

ELECTRICITY (SINGLE WHOLESALE MARKET) (NORTHERN IRELAND) ORDER 2007

S.I. 2007 913

EXPLANATORY MEMORANDUM

INTRODUCTION

1. The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 was made on 21st March 2007.
2. The Explanatory Memorandum has been prepared by the Department of Enterprise, Trade and Investment (the “Department”) to assist the reader in understanding the Order. It does not form part of the Order.

LEGISLATIVE BACKGROUND

3. This Order forms part of the primary legislation programme for Northern Ireland during direct rule. There are some 20-25 such Orders every year which in effect form the Northern Ireland statute book. These Orders are normally made under the Northern Ireland Act 2000 which authorises the making of legislation for Northern Ireland which (but for direct rule) would be enacted by the Northern Ireland Assembly. Although these Orders take the form of statutory instruments their content is similar to that of primary legislation.
4. When preparations for this Order were at an early stage a difficulty emerged concerning *vires* in that under section 6(2)(a) of the Northern Ireland Act 1998 an Act of the Assembly (and therefore an Order in Council under the Northern Ireland Act 2000) cannot make provision which “confers functions exercisable otherwise than in or as regards Northern Ireland”. It was felt that in the context of provision for a Single Electricity Market (SEM) the legislation would need to confer such functions (in respect of certain activities in Ireland).
5. It was therefore decided to take an additional power in the Northern Ireland (Miscellaneous Provisions) Act 2006 to make provision by Order in Council for giving effect to the SEM Agreement with Ireland.
6. The Order is made under two wide powers. Except in so far as it “confers functions exercisable otherwise than in or as regards Northern Ireland” the Order falls within the powers conferred by the Northern Ireland Act 2000. But for the doubts on *vires* mentioned above, the Order would have been made under that power.
7. The Order proceeds largely by amending existing NI domestic electricity legislation to provide mechanisms for regulating a single market in Northern Ireland and Ireland (parallel provisions are being introduced simultaneously in Ireland). In amending domestic law in a few places provision was made which while applying to SEM circumstances could also apply to purely domestic circumstances. This was done to ensure consistency of approach across the electricity legislation.

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8. The citation of the Northern Ireland Act 2000 is intended to avoid any argument as to whether such amendments to domestic law went beyond what was strictly speaking necessary to implement the SEM Agreement. Arguably they do not, but the SEM is of such political and economic importance that an abundance of caution was exercised to avoid any concerns over vires.

TERRITORIAL EXTENT AND APPLICATION

9. This Order applies to Northern Ireland only.

BACKGROUND AND POLICY OBJECTIVES

10. There are currently geographically distinct markets for the sale of wholesale electricity in Northern Ireland (“NI”) on the one hand and the Republic of Ireland (“ROI”) on the other. These two markets are governed by separate legislative provisions and are constituted by separate contractual and regulatory arrangements. In November 2004, the Department in NI and the Department of Communications, Marine and Natural Resources in ROI (“DCMNR”) published a paper entitled “All Island Energy Market Development Framework” setting out a joint commitment to the establishment of unified markets in NI and ROI for electricity and gas and setting out a schedule for implementation of these proposals. The first step proposed by this paper was the introduction of a unified electricity market which was considered to require the following main elements;
 - (a) The removal of physical constraints in the networks linking the electricity networks in NI and ROI, in order to facilitate cross-border trading in electricity;
 - (b) The establishment of a single electricity transmission system for NI and ROI, operated by a single system operator; and
 - (c) The establishment of a single market for the sale by electricity generators in NI and ROI and the legacy Power Procurement Business (the “PPB”) of NIE plc to suppliers of electricity (“wholesale electricity”) in NI and ROI (the “Single Electricity Market” or “SEM”), and measures to ensure effective and co-ordinated regulation of the market.
11. The Order sets out the legislation required to facilitate implementation of element (c) above in accordance with the proposals for the reform of the wholesale electricity market in NI and ROI, as set out in Memorandum of Understanding (the “MOU”) between the United Kingdom Government and the Government of ROI in relation to the establishment and operation of the SEM signed on behalf of the United Kingdom Government on 6 December 2006, and on behalf of the Government of ROI on 5 December 2006.

CONSULTATION

12. Consultation and engagement of all stakeholders has been a key aspect of the SEM project to date and will continue to be so to ensure that the principles and planned procedures meet with the overall needs of the electricity industry.
13. The Department consulted interested parties on the Order and associated Explanatory Memorandum and Regulatory Impact Assessment between November 2005 and January 2006. Twenty one bodies and companies responded out of 467 invitations. In general, there was support for the Order and the potential of the SEM to deliver tangible benefits for electricity consumers North and South. However, a number of technical changes for the Order were suggested. In addition, a number of respondents, including the Democratic Unionist Party (DUP) and the Social Democratic and Labour Party (SDLP) emphasised the necessity to address the dominance and market power of individual participants in order to promote greater competition in the SEM and enable the projected benefits of the SEM to be realised.

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14. As a result of the consultation exercise, a number of amendments were made to the Order. Copies of the responses, together with a summary of the outcome of the Department's consideration of the issues raised can be accessed by referencing the Department's website at www.detini.gov.uk following the link to the consultation section and double clicking on "The Electricity (Single Wholesale Market) Northern Ireland Order 2007 (November 2006)"
15. In addition, the Northern Ireland Authority for Energy Regulation (the "Authority") and the Commission for Energy Regulation in ROI ("CER") have undertaken extensive and ongoing consultations within the electricity sectors, North and South on details of the SEM proposals. The consultation process has helped to refine the overall policy development.
16. The All Island Energy Market Development Framework was itself subject to its own consultation process. It received the broad support of the energy sectors in both NI and ROI, including key industrial stakeholders and the CBI NI and IBEC-CBI Joint Business Council.

MAIN ELEMENTS OF THE ORDER

17. The Order is in twelve articles and four schedules. Articles 1 and 2 are introductory.
18. [Articles 3, 4 and 5](#) (Licences) make provision for (1) the Department or the Authority to modify the conditions of licences for the generation, transmission or supply of electricity in connection with the SEM, (2) the introduction of a licensing regime in respect of the function of market operator of the SEM, which consists of being responsible pursuant to the trading and settlement code referred to in the MOU for calculating charges and other payments due under that code (the "SEM Operator"), and (3) the Authority to make property arrangements schemes to facilitate the transfer of property, rights and obligations between the owner and the operator of a transmission system for the purposes of implementing the SEM. Further details in relation to the power in respect of property arrangements schemes are provided at Schedule 1.
19. [Articles 6-8](#) inclusive (The SEM Committee) provide for the establishment of a special committee of the Authority to be known as the Single Electricity Market Committee (the "SEM Committee") which shall take any decision as to the exercise of certain functions of the Authority, where it considers such functions materially affect or are likely materially to affect the SEM. Schedule 2 (The SEM Committee) provides further details with respect to the SEM Committee, such as its composition and proceedings. Article 8 and Schedule 3 provide powers for officers of the Authority to enter the premises of licence holders in relation to the investigation of licence contraventions.
20. [Article 9](#) and [10](#) (Objectives and duties of the Department, the Authority and the SEM Committee) provide for the imposition of new SEM-related duties on the Department, the Authority and the SEM Committee in carrying out their functions in relation to the SEM.
21. [Articles 11 and 12](#) (Miscellaneous) clarify the effect of the Order on certain agreements between licence holders and provide for certain minor and consequential amendments to be made in accordance with Schedule 4.

COMMENTARY ON ARTICLES

22. Comments are not given where the wording is self-explanatory.
23. [Article 2](#) defines certain key terms used throughout the Order, in particular, "the SEM". "The SEM" is defined as the Single Electricity Market, being the new arrangements in NI and ROI which are designed to promote the establishment and operation of a single competitive wholesale electricity market in NI and ROI and are described in broad terms in the MOU.

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24. **Article 3** allows the Department after consultation with the Authority, or the Authority with the consent of the Department, to modify the licences of market participants without their consent to the extent considered necessary or expedient for the purpose of implementing or facilitating the operation of the SEM or in consequence thereof. The purpose of this Article is to provide for the introduction of new contractual and licensing arrangements relating to the trading of wholesale electricity in NI and ROI in place of the existing wholesale electricity trading arrangements in NI and to facilitate the appropriate operation of those arrangements. These arrangements will be implemented in part by requiring market participants to become party to new contracts in place of certain existing contracts and in part by requiring the amendment of certain existing contracts.
25. Before making modifications using this power, the Department or the Authority must consult the holder of any licence being modified, and such other persons as the Department or the Authority consider appropriate. In addition, where the Department or the Authority make any modifications under Article 3, they must publish such modifications in such manner as they consider appropriate. There is a time limit on the power to modify licence conditions under this Article, being the end of the period of 24 months beginning on the day on which this Article comes into operation.
26. The purpose of Article 4 is to establish a new licenseable activity of acting as SEM Operator, so as to enable the independent licensing and regulation of the person or persons who administer the SEM trading arrangements. In particular, the SEM Operator's responsibility will include responsibility, pursuant to the trading and settlement code referred to in the MOU, for the calculation of charges and other payments due under that code. It is therefore this function which forms the basis of the prohibited activity. Undertaking the function of SEM Operator without authorisation by way of licence of exemption will be a new criminal offence.
27. **Article 5** provides for Schedule 1, which makes provision for property arrangements schemes in respect of certain licence holders, to have effect.
28. **Schedule 1** provides power to the Authority to make property arrangements schemes to enable the transfer of property, rights or liabilities between the owner and the operator of a transmission system for the purposes of implementing the SEM as provided for in the MOU on the application of either or both of the owner and operator.
29. **Article 6** and Schedule 2 establish a special committee of the Authority to take any decision as to the exercise of certain of the Authority's functions in circumstances provided by the Order. In particular, any decision as to the exercise of a relevant function of the Authority in relation to a "SEM matter" must be taken on behalf of the Authority by the SEM Committee, and the Authority is required to give effect to any decision so taken. A "relevant function" here means: (a) a function under Part II of the Electricity (Northern Ireland) Order 1992 No. 231 (N.I. 1) (the "Electricity Order"); (b) a function under the Energy (Northern Ireland) Order 2003 No. 419 (N.I. 6) (the "Energy Order") which relates to electricity; (c) a function under the Electricity Order 1992 (Amendment) Regulation (Northern Ireland) 2005 (SR 2005/335); and a function under Article 3 of the Order, other than a function specified as not being a relevant function under this Article (for example, the determination of disputes under Article 26 and the fixing of the maximum resale price of electricity under Article 47 of the Electricity Order are not relevant functions for the purposes of this Order). A matter will be a "SEM matter" if the SEM Committee determines that the exercise of a relevant function of the Authority in relation to that matter materially affects or is likely materially to affect the SEM.
30. **Schedule 2** has effect in relation to the SEM Committee and provides details of the following (among other things): the composition of the SEM Committee and the terms of appointment and remuneration of its members; the establishment of sub-committees; the regulation of its proceedings; meeting requirements; decision making and voting procedures; and the delegation of its functions.

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31. [Article 7](#) requires the Authority to publish a statement relating to the carrying out of the SEM Committee functions and describing how it will work together with CER in the exercise of their respective statutory functions in relation to the SEM.
32. [Article 8](#) provides for Schedule 3 to have effect where the SEM Committee determines that there are reasonable grounds for suspecting that a licence holder may be contravening or may have contravened any condition of his licence and that such contravention would materially affect, or is likely materially to affect the SEM.
33. [Schedule 3](#) provides powers for officers of the Authority to enter premises of a licence holder, both with and without a warrant, where the SEM Committee has made a determination under Article 8, and sets out various new offences for failure to co-operate with investigations of the Authority in this regard.
34. [Article 9](#) introduces a new set of duties which will apply to the Department in carrying out its electricity functions in relation to matters which it considers materially affect or are likely to materially affect the SEM; to the Authority in giving effect to any decision of the SEM Committee; and to the SEM Committee in taking any decision as to the exercise of a relevant function of the Authority. The SEM duties consist of a principal objective, followed by a suite of subsidiary and additional duties,
35. The principal objective of the Department, the Authority and the SEM Committee in carrying out their electricity functions in relation to SEM matters is to protect the interests of consumers of electricity in NI and ROI supplied by licence holders or persons authorised by exemption under Part II of the Electricity Order or any corresponding provision of ROI law (for the purposes of this Article, “authorised persons”), wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the sale of purchase of electricity through the SEM.
36. [Article 9\(2\)](#) requires the Department, the Authority and the SEM Committee to carry out their electricity functions in the manner they consider is best calculated to further the principal objective, having regard to a number of factors, including the need to secure that all reasonable demands for electricity in NI and ROI are met; the need to secure that authorised persons are able to finance their regulated activities; the need to secure co-ordinated regulation of the SEM; the need to ensure transparent pricing in the SEM; and the need to avoid unfair discrimination between consumers in NI and consumers in ROI. In addition, subject to Article 9(2), the Department, the Authority and the SEM Committee are required to carry out their electricity functions in the manner they consider is best calculated to, among other things, promote efficiency and economy on the part of authorised persons; and secure a diverse, viable and environmentally sustainable long-term energy supply in NI and ROI. Further, subject to Article 9(2), the Department, the Authority and the SEM Committee must have regard to the effect on the environment in NI and ROI of activities and the need (where appropriate) to promote the use of energy from renewable sources.
37. The Department, the Authority and the SEM Committee have an additional duty not to discriminate unfairly between authorised persons or between persons who are applying to become authorised persons.
38. Further, in carrying out any of their functions in relation to the SEM, the Department, the Authority and the SEM Committee may have regard to the interests of gas consumers in NI and ROI.
39. Finally, in carrying out their functions in relation to the SEM, the Department, the Authority and the SEM Committee must have regard to principles of best regulatory practice as specified.
40. [Article 10](#) disapplies Article 9 of the Order in relation to certain functions of the Department and the Authority under the Electricity Order and the Energy Order

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(broadly, the same functions to which the existing duties of the Department and the Authority under the Energy Order do not apply).

41. [Article 11](#) provides that the Order shall not be a relevant change in law for the purposes of any agreement in force between the holder of a generation licence and any other licence holder which contains provisions relating to a relevant change in law.
42. [Article 12](#) provides that the provisions of Schedule 4 are to have effect subject to the minor and consequential amendments specified in that Schedule.
43. [Schedule 4](#) sets out various minor and consequential amendments to the Electricity Order and the Energy Order.

COMMENCEMENT

44. [Article 1](#) provides for Articles 1 and 2 to come into operation one week after the day on which the Order is made and empowers the Department to bring the remaining provisions of the Order into force by order on appointed days.