireland (the “UR”) in Northern Ireland.



wholesale high-speed broadband in the State through its growing fibre-to-the-home offering.

- Engineering consultancy services: Through its engineering and major projects ("E&MP") division, ESB provides engineering services, including services relating to project management, surveying, electrical, mechanical and civil design, environmental matters, the preparation of submissions for planning consents and asset management to the ESB group including the generation and trading business, as well as ESB Networks and to joint venture businesses. ESB International (the trading name of an ESB subsidiary within ESB's E&MP division) is a global provider of engineering consultancy services, currently working in the Middle East, Africa and the Far East. It also continues to work across Europe, including the island of Ireland and the United Kingdom. ESB also provides operation and maintenance services internationally.

8. For the financial year ending 31 December 2018, ESB's worldwide turnover was approximately €3.4 billion, of which approximately €2.6 billion was generated in the State.

Coillte

9. Coillte is a commercial semi-State company incorporated in the State. One ordinary share is held by the Minister for Agriculture, Food and the Marine and the remainder of the issued share capital is held by the Minister for Public Expenditure and Reform.
10. Coillte's business activities consist of the following:
 - Forestry: Coillte's Forestry division manages all aspects of Coillte's forestry business including tree planting, growing, managing, protecting and harvesting of forests on Coillte's 438,000 hectares of land. In addition, Coillte is the largest provider of outdoor recreation in the State with twelve forest parks, almost 300 recreation sites and more than 3,000km of waymarked trails developed on its lands. Coillte's Forestry division supplies wood products such as pulp wood, small sawlog, large sawlog, and bare-rooted plants in the State and worldwide.



- Land Solutions: Coillte's Land Solutions division is responsible for the management, other than through forestry, of Coillte-owned land. Coillte buys, sells and leases land, for example as part of its sustainable approach to forestry and for the development of renewable energy and other infrastructure assets in sectors such as tourism and telecoms.
- Renewable energy development: Coillte's renewable energy development activities are undertaken by a business unit located in the Land Solutions division. This business unit has co-developed four REFIT 2-designated wind farms (two with ESB, one with SSE Airtricity Limited, and one with Bord na Móna). In 2018, Coillte sold its interests in three of these four wind farms, and part of its stake in the fourth wind farm.³ This business unit is currently developing [approximately 45] onshore windfarm project sites in the State (see paragraph 13, below).
- Manufacture and supply of panel boards: Coillte manufactures and supplies panel boards through its *Medité* and *Smartply* divisions. Through these divisions, Coillte supplies medium density fibreboard (MDF) and oriented strand board (OSB) in the State and the United Kingdom for use in the construction industry. *Medité* and *Smartply* source their timber largely from Coillte's Forestry division.

11. For the financial year ending 31 December 2018, Coillte's worldwide turnover was approximately €330 million, of which approximately €[...] million was generated in the State.

The Joint Venture

12. Once established, and following implementation of the Proposed Transaction, the JV will be active in the development of renewable energy generation assets (principally onshore wind farms), primarily located on Coillte-owned land, and the generation and sale of electricity (once the relevant generation facilities are commercially operational).
13. Initially, the JV will manage and develop [approximately 45] onshore windfarm project sites (comprising Coillte-owned land and third party-owned land) which are currently

³ Coillte retains a jointly controlling stake ([...])% in the Sliabh Bawn wind farm, located in Doughill Forest, Co. Roscommon. Bord na Móna holds a [...] stake and Greencoat Renewables holds the remaining [...] stake.



under active development by Coillte (the “Initial Portfolio”) (see paragraph 10, above). The majority of these sites are at early stage development, i.e., at pre-planning or feasibility stages.

14. The Initial Portfolio includes 14 projects that are co-development arrangements (“CDAs”)⁴ where agreements have been reached by Coillte with a number of third parties (referred to as co-development partners) to develop each project under a joint ownership structure in which risk and reward are shared by Coillte and its respective co-development partner. These projects combine land contributed by Coillte and land, grid connection and/or other material enabling additions contributed by the co-development partners.
15. The Parties provided the following information in the notification:

“[...]”

16. Coillte also [...] activities in relation to solar and battery projects in the State. These projects will also be transferred to the JV, in accordance with the BTA, following implementation of the Proposed Transaction. Coillte provided the following information in the notification in this regard:

“[...]”

17. The Parties estimate that the JV (excluding the shares of co-development partners under CDAs) will have an electricity generating capacity of approximately [...] -1000MW by 2030.

Investigation

18. On 24 March 2020, the Commission served a Requirement for Further Information (“RFI”) on each of ESB and Coillte, pursuant to section 20(2) of the Act. This adjusted the deadline within which the Commission had to conclude its assessment of the Proposed Transaction in Phase 1.

⁴ The CDA partners are [...].



19. Upon receipt of full responses to the RFI from both ESB and Coillte on 9 October 2020, the “appropriate date” (as defined in section 19(6)(b)(i) of the Act) became 9 October 2020.⁵
20. During the Phase 1 investigation, the Commission requested and received, on an on-going basis, further information and clarifications from the Parties.
21. No third party submission was received during the Phase 1 investigation.
22. The Commission circulated questionnaires to various third parties during the Phase 1 investigation, including:
 - CRU;
 - The UR;
 - EirGrid, the Transmission System Operator (“TSO”) in the State and in Northern Ireland (through its wholly owned subsidiary System Operator for Northern Ireland, SONI Limited);
 - Electricity generators active in the I-SEM; and
 - Developers of onshore windfarms in the State.
23. The Commission received a response from the majority of the third parties to whom it sent a questionnaire. In each case, the Commission also contacted those third parties by phone to clarify and/or seek further detail in relation to their responses.
24. During the Phase 1 investigation, the Commission identified potential competition concerns arising from the Proposed Transaction. On 17 November 2020, Coillte submitted draft proposals to the Commission in accordance with section 20(3) of the Act with a view to ameliorating the potential competition concerns identified by the Commission. On 18 November 2020, the Parties submitted draft joint proposals to the Commission in accordance with section 20(3) of the Act with a view to ameliorating the potential competition concerns identified by the Commission. The submission of these

⁵ The “appropriate date” is the date from which the time limits for making Phase 1 or Phase 2 determinations begin to run.



two sets of draft proposals by (i) Coillte and (ii) the Parties, respectively, extended the deadline within which the Commission was required to conclude its assessment of the competitive effects of the Proposed Transaction in Phase 1 by 15 working days to 45 working days in accordance with section 21(4) of the Act.

25. During the Phase 1 investigation, the Commission engaged with the Parties and their legal advisors to discuss whether the draft proposals submitted by Coillte and the Parties, respectively, would ameliorate the potential competition concerns identified by the Commission. Following detailed consideration, the Commission was unable to reach a conclusion that the draft proposals submitted by Coillte and the Parties, respectively, would ameliorate the potential competition concerns identified by the Commission.

Analysis

26. The Commission is unable, at this stage, to reach a determination that the Proposed Transaction will not lead to a substantial lessening of competition in any market for goods or services in the State. Accordingly, it intends to carry out a full investigation under section 22 of the Act.



Determination

The Competition and Consumer Protection Commission, in accordance with section 21(2)(b) of the Competition Act 2002, as amended (the “Act”), has determined that it intends to carry out a full investigation under section 22 of the Act in relation to the proposed creation of a joint venture between the Electricity Supply Board and Coillte Cuideachta Ghníomhaíochta Ainmnithe.

For the Competition and Consumer Protection Commission

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