ARTHUR COX

Infrastructure, Construction, Energy

MARCH 2022

Construction and Engineering

FURTHER OGP GUIDANCE ON PRICE INFLATION

In January the OGP published guidance and contract amendments aimed at managing materials' price inflation. The amendments were intended to address material price volatility: a) in the period between tender submission and the award of the contract, and b) within the fixed price period.

The OGP has followed this with further guidance for use with the revised works contract forms PW-CF1 – PW-CF6: GN 2.3.4 Tender Price Indexation – Calculation, Notification and Application.

The guidance states that it deals with the new provision introduced to permit limited indexation of the tendered sum for the period between the date of the tender submission and date of the award of the contract, and that it explains:

1. how to calculate the adjustment at the point where the decision to award the contract has been made,
2. how that adjustment is communicated and recorded, and
3. how the adjustment is to be applied depending on whether parties are using PW-CF1 – PW-CF5 or PW-CF6.

The OGP indicates that it will issue further guidance dealing with the period *after* the award of the contract (in an updated GN 1.5.2 on the amendments to the price variation clauses in forms PW-CF1 – PW-CF5 inclusive; PW-CF6 does not have a price variation clause).

While intended for use by public sector contracting authorities, these mechanisms can provide helpful examples that can be adapted for use in the private sector.

FIRE SAFETY

A Code of Practice for Fire Safety Assessment of Premises and Buildings was published by the Department of Housing, Local Government and Heritage. The Code aims to provide a standard methodology for carrying out fire safety assessments for building owners and their professional advisors, where the fire service requires a fire safety assessment.

The Department of Housing, Local Government and Heritage is also consulting on a Fire Safety Guide for Building Owners and Operators to be issued under section 18A of the Fire Services Acts 1981 and 2003. || **Closing date: 19 April 2022**.

NEC – EARLY CONTRACTOR INVOLVEMENT

In the U.K., an NEC Practice Note on Early Contractor Involvement was published. It is guidance for using Early Contractor Involvement (ECI), a secondary option (X22), available for use with the NEC4 Engineering and Construction Contract (Options C or E). Option X22 provides for two stages, the details of which are set out by the client in the scope. Stage One is the pre-construction ECI phase, with development of the scope, detailed design and agreement on price. Stage Two is the construction phase, with completion of any remaining detailed design.

The Practice Note is based on the Contractor being responsible for the design. It is intended to provide advice on best practice relating to the key aspects of preparing and procuring an ECI contract, together with advice on setting the total of the Prices (commonly known as the target price) for Stage Two.

ARCHITECTS

Building Control (Prescribed Qualifications) Regulations 2022 were made. They add to the list of qualifications underpinning eligibility to be added to the register of architects (for the purposes of section 14(2)(a)(iii) of the Building Control Act 2007) as follows: Master of Architecture (M Arch) awarded by Technological University Dublin.

IME REGULATION (EU) 2019/943 – ARTICLES 12 & 13

The SEMC published Decision Paper **SEM-22-009** on Dispatch, Redispatch & Compensation. The message is that time will be needed to implement the systems' changes required to facilitate market-based redispatch of renewable units. Until then, all redispatch will be considered non-market based and will continue to be done pro rata for renewable units, and the current method of settlement for constraints of firm units will continue but will be extended to include curtailment. Details of the enduring solution do not yet appear to be determined. The SEMC presented its position under the following headings:

1. *Interpretation of dispatch and redispatch in the SEM.*

   - Dispatch relates to scheduling and dispatch of units to meet energy requirements.
   - Redispatch relates to deviations from the market schedule for generation for both local network and broader system reasons: constraints and curtailment.
   - A decision as to whether decremental actions on priority dispatch units to manage the demand-supply balance is dispatch or redispatch is deferred until consultations are completed on the Electricity Balancing Guideline and Articles 3, 6 and 10 of the IME Regulation.

2. *Interpretation of actions which may be considered market based & non-market based redispatch under current market design.*

   - The SEMC considers all redispatch in the SEM to be non-market based.

3. *Determination of the appropriate level of compensation for non-market based redispatching and application of the unjustifiably high test under Article 13(7).*

   - An interim solution (pending necessary system changes) will involve continuation of constraints on a pro-rata basis within a constraint group and curtailment on a pro-rata basis overall. This will apply to priority & non-priority dispatch units.

   - Compensation: The SEMC maintains the view that the "foregone revenues (plus support) measure of compensation for non-market based redispatch under Article 13(7) may properly be found to result in 'unjustifiably high' compensation ..". It decided to proceed on the basis of "separate compensation mechanisms" as follows:

     - **Lost Market Revenues**: All units will initially receive compensation for non-market based redispatch, where firm, at the better of their complex bid/offer price or imbalance settlement price up to the level of Firm Access Quantity. The SEMC states this effectively extends the arrangements in place for constraints to curtailment, with the costs associated with curtailment to be recovered in the same way via the Imperfections Charge. However, compensation for curtailment associated with the Decision will not begin until 2024/25 (and it is not entirely clear whether this will include payment for previous tariff years).

     - **Foregone Financial Support**: The SEMC considers this should be decided in each jurisdiction but sets out principles the Government Departments should follow: (a) For units commissioned after 4 July 2019, compensation based on the higher of a unit's ex-ante revenues or foregone support should not be considered 'unjustifiably high' unless there is good cause to find otherwise. (b) For renewable units commissioned before 4 July 2019, compensation based on the higher of a unit's ex-ante revenues or foregone support should be considered 'unjustifiably high' unless there is good cause. This appears to indicate that REFIT projects would not get compensated for lost support, but RESS projects would. The SEMC notes the Regulation's Impact Assessment in advocating that costs to consumers should remain the same where these are integrated into renewable support schemes but has not cited the precise reference. The Proposal for the Regulation is also cited.

     There is a significant lack of clarity in relation to exactly what the SEMC is saying in this section of the paper or the basis on which they have reached their conclusions. The SEMC does not appear to have engaged with much of the substantive material provided to them as part of the consultation. Rather the SEMC cited material, the probative value of which is unclear, to justify a conclusion that keeping generators whole for the opportunity cost of non-market based redispatch amounts to unjustifiably high compensation. This raises an inference that the SEMC are searching for material to justify a preliminary conclusion rather than engaging on the substance of Article 13(7) as drafted.

   - Once systems' changes can be implemented, an enduring solution would be introduced. The SEMC's minded-to positions (SEM-21-027) has not changed, in particular relating to the enduring treatment of new renewable units (that is they will submit offers to be re-dispatched in a market-based way).

4. *Implementation of ex-post compensation arrangements.*

   - Compensation is to be back-paid to January 2020 for firm units, based on DAM prices and each units' market position. However, note again that, because of current high prices, compensation for curtailment associated with the Decision will not begin until 2024/25.

5. *Firmness in the SEM.*

   - There is no update on policy but decision-making on the financial treatment of non-firm quantities will clearly be critical to any enduring solution.

6. *Treatment of new renewable units in the SEM (which would previously have qualified for priority dispatch).*

   - The SEMC maintains its position from the previous consultation namely:
     1. New dispatchable units: no changes are required to accommodate these units, but two issues need to be considered: treatment of constrains & curtailments and, depending on how non-market-based redispatch is applied now and in the future, the redispatch hierarchy under Article 13(6).
     2. Non-dispatchable but controllable units: will be required to submit PNs, COD & TOD and be treated as dispatchable units.
     3. Non-dispatchable, non-controllable units: the SEMC states its original paper proposed that there are few options for treating these units in a manner different to their treatment today.

   - The SEMC states its view that: "the most appropriate approach is to continue pro-rata dispatch (for both constraints and curtailment), with the intention to transition to merit order based redispatching, applied to non-priority dispatch units prior to priority dispatch units in the medium term. This transition will need to consider the development of TSO systems to accommodate the treatment of new units and the interactions with other future market design programmes. No such change to treatment in this regard is likely before at least 2026."

Aspects of this Decision will be positive for RESS projects in the short-term. However there are several statements, particularly as regards the enduring solution, in respect of which it will be worth seeking clarification, including whether some of the statements made are decisions, or indications of direction of travel.

ENERGY SECURITY

The EU's Communication on **RePowerEU: Joint Action for more affordable, secure and sustainable energy** attracted significant attention. It describes actions the Commission is taking under two main pillars:

- Addressing the emergency: following from the Toolbox for tackling energy prices, the Commission will look at all possible options to limit impact on electricity prices and will assess options to optimise electricity market design to reap the benefits of low cost energy. The Commission confirms that price regulation is permissible under EU law in the current circumstances and provides guidance for Members States to devise schemes for regulated prices. It confirms that State aid rules offer Member States options to provide relief to companies affected by high prices, including through temporary tax measures on windfall profits and higher than expected EU ETS revenue. Filling gas storage for next winter should start now and TSOs should coordinate to optimise capacities available in the network. The Commission will publish a legislative proposal requiring existing storage to be filled to at least 90% capacity by 1 October each year and providing for incentives for storage including aid for example through two way CfDs.

- Eliminating EU dependence on Russian fossil fuels by: (i) diversifying gas supplies via higher LNG imports and pipeline imports from non-Russian suppliers, and higher levels of biomethane and hydrogen; and (ii) more rapidly reducing dependence on fossil fuels in homes, building, industry, and power systems. Proposed measures include faster roll-out of solar, wind, heat pumps and hydrogen, and faster permitting. The Commission states that, given the circumstances, the co-legislators might also want to consider boosting the Fit for 55 proposals with higher or earlier targets for renewable energy & energy efficiency. || Q&A || Remarks || Factsheet || Press Release || Speech || Opening Remarks

The Commission followed this up with a Communication on *security of supply and affordable energy prices: options for immediate measures and preparing for next winter*, and the proposal to amend Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply and Regulation (EC) 715/2009 on conditions for access to natural gas transmission networks. The proposal aims to address "the very significant risks for security of supply" and the economy resulting from the dramatically changed geopolitical situation. The proposal sets out the legislative basis for mandatory minimum levels of gas in storage facilities; mandatory certification of storage system operators, and incentivisation for use of storage (exempting storage users from transmission tariffs at storage entry or exit points). || Press Release || Q&A

There have been numerous statements from EU officials including Commissioner Simson indicating that LNG will need to play a key role and that the Commission has communicated with alternative pipeline and LNG suppliers. There has been a joint EU / US statement on energy security cooperation.

In Ireland, reports on DECC's ongoing energy security review indicate that proposals under consideration include payment to leave reserve gas in Corrib; developing a state-owned LNG terminal; and storage of significant volumes at Kinsale: Press Report || Minister Troy urged consumers with evidence of cartel behaviour or abuse of dominance to contact the Competition and Consumer Protection Commission.

The International Energy Agency published Ten-Point Plans to Cut Oil Use and to Reduce EU Reliance on Russian Natural Gas.

EU

Significant change ahead for Corporates || The EU published the Proposal for a Directive on Corporate Sustainability Due Diligence which seeks to introduce new mandatory due diligence obligations for large EU companies and non-EU companies with significant operations in the EU, together with new duties for directors of in-scope EU companies. We anticipate that this development will have a significant impact on the operations of companies whether they are in-scope or are not in-scope, but seeking to align operations with any final Directive to further their ESG aims. Our briefing on is available here and further information is here.

Carbon Border Adjustment Mechanism || The Council and Parliament published their compromise text for the Regulation establishing a carbon border adjustment mechanism, one of the proposals published last July in the Fit for 55 package. The mechanism is intended to complement the EU ETS by applying carbon prices for imports to the EU equivalent to those applied to domestic products.

Biofuels and Biomass in EU ETS || Implementing Regulation (EU) 2022/388 amends Implementing Regulation (EU) 2018/2066 on monitoring and reporting GHG emissions pursuant to the EU ETS Directive. It postpones the application of the sustainability and GHG emissions saving criteria for biofuels, bioliquids and biomass for the current calendar year to allow time to implement acts to be made under the Renewable Energy Directive (EU) 2018/2001 such that national certification schemes for verifying compliance with savings criteria can be updated.

Net Zero Energy System || The Environment Council of the European Council approved the Commission's intention to join a non-binding commitment to accelerated transition to a net zero energy system through the IEA's Clean Energy Transitions Programme.

European Growth Model || The Commission published a Communication in preparation for a European Council meeting on the objectives of green & digital transition and strengthening of social and economic resilience. It underscores that, to deliver on the European Green Deal, the EU needs to increase annual investment by around €520 billion per year this decade, compared to the previous decade. || Factsheet

Islands || The Clean Energy for Islands secretariat launched a new website to support energy transition on inhabited islands.

Transition || The Transitions Performance Index 2021 reports that the EU is a strong global performer in the transition towards fair and prosperous sustainability, with Denmark and Ireland leading the way. || Press Release.

EU CASE LAW

Gas - Investments Necessary for Incremental Capacity

In Cases T-684/19 & T-704/19, the General Court declared inapplicable (ultra vires) Chapter V of Regulation (EU) 2017/459 establishing a network code on capacity allocation mechanisms in gas transmission systems ("**CAM NC**"). Chapter V relates to the process for the creation of incremental capacity for gas transmission.

The case concerned a proposal to offer incremental capacity between Hungary and Austria, approved by the Austrian regulator, but not the Hungarian regulator. ACER indicated it was empowered to make the decision and approved the proposal. The Hungarian TSO and Regulator challenged ACER's decision and the legality of provisions in the CAM NC.

The General Court found that the Regulation does establish a process that could lead to an obligation on the part of TSOs to make investments necessary for the creation of incremental capacity. However, it is for ENTSOG to develop network codes in areas exhaustively listed in the Regulation. Only where ENTSOG has failed to develop a code can the Commission adopt one in the same area. The only area in which the establishment of a code on creation of incremental capacity might be conceivable is the area of capacity allocation and congestion management rules. The concept of capacity refers to current capacity on the network and congestion management is conceived only on the basis of existing capacity.

The Regulation draws a distinction between the exhaustively listed areas for which ENTSOG is competent to develop rules, and the framework for the investments necessary for the creation of incremental capacity on the network (in respect of which ENTSOG plays only a role of support and coordination). EU-wide network development comes primarily within the competence of the Member States, so the Regulation does not confer regulatory competence on ENTSOG or the Commission as regards the adoption of rules governing creation of incremental capacity on the network. The Regulation does not empower ENTSOG to include in a code rules capable of imposing on a TSO the obligation to create incremental capacity. The Commission (in substituting itself for ENTSOG) was not competent to adopt the provisions of the CAM NC governing a process that could lead to the imposition of such an obligation. || Press Release

Gas - Access to Transmission System

In Case C-290/20 the Latvian Court requested a preliminary ruling on questions of interpretation of the Internal Market in Gas Directive 2009/73/EC. The plaintiff was, until 2017, was the vertically integrated incumbent but then a separate company was established as TSO and a subsidiary of the plaintiff was established as DNO.

The plaintiff challenged the regulator's decision to approve rules for connection to the natural gas transmission network, which provided that any natural gas user can connect, under certain conditions, to the transmission network without the intermediary of the distribution network operator.

The case focused on interpretation of Articles 2(3) (definition of "transmission"); Article 23 (Decision-making powers regarding the connection of storage facilities, LNG regasification facilities and industrial customers to the transmission system) and Article 32(1) (Third-party access) of the Directive. The CJEU noted that Article 23 was not relevant because Latvia had opted for the first model of unbundling, i.e. ownership unbundling (and so did not have to comply with Chapter IV (Independent System Operator), of which Article 23 forms a part). However it provided the following replies to the Court's questions:

- It does not follow from Articles 23 and 32(1) that Member States are required to adopt rules under which any final customer can choose to be connected either to the transmission or distribution network and where the network operator concerned is required to allow it to be connected to said network.

- Article 23 does not oblige Member States to adopt regulations pursuant to which only an industrial customer or new industrial customer may connect to the natural gas transmission network.
- Articles 2(3) & 23 do not prevent Member States from making rules under which transmission includes transporting gas directly to the end customer's natural gas supply network.

INTERNAL MARKETS

CACM Regulation || The Commission is consulting on amendments to Regulation (EU) 2015/1222 establishing a guideline on capacity allocation and congestion management. The aim is to reflect new provisions of the IME Regulation (EU) 2019/943 and to address issues identified in implementation of the guideline so far. Changes are also required to the related articles in Regulation (EU) 2017/1485 establishing a guideline on electricity transmission system operation. || **Closing date: 27 April 2022**. || ENTSO-E is also consulting on the proposal by the TSOs of the Core Calculation Region to amend the Intraday Capacity Calculation Methodology. || **Closing date: 4 April 2022**.

Electricity Balancing || ACER has decided on the TSOs' proposal to amend the common pricing of balancing energy and cross-border capacity used for the exchange across the European electricity markets.

Redispatching & Countertrading || ENTSO-E is consulting on a proposed methodology for the optimisation of inter-TSO settlements for dispatching and countertrading, in accordance with the IME Regulation (EU) 2019/943. || **Closing date: 1 April 2022**.

Resource Adequacy || ENSTO-E is calling for evidence on preliminary input data for the ERAA 2022. || **Closing date: 5 April 2022**.

TYNDP || ENTSO-E released the draft TYNDP Implementation Guidelines, which specify how the CBA Guideline is to be implemented in the 2022 edition of the TYNDP. Proposed changes include development of a methodology to ensure that the impact of the interlinkage between the gas and electricity sectors is considered when assessing the value of infrastructure projects; and development of a methodology for assessment of projects for hybrid interconnectors.

Ukraine || Ukraine decoupled from the Russian grid. ENTSO-E confirmed that the Ukrainian and Moldovan power systems synchronised with continental European power systems.

Gas || ENTSOG published an interactive supply outlook monitoring dashboard.

CEER Reports || CEER published its Annual Report and a Roadmap to 2025 Well-Functioning Retail Energy Markets. A general conclusion of the Roadmap report is that there are very few CEER members that have carried out and shared a gap-analysis for all the 25 metrics included in the self-assessment procedure.

INVESTMENT

Taxonomy Update || The Commission adopted the Taxonomy Complementary Delegated Regulation on gas and nuclear activities, amending the technical screening criteria, setting out the conditions under which nuclear and natural gas energy activities can be included in the list of economic activities covered by the EU Taxonomy Regulation. Conditions include: (a) that they contribute to the transition to climate neutrality; (b) for nuclear, that it fulfils nuclear and environmental safety requirements; and (c) for natural gas, that it contributes to the transition from coal to renewables. The Delegated Regulation also amends the Delegated Disclosures Regulation supplementing Article 8 of the Taxonomy Regulation to require large listed non-financial and financial companies to disclose the proportion of their activities linked to natural gas and nuclear energy. The Council and Parliament will scrutinise this instrument and, if neither object, it will enter into force 20 days after its publication in the Official Journal and apply from 1 January 2023. || Turning to development of the social taxonomy, the EU Platform on Sustainable Finance published its report: our update is available here.

CEF Energy || The connecting Europe Facility Energy programme has been extended to include a new category: Cross-border renewable energy projects. Calls for proposals are invited to obtain status as a cross-border project (the basis for eligibility for support). || **Closing date: 10 May 2022**.

Investors Dialogue || The Commission launched an Investors Dialogue on Energy. It aims to establish a forum of energy and financial experts to find solutions to investment barriers for energy projects and make practical recommendations on how to address them.

InvestEU || The Commission, EIB and EIF signed an agreement on an EU budget guarantee of €19.65 billion to support investment projects focusing on four areas, one of which is sustainable infrastructure. A new dedicated equity initiative – BlueInvest – was also launched to support innovative and sustainable blue economy SMEs and start-ups, via financial intermediaries.

U.S. || The Securities and Exchange Commission proposed rule changes that would require US listed companies to make new climate-related disclosures, including Scope 1-3 emissions.

CLIMATE ACTIVISM

The IEA reported that global energy-related CO2 emission rose to their highest point ever in 2021. The latest IPCC Report warns that the risks of climate change have been severely underestimated. Minister Ryan's statement on the IPCC Report is available here.

It was reported that, in the U.S., the SEC rejected an application by Occidental Petroleum to throw out a

motion for a shareholder vote to secure higher emissions reduction targets. The motion was one of several filed by Follow This, a Dutch NGO, with several companies.

In the U.K., it was reported that an activist shareholder, ClientEarth, has sent pre-action correspondence to Shell alleging breach of the director's duty to promote the success of the company.

Also in the U.K., Friends of Earth and others were granted leave to apply for judicial review of the Government's Net Zero Strategy and Heating and Building Strategy. They claim that the obligations in sections 13 and 14 of the Climate Change Act 2008 are not met by the programmes, which it is claimed do not contain any practical steps to be taken to meet climate goals.

DOMESTIC DEVELOPMENTS

Clean Energy Package || The Government made further Regulations transposing elements of the EU Clean Energy Package. The European Union (Renewable Energy) Regulations 2022 are intended to give effect to Articles 21 (Renewable self-consumers) and 22 (Renewable energy communities) of the Renewable Energy Directive (EU) 2018/2001 and Articles 15 (Active customers) and 16 (Citizen Energy communities) of the IME Directive (EU) 2019/944. The Regulations set out rights for active customers and renewables self-consumers. They provide for a framework for renewables self-consumers to be set out by the CRU & SEAI. They provide for the participation of final customers in renewable energy communities and an enabling framework for renewable energy communities. They require the CRU to establish an enabling regulatory framework for citizen energy communities.

Offshore || The following provisions of The Maritime Area Planning Act 2021 were commenced: section 72 (Powers to specify form of document); Part 4 (Maritime Area Consent) other than Chapter 12 (Transitional provisions); and Part 6 (Enforcement). || Relevant Projects, also known as Phase 1 Projects, have been invited to submit their applications for Maritime Area Consents: Press Release || The Government is also consulting on the Programme of Measures under the Marine Strategy Framework Directive (Marine Strategy Part 3), closing on **20 May 2022**.

Emergency Measures || The Electricity Costs (Domestic Electricity Accounts) Emergency Measures Act 2022 was commenced for the purpose of making a once-off payment to domestic electricity customers, and Regulations made. The CRU published a Guidance Document (CRU/2022/27) setting out the role and responsibilities of the DSO and Suppliers through which credit for customers will pass, as well as a set of FAQs for customers.

National Climate Stakeholder Forum || As envisaged by the Climate Acton Plan, DECC has launched this Forum to facilitate engagement on climate goals.

Clean Air Strategy || DECC is consulting on a Clean Air Strategy for Ireland. || **Closing date: 3 May 2022**.

Spending || The Parliamentary Budget Office published recently published a briefing paper on Climate Related Spending 2022.

CRITICAL INFRASTRUCTURE

DS3 || EirGrid is consulting on the DS3 System Services Protocol, which specifies minimum standards for Providing Units and performance monitoring procedures to be applied by the TSO. || **Closing Date: 15 April 2022**.

FURTHER CRU BUSINESS

TDP (CRU/2022/22) || The CRU is consulting on EirGrid's draft Transmission Development Plan 2021-2030. The Shaping our Electricity Future Roadmap will be updated to take into account the new target of up to 80% RES-E by 2030 and the next TDP (2022) will consider this target. || **Closing date: 19 April 2022**.

Non-Domestic Gas Works (CRU/2022/23) || From 1 July 2023, Non-Domestic Gas Works will be regulated. This will be done by extending the Register Gas Installer scheme to cover Domestic and Non-Domestic RGIs in one membership category.

SEMC BUSINESS

Capacity Market (SEM-22-007) || Consultation on Code Modifications (Working Group 23) has begun. The modifications concern New Interdependent Combined Units; timely publication of Final Auction Information Packs; and transparency on publication of qualification result. || **Closing date: 12 April 2022**.

Directed Contracts (SEM-22-008) || Owing to volatility in the commodities market the Regulatory Authorities postponed Round 18, scheduled to take place in March, for a minimum of two weeks.

NORTHERN IRELAND

NIRO || DfE is consulting on whether energy intensive industries should continue to get relief from the cost of supporting the NIRO. || **Closing date: 7 April 2022**.

Challenge Fund || DfE launched a fund to support green innovation.

ARTHUR COX

Environment & Planning

RECENT JUDGMENTS

Supreme Court determines that upstream consequences of a factory are not indirect effects to be assessed under the EIA Directive or Habitats Directive

An Taisce had challenged a grant of planning permission for a cheese factory, claiming that the environmental effects of the milk inputs for the factory had not been properly assessed for the purposes of the EIA and Habitats Directives. The High Court upheld the Board's decision. An Taisce obtained leave to appeal to the Supreme Court.

In dismissing the appeal, the Supreme Court held that only the environmental effects of the project for which development consent was sought are to be assessed for the purposes of the EIA Directive. In this case, the Supreme Court found that the project was the cheese factory and not the farms which supplied the milk to it.

It held that any indirect effects to be assessed "*must be intrinsic to the construction and operation of the project*" and found that the effects of the supplier farms were not intrinsic to the cheese factory. The Supreme Court also held that there was no obligation to assess the effects of the supplier farms on European sites for the purposes of the Habitats Directive.

High Court determines that applicants taking environmental challenges are not liable for the costs of an unsuccessful application for a costs-protection determination

The Applicant sought to bring a judicial review challenge to a decision of the Aquaculture Licence Appeals Board. Prior to formally issuing those proceedings, the Applicant wanted to establish whether those proceedings would attract the special costs protection (i.e. the loser does not have to pay the winner's costs). Section 7 of the Environment (Miscellaneous Provisions) Act 2011 provides a mechanism which allows for a determination to be made on whether the special costs regime applies. However, the Applicant had not sought a costs-protection determination because it was concerned that if it was unsuccessful in such an application, it might be liable to pay the other parties' costs in respect of it. The Applicant therefore instituted parallel proceedings seeking clarification as to whether an applicant would be liable for the costs of an unsuccessful application for a costs-protection determination pursuant to section 7.

The Court held that no such costs order would be made against an unsuccessful applicant and instead all parties would bear their own costs of such an application. It stated that the statutory mechanism under section 7 was an essential safeguard in light of the uncertainty in the case law on costs protection generally and that the legislative intent would be defeated by any other interpretation.

High Court quashes planning permission for failure to adequately consider evidence relating to the potential impact on protected species

The Applicant challenged the Board's decision to grant permission for a rowing centre on the shores of Blessington Lake, a designated Special Protection Area for the purposes of the Habitats Directive. In quashing the permission, the High Court held that the Inspector's finding that there was no potential for any adverse impact on protected species was neither sustainable nor in keeping with the jurisprudence. In reaching this conclusion the High Court found that the Inspector's finding was based on an assumption that the proposed development would *not* result in an increase in activity on the lake. This assumption was at direct odds with the evidence submitted to the Board by the Notice Party developer that there would be an increase in human and/or boat activity associated with the proposed rowing centre.

High Court refers questions to the CJEU on Residents' Association's capacity to bring judicial review proceedings

In these proceedings the Applicant sought to challenge a decision of the Board granting permission for a strategic housing development. The notice party developer argued that the Applicant, an unincorporated residents' association, did not meet the criteria set out in section 50A(3)(b)(ii) of the Planning and Development Act and therefore did not have the capacity to bring the proceedings. Section 50A(3)(b)(ii) provides an exception to the general rule that an unincorporated association does not have capacity to sue and confers capacity on certain NGOs in the context of environmental challenges where they meet the criteria contained in that section.

The High Court found that the applicant had failed to provide sufficient evidence that it had been in existence for the 12 month period prior to issuing proceedings such as to satisfy the criteria set out in that section.

However, the High Court went on to query whether 'sufficient interest' under section 50A(3)(b)(i) could confer capacity on an unincorporated body that satisfies that test, or whether it merely confers standing on a body that already has legal capacity. The Court referred a number of questions to the CJEU in this regard.

LEGISLATION

Sections of the Maritime Area Planning Act 2021 have been commenced.

The Planning and Development (Amendment) (Breach of Building Regulations) Bill 2022 is at Oireachtas Second Stage. The Bill amends section 35 of the Planning and Development Act 2000 and inserts a new measure which will see past failures to comply with building regulations become a consideration for planning authorities when deciding on planning permissions.

The Green Hydrogen Strategy Bill 2022 is before the second stage of the Oireachtas. This Bill seeks to ensure the State is prepared to realise the full potential of green hydrogen through the preparation of a national hydrogen strategy. This Bill obliges the Minister for the Environment, Climate and Communications to draft and publish a hydrogen strategy within six months of its passing, includes provision for consultation with relevant stakeholders in the preparation of said strategy and includes various topics the hydrogen strategy should cover.

DOMESTIC REPORTS, CONSULTATIONS AND DECISIONS

The Department of the Environment, Climate and Communications has published The National Retrofit Plan, as part of Climate Action Plan 2021. The Plan sets out how the Government will deliver on Ireland's retrofit targets. The Plan is designed to address barriers to retrofit across four key pillars: driving demand and activity; financing and funding; supply chain, skills and standards; and governance. For each pillar, barriers were identified and time-bound policies, measures and actions have been put in place to address them. The National Retrofit Plan also commits to the establishment of a cross-departmental steering group, chaired by the Department of the Environment, Climate and Communications, to oversee and monitor progress against our national targets and develop new initiatives, as required.

The Department of Agriculture, Food and the Marine has announced the results of the "Attitudes to Afforestation in Ireland" survey. This survey was commissioned by the Department as part of Project Woodland's work to develop Ireland's next National Forest Strategy.

The Department of Agriculture, Food and the Marine has opened public consultation on a Shared National Vision for the role of trees and forests in Ireland's future and on developing a new Forest Strategy. The consultation is open until 27 April 2022.

The Department of Housing, Local Government and Heritage has published updated Strategic Environmental Assessment (SEA) guidelines to help local authorities integrate environmental issues into Development Plans.

The Environmental Protection Agency (EPA) has published its updated guidance document "*SEA of Local Authority Land-Use Plans - EPA Recommendations and Resources*". This document provides key EPA recommendations for local authorities to consider when carrying out Strategic Environmental Assessment of land-use plans at county and local level.

The Environmental Protection Agency has published its annual summary report on enforcement activities carried out in 2021.

ARTHUR COX

Employment

PUBLICATION OF THE PROTECTED DISCLOSURES (AMENDMENT) BILL 2022

On 9 March, the Government published the Protected Disclosures (Amendment) Bill 2022, available here. The Bill will transpose the EU Whistleblowing Directive and is intended to significantly enhance the protections for whistle-blowers in Ireland. Employers who already have internal whistleblowing procedures in place will likely need to make changes to those procedures in light of the Bill, while employers without existing whistleblowing systems but who now fall within the legislative scope will need to establish and maintain compliant whistleblowing procedures.

Some of the significant provisions of the Bill include:

1. placing an obligation on all private sector organisations with 50 or more employees to establish formal channels and procedures for their employees to make disclosures;
2. imposing strict timelines for acknowledging, following up and providing feedback on reports;
3. extending the scope of the protected disclosures regime to cover volunteers, unpaid trainees, board members, share-holders, members of administrative, management or supervisory bodies and job applicants;
4. providing for the establishment of the Office of the Protected Disclosures Commissioner, within the Office of the Ombudsman;
5. expanding the definitions of penalisation, relevant information and relevant wrongdoing;
6. creating a number of new offences which attract significant penalties; and
7. reversing the burden of proof onto employers.

For further information on the scope and our briefing here.

OIREACHTAS COMMITTEE PUBLISHES ITS RESPONSE TO THE REPORT OF THE COMMISSION ON PENSIONS

The Oireachtas Committee on Social Protection here has recommended the qualifying age for the State Pension should remain at age 66, as part of its Response to the Report of the Commission on Pensions. The Committee has also called for legislation to prohibit the use of mandatory retirement age clauses in existing and new contracts of employment. The Committee also stated that changes to Employers' PRSI contribution rates should be examined by the Commission on Welfare and Taxation to determine the fairest way to increase Employers' PRSI contribution rates. The recommendations now go to Government for consideration.

WRC AWARDS €118,732 FOR UNFAIR DISMISSAL BY REASON OF REDUNDANCY

A recent Workplace Relations Commission decision awarded €118,732 (in addition to the redundancy payment and notice already received) to the complainant for unfair dismissal. The respondent failed to establish that the complainant's dismissal was wholly related to the redundancy of his position and failed to demonstrate that it was facing financial difficulties, or had genuine reasons to be concerned about its future prospects. The complainant was given no prior knowledge that redundancy was being considered and was not given an opportunity to have other options considered in a meaningful way. Neither was the complainant given a right to appeal the decision to make his role redundant. The WRC found that fair procedures were "totally absent in this case."

EVEN WHERE GENUINE REDUNDANCY, SELECTION PROCESS MUST BE FAIR

In this Nagle v Premier Auto Parts, the WRC accepted there was a significant downturn in the respondent's business and a genuine redundancy situation existed. However, it held the manner in which the complainant was selected for redundancy was unfair and that objective criteria for selection were not applied. The respondent had stated that the complainant's position had been made redundant on the sole criteria of his high salary. Therefore, the WRC was of the view that the consultation with the complainant masked an already "pre-determined" decision to dismiss him. Furthermore, the WRC found no evidence to demonstrate that the respondent had carried out a thorough exercise to consider alternative roles prior to dismissing him. The WRC upheld the claim and ordered the respondent to pay €3,464 (4 weeks' net salary) in compensation for the unfair dismissal. The complainant had secured alternative employment at a higher rate within days of being dismissed and had received €30,345 in statutory redundancy.

Public Procurement

IRELAND

Further OGP Guidance on Price Inflation

As described above in the Construction & Engineering section, the OGP has provided guidance for use with the revised works contract forms PW-CF1 – PW-CF6: GN 2.3.4 Tender Price Indexation – Calculation, Notification and Application.

Challenge to Framework Agreement for Interpretation Services

The High Court dismissed Word Perfect's challenge to the procurement by the Minister for Public Expenditure and Reform of interpretation services (the "**2020 Framework**"). Word Perfect challenged the 2020 Framework on two main grounds which the Court considered were unsustainable.

1. **Division into four lots**: Word Perfect argued that the division of the procurement into lots was unlawful because Article 46(1) (Division of contracts into lots) of Directive 2014/24/EU provides for "a contract" and not "contracts", whereas the title of the tender document was "*Four* Single Supplier *Contracts* for the provision of Interpretation Services …". The Court considered that Word Perfect's interpretation "runs contrary to the overall objective of the Procurement Directive, which … is to make every possible effort to have procurement divided into lots in order to facilitate the participation of SMEs in the tender process". Looking at the substance of the tender, it seemed clear that that it was not concerned with four separate contracts being divided into lots – no contracts were yet in existence. What was meant by the term 'contract' in Article 46(1) was a prospective procurement which may be divided into lots in the context of being at the preparatory stage of the tender process.

2. **'One lot rule'**: Tenderers could submit tenders for any or all of Lots 1 to 4 but were limited to being awarded one lot. They could indicate their preference and, if identified as MEAT for their first preference, they would be awarded that lot. If they were MEAT for another lot also, that lot would be awarded to the next most economically advantageous tender. Word Perfect argued that there may only be four tenderers for the four lots and so the tenderers would have no incentive to put in competitive bids.

   The Court did not accept that there would be only four tenders. Key in ensuring a competitive process was that the competitors were unaware of the number of competitors, and so would put their best foot forward. During the course of proceedings, the Court heard directly divergent expert evidence on these matters and commented on use of expert evidence (at paragraphs 87-96).

   World Perfect also argued that the 'one lot rule' narrowed competition and unduly favoured other suppliers, contrary to Article 18 (Principles of Public Procurement) of the Directive. This argument was based on the fact that Word Perfect was awarded 30% of the contracts allocated under the 2015 Framework, but was now being limited to 25% of the contracts to allocated under the 2020 Framework.

   The Court looked at the wording of Article 18: "The design of the procurement shall not be made with the intention of … artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the *intention* of unduly favouring or disadvantaging certain economic operators." The Court stated that in this case it was clear there was no such intention.

   Word Perfect argued that the 'one lot rule' distorted competition generally. The Court considered that there was no unlawful distortion of competition for several reasons it outlined to do with the market, permissible practices provided for under the Directive, and a detailed analysis of the "numerous and explicit references in the Directive to, in effect, doing everything possible to facilitate SME participation by the use of lots, including the restriction of the number of lots being awarded to tenderers".

   Word Perfect argued that the 'one lot rule' meant that a contract may not be awarded to the MEAT. The Court stated that "it is relevant to note the express provisions in Article 46(2) permitting the contracting authority to limit the number of lots that are awarded to one tenderer. By its very nature, this means that if that tenderer is the MEAT for more than one contract, then the MEAT will *not* be awarded for one contract".

   Word Perfect argued that limiting a tenderer to 25% was so distortive of competition as to be unlawful. The Court said that this was a different situation from where sellers are colluding to exclude others from the market contrary to competition law. Any distortion of competition arising from the 'one lot rule' was permissible under Article 46(2) of the Directive. Further, the tender process did not limit Word Perfect to 25% of the entire market.

   The Court briefly dismissed several other arguments, namely that the 'one lot rule' breached equal treatment and was discriminatory; breached the principle of proportionality; breached freedom to provide services; and was used because of the State's bias against Word Perfect.

EU

International Procurement Instrument

Adoption of the International Procurement Instrument (a Regulation) is anticipated, EU institutions having reached agreement on the proposal. A key objective is driving the opening of non-EU markets to EU businesses. The IPI aims to address this by empowering the EU to investigate alleged restrictive practices in third countries and engage with third them on market opening. Where third countries are restrictive to the EU, the IPI envisages that their access to EU markets could be restricted. Least developed countries would not be subject to IPI measures. || Commission || Parliament.

Public-private entities involved in Bidding Consortia

The Advocate-General providing an Opinion in Case C-332/20 stated that the reference provided an opportunity to clarify case-law on institutionalised public-private partnerships, sometimes used instead of public procurement or "traditional" concession contracts.

He stated that, while no binding provision of EU law expressly governs institutionalised public-private partnerships, they are defined by the Commission as a form of cooperation between public and private partners who establish a mixed capital entity which performs public contracts or concessions, and they are the subject of CJEU case law.

The background was that the city of Rome launched a call for tenders to select a private partner to set up with it a mixed public-private capital company and then to award this company the integrated school service. The city of Rome was to hold 51% of shares in the company, and the remaining 49% was to be acquired by the private partner, which would bear operational risk.

A bidding consortium was excluded from the competition on the grounds that one of its entities was 51% owned by AMA SpA, whose capital was wholly owned by the city of Rome, and that acceptance of the offer of the consortium would lead to the city of Rome holding, in fact, an effective participation of 73.5% in the mixed company to be set up, thus exceeding the 51% threshold set in the tender documents. The consortium challenged this decision.

The Attorney General gave an Opinion that, in the absence of any checks that the shareholding necessarily limited the effective commitment of the economic and financial capacity and/or the technical and professional capacity of the private partner below the threshold of 49%, the tenderer should not have been automatically excluded. He proposed that the CJEU provide these replies to the Italian Court:

- Article 30 and Article 38(1) of Directive 2014/23/EU (concessions) or Article 18 and Article 58(1) of Directive 2014/24/EU (public contracts) should be interpreted as preventing, for the purposes of determining the percentage of participation of a tendering private partner in the mixed public-private company to be set up, account being taken of any indirect participation of the contracting authority in the share capital of this private partner tenderer, such that the latter is automatically excluded from the call for tenders, when the taking into account of this indirect participation leads to the percentage of private participation sought by the contracting authority not being respected according to the tender documents.

- On the other hand, Articles 30 and Article 38(1) of Directive 2014/23/EU or Article 18 and Article 58(1) of Directive 2014/24/EU do not prevent awarding authorities from taking into account indirect participation when it emerges from checks carried out by the contracting authority that this participation consists of the holding of the majority of the capital of a private partner tendering by another entity which, in turn, is wholly owned by the contracting authority, provided that allocation of decision-making powers and risks is proportionate to the capital held with respect to this bidding private partner and this entity.

Case C-436/20 – Restriction of procurement competition to non-profit associations

The Advocate-General provided an Opinion in Case C-436/20 in which a Spanish Court sought a preliminary ruling. A for-profit trade association challenged a decree of a regional authority that stipulated that public authorities may only contract with non-profit entities for provision of certain social services. The Opinion concluded that such schemes are permissible under Articles 74 and 76 of Directive 2014/24/EU and Article 49 of the TFEU, provided such legislative acts conform with the principles of equal treatment and proportionality.

U.K.

Contract Expiry || The UK Infrastructure and Projects Authority prepared a detailed guide on preparing for PFI contract expiry.

Russia and Belarus || The U.K. Government published PPN 01/22 on Contracts with suppliers from Russia and Belarus. We note that considerations in Ireland need to comply with EU and domestic sanctions' law, which we have referenced elsewhere in this briefing.

ARTHUR COX

Real Estate

TITLE COVENANTS

Restrictive Covenant against Development Not Enforceable for want of Annexation

The English case of *Bath Rugby Ltd v Greenwood* related to a question of whether an area of land in Bath, known as the Recreation Ground, was still subject to a restrictive covenant imposed in a conveyance dated 6 April 1922 (the "**1922 conveyance**").

Bath Rugby Ltd wanted to replace its existing stadium with a new, larger stadium incorporating various retail and commercial outlets, with associated car parking. It accepted that if the covenant in the 1922 conveyance was still enforceable, it was possible that the proposed new development might breach the covenant, by which the original purchaser, for itself and its successors, covenanted that nothing should be thereafter "*erected, placed, built or done*" on the land "*which may be or grow to be a nuisance, annoyance or disturbance or otherwise prejudicially affect the adjoining premises or the neighbourhood*."

The question to be determined was whether there was anyone who could now claim to be entitled to the benefit of the covenant, which depended on whether the effect of the 1922 conveyance was to annex the benefit of the covenant to identifiable land.

The English Court of Appeal held (contrary to the English High Court) that the covenant did not sufficiently identify the land intended to be benefited and so the requirements for annexation had not been met.

BENEFICIAL OWNERSHIP OF PROPERTY

UK Register of Overseas Entities

New UK Legislation which requires overseas landowners of UK property to identify their beneficial owners has been enacted, but is not yet in effect.

The Economic Crime (Transparency and Enforcement) Act 2022 introduces a new regime requiring overseas entities (which will include Irish entities) that hold real estate in the UK to file details of their beneficial owners in a public registry at the UK Companies House.

LANDLORD AND TENANT

Development Agreement – Fit Out Obligation

In *Point Village Developments Ltd v Dunnes Stores ULC*, the Court of Appeal considered the proper construction of a single sentence in a development agreement made between the parties, i.e. the meaning of the definition of "*Fit-Out Works*" as:

"*Such fitting-out or other works as Dunnes may require to carry out in connection with the intended use and enjoyment of the store*;"

Dunnes argued that this clause gave it discretion as to when it would carry out the fit-out works or if it would carry out the fit-out works at all.

Noonan J (with Donnelly and Binchy JJ concurring) upheld Barniville J's judgment in the High Court agreeing that the discretion conferred by the above clause related to the nature and type of fit-out works that Dunnes would undertake, which would depend on the particular configuration of the store and the type of business to be carried on there. However, the clause did not confer discretion as to whether any works at all would be carried out.

Lease Frustration and COVID-19

In the English case of *Bank of New York Mellon (International) Ltd v Cine-UK Ltd*, the tenant was forced to cease trading due to coronavirus regulations. The court granted summary judgment for rent arrears against three commercial tenants who had argued that the terms of their leases had been overtaken by wholly unforeseeable events when they were forced to close their premises during the COVID-19 pandemic.

It was held that rent cesser clauses in the leases were not operative because they required physical damage or destruction of the premises. In light of that, the tenants were not entitled to rely on the landlords' insurance for loss of rent because the landlords had not suffered any loss of rent, nor had the leases been temporarily frustrated. The decision is under appeal.

Consent to Assignment

In Gabb v Farrokhzad, the High Court of England & Wales applied the Landlord and Tenant Act 1988 against a landlord who was being obstructive in dealing with a tenant's request for consent to an assignment of a lease. In particular, it invoked the jurisdiction to award damages, including the abortive sale costs in relation to the tenant's lost sale caused by the landlord's delay in dealing with the consent application.

The court also recognised the power to award exemplary damages where a landlord pursues a deliberately obstructive policy designed to prevent the tenant from assigning the lease, but took the view that, in the absence of sufficient evidence of the landlord's motives in this case, such an award was not appropriate.

Regulation of Short-Term Letting

In response to a question during a Seanad Éireann debate on 10 March, the Minister of State at the Department of Housing, Local Government and Heritage, Deputy Michael Noonan, confirmed that Government plans to regulate the rental of entire homes on short-term letting platforms like Airbnb have been delayed until 2023.

The Government's Housing for All plan contains a specific action (action 20.4) to develop new regulatory controls requiring short-term and holiday-lets to register with Fáilte Ireland with a view to ensuring that houses are used to best effect in areas of housing need. The Minister stated that this will take the regulation of short-term letting accommodation out of the planning code.

Fáilte Ireland has been tasked with the design and implementation of the new short-term lettings registration system and the agency is currently recruiting staff to work on the project. The Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media is also scoping out the legislative provisions that will be required to underpin the new registration system with a view to the necessary provisions being enacted this year and the new Fáilte Ireland short-term letting registration system being operational from January 2023.

HOUSING

Housing Commission Announces Details of Referendum Sub-Committee

The Housing Commission has announced details of its Referendum Subcommittee, which will examine the constitutional issues around housing rights and propose appropriate wording to Government for a referendum on the issue.

The Housing Commission was established in to fulfil a Government commitment to examine issues such as tenure, standards, sustainability and quality-of-life issues in the provision of housing and will consider long-term housing policy post 2030.

Mandating Advertisers of Rental Properties to Conduct Inspections

In response to a parliamentary question from Deputy Patricia Ryan of Sinn Féin in relation to banning the advertising of rental properties that do not meet minimum standards, the Minister for Housing, Local Government and Heritage, Darragh O'Brien, said that, under Housing for All, he has proposed the examination this year of the potential extension of the role of estate agents to include the possibility of carrying out initial inspections of rental properties prior to their entry into the rental market.

There is currently no prohibition on advertising rental properties that do not meet the Housing (Standards for Rented Houses) Regulations 2019. The 2019 Regulations require landlords of rented houses and apartments to ensure that they meet certain minimum standards in relation to structural condition, sanitary facilities, heating facilities, food preparation and storage, laundry, ventilation, lighting, fire safety, refuse facilities and the safety of gas, oil and electrical installations. The 2019 Regulations are enforced by local authorities but historically there has been a low level of inspections carried out.

PROPERTY TAX

Repayment of Stamp Duty on Cost Rental Dwellings

Section 12 of the Finance (Covid-19 and Miscellaneous Provisions) Bill 2022 inserts a new section 83F into the Stamp Duties Consolidation Act (SDCA) 1999.

The new section 83F provides for a partial repayment of stamp duty charged at the higher 10 per cent rate under section 31E SDCA 1999 for residential properties that are designated as "cost rental dwellings" subsequent to being acquired.

The standard rates of stamp duty for residential property are currently 1% on values up to €1 million and 2% on values exceeding €1 million. Section 31E SDCA 1999 was introduced in 2021 and provides for a higher 10% rate of stamp duty to be charged where a person acquires 10 or more residential properties (excluding apartments) in any 12-month period. Section 83F will apply where, within six months of being acquired, a residential property is designated as a cost rental dwelling by the Minister for Housing, Local Government and Heritage under Part 3 of the Affordable Housing Act 2021. Where section 83F applies, Revenue will repay any amount of stamp duty paid over and above the standard rate.

State Aid

COMMISSION PUBLISHES NOTICE ON STATE AID RECOVERY INTEREST AND REFERENCE RATES APPLICABLE FROM 1 MARCH 2022

On 17 February 2022, a European Commission notice on State aid recovery interest rates and reference/discount rates for all 27 EU member states plus the UK applicable from 1 March 2022 was published in the Official Journal. The rates have been increased for the Czech Republic, Hungary and Poland, but reduced for Sweden. The rates for all other EU member states and the UK remain unchanged. See the full notice here.

UK HIGH COURT REJECTS BRITISH SUGAR'S CLAIM THAT THE UK'S AUTONOMOUS TARIFF QUOTA FOR RAW CANE SUGAR BREACHES STATE AID RULES

Under the autonomous tariff quota ("**ATQ**") 260,000 tonnes of raw cane sugar may be imported into the UK tariff-free each year for refining. British Sugar claimed that the ATQ constituted unlawful State aid to Tate & Lyle Sugars ("**T&L**"), in breach of Article 10(1) of the Northern Ireland Protocol. T&L is the only substantial refiner of raw cane sugar in the UK and has imported over 99% of the raw cane sugar which has benefited from the ATQ. The High Court rejected British Sugar's submission that the ATQ was selective, finding that it did not discriminate between companies in a comparable factual and legal position. The Court noted that British Sugar did not import raw cane sugar and that anyone else looking to import raw cane sugar would be in the same position as T&L. The judge also rejected British Sugar's claim that the ATQ was an illegal subsidy under the Trade and Cooperation Agreement between the UK and the EU. See the full judgment here.

COMMISSION REFERS THE UK TO EU COURT OF JUSTICE OVER A UK JUDGMENT ALLOWING ENFORCEMENT OF AN ARBITRAL AWARD GRANTING ILLEGAL STATE AID

The Commission has decided to refer the UK to the Court of Justice of the European Union in relation to a judgment of its Supreme Court of 19 February 2020 allowing enforcement of an arbitral award ordering Romania to pay compensation to investors, despite a Commission decision having found that the compensation infringed EU State aid rules. The Commission considers that, in giving such a judgment, the UK: (i) breached the principle of sincere cooperation; (ii) infringed Article 351 TFEU; (iii) infringed Article 267 TFEU; (iv) and infringed Article 108(3) TFEU. Under Article 87 of the Withdrawal Agreement, the Commission may, within four years after the end of the transition period, initiate proceedings before the Court of Justice if it considers that the UK has failed to fulfil an obligation under the Treaties before the end of that period. See the full press release here.

APPEALS OF DECISIONS DECLARING GERMAN ELECTRICITY NETWORK-CHARGE EXEMPTIONS TO BE ILLEGAL STATE AID PUBLISHED

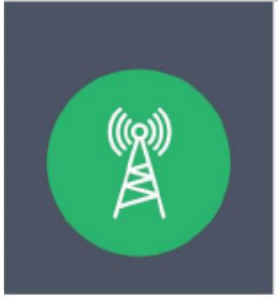
Legal challenges brought by Germany and companies including Infineon, Wepa and Covestro, contesting a General Court judgment upholding the Commission's decision that German exemptions from network charges for certain large electricity users were illegal State aid, have been published. The appellants argue, among other points, that the General Court distorted facts, and was wrong to uphold the Commission's finding that the support measures were granted from State resources. See the Official Journal notices here.

ENERGY COMPANIES' APPEAL OF GENERAL COURT JUDGMENT UPHOLDING DECISION TO INVESTIGATE SPAIN'S SUPPORT FOR COAL POWER PLANTS PUBLISHED

Legal challenges brought by Naturgy Energy Group and EDP España, contesting the General Court's judgment that upheld the Commission's decision to open an in-depth investigation into the environmental investment incentive granted by Spain to coal-fired power station, have been published. In their respective actions for annulment, both applicants argue that the General Court wrongly concluded that the measure at issue was selective and that the Commission's investigation decision was valid, since it did not state reasons in accordance with the standards laid down by the case-law on selectivity. See the full article here.

ARTHUR COX

Telecoms



OPEN CONSULTATION ON THE FRAMEWORK FOR THE MIGRATION FROM LEGACY INFRASTRUCTURE TO MODERN INFRASTRUCTURE

ComReg has invited responses from all stakeholders to the questions set out in the Framework for the Migration from Legacy Infrastructure to Modern Infrastructure Consultation (the "**Consultation**"). The Consultation relates to Eircom's intention to migrate copper-based fixed line telephone and broadband connection services to largely fibre-based networks and to ultimately switch off its copper access network. ComReg's objective is to create the conditions for a successful transition by ensuring that migration does not adversely affect wholesale and retail competition and the interests of end-users while not inhibiting the retirement of the network. All responses should be submitted by 11 May 2022. See the full Consultation here. See ComReg notice with contact details here.