

## CONTENTS

## Energy and Resources

Fundamental change in the electricity sector as the SEM goes live	1
Government White Paper: Delivering a Sustainable Energy Future for Ireland	1

## Public Private Partnership / Private Finance Initiative

National Development Finance Agency (Amendment) Act, 2007	2
PFI Projects - Facilities Management Legal Issues	3

## Public Procurement

New Irish Utilities Regulations 2007	4
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## Environment and Planning

Emissions Trading - National Allocation Plan Revised	6
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## The Projects Group 8

Welcome to our Autumn 2007 edition of "On Track". In this edition, we look at the new Single Electricity Market and the Government's energy white paper; we examine the extended functions of the National Development Finance Agency, the legal issues around facilities management in PFI Projects in Northern Ireland and the new Irish procurement regulations for utilities; we also consider the revised draft of the National Allocation Plan for emissions trading in Ireland.

We hope that you find this newsletter interesting and informative and would be delighted to answer any questions that you may have about anything in it.

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained before taking action.

## ENERGY AND RESOURCES

## Fundamental change in the electricity sector as the SEM goes live

On 1<sup>st</sup> November 2007 the new all-island Single Electricity Market ("SEM") went live. Introduction of the SEM is a radical transition from the previous separate systems of bilateral trading in Ireland and Northern Ireland to a single market in which power is traded at wholesale level via a central pool regardless of location on the island.

Though the new market has been under development since 2004, the past year has seen intensive preparation as government departments, regulators and industry participants have worked in concert to ensure that the appropriate legislative, regulatory and market rules are in place. Since 3<sup>rd</sup> July 2007, the date of SEM "Go Active", market participants have been issued with modified licences and have been able to participate in market trials.

The market rules for the SEM are contained in the Trading and Settlement Code, with which the market operator, system operators, generators, suppliers, and interconnector owners, operators and users are obliged to comply. From a legislative point of view, the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007 and Electricity (Single Wholesale Electricity Market) (Northern Ireland) Order 2007 form the market's legal base in Ireland and Northern Ireland respectively, and commencement orders have been published in respect of both.

By creating a larger market across the island, the SEM increases the potential for greater competition and efficiency in the Irish energy sector. Already, potential new market entrants have signalled their intention to compete in the market. Further information on all aspects of the SEM is available at <http://www.allislandproject.org/>.

## Government White Paper: Delivering a Sustainable Energy Future for Ireland

In March 2007 the Government published a landmark White Paper setting out an energy policy framework for 2007 to 2020. Like the Green Paper that preceded it, the White Paper focuses on three strategic goals: securing energy supply, promoting sustainability of energy supply and use, and enhancing the competitiveness of energy supply.

Interest in the White Paper focused chiefly on measures aimed at reducing ESB dominance, particularly on the commitment to transfer grid ownership from ESB to EirGrid (the transmission system operator). The Government also aims to legally unbundle the distribution system operator from ESB and to require the distribution network business to operate under a risk-related rate of return with savings from lower network tariffs and shareholder dividends being passed to final customers.

On the generation front, the aim is to reduce ESB's market share to 40% in an all-island context by 2010. In addition, EirGrid is to develop a state owned

landbank to facilitate new independent generation. Output of ESB's new plant at Aghada will be ringfenced to ensure that power is sold to suppliers other than the ESB Public Electricity Supplier. The Government also sets out its intention to strengthen the generation capacities of other semi-state bodies (Bord Gáis Éireann and Bord na Móna), while supporting the commercial development of ESB International.

Other areas addressed include the SEM, security of gas supply, hydrocarbon exploration, strengthening the renewables sector and research and innovation. The White Paper is available on the website of the Department of Communications, Marine and Natural Resources (<http://www.dcmnr.gov.ie/Energy/>).

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## ■ PUBLIC PRIVATE PARTNERSHIP / PRIVATE FINANCE INITIATIVE

### National Development Finance Agency (Amendment) Act, 2007 - Delivering on Project Delivery

The National Development Finance Agency ("NDEA") was born on 1<sup>st</sup> January 2003 following the enactment of the National Development Finance Agency Act, 2002 (the "2002 Act"). The principal function of the NDEA under the 2002 Act is to advise State Authorities on the optimal financing solutions for public investment projects with the overriding objective of maximising value for money for the State. The NDEA provides this advice to bodies designated as State Authorities under the 2002 Act. State Authorities currently designated under the 2002 Act include government departments, local authorities, the Commissioners of Public Works in Ireland, the Courts Service, harbour authorities and the Dublin Institute of Technology.

The principal functions of the NDEA are set out in Section 3 of the 2002 Act, as follows:

"(a) to advise on the optimal means of financing the costs of public investment projects in order to achieve value for money;

- (b) to advance monies and enter into financial arrangements in respect of projects approved by any State Authority;
- (c) to provide advice to any State Authority in all aspects of financing, refinancing and insurance of public investment projects to be undertaken by public private partnership; and
- (d) to form or cause to be formed companies for the purposes of securing finance for public investment projects."

To date the NDEA has exercised the powers under sub-paragraphs (a) and (c). It has not advanced any funds to date but has advised on and conducted funding competitions on behalf of State Authorities. The requirement for the NDEA to establish companies has not arisen to date in relation to public investment projects.

Since 2003 the NDEA has advised various State Authorities in relation to numerous projects across a broad number of industry sectors. In 2005 it was recognised that given this exposure, the NDEA was, in fact, strategically well placed to provide a broader function to the State to deliver public investment projects in Ireland. In July 2005 the role and functions of the NDEA were expanded to include project procurement delivery powers in addition to its financial advisory role. It established a "Centre of Expertise" (to include project management expertise) for the specific purpose of project procurement delivery and has been undertaking this role on a non-statutory basis since 2005. The principal aim of the National Development Finance Agency (Amendment) Act, 2007 (the "2007 Act") was to put the NDEA procurement delivery role onto a statutory footing.

The 2007 Act extends the functions of the NDEA, set out in Section 3 of the 2002 Act, by introducing the following two new paragraphs:

- "(e) to enter into public private partnership arrangements with a view to transferring the rights and obligations under such an arrangement to any State Authority; and
- (f) to act as agent for any State Authority in connection with the proposed entry by that State Authority into a public private partnership arrangement."

It is anticipated the NDEA will primarily use the powers conferred under paragraph (f) and act as agent on behalf of State Authorities.

Given the NDEA's exposure to a broad number of sectors and projects since 2003, providing the NDEA with additional powers to undertake a project procurement delivery role was both a sensible and cost effective way of seeking to expedite project delivery. There are obvious benefits to centralising

project procurement too. For example it should allow for the coordination of the roll out of projects to ensure PPP deal flow which the NDFA is employing through the roll out of PPP programmes and streamline the overall procurement process thereby reducing the time it takes to deliver a PPP.

The NDFA has also developed a Template Project Agreement for PPP accommodation projects which will be used in respect of the PPP accommodation projects it is charged with delivering. Use of a standard form of contract is intended to reduce negotiations on positions which have been largely accepted on other similar PPPs and this has been relatively successful with the Standardisation of Public Contracts exercise (SOPC) undertaken in the UK. Contract standardisation is a welcome aim as protracted negotiations on project agreements has been an unwelcome feature of the PPP accommodation sector in Ireland to date. However, no project has been signed yet using the Template so we'll have to wait and see what impact it has in practice.

The National Development Plan 2007-2013 includes a significant number of projects which may be procured as PPPs through the NDFA. The NDFA now has a central role on how projects are procured, responsibility for ensuring projects are brought to market which are deliverable and then ensuring they are delivered within reasonable timeframes. Timely delivery of projects will be very important in order to deliver on the goals of the NDP, retain the interest of potential bidders for projects and to generate real deal flow in the PPP sector. With the enactment of the 2007 Act into law there is now a weight of expectation on the NDFA to deliver on project delivery.

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### PFI Projects - Facilities Management Legal Issues

The Investment Strategy for Northern Ireland ("ISNI"), published in December 2005, earmarked up to £16 billion of expenditure between 2005 and 2015 for infrastructure projects in the health, education and transport sectors. A number of these projects are intended to be PFI projects and a new 10 year ISNI is in preparation which will focus, amongst other things, on potential North-South projects.

In Northern Ireland a number of PFI accommodation projects have reached financial close including, most recently, schools projects such as Bangor and Nendrum Schools PFI Project. This

article summarises some of the typical legal issues arising for a provider of facilities management services on a PFI project.

The implementation of PFI accommodation projects normally involves two main phases – (i) the construction phase, and (ii) the operational phase. During the operational phase, the facility will typically be operated by a facilities management company (the "FM Provider") for a period of up to thirty years.

The services which are provided by the FM Provider vary from project to project, and from sector to sector. However, the facilities management aspects of every PFI project raise a unique set of issues which normally warrant specific legal advice. The issues which typically arise include the following:

- **Defects** - the FM Provider should ensure that any deductions or other liabilities it incurs as a result of defects in construction can be passed on to the builder or the project company;
- **TUPE** - it is likely that a number of public sector staff will transfer to the FM Provider under the legislation relating to Transfer of Undertakings. The FM Provider will want to be sure of exactly how many staff will be transferring to it and what it will be liable for in relation to such employees. To the extent that the number of employees actually transferring differs from the information originally provided by the public sector body, the FM Provider will want to pass on any additional costs to the public sector body;
- **Pensions** - pensions liabilities for transferring staff will become the responsibility of the FM Provider and, in light of the uncertainties which surround pensions in today's market, the FM Provider will want to ensure that its liabilities are capped and that pensions are fully funded on the date of transfer;
- **Benchmarking/Market Testing** - the FM Provider will want to ensure that it can benchmark or market test its services at reasonable intervals throughout the operational phase to ensure that it is not bound into its pricing for the entire contract term;
- **Dispute Resolution** - a fast track dispute resolution procedure should be required by the FM Provider to ensure that payment disputes are resolved as quickly as possible;
- **Malicious Damage** - the FM Provider should seek to avoid liability for malicious damage (such as vandalism) caused by related parties of the public sector body (such as the pupils, in the case of a school); and

- **Interface with other sub-contractors** - interface arrangements will be required with the builder and certain sub-contractors of the public sector body, such as those involved in cleaning or catering.

The above are only a small number of the myriad of issues which affect the FM Provider. In summary, the funders of the project will seek to ensure that as much risk as possible during the operational phase is passed down to the FM Provider. The FM Provider will wish to minimise such risk as much as possible and to cap its liabilities to the greatest extent possible.

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4

## ■ PUBLIC PROCUREMENT

### New Irish Utilities Regulations 2007

Two new EC Public Procurement Directives were enacted in 2004 and became operative with effect from 31<sup>st</sup> January 2006. The first Directive 2004/18/EC ("Public Sector Directive") was transposed into Irish national law by the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (Statutory Instrument No. 329 of 2006) (the "Public Regulations").

The second Directive 2004/17/EC, amended by Directive 2005/51/EC, governing public procurement procedures of entities operating in the Water, Energy, Transport and Postal Sectors (the "Utilities Directive") was transposed into Irish national law by the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 made by the Minister for Finance on 31<sup>st</sup> January 2007 (Statutory Instrument No. 50 of 2007) (the "Utilities Regulations").

Like the Public Regulations of last year, the Utilities Regulations are very detailed, in contrast to the Statutory Instruments which transposed the Public Procurement Directives of the early 1990s which are now replaced.

The main changes introduced by the 2004 Directives may be summarised as follows:

- All **thresholds** are in Euro and are considerably simplified;
- The **Competitive Dialogue** Procedure (over and above the Open, Restricted and

Negotiated Procedures) for what may justifiably be regarded as a complex project (with PPP / PFI particularly in mind but also applicable in other circumstances) has been introduced for the Public Sector only and not under the Utilities Directive or the Utilities Regulations;

- **Framework Agreements** - these are confirmed on a secure legal basis although they have in fact been used for quite a number of years and the consequence of their use is clarified;
- **Central Purchasing Bodies** - again, their use is clarified, although they have been used previously (Public Regulations and Utilities Regulations);
- **Electronic Procurement System** - these include e-auctions and dynamic purchasing systems (Public Regulations and Utilities Regulations);
- There is provision for reflecting **Social and Environmental** requirements in procurement - effectively building upon the seminal decision of the European Court of Justice in the Helsinki buses case - *Concorida Bus Finland -v- Helsinki*, Case C 513/99 (2002) (Public Regulations and Utilities Regulations);
- There is provision for certain **other social objectives** including sheltered workshops and businesses (Public Regulations and Utilities Regulations);
- Various mandatory **exclusions** in the case of certain **fraud** and **corruption** (Public Regulations and Utilities Regulations);
- There is compulsory use of the Common Procurement Vocabulary ("CPV") so as to specify with particularity precisely what is being procured (Public Regulations and Utilities Regulations).

Regulations 5-10 (inclusive) of the Utilities Regulations contain a detailed description of the **activities of utilities undertakings to which the Utilities Regulations apply**. These include what could broadly be described as network-type activities in the areas of:

- certain gas, heat, electricity and electricity services, supply of water supply services;
- certain transport services;
- postal services;
- entities engaged in exploration for, or extraction of, oil, gas, coal and other solid fuels; and
- port and airport operators.

Critically, the financial thresholds, above which the “formalities” (requirement for tender notice, use of prescribed procedures, service of time limits and so forth) become mandatory under the Utilities Directive are currently set at €422,000 in ordinary course for supplies (goods) and service contracts, and €5,278,000 for works or construction contracts. In respect of services, the full formalities apply if the service falls within Category A of the new Utilities Regulations. This is now located at Schedule 6 (Schedule XVI in the former Utilities Directive).

Some of the exceptions in relation to Utilities include:

- Certain contracts in third countries (Utilities Regulation 16);
- Secret / special security measures (Utilities Regulation 17); and
- Affiliated undertakings / joint ventures (Utilities Regulation 19).

This last exception is particularly important in the commercial world and is particular to the Utilities Sector.

Some of the most significant features of the new Utilities Regulations are the following:

- there is detailed provision for excluding certain sectors from the scope of the Directive and Regulations following the making of a case to the European Commission that a sufficient degree of competition exists in the relevant sector;
- the telecommunications sector is excluded entirely on account of the degree of market liberalisation and competition in the sector;
- there is a new definition of “special and exclusive rights” so that private entities operating in sectors open to competition may be excluded from the scope of the Directive; and
- the exception for affiliated undertakings and joint ventures (unique to the Utilities sector) has been extended in some important respects and in particular extended to include contracts for works and supplies (construction and goods) in addition to contracts for services.

The Utilities Regulations reflect in detail the provisions of the 2004 Utilities Directive.

There are important reforms of detail in respect of many provisions governing the operation of Public Procurement procedures contained in the Utilities Regulations.

The fundamental or cardinal principles of EC law which the European Court of Justice applied in many cases in interpreting Public Procurement Law are

expressly reflected in a number of the provisions of the new Utilities Regulation as well as the Public Regulations of 2006, for example:

- **Non-Discrimination** (e.g. nationality) (Public Regulation 17(a), Utilities Regulation 24(a));
- **Equal treatment** of tenderers (Public Regulation 17(a), Utilities Regulation 24(a));
- **Transparency** (adhere to requirements as stated (Public Regulation 17(b), Utilities Regulation 24(a));
- **Proportionality** (relate requirements to needs of contract and as stated (Public Regulation 52(4), Utilities Regulation 24(a)); and
- **Comity** (e.g. according mutual recognition and equal validity to qualifications and standards from other Member States) (Public Regulation 61(7), Utilities Regulation 52).

We have noted previously the important decision of the European Court of Justice in **Telaustria** (2000) which, although the practical application of its principle is not yet fully developed, requires that, in respect of certain important procurements which fall outside the formalities (tendering, prescribed procedures and so forth) of the Directive, nevertheless procuring authorities would accord to such procurements a sufficient measure of publicity. **Telaustria** itself involved a services concession. The European Commission has invoked the **Telaustria** principle in order to pursue a number of cases across Europe including several in Ireland. Those in the public domain include the **Emergency Ambulance Service** in the Dublin area (contract between Dublin Fire Brigade (part of Dublin City Council) and the former Eastern Regional Health Authority) as well as the arrangements between An Post and the Minister for Social and Family Affairs concerning the disbursement of **social welfare payments**.

The **Alcatel Case** (Case C81/98 *Alcatel Austria -v- Bundesministerium für Wissenschaft und Verkehr*, [1999] ECRI-7671) required that national law would permit that a contract could be set aside. If national law provided that the contract could not be set aside once it had been signed, then this was insufficient implementation of EC Law. In Ireland, following this case, there was an administrative instruction by the Department of Finance to public bodies to interpose a **standstill period, whereby** losing bidders would be informed by the relevant public body that it was proposed to award a contract to a preferred bidder after the expiration of the standstill period. Under both the Public Regulations (Regulation 49(5)) and the Utilities Regulations (Regulation 51(8)) the previous administrative recommendation from the Department of Finance is now replaced by a **statutory standstill period of 14 days under each set of Regulations**.

In Case C/19/00 SIAC Construction Limited -v- Mayo County Council [2001] ECR 17725 the Irish Court had favoured a standard of “manifest error” for Judicial Review but the European Court of Justice favoured a “less strict” standard. The Judicial Review proceedings remain the ordinary remedy in Public Procurement although (save where, exceptionally, there would be an extension of time such as canvassed by the Court, for example, in *Veolia Water UK plc -v- Fingal County Council* (High Court, Clarke J, 2<sup>nd</sup> May 2006) there must ordinarily be Judicial Review proceedings initiated “at the earliest opportunity and in any event within three months” of the date of the contested decision. In many cases it will not be appropriate to delay even three months and more prompt action may be required. Careful advice should be taken if seeking remedies as this may entail:

- (i) seeking further information (either under the Public Procurement Directives and Regulations or other legal codes including Freedom of Information Acts, Data Protection Acts, sector or entity specific statutes or access to information on the environment legislation or otherwise);
- (ii) determining under what legal headings a challenge is mounted; and
- (iii) whether legal proceedings are the most appropriate remedy, at least in the first instance.

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## ■ ENVIRONMENT AND PLANNING

### Emissions Trading - National Allocation Plan Revised

On 4<sup>th</sup> October 2007, the Environmental Protection Agency (“EPA”) published a revised draft of the second National Allocation Plan (“NAP2”) for emissions trading in Ireland. This NAP2 will cover the second trading period from January 2008 to December 2012.

Some of the important changes that have been made since the first or pilot trading period are summarised below.

- Careful consideration has been given to the size of the set-aside for new entrants (“NESA”). In general terms, it has been increased from 1.5% of total allowances in the first trading period to almost 9% of total allowances under NAP2. This amount will be supplemented by allowances from installations that close during the second trading period. The size of the set-aside is based on detailed review of future developments in the coming five years, including - in particular - likely new and closed plant within the Powergen sector.
- There is no special treatment of proposed development that has already achieved a high level of development certainty. The concept of “Known Planned Development” has been abandoned and new development will be accommodated within the NESA.
- The calls for clear rules governing priority and allocations from the NESA have led to more detailed explanation of the basis upon which installations can secure priority.
- The bright-line cap of 84,375 allowances per annum for new entrants has been modified, so that larger installations will have an opportunity to recover a greater part of their likely need. In general, allocations are capped at 87% of projected emissions. However, for projected emissions exceeding 50,000 tonnes per annum, the cap is reduced to 68%.
- There is no requirement for the sector-level distribution to match the classes of activity covered by emissions trading. This means that bricks, ceramics, lime, glass, paper, mineral oil and other combustion have been merged in a single sector labelled “General” - with only Powergen and Cement singled out for separate treatment.
- The calls - principally from within the food and drink industry - for flexibility to transfer production and associated allowances from closed installations to others in the same group have been answered. However, this so-called rationalisation is not available for: Powergen; Cement; installations that have different names on their permits; closing installations that received more than 25,000 allowances the previous year (only small installations can be “rationalised”); and, where installations do not transfer production of the same product to the recipient installation.
- Where rationalisation is not available, the allowances of closed installations will fall to the NESA. There are now clear rules for

understanding when an installation is closed and these have particular significance for the Powergen sector, where major closures are anticipated. Unused NESAs will be cancelled.

- As the second trading phase coincides with the first trading period under the Kyoto Protocol, installations will be permitted to use so-called flexible linking credits to meet their surrender obligations each year. However, to ensure local benefits, the amount that may be used is capped at 12% for powergen, 11% for cement and 1% for all others.

The press release for this NAP2 highlights changes made for renewables, combined heat and power (“CHP”) and the exclusion of small installations. However, on second reading, these changes may not be so significant as first anticipated.

- The special recognition for renewables is to reduce the free allowances for existing power generators by 250,000 per annum (which allowances are effectively redistributed among industry).
- The special recognition for CHP is to increase free allowances in the set-aside for future CHP by 300,000 per annum (enough for an additional 6 MWe). There is no recognition for installed capacity.

- In order to be excluded from the scheme under the new de-minimis threshold, the installation will need to have at least seven boilers (each less than 3MW) and have emitted less than 20,000 tonnes in 2005. This is only likely to benefit a handful of the universities and hospitals.

More generally, there are 2,200,000 less allowances being distributed than were first proposed by the EPA in the draft NAP2 that was submitted to the European Commission last summer. This is principally because Government Policy for the non-trading sector - principally on transport - was not accepted by the European Commission as likely to deliver the claimed carbon benefits.

The importance of climate change is commonly accepted and understood, but the manner in which the emissions trading scheme delivers related benefits and the scheme’s impact on industry requires careful analysis. As might be expected with NAP2, the devil is in the detail.

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## In Brief

We are pleased to announce the appointment of two new partners to the Arthur Cox Projects Group. In Dublin, **Tim Kinney** joined as a partner from another Dublin firm where he was Head of Construction. Tim practices principally in the areas of construction and PPP and brings considerable depth to the firm’s practice in these areas. In Belfast, **Alan Taylor** joins as Head of Corporate from another Belfast firm where he was a senior corporate partner. Alan has particular expertise in the energy sector and will lead the firm’s energy team in Belfast. We are delighted to have two partners of the calibre of Tim and Alan join our team.

If you have any feedback on this Newsletter or any of the issues raised in it, please do not hesitate to contact the Arthur Cox Projects Group at [projects@arthurcox.com](mailto:projects@arthurcox.com). Further contact information is overleaf.

## 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.

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