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NATIONAL DEVELOPMENT FINANCE AGENCY ACT, 2002

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Acts Referred to

Companies Act, 1963	1963, No. 33
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Comptroller and Auditor General (Amendment) Act, 1993	1993, No. 8
European Parliament Elections Act, 1997	1997, No. 2
Finance Act, 1970	1970, No. 14
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Health Act, 1970	1970, No. 1
Housing (Miscellaneous Provisions) Act, 2002	2002, No. 9
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NATIONAL DEVELOPMENT FINANCE AGENCY ACT, 2002

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF A BODY TO BE KNOWN AS AN GHNÍOMHAIREACHT AIRGEADAIS D'FHORBAIRT NÁISIÚNTA, OR IN THE ENGLISH LANGUAGE, THE NATIONAL DEVELOPMENT FINANCE AGENCY AND TO DEFINE ITS FUNCTIONS AND TO PROVIDE FOR CONNECTED MATTERS.

[19th December, 2002]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—(1) In this Act, except where the context otherwise requires— Interpretation.

“Agency” means the National Development Finance Agency established by *section 2*;

“appropriate Minister” means any Minister of the Government—

(a) on whom functions stand conferred, or

(b) who has general responsibility,

in respect of or in connection with a public private partnership or a State authority;

“Board” means the Board of the Agency;

“Chief Executive Officer” means the chief executive officer of the Agency;

“Committee of Public Accounts” means the Committee of Dáil Éireann established under the Standing Orders of Dáil Éireann to examine and report to Dáil Éireann on the appropriation accounts and reports of the Comptroller and Auditor General;

“company” means a company within the meaning of section 2 of the Companies Act, 1963;

“equity” means any financial interest resulting from the purchase of shares for a consideration;

“functions” includes powers and duties, and a reference to the performance of functions includes, with respect to powers and duties, a

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S.1 reference to the exercise of the powers and the carrying out of the duties;

“local authority” means a county council, city council or town council for the purposes of the Local Government Act, 2001;

“Minister” means the Minister for Finance;

“public investment projects” includes projects involving public private partnership arrangements;

“public private partnership arrangement” means a public private partnership arrangement within the meaning of the State Authorities (Public Private Partnership Arrangements) Act, 2002;

“refinancing” means changing the terms and conditions, obligations and entitlements attached to arrangements for financing public investment projects, including cancellation and replacement of such arrangements;

“State authority” means a body specified in the *Schedule*.

(2) (a) In this Act—

(i) a reference to a section or Schedule is a reference to a section of, or a Schedule to, this Act unless it is indicated that reference to some other enactment is intended, and

(ii) a reference to a subsection or paragraph is a reference to the subsection or paragraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended.

(b) In this Act a reference to any other enactment shall, unless the context otherwise requires, be construed as a reference to that enactment as amended, extended or adapted by or under any subsequent enactment.

Establishment of Agency.

2.—(1) There shall stand established, on the establishment day, a body to be known as an *Ghníomhaireacht Airgeadais d’Fhorbairt Náisiúnta*, or in the English language, the National Development Finance Agency, and in this Act referred to as the “Agency”, to perform the functions assigned to it by this Act.

(2) The Minister shall by order appoint a day to be the establishment day for the purposes of this Act.

(3) The Agency shall be a body corporate with perpetual succession and have the power to sue and be sued in its corporate name and to acquire, hold and dispose of land or an interest in land, and to acquire, hold and dispose of any other property.

Functions of Agency.

3.—(1) The functions of the Agency are—

(a) to advise any State authority of what, in the opinion of the Agency, are the optimal means of financing the cost of public investment projects in order to achieve value for money,

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- (b) to advance moneys (including repayable loans and equity) S.3 and to enter into other financial arrangements in respect of projects approved by any State authority,
- (c) to provide advice to any State authority on all aspects of financing, refinancing and insurance of public investment projects to be duly undertaken by means of public private partnership arrangements or within the public sector, and
- (d) to form, or cause to be formed, companies, subject to *section 5*, for the purpose of securing finance for public investment projects.

(2) The Agency shall have all such other powers as are necessary or expedient for the performance of its functions, including the engagement from time to time of consultants and advisers and other service providers.

(3) In carrying out its functions the Agency shall comply with all guidelines and instructions that the Minister may, from time to time, issue to the Agency.

4—(1) In providing advice under this Act the Agency shall have regard to— Provision of advice to State authorities.

- (a) such policy directions as the Minister may issue for the purposes of this paragraph to State authorities from time to time in relation to the financing of public investment projects, and
- (b) such policy guidance as the Minister may issue for the purposes of this paragraph to State authorities from time to time in relation to the process, procedures and regulation generally of public private partnership arrangements.

(2) The Minister shall cause a copy of every policy direction and policy guidance issued under *subsection (1)* to be sent to the Agency.

(3) The provision of advice by the Agency under this Act may include, where appropriate, advice as regards the engaging of consultancy services across the range of technical and other relevant expertise necessary to undertake such projects.

(4) In the discharge of functions under this Act the Agency and the National Treasury Management Agency shall at all times exercise due care, skill, prudence and diligence and act in the utmost good faith.

5.—(a) Subject to *paragraph (b)* the Agency may form, or cause to be formed, a company or companies for the purpose of financing a public investment project where, in the opinion of the Agency, it is necessary or expedient to do so in order to discharge its functions under this Act. Establishment of special purpose companies.

(b) The Agency shall not form, or cause to be formed, such a company or companies unless it has obtained the prior consent of the Minister in writing in respect of each company.

referred to in *subsection (1)*, as the case may be, shall remain liable to the Minister in respect of that amount, and that amount, with interest on it at such rate or rates as the Minister appoints, shall be repaid to him or her by the Agency or any company referred to in *subsection (1)*, as the case may be, at such times and in such instalments as the Minister appoints and, in default of such repayment and without prejudice to any other method of recovery, shall be recoverable as a simple contract debt in any court of competent jurisdiction. S.7

(6) Moneys paid by the Agency or any company referred to in *subsection (1)*, as the case may be, under *subsection (3)* or *(5)* shall be paid into or disposed of for the benefit of the Exchequer in such manner as the Minister thinks fit.

(7) In relation to guarantees given by the Minister under this section in respect of moneys in a currency other than the currency of the State—

- (a) each of the references to principal, each of the references to interest and the reference to commission and incidental expenses in *subsection (1)* shall be taken as referring to the equivalent in the currency of the State of the actual principal, the actual interest and the actual commission and incidental expenses, respectively, such equivalent being calculated according to the cost in the currency of the State of the actual principal, the actual interest or the actual commission and incidental expenses, as may be appropriate, at the time the calculation is made,
- (b) the reference to moneys in *subsection (2)* shall be taken as referring to the equivalent in the currency of the State of the actual moneys, such equivalent being calculated according to the rate of exchange for that currency and the currency of the State at the time the calculation is made, and
- (c) each of the references to moneys in *subsections (3) to (5)* shall be taken as referring to the cost in the currency of the State of the actual moneys.

(8) Any payment by the Minister under this section shall be a charge on the Central Fund or the growing produce thereof.

8—Subject to any guidelines that the Minister may from time to time issue for the purposes of this section and *section 3(3)* in respect of public investment projects, including— Obligation of State authority.

- (a) the type of project,
- (b) the size of the project,
- (c) the stage of development of the project, and
- (d) any other relevant factors that will determine projects on which the Agency's advice will be sought,

a State authority shall seek the advice of the Agency as soon as is practicable before undertaking a public investment project.

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S.12 (11) The Minister shall, in so far as is practicable and having regard to relevant experience, ensure an equitable balance between men and women in the composition of the Board.

Chief Executive Officer. **13.—**(1) The Board shall appoint one of its members, other than its Chairperson, to be the Chief Executive Officer of the Agency.

(2) The Chief Executive Officer shall report and be accountable to the Board.

(3) The Chief Executive Officer shall carry out such duties as the Board assigns to him or her.

Meetings of Board. **14.—**(1) The Board shall hold such and as many meetings as may be necessary for the performance of its functions.

(2) The first meeting of the Board shall be on the establishment day of the Agency or on the earliest practicable day after the establishment day.

(3) The quorum for a meeting of the Board shall be 3.

(4) At a meeting of the Board—

(a) the Chairperson of the Board shall, if present, be the chairperson of the meeting, and

(b) if and so long as the Chairperson of the Board is not present or if the office of the Chairperson is vacant, the members of the Board who are present shall choose one of their members to be chairperson of the meeting.

(5) At a meeting of the Board, each member present, including the Chairperson, shall have a vote and any question on which a vote is required in order to establish the Board's view on the matter shall be determined by a majority of votes of the Board members present and voting on the question and, in the case of an equal division of votes, the chairperson of the meeting shall have a second and casting vote.

(6) The Board may act notwithstanding one or more vacancies among its members or at the meeting, provided there is a quorum at the meeting.

(7) Subject to this Act, the Board shall regulate, by standing orders or otherwise, the procedure and business of meetings of the Board.

Seal of Agency. **15.—**(1) The Agency shall, as soon as practicable after the establishment day, provide itself with a seal.

(2) The seal of the Agency shall be authenticated by the signature of—

(a) the Chairperson and one other member of the Board, or

(b) 2 ordinary members of the Board,

authorised by the Board to act in that behalf.

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(3) Judicial notice shall be taken of the seal of the Agency and every document purporting to be an instrument made by the Agency and to be sealed with the seal of the Agency (purporting to be authenticated in accordance with this section) shall be received in evidence and be deemed to be such instrument without proof unless the contrary is shown. S.15

(4) Any contract or instrument which, if entered into or executed by a person not being a body corporate, would not require to be under seal may be entered into and executed by—

(a) the Chairperson of the Board and one other member of the Board, or

(b) 2 ordinary members of the Board,

authorised by the Board for that purpose.

16.—(1) Where a member of the Board—

(a) is nominated as a member of Seanad Éireann,

(b) is elected as a member of either House of the Oireachtas or to the European Parliament,

(c) is regarded pursuant to Part XIII of the Second Schedule to the European Parliament Elections Act, 1997, as having been elected to the European Parliament to fill a vacancy, or

(d) becomes a member of a local authority, a vocational education committee, the board of a health board or the Eastern Regional Health Authority,

Membership of either House of the Oireachtas, European Parliament or local authority, etc.

he or she shall thereupon cease to be a member of the Board.

(2) A person who is for the time being entitled under the Standing Orders of either House of the Oireachtas to sit therein or who is a representative in the European Parliament or who is a member of any of the bodies specified in *paragraph (d) of subsection (1)* shall not, while he or she is so entitled or is such a representative or member, be eligible for appointment to the Board.

17.—(1) Where a member of the Board or a member of the staff of the National Treasury Management Agency, or a consultant, adviser or other person engaged by the Agency, has a pecuniary interest or other beneficial interest in, or material to, any matter which falls to be considered by the Board or by the Agency itself, he or she shall—

Disclosure of interests.

(a) disclose to the Board or, as the case may be, to the Chief Executive Officer, the nature of his or her interest in advance of any consideration of the matter,

(b) neither influence nor seek to influence a decision to be made in relation to the matter, and

(c) take no part in any consideration of the matter, and—

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(i) absent himself or herself from the meeting or that part of the meeting during which the matter is discussed, and

(ii) not vote on a decision relating to the matter.

(2) For the purposes of this section, but without prejudice to the generality of *subsection (1)*, a person shall be regarded as having a beneficial interest if—

(a) he or she or any connected person or any nominee of his or her or any connected person, is a member or director of a company or any other body which has a beneficial interest in, or material to, a matter referred to in that subsection,

(b) he or she or any connected person is in partnership with or is in the employment of a person who has a beneficial interest in, or material to, such a matter,

(c) he or she or any connected person is a party to any arrangement or agreement (whether or not enforceable) to which such a matter relates, or

(d) any connected person has a beneficial interest in, or material to, such a matter.

(3) For the purposes of this section a person shall not be regarded as having a beneficial interest in, or material to, any matter—

(a) by reason only of an interest of his or hers or of any company or of any other body or person mentioned in *subsection (2)* which is so remote or insignificant that it cannot reasonably be regarded as likely to influence a person in considering, discussing or in voting on, any question with respect to the matter, or in performing any function in relation to that matter, or

(b) if he or she can show that at the material time he or she was unaware, and in the circumstances could not possibly have been aware, that a connected person had an interest referred to in *subsection (2)*.

(4) Where an interest is disclosed pursuant to this section, the disclosure shall be recorded in the minutes of the meeting of the Board, or otherwise duly recorded by the Chief Executive Officer.

(5) Where at a meeting of the Board, or otherwise within the Agency, a question arises as to whether or not a course of conduct, if pursued by a person, would constitute a failure by him or her to comply with the requirements of *subsection (1)*, the question shall be determined by the chairperson of the meeting or by the Chief Executive Officer, as appropriate, whose decision shall be final, and where such a question is so determined, particulars of the determination shall be recorded in the minutes of the meeting of the Board or otherwise duly recorded by the Chief Executive Officer.

(6) Where the Minister is satisfied, on being informed by the Board, that a member of the Board (including the Chairperson) has contravened *subsection (1)*, the Minister shall decide the appropriate action (including removal from office) to be taken in relation to that member of the Board. The Minister may, if he or she thinks fit,

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remove that member of the Board (including the Chairperson) from S.17 office.

(7) Where the Chairperson is satisfied that a consultant, adviser or other person engaged by the Agency, has contravened *subsection (1)*, the Chairperson shall decide the appropriate action to be taken.

(8) Where the Chief Executive of the National Treasury Management Agency is satisfied that a member of the staff of the National Treasury Management Agency has contravened *subsection (1)*, the Chief Executive of the National Treasury Management Agency shall decide the appropriate action to be taken.

(9) The Agency may issue and publish guidelines as to what may further constitute an interest for the purpose of this section.

(10) In this section “connected person” means, in relation to a person to whom this section applies—

- (a) the person’s spouse, parent, brother, sister or child, or
- (b) a person with whom the person is cohabiting.

18—(1) Save as otherwise provided by law, a person shall not disclose confidential information obtained by him or her while performing (or as a result of having performed) duties under this Act as—

Prohibition on unauthorised disclosure of confidential information.

- (a) a member of the Board,
- (b) Chief Executive Officer,
- (c) a member of the staff of the National Treasury Management Agency, or
- (d) an adviser or consultant to the Agency, the National Treasury Management Agency or an employee of such person whilst performing duties relating to such advice or consultation, or obtained while in performance of a service contract,

unless he or she is duly authorised by the Agency to do so.

(2) A person who contravenes *subsection (1)* is guilty of an offence and is liable—

- (a) on summary conviction to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 6 months or to both, or
- (b) on conviction on indictment to a fine not exceeding €10,000 or to imprisonment for a term not exceeding 2 years or to both.

(3) Nothing in *subsection (1)* shall prevent disclosure of information to the Board, the Chief Executive Officer or the Minister.

(4) In this section “confidential information” includes—

- (a) information that is expressed by the Board or the Minister to be confidential either as regards particular information

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the Board and shall be submitted as soon as may be, but not later than 4 months after the end of the financial year to which they relate, by the Agency to the Comptroller and Auditor General for audit. A copy of the accounts as so audited shall be presented to the Minister as soon as may be and the Minister shall cause a copy of the accounts as so audited to be laid before each House of the Oireachtas. S.20

(4) The audited accounts prepared under this section shall note a record of expenses incurred by the Agency.

(5) (a) The audited accounts prepared under section 12 of the National Treasury Management Agency Act, 1990, shall note a record of expenses incurred by the National Treasury Management Agency in the exercise of its functions under this Act.

(b) The National Treasury Management Agency Act, 1990, is amended by inserting the following after section 12(3):

“(4) The audited accounts prepared in pursuance of this section shall note a record of expenses incurred by the Agency in the performance of any functions under the *National Development Finance Agency Act, 2002*.”.

(6) The Chief Executive Officer and the Chairperson shall, whenever required by the Committee of Public Accounts, give evidence to that Committee on—

(a) the regularity and propriety of the transactions recorded or required to be recorded in any book or other record or account subject to audit by the Comptroller and Auditor General which the Agency is required by or under statute to prepare,

(b) the economy and efficiency of the Agency in the use of the resources made available to it under this Act,

(c) the systems, procedures and practices employed by the Agency for the purposes of evaluating the effectiveness of its operations, and

(d) any matter affecting the Agency referred to in a special report of the Comptroller and Auditor General under section 11(2) of the Comptroller and Auditor General (Amendment) Act, 1993, or in any other report of the Comptroller and Auditor General (in so far as it relates to a matter specified in *paragraph (a), (b) or (c)*) that is laid before Dáil Éireann.

(7) The Chief Executive Officer and the Chairperson, if required under *subsection (6)* to give evidence, shall not—

(a) question or express an opinion on the merits of any policy of the Government or a Minister of the Government or the Attorney General or on the merits of the objectives of such a policy, or

(b) produce or send to a committee a specified document in which the Chief Executive Officer or the Chairperson questions or expresses an opinion on the merits of any such policy or such objectives.

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(a) in connection with the performance by the National Development Finance Agency of its borrowing function under *section 6* of the *National Development Finance Agency Act, 2002*, and

(b) for the purposes of the better management of the indebtedness incurred by the National Development Finance Agency under *section 6* of the *National Development Finance Agency Act, 2002*,

and may, for the purpose of those transactions, issue such funds from the Exchequer, as the Minister for Finance considers appropriate, and the expenses and other costs incurred by the Minister for Finance in connection with or arising out of those transactions shall be charged on the Central Fund or the growing produce thereof.”.

24.—The First Schedule to the National Treasury Management Agency Act, 1990, is amended by inserting the following after paragraph (*ggg*) (inserted by the Housing (Miscellaneous Provisions) Act, 2002):

Amendment of First Schedule to National Treasury Management Agency Act, 1990.

“(*gggg*) section 54(7B) (inserted by the *National Development Finance Agency Act, 2002*) (in so far as the provision relates to the engagement in certain transactions of a normal banking nature) of the Finance Act, 1970,”.

25.—The expenses incurred by the Minister in the administration of this Act shall be paid out of moneys provided by the Oireachtas.

Expenses of Minister.

26.—(1) The administrative expenses of the Agency that are incurred in the performance of its functions shall be charged on and paid out of the Central Fund or the growing produce thereof.

Expenses of Agency.

(2) The expenses of the Agency that are incurred in the performance of its financing functions (including payments of interest and principal) shall be charged and paid out of repayments to the Agency on loans advanced by it or out of any surplus accruing to the Agency.

(3) The expenses of the Agency that are incurred in the performance of its advisory functions in relation to specific public investment projects or specific related projects shall be charged on and paid out of the vote of the appropriate Department or Departments.

(4) In this section “expenses” includes any fee payable to a Board member, any consultant or adviser or other service provider engaged by the Agency under this Act.

27.—This Act may be cited as the National Development Finance Agency Act, 2002.

Short title.

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Section 1.

SCHEDULE

State Authorities

A Minister of the Government.

A local authority.

The Commissioners of Public Works in Ireland.

The National Roads Authority.

A health board established under the Health Act, 1970.

The Eastern Regional Health Authority.

A university within the meaning of the Universities Act, 1997, other than Trinity College and the University of Dublin.

The Dublin Institute of Technology.

A college within the meaning of section 2 of the Regional Technical Colleges Act, 1992.

A vocational education committee within the meaning of section 7 of the Vocational Education Act, 1930.

Courts Service.

A harbour authority within the meaning of the Harbours Acts, 1946 to 1976.