

2023 Review and 2024 Horizon Scan

Corporate, Commercial, Employment, Disputes and General

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

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1. Company Law and Corporate Governance

Statutory Instruments

1.1 **European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) (Amendment) Regulations 2023¹**

From 13 June 2023, persons seeking to inspect information on the central register of beneficial ownership of companies must first demonstrate that they have a “legitimate interest” in anti-money laundering and countering terrorist financing to justify that access. “Legitimate interest” is demonstrated to the Registrar through the making of a submission and, if required by the Registrar, the supplying of information or documents including those relating to the requester’s previous activities, if any, in AML.

This development follows a significant November 2022 judgment of the Court of Justice of the European Union², which had the consequence that the public access rights under Regulation 25 of European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019³ were incompatible with EU law.

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

1.2 **European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023⁴; European Union (Cross-Border Conversions, Mergers and Divisions) (Amendment) Regulations 2023⁵**

Directive (EU) 2019/2121 (commonly known as the “Mobility Directive”) was transposed into Irish law on 24 May 2023 by the European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (the “Regulations”). The Regulations provide new procedural rules for cross-border mergers and the new concepts of cross-border conversions and divisions into Irish law. European Union (Cross-Border Conversions, Mergers and Divisions) (Amendment) Regulations 2023 made minor amendments to the Regulations and substituted various category 2 offences for a new category of offence with penalties prescribed therein.

The Regulations enable an Irish limited liability company (whether public or private) to carry out a cross-border conversion process pursuant to which, without being dissolved, wound-up or going into liquidation, it will be able to re-domicile or migrate to another EU Member State, thus changing its nationality and place of registration, without any change to, or interruption in, its legal personality. Although cross-border conversions are new to Ireland, the regime shares a common legal framework with that of cross-border mergers (available since 2008) and many features and requirements of the new regime are recognisable and familiar.

The Regulations also recast and update the existing cross-border mergers and divisions regimes, including by introducing enhanced creditor rights.

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

1.3 **Companies Act 2014 (Section 12A(1)) (Covid-19) Order 2023⁶; Industrial and Provident Societies Act 1893 (Section 14A(1)) (Covid-19) Order 2023⁷**

The interim period of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 relating to the holding of virtual meetings, including AGMs, has been further extended to 31 December 2024.

¹ SI 308 of 2023.

² The *Sovim* decision (C-37/20 and C-601/20).

³ SI 110 of 2019.

⁴ SI 233 of 2023.

⁵ SI 469 of 2023.

⁶ SI 646 of 2023.

⁷ SI 647 of 2023.

The temporary increase in the amount at which a statutory demand can be issued to €50,000 was not further extended and lapsed on 31 December 2023, reverting to €10,000 for individual debts and €20,000 for aggregate debts.

EU Developments

1.4 **Corporate Sustainability Reporting Directive (the “CSRD”)⁸**

The CSRD entered into force on 5 January 2023 and is required to be transposed into Irish law by 6 July 2024. The CSRD will amend the Non-Financial Reporting Directive⁹ (the “NFRD”) to broaden the scope of the current non-financial disclosures regime and introduce more detailed reporting requirements in respect of sustainability issues such as environmental rights, social rights, human rights and governance factors. The CSRD will oblige in-scope companies to disclose information on their societal and environmental impact connected with their own operations and with their value chain, which will have to be certified by an independent auditor or certifier and included in the company management reports.

The information reported will have to conform to technical standards, known as the European Sustainability Reporting Standards (“ESRS”) as adopted by the European Commission in July 2023, to increase consistency and comparability.

For more information on the CSRD, please see our briefing [here](#). Also see our briefing [here](#) on the ESRS.

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

This Directive aims to increase the representation of women among directors of listed companies and improve gender balance in their decision-making process. The Directive entered into force on 27 December 2022 and has a transposition deadline of 28 December 2024. The Directive applies to any company with a registered office in the EU and the shares of which are admitted to trading on an EU-regulated market, and does not apply to SMEs.

Member States must subject listed companies either to the objective of having boards on which members of the under-represented sex hold at least 40% of non-executive director positions, or 33% of all director positions (including both executive and non-executive), by 30 June 2026. Listed companies which do not achieve these objectives will have to adjust their selection process for appointment or election to director positions. Clear, neutrally formulated and unambiguous criteria will have to be applied in a non-discriminatory manner throughout the entire selection process. There will be an element of positive discrimination: when choosing between candidates that are equally qualified in terms of suitability, competence and professional performance, priority will have to be given to the candidate of the under-represented sex unless there are reasons of greater legal weight such as the pursuit of other diversity policies.

Under the Directive, upon the request of a candidate during selection for appointment as a director, listed companies will have to inform the candidate of the qualification criteria that are being applied, the objective comparative assessment of the candidates and, where relevant, specific considerations that tip the balance in favour of a candidate who is not of the under-represented sex.

Case Law and Other Developments

1.6 **Verification of directors’ identities through PPSN or VIN**

With effect from 11 June 2023, the Companies Registration Office (“CRO”) have required that Personal Public Service Numbers (“PPSN”) or an Identified Person Numbers (“IPN”) of

⁸ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

⁹ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

directors of Irish companies be provided when a company is being incorporated, when an annual return is being filed, on the appointment of a director, or a change in directors' details.

If an RBO Transaction Number was previously issued to a director for the purpose of filings with the Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies (the "RBO") where a director did not hold a PPSN, this RBO Transaction Number will automatically be reclassified as an IPN by the CRO and it will not be necessary to obtain a separate number in such cases.

If a director does not presently hold either a PPSN or RBO Transaction Number, it is necessary for such director to apply to the CRO to have an IPN issued to them, by means of a Form VIF (Declaration as to Verification of Identity).

CRO have introduced a process (VIFa) whereby a company can obtain an IPN, which is valid for 30 days, for a past director where that director does not provide one but such a number is required to file an annual return.

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

Anticipated Developments

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

The company law amendments in this Bill will improve the availability of information to employees and creditors in corporate insolvencies.

This Bill provides for a new obligation for directors to notify employees and employees' representatives of the winding up petition at the time it is presented to court. The proposed amendments provide that the court direct the appointed provisional liquidator to inform employees and employees' representatives of their appointment within seven days of being served the Statement of Affairs, explain the process and invite them to provide information they have and which they deem would provide a complete overview of the company's affairs.

Further, where s599 Companies Act 2014 regarding contributions by a related company to the debts of a company being wound up is invoked, the court is required to consider the extent to which the related company contributed to the circumstances leading to the winding up as one of the factors among others as it considers fit in exercising its discretion to make a contribution order. The Bill also provides for amendments to sections relating to unfair preference and reckless trading, and a specific exclusion to ensure that payments made in the ordinary course of business are not captured by the power of the court to order the return of assets which have been improperly transferred. Notably, the proposed amendment to s604 Companies Act 2014 would allow the court to examine a transaction outside the time periods of 6 months prior to winding-up with unconnected parties and 2 years with connected parties, provided that it is just and equitable.

1.8 **Companies (Corporate Governance, Enforcement and Regulatory Provisions) Bill 2023**

This Bill proposes to enhance and strengthen enforcement and regulatory provisions in the Companies Act 2014. Proposed amendments largely relate to four distinct areas of company law, namely, corporate governance, company law enforcement and supervision, administration, and corporate insolvency.

A consultation on the proposed Bill launched by the Department of Enterprise, Trade and Employment ended on 9 June 2023 and the consultation document is available [here](#). This Bill is included in the Autumn 2023 Government Legislation Programme where it is indicated that the Heads are in preparation.

1.9 **Miscellaneous Provisions (Transparency and Registration of Limited Partnerships and Business Names) Bill**

This Bill, which is included in the Autumn 2023 Government Legislation Programme, is intended to reform the Limited Partnerships Act 1907 and the Registration of Business Names Act 1963 in order to strengthen Ireland’s regulatory framework and to respond to concerns raised in relation to the transparency of limited partnerships. The Heads of Bill are in preparation.

1.10 **Co-operative Societies Bill**

This Bill, which is included in the Autumn 2023 Government Legislation Programme, aims to place the co-operative model on a more favourable and clearer legal basis, thereby creating a level playing field with companies and encouraging the consideration of the co-operative model as an attractive formation option for entrepreneurs. The Heads of Bill were approved in November 2022 and drafting is on-going.

1.11 **Proposal for a Corporate Sustainability Due Diligence Directive (the “CS3D”)**¹⁰

This Commission proposal aims to foster sustainable and responsible corporate behaviour through due diligence obligations. On 14 December 2023, the Council of the European Union and the European Parliament reached a provisional agreement on the CS3D¹¹. The provisional agreement reached within the European Parliament now needs to be endorsed and formally adopted by both institutions. Once adopted, the CS3D will require transposition by Member States within two years.

The proposed Directive would impose a due diligence duty on large companies to identify – and, where necessary, prevent, end or mitigate – adverse impacts on human rights and on the environment, with respect to of their own activities, those of their subsidiaries and those carried out by their business partners in the value chain. It also requires certain larger in-scope companies to adopt plans to ensure that their business model and strategy are compatible with the Paris Agreement’s objectives in limiting global warming.

The proposal would require directors to set up and oversee the implementation of due diligence systems and to integrate due diligence into corporate strategy. Directors will also be required take into account the human rights, climate change and environmental consequences of their decisions while fulfilling their duty to act in what each director considers to be the interests of the company. The Directive would impose penalties and civil liabilities for violating the obligations that it would create.

This proposed Directive will first apply to large EU limited liability companies and to non-EU companies that meet certain employee headcount and turnover thresholds. Two year later, the rules would apply to companies in high-impact sectors such as textiles, agriculture and mineral extraction which would be subject to lower employee and turnover thresholds.

¹⁰ Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

¹¹ The general approach, as adopted by the Council, is available [here](#).

2. Competition Law

Acts of the Oireachtas

2.1 **Screening of Third Country Transactions Act 2023**

Enacted on 31 October 2023, this Act enables the Department of Enterprise, Trade and Employment (the “DETE”) to review full or partial acquisitions of Irish “undertakings” or assets where the acquirer is from a third country that present risks to security and public order, and requires mandatory notification for transactions in certain areas of activity. A third country is defined as any state or territory other than Ireland, an EU Member State, a European Economic Area state and Switzerland.

Although the Act is pending commencement and due to be operation in Q2 2024, the Minister’s call-in power for transactions completed up to the 15 months prior to the regime coming into force suggests immediate relevance to clients and practitioners.

For more information, please see our briefing [here](#) and our Knowledge Network Webinar notes [here](#).

Statutory Instruments (Commencement Orders)

2.2 **Competition (Amendment) Act 2022 (Commencement) Order 2023¹²**

This Order appoints 27 September 2023 as the day on which the Competition (Amendment) Act 2022 (the “2022 Act”), other than s26 which is a procedural amendment to Competition and Consumer Protection Act 2014, shall come into operation.

Of particular relevance to corporate transactions, the Competition and Consumer Protection Commission (“CCPC”) is empowered under s18A to require notification of below-threshold transactions which do not otherwise satisfy the turnover thresholds for mandatory notification, where in the opinion of the CCPC, such transaction “may have an effect on competition in markets for goods or services in the State”.

The CCPC will be able to exercise its call-in power no later than 60 working days after the earliest of:

- i) the date on which one of the parties publicly announces an intention to make a public bid or a public bid is made but not yet accepted;
- ii) the date on which the CCPC becomes aware that the parties have entered into an agreement; or
- iii) the date on which the transaction is put into effect.

From 27 September 2023, if transactions fall within this 60 working day period, the CCPC will have the power to call it in for review (regardless of whether it signed before the Act entered into force). Clients and practitioners should consider the possibility of the call-in regime applying to ongoing transactions.

For more information, see our briefing [here](#) on the CCPC’s new powers and our briefing [here](#) for a detailed discussion of the new administrative enforcement regime under the 2022 Act.

EU Developments

2.3 **Foreign Subsidies Regulations¹³**

¹² SI 448 of 2023.

¹³ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

The Foreign Subsidies Regulations (the “FSR”) entered into force in July 2023, under which the mandatory requirement to notify foreign subsidies will apply from 12 October 2023. Such requirement arises where either an undertaking proposes to engage in a “concentration” or in a public procurement procedure.

Companies must notify an M&A transaction involving a lasting change of control (similar to the definition in merger control) where:

- i) At least one of the merging undertakings, the acquired undertaking or the joint venture is established in the EU and generates aggregate EU-wide turnover of at least €500 million; and
- ii) (a) the acquirer(s) and acquired undertaking; (b) the merging undertakings; or (c) the joint venture partners and joint venture, received a combined foreign financial contribution of at least €50 million in the preceding three years.

M&A transactions signed after 12 July may need to be later notified to the European Commission if the transaction has not closed by 12 October.

For public procurement aspects of the FSR, please see our briefing [here](#). For detailed analysis of the FSR and the foreign direct investment screening regime, please see our Knowledge Network Webinar notes [here](#).

Anticipated Developments

2.4 **Proposed revision of EU’s FDI Screening Regulation**

On 24 January 2024, the European Commission published a new Proposed FDI Regulation. The Proposed FDI Regulation is available [here](#), accompanied by the Annexes, an executive summary (available [here](#)) and a factsheet (available [here](#)).

The EU foreign investment screening regime is currently provided under Regulation (EU) 2019/452 (the “FDI Screening Regulation”), which is transposed in Ireland by the Screening of Third Country Transactions Act 2023, pending commencement, as discussed at §2.1 above.

Key points of the proposal include:

Updating harmonised rules on national screening mechanisms and assessment criteria

- All Members States must set up and maintain a mechanism in accordance with the common minimum requirements of the Proposed FDI Regulation.
- The harmonised elements of national screening regimes include the minimum sectoral scope of foreign investment screening, screening procedures' essential features, and the criteria for determining the likely impact of foreign investments on security or public order.
- The proposed Annexes (available [here](#)) provide for projects or programme of Union interest, and matters of particular importance for the security or public order interests of the Union.
- The Commission is required to adopt an implementing regulation to provide a standardised form for the notification of foreign investments. Content and procedures for notification of foreign investments under the updated co-operation mechanism described below will also be harmonised.

Updating Member States and Commission co-operation mechanism

- Member States and the Commission could exchange information and suggest measures if a foreign investment will negatively affect security or public order in more than one Member State, under a co-operation mechanism established by harmonised rules under the Proposed FDI Regulation.
- Under the new co-operation procedure, Member States where the scrutinised investments take place will call for a meeting to discuss the planned decision with other Member States and the Commission, and share information with said parties about the final decision it took. The expected length of the co-operative procedure under the Proposed FDI Regulation is 20-45 days.
- The new co-operation mechanism also provides for a specific procedure for foreign investments screened by multiple member states simultaneously.
- In relation to foreign investments not notified by Member States where the foreign investment is planned to take place, Member States and the Commission would be allowed at least 15 months after the non-notified investment has been completed, to commence procedures on their own initiative where it considers the investment to have negative effects on security or public order.

Annual reporting and evaluation

- Member States will be required to report to the Commission annually, on a confidential basis on their activities under national screening mechanisms and under the co-operation mechanism.
- The Commission is required to publish a public report on the implementation of the Proposed FDI Regulation annually.
- The Commission will evaluate the functioning and effectiveness of the Proposed FDI Regulation 5 years after the date of application and every 5 years thereafter and produce a report to the European Parliament and the Council.

Application timeline

- The Council of the European Union and the European Council will now consider the Commission proposal.
- There will be a transitional period of 15 months after the Proposed FDI Regulation enters into force, at the end of which the current FDI Screening Regulation will be repealed and the new provisions will apply.

For more information, please see previous briefing [here](#) on the proposed revision.

3. Employment

Acts of the Oireachtas

3.1 **Work Life Balance and Miscellaneous Provisions Act 2023 (“Work Life Balance Act”)**

For a detailed overview of the Work Life Balance Act, please see our briefings [here](#) and [here](#).

The Work Life Balance Act has not been fully commenced, important commenced provisions include:

(a) Unpaid medical care leave

From 3 July 2023, employees are entitled to 5 days of unpaid leave per year where, for serious medical reasons, the employee needs to provide personal or support to certain family members or persons with whom they live, and who is in need of significant care or support.

(b) Facilitation of breastfeeding

From 3 July 2023, the period during which an employee must be facilitated in breastfeeding with time off or reduced working hours has been extended from 26 weeks to 104 weeks following the birth of the child.

(c) Transgender men’s maternity and pregnancy related leave and entitlements

From 3 July 2023, transgender men who have given birth can access maternity and pregnancy related leave and entitlements under the Maternity Protection Act 1994.

(d) Paid domestic violence leave

From 27 November 2023, where employees or relevant persons in relation to an employee have experienced or is currently experiencing domestic violence, they are entitled to a maximum of five days of leave with pay in a 12-month period for the purpose of obtaining or assisting the relevant persons to obtain services such as medical attention, victim services, counselling, legal advice, obtaining court orders, Garda assistance and relocation.

Provisions pending commencement include:

(e) Right to request remote work

The right to request remote work provided under the Work Life Balance Act have yet to be commenced. It is understood that relevant provisions will not be commenced until the Workplace Relations Commission (the “WRC”) has published a Code of Practice on the “Right to Request Remote Working”. The WRC is expected to have the Code finalised by the end of January 2024.

Under the Work Life Balance act, employees are qualified to request remote working after 6 months' continuous employment. They must request 8 weeks before the proposed commencement of the arrangement. Employers must reply within 4 weeks, or up to 12 weeks if the employer has difficulties assessing its viability. They must consider both parties' needs and the Code (when published), and give reasons for refusal. Employers can end remote working arrangements if it harms the business or if the employee breaches their duties.

(f) Flexible working arrangements for caring purposes

Upon commencement of the relevant section, employee who either is a parent, or will be providing personal care or support to a person that is in a degree of relationship to the employee recognised by the Act may request for flexible working arrangements including remote working, adjusted working hours or flexible schedules.

To request these arrangements, the employee's child must be less than 12 years of age (or 16 years if the child is suffering from a disability or long-term illness) In other cases, the person cared for must be in need of significant care or support for a serious medical condition. The procedure for applying flexible arrangements will be the same as those for the right to request remote work.

3.2 **Sick Leave Act 2022**

The Sick Leave Act 2022 commenced on 1 January 2023. Employees have a legal right to paid sick leave for up to 5 days per year in 2024 (increased from 3 days in 2023). The rate of payment for statutory sick leave is 70% of normal wages, up to a maximum of €110 per day.

The obligations shall not apply to an employer who provides a sick leave scheme more favourable to the employee.

3.3 **Protected Disclosures (Amendment) Act 2022**

The Protected Disclosures (Amendment) Act 2022, which amends the Protected Disclosures Act 2014 to bring about wide ranging changes to whistle-blowing laws, came into effect on 1 January 2023.

As of 1 January 2023, organisations with 250 or more employees must have formal procedures for the making of and for dealing with protected disclosures. From 17 December 2023, this obligation will extend to organisations which employ between 50 and 249 employees. For certain employers including financial service firms, a policy must be in place regardless of size. The policy and procedures must be accessible to workers and it is an offence to not establish a policy or internal reporting channels as required by law.

For a detailed overview of the Protected Disclosures (Amendment) Act 2022, including the details of the new obligations and expanded scope of protection, please see our briefing [here](#) for a detailed overview

3.4 **Gender Pay Gap Information Act 2021**

The Gender Pay Gap Information Act 2021 was enacted in July 2021 to tackle gender pay disparity at a legislative level. Gender pay gap reporting initially applied to public and private sector employers with over 250 employees, with the reports to be published in December 2022 and December 2023.

In 2024, the scope is set to be extended to organisations with over 150 employees, and in 2025 the reporting requirements will extend to organisations with over 50 employees.

For more information, please see our briefing [here](#) and our webinar [here](#) that will guide employers through all elements of gender pay gap reporting.

Statutory Instruments

3.5 **Parental Leave Act 1998 (Section 13AA) (Prescribed Daily Rate of Domestic Leave Pay) Regulations 2023¹⁴**

¹⁴ SI 574 of 2023.

These Regulations set out the prescribed daily rate of pay payable to an employee who exercises their entitlement to statutory domestic violence leave. This is effectively the employee’s normal daily rate of pay.

3.6 National Minimum Wage Order 2023¹⁵

This Order sets out the national minimum hourly rate of pay from 1 January 2024, as follows:

National Minimum Wage (Aged 20 and over)	€12.70
19 years old	€11.43
18 years old	€10.16
Under 18	€8.89

3.7 Workplace Relations Act 2015 (Fixed Payment Notice) Regulations 2023

These Regulations, from 29 December 2023, prescribe the form for fixed payment notices and fixed payment amounts under s36 Workplace Relations Act 2015. Prescribed fixed payment fines are as follows:

Protection of Employment Act 1977, section 11	Failure to supply employees’ representatives with all relevant information relating to proposed redundancies	€2,000
Payment of Wages Act 1991, section 4(4)	Failure to give an employee a statement in writing specifying clearly the gross amount of wages payable and the nature and amount of any deduction therefrom, in a confidential manner	€1,500
National Minimum Wage Act 2000, section 23	Failure to provide upon request from an employee, or providing false or misleading information, in a written statement of an employee’s average hourly rate of pay for any pay reference period falling within the 12 month period immediately preceding the request	€1,500
Terms of Employment (Information) Act 1994, section 6B	Failure to provide a written statement of terms of employment to an employee not later than 5 days after the commencement of their employment, or deliberately providing false or misleading information therein	€1,500
Payment of Wages Act 1991, section 4B(8)	Failure to provide an employee with a written statement specifying the total amount of tips or gratuities distributed by the employer and the amount of tips or gratuities distributed to the employee to whom the statement is provided	€750
Payment of Wages Act 1991, section 4D(2)	Failure to treat all “service charges” or charges that in any other way lead customers to believe that the charge shall be distributed to employees as tips or gratuities	€750
Payment of Wages Act 1991, section 4E(3)	Failure to display a tips and gratuities notice with all prescribed information	€500

¹⁵ SI 497 of 2023. Failure to

Payment of Wages Act 1991, section 4F(3)	Failure to display a tips and gratuities notice in relation to contract workers with all the prescribed information	€500
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Statutory Instruments (Commencement Orders)

3.8 Assisted Decision-Making (Capacity) (Amendment) Act 2022 (Commencement) (No 2) Order 2023¹⁶

From 26 April 2023, the Assisted Decision-Making (Capacity) (Amendment) Act 2022 amends the Disability Act 2005 to provide for public service employment targets for public bodies:

- (a) from 26 April 2023 to 31 December 2023, not less than 3% of persons employed by public bodies are persons with disabilities;
- (b) from 1 January 2024 up to and including 31 December 2024, not less than 4.5% of persons employed by public bodies are persons with disabilities; and
- (c) on and from 1 January 2025, not less than 6% of the persons employed by public bodies are persons with disabilities.

By 31 March in each year, public bodies must produce a report in relation to their compliance with public service employment obligations under the Disability Act and submit it to monitoring committees established by the Minister for Finance.

EU Developments

3.9 Pay Transparency Directive

The Pay Transparency Directive came into force on 6 June 2023 as a part of the EU approach to reduce the gender pay gap and the socio-economic empowerment of women, alongside the Gender Balance on Boards Directive and the Work-Life Balance Directive. The Directive contains far-reaching measures that require Irish transposition and the State have until 7 June 2026 to implement it. Among other measures, employers should be prepared for the following elements of the Directive:

- (a) Gender pay gap reporting
- (b) Pay structures to ensure equal pay for work of equal value
- (c) Joint pay assessments with employee representatives
- (d) Inform employees of, and giving effect to their right to request pay information
- (e) Disclosure of initial pay level or pay range in job vacancy notices or before job interviews
- (f) Prohibition of pay secrecy provisions

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

¹⁶ SI 194 of 2023.

Anticipated Developments

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

This Bill, which is included for priority publication in the Autumn 2023 Government Legislation Programme, proposes various changes to the Protection of Employment Acts 1977-2014 to enhance employee protections in the event of collective redundancies. The Bill is before Dáil Third Stage as of 16 November 2023.

This Bill introduces the definition of a “responsible person”, which will include a liquidator, a provisional liquidator, a receiver or any other person appointed by the court where they assume full responsibility for the management of a business. Where a responsible person proposes to create collective redundancies, they will be required to initiate consultations with employees’ representative with a view to reaching an agreement. They will also be required to provide all relevant information relating to proposed redundancies to the employees’ representatives and notify the Minister for Enterprise, Trade and Employment where they propose to create collective redundancies. Collective redundancies must not take effect before the expiry of the period of 30 days beginning on the date of the relevant notification to the Minister.

The proposed changes to company law under the Bill are addressed in §1.7 of these lecture notes.

3.11 **Automatic Enrolment Retirement Saving System Bill**

This Bill which is included in the Autumn 2023 Government Legislation Programme for priority publication, intends to increase supplementary pension coverage. Automatic enrolment is a quasi-mandatory pension system where employees, subject to certain parameters, are automatically enrolled into a quality-assured retirement savings system, with freedom to opt-out. The Scheme is due to launch in 2024.

For key features of auto-enrolment and what employers operating in the private sector should consider, please see our briefing [here](#).

3.12 **Employment (Restriction of Certain Mandatory Retirement Ages) Bill**

This Bill, which is included in the Autumn 2023 Government Legislation Programme, intends to introduce measures that allow, but do not compel, an employee to stay in employment until the State pension age.

Case law and other developments

3.13 **Parent’s leave**

It was announced in [Budget 2024](#) that parent’s leave will be extended by 2 weeks to 9 weeks from August 2024.

3.14 ***O’Sullivan v HSE* [2023] IESC 11**

On 10 May 2023, the Supreme Court delivered its majority (4:1) judgment in this case holding that the HSE CEO’s decision to suspend a consultant obstetrician and gynaecologist on the basis of an immediate and serious risk to patient safety was lawful. In its judgment, the Supreme Court provides further clarity on the law relating to holding suspensions.

The relevant clause of the disciplinary procedure in this case provides “**where it appears to the CEO**, secretary/manager of a hospital or other health agency or his authorised representative, that by reason of the conduct of a consultant **there may be an immediate and serious risk to the safety, health or welfare of patients**, the consultant may apply for or may be required and shall, if so required, take administrative leave with pay for such time

as may reasonably be necessary for the completion of any investigation into the conduct of the consultant...” (emphases added)

The Supreme Court found that the key issue was whether or not it “appears” to the CEO that there “may” be an immediate and serious risk to the safety, health or welfare of patients. The Court concluded the correct test to be applied involves considering whether the discretion to suspend an employee has been exercised honestly and in good faith, and the decision is not arbitrary, capricious, perverse or irrational, as set out in the English case of *Braganza*¹⁷.

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

3.15 ***Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino’s Pizza [2023] IESC 24***

On 20 October 2023, the Supreme Court delivered its unanimous judgement in this case holding that pizza delivery drivers were to be treated as employees and not independent contractors for the purpose of the Taxes Consolidation Act 1997.

For a contract of employment to exist, there must be a mutuality of obligation comprised of both an obligation on the employer to provide work and an obligation on the employee to perform the work. Murray J noted that the term “mutuality of obligation” has been over-used and under-analysed, and propounded a new five factor test:

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

The Supreme Court held that the first three limbs were satisfied. In relation to all circumstances of working arrangements, the Court noted that drivers did not employ their own labour, took no economic risk, worked exclusively from Karshan’s premises, had limited ability to maximise profits, were required to wear branded uniforms and deliver as instructed by managers.

The Supreme Court therefore found that the Tax Appeals Commission was correct to determine that the drivers were employees of Karshan for the purpose of the Taxes Consolidation Act 1997. The Supreme Court specifically stated in its judgment that the decision would not determine the drivers’ continuous service for the purpose of their rights under employment law.

3.16 **Update to Tax and Duty Manual – Code of Practice on Determining Employment Status (Employed or Self-Employed) (the “Code”)**

¹⁷ *Braganza v BP Shipping Limited & anor* [2015] UKSC 17.

Following the Supreme Court in the *Karshan* case outlined at §3.15 above, Revenue has confirmed in the relevant Part of the Tax and Duty Manual (available [here](#)) that the Code is currently being updated by Revenue, the Department of Social Protection and the Workplace Relations Commission to reflect the judgment.

Separately to updating the Code, Revenue will issue guidelines on the judgement and its impact on the employment status of individuals for tax purposes.

4. Disputes/ Administration of Justice

Acts of the Oireachtas

4.1 **Representative Actions for the Protection of the Collective Interests of Consumers Act 2023**

This Act transposes Directive (EU) 2020/1828¹⁸ and allows for representative actions to be brought on behalf of groups of consumers by designated “qualified entities” in respect of infringements of a wide range of EU consumer protection laws in areas such as financial services, data protection and telecommunications.

The Act, which was signed into law on 11 July 2023, is awaiting commencement and there are several operations aspects which will need to be provided for by Ministerial Regulation, most of which relate to the role of the qualified entities.

“Qualified entities” must be non-profit organisations with a legitimate interest in protecting consumer interests. Central Bank of Ireland, Competition and Consumer Protection Commission, and Financial Services and Pensions Ombudsman may be considered “qualified entities” but no confirmation of this is available.

The Act also provides that a representative action for redress may be funded by a third party “insofar as permitted in accordance with law” and sets out a number of safeguards around such funding, but does not alter the current position that litigation funding is prohibited save in limited circumstances. The question of how any purported “qualified entities” is to be funded isn't clear in circumstances where, due to champerty and maintenance, litigation funding in general is prohibited.

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

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

Overhaul of occupier's liability

This Act, from 31 July 2023, amends the Occupiers' Liability Act 1995 to change the standard of care owed by occupiers to (i) visitors and (ii) recreational users/trespassers, and introduces the concept of voluntary assumption of risk. This change brings the statutory language of the 1995 Act in line with the clear jurisprudence of the Courts.

Previously a visitor was simply owed a duty by the occupier but the 2023 Act now requires the assessment of a number of factors, including:

- severity of injury,
- probability of danger,
- cost and practicality of preventative measures, and
- social utility of the conduct creating the risk.

The standard of care will depend on whether the visitor is considered to have understood and accepted the risk present on the premises or land.

As for recreational users or trespassers, an occupier continues to owe a duty not to act with reckless disregard where there is a danger on the premises. However, the standard has changed from whether it was a danger reasonably expected to protect against to whether the occupier

¹⁸ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

knew or was reckless as to the existence of the danger. This represents a significant rebalancing of the duties of an occupier in this regard. The onus has been lowered on occupiers and landed on recreational users.

The Act also puts on a statutory footing the notion of voluntary assumption of risk. There is no duty to visitors or recreational users where they have comprehended the risks involved and have voluntarily assumed those risk.

We have seen insurers seek to reword their documentation in light of the above changes and we await to see if these changes have an impact on insurance premiums going forward.

Third party funding of international commercial arbitration

The Act inserts a new provision into the Arbitration Act, which expressly provides that the offences and torts of maintenance and champerty do not apply to:

- (i) international commercial arbitration;
- (ii) any proceedings arising out of an international commercial arbitration; or
- (iii) any mediation or conciliation proceedings arising out of an internal commercial arbitration or proceedings arising out of same.

The Act also provides that a third-party funding contract that meets the criteria, if any, prescribed by ministerial regulation, including in relation to transparency in relation to funders and recipients, shall not be treated as contrary to public policy or otherwise illegal or void.

These new provisions are awaiting commencement by ministerial order.

For more information on third party funding of international commercial arbitration, please see our briefing [here](#).

District Court jurisdiction on data protection claims

Previously, the Data Protection Act 2018 only conferred jurisdiction on the Circuit Court and High Court, even though the average compensation for data breach claims in the EU is very limited and mostly within the District Court level. As a result, costs of these claims far eclipse their value and dissuaded litigants from pursuing such claims.

From 11 January 2024¹⁹, the 2023 Act allows these types of claims to be brought in the District Court, as well as the Circuit Court and High Court, remedying the issue of high costs to litigants.

For more information on compensation in data breach claims, please see our briefing [here](#).

New Data Protection Commission power to impose confidentiality obligations

The Act, from 31 July 2023, further amends the Data Protection Act 2018 to enable the Data Protection Commission (the “DPC”) to impose confidentiality obligations on limited categories of people in respect of limited categories of information in limited circumstances. This amendment is intended to enable the DPC to share information with complainants or other participants in investigations, inquiries or complaints that will enable them to participate more fully in the process, without jeopardising its integrity or the ability of the DPC to perform its statutory function in relation to the relevant process.

For more information on confidentiality provisions for DPC, please see our briefing [here](#).

¹⁹ Courts and Civil Law (Miscellaneous Provisions) Act 2023 (Section 77) (Commencement) Order 2024 (SI 6 of 2024)

Statutory Instruments

4.3 **European Union (Hague Judgments Convention) Regulations 2023²⁰**

Through these Regulations, the Hague Judgments Convention²¹ has entered into force in Ireland from 1 September 2023. These Regulations specify the states which are bound by the Convention and include the text of Declarations made pursuant to the Convention.

In January 2024, the UK sign the Hague Judgments Convention which moves ratification in the UK closer, but it is likely to take another 12 months before completion. Under the Convention, UK decisions would be more easily recognised and enforced in other countries including Ireland. Ireland is a member of the Convention by virtue of its membership of the EU.

Pursuant to the Convention, judgments from certain states may be enforceable in Ireland without the need to rely on Common Law enforcement principles. This is a welcomed development that supplements the enforcement methods under the Brussels Recast Regulation, the Lugano Convention, and the Hague Convention on Choice of Court Agreements. The Convention applies to civil and commercial judgments save for certain technical subject matters such as interim measures of protection.

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

EU Developments

4.4 **Collective Redress Directive²²**

This Directive aims to improve consumers' access to justice and sets out rules to ensure that a representative action mechanism for the protection of the collective interests of consumers is available in all Member States, while providing appropriate safeguards to avoid abusive litigation.

Under the Directive, Member States should apply transposing laws from 25 June 2023. While it was proposed in the Directive that the new regime would apply to actions brought on or after 25 June 2023, the transposing Irish legislation (Representative Actions for the Protection of the Collective Interests of Consumers Act 2023) outlined at [•] above confirmed that the legislation will only apply to action brought in respect of infringements occurring on or after 25 June 2023.

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

Case Law and other Developments

4.5 ***Smith v Cunningham & ors* [2023] IESC 13**

In this case, the Supreme Court provided elucidated the approach to be taken to ascertain the point from which a cause of action accrues in a claim for professional negligence against defendant solicitors under section 11(2) of the Statute of Limitations Act 1957.

The Supreme Court clarified that:

²⁰ SI 434 of 2023.

²¹ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters done at the Hague on 2 July 2019.

²² Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

- the binding authority on this subject matter is *Brandley*²³ and *Cantrell*²⁴;
- discoverability is not the test at Irish law and the accrual of a cause of action in tort is not to be postponed such that a limitation period will not run against an injured party until the existence of the cause of action can reasonably be discovered, except for cases specifically covered by statute;
- the limitation period runs from the time when provable injury capable of attracting compensation occurred, and that is when it is available to be proved and damage is manifest;
- the starting line for assessing the impairment of property rights or interests is if there is any reduction in present value;
- increased risk alone does not constitute sufficient damage that may lead to the accrual of a cause of action, but where rights or interests are less valuable by reason of exposure to as risk, real actual damage may arise;
- the assessment of sufficient damage is an objective one with a level of flexibility, but should subjective or unstructured inquiry is not allowed.

4.6 ***In re Article 26 and the Judicial Appointments Commission Bill 2022 [2023] IESC 34***

In this case, the Supreme Court upheld the constitutionality of the Judicial Appointments Commission Bill 2022 following an Article 26 reference from President Michael D. Higgins.

The Judicial Appointments Commission Bill 2022 provides for the establishment of the Judicial Appointments Commission which will be responsible for establishing mandatory procedures for assessing candidates for judicial roles, setting criteria of appointment to any judicial office within the State and to international courts, and recommending a list of candidates meeting those criteria to the Government. The Government cannot select or appoint candidates which are not recommended to it to judicial office.

It was submitted that the Bill failed to respect the rule of law and the binding recommendations will infringe the separation of powers by divesting the executive of its constitutional role in appointing judges. The breadth of powers to be conferred on the Commission was argued to be an unconstitutional delegation of the legislative functions of the Oireachtas and infringement upon judicial independence. It was also argued that the measures may bring about unjustified and unlawful discrimination between individual applicants that interfere with their constitutional right to privacy.

The Supreme Court rejected the arguments and upheld the constitutionality of the Bill, on the grounds that:

- nothing in the Bill has the effect of undermining the rule of law and interfering with judicial independence, given that its *raison d'être* is to safeguard and strength judicial independence and the rule of law;
- the Government has a choice whether to nominate a person recommended, and it follows that if the Government is not satisfied to exercise the power to advise the President, the process will have to start again;

²³ *Brandley v Deane* [2017] IESC 83.

²⁴ *Cantrell & ors v AIB plc & ors* [2020] IESC 71.

- the Bill preserves for the Government a real and meaningful choice as to the acceptance or rejection of a list, freedom not to nominate a person, and choice within the list;
- the proposed Commission' merit-based model of appointments is guided by sufficiently clear legislative guidance; and
- it is a constitutional imperative that there should be rules as to who can or cannot be made a judge and it is a task for the Oireachtas, but not at the Government's unrestricted discretion, to make those rules.

Anticipated Developments

4.7 **Civil Reform Bill**

This Bill, which is included in the Spring 2024 Government Legislation Programme, proposes to give effect to recommendations arising from the Review of the Administration of Civil Justice, also known as the Kelly Review.

The Heads of Bill are in preparation. The Bill is likely to include Court reorganisation, staggering of vacation periods, extra time to be allowed to judges directly after cases to facilitate judgment writing.

4.8 **Court Proceedings (Delay) Bill 2023**

This Bill proposes to provide for the right of persons who are party to proceedings, where such proceedings are not concluded within a reasonable time, to seek a declaration of that fact and, in certain cases, compensation from the proposed Court Delays Assessors.

This Bill was initiated in February 2023 and has most recently been amended in Dáil Committee Stage on 5 December 2023.

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