MASON
HAYES &
CURRAN

Energy Sector Update

In Brief

Autumn 2024

MHC.ie

Welcome

Welcome to the autumn edition of our Energy Sector Update series. In this issue, we examine a selection of topics and trends impacting our clients, including:

- The European Commission's recent guidance on the implementation of the latest requirements under the updated Renewable Energy Directive (RED III) and its likely impact on market participants.
- Key steps and strategic decision-points for developers in securing consent for large-scale offshore wind projects.
- The Irish Government's recent draft revision of the National Planning Framework which focuses heavily on renewable energy.

In addition to the insights set out in this update, we recently hosted our annual Energy Conference, focusing on Financing Ireland's Energy Transition. If you missed the Conference, we will re-running this event recording as a webinar on Friday 18 October from 11:00am-12:20pm, via Zoom. **Register now to confirm your attendence**.

Key Contacts

Eoin Cassidy
Partner,
Energy Sector Lead
ecassidy@mhc.ie

Rory Kirrane SC
Partner,
Head of Construction, Infrastructure & Utilities
rkirrane@mhc.ie

Contact our Energy Sector team

EU Guidance on New Renewable Energy Measures

Peter McLay
Partner,
Energy
pmclay@mhc.ie

Eoin Cassidy
Partner,
Energy Sector Lead
ecassidy@mhc.ie

The European Commission recently published guidance for EU Member States adopting domestic measures to scale up their renewable energy deployment.

The guidance, published on 2 September 2024, relates to the third revised Renewable Energy Directive (2023/2413/EU), commonly known as RED III. The Directive entered into force in November 2023 and, according to the guidance, is intended to expedite the EU's green transition and energy independence following the outbreak of conflict between Russia and Ukraine in 2022.

RED III sets an EU-wide target of 42.5% renewable energy consumption by 2030, which stands as a significant increase relative to the equivalent 32% target under RED II. It introduces a range of new requirements across various sectors and technologies designed to facilitate the achievement of this new target, some of which were required to be implemented by 1 July 2024.

Most notably, Member States must speed up and simplify renewable infrastructure permitting procedures by ensuring that procedures for granting permits to build, repower and/or operate energy assets do not exceed certain timelines, depending on the asset type, size and location. We expect that this will accordingly speed up development and transaction timelines. However, Ireland did not transpose these measures by the 1 July 2024 deadline and on 26 September 2024 received, along with 25 other Member States, formal notice from the European Commission requiring that full transposition of the provisions be notified to the EC by late November 2024. The formal notice also provided that if such transposition is not notified in this manner, the European Commission may issue a 'reasoned opinion' with a view to achieving compliance.

These procedures must also adhere to simplicity requirements for contact points, dispute resolution and appeals. Member States were required, no later than 21 February 2024, to give effect to a legal presumption that renewable energy plants are in the "overriding public interest" when carrying out certain environmental and planning assessments under EU law. Member States will further be required to protect biodiversity in their promotion of bioenergy, among other things. However, the deadline for implementing most domestic measures under RED III is 21 May 2025.

From RED I to RED III

The original Renewable Energy Directive (2009/28/EC), or RED I, entered into force from June 2009 and was required to be implemented in Member States' domestic law from December 2010 until June 2021. It set an EU-wide goal for 20% renewable energy use by 2020, with each Member State assigned different national targets to help meet this overall goal.

In practice, RED I established a policy framework for EU renewable energy deployment within which Member States had some flexibility in adopting domestic measures.

RED I was subsequently replaced by RED II[1], which entered into force in 2018 and has been required to be implemented in Member States' domestic law from June 2021. This revised Directive retained much of the framework established under RED I while setting a new, binding EU-wide target of 32% renewable energy consumption by 2030.

By way of comparison, the 42.5% target now set by RED III underlines the ever-increasing ambition and intervention of the EU in its attempts to ensure as much electricity consumption as possible has come from renewably generated sources.

European Commission's guidance on RED III

Among the measures to be implemented by 21 May 2025, the new European Commission guidance focuses on three policy areas in particular:

1. Heating and cooling
2. Energy system integration, and
3. Renewable fuels of non-biological origin (RFNBOs)

1. Heating and cooling

The new guidance observes that the use of renewable energy in heating and cooling has been slower than in other parts of the economy. To promote an increased uptake in this area, RED III has introduced a target share of renewable energy use in buildings by 2030. It also introduced concurrent average annual increase targets for industry heating and cooling, and district heating and cooling.

RED III allows Member States some flexibility in their choice of methods for achieving renewable energy uptake. It lays down criteria, however, for calculating this uptake and measuring progress towards achieving targets – including the extent to which the use of waste heat and cold is permitted.

2. Energy system integration

The European Commission's guidance notes that more flexible and smarter grid infrastructure will help integrate a greater share of variable renewable electricity. Enhanced deployment of 'distributed energy resources' must also be achieved, including electric vehicles, solar panels and heat pumps. More responsive demand to supply and vice versa will mitigate price spikes and congestion and allow a larger share of lower-cost renewables to meet energy needs.

Towards these aims, RED III introduced new information-sharing obligations which Member States will be required to apply to transmission and distribution system operators, and battery and electric vehicle manufacturers. Member States will also be required to introduce measures for smart recharging, interface with smart metering systems, and bidirectional recharging functionalities. Small and mobile batteries and storage assets will be entitled to non-discriminatory access to balancing and flexibility services markets.

3. Renewable fuels of non-biological origin

RFNBOs are liquid or gaseous fuels produced using renewable electricity. This includes green hydrogen and its potential derivatives such as ammonia, methanol and e-fuels.

[1] *Renewable Energy Directive (2018/2001/EU)*

The Renewable Energy Directive previously only contained RFNBO-related provisions in the context of transport. RED III, however, introduced new obligations and incentives focused on industrial applications of RFNBOs, both as fuels and as feedstock for industrial products such as fertilisers. Within transport, RED III has also gone further than RED II by establishing a target that 1% of energy used in transport be powered by RFNBOs by 2030.

The guidance explains how this target will be calculated, what counts as "industry" under the directive, and that the RFNBO-related obligations are not required or intended to be borne by individual hydrogen consumers directly.

Looking ahead – RED III in practice

While the Commission's guidance is for EU Member States, it gives detail on how various market actors can expect to be regulated and/or incentivised once all binding measures come into force from 1 May 2025.

RED III aims to expand renewable energy as a market but also to create new markets for technologies such as distributed battery storage, district heating, and RFNBOs. It signals to industry how commercial investment should anticipate market shifts towards renewable and renewable-derivative technologies.

In common with much of the renewable energy legislation emanating from Europe, the practical impact in Ireland will depend on:

- How the ambitions of the legislation are translated into Irish law, applied by local regulators and embraced by commercial entities, and
- The extent to which the constraints presented by a small, relatively isolated market are taken into account.

For more information on the impact of RED III, contact a member of our Energy team.

Offshore Renewables: Roadmap to Consent

Jessica Buttanshaw
Senior Associate, Planning & Environment
jbuttanshaw@mhc.ie

Gráinne Tiernan
Senior Associate, Planning & Environment
gtiernan@mhc.ie

Deirdre Nagle
Partner, Head of Planning & Environment
dnagle@mhc.ie

MASON HAYES & CURRAN

Offshore Renewables: Roadmap to Consent

Jessica Buttanshaw, Senior Associate
Gráinne Tiernan, Senior Associate

Dublin London New York San Francisco MHC.ie

The Irish Government has committed to ambitious offshore renewable energy (ORE) targets of 20GW by 2040 and 37GW by 2050, respectively. These targets aim to substantially increase Ireland's ORE generation and export capabilities. The Future Framework Policy Statement for ORE, published in May 2024, confirms the Government's strategic, plan-led approach to achieving these targets.

We provide an overview of the key steps and strategic decision-points for developers in securing consent for a large-scale offshore wind project.

Phase 1: Pre-Application Strategy

Step 1: Consider Policy and Spatial Planning

- Compliance with spatial plans and coordination with other offshore infrastructure is increasingly important. As set out in the Future Framework Policy Statement for ORE, the Government is adopting a strategic, plan-led approach to offshore development in preparation for the expansion of offshore wind.

- This means that appropriate locations for offshore wind energy are identified in advance by the Government. The locations are selected based on environmental impacts and in coordination with other marine users.
- The National Marine Planning Framework (NMPF) was Ireland's first maritime spatial plan, and compliance with the policies set out in the NMPF is important for all offshore projects. However, the more specific identification of maritime areas suitable for offshore wind development is through the new 'Designated Maritime Area Plans' (DMAP) process.
- The Government has recently published the South Coast DMAP and it is expected to be approved later in 2024. The Future Framework Policy Statement for ORE identifies two further DMAP 'priority actions' for 2024 including:
  - Development of a "future DMAP roadmap" to outline the process and timings for the designation of further DMAPs, and
  - Exploration of the potential for development of a West Coast DMAP.
- Ensuring that your project is aligned with the relevant spatial plans and policies is an essential first step in any offshore wind project.

Step 2: Define your 'Project'

- Define the 'project' that you are seeking permission for:
  - Different elements, like the offshore and onshore aspects of a project, can be consented under separate applications. However, the whole project must be assessed cumulatively. You cannot artificially split a project in a manner which could amount to "project splitting" for the purposes of the EIA Directive or the Habitats Directive. Both Directives are generally applicable to large-scale offshore wind projects.

Step 3: Determine the Type of Consent Required

- Identify the type of consent you need and whether you should seek consent for onshore and offshore elements together or separately.
- The Maritime Area Planning Act 2021 as amended (MAPA) now introduced new procedures[1] for offshore consenting. These include applications for the provision of Maritime Area Consents (MACs) and licences for site investigations. It also introduced the Maritime Area Regulatory Authority (MARA).
- The Planning and Development Act 2000, as amended (PDA), is the primary legislation governing onshore and offshore planning. MAPA introduced amendments to the PDA around seeking planning permission for "maritime" developments.
- The consenting process to develop in the "maritime area" is now a two-stage process and the following are required:
  - A consent to occupy a specified "maritime area", by way of a valid lease, licence, a MAC, or consent of the landowner, and
  - Planning permission or a planning exemption depending on the type of activity or project
- Site investigations are also generally undertaken by way of a licence to determine the viability and parameters of an offshore wind project.

Large offshore wind projects will generally require both a MAC from MARA and planning permission from An Bord Pleanála (ABP). We have therefore provided an overview of these processes.

[1] *To note the powers under the Foreshore Act 1933 as amended have been limited since the commencement of certain provisions of the MAPA and further transitionary measures have been introduced under the Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023.*

Phase 2: MAC Application

Step 1: Pre-Application

- Consult MARA and stakeholders including members of the public. This is non-statutory but advised by MARA.
- Prepare the application and financial and technical capability assessments demonstrating that you, the applicant, can meet MAC commitments.
- Environmental Impact Assessment (EIA) required under the EIA Directive and Appropriate Assessment (AA) required under the Habitats Directive are carried out at permission stage.

Step 2: Determination

- MARA makes a determination having regard to satisfaction of statutory criteria including:
  - Public interest
  - NMPF and transmission system operator development plan compliance, and
  - Stakeholder engagement.
- MARA may refuse, grant with conditions, or partially grant.
- There is potential for judicial review within 8 weeks.

Phase 3: Maritime Planning Permission Application

Step 1: Pre-Application

- Consult ABP and stakeholders/public.
- Prepare application and EIA screening and, if required, an Environmental Impact Assessment Report (EIAR). Additionally, you will need to prepare an AA screening and, if required, a Natura Impact Statement (NIS). EIA scoping may also be recommended.
- At pre-application stage, it should be considered whether an opinion on flexibility is required. This allows ABP to consider design flexibility as part of the assessment of the planning application, if granted. This is helpful where emerging technologies are continually evolving such as turbine design.

Step 2: Determination

- ABP will only consider an application for maritime permission if the applicant holds a MAC. It may also consider an application if other consents to occupy the “maritime area” are held. These can include a valid foreshore lease or licence granted under the Foreshore Act 1933 as amended, or consent of the landowner.
- ABP makes a determination having regard to statutory criteria including:
  - NMPF and/or maritime plan compliance
  - Environmental effects, and
  - Consultation responses
- ABP may refuse, grant with conditions, or partially grant.
- There is potential for judicial review within 8 weeks.

Conclusion

This step-by-step overview highlights some of the key strategic decisions in consenting an ORE project. The following questions can act as a general checklist to assist you:

- Does the project comply with policy and offshore spatial and development planning?
- How should the application for consent be structured, separating/not separating different elements of the project?
- Have site investigations been carried out?
- Has a MAC been obtained?
- How much design flexibility is being sought?
- Have robust EIA and AAs, as applicable, been undertaken?
- Has planning permission been obtained?
- Have any other ancillary consents been obtained such as, for example, a derogation licence?

For more information and expert advice on successfully navigating the consenting process for large-scale offshore wind projects, contact a member of our Planning & Environment or Energy teams.

What's New for the Energy Sector in the Draft National Planning Framework?

Deirdre Nagle
Partner, Head of
Planning & Environment
dnagle@mhc.ie

Jessica Buttanshaw
Senior Associate,
Planning & Environment
jbuttanshaw@mhc.ie

The National Planning Framework (NPF) is the Government's high-level, strategic plan for future development in Ireland. The current version of the NPF was published in 2018.

The Government has published a draft revision to the 2018 NPF for public consultation, which is available online. The revised draft NPF proposes some significant changes to energy policy and objectives. We consider some of the key changes here.

The draft NPF remains subject to change. Public consultation on the revised draft NPF closed on 12 September 2024 and the Department is currently reviewing the consultation responses.

There is an increased emphasis on the importance of renewable energy development and the infrastructure needed to support this. Chapter 9 acknowledges that the "*accelerated delivery of additional renewable energy generation is…essential for Ireland to meet its climate targets.*" A number of new or amended National Policy Objectives (NPOs) have been proposed in order to achieve this objective.

The 'Vision' section of the revised NPF identifies a need for a "*more active approach to the management of land*". This more strategic, plan-led approach is a theme throughout the revised NPF.

Onshore renewable energy

Regional Renewable Energy Capacity Allocations

Table 9.1 sets regional renewable energy capacity allocations for wind and solar energy. This was one of the key actions for 2024 under the Climate Action Plan 2024.

New **NPO 75** requires each Regional Assembly to plan how and where to deliver the required capacity by identifying capacity allocations for each Local Authority in its area.

New **NPO 76** requires Local Authorities to plan for the delivery of the energy capacity target that they have been allocated. This is a significant change from the current NPF. It represents a more active and prescriptive approach to land use planning for renewable energy development.

Co-location of Renewable Energy

New text in Chapter 9 identifies the benefit and opportunity offered by the co-location of renewable energy with complementary uses, such as industrial and agricultural uses. New **NPO 74** supports co-location at appropriate locations. This is an increase in the level of support for co-location of renewables, compared with the current NPF.

Repowering

New text in Chapter 9 notes that repowering "*has significant potential to contribute to the achievement of national renewable energy targets and is a central component of EU accelerated renewable electricity policy strategy, including the REPower EU Plan*". There is no mention of repowering in the current NPF. However, the revised NPF does not go as far as introducing a specific NPO which supports repowering.

Grid and interconnection

Grid

New NPOs 72 and 73 provide increased support for the development, upgrading and interconnection of grid infrastructure. New **NPO 56** recognises the role of grid infrastructure in supporting offshore renewable energy development.

Interconnection

NPO 62 seeks to strengthen an all-island interconnection. This is unchanged from the current NPF **(NPO 47)** except for the addition of a reference to exploring "*the potential for strategic cooperation on offshore wind energy development*".

This change is aligned with the increasingly strategic, plan-led approach to offshore development outlined under the Maritime National Marine Planning Framework and the 'Designated Maritime Area Plans' (DMAP) process. Please see our previous article for details. There is reference to the importance of international interconnection but limited new text on this. There is no specific objective supporting international interconnection.

Offshore renewable energy

Offshore Potential

There is a new section on offshore renewable energy in Chapter 7. This acknowledges Ireland's ambitious offshore generation targets. The section outlines the strategic, plan-led approach being adopted to achieve these targets.

While the current NPF is supportive of offshore renewable energy development, for example **NPO 42**, the revised draft NPF places greater emphasis on this.

Ports

There is increased recognition of the critical role played by ports in facilitating renewable energy development and the need for new and improved port infrastructure. New **NPO 52** seeks to "*support the sustainable delivery of port and harbour infrastructure to facilitate the development, maintenance and operation of offshore renewable electricity generating developments*".

Conclusion

There are a number of significant changes proposed to energy policy and objectives, generally indicating increased support for renewable energy development and associated infrastructure.

Some additional supportive text is added on repowering and international interconnection, but neither benefit from a new, topic-specific NPO. This is surprising given the amount of EU action on these topics and their importance in the creation of a reliable, secure renewable energy supply. It will be interesting to see if the final draft NPF provides increased support.

Overall, the revised NPF proposes a more active and prescriptive approach to the management of the use of land in order to meet Ireland's climate and energy targets. This is aligned with other recent Government action, such as the National Marine Planning Framework, the Future Framework Policy Statement for Offshore Renewable Energy and the Designated Maritime Area Plan process. If this approach is adopted in the final NPF, it will be important that the implementation timelines and process facilitates achievement of the 2030 targets.

For more information and expert advice on successfully navigating the complex, changing landscape of renewable energy development, contact a member of our Planning & Environment team.

The EU Nature Restoration Regulation and the Energy Sector

Deirdre Nagle
Partner, Head of
Planning & Environment
dnagle@mhc.ie

David Foy
Associate,
Planning & Environment
dfoy@mhc.ie

The Nature Restoration Regulation[1] is an unprecedented EU law. It requires Member States to jointly restore at least 20% of the EU's land and sea areas by 2030. In addition, all ecosystems in need of restoration must be restored by 2050. The Regulation came into force on 18 August 2024. It sets specific, legally binding targets and obligations for nature restoration in terrestrial, marine, freshwater, and urban ecosystems. We look at what effect the Regulation might have, and how it aligns with other EU environmental initiatives

Main aims of the Regulation

Some of the main aims of the Regulation are to contribute to:

- The long-term and sustained recovery of biodiverse and resilient ecosystems across the Member States' land and sea areas through the restoration of degraded ecosystems, and
- Achieving the EU's overarching objectives concerning climate change mitigation, climate change adaptation, and land degradation neutrality.

What does it mean to restore ecosystems to good condition?

The restoration of ecosystems to good condition means assisting an ecosystem to improve its structure and functions. This process can be active or passive. The goal is to reach a state where the key characteristics of the habitat type reflect the high level of ecological integrity, stability and resilience. The qualities are necessary to ensure the ecosystem's long-term maintenance. The aim is to conserve or enhance biodiversity and ecosystem resilience within a habitat's favourable reference area.

To which ecosystems does the Regulation apply?

The Regulation covers all types of ecosystems, including:

- Terrestrial
- Coastal
- Freshwater
- Forest
- Agricultural, and
- Urban.

[1] *Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869*

These include areas such as wetlands, grasslands, forests, rivers and lakes. Marine ecosystems are also included, such as seagrass, sponge beds and coral beds. A complete list of ecosystem types is set out in the Annexes to the Regulation. Member States will first have to focus on restoring Natura 2000 sites, starting with those in poor condition. The aim is that 30% of these will be restored by 2030, rising to 90% by 2050.

What measures must be implemented?

Member States must put in place restoration measures that are necessary to restore ecosystems to good condition. Whilst these measures must be tailored to each type of ecosystem, they generally must achieve a continuous improvement until good condition is reached. Once good condition is reached, they must ensure the condition does not significantly deteriorate, subject to permitted derogations. The permitted derogations include projects of overriding public interest and projects permitted in accordance with Article 6(4) of the Habitats Directive[2], amongst others.

Derogations for renewable energy

The Regulation specifically identifies "*the planning, construction and operation of plants for the production of energy from renewable sources, their connection to the grid and the related grid itself, and storage assets*" to be in the overriding public interest. However, it is open to Member States to restrict this derogation in certain parts of their territory. Any such derogation must be justified in the specific circumstances. They can also restrict it to certain types of technologies, or to projects with certain technical characteristics, in accordance with their national energy and climate plans.

Peatlands

The Regulation requires Member States to put in place measures, including the 're-wetting of land', aimed at restoring organic soils in drained peatlands that are used for agriculture. The area of these lands where measures must be put in place include:

- 30% by 2030, of which at least a quarter shall be rewetted
- 40% by 2040, of which at least a third shall be rewetted, and
- 50% by 2050, of which at least a third shall be rewetted.

Many renewable energy projects in Ireland are developed in peatland areas. Therefore, there may be some concern that this will impact the area of land that is available for further renewable energy development. However, the Regulation permits Member States to reduce the extent of re-wetting if they have valid reasons. This may be where re-wetting is likely to have significant negative impacts on infrastructure, buildings, climate adaptation, or other public interests, and if re-wetting cannot take place on land other than agricultural land.

In addition, the obligation on Member States to meet the re-wetting targets does not imply an obligation for farmers and private landowners to re-wet their lands. Re-wetting of agricultural and privately owned lands will remain voluntary.

Forestry

Many of Ireland's wind farms are constructed in areas of existing forestry, particularly in upland areas.

The Regulation requires Member States to put in place restoration measures necessary to enhance biodiversity of forest ecosystems.

[2] *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora*

The objectives that Member States must meet regarding forest ecosystems include, amongst others, an increasing trend at national level of at least six out of seven of the following indicators:

- Standing deadwood
- Lying deadwood
- Share of forests with uneven-aged structure
- Forest connectivity
- Stock of organic carbon
- Share of forests dominated by native tree species, and
- Tree species diversity.

Whilst a derogation is provided for renewable energy development elsewhere in the Regulation, this section of the Regulation only provides two express justifications for a Member State not meeting this objective. They are:

1. Large-scale force majeure, including natural disasters, in particular unplanned and uncontrolled wildfire, and
2. Unavoidable habitat transformations which are directly caused by climate change.

Urban development

Member States must ensure that by 31 December 2030 there is no net loss in the total national area of urban green space and of urban tree canopy cover in urban ecosystem areas. The baseline for this calculation is the level of green space and tree canopy cover in 2024 Member States may exclude certain urban ecosystem areas from those total national areas. These exclusions apply to urban centres and clusters where the share of urban green space exceeds 45%. They also apply where the share of urban tree canopy cover exceeds 10%.

Member States must also achieve an increasing trend in the total national area of urban green space from 1 January 2031. This includes integrating urban green space into buildings and infrastructure within urban ecosystem areas. Progress must be measured every six years from 1 January 2031, until a satisfactory level is reached.

To comply with this, the Government and local authorities may have to revise national, county, and local area development plans to ensure their objectives are consistent with the Regulation. These objectives could potentially have the effect of limiting development in certain areas. This is because any proposed plans will have to ensure that there is no net loss, or potentially a net gain, of urban green space and/or urban tree canopy cover in urban ecosystem areas.

National Restoration Plans

Member States must prepare National Restoration Plans covering the period up to 2050, subject to periodic review. As part of this process, they must carry out the preparatory monitoring and research needed to identify the restoration measures required to meet the restoration targets and fulfil their obligations under the Regulation. This includes quantifying and mapping the area that needs to be restored to meet the restoration targets.

Of relevance for renewable energy developers is that the preparation of the National Restoration Plan must:

- Be coordinated with the mapping of areas that are required to fulfil at least the national contributions towards the 2030 renewable energy target
- Ensure synergies with the build-up of renewable energy and energy infrastructure and any renewables acceleration areas and dedicated infrastructure areas that are already designated, and
- Ensure that the functioning of those areas including the permit-granting procedures applicable in those areas, as well as the functioning of grid projects that are necessary to integrate renewable energy into the electricity system and the respective permit-granting process, remain unchanged.

Member States must submit their draft National Restoration Plan to the European Commission by 1 September 2026. The Commission will have six months to review the plan. The views of the Commission shall be taken into account by the relevant Member State in the preparation of its final National Restoration Plan. The final plan must be published within six months of receipt of the Commission's views by the relevant Member State.

The Nature Restoration Regulation & the Climate Neutrality Regulation

Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality (the Climate Neutrality Regulation) sets out a binding objective for the Member States collectively to:

- Reduce net greenhouse gas emissions by at least 55%, compared to 1990 levels by 2030
- Climate neutrality by 2050, and
- Negative emissions thereafter.

The Climate Neutrality Regulation aims to:

- Prioritise swift and predictable emission reductions and, at the same time, enhance removals by natural sinks.
- Require the relevant EU institutions and Member States to ensure continuous progress in enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change.
- Require Member States to integrate adaptation in all policy areas and promote ecosystem-based adaptation and nature-based solutions. These include solutions inspired and supported by nature, that are cost-effective, and that simultaneously provide environmental, social and economic benefits and help build resilience.

It is considered that the Nature Restoration Regulation can make an important contribution to achieving some of the objectives of the Climate Neutrality Regulation. These are maintaining, managing and enhancing natural sinks and to increasing biodiversity while fighting climate change. This is because ecosystems that are in good condition are recognised as being readily able to capture and store carbon more effectively than those in poorer condition.

Conclusion

The Nature Restoration Regulation is an unprecedented EU Regulation with ambitious targets. Its primary purpose is to restore our ecosystems and habitats to good condition. To achieve this, Member States must reflect on the condition of their own ecosystems and propose measures for restoring them to good status. The implementation of National Restoration Plans will be done with oversight by the European Commission to ensure there is accountability.

Some of the Regulation's objectives do raise potential concerns for the continued development of renewable energy projects in certain areas. However, a secondary objective of the Regulation is to reduce greenhouse gas emissions. It is hoped, therefore, that the derogations in the Regulation for renewable energy will be applied to the relevant types of ecosystems, subject to environmental assessment of specific plans.

For more information and helpful advice about the EU Nature Restoration Regulation, contact a member of our Planning & Environment team.

Navigating Ireland's Corporate Sustainability Reporting Regulations

Key Impacts for Businesses

Emer Shelly
Partner,
Corporate Governance
eshelly@mhc.ie

Jay Sattin
Partner,
Planning & Environment
jsattin@mhc.ie

The Corporate Sustainability Reporting Directive, or CSRD, is groundbreaking European Union legislation which is designed to improve access to high quality, reliable and comparable sustainability information from businesses across the EU and beyond. It establishes a harmonised EU-wide framework which will require many companies to make extensive annual disclosures on ESG matters.

Following an 18-month transposition period during which EU Member States were required to incorporate the CSRD into their national laws, the European Union (Corporate Sustainability Reporting) Regulations 2024 (the Regulations) came into force in Ireland on 6 July 2024. The Regulations now integrate the sustainability reporting framework set out in the CSRD into Irish company law.

However, the Regulations have also given rise to a number of unexpected, and perhaps unintended, surprises. In particular, they apply sustainability reporting obligations to companies which, based on the CSRD, had been expecting to find themselves outside scope.

They also extend the scope of sustainability reporting obligations and accelerate the commencement of those obligations for companies which, based on the CSRD, had been anticipating more limited reporting requirements and a longer lead-in time to prepare. The Regulations also unduly limit exemptions for group reporting.

Further legislation appears to be necessary to align the Irish position more closely with the CSRD. However, in the meantime, we look at the key points relating to the implementation of the CSRD in Ireland to date.

Applicable companies

Subject to limited exclusions[1], the new sustainability reporting framework applies to the following categories of Irish companies:

Large companies

A large company includes any company which, for the relevant financial year, fulfils two or more of the following requirements:

- Net turnover exceeding €50 million
- Balance sheet total exceeding €25 million
- Average number of employees exceeding 250

A large company also includes any holding company of a group which, for the relevant financial year, on a consolidated basis, fulfils two or more of those requirements.

However, from an Irish company law perspective, a large company also includes any company which, regardless of its size, cannot qualify as a micro company, a small company or a medium company.

[1] *Exclusions apply to alternative investment funds and UCITS (Undertakings for Collective Investment in Transferable Securities). The Central Bank of Ireland, post office giro institutions, the Strategic Banking Corporation of Ireland and credit unions and friendly societies are also excluded from scope.*

Crucially, this means that any Irish company with transferable securities listed on an EU-regulated market is a large company for the purposes of the Regulations.

Listed SMEs

As envisaged by the CSRD, the Irish legislative framework applies sustainability reporting obligations to small companies and medium companies, excluding micro companies, which have transferable securities admitted to trading on a regulated market of any Member State.

However, any Irish company which has transferable securities admitted to trading on a regulated market of any Member State is deemed to be a large company, regardless of its net turnover, balance sheet and employee headcount. Therefore, there are currently no Irish companies capable of falling within this category. It remains to be seen whether this will be addressed by way of further clarifying legislation.

Commencement of reporting obligations

Sustainability reporting obligations for in-scope Irish companies commence as follows:

Type of Company	Reporting Obligations Apply
Large companies which are public-interest entities and which have an average number of employees exceeding 500	All financial years commencing on or after 1 January 2024
Other large companies	All financial years commencing on or after 1 January 2025
- Small companies and medium companies, excluding micro companies, which have transferable securities admitted to trading on a regulated market of any Member State - Applicable companies being either small and non-complex institutions or captive insurance undertakings or captive reinsurance undertakings	All financial years commencing on or after 1 January 2026, subject to an opt-out on a "comply or explain" basis until financial years commencing on or after 1 January 2028

Public-interest undertakings include undertakings that have transferable securities admitted to trading on a regulated market of any EU Member State, credit institutions, insurance undertakings and other undertakings designated by Member States as public-interest undertakings.

As detailed, any Irish company which has transferable securities admitted to trading on a regulated market of any Member State is a large company. This has a significant impact on the obligations of any such company which, based on its net turnover, balance sheet and employee headcount, expected to be classified as an SME for sustainability reporting purposes. It means that its obligations will now commence sooner than had been expected and it cannot avail of the opt-out until 1 January 2028. It also means that it will be subject to full reporting obligations, rather than the more limited reporting requirements intended to apply to in-scope SMEs. Again, it remains to be seen whether this will be addressed by way of further clarifying legislation.

Reporting requirements

An in-scope company will be required to prepare a sustainability report setting out, amongst other things:

- Information necessary to understand the company's impacts on sustainability matters, and
- Information necessary to understand how sustainability matters affect the company's development, performance and position

That information must include information not only on the company's own operations but also on the operations of its value chain. Transitional arrangements apply for the first three years in which more limited value chain reporting is permitted on a "comply or explain" basis if not all information is available.

Sustainability information must be reported in accordance with the European Sustainability Reporting Standards (ESRS) adopted, or to be adopted, by the European Commission. To date, the only ESRS adopted are as follows (see table):

Simplified ESRS for in-scope SMEs are awaited. Additional sector-specific ESRS and ESRS for third country undertakings are due to follow by June 2026.

While certain disclosure requirements set out in the ESRS are mandatory for all in-scope companies, the extent of an in-scope company's reporting obligations will largely depend on the outcome of its "double materiality assessment". This means the company will need to consider the relevance of each sustainability topic in the ESRS from two perspectives:

- **Financial materiality**: Relevance to or influence on the company's own development, financial position, financial performance, cash flows, access to finance or cost of capital over the short, medium or long-term
- **Impact materiality**: Pertains to the company's external impact on the environment and people material, whether positive or negative and whether actual or potential, over the short, medium or long-term

Cross-Cutting Standards		Topical Standards					
General		Environment		Social		Governance	
1	General requirements	E1	Climate change	S1	Own workforce	G1	Business conduct
2	General disclosures	E2	Pollution	S2	Workers in the value chain		
		E3	Water and marine resources	S3	Affected communities		
		E4	Biodiversity and ecosystems	S4	Consumers and end-users		
		E5	Resource use and circular economy				

Consolidated sustainability reporting

An Irish in-scope company which is a holding company must carry out consolidated sustainability reporting for its group.

Certain exemptions from single-entity and group-level sustainability reporting apply. However, those exemptions are, most likely in error, more limited than envisaged by the CSRD.

Subject to certain conditions, an Irish in-scope company may be exempt from sustainability reporting obligations if it, and its subsidiaries, are included in a consolidated sustainability report of an Irish holding company. A similar exemption applies if an Irish in-scope company together with its subsidiaries are included in the consolidated sustainability report of a non-EU holding company. This is provided that the non-EU holding company reports in accordance with the ESRS or other standards which are determined by the European Commission to be equivalent. Unhelpfully, however, the Regulations omit an equivalent exemption for an Irish in-scope company which has an EU, but non-Irish, holding company. We expect this omission will need to be rectified.

The exemptions do not apply to any in-scope company which is a public-interest entity, regardless of its size.

Third country reporting

The Regulations also contain provisions related to reporting by the following non-EU undertakings:

Non-EU undertakings with an Irish branch

An Irish branch is subject to the Regulations if:

- It generated net turnover of more than €40 million in the preceding financial year
- The non-EU company at its group level or, if not applicable, the individual level, generated a net turnover of more than €150 million in the EU for each of the preceding two consecutive financial years, and
- The third country undertaking is either not part of a group or is a subsidiary of another third country undertaking and it does not have an in-scope subsidiary

Any such Irish branch must deliver to the Companies Registration Office for the relevant financial year a sustainability report of the third country undertaking at its group level or, if not applicable, individual level. The sustainability report must be accompanied by the necessary assurance report.

Non-EU undertakings with an Irish in-scope subsidiary

Third country sustainability reporting obligations need to be considered in the case of an Irish subsidiary which is within the scope of the Regulations itself and has a non-EU parent company. If, at its group level, that parent company generated a net turnover of more than €150 million in the EU for each of the preceding two consecutive financial years, group level sustainability reporting will be required. Any such Irish subsidiary must annex to its annual return a sustainability report of the third country undertaking at its group level. The sustainability report must be accompanied by the necessary assurance report.

Reporting concerning third country undertakings applies for financial years commencing on or after 1 January 2028.

The sustainability report of a non-EU undertaking must be drawn up in accordance with ESRS for third country undertakings to be adopted by the European Commission or reporting standards

determined to be equivalent. Those standards are not yet available.

Assurance of sustainability reporting

Any Irish company that is subject to sustainability reporting requirements must appoint one or more statutory auditors for each financial year to carry out the assurance of its sustainability reporting. Those statutory auditors may be different auditors to those appointed for the purpose of audit of financial information.

Assurance standards are to be adopted by the European Commission. In the meantime, national assurance standards may be adopted by the Irish Auditing and Accounting Supervisory Authority. Assurance will initially be on a “limited assurance” basis.

Format and publication of sustainability reports

Sustainability reporting by an in-scope Irish company must be contained in a clearly identifiable dedicated section of its directors’ report and group directors’ report, if applicable. Sustainability information must be reported in a prescribed electronic, digitally tagged format to ensure it is machine-readable and therefore more accessible.

The process for approval and publication of sustainability reporting follows the existing company law process on approval and publication of the directors’ report and group directors’ report. These reports must be annexed to the company’s annual return, along with:

- Its financial statements
- The auditors’ report on the financial statements, and
- The auditors’ report on sustainability information

Those documents must be filed in the Companies Registration Office within 56 days of the company’s annual return date.

Enforcement

There is no separate penalty or enforcement regime governing sustainability reporting. Existing company law penalties and offences relating to failures to prepare a directors’ report or group directors’ report, or to file an annual return with all necessary documents annexed to it continue to apply.

Conclusion

The transposition of the CSRD in Ireland is a significant milestone which launches many Irish companies into a new era of corporate governance in which accountability and transparency regarding sustainability matters are no longer optional.

However, the Irish legislation introduced unexpected complexities. The expanded application and accelerated timelines for reporting obligations have created challenges and uncertainties, especially for companies which had reasonably understood that they would be outside scope. We will monitor developments closely and continue to keep our clients and contacts informed. In the meantime, it is of central importance that all in-scope companies begin or continue preparations for sustainability reporting. Reporting obligations are extensive so early engagement with the legislation, including the ESRS, and with stakeholders is vital to establish reliable systems for data collection and reporting.

Please get in touch with our ESG team to discuss how we can help your organisation in scoping and understanding its obligations under the Regulations.

National Cyber Security Bill 2024 General Scheme Published

Julie Austin
Partner,
Privacy & Data Security
jaustin@mhc.ie

The Irish Government published the long-awaited General Scheme for the National Cyber Security Bill 2024 on 30 August 2024. A general scheme in Irish law is an important early stage in the legislative process which broadly sets out what a full draft Bill is expected to look like. The next step will be for the full draft Bill to be presented before the Irish legislature.

Once finalised and enacted, the Bill will:

- Transpose the Network and Information Security Directive EU 2022/2555 (NIS2) into Irish law
- Establish the general framework for Ireland's national cybersecurity strategy, and
- Establish Ireland's National Cyber Security Centre on a statutory basis and set out its mandate and role

NIS2 forms part of a package of measures to improve the resilience and incident response capabilities of public and private entities, competent authorities and the EU as a whole in the field of cybersecurity and critical infrastructure protection. Entities regulated under NIS2 are categorised as 'Essential' or 'Important' depending

on factors such as size, industry sector and criticality. In basic terms, these are entities in sectors which are considered critical to the EU's security and the functioning of its economy and society, such as:

- Energy
- Transportation
- Banking
- Digital infrastructure such as data centre service providers and providers of electronic communications networks and services
- Digital providers such as social networks and online marketplaces
- Medical devices, and
- Wholesale food production and distribution

The General Scheme sets out an initial draft structure for how NIS2 will be transposed into Irish law. Key aspects of the General Scheme include:

1. Designation of national competent authorities

The National Cyber Security Centre (NCSC) will be designated as the competent authority for the management of large-scale cybersecurity incidents and crises in Ireland. The NCSC will also be designated as Ireland's Computer Security Incident Response Team (CSIRT) with a range of responsibilities including incident handling. The General Scheme also provides that the NCSC will act as lead competent authority. This means it will act as the central coordinator in Ireland and the central authority for engagement with the European Commission and other Member States.

The General Scheme also provides for the designation of the following sector-specific competent authorities which will oversee implementation and enforcement of the cybersecurity regime within their relevant sectors:

Competent Authority	Industry Sector
Commission for the Regulation of Utilities	– Energy – Drinking water – Waste water
Commission for Communications Regulation	– Digital infrastructure – ICT service management – Space – Digital providers
Central Bank of Ireland	– Banking – Financial market
Irish Aviation Authority	Transport - aviation
Commission for Rail Regulation	Transport - rail
The Minister for Transport	Transport - maritime
National Transport Authority	Transport - road
An Agency or Agencies under the remit of the Minister for Health	Health
NCSC	All other sectors set out in the Schedules to the Bill

2. Cybersecurity risk management measures

The General Scheme will transpose the risk management and reporting obligations under NIS2 into Irish law. All entities will be required to put in place appropriate and proportionate technical, operational and organisational measures to manage the risks posed to the security of network and information systems. Organisations will need to conduct risk assessments and implement measures based on an all-hazards approach to mitigate risk. This might include examining supply chain security, cyber hygiene practices, human resources security, etc.

The European Commission has also published a Draft Implementing Regulation (DIR) elaborating on the security measures that certain Digital Infrastructure and Digital Provider entities will be expected to implement.

The management board of Essential and Important entities will be required to:

- Approve, oversee the implementation of and monitor the application of the risk management measures, and
- Follow cyber security risk-management training and encourage their employees to take relevant cyber security training on a regular basis.

3. Incident reporting

All entities will have an obligation to report certain cyber incidents to the CSIRT. The timelines for reporting are extremely tight, with an early warning to be made within 24 hours of becoming aware of the breach. Notifications to customers may also be required. The DIR provides further clarity around the proposed reporting thresholds for certain Digital Infrastructure and Digital Provider entities.

4. Enforcement powers and personal liability for company officers

The relevant competent authority in each sector will, as noted, be responsible for supervision and enforcement. The General Scheme provides for a broad range of sometimes novel supervision and enforcement powers, including the appointment of independent adjudicators.

Notably, the General Scheme provides that senior management may be held personally liable for an organisation's non-compliance with its cybersecurity risk-management obligations, including incident reporting. Following a finding of non-compliance, organisations will first be issued with a Compliance Notice setting out the suspected breach and directing the organisation to remedy its non-compliance. Where an organisation subsequently fails to comply with a Compliance Notice, it commits an offence and is liable to fines and penalties. The relevant competent authority may also apply to the High Court to restrict senior management from their positions. If the organisation operates under a license or permit issued by the competent authority, the competent authority may also temporarily suspend the licence until compliance is achieved.

In line with NIS2, the maximum fine which can be issued for infringements under the General Scheme is:

- For essential entities, €10 million or at least 2% of an organisation's worldwide group turnover in the previous financial year, whichever is greater
- For important entities, €7 million or at least 1.4% of an organisation's worldwide group turnover in the previous financial year, whichever is greater

5. The National Cyber Security Centre

The NCSC is already responsible for advising and informing government IT and critical national infrastructure providers of current threats and vulnerabilities associated with network information security. As noted, the General Scheme provides the NCSC with a statutory footing, clarifying its role and mandate. The General Scheme also intends to give the NCSC specific powers to engage in a range of scanning activities to identify systems vulnerable to specific exploits.

Top Tips for Businesses

With the deadline for transposition fast approaching, here are our top three tips for businesses:

- **First**, determine if your business is caught by NIS2 and how. NIS2 applies to a number of new sectors that were not originally in scope under NIS1 including ICT service management (B2B), public administration, waste management, medical devices, pharma and wholesale food businesses. The fact that your business was not caught by NIS1 does not mean it will not be caught by NIS2.
- **Second**, consider which jurisdiction your business will be subject to. The general rule is that, if an entity provides services or is established in more than one Member State, it will fall under the separate and concurrent jurisdiction of each of those Member States. In that case, businesses will need to understand how NIS2 was implemented in those jurisdictions. The rules on jurisdiction will however differ for public administration entities, Digital Infrastructure and Digital Providers , some of which will only be regulated in their Member State of 'main establishment' in the EU.
- **Third**, start preparing your compliance plans. The obligations under NIS2 fall into three buckets, (i) governance, (ii) cybersecurity measures, and (iii) incident reporting. Most compliance plans that we are developing with clients will include developing training for management bodies, conducting cyber security risk assessments, updating incident reporting procedures and conducting supply chain audits. We are also assisting clients in coordinating their approach to compliance across NIS2 and similar existing and forthcoming EU laws such as GDPR, the ePrivacy Directive and DORA.

Conclusion

The General Scheme has not yet faced any pre-legislative scrutiny by the Government. It will be subject to further scrutiny as part of the legislative process once the text of the Bill is finalised. However, the deadline for EU Member States to transpose the NIS2 into national law is **17 October 2024**.

Given the upcoming deadline and the fact that the European Commission has indicated that cybersecurity is one of its top priorities, it is anticipated that the legislative process will be streamlined with limited amendments made to the proposed General Scheme before the text of the Bill is finalised and enacted. Organisations should identify whether or not they are subject to the obligations set out in the General Scheme, so they are prepared to comply with this legislation when it enters into force.

For more information and expert advice, contact a member of our Privacy & Data Security team.

Energy Sector

We have advised on some of the largest Irish energy transactions in recent years. Notably, the combined generation capacity of our renewable energy projects in Ireland represents almost half of the total amount installed on the Irish grid.

Energy developments are complex and clients rely on us to identify risk early on to manage the project life cycle. We are also regularly involved in the acquisition and disposal of projects. We are renowned in the sector for our exemplary work on transactional, developmental and regulatory issues.

Our lawyers offer the most comprehensive suite of legal services available to the Irish energy market in both renewable and traditional sectors. Known for our responsive and commercial approach, we quickly react to changes in the market, policy and regulation. We ensure that our clients are always ahead of the energy curve.

Contact our Energy Sector team

About Us

We are a business law firm with 120 partners and offices in Dublin, London, New York and San Francisco.

Our legal services are grounded in deep expertise and informed by practical experience. We tailor our advice to our clients' business and strategic objectives, giving them clear recommendations. This allows clients to make good, informed decisions and to anticipate and successfully navigate even the most complex matters.

Our working style is versatile and collaborative, creating a shared perspective with clients so that legal solutions are developed together. Our service is award-winning and innovative. This approach is how we make a valuable and practical contribution to each client's objectives.

What Others Say

Our Energy Team

"The team produces a quality work product, and is thorough and diligent." "The lawyers' level of service and responsiveness to queries is excellent."

Chambers & Partners

Our Energy Team

"Their availability, attention to detail, and depth of knowledge set them apart." This team "is at the top of its game. Always up to date on the latest legal matters and give sound, bankable advice."

Legal 500

The contents of this publication are to assist access to information and do not constitute legal or other advice. Readers should obtain their own legal and other advice as may be required. © Copyright 2024. Mason Hayes & Curran. September 2024.