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Infrastructure, Construction, Energy

APRIL 2022

Construction & Engineering

NEC CONSULTATION ON NEW CLIMATE CLAUSE

The NEC is consulting until **13 May 2022** on a new secondary option clause X29 called "reducing the impact of works on climate change". It is drafted for use with the NEC4 Engineering and Construction Contract (though the intention is to roll out similar provisions for other suites of contracts). It seeks to enable tangible sustainability and net-zero commitments between clients and suppliers, by introducing a number of mechanisms:

- Climate Change Requirements would be included in the Scope, failure with which to comply would constitute a Defect under the contract. Climate Change Requirements would cover areas like levels of recycling, use of renewable power on-site /EVs, reducing waste generation, designing out waste, and use of design that reduces carbon emissions. Climate Change Requirements would also identify Climate Change Partners with whom the Contractor would be required to engage. Early warnings would be notified for events potentially impacting achievement of the Climate Change Requirements. The Climate Change Requirements would also include a Climate Change Execution Plan to set out strategy and Targets. A disclosure clause would facilitate publication of climate credentials;

- a Performance Table for benchmarking the Contractor's performance against precise targets distinct from the Climate Change Requirements, with the parties free to agree positive or negative financial incentives (or no incentive at all) as they see fit. The drafting also addresses how this would interact with existing mechanisms on compensation events; and

- a clause to allow the Contractor to propose changes to the Scope that may reduce the impact on climate change (provided the Contractor's quote is accepted) following which there may be changes to Scope, Prices, Performance Table, Completion Date and Key Dates. However, even if such changes are made to the Scope, it would still also be open to the Contractor to be rewarded by bettering the targets in the Performance Table.

An accompanying Guidance Document is available here. The clause itself can be accessed by filling the form here.

Construction contract mechanisms have been thoroughly tested over the last years and, for those entering into new contracts, careful consideration must be given to managing the impacts of Brexit, COVID-19 and the war in Ukraine, both in terms of how standard mechanisms apply, as well as new clauses that potentially need to be drafted. This decade, however, will also see momentous efforts to transition economies to carbon neutrality. Proposals we are seeing such as this consultation by the NEC, and other initiatives like The Chancery Lane Project, have the potential to significantly impact the entire life cycle of project delivery from the earliest point in procurement. It will be interesting to see, in particular, how new mechanisms for incentivisation and change management can be utilised to drive results!

JCT PUBLISHES PROJECT BANK ACCOUNT DOCUMENTATION

The JCT has published the 2022 Edition of its Project Bank Account Documentation, updated from 2016. It is intended to help parties to a contract who wish to adopt the use of a project bank account as part of fair payment practice and is for use with 2016 contracts listed here. It is for use on both private and public projects but, in public projects, is intended to assist users on public sector projects to comply with the objectives of the Construction Playbook (which is a UK Government document that sets out its expectations of how contracting authorities and suppliers should engage with each other).

SUSTAINABILITY OF THE BUILT ENVIRONMENT

As envisaged in the EU Circular Economy Action Plan, the European Commission published proposals to make sustainable products the norm in the EU. The Commission indicates that buildings are responsible for around 50% of resource extraction and consumption; 30% of the EU's total waste generated per year; 40% of the EU's energy consumption; and 36% of energy-related emissions. One of the proposals – revision of the Construction Products Regulation - aims to boost the internal market for construction products and ensure that the regulatory framework is fit for making the built environment compatible with climate objectives. It is intended that revision of the Regulation will modernise the rules to create a harmonised framework to assess and communicate the environmental and climate performance of construction products, with new product requirements to ensure that design and manufacture of products makes them more durable, repairable, recyclable, and easier to re-manufacture.

Practice Tip

The Department of Enterprise, Trade and Employment announced that the interim period of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 will be extended until 31 December 2022. It appears from the press release that all elements will be extended, including section 43A of the Companies Act 2014 which provides an alternative approach to execution of documents when use of a company seal is required.

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Energy & Climate

ENERGY SECURITY

Energy Purchase Platform || Following from the REPowerEU proposals mentioned last month, the Commission held a first meeting of an EU Energy Purchase Platform to secure the supply of gas, LNG and hydrogen. The Platform is intended to support in particular refilling of gas storage facilities in time for next winter, optimal use of existing gas infrastructure, and long-term cooperation with key supply partners.

Curbing Reliance on Russian fossil fuels || The Commission will offer technical support to help 17 Member States (including Ireland) phase out reliance on Russian fossil fuels, in line with the REPowerEU plan. The Commission also published headline statistics on fossil fuel reliance.

EU-US High Level Climate Action Group || A joint statement was published following the Group's sixth meeting. It references the latest IPCC reports and the invasion of Ukraine as having strengthened commitment to clean energy transition. || The Irish Government's statement on the April 2022 IPPC report is here.

Tax || The Energy Commissioner provided guidance for Finance Ministers including in relation to possibilities for reduced rates under the EU's VAT rules (the VAT Directive) and excise duty framework (the Energy Taxation Directive).

EU

Trans-European Energy Infrastructure || The Parliament approved the proposal for a revised TEN-E Regulation, which will now go to the Council for approval. It sets out criteria for choosing projects of common interest and also 'projects of mutual interest' which are cross-border infrastructure projects between a Member State and a third country. || Press Release || The Commission also published the 2022 Delegated Regulation setting out the current energy Projects of Common Interest (which include the Celtic IC, and two CO2 transportation projects involving Ireland).

Industrial Emissions Directive || The Commission published a proposal to update the Industrial Emissions Directive. Main changes relate to higher standards in permitting; more flexibility in permitting for innovation frontrunners; possible binding resource use performance levels; and integrating energy efficiency in permits. It is proposed the new rules will cover more installations including largescale production of batteries. || To complement the proposal, the Commission published a new European Research Area industrial technology roadmap for low-carbon technologies to provide a list of key emerging low-carbon technologies for energy-intensive industries and ways to leverage R&I investments to accelerate their development and uptake.

EU ETS || The Commission reported that emissions in EU ETS sectors rose increased by 7.3% in 2021 compared with 2020 levels. This breaks down to increases of 8.3% from the power sector, 5.2% from main industrial sectors and 8.7% from aviation. However when compared with 2019, emissions were down (by 7.3% in power, 1.9% in main industrial sectors, and 61% in aviation).

Vulnerable Customers || A Commission Decision sets out the tasks, composition & operation of the Commission Energy Poverty and Vulnerable Customers Coordination Group. It shall include authorities from all Member States.

Renewable Fuels || The Commission published a series of Implementing Decisions on compatibility of several schemes with the requirements of the Renewable Energy Directive (EU) 2018/2001 for biofuels, bioliquids, biomass fuels, renewable liquid and gaseous fuels of non-biological origin and recycled carbon fuels.

INTERNAL MARKETS

Offshore || ACER responded to the Commission's Offshore Strategy with concerns around "the proposal to allocate congestion income to offshore renewable energy sources, or to exempt hybrid interconnectors from the requirement to make 70% of capacity available for cross-zonal trading". It is concerned that this would unduly favour offshore over onshore generation. ACER comments that, instead, regulators should propose less disruptive solutions such as market-oriented support schemes and/or seeking higher guarantees in terms of interconnection capacity availability." || ACER also published a note on a common approach to monitoring the capacity available for cross-zonal electricity trade.

Network Development || ENTSO-E and ENTSOG published Joint Scenarios for TYNDP 2022.

Gas Storage || ACER has reported on national storage regulations.

Regional Coordination Centres || ACER adopted a Decision defining System Operator Regions in preparation for establishing Regional Coordination Centres. EirGrid & SONI are in the South-West Group. Their obligations pertaining to RCCs' tasks are to become effective only upon the start of energisation of the Celtic Interconnector. || ACER also decided on an RCC post-operation and post-disturbances analysis and reporting methodology.

REMIT Reporting || ACER published updated guidance.

INVESTMENT

Innovation Funding || The Commission is making available €100 million for innovative clean technology projects through a second call for small-scale projects under the Innovation Fund, financed by EU ETS allowances. This is for projects with a capital expenditure between €2.5 and 7.5 million in renewable energy, energy-intensive industries, energy storage, and carbon capture, use and storage. The call is open until **31 August 2022**. This is part of a wider funding package which has been awarded to seven largescale projects.

Alternative Fuels Infrastructure || The Commission published a draft Implementing Decision on the selection of projects following the first cut-off date of the Alternative Fuels Infrastructure Facility rolling call for proposals for grants under the Connecting Europe Facility - Transport sector.

Financial Advisory Support || The EIB is providing financial advice to improve bankability of early-stage innovative low-carbon projects preparing for commercial roll-out. Support is available until the end of 2022.

Green Bond Standard || The Council agreed its position on the Commission's proposal for a voluntary EU green bond standard and the Commission indicated it may be amenable to changes being made to the proposed standard in light of the recent EBA report (which we looked at here). Negotiations will now start with the Parliament (and the indicative plenary hearing date is 12 September 2022). The Parliament's rapporteur has pushed for the green bond standard to be made mandatory.

Green Bonds || In late March 2022 the Commission launched a NextGenerationEU Green Bond Dashboard which shows how Member States are investing the money raised by NextGenerationEU green bond issuances (at that stage €14.5 billion). || On 5 April 2022 the Commission raised €6 billion in NextGenerationEU funds with its second NextGenerationEU green bond syndication. This 20-year bond brings the total long-term financing raised under NextGenerationEU to €99.5 billion, of which €20.5 billion is in NextGenerationEU green bonds.

Sustainable Finance || The Commission adopted a Delegated Regulation setting out regulatory technical standards for disclosures of sustainability-related information under the Sustainable Financial Disclosures Regulation.

Taxonomy || The EU Platform on Sustainable Finance published a report with recommendations to the Commission on the technical screening criteria for the four remaining environmental objectives under the EU Taxonomy Regulation. It also sets out recommendations on the technical screening criteria for the first two objectives (climate change mitigation and climate change adaptation) notwithstanding that these are dealt with in the Taxonomy Climate Delegated Act and in a separate proposal for a Complementary Climate Delegated Act (dealing with gas and nuclear activities). The report also includes recommendations to improve the design of the EU Taxonomy and the technical screening criteria. It emphasises the need for consistency between criteria as the taxonomy evolves, because the different environmental objectives can overlap with each other and economic activities can be linked through supply chains. The Platform also recommends reviewing the existing "*do no significant harm*" criteria in the Taxonomy Climate Delegated Act. || The Platform also published Extended Environmental Taxonomy: Final Report on Taxonomy extension options supporting a sustainable transition in response to the Commission's request for advice on possible extensions to the EU Taxonomy. It recommends extending the EU Taxonomy "beyond green" in order to classify a wider range of economic activities based on a traffic-light system.

ESG ratings || The Commission published a consultation on the functioning of the ESG ratings market and consideration of ESG factors in credit ratings. || **Closing date: 6 June 2022**.

DOMESTIC DEVELOPMENTS

RESS 2 || The Auction Information Pack, Timetable and Process has been published. The CRU published the final competition ratios (CRU/2022/36).

Energy Security || The Government has published a National Energy Security Framework to respond to the impact on the energy system of the war of Ukraine. It references ongoing work in aligning elements of the planning system to fully support accelerated renewable energy development, and reviewing grid connection arrangement for renewable electricity projects and the development of system services.

CPPAs || In line with the Climate Action Plan Annex of Actions, DECC published a Renewable Electricity Corporate Power Purchase Agreements Roadmap. It sets out policy priorities as well as:

- principles of good practice that CPPAs should deliver on. These include lowering net cost of energy transition for Irish consumers and includes the statement: "Longer term, integrating RESS and CPPA markets avoids the problem of competition between the two. Adapting RESS or the design of future support schemes to incorporate CPPA demand for renewable electricity projects could be a means of lowering overall costs to all consumers." There is also a section on community benefits which states: "Those contracting CPPAs should include a level of community benefit, through contributions or investment in communities similar to those supported under RESS."

- a roadmap, which flags the next action as "review of the Government Statement on the role of data centres, ensuring alignment with revised renewable electricity targets and sectoral emissions ceilings". Long-term actions include alignment with RESS, community benefit policies and grid development.

The Roadmap does not reference direct wires but rather includes as a policy priority that CPPAs should facilitate locating energy demand where existing / future grid is available and close to renewable generation including through energy parks. We understand that a consultation on private wires is being developed, as anticipated by the Climate Action Plan (Action 115).

The Roadmap references Article 15 of the RED Directive (EU) 2018/2001 which requires Member States to ensure that CPPAs are not subject to disproportionate or discriminatory procedures or charges.

Circular Economy Bill || The Government published a Circular Economy Bill the intention of which is to support sustainable production and consumption including through introduction of environmental levies, a waste recovery levy, and a segregation and charging regime for commercial waste.

Sustainable Mobility || The Government published a Sustainable Mobility Policy setting out a framework for active travel and public transport to 2050.

Renewable Fuels || The Government is consulting on the Renewable Fuels for Transport Policy Statement. It is intended to progress implementation of the transport elements of the Renewable Energy Directive and to consider the Fit for 55 proposals. Views are sought on the proposed increase in biofuels supply envisaged under the Climate Action Plan 2021, the potential for advanced and development fuels, and future administration of the biofuels obligation. || **Closing date: 20 May 2022**.

EV Infrastructure || The Government is inviting views (with a consultation to be run in May) on an EV Charging Infrastructure Strategy 2022-25. The intention is to set out a plan for delivery of home, residential neighbourhood, destination, and motorway charging. A new office will be established to coordinate and deliver policy: Zero Emission Vehicles Ireland (Department of Transport partnering with TII and SEAI). It is indicated that the ZEVI will work with grid managers, energy providers and private operators to facilitate the delivery of high-speed hubs.

RD&D || SEAI published a call for funding (€20 million) for energy research and innovation projects. || **Closing date: 16 May 2022**.

Offshore || The Government published a report on the public consultation on Marine Protected Areas. Section 4.14 looks at offshore energy.

CRITICAL INFRASTRUCTURE

75% Success || The SNSP cap has been successfully raised from 70 to 75% following an 11 month trial by EirGrid. ENTSO-E reports that the Ireland and Northern Ireland power system is the first in the world to reach this level of renewable power on the grid.

BMPS || EirGrid is consulting on V 5.1 of the Balancing Market Principles Statement. Revisions include updates to legislative references including in relation to Articles 12 & 13 of the Internal Market in Electricity Regulation which, it is noted, is the subject of ongoing industry and regulatory engagement; updates to the description of interconnector arrangements following Brexit; and the situation on enabling additional inputs to scheduling and dispatch processes (such as from BESS units). || **Closing 17 May 2022**.

Community Benefit || EirGrid has published its Community Benefit Policy.

CRU BUSINESS

Gas Year 2022/23 (CRU/2022/35) || The CRU is consulting on allowed revenues and tariffs for transmission and distribution. The CRU does not consider it appropriate to change the multipliers and seasonal factors for the tariff year 2022/23. || **Closing date: 16 May 2022**.

SEMC BUSINESS

System Services Futures Arrangements (SEM-21-069) || The SEMC published its High Level Decision on the competitive procurement of System Services. It is intended that there will be a daily auction framework initially for reserve and potentially other products like ramping; a layered procurement framework for contracts up to 12 months; and the already established Fixed Contract Framework will be utilised to remove barriers to entry for new technologies and ensure sufficient volume of System Services. Providers of System Services will receive payment from the TSOs in the first instance. The TSOs will recover these costs through a new charge to be imposed on Suppliers, who may in turn recover this from the customer. A System Services Code will be elaborated. The SEMC intend to consult further now to develop the detailed design.

Directed Contracts (SEM-22-11) || Round 18 of Quarterly Directed Contracts has been further postponed to mid-May because of the volatility in commodity markets.

All-Island Tariffs (SEM-22-013) || The SEMC published the indicative timetable for setting all island tariffs for 2022/23.

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Environment & Planning

RECENT JUDGMENTS

High Court upholds section 5 declaration where the reasons for the decision were sufficiently clear on reasonable enquiry

The High Court refused to grant an order quashing a section 5 declaration of the Board that a change of use from a furniture manufacture and storage facility to a commercial self-storage facility constituted development.

The applicant challenged the Board's decision on grounds that neither the Board nor the inspector identified a proper, reasoned basis for the conclusion that the change of use was "material". The Court was satisfied from reading the decision together with the inspector's report that there had been proper identification of the actual change of use and that the planning concerns arising from the change had been identified e.g. implications for traffic, servicing and car parking and the amenity of neighbouring properties. It held that, although the reasons for the decision "*could and should have been better stated*", they were sufficiently clear on reasonable enquiry and with access to the planning file.

High Court provides clarity on how PCO motions will be dealt with pending the CJEU's determination in *Enniskerry*

The High Court has determined two PCO motions following the decision to refer questions relating to the scope of the 'not-prohibitively-expensive rule' to the CJEU in the *Enniskerry* case in January of this year.

The High Court found that it had three options for determining PCO motions pending the outcome of the *Enniskerry* reference. It could "***make a further reference** in the present case, **adjourn this motion pending the outcome in Enniskerry**, or **decide the points myself here** (which wouldn't make much sense since I am referring them in Enniskerry)."*

In the first of these judgments, the Court adjourned the proceedings pending the determination of the reference. However, in the second companion judgment, the High Court found that it was necessary to refer a further three questions to the CJEU:

> *"whether art. 9(3) of the Aarhus Convention has the effect that if domestic legislation in a particular member state implements that provision in relation to specified matters by means of an express legislative rule that there be no order as to costs, leaving all other matters to be dealt with by judicial discretion which is subject to the EU law interpretative obligation that it is to be exercised in accordance with the Aarhus Convention, such discretion should be exercised in that member state along the same lines as the express legislative rule of no order as to costs."*
>
> *"whether the concept of "national law relating to the environment" in art. 9(3) of the Aarhus Convention includes national law relating to sustainable development, having regard inter alia to the preamble to the Aarhus Convention and to the Rio Declaration on Environment and Development approved by the United Nations Conference on Environment and Development, held at Rio de Janeiro in June 1992, referred to in the preamble to the Aarhus Convention."*
>
> *"if the answer to the fifth question in general is no, whether art. 9(3) of the Aarhus Convention has the effect that if domestic legislation in a particular member state implements that provision in relation to the prevention of future contraventions of national law relating to the environment by means of an express legislative rule that there be no order as to costs, leaving the remedying of past contraventions of national law relating to the environment to be dealt with by judicial discretion which is subject to the EU law interpretative obligation that it is to be exercised in accordance with the Aarhus Convention, such discretion should be exercised in that member state in relation to the remedying of such past contraventions along the same lines as the express legislative rule of no order as to costs."*

LEGISLATION

The Planning and Development (Amendment) (No. 2) Bill 2022 is currently before Seanad Éireann, Third Stage. The Bill amends the Planning and Development Act 2000 to provide for applications to be made to An Bord Pleanála in respect of development of lands where an application for substitute consent of development of those lands has been made, or in respect of development of adjoining lands; to remove the requirement to apply for leave for substitute consent under Part XA of that Act; and to provide for related matters.

DOMESTIC REPORTS, CONSULTATIONS AND DECISIONS

The Department of Agriculture, Food and the Marine held the 9th meeting of the Forestry Policy Group, welcoming updates on further progress on Project Woodland. Irish Rural Link also presented their report 'Assessment of Attitudes by Communities and Interested Parties on Forestry and Woodlands', which will be central to the development of a new Forestry Strategy for Ireland.

The Department of Agriculture, Food and the Marine also welcomes the publication of the Forestry Appeals Committee Report.

The Department of Housing, Local Government and Heritage, has published the Felling Licence Decision Reports for April 2022.

The Directorate-General for the Environment announced that the Commission is presenting proposals to update and modernise the Industrial Emissions Directive. The updated rules will help guide industrial investments necessary for Europe's transformation towards a zero-pollution, competitive, climate-neutral economy by 2050.

The Directorate-General for the Environment has also published a *questions and answers* style document in relation to the revised EU rules **on industrial emissions.**

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Employment

REDUNDANCY PAYMENTS (AMENDMENT) ACT 2022

The Redundancy Payments (Amendment) Act 2022 became law on 19 April 2022. This Act gives employees who lost out on reckonable service while on lay-off due to COVID-19 restrictions, and who have subsequently been made redundant, a special payment of up to €2,268 tax-free. The aim of this is to bridge the gap in their redundancy entitlements. The payment will apply to employees who are made redundant between 13 March 2020 and 31 January 2025 and who have lost service due to layoffs between 13 March 2020 and 31 January 2022, caused by COVID-19 restrictions. The burden falls on employers to apply to the Department of Social Protection for the special payment on behalf of their employees.

The full Act is available here.

SUPREME COURT ISSUES KEY DECISION ON FIXED TERM WORKERS IN POWER V HSE

The Supreme Court has issued an important judgment on the definition of a fixed-term employee and the entitlement of fixed-term employees to a contract of indefinite duration. This case was an appeal from a High Court decision, whereby the Supreme Court agreed with the High Court that an existing permanent employee of an organisation, who fulfils a more senior role within that organisation on a temporary basis, is entitled to benefit from the Protection of Employees (Fixed-Term) Work Act 2003. In particular, the Supreme Court stated that the employee, who was employed by the HSE as interim CEO on a series on successive fixed-term contracts over the course of four years, was a fixed term-employee notwithstanding his existing permanent contract for the role of CFO. As a result, he was in principle entitled to a permanent contract unless the employer could provide an objective justification as to why this should not be the case.

The full judgment can be read here.

IHREC PUBLISHES TWO NEW CODES OF PRACTICE

The Irish Human Rights and Equality Commission has published two new codes of practice: a Code of Practice on Sexual Harassment and Harassment and a Code of Practice on Equal Pay. Both Codes were published on 9 March 2022. As with all Codes of Practice, neither imposes legal obligations by itself. However, employers should note that both Codes are admissible as evidence before the courts, the Workplace Relations Commission and the Labour Court. As such, employers should follow the guidance in the Codes or, where they do not, be able to explain their reasons for departing from the guidance.

The Code of Practice on Sexual Harassment remains substantively the same as the previous version, with some notable updates, including to the definition of sexual harassment which now mirrors the definition in the Employment Equality Acts. The Code also includes a non-exhaustive list of examples of behaviours which may constitute harassment. The Code of Practice on Equal Pay aims to give practical guidance to employers, employers' organisations, trade unions and employees on the right to equal pay, the elimination of pay inequality and the resolution of pay disputes. It is perhaps timely given the introduction of gender pay gap reporting under Gender Pay Gap (Information) Act 2019 this year (see below).

The Codes can be read in full here and here.

GENDER PAY GAP REPORTING – CERTAIN EMPLOYERS WILL BE REQUIRED TO REPORT THIS YEAR

The Government announced on 19 April 2022 that employers with over 250 employees will be required to publish certain information relating to the gender pay gap in their organisations this year. Minister for Children, Equality, Disability, Integration and Youth, Roderic O'Gorman, TD announced that the Regulations giving effect to the obligations in the Gender Pay Gap (Information) Act 2019 will be published in the coming weeks. It is expected that employers will be asked to include data on the mean and median hourly wage gap in their organisation, as well as data on bonus pay, mean and median pay gaps for part-time employees and employees on temporary contracts and the proportions of male and female employees in the lower, lower middle, upper middle and upper quartile pay bands. Employers will also have to publish a statement setting out why they believe there is a gender pay gap in their company and what measures they propose to eliminate or reduce that gap. Departmental Guidance on how gender pay gap calculations should be made is also expected.

More information about the Gender Pay Gap (Information) Act and its requirements is available here. The Minister's Statement can be read in full here.

ARTHUR COX

Public Procurement

IRELAND

Word Perfect Translation Services Litigation - Costs

The High Court issued a costs' judgment [2022] IEHC 219 (No. 2) in the challenge by Word Perfect to the procurement process of the Department for Public Expenditure and Reform for the award of translation services (which was dismissed when the Court ruled in February in [2022] IEHC 54 that Word Perfect did not have standing to bring the challenge).

The primary focus of the costs' judgment is the fact that the winning party, the State, did not seek to have the eligibility of Word Perfect to challenge the Request for Tenders dealt with as a preliminary issue by the court. The Court said that, instead, the State allowed the case to go to trial on three substantive claims regarding the legality of the Request for Tenders, as well as on the eligibility point.

Word Perfect argued that if the State had conducted this case in the most cost-effective manner possible it would have sought to have the eligibility point dealt with as a preliminary issue and that Word Perfect should not now be liable for the 'unnecessary' costs involved in dealing with the three substantive claims. The State argued that it was entirely successful in these proceedings and should be entitled to 100% of its costs.

The Court considered that it is clear from the wording of section 169 of the Legal Services Regulation Act 2015 and case law that, in order for a winning party to get 100% of its costs, it is no longer sufficient for that party to have been entirely successful in litigation; it must also have conducted the case in the most cost-effective manner possible.

The Court decided that the case was not conducted in the most cost-effective manner possible. It was estimated that circa 20% of the costs were taken up with the 'eligibility' point, with the remainder of time and costs spent on the three 'substantive claims'. Notwithstanding this, the Court awarded the State 50% of its costs, on the basis that the obligation to conduct the case in the most cost-effective manner possible applies not just to the State, but also to Word Perfect, which did not seek to have the eligibility point dealt with as a preliminary issue. Had it done so, it would have been in a stronger position to claim that it should pay only 20% of the State's costs. The Court set out a number of factors underpinning its decision which will form a useful reference point for those taking and defending litigation in the future.

Events move on in a challenge to a PQQ

In Energoinvest Reach Active LTD -v- Electricity Supply Board [2022] IEHC 221, the High Court handed down a decision on an application to amend the applicant's statement of grounds. The proceedings as initiated were a challenge to a PQQ issued by the Respondent in 2019. The PQQ related to an intended framework agreement referred to as the Electrical Distribution Substation Framework. The key thrust of the challenge was that the application of the Contractor Safety Grading System as a selection criteria for appointment to the Framework was discriminatory because of the manner in which it recorded serious safety incidents across different types of work and different frameworks. The applicant said this was discriminatory as against multi-framework contractors. The PQQ was subsequently amended.

The Court had to balance the fact that the amendments sought to made to the Statement of Claim flow from changes in the respondent's position a year after the commencement of the proceedings, against the fact that the proposed amendments were a challenge to a new decision and a wide ranging enlargement of the case. Mr Justice Quinn stated: "I have a measure of sympathy for the applicant which has been faced with a "moving target" in the form of the revised PQQ. Nonetheless I have concluded that the extent of the proposed amendments are such as to enlarge the case to a degree which should not be permitted. I therefore refuse the relief sought."

Since proceedings were initiated, the applicant was successful in tendering for the Framework. The Court is now to determine the question of mootness of the action after the parties have had a chance to make submissions on this judgment.

UK

Public Procurement (International Trade Agreements) (Amendment) Regulations 2022 have been laid before Parliament. They amend public procurement regulations for the purpose of implementing the Free Trade Agreement between Iceland, Liechtenstein and Norway and the UK. A main amendment relates to abnormally low tenders. It provides for tenderers proposing abnormally low tenders to explain whether the price or costs take into account the grant of subsidies, and will apply to all procurements and economic operators.

The UK Government published guidance (Procurement Policy Note 01/22) for contracting authorities considering how to cut ties with companies backed by Russia and Belarus. (This may be of interest but it should be borne in mind that the UK is not subject to the latest EU sanctions law, unlike Ireland, which must comply with it).

Real Estate

COMMERCIAL LANDLORD AND TENANT

'Green' terms in business lease renewals

The English case of *Clipper Logistics plc v Scottish Equitable plc* considered the approach to be taken to 'green lease' terms in lease renewal proceedings under the Landlord and Tenant Act 1954 (the UK equivalent of the Irish Landlord and Tenant (Amendment) Act 1980), specifically in respect of amending the alterations clause to prevent, rectify and/or indemnify against any adverse impact on the energy performance certificate (**EPC**) rating (EPCs being the UK equivalent of Irish Building Energy Rating Certificates).

The landlord argued in favour of covenants which would:

- prohibit the tenant from carrying out alterations which led to the property having an energy performance indicator below band E, such that the property would be considered 'sub-standard' (the **Prohibition Clause**);
- provide an indemnity for the cost of a new EPC certificate if the tenant or any other occupier were to make such alterations (the **Indemnity Clause**); and
- oblige the tenant to maintain the current EPC rating, return the premises to the landlord with the same EPC rating, and promptly carry out remedial works to restore the EPC rating if it fell (the **Reinstatement Clause**).

The court considered that, taken together, the landlord's proposed covenants would unfairly and unreasonably impose on the tenant a number of duties which were (in English law) actually the landlord's. In relation to each proposed clause, the court held that:

- there was no reasonable requirement for the Prohibition Clause, due to the existing clauses in the lease (which would be replicated on renewal) prohibiting the tenant from making alterations to the premises;
- the Indemnity Clause, if permitted, would place too significant a burden on the tenant;
- the part of the Reinstatement Clause which required the tenant to return the property with the same EPC rating as at the start of the lease should be permitted, as without the clause, the landlord would lack any meaningful protection against inaction by the tenant which could make the property 'sub-standard' and have significant adverse consequences for the landlord; and
- the remainder of the Reinstatement Clause should not be permitted, as this would unreasonably burden the tenant and unfairly advantage the landlord.

While it is not binding precedent, with the increasing focus on 'green' lease clauses, the decision is indicative of the approach the English courts (and possibly the Irish courts) may take on this type of issue.

RESIDENTIAL LANDLORD AND TENANT

Annual Tenancy Registration

Legal provisions requiring landlords to register their tenancies with the RTB every year have been commenced. Annual tenancy registration came into effect on 4 April 2022 which means that landlords must register their tenancies every year, within one month of the anniversary of when the tenancy began. See RTB guidance and Government announcement.

The following provide the legislative underpinning for annual registration:

- Section 134 of the Residential Tenancies Act 2004 as amended by Section 22(1)(a) of the Residential Tenancies (Amendment) Act 2019 which introduced the annual registration requirement – Section 22(1)(a) (as well as the remaining un-commenced provisions of the 2019 Act) were commenced on 4 April 2022 by the Residential Tenancies (Amendment) Act 2019 (Commencement) Order 2022;
- Local Government Rates and Other Matters Act 2019 (Commencement) Order 2022;
- Residential Tenancies (Amendment) Act 2021 (Section 7) (Commencement) Order 2022; and
- Residential Tenancies Act 2004 (Prescribed Form) Regulations 2022.

The second and third sets of regulations listed above relate to transition arrangements and registration fees. The Residential Tenancies Act 2004 (Prescribed Form) Regulations 2022 prescribe:

- amended application forms for tenancy registration;
- information to be sent by the RTB to landlords and tenants after registration; and
- information to be furnished by landlords to the RTB under Section 139 of the Residential Tenancies Act 2004 where a landlord is updating the register to reflect an amended rent or other amended tenancy terms.

HOUSING

Land Development Agency

The following regulations have been made:

- Land Development Agency Act 2021 (Dissolution Day) Order 2022 which dissolves the body established by the Land Development Agency (Establishment) Order 2018 (S.I. 352/2018 as amended by S.I. 603/2018) with effect from 31 March 2022; and
- Land Development Agency Act 2021 (Commencement) Order 2022 which commences the remainder of the Land Development Agency Act 2021 including:
  - Section 15 – services to local authorities;
  - Part 3 – funding of the Agency (except insofar as it is already in operation);
  - Part 4 – Agency to establish subsidiary DACs;
  - Part 7 – register and acquisition of relevant public land by the Agency (apart from Section 55(7) which requires the taking into account of certain obligations under Part 9 (that apply to the development of dwellings on relevant public land) in the calculation of the market value of relevant public land);
  - Part 8 – compulsory purchase; and
  - Part 10 – amendment of the Planning and Development Act 2000 to provide the Agency with certain powers to act as a development agency under the Act.

Update on the Ukrainian crisis from the Department of Housing, Local Government and Heritage

The Minister for Housing, Local Government and Heritage, Darragh O'Brien, has provided an update on his Department's work in relation to the Ukrainian crisis. The update includes:

- plans to use vacant buildings to house Ukrainian refugees with exemptions from planning requirements for refurbishment of buildings where necessary;
- the OPW to be tasked with the design, development and delivery of any accommodation to be produced through modular/volumetric construction including associated site enabling works on available and suitable State land;
- the establishing of a 'clearing house' to address contractual, operational and compliance issues associated with planning permissions which have been granted and not yet activated; and
- expanding on-site construction hours.

Other Housing Actions

In the same update, the Minister also flagged the following actions:

- removing the local Authority acquisition cap and restoring local decision making in certain emergency situations;
- a new 2022 voids programme with an emphasis on quick turnaround and re-letting of vacant social housing stock to those on social housing waiting lists;
- removing the vacancy rates exemption to promote full use of vacant properties; and
- finalising restrictions on Short Term Lets in rent pressure zones.

FIRE SAFETY

Security for Costs Ordered Against Management Company

The Irish case of *I.E.G.P. Management Company Limited by Guarantee v Cosgrave, Joseph and ors, and Cosgrave Property Developments Limited, KMD Architecture and OLM Consultancy* is an action against ten defendants concerning a development completed in 2006, where fire safety defects were discovered in 2018. The High Court directed that the plaintiff management company provide:

- security for costs in respect of two defendants, on the grounds that the defendants had a prima facie defence on the limitation period, the management company had failed to establish that it could levy the necessary funds from its members, and there were no special circumstances arising from public interest to justify the refusal of security; and
- security in the sum of over €500,000 in respect of each of the two defendants, 50% forthwith and the balance prior to notice of trial.

The court refused an application by the plaintiff to 'invite' the parties to attend mediation where the replies to particulars had been uninformative, and where mediation seemed premature.

ESG

Circular Economy Bill

The Cabinet approved the Circular Economy, Waste Management (Amendment) and Minerals Development (Amendment) Bill 2022 Bill which the Government describes as landmark Bill to reduce waste and influence behaviour. Some provisions relevant to the construction sector include the following (taken from the Government's notes on the Bill):

Waste recovery: The Bill empowers the Minister to impose a levy on waste recovery (as defined in the Waste Management Act 1996) that takes place in Ireland, and also on waste exports from Ireland for recovery elsewhere in the EU and outside the EU.

Supporting the increased use of recycled or reused materials: The Bill aims to streamline the process for decisions made by the EPA on what are known as End-of-Waste and By-Product applications. These two processes allow, under strict environmental conditions, materials which might otherwise be treated as waste to be recycled or re-used in other applications. This can only happen where it is safe to do so and where there is a genuine use that the recycled/re-used materials can be put to in the market. The Bill will allow the EPA to improve the application processes.

In the construction sector, the Government believes that there is significant potential to reduce the need for mining aggregates, e.g. crushed rock and sand and gravel that are used in concrete, by re-using what might otherwise be treated as waste material from demolition. This has to be done in a way that is safe, in terms of the environment, human health and so on. The Government states that the End-of-Waste process is the means by which those safeguards can be provided.

ECB's Report on Banks' Progress on Climate-Related and Environmental Disclosures

The European Central Bank (**ECB**) recently published a report on its supervisory assessment of institutions' climate-related and environmental risks disclosures. The report is based on a review of 109 directly supervised banks' public disclosures and was published alongside a speech given on 14 March 2022 by Frank Elderson (Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB) on the ECB's supervisory approach to climate-related and environmental risks.

For more, see Arthur Cox partner Sarah Thompson's briefing: "White noise and no real substance": the ECB's assessment of banks' climate-related and environmental disclosures.

LEGISLATION

The Government has published its Summer 2022 Legislation Programme. Property-related legislation is summarised below.

Property legislation on the priority drafting and publication list	
Defective Concrete Blocks Remediation Bill	To provide for a new Defective Concrete Blocks scheme which will provide grants to eligible owners of mica and pyrite homes (heads in preparation).
Planning and Development Bill	To review and replace the Planning and Development Act 2000 with a consolidated Bill improving the clarity and structure of current code (work is underway).
Tailte Éireann Bill	To establish Tailte Éireann, a single body incorporating Ordnance Survey Ireland, Commissioner of Valuation, Boundary Surveyor and the PRA (heads of Bill approved 22 December 2020, PLS has taken place).
Courts and Civil Law (Miscellaneous Provisions) Bill	To enact provisions relating to courts administration and other civil law reform measures including updating the Land and Conveyancing Law Reform Act 2009 to provide for a presumption that a deposit paid on a property purchaser's behalf to a person in connection with such purchase shall be held as stakeholder, and to prevent joint tenants benefiting from homicides and other matters (heads of Bill approved 9 January 2020 & 1 June 2021, PLS has taken place).
Other property legislation (not on the priority list)	
Industrial Development (Miscellaneous Provisions) Bill	To provide that IDA Ireland would partner with the Ireland Strategic Investment Fund to commercially develop advance office buildings on IDA-owned lands in regional areas (revised heads in preparation).
Licencing of Construction Activity Bill	To provide for the establishment of a statutory licensing system for construction and related activities (heads in preparation).
Emergency Management and Fire and Public Safety Bill	To underpin current established emergency management practice at national and local level, to consolidate and update the Fire Services Acts 1981 & 2003, to revise and enhance the legislative approach to safety at funfairs and to amend the legislation dealing with the licensing of indoor events (work is underway).
Housing (Miscellaneous Provisions) Bill	To amend the Housing (Miscellaneous Provisions) Act 2009 in relation to social housing assessments and rent schemes and amend the Housing (Miscellaneous Provisions) Act 2014 in relation to tenant purchase (work is underway).
Land Value Sharing and Urban Development Zones Bill	To amend the Planning and Development Act 2000 to introduce new provisions to deal with land value sharing and urban development zones as set out in the Government's 'Housing for All' plan (heads approved 14 December 2021, PLS to be determined).
Monuments and Archaeological Heritage Bill	To replace and modernise the National Monuments Acts 1930 to 2014 and related enactments, to establish a new Register of Monuments to replace current overlapping systems and related matters (heads approved 30 November 2021, PLS has been done).
Residential Tenancies Bill	To amend the Residential Tenancies Act 2004 to further enhance tenancy protections, particularly during receivership and to enhance the supports and services available to both tenants and landlords (heads in preparation).
Property Services Regulation (Amendment) Bill	To revise the Property Services Regulation Act 2011 in light of the Services Directive and Recognition of Foreign Qualifications Directive (heads in preparation).

State Aid

COMMISSION APPROVES 2022-2027 REGIONAL AID MAP FOR IRELAND

The European Commission has approved, under EU State aid rules, Ireland's map for granting regional aid from 1 January 2022 to 31 December 2027 within the framework of the revised Regional aid Guidelines ('RAG'). The revised RAG enable Member States to support the least favoured European regions in catching up and to reduce disparities in terms of economic well-being, income and unemployment. Ireland's regional map defines the Irish regions eligible for regional investment aid. The map also establishes the maximum aid intensities in the eligible regions. The aid intensity is the maximum amount of State aid that can be granted per beneficiary, expressed as a percentage of eligible investment costs. Under the revised RAG, regions covering 35.90% of the population of Ireland will be eligible for regional investment aid. See the full press release here.

COMMISSION ADOPTS TEMPORARY CRISIS FRAMEWORK TO SUPPORT THE ECONOMY IN THE CONTEXT OF RUSSIA'S INVASION OF UKRAINE

The European Commission has adopted a Temporary Crisis Framework to enable Member States to use the flexibility foreseen under State aid rules to support the economy in the context of Russia's invasion of Ukraine. The new framework will enable Member States to (i) grant limited amounts of aid to companies affected by the current crisis or by the related sanctions and countersanctions; (ii) ensure that sufficient liquidity remains available to businesses; and (iii) compensate companies for the additional costs incurred due to exceptionally high gas and electricity prices. The Temporary Crisis Framework will be in place until 31 December 2022. See the full press release here.

COMMISSION APPROVES €50 MILLION IRISH SCHEME TO SUPPORT THE BEEF SECTOR AFFECTED BY THE COVID-19 PANDEMIC

Under the scheme, the aid will take the form of direct grants. The measure will be open to farmers and companies active in the beef sector in Ireland. The aim of the scheme is to address the liquidity needs of the beneficiaries and to help them continue their activities during and after the pandemic. The Commission found that the Irish scheme is in line with the conditions of the Temporary Framework. In particular, the aid will not exceed €270,000 per beneficiary; and will be granted no later than 30 June 2022. The Commission therefore concluded that the measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State, in line with Article 107(3)(b) TFEU and the conditions set out in the Temporary Framework. See the full article here.

COMMISSION APPROVES PROLONGATION AND MODIFICATION OF IRISH RISK EQUALISATION SCHEME

The European Commission has approved, under EU State aid rules, the prolongation and modification of an existing Irish risk equalisation scheme to compensate insurers for the provision of private medical insurances. Under the scheme, private health insurers, whose customers have a higher risk profile than the market average, continue to obtain payments from a Risk Equalisation Fund. In practice, the state-owned insurer, Vhi Insurance, is expected to be a net beneficiary of the scheme, while its competitors are expected to be net contributors. The existing scheme, approved in 2003 and prolonged in 2009, 2013, 2016 and 2020, was set to expire on 31 March 2022. Ireland notified the following modifications: (i) the introduction of a 'high cost claims pool', whereby the excess of claims over €50,000 will be reimbursed at 40%, while all other claims will continue to be reimbursed based on age of the insured person and the number of days/nights spent in a hospital; (ii) an increase from 4.4% to 6% in the return on sales made by the net beneficiary of the scheme on the basis of the sales of private health insurance services; and (iii) the prolongation of the scheme until 31 March 2027. The Commission found that, following the modifications, the scheme remains in line with EU State aid rules. See the full press release here.

BRITISH SUGAR CAN APPEAL UK STATE-AID CLAIM TARGETING TATE & LYLE SUGARS

British Sugar, which failed to strike down on EU state aid grounds a UK tariff regime that it argued illegally favoured Tate & Lyle Sugars, has won permission to appeal the ruling. Last month, the High Court in London found that UK rules exempting a volume of raw cane sugar from tariffs weren't selective, even though Tate & Lyle was the only refiner that benefited. See the High Court's judgment here.

COMMISSION INVITES COMMENTS ON EVALUATION OF STATE AID RULES FOR BANKS IN DIFFICULTY

On 17 March 2022, the European Commission launched two consultations to gather views on the state aid rules for banks in difficulty, one addressed to all interested parties and the other addressed to financial institutions and Member States' authorities. In parallel, the Commission has published a Call for Evidence seeking feedback on the main aims of the evaluation, its scope and context. This initiative aims to evaluate to what extent the state aid rules have fulfilled their objective of preserving financial stability while minimising competition distortions stemming from the granting of state aid. The deadline for comments is 9 June 2022, and the results are expected to be published in the second half of 2023. See the full article here.

COMMISSION APPROVES €155 BILLION FRENCH LIQUIDITY SCHEME TO MITIGATE UKRAINE WAR IMPACT

The European Commission has approved a French scheme to provide up to €155 billion in liquidity support for companies across all sectors in the context of the Ukrainian war. This is the first scheme approved under the State Aid Temporary Crisis Framework adopted by the Commission on 23 March 2022. The scheme will apply to the whole territory of France, including overseas regions, and will be open to companies of all sizes in all sectors except those active in the financial sector. Eligible

beneficiaries will be entitled to receive new loans covered by a State guarantee of up to 90% of the loan amount. The maximum loan amount per beneficiary the State will guarantee is equal to 15% of the beneficiary's average total annual turnover over a predefined time period. The Commission found that (i) the maturity of the loans cannot exceed six years; (ii) the annual interest rates respect the minimum levels in the Temporary Crisis Framework; and (iii) the guarantees will be granted by 31 December 2022 at the latest. The Commission concluded that the scheme is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State, in line with the conditions set out in the Temporary Crisis Framework and Article 107(3)(b) TFEU. See the full press release here.

FRANCE'S €7 BILLION ECONOMIC-PLAN RECOVERY WINS EU STATE AID APPROVAL WITH 'STRINGS ATTACHED'

The European Commission has approved a €7 billion French scheme which aims to provide investment support towards a sustainable recovery. The measure was approved under the State Aid Temporary Framework. The aid will take the form of (i) direct grants; (ii) subsidised interest rates loans (iii) subsidised guarantees; and (iv) repayable advances. The support will be used to finance sustainable investments in tangible and intangible assets made by companies in the industrial sector, such as the chemical industry, the automotive industry and machinery and equipment manufacturing industry. The scheme will benefit up to 1,000 companies. The aid amount will not exceed €70 million per individual company. The Commission found that the scheme is in line with the conditions set out in the Temporary Framework. Furthermore, the Commission found that the measure is necessary, appropriate and proportionate to foster investment of certain economic activities of importance for a sustainable recovery. The Commission concluded that the scheme is necessary, appropriate and proportionate to foster investment for certain economic activities for a sustainable recovery, in line with Article 107(3)(c) TFEU. See the full press release here.

COMMISSION APPROVES RE-INTRODUCTION OF FINNISH SCHEME TO SUPPORT BUSINESSES AFFECTED BY THE COVID-19 PANDEMIC

The European Commission has approved the re-introduction of a Finnish scheme, with a €10 million budget increase, to support the uncovered fixed costs of companies affected by the Covid-19 pandemic. This scheme is a re-introduction of a measure approved by the Commission in June 2021, which expired on 31 December 2021. The measure is open to all sectors except the financial one and also excludes companies active in the primary agricultural product, aquaculture and fisheries sectors. The scheme entitles beneficiaries to receive support up to a maximum of 70% of their uncovered fixed costs incurred between 1 December 2021 and 28 February 2022. The aid will not exceed €12 million per beneficiary and will be granted no later than 30 June 2022. The Commission concluded that the measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State in line with the conditions set out in the Temporary Framework and Article 107(3)(b) TFEU. See the full press release here.

COMMISSION APPROVES €1.4 BILLION CZECH SCHEME AND €2.9 BILLION SPANISH SCHEME TO COMPENSATE ENERGY-INTENSIVE COMPANIES FOR INDIRECT EMISSION COSTS

The European Commission has approved, under EU State aid rules, Czech and Spanish schemes to partially compensate energy-intensive companies for higher electricity prices resulting from indirect emission costs under the EU Emission Trading System. The Commission found that the schemes are necessary and appropriate to support energy-intensive companies to cope with the higher electricity prices and to avoid companies relocating to countries outside the EU with less ambitious climate policies, resulting in an increase in global greenhouse gas emissions. The Commission found that the schemes comply with the requirements on energy audits and management systems set out in the Guidelines on certain state aid measures in the context of the greenhouse gas emission allowance trading scheme post-2021. The schemes therefore support the EU's climate and environmental objectives and the goals set in the European Green Deal. Furthermore, the Commission concluded that the aid granted is limited to the minimum necessary and will not have undue negative effects on competition and trade in the EU. See the full press releases here and here.

COMMISSION APPROVES LUXEMBOURGISH SCHEME TO COMPENSATE ENERGY-INTENSIVE COMPANIES

The European Commission has approved, under EU state aid rules, a Luxembourg scheme that will partially compensate energy-intensive companies facing higher electricity prices resulting from indirect emissions under the EU Emissions Trading Scheme. This scheme will cover the period 2021-2030 and its total estimated budget is €500 million. It aims to reduce the risk of "carbon leakage", which is when companies relocate their production to countries with less ambitious climate policies, which leads to a reduction in economic activity in the EU without reducing global greenhouse emissions. Compensation will be provided to companies in sectors that are exposed to the risk of carbon leakage. Beneficiaries will receive a partial refund of indirect emission costs incurred in the previous year. The maximum amount of aid will be 75% of indirect emission costs from the previous year. The Commission assessed the scheme under EU state aid rules and found it to be necessary and appropriate to help energy-intensive companies cope with rising electricity prices and to reduce the risk of carbon leakage. They concluded that the aid is limited to the minimum amount necessary and that it will not have unintended negative effects on competition and trade in the EU. See the full press release here.

COMMISSION APPROVES €95 MILLION POLISH AID FOR EXPANSION OF LG CHEM'S ELECTRIC VEHICLES BATTERY PLANT

The investment aid will support the expansion of LG Chem's battery cell production facility for electric vehicles in the Polish Dolnośląskie region. In August 2020, the Commission opened an in-depth investigation to assess whether the measure was compatible with the Guidelines on Regional State Aid for 2014-2020. The Commission found that without the Polish support, LG Chem would have opted to invest outside of the EEA. The Commission also found that the aid was limited to the minimum necessary to incentivise LG Chem to carry out the investment in Poland, as it did not exceed the amount necessary to increase the profitability of the project in Poland to the same level as the one in the third country. Additionally, the Commission found that the investment aid will contribute to job creation, as well as to the economic development and to the competitiveness of the disadvantaged region of Dolnośląskie. On this basis, the Commission concluded that the positive effects of the project on regional development outweigh any possible distortion of competition brought about by the state aid. See the full press release here.

COMMISSION APPROVES €209 MILLION HUNGARIAN AID FOR CONSTRUCTION OF SK ON HUNGARY'S ELECTRIC VEHICLE BATTERY PLANT

The investment aid will support the construction of a new battery cell manufacturing plant in the Közép-Dunántúl region. The Commission assessed the aid measure under the applicable Guidelines on Regional State Aid for 2014-2020. The Commission found that the investment aid will contribute to job creation, as well as to the economic development and to the competitiveness of a disadvantaged region. The Commission held that in the absence of the public funding, the project would have been carried out in a more developed European region than Central Transdanubia. The Commission also found that the aid is limited to the minimum necessary to trigger the investment in Hungary and complies with all aid intensity requirements. On this basis, the Commission concluded that the positive effects of the project on regional development outweigh any possible distortion of competition brought about by the state aid. See the full press release here.

COMMISSION APPROVES €40 MILLION LUXEMBOURGISH SCHEME TO SUPPORT DEPLOYMENT OF RECHARGING INFRASTRUCTURE FOR ELECTRIC VEHICLES

The European Commission has approved, under EU state aid rules, a €40 million scheme to support the development of publicly accessible and private recharging infrastructure in Luxembourg. The Commission considers that the measure will encourage the uptake of recharging infrastructure for electric vehicles, thus contributing to the reduction of CO2 and pollutant emissions, in line with the EU's climate and environmental objectives and the goals set by the European Green Deal. Furthermore, the Commission found that the aid will be limited to the minimum necessary, as it will be granted through a competitive selection process, and that the necessary safeguards will be in place. The Commission concluded that the positive effects of the scheme on EU environmental and climate goals outweigh any potential distortions of competition and trade brought about by the support. On this basis, the Commission approved the measure under EU State aid rules. See the full press release here.

ECJ DISMISSES APPEAL BY GREEK RENEWABLE ELECTRICITY PRODUCER AGAINST REJECTION OF STATE AID COMPLAINT

On 7 April 2022, the ECJ dismissed an appeal by a Greek electricity producer (Solar Ileias Bompina) against a General Court order that held that its action to challenge the European Commission's decision to reject a state aid complaint was inadmissible. The ECJ held that the General Court did not err in law in refusing to accord Solar Ileias Bompina the status of "interested party", within the meaning of Article 1(h) of Regulation 2015/1589 laying down detailed rules for the application of Article 108 TFEU. Therefore, the General Court did not err in dismissing its action as inadmissible. See the full judgment here.

EU CHALLENGES DISCRIMINATORY PRACTICES OF UK'S GREEN ENERGY SUBSIDY SCHEME AT WTO

The EU is requesting consultations with the UK at the World Trade Organization ('WTO') on the UK's discriminatory practices when granting support for green energy projects. According to the Commission, the criteria used by the UK government in awarding subsidies for offshore wind energy projects favour UK over imported content. This violates the WTO's core tenet that imports must be able to compete on an equal footing with domestic products and harms EU suppliers, including many SMEs, in the green energy sector. Moreover, such practices ultimately increase costs of production and thereby risk slowing down the deployment of green energy. The dispute settlement consultations that the EU has requested are the first step in WTO dispute settlement proceedings. If they do not lead to a satisfactory solution within 60 days, the EU can request the WTO to set up a panel to rule on the matter. See the full press release here.

COMMISSION APPROVES €2 BILLION AUSTRIAN SCHEME UNDER RECOVERY AND RESILIENCE FACILITY TO SUPPORT ROLL OUT OF BROADBAND NETWORKS

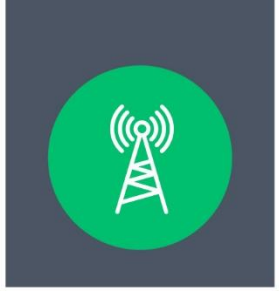
The European Commission has approved, under EU State aid rules, a €2 billion Austrian aid scheme made available through the Recovery and Resilience Facility ('RRF') to roll out passive infrastructure for fixed broadband access networks in areas of the country where there is no current or planned network able to provide at least 100 megabits per second download speed. The Commission found that the scheme is necessary to address a market failure in

target areas. The Commission found that the aid is proportionate as the measure is based on thorough mapping of the current broadband networks and on public consultation processes on future deployment plans that ensure that public interventions address market failure areas without causing undue risks of crowding out private investments. The Commission also found that the scheme has sufficient safeguards to ensure that undue distortions of competition are limited and do not adversely affect trading conditions contrary to the common interest. See the full press release here.

COMMISSION APPROVES €2 BILLION ITALIAN SCHEME UNDER RECOVERY AND RESILIENCE FACILITY TO SUPPORT ROLL OUT OF 5G MOBILE NETWORKS

The European Commission has approved, under EU state aid rules, a €2 billion Italian scheme under the Recovery and Resilience Facility ('RRF') to roll out high-performing 5G mobile networks. The aid will take the form of grants to electronic service providers. The scheme will finance the deployment of (i) performant backhaul networks to connect the mobile base stations that by 2026 will not have a performant one; and (ii) the necessary base stations to provide 5G mobile services offering speeds of at least 150 Mbps download and 30 Mbps upload in those areas of Italy which, by 2026, will not be served by networks offering download speed above 30 Mbps. The Commission found that the scheme is necessary and proportionate to address market failures, in particular, the absence of current or planned mobile networks that would adequately address end users' needs. The Commission concluded that the scheme has sufficient safeguards to ensure that undue distortions of competition are limited and that the aid does not adversely affect trading conditions contrary to the common interest. The Commission found that the scheme fosters competition by ensuring wholesale access to the supported networks. See the full press release here.

ARTHUR COX



Telecoms

NEW ROAMING REGULATION TO ENTER FORCE ON 1 JULY 2022

On 4 April 2022, the European Parliament and European Council approved the recast EU Roaming Regulation. The new regulation will enter into force on 1 July 2022 and replaces the current roaming regulation which expires on 30 June 2022. As such, people will continue to be able to make calls, text, and use mobile data while travelling in other EU countries.

The revised regulation adjusts maximum wholesale prices to ensure that the provision of retail roaming serves at domestic rates is sustainable for operators. A 'fair use' policy designed to prevent permanent roaming remains. The European Commission will monitor the effects of the Regulation and present a new tranche of legislative proposals to regulate the roaming market and adjust wholesale price caps if it believes such changes to be necessary. See the Commission's press release here.

COMREG PUBLISHES DRAFT DECISION ON ACCESS PRODUCTS AND SERVICES KPI METRICS

On 22 April 2022, ComReg published its decision in respect of the key performance indicators by which Eircom must monitor and report on its performance in respect of regulated access products and services. This decision follows a consultation process in which ComReg received comments from ALTO, BT Ireland, Eircom, NBI, and Sky Ireland. Under the European Electronic Communications Code, ComReg must now make the draft decision available to the European Commission, BEREC, and national telecoms regulatory authorities in other EU Member States and take account of any views expressed by them before adopting its final decision.

ComReg's information notice is available here and non-confidential submissions by operators during the consultation process can be found here.

COMMERCIAL COURT REFUSES TO GRANT STAY TO EIRCOM AGAINST COMREG DECISION PENDING APPEAL

On 4 March 2022, the Commercial Court delivered a judgment which clarifies the test that a court will use to assess an application to stay the operation or implementation of a ComReg decision pending an appeal. The judgment in question related to Eircom's application to stay a ComReg decision which, broadly speaking, set out new lower maximum prices that Eircom could charge in certain regulated markets.

An applicant seeking a stay should raise arguable grounds that the ComReg decision subject to appeal may be found invalid. Furthermore, an applicant must show that the stay sought is required to avoid serious and irreversible damage to them. This damage must be likely to occur and not be hypothetical in nature. In addition, the Court will carry out a balancing of interests encompassing those of the appellant, those likely to be adversely affected by a stay being granted, and the general public. The general interest in allowing the immediate implementation of regulatory decisions was underlined, highlighting the onerous threshold required of an applicant seeking a stay.

In this matter, the Notice Parties opposed to Eircom's application, Sky and Vodafone, had offered undertakings which substantially protected Eircom against the irrecoverable losses to which it would be exposed to if its application for a stay was refused pending its appeal. As such, the Court rejected its application.