Winter 2023

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The In-House Lawyer

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How to change the game of environmental, social and governance advice

> **While no two Enterprise GCs are ever the same, one thing is certain: each event is bigger, better and more business-critical than the last.**

Nathalie Tidman

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

Get ready to be more enterprising than ever

As we face another few weeks of inclement weather that has somehow seemed to drag on longer even than the usual UK winter, thoughts inevitably turn to sun loungers, warmth and sandy beaches. Alluring as a spring holiday seems right now, whatever you do, don't book your getaway for the week including the 24th and 25th April.

It's hard to believe that Enterprise GC is once more nearly upon us and that this will be the sixth year of Legalease's marquee, two-day general counsel event at the Hilton London Syon Park. Anyone who has attended in past years will know that I'm not exaggerating when I say that this is the only must-attend GC networking event of the calendar – more than 100 senior speakers and guests can't be wrong.

While no two Enterprise GCs are ever the same, one thing is certain: each event is bigger, better and more business-critical than the last. Expect thought-provoking debates on the in-house counsel's increasingly crucial role in promoting diversity, equity and inclusion; the rewards and pitfalls as Gen Z lawyers infiltrate the workplace; the future of the billable hour; the perennial and thorny question of legal tech; and a whole lot more.

But back to this, the winter edition of IHL. Our cover feature is a must-read for all of us grappling with the ever-pressing ESG (environmental, social and governance) landscape as enforcement and litigation risks loom large. Here we discuss the concerns in-house counsel need on their agenda this year and explain why you need to start shaping the conversation.

Elsewhere, we have our usual insightful Perspectives pieces, this time featuring two prominent individuals who were recognised for their outstanding contributions at the Legal Business Awards 2022.

Sharon Blackman, Citi's managing director and general counsel tells of her continued elation at beating five other nominees to be named GC of the Year after being recognised for her committee work, not to mention her OBE in June 2021 for services to the financial services sector.

Apart from recounting a fascinating career that has seen her cut her teeth as an equity derivatives lawyer at Abbey National, Blackman engages on the importance of bringing up the junior lawyers around you so that they are equipped to deal with whatever might come their way.

Meanwhile Jelena Madir, general counsel of Gavi, the Vaccine Alliance, which won the Most Transformative In-House Team award, retells a globetrotting, if occasionally fraught, career that thwarted a dream job in private practice at Shearman & Sterling when the bottom fell out of the market in 2008. Nevertheless, the reversal no doubt prepped her for the upheaval of being the GC of a vaccine company in 2020 and coping with being under-skilled and understaffed as a legal department supporting the production and distribution of Covid-19 vaccines around the world.

Finally, this issue offers our usual incisive market reports, this time on the particularly topical issues of real estate and corporate crime. There's a lot to unpack before we all get together again for Enterprise GC in April.

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Briefings

Significant matters

Firms reappointed to provide core legal services on FSCS's panel

Eight law firms have been reappointed to provide core legal services on the **Financial Services Compensation Scheme (FSCS)** second legal panel, following a six-month procurement exercise.

The legal panel will last for four years and consists of three lots of work – core legal services, Scots law and HR/employment advice. The firms selected to core panel are: Addleshaw Goddard, Bevan Brittan, Burges Salmon, Burness Paull, Clifford Chance, Dentons and Eversheds Sutherland. Addleshaw is also chosen to provide Scots law advice, while Trowers & Hamlins has been specifically selected to provide HR/employment advice.

FSCS is the UK's financial compensation scheme that protects customers of authorised financial services firms if they fail, playing an integral and unique role in the UK's financial services regulatory structure.

James Darbyshire (*pictured*), FSCS's general counsel, said: 'We're delighted to announce the successful procurement of our new legal panel. The number and quality of firms made for an exceptionally strong field and is testament both to the degree to which FSCS's role is recognised and valued, and to the quality and impact of FSCS's legal work.

'Against a backdrop of increasing customer expectation and a changing economic and regulatory landscape, I'm confident we've got the right mix of legal partners to help us deliver our strategic priorities in the years ahead.'

Suzanne Padmore, partner in Burges Salmon's financial services disputes team and client partner for FSCS, added: 'Having last been appointed to the first FSCS legal panel in 2019, we are delighted to have been reappointed to its 2023 panel. We look forward to continuing to work with the FSCS team to help them deliver their strategic priorities over the next few years.'

Advisers announced for government pension scheme

Twelve law firms have been appointed to the **National Local Government Pension Scheme (LGPS)** Framework for Legal Services, one of the largest pension schemes in the UK with participating employers including local government, charities, housing associations, academies, and private sector providers. It has over six million members across England and Wales, 86 separate pension funds and 18,000 employers, with a total value in 2021 of £342bn.

The 12 firms appointed to the framework in January are: Addleshaw Goddard, Anthony Collins, Brodies, Burges Salmon, Burness Paull, Cleveland & Co, Eversheds Sutherland, Freeths, Gowling WLG, Osborne Clarke, Pinsent Masons and Squire Patton Boggs.

Michael Hayles, a partner in Burges Salmon's pensions team, said: 'Having previously been appointed to the LGPS panels for England, Wales and Northern Ireland, we are delighted to have been reappointed to its 2023 panel to include Scotland. We look forward to continuing to work with LGPS funds, investment pools and employers to help them deliver their strategic priorities over the next few years.'

Doug Mullen, pensions lead at Anthony Collins, said: 'Being appointed to the National LGPS framework for Legal Services will allow us to provide advice for the next four years to LGPS funds on benefit administration and governance and to participating employers.'

Aviva cuts defendant legal panel

Aviva has announced the conclusion of the first comprehensive review of its defendant legal panel in 10 years.

Following a strategic review of its current nine-member panel, Aviva has appointed a core panel of four firms to lead claims legal work on all of Aviva's UK general insurance legal requirements within England, Wales, Scotland and Northern Ireland, and wider global needs where required. The firms appointed, on a three-year contract, are Clyde & Co, DAC Beachcroft, DWF and Kennedys.

The new legal panel is part of a more strategic approach to Aviva's general insurance claims legal work. The streamlined core panel will cover a wide range of defendant legal claims in personal lines, commercial lines and global corporate & specialty, covering motor, property, liability, fraud and major losses.

Tom Baker, DAC Beachcroft's client relationship partner for Aviva, said: 'This is a fantastic achievement and provides an excellent platform for us to further develop our strategic partner relationship with Aviva. Our appointment is a validation of the breadth and depth of DAC Beachcroft's expertise.'

Nigel Knowles, chief executive officer at DWF, added: 'This is a great appointment with the UK's largest insurer which gives DWF an opportunity to further extend our relationship with this long-standing client. It also reflects a number of the wider market trends we discussed at our interim results in December, including clients looking to partner with fewer providers across a wider range of services. It is premium work with a premium client and we are delighted to have been appointed.'

ILP begins chapter on in-house legal offering

International Literary Properties, the global company that invests in, acquires, manages, and enhances literary estates, has hired in three new positions that will start to form its global in-house legal team.

It will be led by Lisa Logan, based in London, who joined in 2022 as GC for UK and Europe, Middle East and Asia, and Barbara Cohen, based in New York City, who joined in January as vice president, legal and business affairs for North America. They will be supported by Sabina Pekin, legal rights and contracts manager, based in the London office.

Logan brings over 20 years' experience in film, television, literary, digital, and technology law. She spent over a decade in-house at Disney, Nickelodeon, and Discovery Channel, before moving to private practice. For 12 years, she was both a partner and head of media/TV, firstly at Gateley, and then at Simkins – working closely with high-profile literary talent on the development and sale of their portfolios.

Cohen will lead the business affairs and contractual process for the company's North American acquisition activity, bringing her decades of publishing, legal and business affairs expertise. Cohen brings to the role more than 30 years' experience as a media lawyer, including as a litigator in two New York law firms and senior in-house roles at book and newspaper publishing companies. Prior to establishing her own firm, Cohen was vice president and general counsel (academic), at Oxford University Press.

'The establishment of a first-class legal team has been a key part of ILP's strategy,' said Hilary Strong, ILP CEO, UK and Europe. 'With Lisa's breadth of experience in TV, film and theatre and Barbara's in publishing, ILP has a robust, global legal team to support our rights management and enable the best possible deals for the works we acquire.'

Moves that matter

■ Private equity lawyer and head of Ropes & Gray's London office, Will Rosen, has joined **Bain Capital** permanently as its European general counsel for private equity following a 12-month secondment with the firm. Rosen was London managing partner for Ropes on his own since 2020 but was first appointed to co-lead the London office alongside Mike Goetz in 2018. He joined the role in 2011 from a role as head of private equity for EMEA at DLA Piper and earlier spent several years as a partner at Weil.

■ **Royal London** has announced the appointment of Julie Whitehead as group general counsel. Reporting to the group chief executive officer, Barry O'Dwyer, Whitehead will be a member of the group executive committee and be responsible for providing strategic legal advice to the Royal London Group and leading the in-house legal team. She joins Royal London from AXA where she held a variety of leadership roles, including UK group regulatory and compliance director and senior counsel for AXA UK.

■ After 15 years at **Nokia**, Esa Niinimäki has been named chief legal officer. Prior to this role he was vice president, deputy chief legal officer and board secretary, where he defined strong governance practices for Nokia. Niinimäki also served as GC of Nokia's global services business group, head of corporate legal of NSN and senior legal counsel, legal and IP, for the IMEA region. Before joining Nokia he worked as group legal counsel for Metsä Group and as an associate lawyer at White & Case.

■ Andrew Garard, the former group general counsel and company secretary of ITV and *GC Powerlist* alumnus, has joined FTSE 250 water company **Pennon** as group GC and CoSec. Prior to joining Pennon, Garard had been group general counsel and director, corporate affairs at Meggitt since September 2019 where he was a member of the group executive and responsible for legal, commercial, trade compliance, government relations, ethics and contract management.

■ London fintech company **Hi Group** has added a senior finance lawyer Lee Cullinane (*pictured*) from McGuireWoods as its general counsel. Prior to joining McGuireWoods as a partner in 2019, Cullinane spent almost nine years at

White & Case, for most of which he led the firm's EMEA banking practice, and earlier was a partner at Mayer Brown and Clifford Chance.

■ **Highview Power**, a long-duration energy storage and essential grid services provider, has appointed Sandra Redding as general counsel. She brings more than 20 years of international experience across a number of corporates in the energy sector. She most recently served as GC for Seadrill and prior to that as GC of Dubai government-owned Dragon Oil. She has also held several in-house legal roles within the RWE, Gaz de France and National Grid groups.

Jelena Madir, Gavi, the Vaccine Alliance

BY CHARLES AVERY

Jelena Madir, general counsel of Gavi, the Vaccine Alliance talks losing her job at Shearman, the billable hour and building a ship while sailing in a storm

Jelena Madir's career to date has been defined by two crises. The 2008 financial crash saw her out of a job and forced to look beyond private practice for gainful employment. Fast forward just over a decade, and the Covid-19 pandemic has spawned the work which she credits as the highlight of her career, and for which the Gavi legal team she leads won the Most Transformative In-House Team gong at the 2022 Legal Business Awards.

A globetrotting career, which has so far spanned two continents and five countries, began in the US. Despite having studied government and Asian studies with Chinese as an undergraduate, Madir insists: 'I always knew I wanted to be a commercial or corporate lawyer'.

Her wish was granted when she landed an associate position at Cleary Gottlieb in Washington DC, where she worked in the finance team. After three years, a return to her home country of Croatia (and country number two) beckoned. Madir took up a role at Privredna banka Zagreb, the country's second largest bank.

From there, Madir moved on to DLA Piper's project finance group. After a year in the role, it seemed that she had struck gold with a move to Shearman & Sterling, which involved a third relocation, this time to Germany.

It was then that fate intervened: 'I got a seemingly perfect job with Sherman & Sterling in Frankfurt in the equity capital markets team. But my timing could not have been worse because the market fell off a cliff. I started in May 2008 and found myself jobless six months later.'

Understandably, the midst of the financial crisis was not the ideal time to be looking for a job at a law firm. Madir had no choice but to cast her net wider, taking a job at multilateral The European Bank for Reconstruction and Development (EBRD) (the fourth country of her career).

Madir says of the decision: 'At the time, no one was hiring in private practice and certainly not in structured finance or capital markets. To be perfectly honest, I would have preferred to stay in private practice at the time, but because no one was hiring except counter cyclical organisations like EBRD, I joined them. It definitely wasn't something that was planned. Over the years, however, I discovered that I really enjoyed being so close to the business as an in-house lawyer.'

The move in-house proved something of a culture shock. She says: 'You're just handling a larger number of projects and you're unable to go into so much depth as you would as a private practice lawyer. You're also closer to the business and your thinking has to be more aligned with the business, rather than saying: "Here is our advice, do what you want with it."'

The work at EBRD certainly seemed to agree with Madir, who spent over a decade rising through the ranks. This included a secondment to The Bank of England where she worked on payment regulation, and a move into fintech.

It was then that global health partnership Gavi came calling. At first, Madir admits that she had not heard of it before, but the nature of the company and the chance of career progression won her over. 'It was a bit out of left field because it was a different sector, but it was a GC role and I wanted to get that breadth of experience. Moreover, what appealed to me was that Gavi is a very dynamic and innovative organisation,' she recounts.

The role at Gavi brought her to Geneva (and country number five), and saw her responsible for a team of 15 people. It has also led to what Madir credits as the standout project of her career so far, and the work which earned her and her team the Most Transformative In-House Team award at the Legal Business Awards.

A coalition between Gavi, the World Health Organization and the Coalition for Epidemic Preparedness Innovations, COVAX, sought to bring together governments, scientists, manufacturers and global health organisations to coordinate access to Covid-19 treatments and vaccines. To call it ambitious would be something of an understatement.

Madir says of the project: 'In the summer of 2020, Gavi set up the COVAX facility, which is the largest programme for the production and distribution of Covid-19 vaccines around the world, and for which we were understandably under-skilled and understaffed in the legal department at the outset. Our CEO used to describe that project as "building a ship while sailing in a storm." For legal, we had to recruit aggressively while at the same time pushing the project and making do with what we had.'

When it comes to the day-to-day, Gavi does not have a formal panel, but does run 'competitive selections' for different areas of work. Prospective firms are first judged on their technical submissions and their knowledge of the subject matter before attention is turned to fees. The current roster of preferred firms includes international powerhouses such as Linklaters, as well as boutiques like Agora.

She explains: 'For more standardised work, I don't think one needs to be paying top dollar because there are many firms that can do a very good job. That means that the large firms are all competing for that really high-end work.'

As well as legal knowledge, diversity and inclusion considerations are high on Gavi's list of priorities. Madir expands: 'We require all of our bidders to submit their policy on diversity and inclusion. Are we going to disqualify someone for having an all-male group of lawyers in the interview? Probably not, but we will definitely take note when comparing them to other firms with greater diversity.'

Despite her previous experience in private practice, Madir has no sympathy for firms which fail to go the extra mile to secure clients. She offers her two cents on what she wants from external counsel: 'I appreciate that putting together a pitch involves a lot of non-billable hours with the risk of not getting the project in the end, but you will really stand out if you demonstrate in your pitch that you have thought carefully about a particular project and how you would approach it rather than just putting together a generic pack of prior experience and lawyers' biographies which takes 10 minutes.'

Her comments allude to one of her bugbears about private practice: the billable hour. She commends the growing band of alternative law firms moving away from what she regards as an antiquated approach, but, when asked if she is seeing larger firms doing the same, Madir is downbeat. She laments: 'Not as much as I would have hoped. I'm quite surprised by that. They're still very much sticking to the billable hour. We always negotiate capped fees, and I am now seeing less of a push back against that than I did 10 years ago, but I'm not seeing creativity in putting together a different proposal.'

However, Madir does credit private practice with abandoning the old habit of palming off associates onto clients: 'Firms have woken up to the fact that they can't win a pitch with partners and then have the client working with junior associates. That doesn't work. This is something that everyone is going to be probing at interview. We ask who is going to be overseeing the day-to-day and if they say it's an associate, then it's just not worth the money.'

Madir's happiness in her current role is evident from her buoyant manner. Nevertheless, she still acknowledges a challenge that will be familiar to many in-house counsel: 'There has often been a lack of appreciation of what the work entails and that's probably normal, unless you are a seasoned business person who has years of experience on transactions. Otherwise, people just naturally think: "Here is what we've agreed, please draft the contract. And of course, you can do that in two hours, right?" Sometimes people also think that the lawyer can be left to draft a contact because a contract is all legal, but it's not – it's 99% commercial, and business people need to read and understand it. That's the challenge, explaining what we do, why it takes so long and the cerebral gymnastics that go into it.

'But it's our duty as in-house lawyers (and essentially a cost centre in a business) to educate our internal clients about the complexity and importance of our work, and about our value add to the business.'

Madir's passion for what she does is evident throughout the conversation (she even took time out of her holiday to speak to IHL), as is her extraordinary work ethic. Alongside her practice, she has somehow found the time to take on teaching responsibilities at University of London and University College London, sit on the sanctions board of Nordic Environmental Finance Corporation (NEFCO), complete a PhD and co-author two books on fintech and healthtech law.

When considering the next steps in her eventful career, Madir insists she is 'not wedded to any type of work', but acknowledges that moving back into a law firm is not always an easy transition. 'It becomes harder to transition to private practice because you don't necessarily have a book of business. But it depends. In the US there is a fluidity between public and private sectors and between in-house and private practice which I don't see on the continent.'

For the moment, Madir has her hands full with all things Gavi, which finds itself in an interesting position as the pandemic recedes. She concludes: 'What will the future look like? COVAX is winding down but morphing into pandemic preparedness. We now need to clearly dedicate some of the resources for pandemic preparedness and that may entail the creation of new departments or the launch of some new, innovative products like mechanisms for the support of local vaccine manufacturing. All of that then trickles down to the legal team.' ■

At a glance
Jelena Madir

Career

2003-06	Associate, Cleary Gottlieb
2006-07	Legal counsel, Privredna banka Zagreb
2007-08	Associate, DLA Piper
2008	Associate, Shearman & Sterling
2009-11	Counsel, EBRD
2011-14	Principal counsel, EBRD
2014-16	Senior counsel, EBRD
2016-19	Chief counsel, EBRD
2019-present	General counsel, Gavi, the Vaccine Alliance

Gavi, the Vaccine Alliance – key facts

Size of team 15

Legal spend $2m

Preferred advisers Linklaters; Slaughter and May; Burges Salmon; Agora; K&L Gates; LALIVE; Lenz & Staehelin

Sharon Blackman, Citi

BY TOM BAKER

Citi's managing director and general counsel Sharon Blackman discusses 18-hour days, hating her law degree and thriving in a crisis

While she is loath to admit it, Sharon Blackman, managing director and general counsel in Citi's global legal affairs and compliance division, 'hated' her law degree. Clearly this has not held her back though, as her GC of the Year gong at the Legal Business Awards in September testifies.

Despite not falling in love with the law at an academic level, during her degree, Blackman took on pro bono work at her local Citizens Advice Bureau, and it was there that her passion was first ignited. She recalls: 'It was really useful for developing the practical piece and I found that much more engaging than just the theoretical piece.'

And her initial disinterest did not stop her from qualifying as a barrister after graduating from Brunel University in 1996, albeit Blackman then took a year out after failing to secure a pupillage. During that time, Blackman says she was 'extremely lucky' to land a role at Colonial Financial Services, where she gained experience in life assurance, pensions, lending, securitisation, investments and general company commercial work.

Blackman says: 'That company then sold, and I could've gone with them. They were an amazing company to work for in terms of developing staff – they would have facilitated anything I asked for. But at that point, after three years, I wanted to move on to derivatives because I thought it was more interesting having worked on a bespoke securitisation.'

And so at the turn of the millennium, Blackman landed a job at building society Abbey National Treasury Services as an equity derivatives lawyer. She quips: 'At the time you could write the amount I knew about derivatives on the back of a stamp! So there was an opportunity to grow my knowledge of equity derivatives, a calculated risk as it was a growth area.'

It is safe to say that it served as another vital learning experience for Blackman, who says the company 'taught her everything'. She clarifies: 'Not just the lawyers, the businesspeople and middle office too.'

After four years in the role, Abbey National was on the cusp of being sold to Santander. This coincided with a testing time internally for Blackman: 'I loved the company, but my team had gone from 15 people to three. We'd interviewed for our own jobs three times in the 18 months preceding and I was one of the ones kept. It made everyone think: "Maybe now is a good time to make a move."'

Move she did, and it proved to be a fruitful decision. In 2004, Blackman joined Citi as a trading floor lawyer in the equity derivatives division, the most junior in a team of three. After five years, Blackman was asked to move to Citi's fixed income division, working on credit derivatives and foreign exchanges. By this point, she was eyeing a director-level promotion.

'I was told you typically need to "own" something if you wanted to become a director, and to do that you need senior support and engagement. FX was the only area which had never had a dedicated lawyer in EMEA, so I decided FX was going to be the area that I focused on.'

Seizing the opportunity, Blackman was able to develop the FX practice over the years. 'I loved the FX business – it was an amazing source of interesting work. But after a year or so, I realised there was a gap in resource, and I was allowed to build my team. I built it up from just me to a team of six in total.'

Eighteen years since joining and now Blackman is a managing director and GC in Citi's global legal affairs and compliance team,

Photographer
JUAN TRUJILLO

> **I need to make sure my junior lawyers see what it's like to be involved in something massive, so they understand it for when I'm not there and they're in charge. You have to make sure people get a broad experience.**

a long tenure by any standards, but particularly in the profession of in-house law. Blackman reveals what has made her stay put for so long: 'I just have really enjoyed the culture and style at Citi. It's very employee focused. I loved being on the trading floor. I had opportunities to move asset classes and learn new things. You know what they say – the more money you make, the more problems it creates. It's the same here – the bigger the institution, the bigger the issues! You can go to a level of depth on a narrow topic as deep as you like. But you can go broadly as well, across anything.'

Some GCs admit choosing the in-house route for more philosophical reasons, but Blackman concedes that she rather 'fell into' her career. Despite this, she is confident that she is in the right lane: 'I wouldn't rule private practice out, but it's not the first thing on my mind in terms of the future. Although there's a lot more willingness these days to have people move about, from the Bar to law firms, from in-house to the Bar and so on. I've actually had a couple of conversations about moving to a law firm but I really enjoy how close I am to the business so I can't imagine a circumstance where it would feel genuinely appealing. But it's nice to flirt with the idea!'

If there is one word to sum up Blackman's time at Citi, it would be 'crisis'. She goes as far as to describe it as 'the theme of her career.' It is hard to dispute when considering the events that have unfolded during Blackman's tenure. She recounts the Lehman collapse, the 2008 financial crisis, the FX scandals, various currency crashes, Brexit and, more recently, Russia's invasion of Ukraine.

But Blackman wouldn't change anything: 'It's at the crunch points where you learn the most. Yes you "know" things, but when you're tested and asked really hard questions, pertinent questions, it changes your appreciation of the documentation, the industry, your business, your own level of knowledge! You grow so much.'

This is not to say that crisis does not take a toll, as Blackman notes, 'it's the exhaustion that gets you'. After Russia invaded Ukraine last year, Blackman says she had seven or eight consecutive weeks where she and a team of five worked 18 hours a day, seven days a week, supporting the business. The marathon was gruelling.

'It's important to prioritise your mental health and wellbeing. I remember one Saturday being so exhausted I said: "I'm not going to be available today." We'd already had some hard discussions and made some hard decisions, and analysed the position on the Friday, which we thought should last the business through the weekend. When I woke up on the Sunday I was dragged into four-hour calls because the law had changed. There were new sanctions. And actually we had to go back to square one.'

But Blackman is alive to her duty as a leader and role model, and readily accepts managing the workload of her team as a key aspect of her role. During these difficult periods, she endeavours to catch up with her team members multiple times a day to make sure they are coping, and having 'very deliberate' conversations about their capacity.

Blackman says: 'As leaders what you have to do is demonstrate how you're taking care of yourself. I encourage people to be open about when they're overloaded. If you've got too much on you should be able to at least ask if other people have capacity, to give yourself the ease you need.'

This philosophy spills over into Blackman's relationships with her external counsel, where possible. Blackman opts for a formal panel arrangement which is understood to include Clifford

Chance, Linklaters, Cleary Gottlieb, Norton Rose Fulbright and Fieldfisher.

Blackman says she expects her advisers to be 'excellent in their field, commercial and all that good stuff', but appreciates it is a two-way street: 'I don't believe in dumping things on law firms, but I have to hold my hand up and say yes, sometimes the 5pm call to say you need something does happen. But I try and moderate things so that we're being fair to external counsel.'

Typically, Citi's panel firms are brought in as an additional resource for one-off matters, or to provide a second opinion on tricky legal grey areas. But Blackman is keen to ensure her team is involved in crisis matters, rather than sending it all out externally: 'I need to make sure my junior lawyers see what it's like to be involved in something massive, so they understand it for when I'm not there and they're in charge. You have to make sure people get a broad experience.'

As co-chair of Citi's EMEA Pro Bono Committee and a member of the company's EMEA Legal Diversity Committee, Blackman unsurprisingly champions legal advisers who go beyond just supplying high-quality counsel. But unlike other GCs who stipulate specific targets, Blackman is less prescriptive with her external counsel when it comes to diversity and inclusion.

Having said that, Citi does have a 'supplier diversity team' which seeks to promote diversity throughout the supply chain. Blackman says: 'The requirement is that the suppliers must have 15% diversity with an expectation that they also insist on 15% diversity with their own suppliers.' She adds: 'We have become increasingly alive to the idea that we have more leverage on this subject, and we are observant of how a law firm presents itself to us. We don't have targets, but if you present a panel which has zero women, it will be noticed.'

And it was the subject of diversity and inclusion which helped propel Blackman to 2022's GC of the Year honour at the Legal Business Awards. She beat five other nominees after being recognised for her committee work – and her OBE in June 2021 for services to the financial services sector helped too.

Blackman summarises her feelings: 'Is it bad to say I'm still contemplating the award? I was incredibly shocked to win. People say a lot that they were humbled, but genuinely, I feel like I've had a lot of accolades recently and this one is pretty high up. I'm really delighted and still slightly shocked. It tends to bring a smile to my face when I think about it.' ■

At a glance
Sharon Blackman

Career

1997-2000	Legal adviser, Colonial Financial Services Ltd
2000-04	Specialist lawyer, Abbey National Treasury Services
2004-present	Managing director and general counsel, markets, Citi

Citi – key facts

Size of team 16
Legal spend Over $500,000
Preferred advisers Clifford Chance; Linklaters; Cleary Gottlieb; Norton Rose Fulbright; Fieldfisher

2023 and beyond: Emerging risks and legislation

DAC Beachcroft has recently published over 140 predictions, in its 'Informed Insurance' publication, considering the opportunities and risks emerging for 2023 and beyond. Partners Duncan Strachan and Clarissa Coleman look at a small selection, with cross-sector relevance.

Parent companies are in the firing line for harms caused by foreign subsidiaries

Growing awareness of ESG issues and rights to access justice is fuelling an increase in group actions against UK and EU-domiciled parent companies for alleged human rights abuse and environmental damage caused by their overseas subsidiaries and affiliates. With the English Supreme Court's confirmation that parent companies can be liable for such harm, and the EU's proposal to legislate for mandatory due diligence on human rights, the environment and good governance throughout supply chains, it is inevitable that this trend will continue. Now is an opportune time for parent companies to review their policies, procedures and corporate governance arrangements and get a real handle on risk management and governance of subsidiaries. Ignorance will not assist those at the top of the corporate chain.

Greenwashing and climate change litigation

Climate activists will continue to challenge the actions of private companies and governmental agencies and bodies. As promoting green credentials becomes ever more important in marketing, consideration must be given to the potential risks arising from those efforts. Producers and manufacturers who want to persuade consumers to purchase their products (rather than those of a competitor) by stating they have been responsibly sourced, manufactured and packaged, risk liabilities relating to unfair trade practices or breaches of competition law and consumer protection laws.

Regulators are responding with more rules to eliminate misleading and unsubstantiated claims, and with greater enforcement activity.

Across the globe, a wide variety of climate litigation is underway, from greenwashing challenges to applications to the European Court of Human Rights regarding factory farming. The high-profile action by ClientEarth against the board of Shell emphasises the prospect of individual directors being the subject of climate-related litigation; the outcome will create an important precedent.

Directors will continue to be under the microscope during challenging economic conditions

While the country struggles to recover from the economic damage of Covid-19, continuing financial uncertainty means companies are now facing a further slew of financial issues beyond their control. An increase in insolvencies will see more claims by creditors against the directors of insolvent companies to recover their losses. The Supreme Court has recently considered the duties owed by directors to creditors in circumstances where a company faces financial uncertainty, holding that a 'real risk' of insolvency is not sufficient for the creditor duty to arise. Rather, the duty to creditors is only engaged when the directors know, or ought to know, the company is insolvent or bordering on insolvency, such that it is 'probable'.

Expect more regulation on protecting the workforce and accountability over supply chains

A new Modern Slavery Bill, announced in the Queen's Speech on 10 May 2022, awaits further Parliamentary debate. Its purpose is to update the existing Modern Slavery Act 2015 and to 'strengthen the protection and support for victims of human trafficking and modern slavery and increase the accountability of companies and other organisations to drive out modern slavery from their supply chains.' The Bill will introduce criminal offences and financial penalties for non-compliance. Globally, legislators have taken significant steps in recent years to introduce responsibilities on companies to prevent harm arising from their operations; this is part of a broader trend of formal legal obligations beginning to align with voluntary business human rights standards, in particular the UN Guiding Principles on Business and Human Rights.

> **Now is an opportune moment for companies in this sector to review their cyber security obligations for existing and future products to ensure compliance.**

Liability for failure to ensure cyber security for connected devices

Stringent requirements at both UK and EU level will increase governance on cyber security for connected devices. The UK Government has recently passed the Product Security and Telecommunications Infrastructure Act, which aims to protect consumer connectable devices from cyberattacks. 'Smart consumer' products will need to be designed more securely against cyberattacks at the manufacturing stage. Any non-compliance risks fines of £10m or 4% of global revenues (similar to the GDPR). Similarly, the European Commission has proposed the introduction of the Cyber Resilience Act for products with 'digital elements'. Any non-compliance risks an administrative fine of up to €15m or up to 2.5% of its total worldwide annual turnover for the preceding financial year, whichever is higher. Companies will face increasing scrutiny over the coming years. Now is an opportune moment for companies in this sector to review their cyber security obligations for existing and future products to ensure compliance.

Ransomware attacks will continue to dominate cyber-security landscape

Ransomware attacks are becoming increasingly sophisticated as cyber-criminals evolve their methods by using expansive infrastructure and multiple malware tools to exploit vulnerabilities. Stolen credentials obtained by phishing scams remains one of the most common ways to launch ransomware attacks on businesses and government organisations. The shift to a hybrid working environment and virtual conferencing alongside the development of 'deep fake' technology has been a crucial factor. The ever complex threat landscape requires a multi-layered solution that combines anti-malware, data loss prevention, email security, endpoint detection response, vulnerability assessment, patch management, remote monitoring and backup capabilities. Staff training and public education also have key roles to play.

New enforcement powers for breach of sanctions

New powers to impose civil penalties for breach of financial sanctions may signal more enforcement activity in 2023. The Economic Crime (Transparency and Enforcement) Act 2022 imposes strict liability, rendering due diligence or the need to show any knowledge or suspicion of acting in breach of financial sanctions irrelevant. The Office for Financial Sanctions Implementation can impose fines of up to £1m or 50% of the value of the breach (whichever is higher). It also has the power to name and shame companies, even where a monetary penalty has not been imposed.

Should you wish to read our full suite of 2023 predictions, please visit our dedicated portal: Informed Insurance. ■

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DAC BEACHCROFT

'Game-changers'– why in-house counsel must take ownership of ESG

ESG (environmental, social and governance) enforcement and litigation risks are looming large. *IHL* explores the challenges in-house counsel need on their agenda this year and explains why they need to start shaping the discussion.

ANNA BAUBÖCK

> **Social media has assured that missteps in the sustainability space will spread within hours to investors, employees and customers.**
> **Timothy Wilkins, Freshfields Bruckhaus Deringer**

'You are all climate lawyers now.' So declared John Kerry, the US special presidential envoy for climate, at the General Assembly of the 2021 American Bar Association hybrid annual meeting in Chicago. Fast forward to 2023, and the veracity of this statement far exceeds even Kerry's predictions.

'You are all ESG lawyers now rings just as true', quips Slaughter and May corporate partner and head of sustainability Jeff Twentyman. 'All lawyers have to be conversant in it, and it should be part of all lawyers' day-to-day job.'

Today's focus on ESG means that the impact every company makes on the environment and society, as well as its internal governance policies, is under scrutiny. Accountability can no longer be an afterthought – it has permeated the very fabric of doing business. 'It's not a discrete subject anymore; it affects everything', states Twentyman.

Inevitably, this scrutiny is also being placed on lawyers both in-house and in private practice.

'An ESG lens should apply to all legal work and no ESG issue can be viewed in isolation', Adrian Walker, global head of ESG at Hogan Lovells, elaborates.

This means that companies must realise that the S and the G are also important, even if many of the headlines to date have focused on environmental issues.

Nor should corporates try to squeeze ESG into an organisational silo. 'The view that ESG is a standalone speciality is no longer compatible with successful operations', points out Timothy Wilkins, who leads the Freshfields Bruckhaus Deringer global sustainability team.

In-house counsel have a crucial role to play in all of this, helping their companies avoid risk and acting as intermediaries between various internal stakeholders. They must also be educators of the business.

Risky business

The steady evolution of new ESG regulation, combined with an increase in enforcement action, means in-house lawyers need to play an ever-increasing role in protecting their companies from the threat of litigation claims, or regulatory violations connected with ESG, as greenwashing claims continue to mount.

Matthew Townsend, one of the founders of Allen & Overy's global ESG group, points to 'the rise in impact litigation, where companies are the subject of claims simply designed to bring attention to an issue rather than seek a monetary award'.

Freshfields' Wilkins adds another layer, suggesting that businesses need to learn 'how to balance short-term economic issues with longer term compliance ones'. He refers to wider geopolitical events such as soaring energy prices, rampant inflation and a looming recession, which may require business decisions that aren't necessarily in alignment with ESG.

Clifford Chance ESG board member Rae Lindsay, who also co-heads the firm's business and human rights practice, expands on this, noting that one of the challenges for businesses is working out 'how to balance the opportunity versus risk side of proposed activities, as well as how to manage double-edged propositions that achieve climate change objectives but may impact human rights'.

Jeroen Ouwehand, who leads Clifford Chance's global ESG board, agrees: 'There are often contrary pressures on ESG strategies and commitments from differing political environments, meaning in-house lawyers have to navigate these opposing pressures to avoid being caught between a rock and a hard place.'

This can be a particularly big issue in global companies, given ESG perspectives and drivers often vary significantly from one jurisdictions to the next.

It's no wonder then that trying to deal with ESG can feel like walking a tightrope, making a risk management plan critical.

Not only are slip-ups highly likely but, as Wilkins points out: 'Social media has assured that missteps in the sustainability space will spread within hours to investors, employees and customers.' The company's reputation is at stake.

> There is a strong connection between ESG risks and opportunities and financial institutions' bottom lines.
> **Aleksandra Schellenberg, UBS**

The in-house view: Aleksandra Schellenberg, global head of legal, sustainable finance, UBS

ESG has been moving up the corporate agenda in recent years. What does this mean for the in-house legal team?

Sustainability has clearly became a boardroom topic, and regardless of whether your company places ESG at the centre of everything it does or not, sustainability has moved from being seen as 'going the extra mile' to being the norm.

How involved do you get in ESG matters?

100%. Sustainability is very high on UBS´ agenda. I lead the sustainable finance legal team which acts as a central legal backbone supporting UBS senior management, business divisions, group functions and group legal on strategic and complex regulatory topics in the ESG space. What is important is that we do not work in silos. The team's effectiveness fully depends on a close collaboration with lawyers aligned with business divisions and group functions.

What are the biggest ESG issues you expect to face this year?

A rapid increase in the carbon markets, particularly offsets, increased regulatory attention to biodiversity, increased regulatory attention to supply chain, human rights, crypto, cybersecurity and AI. Increased regulatory attention to a 'just transition', the growing importance of an effective approach towards D&I supported by reliable data, a growing number of mandatory and voluntary disclosure regimes, a continued tightening of existing standards, and further reclassifications of sustainable products.

How do you think your external law firms could help?

Law firms can help assess the impact of the existing and emerging regulatory landscape on your company´s operations, and help you identify the ESG priorities. Law firms can give a second opinion on regulatory concepts which do not easily fit with complex investment processes and/or products.

What advice would you give other in-house lawyers wanting to stay on top of ESG?

Make it crystal clear that ESG-related legal risks are no longer a problem of the litigation departments. We are all climate lawyers now. Make sure that ESG lawyers are properly connected with the rest of the legal department and beyond. Talk to your senior management. Make it clear that ESG risk, in particular greenwashing risk, can't be seen only as a ring-fenced reputational risk. There is a strong connection between ESG risks and opportunities and financial institutions' bottom lines.

> ‘ESG is now our business as usual, and so we need to be part of the day-to-day activities and decisions.’
> **Katie Smart, Tarmac**

While lawyers are often accused of diluting corporate ambition, private practice partners recommend that the in-house legal team is committed to ensuring that the business does not overstate or oversell ESG credentials.

In the event that something does go wrong, and a company’s ESG credentials are found to be publicly wanting, knowing what to do next is critical.

Lindsay advises: ‘Be wary of making immediate short-term public statements that tie the organisation into a position before it has been possible to take stock and ensure that the position can be backed up.’

Twentyman agrees, noting that ‘success will be judged not by something that’s gone wrong but by how you react to what’s gone wrong. Long-term thinking will help do the right thing when mistakes are made.’

The myriad roles of an ESG lawyer

Where ESG is concerned, risk and reputation are inextricably linked, so it’s clear that in-house lawyers must provide far more than just bog standard legal advice.

Says Twentyman: ‘The in-house lawyer has a role in influencing the right ethical position of businesses. If you simply ask if it’s legal or illegal, there’s a good chance you’ll get it wrong. Many things are legal but plainly wrong.’

ESG is also about being responsible and doing the right thing. Walker stresses: ‘ESG is about values. Increasingly, people will not work for or do business with your company if your values are not aligned.’ And compliance is only one element of this. ‘If you think about ESG purely in compliance terms you miss the real enterprise risk,’ explains Walker.

It’s a view that Paula Alessandro, a general counsel within Standard Chartered Ventures, shares. However, she acknowledges that lack of certainty around ESG can make it hard to fit into a corporate strategy, even for those businesses with a clear focus on sustainability. ‘Not

ESG trends for 2023

Just transition – A concept which emerged from the 2015 Paris Agreement and was developed by the trade union movement, it seeks to unite social and climate justice. It encompasses a range of social interventions needed to secure workers’ rights and livelihoods when economies shift from high-carbon activities to sustainable production and a green economy. Not least due to the current energy crisis, 2023 is seen as a critical year for accelerating a just transition.

Nature – Biodiversity is quickly rising up the ESG investing agenda and is set to influence the future of ESG programmes and reporting. While the Task Force on Climate-Related Financial Disclosures (TCFD) created in 2015 has developed a framework to help companies disclose climate-related risks and opportunities, since 2021 the Taskforce on Nature-related Financial Disclosures (TNFD) has also been developing a risk management and disclosure framework for organisations to report and act on evolving nature-related risks.

Human rights – Human rights issues are sensitive for many businesses and are getting increased attention. The use of innovative human rights arguments in climate cases is set to continue. Human rights are given increased focus in the context of supply chains: On the legislative front, the European Commission’s proposed Corporate Sustainability Due Diligence Directive addresses not only negative environmental but also human rights impacts in global value chains.

The in-house view: Katie Smart, general counsel and company secretary, Tarmac

How involved do you get in ESG matters?

My engagement with ESG falls largely into the following areas, where I'm a key strategic adviser: corporate governance; legislation horizon scanning; reputation and crisis response preparation; policy; and general legal and commercial support, including research and development into sustainable products and solutions. The latter can be quite an exciting area for in-house lawyers, which gives us a real sense of community and purpose.

Do you want to be more involved?

There is a definite need for legal functions to ramp up their input into ESG matters. Legislation is going to keep coming at us at an increasing pace. This will involve rethinking the way we approach horizon scanning to ensure nothing is missed. We should also be giving more time to the tricky issues of greenwashing and climate litigation risk, and I see a good role for lawyers in running ESG training as part of compliance training programmes.

What are the biggest ESG issues you expect to face this year?

The looming threat of climate litigation is one we should all anticipate facing at some point. This year, in-house teams should focus their attention on all the areas and risks that could bring about any claims. I also see a possibility that this litigation risk will extend past the E and into the S. It seems likely that at least one person reading this article will have to deal with protesters this year, so being prepared is essential.

How can your external law firms help?

We need support well beyond traditional legal advice, such as support in analysing local and global risk and translating that into practical tailored solutions, as well as help in predicting future issues based on the geopolitical and social landscape.

What advice would you give other in-house lawyers wanting to stay on top of ESG?

Make sure you continue to be part of the ongoing dialogue, not just the initial adviser to a project. ESG is now our business as usual, and so we need to be part of the day-to-day activities and decisions.

everything that is valuable is measurable and everybody likes metrics – especially in finance. For example, it's very hard to measure social impact in quantitative measures, but qualitative measures are just as important here.'

As boards are increasingly being held accountable for ESG failings, in-house lawyers have an opportunity to take the lead. At the legal level, their role is to use legal tools and frameworks to give effect to what the business is trying to achieve and to act as risk managers. They also need to educate the board and the wider business about how it can effect change consistent with its strategy.

'ESG is a competitive sport and it is about performance; in-house lawyers should be looking at their entire business and legal infrastructure to optimise positive impact and drive long-term, resilient returns,' says Walker.

What does this mean in practice? Firstly, there needs to be a strategic understanding and policy commitment from the top. Secondly, implementation needs to happen effectively throughout the business. The legal team, agree Ouwehand and Lindsay, 'can play an important role in bringing the various internal stakeholders on ESG together as it is such a broad topic'.

'The in-house counsel needs to fulfil the important role of coordinator and ringmaster,' says Twentyman.

Can private practice lawyers help? According to Twentyman, it must be a two-way street: 'It needs to be a collaborative exercise for it to work properly. We need to learn from each other.'

Be the voice

Twentyman believes there is still much to be done: 'Businesses haven't quite realised the change in the way they will need to conduct themselves over the next generation.'

Within this transition, without a doubt, 'in-house lawyers have the potential to be ESG game-changers', says Walker.

Twentyman takes it a step further, saying: 'All lawyers need to expand their role of competence and influence – not just in-house. You don't need to know everything but you need to be in a position to ask.'

At A&O, Townsend acknowledges that a one size fits all approach won't work, given that various sectors are being impacted differently. He concludes: 'We are witnessing the biggest change in law process for at least six decades. Lawyers may not necessarily need to lead the implementation programme but they need a strong voice around the table.' ■

Corporate governance in Saudi Arabia: an overview of the two most common types of corporate entities

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Corporate governance has become an issue of increasing interest and importance in Saudi Arabia, as evidenced by the recent proliferation of corporate governance rules and the increasingly active involvement of regulators to ensure that the applicable rules are being applied. This article presents a general overview of corporate governance of the two most common types of corporate entities in Saudi Arabia.

Sources of corporate governance

The principal sources of corporate governance in Saudi Arabia are:

- the Companies Law, which is applicable to all types of entities incorporated in Saudi Arabia;
- the Corporate Governance Regulations for listed companies issued by the Capital Market Authority (CMA), which are applicable to joint stock companies (JSCs) listed on the Saudi Stock Exchange (Tadawul) and the Saudi Parallel Market (Nomu), but only binding on the former; and
- the Corporate Governance Regulations for non-listed companies issued by the Ministry of Commerce (MOC), which are generally expressed as voluntary guidelines.

A new Companies Law has just superseded the existing Companies Law in mid-January 2023 and will be supplemented by implementing regulations that are expected to be issued by the MOC and CMA shortly. Companies formed after the new Companies Law takes effect are expected to comply with all of its requirements, but existing companies are not required to comply for two years after its entry into force, except insofar as the MOC and CMA may impose certain requirements during the transitional period.

The new Companies Law generally reorganises and clarifies corporate governance principles that are already included in the existing Companies Law, with some minor changes.

The two corporate entity types most commonly used by foreign investors in Saudi Arabia are limited liability companies (LLCs) and JSCs (both listed and non-listed), which will be the entities discussed in this article.

Corporate authorities

LLCs

In an LLC, the shareholder(s) have the ultimate power to control the company acting in accordance with its articles of association (AOA). It is not uncommon for shareholders to enter into a separate shareholders agreement but it would only bind them contractually and not third parties dealing with the company.

An LLC need not have a board, but at least one manager is required. The manager(s) have only those authorities over a company that are stipulated in a company's AOA or in separate instruments issued by the shareholder(s), which are typically to run the day-to-day business of the company, such as representing the company vis-a-vis third parties, entering into contracts in the ordinary course of business, and hiring or appointing employees or independent contractors.

JSCs

In a JSC, the relationship between the company and the shareholders is regulated by its by-laws. While non-listed JSCs may also have one owner, this occurs rarely in

> **Unlike in an LLC, a JSC must have a board of directors comprising of at least three directors.**

practice. Non-listed JSCs may also enter into a separate shareholders agreement as in the case of an LLC. The ultimate authority in JSCs rests with:

- the ordinary general assembly (OGA), which makes decisions on all matters in relation to the company, except for those reserved to the extraordinary general assembly (EGA); and
- the EGA, which has the exclusive authorities to amend the bylaws of the company.

Unlike in an LLC, a JSC must have a board of directors comprising of at least three directors. The management of a JSC is the exclusive function of the board within the authorities granted to it by the by-laws or the OGA/EGA.

All JSCs must have an audit committee and JSCs listed on Tadawul must also have a remuneration committee, a nomination committee, and a risk management committee.

Statutory duties and responsibilities

Shareholders of LLCs and JSCs

The principal duty of shareholder(s) in LLCs and JSCs is to attend an annual general assembly meeting, with an agenda that includes the discussion of the auditor's and management reports relating to the company's activities and financial position in the previous fiscal year, approval of the audited financial statements for such year, decision on profit distribution, and appointment of the next auditor.

Managers of LLCs and directors of JSCs

Other than duties assigned to them by the AOA or by-laws (as applicable) or the decision of the shareholder(s), the principal duties of manager(s) of an LLC and directors of a JSC are to prepare and share with the shareholder(s) the financial statements and management report on an annual basis, convene an annual general assembly of the shareholder(s) at least once a year, and, if the company's losses reach one half of its capital, convene a general assembly meeting for the shareholder(s) to consider whether to continue or dissolve the company.

The new Companies Law provides that manager(s) of LLCs and directors of JSCs owe a duty of care and loyalty to the company and are generally required to:

- perform their duties within the scope of their authorities;
- act in the best interests, and promote the success, of the company;
- take decisions or vote thereon independently;
- exercise reasonable and expected care, diligence and skill;
- avoid conflict-of-interest situations and competition with the company's business without shareholder authorisation;
- disclose any direct or indirect interests in any business or contracts undertaken for the account of the company;
- refrain from accepting any benefit from a third party in relation to their position with the company; and
- refrain from taking advantage of the company's assets or investment opportunities to achieve any direct or indirect personal interest.

Under the existing Companies Law, most of these duties only apply expressly to directors of JSCs.

Accountability

Manager(s) of LLCs and directors of JSCs may be held jointly liable by the company, the shareholders, and/or third parties for any damages resulting from any violation of their duties (whether pursuant to statute or the company's constitutional document), or as a result of any wrongful acts, negligence or failure on their part in the course of performing their duties. A manager or director may avoid liability arising from an action if they have expressly recorded their objection to such action in the minutes of a meeting.

Additionally, the MOC and the CMA may impose penalties on manager(s) and directors (as applicable) for any violations of relevant statute or regulation. ■

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Overview of the exemptions from the new Swiss ESG due diligence and reporting obligations

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In last year's winter edition, we highlighted certain aspects of the new ESG rules in Switzerland, which have entered into force in January 2022. The first ESG reports according to the new Swiss rules must be published in 2024, covering the financial year 2023. This also means that the risk assessments and due diligence processes with respect to conflict minerals and metals (hereinafter referred to as 'conflict minerals') and child labour, and the required data collection, also with regard to the report on non-financial matters, must already be in place for 2023 – i.e., starting now. Unless one of the various exemptions applies, that is.

The framework of exemptions may seem quite complex, which is why this article aims at providing an overview and shedding light on the practical implications of the exemptions under the Swiss ESG obligations.

Companies that apply international ESG standards or regulations or are part of a group

The Swiss ESG reporting rules were developed to set minimum standards and increase transparency on certain non-financial matters, but also to avoid 'double reporting'. Therefore, exemptions from the Swiss ESG due diligence and reporting obligations were introduced. However, companies should be cautious: the exemptions for the report on non-financial matters, the due diligence and reporting obligations regarding conflict minerals and regarding child labour differ from each other, and even if one or several of the exemptions apply, this does not mean that companies can completely disregard the Swiss rules.

- **Report on non-financial matters:** generally, large Swiss companies of public interest, such as listed companies and companies supervised by the Swiss Financial Market Supervisory Authority (FINMA), must publish an annual report on non-financial matters. Exempt from the obligation to publish a report on non-financial matters under Swiss law are companies that are controlled by another company which (i) also falls under the Swiss non-financial reporting obligations; or (ii) must produce an equivalent report under foreign law. The rules do not define what 'an equivalent report' means. The explanations of the Federal Department of Justice on the introduction of these rules only lists one example of an equivalent report under foreign law, which is the EU Directive on Non-Financial Reporting 2014/95/EU. It is hence safe to assume that Swiss subsidiaries of companies with domicile in a member state of the European Union which are obliged to publish a report under the EU regulation are exempt from the Swiss reporting obligations. In all other cases, an individual assessment of the equivalence of any foreign report from a Swiss law perspective is required.

> **Companies should be cautious: the exemptions for the report on non-financial matters, the due diligence and reporting obligations regarding conflict minerals and regarding child labour differ from each other.**

- **Reports on conflict minerals and child labour:** there are two different potential exemptions for companies preparing or covered by a non-Swiss report regarding conflict minerals and child labour. First, the Swiss Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (DDTrO) includes the same rules that apply with respect to the report on non-financial matters, also without defining what an 'equivalent report' under foreign law is. Given that the Swiss provisions regarding conflict minerals were drafted based on regulation 2017/821/EU and the rules on child labour are largely based on the Dutch law on child labour due diligence, we believe that reports produced thereunder should qualify as 'equivalent reports'. For any other reports, again a case-by-case assessment from a Swiss legal perspective would be required.

  The second (additional) exemption from the due diligence and reporting obligations under Swiss law applies to companies that adhere to internationally recognised equivalent regulations. Contrary to foreign equivalent reports, the 'internationally recognised equivalent regulations' are clearly defined in an exhaustive list in Annex 2 of the DDTrO. Importantly, it is not sufficient for companies to commit to adhering to any such internationally recognised equivalent regulations. Rather, they must publish a report naming the combination of international regulations applied, and implement the due diligence and reporting obligations under such regulations in their entirety. Otherwise, the respective Swiss obligations revive and failure to publish a report may be sanctioned in accordance with art. 325ter of the Swiss Criminal Code.

Other companies

Swiss companies that are not part of another company's consolidated report (under Swiss or foreign law) and do not apply any internationally recognised equivalent standards should identify as soon as possible (in case this has not already happened) which of the reporting and due diligence obligations apply to them.

With respect to some obligations and criteria, a one-time assessment is sufficient (unless at least one of the relevant factors changes) and any negative findings do not have to be documented or reported:

- A report on non-financial matters must only be published by Swiss companies of public interest (i.e., listed companies or companies supervised by FINMA) that, together with Swiss or foreign entities they control, exceed two of the three following criteria in two successive financial years: (i) 500 FTE; (ii) a balance sheet total of CHF20m; (iii) annual sales revenues of CHF40m.

- The due diligence and reporting obligations on conflict minerals only apply to Swiss companies (of any size) that import to and place in free circulation, or process in Switzerland any of the following minerals or metals, whereby they exceed the threshold quantities for the respective mineral or metal as per Annex 1 of the DDTrO: tin, tantalum, tungsten or gold.

- The due diligence and reporting obligations on child labour apply to Swiss companies exceeding, together with any Swiss or foreign entities they control, two of the three following criteria in two successive financial years: (i) 250 FTE; (ii) a balance sheet total of CHF20m; (iii) annual sales revenues of CHF40m. This exemption does not apply if the company offers products or services that have evidently been produced or provided using child labour.

> **Should a company be close to any of the quantitative thresholds, an annual re-confirmation of the respective obligations should be conducted.**

Having said this, should a company be close to any of the quantitative thresholds, an annual re-confirmation of the respective obligations should be conducted.

For other obligations and criteria, an annual assessment is required, including the documentation of negative findings (i.e., findings that lead to the application of an exemption or the conclusion that there are no risks):

- **Conflict minerals:** Swiss companies which exceed the exempted maximum threshold quantities must assess on an annual basis whether the minerals originate from a conflict-affected or high-risk area. If this is not the case, such finding must be internally documented, but the reporting and due diligence requirements do not apply.

- **Child labour:** every year, Swiss companies that are not exempt due to their size must complete one or a series of assessments:

- First, they assess whether they qualify as a low-risk undertaking in relation to child labour, i.e., if they only purchase or manufacture products, or primarily procure or provide services, in countries whose due diligence response is rated as 'basic' by UNICEF in its Children's Rights in the Workplace Index. If a company qualifies as a low-risk undertaking, this finding (including the reasoning) must be documented, but the reporting and due diligence obligations do not apply.

- Companies that do not qualify as low-risk undertaking with respect to child labour must annually check whether there are reasonable grounds to suspect child labour. In case there are no such reasonable grounds, this finding must again be documented, but the reporting and due diligence obligations do not apply.

Neither of these exemptions apply if a company offers products or services that have evidently been produced or provided using child labour.

Companies should be aware that even if the substance of the new Swiss due diligence and reporting obligations does not have to be fulfilled by a company, the initial determination whether or not the rules apply, and if a company falls under any of the exemptions, will take some effort. So will the set-up of processes to complete the required annual risk assessments and related internal documentation of negative findings. However, once in place, these processes can be kept lean and will be much less exhaustive than the due diligence and reporting obligations themselves.


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The role of in-house counsel in ESG: a Kenyan perspective

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In the recent past, the role of in-house counsel has evolved from the traditional and, you would be forgiven to say, reactive one where the legal person or team sprung into action only when needed. That is to say, when there was a dispute or other legal 'problem' for the organisation to solve.

Today, in-house lawyers operate in fast-paced, highly dynamic environments, with their employer organisations required to operate in similarly challenging circumstances. The stakes are so high that many times, organisations that have failed to recognise the need to evolve have collapsed entirely.

The evolution of organisations requires that they engage in sustainable business practices. This recognises that even legal or juristic persons exist in a larger space than just the commercial, where they deal in production activities or the sale and purchase of goods and services. They need to relate with the greater society in a way that requires greater levels of accountability and responsibility. They should also be able to clearly outline how each of the activities they undertake impact society, to ensure that resources are annexed and utilised in a manner that will ensure future generations can benefit from present operations.

This is where ESG comes in. Focus is placed on the environmental, social and governance aspects of the operations of an organisation to determine whether they engage in conscientious business practice. Investors are increasingly keen to ensure that businesses are intentional in not only what they do to turn profits, but also in how they operationalise this and further, that businesses understand why this is important in today's world.

It follows that a conscientious business must have the support of conscientious personnel. This includes the legal department. Primarily a support function, a shift from reactive to proactive support is necessary to enable businesses stay steps ahead of any challenges posed by non-compliance with sustainability initiatives.

As your organisation gears towards implementation of ESG principles in day-to-day operations, a clear distinction must be made between standards of operation as would be found in legislation and regulations, and guidelines in place as determined by local and internal organisations that support ESG.

As a rule of thumb, the law of the land must be adhered to. This is the primary role of in-house counsel – ensuring that the company operates within the confines of the law, guiding decision-makers on course correction when this does not happen, foreseeing risks where the decision is made to pursue business outcomes with possible negative legal and regulatory consequences to the business and finding ways to mitigate against such risks. In other words, protect business interests but ensure that there is a method to the madness.

> **Counsel must also keep track of new legislative and regulatory developments in sustainability practice and ESG, and keep the business informed of such changes and their impact.**

Often, the end does not justify the means. Business will likely be more concerned with what needs to be done to get results. In-house counsel must then concern themselves with the how. This requires having an innate understanding of the actual business environment and what your company does, and how this interacts with the laws and regulations in place, to properly advise the business on the propriety or otherwise of decisions made.

Legal and regulatory compliance

Depending on your organisation's operational sector (banking, FMCG, telecommunications, etc) there may be slight variations in how ESG principles are adopted and implemented. Even with these differences, some general rules apply across the board. Key among these is whether, in operationalising sustainable business practices, ESG principles are integrated into your organisation's strategy, with the backing of the highest governing body – the board.

Your role during the formulation of company-specific, strategic ESG principles begins with ensuring that they remain compliant with legal and regulatory standards. Where the law in most cases sets the minimum requirements, companies, in proving to their consumers that they embrace sustainable business practices, often pledge to not only comply with the law and regulations but go a step further and commit to implementing initiatives that will benefit society in the long term. So where, for example, the law defines limits of industrial emissions or effluent and the way such waste should be treated, a manufacturing business may pledge to engage in additional activities for protection of the environment. These include cleaning of rivers into which treated effluent is directed, reduction of their carbon footprint by planting more trees and adoption of green energy sources among others.

Counsel must also keep track of new legislative and regulatory developments in sustainability practice and ESG, and keep the business informed of such changes and their impact. Where there are international practice standards (for instance, the Sustainable Development Goals (SDGs) adopted by a majority of the member states of the United Nations and the standards established under the Global Reporting Initiative (GRI)), counsel will guide the business on their application and where necessary, adaptation to the organisation's specific needs.

The role of counsel stretches further to guiding the organisation on policy issues relating to ESG. These include international, national and organisational policies. Counsel further need to undertake regular reviews of policies and offer assurance to the organisation on its adherence to ESG matters.

Stakeholder engagement

Where collaborations or partnerships with different players are necessary to operationalise these pledges, in-house counsel will curate the agreements defining the terms of reference for such partnerships. What form will they take? Are the terms of reference clear? Are each party's obligations clearly defined? Are there attendant service levels against which either party's performance is measured? Are any commercial terms involved?

These agreements form the backbone of partnerships for the realisation of ESG principles. Counsel must ensure that the terms remain fair for all parties, while safeguarding the business's purpose – implementation of the specific ESG principles.

In-house counsel also play a significant role in engagement of industry-specific regulators to get the necessary backing for ESG activities.

Risk identification and management

In carrying out compliance activities and engaging relevant stakeholders, issues may arise requiring legal intervention. These could be opportunities for improvement or disputes between different parties.

> **An understanding of ESG across multiple functions and assimilation into an organisation's culture inevitably results in a self-aware organisation with a multi-dimensional focus combining profit with purpose.**

As you performed the previously-mentioned roles, you may already have identified possible avenues for such issues to arise. Did you also put measures in place to prevent such negative outcomes? This is another important legal function that helps the business. In keeping with conscientiousness and a 360-degree understanding of your organisation, mitigation of risk will not only focus on legal issues, but also any commercial and reputational (social) ones. Specifically, how may the activities for advancement of ESG principles have unfavourable outcomes? Are there more favourable alternatives? If not, is the business aware of such possible negative outcomes? Is it ready to absorb the risks irrespective of the outcomes?

Always guide the business towards an informed decision with clarity on the legal position, and how it aligns or conflicts with other business interests.

Awareness and knowledge-sharing

Secondary to guidance of business on compliance with legal and regulatory requirements, in-house counsel has a role to play in dissemination of information on ESG to the rest of the functions within the organisation, and the role that these functions have relative to ESG principles.

An understanding of ESG across multiple functions and assimilation into an organisation's culture inevitably results in a self-aware organisation with a multi-dimensional focus combining profit with purpose.

Identification of appropriate external legal expertise

Just as ESG presupposes that organisations operate within a larger environment, so too do in-house counsel exist within a wider legal professional environment.

You may not have all the answers to your organisation's legal challenges. ESG may be a new area of operation for you, or one in which you have had minimal experience. Even where you have some level of knowledge or skill in ESG, you may require new perspective on an area of application. Should that be the case, you should onboard or instruct external counsel with the required expertise in ESG to guide the business as it implements ESG principles. Take this as a learning opportunity to add to your knowledge on ESG, in addition to having the business benefit from the external guidance. ■

ROBSON HARRIS Advocates LLP

'There are landmines out there for companies'– corporate crime issues to stay on top of in 2023

From sanctions, to ESG and auditor scrutiny, *IHL* looks at the issues set to keep in-house lawyers busy this year and asks how businesses can best prepare.

BARNABY MERRILL

2022 may have disappeared into the rear-view mirror but the economic and geopolitical strife and uncertainty that came with it have carried over into 2023. Amid the ongoing war in Ukraine, soaring inflation and energy costs and increasing scrutiny of their processes, businesses continue to face challenges that threaten both their balance sheets and their reputations.

And, from a corporate crime perspective, uncertainty also looks set to be the forecast for 2023. After a year that saw failed prosecutions and collapsed investigations raise questions about the future of the Serious Fraud Office (SFO), the organisation now needs to hunt for a new leader, with controversial director Lisa Osofsky set to step down this summer.

With potential successors yet to emerge and the SFO's next strategy therefore up in the air, the UK white-collar and corporate crime market is in flux, at a time when counterparts in the US Department of Justice are stepping up enforcement activity.

As Dechert's UK head of white-collar and corporate crime, Judith Seddon, says: 'It is likely that we will see a knock-on effect in the UK in terms of increased enforcement – not least because some of the US investigations will be cross-border in nature. Furthermore, the SFO leadership is due to change later in 2023 and it will be worth watching whether there is a change of tone from that agency.'

But while much remains uncertain here in the UK, ongoing trends facing in-house legal advisers are clear. In this piece, private practice lawyers at two leading UK and US firms highlight the issues that in-house lawyers need to look out for in the year ahead and prep their departments for.

The new normal

Exploding into life after the February 2022 Russian invasion of Ukraine, the issue of sanctions continues to be of paramount

> **If you're in-house, sanctions have gone from something you probably didn't have to think about too much to something you now have to think about all the time – an extra job.**
> **Barry Vitou, HFW**

importance to in-house counsel and their private practice counterparts alike. Links with Russian money or assets and connections to potentially sanctioned individuals are all sources of risk, as well as embarrassment, for businesses.

With the list of prohibited services expanding at the end of 2022, it isn't just the financial services sector feeling the strain. While the surge in sanctions work initially drove in-house counsel straight to their external lawyers for guidance, it is now just another part of doing business day-to-day. And what this means for lawyers working inside companies is more work, not all of which can be outsourced to advisers.

'The one thing that eclipsed everything else in 2022 was sanctions,' says Barry Vitou, co-head of corporate crime at HFW. 'It's eased a little now but if you're in-house, sanctions have gone from something you probably didn't have to think about too much to something you now have to think about all the time – an extra job.'

John Bedford, a white-collar crime partner at Dechert, echoes this, stating: 'Clients are grappling with the implications of the huge raft of new sanctions regulations arising from Russia's invasion of Ukraine. Importantly, the requests have been coming from clients involved in a wide variety of industries and sectors, reflecting the breadth of the sanctions. We have also seen an increase in requests for advice around crypto assets, the regulations and the standards to apply to sanctions and [anti-money laundering] AML screening of those assets.'

Bedford believes that this trend will deepen in 2023, potentially extending as far as enforcement action relating to breaches of the Russian sanctions, with the FCA likely to be scrutinising the effectiveness of companies' sanctions systems and controls.

As a result, Bedford says corporate counsel should lean on their private practice advisers if necessary. 'To the extent that in-house lawyers do not have the bandwidth to deal with the myriad issues that arise day-to-day in these areas, they should have trusted advisers to whom they are able to turn and who can, at pace, deal with them.'

Enemies within

Another area where corporate counsel need to be on top of their game is ESG. With corporate culture increasingly under the microscope against a backdrop of high-profile bullying and harassment allegations within both the public and the private sector, the focus now is extending beyond the E, towards governance, creating new challenges for in-house counsel.

These risks are likely to be exacerbated by mounting redundancies across a host of industries, including big tech, which increase the chances of whistleblowing claims around corporate misconduct.

As a consequence, Vitou warns that in-house counsel need to be aware that they may need to right wrongs. 'Expect more media exposés – in part because the media now have more time to find stories after Brexit and the pandemic eclipsed the news cycle in recent years. I would advise companies to think about whistleblowing claims and how they deal with them.'

He goes on to suggest that whistleblower claims can be a blessing in disguise – if handled properly. 'Counterintuitively, whistleblowers represent an opportunity for businesses to sort their own house out. It's an opportunity to fix something internally,' he argues of the potential upside. However, if not handled correctly and not taken seriously, the potential risks could be significant. 'As a last resort, some whistleblowers will approach regulators and/or the media if they feel their concerns are not being dealt with by their employers,' he adds.

Vitou stresses that if a company does find itself dealing with a whistleblower, it's important to make sure that the in-house legal team is involved, to ensure that proper procedures are followed.

> **‘Where there is an allegation arising from a whistleblower, any related investigation should be handled in accordance with policies that exist, with regard for anonymity/confidentiality as appropriate or as required.’**
> **Judith Seddon, Dechert**

It’s a position that Seddon at Dechert agrees with: ‘In-house lawyers (and external counsel, as necessary) should be involved – to provide the protection of legal privilege – in circumstances where there may be potential regulatory or legal exposure. Where there is an allegation arising from a whistleblower, any related investigation should be handled in accordance with policies that exist, with regard for anonymity/confidentiality as appropriate or as required.’

Her colleague, Matthew Banham, adds: ‘ESG is, rightly, high on the regulatory and enforcement agenda with corporates facing a patchwork of new and proposed ESG legislation across the UK and EU. By their nature ESG factors, especially those impacting supply chains and the environment, are of global interest and it is an area that is likely to see an increase in whistleblowing, for example from investors concerned about ‘greenwashing’ (misleading marketing and disclosures around ESG-related products), to social and environmental failings in corporate supply chains.’

Looking beyond the whistleblowing that may trigger an investigation, all aspects of ESG are set to remain at the forefront of the corporate agenda, meaning that businesses must keep a keen eye on the emerging regulatory and legislative landscape for ESG issues, as well as accompanying enforcement risks.

And these risks extend far beyond internal reporting and investigations, with ESG-related disputes set to soar. As Vitou comments: ‘There are landmines out there for companies. So far, the focus has been more on the E than the S and the G, but I think governance probably sits at the top of ESG and drives everything. We’re starting to see the impact of lawyers not being involved early enough in ESG matters in some of the overblown green credential lawsuits that are coming through. We’re still in foothills but I think that the scrutiny around ESG claims will only increase. Companies can’t just shoehorn what they already do into ESG concepts – they must change how they work.

‘In-house lawyers need to be pushing to get more involved in the discussion around ESG and in particular representations made about business' green credentials. Misleading claims around ESG credentials have the potential to be one of the big litigation risks for all companies for years to come’.

Audits

Annual audits are also expected to be another potential driver of work for in-house lawyers and their private practice advisers. This is being driven by increasing caution by auditors when it comes to signing off accounts, leading to more investigations and additional need for businesses to improve their controls and processes.

Seddon expands on the risks, which are being exacerbated by the economic headwinds and cost-cutting efforts by companies: ‘As the impact of the recession starts to bite, we expect to see an uptick in fraud investigations as well as an increasingly rigorous audit testing of companies’ financial accounts. The Financial Conduct Authority’s focus on market abuse in this context will be undiminished, and we expect to see more enforcement actions as issues are exposed.’

For Seddon, the pressures behind this are twofold: ‘In the case of auditors, given the regulatory scrutiny that they themselves face, we have seen a growing trend for them to want to understand the underlying audit evidence prior to signing off companies’ accounts’, she argues.

2023 looks set to be busy from a regulatory perspective for in-house counsel, despite all the uncertainty. In this setting, the most successful legal departments will be those that are proactive in identifying and mitigating against potential hazards before they turn into damaging and costly investigations. This means pushing for involvement as companies vigorously assess their internal policies around ESG and workplace culture, with clear processes in place and a transparent approach to whistleblowing. ■

Financial crime: legislative predictions for the year ahead

RPC explores potential developments that in-house counsel and practitioners should consider in 2023.

2022 proved to be another unprecedented year. It began with the creation of further and increasingly complex sanctions against Russia which set in motion a number of other legal and policy initiatives to combat kleptocracy. The coupling of extreme economic and political climates and the constantly evolving threats from financial crime also served to feed enforcement agencies with a number of corruption, fraud and money-laundering cases to investigate.

As a result, 2022 was a busy year for complex, high-value and international matters. We anticipate that 2023 will be the same in terms of activity but different in relation to both risks and opportunities. In particular, this article explores potential legislation that any in-house counsel or practitioner will be thinking about in 2023, namely: the effect of the UK Economic Crime and Corporate Transparency Bill; potential change to the compensation for victims of international bribery; a new UK corporate offence of failure to prevent fraud; and expanding legal requirements to include ESG within due diligence and third party risk management.

(i) UK Economic Crime and Corporate Transparency Bill

This Transparency Bill is a further measure to crack down on kleptocracy and protect the openness of the UK economy from abuse by financial criminals. It is currently progressing through the House of Commons and is projected to be signed into law sometime in early 2023.

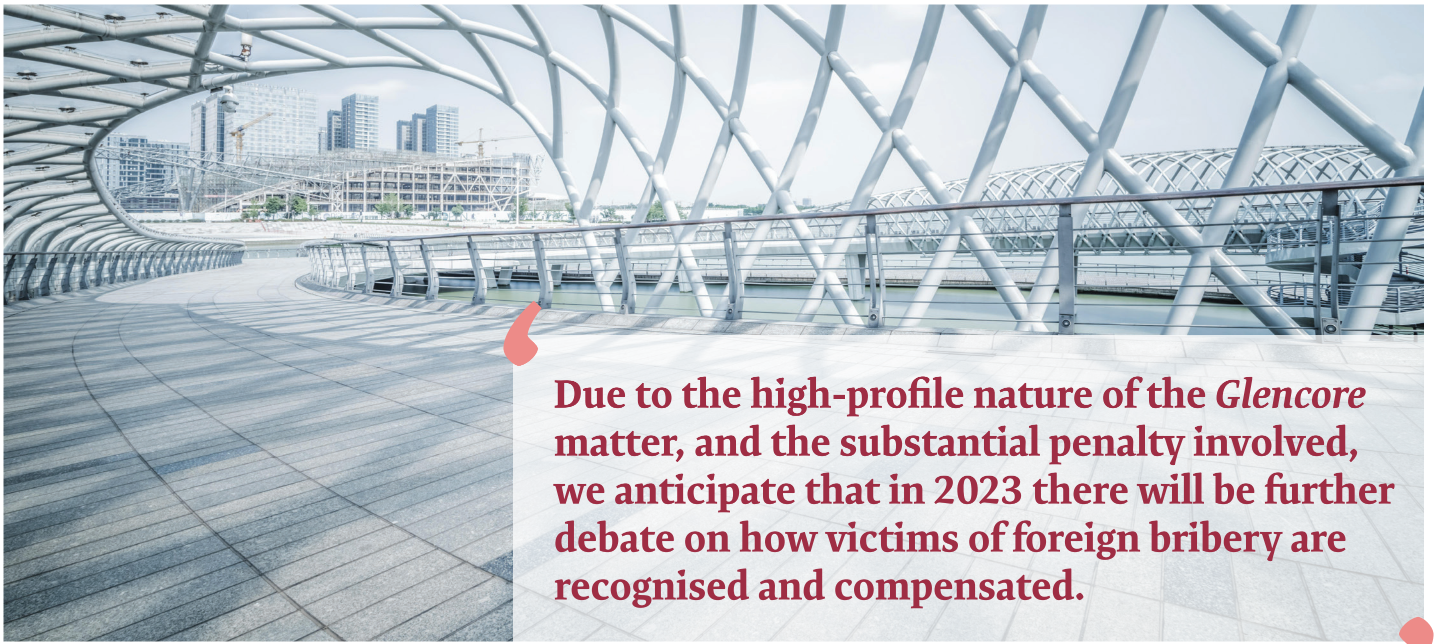
As drafted, the Transparency Bill extends the SFO's section 2 powers to compel the sharing of information or documents in a suspected crime to the provision of documents and information to cover all cases at the pre-investigation stage, broadening the SFO's reach and ability to obtain information from innocent parties and companies under threat of a criminal conviction. This materially enhances existing powers, which are currently limited to only international bribery and corruption investigations that have already reached an advanced stage. The Bill will also enhance the powers of Companies House so that it is not only a 'library' but a guardian of the data it holds. Specifically, this includes empowering Companies House to conduct verification checks when there are suspicions of wrongdoing in the identification information provided.

Whilst these legislative changes could provide a much-needed boost to law enforcement as well as to businesses who need access to up-to-date and accurate company information, they may be stymied by a lack of resourcing in crucial enforcement departments. Here, given government finances, our prediction is that insufficient funding will result in a lack of resources to 'give teeth' to this Bill. As a consequence, these changes will only have a material impact in specific matters or over the medium term.

(ii) Rethinking compensation for victims of foreign bribery

Bribery is not a victimless crime and victims of international corruption have again come to the forefront this year. There has been a number of high-profile cases and ground-breaking penalties, most recent and significant being the £280m sentencing of *Glencore* in relation to widespread criminal activity to secure access to oil in a number of African states between 2011 and 2016.

Press and NGO interest in these significant international cases have highlighted how little compensation is paid to victim states. Due to the high-profile nature of the *Glencore* matter, and the substantial penalty involved, we anticipate that in 2023 there will be further debate on how victims of foreign bribery are recognised and compensated. For example, given the SFO is on notice of the public pressure in this area, we expect defendants in international corruption cases or those companies aiming for deferred prosecutions agreements (DPAs) in



2023 and 2024 to proactively consider compensating victim states or receive harsher treatment by the authorities.

We also expect to see progress on a more robust scheme for compensating victims of foreign bribery. This could come either by changes to the current UK sentencing guidelines or by creating compensation rules more aligned with the US Mandatory Victims Restitution Act through which claims can be filed before sentencing.

(iii) Further progress towards a new UK corporate offence of failure to prevent fraud

On the legislative horizon for 2023 is a new corporate offence for the failure to prevent fraud, similar to that for bribery or tax evasion. As of early 2023, there appears to be real parliamentary appetite to legislate for this offence. In late January, a failure to prevent fraud offence was included as an amendment to the Economic Crime and Corporate Transparency Bill. The amendment was subsequently withdrawn following ministerial assurances that the new offence would be discussed in the House of Lords. It is anticipated that following debate within the House of Lords, this offence will be reintroduced into the Economic Crime and Corporate Transparency Bill. In February 2023 a proposed amendment was made to the Financial Services and Markets Bill adding a similar offence that would impose legal obligations on entities and individuals in the regulated sector to prevent fraud.

While introducing a new offence has been on the agenda for many years, there is new impetus to legislate given the epidemic of fraud in the UK (which resulted in reports of a rise in the value of fraud prosecutions from £137.4m in the first half of 2021 to £532.6m in the first half of 2022) and the end of the Law Commission's review into the topic in June 2022.

Corporate liability for criminal activity normally requires satisfaction of a mental element from the organisation's most senior management. However, it is often challenging to attribute a particular state of mind to a corporation. Specifically, in English law under the identification doctrine, 'a corporation will only be liable for conduct of a person who had the status and authority to constitute the body's "directing mind and will."' In the context of large global corporations, determining which individuals comprise the 'directing mind and will' of the company and showing their specific intention is a difficult and often impossible task.

Given the above, in June 2022 the Law Commission published an Options Paper on Corporate Criminal Liability which appeared to support a new failure to prevent offence for fraud which would create criminal liability for any company with even a part of its business in the UK. The Options Paper set out 10 recommendations to reform the legal framework on corporate criminal liability to ensure that the Government has strong legal tools for holding corporations accountable for criminal wrongdoing. Support continued to gather throughout 2022 for this particular offence and for legislation in 2023, with the House of Lords 'Fraud Act 2006 and Digital Fraud Committee' publishing a report in November 2022 pressing for a focus on telecoms and tech companies who they believed fail to prevent the use of their platforms by organised crime gangs committing fraud.

We anticipate that in-house counsel and practitioners will be following developments in this space intently as momentum continues to gather on a failure to prevent fraud offence and its potential broad scope of application.

(iv) Expanding the scope of due diligence to cover ESG risks?

In 2023 we expect to see further responsibilities imposed on corporations to identify, prevent and mitigate environmental, social and governance (ESG) risks across their third-party management and supply chains.

Under the Due Diligence Directive, existing and potential human rights and environmental risks will need to be identified as part of the due diligence process.

In the EU, this will likely arise under the Corporate Sustainability Due Diligence Directive (Due Diligence Directive) which will create an obligation on companies to carry out ESG due diligence. Similar initiatives are also gathering momentum in the UK.

In February 2022, the European Commission adopted a proposal for a Due Diligence Directive. The draft Directive establishes a corporate due diligence duty to identify, prevent and mitigate human rights and environmental impact of business activities, and will apply to companies that meet specific size and turnover thresholds. The Due Diligence Directive will compliment the Corporate Sustainability Reporting Directive which was approved by the European Council in November 2022 and imposes on certain companies detailed ESG reporting obligations.

Under the Due Diligence Directive, existing and potential human rights and environmental risks will need to be identified as part of the due diligence process. A failure to satisfy these obligations could attract administrative penalties or civil liabilities. It is however unclear what the final text of the Directive may be, with EU member states reportedly in disagreement regarding its scope, particularly as to whether it should apply only to the supply chain or entire value chain. For large multinational companies, entire value chains encompass a network of third party suppliers and customers across the globe. There is concern that extending this obligation to complete human rights and environmental impact due diligence of a company's entire value chain could for some companies impose particularly burdensome or unrealistic obligations.

In the UK, calls for a similar legal obligation and offence have picked up pace. In September 2022, 63 businesses, investors and civil society groups presented the then Prime Minister Liz Truss with a request that mandatory human rights and environmental due diligence be legislated for in the UK.

A requirement to consider ESG risks as part of the due diligence process also reflects growing acknowledgement of the nexus between financial crime risks and ESG. It is no longer practical to consider financial crime risks in isolation. For a company of any size, all compliance programmes must now actively engage with the interaction of human rights violations and environmental crimes, and in particular how they impact money-laundering offences and governance or corruption risks.

Conclusion

In this article, we have set out our forecast for 2023. In summary, this is a period of upheaval with many new anticipated burdens for corporates in particular, and the anticipated legislation, if passed into English law, will have a real and immediate impact on not only UK businesses but all global businesses with even a relatively small presence in the UK.

For further information or if your company would like to discuss any of the above, please get in touch with the team at RPC LLP. ■

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White-collar crime developments and trends in the UAE

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As a federation of seven emirates, each with different leadership, economic circumstances and priorities as well as different (at least in part) legal and regulatory systems, the UAE presents significant complexity for government authorities and regulators when combatting money laundering ('AML') and other financial crime. In March 2022, the UAE was added by the Financial Action Task Force to an international list of jurisdictions which are considered to have weaknesses in their systems for combatting terrorism funding and money laundering (the 'grey list').

Not only does this listing come with increased monitoring and scrutiny, but the possibility of ratings adjustments, challenges to obtaining global finance and higher transaction costs. Businesses with a need to access international financial and other markets may also experience indirect effects of the 'grey listing', such as changes to the lending appetite of (or pricing offered by) their overseas counterparts.

The grey listing comes despite the UAE's new legislation designed to tackle financial crime in recent years. Whilst disappointing, the impact of the listing for the UAE is likely to be limited because of its relative strength and economic stability compared with other grey listed countries. In order to be removed from the grey list, the UAE has pledged to implement the recommendations of an action plan that includes seven specific objectives to enhance its regulatory oversight (the 'action plan'). These include:

- demonstrating a sustained increase in effective investigations and prosecutions of various types of AML cases;
- showcasing an increase in the number and quality of suspicious transaction reports submitted by financial institutions and other entities; and
- proactively identifying and combating sanction evasion.

In order to better coordinate its AML and counter terrorist finance ('CTF') initiatives, the UAE established a new Executive Office to function as the primary body responsible for the implementation of the UAE's National CTF/AML Strategy and National Action Plan ('NAP') – the programme of reforms designed to strengthen the UAE's anti-financial crimes framework.

Recent enforcement activity has shown the UAE's commitment to the action plan objectives. In August 2022, a subsidiary of Wise, the listed money transfer business, was fined USD$360,000 by the financial services regulatory authority of the Abu Dhabi Global Market ('ADGM') after a finding that Wise 'did not establish and maintain adequate systems and controls to ensure full compliance' with anti-money laundering requirements. This sanction comes after Wise's billionaire co-founder and chief executive was put on a list of 'deliberate tax defaulters' and is being investigated by the UK's Financial Conduct Authority.

In December 2022, the Financial Markets Tribunal upheld the Dubai Financial Services Authority's ('DFSA') imposition of fines against the founder and former CEO of Abraaj Group, the largest private equity firm in the region. Mr Arif Naqvi had been fined USD$135m (AED 497m) and prohibited from performing any function in or from the Dubai International Financial Centre ('DIFC') after it was found that he was knowingly involved in misleading and deceiving investors

The rapid growth of the UAE's cryptocurrency market, with its overall transaction value increasing 500% between July 2020 and June 2021 to around USD$25bn, has prompted the introduction of new regulations.

over the misuse of their funds. This is the largest fine ever imposed on an individual by the DFSA.

In a country whose population is 90% expatriates, the UAE's collaboration with foreign law enforcement authorities and preparedness to extradite wrongdoers has historically been perceived to be limited. This in turn has encouraged individuals who have committed crimes overseas to view the UAE as a safe haven, whether for themselves or their assets. This perception is now changing, with the UAE ratifying extradition treaties with South Africa in 2021 and Denmark in 2022. Both treaties were ratified with the intention of securing the extradition of high-profile individuals accused of significant financial crimes. In December 2022, the Dubai Court of Appeal ordered the extradition of British citizen, Sanjay Shah, to Denmark following accusations by the Danish authorities of a suspected €1.7bn dividend tax fraud.

The treaty between the UAE and South Africa was aimed at securing the return of three brothers accused of leveraging connections with Jacob Zuma, former president of South Africa, to secure contracts, misappropriate state assets, influence cabinet appointments and embezzle billions in South African state funds. Two of the brothers have since been detained by UAE authorities.

The UAE is also seeking to bolster international confidence by establishing principles of reciprocity with an increasing number of countries. On 13 September 2022, the UAE Ministry of Justice ('MOJ') called upon the Dubai Courts to enforce judgments of the English Courts in the UAE going forward, a step which follows the English High Court's decision in *Lenkor Energy Trading DMCC v Puri* (2020) EWHC 75. For decades, the English Courts had been reluctant to enforce UAE-issued judgments and the UAE Courts had in turn used the lack of reciprocity as a bar to the enforcement of English judgments. In *Lenkor*, both the High Court and Court of Appeal ruled that a 'bounced cheque' judgment of the Dubai Court of Cassation was a final and conclusive judgment of a court of competent jurisdiction, which did not offend English public policy. Decisions like *Lenkor* and the MoJ's recent announcement should reassure creditors looking to enforce UAE Court judgments in England and Wales, and vice versa.

The rapid growth of the UAE's cryptocurrency market, with its overall transaction value increasing 500% between July 2020 and June 2021 to around USD$25bn, has prompted the introduction of new regulations. In February 2022, Law no. (4) of 2022 'Regulating Virtual Assets in the Emirate of Dubai' (the 'virtual assets law') established Dubai's Virtual Assets Regulatory Authority ('VARA') and created a framework to protect investors and implement international standards to govern the virtual asset industry in the Emirate. VARA has since passed administrative orders which regulate the marketing of virtual assets and outline the fines and penalties which will apply in the event of non-compliance. This new framework is expected to support the mainstream adoption of blockchain applications for economic growth in the region and it is thought that the UAE will follow the example of the United Kingdom, who recently announced plans to make stablecoins a recognised form of payment. Nevertheless, the increased use of crypto currency may heighten financial crime risk in the UAE.

Last year, a new decree introduced significant amendments to the existing commercial transactions law, particularly in relation to bounced cheques. From 2 January 2022, barring a few noted exceptions, most cases of bounced cheques were decriminalised in the UAE. The beneficiary of a bounced cheque retains the right to pursue a civil claim, including the right to seize assets in the name of the drawer.

Also during 2022 the DFSA in Dubai and the Abu Dhabi Accountability Authority introduced laws to protect whistleblowers. These changes should lead to an increased level of reporting and therefore enforcement against perpetrators of white-collar crime.

A notable development in 2023 will be the introduction of corporate income tax in the UAE. As a new tax we anticipate that there will be significant avoidance activity which the tax authorities, prosecutors and courts will need to be prepared to address.

A relatively high risk of white-collar crime therefore continues to persist in the UAE, not least due to the unique challenges presented by the geographical, legal and demographic make-up of the country. However, the UAE is demonstrating greater commitment to tackling financial crime than ever before. ■

HERBERT SMITH FREEHILLS

Laurent Cohen-Tanugi on the French legal privilege

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Laurent Cohen-Tanugi Avocats is a Paris-based boutique law firm specialising in cross-border strategic assignments, including anti-corruption monitorships, transatlantic white-collar litigation, and other international regulatory compliance matters. The firm's practice areas also include cross-border M&A transactions and international arbitration.

Laurent Cohen-Tanugi, its founder and managing partner, handled major international M&A transactions as a partner of Cleary Gottlieb Steen & Hamilton and Skadden Arps, as well as general counsel of global pharmaceutical company Sanofi. A member of the Paris and New York Bars, he subsequently served as FCPA independent corporate monitor appointed by the US DOJ and SEC, as well as World Bank integrity monitor.

He discusses in the interview below the evolving landscape of French legal privilege rules.

Has there been progress in the protective scope of the French legal privilege?

The French legal privilege is traditionally a hot topic, regularly debated between the French Bar and the Judiciary. Revealing of a climate of tension between judges and lawyers, and more broadly of a distrust of lawyers in a system centered around the ascertainment of the truth, the French legal privilege is continuously subject to encroachment.

Narrower than the US and UK legal privileges, the French legal regime traditionally makes a distinction between 'advisory' and 'defence' professional secrecy, with the latter applying in the context of criminal proceedings. According to the longstanding interpretation given by the Criminal Chamber of the French Supreme Court (Court of Cassation), only the latter could be invoked when facing requisitions from prosecution authorities.

Additionally, the French legal privilege does not apply to in-house counsels, who are a distinct profession from the French avocats, and cannot be members of the bar, in spite of recurring requests from the corporate sector. This rule applies regardless of whether the in-house counsel might be qualified to practice as a lawyer in France, or in another country which legislation protects in-house legal privilege.

That being said, recent developments have redefined the boundaries of the French legal privilege.

In what way?

First, following tense debates between French trial attorneys, the Parliament, and the government, France eventually adopted in December 2021 a 'Law on Trust in the Judiciary,' followed by an interpretative circular in February 2022. The law enshrined in the Code of Criminal Procedure respect for both defence and advisory professional secrecy during criminal proceedings, thus seemingly overcoming the traditional distinction between

Companies should, therefore, firmly assert foreign legal privileges wherever applicable and justifiable, especially if they are subject to criminal proceedings in other jurisdictions.

the two concepts, except in cases of tax fraud and integrity violations. In those instances, the law provides that advisory professional secrecy may not be invoked against investigative measures when the communications held or transmitted by a lawyer or his/her client establish proof of their use to commit or facilitate these offences. In a criminal defence context, the law added further protections in connection with dawn raids at a law firm's premises.

However, the implementing circular obscured the interpretation of the law, appearing to backtrack on the protection of the advisory professional secrecy. Pursuant to the circular, advisory communications between a lawyer and his/her client would only be protected when they relate to the exercise of the rights of the defence, 'when a person has committed or believes he or she has committed an offence, but not when advice is sought from a lawyer before the commission of an offence'. This chronological distinction may be hard to draw and, therefore, casts a doubt as to the extent of the protection.

Subject to future rulings of the French Court of Cassation, it appears that the legal privilege protection would apply when a person expects to be prosecuted soon or when it is aware that it has committed a criminal offence, even though no criminal proceedings have yet been initiated. Indeed, the circular considers that such a person is already preparing its defence. However, advice sought prior to any commission of an offence would not be covered by such protection. For instance, a client seeking a criminal risk analysis on some corporate conduct could benefit from the French legal privilege, unless prosecutors demonstrate that the advice was not used to prepare the client's defence, but rather to help commit the offence. Although the French legal privilege finds itself slightly better protected than previously, this ambiguous progress did not convince the Paris Bar, who has challenged the new framework before the Constitutional Council. The Council rejected the Paris Bar's claim in January 2023.

Further, in an unprecedented decision, the Criminal Chamber of the French Court of Cassation opened room for protection of in-house counsel, by ruling in January 2022 that conversations between in-house counsel may benefit from the protection conferred by the attorney-client privilege, specifically when they refer to confidential data communicated by the lawyer to his/her client for the purpose of his/her defence. Therefore, the Court of Cassation confirmed that the content of such communications should prevail over the status of the persons between whom the information was exchanged.

While promising, the new regime remains ambiguous and will have to be tested in courts.

What would you recommend to a global company facing criminal proceedings in France?

Companies should take a close look at the state of play on the French legal privilege, which remains in flux in light of the developments I just described. However, it is worth noting that the French authorities may concede on a case-by-case basis claims of foreign (in particular, US) legal privilege. The joint guidelines from the National Financial Prosecutor and the French Anticorruption Agency provide that prosecutors should take into account the risk of waiver by a foreign company of its foreign legal privilege. Companies should, therefore, firmly assert foreign legal privileges wherever applicable and justifiable, especially if they are subject to criminal proceedings in other jurisdictions. ■

LAURENT COHEN-TANUGI AVOCATS

White-collar enforcement in Italy

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During the pandemic, white-collar experts have not been as busy as they used to before. Has this also been the case in Italy?

G. Scassellati-Sforzolini: During the pandemic, enforcement authorities have mainly focused on combating fraud related to the health emergency and that did not come as a surprise. The restrictions implemented in Italy also impacted the ordinary activity of companies and authorities. However, as the economy rebounded, we have witnessed a ramp-up of criminal investigations, confirming that Italy remains a hub for white-collar crime enforcement.

What are the key areas and future trends of white-collar enforcement and how do you expect them to impact companies operating in your jurisdiction?

G. Scassellati-Sforzolini: The fight against corruption, money laundering, tax evasion and corporate fraud (including false information in financial statements and market manipulation) remains at the forefront of enforcement action, alongside a number of investigations in the area of health, safety and environment. Although criminal law has always been (and – to a certain extent – still is) at the core of state sovereignty and, therefore, outside the scope of supranational legislators, in recent years the European Union has adopted several pieces of legislation concerning criminal law, which impact national enforcement priorities and strategies. For example, the new European Public Prosecutor's Office responsible for prosecuting criminal offences affecting the EU's financial interests, which may act as a driving force for new and more aggressive investigations on VAT fraud or illegally obtained EU funds.

G. Checcacci: We also expect that the EU's new whistleblowing directive will increase reports of improprieties within companies and may fuel new investigations on corporate crimes. Moreover, the proposal for a new EU directive on corporate sustainability due diligence may also increase attention on environmental and human rights violations, for example in the M&A field, where criminal risks have become a focal point during due diligence.

What are the main features of white-collar enforcement in Italy in comparison with other jurisdictions?

G. Scassellati-Sforzolini: One of the main differences vis-a-vis other jurisdictions, especially common law ones, is that in Italy public prosecutors, at least in principle, do not have discretion in deciding whether to prosecute: in other words, they have an obligation to open an investigation whenever they become aware that a crime may have been committed. As a result, any criminal complaint or report filed by private parties, such as an employee or a competitor, may trigger criminal prosecution regardless of whether the complainant joins the criminal proceedings as a party. We have often seen criminal complaints targeting corporates or their senior executives being filed in the context of complex corporate battles to be 'used' as leverage in the overall litigation strategy. However, given that prosecutors have a duty to investigate and that certain crimes are prosecuted *ex officio*, criminal complaints may then escape the control of the party who lodged them. Moreover, Italian law does not provide for non-prosecution or deferred prosecution agreements. As a result, companies do not have the option to settle the case directly with the prosecutors. In practice, the only option is a plea bargain, which needs to be approved by a court.

G. Checcacci: Another important point to bear in mind is that in Italy companies may be held liable before criminal courts for certain

> **A timely internal investigation may allow a company to adopt remedial programmes, which are assessed by judicial authorities to reduce fines or avoid disqualifying measures.**

crimes committed in their interest or to their advantage by their directors or employees. After years of patchy enforcement, this piece of legislation, which was first introduced in 2001 and has been expanded over the years to include additional crimes, is being increasingly applied by prosecutors and criminal courts and it acts as an effective deterrent given the heavy sanctions that may be imposed. Those include fines, but also disqualifying measures, such as the prohibition to carry out the business for a certain period or the suspension or revocation of permits or licenses, which may have a drastic impact on the company's operations.

What does this mean for companies operating in your jurisdiction?

G. Scassellati-Sforzolini: The advice we give to our clients is to heighten their focus on compliance and, specifically in the case of multinationals with significant Italian operations, to adjust their compliance programmes in light of Italian law. The corporate liability statute also applies to foreign companies if the crime is committed in Italy. However, companies may shield themselves from liability if, prior to the commission of a crime, they had adopted and effectively implemented a compliance model suitable to prevent crimes of the same kind as the one committed.

G. Checcacci: We also encourage companies to put in place policies and procedures to properly and timely handle the pitfalls that may arise from investigations, for example preparing a plan of action and training employees. Internal investigations may also be an effective tool: they allow companies not only to preserve documents and information in view of a trial, but also to ponder defence strategies and possibly cooperation or self-reporting actions, bearing in mind though that companies' cooperation during criminal investigations or self-reporting are not formally considered an exculpatory or a mitigating circumstance as in other jurisdictions. Internal investigations were not very common in Italy until recently, when they started to play a crucial role for mitigating the impact of a criminal investigation. Indeed, a timely internal investigation may allow a company to adopt remedial programmes, which are assessed by judicial authorities to reduce fines or avoid disqualifying measures. We expect this trend to intensify also in light of the new EU directive on whistleblowing which will boost investigations on whistleblowers' reports.

What are then your recommendations to effectively handle a crisis arising out of a white-collar crime?

G. Checcacci: First, it is critical to identify the issue and draw up an informed action plan early on. Issues overlooked in the early phases of an investigation could prove very costly down the road, limiting options or potentially subjecting a company to greater penalties. A carefully crafted first response plan should consider the scope of the crisis, whether to conduct an internal investigation and its focus, and the people in charge of coordinating any communication with the public prosecutors or other parties: criminal investigations in Italy are generally secret, so any information should be treated accordingly. Outside counsel may also play a key role in helping clients navigating the first responses to white-collar investigations, assessing the issue and liaising with the authorities. Among other things, outside counsel is critical to maintain privilege, because communications with in-house counsel are not privileged at all in Italy, unlike in other jurisdictions.

How has white-collar assistance changed over the years?

G. Scassellati-Sforzolini: We have witnessed – and experienced ourselves – a big transformation of the white-collar practice in recent years. From a niche practice limited to criminal law boutiques, it has become a core area at many national and international multi-practice firms. Indeed, considering the complexity and globalisation of the modern business world, white-collar cases have often a trans-national nature that requires expertise on different jurisdictions and different substantive areas, such as corporate and securities law, administrative law, bank and financial regulations, or antitrust. Moreover, clients often expect white-collar lawyers to be specialised also in compliance and risk management and to help them communicate strategically with a consistent message across constituencies, including authorities, shareholders, employees, and the media. This is why, for example, we have created our global crisis management practice, equipped with lawyers from different offices and with different backgrounds, in order to help clients assess and manage crises through a multidisciplinary and multi-jurisdictional lens. ■

CLEARY GOTTLIEB

US DOJ's renewed focus on individual prosecutions presses limits

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In the United States, the Department of Justice (DOJ) is chiefly responsible for prosecuting white-collar crime. While white-collar enforcement significantly declined during the past presidential administration, current DOJ leadership has pledged to take a more aggressive approach. To that end, in September 2022, Deputy US Attorney General Lisa Monaco announced changes to DOJ's corporate enforcement policies designed 'to empower our prosecutors, to clear impediments in their way, and to expedite our investigation of individuals.'

In rolling out these changes, embodied in a policy document known as the 'Monaco Memo,' the deputy attorney general emphasised that DOJ's 'top priority' for corporate criminal enforcement is 'going after individuals who commit and profit from corporate crime.' The Monaco memo restores the policy reflected in the 2015 memo of her predecessor, Deputy Attorney General Sally Yates, requiring corporations to identify all individuals who engaged in the underlying conduct in order to receive 'cooperation credit' towards a reduced sentence. The Monaco memo stresses that corporations seeking cooperation credit must disclose all facts about individual misconduct 'swiftly and without delay,' and directs prosecutors to expedite investigations, particularly against culpable executives. The memo also underscores the importance of DOJ cooperating with 'foreign law enforcement partners' in fighting cross-border corporate crime and instructs prosecutors 'not [to] be deterred from pursuing appropriate charges just because an individual liable for corporate crime is located outside the United States.'

This assertive approach comes with the understanding that DOJ will not always win. In a speech at a white-collar crime conference, Monaco acknowledged as much, stating, 'I recognise that cases against corporate executives are among some of the most difficult that the department brings, and that means the government may lose some of those cases. But I have and will continue to make clear to our prosecutors that… the fear of losing should not deter them.' This approach – especially given that it is aimed at individuals – turns prosecutorial discretion on its head. Electing to press forward with weak or novel criminal charges instead of extending a person the benefit of the doubt when the conduct at issue is not clearly criminal has a dramatic negative effect on the individuals in question even when not convicted.

Indeed, the DOJ's theories in white-collar cases do not always withstand scrutiny in the courts. This past year saw several high-profile examples of this.

In *United States v Connolly*, two Deutsche Bank traders, one of whom was based in London, were convicted in New York federal court on federal fraud charges for allegedly manipulating the bank's LIBOR submissions to the British Banking Association. The proof showed, and the government did not dispute, that the rates submitted were a reasonable estimate of the bank's anticipated borrowing costs. The government nonetheless took the position that even an accurate and reasonable estimate constitutes fraud

> **While the DOJ has made it clear that it will be bringing more white-collar cases and is not afraid to take the risk of losing, the courts are not always accepting of its aggressive and creative legal theories.**

if the rates were modified with the purpose of benefiting the bank's trading positions. On appeal, the Second Circuit Court of Appeals roundly rejected the government's theory, holding that it improperly dispensed with an essential element of criminal fraud – falsity – and noting that the federal fraud statutes were not designed to punish 'all acts of wrongdoing or dishonourable practices.'

The Second Circuit also overturned the insider trading convictions of four defendants in *United States v Blaszczak*. Defendants were convicted based on a scheme to trade healthcare stocks based on confidential information from the US Centers for Medicare and Medicaid Services (CMS). *Blaszczak* follows the Supreme Court's decision in *Kelly v United States*, where the court found that the alleged scheme did not aim to obtain 'property' within the meaning of the underlying criminal securities fraud statute. Applying *Kelly*, the Second Circuit found that the leaked information did not constitute CMS' 'property' or a 'thing of value' to support the underlying fraud and theft charges.

Finally, in a case now before the Supreme Court, the DOJ itself recently abandoned the so-called 'right to control' theory of property fraud that prosecutors had relied on to secure convictions for decades. The federal mail and wire fraud statutes require that the alleged victim be deprived of 'money or property.' Under the right-to-control theory, however, the government need not show that the defendant schemed to harm a traditional property interest; rather, the victim's 'right to control' how its money is spent is itself viewed as a protected property interest. This has had the effect of dramatically diluting the government's burden of proof in a wide variety of mail and wire fraud prosecutions. When the issue finally reached the Supreme Court, as it did this year in *Ciminelli v United States*, the DOJ's solicitor general's office overruled the longtime position of federal prosecutors and judges in New York and conceded that the 'right to control' is not a valid theory of property fraud.

Despite these setbacks, the DOJ continues to push the envelope in its white-collar prosecutions. Violations of US sanctions are now squarely in DOJ's cross-hairs. In October 2022, a UK national, Graham Bonham-Carter, was arrested for conspiracy to violate US sanctions imposed on Oleg Deripaska, a Russian oligarch. Even though these sanctions are only directed at US persons, the government charges that by allegedly seeking to fund US properties for Deripaska and to repatriate Deripaska's artwork located in the US through misrepresentations, Bonham-Carter himself violated US sanctions and also committed wire fraud.

In *United States v Chastain*, the government brought novel 'insider trading' charges against an individual who did not trade in the securities markets, but instead allegedly used confidential information of his employer to purchase NFTs before his company featured them on its website. The government's theory in this case threatens to criminalise all sorts of allegedly improper uses by employees of internal employer information for non-work purposes.

Notably, the government alleges that Chastain earned only about $25,000 from buying and selling the NFTs in question. This is consistent with a trend in which the government has been prosecuting traditional forms of insider trading that generated relatively modest trading profits – roughly $134,000 in one case, a mere $82,000 in another. These prosecutions stand in contrast to historical prosecutions that targeted far more substantial gains.

In short, while the DOJ has made it clear that it will be bringing more white-collar cases and is not afraid to take the risk of losing, the courts are not always accepting of its aggressive and creative legal theories. This dynamic is likely to lead not just to more prosecutions, but to more defendants deciding to fight back and attempting to convince juries and judges that the government has overstepped its bounds. ■

Schulte Roth & Zabel

Freezing orders and asset recovery: between effectiveness and fairness

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What is the legal framework in criminal asset recovery in Greece?

Criminal asset recovery in Greece is mainly regulated by provisions found in the Greek Criminal Code and the Code of Criminal Procedure, as well as Law no. 4557/2018 on money laundering. It should be noted that, from 1995 until 2019, anti-money laundering legislation was the key legislation on asset recovery and has been extensively used by the competent authorities to detect and prosecute corruption practices, large-scale fraud, and tax evasion since 1995. The relevant legal framework has been reinforced by the new codes, ie the Code of Criminal Procedure (CCP) and Criminal Code, which entered into force on 1 July 2019 and govern the asset recovery procedures. The new codes regulate the lifting of bank secrecy, the conduct of financial investigations aimed at discovering tainted assets, the freezing of such assets and, in case of a guilty verdict, their confiscation or disposal to compensate victims of financial or related crimes.

What type of assets can be subject to freezing and confiscation measures in criminal proceedings?

The abovementioned framework is in line with the recent EU developments in the field of asset recovery. Following the transposition of EU Directive 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime, any type of property that is considered direct or indirect proceeds of criminal activity (or corresponds to the value thereof) or an instrumentality used (or intended to be used) to commit a criminal offence can be subject to asset recovery measures such as freezing and confiscation.

Which authorities have the power to issue freezing orders in Greece?

Freezing can be ordered by the prosecuting and/or judicial authorities during the pretrial stages of the criminal procedure. Moreover, even before a criminal investigation is initiated, the head of the Financial Intelligence Unit (FIU) has the power to order in urgent cases the freezing of any asset if it is likely that it originates from a predicate or a money laundering offence. After the opening of a criminal investigation, it is the prosecuting and/or judicial authorities who have the power to issue freezing decisions as they bear sole responsibility for the investigation of all aspects of the case entrusted to them, including the evaluation of the evidence and assessing the likelihood of the illegal origin of assets.

More recently, a legal dispute arose on whether the FIU has concurrent competence to order the freezing of assets even in cases where a criminal investigation has already been initiated. Areios Pagos (Greece's Court of Cassation) answered this question in the affirmative by its decision

> **A swift procedure to review the property's seizure and release all obviously "clean" assets is equally important.**

no. 1/2022 relying on the 'administrative' nature of FIU's orders amidst heavy criticism by legal scholars and practitioners. Critics point out that this decision allows a non-judicial authority to interfere with pending criminal investigations and freeze assets, which may have already been deemed 'clean' by the prosecuting or judicial investigating authorities.

What are the requirements for property to be frozen in the course of criminal proceedings?

Property can be subject to freezing measures during the pretrial stage to secure its subsequent confiscation in case of a guilty verdict. Therefore, such measures require indications that the assets in question are connected to the criminal acts under investigation. The investigating authorities are under a duty to conduct a thorough investigation on the origin of the assets before issuing a freezing order. However, unreflected freezing orders are not uncommon in practice, even before the opening of criminal proceedings, and blindly extend to the entirety of the assets of suspects and/or third parties including non-suspicious bank accounts or other non-questionable property. This overly aggressive practice unfairly shifts the burden of proof forcing affected individuals or entities to collect and present all available evidence to prove the lawful origin of the assets before the competent judicial authorities in support of their appeals against evasive freezing orders. Moreover, until a decision on the appeal is issued, which can take many weeks or several months, all assets remain frozen, while affected parties and their families may suffer grave consequences being unable to satisfy their basic needs.

Though there are emergency situations which demand immediate action to secure questionable property and prevent its dissipation, a swift procedure to review the property's seizure and release all obviously 'clean' assets is equally important.

Are there sufficient safeguards in place?

Several procedural safeguards are in place with a view to ensuring that freezing orders do not disproportionately affect individuals or entities whose assets are frozen. According to the CCP and Law no. 4557/2018, assets can remain frozen for a maximum period of five years pending a judgment of a first instance court on the merits of the case. In other words, if no such judgment is issued within five years from the issuance of the freezing order, the seized assets must be released. Moreover, during the criminal proceedings certain assets can be exempted from freezing measures to cover basic living needs of affected persons and their families as well as costs for their legal representation and the management of frozen property. Affected parties have a right to request at any time they deem appropriate the judicial review of freezing measures and introduce new evidence in support of their request.

Does Greece recognise and execute foreign freezing and confiscation orders?

In relation to EU member states Regulation 2018/1805 is in force since 19.12.2020, which establishes the 'free movement' of freezing and confiscation orders based on the principle of mutual recognition in the common EU judicial area. This is the first EU Regulation on mutual recognition in criminal matters and is directly and uniformly applicable in all member states. Greece has already enforced a significant number of such decisions issued in other jurisdictions. In relation to third states, Greece proceeds with the recognition and execution of asset recovery decisions on the basis of bilateral or multilateral treaties. ■

ANAGNOSTOPOULOS

Switzerland: increasing exposure of international businesses to criminal enforcement

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Perception is not everything – general counsel should re-consider the risk exposure to criminal prosecution in Switzerland

When it comes to the exposure of international business to criminal enforcement in Switzerland perception is not everything. In the past, Switzerland has not had a reputation as a tough environment. However, in recent years, the Federal Prosecutor has shown increased resolve to prosecute corporate crime, with a focus on money laundering and bribery offences, often in concert with prosecutors elsewhere, including the US. This has brought results: in 2021 and 2022, the Federal Prosecutor secured the first two corporate convictions of before the Swiss Federal Criminal Court after full trial. Further, over the last 10 years, we have seen numerous resolutions by way of penalty orders against corporates following abbreviated proceedings. While criminal fines are capped at ₣5m, disgorgement orders in the hundreds of millions have added to the reputational damage, costs, distraction of management time, etc that come with every criminal investigation. In addition, efforts to prosecute individuals for crimes in the corporate context have not diminished and, in fact, the trend for lawmakers to criminalise misconduct has increased, as recently seen when the Federal Data Protection Act was amended or in relation to new ESG reporting requirements.

Against this backdrop, general counsel of international businesses whose operations touch on Switzerland should factor into their compliance risk management and incident response strategies their heightened exposure to enforcement in this market. This holds true despite the absence of vicarious liability of corporates for the criminal conduct of employees, and that corporate criminal liability is limited to instances where inadequate compliance failed to prevent the commission of certain specific criminal offences, including money laundering and bribery.

We discuss below the factors and strategic challenges that general counsel should consider as they re-assess their risk exposure and mitigation strategies for Switzerland.

Jurisdictional is wide and co-operation between Swiss and foreign authorities effective

The matters resulting in these convictions and penalty orders illustrate the three principal drivers concerning the exposure of international businesses to criminal prosecution in Switzerland. First, many international businesses maintain a banking relationship in what is one of the most important financial centers globally. Where a Swiss bank account is held by a foreign entity, a transfer of assets into or out of that account representing money laundering or bribery activities may attract Swiss criminal jurisdiction. Second, where an inadequate compliance programme is operated by a Swiss group entity, such as compliance oversight and control of business partner relationships, that entity may become the subject of criminal enforcement in Switzerland, even when the underlying criminal activity by individuals occurs entirely offshore. Third, as virtually all instances of international corporate criminal prosecution have shown, the Federal Prosecutor is co-operating closely with their counterparts elsewhere, making full use of inter-governmental mutual assistance.

Self-reporting does generally not provide a reliable route to a settlement

The proliferation of deferred prosecution agreements (see, eg, UK, France, Singapore, Australia) has not reached Switzerland. Recent

> **The route to a penalty order offers room to negotiate co-operation language and to explore trade-offs between the scope of misconduct covered and how it is portrayed, as well as the penalty and disgorgement amounts.**

efforts by the Federal Prosecutor to introduce this tool to resolve criminal investigations were unsuccessful. What is more, since 2018 the Federal Prosecutor has no longer applied to foreign multi-national businesses the option of an indefinite suspension of a criminal investigation without admission of guilt or conviction under art 53 of the Swiss Criminal Code. In 2015, a large foreign financial institution was able to avoid money laundering charges by way of implementing a robust remediation programme, paying ₣40m to the International Red Cross and persuading the prosecutor that there was no longer a public interest in prosecution. The only option now to avoid conviction is to persuade the Prosecutor that an employee's conduct did not reach the level of individual criminal liability required, the company's compliance programme was not inadequate, or that even an adequate compliance programme would not have prevented the individual from committing the criminal offence in question. Naturally, the strength of such arguments is very difficult to assess and, therefore, self-reporting in such circumstances is not generally a viable option.

Alternatives to adversarial strategies to mitigate the consequences of past criminal conduct

Despite increased enforcement risks, and the absence of a reliable self-reporting and settlement mechanism, there are strategies available to mitigate the consequences of past criminal conduct other than seeking acquittal at trial. In fact, as mentioned, many high-profile corporate criminal investigations have been resolved by penalty orders. Without going into the details of the procedural steps that may lead to such outcome, an early indication by the corporate that a penalty order would be the desired outcome and an appropriate co-operative posture will speed the process, reduce the resources that have to be invested in a criminal investigation and limit publicity and reputational impact. Even more importantly, the route to a penalty order offers room to negotiate co-operation language and to explore trade-offs between the scope of misconduct covered and how it is portrayed, as well as the penalty and disgorgement amounts. Lastly, where international businesses are exposed to contemporaneous enforcement in multiple jurisdictions, this avenue provides the ability to coordinate issues such as respective scopes and timing of the various settlements, as well as disgorgement among the various authorities involved. While formally a penalty order is a criminal sentence, bringing the penalty amount as closely as possible to ₣1 (which we have seen) and favourable co-operation language can likely be positioned not more unfavourably compared to a non- or deferred prosecution agreement as they are available in other jurisdictions.

Universal maxims still apply: investigate quickly to establish the strongest defences available whether you co-operate or litigate

Whatever the strategic choices over self-reporting and co-operation, when confronted with past misconduct, universal maxims also apply in the Swiss context. First, establish independent governance and investigate swiftly to retain as much freedom to act as possible. Second, do not put undue pressure on witnesses and protect privilege. In the corporate context you must carefully consider that under Swiss law only a relatively small group of senior executives have the right not to give evidence against their employer; for instance, regularly, this would not include members of the legal or compliance functions. Third, in view of the structure of corporate criminal liability there are two main lines of arguments to challenge the prosecution's case. We have seen instances where the Federal Prosecutor failed to establish there was in fact an employee who committed one of the crimes that may trigger the corporate's liability (eg, money laundering, bribery, etc). Further, as international businesses have strengthened their compliance programmes, one should consider the strength of the 'rogue employee' argument; no reasonable and adequate programme could have timeously detected the rogue employee, irrespective of the actual quality of the corporate's programme.

To conclude, criminal enforcement is on the rise and incentives to self-report are weak given there is no avenue available to a non- or deferred prosecution agreement or equivalent. That said, litigation is not the only option as prosecutors are increasingly open (and as the practice has evolved increasingly accustomed) to engaging in negotiation of penalty orders. While these orders involve a criminal conviction they can be structured in ways that limit significantly the consequences to the company of past criminal conduct by employees. ■

Baker McKenzie.

Prevention of corporate crimes as a compliance standard for Mexican companies

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Since the inception of corporate criminal liability in Mexico in 2016, federal and state prosecutors have been increasingly active in pursuing both national and foreign-owned businesses for crimes as varied as money laundering, tax evasion and bribery. The legislation that was initially vague and challenging to interpret has, in the hands of regulators and by means of substantial legislative reforms, become a relatively sophisticated set of standards. At this stage in the maturity of the system, companies must take seriously the need to evaluate and adapt their compliance programmes to the expectations of Mexican enforcement authorities. In addition to avoiding criminal and other types of liability, adhering to these standards increases the value of companies in the market by making them more attractive both as business partners and as investment opportunities.

Overview of corporate criminal liability in Mexico

Until a few years ago, the Mexican legal system contemplated criminal liability only for individuals. Legal entities could not commit crimes because only individuals could have the intention of making decisions that violate criminal legislation. However, as of 2016, national legislation establishes a criminal liability regime directly applicable to companies, independent of the individual liability that can be attributed to their employees, shareholders, managers or representatives.

As a general rule, not all crimes can be attributed to a legal entity. The corporate crimes that can be criminally charged to a company are exclusively those committed in its name, for its benefit or in its representation, as well as those committed using any of its resources, regardless of their nature (eg, computers, money, facilities). From a practical standpoint, the crimes commonly related to this legal regime are bribery, tax evasion, money laundering, fraud, environmental pollution and financial crimes.

To prosecute a legal entity, the criminal authorities must prove that the criminal act occurred due to a lack of control within the organisation, ie, the company failed to prevent the corporate crimes related to its operation through the implementation of internal measures and controls of criminal compliance.

External implications for companies doing business in Mexico

As a consequence of implementing this new legal standard of criminal liability, companies find themselves more frequently under scrutiny by Mexican prosecutors and criminal judges. For some criminal authorities, this offers the possibility of reducing the levels of impunity for the commission of corporate crimes through the application of corporate sanctions as examples to the broader corporate community. This presents a heightened risk for companies because the sanctions established by Mexican legislation, whether federal or local, can in some cases be draconian and disproportionate.

Additionally, this new approach to criminal prosecution has become an effective mechanism to encourage compliance programmes in other regulatory areas of company operations in Mexico. For example, in recent years, the Ministry of Finance has adopted a policy of criminal prosecution against tax evasion, while negotiating multi-million dollar settlements to

> **To prosecute a legal entity, the criminal authorities must prove that the criminal act occurred due to a lack of control within the organisation.**

avoid the application of criminal sanctions for certain companies and members of their boards of directors.

The corporate criminal liability regime has also prompted Mexican authorities to enforce legal provisions to prevent and punish money laundering. Under this model, the Mexican government's financial crime department has enforced the criminal statutes by including companies in its blocked persons lists and blocking the bank accounts of these blocked persons.

Although beyond the scope of this article, US enforcement of the Foreign Corrupt Practices Act may also be triggered by Mexican criminal prosecution as it relates to bribery and related crimes.

Corporate integrity culture to prevent prosecution of corporate crimes

To address the risk created by this paradigm shift in legal practice, companies must build a culture of integrity to prevent and mitigate criminal contingencies, as well as reduce their liability in the event of an investigation.

Mexican law provides guidance on the components that constitute a corporate culture of crime prevention or the standard of 'due control' for crime prevention. Although they are evolving rapidly, the following are essential measures that companies can adopt to prevent criminal risks or enhance their legal defense related to corporate criminal charges:

- **Criminal risk assessment.** As a starting point to evaluate potential criminal liability, management must identify the activities that expose them to the commission of a corporate crime, evaluate the level of risk involved for each and determine if they are within the range of risk appetite for their operation in Mexico.
- **Implementation of internal controls.** Management must then implement appropriate policies and controls to reduce the criminal risks to which they are exposed, as well as to mitigate potential corporate criminal liability. Although each company must evaluate its own needs, most companies require controls in finance (including tax and AML compliance), labour and employment, government relations/ interactions, third-party vendor evaluation and procurement, as a starting point.
- **Corporate governance.** Company leadership must also designate a standing internal body responsible for preventing risk of criminal liability.
- **Third-party due diligence.** Legal entities must implement controls to avoid third-party risks that could imply criminal liability for the companies that hire them and in whose name or benefit they could commit a corporate crime.

These corporate compliance measures are a fundamental part of the criminal compliance programmes provided for in national and international compliance standards, and are in turn an important part of a broader legal-regulatory compliance programme. These measures are essential for the detection and deterrence of corporate crimes, as well as for the legal defence of companies and senior management in the event of an investigation.

Conclusions

The corporate criminal liability regime in Mexico has given rise to a new standard of compliance that should be included in the list of priorities for business decision-making in any legal entity: the prevention of corporate crimes.

Regardless of their size, sector or context, companies can incorporate into their business models corporate crime prevention practices to substantially reduce the risk of criminal liability that may reduce their value in economic, social and reputational terms.

Under the parameters of corporate criminal liability, the real challenge for companies doing business in Mexico is to build an internal crime prevention culture that is known, accepted and promoted permanently inside and outside the organisation. As with all compliance initiatives, corporate integrity is key. ■

Baker McKenzie.

The opportunity for strategic corporate measures through compliance programmes in Colombia

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In its economic report about Colombia, the Organisation for Economic Cooperation and Development (OECD) recognised efforts made by recent governments in the fight against corruption[1]. However, the perception on corruption being on the rise is still high: about 62% of Colombians believe that corruption levels have increased[2].

The legislative measures have been abundant in the last decade. Since Congress enacted the anti-corruption statute in 2011, which amended the Criminal Code, the measures include harsh sanctions against corrupt individuals and an increase in the term of debarment preventing former public officers from interacting with state-owned entities. Colombian governments have followed recommendations to enhance measures to increase effectiveness in the prosecution of legal entities and not merely individuals, for corrupt actions.

In addition, following recommendations from the OECD, in 2021[3] the Superintendence of Companies introduced new mandatory requirements of business transparency and ethics programmes.

Thus, since 1 January 2022, companies supervised by the Colombian Superintendence of Companies were required to implement transparency and ethics programmes, independently from the sector in which they exercise their activities.

In 2023, the obligation will apply to the following companies in Colombia:

(i) Companies that carried out in 2022 directly or through an intermediary, contractor or an affiliated company, international business or transactions for a certain value[4] and meet certain financial thresholds in their 2022 financial statements[5];

(ii) Companies that meet certain financial thresholds in their 2022 financial statements[6] and executed agreements with public entities that individually or collectively amount to a certain value[7];

(iii) Companies that are engaged in activities in specific sectors (namely infrastructure, healthcare, construction, manufacturing, TMT, automotive and financial services), meet certain lower financial thresholds[8] and executed agreements with public entities that in the aggregate added a certain value[9].

The implementation of the business transparency and ethics programme is not only a requirement for the companies that meet the criteria described above, but also an element that the Superintendence of Companies must consider when graduating the fines that it imposes on the legal entities for findings of corruption.

The agency has indicated that it will recognise business transparency and ethics programmes as adequate when they contain, at least, the following elements:

- The principles, procedures and governance related to the business transparency and ethics programme;
- Measures to identify, evaluate and manage corruption risks, so that the programme should no longer only aim to prevent corrupt conducts but also include mechanisms to mitigate risks related to contracting with public entities and those managing public resources;
- An exhaustive assessment of corruption and transnational bribery risks, which should be reflected in a risk matrix reflecting the nuances of the entity's activity;
- Definition of the role and responsibilities of all the entity's directors and the compliance officer;

> **A compliance programme applied with a strategic vision creates opportunities to enhance the value of the company and to increase the worth of the shareholders' investment.**

- Appointment of a compliance officer (who must be domiciled in Colombia and have proven expertise on the matter and resources to exercise their functions);
- Existence of due diligence mechanisms to map the risks of related third parties and undertake mitigation actions;
- Existence of mechanisms for control and supervision of compliance policies;
- Adequate disclosure of compliance policies and business transparency and ethics programme;
- Channels to denounce wrongdoings;
- Existence of adequate communication channels.

During 2022, many companies devoted important efforts to implement business transparency and ethics programmes. In most cases, these activities were oriented to satisfy the legal requirements imposed by the mandatory provisions. Clearly this is an important step to increase the engagement of the private sector in combatting corruption.

However, the Colombian government should now aim to create incentives that allow companies to understand the strategic benefits of developing a culture of compliance and not merely complying with the formal requirements. These opportunities require the commitment of the shareholders and directors of the company – through the well-recognised tone at the top.

The creation of a risk matrix and the analysis involved in designing mechanisms that control or reduce the opportunities of stakeholders within the company to engage in corrupt activities, create the prospect for measuring performance in the most relevant areas of the organisation. It also allows the directors to quickly identify gaps, drains and inadequate procedures. A compliance programme applied with a strategic vision creates opportunities to enhance the value of the company and to increase the worth of the shareholders' investment.

To achieve these goals, companies can and should rely on technical and technological tools that allow them to communicate the principles, procedures, goals and contacts efficiently. These also allow them to monitor, detect and correct the possible situations in a timely and efficient manner.

The implementation of a compliance programme does not need to be a burden. Adequately designed, implemented and executed, it can become a strategic tool that allows the shareholders to understand and grow the organisation in a structured way. ■

Baker McKenzie.

Notes

1) **See OECD Economic Surveys, Colombia 2022: OECD Economic Surveys: Colombia 2022.**
2) **https://www.latinobarometro.org/latContents.jsp**
3) **Superintendence of Companies, Circular 100-000011 of 9 August 2021, applicable from 1 January 2022.**
4) **Transactions equal to or exceeding 100 times the value of the minimum monthly legal salary: ie, COP$100m or approximately USD$20,700 in 2022.**
5) **Total assets or revenues equal to or greater than 30,000 times the value of the minimum monthly legal salary: ie, COP$30bn or approximately USD$6.2m in 2022.**
6) **See note 4.**
7) **Contracts that are individually valued at or in the aggregate are equal to or exceeding 500 times the value of the minimum monthly legal salary: ie, COP$500m or approximately USD$103,900 in 2022.**
8) **Total assets equal to or greater than 5,000 times the value of the minimum monthly legal salary: ie, equivalent in 2022: COP$5bn or approximately USD$1.03m, and turnover of or greater than 3,000 times the value of the minimum monthly legal salary: equivalent in 2022: COP$3bn or approximately USD$623,000.**
9) **See note 7.**

Action stations

***IHL* takes a look at the real estate issues set to keep in-house counsel up at night.**

JEMIMA MARSHALL

The world has been turned on its axis over the last few years of unprecedented economic, social and geopolitical disruption. Emerging trends and ongoing developments continue to take the real estate market by storm, and preparation will be the key to success for general counsel and senior in-house lawyers to combat these headwinds.

'In the post-pandemic world, everyone's in-house focus was sharpened,' says Jane Edwarde, head of real estate and one of Slaughter and May's diversity and inclusion partners. 'There have always been global obstacles, now more than ever, and the in-house community needs to be prepared for battle at any moment. Corporates need to be thinking about how to survive these headwinds in a responsible and sustainable way'.

Relocation, relocation

Despite the disruption caused by Covid-19 to occupiers of commercial property, and the subsequent hybrid working model adopted by corporates, 'the corporate occupier space has remained consistently busy', says Jules Needleman, a partner in CMS' real estate team, who specialises in high-end HQ lettings. Edwarde further highlights that there hasn't been a mass exodus from the office as anticipated: 'The demand is still very much there, but an agile policy is here to stay…for corporates, occupational portfolios and HQs are at the top of the agenda.'

This is supported by a survey conducted by real estate group CBRE, which found that 41% of office occupiers plan to expand their footprint over the next three years, demonstrating the

Now that there are mandatory disclosure requirements coming in, combined with increasing prices of energy and ethical arguments, corporates are pushing towards more sustainable practices.
Elizabeth Alibhai, RPC

ongoing demand for office space and heightened expected business growth.

As Elizabeth Alibhai, who heads the real estate team at RPC, comments: 'CBRE is predicting that 10-20% of office stock will be repurposed and there has been a flight towards quality stock. Clients are relocating and downsizing to high-quality spaces. There's an acknowledgement across the board that people will continue to require office premises.'

The hybrid model has boosted the demand for flexible office space and 'as clients are making decisions to relocate to upgraded premises, developers are responding to this', says Edwarde.

Though the number of development projects has increased throughout the past year, concerns surrounding potential plunges in demand levels, in addition to increasing construction and financing costs, could result in a slow-down in development completions. However, according to Jones Lang LaSalle (JLL), refurbishments are likely to continue as these are seen as less time consuming, cheaper and a more sustainable option, the latter being a central focus for corporate occupiers.

Rising tide of ESG regulation

'The response to environmental, social and governance (ESG) issues is at the top of agendas for both owners and occupiers,' says Mark Rajbenbach, co-head of the international real estate group at Taylor Wessing. Premises contribute considerably towards the UK's carbon footprint, and both landlords and occupiers are taking into consideration the building's eco-credentials.

The pressure to adopt ESG standards has compelled all stakeholders to monitor the sustainability and ethical practices of the company, and there is a strong focus to adhere to these principles. Landlords and occupiers will face commercial pressures and legal requirements to attain a sustainable workplace, and in-house lawyers will need to stay on top of these issues and wider developments. Says Alibhai: 'Now that there are mandatory disclosure requirements coming in, combined with increasing prices of energy and ethical arguments, corporates are pushing towards more sustainable practices.'

Key considerations for in-house lawyers when looking to relocate to new premises include searching for developments with sustainability and building certifications, 'green' lease provisions, and checking the EPC rating of premises. Regarding the latter, Alibhai highlights that 'the minimum standard for EPCs on commercial properties is going to rise to a Grade C in 2027 and a Grade B in 2030'. Occupiers are encouraged to challenge landlords where premises do not meet a B rating. However, 'the vast majority of stock is not at these standards and there will be a huge retrofitting exercise over the next two years'.

'When in-house lawyers are looking to secure new premises', Alibhai advises, 'they need to ensure that buildings are energy efficient and if they are in-buildings, which are going to be there

> **Due to the ever-increasing complexity of real estate deals, in-house lawyers need to know the real estate sector inside out. This includes keeping up to date with emerging developments, challenges and wider issues.**
> **Mark Rajbenbach, Taylor Wessing**

for a while, companies need to determine whether they will need to contribute to the cost of these changes, to bring the premises up to the required standard'.

In order to fully engage with ESG developments, 'in-house lawyers will be required to take on a wider role within the company, as we begin to tackle more headwinds in the upcoming year', says Edwarde. They will become an integral part of initiating the company's ESG strategies, ensuring the business stays on top of new developments and complying to changing laws and regulations. Rajbenbach says that 'for in-house lawyers, there is a lot of collaboration with their external law firms in navigating how they adhere to ESG developments in the real estate sector'.

However, with the urgency to adhere to ESG regulations, in-house lawyers must take caution to avoid the consequences of 'greenwashing': the practice of making people believe, commonly through marketing and public relations, that a company is more sustainable than it is. To mitigate the risk, legal is encouraged to collaborate with teams across the company, to ensure it can support their ESG claims.

Stay on your toes

Rajbenbach says: 'Due to the ever-increasing complexity of real estate deals, in-house lawyers need to know the real estate sector inside out. This includes keeping up to date with emerging developments, challenges and wider issues'. This is applicable to the Building Safety Act 2022, 'the biggest revamp of building safety legislation in over 40 years', says Alibhai. The Bill has been published to improve safety during the design, construction and management of higher risked buildings, in response to the devasting events at Grenfell Tower in 2017.

Alibhai says: 'This puts obligations on various stakeholders, who are going through the motions of a building's lifecycle, with a strong emphasis on high-risk buildings. There are numerous issues concerning competence, enforcement of breach, namely sanctions and costs relating to construction, among others. This will have an impact on the in-house community, particularly those in the property development sector'.

For real estate fund managers and investors, 'the mini budget brought additional challenges to the table, and transactions have either been put on hold or there were price reductions', according to Needleman. 'This is due to evaluations, as there is uncertainty surrounding the value of properties and buyers are cautious not to be overpaying. This cycle has been different to previous years, as price reductions were generally accepted in transactions, and these were followed through to completion at a lower price. At this moment in time, sellers have not felt under pressure to sell, so when price reductions are put on the table, they will either pause the transaction or refuse the offer. They do not feel obligated to sell'.

This is further supported by Rajbenbach, who says that 'the current economic climate, rising interest rates, debt and

> **In-house lawyers will play a vital role in restoring relationships within internal teams in the office. This includes rebuilding confidence and refocusing on strategy to face the multitude of obstacles head on.**
> **Jane Edwarde, Slaughter and May**

construction costs have contributed to uncertainty surrounding property evaluations and the slowdown of pace in some transactions'.

Despite the uncertainty and subsequent challenges, Edwarde emphasises that 'the current market still presents opportunities'. For Alibhai, 'the time to invest is when there is blood in the streets – while there are constraints for many, there will be opportunities for the few, especially for those who are cash rich or can borrow at sustainable rates'.

For the in-house community, preparation will be the key to success. 'Everything is time critical, and clients are much more responsive', according to Needleman. 'In-house lawyers need to be more prepared, and they cannot just stop the clock until the terms are agreed. Both seller and buyer will want to ensure that any deal follows through to completion swiftly. In a difficult market, transactions tend to go in different directions and in-house lawyers need to know where this is going. This requires an open dialogue.'

Terminated or otherwise-adjourned transactions will come back to life and in-house lawyers must be prepared to see these through to completion. As highlighted by Rajbenbach: 'Deals initially put on hold should eventually bounce back and naturally, all parties will want to move quickly, particularly those that are price sensitive'. Consideration of costs will also come into play here, says Edwarde: 'Cost control will be the number one theme for all organisations, as we face economic challenges and global turmoil, which is set to continue into 2023. Corporates will need to be thinking about costs and an in-house lawyer will be a critical role in this strategy'.

Take away

The real estate sector will continue to experience a sea change on account of the economic, social and geopolitical disruptions globally, and ongoing challenges will test the resilience of the in-house community. 'This is undoubtedly a difficult time for in-house counsel', says Edwarde, 'but they are working closely with their company's chief executives and the boards to redefine strategies and tackle the current and fast-approaching headwinds'. Both preparation and cost control are paramount, and those who adopt a holistic approach and engage with ongoing developments in the real estate market, will do well.

From workplace flexibility and the rising tide of ESG regulations, to uncertainty surrounding property evaluations and revived transactions, it is important for the in-house community to regroup, in order to navigate these developments responsibly and successfully. 'In-house lawyers will play a vital role in restoring relationships within internal teams in the office. This includes rebuilding confidence and refocusing on strategy to face the multitude of obstacles head on', concludes Edwarde. ■

New building safety requirements

RPC explores the Building Safety Act 2022 and the key considerations of service charge recovery.

The Building Safety Act 2022 (the Act) is the central plank in the government's response to the Grenfell Tower disaster. The Act was enacted with the aim of improving the standard of buildings in England and securing the safety of people in or about those buildings, with a particular focus on fire safety.

The provisions of the Act largely came into force on 28 June and have huge implications for those in the property industry; placing new duties on those who design, construct and manage buildings.

The Act also controls what costs can be recouped from tenants in relation to building safety measures and remediation works via the service charge, and we focus on the key considerations of service charge recovery below.

Active building safety management

The duty

The Act places particular emphasis on higher risk buildings (for the purpose of Part 4 of the Act which deals with building safety measures, higher risk buildings are buildings that are at least 18 metres or seven storeys high and contain at least two residential units). These buildings now require an 'accountable person' to undertake an assessment of the building safety risks at regular intervals and, if so directed, at the direction of the newly-formed building safety regulator. The accountable person must actively manage building safety risks, by taking reasonable steps to prevent risks from materialising and reducing the severity of any incidents that do occur.

The accountable person is the owner of the legal estate in possession of any common parts of a building (i.e. the structure, exterior or any part of the building provided for the benefit and use of the occupiers of the building) or a person who is under a repairing obligation in relation to any of the common parts. This is usually the landlord, and some buildings will have more than one accountable person.

Sounds sensible – but who pays?

The Act introduces a new section 30D to the Landlord and Tenant Act 1985 (LTA 1985), which specifically provides that building safety measures should be treated as a service that can be recovered from tenants under the service charge of a relevant lease (being a lease that is granted for a term of seven years or more of or including a dwelling in a higher-risk building and under which the tenant is liable to pay a service charge). Where the lease contains different measures for apportioning costs between tenants, the costs relating to building safety measures are to follow the apportionment method relating to the costs of insuring the building.

In general, a building safety measure would include:

- applying for the registration of a higher-risk building;
- applying for and displaying a building assessment certificate;
- preparing a safety case report and providing it to the regulator;
- establishing and operating a mandatory occurrence reporting system and providing that information to the regulator;
- establishing and operating a system for the investigation of complaints; and
- legal and professional fees, fees payable to the regulator and management costs in connection with taking a building safety measure.

However, costs incurred as a result of any penalty imposed or enforcement action taken by the regulator due to negligence, breach

> **Going forward, the limitation period under the Act will be 15 years from completion of the construction.**

of contract, an unlawful act or in relation to special measures order proceedings are specifically stated to be non-recoverable.

The implied provisions in section 30D of the LTA 1985 cannot be contracted out of and any provision in a lease purporting to exclude, limit or modify those provisions will be treated as void.

Remediation of building safety risks

The duty

Under the Act, developers or landlords of relevant buildings may also be required to fund the remediation of what are termed 'relevant defects'.

A relevant defect under the Act is a defect in relation to a building arising as a result of anything done or not done, or anything used or not used, in connection with works which causes a building safety risk, being a risk to the safety of people in or about the building arising from the spread of fire or the collapse of all or any part of the building. Further, the Act specifies that the relevant defect can date back to 28 June 1992, which effectively retrospectively extends the limitation period for past defects to 30 years. Going forward, the limitation period under the Act will be 15 years from completion of the construction.

A relevant building is a self-contained building, or self-contained part of a building, that contains at least two dwellings of medium height or above (that is, at least 11 metres or five storeys high). A building is self-contained if it is structurally detached and part of a building is considered self-contained if:

- the part constitutes a vertical division of the building;
- the part could be redeveloped independently of the remainder of the building; and
- the relevant services provided to occupiers of that part are provided independently from the services to the remainder of the building or could be provided without carrying out any works likely to cause significant interruption in the provision of services to the remainder of the building.

A covenant or agreement is void insofar as it purports to exclude or avoid these provisions.

Sounds sensible – but who pays?

The Act specifically provides that the cost of remediation works which relate to relevant defects for which the landlord or an associate is responsible are not recoverable from tenants. A landlord or associate is responsible for a relevant defect if, in the case of an initial defect, they were, or were in a joint venture with, the developer or undertook or commissioned works relating to the defect, or in relation to any other relevant defect, they undertook or commissioned the works relating to the defect.

Recovery limitations and caps for qualifying leases

There are further limitations on the recovery of costs through a service charge for 'qualifying leases'. A qualifying lease is a long lease of a single dwelling in a relevant building under which the tenant is liable to pay a service charge. The lease must have been granted prior to 14 February 2022 and, at that date, the dwelling must have been the tenant's only or principal home and either the tenant did not own any other dwelling in the United Kingdom or the tenant owned no more than two dwellings in the United Kingdom, excluding the lease.

Any costs relating to cladding remediation will not be recoverable via the service charge under a qualifying lease. Furthermore, costs will not be recoverable as a service charge where the value of the qualifying lease

‘It should not be overlooked that the retrospective liability changes and restrictions on cost recovery for building safety measures and remediation works, in particular, will bring significant challenges for some developers and landlords.’

on 14 February 2022 was less than £325,000 if the premises are in Greater London, or less than £175,000, if the premises are situated anywhere else.

Costs incurred in taking measures to remedy a relevant defect will also not be recoverable via the service charge under a qualifying lease where the landlord meets the contribution condition. The contribution condition is met if the landlord group’s net worth as at 14 February 2022 was more than the number of buildings owned by the landlord’s group at the qualifying time, multiplied by £2,000,000. This condition does not apply however to a local authority.

Finally, the Act also provides for caps on the maximum amount of costs recoverable via a service charge in circumstances that are not specifically carved out (as set out above). The maximum value permitted to be recovered will depend on the value of the qualifying lease and certain annual limits will also apply to help spread the costs. The effect being that recoverability is stepped, with greater recoverability possible for higher-value properties.

Landlord’s duty to seek costs from elsewhere

In further support of tenants, the Act also extends the landlord’s duty to take reasonable steps to obtain monies from third parties, such as under a policy of insurance, a guarantee or indemnity, or pursuant to a claim made against a developer or person involved in the design of the building or carrying out works to the building. The landlord’s duty extends to a requirement to take reasonable steps to ascertain whether any grant is payable in respect of the remediation works and if so, obtain the grant as well as to take prescribed steps relating to any other prescribed kind of funding. Where any grant, funding or monies from third parties is obtained, the amount is to be deducted from the remediation costs and any service charge payable reduced accordingly.

Take-aways for in-house counsel at developers and landlords

The Act brings about the biggest change in building safety for 40 years.

The new requirements are expected to engender a culture of safer buildings, which is to be broadly welcomed. However, it should not be overlooked that the retrospective liability changes and restrictions on cost recovery for building safety measures and remediation works, in particular, will bring significant challenges for some developers and landlords. This is not only in terms of potential liability to meet costs or shortfalls in remediation funds themselves, but also in securing finance on buildings awaiting remediation. Not to mention the increased management burdens placed upon landlords by the Act.

Secondary legislation and guidance is awaited which may assist in understanding the full extent and application of the Act. For now, developers and landlords may wish to seek advice on residual liabilities in respect of developments completed since June 1992, and should be more careful than ever to keep full records of construction and safety data for the buildings they have developed or own. ■

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New tax treaty between Luxembourg and UK likely to take effect from 2024 onwards

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Luxembourg and the United Kingdom signed a new tax treaty in June 2022 which revises the terms under which both contracting states may exercise their taxing rights. The new treaty differs from its predecessor, which has been in place since 1968, in that it expands its scope of application to Luxembourg collective investment vehicles, it provides for a full exemption from withholding taxes levied on certain dividend payments and, most notably perhaps, it introduces a 'real-estate-rich' entity provision. Moreover, the new treaty implements the minimum standards under the OECD multilateral instrument and, as a result, tax authorities can deny access to the tax treaty if one of the principal purposes of the action undertaken by the taxpayer was to obtain a tax benefit.

The treaty and its impact on real estate structures in a nutshell

Luxembourg tax exempt corporate real estate funds can obtain treaty benefits

The protocol to the new treaty provides that a Luxembourg collective investment vehicle (CIV) taking a tax opaque legal form eg, a Luxembourg *société anonyme* (SA), *société à responsabilité limitée* (SARL), or *société en commandite par actions* (SCA) shall be entitled to treaty benefits, subject to passing a beneficial ownership test. CIVs typically include undertakings for collective investments (UCIs), specialised investment funds (SIFs) and reserved alternative investment funds (RAIFs). This is a clear improvement compared to the previous treaty, as it clarifies that investment funds can have tax treaty access despite being exempt from income taxation in Luxembourg. Attaining resident and beneficial owner status is contingent on the requirement that 75% or more of the CIV is owned by equivalent beneficiaries, ie, such persons who would be entitled to a tax rate at least as beneficial as the rate applicable under this treaty. It is additionally extended to any undertakings for collective investments in transferable securities (ie UCITS), without the need for the 75% test to be met. This is a welcome clarification especially for the Luxembourg real estate fund sector, which will going forward be able to rely on the clear wording of the treaty to benefit from eg, an exemption from UK source taxation on interest payments. As treaty benefits are subject to the investors in the CIV being equivalent beneficiaries, a regular monitoring of the CIV's investor base, be it during the onboarding phase or in secondaries transactions, is required.

Post-Brexit withholding tax exemption on dividend payments reinstated

Where it can be evidenced that the recipient is the beneficial owner of a dividend payment, the new treaty bars source states from taxing such payments made to entities in the resident state. Profits from investments into Luxembourg real estate may as a result be distributed free of Luxembourg withholding tax to UK investors, without such investor

> **The exemption is expected to contribute to making investments by UK investors into Luxembourg more attractive, especially after the loss of such investors of the benefits of EU directives after Brexit.**

being required to demonstrate that it is subject to a tax that can be considered comparable to the Luxembourg corporate income tax, a condition that would have needed to be met without this provision of the new treaty. The exemption is expected to contribute to making investments by UK investors into Luxembourg more attractive, especially after the loss of such investors of the benefits of EU directives after Brexit.

The exemption does, however, not extend to investment vehicles that annually distribute most of their income and whose income or gains deriving from real estate are exempt from tax. In such an event, the source state may levy up to 15% withholding tax on such payments. Such income may, however, not be subject to withholding tax where the recipient is a recognised pension fund. In the absence of a Luxembourg real estate investment trust (REIT) regime, this paragraph mainly ensures that investors into UK REITs pay a minimum amount of tax of 15% on their UK real estate investments.

Extended source country capital gains taxing rights

The new provision on capital gains differs from the previous tax treaty which protected Luxembourg resident investors against UK capital gains tax on UK real estate investments held through Luxembourg property companies. It was introduced into the treaty in order to effectively allow the UK to levy non-resident capital gains taxation on the alienation of shares in 'real-estate-rich' entities. This UK non-resident capital gains tax applies to the direct disposal of UK property and on the alienation of shares in entities deriving at least 75% of their value from UK real estate.

Under the new treaty, tax may be levied by the source state on gains realised from the alienation of shares or comparable interests deriving more than 50% of their value directly or indirectly from immovable property situated in the source state. It appears that the 50% threshold is assessed at the time of alienation of the shares and the realisation of the gain. As Luxembourg does not tax capital gains derived on 'real-estate-rich' share deals under its domestic law, the extension of the source country taxing rights is expected to have an impact mainly on UK inbound real estate investments. This is likely to affect how UK inbound real estate investments will be structured going forward. As the treaty currently only targets alienations of shares in a 'real-estate-rich' entity, it remains unclear whether the UK would also consider share buy-backs or liquidations as an event that may trigger the 'real-estate-rich' entity clause.

When will these changes enter into effect ?

In Luxembourg, the new treaty should become effective as of 1 January of the year following ratification from both states for all types of taxes.

In the UK, it should become effective as of 1 April of the year following ratification for UK corporation tax, and 6 April of that year for the purposes of UK income tax and capital gains tax. As far as UK withholding tax is concerned, the new treaty should become effective as of 1 January of the year following ratification from both states.

The UK has signed and ratified the new treaty and its accompanying protocol already in October 2022. Luxembourg, however, has not yet ratified the treaty and its protocol. Whilst there was a lot of uncertainty at the end of last year whether Luxembourg would still ratify the new text in 2022, it is now expected that it will do so in 2023, which would mean that the new treaty would take effect as from 1 January 2024.

This affords affected structures some time to adjust and reorient themselves, especially in light of the extended source state capital gains taxing rights. ■

Overview and recent developments in Indonesia's real estate laws – 2023

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Introduction

Understanding the fundamental legal principles and keeping up with continuous reforms are the primary challenges faced by every legal practitioner in the real estate business. Given the importance of a legal framework, this overview provides recent updates on the real estate business in Indonesia.

On December 2022, the Indonesian Government enacted government regulation in lieu of Law no. 2 of 2022 on job creation ('GRL 2/2022') which replaced and revoked Law no. 11 of 2020 on job creation ('job creation law'). GRL 2/2022 essentially restates the provisions stipulated in the job creation law along with the amendments to some provisions, including on land rights. GRL 2/2022 also states that the implementing regulations of the job creation law are still valid and effective for as long as they do not contradict with GRL 2/2022.

Basic framework for land title

A. General framework on land rights

Primarily, ownership of land in Indonesia is regulated under Law no. 5 of 1960 on basic agrarian law and its implementing regulations, including government regulation no. 18 of 2021 on management rights, land rights, apartment units, and land registration ('GR 18/2021').

The highest form of land right in Indonesia is the right to own (*Hak Milik* or 'HM') as it is not subject to a limited time period. A HM can only be enjoyed by Indonesian citizens, certain religious and social organisations, or government bodies in Indonesia. Hence, private companies (national or foreign) or foreign individuals are not eligible to obtain a HM. In order to carry out their business activities, companies may obtain the right to build (*Hak Guna Bangunan* – 'HGB'), right to cultivate, right to use (*Hak Pakai* or 'HP'), and other form of land rights. Another type of property title is the right to manage (*Hak Pengelolaan* or 'HPL'), which can only be held by state-owned businesses or governmental/public entities.

B. Right to build (HGB)

A HGB may be granted to Indonesian citizens or a legal entity incorporated under Indonesian laws, which can also include a foreign direct investment company. A HGB holder may use its land to build and own a building constructed on the land. A HGB holder may also transfer its ownership over the HGB to another person or encumber all or part of such land. The HGB is granted by the relevant land office for a maximum of 30 years and may be extended for a period not exceeding 20 years.

C. Right to use (HP)

A HP may be granted to: (a) Indonesian citizens; (b) an Indonesian legal entity which is located in Indonesia; (c) a foreign legal entity that has a representative in Indonesia; (d) religious and

> **The HGB is granted by the relevant land office for a maximum of 30 years and may be extended for a period not exceeding 20 years.**

social organisations; (e) foreign citizens; (f) government institutions; and (g) local government. The validity of a HP title is divided into two categories: (i) temporary HP title; and (ii) HP title on use. The temporary HP title itself is divided into three types: HP title on state land, HP on HPL land, and HP on HM land. The HP title on state land and HPL land may be granted for a maximum period of 30 years with the extension of 20 years and may be extended for a period not exceeding 30 years. A HP title on HM land may be granted for a maximum period of 30 years and may be renewed. A HP title on use is granted for an unspecified period of time for as long as the land is used and utilised.

D. Strata title

A strata title (*Hak Milik Satuan Rumah Susun* or 'HMSRS') is governed under Law no. 20 of 2011 on multi-story house (as amended from time to time) ('Law 20/2011'), and further regulated by GR 18/2021 and GRL 2/2022. A HMSRS is an ownership right over a multi-story unit which is separated from the joint right over the common part, common objects, and common lands, and may be granted to: (a) Indonesian citizens; (b) an Indonesian legal entity; (c) foreign citizens who have already obtained the license based on the prevailing laws; (d) a foreign legal entity that has a representative in Indonesia; and (e) a representative of a foreign country and international organisations.

Pursuant to Law 20/2011, a multi-story house may be built on a plot of land if the developer holds the following title: a HM over a land, a HGB or HP over a state land, and a HGB or HP over HPL. Additionally, the HGB for a multi-story building that has been granted a certificate of feasibility (*sertifikat laik fungsi*) may be issued concurrently with its extension time, ie, for a total of 50 years at once.

Current developments

A. Land title on foreign ownership

Previously, foreigners with stay permits could only possess a right to use over strata titles (*Hak Pakai Atas Satuan Rumah Susun*) over an apartment unit (a strata title on top of a HP) of the land where the units are built. However, since the enactment of the job creation law, a foreigner (a citizen with the relevant permit, legal entities with a representative office in Indonesia, representatives of foreign countries, and international institutions in Indonesia) is allowed to own a HMSRS. The HMSRS for foreign citizens and foreign legal entities would only be granted in a special economic zone, free trade zone, industrial zone, and other economic zones.

B. Verticale accessie

GRL 2/2022 also regulates the land rights over the space above and below the land. The government may grant a HGB or HP for these spaces to different owners. Hence, the spaces above and below the land may be owned and used by different persons and for different purposes.

C. Electronic certificate

The Ministry of Agrarian and Spatial Utilisation of the Republic of Indonesia regulation no. 1 of 2021 on electronic certificate introduced the process of issuing electronic certificate/e-certificate through an electronic system in the form of an electronic document. This process can be conducted both for the land registration of unregistered lands and for the replacement of physical land certificate into e-certificate for registered lands. However, the current electronic system through the '*Sentuh Tanahku*' application only covers electronic examination, mortgage recordation, and removal of mortgage recordation (*roya*). It has not developed further features for the issuance of an e-certificate. ■

MAKES & PARTNERS
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Major real estate investment structures in Japan

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Introduction

A weak Yen and other factors continue to attract overseas investors to the Japanese real estate market. While this investment can take many forms, two of the most common financing structures are GK-TK and TMK (as defined in the graphics). J-REITs are often used for large-scale portfolios, but because of this structure's longer timeline and complex setup, this article will focus on the GK-TK and TMK investment forms. We explain these two structures below.

GK-TK structure

(i) Summary of GK-TK structure

The GK-TK structure uses a *godo kaisha* ('GK') as a special purpose vehicle to hold a trust beneficiary interest in the subject property (in the context of the GK-TK structure, the GK is sometimes referred to as the 'TK operator'). GKs are used as the property holder because, among other reasons, their corporate structure is simple and flexible under the Companies Act, and they are not subject to the Corporate Reorganisation Act and thus cannot file for or be included in corporate reorganisation proceedings. The GK-TK structure thus eliminates the risk that the lender will not be able to foreclose on its loan collateral due to corporate reorganisation procedures.

Tokumei kumiai ('TK') is the name of the contractual relationship between the GK and its investors (such investors, 'TK investors'). In a *tokumei kumiai keiyaku* ('TK agreement'), which is commonly translated into English as 'silent partnership' (so called because control and management rights are vested in the GK), a TK investor invests with the GK in exchange for a certain portion of the profits and losses of the GK's business ('TK business'). Where the GK has more than one TK investor, it will enter into a separate TK agreement with each.

Since the TK business is operated by the GK and does not involve the TK investors, the GK as TK operator will own all property of the TK business and bears unlimited liability for all obligations of the TK business. Accordingly, all of the TK business is subject to the claims of the GK's creditors. The liability of the TK investors, however, is limited to their investment. It is in part this limited liability that makes the GK-TK structure attractive to investors, in addition to the pass-through tax treatment.

(ii) Application of FIEA to GK-TK

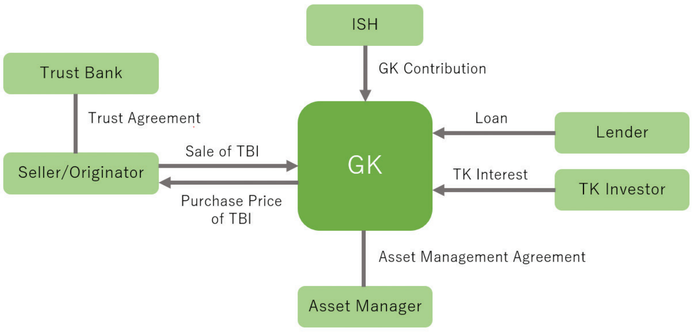
A) TK operator (ie, the GK)

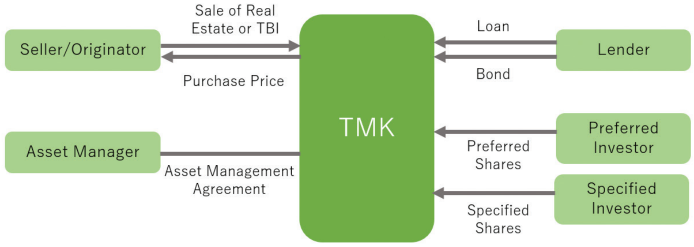
1. Self-offering of TK interests

TK interests are essentially regulated under the Financial Instruments and Exchange Act ('FIEA') as quasi-securities. The TK operator is therefore generally required to register to self-offer or solicit TK interests under the GK-TK structure, and a special purpose vehicle with one independent director and no employees, like the GK, is unable to satisfy these requirements.

There are, however, exemptions to these registration requirements. Under one such exemption, if any of the TK investors is a qualified institutional investor ('QII'), and if certain other conditions are met, eg a limitation on the number of non-QII TK investors, then the TK operator is exempt from registration under the FIEA.

Even if the requirements of this QII exemption for self-offering cannot be satisfied, the TK operator can be exempted from the requirement to register if the TK operator entrusts the offering of TK interests to a registered second-type financial instruments firm. No filing is required to be made by the TK operator in order to take advantage of this exemption.





2. Self-management of TK investment funds

In addition, the management of funds raised through TK arrangements is subject to the FIEA, and where the TK operator elects to self-manage the TK investment funds, it is required to register to conduct discretionary investment management business. However, a special purpose company like the TK operator is not practically able to satisfy the requirements for such discretionary investment management business registration.

Similar to the exemptions available in the case of registration for self-offering, if any of the TK investors qualify as QIIs, the TK operator is not required to register as a discretionary investment manager even where it self-manages the TK investment funds, provided that certain other requirements (such as limitations on the number of non-QII investors) are satisfied. The TK operator must still notify the FSA that it falls within this QII exemption for self-management.

Entrustment of the management of the TK investment funds to a registered discretionary investment management firm, as well as meeting some additional requirements, will also exempt the TK operator from registration. Certain notifications to the FSA of the intention of the TK operator to apply this exemption is required.

B) Asset manager

An asset manager that offers investor advisory services to a TK operator is required to register as an investment advisor. Where the asset manager is given the authority and power to make decisions on buying and selling the investment assets, however, that asset manager is required to register as a discretionary investment manager.

If an asset manager also negotiates on behalf of the TK operator in offering TK interests, that asset manager will need to be registered to conduct second-type financial instruments business.

TMK structure

(i) Summary of TMK structure

A *tokutei mokuteki kaisha* ('TMK') is similar in many ways to a joint-stock corporation, which is the Japanese equivalent of the US corporation. The TMK structure allows for, among other things: (i) issuance flexibility with respect to a variety of securities reflecting different levels of risks and returns; (ii) subject to compliance, elimination of typical joint-stock company double-taxation treatment; and (iii) certain tax advantages at time of acquisition of real estate (eg, registration and acquisition taxes is discounted from the standard rates).

Unlike a joint stock corporation, a TMK is limited in purpose to holding and disposing of an asset in an asset securitisation arrangement, and therefore relies on outside service providers for operational, management and dispositional functions. The members of the TMK, which are the equivalent of shareholders of a joint stock company, have the ability to participate in governance and decision-making, however, distinguishes the TMK from the GK-TK structure, where the TK investors must remain 'silent' and thus cannot participate in management decisions with respect to the TK business.

(ii) Application of FIEA to TMK

The FIEA imposes fewer regulatory restrictions on the TMK than on the GK-TK structure. A TMK falls outside the scope of the FIEA with respect to self-offering and self-management and thus is not required to register for these activities.

With respect to asset management, a TMK's asset manager is not required to register if the investment asset is real estate, even where management of the real estate to such asset manager. Where the investment asset is a trust beneficiary interest, as in the case of the GK-TK structure, whether the asset manager has to register as investment advisory or discretionary investment manager depends on the scope of decision with which it is entrusted.

Conclusion

The foregoing are some of the most important factors foreign investors might want to take into account in deciding on an investment structure as between TMK or GK-TK with respect to Japanese real estate. In particular, the FIEA regulatory structure applies to these structures differently, with the TMK being subject to fewer regulatory requirements, and the GK-TK structure dependent on meeting certain crucial exemptions. ■

NAGASHIMA OHNO & TSUNEMATSU

Sale of agricultural land in Slovenia

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In this article, the author shall present a specific issue in the legal regulation of real estate in the Republic of Slovenia, namely the sale of agricultural land, which is regulated by a mandatory legal regime. This regime is set forth in the provisions of the Agricultural Land Act (hereafter referred to as 'ZKZ') which dictate that agricultural land may only be sold in a special administrative procedure, meaning that the provisions of the said act supersede the general provisions of the Code of Obligations and/or the Law of Property Code.

Real estate not classified as agricultural land is not covered by the rules of sale set forth in ZKZ which means that only the following requirements must be fulfilled for the creation of a valid contract of sale: a valid binding contract (which must be in written form), a valid act of conveyance, the seller's legal capacity to dispose of the property, and other conditions provided by the law. The sale of agricultural land (including cases where land is designated as agricultural only in part), on the other hand, is subject to a specific procedure.

According to article 20 of ZKZ, an owner intending to sell agricultural land, forest or farm must submit an offer, ie a proposal for the conclusion of a contract, containing all the essential elements of the contract, to the competent administrative unit. The administrative unit must publish the offer on a notice board and on the uniform national platform called 'E-Uprava'. Anyone wishing to purchase the land in question must, within 30 days of the publication of the offer, provide a written declaration of acceptance of the offer to the seller and to the administrative unit.

Within 60 days of the expiry of the deadline for the acceptance of the offer, the seller must submit a request for approval of the contract to the administrative unit. Pursuant to article 22 of ZKZ, the administrative unit issues a decision on the request in the so-called approval procedure, taking into account the legal presumptions set forth by the law, such as pre-emption beneficiaries (owner, farmer bordering on the land in question, tenant of the land, another farmer, agricultural organisation, and the Agricultural Land and Forests Fund of the Republic of Slovenia) and their order.

If none of the pre-emption right holders exercise their right, the seller may sell the land to anyone who has accepted the offer in due time in the prescribed manner provided that the concluded contract is approved by the administrative unit following article 22 of the ZKZ.

The purpose of the existence of the pre-emption right with regard to agricultural land is justified by a constitutionally permissible objective, ie to limit the legal transactions concerning agricultural land in such a way that it retains its primary productive function to the extent necessary to ensure the food supply of the

It is important to mention that the seller is bound by the offer he has made and may not unilaterally withdraw the already accepted offer or exclude his obligation against the pre-emption beneficiaries.

population of the Republic of Slovenia. The right of pre-emption lays down no further limitations to the owner of agricultural land, except for the limitation of its disposition.

It is important to mention that the seller is bound by the offer he has made and may not unilaterally withdraw the already accepted offer or exclude his obligation against the pre-emption beneficiaries.

Given the above described procedure and the fact that ZKZ – as *lex specialis* – does not regulate the moment the contract for the sale of agricultural land is concluded, different theories circles in the Slovenian legal system as to when exactly the contract should be deemed to be concluded, however, this issue has been resolved by the Supreme Court of the Republic of Slovenia which held, in its landmark decision, that the contract itself is concluded in the moment when the seller receives the buyer's declaration containing the acceptance of the offer and that such a contract is concluded under a suspensive condition which is fulfilled when the administrative unit issues a decision approving the legal transaction.

The above means that there is a possibility that several contracts may be concluded between the same seller and different buyers for the same agricultural land (if more than one buyer issues a declaration containing the acceptance of the offer), however, only one may actually enter into force – the one approved by the administrative unit.

After the approval of the transaction by the administrative unit, the seller is obliged to issue to the buyer a land registration permission necessary for the registration of the transfer of ownership in the Land Registry, which represents the final pre-requisite in the transfer of ownership over agricultural land. Should the seller refuse to fulfil this obligation, the buyer whose contract was approved by the administrative unit may file a lawsuit with the competent court seeking the issue of such land registration permission. Should the court grant such a claim, the buyer may then use such a ruling to achieve the registration of the ownership transfer in the Land Registry.

This article represents a short overview of the legislation regulating the sale of agricultural land in the Republic of Slovenia and the potential issues related thereto. This set of very formal rules is a specific feature of Slovenian law which may, if not adhered to, lead to the invalidity of sale and purchase contract concerning agricultural land. ■

The growing popularity of climate litigation – trends, impact and what's coming down the track

Niall McLean at Brodies discusses climate litigation trends, challenges in the energy sector, and what the future looks like for climate change cases.

Climate litigation has become an increasingly popular tool for a diverse range of groups promoting their interests in relation to climate change issues. According to a recent report from the Grantham Research Institute on Climate Change and the Environment, the cumulative number of climate change-related cases worldwide has more than doubled since 2015 to over 2,000, with over 500 of these being brought since 2020.

Emerging trends

Climate change litigation has become a key instrument to enforce or enhance climate commitments made by governments. Its increasing importance has been fuelled by the success of several high-profile cases: of the eight decisions in this field handed down by the higher courts, six have had favourable outcomes for campaigners for climate action.

The most common strategy used in climate cases is to attempt to introduce emissions standards and international climate treaty considerations into government decision-making and policies. Although ultimately unsuccessful, the legal challenge lodged in 2020 by several environmental groups against the UK Government's approval of the expansion of Heathrow Airport for failing to consider the country's international climate commitments represents a high-profile example of this type of challenge.

Following the success of *Urgenda Foundation v State of the Netherlands* in 2019, in which the Dutch Government was ordered to reduce its emissions by 25% by the end of 2020, it is 'framework cases' – those that focus on the design and ambition of a government's policy response to climate change – that attract the most media and academic attention.

In the recent High Court decision *ClientEarth v Department for Business, Energy & Industrial Strategy* the High Court found that the UK Government had failed to include enough information in policies to show that its net zero strategy would be sufficient to meet its legally binding emissions reduction targets. The court required the government to return eight months later with an updated and strengthened strategy.

This was a similar outcome to the Supreme Court of Ireland's finding in 2020 that the Irish Government's National Mitigation Plan fell short of what was needed to meet the country's climate commitments. Again, the government was ordered to present a revised and updated strategy containing more detailed information about its climate change policy.

Challenges in the energy sector

It is of no surprise that most climate litigation targets the phasing out of fossil fuels. Most cases take the form of challenging government decisions to grant new permits to coal mines and oilfields, or suing oil and gas companies directly for emissions-linked damages or a failure to transition to greener technologies quickly enough.

But oil and gas producers have begun to challenge governmental climate action. Using an arbitration mechanism (investor-state dispute settlement) contained within the Energy Charter Treaty –

> **Most cases take the form of challenging government decisions to grant new permits to coal mines and oilfields, or suing oil and gas companies directly for emissions-linked damages or a failure to transition to greener technologies quickly enough.**
>
> **Niall McLean, partner, Brodies**

a 1990s pact signed by over 50 countries after the fall of the Soviet Union to protect foreign investments in energy in case of expropriation of assets – these producers have already claimed billions of pounds in compensation from EU governments as they commit to moving away from fossil fuels. As recently as August 2022, UK oil and gas company Rockhopper received €190m from the Italian Government through this mechanism.

While there have been efforts to modernise the treaty for a post-Paris Agreement world where climate action is necessary, the threat of these ISDS actions has led to a 'regulatory chill', and Laura Létourneau-Tremblay, a doctoral research fellow at University of Oslo, has stated that there are 'real concerns as to whether the ECT is compatible with the net-zero energy transition.'

Public and private financial institutions

Both the Paris Agreement and the Glasgow Climate Pact have emphasised the role of finance in the transition to a low-carbon future and this is now reflected in an increase in litigation brought against financial and investment institutions.

Cases targeting 'portfolio emissions' have been brought against universities, pension funds, and banks in the UK and around the world, with litigants arguing that failure to divest from fossil fuels constitutes, for example, a breach of the law (eg state or human rights law), or financial mismanagement.

It is also clear that litigation is increasingly focusing on investment decisions made by public financial institutions, for example the European Central Bank (as in *ClientEarth v Belgian National Bank*). There is still uncertainty as to whether such institutions are legally responsible for considering scope 3 emissions (including those arising from investments). However, Mrs Justice Thornton in *Friends of the Earth v UK Export Finance* commented that UKEF 'had to demonstrate that funding the project is consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C' – as set out in the Paris Agreement. Such comments may indicate an acceptance that investing institutions must exhibit more comprehensive consideration of climate issues.

Climate litigants are also increasingly finding creative ways of holding investors to account for failing to take account of the financial risk of their investments in relation to climate change and the shift towards cleaner energy. In July 2020, after buying shares for €60 in the co-sponsor of a Polish coal plant, ClientEarth raised a lawsuit against the company for investing in a risky stranded asset.

Similarly, another trend in climate litigation focuses on holding public bodies and corporates accountable for any climate-related claims they make. This is of increasing importance given widespread public debate about the contribution that individual lifestyle and consumer choices can make to climate change and the importance of clear communication by companies about their 'green' credentials.

These 'greenwashing' challenges may be filed either before the courts or non-judicial oversight bodies such as advertising standards boards.

> **There has been a steady increase in the number of climate change cases being lodged annually – now over 200 a year – and there is nothing to suggest that this will change.**

The impact

According to the Grantham Institute's report, where relevant decisions on merits in climate-related cases have been handed down, 54% of them have had outcomes favourable to climate change action.

While this is a noteworthy figure, there are countless cases and challenges that do not make it to court but still have an impact on corporate and governmental decision-making processes. For example, a legal challenge against South Korean export credit agency, Kexim, resulted in their delaying a decision on whether to finance a gas project off Australia, citing environmental and legal risks.

However, the unintended consequence of the trend of increasing climate litigation may be a reluctance from national and sub-national governments to commit to the kind of ambitious emissions reduction targets that are required to comply with the Glasgow Climate Accord's aim of limiting global warming to 1.5°C.

The *Summary for Policymakers* published alongside the latest IPCC report recognised litigation as affecting 'the outcome and ambition of climate governance', but a case could be made for the fact that governments are in fact being pulled in opposite directions by the oil and gas industry and environmental organisations alike.

What does the future look like?

There has been a steady increase in the number of climate change cases being lodged annually – now over 200 a year – and there is nothing to suggest that this will change.

Based on recent trends, a further diversification of claimants and defendants can also be reasonably expected, reflecting the way in which climate change has the potential to impact on a broad range of groups and sectors.

While governments and the oil and gas industry will likely continue to be the primary focus for climate litigation, recent years have seen more cases brought against other traditional heavy industries and in sectors including food and agriculture, transport, plastics, and finance.

It is likely that areas such as shipping, aviation, textiles, and steel and concrete will also become the subject of litigation in the coming years.

Recent climate litigation developments also suggest that litigants will continue to broaden the variety of fields in which they bring cases, with the actions of individuals likely to be subject to closer scrutiny and more regularly brought before courts.

It is also anticipated that governments and major emitters will have to respond to an increasing number of cases addressing prevention of and redress for climate change – now commonly known as 'loss and damage' – and challenges to energy transition commitments that rely too heavily on emission reduction technologies like carbon capture and storage (CCS). ■

Urgenda Foundation v. State of the Netherlands
[2015] HAZA C/09/00456689
ClientEarth v Department for Business, Energy & Industrial Strategy
[2021] EWCA Civ 43

BRODIES LLP