



Public & Regulatory Law Update

September 2009

NAMA legislation: update

Following a public consultation on a proposal for a draft Bill, the Irish Government published the National Asset Management Agency Bill 2009 (the Bill) to establish the National Asset Management Agency (NAMA) on 10 September 2009. The Bill states that credit institutions must apply within 30 days of the legislation coming into force to the Minister for Finance (the Minister) to participate in the NAMA process.

NAMA as a separate statutory body will have all necessary commercial powers of a financial asset management company (*for more detail see the Public and Regulatory Law ezine, August 2009*).

The Minister, after consultation with NAMA, the Governor of the Central Bank, and the Financial Regulator, has very broad powers to prescribe classes of bank assets as eligible for acquisition by NAMA. After listing various types of bank assets such as credit facilities used to finance the development of land, there is a catch all provision in the Bill which covers "any other class of bank asset of a participating institution the acquisition of which, in the opinion of the Minister, is necessary for the purposes of this Act." Participating institutions may challenge the proposed acquisition of a bank asset as an eligible bank asset through the review procedure set out in the Bill. However, the Minister will ultimately determine whether or not it is eligible.

NAMA will buy bank assets from the participating institutions at a discount (which the Minister has indicated will average around 30%) on the basis of valuations carried out by experts in accordance with a pre-defined valuation methodology. The Bill provides for an elaborate method of valuation and states that bank assets will be valued at their long term economic value (LTEV) (calculated in accordance with the provisions of the Bill and regulations to be issued by the Minister and European state aid rules). NAMA may, however, after consultation with the Minister, subject to any ministerial regulations and having regard to certain specified factors, determine that the acquisition value of a bank asset shall be its market value or a value (between its LTEV and its market value) that NAMA considers appropriate in the circumstances.

The valuation methodology along with all other State aid aspects of the NAMA initiative will be subject to European Commission approval. The payment for the loans will be in the form of Government debt securities and/or subordinated securities. The Bill provides that the participating banks will receive part of the payment for loans in the form of subordinated debt (debt that takes a lower priority than other debt) and NAMA will suspend payments due on that debt if it cannot realise the full value of properties underlying the loans.

Once acquired NAMA will manage the eligible bank assets to obtain the best achievable return from them and, in effect, will put itself in the place of the institution that originated the loan, and will have all the same rights to pursue debts, where necessary. NAMA has also been given specific statutory powers in order to facilitate enforcement of security/sale of assets, for example, a limited compulsory acquisition power on application to the High Court in certain circumstances; the power to appoint a statutory receiver; the power to obtain a High Court vesting order for land charged in its favour; to dispose of charged assets; and to convey land that has been mortgaged in its favour.



C&AG FÁS report

On 10 September 2009 the June 2009 Comptroller and Auditor General's report into advertising and promotion in FÁS was published. The report demonstrates serious deficiencies in financial controls in particular areas of FÁS. A further report is due to be issued which will, amongst other things, examine the arrangements for internal control and governance in FÁS. The main findings in the report were that:

- Advertising and promotional activities lacked strategic direction and there was a substantial breakdown in budgetary control in promotional expenditure in the period under review with expenditure exceeding budgets by 38%.
- Much of the advertising was ineffective in increasing an awareness of FÁS services.
- There was expenditure of €622,000 as a result of a series of transactions for which there was no evidence of goods or services having been provided. Gardaí have reportedly sent a file to the Director of Public Prosecutions in relation to this amount.
- There was considerable non-effective expenditure including over €600,000 spent on TV advertisements that were not broadcast.
- Internal financial control was insufficient to ensure that all commitments were recorded and captured, and that procurement was conducted in accordance with public service norms and within expenditure authorisation limits.

The findings suggest the need for adjustments to systems, procedures and practices employed by FÁS. New legislation is expected to be published shortly which will include a restructuring of the FÁS Board to reflect best corporate governance practice.

Proposals to strengthen financial supervision in Europe

On 23 September 2009 the European Commission adopted draft legislation to significantly strengthen the supervision of the financial sector in Europe. The stated aim of these arrangements is to sustainably reinforce financial stability throughout the EU; to ensure that the same basic technical rules are applied and enforced consistently; to identify risks in the system at an early stage; and to be able to act together more effectively in emergency situations and in resolving disagreements among supervisors.

The legislation will create a new European Systemic Risk Board (ESRB) to detect risks to the financial system as a whole with a critical function to issue early risk warnings to be rapidly acted on ("macro-prudential supervision"). It will also set up a European System of Financial Supervisors (ESFS), composed of national supervisors and three new European supervisory authorities for the banking, securities and insurance and occupational pensions sectors ("micro-prudential supervision"). There will be a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities and Markets Authority (ESMA) (which will exercise direct supervisory powers for credit rating agencies). The heads of the European Central Bank, national central banks, the European supervisory authorities and national supervisors, will participate in the ESRB. The new supervisory authorities will take over all of the functions of the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Committee (CEIOPS) and the Committee of European Securities Regulators (CESR) and also:

- develop proposals for technical standards, respecting better regulation principles;
- resolve cases of disagreement between national supervisors, where legislation requires them to co-operate or to agree;
- contribute to ensuring consistent application of technical Community rules (including through peer reviews);
- have a coordination role in emergency situations.

The proposals will now go to the European Parliament for discussion and the 27 EU member states for their approval. The EU aims to have the legislation in place in 2010.



Providing payment services: new authorisation regime

The Payment Services Directive 2007/64/EC (PSD) is due to be transposed by all EU member states by 1 November 2009 and will create an EU-wide single market for payments. That means that all domestic and cross-border payments made to and from EU states will be governed by the PSD. Currently the EU payment services market operates on a national level. The draft European Communities (Payment Services) Regulations 2009 which will implement the PSD in Ireland are currently being finalised by the Department of Finance.

The PSD aims to:

- make cross-border payments easier, more efficient and more secure;
- increase transparency through the mandatory provision of standard information about payment services;
- standardise the rights and obligations of customers.

The PSD establishes a new category of firm called a payment institution that must obtain prior authorisation from the relevant competent authority (the Financial Regulator in Ireland) before providing payment services. These are firms other than credit institutions and other regulated entities that provide payment services which provide one or more payment services, such as money remittance, facilitating deposits and withdrawals from bank accounts and certain services executed by means of any telecommunication, digital or IT device. Certain firms who provide payment services therefore including credit institutions and credit unions do not require authorisation although they must comply with certain provisions.

All payment service providers will also have to comply with the conduct of business rules in the PSD that enable payment services customers to compare prices. Under the PSD, information such as fees, currency conversion rates and so on must be made available and the Directive also sets out the rights of parties in relation to payment services and covers areas such as liability issues and disputes between them.

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