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MCCANN FITZGERALD

OUR REF

YOUR REF

DATE

VML\3989347.1

22 November 2011

Single Electricity Market Operator
Modifications Committee

Re: Intra Day Trading

Dear Sirs

1. Executive Summary

1.1 We have acted as solicitors to the Single Electricity Market Modifications Committee for the purposes of the modification to be made to the Trading and Settlement Code to implement the High Level Design for Intra Day Trading. The process pursuant to which we were appointed is described at Section 2; the scope of our review is described at section 3; and the process (or mechanics) of the review and our work product or output therefrom is described at section 4 and appended at Schedules 2 and 3.

1.2 On the basis of the scope of work as described below, under the assumptions and subject to the qualifications and reservations set out in Schedule 1 hereto, and to any matters or documents not described to us, we are satisfied that the final form of the legal drafting for the Intra-Day Trading Modification proposal effectively and accurately reflects and implements the proposal.

2. Introduction

2.1 In the first quarter of 2010, the Single Electricity Market ("SEM") Modifications Committee (the "Committee") issued a request for a proposal for the appointment of legal advisers in connection with modifications to the SEM Trading and Settlement Code (the "Code").

John Cronin, David Clarke, Daire Hogan, Timothy Bouchier-Hayes, Jane Marshall, Ronan Molony, Michael O'Reilly, Lonan McDowell, Julian Conlon, Damian Collins, Catherine Deane, Paul Heffernan, Terence McCrann, Muriel Walls, Roderick Bourke, Ambrose Loughlin, Niall Powderly, Kevin Kelly, Hilary Marren, Eamonn O'Hanrahan, Roy Parker, Patricia Lawless, Barry Devereux, Geraldine Hickey, Helen Kilroy, Judith Lawless, James Murphy, David Lydon, David Byers, Sean Barton, Colm Fanning, Paul Lavery, Julie Quin, Susan O'Connell, Alan Fuller, Claire Lenny, Maureen Dolan, Michelle Doyle, Hugh Beattie, Fergus Gillen, Valerie Lawler, Mark White, Rosaleen Byrne, Eamon de Valera, Joe Fay, Ben Gaffikin, Donal O'Raghallaigh, Karyn Harty, Philip Andrews, Barrett Chapman, Mary Brassil, Audrey Byrne, Shane Fahy, Georgina O'Riordan, Adrian Farrell, Michael Murphy, Annette Hogan, Aidan Lawlor, Darragh Murphy, Brian Quigley.
Consultants: Eleanor MacDonagh (fCA), Peter Osborne, Michael Ryan (fCA), Tony Spratt (ACA).

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McCann FitzGerald submitted its response in March 2010 and in May of that year Tracy Gaughran informed us that we had been identified as the designated successful tenderer.

2.2 In August 2011, we were contacted by David Stevens of the Single Electricity Market Operator (“SEMO”), further to which we presented a fee proposal to the Committee to advise on the implementation of the High Level Design for Intra Day Trading, which was accepted at a Committee meeting on Friday, 9 September. Further to that meeting, by exchange of correspondence on 13 September, the terms of reference and the costs of the advices were agreed and our review commenced.

3. **Scope of Legal Review**

3.1 This Section sets out the scope of the legal review undertaken by McCann FitzGerald (the “**Scope of Work**”) and is subject to the assumptions and limitations set out at Schedule 1 hereto.

3.2 During 2010, the Regulatory Authorities instigated the development of proposals in respect of Intra Day Trading in the SEM and a High Level Design for Intra Day Trading was developed and recommended for approval by the Committee in meeting 32. SEMO developed a modification proposal on behalf of the Committee and the Regulatory Authorities. This modification proposal was developed in stages (known as functional groups and broken down into functional groups 1, 2 and 3 or FG1, FG2 and FG3) and was extensively discussed at various industry meetings.

3.3 SEMO prepared legal drafting to implement the modification proposal in respect of each of the following elements of the Code for each of the functional groups and the transitional provisions:

- (a) the main body of the Code;
- (b) the appendices;
- (c) the glossary;
- (d) the agreed procedures; and
- (e) the transitional arrangements,

collectively, (the “**TSC Documents**”).

3.4 In addition, SEMO prepared a Plain English Document (a “**PED**”) which summarised the changes proposed to be made in the legal drafting in respect of each of FG1, 2 and 3 and the transitional provisions.

3.5 The scope of work of the legal review of the Intra Day Trading Modification proposal which was agreed, was described as follows:

- (a) to review the legal drafting proposed by SEMO in order to verify that the drafting accurately reflects the design, as that is described in the PEDs; and

- (b) to the extent that it does not appear to do so, or is not otherwise legally robust, to prepare amendments thereto.
- 3.6 It was agreed that we would provide our comments on the legal drafting circulated by SEMO which were then addressed and discussed in meetings with SEMO. We also discussed and addressed with SEMO comments from industry participants and the Regulatory Authorities.
- 4. **Legal Review Process**
- 4.1 In addition to various telephone calls to discuss net items or issues arising, meetings to take instructions in respect of the proposal, or to discuss comments made in relation thereto, were held with SEMO at McCann FitzGerald's offices on the following dates:
 - (a) 2 September;
 - (b) 29 September;
 - (c) 27 October;
 - (d) 14 November.
- 4.2 The following iterations of comments were provided:
 - (a) FGs 1, 2 and 3: Legal drafting received on 2 September; discussed at meeting on 29 September and MF comments provided by way of mark-up to the text on 11 October;
 - (b) SEMO comments received on FGs 1, 2 and 3 (by way of spreadsheet) on 21 October; MF comments given on 24 October;
 - (c) Legal drafting of transitional provisions received on 14 October; MF comments given by way of mark-up to the text of both section 9 and the related PED on 19 October;
 - (d) SEMO comments on transitional provisions received on 26 October; MF comments given on 1 November; Regulatory Authorities' comments on transitional provision given on 14 November; MF responses/comments given (by telecon) on 14 & 15 November;
 - (e) FG2 industry review comments given by SEMO on 26 October; MF comments given on 1 November; and
 - (f) Final SEMO comments given on FGs 1, 2 and 3 and the transitional provisions on 7 November; MF comments given on 8 November.
- 5. **Summary of Review**
- 5.1 We attach, as Schedule 2 to this document, copies of the spreadsheets showing the comments made and resolutions reached in respect of each of:

- (i) the IDT modification provisions; and
- (ii) the transitional provisions,

and would note that these represent a collective of our work product in relation to this matter.

5.2 Broadly, our comments fall into three categories as follows:

- (a) **Substantive** comments on the legal drafting in terms of how it reflects or operates to implement the modification proposal; these comments were the subject of an iterative discussion between ourselves and SEMO, described as part of the legal review process and all were ultimately addressed such that the spreadsheets describe all such issues raised/discussed, as being “closed”;
- (b) **Style** comments on the legal drafting, identifying (apparent) inconsistencies in the drafting protocols or the appearance of the Code (e.g. when/where terms are defined and used in capitals, how cross referencing should work, etc); as these matters did not impact on the legal robustness of the text, and were not material to the implementation of the modification proposal, there were instances where such style comments were not taken on board, particularly where they were legacy issues/styles, such that any change or correction at this point would lead to further inconsistencies in the Code; and
- (c) **Housekeeping** comments on the Code, identifying in relation to non Intra Day Trading text amendments to the drafting thereof, of merit. We attach as Schedule 3 to this document a spreadsheet of such comments which it is anticipated will be the subject of a separate modification in due course.

5.3 As opined at Section 1, we are satisfied that the final form of the legal drafting for the Intra Day Trading effectively and accurately reflects the proposal therefore, as set out in the PEDs. We also note that no material concerns were raised in the course of our review, which (as described above) was an iterative process in relation to a large number of drafting comments and not a negotiation in relation to net material aspects.

SCHEDULE 1

ASSUMPTIONS AND LIMITATION

1. **Introduction**

- 1.1 Our review (and our proposed amendments to the TSC Documents) was conducted in accordance with the Scope of Work and is subject to the limitations, assumptions and other matters referred to in this Schedule.
- 1.2 Our proposed amendments to the TSC Documents should be considered in conjunction with, and are supplementary to, any comments, proposed amendments, reports or other documents being prepared by the Committee's other advisers.

2. **Purpose/Use of Review Outcomes**

- 2.1 Our review and the amendments which we have proposed as a consequence of it (the "Review Outcomes") are addressed to you solely for your use in evaluating the modification proposal in respect of Intra Day Trading and you may not rely on them for any other purpose. No other person may use or rely on the Review Outcomes without our prior written consent and we do not accept any responsibility, liability or duty of care to any other person in respect of it.
- 2.2 The Review Outcomes are strictly confidential and may not be disclosed, in whole or in part, to any other person or quoted to any such person in any other context without our prior written consent. We may impose conditions as a prerequisite to giving any such consent.
- 2.3 The Review Outcomes should not be taken out of context or in any way serve as a substitute for other enquiries and procedures that you may wish to undertake for the purpose of considering whether to amend the TSC Documents in accordance with the modification proposal of Intra Day Trading or otherwise.

3. **Non-legal matters**

- 3.1 As legal advisers, we do not accept any responsibility for reviewing or reporting on financial, accounting, treasury, funding, valuation, actuarial, tax, technical or economic matters. We have made no investigations of, and do not comment on, the technical, economic, financial or taxation aspects of any of the TSC Documents, nor do we comment on the financial or mathematical provisions of the TSC Documents or the possible financial, technical or commercial consequences of the legal matters reviewed by us. We have sought, where possible, to highlight matters that seemed to us to be commercially or technically significant. However, a proper commercial and/or technical assessment requires specific technical and/or commercial knowledge, as appropriate, and industry experience as well as a full understanding of your commercial and technical plans.
- 3.2 As legal advisers, we do not accept any responsibility for reviewing or reporting on:
 - (a) the general commercial environment in which the Single Electricity Market

operates;

- (b) the design of Intra Day Trading, either substantively or as described in the High Level Design Paper;
 - (c) the alignment of the legal drafting with the approved High Level Design for Intra Day Trading;
 - (d) the adequacy, sufficiency or any other functional or technical matter relating to any management, accounting, information technology, communication or other technical systems, whether or not these are a necessary support to the Intra Day Trading arrangements;
 - (e) the Code, outside of the drafting amendments reviewed as part of FG1, 2 or 3 of the transitional provisions; or
 - (f) any technical, taxation, accounting, economic or financial matters.
- 3.3 We have not undertaken any independent verification of information by any enquiries of third parties including regulatory authorities.

4. Assumptions

- 4.1 In conducting our review and providing the Review Outcomes, we have made certain assumptions as set out below and, unless expressly stated otherwise, or expressly included within our Scope of Work, we have assumed:
- (a) having relied solely on the TSC Documents and the PEDs (for the purposes of this section 4 and section 5 of Schedule 1, collectively, the “Documents”), that the Documents and the information supplied to us by SEMO or its other professional advisers which: (i) has a bearing on any Documents or (ii) in response to questions asked of SEMO or its other professional advisers, is true, accurate and not misleading and accordingly, we have not independently verified the contents of the Documents nor any of the information supplied in relation to the Documents;
 - (b) where we have requested information, that: (i) the information provided to us in response comprises a full and complete response to that enquiry, (ii) any legal or technical advice contained within that information or upon which that information was based was, when given, and remains correct, and (iii) where no information has been provided, that there is no information which relates to that enquiry;
 - (c) that all Documents in the form of copies conform to the originals; and
 - (d) where extracts or summaries (particularly of comments to the drafting made by the Regulatory Authorities or FGs) have been provided to us, that they are accurate and do not give a misleading view in relation to the underlying comments.

5. Other restrictions and limitations

- 5.1 The Documents may not comprise all the information that ought to have been supplied to us, so that they may not contain all the information which would be relevant to your

- decision as to whether or not to proceed with the modification, in the current form, of the TSC Documents. We do not accept responsibility for any information that may have been disclosed had all such requested information been provided.
- 5.2 We have not made any enquiries regarding any of the participants in the SEM.
- 5.3 With respect to summaries, schedules and extracts of documents, we are not in a position to evaluate whether these are complete and accurate and contain all information necessary for a final assessment of the matters to which they relate.
- 5.4 We accept no responsibility for any loss of legal advice or litigation privilege that may result from any disclosure of any information to us in connection with our review or the distribution of the Review Outcomes in draft or final form.
- 5.5 In certain instances, we have identified issues that we suggest may merit further investigation or action. This should not be interpreted as implying that there are no other issues in relation to the Documents that would merit further investigation or action.
- 5.6 In no circumstances shall the liability of McCann FitzGerald, its partners and employees be increased by:
- (a) any limitation, exclusion or restriction of liability agreed with any other adviser (with or without our knowledge); or
 - (b) your inability to recover from any adviser; or
 - (c) your decision not to recover from any adviser.
- 5.7 We shall not be liable to you for any error, omission or negligence in the Review Outcomes to the extent that you make a recovery in respect of the same matter, fact or circumstance from any other source. If you suffer loss as a result of relying on any statement in or omission from the Review Outcomes and in respect of which we have been negligent but in respect of which you have also been advised by other advisers or have a right of reliance in relation to the advice of other advisers, our liability in respect of such loss shall be limited to the extent and only in the proportion that such loss is agreed by us to be attributable to us by reason of our negligence or is determined to be so attributable by judicial or other relevant process. In no circumstances shall we be liable jointly and severally with any other such adviser.
- 5.8 Multiple and/or electronic copies of some or all of the Review Outcomes may exist. Only the final original copy of the Review Outcomes, signed (or initialled) on behalf of us constitutes our Review Outcomes and no reliance may be placed on any draft review outcomes prepared by us, or any electronic or other copies of the Review Outcomes.
- 5.4 The Review Outcomes are to be construed in accordance with, and our liability in respect of the Review Outcomes is to be governed by, Irish law. Any claim against us in connection with the Review Outcomes may only be made against us in the Irish courts.
6. **Reservations and Qualifications**
- 6.1 Our Review Outcomes are subject to the following reservations and qualifications:

- (a) notwithstanding any provision in any of the Documents to the contrary, any such document may be capable of being amended by oral agreement or conduct of the parties;
 - (b) provisions in the Documents imposing additional obligations in the event of breach or default, or of payment or repayment being made other than on an agreed date, may be unenforceable to the extent that they are subsequently adjudicated to be penal in nature, but, the fact that any payment is held to be penal in nature would not, of itself, prejudice the legality or validity of any other provision contained in the Documents which does not provide for the making of such payment;
 - (c) provisions in any of the Documents that calculations or certifications or acknowledgements are to be conclusive and binding will not necessarily prevent judicial enquiry by the Irish courts into the merits of any claim by a party claiming to be aggrieved by such calculations, certifications or acknowledgements; nor do such provisions exclude the possibility of such calculations, certifications or acknowledgements being amended by order of the Irish courts;
 - (d) to the extent that any of the Documents vests a discretion in any party, or provides for any party determining any matter in its opinion, the exercise of such discretion and the manner in which such opinion is formed and the grounds on which it is based may be the subject of a judicial enquiry and review by the Irish courts;
 - (e) the effectiveness of terms in the Documents exculpating a party from a liability or a legal duty otherwise owed are limited by law; and
 - (f) provisions of the Documents providing for severance of provisions due to illegality, invalidity or unenforceability thereof may not be effective, depending on the nature of the illegality, invalidity or unenforceability in question.
- 6.2 The description of obligations as “**enforceable**” or “**binding**” refers to the legal character of the obligations in question. It implies no more than that they are of a character which Irish law recognises and enforces. It does not mean that the Documents will be binding or enforced in all circumstances or that any particular remedy will be available. Equitable remedies, such as specific performance and injunctive relief, are in the discretion of the Irish courts and may not be available to persons seeking to enforce provisions in any of the Documents. Furthermore, the Irish courts may not allow acceleration of amounts payable under the Documents where an event of default occurs that it considers immaterial. More generally, in any proceedings to enforce the provisions of any of the Documents, the Irish courts may require that the party seeking enforcement acts with reasonableness and good faith. Enforcement of the Documents may also be limited as a result of (i) the provisions of Irish law applicable to contracts held to have become frustrated by events happening after their execution and (ii) any breach of the terms of any of the Documents by the party seeking to enforce the same.
- 6.3 Where an obligation is to be performed outside Ireland under any of the Documents, it may not be enforceable in Ireland to the extent that performance would be illegal or contrary to public policy under the laws of that jurisdiction.
- 6.4 Any judgment of the Irish courts for moneys due under any of the Documents may be expressed in a currency other than an Irish currency but the order may issue out of the

Central Office of the High Court expressed in an Irish currency by reference to the official rate of exchange prevailing on the date of issue. In addition, in a winding-up in Ireland of an Irish incorporated company, all foreign currency claims must be converted into an Irish currency for the purposes of proof. The rate of exchange to be used to convert foreign currency debts into an Irish currency for the purposes of proof in a winding-up is the spot rate (in the case of a compulsory winding-up) on the date of the presentation of the winding-up petition and (in the case of a voluntary winding-up) on the date of the relevant winding-up resolution.

- 6.5 Claims may be or become the subject of set-off or counterclaim and any waiver of those or other defences available to the Parties to the Documents may not be enforceable in all circumstances.

SCHEDULE 2

Spreadsheets re main IDT drafting and transitional provisions

SCHEDULE 3

Housekeeping/Non IDT drafting

Yours sincerely

A handwritten signature in black ink that reads "Valerie Lawlor". The signature is written in a cursive, slightly slanted style.

Valerie Lawlor
McCann FitzGerald

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