Questionnaire for the Avosetta meeting in Oslo, April 1-2, 2011:

Legal issues related to the promotion and regulation of renewable energy

IRELAND

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Questions:

1. *What is the share of renewable energies in overall final energy consumption in your country? From what sources is this renewable energy? How will / should the proportion and composition of renewable energy develop in your country? Can the requirements of the Directive 2009/28/EC be met or exceeded?*

Irish Renewable EnergyTargets

The Irish targets are to have:

- 16 % of energy from renewable sources by 2020.

- 40 % of electricity, 10% per cent of transport and

- 12% of heating fuels from renewable sources by 2020.

Achievement of Targets

According to the *EirGrid Annual Renewable Report 2010*, Ireland is one of the best performing EU Member States in adding wind power and other renewables to energy supplies. It achieved its national target of 13.5 % of electricity from renewable sources by 2010 and is on target to meet 40 per cent by 2020.[2] If it achieves this latter target, it will have one of the highest levels of wind power as a percentage of system demand in Europe.[3]

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[1] A fuller version of the answers to this questionnaire will be published in the Journal of Energy and Natural Resources in May 2011.

[2] *EirGrid Annual Renewable Report 2010*, at p 5.

[3] Targets for wind energy in EU Member States range from 40 per cent in Ireland to 30 per cent in Denmark, 25 per cent in Greece and Slovenia, 24 per cent in the Netherlands to a mere six per cent in Bulgaria. See data

The other sources of renewable energy in 2009 were:

Hydropower (10.5%),
Biomass (6.6%) and
Solar photovoltaic (2.4%), with small contributions from concentrated solar power, geothermal and marine energy.

It is considered that Ireland will meet its targets if problems with delivering a proper grid are overcome. It will also be difficult to meet targets for heat.

2. Describe the key national legislation to promote renewable energies.

National legislation on renewable energy was passed almost exclusively to transpose EC Directives. The key legislation is:

(i) Electricity Regulation Act 2009 under which the Commission for Energy Regulation (CER) is statutorily obliged to promote the use of renewable and sustainable energy and to encourage energy conservation and under which he grants licences to construct or reconstruct an electricity generating station, and to generate and supply electricity.

(ii) Electricity Regulation Act 1999 provides the legal basis for a levy on electricity users to finance renewable energy projects.

(iii) The Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010 imposed a carbon levy for 2010, 2011 and 2012 on electricity suppliers.

(iv) Energy (Biofuel Obligation and Miscellaneous Provisions) Act 2010, which partly implements the Renewables Directive 2009/28/EC

(v) Motor Vehicles (Duties and Licences) (No 2) Act 2008 requires that vehicle registration taxes (VRTs) and annual motor taxes, previously calculated according to the engine capacity of the car, are now calculated according to CO_2 emissions, thereby encouraging the purchase of vehicles using renewable energy fuels

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submitted in national renewable energy plans submitted to the European Commission in June 2010 reproduced in the *EirGrid Renewable Energy Report 2010*, at p 9.

(vi) The **Energy (Miscellaneous Provisions) Act 2006 and** the Electricity Regulation Act (Appointment of Person to Calculate Power to Heat Ratios) Order 2009[4] implements Directive 2004/8/EC on the promotion of cogeneration based on a useful heat demand in the internal energy market

(vii) **Finance Acts 2006-2011** providing for financial supports for renewable energy.

(viii) **Finance Act 2010** imposed carbon taxes at the rate of €15 per tonne of CO_2 emitted on mineral oils, natural gas and solid fuels

(ix)Planning and Development (Strategic Infrastructure) Acts 2006-10 providing a fast track system for getting planning permissions for wind farms.

Subsidies and other financial support and Purchase Guarantees

Since early 2006, the renewable energy feed in tariff (REFIT) is the principal method of promoting electricity from RES-E technologies.[5] The REFIT 2006 scheme supports the generation from biomass, hydro and wind and ensures that a guaranteed minimum price is paid to an offtaker of renewable energy ('the supplier'). Typically a qualifying generator enters into a long-term power purchase agreement with the supplier allowing the generator to receive a stable revenue, while the supplier is entitled to REFIT supplier payments. These REFIT supplier payments include a payment for every kilowatt-hour contracted under a power purchase agreement to compensate suppliers for the cost of balancing undispatchable energy. In some instances a premium payment is given dependent on the renewable technology under the relevant power purchase agreement and market price equalisation compensation is available to suppliers where the market price falls below a floor price. Support under REFIT 2006, which for the most part supports qualifying Gate 2 projects, is for a maximum of 15 years and cannot extend beyond 31 December 2025.[6] After 2025, the energy price for projects qualifying under REFIT 2006 will be set by the market. The

[4] SI No 299/2009.

[5] For further information, see www.dcenr.gov.ie/Energy/Sustainable+and+Renewable+Energy+Division/Electricity+from+Renewables+inc+REFIT+and+AER.htm.

[6] Section 1.3 of REFIT 2006.

quantitative limit for REFIT 2006 has already been reached. However, it is understood that State Aid clearance is currently being sought from the European Commission for an extension to REFIT 2006, albeit with less favourable payment terms. State Aid approval is also currently being sought for REFIT 2009 to enable supports for anaerobic digestion, biomass-powered, high-efficiency CHP, ocean energy and offshore wind energy projects. REFIT 2009 contains a reference price of €140 per megawatt hour for electricity produced from offshore wind.[7] During its first year, 98 per cent of the REFIT 2006 feed-in tariff support was allocated to wind farms. Equity returns on investments are estimated to be in the range of 12 per cent to 18 per cent and about two-thirds of investors are private sector. In 2010, private sector investment in wind energy reached approximately €400 million.[8] Incentives for wind farms have been very successful in attracting development and investment in onshore wind farms. Renewable energy doubled in absolute terms in the period 2003–2007.

Financing REFIT

REFIT is financed, where required, by a public service obligation (PSO) levy on all final purchasers of electricity. The legal basis for the levy is section 39 of the Electricity Regulation Act 1999 and it is administered in accordance with the requirement of the Electricity Regulation Act 1999 (Public Service Obligation) Order 2002[9] as amended by the Electricity Regulation Act 1999 (Public Service Obligation) Orders 2008, 2009 and 2010.[10] The 2009 and 2010 Orders extended the number of projects in the REFIT scheme in respect of which a public service obligation is levied on relevant offtakers and thus supports the construction of new renewable energy plants.[11] It empowers the CER to include the additional costs from listed REFIT projects in its calculations of the PSO levy and provides the legal basis for the collection of a levy payment from final customers and the onward payment by EirGrid of the levy to suppliers under REFIT power purchase agreements (PPAs). Under the old 'AER' and other schemes, the Electricity Supply Board (ESB)

[7] Section 5.1 of REFIT 2009.

[8] Press Release, Department of Communications, Energy and Natural Resources, 5 January 2011.

[9] SI No 217/2002.

[10] SI No 284/2008; SI No 444/2009; and SI No 532/2010 respectively.

[11] The 2009 and 2010 Orders insert a new Schedule 3 into the Electricity Regulation Act 1999 for this purpose.

(Ireland's 95 per cent state-owned and largest electricity generating company) is also subject to PSOs, including obligations to purchase the output of certain peat and renewable, sustainable or alternative electricity generating stations at fixed prices in the interests of security of supply and environmental protection. The last of these obligations ceases in December 2019. The ESB (a state owned electricity company) is also compensated through the PSO levy.

The Electricity Regulation Act 1999 (Public Service Obligation) Order 2002, as amended, allows for the collection of a PSO levy from final customers of electricity to meet the 'additional costs' incurred by the ESB, as well as REFIT supplier, in meeting their PSOs and thus, in the case REFIT, provides the legal basis for payment to suppliers of the REFIT supplier payments outlined above.[12] The amount of the levy is calculated for each levy period by the CER. For the levy period 1 October 2010 to 30 September 2011, the proposed amount of the REFIT part of the PSO levy is €40,497,226 and an astonishing €89,567,000 is estimated to be needed to support subsidies to the three peat burning power plants, which are prime examples of high-carbon-emitting unsustainable developments. Their continuing existence is justified in the interests of social employment and security of energy supplies, although it is questionable whether the latter objective necessarily requires continuous operation of these plants. This misallocation of funding, which could be better spent in upgrading the grid, is objectionable on policy and sustainable development grounds.

3. Tax reliefs for a company investing in solar, wind, hydro or biomass generation is available from 1999 to 2011 under section 486B of the Taxes (Consolidation) Act 1997. Orders made under the Taxes (Consolidation) Act 1997 in 2008 and 2009 provide accelerated capital allowances for the installation of energy efficient equipment.[13]

4. €65 million was allocated for grant schemes relating to biofuels, CHP, biomass commercial heaters and domestic renewable heat grants under the Finance Act 2006.

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[12] Article 8(1) of SI No 217/2002, the Electricity Regulation Act 1999 (Public Service Obligation) Order 2002.

[13] SI No 399/2008 – Taxes Consolidation Act 1997 (Accelerated Capital Allowances for Energy Efficient Equipment) Order, 2008; SI No 76/2009 – Taxes Consolidation Act 1997 (Accelerated Capital Allowances For Energy Efficient Equipment) Order 2009; SI No 393/2009 – Taxes Consolidation Act 1997 (Accelerated Capital Allowances For Energy Efficient Equipment) (Amendment) (No 2) Order 2009; SI No 549/2009 – Taxes Consolidation Act 1997 (Accelerated Capital Allowances For Energy Efficient Equipment) (Amendment) (No 3) Order 2009; SI No 214/2010 – Taxes Consolidation Act 1997 (Accelerated Capital Allowances for Energy Efficient Equipment) (Amendment) Order 2010; and SI No 341/2010 – Taxes Consolidation Act 1997 (Accelerated Capital Allowances for Energy Efficient Equipment) (Amendment) (No 2) Order 2010.

5. ***Disincentives***

The Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010 imposed a carbon levy for 2010, 2011 and 2012 on electricity suppliers.

Section 58 of the Finance Act 2008 and the Electricity Tax Regulations 2008[14] imposed an electricity tax at the rate of €1.0 per megawatt hour for non-business use and €0.05 per megawatt hour for business users to discourage electricity use. (This sum is in addition to the carbon tax that was imposed under the Finance Act 2010, which does not apply to renewable energy.[15])

a. Purchase guarantees? (example: feed-in tariffs?)

See above on working of REFIT

b. **Quota system? (example: "green certificates**"?)

REFIT has a quota system. See above.

A special legal framework for the installation of facilities for the production of renewable energy sources? (short description) .

(i) The CER grants licences under section 16 of the Act to construct or reconstruct an electricity generating station, and under section 14 to generate and supply electricity.

(ii) Wind farms with more than 25 turbines or having a total output greater than 50MW qualify as strategic infrastructure under the Planning and Development (Strategic Infrastructure) Acts 2006–2010[16] and applications for planning permissions for

[14] SI No 385/2008.

[15] The carbon tax was introduced by Chapters 1–3 of Part 3 of the Finance Act 2010. Under the terms of the National Recovery Plan 2011–2014, published on 24 of November 2010 by the Department of Finance, the carbon tax will increase by €10 per tonne in 2012 and a further €5 per tonne in 2014. See www.budget.gov.ie/RecoveryPlan.aspx.

[16] The categories of infrastructure project are provided in the Seventh Schedule to the Planning and Development Act 2000, as inserted by s 5 of the Planning and Development (Strategic Infrastructure) Act 2006. The Seventh

these developments are fast tracked by the Planning Appeals Board. In theory strategic infrastructure applications are supposed to be decided in 18 weeks following a six-week consultation period but this target is not met much of the time.[17] Probably because of this, section 37A(4)[18] of the Planning and Development Act 2000 now provides that an applicant for planning permission for a wind farm project involving 25 or more turbines with a total output of 50MW or more may choose between making an application for strategic infrastructure consent or an application for ordinary planning permission. Applicants with good community relations who consider that there will be no objections to their projects take the latter course. The Planning and Development Regulations 2007 and 2008 exempt some micro-renewable technologies in domestic dwellings and industrial buildings, farms and business premises from planning control. Exemptions (subject to restrictions) are available for small installations of certain renewable energy and biomass technologies, that is wind turbines, solar panels, ground heat pump systems in domestic and non domestic situations and for biomass boilers, small combined heat and power plants in non-domestic situations

Sustainability requirements for biomass / biofuels production? (art. 17-19 of 2009/28/EC)

In so far as I am aware, there has been no debate about these although the subsidy financed by the Public Service Obligation to the peat burning power stations is resented. See below.

6. Describe mayor legal instruments, arguments, and court decisions concerning environmental protection issues of renewables.

Schedule was most recently amended by s 78 of the Planning and Development (Amendment) Act 2010. This reduced the number of turbines required to qualify as strategic infrastructure from 50 to 25 and total output from 100 to 50MW.

[17] Section 37J(2)(a) of the Planning and Development Act 2000. Under the normal planning procedures, it would have been possible to secure consent within 12 weeks – provided nobody appealed the permission. This shorter lead time was critical to the viability of a gas power plant in County Galway, where success in a competition for new generation capacity was dependent on acquiring planning permission before a certain deadline. The short lead times have also been important to a large number of wind and hydro projects that have not been the subject of any appeal.

[18] Inserted by s 25 of the 2010 Act.

Legislation has been described above. There have been no major court decisions. The main arguments have revolved around the location of wind farms and bureaucratic difficulties and delays in application procedures for REFIT and foreshore leases (which have been largely addressed) and the allocation of so much of the PSO levy to subsidise the three peat burning electricity stations. Initially, many applications for wind farms were refused, especially at local authority level. However, difficulties in obtaining planning permissions were greatly alleviated by the *Wind Farm Planning Guidelines 2006* issued by the Department of the Environment[19] and by supportive policies particularly in the *National Spatial Strategy.*[20] Greater clarity on the requirements of Directive 90/43/EEC on the conservation of natural habitats and wild flora and fauna has been provided by the 2010 *EU Guidance on Wind Energy and Natura 2000*[21] and the Irish Wind Energy Association also produced *Best Practice Guidelines for the Wind Energy Industry* in 2008 to encourage responsible and sensitive wind farm development.

7. Is there a national debate about the sense and nonsense of renewable energies, and if so, has this lead to changes or corrections of the regulatory framework?

Irish economic problems have been so serious in the last few years that there has not been much of a debate about renewable energy. The bureaucratic process for obtaining grid connections has been improved. Wind farms with more than 25 turbines or having a total output greater than 50MW qualify as strategic infrastructure under the Planning and Development (Strategic Infrastructure) Acts 2006–2010[22] and applications for planning

[19] *Wind Farm Planning Guidelines* (Department of the Environment, Heritage and Local Government, 2006), available from www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/Planning/PlanningGuidance.

[20] *National Spatial Strategy, 2002–2020* (Department of the Environment, Heritage and Local Government, 2006), Revised 2010, see www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/National SpatialStrategy.

[21] Cf http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm.

[22] The categories of infrastructure project are provided in the Seventh Schedule to the Planning and Development Act 2000, as inserted by s 5 of the Planning and Development (Strategic Infrastructure) Act 2006. The Seventh Schedule was most recently amended by s 78 of the Planning and Development (Amendment) Act 2010. This

permissions for these developments are required to be fast tracked by the Planning Appeals Board. EIA is required for all strategic infrastructure planning applications. In theory strategic infrastructure applications are supposed to be decided in 18 weeks following a six-week consultation period but this target is not met much of the time.[23] Probably because of this, section 37A (4) of the Planning and Development Act 2000[24] as amended in 2010 now provides that an applicant for planning permission for a wind farm project involving 25 or more turbines with a total output of 50MW or more may choose between making an application for strategic infrastructure consent to the Planning Appeals Board or an application for ordinary planning permission to the local planning authority. Applicants with good community relations who consider that there will be no objections to their projects take the latter course. Initially, many applications for wind farms were refused, especially at local authority level. However, difficulties in obtaining planning permissions were greatly alleviated by the *Wind Farm Planning Guidelines 2006* issued by the Department of the Environment[25] and by supportive policies particularly in the National Spatial Strategy.[26]

8. How well do the public accept renewable energy proposals (eg new on- shore and off- shore windfarms, biomass plants etc.)?

Anecdotally, most people favour renewable energy and there has not been a great deal of public opposition in principle to any renewable energy projects except where they immediately affect people. There has been a good deal of public opposition to some

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reduced the number of turbines required to qualify as strategic infrastructure from 50 to 25 and total output from 100 to 50MW.

[23] Section 37J(2)(a) of the Planning and Development Act 2000. Under the normal planning procedures, it would have been possible to secure consent within 12 weeks – provided nobody appealed the permission. This shorter lead time was critical to the viability of a gas power plant in County Galway, where success in a competition for new generation capacity was dependent on acquiring planning permission before a certain deadline. The short lead times have also been important to a large number of wind and hydro projects that have not been the subject of any appeal.

[24] Inserted by s 25 of the 2010 Act.

[25] *Wind Farm Planning Guidelines* (Department of the Environment, Heritage and Local Government, 2006), available from www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/Planning/PlanningGuidance.

[26] *National Spatial Strategy, 2002–2020* (Department of the Environment, Heritage and Local Government, 2006), Revised 2010, see www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/National SpatialStrategy.

renewable energy projects and particularly projects for upgrading and extending the national grid and on- shore wind farms. The planning application for the Meath-Tyrone 400kV grid interconnector between the Republic of Ireland and Northern Ireland was withdrawn in June 2010 during the public inquiry because the heights of some pylons had been misdescribed in the public notices for the project. A new application is to be submitted in early 2011. Another planning application for a 350MW electricity interconnector between Pentir in Wales and Arklow in Wicklow lodged in 2008 was withdrawn in October 2010.[27] Planning permission was recently granted for the 500MW East-West Interconnector to the UK.[28]

Notwithstanding the success of the Irish wind energy policy and the number of windfarms built especially between 2003- 3006, windfarms initially had great difficulties initially in getting planning permissions and still have difficulties in Natura areas. These problems have been alleviated by (i) better policy guidelines on windfarms (ii) greater knowledge of what was involved and of the place of windfarms in national energy policies in planning authorities, (iii) a fast track planning procedure for planning permissions for windfarms and (iv) incentives to persons living near windfarms either by giving the vendor of the property a share of the profits and/or requiring or accepting[29] community gains for local communities under the Planning and Development (Strategic Infrastructure) Act 2006.

9. **How does Strategic Environmental Assessment and Environmental Assessment apply to renewables in your country? Have any particular legal/procedural issues emerged? How does Natura 2000 influence the promotion of renewables**?

[27] An Bord Pleanála Case reference PL27 .VC0030. Cf www.pleanala.ie.

[28] An Bord Pleanála Case reference: PL27 .VA0002. The planning permission can be viewed at www.pleanala.ie/casenum/VA0002.htm. Further background information can be found at www.EirGridprojects.com/projects/east-westinterconnector/overview.

[29] Prior to 2006, it was ultra vires for a planning authority or the Planning Appeals Board to require community gains from a windfarm developer but they sometimes did so. Other times , developers offered the community gains. The practice was legitimized for strategic infrastructure development under the Planning and Development (Strategic Infrastructure) Act 2006.

SEA is required for any plan or programme setting a framework for consents on renewable energy and is carried out on them. Wind farms with more than 25 turbines or having a total output greater than 50MW qualify as strategic infrastructure under the Planning and Development (Strategic Infrastructure) Acts 2006–2010[30] and in theory it is faster to get planning permission for them.

About 50% of windfarms are estimated to be in Natura sites or areas with environmental designations where getting planning permission is always difficult . The presence of the protected hen harrier (A species protected in Annex 1 of the Birds Directive) and other birds in some areas appears to be a particular difficulty to wind farm developers and two planning permissions were refused in November 2010 alone for developments incompatible with objectives in Directive 92/43/EEC on natural habitats and wild flora and fauna. The presence of the protected hen harrier and other birds in some areas appears to be a particular difficulty to wind farm developers and two planning permissions were refused in November 2010 alone for developments incompatible with objectives in Directive 92/43/EEC on natural habitats and wild flora and fauna.

10. Do the existing or planned national legal instruments promoting renewables already comply with EU law or are important adaptations required? What is the status of adoption of the new pieces of legislation necessary to transpose into domestic law the new provisions of Directive 2009/28/EC? Were there already court decisions or infringement procedures taken by the Commission concerning this question?

In so far as I am aware, Irish legislation faithfully transposes the relevant Directives.

[30] The categories of infrastructure project are provided in the Seventh Schedule to the Planning and Development Act 2000, as inserted by s 5 of the Planning and Development (Strategic Infrastructure) Act 2006. The Seventh Schedule was most recently amended by s 78 of the Planning and Development (Amendment) Act 2010. This reduced the number of turbines required to qualify as strategic infrastructure from 50 to 25 and total output from 100 to 50MW.

11. **Is there anything like a general framework act on climate change issues, and if so, what is its main content?** If not, is such an act being considered?
There is no consolidated climate change legislation. A Climate Change Bill 2010 lapsed when Government was dissolved in February 2011. It is anticipated that it will be revived with the new Government. The provisions of the Bill can be obtained at
http://www.environ.ie/en/Environment/Atmosphere/ClimateChange/ClimateChangeResponseBill2010Consultation/