

The Competition Authority

An tÚdarás Iomaíochta

DETERMINATION OF MERGER NOTIFICATION M/10/026 -

ESB/NIE

Section 21 of the Competition Act 2002

Proposed acquisition by Electricity Supply Board of the entire share capital of Northern Ireland Electricity plc and its subsidiaries and certain other subsidiaries of Viridian Capital Limited and Viridian Group Limited.

Dated 29 October 2010

SECTION I: Introduction

1. On 05 August 2010, in accordance with section 18 of the Competition Act 2002 (the "Act"), the Competition Authority (the "Authority") received a notification of a proposed transaction whereby Electricity Supply Board ("ESB"), through ESBNI Limited ("ESBNI"), would acquire sole control of Northern Ireland Electricity plc and its subsidiaries ("NIE") from Viridian Capital Limited and Viridian Group Limited (together "Viridian").
2. The proposed transaction also involves the acquisition by ESB of NIE Powerteam Limited ("NIE Powerteam"), Powerteam Electrical Services (UK) Limited and its subsidiary Powerteam Electrical Services Limited (together "PES") and Capital Pensions Management Limited from Viridian.
3. The proposed transaction involves, *inter alia*, the acquisition by ESB of the electricity transmission and distribution systems¹ in Northern Ireland. The proposed transaction does not involve the electricity generation or supply business activities of Viridian.
4. The Authority considered the following markets as part of its assessment of the proposed transaction:
 - the provision of engineering consultancy services in the State;
 - the provision of high voltage electricity installation services in the State;
 - the transmission and distribution of electricity in the State; and
 - electricity generation and wholesale supply in the Single Electricity Market.

¹ Electricity transmission and distribution systems encapsulate the infrastructure through which the transmission and distribution of electricity occurs. The electricity transmission infrastructure in the State includes 400kV, 220kV, and certain 110kV power lines, sub-stations and interconnectors. In Northern Ireland the electricity transmission system operates at 275kV and 110kV. The electricity distribution infrastructure in the State includes 110kV (tail fed) power lines and low voltage sub-stations.

5. The Authority identified one area of competition law concern during the course of its assessment. The Authority was concerned that, post acquisition, ESB would be in a position to acquire and use “commercially sensitive information²” gained from its ownership of NIE to the competitive advantage of ESB’s generation and supply business activities on the island of Ireland.
6. On 8 October 2010, ESB submitted a proposal to the Authority pursuant to section 20(3) of the Act to address the Authority’s concern. The Authority entered into discussions with ESB as a result of which ESB submitted a finalised proposal in the form of undertakings to the Authority (the “Proposal”).
7. The Authority is of the view that the Proposal is appropriate and effective to address the Authority’s concern. Furthermore, the Proposal, having been taken into account by the Authority and forming part of the basis of its determination, is binding on ESB pursuant to section 20(3) of the Act.

The Undertakings Involved

The Acquirer

8. ESB is a corporation established and operated under statute³ and is active in the electricity sector in the State and internationally. ESB is majority owned by the Irish Government with the Minister for Finance and the Minister for Communications, Energy and Natural Resources holding 85% and 10% respectively of ESB’s issued share capital. The remaining 5% of the issued share capital is held by an Employee Share Ownership Trust.
9. ESB and its 75 subsidiaries comprise a vertically integrated electricity business. ESB is active at all levels of the electricity sector in the State, namely: power generation, electricity transmission and distribution and the wholesale and retail supply of electricity. ESB is also active in the provision of engineering consultancy services⁴; for the most part it provides these services to businesses engaged in the construction and refurbishment of thermal power plants and wind farm developments both in the State and internationally.
10. ESB is the licensed owner⁵ of the electricity transmission and distribution systems in the State.
11. For the year ending 31 December 2009, ESB Group generated a worldwide turnover of approximately €3,014 million including a turnover of approximately €2,829 million in the State.

² Commercially sensitive information means information held/and or obtained by NIE or any of its affiliates or related undertakings in the discharge of NIE’s functions in terms of planning, developing and maintaining the electricity transmission and distribution systems in Northern Ireland.

³ ESB was established by the Electricity (Supply) Act 1927 and operates pursuant to the Electricity (Supply) Acts 1927 to 2006.

⁴ Engineering Consultancy services include the provision of project management, surveying, electrical, mechanical and civil design, environmental studies and the preparation of submissions for planning consents.

⁵ The licensed operator of the electricity transmission system is EirGrid plc. ESB Networks Limited is the licensed operator of the electricity distribution system in the State.

The Target Group

12. The Target Group (being the group of companies to be acquired by ESB) is NIE⁶, NIE Powerteam, PES and Capital Pensions Management Limited. NIE is a wholly-owned subsidiary of Viridian Group Limited ("VGL"), a privately owned vertically integrated energy business, acquired by Arcapita Bank B.S.C.(c) in December 2006.⁷ NIE is the licensed owner⁸ of the electricity transmission and distribution systems in Northern Ireland.⁹
13. NIE Powerteam, PES and Capital Pensions Management Limited are each wholly-owned subsidiaries of Viridian Capital Limited, a subsidiary of VGL.
14. NIE Powerteam is active in the provision of electrical installation and refurbishment services¹⁰ only to NIE in relation to its electricity transmission and distribution systems in Northern Ireland.
15. PES is active in the provision of electrical installation services to third party utility and industrial customers in Northern Ireland, Great Britain and the State.
16. Capital Pensions Management Limited provides intra-group¹¹ pension services to NIE.
17. For the year ending 31 March 2009, the Target Group had a worldwide turnover of €289.02 million and a turnover of €7.12 million in the State.¹²

The Proposed Transaction

18. Under the terms of the proposed transaction, a newly established company and wholly owned subsidiary of ESB, ESBNI, will acquire the entire share capital of the companies making up the Target Group. In essence, ESB will acquire all of the electricity transmission and distribution systems assets in Northern Ireland from Viridian.

⁶ The four subsidiaries of NIE plc that will be acquired as part of the proposed transaction are: NIE Power Limited, NIE Generation Limited, NIE Enterprises Limited and NIE Limited, all of which are registered in Northern Ireland and are currently dormant.

⁷ This acquisition was cleared by the Competition Authority in its decision of 15 November 2006 – *M/06/075 Decision*.

⁸ The licence held by NIE is granted under the Electricity (Northern Ireland) Order 1992 (as amended). NIE is also active in the management of the Land Bank on behalf of customers and on the direction of the Northern Ireland Authority for Utility Regulation. The Land Bank is comprised of power station properties and residual title to those properties. NIE effectively acts as a custodian of the Land Bank and its responsibilities and obligations towards the Land Bank are set out in its Licence.

⁹ SONI Limited, an independent company and a wholly owned subsidiary of EirGrid, is responsible, *inter alia*, for the operation, management and access to the electricity transmission system in Northern Ireland. The electricity distribution system in Northern Ireland is both owned and operated by NIE subject to conditions contained in the TAO licence issued to it by the Department of Enterprise, Trade and Investment (Northern Ireland): see further in paragraphs 71 et seq below.

¹⁰ Electrical installation and refurbishment, hereinafter "electrical installation services", involves the construction and maintenance of electricity overhead lines and sub-stations and includes the provision of labour (including project management), plant and civil engineering work (with or without the supply of materials).

¹¹ The proposed transaction involves the transfer of the Viridian Group Pension scheme to the NIE Group.

¹² Using the monthly average ECB exchange rate for March 2009 of €1=£0.91966.

19. According to the parties, it is the intention of ESB that NIE will operate as a standalone business post-transaction. ESB intends that NIE will continue to operate under the NIE trademark, which is also to be acquired as part of the proposed transaction.

Rationale for the Proposed Transaction

20. ESB states that the proposed transaction will increase its scale and give it a presence outside of the State in a core business area, that being electricity transmission and distribution systems and certain related services. According to ESB, the proposed transaction will [...].

Third Party Submissions

21. No third party submissions were received during the 10 day period for third party submissions.

Investigation

22. The proposed transaction was also notified to the Office of Fair Trading ("OFT") in the United Kingdom ("U.K.") on 12 August 2010. With the agreement of the parties, the Authority consulted extensively with the OFT in relation to the proposed transaction. The proposed transaction was cleared by the OFT on 8 October 2010.
23. The Authority met with the Commission for Energy Regulation ("CER") on 18 August 2010 to discuss the proposed transaction. CER is the independent regulator of the electricity and natural gas sectors in the State. CER indicated to the Authority that it did not have any concerns regarding the proposed acquisition. CER stated that it would expect efficiencies in the planning and expansion of the electricity transmission systems to result from the proposed transaction, which they would view as a positive outcome.
24. The Authority also consulted with the Northern Ireland Authority for Utility Regulation ("NIAUR") in relation to the proposed transaction. NIAUR is an independent non-ministerial government department which ensures the regulation of the Electricity, Gas and Water and Sewage sectors in Northern Ireland. NIAUR provided the following comment on the proposed transaction:

"This transaction has been decided in accordance with the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 to be a Single Electricity Wholesale Market (SEM) matter. It is considered that there is already a strong level of protection in the NIE plc Transmission and Distribution licence relating to competition and non-discrimination. However, to ensure that the transaction would not lead to a substantial lessening of competition and to reflect the purchase by an electricity undertaking with significant generation and retail market share in the SEM a consultation will be carried out identifying key relevant licence conditions. Changes may be made to the licence once this consultation has been completed. Similarly, some changes may be made to the ESB Transmission System Owner Licence."
25. The Authority also discussed the proposed transaction with the Department of Communications, Energy and Natural Resources

("DCENR") on 14 September 2010. DCENR provided an overview of its work on assessing the State's implementation of the European Union's Third Energy Package.¹³ DCENR confirmed that the proposed transaction is not considered part of DCENR's assessment of the Third Energy Package and that the Department for Enterprise, Trade and Investment in Northern Ireland is currently conducting its own consultation on the implementation of the Third Energy Package in its jurisdiction.

26. During the course of its market inquiries the Authority contacted a number of companies active in the electricity sector in the State and/or Northern Ireland. The competition concerns raised during these market inquiries can be summarised below:
- The proposed transaction would strengthen ESB's existing dominant position.
 - The proposed transaction would allow ESB to use its dominant position in electricity transmission and distribution on the island of Ireland to the advantage of its own electricity generation and supply businesses.
 - The proposed transaction would provide ESB with increased knowledge of planning and development of the electricity transmission and distribution systems in the State and Northern Ireland, which ESB could use to the advantage of its own electricity generation and supply businesses.
 - Through the acquisition of PES, ESB would remove a significant electrical installation services provider from the market.
 - ESB could use the acquisition of PES to foreclose the market to other electrical installation service providers tendering for ESB contracts.
27. The Authority addresses these competition concerns in the Competitive Assessment section of this Determination.
28. On 1 September 2010, the Authority served Requirements to provide Further Information, pursuant to section 20(2) of the Act, on both ESB and Viridian. The parties complied with these Requirements on 17 September 2010, which became the new "appropriate date" in accordance with section 19 (6)(b)(i) of the Act.

¹³ The EU's package of EU electricity and gas directives is collectively known as the Third Energy Package ("TPE"). The TPE follows the sector inquiry published by the EU Directorate for Competition ("DG Comp") in early 2007 (the "Sector Inquiry"). This inquiry concluded that reform of the European energy sector is developing too slowly largely on account of the market power enjoyed by vertically integrated incumbent energy suppliers. The legislative package outlines a range of unbundling options allowing each Member State to choose which option suits its particular circumstances. Member States have three options: (i) Full ownership unbundling; (ii) The Independent System Operator (ISO) model; or (iii) The Independent Transmission Operator model (ITO). The parties stated that in addition, a Member State may decide not to implement any of these options where the existing transmission arrangements guarantee more effective independence of the Transmission System Operator than the ITO model.

29. The Authority met with the parties on 1 and 4 October 2010 during which the concern of the Authority, as expressed above in paragraph 5, was discussed. The Authority asked the parties to respond to this concern.
30. Further discussions took place between ESB and the Authority following the above mentioned meetings. As stated above, on 8 October 2010, ESB submitted a proposal to the Authority, pursuant to section 20(3) of the Act. Following further discussions, ESB provided a finalised proposal in the form of two undertakings ("the Proposal") to the Authority. This Proposal forms part of the basis of the Authority's determination and is therefore binding on ESB pursuant to section 20(3) of the Act.

Analysis

Introduction

31. The electricity industry consists of a number of distinct activities at different segments of the supply chain: generation and wholesale supply, transmission, distribution and retail supply. Table 1 provides a summary of the various segments of the electricity sector in the State and Northern Ireland.

Table1: Overview of the Electricity Sector in the State and Northern Ireland

Segment	The State			Northern Ireland		
	Owner	Operator	Regulator	Owner	Operator	Regulator
Generation	ESB and others	ESB and Others	CER	ESB and others	ESB and others	NIAUR
Transmission System	ESB	EirGrid	CER	NIE	SONI	NIAUR
Distribution System	ESB Networks	ESB Networks Ltd	CER	NIE	NIE	NIAUR
Suppliers (SEM) (ESB and others)	N/A	Various	CER	N/A	Various	NIAUR

Source: Market inquiries by the Authority and information provided by the parties.

32. Table 1 shows that ESB is a vertically integrated electricity business, active in all segments of the electricity in the State. Although ESB has established a retail presence in Northern Ireland through its subsidiary ESB Independent Energy, this company only supplies electricity to industrial and commercial customers. ESB does not at present supply electricity to domestic customers in Northern Ireland.
33. ESB is also active in electricity generation in Northern Ireland. As an electricity generator, wholesaler and retail supplier on the island of Ireland ESB is obliged to compete in the Single Electricity Market on the island of Ireland.
34. The Single Electricity Market ("SEM") came into operation in 2007 and is based on the concept of a "gross mandatory pool".¹⁴ This requires that all generators with a generation capacity of 10MW or greater must, as part of their licence conditions, make their output available to the SEM. In addition, generators are prohibited from entering into agreements for the supply of their output outside of the SEM.
35. Like ESB, Viridian is also an integrated electricity business active in electricity generation and supply, and also electricity transmission and

¹⁴ Electricity Regulation Act 1999 (Market Arrangements for Electricity) Regulations 2003.

distribution (through NIE). Like ESB Viridian is also obliged to compete in the SEM.

36. The proposed transaction involves ESB acquiring the electricity transmission and distribution systems in Northern Ireland from Viridian. The proposed transaction also involves ESB acquiring Viridian's electrical installation business activities and intra-group pension services. ESB is not acquiring any electricity generation or supply businesses of Viridian as part of the proposed transaction.¹⁵

Relevant Product and Geographic Markets

Views of the parties

37. The parties state that the proposed transaction concerns the following product markets:
- (i) the transmission of electricity;
 - (ii) the distribution of electricity; and
 - (iii) the provision of electrical installation services.
38. The parties rely on previous decisions of the European Commission ("EC") which have held that the transmission and distribution of electricity are separate product markets. The parties further rely on the EC's definition of the geographic scope of electrical transmission and distribution systems, which found it to be limited to the area covered by those respective systems.¹⁶
39. The parties also submit that there is a separate market for electrical installation services as distinct from engineering consultancy services. The parties state that this distinction may be made given that the two activities require different skills, expertise, certifications and tools. Furthermore, the parties state that these services are generally procured on a separate basis.
40. The parties also state that there is a narrower market for the provision of electrical installation services to the electricity sector.
41. The parties submit that the relevant geographic market for electrical installation services is at least as wide as the U.K. and the State.

EC Decisions concerning the Electricity Sector

42. In previous decisions the EC has considered the following product markets as relevant to the electricity sector¹⁷:
- generation and wholesale supply of electricity;
 - electricity transmission;
 - distribution of electricity; and

¹⁵ [...]

¹⁶ Case COMP/M.3696 – E.ON/MOL and Case COMP/M.4922 – EMCC.

¹⁷ Case No. COMP/M.4672 – E.ON/Endessa Europa/Viesgo; COMP/M.3440 – ENI/EDP/GDP; COMP/M.4180 – Gas de France/Suez; COMP/M.3696 – E.ON/MOL all referred to in case COMP/M.4922 – EMCC at paragraph 11.

- retail supply of electricity to end-customers.
43. The EC has held that the operation and management of electricity transmission and distribution systems constitute natural monopolies and that no competition takes place at these levels.¹⁸
44. The EC has also held that if parties operate transmission systems in different regions¹⁹ or countries²⁰ the parties' activities do not overlap as each electricity transmission system constitutes a separate product market. Furthermore, where there are a number of regional electricity distribution systems in one country, each distribution system constitutes a separate product market.²¹

Views of the Authority

45. For the purposes of examining the proposed transaction, the Authority considered it necessary to assess the potential effects of the proposed transaction in the following markets:

A: Generation of Electricity on the island of Ireland

46. Electricity can be generated in a number of different ways by burning fuels such as: oil, coal, gas, peat or biomass or through the use of hydro and wind power. Conventional power plants use fossil fuels to generate electricity whilst renewable electricity generation involves wind and hydro power. All electricity generators in the State must obtain, from the CER, an Authorisation to Construct or Reconstruct a Generating Station and a Generator Licence.
47. Over the past decade the amount of available installed generation capacity across the island of Ireland has increased by over 90%.²² The increase in new capacity has come from independent generators, including ring-fenced entities connected to the incumbents such as ESB Independent Generation. Figure 1, below, illustrates the growth of installed capacity by company from 2002 to present.

¹⁸ COMP/M.3696 – E.ON/MOL at paragraph 212 and 215 and referenced in COMP/M.4922 –EMCC at paragraph 12.

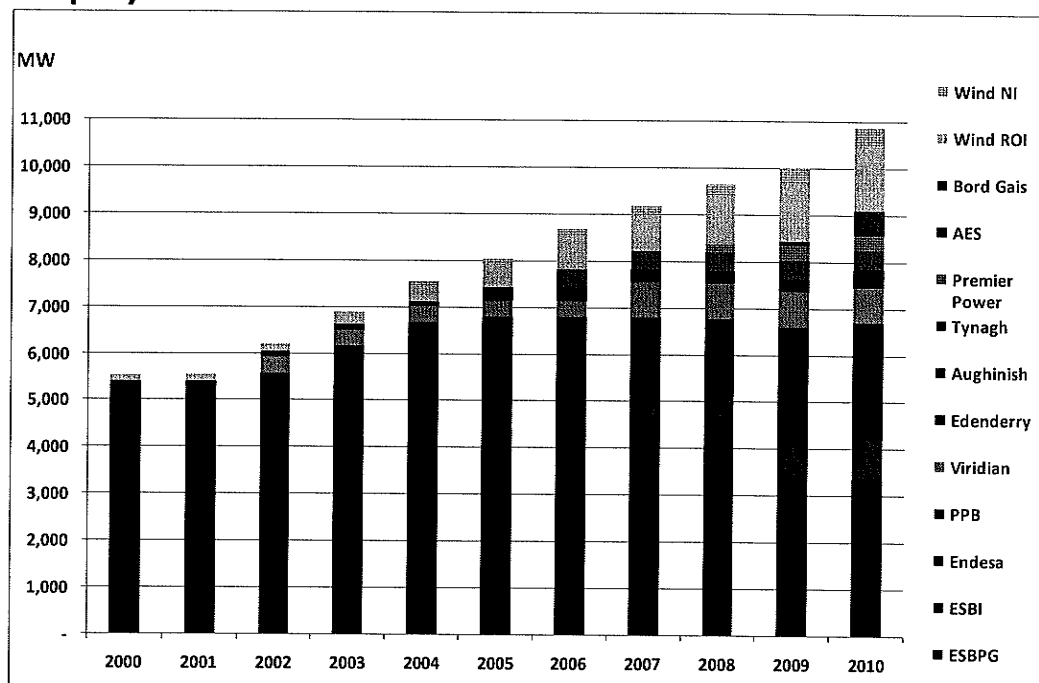
¹⁹ COMP/M.3696 – E.ON/MOL and COMP/M.4922 – EMCC.

²⁰ *Ibid* COMP/M.4922 - EMCC

²¹ *Ibid* at paragraph 217.

²² EirGrid plc, the electricity transmission system operator in the State, prepares an annual generation adequacy report, the latest edition of which is *Generation Adequacy Report 2010-2016*.

Figure 1: Growth in all-island installed capacity by company



Source: SEM Market Monitoring Unit August 2010.

48. There is currently about 1,400 MW²³ of renewable electricity generation, mainly in the form of wind farms, connected to the electricity transmission and distribution systems in the State. This figure is expected to rise sharply over the next few years as a further 1,500 MW of generation capacity from wind farms which are currently under development become available. There is currently 297 MW of renewable electricity generation capacity connected to the transmission and distribution systems in Northern Ireland with a further 1,200 MW of capacity from new wind farms due to become available over the next few years.²⁴
49. In keeping with the Irish Government's decision to increase its target from 33% to 40% of electricity consumption coming from renewable sources by 2020, the CER set the size of applications it would consider for connection to the transmission and distribution systems in the third round of connection offers known as "Gates"²⁵ at 3,900 MW.²⁶
50. Due to their smaller size, relative to conventional power plants, wind farms are in most cases connected to the distribution system rather than to the transmission system. The CER adopts a Group Processing Approach for connection of wind farms under which a number of wind farms in close proximity share the same connection line. This approach ensures that new capacity is added to the electricity

²³ Mega Watts ("MW")

²⁴ Planning permission has not yet been secured for 961 MW of this figure of 1,200 MW. Source: EirGrid, Renewables Integration Development Plan.

²⁵ Gate 3 is the third in a series of CER renewable connection decisions since 2005, under the Group Processing Approach to Renewable Connections. The process allows for a large number of applications for system connections to be dealt with simultaneously.

²⁶ *National Renewable Energy Action Plan*, submitted by the Government of Ireland under Article 4 of Directive 2009/28/EC.

transmission and distribution systems in a scheduled way allowing for any related re-enforcement of the electricity transmission or distribution systems to be conducted ahead of the connection.

51. Table 2 below provides an overview of the main electricity generators in the State and their estimated market share of electricity generation in the SEM.

Table 2: Share of Installed Generation Capacity by Company 2006-2010 on the island of Ireland

Company	2006	2007	2008	2009	2010
AES	0.0%	0.0%	0.0%	0.8%	0.7%
Aughinish	1.8%	1.7%	1.7%	1.6%	1.5%
Bord Gais	0.0%	0.0%	0.0%	0.0%	3.9%
Edenderry	1.3%	1.2%	1.2%	1.1%	2.0%
Endesa	0.0%	0.0%	0.0%	9.7%	8.9%
ESBtg	7.9%	7.5%	7.1%	6.9%	7.4%
ESBPG	48.8%	46.1%	43.8%	32.6%	29.8%
PPB	18.2%	17.2%	16.4%	14.2%	13.1%
Premier Power	0.0%	0.0%	1.7%	3.3%	3.0%
Tynagh	4.3%	4.0%	3.9%	3.7%	3.4%
Viridian	3.8%	7.8%	7.4%	7.2%	6.6%
Wind ROI	8.1%	8.2%	10.1%	12.0%	12.3%
Wind NI	1.3%	1.9%	2.7%	3.0%	3.4%
Moyle Interconnector	4.5%	4.3%	4.1%	3.9%	3.6%
Total	100.0%	100.0%	100.0%	100.0%	100.0%

Source: SEM Market Monitoring Unit August 2010

52. ESB's market share of generation has fallen over the past four years. Endesa, a Spanish-owned energy company, entered the market in 2009 through the purchase of a portfolio of plants and potential sites from the ESB with a capacity of 1,068 MW. Bord Gáis has built a portfolio of generation plants through the acquisition of a renewable energy company, SWS, and the construction of a 445 MW Combined Cycle Gas Turbine (CCGT) plant in Whitegate, County Cork.
53. Although a number of companies have entered the generation market in recent years, ESB, Viridian and their affiliated companies retain substantial interests in electricity generation. ESB's two key electricity generation portfolios are ESB Power Generation ("ESB PG") and ESB Independent Generation ("ESBtg") with a combined market share of 37.2% of installed capacity. Viridian Power and Energy ("VP&E") owns conventional (thermal power plants) and renewable generation (wind farms) in the State while NIE PPB²⁷ is Viridian's power procurement business in Northern Ireland.
54. The regulatory obligations faced by generator operators in the State and in Northern Ireland are sufficiently homogeneous to suggest that there is a single electricity generation market on the island of Ireland.

²⁷ NIE Energy's Power Procurement Business.

Once connected to the electricity transmission systems in Northern Ireland or the State, the electricity generator is required to sell all its generation capacity through the SEM.

B: Electricity Transmission and Distribution Markets on the island of Ireland

55. Legislative provisions govern the regulation of the electricity sector in both the State and Northern Ireland.²⁸ In the State the regulator is the Commission for Energy Regulation ("CER"). In Northern Ireland, the principal regulator is the Northern Ireland Authority for Utility Regulation ("NIAUR").
56. The diagram in Annex 1 illustrates the electricity transmission systems in Northern Ireland and the State.

The Electricity Transmission System

In the State

57. In the State, ESB is the licensed owner of the electricity transmission system's assets ("TAO"). EirGrid plc ("EirGrid"), a state-owned commercial company and independent of ESB, is the designated licensed operator ("TSO") of the electricity transmission system.
58. The terms of the TAO licence issued by CER to ESB²⁹ require that, in the State, ESB must ring-fence its electricity transmission system ownership business from its generation and supply interests. Also, ESB must separate its electricity transmission system ownership business from its other business activities.³⁰ To comply with this condition, ESB Networks, an independently managed business unit of ESB, exercises the ownership functions. Other conditions contained in the TAO licence include the following requirements:
- ESB must have separate TAO accounts from its electricity generation and supply businesses;³¹
 - ESB must ensure that its TAO business does not give subsidy or subsidies to any of its electricity generation and/or supply businesses;³² and
 - ESB must preserve the confidentiality of any commercially sensitive information received by its TAO business.³³
59. As stated above, EirGrid is the licensed operator³⁴ of the electricity transmission system in the State and, in accordance with its statutory

²⁸ In the State the granting of licences for the ownership and operation of electricity transmission and distribution systems is governed by the Electricity Regulation Act, 1999; the European Communities (Internal Market in Electricity) Regulations 2000 and 2005; the Electricity Regulation (Amendment) (Single Electricity Market) Act, 2007; and, the European Communities (Internal Market in Electricity) (Electricity Supply Board) Regulations 2008. In Northern Ireland, the electricity sector is governed principally by the Electricity (Northern Ireland) Order 1992 (as amended) and the Energy (Northern Ireland) Order 2003 (as amended).

²⁹ The TAO licence was issued by CER to ESB in 2001 in accordance with the European Communities (Internal Market in Electricity) Regulations 2000, S.I. No. 445 of 2000.

³⁰ Condition 13 of the TAO licence – Separation of the Transmission System Owner's Business.

³¹ *Ibid*, Condition 14.

³² *Ibid*, Condition 15.

³³ *Ibid*, Condition 16.

³⁴ CER issues the TSO licence to EirGrid pursuant to S.I. 445 of 2000.

and licence obligations, ensures the operation, maintenance and development of the electricity transmission system.

60. ESB, through ESB Networks, is required to ensure the maintenance and construction of the electricity transmission system in accordance with the development plan of EirGrid. An infrastructure agreement,³⁵ approved by CER, facilitates the operational interaction between ESB Networks and EirGrid.
61. In relation to its electricity transmission system ownership business, ESB earns revenue principally through (a) connection charges on electricity generators for the cost of building a connection to the transmission system and (b) Transmission Use of System (TUoS) charges, which are designed to cover the cost of operating and developing the electricity transmission system. The TUoS is calculated to recover 25% of the electricity transmission system related costs from electricity generators, with the remaining 75% being recovered from customers.
62. TUoS charges are regulated by CER and collected by EirGrid. This revenue is then passed on to ESB Networks to pay for the maintenance of the electricity transmission system and funding of its transmission asset base.

In Northern Ireland

63. In Northern Ireland, NIE is the licensed owner of the electricity transmission system assets ("TAO"). NIE's TAO licence was issued by the Department of Enterprise, Trade and Investment (Northern Ireland).³⁶ By the terms of this licence,³⁷ NIE is the owner of, and is responsible for, planning, development and maintenance of the electricity transmission system in Northern Ireland.
64. According to the requirements of the TAO licence, NIE's ownership functions are ring-fenced³⁸ from Viridian's generation and supply interests. Also, the TAO licence and the NIE Compliance Plan, approved by NIAUR in accordance with the TAO licence, ensures managerial and operational independence of NIE's electricity transmission system business from Viridian's electricity generation and supply business activities.
65. SONI Limited ("SONI"),³⁹ an independent company and a wholly owned subsidiary of EirGrid⁴⁰, in accordance with the terms of its TSO licence⁴¹, is responsible, *inter alia*, for the operation and management of, and access to, the electricity transmission system in Northern Ireland.

³⁵ This Infrastructure Agreement was entered into on 1 July 2006.

³⁶ "NIE plc – Licensing Scheme – Participation in Transmission Licence" dated 31 March 1992 and amended in accordance with Licensing Scheme made on 31 October 2007"

³⁷ Condition 19 & 20 of the NIE's TAO licence.

³⁸ Condition 3A of the NIE's licence requires Board Independence, condition 5 contains a prohibition on cross-subsidies, condition 10 is a prohibition on the use of certain information, condition 12 requires the independence of the electricity transmission and distribution systems and condition 14 specifically requires the ring-fencing of the licensee's electricity transmission and distribution systems activities from its other business activities.

³⁹ SONI stands for Systems Operator Northern Ireland.

⁴⁰ The acquisition by EirGrid plc of SONI Limited was cleared by the Competition Authority on 25 September 2008 – Case Ref M/08/028.

⁴¹ SONI was granted its "Licence to participate in the transmission of electricity" by the Department of Enterprise, Trade and Investment (Northern Ireland).

66. NIE derives revenue from charges, regulated by NIAUR, for the use of the transmission system and from transmission services collected by SONI.
67. NIE's role in planning and developing the electricity transmission system in Northern Ireland differs from the role of ESB in the State. NIE is responsible for the planning and development of the electricity transmission system in consultation with SONI. The interaction between NIE and SONI is governed by the Transmission Interface Agreement ("TIA") which is approved by NIAUR. As stated above, ESB is not responsible for the planning or development of the electricity transmission system in the State. This function rests with EirGrid.

The Electricity Distribution System

In the State

68. In the State, ESB (through ESB Networks) is the licensed owner of the electricity distribution system assets ("DAO"). ESB Networks generates revenue from charges for DAO functions.
69. The operation of the electricity distribution system in the State is conducted by ESB Networks Limited, a separate wholly-owned subsidiary of ESB. ESB Networks Limited, as the licensed distribution system operator ("DSO"),⁴² is responsible for planning, development, construction, operation, maintenance and connection to the electricity distribution system. ESB Networks Limited is also responsible for the installation, maintenance and reading of electricity meters. ESB Networks Limited, as DSO, earns revenue principally through charges for these DSO functions. These charges are regulated by CER.
70. According to the terms of the DAO and DSO licence, the ownership and operation functions are ring-fenced from ESB's electricity generation, transmission and supply businesses.

In Northern Ireland

71. In Northern Ireland the electricity distribution system is both owned and operated by NIE. The Electricity (Northern Ireland) Order 1992 (as amended) which principally governs the electricity industry in Northern Ireland does not specifically refer to the distribution of electricity.
72. However, the TAO licence issued to NIE includes conditions relating to its electricity distribution ownership and operator functions. In particular, the distribution ownership and operator functions are ring-fenced from Viridian's generation and supply interests.⁴³ The charges levied by NIE for use of the distribution system are regulated by NIAUR.
73. The Authority concluded in its previous determination, *EirGrid/SONI*⁴⁴, that the activities of EirGrid plc and SONI Ltd, the electrical transmission systems' operators in the State and Northern Ireland respectively, did not overlap horizontally. The Authority held that their

⁴² DSO licence issued pursuant to S.I. No. 280 of 2008.

⁴³ Condition 14 of the Northern Ireland Electricity plc Transmission Licence.

⁴⁴ Determination M/08/028 – *EirGrid/SONI* dated 25/09/2008

roles as the licensed operators were confined by law to operate only in their respective jurisdictions.

74. The geographic market for electricity transmission and distribution has, in previous decisions of the EC,⁴⁵ been defined as being within the limits of the area covered by the respective electricity transmission system.
75. The Authority considers that the electricity transmission and distribution systems in the State and Northern Ireland constitute separate markets. The reasons for this view are set out below:
- An electricity generator established in the State or Northern Ireland must, by law, connect to the electricity transmission or distribution system in the relevant jurisdiction in which it is located. A generator, once established in a specific location, does not have a choice of electricity transmission or distribution system.
 - A new electricity generator may choose to locate in either jurisdiction but again, it will be subject to the relevant jurisdictional regulatory conditions imposed by either CER or NIAUR.
 - The electricity transmission system in the State is owned by ESB and operated by EirGrid. Access to the electricity transmission system by an electricity generator in the State is managed by EirGrid and regulated by CER.
 - The electricity distribution system in the State is owned by ESB through ESB Networks and operated by ESB Networks Limited. The DAO and DSO functions are ring-fenced from ESB's generation and supply business activities and regulated by CER.
 - The electricity transmission system in Northern Ireland is owned by NIE and operated by SONI. Access to the electricity transmission system by an electricity generator in Northern Ireland is managed by SONI and regulated by NIAUR.
 - The electricity distribution system in Northern Ireland is owned and operated by NIE. NIE's licence conditions and its NIAUR approved compliance plan ensure that the electricity distribution system is ring-fenced from Viridian's electricity generation and supply business activities.
 - The Authority sees no reason to depart from its view in *EirGrid/SONI*⁴⁶ for the purposes of assessing the present proposed transaction.
76. In summary, electricity transmission and distribution through one system is not substitutable for electricity transmission and distribution through the other as each system is confined by law to its respective jurisdiction.

⁴⁵ Case COMP/M.5707 TENNET/E.ON at para 7 and Case COMP/M.5793 – DALKIA CZ/NWR ENERGY at para 35 and reference to Case COMP/M.3440 EDP/ENI/GDP at para 75.

⁴⁶ *Supra*, footnote 44.

Interconnection of the NIE and ESB electricity transmission systems

77. Connectivity between the two electricity transmission systems is limited at present and as a result the flow of electricity across the island of Ireland is constrained. The electricity transmission systems are currently linked by a 275kV double circuit line between County Louth in the State and Tandragee, County Armagh in Northern Ireland. Also, there are two 110kV stand-by North-South Interconnectors which provide an alternative connection in the event of an outage of the main 275kV line.
78. At present the electricity transmission system in Northern Ireland is linked, via the Moyle interconnector, to a transmission system in Scotland. Capacity on the Moyle interconnector is largely confined to the import of electricity. Construction is under way on the East-West interconnector, between the State and Wales, which will allow the import and export of up to 500MW of electricity.
79. To increase the electricity transfer capacity between the two electricity transmission systems a new North-South interconnector is (subject to planning permission) planned. According to CER, this new North-South interconnector will reduce the electricity transmission systems' operating costs, strengthen electricity supply on both systems and support greater competition in electricity generation and supply on an all-island basis.⁴⁷
80. Through the development of the East-West interconnector, and thus further interconnection with neighbouring EU Member States, competition in the SEM is expected to improve. The East-West Interconnector will have a capacity to import 500 MW onto the Irish transmission system from other Member States. The additional import capacity is likely to reduce the market share of incumbent generator operators on the island of Ireland. The East-West interconnector is expected to result in an increase in the amount of available power equivalent to that of a large CCGT generation plant.
81. The interconnector is expected to increase the quantity of electricity available on the island of Ireland and make it easier for retail suppliers to purchase electricity in the quantities that best fit the consumption patterns of their customers.⁴⁸
82. In the light of the above, the Authority considers that, for the purposes of assessing the proposed transaction, the electricity transmission and distribution systems in Northern Ireland and the State constitute separate product and geographic markets.

C: The Single Electricity Market in the island of Ireland

83. The Single Electricity Market came into operation in 2007 to facilitate the purchase and sale of electricity at the wholesale level on an all-island basis. Legislation was enacted in both the State and Northern Ireland to underpin the SEM: the Electricity Regulation (Amendment)

⁴⁷ According to information published on the website for CER at: www.cer.ie

⁴⁸ With the increase in interconnectivity between the two electricity transmission systems it is likely that in the future, just as with the SEM, the regulatory conditions in the State and Northern Ireland may be sufficiently homogeneous to suggest a single electricity transmission system. However, this does not affect the Authority's competitive assessment in relation to the proposed transaction.

(Single Electricity Market) Act 2007 and the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 in Northern Ireland.

84. The SEM is based on the concept of a "gross mandatory pool",⁴⁹ which requires that all generators with a generation capacity of 10MW or greater must, as part of their licence conditions, make their output available to the SEM. In addition, generators are prohibited from entering into agreements for the supply of their output outside of the SEM.
85. Ring-fencing arrangements were also imposed by the CER and NIAUR on the ESB and NIE prior to the launch of the SEM. The generation affiliates of ESB and Viridian must operate as separate businesses from their retail supply businesses, ESB Customer Supply and NIE Energy Supply.⁵⁰
86. Ring-fencing requires that the individual business must have separate management and financial accounts. Ring-fencing also prohibits cross-subsidies and imposes an obligation that all contracts between affiliates of the same company are on an arm's length basis and on normal commercial terms. In the absence of ring-fencing, generators might have an incentive to sell electricity to their affiliated supply companies at below the price that other retail suppliers would be willing to pay, to the detriment of rival suppliers.
87. The Economic Purchasing Obligation, ("EPO"), is central to the ring-fencing approach.⁵¹ The EPO requires ESB Customer Supply and NIE Energy Supply to purchase electricity from the SEM in a manner that is economic, fair and transparent.

Regulation of the SEM

88. The SEM Committee exercises regulatory functions on SEM matters and is comprised of three NIAUR representatives, three CER representatives, an Independent Member and a Deputy Independent Member.⁵² The SEM Committee is empowered under legislation enacted in both jurisdictions to establish the SEM. The governance structure of the SEM is outlined in figure 2 below.

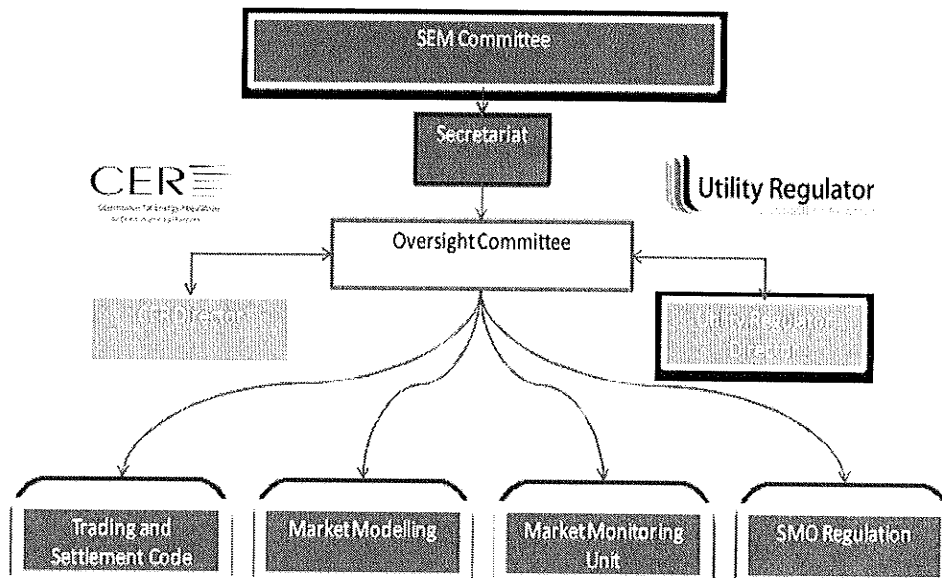
⁴⁹ Electricity Regulation Act 1999 (Market Arrangements for Electricity) Regulations 2003.

⁵⁰ The CER and NIAUR consulted on appropriate ring-fencing arrangements for incumbent Suppliers in August 2005 (AIP/SEM/74/05) and again as part of a broader consultation paper in February 2007 (AIP/SEM/07/16) which was then followed by a decision in June 2007 (AIP/SEM/304/07).

⁵¹ Under Section 9 of the Public Electricity Supply Licence granted to ESB Customer Supply, there is an obligation placed upon the Public Electricity Supplier licence holder to purchase electricity on terms approved and /or directed by the CER. These terms are agreed between the ESB and the CER annually through the Hedging Methodology and Hedging Policy Statements.

⁵² Further biographical details of the current SEM Committee members are available at: http://www.allislandproject.org/en/SEM_members_profile.aspx

Figure 2: The governance structure of the SEM.



Source: SEM Annual Report 2009

SEM Operation and Pricing

89. The day-to-day operation of the SEM is conducted by the Single Electricity Market Operator ("SEMO"), a joint venture between EirGrid and SONI. The activities of SEMO are overseen by CER and NIAUR.
90. The price of electricity ("System Marginal Price") is set for each half-hour period of the day through a market clearing mechanism operated by SEMO. The individual generation plants must submit bids that reflect their individual Short Run Marginal Cost ("SRMC"). This principle of cost reflectivity is set out in two places: the generation licences⁵³ and in the SEM's *Bidding Code of Practice*. The generation licences include as a condition, compliance with the *Bidding Code of Practice*.⁵⁴
91. The SRMC principle is defined broadly in the generation licences as the cost of generating electricity minus the cost of not generating electricity. Therefore in addition to their fuels costs, generators must also provide technical data relating to their individual start-up costs, carbon emission costs and minimal ramping costs. The *Bidding Code of Practice* stipulates that the cost of fuel commodities such as gas should be referenced to the prevailing spot price of gas on a liquid accessible market.

⁵³ CER Generic Electricity Generation Licence, *Condition 15: Cost-Reflective Bidding in the Single Electricity Market*, available to download from the all-island project website: <http://www.allislandproject.org/en/generation.aspx?page=2&article=f51097ff-25d3-40dd-8c73-48264829e2b2>

⁵⁴ The Bidding Code of Practice A Response and Decision Paper 2007. Available to download from the all-island project website: www.allislandproject.org

92. There is significant volatility in System Marginal Price ("SMP") with the price for each half-hour period ranging from €3.29/MWh to €696.85/MWh, over the first 30 months of the SEM with an average SMP of approximately €60/MWh.⁵⁵ The price volatility observed is due to the variety of factors that affect the SMP such as:
- fuel prices – typically the largest component of generators' bids;
 - generator efficiency – the efficiency at which a generation plant converts fuel to electricity and affects the bids they submit to the SEM;
 - generator availability – from both the more predictable price makers and the less predictable price takers;
 - generator start-up costs – included in the overall SMP, through Uplift; and
 - demand – this normally follows a standard profile and load over the day, while varying across the seasons. But demand can be subject to significant changes in the short term due to influences such as changes in temperature, and in the longer term due to changes in economic growth.
93. Retail suppliers purchase electricity from the SEM to fulfil their customers' consumption requirements.⁵⁶ The SEM operates as a "spot" market for electricity in which retail suppliers purchase electricity at the SMP for each trading period. In addition to the SMP, retail suppliers also pay for capacity costs and system charges. Given that prices in the SEM are largely determined by international fuel prices and suppliers are price takers, these firms are exposed to a considerable degree of short term price risk. Retail suppliers can achieve a greater degree of price certainty by the use of Contracts for Difference ("CfDs") with generators. CfDs ensure that the two parties to the contract (the generator as the seller and the supplier as the buyer) are not exposed to volatile price movements in the SEM. If the average SMP is lower than the price struck (the "strike price") by the parties to the contract then the retail supplier compensates (pays) the generator the difference. If the SMP is higher than the strike price, then the generator pays the supplier the difference.
94. The SEM features a range of market power mitigation measures that specifically address concerns about the high market shares in generation held by ESB and Viridian. These measures include:
- (i) the principles contained in the *Bidding Code of Practice* which stipulate that bids must reflect Short Run Marginal Cost;
 - (ii) ongoing market monitoring to enforce compliance with the bidding principles;

⁵⁵ Market Monitoring Unit, *SEM Market Power & Liquidity, State of the Nation Review, An Information Paper*, SEM-10-057, published 23 August 2010.

⁵⁶ In the State the retail supply of electricity was fully de-regulated in 2005. Examples of companies active in this market are Airtricity and Bórd Gáis Energy. ESB Networks Limited continues to provide meter reading and data management services for all suppliers and customers.

- (iii) the obligation on generators with large market shares to make a portion of their capacity available to other market participants through the provision of a particular type of CfD known as a Directed Contract ("DC"). These contracts are directed as the prices and quantities of the DCs are mandated by the regulators;
 - (iv) ring-fencing of each of the generation and retail businesses of ESB and Viridian, and
 - (v) a targeted package of certain local market power mitigation measures that must, if necessary, be operated for local transmission concerns and are aimed solely at generators who face no effective competition.
95. The regulatory obligations faced by operators in the SEM are sufficiently homogeneous to suggest that there is a single electricity market for electricity generation and the sale of electricity at the wholesale level on the island of Ireland.

D: Electrical Installation Services

96. The EC has stated that electrical installation may be seen as one single market or may be segmented into high and low voltage installations, services and maintenance.⁵⁷ The EC also considered the further segmentation into large and small installations without the division into high and low voltage.⁵⁸
97. For the purpose of examining the competitive effects of the proposed transaction, the Authority examined the relevant product market for the provision of high voltage electrical installation services to the electricity sector. This is the narrowest possible product market in which the proposed acquisition is likely to have an adverse impact.
98. From market inquiries conducted by the Authority, companies based outside of the island of Ireland currently provide electrical installation services in the State. The Authority therefore considers that, for the purposes of examining the proposed transaction, the relevant geographic market for the provision of electrical installation services may be wider than the State.
99. However, the Authority does not consider it necessary to define the relevant product and geographical markets because, irrespective of whether the relevant product and geographic markets are defined in a broad or narrow manner, the conclusions concerning the competitive effects remain the same.

E: Engineering Consultancy Services

100. ESB defines engineering consultancy services to the power sector to include at least, project management, surveying, electrical, mechanical and civil design, environmental studies and preparation of submissions for planning consents.

⁵⁷ Case No. COMP/M.2118 Telenor/Procuritas/Isab/Newco decision dated 25/09/2000.

⁵⁸ *Supra*

101. ESB provides engineering consultancy services to third party utility and private operators in the power sector in the State and internationally.
102. For the purposes of examining the competitive effects of the proposed transaction, the Authority examined the relevant product market for the provision of engineering consultancy services to the electricity sector as this is the narrowest possible product market in which the proposed acquisition is likely to have an adverse impact.
103. The Authority is aware that other companies providing engineering consultancy services in the State also operate on an international basis. The Authority therefore considers, for the purposes of examining the proposed transaction, that the relevant geographic market for the provision of engineering consultancy services may be wider than the State.
104. However, the Authority does not consider it necessary to define the relevant product and geographic markets because irrespective of whether the relevant product and geographic markets are defined in a broad or narrow manner, the conclusions concerning the competitive effects remain the same.

Conclusion on the Relevant Product and Geographic Market

105. In conclusion, for the purposes of examining the competitive effects of the proposed acquisition, the Authority considers the relevant markets in the following order:
 - the provision of engineering consultancy services in the State;
 - the provision of high voltage electrical installation services in the State;
 - the transmission and distribution of electricity in the State; and
 - electricity generation and wholesale supply in the SEM.

Competitive Assessment

The Provision of Engineering Consultancy Services in the State

Views of the parties

106. As set out in paragraph 39 above, the parties submit that there are separate product markets for electrical installation and engineering consultancy services. Electrical installation services, according to the parties, involve manual labour, construction and specialist equipment, whilst engineering consultancy is confined to computational analysis, engineering design and on-site supervision. The parties state that, whilst some larger companies have both capabilities, most companies specialise in either electrical installation or engineering consultancy.
107. The parties state that both ESB and Powerteam Electrical Services (UK) Limited and its subsidiary Powerteam Electrical Services Limited ("PES") provide electrical design and project management services to third party utility and private operators in the electrical sector in the State. In addition, PES provides these services in the United Kingdom, and ESB provides these services internationally.
108. However, the parties also state that the services of electrical design and project management provided by PES and ESB are not close substitutes, with the focus of the parties' activities being different.
109. The parties state that ESB, particularly through its affiliated company ESB Energy International Limited and its subsidiaries ("ESBI"), derives its specialist expertise from its design and consultation work in-house with ESB and does not offer any physical installation works. PES, according to the parties, does not offer stand-alone design/consultancy services; rather it provides these services as part of turnkey projects⁵⁹.
110. In light of the above, the parties state that there is no meaningful horizontal overlap in the engineering consultancy services offered by the parties.

Views of the Authority

111. There is negligible horizontal overlap in the provision of engineering consultancy services by the parties in the State.
112. ESB is active, through ESBI, in the provision of engineering consultancy services to other ESB businesses and to third parties. PES is also active in the provision of engineering consultancy services, but only as part of turnkey projects.
113. ESBI only provides 'stand-alone' engineering consultancy services and does not operate as (or bid to operate as) a turnkey contractor (although it has on rare occasions provided engineering consultancy services on a sub-contract basis to turnkey contractors in the State. The parties estimate ESB's market share for the provision of

⁵⁹ A turnkey project is one where the contractor takes responsibility for design, engineering, procurement and construction; taking the project from inception to completion.

engineering consultancy services to third parties in the State to be [less than 30%] in 2009.⁶⁰

114. PES does not provide 'stand-alone' engineering consultancy services in the State. According to Viridian, for the year ending 31 March 2009, PES carried out only a small amount of design related work for ESB, all of which was in conjunction with contracts for the construction/refurbishment of ESB 38kV substations.
115. The Authority also considers that there are a number of competing suppliers of engineering consultancy services active in the State. These include Mott MacDonald Group, Siemens PTI, WS Atkins and Tobin Consulting Engineers.
116. In light of the above, the Authority considers that the proposed transaction does not raise any competition concerns in relation to the provision of engineering consultancy services in the State.

The Provision of Electrical Installation Services in the State

Views of the parties

117. According to the parties, none of the companies affiliated with ESB provides physical electrical installation services to third parties. ESB Networks does provide some electrical installation services in-house to ESB⁶¹ in connection with its electricity transmission and distribution systems but it does not provide such services to third parties.⁶²
118. The parties state that NIE Powerteam only provides electrical installation services in-house to NIE with PES providing similar services to third parties throughout the U.K. and the State.
119. In light of the above, the parties state that there is no horizontal overlap in the electrical installation activities of ESB and PES.
120. The parties have identified one area of vertical overlap between the activities of the parties in the State. The parties highlight that ESB Networks, ESB Wind Development and ESB Energy International, all companies within the ESB Group, purchase electrical installation services. As stated above, PES provides electrical installation services to third parties throughout the U.K. and the State thus giving rise to vertical overlap.
121. However, the parties state that the proposed transaction does not give rise to a substantial lessening of competition in the State in relation to electrical installation services for the following reasons:
 - (i) PES has no significant overall position in the market for electrical installation services in the U.K. and the State. In

⁶⁰ The parties state that there are no third party statistics or estimates of the market size or market shares in respect of the State only. ESB has provided its estimated market share on the basis of the value of services it provides to EirGrid and the estimated amount of spend on engineering consultancy services by wind farm developers.

⁶¹ However, ESB Networks does procure a significant amount of electrical installation services from third parties.

⁶² The parties note that in exceptional circumstances ESB Networks provides emergency electrical installation services to neighbouring jurisdictions. This is done on an ad-hoc and a not-for-profit basis. A recent example of this was when ESB Networks provided assistance to NIE in response to the heavy snow fall in Northern Ireland in early 2010.

2009, the parties estimate⁶³ that its market share was [less than 15%].

- (ii) PES received less than [10%] of the total spend by ESB on electrical installation services in 2009. The remainder is accounted for by other suppliers such as Gaeltec Utilities, Transmission Links Ireland, Sierra Communications, Laing O'Rourke, CIET, SAG, ABB, Killarney Telecom and Kirby Group.
- (iii) There are a number of other large providers of these services in the U.K. and the State, such as Enterprise Power Systems, Balfour Beatty Utility Solutions and AMEC.
- (iv) There are a number of smaller and independent competitors active in the U.K. and the State such as CIET, Transmission Links Ireland, Kirby Power, O'Hara Engineering, Laing O'Rourke and Gaeltec Utilities.
- (v) ESB Networks, which procures a significant amount of electrical installation services from third parties, is not a dominant purchaser of electrical installation services in the U.K. and the State. The parties state that in 2009, ESB's expenditure on electrical installation services purchased from third parties accounted for less than [20%] of purchasing in the total electrical installation market in the U.K. and the State.⁶⁴
- (vi) In most cases, a competitive tender under EU public procurement rules applies to contracts awarded externally by ESB.

Views of the Authority

Horizontal Overlap

- 122. As none of the companies within the ESB Group provides electrical installation services to third parties, the Authority considers that there is no horizontal overlap in the provision of these services in the State.
- 123. For completeness, the Authority notes that it is stated on ESB Independent Energy's ("ESBIE") website that it provides electrical installation services to its own customers.⁶⁵ The parties have confirmed to the Authority that in reality ESBIE does not provide these services itself but refers the work to an independent consultant. This independent consultant [...].

Vertical Overlap

- 124. ESB principally purchases⁶⁶ electrical installation services in connection with the maintenance of the electricity transmission and distribution systems and the construction and maintenance of wind farms. PES is

⁶³ The parties cannot provide third party statistics for the size of the electrical installation market in the State. These market share values are the parties' best estimates.

⁶⁴ This is based on the best estimates of PES for the total market.

⁶⁵ <http://www.esbie.ie/energy-products-hv-and-mv.html>

⁶⁶ ESB is subject to the EU rules governing procurement by utilities. EU Directive 2004/17/EC has been transposed into Irish law by virtue of the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 S.I. No. 50 of 2007

active in the State in the provision of electrical installation services and provides such services to ESB.

125. Market inquiries conducted by the Authority indicate that there are a number of providers of electrical installation services active in the State that currently provide services to ESB. The electrical installation works tendered by ESB are categorised according to the type of voltages involved, namely: Low Voltage ("LV"), Medium Voltage ("MV") and High Voltage ("HV"). LV and MV work would tend to involve the electricity distribution system with HV work mainly corresponding to the electricity transmission system.
126. From these market inquiries it was established that most electrical installation companies can work with any level of voltage but that HV work was generally considered more specialised. PES currently provides mainly HV electrical installation services to ESB.
127. The Authority contacted five electrical installation companies active in the State, all of which provide HV electrical installation services. Four of these companies expressed no concern regarding the proposed acquisition. One company expressed a concern that, post-acquisition, there may be a conflict in ESB owning PES, which could weaken the position of competitors in future tendering processes.
128. The four companies who did not express concern indicated to the Authority that ESB had not previously discriminated against them when ESB had its own in-house electrical installation services company⁶⁷. Also, these companies expected that ESB would continue to tender for such services, that there was sufficient future work available and that they expected ESB to seek value for money.
129. The Authority spoke with five electricity generator companies operating in the State with regard to their requirements for electrical installation services. Four of these electricity generator companies had no concerns with the proposed acquisition and indicated that they engage the services of alternative companies active in the provision of electrical installation service. Some of these alternative electrical installation services providers are: Gama Construction, General Electric, Dornan Electrical, Suir Engineering and Gaeltec Utilities.
130. One electricity generator company expressed a concern that, post-acquisition, a large independent supplier of electrical installation services would be removed from the market. This electricity generator has business activities comparable to the other four electrical generator companies and confirmed that it has engaged the services of other electrical installation services providers.
131. In light of the above market inquiries and information provided, the Authority considers that the proposed transaction does not raise competition concerns in the market for electrical installation services in the State for the following reasons:

⁶⁷ ESB sold the assets of ESB Contracts Limited, which previously conducted its public lighting maintenance and construction business in December 2009. ESB Contracts Limited's electrical installation business was discontinued. Also ESB, through its subsidiary ESBI Engineering UK Limited, previously operated an electrical installation business in the UK but this business was sold to Enterprise Power Services Limited in April 2005.

- (i) There is no horizontal overlap between the parties in relation to the provision of electrical installation services in the State; and
- (ii) No foreclosure concerns arise as a result of the vertical overlap between the activities of the parties in the State as:
 - PES does not have a significant market share of the electrical installation market in the State. According to estimates provided by the parties, PES accounted for [less than 15%] of the market for electrical installation in the State in 2009.
 - Also, according to information provided by the parties, PES received [less than 10%] of ESB total spend on electrical installation services in the State for the year 2009.
 - There are a number of credible alternative electrical installation services providers active in the State in HV electrical installation work, namely: Gaeltec Utilities, Transmission Links Ireland, Laing O'Rourke, CIET, Sierra Communications and SAG.

The Transmission and Distribution of Electricity in the State

Views of the parties

132. The parties state that the electrical transmission and distribution systems are located in separate jurisdictions, are separately regulated and ring-fenced from electricity generation and supply, and are not substitutable on either the demand or supply side. Therefore, according to the parties, there is no horizontal overlap between the parties' transmission and distribution systems.

Views of the Authority

133. As stated above, the Authority considers, for the purposes of assessing the proposed transaction, that the electricity transmission and distribution systems in State and Northern Ireland constitute natural monopolies and separate product and geographic markets.
134. In light of the above, the Authority considers that there is no horizontal overlap between the electricity transmission and distribution systems in the State and Northern Ireland.
135. Some third parties submit that unbundling of the electricity transmission systems would lead to greater competition in the SEM. Compulsory vertical separation of the contestable stages of the electricity production process (generation and retail supply) from the natural monopoly element (transmission and distribution) is a key feature of the regulatory regimes applicable to the electricity market liberalisation process in the State and Northern Ireland. A clear vertical separation ensures that generators and retail suppliers can expect non-discriminatory access to the electricity transmission and distribution system.
136. The Authority is of the opinion that the concerns raised by third parties relating to unbundling do not arise as a result of the proposed transaction and are therefore not directly related to its analysis. Furthermore, the Authority considers that the issues regarding unbundling are best addressed through the consultative processes

under way by the relevant government departments in the State and Northern Ireland.

Electricity Generation and Wholesale Supply on the Island of Ireland

Views of the Authority

137. As previously stated above at paragraph 67, NIE's role in planning and developing the electricity transmission system in Northern Ireland is different to the role of ESB in the State.
138. The Transmission Interface Agreements agreed between NIE and SONI require that they consult with and assist EirGrid in relation to the co-ordination, planning and development of the transmission systems in Northern Ireland and the State.
139. The objective, as set out in NIE's licence, is to ensure the development of the transmission system in Northern Ireland in a way that takes account of the benefits of efficient, co-ordinated and economical systems for the transmission of electricity on the island of Ireland.⁶⁸
140. By virtue of the proposed transaction, the Authority was concerned that ESB would be in a position to acquire knowledge of the future development and planning of the electricity transmission systems in both Northern Ireland and the State.
141. The Authority was concerned about the flow of certain commercially sensitive information between NIE's Transmission and Distribution Systems businesses and ESB's other businesses post-merger. The Authority was concerned that ESB would be in a position to acquire and use commercially sensitive information that would provide it with the ability and incentive to prevent, restrict or distort competition in the supply or generation of electricity on the island of Ireland. Similar concerns were expressed by companies active in the electricity sector as outlined in paragraph 26 above.

PROPOSALS AND REMEDIES

142. The Authority informed the parties of this concern and sought clarification as to whether the current licence conditions imposed on both ESB and NIE by CER and NIAUR respectively were sufficiently clear and adequate to address this concern.
143. In response, ESB submitted a proposal to the Authority. Following discussions between ESB and the Authority, ESB submitted a finalised proposal in the form of undertakings which are acceptable to the Authority. These undertakings are set out in full in Annex 2 (the "Proposal")
144. The Authority is of the view that the Proposal submitted by ESB pursuant to section 20(3) of the Act, is appropriate and effective to address the competition concern identified by the Authority.
145. The Authority has taken the Proposal into account and it forms part of the basis of the Authority's Determination. Therefore, in accordance with section 20(3) of the Act, the Proposal is binding upon ESB, and is

⁶⁸ Condition 19 (1)(b) of NIE's licence.

considered a commitment within the meaning of section 26(1) of the Act.

Ancillary Restraint

146. The proposed transaction imposes non-compete and non-solicitation obligations on Viridian, the seller, for the period of [...] years from the completion date of the proposed transaction. The Authority considers these restrictions to be directly related and necessary to the implementation of the proposed transaction.

DETERMINATION

The Competition Authority, in accordance with section 21(2)(a) of the Competition Act, 2002 and having taken into account the Proposal submitted by ESB in accordance with section 20(3) of the Act, has determined that, in its opinion, the result of the proposed acquisition whereby Electricity Supply Board, through ESBNI Limited, would acquire sole control of Northern Ireland Electricity plc and its subsidiaries, NIE Powerteam Limited, Powerteam Electrical Services (UK) Limited and its subsidiary Powerteam Electrical Services Limited and Capital Pensions Management Limited from Viridian Capital Limited and Viridian Group Limited will not be to substantially lessen competition in markets for goods or services in the State, and accordingly, that the acquisition may be put into effect subject to the Proposal which is attached in Annex 2.

For the Competition Authority

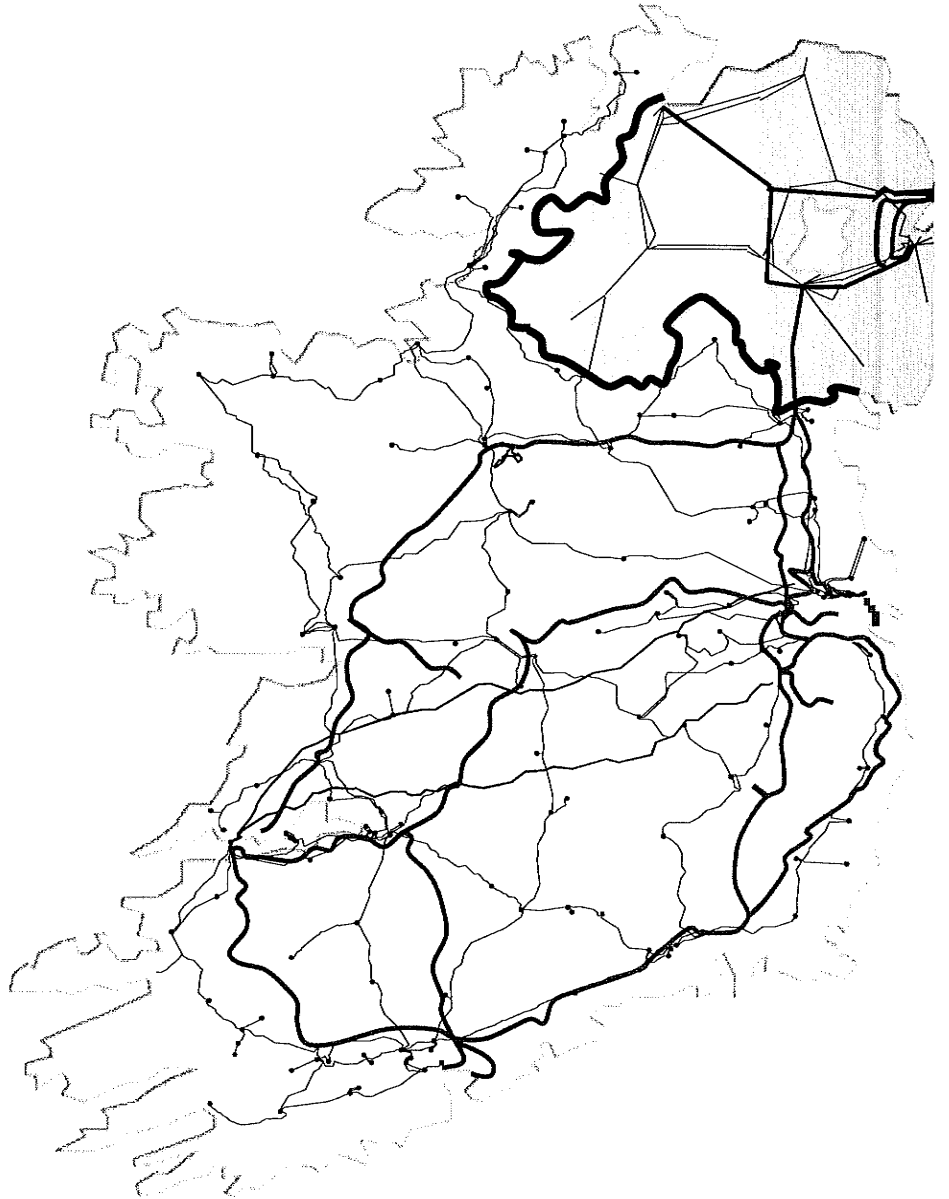
Dr. Stanley Wong

Member of the Competition Authority

Annex 1

Map of the Electricity Transmission Systems in Northern Ireland and the State.

Voltage Total (km)	
400kV	440
220kV	1,875
110kV	4,470



Merger Notification M/10/026 ESB/NIE

In the matter of a proposed transaction notified to the Competition Authority on 5 August 2010 regarding the acquisition by Electricity Supply Board of certain subsidiaries of Viridian Capital Limited and Viridian Group Limited

Proposal submitted by Electricity Supply Board pursuant to Section 20(3) of the Competition Act 2002 (as amended)

1. Definitions

“**Affiliate**” means, in relation to a company, any holding company or subsidiary of that company or any subsidiary of a holding company of that company, in each case within the meaning of Section 155 of the Companies Act, 1963 or Article 4 of the Companies (Northern Ireland) Order 1986.

“**control**” has the meaning ascribed to it in Section 16(2) of the Competition Act 2002.

“**Commercially Sensitive Information**” means any information held and/or obtained by NIE or any of its Affiliates or Related Undertakings in the discharge of NIE’s functions in terms of planning, developing and maintaining the electricity transmission and distribution systems in Northern Ireland. In particular, but without prejudice to the generality of the foregoing, the term “Commercially Sensitive Information” includes any information regarding:

- the North West Reinforcement Project, also known as the Renewables Integration Development Project or “RIDP”; and
- any planning and development in relation to the electricity transmission infrastructure in the area of Counties Fermanagh, Tyrone and Derry in Northern Ireland and Counties Donegal, Mayo and Sligo in Ireland, which seeks to facilitate the introduction of renewable energy generation.

“**ESB**” means the Electricity Supply Board, its subsidiaries, its representatives and agents and all the undertakings that ESB controls either directly or indirectly, solely or jointly, but shall not include NIE.

“**NIAUR**” means the Northern Ireland Authority for Utility Regulation.

“**NIE**” means Northern Ireland Electricity plc, its subsidiaries, its representatives and agents and all the undertakings that NIE controls either directly or indirectly, solely or jointly.

“**Proposed Transaction**” means the proposed transaction which was notified to the Competition Authority on 5 August 2010 whereby ESB, through ESBNI Limited, would acquire sole control of Northern Ireland Electricity plc and its subsidiaries, NIE Powerteam Limited, Powerteam Electrical Services (UK) Limited and its subsidiary Powerteam Electrical Services Limited and Capital Pensions Management Limited from Viridian Capital Limited and Viridian Group Limited.

“**Related Undertaking**” means, in relation to a company, any undertaking in which that company has a participating interest as defined by Regulation 35 of the European Communities (Companies: Group Accounts) Regulations, 1992 or Article 268 of the Companies (Northern Ireland) Order 1986.

“**Senior Official**” means, in relation to ESB, any director of ESB, its Company Secretary, Group Head of Legal, Group Regulation Manager or any officer or member of the senior management of ESB.

2. Undertakings

- 2.1 ESB undertakes to the Competition Authority (on its own behalf and on behalf of its respective successors and assigns) that ESB shall not request from NIE and, to the extent permitted by the regulatory framework, shall ensure that NIE shall not give to ESB, any Commercially Sensitive Information.

- 2.2 Paragraph 2.1 shall not apply to any disclosure of Commercially Sensitive Information which:
- (a) is or becomes publicly available other than as a result of a breach by ESB of the undertaking in paragraph 2.1;
 - (b) is required or permitted by applicable law or regulation, judicial or arbitral process of competent jurisdiction, or a competent authority, including for the avoidance of doubt the provisions of any applicable licence or compliance plan issued or approved by the NIAUR; or
 - (c) is needed in order for ESB to comply with its legal duties and obligations as a parent company of NIE.
- 2.3 ESB undertakes to the Competition Authority (on its own behalf and on behalf of its respective successors and assigns) that ESB shall not disclose to any of its electricity generation or supply businesses any Commercially Sensitive Information that is provided to ESB by NIE, notwithstanding the provisions of paragraph 2.1, or that comes into the possession of ESB by virtue of paragraph 2.2 (a), (b) or (c), save to the extent required by applicable law or regulation, judicial or arbitral process of competent jurisdiction, or a competent authority.

3. Reporting Obligation

ESB commits that a Senior Official shall report to the Competition Authority on an annual basis regarding ESB's compliance with the undertakings in paragraph 2.1 and 2.3 from the date of completion of the Proposed Transaction, using the agreed form of compliance certificate.

4. Modification

No modification of any provision hereof shall be binding unless such modification shall be agreed in writing by or on behalf of each of ESB and the Competition Authority.

5. Duration of Obligations

The undertakings at paragraph 2.1 and 2.3 and the reporting obligation at paragraph 3 shall become binding on ESB to the extent that the Competition Authority takes them into account and states in writing that they form the basis or part of the basis of its Determination on the Proposed Transaction and will become commitments within the meaning of Section 26 of the Competition Act 2002.

Subject to the foregoing paragraph, the undertakings at paragraph 2.1 and 2.3 and the reporting obligation at paragraph 3 shall commence on the date of completion of the Proposed Transaction and remain in force until revoked by the Competition Authority (on its own initiative or on the application of ESB, its consent for such revocation not to be unreasonably withheld).

Signed on behalf of Electricity Supply Board

Signed:



Name: John Shine

Title: Deputy Chief Executive

Date: 26 October 2010