MASON HAYES & CURRAN

Financial Services Sector Update

In Brief

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Welcome

Welcome to the spring edition of our Financial Services Sector Update series. In this issue, we examine a selection of topics and trends impacting our clients.

First up, in the above video, new partner Anthony O'Hanlon discusses Ireland as a hub for European investment funds.. Other popular insights featured in this edition include:

- A Second Wave of Bank Relocations on the Horizon?
- Flexible and Remote Working in the Financial Services Sector
- Data Breach Claims and Financial Institutions
- Greenwashing and the Role of Auditors

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A Second Wave of Bank Relocations on the Horizon?

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We expect international banks to refresh their Brexit plans and reconsider Ireland as an option for establishing or expanding their operations in the EU due to an increased regulatory focus on this sector.

We consider:

- The regulatory focus on international banks in the aftermath of Brexit
- Why those banks may now need to refresh their Brexit plans, and
- Why Ireland continues to be an attractive option for banks wishing to establish or expand their base in the EU

Background

The immediate aftermath of Brexit saw a concerted effort by banks to bolster their presence in Europe. Bank of America, Citi and Barclays, amongst others, chose Dublin as their European headquarters.

From a supervisory perspective, the ECB tackled Brexit head-on operating a "no empty shell" policy. This resulted in banks being required to locate strategic and risk management capabilities within the EU. In addition, the ECB emphasised that "dual-hatting", the practice of senior managers carrying out the same or similar functions at both the non-EU parent company and the EU subsidiary, should be avoided.

Transition issues

Addressing the transition has not been straightforward for international banks. While, at the initial stages, banks tried to minimise the impact of relocation, it soon became clear that "*coping with the reality of Brexit would require more significant effort*".

Media reports have highlighted the continuing efforts by banks to move senior staff from London to the EU to ensure a presence in the EU. In addition, there have been reports of more dubious practices, with a senior banker claiming he was allocated a "fake" job title to satisfy regulatory expectations.

Banks were granted some leeway to postpone relocation plans during COVID-19, however it is now clear that supervisory authorities have refocused their attention on international banks and their presence in the EU.

Complying with new rules

The most significant development on the horizon is the introduction of a new requirement for non-EU banks carrying out "banking" business in the EU to establish an EU branch and apply for authorisation, subject to certain exceptions. A new article of the Capital Requirements Directive will provide that "banking" business, for the purposes of this requirement, includes lending, deposit-taking and providing guarantees and commitments,

In scope international banks should now consider if their operations and business need to be restructured to comply with the new rules. This restructuring may involve establishing a branch in the EU or moving its "banking" business to an EU group entity.

Ireland as an ideal location

In scope banks now need to actively consider Ireland as an option for relocation or expansion of existing operations. Ireland has proven to be an attractive gateway to Europe for financial services firms post-Brexit. The financial services sector in Ireland now directly employs an estimated 57,600 people and more than 430 financial services companies operate in Ireland. These include global financial institutions from international banks, investment managers and insurers to aircraft leasing operators and administrators.

Comment

We expect to see a second wave of international bank relocations and restructurings as a result of the increased regulatory focus on this sector. Ireland is ideally placed to adequately resource international banks given its agile, diverse and English-speaking workforce and its highly regarded financial services sector.

We are currently assisting international bank clients who are actively reconsidering their Brexit plans. Our advice for clients is to start this process now! The complexities of restructuring operations should not be underestimated.

Our Corporate and Financial Regulation teams have extensive experience advising international banks on restructuring options and on how to effectively and efficiently achieve compliance with regulatory requirements. Please reach out to a member of our dedicated teams to discuss any queries you may have.

Flexible and Remote Working in the Financial Services Sector

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A new Code of Practice on the Right to Request Flexible Working and the Right to Request Remote Working was published in March 2024. The Code provides certain employees with a right to request flexible working for caring purposes, to include a variation in hours or days worked, or working compressed hours. It also provides all employees with a right to request remote working.

The Code does not provide employees with an *automatic* right to flexible or remote working but instead, employers are required to consider requests made by employees. The Code is not legally binding but sets out best practice for dealing with requests. The Code can be considered in proceedings before the Workplace Relations Commission and the Labour Court.

Some statistics to consider

A large number of financial institutions currently offer flexible or remote working arrangements. In a recent survey, 90% of companies said they plan to implement return-to-office policies by the end of 2024. Nearly 30% indicated that this might involve returning to the office on a full-time basis, with only 2% of business leaders saying that they do not plan on requiring employees to work in person.

The Code provides clarity for both employers and employees and will shape how flexible and remote working arrangements are managed in the future.

Eligibility

Under the Code, employees can request flexible or remote working from their first day of employment but must have six months of continuous service with their employer before any arrangement can start. Employers can waive this requirement. While all employees are eligible to request remote working, for flexible working, an employee must be:

- A parent (or certain persons acting in place of a parent) of a child under 12 (or 16, if the child has a disability or illness) who will be **providing care to that child**, or
- Providing **personal care or support to another person who requires significant care or support for a serious medical reason**. This includes the employee's child, spouse, civil partner, cohabitant, parent, grandparent, sibling, or a person who resides with the employee.

Making a request

Employees must apply for flexible or remote working no later than 8 weeks before the proposed start of the arrangement. Requests should be in writing and signed by the employee and should note:

- Details of the proposed arrangement, i.e. the form of flexible working being sought or days on which remote working is being sought
- The proposed start date and duration of the arrangement, and
- Specific reasons for making the request, and for remote working, details of the suitability of the proposed work location

Employees requesting flexible working will need to provide documentation/information setting out:

- Details of the person to whom the employee's request relates
- The employee's connection to that person, and
- Evidence of the significant care or support required by that person, where relevant

Right to a response and records

The Code states that employers should respond to requests for flexible or remote working no later than four weeks from receiving the request. This can be extended, however, in limited circumstances. Within four weeks of receiving the request, an employer must either:

- Approve the request – and record this in a signed written agreement
- Refuse the request – and provide written notice of the reasons for refusal, or
- Notify the employee that more time is needed to consider the request

An employer who receives a request for flexible or remote working must consider the request, having regard to the employer's business needs, the employee's needs or the reasons for their request, and the guidance in the Code. The Code lists various factors that an employer can consider in dealing with requests. These factors include the suitability of a role/an employee for flexible or remote working.

Flexible or remote working arrangements may be subject to an initial trial period. Arrangements can be changed with the agreement of an employer and an employee and can be terminated in specific circumstances. An employer must keep a copy of signed agreements and notices. Employees should be given a copy of any agreement signed by them.

Top tips for employers

Employers in the financial services sector should review and adapt their flexible and remote working policies to comply with the Code along with Irish working time and health and safety legislation. Employers should ensure that:

- Requests made by employees are dealt with within the timeframes in the Code
- Appropriate records are retained, and
- Employees are not penalised for exercising their rights

We have extensive experience advising clients in the financial services sector on all aspects of the employment relationship, including requests for flexible and remote working. For more information and expert advice, please contact a member of our Financial Services or Employment Law & Benefits teams.

Data Breach Claims and Financial Institutions

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How claims for non-material damage following data breaches are treated by the Irish courts has been a hot topic in recent years. This is a significant area of interest for companies that handle significant volumes of sensitive customer information. Non-material damage claims are of particular note for data controllers and processors, as multiple claims can often be brought for upset or worry following data breaches where no material damage is suffered by a plaintiff. 2023 and early 2024 has seen a significant number of developments in how these claims are dealt with, which financial institutions should be aware of.

We examine developments in the treatment of claims where the plaintiff has suffered only non-material damage, and a change to the jurisdiction of the Irish courts to hear lower value claims.

Background

Following a long period of uncertainty as to how claims for non-material damage were to be treated under both Irish and EU law, a degree of certainty emerged in May 2023, with delivery of the eagerly-awaited judgment of the Court of Justice of the European Union (CJEU) in *UI v Osterreichische Post AG*. In that judgment, the CJEU determined that:

- A right to compensation for non-material damage does not automatically arise from a mere infringement of the GDPR
- The GDPR does not provide for a *minimum* threshold for non-material damage – there is no requirement to meet a threshold which requires a certain degree of seriousness before a claim can succeed, and
- The cause of non-material damage suffered must be linked to the alleged data breach

The CJEU has considered how non-material damage is to be assessed and ultimately determined that the level of non-material damage is a matter for the national courts of EU Member States to rule upon.

Further guidance provided by Irish decisions

The Irish courts provided subsequent guidance relating to non-material damages in the Circuit Court decision of *Kaminski v Ballymaguire Foods Limited*, delivered in July 2023. The claimant was employed by a food company. During a training exercise, CCTV clips which purported to highlight unapproved work practices were shown to a group of employees. The claimant, who was identifiable in the CCTV footage, alleged that the processing and use of the CCTV footage amounted to unlawful processing of his data and a violation of both the Irish Data Protection Act 2018 and the GDPR.

Regarding the non-material damage suffered, he alleged that it had made him 'more stressed at work', he felt 'humiliated', and he had problems with his sleep for a period of time.

The Circuit Court determined that there are several factors which a court must consider when assessing compensation for non-material damage as follows:

- A mere violation of the GDPR is not sufficient to warrant an award of compensation
- There is no minimum threshold of seriousness required for a claim for non-material damage to exist, but compensation for non-material damage does not cover "mere upset"
- There must be a link between the data infringement and the damage claimed
- Non-material damage must be genuine and not speculative
- Damage must be proved and supporting evidence is strongly desirable
- An apology, where appropriate, may be considered in mitigation
- Delay in dealing with a "data breach" by either party is a relevant factor in assessing damages
- A claim for legal costs may be affected by these factors, and
- Even where non-material damage can be proved and is also not trivial, damages in many cases will probably be modest

The question of appropriate compensation

In determining the appropriate amount of compensation, in the absence of guidance from the Irish Parliament, Superior Courts, or the Judicial Council, the court considered the Personal Injuries Guidelines 2021. The court referred to the category of minor psychiatric injuries, though it noted that in some cases non-material damage could be valued below the lowest Guidelines' valuation of €500. The claimant was awarded €2,000 on the basis that his reaction had gone beyond mere upset.

Fear of future misuse

Further CJEU guidance has since issued which has determined that "non-material damage" can include fear of future misuse of a data subject's personal data.

However, it also emphasised that data subjects must demonstrate that the negative consequences suffered constitute non-material damage.

A change in jurisdiction

Regarding the court in which these claims can be issued, it had originally been the case under the Data Protection Act 2018 that relevant claims could only be brought before the Circuit Court or High Court, even where the quantum claimed fell below the threshold of the Circuit Court. In early 2024, the Government commenced Part 10 of the Courts and Civil Law (Miscellaneous Provisions) Act 2023. This provision allows data breach claims under the 2018 Act to be brought in the District Court. Costs in these cases would be assessed on the District Court scale, which is substantially lower than costs awarded in the Circuit Court. In light of the developments in case law regarding non-material damage, in future, it is likely that most claims of this nature will be more properly issued in the District Court.

Conclusion

There is now a greater degree of certainty as to how data breach claims for non-material damage will be dealt with by the Irish courts,. This is helpful for data controllers and processors. Although a minimum threshold for recovery has not been imposed, encouragingly, it appears any awards for non-material damage will be modest. It is also of note that these claims will now likely be brought before the District Court, which should mean lower costs in defending a claim of this type.

Given the prevalence of claims following data breaches, financial institutions should ensure that customer data is secured appropriately and that a proactive plan is put in place in the event that a data breach occurs.

For more information, please contact a member of our Dispute Resolution or Privacy & Data Security teams.

Greenwashing and the Role of Auditors

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Greenwashing is likely to be detrimental to a business's reputation once the misleading activity is exposed. *'Greenwashing'* is commonly understood to occur when a company engages in practices to mislead or capitalise off the desire for environmentally friendly products or services. This is done by presenting a false impression that its actions, aims, or products are greener than they really are. We examine how auditors and financial boards can gauge good practices in an area that is increasingly the focus of regulators.

Greenwashing may mislead investors and consumers who may forgo savings on a similar products and services, by paying a premium for what they believe to be a 'greener' product. Ultimately the practice represents a serious risk to business. This is particularly concerning because a recent Competition and Markets Authority global review of randomly selected websites found that 40% of green claims made online could be misleading.

In its Global Financial Stability Report, the IMF noted that "*proper regulatory oversight and verification mechanisms are essential to avoid greenwashing*". For example, Irish Auditing & Accounting Supervisory Authority (IAASA) has challenged issuers' climate targets and requested information underpinning "net zero" commitments.

What does this mean for management, directors and audit committees?

- Pay close attention to how social responsibility goals and efforts to implement the goals are communicated externally. Managers should ensure that these goals are achievable and that there is credible evidence to show that the green claim is true.
- Ensure that green claims don't exaggerate positive environmental impact or contain anything that is not correct, whether this is clearly stated or implied.
- Beware not to breach regulatory requirements when making green claims, for example, Consumer Protection legislation or the European Green Deal legislation which requires all large companies and listed companies (except micro-enterprises) to disclose information on social and environmental activities.

What does this mean for accountants?

- Carefully review green assertions by companies and seek evidence to back up these claims. Pay particular attention to claims that appear to be too good to be true and ensure that there is a balance and consistency between the disclosures in the management commentary and in the financial statements.
- Check whether claims have been independently verified by third parties, for example, Fair Trade.
- Apply skills of professional scepticism and attention to detail when considering the difference between fact and fiction.

Comment

According to IAASA, consideration of "*consistency of climate-related information between financial statements and other pronouncements will likely be a current topic*" over the next few years. It is therefore essential for businesses and accountants to become familiar with developments in this area and to ensure compliance with applicable regulatory requirements.

For more information and expert advice, contact a member of our Public, Regulatory & Investigations or Banking teams.

Auto-Enrolment Pension Bill Published

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"Auto-enrolment" is the word of the day for pension experts and Ireland's wider business community. While it has been mooted for many years, now it is finally within sight. The Government published the Automatic Enrolment Retirement Savings System Bill 2024 at the end of March. The Minister for Social Protection is adamant that the system will be implemented by the end of this calendar year. However, in addition to debating and passing the Bill, much remains to be done to implement the technical, administrative, and organisational measures necessary to establish the system.

Governing auto-enrolment

Perhaps the most significant element of the Bill is the proposed establishment of a statutory authority to establish, maintain and control the auto-enrolment system. The National Automatic Enrolment Retirement Savings Authority will be charged with arranging for the enrolment, collection of contributions, and establishment and maintenance of retirement savings accounts. It will also be responsible for:

- The provision of related information and services
- The investment of contributions with investment management providers
- Facilitating the payment of retirement savings
- Monitoring and enforcing compliance, and
- Undertaking research relating to retirement savings services

The National Automatic Enrolment Retirement Savings Authority will be supervised by the Pensions Authority.

How does it work?

A person will be automatically enrolled in the system if they are an employee and are:

- Between the ages of 23 and 60,
- Not already a member of a qualifying pension plan, and
- In receipt of total gross pay in all employments of at least €20,000 per annum

The Bill proposes three sources of contribution, paid as a percentage of an employee's gross pay, as follows:

Source	Years 1-3	Years 4-6	Years 7-9	Years 9+
Participant	1.5%	3%	4.5%	6%
Employer	1.5%	3%	4.5%	6%
State	0.5%	1%	1.5%	2%

Contributions must only be made on the first €80,000 of a participant's gross pay, although the Minister may amend this through subsequent related regulations. The Bill also sets out the conditions for opting in and out of the auto-enrolment system.

Once contributions are made and invested by the National Automatic Enrolment Retirement Savings Authority on behalf of participants, they can be paid out on reaching the State pension age, on death, or earlier in the event of incapacity or exceptional ill health.

We note that the Bill provides for the implementation of standards within future regulations. If implemented, these would essentially aim to ensure minimum standards as between the auto-enrolment savings system and other pension schemes, PRSAs and trust RACs. These standards would come into effect sometime within the first seven years of the auto-enrolment phasing-in period.

Compliance and enforcement

It is proposed that the National Automatic Enrolment Retirement Savings Authority will have a range of inspection and enforcement powers, including the power to issue compliance and fixed-penalty notices. A range of new offences have also been created, including:

Source	Years 1-3
Failure of an employer to give notice of the determination and enrolment date in the system to an employee	Class A fine, imprisonment for up to 6 months, or both on summary conviction
Hindering an employee from participating in the system	As above
Failure of an employer to pay contributions to the system on behalf of an employee	As above
Obstructing or not cooperating with an authorised officer of the Authority	Ditto on summary conviction; a fine not exceeding €50,000, imprisonment for up to 3 years, or both on conviction on indictment
Failing to comply with a compliance notice by the date specified	As above
Forging a notice, certificate or other document purporting to be issued, granted or given	As above

Comment

The Bill's aim is laudable and, if implemented, could provide for a pension system for an estimated 800,000 people currently working in Ireland without any provision for retirement. However, there is little time for substantial debate on the provisions of the Bill if it is to be passed and implemented before the end of 2024. Even if this does occur, however, the compliance pressures on employers and those providing funds into which the contributions will be invested will be intense. As with any initiative, a wide range of challenging legal and practical teething issues should be expected. Employers now need to be seriously considering the implications for their businesses.

For more information and expert advice on how auto-enrolment will materially impact your business's operations, contact a member of our Pensions team.

Financial Services Sector

The financial services sector has undergone unprecedented transformation from traditional banking to new developments like ESG and Fintech. Our lawyers are trusted advisors on the optimal adaptations and solutions for clients in responding to industry changes.

Now more than ever the financial services sector needs to respond and evolve. Our team is at the cutting-edge of these developments working in partnership with clients and drawing on our significant expertise in key areas such as insurance, financial regulation and data privacy.

Our objective is to help clients manage transitions and respond to the ever changing regulatory and political environment. We frequently operate at the intersection of law and technology finding the optimal balance between commercial and legal requirements. Our lawyers are renowned for their thorough and pragmatic approach supported by experienced project managers and bespoke systems to streamline the most complex mandates for clients.

Contact our Financial Services Sector team

About Us

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

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

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

What Others Say

Our Financial Services Team

"Continuously demonstrate their capabilities and ability to deliver."

Legal 500

Our Financial Services Team

"The law firm has a superb team, easy to work with, supportive and fully understands the complexity of cases."

Chambers & Partners

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