

# **COMPETITION AUTHORITY**



## **Submission to the Department of Communications, Marine and Natural Resources on the Draft Electricity Bill 2002**

**Submission No.**      **S/02/005**

**Date:**                      **29 November 2002**

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## 1 INTRODUCTION

This submission sets out the Competition Authority's response to the consultation process on the Draft Electricity Bill 2002, initiated by the Department of Communications, Marine and Natural Resources.

The Competition Authority welcomes this consultative process, and the open and transparent approach to regulatory reform that it signals. Comments expressed in this submission that may be critical of the proposed legislation should be interpreted in the context of the Department's openness. Many important pieces of legislation do not involve consultation of this kind.

The stated purpose of the new legislation appears to be two-fold, namely

- “[to] consolidate all existing electricity legislation and eliminate any unnecessary legislation currently in force”; and
- to deal with remaining regulatory and restructuring issues in relation to the electricity industry

Subject to some minor qualification, the draft Bill appears to succeed in the first of these aims. However, it fails almost entirely to deal with remaining regulatory and restructuring issues in a satisfactory manner. In this regard, this submission contends that:

1. The regulatory approach adopted in Ireland to date has patently failed to deliver competition. It has supported the dominant position of the Electricity Supply Board and sent extremely negative investment signals to new entrants. Little or no competition exists, and there is little prospect of competition developing in the short to medium term. To the extent that the new legislation focuses primarily on consolidation of existing legislation, it will perpetuate these problems.
2. Numerous expert reports and studies, both in Ireland and abroad have (a) highlighted the failure of the current regulatory approach to introduce competition and (b) argued for a more radical approach. These appear, for the most part, to have been ignored in the drafting of the Bill. In addition, no regulatory impact assessment has been

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undertaken to support the status quo approach of this legislation or that would justify ignoring the other reports.

3. A radically different approach is needed if competition is to be allowed to deliver benefits in this sector. This requires both **structural reform** and **asymmetric regulation**. Structural reform would entail splitting the ESB both vertically (i.e., fully separating transmission from generation) and horizontally (i.e., separating the different generating plants, possibly into portfolios). Asymmetric regulation would involve biasing the regulatory system in favour of new entrants. New entrants and rivalry among existing generating capacity are both necessary for competition to operate in the medium term. Competition of this kind cannot be whisked up in an instant in a market that has been monopolised for decades. Instead, regulatory reform requires tough measures to create a regulatory system that explicitly favours and supports competition in its fledgling stages.

This draft legislation offers a unique opportunity to choose between using competition to deliver efficiency and lower prices for consumers and business users on the one hand and catering to vested producer interests on the other. It is not surprising that the latter is the traditional approach.

Choosing competition is more difficult politically. Producer interests, especially in monopolised semi-state sectors, are generally powerful, extremely well represented and opposed to change (sometimes even to change that may benefit them). Moreover, the pain from reform may be felt long before the full benefits of competition arise. As a result, competition is not, and has not been, chosen in Ireland, even when it is clearly in the wider public interest.

The proposed new electricity legislation will perpetuate a regulatory system that has failed to support competition, and may even inhibit it. It represents a continuation of the traditional approach whereby competition takes second place to producer interests. This will have long-term negative repercussions for consumer welfare, competitiveness and productivity in the Irish economy.

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## 2 THE CURRENT STATE OF LIBERALISATION

It is generally accepted that there is no prospect of a competitive market developing in Ireland under the current legislative framework. The problems have been identified by a number of national and international commentators. Some of the major criticisms are summarised below.

### 2.1 *Recent Reports and Studies*

A recent study, carried out for the Department of Public Enterprise and its counterpart in Northern Ireland<sup>1</sup>, pointed out that:

“... achieving competition in generation will require not only the establishment of an effective all-island market, but also substantial measures to tackle the dominant position of ESB (Generation) and the NIE generation contracts.”

This report suggested that the pre-requisites for a competitive market in electricity were:

- A sufficient number of market players, none of whom are able to exercise market power and determine prices;
- A surplus of generation over demand;
- A robust and transparent trading mechanism that facilitates the interaction of supply and demand to produce accurate price signals;
- The separation of the various elements of the supply chain to ensure transparency; and
- An effective means of transporting electricity from the power station to the customer.

The report suggested that the most straightforward way of reducing the ESB's position in the generation market would be to sell all or some of its stations to third parties, preferably new entrants. It also stated that consideration should be given to whether the

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<sup>1</sup> Final Report on North/South Energy Studies to the Northern Ireland Department of Enterprise, Trade and Investment and the Republic of Ireland Department of Public Enterprise. IPA Consulting, PB Power Ltd., Energy Links Consultancy, August 2001.

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ESB should be required to sell its stake in Synergen, or at least reduce it to a minority shareholder, and to prohibiting ESB from building further plant until its position in the market has been reduced.

As the Minister of Communications, Marine and Natural Resources will be aware, on the 1<sup>st</sup> December 1999, the Minister for Public Enterprise, the Minister responsible for overseeing the liberalisation of the electricity sector and key shareholder in the ESB, wrote to the Chairman of ESB expressing concern over the proposed Synergen generation plant at Ringsend, Dublin:

“... I could only consider giving approval in relation to expenditure for the turbine after I have received a written undertaking from ESB that if I am of the opinion that competition law makes it appropriate, the ESB would sell its interest (including any consortium having interest) in any generating station to be built at Ringsend on appropriate terms.”

On the 29<sup>th</sup> June 2001, the Competition Authority wrote to the Minister expressing its concerns about the state of competition in the electricity sector, mentioning in particular the need to ensure that the regulatory environment is focussed on encouraging greater competition in generation, both in the public interest and to comply with Ireland’s commitments under EU liberalisation.<sup>2</sup> In the opinion of the Authority, the swiftest and most effective means for achieving this end was for the Minister to exercise the undertaking required of the ESB in her letter of the 1<sup>st</sup> December 1999. The Minister responded in a letter dated the 7<sup>th</sup> August 2001, indicating that in the absence of any definitive finding or ruling by an independent body competent in the field of competition law, she would not require the ESB to sell its interest in Synergen. It is therefore unclear what this commitment involved other than routine compliance with competition law.

The Commission for Electricity Regulation, recognising the difficulties facing potential investors, commissioned NCB Corporate Finance to undertake an assessment of the viability of the current structure from the perspective of potential independent power

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<sup>2</sup> The Authority’s letter to the Minister is appended.

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producers considering whether or not to enter the market for generation<sup>3</sup>. In the covering letter to their questionnaire to interested parties, NCB point out that:

“Following the deregulation of the Irish electricity sector a number of parties have expressed an interest in entering the sector. A number of these parties have, however, raised issues relating to the structure and operation of the market, and the resultant impact on the ability to secure financing for power projects in Ireland.”

Among the key findings outlined in NCB’s final report to the CER, the dominance of ESB and uncertainty over future trading arrangements are cited as significant obstacles to new investment in the sector. The CER is at present engaged in a review of the trading arrangements. NCB suggest that divestiture by the ESB of some of its generation capacity and the development of an all-Ireland electricity market would be required to tackle the ESB’s dominance.

In April 2000 the OECD produced its report on *Regulatory Reform in Ireland*. The main recommendations of this report relating to electricity were to increase competition in the market for electricity by:

- Prohibiting, in the short and medium term, further additions to the ESB’s generating plant. In the longer term, if effective competition develops, remove this limit on the ESB so that all generators can compete across the entire market.
- Requiring divestiture of some generation plant by the ESB. If market prices to liberalised customers are above competitive levels after the generation fuelled by the existing gas capacity comes on line, and if the amount of entry then expected and import capacity are together insufficient for effective competition, require further divestiture.
- Ensuring by establishment of appropriate access tariffs and terms, that conditions of access to the transmission and distribution grid, including for example, ancillary services, are cost-reflective and non-discriminatory.

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<sup>3</sup> Issues Facing those Considering Investing in the Irish Electricity Market, NCB Corporate Finance for the CER, [www.cer.ie/1101Archive.htm](http://www.cer.ie/1101Archive.htm).

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- Requiring divestiture of transmission from generation if transmission constraints are not relieved or if there is discrimination in access.
  - Proceeding with plans to increase the capacity of transmission of electricity between the Republic and Northern Ireland.
  - Ensuring that any long-term contracts do not block further liberalisation of consumers.
  - Liberalising choice for all electricity and gas consumers by 2005, or sooner if there is evidence of liberalised customers being subsidised by captive customers.

The Competition Authority supports these conclusions and sees the current review of electricity legislation as an ideal opportunity, coinciding as it does with the Commission's work on the energy Directives, to make the necessary changes to ensure that competition works well for consumers in this sector over the medium to long term.

## *2.2 Gaps in the Current Proposals*

The result of the current system is that, while many potential investors initially expressed interest in the Irish market, almost all, including serious players such as CRH, BP and Scottish Power, have left the market.<sup>4</sup> Others are known to be interested in divesting their shareholdings. At present, apart from the ESB, there is only one major company – Viridian, the incumbent generator in Northern Ireland – which has recently started to operate a large-scale power station at Huntstown, Co. Dublin, though this is potentially just phase 1 of a two-phasesd investment plan. The result of the current liberalisation framework is that the ESB faces little or no effective competition. A strong negative signal has been sent to potential investors so that there is little prospect of effective competition developing now or in the medium to long term.

At the transmission level, the cumbersome system created by the European Communities (Internal Market in Electricity) Regulations 2000 and by the manner in which they were

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<sup>4</sup> According to NCB Corporate Finance, there was strong initial interest in developing generation projects in Ireland following the announcement opening of the market, with over 4,000MW of new generation capacity proposed by different interested parties.



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transposed into national law (S.I. No. 445 of 2000) has delayed the set-up of the Transmission System Operator, Eirgrid, by more than a year. Eirgrid has recently settled its dispute with the Commission for Electricity Regulation over the Commission's interpretation of the Regulations in its "Direction To Reach Agreement On Infrastructure Agreement Complying With Industry Requirements". This delay was unnecessary and is directly linked to the current system, which leaves the system operator without effective control over system developments. In this context, it is clear that urgent and decisive action is needed to re-structure the electricity industry. Unfortunately, the draft Heads of Bill does not provide for this.

The stated purpose of the Bill is to consolidate existing legislation and deal with a number of outstanding issues (consumer protection, the licensing of the Public Electricity Supplier, universal supply obligations, national capacity obligation and the conversion of ESB into a plc). This leaves a number of serious gaps in the proposal:

- It does not implement the recommendations of the report, by IPA Consulting and others, on the creation of an all-Ireland energy market
- It does not take account of concerns demonstrated by the Commission for Electricity Regulation in commissioning a study by NCB Corporate Finance on the viability of the current structure;
- It does not implement the recommendations of the OECD Report on Regulatory Reform in Ireland, which identified serious flaws in the electricity market structure; and
- It is not clear if the current draft Bill goes as far as the likely new EU Directive will require, which in any case must become law in Ireland within a short period of time. The Authority would suggest that meeting the minimum required by the Directive is insufficient in a market which, by virtue of its small size and geographical position, is not *a priori* an attractive place for energy investment. The experience of the past 5 years has shown that international energy investors need extra confidence that the market will not operate to the advantage of the incumbent.

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## 3 ACTION REQUIRED

### 3.1 *Structural Separation*

The option of ignoring the evidence identified by independent analysts, and simply perpetuating the existing structure, is not one which can be sustained in the long run. The Bill presents a unique opportunity to fix what is wrong with the electricity market in Ireland. It is vitally important that the Bill should not simply consolidate the current, failed system. Some of the following elements of proposals made by the OECD and IPA and in previous submissions by the Competition Authority are essential, others may act as substitutes for each other:

- Vertical separation of the ESB into its component parts (generation, transmission, distribution and supply) (IPA).
- Horizontal separation of ESB's generating capacity into a number of competing units, whether through a combination of plant disposal, tolling arrangements and other contractual arrangements to remove control of the price-setting plant from ESB and to bring third parties directly into the market (OECD, IPA).
- Transfer of ownership of the transmission assets to, and strengthening of the position of, Eirgrid (CA).

There is nothing radical or groundbreaking in the kinds of structural reforms advocated here. Horizontal and vertical separation of incumbent utilities is a tried and tested approach toward the introduction of competition in newly liberalised electricity sectors. For instance, the horizontal and vertical separation of incumbent electricity utilities has been used in the UK, Spain, Italy, the Australian states and New Zealand to great effect.

- In Italy for instance, a combination of a generating capacity cap and forced divestiture was used to shrink the incumbent's (ENEL) dominant share to 50%. Even at this level, the National Competition Authority and National Regulatory Authority believed that competition was not being sufficiently encouraged.

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- In New Zealand, a capacity cap was initially combined with divestiture but further divestiture by the dominant generator was deemed necessary to successfully promote competition. By 1999 there were four competing generators formed from the initial incumbent utility.
  - In the UK, the incumbent monopolist was split in two and further entry permitted, though it has been argued since that a more radical approach may have yielded results more quickly, e.g. the separation of generation into four or firms distinct firms.
  - In the State of Victoria, which was the first of the Australian States to liberalise its electricity sector, the incumbent generating firm was broken into five distinct firms. In contrast to the UK, the benefits of competition were delivered much more quickly in terms of price reductions.

A second best approach to the problem of horizontal restructuring might be tendered plant management and is discussed in some detail in the ESRI Working Paper, *The Irish Energy Market – Putting the Consumer First*.<sup>5</sup> This approach involves the tendering of plant management on a competitive basis and may be adapted for old as well as newly constructed generating plant. It should be borne in mind however that this is a second best approach and that there is no true substitute for introduction of real competition in terms of potential efficiency gains.

### 3.2 All-Ireland Market

This consultation should also deal with the creation of a North-South electricity market. The creation of such a market should be feasible within a reasonable timescale; the Financial Times of 7 February 2002 announced the creation of an Iberian electricity market in which the Portuguese and Spanish systems would effectively operate as one. Paragraph 13, “Impact on North-South Affairs”, in the Memorandum for Government dated 23 January 2002, states that “... there is active discussion at official level with the Northern Ireland Regulator’s Office and the Department of Enterprise, Trade and

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<sup>5</sup> John Fitzgerald, *The Irish Energy Market – Putting the Consumer First*, ESRI Working Paper No. 145, August 2002.

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Investment with a view to progressing the examination of the feasibility of an all-island energy market.” It may, perhaps, be worth pointing out that the two Departments concerned have a consultants’ report (IPA) recommending how an all-island market may be created, but that the Department of Public Enterprise chose not to implement its recommendations in this legislation. The new Minister has an opportunity to re-examine these inherited choices and take steps to a more integrated and competitive electricity market.

### ***3.3 Asymmetric Regulation***

Experience from elsewhere, and particularly the UK, has shown that in order to kick-start the competitive process it is not enough that the regulatory system be neutral between the various competitors. In particular, it is important at the outset to tilt the regulatory field in favour of new entrants. This is required both to tackle the position of the dominant vertically integrated incumbent, to send positive signals to potential entrants and to create the correct expectations in the energy investment community (who have funds that are liquid and will be attracted to more secure environments).

For instance, in the UK energy sector the regulators have used such tools as fixed price cards that the incumbents had to issue for certain segments of the market. The incumbents were not allowed to undercut these prices ordinarily and this enabled competitors to obtain a foothold in the market place. So successful has been the asymmetric approach to regulation that in recent times price controls have been lifted for the previous franchise sector.

The experience in New Zealand, where the dominant company was split into completely separate State owned enterprises and where competition law was modified to treat them as such, shows that it is possible to foster competition whilst balancing divergent stakeholder interests. This had the effect of immediately introducing effective competition into the generation and supply markets. This then gave private capital a very strong basis upon which to invest in the New Zealand market. In the Irish context, if this route were chosen, it could be done by modifying existing competition law or possibly by requiring the baby ESBs to make a declaration in the High Court that they would act as

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separate undertakings from the perspective of competition law. In this manner, any failure to do so would result in contempt proceedings.

The Authority recommends asymmetric regulation comprising of the following:

- Limiting the ability of ESB to further strengthen its dominant position by building new generation capacity (OECD, IPA).
- The prevention of ESB from participation in VIPP auctions (OECD).
- The creation of genuine opportunities for new entrants in generation. This would include the elimination of any special privileges for ESB, including guaranteed market shares<sup>6</sup> and government guarantees of loans.

## **4 SPECIFIC POINTS**

### ***Head 11 Functions of the Minister and Commission***

Head 11(5)(f) provides that the Transmission System Operator give priority to generating stations using renewable, sustainable or alternative energy sources when selecting generating stations to be despatched. If a lot of renewable power is based on off-shore wind capacity it requires a large spinning reserve (in case the wind dies down). This may increase instability in the system and increase costs. A thorough regulatory impact analysis should be conducted to fully assess the implications of this kind of provision.

### ***Head 12 – 14 Consumer Protection***

Head 12 – 14 of the proposed bill deals with consumer protection and makes provision for the CER to consult with final customer interests at least once a year with regard to

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<sup>6</sup> The Tri-Partite Agreement, the elements of which are private, raises the level of uncertainty amongst potential market participants. Market participants only know of the outline of this agreement in very broad terms (such as, that it provides for ESB to retain at least 60% of the market, thus assigning a very limited role to competition and assuring continued market power for ESB). This creates a suspicion that the agreement holds out guarantees for ESB and the ESB group of unions that may have an impact on competition.

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matters affecting them. It is provided that the results of the consultation be published in the CER annual report.

While the Authority welcomes this development, some aspects of the Heads could benefit from clarification.

- First, in any consultation well-organized cohesive groups are likely to be engaged enough to respond. This gives them an ability to influence outcomes. In the electricity market business and industrial customers are generally well organized, resourced and capable of representing their interests. In contrast, domestic consumers are a diffuse and amorphous group, less able to represent their interests effectively. It is hoped that the impact of these Heads will be to give the smaller consumer an opportunity to have their views heard.
- Second, it is not clear from the Heads how final customers are to be consulted. Will customer surveys be employed or will consumer representatives be consulted on their behalf? In the latter case, it would be advisable to give direction in legislation which kinds of customer representatives will be consulted.

### *Head 25 Conditions of Licences*

Head 25 provides that the Commission may include as a condition of a licence a requirement that the holder of a licence enter into agreement with any person for the purposes specified in the licence condition, and that the Commission may determine the terms of such an agreement. Based on the experience of the Infrastructure Agreement, it appears to be both undesirable and unworkable to require parties to enter into an agreement.

- Undesirable – unnecessary delays are introduced because parties must be allowed to attempt to reach an agreement, which they may fail to do, and in this case it then falls back to the Commission and there may be court proceedings.
- Unworkable – if you want to give a direction you do just that; there is no point in pretending that it is an agreement when the parties have diametrically opposed interests.

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The Authority recommends that those parts of Head 25 which provide that parties be required to enter into agreements be omitted and instead, that the role of the regulator in giving direction to the parties be clarified.

### ***Head 49 – 50      Appeal Panels***

Head 49 – 50 provides an appeals procedure for decisions of the CER and for the establishment of an Appeals Panel. Head 49(3) provides that the Competition Authority be consulted as to the composition of the panel. The Authority seeks clarification on its role in this matter. Further, it is desirable that the composition of the appeals panel be prescribed in greater detail in the legislation, referring explicitly to the required areas of expertise and experience of the panel members.

It is not clear from the Heads who precisely will have standing to appeal decisions of the Commission. In the opinion of the Authority consumer representative bodies, such as the Competition Authority should have standing to appeal decisions of the regulator.

As a general principle the Authority is also of the opinion that under most circumstances competitors should have standing to appeal. However, there is a danger, particularly if regulation is asymmetric, that the incumbent may try to use the appeals process to impede regulatory progress. Accordingly, regulatory decisions should stand until successfully appealed.

Finally, the Appeals Panel will have six months to reach a final decision. In contrast, appeals panels in the aviation sector have only two months.

### ***Head 56      PES Economic Purchase***

Head 56 makes provision for the economic purchase by the PES. It is not clear from the Heads how this is supposed to work – is the PES obliged to purchase only from generating stations owned by ESB Powergen, or from all participants in the market? The latter would be preferable, but it is not clear that this is what is intended.

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### ***Head 66    Infrastructure Agreement***

Head 66 provides for an infrastructure agreement which will define the nature of the relationship between transmission system owner and operator. Section (1)(d) of Head 66 states that:

“The Commission may, for the purposes of exercising its power in subsection (c), consult with the Competition Authority.”

The Competition Authority seeks clarification on the meaning of this provision. In particular, the use of ‘may’ seems to render the provision meaningless since the Commission ‘may’ or ‘may not’ consult with the Competition Authority at any time.

### ***Head 76    Public Service Obligation***

Head 76 provides that the Commission for Electricity Regulation may force the Public Electricity Supplier (PES) to take up to 15% of its requirements from peat-fired stations; require generators to make peat-fired stations available for dispatch; and require the Transmission System Operator (TSO) to give priority in dispatch to peat-fired stations. It can also require the PES to take power from renewable, sustainable or alternative sources or CHP plants, or some combination of indigenous fuels with alternative energy and fuel efficiency measures. The cost of the obligations will be recovered by levy on all electricity users. Obviously, these provisions could, if implemented, substantially raise the cost of electricity. There is no Regulatory Impact Analysis with the bill, apart from a brief statement that the Quality Regulation Checklist has been complied with.

## **5    CONCLUSION**

The current legislation, which underpins the regulatory structure and operation of Ireland’s electricity sector, has delivered a third best outcome. On the one hand, we are denied the efficiency gains that a regulated vertically integrated monopoly electricity utility can potentially deliver. On the other hand, we are denied the benefits that effective competition can deliver. Instead, because of the manner in which the EU Electricity Directive has been implemented, we have a regulated, nominally vertically separated,



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super-dominant undertaking, which brings none of the proven benefits of competition (as shown in other countries) but which costs, apart from the efficiency losses associated with separation, additional wasted resources in terms of the increased regulatory burden.

The stated purpose of the draft Electricity Bill under consideration here is to consolidate and codify existing legislation and address remaining regulatory and restructuring issues in the electricity sector. Unfortunately, as it is at present, the Bill fails to address any of the serious regulatory or restructuring issues which must be resolved before the benefits of liberalisation can be realised.

Legislative provision must be made to allow for meaningful restructuring of the electricity sector. In particular, as identified in reports commissioned by the CER and the Department of Public Enterprise, as well as in the recommendations of the OECD, the Authority recommends:

- Full vertical separation of the ESB, i.e. full ownership unbundling of the ESB's activities in generation, transmission and distribution and supply;
- Horizontal restructuring of the ESB's generation activities – this might mean that divestiture powers and/or the power to impose generation caps be conferred on the CER, and/or that provision be made for tendered plant management;
- The creation of regulatory and political structures that will enable the development of an all-Ireland electricity market; and
- The implementation of regulatory structures that embody the principle of asymmetric regulation, i.e. regulation that favours new investment interests over incumbent interests.

The proposed electricity legislation fails to address any of the serious obstacles to competition in the electricity sector and will only deliver the appearance of liberalisation but with no effective competition. What is now required is a serious undertaking by government that it will tackle problems in the electricity sector. A strong positive signal needs to be sent to private investment that the Irish electricity market is commercially attractive. New legislation in the area represents a unique chance to do that.

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The Competition Act, 2002 confers on the Authority the function of advising the Government, Ministers of the Government and public authorities generally on the potential implications for competition of proposed new legislation. In this regard, the Authority is willing and eager to assist the Department at any stage in the task of drafting this and any other legislation, which has implications for competition.

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## **APPENDIX – LETTER TO MINISTER FOR PUBLIC ENTERPRISE, MARY O’ROURKE (29/06/01)**

29 June 2001

Mary O’Rourke, T.D.  
Minister for Public Enterprise  
44 Kildare Street  
Dublin 2

Dear Minister

**Re: Competition in the Electricity Industry and Divestment by ESB of its Interest in Synergen**

Ireland has recently begun major reform of its gas and electricity sectors under your direction. The Competition Authority welcomes moves towards increased competition in these sectors. If properly implemented these reforms will bring significant benefits to the Irish consumer and Irish economy.

However, despite the fact much has been done, the OECD review of regulatory reform in Ireland found that, “delays and partial reforms have been frequent.” As a result, “Ireland is still closer to the starting blocks than the finishing line in establishing an energy sector where private investment, innovation and lower prices are driven by competition.”

The OECD’s characterisation applies to electricity generation. Here, ESB appears to enjoy considerable market strength that is not challenged by competition. This strong position will be further fortified by the ESB/Statoil Synergen joint venture involving the Ringsend generation plant, which will foreclose the market to new entrants.

Virtual independent power producer auctions cannot be relied upon to provide effective competition to ESB. The withdrawal of potential entrants in generation from outside the State does not augur well for increased independent supply in generation. It also sends a negative signal to potential investors, not just in the electricity industry but throughout the economy, especially if the perception is created that incumbents receive favourable treatment and that there is no real commitment to opening markets.

There is an urgent need to ensure that the regulatory environment is focussed on encouraging and facilitating greater competition in generation, both in the public interest and to comply with Ireland’s commitments under EU liberalisation. The Authority is very happy to assist and support any efforts you make in this area.

One way in which the Authority might assist is to use its statutory powers including, if necessary, legal proceedings. While I am confident that such an approach, if the Authority were to find it appropriate, could achieve the aim of opening the market to competition, it would not do so within a time period that would make it an effective

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response. Moreover, the Authority is reluctant to spend significant public resources on detailed investigation and possibly lengthy legal proceedings until other, and potentially more effective, avenues have been fully exhausted.

An obvious such avenue is to approach you, both as the key shareholder in the ESB and as the Minister with responsibility for liberalisation in this area, with a view to resolving the problem. In your letter of 1<sup>st</sup> December 1999 to the Chairman of ESB concerning the proposed generation plant at Ringsend, you stated that:

... I could only consider giving an approval in relation to expenditure for the turbine after I have received a written undertaking from ESB that if I am of the opinion that competition law makes it appropriate, the ESB would sell its interest (including any interest in any consortium having an interest) in any generating station to be built at Ringsend on appropriate terms.

This offers a swifter and more effective route to the resolution of the problem. For this reason, the Authority has decided to write to you recommending that you call in the ESB's undertaking.

Attached for your information is an internal Authority staff paper, considered and approved by the Authority at its meeting on the 28<sup>th</sup> of June 2001, explaining in detail the negative implications for competition of the ESB's current relationship with the ESB/Statoil Synergen joint venture. The paper outlines why "competition law makes it appropriate" that ESB dispose of its interest in the ESB/Statoil Synergen joint venture.

The release of the OECD's *Regulatory Reform in Ireland* provided the catalyst for this letter: many of the Authority's concerns with respect to the electricity industry are reflected in the report that was warmly welcomed by the government. Resolution of this problem would also mark an important achievement for the High Level Group on Regulation established by the Government in May to implement the main recommendations of the OECD Report.

Should you require any clarification or wish to discuss any aspect of the letter please do not hesitate to contact me.

Yours sincerely

Dr. John Fingleton  
Chairman

cc Brendan Tuohy, Secretary General, Department of Public Enterprise  
Tom Reeves, Commissioner, Commission for Electricity Regulation  
Mario Monti, European Commissioner, Competition Policy  
Philip Kelly, Chair, High Level Group on Regulation, Department of An Taoiseach