



Public & Regulatory Law Update

August 2009

NAMA: Draft legislation published

On 30 July 2009 the Irish Government published the draft text of the long awaited legislation to establish the National Asset Management Agency (NAMA) for public consultation (the National Asset Management Agency Bill 2009) (draft Bill). It is to be formally published as a Bill in the Dail in September and may be substantially amended. NAMA, in essence, will be set up by the Government to manage the bad debts of certain participating Irish banks.

Banking institutions must apply within 28 days of the legislation coming into force to the Minister for Finance (the Minister) to participate in the NAMA process. NAMA's power and functions will include:

- a. acquiring eligible bank assets from participating institutions as appropriate;
- b. holding, managing and realising those assets expeditiously but protecting and enhancing their long term economic value;
- c. performing such other functions relating to the management or realisation of those assets as provided for in the Act or as directed by the Minister;
- d. facilitating restructuring of credit institutions of systemic importance to the economy; and
- e. taking all steps necessary or expedient to protect, enhance and better realise the value of assets transferred to NAMA.

NAMA will be a separate statutory body with its own Board appointed by the Minister for Finance, with staffing and management services provided by the National Treasury Management Agency. It will have the power to establish subsidiaries; to operate through agents; to buy and sell assets; to manage loans and work with borrowers; to provide equity capital and credit facilities; to borrow, raise or secure payment of money in any manner; and to take full action in relation to debts owed.

NAMA will buy loans from the participating banks at a discount in order to take these riskier loan classes away from the balance sheets of the participating banks and make them more secure. This is the most controversial aspect of the draft Bill. NAMA will buy these loans on the basis of valuations carried out by experts in accordance with a pre-defined valuation methodology set out in the draft Bill. The banks' book value of the loans will not be a factor and the banks will have to recognise a loss on their books at the time of the transfer for the difference between the book value and the amount paid by NAMA.

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 securities and/or guaranteed securities.

NAMA is required to manage these loans to obtain the best achievable return from them and in effect will put itself in the place of the bank 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.

Please see the news section on the Beauchamps website for more detail on the draft Bill.



Health Insurance (Miscellaneous Provisions) Act 2009

Community rating: new definition

The recently enacted Health Insurance (Miscellaneous Provisions) Act 2009 (the “2009 Act”) amends the definition of community rating in the Health Insurance Act 1994 (the “1994 Act”) and states that it means measures which whether in whole or in part apply to towards the achievement of the principal objective specified in the new section 1A(1).

This definition is linked to the principle objective of the Minister for Health and Children and the Health Insurance Authority in performing their functions in the new section 1A of the 1994 Act. This new objective has at its core the principles of community rating and inter-generational solidarity and the 2009 Act provides that: “an insurer shall not engage in a practice or enter into an agreement which has as its object or effect the avoidance of the achievement of the principal objective.”

The use of the term “object or effect”, borrowed from the parlance of competition law, means that the jurisdictional reach of the 2009 Act could be quite extensive, embracing:

- practices or agreements which have as their object the impairment of the community rating system;
- practices or agreements which, although not ‘intentionally’ injurious to community rating, have the effect of avoiding the achievement of the principles set out in subsection 1.

This does not affect the operation of permissible discounts or the capacity of an insurer to apply late entry loadings.

New levy

In June 2009 the European Commission authorised a new interim levy scheme to replace the Government’s risk equalisation scheme which was struck down by the Supreme Court last year (*BUPA Ireland Limited and BUPA Insurance Limited v The Health Insurance Authority, Minister for Health and Children, Ireland and the Attorney General and the Voluntary Health Insurance Board [2008] IESC 42*) (for more detail see the *Public and Regulatory Law ezine*, October 2008).

The new levy is provided for in the 2009 Act and aims to ensure that the burden of the costs of health services are shared by insured persons. It provides for additional tax relief on health insurance premiums for those aged 50 or over on an incremental basis. It also introduces a new community rating annual levy payable to the Revenue Commissioners by health insurance companies until 2011 in relation to each person they insure: €160 for each adult and €53 for each child (under 18).



New complaints regime for pharmacists

The Pharmacy Act 2007 established the new Pharmaceutical Society of Ireland (PSI) and enhances and modernises the regulation of pharmacists and has been brought into force on a staged basis. The Act puts in place a modern fitness to practice structure aimed at safeguarding the public and members of the profession in respect of their professional conduct.

On 1 August 2009 the outstanding provisions of the Act which introduces a complaints, inquires and discipline regime for pharmacists and pharmacy businesses was commenced. Any complaints or disciplinary matters arising will be dealt with by the new PSI and anyone can file a complaint relating to a registered pharmacist on the grounds of:

- a. professional misconduct within or outside the State;
- b. poor professional performance within or outside the State;
- c. impairment of the registered pharmacist's ability to practise because of a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs;
- d. a failure to comply with a condition of registration;
- e. a failure to comply with an undertaking or to take any action specified in a consent given in response to a request under section 46 (in relation to resolving a complaint);
- f. a contravention of the Act or rules made by the Council of the PSI; or
- g. a conviction in or outside the State for certain offences.

Provisions in the Act which relate to the prohibition of certain economic relationships between pharmacists or pharmacies and medical practitioners or medical practices were also commenced on 1 August 2009 (except for those registered retail pharmacy businesses or medical practice which was lawfully carried out immediately before the passing of the Pharmacy Act 2007, the commencement date is 1 May 2010.)

Companies (Amendment) Act 2009

The Companies (Amendment) Act 2009 which aims to improve transparency and enhance company law enforcement came into force on 12 July 2009 (*for more detail see the Public and Regulatory Law ezine, April 2009*).

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