

JANUARY 2023

Horizon Scanner: Infrastructure, Construction, Energy

Legal and regulatory developments impacting sectors across the economy including [energy](#), [construction & engineering](#), [real estate](#), [industrials](#), [transport](#) and [digital infrastructure](#).

Highlights this month...

DECARBONISATION ACROSS SECTORS

The Government commits to a series of actions in Ireland's Climate Action Plan 2023 in order to meet sectoral emissions ceilings. Our summary of key actions is [here](#). At EU level, legislation aimed at decarbonising sectors across the economy is being finalised. We provide an update on progress [here](#).

[View the Climate Action Plan Summary](#)

PLANNING AND DEVELOPMENT BILL


Following a 15-month review of the planning system, an outline of proposed reforms has been published.

[Find out more](#)

TRANSPARENT AND PREDICTABLE WORKING CONDITIONS

New employment law introduces obligations around transparent and predictable working conditions in Ireland.

[Find out more](#)

A low-angle, upward-looking photograph of a modern building's exterior. The structure features a complex network of dark metal beams and large glass panels. The background is filled with lush green trees, and the overall lighting is bright and slightly hazy, suggesting a sunny day. A white rectangular text box is centered in the lower half of the image.

Construction & Engineering

DECARBONISATION

Climate Action Plan

In Ireland, the Government published the Climate Action Plan 2023, a sectoral roadmap of actions to reduce greenhouse gas emissions in line with the carbon budget programme. Our summary [here](#) looks at several areas, including construction.

Fit for 55 & REPowerEU

EU legislation advanced as part of Fit for 55 and REPowerEU is nearing finalisation. Our latest update is [here](#). Latest developments include political agreement on the introduction from 2027 of a new emissions trading system for suppliers of fuel to buildings, aimed at incentivising the mainstreaming of renewable energy use in buildings by adding the cost of carbon to fossil fuel supplies. The new Carbon Border Adjustment Mechanism has also been politically agreed. When fully phased in, it will require a carbon price to be paid for imports to the EU (to the extent the carbon price has not already been paid outside the EU). In scope goods include cement, iron, steel, aluminium, fertilisers, electricity and hydrogen.

There will also be a revised Energy Performance of Buildings Directive, Energy Efficiency Directive and Construction Products Regulation. We looked previously at proposed revisions [here](#).

STANDARD FORM CONTRACTS

FIDIC [published](#) a 2022 reprint of the 2017 suite of contracts. FIDIC states that, as well as minor typo and formatting errors, there are more substantive amendments in response to industry feedback, though the risk profile is unchanged. FIDIC also published a second edition FIDIC Contracts Guide on the 2017 suite. We also understand that FIDIC is working on new climate change clauses.

JCT launched an [innovation hub](#) to help parties during periods of economic uncertainty or volatility through the use of fluctuations provisions.

ADJUDICATION

In the UK case of [Sudlows Limited v Global Switch Estates 1 Limited](#), the issue arose as to when and the extent to which a later adjudicator may be bound by a decision of an earlier adjudicator. If the adjudicator was so bound, he would not be able to take account of certain new evidence or assess the matter differently. The Court noted the relevant principles as those set out at paragraphs 20-24 in [Brown v Complete Building Solutions Ltd](#) [2016] EWHC Civ 1.

Under Irish law the decision of an adjudicator is binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision. Given that the UK legislation contains a substantively similar position, these authorities may assist in situations where the issue comes before Irish courts.

BUILDING REGULATIONS

[Building Regulations \(Part M Amendment\) Regulations 2022](#) have been made to require the provision of a changing places toilet in buildings, having regard to the building's use and size.

BREXIT

The date after which CE markings for construction products will not be recognised in Great Britain has been extended to 30 June 2025. Further information is available [here](#).

"JCT launched an [innovation hub](#) to help parties during periods of economic uncertainty or volatility through the use of fluctuations provisions."

[Read more about our Construction & Engineering Group >](#)

"The date after which CE markings for construction products will not be recognised in Great Britain has been extended to 30 June 2025."



Digital
Infrastructure

COMREG UPDATES

ComReg complete assignment stage of Multi-Band Spectrum Auction

Following the recent announcement issuing the results of the main stage Multi-Band Spectrum Award and conclusion of the Assignment Round of the sale process, the Negotiation Phase will conclude on 11 January 2023.

In this stage of the sale process companies which secured spectrum have an opportunity to negotiate a reorganisation of the frequency assignments. Where bidders do not submit a request for an alternative configuration of frequency assignments, ComReg will rely on the Provisional Assignment Plan which has been set out following the Assignment Round. Beyond that, once the Negotiation Phase has been concluded, ComReg intends to issue a further Information Notice with the Final Assignment Plan.

Read the full report [here](#).

"The Negotiation Phase will conclude on 11 January 2023."

ComReg notify Vodafone and Dense Air of non-compliance with 3.6GHz regulations

ComReg issued notifications of a finding of non-compliance to Vodafone Ireland and Dense Air Ireland, giving the companies until 16 January 2023 to state their views on the matter, including any proposal to remedy the non-compliance within 'a reasonable timeframe'.

The non-compliance notifications concern Vodafone, and Dense Air Ireland "not working and using" the required number of base stations in certain areas of the country, as is required by the Wireless Telegraphy (3.6 GHz Band Licenses) Regulations 2016.

Specifically, Vodafone has been advised that its non-compliance relates to it not having built and put into operation the required 15 base stations for the South East region within three years of its licence commencement date, and not operating 15 base stations in at least four counties in that region. For its part, Dense Air has been informed that its non-compliance relates to it not operating the required 15 base stations in at least four counties in the South East region.

Meanwhile, ComReg notes that if it determines that an undertaking has not complied with its obligations, it may apply to the High Court for such an order as the Regulator may consider appropriate. Read the full reports [here](#) and [here](#).

ComReg publish 2022 Radio Frequency Plan

This publication is a minor revision of the major edition of the Radio Frequency Plan, published in 2020. It sets out Ireland's spectrum allocations covering 8.3 kilohertz to 3,000 Gigahertz. The Plan provides an overview of the types of radio services that are permitted and the radio services currently in use. Read the full report [here](#).

ComReg publish Draft Strategy Statement for Electronic Communications Services "ECS" 2023-2025

The Draft Strategy is the mid-term review of ComReg's Five-Year Electronic Communications Services Strategy 2021-2026. This ECS 2023-2025 Draft Strategy Statement publication will kick-start a consultation phase, and the deadline for submitting comments on the strategy is **10 February 2023**. Read the full report [here](#).

ComReg issue opinion of Non-Compliance to Eircom with respect to provisions of the Universal Service Regulations

On 22 July 2022, ComReg notified Eircom of a finding of non-compliance with Eircom's obligations under the Universal Service Regulations. The non-compliance concerns Eircom not notifying some of its customers of a proposed price increase to their contracts at least one month prior to the changes taking effect and by not affording those customers the right to withdraw without penalty from the contract if they do not accept the modification.

Eircom's response, received on 22 August 2022, confirmed that immediately upon identifying the issue, it issued credits or refunds to all affected customers and ensured that a correct Contract Change Notification, including the right to withdraw, was provided and the notice period complied with. To ensure against a recurrence of similar issues, Eircom confirmed that it has now introduced multi-layered protections, and that it has contacted and refunded all of the affected customers. Having considered Eircom's response and the proposed remedies and commitments made, ComReg nonetheless formed the Opinion that Eircom was non-compliant with its obligations under Regulation 14(4) of the Universal Service Regulations. On 8 December 2022, having taken account of Eircom's response and its remedial actions to address the issues raised in the notification, ComReg published an information notice stating that it does not intend to take further action in respect of this matter. Read the full report [here](#).

INDUSTRY NEWS

Three Ireland set to withdraw its appeal over Multi-Band Spectrum Auction

In the wake of the results of its Multi-Band Spectrum Award ("MBSA"), ComReg has now confirmed that it received correspondence from Three Ireland on the day it announced the results (14 December 2022) which indicated the operator had filed a motion with the Courts seeking leave to discontinue its appeal against the sale process.

In an Information Notice, ComReg confirmed that Three's application was subsequently heard in the High Court on 19 December 2022, where an order was made which, among other things, granted Three leave to discontinue its appeal and awarded ComReg its costs against Three. Although a Court ruling will now be needed to lift the Stay against the spectrum auction that had resulted from Three's legal challenge, ComReg has suggested that Three's latest motion means that "the substantive challenge to [the auction rules] is now at an end".

With regards to next steps, it is anticipated that the Court of Appeal will accede to the application to lift the Stay, and once that is lifted, ComReg has said it will complete all the remaining stages of the MBSA and proceed to issue licences for long-term (circa 19 years) spectrum rights of use in the 700MHz, 2100MHz, 2300MHz and 2.6GHz bands.

ComReg Commissioner Garrett Blaney said: "This is very positive for connectivity in Ireland and is clear vindication of ComReg's 2020 decision to advance this award. The 46% increase in the radio spectrum assigned for mobile and fixed wireless services is significant, particularly in rural areas where wireless services play a very important role. ComReg's decision will further drive competition in the Irish communications sector". Read the full report [here](#).

Government publish Digital Connectivity Strategy

The Digital Connectivity Strategy "DCS" was published on 8 December 2022. Its purpose is to set out the targets that will be achieved by the telecommunications sector in providing digital connectivity across the State and to identify the key enablers that will be implemented to ensure these targets are met. This DCS sets out to encourage commercial investment in energy efficient solutions, network integrity and security, and supporting and facilitating the modernization of existing networks and transition to Gigabit and 5G networks. Read the full report [here](#).

"This DCS sets out to encourage commercial investment in energy efficient solutions, network integrity and security, and supporting and facilitating the modernization of existing networks and transition to Gigabit and 5G networks."



Employment

"The 13 grounds for refusing a request to work remotely have been scrapped. There is a simplified obligation for employers to consider both parties' needs."

TRANSPARENT AND PREDICTABLE WORKING CONDITIONS

In an unexpected and somewhat low-key move, the Government implemented Ireland's obligations under EU Directive 2019/1152 on transparent and predictable working conditions on 16 December 2022 by signing into law the European Union (Transparent and Predictable Working Conditions) Regulations 2022. Further information is available in our briefing [here](#).

NEW DEVELOPMENT IN REMOTE AND FLEXIBLE WORKING

The Work Life Balance and Miscellaneous Provisions Bill 2022 continues to progress through the legislative process. A detailed briefing of an earlier draft of the Bill is available [here](#). Significant amendments to the Bill were introduced in December 2022 and a summary of the key amendments is set out below:

The **Right to Request Remote Working Bill** (which we previously analysed [here](#)) has been scrapped. Provisions on the right to request remote working are now contained in the Bill. Key features of the right are:

- A remote working arrangement cannot start until the employee has six months' continuous service.
- An employer has four weeks (which can be extended to up to eight weeks) to consider and either approve or deny a request.
- The 13 grounds for refusing a request to work remotely have been scrapped. There is a simplified obligation for employers to consider both parties' needs and the provisions of an anticipated Code of Practice (to be drafted by the Workplace Relations Commission) when responding to a request, and to provide grounds for refusal.
- While remote working arrangements can be requested by any employee (provided the request is made in the format set out in the Bill), flexible working arrangements may only be requested by those with certain caring responsibilities. The Government has signalled it will review this incongruity two years after the legislation has passed.

Employers can **no longer postpone the start date of flexible working** arrangements.

Remote or flexible working arrangements can be terminated by an employer, provided the employer follows the termination process set out in the Bill. The termination process is similar in both cases: employers must provide reasons for terminating the arrangement which align to those set out in the Bill, give employees an opportunity to respond to the proposal, and consider that response before making a decision.

The grounds for **bringing WRC claims in relation to requests for flexible working and remote working have been broadened** to include claims relating to the termination of such arrangements. However, the Bill expressly states that, for claims concerning both flexible and remote working arrangements, the WRC cannot consider the "merits" of the decisions made by the employer, including the reasons for reaching their decision. This is a significant limitation on the WRC's powers to consider complaints.

New provisions have been inserted providing for **paid domestic violence leave of up to five days' paid leave** in any 12 month period. Pay is proposed to be in line with the rate of pay for statutory sick pay (70% of an employee's wages up to a cap of €110 per day).

It is expected that the Bill will be passed into law in early 2023.

"Remote or flexible working arrangements can be terminated by an employer, provided the employer follows the termination process set out in the Bill"

[Read more about our Employment Group >](#)



Energy

KEY DEVELOPMENTS

Climate Action Plan

The Government published the Climate Action Plan 2023. Our overview of key sectors, including electricity, is available [here](#). The Plan commits to 22GW of new renewable capacity by 2030, a very significant rise from 15GW in CAP21. It includes some anticipated actions as well as newer proposals, such as in relation to Large Energy Users.

Update on Fit for 55 / REPowerEU

The legislation advanced under these packages is close to being finalised. We look at latest developments [here](#), particularly in relation to renewable energy, gas markets, and emissions trading.

Electricity Market Reform

Joint priorities of the EU institutions for 2023 and 2024 include “the overhaul of the EU electricity market, the kick-start of the EU hydrogen market and a faster roll-out of renewables”. Further information is available [here](#).

FURTHER EU DEVELOPMENTS

North Seas Energy Cooperation

Members of the [NSEC](#) and the UK agreed a Memorandum of Understanding. The NSEC is intended to facilitate development of the offshore grid and renewable energy potential. Further information is available [here](#) and [here](#).

Carbon Market

The Commission [reported](#) on the functioning of the carbon market. It concludes: “The increase in the carbon price prompted questions as to whether there has been excessive speculation on the EU carbon market. European Securities and Markets Authority (ESMA) addressed these concerns in an extensive analysis of the market and its behaviour, concluding that the prevailing prices are in line with market fundamentals. At the same time, a higher carbon price in 2021 translated into higher auction revenues for Member States – nearly twice the 2020 revenue. In 2021, Member States spent on average EUR 19 billion of auction revenues on climate- and energy-related action. Member States have also used these resources to cushion the impacts of the energy crisis.” The accompanying staff working document is [here](#).

Hydrogen

The EU and Japan signed a [Memorandum of Cooperation](#) setting out measures to be pursued by stakeholders for development of an international hydrogen market.

Regulations

A Commission [Implementing Regulation](#) establishes operational guidance on the evidence for demonstrating compliance with sustainability criteria for forest biomass in Article 29 of the RED. A Commission [Delegated Regulation](#) revises the primary energy factor for electricity in the Energy Efficiency Directive

Consumers

Joint [common principles](#) for enhanced consumer protection this winter were signed by EU stakeholders.

“The increase in the carbon price prompted questions as to whether there has been excessive speculation on the EU carbon market.”

INTERNAL MARKETS

Work Programmes

The ACER Work Programme 2023-2025 is available [here](#). It includes new responsibilities in relation to cross-border infrastructure under the new [TEN-E Regulation](#). ENTSO-E and ENTSO-G’s work programmes are [here](#) and [here](#).

Gas

TSOs made the latest North-West Gas Regional [Investment Plan](#) available and ENTSO-G published an updated [list of projects](#) to be included in its TYNDP. ACER is concerned by falling levels of consistency between gas NDPs and the draft EU TYNDP 2022, due largely to the absence of hydrogen and biomethane projects in national plans, and has made several recommendations [here](#). ACER also published its views on the [gas supply outlook](#).

Electricity

ENTSO-E is recommending redesign of [long-term markets](#). It has also indicated an intent to develop a [digital twin](#) of the grid, that is a virtual model to enhance efficiency and smartness of the grid.

ACER updated its guidance for regulatory authorities on reporting on use of [congestion income](#). It also [approved](#) the new automatic price limit adjustment mechanism for European electricity spot markets.

Demand Response

ACER provided a framework [guideline on demand response](#) to the Commission. Once approved, ENTSO-E and the EU DSO Entity will be responsible for drafting new binding EU rules within 12 months. ACER also reported that there is scope for grid operators to [reduce market entry barriers](#) to new and small market participants, including small-scale demand response, in balancing services.

INVESTMENT

Connecting Europe Facility

It may be of interest to offshore wind developers that the Department of Transport [indicated](#) that the port of Galway has been added to the TEN-T network, which will make it eligible for funding under the Connecting Europe Facility and certain other supports under the terms of the TEN-T Regulation.

There is a second call under the Connecting Europe Facility [programme](#) for 2021-2027 in relation to cross-border renewable energy projects, closing on **3 May 2023**. Following a previous call, €602 million is to be invested in [projects](#) including the Hydroelectric Power Station Silvermines.

The Commission is consulting on the list of candidate Projects of Common Interest and Projects of Mutual Interest in all infrastructure categories. The closing date is [16 March 2023](#).

The Commission also published [guidance](#) to support Member States willing to engage in cross-border cooperation projects in the area of renewable energy generation in finding a mutually beneficial solution for sharing the related costs and benefits. It can be applied in the context of the Connecting Europe Facility, as well as for renewable projects using cooperation mechanisms more generally. It is relevant to renewable electricity, renewable heat and renewable gas projects.

Horizon Europe Work Programme

Funding of €13.5 billion is available to support researchers and innovators to pursue breakthrough solutions for environmental, energy, digital and geopolitical challenges. A first [call for proposals](#) is open.

Sustainable Finance

The Commission recently adopted two guidance documents on implementation of the EU Taxonomy, in draft form [here](#) pending publication in the CJEU. Further developments in sustainable finance are available in the ESG section of our [Finance Horizon Scanner](#).

FURTHER DOMESTIC DEVELOPMENTS

New Legislation

[S.I. No. 619/2022 - European Union \(Internal Market in Electricity\) \(No. 5\) Regulations 2022](#) add to the functions of the TSO in respect of the transmission assets that it is licenced to own.

[S.I. No. 630/2022 - European Union \(Energy Efficiency\) \(Amendment\) Regulations 2022](#) make updates to regulation of metering, billing and dispute resolution relating to district heat network operators and district heat suppliers.

[S.I. No. 680/2022 - European Union \(Renewable Energy\) \(Amendment\) Regulations 2022](#) make further amendments to the National Oil Reserves Agency Act 2007 and the European Union (Biofuel Sustainability Criteria) Regulations 2012 in relation to the renewable transport fuel obligation (previously known as the biofuel obligation).

[S.I. No. 703/2022 - European Union \(Deployment of Alternative Fuels Infrastructure\) \(Fuel Price Comparison\) Regulations 2022](#) provide for the display for information purposes of a fuel price comparison of petrol, diesel and alternative fuels at petrol stations.

[S.I. No. 719/2022 - Development \(Emergency Electricity Generation\) Regulations 2022](#) set out provisions relating to applications to be made under the [Development \(Emergency Electricity Generation\) Act 2022](#).

Anticipated Legislation

Cabinet [approved](#) publication of the Oil Emergency Contingency and Transfer of Renewable Transport Fuels Functions Bill 2022, aimed at facilitating the Government's management of oil stocks.

Offshore Projects

DECC granted Ireland's first [Maritime Area Consents](#) (under the new consenting regime) and published the [ORESS 1 Community Benefit Fund - Rulebook for Generators and Fund Administrators](#).

Energy Emissions and Consumption

The SEAI [reports](#) that energy-related emissions rose by 5.4% in 2021. [EU statistics](#) show final energy consumption in the EU rising in 2021, although Irish consumption fell in 2021 compared to the 2017-2019 average.

CRU BUSINESS

Price Incentives for SOs

[CRU/2022/989](#): The Balanced Scorecard Information Paper for the PR5 incentive package is available.

Suppliers

[CRU/2022/990 & 991](#): Following consultation, the decision on standards of performance for electricity and gas suppliers is available. A clarification on information to be provided on fixed rate tariffs was also published ([CRU/2022/981](#)).

RESS

[CRU/2023/03](#): Roles, functions and ToRs for the RESS Market Auditor and Auction Monitor for 2023-2027 have been published.

SEMC BUSINESS

Forward Work Programme

[SEM-22-094](#): This year's SEMC work programme includes Clean Energy Package - decision on priority dispatch (consultation and decision on priority dispatch hierarchy); consultation on sundry Clean Energy Package articles (consultation on sundry articles relating to market design); firm access (complete consultation process re: Ireland and consider Northern Ireland aspects); fixed contracts: low carbon inertia services auction; and system services future arrangements high level design implementation, day ahead system services arrangements and layered procurement.

Capacity Market

[SEM-23-001](#): A modification was approved providing for extension of the date of Substantial Financial Completion and the Long Stop Date associated with a Capacity Market Unit where the Capacity Market Unit is subject to a Third Party Judicial Review or Third Party Planning Appeal. The new provisions are available [here](#).

[SEM-22-088](#): Auction parameters for 2023/24 T-1 are available.

[SEM-22-097](#): Proposed changes to the methodology for determining the Capacity Requirement and Associated De-Rating Factor are available.

Directed Contracts

[SEM-22-095](#): Subscription dates for rounds 21-54 are available.

"ENTSO-E has indicated an intent to develop a [digital twin of the grid](#)."

[Read more about our Energy Group >](#)



Environment
& Planning

WATER ENVIRONMENT (ABSTRACTIONS AND ASSOCIATED IMPOUNDMENTS) ACT 2022

- The Water Environment (Abstractions and Associated Impoundments) Act 2022 was enacted on 20 December 2022. It gives further effect to the Water Directive Framework in Ireland. As of 13 January 2022, the Act has not been commenced.
- The Act will introduce a registration and licensing regime for water abstractions that meet or exceed a certain threshold. The registration threshold is the threshold set by the Minister or, if the Minister has not prescribed a threshold, the abstraction of 25 cubic metres or more in any 24 hour period. The licensing threshold is the threshold set by the Minister or, if the Minister has not prescribed a threshold, the abstraction of 2,000 cubic metres or more in any 24 hour period.
- Any person who intends to commence an abstraction, or continue abstracting, above the relevant threshold, will be under a positive obligation to apply for registration with the EPA, or for an abstraction licence from the EPA. For new abstractions, the applicant must apply for its licence before commencing the abstraction. For continued abstractions, the applicant must apply for its licence within 6 months from commencement of the Act.
- The EPA and local authorities will have the power to issue compliance notices where they consider it necessary to do so, and it will be a criminal offence for a person to fail to comply with a compliance notice.

"The registration threshold is the threshold set by the Minister or, if the Minister has not prescribed a threshold, the abstraction of 25 cubic metres or more in any 24 hour period."

THE PLANNING AND DEVELOPMENT AND FORESHORE (AMENDMENT) ACT WAS ENACTED ON 20 DECEMBER 2022

- This Act has two parts, the first dealing with An Bord Pleanála and the second dealing with the definition of "foreshore".
- Sections 1-14 make several amendments to the Planning and Development Act 2000 relating to several matters concerning the governance of An Bord Pleanála, including an increase in the number of ordinary members on the Board, changes to its quorum and amendments to the complaint's procedure.
- A significant change introduced by Section 10 is the removal of the power of the Board to reduce the quorum from three to two persons in certain circumstances.
- As of 13 January 2022, these Sections have not been commenced.
- Sections 15-21 amend the Foreshore Act 1993. They were commenced on 20 December 2022.
- The most significant change introduced by these sections is the amendment of the definition of "foreshore" in the Foreshore Act 1993 and by implication, in the Maritime Area Planning Act 2021. The definition now includes the subsoil below, and the water column (but not the air space) above, the bed and shore. The effect of this, at a high level, is that surveys which do not touch or take from the bed and shore, which only move through the water column, require a licence.

CASE LAW

Several judgments were delivered in December 2022. In the residential development sector, perhaps the most significant is the Crofton case that involves a High Court determination that, in principle, subject to the facts of the individual case, remittal is possible for SHD projects where there has been a change in development plan, with the Court directing that the Board hold an oral hearing after the developer submits additional information.

A further update on other cases will follow.

REVISED APARTMENT GUIDELINES CONCERNING BUILD-TO-RENT

The Minister for Housing, Local Government and Heritage issued new Apartment Guidelines on 21 December 2022, which replace the December 2020 Guidelines. The effect of the new 2022 Guidelines is that BTR is no longer recognised as a distinct development type for planning purposes with its own flexible design standards. The Guidelines envisage that BTR development will be subject to design standards applicable to all apartment development as set out in Section 3.0 of the Guidelines, i.e. the planning standards for BTR development are now the same as those for all other apartment types. No transitional provisions are included in the 2022 Guidelines but have been included in the related Circular.

"The effect of the new 2022 Guidelines is that BTR is no longer recognised as a distinct development type for planning purposes with its own flexible design standards."



Public Procurement

IRELAND

Public Spending Code

It has been [reported](#) in the Sunday Business Post that the [Public Spending Code](#) is being reviewed by the Department of Public Expenditure to assess whether an external review of the business case for projects needs to be scaled back to speed up project delivery.

Climate Action Plan 2023

According to the new Climate Action Plan, we should expect a 2023 update to [Green Tenders: an Action Plan on Green Public Procurement](#), as well as initiatives to strengthen green public procurement of construction projects. Our overview of key actions is available [here](#).

EU

In-house Exemption

Belgian cases [C-383/21](#), [C-384/21](#) concern the law on public contracts between entities in the public sector, set out in Article 12 of [Directive 2014/24/EU](#), and whether the contract concerned fell outside the scope of the Directive. In this case, the public authorities involved had put in place complex arrangements for working together.

One of the conditions to be met in availing of the so-called in-house exemption is in Article 12(3), second subparagraph, point (i). It sets out a condition for demonstrating that the contracting authorities exercise joint control over a legal person, namely that the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. The CJEU found that this condition was not satisfied by virtue of the representative of another authority sitting on the board of directors of the contended controlled legal person.

The contract also did not fall outside of the scope of the Directive under Article 12(4), where a condition to be fulfilled is that the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common. Here, the body was carrying out tasks for two other public bodies, and thus contributing to their objectives, rather than sharing those objectives with them.

Domestic Law inconsistent with principle of Proportionality

In a Latvian procurement to provide a health insurance contract, the most economically advantageous tenderer withdrew from the process. The company in second place stated it had to be regarded as forming a single economic operator with the first tenderer, but had prepared its tender independently and without coordination with the first tenderer. In accordance with domestic law, the contracting authority terminated the process and began a new process. The second-placed tenderer argued that the contracting authority should instead have evaluated its explanations based on a fair balance of the relevant principles of public procurement law.

The Latvian court asked whether general principles of EU law within the meaning of Article 18(1) of [Directive 2014/24](#) must be interpreted as preventing national legislation that requires the contracting authority to terminate a public procurement procedure where, in the event of withdrawal of the tenderer originally selected, the tenderer which submitted the next most economically advantageous tender constitutes with the tenderer originally selected a single economic operator. The CJEU ruled in [C-769/21](#) that the principle of proportionality, within the meaning of Article 18(1) of Directive 2014/24, does prevent such national legislation.

UK

Below Threshold Contracts

Chapter 8 of the Public Contracts Regulations 2015 sets out certain requirements for below threshold contracts (such as advertising on Contract Finder). [Public Contracts \(Amendment\) Regulations 2022](#) set out new thresholds above which these requirements apply. Amendments made post-Brexit provided that UK threshold amounts would, unlike EU thresholds, be inclusive of VAT, to align with the WTO GPA practices. This lowered thresholds. The new Regulations effectively reinstate the previous thresholds.

Application to lift suspension of Contract Award granted

In *Medequip Assistive Technology Ltd v The Mayor and Burgesses of the Royal Borough of Kensington and Chelsea* [2022] EWHC 3293, an incumbent claimant challenges the award of a framework agreement for Community Equipment Services, the largest of its kind in the UK. The defendant applied for the automatic suspension of the contract to be lifted and the application was granted. The judgment is a good example of application of the relevant test from *American Cyanamid v Ethicon Ltd*. The trial will concern numerous issues, the Particulars of Claim being described as making a "wide-ranging attack" on the procurement process.

[Read more about our PPP and PFI Group >](#)

[Read more about our Public Procurement Group >](#)

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Real Estate

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PLANNING

Planning and Development Bill

The Government has published an [outline of the proposed Planning and Development Bill](#).

The main provisions of the Bill are:

- strengthened legal status for Ministerial guidelines;
- amended focus and lifespan of Local Development Plans;
- mandatory timelines for all consent processes, including An Bord Pleanála ("ABP") decisions, to bring certainty to the planning consent process: timelines are being introduced for appeals and consent applications made to ABP (including Strategic Infrastructure Developments) with fines to be introduced where ABP fails to make decisions within these timelines;
- changes to Judicial Reviews ("JRs") of planning decisions: there will be timelines for various steps in the JR process, ABP will be able to correct an error of fact or law in a planning decision and will be able to apply for a stay on the determination of JR proceedings whilst making such corrections, and the Bill will provide for JR applications by certain organisations to be taken by an individual or individuals;
- the re-structuring of ABP: the agency will be re-named An Coimisiún Pleanála and its decision-making and governance structures separated.

TITLE REGISTRATION

Establishment of Tailte Éireann

The [Tailte Éireann Act 2022](#) was enacted on 21 December 2022. The Act establishes a new centralised agency called Tailte Éireann to provide a property registration system, a property valuation service, and a national mapping and surveying infrastructure for the State through a merger of the Property Registration Authority (PRA), the Valuation Office (VO) and Ordnance Survey Ireland (OSI).

When the relevant sections of the Act are commenced, the functions of the PRA (which manages the Land Registry and Registry of Deeds) and the other dissolved bodies will transfer to Tailte Éireann. The PRA has confirmed that business will continue as usual during the merger. How stakeholders contact and access the services of the PRA, VO and OSI will remain unchanged.

"The Act establishes a new centralised agency called Tailte Éireann to provide a property registration system, a property valuation service, and a national mapping and surveying infrastructure for the State."

REAL ESTATE TAXATION

Residential Zoned Land Tax

The Residential Zoned Land Tax ("RZLT") (announced in Budget 2022 to replace the vacant site levy introduced under the Urban Regeneration and Housing Act 2015) is an annual self-assessed tax administered by Revenue calculated at 3% of the market value of land within its scope. It applies to land that, on or after 1 January 2022, is zoned as being suitable for residential development and is serviced, with certain exclusions.

The relevant legislation (Part 22A of the Taxes Consolidation Act 1997 as amended by the Finance Act 2021 and the Finance Act 2022) required local authorities to publish draft maps identifying land within the scope of the tax by 1 November 2022 and landowners had until 1 January 2023 to make submissions to their local authority if they wished to dispute the inclusion of their land on the draft map. Local authorities will assess and respond to submissions on the initial draft maps until 1 April 2023 and landowners can appeal the local authority response to An Bord Pleanála by 1 May 2023.

Local authorities must prepare supplemental maps by 1 May 2023 and there is then a further round of submissions, assessments and a right to appeal. Final maps will be published on 1 December 2023.

The Government has prepared a useful summary of the RZLT [here](#).

RESIDENTIAL LANDLORD AND TENANT & HOUSING

Case on Rent Setting Restrictions

The judgment of Judge John J. O'Connor in the Circuit Court case of Wow Investments Limited v Residential Tenancies Board concerned the impact that the letting history of a property can have on the ability of a subsequent owner to set rents in a rent pressure zone (RPZ).

Essentially, it was held that a purchaser of a property is bound by RPZ restrictions even if the purchaser (now landlord) is not actually aware of the property's letting history. Read more [here](#).

Short-Term Tourism Letting Register

The Cabinet approved proposals for a short-term tourism letting register in December 2022.

The Government hopes to have legislation enacted by the end of March 2023 to underpin the new registration system. Read more [here](#).

CLIMATE & ENVIRONMENT

Climate Action Plan 2023

The [CAP23](#), described by the Government as a roadmap for meeting Ireland's emissions reduction requirements, was published just before Christmas. As against 2018, sectoral emissions ceilings require a 40% decrease in emissions from residential buildings and a 45% decrease from commercial buildings by 2030.

Read more about the Government's plan to reduce emissions from the built environment and other sectors [here](#).

Green Leases

2023 will see an increased focus on the greening of property contracts with green leases in particular being utilised by landlords and tenants to ensure the sustainable management and operation of buildings and to future proof buildings against increasing regulation of carbon emissions from the built environment. 2023 will also see further focus on retrofitting older building stock and contractual mechanisms to facilitate this.

The Arthur Cox LLP real estate group, working with colleagues in other law firms and sustainability professionals, has been leading the development of green clauses for Irish commercial leases under the umbrella of [The Chancery Lane Project](#) (TCLP), a global collaboration of lawyers working pro bono to rewire contracts to combat the climate crisis. The green lease clauses will be published on TCLP's website in the next few weeks.

"The judgment illustrates the narrow scope of doctrine of frustration and that the COVID-19 Regulations do not amount to frustration of such leases."



Transport

KEY DEVELOPMENTS

Climate Action Plan

The Government published the Climate Action Plan 2023. Our overview of key sectors, including transport, is available [here](#).

Update on Fit for 55 / REPowerEU

The legislation advanced under these packages is close to being finalised. The Council agreed its general approach to revision of the TEN-T Network Regulation, which provides for Projects of Common Interest. The advantage of PCI status is potential streamlined / swifter permit granting, incentives for comparatively higher risk profiles, and funding under the Connecting Europe Facility. Revision of the Regulation aims to ensure decarbonisation of transport is adequately built into the Regulation's requirements, as well as setting deadlines for completion of the various networks. Further information is available [here](#) and [here](#).

The Department of Transport in Ireland also [indicated](#) that the port of Galway is to be added to the TEN-T network.

We look at further developments [here](#). They include political agreement on the introduction from 2027 of a new emissions trading system for suppliers of fuel to transport, aimed at incentivising the mainstreaming of renewable energy use in transport by adding the cost of carbon to fossil fuel supplies.

EU Priorities

Joint priorities of the EU institutions for 2023 and 2024 include acting "on further climate measures, notably on transport emissions and pollution, greening freight transport as well as on carbon removal certification". Further information is available [here](#).

EU

Connecting Europe Facility

Funding is being provided to upgrade or construct transport infrastructure in central and eastern Europe to ensure secure [military mobility networks](#).

Hydrogen

The EU and Japan signed a [Memorandum of Cooperation](#) setting out measures to be pursued by stakeholders for development of an international hydrogen market.

Statistics

The Commission published EU-wide [statistics](#) on passenger mobility.

DOMESTIC DEVELOPMENTS

New Legislation

The [Air Navigation and Transport Act 2022](#) provides for the formation of the Irish Air Navigation Service and confers on it certain functions of the Irish Aviation Authority. The Irish Aviation Authority remains responsible for safety regulation and will merge with the Commission for Aviation Regulation, which will be dissolved.

[S.I. No. 680/2022 - European Union \(Renewable Energy\) \(Amendment\) Regulations 2022](#) make further amendments to the National Oil Reserves Agency Act 2007 and the European Union (Biofuel Sustainability Criteria) Regulations 2012 in relation to the renewable transport fuel obligation (previously known as the biofuel obligation).

[S.I. No. 703/2022 - European Union \(Deployment of Alternative Fuels Infrastructure\) \(Fuel Price Comparison\) Regulations 2022](#) provide for the display for information purposes of a fuel price comparison of petrol, diesel and alternative fuels at petrol stations.

[S.I. No. 709/2022 - National Oil Reserves Agency \(Renewable Transport Fuel Obligation Rate\) Order 2022](#) and [S.I. No. 710/2022 - National Oil Reserves Agency \(Advanced Biofuel Obligation Rate\) Order 2022](#) set the percentage rates for the purposes of section 44C of the National Oil Reserves Agency Act 2007.

Road Haulage

Ireland has set out its [Road Haulage Strategy](#) for the next 10 years. Measures focus on decarbonisation and the potential for intermodal transport, particularly in connection with rail transport.

Climate Adaptation

Transport for Ireland adopted a new [Climate Adaptation Strategy](#), setting out actions it will take to manage the impact of climate change on its assets and activities.

Regional Strategies

Two new regional strategies are available, intended to provide long-term roadmaps to meet decarbonisation targets through delivery of infrastructure and services for active travel, public transport and freight, as well as roads. They are the [Limerick Shannon Metropolitan Area Transport Strategy](#) and the [Waterford Metropolitan Area Transport Strategy](#).

Regional Airports

Views are invited by 31 January 2023 on the [Mid-term Review](#) of the Regional Airports Programme 2021-2025.

"The advantage of PCI status is potential streamlined / swifter permit granting, incentives for comparatively higher risk profiles, and funding under the Connecting Europe Facility."

"The Irish Aviation Authority remains responsible for safety regulation and will merge with the Commission for Aviation Regulation, which will be dissolved."

[Read more about our Transport Group >](#)

A kaleidoscope image of a forest scene, featuring a central white box with the text "State Aid" in blue. The background is a repeating pattern of a forest with green trees and a path, viewed through a circular lens. The text "State Aid" is centered in the white box.

State Aid

NEW RULES FOR AGRICULTURE, FORESTRY AND FISHERY AND AQUACULTURE

The European Commission has adopted revised State aid rules for the agricultural, forestry and fishery and aquaculture sectors. The revised rules align State aid with the EU strategic priorities, in particular the Common Agricultural Policy (CAP), the Common Fisheries Policy (CFP), as well as to the European Green Deal. In particular, the Commission has adopted a revised Agricultural Block Exemption Regulation and Fishery Block Exemption Regulation, and accompanying guidelines. The revised Agricultural Block Exemption Regulation provides, inter alia, for block-exempted measures for cooperation in the agricultural and forestry sectors. Further information is available [here](#).

REVISED STATE AID RULES FOR BROADBAND NETWORKS

The Commission has adopted a revised Communication on State aid for broadband networks. The revised Communication sets out the rules under which the Commission will assess State aid measures notified by Member States to support the deployment and take-up of broadband networks in the EU. In particular, the revised Communication aligns the threshold for public support to fixed networks with the latest technological and market developments, introduces a new assessment framework for the deployment of mobile (including 5G) networks, explains how public support can be used to incentivise the take-up of broadband services, provides clarifications of certain key concepts, simplifies certain rules and updates the criteria used for balancing the positive impact of the aid against its negative effects on competition and trade. Further information is available [here](#).

"The Commission has adopted a revised Agricultural Block Exemption Regulation and Fishery Block Exemption Regulation, and accompanying guidelines."

EXEMPTIONS FOR SMALL AMOUNTS OF AID

The Commission is proposing to revise the de minimis threshold exemption from State aid control for small aid amounts – available for aid amounts of up to €200,000 over a three year period. The current regulation providing for the de minimis exemption is due to expire on 1 December 2023 and the Commission is proposing to increase the threshold to €275,000 to take into account inflation. This may provide a helpful increase for undertakings that benefit from state funding. The Commission is also proposing to strengthen the transparency requirements by introducing a mandatory public register at national or EU level where Member States provide complete information on de minimis aid granted by any authority. The Commission's consultation period closed on 10 January 2023. Further information is available [here](#).

EXTENSION OF WHISTLEBLOWER TOOL TO STATE AID

The Commission has extended the scope of its anonymous antitrust whistleblower tool to include mergers and State aid issues. Individuals can now alert the Commission about potential breaches of State aid law, while maintaining their anonymity. The whistleblower tool was introduced in 2017 to allow any person to anonymously report to the Commission cartels and other antitrust violations. It is operated through a third party intermediary, which allows for two-way communications between the Commission and a whistleblower, while maintaining confidentiality. This provides another means of contacting the Commission about potential State aid issues, in addition to formal or informal complaint procedures. Further information is available [here](#).

[Read more about our State Aid Group >](#)

"Individuals can now alert the Commission about potential breaches of State aid law, while maintaining their anonymity."



Want to know more?

Please contact us if you would like to know more about anything in this Horizon Scanner or if you have a matter you would like to discuss. Please click [here](#) to view recent editions of our Horizon Scanner.

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