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EC ELECTRICITY LEGISLATION AND THE IRISH ELECTRICITY INDUSTRY

*Eugene Daniel Cross**

INTRODUCTION

The Republic of Ireland is one of four Member States in the European Community where the generation, transmission, distribution and supply of electricity is carried out almost entirely by a state-owned, vertically-integrated monopoly.¹ The Electricity Supply Board (ESB) was established for the most part in 1927,² which makes it the oldest member of this breed of state-owned enterprise in the European Community.

This article discusses and analyzes the impact of European Community legislation³ on the electricity supply industry of the Republic of Ireland. It is divided into several parts. Part I discusses the historical background and structure of Ireland's dominant supplier, the ESB, and analyzes the recent announcements for a restructuring of this body. Part II discusses and analyzes the regulation of electricity generation, transmission, distribution and supply in Ireland, including the Community directives on price transparency and transit. Part III focuses on relevant legal changes resulting from the Irish implementation of Community directives on the environment, products liability, and public procurement. The latter part includes a description of the 1993 Memorandum of Understanding between the U.S. and the European Community on government procurement as it relates to the electricity sector.

While the general features of the European Commission's program for an internal market in electricity may be familiar to many international energy lawyers,⁴ the scope and impact of this program on particular

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1. The other EC Member States that have this general type of electricity supply industry are France, Greece, and Italy. Portugal had a similar system following the nationalizations of 1975; but, *Electricidade de Portugal (E.P.)* is currently undergoing restructuring, as well as substantial foreign investment in new Portuguese generation facilities. See 1993 O.J. (L 265) 3.

2. Electricity Act, No. 27 (1927).

3. Under Article 189 of the Treaty ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] binding Community legislation can take the form of regulations, directives, or decisions.

4. In 1988, the European Commission issued a Working Document on the Internal Energy Market. COM(88)238 final. In 1992, the Commission elaborated upon and supplemented the original

national regulatory regimes is not as well-known. By focusing on the changes in Irish laws relating to the electricity sector, this article serves as a case study of the effectiveness of the legal transformations being sought by the European Community in this field. In addition, this article aims to provide a thorough description of the structure and regulation of the Irish electricity system, since no other source of current written information seems to be available.

I. THE HISTORY AND STRUCTURE OF THE ELECTRICITY SUPPLY BOARD

A. *The 1927 Act*

When the Irish State was founded in 1922, the electricity industry was fragmented among numerous municipal and private undertakings, some authorized by statute, but most non-authorized. The parliamentary debates regarding the Electricity Supply Bill of 1927 reveal that members of the *Dáil Eireann* engaged in a review of electricity law developments in the United States, Canada, and other parts of Europe.⁵ Of particular interest to the Irish government officials was the development of the "superpower" concept in the United States. This was understood as the development of profitable, high-volume electricity supply in populated areas where "cream-skimming" could take place.⁶ Because the electrification of the less-populated areas of Ireland was a goal of the Irish government, this type of free-market development was unattractive.

Although the Irish government rejected the option of continued private ownership and development in Ireland,⁷ it also recognized that an electricity system under comprehensive state ownership was more likely to perform better when guided by independent business management. Thus, a compromise of sorts was reached. The *Dáil Eireann* contemplated a central authority "independent of Parliament and Government as far as that could reasonably be arranged,"⁸ backed by the financial resources of the state,⁹ free from the control of the civil service,¹⁰ and "armed with the full-

program with new proposals for completing the internal market in electricity. COM(91)548 final. These proposed directives have encountered opposition and have been withdrawn for purposes of modification. There are a number of useful secondary sources describing the EC's Internal Energy Market program as it relates to electricity. See, e.g., LEIGH HANCHER, EC ELECTRICITY LAW 5-17 (1992); EDISON ELECTRIC INSTITUTE, ELECTRICITY IN A UNIFIED EUROPE: AN INTENSIVE ANALYSIS OF THE 'EC 1992' PROGRAM 5-23 (1992); See also R. Whish, *European Commission Policies and Technical Change: Competitive Impact and Regulatory Prospects*, 80 REGULATORY POLICY & THE ENERGY SECTOR, Proceedings of a CRI Seminar of Nov. 11, 1992 (1993).

5. 18 DAIL DEB. col. 1898-02 (Mar. 15, 1927).

6. See *id.* at 1899. For a more detailed explanation of the "superpower" concept, see W. MURRAY, *SUPERPOWER: ITS GENESIS AND FUTURE* (1925).

7. It was believed that concessions to private parties, particularly foreign parties, would be difficult to audit and might conflict with the government's program of industrial development. See 18 DAIL DEB. col. 1905-06 (Mar. 15, 1927).

8. *Id.* at 1909.

9. *Id.* at 1902, 1909.

10. *Id.* at 1903.

lest possible powers"¹¹ to manage the completion and operation of the hydroelectric generation project on the Shannon River and to acquire all of the other authorized or non-authorized undertakings. It was clearly intended that this central authority was to be given every power necessary to become, in its discretion, the sole supplier of electricity in the country.¹²

This conception of the ESB was the defining moment for the electricity supply industry in Ireland. The 1927 Electricity Act established the general duty of the ESB to generate, transmit, distribute, supply, and promote the use of the electricity produced by the hydroelectric power produced on the Shannon River and other lands acquired by the government for such purpose.¹³ By exercising its powers under the 1927 Act to acquire pre-existing undertakings and consolidate the industry, the ESB enlarged its corporate purpose and ensured that electricity planning would be undertaken throughout the country by a single entity.¹⁴

B. Other Irish Electricity Laws

Although the 1927 Act is the "principle act" in the field, it has been amended and supplemented to further delineate the powers and duties of the ESB. One major piece of supplemental legislation is the Electricity (Supply) (Amendment) Act of 1945,¹⁵ which granted the ESB, *inter alia*, exclusive rights to the import and export of electricity¹⁶ and which amended the notice requirements to landowners prior to the placing of electric lines.¹⁷

There were several amendments to the 1927 Act during the 1980s. The Electricity (Supply) (Amendment) Act of 1985¹⁸ was an emergency measure adopted in response to a declaration of unconstitutionality by the Irish Supreme Court¹⁹ with respect to the above-mentioned notice require-

11. *Id.* at 1920.

12. *Id.* at 1918. The drafters of the Electricity (Supply) Act 1927 did not declare outright that the Electricity Supply Board (ESB) was to be the sole and exclusive electricity supplier. Electricity Act, No. 27 (1927). They recognized "authorized undertakers" that had been previously granted exclusive rights to generate, distribute or supply electricity in specified areas. *Id.* §§ 1, 20, 35. The ESB, however, was granted substantial powers to acquire, take control of, and alter the supply areas of such authorized undertakings. *Id.* §§ 39, 40, 42. In addition, new entrants were prohibited absent the ESB's permission. *Id.* § 35. The ESB moved quickly to consolidate its power under the 1927 Act and establish its virtual monopoly over all sectors of the electricity supply industry.

13. Electricity Act, No. 27, §§ 2, 19(a), (c) (1927). The 1927 Act also placed the following duties on the ESB: 1) "to control, manage, and maintain in good repair and condition and proper and efficient working order each and every part of the Shannon works . . ."; 2) "to control, co-ordinate, and improve the supply, distribution, and sale of electricity generally in [Ireland]"; and 3) "generally to perform and exercise all duties and powers which are imposed or conferred on the Board by this Act and all such other duties and powers as may hereafter be imposed or conferred on the Board by the Oireachtas." *Id.* § 19(b), (d), (f).

14. J. ROCHE, *PLANNING IN THE ESB* 1 (1978).

15. Electricity Act, No. 12 (1945).

16. *Id.* § 32.

17. *Id.* § 46.

18. Electricity Act, No. 6 (1985).

19. Electricity Supply Board v. Gormley, 129 I.R. 144 (1985). For a discussion of this case, see *infra*, note 67 and accompanying text.

ments to landowners. This Supreme Court decision and the amendment concern the power and duties of the ESB in connection with the placement of transmission lines on private property.

Two other acts that amended the 1927 Act were adopted in 1982 and 1988. These amendments relate, *inter alia*, to the ability of the ESB to engage in new business activity.²⁰

C. *The ESB's Relationship to the Government*

The ESB is considered to be a commercial "state-sponsored body" under Irish law.²¹ This term "denotes an authority which discharges specialized, central functions usually of a governmental nature, yet which is set at a distance from the Government and Ministers."²² A state-sponsored body has a separate and continuous legal existence, and is endowed with the capacity to own property, make contracts, employ persons, and to sue and be sued.²³ There is no general statutory definition of a state-sponsored body in Irish law. There are approximately seventy such bodies in Ireland, and they account for about ten percent of the gross national product and about seven percent of the total work force.²⁴

As a state-sponsored body, the ESB is a conduit of governmental subsidies. The fuel purchasing policy of the ESB is the means for shoring up other parts of the state-owned energy industry.²⁵ For example, the ESB pays the state gas company, Bord Gais Eireann, substantially more than the latter pays for gas from Marathon Petroleum's Kinsale gas field off the southwest coast of Ireland.²⁶ The ESB also pays high prices for peat from the state peat company, Bord na Mona. The 1990 average cost for peat was twice as much as gas (£34.42 per MWh versus £17.12 per Mwh) and nearly

20. The Electricity (Supply) (Amendment) Act of 1982 permits the ESB to engage in aquaculture. No. 22 (1982). The Electricity (Supply) (Amendment) Act of 1988 expands the powers of the ESB to establish new companies, lend money, and guarantee debt, subject to governmental consent. No. 17 § 2 (1988). The Act also expands the power to distribute and sell coal, coal-based products, electricity by-products and other products. *Id.* §§ 3, 4, 5. The ESB interprets its current mission in a twofold way: 1) to provide consumers with quality energy services at competitive prices with due care for the natural environment, and 2) to support national economic progress by engaging in profitable ancillary activities. ESB, 1991 ANN. REP. inside front cover (1992).

21. The ESB's legal form has been given a surprising number of other names, including: semi-state body, statutory undertaker, state authority, state organization, state enterprise, public enterprise, and public corporation. *See, e.g.*, DAVID G. MORGAN & GERARD HOGAN, ADMINISTRATIVE LAW IN IRELAND, 103 n.1 (2d ed. 1991); *see also* B. CHUBB, THE GOVERNMENT AND POLITICS OF IRELAND, 271 (2d ed. 1982). The legal form has also been equated with the French concept of *établissement public national de caractère industriel et commercial*, which is the legal form for Electricité de France. *See* C. Stevenson, *Public Development and the Irish Planning System*, 8 URBAN LAW AND POLICY 33, 41 (1986).

22. MORGAN & HOGAN, *supra* note 21, at 104.

23. *Id.* at 124. Section 27 of the 1927 Act provides that the ESB "shall be a body corporate having perpetual succession and may sue and be sued under its said style and name." It is not an ordinary statutory company which would be registered under the Companies Act, 1963.

24. *Id.* at 103 (citing 1991 statistics from the Dept. of Finance).

25. A. HOLMES, ELECTRICITY IN EUROPE 99 (1988). *See also* MORGAN & HOGAN, *supra* note 21, at 121-22 (noting that imports of gas and peat might be cheaper).

26. HOLMES, *supra* note 25, at 99.

three times as expensive as coal (£12.17 per Mwh).²⁷ And following a policy dating from the 1930s, the ESB takes almost fifty percent of Bord na Mona's output and burns it in peat-fired stations that generate nearly 500 MW of electricity.²⁸

In the case of other European countries where there is a state-owned monopoly over electricity, the governmental responsibilities for oversight of the Irish electricity industry are divided among a number of ministries. The most important of these ministries is the Minister for Transport, Energy and Communications.²⁹ Other ministries, such as the Minister of Finance, the Minister for the Environment, the Minister for Agriculture, and the Minister of Labour, also have a role in overseeing of the ESB. Acting through its ministries, the government is the ultimate authority regarding national policy on the supply of electricity.³⁰

The government has the power to appoint the members of the board of the ESB, and to remove them.³¹ In 1977, the government adopted legislation to provide for the election of worker-directors to the boards of the seven largest commercial state-sponsored bodies, including the ESB.³² The Minister of Labour issued an order providing that the ESB have twelve directors/members, four of whom represent the work force.³³ The government's power to dismiss the ESB's board in its entirety remains an important means of control over ESB action. In 1987, for example, the (Fianna Fáil) Government threatened publicly to remove the board unless the ESB paid rates which the ESB was disputing to local authorities before the Circuit Court.³⁴ The ESB ultimately conceded. The ESB's obligation to pay

27. ELECTRICITY SUPPLY BOARD, 1990 ANN. REP. 8 (1991). The 1991 Annual Report does not expressly disclose this type of information for 1991.

28. HOLMES, *supra* note 25, at 99. According to the ESB, peat accounts for about 14% of the fuel used in Ireland's electricity generation. See 1991 ANN. REP., *supra* note 20, at 1. This means that the subsidization of Irish peat is within the European Commission's policy that no more than 20% of a Member State's electricity production can be derived from subsidized indigenous fuels. The cumulative effect of peat subsidies and subsidies to other indigenous fuels in Ireland may lead to a breach of the Commission's policy, although the rigidity of this policy has to be questioned. See generally L. Hancher, *State Aid for German Lignite Power Station*, 3 UTIL. L. R. 118-19 (1992).

29. Under the 1927 and 1945 Acts, the relevant ministerial post was the Minister for Industry and Commerce. The post was renamed to the Minister for Commerce, Industry and Energy in the 1970s. It subsequently changed to Minister of Energy in early 1993.

30. It should be noted, however, that the ESB also has a formal statutory role in the formulation of national policy; it has been appointed as an advisor to the government on the use of resources for the generation of electricity, the location of the transmission system, and other matters. Electricity Act, No. 27 (1927).

31. *Id.* §§ 2(4), 5.

32. Worker Participation (State Enterprises) Act, 1977.

33. Worker Participation (State Enterprises) Order, S.I. No. 186, item 6 (1978).

34. See MORGAN & HOGAN, *supra* note 21, at 129 n.98. Governmental control over the ESB was described by another commentator in 1988 as an "unpredictable but ferocious grip," and the relationship between the two was described as "all but . . . war." See HOLMES, *supra* note 25, at 99. The same commentator also stated that "[t]he formal rules on government/ESB relations are of little relevance in the present climate." *Id.*

rates to local authorities was thereafter clarified in the 1988 Electricity (Supply) (Amendment) Act.³⁵

The government has the power to approve the form of the ESB's accounts and to have such accounts audited by a government-appointed auditor in accordance with the government's regulations as to the time, place, and method of audits.³⁶ The government can also order repayment of outstanding debt from the ESB to the government at any time. This latter power was demonstrated in 1988 when the Minister of Finance persuaded the ESB to repay £31.4 million in outstanding debt instead of the ESB's planned interest payment of £2 million.³⁷

D. *The Recent Restructuring Proposals*

In 1992, the Minister for Energy initiated a review of the structure of the ESB with an eye toward restructuring and re-regulating the industry. Early announcements suggested that the ESB might be divided into two divisions, one for electricity generation and the other for distribution.³⁸ The government was also said to be encouraging private investment in new power plants to be located in Ireland, which would receive equal access to the distribution network. However, it was emphasized by the Minister of Energy that a privatization of existing ESB assets was not planned.³⁹

These plans for restructuring were hindered by a change in government in late 1992.⁴⁰ In May 1993 the process was formally restarted with the announcement of a more detailed set of government-approved proposals. In a press release dated May 21, 1993, the Minister of Transport, Energy and Communications welcomed the proposals for a major restructuring of the ESB:

This will be the first major change to the structure of the ESB since the Board was established in 1927 and represents a significant new departure for the company. The objective is to introduce greater cost transparency and competition into the electricity sector, which is expected to contribute to the efficient and cost effective running of the electricity service.⁴¹

The details of the restructuring are still being fleshed out, but a basic outline has been announced:

35. Electricity Act, No. 17, § 9 (1988).

36. Electricity Act, No. 27, § 7 (1927).

37. MORGAN & HOGAN, *supra* note 21, at 136.

38. *See Ireland Seeks An Internal Energy Market With Allowances For Market Development*, 44 EC ENERGY MONTHLY 4 (Aug. 1992).

39. *Id.* The possible privatization of the ESB has been rumored occasionally in recent years. *See, e.g., Talbert Bid Starts ESB Sale Rumours*, 105 POWER IN EUROPE 7 (Aug. 15, 1991). One guesstimate of the proceeds of a sale of the ESB (in late 1990) was £500 million. *See MORGAN & HOGAN, supra* note 21, at 151 n.78. The ESB issued a statement regarding the proposals for restructuring and/or privatization in its 1991 Annual Report. *See* 1991 ANN. REP., *supra* note 20, at 24.

40. The Fianna Fáil Government was defeated in November 1992, and a new coalition government was formed. According to one report, one of the conditions for the formation of the new government was that any privatization plans for the ESB be dropped. *See* 140 POWER IN EUROPE 18 (Jan. 15, 1993).

41. Press Release, Republic of Ireland, May 21, 1993, Government Information Services, on behalf of the Department of Transport, Energy, and Communications.

ESB will remain as a single company and the restructuring will involve the setting up of business units covering Power Generation, National Grid, Customer Service, Commercial Enterprises and Business Services. The business units will be guided by a small corporate centre, headed by the Chief Executive, and will be managed on transparent and commercial principles. The proposals provide for the establishment of an independent power procurement function within ESB. The new arrangements will be subject to independent public regulation.

The restructuring will ensure that the electricity industry in Ireland complies fully with the EC requirements for an Open Energy Market. Cost transparency between the different elements of the business will be achieved and the new structure will facilitate competition, particularly in the generation of electricity.⁴²

Other regulatory changes have been under discussion but were not announced formally in May 1993. These include the possibility of setting up an Office of Electricity Regulation akin to the regulatory body, OFFER, in Great Britain. This regulatory body might be granted some authority to regulate the fuels used in the generation process, although developing criteria for such decisions would be difficult. The possibility of promoting independent power production at a later stage in the ESB restructuring has also been discussed. As of July 1993, it was not known whether legislative changes would be achieved by piecemeal amendments to the existing legislation or by a new electricity act. One likely statutory amendment is the removal of the ESB's break-even obligation under the 1927 Act.⁴³

E. Assessment of the Restructuring Proposals in Light of the European Commission's Program for an Internal Energy Market

In February 1992, the European Commission issued proposed directives for the completion of the internal market in electricity and gas. The Commission advocated a three-stage approach. The first stage was characterized as the implementation of the existing directives on price transparency⁴⁴ and transit.⁴⁵ The second stage was to be based on three "new agents for change": 1) the abolition of special and exclusive rights, including legal monopolies for imports/exports and production, as well as exclusive rights to construct transmission and distribution lines; 2) the administrative separation of production, transmission, distribution and supply, which is known as "unbundling"; and 3) third-party access to the transmission/distribution grids. The third stage was to have been based on progress made in the second stage. The proposed directives for the completion of the internal market in electricity and gas were scheduled to come into effect on January 1, 1993. However, they engendered much resistance

42. Communication of the Department of Transport, Energy and Communications to the ESB Board of Directors, May 21, 1993 (on file at the International Institute of Energy Law, University of Leiden, The Netherlands).

43. See *infra* note 74.

44. Council Directive 90/337, 1985 O.J. (L 185) 1. For a discussion of this directive, see *infra* notes 77-80 and accompanying text.

45. Council Directive 90/547, 1990 O.J. (L 313) 33.

and had to be withdrawn. New proposals are being formulated, but considerable delays in the program are expected.

The proposed restructuring of the ESB announced by the Irish government has not been compelled by the European Commission, but it does appear to fulfill several of the objectives being sought by the European Commission in the proposed "second stage" of the internal energy market program. The most notable of these are the Commission's proposals for unbundling and cost transparency.

The Commission defines "unbundling" as the separation of the management and accounting of production, transmission, and distribution activities in the context of vertically-integrated companies.⁴⁶ Unbundling is defended by the Commission as essential to ensure transparency of operations, but is not intended to affect ownership structure.⁴⁷

The unbundling of the ESB into separate business units for separate businesses seems to fulfill some of the terms of the Commission's unbundling rules as set forth in articles 23 and 24 of the proposed directive.⁴⁸ However, neither the ESB nor the Irish government has announced that the proposed EC rules on accounting will be followed strictly. The ESB currently does not keep separate accounts for its business activity in electricity generation, transmission, distribution and supply, although it does group its assets and allot asset lifespans in accordance with these categories and in line with international practice.⁴⁹ Presumably, each of the new divisions proposed by the government will maintain their own accounts, and this accounting information will be published. The extent to which Ireland intends to adhere to the Commission's other proposed unbundling rules is unclear.

On the matter of transparency of operations, it should be noted that the Irish restructuring calls for "cost transparency," another Commission goal for electric utilities,⁵⁰ but one that has not yet been translated into binding legislation. The EC has adopted a directive on "price transparency" which has been implemented by Ireland. However, cost transparency and price transparency are two different matters. In fact, the adoption of EC rules requiring cost transparency have been opposed and are likely to face continued opposition by certain Member States.

46. See General Explanatory Memorandum, COM(91)548 final at 8. The specific proposal for unbundling the electricity sector can be found in articles 23 and 24 of the proposed directive for completion of the internal market in electricity. 1992 O.J. (C 65) 13.

47. *Id.* at 8.

48. *Id.* at 8. The proposed unbundling rules include the following: 1) vertically-integrated electricity undertakings shall be divided into as many separate divisions as there are activities; 2) any state aid granted to one division shall not benefit another division; 3) separate accounts for each separate business to be established; 4) such accounts shall be audited and published; 5) such accounts should also distinguish between distribution costs and supply costs and between electricity sales for industrial purposes and for other purposes.

49. 1991 ANN. REP., *supra* note 20, at 34.

50. As early as 1981, the Commission set forth the objective of transparency of "costs incurred in the transformation of primary energy and its distribution to consumers." See G. Lang & G. Wunderlich, *After Price Transparency now Cost Transparency?*, 12 ELEKTRIZITÄTSWIRTSCHAFT 671 (1991) (quoting COM(81)539).

If Ireland does implement a complete system of cost transparency for the ESB, it would seem that such a system would require disclosure of any state aid, as well as of the cost structures at the stages of production, transmission, and distribution. Such requirements might be more acceptable to the ESB if it is allowed to remain the only market player and is guaranteed a reasonable rate of return. If, however, competitors are permitted to enter the market, the ESB would likely prefer more "opaqueness" and resist public disclosure of some of its costs. Another traditional concern of European governments regarding transparency regulation is maintaining confidentiality with respect to energy purchases of end-users. The degree to which Ireland wants to protect the confidentiality of Irish businesses in this regard is also unclear.

The Irish restructuring proposals announced thus far have not included the other two "agents for change" promoted by the Commission. These are the abolition of exclusive rights and third-party access to the transmission grid. Moreover, the Irish government has not taken any steps to introduce a new licensing regime, which could open up the market to competitors.⁵¹

It should be emphasized that the European Commission is not seeking the privatization or change of ownership of state-owned, vertically-integrated monopolies such as the ESB. Such a transformation is not required by the Treaty, nor is it contemplated in any proposed EC legislation.⁵²

II. REGULATION OF ELECTRICITY GENERATION, TRANSMISSION, DISTRIBUTION AND SUPPLY

A. Regulation of Generation

There is little express Irish legislation relating to the generation of electricity other than the provisions of the 1927 Act mentioned above, and the licensing requirements for new generation facilities under the Planning Acts⁵³ and environmental laws.⁵⁴

Independent power production is practically nonexistent in Ireland. The ESB generating stations have a total installed capacity of 3932 MW.⁵⁵ In contrast, the few private independent generators have a total capacity of

51. The present licensing scheme is of little significance. The permission of the ESB is required before any person may generate, distribute or sell electricity to the general public or to particular classes or members of the public. Section 37 of the 1927 Act provides the ESB with the power to issue such permits, subject to some restrictions. Although a few permits have been granted by the ESB to small private generators and suppliers, these operators account for less than one percent of the relevant market. Electricity Act, No. 27, § 37 (1927).

52. See SELECT COMM. ON THE EUROPEAN COMMUNITIES, Seventeenth Report, 1992-93, CMND at 47. Testimony of Mr. Nicholas Argyris, European Commission's Directorate General for Energy: "The Treaty does not allow the Community to become involved in issues of ownership systems within the Member States, so privatization is certainly one area where our proposals have nothing to say. . . . We do not require a structural "unbundling" in the sense of a change of ownership." See also HANCHER, *supra* note 4, at 82, 87-88.

53. *Infra* notes 88-91 and accompanying text.

54. *Infra* notes 96-97 and accompanying text.

55. 1991 ANN. REP., *supra* note 20, at 68.

4-5 MW. The ESB takes power from these private schemes, but no legal obligation to do so.⁵⁶

According to the 1993 restructuring announcements, there promises to be an independent power procurement function within the ESB. Some commentators have reported that the aim is "to ensure that the lowest cost generators gain access to the system first and that an open access system will be available to industrial units supplying the non-franchise market."⁵⁷ Whether such regulation will be put in place remains to be seen. If adopted, it could lead to an increase in the role of independent power producers in Ireland.

As mentioned above, one of the concerns of the Irish government is the regulation of the use of fuels in the electricity generation process. Production is mainly based on fossil fuels, but there is a significant use of high-priced peat.⁵⁸ The peat usage is part of a strategy to provide employment in certain rural areas. As part of the restructuring of the electricity sector, the Irish government is considering an independent regulator that would have some control of the fuel mix used in generation. Any such regulation of this type is likely to be complex. Moreover, the enabling statute for any such independent regulator would have to be squared with the ESB's statutory role as advisor to the government on the use of resources for generation pursuant to section 27 of the 1927 Act.

B. Regulation of Transmission

The ESB has been granted a statutory monopoly over the high voltage transmission network, and it owns all the high voltage lines in Ireland. The ESB's market power is augmented by the fact that Ireland is the only Member State in the European Community that lacks a cross-border interconnector with another Member State. An interconnector with Northern

56. In 1988, there were 28 such suppliers which were paid £519,781 by the ESB for a total quantity of 17,765,654 Kwh. In addition, there are some cogeneration facilities owned by private industry for its own use. For example, in August 1987, the Pfizer Chemical Corp in Cork commissioned a 5.4 MW gas turbine generator. P.D. McGlade, *Technical and Economic Aspects of CHP at Pfizer, COMBINED PRODUCTION OF HEAT AND POWER (COGENERATION)* 139 (J. Sirchis ed., 1990).

57. 150 POWER IN EUROPE 18 (June 4, 1993). Another commentator reported that: "The key change in this restructuring is the advent of competition in generation. The power procurer, although part of ESB, will operate independently, buying power from the most economical source. This source could either be from [ESB's] generation business unit, or from independent power producers or from the proposed UK interconnector." *Irish Energy Sector Opens Up*, 55 EC ENERGY MONTHLY 7 (July 1993).

58. The fuel usage for electricity generation in 1991 was a mixture of coal (40%), gas from the offshore Kinsale gas pool (25%), oil (16%), peat (14%), and hydro and others (5%). See 1991 ANN. REP., *supra* note 20, at 14. The oil price shock of 1973 led to a fuel diversification strategy in Ireland, but one that eschewed the nuclear option. Ireland has no nuclear power station and no known supplies of uranium. E. DONELAN, *ENERGY AND NATURAL RESOURCES LAW IN IRELAND* 117 n.96 (1985). A 1970s proposal to build a nuclear power station at Carnsore in County Wexford was shelved. See *id.* at 118. In 1971, the Nuclear Energy Act, No. 12 (1971), was passed to provide for the establishment of a nuclear energy board with specific functions. However, definite decisions about the future of this board have never been made. Because of the lack of nuclear stations in Ireland, there is no additional Irish legislation of nuclear power. DONELAN, *supra* note 58, at 117-18.

Ireland was destroyed by the IRA in 1975 and has not been rebuilt. While there are plans to link Ireland's grid to the power pool in England and Wales⁵⁹ and to re-establish the Northern Ireland link,⁶⁰ the system remains isolated at present. This isolation may partially explain the relatively static nature of the structure and regulation of the Irish electricity supply industry. Because there has been no threat of competition from foreign companies for nearly twenty years, there has been little need to regulate the relationship between the ESB and other European electricity suppliers. Pressure from the European Commission, as well as the need to accommodate potential investors, is now beginning to change this situation.

C. *Rights to Transit and Third-Party Access*

One of the subjects of EC electricity legislation is the transit of electricity across borders. Transit Directive 90/547 was adopted on October 29, 1990 and has been implemented into Irish law. The Transit Directive has been promoted by the Commission as an important step towards the completion of the internal market.

According to the recitals, the general purpose of the Transit Directive is to increase electricity transfers between grids and to reduce obstacles to the exchange of electricity by "making the transit . . . through grids compulsory."⁶¹ The high-voltage transmission lines and grid operators subject to the directive are listed in annexes, including the ESB. Article 1 of the directive asks the Member States to "take the measures necessary to *facilitate* transit" of electricity. The directive defines transit to cover transactions in which: 1) the grid originates or has its final destination in the Community, and 2) at least one internal border (i.e. an intra-Community border between two Member States) is crossed.⁶² In short, the directive establishes a limited legal obligation on grid operators to negotiate with parties who seek certain types of contracts for transit.⁶³

The implementation of the Transit Directive in Ireland has been described as "academic" because there is presently no cross-border interconnector. Nevertheless, it can be viewed as having some significance since the establishment of this legal duty on the ESB would be viewed as an essential requirement by any potential investor in a cross-border interconnector. The rights to transit help clear the way for such a development.

Another central point of the Commission's legislative program for the European electricity industry is the introduction of a system of third-party

59. In 1991, the ESB and the National Grid Company in the United Kingdom completed a feasibility study on a proposed interconnector. It was concluded that an interconnector would be economically viable provided that the EC supports it with a sufficient subsidy. 1991 ANN. REP., *supra* note 20, at 12.

60. Two standby 110kV links between the two halves of Ireland are scheduled for completion in winter of 1994, and a larger sub-sea link has been suggested. See 154 POWER IN EUROPE 11-12 (July 1993).

61. Council Directive 90/547, Recital 9, 1990 O.J. (L 313) 13.

62. *Id.* art. 2(1)(b), (c).

63. See *id.* art. 3.

access (TPA) to the network. According to this program, the electricity transmission and distribution companies are required to offer terms for the use of their grid to a small number of eligible consumers and distribution companies in return for reasonable payment, provided that there is transmission or distribution capacity available.⁶⁴ The proposal is controversial, and it has been withdrawn at least temporarily due to opposition from a variety of sources.

While a few Member States have third-party access of one sort or another, Ireland is not one of them. There is no obligation of the ESB under Irish legislation to offer access to any third-party to the transmission or distribution system. Until the exclusive rights granted to the ESB are eliminated, there is no reason to expect that there will be other utilities seeking the use of the ESB grid for "wheeling" purposes.

D. Imports and Exports

There are no imports or exports of electricity to or from Ireland. The ESB has been granted a statutory monopoly over imports and exports.⁶⁵ For the purpose of the exercise of such powers, the 1945 Act also grants the ESB, *inter alia*, the power "to do all such things as shall be incidental or ancillary to the exercise of the said extended powers."⁶⁶ It is arguable that section 32 would not permit the delegation of the right to import or export electricity to a third party. In a 1989 letter to the European Commission, a representative of the Irish government stated that "[t]he authorization for anybody else other than the ESB to import or export electricity would have to be granted by further legislation."⁶⁷

Exclusive rights to import or export electricity have been targeted by the European Commission for abolition. In August 1991, the Commission sent a letter to Ireland, among other Member States, to open the infringement proceedings under the EEC Treaty. The Commission considers that these exclusive rights are contrary to Articles 30, 34 and 37 of the EEC Treaty.⁶⁸ The second step in the infringement proceedings was taken in November 1992, when the Commission delivered a reasoned opinion under Article 169 demanding action by Ireland (and four other Member States) regarding exclusive rights to import and export electricity. Ireland was given two months to show that measures were being undertaken to adapt

64. See Proposal for a Council Directive Concerning Common Rules for the Internal Market in Electricity, art. 14, 1992 O.J. (C 65) 10.

65. Electricity Act, No. 12, § 32 (1945).

66. *Id.*

67. Letter from the Permanent Irish Representative to the European Community and to the European Commission in response to the Commission's Questionnaire on monopolies and special or exclusive rights in the field of electricity (May 10, 1989)(on file at the International Institute of Energy Law, University of Leiden, The Netherlands).

68. Articles 30 and 34 of the EEC Treaty prohibit quantitative restrictions on imports or exports and all measures having an equivalent effect between Member States. Article 37(1) provides that "Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that . . . no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States." EEC TREATY, *supra* note 3, art. 30, 34, 37(1).

these exclusive rights. Because of the change in government in November 1992, Ireland requested additional time to respond.⁶⁹ As of June 1993, the electricity division of the Ministry in charge of energy matters would not comment on Ireland's position. In July 1993, the European Commission announced that it would delay legal action before the Court of Justice of the European Communities because two of the other Member States with similar legislation, France and the Netherlands, indicated a willingness to review their import and export rules. In light of the Commission's long pursuit of this matter and of the present lack of a threat from cross-border competition, it seems likely that section 32 of Ireland's 1927 Electricity Act will be amended soon.

E. *Taking of Private Property*

The powers and duties of the ESB with respect to the placement and maintenance of transmission lines has been a matter of controversy in recent years. The applicable standards and procedures have evolved through both judicial interpretation and legislative changes at the national level and not because of any pressure from the European Community, which tends to defer to the Member States on matters involving property law.⁷⁰

In the 1985 case, *Electricity Supply Board v. Gormley*,⁷¹ the Irish Supreme Court held that section 53(5) of the 1927 Act (as amended by section 46 of the 1945 Act) was unconstitutional because it did not provide any statutory obligation to pay adequate compensation to landowners when their property rights are affected by the placement of works on their land by the ESB.⁷² However, the Court upheld the constitutionality of section 98 of the 1927 Act (as amended in 1945), which gives the ESB the compulsory power to lop or cut trees, shrubs, or hedges that obstruct or interfere with any electric wires.⁷³

Shortly after the *Gormley* decision, the *Oireachtas* amended section 53(5) of the 1927 Act. The ESB is now required to compensate landowners when it acts under section 53. A method for resolving disputes over the amount of such compensation is also provided for in the 1985 amendment.

F. *Regulation of Distribution/Supply*

Under current Irish law on electricity pricing, the ESB has a duty to break even each year,⁷⁴ and the tariffs charged to consumers of electricity

69. 50 EC ENERGY MONTHLY 11 (Feb. 1993).

70. Art. 222 of the EEC Treaty states: "This Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership." EEC TREATY, *supra* note 3, art. 222.

71. 129 I.R. 144 (1985).

72. *Id.* at 151.

73. *Id.*

74. All charges made by the ESB "shall be fixed at such rates . . . that the revenue derived in any year . . . from such sales . . . together with its revenue (if any) in such year from other sources will be sufficient and only sufficient (as nearly may be) to pay all salaries, working expenses, and other outgoings . . . properly chargeable to income in that year (including [payments of interest and sinking

are connected to this break-even obligation. As noted above, the 1993 restructuring is likely to involve the elimination of the ESB's break-even obligation in order to allow the ESB to make a profit.

Nevertheless, the Irish government has retained the authority to approve or reject the ESB's proposed tariffs. In recent years, the government has imposed price freezes, which the ESB has had no choice but to accept. For example, in 1988 a five percent value added tax (VAT) was imposed on electricity prices. The ESB has also been instructed to charge the same rates to rural and urban domestic consumers,⁷⁵ although there is a higher standing charge for rural areas. A unified tariff system applies to the whole country, and there are only two tariff bands: domestic and non-domestic.⁷⁶

EC legislation has only had a limited relevance to electricity pricing in Ireland. In June 1990, the Price Transparency Directive⁷⁷ was adopted by the Council of the European Communities for the purpose of "improv[ing] the transparency of electricity and gas prices charged to industrial end-users". This Directive was due to come into force on July 1, 1991, and its implementation in Ireland has been uncontroversial. As its legal basis, the Directive takes Article 213 EEC, which enables the Commission to collect information required for the performance of its tasks.

The Directive basically obligates the institution to make a reporting of a limited nature with respect to undertakings that supply electricity or gas to industrial end-users. Article 1 of the Directive requires the Member States to take the necessary steps to ensure that such undertakings communicate certain information to the Statistical Office of the European Community (SOEC) on a periodic basis. The information reported under this Directive relates to electricity and gas prices for industrial end-users, the pricing systems in use, and a breakdown of consumers with the corresponding volume of consumption.⁷⁸ The form, content, and other features of the information reported under the Directive are set out in annexes.⁷⁹ Under Article 5, when "statistically significant anomalies or inconsistencies in the data" are noted by the SOEC, it is permitted to check on the reliability of the data via inspections.

Several observations can be made about the Price Transparency Directive. The first is that the function of the Directive is primarily to communicate information to the Commission rather than to the consumer. In testimony before a committee of the British House of Lords in late 1992, a Commission representative seemed to describe the system effected by the Directive as follows: "a system of information to the Commission which,

fund payments)) and such sums as the [ESB] may think proper to set aside in that year for reserve fund, extensions, renewals, depreciation, loans, and other like purposes." Electricity Act, No. 27, § 21(2) (1927).

75. MORGAN & HOGAN, *supra* note 21, at 122.

76. See *Electricity Tariff Report 6: Ireland*, 13 POWER IN EUROPE 7-10 (Feb. 13, 1992).

77. Council Directive 90/377, 1990 O.J. (L 185) 16.

78. *Id.* art. 1.

79. See HANCHER, *supra* note 4, at 176 (a summary of the form and content of the required information).

on the basis of that information, publishes, as it were, market prices for certain categories of consumers".⁸⁰

A second observation is that the Directive is directed only at the downstream market. The "transparency" that is being sought under the terms of the Directive relates only to the price charged by electricity and gas suppliers to end-users. It does not apply directly to cost structures at the stages of production, transmission, and distribution, which precede the stage of direct energy supply.

IV. ENVIRONMENTAL PROTECTION REGULATION

The Irish electricity legislation adopted in 1927 and 1945 does not contain many provisions that reflect environmental concerns. For example, the statutory standards for the planning, ministerial approval, and execution of the damming of rivers⁸¹ do not contain any duty to minimize adverse environmental impact, except for the purpose of protecting fisheries.⁸² The ESB is liable to pay compensation to any person who suffers loss by reason of an injury to a fishery or fishing right where such injury is caused by the construction or operation of hydroelectric works.⁸³ The 1945 Act prohibits the discharge of chemicals or other substances designed to injure a generating station into any river or watercourse connected with the production of hydroelectric power.⁸⁴ Such provisions were included primarily to protect the fisheries industry and the ESB operations themselves, rather than to protect the environment per se. The ESB exercises its duties under these Acts in a manner that entails considerable expenditures and raises the level of environmental protection in Ireland.⁸⁵

The Irish planning system was altered significantly with respect to electricity and gas installations as a result of the implementation of the 1985 Council Directive regarding environmental impact assessments (EIAs).⁸⁶ The Irish EIA regulations came into force on February 1, 1990.⁸⁷ These regulations amend the Irish Planning Act and regulations promulgated thereunder⁸⁸ in a number of consequential ways. EIA statements

80. See SELECT COMM. ON EUROPEAN COMMUNITIES, *supra* note 52, at 47 (testimony of Mr. Nicholas Argyris).

81. Electricity Act, No. 12, §§ 4, 6 (1945).

82. *Id.* §§ 4(2), 11.

83. *Id.* § 28.

84. *Id.* § 42.

85. See Y. SCANNELL, *THE LAW AND PRACTICE RELATING TO POLLUTION CONTROL IN IRELAND* 22 (2d ed. 1982) (discussing the ESB's activities).

86. Council Directive 85/337, O.J. (L 175) 40 concerns the assessment of the effects of certain public and private projects on the environment. For a discussion of this directive and the provisions relating to the electricity industry, see HANCHER, *supra* note 4, at 227-29.

87. European Communities (Environmental Impact Assessment) Regulations, 1989 S.I. 25 (1990) (hereinafter EIA Regulations).

88. The Local Government (Planning and Development) Act, No. 28 (1963) gives planning authorities (which are for the most part co-extensive with local authorities) the power to grant or deny planning permissions for any "development" as defined in the Planning Act. "Development" is divided into two broad categories: 1) the carrying out of any works on, in or under land, or 2) the making of any material change in the use of any structures or any other land. "Exempted development" is

must now be submitted for all specified developments made public and regarded by the planning authorities along with any supplemental information related thereto. In accordance with the EC Directive, the Irish EIA regulations have two classes of developments that constitute "specified developments" requiring an EIA statement. Part I of the First Schedule includes thermal power stations or other combustion installations with a heat output of 300 MW or more.⁸⁹ Part II of said Schedules include the following developments:

- (a) industrial installations for the production of electricity [unless included in Part I] with a heat output of 300 MW or more,
- (b) industrial installations for carrying gas, steam and hot water with a potential heat output of 300MW or more; transmission of electrical energy by overhead cables where the voltage would be 200 kV or more,
- (c) installations for hydroelectric production with an output of 20 MW or more, or where the surface area of water impounded would be 30 hectares or more, or where there would be a 30 percent change in the maximum, minimum, or mean flows in the main river channel.⁹⁰

The last requirement (item c) is a variation on the EIA Directive. The implementation of the EIA Directive in Ireland effectively "de-exempted" the electricity and gas industry from its privileged status under the previous planning regime.

A substantial amount of additional Irish law and regulation has been adopted recently to protect the environment.⁹¹ The impetus for these new laws and regulations has been a combination of changes not only in internal Irish policy,⁹² but also in European Community law.

The Air Pollution Act of 1987 is designed to limit and reduce emissions. This legislation empowers the Minister for the Environment to determine and impose emission limits for pollutants from premises.⁹³ Polluting activities require licenses granted by local authorities. The Minister for the Environment has adopted regulations pursuant to this legislation which specify air quality standards for SO₂, NO_x, particulates and lead.

development that may be carried out without planning permission. Under the original Planning Act regime, a large number of developments by the Electricity Supply Board (ESB) and the state gas company, Bord Gais Eireann, fell within the "exempted development" category. These exemptions are provided for in section 4(1)(f) of the Planning Act and in the third schedule (classes 22-25) to the Local Government (Planning and Development) Regulations 1977.

89. EIA Regulations, 1989 S.I., First Schedule, pt. I, § 2 (1990).

90. *Id.* pt. II, § 3(a)(b)(j).

91. See generally MATHESON ORMSBY PRENTICE, SOLICITORS & THE INDUSTRIAL DEVELOPMENT AUTHORITY OF IRELAND, ENVIRONMENTAL LAW IN IRELAND (1992).

92. See, e.g., Environment Council, A POLICY FOR THE ENVIRONMENT: REPORT (Stationery Office 1980); E. Henry, Energy Conservation in Ireland, 1975-1985: Report to the Minister for Transport and Power (Stationery Office 1976). The opinions of certain legal commentators should also be given some credit. See, e.g., Y. Scannell, *Aspects of Pollution Control in Ireland*, 2 DUBLIN U. L. J. 18-20 (1976) (criticizing a "fragmented" and "unsound" system of pollution control in Ireland); see also SCANNELL, *supra* note 85.

93. INTERNATIONAL ENERGY AGENCY, THE ROLE OF IEA GOVERNMENTS IN ENERGY 163 (1992).

The minimum emissions standards have been set by Community legislation.⁹⁴

The Environmental Protection Agency Act of 1992⁹⁵ established the Environmental Protection Agency (*An Ghnómhaireacht um Chaomhunú Comhshaoil*), which has the task of carrying out integrated pollution control in Ireland. New licensing requirements have been or will be issued under Part IV of this Act, which expressly applies to the production of energy in plants with an output of 50MW or greater.⁹⁶

The ESB has reacted to these changes in environmental law and policy. In 1990, it created a senior management position and appointed an officer to monitor the environmental impact of ESB's operations.⁹⁷ In addition, the ESB is promoting energy conservation. The ESB is seeking to maintain annual demand growth at three percent. The ESB is advocating the use of energy efficient light bulbs and equipment, and better insulation and metering in order to encourage energy efficiency.

V. PRODUCTS LIABILITY REGULATION

Ireland has adopted the Liability for Defective Products Act, 1991,⁹⁸ which is designed to implement the EC Directive on products liability.⁹⁹ The Irish products liability law creates potential liability for the ESB for damages caused by "defective" electricity.

The scope of such liability is unclear not only because national laws have not yet been applied to electricity utilities in any of the Member States, but also because Ireland has attempted to narrow the potential impact of the EC Directive. Article 2 of the EC Directive states flatly: "Product" includes electricity." In contrast, Article 1 of the Irish products liability law defines "product" as including "electricity where damage is caused as a result of a failure in the process of generation of electricity." By implication, the Irish law attempts to exclude damages that are not caused by the generation process. This would seem to exclude the application of the Irish product liability law to damages caused by the transmission, distribution, or supply of electricity. Under the present formulation of the Irish law, claims against the ESB for such damages would apparently be covered by existing Irish tort and contract law.¹⁰⁰ It is arguable that the

94. The ESB claimed recently that it is meeting its commitments under the EC's Directive on large combustion plants. Council Directive 88/609, 1988 O.J. (L 336) 1. See 55 EC ENERGY MONTHLY 8 (July 1993).

95. Environmental Agency Protection Act, No. 7 (1992).

96. *Id.* First Schedule, pt. IV, § 2.

97. 1990 ANN. REP., *supra* note 27, at 6.

98. Liability for Defective Products Act, No. 28 (1991). For a general discussion of the Irish products liability act, see T. Bird, *Liability for Defective Products Act, 1991*, 10 IRISH LAW TIMES 188-91 (No. 8) (Aug. 1992).

99. Council Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. 1985 O.J. (L 210) 29.

100. See B. McMAHON & W. BINCHY, IRISH LAW OF TORTS 186-87 (2d ed. 1990) ("The Directive supplements, rather than replaces, the existing remedies in tort and contract").

Irish version is an improper implementation of the EC Directive and could be challenged on pre-emption grounds.¹⁰¹

The Irish products liability law raises the issue of whether the EC Directive is intended to extend the strict liability standard to electricity at all levels of the electricity supply industry or only at some levels. Does the directive create potential liability for defects in generation, transmission, distribution, and/or supply of electricity, or does it only apply to a specific stage of the process? In the U.S., courts have split over the issue of whether electricity flowing through high-voltage transmission lines is a service or a product.¹⁰² Some courts have ruled that electricity is not a product until it is transformed into low-voltage electricity for end-user consumption. Other courts have held that electricity in high voltage lines is a product, thereby allowing recovery to persons who are injured by contact with such lines.

The Irish government seems to have taken the opposite approach from that used by many United States courts: Ireland has apparently tried to limit the strict liability rule in electricity cases by placing potential liabilities upstream at the generation end, rather than downstream at the supply end. The likely explanation for the Irish approach is that the concept of a "defect" in generation is difficult to comprehend and, therefore, to establish. If the Irish law is maintained and succeeds in thwarting products liability claims for damages caused by electricity, it will do little to raise the standard of protection for electricity consumers in Ireland.

VI. PUBLIC PROCUREMENT REGULATION¹⁰³

The European Community has pursued an extensive legislative program in the field of public procurement, some of which is specifically

101. The Irish definition of "product" in the case of electricity is arguably pre-empted because of its conflict with Community law. A judgment by the Court of Justice of the European Communities that could be used in support of this argument is Case 158/88, *Commission v. Ireland*, E.C.R. I-2367, 3 C.M.L.R. 103 (1990). In this case, which involved a series of EC directives on uniform exemptions for international travellers from turnover taxes and excise duties, Ireland attempted to "clarify" the directives by adding a minimum 48-hour requirement not provided for in the directives. The Court of Justice ignored Ireland's economic justifications and instead concluded that the 48-hour requirement was "incompatible" with the directives because no such derogation was expressly provided for in the directives and because it would have limited the exemption rights of those travellers who stayed less than 48 hours.

Ireland's implementation of the EC Directive on products liability seems to fall within the purview of the *Commission v. Ireland* case. The EC Directive on products liability contains provisions that allow Member States to derogate from Community requirements on narrow, specific issues that are subject to explicit reporting obligations to the European Commission. The designation of electricity as a "product" is not one of the issues on which Member States are explicitly permitted to derogate. Therefore, it is arguable that the facial incompatibility requires that the Irish definition be considered pre-empted by the EC Directive regardless of any economic justifications that might be offered in support of the Irish version.

102. See, e.g., Louis Lawrence Boyle, Comment, *Electrifying Solutions for the Shocking and Disparate Treatment of Electricity Within Product Liability Law*, 93 DICK. L. REV. 851 (1989).

103. For a detailed treatment of procurement and the electricity sector, see HANCHER, *supra* note 4, at 235-63.

directed at the utilities sector.¹⁰⁴ Because Ireland has implemented only a portion of these procurement directives,¹⁰⁵ the following describes only the Community legislation.

Prior to January 1, 1993, the utilities sector, which includes water, energy, transport and telecommunication sectors, had been excluded from the application of the EC's public procurement regime relating to public works and public supplies. In 1990, the council adopted Directive 90/531,¹⁰⁶ commonly known as the "Utilities Directive," which set forth procurement rules for contracting entities that provide or operate "fixed networks intended to provide a service to the public in connection with the production, transport or distribution" of electricity, gas, heat, or drinking water.¹⁰⁷ Directive 90/531 is backed up with Community legislation on remedies.¹⁰⁸

On June 14, 1993, the Community adopted three new directives on procurement matters.¹⁰⁹ Two of the directives amend and consolidate the procurement regime for public works¹¹⁰ and public supplies.¹¹¹

The adoption of the Utilities Directive has been described as "an important victory for the Community Institutions in their attempt to expose public firms to greater competition,"¹¹² and it should be "seen in the context of the EC Commission's ongoing efforts to liberalize more generally sectors such [as] telecommunications, electricity and gas."¹¹³ In contrast to the other procurement directives, the distinction between public and private undertakings is not crucial in relation to utilities.¹¹⁴ Even privately-owned utilities are covered by the Utilities Directive as long as they "operate on the basis of exclusive or special rights"¹¹⁵ granted by a Member State.

There are some significant exclusions. While the Directive covers equipment and materials, it does not extend to fuel purchasing. Article 9

104. For a detailed treatment of the public procurement regime generally, including the 1993 directives, see P. TREPTE, *PUBLIC PROCUREMENT IN THE EC* (1993). For a description and analysis of the public procurement rules for utilities, see A. Brown, *The Extension of the Public Procurement Rules for Utilities*, 30 C.M.L. REV. 721-48 (1993).

105. See European Communities Regulations, S.I. Nos. 36, 37, 38 (1992).

106. See 1990 O.J. (L 297) 1 on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors.

107. *Id.* art. 2(2)(a).

108. Council Directive 92/13, 1992 O.J. (L 76) 14, co-ordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors.

109. The new Utilities Directive is 93/38, 1993 O.J. (L 199) 84.

110. Council Directive 93/37, 1993 O.J. (L 199) 54, consolidating Directive 71/305, 1971 O.J. (L 185) 1, as amended by Directive 09/380, 1990 O.J. (L 210) 1 and Decision 90/380, 1990 O.J. (L 187) 55.

111. Council Directive 93/36, 1993 O.J. (L 199) 1, consolidating and amending Directive 77/62, 1977 O.J. (L 13) 1, as amended by Directive 80/767, 1980 O.J. (L 215) 1 and Directive 88/295, 1988 O.J. (L 297) 1.

112. J. McELDOWNEY, *ELECTRICITY LAW HANDBOOK: LAW AND PRACTICE* 66 (1992)(chapter authored by L. HANCHER).

113. BROWN, *supra* note 104, at 722.

114. BROWN, *supra* note 104, at 723.

115. Council Directive 93/38, art. 2(1)(b), 1993 O.J. (L 199) 84.

provides that the Directive shall not apply to contracts awarded by the entities listed in Annexes II and III which list the electricity and gas utilities subject to the Directive. This major exclusion has been linked to the European Commission's progress towards achieving the internal energy market. As one commentator has explained, "until various matters concerning the internal energy market have been resolved satisfactorily, the application of procurement procedures to purchases of electricity and other forms of energy would be a wholly inappropriate and ineffectual way of liberalizing the Community energy market."¹¹⁶ This exclusion will be re-examined by the Council on the basis of a Commission report to be made not later than four years after the Directive's application.¹¹⁷ The exclusion of fuel purchasing is of particular significance for electricity generating companies which operate thermal combustion plants. Other significant exclusions for the electricity and gas industries are those that relate to contracts with affiliated undertakings, contracts under certain value thresholds, and secret contracts involving security interests.¹¹⁸ These exclusions are designed to introduce greater flexibility into the procurement rules as compared to the rules applicable to non-utilities.

A controversial provision in the Utilities Directive is Article 36 (or Article 29 in the unamended Directive 90/531), which is the so-called Community preference rule. This rule allows Member States to give preference to bids with a 50 percent Community content and when two or more bids are considered equivalent, requires Community undertakings to be given preference within a three percent price range. This preferential treatment has been criticized by the U.S. government, among others, for failing to provide predictable treatment to suppliers of non-EC products.¹¹⁹ Of particular concern is the market for power generation and telecommunications equipment.

In an effort to resolve the dispute over the Community preference rule, the United States and the EC concluded a Memorandum of Understanding on government procurement in May 1993.¹²⁰ The Memorandum is essentially an interim agreement with a limited life span of about two years. The Memorandum is the result of bilateral negotiations that were undertaken in the interest of facilitating an agreement on a new GATT Code on Government Procurement, which has been the subject of multilateral negotiations since 1984. The Memorandum shall terminate automatically on the earlier of May 30, 1995 or the entry into force of any expanded Code on Government Procurement. Either party can also terminate the Memorandum on May 30, 1994 upon 30 days prior notice. The reciprocal

116. TREPTE, *supra* note 104, at 15-16.

117. See Council Directive 93/38, arts. 9, 44, 1993 O.J. (L 199) 84.

118. *Id.* arts. 10, 13, 14.

119. See U.S. GOVERNMENT TASK FORCE ON THE EC INTERNAL MARKET, EC 1992: AN ASSESSMENT OF ECONOMIC POLICY ISSUES RAISED BY THE EUROPEAN COMMUNITY'S SINGLE MARKET PROGRAM 19 (1990).

120. Commission Notice 93/C178/16, 1993 O.J. (C 178) 19. The Council approved the Memorandum in a decision of May 10, 1993. Council Decision 93/323, 1993 O.J. (L 125) 1 (containing text of the Memorandum with annexes).

commitments made under the Memorandum are described as a "downpayment" towards an expanded GATT Code on Government Procurement.¹²¹

Under the Memorandum, public authorities in the EC that are subject to the GATT Code on Government Procurement are required to extend to United States bidders the same advantages, products and services as are afforded to Community bidders for public works contracts under the Directive on public works and the Directive on public service contracts. Specific provisions of the Memorandum apply to EC and United States electricity utilities.¹²² On the Community side, the EC has agreed to extend the benefits of the Utilities Directive to United States products, suppliers and contractors in the award of contracts by EC entities in the electricity sector and to make the benefits of the related Community rules on remedies available to United States suppliers and contractors for such awards. On the United States side, the federal government has agreed to waive the Buy America Act¹²³ to the award of contracts by federal entities¹²⁴ in the electric power sector above a threshold of \$6.5 million for works contracts and \$450,000 for goods contracts. The United States also agreed to abide by the substance of the Federal Acquisition Regulations with respect to Community bidders. The Memorandum applies to tenders issued during its period of validity.

At the time of the conclusion of the Memorandum, the number of EC entities covered by the Memorandum exceeded the number of United States entities. The EC entities are listed in an annex and include most of the major electricity suppliers in the EC Member States, both public and private. The United States federal government was able to make commitments with respect to federal agencies, but not with respect to "sub-federal" entities. Public procurement at the level of state or local government is not preempted by federal law, and therefore, any commitments on state or local procurement has to come from those sub-federal governmental authorities. Pursuant to Article 6 of the Memorandum, the Office of the United States Trade Representative has sought the voluntary commitment of sub-federal entities to be included in the final entry lists. In a letter accompanying the Memorandum,¹²⁵ the United States Trade Representative promised to attempt to obtain final commitments from all 50 states, municipalities with a population over 500,000 and entities operating in or serving such municipalities. The aim is to complete this process in time for the final phase of negotiations scheduled to begin in January 1994. Moreover, the United States Trade Representative stated that "[a]ny commitments by sub-federal entities will be bound in legislation implementing a final procurement agreement."¹²⁶

121. *Id.* sixth recital.

122. *Id.* art. 3.

123. 41 U.S.C. § 10a (1993).

124. The United States federal entities in the electric power sector are the Tennessee Valley Authority and the Power Marketing Administrations of the Department of Energy.

125. 1993 O.J. (L 125) 53.

126. *Id.*

With respect to the Irish electricity sector, the EC procurement regime has not yet had any significant impact on competition. The Utilities Directive contains significant exclusions that preserve much of the status quo. Some of these exclusions can be narrowed by the Council following a Commission review in not less than four years. Under the terms of the 1993 Memorandum between the U.S. and the EC, American companies are entitled to receive the benefits and protection of the Utilities Directive and other EC procurement legislation in bidding for the relevant contracts in the Irish electricity sector, and the EC firms such as the ESB are afforded similar treatment in the U.S.

VII. Summary and Conclusions

The implementation of Community legislation in Ireland has begun to change the rather static and insulated legal regime applicable to the ESB. This change is most evident in the new standards and liabilities that have been adopted in Ireland recently to protect the environment and the consumer and to promote openness in procurement activities. In particular, the implementation of the EC Directive on environmental impact assessment compelled significant changes to the Irish planning laws which had previously exempted much of the ESB's developmental projects. Emissions standards have also been established in compliance with Community directives. With respect to products liability in the electricity sector, the Irish government has attempted to narrow the impact of the EC products liability directive, but this effort is legally suspect.

The EC Directives on price transparency and transit have been implemented in Ireland, but neither has had much significance. Because there are no cross-border interconnections, the right to transit is presently of little concern to the ESB. Similarly, the European Commission's campaign to abolish the ESB's exclusive rights to import and export, while likely to succeed, is unlikely to have any impact in Ireland as long as there are no interconnections. Nevertheless, these legal changes are important for clearing the path for potential investment in interconnections.

This article reveals that the European Commission is concerned not only with removal of barriers to electricity trade, such as the exclusive statutory rights to import and export, but also with matters that are more "internal" to a Member State, such as the structural organization and general accounting methods of state-owned utilities. While the Commission's program for the completion of the internal energy market has been stalled, many of its proposed methods for promoting greater integration and competition within the European electricity sector are compelling. They influence national decisions on regulation and structure of the electricity industry. The Irish case is an example of the force of the ideas behind the Commission's program. In line with the Commission's "unbundling" proposals, the ESB is facing its first major change to its structure since it was established in 1927. Other Irish measures, albeit modest ones, to promote greater transparency and competition are also being introduced or considered.

The present changes in structure and regulation of the Irish electricity system are modest when compared to the dramatic changes in countries like the United Kingdom. Given the Irish political climate, the tradition of statism, and the relatively small size of the market, there is no reason to expect the government to embrace competition-oriented measures such as the break-up and privatization of the ESB, third-party access to the grid, or an open licensing system for private power producers. However, the present restructuring helps to prepare Ireland for participation in the EC's internal market in electricity and to open the door for the continued regulatory reform in the future.

