



FEBRUARY 2023

Horizon Scanner: Infrastructure, Construction, Energy

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

Highlights this month...

EV CHARGING INFRASTRUCTURE

Against the context of the latest EU and Irish legal and policy developments, we look [here](#) at some of the main legal considerations in rolling out charging infrastructure.

[Find out more](#)

GREEN CLAUSES FOR LEASES

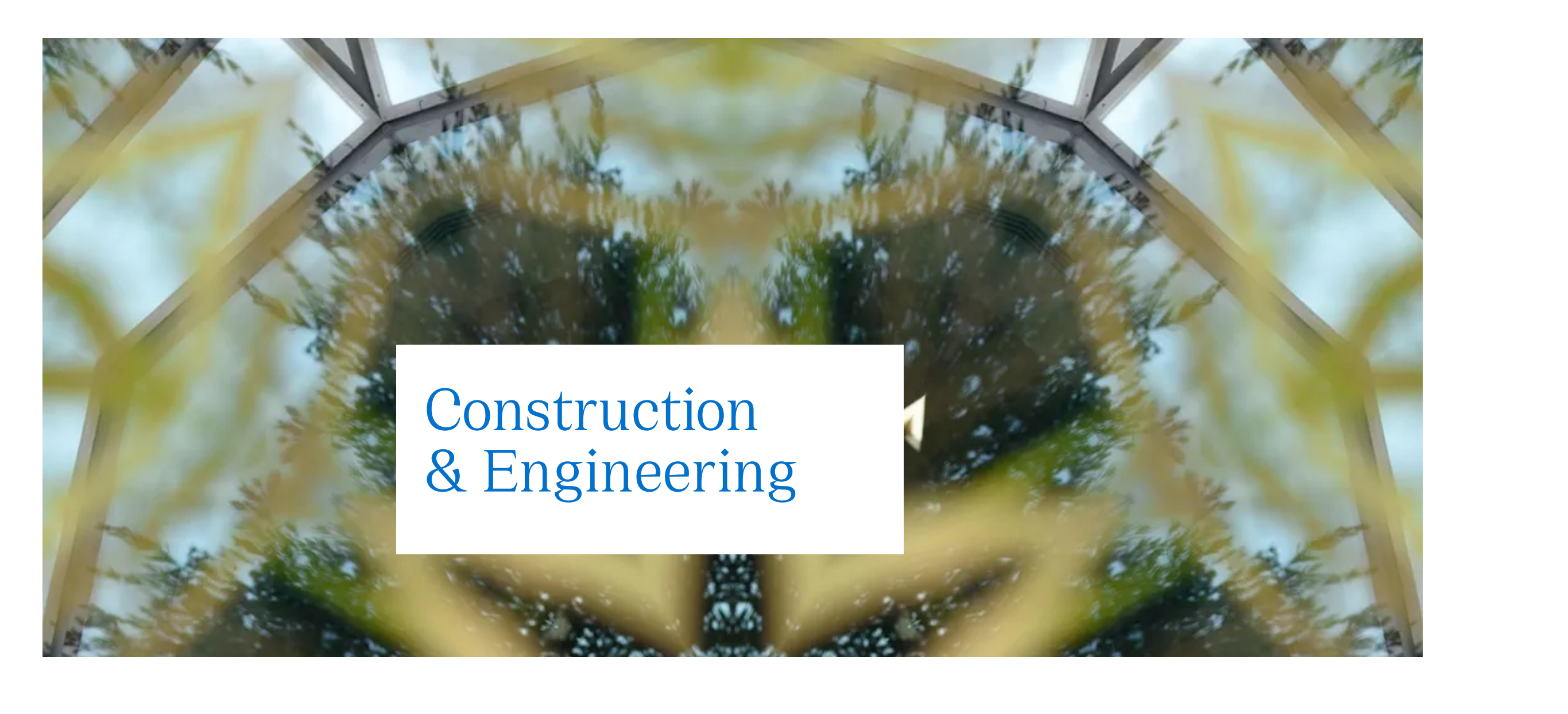
The Chancery Lane Project has published a suite of green lease clauses, the culmination of work carried out by the Project's Irish Property Working Group.

[Find out more](#)

ADJUDICATION

Can referral for adjudication of a payment dispute arising under a construction contract be time barred?

[Find out more](#)



Construction & Engineering

"While the circumstances of this case are unusual, it provides an analysis of how the statutory limitation period interacts with the UK adjudication regime (which, as in Ireland, provides an entitlement to refer the dispute "at any time")."

UK ADJUDICATION PROCEEDINGS FOUND TO BE TIME BARRED

In the UK judgment in [LJR Interiors Limited v Cooper Construction Limited](#), a contractor completed works in October 2014 but submitted a payment application no. 4 nearly eight years later, in July 2022. When the employer did not respond, the contractor referred a dispute for adjudication. The employer argued that it was too late for payment to be pursued given that, under the Limitation Act 1980 in the UK, an action for breach of contract cannot be brought after the expiration of six years from when the cause of action accrues.

The adjudicator disagreed and decided that a sum should be paid to the contractor: The cause of action arose when the breach occurred, and the breach was the employer's failure to pay the sum claimed by the final date for payment, identified in the notice of referral as August 2022. The contractor applied to court to enforce the decision and the employer applied for a declaration that the adjudicator's decision was void and unenforceable.

The Court concluded that "action" under the Limitation Act 1980 had to be read as including adjudication proceedings. Could the Court go on to examine whether the adjudicator had reached the correct conclusion as to when the cause of action has arisen? The Court indicated that the circumstances in UK law in which a declaration that an adjudicator's decision is void and unenforceable can be granted are narrow, but include instances "where the adjudicator has not just gone wrong but done so in a way it would be "unconscionable for the court to ignore.""

Though there was complexity in identifying when the cause of action arose, the Court ruled that the right to payment had accrued in November 2014. The adjudicator had been wrong to ignore the limitation defence available to the employer, and that error was unconscionable for the court to ignore. The Court decided not to enforce the adjudicator's decision and to grant the declaratory relief sought to the employer.

While the circumstances of this case are unusual, it provides an analysis of how the statutory limitation period interacts with the UK adjudication regime (which, as in Ireland, provides an entitlement to refer the dispute "at any time").

As to when a Court would overturn an adjudicator's decision because of error in law, this has been touched on in Ireland in *Aakon Construction Services Ltd v Pure Fitout Associated Ltd*, which we looked at [here](#). In *Aakon*, the Court indicated that the precise contours of its discretion to refuse to enforce an adjudicator's decision should be developed incrementally, and suggested the possibility that it may need to consider whether an error of law made during adjudication might mean an adjudicator acted outside his/her jurisdiction.

ADJUDICATION AND COLLATERAL WARRANTIES

When may a collateral warranty be deemed to be a construction contract for the purposes of statutory adjudication? The question is to be considered by the UK Supreme Court, as we note [here](#).

EV CHARGING INFRASTRUCTURE

The Government published an Electric Vehicle Charging Infrastructure Strategy. We look at domestic policy, recent EU law developments, and legal considerations that arise when delivering charging infrastructure in our briefing available [here](#).

LEGISLATION

Regulation of Providers of Building works

The Construction Industry Federation is [appointed](#) to be the registration body to perform the functions conferred on the registration body by or under the [Regulation of Providers of Building Works and Miscellaneous Provisions Act 2022](#).

Fire Safety

The Government is [consulting](#) on proposed amendments to the Building Regulations relating to fire safety in buildings other than dwellings. The closing date for responses is **21 April 2023**.

Government Spring Legislative Programme

The Government's [Spring Legislative Programme](#) includes in priority legislation for drafting and publishing a Licencing of Construction Activity Bill to provide for the establishment of a statutory licensing system for construction and related activities.

Screening of Third Country Transactions

Following consideration by Select Committee, an [amended version](#) of the Screening of Third Country Transactions Bill was published on 25 January 2023. The Bill facilitates review of transactions involving foreign investment that may impact on security or public order. Our briefing on the initial draft is available [here](#).

SUSTAINABILITY

EU Green Industrial Plan

A [Green Deal Industrial Plan](#) aims to support the scaling up of manufacturing capacity for net-zero products and technologies. It includes a proposal to establish Net-Zero Industry Academies including in relation to sustainable construction with a focus on the use of bio-based materials, circularity and digital technologies.

Modern Methods of Construction

In the UK, it has been [reported](#) that the Government has asked the British Standards Institution to develop a UK standard for MMC.

"A [Green Deal Industrial Plan](#) aims to support the scaling up of manufacturing capacity for net-zero products and technologies."



Digital Infrastructure

LEGISLATION

Communications Regulation and Digital Hub Development Agency (Amendment) Bill 2022 passes final stage of Dáil legislative scrutiny

The Bill requires providers of public electronic communications networks and providers of publicly available electronic communications services to take measures to manage the risks posed to the security of the networks and services. The Bill also empowers the Minister to take measures regarding the supply of critical components in the sector. Having completed its final stage in the Dáil on 25 January 2023, the Bill will now undergo legislative scrutiny in the Seanad. The report is available [here](#).

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COMREG UPDATES

ComReg commences consultation period on WLA and WCA Market Reviews

On 9 January 2023, ComReg published a Consultation and Draft Decision examining the two wholesale broadband markets in order to determine whether regulation is warranted, and if so, in what form. The markets being examined are the provision of Wholesale Local Access provided at a fixed location ("WLA") and Wholesale Central Access provided at a fixed location for mass-market products ("WCA"). The deadline by which interested parties must make their submissions is 5pm on 3 March 2023. The report is available [here](#).

ComReg initiates Physical Infrastructure Access Market Review Consultation

On 9 January 2023, ComReg published a Consultation and Draft Decision analysing the market for Physical Infrastructure Access ("PIA") and whether any service provider has market power over PIA which could inhibit the development of infrastructure competition. Interested parties are invited to comment up until 5 pm on The report is available [here](#).

ComReg publishes information notice setting out Final Assignment Plan for Multi Band Spectrum Award

On 19 December 2022, ComReg published the Provisional Assignment Plan for each winning bidder, and notified the winning bidders of the opportunity to negotiate a reorganisation of the Provisional Assignment Plan. The negotiation phase closed on 11 January 2023 with no changes to the Provisional Assignment Plan. ComReg is now commencing the remaining stages of the Multi Band Spectrum Award, which include the issuing of licenses to the winning bidders and transitional adjustments to providers' networks. The report is available [here](#).

ComReg publishes feasibility study on Passive Access Records Report

ComReg has published a report on the feasibility of providing Access Seekers with real time access to Eircom's Passive Access Records ("PAR"). The study focused on three main requirements: providing real time access to Eircom's PAR; enabling access seekers to extract information on passive infrastructure stored in Eircom's Physical Network Inventory system; and ensuring each PAR record includes a unique reference identifier when extracted. The report is available [here](#).

ComReg publishes Final Determination regarding the Emergency Call Answering Service Call-Handling Fee Review 2022

The Communications Regulation Act, 2002 (as amended) sets out ComReg's statutory role in respect of the Emergency Call Answering Service ("ECAS") and ComReg's function relating to the review of the maximum permitted call handling fee that a ECAS is allowed to charge for handling emergency calls. The Determination sets out the maximum call-handling fee that the ECAS operator is allowed to charge for the period from 12 February 2023 to 11 February 2024. The Determination concludes that the maximum permitted call handling for the above period shall be €3.78. The report is available [here](#).

ComReg publishes information notice on Spectrum Lease Notification

On 25 July 2022, ComReg approved the lease of spectrum rights in the 3.6 GHz band to Imagine from Meteor and Vodafone respectively. These leases expired on 24 January 2023. On 19 January 2023 Imagine submitted a notification to ComReg to lease spectrum rights in the 3.6 GHz band from Vodafone. ComReg invited submissions from interested parties on the Lease Notification, and will determine whether or not a proposed lease would distort competition. The report is available [here](#).

ComReg proceeds with District Court prosecution against Three

Three was charged on eight counts, having failed to meet requirements set out in Article 15 of the EU Roaming Regulation (the "Regulation"). The Regulation requires that service providers implement a financial cap of €50 for data roaming charges in a single billing period, and that service providers notify customers as they reach 80% and 100% of their limit. Three stated that following an investigation by ComReg it has credited or refunded the identified customers. Three pleaded guilty to one count on each of the eight summonses. The report is available [here](#).

INDUSTRY NEWS

The Department of the Environment, Climate and Communications issues update on the delivery of the National Broadband Plan

Key achievements outlined in the update include that over 27,600 premises across Ireland were connected to high-speed broadband under the National Broadband Plan ("NBP") by the end of 2022. The update also highlights that the company rolling out the NBP, National Broadband Ireland ("NBI"), has met its target to pass in excess of 100,000 premises by the end of its third contract year, which falls at the end of January 2023. NBI has passed more than 109,000 of the intended 560,000 premises. The report is available [here](#).

Amazon submits plans for three new data centres in north Dublin

The planned developments would bring the total number of data centres on the site to six. Universal Developers, on behalf of Amazon, submitted that the three new buildings would have a combined power load of 73MW. The deadline for submissions to be received on the planned development was 30 January 2023. The report is available [here](#).

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Employment

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LABOUR COURT TO REVIEW ALL JOINT LABOUR COMMITTEES (JLCS)

The Labour Court is inviting written submissions in respect of the review of JLCs it is carrying out pursuant to the requirements of the Industrial Relations Act 1946. The Court is required to carry out such a review at least every five years.

JLCs are independent bodies made up of employer and worker representatives that can set employment conditions and minimum rates of pay for employees in certain sectors through the drafting of Employment Regulation Orders (EROs) which can be given statutory effect with ministerial approval. There are currently JLCs in several sectors including in relation to agricultural workers, catering, contract cleaning, and the security industry.

Historically, the actions of JLCs have been frequently challenged in the Courts. The five-year review requirement was introduced after the High Court found certain provisions of the Industrial Relations Acts 1946 and 1990 unconstitutional; thereby deeming all EROs invalid in 2011. There are currently proceedings seeking judicial review of the approval of an ERO for the security industry in August 2022; and there is an injunction in place preventing its commencement. Despite those proceedings being ongoing, the Security Industry JLC has made proposals for a new ERO and the Labour Court is also currently inviting written submissions in respect of those proposals.

See information regarding the invitations for written submissions to the Labour Court [here](#) and [here](#).

SUPREME COURT SET TO HEAR APPEAL IN GIG ECONOMY CASE

The Supreme Court is set to hear an appeal by the Revenue Commissioners of the decision of the Court of Appeal in the case of The Revenue Commissioners -V- Karshan Midlands Ltd T/A Dominos Pizza this month. The Court of Appeal had overturned the judgment of the High Court, which had upheld the determination of a Tax Appeals Commissioner that that pizza delivery drivers engaged by Domino's were employees for tax purposes. The Court of Appeal disagreed and held that the drivers were self-employed contractors. The decision of the Supreme Court is set to clarify the law in relation to the gig economy and workers engaged under contracts similar to those used by the defendant in this case. See the Supreme Court's decision on the Application for Leave to Appeal [here](#).

"The decision of the Supreme Court is set to clarify the law in relation to the gig economy and workers engaged under contracts similar to those used by the defendant in this case."

NO BLUE TICKS: LIMITATIONS TO EMPLOYER USE OF EMPLOYEE WHATSAPP MESSAGES IN LITIGATION

In a recent judgment, FKJ v RVT and others [2023] EWHC 3, the High Court in England & Wales refused to strike out a misuse of private information claim taken by a former employee. The claim related to the use of the employee's personal WhatsApp messages by her employer in defending a claim she had taken. We look at the judgment in further detail [here](#).

LEGISLATION EXPECTED EARLY THIS YEAR

It is expected that these Bills will pass into law in early 2023.

Work Life Balance and Miscellaneous Provisions Bill 2022

This Bill was examined by the Seanad at Committee Stage on 31 January 2023. Unlike the significant amendments introduced in December (set out in our previous horizon scanner [here](#)) the amendments made were largely technical.

Central Bank (Individual Accountability Framework) Bill 2022

This Bill, which aims to enhance individual accountability in the financial services industry (previously analysed [here](#)) was before the Dáil for Report and Final stages on 1 February 2023.

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

A low-angle photograph looking up at a wooden pergola structure. The wooden beams form a geometric pattern against a backdrop of lush green trees and a clear sky. Sunlight filters through the leaves, creating a warm, golden glow. In the center of the image, there is a white rectangular box containing the word "Energy" in a blue serif font.

Energy

"The focus is on how to achieve current objectives. It therefore represents an opportunity for market participants to raise awareness about current barriers and present solutions for progressing project delivery and ensuring optimal market functioning."

KEY DEVELOPMENTS

Review of EU Electricity Market Design

The Commission began review of market design by inviting views on policy proposals by 13 February 2023, which we consider further [here](#). They do not signal an overall policy shift, focusing instead on mechanisms aimed at achieving current objectives. The review is to be discussed further at a March [meeting](#) of the Commission. ACER has also called for improvements to be made to [forward markets](#), echoed by the Florence School of Regulation [here](#).

The impact of the War in Ukraine during 2022 led to debate around market functioning. A recent [report](#) by the Court of Auditors concluding that progress towards an internal market has been slow, for reasons including weakness in the governance framework, is to be [examined](#) by the Council. In response, ACER [highlighted](#) the achievements of market integration. Commentators also [highlight](#) market effectiveness over the past year.

EV Charging Infrastructure

As the Government of Ireland publishes an EV Charging Infrastructure Strategy and the EU works to finalise legislation that will require roll out of infrastructure, we look at latest developments and key legal considerations that arise in the development of this sector. Our briefing is available [here](#).

Regulatory Decisions on Grid Infrastructure

Decisions are now available on firm access policy ([SEM-23-004](#)) and offshore grid connection asset treatment ([CRU/2023/09](#)). We provide further information [here](#).

Interconnectors

Citing delay in introducing MRLVC under the EU-UK Trade and Cooperation Agreement, in 2022 the SEMC consulted on SEM-GB trading arrangements ([SEM-22-005](#)). The SEMC has now published a decision ([SEM-23-012](#)) which comments on consultation responses. Among its comments, the SEMC includes the following:

- In deciding on changes to current arrangements, the SEMC will include forward hedging liquidity as a key aspect of its decision.
- Introduction of Financial Transmission Rights (FTRs) referenced to IDA1 prices may only have a limited effect in providing forward hedging opportunities for suppliers.
- The SEMC sees four key issues driving its decision: allocation of interconnection capacity and market efficiency; forward hedging liquidity; market power implications; and wider market developments taking place in GB and EU/SEM.
- As regards forward hedging, Physical Transmission Rights (PTRs) should be a superior instrument given current market arrangements in the SEM and GB. However, the timeframe for implementation and associated costs could pose unsurmountable challenges. If that is the case, FTRs could be the fall back alternative. If PTRs were implemented, the SEMC would consider whether market power mitigation measures should be introduced.
- Interconnector owners should undertake an assessment in relation to implementation of PTRs on the SEM-GB border within three months of publication of this paper, following which the regulatory authorities and interconnector owners will consider next steps.

"The Commission's review may therefore also present an opportunity to clarify or strengthen current expectations and requirements. ... it is interesting to note the questions around how necessary investment in network infrastructure might be ensured and the suggestion of providing a transmission access guarantee for offshore wind.."

FURTHER EU DEVELOPMENTS

Gas Market Intervention

The Commission established a [Steering Board](#) to facilitate coordination of demand aggregation and joint purchasing of gas. ACER published its first [daily reference price](#) related to the gas market correction mechanism. Preliminary reports following introduction of the mechanism have been published by [ACER](#) and [ESMA](#).

REPowerEU

The Commission published [guidance](#) for Member States completing REPowerEU chapters of Recovery and Resilience Plans to access the Recovery and Resilience Facility (loans and grants). There is an emphasis on quick progress towards REPowerEU goals. Examples of measures that can be included in REPowerEU chapters are increasing renewable energy generation capacity, reinforcement or upgrade of the grid needed to integrate renewables and respective storage, and reform to speed-up permit-granting procedures for renewable energy projects, including connection to the grid.

Green Industries - Incentives and Investments

In advance of a Council Working Party meeting on 16 February 2023, a [discussion paper](#) has been published on the US Inflation Reduction Act and the European Business Case for Green Industries and Investments. Questions include how existing frameworks can be scaled up to support green industries and how a [Net-Zero Industry Act](#) can improve the case for investment.

Hydrogen

The European Patent Office and International Energy Agency have compiled a [report](#) on latest technologies for hydrogen supply, storage, distribution, transformation and end-user applications. An EU Hydrogen Bank is to be discussed at a Commission [meeting](#) in May 2023.

INTERNAL MARKETS

Monitoring

The Commission published electricity and gas [market monitoring](#) reports for Q3 of 2022 and ACER published a new daily [LNG price](#) assessment report.

Networks

ACER published new [Framework Guidelines](#) for joint scenarios for network development planning in accordance with the recast TEN-E Regulation. Its latest report on electricity [tariff methodologies](#) includes recommendations for regulators on how to improve tariff setting.

Gas

ENTSOG has published a new [European Gas Flow Dashboard](#) to allow interrogation of gas flows and storage levels.

DOMESTIC DEVELOPMENTS

Legislation

Legislation listed for priority publication this [Spring](#) includes a Gas (Amendment) Bill to facilitate the integration of Ervia and Gas Networks Ireland and provide for the transfer of functions and assets from Ervia to GNI. Heads of Bill were approved on 4 October 2022. The list also includes a Marine Protected Area Bill 2022 to provide for the designation and effective management of Marine Protected Areas in the Irish maritime area. Heads of Bill were approved on 13 December 2022.

Legislation for priority drafting includes an Energy (Windfall Gains in Energy Sector) Bill 2023 to implement Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices. Heads of Bill were approved on 4 October 2022.

Climate Action Fund

DECC announced €27 million funding to assist local authorities to scale up [community climate action](#). The type of initiatives supported include projects that seek to reduce emissions, increase renewable energy, or improve energy efficiency.

FURTHER CRU BUSINESS

Gas Networks

Following a reprioritisation of outputs in CRU’s 2022 Work Plan, it decided not to consult on a NDP 2022. GNI has developed an alternate document, a Gas Forecast Statement 2022, to be published on the GNI site in Q1 2023 ([CRU/2023/10](#)).

Generator Financial Reporting

In 2022 the CRU decided that conventional generating units with nameplate capacity of 50 MW or more should provide additional reporting to identify vulnerabilities to security of supply. The CRU has published the template for reporting to be submitted yearly from 1 June 2023 ([CRU/2023/06](#)).

Customers

The Quarterly Insights Report on Customer Contacts and Complaints is available ([CRU/2023/02](#)). The CRU also published a note on annual audit of price comparison websites ([CRU/2023/01](#)).

FURTHER SEMC BUSINESS

Capacity Market

Consultation will run until 9 March 2023 on proposed modifications to Substantial Completion and Milestones for Substantial Financial Completion ([SEM-23-010](#)). For T-4 2026/27, the Auction Price Cap has been published ([SEM-23-009](#)). For T-4 2027/28, De-Rating Factors have been consulted on ([SEM-23-006](#)) and the Exception Application and Opt-out Notification process have been published ([SEM-23-003](#)).

Directed Contracts

The SEMC has published an Information Paper on quantities and pricing Round 21 ([SEM-23-013](#)).

NORTHERN IRELAND

Offshore Wind

DfE is [consulting](#) until 16 March 2023 on an Offshore Renewable Energy Action Plan and DfE and the Crown Estate signed a [Statement of Intent](#) to outline how they will work together to enable leasing in the NI marine area.

Support Scheme

DfE is [consulting](#) until 27 April 2023 on a renewable energy support scheme. Questions include whether a CfD scheme should be the preferred approach and whether participation should be mandatory for all generators.





Environment & Planning

RECENT JUDGMENTS

High Court [refuses](#) applicants leave to appeal challenges to Meath County Development Plan 2021-2027

The Court dismissed applications for leave to appeal its decision to quash two separate challenges to the Meath County Development Plan. The cases, which concern the re-zoning of lands owned by the applicants, have been heard together. Both applicants claimed that their lands ought to be zoned for immediate housing as a matter of “exceptional public importance”.

The Court stated that the “fundamental problem” for both applicants was that a challenge to the individual zoning of a particular piece of land without challenging the core strategy and distribution of housing provision under the Development Plan is a “pointless exercise”. The Court stated that it was not possible for the court to create additional housing provision “out of thin air” when doing so would breach the hierarchical and sequential approach to the unchallenged core strategy. The applicant’s application was dismissed.

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Court of Appeal [dismisses](#) applicant's appeal of decision of High Court to strike out proceedings

The applicant, Mr Cooper, objected to the grant of planning permission by Dun Laoghaire Rathdown County Council to Dundrum Retail GP DAC for the installation of a large open-air screen at Dundrum Town Centre. The applicant claimed that he did not receive notification of the decision until a month after the decision was made. He then attempted to lodge an appeal with the Board but was told that, as the application was late, it was invalid for failing to meet the requirements regarding making planning appeals under the Planning Act (“PDA 2000”).

In dismissing his appeal, the Court of Appeal noted that there is a significant body of High Court authority indicating that the requirements regarding appeals under the PDA 2000 are mandatory and that the time-limit for bringing appeals to the Board is absolute. The Court of Appeal also highlighted a number of procedural issues with Mr Cooper’s pleadings. The Court acknowledged that if the facts are as Mr Cooper asserts, then it understands his grievance. However in the absence of any constitutional challenge, any unfairness arising from the operation of the relevant sections of the PDA 2000 is a matter for the Oireachtas to address.

"In dismissing his appeal, the Court of Appeal noted that there is a significant body of High Court authority indicating that the requirements regarding appeals under the PDA 2000 are mandatory and that the time-limit for bringing appeals to the Board is absolute."

High Court [finds](#) that a change in a Development Plan is not in principle a bar to remittal of an SHD application

The Board consented to the quashing of its decision to grant planning permission for a SHD on Crofton Road in Dun Laoghaire on the basis that it unlawfully granted permission in material contravention of the Development Plan then in force in relation to building height. The Notice Party developer applied to have the matter remitted to the Board for a fresh decision to be made. As a new Development Plan was now in force, the developer asked the Court to either (a) remit the decision having regard to the 2016 Development Plan, or (b) remit the decision having regard to the 2022 Development Plan with directions and permitting all parties to make submissions having regard to the 2022 Development Plan and/or directing the Board to hold an oral hearing.

The applicants argued against remittal on the basis that the SHD process did not allow for further information to be submitted.

Holland J found that a change in a Development Plan was not a bar to remittal. However, the decision on remittal must be made having regard to the 2022 Development Plan. The High Court did not make final directions but requested parties to liaise to agree directions in accordance with the judgment and set out what it is envisaged those directions will cover (which included that an oral hearing be held, that submissions be made by the developer regarding the 2022 Development Plan’s bearing on its SHD application in advance, and that the relevant parties and the public should be invited to make submissions in response). The applicant has indicated its intention to seek leave to appeal this decision to the Court of Appeal.

In a separate High Court [judgment](#), the Board also conceded the judicial review but the Court found that remittal was not possible. This was because the planning application had been missing certain particulars which meant that the application itself was invalid and remittal could not cure this defect. This applicant had also asked the Court to go on to consider any other grounds that were not conceded but that would have the effect of rendering any remittal unlawful. The Court did not go on to consider this issue in this case.

Supreme Court [dismisses](#) appeal of Cork community group to have planning permission for flood defence works overturned

This case concerned a development which involved flood defence works in an area in Cork known as Morrison’s Island. ‘Save Cork City’ appealed the decision of the High Court to uphold the planning permission on the basis that the Board did not have the power to carry out an EIA Screening. The Supreme Court upheld the decision of the High Court and ruled that the Board had implied jurisdiction to conduct an EIA screening for this type of development. The Supreme Court also held that the Board has a statutory duty to consider likely effects on the environment before making a decision to grant approval under the relevant statutory provision.

High Court [dismisses](#) challenge by residents group to planning permission for solar farm

A local residents group challenged planning permission granted by the Board for an 86.7 hectare solar farm of up to 60 megawatt (MW) in Co. Offaly.

The residents group sought, among other things, to have the planning permission overturned, claiming that the Board’s decision contravened the Planning and Development Regulations and a number of EU Directives in relation to habitats screening, water quality assessment, and environmental assessments. The High Court had previously refused to overturn the planning permission. The Judge also confirmed once again that solar farms in and of themselves are not projects that require EIA.

CJEU AG [opinion](#) finds that mitigation measures can be taken into account at AA screening stage where they are a standard design feature

In May 2021 the High Court referred a question to the CJEU asking whether measures that would have been incorporated into the design of a development as standard features but which may have the effect of mitigating harmful effects on a European site may be taken into account at AA screening stage.

Advocate General Kokott has opined that such standard design features may be taken into account at screening stage. We expect the CJEU to deliver its judgment in Q2 of this year.

LEGISLATION

Draft Planning and Development Bill 2022

The draft Bill was approved in December 2022 and was [published](#) on 26 January 2023. A finalised Bill will be published once pre-legislative scrutiny by the Joint Oireachtas Committee on Housing, Local Government and Heritage has been concluded.

Water Services (Amendment) Act 2022

This [Act](#) was signed into law on 7 December 2022. It provides that Irish Water shall be known as Uisce Éireann and makes provision for a number of organisational and governance changes for Uisce Éireann. The [Water Services \(Amendment\) Act 2022 \(Commencement\) Order 2022](#) sets out the relevant commencement dates.

The Planning and Development and Foreshore (Amendment) Act 2022

This [Act](#) was enacted on 20 December 2022. It has two parts, the first dealing with An Bord Pleanála and the second dealing with the definition of “foreshore”.

Sections 1-14 make amendments to the Planning and Development Act 2000 relating to matters concerning the governance of An Bord Pleanála, including an increase in the number of ordinary members on the Board, changes to its quorum and amendments to the complaint’s procedure. A significant change introduced by section 10 is the removal of the power of the Board to reduce the quorum from three to two persons in certain circumstances. These sections (except sections 3, 13 and 14) have been commenced.

Sections 15-21 amend the Foreshore Act 1993. They were commenced on 20 December 2022.

The most significant change introduced by these sections is the amendment of the definition of “foreshore” in the Foreshore Act 1993 and, by implication, in the Maritime Area Planning Act 2021. The definition now includes the subsoil below, and the water column (but not the air space) above, the bed and shore. The effect of this, in summary, is that surveys which do not touch or take from the bed and shore, and which only move through the water column, require a licence.

Planning and Development and Foreshore (Amendment) Act 2022 (Commencement) Order 2023

These [Regulations](#) state that Parts 1 and 2 (other than sections 3, 13 and 14) of the Planning and Development and Foreshore (Amendment) Act 2022 shall come into operation.

Marine Protected Areas Bill 2022

The Government has published the [General Scheme](#) of this Bill, which will provide for the designation and management of Marine Protected Areas.

Maritime Area Planning Act 2021 (Commencement of Certain Provisions) (No. 4) Order 2022

This [Order](#) commences section 56 of the MAP Act 2021 as of 1 December. Section 56 deals with the appointment of the CEO of MARA.

Planning and Development, Maritime and Valuation (Amendment) Act 2022 (Commencement of Certain Provisions) (No.5) Order 2022

This [Order](#) commences section 46 of the Planning and Development, Maritime and Valuation (Amendment) Act 2022 as of 1 December. Section 46 amends section 56 of the MAP Act 2021.

Planning and Development (Amendment)(No. 3) Regulations 2022

These [Regulations](#) amend the process for the planning authority consulting with various state bodies (including the EPA) when there is a proposed development which would be likely to have significant effects on the environment in a transboundary State.

Historic and Archaeological Heritage Bill 2023

If enacted, this [Bill](#) will repeal the National Monuments Acts 1930 to 2014 and replace those Acts with provisions for the protection of historic and archaeological heritage and provisions enabling the State to ratify or accede to certain international conventions which relate to such protection, as well as giving effect to the EIA and Habitats Directives in respect of works to / near monuments

Planning and Development Act 2000 (Exempted Development) (Number 5) Regulations 2022

These [Regulations](#) insert a new Article 8H in the Planning and Development Regulations 2001 which exempts the replacement of broadleaf high forest by conifer species from the Planning and Development Act in certain circumstances.

Planning and Development act 2000 (Section 181(2)(a)) (No.2) Order 2022

These [Regulations](#) provide that the Planning and Development Act 2000 (No. 30 of 2000) (other than sections 50, 50A, 50B and 181 of that Act) shall not apply, pursuant to subsections (2) to (2AA) of section 181 of that Act, to the development described in the Schedule proposed to be carried out by or on behalf of EirGrid, a statutory undertaker for the purposes of that section.

Development (Emergency Electricity Generation) Regulations 2022

These [Regulations](#) amend the Development (Emergency Electricity Generation) Act 2022 (No. 35 of 2022) and the provisions relating to applications to the Minister for the Environment for approval for the specific developments covered by the Act.

European Union (Ecodesign Requirements for Certain Energy - Related Products) Amendment) Regulations 2022

These [Regulations](#) give full effect in Irish law to an EU regulation on market surveillance and compliance of products and give further effect in Irish law to an EU directive establishing a framework for the setting of eco-design requirements for energy-related products.

European Union (Planning and Development) (Habitats and Environmental Impact Assessment) Regulations 2022

These [Regulations](#) facilitate the granting of an EIA exemption to developments solely designed to respond to civil emergencies, where those developments would be likely to have a significant effect on the environment. The Regulations also ensure that the existing transposition provisions in relation to the test for screening for Appropriate Assessment are consistent with EU law and facilitate interaction between the Board and the EPA.

"This [Act](#) was enacted on 20 December 2022. It has two parts, the first dealing with An Bord Pleanála and the second dealing with the definition of "foreshore"."

DOMESTIC REPORTS, CONSULTATIONS AND DECISIONS

The Department of Housing, Local Government and Heritage

Restructured National Biodiversity Data Centre to [strengthen](#) State's ability to confront biodiversity challenges

The Minister announced the new governance and structures for the [National Biodiversity Data Centre](#) as a company limited by guarantee (NBDC CLG). The Minister also announced the new Chairperson and board of the NBDC CLG.

Office of the Planning Regulator

The Office of the Planning Regulator (OPR) has [published](#) its Report on the Second Phase of the OPR's Review of Certain Systems and Procedures used by An Bord Pleanála. The findings from this phase of the review, which build on the 11 recommendations contained in the report arising from the first phase (published on 4 October), indicate an urgent need for a 'reset' in the way An Bord Pleanála delivers its functions.

Environmental Protection Agency

The EPA [published](#) a technical report "Assigning WFD Status to Unmonitored Water Bodies in 2013-2018", outlining the methodologies used in surface waters and groundwaters.

[Read more about our Environment and Planning Group >](#)



Public Procurement

EU

Foreign Subsidies Regulation – Consultation on Implementation

[Regulation \(EU\) 2022/2560](#) on foreign subsidies distorting the internal market entered into force. It provides three mechanisms, one of which relates to public procurement and obliges companies to notify the Commission of participation in procedures where:

- the estimated contract value is **at least €250 million**; and
- the foreign financial contribution involved is **at least €4 million per non-EU country**.

The Commission may prohibit the award of contracts in such procedures to companies benefiting from distortive subsidies. Further information is available [here](#).

The Commission is inviting [feedback](#) on a draft Implementing Regulation setting out practical and procedural aspects for application of the new rules. The closing date for responses is **6 March 2023**.

Entry on Unreliable Supplier List following Group Failure

When a group of economic operators selected by a Lithuanian authority to undertake a substantial building contract failed to deliver the works and the lead partner in the group became insolvent, the awarding authority terminated the contract.

The other companies in the group brought a court action seeking a declaration that their automatic entry on the list of unreliable suppliers in the central public procurement portal was unlawful.

To rule on the issue, the Supreme Court sought clarification from the CJEU on the application of EU law. The CJEU replied in the following terms:

- Articles 18(1) and 57(4)(g) of [Directive 2014/24/EU](#) prevent national rules under which each member of the group in this scenario is automatically entered on a list of unreliable suppliers and thereby temporarily prevented from participating in new procurement procedures.
- Articles 18(1) and 57(4)(g) of [Directive 2014/24/EU](#) mean that an economic operator in this type of scenario can rely, for the purpose of demonstrating that its entry on the list is unjustified, on any factor capable of showing it was not the cause of the deficiencies resulting in early contract termination and that it could not have been reasonably required to do more than it did to remedy the deficiencies.
- Article 1(1) and (3) of [Directive 89/665/EEC](#) means that a Member State, when laying down conditions for the application of optional grounds for exclusion under Article 57(4)(g) of Directive 2014/24, as would apply in this type of scenario, must ensure there is a right to bring an effective action against entry on the list.

"Member States ... must ensure there is a right to bring an effective action against entry on the list."

UK

Contract Finder

The Cabinet Office published a Procurement Policy Note ([PPN 01/23](#)) setting out legal and policy requirements to publish procurement information on Contracts Finder. It is stated not to apply to contracting authorities whose functions are wholly or mainly Scottish, Northern Ireland or Welsh devolved functions.

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

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



Real Estate

"This [green leases] is an extremely dynamic area with the pace of technical, policy and legislative change requiring lawyers and their real estate clients to be agile and to reflect these changes in how they approach the negotiation of commercial leases. The expectation is that green lease clauses will likewise require significant flexibility in their drafting to keep in step with the expected pace of change as governments, businesses, NGOs and individuals seek to find solutions to climate change."

CLIMATE & ENVIRONMENT

Green Leases

We anticipated last month that 2023 would see an increased focus on the greening of property contracts with green leases in particular being utilised by owners and occupiers to ensure the sustainable management and operation of buildings and to future proof buildings against increasing regulation of carbon emissions.

[The Chancery Lane Project](#) (TCLP) has now published a [suite of green lease clauses](#) for use in Irish commercial leases. TCLP is a collaboration of lawyers from around the world, working pro bono to develop new contract provisions to help fight climate change. The Arthur Cox LLP real estate group, working with colleagues in other law firms and sustainability professionals, spearheaded the development of the clauses by the Irish Property Working Group of TCLP.

This is an extremely dynamic area with the pace of technical, policy and legislative change requiring lawyers and their real estate clients to be agile and to reflect these changes in how they approach the negotiation of commercial leases. The expectation is that green lease clauses will likewise require significant flexibility in their drafting to keep in step with the expected pace of change as governments, businesses, NGOs and individuals seek to find solutions to climate change.

Read more on our website [here](#) and on LinkedIn [here](#).

HOUSING

EU Approves Funding for Croí Cónaithe Build to Sell Apartment Schemes

The European Commission has approved Ireland's State aid application for the [Croí Cónaithe \(Cities\) Scheme](#) to support the building of 5,000 apartments for sale to owner-occupiers in Dublin, Cork, Limerick, Galway and Waterford. The scheme aims to bridge the so called 'viability gap' between the cost of building apartments and the market sale price (where the building cost is greater).

The Department of Housing's [press release](#) states that the decision will enable the Housing Agency to conclude its first set of development agreements after concluding its appraisal of projects that have applied for funding to date.

Housing for All Q4 2022 Progress Report

The Department of Housing has published a [progress report](#) on Housing for All highlighting the following:

- the LDA's renewal of their call for proposals under Project Tosaigh (a market engagement initiative aimed at unlocking land that is not being developed by private owners due to financing or other constraints);
- the ongoing appraisal of projects under the Croí Cónaithe (Cities) Scheme;
- the extension of the Help-to-Buy Scheme to the end of 2024;
- the commencement of Part 9 of the Land Development Agency Act 2021 which places an affordable housing delivery requirement on the development of relevant public land (70% social and affordable housing in urban areas with populations over 10,000 and 100% social and affordable housing in Dublin and Cork cities);
- various measures in relation to innovation and modern methods of construction;
- an Action Plan to recruit and retain those with the necessary skills for residential construction and retrofitting;
- the publication of the Vacant Homes Action Plan in January 2023, the introduction of the Vacant Homes Tax in Budget 2023, and the expansion of the Vacant Property Refurbishment Grant in November 2022 to include properties in both cities and more remote rural areas (in addition to those in towns and villages, eligible since July 2022);
- the introduction of a €500 tax credit for renters, temporary measures deferring 'no fault' tenancy terminations until the expiration of the winter emergency period on 31 March 2023 (read our briefing on this measure [here](#)), and the increase to €10,000 of the amount allowed for landlords' pre-letting expenses;
- the approval of proposals to provide State assistance to stimulate the development of new student accommodation;
- the amendment in December 2022 to the Section 28 Guidelines on Sustainable Urban Housing: Design Standards for New Apartments to remove Build to Rent (BTR) accommodation as a separate development type, meaning that there will no longer be a difference in standards for future apartment developments, regardless of the development type;
- the publication of the draft Planning and Development Bill 2022 and the approval in December 2022 of the revised General Scheme of the Land Value Sharing and Urban Development Zones Bill (to be published in February 2023); and
- the implementation of the Residential Zoned Land Tax.

The report also highlights Housing for All priority actions for 2023 including the following:

- publication of legislation for land value sharing mechanisms reflecting the uplift in value arising from rezoning of lands and for Urban Development Zones (the Land Value Sharing and Urban Development Zones Bill is priority legislation in the Government's Spring Legislative Programme (see below));
- publication of draft Section 28 Guidelines for Planning Authorities on Sustainable and Compact Settlement Guidance (to be published in March 2023 for public consultation with final guidelines to be published by the end of Q2 2023); and
- establishment of a new Division of the High Court dealing with planning and environmental issues (early 2023 subject to the appointment of additional judicial resources).

Vacant Homes Action Plan 2023-2026

The Department of Housing's [Vacant Homes Action Plan](#), published on 30 January 2023, reports on progress to date and actions to be pursued to return recoverable vacant properties back to viable use. The Department also published a [list of all supports available](#) for refurbishing vacant property, a note on [planning exemptions](#) for converting vacant commercial premises to residential use and a [policy on addressing vacancy](#).

LEGISLATION

Government Spring Legislative Programme

The Government published its [Spring Legislative Programme](#). Real estate-related priority legislation for drafting and publication this session includes:

- Licencing of Construction Activity Bill: to provide for the establishment of a statutory licensing system for construction and related activities.
- Land Value Sharing and Urban Development Zones Bill: to amend the Planning and Development Act 2000 to introduce new provisions to deal with land value sharing and

urban development zones reflecting [Housing for All](#) (the revised general scheme was approved on 13 December 2022 and will be published in February 2023, PLS to be determined).

- Planning and Development Bill: to review and replace the Planning and Development Act 2000 with a consolidated bill. The draft Bill was published on 26 January 2023. The Joint Committee on Housing, Local Government and Heritage met on 7 February to discuss pre-legislative scrutiny of the general scheme of the Bill and resume discussions on 9 February. The Committee's PLS report can be viewed [here](#). Once PLS has been concluded, a finalised Bill will be published which will then proceed through the Houses of the Oireachtas. We previously outlined the main provisions of the Bill [here](#). The Government hopes to enact the Bill in early 2023. The Department of Housing's press release is available [here](#).
- Registration of Short-Term Tourist Letting Bill 2022: to provide for 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 (heads in preparation) (read our update [here](#)).

Other relevant legislation for this session includes:

- Industrial Development (Miscellaneous Provisions) Bill: to provide that IDA Ireland would be permitted to establish and participate in corporate partnerships, with the sole purpose of developing critical industrial and commercial property in regional locations (*revised heads in preparation*).
- Housing (Miscellaneous Provisions) Bill: to amend the Housing (Miscellaneous Provisions) Act 2009 to include provisions in relation to social housing assessments and rent schemes and to amend the Housing (Miscellaneous) Act 2014 in relation to tenant purchase (*work is underway*).
- Property Services Regulation (Amendment) Bill: to revise the Property Services Regulation Act 2011 in light of the Services Directive 2006/123/EC (on services in the internal market) and Recognition of Professional Qualifications Directive 2005/36/EC and related CJEU jurisprudence following an EU-PILOT query (*heads in preparation*).
- Co-operative Societies Bill: to consolidate and modernise the existing Industrial and Provident Societies legislation (*heads in preparation*).
- Companies (Administrative, Governance & Insolvency Amendment) Bill: to give effect to outstanding Programme for Government commitments on rights of workers as creditors; trading entities splitting operations; and transactional avoidance (*work is underway*).
- Miscellaneous Provisions (Transparency and Limited Partnerships and Businesses Names) Bill 2023: to reform the Limited Partnership Act 1907 and the Registration of Business Names Act 1963, strengthening Ireland's regulatory framework and responding to concerns raised in relation to the transparency of Limited Partnerships (*heads in preparation*).

[Read more about our Real Estate Group >](#)



State Aid

"The proposal aims to boost investments for a faster roll-out of renewable energies as well as to support the decarbonisation of the industry and the production of equipment necessary for the net-zero transition, while preserving the integrity and level playing field of the Single Market."

TRANSFORMATION OF THE EUROPEAN STATE AID TEMPORARY CRISIS FRAMEWORK

On 1 February the European Commission sent Member States a draft proposal to transform the State aid Temporary Crisis Framework into a Temporary Crisis and Transition Framework to facilitate and accelerate Europe's green transition. The proposal aims to boost investments for a faster roll-out of renewable energies as well as to support the decarbonisation of the industry and the production of equipment necessary for the net-zero transition, while preserving the integrity and level playing field of the Single Market. Proposed amendments are aimed at further facilitating the roll-out of renewable energy and decarbonising the industry and supporting investments in the production of strategic equipment necessary for net-zero transition. If accepted, these new provisions will be in place until 31 December 2025. Further information is available [here](#).

EUROPEAN COMMISSION 2023 GUIDELINES ON STATE AID FOR BROADBAND NETWORKS PUBLISHED IN OFFICIAL JOURNAL

The Guidelines on State aid for broadband networks, adopted in December 2022, were published in the OJEU on 31 January 2023 and entered into force on 1 February 2023. They update the 2013 rules on State aid granted by Member States for the deployment of broadband networks and the take-up of available broadband services to support the digital transition. The main revisions relate to alignment of the threshold for public support to fixed networks with the latest technological and market developments; the introduction of a new assessment framework for the deployment of mobile (including 5G) networks; an explanation of how public support can be used to incentivise the take-up of broadband services; simplification of rules to facilitate the practical application of the Guidelines; and expanded guidance on key concepts, such as mapping, public consultations, selection procedure, wholesale access pricing, and claw back mechanisms. Further information is available [here](#).

STATE AID: COMMISSION APPROVES €1.36 BILLION GREEK SCHEME TO COMPENSATE ENERGY-INTENSIVE COMPANIES FOR INDIRECT EMISSION COSTS

The Commission approved a Greek scheme to partially compensate energy-intensive companies for higher electricity prices resulting from indirect emission costs under the EU Emission Trading System. The scheme notified by Greece, with a total estimated budget of €1.36 billion, will cover part of the higher electricity prices arising from the impact of carbon prices on electricity generation costs incurred between 2021 and 2030. The support measure is aimed at reducing the risk of 'carbon leakage', where companies relocate their production to countries outside the EU with less ambitious climate policies, resulting in increased greenhouse gas emissions globally. Further information is available [here](#).

STATE AID: COMMISSION OPENS IN-DEPTH INVESTIGATION INTO FRENCH SUPPORT MEASURES IN FAVOUR OF FRET SNCF

The Commission opened an in-depth investigation to assess whether certain French support measures in favour of Fret SNCF are in line with EU State aid rules. The beneficiary of the measures is Fret SNCF SAS, a wholly owned subsidiary of the French railway operator SNCF SA ('SNCF'). Fret SNCF has been constantly loss-making, except in 2021. In the period from 2007 to 2019, its losses were continuously covered by its parent company SNCF through intra-group cash advances, which constitute State resources because of shareholding and control by the State. Further information is available [here](#).

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

"The scheme...will cover part of the higher electricity prices arising from the impact of carbon prices on electricity generation costs incurred between 2021 and 2030."



Transport

"Like many aspects of the journey to net zero, roll out of charging infrastructure is required quickly and there are many tried and tested commercial structures for its delivery."

KEY DEVELOPMENTS

EV Charging Infrastructure

As the Government of Ireland publishes an EV Charging Infrastructure Strategy and the EU works to finalise legislation that will require roll out of infrastructure, we look at latest developments and key legal considerations that arise in the development of this sector. Our briefing is available [here](#). The Department of Transport also announced funding for the Shared Island Sports Club EV [Charging Scheme](#) and a first all-electric town [bus service](#).

EU

Maritime Transport

Regulations have been made in respect of the implementation of the [European Maritime Single Window environment](#), which is intended to reduce the administrative burden for maritime transport.

Rail

The EU announced support for 10 pilot projects to establish [cross-border rail services](#) on continental Europe.

Drones

Regulations governing [dedicated airspace](#) for drones and manned aircraft have been made.

Hydrogen

The European Patent Office and International Energy Agency have compiled a [report](#) on latest technologies for hydrogen supply, storage, distribution, transformation and end-user applications. An EU Hydrogen Bank is to be discussed at a Commission [meeting](#) in May 2023.

"The European Patent Office and International Energy Agency have compiled a [report](#) on latest technologies for hydrogen supply, storage, distribution, transformation and end-user applications."

DOMESTIC DEVELOPMENTS

Legislation

[S.I. No. 24/2023 - Irish Aviation Authority \(Unmanned Aircraft Systems \(Drones\)\) Order 2023](#) has been made to give effect to Commission Implementing Regulation (EU) 2019/947 on the rules and procedures for the operation of unmanned aircraft.

[S.I. No. 25/2023 - Irish Aviation Authority \(Upper Airspace and Rockets\) Order 2023](#) has been made to designate the limits and categories of Upper Airspace in the State and define rules for the operation of rockets in Irish controlled Airspace.

New legislation listed for priority drafting this [Spring](#) includes a Merchant Shipping (Investigation of Marine Accidents) Bill to establish a new independent Marine Accident Investigation Unit within the Department of Transport and to dissolve the Marine Casualty Investigation Board. Heads of Bill were approved on 7 December 2022.

Further legislation to be worked on includes an Air Navigation and Transport (International Aviation Agreements) (Amendment) Bill; a Large Public Service Vehicle Reform Bill; a Merchant Shipping (International Conventions) Bill; a Railway Safety (Amendment) Bill; a Road Safety Authority (Amendment) Bill; and a Vehicle Roadworthiness Bill.

Active Travel

The Department of Transport [allocated](#) €290 million for walking and cycling infrastructure in 2023.

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



Want to
know more?

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

Contacts



AARON BOYLE
Partner
+353 1 920 1213
aaron.boyle@arthurcox.com

Read Aaron's Bio



DANIELLE CONAGHAN
Partner
+353 1 920 1082
daniella.conaghan@arthurcox.com

Read Danielle's Bio



JACINTA CONWAY

Partner
+353 1 920 1775
jacinta.conway@arthurcox.com

[Read Jacinta's Bio](#)



KAREN KILLORAN

Partner
+353 1 920 1097
karen.killoran@arthurcox.com

[Read Karen's Bio](#)



NIAMH MCGOVERN

Partner
+353 1 920 1208
niamh.mcgovern@arthurcox.com

[Read Niamh's Bio](#)



ALEX MCLEAN

Partner
+353 1 920 1195
alex.mclean@arthurcox.com

[Read Alex's Bio](#)



NIÁV O'HIGGINS

Partner
+353 1 920 1090
niav.ohiggins@arthurcox.com

[Read Níav's Bio](#)



LAURA RAFFERTY
Of Counsel
+353 1 920 1114
laura.rafferty@arthurcox.com

[Read Laura's Bio](#)



KATRINA DONNELLY
Senior Professional Support Lawyer
+353 1 920 2122
katrina.donnelly@arthurcox.com

[Read Katrina's Bio](#)

Contributors

Simon Breen, Senior Associate
Competition & Regulated Markets
simon.breen@arthurcox.com
+353 1 920 1971

Bridget Clinton, Associate
Competition & Regulated Markets
bridget.clinton@arthurcox.com
+353 1 920 1298

Dearbhla Considine, Senior Professional Support Lawyer
Real Estate
dearbhla.considine@arthurcox.com
+353 1 920 1108

Sarah O'Mahoney, Professional Support Lawyer
Employment
sarah.e.omahoney@arthurcox.com
+353 1 920 1103

Jeanie Kelly, Associate
Environment & Planning
jeanie.kelly@arthurcox.com
+353 1 920 1376

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