A&L Goodbody

ANNUAL

Knowledge Report 2022

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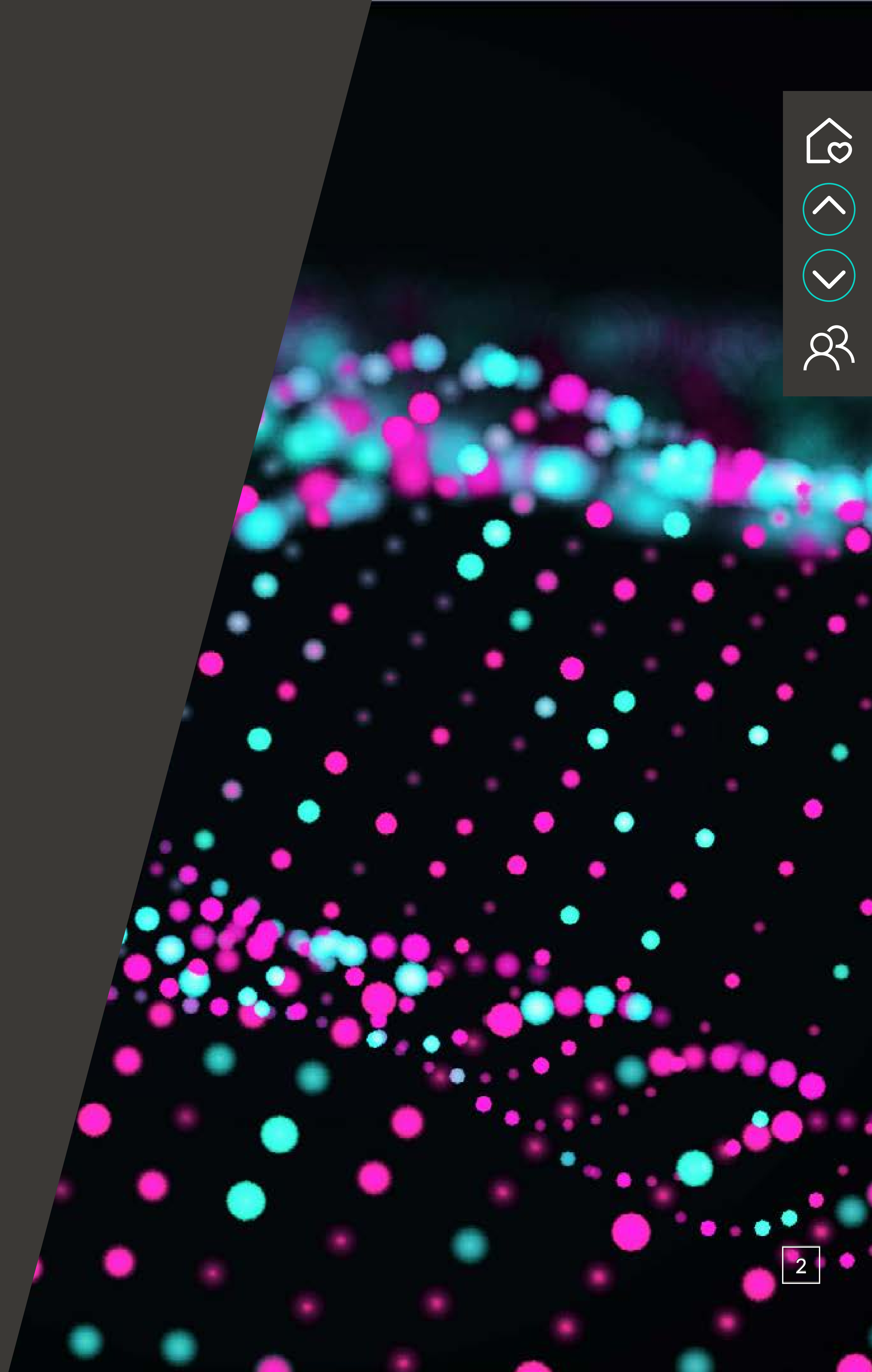

INTRODUCTION

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Paula Reid
Partner, Knowledge

Welcome to our Annual Knowledge Report for 2022. This is the seventh year that the ALG Knowledge team has published its report looking at the year's key legal developments and those in the pipeline. This year's Report contains insight pieces from our Knowledge team covering a broad range of topics, including anti-money laundering, asset management and investment funds, finance, financial regulation, corporate law, employment law, litigation and real estate law.

This year's Report also includes some additional feature articles from a number of partners and other lawyers across the firm. Dr Vincent Power, SC and head of ALG's EU, Competition & Procurement group reviews key developments and trends in competition law, merger control, State aid and foreign investment controls. Chris Comerford, a partner in Pensions, examines emerging trends in pensions law. Mark Ellis, a new partner in our Commercial & Technology group, takes us through what has been a very busy year in the data protection space. Alison Fanagan, SC, consultant and joint head of Environmental & Planning at ALG, and Chris Stynes, associate, reflect on the rise in climate litigation. Liam Murphy, Knowledge lawyer, and Sheena Doggett, partner in our Corporate and M&A group, consider the developments in ESG over the past year.

We also have a feature on knowledge management and the value of small projects in building engagement and validating knowledge management efforts.

The Report is laid out in three sections: '2022 at a glance' highlights the key themes of the past year, followed by a review of the year's legal developments and finishing with a brief 'looking ahead' to developments on the horizon. An audio version of each chapter of the Report is also available.

ALG CLIENT KNOWLEDGE OFFERING

KnowledgeCONNECT

In 2020 we launched KnowledgeCONNECT, which is available via KnowledgePlus. CONNECT was about establishing personal connections between our clients and members of the Knowledge team. It was a build on our existing Knowledge Lawyer Helpline and helped our clients to gain access to the entire Knowledge team, which includes our paralegals and Knowledge Centre team, comprising our information and research professionals.

CONNECT affords our clients the opportunity to discuss high-level legal points with our Knowledge lawyers (such as the impact of new legal or regulatory developments) and to ask our Knowledge Centre professionals how to source a legal resource, or for tips on how to track a piece of legislation. CONNECT also enables our clients to talk with our knowledge management professionals about knowledge management solutions which might help them to better manage their own legal know how and resources.

Legal Leaders' Toolkit – MPF Award for Best Collaboration with Clients

In 2021 we launched our Legal Leaders' Toolkit, which builds on CONNECT. The Legal Leaders' Toolkit is focused on helping legal teams manage some of the challenging impacts of the hybrid working model relating to knowledge capture. We know from our own business that hybrid working makes it harder for lawyers to share knowledge informally through conversations or meetings. In a hybrid environment, lawyers need to work a little harder on knowledge sharing and there is a greater need to establish formal systems to share knowledge.

The Toolkit helps legal teams to bring knowledge management (**KM**) and process efficiencies to their work streams. It contains articles, videos and podcasts from the ALG Knowledge team on a range of KM topics, including guidance on running a knowledge audit and pointers on how to develop a formal knowledge capture system.

We were delighted that our Toolkit won the Best Client Collaborative Initiative at the Managing Partner Forum (**MPF**) Awards in London in June of this year.

Launch of On Board

On Board is the newest addition to our client knowledge offering, which we launched at our Annual Knowledge Seminar in November 2022. On Board is a repository of legal guidance and considerations for company directors and client teams across a broad range of legal themes and challenges facing directors. Topics covered include: conflicts of interest, fiduciary obligations, and emerging responsibilities under ESG rules, among others. On Board also features **Board Series**, our video series of fireside chats and interviews with ALG partners sharing their practical experience of advising boards on a range of business issues.

Online knowledge and learning

KnowledgePlus is our online knowledge and e-learning extranet for ALG clients. The site provides clients with access to legal know how in the form of practice notes, checklists and FAQs covering a range of legal practice areas. It also provides access to hours of online recordings and presentations which qualify for CPD. Again this year, the Law Society has permitted all 20 hours of CPD to be obtained online.

KnowledgePlus will provide you with thought leadership, expert opinion and spotlight coverage of key areas of significant impact for your legal team and business. It also features case studies of how our Knowledge team has worked with client legal teams to develop bespoke KM solutions. Access to KnowledgePlus is available exclusively to ALG clients.

Other knowledge tools are also available to clients, such as the Contract Law Toolkit and the Financial Litigation Case Law Website. We encourage our clients to engage with our team and to make use of our knowledge offerings, which can be reviewed in detail under the Client Knowledge Services section of this Report.

To register for KnowledgePlus, please email your details to **knowledge@algoodbody.com**

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SECTION 01

9 MIN READ

ANTI-MONEY LAUNDERING

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Limited progress with the EU's AML/CFT reform package

Last year saw the publication by the EU Commission of a package of reforms focused on strengthening the EU legal framework on anti-money laundering and countering the financing of terrorism (**AML/CFT**). There are four strands to this reform package:

- a Regulation establishing a new EU AML/CFT Authority (the **AMLA Regulation**)
- a Regulation (the **AML/CFT Regulation**) (known as the Single Rulebook), which recasts into a regulation the AML/CFT rules currently found in the Fourth Anti-Money Laundering Directive (**4AMLD**) relating to customer due diligence, record keeping and beneficial ownership, among others
- a sixth AML/CFT Directive (**6AMLD**) containing the provisions which are not carried over from the 4AMLD into the Single Rulebook, such as rules on national supervisors and Financial Intelligence Units (**FIUs**)
- a recast of the Transfer of Funds Regulation (**TFR**) to facilitate the transfer of crypto-assets

A summary of these proposals was included in last year's Annual Report and an update on the progress of these proposals was provided earlier in the year.

Transfer of crypto-assets

The TFR will extend the rules on information accompanying the transfer of funds to transfers of crypto-assets. Crypto-asset service providers will be required to collect and make accessible certain information about the originator and the beneficiary of the transfers of crypto-assets they operate. This will facilitate the traceability of crypto-asset transfers.

Political agreement was reached on the draft text of the TFR back in June 2022. Once it has been formally adopted by the Parliament and the Council, it will be signed into law and published in the Official Journal. It was thought that the TFR would enter into force at the same time as the related Markets in Crypto-Assets Regulation (**MiCA**). However, it now seems that MiCA's adoption will be delayed until February 2023, which could impact on the application date of the TFR (which is due to apply 18 months after its entry into force). Therefore, it now seems likely that the TFR won't enter into force until near the end of Q1, 2023 and apply 18 months later.

The other proposals

The other three proposals in the reform package are not as advanced in the legislative process as the TFR and are awaiting Parliament and Council negotiating positions, so that interinstitutional negotiations (trilogue) can commence. The French Presidency of the Council of the EU focused its efforts in the first half of 2022 on the AMLA Regulation and achieved a partial negotiating mandate before the end of its presidency in June 2022. Commissioner Mairead McGuinness remains optimistic that AMLA is on track for establishment in 2024, with direct supervision to commence in 2026.

It is interesting to note that a broad range of amendments have been suggested to the Single Rulebook (the AML/CFT Regulation) by the parliamentary committees. The most noteworthy of these is a proposal that the percentage threshold, which serves as an indication of beneficial ownership of a legal entity, should be reduced from 25% to 5%. There is also a proposal to extend the obligation to register beneficial owners to already existing business relationships and property owned by foreign entities. An extension of the category of persons that qualify as politically exposed persons (**PEPs**) has also been tabled. It remains to be seen whether these amendments will be accepted and make their way into the final version of the proposal.

A number of amendments have also been proposed to the draft 6AMLD. The most interesting of these also relate to beneficial ownership including:

- stronger requirements in relation to verification, notably on the verification of data and use of technology, and on the abilities of entities in charge of the registers to sanction inaccuracies and inconsistencies
- lifting of restrictions on public access to beneficial ownership information on trusts and similar legal arrangements
- specific provisions laying down the criteria for searches in the beneficial ownership registers through the European Central Platform

Commission's third supranational risk assessment

In October, the Commission published its Report on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities. This is the Commission's third supranational risk assessment (the **SNRA**), publication of which is required every two years in accordance with the Fifth Anti-Money Laundering Directive (**5AMLD**). This report was due last year, but was delayed due to COVID-19. As in previous reports, the SNRA examines the present money laundering and terrorist financing (**ML/TF**) risks associated with eight categories of financial products and services and recommends actions to address them.

A key theme in this SNRA is beneficial ownership and the continuing problems in identifying beneficial owners. Anonymity remains a "critical vulnerability" in the financial system, with banks, regulators, and law enforcement authorities unable to quickly ascertain the true owners of entities. The SNRA calls out trusts and arrangements

such as collective investment undertakings, which "provide opacity and hide the existence of assets from law enforcement authorities". The services provided by nominee directors and shareholders may also be exploited for the purposes of obscuring ultimate ownership.

Within the financial sector, the SNRA notes that a lack of clear and consistent rules, inconsistent AML/CFT supervision across the internal market, and insufficient coordination and exchange of information among FIUs, continue to affect the EU's ability to correctly address ML/TF risks. In addition, the SNRA notes, authorities in the Member States often appear to find it difficult to supervise the sector in line with a risk-based approach. In particular, the SNRA calls out three areas of vulnerability in the financial sector:

- Credit and payment institutions, bureaux de change, e-money institutions and credit providers (other than credit institutions) appear to be most vulnerable to risks arising from weaknesses in AML/CFT systems and controls. This is in line with the Opinion of the European Banking Authority of March 2021.
- Risks associated with crypto-assets require a high level of consumer and investor protection and market integrity, but also measures to prevent market manipulation and ML/TF activities.
- The nature of investment funds make them vulnerable to laundering of proceeds derived from fraud, tax crimes, corruption, and bribery. In this industry, transparency of beneficial ownership is "still sub-optimal".

The SNRA further notes that, although retail transactions in cash have declined, the demand for euro banknotes has increased (the "paradox of banknotes"). The "criminal economy" remains overwhelmingly cash-based, which exposes the EU to significant ML/TF risks due to the anonymity and movability of cash.

COVID-19

In addition to the usual categories of evaluation, the SNRA looks at the impacts of the COVID-19 pandemic on ML/TF. The pandemic enhanced ML/TF risks in many economic sectors and business activities. These risks include:

- misappropriation and fraud on public funds granted as part of relief measures
- the take-over of businesses facing financial difficulties by criminal organisations
- increased opportunities for criminal groups to obtain revenues from selling unauthorised medical devices and illicit pharmaceuticals and vaccines, including to governments
- cybercrimes committed by taking advantage of the increasing volume of on-line purchases, including through the use of fraudulent identities

Many of these risks are still present, although their impact is now more limited due to greater awareness of the criminal threats.

Russian war against Ukraine

The ML/TF risks stemming from Russia's current invasion of Ukraine were also considered, in particular the interplay between restrictive measures and beneficial ownership rules.

The SNRA cites a recent study, which reported that there are almost 31,000 firms in Europe with Russian beneficial owners (among which real estate, construction, hotels, and the financial and energy sector prevail). 33 sanctioned individuals, the so-called oligarchs, hold ownership in 1,400 of these firms. Some oligarchs may conceal their ownership or control of firms through intermediate companies registered in non-EU countries or through the use of local nominee shareholders.

The SNRA emphasises that proper implementation of the EU's restrictive measures (asset freezes) requires the effective enforcement of beneficial ownership rules (i.e. transparency of business registries and of the corporate domain) and the further development of interconnections between registers (beneficial ownership registers, company/business registers, land registers, etc.). It also requires effective inter-agency cooperation and exchange of information, and the adequate detection and supervision of hidden assets.

The SNRA highlights the use of empty shell companies, which can be created with relative ease and used "to transit hundreds of millions of euros through opaque transactions" by allowing criminals to conceal the origins and destinations of funds and obscure the real beneficiary.

Beneficial ownership

At the time of going to print, the European Court of Justice handed down judgment, finding that public access to registers of beneficial ownership is a violation of privacy rights, personal data and the GDPR. The repercussions of this case are substantial and public access to beneficial ownership registers is already being restricted across the EU in the aftermath of the ruling (including to Ireland's RBO) and while we await EU legislative response. This case will be covered in more detail in a separate publication.

Domestic developments

On the domestic front, legislative and regulatory activity has not been as busy as in 2021.

Anti-Money Laundering Steering Committee

To ensure that Ireland's policies remain compliant with EU and international standards, the Department of Finance chairs the multi-departmental and multi-agency Anti-Money Laundering Steering Committee (**AMLSC**). The AMLSC is a national, cross-sectoral forum for the oversight and review of Ireland's AML/CFT framework. Formed in 2003, the Central Bank of Ireland (the **CBI**) published revised terms of reference for the AMLSC in May 2022.

The objectives of the AMLSC are to consider emerging risks, threats and legislative developments, as well as international best practice, so as to coordinate and ensure responses which will strengthen Ireland's AML/CFT framework. It is also charged with developing measures that will detect, deter and prevent the misuse of the financial

and non-financial systems for the purposes of ML/TF. The AMLSC will also play a role in sharing information and facilitating discussion between domestic stakeholders regarding emerging trends and risks, developments in international standards and in AML/CFT legislation at EU and national and international levels. It must also drive actions and responses arising out of Ireland's membership of the EU, UN and FATF. The AMLSC must agree its priorities at the start of the year and produce an annual report of its workings and outputs.

Safe-deposit boxes and payment accounts

The European Union (Anti-Money Laundering: Central Mechanism for Information on Safe-Deposit Boxes and Payment Accounts) Regulations 2022 (the **Regulations**) came into force on 3 February 2022 (and were subject to further, minor amendment in September). The Regulations give effect to Article 32a of 4AMLD, as amended by 5AMLD, which requires Member States to put in place centralised registers containing information on the holders and beneficial owners of bank and payment accounts (identified by IBAN) and safe-deposit boxes. These registers will allow for the timely identification of these entities and individuals and the detection of links between suspicious transactions and underlying criminal activity.

The Regulations charge the CBI with establishing and maintaining a central register of information on safe-deposit boxes and payment accounts. Recently, the CBI announced the establishment of the Ireland Safe Deposit Box Bank and Payment Accounts Register (**ISBAR**). The CBI has produced technical guidance documents, reporting templates and FAQs to aid in-scope institutions.

Who must comply?

- The Regulations apply to any credit institution, including a branch, which:
  - is established in Ireland (whether their head office is situated in the EU or in a third country)
  - issues Irish IBAN identifiable accounts, or holds safe-deposit boxes on behalf of its customers
- Further legislation will be enacted to extend the scope of the reporting obligation to other financial service providers at a later date.

What's the deadline for compliance?

- The obligation for credit institutions to provide information will commence once formally notified by the CBI to do so.
- Initial onboarding by the CBI is expected to take place in Q1 2023, when credit institutions will be provided with a precise onboarding timeline.

What information is required?

- ISBAR only requires information in relation to bank or payment accounts identifiable by IBAN and to safe-deposit boxes.
- For bank and payment accounts, the credit institution must provide the IBAN, account name, date of account opening and date of account closing (if applicable).
- In addition, the institution must provide the name, date of birth and address of the account-holder(s), the beneficial owner(s) and any person controlling the account on behalf of the account holder. The account-holder and/or the person controlling the account may not be a natural person (e.g. a company); in which case, the company's registered address must be provided instead.

- For safe-deposit boxes, the credit institution must provide the name, date of birth and address of the lessee, along with the lease period. If the lessee is not a natural person, the name of the company and its registered address should be provided.
- No account balance or other monetary information will be contained in the register under the current legislation.
- For closed accounts, information is required to be reported if the account or safe-deposit box was closed on or after 3 February 2022.

How is the information submitted to the CBI?

- The Central Bank's Online Reporting (**ONR**) system will be used as a secure mechanism to collect ISBAR data from credit institutions.
- There will be an "initial submission" which will constitute a baseline dataset. After that, weekly "delta" files will be submitted where there are changes to the records provided in the previous upload.

Who has access to the register?

- The information stored in ISBAR will not be accessible to the general public and may only be accessed by the FIU within An Garda Síochána.
- In the future, it is intended that access will be extended to other branches of An Garda Síochána and other competent authorities including designated individuals in the Criminal Assets Bureau (CAB) and in the Revenue Commissioners. This will require further legislation.

> *"Initial onboarding to ISBAR is expected to take place in Q1 2023.*

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SECTION 02

10 MIN READ

ASSET MANAGEMENT & INVESTMENT FUNDS

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2022 AT A GLANCE

- The Russian invasion of Ukraine triggered rounds of financial sanctions, presenting significant practical challenges for funds and their service providers
- Sustainable finance and taxonomy disclosures involve ongoing documentation and process updates for AIFs, UCITS and their managers
- AIFMD II continues through the EU legislative process
- Focus on Fund Management Company Effectiveness (CP86) continues
- Ongoing implementation of outsourcing and operational resilience requirements
- PRIIPs KID deadline of 1 January 2023
- ESMA recommends enforcement actions in the priority area of costs and fees
- QIAIF fast-track process improvements
- Macroprudential measures for property funds imminent

While the Irish funds industry entered 2022 still feeling the effects of continuing market uncertainty caused by the global pandemic and Brexit, the net asset values of Irish resident funds reached an all-time high of €4,067b at the end of December 2021. Ireland continues to be a leading and fast growing domicile for investment funds, including being the leading domicile for the establishment of exchange traded funds in Europe. The Irish funds industry has again showed resilience in 2022, particularly in light of the market turmoil caused by the Russian invasion of Ukraine.

Financial sanctions

The EU imposed successive rounds of financial sanctions in response to the Russian invasion of Ukraine. Sanctions included a prohibition on selling funds to a broad range of Russian and Belarusian investors, including many that are not named on sanctions lists. The EU Commission issued FAQs on the topic. The Central Bank of Ireland (**CBI**) actively engaged with fund service providers through industry communications, including on matters such as liquidity and valuations and the importance of timely engagement. The CBI's response (aligned with ESMA) included clarification around the ability of certain UCITS holding assets impacted by the Russian-Ukraine war to create side-pocket arrangements by way of a new clone fund structure, and established a streamlined authorisation and approval process.

Sustainable finance

UCITS, AIFs and their management companies faced another challenging year to ensure they meet the disclosure requirements of the Sustainable Finance Disclosures Regulation (**SFDR**) and the Taxonomy Regulation (**TR**). The deadline to comply with the general sustainability-related disclosures of the SFDR was 10 March 2021. The deadline for general taxonomy-alignment related product disclosures in respect of the first two TR environmental objectives (climate change mitigation and climate change adaptation) was 1 January 2022. The more detailed disclosure requirements, included in the regulatory technical standards (**RTS**) supplementing SFDR, will apply from 1 January 2023. In addition, from 1 August 2022, AIFMs and UCITS management companies were required to integrate sustainability risks and factors into their policies, procedures and operations.

The requirements for explicit quantifications of product taxonomy alignment and preparing for the entity-level 'principal adverse sustainability impacts statement' have been particularly challenging. The industry will continue to focus on monitoring and implementing evolving legal and regulatory developments, including European and CBI supervisory guidance, as the industry moves into the next phase of implementing the disclosure requirements. The CBI has recently published an Information Note, which includes findings of its gatekeeper review of SFDR level 1 and TR disclosures, and CBI expectations around the implementation of the next phase of SFDR. The note also indicates the CBI's supervisory roadmap into the future, which is in addition to ESMA's planned Common Supervisory Action (**CSA**) on sustainability risks and disclosures.

The CBI has established a streamlined filing process for pre-contractual document updates to reflect the more detailed disclosure requirements in the RTS based on the SFDR requirements and confirmed that filings must be made no later than 1 December 2022. More generally, the CBI has continued to reiterate its 'greenwashing concerns', and in its 2022 Securities Markets Risk Outlook Report, provides that it expects

sufficient resources and management focus to be devoted to ensuring obligations are met and a reminder to regulated financial service providers to have regard to the CBI's supervisory expectations, as set out in its Dear CEO letter of 3 November 2021. The CBI intends to undertake a thematic review on sustainable disclosure requirements.

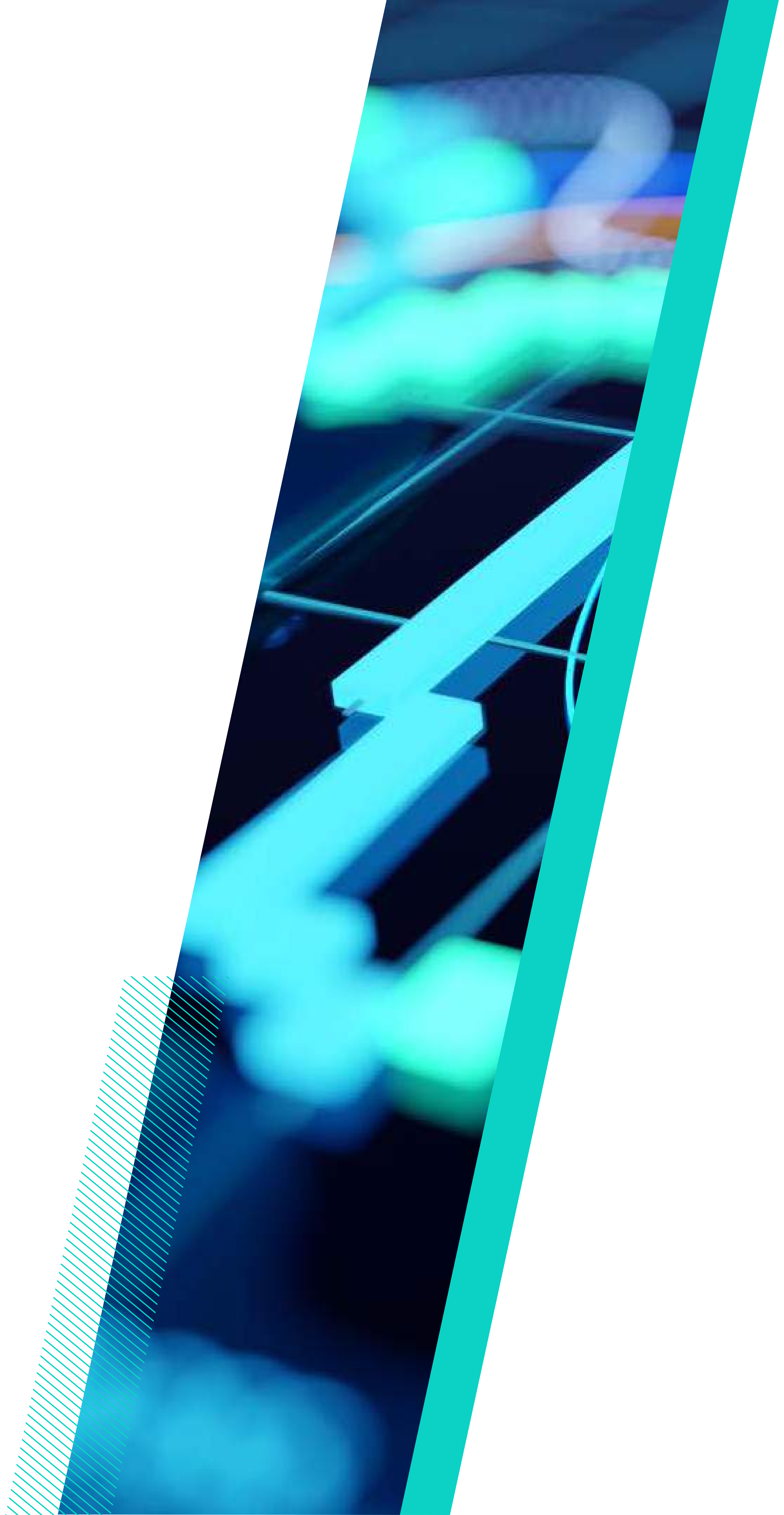
Amendments to AIFMD and UCITS Directive

The Commission's review of the application and scope of the AIFMD, undertaken under its Capital Markets Union plans, identified regulatory gaps. This led to a proposed directive, otherwise known as AIFMD II (the **Directive**) containing targeted changes to the AIFMD and consequential changes to the UCITS Directive, regarding delegation arrangements, liquidity risk management, supervisory reporting, the provision of depositary and custody services and loan origination by AIFs.

The European Parliament's Economic and Monetary Committee (**ECON**) published its draft report on the Directive in May 2022 and the Council of the EU (**Council**) published its final compromise text and general approach in June 2022. Trilogue negotiations are ongoing to agree a final version of the Directive. Member States will be expected to implement the Directive into national law within 24 months of its entry into force, leading to the Directive coming into force in 2024/2025. Some key areas of focus are as follows.

Delegation

While the Directive addresses concerns about letter-box entities, neither the Commission nor the Council seek to substantively restrict delegation. The Council proposes that information provided in delegation reporting should be prescriptive and included within regular supervisory reporting requirements for AIFMs and UCITS management companies, including: information on delegates, the description of delegated activities and information on sub-delegated activities, the percentage of assets that are subject to portfolio management delegation, a description of how the management



company oversees, monitors and controls the delegate, and the dates of commencement and expiry of the arrangements.

Loan origination

The Directive introduces common rules for AIFMs to conduct loan origination on a cross-border basis, subject to requirements relating to: policies and procedures, structuring AIFs as closed-ended AIFs when the notional values of loans exceed a proposed 60% of net asset value, risk diversification limits, risk retention requirements, reporting limits, and in order to avoid conflicts of interest, limitations on lending to related parties. The Council has proposed several amendments to the original Directive proposals.

Liquidity management tools (LMTs)

The Council has amended the Commission's LMT proposal so that open-ended AIFs should be required to select at least two LMTs from the list set out in a new Annex V to the Directive, in addition to the possibility to suspend redemptions and activate side-pockets in exceptional circumstances. By way of derogation, AIFMs of a money market fund (**MMF**) structured as an AIF and a MMF structured as a UCITS should be able to select only one LMT. The Council has also amended the Commission's requirements around LMT notifications to competent authorities. The Council proposes that ESMA should issue guidelines determining the criteria for selection and use of LMTs.

Depositaries

Until the Commission separately considers the introduction of a depositary passport, the possibility of cross-border access to depositary services has been introduced, subject to the approval of the competent authority of the AIF, in concentrated markets lacking a competitive supply of depositary services.

AIFM permitted activities

The Commission extended the list of authorised ancillary services AIFMs can provide, to include benchmark administration and credit servicing. The Council proposes that AIFMs may carry out any other ancillary services that represent a continuation of the services already undertaken by the AIFM, provided this does not create conflicts that could not be managed by additional rules. It also proposes that credit servicing by AIFMs be subject to Member States prohibiting AIFs servicing credits granted to consumers.

Fund management company effectiveness requirements (CP86)

Following the CBI's 2021 thematic review of the implementation of fund management company effectiveness requirements, the CBI carried out its 2022 CP86 survey. The CBI will use the findings of this survey to establish whether issues raised in the CBI's letter of October 2020 have been addressed. The findings will also inform future regulatory developments in this area, including potential updates to the CBI's rules and guidance for management companies.

Outsourcing

In December 2021, the CBI published its finalised Cross Industry Guidance on Outsourcing (**Guidance**). The CBI's accompanying feedback statement confirms that the Guidance applies to 'regulated firms' in a proportionate manner to the fund service providers associated with the operation of

the fund. The CBI has also confirmed that the board of directors of an externally managed investment company should ensure that it supports the ability of a fund management company to comply with all regulatory obligations, including the Guidance.

While the Guidance takes into account the existing elements of UCITS and AIFMD frameworks and developments at ESMA, the CBI expects all regulated firms to be in a position to demonstrate that they have appropriate measures in place to effectively govern and manage outsourcing risk and to ensure compliance with the sectoral legislation, regulations and guidance applicable to their business.

Among the measures, regulated firms are required to establish and maintain an outsourcing register. Regulated financial service providers whose PRISM Impact Rating is Medium Low or above (or its equivalent) were required to make their first annual submission to the CBI's outsourcing register by 7 October 2022. We expect the CBI to maintain its focus on outsourcing and operational resilience in 2023.

> *"The risks relating to ineffective Board oversight of delegates and third party intermediaries remain a major factor in the regulatory deficiencies we see across our mandate, including funds, FSPs, investment firms and trading venues.*
>
> *CBI Securities Markets Risk Outlook Report 2022*

PRIIPs KID

As of 1 January 2023:

- UCITS must produce a PRIIPs KID for marketing to EEA retail investors.
- UCITS which do not market to EEA retail investors may either produce a UCITS KIID or a PRIIPs KID.
- QIAIFs or RIAIFs which publish a PRIIPS KID (because they are marketed to EEA retail investors) must update their PRIIPS KID to comply with the new updated PRIIPs KID requirements.
- UCITS being marketed to UK retail investors must continue to produce a UCITS KIID.

In May 2022, the European Supervisory Authorities (**ESAs**) issued a joint supervisory statement on expectations regarding the 'What is this product?' section of the KID for PRIIPs, providing helpful guidance for industry. The ESAs also issued updated Q&A on PRIIPs in November, with over 40 new Q&A, many of which concern the new rules applicable on 1 January 2023. The Q&A include background, analysis of legislative provisions and helpful examples.

Costs and fees

We expect the CBI to continue its enhanced focus on costs and fees.

ESMA published a report on its 2021 CSA on the supervision of costs and fees of UCITS across the EU/EEA. It includes valuable insights on supervisory approaches to the process of the setting and reviewing of fees, the notion of undue costs, the issues stemming from related party transactions and EPM techniques, follow-up actions and lessons learnt. ESMA highlights the importance of ensuring that investors are adequately compensated in all cases where they were charged with undue costs or fees, and also in cases where there were calculation errors that resulted in a financial detriment for investors. ESMA invites NCAs to consider enforcement actions in cases where a significant regulatory breach is identified.

In 2022, the CBI published new UCITS and AIFMD Q&As aimed at multi-manager UCITS and RIAIFs requiring compliance with ESMA's Q&A on performance fees by 1 January 2023.

QIAIF fast-track authorisations

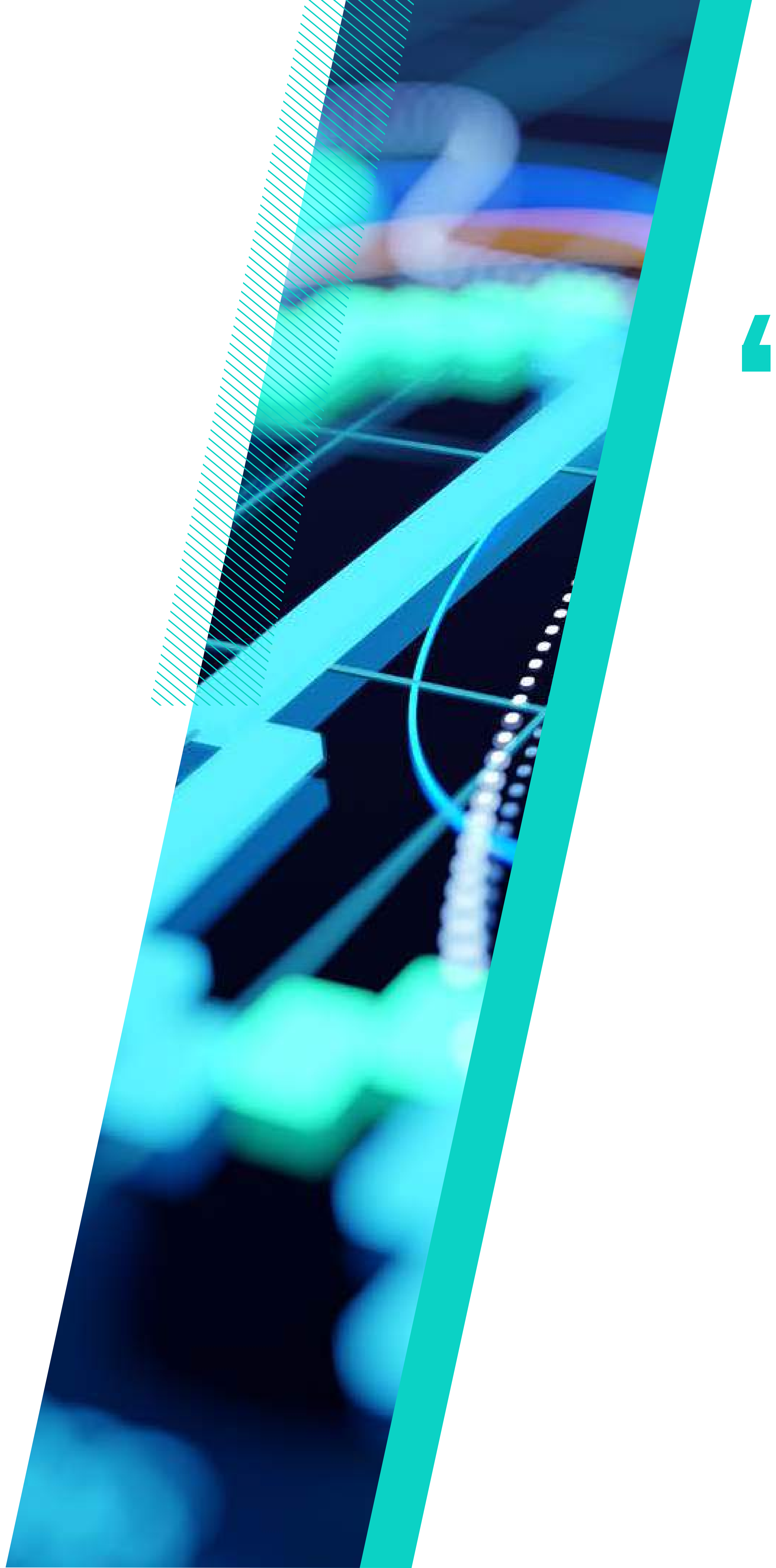
As a rule, QIAIFs may avail of the CBI's fast-track approval process which provides for approval of QIAIFs within 24 hours of submission of an application for authorisation. However, certain QIAIFs are required to make a pre-submission which must be cleared by the CBI before the application for authorisation may be filed. The CBI updated its requirements so that loan origination QIAIFs and life settlement QIAIFs are no longer subject to the pre-submission process. Accordingly pre-submissions are only required for:

- QIAIFs proposing to invest in Irish property assets
- QIAIFs proposing to invest in crypto-assets (unless the QIAIF proposes to invest no more than 10% of its NAV in cash-settled bitcoin futures traded on the Chicago Mercantile Exchange and can satisfy certain conditions).

Property funds

In November 2021, the CBI published a Consultation Paper (**CP145**) on macroprudential measures for the Irish property fund sector with an objective of increasing the resilience of property funds. The proposed measures include leverage limits for property funds imposed through AIFMD, in line with ESMA guidelines, and the introduction of additional guidance on aligning their redemption terms with the liquidity of their assets, with a three-year transition period. These proposals are consistent with the CBI's broader priority to develop and operationalise the macroprudential framework for investment funds. The consultation period closed in February 2022. We expect the CBI will soon implement revised borrowing limits and guidance.

(**Editor's note:** At the time of going to print, the CBI published its new *Macroprudential policy framework for Irish property funds*. These macroprudential measures consist of the imposition of a leverage limit for authorised investment funds that invest 50% or more of their assets under management directly or indirectly in Irish property. The CBI also provides guidance on liquidity timeframes for such funds.)



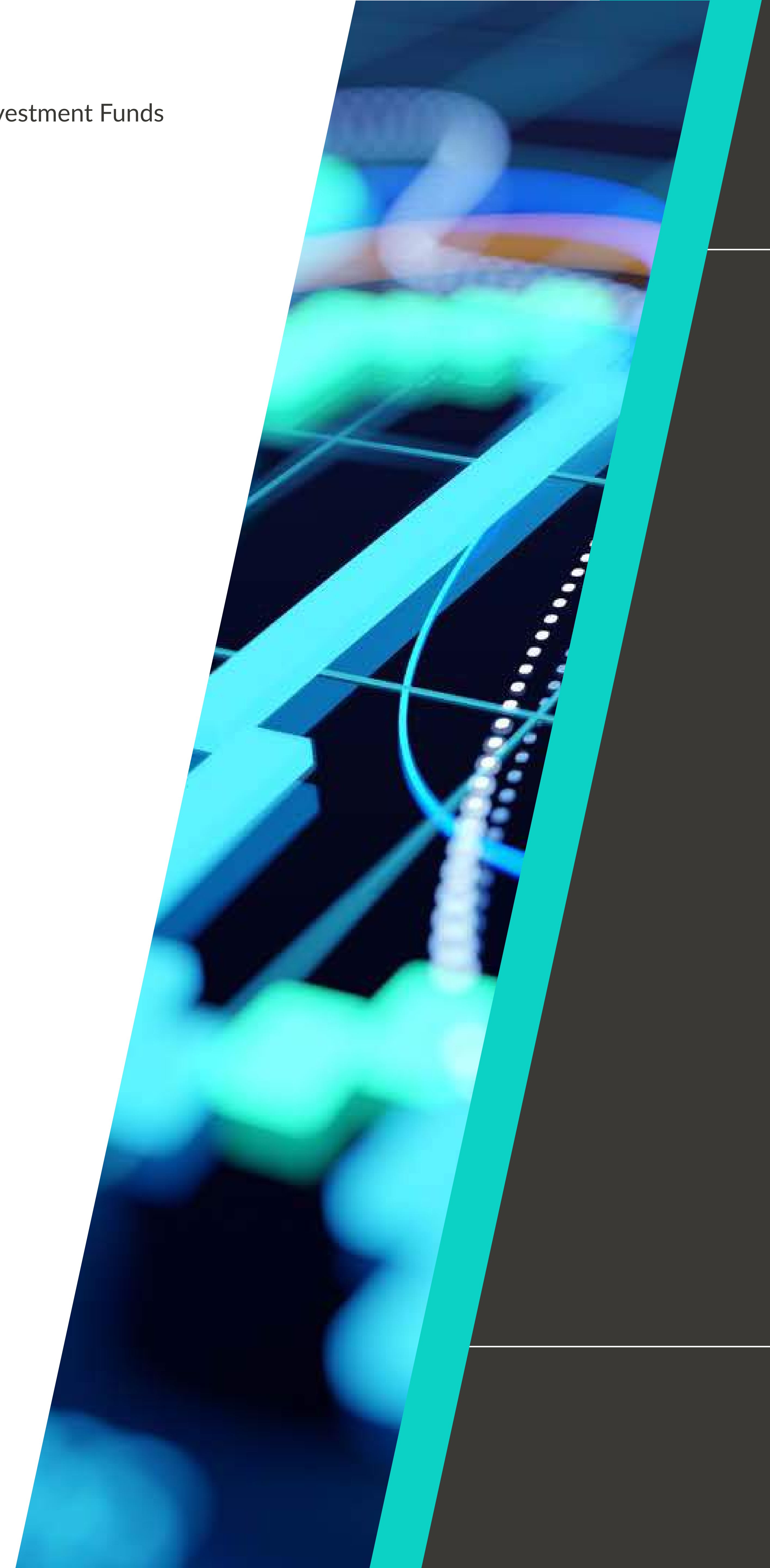
> *"Here in Ireland, we are planning to introduce leverage limits for property funds connected to the domestic economy, but we cannot tackle the wider issue of systemic risk alone. Global and European coordination is needed here, and, I suggest, urgently.*
>
> *Opening remarks by CBI Governor Gabriel Makhlouf at the Financial System Conference, 2 November 2022*

Money Market Funds

The CBI expects full compliance with the ESMA 'Guidelines on stress test scenarios under the MMFR' from 4 July 2022. The EU's MMF regulatory framework continues to be an area of regulatory focus. ESMA issued an Opinion containing proposals to improve the resilience of MMFs by addressing, in particular, liquidity issues and the threshold effects for constant net asset value (**CNAV**) MMFs. The EU Commission also held a targeted consultation on the functioning of the MMF Regulation. MMFs are included in ESMA's work programme for 2023.

Protected Disclosures (Amendment) Act 2022

The Protected Disclosures (Amendment) Act 2022 transposes the EU Whistleblowing Directive into Irish law and will take effect on 1 January 2023. In addition to other categories of employers, the Act applies to Irish UCITS Management Companies, Irish AIFMs, Irish MiFID firms and Irish corporate funds. In-scope firms should be ensuring that their whistleblowing policies and procedures are reviewed and updated to comply with the Act. For more information, see the Employment chapter.



LOOKING AHEAD

- Regulatory focus will continue on fund management company effectiveness, including operational resilience, outsourcing and cyber-resilience. Focus on costs and fees and valuations remains a priority at EU and Irish level.
- The CBI will likely provide feedback on the treatment, correction and redress of errors in investment funds (CP130).
- Sustainable finance will continue to feature strongly. We await European Commission clarification around certain requirements. Data availability remains an issue. Focus will move to the **30 June 2023** deadline for fund management companies to make their first principal adverse impacts (**PAI**) statement under the SFDR RTS.
- The implications of the targeted reforms to the AIFMD will remain high on the agenda of both AIFMs and UCITS management companies.
- The Central Bank (Individual Accountability Framework) Bill 2022 (**IAF Bill**) will soon be enacted.
- Work is ongoing at European level to develop an appropriate regulatory framework for crypto assets. "At the moment, while such assets may be suitable for wholesale or professional investors, the CBI is highly unlikely to approve a UCITS or a RIAIF proposing any exposure (either direct or indirect) to crypto-assets, taking into account the specific risks attached to crypto-assets and the possibility that appropriate risk assessment could be difficult for a retail investor without a high degree of expertise." CBI, Securities Markets Risk Outlook Report 2022
- For further information on this and the IAF Bill, see the Financial Regulation chapter.

SECTION 03

10 MIN READ

CORPORATE LAW AND CORPORATE GOVERNANCE

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Anne O'Neill
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2022 AT A GLANCE

- The Screening of Third Country Transactions Bill 2022 is before the Oireachtas
- The new Corporate Enforcement Authority was established on 7 July 2022
- The European Union (Preventive Restructuring) Regulations 2022 were introduced in July 2022
- The Competition (Amendment) Act 2022 is awaiting commencement
- Irish Takeover Rules were significantly amended in July 2022
- Temporary COVID-19 legislation for companies is expiring on 31 December 2022

The Screening of Third Country Transactions Bill 2022

The Screening of Third Country Transactions Bill 2022 (the **Bill**) introduces a foreign direct investment (**FDI**) screening mechanism in Ireland for the first time and is currently making its way through the Oireachtas. Once introduced, the Bill will allow the Minister for Enterprise, Trade and Employment (the **Minister**) to scrutinise a wide range of transactions involving a non-EU/EEA/Swiss undertaking and relating to the control of Irish businesses and assets in key sectors.

The Bill was introduced in the Dáil back in September and was initially expected to be enacted by the end of 2022, but we now understand that it is undergoing further consideration and won't become law until sometime in 2023.

Key features of the Bill

Notifiable transactions

Under the Bill as currently drafted, it is mandatory to notify transactions to the Minister at least ten days prior to completion where four criteria are satisfied:

1. a party (whether or not a purchaser) to the transaction is a third country undertaking or person connected with them
2. the value of the transaction is €2m or greater
3. the transaction directly or indirectly relates to an asset or undertaking in the State
4. the transaction directly or indirectly relates to, or impacts upon, one or more of the areas set down in Article 4(1) of the EU Regulation on screening of FDI

If the transaction concerns the acquisition of shares or voting rights, it will be notifiable where it satisfies the above four criteria and where the percentage of shares or voting rights changes (i) from 25% or less to more than 25%, or (ii) from 50% or less to more than 50%.

Definition of "transaction"

The definition of 'transaction' under the Bill is extremely broad and extends beyond transactions typically subject to a merger notification. A transaction under the Bill includes (but is not limited to) any transaction, acquisition, agreement, or other economic activity relating to a change in control of an asset in Ireland, or the acquisition of all (or part of, or an interest in) an undertaking in Ireland.

Review period

The Bill prescribes a standstill or suspensory obligation until a screening decision is received from the Minister. The proposed 90-day Ministerial review period (extendable up to 135 days) is longer than screening review periods in other EU Member States and significantly longer than the 30-day domestic competition review period.

Screening decision

The Minister will decide if a transaction poses a risk to Ireland's security or public order. Upon review, the Minister may (i) prohibit, (ii) authorise, or (iii) authorise a transaction subject to conditions.

Ministerial discretion

Transactions that aren't required to be notified may also be screened at the discretion of the Minister, if the Minister has reasonable grounds to believe that it affects or would be likely to affect Ireland's security or public order and would lead to certain results (e.g. changing the extent of control of an asset or an interest in an undertaking in Ireland).

Look back and call in periods

The Minister may 'call in' transactions for up to 15 months after a transaction has completed and transactions completed in the 15 months before the legislation enters into force may also be called in.

Potential impacts of the Bill

The Bill will have a marked impact on FDI in Ireland. Notification and clearance will likely become a standard condition precedent in transaction documentation and the review process will need to be factored into the timeline to completion and the longstop date.

Looking at FDI screening in other jurisdictions, the concept of 'national security' has been significantly expanded, moving from defence sector deals to encompass international investments in targets with various civilian technologies and innovations.

While there are differences between Ireland's proposed regime and the UK's newly strengthened FDI screening regime under the National Security and Investment Act 2021 (the **NSIA**), lessons may still be learned from considering the UK experience. Within the first three months of the NSIA, the UK government reported receiving 222 notifications, 17 of which were called in for further assessment. In July, the UK government issued its first final order notice (screening decision), blocking a licensing deal which would have seen a Chinese-owned entity acquire vision sensing technology. Nine decisions have been issued by the UK government to date: another blocking order and seven permitting "clearance with remedies" (transactions permitted with conditions).

(**Editor's note:** at the time of going to print, a tenth decision had been issued, ordering a China-backed acquirer to divest themselves of 86% of their shareholding in the UK's largest semi-conductor manufacturer (a 2021 acquisition which had taken their shareholding to 100%). This is the first time that the 'look-back' powers under the NSIA have been employed.)

Companies (Corporate Enforcement Authority) Act 2021

The Companies (Corporate Enforcement Authority) Act 2021 (the **CEA Act**) was commenced on 6 July 2022 (except for section 35). Much of the Act is taken up with the new Corporate Enforcement Authority (the **CEA**), established on 7 July 2022.

The company law compliance functions of the CEA are substantially the same as those of the ODCE. However, the establishment of the CEA has ushered in an increased energy in the area of corporate enforcement.

The CEA Act also introduced a number of company law amendments to the Companies Act 2014 (the **2014 Act**), all of which have been commenced save for section 35, which relates to the provision of directors' PPS numbers (**PPSNs**) in certain filings to the Registrar of Companies.

When section 35 is commenced, directors will be required to provide their PPSNs (or other information if they do not have PPSNs) when incorporating a new company, filing an annual return, or notifying a change of director. This is a safeguarding measure designed to mitigate the possibility of (deliberate and inadvertent) breaches of company law where a director has used different versions of their name on company documentation.

The European Union (Preventive Restructuring) Regulations 2022

Ireland introduced the European Union (Preventive Restructuring) Regulations 2022 (S.I. No. 380/2022) (the **Regulations**) on 27 July 2022 to implement the mandatory articles of the Preventive Restructuring Directive (the **PRD**) into Irish law.

The PRD sets down minimum rules for Member States to implement into their preventive restructuring frameworks, in order to remove barriers to the effective restructuring of viable debtors in financial difficulties across the EU.

Key features of the Regulations

Some of the amendments to the 2014 Act will have a material impact on how the examinership process operates in Ireland.

Only impaired creditors counted for voting purposes

In a significant change from current practice in Ireland, the Regulations provide that only creditors who will be impaired by a plan are to have a vote and the amount owed to them count towards any value threshold required to approve a scheme. This means that, if the company was to be liquidated, the class of creditor who has voted in favour of the scheme must be in line to receive a payment.

Cross-class cram-down

Irish law already provides for a cross-class cram-down, which allows the court to confirm a scheme of arrangement despite there being one or more classes of dissenting creditors or other affected parties. Some procedural changes have been introduced to ensure full alignment with the PRD, including permitting the court to approve proposals, on the application of the examiner, which have not been accepted by all classes of creditors so long as at least one class of creditors whose interests or claims would have been impaired has accepted the proposals.

Best-interest-of-creditors test

The Regulations include a "best-interest-of-creditors test", defined in the PRD as one that is satisfied if no dissenting creditor would be worse off under a restructuring plan than they would be if the normal ranking of liquidation priorities under national law was applied. An arrangement or compromise in the examiner's report cannot be sanctioned if it does not satisfy the test.

Early warning tools

A new section 271A has been inserted into the 2014 Act (duties of directors and other officers) such that a director "may have regard to early warning tools" when their company is in the zone of insolvency, which will allow them to "identify the restructuring frameworks available to the company and signal ... the need to act without delay".

The CEA has been charged with developing an early warning system in Ireland. In October, the CEA sought views on a draft Information Note, which is essentially a guide to the key concepts and provisions of company law, relevant to companies in distress, and a list of possible early warning indicators. The results of this consultation have yet to emerge.

Carve out of workers' claims

Workers' claims will be carved out of the stay on enforcement of security by creditors during the period of protection. This means that employees can commence or advance certain actions or proceedings notwithstanding the fact that the company is in examinership.

Directors' duties to creditors

The common law duty of directors to creditors when the company is in the zone of insolvency has been established in Ireland since the Supreme Court's 1993 judgment in *Re Frederick Inns*. This duty has now been codified as a fiduciary duty by inserting a new section 228(1)(i) into the 2014 Act. This means that a breach of the duty will be subject to statutory consequences similar to breaches of the other fiduciary duties.

Case law – recent cases related to directors' duties

2022 has seen a notable number of cases involving the 2014 Act before the Irish courts, two in particular concerning the duties of directors.

In *Fennell v Appelbe*, the Court of Appeal upheld an order for restriction made against a director pursuant to section 819 of the 2014 Act. The case is an important reminder of the principle that a claim of passivity is not an acceptable defence against restriction and that claiming ignorance of the company's affairs is "a most fundamental misunderstanding of the serious duties of directors". The Court emphasised the active nature of a director's role and duties, even where one is a non-executive director, as the appellant was here.

The case also provides clarity on the interpretation of section 819 and confirms that the burden of proof rests on the director to put forward evidence that they acted honestly and responsibly.

In *Keating v Shannon Foynes Port Company*, the High Court ordered the defendant company to pay its CEO €297,863 in outstanding bonuses. The directors argued that they believed themselves to be constrained from awarding performance related payments (**PRPs**) to their CEO, because they had to comply with the policy of the company's shareholder (the Minister for Transport). In deciding to follow the wishes of the shareholder and to not pay these bonuses – even though they had concluded that they were in the interests of the company – the Court found that the directors had breached their fiduciary duty to the company and thus, the company's contract with its CEO.

While the case largely turns on its facts (e.g. the company's status as a semi-state entity and the directors' mischaracterisation of the nature of the government's policy on PRPs), it reaffirms that a director's duties are owed to the company alone and not to the shareholders. In the Court's view, the directors here had breached their fiduciary duty by giving "undue weight to the wishes of the shareholder" and ignoring the best interests of the company.

> *"Passive directors cannot be exonerated from liability or relieved from disqualification or restriction on the basis of the passive nature of their role.*
>
> *Walfab Engineering Limited*

Competition (Amendment) Act 2022

The Competition (Amendment) Act 2022 (awaiting commencement) significantly amends Ireland's existing merger control regime and bestows new powers of investigation, intervention and enforcement on the Competition and Consumer Protection Commission (**CCPC**). One of these powers, which will impact on M&A in Ireland, permits the CCPC to compel the notification of 'sub-threshold' transactions (i.e. those that do not meet the compulsory notification thresholds).

This 'call in' provision is not limited to transactions in Ireland and can apply to foreign-to-foreign transactions where there may be some effect on competition in Ireland. The CCPC must request notification within 60 working days of the earliest of when: (i) one of the parties to the transaction publicly announces an intention to make a public bid (or a public bid is made but not yet accepted), (ii) the CCPC becomes aware that the parties to the transaction have entered into an agreement to complete a transaction, and (iii) the transaction is put into effect.

Temporary COVID-19 legislation

The COVID-19 pandemic continued to impact on the operations of companies in 2022. Following a further extension in April, the 'interim period' of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (the **2020 Act**) is now set to expire on 31 December 2022.

The provisions of the 2020 Act have proved useful to companies; in particular the provisions allowing sealed documents to be executed by counterpart, general meetings (AGMs and EGMs) to be conducted wholly or partly by electronic means, and the extension of the period of protection from creditors (which was availed of in the courts earlier this year).

If the 2020 Act ceases to operate at the end of the year, companies will no longer be able to rely on these measures. The impact on AGMs will be especially significant, as companies will no longer be permitted to hold fully virtual general meetings and will only be able to conduct hybrid meetings if permitted under their constitutions. It is hoped that new legislation will be introduced in 2023 to put virtual and hybrid general meetings on a statutory footing.

> *"The CCPC's new power to call in below-threshold transactions could have significant impacts on M&A in Ireland.*

LOOKING AHEAD

- The Screening of Third Country Transactions Bill 2022 is expected to be enacted in early- to mid-2023.
- The Directive on cross-border conversions, mergers and divisions is due to be transposed into Irish law by 31 January 2023. At the time of writing, the Department has indicated that Ireland is on track to meet this deadline.
- The dematerialisation of holdings of transferable securities under the Central Securities Depositary Regulation (the **CSDR**) requires Irish-listed PLCs to represent their securities in book-entry form: (i) from 1 January 2023 for new issues of shares and (ii) from 1 January 2025 for existing securities. This is an area on which further developments are expected during 2023. The European Commission's proposal to amend the CSDR will also be progressed in the coming year.
- The EU will further progress its sustainability legislation (which is covered in more detail in the chapter on ESG), including the Corporate Sustainability Reporting Directive (the **CSRD**) and the Corporate Sustainability Due Diligence Directive (the **CSDDD**). The CSRD looks set to apply to companies as early as 2025 (covering the 2024 financial year), with the CSDDD applying to the first group of companies later that same year.
- New company law legislation was promised in the government's Autumn Legislative Programme. While no further details are available at present, it is hoped that the Companies (Administrative, Governance & Insolvency Amendment) Bill will clear up long-standing anomalies in the Companies Act 2014 and place virtual general meetings on a statutory footing.
- On 16 November 2022, the Tánaiste and Minister for Enterprise, Trade and Employment published the General Scheme of the Co-operative Societies Bill 2022, which will provide for a specific legislative framework for co-operative societies for the first time. It consolidates and modernises existing provisions and introduces modern corporate governance, financial reporting and compliance requirements, thereby making co-operatives more attractive to investors.

A&L Goodbody

SECTION 04

10 MIN READ

EMPLOYMENT

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2022 AT A GLANCE

- The Protected Disclosures (Amendment) Act 2022 and the Sick Leave Act 2022 were enacted and will come into force on 1 January 2023
- The long-awaited Gender Pay Gap Information Regulations, which bring gender pay gap reporting into effect in Ireland, were commenced and the first reports are due in December
- The Irish Human Rights and Equality Commission published two new codes of practice for employers in respect of workplace harassment and equal pay
- Significant case law emerged, including a Court of Appeal decision on the use of CCTV footage in a disciplinary process

Whistleblowing Directive: additional compliance for employers

The Protected Disclosures (Amendment) Act 2022 (the **2022 Act**) will commence on 1 January 2023. It transposes the EU Whistleblowing Directive into Irish law. It extends the scope of the Protected Disclosures Act 2014 (the **2014 Act**) and provides protections to new categories of "worker", such as volunteers, shareholders, board members and job applicants.

A protected disclosure is a disclosure of "relevant information". Information is "relevant information" if it satisfies both of the following:

i. in the reasonable belief of the worker, it tends to show one or more "relevant wrongdoings"

ii. it came to the attention of the worker in a "work-related context"

The eight "relevant wrongdoings" are expanded to include breaches of EU law.

The 2022 Act attempts to exclude matters exclusively affecting a reporting person from the definition of 'relevant wrongdoing'.

This is quite a narrow exception and significant scope remains for complaints to fall within the definition of a protected disclosure.

Penalisation

The 2022 Act inserts a new definition of "penalisation" into the 2014 Act. 'Penalisation' now means:

"Any direct or indirect act or omission which occurs in a work related context, is prompted by the making of a report and causes or may cause unjustified detriment to a worker."

It includes existing examples such as suspension, lay-off or dismissal, and also some new examples such as a negative performance assessment, failure to convert a temporary employment contract to a permanent one, and a medical referral.

An employee who claims to have suffered penalisation can take a claim to the Workplace Relations Commission (**WRC**) and may be awarded up to five years' remuneration. Applicants for employment can also be awarded compensation, up to a statutory cap of €15,000.

The 2022 Act provides a significant new avenue of redress to employees who claim they have been subject to penalisation. Employees will be able to apply to the Circuit Court for interim relief to restrain an alleged act of penalisation within 21 days following the last instance of penalisation, or such longer period as the Court may allow. Currently, interim relief is only available in the context of an alleged dismissal for having made a protected disclosure.

The 2022 Act also raises the bar for employers when it comes to defending penalisation claims. Where an employee brings a penalisation claim, the penalisation will be deemed to be as a result of the protected disclosure, unless the employer proves that the act or omission allegedly constituting the penalisation was based on duly justified grounds.

Internal reporting channels

Another key change for employers will be the requirement to have internal reporting channels and procedures in place for the making of protected disclosures. Initially, the requirement will apply to all public sector employers and to private sector employers with 250 or more employees. From 17 December 2023, this obligation will be imposed on private sector employers with 50 or more employees. In addition, the thresholds do not apply where the employer falls within the scope of certain EU laws, as set out in Schedule 2 of the Act, in areas such as financial services.

Channels must be designed, established and operated in a secure manner, which ensures the protection of the confidentiality of the identity of the reporting person and any third party and prevents access by non-authorised persons.

The internal reporting channels and procedures involve the following steps:

1. Acknowledge receipt of the protected disclosure within seven days.
2. Designate an impartial person or persons who:
   - is/are competent to follow up on reports
   - will maintain communication with the reporting person
   - where necessary, will request further information from, and provide feedback to, that reporting person
3. Ensure diligent follow-up by the designated person which necessitates "at least" the carrying out of an initial assessment to assess whether there is prima facie evidence that a relevant wrongdoing may have occurred.
4. Provide a reasonable timeframe for the provision of feedback to the reporting person, not exceeding three months from the acknowledgement of receipt of the

report or, if no acknowledgement was sent, not more than three months from the expiry of the seven-day period after the report was made. A reporting person may request in writing the provision of ongoing feedback. This feedback must be given at intervals of three months until the procedure is closed.

5. Ensure provision of clear and easily accessible information regarding:
   - the procedures for making a protected disclosure using the internal reporting channels and procedures
   - in relation to anonymous reports, the conditions under which such reports may be accepted and follow-up undertaken
   - the procedures for making a protected disclosure to a prescribed person or to the Office of the Protected Disclosures Commissioner

While some employers will need to roll out policies and procedures for the first time, many others will need to undertake a detailed analysis of their current policies and procedures and update them as necessary to ensure compliance with the requirements of the 2022 Act.

Confidentiality

One of the biggest challenges for employers managing and investigating protected disclosures is upholding their duty of confidentiality to protect the identity of the reporting person. Importantly, the 2022 Act creates a new offence for breach of this duty. It also modifies the existing right of action such that a reporting person will be able to take proceedings against a person who fails to comply with this duty; seemingly without the reporting person needing to show any proof of loss.

The 2022 Act imposes an obligation on the recipient of a disclosure to obtain the "explicit consent" of the reporting person to the disclosure of their identity, other than in limited circumstances. Individuals managing a protected disclosure, who make the decision to disclose in the absence of this consent, will need to ensure that they can stand over whatever exception is being relied on, if they are to avoid exposing the organisation to a claim that they breached confidentiality.

Penalties

The 2022 Act creates a number of new criminal offences, many of which attract very serious criminal sanctions (e.g. fines of up to €250,000 and/or up to two years' imprisonment).

The offences include:

- failing to comply with the requirement to establish, maintain and operate internal reporting channels
- breaching the duty of confidentiality to protect the identity of the reporting person
- penalising or threatening penalisation against a reporting person and certain persons connected with them, or bringing vexatious proceedings against them
- hindering or attempting to hinder a worker in making a protected disclosure

Employers should take steps now to establish the necessary internal channels and procedures, which will involve designating the appropriate staff to receive protected disclosures in a secure and confidential manner and providing them with training.

"Companies may be able to leverage off the reporting experience of GB companies in their group.

Gender pay gap reporting

On 3 June 2022, the long-awaited Employment Equality Act 1998 (section 20A) (Gender Pay Gap Information) Regulations 2022 (the **Regulations**) were published. The Regulations detail the gender pay gap (**GPG**) reporting requirements and how to comply with them.

Employers with 250 or more employees need to select a snapshot date in June 2022 and report for the first time within six months of that date. Over the next few years, employers with 50 or more employees will fall into the GPG reporting net on a staggered basis.

Many employers in Ireland will be in a position to leverage off the experience of companies within their corporate group, which may have reported on their GPG in Great Britain (**GB**) already. GPG reporting has been a statutory obligation in GB since 2017.

Irish employers should be aware of some notable differences between the two regimes, which include:

1. **The snapshot date and the deadline**

   In GB, the snapshot date is 5 April every year and the deadline for reporting is 4 April of the following year. Employers in Ireland may pick any date in June 2022 and then report within six months of that date.

2. **The information to be reported**

   The Regulations require additional information to be reported, including the mean and median hourly pay of part-time and temporary male and female employees and the percentage of male and female employees who received benefits in kind.

3. **The hourly pay reference period**

   Under the Regulations, the pay reference period for calculating the hourly pay to be reported is the 12-month period immediately preceding and including the snapshot date. In GB, the pay reference period is the pay period within which the snapshot date (5 April) falls. So, for example, for employees paid per calendar month, it is the month of April.

4. **Employees on leave**

   This is a key difference. In GB, employees are mostly excluded if they receive less than full pay because of being on leave on the snapshot date. Such employees are not excluded in Ireland.

5. **Publication**

   Irish employers must publish a statement setting out their opinion on the reasons for their GPG and the measures (if any) being taken, or proposed to be taken, to eliminate or reduce such differences. This statement is optional in GB.

6. **Where to report**

   Irish employers must report their GPG information on their website, or in some other manner easily accessible to employees and the public. The report must remain available for three years. In GB, the report must also be uploaded to a government website. There is no such requirement in Ireland at present, but this is expected to change in the future, potentially before the reporting deadline in 2023.

Use of CCTV in disciplinary processes

In *Doolin v DPC* [2022] IECA 117, the Court of Appeal (**COA**) examined the use by an employer of CCTV footage for disciplinary purposes. Upholding an earlier decision of the High Court, it found such use constituted unlawful further processing.

Background

Less than a week after the 2015 Paris terror attacks, graffiti stating: “Kill all whites, Isis is my life” was carved into a table in the staff tearoom at Our Lady’s Hospice and Care Service (the **Hospice**). Hospice management contacted Gardaí, who advised the Hospice to review CCTV to ascertain who had accessed the room over the previous days. The footage showed Mr Doolin entering the room on a number of occasions. Although there is no suggestion that Mr Doolin was involved in the graffiti incident, the information suggested that he had accessed the room for the purpose of taking unauthorised breaks.

An investigation report which followed was entitled: "Investigation into staff member (Cormac Doolin) accessing the Anna Gaynor House tea room at unauthorised times". This report provided that the "panel have established on the balance of probabilities that unauthorised breaks were taken by Mr. Cormac Doolin..." The report made no reference to any findings in connection with the graffiti.

This led to a disciplinary sanction against Mr Doolin in respect of unauthorised breaks.

The legislation

The Data Protection Acts 1988 and 2003 (and now the Data Protection Act 2018) provide that data shall be obtained only for one or more specified, explicit and legitimate purposes and not further processed in a manner incompatible with that purpose or those purposes.

The Hospice CCTV policy stated that "...the purpose of the system is to prevent crime and promote staff security and public safety" and a sign was placed beside each camera, which read “images are recorded for the purposes of health and safety and crime prevention”.

Decision

Mr Doolin made a complaint to the Data Protection Commission (**DPC**), which rejected his complaint. This was appealed all the way to the COA. In the COA, the DPC argued that the case rested upon three fundamental propositions, but these were not accepted by the COA.

1. **DPC:** The CCTV footage was viewed on one occasion only, for the purpose specified in the Hospice CCTV policy, namely security, and was not further processed thereafter. Accordingly, no breach occurred.

   COA: Mr Doolin's data was in fact processed three times: (i) when it was collected/recorded, (ii) when it was watched for the purposes of the security incident, and (iii) when the data relating to Mr Doolin's access and egress from the tea room were tabulated in the investigation report.

2. **DPC:** If the CCTV footage was further processed by the Hospice, it was processed for a security purpose.

   COA: The disciplinary investigation was not for the purpose of security. The COA noted that the title of the report does not refer to security. The COA found that "the processing of Mr Doolin's data was not for a security purpose as the DPC contends. It was manifestly for a different purpose …"

3. **DPC:** If the CCTV footage was further processed and such processing was not for a security purpose, then it was for a related purpose that was not incompatible with the security purpose and therefore was not unlawful.

   The DPC argued that every employee entering the room for a defined period of time had to be regarded as a suspect for the graffiti incident, including Mr Doolin, and accordingly his unauthorised access had a clear security dimension and was integral to the investigation of the graffiti.

   COA: The COA disagreed and restated that there was absolutely no evidence that the taking of unauthorised breaks represented a security issue in itself.

What does this mean for employers?

The case provides a cautionary tale for employers in terms of relying on CCTV footage in disciplinary processes.

In the first instance, employers should ensure that they comply with data protection principles when using CCTV, as outlined in the DPC Guidance on the use of CCTV for Data Controllers.

The case highlights the importance of having clear policies and procedures in place for processing personal data relating to employees, particularly in relation to CCTV footage. An organisation must carefully consider the purpose(s) for which it is collecting personal data, and ensure these purposes are clearly set out in the organisation's data protection notice/policy, and are communicated to employees and/or other data subjects whose personal data is collected.

Although further processing of personal data is not automatically unlawful, it is more likely to be so where it:

- is not related to the original purpose
- would not be expected by data subjects
- could have unforeseen or negative impacts on data subjects
- has no additional safeguards to ensure fair and transparent processing

LOOKING AHEAD

- The Protected Disclosures (Amendment) Act 2022 is due to commence on 1 January 2023.
- The Sick Leave Act 2022, also due for commencement on 1 January 2023, provides for statutory sick pay which will be phased in over a four-year period, starting with three days per year in 2023.
- Transposition of two important EU Directives into Irish law remains outstanding since August: the Work-Life Balance Directive and the Directive on Transparent and Predictable Working Conditions. The Work Life Balance and Miscellaneous Provisions Bill 2022 implements the Work-Life Balance Directive. It is currently before the Oireachtas and is due to be enacted by the end of the year. While some elements of the Directive on Transparent and Predictable Working Conditions are already in place in Ireland, the remaining elements are expected to be transposed by way of regulations before the end of 2022.
- On 9 November 2022, it was announced that the Right to Request Remote Work Bill will be integrated into the Work Life Balance and Miscellaneous Provisions Bill and therefore enacted much sooner than was originally expected.

A&L Goodbody

SECTION 05

9 MIN READ

FINANCE

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2022 AT A GLANCE

- Increased regulation was once again a theme for 2022, with implementation of a new EU-wide crowdfunding regime, expansion of domestic retail credit and credit servicing regimes, and establishment of a new central register and database for bank accounts and safe-deposit boxes
- An unwinding of financial supports and a return to cautious resilience building is evident from increases to counter-cyclical capital buffer and extension of bank levy
- COVID-19 accommodations were still relevant this year, from further e-signatures developments to the extension of the Companies Covid-19 Act to the end of 2022
- 2022 showed a return to a more normalised legislative programme, with significant developments in the areas of examinership law and unfair terms provisions
- Green finance initiatives continue to feature prominently in policy objectives and requirements at Eurosystem level

Crowdfunding: new EU-wide regulatory regime

The European Union (Crowdfunding) Regulations 2021 (S.I. No. 702/2021) were made on 13 December 2021 and give full effect to Regulation (EU) 2020/1503 (the **ECSPR**). The ECSPR regulates investment-based and peer-to-peer loan based crowdfunding, and applied from 10 November 2021.

In-scope crowdfunding service providers (**CSPs**) must be authorised by their national competent authority (**NCA**), and authorised CSPs can benefit from an 'EU passport' to provide their services across the EU. CSPs that are already engaged in activities that require authorisation under the new framework can continue to engage in those activities on a transitional basis until 10 November 2023.

The Irish Regulations designate the Central Bank of Ireland (**CBI**) as Ireland's NCA. In January 2022, the CBI introduced additional crowdfunding marketing requirements through an Addendum to the Consumer Protection Code 2012. As a result, since 13 January 2022, a number of provisions of the Code now apply to advertising by CSPs in Ireland.

Retail credit: expansion of Retail Credit and Credit Servicing regulatory regimes

The Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 expands (since 16 May 2022) the existing regulatory regime for retail credit firms (**RCFs**) and credit servicing firms (**CSFs**).

Entering into consumer-hire, hire-purchase (including personal contract plans) and indirect credit agreements are now deemed to be "relevant activities" requiring firms to be authorised as RCFs. Indirect credit is now also captured due to the extension of the definition of 'credit', which now goes beyond cash loans to include deferred payment and other financial accommodation arrangements.

Credit servicing activities have also been expanded to include managing or administering consumer-hire and hire-purchase agreements and communicating with the hirers in that context (as well as holding legal title to the rights of the owners under such agreements). Firms involved in such expanded activities now need to be authorised as CSFs.

The Act also extends the scope of the Consumer Credit Act 1995 by capturing credit arrangements provided by persons who have invited consumers by advertisement to avail of credit without payment of interest or any other charge. Previously, only if the person was also the seller of the goods were they caught by the 1995 Act's requirements.

The Act also introduces an annual percentage rate cap of 23% for credit agreements (other than moneylending agreements) and hire-purchase agreements entered into after 16 May 2022.

Anti-money laundering: new register of bank accounts and safe-deposit boxes

The European Union (Anti-Money Laundering: Central Mechanism for Information on Safe-Deposit Boxes and Bank and Payment Accounts) Regulations 2022 (S.I. No. 46/2022) were made in February (and were subsequently amended in September by S.I. No. 445/2022). They implement an additional requirement of the Fifth Anti-Money Laundering Directive.

These Regulations authorise the CBI to establish a centralised national register and database of all bank accounts, account holders and safe-deposit boxes in the State. They apply to credit institutions, including branches, which are established in Ireland (whether their head office is situated within the EU or in a third country) (**CIs**).

The CBI may request a CI to provide, through a 'Central Mechanism', certain information in relation to accounts or safe-deposit boxes held by that CI on or after 3 February 2022. That information, which can include details of account holders, beneficial owners of accounts, lessees of safe-deposit boxes and their lease periods, will be included by the CBI in a centralised database. The Garda Financial Intelligence Unit (**FIU**) will be allowed full access to that database.

The CBI recently launched details of what it's calling the Ireland Safe Deposit Box Bank and Payment Accounts Register (**ISBAR**). The CBI has produced FAQs, Scope, Reporting and Record Validation guidelines and reporting templates. According to its FAQs, the CBI is expected to formally notify CIs of their obligation to provide information to ISBAR in Q1 2023. An initial data collection and phased onboarding of CIs will also take place in Q1 2023 (the CBI will provide a precise onboarding timeline to CIs then).

ISBAR is discussed further in the chapter on Anti-Money Laundering.

Counter-Cyclical Capital Buffer: CBI announces increases

On 15 June 2022, the CBI announced it was increasing the Counter-Cyclical Capital Buffer (**CCyB**) to 0.5% as its main tool for safeguarding resilience, with plans to rebuild the buffer to 1.5% by mid-2023. The CCyB was reduced to 0% in March 2020 to support bank lending into the economy during the pandemic. The CBI said it no longer deemed that support necessary.

Bank Levy to be extended as part of Budget 2023

The Levy is being extended for another year from the end of 2022, and is again expected to raise €87m in 2023. The future of this levy is expected to be informed by the findings of the Retail Banking Review (report due in November 2022.

(**Editor's note:** At the time of going to print, the Minister for Finance and the Minister of State for Financial Services, Credit Unions and Insurance published the Report of the Retail Banking Review following its approval by government, which also approved the implementation of the recommendations in the Review. The Review will be covered in more detail in a separate publication.)

E-signatures

Regulations for registered land transactions

The Electronic Commerce Act 2000 (Application of Sections 12 to 23 to Registered Land) Regulations 2022 (S.I. No. 55 of 2022) came into effect on 9 February 2022. The Regulations amend Section 10 of the Electronic Commerce Act 2000 "in order to permit the use of electronic signatures for applications for the registration of registered land". However, the Property Registration Authority of Ireland (**PRAI**) stated in March 2022, that it needs to consent to the use of electronic signatures and "until such time as a system has been developed and implemented, the Authority is not in a position to accept electronic/digital signatures on Land Registry or Registry of Deeds forms". It seems, therefore, that the PRAI is not yet ready to implement the intended changes, so the current position remains that any deeds creating or transferring an interest in land (or charging it) will need to be executed in wet ink.

Updated Law Society Guidance

The Law Society published an updated version of its Guidance Note on E-Signatures, Electronic Contracts and Certain Other Electronic Transactions in May 2022. The revised guidance makes some welcome clarifications to its original March 2020 Guidance Note, but doesn't make any substantial changes to the Society's position and advice to the profession (and ultimately their clients) on e-signatures.

Companies Covid-19 Act: 'interim period' extended to 31 December 2022

Back in April, the Companies Act 2014 (Section 12A(1)) (Covid-19) Order 2022 was signed to further extend the operation of the "interim period" effected by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (the **Companies Covid-19 Act**) until 31 December 2022.

The Companies Covid-19 Act makes temporary amendments, for the duration of the 'interim period', to the Companies Act 2014 to address issues arising as a result of COVID-19. The extension confirms several accommodations, including:

- facilitating execution of instruments under seal in counterparts
- extending examinership to up to 150 days
- keeping the threshold at which a company is deemed unable to pay its debts at €50,000 for both individual and aggregate debts

When the Order was published, it was indicated that this would likely be the final extension of the 'interim period'. At the time of writing, there has been no further comment from Government.

Examinership changes: new Irish regulations

The European Union (Preventive Restructuring) Regulations 2022 (S.I. No. 380/2022) came into effect on 27 July 2022. They transpose the requirements of the 'Preventive Restructuring Directive' (Directive (EU) 2019/1023) not already provided for in Irish law.

The Regulations result in a number of modifications to the examinership process under the Companies Act 2014. Some are significant, such as the following:

- changes to eligibility and voting requirements to confirm an examiner's proposals
- a new ability to compel counterparties to continue to trade with a company in examinership, irrespective of any contractual clause allowing such counterparty to modify or terminate the contract on the occurrence of an event – such as the appointment of an examiner
- codification of the duty, previously recognised by the courts, of directors of a company to have regard to the interests of creditors, when a company is in the 'zone of insolvency'
- directors may have regard to early warning tools or an 'early warning system', to allow them to act to prevent or overcome insolvency

The Regulations are discussed in more detail in our Corporate chapter.

Unfair terms: substantial changes imminent under Consumer Rights Act 2022

The purpose of the Consumer Rights Act 2022 is to give effect to a number of EU consumer rights directives, including the so-called Omnibus Directive (Directive 2019/2161), which itself amends four separate EU directives, the Unfair Contract Terms Directive (Directive (93/13/EEC)) (**UCTD**) among them. The Omnibus Directive was due to be implemented in Ireland by 28 May 2022.

The Act was signed by the President on 7 November 2022, and is expected to be commenced before Christmas 2022.

Editor's note: The Act came into force on 29 November 2022.

"The Act will make substantial changes to Irish legislation on unfair terms in consumer contracts.

The Act will make substantial changes to Irish unfair terms in consumer contracts legislation. The current Irish regulations implementing the UCTD will be revoked and replaced in their entirety with the Act's Part 6 provisions.

The changes for consumer contract terms include:

- strengthened transparency requirements
- an expanded 'grey list' of terms, which will now be presumed unfair (rather than simply being indicative of terms that may be regarded as unfair)
- the introduction of a 'blacklist' of terms that are automatically unfair
- notably, enhanced enforcement measures – expanded fines of up to 4% of annual turnover in the relevant Member State (or up to €2m if turnover information is not available) will be considered for more serious breaches of Part 6 requirements that constitute intra-union or widespread infringements

The Act also consolidates, modernises and enhances a range of other domestic consumer related legislation, and introduces new rights and remedies for consumers and enforcement measures for regulators.

Green finance: further steps from the ECB

In July of this year, in line with the EU's climate neutrality objectives, the ECB decided to take further steps to include climate change considerations in the Eurosystem's monetary policy framework. It decided to:

i. adjust its corporate bond holdings in the Eurosystem's monetary policy portfolios
ii. amend its collateral framework
iii. introduce climate-related disclosure requirements for collateral
iv. enhance its risk management practices

In September, the ECB provided further details on how the Eurosystem aims to decarbonise

its corporate bond holdings, by taking into account the climate score of issuers in all purchases of corporate bonds settled as of 1 October 2022, and tilting purchases towards issuers with better scores.

Before the end of 2024, the Eurosystem will limit the share of assets issued by entities with a high carbon footprint that can be pledged as collateral by individual counterparties, when borrowing from the Eurosystem.

Once the Corporate Sustainability Reporting Directive (**CSRD**) applies (expected to apply in 2025 to the first group of in-scope companies), the Eurosystem will only accept marketable assets and credit claims from companies and debtors within the scope of the CSRD, as collateral in Eurosystem credit operations, if they comply with the CSRD.

The Eurosystem will also urge rating agencies to be more transparent about how they incorporate climate risks into their ratings, and to be more ambitious in their disclosure requirements on climate risks.

LOOKING AHEAD

- The impacts of the Retail Banking Review and the implementation of its recommendations will be seen throughout 2023.
- In October, the CBI concluded its comprehensive mortgage measures framework review. The CBI deemed that targeted changes were appropriate to re-balance the benefits and costs of the calibration of the measures, and to ensure they remain fit for purpose into the future. The changes will come into effect on 1 January 2023.
- The CBI is also conducting a comprehensive review of the Consumer Protection Code 2012. Public feedback on a discussion paper (published in October) is invited until 31 March 2023, and will be published in Q2 2023. A public consultation, including draft regulations to replace the existing Code, will then follow in Q4 2023. The final resulting regulations are expected in 2024.
- According to the Government's most recently published Legislative Programme, anticipated legislation includes: (i) a Credit Guarantee (Amendment) Bill to create a specific Ukraine Credit Guarantee Scheme to support loans to businesses impacted as a result of the invasion of Ukraine, (ii) a Limited Partnership Bill to modernise the Limited Partnership Act 1907, (iii) a Financial Services and Pensions Ombudsman (Amendment) Bill to amend the Financial Services and Pensions Ombudsman Act 2017, and (iv) a further Personal Insolvency (Amendment) Bill to update aspects of personal insolvency legislation following a comprehensive statutory review of the Personal Insolvency Acts.
- Ireland also needs to transpose the Credit Servicers and Credit Purchasers Directive (Directive (EU) 2021/2167) by December 2023. Current tensions with the existing Irish regime will need to be worked through, and news of the approach to be taken by the Department of Finance and the CBI is eagerly awaited.
- The Digital Finance Package, adopted by the European Commission in September 2020, will begin to take effect next year – see the Financial Regulation chapter for more on this.
- The European Commission is also expected to present a legislative proposal for a digital euro in 2023.

SECTION 06

9 MIN READ

BANKING IN THE COURTS

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2022 AT A GLANCE

- Lenders who are seeking interlocutory injunctions in lieu of possession orders or summary judgments are required to satisfy the 'strong test' requirement set out in the *Maha Lingham* case
- Applications by lenders seeking leave to issue execution beyond the six-year period, pursuant to Order 42, Rule 24 of the Rules of Superior Courts must explain such periods of inactivity adequately to the courts
- The impact of the decisions of *O'Malley* and *Harris* continue, with the courts reiterating the requirement that particulars of debt must be sufficiently set out in summary proceedings
- In applications for Well Charging Orders, the courts are being asked to consider the interpretation and effect of section 73 of the Registration of Deeds and Title Act 2006

Interlocutory injunctions

The case of *Kieran Wallace and Cormac O'Connor v Frances Davey [2022] IEHC 120* is an example of the rising trend of lenders seeking interlocutory injunctions in lieu of possession orders, or as a means of obtaining summary judgment. In this case, Stack J refused an application for interlocutory orders for possession without a power of sale in circumstances where the evidence failed to show that the mortgagee's power of sale was exercisable. The Judge ruled that the receivers in that case had not made out the strong case required for a mandatory injunction.

The criteria set down in the case of *Mahalingham v HSE* [2005] IESC 89 (**Maha Lingham**) were considered in the cases of *O'Brien, Larkin and Pepper Finance Corporation (Ireland) DAC v McMahon & another* [2022] IEHC 246 (**McMahon**) and *Everyday Finance DAC & ors v Jane Gleeson & another* [2022] IECA 130 (**Gleeson**). In the *Maha Lingham* case, the Court determined that where a plaintiff is seeking a mandatory interlocutory injunction, it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. Satisfying the ordinary test of 'a fair case to be tried' is not sufficient in these types of applications. In McMahon, the lender and receivers sought a number of injunctions, which Stack J classed as mandatory rather than prohibitory. As the plaintiffs were seeking possession of the properties, the Judge held they were required to meet the *Maha Lingham* test. In this case, they had and he granted the injunctions sought.

> *"Where a plaintiff is seeking a mandatory interlocutory injunction, it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action.*

In *Gleeson*, the Court of Appeal reversed the High Court decision, which had held that the original lender and receiver had made the necessary strong case for granting a mandatory injunction to obtain a possession order. The Court of Appeal held that the plaintiffs had in fact not met the threshold of a strong case and allowed the appeal. The second named defendant brought the appeal and contested the appointment of the receivers. She argued that the trial judge incorrectly applied the *Maha Lingham* test, an argument which was conceded by the Court of Appeal.

Explanations for delays

The past year has seen a trend of lenders making applications for leave to issue execution against defendants where six years has elapsed since the judgment or order, pursuant to Order 42, Rule 24 of the Rules of the Superior Courts. The case of *ACC Bank PLC v Joyce & ors* [2022] IEHC 92 highlights the importance of explaining periods of inactivity in such applications. ACC Bank plc (**ACC**) had obtained judgment against the defendant, which was registered as a mortgage against his interests in three properties. The defendant was subsequently adjudged a bankrupt and his interests in the properties were vested in the Official Assignee before being re-vested in the defendant once the bankruptcy period ended. Cabot Financial (Ireland) Limited (**Cabot**) acquired the debt during the bankruptcy period and argued that neither ACC nor Cabot could have executed the judgment throughout the period of the bankruptcy. In such circumstances, an application for leave to issue execution was required in order to enforce the judgment debt. In the absence of any sufficient explanation or "plausible reason" for the delay, the Court refused the application.

In the case of *Cabot Financial (Ireland) Limited v Heffernan & Ors* [2021] IEHC 823, the second named defendant, Mr Heffernan, successfully applied to have the proceedings against him dismissed for want of prosecution and inordinate delay. Ulster Bank, the original lender, initially commenced proceedings in 2012 and the debt was subsequently acquired by Cabot in 2019. The proceedings had remained at summary stage. When Cabot took over proceedings, the litigation files were never transferred over to the new solicitor resulting in the delay to the proceedings. In his judgment, Meenan J held that the delay in prosecuting these proceedings was both inordinate and inexcusable and he granted the reliefs sought by Mr Heffernan.

Another case which saw the refusal by the courts of an application for leave to issue execution was *Irish Nationwide Building Society v Con Heagney* [2022] IEHC 12. The plaintiff, Mars Capital Ireland DAC, argued that the failure to issue execution within six years was due to a change in the party entitled to execution. In his judgment, Allen J distinguished the rules governing the execution of a judgment from those governing the prosecution of litigation. He held that a successor lender must provide some explanation or grounds to justify the court exercising its discretion to grant leave to execute out-of-time in the same way the original lender would have to do.

These cases serve as reminders to lenders of the importance of issuing execution in a timely manner. Where the delay is beyond the six-year period, it is essential that a court application for leave to issue execution is accompanied by an explanation for the delay.

Ongoing impact of *O'Malley*

Although three years have passed since the Supreme Court decision in *Bank of Ireland Mortgage Bank v Joseph Joseph O'Malley* [2019] IESC 84 (**O'Malley**), the consequences continue to have an impact in the courts. The Court in *O'Malley* held that both the pleadings and the supporting affidavit should provide "at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest". This test was subsequently confirmed by the High Court in *Havbell DAC v Harris* [2020] IEHC 147 when it allowed the applicant for summary judgment to amend its summons to particularise the debt claimed to comply with the *O'Malley* decision. This latter case provided welcome guidance on how cases should be pleaded in light of the *O'Malley* decision and the particulars required for summary judgment.

This year, in *AIB Bank plc and Everyday Finance DAC v Doran and Scanlon* [2022] IECA 78, the Court relied heavily on the *O'Malley* case in its judgment. The defendant, in his appeal, argued that the trial judge erred in law by concluding that the evidence placed before her by the defendant was not sufficient to warrant remittal of the matter to plenary hearing. The appeal was successful on the basis that the Court of Appeal found that the pleadings and supporting documentation provided by the Bank did not satisfy the evidential burden of proof required for summary judgment. Pilkington J found that there was no calculation of interest or statement of account filed with the pleadings, or in any other documentation provided to the defendant. The Court found that the evidence furnished by the Bank failed to adequately meet the evidential gap identified.

In the case of *Feniton Property Finance DAC v Eugene McCool* [2022] IECA 217, the Court of Appeal held that the borrower had not raised the point regarding the defective pleadings pursuant to the *O'Malley* decision in the High Court, which could have allowed the deficiency to be addressed by the amendment of the summons. On this basis, they could not allow the borrower to do so for the first time on appeal, "not least of all because had such a point been made it would have been open to the trial judge to afford the plaintiff an opportunity to amend its claim".

Both the *O'Malley* and the *Harris* cases reiterate for lenders and legal practitioners the importance of ensuring detailed particulars of debts claimed are pleaded in both the summary summons and the supporting grounding affidavits submitted with their application for summary judgment. If the *O'Malley* test is not met at the time of issuing summary judgment proceedings against a borrower, it is now clear that creditors will have little success in obtaining orders for judgment on foot of the summary judgment procedure.

Well charging orders

Under section 73 of the Registration of Deeds and Title Act 2006 (the **2006 Act**), all land certificates lodged with lenders as equitable deposits had to be converted into registered liens prior to 31 December 2009. Any such liens not registered by this deadline were extinguished. Consequently, we continue to see many cases before the courts relating to liens and well charging proceedings in connection with section 73 of the 2006 Act.

In *Promontoria (Oyster) DAC v Fox* [2022] IEHC 97 (**Fox**), the High Court was asked to consider whether a registered lien under section 73 of the 2006 Act could be relied upon as security for a further loan agreement entered into after 31 December 2009. In opposing the application for a well charging order, the defendant argued that the purpose of section 73 was to provide a mechanism for the registration of security that already existed and could not be used to create security for further advances after 31 December 2009. In his judgment, Simons J recognised that the legislation was silent on this issue and accordingly, he looked to the overall scheme of the legislation for guidance. He determined that a registered charge can cover further advances, whereas a lien relates to an existing loan only. The Court held that loan facilities advanced to the defendant under loan agreements entered into in June 2010 were not secured against the relevant lands and it refused the application for a well charging order. An appeal has since been taken against this judgment to the Court of Appeal and is listed for hearing on 16 January 2023.

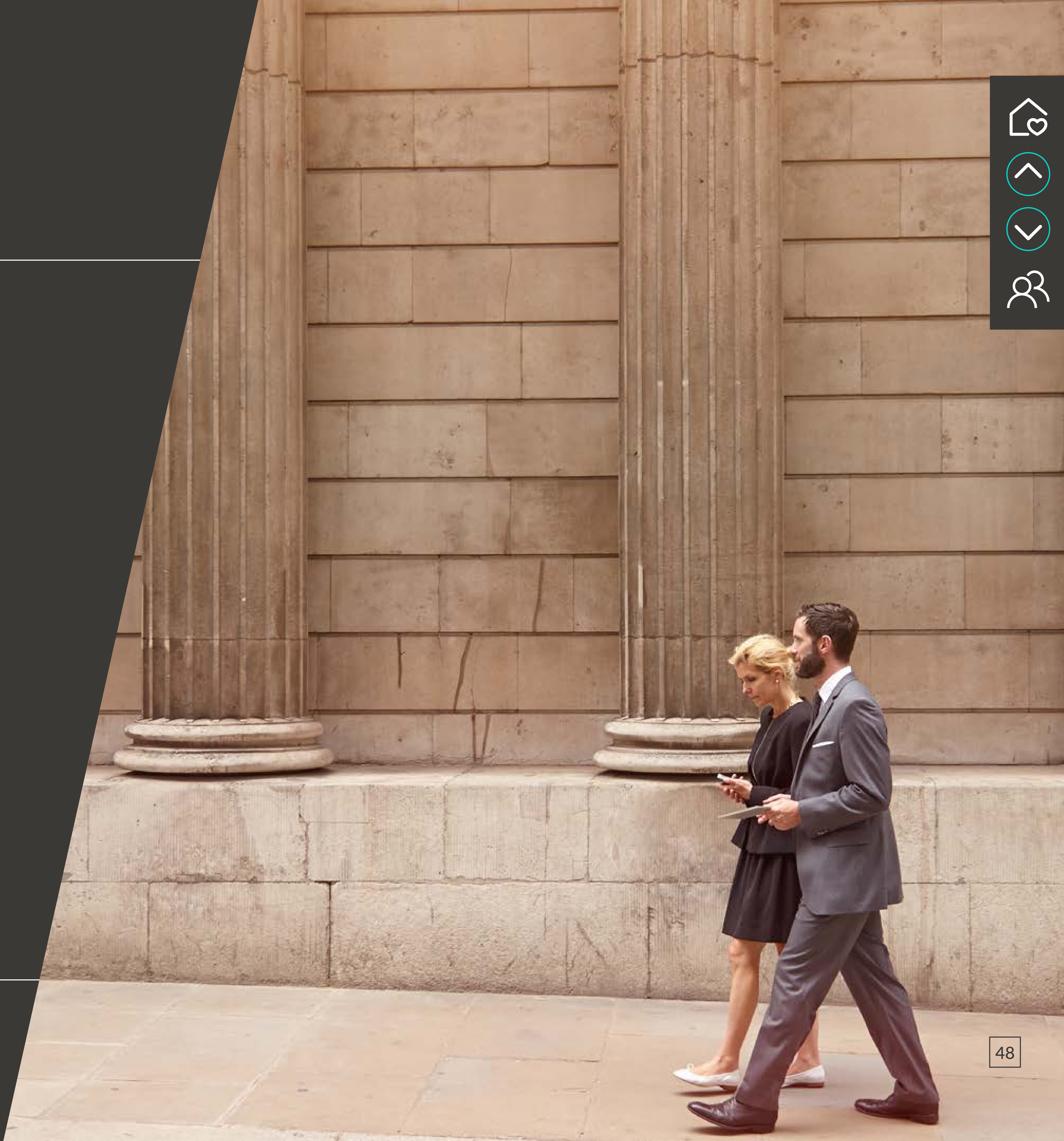
In the earlier case of *Promontoria (Oyster) DAC v Kean* [2021] IEHC 796, Simons J was asked to consider whether it was sufficient merely for the application to be lodged in the Property Registration Authority by the deadline of 31 December 2009 or whether registration of the lien needed to be completed by that date. In his judgment, Simons J was satisfied that an unusually important point of law suitable for adjudication by the High Court had been raised. He held "the principal line of defence advanced in these proceedings raised a significant question of statutory interpretation… [which] is an issue of general public importance".

In October this year, this case came before the High Court again ([2022] IEHC 526). In an attempt to circumvent the *Fox* decision, the plaintiff put forward a number of novel arguments to support its application for a well charging order. One such argument related to a claim that an express agreement by the borrower to deposit the land certificate as security in respect of both present and future loans was a contractual promise that is sufficient on its own to create an equitable mortgage. Simons J determined that the circumstances of the present case of *Kean* were indistinguishable from those of *Fox* and refused the application for a well charging order.

"The Judge determined that a registered charge can cover further advances, whereas a lien relates to an existing loan only.

LOOKING AHEAD

- The Court of Appeal will hear the plaintiff's appeal of the High Court decision in *Fox* in January 2023. In the event that the Court finds in favour of the plaintiff, the impact on the interpretation of Section 73 of the Registration of Deeds and Title Act 2006 and its effect on further advances post 31 December 2009 cannot be overstated.
- In order to resolve the question of the statutory interpretation raised in *Kean*, Simons J held that careful consideration of the 2006 Act is necessary. He held that "a written judgment of the High Court (and if necessary, the Court of Appeal or Supreme Court) on this issue" would provide legal certainty. Similar to the Court of Appeal decision in *Fox*, any such decision from these higher courts will have a direct impact on well charging proceedings.
- Another case we are monitoring as it works its way through the courts is the case of *Ryan v Dengrove* DAC [2022] IEHC 20 which concerns a dispute between the parties over the meaning of "all sums due" mortgages. The question the courts will need to determine is whether redemption of a debt relating to a secured property releases that property in full or whether it is treated as only part redemption of the wider debt owed by the parties.



A&L Goodbody

SECTION 07

XX MIN READ

FINANCIAL REGULATION & INVESTIGATIONS

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2022 AT A GLANCE

- Central Bank (Individual Accountability Framework) Bill published in July 2022
- Continued focus on culture and conduct
- Resilience is an ongoing priority for the Central Bank of Ireland and the European Supervisory Authorities, with an emphasis on outsourcing and cyber-resilience
- Consumer and investor protection – the Consumer Protection Code review is now underway, together with a focus on the regulation of crypto-assets
- ESG and, in particular, climate change remains a continuing priority of the Central Bank of Ireland and the European Supervisory Authorities

Individual accountability

The Central Bank of Ireland's (the **CBI**) Individual Accountability Framework (**IAF**) will be one of the most impactful regulatory changes of recent years. While much of the focus has been on the Senior Executive Accountability Regime (**SEAR**), this is just one element of the overall IAF. Now that the Central Bank (Individual Accountability Framework) Bill 2022 (the **IAF Bill**) has been published, there will be a renewed focus on implementation of these reforms.

There are six parts to the IAF, some of which will apply to all regulated financial service providers (**RFSPs**), and others, such as SEAR, which will apply initially to credit institutions and certain types of insurers and investment firms:

1. the introduction of SEAR
2. a new 'duty of responsibility' for individuals within the scope of SEAR
3. new conduct standards for individuals, with 'common conduct standards' applying to all individuals in controlled function (**CF**) roles and 'additional conduct standards' applying to pre-approval controlled function (**PCF**) holders and CF1 holders
4. new 'business standards' applying to all RFSPs
5. enhancements to the CBI's fitness and probity (**F&P**) regime, in particular a new certification requirement
6. enhancements to the CBI's administrative sanctions procedure (**ASP**)

Whilst the IAF Bill largely reflects the previously published General Scheme, there are some significant amendments, such as the extension of F&P investigations to any person who performed a CF up to six years before the commencement of an investigation, and enhanced transparency and oversight of the CBI's enforcement regimes.

There are also many aspects of the IAF which remain to be clarified, such as:

- the list of 'prescribed' and 'inherent' responsibilities under SEAR
- the scope of responsibilities held by non-executive directors
- the content and format of the 'statement of responsibilities' and 'management responsibility maps'
- what steps may be considered 'reasonable' in the context of the 'duty of responsibility'

The CBI has indicated that, upon enactment of the IAF Bill (end of this year/early 2023), it will move quickly to consult and engage with key stakeholders on the 'operationalisation' of the IAF. This consultation is expected to include draft regulations and accompanying guidance on these key components of the IAF, which currently remain unclear.

Whilst the introduction of the IAF does of course enhance individual accountability and strengthen the CBI's enforcement toolkit, it also enhances the transparency and fairness of the CBI's enforcement processes. It should also improve firms' reporting lines, governance and decision-making, which should lead to better outcomes for both firms and individuals. We expect implementation programmes to occupy cross-divisional teams for the foreseeable future, with HR, legal and compliance teams, and affected employees, feeding in to the process.

Culture

Culture, and conduct generally, is an ongoing area of focus for the CBI, and its consistent messaging is that the IAF is fundamentally about underpinning good conduct and high quality governance and culture within firms. The CBI has emphasised that culture is a matter for each individual firm, with the role of prescribing culture falling to the board and senior leadership teams. The CBI's expectation is that the board and senior leadership teams should define a set of values and guidelines for desired behaviour and lead by example with regular re-enforcement to ensure the culture is actively shared.

In the recently published Demographics of the Financial Sector Report, the CBI highlighted that diversity, including age, ethnicity, educational and professional background, amongst other characteristics, is critical to develop an effective culture. The CBI also expressed a view that a lack of diversity at senior management and board level is a leading indicator of heightened behaviour and culture risks and that diversity will continue to be a priority for the CBI.

Regulatory activity

The CBI's priorities for 2022 focused on the changing regulatory landscape, resilience, consumer and investor protection, enhancing the regulatory framework and ESG. Several enforcement actions this year under the CBI's ASP have reflected these priorities.

Enforcement

Enforcement actions in 2022 to date have involved issues relating to:

- the Consumer Protection Code (in particular regulatory breaches affecting tracker mortgage customers)
- F&P pre-approval requirements
- outsourcing
- transaction monitoring failures in respect of anti-money laundering and terrorist financing systems

The CBI also published its first adverse assessment for insider dealing under the Market Abuse Regulations, and commented that it will continue to take proactive steps to protect the financial markets from potentially abusive practices. This adverse assessment confirms the CBI's continued focus on market conduct and individual accountability.

Fitness and probity

F&P continues to be an area of regulatory focus. In its recent enforcement action for regulatory breaches of F&P pre-approval requirements, the CBI emphasised the critical role of the F&P regime in the protection of consumers and investors, and that it is committed to holding firms accountable for F&P failures and to raising compliance standards.

"Firms are required to take action and consider the risks to consumers of the more challenging economic outlook.

This year, the CBI made a number of amendments to the list of PCFs, including the splitting of the 'PCF-2 Non-executive director' into 'PCF-2A Non-executive director' and 'PCF-2B Independent non-executive director', and the introduction of the new 'PCF-52 Head of anti-money laundering and counter terrorist financing compliance'.

Changing regulatory landscape

Changes to the Irish retail banking sector, in particular the pending exits of KBC and Ulster Bank from the Irish market, were a key concern for the CBI this year. The CBI has had continued engagement (by way of roundtables) with the CEOs of the five main retail banks, to ensure that the large scale migration of customer bank accounts happens in line with customer needs and expectations. The CBI also issued Dear CEO letters to direct debit originators, setting out expectations to ensure that customers are supported during the switching process, and called on regulated firms to prevent IBAN discrimination.

Operational resilience of financial service providers

Unsurprisingly, in light of the increasingly complex and interconnected environment that the financial services industry now operates, operational resilience was an ongoing priority of both the CBI and the European Supervisory Authorities (the **ESAs**) this year. Key areas of attention included outsourcing and cyber-resilience, with concerns around the latter exacerbated by the Russian invasion of Ukraine.

This year saw a focus on the implementation of the CBI's Cross Industry Guidance on Operational Resilience and its Cross Industry Guidance on Outsourcing, both of which were published in December of last year. The CBI expects firms to be actively and promptly addressing operational resilience vulnerabilities, and to be in a position to evidence actions and plans to apply the Guidance on Operational Resilience at the latest within two years of it being issued. The CBI will apply a risk-based approach to assess the effectiveness of regulated entities' governance and management of outsourcing arrangements and their adherence to, and implementation of, the Guidance on Outsourcing.

A key pan-European development in terms of cyber-resilience is the introduction of the Digital Operational Resilience Act (**DORA**), the core aim of which is enhanced cyber-resilience. DORA is expected to enter into force in 2023 and apply from early 2025.

Consumer and investor protection

On 18 November 2022, the CBI announced that it has written to all regulated firms to reaffirm its expectations on how they treat consumers, in the context of the current economic environment. The Dear CEO Letter details the specific actions, as set out in the Consumer Protection Outlook Report (discussed below), which firms are required to address to manage potential risks arising from this changing landscape for consumers.

Firms are required to take action and consider the risks to consumers as a result of the more challenging economic outlook, energy-driven inflation, rising interest rates and significantly higher consumer prices and business costs.

Earlier this year, the CBI published its second Securities Markets Risk Outlook Report, which details key conduct risks to securities markets and the actions firms should take to identify, mitigate and manage them. The conduct risks identified related to: governance, data quality, misconduct, market dynamics, sustainable finance, cyber security, conflicts of interest and financial innovation.

The CBI also published its Consumer Protection Outlook Report, which identifies five risks facing consumers of financial services. The CBI expects regulated entities to take actions to identify, mitigate and manage these risks so that the best interests of consumers are protected. The risks identified were:

1. poor business practices and weak business processes
2. ineffective disclosures to consumers
3. the changing operational landscape
4. technology-driven risks to consumer protection
5. the impact of shifting business models

The recent publication of a CBI Discussion Paper on its review of the Consumer Protection Code (**Code**) represents a significant step forward in this long-anticipated review. The Discussion Paper sets out ten themes (two broad discussion themes concerning securing consumers' best interests, and eight, more focused discussion themes concerning topical issues for consumers), and poses a number of questions for consideration. This is an important first step in the Code review process, and will inform a revised Code, which may impose new requirements on regulated entities, and whose scope may be extended to currently unregulated entities.

Further to its 2021 review of differential pricing in the home and motor insurance markets, earlier this year the CBI published the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Insurance Requirements) Regulations 2022 (the **Regulations**). The Regulations were introduced to protect consumers and are effective since 1 July 2022. The new rules ban 'price walking' in the motor and home insurance market, require providers of home and motor insurance to review their pricing policies and processes annually, and to ensure that additional, consistent information is provided upon automatic renewal of home or motor insurance policies.

Back in April 2022, the CBI wrote to MiFID investment firms, setting out its findings from a series of targeted reviews of structure retail products (**SRPs**), and its expectations of firms when implementing relevant MiFID II requirements. The reviews identified a number of poor practices and weaknesses in firms' SRP arrangements and controls, which increase risks to investors. The CBI expects firms to adhere to high standards of investor protection, acting in the best interests of their clients at all times. In particular, the CBI expects firms to undertake a full documented review of current SRP arrangements and controls against the findings and expectations outlined in this engagement.

Regulatory enhancements

Without doubt, the most impactful enhancement to the domestic regulatory framework this year is the introduction of the IAF Bill, previously discussed.

We also saw activity in the crypto-assets space, with both the Central Bank and the ESAs issuing a warning to consumers and retail investors of the risks of investing in crypto-assets earlier this year. A key legislative development in this regard is the Markets in crypto-assets regulation (**MiCA**), which is expected to enter into force early next year and apply on a staggered basis over the following 12-18 months. The aim of MiCA is to regulate currently out-of-scope crypto-assets and their service providers in the EU, and to provide a single licensing regime across all member states.

Further to the launch of the European Commission's (**Commission**) Digital Finance Strategy and Retail Payments Strategy in September 2020, this year the Commission opened three consultations to progress these strategies and, in particular, to progress its review of the revised Payment Services Directive (**PSD2**). All three consultations are now closed and we are awaiting further updates.

Towards the end of 2021, the Commission adopted a review of EU banking rules (the capital requirements regulation and directive, **CRR** and **CRD**) with the aim of ensuring that European banks become more resilient to future economic shocks, while contributing to Europe's recovery from the COVID-19 pandemic and the transition to climate neutrality. Earlier this year, the ECB published an opinion which, whilst welcoming the Commission's proposals, emphasised the importance of finalising the EU implementation of the Basel III reforms in a timely, full and faithful manner. Consultations in respect of the review are ongoing.

Climate change

ESG and, in particular, climate change is an ongoing priority of both the CBI and the ESAs. This year, the CBI launched its Climate Risk and Sustainable Finance Forum, with the aim of building a shared approach (with climate change experts, representative bodies and regulated firms) to the understanding and management of risks and opportunities posed by climate change to the financial system.

The CBI also launched a public consultation on proposals to introduce guidance on climate change risks for the insurance sector. The proposed guidance aims to clarify the CBI's expectations on how (re) insurers address climate change risks in their business and to assist them in developing their governance and risk management frameworks to do this.

LOOKING AHEAD

Implementation of the IAF will occupy all RFSPs going forward. Many firms are currently running pilot programmes to assess how implementation will progress and to identify key issues for lobbying and consultation.

Other areas of focus from the CBI where we're likely to see developments include:

- progression of the **Code** review, with a public consultation expected next year and issuance of the revised Code in 2024
- continued focus on ESG, in particular **climate change**
- continued focus on implementing an **effective culture** within firms, with the CBI indicating an enhanced supervisory approach to behaviour and culture within firms, alongside its implementation of the IAF
- continued **regulatory enhancements**, with the expected coming into force of key legislation such as DORA and MiCA and continued engagement on legislative proposals such as the PSD2 and CRR3/ CRD6 reviews

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SECTION 08

10 MIN READ

DISPUTES & INVESTIGATIONS

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2022 AT A GLANCE

- Publication of the detailed Implementation Plan on Civil Justice Efficiencies and Reform Measures sets the scene for a period of reform
- Third party litigation funding remains an evolving issue in this jurisdiction and is now under scrutiny at an EU-wide level
- Cross border litigation and enforcement – the Hague Judgments Convention signals a possible new tool for future EU/UK co-operation should the UK choose to accede
- The Court of Appeal confirmed that the Civil Liability Act 1961 does not apply to debt recovery cases as they are not considered actions for "damages"
- There were a number of interesting decisions dealing with discovery, security for costs, complex management company agreements and defamation
- There have been some key developments in the restructuring and insolvency space

Civil justice reform

The most important development in the year, in terms of the overall civil justice landscape, was the publication in May by the Minister for Justice, Helen McEntee, of the government's Implementation Plan on Civil Justice Efficiencies and Reform Measures (the **Plan**).

The Plan provides welcome guidance on how the recommendations of the Civil Justice Review Group's 2020 report will be implemented on a phased basis over the next three years.

The Plan provides for an ambitious and complex reform programme that will necessitate the enactment of primary legislation and the introduction of new Rules of Court.

The five key reforms that will increase the efficiency of the operation of the Courts for dispute resolution are as follows:

1. The Plan provides for new Rules of Court to be introduced that will require parties to plead their case with much greater precision. A single originating document called a "claim notice" will be introduced across all courts of first instance to replace the various documents which now exist.
2. The Plan contemplates automatic discontinuance of dormant cases which will avoid parties being locked in litigation for too long.
3. A new system for multi-party actions will be introduced, which will be somewhat similar to the Group Litigation Orders in the UK and provide better structure to ensure the efficient resolution of similar claims.
4. The current discovery rules will be replaced with a new set of rules that will better regulate the entitlement of parties to another party's documents before trial.
5. Parties seeking judicial review of the decisions of public bodies will need to establish "substantial grounds" for the review, which should help reduce the number of speculative claims and avoid delays in the implementation of decisions by such bodies.

The Plan also contemplates the commissioning of an economic analysis of litigation cost control models, but there is no immediate proposal to legislate for litigation funding outside of the insolvency arena, pending the outcome of the Law Reform Commission's examination of the topic, which the Plan sets out as an action point to be achieved by 2024.

Increased investment in Courts Service infrastructure and technology is expected, which will facilitate better access to the courts and remote hearings, which is to be welcomed particularly for international litigation.

Generally, as we exit 2022, courts are operating in a flexible and hybrid manner, with certain proceedings, or applications, being dealt with fully remotely or on a hybrid basis. The default position now is that all witness actions involving oral evidence are listed for physical/in person hearing.

Third party litigation funding – arbitration?

Notwithstanding the pending Law Reform Commission report, Minister McEntee indicated in September 2022 that proposals would be brought forward to introduce third party funding for international arbitration. This is a significant step which is likely to greatly boost the attractiveness of Ireland as a jurisdiction for international commercial arbitration. The Government has, since then, put forward the language around this proposal by way of an amendment to the Courts and Civil Law (Miscellaneous Provisions) Bill which is making its way through the legislative process.

This step, in the context of arbitration, may signal the beginning of an easing of the overall existing prohibition on maintenance and champerty that currently exists under Irish law. This prohibition stems from legislation dating back hundreds of years and has meant that third party funding has effectively been prohibited in Ireland, save for certain limited exceptions.

In September, the European Parliament, in adopting a report by German MEP Axel Voss, called on the European Commission to establish common minimum standards for third party litigation funding at a Union level.

Cross-border litigation and enforcement

This remains an issue. The withdrawal of the UK from the EU, resulting in the cessation of the application of the Brussels Recast Regulation and the Lugano Convention to the UK, has created a vacuum as to the rules that govern English judgments in the EU and vice versa. There remains a stalemate in terms of the re-participation of the UK in the Lugano Convention.

The UK maintains the benefit of the 2005 Hague Convention on Choice of Court Agreements where appropriate, however, this is limited to judgments based on exclusive jurisdiction clauses in favour of a contracting state. On 29 August 2022, Ukraine ratified the Hague Judgments Convention 2019 (the **HJC**) and on the same date, the EU also deposited its instrument of accession, thus triggering the HJC coming into force on 1 September 2023.

The HJC significantly expands the scope of the 2005 Hague Convention and has the potential to substitute the complicated dynamics that emerged post-Brexit with a straightforward mechanism for enforcing English judgments. Should the UK opt to become part of the HJC, this has the potential to provide a longer term solution.

Civil Liability Act

The Court of Appeal delivered judgment in April which provided welcome clarification on disputes involving the Civil Liability Act 1961 (the **CLA**). In *Ulster Bank DAC and Ors v McDonagh and Ors* [2022] IECA 87, the Court of Appeal confirmed that the CLA does not apply to debt recovery cases, as they are not considered actions for "damages". The decision is also of interest due to the Court's consideration of the particular factual matrix presented by the case, namely a valuer who was alleged to have provided a negligent valuation and a borrower who was contractually obliged to repay the debt, before ultimately deciding that they were not concurrent wrongdoers.

As such, the decision provides key commentary on the CLA and the law surrounding concurrent wrongdoers and will be an essential reference point going forward.

Discovery

At the beginning of the year, the Commercial Court provided a note of caution to parties engaging in voluntary discovery, delineating that they must be crystal clear when agreeing terms.

In *Irish Airline Pilots Pension DAC v Mercer* [2022] IEHC 22, Twomey J determined that, in interpreting agreed categories of discovery, the Court would look at the wording agreed and, if it was unambiguous, the reasons originally advanced for the category would not alter the interpretation.

This decision signals an unwillingness by the courts to widen the scope of terms as agreed between parties and sets out clearly the means by which any such disagreement which comes before them will be approached. The case also underscores the central importance of the wording agreed in each category of voluntary discovery.

The Court of Appeal has, this year, proactively looked at decisions of the High Court when it comes to discovery. In *Ryan v Dengrove Designated Activity Company* [2022] IECA 155, Collins J was satisfied that the trial judge had erred in making the discovery order to the extent that it fell outside the range of orders that could have been made by him. The issue arose in respect of an application for discovery whereby the plaintiff's statement of claim was amended after the original discovery order had been made. In overturning the decision of the High Court, the Court of Appeal found that it had not been shown that discovery of the additional material was necessary for the fair disposal of the proceedings.

> *A plaintiff was not entitled to inflict €3m in legal costs on the defendants, which the defendants would never recover, even if they won.*

In *O'Donnell v Michael Ryan & Ors* [2022] IECA 76, the Court was satisfied that the High Court had erroneously refused an application for discovery. Whelan J noted that the High Court had failed in assessing the weight to be attached to the relevance of the documents, as adequate consideration was not given to the relevance of the documentation in the context of pleas which were key issues for determination at the trial of the action.

Security for costs

In *James Street Hotel Ltd v Mullins Investment Ltd & Ors* [2022] IEHC 549, the High Court considered whether a plaintiff with no assets could be entitled to inflict €3m in legal costs on the defendants, which the defendants could never recover, even if they won the litigation. The Court looked to the law applicable to security for costs and ultimately concluded that the plaintiff was not entitled to inflict €3m in legal costs on the defendants. When a corporate plaintiff has no assets, the default rule is that the plaintiff is required to provide security for the costs of the litigation it wishes to pursue.

The Court of Appeal upheld a High Court order directing the appellant to provide two-thirds of the respondent's costs in *Demeray Limited v O'Grady and Ors* [2022] IECA 12. Whelan J dismissed the appellant's contention that the trial judge was incorrect to make a security for costs order in circumstances where, as alleged by the applicant, its inability to pay the costs was caused by the respondents' wrongdoing. The appellant's reliance on the respondent's delay in bringing the application for security for costs was also rejected, as the special circumstances of delay had not been established.

Defamation

The Supreme Court delivered judgment in *Higgins v Irish Aviation Authority* [2022] IESC 13, detailing the sum of damages the plaintiff was entitled to following a series of defamatory emails sent by the defendant. The decision reaffirms the power enjoyed by appellate courts to substitute an award of damages in defamation proceedings with an amount that it deems appropriate. Of note are the four general financial "categories" or "brackets" set out by MacMenamin J to act as parameters or guidelines for awards in defamation. Whilst noting that rigid guidelines cannot be applied in defamation, this judgment offers guidance to juries when assessing the damages to be awarded in such cases.

Complex management company agreements

The Commercial Court sought to shine a light on complex management company agreements (**MCA**) in *Clarion Quay Management Company v Dublin City Council and Anor* [2021] IEHC 811, as Barniville J delivered judgment in respect of the trial of four agreed preliminary issues. In addition to engaging in a thorough discussion of the law on implied terms, the Court also considered the application of the rules of contractual interpretation to a complex MCA that incorporates the *Law Society General Conditions of Sale* (1995 edition).

Significantly, the Commercial Court offered guidance on the interpretation of the Multi-Unit Developments Act 2011 (the **2011 Act**), to include retrospective effect and the exclusive jurisdiction of the Circuit Court to enforce rights conferred by the 2011 Act.

Restructuring and insolvency

The High Court welcomed advanced form proposals in a petition to appoint an examiner in *Mallinckrodt PLC v Companies Act, 2014* [2022] IEHC 157. The decision demonstrates how an Irish court will consider a petition for the appointment of an examiner in circumstances where there has been mass litigation and where a court in another jurisdiction has ruled on the company's prospect of survival. Quinn J confirmed the appointment of the examiner, as he was satisfied that the company was unable to pay its debts, that it had a reasonable prospect of survival as a going concern and that "the formulation of appropriate proposals for a scheme of arrangement" would facilitate that survival.

In a subsequent ruling, *Mallinckrodt PLC v Companies Act, 2014* [2022] IEHC 270, the High Court was satisfied that the examiner's proposals met the test for confirmation pursuant to section 541 of the Companies Act 2014, and that confirmation itself would facilitate the restructuring and survival of the Company and all or part of its undertaking.

On 27 July 2022, the European Union (Preventive Restructuring) Regulations 2022 amended the Irish Companies Act 2014 by transposing certain requirements of Directive (EU) 2019/1023 (the Preventive Restructuring Directive) not already provided for in Irish law. This has resulted in a number of modifications to the examinership regime and, for the first time, a codification of directors' duties when companies are in the 'zone of insolvency'. Aspects of this legislation are considered further in the Corporate chapter of this publication.

LOOKING AHEAD

- The outputs of the Plan reforming the civil justice system will be a key area to monitor. Developments in the area of third party litigation funding seem likely, even if these are initially confined to funding of arbitrations.
- The Collective Redress Directive is to be transposed by the end of 2022 and operational by June 2023.
  - The law will introduce a framework for collective or 'class' actions to be brought by Qualified Entities (**QEs**) where consumers have suffered material loss or adverse consequence for breaches of EU consumer protection legislation.
  - This will be a significant change in Ireland, which at present has no such framework for group claims in place.
  - The General Scheme of the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2022, which will implement the Directive into domestic law, was published earlier this year and is going through the legislation process. The final text of the Irish implementing legislation is not yet settled and rules of court will also be required.
  - The main issue we see is that funding for QEs will be crucial to their success.
- The signing into law in November of the Consumer Rights Act 2022 is significant. At the time of its publication in April 2022, the Minister for State responsible described it as "the biggest overhaul of consumer rights law in 40 years". The Act is extremely wide in scope, in that it transposes a number of EU directives, amends existing consumer protection legislation and provides for enhanced regulatory and enforcement powers, in particular for the Competition and Consumer Protection Commission.
- An increase in tax disputes both domestically, and in cases that involve competing claims by tax authorities in different jurisdictions, seems likely.
- The Hague Judgments Convention will come into force on 1 September 2023 and will establish a set of uniform rules for all contracting States on the recognition and enforcement of foreign judgments. At the moment, this will regulate the relationship between the EU and Ukraine only. Depending on whether the UK and other countries accede to the HJC, it could play a significant role in facilitating mutual enforcement of judgments in the longer term.

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SECTION 09

10 MIN READ

REAL ESTATE

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2022 AT A GLANCE

- Bedding in and continued roll-out of housing provisions enacted in 2021
- Further tightening of controls around the acquisition of houses by investment funds
- New rent review mechanism and notice periods for residential tenancies, to accompany the introduction of tenancies of unlimited duration
- Reform of prescriptive easements regime
- Extension of e-signature legislation to transfers of registered land, with limited practical implications

Acquisition of housing by investment funds

Majority of the Land Development Agency and Affordable Housing provisions commenced

As previously reported, 2021 saw the introduction of two significant pieces of legislation in the area of housing, namely the Land Development Agency Act 2021 and the Affordable Housing Act 2021. 2022 has seen further developments in this context, namely:

- The large-scale commencement of the Land Development Agency Act such that the only provisions remaining to be commenced are those relating to the development of dwellings on relevant public land.
- The commencement of further provisions of the Affordable Housing Act allowing for housing authorities to enter into arrangements with the Land Development Agency for the purposes of making homes available for sale to eligible applicants under affordable dwelling purchase arrangements.

Bulk purchase of residential properties

We reported last year that the Government was in the process of introducing a suite of measures intended to disincentivise the bulk sale of units in housing developments to investment funds. Amongst those measures were changes to both the stamp duty and planning codes. Further changes have been introduced this year as follows.

Stamp duty

On 2 June 2022, the President signed the Finance (Covid-19 and Miscellaneous Provisions) Act 2022 into law. This legislation introduces a further change to the stamp duty treatment of the bulk purchase of residential properties which commenced in May 2021. Provision has now been made for a partial repayment scheme for properties designated as cost-rental dwellings by the Minister for Housing, Local Government and Heritage within six months of their acquisition. Consequently, purchasers of such dwellings will get a refund of the difference between the 10% rate and the normal stamp duty rates (i.e. 1% on the first €1m and 2% thereafter). The intended beneficiaries of this amendment are those involved in the delivery of cost-rental homes at scale, e.g. approved housing bodies, the Land Development Agency and local authorities.

"The LSRD Act provides that housing strategy must now take into account the existing need and the likely future need for housing for purchase.

Owner occupier guarantee

We reported last year that the Government intended to introduce an "owner occupier guarantee" which, to quote the Government's press release, will enable "Local Authorities to designate a specified number of houses and duplexes within a pre-determined range of 0-50% in a development for owner occupiers".

The Planning and Development (Large Scale Residential Developments) Act 2021 (the **LSRD Act**) now provides that housing strategy must take into account the existing need and the likely future need for housing for purchase by intending owner-occupiers, in particular for houses and duplexes. It further obliges the chief executive of every planning authority, whose development plan includes a housing strategy, to make an estimate of the amount of housing for purchase by intending owner-occupiers required in the area of the development plan during the period of the development plan, with the provision that the estimate may state the different requirements for housing for different areas within the area of the development plan.

The LSRD Act also provides that a planning authority "shall include objectives in the development plan in order to secure the implementation of the housing strategy … including objectives requiring that a specified percentage of land zoned solely for residential use, or for a mixture of residential and other uses, be made available for the provision of housing". In other words, the planning authority can require that a specified percentage of land zoned for residential use be made available for housing for purchase by intended owner-occupiers.

Land value sharing bill

The concept of land value sharing forms a key part of the Government's Housing for All plan to increase the supply of housing. The General Scheme of the Land Value Sharing and Urban Development Zones Bill 2021 was approved by Government in December 2021 and the Bill appears as priority legislation in the Government's legislative programme for autumn 2022.

Under the Bill it is proposed that up to 30% of the value of the uplift in land value due to rezoning will be retained by the local authority for use in the delivery of social and physical infrastructure. The value is to be captured by way of a condition in the relevant planning permission and will be calculated by reference to the market value of the land immediately prior to the rezoning, referred to as the current use value.

The Bill also introduces the concept of urban development zones which will comprise significant urban areas that are suitable for redevelopment or regeneration, to include housing. These designations will operate on a similar basis to the existing Strategic Development zones, benefitting from an expedited planning process.

While the Bill is listed as priority legislation, little has progressed since December 2021 and the latest update is that a decision has yet to be made as to whether pre-legislative scrutiny will be required. Consequently it would appear that enactment of the legislation is some way off.

Residential tenancies

The past year has once again seen a number of developments in the context of residential tenancies, as follows:

1. A further change in the manner in which rent changes are to be calculated in rent pressure zones, moving from a model which linked rent increases to the rate of inflation shown by the Harmonised Index of Consumer Prices (**HICP**), to one which caps rent increases at the HICP rate or 2% per annum, whichever is the higher.
2. The introduction of a requirement for landlords to register tenancies with the Residential Tenancies Board (**RTB**) on an annual basis.
3. The introduction of tenancies of unlimited duration, which was a Government commitment under the Housing for All plan. What this means in practice is that, from June 2022:
   - after six months of a tenancy the tenant will have a right to remain in the property for an unlimited duration; and
   - the landlord no longer has a right to terminate on a "no fault" basis every six years.

   New tenancies can now only end where a landlord serves a valid notice relying on the formal termination grounds set out in the legislation (e.g. non-payment of rent, or the landlord intends to sell the property).
4. An increase in the notice periods that landlords must give to tenants in order to terminate tenancies where the tenant has been in occupation for three years or less. Tenancies of less than six months previously required a 28-day notice period which has now more than tripled to 90 days. For tenancies between six

   months and one year, the notice period has risen from 90 days to 152 days. Finally, tenancies between one and three years have a new notice period of 180 days instead of the previous 120.
5. The introduction of a requirement for the landlord to serve a copy of the notice of termination of a Part 4 tenancy on the RTB in all circumstances, not just where the ground for termination is the non-payment of rent. This is accompanied by an associated change whereby tenants now have a 90-day period to apply for dispute resolution with the RTB (increased from 28 days).
6. The introduction of a temporary moratorium on terminations of both residential tenancies and lettings of student accommodation under the Residential Tenancies (Deferment of Termination Dates of Certain Tenancies) Act 2022, which was signed into law by the President on 29 October 2022. The moratorium on terminations applies during what is referred to as the "winter emergency period", running from 30 October 2022 to 31 March 2023. The effect of the legislation is to freeze the notice period under notices of termination served on or prior to 29

October 2022, such that no tenants can be required to vacate a property during the winter emergency period, and in fact certain tenancies are protected until 18 June 2023. These provisions do not apply where the tenant is in breach or the landlord is terminating on the ground that the accommodation no longer suits the tenant's needs having regard to the number of bed spaces and the size of the household.

Easements reform – an update

We reported last year that imminent reform was expected in the context of the acquisition of easements by prescription – that is to say, by long use as of right. The relevant legislation giving effect to these amendments, the Land and Conveyancing Law Reform Act 2021 (the **2021 Act**), became law on 30 November 2021.

By way of recap, the law relating to prescriptive easements changed significantly under the Land and Conveyancing Law Reform Act 2009 (the **2009 Act**). Prior to the 2009 Act, prescriptive rights were usually verified by statutory declarations of long use. The 2009 Act introduced new requirements for these rights to be verified by court order and/or registered with the Property Registration Authority (**PRA**). These changes brought about a number of issues and the requirement for registration of prescriptive easements was generally not operating satisfactorily in practice.

The net effect of the 2021 Act is to return the law applicable to prescriptive easements largely to the law that applied prior to the introduction of the 2009 Act as follows:

- Where the period of user required to establish prescription (the prescription period) was completed before 1 December 2009, the old, pre-2009 Act rules will apply.
- Where the prescription period was completed after 1 December 2009, what is referred to as the "doctrine of lost modern grant" will apply – in other words, the right can be established where there has been continuous user for 20 years and that user is evidenced by way of statutory declaration.

The 2021 Act was introduced by Government on the basis that it was a temporary measure and would be subject to a review of the law of easements more generally. The stated intention of the Minister for Justice was to have this review concluded by summer 2022. This has not happened and we await further clarity on the longer-term future of the law in this area.

E-signatures

Anyone who deals in Irish property will be aware that the requirements around the execution of deeds and documents has changed little in the past 150 years, with so-called 'wet ink' signature still being the required norm. While our neighbours in the UK made great strides in permitting the electronic signature of property transfer documents during the COVID-19 pandemic, we have yet to follow suit in Ireland. This has been due to a combination of legislative restrictions and the practice of the PRA.

2022 saw an initial progressive step in this regard, with the introduction of the Electronic Commerce Act 2000 (Application of sections 12 to 23 to Registered Land) Regulations 2022 (the **Regulations**). The Regulations amend the underlying legislation governing the electronic execution of documents in Ireland to bring the creation and transfer of interests in registered land within scope for the first time.

However, we do not expect to see electronic signatures being used to transfer interests in registered land for some time, due to registration constraints. In its press release following the introduction of the Regulations, the PRA stated that:

"The Electronic Commerce Act 2000 provides that the consent of a public body to the use of an electronic signature is required and, until such time as a system has been developed and implemented, the Authority is not in a position to accept electronic / digital signatures on Land Registry or Registry of Deeds forms. The Authority welcomes the introduction of the legislation which will enable the PRA, together with our stakeholders, to explore the potential for the development of a paperless system of registration."

While this is therefore a welcome change in the law, we expect it will be a number of years before we see any meaningful change in practice which would facilitate the electronic signature of property transfer documents, or indeed a broader e-conveyancing system.

LOOKING AHEAD

Tailte Éireann

The Tailte Éireann Bill was published on 6 September 2022. The Bill is intended to provide for:

- the establishment of a body to be known as Tailte Éireann
- the dissolution of the Property Registration Authority and Ordnance Survey Ireland and the transfer of their functions to Tailte Éireann
- the transfer of the functions of the Commissioner of Valuation to Tailte Éireann

The government's stated position is that, by combining all three bodies, it will optimise the benefits of land information and provide citizens, businesses and policy makers with ease of access to and use of location information including property and title information, property, valuation data, maps and aerial imagery.

The Bill is priority legislation for the government and is therefore expected to become law in a relatively short period of time.

Budget 2023

Budget 2023 introduced some new developments for those involved in the property market to keep an eye on, as follows:

Vacant Homes Tax

A new Vacant Homes Tax is to be introduced in 2023. This will be self-assessed and administered by Revenue. The government states that the purpose of this measure is to increase the supply of homes, rather than to raise revenue.

The tax will apply to long-term vacant residential property. A property will be considered vacant if it is occupied for less than 30 days in a 12-month period.

The tax will be charged at a rate equal to three times the property's existing base Local Property Tax liability.

There will be a number of exemptions to ensure property owners are not unfairly charged for temporary periods of vacancy with genuine reasons. These will include properties:

- recently sold or currently listed for sale or rent
- vacant due to the occupier's illness or long-term care
- vacant as a result of significant refurbishment work

Concrete levy

The government also intends to charge a levy on concrete blocks and pouring concrete in order to offset the cost of the redress scheme agreed earlier this year for homeowners who have been affected by the issue of defective products used in the building of their properties.

The levy will be applied from September 2023 at a rate of 5%.

Review of IREFs and REITs

The Minister for Finance announced in his budget day speech that he was "*committing to commencing a review of the REIT and IREF regimes. Institutional investment has played a key role in the provision of housing in recent years. This review will consider those structures and how best they can continue to support housing policy objectives.*"

It is currently unclear how and when this review will be carried out.

FDI Bill

Finally, it is important to acknowledge that the Screening of Third Country Transactions Bill 2022 has, in its current form, the potential to be of relevance to real estate transactions. This is due to the extremely broad definition of what constitutes a notifiable transaction and the low transaction threshold of €2m. Where transactions are in scope it will trigger a compulsory notification to, and the requirement for pre-completion clearance from, the Minister for Enterprise, Trade and Employment. See the Corporate chapter for further information on this proposed legislation.

SECTION 10

8 MIN READ

ESG
– as easy as 1, 2, 3?

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Amid the continuing climate emergency there has been an understandable tendency for corporates, regulators and stakeholders generally to focus on the 'E' in ESG, but recent developments demonstrate that the 'S' and the 'G' are coming into sharp focus as well. Regulatory momentum in connection with ESG matters (for example the incoming EU initiatives discussed in more detail below) is pushing ESG up the agenda for many clients, and this focus is timely.

The time for corporates to get their arms around their ESG data and metrics is now to allow them to shape their corporate strategic planning around sustainability matters. We believe that corporates who are able to internalise ESG considerations and articulate their ESG journey convincingly will have an opportunity to outshine their peers and be at the forefront of positive change as businesses everywhere seek to become increasingly sustainable in the medium to long term.

Background

In his opening remarks to the United Nation's Climate Change Conference 2022 (**COP27**), which, at time of writing, had recently concluded in Sharm El-Sheikh, Secretary-General of the UN António Guterres warned that "our planet is fast approaching tipping points that will make *climate chaos* irreversible" (emphasis added). Timed to coincide with COP27, the World Meteorological Organisation published its report on the global climate, noting that the years 2015-2022 are likely to be the eight hottest years since records began.

Recent geopolitical events (including the global COVID-19 pandemic and the war in Ukraine) have highlighted an ongoing difficulty with effectively prioritising what Guterres called "the defining issue of our age" – halting human-induced climate change. Unless the world is able to achieve global net zero emissions by 2050, Guterres noted, it will be impossible to keep global warming to below the 1.5°C upper limit, which was the subject of the Paris Agreement and reiterated at COP26 in Glasgow in 2021. Failure to do so could have catastrophic effects for us all.

Against this backdrop, the importance that must be given to climate related matters is clear. Climate change has been a priority in Europe for some time. The European Commission's European Green Deal (the **Green Deal**), announced in December 2019, is a framework intended to ensure that Europe reaches this goal of climate neutrality by 2050 and to help improve the quality of life for its citizens through cleaner air, water and the protection of the natural world. Inevitably, the transition to carbon neutrality requires innovation and change, likely to come at a cost. It is widely accepted that the global finance industry has a powerful opportunity to bridge the funding gap by directing capital towards a more sustainable, resilient and circular economy.

Accepting this fact, the EU's Action Plan on Sustainable Finance (the **Action Plan**) seeks to reorient capital flows towards sustainable investment, to mainstream sustainability into risk management, and to foster transparency and long-termism in financial and economic activity. This has led to legislation that is already with us in the form of the Non-Financial Reporting Directive (**NFRD**), the EU Taxonomy Regulation (**Taxonomy**) and the Sustainable Finance Disclosures Regulation (**SFDR**).

This article will not deal with these existing examples of legislation in detail. In brief, however:

- The NFRD requires large publicly listed companies to make non-financial disclosures regarding their activities.
- Taxonomy established a unified classification system on what can be considered environmentally sustainable economic activities. It is an important body of work underpinning much of the European approach and is already having far reaching consequences for European and Irish business sectors and firms.
- SFDR has already had an impact on disclosures made by EU-regulated financial services firms in and firms who distribute their products into the EU. This has, and will continue to be, a significant product, governance, risk and compliance issue and, for example, will have ongoing product classification and disclosure implications for the Irish asset management and investment funds industry.

Two recent key European initiatives delivered under this Action Plan clearly demonstrate that European regulators are seeking to grapple with S and G factors as well as the purely environmental.

Corporate Sustainability Reporting Directive

In April 2021, the European Commission published its proposal for a directive on corporate sustainability reporting (the **Reporting Directive**). The proposal builds on the existing disclosures required under the NFRD and extends (i) the scope of the information currently required to be reported under the NFRD, and (ii) the companies to which the disclosure regime applies (it is estimated that as many as 50,000 companies will be required to report under the CSRD instead of the approximately 11,600 currently reporting under NFRD).

One of the key elements of the proposal is the creation of mandatory European sustainability reporting standards (**ESRS**) against which in-scope companies will be required to report. The European Financial Reporting Advisory Group (**EFRAG**) has been tasked with preparing these standards. In April 2022, EFRAG launched a consultation on the exposure drafts for the first set of sector-agnostic ESRS featuring 13 documents setting out standards relating to E, S and G matters. A second set of standards covering sector specific disclosure requirements and separate standards for in-scope SMEs are being prepared and are due to be consulted upon in 2023. The first set of ESRS are due to be submitted by EFRAG to the European Commission in November 2022. (**Editor's note:** These ESRS were published just as this Report went to print and will be covered in a separate publication.)

The Reporting Directive will require reporting in a staggered way. Large public companies will be required to report as early as 2025 (covering the previous financial year), with other large companies (whether listed or not) required to report by 2026. Listed SMEs (excluding micro-enterprises) will be required to report from 2027, and non-EU entities with significant activities in the EU will have to report by 2029.

The Reporting Directive incorporates the EU's principle of 'double materiality' disclosure. This means that companies reporting against the ESG heads will be required to report against various items on both sustainability risks to reporting companies, as well as on the impacts the reporting companies activities themselves have on the environment and society.

The Reporting Directive will require information being reported to be verified by an independent third party such as an accredited independent auditor or certifier. This verification may initially be provided on a limited assurance basis, but eventually the standard required will be a reasonable assurance basis. Sanctions, intended to be "effective, proportionate and dissuasive" will apply, and these may include criminal sanctions where member states so decide.

At time of writing, the Reporting Directive is completing its passage through the EU legislative process. As a directive, it will then require transposition into national law, with initial reporting expected to be required on the timelines discussed above.

The key challenge that the Reporting Directive presents to corporates now is the need to assess the incoming reporting standards and to understand how they will collect and analyse the relevant data required from their own operations to report on a timely basis. Under many heads of reporting a relatively significant degree of interpretation is required. This presents opportunities for companies to ensure data being reported tells the story well (while ensuring it is accurate). However, we anticipate that this process will require significant resourcing and leadership – it will not be enough to simply crunch the data. In other words, ESG reporting won't be as easy as 1, 2, 3.

For more information on the Reporting Directive see our website.

Corporate Sustainability Due Diligence Directive

In February of this year, a separate but related proposal was adopted by the European Commission for a directive on corporate sustainability due diligence (the **Diligence Directive**), which will bolster the Reporting Directive. The main aim of this proposal is to require companies to conduct due diligence on the human rights and environmental impacts of their operations and, importantly, of their entire value chain, and to take steps to mitigate and bring to an end adverse impacts. However, there are also additional requirements for certain large entities to adopt a plan and execute strategies to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. These matters, including progress against such plans, will also be required to be disclosed in annual reporting.

The Diligence Directive also proposes that the exercise by directors of their fiduciary duty to act in the best interests of the company will be explicitly expanded to require consideration of human rights and sustainability factors, and that a breach of these obligations will be a breach of fiduciary duties under national laws. This will likely expand the directors' duty of care under the laws of EU Member States (to the extent that such duty to act in the best interests of the company does not already encompass sustainability matters).

Some companies will already be factoring these matters into their decision-making processes, but we anticipate that for many, such considerations will be entirely novel. Whether the introduction of this fiduciary duty requirement will necessitate a change in the law in Ireland is not yet clear.

Sanctions for breach of the Diligence Directive are likely to include administrative penalties and civil liability, not to mention the reputational damage that will attach to breaching companies and individuals.

As with the Reporting Directive, the requirements of the Diligence Directive are intended to be introduced in phases, with larger entities (referred to in the proposal as 'Group 1' entities) having to comply as early as mid-2026 if the legislative process continues as expected.

Again, the Diligence Directive will require significant resourcing and planning by in-scope corporates. There are practical steps that such entities should be taking now. These include high level reviews of existing policies, systems and procedures set up to identify the impacts of operations on human rights and environmental factors, as well as a review of value chain contracts to consider what mechanisms may be used or may be required to monitor against the required impacts.

For more information on the Diligence Directive see our website.

Headwinds

It must be acknowledged that despite best intentions, the complications inherent in dealing with the entrenched and sensitive issues that fall within ESG mean that enacting these measures is not all plain sailing. An example of the difficulties that arise is the recent controversy (and indeed legal action) in respect of the EU's decision to include nuclear and gas power in green investment categories within its green Taxonomy. This contretemps has led to a knock-on decision to delay the introduction of a social taxonomy tool to classify economic activities that contribute to the EU's social goals (such as improved living standards, cost of living wages and anti-bribery and corruption measures).

On a positive note, however, this focus on broader social initiatives in the EU is gaining traction in domestic legislation that echoes this focus on sustainability in a broader sense. While this is dealt with in more detail elsewhere in this report, local legislation in Ireland like the Gender Pay Gap Reporting Act 2021 demonstrates an engagement with social factors.

> *"The focus on broader social initiatives in the EU is gaining traction in domestic legislation that echoes the focus on sustainability in a broader sense.*

LOOKING AHEAD

In the coming months the ESRS will be finalised and companies will begin reporting under the Reporting Directive. Being in a position to report on a timely basis will require significant resources for affected entities. As the Diligence Directive continues its passage through the legislative process, its implications will become clearer, but again we anticipate that significant investment of funds, people and time will be required in order to comply.

The initiatives discussed in this article are the vanguard and we expect that more legislation is coming. The EU has initiated proposals on additional topics such as board gender diversity, bans on products resulting from forced labour and on products resulting from or implicated in deforestation. It is therefore true to say that the momentum for regulatory intervention in the field of ESG related matters continues to gather pace and this is a trend that we think is likely to continue for the foreseeable future. As the legislation develops, the opportunities for greenwashing claims, and for sustainability-based litigation will correspondingly develop, so we do anticipate claims of this nature increasing in the medium term.

The breadth of the current proposals and the pace of change mean that the time for corporates to engage with ESG is now – businesses big and small will have to consider the materiality of ESG to their operations and ensure that they are in a position to act accordingly.

A&L Goodbody

SECTION 11

10 MIN READ

DATA PROTECTION

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2022 AT A GLANCE

- A record GDPR fine of €405m was imposed on Meta Platforms by Ireland's Data Protection Commission relating to Instagram and a further fine of €17m relating to personal data breaches
- Data subject access requests continue as the largest category of complaints
- Guidance on the GDPR right of access has been received from the European Data Protection Board and the Data Protection Commission
- There have been further developments with regards to international transfers of personal data
- The European Court of Justice has considered cases concerning special category data and non-material damages for GDPR violations

International data transfers, the protection of children online, the right of access, data security breaches and record GDPR fines were some of the main data protection issues in 2022. Headline fines included a hefty €405m fine imposed by the Data Protection Commission (**DPC**) on Meta Platforms (**Meta**) concerning Instagram for breaches under the GDPR in relation to children's data and a €17m fine on Meta for data breaches.

There have also been a number of important developments at an international level, such as the signing by President Biden of an Executive Order implementing the commitments made by the US under the Trans-Atlantic Data Privacy Framework (announced in March 2022), which aims to facilitate transfers of personal data from the EU to the US.

DPC regulatory activity

The DPC's Annual Report (the **Report**) for 2021 (published in Q1 of 2022) reviews the span of regulatory work completed by the DPC, and reveals some interesting trends and statistics. It highlights that the DPC received 6,616 data breach notifications, led on 33 applications for approval of binding corporate rules, and progressed 81 statutory inquiries during 2021.

Data subject access requests

The DPC will continue to target enforcement actions aimed at driving necessary improvements to data controllers' responses to data subject access requests (**DSARs**). The DPC is concerned that there is a pattern of data controllers not responding to DSARs and/or not responding to complaint commencement correspondence by the DPC.

Data breaches

The most frequent cause of data breaches reported to the DPC was unauthorised disclosure. The ten organisations with the highest number of breach notifications recorded against them are public sector bodies and banks, with insurance companies coming within the top 20.

In a change of approach to data breach notifications, the DPC announced that it will acknowledge receipt of each notification, but will no longer offer guidance to a controller when a breach arises. Instead, the DPC will focus on prioritising enforcement cases.

DSARs continue as the largest category of DPC complaints, followed by:

- fair processing
- unauthorised disclosure
- direct marketing
- the right to be forgotten

The DPC continues to encourage the amicable resolution of complaints.

DPC enforcement activity

As of 31 December 2021, the DPC had 81 statutory inquiries open, including 30 cross-border inquiries. Ten of these cross-border inquiries relate to Meta.

The Report highlights that in 2021, the DPC imposed significant sanctions or corrective measures against the Irish Credit Bureau DAC, WhatsApp Ireland Limited, MOVE Ireland, the Teaching Council of Ireland and Limerick City and County Council.

On 15 September 2022, the DPC issued its final decision and imposed a €405m fine on Meta following its inquiry into Instagram. The inquiry focused on the public disclosure of email addresses and/or phone numbers of children using the Instagram business account feature and a public-by-default setting for the personal Instagram accounts of children. The decision noted the relevance of Recital 38 to the GDPR to the processing in question, which provides that children merit specific protection with regard to their personal data.

The fine is the largest imposed to date by the DPC and highlights that child protection issues are high up on the DPC's agenda. This decision has implications for all businesses relevant to children, as it emphasises that additional caution should be used when dealing with children's data. It also communicates the DPC's expectation that businesses adopt a 'privacy-first' stance as the default from the outset of data processing practices.

In its fining of Meta in March 2022 for data breaches, the DPC held that Meta failed to have in place appropriate technical and organisational measures which would enable it to readily demonstrate the security measures that it implemented in practice to protect EU users' data, in the context of 12 personal data breaches.

Upcoming legislation

The Report considers new data regulation regimes at EU level, including the pending Directive on measures for a high common level of cybersecurity (the NIS2 Directive), which is likely to be enacted before the end of 2022, the ePrivacy Regulation, the Artificial Intelligence Act and the Data Governance Act.

There are also substantive changes in the pipeline from the European Commission regarding a new anti-money laundering regulation and guidance will be needed for all affected entities to ensure GDPR compliance. The DPC has raised these issues with the Department of Finance, the Central Bank of Ireland and the Revenue Commissioners.

Non-material damages for GDPR violations

On 6 October 2022, the Advocate General (the **AG**) of the Court of Justice of the EU (the **CJEU**) issued an opinion relating to the right to compensation under the GDPR in *UI v Österreichische Post AG* (Case C-300/21).

The Austrian Supreme Court sought the ruling of the CJEU on whether compensation under the GDPR is intended for consequences that go beyond “annoyance or upset”.

The AG concluded that:

- Mere infringement of the GDPR (without resulting material or non-material damage) should not entitle a claimant to compensation under the GDPR.
- Compensation for non-material damage requires a claimant to demonstrate more than “mere upset”.

It will be interesting to see if the CJEU follows the approach of the AG here.

CJEU decision on special category data

The CJEU recently delivered a significant judgment in *OT v Vyriausioji tarnybinės etikos komisija* (Case 184/20) relating to the processing of special category data (**SCD**). The case concerned a provision of Lithuanian national law, which required certain individuals working in the public service to declare (amongst other things) the name of their spouse, cohabitee or partner. Under the relevant national law, this information was then published on the website of the public authority responsible for collecting the data.

The CJEU held that the publication of details relating to an individual's spouse on the public authority’s website was liable to indirectly disclose the sexual orientation of a natural person. In coming to this decision, the CJEU concluded that data which was capable of revealing the sexual orientation of a natural person “by means of an intellectual operation involving comparison or deduction” was in fact SCD.

This judgment will broaden the situations in which a controller can be said to be processing SCD and may require certain organisations to re-assess their approach to such processing.

International data transfers

2022 saw further activity in regard to international transfers of personal data.

Update on SCCs, US developments and Privacy Shield 2.0

Organisations will be aware that any existing reliance on the European Commission's previous standard contractual clauses (**SCCs**) in existing contractual arrangements must come to an end by 27 December 2022. From this point on they will no longer be valid for international transfers under the GDPR. Companies intending to rely on the SCCs for transfers from that point on should execute the relevant module of the Commission's 'new' SCCs (which have been available for use since 27 June 2021). Data controllers may need to expedite plans to do that rectification exercise in order to meet the December deadline.

On 7 October 2022, President Biden signed an Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities in order to implement the Trans-Atlantic Data Privacy Framework (the **Framework**). The Framework, intended to form the basis of a European Commission-US "Privacy Shield 2.0", was announced in March 2022. The Framework aims to provide improved protections for personal data transferred from the EU to the US, after two previous EU-US data transfer frameworks – Safe Harbour and Privacy Shield - were invalidated by the CJEU following actions by the privacy campaigner Max Schrems (the CJEU identified deficiencies in both data transfer frameworks).

> *"The DPC strongly recommends that controllers should respond to DSARs within 15 working days.*

The main features of the Framework include the establishment of a two-tier redress system, enabling EU citizens to challenge access by US intelligence authorities to EU personal data, and improved oversight of surveillance activities. On the basis of the Executive Order, the Commission will now prepare a draft adequacy decision, as well as launch its adoption procedure.

New guidelines 2022-23

EDPB draft guidelines on the right of access

On 18 January 2022, the European Data Protection Board (the **EDPB**) published draft guidelines on the right of access. Some of the most significant aspects of the draft guidelines include the following:

- For identity verification of a data subject, official ID should generally not be requested unless the data controller is under a legal obligation to request it. Unnecessary processing of such documents, for example storing copies, should be avoided.
- Controllers should provide tailored information about the processing of their personal data to data subjects, rather than simply providing them with a copy of the controller's privacy notice.
- Guidance is given on when a data controller seeks to extend the deadline to respond to a DSAR by two months, taking into account the complexity and number of the requests.
- The right of access is without general reservation "to proportionality with regard to the efforts the controller has to take to comply with the data subject's request". If adopted in the final version of the guidelines, this would represent an onerous obligation on data controllers and appears to be a departure from the position previously accepted by the DPC (i.e. where controllers were generally expected to take reasonable and proportionate steps to identify personal data).
- In respect of "manifestly unfounded" or "excessive" requests, which are the subject of a limitation under Article 12(5) GDPR, the guidelines state that there is limited scope for data controllers to rely on this. Where it is possible to provide personal data to a data subject easily by electronic means or by remote access to a secure system, such that complying with a request doesn't "strain" the controller, the EDPB's view is that it is unlikely that subsequent requests can be regarded as excessive (except if a request overlaps with a previous request).

Public consultation on the draft guidelines concluded in March 2022 and the extent to which any changes from the draft version will be implemented in the final iteration remains to be seen.

DPC guidance on subject access requests

On 10 October 2022, the DPC published guidance setting out its expectations regarding the procedures that should be adopted by data controllers when addressing DSARs (which echo some of the standards contained in the EDPB draft guidelines):

- The DPC strongly recommends that controllers should respond to DSARs within "15 working days" or as soon as

possible. Controllers may only extend the timeframe for responding to DSARs by two months where it is necessary and "in the event of complex or multiple requests". The clock for complying with the relevant time limit begins from the day the request is received by the controller, regardless if the DSAR is sent to the wrong department.

- Acknowledging receipt of a DSAR is a recommended practice, allowing the controller and the requester to identify the date from which the clock starts for responding to the request in time.
- Data subjects are not obliged to respond to a controller's request to specify the scope of a DSAR – a controller must still comply with the request even if the data subject does not respond to its request for clarification.
- Controllers should not be tempted to simply “copy and paste” the information provided in its organisation's privacy notice – the information should be adapted to information relevant to the specific case at issue.
- Controllers are not obliged to conduct searches which go beyond what is reasonable in terms of time and money, taking into account the circumstances of the case (this appears in contrast to the EDPB position outlined above).
- Controllers should not request any additional verification information from the requester unless the controller has a reasonable doubt in relation to the requester's identity. If the controller has a reasonable doubt, verification should not exceed what is necessary to confirm the requester's identity.

EDPB guidelines on the calculation of administrative fines

On 12 May 2022, the EDPB published new draft guidelines with the aim of harmonising the methodology that Data Protection Authorities (**DPAs**) use when calculating and imposing fines for violations of the GDPR.

In establishing the grounds for a fine, the guidelines set out the three elements to be considered:

1. the categorisation of the infringement by nature
2. the seriousness of the infringement
3. the turnover of the infringing business

Once established, the fine is calculated using a five-step method introduced by the guidelines:

1. Identify the processing operations in the case and evaluate the application of Article 88(3) GDPR.
2. Identify whether the infringement is punishable by (i) Article 83(4) (€10m or 2% of annual turnover), or (ii) Article 83(5)-(6) (€20m or 4% of annual turnover).
3. Evaluate aggravating or mitigating factors related to past and present behaviour of the controller or processor, and comply with the legal maximum which can be fined under Article 83 (4)-(6) GDPR.
4. Identify the legal maximum for the infringement(s) and corporate liability.
5. Assess the effectiveness, proportionality and dissuasiveness of the fine.

A final version of the guidelines is awaited. We will continue to monitor the progress of the guidelines and their implementation by supervisory authorities over the coming months.

LOOKING AHEAD

- In December 2021 the DPC published its Regulatory Strategy 2022-2027, setting out its strategic roadmap over the course of the next five years. The DPC will focus on five strategic goals:
  - » regulating consistently and effectively
  - » safeguarding individuals and promoting data protection awareness
  - » prioritising the protection of children and other vulnerable groups
  - » bringing clarity to stakeholders
  - » supporting organisations and driving compliance
- The DPC intends to increase its enforcement in respect of data controllers not responding to DSARs and/or not responding to complaint commencement correspondence by the DPC, and will target non-responses and inadequate responses from data controllers.
- The signing of the Executive Order has brought the Framework one step closer to implementation. The European Commission must submit a draft adequacy decision to the EDPB for review, and then have a final adequacy decision approved by EU Member States. The EU adoption process could take up to six months, meaning that the Framework may not be finalised until mid-2023.
- In the meantime, data exporters should continue with the contractual "re-papering exercise" required to implement the European Commission's 2021 SCCs to meet the deadline of 27 December 2022.
- In 2022, the DPC's budget increased to €23.2m with a further increase of €26m promised in 2023. This was accompanied by a decision to appoint two further commissioners. In line with the DPC's increased funding and expanding staff levels, we can therefore expect to see increasing levels of inquiries and enforcement actions being taken in 2023.
- Draft decisions were issued by the DPC in 2022 in respect of Meta, Yahoo, and TikTok. On 7 July, the DPC sent a draft decision to other EU DPAs, proposing to halt Meta's transfers of personal data from the EU to the US. The final decision, in conjunction with the progression of the Framework, could have a significant impact on data transfers from the EU to the US.

There is no doubt that data protection issues will continue to dominate the headlines as 2022 closes and 2023 begins, and the DPC – as lead supervisory authority for some of the world's principal technology companies – will continue to play a leading role in regulating GDPR compliance.

A&L Goodbody

SECTION 12

9 MIN READ

EU, COMPETITION AND FOREIGN DIRECT INVESTMENT:

11 takeaways for business leaders

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What are the key takeaways for business leaders and executives in terms of on-going developments in the areas of competition, merger control, State aid and foreign investment controls?

Drawing on a busy year of casework and research, this briefing provides 11 key takeaways that everyone doing business in Ireland should know:

1. The business world is becoming less 'open' and more 'protectionist' and 'regional' in nature: 'Europeanisation' is underway.
2. Regulatory dawn raids being conducted on homes and not just offices are a fact of life due to hybrid working.
3. M&A and joint venture deals below the statutory deal threshold may still be subject to Irish competition scrutiny.
4. M&A and joint venture deals below the published EU thresholds may be subject to EU scrutiny.
5. Gun-jumping in M&A/joint venture deals is going to be a bigger battleground for regulatory intervention.
6. Ireland's Competition and Consumer Protection Commission (CCPC) will impose penalties, but it may not be plain sailing for the CCPC.
7. Merger review by the CCPC is now often taking longer.
8. State aid rules are simultaneously tough and flexible.
9. Foreign (i.e. non-EU) subsidies will be scrutinised by the European Commission.
10. Businesses need to be careful how they react to inflation.
11. Directors of competing or connected companies should be wary of sharing information or strategy.

1. The world is becoming less 'open' and more 'protectionist' and 'regional'

Starting in the 1980s, the business world internationally became more open. Quotas, embargoes, currency exchange controls and other barriers to trade started to fall away. 'Globalisation' was the label to encapsulate the work done by the World Trade Organisation, the European Union, the United States and others.

We are now in an era of regionalisation and even growing nationalistic protectionism.

The EU has firmly started a process of 'Europeanisation'. Yes, an Irish airline (provided it is majority owned and effectively managed by EU interests) can become the largest airline in Europe and fly anywhere in the EU, but the rules remain very much European. And those European rules are becoming even more prevalent globally. EU legislation such as the Foreign Subsidies Regulation, Foreign Direct Investment Regulation, General Data Protection Regulation (**GDPR**) and the European Competition Network Plus Directive all epitomise the Europeanisation of business. For example, in practical terms, the GDPR sets standards for many *outside* the EU and the same will probably happen with the new Digital Services Act and Digital Markets Act. These are not global measures, they are decidedly European or regional and this is the sign of what is to come.

The other straw in the wind is the re-nationalisation (rather than the globalisation) of regulation. Countries such as the UK have chosen a nationalistic path. The UK's National Security and Investment Act 2021 and Economic Crime (Transparency and Enforcement) Act 2022 are two examples. They are justified on the basis of the need for national security, but it is more complicated than that – they will apply to the innocent as well as the guilty or the suspicious.

Curiously, the UK's room for manoeuvre to enact independent legislation is, in practical terms, somewhat limited because of the reach of the EU's legislation in all the markets which surround the UK. Nonetheless, we will see this trend towards nationalistic regulation continuing both in the UK and around the world. Ironically, while Ireland is likely to soon enact its Screening of Third Country Transactions Bill 2022, it is unlikely that Ireland (being so keen on foreign direct investment) will be unrealistic or unreasonably difficult in applying the new regime.

2. Regulatory dawn raids being conducted on homes and not just offices

Going from the global to the very local – regulatory dawn raids being conducted on homes, as well as offices, is now a fact of life due to hybrid working.

Responsible businesses have long had dawn raid procedures to deal with regulatory dawn raids on *offices*. General Counsel and CEOs have a drill on what their business should do when there is an unannounced inspection by the likes of the competition agencies. With more people working from home, we now have to ensure that employers also have dawn raid procedures for homes. This procedure needs to cover the 'hybrid' inspection where there is a simultaneous dawn raid or inspection on the office and on the home. These are not easy situations, but ALG's EU, Competition & Procurement group has been devising a plan and process on how best to deal with such inspections using technology and working within the confines of EU and Irish legislation. It is likely that there will be an increase in hybrid dawn raids in the future, otherwise regulators could be leaving evidence 'on the table'.

3. M&A deals below statutory thresholds may be subject to Irish competition scrutiny

Businesses know that mergers, acquisitions and certain joint ventures involving businesses which have turnovers above certain statutory thresholds must notify their deals under Part 3 of the Competition Act 2002 (the **2002 Act**) and await clearance by the CCPC. All deals in the "media" sector (as defined in Irish law) must be notified under Part 3A of the 2002 Act irrespective of the turnovers of the parties. This system works reasonably well. The rule was simple and predictable: deals involving turnovers above the thresholds were notifiable; deals involving turnovers below the thresholds did not have to be notified. One was always mindful of the possibility of a below-threshold deal which should be notified voluntarily, but such deals were rare.

The Competition (Amendment) Act 2022 (the **2022 Act**), which has not yet commenced, has changed that simplicity and predictability. The thresholds remain, but it is now much more likely that even smaller deals could be called in by the CCPC to see if the transaction is likely to "substantially lessen competition".

So those planning deals – even small deals – need to factor in the possibility of a CCPC review and build that in to the timetable. Otherwise, any attempt to implement an unapproved deal is 'gun-jumping', which is going to be punished even more severely under the 2022 Act.

4. M&A and joint venture deals below EU thresholds may be subject to EU scrutiny

A similar phenomenon is occurring at the EU level with the European Commission. This is clear from the prohibition by the Commission on 6 September 2022 of the proposed acquisition of GRAIL by Illumina. The proposed transaction did not meet the turnover thresholds in the EU Merger Regulation, so the parties did not notify the European Commission. It did not even have to be notified in a single EU Member State. Nonetheless, the Commission believed it could review it under the Merger Regulation. The Commission was emboldened in its approach by a judgment of the General Court on 13 July 2022, which endorsed this approach (Case T-227/21 *Illumina Inc v European Commission*). This judgment is now on appeal to the Court of Justice so watch this space. As things currently stand, deals below EU and even Member State thresholds could be scrutinised carefully by the Commission and even blocked.

5. Gun-jumping in M&A/joint venture deals: greater regulatory intervention

Ireland's CCPC will have more powers under the 2022 Act to enforce the rule that businesses should not implement or "put into effect" a deal which has not been cleared by, or notified to, the CCPC – the 'gun-jumping rule'. While there have been some cases in the past and even some convictions, this is a priority area for the CCPC and we expect to see more cases.

6. Ireland's CCPC to impose penalties

The CCPC has been given powers under the 2022 Act to impose civil penalties in certain circumstances. The CCPC (like some other competition agencies around the world) was somewhat of an outlier in not having the power to impose fines for breaches of competition law (as, for example, the Commission and the UK's Competition and Markets Authority may do already). An extraordinarily complicated and complex system has been created in the 2022 Act to enable the CCPC to impose such penalties in certain circumstances.

Such penalties will probably be imposed, but it is very likely that some of them will be appealed to the courts and it is far from certain that some of those penalties (particularly those setting high levels of penalty) will be upheld by the courts. Clearly, those penalties which should be upheld will be, but the CCPC will need to tread carefully in this new area. This is an area to watch with great interest.

7. Merger review by the CCPC is now often taking longer

While some deals are notified, reviewed and cleared quite quickly, it is notable over the last year or two that some deals (even simpler ones) have taken longer to review. This causes difficulties for those involved. Some businesses might even be tempted to give concessions where they are not needed just to get the deal closed rather than risk losing the deal because the agreements contain 'drop dead' dates by which the deal has to be done or the parties could walk away. The key takeaway for businesses is that they should factor in more time than was historically needed to deal with the CCPC clearance process.

8. State aid rules are simultaneously tough and flexible

Businesses receiving illegal State aid from any EU Member State know that they may have to repay the aid (with interest) to the Member State which provided the aid if the aid is illegal. A dramatic example of this was when the Commission ordered Ireland to recover billions of euro from Apple. That decision has been challenged successfully in the EU's General Court, but there is an appeal pending before the Court of Justice. Equally, during the financial crisis, banks across the EU learned about the toughness of EU State aid law as banks were forced to sell businesses, close lending lines and lay off staff.

But one of the lessons of the last few years – particularly during COVID-19 and the Ukraine invasion – is that the Commission has been willing to loosen the State aid rules, on occasion, to deal with crises – perhaps even too loosely on occasion. Moreover, we have learned from the jurisprudence of the General Court that the Commission has been given a great deal of discretion on State aid matters, so it is very likely that the Commission will still take a tough stance in the 'peacetime' of stability, but be flexible in the 'wartime' of crises.

9. Foreign subsidies will be scrutinised by the EU

The provision of aid by EU Member States is already supervised carefully by the Commission, but the European Commission is fast-becoming not only the global standard-setter but also inspector-in-chief of aid by various countries (including the EU). The Regulation on foreign subsidies distorting the internal market will allow a *European* body (the Commission) to scrutinise aid and assistance from third countries (e.g. the UK, the US, China, Australia, Canada and Japan). The Regulation is expected to apply from the second half of 2023. The Europeanisation effect continues!

10. Businesses need to be careful how they react to inflation

Inflation is a reality. From a competition law perspective, business leaders need to be careful how they react to it. Reacting individually usually raises no competition law problems unless one is in a dominant position and the reaction is an abuse of that dominant position. However, reacting collectively is very likely to amount to a breach of competition law. Any collective boycott would be seriously problematic. Indeed, talk of a boycott might well attract scrutiny and attention from competition agencies. Sometimes during such crises as inflation (e.g. when the price of a particular product is rising), competition agencies have to be seen to react and they often take decisive action (e.g. dawn raids, summons seeking information, investigations, etc.) even if nothing eventually emerges. So, react to inflation carefully, unilaterally and in a thoughtful manner, being mindful of competition law compliance.

11. Directors of competing or connected companies should be wary

US antitrust and competition agencies are looking more closely at so-called 'interlocking directorships'. In October 2022, the US Department of Justice's Antitrust Division announced that seven directors from five companies resigned because of concerns that their roles as interlocking directors violated the prohibition in section 8 of the US Clayton Act.

Ireland does not have a comparable statutory provision, but section 4 of the 2002 Act could potentially be used to deal with any anti-competitive arrangement where there is an anti-competitive arrangement, decision or concerted practice involving two or more businesses. For example, a director of a company who is also a director of a competing company, a supplier or a customer or, indeed, a trade association involving competitors, ought to be careful that their interconnectivity does not lead to the exchange of competitively sensitive information in the context of an anti-competitive arrangement or practice. Executives in private equity and the tech sector are most likely to be affected, but it is relevant to all sectors.

CONCLUSION

Overall, the world is not getting easier for business leaders. The processes of simplification and globalisation are in reverse – perhaps it is a temporary reversal, but it is real. The rules are becoming more opaque, uncertain and unpredictable. The remit of those rules is becoming more regional, and even nationalistic, and certainly less global. And existing rules are being applied in new and challenging ways.

A&L Goodbody

SECTION 13

10 MIN READ

CLIMATE LITIGATION What does it mean for Ireland?

Alison Fanagan
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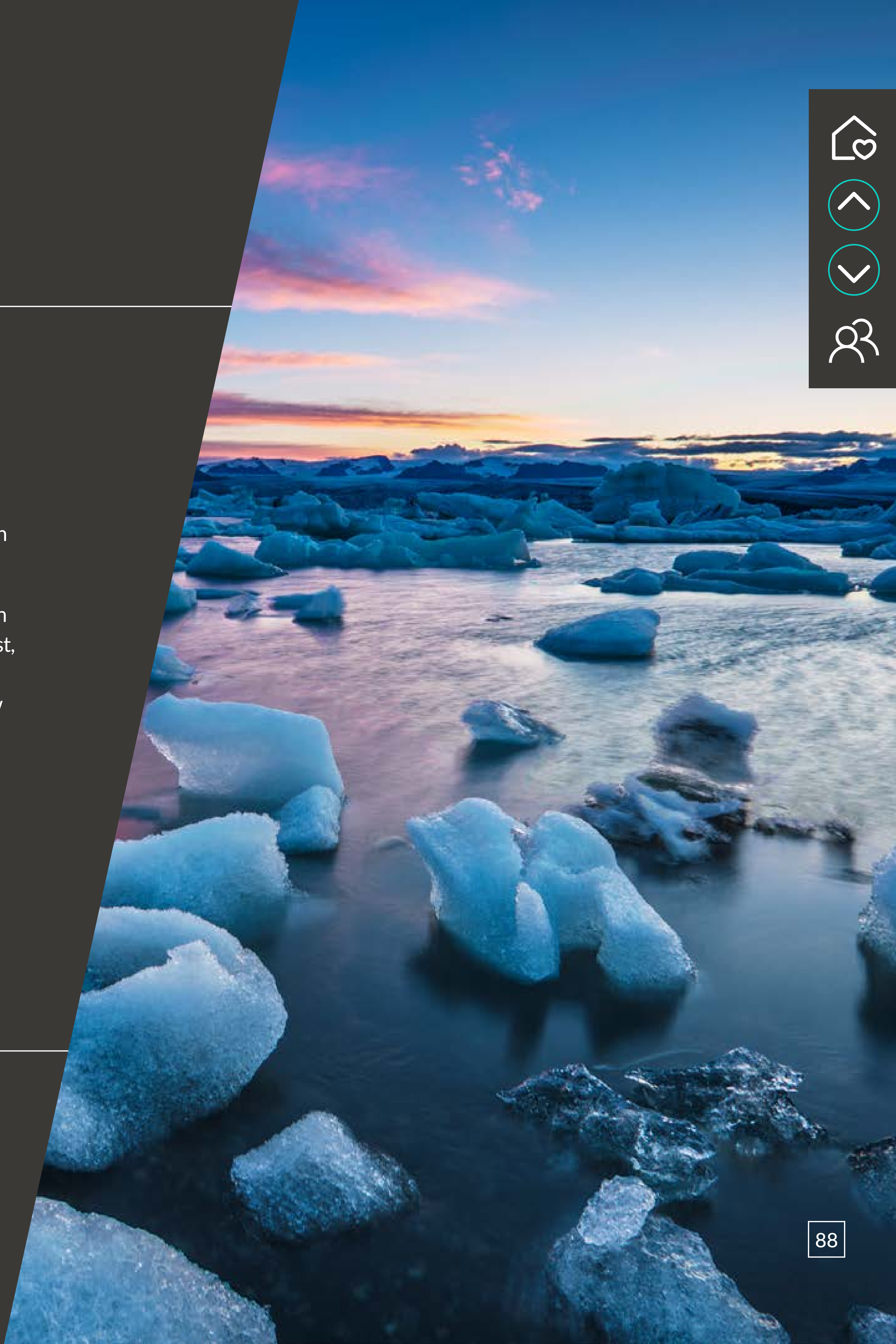
Listen to the audio version

CLIMATE LITIGATION

Climate litigation has increased in many jurisdictions over the past 30 years, and especially in the last five or so years. It is seen as a way of both advancing climate objectives and raising greater awareness of environmental concerns. This dramatic rise is due to the greater social focus on environmental issues and climate change, not to mention the increasingly worrying science. The Grantham Research Institute on Climate Change and the Environment has noted a doubling of climate change-related cases globally since 2015, bringing the total number of cases to over 2,000, with around one quarter of these filed between 2020 and 2022. There has also been a noted increase in 'framework' cases: cases where Government policy frameworks (for fighting climate change and working towards carbon neutrality) have been challenged by environmental objectors for being too vague. In the case of Ireland, this was done successfully in *Climate Case Ireland*, discussed below. It resulted in much stronger climate framework legislation, and some interesting observations by the Supreme Court on how these cases can be taken. A good example of the relevance of such legislation is the recent concession by An Bord Pleanála of a judicial review case challenging the decision to permit a new ring road around Galway City, on the basis of a failure to consider Climate Action legislation.

In this article, we review the climate litigation trends, consider some recent cases of interest, and reflect on how climate litigation can impact developers and investors, with a view to guiding their response.



The impact of climate litigation

Climate litigation can impact companies in a variety of ways including:

- pressuring governments to increase their ambition in carbon reduction, leading to tighter regulation and, in some cases, a restriction on certain operations
- ensuring stricter enforcement of existing legislation
- challenging environmental assessment and permitting decisions
- enforcement of securities laws and consumer protection legislation

There has been a significant escalation in the use of the legal system by activists, advocacy groups and certain public authorities in different countries, in an effort to block carbon-intensive activities over the last ten years in particular. The claims advanced vary depending on the particular circumstances of the litigation involved, however definite trends are emerging as outlined below:

- human rights arguments are being used
- states are being held to account by their own judiciaries to take proper steps towards their stated climate action objectives
- nuisance claims and disclosure-related litigation are increasingly being pursued against carbon majors
- claims of deceptive 'greenwashing' marketing campaigns are being brought before courts and non-judicial bodies

Although only a small sample, three decisions of the Irish and EU member states' courts are worth considering in more detail.

1. Urgenda Foundation v Netherlands

This Dutch case is celebrated as the first to establish a legal duty on a government to prevent dangerous climate change. The Supreme Court of the Netherlands confirmed in 2019 that the Dutch government is under an obligation to significantly reduce its greenhouse gas emissions in the short-term to prevent dangerous climate change. The Court rejected all of the Dutch government's arguments, including the claim that emissions from the Netherlands are small – roughly around 0.4% of global emissions – and therefore the impact of tightening its emissions reduction policies would just be a "drop in the ocean". Further, and most significantly, the Court decided that the risks of climate change fell within the scope of the European Convention on Human Rights, particularly within Article 2 (right to life) and Article 8 (private and family life). In so doing, the Court created the basis for the argument that climate change is a human rights issue.

2. Climate Case Ireland

In *Friends of the Irish Environment v Ireland* (**Climate Case Ireland**) in 2020, the Irish Supreme Court held that under the Climate Action and Low Carbon Development Act 2015 (the **2015 Act**), the Irish government was under a binding legal obligation to set out serious and credible measures to achieve Ireland's 'national transition objective'. Section 4 of the 2015 Act required adoption of a National Mitigation Plan which would "specify the manner in which it is proposed to achieve the national transition objective", i.e. transition to a "low carbon, climate resilient and environmentally sustainable economy" by 2050. Friends of the Irish Environment (**FIE**), an active national environmental

NGO, challenged the legal validity of the 2017 National Mitigation Plan (the **Plan**) on the basis that it failed to (a) meet the requirements of the 2015 Act and (b) vindicate constitutional and human rights.

The Supreme Court overturned the Plan, because it did not contain the specificity required by the 2015 Act. According to the Supreme Court, the 2015 Act required that the Plan explain how the government planned to achieve the National Transition Objective (**NTO**) over the entire period to 2050, not just the five years until the first scheduled review.

The level of specificity required was enough: "*to allow a reasonable and interested member of the public to know how the government of the day intends to meet the NTO so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in the light of that policy.*"

However, the Supreme Court was more cautious in relation to the constitutional and human rights claimed by FIE. It denied FIE standing, as a corporate entity, to invoke such personal constitutional or human rights, but left this issue open to be decided in a future case.

Climate Case Ireland led to the introduction of stronger legislation in Ireland – the Climate Action and Low Carbon Development (Amendment) Act 2021. It is noteworthy that a failure by An Bord Pleanála (Ireland's national planning authority) to take account of that legislation was successfully used by FIE in a legal challenge in October 2022 to a decision to grant permission for a new ring road around Galway City. An Bord Pleanála announced that it would not be contesting the legal challenge and admitted that it was "not aware" at the time the planning permission was granted that the government had adopted a new climate plan (Climate Action Plan 2021) just days previously and therefore, had failed to consider it, as required by law. A key consideration now for any projects applying for planning permission, is to ensure that the climate impact is fully considered.

3. Royal Dutch Shell case

The District Court in The Hague in June 2021 held that Royal Dutch Shell (**Shell**) must reduce its emissions by net 45% by 2030. This marked the first time a court had ordered a private company to align itself with the Paris Agreement. In its decision, the Court used the 'soft law' of the United Nations Guiding Principles to establish that Shell had a duty of care towards Dutch citizens and is therefore obliged to reduce its emissions to help prevent climate change.

One key point from the Court's decision is that Shell was ordered to account for emissions from the fuels and other energy products it sells, known as scope 3 emissions, which make up more than 90% of the total amount. The Court reached a different conclusion on this question than the Norwegian Supreme Court in December 2020 did when faced with a challenge to the granting of controversial oil exploration licences in the Arctic.

This question of emissions is a key legal battleground, which has seen courts in different jurisdictions, including Ireland and the UK, reach different conclusions in challenges to development consents in industry sectors as diverse as oil refinery and food production facilities.

Shell has said it will appeal the decision, which it expects to take between two and three years. However the District Court's ruling applies in the meantime.

Sectors at risk

Although the majority of cases to date have been taken against governments or fossil fuel companies, sectors such as food and agriculture, transport and finance are also being increasingly targeted.

Climate change arguments are also being used in environmental assessment cases relating to planning permission and environmental licensing. In a recent Irish case, An Taisce (an environmental NGO) sought to challenge a planning decision to allow the expansion of a cheese factory in Kilkenny on the basis that upstream emissions had not been properly taken into account by An Bord Pleanála. In particular, it was argued that there was no adequate environmental impact assessment of the 450 million litres of milk needed to supply the factory. It was further argued that such supply would have significant consequences for Ireland's greenhouse gas reduction obligations as the supply of milk at these quantities would negatively impact methane and nitrate emissions.

The High Court rejected this argument, and upheld the decision to grant permission. An Taisce appealed to the Supreme Court, which gave judgment in February 2022. In refusing An Tasice's appeal, the Supreme Court considered the interpretation of Article 3(1)(a) of the Environmental Impact Assessment (**EIA**) Directive (Directive 2011/92/EU, as amended), and Art 6(3) of the Habitats Directive (Council Directive 92/43/EEC, as amended). Ultimately, the Court concluded that the effects which the applicant argued should have been considered were so remote that they could not realistically have been regarded as falling within the scope of these directives. Despite this finding, the Supreme Court did note that An Taisce had nevertheless raised important and practical issues regarding the development consent process.

Costs protection

Legal cost risk is an essential consideration for applicants bringing climate proceedings. Under Irish and EU Law, there are a number of protections in place which afford leniency to applicants in circumstances where they raise points of environmental law in the courts, so they are not exposed to costs orders against them. Domestically, section 50B of the Planning and Development Act 2000 provides that, where an applicant raises issues relating to provisions of the EIA Directive and Habitats Directive in Judicial Review proceedings, then the court may determine that each side should bear their own costs. Furthermore, the Environment (Miscellaneous Provisions) Act 2011 provides that, in proceedings where Section 3 of this Act applies (where civil proceedings are brought for the purpose of compliance/enforcement of a condition or requirement of an environmental licence), then each party shall bear their own costs. This domestic legislation is bolstered at EU level by the Aarhus Convention, which requires, at Article 9(4), that proceedings brought for the purposes of enforcing environmental laws should be appropriate, and be fair, equitable, timely and not prohibitively expensive.

The scope of protection afforded to applicants under these provisions has been considered by the courts on a number of occasions, and most recently by the Court of Appeal in 2021 in *Heather Hill Management Company CLG & Anor v An Bord Pleanála*. Here the Court overturned the earlier decision of Simons J in the High Court, and determined that the application of the special costs rules apply only to those grounds of challenge which allege a breach of the requirements of the directives specified in section 50B(1), but not to any other grounds for judicial review in the proceedings which are not based on these directives. This case has been appealed to the Supreme Court and a decision is awaited.

The special costs rules, even where applicable, do not automatically entitle the applicant to their costs in circumstances where they lose their case. This issue was considered in the above-mentioned An Tasice case in a separate costs hearing, in which the Court held that, despite European and national environmental law considerations being raised, and the fact that An Taisce had no personal or financial interest in the outcome and instituted the litigation in the public interest, they were not entitled to an order for costs. Each party was ordered to pay their own costs.

SLAPP litigation

Strategic Lawsuits Against Public Participation (**SLAPP litigation**) have received increased focus in the Irish courts through the lens of the Aarhus Convention in recent years. These are lawsuits which are generally lodged against NGOs and public interest groups to prevent them from informing the public and reporting on matters of public interest. The protection afforded by the Aarhus Convention against such litigation is a vital aspect of access to justice in climate litigation. In a recent High Court Decision, *Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanála*, Humphreys J noted that the ability of concerned individuals to litigate on environmental matters was dependent on a range of preconditions, one being, the "rejection of penalisation prohibited by the Aarhus Convention, or incitement to such penalisation and other related inchoate wrongs".

Climate washing

There has also been a marked increase in climate washing cases (also known as 'green washing'), which are challenges or complaints made on the basis of misleading or unsubstantiated communications in relation to environmental performance in order to gain a commercial or political advantage. These cases and rulings are typically taken by advertising standards regulators (as a result of complaints) in respect of companies that highlight their climate-friendly activities without acknowledging their involvement in less climate-friendly activities, or their own carbon impact.

A recent decision by the Advertising Standards Authority of Ireland (**ASAI**) provides an example of this. An advertisement for the Land Rover Defender, featuring an Irish TV celebrity with the headline "planting the seeds of a more sustainable life", was held to be in breach of the ASAI Code. Green washing was the dominant factor in this decision, and the ASAI found that other statements made in the advertisement with regard to the environmental credentials of the product were "likely to mislead consumers".

What does this all mean?

It is important to acknowledge that use of the courts to address climate change issues faces many well-known hurdles, including technical legal issues such as the entitlement to bring the case, barriers to accessing justice including access to lawyers, difficulties in dealing with scientific evidence, and the conservatism of many courts when confronted with contentious policy issues. Nevertheless, climate-related litigation is likely to increase.

Apart from the risks of climate litigation, and of not securing regulatory consents due to a failure to take adequate account of climate impacts, there is also reputational risk to consider: the risk of companies being perceived by customers, employees, investors or shareholders as failing to address climate and sustainability issues. This can be even more significant. All the indications are that companies that are taking a 'business as usual' approach to climate and sustainability issues will quickly be perceived by each of these stakeholder groups as not responding to these issues with sufficient focus or urgency. It is almost inevitable that companies will be judged in ten years' time with a degree of hindsight that will lead to a harsh judgment of any perceived failure to respond fully to the specific challenges which climate change and carbon reduction present.

At the time of writing, the United Nations Climate Change Conference 2022 (COP 27) has just begun. The UN has reported that EU Member States are still not doing enough to limit global warming to 1.5°C. One year on from the commitments made by governments in Glasgow at COP26, this serves to highlight the need for tangible action on climate change and will likely lead to further climate action litigation from those who want to see better results in the fight on climate change.

In summary, the best advice is to put every decision being made through the 'climate action' lens to determine: will it negatively impact on national and international targets and how could it be changed to positively impact on the attainment of them?

The law as stated is at 3 November 2022. Check out our Climate Action Hub for the most up-to-date content.

SECTION **14**

8 MIN READ

PENSIONS: in transition

Chris Comerford
Partner, Pensions

Listen to the audio version

2022 AT A GLANCE

The Irish pensions landscape is going through a major transition. A combination of political pressure, a rapidly ageing population, a far-reaching European pension's directive (IORP II), and a regulator with increased supervisory powers and a consolidation objective, means that pensions are, or should very soon be, on the agenda of almost every employer in Ireland. 2021 and 2022 have seen big structural changes in the Irish pensions system and these will continue into 2024 and beyond. We can expect to see interventionist and forward-looking regulation from the Pensions Authority from 2023.

IORP II

IORP II (Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision) was substantially transposed into Irish law on 22 April 2021 by the European Union (Occupational Pension Schemes) Regulations 2021 (the **Regulations**), which made sweeping changes to the Pensions Act 1990 (the **Act**). The broad objectives of IORP II are to improve pension scheme governance, protect members and achieve better member outcomes.

The Regulations are supplemented by a detailed Code of Practice for trustees published by the Pensions Authority in November 2021.

The main changes applicable to all schemes require trustees to:

- appoint key function holders (risk manager and internal auditor)
- adopt and implement policies in a broad range of key areas (including remuneration, administration and conflicts of interest)
- ensure that trustee boards and key function holders meet new 'fit and proper' tests, including holding relevant qualifications
- ensure that all service providers have written contracts with the trustees containing certain minimum terms

Up to the transposition of IORP II under Irish law, certain pension schemes (in particular, those with less than 100 members and single member arrangements) were exempt from complying with certain requirements of the Act, the idea being that the cost of compliance was disproportionate to the benefit to the members of those schemes. Now, all schemes must comply with all requirements of the Act (including the new IORP II requirements and pre-existing requirements that small schemes were previously exempted from). A limited exemption to investment and borrowing rules applicable to one member arrangements established prior to 22 April 2021 applies until 2026.

The new requirements and abolition of existing exemptions has led to increased compliance risk for trustees and increased costs associated with complying.

The Regulator's perspective

The Pensions Authority (the **Authority**) is responsible for monitoring and enforcing compliance with the Act. A new Part IIA, which was inserted into the Act by the Regulations, requires the Authority to carry out "forward-looking and risk-based" prudential supervision of schemes.

Part IIA of the Act also gives the Authority new powers to assist it in carrying out its forward-looking risk-based supervision.

These include:

- carrying out supervisory reviews of schemes
- requiring schemes to carry out financial stress tests
- issuing advisory notices
- requiring trustees to commission external reports for submission to the Authority

The Authority also retains its existing powers to impose on-the-spot fines for certain offences and to take criminal proceedings for breaches of the Act.

Schemes are required to submit annual compliance statements to the Authority by no later than 31 January in the year subsequent to the year the statement relates to. It can be expected that these statements will be an important part of informing the Authority's supervisory actions for the year ahead.

While the new IORP II requirements have been law since 22 April 2021, the Authority has stated that, other than master trusts (which are already required to be compliant), most schemes will have until 1 January 2023 to be compliant. A welcome recent announcement by the Authority stated that schemes that have committed to wind up by 1 January 2023 will not be required to comply with the new requirements so long as the wind up is complete by 31 December 2023. The Authority has also stated that it believes that significant consolidation of Irish pension schemes is the only practical means of achieving high standards of management, good value for money and effective supervision.

From a regulatory perspective, a consolidation agenda makes a lot of sense. There were over 82,000 defined contribution schemes with employee members at the end of 2021 in Ireland; over 78,000 of these had a single member. The Authority's supervisory resources will find it much easier to focus on supervising a small number of large schemes, than a large number of small schemes.

Master trusts – the consolidation solution?

Master trusts are seen as the consolidation solution.

A master trust is a multi-employer, defined contribution scheme which caters for employees of unrelated employers. Master trusts have been around in Ireland for a number of years, but the take-up was very limited. Instead, employers tended to establish their own standalone pension trusts specific to their own employees. 2022 has seen an unprecedented rush to master trusts by employers seeking to avoid their standalone pension trust having to incur the cost of complying with the new regulatory requirements by 1 January 2023.

Economies of scale mean that a master trust will often offer better value for money for members and better investment options than a standalone trust option. Importantly, the cost of compliance is spread across many thousands of members in many different employer sections and, therefore, less likely to have any material impact on member outcomes than under a standalone trust option. We now have approximately 12 active master trusts operating in Ireland with others set to launch over the next 12 months.

While master trusts are undoubtedly a very attractive option, employers considering transitioning to a master trust should remember:

- employers have no control over the identity of the master trust trustees or the master trust founder
- conflicts of interest risks are higher in a master trust because often (but not always) the assets are invested with, and the administration is carried out by, the master trust founder or a related company
- as master trusts grow, they become systemically fundamental to the Irish pensions system and therefore will attract significant regulatory scrutiny
- exiting a master trust and consolidating in another product or another provider's master trust may not be straightforward

> *"Even employers without a pension scheme should now have pensions on the agenda.*

- if you are transitioning from a standalone trust, it is likely the trustees (and not the employer) of your standalone trust will have decision-making responsibility in relation to whether to consolidate accrued member benefits in the master trust
- transitioning to a master trust is an important decision which should only be taken after full commercial and legal diligence

The defined benefit agenda

As well as IORP II considerations, favourable market and scheme funding conditions in 2021 and 2022 have seen a steady increase in scheme mergers and annuity buy-ins and buy-outs for Irish defined benefit (**DB**) schemes.

Many of the remaining schemes are focusing on long-term de-risking strategies and will have been paying close attention to the recent UK DB scheme liability driven investment (**LDI**) crisis in the UK, where the UK government's much criticised mini-budget had an unprecedented effect on UK gilt yields, triggering unexpected and unplanned margin calls on UK DB schemes. Irish DB schemes' LDI strategies will not typically have included hedging instruments related to UK gilts and therefore will have been largely unaffected. Stable Eurozone governments mean that the risk of a similar crisis on Irish LDI strategies is lower. However, the principles are the same and Irish DB scheme trustees should be familiar with the circumstances in which margin calls on their LDI strategies may arise and understand the measures their LDI managers have in place to reduce risks and access liquid collateral on short notice if required.

The High Court is expected to hand down its decision in *Masterson & Ors v CIE* before the end of 2022. While the case may turn on its facts, the industry will be paying attention for any more general guidance that the court can provide on DB scheme employers' funding obligations. DB scheme trustees and employers should watch this case closely.

Government and policy

Even employers without a pension scheme should now have pensions on the agenda. Two important governmental policy developments will affect employment policy and costs over the next number of years.

Auto-enrolment

According to the results of the Central Statistics Office's Pensions Survey, carried out in 2021, one in three Irish workers has no private pension coverage at all. The population is maturing. By 2050, the number of people aged 65 or over in Ireland is expected to double from current levels and the ratio of working age people to retired people is projected to fall to about 2.3:1. In the absence of increased private pension coverage, the State pension system is going to come under more and more pressure as the population ages.

Since as far back as 2005, Ireland has been proposing the introduction of an auto-enrolment pension system, under which employees would be automatically enrolled in a pension scheme and they and their employer would be required to make minimum contributions. The logic, as has been borne out in many other countries, is that when employees are defaulted into a pension scheme (rather than having to make an active choice to join) they are more likely to stay there. For example, Australia has had at least 90% pension coverage since as far back as 2006 and, based on recent statistics, the UK has almost 80% pension coverage.

In 2022, the Irish government took concrete steps towards the introduction of an auto-enrolment pension system and it now looks like it will become a reality from early 2024, with the intention that it will bring about 75,000 workers into the private pension system. The General Scheme of the Automatic Enrolment (**AE**) Retirement Savings System Bill was presented to the government in early October 2022 and is currently under consideration. It is expected that the Bill will be published later this year or in early 2023 and finalised during 2023, with a view to the AE system going live in early 2024.

Increased employer costs and cost of living pressures may delay the implementation of AE in Ireland. However, there is now significant political will to make AE a reality and it is clear that we cannot afford any more delays.

Employers who don't currently contribute to a pension arrangement for their employees should start to make a cost allowance for AE. Those who do currently contribute will likely be unaffected by AE, unless contribution levels are particularly low.

The key terms of the proposed AE system are set out in the figure below.

State pension age

The proverbial political hot potato! The proposal to increase the State pension age (the age that qualifying employees are

01

Who?

- All employees aged 23-60 earning more than €20,000 who are not already in an occupational pension scheme

02

When?

- Commencing in 2024
- Legislation not yet published but intention is to draft legislation and have systems in place by end 2023

03

Contributions

- Employees must contribute
- Employer must match
- State tops up by additional 33%
- Salary cap at €80,000

04

Phased implementation

- **2024 - 2026**: 1.5% contribution
- **2027 - 2029:** 3% contribution
- **2030 – 2033:** 4.5% contribution
- **2034 onwards:** 6% contribution

*To be operated and administered by Central Processing Authority (***CPA***)*

entitled to draw their State pension) from 66 to 67 in 2021 became a major issue on the doorsteps in the 2020 General Election. This was followed by a change to legislation to abolish the increase to 67 (and the further proposed increase to 68), and the establishment of a Pensions Commission to consider the issue.

The Pensions Commission recommended a gradual increase in the State pension age over a much longer time frame than had previously been proposed. Having considered the recommendations of the Commission, the government has, however, decided that the State pension age will remain at 66, but that employees who defer drawing their State pension until a later date will receive a higher pension, reflecting late payment. In other words, 66 will now become the minimum State pension age, but employees do not have to begin drawing their pension from that age.

The proposal is good news for those wishing to work later, but does not appear to address the fundamental point that the State pension system is too expensive to fund and also creates issues for employers, including:

- pay related social insurance (**PRSI**) will increase to cover the cost of maintaining the State pension age at 66
- employees may be more likely to want to work beyond age 66, which may have implications for employers' succession planning, particularly given calls to now abolish mandatory retirement ages

WHAT NEXT?

2023 is likely to see the continuation of the consolidation of smaller defined contribution schemes and the shape of the AE system become clearer.

We can also expect to see more and more regulatory interventions as the 1 January 2023 deadline passes and schemes begin to submit their annual compliance certificates to the Authority at the end of January 2023. This will mark a new departure in the Regulator's approach to supervision, which is more pro-active (forward-looking and risk based to avoid breaches of the Act) than reactive (prosecuting offences after the fact).

The transition to a new pensions landscape in Ireland is now well underway and we can expect plenty more activity in this space over the coming years.

SECTION 15

5 MIN READ

KNOWLEDGE MANAGEMENT: the big power of starting small

Celine Kelly
Knowledge & Client Solutions Manager

Listen to the audio version

Legal departments in organisations across sectors are recognising the value of knowledge management (**KM**) and the role it can play in making their teams more efficient and their employees more satisfied day to day. Remote and hybrid working refocused business on the value of having ready online access to centralised collections of know-how, from department precedents and business best practice to external advices and previous work product.

KM will mean different things to different teams depending on what their knowledge needs are and what their resources allow. A department with identified knowledge gaps around certain types of work may focus their KM efforts on skills and expertise building, mentoring and building communities of practice. Conversely, a practice focused on reducing effort taken around similar and standard pieces of work might focus on collating and managing a few quality and up to date template documents in to one place to make these easy to find and reuse.

Small KM projects give the busy legal team the chance to demonstrate some quick wins, build engagement and validate KM efforts. One size does not have to fit all and the team should feel confident in an approach that identifies and executes specific projects to address specific knowledge needs, for example by focusing on a particular business unit. Examples of small projects include dedicating time in each team meeting to deliberate knowledge sharing, building a digital library of employment precedents, or conducting after-actions reviews on projects that meet a certain financial threshold.

Do sweat the small stuff

KM at a high level is a set of management principles applied to the people, processes and information of an organisation to yield strategic benefits. From business to business, the goals of a KM strategy will vary, as will the practical projects put in place to meet these objectives.

While every organisation is different, there are some common knowledge challenges that many businesses are dealing with:

- employees waste time searching for the documents and knowledge to do their jobs
- knowledge lives in different locations across the business making it difficult to find
- employees duplicate work because they don't know what already exists
- new joiners struggle to find core policy, practice and precedent knowledge which will allow them to get in step with department processes and culture quickly
- knowledge is lost when subject matter experts move out of the department or organisation
- employees don't know what knowledge they should be sharing or how to share it

The number one driver for KM efforts in legal environments tends to be improving the findability and discoverability of existing business or department expertise. 'Findability' relates to the ease with which employees can search and find know-how that they know to exist, i.e. the ability to find the team's best NDA for use with a new developer. 'Discoverability' is the ease with which employees are offered useful know-how which they don't necessarily know exists. A sophisticated example of this is the watch list offered to you in Netflix based on your previous viewing habits. A simpler legal KM equivalent is the ability to browse all previous external advices on handling DSARs when you need to level-up your knowledge on the topic quickly.

The principle of connecting colleagues should be carried through to all aspects of your knowledge strategy. For example, when adding know-how to central banks or repositories, it is vital to capture author/adviser details to ensure the expertise can be mapped back to the expert person on the legal team (or external counsel). Good KM is not just about finding the right document; it can also be about quickly identifying the right person to speak with.

Smaller projects that focus on addressing one or more of the issues above are smart places for a team to start. Small project examples include creating a clear path or process for sharing knowledge, running a campaign for the team on what good knowledge looks like so everyone knows what to share, or running a knowledge drive for know-how on an emerging issue or hot topic.

Scope creep

Small KM projects are ideal starting points for legal departments. However, in even the smallest of projects it is important to watch out for scope creep, which can derail any effort. In its simplest form, scope creep is when a project's requirements, goals, or vision changes beyond what was originally agreed.

It is perfectly acceptable, and often preferable, to focus KM efforts on distinct projects that address particular challenges or gaps across the team. However, as knowledge initiatives are planned, developed and socialised, well-intentioned ideas or suggestions from stakeholders that shift the project beyond the originally agreed boundaries can undo even the most straightforward initiatives.

The project owner needs to keep the original objective firmly in focus and suggestions and ideas can be carried over for consideration as part of a project's phase two. Project owners should remember that the ability to manage and control the project scope on even a small project is key to that project's success.

Small project case studies

Notwithstanding all the value that KM can bring to legal departments, for teams without dedicated knowledge personnel the distance between wanting to do KM and practically executing KM can seem huge. This is another reason to focus on small initiatives that are achievable rather than large and complicated enterprise projects that would require full-time resources to implement.

It is against this backdrop that the ALG Knowledge team launched the Legal Leaders' Toolkit in 2021. The toolkit is an 'off the shelf' guide for GCs and heads of legal who are looking to drive efficiencies through KM. The toolkit follows the life cycle of a KM programme from making the case for KM, to conducting a knowledge audit, to socialising and promoting strategies with teams and working with IT on knowledge projects.

The toolkit is made up of original articles, videos and podcasts. The focus is firmly on low-cost and no-cost solutions, recognising that most legal departments do not have budget to spend on KM initiatives. Some small project case studies that might be of particular interest are the following.

To gain access to these recordings, you first need to register for access to the Legal Leaders' Toolkit by emailing knowledge@algoodbody.com.

1. **Creating a precedents collection:** having a collection of standard agreements improves consistency, reduces risk and avoids reinventing the wheel. But how does a busy team identify and manage a collection? In this video Lorna McNeely, Knowledge Paralegal, breaks down the project in to simple and straight-forward steps.
2. **Capturing tacit knowledge:** Tacit knowledge is the holy grail of knowledge, as it is the expertise, judgment and experience of lawyers residing in their heads. It is also one of the most challenging aspects of knowledge to capture. Aoife Smyth, Knowledge Lawyer, shares her experience of capturing tacit knowledge across the ALG Real Estate practice.
3. **Driving adoption:** Knowledge efforts realise their value at the point where someone reuses or learns from existing knowledge. Solutions or processes without end users will be for nothing, so driving adoption and engagement is an important part of a knowledge strategy. Anne O'Neill, Senior Knowledge Executive, shares her experience promoting knowledge across the Corporate Transactions teams.

WATCH NOW

Equally important to the materials on the toolkit is the access to the people behind the toolkit. The toolkit serves as a catalyst for conversations with ALG clients about problems and potential KM solutions. The team at ALG have decades of experience of developing solutions for our lawyers. Authentic conversations nurture client relationships and conversations that solve problems are truly differentiating.

To request access to the Legal Leaders' Toolkit or to start a KM conversation, please contact the Knowledge team.

THE KNOWLEDGE CENTRE

Listen to the audio version

The Knowledge Centre is the ALG in-house law library and information centre. Based in our Dublin office, the Knowledge Centre is staffed by three professionally qualified librarians. It is both a virtual and physical space, providing 24/7 access to legal resources across the ALG network. The Knowledge Centre is a core business support function within the firm ensuring ALG lawyers have immediate access to legislation, case law and other legal materials, as well as relevant business critical information. In addition to curating the firm's digital and hard copy resources, the Knowledge Centre provides the firm with a bespoke legislation tracking service and legal current awareness alerts. The Knowledge Centre staff deliver legal research training to ALG's lawyers and other legal professionals, promoting legal information literacy and robust research skills across the firm.

Remote and hybrid working

In recent years the Knowledge Centre team has moved to a remote and hybrid way of working. The team supports ALG lawyers both from the office and remotely. For many years the Knowledge Centre has had a strong virtual presence. The team continues to enhance its offering of digital and online legal information resources, as well as delivering additional training and support to users.

What can the Knowledge Centre do for you?

For legal teams advising and supporting a business, the ability to conduct research quickly and efficiently is important. This can be challenging against the backdrop of a growth in the quantity (but not necessarily quality) of information resources. The ALG Knowledge team has developed a sophisticated in-house library and research function and we are happy to share our experience in this area with our clients. This offering will be of particular interest and relevance to client legal teams.

Our Knowledge Centre team, led by Ann O'Sullivan, is available to work with legal teams to review their research tools and resources and also to deliver legal research training. Through legal research guides, on-site training and workshops, our information professionals will advise you on how to get the most out of both free and premium resources and how to ensure a consistent approach to legal research across the team.

The Knowledge Centre team

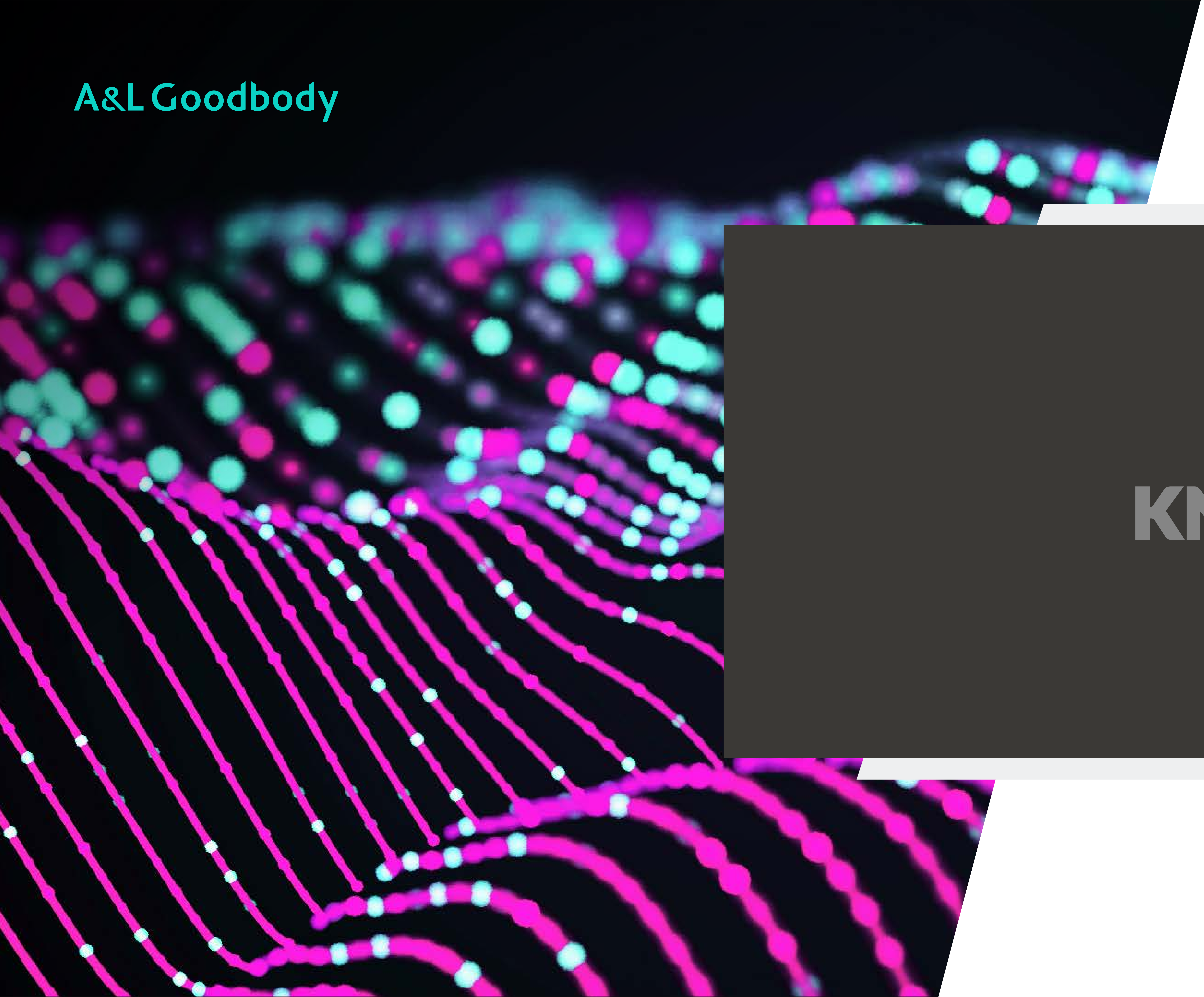
Ann O'Sullivan
Knowledge Services Manager

Catherine Watters
Assistant Knowledge Services Manager

Fiona Lacey
Assistant Knowledge Services Manager

Available via KnowledgeCONNECT

Registered users of KnowledgePlus, our client knowledge extranet, have direct access to our Knowledge Centre team through KnowledgeCONNECT. Ann, Catherine and Fiona are available to help with high-level research queries and to provide guidance on sourcing information using both open-source resources and the client's existing tools. For further details on CONNECT, see Client Knowledge Services.



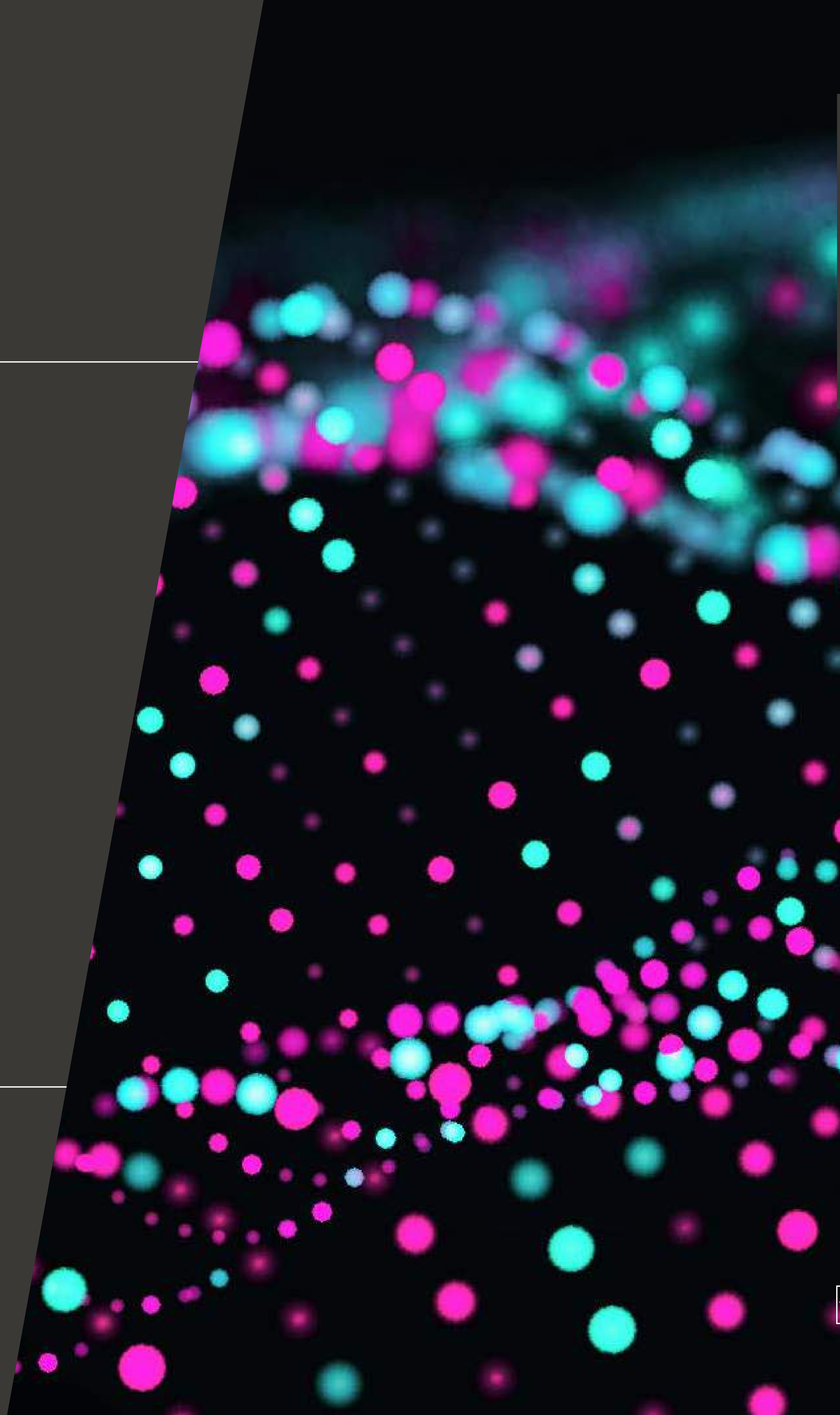
KNOWLEDGE AT ALG

ABOUT KNOWLEDGE

Knowledge is at the heart of ALG's commitment to delivering the best legal advice and services to our clients. The firm was the first in Ireland to establish a dedicated knowledge function and a partner within its practice, signifying its commitment to placing knowledge at the forefront of its business. Today, Knowledge still occupies a position of prominence in ALG, with colleagues and clients turning to our team for support and guidance on everything from legal developments to knowledge management solutions.

A diverse set of work streams requires a diverse team and we continue to bring talented professionals on board. The Knowledge team at ALG is made up of legal and knowledge professionals who are passionate about working with our people and clients to develop a strong knowledge sharing culture where lifelong learning, smart working and engagement with people and ideas are encouraged. The team's unique knowledge initiatives have been internationally recognised in the legal market and we continue to strive for excellence in this field.

There are several elements to the ALG Knowledge team which may be of interest to General Counsel and their legal teams. A few are set out in the pages to follow, but please get in touch with our Knowledge partner, Paula Reid, if you would like to discuss how we can best help you and your business.



CLIENT KNOWLEDGE SERVICES

KNOWLEDGEPLUS

KnowledgePlus is our online knowledge and e-Learning resource for ALG clients. It provides a range of useful know-how covering a number of legal practice areas. It also provides access to CPD-eligible recordings from the firm-wide seminar programme.

Please email knowledge@algoodbody.com to register for access to KnowledgePlus.

WEEKLY KNOWLEDGE BULLETIN

The team provides a weekly update on legal developments through its Knowledge Bulletin. These updates cover legislative, regulatory and case law developments across Ireland, the UK and the EU, and consider the practical implications for clients.

Please email knowledge@algoodbody.com to subscribe to the Knowledge Bulletin.

KNOWLEDGE LAWYER HELPLINE

Clients have the benefit of direct access to our Knowledge Lawyer team and may contact the appropriate Knowledge lawyer with informal queries.

Contact details are available from Meet the Team.

KNOWLEDGECONNECT

KnowledgeCONNECT provides clients with direct access to the entire Knowledge team, including our Knowledge lawyers, paralegals, knowledge management professionals and our Knowledge Centre team of information professionals.

Please email knowledge@algoodbody.com to find out more about KnowledgeCONNECT.

ON BOARD

On Board is the newest addition to our client knowledge offering. It's a repository of legal guidance and considerations for company directors and client teams, organised across legal themes and addressing a number of the challenges facing directors. There is also a video series featuring ALG partners sharing their experience and insights on topical issues.

Please email knowledge@algoodbody.com to register for access to On Board.

LEGAL LEADERS' TOOLKIT

The Legal Leaders' Toolkit has been designed to help legal teams looking to bring knowledge management (**KM**) solutions and efficiencies to their departments, particularly in the hybrid working environment. The Toolkit contains multi-media know-how and advice for in house teams looking to start a KM programme.

Please email knowledge@algoodbody.com to register for access to the Toolkit.

PROPERTY LEGAL INSIDER

The Property Legal Insider blog provides clients and advisers with access to legal updates and knowledge devoted to all aspects of the private residential sector - from the initial planning process to the regulations governing the rights of residential tenants.

Get in touch with your usual ALG contact to learn more or to register for updates.

CONTRACT LAW TOOLKIT

The Contract Law Toolkit is an easy-to-use, searchable repository of summaries of contract law cases decided by the Irish and English courts over the last ten years.

Please email contract@algoodbody.com to register for access to the Toolkit.

FINANCIAL LITIGATION CASE LAW TOOLKIT

The Financial Litigation Case Law Toolkit collates and indexes summaries of important Irish financial cases. It is fully searchable and maintained on an ongoing basis..

Please email knowledge@algoodbody.com to register for access to the Toolkit.

TRAINING AND DEVELOPMENT

We provide a number of online and event-based learning sessions, which are eligible for CPD, including workshops, seminars and knowledge updates. Members of the Knowledge team are also available to visit client offices to deliver workshops and seminars.

Please contact Paula Reid or your usual ALG contact to discuss your needs and how the Knowledge team may help.

CPD TRACKER APP

ALG's CPD Tracker App helps in-house lawyers and legal professionals to log CPD records on-the-go and automatically calculate outstanding CPD requirements. All CPD information can be exported at the touch of a button. The App is available to download for free from the Apple App Store or Google Play.

KNOWLEDGE MANAGEMENT CONSULTANCY

In collaboration with other members of the team, our Knowledge & Client Solutions Manager, Celine Kelly, can advise you on the best-fit knowledge management solutions for your business.

Please contact Paula Reid to discuss knowledge management consultancy services further.

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