



2023 Review and 2024 Horizon Scan: Corporate, Commercial, Employment, Disputes and General

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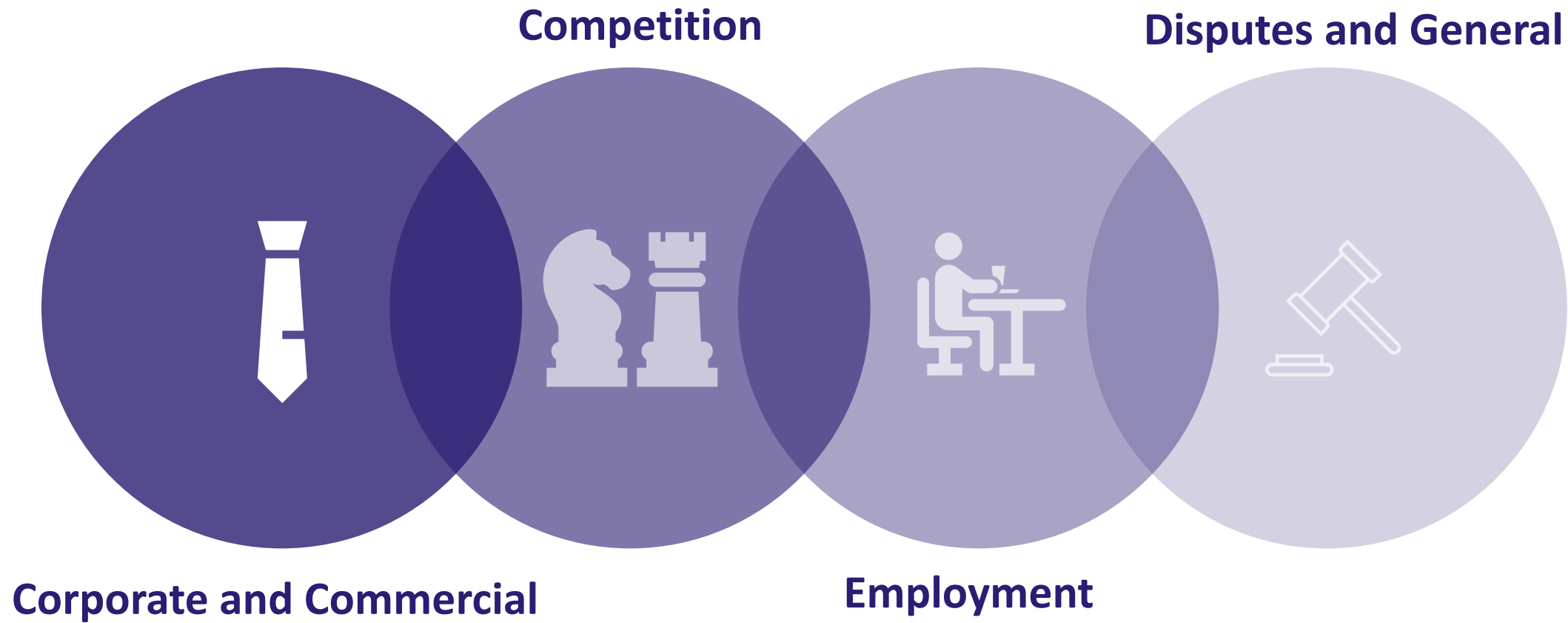


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Overview



2023 Review and 2024 Horizon Scan: Corporate



2023 Review

- Cross-Border Conversions, Divisions and Mergers
- Company secretarial matters
- Anti-money laundering due diligence practice

2024 Horizon Scan

- Company law updates
- Corporate Sustainability Reporting Directive (“CSRD”)
- Corporate Sustainability Due Diligence Directive (“CS3D”)
- Board Gender Balance Directive

European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023

- Enhanced creditor rights in cross-border mergers
- New process for cross-border conversions:
 - limited liability companies can migrate to other EU countries without being dissolved so that all the assets and liabilities of the company become those of the converted company, and the members of the company continue as members of the converted company under the law of the destination Member State



Company Secretarial Updates



Companies Registration Office verification of directors' identities

- CRO require Personal Public Service Number (“PPSN”) or an Identified Person Number (“IPN”) be used when filing certain forms concerning directors.
- Required to improve identification of relevant directors

Extension of “interim period” until end of 2024 to allow companies hold virtual general meetings

- Separately, it is proposed that the ability to hold virtual general meetings will become permanent in forthcoming change to Companies Act

European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) (Amendment) Regulations 2023

- Certain designated persons have unrestricted access to the registers. Some designated persons have restricted access (for AML due diligence purposes)
- Members of the public must show a “legitimate interest” to justify the search request
- “Legitimate interest” is demonstrated to the Registrar through the making of a submission and, if required by the Registrar, the supplying of information or documents including those relating to the requester’s previous activities, if any, in AML



Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023

- Dail 3rd Stage
- Bill will improve the availability of information to employees and creditors in corporate insolvencies

Companies (Corporate Governance, Enforcement and Regulatory Provisions) Bill

- In Programme for Government but not yet published
- Public Consultation 2023 (also some CLRG recommendations)

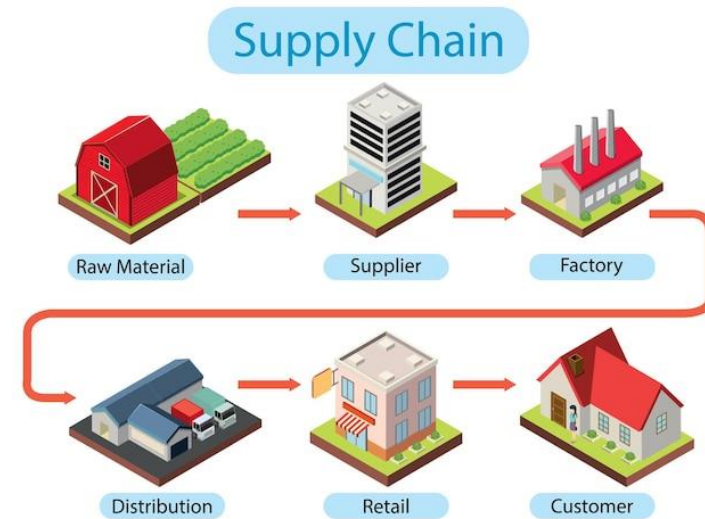
Corporate Sustainability Reporting Directive (“CSRD”)

- Will replace Non-Financial Reporting Directive
- Creation of mandatory European Sustainability Reporting Standards (ESRS) against which in-scope companies will be required to report
- Information being reported is legally required to be subject to third party assurance

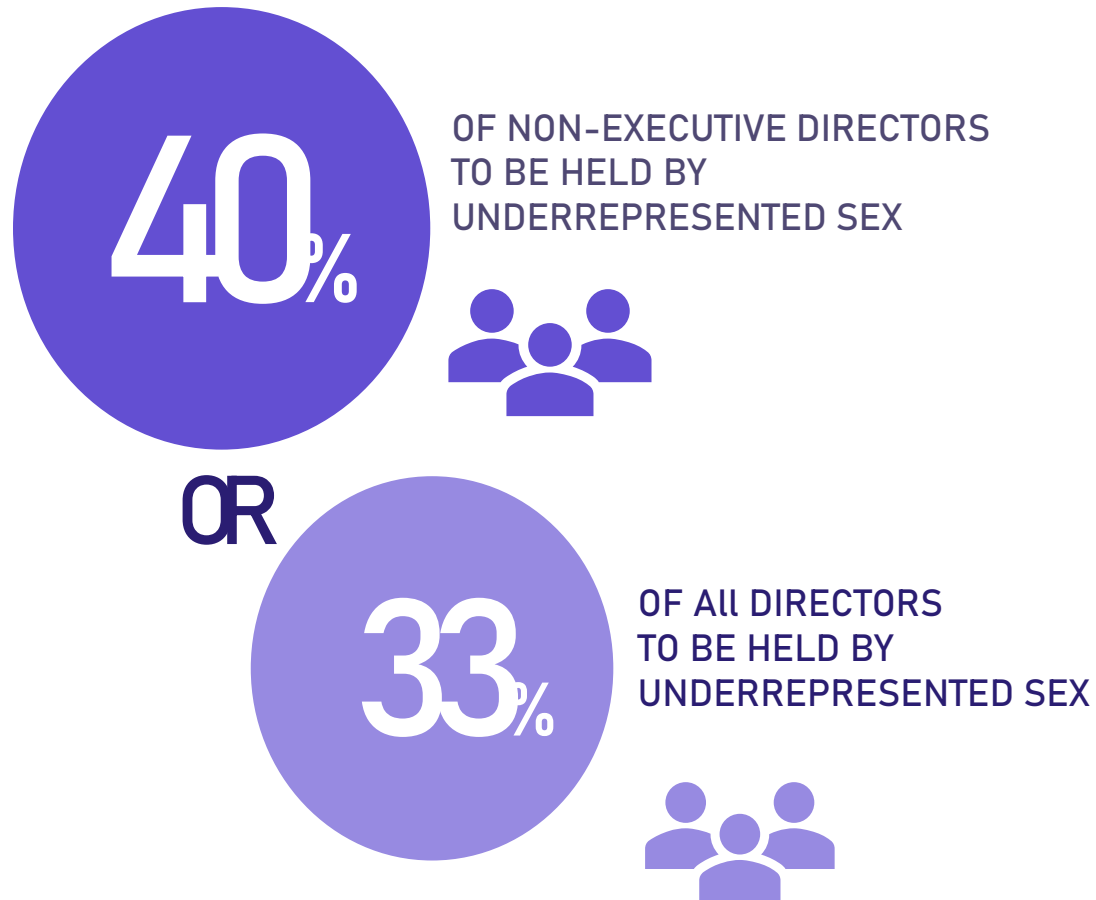


Proposal for a Corporate Sustainability Due Diligence Directive (“CS3D”)

- Political agreement at EU level in December 2023. Likely to take effect 2026
- In scope companies must
 - (1) identify, prevent, mitigate and remediate actual and potential adverse impacts on people and environment and
 - (2) implement a detailed climate transition plan
- All businesses in supply chains impacted (as they will be required to provide information to in scope companies)
- There will be public enforcement and also civil liability



Directive (EU) 2022/2381 on improving the gender balance among directors of listed companies and related measures



- To be implemented by **28 December 2024**
- EU listed companies
- A minimum either 40% of all non-executive director positions or
- 33% of all director positions are held by the "underrepresented sex" (to use the EU's term)
- by **30 June 2026**
- "effective, proportionate and dissuasive" penalties for non-compliant companies

2023 Review and 2024 Horizon Scan: Competition



2023 Review

- Screening of Third Country Transactions Act 2023
- Competition (Amendment) Act 2022 (Commencement) Order 2023
- Foreign Subsidies Regulation

2024 Horizon Scan

- Irish Screening Regime in force
- Increased notification of below threshold deals in merger control
- Increased dawn raids

Screening of Third Country Transactions Act 2023

- Expected to be commenced Q2 2024
- Minister for Enterprise, Trade and Employment to scrutinise certain transactions as to the risks they present to national security and public order, where a non-EEA or non-Swiss undertaking (a third country undertaking or person connected with such an undertaking) acquires control of, or a prescribed share in, an Irish asset or undertaking in certain sectors
- Apart from mandatory notifiable transactions, any transaction may be screened if certain conditions exist
- The Act also empowers the Minister to review transactions that have completed within 15 months of the Act coming into force
- Transactions cannot be completed until a screening decision has been issued by the Minister (criminal consequences involved)

Foreign Subsidies Regulation- In a nutshell

- New regime applicable to acquisitions of large EU businesses, to allow European Commission to investigate subsidies from non-EU governmental and state-owned entities
- Mandatory notification to the European Commission of M&A transactions which meet specific thresholds
 - Note: call-in of below threshold deals, and *ex officio* investigations into completed deals, possible in certain circumstances
- Notification will trigger standstill obligation → cannot close deal before clearance
- Foreign subsidies will be more closely scrutinised if they are specifically granted to facilitate the deal, granted to an ailing undertaking, or in the form of an unlimited guarantee
- Will it apply to your deal?
 - Only targets with significant EU turnover (**at least €500 million**) will be caught by thresholds
 - However, if such a target is present, mandatory notification may be triggered once combined ‘foreign financial contributions’ of parties **exceed €50 million**

Competition (Amendment) Act 2022

- Act commenced on 27 September 2023
- Competition and Consumer Protection Commission (“CCPC”) is now empowered to:
 1. review **below-threshold** transactions; and
 2. sanction anti-competitive behaviour with fines of up to €10 million.



Below-threshold mergers

- Thresholds: in the most recent financial year
 - (i) the combined Irish revenue of all the parties to the transaction is at least €60,000,000; and
 - (ii) each of at least two of the parties to the transaction have Irish revenue of at least €10,000,000.
- Call-in on a mandatory basis any merger that it believes “*may*” have an effect on competition in Ireland, whether or not it has been put into effect.
- 60 working days after earliest of the following:
 - Announcement of intention to make a bid
 - CCPC becomes aware of the transaction
 - Transaction is put into effect

Administrative Enforcement Regime

- For first time, CCPC can itself sanction anti-competitive behaviour
 - Prior position:
 - Civil proceedings to High Court (declarations, injunctions)
 - Criminal proceedings on summary basis
 - Refer to DPP with recommendation for prosecution on indictment
 - New position:
 - CCPC has power to impose significant financial sanctions on undertakings
 - Balance of probabilities standard
- Leading to...
- Under enforcement:
- Only most serious breaches prosecuted criminally
 - High burden of proof presents challenges
 - Low fines

What to expect in 2024...

Mergers:

- Increased merger monitoring by CCPC
- Increase in below threshold deals notified
- Preliminary competition assessment for all transactions
- Increase in pre-notification discussions

Enforcement:



- Increase in dawn raids
 - Procedural litigation regarding dawn raids
- Investigations opened under new powers
 - 4 February 2021
- Continued focus on cartel behaviour (over vertical infringements/abuse of dominance)

2023 Review and 2024 Horizon Scan: Employment



2023 Review

- Work Life Balance and Miscellaneous Provisions Act 2023
- EU (Transparent and Predictable Working Conditions) Regulations 2022
- Protected Disclosures (Amendment) Act 2022
- *The Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza* [2023] IESC 24

2024 Horizon Scan

- The Pay Transparency Directive
- The Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023

Work Life Balance and Miscellaneous Provisions Act 2023

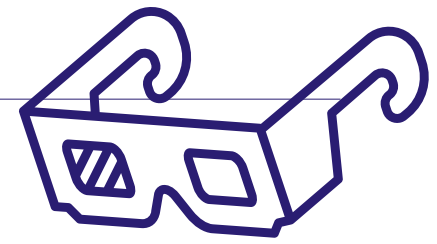
- From 3 July 2023, unpaid **leave for medical care purposes** (5 days)
- From 3 July 2023, extension of the current entitlement to **breastfeeding breaks** (26 weeks to 104 weeks)
- From 27 November 2023, paid **domestic violence leave** (5 days) where the purpose of the leave is to obtain “relevant services”
- Awaiting commencement
 - statutory right to request **remote working**
 - statutory right to request **flexible working for caring purposes**
 - WRC Code of Practice



Statutory Right to Request Remote Working

- Right to request only
- 6 months' continuous service requirement
- 4 weeks to “*consider*” request (which can be extended to up to 8 weeks) and employer must provide reasons for any refusal
- May be terminated where has “*substantial adverse effect on the operation of the business*”
- WRC can award compensation up to 4 weeks' remuneration. However, WRC cannot consider the merits of the employer's decision to refuse a request





Transparent and Predictable Working Conditions Regulations

- In December 2022, EU Directive 2019/1152 was transposed into Irish law by the European Union (Transparent and Predictable Working Conditions) Regulations
- Aim - to improve employees' working conditions by promoting more transparent and predictable employment, in particular, for gig economy and platform workers
- Key changes include:
 - additional written terms of employment that employers must give employees on commencement of employment and a new timeframe for providing them
 - a six-month limit on the maximum duration of a probationary period (with some exceptions)
 - a general prohibition on exclusivity of service clauses
 - rights to greater predictability of working time and reasonable advance notice for those on variable work schedules
 - mandatory training (i) free of charge, (ii) during working hours (if possible) and (iii) be counted as working time.

The Protected Disclosures (Amendment) Act 2022

- The Protected Disclosures (Amendment) Act 2022 transposes the EU Whistleblowing Directive
- Amendments effective from 1 January 2023:
 - Expanded scope of 2014 Act to “workers” which can include volunteers, shareholders, board members and job applicants
 - Definition of “*relevant wrongdoing*” extended
 - Prescriptive obligations re: acknowledgement of the disclosure (within 7 calendar days) follow up and feedback (within 3 months of acknowledgement)
 - Obligation to protect identity of person making disclosure
 - Broadening of what amounts to penalisation
 - Extension of legal remedies, including ‘interim relief’ against any form of penalisation and burden of proof is now placed on the employer
- New Statutory Guidance on Protected Disclosures for Public Bodies and Prescribed Persons



Employment status - *Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza* [2023] IESC 24



- On 20 October 2023, the Supreme Court delivered its unanimous judgement in this case holding that pizza delivery drivers were to be treated as employees and not independent contractors for the purpose of the Taxes Consolidation Act 1997
- Question for the Supreme Court was whether the mutuality of obligation was a “*sine qua non*” of the employment relationship and created an ongoing obligation on the employer to provide work and the worker to perform work
- In the unanimous judgement, Justice Murray stated that
 - “*the term ‘mutuality of obligation’ has, through a combination of over-use and under-analysis been transformed in employment law from what should have been a straightforward description of the consideration underlying a contract of employment, to a wholly ambiguous label.*”

The New Five Factor Test

Filter Test

1. Does the contract involve the ***exchange of wages*** or other remuneration for work?
2. If so, is the agreement one pursuant to which the worker is agreeing to ***provide their own services***, and not those of a third party, to the employer?
3. If so, does the employer exercise ***sufficient control*** over the worker to render the agreement one that is capable of being an employment agreement?
4. If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the ***working arrangements*** between the parties as disclosed by the evidence, ***are consistent with a contract of employment***, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.
5. Finally, it should be determined whether there is ***anything in the particular legislative regime*** under consideration that requires the court to adjust or supplement any of the foregoing.

Pay Transparency Directive

- EU Directive 2023/970 on Pay Transparency came into effect on 7 June 2023 and EU member states have **three years** to transpose its provisions into domestic law
- Mandatory gender pay gap reporting in all EU member states
 - Reporting requirements under the Directive go further than the Irish GPG reporting requirement and require reporting of pay gaps by “**categories of workers**”
 - “**Categories of workers**” refers to employees carrying out the same work or work of equal value
 - **Obligation** to conduct a Joint Pay Assessment where there is:
 - at least a 5% gender pay gap in any category of workers
 - the gap has not been justified by objective and gender-neutral factors
 - the gap has not been remedied within six months of the gender pay gap report

Pay Transparency Directive continued

- Pay Transparency measures for **job applicants**
 - employers will be required to indicate the initial pay range to be paid for a specific position in a job vacancy notice prior to interview
 - employers are not permitted to ask job applicants about their pay history
- Employees (or their representatives) have right to request and receive information on individual & average pay levels, broken down by gender, for categories of workers doing the same work or work of equal value
- Member States, will be obliged to put measures in place to prohibit contractual terms that restrict employees from disclosing information about their pay (**pay secrecy clauses**)

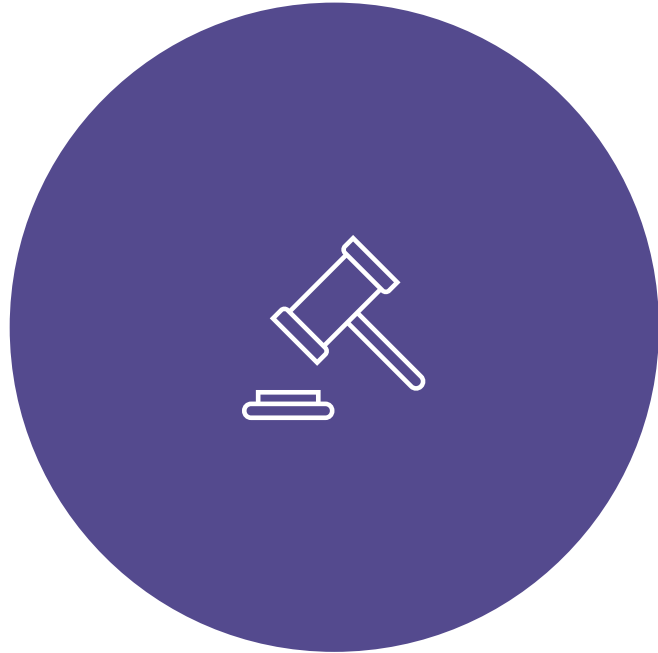
Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023

- Key changes to Protection of Employment Act 1977
 - ❑ Liquidators or similar appointees (defined as a ‘responsible person’) will have the same employee consultation obligations as would ordinarily apply to employers
 - ❑ 30 day consultation period with employee representatives
 - ❑ Information to be provided to such employee representatives
 - ❑ Responsible persons must notify the Minister at least 30 days before the first dismissal (currently exempt), and a failure to do so will be an offence
 - ❑ Employees will be able to present a complaint to the WRC if dismissed prior to the expiry of the 30-day period following notification to the Minister

Collective Redundancies and Fixed Payment Notices

- Key changes to Companies Act will include:
 - Amendments to Ss 571, 573, 594: obligation to notify employees of certain insolvency events, including the presentation of a winding up petition, appointment of a provisional liquidator or service of a statement of affairs
- ***Workplace Relations Act 2015 (Fixed Payment Notice) Regulations 2023***
 - The ability of WRC Inspectors to issue fixed payment notices, in lieu of prosecution, has been extended to certain breaches concerning collective redundancy
 - Failure to consult with employee representatives: €2,000 fine
 - Failure to provide mandatory information: €2,000 fine

2023 Review and 2024 Horizon Scan: Disputes and General



2023 Review

- Consumer's collective redress and representative actions
- Courts and Civil Law (Miscellaneous Provisions) Act 2023
- Hague Judgments Convention

2024 Horizon Scan

- Civil Reform Bill
- Court Proceedings (Delay) Bill 2023

Collective Redress for Consumers



- **Collective Redress Directive**
 - Directive (EU) 2020/1828
 - Aims to improve consumers’ access to justice
 - Safeguards against abuse
 - Member States should apply transposing laws from 25 June 2023
- **Representative Actions for the Protection of the Collective Interests of Consumers Act 2023**
 - Awaiting commencement
 - “Qualified entities”
 - Third party funding position unclear



Courts and Civil Law (Miscellaneous Provisions) Act 2023

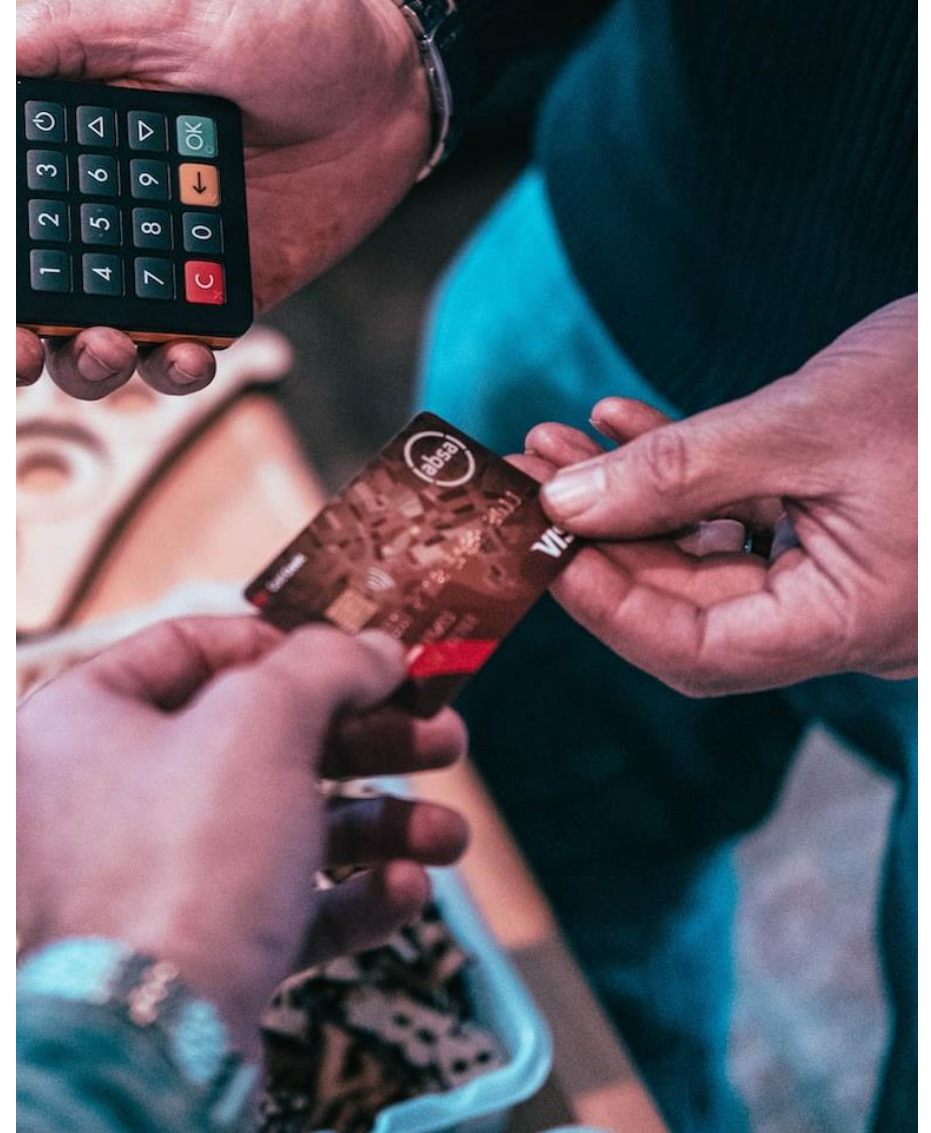
Overhaul of occupier's liability



- From **31 July 2023**
- amends the Occupiers' Liability Act 1995
- changes the standard of care owed by occupiers to (i) visitors and (ii) recreational users/trespassers
 - Severity of injury
 - Probability of danger
 - Cost of preventative measures and practicality and social utility of the conduct creating the risk
- introduces the concept of voluntary assumption of risk

Third-party funding of international commercial arbitration

- Awaiting commencement
- Offences and torts of maintenance and champerty do not apply to:
 - international commercial arbitration;
 - any proceedings arising out of an international commercial arbitration; or
 - any mediation or conciliation proceedings arising out of an internal commercial arbitration or proceedings arising out of same.
- Third-party funding contract that meets the criteria (if any) prescribed by ministerial regulation, including in relation to transparency in relation to funders and recipients
 - shall not be treated as contrary to public policy or otherwise illegal or void



Data Protection

- **District Court jurisdiction on data protection claims**
 - From 11 January 2024
 - Average compensation for data breach claims in the EU – very limited
 - Data breach claims may be brought in the District Court
- **New DPC power to impose confidentiality obligations**
 - From 31 July 2023
 - New power to impose confidentiality obligations
 - Allows DPC to share information with complainants or other participants in investigations, inquiries or complaints that will enable them to participate more fully in the process

European Union (Hague Judgments Convention) Regulations 2023



- From 1 September 2023
- Pursuant to the Hague Judgments Convention, judgments from certain states may be enforceable in Ireland without the need to rely on Common Law enforcement principles
- Supplements enforcement methods under
 - the Brussels Recast Regulation,
 - the Lugano Convention, and
 - the Hague Convention on Choice of Court Agreements

Anticipated Developments

- **Civil Reform Bill**

- Spring 2024 Government Legislation Programme
- Give effect to recommendations from the Kelly Review
- Heads of Bill in preparation

- **Court Proceedings (Delay) Bill**

- Dáil Committee Stage
- Right of persons who are parties to proceedings to seek a declaration of the proceedings are not concluded within reasonable time
- Compensation in some cases
- Proposed Court Delay Assessors

Questions?



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