



Construction & Engineering

NEC DEVELOPMENTS

NEC published the final version of [Secondary Option X29](#) on climate change, which we looked at in April. It seeks to enable tangible sustainability and net-zero commitments between clients and suppliers by introducing a number of contractual mechanisms for consideration (Climate Change Requirements in the Scope; a Performance Table for benchmarking performance against targets distinct from the Climate Change Requirements; and a mechanism for managing climate related changes to the Scope, Prices, Performance Table, Completion Date and Key Dates).

NEC also published a [Practice Note](#) on international use of the NEC4 Facilities Management Contract. It is aimed at providing guidance where, for example, the service is being provided in two or more countries, the service provider is from the country where the service is being provided rather than the country of the client, or the service is being provided in a different country to that of the service provider and client.

REGISTRATION OBLIGATION FOR BUILDING SERVICES PROVIDERS

The [Regulation of Providers of Building Works Act 2022](#) has been signed into law. It puts the Construction Industry Register Ireland on a statutory footing and aims to benefit consumers and the general public by giving those who engage a registered builder the assurance that they are dealing with a competent and compliant operator. It prohibits engaging in building works or holding oneself out as available for being a provider of building works without being registered and sets out a framework for complaints, investigations and sanctions in respect of registered persons.

DATA ON THE CONSTRUCTION SECTOR

The Minister for Public Expenditure and Reform published [Build 2022: Construction Sector Performance and Capacity](#). It is intended to provide information on costs (including materials' and wage inflation), skills, productivity, sustainability, investment and output in the construction sector. || [Press Release](#)

CIRCULAR ECONOMY

The [Circular Economy and Miscellaneous Provisions Act 2022](#) has been signed into law. The Government stated that one of the aims of the Act is to ensure that there is a regulatory system to allow material to be safely and sustainably re-used as secondary raw materials, and that this could be particularly important for the construction sector. The Act also places the circular economy strategy on a statutory footing and requires that it sets out targets in several sectors including construction. || [Press Release](#)



TRAINING

At the National Construction Training Centre, Minister for Further and Higher Education, Research, Innovation and Science launched a Scaffolding Apprenticeship programme; announced work on a proposal to deliver additional capacity at the retrofitting and Near Zero Energy Buildings (NZEB) training facility; and launched development of a Demonstration Park for Modern Methods of Construction. || [Press Release](#) || The Tánaiste announced establishment of a Construction Technology Centre at NUI Galway. || [Press Release](#)



EU

REPowerEU || The Commission published a further [Staff Working Document](#), Implementing the REPowerEU Action Plan: Investment Needs, Hydrogen Accelerator and Achieving the Bio-Methane Targets. The Commission also [proposed](#) a new Regulation on Coordinated Demand Reduction Measures for Gas and a European Gas Demand Reduction Plan, now agreed at the meeting of Transport, Telecommunications & Energy Council. It aims to reduce gas use in Europe by 15% between 1 August 2022 and 31 March 2023. The proposals were welcomed by the [Parliament](#) and [ACER](#). It has been reported in Irish [media](#) that the Irish Government will likely seek an exemption. || [Q&A](#) || [Statement](#) || [Factsheet](#) || [Factsheet on Demand Reduction Plan](#)

NECPs || The Commission seeks [feedback](#) on a draft Implementing Regulation and annex setting out the structure, format, technical details, and information to be included in the integrated national energy and climate progress reports referred to in Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action. NECPs are the reporting mechanism through which measures to be taken to meet emissions reduction and renewable energy targets are agreed and monitored for each Member State. Member States will report on progress every two years. || **Closing date: 9 August 2023.**

Temporary Crisis Framework || The Commission [approved](#) for State aid purposes a €5 billion German grant aid scheme to support energy and trade intensive companies in industrial sectors pursuant to the State aid [Temporary Crisis Framework](#), adopted by the Commission on 23 March 2022.

Reports and Briefings || The Commission published reports on gas and electricity [markets](#) in the EU, outlining statistics on price volatility. || The Commission also produced a briefing on [smart cities](#), which includes the themes of energy efficient buildings, integrated renewable energy sources, sustainable heating and cooling systems, and transport networks. || The

Parliament published a briefing on the EU [carbon border adjustment mechanism](#), looking at implications for climate and competitiveness. || The Parliament also published a report on [PV solar energy](#) and identified a risk of dependency on solar panels manufactured in China. || The Parliament reported on [energy poverty](#) looking at definitions and indicators, EU policies and legislation, and outlook and options.

Industrial Forum || The Fourth Meeting of the EU [Industrial Forum](#) focused on scaling up the manufacturing of key products and components for the future energy system.

Trade Complaint || The EU made a [formal complaint](#) to the WTO that CfDs to support low-carbon energy, especially through offshore wind, violate UK obligations under the GATT 1994 by prioritising local content and according less favourable treatment to imported goods when compared with similar domestic goods.

INTERNAL MARKETS

Electricity || ACER announced it will decide on the TSOs' proposal for a new methodology to optimise inter-TSO settlements related to redispatching and countertrading. Interested stakeholders are invited to submit [views](#) by **10 August 2022**. || ACER has [submitted](#) its revision of the Network Code for cyber security aspects of cross-border electricity flows to the Commission. || ACER has also [reported](#) on progress in implementing the guideline on electricity transmission system operation. || ENTSO-E has [reported](#) progress in implementing the Capacity Allocation and Congestion Management Regulation, the Forward Capacity Allocation Regulation and the Electricity Balancing Regulation. It estimates savings of €34 billion per year for the day-ahead market alone. As part of the bidding zone review pursuant to the IME Regulation, it also [reported](#) on the Locational Marginal Pricing Study. ENTSO-E also [published](#) its annual report and announced a series of [webinars](#) on a power system for a carbon-neutral Europe.

Gas || ACER and ENTSOG are [gathering](#) information with a view to preparing a solution note on ensuring greater flexibility to book firm capacity at interconnection points.

The **closing date is 4 August 2022**. || ENTSOG invites [views](#) on its annual work programme by **6 September 2022**. || ACER also [reported](#) on positive progress in implementing the gas balancing network code.

Network Planning || ACER published its [Opinion](#) on the draft TYNDP Scenario Report. || ACER is beginning the [process](#) of adopting new guidelines on scenarios for gas and electricity network development planning in accordance with the TEN-E Regulation. Consultation will take place in **October 2022**.

Market Monitoring || ACER and CEER published the [Gas Wholesale Volume](#) of the Market Monitoring Report, looking at 2021 and H1 of 2022. It includes recommendations to speed up development of the single market, secure supplies and hedge price exposure.

Nord Stream 2 || We previously mentioned Nord Stream 2 AG v European Parliament & Council (C-348/20 P), in which Advocate-General Bobek published an [Opinion](#) indicating that Nord Stream 2 is entitled to challenge the amendments to the Gas Directive aimed at ensuring that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the EU, to gas transmission lines to and from third countries. The rules relate to unbundling of transmission system structures and production & supply structures, as well as third-party access to the system. The Opinion was not supported by the General Court but the CJEU has now ruled that Nord Stream 2's challenge to the new provisions is partially admissible. Nord Stream 2 may now continue with its challenge in the General Court. || [Press Release](#) || [Judgment](#) || Nord Stream 2 is not yet operational and, as widely [reported](#), flows in Nord Stream 1 are being reduced.

INVESTMENT

EU Taxonomy Regulation || The Commission's proposal to allow certain nuclear and fossil gas activities to be classified as transitional activities for the purposes of the EU Taxonomy, and to include them in the [EU Taxonomy Delegated Act on Climate Change Mitigation and Climate Change Adaptation](#), has been finalised and [published](#). We provide further information [here](#).



Hydrogen || The Commission approved the first Important Project of Common Interest in the [hydrogen sector](#). It aims to develop innovative technologies for the hydrogen value chain to decarbonise industrial processes and mobility. It involves 35 companies and 41 projects, with a total anticipated investment of almost €14.2 billion euros.

Innovation || Under a third round of [awards](#) under the EU Innovation Fund, €1.8 billion of grants will be awarded to 17 large-scale innovative clean-tech projects.

Interconnection || The EIB and other banks are [supporting](#) the development of an interconnector between Germany and the UK to be known as the NeuConnect interconnector.

Public Sector Loan Facility || The Commission published a first [call for proposals](#) for grants under the Public Sector Loan Facility which is one of the three pillars of the Just Transition Mechanism of the European Green Deal. Public authorities may apply for grants for projects that will benefit [just transition territories](#) (which includes the Midlands in Ireland). The Facility is expected to mobilise between €18-20 billion over the next seven years.

CLIMATE LITIGATION

In the UK, the High Court upheld a challenge by three NGOs to the UK's Net Zero Strategy (in effect a report to say how the UK's sixth carbon budget will be met). The judgment in the case of R (on the application of Friends of the Earth Ltd and others) v Secretary of State for the Business, Energy and Industrial Strategy [2022] EWHC 1841 is [here](#) and a court summary is [here](#). There were three main grounds of challenge.

Ground 1: Section 13 of the Climate Change Act 2008 requires the Secretary of State to "prepare such proposals and policies" to enable the carbon budgets set under the Act to be met. The claimants argued first that

this meant the Secretary of State had to be satisfied that his numerical estimate of emissions reductions from policies with a quantifiable effect would enable 100% of the numerical target in the carbon budget to be met. They said he erred because he was only satisfied that his quantifiable policies would achieve 95% of the target in carbon budget, leaving the shortfall to be made up by a qualitative judgment about the future effects of his policies. Second, the claimants argued he failed to take into account matters he was legally obliged to consider including the contributions each of the policies would make to the targets. The Court accepted the second argument: although the Department had carried out extensive quantitative analysis identifying the contributions made by individual policies to meeting carbon budgets, that information was not in the briefing given to the Secretary of State for the purposes of his approving the Strategy. The Court concluded he should have taken into account the quantitative effects of individual policies as well as which policies were relied upon in the qualitative analysis to make up the 5% shortfall and in what ways.

Ground 2: Section 14 of the Act requires the Secretary of State to "as soon as is reasonably practicable" after setting a carbon budget, lay before Parliament a report setting out proposals and policies for meeting the current and future "budgetary periods" up to and including that budget. The claimants argued that the Secretary of State failed to include in the Strategy information legally required to discharge his reporting obligations, in particular an estimate of the contribution each quantifiable policy would make to meeting the carbon budgets, the existence of the 5% shortfall resulting from the quantitative analysis and how that shortfall was to be made up. The Court mainly agreed: a report under section 14 was important not only to enable Parliament to scrutinise the Secretary of State's policies and to hold him to account, but also to provide transparency so that the public could properly understand how the Government intended to meet the statutory targets.

Ground 3: The claimants also argued that their interpretation of sections 13 and 14 was the interpretation

consistent with the Human Rights Act 1998 (and underlying European Convention rights). The Court did not consider that the ordinary meaning of the language in the Act had to be departed from to uphold a Convention right. The Court also considered it was keeping pace with the Strasbourg Court's jurisprudence whereas the claimants' arguments went beyond any "clear and constant" principles laid down so far in the Strasbourg case law.

This case has some parallels with the Irish case of [Friends of the Irish Environment CLG v Government of Ireland, Ireland and the AG](#), rather than cases in other jurisdictions in which courts have found that Government failures impinge on Convention and constitutional rights. In the Irish case, the Supreme Court struck down the National Mitigation Plan on the basis that it failed to comply with the statute under which it was made, the Climate Action and Low Carbon Development Act 2015, because it fell short of the levels of specificity required to provide the transparency needed for citizens to form a view on Government policy. As Ireland begins the process of elaborating how its first carbon budget programme will be met, this UK judgment will further emphasise the need for a certain standard of evidence-based specificity in climate policy.

DOMESTIC LEGISLATION

Emergency Generation || The [EirGrid, Electricity and Turf \(Amendment\) Act 2022](#) was enacted and commenced on 12 July by [SI 352/2022](#). It sets out provisions including in relation to emergency measures that may be taken by the Minister and EirGrid to ensure security of supply (including purchase of electricity generation plant and entry into agreements with generators in relation to electricity generation plant). It also amends the Electricity Regulation Act 1999 to provide for payments to final customers of certain benefits relating to the public service obligation.



Clean Energy Package || Two further sets of regulations have been made to transpose elements of the Clean Energy Package into Irish law.

First, the [European Union \(Renewable Energy\) Regulations \(2\) 2022](#) (SI 350/2022) are intended to give effect to the following articles of the [Renewable Energy Directive](#) (EU) 2018/2001: 2 (Definitions), 3 (Binding overall Union target for 2030), 15(2) (Administrative procedures, regulations and codes), 16 (Organisation and duration of the permit-granting process), 17 (simple-notification procedure for grid connections), 18 (Information and training), 19 (Guarantees of origin for energy from renewable sources), 23 (Mainstreaming renewable energy in heating and cooling), 24 (District heating and cooling), 25 (Mainstreaming renewable energy in the transport sector), 26 (Specific rules for biofuels, bioliquids and biomass fuels produced from food and feed crops), 27 (Calculation rules with regard to the minimum shares of renewable energy in the transport sector), 28 (Other provisions on renewable energy in the transport sector), 29 (Sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels), 30 (Verification of compliance with the sustainability and greenhouse gas emissions saving criteria), and 31 (Calculation of the greenhouse gas impact of biofuels, bioliquids and biomass fuels).

These Regulations require the Minister to designate the SEAI as the single contact point for the permit application and granting process in respect of applications related to renewable energy, including in relation to planning, authorisation to construct & licence to generate, and grid connection offer. You can read our further comment [here](#).

Second, the [European Union \(Internal Market in Electricity \(4\) Regulations 2022](#) (SI 366/2022) are intended to give effect to the following articles of the [IME Directive \(EU\) 2019/944](#): 2 (Definitions), 12 (Right to switch and rules on switching-related fees), 13 (Aggregation contract), 14 (Comparison tools), 17 (Demand response through aggregation), 25 (Single points of contact), 26(1) (Right to out-of-court dispute

settlement), 31(1) and (6) (Tasks of distribution system operators), 36 (Ownership of energy storage facilities by distribution system operators), 40(1) (Tasks of transmission system operators), 54 (Ownership of energy storage facilities by transmission system operators), and 59(1)(v) (Duties and powers of the regulatory authorities).

Circular Economy || The [Circular Economy and Miscellaneous Provisions Act 2022](#) has been signed into law.

Planning Legislation || The Oireachtas passed the [Planning and Development, Maritime and Valuation \(Amendment\) Bill 2022](#), discussed further below. It aims to introduce flexibility in planning applications to address the High Court's decision relating to Derryadd wind farm. It includes amendments to the Maritime Area Planning Act 2022 including to enable public bodies to perform functions relating to the continental shelf; to address judicial review in relation to maritime spatial plans and designated maritime area plans; to provide further provisions in relation to the assignment of MACs; to provide for amendment or replacement of rehabilitation schedules; and to grant MARA further enforcement powers. It also introduces changes to applications for judicial review of planning decisions including for example by introducing a presumption that the matter can be remitted to An Bord Pleanála for rectification of errors. || [Press Release](#)

DOMESTIC DEVELOPMENTS

ORESS 1 || The Government is [consulting](#) on draft Rules and Guidance for Offshore ORESS 1 Community Benefit Funds. || **Closing date: 9 September 2022.**

Hydrogen Strategy || The government is [consulting](#) on development of a hydrogen strategy for Ireland. || **Closing date: 2 September 2022.**

MaresConnect || Ofgem has granted an electricity interconnector licence for the proposed 750 MW interconnector linking Ireland and Britain. It is [reported](#) that it has secured a grid connection in Britain and is seeking a grid connection on the Irish side and is planned to start construction in 2024 and operations in 2027.

Connections || EirGrid published ECP 2.1 Category A [connection offers](#).

System Statistics || EirGrid published [System and Renewable Data Summary Report Update](#), as well as an overview of levels of [constraint and curtailment](#) for wind and solar since 2011.

2021 Emissions || The EPA reported on Ireland's [2021 GHG emissions](#), noting that Ireland will exceed its 2021 annual limit under the Effort Sharing Regulation (EU) 2018/842, without use of flexibilities, by 2.7 Mt CO₂eq. This was attributed to a return to coal use in electricity generation, continued growth in emissions from the agriculture sector, and a partial rebound in transport emissions following the easing of COVID-19 restrictions.

Wider Public || [Regulations](#) to curb use of polluting/solid fuels were agreed. || The [grant structure](#) for Electric and Low Emissions Vehicles was changed to focus more on commercial vehicles and home/apartment charging grants. The Government has published relevant policy documents [here](#). || The Minister also [launched](#) a climate conversation to invite views from the public **by 9 September** on securing a sustainable future.

CRU BUSINESS

New Process for >10MW Generators (CRU/2022/55) || The CRU intends to introduce a new process for the grant of authorisation to construct and licence to generate for generators greater than 1MW and not exceeding 10 MWs. This is intended to be in line with the Renewable Energy [Directive \(EU\) 2018/2001](#) which requires that the authorisation process for generators is proportionate to their size and impact.

European Network Codes (CRU/2022/74) || The CRU published the approval of establishment of the central Europe RCC along with latest updates on the EU Network Codes and Guidelines.



Smart Meters ([CRU/2022/65 and 65a](#)) || The CRU is consulting on the Smart Meter Data Access code with the aim of setting out how smart meter data will be capable of being accessed by market participants and third parties with a view to protecting customer interests. || **Closing date is 31 August 2022.**

Installers ([CRU/2022/68](#)) || The CRU is preparing to appoint the Electricity & Gas Safety Supervisory Bodies for the next designation round and is reviewing existing arrangements to make improvements.

Customers || Recent customer switching data has been published ([CRU/2022/63](#)) as well as details of spot checks on suppliers' compliance with their obligations relating to accuracy and accessibility of Time of Use tariffs ([CRU/2022/66](#)).

SEMC BUSINESS

Balancing Market – Collateral Requirements ([SEM-22-032](#)) || The SEMC has decided to reduce collateral requirements in the Balancing Market by reducing the Undefined Exposure Period from nine to seven days.

Balancing Market – DSUs ([SEM-22-036](#)) || The SEMC is consulting on an enduring solution to ensure that DSUs receive energy payments in the Balancing Market at all times. This is intended to deal with the (interim) different treatment of DSUs in the Capacity Market which arose from DSUs not having offsetting energy payments in the Balancing Market. || **Closing date: 26 August 2022.**

Imperfections Charges ([SEM-22-038](#)) || The Regulatory Authorities are seeking views on several aspects of Imperfections Charges for the tariff year 2022/23. || **Closing date: 5 August 2022.**

Systems Services ([SEM-22-039](#)) || The SEMC set out the next steps to TSOs following publication of the High Level Design Decision. It indicates the TSOs should commence engagement with the distribution system operators to develop a framework for the participation of

distribution connected providers, and requests TSOs to give consideration to how an ex ante daily System Services auction could operate.

Capacity Market – Difference Charges ([SEM-22-030](#)) || The SEMC seeks views on the circumstances in which Capacity Market Units can be available and in-merit, but not dispatched, and on the appropriate approach to the application of Non-performance Difference Charges where a Reliability Option event occurs in these circumstances. || **Closing date: 31 August 2022.**

Capacity Market – Code Modifications ([SEM-22-033](#)) || The Regulatory Authorities invite views on the proposals discussed in Working Group 25 (Reference Dates for Default Interest; New Independent Combined Units; Joint Market Registration Variation in Mix; Local Capacity Constraints Maximum Quantities; and Secondary Trade Approval Notification). || **Closing date: 2 August 2022.**

Directed Contracts ([SEM-22-010](#)) || Given commodity market volatility the Regulatory Authorities are updating the pricing coefficient formulae for DC Round 19.

Market Monitoring ([SEM-22-031](#)) || The monitoring report for May 2022 has been published.

NEMOs ([SEM-22-037](#)) || The Regulatory Authorities are consulting on options for a framework for regulation of NEMOs in Ireland and Northern Ireland. || **Closing date: 12 August 2022.**

NI

The Department for the Economy is consulting on [Revocation of EU Guarantees of Origin](#) and Combined Heat and Power GOOs (closing date **4 August 2022**) and draft [Gas \(Designation of Pipe-lines\) Order \(Northern Ireland\) 2022](#) (closing date **23 August 2023**).



Environment & Planning

RECENT JUDGMENTS

High Court [refers](#) a question in respect of ministerial guidelines to the CJEU

The High Court has referred the following question to the CJEU. We set it out in full to demonstrate the complexity that currently exists in defending judicial review challenges to planning consents.

"Is a challenge to be considered as falling outside the interpretative obligation whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, either as not being one where the application of national environmental law is in issue or as not within the sphere of EU environmental law, merely because it involves a challenge to the validity of an instrument adopted under a statutory provision based on domestic public law or constitutional law (for example, a challenge on the basis of national administrative law principles and constitutional provisions regarding the exercise of the legislative function in accordance with the separation of powers as between the legislature and the executive) in a context relating to the environment or by way of a challenge to the procedure by which guidelines with environmental relevance (assessed under directive 2001/42) were adopted."

Five separate judicial review challenges brought in respect of the Meath County Development Plan

Five separate challenges have been instigated against the Meath County Development Plan 2021-2027 (the "**Development Plan**") by Protect East Meath, Killeglan Estates Ltd, McGarrell Reilly Homes, Hickwell Ltd (Hickcastle Ltd), and Dolent Properties. Three have been dismissed, one has succeeded and one has been adjourned. A high level summary of the five cases is set out below:

1. The High Court has dismissed a challenge to a decision to re-zone an area of land from New Residential to Community Infrastructure. [Killeglan Estates Limited](#) had obtained a notification of a decision to grant planning permission for the development of 31 homes on the land, which is currently under appeal to the Board. The Court found that the assertion that the Council's decision to re-zone this land "*exceeded the bounds of rationality*" had no basis, and further held that the challenge was "*impermissibly attempting to engage in a review of the merits of the decision*".
2. The High Court has dismissed a challenge alleging that the Council had failed to conduct a valid SEA when adopting the Development Plan. [Protect East Meath Ltd](#) argued that the Board had failed to consider its submission of an expert report on traffic impacts. In dismissing this ground, the Court found that no breach relating to considering submissions in the SEA context was made out and said "*it seems to me that it makes the classic error of confusing lack of narrative discussion with failure to have regard to something.*"
3. The High Court has dismissed a challenge taken by [McGarrell Reilly Homes Ltd and Alcove Ireland Eight Limited](#) to the decision to rezone land from residential to non-residential. The court held that the challenge was problematic as it only sought to quash the particular part of the plan that related to their land, thus "*cherry-picking*" the part of the process that did not suit them.
4. The High Court has upheld a claim brought by [Hickwell Limited & Hickcastle Limited](#) in respect of the inclusion in the Development Plan of an indicative road route running through its lands. The Court found that the Council had failed to give adequate reasons as to why the particular route was chosen and as such, there was an interference with the applicants' rights to the peaceful enjoyment of their possessions. The Court has invited the parties to make submissions as to the form of the final order.

5. Finally, Dolent Properties LLP has sought to challenge a decision to zone its land claiming that the Council acted irrationally by putting a zoning objective of improving open spaces on privately owned land when there is no basis in law for this. It also claims that the Council failed to have regard to its submission on flood risk. The case has been adjourned to facilitate discussions between the parties with a view to a potential resolution being reached.

Supreme Court [determines](#) developers are **not** required to submit separate statement of environmental impact in SHD applications

The Supreme Court has determined that developers are not required to submit a distinct, identifiable document in SHD planning applications for the purposes of article 299B of the Planning and Development Regulations 2001 which requires the Board to satisfy itself that a developer has provided a "*statement indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account.*" The appeal has resolved a conflict of judicial interpretation in two High Court cases as to whether a "statement" under article 299B required a separate document to be submitted with the application.

The Supreme Court held that the word "*statement*" had to be understood as "*a definite and clearly identified expression of views in a particular document*". It was noted that the Board was required to be "*satisfied*" that such a statement had been provided by the developer.

CJEU finds that Slovakia has [failed](#) to fulfil its obligations under the Habitats Directive in respect of its Forest Management Programmes

The Commission brought an action against Slovakia alleging that it had failed to fulfil its obligations under the Habitats and Birds Directives as its forest management programmes (FMPs), which provided for emergency



felling and measures intended to prevent threats to forests and to eliminate the consequences of damage caused by natural disasters, were not subject to an appropriate assessment.

The CJEU upheld the Commission's action in its entirety and found that Slovakia had failed to fulfil its obligations under the Habitats and Birds Directives by:

- exempting FMPs which were likely to have a significant effect on European sites from appropriate assessment;
- failing to take 'appropriate steps' for the prevention of the deterioration of the habitats and of significant disturbance in the special protection areas (SPAs) designated for the conservation of the protected birds;
- failing to adopt the special conservation measures applicable to the habitat of protected birds in the SPAs designated for their conservation in order to ensure their survival and reproduction in their area of distribution.

DECISIONS OF THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

The Office of The Commissioner for Environmental Information has [found](#) that Inland Fisheries Ireland ('IFI') was not justified in refusing a request for records relating to a fish-kill. The IFI refused access to the records as they were "*part of an ongoing investigation*". The appellant sought an internal review of the IFI's decision and it affirmed the refusal stating, "*it would not be in the public interest to jeopardise this process by releasing records that may form part of a court case before completion of this legal process*".

The Commissioner found that the IFI was not justified in refusing the request stating that it did not "*demonstrate that it had carried out a review of the records at issue in order to establish whether release of the information requested would have adversely affected the course of*

justice". The Commissioner further stated, "*It is unsatisfactory that IFI would seek to rely on article 9(1) (b) as grounds for refusal without providing details as to the basis on which it considered that the course of justice would be adversely affected.*"

The **Office of the Commissioner for Environmental Information** [annulled](#) a decision by the Department of Agriculture, Food and the Marine to part grant a request by Mr. A under the AIE Regulations. Mr. A had requested information relating to a tree felling licence to include "all internal and external correspondence (including WhatsApp and Text Message) and all iterations of the Inspector's Certification post licence inspections / follow up". The Department decided to withhold AA and EIA screening reports. The Commissioner found that that it had failed to identify the basis upon which these reports were withheld. The Commissioner also found that the Department had failed to give reasons under the AIE Regulations for redacting certain personal information from the records.

LEGISLATION

The [Circular Economy and Miscellaneous Provisions Act 2022](#) was adopted on 21 July 2022. The Act directs that a new Circular Economy Strategy be prepared by the Minister, in response to which it directs that the EPA develop a Circular Economy Programme setting out measures to be taken by the Agency to give effect to the objectives set out in the Circular Economy Strategy. It also allows the Minister (with the consent of the Government) to put in place an environmental levy on single use products or to prohibit them. The Act also provides for, among other things, a National Food Waste Prevention Strategy, a waste recovery levy and the use of CCTV to prevent or deter illegal dumping.

The [EirGrid, Electricity and Turf \(Amendment\) Act 2022](#) was adopted on 7 July 2022. This Act provides for certain emergency measures that can be taken pursuant to a direction of the Commission for Regulation of Utilities for the purpose of ensuring and protecting security of supply of electricity among other measures.

The [Planning and Development, Maritime and Valuation \(Amendment\) Act 2022](#) was passed by the Government on 13 July 2022. Below is a high-level summary of the key provisions:

1. **Ministerial Directions regarding development plans:** Amendments have been made to section 31 of the PDA. Section 31 gives the Minister powers of direction to compel a local authority to amend its development plan where it does not comply with inter alia national policy. Section 31 also allows for the Office of the Planning Regulator ("**OPR**") to recommend to the Minister that he invoke his powers of direction. The amendments provide a timeframe for the OPR to make such a recommendation and to set out the process and timeline for the Minister to issue a final direction.
2. **Rochdale Envelope:** Amendments have been made to the PDA to address the *Derryadd* judgments and to allow for flexibility and a design envelope in planning applications. The amendments provide for a pre-application process where prospective applicants who wish to avail of design flexibility may request a meeting with the planning authority or ABP (for SID) in advance of submitting the planning application. The planning authority or ABP must then determine whether it is satisfied that it is appropriate that the application for permission be made and decided. Where it is so satisfied, it must issue an opinion. The prospective applicant must then submit the opinion with the planning application and the information requirements for the planning application will be read in accordance with the opinion issued.
3. **JR Leave Applications:** The Court must now refuse to grant leave in circumstances where the applicant has not exhausted all available appeal procedures (i.e. to the ABP) or other available administrative remedies, unless there are special circumstances which dictate that an appeal to the Board is not an adequate remedy. They create a presumption that a decision of a planning authority ought to be appealed to ABP, unless there are special circumstances and



that an appeal rather than a judicial review should be the default. This largely reflects the position as already set out in the case law. Case law has held that in order to determine whether such special circumstances exist, it must be determined whether or not the appeal is “within the jurisdiction of the Board”. Matters which have been found not to be “within the jurisdiction of the Board” are allegations of bias or improper motive on the part of the planning authority or cases where the planning authority has unlawfully granted retention permission in circumstances where the underlying development has been carried out in breach of the EIA and/or Habitats Directives.

4. **Presumption in favour of remittal:** Where a decision is quashed and the developer requests that the decision be remitted, there will now be a presumption that the decision will be remitted unless, having regard to the circumstances of the case, the Court considers that it would not be lawful to do so.
5. **Amendments to the substitute consent process:**
 - a) **The current two-stage process is replaced with a new single-stage process:** The leave stage of the substitute consent process has been abolished and replaced with a one-stage process whereby any person can apply directly to ABP for substitute consent. All matters (including the question of exceptional circumstances) will be considered as part of that single-stage application process and include opportunities for public participation, including in relation to exceptionality. A defect in a planning permission, for example, an error of law, will remain a consideration for the purposes of assessing whether exceptional circumstances exist.
 - b) **Simultaneous Applications:** All applications for substitute consent may now be accompanied by a simultaneous application for further development. Previously, this was only permitted for quarries. The simultaneous application for further development may be for development of the land the subject of the application for substitute consent or adjoining land and is not required to be the same as, or of the same description as, the development the subject of the application for substitute consent. As was previously the case, applications for future development will not be decided until the application for substitute consent is determined with the simultaneous application being determined either at the same time or as soon as possible afterwards.
6. **Changes to the Maritime Area Planning Act 2021** are also provided for and include an amendment to provide for the appointment of a chief executive designate to the Maritime Area Regulatory Authority, an amendment to provide that where there is irreconciliation between a provision of a MAC and a provision of a development permission for the maritime usage the subject of the MAC, that first-mentioned provision will be deemed to be amended to the extent necessary to remove that irreconciliation in favour of the second-mentioned provision and the Maritime Area Regulatory Authority will be able to require that rehabilitation schedules be updated, subsequent to the grant of a MAC, or the grant of development permission for the maritime usage the subject of a MAC, as appropriate.

DOMESTIC REPORTS, CONSULTATIONS AND DECISIONS

The **Environmental Protection Agency** [published](#) a Hydrology Summary Bulletin outlining the flows in rivers, rainfall, lake and turlough levels, groundwater levels and spring outflows of over 300 stations across Ireland for the month of June 2022.

The **Department of Housing, Local Government and Heritage** has [published](#) national guidelines for the preparation of local authority development plans. The revised guidelines aim to ensure Development Plans take into account the forecasted amount of housing in an area and that sufficient new homes can be built in key areas of housing demand.

The **Department of Housing, Local Government and Heritage** has [published](#) a framework for future delivery of water services. This Framework, the Department says, will assist in ensuring a stable operational environment is maintained as the water sector completes the transition to a national water services authority.

The Government has approved the publication of the [Water Services \(Amendment\) \(No.2\) Bill 2022](#) which provides for the separation of Uisce Éireann (Irish Water) from Ervia and its establishment as the standalone national authority for water services. As part of the change, the authority shall be known by its Irish name, Uisce Éireann. The Bill was sponsored by the **Minister for Housing, Local Government and Heritage**.

The **Department of Agriculture, Food and the Marine** has commissioned an external, independent review of Ireland’s forestry regulations following recommendations from Project Woodland working groups. The result is an independent report called “Project Woodland: Regulatory Review Report”. The Regulatory Review analyses the regulatory framework that underpins forestry in Ireland and makes recommendations that could lead to efficiencies in the regulatory regime. A full list of recommendations and analysis can be found in the [report](#).

The **Department of Agriculture, Food and the Marine** has [announced](#) the commencement of payment of Environmental Report Grants for licensed applicants and their registered Forester. Payments have commenced for all 2022 processed applications.



The **Department of Agriculture, Food and Marine** has [published](#) its annual forest statistics report for 2022. The national forest estate is still expanding and has reached 11.6% of total land area; for the first time more than half (50.9%) of forests are now in private ownership; and in 2021 the volume of roundwood removals was at 4.33 million cubic metres. This is an increase of 11% compared with 2020 roundwood removals of 3.89 million cubic metres.

The **Department of the Environment, Climate and Communications** has [opened](#) consultation on the development of a Hydrogen Strategy for Ireland. This is one of the key priorities in the National Energy Security Framework. The strategy will outline the pathways towards the production of green hydrogen, and its use in Ireland's energy mix.



Employment

PROTECTED DISCLOSURES (AMENDMENT) ACT 2022

The Protected Disclosures (Amendment) Act 2022 was signed into law by the President on 21 July 2022. A commencement order and official version of the 2022 Act is still awaited. This Act will transpose the EU Whistleblowing Directive (Directive (EU) 2019/1937) and will significantly enhance the protections for whistleblowers in Ireland. The Bill places an obligation on all private sector organisations with 50 or more employees to establish formal channels and procedures for their employees to make protected disclosures. The Act provides a derogation from these obligations until 17 December 2023 for organisations with between 50 and 249 employees. Employers who already have internal whistleblowing procedures in place need to make changes to those procedures in light of the Bill. Those without existing whistleblowing systems but who now fall within the legislative scope need to establish and maintain compliant whistleblowing procedures. The Act also extends the scope of the protected disclosures regime to cover volunteers, unpaid trainees, board members, and shareholders, members of administrative, management or supervisory bodies and job applicants.

For more information on the changes introduced by the Act, read our briefing [here](#).

SICK LEAVE ACT 2022

The Sick Leave Act 2022 was signed into law by the President on 20 July 2022. The Act, once commenced, will introduce an entitlement to statutory sick leave for an employee who would ordinarily work but is incapable of doing so due to illness or injury. The Act also provides that the employee will be entitled to statutory sick leave payment from his or her employer for each statutory sick leave day. A commencement order, along with regulations under the Act, which will set out the prescribed daily rate of payment, are still awaited. Employers should act now to ensure that policies are updated to reflect the obligations contained in the legislation. Initially, an employee will be entitled to up to three statutory sick leave days per year increasing to five

days in 2024, seven days in 2025, and 10 days in 2026. The Government has indicated that the rate of payment for statutory sick leave will be 70% of normal wages (up to a maximum €110 per day). In order to benefit from the entitlement to statutory sick leave days, the employee must have completed 13 weeks continuous service with his or her employer and provide a medical certificate signed by a registered medical practitioner stating that the employee named in the certificate is unable to work.

For more information on the new Sick Leave Act 2022, read our briefing [here](#).

PARENT'S LEAVE AND BENEFIT ACT 2019 (EXTENSION OF PERIODS OF LEAVE) ORDER 2022

The Parent's Leave and Benefit Act 2019 (Extension of Periods of Leave) Order 2022 was commenced on 1 July 2022. This Order extends the entitlement to Parent's Leave from five to seven weeks, once taken within the first two years of a child's birth or placement with an adoptive family. In line with new EU rules to improve work-life balance of workers, the Irish Government's intention is to further extend this entitlement to nine weeks from August 2024. Employers should update their Parent's Leave policy to reflect the changes implemented under the 2022 Order. Where the employee has sufficient PRSI contributions, Parent's Benefit is a payment, paid by the State, to parents who avail of parent's leave. The value of the Benefit is currently €250 (less tax) per week. Employers may top-up Parent's Benefit but are not required to do so.

THE PAYMENT OF WAGES (AMENDMENT) (TIPS AND GRATUITIES) ACT 2022

The Payment of Wages (Amendment) (Tips and Gratuities) Act 2022 was signed into law by the President on 20 July 2022. The Act, once commenced, will introduce new rules about how employers share tips, gratuities and service charges amongst employees. Regulations to give effect to the Act are still awaited. Consultations are set to commence shortly with employee and employer organisations, leading to the new regulations. The Act will regulate employer practices around tips and gratuities and

will provide further protection to a fair distribution of certain tips and gratuities. The Act makes it illegal for employers to use these tips or gratuities to make up basic wages. The Bill also requires employers to clearly display their policy on how tips, gratuities and service charges are distributed and will ensure that customers are given clear information about where their tips and service charges go. The legislation will be reviewed after one year to assess its effectiveness and decide if further measures are needed.



Public Procurement

EU CASE LAW – DIRECT AWARD OF CONTRACTS TO NON-PROFIT OR VOLUNTARY ORGANISATIONS

In a Spanish case ([C-436/20](#)), a trade association for private undertakings in the home care sector challenged a law, alleging that it excluded profit-making entities from providing public services under a public-private contract, but allowed non-profit organisations to provide such services for payment without having to go through a transparent competitive process to ensure equal treatment. In response to the Spanish Court's questions the ECJ indicated the following:

- Articles 74 to 76 of Directive 2014/24 and Article 49 of the TFEU must be interpreted as not precluding national legislation that allows a public authority to conclude, without complying with the procedural requirements imposed by EU law, a public contract under which that authority entrusts only non-profit entities with the provision of certain social services in return for reimbursement of the costs incurred by those entities, provided that such legislation complies with the principles of equal treatment and proportionality.
- Article 75(1) of Directive 2014/24 must be interpreted as precluding national legislation that requires that contract notices be published only in the regional official journal.
- Article 76 of Directive 2014/24 precludes national legislation according to which, in the context of the award of a public contract for social services referred to in Annex XIV of Directive 2014/24, the establishment of the economic operator in the locality where the services are to be provided constitutes a criterion for the selection of economic operators, prior to the review of their offers.

In two Italian cases ([C-213/21](#), [214/21](#)), a social cooperative challenged decisions by which health authorities began selection procedures with a view to awarding contracts for emergency ambulance transport services to voluntary organisations. The ECJ indicated that Article 10(h) of Directive 2014/24 must be interpreted as not precluding national legislation which provides that emergency ambulance transport services

may be awarded, by contract, on a preferential basis, only to voluntary organisations, and not to social cooperatives which can offer rebates associated with their activities to their members.

UK

Legislative Amendments

The [Public Procurement \(International Trade Agreements\) \(Amendment\) Regulations 2022](#) have entered into force. They amend the UK 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 - tenderers proposing abnormally low tenders must explain whether the price takes into account the grant of subsidies.

Procurement Process Reforms

The UK Government published [Transforming Public Procurement: our transparency ambition](#), a paper setting out proposals to improve the transparency of UK public contracts and spending. It promotes the idea of a new procurement "noticing" regime covering the full life cycle of a procurement. This would involve: (i) new procurement notices from planning to contract expiry meaning that additional information from several stages will need to be published; (ii) a registration service for suppliers for inputting information to be used by all contracting authorities; and (iii) a central digital platform that will publicly display all of this information, building on the Find a Tender service, and allowing for analysis of commercial procurement data and compilation of registers (such as a performance register, prompt payment register and a debarment list). Timing wise, the intention is that further details will be elaborated in secondary legislation once the Procurement Bill 2022-23 is enacted, and then there will be six months' notice of these new practices coming into effect.

Case Law

In [Braceurself Ltd v NHS England](#) [2022] EWHC 1532 (TCC), Braceurself was unsuccessful in a nationwide

procurement for orthodontic services. Braceurself was one of two bidders for a particular lot in respect of which it was the incumbent provider. It challenged the award and, following the lifting of the automatic suspension, pursued damages of £4.7m for loss of profit, bid costs of £26,500 and loss of goodwill, alleging breach of equal treatment, transparency and manifest error.

One aspect of the claim was successful. The Court considered that there had been manifest error in that the NHS misunderstood the basis of an answer to a question concerning accessibility of the premises and use of alternative premises. Had it correctly understood the basis of the bid, the scoring outcome would have been such that Braceurself would have been successful. The Court is to consider at a further hearing whether this breach was "sufficiently serious" to justify a damages award.

The Court rejected certain criticisms of the NHS's process. For example, the Court considered that use of multiple evaluators in different permutations to mark different questions was not an issue that created inconsistency, but rather was an appropriate approach. The Court also rejected an argument that there was lack of guidance on how to give a single score for a question that required tenderers to cover (at least) a list of bullet points which did not have sub-weightings. The Court was satisfied that a composite score could be provided without the need for each bullet point to be sub-weighted. The bullet points were not an exhaustive list of factors and it would have been inappropriate to weight them because there would then have been no basis for evaluators to take account of information provided in addition to the information addressing the bullet points. We note that it should always be borne in mind that, where there are criteria or weightings to be applied in evaluation, the principle of transparency demands they are disclosed.

NI

The NI Department of Finance has published new [procurement toolkits](#) and is seeking feedback on them until **12 August 2022**.



State Aid

COMMISSION AMENDS THE TEMPORARY CRISIS FRAMEWORK INCLUDING IN RELATION TO RENEWABLE ENERGY AND DECARBONISATION

The European Commission adopted an amendment to the State aid Temporary Crisis Framework, initially adopted on 23 March 2022 to support the economy in the context of Russia's invasion of Ukraine. The amendment complements the Winter Preparedness Package that the Commission has also adopted. In particular, the amendment extends the Temporary Crisis Framework by providing additional aid for both measures accelerating the rollout of renewable energy and measures facilitating the decarbonisation of industrial processes. See the full press release [here](#).

COMMISSION APPROVES €500 MILLION IRISH SCHEME TO SUPPORT INVESTMENT TOWARDS A SUSTAINABLE RECOVERY

The European Commission has approved a €500 million Irish investment support scheme aimed at incentivising companies to accelerate or expand capital investment in Ireland, including in relation to green and new digitalisation technologies, for greater competitiveness and productivity. The scheme was approved under the State aid Temporary Framework. Executive Vice-President Margrethe Vestager, in charge of competition policy, said: "This €500 million scheme will help Ireland set the path for a faster and more sustainable recovery and represents an important step to bridge the investment gap left behind by the coronavirus crisis. We continue working in close cooperation with Member States to ensure that national support measures to kick-start and crowd-in private investment can be put in place as quickly and effectively as possible, in line with EU rules." See the full press release [here](#).

COMMISSION APPROVES €1.2 BILLION POLISH SCHEME TO SUPPORT COMPANIES IN CONTEXT OF RUSSIA'S INVASION OF UKRAINE

The European Commission has approved a €1.2 billion Polish scheme (PLN 5.5 billion) to support companies across sectors in the context of Russia's invasion of Ukraine. The scheme was approved under the State aid Temporary Crisis Framework, adopted by the Commission on 23 March 2022, based on Article 107(3)(b) of the Treaty on the Functioning of the European Union, recognising that the EU economy is experiencing a serious disturbance. Executive Vice-President Margrethe Vestager, in charge of competition policy, said: "This €1.2 billion scheme will enable Poland to mitigate the economic impact of Putin's war in Ukraine and to further support companies across sectors affected by the current crisis and the related sanctions. We continue to stand with Ukraine and its people. At the same time, we continue working closely with Member States to ensure that national support measures can be put in place in a timely, coordinated and effective way, while protecting the level playing field in the Single Market". See the full press release [here](#).

COMMISSION APPROVES UP TO €5.4 BILLION OF PUBLIC SUPPORT BY FIFTEEN MEMBER STATES FOR AN IMPORTANT PROJECT OF COMMON EUROPEAN INTEREST IN THE HYDROGEN TECHNOLOGY VALUE CHAIN

The Commission approved, under EU State aid rules, an Important Project of Common European Interest ('IPCEI') to support research and innovation and first industrial deployment in the hydrogen technology value chain. The project, called "IPCEI Hy2Tech", was jointly prepared and notified by fifteen Member States: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany,

Greece, Italy, Netherlands, Poland, Portugal, Slovakia and Spain. The Member States will provide up to €5.4 billion in public funding, which is expected to unlock additional €8.8 billion in private investments. As part of this IPCEI, 35 companies with activities in one or more Member States, including small and medium-sized enterprises and start-ups, will participate in 41 projects. See the full press release [here](#).



Telecoms

COMREG ISSUES A FINDING OF NON-COMPLIANCE TO EIRCOM LIMITED IN RELATION TO PROVISIONS OF THE UNIVERSAL SERVICE REGULATIONS

On 22 July 2022, ComReg notified Eircom Limited of a finding of non-compliance with Eircom's obligations under Regulation 14(4) of the European Communities (Electronic Communications Networks and Services) (Universal Service and User's Rights) Regulations 2011. The non-compliance concerns Eircom not notifying, in accordance with Regulation 14(4) of the Regulations, 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. The full finding of non-compliance can be found [here](#).

COMREG ISSUES RADIO SPECTRUM MANAGEMENT STRATEGY 2022 - 2024

On 15 July 2022, ComReg released its strategy statement setting out the work plan and ComReg's priorities, as Ireland's radio spectrum manager, for the next two years. It will inform ComReg in addressing the challenges it will face over the next two years and supplements the five year strategy statement released in 2021. Full text of the management strategy can be found [here](#).

COMREG ISSUES AN OPINION OF NON-COMPLIANCE TO VIRGIN MEDIA IRELAND LIMITED IN RELATION TO PROVISIONS OF THE UNIVERSAL SERVICE REGULATIONS

On 29 March 2021, ComReg notified Virgin Media Ireland Limited of a finding of non-compliance with Virgin's obligations under Regulation 25(6)(b) of the Universal Service Regulations, specifically that Virgin had failed to ensure that its conditions and procedures for contract termination did not act as a disincentive to a consumer changing service provider. The full opinion can be found [here](#).

COMREG RELEASES REVIEW OF THE SATELLITE EARTH STATION LICENSING REGIME

ComReg has released the review of the Satellite Earth Station ("SES") Licensing Framework. The study reviews various aspects of the SES Licensing Framework in Ireland, such as future developments in demand for SES licences in Ireland, the need for new bands available for SES licences and/or for adjusting the current set of available bands, the structure of licences to be assigned as part of a future licensing regime and an appropriate fee schedule for SES licences. The full text of the review can be found [here](#).