

CONTENTS

Energy

 Green Paper: Sustainable Energy 1

Construction / Health and Safety

 Safety, Health and Welfare at Work
(Construction) Regulations 2006 3

Regulatory

 Government Consultation on
Regulatory Appeals 5

Environment and Planning

 Update 6

 The Projects Group 8

Welcome to our Winter 2006 edition of "On Track". In this edition, we consider recent developments in the energy sector; the Government consultation process on regulatory appeals which is particularly relevant to participants in the energy, communications and transport sectors; the new health and safety regulations for construction work; as well as recent developments in environment and planning law, including European amendments to Ireland's second national allocation plan for greenhouse gas emissions trading, the first significant prison sentence being imposed for illegal dumping of waste, and the ongoing controversy surrounding the Nitrates Directive. We hope that you find this interesting and informative and would be delighted to answer any questions that you may have about anything in this newsletter.

As another successful year for the Arthur Cox Projects Group draws to a close, we would like to take this opportunity to thank our clients and friends for their support during the past 12 months. The last year has seen the Projects Group continue to grow strongly and we are particularly delighted with the growth in our Projects team in Belfast where the appointment of two new partners, Jane Hollway and Andrew McCluggage, adds significant depth to our team and consolidates Arthur Cox's position as a leading Projects practice in Northern Ireland.

We have also seen some cherished colleagues leave, most recently Ted Williams and Ann Marie Kearney. Both have taken on prestigious new roles: Ted has returned to Australia to become a Projects partner in the Brisbane office of Phillips Fox, a leading Australian law firm, whereas Ann Marie Kearney has been appointed General Counsel and Company Secretary for eircom. Both of these are very significant appointments and reflect their standing as having been amongst Ireland's leading lawyers in their respective fields in recent years. We congratulate them on their respective appointments and thank them for their considerable contribution to the Projects Group and the firm over many years. Níav O'Higgins succeeds Ted as Head of the firm's Construction Group and Patrick McGovern remains Head of the firm's communications practice.

ENERGY
Towards a Sustainable Energy Future for Ireland

October 2006 saw the publication of the most comprehensive energy policy statement in the Republic of Ireland in many years. The Green Paper, entitled *Towards A Sustainable Energy Future for Ireland*, deals with energy policy proposals up to 2020. Three key pillars are identified: security, sustainability, and competitiveness.

Policies to ensure security of supply include delivery of an All-Island Energy Market (encompassing the Republic of Ireland and Northern Ireland) and two new electricity interconnectors. Gas transmission policy, and potential for LNG and storage facilities will be reviewed in an all-island context. Development of networks continues, including construction of a North-South gas pipeline by the end of 2006. Results of an all-island Grid Study are awaited as ground work for developing a transmission system for optimal fuel diversity and use of renewables. Policies also aim to encourage oil and gas exploration, strengthen contingency measures for supply disruptions, and participation in the development of European energy markets.

To enhance both security and sustainability, targets for the proportion of electricity generated from renewables are proposed (15% by 2010 and 30% by 2020, and 30% co-firing at peat stations by 2015). While the option of additional coal-fired generation will be kept under review depending on technological developments and environmental constraints, prohibition of nuclear generation continues.

Specific policies supporting sustainability include setting all-island targets for renewable generation. Other targets are set for use of biofuels in transport, CHP, and biomass in heat generation. An Action Plan on Energy Efficiency is expected with the aim of delivering 20% improvement in energy efficiency by 2020 and integrating efficiency programmes into the new National Development Plan. Domestic and commercial alternative technology and the direction of research and development are also addressed. These goals are reflected in increased spending announced in the Government's latest budget.

Central objectives in enhancing competitiveness include legal unbundling of BGE networks in 2006 and introduction of the Single Electricity Market, full gas market opening, and legal unbundling of ESB DSO during 2007. Construction of new generating capacity is envisaged; to promote new entry, it is proposed to create a landbank of suitable sites. Addressing dominance and market power in price-setting generation plant is declared a priority. On 29 November 2006, the Commission for Energy Regulation (CER) announced that, following agreement with ESB, ESB will divest itself of 1,300MW of existing power plant by 2010. In return, the CER has agreed to authorise the

construction by ESB of a 400MW gas fired power station in County Cork, though it reserves the right to direct the sale of this plant if insufficient progress has been made to reduce ESB's market share.

In the last edition of *On Track* we focused on Renewable Energy. Two other major goals discussed in the Green Paper are the All Island Energy Markets and new interconnection.

The All Island Energy Markets

Development continues of a single electricity market (SEM) on the island of Ireland as part of a broader project to create all island markets in electricity and gas. Legislation to underpin the SEM is under preparation in Northern Ireland and the Republic of Ireland.

The Republic's Energy (Miscellaneous Provisions) Bill 2006 proposes to empower the CER to take all actions necessary to participate in the all-island energy market. In electricity, this includes specific powers of direction towards TSOs, including direction to undertake any necessary expenditure. Further provisions were published on 14 November 2006 in the Electricity Regulation (Amendment)(Single Electricity Market) Bill 2006. The Bill proposes to amend the Electricity Regulation Act 1999 to set out the function of the CER relating to the SEM; establish an SEM Committee within the CER; and provide for a CER statement on SEM procedures and working arrangements including interaction with the Regulator in Northern Ireland. The Bill also addresses information sharing, the objectives of the Minister and the CER and a revised licensing framework. In Northern Ireland, similar areas are developed in the draft Electricity (Single Wholesale Electricity Market)(Northern Ireland) Order 2007.

Consultation on all aspects of the SEM continues, with key developments throughout 2006 including publication of Version 1.1 of a Trading and Settlement Code and the Regulatory Authorities' decisions on market power mitigation and the capacity payment mechanism. Further information is available at <http://www.allislandproject.org>.

Interconnection

At present, the only electricity interconnector between the island of Ireland and Great Britain is the 500MW Moyle interconnector in Northern Ireland. Electricity transported from Great Britain via Moyle can be made available to the Republic of Ireland across the North-South interconnector

between the Republic and Northern Ireland.

However, on 3rd October 2006 a preliminary announcement was made of a competition for construction of a 500MW HVDC East West Interconnector between Ireland and Wales at the earliest possible date before 2012. The interconnector is to be constructed following a competition administered by the CER and ultimate ownership will remain with EirGrid, the Transmission System Operator in the Republic of Ireland. In addition, a second North-South interconnector, to be constructed by ESB National Grid and Northern Ireland Electricity by 2012, will double current cross-border trading capacity to over 600MW. These are highly significant developments in the Irish market intended to increase security of supply and competition, tackle dominance and enable integration of Ireland into EU markets.

The Energy (Miscellaneous Provisions) Bill 2006 will pave the way for these developments by bringing interconnectors owned by persons other than ESB within the CER authorisation and licensing scheme. The CER would also be able to secure construction of an interconnector by competitive tender; authorisation granted without a competitive tender if it is in the long term interests of final customers; or directly, by requesting the TSO to provide for its construction as part of the CER's development plan. Interconnector operators would be obliged to offer access on the basis of published non-discriminatory terms under the direction and approval of the CER.

The Green Paper also indicates that oil infrastructure interconnection with the UK and/or mainland Europe will be considered in a forthcoming review of security of Ireland's access to oil.

France-UK-Ireland Electricity Regional Energy Market invites interested parties to respond to a suite of publications on market integration

Under the France-UK-Ireland Electricity Regional Energy Market initiative, launched in February 2006 within the ambit of the Electricity Regional Initiative of the European Regulators' Group for Electricity and Gas (EREG), the regulators in Great Britain (Ofgem), France (CRE), Northern Ireland (Ofreg) and the Republic of Ireland (CER) aim to enhance competition and efficiency of trade. Following consultation with stakeholders, priorities for furthering integration of the four markets were identified:

- compliance with Congestion Management Guidelines under Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26th June 2003 on conditions for access to the network for cross-border exchanges in electricity;
- co-ordination of capacity allocation on electricity interconnectors;
- enhancing reciprocal access to balancing markets; and
- wholesale market transparency.

In November 2006 the TSOs of the four jurisdictions published papers on these areas which analyse existing gaps and options for future development. The regulators have published complementary reports comparing imbalance pricing, outlining transmission tariffication and setting out a framework for analysing interconnector flows. The seven reports are available at <http://www.ergeg.org>. Responses, to be made to Ofgem, are invited until **19th January 2007**.

For further information please contact:

Alex McLean
alex.mclean@arthurcox.com

Katrina Donnelly
katrina.donnelly@arthurcox.com

CONSTRUCTION / HEALTH AND SAFETY

Safety, Health and Welfare at Work (Construction) Regulations 2006

The Construction Regulations 2006 finally came into effect on 6th November 2006. They impose extensive new duties on all those involved in procuring, planning, designing and constructing projects including or likely to include construction work. Construction is very widely defined and involves activities such as repair and maintenance, installation of new M&E and IT systems as well as building and civil engineering works.

The 'Client'

The 'Client' defined as a person for whom a project is carried out, in the course or furtherance of a trade,

business or undertaking, or who undertakes a project directly in the course or furtherance of such trade, business or undertaking, has extensive duties.

Duties imposed upon Clients in relation to the appointment of project supervisors (and the corresponding duties imposed upon the project supervisors under the Construction Regulations 2006) may be deferred by the client for a period of 18 months (extendable for a further 12 months) where, prior to 6th November 2006, (1) the design stage had commenced and the Client had appointed a Project Supervisor Design Stage under the old Construction Regulations and/or (2) where construction had commenced, and where a Project Supervisor Construction Stage (“PSCS”) had been appointed under the old Construction Regulations, with notification given to the HSA and the PSCS held the position on that date. It is the Client’s decision whether to avail of this limited exemption and regardless of whether or not it applies, all other duties under the Construction Regulations 2006 apply from 6th November 2006.

The Project Supervisor for Design Process (“PSDP”)

The PSDP replaces the Project Supervisor for the Design Stage and assumes a far more onerous role. The PSDP must be an individual or a company (joint ventures and partnerships may no longer be appointed to the role) and must be appointed before the start of the design process, defined as *the process for preparing and designing a project, including alterations to the design and the design of the temporary works to facilitate construction of the project*. This definition emphasizes the continuing role of the PSDP throughout construction. The PSDP is required to take account of the principles of prevention during the various stages of the design process, and must review assumptions made as design progresses. The PSDP is also required to facilitate co-operation and co-ordination of all designers involved in a project. The PSDP remains responsible for preparing the preliminary safety and health plan, which must be available to be provided to anyone being considered for or tendering for the role of PSCS.

There is a significant change in the Construction Regulations 2006, which now imposes the duty of preparing the Safety File on the PSDP, rather than the PSCS. The PSCS is under an obligation to co-ordinate the provision of relevant information for the safety file by contractors to the PSDP. The Safety File must be promptly delivered to the client on completion of the project.

The ‘Designer’

A Designer is a person engaged in work related to the design of a project, including *the preparation of drawings, particulars, specifications, calculations and bills of quantities in so far as they contain specifications or other expressions of purpose according to which a project, or any part or component of a project, is to be executed*. The definition of Designer includes anyone specifying or altering the design, including those specifying certain methods of work or the selection of certain materials (which could include the client), as well as designers of temporary works, and specialist sub-contractors which works include a design element.

All Designers must take account of the principles of prevention (essentially, by identifying hazard and designing risk out, if possible, or mitigating the impact of any residual risks) and of any relevant safety and health plan and safety file. To facilitate this process, the HSA Guidelines propose the completion of design certificates.

Designers must co-operate with the PSDP and PSCS and with other designers ‘as appropriate’ to enable them each to discharge their duties and comply with any reasonable directions issued.

The Project Supervisor for the Construction Stage

The PSCS, according to the HSA Guidelines, is *responsible for managing and co-ordinating the construction phase safety and health issues on site*.

The Safety and Health Plan (the “Plan”) is developed by the PSCS and should include all information on all measures in place on site for ensuring safety, including emergency and evacuation procedures, arrangements for the co-ordination of activities on site and the sharing of information, the means for facilitating the appointment of the Site Safety Representative and the information to be provided to that person etc. As much of this as possible should be developed before construction commences. A new requirement is for the PSCS to include in the Plan all rules required to be followed in executing construction work for the purpose of ensuring the safety, health and welfare of all persons undertaking the work.

Where there are normally more than 100 persons on site engaged in construction work at any one time, the PSCS must now appoint a full time, competent Safety Advisor. This does not, however, absolve any of the contractors from compliance with their own health and safety duties.

Where any direction issued by the PSDP or PSCS is not complied with, the PSDP / PSCS should notify the Health and Safety Authority, the client and the person in question, including a copy of the direction and any response received to it. A copy of all directions and any notifications to the Health and Safety Authority should be retained with the Plan.

The Client must appoint the PSDP at the outset of the project and the PSCS before construction work commences, both appointments to be made and confirmed in writing. The client must be 'reasonably satisfied' as to the competence of all persons involved in the project, including designers and contractors, and that they have adequate resources to discharge their duties.

The Client must co-operate with the PSDP and PSCS, including in relation to the time allowed for completion of a project. Thus, the Client should not impose unrealistic time constraints at either end of the project. The Client is also required to provide all relevant information in his possession or procurement to the project supervisors to enable them to comply with their duties.

For further information please contact:

Niav O'Higgins
niav.ohiggins@arthurcox.com

REGULATORY

Government Consultation on Regulatory Appeals

Introduction

In July 2006 the Department of the Taoiseach published a Consultation Paper on Regulatory Appeals (the "Consultation Paper"). Submissions were due on 31st October 2006. The Consultation Paper was prepared under the auspices of the Better Regulation Group which oversees the implementation of the action plan arising from the 2004 Government White Paper "Regulating Better". The Consultation Paper reviews the existing mechanisms for appealing decisions of relevant regulators, in particular ComReg, the Commission for Energy Regulation (CER), the Commission for Aviation Regulation (CAR), the Financial Regulator, the Competition Authority and the Taxi Regulator and makes suggestions for

possible improved approaches to appealing their decisions.

Existing appeals procedures

At present there is only a standing appeal body for the Financial Regulator - the Financial Services Appeals Tribunal. In the case of ComReg, the CAR and the CER, appeals panels are formed for each appeal, while appeals against decisions of the Competition Authority and the Taxi Regulator, as well as certain decisions of the Financial Regulator, are to the courts. Decisions of ComReg, the Competition Authority, the CAR and the Financial Regulator can be stayed pending the outcome of an appeal.

Where an appeal against a decision of ComReg or the Financial Regulator is upheld, the issue can be returned to the regulator for consideration or, in limited circumstances, the appeals body can make a new decision (to cure technical defects in the case of ComReg and only in relation to a decision concerning administrative sanctions by the Financial Regulator). Appeals against decisions of the CER that are upheld can also be returned to it for reconsideration. In the case of ComReg, where an appeal is allowed and the original decision is annulled in whole or in part, ComReg must rescind the appealed decision if it was not suspended pending the outcome of the appeal. If it was suspended, it continues to have no effect. Finally, the High Court can substitute its decision for a determination by the Competition Authority to block a merger or allow it with conditions.

Evaluation of appeals mechanisms

The Consultation Paper poses a number of questions about existing appeals mechanisms, including whether they are cost effective, operate effectively, deliver decisions sufficiently quickly, lead to a fair and balanced outcome, have clear and accessible procedures and are accountable and whether the rules and structures that govern the appeals mechanism can be adapted sufficiently quickly to match market, technological and other changes.

The Consultation Paper then examines appeals mechanisms in other jurisdictions, including the UK Competition Appeal Tribunal ("CAT"), which, inter alia, hears appeals against decisions of certain UK sector regulators and the Office of Fair Trading. The CAT has the standing of a court and as such can combine judicial review with an appeal on the merits, but is also assisted by a panel of experts.

Issues and Challenges in Developing Appeals Systems

The Consultation Paper outlines some of the structural and procedural elements to be considered when designing appeals systems.

In relation to the form of appeals body, it identifies the potential advantages and disadvantages of the following alternatives:

- *Expert appeals panel (ad hoc and standing)*
The advantages of expert appeals panels outlined in the Consultation Paper include sector knowledge and a faster and more cost-effective appeals process, while the perceived disadvantages include that they may lengthen the decision-making process by adding another layer of appeal, may not be efficient at handling a high volume of appeals and that their decisions are not directly enforceable.

Furthermore, the Consultation Paper highlights a number of possible disadvantages in establishing a single, cross-sector appeals body applying to a number of regulators, in particular that the potential synergies may be overstated given the disparate nature of the functions that the relevant regulators deal with.

- *A specialist court or a court advised by an expert panel*

The advantages of both a specialist court and a court advised by an expert panel as set out in the Consultation Paper are that they would develop expertise more readily than a general court and would speed up the appeals process by removing one layer of appeal thus adding greater legal certainty to decisions. Among the further advantages the Consultation Paper outlines are that the permanent nature of such bodies would allow for consistency, their decisions would be enforceable and they could combine an appeal with judicial review.

Disadvantages outlined in the Consultation Paper include that without a time limit for a hearing to conclude that delays may persist. However rigorous case management may address this and the Consultation Paper cites the example of the Commercial Court, which has reduced the average time from entry onto the Commercial List to the final conclusion of a case to just ten weeks, in support of this. The Consultation Paper also suggests that recent experience with the

Electronic Communications Appeal Panel indicates that expert appeals panels will not necessarily dispose of appeals more quickly than the courts.

Finally, the Consultation Paper examines the nature of the decision an appeals body can make where it finds in favour of an appellant - either to remit the case to the regulator for a new decision or to replace the decision with its own. A number of arguments are made against granting the latter power to an appeals body, including that it might encourage excessive use of appeals as a speculative attempt to reopen general regulatory policy issues and that the appeals body might come to be viewed as the de facto regulator, thereby rendering the regulator itself effectively obsolete.

Conclusion

It would appear at this stage that the Consultation Paper sees considerable merit in regulatory appeals being dealt with by a specialist court along the lines of the CAT in the UK rather than either ad-hoc or standing appeals panels. A clearer indication of what reforms, if any, are likely to be introduced will be possible once a summary of the consultation submissions and policy options is published, most likely in early 2007.

For further information please contact:

Patrick McGovern

patrick.mcGovern@arthurcox.com

Ed Brophy

edward.brophy@arthurcox.com

ENVIRONMENT AND PLANNING

Update

Strategic Infrastructure

The Minister for the Environment, Heritage and Local Government has brought part of the Planning and Development (Strategic Infrastructure) Act 2006 into force. With effect from 17th October 2006, the chequered compliance history of any private developer may be used against them to refuse planning

permission - without the need to apply to Court. Among other changes, there is now a presumption that the value of land lying 10 metres or more below surface is nil, which will be relevant to major tunneling projects within Dublin City such as Metro North and the Interconnector. In addition, with effect from 5th November, the membership of the Board has been changed to allow for the new Strategic Infrastructure division to operate.

Second National Allocation Plan Approved

On 29th November 2006, the European Commission directed Ireland to make amendments to the second national allocation plan for emissions trading from 2008 to 2012. This includes a reduction in the overall trading sector allocation by 6%, as other proposals for limiting emissions in the transport sector and for purchase of flexible mechanism credits were not properly substantiated. The approach to new entrants and site closures has also been criticised and the availability of flexible mechanism credits to operators has been limited. These changes apart, the allocation plan has been approved.

Prison Sentence for Waste Breach

In a landmark environmental decision, Dublin Circuit Court has imposed a six months custodial sentence on an individual involved in the illegal deposit of waste at an illegal landfill at Whitestown, County Wicklow. Waste disposed of included chemical waste and human blood and the site itself was completely unsuitable for the dumping of waste. The individual was legally trading on a small scale in the waste disposal business, and pleaded guilty to not having a licence under the Waste Management Act 1996 for the dumping of waste at the site. Judge Delahunty noted that as this individual was already involved in the waste disposal business, he should have been aware of his responsibilities and liabilities and would have known the potential ramifications of his actions on the environment. The owner of the site was not given a custodial sentence but was fined €150,000 despite the Court determining that he was not aware of the volume of waste being dumped or the extent to which his land was being abused.

New Dublin Transportation Authority

On 9th November 2006, the Minister for Transport reported on the establishment of a Dublin Transportation Authority to have overall responsibility for the delivery of €14 billion worth of projects under Transport 21 in the Greater Dublin Area - which includes Kildare, Meath and Wicklow. Legislation to provide the necessary statutory basis is expected within weeks. The Authority will have responsibility for strategic transport planning, allocation of capital and current funding for public transport and traffic management, procurement of public transport services, regulation of public transport fares and traffic management for the region.

Derogation from the Nitrates Directive obtained

On 13th November 2006, the EU Commission accepted Ireland's application for a derogation to the limit of 170 kg Nitrogen³ per hectare set out in Council Directive 91/676/EEC of 12th December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (the "Nitrates Directive"), implemented in Ireland by the European Communities (Good Agricultural Practice for Protection of Waters) Regulations 2006 (the "2006 Regulations"). Grassland farms that apply for a derogation and meet the conditions will be permitted to apply manure in excess of the 170 kg of nitrogen per hectare limit, up to a maximum of 250 kg per hectare. However, the EU Commission did not accept an extension of the derogation to include farmers wishing to take in pig and poultry manure. Implementation of the Nitrates Directive in Ireland continues to prove a source of controversy, however, as farms become subject to unannounced farm inspections to check compliance with the 2006 Regulations. A dispute has also arisen as to the meaning of "soiled water" in collecting yards, which the Department of Agriculture has classified as slurry.

For further information please contact:

Deborah Spence

deborah.spence@arthurcox.com

Brendan Slattery

brendan.slattery@arthurcox.com

THE PROJECTS GROUP

The Arthur Cox Projects Group comprises all-Ireland legal experts from our Dublin, Belfast and London offices in Public Procurement, Project Finance, Environment & Planning, Construction, Health & Safety, Energy, Transport & Infrastructure, Waste, Water and Telecommunications. We represent Irish and multi-national corporations, State and semi-State bodies, private developers, contractors, consultants and financiers in many of Ireland's largest projects. The Arthur Cox Projects Group provides a dynamic, client focused and comprehensive service to those at the forefront of development on the island of Ireland.

For further information please contact any of the following members of the Projects Group or your usual Arthur Cox contact:

Jane Hollway, Partner (Belfast)
Tel: +44 28 9026 2676
jane.hollway@arthurcoxni.com

Patrick McGovern, Partner (Dublin)
Tel: +353 1 618 0545
patrick.mcgovern@arthurcox.com

Niav O'Higgins, Partner (Dublin)
Tel: +353 1 618 0314
niav.ohiggins@arthurcox.com

Deborah Spence, Partner (Dublin)
Tel: +353 1 618 0444
deborah.spence@arthurcox.com

David Flinn, Consultant (Belfast)
Tel: +44 28 9026 2672
david.flinn@arthurcoxni.com

Dr. Yvonne Scannell, Consultant (Dublin)
Tel: +353 1 618 0409
yvonne.scannell@arthurcox.com

Andrew McCluggage, Partner (Belfast)
Tel: +44 28 9026 2678
andrew.mccluggage@arthurcoxni.com

Alex McLean, Partner (Dublin)
Tel: +353 1 618 0546
alex.mclean@arthurcox.com

Mark Saunders, Partner (London)
Tel: +44 20 7213 0451
mark.saunders@arthurcox.com

Niamh Burke, Consultant (Dublin)
Tel: +353 1 618 0355
niamh.burke@arthurcox.com

Barbara Linehan, Consultant (Dublin)
Tel: +353 1 618 0000
barbara.linehan@arthurcox.com

DUBLIN

Earlsfort Centre
Earlsfort Terrace
Dublin 2
Ireland
T: +353 1 618 0000
F: +353 1 618 0618

mail@arthurcox.com
www.arthurcox.com

BELFAST

Capital House
3 Upper Queen Street
Belfast BT1 6PU
Northern Ireland
T: +44 28 9023 0007
F: +44 28 9023 3464

LONDON

29 Ludgate Hill
London EC4M 7JE
England
T: +44 20 7213 0450
F: +44 20 7213 0455

NEW YORK

570 Lexington Avenue
28th Floor
New York NY 10022
USA
T: +1 212 759 0808
F: +1 212 688 3237