MASON HAYES & CURRAN

Technology Sector Update

In Brief

Autumn 2024

Welcome

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

- The National Cyber Security Bill 2024 General Scheme which is set to enhance cybersecurity measures across critical sectors
- How the European Commission prevailed in its state aid case against Apple and the impact on the current domestic and international tax landscape
- How businesses need to prepare for the European Accessibility Act (EAA) by creating an accessibility statement that publicly demonstrates their compliance before the June 2025 deadline.

In the above video, Head of our Artificial Intelligence team, Brian McElligott discusses the complexities of Article 5 of the AI Act and the importance of internal justification documents to mitigate risk. Watch to ensure your organisation is prepared for the 2025 compliance deadline.

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National Cyber Security Bill 2024 General Scheme Published

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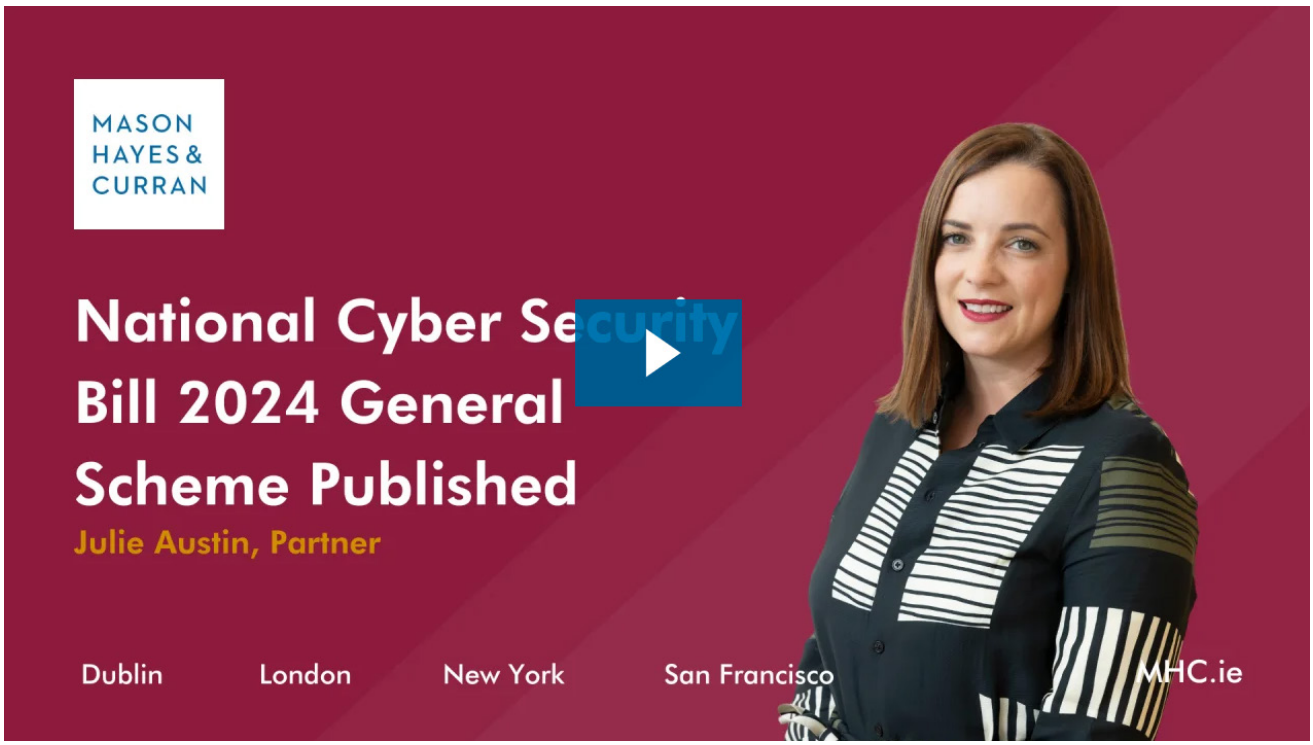

The Irish Government published the long-awaited General Scheme for the National Cyber Security Bill 2024 on 30 August 2024. A general scheme in Irish law is an important early stage in the legislative process which broadly sets out what a full draft Bill is expected to look like. The next step will be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

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

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.

The European Commission Prevails in its Apple State Aid Action Against Ireland

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What you need to know

- *The CJEU ruling in Apple should not impact Ireland's attractiveness as a hub for global business and does not affect Ireland's current tax laws or policies. This is because it relates to historic rules and practice – Ireland's current tax regime is aligned with EU and OECD rules and guidelines on corporate taxation.*
- *Transfer pricing remains crucial, requiring proper documentation and functional analysis within multinational groups. Businesses should ensure that their transfer pricing is reflective of their operations on the ground and is supported by appropriate intercompany documentation and other records, to ensure that they are well placed to defend potential challenges to pricing policies by tax authorities.*

The Court of Justice of the European Union (CJEU) has, contrary to the expectations of many observers, found in favour of the European Commission (the Commission) in the Apple case. In its judgment, the CJEU held that historic Irish tax rulings granted to Apple Inc. entities were unlawful state aid. These rulings were granted in the context of historic tax residence rules which are no longer in force in Ireland.

Background to the decision

The Commission began a series of state aid investigations related to Member State tax practices in 2013. These investigations concerned:

- Starbucks in the Netherlands
- FIAT, Engie and Amazon in Luxembourg, and
- Apple in Ireland.

Following the Apple investigation, it concluded that Ireland had granted unlawful state aid worth €13 billion.

The Commission's decision related to two tax rulings issued by the Irish tax authorities in 1991 and 2007 in favour of Apple Sales International (ASI) and Apple Operations Europe (AOE).

ASI and AOE were companies incorporated in Ireland but not tax resident in Ireland, albeit each company had an Irish branch subject to tax in Ireland. The contested tax rulings approved the methods used by ASI and AOE to calculate the profits attributable to their respective Irish branches for tax purposes. The Commission's state aid decision was appealed to the EU's General Court by both Apple and Ireland.

The General Court, in 2020, annulled the Commission's decision on the basis that the Commission failed to prove that ASI and AOE had been granted a selective economic advantage and, by extension, unlawful State aid. This decision was appealed by the Commission to the CJEU, which issued its final judgment on 10 September 2024.

Key findings of the Court

The CJEU decided that the General Court erred when it ruled that the Commission had not sufficiently proved that intellectual property licences held by ASI and AOE and related profits should have been allocated to the Irish branches for tax purposes. After setting aside the judgment of the

General Court, the CJEU had the option to refer the case back to the General Court but decided instead to give final judgment on the matter.

In that final judgment, the CJEU, confirmed the Commission's approach in arriving at its decision that Ireland provided unlawful State aid to ASI and AOE including:

- Carrying out a functional analysis of the Irish branches which did not rely on the lack of substance in the head offices. In particular, the CJEU dismissed the finding of the General Court that the Commission had allocated profits using an 'exclusion' approach, finding that it had misinterpreted the Commission's decision in that regard, which constituted an error of law.
- Disregarding the functions of Apple Inc. in attributing profits between the Irish branches and the head offices.
- Relying on the arm's length principle and the Authorised OECD Approach for the purposes of applying the branch profit allocation rules in Irish law.

The CJEU agreed with the Commission that the tax rulings provided a selective advantage to ASI and AOE. This was on the basis that those tax rulings reduced the chargeable profits of ASI and AOE for Irish tax purposes and, therefore, the amount of corporation tax which they were required to pay in Ireland. This was in contrast to other companies taxed in Ireland whose chargeable profits reflect prices determined in the market in line with the arm's length principle.

Does this impact Ireland's attractiveness as a hub for global business?

In short, no. This decision has no impact on current Irish tax law, policy or practice. The judgment of the CJEU concerns Irish tax laws and practices that are no longer in force. Ireland has in the meantime introduced changes to the law regarding corporate residence rules and the attribution of profits to branches of non-resident companies operating in Ireland.

Ireland has also positively contributed to international tax reform including the implementation of:

- The EU anti-tax avoidance directive
- The OECD BEPS process, and
- The global minimum effective tax rate, known as Pillar II

In addition, Ireland has modernised its transfer pricing regime and adopted the OECD transfer pricing guidelines.

Ireland's transparent and predictable tax regime and its sophisticated business environment continue to provide a unique platform from which to establish international business operations.

What action should multinational groups take?

The ruling does not have a general impact. However, it does emphasise the importance of the correct analysis of functions, assets and risks in pricing transactions within multinational groups - particularly those between branches and head offices of the same company. Transfer pricing is not usually a state aid matter but one between taxpayers and Revenue authorities. It continues to be the source of many tax disputes.

Clients should ensure that their transfer pricing is reflective of the operations on the ground and is supported by appropriate intercompany documentation and other records. This approach should provide assurance that they are well placed to defend potential challenges to pricing policies by Revenue authorities. Businesses with any concerns about the potential implications of this judgment are invited to contact a member of our Tax team.

European Accessibility Act: Accessibility Statements

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The European Accessibility Act, or EAA, was implemented into Irish law through the European Union (Accessibility Requirements of Products and Services) Regulations 2023. The Regulations will apply from 28 June 2025 and will have significant consequences for:

- Economic operators of in-scope products, such as computers and operating systems, ATMs, ticketing and check-in machines and smartphones, and
- Providers of in-scope services, such as e-commerce, consumer banking, e-books, access to audio-visual media services, electronic communications services and air, bus, rail and waterborne passenger transport services

With less than a year to go, our Technology team considers the importance of an accessibility statement for providers of in-scope services and what businesses should be doing now to ensure compliance in advance of the deadline.

For more information on the EAA, please see our previous articles:

- Overview of the European Accessibility Act which outlines the products and services which will be subject to the EAA and gives an overview of the accessibility requirements
- Update on the European Accessibility Act in Ireland which gives an overview of what businesses should be doing to prepare for the EAA
- European Accessibility Act Implemented into Irish Law which provides an overview of the Irish implementing measures including the penalties for breaches of these measures

Accessibility statements

The EAA requires that providers of in-scope services produce a public facing document which sets out information on how the in-scope service it provides meets the relevant accessibility requirements. This document, commonly referred to as an "accessibility statement", must be included in either the businesses' general terms and conditions, or in an equivalent document.

The required information must include the following:

- A general description of the service in accessible formats
- Descriptions and explanations necessary for the understanding of the operation of the service, and
- A description of how the relevant accessibility requirements are met by the service

This information must be made available to the public in written and oral format, including in a manner that is accessible to people with disabilities.

What should in-scope businesses be doing?

Accessibility statements serve as the public declaration of how a business complies with the EAA, so they should be drafted towards the end, or near completion, of the EAA compliance process.

For achieving compliance with the EAA generally, the following steps businesses should be taken, noting the compliance deadline is June 2025:

1. Identify whether any of the services and/or products provided by your business are subject to the EAA
2. If your business provides any in-scope products, identify the role in the supply chain that your business plays
3. Identify whether your business can avail of any exemptions under the EAA
4. Identify the precise obligations that your business is subject to
5. Identify the accessibility requirements that will apply to your product / service and undertake an impact analysis
6. Conduct an accessibility audit to identify accessibility gaps in products and services
7. Collaborate with different teams in your organisation to make adjustments to your products / services where required
8. For in-scope services, publish an accessibility statement on or before 28 June 2025

For more information on the implementation on what in-scope businesses need to do in advance of the EAA coming into force, contact a member of our Technology team.

Litigation Funding in Ireland

Key Considerations

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Dispute Resolution partner, Colin Monaghan, discusses the current prohibition on "for profit" third-party litigation funding in Ireland and change that may be on the horizon. For more information, please contact Colin or another member of our Dispute Resolution team.

Application to Join Social Media Platform to Defamation Proceedings 'Time-Barred'

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A recent High Court decision in the case *Gilroy v O'Leary* [1] relates to an application to join Google Ireland Limited as a defendant to defamation proceedings. The plaintiffs, Ben Gilroy and Vincent Byrne, made the application under Order 15 Rule 4 of the Rules of the Superior Courts. The proceedings relate to allegedly defamatory statements made by the defendant, Ms O'Leary, in a video published to the video-sharing platform YouTube, a service provided by Google. The video was posted in June 2018 and is said to suggest that the plaintiffs promoted the use of Miracle Mineral Solution as a cure for autism, cancer and AIDS. This case is a useful guide on when joinder to defamation proceedings can be statute barred where proceedings must normally issue within one year.

Background

Proceedings were issued by way of a plenary summons in June 2018 against the Defendant, Ms O'Leary. The plaintiffs issued a Notice of Motion seeking to join Google in March 2021. However, they were required to file a new motion, as they had not submitted a Notice of Intention to Proceed before issuing the 2021 motion. A second motion was subsequently filed in December 2022, and the current decision pertains to this latter motion.

The jurisdiction to refuse to join a proposed co-defendant is a very narrow one and the Court accepted that an application should be refused in limited circumstances. However, the High Court relied on the previous decisions of *Hynes v Western Health Board* [2] and *O'Connell v Building and Allied Trades Union and Others* [3]. It found that the test for refusal was satisfied in circumstances where the claim against Google was manifestly time-barred under the provisions of section 11 of the Statute of Limitations 1957. The Court noted that if successfully joined, Google would rely on this argument and could not be prevented from doing so.

Statute of Limitations 1957

Section 11(2)(c) of the 1957 Act states that a defamation action shall not be brought after the expiration of:

- One year, or
- A longer period, as directed by the court, may be allowed but cannot exceed two years from the date the cause of action arose

Section 11(3B) states that for the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be:

- The date on which the defamatory statement is first published, and

[1] *[2024] IEHC 349*
[2] *[2006] IEHC 55*
[3] *[2012] IESC 36*

- Where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium

On this basis, the date the cause of action accrued was 23 June 2018. As the Notice of Motion to join Google was not brought within the limitation period, the cause of action against Google was statute barred.

Date of publication of the video by Google

The plaintiff sought to argue for a later date of publication. They proposed that this date was the point when they requested Google to take down the material and Google refused. This correspondence took place between March 2021 and October 2022.

The plaintiffs relied on a number of cases in support of the proposition that a person may become a publisher of a defamatory statement even if they were not involved in its initial publication. Cited instances include where the publisher refused to take steps to remove the statement after the publisher received a request to remove the content from its platform. Google accepted that it was possible to become a publisher of defamatory statements, including statements on the internet, in certain circumstances. However, Google argued that the question was not whether Google became a publisher of the video but, assuming it became a publisher, when the claim accrued and the time began to run for the purpose of the Statute of Limitations.

The Court accepted Google's argument on the basis that section 11(3B) is clear that the cause of action accrues when the material is first capable of being viewed or listened to on the internet, and not on the date there was a refusal to take down the material. Therefore, even if Google were deemed a publisher of the video from the date it refused to remove it, this would not change the outcome. The law still considers the cause of action to begin when the video first became viewable or audible online, which was on 23 June 2018.

Comment

This decision offers useful clarification on the prosecution of online defamation claims in Ireland. It is especially relevant when the publication involves third-party providers, such as social media platforms:

- The cause of action accrues from the date the content is "*first capable of being viewed or listened to*" on the internet. This date is not impacted by a later request to remove the content and a subsequent refusal
- Although the default position is that parties should generally be joined, the court has the authority to refuse the application. This can occur when the claim against the proposed co-defendant is statute-barred, and the proposed co-defendant raises that argument in defence of the application
- Plaintiffs should be careful to initiate proceedings against all relevant parties from the beginning. This is especially important in defamation cases, where the limitation period is relatively short, ranging from one to two years

For more information and expert advice on successfully defending defamation claims, contact a member of our Intellectual Property team.

Is Your Non-Compete Clause Unenforceable?

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***Note**: This article considers non-compete clauses only in the context of corporate transactions. Different considerations apply in the context of employees.*

Signing a shareholders' agreement or buying a business? Avoid the temptation to impose an unduly broad non-compete clause on former shareholders. Otherwise, you may find the clause is void and unenforceable.

The recent decision of the English High Court in *Literacy Capital Plc v Vanessa Jane Webb ([2024] EWHC 2026 (KB))* offers a timely reminder of the need for balance. While this judgment is not binding in Ireland, it does offer some helpful guidance.

Are non-compete clauses enforceable in Ireland?

Non-complete clauses are a common feature of Irish corporate transactions. They are essential to protect a business against competition from its former owners and can be enforceable under Irish law provided they are appropriately limited.

However, when drafted too aggressively, a non-compete clause is a mere paper tiger – offering apparent protection that is not actually effective.

Sale of a business

Vanessa Jane Webb developed Mountain Healthcare Limited (Mountain) into a successful company. Mountain provided medical services to sexual assault referral centres for police services in England. Ms Webb and the other shareholders of Mountain sold the business to Literacy Capital plc. (Literacy Capital) in 2018. Ms Webb remained as a director for several more years. Ms Webb decided to resign from Mountain and all other directorships connected with Literacy Capital in 2021.

In connection with her departure, Ms Webb renegotiated the sale of her shares which by that time had increased in value to approximately £7 million. Ms Webb entered into an investment agreement and a loan note agreement which had restrictive covenants in them.

Three essential elements of a non-compete

The three essential elements of a non-compete clause are the duration, the geographical scope and the subject matter of the covenant. The parameters of the non-compete prohibited Ms Webb from competing:

	Scope
Duration	Until 12 months after Ms Webb held loan notes.
Geography	In the UK and Channel Islands.
Subject matter	Against the business of Mountain or any other subsidiary of Literacy Capital.

Why was this too wide?

The Court took issue with every element of the scope of the non-compete clause.

- **Duration**: The duration, which effectively meant up to 10 years, was far past the duration allowed in UK former employee or sale of business cases.
- **Geography**: The nationwide scope was not justified by any evidence that Mountain did business outside of Norfolk and Suffolk.
- **Business**: Applying the non-compete to the other subsidiaries of Literacy Capital, which had businesses wholly unrelated to Mountain, went far beyond any legitimate protectable interest it had.

Is your non-compete clause unenforceable?

Non-compete clauses are not a "one size fits all". The judgment in *Literacy Capital v Webb* highlights that these clauses must be tailored to the individual circumstances of the business.

Businesses may adopt a strategy of seeking extremely broad non-compete clauses to assert maximum protection. However much like a paper tiger, the protection can be illusory. If not drafted appropriately, the entire clause may be struck-down as void when the company seeks to enforce the clause.

While a court might sever elements of an offending clause to make it enforceable, there is no guarantee a severance clause will save an offending non-compete. It did not save the clause in *Literacy Capital*.

Businesses should review their shareholders' agreements to consider whether the obligations imposed on shareholders are appropriately limited regarding:

- Duration
- Geographical scope, and
- Relevant business

For more information, contact a member of our Corporate team.

Navigating Ireland's Corporate Sustainability Reporting Regulations

Key Impacts for Businesses

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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.

Assessing Technology Workers' Status for Tax Purposes

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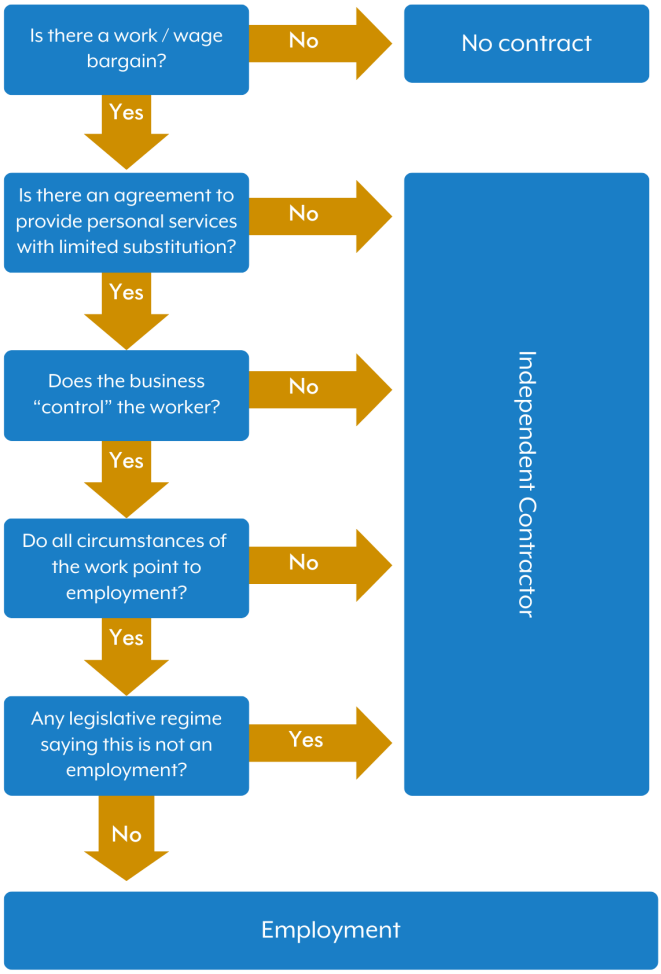
The Revenue Commissioners (Revenue) recently published guidelines on determining employment status for tax purposes (the Guidelines). The Guidelines will be of interest to businesses in the technology sector which engage independent contractors.

It is clear from the Guidelines that Revenue expect that there will be an increase in the number of workers that will be determined to be employees rather than independent contractors for tax purposes. This is an important issue for businesses because, where a worker is an employee for tax purposes, the employer must apply the pay as you earn (PAYE) withholding system on payments and benefits provided to that worker.

Five-step framework

The Guidelines were issued in light of a landmark decision of the Irish Supreme Court in *The Revenue Commissioners v Karshan (Midlands) Ltd. t/a Domino's Pizza*. In that decision, it was held that delivery drivers of Domino's Pizza should be treated as employees and not independent contractors for tax purposes. The Guidelines set out a five-step "decision-making framework". This framework is derived from the *Karshan* case to assist employers in identifying whether or not a worker is an employee.



Some important points for the technology sector

Control test

Applying the control test at Step 3 for unskilled workers is generally relatively straightforward. It requires consideration of the extent to which the employer controls the means and manner by which the work is to be done. In the technology sector, contractors will often be skilled workers. The application of the control test in the case of these workers is more difficult because skilled workers may need little or no specific direction in their daily activities. This does not mean however that such workers could not be employees for tax purposes. The control test may be met where the employer retains residual authority over the work. Some examples provided by Revenue in the Guidelines include the expectation to meet clearly defined deliverables, or meet clearly set targets, within defined deadlines. In applying the test for skilled workers, control would generally not extend to how work is undertaken, but rather what is required to be done and by when.

Part-time and casual workers

Revenue note in their Guidelines that there has been a perception that when workers were engaged on a part-time or casual basis, including specifically for one-off shifts, they were not employees as there was no continuous employment obligation. However, the arrangements with these workers should be analysed using the five-step framework in the same way as any other workers.

All of the circumstances of the work

Step 4 involves an examination of the terms of the contract interpreted in the light of all of the circumstances of the work to establish if the working arrangement is consistent with an employment or whether the individual is self-employed. The guidelines confirm that, while a detailed written agreement may carry significant weight, efforts to describe a relationship in a particular way which differs from the day-to-day reality may be challenged. It is also confirmed that including phrases such as "as a self-employed contractor you will be responsible for your own tax" are not sufficient to ensure that a worker will not be treated as an employee for tax purposes.

The Guidelines note that there are no "static characteristics" of an employment arrangement but some of the factors considered by Revenue in the examples provided in the Guidelines include:

- The terms of the contract
- Control, which as discussed above may be different for skilled v unskilled workers
- Substitution rights
- Whether the person can profit beyond their normal payment if they do things more efficiently
- Use of their own materials, tools or equipment
- Level of integration to the business including use of uniform, email address, access to paid support staff
- Restrictions on the ability to refuse work and/or work for other businesses
- Entitlement to holiday pay, sick pay, notice periods etc.
- Whether the worker has their own insurance

Personal/managed services companies

It is common in the technology sector for workers to be employed through personal/managed services companies. Helpfully, Revenue have confirmed that there is no change in the tax position for businesses who engage such companies to conduct work on their behalf. Revenue will generally not look behind corporate structures. However, businesses employing contractors through personal/managed services companies should be aware that it is important that the invoicing and payment arrangements are correctly administered by the company so that its operations are in line with the contractual arrangements. Also, Irish PAYE must be applied to payments for services of a director of an Irish incorporated company even if these are provided through a company.

The personal/managed services company will have a PAYE withholding requirement for payments to its directors and employees and whether workers are employees for tax purposes should be determined in line with the tests outlined above. A secondary liability to Irish PAYE may arise for the end-user businesses where an employee of a non-Irish company performs duties in Ireland. This means that the end-user business can be liable for the PAYE which should have been withheld by the personal/managed services company, so it is important that businesses are appropriately protected from this risk.

Agencies

It is also common in the technology sector for workers to be employed through agencies. The Guidelines confirm that Revenue do not regard the taxation of workers employed through agencies any differently to the taxation of workers employed by any other means. For agency workers, the person who is contractually obliged to make the payment to an employee is the employer for the purpose of collecting income tax, USC and PRSI through the PAYE system.

Employment law implications

While the *Karshan* decision and Guidelines concern employment status for tax purposes, they may also be relevant in the context of determining employment status for employment law purposes. This is due to overlap in tests used by Revenue and bodies adjudicating on employment rights, such as the Workplace Relations Commission, Labour Court and civil courts, to determine employment status. Where an employee is misclassified as an independent contractor, this gives rise to significant liabilities under employment law, in addition to tax and social insurance liabilities.

Conclusion

Revenue indicate in the Guidelines that they expect businesses to review arrangements and apply the five-step framework to determine if a worker should be treated as an employee. Evidence should be retained of the analysis done to apply the framework when a worker is engaged and at regular intervals thereafter. This is especially important where a contractor's role may develop over time. Technology businesses should take action to ensure that they are prepared in advance of any Revenue compliance intervention as it is clear that this is an area of focus for Revenue.

For more information and expert advice on all relevant taxation matters impacting your business, contact a member of our Tax team.

AI Literacy

Key Considerations

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Brian McElligott, Head of Artificial Intelligence, dives into the upcoming AI Act obligation on AI literacy, effective from 2 February 2025. Watch now to prepare your organisation for this crucial regulatory milestone.

Technology Sector

Our Technology team are the 'go to' lawyers for technology. We provide cutting edge advice on a range of complex legal matters to the world's leading tech and data driven companies.

From first round funding and global privacy structures, to strategic outsourcing partnerships and intellectual property management, we give smart advice. We regularly advise on topics at the intersection of law and new technology such as AI and Fintech, frequently when there is no definitive regulatory guidance. Clients trust us to steer them through new and sometimes unforeseen legal situations.

Central to our work in the technology sector is our market leading advice on data privacy and protection. We work closely with organisations to help them balance the often conflicting needs of monetisation and data protection. Our lawyers have also worked on some of the most high profile data breaches both locally and internationally, with a keen eye on the legal, commercial and reputational issues that arise.

Contact our Technology 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.

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Our Technology Team

"Unrivalled legal and industry knowledge. They are the go-to firm for anything information technology related."

Legal 500

Our Technology Team

"At the cutting edge of the post-GDPR data privacy/protection world. They advise many of the world's biggest companies on GDPR compliance and in ground-breaking regulatory inquiries"

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