



KNAB

# Country Profile Ireland

Raising the Institutional and Professional Capacity of the Corruption Prevention  
and Combating Bureau

8 June 2006

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Ref  
Version 2  
Date 2006-06-08  
Prepared by CASS  
Checked by  
Approved by CASS

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## **Table of contents**

|            |  |          |
|------------|--|----------|
| <b>1.</b>  | <b>General information on the legal system</b>                     | <b>1</b> |
| <b>1</b>   | <b>Sale and Lease of Public Real Estate</b>                        | <b>2</b> |
| <b>1.1</b> | <b>Sale and Lease of State Owned Real Estate</b>                   | <b>2</b> |
| <b>1.2</b> | <b>Sale and Lease of Municipally Owned Real Estate</b>             | <b>3</b> |
| <b>1.3</b> | <b>Penal Rules Pertaining to Corruption</b>                        | <b>3</b> |
| <b>1.4</b> | <b>Squandering</b>   | <b>5</b> |
| <b>1.5</b> | <b>Alienation</b>  | <b>5</b> |
| <b>2</b>   | <b>Procurement Related Issues</b>                                  | <b>6</b> |
| <b>2.1</b> | <b>Liability for Public Employees</b>                              | <b>6</b> |
| <b>2.2</b> | <b>The Complaint Mechanisms / Enforcement of Procurement Rules</b> | <b>7</b> |
| <b>2.3</b> | <b>Thresholds for Application of Procurement Rules</b>             | <b>8</b> |
| <b>2.4</b> | <b>Framework Contracts in Procurement</b>                          | <b>8</b> |

## **1. General information on the legal system**

The Republic of Ireland is a sovereign independent State. It is a liberal democracy with a parliamentary system of government. It comprises approximately 80% of the island of Ireland and is a member of the European Union. The territory concerned by this report is the 26 county Republic of Ireland. The 1937 Bunreacht na hEireann ("Irish Constitution") sets out the broad principles which underpin the Irish legal framework.

Ireland is a common law jurisdiction. This means that there are two main bodies of law, legislation and common law. Common law is the term given to the body of law which has been developed by the judiciary over the last nine centuries and is of binding precedent. Legislation remains a more authoritative source if it covers the particular area concerned. The interpretation of legislation by the Courts, nevertheless, is of binding precedent.

In Ireland decisions of a higher Court must be followed by a lower Court. This is to be contrasted with the civil law system which has a much more comprehensive legislation, which attempts to deal with every legal contingency, and where the previous decisions of the Courts are not as important.

Higher Courts can overrule as they please but in practice there is deference to lower Courts' decisions. It is very rare that Courts of similar jurisdiction overrule previous decisions, instead preferring to 'distinguish' previous decisions.

Cases from other jurisdictions are not binding on the Irish Courts but can, in certain instances, provide persuasive authority. Decisions of the European Court of Justice are binding on the Irish Courts.

Legislation may be introduced to deal with any issues which a judicial decision creates or to circumvent the effect of a judicial decision. This happens occasionally when a Court rules a law unconstitutional or criticises a law and applies it strictly, against the intention of the legislature.

In non-criminal (i.e. civil) cases the rules of evidence declare that the plaintiff must prove his case 'on the balance of probabilities'. This can be contrasted with the criminal Courts where the prosecution must prove its case 'beyond a reasonable doubt'. There is a sizeable difference between the two standards of proof. The reason for the difference is that liberty is not at stake in civil trials.

The Irish Court system is governed by the Courts (Establishment and Constitution) Act 1961 and the Courts (Supplementary Provisions) Act 1962. Articles 34 to 37

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<sup>1</sup> No. 38 of 1961.

of the Irish Constitution provide an outline of the essential elements of the Court system.

The appellate process in Ireland is a single instance model. A District Court decision may be appealed the Circuit Court. A Circuit Court decision may be appealed to the High Court and a High Court decision may be appealed to the Supreme Court. Except in the first case, this is not an automatic right and leave to appeal needs to be granted.

## **1 Sale and Lease of Public Real Estate**

In general, the State owns most land and property that is occupied by State organisations. This land is either owned by a State body corporate such as a local authority or, in the case of central government, by the Minister of the relevant government department, as a corporation sole<sup>3</sup>. These organisations can usually deal in land<sup>4</sup>, although the consent of the Minister for Finance is generally required to do so. The State also owns large amounts of land which are open to the public ranging from small parks to large national parks.

There appear to be no statistics available in relation to the distribution of property between public and private ownership. However, the vast majority of land in Ireland appears to be privately owned by either individuals or body corporates. There are provisions in the 1937 Bunreacht na hÉireann (Irish Constitution) which protect a person's right to own land<sup>5</sup>.

The State is the ultimate owner of all land should no other owner be found or exist. The rationale for this is that all land must be owned by someone. The Succession Act 1965<sup>6</sup> deems the State as the ultimate intestate successor<sup>7</sup>. The State Property Act 1954<sup>8</sup> deems the Minister for Finance the owner of all land formerly owned by dissolved corporate entities.

### **1.1 Sale and Lease of State Owned Real Estate**

A number of guidelines on the conduct of those in public office have been issued by the State. The most relevant one to property is the 1994 Guide to Public Procurement in Ireland ("**Green Book**") issued by the Department of Finance.

The focus of the Green Book is on the procedures which should be followed by government departments, local and regional authorities and other bodies dependent on State funding, in the award of public sector contracts (including the acquisition, let-

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<sup>2</sup> No. 39 of 1961.

<sup>3</sup> Ministers and Secretaries Act 1924 (No. 16 of 1924), s.2(1).

<sup>4</sup> This depends on the statutory basis of the organisation and the powers given to it under the relevant legislation.

<sup>5</sup> For instance, Article 40.3.2 and Article 43.

<sup>6</sup> No. 27 of 1965.

<sup>7</sup> Section 73.

<sup>8</sup> No. 25 of 1954.

ting and the disposal of public property), once any other required formal approvals have been obtained.

The key principle underlying the Green Book is that a competitive tendering process should always be used, unless exceptional circumstances apply. The Green Book requires that the disposal or letting of property should be dealt with by competitive tendering or by auction. The prior approval of the Department of Finance must be obtained for any departure from this general principle.

The Green Book has been gradually supplemented and updated in an ad hoc manner by various further guidelines and circulars. In particular, the guidance in the Green Book in relation to competitive processes was updated in 2004, in respect of the procurement of supplies and services, by the Public Procurement Guidelines – Competitive Processes ("**2004 Public Procurement Guidelines**"). While the latter guidelines are not expressed to apply to the disposal or letting of property, it seems that the guidance contained in them may still be relevant in this respect.

In addition to the above, if applicable, the public procurement directives and the provisions of the EC Treaty including, in particular, the state aid and free market provisions must be complied with.

### **1.2 Sale and Lease of Municipally Owned Real Estate**

The Green Book and the 2004 Public Procurement Guidelines also apply to municipal bodies such as local authorities which are dependent on State funding. Consequently, the principles outlined in section 1.1 apply equally to the sale and lease of municipally owned real estate.

### **1.3 Penal Rules Pertaining to Corruption**

The penal rules pertaining to corruption are contained in the Prevention of Corruption Acts 1889-2005<sup>9</sup> ("**Corruption Acts**"). The Corruption Acts are designed to prevent and prohibit the commission of corrupt acts by holders of public office or public servants.

The Corruption Acts provide that it is an offence for a person to corruptly solicit or receive or agree to receive, for himself or any other person, any gift, loan, fee, reward or advantage whatever as an inducement to, or reward for, or otherwise on account of, any employee or office holder of a public body doing or forbearing to do anything in respect of any matter or transaction whatever, actual or proposed, in which the said public body is concerned.

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<sup>9</sup> These acts are the Public Bodies Corrupt Practices Act 1889 (52 & 53 Vic. c. 69), the Prevention of Corruption Act 1906 (6 Edw. 7. c. 34), the Prevention of Corruption Act 1916 (6 & 7 Geo. 5. c. 64), the Ethics in Public Office Act 1995 (No. 22 of 1995), the Prevention of Corruption (Amendment) Act 2001 (No 27 of 2001) and the Proceeds of Crime (Amendment) Act 2005 (No. 1 of 2005).

Similarly, it is an offence under the Corruption Acts for any person to corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatever to any person, whether for their benefit or the benefit of another person, as an inducement to, or reward for, or otherwise on account of an employee or office holder in a public body, doing or forbearing to do anything in respect of any matter or transaction whatever, actual or proposed, in which such public body is concerned.

Any person summarily convicted of these offences is liable to a fine not exceeding €1,270 and/or imprisonment for a term not exceeding 12 months. Any person convicted on indictment is liable to a fine not exceeding €50,000 and/or a term of imprisonment not exceeding 7 years. If the conviction is on indictment, a court may make a number of further orders including an order to pay to the relevant public body the amount or value of the gift etc. received and an order preventing the person from holding public office.

It is also an offence under the Corruption Acts for an agent, as defined in the Corruption Acts, to corruptly accept or obtain, or corruptly agree to accept or attempt to obtain, for himself or herself, or for any other person, any gift, consideration or advantage as an inducement to, or reward for, or otherwise on account of, the agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business.

The Corruption Acts similarly provide that it is an offence for any person to corruptly give or agree to give, or to offer any gift or consideration to an agent or any other person, whether for the benefit of that agent, person or another person, as an inducement to, or reward for, or otherwise on account of, the agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business.

Any person summarily convicted of these latter offences is liable to a fine of up to €3,000 and/or imprisonment for a term not exceeding 12 months. Any person convicted on indictment is liable to an unlimited fine and/or a term of imprisonment not exceeding 10 years.

Under the Corruption Acts, an agent includes anybody employed by or acting for another, whether in the public or private sector. This includes the vast majority of persons including all politicians, judges, civil and public servants and this definition does not limit itself to Ireland.

There is a rebuttable presumption in the Corruption Acts that any undisclosed political donation is a corrupt donation. There is also a further rebuttable presumption that where any gift, consideration or advantage has been given to a person by another with an interest in the discharge of the functions of that person that such gift, consideration or advantage was given and received corruptly. This latter presumption applies to the carrying out of certain functions by Ministers, their servants and persons employed by or acting on behalf of the public administration of the State. It

is expressed to apply, in particular, to the making of any decisions relating to the acquisition or sale of property.

In addition to the above, corruption in office is also an offence under the Corruption Acts. There is further legislation which may also be relevant including the Ethics in Public Office Act 1995<sup>10</sup> and the Proceeds of Crime Act 1996<sup>11</sup> as well as other statutory, common law and equitable tools which can be employed in circumstances of corruption and fraud. The Proceeds of Crime Act 1996, in particular, enables the State to seize the proceeds of criminal conduct which may include the commission of corrupt acts.

#### **1.4 Squandering**

The office of the Comptroller and Auditor General has a number of functions which are designed to ensure the efficient spending of public money. The Comptroller and Auditor General is a constitutional officer who holds office under Article 33 of the Irish Constitution. The role of office is to:

- audit and report on the accounts of public bodies;
- establish that transactions of public bodies are in accordance with the legal authorities governing them and that funds are applied for the purposes intended;
- provide assurance on the system of internal financial control put in place by each body; and
- examine whether each body administers its resources economically and efficiently and has mechanisms in place to evaluate the effectiveness of operations.

The Irish press, media and general public have extensive rights of access to public records under the Freedom of Information Acts 1997 and 2003 which may deter the squandering of public money.

Also, the civil (non-criminal) action of misfeasance in public office may be relevant<sup>12</sup>. This tort covers situations where an administrative action is *ultra vires* and the act is either actuated by malice (*e.g.*, personal spite or a desire to injure for improper reasons) or if the authority knows that it does not possess the power which it purports to exercise. An action for damages lies in these situations. The offences mentioned above in section 1.3 may also act as a deterrent.

In the event of squandering occurring at public office, it is conceivable that certain other legislative, common law and equitable tools could also be used to counter-act and prosecute such.

#### **1.5 Alienation**

The rules in relation to alienation of public land are determined by ownership and the Department of Finance public procurement guidelines as outlined above<sup>13</sup>.

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<sup>10</sup> No. 22 of 1995.

<sup>11</sup> No. 30 of 1996.

<sup>12</sup> See, for instance, *Pine Valley Developments Ltd v Minister for the Environment* [1987] ILRM 747.

<sup>13</sup> See section 1.1

Any public body with the statutory power to own and deal in land in Ireland may do so. The precise nature of their powers depends on the statutory framework under which it is set up.

## **2 Procurement Related Issues**

The old public procurement directives<sup>14</sup> were implemented in their entirety in Ireland by means of statutory instruments.<sup>15</sup>

The new procurement directives<sup>16</sup> have not yet been implemented by Ireland. It is anticipated that the public sector directive will be implemented shortly. The manner of implementation will be by statutory instrument but will be different to the manner of implementation of the old directives. The new draft regulations set out a full transportation of the rules in relation to public sector contracts and we understand that the same will be done in respect of the new utilities directive.

### **2.1 Liability for Public Employees**

There is no procurement specific liability, either civil or criminal, for employees of contracting authorities who do not follow the public procurement rules.

A public employee who acts in breach of the legislation mentioned in sections 1.3 above may be found guilty of a criminal offence if prosecuted. Also, public employees are required to obtain best value for money and to apply the various government guidelines and circulars which govern public procurement. The sanctions for non-compliance may vary from warnings to, in extreme cases, summary dismissal.

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<sup>14</sup> Directive 92/50/EC, Directive 93/36/EC, Directive 93/37/EC and Directive 93/38/EC.

<sup>15</sup> European Communities (Award of Public Service Contracts) Regulations 1993 (S.I. No. 173 of 1993), European Communities (Award of Contracts by Entities operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1995 (S.I. No. 51 of 1995).

<sup>16</sup> Directive 2004/18/EC and Directive 2004/17/EC.

## 2.2 The Complaint Mechanisms / Enforcement of Procurement Rules

There are various remedies by which an aggrieved party may attempt to challenge an alleged breach of public procurement legislation. These remedies arise under the Remedies Directives<sup>17</sup> as implemented in Ireland and under other sources of law.

The Remedies Directives are implemented in Ireland through statutory instruments<sup>18</sup>. The High Court is appointed the competent authority for the purpose of these directives. The High Court is the highest court of first instance in Ireland and second only to the Supreme Court, which is the court of final appeal in Ireland.

There are special rules of court which implement the procurement remedies. Order 84A of the Rules of the Superior Courts is the mechanism through which a party may challenge the award of a public contract. The High Court has the power to grant interlocutory and other types of injunctions, to award damages against the awarding authority and to set aside unlawful decisions of any awarding authority.

The High Court maintains very strict procedural rules for dealing with challenges in the area of public procurement. It is very important that a party challenging the decision of a contracting authority to award a public contract first notifies the contracting authority of its complaint and secondly, sticks to the strict time limits in Order 84A. Non-compliance with either of these requirements may result in the rejection of any complaint to the High Court.

The time limit is three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period. The Courts try to stick rigidly to the three month deadline and there must be a compelling argument to get an extension. To satisfy the Court that delay beyond the three month limit is excusable it is necessary to show that there are reasons which explain the delay and offer an excuse for the delay<sup>19</sup>. This is a very high standard to meet.

It is possible for a complainant to institute proceedings against a contracting authority even though the bid has been selected and the contract between the contracting authority and the winning bidder has been signed. There are different rules in Ireland under the General Remedies Regulations and the Utilities Remedies Regulations.

Under the General Remedies Regulations, the High Court has the power to declare the relevant contract or any of its provisions void. It may also declare that the contract may have effect only subject to such variation as the Court thinks fit. Finally,

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<sup>17</sup> Directive 89/665/EC (General Remedies Directive) and Directive 92/13/EC (Utilities Remedies Directive)

<sup>18</sup> European Communities (Review Procedures for the award of Public Supply and Public Works Contracts)(No. 2) Regulations 1994 (S.I. No. 309/1994) (“**General Remedies Regulations**”) and the European Communities (Review Procedures for the award of Contracts operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1993 (S.I. No. 104/1993) (“**Utilities Remedies Regulations**”)

<sup>19</sup> See *Dekra Teoranta Eireann v Minister for Environment and Local Government* [2003] 2 ILRM 210

the Court may make any order in relation to the contract as it sees fit<sup>20</sup>. Under the Utilities Remedies Regulations, the Court may only award damages in the case of a contract already being awarded.

In addition to the remedies provided for in the directives there are a number of other legal routes that the aggrieved persons can take to challenge an award of a public contract.

The award can be subject to a judicial review. In this situation the award can be reviewed judicially for administrative "unreasonableness". This is a very high threshold to meet but is sometimes achievable. There may be remedies available under the law of contract. This depends on the text of the actual tender document or the request for proposal. The aggrieved party may also complain to the European Commission who may investigate and/or take appropriate action. It may also be possible to take a civil (non-criminal) case for misfeasance in public office<sup>21</sup> or for breach of statutory duty. Depending on the circumstances of the award it may also be possible to take a competition law course of action or certain other courses of action.

### **2.3 Thresholds for Application of Procurement Rules**

The thresholds for the application of procurement rules under the new public procurement directives have recently been changed by Commission Regulation No. 2083/2005. This regulation has not been implemented by Ireland but is directly applicable. The new directives have not yet been implemented in Ireland.

The thresholds under the old procurement directives are those which apply under the relevant directives as amended.

Contracts which are below the applicable procurement thresholds must still comply with any applicable provisions of the EC Treaty.

The Green Book and 2004 Public Procurement Guidelines set out the procedures and principles which must be applied and adhered to if a contract falls outside the ambit of the procurement directives. These guidelines suggest that less formal procedures may be appropriate for low value contracts. Even if a contract falls outside the ambit of the directives, the Department of Finance suggests that contracts which are in excess of €50,000 should generally be advertised as part of a formal tendering process. It is the policy of the government to encourage that all public contracts follow the principles which are enunciated in the directives *i.e.*, transparency, equal treatment and competition.

### **2.4 Framework Contracts in Procurement**

The use of framework contracts has been limited to date. However, it appears that there has been a recent increase in their use and that this trend is continuing. The

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<sup>20</sup> General Remedies Regulations, Article 6.

<sup>21</sup> Discussed above at para 1.5

clarity in relation to the use of framework agreements provided by the new procurement directives are likely to further increase this trend.