

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

Dated 5 February 2021



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1. INTRODUCTION

Introduction

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

The Proposed Transaction

- 1.2. Prior to completion of the Proposed Transaction, Coillte intends to establish a wholly-owned subsidiary (“DevCo”) to which, upon completion of the Proposed Transaction, Coillte’s renewable energy division would be transferred.
- 1.3. The Proposed Transaction will be implemented pursuant to the following steps and/or agreements:
- A draft Business Transfer Agreement (“BTA”) between Coillte and DevCo, pursuant to which Coillte’s renewable energy division and its associated assets, goodwill, and staff will be transferred to DevCo;
 - A Share Purchase Agreement (“SPA”) between ESB Wind Development Limited (“ESB Wind”), a wholly-owned subsidiary of ESB, and Coillte dated 22 November 2019. Pursuant to the SPA, ESB Wind will acquire a 50% shareholding in DevCo from Coillte;
 - ESB Wind and Coillte will incorporate a jointly controlled holding company (“HoldCo”) to which ESB Wind and Coillte will assign all of the shares of DevCo;
 - An agreed form Shareholders Agreement (“SHA”) between Coillte, ESB Wind, DevCo, and HoldCo. The SHA will govern the management of HoldCo and its subsidiaries, including how decisions will be taken in respect of material issues affecting the joint venture; and
 - A Lease Option Framework Deed (“LOFD”) between Coillte and DevCo pursuant to which HoldCo and DevCo (together, the “Joint Venture” or “JV”) will obtain certain rights over Coillte-owned land.
- 1.4. Following implementation of the Proposed Transaction, ESB and Coillte (together, the “Parties”) will each hold a 50% shareholding in HoldCo, and thus will each exercise joint control over HoldCo. Following implementation of the Proposed Transaction, HoldCo will be the 100% shareholder of DevCo.

The Undertakings Involved

ESB

- 1.5. ESB is a vertically-integrated energy corporation established by statute¹ with operations at all levels of the energy sector in the State.
- 1.6. ESB is majority-owned by the Government of Ireland through the Minister for Public Expenditure and Reform (85%) and the Minister for the Environment, Climate, and Communications (10%). The remaining 5% shareholding is held by the trustees of an Employee Share Ownership Plan.
- 1.7. ESB's business activities consist of the following:
 - Generation and wholesale supply of electricity: ESB generates and sells electricity on the all-island Integrated Single Electricity Market ("I-SEM"). ESB's generation and trading business develops, operates and trades the output of ESB's electricity generation assets. ESB's generating portfolio consists of 5,558MW of electricity generation assets across the I-SEM and Great Britain. ESB's existing electricity generation assets are principally thermal and hydro sourced. On the island of Ireland, ESB has interests in seven operational thermal plants (four natural gas, two peat and one coal and oil plant) with total installed capacity of 3,272MW, and five hydropower plants with total installed capacity of 221MW. On the island of Ireland, ESB also owns and operates onshore wind farms with total installed capacity of 669MW.
 - Electricity transmission and distribution: ESB is the licensed Transmission Asset Owner ("TAO") and Distribution Asset Owner ("DAO") in the State and in Northern Ireland (the latter through its subsidiary, Northern Ireland Electricity Networks Limited ("NIE Networks")). ESB is also the holder, via its subsidiary ESB Networks DAC ("ESB Networks") and NIE Networks, of distribution system operator ("DSO") licences in the State and Northern Ireland respectively.² ESB's functions as TAO, DAO, and DSO are strictly ring-fenced from all other functions of ESB, including its electricity generation and retail supply business.
 - Retail supply of electricity and natural gas: ESB is also engaged in the retail supply of electricity to end-users on the island of Ireland under the brand *Electric Ireland* and in Great Britain (under the brand *ESB Energy*). *Electric Ireland* is also active in the retail supply of natural gas to end-users on the island of Ireland.
 - Energy efficiency consulting: *ESB Smart Energy Services* business unit assists businesses to reduce their energy costs (through energy management, lighting as a service, battery storage, heating solutions and demand side response).

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

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



- Electric vehicles: ESB owns and operates public charging infrastructure for electric vehicles in the State.
- Telecoms: ESB, through its wholly-owned subsidiary ESB Telecoms Limited, provides wholesale services such as leased lines and physical infrastructure access, as well as retail end-to-end business connectivity services, in the telecoms sector in the State. ESB is also a 50% shareholder in a joint venture with Vodafone, SIRO, which offers wholesale high-speed broadband in the State through its growing fibre-to-the-home offering.
- Engineering consultancy services: Through its engineering and major projects ("E&MP") division, ESB provides engineering services, including services relating to project management, surveying, electrical, mechanical and civil design, environmental matters, the preparation of submissions for planning consents and asset management to the ESB group including the generation and trading business, as well as ESB Networks and to joint venture businesses. ESB International (the trading name of an ESB subsidiary within ESB's E&MP division) is a global provider of engineering consultancy services, currently operating in the Middle East, Africa, the Far East and Europe, including the island of Ireland and the United Kingdom. ESB also provides operation and maintenance services internationally.

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

Coillte

1.9. Coillte is a commercial semi-State company incorporated in the State. One ordinary share is held by the Minister for Agriculture, Food and the Marine with the remaining share capital held by the Minister for Public Expenditure and Reform.

1.10. Coillte's business activities consist of the following:

- Forestry: Coillte's Forestry division manages all aspects of Coillte's forestry business including tree planting, growing, managing, protecting and harvesting of forests on Coillte's 438,000 hectares of land. In addition, Coillte is the largest provider of outdoor recreation in the State with twelve forest parks, almost 300 recreation sites and more than 3,000km of waymarked trails developed on its lands. Coillte's Forestry division supplies wood products such as pulp wood, small sawlog, large sawlog, and bare-rooted plants in the State and worldwide.
- Land Solutions: Coillte's Land Solutions division is responsible for the management, other than through the Forestry division, of Coillte-owned land. Coillte buys, sells and leases land, for example as part of its sustainable approach to forestry and for the development of renewable energy and other infrastructure assets in sectors such as tourism and telecoms.

- **Renewable energy development:** Coillte's renewable energy development activities are undertaken by a business unit located in the Land Solutions division. This business unit has co-developed four Renewable Energy Feed In Tariff ("REFIT")³ 2-designated wind farms (two with ESB, one with SSE Airtricity Limited, and one with Bord na Móna). In 2018, Coillte sold its interests in three of these four wind farms, and part of its stake in the fourth wind farm.⁴ This business unit is currently developing [approximately 45]⁵ onshore wind farm project sites in the State.
- **Manufacture and supply of panel boards:** Coillte manufactures and supplies panel boards through its *Medite* and *Smartply* brands. Through these brands, Coillte supplies medium density fibreboard (MDF) and oriented strand board (OSB) in the State and the United Kingdom for use in the construction industry. *Medite* and *Smartply* source their timber largely from Coillte's Forestry division.

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

The Joint Venture

- 1.12. Once established, and following implementation of the Proposed Transaction, the JV will be active in the development of renewable energy generation assets (principally onshore wind farms), primarily located on Coillte-owned land, and the generation and sale of electricity (once the relevant generation facilities are commercially operational).
- 1.13. Initially, the JV will manage and develop [approximately 45] onshore wind farm sites (comprising Coillte-owned land and third party-owned land) which are currently under active development by Coillte (the "Initial Portfolio"). The majority of these onshore wind farm sites are at early stage development, i.e., at pre-planning or feasibility stages.
- 1.14. The Initial Portfolio comprises 14 onshore wind farm sites that are co-development arrangements ("CDAs") between Coillte and a number of third parties (referred to as CDA partners) to develop each onshore wind farm site under a joint ownership structure in which risk and reward are shared between Coillte and the CDA partner.⁶ These onshore wind farm sites combine land contributed by Coillte and land, grid connection and/or other elements contributed by the CDA partners. The remaining [approximately 30] sites will be wholly owned by the JV.

³ REFIT is the predecessor subsidy scheme to the RESS

⁴ Coillte retains a jointly controlling stake ([...])% in the Sliabh Bawn wind farm, located in Doughill Forest, Co. Roscommon. Bord na Móna holds a [...])% stake and Greencoat Renewables holds the remaining [...])% stake.

⁵ In the notification, the Parties state that this figure comprises "[...] *Initial Advanced Sites*" and "*a likely additional [...] - [...] sites to be chosen from the schedule of Reclassification Sites*" to offset "title risk" ..

⁶ There are currently [...] CDA partners: [...]).

1.15. The Parties provided the following information in the notification:

“[...]”

1.16. Coillte also has solar and battery projects in the State that [...]. These projects will also be transferred to the JV, in accordance with the BTA, following implementation of the Proposed Transaction. Coillte provided the following information in the notification:

“[...]”

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

Rationale for the Proposed Transaction

1.18. Coillte provided the following information in the notification:

“[...]”

1.19. ESB provided the following information in the notification:

“[...]”

Preliminary Investigation (“Phase 1”)

Contact with the Undertakings Involved

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

1.21. Upon receipt of a full response to the RFI from both of ESB and Coillte on 9 October 2020, the “appropriate date” (as defined in section 19(6)(b)(i) of the Act) became 9 October 2020.⁷

1.22. During its Phase 1 investigation, the Commission requested and received, on an on-going basis, further information and clarifications from the Parties.

1.23. On 1 September 2020, an economic report entitled “*Project Pearl: An Assessment of the CCPC’S Potential Concerns*” prepared by Frontier Economics, commissioned on behalf of Coillte, was submitted to the Commission by Coillte (the “Frontier Report”).

⁷ The “appropriate date” is the date from which the time limits for making Phase 1 or Phase 2 determinations begin to run.

Third Party Submissions

1.24. No submission was received during the Phase 1 investigation.

Market Enquiries

1.25. The Commission circulated questionnaires to various third parties during the Phase 1 investigation, including:

- The Commission for Regulation of Utilities;
- The Utility Regulator of Northern Ireland;
- EirGrid, the Transmission System Operator (“TSO”) in the State and in Northern Ireland (through its wholly owned subsidiary System Operator for Northern Ireland, SONI Limited);
- Electricity generators active in the I-SEM; and
- Developers of onshore wind farms in the State.

1.26. The Commission received a response from the majority of third parties to whom it sent a questionnaire. In the case of each third party that submitted a response, the Commission followed-up by phone seeking further detail in relation to each response.

Phase 1 Proposals

1.27. During the Phase 1 investigation, the Commission identified two potential competition concerns arising from the Proposed Transaction. First, the Commission identified a potential competition concern related to a risk that the Proposed Transaction could lead to the exchange of competitively sensitive information (“CSI”) between ESB and the JV. Following implementation of the Proposed Transaction, ESB will be active in the development, construction and operation of onshore wind farms through: (i) its shareholding in the JV; and (ii) its development activities outside the JV. ESB will therefore be a competitor of the JV in the development, construction and operation of onshore wind farms in the State (the “Horizontal CSI Concerns”). These concerns are detailed in paragraphs 5.47-5.51 below.

1.28. Second, the Commission identified a potential competition concern related to a risk that the Proposed Transaction could lead to the exchange between Coillte and the JV of CSI of Coillte’s third party land customers. Following implementation of the Proposed Transaction, Coillte will continue to supply land to third party developers of onshore wind farms in the State (the “Vertical CSI Concerns”). These concerns are detailed in paragraphs 5.119 and 5.120 below.

1.29. On 17 November 2020, Coillte submitted draft proposals to the Commission in accordance with section 20(3) of the Act with a view to ameliorating the potential

Vertical CSI Concerns identified by the Commission. On 18 November 2020, the Parties submitted draft joint proposals to the Commission in accordance with section 20(3) of the Act to ameliorate the potential Vertical CSI Concerns identified by the Commission. The submission of these two sets of draft proposals by (i) Coillte and (ii) the Parties, respectively, extended the deadline within which the Commission was required to conclude its assessment of the competitive effects of the Proposed Transaction in Phase 1 by 15 working days to 45 working days in accordance with section 21(4) of the Act.

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

Phase 1 Determination

- 1.31. Having considered all the available information in its possession at the time, the Commission was unable to form the view at the conclusion of the Phase 1 investigation that the result of the Proposed Transaction would not be to substantially lessen competition in any market for goods or services in the State.
- 1.32. Consequently, on 10 December 2020 the Commission determined, in accordance with section 21(2)(b) of the Act, to carry out a full investigation in relation to the Proposed Transaction under section 22 of the Act.

Full Investigation (“Phase 2”)

- 1.33. During the Phase 2 investigation, the Commission engaged further with the Parties and their legal advisors concerning the draft proposals submitted by Coillte and the Parties, respectively, during the Phase 1 investigation.

Third Party Submissions

- 1.34. Three submissions were received from third parties during the Phase 2 investigation. The competition concerns expressed in these submissions were assessed by the Commission during the Phase 2 investigation as part of its review of the likely competitive impact of the Proposed Transaction in a number of potential markets for goods or services in the State.

Phase 2 Proposals

- 1.35. On 21 December 2020, ESB and Coillte submitted revised draft joint proposals to the Commission in accordance with section 20(3) of the Act with a view to ameliorating the Commission’s Horizontal CSI Concerns. The Commission engaged further with the Parties and their legal advisors concerning the draft joint proposals. On 28 January 2021, ESB and Coillte submitted to the Commission final

joint proposals under section 20(3) of the Act (the “Joint Proposals”). The Joint Proposals are discussed further in section 6 below.

- 1.36. On 8 January 2021, Coillte submitted revised draft proposals to the Commission in accordance with section 20(3) of the Act with a view to ameliorating the Commission’s Vertical CSI Concerns. The Commission engaged further with Coillte and its legal advisors concerning Coillte’s draft proposals. On 18 January 2021, Coillte submitted to the Commission final proposals under section 20(3) of the Act (the “Coillte Proposals”). The Coillte Proposals are discussed further in section 6 below.



2. INDUSTRY BACKGROUND – THE DEVELOPMENT, CONSTRUCTION, AND OPERATION OF ONSHORE WIND FARMS

- 2.1. The Proposed Transaction takes place in the renewable energy sector (specifically the development, construction, and operation of onshore wind farms) in the State.
- 2.2. It is the stated policy of the Irish Government to achieve 70% electricity generation via renewable energy sources by 2030.⁸ In addition, electricity demand and consumption is expected to increase over the coming years.⁹
- 2.3. The development, construction and operation of onshore wind farms comprises the following stages: (i) selection of location/site and assessment of wind conditions; (ii) administrative procedures and environmental authorisation; (iii) acquisition of the necessary rights on the land and procurement of wind generators; (iv) granting of license to connect the wind farm to the electricity transmission network; (v) securing a “route to market”; (vi) construction; and (vii) start-up.
- 2.4. Onshore wind farms can be developed by undertakings for their own use (in order to generate electricity for sale into the I-SEM) or for sale to third parties.

Choice of location and acquisition of rights on the land

- 2.5. Third parties contacted by the Commission informed the Commission that it is necessary to construct onshore wind farms in locations that have certain characteristics. In particular, onshore wind farms must be set back a sufficient distance from other developments; must be in locations compatible with local authority development plans; must not be located in areas designated for environmental protection or conservation; and must be located in relatively close proximity to the electricity transmission or distribution system to facilitate grid connection.
- 2.6. In addition, developers of onshore wind farms contacted by the Commission expressed the view that larger sites are particularly advantageous and allow developers to benefit from economies of scale.

⁸ See, for instance, *Programme for Government 2020: Our Shared Future* which is available at: <https://assets.gov.ie/94092/50f892b9-a93e-43fc-81d1-778ff9954d9f.pdf>

⁹ See paragraph 2.3 of the *Climate Action Plan 2019*, which is available at: <https://assets.gov.ie/25419/c97cdecddf8c49ab976e773d4e11e515.pdf>

- 2.7. Land on which a developer can develop and construct an onshore windfarm is typically secured through: (i) sale/purchase agreements; or (ii) lease (option) agreements.¹⁰
- 2.8. Developers of onshore wind farms contacted by the Commission expressed the view that they often need to source land for project sites from multiple landowners in the State to “*piece together*” a site of appropriate scale. Developers of onshore wind farms therefore typically need to enter into multiple sale and/or lease (option) agreements with landholders to source land on which an onshore wind farm can be constructed.
- 2.9. Prior to entering into sale/purchase or lease (option) agreements, developers of onshore wind farms typically enter into agreements with landowners to allow wind assessments or environmental surveys to be carried out on land.
- 2.10. Land rights also need to be secured by a developer of an onshore wind farm to facilitate site access and/or connection to the electricity grid. Developers typically agree the following with landowners to facilitate the development and construction of an onshore wind farm:
 - Wayleave agreements are used to facilitate the connection of electricity generation facilities to the electricity grid. This is usually by way of overground or underground cables; and
 - Easement agreements are used to grant a right of way and a right of access to developers of onshore windfarms. They facilitate site access, site maintenance, and/or the delivery of equipment and wind turbines.

Administrative procedures and environmental authorisation

- 2.11. There are a number of administrative procedures and environmental authorisations that must be secured prior to developing an onshore wind farm in the State.
- 2.12. Planning permission to construct the onshore wind farm must be secured by the developer.
- 2.13. Typically, when applying for planning permission, a developer of an onshore windfarm must submit plans to the relevant planning body¹¹ concerning the arrangement of wind turbines on a site as well as environmental impact studies, ornithological surveys, and wildlife surveys.

¹⁰ Lease option agreements are typically agreed between a developer of an onshore wind farm and a landholder during the early stages of the development process. Lease option agreements allow the developer to “reserve” land without committing to a “full” lease. Lease option agreements afford the developer the right to draw down a lease at a later date, when the project is more certain (for example, as a result of securing a subsidy). The Parties informed the Commission that the lease is typically entered into at the financial close of a project.

¹¹ A local authority or An Bord Pleanála, as appropriate.

- 2.14. Licences to: (i) construct and (ii) operate an electricity generator must also be sought from CRU.

Grid connection

- 2.15. Approval to connect the onshore wind farm to the electricity transmission or distribution network must also be secured from CRU and ESB Networks.

Route to market

- 2.16. A “route to market” must also be secured by a developer of an onshore windfarm. Typically, this would be by way of public subsidy or price support, such as through the Renewable Energy Support Scheme (“RESS”).
- 2.17. The RESS is a subsidy scheme for renewable electricity generation facilities designed to support around 13,500GWh of generation capacity through a series of competitive auctions over the lifetime of the scheme (2020-2025). All renewable electricity sources (onshore wind, offshore wind, solar, biomass, hydro, etc.) are eligible to compete for the subsidy, which will be in the form of a two-way contract for difference (“CfD”), with the strike price determined by auction. The first RESS auction (“RESS 1”) took place from 21-28 July 2020. The final results of the RESS 1 auction were published on 10 September 2020.¹² Further RESS auctions will be held at frequent intervals throughout the lifetime of the scheme.¹³
- 2.18. The RESS auctions are implemented and operated by EirGrid on behalf of the Minister for the Environment, Climate and Communications. The Department of the Environment, Climate and Communications and CRU provide input into the auction process, with the latter conducting a “competitive analysis” of the submitted bids.¹⁴
- 2.19. RESS is expected to be the most common “route to market” for onshore windfarms (and all other renewable electricity generation sources) over the next 5 years.
- 2.20. Bids into the RESS auction are undertaken on a project-by-project basis. Auction participants are required to submit individual and independent bids for each project for which they are seeking a two-way CfD.
- 2.21. A single wholesale electricity market, the I-SEM, operates on the island of Ireland. The I-SEM comprises various temporal markets. The physical delivery of electricity is conducted in three markets: the Day-Ahead Market, the Intraday Market and the Balancing Market. Trading of financial instruments for the payment of electricity is conducted in the Forwards Market and the Financial Transmission

¹² The results of the RESS1 auction are available at: [https://www.eirgridgroup.com/site-files/library/EirGrid/RESS-1-Provisional-Auction-Results-\(R1PAR\).pdf](https://www.eirgridgroup.com/site-files/library/EirGrid/RESS-1-Provisional-Auction-Results-(R1PAR).pdf)

¹³ Please see: <https://www.gov.ie/en/publication/36d8d2-renewable-electricity-support-scheme/>

¹⁴ Factors considered by CRU when undertaking this “competitive analysis” include “*distribution of ownership and commonality of control, pivotal supplier considerations, other market concentration considerations, and other factors as the Regulatory Authority [CRU] in its sole discretion deems appropriate*”. Please see section 6.5 of the RESS 1 Terms and Conditions which is available [here](#).

Rights Market while financial incentives to generators to supply electricity at short notice are available in the Capacity Market. It is essential that electricity demand matches electricity supply at all times. The Balancing Market of the I-SEM is used to balance electricity demand with electricity supply. The strike price of electricity in this market is determined by imbalances between forecasted electricity demand and forecasted electricity supply.

- 2.22. In order to qualify for a RESS auction, a renewable electricity developer is required to have a power purchase agreement (“PPA”) with a licenced energy supplier (such as Electric Ireland, Bórd Gáis Energy, Energia, etc.) (an “Offtaker”). The Offtaker trades the electricity generated by the renewable energy generator in the I-SEM. PPAs are underpinned by CfDs between the Offtaker and the generator.
- 2.23. An alternative “route to market” for an onshore wind farm is via a corporate power purchase agreement (“CPPA”). A CPPA is a contract to provide electricity at an agreed price for an agreed term. Pricing of CPPAs are set without access to the PSO levy. In the case of CPPAs, the counterparty to the PPA is a corporation (typically a large consumer of electricity, such as a data centre operator).
- 2.24. Third parties contacted by the Commission during its review of the Proposed Transaction expressed the view that CPPAs are relatively uncommon in the State, but will become an increasingly common route to market for onshore wind farms (and other renewable energy generation facilities) over the coming years.¹⁵

Construction and start-up

- 2.25. Following the securing of a route to market, and the approval of planning permission and the other administrative procedures as described above, the developer of an onshore wind farm can commence construction on the project. Typically, third party contractors, engineers, and other services are procured to construct the onshore wind farm.

Conclusion

- 2.26. The Commission understands that the development of an onshore wind farm can fail at any of the stages described above. Consequently, it is not certain that all of the [approximately 45] sites of the Initial Portfolio will be successfully developed by the JV following implementation of the Proposed Transaction.
- 2.27. The Parties provided the following information in the notification in this regard:

“In particular, the following “pass/fail” stages in a project include a high risk of project failure: (i) a site may prove promising on early analysis but prove to have insufficient wind resource; (ii) environmental factors that only arise on detailed analysis may restrict development potential; (iii) a project may fail to obtain

¹⁵ Third Parties contacted by the Commission expressed the view that increased development and construction of data centres (and other large electricity users) in the State will result in a greater number of CPPAs between such large electricity users and renewable energy facilities.

planning permission; (iv) a project may fail to obtain grid connection; (v) a project may fail to obtain a route to market (e.g. failure to win at RESS government support auction or CPPA tender); (vi) external finance may not be secured.”

- 2.28. If the development of an onshore windfarm successfully proceeds through the stages described above and completes construction the onshore wind farm commences generating electricity and can supply this electricity in the I-SEM.

3. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

Introduction

- 3.1. The Commission focuses its merger review on the part(s) of the economy that will most likely be affected by the Proposed Transaction. This involves defining relevant product and geographic markets to the extent necessary depending on the particular circumstances of a given case.

Horizontal Overlaps

- 3.2. Following implementation of the Proposed Transaction, there will be a horizontal overlap between ESB and the JV in relation to the development, construction and operation of renewable energy generation facilities (specifically onshore wind farms) in the State.
- 3.3. Following implementation of the Proposed Transaction, there will also be a horizontal overlap between ESB, Coillte, and the JV in relation to the generation and wholesale supply of electricity in the I-SEM.

The Development, Construction, and Operation of Onshore Wind farms

Previous Determinations

- 3.4. The European Commission has previously assessed transactions involving the development, construction and operation of onshore wind farms. In *M.5366 - Iberdrola Renovables / Gamesa*,¹⁶ the European Commission stated the following:

“The development and promotion of wind farms basically comprises the following stages: (i) choice of the location and assessment of wind conditions, (ii) administrative procedures and environmental authorisation, (iii) acquisition of the necessary rights on the land and procurement of wind generators, (iv) license to connect the wind farm to the transmission network, (v) construction and (vi) start-up. These wind farms can be developed by undertakings for their own use (in order to generate electricity for its sale into the wholesale market) or for their sale to third parties.”

¹⁶ Please see paragraphs 10 and 11 of European Commission decision in *Case No. COMP/M.5366 -Iberdrola Renovables / Gamesa*, which is available at: https://ec.europa.eu/competition/mergers/cases/decisions/m5366_20081204_20310_en.pdf

- 3.5. This view was reiterated by the European Commission in *M.6540 - Dong Energy Borkum Riffgrund I Holdco/ Boston Holding/ Borkum Riffgrund I Offshore Windpark*.¹⁷
- 3.6. In both *M.5366* and *M.6540*, the European Commission did not distinguish between onshore wind farms and offshore wind farms and ultimately left open the precise definition of the relevant product market as, in those instances, the transactions concerned did not raise any competition concerns under any possible product market definition.
- 3.7. In relation to the relevant geographic market, the European Commission considered that the potential market for the development, construction, and operation of wind farms could be national in scope, but ultimately left open the precise relevant geographic market definition.

Views of the Parties

- 3.8. In relation to the relevant product market, the Parties expressed the following view in the notification:

“The Parties do not believe it necessary to conclude definitively on the relevant product market definition, as regardless of how the market is defined (i.e., whether for wind farms or renewable energy assets more broadly), no competition concerns arise as a result of the Proposed Transaction”.

- 3.9. In relation to the relevant geographic market, the Parties expressed the following view in the notification:

“In Ireland there is one all-island market for wholesale supply of electricity. Therefore, wind farms and other renewable facilities are obliged to conform to the same standards for generation and wholesale supply of electricity across the island of Ireland. That a number of entities, including ESB, Energia and Brookfield have been active in relation to renewables in both the State and Northern Ireland indicates supply side substitutability between the jurisdictions. That the JV’s projects are located exclusively in the State is a function of Coillte land being located in the State, rather than evidence that there are separate geographic markets. Therefore, if the CCPC is to assess the development, construction and operation of wind farms or renewable energy generation assets, the Parties submit that the

¹⁷ This decision is available at:

https://ec.europa.eu/competition/mergers/cases/decisions/m6540_20120510_20310_2569287_EN.pdf



relevant geographic frame of reference is the island of Ireland.

In any case, it is not necessary to define the relevant product or geographic markets, as no competition concerns are raised in respect of the development, construction and operation of wind farms or renewable energy generation facilities by the Proposed Transaction regardless of how markets are defined.”

Views of the Commission

- 3.10. In this instance, it is not necessary for the Commission to define the precise relevant product market since its conclusion on the competitive impact of the Proposed Transaction will be unaffected whether the relevant market is defined narrowly (i.e., the development, construction and operation of onshore wind farms) or more broadly to encompass the development, construction and operation of all renewable energy generation facilities. For the purposes of assessing whether the Proposed Transaction might result in a substantial lessening of competition, the Commission has analysed the likely effects of the Proposed Transaction with reference to the narrowest possible potential relevant product market, i.e., the development, construction and operation of onshore wind farms.
- 3.11. Following the approach taken by the European Commission in its previous decisions, and taking into account the fact that the RESS will only be available to renewable electricity generation facilities developed in the State, the Commission has analysed the likely competitive impact of the Proposed Transaction by reference to the narrowest potential geographic market, i.e., the State.

The Generation and Wholesale Supply of Electricity

Previous Determinations

- 3.12. The European Commission has previously considered the generation and wholesale supply of electricity as one distinct product market, defining it as the:

“domestic generation of electricity at power stations within a certain geographic market as well as the electricity that is physically imported into this geographic market via interconnectors to be sold on to retailers.”¹⁸

¹⁸ Please see, for example, European Commission decision in *Case No COMP/M.7850 – EDF/CGN/NNB Group of Companies*, which can be accessed at: https://ec.europa.eu/competition/mergers/cases/decisions/m7850_429_3.pdf; *Case No COMP/M.7137 – EDF/Dalkia en France*, which can be accessed at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7137; and *Case No*

- 3.13. In addition, previous European Commission decisions have made no distinction between the different sources of electricity within the wholesale electricity market.¹⁹
- 3.14. In *M/12/008 – SSE/Endessa*²⁰ and *M/19/025 – EP UK Investments/Tynagh Energy*²¹, the Commission’s predecessor, the Competition Authority (the “Authority”) and the Commission, respectively, analysed the competitive impact of the relevant transaction in the market for electricity generation and wholesale supply in the I-SEM or its predecessor, the Single Electricity Market the (“SEM”).”
- 3.15. In relation to the potential relevant geographic market, the Commission has previously assessed the competitive impact in the island of Ireland (i.e., the I-SEM, and its predecessor the SEM).²²

Views of the Parties

- 3.16. The Parties expressed the following view in the notification:

“segregating generation and wholesale of electricity by energy source would diverge from precedent. The parties note that despite market interventions, such as subsidies to renewable electricity generators, electricity from all sources is substitutable from the end-user perspective. In addition, electricity generated from subsidised renewable sources exercises competitive pressure on conventionally generated electricity.

For the reasons stated above, the Parties submit that the relevant product market is for the generation and wholesale supply of electricity regardless of the source of electricity.

COMP/M.6984 – EPH/Stredoslovenska Energetika, which can be accessed at: https://ec.europa.eu/competition/mergers/cases/decisions/m6984_20131120_20310_3409627_EN.pdf.

¹⁹ Please see for example, European Commission decision in *Case No COMP/M.7850 – EDF/CGN/NNB Group of Companies*, which can be accessed at: https://ec.europa.eu/competition/mergers/cases/decisions/m7850_429_3.pdf and *Case No COMP/.4517 – Iberdeloa/Scottish Power*, which can be accessed at: https://ec.europa.eu/competition/mergers/cases/decisions/m4517_20070326_20310_en.pdf

²⁰ Please see merger determination *M/12/008 – SSE/Endessa*, which can be accessed at: <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2017/04/M-12-008-SSE-Endesa-Determination.pdf>

²¹ Please see merger determination *M/19/025 – EP UK Investments/Tynagh Energy*, which can be accessed at <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2019/08/Public-Determination-M-19-025-EP-UK-Investments-Tynagh-Energy.pdf>

²² Please see, for example, merger determination *M/10/026 – ESB/NIE*, which can be accessed at: <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2017/04/M-10-26-ESB-NIE-Determination.pdf>; *M/12/008 – SSE/Endessa*, which can be accessed at: <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2017/04/M-12-008-SSE-Endesa-Determination.pdf>; and *M/19/025 – EP UK Investments/Tynagh Energy*, which can be accessed at <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2019/08/Public-Determination-M-19-025-EP-UK-Investments-Tynagh-Energy.pdf>

The Parties submit that the relevant geographic market for the generation and wholesale supply of electricity is the island of Ireland.”

Views of the Commission

- 3.17. The Commission has not, in the course of its assessment of the competitive impact of the Proposed Transaction, found reasons to depart from the approach previously taken by the Authority and the Commission in relation to the generation and wholesale supply of electricity.
- 3.18. For the purposes of assessing whether the Proposed Transaction might result in a substantial lessening of competition, the Commission has analysed the likely competitive effects of the Proposed Transaction with reference to the generation and wholesale supply of electricity on the island of Ireland.

Vertical Relationships

- 3.19. Following implementation of the Proposed Transaction, there will be a vertical relationship between Coillte and the JV in relation to the supply of land suitable for the development and construction of onshore wind farms.
- 3.20. Following implementation of the Proposed Transaction, there will also be three potential vertical relationships between ESB and the JV in relation to:
- (i) the supply of engineering consultancy services;
 - (ii) the transmission and distribution of electricity; and
 - (iii) the retail supply of electricity to end users.

The Supply of Land Suitable for the Development and Construction of Onshore Wind farms

Previous Determinations

- 3.21. The Commission has not previously examined the potential market for the supply of land suitable for the development and construction of onshore wind farms. The Commission is also not aware of any instance where the European Commission has examined any potential market for the supply of land suitable for the development and construction of onshore wind farms.

Views of the Parties

- 3.22. The Parties expressed the following views in the notification:

“The Parties submit that it is not necessary for the [Commission] to reach a definitive conclusion regarding the existence or otherwise of a market for the supply of



development land or, more narrowly, a market for the supply of development land suitable for (renewable) generation facilities. On any view, no competition concerns can arise from this transaction.

Due to the many common features of development land, the Parties submit that there is no reason why, in the context of this transaction, the relevant market to be analysed should be restricted to land suitable for development of electricity generation assets (or more narrowly, for development of renewable electricity generation assets). The Parties submit that there is one market for the supply of development land on the island of Ireland.”

Views of the Commission

3.23. In this instance, it is not necessary for the Commission to define the precise relevant product market since its conclusion on the competitive impact of the Proposed Transaction will be unaffected whether the relevant market is defined narrowly (i.e., the supply of land suitable for the development and construction of onshore wind farms) or more broadly to encompass the supply of all development land. For the purposes of assessing whether the Proposed Transaction might result in a substantial lessening of competition, the Commission has analysed the likely competitive effects of the Proposed Transaction with reference to the narrowest possible potential relevant product market, i.e. the supply of land suitable for the development and construction of onshore wind farms.²³

3.24. With respect to the relevant geographic market, the Commission has analysed the likely competitive effects of the Proposed Transaction with reference to the narrowest possible potential relevant geographic market – i.e. the State.

The Supply of Engineering Consultancy Services

Previous Determinations

3.25. The Authority previously examined the potential market for the supply of engineering consultancy services in the State in *M/10/026 – ESB/NIE*. In that determination, the Authority stated the following:

“ESB defines engineering consultancy services to the power sector to include at least, project management, surveying,

²³ As noted in paragraph 2.5 above, land suitable for the development and construction of onshore wind farms in the State must have particular characteristics (such as, for example, certain setback from other developments, compatibility with local authority development plans, and environmental designations). In light of this, the Commission considers that it is appropriate to examine this potential market on a narrower basis in this instance.



electrical, mechanical and civil design, environmental studies and preparation of submissions for planning consents.”²⁴

- 3.26. The Authority stated the following regarding its conclusions on the relevant product and geographic markets:

“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.

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.

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.”²⁵

Views of the Parties

- 3.27. The Parties expressed the following view in the notification:

“The Parties submit that the market is broader than the provision of engineering consultancy services to the electricity sector and consists of infrastructure engineering consultancy, as many of the skills are transferrable and as a number of ESB's competitors are active across sectors.”

Views of the Commission

- 3.28. The Commission has not, in the course of its assessment of the competitive impact of the Proposed Transaction, found sufficient reasons to depart from the approach previously taken by the Authority in *M/10/026 – ESB/NIE*.
- 3.29. In this instance, it is not necessary for the Commission to reach a precise definition on the relevant product and geographic markets since its conclusion on the competitive impact of the Proposed Transaction will be unaffected whether the

²⁴ Please see paragraph 100 of the Authority's determination in *M/10/026 – ESB/NIE*, which is available at: <https://www.cpc.ie/business/wp-content/uploads/sites/3/2017/04/M-10-26-ESB-NIE-Determination.pdf>

²⁵ Please see paragraphs 101 – 103 of the Authority's determination in *M/10/026 – ESB/NIE*.

relevant market is defined narrowly (i.e., the supply of engineering consultancy services to the electricity sector in the State) or more broadly to include the supply of engineering consultancy services to other sectors and industries or to a geographic market wider than the State. For the purposes of assessing whether the Proposed Transaction might result in a substantial lessening of competition, the Commission has analysed the likely competitive effects of the Proposed Transaction with reference to the narrowest possible potential relevant market, i.e., the supply of engineering consultancy services to the electricity sector in the State.

The Transmission and Distribution of Electricity

Previous Determinations

- 3.30. The Authority previously examined the potential product market for the transmission and distribution of electricity.²⁶ In *M/10/26 - ESB/NIE*, the Authority stated the following:

“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 [the Commission for Energy Regulation, the predecessor to CRU] or NIAUR [Northern Ireland Authority for Utility Regulation].

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

²⁶ Please see *M/08/028 – EirGrid/SONI*, which is available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/05/M08028.Public.pdf> and *M/10/026 – ESB/NIE*, which is available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/M-10-26-ESB-NIE-Determination.pdf>



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/SONI²⁷ for the purposes of assessing the present proposed transaction.

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."²⁸

Views of the Parties

3.31. The Parties state the following in the notification:

"Generators are obliged to connect to the transmission or distribution system operated by the relevant monopoly provider in their relevant country and end users are obliged to be connected to the distribution system in order to purchase electricity. There are no substitutes for these systems. As such, each represents a separate product market.

In both M/10/26 - ESB/NIE and M.3696 – E.ON / MOL, the [Authority] and the European Commission, respectively, defined the geographic market as being the area in which the relevant transmission or distribution system is located.²⁹ That being the case, the Parties submit that the relevant geographic market is the State."

²⁷ Please see the Authority's determination in M/08/028 – EirGrid/SONI, which is available at: <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2017/05/M08028.Public.pdf>

²⁸ Please see paragraphs 75-82 of the Authority's determination in M/10/026 – ESB/NIE.

²⁹ The same conclusion in respect of the relevant geographic market was also reached by the European Commission in other cases such as M.7927 – EPH / ENEL / SE and M.4922 – EMCC.

Views of the Commission

- 3.32. The Commission has not, in the course of its assessment of the competitive impact of the Proposed Transaction, found sufficient reasons to depart from the approach previously taken by the Authority in *M/10/26 - ESB/NIE* in relation to the transmission and distribution of electricity.
- 3.33. For the purposes of assessing whether the Proposed Transaction would result in a substantial lessening of competition, the Commission has analysed the likely competitive effects of the Proposed Transaction with reference to the transmission and distribution of electricity in the State.

The Supply of Electricity to End Users

Previous Determinations

- 3.34. The Authority previously considered the supply of electricity to end users in the State in *M/12/008 – SSE/Endessa*. In that instance, the Authority did not come to a definitive view on the relevant product or geographic markets as its conclusions would have been unaffected whether the markets were defined on a narrow basis or more broadly. For the purposes of its competitive assessment in that case, the Authority examined the supply of electricity to large energy users in the State.
- 3.35. With respect to the potential relevant geographic market, the European Commission has defined retail electricity markets as national in scope.³⁰

Views of the Parties

- 3.36. The Parties expressed the following view in the notification:

“In the present case, the Parties submit that it is not necessary to conclude on the exact definition of the relevant product market, due to the absence of competition concerns relating to the retail supply of electricity, however the market is assessed.”

Views of the Commission

- 3.37. In this instance, it is not necessary for the Commission to define the precise relevant product market since its conclusion on the competitive impact of the Proposed Transaction will be unaffected whether the relevant market is defined narrowly (i.e., the retail supply of electricity to (i) domestic customers, (ii) small business customers, (iii) medium business customers and (iv) large energy users) or broadly to encompass the retail supply of electricity to all electricity users. For the purposes of assessing whether the Proposed Transaction might result in a substantial lessening of competition, the Commission has analysed the likely competitive effects of the Proposed Transaction with reference to supply of

³⁰See cases *COMP/M.6984 – EPH/Stredoslovenska Energetika*, para. 18; *COMP/M.5827 – Elia/IFM/50 Hertz*, para. 24; *COMP/M.5496 – Vattenfall/ Nuon Energy*, para. 15; *COMP/M.5467 – RWE/Essent*, paras 283-284.

electricity to all electricity users. The Commission considers it appropriate in this instance to analyse the likely competitive effects of the Proposed Transaction with reference to all electricity users in the State as the JV currently generates no electricity and therefore no end users in any hypothetically narrower markets currently consume electricity generated by the JV.

- 3.38. Similarly, it is not necessary for the Commission to define the precise relevant geographic market in this instance. The Commission has not, in the course of its assessment of the competitive impact of the Proposed Transaction, found reasons to depart from the approach taken by the European Commission in relation to the retail supply of electricity. For the purposes of assessing whether the Proposed Transaction might result in a substantial lessening of competition, the Commission has analysed the competitive impact of the Proposed Transaction with reference to the retail supply of electricity in the State.

Conclusion on Market Definition

- 3.39. For the purposes of its competitive analysis of the horizontal overlaps that exist between the Parties and the JV, the Commission has assessed the competitive impact of the Proposed Transaction in the following potential product and geographic markets:

- (i) the development, construction and operation of onshore wind farms in the State; and
- (ii) the generation and wholesale supply of electricity in the island of Ireland.

- 3.40. For the purposes of its competitive analysis of the vertical relationship that exists between the Parties and the JV, the Commission has assessed the competitive impact of the Proposed Transaction in the following potential product and geographic markets:

- (i) the supply of development land suitable for the development and construction of onshore wind farms in the State;
- (ii) the supply of engineering consultancy services to the electricity sector in the State;
- (iii) the transmission and distribution of electricity in the State; and
- (iv) the retail supply of electricity to end users in the State.

Other Horizontal and Vertical Overlaps

- 3.41. There are also a number of other potential product markets where a horizontal and/or vertical overlap exists between the Parties and the JV. These are as follows:



- (i) demand side services;
- (ii) CO₂ allowances; and
- (iii) Guarantees of Origin.

Demand side services

3.42. The Parties state the following in the notification:

“[...]”

3.43. The Commission considers that no competition concerns arise in relation to demand side services as [...] and Coillte represents a single DSU in the State and this situation is unlikely to change following implementation of the Proposed Transaction.

CO₂ allowances

3.44. Under the European Union’s Emissions Trading System³¹ (“EU ETS”), CO₂ allowances represent a set quantity of carbon dioxide that an emitter is permitted to release.

3.45. Under the EU ETS, a cap is set on the total amount of certain greenhouse gases that can be emitted by installations covered by the system. The cap is reduced over time so that total emissions fall.

3.46. Within the cap, companies receive or buy emission allowances, which they can trade with one another as needed. The limit on the total number of allowances available ensures that they have a value.

3.47. After each year a company must surrender enough allowances to cover all its emissions, otherwise heavy fines are imposed. These allowances are tradeable on an EU-wide basis. If a company reduces its emissions, it can keep the spare allowances to cover its future needs or else sell them to another company that is short of allowances.

3.48. The European Commission has previously considered the market for the trading of CO₂ allowances to be EU-wide in scope.³²

3.49. There is a horizontal overlap between ESB and Coillte in relation to CO₂ allowances as both ESB and Coillte hold CO₂ allowances under the EU ETS.

³¹ Please see https://ec.europa.eu/clima/policies/ets_en

³² Please see European Commission decision in *M.8660 – Fortum/Uniper*, which is available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2018%3A260%3ATOC>

- 3.50. The Commission considers that no competition concerns arise in relation to the trading of CO₂ allowances as the Parties' holding of CO₂ allowances is minimal in the context of an EU-wide market.

Guarantees of Origin

- 3.51. Guarantees of Origin ("GoOs") are electronic certificates issued in respect of energy generated from renewable sources and are issued to renewable electricity generators that are not in support schemes, such as RESS, per MWh of electricity generated. GoOs are tradeable instruments and electricity suppliers purchase GoOs to certify that their electricity demand is covered by certified renewable sources.
- 3.52. The European Commission has previously considered the market for the trading of GoOs to be EU-wide in scope.³³
- 3.53. There is a potential horizontal overlap between ESB and the JV in relation to the trading of GoOs.
- 3.54. The Parties state the following in the notification:
- “[...]”.
- 3.55. The Commission considers that any horizontal overlap between the JV and ESB will be negligible due to the potential market for the trading of GoOs being EU-wide in scope.
- 3.56. In light of the above, the Commission considers that no competition concerns arise in relation to the trading of GoOs.

³³ Please see European Commission decision in *M.8660 – Fortum/Uniper*, which is available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2018%3A260%3ATOC>

4. RELEVANT COUNTERFACTUAL

4.1. Identifying the relevant counterfactual is an important step in assessing the likely competitive impact of the Proposed Transaction.

4.2. As set out in paragraph 1.12 of the Commission’s “Guidelines for Merger Analysis” (the “Commission’s Merger Guidelines”):³⁴

“the term ‘counterfactual’ refers to the state of competition without the merger or acquisition. In other words the “actual” situation is the merger being put into effect and the counterfactual is the situation in the absence of the merger being put into effect. The counterfactual provides the reference point, or the point of comparison, for assessing competitive effects arising from a merger.”

4.3. The Parties expressed no views to the Commission concerning the relevant counterfactual.

4.4. In the Commission’s view, the most plausible counterfactual in the potential markets for: (a) the development, construction, and operation of onshore wind farms in the State; and (b) the generation and wholesale supply of electricity in the island of Ireland is Coillte continuing to develop and construct wind farms in the State, both on its own and in conjunction with third parties through CDAs. In the Commission’s view, there is little or no prospect, absent the Proposed Transaction, of Coillte reducing its wind farm development activities in the State, particularly in light of the Irish Government’s stated policy of achieving 70% electricity generation via renewable energy sources by 2030.

4.5. It is clear, however, that the Proposed Transaction will allow Coillte to develop onshore wind farms on its land at a greater scale than would be the case absent the Proposed Transaction.

4.6. An internal document provided to the Commission by Coillte entitled [...] dated 10 September 2018 states the following: “[...]” Another internal document provided to the Commission by Coillte entitled [...] dated March 2019 states the following: “[...]”

4.7. It is possible that Coillte, absent the Proposed Transaction, might enter into a joint venture with another entity for the purposes of developing and constructing wind farms in the State. Information provided by Coillte to the Commission indicates that Coillte’s financial advisors, [...], discussed with a number of entities (including [...]) the possibility of entering into a long term partnership similar to that which is the subject of the Proposed Transaction. However, Coillte informed the Commission that [...]. Third parties contacted by the Commission characterised

³⁴ The Commission’s Merger Guidelines are available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/CCPC-Merger-Guidelines.pdf>

these discussions as a call for “*expressions of interest*”. No third party informed the Commission that their expression of interest was followed up by Coillte.

- 4.8. The Commission has not been provided with any evidence to suggest that Coillte has given detailed consideration to entering into a joint venture with any entity other than ESB for the purposes of developing and constructing wind farms in the State.
- 4.9. The Commission has therefore concluded that the prevailing conditions of competition in the relevant markets (i.e., the potential market for the development, construction and operation of onshore wind farms in the State and the potential market for the generation and wholesale supply of electricity in the island of Ireland) is the appropriate counterfactual for assessing the likely competitive impact of the Proposed Transaction, i.e., absent the Proposed Transaction, Coillte will continue to develop and construct wind farms, both on its own and in conjunction with third parties through CDAs.
- 4.10. The Proposed Transaction will create structural linkages between Coillte and ESB through their joint control of the JV. As will be described in Section 5 below, the Commission is concerned that the Proposed Transaction could potentially lead to the exchange of competitively sensitive information (“CSI”) between Coillte, ESB, and the JV. In the counterfactual world, however, no such information-sharing concerns would arise since there would be no structural links between Coillte and ESB.

5. COMPETITIVE ASSESSMENT

Introduction

- 5.1. In this section, the Commission sets out in detail its assessment of the competitive impact of the Proposed Transaction in each of the potential relevant markets identified in paragraphs 3.40 and 3.41 above.

Potential Markets in which the Proposed Transaction Raises No Competition Concerns

(i) The Generation and Wholesale Supply of Electricity in the Island of Ireland

- 5.2. There is a horizontal overlap in the generation and wholesale supply of electricity in the island of Ireland between Coillte, ESB, and the JV. Following implementation of the Proposed Transaction, ESB, Coillte, and the JV will operate electricity generation facilities in the State. These facilities generate electricity from various sources (including sources such as thermal, solar, wind, etc.) which is traded in the I-SEM.

Market Structure

- 5.3. Table 1 below provides share estimates in the I-SEM in relation to: (i) total installed electricity capacity³⁵ (from all generation sources); and (ii) installed electricity capacity of onshore wind generation.

³⁵ Installed capacity refers to the maximum output of electricity that a generator can produce under ideal conditions.

Table 1: Generation and Wholesale Supply of Electricity in the I-SEM, Market Shares by Installed Capacity, 2019

Electricity Generator	All Technologies	Onshore Wind
Coillte	[0-5]%	[0-5]%
ESB	[30-35]%	[10-15]%
EP UK Investments Ltd (EPH)	[10-15]%	-
Aughinish Alumina Limited	[0-5]%	-
Bord Gáis Energy Limited/Centrica plc.	[0-5]%	[0-5]%
Other Independent Power Producers	[15-20]%	[40-45]%
SSE Airtricity Limited	[15-20]%	[25-30]%
Energia Group Limited	[10-15]%	[10-15]%
Interconnectors	[5-10]%	-
Total	100%	100%

Source: The Commission, based on information provided by the Parties.³⁶

- 5.4. The above table shows that, before the implementation of the Proposed Transaction, Coillte holds a minimal share of the potential market for the generation and wholesale supply of electricity in the I-SEM (approximately [0-5]%). ESB is the largest undertaking active in this potential market, with a pre-Proposed Transaction share of approximately [30-35]% in 2019.
- 5.5. In the notification, the Parties estimate that, following implementation of the Proposed Transaction, and once the wind farm projects to be developed by the JV become operational, the JV will have an estimated share (in terms of installed capacity) of [5-10]%³⁷ in 2030. The Parties informed the Commission that this is an approximate estimate as [...].³⁸

³⁶ Please note that, due to rounding, the sum of these figures may not equal 100%. The Commission has verified the figures provided by the Parties by reference to reports published by CRU

³⁷ This figure excludes electricity generation attributable to each of the CDA partners.

³⁸ As noted in paragraphs 2.27 and 2.28 above, the development of an onshore wind farm can fail for many reasons.

Unilateral Effects

- 5.6. The Commission considers that the Proposed Transaction is unlikely to give rise to any unilateral effects in the potential market for the generation and wholesale supply of electricity in the island of Ireland as the Parties estimate that the share of the JV (once the wind farm projects to be developed by the JV become operational) in terms of installed capacity would be approximately [5-10]% in 2030.
- 5.7. In addition, both CRU and the UR expressed the view to the Commission that the potential market for the generation and wholesale supply of electricity in the island of Ireland is very tightly regulated.³⁹
- 5.8. Both CRU and the UR informed the Commission that there are market power mitigation measures in place in the I-SEM, for which both CRU and the UR are responsible.⁴⁰ The Commission considers that these market power mitigation measures will likely ensure that Proposed Transaction does not lead to a substantial lessening of competition in this potential market for the generation and wholesale supply of electricity in the island of Ireland following implementation of the Proposed Transaction.
- 5.9. Further, ESB informed the Commission that it expects its share of this potential market (approximately [30-35]% in 2019) to decrease over the period of time during which the JV's wind farm projects will be developed (i.e., from 2020-2030). ESB informed the Commission that this will be due to obsolescence and the retirement of a number of ESB's larger thermal electricity generation stations, such as Moneypoint power station located in Co. Clare.
- 5.10. In addition, Coillte's current share in this potential market is minimal (approximately [0-5]%), resulting from a [...] shareholding in a single wind farm located in Sliabh Bawn, Co. Roscommon. Coillte informed the Commission that, following implementation of the Proposed Transaction, [...].
- 5.11. Finally, following implementation of the Proposed Transaction, the Commission considers that there will continue to be a number of other participants in this market such as SSE Airtricity Limited, Energia Group Limited, and Bord Gáis Energy Limited. These undertakings are likely to continue to exercise a competitive constraint on ESB and the JV following implementation of the Proposed Transaction.

³⁹ The decision making authority for the I-SEM is the Single Electricity Market ("SEM") Committee. The CRU and the UR both hold three seats on the SEM Committee alongside an independent and deputy independent member.

⁴⁰ Principal among these measures are directed contracts which ESB is obliged to issue on terms, including pricing, set by CRU and the UR. Directed contracts allow suppliers to buy electricity from ESB at a regulated price. The CRU calculates a measure of market concentration (using the Herfindahl-Hirschman Index ("HHI")) for the market for the generation and wholesale supply of electricity in the island of Ireland. Where the HHI exceeds 1150, ESB is obliged, through license conditions, to sell sufficient volumes of electricity in order to bring its HHI below 1150. This is done through Contracts for Difference, and this occurs on a quarterly basis.



Coordinated Effects

- 5.12. The Commission considers that the Proposed Transaction is unlikely to give rise to any coordinated effects in the potential market for the generation and wholesale supply of electricity in the island of Ireland because, as set out in paragraph 5.7 and 5.8 above, CRU and the UR informed the Commission that this market is tightly regulated.

Conclusion

- 5.13. In light of the above, the Commission considers that the Proposed Transaction does not raise any horizontal competition concerns in the potential market for the generation and wholesale supply of electricity in the island of Ireland.

(ii) The Supply of Engineering Consultancy Services to the Electricity Sector in the State

- 5.14. There is a potential vertical relationship between ESB and the JV in the potential market for the supply of engineering and consultancy services to the electricity sector in the State.

- 5.15. The Parties state the following in the notification:

“[...]”

- 5.16. The Commission does not consider that the Proposed Transaction will change ESB’s ability or incentive to engage in either input or customer foreclosure for the following reasons.⁴¹

- 5.17. In relation to the likelihood of the Proposed Transaction leading to input foreclosure, ESB states in the notification that it provides engineering consultancy services to only “[...]”.⁴²

- 5.18. In addition, ESB provided the following information to the Commission in response to the Commission’s RFI of 24 March 2020:

“[...]”

- 5.19. Therefore, the Commission considers that the availability of these services to third parties will likely remain unchanged following implementation of the Proposed Transaction.

- 5.20. Furthermore, following implementation of the Proposed Transaction, the Commission considers that there will remain a number of other suppliers of engineering consultancy services active in the State. These include Mott MacDonald Ireland Limited, Ionic Consulting Limited, Natural Power Consultants (Ireland) Ltd and Fehily Timoney & Company Consultants. Purchasers of

⁴¹ Paragraphs 5.7-5.17 of the Commission’s Merger Guidelines set out how the Commission assesses input and customer foreclosure in non-horizontal mergers.

⁴² See paragraph 5.15 above.



engineering consultancy services in the State (e.g., onshore wind farm developers such as Statkraft Ireland Limited, Brookfield Renewables Ireland Limited, etc.) are very likely to continue to have the option of using one or more of these suppliers following completion of the Proposed Transaction.

- 5.21. The Commission does not consider that the Proposed Transaction is likely to give rise to any customer foreclosure concerns in the potential market for the supply of engineering consultancy services to the electricity sector in the State. This is because, following implementation of the Proposed Transaction, there is likely to remain a number of purchasers of engineering consultancy services in the State, such as Statkraft Ireland Limited, Brookfield Renewables Ireland Limited, and SSE Airtricity Limited.
- 5.22. On the basis of the above, the Commission considers that the Proposed Transaction will not lead to a substantial lessening of competition in the potential market for the supply of engineering consultancy services to the electricity sector in the State.

(iii) The Transmission and Distribution of Electricity in the State

- 5.23. There is a vertical relationship between ESB and Coillte, and between ESB and the JV, with respect to the transmission and distribution of electricity in the State.
- 5.24. As noted in paragraph 1.7 above, ESB is the licensed TAO and DAO in the State. These licences are granted to ESB by CRU. ESB is also the licensed DSO in the State, while EirGrid is the licensed TSO in the State. These licences are granted to ESB and EirGrid, respectively, by CRU.
- 5.25. The Commission does not consider that any vertical foreclosure concerns will arise as a result of the Proposed Transaction for the reasons set out below.
- 5.26. ESB's functions as TAO, DAO, and DSO are, under licences, strictly ring-fenced from the rest of the ESB group. ESB, therefore, has no ability to deny licensed electricity generators in the State access to the electricity transmission and distribution systems. Similarly, ESB has no ability to discriminate against licensed electricity generators in the State in relation to conditions for access to the electricity transmission and distribution systems.
- 5.27. ESB, as DSO, is obliged to comply with directions laid down by CRU. In this regard, the terms of a DSO connection agreement, as well as any amendments to the terms, must be approved in advance by CRU. Disputes regarding any refusal by ESB to enter into a connection agreement with a licenced electricity generator in the State are subject to determination by CRU.
- 5.28. On the basis of the above, the Commission considers that the Proposed Transaction will not lead to a substantial lessening of competition in the potential market for the transmission and distribution of electricity in the State.

(iv) The Retail Supply of Electricity to End Users in the State.

- 5.29. There is a vertical relationship between Coillte and ESB, and between the JV and ESB, in the potential market for the retail supply of electricity to end users in the State.
- 5.30. Retail electricity suppliers in the State, such as ESB (through its brand *Electric Ireland*), Energia Group Limited, and SSE Airtricity Ireland Limited, purchase electricity in the wholesale market (from electricity generators such as ESB, Coillte, and, following implementation of the Proposed Transaction the JV) and sell this electricity to end users (i.e. households and businesses).
- 5.31. Table 2 below sets out estimated shares for the retail supply of electricity to categories of end users in the State – namely domestic customers; small business customers; medium business customers; and large energy users.

Table 2: Retail Supply of Electricity to End Users in the State, 2019

Company	% Share – MWhs – Domestic Customers	% Share – MWhs – Small Business Customers	% Share – MWhs – Medium Business Customers	% Market Share – MWhs – Large Energy Users
Electric Ireland (ESB)	[45-50]%	[30-35]%	[35-40]%	[30-35]%
Bord Gáis Energy Limited	[15-20]%	[15-20]%	[5-10]%	[5-10]%
SSE Airtricity Limited	[10-15]%	[15-20]%	[15-20]%	[35-40]%
Energia Group Limited	[5-10]%	[25-30]%	[25-30]%	[10-15]%
PrePayPower Limited	[5-10]%	[5-10]%	-	-

Panda Power Limited	[0-5]%	[0-5]%	[0-5]%	-
New Measured Power Limited (t/a Pinery)	[0-5]%	[0-5]%	-	-
Others	[0-5]%	[0-5]%	[5-10]%	[10-15]%
Total	100%	100%	100%	100%

Source: The Commission, based on information provided by the Parties.⁴³

- 5.32. For the reasons set out below, the Commission considers that the Proposed Transaction will not give ESB (or the JV) the ability or incentive to foreclose rivals of Electric Ireland in the potential market for the retail supply of electricity to end users in the State.
- 5.33. In relation to input foreclosure, first, as set out in paragraphs 5.6-5.13 above, the Commission has concluded that the Proposed Transaction will not result in a substantial lessening of competition in the upstream potential market for the generation and wholesale supply of electricity in the island of Ireland. Therefore, competitors of Electric Ireland will be able to purchase electricity from these generators through the I-SEM for onward sale to end users in the State.
- 5.34. Second, even if, following implementation of the Proposed Transaction, ESB's market power with respect to the generation and wholesale supply of electricity in the island of Ireland were to increase, the market power mitigation measures in the I-SEM (as implemented by CRU and the UR) would require ESB to make available additional electricity to its competitors in the potential market for the retail supply of electricity to end users in the State through CfDs.
- 5.35. In relation to customer foreclosure, the Commission considers that the Proposed Transaction would not give ESB either the ability or incentive to pursue a customer foreclosure strategy due to the small increment of the JV in the potential market for the generation and wholesale supply of electricity in the island of Ireland. *Electric Ireland* is required to purchase electricity, through the I-SEM, to ensure that its electricity supply matches its customer demand. The combined generation share of the JV and ESB is unlikely to be sufficient to satisfy the entire electricity demand of *Electric Ireland* customers. For example, as shown in Table 1 above, ESB has a share of the potential market for the generation and wholesale supply of electricity in the island of Ireland of approximately [30-35]% in 2019. As shown in Table 2, *Electric Ireland's* share of electricity consumption by domestic customers in this same year was approximately [45-50]%. On this basis, the

⁴³ Please note that, due to rounding, the sum of these figures may not equal 100%. The Commission has verified the figures provided by the Parties by reference to reports published by CRU.

Commission considers it likely that Electric Ireland will continue to be required to purchase electricity in the I-SEM from third-party generators to satisfy the total electricity demand of *Electric Ireland's* customers.

- 5.36. On the basis of the above, the Commission considers that the Proposed Transaction does not raise any vertical competition concerns in the potential market for the retail supply of electricity to end users in the State.

Potential Markets in which the Commission Has Identified Potential Competition Concerns Arising from the Proposed Transaction

Horizontal Overlap

- 5.37. Paragraphs 4.6 and 4.7 of the Commission's Merger Guidelines state the following in relation to the Commission's analysis of horizontal mergers:

"4.6 The Commission's analysis is evidence based and focuses mainly on two types of effects:

(a) Unilateral effects arise where, as a result of the merger, the merged firm finds it profitable to raise price, irrespective of the reactions of its competitors.

(b) Coordinated effects arise when a merger facilitates coordinated interaction by competitors to raise price. Coordination is profitable for each firm only as a result of accommodation by other firms. In essence, each firm decides not to compete aggressively (thereby foregoing presumably profitable sales) in the expectation that others will do likewise. This results in less vigorous competition with the net result that prices remain higher than they would in a normally functioning competitive market.

4.7 A merger may give rise to either or both unilateral and coordinated effects. Accordingly, the Commission's analysis of any proposed merger may cover both unilateral and coordinated effects."

- 5.38. The Commission has therefore assessed whether unilateral and/or coordinated effects are likely to result from the Proposed Transaction.

(v) The Development, Construction, and Operation of Onshore Wind Farms in the State

- 5.39. There is currently a horizontal overlap between ESB and Coillte in the potential market for the development, construction and operation of onshore wind farms in the State. Following implementation of the Proposed Transaction, there will be a horizontal overlap between ESB and the JV in this potential market.

Unilateral Effects

- 5.40. The Commission considers that the Proposed Transaction is unlikely to give rise to any unilateral effects concerns in this potential market for the reasons set out below.
- 5.41. First, the Parties estimate the development pipeline of onshore wind farms in the State to be approximately [...]MW.⁴⁴ The Parties informed the Commission that Coillte’s development pipeline of onshore wind farms in the State (which, following implementation of the Proposed Transaction will become the JV’s development pipeline) is approximately [...]MW (approximately [...]%) with ESB having a development portfolio of approximately [...]MW (approximately [...]% of the development pipeline of onshore wind farms).⁴⁵
- 5.42. Second, there are a significant number of competitors active in the development, construction, and operation of onshore wind farms in the State. These include large energy utilities such as SSE Airtricity Limited⁴⁶ and Energia Group Limited,⁴⁷ as well as specialist renewable energy developers such as Statkraft Ireland Limited⁴⁸ and Brookfield Renewables Ireland Limited.⁴⁹
- 5.43. Table 3 below provides share estimates of developed and operational onshore wind capacity in the I-SEM.

Table 3: Developed Onshore Wind in the I-SEM, Market Shares by Installed Capacity, 2019

Electricity Generator	Onshore Wind
Coillte	[0-5]%
ESB	[10-15]%
Bord Gáis Energy Limited/Centrica plc.	[0-5]%
Other Independent Power Producers	[40-45]%
SSE Airtricity Limited	[25-30]%

⁴⁴ The Parties state the following in the notification: “[...]”

⁴⁵ It should be noted that these figures represent only projects currently under development, and not the total potential capacity of onshore wind farms in the State (irrespective of whether the land is currently being developed).

⁴⁶ <https://www.sseairtricity.com/ie/home/about-us/about-us/>

⁴⁷ <https://www.energia.ie/business/products-and-services/energia-renewables/windfarm-locations>

⁴⁸ <https://www.statkraft.ie/about-statkraft/>

⁴⁹ <https://www.brookfield.com/our-businesses/renewable-power?redirect=www.brookfieldrenewable.com>

Energia Group Limited	[10-15]%
Total	100%

Source: The Commission, based on information provided by the Parties⁵⁰

- 5.44. As shown in Table 3, SSE Airtricity Limited is the largest single operator of developed onshore wind farms in the State (approximately [25-30]% share). ESB’s share of developed onshore wind farms is approximately [10-15]%, with Coillte’s share representing a minimal [0-5]%. Approximately [40-45]% of the onshore wind farm generation capacity in the State is held by various smaller independent power producers.
- 5.45. Third, it does not appear that that potential market for the development, construction and operation of onshore wind farms in the State has high barriers to entry, as evidenced by the recent entry of developers of onshore wind farms (and other renewable electricity generation facilities) such as Iberdrola Ireland Limited⁵¹, Neoen Renewables Ireland Limited,⁵² and EDF Renewables Ireland Limited.⁵³ These developers have entered the market to develop new onshore wind farms in the State.
- 5.46. Finally, as noted in paragraph 2.2 above, current Irish Government policy has set a target of 70% of electricity to be generated from renewable sources by 2030. As described in section 2 above, subsidies will be provided to wind farm developers under the RESS. This will continue to incentivise the development of renewable energy generation facilities in the State, including onshore wind farms.

Coordinated Effects

- 5.47. The Commission identified concerns that the Proposed Transaction could potentially lead to coordination between the JV and ESB through the potential exchange between ESB and the JV of: (i) JV CSI; (ii) CDA partner CSI; and (iii) ESB CSI. The Commission was of the view that the exchange of competitively sensitive information may have an adverse effect on competition in the potential market for the development, construction and operation of onshore wind farms in the State (the “Horizontal CSI Concerns”).
- 5.48. The Commission’s Horizontal CSI Concerns arose as, following implementation of the Proposed Transaction, ESB will be active in this potential market through: (i) its shareholding in the JV; and (ii) its wind farm development activities outside the JV. In addition, ESB informed the Commission that [...].⁵⁴ Moreover, the

⁵⁰ The Commission has verified the figures provided by the Parties by reference to reports published by CRU.

⁵¹ Entered in 2019, <https://www.iberdrola.ie/aboutus>

⁵² Entered in 2019, <https://www.noen.com/en>

⁵³ Entered in 2019, <https://www.edf-re.uk/about/edf-renewables-ireland>

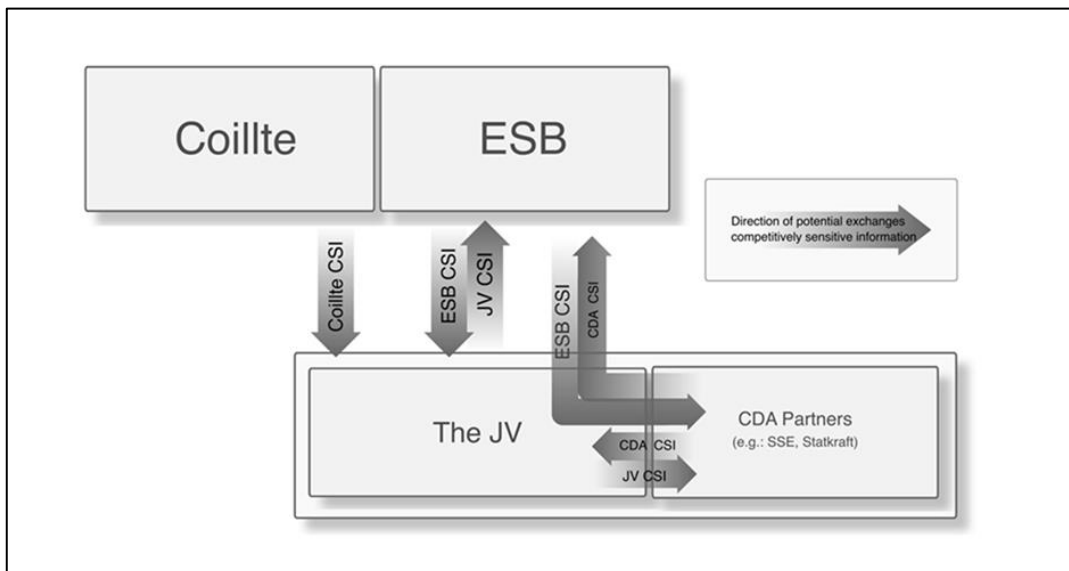
⁵⁴ ESB’s Generation and Trading division is the division which develops, operates, and manages ESB’s electricity generation assets. In addition, this division is responsible for trading the electricity generated by these assets in the I-SEM.

Commission was concerned that the Proposed Transaction could potentially enable ESB to solicit or exchange CSI with third party developers in co-development arrangements with the JV.

5.49. In particular, the Commission was concerned that the Proposed Transaction may enable the exchange of CSI between ESB and the JV in relation to potential bids into the RESS auctions (or any comparable subsidy scheme) by: (i) the JV; (ii) ESB (through its development activities outside the JV); and (iii) the CDA partners.

5.50. Figure 1 below illustrates the structural links between ESB, Coillte, and the JV and the potential flows of CSI following implementation of the Proposed Transaction.

Figure 1: Structural Links and Potential Flows of CSI Following Implementation of the Proposed Transaction



Source: The Commission

Conclusion on Coordinated Effects

5.51. The Commission was concerned that the implementation of the Proposed Transaction could potentially lead to coordination between the JV and ESB through the potential exchange between ESB and the JV of: (i) JV CSI; (ii) CDA partner CSI; and (iii) ESB CSI, which could give rise to adverse effects on competition in the potential market for the development, construction and operation of onshore wind farms in the State.

Proposals Submitted by the Parties

5.52. On 5 November 2020, the Commission informed the Parties of its Horizontal CSI Concerns in a telephone call. On 18 November 2020, the Parties submitted draft joint proposals to the Commission in accordance with section 20(3) of the Act intended to ameliorate the competition concerns identified by the Commission.

- 5.53. Following receipt of these draft joint proposals, the Commission engaged with the Parties and their legal advisors to formulate proposals which would ameliorate the Horizontal CSI Concerns.
- 5.54. On 28 January 2020, the Parties submitted final joint proposals which are intended to prevent the exchange of CSI between the JV and ESB. The Joint Proposals are discussed in greater detail in section 6 below.

Conclusion

- 5.55. The Commission is of the view that the Joint Proposals are sufficient to address the competition concerns identified by the Commission in the potential market for the development, construction and operation of onshore wind farms in the State. In accordance with section 20(3) and section 26(1) and section 26(4) of the Act, the Commission has taken the Joint Proposals into account and the Joint Proposals form the basis or part of the basis for this determination. Consequently, the Joint Proposals have become commitments binding upon the Parties.

Vertical Relationship

- 5.56. Paragraph 5.6 of the Commission’s Merger Guidelines states the following:

“As with its analysis of horizontal mergers, the Commission’s analysis of non-horizontal mergers is conducted primarily in terms of unilateral and coordinated effects for both vertical and conglomerate mergers. Non-horizontal mergers may result in an SLC where

(a) the merged entity having market power (i.e., the ability to unilaterally increase prices above what they would have been in a competitive market) is able to exercise this power to lessen competition by:

(i) foreclosing competitors (after a vertical merger) or

(ii) tying or bundling the purchase of one product to the purchase of another (after a conglomerate merger), or

(b) the merger facilitates coordination between the merged entity and some or all of its competitors.”

(vi) The Supply of Development Land Suitable for the Development and Construction of Onshore Wind Farms in the State

- 5.57. There is a vertical relationship between Coillte and the JV, and between Coillte and ESB, in the potential market for the supply of land suitable for the development and construction of onshore wind farms in the State.

- 5.58. Coillte is by far the single largest landholder in the State with circa 440,000 hectares.
- 5.59. Coillte supplies land to developers of onshore wind farms in the State for the purposes of developing and constructing onshore wind farms through:
- i. sale agreements;
 - ii. lease option agreements;
 - iii. lease agreements;
 - iv. wayleave agreements;⁵⁵ and
 - v. easement agreements.⁵⁶
- 5.60. Coillte provided the Commission with a document entitled “*Spatial Analysis of Land Theoretically Suitable for Onshore Wind Development on the Island of Ireland*”. This document sets out the process by which Coillte estimated its share of the total area of land in the State that is “*suitable in principle for development of onshore wind generation facilities*”⁵⁷ (“Theoretically Suitable Land”). When calculating its estimated share, Coillte removed from the total land in the State any land that fell into the following categories:
- i. Land within [...]m of an Eircode address;
 - ii. Land with an environmental protection or conservation designation;
 - iii. Areas of “*national importance*” such as nature reserves and national parks;
 - iv. Land owned by Coillte that has been contractually committed to third parties;⁵⁸ and
 - v. Land within specified distances of certain obstacles (such as rivers, lakes, roads, rail lines, and electricity transmission lines).
- 5.61. Coillte estimates that it has the largest share of Theoretically Suitable Land in the State (approximately [25-30]%). Coillte estimates that Bord na Móna holds the second largest share of Theoretically Suitable Land in the State (approximately [5-10]%) with the remaining [65-70]% held by various individual landholders across the State.

⁵⁵ Wayleave agreements are typically used to facilitate the connection of electricity generation facilities to the electricity grid. This is usually by way of overground or underground cables.

⁵⁶ Easement agreements are typically used to grant a right of way and a right of access to developers of onshore windfarms. They facilitate site access, site maintenance, and/or wind turbine delivery.

⁵⁷ This document was provided to the Commission as an annex to the notification.

⁵⁸ This land was removed from Coillte’s share only and was not removed from the total landbank in the State.



- 5.62. Theoretically Suitable Land is a key input for developers of onshore wind farms in the State. Theoretically Suitable Land has a number of distinct characteristics (such as, sufficient setback from other developments; compatibility with local authority development plans; and compatibility with environmental and conservation designations) that makes it highly attractive for developers of onshore wind farms. Coillte informed the Commission in the notification that it characterises non-Theoretically Suitable Land as “*land which by virtue of its location renders it unsuitable for onshore wind development*”.
- 5.63. Several wind farm developers contacted by the Commission raised a potential competition concern that, following implementation of the Proposed Transaction, such third party wind farm developers may be foreclosed from accessing Coillte land for the purposes of developing and constructing onshore wind farms in the State.
- 5.64. Coillte is the only landholder in the State with a significant share of Theoretically Suitable Land. An internal document provided to the Commission by Coillte entitled [...] dated March 2019 states the following:

“[...]”

Unilateral Effects

- 5.65. During its review of the Proposed Transaction, the Commission assessed two potential theories of harm concerning access to Coillte land following implementation of the Proposed Transaction:
- i. Total foreclosure of access to Coillte land for the purposes of developing and constructing onshore wind farms in the State; and
 - ii. Partial foreclosure of access to Coillte land for the purposes of developing and constructing onshore wind farms in the State, i.e., raising rivals’ costs by increasing the cost of accessing land owned by Coillte.
- 5.66. The Commission considers that “*total foreclosure*” would arise where Coillte refuses to grant access to third party developers to Coillte land for the purposes of developing and constructing an onshore wind farm in the State (via sale, lease, lease option, wayleave or easement).
- 5.67. The Commission considers that “*partial foreclosure*” would arise where Coillte increases the fees charged by Coillte to third party developers seeking access to Coillte land for the purposes of developing and constructing an onshore wind farm in the State (via sale, lease, lease option, wayleave or easement).
- 5.68. The Frontier Report states the following:

“The potential competition concern could arise if Coillte could hinder third-party developers from building other onshore wind developments by either: 1. not

selling/leasing/optioning Coillte land to the third party (i.e. denying access to Coillte land); or 2. not providing the third party with rights to pass over Coillte land (i.e. denying access via Coillte land), either to: a. access its development; or b. install cables over or under Coillte land which are needed to facilitate a nearby third party's development.”⁵⁹

- 5.69. In assessing the two potential theories of harm listed above, the Commission considered whether, following implementation of the Proposed Transaction, Coillte would have the ability and incentive to engage in a total and/or a partial foreclosure strategy concerning access to its land.
- 5.70. The Commission's analysis of these two potential theories of harm is set out below.

Total foreclosure of access to Coillte land for the purposes of developing and constructing onshore wind farms in the State

Ability

- 5.71. The Commission considers that it is unlikely that Coillte, following implementation of the Proposed Transaction, would have the ability to engage in a total foreclosure strategy in relation to the supply of land suitable for the development and construction of onshore wind farms in the State, including through (i) not selling/leasing/optioning land; (ii) not granting access via Coillte land; and (iii) unduly delaying its assessment and processing of land access requests, for the reasons set out below.

(i) Selling/leasing/optioning land owned by Coillte

- 5.72. The Commission considers that it is unlikely that Coillte, following implementation of the Proposed Transaction, will have the ability to totally foreclose rival onshore wind farm developers by not selling, leasing, and/or optioning Coillte land for the following reasons.
- 5.73. First, Coillte estimates that it has only a [25-30]% share of Theoretically Suitable Land in the State.⁶⁰
- 5.74. Second, it does not appear that access to Coillte land is essential to develop and construct onshore wind farms in the State. Coillte states the following in the notification:

“[...]”⁶¹

⁵⁹ As noted in paragraph 2.10 above, onshore wind farm developers that require access rights to pass through land typically negotiate rights of way through wayleave and easement agreements with a landowner(s).

⁶⁰ Please see paragraph 5.60 above which details the method by which this figure was estimated.

⁶¹ The Frontier Report states the following: “[...]”

- 5.75. The Commission considers it significant that [...]out of the 19 onshore wind farm projects that were successful in the RESS 1⁶² auction in July 2020 will be built on land that is not owned by Coillte.⁶³ Page 10 of the Frontier Report states the following:

“[Onshore wind farm] developers have multiple credible options to obtain land from other suppliers, as demonstrated through the outcome of the recent RESS1 auction. ... 19 projects made successful bids for onshore wind developments. [...]. This means that [...]% of the successful total onshore wind capacity ([...]MW) in RESS1 will be built on land from other providers.”

- 5.76. Some third parties contacted by the Commission raised a potential concern that Coillte, post-Proposed Transaction, might have the incentive to “sterilise” (i.e., render unusable for development purposes) third party land located adjacent or close to Coillte land. In such instances, access to a small parcel of Coillte land (by way of sale, lease, or land access agreement) may be essential for such sites to be of a viable scale for wind farm development. Without access to this small parcel of Coillte land, the adjacent non-Coillte land may be economically unviable for the development of a wind farm. Coillte informed the Commission that such small plots of land are typically referred to as “pinch points”.

- 5.77. The Commission considers that Coillte is unlikely to have the ability to engage in such a strategy following implementation of the Proposed Transaction. Coillte informed the Commission that:

“of the [...] expressions of interest exclusively for “pinch point” sales [during the period 1 January 2015 to 2 July 2020], [...].”

- 5.78. The Commission considers it significant that no third party contacted by the Commission was able to provide specific evidence that Coillte has, in the past, successfully foreclosed its competitors by denying access to third parties seeking access to Coillte land for the purposes of developing, constructing and operating an onshore wind farm in the State. The Commission considers that the evidence submitted by Coillte in the Frontier Report is consistent with the Commission’s engagement with third parties during the Phase 1 investigation who were unable to provide specific examples of Coillte refusing to allow third parties access to Coillte land for the purposes of developing and constructing an onshore windfarm in the State and such refusals resulting in the project failing entirely.

(ii) Right of access via Coillte Land

⁶² RESS1 refers to the first RESS auction which took place in 2020.

⁶³ The results of the RESS1 auction are available at: [https://www.eirgridgroup.com/site-files/library/EirGrid/RESS-1-Provisional-Auction-Results-\(R1PAR\).pdf](https://www.eirgridgroup.com/site-files/library/EirGrid/RESS-1-Provisional-Auction-Results-(R1PAR).pdf)



- 5.79. For the reasons set out below, the Commission considers that it is unlikely that Coillte, following implementation of the Proposed Transaction, would have the ability to totally foreclose rival onshore wind farm by not granting rights to pass over and/or under its land.
- 5.80. Onshore wind farm developers typically require access to land adjacent or close to their project sites to facilitate the development of a wind farm. Such land access is required to facilitate grid connection, and/or for logistical purposes (i.e., such as the transportation of wind turbines and/or equipment across third party land to the wind farm project site). This is facilitated through wayleave and easement agreements with a landowner(s).
- 5.81. The Commission has found no evidence to suggest that access via Coillte land is a necessary input to the development and construction of onshore wind farms in the State.
- 5.82. The Frontier Report provided the following information:

“[Onshore wind farm] developers may also have other access options to their existing sites. For example [...]”⁶⁴

- 5.83. Evidence submitted to the Commission by Coillte suggests that [...]. This is supported by the views of onshore wind farm developers contacted by the Commission during the course of its review of the Proposed Transaction, none of whom was able to provide any example of where the development of an onshore wind farm in the State either was hindered by, or failed outright through, an inability to gain access to land owned by Coillte. Third parties contacted by the Commission stated that they often consider multiple potential alternative routes to facilitate grid connection when developing an onshore wind farm in the State.

(iii) Unduly delaying its assessment and processing of land access requests

- 5.84. For the same reasons as those described above, the Commission also considers that it is unlikely that Coillte will have the ability to foreclose third party wind farm developers by unduly delaying its assessment and processing of land access requests.⁶⁵ The following information provided by Coillte in response to the Commission’s informal request for information dated 2 July 2020 indicates that while the time taken by Coillte and a third-party to negotiate and conclude land access agreements can vary, it typically takes [...]:

“[...]”

- 5.85. The Commission considers it significant that no third party contacted by the Commission during the course of its review of the Proposed Transaction was able to provide any example of Coillte delaying the assessment and processing of a land

⁶⁴ The Frontier Report, page 10.

⁶⁵ Any significant delay in the assessment and processing of a land access request by a landholder could potentially jeopardize a wind farm project as access to project funding and RESS subsidy is dependent on the prior approval of all land access requests.

access request in order to frustrate or hinder attempts by a third party to develop and construct an onshore wind farm in the State.

- 5.86. The Commission considers that Coillte is unlikely, following implementation of the Proposed Transaction, to have the ability to totally foreclose rival developers by delaying consideration of access requests because, as mentioned above, developers typically consider multiple site access and grid connection routes and approach multiple landholders to facilitate site access and grid connection.
- 5.87. Coillte expressed the following view in response to the Commission’s informal request for information of 2 July 2020:

“In Coillte’s experience, developers identify a number of potential access routes when access is required, given that an access route may not materialise for multiple reasons (environmental, community relations, where the land is being considered by the landowner for development, etc.). From a development perspective, it is not commercially advisable to rely on a single access route and so developers tend to line up multiple potential access routes. For example, Coillte’s own practice as a developer is to [...].”

- 5.88. On the basis of the above evidence, the Commission considers that it is unlikely that Coillte would have the ability, following implementation of the Proposed Transaction, to foreclose rival wind farm developers by: (a) refusing to sell, lease or option its land; (b) refusing to grant access rights via its land; and/or (c) unduly delaying its assessment and processing of land access requests. The evidence provided to the Commission by third party developers of onshore wind farms in the State indicates that developers of onshore wind farms in the State can and do consider many alternative sites and routes for site access that do not require access to Coillte land.
- 5.89. Finally, and significantly, it is not clear that Coillte’s ability to engage in any form of total foreclosure strategy in relation to its land would be affected by the implementation of the Proposed Transaction. ESB is not contributing any Theoretically Suitable Land (as defined in paragraph 5.60 above) to the Proposed Transaction. Therefore, the Commission considers that the ability of Coillte to engage in any form of total foreclosure strategy in relation to its land is likely to remain unchanged following implementation of the Proposed Transaction.

Incentive

- 5.90. The Commission also considers that it is unlikely that Coillte, following implementation of the Proposed Transaction, would have the incentive to engage in a total foreclosure strategy in relation to its land.
- 5.91. As noted above, Coillte generates revenue from third parties through land sales, land leases, option agreements and the granting of land access rights (e.g., rights of way, etc.).

- 5.92. For the year ending 31 December 2019, Coillte informed the Commission that it generated revenue of approximately €[...]from “*from options, leases, access rights and land sales for the development of onshore wind farms*”. This represented approximately [...] % of Coillte’s total turnover in 2019.⁶⁶
- 5.93. The Frontier Report characterises these revenues as “[...]” and “[...]”. The Frontier Report also states that: “*the gross margins in 2019 were: [...] % for options; [...] % for leases; and [...] % for land sales.*” The Frontier Report states that “*the wayleave agreement revenues are [...]*”.⁶⁷
- 5.94. The Frontier Report further states that:
- “[...]”.⁶⁸
- 5.95. Internal documentation provided to the Commission by Coillte indicates that the primary aim of Coillte’s overall business is to [...].
- 5.96. An internal document provided to the Commission by Coillte entitled [...] dated 10 September 2018 states the following:
- “[...]”
- 5.97. The Commission therefore considers that it is unlikely that Coillte, following implementation of the Proposed Transaction, would have the incentive to totally foreclose rival wind farm developers and thus forego high margin revenue in exchange for uncertain future revenue streams.
- 5.98. The Commission also considers it significant that there is no evidence to indicate that Coillte has ever engaged, or attempted to engage, in any form of total foreclosure strategy in relation to its land.
- 5.99. As noted above, no rival wind farm developer contacted by the Commission during the course of its review of the Proposed Transaction provided any example of: (i) Coillte refusing to sell or lease land to a wind farm developer; (ii) Coillte refusing to enter into land access agreements with a wind farm developer; or (iii) where the development of a wind farm failed to progress primarily because of the inability to access land owned by Coillte.
- 5.100. On the contrary, rival wind farm developers contacted by the Commission stated that they had in the past sought and successfully secured access to Coillte land for the purposes of developing and constructing wind farms in the State.

⁶⁶ This figure is based on the Commission’s analysis of information provided to the Commission by Coillte in response to the information request for information of 2 July 2020 and information from Coillte’s 2019 annual report.

⁶⁷ The Frontier Report, page 6.

⁶⁸ The Frontier Report, page 6.

5.101. In an informal request for information dated 2 July 2020, the Commission asked Coillte to provide detail on instances when Coillte *“rejected an approach (formal or informal) by an entity active in the development, construction and operation of wind farms in the State seeking to purchase and/or lease (or enter into an option agreement to purchase and/or lease) land owned by Coillte for the purposes of developing, constructing and operating an onshore wind farm in the State”*.

5.102. In its response to this informal request for information, Coillte provided the following information on 1 September 2020:

“Coillte received and negotiated [...] expressions of interest that were exclusively for lease/sale/option for lease/sale (i.e., not access) over the relevant period [from 1 January 2015 to 2 July 2020]:

- i. [...] have been accepted in principle by Coillte;*
- ii. [...] [in total], [...] of which were initiated since October 2019, are under active consideration by Coillte for co-development potential and yet to be decided on;*
- iii. [...]*
- iv. [...]*

5.103. [...]

5.104. In its informal request for information dated 2 July 2020, the Commission also requested Coillte to provide detail on instances where Coillte *“rejected a request from an entity active in the development, construction and operation of wind farms in the State seeking to gain access to land owned by Coillte for the purposes of developing, constructing and operating an onshore wind farm in the State.”*⁶⁹

5.105. In its response to this question, Coillte provided the following information:

“In the period between January 2015 and 2 July 2020, Coillte received and, in cases where the negotiation began before that period but continued past January 2015, negotiated a total of [...] pure access-related expressions of interest for the development of onshore wind farms”.

5.106. In relation to the outcome of these approaches, Coillte provided the following information:

- i. “[...] were rejected by Coillte.*

⁶⁹ This question did not refer to approaches to Coillte by third parties concerning land sale, land lease, or land lease option agreements.



- ii. [...] were accepted and proceeded either to access or a legally binding option in favour of the access-seeker for access at a later date.
- iii. [...] others have been accepted in principle by Coillte and are subject to agreement on commercial terms.
- iv. [...] was due to be executed in 2020, following acceptance by Coillte, but [...].
- v. [...], initiated in July 2020, is under consideration by Coillte and no decision has been made.
- vi. [...] fell away during the process.”

5.107. The above information provided by Coillte is in line with the views of third parties contacted by the Commission, none of whom provided any examples of: (i) Coillte refusing to sell or lease land to a rival wind farm developer; (ii) Coillte refusing to enter into wayleave or easement agreements with rival wind farm developers; or (iii) instances where the development of a wind farm failed to progress because of the inability to access land owned by Coillte.

5.108. On the basis of the above, the Commission considers it unlikely that Coillte would, following implementation of the Proposed Transaction, have the incentive to successfully engage in a total foreclosure strategy in relation to its land holdings.

Partial foreclosure of access to Coillte land for the purposes of developing and constructing onshore wind farms in the State

Ability

5.109. Partial foreclosure in this instance refers to Coillte increasing the cost for third parties who seek access to Coillte-owned land for the purposes of developing and constructing an onshore wind farm in the State. There are two ways in which Coillte could raise rivals’ costs following implementation of the Proposed Transaction: (a) by increasing the cost of gaining access to Coillte land (e.g., by increasing the cost of buying or leasing land); and/or (b) by increasing the cost of gaining access via Coillte land (e.g., by increasing the fees charged for wayleave and easement agreements).

5.110. As set out in paragraphs 5.71 - 5.89 above, the Commission has concluded that Coillte, following implementation of the Proposed Transaction, would not have the ability to pursue a total foreclosure strategy in relation to its land because: (a) Coillte only has a [25-30]% market share of Theoretically Suitable Land in the State, and (b) the Proposed Transaction does not increase Coillte’s ability to pursue such a strategy. These points are also pertinent to the assessment of whether Coillte would have the ability to pursue a partial foreclosure strategy implementation completion of the Proposed Transaction. Should Coillte attempt to raise rival’s costs post-Proposed Transaction, rival wind farm developers have

the option of approaching other landholders for the purposes of accessing land suitable for developing and constructing wind farms in the State.

5.111. The Frontier Report states the following:

“[...]”⁷⁰

5.112. Even if Coillte were to raise rivals’ costs for accessing via Coillte land for the purposes of developing and constructing onshore wind farms in the State, it is not clear that such an increase in costs would result in harm in any potential downstream market. The Frontier Report states the following:

“[...]”.⁷¹

5.113. On the basis of all the evidence available to it, the Commission considers that Coillte is unlikely to have the ability to successfully pursue a partial foreclosure strategy following implementation of the Proposed Transaction.

Incentive

5.114. The Commission considers that Coillte is unlikely to have the incentive to engage in a partial foreclosure strategy following implementation of the Proposed Transaction for the reasons set out below.

5.115. The Commission has seen no evidence to indicate that Coillte has ever sought to foreclose its rivals through the partial foreclosure of access to or via Coillte land. No third party contacted by the Commission provided any evidence of Coillte increasing the cost of accessing Coillte land for the purposes of developing an onshore wind farm in recent years.

5.116. As set out in paragraphs 5.71 - 5.89 above, Coillte has a share of approximately [25-30]% of Theoretically Suitable Land in the State, and developers of onshore wind farms consider many alternative routes for site access and grid connection. The Commission considers it likely that, in the event of Coillte increasing the fees charged for accessing its land for the purposes of developing a wind farm, third party wind farm developers would pursue alternative routes for grid connection or site access (as described above), thereby resulting in Coillte foregoing these [...] revenues altogether.

5.117. On the basis of all the evidence available to it, the Commission considers that Coillte is unlikely to have the incentive to successfully pursue a partial foreclosure strategy following implementation of the Proposed Transaction.

Conclusion on unilateral effects

⁷⁰ The Frontier Report, page 8.

⁷¹ The Frontier Report, page 10



5.118. In light of the above, the Commission considers that the Proposed Transaction is unlikely to give rise to any unilateral effects in relation to the potential market for the supply of land suitable for the development and construction of onshore windfarms in the State.

Coordinated Effects

5.119. The Commission identified concerns that the Proposed Transaction could potentially lead to the exchange of CSI between Coillte, the JV and ESB regarding third parties seeking access to Coillte-owned land for the purposes of developing and constructing an onshore wind farm in the State (the “Vertical CSI Concerns”).

5.120. In particular, the Commission was concerned that the Proposed Transaction may enable the potential exchange of CSI between Coillte and the JV, and between Coillte and ESB through the JV in relation to fees charged by Coillte to third parties seeking access to Coillte-owned land for the purposes of developing and constructing an onshore wind farm in the State, and other commercially sensitive information provided by third parties to Coillte seeking access to Coillte-owned land.

Proposals Submitted by Coillte

5.121. On 5 November 2020, the Commission informed Coillte of its Vertical CSI Concerns in a telephone call. On 17 November 2020, Coillte submitted draft proposals to the Commission in accordance with section 20(3) of the Act intended to ameliorate the competition concerns identified by the Commission.

5.122. Following receipt of these draft proposals, the Commission engaged with Coillte and its legal advisors to formulate proposals which would ameliorate the Vertical CSI Concerns.

5.123. On 19 January 2020, Coillte submitted final proposals which are intended to prevent the exchange of competitively sensitive information between Coillte and the JV, and between Coillte and ESB through the JV. The Coillte Proposals are discussed in greater detail in section 6 below.

5.124. The Commission is of the view that the Coillte Proposals are sufficient to address the competition concerns identified by the Commission in the potential market for the supply of land suitable for the development and construction of onshore wind farms in the State. In accordance with section 20(3) and section 26(1) and section 26(4) of the Act, the Commission has taken the Coillte Proposals into account and the Coillte Proposals form the basis or part of the basis for this determination. Consequently, the Coillte Proposals have become commitments binding upon Coillte.

Conclusion

5.125. In light of the above, and having taken the Coillte Proposals into account (which form the basis or part of the basis of its determination), the Commission considers

that the Proposed Transaction will not lead to a substantial lessening of competition in the potential market for the supply of land suitable for the development and construction of onshore wind farms in the State.

Conclusion on competitive assessment

5.126. In light of the above, and having taken both the Joint Proposals and the Coillte Proposals into account (which form the basis or part of the basis for its determination) the Commission considers that the Proposed Transaction will not substantially lessen competition in any market for goods or services in the State.

6. PROPOSALS TO ADDRESS COMPETITION CONCERNS

Introduction

- 6.1. On 5 November 2020, during the preliminary (Phase 1) investigation, the Commission informed the Parties of its potential competition concerns. On 17 November 2020, Coillte submitted draft proposals intended to address the Commission’s Vertical CSI Concerns. On 18 November 2020, the Parties submitted draft joint proposals intended to address the Commission’s Horizontal CSI Concerns.
- 6.2. Following its detailed consideration of both sets of proposals, the Commission could not conclude that both sets of proposals, respectively, would ameliorate the potential competition concerns identified by the Commission during the preliminary (Phase 1) investigation.
- 6.3. During the full (Phase 2) investigation, the Commission engaged with the Parties and their legal advisors to ensure that proposals were put forward that would fully ameliorate the potential competition concerns identified by the Commission.

Horizontal CSI Concerns

- 6.4. As set out in paragraphs 5.47-5.50 above, the Commission identified competition concerns arising from the Proposed Transaction in relation to the potential exchange of competitively sensitive information between ESB, the JV and third parties that are currently involved in CDAs with Coillte. The Commission considered that the potential exchange of CSI could have adverse effects on the potential market for the development, construction and operation of onshore wind farms in the State.
- 6.5. On 28 January 2020, the Parties submitted the Joint Proposals to the Commission under section 20(3) of the Act intended to address the Commission’s Horizontal CSI Concerns.
- 6.6. The Joint Proposals provide, *inter alia*, that:
 - Effective arrangements are in place within the JV to ensure that directors appointed to the board(s) of the JV by ESB (“ESB Director(s)”) will not have access to JV CSI;
 - ESB Directors shall not be provided with, or have access to, JV CSI and shall not discuss or solicit JV CSI with or from any officer, employee, representative or agent of the JV;
 - An independent chairperson (the “Independent Chairperson”) will be jointly appointed to chair the board(s) of the JV by ESB and



Coillte [in accordance with the SHA in the form agreed between ESB and Coillte on 22 November 2019], with the independence of such Independent Chairperson being assessed by reference to objective criteria of independence;

- The Parties will notify the Commission in writing in advance of the appointment of a proposed Independent Chairperson, provide full contact details of the proposed Independent Chairperson and any proposed replacement;
- The Parties will provide the Commission with confirmation, in writing, that the proposed Independent Chairperson satisfies the objective criteria of independence and provide the Parties' reasoning for this view;
- Upon notification of a proposed Independent Chairperson, the Commission may express: (i) approval; (ii) no rejection; or (iii) rejection of the proposed appointment of an individual as Independent Chairperson;
- The Independent Chairperson will be responsible for ensuring that no JV CSI is discussed with or passed on, directly or indirectly, to any ESB Director, and will implement appropriate mechanisms for preventing JV CSI being discussed with or passed on, directly or indirectly, to any ESB Director.
- An independent expert may be appointed by the Independent Chair from time to time with the role of the independent expert being to:
 - a. assist the Independent Chairperson with the identification of JV CSI, and/or
 - b. advise on the implementation (including activation) of appropriate mechanisms for preventing certain JV CSI being discussed with or passed on, directly or indirectly, to any ESB Director.
- The Commission will be notified of the appointment of any independent expert within one month from the end of each quarter-year following such an appointment;
- ESB shall not (and shall not permit any ESB personnel or, to the extent that any ESB Director has any ESB CSI, any ESB Director to) discuss with or pass on, directly or indirectly any ESB CSI to the JV or any JV personnel;
- ESB shall not (and shall not permit any ESB personnel or, to the extent that any ESB Director has any ESB CSI, any ESB Director to)

discuss with or pass on, directly or indirectly any ESB CSI to the CDA partners or any CDA partner personnel;

- ESB shall not (and shall not permit any ESB personnel or any ESB Director to) discuss with or solicit, directly or indirectly, any CDA partner CSI from any CDA partner or any CDA partner personnel; and
- The Parties shall certify their compliance with the Joint Proposals annually, provide training to the relevant directors and personnel, and provide to the Commission upon request any additional information which the Commission may reasonably require and which is necessary in order for the Commission to verify ESB and Coillte's compliance with their respective obligations.

- 6.7. The Commission is of the view that the Joint Proposals submitted by the Parties on 28 January 2021 are sufficient to address the Horizontal CSI Concerns identified by the Commission during its investigation as they put in place appropriate measures to prevent the exchange of CSI between the JV, ESB and third parties.

Vertical CSI Concerns

- 6.8. As set out in paragraphs 5.119 and 5.120 above, the Commission also identified potential competition concerns arising from the potential exchange of CSI between Coillte, the JV and ESB regarding third parties seeking access to Coillte-owned land for the purposes of developing and constructing an onshore wind farm in the State ("Third Party CSI").
- 6.9. On 19 January 2021 Coillte submitted the Coillte Proposals to the Commission under section 20(3) of the Act.
- 6.10. The Coillte Proposals provide, *inter alia*, that:
- Coillte shall ensure that any person appointed by Coillte to serve on the board(s) of the JV by Coillte (a "Coillte JV Director") has no ongoing responsibility for the day to day running of third party land access requests in Coillte;
 - Coillte shall not (and shall not permit any Coillte personnel to) discuss with or pass on, directly or indirectly, to any person appointed to serve as a Coillte JV Director any Third Party CSI;
 - Coillte shall not permit any person appointed to serve as a Coillte JV Director to discuss with or solicit from any Coillte personnel any Third Party CSI;
 - Coillte shall not (and shall not permit any Coillte personnel to) discuss with or pass on, directly or indirectly, to any JV CSI or CDA

partner (including JV personnel or CDA personnel) any Third Party CSI;

- the Chairperson of Coillte shall be responsible for putting in place and administering policies and procedures to ensure that Coillte personnel (including Coillte board members) do not discuss with or pass on, directly or indirectly, to any person appointed to serve as Coillte JV Director any Third Party CSI;
- Coillte shall [...];
- Coillte shall [...];
- [...];
- [...]; and
- [...].

6.11. The Commission is of the view that the Coillte Proposals submitted by Coillte on 18 January 2021 are sufficient to address the Vertical CSI Concerns identified by the Commission during its investigation as they put in place appropriate measures to prevent the exchange of CSI between Coillte, the JV, and ESB.

Conclusion

6.12. In light of the Joint Proposals and the Coillte Proposals (which form part of the basis of its determination), and in light of its analysis as set out in this determination, the Commission has determined that the Proposed Transaction will not substantially lessen competition in any market for goods or services in the State.

6.13. In accordance with section 20(3) and section 26(1) and section 26(4) of the Act, the proposals submitted by Coillte and the Parties, respectively, have become commitments binding upon Coillte and the Parties, respectively. Both the Coillte Proposals and the Joint Proposals are appended to this determination below.

7. CONCLUSION

- 7.1. In light of its analysis as set out in this determination, and having taken both the Coillte Proposals and the Joint Proposals into account, the Commission has determined that the Proposed Transaction will not substantially lessen competition in any market for goods or services in the State.
- 7.2. Before making a determination in this matter, the Commission, in accordance with section 22(8) of the Act, has had regard to any relevant international obligations of the State, and concluded that there were none.

8. ANCILLIARY RESTRAINTS

- 8.1. The SHA contains a number of restrictive obligations on the Parties. These include [...]and [...]clauses. The Parties state in the notification that these restrictive obligations are appropriately limited and are thus considered to be directly related and necessary to the implementation of the Proposed Transaction.
- 8.2. [...].
- 8.3. [...].
- 8.4. The Commission considers these restrictions to be directly related to, and necessary for, the implementation of the Proposed Transaction insofar as they relate to the State.

9. DETERMINATION

Pursuant to section 20(3) of the Competition Act 2002, as amended (the “Act”), the Electricity Supply Board (“ESB”) and Coillte Cuideachta Gníomhaíochta Ainmnithe (“Coillte”) have submitted to the Competition and Consumer Protection Commission (the “Commission”) the joint proposals set out below regarding measures to be taken to ameliorate any effects of the proposed acquisition on competition in markets for goods or services in the State, with a view to the said joint proposals becoming binding on ESB and Coillte.

Additionally, pursuant to section 20(3) of the Act, Coillte has submitted to the Commission the proposals set out below regarding measures to be taken to ameliorate any effects of the proposed acquisition on competition in markets for goods or services in the State, with a view to the said proposals becoming binding on Coillte.

The Commission has taken the joint proposals and proposals into account and, in light of the said joint proposals and proposals (which form part of the basis of its determination), has determined in accordance with section 22(3)(a) of the Act that the result of the proposed creation of a joint venture between ESB and Coillte, will not be to substantially lessen competition in any market for goods or services in the State, and, accordingly, that the transaction may be put into effect.

For the Competition and Consumer Protection Commission

Isolde Goggin
Chairperson
Competition and Consumer Protection Commission

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

JOINT FORMAL PROPOSALS: 28 January 2021

Joint Formal Proposals submitted by The Electricity Supply Board and Coillte Cuideachta Ghníomhaíochta Ainmnithe to the Competition and Consumer Protection Commission ("Proposals")

RECITALS

- (A) On 12 February 2020, the proposed creation of a joint venture by ESB and Coillte was notified to the Commission in accordance with section 18(1)(a) of the Act (the "Proposed Transaction").
- (B) Prior to completion of the Proposed Transaction, Coillte intends to establish a wholly-owned subsidiary (**DevCo**) to which Coillte, upon completion of the Proposed Transaction, would transfer its onshore wind development business (including relevant business unit employees) and associated assets/goodwill. Following implementation of the Proposed Transaction, ESB would acquire a 50% shareholding in DevCo.
- (C) ESB and Coillte will subsequently incorporate a jointly-controlled holding company ("HoldCo") and will transfer all of the shares in DevCo to HoldCo. HoldCo will, subject to approval by its board, establish special purpose vehicles to which individual renewable energy projects will be transferred (i.e. Development Projects, including wholly-owned Development Projects and Co-Development Projects).
- (D) Pursuant to Section 20(3) of the Act, ESB and Coillte have submitted the Proposals to the Commission relating to the Proposed Transaction for the purpose of ameliorating any possible effect of the Proposed Transaction on competition in markets for goods or services, with a view to the Proposals becoming binding on ESB and Coillte.
- (E) The Proposals submitted by ESB and Coillte are intended to confirm the arrangements as set out in the Agreement that would prevent any direct or indirect exchange of competitively sensitive information between ESB, Coillte, HoldCo, DevCo and the potential Co-Development Project Partners.

Definitions

- 1 For the purpose of the Proposals, the following terms shall have the following meaning:

Act means the Competition Act 2002, as amended;

Agreement means the shareholders' agreement between Coillte; ESB Wind Development Limited; HoldCo; and DevCo (and any amendments thereto), submitted to the Commission in agreed form on 12 February 2020;



AssetCo means, where relevant in the event that an AssetCo framework is established, the entity which contracts, or intends to contract, with DevCo or HoldCo to acquire Coillte's indirect equity interests in a Co-Development Project company, as more particularly set out in the Agreement;

Business Plan means the business plan of the Company Group from time to time, which shall be:

- (a) from the date of the Agreement, the [...] business plan of the Company Group; and
- (b) thereafter, any proposed amended business plan that is approved by the board of a member of the Company Group in accordance with the Agreement;

JV Chief Financial Officer or JV CFO means the chief financial officer of the Company Group;

Co-Development Agreement means any agreements entered into from time to time between any company in the Company Group and any third party for the joint development of renewable energy facilities;

Co-Development Project means any of the projects to be developed pursuant to any Co-Development Agreements that DevCo is party to, from time to time;

Co-Development Project Partner means any counterparty to a Co-Development Agreement (other than, where applicable, ESB);

Co-Development Project Partner CSI means any specific, disaggregated information in relation to a Co-Development Project Partner where the disclosure of such information would constitute a breach of section 4(1) of the Act. For the avoidance of doubt, information that is available in any form to the public by lawful means, other than as a result of a breach of these Proposals, shall not be considered to constitute Co-Development Project Partner CSI.

For the purposes of these Proposals, information which relates to Co-Development Projects or proposed joint projects between the Company Group and a Co-Development Project Partner shall constitute Company Group Project CSI and not Co-Development Project Partner CSI;

Co-Development Project Partner Personnel means any officer, employee, representative or agent of, or person holding equivalent function in, a Co-Development Project Partner (including any member of that Co-Development Project Partner's corporate group);

Co-Development SPV means any special purpose vehicle relating to a Co-Development Project;

Coillte means Coillte Cuideachta Ghníomhaíochta Ainmnithe;

Coillte Directors means the directors appointed by Coillte to a Company Group company, including as alternate directors, and each individually a **Coillte Director**;

Coillte Personnel means any officer, employee, representative or agent of, or person holding equivalent function in, Coillte other than the Coillte Directors;

Coillte Termination Date means the date on which (a) Coillte disposes of its entire shareholding in HoldCo to a third party not owned or controlled by Coillte; or (b) Coillte acquires the entire issued share capital of HoldCo subject to conclusion of any review required under Part 3 of the Act; or (c) the Parties receive written confirmation from the Commission that the Proposals shall cease to apply;

Commencement Date means the date of the Commission's determination pursuant to section 22(3)(a) of the Act that the Proposed Transaction may be put into effect;

Commission means the Competition and Consumer Protection Commission and its successors;

Company Group means HoldCo together with its subsidiaries from time to time and all undertakings directly or indirectly controlled by HoldCo (which, for the avoidance of doubt, includes DevCo). In this context, the notion of control shall be interpreted pursuant to section 16 of the Act;

Company Group Project means a project owned, developed, or to be developed, by a member of the Company Group for the generation of electricity from a renewable source or as may otherwise be agreed by the Parties;

Company Group Project CSI means any specific disaggregated information, including in relation to pricing in the context of any proposed RESS auction(s) or of any replacement competitive process for the grant of subsidies to renewable energy projects or competitive bidding processes for corporate power purchase agreements, of Company Group Projects where the disclosure of such information would constitute a breach of Section 4(1) of the Act. For the avoidance of doubt, information that is available in any form to the public by lawful means, other than as a result of a breach of these Proposals, shall not be considered to constitute Company Group Project CSI;

Company Group Personnel means any officer, employee, representative or agent of, or person holding equivalent function in, a Company Group company;

CRU means the Commission for the Regulation of Utilities established pursuant to the Electricity Regulation Act 1999 as amended, and its successors;

Day-to-Day Running of ESB Competing Projects means the day to day management or operation of ESB Competing Projects including any role that requires knowledge of ESB CSI;

Day-to-Day Running of the Company Group Projects means the day to day management or operation of Company Group Projects including any role that requires knowledge of Company Group Project CSI;

DevCo means a company as described in the Agreement to which Coillte will transfer its onshore wind development business (including relevant business unit employees) and associated assets/goodwill, and in which ESB will acquire a 50% shareholding;

Electric Ireland means that part of ESB and its subsidiaries which carry out licensed supply under the trading name 'Electric Ireland';

ESB means the Electricity Supply Board (ESB) and any member of its Group (but shall not include any member of the Company Group). For the purposes of this definition "Group" shall mean any subsidiary or holding company of ESB, any subsidiary of any holding company of ESB from time to time other than ESB Networks and Electric Ireland;

ESB Directors means the directors appointed by ESB to a Company Group company, including alternate directors, and each individually an **ESB Director**;

ESB Competing Projects means any renewable energy project which is solely or jointly controlled by ESB or a member of ESB's Group, or in which ESB holds a minority interest and which is reasonably likely (in the opinion of the board of HoldCo), to compete with any of the Company Group Projects for subsidy through RESS auction(s) or through any other additional or replacement competitive process for the grant of subsidies to renewable energy projects or in the context of alternative routes to market (including, but not limited to, corporate power purchase agreements);

ESB CSI means any specific disaggregated information, including in relation to pricing in the context of any proposed RESS auction(s) or of any replacement competitive process for the grant of subsidies to renewable energy projects or competitive bidding processes for corporate power purchase agreements, of ESB Competing Projects where the disclosure of such information would constitute a breach of section 4(1) of the Act. For the avoidance of doubt, information that is available in any form to the public by lawful means, other than as a result of a breach of these Proposals, shall not be considered to constitute ESB CSI;

ESB Networks means (i) ESB Networks DAC, being the holder of the distribution system operator licence issued by the CRU under Section 14(1) of the Electricity Regulation Act 1999 as amended, and (ii) that ring-fenced part of ESB designated for the purposes of the transmission system owner and distribution system owner licences as issued by the CRU under Section 14(1) of the Electricity Regulation Act 1999 as amended, and any successor to any of these licensed roles within ESB;

ESB Personnel means any officer, employee, representative or agent of, or person holding equivalent function in, ESB other than the ESB Directors;

ESB Termination Date means the date on which (a) ESB disposes of its entire shareholding in HoldCo to a third party not owned or controlled by ESB; or (b) ESB acquires the entire issued share capital of HoldCo subject to conclusion of any review required under Part 3 of the Act; or (c) the Parties receive written confirmation from the Commission that the Proposals shall cease to apply;

HoldCo means an incorporated jointly controlled holding company to which ESB and Coillte will transfer all of the shares in DevCo;

Independent Chairperson has the meaning set out in para 2.2 below;

Independent Expert has the meaning set out in para 2.3 below;

Parties means ESB and Coillte;

RESS means the Renewable Electricity Support Scheme, as designed and implemented from time to time by the Irish Government by reference to (i) Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, and (ii) Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources;

Transaction Documents means the Agreement and all other agreements between the Parties comprising the Proposed Transaction; and

Term means the period beginning on the Commencement Date and ending for ESB on the ESB Termination Date and for Coillte on the Coillte Termination Date.

2 **Joint Undertakings:**

2.1 During the Term, if and to the extent that any ESB Director has ongoing responsibility for the Day-to-Day Running of ESB Competing Projects, the Parties undertake:

- a. to ensure that effective arrangements are in place within the Company Group to ensure that ESB Directors will not have access to Company Group Project CSI, such as through the arrangements outlined in the Agreement (or any other agreement that is entered into in relation to these matters under the Agreement); and
- b. to ensure that the ESB Directors appointed to the boards of DevCo and of HoldCo, with the exception of the Independent Chairperson, would not be provided with, or have access to, Company Group Project CSI and would not discuss or solicit Company Group Project CSI with or from Company Group Personnel.

(a) The Independent Chairperson

- 2.2 If and for so long as the criteria in paragraph 2.1 of these Proposals are met, the Parties further undertake that an independent director (i.e. the Independent Chairperson) will be jointly appointed by the Parties to chair the boards of both HoldCo and DevCo for the duration of the Term.
- 2.3 The Parties undertake that the Independent Chairperson's independence will be assessed by reference to objective criteria, such as those contained in the UK Code of Corporate Governance, in particular, whether the Independent Chairperson would:
- (a) be or have been an employee or director of either of the Parties within the preceding five years,
 - (b) have or have had within the preceding one year a material business relationship with either of the Parties either directly or as a partner, shareholder, director or senior employee of a body that has such a relationship with either of the Parties,
 - (c) receive or over the past five years have received additional remuneration from either of the Parties apart from a director's fee, participate in any share option or performance-related pay scheme operated by either of the Parties, and/or be a member of either of the Parties' pension schemes,
 - (d) have close family ties with any of the Parties' directors or senior personnel,
 - (e) hold cross-directorships or have significant links with other members of the boards of any member of the Company Group or any member of the Parties,
 - (f) represent a significant shareholder of either Party, and
 - (g) have served on a board of any member of the Company Group for more than nine years from the date of their first appointment.
- 2.4 With the exception of the first Independent Chairperson designate, [...], who was notified to the Commission on 2 December 2020, the Parties will notify the Commission in writing in advance of the appointment of a proposed Independent Chairperson and any proposed replacement Independent Chairperson, where relevant (the "Proposed Independent Chairperson") and provide full contact details of the Proposed Independent Chairperson and the reasons justifying the Parties' assessment that the Proposed Independent Chairperson is independent in accordance with paragraph 2.3 of the Proposals. For the avoidance of doubt, where any of the circumstances in paragraph 2.3(a)-(g) of the Proposals are considered by the Parties to apply, and the Parties nonetheless consider that the Proposed Independent Chairperson is independent, the Parties will explain in writing to the Commission why the Proposed Independent Chairperson is suitable to become the Independent Chairperson in such circumstances and should be appointed in accordance with paragraph 2.5 of the Proposals.
- 2.5 With the exception of the first Independent Chairperson designate, [...], who was notified to the Commission on 2 December 2020, the appointment of an Independent Chairperson

and any proposed replacement will be subject to prior approval by the Commission (approval not to be unreasonably withheld or delayed and such approval to be granted by the application of the criteria set out in paragraph 2.3 of the Proposals, and any other objective standards, by the Commission) in accordance with the following procedure:

- (a) If the Commission does not reject the appointment of the Proposed Independent Chairperson by notice in writing to the Parties within ten working days of receipt of the notification made to the Commission by the Parties in accordance with paragraph 2.4 of these Proposals, the Proposed Independent Chairperson shall be deemed to have been approved by the Commission;
- (b) If the appointment of the Proposed Independent Chairperson is rejected by the Commission by notice in writing to the Parties within ten working days of receipt of the notification made to the Commission by the Parties in accordance with paragraph 2.4 of these Proposals, the Parties will propose to the Commission the name of another proposed Independent Chairperson (the “Second Proposed Independent Chairperson”) within thirty working days of being informed by the Commission of the rejection. If the Commission does not reject the appointment of the Second Proposed Independent Chairperson by notice in writing to the Parties within ten working days of the receipt of the new proposal, the Second Proposed Independent Chairperson shall be deemed to have been approved by the Commission;
- (c) If the Second Proposed Independent Chairperson is rejected by the Commission by notice in writing to the Parties within ten working days of receipt of the proposal made to the Commission by the Parties in accordance with sub-paragraph (b) above, the Parties will propose to the Commission the name of another proposed Independent Chairperson (the “Third Proposed Independent Chairperson”) within thirty working days of being informed by the Commission of the rejection of the appointment of the Second Proposed Independent Chairperson. If the Commission does not reject the appointment of the Third Proposed Independent Chairperson by notice in writing to the Parties within ten working days of the receipt of the new proposal, the Third Proposed Independent Chairperson shall be deemed to have been approved by the Commission;
- (d) If the Third Proposed Independent Chairperson is rejected by the Commission by notice in writing to the Parties within ten working days of receipt of the proposal made to the Commission by the Parties in accordance with sub-paragraph (c) above, the Commission shall nominate a suitable person which the Parties shall appoint or cause to be appointed as Independent Chairperson; and
- (e) The procedure for the appointment of an Independent Chairperson set out in paragraphs 2.4 and 2.5 of these Proposals shall apply if at any time during the Term the Parties propose to replace the Independent Chairperson.

- 2.6 The Parties will ensure, to the extent reasonably possible and allowing for any period of vacancy which occurs by reference to any hand-over between the outgoing Independent Chairperson and the in-coming Independent Chairperson, that the position of Independent Chairperson will not be vacant at any time.
- 2.7 The Parties will procure that the duties of the Independent Chairperson shall include:
- a. ensuring that no Company Group Project CSI is discussed with or passed on, directly or indirectly, to any ESB Director, and
 - b. implementing appropriate mechanisms for preventing Company Group Project CSI being discussed with or passed on, directly or indirectly, to any ESB Director.
- 2.8 The Parties will inform the Independent Chairperson of his/her role in facilitating the Parties' compliance with the obligations and responsibilities under the Proposals and will ensure that the Independent Chairperson receives necessary training in this regard to assist in ensuring compliance with the Proposals as they apply to the Independent Chairperson.
- 2.9 Subject to paragraph 2.1 of the Proposals, nothing in the Proposals shall prevent the Company Group, or any director of a Company Group company, from taking steps necessary to comply with statutory or common law duties.

(b) Independent Expert(s)

- 2.10 The Independent Chairperson may be assisted by one or more Independent Expert(s) upon request by the Independent Chairperson in relation to the matters listed at paragraph 2.13 (a) and (b) of these Proposals.
- 2.11 The Parties undertake that the independence of the Independent Expert(s) shall be assessed by reference to objective criteria such as those contained in the UK Code of Corporate Governance and, in particular, those set out at paragraph 2.3 of the Proposals.
- 2.12 The Parties shall, within one month of the end of the relevant calendar quarter-year in which any Independent Expert(s) is/are appointed, provide written notice to the Commission of the date of the appointment, name and contact details of such Independent Expert(s) appointed during that quarter-year. For the avoidance of doubt, the appointment of any Independent Expert(s) will not be subject to prior approval by the Commission.
- 2.13 The Parties will procure that the role of Independent Expert(s), where requested by the Independent Chairperson, will be to:
- a. assist the Independent Chairperson with the identification of Company Group Project CSI, and/or
 - b. advise on the implementation (including activation) of appropriate mechanisms for preventing Company Group Project CSI being discussed with or passed on, directly or indirectly, to any ESB Director.

2.14 The Parties will inform the Independent Expert(s) of the existence of the Proposals and the role of the Independent Expert(s) in facilitating the Parties' compliance with the Parties' obligations and the responsibilities of the Independent Expert(s) under the Proposals upon appointment.

3 Undertakings by ESB

3.1 The following undertakings in Section 3 of the Proposals will apply only to activities connected with the implementation of the Proposed Transaction and operation of Company Group activities.

3.2 ESB undertakes that, for the Term of these Proposals,

3.2.1 ESB shall not (and shall not permit any ESB Personnel or, to the extent that any ESB Director has any ESB CSI, any ESB Director to) discuss with or pass on, directly or indirectly any ESB CSI to the Company Group or any Company Group Personnel other than, subject to the obligations under paragraph 3.2.5 of the Proposals, ESB Directors;

3.2.2 ESB shall not (and shall not permit any ESB Personnel or, to the extent that any ESB Director has any ESB CSI, any ESB Director to) discuss with or pass on, directly or indirectly any ESB CSI to any Co-Development Project Partner or Co-Development Project Partner Personnel;

3.2.3 ESB shall not (and shall not permit any ESB Personnel or any ESB Director to) discuss with or solicit, directly or indirectly, any Co-Development Project Partner CSI from any Co-Development Project Partner or any Co-Development Project Partner Personnel; and

3.2.4 ESB will ensure that (i) any person appointed by the ESB from time to time to act as company secretary within the Company Group; and (ii) the JV Chief Financial Officer (and any other ESB Personnel who may be appointed to a role in the Day-to-Day Running of the Company Group Projects) will have no ongoing involvement in the Day-to-Day Running of ESB Competing Projects.

3.2.5 At any time when the arrangements referred to in paragraph 2.1 of the Proposals are not in place (i.e. if none of the ESB Directors has ongoing responsibility for the Day-to-Day Running of ESB Competing Projects), ESB shall ensure that:

(a) any ESB Director has no ongoing responsibility for any function in the Day-to-Day Running of ESB Competing Projects; and

(b) ESB Directors shall not discuss with or provide to ESB Personnel involved in the Day-to-Day Running of the ESB Competing Projects any Company Group CSI.



4 These Proposals shall not prevent the following:

- 4.1 Disclosure by ESB to Coillte and/or disclosure by Coillte to ESB of any information pursuant to the Transaction Documents which is necessary to be provided to ESB or to Coillte in order to implement or operate the Proposed Transaction;
- 4.2 Disclosure by ESB to Coillte or the Company Group and/or disclosure by Coillte or the Company Group to ESB and/or as between any Company Group member and ESB/Coillte of (i) any information pursuant to the Transaction Documents for any arrangements necessary to negotiate and operate agreements between ESB and the Company Group (e.g. as applicable, power purchase agreements, engineering services, and as required to facilitate the operation of the share sale mechanisms set-out in the Agreement) or (ii) any information necessary for the exploration (e.g. due diligence and negotiation), execution or operation of any agreements executed or to be executed between ESB and the Company Group (including co-development agreements and commercial opportunities linked to land rights/access);
- 4.3 To the extent relevant, attendance by an ESB representative at meetings with AssetCo as contemplated by the Agreement;
- 4.4 ESB and Coillte exercising necessary shareholder approval rights on Reserved Matters (including but not limited to approval of the Business Plan and budgets) as defined and more fully set out in the Agreement; or
- 4.5 Disclosure by ESB, Coillte, or any member of the Company Group of any information which is required to comply with any applicable law or regulation (including, without limitation, disclosure which may be made by any director and/or officer of ESB, Coillte or of the Company Group in order to fulfil any statutory and/or fiduciary duty) or judicial or arbitral process of any competent jurisdiction, or which is required to be disclosed by any competent authority or which is dealt with in accordance with Regulation (EU) No. 596/2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC or any applicable national implementing measures.

5 Compliance

- 5.1 ESB and Coillte shall each submit to the Commission within six (6) months of the Commencement Date, and, at intervals of one year thereafter during the Term, a written certificate in the form set out in the Schedule 1 hereto (a "Compliance Certificate"), signed by a director of ESB and Coillte, or by a member of their respective executive management teams duly authorised by their respective boards, confirming that each of ESB and Coillte has complied with their respective obligations set out in the Proposals in the preceding period, and setting out changes, if any, to the Coillte Directors and/or the ESB Directors during the preceding period.

- 5.2 Each of ESB and Coillte shall inform respectively the relevant ESB Personnel and Coillte Personnel, all Company Group Personnel, and the ESB Directors and Coillte Directors of their obligations and responsibilities under the Proposals and shall provide training to them in that regard.
- 5.3 The Commission reserves the right to require each of ESB and Coillte to provide to the Commission, at any time and on reasonable notice, such additional information as the Commission reasonably requires and which is necessary in order for the Commission to verify each of ESB's and Coillte's compliance with their respective obligations set out in the Proposals. Each of ESB and Coillte shall promptly provide to the Commission all such information in its possession.
- 5.4 The Proposals will come into effect on the Commencement Date and will remain in force during the Term. For the avoidance of doubt, the Proposals shall have no retrospective effect.

6 Review Clause

- 6.1 The Commission may, at its sole discretion, in response to a reasoned request from the Parties showing good cause, amend, revise or remove any of the Proposals, provided always that any such amendment, revision or removal is necessary, proportionate and objectively justifiable.

SCHEDULE 1

[Headed paper of ESB/Coillte]

[date]

Ibrahim Bah
Competition Enforcement and Mergers Division
Competition and Consumer Protection Commission
Bloom House
Railway Street
Dublin 1

Merger Notification M/20/005 – ESB/Coillte (JV)

Dear Mr. Bah,

I refer to Merger Notification M/20/005 – ESB/Coillte (JV) whereby a joint venture would be created by the Electricity Supply Board (“ESB”) and Coillte Cuideachta Ghníomhaíochta Ainmnithe (“Coillte”) for purposes of developing and constructing renewable energy generation facilities was notified to the Competition and Consumer Protection Commission on 12 February 2020 under Part 3 of the Competition Act 2002 (as amended) (“the Proposed Transaction”).

The Commission issued its Determination approving the Proposed Transaction on [] February 2021.

In accordance with the terms of the proposals given by ESB and Coillte to the Commission on 28 January 2021 in relation to the Proposed Transaction which, in accordance with section 20(3), section 26(1) and section 26(4) of the Competition Act 2002, as amended, have become commitments binding upon ESB and Coillte (“the Commitments”), we hereby confirm ESB’s/Coillte’s compliance with the terms of the Commitments during the period commencing on [the date of the Determination/date of the previous certificate issued by ESB/Coillte] and ending on the date hereof.

[Since [date], there have been no changes to the Coillte Directors or ESB Directors]/[Since [date], the following change(s) to the Coillte Directors and/or the ESB Directors have/has been made: []].

Yours faithfully,

[Name]

[Duly Authorised Member of the ESB Executive Management Team / Director ESB [AND] Duly
Authorised Member of the Coillte Executive Management Team / Director Coillte]

M/20/005 – ESB/COILLTE (JV)

SECTION 20(3) PROPOSALS SUBMITTED BY COILLTE (“Proposals”)

Recitals

- a) On 12 February 2020, the proposed creation of a full function joint venture (“JV”) by Coillte Cuideachta Ghníomhaíochta Ainmnithe (“Coillte”) and the Electricity Supply Board (“ESB”) was notified to the Commission under Part 3 of the Act.
- b) Pursuant to section 20(3) of the Act, Coillte has submitted to the Commission these Proposals relating to the Proposed Transaction for the purpose of ameliorating any possible effect of the Proposed Transaction on competition in markets for goods or services, with a view to the Proposals becoming binding on Coillte.
- c) The Proposals submitted by Coillte are intended to strengthen existing measures to prevent the exchange between Coillte and the JV of competitively sensitive information of third party land customers of Coillte which would constitute a breach of section 4(1) of the Act.

Definitions

“Co-Development Agreement” means any agreement entered into from time to time between any company in the Company Group and any third party for the joint development of renewable energy facilities;

“Co-Development SPV” means any special purpose vehicle relating to a Co-Development Project;

“Co-Development SPV Personnel” means any person employed by a Co-Development SPV other than a Coillte JV Director;

“Co-Development Project” means any project to be developed pursuant to any Co-Development Agreement to which JV DevCo is a party, from time to time;

“Coillte Board” means the board of directors of Coillte;

“Coillte JV Director” means any person appointed by Coillte to the board of any JV Company or Co-Development SPV, including as an alternate director;

“Coillte Land” means land owned or occupied by Coillte or land to which Coillte is beneficially entitled;

“Commencement Date” means the date that the Proposed Transaction is completed, being the date following the transfer by Coillte of its onshore wind development business (including relevant business unit employees) and associated assets/goodwill to DevCo on which ESB acquires a 50% interest in DevCo;

“Commission” means the Competition and Consumer Protection Commission and its successors;

“Company Group” means JV Holdco together with its subsidiaries from time to time and all undertakings directly or indirectly controlled by JV Holdco (which for the avoidance of doubt includes the JV DevCo). In this context, the notion of control shall be interpreted pursuant to section 16 of the Act;

“Day to Day Running of Third Party Land Access Request” means any role in the day to day management of the receipt, negotiation and execution of Third Party Land Access Requests;

“JV Company” means a member of the Company Group;

“JV Company Personnel” means any person employed by a JV Company other than a Coillte JV Director;

“JV Devco” means a company as described in the shareholders’ agreement (and any amendments thereto) between Coillte, ESB Wind Development Limited; JV HoldCo; and JV DevCo, to which Coillte will transfer its onshore wind development business (including relevant business unit employees) and associated assets/goodwill, and in which ESB will acquire a 50% shareholding;

“JV Holdco” means the company to be established to hold, directly or indirectly, the Parties’ interests in the JV and its successors;

“Land Access Request” means any request, including informal contacts and enquiries, received by Coillte for Land Rights;

“Land Rights” means rights over, or the use of, Coillte Land, whether by way of sale, lease, option or otherwise (e.g. by way of right of way, wayleave, easement or licence) for the purposes of development of renewable energy facilities;

[...];

“Termination Date” means the date on which (a) Coillte disposes of its entire shareholding in the JV Holdco; or (b) Coillte acquires the entire issued share capital of JV Holdco subject to conclusion of any review required under Part 3 of the Act; or (c) Coillte receives written confirmation from the Commission that these Proposals shall cease to apply;

“The Act” means the Competition Act 2002, as amended;

“The Term” means the period beginning on the Commencement Date and ending on the Termination Date;

“Third Party” means any person, company or other entity which is not a JV Company or Co-Development SPV;

“Third Party CSI” means, any specific disaggregated information concerning a Third Party project for development of renewable energy facilities received by Coillte further to a Third Party Land Access Request (including, but not limited to the following insofar as either alone or in combination their disclosure would constitute a breach of section 4(1) of the Act: information concerning the price agreed by Coillte and the Third Party in respect of the Third Party Land Access Request; the location and size of a potential site to be developed by the Third Party; the potential electricity output of a site to be developed by the Third Party; and/or the number and type of turbines to be located on a potential site to be developed by the Third Party) where the disclosure of such information would constitute a breach of section 4(1) of the Act. For the avoidance of doubt, information that is available in any form to the public by lawful means (including available in public registers such as those maintained by the Property Registration Authority, any local authority or planning authority) other than as a result of a breach of the Proposals, shall not be considered to constitute “Third Party CSI”; and

“Third Party Land Access Request” means any Land Access Request received by Coillte from a Third Party.

Proposals

1. Coillte shall, within one month of the Commencement Date, provide to the Commission in writing the name and contact details of any person or persons appointed to serve as a Coillte JV Director.
2. During the Term, Coillte undertakes that:
 - (a) Coillte shall ensure that any person appointed to serve as a Coillte JV Director has no ongoing responsibility for the Day to Day Running of Third Party Land Access Requests;
 - (b) Coillte shall not (and shall not permit any Coillte personnel to) discuss with or pass on, directly or indirectly, to any person appointed to serve as a Coillte JV Director any Third Party CSI;
 - (c) Coillte shall not permit any person appointed to serve as a Coillte JV Director to discuss with or solicit from any Coillte personnel any Third Party CSI;
 - (d) Coillte shall not (and shall not permit any Coillte personnel to) discuss with or pass on, directly or indirectly, to any JV Company or Co-Development SPV (including JV Company Personnel or Co-Development SPV Personnel) any Third Party CSI; and
 - (e) For the avoidance of doubt, the obligations set out in Clause 2 (a)-(d) of the Proposals will not apply:
 - (i) to any information which at the time of disclosure or thereafter is generally available to or known by the public (other than as a result of its disclosure by Coillte or Coillte personnel);



- (ii) to any information which was or becomes available to any JV Company, Co-Development SPV or Coillte JV Director from a person, other than Coillte (or any of its directors, employees, agents, consultants, representatives or advisers);
- (iii) to any information relating to a Third Party which is necessary for Coillte to disclose to a JV Company or Co-Development SPV for the purposes of facilitating a Land Access Request or development activities enquiry received from a Third Party or a JV Company or Co-Development SPV, provided that such information is (A) disclosed with the consent of the Third Party; and (B) limited to the minimum information necessary to facilitate the Land Access Request or development activities enquiry; and
- (iv) to any information which is required to be disclosed by judicial order or action or any applicable law, regulation or rule of any recognised investment exchange.

3. During the Term, Coillte undertakes that:

- (a) Coillte shall, within one month of the appointment of the Chairperson, provide the Commission with the name and contact details of the person appointed pursuant to section 15(2)(b) of the Forestry Act 1988 to serve as the chairperson of the Coillte Board by the Minister of Agriculture, Food and the Marine with the consent of the Minister for Public Expenditure and Reform (the “Chairperson”).
- (b) Coillte shall take all reasonable steps to ensure that the position of Chairperson is not vacant at any time, and that any acting chairperson of the Coillte Board is also bound by the obligations of the Chairperson;
- (c) Coillte shall procure that the Chairperson shall be responsible for putting in place and administering policies and procedures to ensure that Coillte personnel (including Coillte Board members) do not discuss with or pass on, directly or indirectly, to any person appointed to serve as Coillte JV Director any Third Party CSI; and
- (d) Coillte shall ensure that the Chairperson, and any acting chairperson, shall not simultaneously serve as an officer, director, representative, agent or person holding equivalent functions in the Company Group.

4. In addition to its obligations under Clauses 2, 3 and 4 of the Proposals, Coillte undertakes to implement all such measures as are necessary to ensure that no Third Party CSI is passed, directly or indirectly, from Coillte to the Company Group (including, for the avoidance of doubt, to any person appointed to serve as Coillte JV Director) and shall include the following measures:

- (a) [...], and



- (b) [...].
- 5. During the Term, Coillte undertakes that:
 - (a) [...];
 - (b) [...]; and
 - (c) [...].

Compliance

- 6. Coillte shall provide written notice to the Commission in advance of any changes to any person or persons appointed to serve as a Coillte JV Director and shall promptly provide to the Commission the name and contact details of any person who is to replace the prior nominated Coillte JV Director. Coillte shall take all reasonable steps to provide such written notice one month in advance of any change. For the avoidance of doubt, the Commission's approval is not required to appoint a Coillte JV Director.
- 7. Coillte shall submit to the Commission within six (6) months of the Commencement Date, and at intervals of one year thereafter, a written certificate in the form set out in Schedule 1 hereto (a "Compliance Certificate"), signed by a director of Coillte, or a member of Coillte's executive management duly authorised by the Coillte Board, confirming that Coillte has complied with its obligations set out in these Proposals in the preceding period, and setting out changes, if any, to any person or persons appointed to serve as a Coillte JV Director and to any person appointed to serve as Chairperson.
- 8. Coillte shall inform all persons appointed to serve as a Coillte JV Director of their role in facilitating Coillte's compliance with the obligations and responsibilities under these Proposals and shall provide training to them in this regard.
- 9. Coillte shall inform the person appointed to serve as Chairperson of their role in facilitating Coillte's compliance with the obligations and responsibilities under these Proposals and shall provide training to them in this regard.
- 10. Coillte shall inform all Coillte personnel that have ongoing responsibility for the Day to Day Running of Third Party Land Access Requests of their responsibilities pursuant to the Proposals and shall provide both training and written guidelines to them in that regard.
- 11. The Commission reserves the right to require Coillte to provide to the Commission, at any time and on reasonable notice, such additional information as the Commission reasonably requires and which is necessary in order for the Commission to verify Coillte's compliance with the obligations set out in these

Proposals. Coillte shall promptly provide to the Commission all such information in its possession.

12. These Proposals shall come into effect on the Commencement Date and shall remain in force during the Term. Within one week of the Commencement Date, Coillte shall notify the Commission in writing that the criteria in the definition of the Commencement Date have been met.

Review Clause

13. The Commission may, at its sole discretion, in response to a reasoned request from Coillte showing good cause, amend, revise or remove any of the Proposals, provided always that such amendment, revision or removal is necessary, proportionate and objectively justifiable.

SCHEDULE 1 TO THE PROPOSALS

[Coillte Headed Paper]

[Date]

Ibrahim Bah
Competition Enforcement and Mergers Division
Competition and Consumer Protection Commission
Bloom House
Railway Street
Dublin 1

Merger Notification M/20/005 – ESB/Coillte (JV)

Dear Mr. Bah,

I refer to Merger Notification M/20/005 – ESB/Coillte (JV) in relation to a proposed joint venture between the Electricity Supply Board (“ESB”) and Coillte Cuideachta Gníomhaíochta Ainmnithe (“Coillte”) which was notified to the Competition and Consumer Protection Commission (“Commission”) on 12 February 2020 (“the Proposed Transaction”).

The Commission issued its Determination approving the Proposed Transaction on [date].

In accordance with the terms of the proposals given by Coillte to the Commission on [] in relation to the Proposed Transaction which, in accordance with section 20(3), section 26(1) and section 26(4) of the Competition Act 2002, as amended, have become commitments binding upon Coillte (“the Commitments”), I hereby confirm Coillte’s compliance with the terms of the Commitments during the period commencing on [the

date of the Determination/date of the previous certificate issued by Coillte] and ending on the date hereof.

[Since [date], there have been no changes to the Coillte JV Director/Since [date], the following change(s) to the Coillte JV Director have/has been made: []].

[Since [date], there have been no changes to the Chairperson/Since [date], the following change(s) to the Chairperson have/has been made: []].

Yours faithfully,

[Name]

[Duly Authorised Member of the Coillte Executive Management Team / Director of Coillte]