A&L Goodbody

Knowledge

annual report

2023

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INTRODUCTION

Paula Reid
Partner, Knowledge

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Welcome to our Annual Knowledge Report for 2023. This is the eighth 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 12 knowledge lawyers covering a broad range of topics, including asset management and investment funds, data protection, finance, financial regulation, corporate law, ESG for corporates, employment law, litigation, and real estate law.

2023 is a year which has been quite dense with legal and regulatory change. As you might expect there are some overarching themes, including:

- a focus on accountability and transparency in the workplace
- an uptick in legislation and regulatory activity in the corporate and tech spaces
- a range of reforms in the area of litigation
- a continuing spotlight on governance from a range of sources, most notably the Individual Accountability Framework for the financial sector

Many of these developments present new challenges relating to culture and leadership for decision makers and those sitting on company boards, as well as legal teams advising businesses.

This year's Report also includes a follow-up to last year's feature on pensions law, written by Chris Comerford, a partner in our Pensions group. Alison Fanagan, SC, consultant and joint head of Environmental & Planning at ALG, and Rachel Kemp, Knowledge Lawyer, consider Ireland's Climate Action Plan 2023 and renewable energy targets.

This year's Report also features an article by our Client Knowledge Solutions Manager, Celine Kelly, which explains how simple knowledge management solutions can assist smarter working practices and generate business efficiencies to legal teams.

The Report is laid out in three sections: '2023 at a glance' highlights the key themes of the past year; it is followed by a review of the year's legal developments, finishing with a brief 'looking ahead' to developments on the horizon. An audio version of each chapter in the Report is also available.

ALG CLIENT KNOWLEDGE OFFERING

ON BOARD - MPF AWARD FOR BEST CLIENT SUPPORT 2023

In 2022, we launched On Board at our Annual Knowledge Seminar. 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. 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. We were delighted that On Board won the accolade of Best Client Support at the Managing Partner Forum (**MPF**) Awards in London in June of this year – a successive win for the ALG knowledge team at these awards. On Board was also shortlisted in the category of 'best client service initiative' at The Lawyer European Awards 2023.

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

ONLINE KNOWLEDGE AND LEARNING

KnowledgePlus is our online knowledge and e-learning extranet for ALG clients. It 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 knowledge management solutions. Access is available exclusively to ALG clients.

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.

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SECTION 01

Asset Management & Investment Funds

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01/ Asset Management & Investment Funds

2023 AT A GLANCE

- The Department of Finance's Funds Sector 2030 review is underway
- The Central Bank of Ireland is consulting on the European Long-Term Investment Fund
- Clarity continues to emerge on the Central Bank of Ireland's Individual Accountability Framework
- Macroprudential developments evolve, associated with leverage, liquidity and interconnectedness
- The Central Bank of Ireland's thematic supervision of the funds sector continues and there is ongoing regulatory focus on costs, fees and valuations
- Increased limits for indirect exposure to digital assets have been applied for QIAIFs
- Provisional political agreement has been reached on the text of AIFMD II and the legislative process for the EU's Retail Investment Strategy is underway

Funds sector review

The Department of Finance (**DoF**) commenced a wide-ranging review of the Irish funds sector (including regulated and unregulated products, section 110 special purpose vehicles (**SPVs**) and taxation issues) under the interlinked themes of "Open Markets, Resilient Markets and Developing Markets". The review seeks to ensure that the funds sector in Ireland "is resilient and that the regulatory and supervisory frameworks are future-proofed, supportive of macroprudential stability, investor protection and consistent with international best-practice standards". Following its public consultation, the DoF is expected to issue its draft report in summer 2024.

European Long Term Investment Fund (ELTIF)

The enhanced ELTIF (**ELTIF 2.0**) will apply from 10 January 2024. ELTIF 2.0 aims to boost the raising and channelling of capital towards long-term investments in the real economy, including towards investments that promote the European Green Deal and other priority areas.

The Central Bank of Ireland (**CBI**) is consulting on a new standalone ELTIF chapter for inclusion in the AIF Rulebook, enabling the authorisation in Ireland of ELTIFs using Ireland's popular regulated fund vehicles, including the ICAV. The ELTIF will be a stand-alone product benefitting from the Irish tax regime applicable to Irish regulated funds. The proposed ELTIF chapter will include supervisory and operational conditions that align with those applicable under other Irish regulated fund regimes and does not gold-plate the product features set out in ELTIF 2.0, such as on eligible investments, portfolio composition and diversification.

ESMA expects to submit draft technical standards to the European Commission (the **Commission**) for endorsement by 10 January 2024 (when ELTIF 2.0 will apply).

Upon finalisation of the AIF Rulebook update, ELTIFs can be authorised in Ireland under ELTIF 2.0 or ELTIF 1.0.

Individual Accountability Framework

The CBI has progressed its work in relation to individual accountability this year. The Central Bank (Individual Accountability Framework) Act 2023 (the **IAF**) was enacted in March 2023 and is supported by regulations and guidance, on which the CBI consulted. The reforms impacting fund management companies and funds comprise enhancements to the current Fitness and Probity (**F&P**) regime, including a certification requirement, and enhancement of enforcement processes. Importantly, the IAF also introduces 'Common Conduct Standards', for all individuals holding controlled function roles within the F&P regime and 'Additional Conduct Standards' for certain senior individuals. Fund management companies and funds are required to notify and train staff on the conduct standards, as well as embed these principles into their organisation. These obligations will apply from 29 December 2023.

CBI thematic supervisory work

The CBI is continuing its programme of thematic supervisory work. This includes two European Common Supervisory Actions (**CSAs**):

- asset valuation - ESMA published its pan-EU findings on asset valuation in May 2023 (discussed further below) and the CBI expects to issue an industry letter soon
- sustainability and disclosure risk - explained more fully in the 'Sustainable finance' section of this chapter

On local supervisory initiatives, the CBI progressed its thematic review of Exchange Traded Funds (**ETFs**) by issuing qualitative and quantitative surveys to industry regarding their operationalisation. The primary objective of this thematic review is to gain a better understanding of the roles played by 'Authorised Participants' and 'Market Makers' in the ETF ecosystem. The CBI aims to conclude this review later this year.

The CBI is carrying out mini thematic reviews examining:

- the role of non-discretionary investment advisors
- conflicts of interest for third party management companies
- the use of the 'Fixed Operating Expense Model' in some investment funds

The use of such mini thematic reviews will likely be a feature of the regulatory toolkit going forward. As a result, industry can expect to see more frequent targeted questionnaires focused on specific areas of risk.

Issues of liquidity and leverage remain a focus in Europe and at the CBI. Work continues on liability driven investment (**LDI**) funds with a view to preventing a repeat of the issues seen last year; one of the first times that leverage played such a significant role in a market event.

Macroprudential developments

The international debate on the need for a macroprudential framework for the fund sector continues. Issues of liquidity and leverage remain a particular focus in Europe and at the CBI.

To inform the debate, the CBI published a discussion paper 11 (**DP11**) entitled 'An approach to developing a macroprudential policy framework for investment funds'.

DP11 notes that typically it is the collective actions of fund cohorts that can generate systemic risk. It also notes that the materialisation of systemic risk arises from a shock and the interplay between leverage and liquidity mismatch, and the interconnectedness of fund cohorts. The CBI also observes the absence of high-quality data which would allow for meaningful analysis of the resilience of the funds sector to market shocks.

DP11 explores the merits of ex post and ex ante macroprudential tools. In the case of liquidity, these include reduced dealing frequency, the imposition of redemption notice periods, liquid asset buffers to meet redemptions and liquidity management tools (**LMTs**). Irish regulated funds will, likely, already cater for the use of LMTs. For leverage, these include leverage limits, stress testing and tools that focus on leverage beyond limits. DP11 also explores measures that would aim to limit systemic risk from fund cohorts to other parts of the financial system.

> *"The IOSCO consultation sets out an expectation that 'responsible entities should consider and use at least one appropriate anti-dilution LMT for each open-ended fund (**OEF**) under management to mitigate investor dilution and potential first-mover advantage arising from structural liquidity mismatch in OEFs'.*

We saw progress through the package of measures on Money Market Funds (**MMF**) resilience and on liquidity management of open-ended funds from the Financial Stability Board (**FSB**) and the International Organization of Securities Commissions (**IOSCO**). The FSB consulted on proposed revisions to some of its 2017 policy recommendations to address vulnerabilities from liquidity mismatch in open-ended funds. IOSCO also proposed new guidance on anti-dilution LMTs. The European Systemic Risk Board is also engaged on this topic.

Asset valuations

ESMA reported its CSA findings on the supervision by national competent authorities (**NCAs**) of asset valuation rules under the UCITS and AIFM Directives, highlighting room for improvement on:

- the appropriateness of valuation policies and procedures
- valuation under stressed market conditions
- independence of the valuation function and use of third-party valuers
- early detection mechanisms for valuation errors and compensation to investors

ESMA identified that NCA supervision should pay close attention to potential valuation issues arising from less liquid assets, whose nature can amplify the structural liquidity mismatches of certain types of investment funds. This is particularly true for funds investing in private equity and real estate assets which might be more exposed to revaluation risks, considering the heavy reliance on long-term models and the illiquidity of their assets.

Costs and fees

The oversight and setting of costs and fees have been supervisory areas of focus for some time. The CBI issued an industry letter highlighting the main findings of its inspection of costs and fees charged to UCITS as part of ESMA's 2021 CSA. The Irish UCITS Regulations require that firms act in such a way as to prevent undue costs being charged to the UCITS and investors. The CBI's letter, which we discuss further here, sets out its expectations for UCITS managers and AIFMs and identifies the key actions to be taken to address these issues.

ESMA submitted an opinion to the Commission with suggested revisions to the UCITS Directive and the AIFMD to deal with “undue costs”. This was prompted by one of the findings of the ESMA 2021 CSA on costs and fees, which showed divergent market practices as to what industry reported as ‘due’ or ‘undue’ costs in funds.

Separately, ESMA identified cases where ‘Efficient Portfolio Management’ (**EPM**) costs charged to some UCITS are significantly higher in comparison to others, especially where EPM techniques are carried out by the UCITS management company itself or by their related parties. ESMA advised NCAs to continue monitoring this.

In May 2023, the Commission adopted its long-awaited retail investment strategy, including proposed amendments to the UCITS Directive and AIFMD to introduce a regulatory basis for existing ESMA guidance and CBI ‘Dear Chair’ letter obligations that costs are not undue (discussed further below). To help develop a common understanding of the notion of undue costs, the AIFMD II final compromise text (discussed further below) requires ESMA to carry out a one-off data collection exercise.

Exposure to digital assets – QIAIF, RIAIF and UCITS

The CBI increased limits for indirect exposure to digital assets (also known as crypto-assets), depending on the liquidity provided by the QIAIF. It is also removing the requirement for a pre-submission where a QIAIF proposes to invest in digital assets. The EU’s Markets in Crypto-Assets Regulation (**MiCA**) will introduce a new regulatory framework for European crypto-assets and the CBI will likely adapt its approach accordingly.

CBI expectations of RFSPS

The CBI’s annual Securities Markets Risk Outlook Report informed regulated financial service providers (**RFSPs**) of the key risks and areas of focus for markets supervision in 2023. Among other areas of focus, the CBI sets out its expectations for RFSPs in respect of the deterioration in the external risk environment, that they:

- conduct robust stress testing, updated regularly, to take due account of market dynamics so that all funds are positioned to ensure their liquidity arrangements are sufficient to meet redemptions and margin calls
- ensure that LMTs are being utilised when needed and that appropriate LMTs are in place
- verify valuations of assets affected by rising interest rates and sanctions
- have appropriate systems and controls in place to identify relevant sanctioned investments and individuals to ensure they are compliant with their obligations in relation to financial sanctions

AIFMD II

The Council of the EU and European Parliament reached political agreement on AIFMD II in July 2023 and published the final compromise text. AIFMD II introduces targeted changes to the AIFMD and aligns certain requirements between the AIFMD and UCITS Directive. AIFMD II is expected to be formally adopted during Q1, 2024. Member States will have 24 months to transpose AIFMD II into national law, so it will likely apply in 2026. Further specification of the requirements will be provided in delegated acts.

Some key areas of interest of the agreement include:

- increased information requirements for UCITS management companies and AIFM authorisations on substance including increased conducting officers’ resource requirements

- increased reporting on delegation/sub-delegation
- harmonised rules on the use and availability of LMTs
- an EU framework for AIFs originating loans
- a requirement for AIFMs to disclose fees, charges and expenses borne by the AIFM in connection with the operation of the AIF (which will be directly or indirectly allocated to the AIF), as well as annual disclosures of fees borne directly or indirectly by investors
- the possibility to appoint a depositary of an AIF located in another Member State
- measures to prevent possible misleading names to better protect investors
- ESMA to undertake work to develop a common understanding of 'undue costs' (see Retail Investment Strategy)

> *"This is the most ambitious legislative proposal since the inception of EU financial regulation.*
>
> Mairead McGuinness

Retail investment strategy

One of the aims of the EU's 2020 Capital Markets Union Action Plan was to make the EU an even safer place for citizens to save and invest long-term and thereby encourage retail investor participation in this market. In furtherance of this aim, in May 2023, the Commission adopted its ambitious retail investment strategy (**RIS**).

The Omnibus Directive included in the RIS proposes amendments to the UCITS Directive and the AIFMD, among others. It enhances existing obligations on disclosure and transparency of costs, including clarifying what costs are due. It also includes requirements to compensate investors where undue costs have been charged, to report to NCAs, and to compare costs to benchmarks developed by ESMA so that only products that deliver "value for money" are offered to retail investors. The proposal takes account of ESMA's recent Opinion on undue costs discussed above.

The wide-ranging measures proposed in the Omnibus Directive include amendments to the Directive on markets in financial instruments (**MiFID II**), such as a "value for money" pricing process requirement that builds on existing product governance rules. Other proposed amendments include an extension of the ban on inducements to include execution-only sales and measures to protect retail investors from misleading marketing.

As part of the RIS, the Commission also published a proposed regulation to amend the Packaged Retail and Insurance-based Investment Products (**PRIIPs**) Regulation. Changes are proposed to the Key Information Document (**KID**) to make it more suitable to the evolving needs of investors and use on digital devices.

The Commission's proposals were open for feedback and funds industry concerns have been raised in a Joint Industry Statement, including concerns with the proposed 2025 timeline for implementation. The RIS proposals will now go through the EU legislative process.

Marketing UCITS in the UK

Currently, the UK's regime for UCITS marketing in the UK post-Brexit (the **TMPR**) is only available to UCITS umbrellas that entered the TMPR prior to the end of 2020. UCITS umbrellas seeking to market in the UK without the TMPR have been forced to undergo a lengthy and costly recognition procedure under section 272 of the UK's Financial Services and Markets Act 2000 (**FSMA**).

According to a recent announcement, the Financial Conduct Authority (**FCA**) is working to open the TMPR's replacement regime, the Overseas Funds Regime (**OFR**), in April 2024. Funds that are currently within the TMPR will receive landing slots to go through the OFR process and it is hoped that newcomer UCITS umbrellas will be able to apply for OFR recognition in parallel.

LOOKING AHEAD

- Sustainability will remain an EU wide supervisory priority over the coming years. Publication of ESMA's final guidelines on funds' names using ESG or sustainability-related terms is expected soon, followed by its final report on greenwashing, expected in May 2024. The funds industry can expect more clarity on the longer-term enhancements that the Commission intends to propose on the Sustainable Finance Disclosure Regulation.
- The CBI's work to realise the potential of ELTIFs through Ireland's regulated fund structures is an important step towards Ireland becoming a core jurisdiction for the establishment of ELTIFs.
- The Irish funds industry will be closely monitoring the progress of the Funds Sector Review 2030 and the positive opportunities that its conclusions may present.
- Work will continue internationally to address vulnerabilities in the non-banking sector. The CBI has already introduced macroprudential rules for property funds, followed this year by DP11 aimed at advancing the international approach to macroprudential policy for investment funds.
- The targeted amendments of AIFMD II are expected to come into effect in 2026. Now that the final rules have been clarified, AIFMs and UCITS management companies can focus on what changes to their business practices are required.
- The legislation relating to the European Commission's ambitious RIS will proceed through the legislative process, but progress may depend on the outcome of the European Parliamentary elections in June 2024. We can expect further debate on some of the most controversial elements, including the value for money assessment and pricing process for manufacturers, distributors, AIFMs and UCITS management companies.

SPOTLIGHT ON SUSTAINABLE FINANCE

Sustainable finance has been and will remain a key and evolving area of supervisory focus. Key pieces of legislation that support the transition to a carbon neutral economy, such as the Sustainable Finance Disclosure Regulation (SFDR) and the Taxonomy Regulation (TR), are now in place, providing fund investors with structured sustainability information in pre-contractual documents, on websites and in periodic reports.

The EU supervisory focus has now switched to examining how these disclosure regimes are being used, whether they are working as intended, and to seek enhancements to the framework to ensure that it meets its aims. Central to this regulatory focus, and with strong investor demand for ESG funds, regulators seek to address their growing greenwashing risk concerns.

Fund names

With an increasing number of funds including ESG terms in their names (see ESMA TRV Risk Analysis), ESMA is soon expected to publish final guidelines on the use of ESG or sustainability-related terms in the names of funds. In our related publication, we outline ESMA's proposals, which include a a quantitative threshold of 80% of the minimum proportion of investments for the use of any ESG or impact-related words in the name of a fund, and the application of minimum safeguards. Subject to any changes in the final guidelines, they will apply from three months after the publication of their translations on the ESMA website, with a transitional period of six months for funds launched prior to the application date.

Improving the SFDR

An evaluation of the SFDR by the European Commission (the **Commission**) is underway. Commissioner Mairéad McGuinness noted in a recent speech: "The market is not using the Regulation in the way it was designed. It was meant to be about transparency." Through its targeted consultation and public consultation, the Commission seeks to assess how the SFDR has been implemented and identify potential shortcomings within the framework, including legal uncertainty and the SFDR's interaction with the other parts of the European framework for sustainable finance. The Commission also explores options to improve the framework, including measures to combat greenwashing.

Potentially introducing significant change, the Commission notes in the targeted consultation that Articles 8 and 9 of the SFDR are being used as de facto product labels, leading to greenwashing risks, and, together with the proliferation of national ESG/ sustainability labels, suggests there is a market demand for the introduction of a consumer-friendly, more precise, EU-level product categorisation system.

The consultations close to comments on 15 December 2023 and the Commission intends to adopt a report on SFDR improvements in Q2 2024.

SPOTLIGHT ON SUSTAINABLE FINANCE

Amending the SFDR RTS

In response to a mandate from the Commission to undertake a review of the disclosure requirements of the SFDR Delegated Regulation (Regulatory Technical Standards, **RTS**), the European Supervisory Agencies (**ESAs**) issued a consultation. The review is aimed at broadening the disclosure framework and addressing the main technical issues that have emerged post-implementation, including proposals to amend and extend the indicators for Principal Adverse Impacts (**PAIs**) and amendments around greenhouse gas (**GHG**) emissions targets. Other proposed changes relate to "do no significant harm" (**DNSH**) disclosures and RTS disclosure template simplifications. You can read more on the consultation here. The ESAs are due to prepare a final report for the Commission.

Greenwashing

ESMA published its Progress Report on Greenwashing in the Financial Sector, which includes the ESAs' common high-level understanding of greenwashing, how greenwashing can occur, its main drivers and possible remediation. The final report is expected to be published in May 2024. We explain the background to this work in our related article.

Common Supervisory Action

In July 2023, ESMA launched a Common Supervisory Action (**CSA**) with national competent authorities (**NCAs**) on sustainability-related disclosures and the integration of sustainability risks in the funds sector. The Central Bank of Ireland (**CBI**) has commenced work on this CSA and issued a questionnaire to a sample of fund managers covering a range of funds within scope of Articles 6, 8 and 9 SFDR. For reporting purposes to ESMA, phase 1, due to conclude by 31 January 2024, will address greenwashing risks and phase 2, due to conclude by 30 September 2024, will focus more generally on sustainability and disclosure risks. The preliminary findings on the identification of greenwashing at entity and product level, included in the CSA, will also provide input into ESMA's final report on greenwashing. The CSA will run until Q3 2024.

CBI

The CBI published the findings of its review of SFDR Level 2 disclosures raising concerns about whether the disclosures of certain Article 8 and 9 funds meet the spirit of the rules. While the CBI expects that some of the issues identified will be addressed as part of the Commission's broader review of the SFDR, it intends to publish additional clarifications. In November 2023, the CBI hosted a workshop with fund industry stakeholders to seek resolution of these issues.

Other areas of supervisory focus for the CBI are:

- The adaptation of risk management frameworks by AIFMs and UCITS management companies to comply with the requirement for them to consider sustainability risk factors when undertaking their due diligence on investments and to take sustainability risks into account in their organisational procedures and risk management policies.
- Whether funds which engage in securities lending can meet their environmental or social characteristics if they have lent shares and if those loaned shares lead to positions which would not qualify as 'sustainable investments'.

9 MIN READ

SECTION 02

Corporate

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2023 AT A GLANCE

- The Screening of Third Country Transactions Act 2023 is enacted but not yet commenced
- The European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 were signed into law on 24 May 2023
- The Competition (Amendment) Act 2022 was commenced on 27 September 2023 and sub-threshold concentrations are under the spotlight in the EU
- The Foreign Subsidies Regulation comes into operation
- Cases involving directors' conduct and the performance of their duties continue to appear before the courts

Screening of Third Country Transactions Act 2023

The signing into law of Ireland's long-awaited Screening of Third Country Transactions Act 2023 (the **Act**) is one of the biggest events of the past 12 months. The Act was signed by the President of Ireland on 31 October 2023 and requires commencement by Ministerial Order. It is intended to come into operation during Q2, 2024.

The Act introduces, for the first time in Ireland, a framework for the screening of inward foreign direct investment (**FDI**). It empowers the Minister for Enterprise, Trade and Employment (the **Minister**) to scrutinise certain transactions as to the risks they present to national security and public order, where a non-EEA (EU plus Norway, Iceland and Liechtenstein) or non-Swiss undertaking (a **third country undertaking**) acquires control of, or a prescribed share in, an Irish asset or undertaking in certain sectors.

Notifiable transactions

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

1. A third country undertaking, or a person connected with such an undertaking, as a result of the transaction (i) acquires control of an asset or undertaking in the State, or (ii) changes the percentage of shares or voting rights it holds in an undertaking in the State from 25% or less to more than 25%, or from 50% or less to more than 50%.
2. The cumulative value of the transaction and each transaction between the parties to the transaction (or persons "connected" with these parties) over a 12-month period is equal to or greater than €2m.
3. The same undertaking does not, directly or indirectly, control all the parties to the transaction (this means that intra-group transactions and reorganisations are excluded from scope).
4. The transaction relates to, or impacts upon, one or more of the categories set down in Article 4(1) of the EU FDI Screening Regulation. These include critical infrastructure (transport, health, defence, communications, etc.), critical technologies (artificial intelligence, semiconductors, aerospace, energy storage, biotechnologies, etc.), the supply of energy and raw materials, access to personal data, and freedom of the media.

Other transactions

Outside of transactions where notification is mandatory (**notifiable transactions**), any transaction may be screened if (i) the Minister has reasonable grounds to believe that it affects, or would be likely to affect, Ireland's security or public order, and (ii) the transaction has resulted in (or would if completed result in) a third country undertaking acquiring, or changing the extent to which it has control of (or exercises certain rights over) an Irish asset or undertaking.

The Act also prescribes a look-back period, which empowers the Minister to review transactions that have completed within 15 months of the Act coming into force. This means transactions currently under way may be reviewed whether they meet the mandatory notification criteria or not, although transactions where a risk to national security and public order is perceived are likely most at risk of being called in for review.

Review period

The Act has a suspensory effect on notified transactions, which means that these transactions cannot be completed until a screening decision has been issued by the Minister. The 90-day review period (extendable up to 135 days) between notification and decision has been described as the "upper limit" and it is anticipated that the majority of transactions will be cleared in much shorter periods.

New opportunities for cross-border movement of EEA companies

Directive (EU) 2019/2121 on cross-border conversions, mergers and divisions (the **Mobility Directive**) was implemented into Irish law on 24 May 2023 by the European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (the **Mobility Regulations**).

The Mobility Regulations provide new procedural rules for cross-border mergers and, for the first time, introduce the concepts of cross-border conversions and divisions into Irish law. The Mobility Directive aims to reduce the administrative cost for companies operating across the EEA, while safeguarding employees, creditors, and minority shareholders. It is a much more powerful enabler of cross-border movement than its predecessor. It presents new opportunities for limited liability companies to structure migrations, separations, consolidations and re-organisations and we are likely to see many companies availing of it in the years ahead.

Competition law developments

Competition (Amendment) Act 2022

Ireland's Competition and Consumer Protection Commission (**CCPC**) has been given significantly enhanced powers of merger control intervention under the Competition (Amendment) Act 2022 (the **2022 Act**), which commenced on 27 September 2023. The 2022 Act represents a fundamental change to the competition law landscape in Ireland.

One of the most significant changes is the new power of the CCPC to compel the notification of 'sub-threshold' transactions (i.e. those that do not meet the mandatory notification thresholds) where the CCPC believes they impact on competition in Ireland. This call-in power encompasses not only transactions carried out in Ireland, but also foreign-to-foreign transactions without an Irish dimension where they may affect competition here. The CCPC may unwind/dissolve completed transactions if it concludes that the transaction will substantially lessen competition, or impose steps to be taken to restore pre-merger market conditions.

Other notable features of the 2022 Act include:

- new EU and Irish competition law administrative investigation and enforcement powers for the CCPC
- a new offence of "gun-jumping" (punishable by fines of up to €250,000) for the implementation of certain transactions prior to clearance from the CCPC
- changes to criminal law sanctions, including a new offence of bid-rigging, increased fines, and new standards of proof for competition law breaches
- increased dawn raid and surveillance powers for the CCPC

Sub-threshold transactions and the European Commission

Sub-threshold transactions are already under the spotlight at EU level. Last year, the General Court of the EU (Case T-227/21) confirmed the European Commission's (the **Commission**) jurisdiction under the EU Merger Regulation to review transactions which fall below both EU and Member State thresholds in an action relating to the Illumina-GRAIL merger (Illumina is appealing this ruling).

In July 2023, the Commission fined both Illumina and GRAIL a record €432m for implementing the merger prior to receiving approval and then, in October, the Commission ordered Illumina to unwind its $7.1b acquisition of GRAIL and take steps to restore GRAIL to its pre-acquisition independence and viability. The decision is particularly novel because the US entities do not generate revenue in the EU. However, the nature of GRAIL's work in developing technologies for cancer detection led the Commission to conclude that the merger "would have significant anticompetitive effects, stifling innovation and reducing choice in the emerging market for blood-based early cancer detection tests".

Proving that this decision is not a one-off, the Commission is also reviewing the proposed acquisition of semi-conductor company Autotalks (Israeli) by US-based Qualcomm, and European Energy Exchange's proposed (sub-threshold) acquisition of Nasdaq Power.

Foreign Subsidies Regulation (FSR)

A new tool in the Commission's anti-trust toolkit is the FSR, which came into operation on 12 July 2023. The FSR establishes a framework for the Commission to review foreign subsidies granted by non-EU countries which may distort competition in the internal market by providing recipients with an unfair advantage in acquiring companies or winning public tenders in the EU.

A foreign subsidy arises where a non-EU country provides a "financial contribution" which confers a benefit on a company engaging in an economic activity in the EU and where this benefit is targeted at specific companies or industries. The concept of a financial contribution is broad: it's not confined to monetary transfers and captures any form of value transfer, whether direct (such as the transfer of funds through direct grants), or indirect (such as tax exemptions).

The FSR empowers the Commission to review, on its own initiative ("ex officio"), completed concentrations and awarded public procurement contracts where it suspects that a distortive foreign subsidy may have been involved. Under the ex officio regime, the Commission may review a foreign subsidy for up to 10 years from the date on which the subsidy was granted, but cannot look back further than 12 July 2018.

An important feature of the FSR is its mandatory notification regime for M&A deals and public tenders that meet certain thresholds, which commenced on 12 October 2023. As with merger control, the effect of the FSR's notification regime is suspensory, which means that notified transactions may not be completed (nor public tender contracts awarded) until approved by the Commission.

What transactions are within scope?

Mergers, acquisitions, and full-function joint ventures ("concentrations") must be notified where at least one of the merging parties, the target, or the joint venture is established in the EU and has an EU turnover of at least €500m, and the companies involved in the transaction received aggregate foreign financial contributions of more than €50m from non-EU countries in the three years prior to notification.

Public tender processes must be notified where the estimated value of the public procurement or framework contract is at least €250m (net of VAT), or, where the tender is divided into lots, the aggregate value of the lots applied is at least €125m, and the bidder (including its main contractors and suppliers) has received foreign financial contributions of at least €4m per non-EU country in the previous three financial years.

The Commission may also request ad-hoc notifications for concentrations and public procurement procedures below these thresholds where it suspects the existence of distortive foreign subsidies.

Verification of directors' identities

Since 11 June 2023, the Personal Public Service Numbers (**PPSNs**) of directors of Irish companies must be provided when: a company is being incorporated, an annual return is being filed, on the appointment of a director, or there is a change in directors' details. Directors who previously obtained an identity number for the Register of Beneficial Ownership must use this number. Directors without any such identity number must complete a Declaration of Identity and wait to be issued with an Identified Person Number (**IPN**). This new requirement is designed to improve the accuracy of the register and mitigate the possibility of (deliberate and inadvertent) breaches of company law where a director has used different versions of their name.

Temporary Covid-19 provisions

The 'interim period' of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (the **2020 Act**) is set to expire on 31 December 2023. At time of writing, there has been no indication that this will be extended. Companies should therefore be aware that, in the absence of legislation, companies will no longer be able to hold fully virtual general meetings and will be able to conduct hybrid meetings only if permitted under their constitutions. The expiration of the 2020 Act also means that the period of protection from creditors will return to the maximum of 100 days and the winding up debt thresholds for individual and aggregate debts will return to €10,000 and €20,000 respectively.

02/ Corporate

NOTABLE CASES IN 2023

No liquidator, no order to wind up

In *WFS Forestry Ireland Limited v Companies Act 2014* [2023] IEHC 258, the High Court held that a winding up would be appropriate if a person was willing to act as liquidator, but with no one nominated for the position, no winding up order should be made.

Only liquidators may deal with company assets

In *GTLK Europe DAC v Companies Act 2014* [2023] IEHC 486, the High Court held that, on appointment of liquidators, a company ceases to be the beneficial owner of its assets and holds the assets on trust for the company's creditors, and the directors and shareholders lose control of the company.

Director disqualified for seven years

In the Matter of Irish Gold and Silver Bullion Limited [2023] IEHC 392, a director was disqualified from holding a directorship for seven years despite behaviour falling within the class of "particularly serious cases" which warrant disqualification for more than ten years. The decision is noteworthy because the disqualification period was reduced primarily because of the payment by the director of a "substantial amount of money" (albeit a "nonetheless inadequate" sum given the company's deficit) into the liquidation.

Holding company director was de facto director of subsidiary

In *Aston Risk Management Ltd v Jones* [2023] EWHC 603 (Ch), the High Court of England and Wales held the director of a holding company to be the de facto director of its subsidiary due to his direct involvement in management and day-to-day operations and his performance of functions that could properly be discharged only by a legally appointed director.

LOOKING AHEAD

- The Screening of Third Country Transactions Act 2023 will come into operation during Q2, 2024. The Commission is also reviewing the operation of the EU FDI Screening Regulation with a view to introducing a new regulation.
- The Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023 was initiated in Dáil Éireann on 27 October 2023 and will likely be progressed in 2024. As well as amendments to employment law, the Bill will amend the Companies Act 2014 to improve the circulation of information to workers as creditors and ensure the accessibility to creditors of remedies for transactional avoidance.
- We hope to see progression of the proposed Companies (Corporate Governance, Enforcement and Regulatory Provisions) Bill (as yet unpublished) to amend the Companies Act 2014 in the areas of corporate governance, company law enforcement, company law administration and corporate insolvency.
- Progress is awaited on 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.

ANNUAL KNOWLEDGE REPORT 2023

10 MIN READ

SECTION 03

Key ESG developments for corporates

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03/ Key ESG developments for corporates

2023 AT A GLANCE

- A number of initiatives with an ESG focus have come into force during 2023 on topics which include environmental and social matters
- The Corporate Sustainability Reporting Directive will require corporates to prepare sustainability reports from financial years commencing on or after 1 January 2025 on the activities of the previous financial year
- The first sector-agnostic European Sustainability Reporting Standards were adopted in July 2023, with further sector-specific standards due to be adopted in 2024
- The proposed Corporate Sustainability Due Diligence Directive is making its way through the EU legislative process and is expected to bolster the requirements of the Reporting Directive

Background

The European Green Deal put forward by the European Commission (the **Commission**) is a framework of proposals intended to ensure that Europe reduces its emission of greenhouse gases by 55% by 2030 and reaches climate neutrality by 2050. This is intended to work in tandem with the EU's Action Plan on Sustainable Finance (the **Action Plan**) which seeks to reorient capital flows towards sustainable investment and financial activity. This has led to legislation that is already with us in the form of the Non-Financial Reporting Directive 2014/95/EU (**NFRD**), the EU Taxonomy Regulation (**Taxonomy**) and the Sustainable Finance Disclosures Regulation (**SFDR**).

We have seen legislation on a range of ESG issues this year. These include an EU Regulation on Deforestation-free Supply Chains (Regulation (EU) 2023/1115), reforms to the Emissions Trading System and the introduction of a Carbon Border Adjustment Mechanism (Regulation (EU) 2023/956) (which respond primarily to environmental concerns under the Green Deal), and a Gender Balance on Boards Directive (Directive EU 2022/2381),which straddles the border between governance and social issues. The EU remains committed to developing a 'social taxonomy', so, even with our crystal ball at the cleaners, we can forecast that more intervention and legislative supervision can be expected from the EU in the coming months.

For now, it remains the case that some critical initiatives are foremost in our minds when discussing the principal developments of this year, each of which is discussed in more detail below. Each of the below initiatives demonstrate the continuing legislative intention from the EU to deal with social and governance matters – in addition to the purely environmental – under the ESG umbrella.

Corporate Sustainability Reporting Directive

We have previously written on the Corporate Sustainability Reporting Directive (EU) 2022/2464 (the **Reporting Directive**). The Reporting Directive builds on the existing disclosures required under the NFRD and extends both (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 prepare sustainability reports). The Reporting Directive was published in the Official Journal of the European Union (the **OJEU**) on 16 December 2022 and entered into force on 5 January 2023. It is required to be transposed into Member States' national law by 6 July 2024.

03/ Key ESG developments for corporates

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 first set of sector-agnostic ESRS were adopted by the Commission by means of delegated regulation in July of this year and are awaiting publication in the OJEU. 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 adopted in 2024.

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 has other significant aspects. A key one is that information being reported is legally required to be subject to third party assurance. This verification may initially be provided on a limited assurance basis, but eventually the standard required will be based on reasonable assurance. Ireland, in its policy response to consultation on the Member State discretionary items in the Reporting Directive, has indicated that it may accredit independent assurance providers to audit sustainability reports. In-scope companies should commence the process of engaging with a preferred provider of assurance services early to avoid logistical difficulties further down the track.

Reporting will be required not only on the activities of reporting entities themselves, but also on material ESG issues in their value chains. Finally, the Reporting Directive incorporates the EU's principle of 'double materiality' in terms of the disclosure requirements. This broadly means that reporting entities will be required to report on the financial impact of ESG matters on their business as well as the risks and opportunities they face relating to ESG.

The Reporting Directive presents businesses with significant challenges. It is necessary for entities to assess whether (and if so when) the Reporting Directive applies to them. This analysis can be complex, particularly where operations are cross-border and group structure is multinational. To the extent the Reporting Directive does apply, it will also be necessary for corporates to assess the incoming ESRS and to understand what is required to allow them to collect and analyse the relevant data required from their own operations and that of their value chains. It is likely that significant resource

will be required to allow corporates to collect all the data required to report on a timely basis. At its heart, however, the Reporting Directive is about just that: reporting. It does not set conduct or behaviour standards. Instead, the obligation is to report on what is or is not being done under various ESG headings.

Corporate Sustainability Due Diligence Directive

By contrast, the Commission's initial proposal for a Corporate Sustainability Due Diligence Directive (the **Diligence Directive**) goes further than pure reporting. The proposal aims to assist with delivery of the EU's Green Deal and is intended to foster sustainable corporate behaviour and to address the adverse human rights and environmental impacts of global value chains.

If adopted as initially proposed, the Directive would, in summary:

- impose due diligence obligations on in-scope companies to identify, prevent, mitigate and account for adverse human rights and environmental impacts from the company's own operations, those of its subsidiaries and those of entities with which there is an established business relationship in the company's value chain
- impose obligations on certain large companies to adopt a plan to ensure that their business model and strategy are compatible with a transition to a sustainable economy and limiting global warming
- require directors to take into account human rights and climate change impacts when fulfilling their duty to act in the best interests of the company

The EU's legislative process in respect of the Diligence Directive continues and negotiations are ongoing. On 1 December 2022, the Council of the EU (**Council**) adopted its position in respect of the Diligence Directive. On 1 June 2023, the European Parliament (**Parliament**) adopted its negotiating position, which differs from the Commission's proposal in certain key respects, outlined below.

One fundamental difference is Parliament's position on the scope of the Diligence Directive. Under Parliament's proposal, the Diligence Directive would apply to a broader cohort of companies being:

- all EU companies with more than 250 employees and €40m in net annual turnover, or EU parent companies with more than 500 employees and €150m in net annual turnover on a group basis, and
- all non-EU companies with €40m net annual turnover generated in the EU, or non-EU parent companies with more than 500 employees and worldwide net annual turnover of €150m with at least €40m of that turnover generated in the EU on a group basis

In a further change, for non-EU companies, EU turnover would be calculated to include third party companies based in the EU which have entered into a vertical agreement in return for royalties with the relevant non-EU company. Parliament envisages a staggered introduction of the Diligence Directive which aligns with the above thresholds, similar to the phased introduction of the requirements of the Reporting Directive.

Further, under Parliament's proposal, directors would be made explicitly responsible for overseeing compliance with the Diligence Directive's requirement for in-scope companies to adopt a plan that ensures that the business model and strategy of the company are aligned with the transition to a sustainable economy and the limiting of global warming to 1.5°C. For larger companies with more than 1,000 employees, part of their directors' remuneration would be explicitly linked to the achievement of targets of the company's transition plans.

Parliament's proposal specifically includes regulated financial undertakings and financial products within the scope of the Diligence Directive. It is anticipated that this element of the proposal will attract considerable debate as negotiations progress. Finally, under Parliament's proposal the ambit and scope of sanctions for non-compliance have been further clarified. These expressly include pecuniary sanctions, public statements of censure, the obligation to perform a specified action and the suspension of products from free circulation or export. Parliament proposes that the limit for pecuniary sanctions shall be not less than 5% of worldwide turnover for the relevant company in the financial year preceding the fining decision, and that third country undertakings may be excluded from public procurement processes if they fail to comply with the Diligence Directive. We await further clarification on the progress of negotiations relating to the Diligence Directive with interest.

Gender Balance on Boards Directive

The Gender Balance on Boards Directive (2022/2381) (the **Directive**) came into force on 28 December 2022. Member States have until 28 December 2024 to transpose the Directive into domestic legislation. Companies to which the Directive applies have until 30 June 2026 to comply with its requirements. Employers that are listed companies with 250 or more employees, an annual turnover of more than €50m or an annual balance sheet of €43m or more should familiarise themselves with the Directive and seek advice in order to ensure their compliance on its transposition.

The Directive is intended to achieve a more balanced representation of women and men among the directors of larger listed companies by requiring that at least 40% of non-executive board seats, or 33% of all board seats for relevant companies, are occupied by "the underrepresented sex" (expected to be women in most cases). It requires that board appointment procedures are transparent and clear and that candidates are assessed objectively, and not that there is an automatic and unconditional preference for the underrepresented sex.

The Directive requires listed companies which do not reach the above objectives to adjust their processes for selecting candidates for appointment or election to director positions. Clear, neutrally formulated and unambiguous criteria must be established in advance of the selection process and applied in a non-discriminatory manner throughout.

The Directive requires Member States to enforce breaches of the Directive by means of penalties, intended to be "effective, proportionate and dissuasive", and to ensure adequate procedures are available to allow them to be enforced. It is hoped that larger listed companies will already have gender – and other – diversity characteristic initiatives underway at this stage.

> *"Significant investment of funds, people and time will be required in order to comply with the requirements of the Diligence Directive.*

LOOKING AHEAD

In the coming months, the sector-specific ESRS will be finalised. From 2025, the largest companies will begin reporting under the Reporting Directive. Being in a position to report on a timely basis will require significant resources for all entities, and those in the first waves of reporting should be reviewing the ESRS in detail and ensuring their plans for the assurance of the information are appropriate.

As the Diligence Directive continues its passage through the legislative process, its implications will become clearer, but we anticipate that significant investment of funds, people and time will be required in order to comply with its requirements.

ESG related legislation continues to proliferate at 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 in general will correspondingly develop in the medium term. It is therefore essential that businesses engage at senior levels to identify areas of concern which may require intervention now to future-proof adequately.

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, to assess their approach to ESRS reporting and to ensure that they are in a position to act accordingly. This will involve significant analysis of ESG data and metrics, which will extend to value chain partners. The size and complexity of the task facing businesses as they ascend this learning curve should not be underestimated.

For more information on the above topics, please visit our ESG & Sustainability website, where you can sign up for our quarterly bulletin.

SECTION 04

Employment

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2023 AT A GLANCE

- The Work Life Balance and Miscellaneous Provisions Act 2023 was enacted and partially commenced on 3 July 2023, with the provisions relating to medical care leave and breastfeeding breaks commencing on that date
- Domestic violence leave entitlements under the same Act commenced on 27 November 2023 and the right to request remote and flexible working is due to commence shortly
- The Supreme Court delivered two very important judgments, one on the law relating to workplace suspensions and the second on determining employment status
- The Pay Transparency Directive came into force at EU level, containing far-reaching requirements to increase transparency around equal pay and equal pay enforcement

Work Life Balance Act: new law is wide-ranging

The eagerly anticipated Work Life Balance and Miscellaneous Provisions Act 2023 (the **Act**) implements elements of the EU Work-Life Balance Directive (the **Directive**) which were not already in place under Irish employment law.

While some of the provisions of the Act are necessary to implement the Directive, the Act also contains further significant new workplace entitlements, such as a right to request remote working and a right to take domestic violence leave.

The core elements of the Act are as follows:

- a right for parents and those with caring responsibilities to request flexible working arrangements
- a right to take up to five days unpaid leave per year for medical care purposes
- a right for all employees to request remote working arrangements
- a right to take up to five days paid leave per year for victims of domestic violence
- a significant extension to the period in which new mothers are entitled to paid time off work to breastfeed (from six months to two years)
- an amendment to existing maternity protection legislation to ensure transgender males who have obtained a gender recognition certificate and subsequently become pregnant fall within its scope

Medical care leave and time off for breastfeeding came into force on 3 July 2023. The provision relating to domestic violence leave came into force on 27 November 2023 and is supplemented by the Parental Leave Act 1998 (Section 13AA) (Prescribed Daily Rate of Domestic Violence Leave Pay) Regulations 2023.

The rights to request remote and flexible working require the Workplace Relations Commission (**WRC**) to produce a code of practice, which will provide guidance for employers on how best to consider and properly manage remote and flexible working requests. This is due to be published shortly.

New EU directive: pay transparency under the spotlight

Directive 2023/970 (the **Pay Transparency Directive**) is part of a multi-pronged approach to address the root causes of the gender pay gap (the **GPG**) and the economic empowerment of women, which includes the Work-Life Balance Directive and a Directive on improving gender balance on the boards of large EU listed companies (the latter is covered in the chapter, Key ESG developments for corporates).

The key elements of the Pay Transparency Directive are as follows:

1. ***GPG reporting:*** While the information which will be required to be reported is similar to existing Irish requirements, the Pay Transparency Directive also requires the GPG by category of employees to be provided to employees and employee representatives. Broadly, this means employees categorised as performing equal work or work of equal value.
2. ***Joint pay assessment:*** Where the GPG report indicates a gap which (i) is at least 5% in any category of workers, (ii) has not been justified by objective and gender neutral factors, and (iii) has not been remedied within six months of the date of the report, the employer will have to carry out an equal pay audit. This involves a detailed process, and the results must be made available to employees, their representatives and the monitoring body.
3. ***Pay transparency for jobseekers:*** Employers will be obliged to indicate the initial pay level or range to be paid for a specific position in a job vacancy notice, or otherwise prior to interview and, importantly, will not be permitted to ask prospective employees about their pay history.
4. ***Right to information:*** Employees will have a right to request information from their employer on their individual pay level and on average pay levels broken down by gender for employees doing the same work or work of equal value. Employers will have to inform employees on an annual basis of their right to receive the information and how they may go about doing so. Not only that, but employers with 50 or more employees will have to make information regarding the criteria (which must be objective and gender neutral) used to determine employees' pay, pay level and pay progression easily accessible.
5. ***Ban on pay secrecy clauses:*** All Member States will be obliged to put measures in place to prohibit contractual terms that restrict employees from disclosing information about their pay.

Next steps

The Pay Transparency Directive contains significant extra measures and new laws will be required to align Irish law with its requirements. While Member States have until 7 June 2026 to implement it, it is by no means too soon for employers to begin considering their compliance strategy. It will undoubtedly lead to an increase in employee and representative involvement in addressing pay equity and it contains potentially arduous requirements to conduct equal pay audits and assessments of work of equal value. Employers should consider how the Pay Transparency Directive will impact their recruitment, pay and gender pay gap reporting practices and plan their compliance strategy accordingly.

Workplace suspensions: Supreme Court clarifies the law

Allegations of misconduct can arise in any workplace and employers often find themselves having to consider whether to place an employee on suspension, with pay, pending the outcome of an investigation and/or disciplinary process – otherwise known as a "holding" suspension. The recent Supreme Court judgment in *O'Sullivan v HSE* [2023] IESC 11 has clarified the law surrounding holding suspensions (three judgments delivered by O'Donnell CJ, Woulfe J and Dunne J).

What happened in the case?

Professor O'Sullivan was employed as a consultant obstetrician and gynaecologist at St Luke's General Hospital. In 2018, as part of what he described as a "feasibility study", he inserted a catheter into five patients during the course of a procedure. None of the patients were informed that this was being done, nor was their consent sought. The matter was reported by nursing staff to management.

An independent expert report concluded that the study was not carried out ethically and did not accord with good practice, but did not suggest that Professor O'Sullivan was a danger to the safety of patients. A further report, the Systems Analysis Review (**SAR**), found that there were failings on Professor O'Sullivan's part, but that he did not pose a risk to patients.

After receiving the SAR report, management sought the view of the Clinical Director of the National Women and Infants Health Programme, who expressed reservations about the continued involvement of Professor O'Sullivan in practice.

The relevant clause of the disciplinary procedure provides: "where it appears to the CEO, secretary/manager of a hospital or other health agency or his authorised representative, that by reason of the conduct of a consultant there may be an **immediate and serious risk to the safety, health or welfare of patients**, the consultant may apply for or may be required and shall, if so required, take administrative leave with pay for such time as may reasonably be necessary for the completion of any investigation into the conduct of the consultant..." [Emphasis added]

Management referred the matter to the CEO of the HSE in July 2019 and he directed that Professor O'Sullivan take administrative leave with pay with effect from 6 August 2019. The CEO then sought and obtained an additional report on whether the matter was a serious matter, before initiating disciplinary action. This report found that Professor O'Sullivan's actions fell below, but not seriously below, the standard of conduct expected of a consultant.

The CEO disagreed with this finding and wrote to Professor O'Sullivan proposing the termination of his employment. Professor O'Sullivan brought legal proceedings in the High Court seeking to challenge his continued enforced administrative leave and to restrain his dismissal. He was ultimately unsuccessful in those proceedings and appealed to the Court of Appeal, which held, among other things, that his suspension was unlawful.

What did the Supreme Court decide?

According to the Supreme Court, the key test was whether or not it "appears" to the CEO that there "may" be an immediate and serious risk to the safety, health or welfare of patients. The Court concluded the correct test to be applied involves considering whether the discretion to suspend an employee has been exercised in good faith and the decision is not arbitrary, capricious or irrational. Applying this test to the facts, the Court found that it could not be said that the approach of the CEO was anything other than careful and considered.

What does this mean for employers?

The decision provides further clarity on the law relating to holding suspensions. It puts to bed any suggestion that holding suspensions can be implemented in misconduct cases without ensuring appropriate fair procedures are afforded to the employee.

Landmark judgment: Supreme Court rules on pizza delivery drivers' employment status

Issues involving whether a worker is engaged under a contract of service (as an employee) or a contract for services (as an independent contractor) occur in a wide range of different legal contexts and have been the subject of many decisions handed down by various bodies over the years. Now, for the first time in recent years, the Irish Supreme Court has delivered a judgment on this issue in the case of *Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza* [2023] IESC 24.

What happened in the case?

Drivers were engaged to deliver pizzas for a Domino's pizza franchise (Karshan). The drivers signed agreements (umbrella contracts) with Karshan, pursuant to which it engaged them to deliver pizzas and to promote its brand logo. Among other terms, the umbrella contracts described the delivery drivers as independent contractors and required the drivers to acknowledge that Karshan had no responsibility or liability to deduct and/or pay employment taxes on behalf of the drivers.

This particular case involved the question of whether the workers were employees or not under the Taxes Consolidation Act 1997 (**TCA**) as different tax rules apply depending on whether a worker is, or is not, an employee.

What did the Supreme Court decide?

The concept of "mutuality of obligation" (i.e. whether there is a mutual obligation on the employer to provide work for the employee and on the employee to perform work for the employer) dominated both parties' legal arguments. The Court found the term has, through a combination of over-use and under-analysis, been transformed from what should have been a straightforward description of the consideration underlying a contract of employment, to a wholly ambiguous label. The Court noted that the term has generated unnecessary confusion, which will be most effectively avoided in the future if use of the phrase in this area is discontinued.

In its unanimous judgment, the Court conducted a detailed assessment "of the warehouse of cases that have developed around this issue over the past half a century" in order to retrieve a test that is "clear, workable and yet sufficiently flexible".

The question of whether, in any given case, a worker is an employee should be resolved by reference to the following factors:

01

Does the contract involve the exchange of wage or other remuneration for work?

In this case, the Court held that there could be no doubt but that the umbrella contract was a contract, nor could there be any serious dispute that, at some point, an agreement came into being between the drivers and Karshan whereby they would be paid in consideration for their services. The agreement was capable of being an employment contract, insofar as, for at least the periods during which they worked, there was an exchange of labour and wage.

02

Is the worker agreeing to provide their services personally?

It is necessary to decide if the agreement is:

i. for personal services

ii. for personal services with a conditional capacity for delegation, or

iii. an agreement that enables such a level of unconditional delegation that it is not an employment contract at all

The Court agreed with the Tax Appeal Commission's (**TAC**) finding that the right of substitution in this case was limited. The right of substitution could only be availed of by a driver who had agreed to be rostered and who was unavailable to work at short notice. The TAC was entitled to decide that the ability of a driver to delegate was sufficiently limited, maintaining the personal service required for it to be an employment contract.

03

Does the employer exercise sufficient control over the employee?

The Court commented that what is of concern is a right of control: if a worker is unskilled, close direction as to the means and manner by which the work is to be done is to be expected, while, if skilled, the employer would not be expected to be in a position to direct the worker as to how to achieve the prescribed objective. In both situations there is a right of control.

The Court found that the combined effect of the operation of the rosters and weekly allocation of work, as well as the level of control over certain matters, all pointed to a high level of control on the part of Karshan.

04

Does the contract involve the exchange of wage or other remuneration for work?

The first three questions act as a filter in the form of preliminary questions which, if any is answered negatively, means that there can be no contract of employment. If all are answered affirmatively, the next step is to interrogate the factual matrix to ascertain the true nature of the relationship. Central to this is the question: is the worker carrying on business on their own account?

The Court noted certain factors considered by the TAC in "correctly" determining that the pizza delivery drivers were not independent contractors and took the view that the drivers' economic activities were so restricted by the terms and conditions imposed on them, that their work was in, every sense, work for Karshan and was directed towards advancing its business, not their own.

05

The legislative context

Depending on the particular legislation under which a worker's employment status is being considered, the different language, purpose and context of that legislation will need to be taken into account. In this case, the language of the TCA did not require any modification to the above approach.

Conclusion

The Court found the TAC was entitled to reach the conclusion it did and its decision provides welcome clarification on this complex area of law. It is vital that businesses now consider their current and future arrangements with those they engage to provide services, in light of the five sequential factors promulgated by the Court.

LOOKING AHEAD

- The WRC is shortly expected to publish the eagerly awaited Code of Practice on the right to request flexible working and remote working.
- The Supreme Court is due to hear an appeal in an important retirement age case, *Mallon v the Minister for Justice, Ireland and the Attorney General.*
- The Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023 outlines how collective redundancy information and consultation rights will have to be carried out by liquidators as well as the functions of a new Employment Law Review Group. It is currently going through the legislative process and is due to be enacted in the coming months.

9 MIN READ

SECTION 05

Finance

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2023 AT A GLANCE

- Regulated credit institutions - roll-out of the Individual Accountability Framework is well underway, the capital buffer and bank levy are to increase, and access to Ireland's Safe Deposit Box, Bank and Payment Accounts Register is extended
- EU and UK sign Memorandum of Understanding for regulatory cooperation on financial services
- Department of Finance confirms Ireland to operate parallel credit servicing regimes once Credit Servicing Directive transposed
- New foreign direct investment screening regime to lead to specific inclusions in facility and security documentation
- Credit union reforms may lead to increased competition in the financial services space
- ESG/sustainable finance - EU Green Bond Standard nears entry into force
- Digital Euro - EU project advances with legislative proposal establishing legal framework for possible digital euro published and the ECB announces a two-year 'preparation phase'

Anti-money laundering (AML): ISBAR access extended

New AML regulations, the European Union (Money Laundering and Terrorist Financing) (Use of Financial and Other Information) Regulations 2023 (the **Regulations**), were made in February 2023. The Regulations allow designated Irish authorities to access Ireland's Safe Deposit Box, Bank and Payment Accounts Register (**ISBAR**). ISBAR was set up by the Central Bank of Ireland (the **CBI**) last year, and the Financial Intelligence Unit (the **FIU**) and the Revenue Commissioners were initially prescribed as being able to access ISBAR. The Regulations expand access to ISBAR, allowing the Gardaí, the FIU, the Criminal Assets Bureau, and the Minister for Social Protection either direct access or indirect access (through the FIU), depending on the circumstances. Additional primary legislation is expected to further extend the scope of ISBAR to other financial institutions.

Tailte Éireann

The Property Registration Authority of Ireland (the **PRAI**) was dissolved, and its functions were transferred to a newly established body called Tailte Éireann, from 1 March 2023 under the Tailte Éireann Act 2022. Property finance related precedents and documents referencing the PRAI should now refer to Tailte Éireann.

Individual Accountability Framework

A key development in the financial sector this year was the enactment of the Central Bank (Individual Accountability Framework) Act 2023 (the **Act**) on 9 March 2023. It introduces an Individual Accountability Framework (**IAF**), which includes a Senior Executive Accountability Regime (**SEAR**). The new IAF regime mandates various conduct standards for individuals and businesses and includes enhancements to the CBI Administrative Sanctions Procedure and Fitness and Probity regimes. The CBI carried out two public consultations during 2023 and published several sets of draft regulations and guidance documents. In November 2023, the CBI published its finalised guidance on the IAF, as well as three sets of (revised draft) regulations on SEAR, certification and holding companies. Two commencement orders were also published, which will result in the Act being fully commenced from 29 December 2023 (albeit the various constituent parts of the IAF will apply from different dates, and in some cases on a staggered basis across certain PCF roles). For more on this, see our Financial Regulation chapter.

Counter-Cyclical Capital Buffer (CCyB) to increase

In June 2023, the CBI confirmed that the CCyB is to increase from 0.5% (announced in June 2022) to 1.5% from June 2024.

EU-UK financial services

In June 2023, the European Commission (the **Commission**) and the UK signed a Memorandum of Understanding (**MOU**) establishing a framework for structured regulatory cooperation in the area of financial services. The MOU was signed pursuant to the Joint Declaration on Financial Services Regulatory Cooperation, which accompanied the Trade and Cooperation Agreement (the **TCA**), signed by the EU and the UK in December 2020. The MOU was supposed to be in place by March 2021, but negotiations were delayed due to political tensions between the parties (which were resolved earlier this year by the Windsor Agreement).

The MOU creates an administrative framework for voluntary regulatory cooperation in financial services between the EU and the UK, outside of the TCA structures. This includes the establishment of a Joint EU-UK Financial Regulatory Forum (the **Forum**), which will serve as a platform to facilitate structured dialogue on issues related to financial services. This is similar to the arrangements the Commission has with other third country jurisdictions, such as the United States. The inaugural meeting of the Forum took place on 19 October 2023 in London. The next meeting is expected to take place in Spring 2024 in Brussels.

Credit servicing: parallel regimes confirmed

The EU Credit Servicing Directive was published in December 2021 and is due to be transposed in Ireland by 29 December 2023. In June 2023, the Department of Finance confirmed it is planning for two parallel regimes. Sales and servicing of non-performing loans (**NPLs**) originated by EU banks (post-transposition) will be subject to the Directive's framework. The existing Irish regulatory regime (which requires holders of legal title to be authorised by the CBI) will continue to apply to the sales and servicing of performing loans, NPLs originated by EU banks (pre-transposition), and the sales and servicing of NPLs originated by non-bank lenders.

Bank levy revised for 2024

It was announced in October, during Budget 2023, that the bank levy will be revised for 2024. The levy was due to expire at the end of this year, but the Finance (No. 2) Bill 2023 proposes a revised version, to raise revenues of €200m. It will apply to those banks that received financial assistance from the State during the banking crisis (so, AIB, Bank of Ireland, EBS and PTSB).

Screening Act: financing impacts

The Screening of Third Country Transactions Act 2023 (the **Screening Act**) was enacted on 31 October 2023. It establishes a screening mechanism for foreign direct investment into Ireland for the first time. The Screening Act provides a broad system for the Irish Government to scrutinise a range of investments by parties established in third countries (being countries outside the EEA and Switzerland), in critical technology and infrastructure businesses and assets in Ireland. The Screening Act establishes a mandatory prior notification system, but the Minister for Enterprise, Trade and Employment may also call-in certain transactions, whether or not such transactions meet the mandatory screening criteria. The regime has retrospective effect and will be capable of affecting transactions completed up to 15 months before the relevant sections become operative (expected to occur in Q2 of 2024). The Screening Act provides for significant sanctions for failure to comply with screening obligations (including fines of up to €4m and imprisonment for up to five years). For further details, see the Corporate chapter.

It remains to be seen how the regime will be implemented once it comes into effect, and to what extent certain financing transactions and arrangements may be caught. But initial views are that specific provisions may need to be included in certain facility and security agreements: for example, to protect parties from inadvertently breaching the screening requirements, if they do come within the scope of the regime, at a future point in time (upon enforcement, for instance).

Credit unions: reforms on the way

The Credit Union (Amendment) Bill 2022 was published in November 2022. Of note for the financial industry is that it proposes to allow corporate credit unions to be established, to alter the scope of permitted investments by credit unions, and to permit credit unions to participate in loans to members of other credit unions. It also proposes to amend current legislation to allow the Minister for Finance to set a maximum interest rate, currently fixed at 1% per month. This will provide more flexibility for credit unions to price risk in a rising interest rate environment. In addition, credit unions will be able to take part in loan syndications, which is not currently permitted. A credit union will also have the power to refer members to another credit union, if it cannot provide the service the customer is requesting. The Department of Finance has called this the first meaningful reform for the credit union sector in ten years. These changes will allow credit unions greater scope for investment and to offer a greater range of services, including more substantial mortgage offerings, likely resulting in increased competition in the financial services sector. The Bill is currently before the Oireachtas and is expected to become law before year-end.

Separately, in September 2023, the CBI enacted regulations to apply its minimum competency standards to more credit union staff undertaking wider services, including, but not limited to, lending and term deposits. Expanding the scope of the standards will mean that credit union members are protected in the same way as consumers using similar services offered by other financial service providers. To apply the standards to credit unions when acting in respect of these additional services, the CBI's fitness and probity regulations were amended, to introduce additional 'controlled functions' for credit unions. The changes come into effect in October 2024 (with some transitional arrangements available).

European Green Bond Regulation

The EU Regulation on a voluntary European Green Bond Standard (**EUGBS**) will be published in the Official Journal of the EU (the **OJEU**) shortly. It will apply 12 months later, which is likely to be late 2024 or early 2025. The EUGBS aims to further increase investment opportunities, and facilitate identification of environmentally sustainable investments, through a clear (voluntary) label. It lays down a uniform set of specific requirements for issuers that wish to use the "European green bond" or "EuGB" label. Funds raised by the bonds must be allocated to economic activities or projects that are aligned with the EU Taxonomy Regulation and all European green bonds must be checked by an external reviewer, to ensure compliance with the EUGBS Regulation and Taxonomy-alignment of the funded projects. External reviewers must be registered with and supervised by ESMA, which is tasked with developing technical standards under the EUGBS (some draft regulatory technical standards are expected before year-end).

Digital Euro

In June 2023, the European Commission published its Single Currency Package, which includes a proposal for a regulation on the establishment of the digital euro, which the European Central Bank (the **ECB**) may issue in the future as a complement to cash.

In October 2023, the ECB announced that it had decided to move to the next phase of its digital euro project, the preparation phase, which will initially last two years. The previous investigation phase explored possible design and distribution models, and the emerging ECB concept will be a digital euro widely accessible to citizens and businesses, through distribution by supervised intermediaries such as banks. The preparation phase will involve finalising the digital euro rulebook and selecting providers that could develop a digital euro platform and infrastructure. The launch of the preparation phase is not a decision on whether to issue a digital euro; this will only be considered by the ECB's Governing Council once an EU regulation is in place.

> *"The emerging ECB concept will be a digital euro widely accessible to citizens and businesses, through distribution by supervised intermediaries such as banks.*

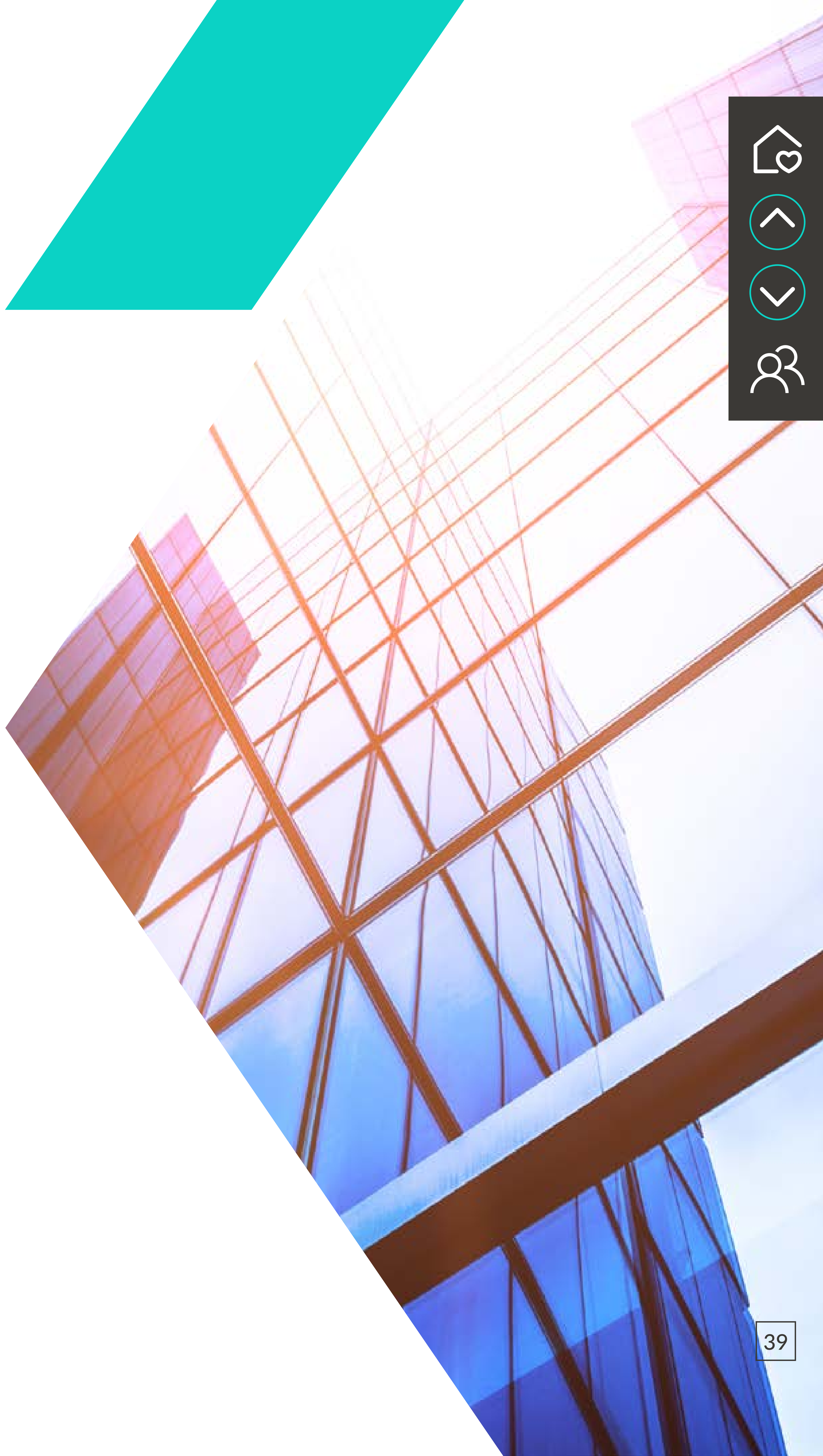
LOOKING AHEAD

IRELAND

- Review of the **Consumer Protection Code (CPC)**: The CBI is expected to publish a consultation paper this December, setting out proposed changes to the CPC. An updated CPC is due to follow (by way of new regulations) in 2024. For more on this, see our Financial Regulation chapter.
- The Department of Finance has begun work on a **National Payments Strategy** for 2024. The strategy aims to set out a roadmap for the future evolution of the entire payments system, taking account of developments in digital payments and cash usage, as well as EU proposals (including instant euro payments, revisions to the Payment Services Directive and the digital euro).
- The **Financial Services and Pensions Ombudsman (Amendment) Bill 2023** will introduce amendments to ensure the Ombudsman (the **FSPO**) continues to discharge its statutory functions in line with the Irish Constitution (following the Supreme Court decision of *Zalewski* in 2021). It also aims to safeguard consumer protections, and access to the FSPO, for customers of financial service providers who have left the Irish market. The General Scheme was published in April 2023 and has undergone pre-legislative scrutiny. The Bill is expected to be published soon.

EU

- The EU's revised **Distance Marketing Directive** will be published in the OJEU shortly. It repeals the existing Directive (2002/65/EC) and inserts new and revised provisions into the Consumer Rights Directive (2011/83/EU) covering financial services contracts concluded at a distance. Member States have two years to adopt the necessary laws and administrative provisions to transpose the directive, and a further six months to apply them.
- A new **Consumer Credit Directive** was published in the OJEU on 30 October 2023 and entered into force on 19 November 2023. The revised directive repeals the current Directive on consumer credit agreements (2008/48/EC) and enhances protections for consumers applying for credit. Member States must adopt and publish implementing legislation by 20 November 2025 and apply those measures from 20 November 2026.



9 MIN READ

SECTION 06

Banking in the courts

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2023 AT A GLANCE

- Applications for well charging orders, orders for sale and orders for possession continue to be some of the most frequently made applications by lenders to enforce judgment.
- Lenders' applications seeking extension of time to issue execution for an order of possession remain a common fixture.
- Orders for interlocutory injunctions will only be granted where the test established by the Supreme Court in the case of *Merck Sharpe and Dohme* v *Clonmel Healthcare Limited* is satisfied.
- The courts repeat their confirmation that they cannot entertain a challenge as to the conclusiveness of the register, as enshrined in Section 31 of the Registration of Title Act 1964.
- Courts continue to reject challenges taken by borrowers in summary judgment applications regarding the valid notice of assignment of mortgages through the posting of 'hello' and 'goodbye' letters.

Well charging orders, orders for sale and possession

Throughout 2023, we saw the continuing trend of applications by lenders for well-charging orders, orders for possession and orders for sale. In March, the Court of Appeal's anticipated judgment in *Promontoria (Oyster) DAC v Fox & Anor* [2023] IECA 76, (the **Fox case**) addressed the controversial question of whether a registered lien under Section 73 of the Registration of Deeds and Title Act 2006 (the **2006 Act**) could be relied upon as security for future advances. The judgment related to two separate High Court decisions (the Fox case, and *Promontoria (Oyster) DAC v Lynn* [2022] IEHC 99) which ruled that Promontoria was not entitled to well charging orders, on the basis that Section 73 of the 2006 Act did not secure future lending after 31 December 2009. In the Fox case, security was created over the properties by the registered owners depositing the respective land certificate with Ulster Bank. Once this method of security was abolished by the 2006 Act, a lien was registered as a burden on the relevant folios under Section 73(3) of the 2006 Act. Nonetheless, the High Court determined that the registered liens could not be relied on as security for future loan agreements, on the basis that the lender had advanced new monies after the date on which the lien was registered. In the Court of Appeal, Pilkington J did not find anything to infer that registered security could not be used as security for later or further advances. Crucially, the point was made that it was not the case that each new advance amounted to new security. Rather, the security remained the same but secured different amounts. This judgment, which was subsequently applied in the cases of *Bank of Ireland v Carey* [2023] IEHC 388 and *Promontoria (Oyster) DAC v Kean* [2023] IECA 181, provides clarification and comfort to lenders who continue to rely on registered liens as security over registered property.

Extension of time

Cases have continued to come before the courts relating to applications by lenders seeking leave to issue execution in respect of a judgment or order, pursuant to Order 42, rule 24 of the Rules of the Superior Courts (**O.42, r.24**). Following the principles set down in *Smyth v Tunney* [2009] IESC 5, the courts have confirmed that it is not necessary to give some unusual or exceptional reasons for obtaining permission to execute following the lapse of six years from the date of the judgment or order, provided that there is some explanation for the lapse of time.

06/ Banking in the courts

In *Pepper Finance Corporation (Ireland) DAC v Moloney* [2023] IECA 161 the Court of Appeal reversed Egan J's refusal in the High Court to grant the lender leave under O.42, r.24 to issue execution of a possession order in 2010. The judgment of Simons J in the case of *ACC Bank v Sweeney* [2023] IEHC 503 offers a useful reminder of the criteria required in an application for leave to issue execution pursuant to O.42, r.24. In quoting the principles from *Smyth v Tunney*, Simons J reiterated that the relief is discretionary in nature and that, even if a good reason is given, the court must consider any counterbalancing allegations of prejudice.

The case of *Start Mortgages DAC v Hendrick* [2023] IEHC 11 also concerned an application under O.42, r.24, and related to an extension of time within which to issue execution for an order of possession. Here, the Court found that the explanation of delay provided by Start Mortgages met the threshold, as much of the delay was attributable either to time expended on attempts to resolve the debt by methods other than repossession, or to time lost as a result of the outstanding appeal. The Court was also satisfied that no prejudice had been asserted by the other side in this instance and noted that the first named defendant had acknowledged that Start Mortgages had shown considerable forbearance. Interestingly, Simons J went on to clarify that procedural steps to execute a judgment do not involve an "action" within the meaning of the Statute of Limitations 1957 and thus do not trigger the 12-year limitation period prescribed by section 11(6)(a) of that Act. Consequently, there appears to be no limitation period for applications to renew an order for possession or for leave to execute it. The Court therefore ultimately granted the plaintiff leave to issue execution in respect of the order for possession of 11 October 2010.

Satisfying the interlocutory injunction test

As lenders and borrowers continue to seek interlocutory injunctions as a means of either enforcing security or resisting the enforcement of security, the courts continue to remind applicants that such injunctions will only be granted where the test established in *Merck Sharpe and Dohme v Clonmel Healthcare Limited* [2019] IESC 65 (the **MSD case**) is satisfied. In this regard, they must be able to show that (i) there was a serious issue to be tried, (ii) damages are not an adequate remedy, and (iii) the balance of convenience or balance of justice lies in favour of granting the injunction. The judgment of Simons J in *Farrington v Promontoria (Oyster) DAC* [2023] IEHC 492 from August serves as a good reminder of the principles governing interlocutory injunctions.

The case of *Monkswood Investments Limited v Everyday Finance DAC & ors.* [2023] IEHC 77 is a rare example where a borrower succeeded in obtaining an interlocutory injunction, restraining the successor lender and its receivers from taking any steps, directly or indirectly, to sell or market the mortgaged lands. In the Court's view, the evidence presented showed there was a fair issue to be tried as to whether the plaintiff ever granted a valid mortgage or charge over the lands, and whether the defendants had any legal right or entitlement to enter into possession of, or sell, the lands.

In *Downey & Anor v Everyday Finance DAC & ors* [2023] IEHC 101, the High Court heard an application by the plaintiff seeking an interlocutory injunction, restraining the defendants from offering for sale and/or engaging in any actions relating to the sale of certain mortgaged properties, until the determination of these proceedings. Roberts J concluded that the plaintiffs had established a fair issue to be tried, but ultimately determined that damages would be an adequate remedy if the property was disposed of by the defendant in a negligent manner. The application for the injunctive relief was therefore refused.

In the case of *Emerald Sky 2 DAC & ors v Victoria Homes Limited & ors* [2023] IEHC 446 (the **Emerald Sky case**), the lender and its receivers relied on Clarke CJ's judgment in *Charleton v Scriven* [2019] IESC 28 in which he stated that the test for the grant of interlocutory relief identified in the MSD case only arises in circumstances where there is an issue of substance concerning the validity of the appointment and powers of the receivers. In the Emerald Sky case, the plaintiffs sought possession orders in respect of development properties which were security for construction companies' loans, and mandatory injunctions for delivery of possession and surrender of all keys. Egan J concluded that, in any event, a strong case had been made out for a grant of an interlocutory, mandatory injunction and that the defendants would not be in a position to satisfy an award of damages.

Looking behind the register

The judgment of the Court of Appeal in *Tanager v Kane* [2018] IECA 352, which confirmed that the Land Registry register is conclusive evidence of title in repossession cases, continues to be referenced and confirmed by the courts in these types of proceedings.

In the case of *Pepper Finance Corporation (Ireland) DAC v Moloney* [2023] IECA 161, the lender lodged an appeal against a High Court order which refused Pepper's application pursuant to O.42, r.24 for liberty to issue execution on foot of an order for possession. The High Court found that there was clearly an issue as to whether Pepper had retained the legal interest in the mortgage following the sale of beneficial interest in the mortgage to another company, and therefore refused to grant an execution order. On appeal, it was held that the Court was not entitled to go behind the register, in accordance with section 31 of the Registration of Title Act 1964 (the **1964 Act**). Allen J, in his judgment, stated that the High Court judge had failed to apply the principle emphasised in recent cases. The courts cannot go behind the Land Registry register and must abide by the conclusiveness of the register enshrined in section 31 of the 1964 Act. As Pepper was recorded as legal owner in the register, the Court held that the register itself was sufficient proof that Pepper was entitled to the execution order. Similarly, in *Ulster Bank Ireland DAC v Greene* [2023] IEHC 445, the High Court reiterated that it could not entertain a challenge as to the conclusiveness of the register below the threshold of "actual fraud or mistake", nor was the onus on the creditor to prove that it had retained legal interest in the mortgage.

In *Mars Capital Finance Ireland DAC v Gibney* [2023] IEHC 462, the borrowers argued that the transfer of the loan to the successor lender had been defective because it did not comply with the provision in the mortgage deed relating to a power of attorney. Barr J ruled that, apart from the fact that the provision had nothing to do with the lender seeking a possession order, the successor lender had been registered as owner of the charge and previous case law had emphasised that, in the absence of an allegation of fraud, the courts should not go behind the conclusiveness of the register enshrined in section 31 of the 1964 Act.

However, as noted above, the case of *Curran v Hamilton Holdings LLC* [2023] IEHC 380 demonstrates that the conclusiveness of the register is not absolute and is subject to the court's power of rectification in the case of "fraud or mistake". In these "truly extraordinary" proceedings, the Court found that a conveyance of the plaintiffs' property amounted to a fraudulent transaction, and that no conveyance of the property had ever been made by the owners. Furthermore, the application for first registration in the Land Registry falsely claimed it was free from encumbrances, which resulted in the mortgages in favour of Permanent TSB failing to be registered as burdens on the folio. Consequently, O'Moore J made an order under sections 31 and 32 of the 1964 Act directing rectification of the register to show the true owners of the property subject to the mortgages held by Permanent TSB.

'Say hello, wave goodbye'

Over the past year, a number of summary judgment applications have come before the courts where compliance with section 28(6) of the Judicature (Ireland) Act 1877 (the **1877 Act**), in the form of the customary 'goodbye' and 'hello' letters, has been challenged by borrowers.

In *Cabot Financial (Ireland) Limited v Hamill* [2023] IEHC 405, the borrower alleged a failure on the part of the assignor to comply with section 28(6) of the 1877 Act, by failing to notify the borrowers of the transfer of the loan to the plaintiffs (who subsequently acquired the loan). The Court rejected this argument, as although there was no 'goodbye' letter sent to the borrowers by the assignor, the plaintiffs had sent an 'hello' letter notifying the borrowers of the transfer. Under a literal interpretation of the 1877 Act, this 'hello' letter was sufficient to qualify as the requisite notice, as there was no specification under the 1877 Act as to who is to notify the debtor of the transfer.

10 MIN READ

SECTION 07

Financial Regulation & Investigations

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2023 AT A GLANCE

- Central Bank (Individual Accountability Framework) Act 2023 signed into law
- Changes to the fitness and probity investigations procedures and application process
- Review of the Consumer Protection Code 2012 progressed by the Central Bank of Ireland
- New EU legislation brings harmonisation of the rules relating to digital operational resilience and cyber risk management for the financial sector
- EU legislation introduces new legal framework for crypto-asset issuers and traders
- New EU rules for financial services contracts concluded at a distance adopted to address rapid technological developments in the financial services market
- Enhanced protections for consumers applying for credit introduced at EU level
- ESG continues to be a priority of EU regulators

Regulatory activity

The Central Bank of Ireland's (the CBI) priorities for 2023 focused on assessing and managing the financial and operational resilience of regulated financial service providers (**RFSPs**), progressing actions relating to the systemic risks generated by non-banks, enhancing supervisory approaches to mitigate risks from the changing financial services landscape, consumer protection and implementing EU legislative initiatives.

Enforcement

To date, the CBI has not agreed any settlements in respect of enforcement actions this year.

Inquiry management meetings and a legal issues hearing were held this year in relation to the inquiry into Mr David Guinane, former chief executive of permanent tsb plc., for alleged participation in the commission of a prescribed contravention by the bank regarding its treatment of tracker mortgage customers. The substantive inquiry hearing is due to begin on 21 February 2024.

In April 2023, the CBI published a prohibition notice issued to Mr Martin Ryan, former chief and signing actuary at RSA Insurance Ireland DAC (**RSAII**) and former actuarial manager at Euro Insurances DAC (**EID**). The prohibition notice issued after Mr Ryan signed a statement of undisputed facts, in which he accepted that he facilitated an undocumented practice during his time at RSAII, resulting in a shortfall of the firm's reserves in 2013. Mr Ryan also accepted that, during a fitness and probity (**F&P**) assessment at EID in 2016, he failed to provide material information and gave false and/or misleading information. The prohibition notice prohibits him from carrying out any controlled functions (**CFs**), including pre-approval controlled functions (**PCFs**), in any RFSP for a period of five years.

Fitness and probity

The CBI's F&P enforcement procedures were updated, in April 2023, following the commencement of Part 3 of the Central Bank (Individual Accountability Framework) Act 2023 (**IAF Act**), which introduced amendments to the Central Bank Reform Act 2010.

The CBI notified industry bodies of the changes in an Industry Letter and issued a Guide explaining the changes and transitional arrangements. The CBI also replaced previous guidance and regulations with Fitness and Probity Investigations, Suspensions and Prohibitions: Guidance (April 2023) and Central Bank Reform Act 2010 (Procedures Governing the Conduct of Investigations) Regulations 2023.

The CBI introduced changes to the F&P application process in April 2023, including changes to the Individual Questionnaire (**IQ**) and the requirement to submit the IQ via the CBI Portal. The CBI published the following documents to help firms adapt to the new system: New F&P Application Process, New Individual Questionnaire and Fitness and Probity Individual Questionnaire, Applications and PCF Roles Guidance.

Consolidation of the retail banking sector

In its Annual Report 2022 and Annual Performance Statement 2022 – 2023, the CBI stated that the large scale account migration, transfer of loans and other assets, and winding down of the business of the exiting banks is a complex process and is on track. It has set specific expectations for the acquiring banks that they have appropriate financial and operational resources to acquire the new accounts and to execute and integrate the transfers in a safe manner.

IAF Act

One of the most impactful regulatory developments of recent years is the IAF Act, which was signed into law on 9 March 2023. The IAF Act is designed to improve governance, performance and accountability in RFSPs. To achieve this aim it introduces:

- the Senior Executive Accountability Regime (**SEAR**)
- common conduct standards applicable to all individuals in CF roles and additional conduct standards applicable to PCF and CF1 holders, with both sets of standards to apply from 29 December 2023
- business standards applicable to all RFSPs
- a new certification requirement under the F&P regime to apply from end of December 2023
- provisions to bring holding companies within the application of the F&P regime that will apply from end of December 2023

- further enhancements to the F&P regime (outlined in the section above)
- enhancements to the CBI's Administrative Sanctions Procedure (**ASP**)

The CBI launched a consultation, in March 2023, on key aspects of the IAF with a view to providing clarity on the CBI's expectations for the implementation of SEAR, the conduct standards and certain aspects of the enhancements to the F&P regime. Following receipt of stakeholder feedback, the CBI published final Guidance on the IAF, a further version of Draft Regulations and a Feedback Statement on 16 November 2023. The documents outline a number of substantive changes to aspects of the IAF, including SEAR, as against the draft guidance.

One of the most significant changes is the introduction of a one-year deferral period in respect of the application of SEAR to non-executive directors (**NEDs**) and independent non-executive directors (**INEDs**) of in-scope firms. This means SEAR will not apply to such NEDs and INEDs (including the chair of the board and the chairs of the audit, risk, remuneration and nomination committees of in-scope firms) until 1 July 2025. SEAR will apply to all other PCF roles from 1 July 2024. All other parts of the IAF, including the conduct standards and the duty of responsibility will still apply to NEDs and INEDs (and all other PCF roles) from 29 December 2023.

The CBI also reviewed and consulted on the ASP with a view to updating its processes and procedures. In June 2023, the CBI published a Consultation Paper and Draft ASP Guidelines, which update and consolidate the existing ASP Outline, Inquiry Guidelines and ASP Sanctions Guidance into composite guidelines. To date, the CBI has not published its feedback statement or finalised Guidelines.

Review of the Consumer Protection Code 2012

In October 2022, the CBI launched its review of the Consumer Protection Code 2012 (**CPC**) to ensure the CPC remains fit for purpose and consumers remain protected in light of developments in the financial services landscape. In July 2023, the CBI published an engagement update following feedback received on its October 2022 Discussion Paper. The CBI is expected to publish a consultation paper in December 2023, setting out the proposed changes to the CPC. The feedback from the consultation paper will be considered by the CBI, who will publish an updated CPC by way of new regulations in 2024. The CBI will continue to consider further enhancements required to the CPC and publish a second consultation paper with proposed amendments during 2024. Revised regulations are expected to be published in 2025.

The CBI has indicated that the revised CPC will:

- include general business standards, cross sectoral and sector specific requirements
- consolidate existing standalone consumer protection codes and regulations (e.g. the Code of Conduct on Mortgage Arrears 2013)
- have a particular focus on ensuring firms act in consumers' best interests

Digital operational resilience

As a measure to enhance the digital operational resilience of the EU financial sector, the Regulation on digital operational resilience for the financial sector (**DORA**) entered into force on 16 January 2023 and will apply from 17 January 2025.

DORA creates a harmonised regulatory framework to mitigate information and communication technology

(**ICT**) risk by enhancing firms' technology, cyber risk management and digital operational resilience. It is a cross-sectoral EU Regulation applying to most firms regulated under EU law and to ICT third-party service providers that provide ICT services to in-scope firms.

As part of the regulatory framework, DORA requires the adoption of specific regulatory technical standards and implementing technical standards (**RTS/ITS**). The European Supervisory Authorities (**ESAs**) are jointly leading the development of these RTS/ITS, which are progressing in two separate tranches. In June 2023, the ESAs published the first of the two tranches, for public consultation, which address the areas of ICT risk management, major ICT related incident reporting and ICT third party risk management. The second tranche of draft RTS/ITS is expected to be published by year-end.

In September 2023, the ESAs published a joint response to a Call for Advice from the European Commission on two delegated acts that the Commission is empowered to adopt under DORA in order to specify further criteria for critical ICT third party service providers and to determine oversight fees levied on such providers. The delegated acts must be adopted by the Commission by 17 July 2024.

Crypto-assets

The publication of the Regulation on markets in crypto-assets (**MiCA**) was a key legislative development at EU level, which harmonises the regulatory framework for crypto-assets not otherwise captured under existing EU financial services regimes. MiCA brings crypto-assets, crypto-asset issuers and crypto-asset service providers (**CASPs**) under an EU-wide regulatory framework for the first time. It is accompanied by the Regulation on information accompanying transfers of funds and certain crypto-assets, which concerns crypto-assets in the context of anti-money laundering rules.

The new framework introduces rules relating to authorisation, transparency, disclosure and supervision of transactions that are designed to protect consumers and support market integrity and financial stability. MiCA will apply from 30 December 2024, save for the provisions relating to asset-reference tokens and e-money tokens, which will apply from 30 June 2024.

MiCA requires numerous Level 2 and Level 3 measures such as RTS, ITS and guidelines. The European Securities and Markets Authority (**ESMA**) and the European Banking Authority (**EBA**) are tasked with developing the measures, which involve public consultation and are progressing in three separate tranches respectively. The first and second tranches of consultation papers were published by ESMA and the EBA in July and October 2023, together with joint consultation papers on two sets of draft joint guidelines. ESMA also published a letter and statement encouraging Member States, competent authorities and CASPs to act now to ensure a smooth transition to the new framework. Furthermore, the Irish Department of Finance launched a public consultation on the exercise of certain national discretions contained in MiCA.

ESG and the Markets in Financial Instruments Directive (MiFID II)

To complement ESG-related changes introduced to the MiFID II legal framework in 2021 relating to suitability and product governance, ESMA published new Guidelines on MiFID II suitability requirements and new Guidelines on MiFID II product governance requirements this year, which became applicable on 3 October 2023. The ESG-related changes to the

MiFID II legal framework included the integration of sustainability factors, risks and preferences into organisational requirements and operating conditions (including suitability assessments) for firms, and integration of sustainability factors into product governance obligations. ESMA expects both sets of guidelines to assist firms in their interpretation of the updated suitability and product governance requirements and ensure consistent, uniform and harmonised application of the rules to further strengthen investor protection.

Distance Marketing Directive

The EU's revised Distance Marketing Directive will be published in the Official Journal of the EU shortly. Once it's published and enters into force, Member States will have 24 months to publish transposing legislation and another six months to apply it. The new Directive revises the current legal framework by repealing the existing Distance Marketing Directive (2002/65/EC), while including new and updated rules regarding financial services contracts concluded at a distance in a new chapter of the Consumer Rights Directive (2011/83/EU), which protects consumers engaging in all types of commercial practices.

The new rules under the Distance Marketing Directive:

- enhance existing rules on information disclosure and modernise pre-contractual information obligations
- establish the right of consumers to request human intervention if dissatisfied with websites that display automatic information tools (robo-advisors or chatbots)
- facilitate the right of withdrawal from contracts concluded at a distance by requiring an easy to use and prominent 'withdrawal function' on firms' platforms
- introduce protections for consumers against dark patterns

Consumer Credit Directive

A new Directive on credit agreements for consumers, which entered into force on 19 November 2023, repeals and replaces the existing Consumer Credit Directive (2008/48/EC). It aims to improve protections for consumers applying for credit by introducing new measures, such as widening the scope of the requirements to include loans below €200 and buy-now-pay-later products, giving consumers the right to terminate a credit agreement within 14 days, establishing stricter advertising rules, and ensuring that credit information is presented in a clear, understandable manner and is adapted to digital devices. Member States must publish transposing measures by 20 November 2025 and apply those measures from 20 November 2026.

LOOKING AHEAD

- In November 2021, the European Commission proposed a directive and a regulation to amend MiFID II and the Markets in Financial Instruments Regulation (**MiFIR**) to improve market data and trade transparency. Provisional political agreement was reached on the proposals on 29 June 2023 and they are expected to be formally adopted by the Council and Parliament in early 2024.
- Developments are expected next year at an EU level to progress the European Commission's proposals to amend and modernise the Payment Services Directive 2 and to introduce a new Payment Services Regulation to ensure the EU's financial sector is capable of adapting to the ongoing digital transformation and the risks and opportunities it presents, particularly for consumers
- Provisional political agreement has been reached between the Council and the Parliament on the proposal for a Regulation on instant credit transfers in euro (the Instant Payments Regulation). The proposed regulation intends to make instant payments in euro available to all citizens and businesses holding a bank account in the EEA.
- The European Central Bank will continue forward with the digital euro project following its announcement of the next phase of the project (the preparation phase) and the publication of an opinion and technical working document on the proposal for a regulation on the establishment of the digital euro. For more information, please see our Finance chapter.

10 MIN READ

SECTION 08

Disputes & Investigations

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2023 AT A GLANCE

- Civil justice reform continues - the Judicial Planning Working Group Report was published
- Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 was enacted, introducing the prospect of consumer mass claims
- Third party litigation funding – Law Reform Commission consults on the general position, pending expected movement in this space
- Statutory mechanism introduced (but not yet commenced) permitting funding for international commercial arbitration and related disputes
- "State Litigation" principles are published for the first time
- Supreme Court clarifies position on accrual of causes of action for financial loss
- Cross border litigation and enforcement – the Hague Judgments Convention came into force and there has been some interesting case law this year
- The Court of Justice of the EU expands the concept of EU legal privilege
- Restructuring and insolvency has seen some noteworthy decisions

Civil justice reform

In April, we saw the publication of the Judicial Planning Working Group Report (the **Judicial Planning Report**), along with an OECD report on Modernising Staffing and Court Management Practices in Ireland.

The Judicial Planning Report contains 54 recommendations. These recommendations include a review of the geographical areas within the Circuit Court, a review of court organisation and sitting times and the possibility of staggering vacation periods across different courts.

There is also a recommendation that judgment writing should be made more efficient, including enabling judges to set aside sufficient time for the production of written and oral judgments soon after a case has been heard, recognising the importance of the early delivery of judgments for the administration of justice.

The recommendations will need to be considered by the various bodies responsible – such as the various government departments who formed part of the Working Group, the Courts Service, the Judicial Council and Court Presidents. In tandem with the reform initiatives already underway in the civil justice sphere, there promises to be plenty to monitor in the coming months and years.

Legislation

There were two key pieces of legislation enacted in the disputes space this year.

1. The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 was enacted in July 2023, but has not yet been commenced. Ireland was up against a deadline to transpose the EU's Collective Redress Directive (2020/1828) by the end of December 2022, which didn't happen. Ireland, along with most of the other EU Member States, received an infringement notice in January of this year. What followed then was a fast-paced legislative passage, with a draft bill being published in March, going through each stage of the legislative process and ultimately being signed into law in mid-July.

   The Collective Redress Directive was introduced in 2020 to effectively set a floor or a minimum standard across the EU – to ensure that consumers across the EU have access to some form of mass litigation remedy. At its most basic, it introduces a formal mechanism whereby huge numbers of consumers can come together to pursue a group claim via a qualified entity (**QE**). These claims can be cross border in nature and QEs can seek injunctions, redress measures, or both.

Ireland has transposed the law domestically, but we still await lots of information as to how it will operate in practical terms. The law applies to infringements occurring on or after the 25 June 2023. Funding is, in our view, the major outstanding question in terms of this Act and the one thing that might delay any real practical impact on a domestic level for the time being.

2. The Courts and Civil Law Miscellaneous Provisions Act 2023 was also enacted in July and the majority of the provisions were commenced on 31 July 2023. It is an instrument which reforms many other pieces of legislation. There are some important general changes introduced, such as amendments to the Bankruptcy Act 1988 to further modernise and streamline the bankruptcy process and to reduce unnecessary costs and delays, and lots of individual changes to courts legislation, such as permitting a single judge of the Court of Appeal to hear certain specified applications and appeals.

   Of key importance is the amendment made to the Arbitration Act 2010, by the insertion of a new section 5A which serves to remove the current restriction on third party funding in the specific context of international commercial arbitration in Ireland and for related mediation and court proceedings. At the time of writing, this provision awaits commencement, with ministerial regulations to follow on certain aspects. Given the growth of the arbitration funding market around the common law world, this will arguably make Ireland a more attractive destination for international commercial business and arbitration.

Third party litigation funding – the general position

In a development which looks set to move the dial in this space more generally, the Law Reform Commission (**LRC**) published a consultation paper on third party litigation funding in July, with the consultation period closing in mid-December.

As made clear in the executive summary at the beginning of the consultation paper, the responses to the consultation will allow the LRC to move to a final report which will set out recommendations. The report, once published, will then feed into government policy considerations as to how reform of the position will take shape going forward.

The Department of Justice, in the Implementation Plan on Civil Justice Efficiencies and Reform Measures published in May 2022, committed to carrying out a policy review on third party funding by the first half of 2024, taking into account the LRC's current project. These national outcomes will also have to be monitored in the context of the overall EU position, with likely activity in this space. The European Commission has indicated that it will carry out a mapping exercise on third party funding across the EU bloc, following the proposal for a directive in this space, put forward by the European Parliament in 2022.

State Litigation Principles

In June, the Attorney General published seven non-binding principles which are intended as guidelines to "assist the State in maintaining high standards of ethics and integrity in the conduct of litigation". This is notable and we haven't seen this before. The first principle is to avoid legal proceedings where possible – with reference to alternative dispute resolution processes and the Mediation Act 2017. Another is the identification of "lead" cases when there are multiple sets of proceedings on the same issue.

Case law developments

At the end of 2022, the Court of Appeal, in the case of *Inland Fisheries Ireland v O'Baoill & Ors* [2022] IECA 266, granted summary judgment in plenary proceedings for the first time. The Court found that, as (i) the case involved extensive proceedings, (ii) the pleadings had closed, and (iii) over a decade had elapsed since the institution of the proceedings, “such an approach in the context of the factual matrix obtaining was overwhelmingly warranted”.

There were two important decisions on limitation periods this year: *Mark Smith v Mark Cunningham & Ors* [2023] IESC 13 in the Supreme Court and *McDonagh & Ors v Ulster Bank Ireland DAC & Ors* [2023] IEHC 242 in the High Court. The concept of an ‘accrual of a cause in action’ and its significance for limitation periods has become increasingly problematic and difficult in the modern era. Both *Smith* and *McDonagh* dealt with this issue in the context of claims for financial loss arising from the alleged negligent performance of professional services. Both cases were found to be statute barred and the decisions are important in setting out some useful principles to be followed in these sorts of pure financial loss cases.

In the *Pepper Finance DAC* [2023] IESC 21 cases, the Supreme Court clarified that proceedings against “persons unknown” should only be brought in exceptional circumstances – following some jurisprudence in this space in recent years.

In *Barry & Ors v BDO* [2023] IEHC 61, the High Court refused an application by the plaintiffs to give them liberty to use discovery made by the defendant in separate proceedings and refused an order releasing them from their implied undertaking not to use that discovery. The law required the plaintiffs in this application to establish the existence of special circumstances and to satisfy the Court that the documentation in question was of obvious relevance to these proceedings, such that the relief they sought was necessary in the interests of justice. The plaintiffs did not establish the existence of special circumstances or the relevance of the documentation such as would render it appropriate for the Court to even consider allowing disclosure of the extensive amount of documentation.

We also saw interesting developments on the issues of jurisdiction and choice of law this year. The Irish Commercial Court confirmed in an ex tempore decision that the Irish courts have jurisdiction to resolve an insurance claim against a Russian insurer related to aircraft stranded in Russia.

In *Compagnie De Bauxite ET D’alumine De Dian Dian SA v GTLK Europe Designated Activity Company* [2023] IEHC 324, the High Court had to tackle the issue of choice of law post-Brexit, with reference to the Hague Convention, and refused to allow proceedings to continue which had been issued in Ireland, but where there was an exclusive jurisdiction clause in favour of the English courts.

In *Microsoft Ireland Operations Ltd v Arabic Computer Systems* [2023] IECA 225, Microsoft Ireland brought an action for enforcement of a contract against two Saudi Arabian partners (**ACS**) and sought recovery of more than €30m. ACS argued that Microsoft Ireland did not have ostensible authority to sign the agreement as ACS had been dealing with ‘Microsoft Arabia’ and, accordingly, the contract was void. In an appeal on a discrete point of law, the Court of Appeal used the ‘putative law’ approach in deciding that Irish law applied: relying on the fact that the choice of law clause in the contract stated that it should be governed by Irish law. The judgment reflected on the difficult conflict-of-laws issues in the case and noted that the putative law approach was not without weaknesses, but it was ultimately important to have a clear, definitive approach in such cases. The decision suggests that, in cases falling outside the scope of the Rome I Regulation, the putative approach will prevail.

Hague Judgments Convention

The Hague Judgments Convention (**HJC**) entered into force on 1 September. In short, the HJC expands upon the 2005 Hague Convention – whereas the latter deals with choice of court agreements, the HJC now provides a much more predictable set of rules for the enforcement of foreign judgments in the absence of exclusive jurisdiction clauses. At present, the HJC only applies between the EU and Ukraine, although Uruguay looks set to be next to join. A number of other states, including the USA, have signed the HJC but haven't yet ratified it. Interestingly, the UK Government recently held a consultation on joining and has concluded that it is the right time to do so. If this happens, it may, in time, address a number of issues that arise when EU citizens and businesses seek to enforce a national judgment in the UK.

EU

In the case of *Orde van Vlaamse Balies and Others v Vlaamse Regering*, Case C-694/20 (**Orde**), the Court of Justice of the EU (the **CJEU**) ruled that requiring lawyers, who qualify for a waiver from reporting obligations due to legal professional privilege, to notify other intermediaries was a breach of the right to respect for communications between lawyers and their clients guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union. This was in the context of the EU Mandatory Disclosure Regime, or DAC 6, and has been broadly perceived as an expansion of the scope at a European level of legal professional privilege (**LPP**) to include legal advice. The DAC 6 reporting obligations imposed on lawyer intermediaries subject to LPP in this jurisdiction seem to be aligned already to the approach adopted by the CJEU in the Orde case.

Restructuring and insolvency

Earlier in the year, the High Court appointed an examiner to MAC Interiors Limited, a Northern Ireland incorporated company operating in the construction sector.

While non-Irish companies have previously availed of examinership as "related companies" where the main petitioning company was Irish incorporated, this was the first occasion where the petitioning company was a non-Irish incorporated company. However, in October, in *MAC Interiors LTD v Companies Act 2014* [2023] IEHC 549, the High Court (following a formal challenge by the Revenue Commissioners) found it had no jurisdiction to confirm the proposals as put forward, as it found that the only supporting impaired class of creditors was not validly formed.

In the Matter of Diamond Rock Developments Limited (In Liquidation) [2023] IECA 198, the Court of Appeal held that a mortgage is void as against the liquidators and other creditors of a company due to non-compliance with the registration requirements under section 409 of the Companies Act 2014.

In the Matter of Beggasa Limited (In Receivership) [2023] IECA 21, consideration was given by the Court of Appeal as to a receiver's liability under section 440 of the Companies Act 2014. The Court held that a receiver is entitled to be paid in priority to the claims of preferential creditors or the debenture holder, the costs of realisation of assets subject to a floating charge, and the costs and expenses of the receivership.

In *Eteams International (in liquidation) v The Governor & Company of the Bank of Ireland* [2020] IESC 23, the Supreme Court affirmed judgment awarding the costs of an appeal against the liquidator personally.

In the Matter of Latzur Limited (In Receivership) & Anor and In the Matter of The Companies Act 2014 & Anor [2023] IECA 60, the Court of Appeal considered crystallisation, decrystallisation and re-crystallisation of a floating charge in the context of an unsuccessful examinership and preferential creditors. The Court held that the charge under the debenture (the charge) did not crystallise at any point prior to the receiver's appointment, and thus the receiver was appointed on foot of a floating charge and not a fixed charge. As such, Revenue's claim ranked in priority over the charge.

LOOKING AHEAD

- We expect to see a continuation of the trend of aviation and aviation insurance cover disputes being litigated in the Irish Commercial Court.
- We await developments on the operational points flowing from the collective redress regime (the appointment of QEs and so on), domestically and across the EU; these will be critical to how the regime works in practice.
- The Court Proceedings (Delays) Bill 2023 was initiated by the Government on 17 February 2023, but has yet to progress any further. This Bill provides for the right of persons who are party to proceedings, where such proceedings are not concluded within a reasonable time, to seek a declaration of that fact and, in certain cases, compensation.
- We await the results of, and a possible path arising from, the LRC report on third party litigation funding and EU developments in this area. In addition, the commencement of the new statutory mechanism permitting funding for international commercial arbitration is eagerly anticipated.
- The direction of travel of the UK in terms of the Hague Judgments Convention will be of interest.
- Reform of defamation law looks set to progress in 2024, with the General Scheme of the Defamation (Amendment) Bill published during 2023 and pre-legislative scrutiny completed in late September.

9 MIN READ

SECTION 09

Renewable energy targets and Ireland's Climate Action Plan 2023

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09/ Renewable energy targets and Ireland's Climate Action Plan 2023

Climate change has been described as one of the greatest challenges facing all states, with Ireland being no exception. At a domestic level, Ireland has set ambitious targets in the Climate Action Plan 2023 (**CAP 2023**) to halve emissions by 2030 and reach net zero emissions by 2050. That is likely to be further developed by the expected updating of that plan for 2024. A major upscaling of renewable energy is critical to decarbonising the electricity sector and delivering on the targets in CAP 2023. At a European level, the European Green Deal is a package of policy measures designed to put energy transition at the heart of the EU's efforts to reach climate neutrality by 2050. An increase in the use of renewable energy is recognised as being key to delivering on the Green Deal objectives, with offshore renewable energy, in particular, expected to contribute significantly to reaching these objectives.

This article will focus on the objectives of CAP 2023 relating to the acceleration of renewable electricity generation and highlight some of the challenges facing Ireland in achieving these objectives, particularly in the offshore wind sector. Ireland rightly considers it needs to deliver offshore wind at scale to meet its 2030 targets.

Climate Action Plan 2023

On 21 December 2022, the Irish Government published CAP 2023, which is the second annual update to Ireland's Climate Action Plan 2019. Our previous analysis on the Climate Action Plan 2019 can be accessed here.

CAP 2023 is the first plan to be prepared since the enactment of the Climate Action and Low Carbon Development (Amendment) Act 2021 (the **2021 Act**) which places a legally binding objective on the State to pursue and achieve, by 2050, "the transition to a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy" (the 'national climate objective').

Another addition of the 2021 Act was the requirement, under section 15, that all public bodies (widely defined) "shall" perform their functions "in a manner consistent with" the most recent climate plans and strategies. The power of section 15 is evident in An Bord Pleanála conceding a judicial review challenge to its decision to grant permission for the proposed Galway ring road development, because it had not considered the Climate Action Plan 2021 (even though the Plan had only been published days before its decision). This matter is back with An Bord Pleanála now for a fresh decision.

CAP 2023 is also currently the subject of a High Court judicial review challenge taken by the environmental, non-governmental organisation, Friends of the Irish Environment (**FIE**). FIE claims that CAP 2023 lacks sufficient detail as to how Ireland will attain the carbon budgets approved under the 2021 Act, which require substantial annual emission cuts. This challenge will be determined during 2024. FIE successfully challenged a previous climate plan in the Supreme Court in 2020 on the basis that the plan failed to specify how Ireland would achieve the objective of transitioning to a low carbon, climate resilient and environmentally sustainable economy by the end of 2050.

What does CAP 2023 say?

CAP 2023 builds upon the Climate Action Plans 2019 and 2021 by setting out the roadmap to deliver on Ireland's climate ambition to reach net zero.

The Government summary of CAP 2023 identifies the so-called "Six Vital High Impact Sectors" requiring emissions reductions as being:

1. electricity and renewables
2. industry
3. built environment

4. transport
5. land use, land use change and forestry
6. agriculture

A fuller analysis of CAP 2023 can be accessed here.

As regards electricity and renewables, CAP 2023 aims to facilitate a large-scale deployment of renewable energy to replace fossil fuels in electricity generation.

At an EU level, binding targets for renewable energy have also been set, with the EU formally adopting the new Renewable Energy Directive (**RED II**) on 9 October 2023. RED II raises the EU's binding target share of renewable energy in the overall energy consumption to 42.5% by 2030, with the hope of achieving a target of 45%. It was published in the EU's Official Journal on 31 October 2023 and entered into force on 20 November 2023. Member States have 18 months from the date of entry into force to transpose it into national legislation.

Domestic developments affecting offshore wind since CAP 2023

There has been huge change recently in the Irish offshore wind sector, and even some history made, with the first ever auction for offshore wind taking place earlier this year. Momentum is continuing to build and will need to be sustained if Ireland is to meet the ambitious targets set out in CAP 2023.

ORESS 1 – the first auction for offshore wind

In December 2022, Maritime Area Consents (**MACs**) were granted to six Phase 1 offshore wind projects, which enabled these projects to apply for planning permission and participate in the first auction for offshore wind under the Offshore Renewable Electricity Support Scheme (**ORESS**). ORESS 1 used a competitive auction process which invited renewable energy projects to compete against each other to win contracts to provide electricity at a guaranteed price. Almost 3.1MW of capacity was awarded to four Phase 1 projects in June 2023.

All of the Phase 1 projects are expected to submit planning applications in Q1 2024. Those applications will be subject to public participation and environmental assessment, with the first development consents for the projects potentially issuing by the end of 2024, enabling construction and operation in advance of 2030.

Phase 2 offshore wind

Additional offshore projects will be needed to meet the CAP 2023 target of 5GW of installed capacity by 2030. On 10 March 2023, the Government published its Policy Statement on the Framework for Phase Two Offshore Wind. ORESS 2 will likely consist of at least 700MW off the south coast. The Phase 2 Policy Statement commits to a new Phase 3, which targets 2GW of floating offshore wind capacity in development by 2030.

Consultation on ORESS 2

In July 2023, the Government announced a consultation on the principles for the design of ORESS auctions under the Government's plan-led Phase 2 policy. The Consultation Paper confirms that ORESS 2 auctions will be geographically aligned with available onshore grid capacity and that the first auction, 'ORESS 2.1', will see the development of offshore wind within the South Coast Designated Maritime Area Plan (**DMAP**).

Maritime Area Regulatory Authority (MARA)

MARA is responsible for regulating development and activity in Ireland's maritime area, including assessing applications for MACs and licences for surveys. In August 2023, MARA published guidance outlining the requirements that apply to applicants for, and holders of, MACs under the Maritime Area Planning Act 2022, including eligibility and deciding criteria. It is hoped that MARA will be able to expedite licence applications to allow critical marine surveys to proceed.

First DMAP proposal published

The first DMAP proposal for offshore renewable energy (**ORE**) was launched in July 2023. DMAPs will determine the broad areas where ORE projects can be developed and act as a management plan for a specific area of our marine waters. The DMAP Proposal for the South Coast puts forward an initial 'proposed' geographical area within which future ORE development may take place. It is expected that the draft DMAP will be presented to the Oireachtas in December 2023/January 2024 for approval, which will then allow ORESS 2 auctions to commence.

Challenges to achieving renewable energy targets

At a national level, there have been a number of positive developments in the offshore wind sector, but there are also a number of challenges facing the increased roll-out of renewable energy projects.

The planning process

Delays in the planning process for renewable projects can arise as the result of resourcing issues within regulators, as well as legal challenges to licences and permissions granted. There have been many challenges to onshore wind farm permissions, and concerns have been raised by, for example, fisheries bodies and environmental bodies as to the potential impact of offshore wind. The Phase 1 projects have engaged in extensive consultation to mitigate these concerns. Crucially, additional resourcing has been provided to MARA and An Bord Pleanála, which should assist in making good, and prompt, decisions whilst facilitating effective public consultation. The Planning and Development Bill 2023 (the **Bill**) was published on 21 November 2023 and is expected to become law early in 2024. The Government has said the Bill will speed up and bring certainty to the planning process but it remains to be seen how the Bill will address planning delays.

The Bill proposes to remove the requirement for an application for leave to apply for judicial review. The Bill also seeks to provide that applications for judicial review may be made only on the grounds of challenge raised by the applicant in the statement of grounds filed with their application, with subsequent amendments being permitted only in limited circumstances. An applicant will also need to have a "sufficient interest" in the matter. According to the Bill, applicants will have a "sufficient interest" where they are, directly or indirectly, materially affected by the matter. Unincorporated bodies will be permitted to take judicial review proceedings as long as they meet certain administrative conditions. Environmental organisations will enjoy a privileged status in relation to bringing judicial review proceedings providing they also meet certain administrative conditions.

The Bill grants more flexibility to planning authorities to fix errors and the courts will have a wider array of remedies which stop short of quashing planning decisions. The Bill also requires that judicial review proceedings, and associated appeals, shall be dealt with by the courts as "expeditiously as possible consistent with the administration of justice".

Port infrastructure

Industry groups have been calling for increased investment in Irish port infrastructure to support offshore wind farm development here. A 2022 National Port Study revealed that Belfast was the only port on the island capable of serving as a construction base for offshore wind farms. In its 'Policy Statement on the Framework for Phase Two Offshore Wind' earlier this year, the Government recognised that ports would play a "crucial role … in facilitating the necessary development of offshore renewable generation and grid infrastructure". The Government has committed to developing ports through a new National Ports Policy. The Government's 2021 Policy Statement on the Facilitation of Offshore Renewable Energy by Commercial Ports in Ireland highlighted that a number of port facilities will be required for deployment activity and a multiple of ports will be needed for the operation and maintenance of wind farms. On 19 October 2023, the commencement of the first phase of a public consultation for the Review of National Ports Policy was announced. The first phase invites submissions on an Issues Paper, with the second phase to consist of a shorter public consultation on the draft policy document. It is envisaged that a new draft policy will be presented to the Government in 2025.

Grid infrastructure

It is widely recognised that Ireland's grid infrastructure requires further development to support the delivery of both onshore and offshore renewable energy targets. In its 'Policy Statement on the Framework for Phase Two Offshore Wind', the Government stated that it will invest in Ireland's onshore grid to ensure it is capable of handling the generation of increasing amounts of renewable energy. The Policy Statement states that the development of regional meshed offshore grids will be prioritised to "match and harness our offshore energy ambition and enable the export of surplus renewables produced from floating offshore wind projects situated off our Southern and Western coasts". The Policy Statement further recognises that this will require development of an appropriate regulatory and legislative framework at EU level.

EU improvements

In her most recent State of the Union address, Ursula von der Leyen, President of the European Commission, described the EU wind industry as a "European success story", while also noting that it was currently facing a "unique mix of challenges." She announced a European Wind power package to support the industry and the European Wind Power Action Plan was published on 24 October 2023. Among its features, the action plan seeks to accelerate the awarding of permits and improve auction designs across the EU.

LOOKING AHEAD

If Ireland is to reach its targets to halve emissions by 2030 and reach net zero emissions by 2050, it is imperative that renewable energy projects are proactively encouraged and supported, as they will be key in assisting Ireland to achieve these objectives. Although there have been promising developments in Ireland recently in relation to the roll-out of increased offshore wind capacity, a number of challenges remain. As set out above, however, both the Government and the EU have pledged their support to tackle and alleviate these challenges in recognition of the important role wind energy, and offshore wind in particular, will play in Ireland and the EU reaching their emissions targets.

11 MIN READ

SECTION 10

Real Estate

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10/ Real Estate

2023 AT A GLANCE

- Continued interventions in the context of housing, but focus in 2023 has been more on increasing housing supply from a development point of view, rather than on the kinds of changes to residential tenancies law that we have seen over the preceding few years
- Commercial rates reform to happen with effect from 1 January 2024, following recent amendments to the problematic Local Government Rates and other Matters Act 2019.
- We are seeing ESG become a core concern for both owners and occupiers in the commercial property market, with green lease provisions becoming more common, particularly in the letting of offices

Tailte Éireann

To start our year in review off from a very practical perspective, the Tailte Éireann Bill, which we reported on last year, has now been made law. As a result, the Property Registration Authority is no more. Tailte Éireann is the new parent body which sits over both the Registry of Deeds and the Land Registry, with the Valuation Office and Ordnance Survey Ireland having been brought in under the same umbrella. The day-to-day operation of the Registry of Deeds and Land Registry from an end-user perspective has not been materially affected by the new structure, and the provisions of the Registration of Deeds and Title Act 2006 and the Registration of Title Act 1964 remain broadly operative.

Law Society documentation

A new edition of the Law Society's General Conditions of Sale has just been published, to be used for the sale of property interests from 1 November onwards. The main thrust of the amendments to the general conditions is to modernise the content, and there are therefore changes such as the inclusion of gender-neutral language and the removal of Latin 'legalese'. The main contractual changes relate to the inclusion of a Law Society drafted GDPR provision and a new General Condition 48 which recognises the general move to digitisation and the increasing use of electronic signatures when exchanging contracts for the sale of land.

We understand that a new set of requisitions on title is also expected, to deal with certain legislative changes which have occurred since the last requisitions were released in 2019.

Legislative developments

The Government continues to introduce legislation in support of its *Housing for All* plan – a "multi-annual, multi-billion euro plan which will improve Ireland's housing system" – as follows:

Land value sharing

We highlighted last year that the concept of land value sharing (**LVS**) forms a key part of *Housing for All*, and that the General Scheme of the Land Value Sharing and Urban Development Zones Bill 2021 had been published in December 2021. This has since been superseded by the General Scheme of the Planning and Development (Land Value Sharing and Urban Development Zones) Bill 2023 (the **2023 LVS General Scheme**), which was published in April of this year.

The aim of the LVS element of the legislation is to introduce a mechanism to ensure that a proportion of the value uplift associated with a decision to zone land for development purposes is shared with the State, in the interest of the common good.

The net effect of this mechanism is to:

1. Establish a LVS Register (the **Register**) containing all lands falling within the scope of the LVS obligation.
2. Impose a statutory charge (the **LVS contribution**), payable to the planning authority by owners of those lands. The exact rate of the LVS contribution has not been finalised as yet, however the general scheme suggests an initial rate of 30% of the value uplift based on valuations relating to the existing use value (**EUV**) and market value (**MV**) of the land.

LVS will initially apply to all lands that are zoned for the purposes of residential use or mixed use (to include residential). It is proposed that LVS will be extended to commercial and industrial development zonings over time, on the basis that the owners of such lands also benefit from uplift in values as a result of zoning decisions. Planning authorities will be required to publish a map showing the lands initially in scope for LVS in March 2024.

Liability for the LVS contribution will commence on 1 December 2024 in respect of planning applications lodged for permission on land that is:

1. acquired on or after 21 December 2021; and
2. zoned residential or zoned mixed use (to include residential), within an urban development zone or within a strategic development zone

Lands within the initial zoning categories acquired before 21 December 2021 will come within scope on 1 December 2025.

All other lands which meet the zoning requirements prescribed in the legislation, to include commercial and industrial development zoning, will come within scope on 1 December 2026.

Pre-legislative scrutiny of the 2023 LVS General Scheme has taken place. The resulting report, published at the end of September, identified issues with the draft legislation in the context of the valuation mechanism, the proposed 30% LVS rate, the possible impacts on the viability of development projects, and exemptions. It goes on to make a number of recommendations for consideration by Government in preparing the first draft of the bill itself, to include the possibility for flexibility around the headline LVS rate of 30% and a general consideration of the impact LVS will have on the viability of projects and housing supply.

The legislation is a priority drafting item for the Autumn term and we expect to see the first draft of the actual bill before year-end.

Residential Zoned Land Tax

Residential Zoned Land Tax (**RZLT**) is a new tax introduced as part of the Government's *Housing for All* plan. It is aimed "at increasing housing supply by activating zoned, serviced residential development lands (including mixed-use lands) for housing [and] to incentivise landowners to use existing planning permissions for housing". It is an annual tax calculated at 3% of the market value of land within scope, which will be administered by Revenue. It replaces the Vacant Site Levy which was not deemed a success.

RZLT was initially due to become payable from 1 February 2024. However, it was announced in Budget 2024 that the first liability date will be extended by one year to allow for further review of the draft local authority maps and to afford taxpayers further opportunity to engage with the process.

We understand that this change is due to the volume of submissions raised with local authorities by property owners querying the inclusion of their lands on the draft maps which have been prepared in contemplation of the introduction of the charge.

Vacant Homes Tax

Vacant Homes Tax (**VHT**) is a new tax introduced in 2023. It applies to residential property which is being used as a dwelling for less than 30 days in a 12-month chargeable period (running from 1 November to 31 October each year). The tax is to be paid annually and was originally payable at a rate of three times the basic rate of Local Property Tax (**LPT**) for the property. However, Budget 2024 has increased this to five times the basic rate of LPT. This new, higher rate will apply for the chargeable period commencing on 1 November 2023.

Commercial rates

One important piece of legislation from 2023 which does not concern housing is the Historic and Archaeological Heritage and Miscellaneous Provisions Act (the **Heritage Act**), which the President signed into law on 14 October. The primary purpose of the legislation is to repeal the National Monuments Acts and replace them with more modern provisions for the protection of heritage.

Of more significance for the majority of commercial property owners and occupiers, however, are the amendments to the Local Government Rates and other Matters Act 2019 (the **2019 Act**). We reported in 2019 that the most controversial aspect of the 2019 Act provided that an owner of property who proposes to sell must, before the completion, pay to the local authority all rates and accrued interest which are due and payable in respect of the property. The text of the 2019 Act was drafted such that this provision was to apply even in the context of a fully-let investment property, where rates would otherwise be the liability of the tenant(s).

Following lobbying in 2019, the Department of Housing, Planning and Local Government indicated that the wording of the provision did not align with the intention of the legislation and that there would be legislative amendment in this regard. The rates provisions of the 2019 Act were not commenced as a result. The Heritage Act has now brought about this promised legislative amendment such that owners will now ***not*** become liable for the rates arrears of their tenants on a sale of the property.

The relevant provisions will commence with effect from 1 January 2024.

ESG considerations

Green leases

In January 2023 the Chancery Lane Project (**CLP**) published a suite of green lease clauses for use in commercial leases in Ireland. The clauses aim to:

1. Promote co-operation between landlords and tenants in relation to the environmental performance of buildings.
2. Address issues such as repair, alteration and rent review from the perspective of energy and sustainability ratings.
3. Bring circular economy and sustainability principles into a service charge regime, landlord regulations and landlord's works.

As the Law Society of Ireland has noted, the clauses should not be treated as precedent clauses to be used in all commercial lease arrangements – they have been drafted primarily from the perspective of a lease of a new multi-let office. That being said, some clauses may be suitable for use in leases of other types of commercial property.

Some commercial property investors may have their own set of green lease clauses, drafted based on specific investment, funding and management requirements. Whilst the new clauses are intended to provide a more generic framework, they are extremely detailed and require in-depth legal and technical advice, tailored to suit the specific circumstances of the parties, the property and the letting arrangements.

Energy performance of buildings

During the course of this year, the proposal to revise the Energy Performance of Building Directive (**EPBD**) entered the final phase of the EU legislative process. Updating the existing EPBD is seen as critical to achieving the EU's climate objectives, as the built environment accounts for 40% of the EU's energy consumption and 36% of its energy-related emissions.

Some of the core aims of the European Commission's original proposal were as follows:

- All new buildings to be zero-emissions buildings by 2030.
- Existing buildings transformed into zero-emissions buildings by 2050.
- The certification process for energy performance certificates (**EPCs**) (or BERs, in the Irish market) to become more stringent, with all EPCs based on a harmonised scale of energy performance classes by 2025. Minimum energy performance standards (**MEPS**) to be introduced gradually with a view to triggering the renovation of the worst-performing buildings across the bloc – the worst-performing 15% of the building stock in each Member State to be obliged to reach certain EPC standards, with the obligation being triggered by a sale or letting of the property.

However, trilogue negotiations between the EU institutions have been taking place and our understanding is that these negotiations will result in significant changes to the original proposal.

Most notably, it appears that the MEPS proposal has been rejected, primarily on the basis that the worst-performing buildings are often owned by those who can least afford to renovate them. It is understood that MEPS will be replaced with benchmark targets for each Member State, which will be empowered to set out their own renovation strategies.

It seems that, similarly, the EPC system will also not be fully harmonised across the EU as originally planned, a move which is believed to be in recognition of the differing climate circumstances across the EU.

We await further detail of what has been agreed before we can assess the potential impact, particularly in the context of commercial property.

Case Law

A notable case this year, which is of relevance to both occupiers and landlords, dealt with the issue of fixtures and fittings. While this is, on the face of things, a somewhat technical and unexciting area of the law, it is very often of real practical relevance where commercial leases come to an end.

RGRE Grafton Ltd v Bewley's Café Grafton Street Limited [2023] IEHC 25 concerned the issue of whether certain Harry Clarke stained glass windows/panels, originally installed in Bewley's Café on Grafton Street, belonged to the landlord or the tenant. Having considered the law relating to fixtures at length, McDonald J concluded that certain windows on the western wall of the premises were part and parcel of the premises and so were not fixtures at all, but rather belonged to the landlord. This was distinguished from other windows, which formed the inner layer of a double fenestration system and which the Court ruled were not part of the fabric of the building. McDonald J concluded that these were tenant fixtures, satisfying the conditions for such laid down in section 17 of Deasy's Act (the Landlord and Tenant Law Amendment Act, Ireland 1860). They were "mock" windows, the Court held, which did not serve the landlord's interests and were rather part of the interior of the café, to be enjoyed by the staff and patrons because of their ornamental attributes.

In reaching its judgment, the Court summarised the more general principles that a tenant may be entitled to remove tenant's fixtures; being items that are fixed to the premises for the benefit or convenience of the tenant's trade or business, and which can be removed without causing substantial damage to the premises. In contrast, a tenant may not be entitled to remove items considered to be landlord's fixtures; being items fixed to the premises for the permanent improvement or better enjoyment of the premises as a whole, and which cannot be removed without causing substantial damage to the premises or the items themselves.

This case is significant as it represents the first modern Irish judicial consideration of the law of fixtures in the context of the landlord and tenant relationship.

LOOKING AHEAD

- We await publication of the Residential Tenancies (Right to Purchase) Bill. This is priority legislation for publication by the Government and its stated intention is "to allow tenants in rental properties a first right of refusal to purchase a property when it is put forward for sale". Depending on how the legislation is drafted, this could have significant implications for those who invest in residential property.
- As noted above, the next iteration of the recast EPBD is awaited, which will need to be assessed for its potential impact on the commercial property sector.
- It remains to be seen if the Seller's Legal Pack for Property Buyers Bill 2021, a Private Member's Bill introduced by Marc McSharry TD which passed second stage in the Dáil on 5 October 2023, makes any further progress. It provides that a property cannot be marketed for sale until a "seller's legal pack" comprising certain specified documents has been produced. The Law Society has made a submission to Government on this bill, highlighting concerns around additional (and potentially sunk) costs for sellers, the likelihood of having to deal with increased queries on title from multiple potential buyers and potential delays to the sale process.

10 MIN READ

SECTION 11

Data Protection

Eoghan O'Keeffe
Knowledge Consultant,
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11/ Data Protection

2023 AT A GLANCE

- A record GDPR fine of €1.2b was issued to Meta Platforms Ireland by the Data Protection Commission, relating to international data transfers
- Data subject access requests continue to be the largest category of complaint received by the Data Protection Commission
- There have been further developments with regards to international transfers of personal data, including the EU-US Data Privacy Framework coming into effect
- The European Court of Justice has decided cases concerning the interpretation of "non-material damages" for GDPR violations

Data Protection Commission (DPC) regulatory activity

The DPC's Annual Report (the **Report**) for 2022 (published in Q1 of 2023) reviews the span of regulatory work completed by the DPC and reveals some interesting trends and statistics.

The DPC opened 9,370 new cases in 2023, which is a slight decrease on last year. It received 2,700 complaints, with the most frequent topic of complaint, by a considerable margin, once more being data subject access requests (42%). The other major topics of complaint included fair processing (14%), right of erasure (10%), and direct marketing (9%). The Report stresses the DPC's continued encouragement of using amicable, informal resolution to resolve complaints.

The DPC received a total of 5,828 valid breach notifications (down on last year). The most frequent cause of breaches, by far (62%), was a result of correspondence being inadvertently misdirected to wrong recipients - a timely reminder to always double check email addressees!

DPC enforcement activity

By the close of 2022, the DPC had 88 statutory inquiries open, including 22 'large-scale cross-border inquiries'. The Report also specifically highlights how, through supervisory action, the DPC brought about the postponement or revision of seven scheduled internet platform projects, indicating the DPC's increasingly proactive approach in reviewing products in advance of release to market, and confirming the importance of early regulatory engagement when launching significant new products or processing systems.

Conclusion of DPC inquiries into behavioural advertising practices

On 4 January 2023, the DPC announced the conclusion of two inquiries into the processing activities of Meta Platforms Ireland (**Meta**), imposing fines of €210m for GDPR breaches linked to Facebook, and €180m for GDPR breaches related to Instagram.

The critical issue in the inquiries was the legal basis on which Meta relied for its processing of personal data for the purpose of behavioural advertising. The DPC's final decision, which reflects the European Data Protection Board's (**EDPB**) binding Article 65 determination (following disputes between concerned supervisory authorities across the EU), found that Meta is not entitled to rely on the 'contract' legal basis (Article 6(1)(b) GDPR) for the delivery of behavioural advertising as part of its Facebook and Instagram services. Reliance on this basis for the processing of users' data amounted to a contravention of Article 6 GDPR.

The EDPB also called on the DPC to conduct a fresh investigation spanning all of Facebook's and Instagram's data processing operations and examine special categories of personal data that may or may not be processed in the context of those operations. Following the EDPB's decision, the DPC brought an action for annulment before the Court of Justice of the EU (the **CJEU**), requesting it to set aside the EDPB's direction to conduct a fresh investigation. The decision of the CJEU is awaited.

DPC decision on international data transfers

On 12 May 2023, following the EDPB's binding decision on the case in April, the DPC adopted its final decision in respect of its investigation of Meta's processes for transferring users' personal data from the EU to the US.

In the aftermath of the CJEU decision in *Schrems II*, which invalidated the US Privacy Shield as a basis to transfer personal data from the EU to the US, Meta had facilitated data transfer from the EU to the US by way of Standard Contractual Clauses (**SCCs**). SCCs are contractual clauses provided for under the GDPR framework that allow data transfers by ensuring data subjects are afforded appropriate safeguards following a data transfer outside of the EU.

The DPC found that Meta's SCCs (and the supplementary measures it adopted) did not adequately address the gap between EU and US data privacy protections and, accordingly, failed to properly safeguard the fundamental rights of EU data subjects. The EDPB, considering the case under Article 65 GDPR, instructed the DPC to impose a fine of 20-100% of the maximum fine permitted and to order Meta to amend its data transfer processes.

This was notwithstanding Meta's documented efforts to comply with EU law on international transfers, including (i) its implementation of SCCs, (ii) its transfer impact assessment relating to these transfers and, (iii) additional organisational, technical and legal measures to protect data transferred to the US.

The DPC ordered Meta to (i) suspend its transfers of EU user data to the US (within five months of the decision), (ii) bring its transfers of EU user data into compliance (within six months of the decision), and (iii) pay a €1.2b fine, the largest fine ever imposed under the GDPR.

Meta appealed the EPDB decision, filing an action in the General Court of the EU in June 2023. It will be interesting to follow the progress of this action, particularly given the recent European Commission adequacy decision in respect of the new EU-US Data Privacy Framework (discussed below), which many expect will ease concerns around international transfers and potentially negate the processing bans imposed on Meta.

Age verification and protection of children's data

In September, the DPC announced its decision following its investigation into TikTok Limited (**TikTok**). The DPC issued a fine of €345m for various infringements, mostly concerning the protection of children's data. In particular, the investigation considered (i) TikTok's age verification procedure and (ii) certain platform settings and safeguards.

The age verification procedure at issue involved TikTok simply requesting users to input their date of birth upon setting up an account. The supervisory authorities of other Member States submitted that this method should not be considered "state of the art" or sufficient to safeguard rights. However, when the matter was referred to the EDPB for a decision under Article 65, the EDPB did not have enough evidence to conclude that any "state of the art" methodology existed in respect of age verification and accordingly there was no strict obligation for an entity to employ one specific method over another.

The DPC did not find fault with TikTok's age verification process, but it found that the associated Data Protection Impact Assessment (**DPIA**) infringed the GDPR, because it did not take sufficient account of the severe risks posed to minors accessing the platform. The decision serves as a strong reminder that particular care must be exercised to ensure all relevant risks are sufficiently considered in a DPIA.

Among the other issues flagged by the DPC were the following:

- In the past, TikTok had a practice of assigning 'public' accounts to all users by default, including minors. The DPC suggested that, to accord with data minimisation and privacy by design principles, all accounts, but particularly minors' accounts, should be private by default.
- The DPC found that TikTok had not sufficiently complied with its transparency obligations, as its Privacy Policy and pop-up notices did not reflect the full implications of adopting a public account.

Overall, this decision and the significant fine issued by the DPC demonstrate the high level of care expected when processing the data of minors, and further, the careful consideration which should be employed when drafting documentation like a DPIA and privacy policy.

CJEU guidance on non-material damages

On 4 May 2023, the CJEU issued its decision in Case C-300/21, *Österreichische Post*. This decision was highly anticipated by data controllers as it marks the first time the CJEU has ruled on the question of non-material damages under Article 82 GDPR.

The case concerned a logistics and postal service provider which collected information relating to the political preferences of the Austrian population. A citizen claimed he had not consented to such processing and, as a result of its collection, suffered significant upset, loss of confidence and a feeling of exposure. He sought non-material damages in the amount of €1,000.

On referral from the Austrian Supreme Court, the CJEU ruled that:

- Not every infringement of the GDPR gives rise, by itself, to a right to compensation - it must be an infringement giving rise to damage.
- The right to compensation is not limited to non-material damage that reaches a certain threshold of seriousness. Article 82 does not contain a definition of non-material damage and should be interpreted in broad terms. (This was in direct contrast to the Advocate General's Opinion on the same case.)
- As the GDPR does not contain any rules governing the assessment of damages, it is for the legal system of each Member State to prescribe the detailed rules for actions intended to safeguard the rights of individuals and, in particular, the criteria for determining compensation.

This precedent has already been followed in this jurisdiction, in *Kaminski v Ballymaguire Foods Limited* [2023] IECC 5, where the Circuit Court awarded an employee €2,000 for non-material damages associated with his non-consensual appearance in a CCTV video shown to co-workers as an example of poor workplace practices.

Data transfers: EU-US Data Privacy Framework

On 10 July 2023, the European Commission adopted its adequacy decision on the EU-US Data Privacy Framework (the **DPF**), a successor to the previously struck down Privacy Shield. The Commission ruled that the DPF provides an adequate level of protection for personal data transferred from the EU to the US, which means that companies which participate in the DPF can transfer personal data freely to the US without the need for additional data protection safeguards (e.g. SCCs or binding corporate rules).

The changes introduced to US law, by President Biden's Executive Order on 'Enhancing Safeguards for United States Signals Intelligence Activities' (EO 14086) and its accompanying regulation, were a key factor in the Commission's decision. These instruments introduce measures designed to address the deficiencies in US law identified by the CJEU in *Schrems II*, including:

- the establishment of a new Data Protection Review Court to handle and resolve complaints from individuals relating to access to data by US authorities
- the introduction of binding safeguards which limit access to data by US authorities to what is necessary and proportionate to protect national security
- significant limitations on the ability of US authorities to engage in bulk collection of data

Participation in the DPF by US entities involves a self-certification process which must be renewed annually.

Upcoming legislation

2023 saw the continued progression and/or finalisation of a number of significant data regulation laws, including:

- Proposal for a regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act): intended to regulate AI systems in the EU through implementing a risk-based approach - i.e. the greater the risk associated with an AI system, the greater the regulation.
- Digital Operational Resilience Act (DORA) (applicable from 17 January 2025): a regulation setting out uniform requirements for the security of data in the financial sector and mandating specific network and information protections.
- Proposal for a Regulation laying down additional procedural rules relating to the enforcement of the GDPR: intended to clarify the rules concerning cross-border enforcement under the GDPR.

Regulatory guidance

EDPB

The EDPB provided revised and final versions of guidance on a number of key subjects in 2023, including:

- Calculation of administrative fines under GDPR
- Data subject rights - right of access
- Personal data breach notification under GDPR
- Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR

Although these updated guidelines did not (with some exceptions) substantially change earlier versions, they often provided additional detail and clarity.

DPC guidance on records of processing activities

In April 2023, the DPC published guidance on records of processing activities (**RoPA**) required under Article 30 GDPR. The guidance sets out what should be contained in a RoPA and explains that the RoPA should be a standalone record that the DPC can request and view in a readable format.

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The guidance provides a helpful list of 'Dos' and 'Don'ts' for organisations in respect of RoPAs, which stresses the need to maintain the RoPA as a living document and ensure it provides a sufficiently detailed breakdown of activities from across all functions within an organisation.

DPC guidance for employers in the workplace

The DPC also published new guidance for employers concerning data protection in the workplace. The guidance is intended to help employers, in their role as data controllers, to manage their data processing activities in relation to current, former and prospective employees.

The guidance outlines best practices for various standard employer processing activities, such as processing relating to occupational health and employee monitoring.

The guidance also provides useful examples of what is considered personal data and in what circumstances. It is important for employers to have an understanding as to whether data is personal or commercial when faced with a data subject access request. Notably, the DPC expresses the view that emails sent by an employee in their professional or work capacity are unlikely to constitute personal data.

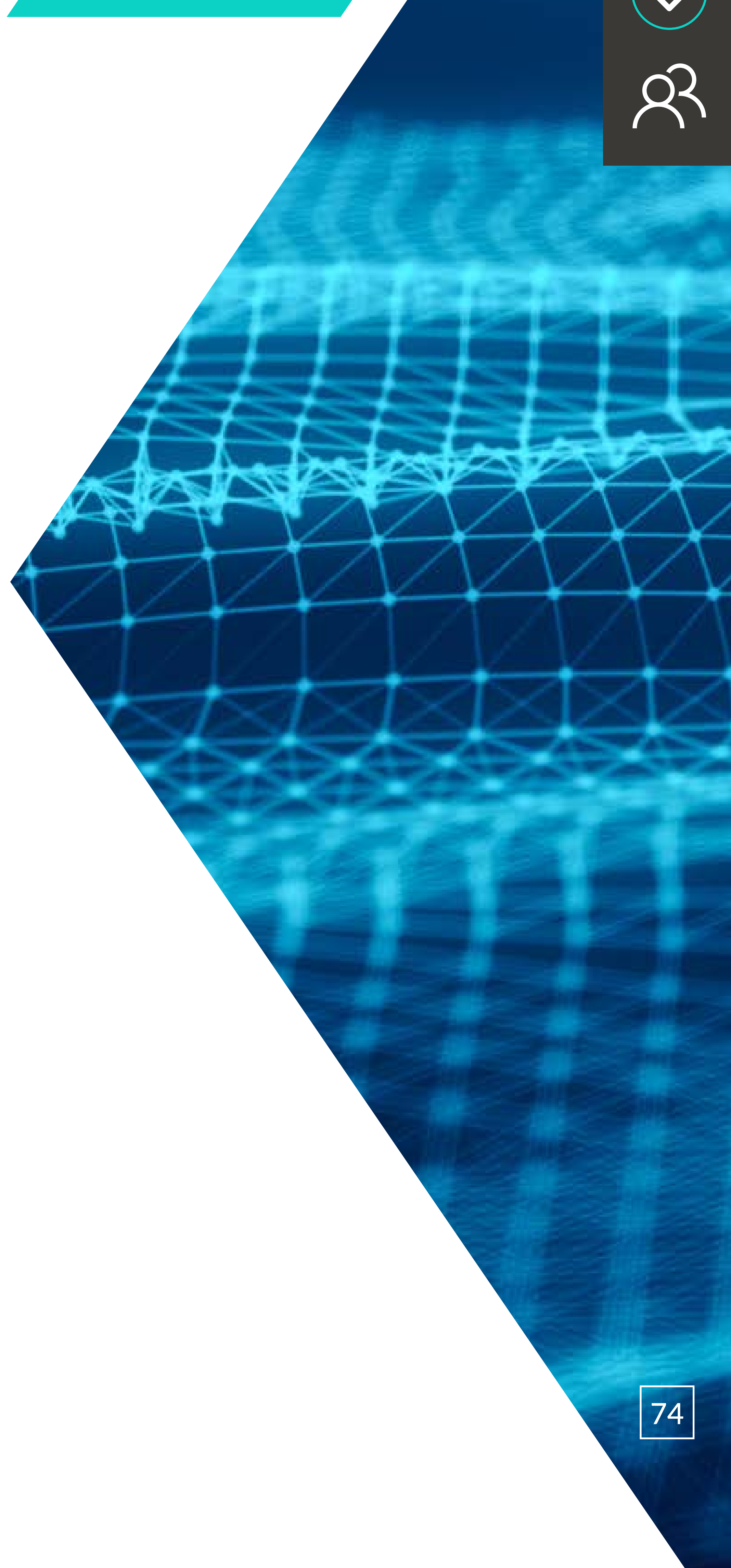
LOOKING AHEAD

The introduction of the DPF was a major development in data protection this year. It is hoped that this framework provides sufficient safeguards to shield it from the types of legal challenge which saw the invalidation of the previous US transfer mechanisms, Privacy Shield and Safe Harbour. However, the DPF has already been the subject of one challenge in the EU courts. The challenge by French MEP, Philippe Latombe, will be heard in the coming months. Max Schrems has also indicated that his organisation, NOYB, may file a complaint against the DPF early next year. So, this will be an area to watch closely in the months ahead.

We await the final decisions of the DPC in relation to two inquiries: an inquiry into X (formerly Twitter) in respect of the availability of collated datasets of user personal data online and the inquiry into Yahoo's compliance with the requirements to provide transparent information to data subjects under the provisions of the GDPR.

Meta has issued High Court challenges to a number of the fines it recently received from the DPC. The outcome of those appeals could have a significant impact on the DPC's future approach, for example, most relevantly, to fine calculations.

2023 also saw the establishment of a new Irish regulator, Coimisiún na Meán, which is responsible for regulating broadcast and online media. Coimisiún na Meán will have competencies under the Online Safety and Media Regulation Act 2022 and the EU's Digital Services Act, which could potentially have some overlap with the role of the DPC in terms of monitoring the protection of fundamental rights by online platforms. It remains to be seen how this new regulator will coordinate its activities with the DPC.



SECTION 12

Pensions:
Key themes for business

Chris Comerford
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A&L Goodbody

12/ Pensions: Key themes for business

2023 has been dominated by four key themes in the pensions industry. Defined contribution (**DC**) schemes have continued their mass migration to DC master trusts. Ireland's auto-enrolment (**AE**) pensions regime is finally beginning to gain some traction. All continuing schemes have shifted, or are beginning to shift, their focus to compliance with the critical review and risk requirements of the Pensions Act 1990 (the **Act**) and the Pensions Authority's approach to monitoring supervision and compliance is becoming clearer. Finally, high interest rates and favourable bond yields, as well as generally strong funding levels in defined benefit (**DB**) schemes have created favourable conditions for DB schemes to move toward winding up or de-risking.

DC consolidation and master trusts

This year has seen an increase in the number of DC master trusts operating in the Irish market. Most of the main pension providers now offer their own master trust. Within the master trust market, different products have been developed to address different demands. For example:

- The basic product is a master trust which is designed to cater for groups of employees of unrelated employers.
- Some providers offer separate master trust products depending on whether the underlying investment fund options are actively managed or passively managed, with a related increase in costs for the actively managed option.
- Providers are establishing standalone master trusts to cater for employees who, prior to now, would have participated in single member arrangements so as to preserve some of the essential characteristics of those single member arrangements within a master trust structure.

We are still awaiting the publication of master trust-specific legislation. However, all of the master trust providers have been subjected to the scrutiny of the regulator, the Pensions Authority. For new master trusts, this takes the form of a requirement that all of the Pensions Authority's master trust criteria are satisfied in advance of registration being provided. For existing master trusts, the Pensions Authority engaged extensively with each of the providers to ensure that those criteria have been satisfied. The Pensions Authority has identified the master trust sector as systemically important to the future of the Irish pensions landscape and will continue to monitor their compliance very closely.

In addition to master trusts, we have also seen a significant migration of DC plans to personal retirement savings accounts (**PRSA**s) during 2023. Unlike a master trust, a PRSA is not trust-based. Rather, it is a contract between an employee and a PRSA provider (usually an insurance company). An employer's role under a PRSA is much more limited than under a trust-based pension arrangement in that it simply provides access to a PRSA and facilitates payment and remission of contributions to that PRSA.

Prior to the Finance Act 2022, employee tax relief on contributions to a PRSA did not match up to the tax relief on contributions to a trust-based pension scheme.

However, the tax treatment of contributions is now the same under each arrangement, which means that PRSAs are now considered genuine alternatives to master trusts. Other advantages to PRSAs are that they are not subject to the same investment and borrowing rules that apply to trust-based arrangements and therefore may represent a better option for more sophisticated pension investors than a trust-based arrangement. However, this can of course also expose less sophisticated investors to unnecessary investment risk. The key perceived drawback to PRSAs is that they are typically less competitive from a cost perspective than a master trust.

2023 also saw the High Court's judgment in *O'Rourke v Meadowvale Pension Scheme* [2023] IEHC 148. This judgment is a timely reminder for employers and schemes transitioning to master trusts or PRSAs not to lose focus on ensuring the existing scheme wind-up is effective. In this case, a scheme which wound-up in 2012 was found not to have been properly wound-up because of a failure by the trustees to transfer legal title to assets effectively. The outcome is that the trust continued to exist, and the trustees continued to be subject to trust obligations. An employer of a scheme which is not properly wound up can expect they may continue to retain an exposure to that scheme too, often by way of an indemnity which is provided to the trustees.

Auto enrolment (AE)

The Draft Heads and General Scheme of the Automatic Enrolment Retirement Savings System Bill 2022 (the **AE Bill**) was published by the Irish Government in October 2022. Detailed consultation with industry has taken place over 2023 and the Report on pre-legislative scrutiny was published in April. The Government has indicated that the AE Bill will be presented to Cabinet before the end of 2023.

A number of questions remain unanswered in relation to what the AE Bill will contain once it is published and what the timeline for implementation will be. In general, AE is welcomed by Irish industry. However, it will necessarily lead to increased costs for employers and the diversion of employees' pay to pension contributions when they may prefer to use it to address cost of living and interest rate pressures. The timing of introduction and education around the merits of AE will be crucial to its success.

It's still a little early to fully understand the implications of AE for individual business, but employers should start thinking about the following:

- All private sector employers will be required to comply with AE.
- While employees can opt out of AE at staged intervals, they will also be required to be automatically opted back in at future intervals.
- Employers should not incentivise employees to opt out of pension provision.
- Most employees will be AE eligible, but the exact age range and salary range is still to be decided.
- Employees as well as employers will be required to make contributions.
- If you have an existing pension arrangement, when the final shape of AE becomes clear. you should review it to understand if it needs to be updated in order to avoid having to enrol employees in the Government's AE arrangement.

The original AE proposal remains unchanged, but we may see some updates once the AE Bill is published and as it makes its way through the legislative process.

12/ Pensions: Key themes for business

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***)*

Compliance requirements and regulatory approach

The Pensions Authority will start monitoring compliance with the requirements of IORP II (Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision) for schemes from 1 January 2024.

While many employers have opted to wind-up schemes and transition to master trusts or PRSAs prior to this date, for those continuing to operate, the focus has been on ensuring that the scheme is compliant or is on the path to compliance with the new IORP II requirements. Compliance means updating service provider contracts, appointing key function holders, preparing own risk assessments (**ORA**s), adopting policies, carrying out critical reviews of existing service providers, and the list goes on.

One of the main focuses for schemes for the remainder of 2023 and into 2024 will be preparing an ORA. Pension schemes in Ireland are, for the first time, being subjected to requirements to assess, identify and manage scheme-specific risks. This process is similar to the well-established requirements on insurance companies to prepare own risk and solvency assessments (**ORSA**s) and we can expect both schemes' and the Pensions Authority's understanding and expectations of what an ORA should contain to develop over the next number of years.

In the meantime, schemes' first ORAs must be completed and submitted to the Pensions Authority by 22 April 2024. The Pensions Authority has published helpful guidance on preparing an ORA and what it should contain. It is clear from the guidance that the Pensions Authority does not expect trustees to abdicate responsibility for the ORA to advisers or the scheme's risk key function holder. The ORA should be an objective assessment of risks and not simply a rationalisation of identified risks.

The Pensions Authority has also indicated that its new supervisory review programme (**SRP**) will commence in 2024. While we await detail of what the SRP will entail, we can expect it to involve a deep dive by the Pensions Authority into how a scheme works and the sorts of processes and supports it has in place to protect members' interests and comply with legal requirements. The SRP might also represent a good opportunity for schemes to have productive dialogue with the Pensions Authority over what areas are working well, what areas need improving, and how they might be improved. We await further details on the SRP with interest.

12/ Pensions: Key themes for business

Defined benefit – endgame discussions

In presentations to industry, the Pensions Authority has indicated that it expects small (that is those with liabilities of less than approximately €16m) DB schemes to start the process of thinking about 'endgame' and settling scheme liabilities. Proactive engagement from the Pensions Authority with DB schemes of this size can be expected.

Endgame means wind-up or preparing for wind-up. Quite a few material DB scheme wind-ups occurred during and in the aftermath of the 2008 global financial crisis. These wind-ups were characterised by severe underfunding in schemes, high costs of providing benefits on wind-up, and varying degrees of reduction to member benefits. These were wind-ups to address a problem.

The external market is now very favourable for scheme wind-ups. High interest rates and high bond yields, along with reasonably strong investment performance and maturity of membership profile mean that relatively well-funded pension schemes can buy well-priced annuities. This might include buying annuities as scheme investments to match future pensioner liabilities and remove volatility ('buy-in') to build toward a future wind-up. Alternatively, it might include buying annuities in the name of pensioners so that the scheme passes the obligation to pay the pension to the annuity provider ('buy-out'). We are also seeing partial buy-outs while schemes remain ongoing.

DB schemes of all sizes have, or are developing, end-game plans; some over short time horizons and others by tailoring investment strategy to target endgame at a future date while protecting all stakeholders in the interim.

WHAT NEXT?

The intensity of pension change continues in the market. Regulatory and Government policy is shifting the emphasis of the change from consolidation in the DC market to improved pension coverage through AE, risk assessment through ORA and SRP, and consolidation or wind-up in the DB market.

2024 is set to be another busy one for everyone involved in the industry. The long-term societal benefits that will result from AE are much anticipated and long overdue and we are hopeful that 2024 will mark an important milestone for Ireland in finally implementing AE.

6 MIN READ

SECTION 13

Bringing the value of knowledge management to your team

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Listen to the audio version

A&L Goodbody

13/ Bringing the value of knowledge management to your team

Knowledge management (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.

A department with identified knowledge gaps around certain types of work may focus their first year KM efforts on skills and expertise building, mentoring and building communities of practice. Conversely, a department focused on reducing reliance on panel firms may focus their efforts on collating and managing all outside counsel advice in one place to make it easy to find and reuse.

Those tasked with KM responsibilities can be pulled in many different directions, from building knowledge repositories to creating playbooks for new joiners. The legal team's knowledge programme will need to have priorities and defined objectives, or else it won't make meaningful progress.

Identifying opportunities

Legal teams should look to KM to solve some of their business problems. These pain-points are the opportunities that KM can capitalise on. While every department and business is different, there are common challenges that all teams in 2023 will identify with. In its 2023 Knowledge Management Priorities and Predictions Survey Report, the American Productivity & Quality Center (**APQC**) identified the following as business problems that KM can address:

- Staff turnover necessitates the critical capture and transfer of institutional knowledge.
- Employees are frustrated with fragmented and poorly organised information repositories.
- For organisations adopting hybrid and remote work models, effective knowledge capture, transfer, and sharing are more important than ever.
- Leadership recognises knowledge silos and gaps as significant organisational risks.
- Employees need to feel progression in their careers. KM can support this through learning, development and upskilling.

In the same survey the APQC recognised that there are certain persistent threats to KM adoption:

- Overburdened teams and employees don't think they have time for KM.
- The culture does not incentivise knowledge sharing and reuse.
- Leaders are focused on immediate priorities and this diverts attention from long-term KM benefits.
- Organisations have fragmented and disconnected technology ecosystems. Employees don't know where to go to find answers.
- The impact of KM activities is hard to measure and this complicates resource allocation and stakeholder buy-in.

13/ Bringing the value of knowledge management to your team

When designing knowledge programmes, it's essential to consider these threats or barriers to success. These are valuable perspectives from the business and cannot be ignored. Other significant factors influencing knowledge activities in 2023 are remote and hybrid working and generative AI. These components will bring change to the business and may upset previously effective KM practice. Knowledge programmes must be flexible and dynamic and able to respond to the changing environment of knowledge workers. Knowledge practices, systems and processes will need to be recalibrated for the changed work environment.

> *"A framework KM audit is available through the Legal Leaders' Toolkit, a resource for GCs and in-house legal who are looking to introduce or enhance KM efficiencies and solutions in their department.*
>
> *Contact Celine Kelly to learn more*

Where are we now and where do we want to be?

One of the first steps in developing a KM programme now is to get a clear understanding of where the department is compared to where the department wants to be. To do this, an assessment of the current state of play needs to be made and this is done through the 'KM audit'. The audit is a framework of questions which allows the team to identify where knowledge sits, where it is being lost, the systems available and the opportunities for knowledge capture and retention that the existing ecosystems offers. The audit is the first step in drawing up the blueprint for the team's knowledge programme.

The audit process builds an inventory of the information and knowledge within the team and is important for the team looking to leverage existing activities into knowledge sharing opportunities. The audit may also reveal significant gaps that need to be addressed as part of the programme, from who manages or makes decisions about naming conventions to streamlining where knowledge is collected from multi-systems into one centralised place.

Resourcing and support are key enablers for KM and critical for success. Resources normally need to include dedicated people resources from the business, as well as people's time in general, to contribute to KM initiatives and activities. Resourcing may extend to funding for specific activities, or investment in technology to support strategic goals.

In assessing resource needs, teams should consider the culture of the department and provide for the time it takes to manage change effectively. There can be resistance to new ways of doing things and a fear generally of change. Acknowledge the time it will take to bring the department and the business on-board. Ideally make the team part of the KM strategy and implementation from day one. Be transparent about the strategic goals and objectives and then bring the team in on developing the knowledge projects to meet those goals. Turn sceptical team members into true believers of the benefits of KM and allow them to champion KM to colleagues within and beyond the department.

Clear, consistent and regular communication on KM efforts, projects and initiatives is needed to build awareness amongst the department. Position the programme clearly and outline in particular where there are mandatory requirements around, for example, contributions or other accountabilities. Building effective awareness can take a surprising amount of time, so be prepared to deliver the same messages again and again.

13/ Bringing the value of knowledge management to your team

10 STEPS TO GETTING A KM PROGRAMME OFF THE GROUND

01 Identify your knowledge committee/ champions/ team.

02 Assess your needs and current practices through the KM Audit.

03 Identify the objectives for your KM programme.

04 Present KM as a framework of people, processes and technology. Emphasise that it is an ecosystem of resources and behaviours.

05 Identify and focus on the highest priorities. Quick wins are very important.

06 Clarify expectations, timelines and milestones.

07 Utilise existing systems, tools, processes and workflows.

08 Emphasise change management and team engagement. What will drive adoption?

09 Scale and improve based on what works.

10 Cycle through steps 3-10 to continually grow your KM programme.

Source: *ALG's Legal Leaders' Toolkit*

13/ Bringing the value of knowledge management to your team

Bringing knowledge into the workday through design thinking

Once the knowledge gaps and opportunities are identified, efforts quickly turn to the solutions and systems that can be put in place to close these gaps and leverage these opportunities. When crafting knowledge capture or sharing processes, it is vital that these activities happen within the flow of existing work practices. Knowledge sharing processes that are seen as separate to day-to-day work will be viewed by the team as yet another drain on their time and yet another job to do in the already busy day. Ideally, knowledge sharing and capturing activities happen within the flow of work, rather that becoming a separate and siloed activity, adding to an already full to-do list.

When formulating processes, the key is to keep the user at the centre of the design process. This is the central tenet of design thinking. Design thinking (see McKinsey, What is design thinking?) is both a mindset and a framework for creative problem-solving that ensures the end-user is at the centre of all decisions. Bringing a design thinking mind-set to knowledge processes and systems means hardwiring the practical day-to-day experience of the busy and stretched lawyer into any new process or system.

This user-centred approach keeps the perspectives of the user at the heart of system design and process design. While the legal department may not have design thinking experience within the department, any business with customer facing channels such as apps, websites, client portals and customer service operations will likely be using design thinking to improve customer experience. It is quite likely that the product design, user experience (UX) personnel and business analyst personnel already employed by your company have these skills. These professionals can bring their tacit knowledge and experience in service design, digital transformation and design thinking to your knowledge solutions. Collaborating with these people on process and system design will bring value and boost your chances of rolling-out practical, useful and successful solutions.

Measuring success

It is prudent to consider how the team will measure the success of the knowledge programme projects and to then begin measuring the key performance indicators from day one. Ideally, engagement will be measured or extracted from a central resource, as a reporting procedure that requires manual reporting at sporadic intervals is unlikely to survive.

A genuinely useful set of nuanced metrics can be difficult to identify, particularly at the beginning of a KM programme. Using blunt measurements, such as the number of precedent documents shared with the department or hours spent on the development of template agreements, have their place. Just make sure that your measurements and reporting take into account the qualitative as well as the quantitative aspects of contributions made by the department.

THE KNOWLEDGE CENTRE TEAM

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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 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.

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.

AVAILABLE VIA KNOWLEDGECONNECT

Registered users of KnowledgePlus, our client knowledge extranet, have direct access to our Knowledge Centre team through KnowledgeCONNECT. The Knowledge Centre team 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 Knowledge at ALG

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; most recently, On Board, one of our client knowledge products, won the award for Best Client Support at the International Management Excellence awards 2023.

There are several elements to the ALG Knowledge team which may be of interest to legal counsel and their legal teams. Many 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 eLearning website available exclusively to ALG clients. The site provides a range of useful legal know-how, case studies and guides. It hosts new articles every week, providing updates on key areas of domestic and international law that impact your business. KnowledgePlus also includes a library of on-demand recordings, which are eligible for CPD.

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

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 team of Knowledge lawyers and consultants and may contact the appropriate Knowledge lawyer with informal queries.

Contact details are available from Meet the Team.

KNOWLEDGE CONNECT

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

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

Client Knowledge Services

ON BOARD

On Board is our award-winning repository of guidance, videos and other useful materials for company directors, client teams and their legal counsel, covering a broad range of legal themes. Topics covered include conflicts of interest, fiduciary duties, and emerging responsibilities under ESG rules.

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

TECHREG TRACKER

The TechReg Tracker allows you to keep up to date on the rapidly evolving ecosystem of Irish and EU legislation relating to digital services. The tracker monitors critical legislation across the areas of security, data, content law and consumer law.

Access the Tech Regulation Tracker here.

LEGAL LEADERS' TOOLKIT

The Legal Leaders' Toolkit has been designed for legal teams looking to bring knowledge management (KM) solutions and efficiencies to their departments. 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.

CONTRACT LAW TOOLKIT

The Contract Law Toolkit is an easy-to-use, searchable repository of key contract case law summaries decided by the Irish and English courts.

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

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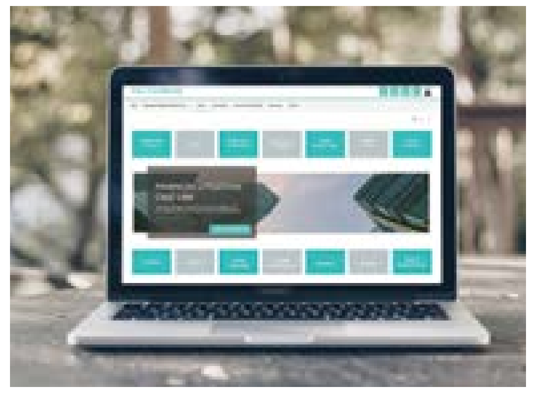
FINANCIAL LITIGATION CASE LAW TOOLKIT



The Financial Litigation Case Law Toolkit is an easy-to-use, searchable repository of key Irish financial cases. It is fully maintained on an ongoing basis.

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

PROPERTY LEGAL INSIDER

The Property Legal Insider is a blog hosting 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.

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.

Client Knowledge Services

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.

LEGAL RESEARCH

Our Online Legal Research Guide helps legal teams understand and navigate the key legal research tools and resources freely available.

If you would like more information on any of the services outlined above, please email knowledge@algoodbody.com

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