Summer 2022

ihl

The In-House Lawyer

EMPLOYMENT • COMPETITION • CORPORATE RESTRUCTURING • ESG • REIMAGINING IN-HOUSE

The balance of risk

GCs and crisis management experts on navigating the latest ESG challenges

DAC BEACHCROFT

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ESG is a business imperative. We all have a responsibility to our people and our planet to do better – to strengthen our sustainability – and organisations are working hard to improve their response to ESG.

By listening, collaborating, challenging and innovating DACB delivers bespoke solutions that help leadership teams identify their ESG risks, opportunities and actions.

Underpinned by our own response to ESG, our legal experts advise on a range of commercial, regulatory and insurance issues associated with this complex and interconnected landscape.

Use this QR code for further information on how we can help you achieve your ESG ambitions.

Nathalie Tidman

Editor, *The In-House Lawyer* and *Legal Business*

> **The only way we can continue to consistently create content of the highest possible quality is to find out what really matters to you. You can help to shape the magazine into the publication you really want.**

The In-House Lawyer needs you – let us know what you really want

In early August, many of you will have received an email from *IHL*, with any luck while you were keeping on top of your work emails from the luxury of a sun lounger, rather than during an ill-fated roundtrip to the airport departure lounge.

This is a quick reminder in case you haven't had a chance to follow up, of our request for feedback. We are dedicated to bringing our loyal readers the most business-critical, actionable and insightful editorial content that we can, even as the world affecting the modern in-house team evolves so rapidly around it.

The only way we can continue to consistently create content of the highest possible quality is to find out what really matters to you. By responding to the *IHL* readership survey we have sent you, or emailing me at the address below, you can help to shape the magazine into the publication you really want to read, and which will be most relevant to your business.

This issue of *IHL* features profiles from Elisabeth Sullivan, the high-profile legal chief of beloved high street bookseller Waterstones, as well as insights from the dynamic Wayne Spillett, Vodafone's head of legal for commercial operations, IP and corporate secretariat. Do you want to see more of this kind of people-focused article?

Or is it more sector-focused features you are after, like our write-up of a panel sponsored by Travers Smith on acting for clients on ESG-related risks in which law firm partners, GCs, and experts from the Bar met with a crisis-management guru to share their insights?

If so, which sectors are most relevant to you and your business? Are you all about trends in technology, cyber security and data protection, dispute resolution, competition, employment, or something else?

For this latest issue, we also have three incisive market reports featuring developments in competition, corporate restructuring, and employment respectively. For these, *IHL* sat down with Nicholas Levy of Cleary Gottlieb to discuss CMA chief executive Andrea Coscelli's legacy and analyse the current global antitrust market. We interviewed Shearman & Sterling's restructuring and insolvency team to find out the latest trends in this constantly changing practice area and spoke with partners from Paul Hastings, Mishcon de Reya and Lewis Silkin on grappling with employment challenges in the new hybrid working world.

We hope you find these valuable, but do let us know how we can improve.

Elsewhere in this issue, partners from Pinsent Masons got around the table with an eclectic group of in-house counsel to thrash out how law firms can improve their offering for good. We hope you find the debate thought-provoking and wide-ranging as it crosses topics including reputational risk, ESG compliance and ethnic and gender diversity.

It goes without saying that all our readers and their views are incredibly valued by us, and we are very much looking forward to receiving your feedback and taking it on board for future issues. Please let us know what you really think.

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Contents

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24 ESG risks


86 Corporate restructuring

Briefings

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Significant matters

Nokia collaborates to drive D&I among law firms

Nokia and the **Minority Corporate Counsel Association** (MCCA) have launched a global law firm survey that will allow firms to assess and advance efforts that promote equity, inclusion and diversity.

The survey brings together Nokia's own equity, inclusion and diversity survey, which it launched in early 2021, with MCCA's 18 years of experience in assessing diversity across top US firms.

Nokia's initiative is designed to collect both qualitative and quantitative data from panel law firms to identify areas of improvement, which the telecoms giant has worked with external counsel to improve. Nokia's chief legal officer Nassib Abou-Khalil told *The In-House Lawyer*: 'Our approach was different from other companies that launched initiatives before us because it has moved away from the carrot-and-stick approach, and is rather focused on how we work together in order to achieve better outcomes.

'It has more teeth because essentially you can't buy your way out. Either you are fully in, and your values match our values, or you are not and then we have to part ways and we will not be your client.'

The Nokia-MCCA survey incorporates this approach and allows law firms globally to receive bespoke analysis that can be accessed by any company looking to work with them. It covers key diversity indicators such as race and ethnicity, religious minorities, gender identity, disability status and LGBTQ+ status, as well as subjects including leadership,

recruitment and management structure. The use of qualitive data also overcomes jurisdictional restrictions to sharing employees' personal data.

This is the latest example of the role that in-house legal teams can play in driving diversity in private practice following a marked increase in companies including diversity and inclusion considerations in legal tender processes.

Abou-Khalil, who also co-developed Nokia's OUT Leaders program, which he has also extended to external counsel, concluded: 'There's a realisation, including among the law firms themselves, that they need their clients to be very active in asking them to prioritise equity, inclusion and diversity because it gives them the platform to drive initiatives in that direction.'

Cripps and Gowling win spots on Landsec's expanded panel

Commercial property developer Land Securities Group (**Landsec**) has unveiled its revamped property legal panel, expanding its roster from seven to nine firms as it aligns its legal service providers with its new emphasis on mixed-use urban neighbourhoods.

Cripps and Gowling WLG are new additions from its last review in 2016, while Bryan Cave Leighton Paisner, CMS, DAC Beachcroft, Eversheds Sutherland, Herbert Smith Freehills, Hogan Lovells and Pinsent Masons were all reappointed for a five-year term.

The FTSE 100 real estate company, which has a £12bn portfolio of retail, leisure, workspace and residential hubs including Deutsche Bank's London headquarters and Trinity shopping centre in Leeds, highlighted a focus on mixed-use urban neighbourhoods as the newest element to its growth strategy announced in October 2020. Its strategy also includes a continued focus on central London offices and major retail destinations.

Since then, CMS has advised Landsec on its £425.6m acquisition of a 75% interest in MediaCity, Europe's leading digital, media and tech hub in Salford in November 2021, while Hogan Lovells and CMS both advised Landsec on the launch of Bluewater REIT in April 2022, its £172m joint venture with M&G Real Estate.

As part of the retender process, Landsec also considered value creation and alignment with the companies' refreshed sustainability strategy launched in April 2022, which embedded ESG through its relationships with suppliers.

Head of legal Alex Peeke said: 'We have been very pleased with the performance of our panel over the last six years and in particular during the pandemic when they helped us carry out some major transactions under very challenging circumstances. Our review has enabled us to tap into some of the additional capability that our panel has to support new focus areas for the business, such as mixed-use urban neighbourhoods.'

He added: 'We are also delighted to welcome Cripps and Gowling to the panel and look forward to working with them. I am very confident that we have the capacity, capability and enthusiasm in our panel to help us deliver our strategy over the next five years.'

Anna Favre, partner in Cripps residential estates team, said: 'We are delighted to have been appointed to the property legal panel and to be working closely with Landsec to achieve its objectives for growth in the mixed-use urban environment.'

As a new strategic supplier to Landsec, we are also pleased to have the opportunity to act in partnership to improve how we operate as a responsible business, such as reducing our carbon emissions and improving diversity and inclusion. With Landsec as a client partner we will share the skills, resources and knowledge to tackle these real-world problems together.'

National firms get full marks in £49m education sector tender

Eversheds Sutherland, **Ward Hadaway** and **Weightmans** are among the eight firms appointed to further education sector purchasing consortium Crescent Purchasing Consortium (CPC)'s £49m legal panel.

The new panel structure focuses on a combination of geographical and specialism-led lots. The seven lots cover human resources, pensions and people; academy conversions and post-conversion services; property issues; contracts, procurement governance and related issues; dispute resolution; general legal advice as well as one all-encompassing category covering all eventualities that could occur nationally.

Of the appointed firms Eversheds, Ward Hadaway and Weightmans won spots on all of the lots, including to its all-encompassing 'national one-stop-shop' lot to which Capital Law was also appointed. Forbes Solicitors, Rollits, and Shakespeare Martineau were appointed to all but the one-stop lot, while Stone King was selected for its academy conversion expertise.

The panel will last until 31 May 2025, with an option for a one-year extension.

Moves that matter

- **Sky Group** has recruited Niamh Grogan to succeed long term general counsel Vicky Sandry, who stepped down after 17 years in the role. Grogan joined in June from insurance broker Willis Towers Watson where she was global deputy general counsel and chief compliance officer.

- **Ocado** has bagged a new head of legal from Vodafone. Clare Lynch, who will join the online supermarket in September, started her career at Herbert Smith Freehills where she spent nearly four years post qualification. After two years at King & Spalding, she left private practice for Vodafone in 2015 where she most recently held the role of senior legal adviser in the tax group.

- Linklaters Tokyo partner Matthew Bland has joined multinational conglomerate **Jardine Matheson** in Hong Kong as GC. During his 24 years at the firm, the corporate expert worked in both London and Tokyo and was promoted to the partnership in 2008. Bland will become the third former Links partner to take on the role as he succeeds the magic circle firm's former head of corporate Jeremy Parr, who took over the role from his former Links colleague Giles White in 2015.

- De La Rue GC Jane Hyde is set to join **RWS Holdings** as GC and company secretary from 1 October. Hyde has previously worked at Freshfields and Taylor Wessing, and directly before joining De La Rue she was the head of corporate and European legal at FTSE 100 company Hikma Pharmaceuticals.

- Gett's former head of legal Chris Fletcher has joined **Infinium Logistics** as GC. Fletcher previously spent seven years at CMS, before occupying in house roles at Amazon, Deliveroo and publishing company Informa.

- Former Slaughter and May associate Vicky Harris has been appointed GC of **Pharma Intelligence**, the pharmaceutical and medtech market intelligence company recently acquired by global growth investor Warburg Pincus. Harris, who left private practice in 2009 to join Thomson Reuters, is well placed for the role, having led the legal department of Clarivate following its sale by Thomson Reuters in 2016.

- **Axon** has promoted Isaiah Fields to chief legal officer. Fields joined Axon in 2011 as litigation counsel, since then he has been promoted several times most recently to EVP and general counsel in January 2021 where he oversaw the legal, medical and compliance departments.

- French Connection GC Sarah Mackie has joined Unilever-owned beauty brand **Elida Beauty**, which was recently carved out as a separate entity. Mackie made the move in June after seven years at the fashion retailer.

- **Scania**'s head of legal and compliance, Sarah Holford (*pictured*), is set to take on a new role in Scania's central operations. Since taking the reins in January 2019, her team was named Most Transformative In-House Team of the Year at the 2021 Legal Business Awards. Her successor is yet to be announced.

Elisabeth Sullivan, Waterstones

BY TOM BAKER

The in-house legal chief-cum-budding novelist talks to *IHL* about working for one of the UK's most beloved high street brands

While some discover an aptitude for law while at university, others have it in their veins. According to Elisabeth Sullivan, recently installed as general counsel of book retailer Waterstones, she very much falls into the latter category.

'People always told me since I was a kid I should be a lawyer because I had a "strong sense of justice". Probably after I had some big tantrum!'

And despite growing up loving the likes of Ally McBeal and anything by John Grisham, Sullivan ended up reading PPE at Oxford, rather than law. Upon graduating however, Sullivan sought out Herbert Smith Freehills (HSF) based on its premier reputation in dispute resolution: 'I said this to HSF when they interviewed me: "I haven't studied law but it looks like a great start in life and a great profession."'

Sullivan recalls her formative years at HSF very fondly, using a Harry Potter analogy to describe it as 'the Gryffindor of law firms'. She says: 'Some of the associates I met there are still my closest friends and peers. We have a network of partners, associates from that time, we're very close. I don't think I ever recreated that professional bond in any other company. In every job I've gone to, someone from HSF has checked in on me, which is really nice.'

However her private practice days also taught Sullivan some valuable career lessons. She had arrived at HSF with litigation ambitions, before an energy seat out in Tokyo ignited an interest in renewable energy and mining. After qualifying, Sullivan found herself as an associate in the corporate M&A group, which brought with it a culture she found difficult to live up to: 'You have to be extremely dedicated and available 24/7. Those guys work so hard. I was just so conscious in my late 20s/early 30s that I wanted a good family life and to set up a home with my husband – we were thinking about having kids. Just as I was thinking about this, a number of companies reached out to me.'

Therefore Sullivan's in-house career began at Perenco in 2013, a privately-owned French oil and gas company that she remembers as 'glamorous'. In some ways, it was a perfect foundational role for Sullivan as it forced her to pick up a variety of skills and take on some weighty responsibility: 'I was legal manager for Perenco UK, so I had about 1,000 employees and contractors and about £1bn turnover in my control, and I was the only lawyer there. It meant I was becoming a jack of all trades and master of some of them!'

But it was also a tumultuous time for the oil market. Sullivan joined Perenco when the price of oil was over $100 a barrel; four years later however, the market was in the midst of a price crash. As a result, Perenco was keen to cut costs wherever possible. Suddenly the lush offices on the King's Road became unjustifiable, and plans to relocate to Norwich were drawn up. 'No offence to Norwich, but it wasn't going to work for my family!', Sullivan quips.

She left Perenco in 2017 and took some time off to start a family before beginning a two-year stint as a contractor. During this time, Sullivan took on work for Centrica and later South African energy firm Sasol. She recalls: 'Contracting is a good way to really guarantee a work/life balance. On the days you're not working, if people ask you to work, you can say "yeah, I can do that" but you charge another day's rate, so they quickly back off!'

Once her children were a bit older, Sullivan was ready for a full-time role again. It arrived in 2020 when she was approached by Ineos, the oil and gas company owned by high-profile British billionaire Jim Ratcliffe. Building on her experience from Perenco, Sullivan was exposed to a wide range of work at Ineos: 'They have all their standard businesses, but they also sponsor a lot of sports. My husband and I sail, and I was lucky enough to support all the America's Cup sailing work, working with Ben Ainslie and the team on various sailing bits

> **Retail is going through a tough time with Covid, and coming through the latest wave of the pandemic with us safely up and running is nothing to sniff at.**

and pieces. I even got to go down to Portsmouth and get onboard the America's Cup boat!'

Ineos also owns a number of hotels and runs a fishing conservation programme in Iceland, both of which expanded Sullivan's legal horizons. Crucially though, Ineos owns a clothing brand called Belstaff, which specialises in motorcycle jackets. Sullivan undertook work for Belstaff on the retail side, which she claims helped make her step up to Waterstones a smoother one.

Her arrival at Waterstones last year marked not only her first legal role exclusively in the retail sector, but her first GC responsibility. Thankfully, previous GC Laila Aslam spent considerable time conducting a handover process with Sullivan to ease the replacement.

And the surroundings certainly helped. Sullivan says: 'I'm based on the 6th floor of Waterstones Piccadilly, above the shop floor. It's the biggest bookshop in Europe. Any time I need a bit of stress relief I can take the service elevator down and browse through genres I might not have even thought about. I've been getting really into non-fiction!'

Unlike her previous roles, which often necessitated working with large teams, at Waterstones Sullivan is the company's sole legal counsel. This is something she relishes: 'It can be intimidating when you come in and inherit a large team of people who you don't know – I feel a lot nimbler coming in here and getting on with everything.'

One of the major advantages of not managing a legal team is that it allows Sullivan to work more closely with the core business, something that she finds particularly rewarding. She cites managing director James Daunt as an inspiration – Daunt, who is also chief executive of Barnes & Noble (which is owned by Waterstones' parent company Elliott Advisors), was dubbed 'the man who saved Waterstones' in 2014 for his successful efforts in championing the bricks-and-mortar bookshop model and competing financially with Amazon.

And when looking at the other key boardroom figures, Sullivan sees a cultural fit: 'The other directors, such as the finance director, retail director and COO, they're all my age roughly. There's also a large number of women with children here, so it's a very comfortable place to work where I feel like a natural fit.'

The issues that established Daunt's reputation in 2014 are of course still relevant in 2022, perhaps more relevant. This is not lost on Sullivan, who feels the burden of protecting the Waterstones brand against varied threats. She says: 'Retail is going through a tough time with Covid, and coming through this latest wave of the pandemic with us safely up and running is nothing to sniff at. There's a very loyal and committed staff and customer base who have a deep affection for the brand – I want to make sure I'm protecting that brand and continuing the good work people have done here.'

In terms of more BAU work though, Sullivan is forced to be on top of all things related to data privacy and GDPR when it comes to Waterstones' website. In addition, Waterstones has stores in Amsterdam, Dublin and Brussels, which adds local complexities to such regulations.

Sullivan is also exposed to various facets of media law, which tends to be a niche specialism for private practice lawyers. As such, she is quickly becoming adept at navigating slippery issues pertaining to libel: 'I've had a couple of queries where someone is concerned about the contents of a book we're selling, and then I'm just trying to get the balance right between doing our role of making books available to the public while being aware of what our legal obligations are.'

As Waterstones' only lawyer, Sullivan relies heavily on external counsel for input. Thanks to her longstanding ties with HSF, Sullivan has retained the firm's advice throughout her career among other long-term advisers. However, the company itself has different legacy relationships that Sullivan has had to get to grips with: 'A number of firms have an existing relationship with Waterstones; they've been good at reaching out to me and introducing themselves. That's a very valuable way to understand the history of the business here. I just had lunch with one of the partners at Slaughter and May, which is a fantastic law firm. Our shareholders have a good relationship with Clifford Chance. So I'm just trying to piece it together.'

There is no formal panel arrangement though – something which chimes with Sullivan's own philosophy on managing external counsel: 'My own view is that panels can create a lot of admin and hassle for us and the firms. To the extent you can simplify things for everyone and not tie people up doing admin, the better.'

As an extension of this, Sullivan tends to prefer a light touch approach from law firms, rather than an assault of legalese: 'It's crazy how often you'll see a law firm just go off on a frolic where you've been very clear with them that they only need to look at something for a few hours and produce some bullet points. I try to be really clear with people that I want something quick and dirty so they don't end up spending too much time and wasting the budget.'

It is not just Sullivan's legal skills that have expanded since joining Waterstones – she has since become a keen writer in her spare time. 'It's only to sell as many books as possible though, I don't have any great literary ambitions!', she remarks. But with her newfound novelist persona, Sullivan concludes with an apt analogy: 'I keep coming back to the John Grisham books – what about them captures people? Those books deliver justice, often it's a David and Goliath situation that captures my imagination still. And it's sometimes a similar uphill battle at Waterstones – you're coming in trying to protect and grow this business in the face of Amazon, by offering a more personal alternative for book lovers.' ■

At a glance
Elisabeth Sullivan

Career
2005 Trainee, associate and senior associate, Herbert Smith Freehills
2013 Legal manager – Perenco
2018 Senior legal counsel (freelance), Centrica
2019 Senior legal counsel (freelance), Sasol
2020 Group legal manager, Ineos
2021 General counsel, Waterstones

Waterstones – key facts
Size of team One
Legal spend Approximately £1m for 2019/20 (excluding VAT)
Preferred advisers Bird & Bird, Clifford Chance, Lewis Silkin, Osborne Clarke, RPC, Shoosmiths, Squire Patton Boggs

Wayne Spillett, Vodafone

BY TOM BAKER

Vodafone's head of legal for commercial operations, IP and corporate secretariat on being a diversity champion and holding panel firms to task on their ESG credentials.

Unlike some flightier in-house counsel, Vodafone's head of legal for commercial operations, IP and corporate secretariat, Wayne Spillett, has stayed loyal to the company for close to 13 years. After a lengthy conversation, it is easy to see why.

Spillett studied both English and French law at the University of Exeter, developing a keen interest in EU law. The logical next step was a training contract at Lovells, where he qualified as a competition lawyer working out of both the firm's London and Paris offices.

While that role scratched an academic itch, Spillett needed to come back to London full time. His boyfriend (now husband) was anchored to London as a property lawyer at Trowers & Hamlins. A role cropped up at Vodafone as a legal counsel in the competition team. As Spillett recalls, it had the attraction of almost mirroring a City law firm, having a sophisticated in-house legal team with expertise spanning M&A, litigation, patents, privacy and more.

While some GCs cite philosophical musings on the allure of going in-house and getting closer to the business, Spillett joined Vodafone for more straightforward reasons. But it is clearly one of the best decisions he has made: 'I moved back for practical reasons to be with my husband, and I thought I'd give Vodafone a couple of years. That was in 2009 and I'm still here!'

Spillett stayed in his competition lane for the first seven years at Vodafone, with his daily dealings seeing him engage with industry bodies and representing the company before the competition authorities. Perhaps the most defining mandate from that time, however, was a large antitrust damages action pursued by Vodafone in the High Court against three semiconductor companies active in the smart card industry.

In 2014, the EU Commission fined Infineon, Philips, Samsung and Renesas €138m for their roles in a price fixing cartel in the production of smart cards, which are used in mobile phone SIM cards. Spillett recalls: 'The big challenge in that role was moving into contentious antitrust work which we hadn't done before. We took on the chipset manufacturers who make the SIM cards – we'd been overpaying for years because of a cartel in the supply chain. We realised we had suffered a huge loss and we needed to redress it.

'We took them to the High Court and brought the litigation forward. I led on it for a couple of years before moving into another role. For Vodafone legal, that was a first.'

Spillett quickly realised that an in-house career is far more malleable than a private practice one. He was soon encouraged by Vodafone to branch out with its mantra of: 'if you want to move up you have to move sideways.' In 2016 an opportunity presented itself and Spillett moved up (and sideways) to become head of legal for partnerships and alliances.

The move allowed Spillett to expand his horizons: 'Vodafone does consultancy for big telcos globally, whether its Telecom Argentina or our branded partners in Qatar or New Zealand. I took over the team that did all those deals, so I rolled my sleeves up, got on planes and negotiated commercial deals. I re-invented myself a bit.'

It was during this time that Spillett handled another career-defining matter: 'We divested Vodafone Qatar, and it became a partner of the company. I went all over the world, from Argentina to Singapore to negotiate similar deals with telcos in those markets. That was tough, I was the only lawyer in the room across the table from CEOs. I felt quite out of my comfort zone doing it, it was a great challenge and it helped me to grow as a business adviser.'

That experience of branching out gave Spillett the necessary confidence to step up and become head of legal for commercial operations and IP in 2018. As of this year, he has also added company secretariat to his remit as part of a maternity cover.

Spillett now controls a team of 30 staff, mostly lawyers but also risk and compliance professionals, trademark attorneys, patent attorneys and company secretariat professionals. He reports into group general counsel Rosemary Martin, who is a bit of a legend in in-house circles.


Photographs: Brendan Lea

> **We are in the category that takes ESG very seriously, and we did that by building it into our tender. It did make a difference between the firms we brought on and those we didn't.**

Spillett gives a personal account to back up her reputation: 'Rosemary is excellent as a leader. She's very astute, got great energy and is very forward-thinking. Whether that's tech or diversity and inclusion she's always pushing the boundaries.

'When I first I joined Vodafone, and it was true at Lovells, I wasn't out (as gay) at work. It was small gestures of allyship from people like Rosemary – like hosting an LGBT lunch where the executive committee get to know the LGBT community better – that made me feel more comfortable in my own skin. In some ways I held myself back a bit when I wasn't out at work, but Rosemary was the first one to show me support from the top.'

While he did not think about the subtle differences much when first entering in-house law, after 13 years and with his current responsibility of overseeing Vodafone's legal advice panel, Spillett has had a chance to reflect: 'In-house, no one ever comes up to you and says: "write me a ten page note on X." But on the flipside, you are often the only lawyer at the table, opposite a group of 20 people all of whom are ten years older than you and with lots of commercial experience. Early on I felt out of my comfort zone, but you quickly become that business adviser. You're there to give your opinions on a new product or service, not just on the law.'

Having a relatively large in-house team, Spillett mostly relies on his external counsel for one-off, large projects or those which require specialist knowledge. But like most modern GCs, he also seeks to drive as much value out of the relationship as possible.

Before last year's refresh, the previous panel saw Spillett instruct his firms to focus on legal tech. Out of that ambition came Sprite Platform, an all-in-one internal dashboard covering matter management, knowledge management and interactive playbooks created in collaboration with his external advisers.

However, for the current iteration of the panel, which comprises Slaughter and May, Linklaters, Hogan Lovells, Latham & Watkins, Osborne Clarke, TLT, Wiggin and Deloitte Legal, diversity and inclusion has been highest on the agenda. Spillett notes: 'We are in the category that takes ESG very seriously, and we did that by building it into our tender. It did make a difference between the firms we brought on and those we didn't.

'In fact there were two firms who didn't make it onto this panel, where the strong feedback we gave was that they weren't communicating enough in those areas. They might have had the credentials, but we didn't see it.'

Spillett is quick to state however that Vodafone legal is not trying to be dictatorial with its requirements, describing it more as a mutually beneficial relationship: 'We're not perfect either, so we don't tell firms what we think ought to be done. There's no stick, it's much more of a collaboration and discussion. But we do ask them to report on the number of women working on our matters, the number of other people with diverse characteristics, and they have a target for those.'

And it appears this approach has worked, as evidenced by the change in firm culture. Spillett recalls the transformation from previous panel tenders: 'We used to go once a year around all the firms and meet them all in a day. I was in the meetings with two of my colleagues who were women, and it really struck us how few women there were around the tables. It was very clear the people owning the relationship, the senior people in charge, were very much of a certain

type and we needed to do something about that. We saw changes immediately. We were deliberately being a bit disruptive.'

There is no doubt that Spillett can consider himself a diversity champion – not only does he drive change externally with his law firms, internally he is an executive sponsor of Vodafone's LGBT+ & Friends network, an initiative he has been involved with for about eight years. He is also an executive sponsor of Vodafone's multicultural inclusion network.

However, he admits that at times it pays to be flexible with who you instruct: 'Sometimes when you've got the most complex deal in the industry at the time, or you're sued by a really aggressive opponent, you just need the best in the business no questions asked. You don't necessarily overlook [ESG credentials], but you go for the safest pair of hands. And I think that's just being astute as a general counsel. But that's a very small part of being a GC.'

In terms of more routine panel requirements, Latham, Deloitte and TLT are the new entrants onto the roster, all of which were drafted in to fulfil a certain niche. Spillett says Latham was brought on to increase competition for advising on large deals, particularly relevant for Vodafone Business, the company's dealmaking outfit. TLT was appointed for its end-to-end service, with a view to advising on a variety of matters, while at the more niche end, Deloitte has been enlisted to assist with IT, legal tech transformation and risk management. On opting for the accountancy firm, Spillett notes: 'Those are all parts of the legal function but not services that traditional law firms tend to offer.'

Fundamentally, Spillett's philosophy on instructing firms is a simple but effective one. He concludes: 'Day to day, the key is wanting to work with people. It's not just a quick transactional relationship – it's often deals that go on for months, there's travel together, late night conference calls. You want to get on with these people otherwise you're making your work life miserable.

'This is why diversity so important. It makes for a more creative and powerful team. If the cultures chime, it's going to be mutually beneficial.' ■

At a glance
Wayne Spillett

Career

2006 Trainee then associate, Lovells
2009 Solicitor, competition law, Vodafone
2013 Senior solicitor, competition law, Vodafone
2016 Head of legal, partnerships and alliances, Vodafone
2018 Head of legal for commercial operations, IP and corporate secretariat, Vodafone

Vodafone – key facts

Size of team 30
Legal spend Undisclosed
Preferred advisers Slaughter and May, Linklaters, Hogan Lovells, Latham & Watkins, Osborne Clarke, TLT, Wiggin, Deloitte Legal

New competition rules for distribution arrangements

Brodies discusses exemptions from competition law rules for vertical agreements in the EU and UK.

On 1 June 2022 new rules came into force in both the EU and UK concerning exemptions from competition law rules for so-called 'vertical' agreements.

Vertical agreements are between companies at different levels of the supply chain, for example an agreement between a manufacturer and a distributor, and then onward between a distributor and a retailer. Because the parties to a vertical agreement are not generally competitors, agreements between them enjoy a general or 'block' exemption from competition law rules, provided certain conditions are met. Those conditions in turn point clearly to types of agreement that not only are unprotected by the exemption, but are very likely to involve a competition law breach in and of themselves.

The block exemption was previously provided in the EU by the 2010 Vertical Agreements Block Exemption Regulation (known as 'VABER'), which was maintained in UK law post-Brexit.

That expired on 31 May 2022, and a new revised VABER came into force in the EU on 1 June. At the same time, a replacement for VABER came into force in the UK (the Vertical Agreements Block Exemption Order, or 'VABEO'). Both instruments update the conditions for an agreement to be exempt, but each makes subtly different changes. The law on vertical agreements is therefore now different between the UK and EU, for the first time ever.

The key points

VABER and VABEO apply the same basic approach: vertical agreements that meet certain conditions (including that neither party to the agreement can have a market share higher than 30% at its level of the supply chain) are exempted from the general prohibition on agreements with anti-competitive objects or effects.

However, some types of restriction remain prohibited, while some 'hardcore restrictions' are so serious that including one in an agreement will result in the entire agreement losing the benefit of the exemption, as well as themselves being very likely to be a competition law breach.

Hardcore restrictions

The following are the key examples of restrictions that fall into that category:

- Resale Price Maintenance (RPM) clauses, meaning a seller cannot (directly or indirectly) set a minimum or standard price at which the buyer must sell (or indeed advertise) the seller's products – this is the most serious type of 'vertical' breach, consistently leading to large fines.

- Restricting the territories into which or customers to whom the buyer party can sell products – unless the seller is only restricting 'active' sales into a territory or customer group allocated to another buyer or reserved to the seller ('active' sales means pursuing customers, as opposed to 'passive' sales where the customer seeks out the sale, which cannot generally be restricted).

- Preventing buyers within a selective distribution system (where the seller will only sell to or through buyers who meet certain criteria) from supplying other buyers within the system, though they can be prohibited from selling outside the system.

- Restricting the ability of a supplier of components to sell those components to third parties as spare parts.

- Preventing the buyer from making 'effective use' of the internet, including by selling via price comparison websites.

- Imposing Most Favoured Nation (MFN) or price parity clauses – ie requiring that a product or service may not be offered on better terms on any other platform or channel (called a 'wide MFN'), although 'narrow MFNs' which stop the seller from

VABER/VABEO still will not protect a non-compete clause longer than five years (including if it is indefinite or automatically renewable) or that applies post-termination.

(L-R) Jamie Dunne, Charles Livingstone

undercutting the buyer on its own channels, are permitted. There is some divergence here – the EU rules only prohibit wide MFNs for price comparison websites, whereas the UK rules prohibit them entirely.

The online and MFN restrictions are new additions to the list, clearing up what had been grey areas under the old rules.

The old prohibition on 'dual pricing' (ie charging the buyer more for products to be sold online than for offline products) has been removed entirely, in recognition that online channels no longer need protection (and that, perhaps, brick and mortar retailers now do).

Other restrictions

VABER/VABEO still will not protect a non-compete clause longer than five years (including if it is indefinite or automatically renewable) or that applies post-termination, though unlike hardcore restrictions those will not remove protection from the whole agreement as long as the offending clause can be severed from the rest of the contract. The new EU rules do allow tacitly renewable non-competes where the contract can be renegotiated or terminated with reasonable notice and at reasonable cost. The UK rules still do not protect them at all.

In addition to the divergence on prohibited MFN clauses and non-competes, the other main difference between VABER and VABEO is that the UK rules continue to exempt non-reciprocal 'dual distribution' arrangements – ie manufacturers who distribute their goods both directly and through distributors, whereas the EU rules now only exempt dual distributors where their market share, aggregated with that of the buyer, does not exceed 10%.

What does this mean for businesses?

Vertical agreements will continue to benefit from an exemption from the usual competition rules until at least 2028 in the UK (and 2034 in the EU).

The new rules are more favourable to sellers. They can now impose the permitted distribution restrictions (eg prohibiting active sales into exclusive territories) on their buyer's customers, extending those down the supply chain, and appoint multiple distributors (five under VABER, 'a limited number' under VABEO) to a particular 'exclusive' territory. It is also now easier to operate selective distribution systems (and to combine these with exclusive distribution).

The new rules also make significant but double-edged changes for online sales. While buyers must now be allowed to use the internet, including price comparison websites, such online intermediaries are now treated as suppliers rather than agents, and dual pricing is now permitted as noted above. In addition, different criteria can now be set for online and offline sales in selective distribution systems. Sellers now have much more freedom to discount the price of goods a buyer will be selling in physical stores, and can apply different rules to their 'bricks and mortar' distributors from the rules imposed on their online distributors. This change may produce some rebalancing between physical and online retail, after the old VABER gave significant additional advantages to the latter.

More broadly, the small but important divergences between the EU and UK rules on vertical agreements mean that producers and distributors operating in both territories will need to take account of both sets of rules in their distribution agreements. We have significant expertise advising a range of clients on how distribution agreements are affected by competition law, so do get in touch if you need assistance or would like to know more. ■

In-house legal reimagined

In a key session at this year's Enterprise GC, *The Legal 500* teamed up with Thomson Reuters to discuss where in-house legal functions are headed in the future.

BY JOE BOSWELL

The jewel in the crown of *The Legal 500*'s in-house focused events calendar, Enterprise GC, took place on 25 and 26 April at Syon House in West London. It saw elite UK general counsel and heads of legal come together to learn and engage with each other in a professional but light-hearted environment.

On day one of the retreat, *The Legal 500* partnered with Thomson Reuters to examine where the in-house legal world might be headed, and what in-house legal teams might look like in 5-10 years' time, as part of a wide-ranging panel discussion under the title of 'In-house Legal Reimagined'.

James Byrne, solutions consulting manager at Thomson Reuters, kicked things off as moderator by referencing his organisation's 2022 *State of Corporate Law Departments* report and invited the audience to share whether they agreed that there was a readiness for further transformation among them, a key finding of the report. The overall feeling in the room was that a huge transformation had already happened during the tumultuous period following March 2020; there is an appetite for even further progress, especially in the areas of sustainability and people management.

Byrne then asked the audience to highlight the significant challenges legal departments had encountered over the last couple of years. One legal head explained that they had encountered one matter that had made them rethink the way they operated their department, where a colleague had been poached by another business unit. This situation, in their estimation, would have been avoided in a face-to-face office situation. Being able to assess team dynamics was one advantage of office, rather than home, working.

Another participant related that the pandemic had highlighted several unique legal challenges to them. Given their company's operations, staff members were obliged to remain in the office during the worst of the pandemic. The business was forced to create a safe working environment to continue generating revenue, an endeavour that the legal department was intimately involved in. This had the added benefit of ensuring that the entire company was genuinely invested in ensuring health and safety and efficient office working conditions, which continued post-pandemic. The speaker was of the view that the lesson of the pandemic is that general counsel must now think more holistically about their work and the values of their organisation going forward.

The conversation then moved on to analysing how efficient participants felt their businesses had been when transitioning to the pandemic situation. One participant stated that everyone within their company was able to work agilely from an early stage, though it had been challenging to get all members of their organisation to think in terms of risk management, which made it difficult to create an effective model to work from.

The main takeaway in terms of technological adoption by in-house legal functions from the pandemic was undoubtedly the large-scale deployment of audio-visual conferencing software, which was used *en masse* over the pandemic and continues to be utilised regularly by everyone in attendance, despite the drawbacks compared to in-person meetings being highlighted. One GC railed against the often boring Microsoft Teams calls they were subjected to, while another echoed the views of many when pointing out that conferencing software leads to many in larger groups feeling left out, which is not ideal for a meeting. With that said, the technology provided certain benefits. One delegate waxed lyrical about the benefits of getting into the habit of reaching out to other business units regularly, something that started in the pandemic but continues today. Even teams geographically far apart can easily meet this way, effectively removing the silo effect that can often occur in larger organisations.

Adding value

Byrne then asked whether the wider transformations were being led by legal teams that were attempting to align themselves with the strategic focus of an organisation. There followed an interesting and informative conversation about the use of metrics to demonstrate the value of the legal department. Participants were split on how useful these can be to a legal department. Some saw the value of KPIs, while others were adamant that this could muddy the waters when getting across the value of a team. One participant felt that the effectiveness of KPIs is extremely operationally

dependent. Since the start of Covid, their organisation had witnessed a large drop in demand, creating a governance challenge that had to be solved by the legal team. What they did was an immense benefit to the organisation, but something that was hard to quantify using hard statistics.

Most in attendance believed that there was no one-size-fits-all approach on this matter, but that statistics have their place in demonstrating value. One participant added that, at the end of the year, their team would produce a detailed list of what it had achieved, which had proven to be a significant help in getting across their value to business leaders, albeit much of the report made use of the less-quantitative medium of stakeholder feedback.

Another speaker echoed this mixed approach. In their estimation, pure lawyers are fundamentally different to businesspeople, and the best in-house teams must always remain partners to the business. The ideal general counsel should make the CEO consider them a trusted advisor who can not only help execute a business strategy, but also find a way to discuss the execution of the strategy within their own departments, a collaboration that would be far more useful for the organisation. An organisation that was unaware of the value of its legal team would not be operating to its maximum potential, which would amount to a failure on the part of the legal department. This, however, was a contested point. One lawyer in attendance felt that this was a privileged perspective, as any organisation with a large legal team will have members who are located far away from the strategic conversation, and it is not necessarily their fault if they are unable to demonstrate their value effectively.

Byrne then asked those in attendance if they agreed with his analysis, which is that technology has the potential to demonstrate value. One lawyer stated that their business had undergone a transformation, which had included the production of internal reports that would allow clients to self-serve. They added that legal did not form a core function within their company, and that the reality was that if a major issue arose, external lawyers would be hired to carry out their role. It was important that one's judgement could be trusted. A way to do this was to demonstrate the savings they could secure for a business, as well as what they delivered, which technology absolutely can help with. Another participant stated that it was extremely difficult to get businesspeople to appreciate what might have gone wrong had the legal function not been there to prevent a threat from developing.

Tech issues

The moderator then invited the attendees to state the areas in their organisations in which they would welcome the use of technology. A participant stated that there appeared to be a lot of legal tech pertaining to AI, contract management and contract production. But they struggled to quantify the value of the legal team and believed that a technological solution in this area would be extremely valuable, but that the current state-of-the-art does not allow for that.

Another felt that, without rigorous time-logging, it would be exceedingly difficult to truly get across everything that their team did, but that this would cause far more problems than it would solve, which is why it is an approach that is not taken by most in-house legal teams.

Given the tight cost constraints that they were under, those that were part of the discussion agreed that it was a case of finding the right tech at the right price. There was a contribution from one participant who was unsure of the time it would take to acquire the perfect software, or the amount of money needed to make the software more bespoke, and whether this was worth it.

Another stated that technology had to make things simpler for the business. They had found that the use of tech within their organisation had improved things. While another participant explained that their organisation made use of an asset management system that, while excellent, had cost a large amount of money that they could not justify. With that said, they felt the pace of technological change was inevitable, especially given that the younger generation of lawyers were more tech-savvy than the old guard.

One speaker was of the view that general counsel do not comment enough about the technology that they were utilising. Teams that were restricted by resources needed only to make use of basic technology to improve their performance markedly.

The conclusion from this being, as James Byrne pointed out when summing up, that businesses should closely examine how they use the technology they already have, while considering onboarding useful new technology when they are able.

Many thanks to Thomson Reuters for partnering with *The Legal 500* at Enterprise GC, and a special thanks to James Byrne for moderating the session so expertly. ■

James Byrne,
Thomson Reuters

Conclusion from James Byrne

The focus of the session was based on the key findings of the Thomson Reuters 2022 *State of Corporate Law Departments* report, which highlights the enormous operational pressures that in-house legal departments have faced over the past two years. Legal departments have taken a crucial role in safeguarding and supporting their organisations through unprecedented times, while rapidly adapting to the practical constraints those times brought.

As some practical pressures have eased and organisations settle into new dynamics, it was evident from the conversation that legal departments are continuing to re-evaluate how they fit into this changing landscape, and the potential for further transformation. The changing role and demands on the GC and their teams, and how best to navigate the path going forward, also emerged as a key theme of the conference and resonated strongly with the audience in the room.

There was diverse opinion and animated discussion in terms of how to shape the direction and purpose of the in-house legal team, the role that work-life balance plays and how to incorporate technology into the new ways of working, which aligns with the report findings that there is a need for ongoing evaluation in both the departmental and organisational framework of the business, as well as in a wider societal context, of the in-house legal department.

On a final note, it was an honour to moderate such a dynamic discussion with a packed room of over 40 legal leaders in a face-to-face environment. While hybrid working is here to stay, in person events like this continue to be invaluable.

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The pandemic has transformed legal work… to an extent. But the journey must continue

Alexandra Graydon of Thomson Reuters reflects on the impact of Covid-19 within her corporate legal team and looks at how hybrid working could evolve in the future.

I was interviewed last year about how our legal department coped with the pandemic hit. I talked about how we adapted to remote work far better than expected, and the big role that tech played in making it all pretty seamless. That type of story is well told now. But, let's be honest, there are a few more chapters on hybrid working to be written yet.

If you work in corporate legal, I'm sure you'll agree that there's always 'more to do'. Long hours, long task lists, pressure to do more with less. And until recently, technology played a fairly minor role in how we got things done. The industry has been relatively slow to get onboard with digitalisation as a means of boosting productivity.

Technology for good

At Thomson Reuters, we did make some progress pre-2020. Our legal team is large and global, so we were already working on ways to centralise our materials and processes digitally. The pandemic accelerated those efforts. It really changed our mindset on the role of technology – and we were soon exploring what else it could do, like prioritising our work more intelligently.

I sometimes smile at how we used to do things – like taking it in turns to read out our to-do lists in team meetings. It's very different now. We've got more sophisticated tools that help manage our resources dynamically, and we do far more real-time collaboration thanks to the cloud.

Hybrid working has also given us far more flexibility over how we manage our time. For example, one member of my team recently adjusted her hours so she can volunteer her time giving humanitarian aid. It's great that people are able to manage their day-to-day legal work alongside activities that contribute more widely to society.

Distance still to travel

Yet the flipside of hybrid working is that boundaries have become blurred. I'll freely admit that my work-life balance needs attention. In fact, it's probably become a lot worse since the pandemic began. I find it very difficult to switch off from work, and not to start responding to emails after dinner or over breakfast.

While technology may have liberated work from the confines of a 'place', it has also brought work into our private 'space'. I'm hopeful that we can find ways to balance that in the coming years, and I'm keen to hear how other legal departments are managing it.

Getting more personal

Another impact of hybrid working, which we hear a lot about, is the loss of face-to-face interaction. That ability to walk up to someone and ask a basic question, or to empathise with a colleague about their caseload over a coffee, has diminished.

Like many managers, I've tried to offer virtual alternatives. For example, I keep an open slot in my calendar everyday so people can call me about anything, no matter how trivial. And both within our team and across the organisation, we've implemented all sorts of social and wellness schemes to try and keep us connected.

> I sometimes smile at how we used to do things – like taking it in turns to read out our to-do lists in team meetings.
> **Alexandra Graydon, Thomson Reuters**

But it does make me think about the long-term implications. Given that hybrid working is here to stay – people entering the job market simply expect it by default – should we even try to replicate those 'old' aspects of work? Should we be thinking about our professional interactions and relationships in a whole new way?

Much is talked about offices becoming more like hubs or destinations, used primarily for specific in-person activities or events. I can definitely see that happening. But there are flipsides to that as well.

Certain employees may not have the space or right conditions to work from home, meaning they'll go to those hubs fairly regularly. While others, who are fortunate to have a comfortable home office, will typically stay away. Could that create a demographic divide within the workforce?

Similarly, could hybrid working disproportionately hold women back from career progression? Those who need to balance work and family needs by working at home could miss out on key in-person events or opportunities that would help their development.

Momentum for change

So, I've probably opened more questions here than answers! But I do believe that's the phase we're in right now – with many uncertainties to work through, and many possibilities not yet fully explored.

The pandemic pushed us all to embrace digitisation and let go of past practices, but the new has not yet totally eclipsed the old. Therefore, I see the next phase of transformation as the most exciting one to date, with a big focus on making hybrid work better for people. ■

Alexandra Graydon, general counsel, Thomson Reuters

Alex Graydon has been a commercial lawyer for over 20 years. She began her legal career as a know-how officer in a City firm of solicitors, going on to become a legal publisher at Sweet & Maxwell, Thomson Reuters' book-publishing arm.

After a period in private practice as a corporate and commercial lawyer, Alex returned to Thomson Reuters, where she is now assistant general counsel based in London. She is presently working on a change programme to transform the delivery of legal services using automation, collaboration and knowledge tools and solutions offered by Thomson Reuters.

Staying on top of employment law risks

Jonathan Rennie, partner and lead presenter on TLT's Employment Law Focus podcast, shares his highlights from the series.

In 2019, I felt compelled to launch a podcast that went beyond case updates and tackled some of the increasingly complex and challenging issues that HR and legal teams are facing. At the time, the media was aflush with issues such as the Henry Weinstein allegations, the #MeToo movement and LGBTQ+ rights and this was spilling over into questions about the culture in UK businesses.

Three years and 16 episodes later, there's still no lack of topics to cover and the positive feedback and Apple rankings show just how high this is on employers' agendas. And rightly so; we invest in this because it's such a high profile and potentially damaging area for things to go wrong for our clients. It's a board-level issue, and as much about the court of public opinion as it is about the court of law.

The volume of these complex, multi-faceted issues is growing and they're often being pushed up by the ESG agenda – a fertile ground for issues that question how employers treat their people and if and how they address the myriad issues that affect their staff, from sexual harassment, burnout and flexible working to employee monitoring and race discrimination.

With ESG being the acronym that will define our era, it's never been more important for HR and legal teams to keep track of how the law and expectations are changing, new risks, and where they might be falling behind, meeting or exceeding best practice.

Listeners' top concerns

Burnout and workplace stress has been our most popular episode by far, attracting 920 listens and counting. Prompted by the World Health Organisation categorising burnout as a workplace disease in May 2019, there was a rush of interest in what causes this occupational phenomenon and what employers should be doing to prevent and manage it.

In my experience, claims relating to burnout and stress can get extremely complicated and it's becoming harder for employers to prove that they discharged their duty to the employee. In the episode, we discussed questions like: is working from home a sufficient reasonable adjustment for an agoraphobic employee? How can modern working practices like hot desking affect people with social anxiety disorders? And are you obliged to create a new post for somebody who is disabled?

We're entering an interesting phase in post-pandemic work at the moment with people realising that flexible working can be a double-edged sword when it comes to work-life balance, especially for women, and I'm sure we'll be revisiting this topic again in this context.

Unconscious bias has also over-performed, considering it was our eighth episode and is already rounding off the top four with 749 listens. This is interesting because in the media you hear a lot of stories about unconscious bias perpetuating prejudice against certain groups of people, as well as heavy dismissal of unconscious bias training as the solution, and yet not a lot of success stories.

It's certainly a challenging issue for employers to address, and we looked at how some organisations are going about it, such as linking their ED&I strategy with people's individual objectives, so

> In my experience, claims relating to burnout and stress can get extremely complicated and it's becoming harder for employers to prove that they discharged their duty to the employee.
> **Jonathan Rennie, partner, TLT**

that they're much more embedded in day-to-day work and the way people carry out their roles, rather than just being able to demonstrate that an annual training session has been held.

I'd also like to acknowledge our more recent working parents episode, with 536 listens and still rising up the charts. As I mentioned, the nature of the issues in relation to this are evolving all the time and there's a huge cross-over with gender equality, so I expect this to remain top of the agenda. The law and employers' policies and support mechanisms will need to keep track with the issues and ensure that we aren't taking one step forward with flexible working and ten steps back in other areas.

New episodes

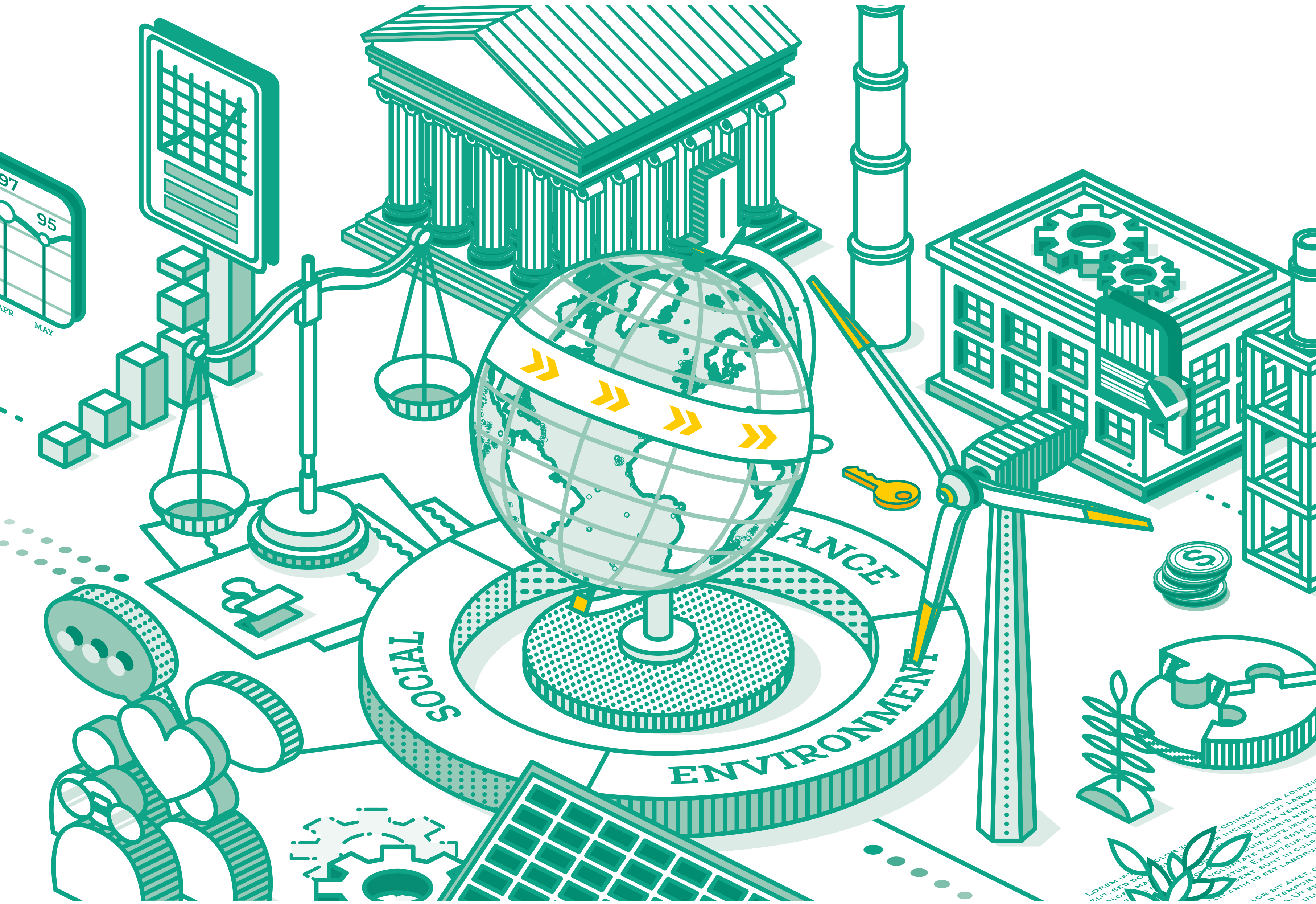
More recently, we acknowledged a possible inflexion point for the 1.2 billion people in the world who identify as disabled, with an episode on the impending rise of the disability agenda. This is the largest marginalised group in the world and in 2021 there were various indicators from the government and society that we're going to see more rights in this area, more awareness, and more pressure on employers to address equality, diversity and inclusion issues with regards to people with disabilities.

We discussed everything from employer attitudes when deciding what is and is not a disability to the challenges with using medical reports – quite a practical discussion. Disability discrimination kicks in for all sorts of reasons and in our forthcoming episode on gender equality we talk about how things like the menopause – which doesn't have a specific legal protection – can be classed as a disability, so I think this is a significant risk area for businesses and something to focus on.

We're often joined by people from across the firm and one of our regulatory partners joined me recently for a conversation about five new challenges with returns to work since the pandemic. For example, employers' duties and the legal risks associated with people returning from long periods out of the business to a hybrid working world where they have less face to face time with colleagues.

Likewise, one of the co-chairs of our BAME network joined us for a discussion about race discrimination and shared some invaluable insights into the role and benefits of affinity networks including the role of data in improving equality, diversity and inclusion in business. Regulators and investors are flexing their muscles here, and many companies still aren't treating this topic or cases with the seriousness it deserves, so it's another important listen.

We encourage people to send us their feedback on the podcast and are always looking for suggestions of new topics, and any general or practical questions we can address. ■



Advising and acting for clients on ESG-related risks

In a webinar hosted by *IHL* and sponsored by Travers Smith, law firm partners, GCs, and experts from the Bar met with a crisis-management guru for a wide-ranging debate on risk and ESG.

BY NATHALIE TIDMAN

ESG imperatives have never been more at the fore for partners, GCs, or indeed any professional with exposure to related reputational risk. A webinar, hosted by *The In-House Lawyer* and sponsored by Travers Smith brought together partners, experts from in-house, the Bar and a crisis-management guru for a diverse and challenging debate on the ESG-related risks – and rewards – at the top of the agenda.

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Nathalie Tidman, The In-House Lawyer: What are the main ESG risks that corporates are facing right now?

Rob Sully, Advanz Pharma (now at Amadeus Advisory): The key risk is how to position our ESG accomplishments and achievements in the absence of any kind of level playing field for positioning those. It's great that there's this sudden ramp up of interest in ESG credentials from stakeholders, investors and employees. We've seen two risks. Firstly, the initial risk of exaggerating your ESG accomplishments and then creating corporate accountability because you've publicised points that people have relied on, whether because of market pressure or simple over optimism. The wider risk and perhaps frustration we're finding is around the risk of being miscategorised in the multitude of different ESG disclosure regimes that exist, some of which don't even mention governance, despite it being one of the three letters of ESG.

Nathalie Tidman: From an M&A point of view, what are you seeing in the market?

Samantha Thompson, Anglo American: Increased focus and scrutiny on ESG matters in the business. That has to be built into your M&A strategy. The type of due diligence that you do; you need to be more certain of human rights, the environmental angles, the societal angles of what you're doing, taking into account a broader range of stakeholders, than one might have otherwise done in an M&A context. The other thing that's striking is the reputational angle. It's not just about the numbers and asking: 'Is this going to make a return on investment?' It's actually also: 'What is the reputational impact going to be?'

One thing that is a real risk is being accused of greenwashing and potentially bluewashing, so overstating your commitment to social responsibility. That is a risk that can come from the best of intentions, as you want to be saying what you're doing, but actually you run the risk of getting ahead of your skis and overstating what you're doing. That can have a backlash from the greenwashing angle.

Nathalie Tidman: How is the ESG regulatory landscape playing out for these types of risks?

Doug Bryden, Travers Smith: You've got your first bucket of regulations which deals with the underlying subject matter of ESG. These are your traditional regs, rules, commitments on what you can and cannot do at an operational level. They have over the last 30 years done a job: controlled pollution, limited the use of certain chemicals, promoted better health and safety. However, these traditional regulatory levers don't deal with the realities of our modern global economy, in which a lot of the ESG problems have migrated elsewhere out of the reach of our operational regulatory frameworks and courts.

In response, the EU started to roll-out its 'new-wave' regulations, which looked at market access controls, as well as naming and shaming and enhanced corporate transparency. In the beginning these very much focused on chemicals and products which came into the EU – effectively creating at least some extraterritorial effects, not directly but by engaging market access and wider consumers, stakeholders and investor pressures. Over the last few years these mechanisms have moved across into broader ESG disclosure and greenwashing regimes.

The EU is now taking ESG regulation to another level and the UK is following suit. The burgeoning sustainable finance ESG regimes, in particular, are causing real change. Although they have little in the way of regulatory teeth, it's all about transparency and engaging market pressures. There is also real legal risk with these public statements and I would urge everyone to look very seriously at this, because you will increasingly be held to account regarding those statements.

Nathalie Tidman: What are the main areas where ESG risks have crystallised into a litigation trend?

Heather Gagen, Travers Smith: I would highlight efforts to expand the scope of corporate liability. That looks very different now than it did five or ten years ago. Parent company liability claims are one example of the effort to impose essentially negligence liability on a UK-domiciled company for something that has happened overseas in its operations, often in a very, very different operating environment. Also, value chain litigation. That's potential liability arising from issues which are not even within your own group – that's looking at conduct across your commercial value chains.

Adam Heppinstall QC, Henderson Chambers: Some of these claims are because there has been loss and the claimants will say there ought to be compensation, but claims are also often brought to highlight a problem which has occurred abroad and which has fallen between the stools of multinational regulation. In that space we're seeing activist-type litigation. The UN Guiding Principles aren't currently front and centre as part of the regulatory arsenal in this country. People are aware that there are specific laws now in France, Germany and Norway. The one route that is available here, and it really is on the rise, is complaints to this little known body, the OECD National Contact Point, which is there if you've got a complaint about a multinational company in the UK that you want to allege has breached human rights. Because the OECD guidelines incorporate the UN GPs, it's a way of alleging that a big multinational corporation has breached human rights. Further, if the NCP process does not give you what you are looking for there is always the possibility of bringing a judicial review against the NCP, not least to attract further publicity to the underlying complaint.

> **If firms don't allocate sufficient resources, time and thought to think through their plans carefully, there is a greater risk of non-compliance, misstatements, or overestimations.**
> **Nayeem Syed, London Stock Exchange Group**

Nathalie Tidman: Are there any new challenges and risks emerging? How are you expecting them to impact your business?

Rob Sully: My worst fear is about greenwashing and where that goes, particularly with a lot of national tenders increasingly taking ESG into account. What do you do if a company is gaming the system when it's exaggerating its ESG credentials, and it's winning tenders off the back of that, on the basis of: 'I'd rather have the business now and defend it later, because who's actually going to challenge?' If my business loses to a company like that, how do I challenge that later and show that actually, that ESG point was a determining factor in losing a tender to someone that's exaggerated? If we're not careful, this becomes something that could be used quite insidiously and undo the good that ultimately, many of us are trying to build up.

Samantha Thompson: We are obviously in an energy transition. A lot of that is driven by the recognition that the climate change piece of ESG is happening, so how does a business remain relevant, and be sustainable and resilient through a transition, where perhaps the business model actually needs to change to reflect that societal expectations and demand for products are changing? Technology is changing too. It's part of the bigger strategy, but then that does all play into your M&A strategy as well because, particularly in my sector – mining and metals – any assets that we acquire now, we want to be relevant, not just in two years, but in 20 or 30.

Nayeem Syed, London Stock Exchange Group: Many firms are now moving very quickly with their ESG plans and as such, transforming very entrenched concepts, business models, structures, as well as whole ecosystems of interdependent relationships. Given that pace, lawyers should help advise their internal clients to not underestimate the amount of analysis required and resulting work that's involved. If firms don't allocate sufficient resources, time and thought to think through their plans carefully, there is a greater risk of non-compliance, misstatements, or overestimations.

Nathalie Tidman: What governance decisions are people seeing as being priorities, in terms of managing risks, and also protecting reputations?

Doug Bryden: The level of commitment to managing the risk around statements is certainly increasing (we're seeing libraries of pre-approved and verified statements), which is very similar to what we see with financial statements. It's the same level of rigour with lawyers crawling all over it, making sure that there is alignment, there are own-goals. That didn't happen a few years ago. All the litigation risk is driving that change.

Lawrence Dore, DRD Partnership: We work with a lot of companies helping them on ESG reporting. For all those of you who have worked in-house, you will understand that there is an annual treadmill that you leap on – results, AGMs, annual report. The addition of your sustainability report adds new demands on time and data collection. So new risks emerge – does the expertise exist, what data is available, has it been verified, are the KPIs right and measurable on an on-going basis? In short, it's more pressure.

Nayeem Syed: In terms of governance, it is important to check if the top-down approach is reaching the bottom. Is it embedding in people's day jobs? Is there enough risk assessment going into that, if this is

Having the right governance in place is critical. Having a track record to show that you take these things seriously is also important.
Doug Bryden, Travers Smith

moving quickly? Often, it's about stepping back or zooming in to make sure that the firm's stated objectives are correctly incorporated into the daily business operations and product activities and policies. That alignment will ensure more scalable progress on this.

Nathalie Tidman: What do you think the big ESG claims will be in five years? Are there particular features of the UK environment which will mean we see a particular type of claim compared to other jurisdictions?

Heather Gagen: Not to sound too much like a doom-mongering litigator, but I don't think ESG litigation is going to get smaller in five years' time. A lot of ESG litigation, particularly in the climate change space, but also where businesses have got consumer stakeholder pressure on them, has to be seen through an intergenerational lens; there is really strong pressure, both from very young people and from older people in how they look at this. There's a very interesting point on climate change litigation about whether the law can really achieve what those activists want or not. You've seen the Dutch courts be pretty interventionist and make pretty big orders requiring major energy companies to do particular things. Equally, the New Zealand courts have effectively refused to do that and said: 'we're not going to become unelected quasi regulators'. There's a real debate about how that will play out in this country.

Adam Heppinstall: The thing that we're waiting for are judgments to come out of the European Court of Human Rights in Strasbourg which state that climate change endangers human rights. Once the dam breaks in this way, then the courts in London might be persuaded to adapt courses of action which allow these cases to proceed, and that may well be how these cases are going to go in the future.

Nathalie Tidman: If the worst does happen, and the crisis moment occurs, what are the implications? What's the best way to respond effectively to that?

Lawrence Dore: People understand the world is not perfect. What they look to now is how are you going to respond? Standards are very different if you have stuck your head up above the ESG parapet and made yourself a virtue case. The higher you are, the harder to fall. You should spend time before any crisis explaining what your purpose is, what you're trying to achieve, and critically, explaining why it's hard, as it is not easy to gain total control of everything that your organisation touches. You should be upfront about the challenges and issues that you face and talk about those before, so that when these issues come, your policies and your approaches are understood.

Doug Bryden: Having the right governance in place is critical. Having a track record to show that you take these things seriously is also important. Make sure you have a team which can mobilise quickly if issues arise. This should include lawyers as well as comms and media. Steps taken in the first 48 hours after an ESG crisis often sets the drumbeat of the next two years of investigations, claims and settlement.

Nathalie Tidman: Any closing remarks to end on a positive?

Nayeem Syed: All of this is not easy and it is important to acknowledge that we're seeing so much helpful transformation. We should be grateful there is so much commitment to potentially reverse course or forgo existing revenue streams and invest to move to things that are uncertain. There is still a big job to do in terms of risk management clearly, but overall, it's incredibly positive. ■

Digital reputation management for businesses and C-suites: online opportunities and emerging threats

Partner Allan Dunlavy, who leads Schillings' digital communications division, and Rudi Moghaddam from Legendary, a tech start-up specialising in online reputation and crisis management, discuss what businesses and their senior people can do to minimise the threats that social media presents, while also taking advantage of the opportunities it offers.

In today's digital-first world, businesses and C-suites are increasingly using social media to raise their profiles, contribute to online conversation, and to market services. But alongside the countless opportunities it offers, social media also poses risks to privacy, reputation and security.

Tell us about what you do and your background?

Allan Dunlavy (AD): I've been at Schillings, protecting privacy, for nearly 15 years. I started out as a media litigator and I now help clients – including individuals who are high-profile, corporates, family offices and C-suite executives – solve knotty issues affecting their privacy, reputation and security.

With the growth of social media and the internet, threats to privacy have multiplied exponentially over recent years. The nature of this online world means that everyone is at risk – and we're all dealing with the consequences of the loss of privacy that comes along with it.

At Schillings, we've been leading in the area of privacy for a long time – and it's great to see that the value and importance of universal privacy is now being more widely recognised and appreciated. Ultimately, privacy is crucial to all of us to be able to live fulfilling and successful lives.

Rudi Moghaddam (RM): I've worked in the digital communications field for over five years now, in various capacities, from heading the private office of a CEO and Internet Minister, to running digital communications for a non-profit working to protect children from online harms. So I've seen this issue from a number of perspectives.

The psychological damage caused by the overnight digital destruction of a person's reputation can be extreme, especially if the client has been the victim of fake news, a smear campaign or a serious privacy breach. Not only are the personal costs great but, in a business context, these digital challenges can impede C-suites' ability to manage and protect their businesses, and therefore their employees, to the best of their ability. There is a professional chain of damage, especially in terms of the financial impact of reputational harm – the impact is very real, far-reaching and can easily stop businesses from reaching their full potential.

In our online world, how has the way in which businesses and C-suites engage with Big Tech and social media evolved?

AD: Over recent years, businesses and their leaders have embraced the data collected by Big Tech and social media companies, and are using this data in order to grow their businesses and access their customers and target markets. This has been the primary driver of revenue for Big Tech companies.

However, as the methods used for data collection and storage have become better understood and the wide-ranging invasion of privacy has been exposed, companies are becoming concerned about using this data for marketing purposes.

> There needs to be enough about a client online so that they are clear about who they are and what they stand for, giving them a platform to represent themselves when their narrative is challenged.
> **Rudi Moghaddam, Legendary**

I doubt that companies want to identify potential customers and sell their product to them by using data that has been collected, stored and sorted by violating that customer's privacy. And although they may not be the ones collecting the data, if companies are using it and paying for it – which sustains the entire data collection industry – there is likely to be backlash. As a result, we're now seeing a increase in companies with user privacy as their USP.

But that's not to say social media and Big Tech are not incredible tools: C-suite executives and companies are embracing social media to connect and build a direct and more engaging relationship with customers, allowing them to be more than just a faceless brand. Social media is additionally used as an avenue to receive feedback and complaints and address them: a well resolved complaint through social media can be a great tool for customer satisfaction and brand reputation.

RM: One of the demands of the evolution of social media is that consumers expect to have access to big-business decision makers, have their views heard and engage in an open dialogue with them. Following several major events of the past couple of decades – including the #MeToo and #BlackLivesMatter movements – consumers expect transparency and social advocacy, especially on the part of C-suites. So I think the biggest change we've seen is that an engagement with social media, however bold or subtle, is necessary on the part of businesses.

What risks do Big Tech and social media pose to businesses and C-suites?

AD: There are a number of issues which we're seeing as increasingly problematic for clients. Fake adverts – where a company or executive is held out as supporting or being behind a product or service – are ramping up. In addition, social media use by staff with views that don't align with the business can reflect on the business and have a big reputational impact on corporate image. Employees also often use social media to criticise or challenge their employers, again affecting reputation. Finally, we're seeing C-suite executives and their families being exposed to hate and harassment, smear campaigns and fake news as a result of actions by their companies.

RM: One of the biggest risks companies face relates to third parties controlling or dominating the individual or brand's online story. False endorsements, online abuse, smear campaigns, impersonation – these tactics are undertaken by malicious actors causing businesses and C-suites damage by overtaking their narratives. This is why there needs to be enough about a client online so that they are clear about who they are and what they stand for, giving them a platform to represent themselves when their narrative is challenged. That's digital resilience.

Is the law keeping pace with the developments of social media?

AD: Unfortunately not. The laws currently being used to address issues on social media were created for newspapers, telephones

Walking the talk

On the back of the GC Powerlist: UK 2021 report, we teamed up with Pinsent Masons to ask leading general counsel how law firms can improve their offering.

BY JOE BOSWELL

Clare Francis, Pinsent Masons: We want to look at the change agenda and what that means for GCs, especially given the unprecedented events that have hit us over the last two or three years which have really disrupted business. Given that our clients are looking at things differently, having different priorities in the boardroom, and seeking to make progress in areas such as ESG and D&I [diversity and inclusion], it will be interesting in our debate to look at how that flows through into what you expect from law firms. To kick off, we thought it would be good to start by asking, what is high up on your priority list today and how have you seen that evolve over the last few years?

David Eveleigh, Serco: Definitely ESG. We at Serco do defence and immigration; if you take defence, this has been an area some investors have been reluctant to be associated with. You have this horrible situation with Russia and Ukraine now, and defence can suddenly be seen as a social good – you have funds that would never invest in defence, now saying defence stocks are investable. ESG analysts and investors may have a very different approach; one will say we are good while another will say we are awful based on the same data. It is probably the variability of ESG that is the biggest issue for us as a company and trying to understand, 'What should you publish? What should you not publish?'

Anthony Kenny, GSK: That, plus the court of social media and the increasing importance and measurement of reputation as part of market cap. One of the issues with ESG is that it is the three topics: environmental and human rights perhaps being the most cited ones, and diversity and inclusion. We have different jurisdictions measuring those in different ways, and if you are a global company trying to keep track of all the legislation and all the ways ESG is being measured, it can get quite tricky. My hope is that, at some point, we will get a global standard we all can adhere to, but we are a way from that now.

Samir Patel, HANetf: We had the same problem on the investment side. We are trying to invest in companies that meet ESG standards, but they are not obliged to provide us with the data we need, and regulators haven't provided clear enough guidance, which means we are at risk of being accused of greenwashing. Many ESG products use screening criteria, but most observers who are passionate about ESG would probably want product providers to do more to change behaviours in a wider range of companies.

Liam Foweather, Telford Homes: It is interesting that you say that. We are the UK's most sustainable housebuilder, and that is measured by a well-established third party. Because it is quite possible to measure things like net carbon in the built environment quite easily, it is top of the board agenda. I do not think we have the same issues as companies wishing for more clarity; it is more about making sure that we continue the good work we have already done.

Alex Wilson, CBRE: Clients come to us about this as well. They are very hot on ESG because they can save money and it is a reputational gain. They can say, 'Look at us. We are best in class, and this is what we do.' Trying to have a one-size-fits-all approach does not work; a size that fits all invariably ends up fitting nobody, does it not?

Bea Miyamoto, formerly of Panasonic: You have that challenge between data for marketing versus data for oversight, and a lack of consistency that goes along with this. If you start to engage in arbitrage, you can get yourselves into real trouble. A lot of the ESG and D&I agenda is related to the transition to enterprise risk management. When I was at GE Capital, we were pivoting from thinking of risk as credit risk and financial risk to the broader enterprise risk mindset, with reputation and strategic risk being a massive part of that.

Catherine Odigie, ED&F Man Capital Markets: Going directly to the question of how roles change, you just hit the nail on the head from my perspective. Your role as a general counsel is not just looking at the substance or the commercial reality of a transaction. Rather, we are now veering more towards risk, because there is no clarity in terms of

what they ought to be measuring, what they ought to be interpreting to measure and what facts they need to identify.

David Eveleigh: This is where the law firms can help. As for enterprise risk management, I am guessing the GC role is morphing into that, which is great because this is of far more tangible value to the business than a purely legal role. The challenge from my perspective is whether the law firms can adapt to that involvement.

Brad Duncan, Children's Investment Fund Foundation: I do not think that I have come across a single law firm that has really managed to understand this from a client's point of view. The ones that can help clients measure risk, and understand and report it, will be the real winners.

Nigel Paterson, Currys: The ESG focus is partly driven by the investor community, but the pandemic has led to companies really focusing on their corporate culture as well. There have been different conversations over the pandemic, a more empathetic way of managing people. Given the war for talent, this is extremely important. We have also been grappling with hybrid working, looking at this partly through the lens of how to attract a diverse workforce. If we are looking at moving the question towards what we are looking for from our law firms, we must be much more focused on whether the law firm we want to work with shares our values.

Joe Boswell, The Legal 500: Nigel, how do you test that? Between law firm A and B, how are you able to measure whether they fit with your values?

Nigel Paterson: I agree that collaboration is a difficult thing to measure. If it is on an individual matter, we look at how our law firms collaborate with different levels of the organisation, assess that, and get feedback. Sometimes law firms are good at communicating with the legal teams and bore the brains off the commercial teams, which they therefore cannot engage with. That's one way to gauge how collaborative they are. We also ask our law firms to provide diversity and inclusion statistics for all the people who work on our matters, so we hope to be able to demonstrate that we take D&I very seriously.

Samir Patel: Can I just ask, is that the law firm or is it the lawyer you are working with? If you find a lawyer that you particularly like, not everybody in the law firm is going to be at the same level, right?

Nigel Paterson: No, but if we are starting a major project, we hopefully sit down with our external team and we talk about what the

Key take outs from the discussion

- The pandemic has increased the appetite for change within organisations.
- Clients are now more attuned to reputational risk than ever. Law firms must align with the values of their clients.
- Investors care deeply about ESG matters, but without a set of standards for ESG compliance this remains a fraught area.
- Law firms must show progression in terms of their gender and ethnic diversity. Clients will see through tokenism.
- Reporting on ESG matters can allow law firms to differentiate themselves from competitors.

expectations are and can align. If you measure these things over time, you can ascertain behaviours and get a better fit.

Richard Foley, Pinsent Masons: This is an interesting subject. Lawyers in particular like to prove points and see evidence; if you talk a good game about an inclusive organisation, that diversity and equality is important to you, great, but in many cases you might have a meeting with that firm with five white, male lawyers in attendance. There is no data analyst insight, no computer scientist, no knowledge engineer, no diversity and inclusion consultant, no experiential diversity around the table at all and no evidence that you are actually an inclusive employer. Sophisticated clients absolutely pick up on this.

Bea Miyamoto: It's easy to fall into tokenism, though. If we look at a snapshot of where we are today, there is a finite number of lawyers from a diverse background. If we keep shuffling them around from pitch to pitch, that does not help diversity necessarily. If I have data points in front of me saying there has been a 10% year-on-year improvement in diversity, I would be happy with that, rather than a firm that has presented me with the right mix just for a pitch.

Brad Duncan: You are also going to find that law firms are subject to much more external third-party scrutiny. It will not be a matter of doing your own diligence on what is presented to you at a meeting; you will see reports that are not commissioned but are made independently by NGOs.

Quentin Zentner, The Phoenix Group: Surely it should come from the firm itself, rather than externally? Each business should set their own level of commitment and then disclose against that. I guess law firms have been in a place where it is an option as to what you want to do and how much you want to put yourself out there in a particular way.

Alex Wilson: That is a really important point. We must acknowledge that all law firms are at a different place along the journey of creating a more diverse culture. Exactly as you say, if a law firm holds out the standards they adhere to, then they are suddenly accountable. Historically the legal profession in the UK has been white and male, so certain firms will be further along than others in achieving that shift in mindset and creating a diverse culture.

David Eveleigh: I remember about four or five years ago there was an *FT* article about the gender pay gap, and some law firms were noticeably downplaying it. The whole legal profession came out of it badly because they were standing behind a very weak argument. Those law firms that succeed are the ones who lean into it.

Richard Foley: The customers are the burning platform that mean that change is inevitable; it is not just hot air. When all the things we are talking about genuinely start driving buying decisions is when you see the change. The law firm model assumes the customer base is not changing, and you have to listen to the conversation we are having now, and also issues like the Ukraine crisis, to see that the customer base can change rapidly.

Katya Dunitz, Nemetos

Jeremy Barton, KPMG: After Covid, there is a much greater propensity now to listen to your people and maybe that is the factor that is going to help secure real change. On the subject of legacy law firms, an interesting bid I did three or four years ago included a pitch from a Magic Circle firm but we eventually instructed one outside of that group. The feedback that we gave to the Magic Circle firm was to say, 'You were not chosen because your team did not gel', and to give feedback around some of those intangible tests that we have already talked about. The test now will not just be around whether the team gels, but will be around whether the values are shared, which will come into the D&I question as well.

Anthony Kenny: Jeremy raises a critical point. It is about the customers, absolutely, but it is also about the people in the business who are here already and the future employees as well. What do they see in the organisation in terms of values? How I really test a law firm is by asking: 'Are they an extension of our team? Can they be an extension of our team?'

Catherine Odigie: I was just going to say, just drawing from the points raised earlier about the change in the scope of the role, to my mind it seems that since we are veering more towards the enterprise risk management style of leadership, it just means that whatever law firm you work for, or choose to work with, would be one that you would have to engage with more closely than you would have in the past. You are not going to an external law firm just for technical advice now, but to partner with them. The relationship is inevitably closer, and, because it is closer, reputational risk is greater.

Brad Duncan: When you engage a firm, you want good people working for you. If law firms are not doing the sort of stuff we have been talking about – addressing D&I, climate concerns – they are not going to attract good lawyers. They are going to attract the lawyers that could not get a job at one of the more responsible firms.

Jeremy Barton: It would be quite interesting to find out whether anybody around the table has blacklisted a law firm or taken a positive decision not to use a particular law firm. I don't believe I have. My perspective on this is that we are in an ecosystem, and I suppose my contribution to it is to try to help it thrive in a healthy way. That recognises there are limitations, because it is difficult to work out where to draw the line. It is not only climate, is it? This also encompasses doing business with governments who may have different values from us.

Sharon Kahanov, Siemens: It can also backfire because people will want to measure you against an impossible standard. Are we that perfect that we are allowed to measure our supply chain without reflecting? If so, this can backfire, and we all need to appreciate that this is a long journey that we must make the best of.

Richard Foley: At a gender level, our leadership representation is really good. At partnership level, it is still nowhere near where it needs to be, but the percentage of promotions in this year's round was about 42% female to male. It should be the other way around, but it has moved a lot from where we were three or five years ago.

David Eveleigh: Show progression. Nobody expects law firms to be perfect immediately, but just show progression.

Bea Miyamoto: Definitely. The base is the base. You cannot change that, but you can keep improving it.

Anna Hart, Bank of China: What does that translate into in terms of your policies or your culture? I imagine it is a complicated issue to tackle. Aside from positive discrimination, how are you going to get those women or under-represented groups into partnership or more senior positions?

Clare Francis: It is a great question because, as a female as well, you do not want to feel you were promoted just for that reason. I was promoted because I am good at my job. You have to give people the right support so they can come through, and part of that is having female role models in the business. If I cannot see it, I cannot be it. That is really important. It is the same with race and ethnicity as well – it is about actually changing the way we do the work.

Katya Dunitz, Nemetos: There is a time lag in terms of how law firms can improve. I am a GC in a small digital agency. In terms of digital knowhow or how organisations are structured – agile working, D&I, the whole lot – it just seems like law firms are a decade behind. Perhaps if there was more flow back and forth from industry to law, and less of this career private-practice lawyer, rather than law firms operating in a predominantly white British ivory tower in London, you might get more commercially representative, culturally-attuned advice. ■

The panellists

- Jeremy Barton, partner and general counsel, KPMG
- David Eveleigh, group general counsel and company secretary, Serco
- Katya Dunitz, general counsel, Nemetos
- Brad Duncan, general counsel, Children's Investment Fund Foundation
- Liam Foweather, general counsel, Telford Homes
- Anna Hart, head of legal, Bank of China
- Sharon Kahanov, general counsel, Siemens
- Anthony Kenny, assistant general counsel corporate and CBS, GSK
- Bea Miyamoto, general counsel, formerly of Panasonic
- Catherine Odigie, general counsel, ED&F Man Capital Markets
- Samir Patel, general counsel, HANetf
- Nigel Paterson, general counsel and company secretary, Currys
- Alex Wilson, EMEA legal director, CBRE
- Quentin Zentner, general counsel, The Phoenix Group

- Richard Foley, senior partner, Pinsent Masons
- Clare Francis, partner, Pinsent Masons

- Joe Boswell, head of research: GC Powerlist series

External risk, greenwashing, and how to manage it

With the climate crisis and other external threats increasingly dominating risk registers, Andrew Henderson and Tom Nener of Pinsent Masons look at what GCs can do to steer their organisation through increasingly perilous legal and reputational terrain.

Nursing deep bruises from the seemingly endless bombardment of external curveballs which have battered businesses in recent years, most organisations will have given up some time ago in planning for any return to normality.

Indeed, rather than hankering for a more familiar, stable and predictable political and economic outlook, in the age of 'permacrisis', savvy organisations have instead adapted to view external risk as a constant. Rather than simply focussing on how to respond to present crises, smart companies are looking to the horizon and assessing where the next risks (and indeed, opportunities) may spring from.

One crisis which is now firmly lodged in the minds of business as immediate, pressing, and here to stay though, is the climate emergency. Despite a lull in media attention since its peak around COP-26 last November, businesses know that action needs to be taken and, with few exceptions, are now pedalling fast to deliver.

However, the sheer scale of the climate emergency and the level of response required from organisations to meaningfully play their part in addressing it, makes the task both daunting and fraught with risk of its own.

With new mandatory climate reporting requirements introduced earlier this year for certain large organisations, and more in the post which will impact a much wider portion of the business world, companies must ready themselves with urgency.

Layered upon this compliance risk is that of perception and reputation. Customers are rightly placing high expectations on the business world to step-up and lead on the drive to Net Zero. In turn, businesses are keen to communicate the action they are taking (which in many regards is actually outpacing the work of government) and evidence their commitment to the ESG agenda.

Here internal organisational structures, and questions of where the 'ownership' of external risks lie, become critical.

While once it may have been adequate to compartmentalise the E (environmental) and S (social) components of ESG within a sub-team of an organisation's communications or corporate affairs division – often referred to as Corporate Sustainabilty or before that Corporate Social Responsibility – the urgency of the sustainability agenda within businesses now goes far beyond one of ensuring brand defence or seeking reputational advantage.

Indeed, the impact and immediacy of ESG has spread with such pace in recent years and months that an 'all organisation' approach is now not only desirable, but essential.

Be it an incursion into the traditional domain of the COO through the need to audit supply chains in order to measure Scope 3 emissions, or TCFD reporting requirements invading CFO fiefdoms, most if not all of the organisation will have a material role to play as businesses step-up to the Herculean climate challenge.

In part a legacy from where ESG was first housed in its nascent state back in the early-to-mid 2000's, corporate communications teams will still, in many cases, be the 'home' of environmental and social matters in large organisations. However, the role of the GC

'The regulatory sphere has been playing catch-up, and we can expect to see wave after wave of mandatory ESG-related disclosure requirements hitting business over the coming months and years.'

(L-R) Andrew Henderson, Tom Nener

in this space is coming into ever-sharper focus, reflected in an increasing number of chief legal officers who are either overseeing or located closely alongside corporate and public affairs functions in organisational structures.

Greenwashing is a case in point as to why this close alignment with corporate communications and policy colleagues makes sense.

Rewind the clock just a few short years and sustainability reporting was, to all intents and purposes, a communications and marketing exercise, and a largely discretionary one at that.

Beyond limited environmental impact data (which was generally a niche interest and therefore under-read interest before the climate crisis took hold of the public consciousness), companies would be largely free to cherry-pick the initiatives they focussed on. Unsurprisingly these generally were designed to resonate with positive media, political and community agendas and oftentimes were built, bought or borrowed to offset or 'answer' more reputationally-challenging impacts of what the organisation did operationally.

This 'communicating-out' approach to sustainability still pervades in many quarters, but now as we enter the jaws of the climate crisis, it is no longer just insufficient, but also awash with peril.

As the consumer world has awoken to the climate crisis, such has been the subsequent volume of sustainability-related corporate marketing that by the time of COP-26 last November, environmental messaging had become less of a differentiator and more a hygiene factor for big business.

This prevalence of sustainability-focused marketing, coupled with the advent of mandatory reporting, exposes organisations to accusations of 'greenwashing' if they are judged, or perceived, to be over-reaching in their claims about the impact or depth of their climate action.

Greenwashing allegations can cause great harm to an organisation. While stemming from a global crisis, the damage they do is highly targeted and local to the organisation in question. Of course this should not be cause for paralysis or a lack of ambition, but rather a trigger for businesses who are rightly scanning the horizon for the next external risk, to also invest effort internally, so as to ensure future crises do not emerge from within.

Much attention is afforded to the reputational and brand damage that greenwashing allegations can inflict on an organisation – on a sliding scale from 'light', isolated online criticism, to the 'severe' – such as the humiliation of company executives by grandstanding MPs at excoriating parliamentary committee hearings, all the way to crippling large-scale customer boycotts.

Given such reputational stakes, it is understandable why sustainability matters have traditionally been 'owned' by comms teams and why corporate affairs executives will continue to play a leading role in their management. However, the regulatory sphere has been playing catch-up, and we can expect to see wave after wave of mandatory ESG-related disclosure requirements hitting business over the coming months and years. Failure to comply

> **Although there are currently no "live" greenwashing claims under FSMA, it is easy to see how claims could increasingly arise when companies are seeking to promote green credentials, and investors are keen to buy such products.**

with such regulation will cost organisations more than 'just' reputational damage.

Here the GC comes into their own and the role of in-house legal teams in defending their organisations against greenwashing is one which will only grow as regulatory interventions become increasingly widespread.

Greenwashing can occur through deceptive practices (knowingly making a claim which is untrue or exaggerated), through negligence (making a statement about ESG credentials without checking the facts) or by a business 'green-wishing' (actually thinking a product has certain environment credentials when it does not).

Examples of this include making pledges about becoming carbon neutral by a set future date. Here, investors and members of the public may be critical of progress in meeting those targets if the business continues to fund or undertake projects which do not appear to support its aim in becoming carbon neutral, such as high carbon emitting projects. Others include producing advertising which promotes a company's green initiatives or a particular 'green' investment fund while excluding information about funding businesses which generate substantial emissions.

While a lack of clarity pervades in many jurisdictions over how regulators can and should tackle the issue, a wide variety of measures are currently being created at UK, European, member state and international level to counter greenwashing. Indeed, some are already in place.

For example, in the EU the planned EU Ecolabel for financial products is to be expanded to include both the creation of a label for ESG benchmarks and the establishment of minimum sustainability criteria for financial products that advertise environmental or social characteristics, while the French legislature passing a law in April that sanctions the advertising of products as 'sustainable' without them meeting the necessary requirements.

Meanwhile, in the UK the Financial Services and Markets Act 2000 (FSMA) offers a potential cause of action if an investor has suffered loss as a result of greenwashing – such as buying shares in a company where the green credentials of the company have been overstated, or where a financial product is marketed as 'green' and therefore achieved a premium (the 'greenium'). Under section 90, investors who bought shares under an IPO or rights issue could sue a public company that publishes any untrue or misleading statement in listing particulars or the prospectus; or under section 90A publishes a misleading statement or dishonest omission relating to the securities (for example, in an annual report), or dishonestly delays in publishing. Although there are currently no 'live' greenwashing claims under FSMA, it is easy to see how claims could increasingly arise when companies are seeking to promote green credentials, and investors are keen to buy such products. A fund manager or other investor, faced with a drop in the value or of their investment as a result of the true 'green' position being revealed, could seek compensation.

This patchwork approach to tackling greenwashing – significantly differing approaches are being taken across different jurisdictions – demonstrates the need to look at regulation across multiple countries, both when an organisation plans to operate there in the future, and also as an indication of what law may be adapted and enacted in an organisation's 'home' country.

If managed poorly, this agenda of mounting regulatory policy around ESG risks colliding head-on with businesses which may inadvertently over-sell their green credentials in a bid to achieve competitive advantage.

So where can a solution be found? Good governance is unquestionably key to managing the risks associated with allegations of greenwashing. Some actions to consider include providing comprehensive training to all members of staff regarding greenwashing

> **With proposals for the CMA to be able to impose fines up to 10% of turnover for breach of the rules, putting in place robust compliance teams and processes is essential.**

and how it applies to your sector; issuing clear guidance to ensure that risk is managed and to create a culture of compliance; and ensuring that there is a procedure to follow prior to signing off on any environmental or ESG claims that are made about the business or its products and services. Here, there should be a robust analysis of the claim, and an understanding of whether the business holds objective up to date evidence to support it. A written record of the process which has been followed to support a particular claim is important and each claim that is made should have a written set of materials to support it.

Regular monitoring of market developments should also take place including understanding what regulators are saying and greenwashing examples across all industries should be reviewed to ascertain the 'lessons learnt'. Positive engagement with supply chains is also key as they often hold key information and third party independent data to support claims should also be utlilised where it is verifiable. Showing that a claim has been subjected to independent scrutiny can be particularly important where a matter is complex or controversial.

Any team tasked with assessing the validity and legality of green claims would need a team of individuals who understand the full regulatory landscape, have an in-depth understanding of the product or services, know the claims being made, and understand what is required in terms of evidence and processes to ensure that any claims can be substantiated and remain up-to-date. In the UK alone, multiple regulators are engaged in this space. An exercise of 'join the dots' must therefore being an ongoing endeavour. For example, the Competition and Markets Authority (CMA) has published a checklist for companies to assess their compliance with greenwashing while the FCA has also published a number of principles that authorised ESG and sustainable investment funds should follow. There is a general theme for companies to ensure accuracy in terms of the information they are providing, and to ensure that any statements made are not misleading to consumers, but the guidance differs in terms of what is required. The Advertising Standards Authority is another body interested in misleading advertising claims in the greenwashing space operating under a different regulatory framework.

A multi-disciplinary approach is also essential to ensure that a company is supported from compliance to managing and mitigating risks if there is a complaint or regulatory investigation. With proposals for the CMA to be able to impose fines up to 10% of turnover for breach of the rules, putting in place robust compliance teams and processes is essential.

Here, perhaps most importantly in order to get on top and head of this agenda, GC's should work closely with their communications, marketing and corporate affairs colleagues to provide a seamless and integrated 'one voice' approach to their business on ESG, and indeed all external risks. Doing so will not only minimise the number of stable doors needing to be closed after the horse has bolted, but will also help organisations to create meaningful, robust and campaignable narratives which are both of far greater interest and value than rushed-out claims or unachievable targets, and far less likely to store problems up for the future. ■

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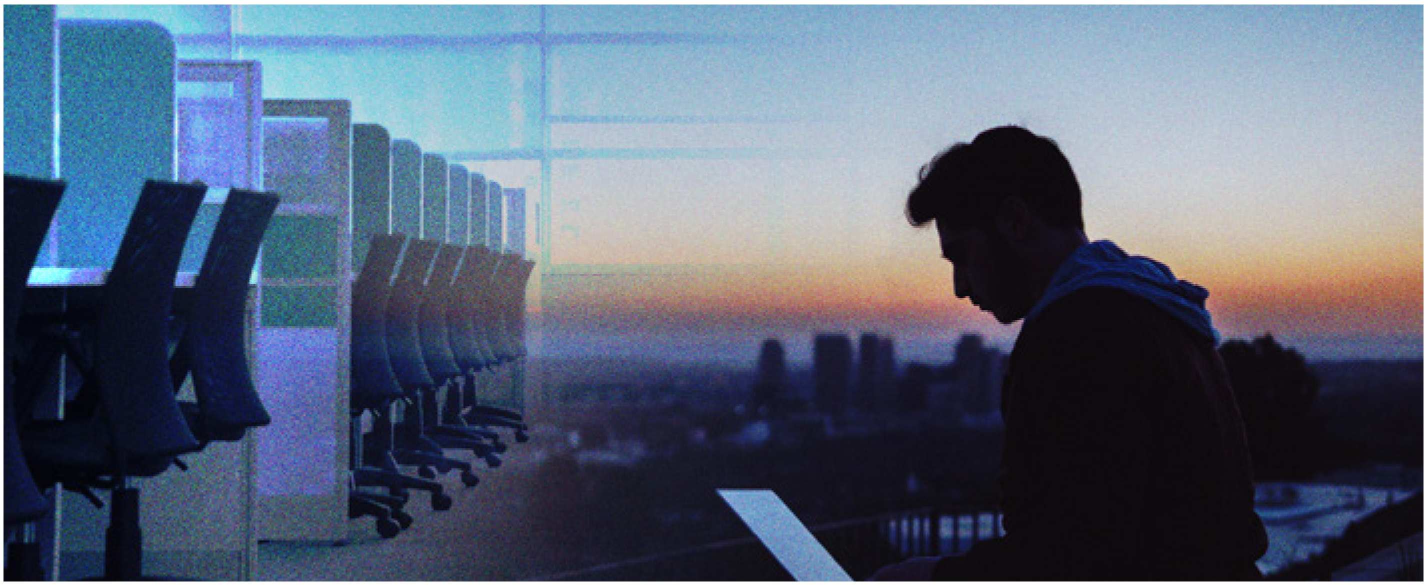

On your toes

With battery of employment law issues for in-house teams to cope with in today's rapidly altering climate, *IHL* asks specialist practitioners for their views.

BY JAMES FIELD

Tumultuous is possibly an understatement when describing the past few years, not least the global Covid-19 pandemic proving a major game-changer socially, culturally, economically and politically. Significant shifts in all these categories of life have had profound employment law implications, pushing it ever higher up the corporate agenda.

'Employers are obviously grappling with all of the myriad issues that this new world order has thrown up, and how they adapt their businesses to it,' says Sharon Tan, employment partner at Mishcon de Reya. 'What we're witnessing is huge upheaval in the workplace generally, seismic changes coupled with economic challenges.'

This sense of radical movement in the field is shared by Colin Leckey, partner in Lewis Silkin's employment practice: 'There's probably never been a time in my career where employment law has been more topical, more on the front pages, and more of a boardroom issue than it is today, and that's been turbocharged by the pandemic'.

Leckey says practitioners in the space have had to adapt to the evolving situation. 'We hurried to become experts in furloughing entire workforces, which they hadn't even heard of before, and becoming health and safety lawyers as we all grapple with the consequences of Covid.'

Suzanne Horne, a partner in Paul Hastings' employment department, adds: 'The transformation of work that we're all living through is manifesting itself in a number of really interesting and challenging ways for employers'. These transformations have resulted in substantial changes to the way people work, as well as where people work, she says, with corporates having to keep pace with the ever-evolving employment landscape. 'Post-covid work was like living through an experiment – the rulebook has been ripped up'.

Hybrid working

When it comes to the mountain of issues employers are having to deal with, hybrid working is at the summit. In some industries this might be old news, but one undisputed effect of the pandemic has been to accelerate the trend toward remote or hybrid working.

'A lot of people have readily embraced the opportunities that hybrid working has given them,' says Tan. 'If you go to the recruitment market one question that a lot of people ask is: "Can I work from home all the time?" There's a whole new post-pandemic spate of requests, people asking to relocate to Scotland, Cornwall, Spain or wherever, saying: "My job can be dome remotely, as I've shown before"'.

Tan suggests that this current preference of employees for flexible working contrasts with pre-covid prevailing tendencies among employers, which is creating tensions for some corporates: 'Pre-pandemic there was a degree of presenteeism, that people weren't

> **IT departments were already pulling their hair out over home-working security before Coronavirus, but data protection issues have been exacerbated by the pandemic-induced exodus from the office.**

working as hard from home. This was a fallacy, and post-pandemic this myth has been dispelled'.

She suggests that the narrative of office work has shifted from proof of productivity to a position of: 'We need you here for collaboration, for creating ideas, and for training'.

However, the reluctance of some employers to embrace hybrid or remote working is not simply about traditional ideas of the workplace, issues of fairness and equality also come into play. Policies and approaches differ from employer to employer and from industry to industry, and as such advice must vary accordingly, a problem outlined by Leckey: 'At one end of the scale you've got financial services industries and the big banks, some of whom have said, "we want everybody to work significantly in the office". For them, queries will be about how to make this unpopular decision with a significant swathe of the workforce stick, and you're probably going to be dealing with a flexible-working queries from people who say: "I worked perfectly effectively from my home for the last 18 months why aren't I allowed to do that now?" At the other end of the spectrum are the utopian tech companies that really embrace the idea that people can work from anywhere and have been doing it long before the pandemic.'

While certain financial institutions may site the regulatory concerns that remote working throws up, for others the issue is potential indirect discrimination. 'Are we going to end up with this sort of two-tier workforce where the ones that tend to work most from home are predominantly those with childcare responsibilities, who are disproportionately female, whereas the ones who like coming into the office are more predominantly male or younger?' asks Leckey, who highlights that law firms are already starting to see disputes off the back of this tension.

The catch-22 for some employers lies in offering hybrid working to some employees to appease those that are keen and able to do it, which in turn angers a significant part of the workforce that cannot work remotely, due to the nature of their work or circumstances. Suzanne Horne suggests that a major endeavour for employers is attempting to solve this tension: 'It may well be that you have different roles in a company where some people can work from home and some people can't, flexibility is now incredibly important to so many employees and something that they expect to retain. So, for corporates it's about sitting down and looking at their business and workforce, and trying to rewrite policies that are now completely out of date.'

Whether or not corporates can solve this conundrum without alienating a chunk of their workforce it's clear hybrid working is here to stay, and with more and more employees walking around with their laptops or conducting videocalls from their living rooms, the spectres of data protection and cyber security loom greater than ever.

Data protection and cyber security

IT departments were already pulling their hair out over home-working security before Coronavirus, but data protection issues have been exacerbated by the pandemic-induced exodus from the office.

'There are categories of job where it really wouldn't be appropriate for that person to be sat doing their work with a laptop on a train, local Starbucks, or even in their house surrounded by housemates', says Leckey. 'There's real security issues there and also a cross-border dimension, particularly once you get outside the UK and EU where GDPR rules apply.'

Whether within the safety umbrella of a GDPR country or otherwise, data and sensitive information is naturally more difficult to control outside an office environment. One core problem is highlighted by Tan: 'Employers need to make sure that employees are not, for example, sending things in the most convenient way, rather than dealing with them in the organisation's way. So, they're not just sending things insecurely because it's expedient or because they happen to be working from home. There's a good chance of human error there'.

Alongside the – possibly expected – security concerns that remote working has thrown up, the way some employers are attempting to deal

> **The tension between increasing pay or losing people, or even industrial action, seems set to dominate boardroom debates.**

with the new norms of work is hinting at more novel conflicts ahead. Some businesses are now turning to digital solutions to calm their anxieties around hybrid work, which in turn is creating more potential data protection and privacy issues. 'We're seeing employers wanting to track the attendance of their staff at the office, because they're trying to work out how many people are coming in,' says Horne. 'So we're seeing issues around the collection of data and we're also seeing employers looking at how they can monitor remote work'.

Cost of living crisis

'Employment law is always changing, there's always some issues in the news, this week it has to be strikes and the prospect of a summer of industrial action,' warns Horne. 'This is all related to the economic challenges that have arisen, whether directly or indirectly, from the pandemic and the war in Ukraine'.

Many fear these economic challenges are the opening salvoes of a looming recession. The spiralling prices of goods and services combined with inflation and a reluctance to raise wages *en masse* to meet these rising costs has inevitably resulted in pay disputes across the spectrum, from individual grievances to strikes.

Tan outlines the dilemma many employers are facing: 'It's a difficult one to land the messaging because we don't want to be making a representation matching inflation, which might then run rampant. It might be impossible economically to keep up with that.'

While fears of soaring inflation are widespread, the prospect of walkouts and collective actions looks equally bleak. 'We're expecting a huge upsurge in strikes and industrial action, and threats of the same in the next year or two as we haven't seen for years,' says Leckey. 'In this highly inflationary environment it's going to cause a lot of tensions because employers have to make decisions on when to give in and then we've got to find a way to fund these pay increases, or we hold tight and risk people walking out or joining the competition.' This tension between increasing pay or losing people, or even industrial action, seems set to dominate boardroom debates during this latest crisis.

Fortunately, it's not all doom and gloom, some see possible routes around this seemingly no-win situation. 'Is more and more money what people are really looking for?' asks Leckey. 'It might be that part of the way that you can square the circle of eyewatering demands for pay rises, is that increasingly for the younger generations coming to work it isn't just about pay, it's the all-round proposition'.

This 'all-round proposition', Leckey suggests, might include considerations such as: 'Do the organisation's values align with mine? Where are they on CSR, ESG, diversity and inclusion?' Taking these considerations into account could provide at least part of the answer to the spiralling inflation conundrum.

The breakneck speed of change over the past few years has kept employment law a busy and dynamic space, where solutions continue to be found for some of the most difficult problems employers and employees face. In this environment adaptability seems to be essential, as Horne aptly sums up: 'The real test for corporates is going to be trying to pivot and innovate to keep pace with economic and cultural change, and maybe political changes, so I think the trick in employment law issues is being as nimble as you can.' ■

Top five tips for corporates

- Increased dialogue and transparency with employees.
- Be open to flexible, hybrid working.
- Look to work-life balance solutions in immovable pay disputes.
- Nimbleness is the name of the game.
- Wear your ESG and CSR credentials on your sleeve.

Spilling the beans

Well maybe not Heinz beans at the moment if you are Tesco… All joking aside, whistleblowing is a serious and expensive matter for all those involved. In this article, we look at the 'alphabet soup' that is the dynamic and complex employment law landscape across different jurisdictions, what's on the horizon, and explore some of the best practices that help mitigate the risks for employers.

I have been advising employers and senior executives on whistleblowing issues for over 20 years. In fact, the Public Interest Disclosure Act 1998 (PIDA) came into force just as I qualified. In recent years, we've seen whistleblowing claims get significant global media coverage, and whistleblowers putting the spotlight on a wide range of illegal and public interest issues.

Just in the last 12 months, we have seen former employees of household brand names blow the whistle on an alleged culture of profitability over ethics and a dubious approach to misinformation. We've witnessed allegations of defrauding clients, and failures to investigate sexual harassment allegations, to highlight but a few examples.

The consistent trend we see is that many whistleblowers work directly for the named entities. Whether FTEs, contractors (for example, Edward Snowden) or suppliers, these individuals are privy to confidential information and have access to the documents that support their claims – in this digital age, everything is recorded in an electronic paper trail.

Whistleblowers have the ability to impact both the reputation and the share price of organisations. For example, allegations in the Wall Street Journal last year resulted in a share price dip of 13% for the named corporation. Whistleblowers can also derail careers: in a matter that we recently concluded for a client, a significant part of a divisions' senior management team were exited.

So, the stakes are high and organisations may well be heading into a perfect storm when it comes to responding to whistleblowing disclosures.

An uneven playing field

Today, we have more laws around the world than ever before, but more uncertainty in respect of the laws. While there are comprehensive laws in Australia, Canada, Japan, the US and New Zealand, there is very little substantive law in, say, Israel or Mexico. Prior to Brexit, the UK was one of only 10 EU member states with comprehensive laws protecting whistleblowers, while 18 other EU member states did not have laws that meet this standard.

Currently we are seeing the piecemeal rollout of the Covid-impacted EU Whistleblowing Directive 2019/1937 (the 'Directive'). As part of our research for the Paul Hastings' annual survey of local counsel 'Mapping the Trends: The Global Employer Update' in early 2022, only 10 jurisdictions listed the implementation of the Directive as a top three issue for them. This is surprising as the deadline for transposition into national law was 17 December 2021.

The Directive itself leaves some key issues to be resolved in the national legislation of member states. For example, whether to go beyond a breach of the specified EU laws or not; whether to allow anonymous whistleblowing; whether there needs to be an internal reporting channel by legal entity; whether whistleblowers will be allowed to go external without exhausting internal channels; and whether there are civil or criminal sanctions.

It is fair to say that, in July 2022, the laws across the EU are in a state of flux and remain fragmented. As the EU threatens enforcement action, we will see more national legislation come into force across the EU. These developments may well impact existing compliance programmes and also require in-house legal teams to stay up to the minute on the latest legislative changes.

The right conditions for whistleblowing

With the current lack of consistency from one jurisdiction to the next, there is an increased likelihood of forum shopping (well who would not want 30% of any monies recovered by the SEC even if you are not a US citizen, or perhaps 'gold-plated' non-retaliation protection in the EU). While South Korea, Ghana, Slovakia and Canada also reward their whistleblowers, the US is the most well-known 'bounty' payer, where the SEC reports that it has awarded a staggering $1.1bn to over 200 whistleblowers since its first award in 2012.

More individuals than ever before now have legal protection against retaliation due to broad scope of the varied legislation. In New York, section 740 of the labour law now protects former

> **Now is the right time to review existing programmes to ensure they really do nurture a speak-up culture while also complying with the requirements of the varied and complex laws.**

employees and independent contractors. While coverage under the Directive may be incredibly challenging for companies. For example, Chapter VI of the Directive protects 'facilitators' and colleagues or relatives of the whistleblower who suffer retaliation in a work-related context. Traditionally, this is a group of individuals who did not have any workplace legal protection and it may not always be easy for an employer to identify these peripheral persons until they raise their hand to assert retaliation. Therefore, the investigations team will need to be even more astute in calling out this additional legal risk and gathering detailed background information.

The subject matter of any disclosures is now broader (including for sanction violations). We have greater employee and stakeholder activism at a time when there is increased scrutiny on ESG and the veracity of corporate disclosures and claims. We also have more of the C-suite speaking out on public interest issues, with CEOs taking corporate positions on issues that have not been vetted by legal and may not directly relate to their business.

Closer to home, while the UK is not implementing the Directive, there have been calls for reform for many years. A Private Members Bill had its first reading in the House of Lords last month, but the second reading is yet to be scheduled. The aim of the Bill is to establish an Office of the Whistleblower to protect whistleblowers and whistleblowing and to uphold the public interest in relation to whistleblowing; to create offences relating to the treatment of whistleblowers and the handling of whistleblowing cases; and to repeal PIDA. Some of this will align the UK with the Directive. However, this Bill is a long way off from becoming law and the focus of so many parliamentarians is certainly elsewhere at present.

In the meantime, for research Paul Hastings has underway into whistleblowing, the FCA confirmed that anonymous whistleblowing is on the rise. 22% of cases in the first three months of 2022 (21.65%) have been anonymous compared to 15% (15.33%) of cases in 2021. Of the 587 cases relating to employees/ex-employees reported to the FCA in 2021, 355 (60%) did not have an outcome as of March 2022. Therefore, there is no quick resolution for the UK financial services whistleblower and regulator interest and involvement seems protracted. (More to come from us on this research project).

All of these factors point to a potential tsunami of disclosures over at least the next 12 to 18 months and a considerable uptick in workload for in-house counsel. And if those disclosures are in the EU, companies have seven days to acknowledge the whistleblower's allegations and three months to report back. Then, if the 'speak up' relates to a cross-border matter, or it is made to a group level reporting channel outside the EU, there is the small matter of GDPR compliance and any local language requirements.

Cultivating a speak-up culture

We know that if there is a genuine and healthy speak-up culture, there are obvious business benefits. It allows corporations to prevent further wrongdoing, to intervene with training, education and leadership development measures and hopefully resolve problems internally beyond the glare of shareholder scrutiny or the (social) media spotlight, mitigate fines and manage relationships with their regulators, including the FCA, the mighty SEC, DoJ, and EEOC, and other law enforcement agencies. Now is the right time to review existing programmes to ensure they really do nurture a speak-up culture while also complying with the requirements of the varied and complex laws.

But how to achieve it.

The successful whistleblower programmes that I have seen take time to implement and they are regularly monitored. For a global business, there needs to be dedicated resources from various teams across the business and relevant jurisdictions, including legal, ethics, HR and IT. There needs to be financial investment in the right tech, and of course, excellent legal advice from in house and external legal counsel.

The whistleblowing policy, associated process documents, and roles and responsibilities should be clear, user-friendly and realistic to

If there are regular issues in certain divisions or in certain jurisdictions, even if seemingly innocuous, this may be a red flag to more significant issues.

facilitate prompt investigation. Key stakeholders need to be mindful of privilege and the varying practices around the world. There should also be consideration of how the whistleblowing policy interacts with other workplace policies, in relations to grievances, harassment, bullying and the code of conduct or ethics policy.

The programme needs to be widely launched and regularly promoted, ideally with the support of a board-level champion. There is no point embedding an email address in a Staff Handbook or Code of Conduct if you are serious about tackling these issues.

There also needs to be effective and engaging training, part of which needs to be tailored to local requirements. Disclosures under the Directive can be made in writing or orally and the whistleblower must have the option of reporting it at a local level. Therefore, the line manager on the ground needs to be alive to what s/he is being told and the local investigations team needs to know how to respond, and quickly.

A further crucial element to a successful programme is a process to collect and analyse the subject-matter and key details of speak-up reports to determine any patterns, trends or potential problem areas which will allow for targeted intervention. If there are regular issues in certain divisions or in certain jurisdictions, even if seemingly innocuous, this may be a red flag to more significant issues. Care needs to be taken to appropriately address issues of anonymity and confidentiality during this process.

There also needs to be a well-established practice of enforcement in response to established wrongdoing. Firstly, to achieve the obvious business benefits. Secondly, if the employee speaks up and nothing happens, the likelihood is that they will look for other avenues to vent their allegations. Equally, if the company is not receiving that many 'speak-ups' this may mean that the culture is not as healthy as the board might like or there is an issue with the programme. Either way this 'silence' requires some probing questions.

Then there is the issue of what to do with the whistleblower.

The longer-term relationship with the whistleblower

While retaliation is a definite 'no-no', the longer-term relationship with the employer and co-workers is a real challenge. The Directive contains rules designed to prevent direct or indirect reprisals but it is silent on what happens when the investigation is complete.

There are, of course, some employee whistleblowers who raise their hand when there is an on-going employment action or process, perhaps a transformation, performance issue or threat of dismissal, when it becomes clear that they don't have the requisite two years' service to bring an unfair dismissal claim or they want to take the 'unfair dismissal compensation cap off' as part of their leverage in the exit negotiation. These employees are often eager to tell the employer how they want their concerns resolved.

However, there are other whistleblowers who genuinely believe that they have an ethical obligation to call out wrongdoing to create a positive and healthy workplace. But, in a number of cases, the employment relationship is fractured by the end of the process despite everyone's best intentions. In these cases, there is obvious scope for actual or perceived detriments if they remain with the business but are, say, unsuccessful in applying for that next role. It is a brave employer that raises the issue of a negotiated exit with these whistleblowers.

However, perhaps there is another way.

What if the whistleblowing policy contained a provision that if at the end of the process the employee wished to leave the business, they could opt for a specified severance package? The employer could take the position that the suggestion was not in response to their allegations but an integral part of their process. This would leave less scope for negotiation as to quantum, it could be overseen by someone independent, and the employee could exit stage right, if that is their preference. Radical but worth considering as a potential solution to a thorny issue that is not addressed in the reams of legislation.

In-house legal to the rescue

The in-house legal function continues to be at the epicentre of the corporate response to whistleblowing, advising the business on the complex and dynamic legal landscape particularly across the EU and aligning the corporate response to the culture, systems and processes already in place. As time runs down on the national implementing legislation coming into force across the EU, this is another opportunity for in-house counsel to demonstrate their 'value-add', as they help the business prepare for and weather the 'perfect storm' of the next 12 to 18 months. Of course, myself and the broader employment and investigations teams at Paul Hastings are at your disposal for both avoiding and cleaning-up any spillages. ■

The article forms part of an on-going series of whistleblower alerts and events by Paul Hastings

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PAUL HASTINGS

Covid-19 vaccination and alternative work arrangements in the Philippines

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More than two years into the Covid-19 pandemic, there appears to be no end in sight for the infectious disease. New cases in the Philippines are again increasing, with the daily new cases breaching the 2,000 mark anew due mainly to the more transmissible variants of the virus.

The government thus continues to advise the populace to secure vaccination and booster shots to ensure herd immunity and for additional protection. The good news is that at present, Covid-19 vaccines are more accessible to the general public. In fact, this has led to about 66% of the country's population already securing their full vaccination, or a total of around 72,000,000 fully vaccinated individuals in the country.

Due to the relative improvement in the Covid-19 situation in the country in 2022, as compared to 2020-2021, employers in various industries have been exerting efforts to shift back to reporting to office work, as encouraged by the country's economic managers, if only to revive the economy. At the very least, employers would resort to a hybrid arrangement, mixing work at home with office work during the week. Indeed, due to this resurgence, Philippine 2022 GDP growth was reported to be at 8.3% in the first quarter and forecasted to be about 7% for the second quarter. The fact is during the pandemic, a lot of employees who were placed on work from home and other alternative work arrangements maintained good productivity.

Some employers have determined that requiring their employees to report to the office, even for just two or three times per week, is important for the business due to a confluence of various factors, including the need for more personal mentoring and collaboration, and the maintenance of company culture as well as professional relationships among employees. On the other hand, many employees have learned to adapt to the requirements of clients or customers even while working from home, especially for the professional service firms and the BPO companies.

In the case of the Information Technology–Business Process Management (IT-BPM) industry registered with the Philippine Economic Zone Authority (PEZA), employers have generally clamoured for the continuance of 100% of their workforce being allowed to work from home. However, the Government's Fiscal Incentives Review Board is of the view that entitlement to statutory fiscal and tax incentives requires ecozone locators to actually operate in the ecozones. By special and temporary concession, the FIRB allowed PEZA registered companies to only have up to a maximum of 30% of their workforce working from home. The remaining 70% of their workforce must perform work

The current trend in recent issuances would show that there is a continuing effort to afford employees a healthy and safe workplace by encouraging the vaccination of employees.

in the office (within the economic zone). The government has set this special accommodation to be coterminous with the declared period of a national state of calamity in the country which shall expire on 12 September 2022.

With the increasing number of employees returning to the office, the recent policies of the government have been focused on ensuring the safety of employees performing office work. Despite the initial policy of mandating no discrimination against any employee who refuses or fails to be vaccinated, the current trend in recent issuances would show that there is a continuing effort to afford employees a healthy and safe workplace by encouraging the vaccination of employees.

In making a significant move towards the encouragement of employees to get vaccinated against Covid-19, on 11 November 2021, the Inter-Agency Task Force for the Management of Emerging Infectious Diseases (IATF), issued Resolution No 148-B, Series of 2021 (IATF Resolution No 148-B), which was supplemented by its Resolution No 149, Series of 2021 (IATF Resolution No 149).

These IATF Resolutions provide that in areas where there are sufficient supplies of Covid-19 vaccines as determined by the government, employers shall require their employees tasked to perform on-site work to be vaccinated against Covid-19. This notwithstanding, IATF Resolution No 148-B provides that employees who refuse to be vaccinated against Covid-19 may not be dismissed from employment solely by reason of being unvaccinated. By way of a compromise, the IATF Resolutions mandate unvaccinated employees to undergo Covid RT-PCR tests at their own expense at least once every two weeks for purposes of on-site work. IATF Resolution No 148-B also allows them to resort to antigen tests when RT-PCR capacity is insufficient or not immediately available. Unvaccinated employees who refuse to get tested in accordance with IATF Resolution No 148-B may be placed on forced leave without pay.

Recognising an improvement in the Covid situation, on 27 June 2022, the IATF issued IATF Resolution No 169, Series of 2022 (IATF Resolution No 169), which modified IATF Resolution No 148-B. IATF Resolution No 169 allowed unvaccinated employees to undergo either RT-PCR tests once every two weeks or antigen tests weekly for purposes of on-site work. IATF Resolution No 169 also adds that employees with a recent Covid-19 infection within the last 90 days and those under alternative working arrangements which do not require on-site reporting are exempted from this testing requirement. Similarly, the said testing requirement is also waived for areas under Alert Level 1 Classification (as determined by the IATF), subject to the implementation of clinical-based management and symptomatic testing.

With the recent announcement of President Ferdinand Marcos, Jr. that there will no longer be any further lockdowns due to Covid, it is expected that many more businesses will resume, if not expand their activities, and in the process entice employees to return to work in the office.

This is, however, without prejudice to the continuing prerogative of employers to continue resorting to a hybrid arrangement of enjoining employees to report in the office on a number of days during the work week, and to work from home the rest of the week. This hybrid work appears to be a most appealing arrangement in many jurisdictions. ■

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Knives out for labour reform: major rollbacks to Puerto Rico's 2017 Labour Reform Act expected

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On 26 January 2017, Puerto Rico enacted Law No 4-2017 (Law No 4-2017), a far-reaching statute known as the Labour Reform Act, which amended most of the existing labour and employment legislation in the jurisdiction. Notably, the Labour Reform Act increased the number of hours employees must work in order to accrue statutory vacation and sick leave[1], as well as the number of hours needed to qualify for Puerto Rico's statutory Christmas bonus[2]; decreased the number of vacation days accrued by employees in a given year; established a cap for the statutory indemnity under Puerto Rico's Wrongful Discharge Act (Law No 80 of 30 May 1976)[3]; instituted probationary periods of nine months for hourly employees and 12 months for exempt employees; and changed the computation of daily overtime, among many others. The law also introduced unquestionably positive changes to Puerto Rico's labour and employment legislation, such as a statutory cap on damages in employment cases; a presumption in favour of independent contractor relationships; codification of employees' duties towards their employers (such as a duty of loyalty, a duty to not compete against the employer's business activities and an obligation to cooperate in good faith towards the successful operation of the business), as well as the rights of employees in the workplace (such as the right to be free of discrimination in the workplace, the right to be timely compensated for work performed, and protection of an employees' right to privacy, subject to the employer's legitimate interest in protecting its business, its property, and the workplace); religious accommodation; and a rule requiring that local labour and employment statutes be interpreted in a manner consistent with federal legislation on the same issues. Proponents of the Labour Reform Act argued that by reducing burdens on employers, the law would incentivise hiring and stimulate Puerto Rico's flagging job market. Since its enactment, the statute was met with fierce pushback from labour organisations, who argued that it unfairly reduced employees' statutorily protected benefits and would have the reverse effect of further dragging down the job market.

During the 2020 election campaign in Puerto Rico, several candidates ran on a platform that included amending the Labour Reform Act of 2017, Law No 4 of 26 January 2017 (Law No 4-2017), including Governor Pedro Pierluisi, who indicated that these matters would be addressed as part of his administration's public policy. Accordingly, it was no surprise that in the opening 2021 legislation session, there were a flurry of bills in the House intended to amend or repeal Law No 4-2017.

Legislators introduced H-B3 as a full reversal of Law No 4-2017, but ultimately a pared-down version was sent to the Governor's desk for approval. Most notably, if passed, employers will be faced with changes to the statutory probation period, daily overtime compensation, statutory severance for wrongful discharge (along with changes to the definition of unjust termination which had been enacted in the Labour Reform Act), among others. HB-3 also includes provisions that would eliminate the requirement that there be consistent interpretation between federal

> **Proponents of the Labour Reform Act argued that by reducing burdens on employers, the law would incentivise hiring and stimulate Puerto Rico's flagging job market.**

laws and local laws that regulate the same issues; reincorporation of the presumption of wrongful termination in all employment termination cases and reverting the commencement of meal period to no earlier than the third hour of work, rather than the second, unless there is written agreement to do so. The law would have gone into effect immediately, leaving employers ill-prepared and hard-pressed to comply.

However, on 5 March 2022, Governor Pierluisi vetoed H-B3, on the grounds that it contained errors and inconsistencies as drafted. In addition, Governor Pierluisi indicated that the proposal for the law to go into effect immediately after being signed was prejudicial to employers, who would not have time to adjust their payroll systems and prepare for the dramatic changes the law contemplated. Notwithstanding, Governor Pierluisi indicated that there were areas of consensus within the proposed statute, including establishing a fixed probationary period of six months for both exempt and non-exempt employees, creating a uniform requirement of 700 hours worked in order for private-industry employees to be entitled to the local statutory Christmas bonus, and reverting the minimum hours worked in order to be entitled to accrue statutory vacation leave from 130 hours to 115 hours per month.

After the governor's veto, the Puerto Rico legislature wasted no time. On 8 March 2022, an overwhelming majority of the members of the House approved HB-1244. This new version was discussed with the Governor's team in advance and introduces some changes to HB-3. For instance, under HB-1244, employees who work 20 hours or less per week would accrue half a day of vacation per month. Also, HB-1244 restores the accrual for those employees who work 115 hours per month to one and quarter days per month, among other changes. The probationary period will likewise be restored to three months, which can be extended to a maximum of six months. The Christmas bonus will be accrued with 700 hours of work. On the other hand, HB-1244 is silent as to flexible schedules. However, employees could request changes in work schedules and the employer must respond in 20 days. Employers will not be obligated to publish work schedules in writing. As to the indemnity provided for wrongful discharge, HB-1244 restores the previous formula of the law and language to the effect that terminations are presumed unjustified. Finally, the statute of limitations for wrongful discharge is restored to three years.

On 20 June 2022, Governor Pierluisi signed HB-1244, creating Law No 41-2022. However, the Fiscal Control Board established by PROMESA formally objected to the law on 19 July 2022 and ordered its enforcement suspended. For its part, Governor Pierluisi's administration has expressed its intention to defend the law and its implementation. The outcome of this dispute remains uncertain. Accordingly, employers doing business in Puerto Rico should continue to monitor this situation closely.

For further information or, if you should have any questions or comments relative to this article, please consult the labour and employment law team at AMG.

Notes

1) **From 115 to 130 hours for all employees.**

2) **From 700 hours to 1,350 hours, with a grandfather clause for employees hired before 26 January 2017.**

3) **With a grandfather clause for employees hired before 26 January 2017.**

Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.

Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C. (AMG) endeavours to provide comprehensive business-related legal services to companies throughout Puerto Rico, as well as business interests based in the continental United States or abroad that have financial

interests in Puerto Rico. AMG's exceptional team of lawyers bring years of experience and a wide range of professional credentials to every matter they handle. As a full-service law firm, AMG assists clients facing a wide range of issues including business disputes; labour and employment law; tax issues; commencing business operations in Puerto Rico; banking, real estate, finance and mergers and acquisitions; and aviation law.

AMG's labour and employment department is experienced in all areas of labour and employment law, including legal counselling in cases of wrongful discharge, employment discrimination, workplace retaliation, wage and hour claims, employee benefits, business-related immigration, and employment practices liability. AMG's labour and employment practice includes representation of employers in cases before federal and Puerto Rico courts, as well as administrative agencies. Our attorneys also represent employers in the public and private sectors with claims and proceedings involving union campaigns, negotiation and administration of collective bargaining agreements, and labour arbitrations. AMG labour and employment law attorneys also have extensive experience in reorganisation of businesses, reductions-in-force, plant closings and mergers and acquisitions. AMG's labour and employment law attorneys are the current Puerto Rico contributors to the *Executive Remuneration Review* and *Chambers Global Practice Guide* (Employment).

Mariel Y Haack joined AMG in 2005. She is currently a shareholder in the firm's labour and employment department. Her areas of practice include representation of management before administrative agencies and in federal and Puerto Rico courts in wrongful discharge cases, discrimination suits, wage and hour and benefits claims; general counselling with clients regarding the avoidance of litigation, as well as compliance with Puerto Rican and federal labour laws, employment discrimination statutes (such as the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964), ERISA and other laws governing various aspects of employment; appellate practice in both federal and Puerto Rican courts; and employment-based immigration, including H-1B visas for professionals and individuals with specialist knowledge; L visas for intra-company transfers for executives, administrators, professionals and individuals with specialist knowledge; e-Visas for treaty investors and treaty traders; and labour certifications, employment-based permanent resident petitions and naturalisation. Ms Haack's practice also includes defending insurance claims in the area of employment practices liability. She also represents major airlines serving Puerto Rico in labour and employment matters and aviation law.

Ms Haack is admitted to the Puerto Rico Bar, the US District Court for the District of Puerto Rico and the United States Court of Appeals for the First Circuit.

Edwin J Seda-Fernández is the director of AMG's labour and employment department. His active practice encompasses counselling and representing clients in all areas of labour and employment law. A substantial element of his practice consists of representing management in union campaigns, negotiation of collective bargaining agreements, labour arbitration and proceedings before the National Labour Relations Board. Mr Seda-Fernández also defends vigorously but judiciously employers in wrongful discharge, employment discrimination, benefits, and wage and hours claims in the Puerto Rican and federal courts, including the United States Court of Appeals for the First Circuit.

Mr Seda-Fernández has extensive experience in counselling employers in workforce reductions, business reorganisations and employment aspects of mergers and acquisitions. He has lectured extensively before commercial and professional associations, including the Puerto Rico Manufacturing Association, the Puerto Rico Chamber of Commerce, the Council on Education in Management, the National Business Institute, the Puerto Rico Hotel and Tourism Association, the programme for professional development of the University of Puerto Rico and the Association of Labour Relations Practitioners. He has also taught courses in labour law and jurisprudence, collective bargaining and labour relations at the Business Administration Faculty of the University of Puerto Rico, Río Piedras.

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The new style of working in Japan – 'Work Style Reform' and teleworking

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In 2019, right before the coronavirus pandemic, the Japanese government introduced the so-called 'Work Style Reform' which aimed to (i) reduce the infamous long working hours of Japanese workers, (ii) introduce flexible and diverse work styles, and (iii) ensure that all workers receive equal treatment. This shift towards a new work style was accelerated by the coronavirus pandemic of 2020 through the widespread adoption of teleworking, as we shall explain below.

1. Work Style Reform

The 'Act on the Arrangement of Related Acts to Promote Work Style Reform' (the Act) covers the following reforms:

(a) Reducing long working hours – setting a limit on overtime

The Labour Standards Act (LSA) provided maximum working hours of eight hours/day and 40 hours/week, and it allowed overtime work if a labour-management agreement was entered (so-called the '36 Agreement' because it is based on article 36 of the LSA). However, the LSA did not limit the number of overtime work that could be set in the 36 Agreement. The Act introduced an amendment to the LSA to set the maximum overtime to be in principle 45 hours/month and 360 hours/year. This may be extended up to 80 hours/month and 720 hours/year under certain circumstances.

(b) Introduction of diverse and flexible work styles

The Act introduced the following new work styles:

i) Mandatory paid leave

To counter the issue of employees not taking annual paid leaves (APL), the employer is now required to ensure that employees who are eligible to take 10 or more days of APL in a year take at least five days of APL during the same year.

ii) Work intervals

The Act introduced a work-interval system that requires an employer to make efforts to provide its employee with intervals between the end time of a working day and the start time of the next working day.

iii) New exemptions

The exemptions for the overtime regulation were limited under the LSA and only applied to high-ranking managers. The Act introduced an additional exemption for highly skilled professionals earning ¥10.75m/year or more. This differs from other reforms in that it is deregulation rather than a stricter regulation.

(c) Ensure equal treatment of workers

Another issue that the Act attempted to tackle was the discrimination of non-regular/contract employees. The Act introduced a prohibition of unequal treatment among employees engaging in the same type of work.

> **Unlike working in the office, it will be difficult for managers to control the work hours of employees who are teleworking.**

2. The pandemic and teleworking

Although not specifically a target of the Work-Style Reform, the SARS-CoV-2 pandemic that landed in Japan in March 2020 and continues to this day, has caused many companies to adopt teleworking, which was rare before the pandemic.

(a) Management of work hours

Unlike working in the office, it will be difficult for managers to control the work hours of employees who are teleworking. Under the LSA, as noted, the maximum work hours per day is eight hours, and the employees must be granted at least 45 minutes of recess in between. Some expert or managerial employees are exempt from such work hour regulations, but the exemption will not apply to most employees. While some have advocated monitoring employees by using IT tools, there are risks to micro-managing, such as diminishing morale, and it is hard to deny such monitoring may be an intrusion of privacy given that teleworking is often done at the employee's homes.

However, fortunately, the LSA allows what is commonly called the 'deemed work hour' system, where the employer may, for employees whose work hours are difficult to manage (typically, sales staff who spend most of their hours outside of the office), deem that the employees have worked predetermined hours of work (ie, the 'deemed work hours'). The deemed work hours are typically eight hours, which is the legal maximum, but the employer needs to be careful that the employees are not in fact working more.

Flexible working hours may also be an option, but the flexible working hours under the LSA still require the employer to monitor and manage the total working hours of its employees within a certain period of time (such as a month), so the issue of the need to monitor at least the employee's daily start time and the end time remains.

(b) Expenses

For office work, the issue of the expense required to manage the office was simple – the employer pays for the rent, equipment, electricity, etc. For teleworking, the issue becomes sophisticated because utility costs are commingled with regular household use. The law is unfortunately unclear on this issue other than that if the employer requires its employees to pay for the costs of equipment and other materials needed to perform work, such must be clearly stated in the employment contract or be stated in the work rules. The government guideline provides that employers should not place too much burden on the employees for teleworking, but this is not the law, and employers are not legally refrained from making the employees pay for such costs.

However, many companies have introduced special benefits for teleworking that cover part, if not all, of the expenses for teleworking.

(c) Unsolved issues

Due to the shifting pandemic situation, it is not clear if employers may require their employees come to the office or engage in telework. In theory, this would depend on the severity of the community spread of the coronavirus, and when commuting or working in the office becomes a health risk, then perhaps employees should be allowed to telework as much as possible. However, even the experts are divided over the risks of the pandemic, and with court cases still limited, the legal situation is still murky. ■

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Dutch employment law – exciting and complicated

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After the world was literally locked up by the global Covid measures, everyone was ready to get back to work, to do business, to develop, to meet business partners and to travel. But a shortage of personnel seems to be curbing these ambitions of many entrepreneurs. All over the world, companies are struggling with a huge labour shortage. This is no different in the Netherlands. One place where this is very visible is Amsterdam Schiphol Airport where travellers queue for hours before departure and where recently flights are regularly cancelled as the airport cannot handle the huge number of passengers. Before Covid, Schiphol was one of the most important hubs in Europe, now it suffers from a shortage of security personnel and baggage handlers and ordering airlines to sell 10,500 fewer seats each month to be able to guarantee the safety of the passengers.

What can and should employers do to attract, find and retain employees?

In this regard, I refer you to *The Legal 500* webinar of 29 June 2022 in which I had the pleasure of discussing the gig economy and the importance of accurately defining employment status with Francisca Burtenshaw, head of people, global DCS at CBRE, and Damian Bethke, a tech-GC and former head of legal at MessageBird, as well as with Linda Frietman, CEO of IamProgrez, a Dutch tech company that develops digital (competence and soft skill) assessments to bridge the gap between education and the labour market.

In addition to the labour shortage, which already causes great concern for entrepreneurs, as per 1 August 2022, a number of important changes in employment law will enter into force. By this date, Dutch legislation must be aligned with the 'European directive for transparent and predictable employment conditions' and employers need to be ready.

These employment law changes have far-reaching consequences for various employment conditions and clauses, such as the extension of Employer's Information Obligation, the prohibition of the study costs clause and the prohibition on ancillary activities.

It is of great importance that you, as an employer, understand what your new mandatory obligations are (note that for most, no transitional law applies!) and that you have your standard contracts adjusted accordingly.

Prohibition of ancillary activities

As a basic principle, the employee will be allowed to have several jobs. An ancillary employment clause will therefore be null and void as of 1 August 2022, unless the clause can be justified on the basis of an objective reason.

A justification based on an objective reason for the application of a prohibition on ancillary activities may be included in the employment contract itself, but may also be given afterwards. For example, at the time the employer wants to invoke an ancillary employment clause.

Examples of an objective reason are: protecting the confidentiality of business information and avoiding a conflict of interest.

There is no transitional law for this. This regulation will therefore also apply to existing ancillary employment clauses.

May an employer then not put any obligation in the employment contract?

Certainly, we recommend including a clause stating that the employee must inform the

> **Since training that is required by law must always be offered free of charge, a study costs clause that pertains to such training will soon be null and void.**

employer if and what ancillary activities he performs or wishes to perform.

Existing terms remain valid to the extent that they do not have to contain the justification itself, but when they are invoked, it must be clear what the objective reason consists of.

Think carefully about what reason this should be and whether this reason can be objectively justified.

Schooling and study costs

Another new legal provision resulting from the implementation of the European directive is the training obligation.

This means that, as of 1 August 2022, the employer is obliged to provide training to his employees in order to execute the work for which they have been hired, the training shall be offered free of charge to the employee, the training time shall be regarded as working time and, if possible, it shall be offered during the hours in which the work is to be done.

Since training that is required by law must always be offered free of charge, a study costs clause that pertains to such training will soon be null and void. No transitional law applies. The consequence may be that existing study-costs clauses will no longer be valid from the moment the law enters into force.

No distinction is made between permanent, part-time and operational contracts; this applies to all employees.

Professional training courses or training courses that employees are obliged to attend in order to obtain, maintain or renew a professional qualification are exempted, as long as the employer is not obliged to offer them by law or under a collective bargaining agreement. This concerns so-called 'regulated professions' as included in the Directive 2005/36/EC on the recognition of professional qualifications.

Gig economy and employment law

As gig economy is keeping employment law specialists busy, the recent opinion of the Advocate General (AG) at the Dutch Supreme Court explains a pressing employment issue, namely whether platform-workers are employees or not based on the Deliveroo case in a 100-page opinion, which is an exciting read!

According to the AG the answer revolves around the interpretation of the criterion 'in the service of the other party' – the authority criterion. Hence whether the work is organisationally embedded in the company of the provider (the platform).

When determining whether the work is organisationally embedded in the company of the provider, the actual performance of the work should be the main focus. This is in line with the case law of the Court of Justice of the European Union and has major implications for the gig-economy if not properly addressed.

In this article I can only scratch the surface, but I would be happy to answer all your questions, just send me an email to: enordmann@acginter.com.

About the author:

Edith Nordmann is managing partner and Attorney at Law at ACG International.

She is an experienced corporate and commercial litigator, has an expert qualification in employment law and is an international ADR certified mediator.

Nordmann is specialised in cross-border business transactions, taking into consideration not only the different legal systems, but also being acquainted with the various cultural differences that can make or break a deal.

As a public speaker she has shared this knowledge on various international conferences.

As managing partner of Attorney Consulting Group International (ACG International), Nordmann can combine all these skills and expertise for the benefit of her international clients. By using deep-seated local knowledge and proven (international) networks across practice areas and borders, she assists her clients in getting deals done and finding solutions that achieve the best results for their actual needs.

Being fluent in German (as a native speaker), English, Dutch, French and Italian and understanding difference in mentality, culture and legal systems across many different cultures and countries, she is able to help her clients in a unique way.

Next to her professional career Nordmann engages in many charitable and social organisations using her professional expertise, not only helping others but also empowering them in their endeavours. ■

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Employment in a Covid-present world – what employers need to ponder

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In the now infamous email, titled 'To be super clear', sent to all Tesla employees last month, Elon Musk wrote: '*Everyone at Tesla is required to spend a minimum of 40 hours in the office per week. Moreover, the office must be where your actual colleagues are located, not some remote pseudo office. If you don't show up, we will assume you have resigned.*'

Unsurprisingly, the email quickly went viral and was met with both praise and condemnation. Some claimed that Elon Musk had simply articulated the frustration employers were feeling after facing resistance to a return to the workplace from staff who had grown accustomed to working remotely. Others criticised Musk for not embracing 'the new normal' and for failing to appreciate that remote working had a number of tangible and intangible benefits, including a perceived improvement in work/life balance for employees.

Divergence in views aside, the debate about Elon Musk's email demonstrates that there is no clear and settled roadmap for 'returning to normal', but rather a spectrum of approaches. The right approach will depend on various factors including the business, industry and size of the employer, the need for in-person client and staff connection (including for the purpose of mentoring junior staff), the preferences of employers and employees about how work is performed, and the availability of suitable technology to successfully support remote work.

There is no doubt that Covid-19 has had a profound effect on employers and employment relationships more broadly, and has fuelled speculation and predictions about both what employees want and what employers will need to consider in organising work in the future. The purpose of this article is to address some of the underlying employment law considerations associated with those predictions, and provide some tips about what employers, irrespective of their industry or size, can do now to meet the challenges of operating under a Covid-19 cloud.

Hybrid and remote work arrangements

Much has been written about hybrid workplaces being not only inevitable, but the new normal. The idea being that employees are not required to spend all of their working time at the workplace, but can work remotely, for some or all of their working hours. For those industries where hybrid arrangements are possible (and of course, in some, they are not), they present their own unique set of employment law challenges. Whilst how and where we perform work may be changing, the underlying legal principles (and legislation) which govern employment relationships in Australia remain the same. An obvious concern is how employers ensure that they meet their various obligations, including the duty of care owed to employees, how they monitor and manage work relationships (including incidents of bullying and sexual harassment through electronic means) when their staff work remotely, and how they ensure that their employees meet their various obligations more generally when, at times, there

> **Where the employee is not sufficiently compensated for their actual hours of work (notwithstanding that they may, in some respects, set their own hours), the risk of an underpayment claim is born.**

is no direct 'line of sight' over what they might be doing.

As a practical example, consider an employer who employs an employee covered by an award or enterprise agreement (being documents which, in Australia, are made by an employment tribunal and set out minimum entitlements for the employees covered by them). Both the employer and employee may see benefits in enabling the employee to perform their work remotely around some of their family commitments, including logging on 'after hours' to catch up on work that they might otherwise have performed during the day. While this agreement may suit the parties (and the employee in particular), it could also create unintended liability for the employer, in circumstances where the award or enterprise agreement sets when ordinary hours of work can be worked, and requires that work performed outside that span of hours be paid at overtime rates. Where the employee is not sufficiently compensated for their actual hours of work (notwithstanding that they may, in some respects, set their own hours), the risk of an underpayment claim is born. Without adequate controls to monitor and manage remote working arrangements, it is easy to see how employment arrangements of this type, which principally benefit the employee, can become problematic for an employer from a compliance perspective.

More broadly, employers need to consider how best to measure productivity, successfully manage underperformance and maintain employee engagement. What may have worked in person in a workplace environment is unlikely to translate neatly into remote work arrangements. Ensuring appropriate policies and procedures, that are both lawful and workable, are implemented in this context is critical.

Flexing the flexibility muscle

The desire for flexibility (broadly defined) appears to be one of the key drivers for hybrid work arrangements, with data collected by Australian statutory agency, the Workplace Gender Equality Agency, suggesting that Covid-19 created widespread support for flexible working among both employers and employees. But of course the desire and need for flexibility in the Australian workforce has existed for some time.

The Fair Work Act 2009 (Cth) (FW Act) now gives employees with more than 12 months' service with their employer the right to request flexible work arrangements in certain circumstances, including where they have responsibilities for the care of school aged children, are a carer, have a disability, are over the age of 55 or are either experiencing, or supporting someone who is experiencing, domestic violence.

The FW Act details the process for making and considering flexible work arrangement requests noting, importantly, that an employer can only refuse to agree to the arrangement on reasonable business grounds. These grounds include where the arrangement would be too costly; cannot be accommodated due to the existing work arrangements of other employees; is likely to result in significant loss of efficiency or productivity; is likely to have a significant negative impact on customer service; or is otherwise likely to be impracticable in light of the necessary changes to the work arrangements of other employees (including the recruitment of new employees).

In reality, many employers have introduced flexible work policies which build on and expand the entitlement created in the FW Act. Data collected by the Workplace Gender Equality Agency about the uptake of flexible work arrangements due to Covid-19 demonstrates that nearly four in five private sector organisations with 100 or more employees in Australia have a formal flexible work policy in place and that many of the organisations that do not have formal flexible work arrangements may nonetheless enter into informal flexible work arrangements with their employees.

While the data suggests that offers of flexibility in work arrangements can assist with attracting and retaining staff, employers must be careful to ensure

> **Employers must be careful to ensure that the implementation of any policy or decision-making process around flexibility is applied fairly and consistently to all staff.**

that the implementation of any policy or decision-making process around flexibility is applied fairly and consistently to all staff. An inconsistent approach has the potential to create not only discontent among the workforce, but increase the risks of claims of bullying and unlawful discrimination, in circumstances where employees do not consider that like is being treated for like.

Moreover, and in circumstances where an employer is unable (or unwilling) to offer flexibility (for instance, by means of remote work) to staff, the employer will need to engage in dialogue with employees about why it is approaching the issue in that way. This may include explaining the inherent requirements of their roles in question and the needs of the business more broadly. The employer will need to articulate why, for example, a particular role cannot be performed remotely in whole or in part. There may undoubtably be valid business reasons for forming a particular view, but where those reasons exist (and, ideally, they should be based on actual experience as opposed to theory in the absence of any real life experience), they should be clearly communicated to the employee in question and documented.

Wellness – a work health and safety perspective

Last year, in a report entitled *Taking Action: A best practice framework for the management of psychological claims in the Australian workers' compensation sector*, Safe Work Australia noted that serious claims involving psychological injury (being those where an employee is absent from work for a week or more), resulted in more lost time and significantly higher cost than other type of workplace injuries. Further, and given emerging studies about the effect of Covid-19 on life and work, there is now evidence that employees are facing record rates of burnout. The upshot of all of this is that workplace stress is bad for staff and bad for business.

The prevalence of 'wellness' programmes within the employment setting in response to these issues has steadily increased to what one US study quantified as a US$8bn per annum industry. Initiatives include subsidised gym memberships, yoga and meditation classes, and healthy ready-made meals, all of which are aimed at improving employee health and wellbeing. While these initiatives are to be commended, their overall effectiveness has been questioned and they cannot be a substitute for the comprehensive identification and effective management of psychosocial hazards (being risk factors which lead to workplace-stress).

When it comes to work health and safety, employers have a statutory obligation to provide a safe work environment and safe systems of work. Employers are required to monitor the health of employees and consult with employees on work health and safety matters. As mentioned above, while work arrangements may have changed dramatically in response to Covid-19, these obligations remain the same (although they must be met in changing circumstances), and extend to not only an employee's physical health but psychological health too.

In that context, any meaningful discussion about wellness at work must consider appropriate work design. Work design includes not only the nature of the work and the way in which it is performed, but relevantly for hybrid work arrangements, where the work is performed. This is critical because remote work and poor environmental conditions are known psychosocial hazards which have the potential to increase the risk of work-related stress. Despite what an employer's employees may say that they would like to do, failing to understand and investigate the safety of an employee's remote work environment (including for example, an appropriate ergonomic assessment) has the potential to increase the risk of injury, but also liability for breach of work health and safety obligations.

Five things employers should do now

1. Review employment contracts and workplace policies

Make sure that your employment contracts (including position descriptions) and

> **Employers are required to monitor the health of employees and consult with employees on work health and safety matters.**

policies are fit for purpose and accurately capture and support the needs of your business in the evolving employment law environment. While we may be experiencing rapid change in the way we work (including when and where work might be performed), the need for appropriate assessments, controls, management, training, information and documentation is as important now as ever. If an employment issue arises within your organisation tomorrow, these will be among the first things your organisation will need to draw on to address and manage the issue(s) in question.

2. Address uncertainty by telling your employees what they need to know

In uncertain times, communication and consultation is key. Employees both want and need to understand how their employers intend to operate post Covid-19 and the impact (if any) on their role. A recent study conducted by McKinsey found that employees felt marked anxiety around the uncertainty of their work arrangements post Covid-19. If your organisation intends to implement a hybrid work arrangement temporarily or permanently, have you communicated this to your staff? Are staff aware of your organisation's expectations about working in the workplace? From a legal compliance perspective, employers covered by an award or enterprise agreement are obliged to consult with staff about major workplace changes. Similar duties arise under work health and safety legislation for all employees regarding safety issues. Consultation is, in any event, good practice generally.

3. Don't just think about 'wellness', consider work design

It's one thing to talk about 'wellness' at large and another to get granular about ways in which you can address and manage psychosocial hazards in your workplace. This requires employers to identify, assess and control psychological risks. While in-house (or virtual) yoga is a great initiative on its own, it's unlikely to address the stress an employee may experience in a highly demanding job, with low role clarity, that they might be required to perform sitting at home at their kitchen counter. Considering work design, and addressing its inherent risks is critical to supporting the mental health and wellbeing of employees.

4. Engage with staff about what you are doing well and what you can do better

At a time when staff shortages are at an all-time high, and the 'war on talent' intensifies, attracting and retaining good staff is front of mind for many organisations. Engaging with employees to understand what they want and value, what they perceive their employer does well and what their employer can do better is invaluable information that can lead to meaningful and positive change. Among other initiatives, this type of information can be gleaned from well-structured and anonymous engagement surveys which employees can complete online. However, simply relying on online engagement is likely to be an error which, of itself, may result in some of the problems discussed above emerging at an organisation.

5. Review, review, review

Practice may make perfect, but review makes it all worth it. There is little utility in implementing a particular strategic focus when it comes to management of employment issues only to have circumstances change without re-evaluating and changing course (if required). Work health and safety legislation, in fact, requires it. The need for agility is fundamental in our Covid-present world. In this context, review and continuous improvement in the areas we have identified above is, and will continue to be, key. ■

Maddocks

Employment in Hong Kong

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Although Hong Kong's employment laws are relatively straight forward and similar to the UK, there are a number of unique provisions that companies hiring workers should be aware of. We spoke with the employment team at RPC to understand more.

What is the importance of employment status in Hong Kong?

Whether a worker is an independent contractor or an employee is one of the most contested issues in employment law. In order to qualify for most statutory rights, protections and entitlements, the worker would need to be hired as an employee.

If the worker is hired as an independent contractor, the hiring company is only bound by contractual terms of the consultancy agreement or contract for services. Parties are, by and large, free to agree terms of the working relationship and generally only bound by the terms expressly agreed.

Where the worker is hired as an employee, he/she is entitled to basic protections, entitlements and rights which are predominantly found in the Employment Ordinance (EO). These rights include the right to buy out notice periods, paid statutory holidays and annual leave, severance or long service payments, sick pay, maternity/paternity leave, rest days and some protection against dismissal.

In addition to the rights conferred by the EO, there are a number of statutory obligations on companies hiring employees. These are set out in the EO and include maintaining employment records, filing obligations to the Inland Revenue Department, taking out insurance to cover liabilities for employees' work injuries and making monthly contributions to a compulsory saving scheme (pension fund).

Whilst the protections, benefits and obligations under the EO aren't typically burdensome (eg employers should pay wages on time), the consequences of breaching statutory provision are potentially more serious than many other jurisdictions (including in the UK), and depending on the type of breach, may result in civil liability and/or criminal prosecution for employers and/or directors and other senior officers of the company.

Can the contracts expressly exclude the Employment Ordinance and be governed by foreign law?

It is not possible to contract out of the EO in a Hong Kong employment contract.

In the case of *Cantor Fitzgerald Europe v Jason Jon Boyer*, the Court of First Instance held that the employer could not attempt to get around the protection afforded by the EO to employees working in Hong Kong by choosing a foreign law. The court reasoned that such attempt would be struck down by section 70 of the EO, which provides that any term in the employment contract which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by the EO shall be deemed void.

> **Directors, managers, company secretaries and other similar officers can be held personally liable for the wage offence if it is proved that the offence is committed with their consent or is attributable to their negligence.**

Are all employees entitled to minimum employee benefits prescribed by the Employment Ordinance?

An employee's rights under the EO will vary depending upon whether he/she is employed under a 'continuous contract', ie by the same employer for four weeks or more, working at least 18 hours each week.

If so, this entitles them to certain benefits under the EO, including annual leave, paid statutory holidays, paid sick leave, and maternity/paternity leave. It is extremely important for companies to ensure that they are properly providing and paying these benefits and entitlements, since an employer who without reasonable excuse fails to grant and pay for such entitlements on time commits a criminal offence.

When and how should wages be paid?

Wage calculation and payment is a thorny area in Hong Kong employment law. Getting it wrong may result in heavy criminal sanctions. Directors, managers, company secretaries and other similar officers can be held personally liable for the wage offence if it is proved that the offence is committed with their consent or is attributable to their negligence. If in doubt, employers should err on the side of caution and speak to local practitioners well versed in this niche.

The calculation of wages has a knock-on effect on employee's payment entitlements to annual leave pay, holiday pay, sickness allowance, maternity/paternity leave pay, severance payment/long service payments and payment in lieu of notice (see below), which are calculated with reference to the daily average wage in the preceding 12 months.

Although what amounts to a wage is defined in the EO, this has not stopped employers from trying to creatively structure employees' compensation to prevent certain payments from being classified as wages. Most typically, companies will label certain payments as a 'discretionary' and argue that they are therefore not wages. In the event of a dispute, courts in Hong Kong will adopt the principle of substance over form and will look at how the 'discretionary' payment was assessed, ignoring any labels attached to such payments. As such, a 'discretionary' label does not preclude a court from finding that the relevant payment amounts to a wage.

In Hong Kong, wages must be paid on time and there are very limited situations in which an employer is lawfully permitted to make a deduction from an employee's wage (for example, deductions for unauthorised absence from work or contributions to the Mandatory Provident Fund). Late payment of wages and/or unlawful deduction of wages is taken seriously in Hong Kong, and an employer who fails to pay wages on time without a reasonable excuse commits a criminal offence and is liable to a maximum fine of HK$350,000 and imprisonment for three years.

Are there any automatic transfer of employees if there is a change of business ownership?

Unlike in many jurisdictions (such as the UK), upon a change of business ownership the employees of a business will not be automatically transferred to the buyer (ie the new employer) and the buyer is not obliged to employ the existing employees of the business.

To effect the transfer of employees on a change of business ownership, the existing employer must lawfully terminate the employment contracts with its employees first before the new employer enters into fresh employment contracts with them. The continuity of the employee's employment is generally preserved upon such transfer for the purposes of calculating statutory benefits.

Do employers need to give reasons for the dismissal?

If the employee has been employed for less than 24 months in a continuous contract, no reasons need to be given for dismissal. The employer simply needs to give the requisite notice or payment in lieu of notice.

After 24 months, an employer will need to justify its dismissal with one of the five 'valid reasons' under the EO. These include redundancy or other genuine operational requirements of the employer; conduct/misconduct of the employee; the employee's capability or qualifications for performing their work; contravention of the law; or any

> **Regardless of any contractual agreement, during the probation period, an employee's employment may be terminated without notice during the first month of their employment.**

other substantial reason which a court or the Labour Tribunal would deem sufficient.

However, there are certain situations where it is unlawful for an employer to dismiss an employee. This include where an employee is pregnant, on statutory paid sick leave, who are giving evidence in proceedings related to the enforcement of EO, work accidents or breach of work safety legislation, who take part in trade union membership and activities, or who are suffering a work-related injury entitling them to compensation under the Employees' Compensation Ordinance.

What payments need to be made to employees upon termination?

Within seven days of termination, the employer must pay the employee all terminal payments due. These may include any accrued wages, payment in lieu of notice (if any), unpaid annual lave, holiday pay, maternity/paternity or sickness allowance, long service payments or end of year bonus, and any other contractual payments such as bonuses and commissions.

In addition, an employee who has been employed for at least two years and dismissed by reason of redundancy is entitled to statutory severance payment. An employee who has been employed for not less than five years under a continuous contract and is dismissed or retires at or above the age of 65 is entitled to long service payment. Both of these payments are calculated by reference to a statutory formula and subject to an overall cap of HK$390,000.

What is the minimum notice period given to terminate an employment contract?

This very much will depend on the length of service.

Regardless of any contractual agreement, during the probation period, an employee's employment may be terminated without notice during the first month of their employment. After the first month, the employee is entitled to notice as set out in their employment contract (which must be at least seven days).

Where an employment contract does not provide for a notice period and/or the employee is not required to undergo a period of probation, the employee is entitled to at least one month's notice of termination.

Depending on the seniority of the employee, for most professional services industries, notice periods would typically be between one and six months. For other industries, the contractual notice periods are generally shorter with one week to one month being most common.

In Hong Kong, both employers and employees have a statutory right to terminate the employee's employment immediately by undertaking to make a payment in lieu of notice. No advance warning is necessary and neither the employer nor employee can object to a termination by payment in lieu of notice.

This unique statutory right has resulted in competitors of employers offering to buy out key employee's notice periods and having those employees work for them the very next day.

Given that employees can buy out their notice period at any time, how should GCs best protect their company from a departing employment joining a competitor?

Reasonably drafted post-termination restrictive covenants (PTRs) in employment contracts are enforceable in Hong Kong so long as it reasonably protects the employer's legitimate business interests. PTRs must be agreed in writing and courts in Hong Kong will not fashion relief for an ex-employer who has not troubled to agree PTRs with their employees.

Our case law in Hong Kong is plagued with examples of employers who had ample justification to restrict competition by a former employee but who brought defeat on themselves by either (i) failing to include such restrictions in the employment agreements – whether at the start of the employment relationship, during any contract variation, as a condition to any non-wage payment, or in termination agreements or (ii) failing to satisfy the court that the restriction is reasonable

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and proportionate to the employer's legitimate business interests.

Whilst the law is very similar to the UK, the application of the law is very different. Perhaps taking into account the smaller geographic region in Hong Kong, the market size and impact on both the employer and the employee, courts in Hong Kong do not generally uphold a long temporal restriction on non-competes. However, by way of comparison, where the PTR does not affect the ability of a working person to earn a living (such as a non-solicitation or a non-poaching restriction), the court is generally more liberal in its enforcement.

About the authors:

Andrea Randall

Andrea Randall is a Hong Kong employment lawyer and advises on both Hong Kong and English law. She has significant and extensive experience in high profile complex litigation, including multi-jurisdictional disputes. She undertakes all types of employment law work. She advises both employer and employees on contentious and non-contentious matters and is regularly instructed in civil proceedings as well as criminal prosecutions. She practiced in a City firm in London before relocating to Hong Kong.

Randall has been ranked in all major legal directories including *The Legal 500*, *Chambers & Partners*, *AsiaLaw* and the *Doyle's Guide*. Randall is also recognised as an Elite lawyer in China's *Elite 100 Lawyers* (Foreign Firms). Randall is fluent in English and Cantonese.

Yuki Chiu

Yuki Chiu's practice is a mixture of commercial litigation, arbitration, and contentious and non-contentious employment matters. Chiu assists Randall in a wide range of employment law matters, including advising on employment contracts and complex deferred remuneration schemes, enforceability of post-termination restrictive covenants, termination and separation agreements. On the contentious side, Chiu has worked on a number of matters in relation to claims involving breach of contract, discrimination, personal injury, retirement, and repayment of bonuses. Chiu acts for both employers and employees with a particular focus in matters involving the legal and financial sectors.

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Employees v independent contractors under Egyptian law

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Employers often find themselves in need of hiring independent contractors to meet certain business needs. Moreover, independent contractors are generally attractive to employers, as they offer flexible working arrangements without the responsibilities that arise from hiring employees. However, as an in-house lawyer, you are always apprehensive of the risk of misclassification of contractors as employees, and the obligations that would ensue on the employer should such risk materialise.

Legal framework

Employment relationships are regulated through the employer's internal policies and the employment contracts concluded between the employer and the employee, which are subject to the provisions of the Egyptian Labour Law No 12 of 2003 and its executive decrees (ELL). The ELL does not expressly regulate the relationship between independent contractors/service providers and the recipient of their services (ie employers). Such relationship is contractually regulated by way of an agreement between the parties, rendering the executed contract the law of the parties. Accordingly, the employer and the contractor are free to define their rights and obligations as they deem fit, without prejudice to the general rules and regulations of Egyptian law.

From a practical perspective, it may be perceived as somewhat challenging for an employer to walk the line between employees and independent contractors under Egyptian law, which is largely due to the absence of substantial regulations on engaging independent contractors. However, the benefit of the extensively regulated employment sector is that it makes it easier to identify what to avoid when hiring an independent contractor in order to minimise the risk of misclassification.

The key aspect that distinguishes employees apart from independent contractors is the obligations employers have before employees by virtue of the ELL, which employers are not required to fulfil vis-à-vis contractors. For example, employers are required to:

- provide their employees with the tools and equipment necessary to perform the work;
- withhold and pay the applicable income tax from their employees' salaries;
- register employees under their social insurance file;
- keep track of employees' working hours and leaves;
- increase employees' salaries on an annual basis;
- pay the statutory employee profit share (if applicable); and
- comply with the employment termination regulations under the ELL.

On the other hand, independent contractors are normally responsible for the provision of their own tools and equipment and making their statutory tax and social insurance payments. Furthermore, they are not entitled to any share in the employer's profits, and the employer is not obligated to increase their fees, unless stipulated otherwise in their contractual arrangement.

Risk of misclassification

It would be impractical to disregard the grey area that renders independent contractors comparable to employees, and which ultimately contributes to the risk of misclassification. This is clearly represented in the obligations that the employer can place on both independent contractors and employees, such as:

> **If the court concludes that the employer is using the contractor to circumvent the obligations that ensue from employment relationships under the ELL, it will rule in the contractor's favour.**

- following the employer's orders and instructions;
- compliance with internal policies and codes of conduct;
- assignment of intellectual property rights to the employer, to the extent permitted by law; and
- adhering to a work schedule.

Additionally, should the employer require an independent contractor to comply with obligations that are typically associated with employees, this would alleviate the risk of misclassification being triggered. Obligations such as, among others, exclusivity, compliance with leave policies and post-termination non-compete when imposed collectively increase the associated risks.

In this regard, it should be noted that it takes several elements to build a misclassification case, the same does not merely arise from requiring an independent contractor to comply with any of the abovementioned obligations. However, when these obligations add up, an independent contractor can easily claim before the competent labour court that its relationship with the employer should be classified as an employment relationship under the ELL. In addition to the reclassification, the contractor would typically claim from the employer the benefits granted to their employees; such as: social insurance registration, bonuses, leave payouts etc.

The nature of the relationship between the employer and the independent contractor would be examined by the court, in light of the agreement concluded between them.

In addition, the court would investigate the relevant factors supporting such claim, in terms of subordination, working hours, payment of fixed wages, granting benefits or bonuses etc. If the court concludes that the employer is using the contractor to circumvent the obligations that ensue from employment relationships under the ELL, it will rule in the contractor's favour. Consequently, the employer will be required to reimburse the contractor for any claimed entitlements.

Moving forward

The trick to the classification of employee v independent contractor lies in the contractual arrangement entered into with the employer. In principle, there should not be an issue with requiring the contractor to comply with obligations that are typically associated with employees. However, it is vital to ensure such matters are handled delicately when drafting the agreement between the employer and the independent contractor to minimise the misclassification risks.

Needless to say, it is recommended not to subject the agreement concluded with an independent contractor to the regulations of the ELL, whether explicitly or implicitly.

About the authors:

Tamer Fawki is a partner at Matouk Bassiouny & Hennawy and is the founding member of the employment and labour practice. Fawki has been with the firm for over 25 years, starting when the law firm was Bassiouny Law Firm.

He is experienced in providing clients with comprehensive legal support in relation to employment and labour laws in Egypt and all human resources matters, as well as a wide range of regulatory advice to clients on day-to-day employment, labour and social insurance matters including implementation and enforcement.

In addition to this, Fawki has significant experience in advising on all aspects of investing and doing business in Egypt, with particular expertise and a deep bench of experience in all matters relating to employment and labour in Egypt. Furthermore, Fawki also has significant experience in the fields of corporate, real estate, commercial, banking and finance.

Susan Romana is a senior associate at Matouk Bassiouny & Hennawy and a member of the corporate and M&A group. She has over six years of experience in general corporate, commercial and M&A transactions, which include four years' experience in the employment and labour practice.

She advises clients across all sectors on day-to-day employment matters, which include employment and management contracts, social insurance, HR policies, personnel investigations, redundancies, in addition to providing workplace training programmes. Further, Romana has assisted with the employment and labour work streams of several transactions pertaining to cross border acquisitions, internal restructuring, and transfer of business.

Romana is one of the founding members of the employment and labour practice in Matouk Bassiouny & Hennawy, which is the first department dedicated to employment work streams across top tier law firms in Egypt.

The harder line

The In-House Lawyer sat down with Nicholas Levy of Cleary Gottlieb to discuss CMA chief executive Andrea Coscelli's legacy and analyse the current global antitrust market.

BY CAMERON PURSE

Andrea Coscelli's leadership of the Competition and Market Authority (CMA) has been highly consequential. Since his appointment in 2016, the agency has become one of the most interventionist competition agencies in the world, challenging more than 30 transactions, including transactions that had little nexus to the UK and, in some cases, had been approved by other agencies.

Coscelli has also been at the forefront of those calling for new powers to regulate the world's largest tech firms. As he stepped down in July, we spoke to Cleary Gottlieb competition partner Nicholas Levy about the temperature of the enforcement environment domestically and globally, and to assess the implications of that environment.

The In-House Lawyer: It feels that, despite the spectre of a looming recession and an ever-tightening regulatory landscape, there is still a terrific appetite for deals?

Nicholas Levy: We've already seen a number of significant transactions announced this year, including three sizeable US-based tech deals: Microsoft's $69bn acquisition of Activision Blizzard; Broadcom's $68bn offer for VMware; and Elon Musk's $40bn run at Twitter. Overall, though, deal activity is down around 20% and some expect it to fall further in the second half of 2022. Antitrust enforcement nevertheless remains vigorous, including in the UK.

Perhaps it's best to first provide some historical context. Would you set the scene for us?

The last 30 years have seen three principal developments in merger control around the world: the EU's implementation of a mandatory system of merger control in 1990; the adoption of competition rules in China; and the establishment of merger control regimes in more than 150 jurisdictions around the world, based largely on the EU's administrative model and substantive test. To a greater or lesser extent, the EU, China, and other jurisdictions applied evidence-based rules grounded in the consumer welfare standard that has been the bedrock of US enforcement policy from the outset.

It feels like a transformative time for competition enforcement, on a global scale. Decades-long precedents seem to be on the chopping block.

The last few years have called into question what had been a fairly settled consensus around the focus and objectives of merger control rules. Some have demanded more permissive rules to allow for the creation of national champions, others have criticised perceived under-enforcement and called for new rules to rein in the leading digital platforms, and still others have suggested that the consumer welfare standard was too narrow and have urged antitrust agencies to take account of social, industrial, employment and environmental considerations.

How is the European Commission operating in this environment?

Twenty years on from the *General Electric/Honeywell* decision, when the EC was criticised by the then-heads of the US antitrust agencies for blocking a merger they had approved, on grounds they disagreed with, it has become one of the most stable and consistent agencies in the world, applying a well-established, economically based analytical framework in a flexible and transparent way. Commissioner Vestager has resisted calls to flex EU rules to create European or national champions, although she has been somewhat more interventionist than her immediate predecessors while refraining from criticising their records or decisions.

Let's turn our attention to the UK, specifically. What is the role of the CMA in this paradigm shift?

Over the past 20 years, UK competition law enforcement has experienced continuous reform and innovation. That process has accelerated since the UK voted to leave the EU in June 2016. The past few years have seen significant changes in UK antitrust policy and enforcement. Some were anticipated, others less so.

As had been expected, Brexit gave the CMA parallel jurisdiction over major transactions, cartels and unilateral conduct that were previously subject to exclusive EC jurisdiction, increasing costs arising from parallel reviews in London and Brussels. What was less anticipated was that the CMA would ally itself with those who believe that merger control rules have been under-enforced, allowing some industries to become too concentrated, and, as a result, that it would become more muscular and interventionist in its enforcement practice.

The most significant change at the CMA has been the way in which it now uses its existing merger control powers, in particular by asserting jurisdiction over transactions that might previously have escaped scrutiny in the UK, challenging transactions that might have been approved in the past, and imposing global hold-separate orders on completed transactions. The CMA's general concerns over concentration levels in UK markets have translated into consistently high intervention rates in mergers. In the three years preceding the Brexit vote, the CMA prohibited or caused the abandonment of around seven transactions. In the five years since then, that number stands at more than 30. Among those blocked transactions are deals that were not approved in other jurisdictions and/or involved companies that had next to no turnover in the UK.

There is a great deal of speculation about Coscelli's successor and whether they will confirm the policies championed under his leadership or step back, possibly under pressure to avoid the UK becoming an unattractive target for foreign investment.

So, it's fair to say that the CMA is more forceful these days?

Yes, particularly in markets that the CMA already considers to be concentrated. In these cases, the CMA has shown a readiness to intervene even where market-share increments are low, and in assessing acquisitions of new entrants and potential competitors by established market players. The CMA is also sceptical of behavioural remedies in merger cases, and has blocked two transactions that the EC approved because it didn't agree with remedies that the Commission had accepted.

As to antitrust enforcement, the CMA has brought cases concerning allegedly excessive pricing, which were novel at the time but, partly due to Covid, has been less active with respect to cartel investigations.

You have previously described the Directors Disqualification Bill as legislative 'tinkering', rather than a wholesale overhaul. So this isn't a sea change then?

I wouldn't call it a sea change, although the CMA does consider that its 2019 policy change was significant in allowing the CMA to consider director disqualifications in all cases and in parallel with its substantive investigation. I don't think there's anything in the Bill that will fundamentally change the importance and modalities of companies' compliance policies. Around 20 or so directors have been disqualified over the past couple of years to date and it's thought unlikely the new legislation will lead to a materially greater number of disqualifications.

What about the National Security and Investment (NSI) Act?

This is a sea change. It's the culmination of a wide-ranging debate around national security and the acquisition of domestic companies by foreign buyers. In this respect, the UK legislation reflects the mood of our times, and other jurisdictions have adopted similar rules in response to concern about domestic companies in strategically important industries being acquired by foreign buyers. It's broadly comparable to regimes that have been brought in all over the world, although it goes further than certain of those regimes in some respects.

How so?

The new rules can be applied retroactively; they apply to acquisitions of domestic companies by UK companies, as well as foreign buyers, and also capture acquisitions of non-UK targets; they apply to acquisitions of noncontrolling minority shareholdings; they include mandatory reporting rules in 17 sensitive sectors and the possibility to call in transactions in sectors that fall outside the mandatory regime if a risk to national security is suspected; there's no definition of national security; and the Government may void transactions entirely even after they have been completed.

> **The limited pool of parallel cases decided to date show that co-operation and alignment of the EC and CMA processes is possible but that there is no guarantee of the same outcome.**

What is perhaps the biggest takeaway here for potential acquirers?
You should take account of the possibility of an NSI review in deal planning and transaction documentation, including in situations that might not obviously appear to involve national security.

What are the main concerns about the new law?
The main concerns have been around the administrative costs of notification and the attendant delay, together with the possibility that the rules may inject a political dimension into M&A by allowing the Government to use the NSI rules to maintain jobs and keep technology in the UK. Many view this possibility with alarm, although the Government has said this isn't its intention.

Will this broader scope translate into elongated deal timelines across the board?
I don't think it's possible to discern any pattern yet. Some types of transactions will inevitably draw more scrutiny, but it's encouraging that while there have been many filings, there have been relatively few challenges or conditional approvals.

Which sectors are likely to come under the most scrutiny in the coming years?
The digital sector has attracted a great deal of attention in the UK and elsewhere. Until recently, the CMA was less active in the digital space, but it's opened a number of cases recently and has ongoing investigations of Apple, Amazon, Meta, and Google. It has also been strongly supportive of a regulatory regime with comparable heft to the one the EC is adopting with the Digital Markets Act. As it stands, though, there's only a draft Bill, and the messages from Government have been mixed. The UK Government recently shelved plans to give statutory powers to the Digital Markets Unit (DMU) during this parliamentary term, but it is committed to putting the regime on a statutory footing when parliamentary time allows. Some are advocating for a lighter-touch regime, hoping to make the UK a friendly venue for tech companies to invest in.

These seem like opposing aims.
The Government wants to make the UK attractive for foreign investment while also establishing a new regulatory regime. For the time being, the CMA is bringing individual cases while it waits for a DMU to be formally established and given the powers it needs. My suspicion is that there may be little desire politically for a new piece of legislation that could inhibit investment in the UK.

Beyond tech, which other sectors are facing high levels of regulatory pressure?
Pharmaceuticals is an area where the CMA and others want to ensure that strong incumbents aren't snapping up nascent, emerging competitors – so-called 'killer acquisitions'. As for other sectors, the CMA's stated ambition to be relevant may lead to greater focus attention on consumer-facing markets, such as music streaming, which is currently subject to a market study.

What are your predictions for the future?
More than a year on from Brexit, the CMA has taken its place as a global competition authority. The limited pool of parallel cases decided to date show that co-operation and alignment of the EC and CMA processes is possible but that there is no guarantee of the same outcome even where the agencies co-operate closely. The CMA is likely to maintain its rigorous enforcement of merger control in the coming years, and has already shown that it is prepared to take a different decision from other competition authorities in parallel cases, requiring merging parties and their advisers to give close attention to timing strategy and remedy design in future complex parallel cases. ■

Brexit's implications for UK antitrust enforcement

Brexit transformed the practice of UK competition law, empowering the Competition and Markets Authority (CMA) to review major transactions, cartels, and unilateral conduct previously assessed by the European Commission (EC). To explain Brexit's implications, Cleary Gottlieb's award winning UK antitrust team sat down for a roundtable for *The In-House Lawyer*.

In a short period of time, and without any change in UK law, the CMA's enforcement of UK merger rules has become much more interventionist. Can you explain how CMA enforcement has changed?

Jackie Holland, partner, Cleary Gottlieb: There have been a number of important changes. First, the CMA has become more creative at claiming jurisdiction over mergers it believes may have a negative impact in the UK. We have two jurisdiction tests in the UK – a turnover test and a share of supply test. The share of supply test allows the CMA to review a merger where the parties will achieve a 25% share of the supply of goods or services of any description in the UK. This is not a market share test and has been interpreted more flexibly by the CMA to a point where it can be difficult to exclude CMA jurisdiction.

Second, the CMA has become more aggressive at calling in mergers for review that it thinks could have a negative impact on competition in the UK. We have a voluntary notification regime for mergers in the UK, but the CMA has power to call in a merger for review up to four months after closing. A number of cases called in by the CMA have been US-US mergers, such as Sabre/Farelogix and Facebook (Meta)/Giphy.

Third, a much higher proportion (around 75%) of mergers referred for a Phase 2 investigation have been prohibited over the past few years. Recent examples include Facebook (Meta)/Giphy and JD Sports/Footasylum. The CMA has also been tougher on remedies, and we are starting to see cases where the CMA has not been prepared to go along with remedy packages agreed with the EC under the EC Merger Regulation, such as Cargotec/Konecranes.

Fourth, some of the problematic cases have involved novel theories of harm or the dynamic competition concerns, such as a concern that one party may have entered the UK in the future. This can make it difficult to predict whether their merger is likely to raise concerns.

Fifth, the CMA is requesting a greater volume of data and internal documents than it did in the past. This increases the burden on the parties. Internal documents are often relied on by the CMA to support their case, especially to analyse the closeness of competition between the parties and the way the market may develop in the future.

Finally, when the CMA investigates completed mergers it routinely imposes an Initial Enforcement Order, requiring the businesses to be held separate until the end of the CMA investigation. The restrictions imposed by IEOs are very burdensome on both the acquirer and the target and the CMA has the power to impose significant fines of up to 5% worldwide turnover for breaches. We spend a considerable amount of time monitoring compliance with IEOs and applying for derogations to take actions that are prohibited by the IEO.

The CMA was for many years criticised for not having used its antitrust enforcement powers to bring cartel and dominance cases. What effect, if any, has Brexit had in these areas?

Paul Gilbert, partner, Cleary Gottlieb: The short answer is yes. The CMA has become a stronger and more confident agency across all areas of its work. This is true of cartels and dominance cases, just as it is for mergers.

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Before Brexit, international cartel and dominance cases fell mainly to the EC. The CMA was left targeting local cartels and conduct specific to the UK: the way pharmaceutical companies sold products to the National Health Service, for instance. Since Brexit, we have seen three things. First, the CMA is targeting much of its enforcement activity on large technology companies. Second, the CMA is investigating conduct that extends beyond the UK. Third, the CMA is willing to take the intellectual lead in international cases and encourage agencies in other countries to develop parallel investigations.

It's not all about digital markets, either. The CMA has the largest number of ongoing cases that it's had for many years, and at a time when it has been difficult to use dawn raids to gather evidence because of Covid-19. These include investigations into retail markets, construction, pharmaceuticals, airlines, ferries and financial services. Many of these cases have a long way to go and it's probably too early to know if the CMA has bitten off more than it can chew, but all the indications are that the CMA is up for the challenge.

The CMA has expressed some frustration about the legislative delay in establishing a Digital Markets Unit to regulate the leading digital platforms. What's going on and what should we expect?

Henry Mostyn, partner, Cleary Gottlieb: The Government first announced plans to introduce a Digital Markets Unit (DMU) in 2020. The DMU was supposed to be given powers to devise codes of conduct for tech companies. It was established in shadow form last year, and is operating with around 60 staff. But it has no powers beyond the CMA's existing capabilities. The bill to put the DMU on a statutory footing was dropped in this year's Queen's Speech and won't be introduced in this Parliamentary session.

The CMA is, however, still pursuing antitrust cases in tech, and trying to reach resolutions swiftly. It recently agreed commitments with Google about its removal of third-party cookies in Chrome, has ongoing probes into Google's and Apple's app stores, is investigating Facebook's collection of data from advertisers to enhance its downstream services, and is consulting on a market investigation into browsers and cloud gaming. We expect these cases will continue – and the CMA to open new cases – while the Godot-like wait for the DMU goes on.

Many predicted that Brexit would slow the growth of competition litigation in the UK and that follow-on damages actions on the back of EU cartel decisions would no longer be brought in London. Were these predictions correct and what's going on?

Paul Stuart, counsel, Cleary Gottlieb: Although we were always optimistic that England would remain a vibrant jurisdiction for competition litigation post-Brexit, the last 18 months have surprised many with the amount and variety of cases being brought in English courts.

That's down to several factors. First, the collective proceedings regime has taken off, with the Supreme Court's judgement in *Merricks* leading to a raft of CPOs being certified. Second, we've seen growth in standalone claims, which don't rely on a prior infringement decision, and usually relate to non-cartel conduct that

(L-R) Paul Stuart, Jackie Holland, Maurits Dolmans

doesn't require an agency to uncover. Third, the transitional provisions mean there's a long-tail of EC decisions that can still be used for follow-on cases, and those continue to be brought in England. Fourth, we're seeing competition litigation used in ever more creative ways, with cases covering a more diverse range of conduct, including what would historically have been thought of as consumer protection issues.

There's every reason to expect this growth to continue. The CMA is among the most active competition authorities in the world, and its docket of enforcement cases will generate a new set of follow-on cases, including because the increasing availability of third party funding is enabling a wide array of cases to be brought. The current trajectory suggests that the number and breadth of competition disputes is set to increase.

It's now six months since the UK's national security screening regime came into force. What's your experience been to date?

John Messant, senior attorney, Cleary Gottlieb: The new national security regime was expected to affect a large number of UK-related transactions and that has been borne out in the first few months. According to a report published by the Government in June, the new Investment Security Unit (ISU) received around 220 notifications in the first three months of the regime. 17 transactions were called in for in-depth review, around half of which related to the defence sector. The sectors covered by the mandatory notification regime are broad so it can take time to exclude investments that have no obvious relevance to national security.

The good news is that the ISU has been efficient in dealing with the large number of anodyne filings. There was some concern that the ISU would be overwhelmed with the number of transactions reported and would take its time before accepting filings as complete. Instead, according to the Government report, the 30-working-day screening period has started on average within three days from notification and has lasted on average 24 working days. This is consistent with our experience.

One significant concern thus far is the lack of transparency. Though the ISU has been open to questions on interpretation of the new legislation, there has been little engagement on specific cases once a filing is made. In most cases parties have not heard anything from the ISU between the filing and the decision. This is not a problem when the transaction is cleared, but we have also heard of cases where the decision to call in the transaction for further review arrived without any questions during the screening period.

It will also take time for any clear pattern in the Government's enforcement practice to become apparent since decisions will largely be taken out of the public eye. There are many other uncertainties in the legislation that are yet to be resolved and the ISU, investors, and their advisors will all be learning on the job. So watch this space.

You've been in London for 10 years. How has the practice changed?

Maurits Dolmans, partner, Cleary Gottlieb: We have seen huge changes over the last decade. Cases have become more complex and fact-intensive across the board. Economic analysis has become

> We're really excited about our prospects and see considerable scope for further growth as the UK competition enforcement becomes more challenging and client demand for high-quality advice increases.
>
> **Nick Levy, partner, Cleary Gottlieb**

more nuanced, taking into account multisided platform competition, behavioural economics taking account of irrational consumer conduct, and the implications of market failures and collective action problems in assessment of sustainability agreements. It took a few years of discussion, but competition authorities are finally beginning to recognize the importance of integrating climate change and sustainability in competition policy.

In the high-tech area, there is increased attention to protection of innovation, but also a trend towards regulation of conduct regardless of competitive impact or effect, to address the societal impact of online platforms. Regulation may be needed, but there is no one-size-fits-all for different online platforms, and I have the feeling not only that online platforms are increasingly seen as scapegoats of all societal ills, but also that competition law is seen too much as a panacea.

Brexit added to that heady mix, which is making compliance more complex and costly, as a result of inefficient duplication and greater risk of divergence. We live in an integrated world, and coordination of antitrust advice worldwide is more needed than ever, whether in the online economy or as it relates to sustainability and the climate crisis. To address these challenges, it is important to plan well ahead, and do so with an integrated team that has a deep understanding of the UK, EU, US, and other jurisdictions' regimes.

You came to London shortly after the Brexit vote with a plan to develop Cleary's London practice. How's it gone and what are your plans for the future?

Nick Levy, partner, Cleary Gottlieb: With leading practices in Brussels, Washington DC, Rome, Paris, and Cologne, we've long wanted to develop a London competition practice. Brexit gave us that opportunity and made it a strategic imperative to develop our UK practice.

The practice's growth has exceeded our initial plan – we now have seven senior lawyers, 25 junior lawyers in London, and 10 UK and Irish-qualified lawyers in Brussels. Demand is strong across all areas of the practice.

We've worked on a raft of significant mergers, including NVIDIA/ARM, Sainsbury's/ASDA, Ecolab/Holchem, Veolia/Suez, Facebook/Giphy, Telefónica/Liberty Global, Adevinta/eBay, and Sony Music/AWAL, are advising Google on the CMA's on-going investigations, have been involved in several cartel matters, and have a thriving antitrust litigation practice, representing, among others, 'K' Line in defence of collective proceedings relating to the Maritime Car Carriers infringement, and LG Display in successfully challenging jurisdiction in relation to contribution proceedings arising out of the LCD infringement.

We're really excited about our prospects and see considerable scope for further growth as the UK competition enforcement becomes more challenging and client demand for high-quality advice increases. ■

Selective distribution systems in the pharmaceutical sector

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Introduction

Ankara's 13th Administrative Court (Administrative Court) annulled[1] the Turkish Competition Board's (Board) decision, dated 3 September 2020 and numbered 20-40/553-249, rejecting the exemption application of Johnson & Johnson Sıhhi Malzeme Sanayi ve Ticaret Ltd Şti (J&J) (Board's decision). The distribution system that is assessed by the Board within the scope of J&J's exemption application concerns the distribution of four medicines, namely, Darzalex, Imbruvica, Stelara and Zytiga, manufactured by J&J by nine pharmaceutical warehouses within the scope of a quantitative selective distribution system (Warehouse Sales Agreement or the Agreement). Through the exemption application, J&J requested the Board to determine that the Agreements benefit from the block exemption per the Block Exemption Communique No 2002/2 on Vertical Agreements (Communique No 2002/2) or else, satisfies the conditions for an individual exemption as per Article 5 of the Law No 4054 on the Protection of the Competition (Law No 4054).

The Board's decision

a) The vertical restrictions envisaged by the Agreement

The Agreement envisaged a quantitative selective distribution system by J&J covering the distribution of Darzalex, Imbruvica, Stelara and Zytiga within the pharmacy channel. The Board noted that the Agreement would reduce the number of warehouses in J&J's distribution network in the pharmacy channel from 40 to nine. The Board also remarked that per the selective distribution system these nine warehouses are prohibited to sell/supply the medicines subject to the Agreement with warehouses and/or distributors outside the scope of the selective distribution system and to barter such medicines with such warehouses and/or distributors. Additionally, the Agreement prohibited sales of the relevant medicines outside of Turkey or sales of such medicines within Turkey with the intent of resale to natural or legal persons located outside of Turkey. In that context, J&J was considered to have aimed to restrict parallel exports.

In terms of its assessment regarding the selective distribution, the Board emphasised that distribution systems that are non-qualitative (ie distribution systems where distributors are chosen based on objective criteria such as training of sales personnel, quality of service and product portfolio) and directly or indirectly restricting the number of re-sellers are within the scope of Article 4 of the Law No 4054. The Board further explained that quantitative and/or qualitative selective distribution systems could benefit from the block exemption per the Communique No 2002/2 even if it is applied simultaneously with vertical restrictions such as a non-compete clause or an exclusive distribution system, on the condition that (i) the market share of the supplier does not

> **The Board further noted that selective distribution systems are generally applied for the products within automotive, cosmetic, or durable consumer goods sectors with a view to protect the brand image.**

exceed 40% threshold and (ii) active sales between authorised distributors as well as active sales from authorised distributors to end-users are not restricted. That being said, the Board remarked that an assessment on whether a selective distribution system would benefit from block exemption or not would boil down to elements such as whether the nature of the product would require selective distribution, whether inter and intra brand competition is restricted and cumulative effects that may result from parallel networks.

b) The Board's assessment on the selective distribution system

Against the foregoing, the Board assessed whether the products in question require selective distribution by their nature and whether the criteria set forth for the selective distribution are necessary for effective distribution of such products. The Board further noted that selective distribution systems are generally applied for the products within automotive, cosmetic, or durable consumer goods sectors with a view to protect the brand image. Additionally, the Board noted that in such sectors the suppliers may be inclined to set criteria regarding the quality of sales points or sales personnel, professional and technical capabilities and after-sales repair and warranty services to protect the brand image.

In terms of its assessment on whether medicines would fall within the scope of products that would necessitate selective distribution by its nature, the Board remarked that wholesale level of medicine supply would not require such a distribution system by its nature. That being said, the Board dug deep into the medicines subject to the Agreement and assessed whether the respective products require a selective distribution system by their nature. To that end, the Board assessed whether following arguments of J&J would deem the relevant medicines eligible for a selective distribution system requirement: (i) Darzalex, Imbruvica, Stelara and Zytiga require expertise and are sold at a more expensive retail price than other medicines sold by J&J in the market, (ii) Darzalex and Stelara are biotechnological medicines that requires delivery under cold chain, (iii) Imbruvica and Zytiga are conventional products that are produced via high technology. Despite J&J's arguments, the Board concluded that the medicines at question do not differ from most of other medicines and did not necessitate a selective distribution system given that most of other medicines also require delivery under cold chain and are produced by way of a sophisticated technology. Furthermore, the Board remarked that the main purpose of the Agreement subject to the application is to implement an export ban and J&J aimed to monitor export of such products by way of limiting the number of its distributors. Relatedly, the Board considered such aim to be reasonable, however concluded that application of a selective distribution system is not necessary to achieve such purposes.

Consequently, the Board held that the distribution system at hand could not be deemed as a selective distribution system, due to the characteristics of the products. Hence, despite the fact that market shares of the products (ie Imbruvica, Zytiga, Stelara and Darzalex) subject to the Agreement were below 40% (ie, the threshold set forth under the Communique No 2002/2 was not exceeded for any of the pharmaceuticals concerned as of the date of the application[2]), the Board decided that the Agreement did not benefit from a block exemption, and J&J's preventing its authorised dealers from selling the relevant medicines to unauthorised resellers should be treated as a restriction on active and passive[3] sales. In light of this, the Board proceeded with an individual exemption analysis.

c) The Board's individual exemption analysis

Within the scope of the individual exemption analysis, the Board first remarked that the agreement at hand would not satisfy the criteria of ensuring new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services, given that the

The Administrative Court noted that while quantitative selective distribution systems should be under a stricter scrutiny within the scope of Article 4 of Law No 4054, there is no legislative provision that prohibits quantitative selective distribution agreements.

distribution system at hand could not be deemed as a selective distribution system. In that case, the Board remarked, that the clause stipulating the selective distribution system of the Agreement would merely function as a restriction on resale activity of the distributors and it is not necessary for ensuring the availability of the relevant products within Turkey.

As regards to the criteria of customers benefitting from such developments and/or improvements, the Board first remarked that the Agreement may have positive effects for accessibility to the relevant products within Turkey given that the Agreement envisaged an emergency distribution system, which would enable allocation of additional quota of medicines to a given authorised distributor. That being said, the Board underscored that limiting the number of distributors that undertake the distribution of the respective products within Turkey would hamper and/or impede consumers' access to these medicines. To that end, the Board concluded that the consumers would not benefit from the developments and/or improvements arising from the Agreement.

In terms of the criteria of not eliminating competition in a significant part of the relevant market, the Board focused on J&J's market shares regarding these medicines within the pharmacy channel and the portion that these medicines take within J&J's total sales. Consequently, the Board concluded that the possibility that unauthorised pharmaceutical warehouses could not offer the medicines distributed under the Agreement under their own portfolio would have a negligible effect on the relevant market. To that end, the Board concluded that the Agreement would not eliminate competition in a significant part of the relevant market.

In terms of the criteria of not restricting competition more than necessary to achieve the goals set out in the first and the second criteria, the Board simply noted that the fundamental aim of the Agreement is to ban exports of the relevant products and the relevant clause of the Agreements setting out the selective distribution system would exceed beyond such aim and would restrict competition more than what is necessary to achieve efficiency in distribution and consumer benefit. To that end, the Board concluded that the Agreement failed to meet the final condition for being granted an individual exemption.

Against the foregoing, the Board concluded that the Agreement could not be granted individual exemption either.

Annulment decision of the Administrative Court

Following the Board's decision, J&J filed a lawsuit before the administrative courts for the annulment of the decision. In its examination, the Administrative Court noted that while quantitative selective distribution systems should be under a stricter scrutiny within the scope of Article 4 of Law No 4054, there is no legislative provision that prohibits quantitative selective distribution agreements.

Furthermore, the Administrative Court countered the Board's argument that the Agreement would hamper and impede the consumers' accessibility to the relevant medicines due to the selective distribution clause and limitation of the number of distributors, by way of indicating that all cities within Turkey would be supplied by at least two pharmaceutical warehouses within the scope of the distribution system set out by the Agreement. Furthermore, the Administrative Court noted that the emergency distribution system would also prevent supply bottlenecks. Additionally, the Administrative Court underscored that the Agreement did not restrict the pharmacy channel, which is the downstream market for the pharmaceutical warehouses that distribute the medicines and any pharmacy that would require the medicines at question could access to them.

In terms of the Board's approach that only the agreements covering the products that require selective distribution system by their nature would benefit the protective cloak of the block exemption, such as the products offered within automotive, cosmetic, or durable consumer goods sectors, the Administrative Court confined itself to address the Board's remarks within the scope of its individual exemption analysis and did not address the Board's remarks on how the block exemption rules would be

> **The Administrative Court's decision is crucial in the sense that it blocked a categorical preclusion of quantitative selective distribution systems except for the sectors such as automotive, cosmetics and durable consumer goods.**

applied to selective distribution systems. In that context, the Administrative Court considered the Board's argument that the pharmaceutical industry does not require technical and professional capabilities, after-sales services as unfounded, given that supply of pharmaceuticals requires technical and professional capabilities as well as after-sales feedback from the consumers within the scope of the applicable regulations to the relevant sector. That being said, the Administrative Court did not shed light on the issue on whether a product that does not require the selective distribution system by its very nature should be precluded from the protective cloak of the block exemption.

Lastly, the Administrative Court remarked that the Board's conclusion that the relevant clause of the Agreement stipulating the selective distribution system is not necessary to achieve the aim of export ban is unfounded, given that J&J substantiated that it could not prevent the exportation of such medicines despite the fact that these medicines are traced with barcode numbers labelled on them.

Accordingly, the court considered the fact that the Competition Authority can withdraw the exemption decision in case of a change in any event that constitutes the basis for the exemption decision within the scope of Article 13 of the Law No 4054, and therefore deemed the rejection of the exemption application is unlawful and annulled the Board's decision.

Main takeaways from the case

The Board's decision was a 'once in a blue moon' case in the sense that the Board refused to determine that the Agreement benefits from the protective cloak of the block exemption, despite the fact that J&J's market share for the medicines covered by the Agreement were each below 40% (ie, the threshold set forth under the Communique No. 2002/2 was not exceeded for any of the pharmaceuticals concerned as of the date of the application). The reason that such an approach was exceptional is that such a case is explicitly guided under the Guidelines on Vertical Agreements ('Guidelines'). Paragraph 172 of the Guidelines provides that both 'qualitative and quantitative selective distribution may benefit from the block exemption up to the 40% market share threshold, even if combined with other non-hardcore restraints, such as non-competition or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted'. Additionally, the Guidelines explicitly sets out that 'The Communiqué grants exemption to selective distribution networks, regardless of the nature of the product'.

The Administrative Court's decision is crucial in the sense that it blocked a categorical preclusion of quantitative selective distribution systems except for the sectors such as automotive, cosmetics and durable consumer goods. ■

Notes

1) **Ankara 13th Administrative Court's decision numbered 2021/778 E and 2022/966 K, dated 27 April 2022.**

2) **With the new amendment introduced by the Communiqué No 2021/4 on the Amendments to the Block Exemption Communiqué on Vertical Agreements ('Communiqué No 2021/4'), which promulgated in the Official Gazette dated 5 November 2021 and No 31650, the threshold regarding the supplier's market share(s) for the market(s) for the contract goods has now been lowered to 30%.**

3) **Fulfilling demands of customers from another buyer's region or customer group, which are not a result of active efforts by the buyer constitutes 'passive sales', even when the buyer delivers the goods to the customer's address. (Guidelines, para 24).**

Headline trends in merger control and competition law enforcement in Ireland

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Starting with Irish merger control, how would you sum up activity in the past 12 months in Ireland?

Consistent with global M&A activity, 2021 was a busy year for the Competition and Consumer Protection Commission (CCPC) with 74 merger clearances. Banking and financial services attracted the most significant merger reviews. This included the CCPC's review of landmark transactions arising from KBC and Ulster Bank's exit from the Irish retail banking market (Matheson acted for Bank of Ireland (BOI) in its purchase of KBC's mortgage back book). In another high-profile case, the CCPC carried out a full Phase 2 investigation into the plans by the main Irish banks to set up a mobile payments system (on which Matheson advised one of the banks).

Our experience over the last year or so suggests that the CCPC's new simplified procedure (broadly, an expedited procedure for mergers where there is little to no overlap) is working very well. Average timeframes are coming in under 15 working days, which means that obtaining merger clearance in Ireland is now amongst the quickest across the EU. The CCPC should be commended for its endeavours in this connection.

The recent enactment of the Competition (Amendment) Act 2022 (the '2022 Act') has attracted significant press coverage in Ireland and beyond. The Act includes important changes to the Irish merger control landscape, such as the CCPC's new powers, (i) to compel notification of transactions which do not meet the financial reporting thresholds, (ii) to impose interim hold-separate orders (like the CMA does in the UK) and, (iii) to deal with a situation whereby a notified transaction is completed prior to obtaining CCPC clearance (so-called gun jumping). We touch on these changes in more detail below.

You mention landmark transactions in the banking and financial services sectors. To what extent did the Irish merger review process impact the exit from the Irish market of KBC and Ulster Bank?

Matheson advised BOI on the acquisition of KBC's back book of mortgages. Following a 15 month process and in the context of the parallel transactions involving Ulster Bank's exit from the Irish market, conditional clearance for the transaction emerged in May 2022. This was only the second transaction in the last 10 plus years that progressed through all stages of the CCPC's merger review process. The review process included the issuance of two extensive formal requests for information and a significant discovery ask of the parties, a full Oral Hearing before the members of the CCPC and extended Phase 2 remedy negotiations.

Interesting points of law argued during the case included, (i) the relevant counterfactual

> **Negotiating, agreeing and ultimately implementing commitments/remedies can also add significant time to a merger review process.**

and whether KBC's exit was inevitable, (ii) the application of the EU priority rule in light of parallel transactions involving Ulster Bank, and (iii) in the absence of single firm dominance, whether KBC was an important competitive force within the meaning of the relevant EU case law. Whilst the CCPC viewed the transaction as resulting in a reduction from four to three of the large retail banks in the Irish mortgage market, the CCPC's analysis centred on the strength and sustainability of three new non-bank lenders in the market. Bank of Ireland ultimately agreed a novel access commitment with the CCPC to underpin the funding capacity of the non-bank lenders.

The CCPC also issued its clearance of AIB's proposed purchase of Ulster Bank's €4.2bn performing commercial loan book.

Has there been any innovative developments in established sectors that the CCPC has had to investigate recently?

The Synch mobile payments app was a joint venture between the large Irish retail banks (AIB, BOI, PTSB) to develop an instant mobile payment app which would also allow participation by other financial entities (such as Revolut). Matheson acted for AIB. Like in the BOI/KBC case, this transaction progressed through all stages of the CCPC's merger review process, ultimately concluding after a near 18 month review (the longest in the jurisdiction to date).

The CCPC cleared the transaction subject to a number of commitments designed to address the CCPC's innovation, foreclosure and coordinated effects concerns. For example, Synch is required to set out objective eligibility criteria for any banks or other financial institutions that wish to become participants in the Synch mobile payments service. Synch will also allow for interoperability, with licensees permitted to embed certain mobile payments functionalities within their own apps. The parties also agreed to put a specific governance structure in place and to implement safeguards to prevent the exchange or disclosure of commercially sensitive information (the latter being a commitments staple on the CCPC side).

In light of the highlighted merger investigations, or indeed more generally, are there specific points of practice or likely developments that may impact deal timing and which in-house practitioners should be aware of ?

We mention above the issuance of extensive formal requests for information and a significant discovery ask of the parties. This has become a relatively regular feature of the Irish merger review landscape in complex cases, with a broad definition of 'documents' typically being utilised by our competition regulator – think ever greater costs and a significant internal resource commitment. It's worth noting, however, that formal requests for information are not reserved for complex cases and they can have a significant impact on timing. Such a request in Phase 1 for example stops the CCPC's clock, with time starting again once a full response to the request is confirmed by the CCPC.

Negotiating, agreeing and ultimately implementing commitments/remedies can also add significant time to a merger review process. Our experience, however, is that the CCPC has demonstrated both its practicality and flexibility in terms of its approach to commitments. For example, the CCPC appears more open to behavioural and access remedies (a feature of the BOI/KBC case) than many other EU competition regulators, but where such commitments can address the CCPC's competition concerns. Divestments still, however, remain a feature of our merger control regime, which is evident from recent cases such as Pandagreen/

> **Given that Ireland is among the minority of EU member states that does not currently conduct any screening of FDI, primary legislation is required to close this regulatory gap.**

Exomex, Tesco Ireland/Joyce's Supermarkets and Elis/Kings Laundry.

More generally, we await the introduction of Ireland's first investment screening regime for foreign direct investment (FDI). IDA Ireland, the inward investment agency of the Irish Government, recently reported significant investment growth in the first half of 2022, returning FDI employment creation plans to above the pre-pandemic record levels. Given that Ireland is among the minority of EU member states that does not currently conduct any screening of FDI, primary legislation is required to close this regulatory gap.

What do you see as the main features of the new Act that in-house practitioners should be aware of?

As touched on above, the CCPC will now have the power to compel the notification of transactions that do not meet the mandatory financial reporting thresholds. The ambit of this power is potentially very broad and with the CCPC having 60 working days within which to direct that a deal be notified to it. In short, the Act may well result in an increase in voluntary notifications of below threshold transactions in order to avoid the 60 working day CCPC intervention risk.

This new regime has been flagged as being particularly relevant for deals in the technology and pharma sectors, where targets may have great potential, but where revenues fall below the reporting thresholds. The new regime will also be relevant where, for example, small but concentrated markets are in play. Businesses in sectors other than technology and pharma should also be vigilant. The CCPC has previously reviewed below threshold transactions in cases such as Eason/Argosy and the CCPC's voluntary notification regime has also been utilised in the past by myriad businesses in below threshold transactions.

Gun jumping offences have also been expanded in the Act. Going forward, it will be an offence to put a transaction into effect where it has been notified, but before it has been approved by the CCPC. Further, the CCPC will have the power to initiate its own summary proceedings for gun jumping. To date, there has only been one criminal conviction for gun jumping recorded in the jurisdiction (Armalou Holdings). Further, where the CCPC finds that a transaction significantly affects competition and that it has been put into effect before it has been approved, the CCPC is empowered to unwind or dissolve the transaction, so as to restore the situation prevailing prior to the transaction being put into effect. If that's not possible, the CCPC can determine that the parties take such steps as are appropriate to achieve restoration of the situation prevailing before the transaction was put into effect.

What are the recent trends in competition enforcement?

Prior to the enactment of the 2022 Act, Ireland was one of a very small number of European countries in which a business could only be fined if a court found that there had been a criminal breach of the competition rules. If an investigation did not reach a criminal standard, the CCPC was limited to seeking commitments from a business that it would cease the offending practice and/or obtaining a court injunction to prevent the business from repeating the practice. However, the 2022 Act transposes Directive EU 2019/1 (the ECN+ Directive) into Irish law and introduces a number of significant changes to the enforcement regime in Ireland. In summary:

- Administrative fines – The Act allows the CCPC to impose civil fines up to a maximum of €10m or 10% of worldwide turnover. It also allows the CCPC to impose civil fines for breach of a procedural requirement up to a maximum of €1m or 1% of worldwide turnover;

- Criminal fines – The Act increases the level of criminal fines which

> **Going forward, it will be an offence to put a transaction into effect where it has been notified, but before it has been approved by the CCPC.**

can be imposed on companies and individuals for cartel offences up to the greater of €50m or 20% of turnover;

- New bid-rigging offence – The Act introduces a new explicit cartel offence of bid-rigging and, in this connection, identifies a number of bid-rigging practices such as bid suppression, cover bidding and collusive tendering; and
- Leniency programme – The Act requires the CCPC to introduce a new leniency programme to enable it to grant leniency in exchange for disclosing participation in a cartel and co-operating with an investigation. The programme will run alongside the existing cartel immunity programme which is available in respect of criminal sanctions.

The Act applies to conduct after 4 February 2021 – the date by which the ECN+ directive should have been transposed into Irish law.

About the author

Niall Collins is the head of EU, competition and regulatory group at Matheson LLP, Ireland's largest dedicated practice.

He has extensive experience advising Irish and multinational businesses on Irish and EU competition law, particularly on complex merger control mandates. This experience extends to public and private deals, private equity and venture capital investments and to joint ventures and strategic alliances. His behavioural competition law practice covers abuse of dominance, cartels and other restrictive arrangements, regulatory investigations, compliance issues and consequential litigation following on from allegations of breach of competition rules. Collin's practice has a focus on the energy, media and entertainment, insurance, agriculture and food, technology, sport and financial services sectors. Prior to joining Matheson, Collins led the competition team at another Irish law firm and also previously practiced with two top tier international competition practices in London. Consistently ranked in the top tier of competition law advisers in Ireland by both *Chambers & Partners* and *The Legal 500*, Collins was also identified by Global Competition Review as one of the world's top competition lawyers in their '40 under 40' feature. ■

Matheson

New world

IHL interviews Shearman & Sterling's restructuring and insolvency team to find out the latest trends in this constantly changing area.

BY MEGAN MAYERS

'The current market is very different to what it was like this time last year. There are many more opportunities for investors to be looking at, and that will only become greater as the year develops.'

As this comment from Sam Brodie, restructuring partner at Shearman & Sterling encapsulates, the restructuring market is in flux. Since the pandemic hit, law firms have braced for a deluge of insolvency and restructuring work. In fact, faced with a unique crisis and a backdrop of large corporates with capital structures more complicated than ever, many firms bolstered their restructuring teams. Brodie was himself part of this trend, having joined Shearman in March 2021 from Akin Gump.

But now, more than two years on from the UK's first Covid-19 lockdown, a lot has changed. Since then, temporary government support has come and gone, and new economic challenges have emerged. Speaking with Shearman's *Legal 500*-ranked corporate restructuring and insolvency team, *The In-House Lawyer* reflects on the market.

Heightened headwinds

Despite the perfect storm of 2020, the restructuring market in 2021 was notably subdued. While the number of UK company insolvencies snuck up 11% from the previous year, according to government statistics, they remained below pre-pandemic levels and distressed investment opportunities were comparatively sparse. Explains Brodie: '2021 was a muted environment for the restructuring community. The cases that were out there were generally legacy cases and involved a few of the issues that flowed from Covid, but new cases were relatively few and far between compared to 2020 and years prior to that.'

Instead, many companies were able to ride out adversity relying on temporary measures introduced by the Corporate Insolvency and Governance Act 2020 (CIGA), government support measures and the ability in favourable financial markets to raise capital through further equity or debt issues. But this is starting to change.

Now, as inflation has reached a 40-year high and interest rates surge, companies grapple with long-term economic issues catalysed by Covid-19. Brodie's colleague, Alexander Wood, notes: 'The uncertainty around Covid meant that there was an expectation that there would be a bump in the road, but that things would also recover. We are now out of that and there is a strong expectation among investors that businesses must demonstrate a credible business plan going forward. There's going to be much more focus on the fundamental issue, and that is: "is there a viable business here worth supporting?"'

The war in Ukraine has created further difficulties for certain businesses, particularly those in industries heavily reliant on large volumes of oil and gas consumption, as well as those dependent on supply chains, agricultural produce and other commodities emanating from the affected areas. Investors are also sensitive to the sanctions arising from Russia's invasion of Ukraine and to the human impact of the situation, and do not want to find themselves in positions that might have sanctions or reputational implications. 'They have also been seeking to analyse the impact of sanctions on positions they already hold and there has been a lot of legal advice around which situations people can or cannot be invested in,' says Brodie.

These reputational concerns chime with a wider trend of the scaling of ESG issues on the corporate agenda, adds Brodie's fellow partner, Helena Potts. 'ESG has a bearing on restructuring dynamics, it is not just a new money issue. Some investors are retreating from certain markets where they feel less able to deploy their capital. The most obvious one is the oil and gas markets where we see a contraction in the number of finance parties willing to follow their money, or even amend and extend their historical exposures.' Though, as Potts notes, this could provide new, more lucrative opportunities for investors who continue to operate in these spaces.

Still, the ripples that are starting to be felt in the SME space will likely soon hit big corporates, says Brodie. 'Because a lot of the larger corporates used 2020 and 2021 to focus on liquidity and to amend or refinance their capital structures and push out debt maturities, the macro headwinds that we have seen over the last few months haven't yet pushed a lot of these corporates into restructurings, but they certainly have the potential to, whether that's a consequence of impending maturities, liquidity shortfalls, covenant breaches, audit pressures or other defaults.'

Going forward, some sectors will inevitably be more vulnerable in the initial wave, but Wood warns that there are few businesses completely immune. 'There are localised pockets, but the reality is that there are lots of sectors being impacted. We are facing a genuine worldwide economic set of circumstances that are going to put pressure on a lot of businesses and the broader that pressure and the broader the impact, the further reaching the tentacles of recession become.'

Regulatory refresh

These developments come at a time when there has been a shift in the regulatory landscape in the UK. In addition to temporary measures designed to curtail the impacts of Covid-induced lockdowns, CIGA introduced three permanent tools to facilitate easier resolutions.

These include a restructuring plan regime that allows for distressed companies to propose a restructuring arrangement, as an alternative to schemes of arrangement, to compromise the claims of creditors and/or shareholders. The Act also introduced a new standalone moratorium as well as a prohibition on the application of 'ipso facto' automatic termination provisions on insolvency, which preserves the insolvent companies' supply contracts, to aid its rescue plan.

According to Brodie, the restructuring plan is 'a game-changer in the restructuring world'. 'It has given debtors a lot more leverage and control in managing their creditors towards a sensible resolution or compromise of liabilities,' he says. The regime also allows debtors in certain circumstances to cram down or disenfranchise dissenting creditors (or shareholders) to drive a quicker resolution, which, albeit a positive for distressed companies, is an additional risk factor for creditors to consider given that it reduces any power they might otherwise have to 'hold out' for a more favourable resolution.

However, the proactivity in the UK to adapt to the market challenges has been received favourably, says Wood. 'The restructuring plan is a powerful tool both locally and internationally,' he notes. 'One of the things that lawyers were concerned about was whether Brexit would affect the UK as a restructuring hub, but this has not been the case at all. The UK has continued to be a hub for European restructuring and provided you have got English law in there or English assets, there's always going to be a good case for restructuring under a UK restructuring plan.'

Looking forward, the evolution of the regime through judicial interpretation will be closely followed. Despite being a relatively new restructuring tool, a number of restructuring plans have passed through the courts. In one recent example from March 2022, for Smile Telecoms Holdings, the High Court approved the first plan to exclude out-of-the-money stakeholders from voting. 'The court found that the shareholders of the scheme company could be disenfranchised on the basis that they had no genuine economic interest left in the business. That has been of particular interest to the market generally because it's the first time the court has sanctioned the use of that power,' highlights Brodie.

Yet, there are other areas yet to be addressed. 'We think there will be a significant pressure point when competing parties have different views as to what the "relevant alternative" is, in circumstances where the debtor is seeking to use the cram-down mechanism,' Brodie notes. The concept of the relevant alternative refers to the hypothetical scenario that is most likely to occur if not for the restructuring plan being sanctioned by court.

'Creditors' claims can only be crammed down if they would be no worse off in that alternative outcome,' explains Brodie. 'If you have one set of dissenting creditors saying: "we would be better off in the relevant alternative if there were no restructuring plan and so we shouldn't be crammed down", and the debtor saying "you would be no worse off in the relevant alternative" such that the restructuring plan and cram-down mechanism should be approved, the court will be asked to adjudicate as to which is the most likely relevant alternative. In that circumstance, there may be a point of difficulty for the court as it will have to assess competing financial models and evidence being presented to it.'

As such, the restructuring and insolvency space is likely to remain in flux as it faces novel and ever more complicated scenarios. And, if market sentiment is to be believed, there are plenty of these expected in the coming years.

As Potts concludes: 'Capital structures are now more multi-layered and nuanced than they were around the time of the global financial crisis; the providers of capital are more diverse and with varying degrees of risk appetite and willingness to engage in distressed processes. Being able to understand and manage these dynamics to find implementable solutions is a key requirement for advisers operating in this space.' ■

The UK financial restructuring market

Shearman & Sterling highlights some of the key legal developments and market trends which are relevant to stakeholders whose interests are or may become subject to the UK restructuring market.

The last two years have seen significant developments and unexpected turns in the financial restructuring market. The impact of the Covid pandemic precipitated an immediate and significant uptick in the level of corporates facing underperformance and distress, only to be followed in 2021 by an incredibly 'hot' financing market and significant drop-off in corporate default rates – a consequence, among other things, of unprecedented levels of government support provided across the major global economies, an active M&A sector, a low interest rate environment and strong asset valuations.

By the start of 2022, among other challenging macro-economic factors, it was clear that supply-chain difficulties, mounting inflationary pressures and resultant interest rate hikes would start to put pressure on certain corporates, especially those that were exposed to commodity costs and/or already experiencing financial difficulties in the form of liquidity shortages or over-levered balance sheets. Those challenges, exacerbated by the conflict in Ukraine, have intensified throughout 2022, and recent US and UK insolvency data points towards, and the market anticipates, an increase in default rates and restructuring cases over the next year.

Against that backdrop, this article focuses on some of the key legal developments and market trends which are relevant to stakeholders whose interests are or may become subject to the UK restructuring market.

Key legal developments

The Restructuring Plan

Of the measures introduced by the Corporate Insolvency and Governance Act 2000, the Restructuring Plan (RP) has attracted the most attention within the restructuring community. Despite its infancy, it has become a powerful restructuring tool for complex capital structures, and we expect it to become even more prevalent as corporate stress increases. A recent interim Insolvency Services report has branded it a success. More recently, we could see our first RP being used in the SME space so it is not necessarily the province of larger restructurings.

The RP allows a company (which may include a non-UK company) that is facing financial difficulties to enter into a plan with its creditors and/or shareholders to alleviate those financial difficulties. While very similar to the well-established UK scheme of arrangement process, the RP contains a number of key additional features over and above what can be achieved by a scheme of arrangement, which make it an attractive method by which to reach a compromise between a debtor and its creditors. The most notable additional features are:

- Cross-class cram down, by which an RP can be imposed on a class of creditors or shareholders even if it is not approved by the minimum threshold of 75% in value of such class, provided that the dissenting class of creditors or shareholders are 'no worse off' under the plan than they would be in the so-called 'relevant alternative' and there is a consenting class of creditors or members who would receive a payment, or have a genuine economic interest in the company, in the event of the 'relevant alternative'; and

- The possibility to disenfranchise entirely a class of creditors or shareholders from voting on the RP if that class has no genuine economic interest in the company.

In the future, companies proposing RPs will need to assess carefully the terms of their proposal in light of how the English court will scrutinise the application of the 'no worse off' and 'relevant alternative' principles that are relevant to an RP. One of the areas we believe is most likely to be a key focus of any strategy is the strength (or weakness) of the valuation evidence provided to support

> **Companies proposing RPs will need to assess carefully the terms of their proposal in light of how the English court will scrutinise the application of the "no worse off" and "relevant alternative" principles that are relevant to an RP.**

the RP. Creditors must also tread carefully; the power of the RP means that they need to think about the terms and structural positioning of their debt claims as against the claims of other creditors and whether that puts them at risk of being classified and isolated as a separate class of creditor capable of being crammed down. A weakness in valuation or a misjudged 'relevant alternative' will increase the risk of creditor challenge and the court choosing not to exercise its discretion to sanction the RP (even if the RP is approved by the applicable majority(ies)).

FCA scrutiny

In light of the increasing number of cases where regulated entities have used schemes of arrangement to compromise the claims of redress creditors (see Provident Financial and Amigo Loans), the FCA has recently published guidance setting out in detail the approach it intends to take to ensure that consumers are treated fairly when compromise processes, such as schemes, RPs and CVAs, are used by regulated firms. The consumer protections set out in the FCA guidance go above and beyond the typical controls, levels of information (provided to affected creditors) and principles of fairness which the court will assess or apply when considering a scheme, RP or CVA, and regulated firms looking to launch any such process will need to be mindful of:

- The FCA's guidance;
- Its willingness to challenge these processes if it feels they do not adequately satisfy its regulatory requirements (see Amigo Loans); and
- The competing pressures to which directors may be subject if, in a distressed scenario, they are required to discharge statutory duties to the company's creditors as a whole, while at the same time having to satisfy the FCA's requirement that the relevant compromise is the 'best' outcome possible for consumers.

Pensions

Supplementing its existing controls under the Pension Act 2004, the Pension Regulator (tPR) has been granted under the Pension Schemes Act 2021 additional anti-avoidance powers in respect of defined benefit (DB) pension schemes, the most notable being its ability to investigate and prosecute any person for two new criminal offences. Those are:

- Where a person (with intention and without reasonable excuse) acts or engages in a course of conduct that prevents the recovery of whole or part of employer DB pension scheme debt, prevents such debt becoming due, compromises or otherwise settles that debt, or reduces the amount due; and
- Where a person without reasonable excuse acts or engages in a course of conduct that they knew or ought to have known would detrimentally affect in a material way the likelihood of accrued pension scheme benefits being received.

The term 'person' is wide in scope and includes companies, directors, trustees, professional advisers and lenders. Each offence carries a penalty of seven years in prison and/or an unlimited fine of up to £1m. However, tPR has stated that the new criminal offences are aimed at 'the most serious examples of intentional or reckless conduct' and that they 'don't intend to prosecute behaviour which [they] consider to be ordinary commercial activity'.

While restructurings of corporates with DB pension schemes have often required engagement or negotiations with the relevant pension trustee, the introduction of these criminal offences mean

> **As the macro-economic stresses begin to impact businesses, pressures on liquidity will likely become greater, while some highly levered or underperforming companies will find it increasingly difficult to refinance their maturing debt.**

that stakeholders and advisers may be even more careful to engage with pension trustees and/or tPR in respect of whole business restructurings/restructurings which may affect the position of a DB pension scheme.

Sanctions

Sanctions arising from the Ukraine-Russia conflict have had a significant impact on corporates which have business lines in the affected areas or whose shareholders are subject to sanctions. Corporates have generally responded swiftly to these challenges, but some may remain unresolvable for the foreseeable future and continue to create operational and financial difficulties. For example, sanctions on Russian credit institutions will likely cause significant disruption for those businesses seeking to repay loans to those institutions and may limit access to alternative sources of liquidity and/or trigger cross-defaults across other facilities. Obtaining consents or waivers from lenders or approvals from stakeholders may also be difficult if those constituencies comprise sanctioned persons, which may in turn limit or prevent companies from effecting consensual amendments or restructurings to their debt terms without a cramdown process.

Market trends

Default triggers

The prevalence of 'cov-lite' financings across the debt capital markets has led to a situation where highly levered or stressed corporates have been able to navigate periods of difficulty and underperformance without having to turn to lenders or bondholders for consents or waivers. In recent years, liquidity shortfalls and the related need for companies to obtain creditors' consent to incur new money have often been the most common trigger for restructuring discussions. Even then, in many cases, permissive covenant terms have allowed companies to access new credit lines by relying on the greater flexibility for the provision of new money in leveraged finance documents. As the macro-economic stresses begin to impact businesses, pressures on liquidity will likely become greater, while some highly levered or underperforming companies will find it increasingly difficult to refinance their maturing debt (in particular those who added debt to their balance sheets to overcome the impact of Covid). Some companies may also be forced into refinancing debt ahead of maturity if audit-related pressures require them to do so. In that context, new money will continue to be a key factor in most distressed situations. Those investors ready to provide that new money will be well placed to participate in, if not drive, any restructuring process which is subsequent to or part of that new money injection.

New money terms

The terms of any new money will depend on the circumstances of each deal. If the consent of existing creditors is required for any additional debt financing, that consent is often forthcoming only if such lenders or a group of them provide that financing on a 'super senior' basis. Third party providers of new money, on the other hand, will have to find basket availability in the existing debt document to provide funding or, if baskets are used up or restrictions on financial indebtedness are tight, they may have to be more creative, with consideration often given to providing finance at entities outside the restrictions in existing debt documents. One critical and recurring theme is control; having provided capital in stressed circumstances, new lenders will likely expect to have mechanisms in place to protect that investment in a downside scenario, whether through security interests, enhanced governance rights or contractual provisions.

Forbearance – a return to normal behaviour?

Throughout the Covid pandemic, creditors generally provided unusually high levels of forbearance in its various guises. That was driven by a number of factors. Credit institutions, for example, were under regulatory pressure to show leniency to corporates struggling due to impacts arising from Covid, while creditors more

> **The market volatility of certain crypto assets and the drive for investment in often little understood assets may be a cause for concern and may give rise to future economic stress.**

generally were reluctant to implement any fundamental balance sheet restructurings or take assertive enforcement action at a time when there may have been no predictable business plan against which they could model a restructuring or enforcement (and recovery) strategy or any certainty that they could recover sufficient value from disposals of secured assets. As the market impact of Covid recedes (albeit other market storms are brewing in its place) and given that the Covid-related regulatory programmes have all but fallen away, it will be interesting to see how willing creditors are to provide forbearance, especially as activity in the secondary market picks up and incumbent creditors begin to comprise a lesser proportion of par investors than in 2020 and 2021.

ESG

ESG remains a core focus across all markets, as shown by asset allocations, ESG metrics in bond and loan terms and a renewed scrutiny on 'greenwashing'. In the refinancing and restructuring context we expect that it will cause capital constraints in the mining, oil and gas and other ESG-challenged sectors, with the pool of investors willing to invest in those industries becoming smaller over time. For the more stressed companies in these sectors, we expect that external capital will become less available and more expensive, and that in turn may increase refinancing risk and precipitate restructurings.

Crypto

The universe of crypto assets is broad, encompassing digital currencies, stable coins, non-fungible tokens and others. This has given rise to new opportunities in the market but also increased risk, particularly in unregulated activities. The market volatility of certain crypto assets and the drive for investment in often little understood assets may be a cause for concern and may give rise to future economic stress. It is not clear how the traditional market tools for dealing with a collapse (including insolvency and regulatory) would respond to this new technology. The UK government has, for example, started to examine the potential need for a special insolvency regime to deal with the collapse of crypto exchanges.

What next?

Preparing as promptly as possible for the downside scenario, even if that feels like a relatively remote outcome or an interim solution is expected to be found, is in our opinion a good housekeeping exercise which will become even more valuable as the rising number of distressed credits places increased pressure on the resources required to manage underperforming investments. Understanding what may occur post-default or how a distressed situation might play out, which stakeholders will be able to control or influence any given situation, and where allegiances can be formed with other interested parties will ensure readiness and may even present opportunities which might not otherwise have been considered. On the other hand, failure to prepare exposes both debtors and creditors to the risk of their counterparties being better organised and able to respond more quickly to defaults or other restructuring triggers when they occur, taking control of the process away from the stakeholders who are late to the party. With that in mind, debtors are beginning to stress test liquidity scenarios, refresh on basket availability/permissions under debt documents and in some cases engage with lenders. Creditors, on the other hand, are starting to assess exposures across portfolios, strategise enforcement, restructuring or even new money options and work out the risks of their debt claims being crammed or compromised by the action of debtors and other competing creditors. ■

Sam Brodie, Helena Potts and Alexander Wood are all partners in the financial restructuring and insolvency practice at Shearman & Sterling.

Irish insolvency procedures and international restructurings

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Introduction

The Irish restructuring and insolvency regime is well-established and internationally recognised. The underlying principles have been heavily shaped and influenced historically by the common law system and in recent years have been integrated in the EU framework under the Recast Insolvency Regulation, augmented by the provisions of the Rome Regulation and Recast Brussels Regulation. Ireland is generally regarded as having a creditor friendly and flexible restructuring and insolvency framework providing the required degree of certainty for both creditors and debtors.

Irish insolvency procedures

There are a variety of insolvency and restructuring solutions available, the main ones of which are:

- **Liquidation** – an insolvent company can be wound up by the High Court (compulsory liquidation) or by way of a shareholders' resolution followed by a creditors' meeting (creditors' voluntary liquidation).
- **Examinership** – similar in many respects to the Chapter 11 procedure in the United States and, to a lesser extent, administration in the United Kingdom. The procedure's main attraction is that a simple majority of only one impaired class of creditor must vote in favour of the scheme in order for it to be approved by the court.
- **Statutory schemes of arrangement** – although the statutory scheme of arrangement (similar in all material ways to the English scheme of arrangement) is not necessarily an insolvency process, it can be used to facilitate a broad range of possible restructurings and arrangements between a company and its members or creditors.
- **Receivership** – whilst this is the usual method for enforcing security, restructurings are regularly implemented using a pre-pack receivership process.

International restructurings in Ireland

As one of the most open economies in the world for trade and finance, Ireland has proved in recent years to be a jurisdiction of choice for a number of significant and complex cross-border restructurings, aided by a combination of Brexit and the Covid-19 pandemic.

In *re Ballantyne Re plc* an Irish scheme of arrangement was used to effect the restructuring of the company's reinsurance obligations and US$1.65bn of senior New York law governed debt. In sanctioning the scheme, the High Court demonstrated a clear willingness to take into account established case law from a number of jurisdictions, including the UK. Following the sanction hearing in Ireland, an application was successfully made to have the Irish scheme recognised under Chapter 15 of the US Bankruptcy Code. The entire process was concluded in a matter of weeks, which is testament to the efficiency of the Irish commercial court process.

The 2019 restructuring of Weatherford International plc, one of the largest oil-field service companies in the world, was the first occasion on which the Irish examinership process was used in parallel with the US Chapter 11 process. Weatherford was an Irish parent company of the US-based Weatherford group with 24,500 employees worldwide and $8.35bn in debt to be restructured. The examinership dove-tailed with a Chapter 11 bankruptcy in

> **As a member of the EU, Ireland can benefit from the fact that it has a similar insolvency and restructuring regime to the UK that is automatically recognised and enforced across the EU.**

the US Bankruptcy Court for the Southern District of Texas and a provisional liquidation in Bermuda. This was one of the most significant global corporate restructuring transactions of 2019 and the largest corporate restructuring to date in Ireland.

Ireland is the global leader in the aviation sector and has played a central role in a number of recent restructurings in this sector. Nordic Aviation Group, one of the world's largest regional aircraft lessors and the world's fifth largest aircraft lessor, used an Irish scheme of arrangement to effect a 12-month standstill and deferral of over US$5bn of secured and unsecured debt from the group to its creditors. The scheme was implemented using the scheme company as a common guarantor and single point of entry across the complex financings of the group. The Irish scheme was the first part of Nordic Aviation Group's international restructuring, with a US Chapter 11 plan utilised in 2022 to eliminate nearly $4.1bn of debt, while significantly enhancing the group's liquidity.

In 2020, examinership was used to facilitate the survival of CityJet. The Irish examinership process was also utilised by Norwegian Air to effect one of the most innovative and complex restructurings in Europe. The Irish examinership was the lead process along with a parallel Norwegian reconstruction used to restructure English and US law debt, repudiate English law contracts, reduce the group's fleet and discontinue its long haul operations, and restructure the group's balance sheet by compromising debt of approximately €5bn and raising new capital through share and debt offerings. Orders were sought and obtained recognising an Irish examinership for the first time under Chapter 15 of the US Bankruptcy Code.

Most recently, the Irish High Court approved a scheme of arrangement in the examinership of Mallinckrodt plc (a pharmaceutical company run in the US with its holding structure based in Dublin, with $5.3bn in long-term debt arising from lawsuits relating to its marketing of opioids). This scheme gave effect to a wider global restructuring of the group by way of a US Chapter 11 plan, demonstrating the willingness of the Irish courts to recognise US Chapter 11 orders when necessary. This was the second largest examinership in Ireland to date.

Outlook

The general consensus among insolvency practitioners is that Ireland will see an increase in insolvency activity and the uptake of restructuring solutions as we move into the second half of 2022 and into 2023. With government support after the pandemic being phased out and creditor forbearance depleting, the effect of government support being withdrawn cannot be understated[1]. The war in Ukraine has resulted in higher energy costs and price inflation combined with continued supply chain issues, as well as upward pressure on interest rates, further contributing to the increased level of uncertainty and pressures for business owners.

Ireland is now the largest remaining English-speaking, common law EU member state and its restructuring and insolvency processes and court structure will be familiar to those accustomed to doing business in the UK. In addition, Ireland is the only EU country that can avail of section 426 of the UK Insolvency Act 1986, permitting the recognition of Irish insolvency proceedings in the UK through the provision of judicial assistance. As a member of the EU, Ireland can benefit from the fact that it has a similar insolvency and restructuring regime to the UK that is automatically recognised and enforced across the EU.

Examinership is increasingly used as the tool of choice in international restructurings. Ireland presents significant jurisdictional advantages and gaining an understanding of that dynamic at an early stage will reap rewards down the line. ■

Julie Murphy-O'Connor and Kevin Gahan are partners in Matheson LLP. Matheson LLP has played a leading role in all of the international restructurings mentioned in this article.

Notes

1) **PwC restructuring update – Q1 2022 – reporting that liquidations in the United Kingdom are currently running at three times the number of liquidations in Ireland per 10,000 companies since government pandemic support was tapered in Autumn 2021.**

Rehabilitation and liquidation proceedings in the Philippines

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What remedies are available to insolvent corporations/individuals in your jurisdiction?

Under Republic Act No 10142 (Financial Rehabilitation and Insolvency Act of 2010 (FRIA)), which governs proceedings for the rehabilitation and/or liquidation, insolvent juridical debtors may undergo: (1) rehabilitation; or (2) liquidation proceedings.

FRIA only covers private stock or non-stock corporations, government financial institutions other than banks, and government-owned or-controlled corporations, unless otherwise provided by their charters. FRIA is not applicable to banks, insurance and pre-need companies, which are governed by other laws.

Individual debtors, on the other hand, can only avail of suspension of payments or liquidation, whether voluntary or involuntary.

How is voluntary rehabilitation different from involuntary rehabilitation?

In voluntary (debtor-initiated) rehabilitation, the verified petition for rehabilitation is filed by:

1) owner in case of a single proprietorship;

2) majority of the partners in case of a partnership; or

3) majority vote of the Board of directors or trustees and authorised by at least two-thirds of the outstanding capital stock or members;.

In involuntary (creditor-initiated) rehabilitation, a verified petition is filed by any creditor/s with an aggregate claim of at least PHP1,000,000.00 or at least 25% of the subscribed capital stock or partners' contributions, whichever is higher, if: (a) there is no genuine issue of fact or law on the claim/s, and that due and demandable payments have not been made for at least 60 days, or that the debtor failed to meet its liabilities due; or (b) a creditor, other than the petitioner/s, initiated foreclosure proceedings that will prevent the debtor from paying its debts as they become due or will render it insolvent.

What is the cram down rule and its effect on rehabilitation proceedings?

The cram down rule states that a rehabilitation plan may be approved even over the opposition of the creditors holding a majority of the liabilities, upon showing that rehabilitation is feasible, and the opposition of the creditors is manifestly unreasonable.

What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

A stay order, when issued by the court:

1) suspends all actions, in court or otherwise, seeking to enforce a claim, including auxiliary remedies, against the debtor;

2) prohibits the debtor from: (a) disposing its properties, except in the ordinary course of business; and (b) making payments on its outstanding liabilities, except as may be provided under the FRIA.

> **A management committee may be appointed to take the place of the debtor's governing body, and assume its rights and responsibilities.**

The stay order does not apply to cases pending before the Supreme Court, specialised courts or quasi-judicial agencies as of commencement date of the rehabilitation proceedings; enforcement actions against persons solidarily liable with the debtor, including sureties, and third-party or accommodation mortgagers and issuers of letters of credit, unless the property subject thereof is necessary for the rehabilitation of the debtor as determined by the court.

Who is the person in charge of rehabilitation proceedings? What are the corresponding qualifications, functions, and manner of appointment of said person in charge?

The rehabilitation receiver appointed by the rehabilitation court may be a natural or juridical person; must be a Philippine citizen, or resident for six months immediately preceding the nomination; of good moral character and with acknowledged integrity, impartiality and independence, who possesses knowledge about insolvency and other commercial laws; and has no conflict of interest.

The receiver must manage the debtor's assets; determine the substantial likelihood that the debtor will be rehabilitated; and prepare, recommend, and implement the rehabilitation plan. The receiver also establishes a preliminary registry of claims, and renders a report within the prescribed period from the initial hearing.

In case of danger of dissipation of assets, paralysation of business, or gross mismanagement, a management committee may be appointed to take the place of the debtor's governing body, and assume its rights and responsibilities.

What is a pre-negotiated rehabilitation proceeding? What are the requirements and procedures for said proceeding?

In pre-negotiated rehabilitation proceedings, a verified petition is filed by an insolvent debtor, by itself or with any of its creditors, with the court for the approval of a pre-negotiated rehabilitation plan. The plan must be endorsed by creditors holding at least two thirds of the total liabilities, including secured creditors holding more than 50% of the secured claims, and unsecured creditors holding more than 50% of the unsecured claims.

What is out of court rehabilitation? What are the requirements and procedures for said proceeding?

Out of Court Rehabilitation (OCRA) occurs when debtors and creditors agree upon and execute a rehabilitation plan, without need for court approval.

The plan must be approved by: (a) debtor/s; (b) creditors representing at least 67% of the secured obligations and 75% of the unsecured obligations; and (c) creditors representing at least 85% of the total liabilities.

The notice of OCRA must also be published as prescribed in the FRIA. Pending the finalisation of the OCRA, parties may agree upon a standstill period, which may include legal effects similar to that of a stay order in a court-supervised rehabilitation proceeding.

What is liquidation proceeding? What are the requirements and procedures for said proceeding?

Liquidation may be voluntary or involuntary. In voluntary liquidation, the insolvent debtor files a verified petition with the court, upon at least the majority vote of the board of directors or trustees and the vote of stockholders representing at least two thirds of the outstanding capital stock or members in corporations, or two thirds vote of the partners in partnerships.

In involuntary liquidation, three or more creditors with aggregate claims of at least PHP1,000,000.00, or 25% of the subscribed capital stock or partner's contributions, whichever is higher, may file a verified petition with the court, seeking the liquidation of the insolvent debtor. If the petition is sufficient in form and substance, the court shall order the publication of the petition, and for the debtor and all other creditors to file their comment on the petition.

What is a liquidation order and its corresponding effects?

The liquidation order declares the insolvency, and orders the liquidation of the debtor. Upon issuance, the debtor is deemed dissolved and its corporate existence terminated. It prohibits payments and transfers of any property by the debtor,

> **The liquidator is mandated to preserve and maximise the value of the debtor's assets, with the end of liquidating the assets to discharge, to the extent possible, all the claims against the debtor.**

and requires the sheriff to take possession and control of all properties of the debtor, with the legal title and control over the same vested upon the court-appointed liquidator, except those exempt from execution. All contracts of the debtor shall be deemed terminated, unless the liquidator declares otherwise and the contracting parties agree.

No separate action for the collection of unsecured claims is allowed, and actions already pending shall be transferred to the liquidator to accept and settle, or contest. No foreclosure proceeding is allowed for 180 days from date of issuance of the liquidation order.

What practical issues do secured creditors face in enforcing their security (eg timing issues, requirement for court involvement)? What are the rights of a secured creditor upon the issuance of a liquidation order by the rehabilitation court?

A secured creditor's right to enforce a lien is not affected by the liquidation order. However, a secured creditor may waive such rights under the security, and prove the claim in the liquidation proceedings.

In case the secured creditor opts to maintain the security, the value of the property may be agreed upon by the creditor and liquidator. If the value of the property is less than the claim, the liquidator may convey the property to the creditor, with the balance being admitted into the liquidation proceedings. If the value of the property exceeds the claim, the liquidator may convey the property to the creditor and waive the debtor's right of redemption upon receiving the excess from the creditor. The creditor may also opt to enforce the lien by foreclosing on the property pursuant to applicable laws.

The liquidator may also sell the property and satisfy the creditor's entire claim from the proceeds of the sale.

Who is the person in charge of liquidation proceedings? What are the corresponding qualifications, functions, and manner of appointment of said person in charge?

The court-appointed liquidator is a natural or juridical entity; must be a Philippine citizen, or resident in the six months immediately preceding the nomination; possesses knowledge about insolvency and relevant commercial laws; of good moral character and with acknowledged integrity, impartiality and independence; and has no conflict of interest.

The liquidator is mandated to preserve and maximise the value of the debtor's assets, with the end of liquidating the assets to discharge, to the extent possible, all the claims against the debtor.

What are available legal mechanisms for foreign creditors and cross-border cases in relation to restructuring and insolvency in the Philippines?

When there is a rehabilitation or insolvency in a foreign jurisdiction involving a foreign entity, the Philippine court shall, upon petition filed by the foreign entity representative, set a hearing to either: (1) suspend any action to enforce claims against the foreign entity or otherwise seize or foreclose on its property located in the Philippines; (2) require the surrender of the foreign entity's property to the foreign representative, or (3) provide any other necessary relief.

Did your country make any changes to its restructuring or insolvency laws in response to the Covid-19 pandemic? If so, what changes were made, what was/is their effect and were/are they temporary or permanent?

Covid-19 prompted the implementation of various debt relief and restructuring measures.

Banks and other non-bank financial institutions (NBFIs) that agree to loan extensions and restructuring beyond 2020 are granted tax exemptions and regulatory reliefs (Republic Act No 11494).

Republic Act No 11523 was enacted, authorising the incorporation of Financial Institutions Strategic Transfer Corporations (FISTC). FISTC has the power to acquire non-performing loans (NPL) and non-performing assets (NPA) of banks and NBFIs. To encourage the transfer of NPAs and NPLs from banks and NBFIs, the law grants several incentives, such as tax exemptions and reduced property registration fees.

Republic Act No 11534 was enacted, amending the National Internal Revenue Code. This allows activities registered with an investment promotion agency to carry over losses as deductions from gross income and to claim additional deductions on gross income for labour, research and development, training, and power expenses, among others. ■

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