

The Onward Commercialisation of the Irish Ports

The Harbours (Amendment) Act 2009 introduces further liberalisation and commercial opportunities for the commercial ports. We highlight the principal changes.

The Harbours Act 1996 enacted the first major revision of Irish harbours' legislation since the 1940s. Prior to that Act Ireland's 26 State owned ports operated as harbour authorities under the Harbours Act 1946 and were essentially run as public utilities by harbour commissioners, many of whom were nominated by local authorities, chambers of commerce and others representative of port user interests. Central to the reforms introduced by the 1996 Act was the introduction of a legislative framework for establishing a top tier of State owned commercial companies incorporated under the Companies Acts to own and manage the principal commercial Ports of Dublin, Cork, Shannon, Foynes, Dun Laoghaire, Waterford, Dundalk, Galway, Drogheda, New Ross, Arklow and Wicklow. (Rosslare Port is excluded from the 1996 and 2009 Acts and continues to be governed by private legislation of the Victorian era under the aegis of Iarnród Eireann). Given that Ireland, of all the countries in the EC, is the most heavily dependant on external trade the State policy underpinning the Harbours Act 1996 reflected the importance of fostering a competitive and commercial regime within the Irish ports sector by removing operational State control of the principal commercial ports. After a decade of operating within the commercial environment introduced by the 1996 Act the majority of the commercial ports have adapted to the new commercial environment and have developed from being essentially public utilities with unclear mandates to enterprises with clear and defined commercial objectives. By implementing the Government's policy as set out in its Ports Policy Statement of 2005, the Harbours (Amendment) Act 2009 ("the 2009 Act") compliments and expands upon the commercial mandate given to the commercial ports under the 1996 Act and removes the local authority and port user representation at Board level, which had constrained the ports' commercial ambitions. As with much legislation which has a commercial impact, the 2009 Act was preceded by a fulsome consultation process with the port sector stakeholders including the Irish Ports Association whose members include the Irish commercial port companies. The 2009 Act became law on 21 July 2009. Here we focus on the principal changes introduced by the 2009 Act.

Scope of Activities of Port Companies

The scope of activities which may be undertaken by port companies has been extended by Section 5 to permit port companies to invest in or engage in commercial activities outside the limits of their respective harbours subject to obtaining Ministerial consent. Under the 1996 Act the port companies were constrained in that they could only engage in business activities which were advantageous to development within their harbours. Port companies may now participate in a range of commercial ventures with other harbour companies, local authorities and private enterprises outside of their harbour limits, including ventures overseas. Thusfar there has been little appetite for establishing cross border joint ventures between port companies. However, as traffic volumes within the Irish ports decline, port companies are now empowered to make strategic external investments with a view to benefiting from such investments when the economy recovers.

Borrowing by Port Companies

Section 9 introduces flexibility to enable the port companies to borrow funds to finance a number of strategically important capital projects. Under the 1996 Act the amount of borrowings of a port company was capped at 50% of the value of its fixed assets. Borrowings may now exceed this threshold where Ministerial consent is obtained, provided that total borrowings do not exceed €200m.

Implementing Government policy on land acquisitions by Port Companies

Under Section 6 port companies are now subject to a legal obligation to have regard to Government policy or guidelines in relation to both the disposal and the acquisition of land and the consideration thereof. Under the 1996 Act, port companies were only required to have regard to Government policy or guidelines in relation to the acquisition of land. Notwithstanding this, port companies were, and continue to be, expected to adhere to the corporate governance principles in the Code of Practice for the Governance of State Bodies which addresses both land acquisitions and disposals. It remains to be seen whether the An Bord Snip Nua Report will be adopted as Government policy. If it is adopted as Government policy port companies will be required to adhere to its policies in respect of land disposals and acquisitions.

The Removal of Local Authority Representation and User Representation on the Boards of Port Companies

Sections 8 and 11 have repealed the provision contained in the 1996 Act and the Port Companies (Appointment of Local Authority Directors) Regulations 1996 (SI 335 of 1996) whereby the Minister for Transport was required to appoint three directors of a port company as nominated by the local authority in which the port company was situated and in neighbouring local authorities. The repeal of local authority and user representation is central to the liberalisation of the Irish commercial ports. Given their role and status as commercial entities the Government regards it as being essential that the boards of the port companies be smaller and more focused on the achievement of commercial objectives and well being of the port company alone. The former requirement for significant local authority representation was regarded as being inconsistent with Government policy and the 2009 Act gives effect to this policy. Those practitioners with an interest in history will be aware that the harbour authorities, which preceded the commercial port companies, were founded in the Georgian/early Victorian era and evolved in tandem with the local chambers of commerce. As a result it became common practice, and later a legal requirement of the 1946 Act, for harbour authorities to have commercial, user and local authority representation on their boards. By removing local authority and user representation this characteristic of the ports for upwards of 300 years has been severed. As a result, the maximum number of directors who may be appointed to the Board of a port company has been reduced from 12 to 8. Consequential changes are made to the model form of Articles of Association of port companies which will require implementation by special resolution of each of the port companies.

Employee Directors

With a view to deducing the size of the boards of port companies Section 11 has reduced the number of staff elected directors of port companies from two to one, irrespective of the number of staff employed by the port company. Under the 1996 Act where the number of a port company's employees was between 30 and 50 it was

required to hold an election for the appointment of one member of staff as a director of the company. Where the number of employees exceeded 50, an election for the appointment of two employees to the board was required. In addition to reducing the number of worker elected directors from two to one the 2009 Act introduces helpful averaging provisions in recognition of the fact that the number of employees may rise above or fall below the trigger number of 30 during the course of a year. An election is now only required where the average number of the employees will remain in excess of 30 in the following accounting year. Under the former law, an election was required if the threshold was attained at any point in time even if it was envisaged that the workforce would fall below the threshold level immediately after the election result was announced. In determining the number of a port company's employees those members of staff employed in subsidiary companies are not to be aggregated with the employees of the port company itself. For example, where a port company employs 29 members of staff directly and a further 2 are employed in a subsidiary, no election is required, whereas if all of the 31 staff were directly employed in the port company an election is required. Surprisingly, the 2009 Act has not addressed this issue. For those port companies whose employees are below 30 and consequently no election is required, the Minister for Transport is required to appoint a person who in the Minister's opinion is representative of the interests of the employees of the company and in this regard the Minister is required to consider any recommendations of nominees made by any relevant recognised trade union or staff association. Such a person need not be an employee of the port company.

Directors' Qualifications

In an effort to prevent conflicts of interest at Board level, the 2009 Act precludes the appointment and or nomination of certain persons as directors such as a person who has provided a "significant commercial service", to the port company during the previous 3 years.

Pilotage Exemption Certificates

Section 15 gives effect to recent changes in International Maritime Conventions which extend the range of persons who may be issued with a pilotage exemption certificate under Section 72 of the 1996 Act. The holder of a pilotage exemption certificate is exempt from compulsory pilotage within the whole or part of a port company's pilotage district. Before such a certificate is issued the port company must be satisfied that the holder is in possession of the skill, experience and local knowledge sufficient to enable the holder to pilot the ship within the relevant area of the company's pilotage district.

Reorganisation of pilotage services

The 2009 Act implements the advice of the Attorney General by closing off a lacuna under the 1996 Act whereby those harbour authorities which were not incorporated under the 1996 Act and which remain subject to the 1946 Act had no power to organise and ensure the provision of pilotage services including the making of bye-laws in relation to pilotage services.

Braemore Port

Section 3 alters the harbour limits of Drogheda Port Company in order to facilitate the construction of a new port at Braemore in North County Dublin. The change to the harbour limits is being effected by a retrospective change to the 1996 Act. These changes had previously been made by the Minister under statutory instruments passed under Section 9 of the 1996 Act which are now revoked. The power of the Minister to alter a company's harbour limits under Section 9 of the 1996 Act has also been clarified in the 2009 Act to take account of case law developments in *Cityview Press Limited – v – An Chomhairle Oiliunna* [1980] IR 381 and *Mulcreavy – v – Minister for Environment, Heritage and Local Government* [2004] 1 ILRM 419 concerning the extent to which a Minister may by statutory instrument effect changes to primary legislation. Following advice from the Attorney General that the 1996 Act did not contain sufficient principles and policies to allow the harbour limits to be altered by Ministerial order, Section 9 has now been amended to include sufficient principles and policies to satisfy the requirements identified in the above cases.

Arklow Harbour

The 1996 Act envisaged and provided for the incorporation of Arklow Harbour. This is no longer warranted and Section 17 amends the 1996 Act to facilitate the reversion of Arklow Harbour from being a port company governed by the Companies Acts 1963 to 2009 to local authority control.

Bantry Bay, Tralee and Fenit Harbours

Section 18 makes provision for the transfer by ministerial order of Bantry Bay Harbour to Port of Cork Company and Tralee and Fenit Harbours to Shannon Foynes Port Company in the event that it is determined that there is significant commercial traffic within these harbours. However, flexibility is maintained to provide for their possible reversion to local authority control or to local port company control. No such transfer may take place unless a public consultation process is undertaken in accordance with the Section.

Transfer of Ministerial CPO powers to An Bord Pleanala

Port companies were conferred by the 1996 Act with powers of compulsory acquisition of land within their harbour limits. Section 7 of the 2009 Act transfers the CPO functions exercisable by the Minister for Transport to An Bord Pleanala. This transfer is similar to that made by the Planning and Development (Strategic Infrastructure) Act 2006 with regard to the CPO powers of Dublin Airport Authority.

The Future

Given that the Government expects that the commercial port companies should be capable of funding their operations and infrastructural requirements without relying on Exchequer support, the 2009 Act provides for the necessary legal environment to encourage the port companies to develop sources of revenue from other avenues such as private sector investment. Notwithstanding the 2009 Act's focus on individual port responsibility it is likely that amalgamations and mergers of port companies, and even the possibility of privatisation of port companies, will feature as the current economic climate and contraction of exports bring further commercial challenges to the ports sector. The Government has indicated that the case for amalgamations will be accepted

where the proposals demonstrate the potential to reduce costs, create synergies and opportunities for more dynamic development, marketing, product delivery and critical mass. The case for amalgamations has already been made and implemented in relation to Foynes Port Company and Shannon Estuary Port Company which were amalgamated to form Shannon Foynes Port Company. It will be interesting to see if other port companies follow suit. The firm represented the Irish Ports Association in its submissions to the Department of Transport on the Harbours (Amendment) Bill 2008. For further information contact Sean Nolan at snolan@mjoc.ie.