



# The Legal 500 Country Comparative Guides

## Ireland: Real Estate

This country-specific Q&A provides an overview of real estate laws and regulations applicable in Ireland.

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## 1. Overview

2020 has been a very challenging year for the Irish commercial property market. Most sectors have seen transactional activity negatively impacted directly as a result of both (i) the Irish Governments response to the Covid-19 pandemic and (ii) the threat of a no-deal Brexit.

The impact of both of these issue and particularly that of Covid-19 has been particularly seen in the retail, hospitality and leisure sectors of the market which have all had significant difficulties since Q2 2020. Activity in the retail and hospitality market has been severely affected with vacancy continuing to increase due to government forced closures throughout the year, a decrease in footfall at retail stores and an increase in online shopping. The office occupier market has also been impacted negatively as many occupiers understandably delayed making location decisions during 2020.

However it should be noted that the multifamily sector and the industrial and logistics sector of the Irish market have both performed relatively well and demonstrated a notable resilience in the face of the current economic conditions.

While the Investment market has also been impacted by the challenging global conditions in 2020, Irish commercial property is still seen as an attractive market and investors have continued to seek out opportunities in the Irish real estate market throughout the year notwithstanding the obvious challenges faced by international investors in particular with their inability to travel to Ireland to inspect assets.

The resilience of the Irish commercial property market has been significantly tested this year with both the depth and duration of Covid-19 lockdown measures considerably more severe than originally anticipated at the start of the pandemic back in March 2020. The focus for 2021 will be on reigniting the market following what has been an unprecedented and challenging year. We are likely to see a continued increase in forward fund and forward commit transactions in the Irish market in 2021 with the focus also maintained on “green buildings”, sustainability and reduced energy consumption throughout all sectors of the real estate market.

## 2. What is the main legislation relating to real estate ownership?

Irish law was historically based on old legislation which predates the establishment of the Irish State in 1922, such as the Conveyancing Acts, 1881-1911 and the Settled Land Acts, 1882-1890. The Land and Conveyancing Law Reform Act 2009 (the “**2009 Act**”) replaced much of the old law, including the pre-1922 statute law and modernised the law and conveyancing practice. There is modern legislation governing registration of title (the Registration of Title Act, 1964 which was modified by the Registration of Deeds and Title Act, 2006) to facilitate the increasing computerisation of the property registration system in this jurisdiction and succession law (the Succession Act, 1965).

There is extensive statutory protection afforded to family property in particular, which affects conveyancing practice (e.g. the Family Home Protection Act, 1976). This is partly due to the fact that Ireland has a written Constitution enshrining certain fundamental rights which override any other law, including legislation.

### **3. How is ownership of real estate proved?**

The Property Registration Authority (the “**PRA**”) is the State body responsible for the registration of property transactions in Ireland and the system of registration of title (ownership) to land in Ireland.

The main functions of the PRA are to manage and control the two registries for land ownership in Ireland namely the Land Registry and the Registry of Deeds and to promote and extend the registration of ownership of land.

The Registry of Deeds was established in 1707 to provide a system of voluntary registration for deeds affecting land (as opposed to title to land) and to give priority to registered deeds over unregistered but registrable deeds. There is no statutory requirement to register a document in the Registry of Deeds, but failure to do so may result in a loss of priority. The effect of registration is generally to govern priorities between documents dealing with the same piece of land. The primary function of the Registry of Deeds is to provide a system of recording the existence of deeds affecting unregistered property. When a deed is lodged in the Registry of Deeds it must be accompanied by the relevant application form (in a prescribed form) which is a summary of the essential information of the relevant deed. The registration of a deed in the Registry of Deeds alone is not proof of ownership. The underlying title must also be fully investigated to determine ownership.

The Land Registry was established in 1892. When ownership is registered in the Land Registry, the deeds are filed with the Land Registry and all relevant particulars concerning the property and its ownership are entered on folios which form the registers maintained in the Land Registry. In conjunction with folios, the Land Registry also maintains maps (referred to as filed plans). Both folios and maps are maintained in electronic form. Owners of registered real estate generally prove their title via the Land Registry folio, which is prima facie evidence of title. The legal owner of the registered property is recorded in part 2 (the ownership section) of the folio. A title registered in the Land Registry is guaranteed by the state. The Land Registry indemnifies any person who suffers loss through a mistake made by the Land Registry. A buyer, therefore, can accept the folio as evidence of title. However, the State does not guarantee the conclusiveness of boundaries or the area of the relevant property as identified on the Land Registry maps.

Any unregistered property (Registry of Deeds) purchased in the State after 1 June 2011 is subject to compulsory first registration in the Land Registry. Registration is also compulsory where land is bought under the Land Purchase Acts or where land is acquired after 1 January

1967 by a statutory authority.

**4. Are there any restrictions on who can own real estate?**

There are no legal restrictions on the ownership of real estate in Ireland. However, anti-money laundering legislation requires that a number of checks be carried out on a potential buyer, and the identity of the buyer, the source of funds and the ability to fund the acquisition of real estate will need to be verified.

**5. What types of proprietary interests in real estate can be created?**

Irish property can be held under freehold title which confers absolute ownership, or a leasehold title which confers ownership for the period of years granted by the relevant lease and held from the owner of the freehold or the owner of the superior leasehold title in the relevant property. A leasehold interest is based on a contractual relationship between the lessor/landlord and the lessee/tenant.

**6. Is ownership of real estate and the buildings on it separate?**

Real estate in Ireland comprises all immovable property. This includes land and any buildings or fixtures on the land. No distinction is made between title to land and title to buildings where they are in the same ownership. Typically, the owner of land is also the owner of any buildings erected on the land. However it can be the case that one party owns the freehold interest in a property and another party holds a long leasehold interest in the same property. While the reversionary freehold interest in such circumstances would only have a residual monetary value, it would usually benefit from certain restrictive or behavioural covenants on the part of the lessee under the long lease of the property in question.

**7. What are common ownership structures for ownership of commercial real estate?**

Ownership structures for commercial real estate in Ireland range from private individuals, corporate entities, co-ownership structures and limited partnerships.

The most popular structure for international investors in recent years is an Irish Collective Asset-management Vehicle (ICAV) - a vehicle designed for investment funds and attractive to investment managers seeking to market their funds in the U.S. The introduction of tax reforms in 2016 has led to a decline in the popularity of such structures. International investors are increasingly using non-Irish resident structures, such as Luxembourg companies.

Irish resident investors will typically utilise Irish resident companies, or limited partnerships.

Real Estate Investment Trusts (REITS) were introduced in 2013 as a new vehicle for investment. Subject to meeting certain criteria, a REIT will not be liable to either

Corporation/ Income Tax on its property rental income or property profits, or Capital Gains Tax on disposals of assets of its property rental business. Finance Act 2019 has limited the existing provision which allows a REIT to avoid any latent Capital Gains Tax exposures when it ceases to be within the regime so that the provision applies only where REITs have been in operation for a minimum of 15 years.

## 8. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

To ensure consistency in drafting and avoiding protracted negotiations, the Law Society of Ireland produces a pro forma contract for sale for use in real estate transactions, which is designed to give a fair balance of rights between buyers and sellers.

The contract for sale:

- contains a memorandum of the agreed terms of the sale (parties, price, description of property, and completion date),
- lists the documentation and searches to be provided by the seller, and
- incorporates the Law Society of Ireland General Conditions of Sale (the “**General Conditions**”). The General Conditions make a number of assumptions about the property and place certain disclosure obligations on a seller, which the seller can only exclude by inserting special conditions. This way, the buyer is on notice of any deviations from the standard contract. The General Conditions were updated in 2019 for use in respect of transactions commencing on or after 1 January 2019.

By virtue of the General Conditions of the contract for sale the seller gives various contractual warranties in respect of the property for sale. It is typical for a seller to limit the scope of warranties through the careful drafting of special conditions in the contract for sale, in particular for commercial property and where the seller’s knowledge of the property is limited, for example, a sale by a receiver, liquidator or mortgagee. Despite the existence of warranties, a prudent seller (or its legal advisers) will still carry out its own due diligence of the property as the principle of caveat emptor is at the heart of commercial property transactions.

There are typically implied covenants as to ownership contained in a purchase deed but there is no form of title warranty. However, a buyer’s lawyer will investigate the seller’s title to the relevant property to ensure a buyer will acquire a good and marketable title. The 2019 General Conditions require the buyer to investigate and satisfy itself as to the title to the property pre-contract. The buyer’s lawyer also carries out a number of searches against both the seller and the property as well as a review of the planning position in relation to the asset and evidence of compliance with building control regulations. The seller must explain and/or discharge any adverse matters resulting from the searches which affect the seller and/or the relevant property before the completion of the sale can occur.

## **9. What legal issues (if any) cannot be covered by usual legal due diligence?**

There are certain legal issues that may only be identified through a physical inspection of the property in sale such as environmental issues, issues with access and services, and unknown occupants as well as issues of technical compliance with the planning laws. Best practice is for the buyer to arrange for a professional survey and valuation of the property in sale to be carried out.

## **10. What is the usual process for transfer of commercial real estate?**

The relevant property is usually marketed on behalf of the seller by an agent who advertises the property and advises on the market value of the property. In commercial real estate transactions, the parties often appoint agents to act on their behalf and the commercial terms are negotiated between the parties and their respective agents. Once the commercial terms are agreed, they are reduced to a non-binding heads of terms document.

Between heads of terms being agreed and a binding contract being signed, the parties may put in place exclusivity agreements and confidentiality agreements (which is becoming more widespread in the sale of commercial real estate). A seller's lawyer is responsible for drafting contracts, dealing with pre-contract enquiries raised by the buyer's lawyers, replying to requisitions on title, redeeming mortgages/charges and distributing the balance of sale proceeds to the seller. A buyer's lawyer investigates the title, raises requisitions on the title, drafts the purchase deed, conducts closing searches, attends the closing appointment and stamps and registers the title.

Surveyors and/or architects may be engaged before the buyer signs contracts to carry out a structural survey of the relevant property. Depending on the nature of the transaction, an environmental expert may also be engaged to provide an environmental report in respect of the property.

In the sale of commercial real estate asset portfolios, the commercial and legal due diligence is usually facilitated by providing interested parties with access to information contained in an online data-room. Before access is granted, the interested parties will typically be required to execute a non-disclosure agreement.

## **11. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?**

Yes, however share transfers were not as common for the period 2012-2018 as there was only a small difference in respective stamp duty rates on asset and share transfers. This is may become more commonplace again as Budget 2020 increased stamp duty on commercial property asset transfers to 7.5%, while stamp duty on share transfers remains at 1%. Transfers of corporate entities and partnerships can be subject to 7.5% duty where the entity derives over 50% of its value from Irish land which is intended for development, held as

trading stock, or held with the sole or main object of realising a gain on disposal. This provision is subject to a number of conditions, including that the transfer is one which transfers control of the land. Minority holdings may not be impacted.

**12. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?**

Yes.

**13. What common rights, interests and burdens can be created or attach over real estate and how are these protected?**

Common rights, interest and burdens that can be created or attach over real estate would for instance include mortgages and charges, leases, easements, wayleaves and covenants (positive and negative).

In the case of registered land, there are certain rights which must be registered in the Land Registry to gain protection; otherwise these rights will not be protected against a bona fide buyer for value without notice (e.g. rights of residence, restrictive covenants, leases for a term exceeding 21 years). There are also a number of burdens which affect registered land without registration, such as public rights and occupational tenancies for terms not exceeding 21 years.

In the Registry of Deeds (unregistered land), priority is determined by the serial number allocated to the instrument. Registered instruments have legal priority over unregistered instruments or instruments registered later in time. An exception applies where the owner of a registered instrument had actual notice of a prior unregistered or unregistrable instrument.

**14. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised**

There is a split between legal title and beneficial ownership of property in Ireland. The 2009 Act provides that the entire beneficial interest in property passes to the buyer on the making of an enforceable contract for the sale or other disposition of land (unless the provisions of the 2009 Act are disapplied). The beneficial interest in property can also be held through a traditional "off-title" trust.

In respect of registered land, the Land Registry does not recognise a split between legal title and beneficial ownership and only the legal owner of property will be recorded in part 2 (the ownership section) of the folio. A beneficial owner may, however, protect his or her interest in the property by registering a caution or an inhibition against the folio in question. The purpose of a caution is to obtain notice of dealings by the registered owner so that the cautioner has an opportunity to assert his or her unregistered right(s). An inhibition, on the other hand, operates as a restriction on registration that prevents all registrations except



those made in compliance with the terms thereof.

There are currently no proposals to change the split between legal title and beneficial ownership of property in Ireland.

**15. Is public disclosure of the ultimate beneficial owners of real estate required?**

There is no requirement for the public disclosure of the ultimate beneficial owners of real estate. As an aside, it should be noted that since 2019, businesses in Ireland have been obliged to disclose details of the beneficial ownership of that business for inclusion on Ireland's Central Register of Beneficial Ownership. A 'beneficial owner' is someone who ultimately owns or controls a legal entity, either through direct or indirect ownership of at least 25% of the voting rights or shares or ownership interest in the entity.

**16. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?**

**Capital Gains Tax**

The sale of Irish real estate, or of unquoted shares in companies deriving the greater part of their value from Irish real estate, will be subject to Irish capital gains tax. The current rate is 33%. The gain is calculated on the proceeds of sale less acquisition and enhancement costs, and less the incidental costs of acquisition and the incidental costs of disposal.

Irish capital gains tax is subject to a withholding procedure. The buyer must generally withhold 15% of the consideration and pay this amount to Revenue unless the seller provides a tax clearance certificate from Revenue. A clearance certificate is automatically available on application to Revenue if the seller is resident in Ireland for tax purposes. A non-resident seller will need to agree and discharge its capital gains tax liability in order to obtain a clearance certificate. This withholding procedure only applies to a buyer where the consideration payable to the seller exceeds the relevant threshold current at the date of the transfer agreement (currently €500,000 or €1,000,000 if the asset disposed of is residential property).

A capital gains tax exemption applies to disposals of land acquired between 7 December 2011 and 31 December 2014 (inclusive), provided the land was held for at least for and up to seven continuous years. The relief applies to residential and non-residential real estate located within any EEA state acquired by an Irish resident during the period set out above.

**Stamp Duty**

Ireland also imposes stamp duty on transfers of Irish real estate and certain other property. The stamp duty is charged on the consideration payable for the property, or the market value



in certain instances. Stamp duty is generally payable by the buyer, although in certain transactions, such as voluntary transfers, both parties to a contract can technically be liable. There are provisions which apply to contracts to acquire land, as opposed to actual transfer documents, in cases where there is a “resting on contract” position.

The rate of stamp duty on transfers of residential property is 1% on consideration up to €1,000,000 and 2% on consideration over this threshold.

The stamp duty rate on transfers of non-residential (commercial) property is 7.5%.

Where non-residential property is transferred and is subsequently utilised for construction of residential accommodation, a stamp duty refund is available which effectively reduces the rate from 7.5% to 2%. Budget 2021 has extended the time allowed to commence construction work to avail of this refund to 31 December 2022. This scheme is subject to a number of conditions.

Generally, the buyer of the property is liable for stamp duty which can be directly assessed.

## **VAT**

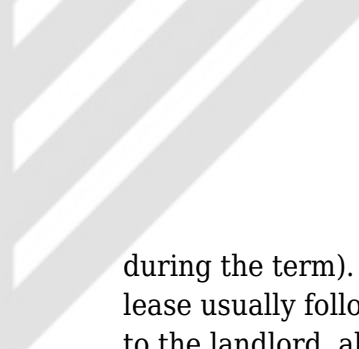
The sale of Irish real estate may be subject to Value Added Tax (“**VAT**”). As there are many variations and exemptions under the current Irish VAT regime, the VAT treatment should be addressed by the appropriate professional advisors pre-contract with the final agreed position reflected in the contract.

Broadly, the sale of land which has been developed in the previous 20 years, or buildings which have been developed or redeveloped in the previous five years (“new” property) will be subject to VAT. The sale of “old” property which falls outside these rules is exempt from VAT. In certain cases, where a sale would otherwise be exempt, the buyer and seller can agree that the sale will be subject to VAT in order to avoid a clawback of VAT previously recovered in respect of the relevant property by the seller. The first sale of residential property by the person who developed the property is always subject to VAT.

The rate of VAT on transfers of real estate is 13.5% (a VAT rate of 21% applies to VATable lettings (but this rate is likely to increase to 23% in February 2021)).

### **17. What are common terms of commercial leases and are there regulatory controls on the terms of leases?**

The term of a lease of business premises has traditionally ranged from short-term up to 35 years, but recent legislative changes and market forces are resulting in shorter term leases, with the maximum term now being 15–20 years (typically including break options exercisable



during the term). The structure of a typical medium- to long-term (10-25 years) commercial lease usually follows the same traditional format which, in addition to securing rent payments to the landlord, also passes the cost of maintaining, insuring and occupying the relevant property from the landlord to the tenant. This allows the landlord to enjoy the rent without deduction.

In certain cases, tenants will seek to negotiate an option to break or terminate the term of the lease, i.e. after five or ten years of the term. Any business lease granted for a term in excess of five years would typically have a provision for the periodic review of rent on a five yearly basis to the then current open market rent.

Most business leases in Ireland are of a full repairing and insuring nature, whereby the tenant will be subject to extensive repairing obligations. These will be imposed directly by a repairing covenant entered into by the tenant or, in the case of a multi-let development like an office block, shopping centre or business park, indirectly through a service charge regime which will include reimbursing the landlord for repair works carried out to the structure and common areas of the relevant development.

Usually the provisions of a business lease place restrictions on a tenant's contractual right to assign or sub-let without the landlord's prior written consent. Under Section 66 of the Landlord and Tenant (Amendment) Act, 1980, a landlord cannot unreasonably withhold consent to an assignment or sub-letting of the entirety of a premises which will override the contractual terms of any business lease.

Sharing a business premises with companies in the same corporate group is generally a matter for negotiation between the landlord and tenant but it is commonplace for leases to have such a provision permitting such sharing of occupation, subject usually to a requirement to notify the landlord and provided that the sharing is by way of licence only and no Landlord and Tenant rights accrue for the sharing entity.

It is less common to see provisions in a lease relating to reorganisation or change of control of the tenant. Again, these are matters for negotiation. While landlords will generally agree on request to provisions allowing sub-letting to or sharing space with a group company without consent, it is rare that a landlord will permit assignment to a group company without consent. Normally, there are no restrictions on the change of control of a tenant company included in a lease.

Commercial business leases are freely negotiated subject only to statutory provisions.

The introduction of the Commercial Leases Register now requires the particulars and terms of all leases and related documentation to be disclosed on a public register.

In 2011, the draft Landlord and Tenant Law Reform Bill was published. While not yet

enacted, the Bill is worthy of note as the objective is to consolidate and modernise much of the general law of landlord and tenant under one act going forward, including landlord and tenant obligations and their enforcement, statutory rights and termination.

#### **18. How are use, planning and zoning restrictions on real estate regulated?**

The Planning and Development Acts 2000-2019 (the “**Planning Acts**”) govern planning and zoning matters. The Planning Acts regulate the zoning of areas through a variety of development, sustainability, landscape conservation and special amenity plans. Most of the functions reserved by the Planning Acts are exercised by the local authority in the area where the relevant property is situated. There are currently 31 local authorities in Ireland, each a planning authority for the purposes of the Planning Acts, responsible for monitoring and enforcing compliance with planning laws in relation to property in its area and responsible for making decisions regarding applications for planning permission. Where suitable grounds for appeal exist, the decision of the planning authority, including conditions imposed, may be appealed by the applicant to An Bord Pleanála (the Planning Appeals Board).

Generally, planning permission is required for any development of land or property, unless the development is specifically exempted from this requirement. The term “development” includes the carrying out of works (building, demolition, alteration) on land or buildings and the making of a material change of use of land or buildings.

#### **19. Who can be liable for environmental contamination on real estate?**

Liability for environmental contamination is not limited to the polluter although the polluter is likely to be pursued in the first instance by the relevant authority. Liability can extend to the owner of the property affected.

Certain statutory bodies are required to publish periodic reports which identify specific properties which are hazardous or which do not comply with certain environmental requirements. However, Ireland has no dedicated register of contaminated land. A potential buyer would always be advised to carry out its own due diligence where non-compliance with environmental law is a concern.

#### **20. Is expropriation of real estate possible?**

Yes. Local authorities can compulsorily acquire lands in limited circumstances such as (1) where a site is derelict and poses a danger in the community, (2) for the purpose of developing infrastructure and (3) for conservation/preservation purposes. Where property is compulsorily acquired by a local authority, compensation is payable to all persons with an interest in the lands. The assessment of compensation generally falls under a number of headings of claim to include the value of the land acquired, compensation for disturbance and any diminution in value of any retained lands.

Section 158 of the National Asset Management Agency Act, 2009 (the “**NAMA Act**”) outlines the powers of the National Asset Management Agency (“**NAMA**”) to acquire land compulsorily in certain circumstances where the compulsory acquisition is necessary to allow NAMA to deal with the property charged to NAMA.

Section 16 Industrial Development Act, 1986 (as amended by the Industrial Development (Amendment) Act 2018) (the “**IDA Act**”) enables the Industrial Development Agency (the “**IDA**”) to acquire lands either compulsorily or by agreement for the purpose of industrial development. A large part of the IDA’s role, under legislation, is acquiring land for development and, as a result, the IDA’s power to compulsorily acquire land is considered broad. The IDA can compulsorily acquire property even where the property is not immediately required but will, or is likely to be, required for the purpose of industrial development in the future.

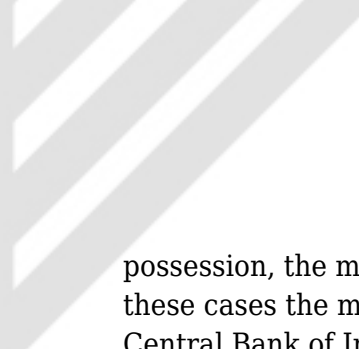
**21. Is it possible to create mortgages over real estate and how are these protected and enforced?**

It is possible to create mortgages over real estate. A mortgage under Irish law is the conveyance of the legal title subject to a proviso that the title is conveyed back to the mortgagor when the loan is redeemed. A mortgage of registered land is referred to as a charge – but its effect is the same.

A lender’s interest arising from a mortgage/charge is principally protected by the registration of the mortgage with the PRA. Where the security is created over registered land, the charge is registered with the PRA in the Land Registry and its legal is conclusive evidence of the chargee’s entitlement to the charge over the relevant property. (In limited and exceptional circumstances – e.g. fraud or mistake – the court may order the PRA to amend the register.) A mortgage of unregistered land must be lodged with the Registry of Deeds. However, unlike the system for registered land, registration with the Registry of Deeds is not conclusive. Registration of a mortgage with the Registry of Deeds affects the priority of the security interest.

Where the mortgage/charge is created by a company, particulars of the charge must be registered with the Irish Companies Registration Office (“**CRO**”) within strict time periods according to the procedures set out in the Companies Act 2014 (“**CA 2014**”). If the mortgage/charge is not registered with the CRO accordingly, it will be void as against any liquidator appointed to the company, and any creditor of the company.

Banks in Ireland typically enforce mortgages by appointing a receiver over the property. The receiver is deemed to be an agent of the mortgagor and has a duty to obtain the best price reasonably possible in selling the asset. A receiver will also typically have the power, in the mortgage deed and under CA 2014 (if applicable), to manage the property pending a sale. Otherwise a mortgage may be enforced by a sale by the mortgagee. Where the property is the principal dwelling house of the mortgagor, if the mortgagor does not voluntarily yield up



possession, the mortgagee must apply to the Circuit Court for an order for possession. In these cases the mortgagee, or credit servicer, must follow the procedures stipulated by the Central Bank of Ireland (“**CBI**”) for dealing with consumer mortgage default. These requirements are set out in the CBI’s Code of Conduct on Mortgage Arrears and Consumer Protection Code. If the court makes an order for possession the mortgagor must vacate the property at the stipulated time at which point the mortgagee may sell.

**22. Are there material registration costs associated with the creation of mortgages over real estate?**

No, only registration and filing fees. The registration fee in the Land Registry is €175, the fee in the Registry of Deeds is €50 and the fee in the CRO for registering a charge under CA 2014 is €40.

**23. Is it possible to create a trust structure for mortgage security over real estate?**

Yes. Trusts, and in particular trusts of real estate, are recognised under Irish law and may be utilised in various commercial contexts to achieve legitimate structural objectives.