

ENERGY UPDATE

Legislation update: Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010


New legislation (the Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010) has provided for the introduction of a carbon levy in Ireland from 1 July 2010. Pursuant to the requirements of the Emissions Trading Directive 2003 electricity generators receive an annual allocation of carbon allowances. Up to now these credits have been provided free; and generators have earned a monetary return on these credits. The levy seeks to recover these gains and will remain in place until the end of the current round of the emission trading scheme in 2012.

The new legislation sets out how the levy will be calculated and paid. As the levy is emission based, it will not apply to renewable electricity generators with no carbon emissions. The levy will be collected and managed by the Commission for Energy Regulation (CER). Commenting on the introduction of the Act, Minister Ryan indicated his intent to use funds raised by the levy to help protect the competitiveness of Irish enterprise by reducing electricity costs. The Minister also stated that as the levy is emissions based it will provide a boost for competitiveness of the renewable energy sector.


European Commission infringement proceedings against Ireland for violation of the Electricity and Gas Regulations

The European Commission has announced that it will continue with its infringement proceedings against 20 Member States, including Ireland, for violations of the Electricity and Gas Regulations. The European Commission acknowledged that some of the violations had been remedied since infringement proceedings were initiated against Ireland in June 2009, however a number of important issues remained to be addressed. In relation to the Electricity Regulation 1228/2003, the European Commission cited the lack of an intraday congestion management mechanism at all interconnections and a common co-ordinated congestion management method. As regards the Gas Regulation 1775/2005, the European Commission's concerns are that no interruptible reverse flow capacity (backhaul) is offered at all interconnection points and that the relevant points of the transmission system have not been approved by the competent authorities. The European Commission requested that the national regulatory authorities take action to ensure compliance with these concerns. Ireland could potentially face legal action and heavy fines if it fails to remedy the violations.

CER is expected to issue its decision paper on licensing later this year.



Growth in renewable energy and fall in electricity and gas prices



The Sustainable Energy Authority of Ireland's latest report in May 2010 reveals that 14.4% of electricity was generated from renewable sources in 2009. Wind continues to be the main source of renewable electricity accounting for two thirds of the 2009 figure. The report also revealed that that Irish electricity and gas prices fell in the second half of 2009 for all consumers. However, in absolute terms Irish electricity prices remain 7% above the EU average.



Legislative update: Planning and Development (Amendment) Act 2010

The Planning and Development (Amendment) Act 2010, the most significant overhaul of planning law since the introduction of the Planning and Development Act 2000. The new Act was signed into law on 19 July 2010. A number of the provisions of the Act were commenced in August and September. The remaining provisions of the Act are to be enacted at a later date. For the Irish wind energy industry, the Act contains a number of important new provisions relating to the permitting of wind farms.




Extension of planning permission

The risk a planning permission would expire while a proposed wind farm is awaiting consents and authorisations has long been an issue of concern for wind farm developers. Under the 2000 Act an extension to a planning permission was only available where substantial works had been carried out on foot of the permission. The new Act allows for a single extension to a planning permission for up to 5 years. Wind farm developers who have yet to commence work must show that there were commercial, economic or technical issues beyond their control which substantially militated against either the commencement of development or the carrying out of substantial works pursuant to the planning permission. In order to avail of an extension there must have been no significant changes to the development objectives of the development plan or regional planning guidelines that would render the planning permission inconsistent with the proper planning and sustainable development of the area. In addition, the planning permission must be consistent with any guidelines issued by the Minister. In cases where the development has not commenced, an environmental impact assessment, or an appropriate assessment (as required under the EU Habitats Directive), or both, must have been carried out before the permission was granted.


Lower threshold for strategic infrastructure

The Strategic Infrastructure Act 2006 introduced a more streamlined planning process for strategic infrastructure developments, with applications made directly to An Bord Pleanala, bypassing the need for consent from the local planning authority. The 2010 Act will provide for the lowering of the thresholds as to size of wind farm that is considered a strategic infrastructure




development. Wind farms with more than 25 turbines or a total output of greater than 50 MW will now be able to apply directly to An Bord Pleanála for planning permission. This section of the Act has yet to be commenced.

Ministerial guidelines




The Act requires planning authorities to implement any guidelines issued by the Minister. This will mean that planning authorities will be under a legal obligation to include renewable energy strategies in their development plans. For example, planning authorities will be required to implement the provisions for selecting strategic sites for wind farm developments as set out in the *Wind Energy Guidelines for Planning Authorities 2006*.

Foreshore licensing laws to be reformed



The Minister for the Environment, John Gormley, has recently stated his Department is preparing new legislation to revise the Foreshore Act 1933 is being prepared. Speaking at Irish Wind Energy Association conference on 30 September 2010, the Minister indicated the new legislation will transfer responsibility for foreshore licensing to An Bord Pleanála for projects of a certain size. A marine spatial plan, which will inform planners and help to avoid conflicting uses of sea areas will also be drawn up.



The Foreshore Acts 1933-2009 require that developers must obtain a foreshore licence in order to assess the suitability of a stated-owned foreshore site in connection with the construction offshore wind or wave energy farm. A foreshore lease is required for the construction of an offshore wind or wave energy farm. At present the Minister is responsible for the granting of foreshore licenses and leases, and there is no statutory limit on the time afforded to the Minister in processing such applications. The Minister confirmed that at present there is a backlog of some 700 foreshore lease and licence applications with his Department.

The new legislation, according to the Minister will give "*greater certainty of timeframes, including mandatory pre-application consultations, a rigorous assessment of environmental impacts, and full public participation*".

The proposed legislation if enacted, is likely to have significant impact on the development of offshore renewable energy in Ireland.

Philip Lee is one of Ireland's leading law firms. We advise on all legal aspects of energy projects. Our expertise in electricity, oil and gas industries is complemented by our special focus on the renewable energy sector. See reverse for further information.

Our Principal Contacts:



Name: Philip Lee **Practice Areas:** Procurement and competition law, PPPs, property, construction, energy, trade and WTO. **E-mail:** plee@philiplee.ie **Role:** Managing and Founding Partner

Philip is a recognised leader in the areas of procurement, energy and construction law advising on the largest public infrastructure and utilities projects, including the East-West Electricity Interconnector. Philip also has particular expertise in the oil and gas sectors arising from his prior experience as in house counsel for a major energy company. His specialisation in the regulatory and competition aspects of renewable energy encompasses advice on the Poolbeg Waste to Energy project, onshore and offshore wind farms, and bioenergy projects.



Name: Andreas McConnell **Practice Area:** Energy, technology, corporate and commercial, banking and finance **E-mail:** amcconnell@philiplee.ie **Role:** Partner

Andreas, who joined the firm in January 2009, brings considerable transactional expertise to the group. Since joining he has advised on the trade sale of two wind farm companies and he is currently advising on a number of renewable energy transactions including trade sales and project financings.

Andreas recently addressed the last Meitheal na Gaoithe annual conference on the topic of how to trade sale a wind farm company / project finance a wind farm development.



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Alice leads the firm's environmental and planning group. She has advised extensively on a range of transport, energy, environmental and marine projects including the Dublin Waste to Energy project, wind farms, bioenergy projects, Greystones Harbour and Marina PPP; various waste infrastructure projects; social and affordable housing and urban regeneration projects; road and tunnel projects; the East-West Electricity Interconnector project and a proposed sub-sea marine observatory project.