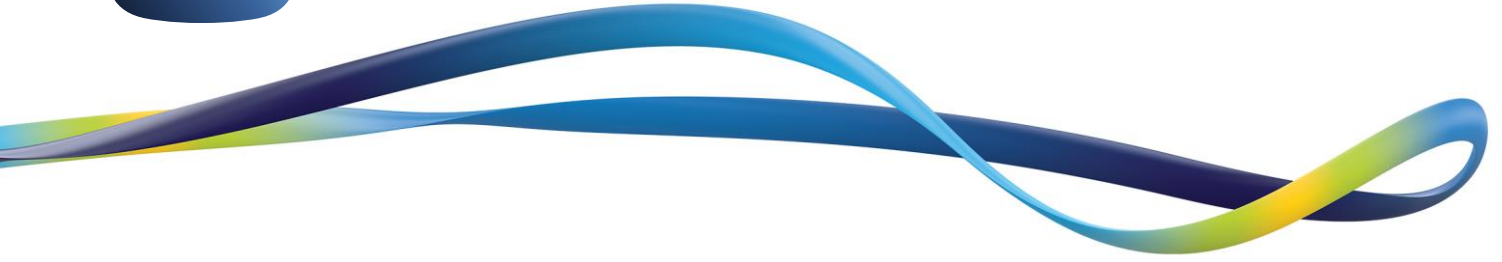




NETWORKS



# Proposed Specification of Standards of Performance in Electricity DSO Licence

ESB Networks Response to CRU Consultation  
(CRU202415)

Date: 07 June 2024

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## 1. Introduction

The Energy Act 2016 expanded the authority of the Commission for Regulation of Utilities (CRU) to include the ability to investigate and enforce administrative penalties, which encompass financial sanctions. This applies specifically to licences associated with the supply and network operations for gas and electricity. The CRU published its ‘Approach to Setting Financial Penalties (Economic Regulation) (CRU2023160)<sup>1</sup>’ consultation in January 2024, which laid out the CRU’s proposals for how it would impose financial penalties on a licence holder. In line with CRU2023160, should the CRU determine instances of ‘improper conduct’ in respect of a Standard of Performance, it is authorised to administer such sanctions.

The CRU’s current consultation seeks to identify which conditions of the Distribution System Operator (DSO) Licence should be specified as Standards of Performance, a breach of which could lead to the imposition of administrative sanctions. As DSO, ESB Networks DAC (“ESB Networks”) welcomes the opportunity to respond to this important consultation.

ESB Networks notes that the principles-based approach to drafting the electricity licences in Ireland has been less prescriptive compared to the electricity licences in Northern Ireland, which are more detailed. This more principles-based approach means that linking Standards of Performance to certain licence conditions is difficult to achieve e.g. performance of the Distribution business.

In this submission ESB Networks has set out several key issues for the CRU’s consideration, focus on which, ESB Networks believe, will support the proposed specification of Standards of Performance in the Electricity DSO Licence, and better serve the customers and industry as a whole. These issues cover the broad-spectrum approach taken in proposing the Standards of Performance, and the significance of existing remedies, which in ESB Networks’ view should be given due consideration before the administrative sanction route is followed. ESB Networks also proposes that further clarity is provided on how the CRU will assess the DSO against the Standards of Performance chosen.

In this response, ESB Networks identifies a number of conditions which, in our view, are not suitable to be designated as Standards of Performance, for the reasons outlined.

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<sup>1</sup> [CRU Compliance and Enforcement Policies | CRU.ie](https://www.cru.ie/consultations/2024/01/24/CRU2023160)

## 2. Consultation Question 1

Do you agree with the CRU's proposed criteria for exclusion, as detailed in Section 2, and the proposed exclusions? If not, please state reasons for your objection(s) with specific reference to the proposed exclusion(s).

### **ESB Networks Response:**

ESB Networks agrees with the exclusion of a number of licence conditions by the CRU, where the CRU find that the conditions are administrative in nature, or where the CRU noted that they are not the lead regulatory/oversight authority. ESB Networks also welcomes the exclusion of a number of conditions where the CRU has identified 'Low Customer harm'.

Building on this approach, ESB Networks maintains that the Standards of Performance should be more precisely aligned with those licence conditions whose infringement would result in direct and substantial harm to our customers. In ESB Networks' view, this is aligned to CRU's principle of targeting compliance and enforcement activities to prioritise *"its compliance monitoring and enforcement activities to provide the greatest value in the public interest"*.<sup>2</sup>

### 3. Consultation Question 2

Do you agree with the CRU's proposed standards of performance, as detailed in Section 3? If not, please state reasons for your objection(s) with specific reference to the conditions.

#### **ESB Networks Response:**

ESB Networks is not in full agreement with some of the Standards of Performance proposed by the CRU, as set out in more detail in the table below and makes the following overarching comments which should be read together with the table.

#### **(a) Alternative remedies available**

As part of the analysis of relevant licence conditions for the purposes of the specification of Standards of Performance, ESB Networks considers that it is necessary to have regard to existing remedies/penalties, which we believe should be used to address non-compliances in the first instance.

The investigation process is likely to be administratively burdensome and resource intensive and potentially costly for all parties involved. Further, given the degree of regulation of the DSO business, including the annual licence compliance process, the price control process, and CRU spot checks and audits, there is a strong level of monitoring of compliance in place, and significant opportunity for issues to be identified at an early stage, and for CRU and the DSO to work collaboratively to reach a resolution to such issues.

Given the degree of regulation and the availability of alternative routes, ESB Networks is of the view that Administrative Sanctions should be a last resort and only be required in the event that cooperation is not at the required level and no other remedy is deemed appropriate or sufficient. In this regard, ESB Networks welcomes the following statement from CRU in relation to Condition 25 and believe that this should apply across all Standards of Performance:

*“CRU endeavours to promote a culture of compliance and would aim to secure cooperation of the regulated entities. Administrative sanctions provide additional incentives for the Licensee to comply with its obligations. In cases where the Licensee refuses to cooperate, Administrative Sanctions would be a proportionate and targeted tool to assist the CRU in performing its relevant functions in terms of assessing the relevant issues and taking appropriate actions to address such issues.”*

It would be important that the new framework takes due account of these alternative remedies, both in terms of the decision as to whether to pursue an investigation for breach of Standards of Performance, and also, where relevant, in considering the type of sanction to be imposed, including the level of any fine to be levied. This is also relevant to the overlap with the price control process (see further section below).

Where there are effective and robust legal and compliance mechanisms already in place, the introduction of a Standard of Performance for such conditions is unnecessary. Therefore, ESB Networks believes that conditions 2, 4, 7, and 13, should be excluded as Standards of Performance (see further following sections).

### ***(i) Engagement with CRU***

ESB Networks is of the view that engagement between the DSO and CRU as well as the CRU's existing enforcement options in respect of compliance issues such as a notice, determination or, in some circumstances ultimately a direction, are significant in their effect and should continue to be used as effective regulatory tools. Additionally, ESB Networks suggests that there is an opportunity for the DSO to engage with CRU on any compliance issues prior to an investigation being opened under the Administrative Sanctions regime, with a view to bringing the issue into compliance (e.g. a mitigation step plan) or alternatively narrowing the scope of a proposed investigation and to reflect the CRU's objective of providing a culture of compliance. We consider this approach is particularly the case for the system operator role, where some of the licence compliance requirements cover broad and technically complex issues (such as, for example, the MRSO role and the Planning Standards).

### ***(ii) CRU Direction***

CRU already has the power to issue a Direction to licensees to address licence breaches and ESB Networks is not aware of any instances where CRU has needed to seek a High Court order, as provided for in the legislation, to ensure compliance with a Direction by a system operator. The licence and statutory duties to comply with CRU directions set clear expectations for compliance and this mechanism is effective in the monitoring of regulated entities. The fact that CRU has not had to seek a High Court order to enforce compliance demonstrates the effectiveness of this existing tool, and further demonstrates that the administrative sanctions regime should be utilised as a last resort once all other measures have been exhausted.

### ***(iii) Connection Disputes***

In addition, with regard to connection to the system, affected parties can have issues considered and determined by CRU in a transparent and thorough way by raising a dispute with the DSO under Section 34 of the Electricity Regulation Act, 1999, for example where a connection application has been refused.

This mechanism affords interested parties the opportunity to present and discuss the issues such that a practical outcome as regards connection to the distribution system is identified, in compliance with the connection policy. Compliance with connection policy/directions can give rise to difficult/complex questions of interpretation, and differing interpretations should not be a basis for imposition of sanctions. Accordingly, including this element in the framework for Standards of Performance is inappropriate and unnecessary overlap, as the imposition of sanctions would not be an effective result for the affected party. If Condition 2 is included as a Standard of Performance, it is suggested that it should be strictly in respect of

clear and unambiguous issues that would not necessarily be the subject of a connection dispute such as, for example, failure to publish tariffs.

### (b) Overlap with Price Review process

For the DSO, the Price Review process involves substantial and thorough reporting and analyses to determine the DSO's performance against KPI's for network and operational issues. Failure by the DSO to achieve the KPI's can result in significant penalties (for example the Customer Survey (CSAT) incentive). For example, the total downside risk during PR5 for the DSO was set at €217.7m. This process has successfully operated for some time. As we currently prepare for Price Review 6, it is ESB Networks' view that, for those conditions to which the Price Review relates, a Standard of Performance should not overlap with the penalty regime in the Price Control. This creates the risk of double jeopardy. In the event that CRU does designate these conditions as Standards of Performance, or to the extent there is any overlap, ESB Networks considers it appropriate that, prior to opening an investigation, due consideration should be given to the role of the Price Review process, and whether it is appropriate to pursue an investigation in that context. Further, any penalty or loss of incentive imposed through the Price Review process must be taken into account in determining any sanction that may be imposed by CRU under this regime. We consider these points should be expressly acknowledged in the CRU decision.

### (c) Standards must be clear and consistent to enable ease of conformance and ensure legal certainty

As DSO, ESB Networks recognises the importance of clarity and precision in the licence conditions set forth by the CRU. ESB Networks believes that specificity around the type of instances/behaviours that would trigger an investigation into *improper conduct* should be clearly set out and align with CRU's principle of clarity in its compliance and enforcement activities<sup>3</sup>.

It is essential that the Standards of Performance are not only well-defined but also transparent in their intent and application. For instance, the broad scope of licence condition 7, which requires the DSO, and its agents, to take *all reasonable steps* to detect and prevent theft of electricity, damage to plant or interference with Metering Equipment, necessitates further clarification to ensure that all parties understand the specific requirements that must be adhered to. To address these concerns, ESB Networks proposes a collaborative approach to developing a comprehensive joint understanding of the CRU's expectations in respect of designated Standards of Performance in the DSO Licence, as well as mitigating factors that would be considered in sample scenarios. Such a step is required to ensure that ESB Networks meets the Standards of Performance, and align operational practices with the revised regulatory framework, thereby continuing to foster an efficient and compliant system operator performance.

In the implementation of the Standards of Performance as a measure of compliance, it will be critical that there is legal certainty as regards the elements of a licence condition or

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<sup>3</sup> CRU Investigation and Enforcement Guidelines (Economic Regulation) Information Paper (CRU2023132)

subsidiary documents that are subject to sanctions. In the context of the DSO role in its entirety, ESB Networks is of the view that a materiality threshold should be applied where technical requirements are very detailed, for example, the Distribution System Security and Planning Standards, particularly in circumstances where ESB Networks will be working on the delivery of PR6.

It is noted in the ‘CRU Investigation and Enforcement Guidelines’ paper (CRU2023132<sup>4</sup>), that, “*CRU intends to provide industry with greater clarity on investigations and enforcement procedures which will apply to all relevant licences*”. Where there is a lack of clarity, there could be a risk of vexatious complaints regarding standards of performance being used to interfere with the proper functioning of DSO’s licence obligations.

ESB Networks welcome CRU’s intention to provide industry with greater clarity on investigations and enforcement procedures which will apply to all relevant licences. Should there be any changes to the investigation and enforcement guidelines as per CRU2023132, ESB Networks would seek to understand any such changes ahead of any final decisions being made.

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<sup>4</sup> [CRU Compliance and Enforcement Policies | CRU.ie](https://www.cru.ie/en/2023/12/13/cru-compliance-and-enforcement-policies/)



## ESB Networks' position on individual Conditions

Below ESB Networks have set out below for each license condition whether we agree or disagree with CRU proposed Standard of Performance. These should be read along with the broader points above.

Condition No.	Condition Title	Proposed by CRU as Standard of Performance in Full or in Part	Does ESB Networks agree or disagree with the CRU's proposed Standards of Performance	Reasons for disagreement	ESB Networks Comment
2	Connection to and Use of the Distribution System	Paragraphs 2 to 11	Disagree	<ul style="list-style-type: none"> <li>• CRU has extensive powers to issue directions in relation to connection under Sections 34 to 36 of the Act.</li> <li>• Non-compliance with directions can be enforced through the existing mechanisms under the Act.</li> <li>• The disputes mechanism under Section 34 of the Electricity Regulation Act provides an appropriate forum for affected parties to have any issues with connection determined by CRU.</li> <li>• Implementation of connection policy, including applicable directions involves difficult/complex issues of interpretation, and does not lend itself to an investigation/penalty regime, nor would this operate to the benefit of an affected customer.</li> <li>• ESB Networks is obliged to comply with a determination on foot of a connection dispute (and CRU can enforce this through the High Court).</li> <li>• Connection is also addressed through the Price Review as a performance metric, e.g. existing ECP incentive remedies.</li> </ul>	

Condition No.	Condition Title	Proposed by CRU as Standard of Performance in Full or in Part	Does ESB Networks agree or disagree with the CRU's proposed Standards of Performance	Reasons for disagreement	ESB Networks Comment
				<ul style="list-style-type: none"> <li>Given the above overlaps, it is not necessary to specify this licence condition as a Standard of Performance.</li> </ul>	
3	Operation Agreements	Full	Agree		
4	Economic Procurement of Assets and Services	Full	Disagree	<ul style="list-style-type: none"> <li>ESB Networks is of the view that licence condition 4 paragraphs 1-3 should not be considered Standards of Performance as there are a number of existing remedies and regulations in place which ESB Networks must comply with, such as EU and Irish procurement law and the Code of Practice for the Governance of State Bodies.               <ul style="list-style-type: none"> <li>ESB Networks must comply with EU Procurement Directives and Irish Procurement Regulations. Failure to comply could result in a challenge by an unsuccessful tenderer under the EU Remedies Directive where the courts have the power to award damages and/or cancel a contract award and require the tender to be rerun. The outcome of such a challenge may impact negatively or positively on the costs borne by industry and ultimately, by final customers.</li> <li>ESB and therefore ESB Networks must also comply with the Code of Practice for the Governance of State Bodies which has requirements for competitive tendering and reporting requirements for non-competitive and non-compliant tendering.</li> </ul> </li> </ul>	

Condition No.	Condition Title	Proposed by CRU as Standard of Performance in Full or in Part	Does ESB Networks agree or disagree with the CRU's proposed Standards of Performance	Reasons for disagreement	ESB Networks Comment
7	Detection and Prevention of Theft of Electricity	Full	Disagree	<ul style="list-style-type: none"> <li>ESB Networks agrees that paragraphs 2 and 3 of condition 7 are clear and auditable. However, the wording in paragraph 1 is more subjective, and could be open to different interpretations of what the CRU considers "<i>all reasonable steps to detect and prevent</i>". ESB Networks is of the view that the objectives of paragraph 1 are met through paragraph 3 – i.e. having in place and complying with the CRU-approved Revenue Protection Code of Practice. As such, ESB Networks' view is that paragraph 1 should be excluded from any Standard of Performance.</li> </ul>	
8	Meter Point Registration Service	Full	Agree		
9	Provision of Metering and Data Services	Full	Agree		
10	Capacity Statement	Full	Agree		
11	Distribution System Security and Planning Standards	Paragraph 2	Agree		<ul style="list-style-type: none"> <li>ESB Networks considers that a reasonable materiality threshold should apply to the designation of this condition as a Standard of Performance as the planning standards include technically complex and detailed requirements.</li> </ul>

Condition No.	Condition Title	Proposed by CRU as Standard of Performance in Full or in Part	Does ESB Networks agree or disagree with the CRU's proposed Standards of Performance	Reasons for disagreement	ESB Networks Comment
12	Duty of Non-Discrimination	Full	Agree		
13	Performance of the Distribution Business	Full	Disagree	<ul style="list-style-type: none"> <li>• This condition effectively refers to the establishment and operation of the price review process. This is now a well established process and it is entirely in the interests of the DSO to operate within the process to ensure recoverability of costs.</li> <li>• As this mechanism is established and operational, ESB Networks does not consider that there is a need to specify the entirety of this condition as a Standard of Performance.</li> <li>• ESB Networks is of the view that compliance with the reporting obligations in this condition is sufficient as a Standard of Performance.</li> </ul>	
14	Access to Land and/or Premises	Full	Agree		
15	Customer Service Code and Complaints Handling Procedure	Full	Agree		
16	Compliance with Codes of Practice, Procedures and Publishing Arrangements	Full	Agree		

Condition No.	Condition Title	Proposed by CRU as Standard of Performance in Full or in Part	Does ESB Networks agree or disagree with the CRU's proposed Standards of Performance	Reasons for disagreement	ESB Networks Comment
18	Separation of Distribution Business	Paragraphs 1 to 5 and 8 to 11	Agree		<ul style="list-style-type: none"> <li>As CRU will be aware, CRU has previously approved arrangements in the interests of economic efficiency, whereby the TAO, DAO and DSO functions are all carried out by staff in the ESB Networks business unit, managed by ESB Networks DAC. It would be important that the existing approval is acknowledged when specifying this standard of performance.</li> <li>Paragraphs (1) to (4) of Condition 18 are very broad and lack specific metrics. ESB Networks has, in accordance with paragraph 4, put in place a DSO Compliance Programme, approved by CRU, which effectively sets out how these provisions are implemented in practice. It is suggested that for the purposes of sub-sections (1) to (4) of Condition 18, Condition 18(5), i.e. implementation of the Compliance Programme, should be set as the Standard of Performance.</li> </ul>
20	Prohibition of Subsidies and Cross-subsidies	Full	Agree		

Condition No.	Condition Title	Proposed by CRU as Standard of Performance in Full or in Part	Does ESB Networks agree or disagree with the CRU's proposed Standards of Performance	Reasons for disagreement	ESB Networks Comment
21	Restriction on Use of Certain Information	Full	Agree		
23	Public Service Obligation	Full	Agree		
24	Provision of Information to the Transmission System Operator	Full	Agree		<ul style="list-style-type: none"> <li>This condition is somewhat subjective, given that it refers to reasonable requests for information, and there is scope for differing interpretation. As such, ESB Networks considers that the mechanisms for raising disputes with CRU under legislation and under the Infrastructure Agreement may be the more appropriate route to address any potential issue here, and that this condition should only be pursued as a Standard of Performance in the event of clear, intentional breach.</li> </ul>
25	Provision of Information to the Commission	Full	Agree		
26	Distribution Code	Full, Excluding obligation on DSO of compliance	Agree		
28	Trading and Settlement Code	Full	Agree		

Condition No.	Condition Title	Proposed by CRU as Standard of Performance in Full or in Part	Does ESB Networks agree or disagree with the CRU's proposed Standards of Performance	Reasons for disagreement	ESB Networks Comment
29	Compliance with Laws and Directions	Full	Agree		<ul style="list-style-type: none"> <li>• ESB Networks agrees that in the context of Standards of Performance the scope of 'all applicable laws' should be limited to those laws under which CRU is the lead authority.</li> <li>• It would be critical that where there is another potential remedy under the relevant legislation, then the adequacy of this remedy is fully assessed before opening an investigation, and further, that any remedies imposed under any other regime are fully taken into account in determining the amount of any fine.</li> </ul>

## 4. Consultation Question 3

Is there an alternative standard of performance not proposed in this paper that you think the CRU should consider including? If yes, please state the reasons for your proposal.

### **ESB Networks Response:**

ESB Networks has no alternative Standard of Performance to propose at this time, However, ESB Networks would like to request the right to propose amendments to the Standards of Performance and or licence conditions in the future, in order to allow for an evolving and interactive regulatory regime.



## 5. Conclusion

In conclusion, ESB Networks agrees with some of the designations of licence conditions as Standards of Performance proposed by the CRU, however, is of the view that certain licence conditions should not be so designated.

Firstly, it is ESB Networks' view that the current broad-spectrum approach dilutes the effectiveness of these Standards of Performance and does not adequately prioritise the conditions which have the potential to significantly impact customers safety and welfare as highlighted above in section 2. In ESB Networks' view, the Standards of Performance should be focussed on those conditions whose infringement would result in direct and substantial harm to our customers, which is aligned to CRU's principle of targeting in its compliance and enforcement activities.

Secondly, ESB Networks believes that where there are existing remedies such as engagement, CRU Directions, dispute mechanisms, Price Reviews, and legislative remedies in place in relation to a licence condition, then such a condition should not be designated a Standard of Performance. ESB Networks is of the view that the existing enforcement regime is transparent, fair, reasonable, and proportionate. If CRU is to proceed with designating these as Standards of Performance, existing remedies should be applied and exhausted before the administrative sanctions regime is implemented.

Thirdly, ESB Networks seeks further clarity on how the CRU will assess the DSO against the Standards of Performance in circumstances where a finding of *improper conduct* could potentially have far-reaching consequences for the DSO. As noted above at Section 3 of this response, it will be critical for the DSO that there is certainty as regards the elements of a licence condition or subsidiary documents that are subject to sanctions.

ESB Networks hopes that the CRU finds our feedback useful, and we are available to discuss our observations on this consultation in more detail, or to engage with the CRU in advance of any final Decision with regards to Standards of Performance.