

# 2023 Review and 2024 Horizon Scan

## *Real Estate and Public Law*

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## McCann FitzGerald 2023 and 2024: Review and Horizon-Scan: Real Estate and Public Law

### 1. Real Estate (General)

#### 1.1 Transactions / Conveyancing Practice

##### (a) Commercial rates

#### ***Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023***<sup>1</sup>

With effect from 1 January 2024 a new regime for the collection of commercial rates comes into effect under the Local Government Rates and Other Matters Act 2019 (here) (the “Act”) as amended by the Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023 (the “**2023 Act**”) ([here](#)) with the aim of improving the effectiveness of the rates collection process.

The Act repeals relevant provisions of the Poor Relief (Ireland) and Local Government Acts including, most notably from the perspective of conveyancing practice, s32 Local Government Reform Act 2014 ([here](#)).

The following is a brief summary of the provisions of the new regime most relevant to conveyancing practice:

- (i) the “liable person” is the person in occupation on 1 January every year;
- (ii) the liable person has the obligation to pay the rates and to notify the rating authority of any change in their status as liable person, with such change in status leading in turn to a “subsequent liable person” taking on those obligations;
- (iii) a liable person “who proposes to sell the property” is obliged to discharge the rates and any accrued interest before the completion of the sale; failure to do that is a criminal offence;
- (iv) while unpaid rates of an “owner”<sup>2</sup> operate to charge the property on a rolling basis unless and until discharged: “rates due and unpaid by the owner of the relevant property, in the owner’s capacity as a liable person, shall be.....a charge on the .....property.....[and]... the charge.... shall continue to apply without a time limit until such time as it is paid in full” (s14), the charge “shall cease to apply to a relevant property where the property is sold such that the liable person referred to in that subsection ceases to be the owner of the property” (14(2A)) –

<sup>1</sup> Number 26 of 2023

<sup>2</sup> The “owner” “in relation to a relevant property, means “a person (other than a mortgagee not in possession) who, whether in that person’s own right or as trustee or agent for any other person, is entitled to receive the rent of the property or, where the property is not let, would be so entitled if it were so let” (s1).

this allows a buyer from an “owner” as defined to take the property free of any concern with unpaid rates under the new regime, but doesn’t resolve any concerns with charges that may have arisen under the old regime; and

- (v) local authorities may make schemes for the abatement of rates for vacant properties and for the waiver of rates in support of the National Spatial Strategy and other relevant plans and the Minister may make regulations governing any aspect of an abatement scheme or a waiver scheme, none of which have yet been published.

In terms of engagement in practice with the new regime, while the new regime simplifies certain matters, including the notification requirements, a charge may still attach to the property in certain circumstances. In addition, while the legislation governing the old regime is repealed, this does not affect certain charges arising under that regime, so that it will be important to adopt an approach which considers and ensures that there is no ongoing liability for a successor (eg buyer or tenant) or other interested party (eg lender) under either regime. Pending expected guidance on the implementation by rating authorities of the new regime, still awaited, both parties to a transaction should:

- be satisfied that all rates due in respect of the property have been paid up to date;
- be satisfied that the details held by the rating authority for liable persons are up to date; and
- notify the rating authority if the transaction results in a change of liable person.

(b) General Conditions of Sale 2023 Edition

In October 2023 the Law Society of Ireland published the updated Conditions of Sale 2023 Edition with a recommendation that they be used for transactions from 1 November 2023.

The Conditions of Sale 2023 edition make various changes to the 2019 edition including the introduction of three new general conditions on data protection (general condition 3), electronic execution (general condition 48) and severance (general condition 49). Internal guidance on

The Conditions of Sale 2023 edition alongside an explanatory memorandum which explains the amendments made, a comparison of the 2019 edition to the 2023 edition and a practice note on general condition 48 are all available on the Law Society website.

(c) New FDI Screening Regime

The Screening of Third Country Transactions Act 2023<sup>3</sup> was enacted on 31 October 2023. While not yet commenced, it is expected to commence in the first half of 2024. It has retrospective application so that it is important to be aware of its potential implications for not just future, but also current and past transactions.

The Act regulates foreign direct investment (“**FDI**”) in Irish undertakings or assets (including real estate assets) where that investment may present risks to the security or public order of the State by:

- (i) requiring transactions involving a certain threshold of investment by persons or entities from a country outside the EU, EEA or Switzerland (“third” countries) to be notified to the Minister for Enterprise, Trade and Employment (the “Minister”) for approval by the Minister before they may be implemented if that investment is in undertakings or assets that relate to, or impact upon the following specific sectors:
  - (A) critical infrastructure, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure and sensitive facilities, including the land/real estate used crucial for the use of such infrastructure;
  - (B) critical technologies and dual use items, including AI, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies and biotechnologies;
  - (C) supply of critical inputs, including energy or raw materials, as well as food security;
  - (D) access to sensitive information, including personal data or the ability to control such information; and
  - (E) the freedom and pluralism of the media; and
- (ii) giving the Minister the power to review investment and purchase transactions:
  - (A) up to 15 months after they’ve completed, regardless of whether they are technically required to be notified under the Act; and / or

- (B) that completed up to 15 months prior to the coming into operation of the relevant provision of the Act, regardless of whether they would have been technically notifiable.

While detailed criteria are set out in the Act for the mandatory notification requirement to be triggered, the broad discretion afforded to the Minister to call in non-notifiable transactions for review means that any transaction involving investment in any asset or undertaking (including real estate) by a person or entity from a third country (including the UK or US) considered by the Minister to have the potential to adversely impact the security or public order of the State will be open to review.

For further information on the new FDI screening regime, see our briefing [here](#).

## 1.2 Case-law

### **Receiver Sales:** *Bank of Ireland Mortgage Bank v Hade* [2023] IECA 293

In *Bank of Ireland Mortgage Bank v Hade* [2023] IECA 293 here Costello J heard an appeal of the original High Court decision of Barr J<sup>4</sup>. Barr J had held that the receiver appointed by the Bank had acted unlawfully in repossessing and selling certain properties without the court orders for possession and sale, respectively, required for housing loan mortgages under s97 and s100 of the Land and Conveyancing Law Reform Act 2009 (the “**2009 Act**”). Although Barr J had determined that the relevant loans were not strictly housing loans for the purposes of the 2009 Act, he held that the Bank had agreed to treat them as such and that the receiver had therefore acted unlawfully in taking possession of the properties without the court orders for which he awarded exemplary damages in the amount of €550,000.

This decision of the High Court led to the Land Registry pausing registration of applications for registration of title from receivers pending the outcome of an appeal, presumably to determine in what additional circumstances the Land Registry might require court orders to be lodged with the applications. In response to this, the Law Society of Ireland’s Conveyancing Committee issued a practice note on 12 May 2023 on the decision (here) urging, that “until an appeal is determined, the Conveyancing Committee recommends that practitioners acting in the sale of a property by a receiver should consider carefully before entering into a contract whether Sections 97 and 100 of the 2009 Act have application, and whether necessary court orders should be obtained.”

In the Court of Appeal, Costello J (with whom Noonan and Butler J agreed) found that the trial judge had erred in his interpretation of the mortgages and that, although the general conditions incorporated into the mortgages were subject to the 2009 Act, this did not mean that the Bank

<sup>4</sup> [2022] IEHC 645: High Court (Barr J): 25 November 2022 linked [here](#).

had agreed to treat the loans as housing loans and the mortgages as housing loan mortgages. Furthermore, Costello J held that s97 of the 2009 Act does not refer to a receiver, that the receiver, in this case, had acted lawfully in his possession of the properties and was not a trespasser.

The Court of Appeal allowed the appeal of the receiver in their challenge to the award of exemplary damages against him and the determination that the receiver had acted unlawfully in possessing the properties without a court order.

While the Land Registry has not published any update to its practice since the judgment of the Court of Appeal, the Court of Appeal decision appears to signal that a court order for possession will never be required in the context of a sale by a receiver (being only required for possession by a mortgagee) and that the usual considerations will apply in determining any requirement for a court order for sale by a receiver ie whether the mortgage a housing loan mortgage in accordance with the statute, and if not, whether the provision of the 2009 Act requiring a court order for sale has been disapplied.

See also our briefing [here](#).

### 1.3 **Horizon-Scan to 2024**

(a) The Government’s Legislation Programme for Spring 2024 (the “**Spring 2024 Legislation Programme**”) was published on 16 January 2024 is accessible [here](#) for a full overview of all currently proposed new legislation, including its status as for drafting or for publication and whether it is a priority. Of the legislation relevant to the real estate sector proposed in the programme, the proposals for reform of the Planning Acts are of greatest significance (the Planning and Development Bill 2023 is available [here](#) with an explanatory memorandum [here](#)). Other proposals for legislation affecting housing and residential development and delivery are also separately dealt with at section 2.6 below. Other more generally applicable proposals include:

- (i) [Licensing of Construction Activity Bill](#) ([here](#)): This Bill is at fourth stage in the Dáil as of 28 June 2023. The purpose of this Bill, among other things, is to provide for the appointment of a licensing authority for the purpose of licensing workers carrying out certain activities in relation to construction work.
- (ii) [Intoxicating Liquor Bill](#)<sup>5</sup> ([here](#)): To codify the law relating to the sale and consumption of alcohol. Drafting of the Bill commenced in March 2023, pre-legislative scrutiny is complete with the report published in March 2023 ([here](#)). This is for priority publication in the Spring 2024 Legislation Programme.

<sup>5</sup> Previously referred to as the Sale of Alcohol Bill.



**(iii)** Remediation of Defects in Apartments and Duplexes Bill: To provide for the establishment of a remediation scheme for apartments and duplexes with fire safety, structural safety, and water ingress defects, constructed between 1991 and 2013. This is for priority drafting in the Spring 2024 Legislation Programme.

(b) Seller’s Legal Pack for Property Buyers Bill 2021<sup>6</sup>: 2024 may see the further development or further debate around of this Private Member’s Bill which aims to reduce transaction times and wasted costs by introducing a requirement for a Seller’s Legal Pack of certain essential documents to a property transaction to speed up the conveyancing process. As a Private Member’s Bill it doesn’t feature in the Government’s Spring 2024 Legislation Programme but was last debated in the Dáil in October 2023 with government support, which is an indicator that it might progress further.

## 2. **Housing and Residential Development**

### 2.1 Introduction

Legal and market developments for 2023 in the area of housing and residential delivery are framed principally by *Housing for All*, the Government’s action plan on housing and homelessness launched in September 2021. The latest Government update and progress report on the objectives set out in the plan is for Q3 2023 and is available [here](#).<sup>7</sup> Published on 14 November 2023, it provides both a review of achievements in 2023 and sets out priorities for 2024 to activate and accelerate the delivery of housing. We focus on some of the highlights below in both our review of 2023 and our horizon-scan to the year ahead, distinguishing between measures affecting public sector delivery and private sector delivery.

### 2.2 Public: New schemes and LDA-related developments

(a) Commencement of Part 9 Land Development Agency Act 2021 (the “LDA Act”): Land Development Agency Act 2021 (Remaining Provisions) (Commencement) Order 2022<sup>8</sup> brought s55(7), Part 9 and Schedules 1, 2 and 3 into operation from 1 January 2023. While a detailed review of Part 9 would be required to understand how it applies in any given circumstance, the net effect of Part 9 is that unless exempted, development of dwellings (as defined) on land that was relevant public land on 1 January 2023 can effectively only ever be predominantly for social and affordable purposes whether the development is by the relevant public body or a successor.

(b) Land Development Agency Act 2021 (Valuation of Relevant Public Land) Regulations 2023<sup>9</sup>: On 8 March 2023, the Land Development Agency Act 2021 (Valuation of Relevant

<sup>6</sup> See the bill linked [here](#).

<sup>7</sup> Further information on *Housing for All* as launched is available [here](#).

<sup>8</sup> SI 724 of 2022 ([here](#)).

<sup>9</sup> SI 106 of 2023



Public Land) Regulations 2023<sup>10</sup> were published ([here](#)). These Regulations set out the process for determining the market value of relevant public land being acquired by the Land Development Agency (the “LDA”) under s53(3), s54(2) and, in relation to relevant public land referred to in column (1) of Schedule 3 of the LDA Act. The Regulations appoint Tailte Éireann to nominate a qualified person to determine the value subject to specific requirements following a request of it by the LDA to do so. These Regulations came into effect on 10 March 2023.

- (c) LDA published its first s52 Public Land Report: On 28 March 2023, the LDA published its first Public Land Report ([here](#)). This triggers an entitlement of the government to direct the LDA to acquire relevant public lands identified in the report that are owned by Schedule 1 public bodies. Among other matters, the report finds that there are 83 state-owned sites identified in 10 urban areas with the development potential for up to 67,000 affordable homes in the medium to long-term, including 35,130 possible homes in Dublin but varying levels of constraint on the ability to develop these sites into housing means that engagement with stakeholders and public bodies, due diligence and feasibility studies will be required to convert these lands into housing.
- (d) STAR: New scheme and funding for the construction of affordable apartments under the cost rental model: In April 2023 the government committed up to €750 million to facilitate the commencement of construction on affordable homes for which planning permission has been granted but had not been progressed. This funding has since made available through the Housing Agency as the Secure Tenancy Affordable Rental (**STAR**) Investment scheme<sup>11</sup>. Launched on 18 July 2023, STAR makes up to €750 million available for the delivery of an estimated 4,000 cost rental homes. All operators in the market, both public and private can apply to the Housing Agency to provide cost rental homes under STAR. The State makes an equity investment in qualifying developments in return for designation of the resulting homes as cost rental for 50 years.

### 2.3 Private: April 2023 Incentives

The Government announced three supply-focussed measures under *Housing for All* on 25 April 2023:

- (a) Development Levies Waiver: A waiver of development levies payable by developers to local authorities to connect new homes with roads and other services, including financial contributions and water connection fees was announced to apply for 12 months. The government estimated this measure to reduce the average cost of building a home by €12,650. Planning Circular PL 04/2023<sup>12</sup> was published following the announcement,

<sup>10</sup> SI 106 of 2023

<sup>11</sup> Information on STAR is available [here](#).

<sup>12</sup> Planning Circular PL 04/2023 is available [here](#).

providing further details of how the measure would be implemented in practice. To qualify for the waiver, and irrespective of the date on which the planning permission was granted, the residential development must:

- (i) commence on site between 25 April 2023 and 24 April 2024 (linked with the timing of submission of commencement notices and 7-day notices); and
- (ii) be completed no later than 31 December 2025.

Clawback arrangements apply if the works have not actually started or ended within the relevant times periods.

- (b) Increase and extension of the Vacant Property Refurbishment Grant<sup>13</sup>: This grant increased from €30,000 to €50,000 for vacant properties and from €50,000 to €70,000 for derelict properties and availability was extended to houses built up to 2007 (from 1993) and to houses intended for rent (in addition to those intended for owner-occupation). A commitment to make the application process easier and more efficient was also announced.
- (c) Increase in funding for investment in cost rental: This has led to the STAR scheme referred to above.

#### 2.4 Private: Taxation Measures<sup>14</sup>

Changes to the implementation of both Residential Zoned Land Tax (“**RZLT**”) and Vacant Homes Tax (“**VHT**”) were part of a suite of wider taxation changes announced on 10 October 2023 as part of Budget 2024 and enacted on 18 December 2023 in the Finance (No. 2) Act 2023 available [here](#).

- (a) Residential Zoned Land Tax: A number of amendments have been made to the application and operation of RZLT as provided for under Part 22A Taxes Consolidation Act 1997 including to allow affected landowners more time to engage with the process for designation of lands to be the subject of the tax. The most significant changes include:
  - (1) the deferral of the first liability date by one year to 1 February 2025;
  - (2) a further opportunity to landowners whose land will appear on a draft revised final map to be published on 1 February 2024 to request the rezoning of that land

<sup>13</sup> Information on the Vacant Property Refurbishment Grant is available [here](#).

<sup>14</sup> Other housing related measures included in the Finance (No. 2) Act 2023 are an extension of the Help to Buy scheme for first time buyers, a temporary mortgage interest tax relief for owner occupiers, and as reliefs for residential tenants, an increase in the Rent Tax Credit and an increase in the annual rent threshold for stamp duty to become chargeable on residential leases<sup>14</sup> from €40,000 to €50,000. A new limited tax relief for individual (non-corporate) landlords on rental income was also introduced subject to a claw back if the conditions do not remain complied with for 4 years following the relief being availed of.

from the local authority by 31 May 2024, with a response to be provided by the local authority by 31 July 2024; and

- (3) the exclusion from the application of the tax of land zoned in a development plan or local area plan where immediate development of the land would not conform with phased development objectives that are part of the core strategy of the plan.
- (b) Vacant Homes Tax: VHT is an annual self-assessed tax introduced by s96 of the Finance Act 2022. While certain exemptions may be claimed, VHT generally applies to residential properties which have been in use as a dwelling for less than 30 days of a chargeable period. The rate of VHT has been increased from three to five times that of the existing local property tax liability. This change takes effect from and including the chargeable period for VHT beginning on 1 November 2023 and ending on 31 October 2024.

For further information the application and operation of VHT please see our briefing [here](#).

- (c) New stamp duty reliefs where property is made available for specific social or affordable purposes: The Finance Act 2022 (Section 68(1)) (Commencement) Order 2023<sup>15</sup> appointed 1 June 2023 as the day on which section 68(1) Finance Act 2022 came into operation. Section 68(1) amends the Stamp Duties Consolidation Act 1999 (“**SDCA 1999**”) by the insertion of s83DA and s83DB which set out new provisions governing rebates from stamp duty paid on residential property at any of the three chargeable rates (1%, 2% or 10%) where subsequently the property is (i) sold under a “direct sales agreement” to an eligible applicant nominated by a housing authority in accordance with the Affordable Housing Act 2021; (ii) leased to a housing authority or approved housing body; (iii) where the units are put to use as cost rental dwellings; (iv) where the units are registered as designated centres under the Health Act 2007, or (v) where the units are registered as children’s residential centres under the Child Care Act 1991. S83DB results in the repeal of s83E and s83F SDCA 1999.

For further information on the effect of these amendments, see our briefing [here](#).

## 2.5 Private: Amendment to Build to Rent Regulations<sup>16</sup>

In July 2023 the Sustainable Urban Housing: Design Standards for New Apartments (“**Guidelines**”) (here: [BTR Regulations - 2023 Sustainable Urban Housing: Design Standards for New Apartments 2023 \(July\)](#)) were updated. The principal purpose of the update was to remove the remove the planning requirement that Build-To-Rent (“**BTR**”)

<sup>15</sup> SI 240 of 2023

<sup>16</sup> Linked [here](#)

accommodation is identified as a separate development type, with specific design standards. The BTR-specific design standards introduced in 2018 had been less onerous than for apartments built for individual sale to owner-occupiers. The application of the amended Guidelines will not preclude future BTR development from taking place. It requires instead that the standards for BTR development are the same as those for all other permitted apartment development. Under transitional measures all BTR planning applications in the planning application system by 21 December 2022 will be processed under the Guidelines that applied at that time.

## 2.6 Horizon-Scan to 2024

In addition to the Bill to replace the current Planning Acts, the most significant proposals relevant to housing and residential development set out in the Government Spring 2024 Legislation Programme include the following:

### (a) New Legislation to govern Land Value Sharing and Urban Development Zones

The Government proposal under *Housing for All*<sup>17</sup> to introduce legislation to provide a mechanism for local authorities to share in the uplift in the value of land attributable to its zoning for a particular use (“**land value sharing**” or “**LVS**”) and also for a new bespoke planning regime to apply to urban development zones (“**UDZs**”) progressed in 2023 with an update to the General Scheme of the Bill (“**General Scheme**”) published on 13 April 2023.

*LVS Proposal:* In brief, the LVS proposal is to implement a levy on landowners based on 30% of the increase in value due to the rezoning of land, payable on securing planning permission on the rezoned land, and which would attach to the land as a statutory charge for so long as it is unpaid. The levy would apply initially to all lands that are zoned for mixed or residential use but would be extended in time to apply to land zoned for commercial and industrial development. The updated General Scheme with relevant documentation is available [here](#) and sees a number of significant amendments made to the initial proposals published in December 2021 including:

- (i) changes to the proposed calculation of the levy – to be based on the uplift effect of the zoning decision only and not also a grant of planning permission; and
- (ii) changes to the application of the levy, in that it will arise not just in respect of zoning decisions which take place after the legislation comes into effect, but to all in-scope zoned lands irrespective of the timing of the zoning.

<sup>17</sup> And first outlined in the “*Programme for Government – A Shared Future*” published in June 2020

This latter change to the proposals means, for example, that the levy would apply to a developer who bought the lands already zoned for development and so has already paid the development value of the land reflected in the zoning, so that the levy becomes, in effect, a double-charge. There is concern that the LVS regime as proposed under the General Scheme will create challenges for the viability of housing delivery, a concern also identified by the Law Society in its submissions on the LVS aspects of the General Scheme in June 2023 available [here](#).

*UDZ Proposal:* UDZs are intended as designated areas identified for development or redevelopment to ensure the efficient and sustainable use of land to create well-functioning and sustainable communities which integrate with their surroundings. The main change introduced in April 2023 to the UDZ aspects of the General Scheme is the formal process for planning authorities to identify potential candidate UDZs by designating them as such by Government Order.

While the Bill itself remains to be published it is designated as a priority for publication in the Government’s 2023 Winter Legislation Programme.

(b) New Legislation to govern the regulation of short-term tourist lettings

In December 2022 the Government announced (by announcement [here](#)) the publication of the General Scheme of a Bill ([here](#)) to establish a new short-term tourist lettings register. In brief, the proposals under the General Scheme:

- (i) apply to overnight sleeping accommodation not otherwise registrable on another Fáilte Ireland register provided for consideration to one or more tourists for any period up to 21 nights (“short-term tourist lettings”);
- (ii) require properties advertised and made available for short-term tourist lettings to have and display a valid registration number provided by Fáilte Ireland;
- (iii) extend to persons with a legal or beneficial interest in the premises including an owner, occupier or lessee and also anyone who promotes or advertises accommodation for short-term tourist lettings;
- (iv) include sector-specific obligations placed on online platforms providing “information society services” in respect of short-term tourist lettings including that any provider of such services must suspend the provision of their services to any person that is frequently non-compliant with the legislation and to have policies to deal with such non-compliance;

- (v) the introduction of new Authorised Officers, new penalties and new enforcement powers for Fáilte Ireland to oversee and support adherence and enforcement; and
- (vi) revisions to existing Fáilte Ireland registers for hotels and guesthouses to bring them into line with the new registration systems.

The Bill itself to give effect to the proposals in the General Scheme has yet to be published. The proposals had to be submitted to EU Commission under the EU Technical Regulations Information System (**TRIS**) Directive<sup>18</sup> and the Commission extended the standard 3-month review or “standstill” period to 22 December 2023 to ensure the proposals comply with EU’s proposals for the regulation of short-term accommodation rental services<sup>19</sup> and also with the Digital Services Act, the eCommerce Directive and the Services Directive.

The standstill period under TRIS has now passed and Fáilte Ireland indicate [here](#) the intention that the register will become operational in 2024. While not yet published the Bill is categorised as a priority for publication in the Government’s Spring 2023 Legislation Programme.

- (c) New legislation to give residential tenants the right to purchase their properties

The proposal that residential tenants would have a right of first refusal to buy properties they are living in from landlords wishing to sell was approved in April 2023 following the lifting of the temporary ban on termination of tenancies that was introduced as an emergency measure for the winter period October 2022 to April 2023. The legislation to give effect to the proposal is still awaited but it completed pre-legislative scrutiny in December 2023 and is listed for priority publication in the Government’s Legislation Programme for Spring 2024. The general scheme of the Bill is not available, however a report on the pre-legislative scrutiny of the general scheme is available [here](#) from December 2023 and contains some useful information pertaining to what the general scheme contains.

### 3. **Impacts of legal and regulatory changes in ESG for the built environment**

#### 3.1 **Green leases / contracts**

<sup>18</sup> This Directive requires Member States to notify certain primary and secondary legislation, laws, regulations, circulars, technical specifications or rules on services that are linked to financial measures affecting the consumption of products or services through the TRIS system before they are adopted into national law.

<sup>19</sup> On 15th November 2023, following a final trialogue, [the European Council and the European Parliament reached a provisional agreement](#) on the Short Term Rental (STR) Proposal. This will provide for harmonisation of collection and sharing of short-term rental accommodation data across the EU.

In January 2023 the Chancery land Project (“**TCLP**”) uploaded a suite of green lease clauses to its website for Irish commercial leases. These clauses serve to promote greater co-operation between landlord and tenant in maintaining an environmentally friendly performance of buildings (Odhran’s Clause), incorporating circular economy and sustainability principles in a service charge regime (Amélie & Lauri’s Clause) and relating to sustainable and circular economy principles in repair and alteration covenants (Emily & Tom's Clause).

All of these clauses can be accessed [here](#).

### 3.2 **Proposed EPBD (recast)**

#### ***Proposed Energy Performance of Buildings Directive (“EPBD”) (recast)***

The Energy Performance of Buildings Directive<sup>20</sup> originally adopted in 2010 (the “**EPBD**”), alongside the Energy Efficiency Directive<sup>21</sup> and the Renewable Energy Directive is an important part of the EU legislative framework to improve the energy performance of buildings.

The agreed text of the proposal for a directive of the European Parliament and of the Council on the energy performance of buildings (recast)<sup>22</sup> (the “**recast EPBD**”), is not yet available to view. Information on what it contains is available on the European Commission’s website [here](#).

On 14 March 2023, the European Parliament adopted, subject to some amendment, the European Commission’s proposal from 15 December 2021 to recast the EPBD.<sup>23</sup> On 7 December 2023, the European Parliament and Council reached a provisional political agreement on the recast EPBD. Next steps will be its formal adoption by both the Parliament and Council before it enters into force by its publication in the Official Journal. there is no indicated date as to when it will come into force.

As agreed, the recast EPBD provides for a range of ambitious measures aimed at reducing energy emissions from buildings across the EU. Requirements for new buildings are clearest. Requirements for existing buildings are set by reference to percentages of the worst performing buildings so that there is significant discretion allowed to Member States in how they implement those requirements. The main requirements of the recast EPBD include:

- (a) A new zero emissions standard for all [new buildings](#)

<sup>20</sup> Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJ L 153, 18.6.2010, p. 13)

<sup>21</sup> 2012/27/EU

<sup>22</sup> (COM(2021)0802 – C9-0469/2021 – 2021/0426(COD))

<sup>23</sup> The EPBD (recast) is part of the ‘fit for 55’ package, a set of proposals to make the EU’s climate, energy, transport and taxation policies fit for reducing net greenhouse gas (GHG) emissions by at least 55% by 2030, compared to 1990 levels, thereby setting the EU firmly on the path towards delivering the European Green Deal (linked [here](#)) for climate neutrality (net zero GHG emissions) by 2050. A new European Climate Law (July 2021) enshrined both the 2030 and the 2050 targets into binding European law..



The recast EPBD will make zero-emission buildings the new standard for all new buildings (both residential and non-residential). The dates by which this must take effect are 1 January 2028 for publicly-owned buildings and 1 January 2030 for all other new buildings. Exemptions may be provided.

(b) Towards better performing existing buildings

**(i)** For commercial buildings specific targets are set for renovation of the worst performing buildings: 16% by 2030 and 26% by 2033. This is to be achieved through implementation of minimum energy performance standards, but quite how this will operate won't be clear until we see the Irish implementing regulations.

**(ii)** For residential buildings specific targets are set for reducing the average primary energy use by 16% by 2030 and 20-22% by 2035. Member States are free to choose which buildings to target and which measures to take but the national measures will have to ensure that at least 55% of the decrease of the average primary energy use is achieved through the renovation of the worst-performing buildings. Member States will be required to incentivise renovation and also protect vulnerable tenants from the risk of eviction due to increased rents following renovation.

Member States will have the possibility to exempt certain categories of buildings from these obligations, including historical buildings or holiday homes.

(c) A standard Energy Performance Certificate across the EU

Under the recast EPBD Energy Performance Certificates (EPCs) (including the Irish BER certificate) will be standardised across the EU, to make them comparable.

(d) Measures to Facilitate Renovation Wave

To ensure that the renovation wave that is intended to be triggered by the recast directive can take off and succeed, Member States are required to put in place the plans and the tools to ensure that everyone is equipped to facilitate that including:

**(i)** establish national Building Renovation Plans to set out the national strategy to decarbonise the building stock and how to address remaining barriers, such as financing, training and attracting more skilled workers.

**(ii)** set up national building renovation passport schemes to guide building owners in their staged renovations towards zero-emission buildings.

- (iii) establish one-stop-shops for home-owners, SMEs, and all actors in the renovation value chain, to receive dedicated and independent support and guidance.
- (e) Specific requirements for the phase-out of fossil fuels in heating and cooling
- (f) Buildings to boost sustainable mobility by making provision for pre-cabling, recharging points for electric vehicles and bicycle parking spaces and remove barriers to the installation of recharging points, to ensure that the 'right to plug' becomes a reality.
- (g) Buildings to be solar-ready

Member States will also have to ensure that new buildings are solar-ready, meaning that they must be fit to host rooftop photovoltaic or solar thermal installations. Installing solar energy installations will become the norm for new buildings. For existing public and non-residential buildings solar will need to be gradually installed, starting from 2027, where this is technically, economically, and functionally feasible. These provisions will come into force at different points in time depending on the building type and size.

### 3.3 **Energy Efficiency Directive<sup>24</sup>**

The Energy Efficiency Directive (recast) [here](#) was published in the Official Journal in September 2023 and entered into force on 10 October 2023. The main pillar of the revised Directive is the “energy-efficiency first” principle which requires all EU countries to consider energy efficiency in all relevant policy and major investment decisions taken in the energy and non-energy sectors (article 3). The revised Directive contains targets for the reduction of energy consumption in the EU, requiring an 11.7% additional reduction by 2030 (article 4). EU countries are also required to achieve 1.3% annual energy savings between 2024-2025, 1.5% between 2026 and 2027 and 1.9% from 2028-2030 (article 8). Additionally, there is an annual energy consumption reduction target of 1.9% for the public sector as a whole and an annual 3% buildings renovation obligation is being extended to all levels of public administration (articles 5 and 6). The revised directive also puts a stronger focus on alleviating energy poverty. It aims at empowering consumers through stronger requirements for EU countries to raise awareness and provide information on energy efficiency (article 24).

Member States are required to bring into force the laws, regulations, and administrative provisions to comply with most of the Directive by 11 October 2025. 2024 should see the continued reduction of energy consumption in the EU to meet the 11.7% reduction target by 2030. Between 2024 and 2025 EU countries are required to achieve an annual energy savings rate of 1.3% and this will increase after 2025 to 1.5% and 1.9%.

<sup>24</sup> Directive (EU) 2023/1791 of the European Parliament and Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast)

### 3.4 **Renewable Energy Directive<sup>25</sup>**

The revised Renewable Energy Directive [here](#) was published in the Official Journal in October 2023 and entered into force on 20 November 2023. The Renewable Energy Directive (revised) seeks to set an overall renewable energy target of at least 42.5% binding at EU level by 2030. The revised Directive seeks to achieve the EU’s climate neutrality objective by 2050 by doubling the existing share of renewable energy sources, introducing new sector-specific targets for renewables in heating and cooling, transport, industry and buildings.

This Directive must be transposed by 21 May 2025 however the revisions and amendments relating to the permit-granting procedure for renewables (solar energy, heat pumps etc) must be transposed by 1 July 2024.

### 3.5 **General Legal / Regulatory ESG Developments**

In addition to buildings-specific regulation, other general ESG policy and regulatory developments in 2023 impacting the real estate sector include the continuing implementation of the EU Sustainable Finance Disclosure Regulation (“**SFDR**”), the EU Taxonomy Regulation and the EU Corporate Sustainability Reporting Directive (“**CSRD**”). Each of these have the aim or effect of facilitating more sustainable decision-making and investment in more sustainable assets, including real estate, and are impacting real estate investment and management decisions in very real ways. See [here](#) for a timeline setting out key dates for implementation of SFDR, the Taxonomy Regulation and CSRD.

See the Finance, Financial Services, Financial Services Regulation and ESG notes in this series for further detail on these developments.

## ***Anticipated ESG Developments***

### 3.6 **Corporate Sustainability Due Diligence Directive**

On 14 December 2023, the Council of the EU and the European Parliament reached a provisional political agreement (see [here](#)) on the Corporate Sustainability Due Diligence Directive (“**CSDDD**”) (proposed text [here](#)), which will place obligations large companies to enquire into the actual and potential adverse impacts on human rights and the environment of their operations, those of their subsidiaries, and those carried out by their business partners and to take certain actions based on the outcome of those enquiries. Certain larger companies will also have to have a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C, in line with the Paris Agreement.

<sup>25</sup> Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652

See the Finance, Financial Services, Financial Services Regulation and ESG notes in this lecture series for further detail on these developments and our briefing [here](#).

#### 4. **Public Law**

##### 4.1 **Occupier’s liability changes**

*Courts and Civil Law (Miscellaneous Provisions) Act 2023*

This Act (the “2023 Act”) ([here](#)) was enacted on 5 July 2023 and makes significant amendments to the Occupiers’ Liability Act 1995 (Part 6, which was commenced on 31 July 2023<sup>26</sup>), changing the standard of care owed by occupiers to (i) visitors and (ii) recreational users/trespassers as well as introducing the concept of voluntary assumption of risk.

##### 4.2 **GDPR: Case C-300/21 – UI v Österreichische Post AG (“Austrian Post Case”)**<sup>27</sup>

In May 2023 the European courts gave judgement in this highly anticipated case, marking the first jurisprudence at an EU level concerning non-material damages under the General Data Protection Regulation (“**GDPR**”).

*What are non-material damages?*

Article 82 GDPR provides that anyone who has suffered material or non-material damage due to a data privacy infringement shall have the right to receive compensation from the data controller or processor.

The Austrian Postal Service collected information in respect of the political preferences of the Austrian population. A citizen objected to this practice on the basis he did not consent to the processing and claimed to have suffered significant upset due to stress. He sought non-material damage in the amount of €1000.

The case reached the Court of Justice of the European Union (“**CJEU**”) where it was held that not every infringement of GDPR gives rise in and of itself to a right to compensation. The infringement must give rise to damage. The court held that article 82 does not give a definition of non-material damages and should be interpreted in broad terms. It is for each Member State to prescribe rules around damages for breaches of GDPR and the criteria for compensation. Interestingly, the CJEU noted that the right to compensation is not to be limited to a threshold of seriousness.

This precedent has already been followed in this jurisdiction, in *Kaminski v Ballymaguire Foods Limited* [2023] IECC 5 (our client briefing is linked [here](#)), where the Circuit Court awarded an

<sup>26</sup> SI 389 of 2023

<sup>27</sup> Judgment linked [here](#)

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.

For more information see our briefing linked [here](#).

#### 4.3 **Sanctions: restrictive measures in 2023**

2023 saw more than 75 sanctions-related statutory instruments in respect of various jurisdictions and organisations, with 15 relating to restrictive measures concerning Ukraine due to Russia's ongoing war against Ukraine. Irish sanctions always are in pursuance of United Nations or EU measures.

##### ***Restrictive Measures Bill***

This Bill intends to create a mechanism by which persons would be obliged to adhere to the asset freezing requirements of certain UN Security Council Resolutions in the period prior to their incorporation in an EU legislative act, in order to meet Ireland's international obligations and prevent sanctions evasion.

This Bill is included in the Spring 2024 Government Legislation Programme where it is indicated that the Heads of Bill are in preparation.

#### 4.4 **Alternative dispute resolution**

It was held in the public procurement case *Sere Holdings Ltd v HSE [2023] IEHC 63* ([here](#)) that the State should at least consider mediation in every dispute in which it was involved. The High Court held litigation should be the last resort in all cases but particularly in cases involving state bodies. This is in light of the obligation on the state where possible to avoid expensive litigation to resolve disputes.

This decision reinforces (especially for state bodies) the importance of the obligations of the Mediation Act 2017. That Act obliges solicitors to advise their clients to consider mediation prior to issuing proceedings. This case can be seen as a strong indication for state bodies to explore ADR solutions and to attempt to avoid litigation and its prohibitive costs where possible.

##### ***State Litigation Principles***

In June the Attorney General published the State Litigation Principles (available [here](#)), these are the principles intended to guide state parties when engaging in legal disputes and litigation. The first point about these principles is the sea change they represent. Before June there was no guidance for state bodies and there had been a history of criticism in respect of how some state bodies conduct themselves in legal disputes.

These new principles seek to ensure that state actors conduct themselves as a ‘model litigant’ and act as a positive example to other parties to do likewise. One of the principles ties in with the *Sere Holdings* case and notes that the state will avoid legal proceedings where possible and consider alternative dispute resolution such as mediation before initiating any court proceedings. Another principle is to minimise costs for all parties, and to apologise where the state has acted unlawfully.

While these principles have no legally binding effect they are seen as an important acknowledgment by state actors that if there that if they are to be critical of other parties, they must adopt the position of a model litigant themselves.

For more information please see our briefing [here](#).

#### 4.5 **Horizon-Scan to 2024**

##### ***DORA (“Digital Operational Resilience Act”)***

Regulation (EU) 2022/2554 ([here](#)), known as DORA, introduced detailed and comprehensive rules on the digital operational resilience for the financial sector. The DORA aims to consolidate and upgrade information and communications technology (“**ICT**”) risk requirements in the financial sector in a single European legal act. DORA will introduce targeted rules in respect of ICT risk-management capabilities, incident reporting, operational resilience testing and ICT third-party risk monitoring. The DORA will take effect on 17 January 2025.

“Financial entities” are subject to ICT risk management, incident reporting, digital operational resilience testing, information sharing, and ICT third-party risk management requirements, as adjusted by the principle of proportionality based on a financial entity’s scale and overall risk profile.

For more information please see our briefing [here](#).

##### ***Proposed EU Artificial Intelligence Act (“AI Act”)***

The AI Act will be the world’s first comprehensive AI legislation laying down the coordinated European approach on the human and ethical implications of artificial intelligence. If adopted, it will have direct effect in Ireland and the Regulation will automatically become part of Irish law. Whilst the proposed new law aims to impose the new rules “without prejudice to the application of Union competition law”, it is likely to have a significant impact on the procedural and investigative powers of competition agencies.

The draft AI Act requires that the national supervisory authorities “without delay” report to both the Commission and national competition authorities, “any information identified in the course of market surveillance activities that may be of interest for the application of Union law on competition rules.” Access to this type of data will be significant for competition authorities and the bar for obligating the sharing of information gathered by the national supervisory authorities

with the competition agencies, appears to be much lower compared to approaches in EU legislation such as the Digital Markets Act which requires suspected or alleged infringements.

For more information, please see our briefing [here](#).

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