Spring 2021

IFLR

Women empowering change

Female leaders in the banking and legal professions reveal how to get more women into leadership roles

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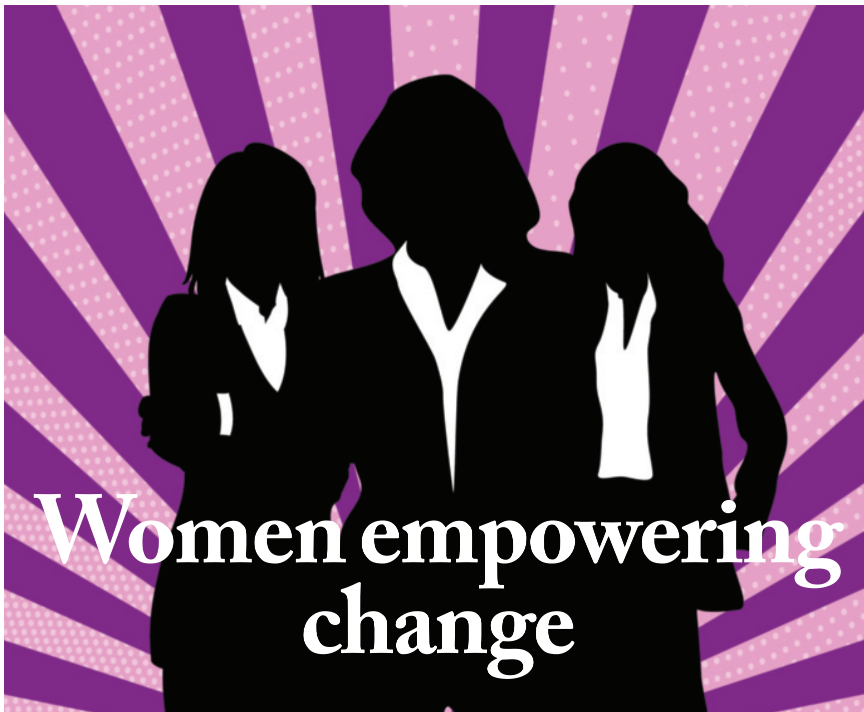

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"It's not easy to be in the minority but you start to feel more comfortable when there are other women occupying important leadership roles"

Bénédicte Nolens, head of the BIS innovation hub in Hong Kong SAR, on empowering women

EDITORIAL

Light at the end of the tunnel

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When I took over as Managing Editor of IFLR in late 2020, we were living in a different world. Donald Trump was still president, the UK was still part of the European Union and a Covid-19 vaccine felt like a distant glimmer.

Now, as we move towards the second quarter of the year and the number of successful vaccinations continues to grow, there appears to be light at the end of the tunnel. In early March, Congress passed a $1.9 trillion coronavirus relief package aimed at boosting the economy, a step that will take huge steps to undo some of the pandemic's economic damage.

Of course, around the world things are not moving at quite the same pace. While the US, the UK, Israel and other first world countries are making great progress with vaccine rollouts, some anticipate that large parts of the emerging world could take as many as three years to be fully vaccinated. The inescapable reality of vaccine passports and continued travel restrictions is going to be an issue for years to come, and is something that legal and financial sectors must take action to help prevent.

Of course, Covid-19 is not the only pressing issue we face, the world remains greatly unequal.

March 8th was International Women's Day. To celebrate the occasion this year we dedicated this entire edition to the topic. Asia reporter Karry Lai and I put together the cover story, which looks at how women can create change (page 16). It discusses what key leaders see as the biggest challenges to get more women in leadership roles, what initiatives and support programmes can help, and how regulation or company policy can drive change.

Elsewhere in the issue, IFLR1000 journalist Chynna Lewis spoke with Mary Akhimien, AGC at Bank of America, to discuss the issues of gender and race in the legal industry. It is an excellent interview that tackles an incredibly significant topic, you can find it on page 8. This month's market poll – from Natasha Teja – looks at how women lawyers have been disproportionately affected by Covid-19 , on page 6.

This edition also features the inaugural National Security Quarterly from Berkeley Research Group's Harry Broadman. Broadman, formerly of CFIUS, discusses what the Committee is going to look like under President Biden, on page 26.

I am happy to be tackling such an important issue for my first edition. The legal industry has been historically male dominated, a trend that will need real action to reverse – action from everyone who has any semblance of influence. This includes us. In our near 30-year history, IFLR has been something of a beacon for the industry and we will continue to be so for the next chapter of our story as well.

Together, we can #ChoosetoChallenge. Enjoy the issue.

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ONLY ONLINE

EMEA

SPACs turn to Europe for new targets

With the US market nearing saturation point, Europe has become the new hunting round for SPACs looking for high growth acquisition targets. However, existing regulatory and structural issues make listing a SPAC in Europe a less attractive option

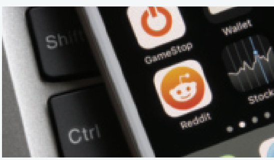
ASIA

India's insolvency scheme evolves on pre-packs

A Chapter 11-style plan will help to encourage investor participation for distressed assets but is clouded with implementation risks. Lawyers in India are optimistic that the proposed scheme will speed up the insolvency process but see potential implementation issues

AMERICAS

GameStop drama leaves SEC in tricky situation



The chaos surrounding the retailer's stock price raised significant manipulation issues for the capital markets regulator, and it is not necessarily equipped with the tools to handle it. The issue at hand for the SEC is how it can control unprecedented market volatility

EMEA

UK ban on cryptocurrency derivatives may stifle innovation

As the world moves to open up digital asset innovation, the UK has gone in the opposite direction with its ban on the sale of cryptocurrency derivatives. Critics feel the regulation could potentially set the country back against the global trend and stifle innovation

ASIA

Chinese companies unfazed by US securities audit rules

Re-listing in Hong Kong SAR or Shanghai won't be end of the world for companies listed in the US, meaning the new rules are significantly less threatening than expected. The rules require that auditors of foreign public companies allow the PCAOB to inspect audit papers of non-US operations

AMERICAS

USD Libor delay: problem solver, or problem creator?

The initial industry response to the multi-agency decision to delay parts of the USD Libor transition was positive, but some sources argue the delay is causing more problems than it is fixing. The announcement goes against everything that has been said so far

QUOTES
OF THE MONTH

"The Libor transition is very space-mountain-y – we're in the dark, not exactly knowing where we're going. It has taken years to prepare it, this is the last stretch, and hopefully it will get people home safely"

Jason Granet, managing director at Goldman Sachs, discusses the seemingly endless work to transition away from the expiring rate

"Companies need to be aware of the stages in a woman's career because if they are ignored, women will continue to drop out of the workforce at these critical junctures, perpetuating the gap at the top"

Bénédicte Nolens, head of the BIS innovation hub in Hong Kong SAR, discusses the difficulties in getting women into positions of authority, on page 20

"More and more we are seeing US SPACs targeting European opportunities, particularly in growth sectors like tech"

Adam Kostyál, head of European listings at Nasdaq, expects more and more SPACs to reach the European markets this year

"Regulators have congratulated themselves on the resiliency of banks during this volatile period, insofar as they have enabled banks to continue to provide a degree of lending to the real economy despite economic turmoil"

Ferdisha Snagg of Cleary Gottlieb believes Basel III buffers have been especially effective in the battle against Covid-19

ASIA

China's antitrust regulator tightens its grip

China's regulators have made it loud and clear that antitrust investigations will be a top priority for 2021.

According to a plan released by the Communist Party Central Committee and the State Council, China has stated that it "resolutely opposes monopolies and unfair competition behaviour" and will step up regulation in sectors such as platform businesses. Zhang Gong, head of the State Administration for Market Regulation, China's antitrust watchdog, has indicated that the regulator will monitor and block companies from disrupting fair competition with their use of big data and technology.

Following Alibaba's antitrust probe after the surprise suspension of Ant Group's IPO in November 2020, Ant Group has agreed to restructure its business such that it will group its fintech businesses under a financial holding company subject to bank capital requirements.

A series of antitrust enforcement actions from December 2020 onwards on internet companies China Literature and Hive Box have demonstrated that China's antitrust regulator is tightening its grip over monopolistic behaviour. The companies were fined for not reporting past deals properly for antitrust reviews, specifically China Literature's acquisition of New Classics Media in 2018 and Hive Box's purchase of China Post Smart Logistics in 2020.

Companies in the gig economy, such as ride-hailing app Didi Chuxing and e-commerce platform, Meituan, are also in hot water. For instance, Meituan, which commands 60% of the Chinese food delivery market, faced backlash for its high commission rates. Many restaurants suffered great losses during Covid-19 and the additional burden did them no favours. It also locks in selected merchants with exploitative commission contracts that take a lower commission from restaurants that are listed only on its platform, than those also listed on alternative platforms.

All eyes are also watching closely the lawsuit between video-sharing platform Douyin, which is owned by ByteDance, and Tencent. Douyin has launched a lawsuit over alleged monopolistic behaviour. The lawsuit revolves around the inability for users to share Douyin content via the WeChat platform, which is owned by Tencent. This is the first antitrust case between China's internet platforms since new anti-monopoly guidelines were announced in February 2021.

What jumps out is the increase in the upper limit of fines under the new rules. They are expected to rise from RMB500,000 ($77,423) to 10% of the operators' sales in the previous year.

For digital economy companies in China, the days of operating with free rein and wild growth may soon be over. What will be interesting to keep an eye on in the coming months is how far Chinese regulators will go to keep badly behaving companies at bay.

AMERICAS

Coinbase IPO will be a turning point

A couple of times a year an IPO takes centre stage. Uber, Slack, Snap, AirBnB, Tesla – they've all been the one to watch on Wall Street in previous years. Right now, it's Coinbase – the cryptocurrency equivalent of big tech.

Like others before it, Coinbase has forgone the option of a regular IPO and taken the ever popular direct listing route. This process involves investors and employees converting their ownership stakes into stock that is then listed on an exchange and no new shares are offered.

Among other benefits, a direct listing is a cheaper way for the company to go public. By this point a direct listing is nothing new, and that is not what will be discussed here.

In its much anticipated S-1, Coinbase omitted some key numbers which will not allow it to be fully valued until the listing is complete. However, an Axios report valued the company at over $100 billion in February based on its most recent sale of shares on the secondary market. Some suggest that the company will end up with a $200 billion valuation.

The company itself is definitely making money, with very positive financial reports. Founder Brian Armstrong is set to join the ranks of the world's richest once the listing is complete.

The Coinbase IPO is going to be a turning point for cryptocurrency, and for finance more generally. The IPO is a vindication of a company's success – what better way to legitimise the most prominent member of a once rogue and subculture industry than by

listing it on Nasdaq's exchange with a huge valuation?

Firstly, the listing is going to authenticate the business of bitcoin and the array of alternative cryptocurrencies, or altcoins, that Coinbase buys, sells and trades on its platform. This is an important step in the evolution of the sector. Despite early stories of two pizzas being sold for 10,000 bitcoin, the currency really found its feet on the dark web as a means of payment for drug dealers and other illicit merchants on the Silk Road website.

This start was far from ideal for the cryptocurrency sector, and has marred its development at almost every turn over the last decade. As bitcoin gets backing from institutional investors, banks, governments et al, ridding itself of the shackles of these negative connotations will be a huge step.

More than anything else, Coinbase listing on Nasdaq this month will be the turning point that some in the cryptocurrency space have been looking for. The move will not be welcomed by those that prefer the sector to remain unregulated and decentralised, as per the original modus operandi.

Once Coinbase completes its IPO, bitcoin will have a new-found sense of legitimacy. Most people see that as a positive, others of course will not.

EUROPE

'Singapore on Thames' model is a post-Brexit fantasy

The low tax, deregulated economy of a 'Singapore on Thames' model might seem attractive, but it is unlikely to ever take off in Britain.

As Europe slowly chips away at London's financial crown, most recently with Amsterdam overtaking the city as Europe's largest share trading hub, the prospect of a Singapore on Thames model has been widely debated. The concept, however, is nothing but fantasy.

The idea was first floated in 2017 by then chancellor Philip Hammond. The model would bring about a low tax, light regulation, open for business economy that would rival the European Union's heavily regulated financial sectors.

A move towards this kind of model would significantly diverge the UK economy from its immediate neighbours.

Markus Ferber, MEP, has informed Boris Johnson that turning the Square Mile into a "Singapore upon Thames" would leave the EU no choice but to declare the UK non-compliant to key rules pertaining to its financial markets.

A flawed model

The very analogy of 'Singapore on Thames' itself is flawed. Those familiar with Singapore are aware that the island nation's economy is far from deregulated.

In 2019, Sir Martin Sorrell, a prominent British businessperson, stated that Britain should be "Singapore on steroids" with a regulation-light, tax-light UK economy, open for business in ways not seen before.

"The UK should be the home of Amazon, Google and Facebook, not a regulatory nightmare," he said.

However, the idea that Singapore's success is built upon this model of low taxes and light regulation is detached from reality. While the city state's economy is enviable, its success has been predicated on being the trading hub of Asia, not a deregulated economy.

In contrast, Brexit threatens London's role as a trading hub, disrupting supply chains and the ease of doing cross-border business.

The reality is that Singapore is not the laissez-faire economy Britain may believe it to be. The state remains a major shareholder in key domestic industries, from banking to telecommunications to electricity.

In fact, Singapore is often mocked by the rest of Asia for being a 'nanny state', a term in which the late Lee Kuan Yew, the state's former long-serving leader, took pride.

Open for business

One aspect where Britain may succeed in following the Singapore model is the city state's open immigration and low tax. Their open-door policy has attracted entrepreneurs and top talent, which in turn helped propel the economy forward.

However, the Trade and Cooperation agreement with the EU keep's Britain's tax policies in check. While the UK is free to compete on tax rates, many tax avoidance and anti-money laundering restrictions ensure that both sides have competitive tariffs.

In essence, if Britain wants to succeed with a Singapore on Thames model, it must significantly rethink and reshape the true realities of the proposal. Britain has a lot to learn from its former colony but only if it studies the model for what it truly is – and not the fantasy it thinks it is.

OFF THE

RECORD

"I talk to these people every day, and of course it undermines the whole thing, it is ridiculous that the ARRC did not get advance warning and was not consulted"

One New York-based source who works closely with several ARRC members was not impressed with the way the USD Libor delay was handled

"In most families there is already an unequal division of labour. I think it has been particularly difficult for women with families and children or women who are caregivers"

An executive director at a large UK Bank discusses how Covid-19 has impacted women more than men, on page 6

"It's like the boy who cried wolf. Every time the US inches towards doing inspections of audit firms, something happens at the end and the two countries come to a compromise"

The managing director of a private equity firm in Hong Kong SAR is confident that the US and China will come to a compromise before anything drastic happens

"I don't think Clayton was pushing things through that were terribly political or didn't have support, in some cases, the incoming team says 'actually get it done', because they are not opposed to it but don't want to spend political capital on it"

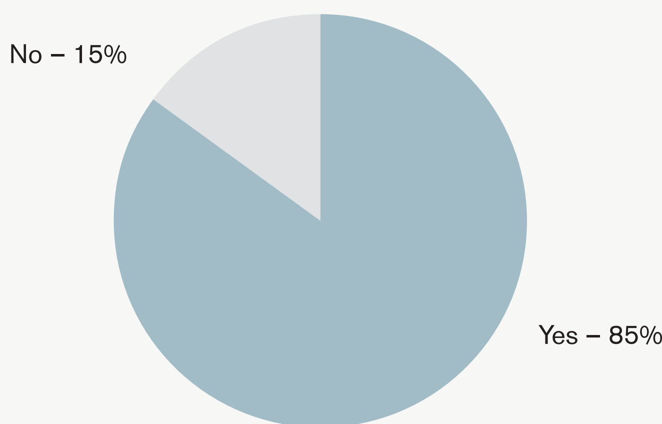
A DC-based source with a wealth of experience in the US regulatory system discusses the last actions of the outgoing SEC chairman

Sharing the burden

For this edition's poll, IFLR asks women practitioners if they have felt disproportionately affected by the pandemic. Thanks to an uneven share of household responsibilities and childcare, respondents think they have

By Natasha Teja

Do you think the Covid-19 pandemic has created disproportionately greater challenges for women practitioners?



A survey conducted by IFLR aimed to investigate whether the pandemic has created disproportionately greater challenges for women in the legal industry. With over 100 respondents, 85% said that the pandemic has created greater challenges for women practitioners while the remaining 15% said it had not.

Respondents cited childcare issues, household chores and longer working hours as the biggest reasons to how the pandemic has negatively affected them.

Childcare issues and more household responsibilities

Childcare issues were the number one reason stated as to why the pandemic has been harder on women. "In most families there is already an unequal division of labour. I think it has been particularly difficult for women with families and children or women who are caregivers," says an executive director at an American Bank.

"For my colleagues the women are doing most of the childcare and the home schooling. The existing differences were exacerbated by the pandemic," she continues.

From speaking to friends and colleagues she found that many women were left with the task of ensuring the children were on track. This included providing extra support for homework, driving them to their activities or helping them log onto online classes. "Women have invariably taken more of that work burden."

METHODOLOGY

IFLR publishes its quarterly poll question on iflr.com. Throughout the quarter, IFLR's editorial team gathers the responses and interviews selected respondents.

"I am finding that I'm not being as productive because I'm being constantly interrupted or disrupted by my children," she continues.

While Joanna Fields, founder of Aplomb Strategies, agrees with the notion that balancing work and household tasks such as childcare has been difficult, she believes it may have helped long-term career prospects.

"I think that this year has actually shown that women can and have stepped up," she says. "Which is why I've seen a lot of women move into more senior roles. There's been a lot more movement this year than I would have expected."

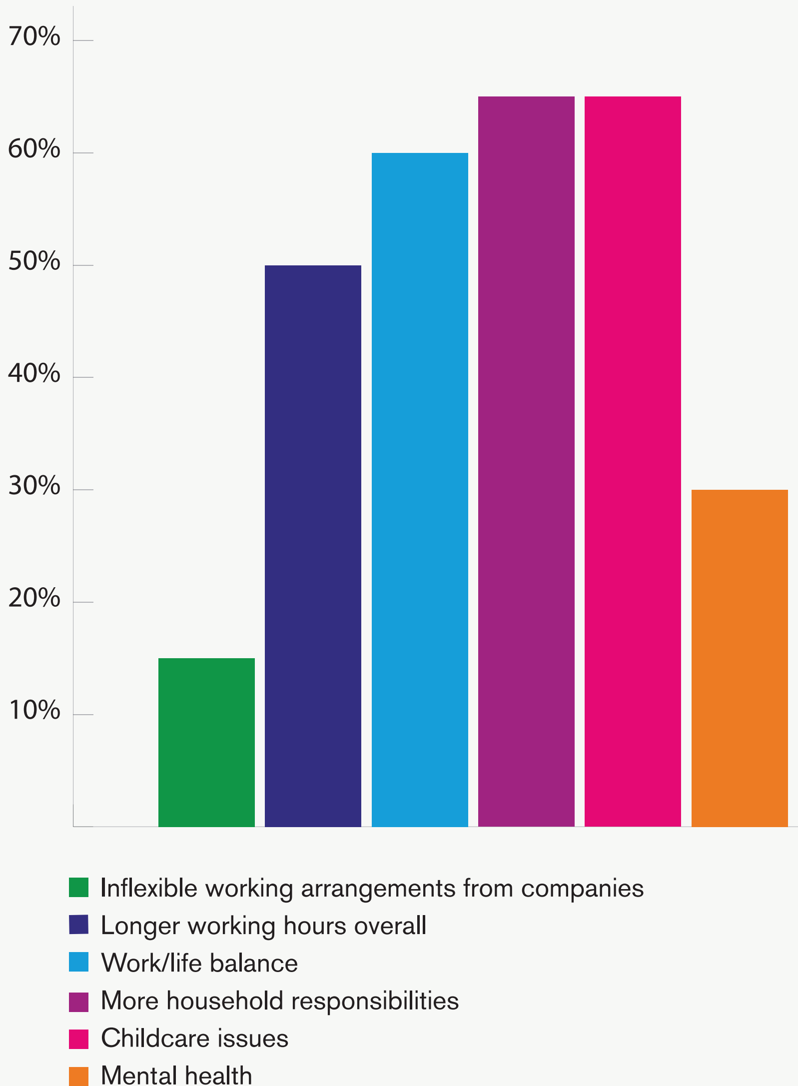
Longer working hours

The second reason stated in the survey as to why the pandemic has created disproportionately greater challenges for women practitioners is longer working hours. However, this effect may not be felt by women alone.

In April 2020, 47% of workers in the UK were working remotely compared to an average of 14% in April 2019. Many found that working from home blurred the lines of when work started and ended compared to the rigidity set out by the nine to five structure.

On the other hand, flexible working has created more opportunities for others.

"While the restrictions of lockdown have presented many challenges, what I know first hand from family, friends and colleagues is that the pandemic has allowed people to rid themselves of the



'shackles of the schedule'," says Nicola Stott, CEO of Exigent. "I think that's been a relief and an enormously valuable opportunity for many."

People have been able to reshape their lives to take care of themselves better.

"Instead of having to rush out the door, it's given back some control over their day – perhaps to fit in a yoga or mindfulness session in the morning or the time to prepare meals during the day instead of grabbing some fast-food down the road from the office," continues Stott.

With better work flexibility the pandemic has allowed additional time for learning and development. "I think the pandemic has helped the well-being agenda in terms of the time aspect. I've started to think about what I want to achieve for the day instead of just thinking of the 9 to 5," says Leslie Jerry, director of people at Exigent.

"I can fit more into my day. There have been more opportunities for learning and development," she adds.

A level playing field

Many networking opportunities and chances to move up the career ladder present themselves in after-office social activities.

"Men work together in groups. They go out, they drink. So making sure that you make the time to build relationships, and work together is always key. It's not always something women either have the opportunity to do, or that they have the luxury of doing," says Aplomb Strategies's Fields.

"But this last year has created a level playing field for the first time," she continues. "Since everyone is working from home and these networking opportunities moved online, women are able to better participate in them."

The importance of relationships

Another aspect that the pandemic has taught both men and women is the importance of relationships. Mary Akhimien, assistant general counsel at Bank of America, who is profiled in this edition, stresses the importance of working closely with colleagues.

"I think the one silver lining, if there is one, is that we've all come to realise now more than ever that the crux of our business model is relationships," she says.

"Building and cultivating relationships are integral in every industry, but in the legal industry, who you know and how well you're known not only sets you apart, but it can also help you land your next opportunity," she continues.

An effect on everybody

While our survey found that 85% of respondents felt that the pandemic has disproportionately affected women practitioners, there were still 15% that felt differently.

"I don't believe that the pandemic treats us equally. It doesn't treat us as individuals or organisations equally," says Exigent's Stott. "I felt it was too much of a generalisation to say that the pandemic has been harder for women."

This is not because she does not think it has been hard for everyone, including women, but that it has not been disproportionately difficult for women. "It is not fair that women claim the top of the 'challenging' leader board," she says. "I know for sure that my male relatives, friends and colleagues would dispute that for sure."

While it is difficult to truly determine how disproportionately the pandemic has affected women, it has likely exacerbated existing inequalities. For both men and women, Covid-19 has presented unique challenges and learning opportunities that are likely to affect us in the many years to come.

PEOPLE AND CULTURE

INTERNATIONAL WOMEN'S DAY 2021

The sky is not the limit

IFLR1000 journalist **Chynna Lewis** and **Mary Akhimien**, assistant general counsel and senior vice president at **Bank of America**, discuss the issues of gender and race in the legal industry

Currently serving as assistant general counsel, senior vice president at Bank of America, Mary Akhimien is a highly accomplished lawyer. IFLR1000 journalist Chynna Lewis had the honour and pleasure of sitting down (virtually) with her to discuss her experiences as a Black woman in the legal industry, as well as her outlook on diversity and inclusion.

Hi Mary, thanks so much for taking the time to talk to me today. What obstacles have you faced during your legal career related to your gender and race?

I think the obstacle is not as important as knowing where you are going and how you overcome the obstacle to reach your destiny. My parents came to this country as immigrants, and they instilled in me and my siblings the importance of hard work, determination, and developing a strong skill set. In my experience, race and gender have not been the key differentiators, but it's about skills and the development of those skills.

When you develop your skill sets, you can do well and adapt in any environment. Leaders have those people skills – they know how to navigate any environment and they know how to get a job done. By taking on leadership roles, I have acquired numerous skill sets such as leadership and management skills, teamwork and adaptability. These skills have been transferable from the boardroom to the courtroom.

Harnessing those skills is really what's helped me to overcome any obstacle. At the end of the day we all face challenges and obstacles, but the obstacle is not as important as how you overcome it.

That's a fantastic perspective. Going off that, what do you consider your biggest success in your career, and what is the most important thing you have learned so far?

That's a great question. I worked in private practice at a law firm before coming to Bank of America, which gave me exposure to federal and state court systems, lawyers and judges in the District Court of Delaware, Delaware Court of Chancery, Superior Court and Supreme Court. Through litigation, I gained a solid grasp of how judges thought about cases, and also gained experience with crisis management and resolving complex cases successfully for my clients. That was a huge asset and transferable skill set.

When I joined the bank, I was able to quickly spot the issues in complex matters, find holes in the other sides' arguments, and zealously represent the bank. So, without question, joining Bank of America's in-house legal department and working under the leadership of our CEO, Brian Moynihan, and general counsel, David Leitch, has been the biggest success and highlight of my career thus far. David, and many other leaders in our legal department, such as deputy general counsel, Amy Littman, and [associate general counsel] Mary Ulmer-Jones, taught me the importance of teamwork, staying connected, and that a collaborative culture is a true bellwether for success.

Do you have any mentors that helped you to get to where you are and, more broadly, how important is mentorship to you?

Mentorship and sponsorship are so important. I've had several mentors and sponsors that have had an impact on my career, too many to name. Some I've known personally and others I've admired from afar. I'm truly grateful for all of those mentors and their continued efforts to show me what's possible.

During high school, I participated in the Delaware High School Mock Trial competition, and got first-hand experience of courtroom decorum. I won a Best Attorney gavel there, and that's when I knew I wanted to practice law. From that experience, and with encouragement from my mentors, I decided to pursue law school.

During this time, I started a mentorship programme called Footprints. It paired law students in the Black Law Students Association with practitioners in in-house legal departments, government and at law firms. The programme was very successful, and I believe it still continues to this day.

I strongly believe that as you are being poured into, you should turn around and pour into someone else. Mentoring is so important, but so is giving back. I'm very much indebted to the Delaware High School Mock Trial programme, I was a scoring judge for that competition in February. I sign up to be a scoring judge every year, because that was a pivotal moment in my life. Continuing to be a part of that programme is very, very important to me and something that I strive to do every year.

"Diverse attorneys have to be receptive to coaching and sponsorship and do their part in engaging with their mentors and recognising the value of that exchange"

The financial and legal industries are known to be heavily white and male dominated, and we as Black women are often 'the only one in the room'. How have you gained comfort in establishing yourself in these spaces?

It is true, but it is important that we don't make assumptions about people. For example, if I'm in the room or a new environment and no one has reached out to me, I take the initiative by going around the room, introducing myself and making new acquaintances. I genuinely like to meet new people and find out what we have in common, if we have similar hobbies or like the same football team (the Pittsburgh Steelers, by the way).

Once I find those commonalities and interests, it gives common ground for conversation and that is how the relationship is built. Even when I don't have something in common with someone, I like learning something new from those differences. That has always been my approach, it's not so much being the only one in the room, but knowing how to best navigate that dynamic. That's what leads to success.

Going back to this theme of mentorship, you're involved with the Corporate Counsel Women of Color (CCWC) and now you sit on the advisory board. Can you tell me about your involvement with the group?

I was drawn to the organisation because I wanted to expand my network beyond Delaware and connect with people who not only looked like me, but who were at the top of their game. I wanted to know how they got to where they are, their leadership style and the lessons they learned along the way.

I first attended the annual conference in Chicago in 2012 as a junior associate. I met so many phenomenal women, including the founder Laurie Robinson Haden and many others in leading legal departments. After that one conference, I made it a point to attend every year, sponsoring myself as a personal investment. Last year I had the opportunity to speak at the boot camp.

Meeting so many different women and attorneys who are at the top of the house – c-suite, chief legal officers and general counsels – has been phenomenal. I've been able to connect with them on so many different levels, both within and outside of that environment. I actually met the predecessor for my current role through CCWC. When she left the bank, she told me about the opening at Bank of America, and, after the interview process, I was hired.

I love how driven and initiative-taking you are. What advice would you give to young Black women looking to start a career in law? What is something you wish you knew earlier in your career?

I would say never give up. No matter how hard things get or the obstacles that come your way, just don't give up. I heard this great quote recently, "tough times never last, but tough people always do."

Young lawyers have everything they need to not just survive, but to thrive in this industry and they shouldn't limit themselves. The sky is not the limit, it is the baseline. They should continue to dream big and do everything they can to reach their dreams.

The one thing I wish I knew earlier in my career is to never be afraid to take chances.

Shifting to corporate law more generally, how do you think the legal environment has changed from when you started to now, in terms of race and gender?

When I first started practising in 2009, diversity and inclusion was a nice buzzword in the legal profession. Very few firms were tracking whether diverse attorneys were being staffed on legal matters, where origination credits were going, and how bonuses, compensation and advancement was impacted by the presence or absence of diverse attorneys.

That dynamic has now changed and firms and corporations have become very granular about tracking that information and ensuring that women and minorities are not only staffed on matters, but that they're being compensated for it and receive the origination credits and career advancement.

What diversity and inclusion initiatives can firms implement?

These initiatives have to come from and you have to get buy in from the top. Without early support from the c-suite, it's very hard to make progress or to make an impact. Strong mentorship and sponsorship programmes are also crucial. Everyone has a role to play in this ecosystem and mentors and sponsors are certainly key players, those who invest their social and political capital in mentees really make the difference in the protégée's advancement. By that same token, diverse attorneys have to be receptive to coaching and sponsorship and do their part in engaging with their mentors and recognising the value of that exchange.

How can firms increase diversity, especially in the upper/senior management level?

Firms should be intentional about building out diverse pipelines and teams, casting a wide net and looking for diverse talent in non-traditional ways. This might mean going to schools they haven't traditionally gone to and recruiting from those talent pools, connecting with diverse student leaders to help build talent pipelines and grooming them for positions of leadership.

In addition, firms need to be intentional about their lateral hires. Some of that talent may already be within their organisation and it's up to recruiters and hiring managers to pay attention and keep their pulse on what

is going on in their own organisation, ask tough questions and make appropriate changes wherever they see gaps.

What initiatives has your firm implemented to promote diversity and inclusion (D&I)?

The Bank of America legal department has a sustained commitment to D&I. We have diverse in-house legal teams and leaders, and are intentional about working with diverse outside counsel teams and minority and women-owned firms. We also have firm-wide employee affinity networks.

Within the legal department, we have several resources available, such as the Employee Engagement Council, of which I am a member. It invests in the growth and development of teammates and provides forums for attorneys to connect globally.

We also have another resource called MINI networking sessions, which are like coffee break meetings, where we meet in small groups with other attorneys in the department. I have met colleagues in EMEA, APAC, and in our London and Latin American offices through the MINI programme.

We have a pro bono committee, which I'm also a part of, that lets us work on different projects that are important to the organisation and the communities where we live and work. Finally, we have our Diversity and Inclusion Business Council, which fosters an equitable and inclusive environment where employees really feel respected, valued and culturally enriched.

Ed Note: Bank of America also pledged $1 billion spread out over four years to advance racial equality and economic opportunity through various investments.

> ***"Creating an inclusive and equitable environment is not a black issue or a white issue – it is a heart issue"***

As you've mentioned before, you've worked both in private practice and in-house. Do you think there is a difference in how each group has developed and implemented corporate governance initiatives?

There is somewhat of a difference. I think corporations have been the driver of those routines. Many corporate firms have made it a business imperative for talent within the company to reflect and mirror the communities they serve, and they made the business case for their outside counsel to reflect that same diversity.

Corporate legal departments built the model, set the trend, figured out how to track and measure success and worked out how and what those governance routines needed to look like. Law firms have followed suit.

In 2020, we saw racial justice protests stemming from the deaths of George Floyd, Ahmaud Arbery and Breonna Taylor, among numerous other Black Americans. This became a huge catalyst for systemic change throughout the country. Do you think this event will continue to change the legal profession in the US?

Each of those tragedies reawakened our country to the need for change. Creating an inclusive and equitable environment is not a black issue or a white issue – it is a heart issue. Out of that tragedy, we saw firms release statements, and become more transparent about what they were going to do to address the issue in their communities and within their own organisations.

We are going to see that momentum continue, and we'll see greater strides made at every level of the organisation, certainly greater transparency, educational sessions and more inclusion initiatives. Organisations have to continue to track and measure, and make sure leaders are held accountable to what they committed to.

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EVENT REVIEW

European In-house Counsel Summit

The ninth annual IFLR European In-house Counsel Summit took place over February 9 & 10, covering a number of developments in the UK and European capital markets, in M&A and corporate sustainability, Brexit, competition law, and the impact of Covid-19 on the legal team

With the long-term implications of Covid-19 still unknown and the impact of Brexit unclear, 2021 will be a challenging year for banks and corporates in the UK and across Europe.

IFLR's EMEA reporter Natasha Teja highlights some of the key moments from both days of the event.

DAY 1

A year of change: key legal implications of Covid-19

Covid-19 has changed the way the world works dramatically. The initial challenges were related to completing deals while everyone was working from home – electronic signatures, for example, quickly become a key aspect of legal work, something that had not been the norm prior to the pandemic. Furthermore, for the first time, organisations called on medical experts to understand best practices such as business travel, vaccinations, and wearing masks in the office etc.

Companies were often faster than governments in responding to the pandemic. For example, shutting down operations and sending employees to work from home before it was mandated by authorities. Panellists discussed the importance of technology, which has played a significant role in easing workflows and ensuring continued productivity. Many organisations saw an increase in productivity as well-being became the focus during the pandemic, calling into question the future of workspace once the world exits the crisis.

Latest developments in the debt and equity capital markets

Covid-19 has posed a significant challenge to capital markets and structures. "There was a rallying or a cohesion

among the markets that we're all on the same side," said Jacqueline Wygas, director and managing counsel at NatWest Markets. "Capital markets wanted to preserve liquidity, and nobody was retrenching or looking to exit positions, there was an overarching atmosphere of support."

A key development that panellists spoke about was how Covid-19 was able to accelerate the trend in environmental, social, and governance (ESG) – for example, there was a rise in the issuance of green and sustainable bonds during the pandemic. Furthermore, the ingenuity of the industry was on full display with regards to brown bonds. Brown bonds, also known as transition bonds, aim to push a company towards being more environmentally sustainable.

Panellists also discussed the rising importance of credit ratings. Being able to successfully credit rate a green bond will pose a challenge for the market, owing to the inherent subjective assessment that is vulnerable to greenwashing.

Assessing the current M&A landscape

The workflow in M&A markets has increased since the pandemic began. "We have not experienced a huge challenge in the year 2020 in doing M&A," said Anna Halmer, deputy general counsel at Delivery Hero. Other panellists echoed this view: "Despite the limited disruption on workflow there's no doubt that for those crucial last couple of days leading to signing of a deal, it would have been so much better had we been in the same room," said Graham Kirk, general counsel and company secretary at Cobham. "I think at the crunch point of the deal there is no substitute for being together."

Another significant development discussed was the increased role of regulatory intervention in the backdrop of political trade tensions. There have been significant challenges in undertaking M&A deals, especially with China and the US. The UK has elevated its regulatory oversight with the introduction of the National Security and Investment (NSI) Bill. While private equity remains positive on deal activity outlook for 2021, it remains at the mercy of long-term political decisions.

Recent trends, issues and challenges in data protection and privacy

The continuation of cross-border data flows post-Brexit has been an immediate issue that many organisations, including payments innovator Contis, have had to grapple with. "The UK got Brexit done and with it they lost cross-border passporting rights. We know that with the loss of passporting rights we have to deal with the issue of equivalence, which in a new concept," said Lara Oyesanya, general counsel and chief risk officer at Contis. "The challenge with equivalence is that it is determined in different ways in different EU areas, posing a difficulty for financial services firms."

Another issue is the cultural differences between countries that create divergent approaches to data privacy. "Agencies in one country tend to be a bit more forward-leaning and aggressive in how they interpret and enforce things than other countries," said Jonas Bengtsson, general counsel at Telia Company. The variance in the amount and volumes of fines across EU member states is an example of this.

The Schrems II decision: what it means for privacy programmes

The Schrems II decision invalidated the EU-US Privacy Shield and provided clarity around Standard Contractual Clauses (SCCs). The decision will have a resounding impact on the future of international data flows for businesses, adding new considerations for using SCCs as the transfer mechanism of choice. The mechanisms for data transfer include adequacy, appropriate safeguards and exceptions.

For transfers to the US, EU businesses will need to consider the protection people

will receive in the US even though they are not a US citizen. The department of commerce in the US has already issued a white paper that lists all the different recourses individuals could have if they were subject to investigations.

The US department of commerce will continue to administer the Privacy Shield programme. Most importantly, the decision does not relieve participating organisations of their Privacy Shield obligations.

DAY 2

Employment law and the future of the workforce

Covid-19 has significantly altered how the world works, and thus employment law has had to adapt. One of the first issues that arose was the allowance of remote working. As time at work and time off blurred when working from home, the legal risk for employers to be sued for overtime work increased.

Issues such as whether employers could make it obligatory for staff to wear masks and carry out temperature checks were at the forefront of debate. "A really good learning point we took away from 2020 is that when it comes to matters like this – the right approach is safety first," said Tarun Tawakley, head of employment law and commercial litigation at Deliveroo. "You put in place measures to keep your staff safe and then deal with the contractual amendments after."

Legal tech: maximising the value and efficiency of the in-house legal team

As the world evolves with increasing use of technology, our panellists discussed how the legal field is using legal tech to maximise efficiency. Legal tech has been used to closely align with the operating business. However, building a business argument to adopt these technologies brings issues. Getting internal stakeholders to sign off on buying new tech was often a hurdle.

Nevertheless, technology has been incredibly helpful in streamlining and building efficiency. "We were wasting so much time finding out where contracts were. You can easily spend half a day trying to find a signed contract, so we knew we needed something," said Jane Clemetson, commercial legal director at Reach.

Global competition law outlook

Our panellists discussed recent trends in regulatory enforcement, foreign direct investment considerations and managing regulatory investigations. "We have definitely noticed a tightening of merger control rules over the last five years or so and my gut feel is that this is driven by competition authorities feeling they may have missed some mergers in the past – particularly in the tech sectors," said Simon Burden, senior competition solicitor at Vodafone.

There has been increasing unpredictability in the timeline from when you submit your notification and receive your clearance decision. "It's a bit like doing work on your house nowadays, work out the realistic time and cost budget and then double it. I'm afraid that's more how it works with merger controls now," said Matthew Readings, partner at Shearman and Sterling.

NAVIGATING THE JOBS ACT: A QUICK GUIDE TO FINANCING ALTERNATIVES

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Women empowering change

To mark International Women's Day, IFLR spoke to female leaders in the banking and legal professions. They reveal what must be done to get more women into leadership roles

By Karry Lai and John Crabb

The proportion of women in senior management roles globally stood at 29% in 2020, according to advisory firm Grant Thornton. This compares with 30% in the EU, 29% in North America and 27% in Asia-Pacific. Female leaders around the world have told IFLR that gender diversity in senior management is improving but there is a lot more to be done, especially when it comes to company and government policies that can help.

Women on the world stage

An unmistakably positive trend has been the rise of female role models in positions of power around the world. These include European Central Bank president Christine Lagarde, IMF managing director Kristalina Georgieva, EU Commission president Ursula von der Leyen, US vice president Kamala Harris and US secretary of the treasury Janet Yellen, as well as most recently Ngozi Okonjo-Iwaela, WTO's director-general.

Bénédicte Nolens, head of the Bank for International Settlements (BIS) innovation hub in Hong Kong SAR, does not underplay the significance of this. "There are now more women than ever before in leading positions where they can set and influence policies that are critical for the future," says Nolens.

The age and cultural diversity of these individuals inspiring confidence in women around the world to lead is also noteworthy.

"It's not easy to be in the minority but you start to feel more comfortable when there are other women occupying important leadership roles," says Nolens.

Yet, there is a lot that can be done to improve things for women on the world stage.

Changing the rules

When it comes to leadership roles in companies, board diversity is an increasingly important subject for corporate governance. One particularly controversial topic is whether companies should have gender quotas. According to data compiled by Deloitte, women held 16.9% of board seats globally in 2020. In Asia, the figure is 9.3%.

> ***"It's not easy to be in the minority but you start to feel more comfortable when there are other women occupying important leadership roles"***

- Bénédicte Nolens, head of the BIS innovation hub in Hong Kong SAR

This compares with 41% in Norway, which was the first country to enact a legislation in 2005 for a 40% female quota on corporate boards.

In 2018, the state of California introduced a law that meant all companies located in California had to have a minimum of one female director on its board – and by the end of 2021 the same law stipulates that boards of six or more must have at least three female directors. The state also legislates for underrepresented communities.

Joy Van Cooten, EMEA head of legal at ACI Worldwide, says that she has been an advocate against quotas because they lead people to think that a woman only got a role because she is the token woman, not because of merit.

"But I'm beginning to accept diversity quotas because the rate of progress has been so slow that we have to be that radical," she says. "I'm wrestling with my conscience. However, I want to see real diversity, not token women."

Nolens, who is a strong believer of quotas, says that opponents often rely on the argument that women who get board seats are token women who are not necessarily the best for the job.

This, according to Nolens, is "just inherently discriminatory".

"It implies a belief that there are fewer smart women out there than men even though there is little difference between the average IQ scores of women and men," she adds.

Not everyone agrees with this.

One founding partner at a law firm in Brazil is firmly against quotas. "As a woman I would professionally benefit from it, but women should be able to reach these positions because they are recognised as the best fit for the job, regardless of their gender," she says.

She continues: "A woman should be on the board for her merits, not because she is a woman, otherwise she will start off on the wrong foot. Entering the board because she's a woman instead of because she is the best person to be on the chair, regardless of gender, is not good."

Carolyn Herzog, board member at the Association of Corporate Counsel and general counsel at technology firm Arm in California, agrees that although California's regulation is designed to help it also has the potential to backfire, and is against quotas for most corporates.

"You may end up with a less qualified person in the role, who may then feel excluded and like a quota rather than a qualified person," she says. "What you always want is the most qualified person who feels like they belong."

Herzog recommends promoting a process that helps create an opportunity for the most qualified person, and one which recognises that underrepresented groups should have more opportunities.

"Firms should always hire the best person for the job, but I also believe in the importance of guidelines to make sure that you have a diverse panel of people to interview," she says. "Whether that is by mandate or not, people need to see the common sense in that. The importance of diversity has been proven over and over again."

"If it has to be initiated by regulation – that's okay," she concludes.

However, while boards often have diversity on factors such as culture, sexual orientation and religion, gender diversity continues to lag. Having three or more women on company boards is a good number, says Nolens.

"Unless women occupy at least 30% of board seats, it won't make much of a difference because of unconscious bias," she says. "When there is just one woman on a board, however assertive she might be, it's natural to automatically discount her opinion because it is different from others' on the board. It might also be more difficult for that woman to speak up."

Fiona Nott, CEO at the Women's Foundation in Hong Kong SAR, says: "Not only do we need to build a strong pipeline of female talent and provide women with the enabling workplace environment to reach the top, but we must also create the demand for such talent in senior levels of management, including at the board level."

Unless both the supply and demand sides are addressed, efforts to achieve greater gender diversity will be undermined.

At the listed company level, Nott says, we must aim for 50% women on our boards. To get there, it is time to set targets. Take Hong Kong SAR's case, for example – she says that there must be meaningful targets of 25% by 2025 and 30% within six years which, if not met, should be mandated through quotas.

"Regulation should further require diversity policies to apply across companies and mandate that companies set measurable objectives to achieve their goals, creating accountability through regular and transparent reporting to the market," says Nott. This holistic approach will increase the number of women on boards, strengthen the pipeline of female directors, and advance diversity across companies.

In some countries, such as the UK, while equal pay legislation has been in place since 1970, there remains disparity in pay between men and women. "Past and present governments have not taken the law seriously," says Van Cooten. While firms have to publish data on pay, she says that the data needs to be drilled down further into gender and ethnic backgrounds because disparity persists.

"The data is meaningless if it does not give the true picture," she adds.

> *"A woman should be on the board for her merits, not because she is a woman, otherwise she will start off on the wrong foot"*

Acknowledging progress

While there is clearly a long way left to go and a lot of work to do to reach gender equality in the legal industry, and across the corporate space more generally, it is important to acknowledge the progress that has been made up to this point.

This year a female prosecutor was elected to the office of the vice president of the US for the first time, and female lawyers fill more positions of prominence than ever before.

In 1987, the American Bar Association (ABA) formed the Commission on Women in the Profession to assess the status of women in the legal profession, identify barriers to advancement, and recommend to the ABA actions to address problems identified. The very first chair was Hillary Clinton, who was a lawyer in Arkansas at the time.

"This is an issue that we've been working on for a very long time, and have made important progress on," says Patricia Refo, president at the ABA. "To be a change agent, you have to be able to not only acknowledge the progress that has been made, but still see what remains to be done."

The ABA has made huge strides. "While other bar associations around the world are welcoming their first woman president, we are on our 10th – that's progress," she adds. "At the same time, we know that in the legal profession women are still underrepresented in positions of power and underpaid. There is work yet to be done."

For Refo, the most important step that can be taken towards achieving gender equity is being intentional about it, and measuring results. "Having good intentions alone is insufficient. There has to be intentional action to make a difference for women," she says. "That is the responsibility of both men and women in the legal profession."

Law firms need to look at their systems for advancing people to partnership and advancing partners into firm leadership, and make sure that women are getting their fair share of those conditions.

Women in positions of power must also do what they can to help others reach the levels they have. In law, perhaps a more male-dominated industry than any other, this is crucial. One organisation where there is positive evidence of this is the International Swaps and Derivatives Association (ISDA), the main trade organisation for over-the-counter derivatives, according to Ann Battle, head of benchmark reform.

Battle has played a crucial role in the Libor transition at ISDA, easily the biggest regulatory development to happen within the last few years, but owes a lot of her success to senior women in the organisation. Our general counsel Katherine Darras, has played a key leadership position in the project and been a great help to me," she says. "When I first joined, Sandie O'Connor was the head of the Alternative Reference Rates Committee (ARRC) – the body responsible for the transition in the US. She was great motivation."

Battle continues: "At the time the ARRC was probably even more male-dominated than it is today. There would only be a few women in those meetings, but having a woman as the chair and as a very effective leader was a great example."

While it is important for women to see other women in positions of authority, says Battle, it is equally important for women to have men take interest in their success and in what they do. "I have definitely benefited from this," she says. "Very early on in my career, colleagues taught me how to ask questions, understand what I need to know, and really gave me the confidence to ask those questions and learn things."

More can still be done to create additional equality from day one, when people are very junior, to ensure that men are not able to work their way up and get access to high level meetings, she continues, just because other males who are in more senior positions gravitate towards them and the idea of bringing them into the circle.

Diversity matters

Joanna Fields, founding principal at regulatory development and consulting firm Aplomb Strategies, is confident the progress made so far will be a good building point for the future, especially as the arena evolves. In the cyber area, she has seen women fill senior positions that nobody else wanted over the last years – those roles protecting banks, or law firms.

"Those are the roles women took," she says. "They weren't necessarily the client-facing roles, but I don't want a client-facing person on board. I want somebody who knows something about risk management."

Fields says that she's not sure that quotas are necessary. She is very optimistic about the line of women coming up and the roles that they've played over the last decade. "The regulatory focus on enterprise risk management and cyber present opportunities for women on corporate boards that we have never seen before," she says.

For Battle, a similar story. "One thing that makes it easier for women to break into benchmark reform is that it is very technical," she says. "Technical fields are easier for women to break into because there is only so far you can go without the requisite expertise."

She adds: "During the benchmark transition, there has been a lot of respect for people with expertise. So if myself or any female is willing to put the time in and learn the issues, then they will succeed."

Another important step is to train senior managers at firms and banks on the importance of diversity for the sake of development rather than for diversity's sake. Isabel Costa Carvalho, managing partner at the São Paulo office of Hogan Lovells, stresses the importance of governance training.

"When IPOs first started in Brazil, I was in a drafting session with a logistics company discussing risk factors for the business," she says. "I realised that there were absolutely no women at board level or among the executive officers. There was not a single woman in this company in a position that matters."

She continues: "When I told them everyone stopped, looked at me and said 'you must be nuts', but there was no diversity. No company should have only women, and no company should have only men," says Carvalho.

"Regulation should require diversity policies to apply across companies and mandate that companies set measurable objectives to achieve their goals"

- Fiona Nott, CEO at the Women's Foundation

"Companies lose out by not having women because we think differently, and we can bring a lot to the table," she adds. "More and more global companies are beginning to demand diversity in terms of background, race and gender – they want diverse teams."

Succession planning

In order to build the pipeline of women leaders, tracking numbers in different stages of the career ladder is key. "Companies have to create a benchmark and put in targets because female leadership won't happen if there isn't a systematic approach," says Nolens.

The BIS for example, she says, recently set a 50-50 gender diversity target to fill upcoming vacancies for managers and senior professionals.

This is also one of the challenges that Maggie Dou, head of legal Asia at Iron Mountain, sees. Having goals and objectives throughout different levels of a company can help. At Iron Mountain, for example, there is an objective for different departments to bring female managers to 33%.

"Once diversity goals are part of key performance indicators, there is more confidence that things will happen," she says.

As a mentor in the Women's Foundation's mentoring programme, Dou sees the need for more women role models who can support the next generation of female leaders.

"We often don't see female successors because they are so rare, so there needs to be more discussions on building the women leadership pipeline," says Dou.

This can be done by increasing the percentage of female directors in companies through strategies such as getting recruiters to line up more female candidates for job interviews. Company management also needs to make sure that interviewers are diverse.

Sponsorship and mentorship schemes are useful for women to develop their careers. ACI Worldwide's Van Cooten says that some women have found it difficult to find mentors or sponsors because men are sometimes afraid to mentor women as they do not want to be accused of inappropriate behaviour.

"This trend has gotten worse since the #metoo movement, but one simple thing to do is to have an open-door policy and give both the mentor and mentee peace of mind," she says.

Van Cooten says that sponsorship and mentorship programmes can help women advance in their careers because women can get in front of people who can make decisions.

"Mentors can help by including mentees in high profile work that gets noticed," she says. "They can also encourage mentees to come out of their comfort zones. The main thing is to give them confidence."

Samantha Mobley, partner at Baker McKenzie in London, agrees and says that young women are often unsure whether they are good enough to go to for a certain role and sponsors and mentors can help to instill the confidence in them and encourage them to go forward.

"Women are often working hard but they don't spend a lot of time to get noticed or be promoted," she says. "They are not seeking out sponsors or doing enough networking."

She says that women often undersell themselves, and for managers, the goal is to help identify women with leadership potential.

Better support programmes

A contributing factor to the lack of female talent in the leadership pipeline is the lack of support for women with children, which means most tend to leave the workforce after childbirth. There is a need for HR policies that can better accommodate women who have children, both during and after their pregnancies.

"It takes nine months to bear a child and about nine months for the body to unwind the physical and hormonal changes brought about by pregnancy. Multiply this by two children on average, and it adds up to four years in a woman's career where she feels different from her normal self," says Nolens.

For women in their 40s and 50s, they are also dealing with pre-menopausal and menopausal stages where oestrogen levels drop.

"While these were often taboo subjects, that is changing," says Nolens. "Companies need to be aware of these stages in a woman's career because if they are ignored, women will continue to drop out of the

"When I told them, everyone stopped, looked at me and said, 'you must be nuts', but there was no diversity. No company should have only women, and no company should have only men"

workforce at these critical junctures, perpetuating the gap at the top."

Dou says that over the past five years or so, work-life balance has been changing in the legal profession. As a new mother, Dou has experienced the need for a well-balanced maternity leave and can understand how big a difference an extended maternal and/or paternal leave can be for new parents.

"The message for many companies now is that it is okay for women to fulfil their parental responsibility and can also have the space to be successful," says Dou. "This message wasn't so clear five years ago but now companies take pride in helping women."

Being able to work flexibly can help tremendously. Van Cooten says that Covid-19 has helped in some respects, as everyone has had to adapt to flexible working.

"Women are often seen to be not ambitious or not wanting senior roles when they need to work flexibly," she says. Rather than promoting presenteeism, company cultures should allow employees to work flexibly to have more dedicated staff.

Company policies are the enabler of diversity, equity and inclusion initiatives, while culture and tone from the top can embed these across an organisation and drive necessary changes.

Nott says that key policies around parental leave, flexible work, caring responsibilities, and prevention of sexual harassment, for example, are all critical but it's the everyday culture, practices and leading by example which are the most effective ways to promote inclusion.

Senior management generally sets policies, but building a framework that allows for individual departments or teams to implement practices to fit their circumstances empowers the whole company to help build a culture that supports overall diversity, equity and inclusion.

Overcoming fear

However, things are not always so simple. More often than not the support network is not there and the disadvantages are firmly in place to make sure women do not get the necessary help to rise to the top.

"Companies need to be aware of these stages in a woman's career because if they are ignored, women will continue to drop out of the workforce at these critical junctures"

As co-chair of Women in Finance Asia (WiFA), Nolens says that having a support system is key, not just for women but also men who are advocating for diversity.

"It gets easier when you know you are not alone. Role models, corporate and public policies, male advocates and support groups, it all makes a difference," she says.

But for emerging countries in particular, finding support can be difficult. In Brazil, like many emerging countries in the world, the number of women entering law school is on the rise – but the number of women in senior positions remains statistically low.

"If you go to any law school in Brazil there are more women than men in the room," says Juliana Martinelli, managing partner at Martinelli Advogados. "But even though they do enrol at law firms, when it comes to reaching leading positions in higher levels there are difficulties that usually pull women back."

According to Martinelli, the expectations that society has towards women are so different to those of men that the playing field is a long way from being level. Professional women are expected to take care of children's education and to take care of household responsibilities, even in households where both parents work.

"The problem is that women usually see themselves this way," she adds. "It isn't only about the way that men look at women, it is about the way women look at themselves."

For many women, the fear factor of taking the lead is a challenge that is difficult to overcome.

"Women often tend to be modest and don't want to upset others or have the fear of not being good enough," says Dou. Even though the external support might be there, Dou says that women need to change their mindsets to be more fearless and lean in more.

Women can be leaders in many ways, not necessarily just in the workplace. For example, as a yoga and meditation practitioner, Dou leads classes in her community.

"The leadership skills that you learn in a non-work setting can be transferable in the workplace," says Dou. "Breakthroughs can happen when you start something you feel passionate about and not be fearful about failing."

Women can help take matters into their own hands by being more assertive. She gave the example of where a man might see a job advert that he is not fully qualified for and still apply, a woman is likely not going to apply unless she has all the qualifications in the advert.

"It's a mindset change and that is where a sponsor or mentor can help champion you and give you the tools you need to be more confident," Dou says.

There has been much progress; women are consistently taking positions of power and prominence in the legal sector. But, there is a lot more work to be done to truly level the playing field. This drive needs to come not only from women empowering change, but from men, senior management, and government.

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CORPORATE

CORPORATE TRANSPARENCY ACT

Shell Game

The CTA establishes a national registry for beneficial ownership information on entities, but still permits more secrecy than many other countries' reporting systems

Enacted in January, the Corporate Transparency Act (CTA) makes significant changes to the US anti-money laundering rules. For the first time, the Act creates a system of beneficial reporting for entities that cuts through much of the opacity that has until now cloaked owners of corporations and other entities.

Enacted as part of the Anti-Money Laundering Act of 2020 (AMLA), the CTA is a response to the traditionally opaque system of entity formation in the US that does not require the disclosure of the owners of the entity. This led to concerns that the anonymity of ownership data could enable money laundering, tax evasion and other financial crimes.

Once implementing regulations are adopted, enacting the provisions of the CTA by 2022, a significant majority of the entities organised in the US will be required to report identifying information on their beneficial owners to the Financial Crimes Enforcement Network of the US Department of the Treasury (Fincen).

This type of beneficial ownership information collection is common in many jurisdictions, but the US has not – to the surprise of many non-US attorneys and investors – previously collected such information about corporations and other legal entities. While certain types of regulated institutions and public companies have long been required to disclose their corporate structures, new private legal entities are easily formed under state law without disclosing ownership, capitalisation or management information. The lack of a central registry may in part be due to the fact that, in the US, legal entities may be formed under the laws of any of the 50 states, and each state has its own corporate law statute and administrative procedures, without any nationwide organising authority.

Though the CTA creates the US' first ever corporate registry, other such registries already exist in various other

1 MINUTE READ

The US's newly-created corporate ownership registry under the Corporate Transparency Act has drawn comparisons and contrasts to similar reporting registries already in existence in jurisdictions around the world.

While the US may be late to the game in establishing such a registry, the driving force behind it seems on par with global anti-money laundering and anti-terrorism funding efforts. Still, a look at the similarities and differences between the CTA and similar regimes in the UK and Luxembourg reveals the different aims it seeks to achieve relative to its counterparts; as well as its limitations and the unintended knock-on effects.

> *"The anonymity of ownership data could enable money laundering, tax evasion and other financial crimes"*

jurisdictions. Since 1844, the UK has maintained a comprehensive registry of all companies incorporated and registered within the UK (known as Companies House). Registration with, and disclosures to, Companies House is required for all UK companies. Currently, Companies House, which makes its information database available to the public, houses information on more than four million companies. This information includes details regarding directors, shareholders and persons with significant control.

Luxembourg has both a trade and company register (the RCS) and a beneficial owner register (the RBE). The RCS contains, among other data, information on all Luxembourg companies, including details such as their directors, share capital and, depending on the company type, shareholders, financial information and articles of association. The RBE was created by the Luxembourg law of 13 January 2019, establishing the beneficial owner register and requires all companies registered with the RCS to disclose the beneficial owners of the companies with the RBE.

A close look at the CTA reveals that Congress did not seek to create a comprehensive database similar to the UK's Companies House. Rather, the CTA's registry will more closely mirror Luxembourg's RBE, in that its narrow intent is to combat money laundering and other financial crimes. Still, significant differences between the CTA and RBE regimes exist.

Purpose

The CTA, like the RBE but unlike Companies House, is primarily focused on targeting money laundering and financial crimes. In passing the CTA, Congress noted that a federal registry of beneficial ownership is necessary to counter money laundering and terrorism financing, and to bring the US into compliance with international anti-money laundering standards.

Similarly, the RBE directly implements EU Directive 2015/849 (amended by EU Directive 2018/843), which seeks to prevent the use of financial systems for the purpose of money laundering or terrorist financing. Unlike the CTA and RBE, Companies House has a broader mandate and acts as a repository of information about all companies in the UK.

Public and governmental access

The contrasting objectives of the CTA registry, the RBE and Companies House are further reflected in the level of access the public has to their beneficial ownership information. As Companies House is designed to provide a centralised information system for UK companies, the database is accessible to the public. Under the RBE, all information, with the exception of addresses and identification numbers of beneficial owners, can be accessed by the public, and governmental authorities are granted unrestricted access.

Access to beneficial ownership information under the CTA will be far more limited. Federal agencies and regulators will be able to access CTA information, and state and local authorities may obtain access by court order. Under certain circumstances, foreign jurisdictions may also obtain access to the CTA registry. Financial institutions will also be allowed to access the database for customer due diligence purposes.

The general public, however, will not have access to beneficial ownership information gathered under the CTA. Any party that does get access to the CTA database must use the information solely to assess or investigate potential financial criminal activity.

Reporting requirements

The differences in the registry's objectives are further reflected in the requirements under each regime with respect to (i) which entities are required to report, (ii) which beneficial owners must disclose personal information, and (iii) the scope of their disclosure.

Entities required to report

Unlike the RBE and Companies House regimes, where all companies (and other legal entities) must disclosure beneficial owners, the CTA reaches only a portion of the companies doing business in the US. The CTA attempts to capture only those legal entities that are more likely to be employed for illegal operations, while companies with legitimate operations are generally exempt from the CTA's reporting requirements.

Among other things, the CTA exempts legal entities that:

- are publicly traded on a US exchange;
- are subject to existing regulatory reporting requirements (e.g. banks and other regulated institutions);
- employ more than 20 full-time employees;
- generate more than $5 million in annual sales; or
- have an operating presence with a physical office within the US.

Companies subject to the CTA's reporting requirements include those with no operating presence in the US or which lack revenue-generating operations, i.e., a corporation formed under state law that has no physical operations or offices would be subject to the reporting requirements of the CTA. In addition, a loss-making legal entity, perhaps even if it has had only one bad year, may find itself within the ambit of the CTA's reporting requirements, assuming it does not qualify for another exemption.

Individuals who must disclose personal information

The CTA defines a beneficial owner as an individual who, directly or indirectly, holds at least 25% of the equity interests or exercises "substantial control" over a legal entity. Equity interests and substantial control are not defined, leaving any interpretation of these terms to the Treasury Secretary and Fincen. The CTA exempts certain agents, creditors, custodians and employees from the definition of "beneficial owner".

Under the Luxembourg law of November 12 2004 on the fight against money laundering and terrorist financing (the Lux AML Law), a beneficial owner is any natural person who ultimately owns or controls such company, through either direct or indirect ownership of a sufficient percentage in shares, voting rights or other ownership interests of the company, or by other means.

Under the Lux AML Law, "sufficient percentage" is not explicitly defined, but a person who holds or controls greater than 25% of such interests is deemed to be a "beneficial owner". If no individual is within

the Lux AML Law's description of beneficial owner, then any senior managing official is generally treated as the beneficial owner. A company listed on a regulated market subject to disclosure requirements consistent with European Union law or equivalent standards need only disclose the name and country of the regulated market.

Companies House also collects information regarding persons with "significant control", as well as information on directors and certain other shareholders. Under UK law, a person is considered to have "significant control" if he or she directly or indirectly holds 25% or more of a company's shares or voting rights, may appoint or remove the majority of the company's board of directors, or otherwise has the right to exercise or actually exercises significant influence or control.

Each of Companies House, the CTA and the RBE use a 25% threshold to determine beneficial owner status (or the relevant similar concept). Further, each regime captures individuals who exercise other types of control over a company, though the degree of overlap in this regard is as yet somewhat unclear given the lack of any definition of substantial control in the CTA. It is expected that substantial control will be further defined in FinCEN regulations, and will likely focus on influence over a legal entity's board of directors or management.

Unlike Companies House and the RBE, the CTA also expressly exempts from the beneficial owner definition employees whose ownership interests are solely derived from their employment, certain agents or intermediaries holding ownership interests on behalf of another, and certain creditors.

Scope of disclosure

Finally, the three regimes vary in the information beneficial owners must disclose. The CTA requires all beneficial owners to report their full legal name, date of birth, a current residential or business address and a government-issued ID number. Further disclosures may be required by the to-be-issued regulations. Similarly, the RBE requires disclosure of the same personal information in addition to the nationality and the nature of beneficial interest of the beneficial owner. Companies House requires more substantial disclosures – in addition to personal information regarding directors, shareholders and beneficial owners, companies must also disclose information regarding the company's current state of affairs. This includes solvency status information, filed statutory documents (such as tax returns and confirmation statements regarding previously submitted information), and a list of disqualified directors.

> *"Congress did not seek to create a comprehensive database similar to the UK's Companies House"*

Penalties

Each reporting regime imposes monetary penalties for failures to report. In the UK, companies must file annual returns, and failure to report in a timely manner is a criminal offence that can carry a fine of up to £5,000. Similarly, a failure to report under the RBE could trigger criminal fines for the company and its beneficial owners ranging from €1,250 to €1.25 million. Finally, the CTA provides for civil and criminal penalties on individuals who wilfully provide false information or fail to provide any information at all. The CTA contains a safe harbour for individuals who voluntarily correct inadvertently submitted false information within 90 days of submission.

Unintended practical effects

Corporate groups often form single-purpose entities for tax- or liability-planning reasons. These entities may perform a vital function for the corporate group, but may not have operational presence, meaningful revenue or any employees. Such companies may be subject to the CTA even though the affiliates within their corporate group are not. In the mergers and acquisitions context, empty subsidiaries are often formed to be merged into a corporate structure or to be merged with a target entity.

These merger subsidiaries, which typically have no revenue and no employees, may need to report beneficial ownership information under the CTA. The secretary of Treasury, with the consent of the secretary of Homeland Security and the attorney general, is permitted under the CTA to provide exemptions for entities or classes of entities not specified in the current exemptions and may consider exempting single-purpose entities such as these.

With more than one million businesses incorporated or formed in Delaware alone, FinCEN should expect to receive an enormous volume of data as a result of the requirements of the CTA. This will require a substantial amount of resources and careful consideration by Fincen of how best to identify the actual targeted information of the CTA. This is a mismatch between, on one hand, the burden on industry and regulatory resources with, on the other hand, the relatively narrow goal of determining bad actors.

Conclusion

A comparison of the CTA with more established legal entity registries demonstrates that Congress took an incremental approach and perhaps recognised the practical challenges of mimicking a disclosure regime like Companies House. The CTA does not set out to create a registry on the same scale as Companies House, and is still seemingly conservative when compared to other AML-driven databases (such as the RBE). With its limitations and exemptions, the CTA minimises the required disclosures made to Fincen and only subjects those who are most likely to be operating shell companies to its reporting requirements. It remains to be seen if the regulations promulgated thereunder address some of the CTA's unintended negative effects.

Special thanks to Scott Sonnenblick for his insights on this topic.

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Biden's CFIUS approach expected to be coherent

In his inaugural national security column, Berkeley Research Group's Harry Broadman outlines why Biden's CFIUS policy is unlikely to differ significantly from Trump's, but will be more coherent

Donald Trump's presidency coincided with the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the most systematic and comprehensive statute undergirding both the direction and operations of the Committee on Foreign Investment in the US (CFIUS) since its inception in the 1970s. FIRRMA not only enjoyed wide bipartisan support but also garnered near unanimous votes in both houses of Congress.

One would have thought, therefore, that the Trump administration's CFIUS policy would have been coherent, widely supported and effectively administered. It was not.

This is no better epitomised than the case of the Chinese firm ByteDance's ability to own and operate the widely popular video-sharing app TikTok in the US.

Over the course of just two weeks last summer, president Trump issued a spate of executive orders on the matter. They were awkwardly choreographed and focused on seemingly contradictory actions. The first order sought to ban Americans' use of TikTok, while the second directed the Chinese to divest the app's ownership to a US entity. Today, notwithstanding Trump's pronouncements about the immense national security risks posed to the country by TikTok, the app's availability in the US and its Chinese ownership remain unchanged.

Given the nascency of President Biden's administration, it is still too soon to predict with much precision how CFIUS policy will be conducted under his presidency, including whether he will take up the TikTok matter.

Yet, in light of both his seasoned foreign relations and national security background and extensive experience as a senior-level decision-maker as vice president and senator – not to mention the deep backbench of veteran policy-making cabinet members and White House staff with whom he has surrounded himself – one should be confident

1 MINUTE READ

With the enactment in 2018 of the Foreign Investment Risk Review Modernization Act (FIRRMA) and the subsequent finalisation of its implementing regulations in 2020, the operations and decision-making calculus of the interagency Committee on Foreign Investment in the United States (CFIUS) became significantly more systematic.

This signalled maturation of CFIUS, a heretofore relatively unknown entity, which began assessing the national security impacts of inbound US cross-border transactions in the 1970s. Still, every administration places its imprimatur on the stance taken by CFIUS. Under the Trump presidency, its handling of the most important cases was comparatively aggressive but erratic. President Biden will likely be as tough as his predecessor – but more coherent.

> ***"Given the nascency of President Biden's administration, it is still too soon to predict with much precision how CFIUS policy will be conducted under his presidency"***

in Biden's approach towards CFIUS. The hope is that it will be free from the drama and chaos that permeated his immediate predecessor's handling of these matters, especially, of course, for those that came to him for decisions.

This very last point deserves emphasis.

The lion's share of the media's attention given to CFIUS focuses only on the transactions that involve the need (or the desire) for an Oval Office decision. In fact, those cases are the exception rather than the rule. The vast majority of transactions reviewed by CFIUS are decided at the sub-cabinet level. And, most of those tend to be approved. This has been the practice for as long as CFIUS has been in existence. Having been a member of CFIUS in the early 1990s, I can testify that this was also the case then.

Thus, much of the perception held by outsiders to the CFIUS process – which, like other complex regulatory regimes is dominated by specialists, both those in the legal profession and non-lawyers – is skewed.

Still, it might be argued that CFIUS policy-making overall during the Trump administration was less coherent than it should have been.

This is because the actions of interagency staff working on CFIUS cases at the sub-cabinet level can ultimately be a reflection of the views of their agencies' most senior officials. In some administrations – and arguably more so during the Trump era than most in the recent past – decisions by those officials can be driven by what they think are the views of the president. It is hardly a secret that Trump is widely known to have mercurial decision-making tendencies.

To be fair, it may also be the case that with a new law in place, which required a sizeable number of implementing regulations to be promulgated, the workings of CFIUS over the course of the Trump administration were subjected to teething pains. However, even if that were true, there is only a remote chance those effects would have reverberated to a level where important decisions were significantly affected.

In addition, if anything, one of the major benefits engendered by FIRRMA and its implementing regulations, which were finalised in 2020, is they serve to make CFIUS's decision-making calculus more regularised and transparent. This is especially true where the regulations delineate the types of transactions where notification to CFIUS is mandatory and which specific subsectors will be subject to review, such as critical technologies, infrastructure services, and data and personal information. To be frank, that is a huge change relative to the time of my tenure on the Committee. And it is all for the good.

Metamorphosis

Of course, FIRRMA and the implementing regulations do not obviate the fact that in the final analysis an administration will always put its imprimatur on the decisions it takes.

Putting aside for a moment differences in policy stances, operational styles and demeanours of the two presidents, this maturation of the CFIUS process augurs well for Biden's team to adopt a more coherent approach than did Trump's. In fact, given the way in which Biden has been known to work in coming to policy decisions – devoting significant effort to reaching out to stakeholders who will be directly affected – he will likely vigorously capitalise on CFIUS's metamorphosis.

Those who might interpret this as implying Biden's approach to CFIUS will be more lenient than Trump's likely will be disappointed. Recall that one of his very first economic decisions after taking office was to make more stringent the permitted exemptions under the Buy American Act.

At the same time, he has also moved to devote more resources and staff working on CFIUS issues in business segments that heretofore have not been a focus of the Committee – for example, the venture capital industry.

Frankly, the increased attention being paid to the potential national security impacts of venture capital funding of US investments, whether originating in China or in other foreign nations, should not be a surprise to foreign investors or to US recipients of such investment. It is yet another reflection of the maturation of the CFIUS process; indeed of the increasing dexterity of the Committee.

After all, the need for CFIUS to continue to "raise its game" reflects its response to safeguard US national security as foreign parties closely scrutinised by Washington and their potential domestic recipients test out new channels to try to consummate deals in an environment where regulatory constraints have been tightening. In a very real sense this is part and parcel of the natural process of investment optimisation in a global economy where there is competition for investment capital that is increasingly highly mobile.

Indeed, just as CFIUS has become more dexterous, foreign parties with robust interests to invest in the US but seen by Washington as evincing significant national security risks – China being the obvious example – are rapidly climbing the CFIUS "learning curve." Their self-selection of deals being attempted in the US is readily apparent. While Chinese-related transactions accounted for the largest share

> ***"One of the major benefits engendered by FIRRMA and its implementing regulations is they serve to make CFIUS's decision-making calculus more regularised and transparent"***

"Much of the perception held by outsiders to the CFIUS process is skewed"

of all notices filed with CFIUS in 2017 and 2018 (25% and 24%, respectively), in 2019, China's share fell to 11%. That is a 50% decrease. Indeed, for 2019, deals related to Japanese entities accounted for the absolute largest number of filed CFIUS notices, equal to 20% of the total.

A systematic approach

Biden's approach to CFIUS will be far more systematic than his predecessor's and the rationale for decisions made will be more clearly articulated. For example, Biden appears to be interested in coordinating US national security regulation of inbound foreign investment and US controls on exports with analogous regimes – either already in place or in the process of development, sometimes with an eye toward mirroring CFIUS – of economic allies, especially those seemingly focused on countering China.

His recent executive order initiating a comprehensive assessment of US global supply chains would appear to be cut from the same cloth. He could even move these efforts to enhance US national security and international competitiveness further upstream by strengthening US R&D collaboration with other members of the G7 countries.

It is also likely that Congressional oversight of CFIUS's actions during the Biden administration will increase. While not always a certainty, this dynamic could well engender consensus-building between the legislative and executive branches on the US stance in this area, thus fostering greater policy coherence and stability.

This should not be a surprise, both because of the intense involvement of Congress in the writing of FIRRMA and because the teething phase of devising the statute's implementing regulations has now ended. And, do not forget that Biden is a creature of the Congress, with a penchant for a "whole of government" approach where it is both desirable and feasible.

To be sure, executive branch officials sometimes (maybe even often) bemoan oversight by Congress. The upside in the case of CFIUS policy is that the process will likely only strengthen the global credibility of the stance taken by the US on economic decisions seen abroad as controversial and sensitive.

Along with the greater policy coherence and stability that oversight can bring, if it also enhances US credibility on CFIUS matters, that is surely a welcome outcome, especially in light of the uneven record of the previous administration on this score. After all, an important engine of US economic growth over the past century has been its ability to produce an investment-friendly policy environment that can attract overseas investment.

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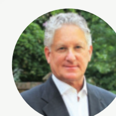

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DISPUTE RESOLUTION
SWISS ARBITRATION RULES

The case of Sun Yang and Switzerland's international arbitration law

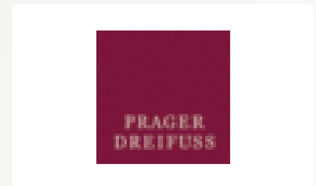
Bernhard Lauterburg and Marcel Frey of Prager Dreifuss explain how the Federal Tribunal overturned a CAS decision ordering an eight-year doping ban of the Chinese Olympic swimmer on the discovery of circumstances justifying the removal of an arbitrator.

Switzerland is considered one of the leading places for conducting international arbitrations. Parties in international business transactions regularly opt to have possible disputes adjudicated by an arbitral tribunal in Switzerland and also frequently subject their transaction documents to Swiss substantive law. The Swiss Federal Tribunal, acting as highest review court, is known for its arbitration-friendly jurisprudence, only rarely overturning awards handed down by arbitral tribunals.

To a considerable extent, the Federal Tribunal's jurisprudence relied on principles developed by its practice during the previous decades. In 2020, the Swiss parliament adopted amendments to the 12th chapter of the Swiss Private International Law Act (PILA), which contains the Swiss international arbitration law. These amendments became effective as of January 1 2021 and incorporated core elements of the Federal Tribunal's case law into statutory law.

The key aspects of the amended PILA pertained to certain clarifications as to the scope of its application when a party to the arbitration agreement did not have its domicile in Switzerland at the time of conclusion of the arbitration agreement. The new provisions also state that the PILA applies *mutatis mutandis* to arbitration clauses contained in unilateral instruments, such as by-laws, wills or trust deeds.

Also, some clarifications were made with regard to the appointment and replacement of arbitrators. The law stipulates (what was previously a matter of case law) that a person who is proposed as an arbitrator shall immediately disclose the existence of any circumstances that may give rise to justifiable doubts as to his or her independence or impartiality. In addition, it states that this duty shall continue throughout the proceedings, an aspect that played a role in the matter of Sun Yang's case discussed below.



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Marcel has a law degree from the University of Zurich and a master's degree from the University of Cape Town.

Furthermore, the new law contains a provision allowing foreign arbitral tribunals or its parties to seek assistance from a Swiss court to enforce interim measures or to take evidence in Switzerland. Also, it is now possible to file appeals to the Federal Tribunal against arbitral awards in English. Finally, the instrument of revision, as previously acknowledged in the Federal Tribunal's case law, was formally introduced into the international arbitration chapter of the PILA.

The authors take a recent Federal Tribunal decision concerning the Chinese elite swimmer, Sun Yang (Federal Tribunal decision 4A_318/2020 of December 22, 2020), to discuss the Federal Tribunal practice in international arbitration as well as the revised PILA provision allowing for revision requests (Article 190a PILA). In the aforementioned case, the Federal Tribunal upheld Sun Yang's request for revision of the arbitral award and thereby – *de facto* – gave effect to the revised PILA before its entering into force.

The case before the Federal Tribunal

It was the fifth time that the Federal Tribunal has had to deal with aspects of the arbitration proceedings involving Sun Yang. In the case at hand, Sun Yang had lodged a revision against an earlier arbitral award against him whereby the World Anti-Doping Association (WADA) had issued an eight-year ban against the athlete, which would have effectively ended the swimmer's career.

Facts of the case

An English summary of the case can be found at *swissarbitrationdecisions.com*. In short, the following transpired:

On the evening of September 4 2018, Sun Yang, the Chinese Olympic medal winner and multiple swimming world champion was subject to an unannounced (out-of-competition) doping control ordered by FINA, the international swimming federation (an association based in Lausanne, Switzerland). Obtaining the test samples was delegated to the International Doping Tests and Management (IDTM), acting as sample collection authority.

On the evening, between 10.00 and 11.00pm, the delegates of the IDTM rang at the private home of Sun Yang to collect blood and urine samples from the swimmer. The group was made up of (i) the office in charge of the doping control (DCO), (ii) an assistant in charge of blood collection (BCA), and (iii) another doping control assistant (DCA). Based on the facts of the contested award brought before the Federal Tribunal, by which it was bound, the following then transpired.

The DCO, who was known to Sun Yang from earlier controls, presented him with a copy of her identification card issued by IDTM and a FINA document for the IDTM titled 'Letter of Authority', appointing and authorising it by FINA to collect random urine and blood samples from athletes. The DCA presented Sun Yang with his national ID card and the BCA submitted a copy of her junior nurses' certificate.

After having signed the doping control form, Sun Yang cooperated in providing two blood samples, which were sealed in glass containers and stored in a storage box. Before providing the urine sample, Sun Yang noted that the DCA was taking photographs of him. Finding this behaviour inappropriate, he requested a re-examination of the documents presented by the sample collection personnel, in particular the references of the DCA. Sun Yang felt that the information provided by the DCA was insufficient. At the initiative of the DCO, or at least with her agreement, the DCA, whose sole task was to supervise the urine sample collection process, was excluded from the control mission. However, as the DCA was the only male member of the collection team, no urine samples could be collected.

> **"Finally, the instrument of revision, as previously acknowledged in the Federal Tribunal's case law, was formally introduced into the international arbitration chapter of the PILA"**

The whole incident disquieted Sun Yang and he consulted with his personal physician and the head of the Chinese swimming team over the phone, who discussed the accreditations of the sample collection personnel and the letter of authority with the DCO. They informed the athlete and the DCO that the documents presented did not meet the necessary requirements, wherefore the blood samples collected could not be taken by the DCO. Consequently, Sun Yang wanted the samples returned to him. The DCO however warned the swimmer that this could possibly be considered as a failure to comply with doping control with potentially serious consequences.

After intense discussions and under pressure from the athlete, the DCO or BCA removed a glass container from the storage box and gave it to Sun Yang. Since the glass contained could not be opened, Sun Yang instructed a security officer to break it open. The security guard broke the glass container with a hammer, with Sun Yang assisting him by shining light from his cell phone. The swimmer then retrieved the blood samples, which had remained intact during the extraction exercise, and returned the broken container to the DCO. Sun Yang then tore up the doping control form he had previously signed.

At Sun Yang's request, one of the present physicians transcribed the swimmer's remarks regarding the disputed doping control on a separate sheet of paper. The said document, was signed by the DCO, the BCA, the DCA, the swimmer and the doctor and read as follows in its English translation:

On the night of September 4 2018, 4 persons of FINA conducted urine test and blood test to Mr. SUN Yang. One of the four persons was the driver who was unrelated. The rest of three persons entered into the room. Among the three persons, the [DCO] (…) possessed and provided and showed the certification of Doping Control Officer. [The Athlete] actively cooperated with the testing. However, in the following process of blood and urine sample collection, [The Athlete] found that the [BCA], Blood Collection Officer, only provided her Nurse Qualification Certificate (…) but did not provide any other proof of certification for Blood Collection Officer. The DCA] (classmate of the [DCO]), the Doping Control Officer for urine test, only provided his resident ID card (…) and did not provide any other certification of Doping Control Officer for urine. They were unrelated personnel. Under our repeated inquiries, among them, only [the DCO] (…) provided the certification of Doping Control Officer, and the rest two could not provide Doping Control Officer certification and any other relevant authority. Therefore, the urine test and blood test cannot be completed. (The blood sample that has been collected could not be taken away.

Procedural history

In the aftermath of this unfortunate control, Sun Yang was found guilty of an anti-doping rule violation by WADA, only to be cleared later by the FINA Anti-Doping Commission on January 3 2019, which considered the events during the control to have been irregular. The disputed doping control was deemed to be invalid and void. The commission took into consideration the inappropriate behaviour of the DCA, the insufficient identification/authorisation, and the fact that Sun Yang had not been clearly informed that his behaviour could constitute a failure to comply with the doping control.

On February 14 2019, WADA lodged an appeal with the Court of Arbitration for Sport (CAS), requesting Sun Yang's suspension for a period of eight years. The proceedings grew progressively complex from there onwards, with the Federal Tribunal being invoked four times during the entire process adjudging an array of procedural issues ranging from challenges against the appointed arbitrator, bifurcation applications relating to the admissibility of the WADA appeal, to the entire annulment of the rendered award (Federal Tribunal decisions 4A_265/2019; 4A_287/2019; 4A_413/2019 and 4A_192/2020).

In the end, on February 28 2020, the arbitration panel rendered an award finding Sun Yang guilty of a violation of the FINA Doping Control Rules, suspending him for eight years while denying WADA's request to set aside the swimmer's earlier competition results (September 4 2018 to February 28 2020). In substance, the arbitrators found that the IDTM notification to Sun Yang had been sufficient, his destroying of the samples had not been justifiable, and that he had been adequately informed about the potential consequences of his behaviour.

On April 28 2020, Sun Yang filed an appeal in civil matters with the Federal Tribunal seeking the annulment of the award rendered on February 28 2020. As will be seen, the present case has rendered those appeal proceedings irrelevant.

One and a half months later, on June 15 2020, in an unexpected turn of events, Sun Yang filed an application for revision of the award of February 28 2020 to the Federal Tribunal, requesting the disqualification of the chairman of the panel, Franco Frattini. Sun Yang based his request for revision on the fact that on May 15 2020, he had learnt of articles by the chairman published on a website, which had earlier been published by Frattini on his Twitter account. Sun Yang argued that the attitude and sentiments demonstrated by Frattini in his tweets constituted unacceptable comments about Chinese nationals, which, in his opinion, were likely to raise legitimate doubts as to his impartiality as chairman, given that the arbitration proceedings involved a Chinese athlete.

In his revision brief, Sun Yang cited the tweets posted by the chairman between May 28 2018 and June 9 2019, in connection with his critical views on the Yulin Dog Meat Festival. The chairman had voiced his grave anger about this Chinese practice in no uncertain terms in his tweets. The Federal Tribunal reviewed the following messages (all tweets copied directly from Federal Tribunal decision, consideration 5.1.):

- "*Show the HORROR – THIS IS CHINA TODAY!! I'm sure nobody will ha e* [sic] *the courage to respond to me!!! Ambassador of China to Italy, where are you??? Are you silent on the tortures on dogs in Yulin???*" (tweet of May 28 2018);
- "*Let's multiply our messages! Invade in China with our protest against horror and*

> *"The WADA had issued an eight-year ban against the athlete, which would have effectively ended the swimmer's career"*

torture on stray dogs and cats, as they try to invade our markets with fake products!! Raise our voice, otherwise we are in complicity!," (tweet of May 28 2018);

- "*Hell forever for those bastard sadic chinese who brutally killed dogs and cats in Yulin, with the complicity of the Chinese authorities !!!*" (tweet of July 3 2018);
- "*This yellow face chinese monster smiling while torturing a small dog, deserves the worst of the hell!!! Shame on China, pretending to be a superpower and tolerating these horrors!!* (tweet of May 28 2019);
- "*Racist????Me??ehi guy, I repeat: those horrible sadics are CHINESE! not French or Italian or polish! And I think they deserve a worse hell than the one in which they torture innocent animals!!Chinese is Yulin!!!do you want to defend!!come on, shame!!!*" (tweet May 28 2019);
- "*Old yellow-face sadic trying to kill and torture a small dog: this is China's picture!!! Westerners doing rich business with China bear in mind these atrocities*" (tweet of June 2 2019);
- "*Torturing innocent animal is a flag of chinese! Sadics, inhumans with the protection of chinese authorities and the tolerance of western powers focusing on more business with China, regardless any massive violence! Shame on china and their protectors!*" (tweet of June 9 2019).

Both the CAS and WADA filed for rejection of the revision application, but were unsuccessful. The Federal Tribunal's judgment eventually turned on two material aspects which warrant closer inspection and may be of particular interest to arbitration practitioners with links to Switzerland or applying Swiss law.

Firstly, to what degree is a party required to do research upon becoming aware of the choice of arbitrator adjudging its matter in order not to be precluded from raising impartiality concerns. Secondly, when and how is it possible to bring an instrument of remedy in instances where grave reasons for concern are only identified after the rendering of an award in proceedings governed by Swiss law.

Diligence in researching the background of the arbitrator

The Federal Tribunal gave some interesting insights in respect of a party's 'duty of curiosity' when becoming aware of the choice of arbitrator. The court first confirmed its established practice that the parties must not be satisfied by an arbitrator's declaration of independence but are expected to do certain internet research and consult the main search engines or sources that may indicate a possible risk of bias on the part of an arbitrator.

In the Federal Tribunal's view, these are, among others, the websites of the main arbitral institutions, the parties, their legal representatives, and the law firms for which they work, the websites of the law firms for which the arbitrators work, and, in sports arbitration, the websites of WADA and the sports institutions concerned. Yet, with respect to social networks and instant messaging services, the highest Swiss court set certain limits on what a party must undertake to fulfil its legal obligations.

The Federal Tribunal noted that, at a time when some people frequently use or even abuse certain social networks, such as by publishing countless messages on their Twitter account, it would be advisable, where appropriate, not to be too demanding as to the obligations of the parties. Otherwise, the duty of curiosity could be transformed into an obligation to carry out very extensive, if not almost unlimited, time-consuming, ongoing investigations.

Accordingly, the Federal Tribunal acknowledged that the fact that information is publicly available on the internet would not necessarily render a party's investigation efforts to fall short of the required threshold by the mere fact that it did not find the information. This is reflected in the Federal Tribunal's holding that depending on the circumstances, a party may need clues that a potential conflict of interest exists and requires further investigation, particularly when the reason for the risk of bias is *a priori* unsuspected.

In the case of Sun Yang, Frattini made certain tweets some ten months prior to his appointment as arbitrator and some well after his appointment and in any case some well after the seven-day period the CAS Code allows for a challenge of an arbitrator. The Federal Tribunal noted that a party could not be required to continue its internet searches throughout the arbitration proceedings, nor, *a fortiori*, to scan the messages published on social networks by the arbitrators during the arbitration proceedings.

The Federal Tribunal's approach in this case should, however, not be taken lightly by the parties. Indeed, the Federal Tribunal noted that in respect of social media, an area that is in constant flux, the standard of curiosity may need to be redefined over time.

Bringing a request for revision under Swiss arbitration law

Until January 1 2021, the revision of arbitral awards was a matter of case law. In 2020, the legislator adopted amendments to the PILA and introduced a provision on the revision of arbitral awards. The provision provides, among other grounds, that a party may

> *"The Federal Tribunal noted that in respect of social media, an area that is in constant flux, the standard of curiosity may need to be redefined over time"*

apply for the revision of an arbitral award if, despite having exercised due diligence, a ground for challenge of an arbitrator is discovered only after closure of the arbitral proceeding, provided that no other remedy is available.

As the case of Sun Yang occurred prior to the coming into effect of the aforementioned provision, the Federal Tribunal referred to its previous jurisprudence where it did not exclude that arbitrators could be challenged even after conclusion of the arbitral proceedings, and after expiry of the statutory time limit for an ordinary appeal provided that the requesting party could not have discovered the ground for challenge during the arbitral proceedings. In view of the recent legislative process, the court also referred to the accompanying message of the Federal Council on the amendment of the PILA. Having regard to its earlier case law which effectively had filled the lacuna that existed as to the instrument of revision and in view of the amendment of the PILA, the Federal Tribunal in essence adopted the solution which has become law as of January 1 2021.

Findings by the Federal Tribunal

The Federal Tribunal eventually accepted the reasons for revision brought by Sun Yang and cancelled the award of February 28 2020. Frattini was recused from the proceedings and the matter referred back to the CAS.

In terms of procedure, the Federal Tribunal considered that the challenge of the chairman had been raised timely under the practice governing a revision. Under the new PILA provision, an application for revision must be submitted within 90 days of the discovery of the grounds for revision. After the expiry of 10 years from the entry into force of the decision, a revision may no longer be requested, except in limited cases. Not being valid at the time of the Federal Tribunal's decision, the court considered that according to the Law on the Federal Tribunal governing domestic proceedings to the court, an application for revision must be filed within 30 days of the discovery of the ground for challenge (Article 124 paragraph 1 let. a Federal Tribunal Act).

This time limit had been observed by Sun Yang. He was able to establish that he had learnt of the existence of the grounds for challenge (tweets) on May 15 2020, well after the expiry of the statutory 30 day time limit during which an appeal against the arbitral award could have been filed (which had originally been rendered on February 28 2020 and notified on March 2 2020). Given that Sun Yang filed the application for revision on June 15 2020, the Federal Tribunal held that he had adhered to the 30 day limit it has applied in standing practice.

On the substantive issue, the Federal Tribunal referred to its case law as well as to the case before the European Court of Human Rights (ECHR), *Mutu and Pechstein v Switzerland* (cases 40575/10 and 67474/10). The Federal Tribunal recalled the principle that the mere appearance of bias was sufficient to disqualify an arbitrator and referred to the dictum also used by the ECHR that "justice must not only be done: it must be seen to be done", a principle which is also embodied in the Swiss constitution. Accordingly, a judge whose situation or behaviour – from an objective perspective – is such as to raise doubts as to his impartiality may be challenged.

The Federal Tribunal also considered the IBA Guidelines on Conflict of Interest in International Arbitration and recalled that these, although not having legal force, could be a useful working tool. According to the guidelines, an arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence (Standard 2.b). Such doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision (Standard 2.c).

The Federal Tribunal considered that from the point of view of a reasonable third person, the tweets by Frattini were of such a nature as to raise doubts as to his impartiality and could create an appearance of bias. In the context of social media, the Federal Tribunal recalled and also warned that an arbitrator could perfectly well defend his convictions on the various social networks. However, an arbitrator could not express on the internet everything he thought, in extremely strong terms, without risking arousing fears as to his impartiality, even if he did not post his comments wearing his arbitrator's 'hat'.

Evolving with time

The judgment by the Federal Tribunal neatly shows that times are shifting and with more and more material being posted on social media channels, both the reach of arbitrators and the diligence of attorneys advising clients seem to be expanding.

The court has indicated that it is aware of this development and that consequences can be drawn depending on the set of facts and its timely notification upon detection. At the same time, legislation is being adapted to these modern times ensuring that Switzerland remains firmly placed on the global arbitration map.

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ESG AND EU COMPETITION

The challenge of ESG for EU competition law

White & Case partner Jacquelyn MacLennan explores the competition considerations involved in ESG decision making

Who can ignore environmental, social and governance (ESG) factors these days, either globally or, particularly, in the EU? ESG considerations are front and centre of decision making for many investors. Financial institutions of all types review ESG criteria in loan policies.

All corporates assessing external risks with serious financial consequences have long looked at the ABC and AT – anti bribery and corruption, and antitrust – but now the acronym of our times, ESG, has surged forward as a key risk factor.

Whether factoring it into the fear of litigation or criminal investigation, the consequences of inaccurate or misleading responses to non-financial reporting obligations or supply chain disruption, and the repercussions on reputation and share price, the global mega-trends of climate change and human rights (including workers' rights, and the use of slave, trafficked or child labour in the production process of products or services), can't be overlooked.

Many corporates are also looking at ESG as an opportunity. One hundred and forty CEOs signed up to the WEF International Business Council 2017 statement: "Society is best served by corporations that have aligned their goals to the long-term goals of society." The roadmap for that alignment was identified as the UN Sustainable Development Goals (SDGs).

On top of this, close to 10,000 corporates have committed themselves to operating responsibly, in accordance with universal sustainability principles, under the UN Global Compact. Increasingly seen as corporate doctrine – rather than heresy – is the principle of stakeholder capitalism and the idea that: "A company is more than an economic unit generating wealth. It fulfils human and societal aspirations as part of the broader social system. Performance must be measured not only on return to

1 MINUTE READ

ESG considerations are front and centre of decision making for many investors these days. Financial institutions of all types review ESG criteria in loan policies. Corporates assessing external risks with serious financial consequences have long looked at anti bribery and corruption, and antitrust – but now the acronym of our times, ESG, has surged forward as a key risk factor.

This article discusses the fear of litigation or criminal investigation, the consequences of inaccurate or misleading responses to non-financial reporting obligations or supply chain disruption, and the global mega-trends of climate change and human rights (including workers' rights, and the use of slave, trafficked or child labour).

"Society is best served by corporations that have aligned their goals to the long-term goals of society"

shareholders, but also on how it achieves its environmental, social and good governance objective."

So it is no surprise that ESG has hit the radar of antitrust authorities, as 2020 saw "sustainability" move to centre stage. But antitrust law is often seen as a problem for companies wishing to move in the direction required for sustainable development, particularly in the EU. Why is this?

The EU competition law problem

For many companies, contributing to a sustainable society requires collaboration. Businesses transitioning their operating models to a carbon neutral future, tackling environmental issues and climate change, are likely to face initiatives requiring substantial investment and financial risks associated with being the "first mover".

Businesses looking to improve the position of child labour in a specific region may realise that if only they take a stance, other companies may undermine their efforts, or there may not be the critical mass required to be truly effective. The solution is to partner with other businesses. But those other businesses are likely to be competitors and antitrust law may be a block. Antitrust regulators are often perceived to start from the premise that any joint conduct is designed for anti-competitive ends. Understandably, and sometimes rightly, they are suspicious of competitor cooperation, fearing it may be a cover for collusive, cartel behaviour or lead to coordination with ill effects on the market.

Indeed, Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits outright agreements and practices between competitors that could do harm to competition. Article 101(3), however, recognises that some otherwise restrictive agreements or practices may be permissible, if they lead to improvements or efficiencies in the market, or promote technical or economic progress. This is provided they allow consumers a fair share of the resulting benefit, and do not impose restrictions that are not indispensable or that eliminate competition for a substantial part of the products involved.

Initially, when competition law in the EU was novel and Commission decisions and judgments of the Court of Justice in Luxembourg relatively scarce, the EU enforcement system encouraged all but the brave to take agreements that might formally restrict Article 101(1) – but which, looked at in the round, would be pro-competitive– to the European Commission (EC) for an "exemption" under Article 101(3). This would be granted by way of formal decision (rare) or informal "comfort letter".

Some 20 years ago, EU competition law was redesigned. Supplication and blessing was replaced with "self-assessment", accompanied by greater guidance on the law from the EC. The Commission issues "block exemptions" under Article 101(3) TFEU (provided an agreement is drafted to comply with the language of such an exemption it is automatically lawful), and detailed guidance in the form of notices setting out its view of what is and is not legal in competitor collaborations (horizontal agreements) or supply agreements (vertical agreements).

As EU competition law has developed, a more economics-based determination has been adopted in defining what will be considered a restriction of competition. This has the merit of moving from a purely formalistic approach to a more flexible process of scrutiny considering market-specific criteria. However, greater flexibility has the downside of greater legal uncertainty. The criteria for when an effects analysis must be applied under Article 101(1), rather than an automatic assumption that an agreement is a "by object" infringement, has recently been clarified by the EU Court of Justice in Luxembourg (in the *Carte Bancaire*, *Generics* and *Budapest Bank* cases).

Even under Article 101(1), some restrictions of competition may be lawful. The "ancillary restraints" doctrine recognises that certain restraints do not restrict competition, if they are required to protect the parties' legitimate interests and ultimately underlie the creation of the agreement. However, the extent to which this doctrine can provide a defence to an otherwise illegal agreement is quite unclear, because a proportionality test is required.

So can parties be more confident relying on Article 101(3)? The nub of the problem here is the need to show consumer benefit. The EC has narrowed its approach over recent years and assumes that the promotion of technical or economic progress requires a result in short-term economic growth, and that consumer welfare "efficiencies" require economic benefits to the consumer, such as lower prices or wider choice. The achievement of sustainability objectives, including environmental benefits, leading to overall or longer-term public good or societal welfare, is not necessarily captured by that approach.

Indeed, the incremental benefits of sustainability initiatives may only be realised by consumers decades after a measure is initiated. The question is whether an agreement between parties to, for example, develop a new carbon capture and storage technology and bring that to market, can demonstrate sufficient price benefits for consumers for the companies involved to feel comfortable that the agreement merits exemption under Article 101(3)? Of course, if one could reasonably conclude that the agreement was not illegal under Article 101(1), Article 101(3) would not arise.

An additional complication is the impact of Article 11 TFEU, which sets out an all-encompassing legal duty to integrate environmental protection requirements in all the policies and activities of the EU. How should this be reflected in the analysis of a sustainability agreement under Article 101? Does it mean that competition law enforcement must take into account sustainability goals, including environmental policy goals? Some competition regulators accept this role for themselves. Others consider their responsibility is to apply competition law in its economic context, and they have neither the competence nor political authority to apply other policy factors in their decisions.

Why companies need guidance

Putting it simply: companies are now looking for reassurance on the law to encourage their sustainability initiatives. However, in the EU, the state of the law and

guidance interpreting the principles set out in the TFEU does not currently give that reassurance. Looking at an agreement aimed at standard-setting, or developing and bringing new products to market, there may be awkward decisions or out-of-date guidance that may not reflect current thinking published by the EC (or other national antitrust authorities, where an agreement falls under national competition law, which is based on, and must comply with, EU law).

Antitrust authorities with the assessment of actual cases are building experience, but this is slow progress. EC guidance on what is not allowed under Article 101 is much more elaborated upon than what type of agreement is permissible. This can be contrasted with the US, where US antitrust laws recognise many collaborations among competitors and with customers and suppliers as pro-competitive and perfectly lawful. The US benefits from 130 years of Supreme Court case law and accumulated experience that has created some reliable guidance as to what constitutes pro-competitive behaviour, and so arguably gives US companies greater legal certainty than that available in the EU.

At EU level, commissioner for competition policy, Margrethe Vestager has urged a "don't fear us, come talk to us" line: tell us what you are doing and we can give you guidance. Is this enough? Lawyers are (often) conservative creatures by nature and training, and antitrust law is particularly fluid and dynamic. In-house general counsel and their teams have to find ways of making compliance with a moving target workable and effective to safeguard the integrity of their companies. External counsel may be comfortable with a level of risk for which litigation-averse in-house counsel have no appetite.

For a large multinational considering a major business venture, the risk of an adverse decision in an investigation somewhere down the line could be a fine of up to 10% of worldwide turnover, followed by damages suits from customers or others who claim to have been harmed by the conduct, as well as the potential reputational damage that comes with being the subject of a Commission investigation. Other parties to such agreement could also sue to end the collaboration, on the basis that it infringes antitrust law and has been null and void from the beginning. Will management be happy to rely on some ad hoc statement by an official in an antitrust authority, even if that is the European Commissioner for Competition?

> *"The EC has narrowed its approach over recent years and assumes that the promotion of technical or economic progress requires a result in short-term economic growth"*

Lessons from Covid-19

There may be lessons to be learned from the Covid-19 experience. The pandemic has tested how antitrust law operates around the word as regulators have sought to ensure that the law is not a barrier to efforts to assist recovery. The EC published a temporary framework for assessing possible cooperation projects, acknowledging that cooperation between competitors may help to address the shortage of essential products and services that the outbreak has caused. Following intense pressure by companies, the temporary framework makes it clear that the Commission's Directorate-General for Competition is willing to provide informal "comfort letters" to companies. This "back to the future" move returns to the pre-2004 EU competition law world and accepts that the legal risk in self-assessment may be more than unpalatable, and simply unacceptable.

Other competition authorities – including the UK, Germany and the Netherlands – also took steps making it easier for competitors to collaborate during the pandemic. The approach of the US is also instrumental: entities seeking to work together in response to the pandemic can request an expedited response to a "business review letter", which sets out the envisaged conduct and to which the agencies will respond within a record seven calendar days. The Department of Justice Antitrust Division has already issued several "no-action" letters under this new process, demonstrating its commitment to encouraging collaborations in aid of pandemic relief (including no-action letters after cooperation between parties had begun, signalling additional flexibility under the new Covid-19 policies).

A *sine qua non* for acceptance by all antitrust authorities is that cooperating entities refrain from any behaviour that constitutes "non-essential" collusion and which might distort competition. This may be demonstrated by companies, for example, agreeing to prohibit any discussion of prices or future strategy, or the sharing of any costs beyond those necessary to share for their collaboration. Regulators have been very focused in ensuring that where competitively sensitive information (CSI) must be exchanged in order to make the collaboration function, there are robust and effective firewalls and antitrust protocols put in place. These will, for example, limit those receiving CSI to a "need-to-know" basis, excluding any employees in market-facing functions, and providing a cooling-off period before employees in receipt of CSI can take on a new business role.

A new approach for sustainable agreements?

So could these initiatives provide a prototype for a more sustainable future? A more predictable legal basis for competitor cooperation is not going to solve the world's problems alone, of course, but it would be a real advantage. Antitrust regulators have shown they can be flexible and respond to the threat posed by the pandemic with a proactive and practical response. What could this mean, applied to collaborations driven by sustainability goals?

First, a simple identikit method to the Covid-19 approach will not work. The response to the Covid-19 crisis is temporary (albeit longer lasting than initially foreseen). The challenge of climate change is not. A more permanent solution is required. In addition, the Covid-19 response has been sectoral, and a general approach is necessary to cover the variety of sustainability-justified initiatives that could be foreseen.

Second, companies have emphasised to the EC and other authorities that they do not currently have sufficient legal certainty to engage with confidence in novel initiatives requiring cost sharing and cooperation with competitors. Greater transparency in the likely approach of the regulators and their view of the law is necessary. If the ambitious environmental and other sustainability goals

"Antitrust authorities with the assessment of actual cases are building experience, but this is slow progress"

are to be achieved, they need targeted, clear guidance, and fast.

The return to the old "comfort letter" procedure by the Commission is not an ideal solution – it is too resource-intensive and the legal value of a comfort letter is limited – but it is a means of companies receiving some protection, at least for very large scale, innovative projects. At the same time, the obvious and immediate need is for more detailed, concrete guidance from the EC, consistent with that provided by other competition authorities, on the approach that will be applied to agreements and conduct entered into for clearly defined environmental or other sustainability goals.

This requires a focus on the type of legal assessment that will be applied under Article 101(1), and detail on the kind of evidence required to demonstrate the economic benefits of an initiative under Article 101(3). This also involves a movement away from a narrow, short-term, price-focused view of consumer welfare as the rationale for the application of Article 101(3) (as reflected in the EC guidelines), back to a more holistic understanding of Article 101(3), covering the concept of consumer welfare more widely in a manner that includes consideration of the benefits of social and environmental protection for society.

Other European competition authorities have moved into the space before the Commission, and views are not wholly aligned. The Netherlands is leading the way on adapting its rules on competitor collaboration to take account of sustainability initiatives. The Dutch competition authority (ACM) began a consultation in July 2020 on draft guidelines on sustainability agreements. This came in the wake of a few high-profile instances of apparently laudable initiatives being struck down under competition law (notably cooperation between supermarkets and meat producers over enhanced animal welfare conditions for the production of chicken in the *Chicken of Tomorrow* case, 2015, on the basis that the price increases would not be acceptable for consumers).

Draft ACM guidelines provide examples of the kinds of sustainability agreements that will not fall under the prohibition in EU law and its equivalent Dutch legislation: these include participation in agreements to agree to certain foreign law environmental or social standards, or codes of conduct promoting certain practices in production methods or use of raw materials with certification labels (subject to certain safeguards). They then focus on guidance on the assessment of agreements that would normally fall foul of the Article 101 prohibition, but which include certain sustainability efficiencies – wider than purely economic consumer benefits that would potentially justify an exemption under Article 101(3).

They single out agreements addressing environmental damage for a more permissive approach. Crucially, they make clear that the ACM will not impose fines if those initiatives are later found to have led to a formal infringement, provided participants have followed the guidelines in good faith. The Greek competition authority has taken a fairly similar approach, and the German and French authorities are active in the area. While now outside the EU rules (although still operating under equivalent domestic legislation), the UK has also sought to provide guidance on the application of competition law rules for cooperative sustainability agreements, within its existing framework.

In the US, the (now departed) head of the antitrust division of the Department of Justice under Trump promised little sympathy for "sustainability arguments", on the basis that laudable ends do not justify collusive means, and antitrust laws should not render judgement on the "moral" aspirations behind conduct. The approach of the Biden administration, which has already signed an executive order to re-join the Paris Agreement on Climate Change, may be a little more nuanced. Applying a "sustainability" label to anti-competitive collusive behaviour is never going to make that acceptable, nor should it. The US might nevertheless be more encouraging of joint responses to an environmental emergency, or human rights catastrophe, where proper safeguards are in place.

Many in the EC would take the same view. The Commission is currently reviewing two of its block exemptions (on specialisation and R&D agreements) and its horizontal cooperation guidelines, and has said that it plans to include specific guidance on the sustainability issues in its guidelines. While the guidance issued in this sphere by national authorities is discussed in international and European fora (e.g. the International Competition Network and European Competition Network, the OECD), and the advantages for business in a common approach are recognised, there is no uniformity of view at present.

Some in the EU suggest that a new EU block exemption covering certain sustainability-focused agreements would provide companies with the kind of practical, predictable, legal certainty on collaborative initiatives they need, while also leaving scope for self-assessment and the possibility for comfort letters to be sought in exceptional circumstances for agreements falling outside the block exemption guardrails. For others, the block exemption approach is anathema, and merely a way to reduce flexibility in how agreements must be tailored, with the result that companies may be more conservative than necessary in terms of their collaboration, impacting the scope for them to be truly innovative.

In the longer term, if the EC does not go down the block exemption route (which currently seems likely) – or even if it does – in addition to informal guidance, it could issue Commission decisions spelling out an approach which will foster agreements and practices aimed at contributing to climate change goals or developing high environmental or human rights of other welfare standards. Ultimately, it will then be for the Court of Justice in Luxembourg to ensure that ESG is at the heart of EU competition law, by defining principles that will encourage companies to collaborate in achieving the UN SDGs by 2030 and address the global climate change challenge. In the meantime, greater clarity from the EC is eagerly awaited by business.

These views are expressed in the author's personal capacity. Jacquelyn would like to thank her colleague, Kate Kelliher for her valuable contribution.

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Tonnage tax order provides incentives for environmentally friendly ships

The shipping industry has for many years proved to be one of the most successful sectors of the Cyprus economy. It is the longest serving generator of foreign direct investment and contributes approximately 7% of GDP. An important element of this success is the Cyprus merchant fleet, which is the third largest in Europe and the 11th largest in the world.

Among the various factors that have rendered the Cyprus flag attractive to ship owners, a key pull has been the existence of a specialised shipping taxation system based on the tonnage of a vessel (the tonnage tax). The advantage of such a system is that the tax burden in relation to the vessel is known, and does not fluctuate with profit or income levels. The Cyprus tonnage system is detailed in the EU approved Cyprus Tonnage Tax System Law 44(I)/2010 (the tonnage law).

In 2020, in a move to reduce the adverse impact of the shipping industry on the environment, the Cyprus government amended the tonnage law. The purpose of the amendment was to provide qualifying ship owners with an incentive to reduce the adverse environmental impact of their vessels. This incentive took the form of a potential reduction of up to 30% of the tonnage tax imposed. This would apply where owners could demonstrate that their vessels used equipment and/or mechanisms that contributed to the environmental preservation of marine life or worked towards reducing the effects of climate change.

On January 29 2021, the Tonnage Tax (Environmental Incentives) Order of 2021 (the order) was published in the Official Gazette of the Republic. The order details the eligibility criteria for obtaining a reduction in tonnage tax and for the level of reduction that will be applied. These are summarised below.

Qualifying vessels

To be eligible to apply for any aspect of the incentive scheme, a ship must be:

- A Cyprus or European Community ship that is within the tonnage scheme and is engaged in maritime transport; and
- Not 'laid up' during the calendar year during which the owner applies for an environmental incentive.

Excluded from the scheme are ships which, in a calendar year when the owner has applied for an environmenal incentive, have:

- Been detained for any environmental deficiency during a port state control inspection; or,
- Have violated any EU legislation in force related to environmental protection.

No incentive will be granted to the ship owner in that calendar year.

Available incentives

There are three types of incentives detailed within the order. These are summarised below.

Energy Efficiency Design Index (EEDI)

This is mainly relevant to ships subject to provisions of Regulations 19-21 of the amended MARPOL Convention/Annex VI (MARPOL).

Ships that can demonstrate a further reduction of the attained EEDI, relative to the required EEDI, can secure an annual tonnage tax reduction for their owner as follows:

- A greater than 10% reduction relative to required level will result in a 5% reduction in annual tonnage tax;
- A greater than 15% reduction relative to required level will result in a 10% reduction in annual tonnage tax;
- A greater than 20% reduction relative to required level will result in a 20% reduction in annual tonnage tax; and
- A greater than 30% reduction relative to required level will result in a 25% reduction in annual tonnage tax.

For phase two of the scheme, an additional 10% tonnage tax reduction will be applied to the corresponding percentage of the table. For phase three, an additional 30% reduction will apply to the initial reduction percentage. Thus, if a 10% reduction is obtained in phase one, this will rise to 11% in phase two and, to 13% in phase three.

It should be noted that ships falling outside of the MARPOL convention that demonstrate voluntary compliance with phases one, two or three, may secure their owner an annual tonnage tax reduction as follows:

- 5% when compliant with phase one;
- 15% when compliant with phase two;
- 30% when compliant with phase three.

IMO Data Collection System (DCS)

This is relevant for ships of 5,000GT and above spending a minimum of 4,380 hours at sea per annum and, subject to regulation 22A of MARPOL.

Ships that can demonstrate a reduction of total fuel consumption per distance travelled between two consecutive reporting periods, render their owner eligible for the following annual tonnage tax reductions.

- 2-4% fall in fuel usage will lead to a 10% reduction in tax;
- 4-6% fall in fuel usage will lead to a 15% reduction in tax; and
- A fall great than 6% in fuel usage will lead to a 20% reduction in tax.

Consumption of alternative fuels

This is applicable for ships of 5,000GT and above.

Ships powered by alternative fuels can obtain an annual tonnage tax reduction for their owner as follows:

- 15% reduction for using biofuels, methanol, electricity or other fuel types that achieve a reduction in carbon dioxide emissions of at least 20% relative to comparative ships using fossil fuels; and
- 30% reduction for using biofuels, methanol, electricity or other fuel types that achieve a reduction in carbon dioxide emissions of at least 30% relative to comparative ships using fossil fuels.

Other considerations

To be approved for any of the incentives, applicants must submit the relevant supporting documents specified in the order as an attachment to their application.

It should also be noted that the maximum annual tonnage tax reduction granted to an owner will never exceed 30%.

Wider impact

The positive outcomes of the legislative change are not restricted to the direct environmental improvements they may induce. The introduction of the amendment to the tonnage law was an important factor in the EU agreeing to

extend its approval of the tonnage system for a further 10 years.

In 2020, Cyprus also consolidated its position on the Paris and Tokyo Memorandum of Understanding on port state control (MoU) 'white lists', and joined the US Coast Guard's Qualship 21 list. When combined, these votes of confidence for Cyprus' tax system, its safety standards and, its port state control performance should ensure the sustainability of the shipping sector for the next decade.

Finally, the order may also help boost the country's growing number of dedicated marine institutes, which are focused on promoting research, technology and innovation in the shipping sector and, on influencing international policy towards a greener, smarter and safer shipping industry.

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APPI revisions seek to support digitalisation

The Japanese government has recently been pursuing an aggressive legislative agenda to ensure Japanese laws are in step with the rapid digitalisation occurring in Japanese society.

On February 9 2021, the Japanese cabinet submitted drafts of six acts related to digitalisation reform to the National Diet, comprised of the Basic Act on the Formation of a Digitalized Society (to replace the Basic Act on the Formation of an Advanced Information and Telecommunications Network Society) and other related statutes. Among them is the draft of the Act on the Amendment of Related Laws for Formation of Digitalized Society (the Act).

The Act itself covers three different goals: amending the Act on the Protection of Personal Information (the APPI); facilitating the data linkage and the usability of social security and tax number; and abolishing the requirement for physical documentation and individual/corporate seals in as many as 48 statutes.

This article focuses on four key proposed amendments to the APPI.

1. The Act will integrate the Act on the Protection of Personal Information Held by Administrative Organs (the APPIHAO) and the Act on the Protection of Personal Information Held by Incorporated Administrative Agencies (the APPI-IAA) into the APPI. The Act will also begin to regulate municipal governments' processing of personal information, which is currently regulated under separate municipal regulations. Along with the integration of the APPIHAO and the APPI-IAA, the Personal Information Protection Commission will have supervisory authority regarding data protection over all administrative organs (except for the Board of Audit), incorporated administrative agencies, and municipal governments.
2. The definition of a personal information handling business operator (a PIHBO) under the APPI will be modified to include certain types of public entities, such as national university corporations, national hospital organisations, and national research and development agencies. This means that a number of the rules under the APPI that regulate private organisations will also apply to these types of public entities.
3. The APPI currently exempts "universities and any other organizations or groups aimed at academic studies, or any person belonging to such an organization" from fulfilling the obligations of a PIHBO, to the extent they process personal information for academic studies. The Act will remove this categorical exemption and introduce more specific descriptions of requirements for exemptions based on individual obligations of a PIHBO relating to the usage purpose, sensitive personal information and third-party transfer. This revision intends to make the rules for academic organisations under the APPI satisfactory for an adequacy decision under EU's GDPR.
4. Fragmented definitions of 'personal information' between the APPI, the APPIHAO, and the APPI-IAA will be harmonised. It has been noted that the fragmented definitions have hindered data flow between the private and public sector since the APPI only applies to the former, and the APPIHAO and the APPI-IAA apply to the latter.

The Act comes in the wake of the proposal report from the Task Force on the Review of the Personal Information Protection System, which resulted from a supplementary clause of an amendment to the APPI in 2015 that instructs the government to revise the APPI. If passed, the provisions of the Act will be effective within one year (two years in the case of amendments relating to municipal governments) of promulgation.

Businesses and investors hope that the new law improves the efficiency of data usage throughout Japanese industries and the public sector, while maintaining appropriate protections on personal information.

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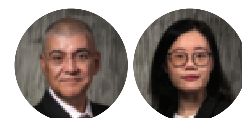

João Nuno Riquito and Bernice Kwok

New scheme encourages cross-border finance in the Greater Bay Area

The Outline Development Plan for the Guangdong-Hong Kong-Macau Greater Bay Area (the plan) was launched in February 2019, with the aim of concretising goals (e.g. technological, financial, infrastructural development) set up by a framework agreement of developing the area from July 2017. In terms of the financial aspects of the 2019 plan, Hong Kong SAR and Macau SAR bear the responsibility for its external development, due to their historical comparative

advantages. Internally, access to the mutual financial market among the Greater Bay cities is put in priority.

Following the guidance of internal development, the most recent milestone would be the establishment of the Memorandum of Understanding on the Launch of the Cross-boundary Wealth Management Connect Pilot Scheme (the scheme) in the Guangdong-Hong Kong-Macau Greater Bay Area (the memorandum), which was signed on February 5 2021 between seven parties. This included the People's Bank of China (PBoC), China Banking and Insurance Regulatory Commission (CBIRC), China Securities Regulatory Commission (CSRC), State Administration of Foreign Exchange (SAFE), the Hong Kong Monetary Authority (HKMA), Securities and Futures Commission of Hong Kong (SFC) and the Monetary Authority of Macao (AMCM).

The scheme allows citizens of the Greater Bay Area to exercise individual cross-border banking investment. It is divided into the Northbound Scheme (mainland financial products for Hong Kong SAR and Macau SAR citizens) and the Southbound Scheme (Hong Kong SAR and Macau SAR products available for mainland citizens).

The memorandum aims at establishing common ground between the parties, ensuring effective operation and proper risk controls of the scheme.

Whereas this memorandum is not legally binding, the scheme will be operated under the principle of 'regulation by the jurisdiction where the business is conducted'. Moreover, the parties would take up respective responsibilities in setting up guidance concerning management operation, anti-money laundering, personal information protection, etc. Besides, the parties have agreed on establishing a mechanism for collection and exchange of information under supervisory rules. In addition, regular liaison meetings would be held for the enhancement and arrangements of the implementation of the memorandum.

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Women in law: A reply to my daughter's sincere question

As these long days of confinement go by, among the many questions from my kids that I am forced to respond to, one particular query from my 10-year-old daughter has been the hardest to answer.

She asked me 'why' women were ever limited in their rights when compared to men, and 'when' this would no longer be the case in society.

This question – which develops into two – has the simplicity inherent to all the hardest questions.

On the one hand, the reasons for discrimination against women existing have deep sociological roots. On the other hand, the 'when' element requires the ability to predict the future, which of course, children assume their parents possess together with all their other special superpowers. I therefore struggled to convey my views on the matter to my daughter without destroying her hope, while teaching a few lessons along the way to my 13-year-old son.

This parenting challenge led me to consider the journey that I have personally taken on women's rights issues. Brought up by a fairly liberal father and mother in a closed family, where most figures of authority were women, and with a female teacher as a reference, I do not recall having any specific concerns during childhood.

As a teen and a young adult, I became more attentive to issues such as the 'pay gap' and the 'glass ceiling', although perhaps with different labels. However, a significant part, if not the majority, of the higher performers in my high school classes were female and that continued to be the case at law school. I was then under the impression that despite all doubts around the 'why' element, the 'when' had a clear-cut answer: it was just a matter of time. It was just a matter of time for all those successful girls and young women to reach the peak of their careers and assume the leadership roles that would have been consistent with their education and performance. My perception was that by having equal rights legally established for men and women, education and talent would do the rest.

Unfortunately, today I take a different view.

Almost two decades have passed since I entered college and, according to the European Commission, the gender pay gap in the EU today stands at 14.1% and has only changed minimally over the last decade.

As of June 2019, out of the 500 chief executive officers leading the highest-grossing firms (Fortune 500), just under 7% were women and, as of January 2020, only 1 in 4 parliamentary seats worldwide were held by women.

Further to that, there is already relevant data that anticipates that the Covid-19 pandemic will hit women harder as they continue to account for the majority of caregivers, at home and in communities, and domestic violence appears to have increased as result of the confinements.

Hence, equal rights and time by themselves do not have transformative power that I anticipated.

The 'when' and the 'why' cannot be separated in discussions. A simple root cause analysis tells us that culture and social roles play a big part in gender equality. For this reason, education is key but, personally, I am convinced that gender-sensitive policies are the most effective short to medium term tool necessary to promote gender equality in the workplace and in society.

These can be put in place to instil a desired behaviour and be removed when the goal has been achieved. A good example of gender-sensitive policies are parental leaves structured as equitable family leaves with 'daddy quotas' exclusively reserved for fathers. These have the effect of increasing the level of engagement of fathers in childcare, while contributing to increase women's labour-market participation, reduce gender pay gaps and increase male participation in household work.

In companies and firms, diversity and inclusion policies can also play a relevant role. At Morais Leitão, there is an assumed commitment in defining and adopting such policies. Besides a comprehensive package of work-life balance measures (which includes parental leave for fathers), an

internal mentoring programme – 'Mentoring for Leadership' – allows any trainee or associate of the firm to have a senior lawyer or partner as a mentor.

Today, I believe that the overall answer to my daughter's confinement question lies therefore not in time but in action. It is action that can protect the girls hope for equality.

This piece was written to mark International Women's Day 2021.

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Dividing line drawn between remote work and homework

The Covid-19 pandemic has caused work processes to change and mandatory employee presence in the workplace to be re-evaluated. As a result, the Slovak Republic has updated its rules for carrying out remote work, including telework, in order to draw a clear distinction between the frequently used home-office forms of work by employees.

As of March 1, the dividing line between 'remote work' and the occasional and more flexible 'homeworking' will be drawn, depending on the regularity of work performed off the employer's site. If an employee is working from home but there is no element of regularity, it will be deemed 'homeworking' and not remote work or telework. Homeworking will therefore be reserved for special circumstances requiring the employee to temporarily work from home, such as when there are technical problems in the workplace, an extraordinary childcare situation, or other unplanned situations, including temporary homeworking due to the pandemic measures put in place by the government.

Regularity as a feature of remote work and its distinguishing from occasional homeworking will also not necessarily mean that employees should work from home the entire five-day work week. It can also include an agreement to work remotely for a specified number of days during the week, such as one or two days. Also, remote work can be performed in any location off the employer's worksite and is not restricted to just the employee's home.

Unlike from agreeing on a home office even informally between the employer and employee, arrangements for remote work or telework will have to be agreed by the employer and employee specifically in the employment contract. The employer will not be able to unilaterally require the employee to engage in regular remote work.

For remote work, the employer can either set out fixed or flexible working hours or let the employee manage their own working hours, in which case there is a deadline by which work must be delivered and the period of time during which the work is carried out is irrelevant. The employee will ordinarily not be entitled to overtime pay, holiday pay or weekend and night allowances unless expressly agreed under the employment contract.

The employer will be required to provide work equipment to the employee for remote work or telework, but the employee and employer can also make arrangements for using the employee's own equipment. The employer will also be required to cover the employee's increased costs associated with the work, such as electricity or a high-speed internet connection, if necessary to perform the work. To avoid the social isolation associated with remote work and telework, the employer must allow the employee to enter the workplace, if possible, to meet up with their colleagues.

One of the obligations of the employee will be to promptly report to the employer any technical problems associated with malfunctioning equipment and software, internet outages, and other similar issues that prevent them from working from home. Under the new rules, even employees engaged in the more flexible 'homeworking' will be required to report these issues to the employer.

The 'right to disconnect' will also be introduced from March 1 for both remote work and the more flexible homeworking. It will represent the so-called right of the employee to disconnect from work-related tasks outside working hours and the right to not use work-related equipment during their free time when working from home. If an employee refuses to perform work or carry out an instruction outside working hours during periods when the employee is remote working, teleworking or homeworking, it cannot be considered by the employer as misconduct.

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SFTA clarifies tax treatment of employee share plans

Share-based incentive share plans are very popular in Switzerland among corporations of all sizes as they increasingly provide the only possibility of a tax-free private capital gain for their employees. In this context, on October 30 2020, the Swiss Federal Tax Administration (SFTA) published the amended Circular Letter No. 37 'Taxation of Employee Participations' (Circular 37), strengthening the uniformisation of the tax treatment of employer stock across Swiss cantons.

The alignment of the tax consequences from participation plans is expected to increase Switzerland's attractiveness as a location for start-ups and established companies alike. This article provides a broad overview of the key amendments from the updated Circular 37, which came into force on January 1 2021. These amendments mainly concern employer stock and not other forms of incentive awards (options, restricted stock units, phantom

stock, stock appreciation rights or similar), for which reason the latter are not further discussed herein.

Employee incentive plans

By implementing an employee incentive plan, the employer usually offers selected employees a scheme that grants them the right to participate in the equity of the employer and strengthens the employees' relationship with, and commitment to, the employer.

A qualifying employer stock under Swiss tax law

Administrative practice and case law interpret the term 'employer stock' broadly. Any acquisition of stock issued by the employer or a related party, in connection with an employment relationship, is considered as employer stock, including the acquisition of such stock by a future employee in view of a future employment relationship, and irrespective of whether employer stock is purchased from the employer itself or from a third party acquisition . According to a recent federal supreme court decision, the acquisition of a large shareholding (*in casu* a 50% stake in a company) can also qualify as employer stock.

Not classified as employer stock are shares acquired at the time of incorporation of a company or shortly thereafter (so called 'founder shares'). The same is true for shares bought by an employee at market conditions in the context of a third-party transaction (see below), i.e. at conditions which would also have been offered to non-employees.

Distinction between fair market value and formula value

The question whether employer stock has a fair market value or a formula value is important for determining the tax consequences at grant and at disposal. While the stock of listed companies generally has a fair market value, the stock of unlisted companies – to which category start-ups generally belong – only has a fair market value at times, i.e. when there has been a substantial third-party transaction over such stock. If a fair market value is unavailable, the value of the company's equity needs to be determined based on a suitable valuation method recognised by the tax authorities (resulting in a so-called 'formula value').

Circular 37 newly suggests that the so-called 'practitioners' method' – which is widely used in share valuations for Swiss wealth tax – results in an appropriate formula value for unlisted stock. The practitioners' method calculates the fair market value of a company based on a weighted average of the book equity (single weighting) and the capitalised historic earnings (double weighting), with the book equity being considered the minimum value. However, since the practitioners' method might not be suitable for every market sector, other valuation methods (e.g. turnover or EBITDA multiples) may be applied, if they are suitable and appropriate for the specific market sector. Once determined, a chosen method must be maintained over time.

Timing of taxation of employer stock

In case of an employer stock award, the difference between the fair market value or, as the case may be, the formula value of the employer stock and the lower offer price represents taxable income, which is subject to tax at the time of grant of the stock.

No tax is due on such difference in case of restricted employer stock, to the extent a permitted discount of 6% per year of blocking period is not exceeded (the maximum discount is 44.161% for a 10-year blocking period).

Tax-free private capital gain from the sale of employer stock

As a general rule and fundamental taxation principle in Switzerland, private capital gains from movable property realised by Swiss resident individuals are exempt from Swiss income tax. Accordingly, since employer stock is taxed at grant, capital gains derived from a later sale of such stock are generally exempt from income tax.

The principle of tax-free capital gain applies without restrictions in the case of shares that were either purchased at fair market value, or for which the employee was taxed at grant based on a fair market value. In the case of employer stock without a fair market value, for which a formula value was calculated at grant, the capital gain may not be entirely tax free. This is the case if the valuation method is changed between the grant and the sale of the shares; the portion of the capital gain exceeding the formula value at the time of sale – the 'excess gain' – is considered as salary and subject to income tax.

This excess gain is not taxed in case of a sale at fair market value (e.g. in case of a takeover by a third party or an initial public offering), if such sale occurs after a five-year holding period of the shares by the employee. In the past, this five-year exception was applied in a few Swiss cantons only, and Circular 37 extends it to all of Switzerland.

Ruling confirmation by the tax authorities

It is recommended to seek pre-approval from tax authorities of employee participation plans, in particular in view of a confirmation of the fair market value, or of the valuation method used for the valuation of employer stock. Since in Switzerland tax jurisdictions are with the cantons, such rulings should be asked for in all relevant cantons in which employees receiving stock awards are residents.

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Ahmed Ibrahim

Incremental reforms to the Companies Law set to change investment landscape

After weeks of speculation between UAE law firms, Law No. 26 of 2020 (New Law) amending a total of 51 articles of the Commercial Companies Law No. 2 of 2015 (Companies Law) is now available. It came into force on January 2 2021, with three further exceptions that will come into force after six months from the date of publishing of the New Law.

The New Law introduces key incremental reforms that have been long-awaited by the business and the legal community in the UAE since the promulgation of the new Companies Law back in 2015. Finally, the New Law puts an end to the inherited conservative approach in relation to foreign ownership restrictions. With particular exceptions that will be unveiled soon, under the New Law, foreign investors are allowed to own up to 100% of their UAE business and no service agent is needed for branches of foreign companies.

The New Law addresses most, if not all, the exemptions that have always been sought by companies considering an initial public offering (IPO). After a marathon of prolonged and extended discussions with UAE regulators, the legislation has taken into consideration all the exemption requests in formulating the New Law and has sought to accommodate the fair demands of investment bankers, international underwriters, auditors, and IPO candidates.

In addition to the foreign ownership restrictions, the New Law touches upon key matters that have always been a concern to all IPO participants and stakeholders. These key matters include: the nationality of board members of public companies, founders' lock-up periods, the scope of financial assistance, the joint liability of IPO advisors in respect of the content of prospectuses, the terms of auditors' mandates, the limitation on the ability of founders to sell-down in IPOs, and many other strategic and crucial matters.

This article sheds light on the main fresh concepts enacted under the New Law, the differences between the provisions of the New Law and the same provisions under the existing Companies Law, and seeks to highlight the practical impact of these differences. It is divided into five main sections: (i) general provisions; (ii) new rules applicable to limited liability companies (LLCs); (iii) new rules applicable to public companies; (iv) new rules applicable to private joint stock companies; and (v) concluding provisions.

This article follows the same sequence of the New Law, though it is worth noting that the key reforms start from Article 112 of the New Law.

General provisions

Article 6 – Corporate governance: The New Law defers to the Minister of Economy to introduce corporate governance rules that will be applicable to companies. The repealed provision provides that private joint stock companies with more than 75 shareholders had to abide by the relevant corporate governance rules. It is not clear if this rule is abolished by the amended article.

Article 10 – Activities with strategic impact: This article is long-awaited and was expected to be included in the Companies Law back in 2015. The New Law, repeals the existing provision titled 'UAE Ownership Percentage' that imposed the restriction of foreign ownership and required all companies to be owned at least 51% by UAE nationals, paving the way for foreign investors to own and control their own business without any complicated and costly contractual arrangements with a UAE sponsor. In principle, companies may now be owned 100% by foreigners. By way of exception, the new article provides that the UAE cabinet, in conjunction with a new committee to be formed by the cabinet, shall prepare a list of activities that require a minimum UAE ownership.

Article 11 – Practice of activities: The new article abolishes the requirement that investment of funds may only be carried out by public joint stock companies as stipulated under the repealed provision, opening the door for private companies to carry out investment activities.

New rules applicable to LLCs

Article 71 – Definition of company: Sole-shareholder companies need not be owned by a UAE national (or by a company owned by a UAE national). This follows the revocation of the minimum UAE ownership percentage, and so, subject to the list of 'activities with a strategic purpose', sole-shareholder companies may now be owned by a non-UAE national or by a company owned by a non-UAE national.

Article 73 – Companies MOAs: Going forward, the memorandum of association (MOA) of LLCs must indicate a dispute resolution forum to resolve any dispute that might arise between the company and its shareholders and between the shareholders themselves.

Article 93 – Invitations of general assembly meetings: The new concepts introduced under this article are twofold:

- As per the recommendations of the World Bank in respect of ease of doing business reviews, invitations to general assembly meetings must be published 21 days prior to the date of the meeting. As a point of interest, the repealed Companies Law No. 8 of 1984 had the same timing requirement to publish the general assembly invitation, which was abolished by the Companies Law No. 2 of 2015. The New Law comes to reinstate the repealed rule, requiring companies to publish the invitations for general assembly meetings 21 days prior to the date of the meeting. This should not be a concern to LLCs in view of its private nature but will of course have an impact on public joint stock companies.
- In view of the Covid-19 pandemic, the New Law allows companies to have general assembly meetings via electronic means. This concept was introduced during the lockdown and the New Law provides a legislative foundation for such practice, ending any potential legal challenges by shareholders where the general assembly meetings took or will take place via electronic means.

Article 96 – Attendance quorum of general assembly meetings and voting requirements: The New Law relaxes the requirements under the existing law as follows:

- Reducing the quorum of LLCs from shareholders owning 75% of issued share capital of the company, to 50% only;
- There will be no requirement to hold a third meeting, if the quorum is not satisfied in the first meeting, the second meeting will be valid regardless of the number of shares attended or represented in the meeting; and
- The second meeting will have to take place after no less than five days but no more than 15 days from the date of the first meeting.

Article 101 – Increasing or reducing the share capital: For the first time, the New Law introduces a new mechanism to allow shareholders to resort to courts to increase the issued share capital of a company where the quorum to increase the capital (being 75% of the shares represented in the meeting) is not met and the company in question suffers insolvency issues.

New rules applicable to public companies

The newly introduced rules in respect of public joint stock companies are the highlight of the New Law's changes.

Below are the key incremental reforms:

Article 112 – Founders committee: In an unprecedented approach in the UAE, the New Law abolishes advisors' and offering participants' liability in respect of the accuracy and completeness of information and reports submitted to regulators in an IPO process. Now, the liability lies solely with the founders committee of the company in question.

Previously, all advisors and offering participants (including legal counsels, banks/underwriters, auditors, valuers, etc.) were jointly liable with the founders committee for the accuracy and completeness of information shared with different regulators. This is one of the articles that all companies going public seek a cabinet exemption from. Such a provision meant additional contractual arrangements between the companies going public and their advisors to ensure a proper and fair indemnity from the company to all offering participants. This will not be needed anymore.

Article 118 – Valuation of in-kind contribution: The new provision brings more relief to valuers, particularly the big four auditing/accounting firms that are extending valuation services to public joint stock companies. Valuers will not liable anymore in respect of their valuation reports of in-kind contributions, but rather the liability again lies with the founders committee. It has always been a common practice that valuers heavily disclaim their valuation report to avoid potential liability under the old provision to protect their position, and it is expected that valuers will, in any case, continue to heavily disclaim their valuation reports even after the new amendment to Article 118.

Article 121 – Invitation for public subscription: Article 121 has always raised a lot of complaints from offering participants. The provision assumed that the founders' committee, the company's counsels and advisers and other parties involved in the IPO process and their representatives were jointly liable for the accuracy of the information in the prospectus. As Article 121 had a very broad remit, it continued to have a negative impact on the appetite of international banks to play a leading role in the UAE capital markets. Also, this liability was not in line with international or regional market practice, where each offering participant is only liable for its input and participation in the offering documents. In response to numerous exemption requests in previous and ongoing IPOs, the legislator has limited the scope of liability of each offering participant to their relevant scope of work, without being jointly liable for the work products of other participants.

Article 123 – Underwriters: In view of the new amendments, it is expected that the Securities and Commodities Authority (SCA) will issue new rules to regulate the underwriting activities in the upcoming IPOs.

Article 139 – Amendments of the articles of association (AOA): In a bold attempt to limit the workload of the Department of Economic Development (DED) in respect of the amendments in the AOAs of public joint stock companies, the amended Article 139 provides that the the approval of the DED on amendments to the AOA is not required. It remains to be seen how this new article will be implemented in practice, and if the DED will truly cease interfering in public companies' wishes to amend their articles in a manner that their shareholders deem appropriate.

Article 144 – Election of board members: Surprisingly, this article reconfirms a redundant approach introduced back in 2015, by giving public companies the right to appoint expert board members not from within the pool of shareholders. As a matter of law, board members need not be a shareholder, and thus this article remains redundant and its application in practice is moot.

Article 151 – Nationality of board members: The amendment of this article has been long-awaited and is far overdue. The article required the majority of board members of public companies to be UAE nationals. Under the New Law, the requirement of having UAE-national board members will be limited to the companies that will be practicing activities with strategic impact as per Article 10 of the New Law. Having said that, this article will only come into force after six months from the publication of the New Law.

Article 153 – Prohibition to extend loans to board members: In principle, companies may not extend loans to their board members. The repealed Companies Law No. 8 of 1984 exempted insurance companies and financial institutions under the supervision of the UAE Central Bank (CB) from the application of such rule. In 2015, the Companies Law No. 2 of 2015 abolished such exemption so that all companies, including financial institutions, were prohibited from extending loans to their board members. The approach introduced by the article raised the concerns, the New Law addresses this issue by exempting financial institutions from the application of Article 153.

Article 162 – Liability of board members and executive management: The amended article sets out the parameter of who falls under the definition of 'executive management'. It also penalises any board member, who is found to be guilty by a final court judgment of fraud, abuse of power, or if entered into related party transactions or transactions where there is a conflict of interest in breach of the Companies Law, to be discharged from the board of directors immediately by operation of law. The discharged board member may not be re-elected for board membership for a period of not less than three years from the date of the court judgment.

Article 172 – Invitation of general assembly meetings: Invitations to general meetings must be sent 21 days prior to the date of the meeting instead of 15 days under the old provisions. For more information, please see the commentary above on Article 93.

Article 174 – Shareholders' request to call for a general assembly meeting: Now, shareholders owning a minimum of 10% of the issued share capital can call a general assembly meeting. Under the old provision, the minimum required was 20%.

Article 176 – SCA's request to call for a general assembly meeting: The amended article provides the SCA with the right to call a general assembly if: (i) the number of board members falls below the minimum requirement to have a valid board meeting; (ii) if there is a breach of law or the AOA by the company in question; and iii) if the board fails to call for a general assembly as per the Companies Law.

Article 180 – Competencies of the general assembly: Now, shareholders owning a minimum of 5% of the issued share capital may add a new agenda item to the general assembly meeting. Previously, the minimum required percentage was 10%.

Article 184 – Withdrawing from the general assembly meeting: The amended article regulates the scenario where one or more shareholders withdraw from the general assembly meeting after they register their attendance. In which case, the voting quorum will be adjusted accordingly, so that resolutions will be passed by the majority of votes represented in the meeting after disregarding the shares of the withdrawn shareholders.

Article 186 – Voting in general assembly meeting: The New Law accommodates the new challenges of Covid-19 and allows companies to have electronic voting instead of physical attendance, for so long as all the applicable rules are adhered to.

Article 193 – Share capital: As per the amended article, the concept of the authorised share capital has been abolished. This concept was introduced for the first time under the Companies Law No. 2 of 2015, whereby the board of directors can increase the issued share capital of a company within the limit of the authorised share capital without resorting to the shareholders. The concept of authorised

capital is beneficial, provides a degree of flexibility, and saves the logistics required for calling a general assembly. It is not clear what the motivation behind this is, and it can be stated that the deletion of such a concept would be a step backwards.

Article 204 – Reduction of capital: In recent times, a number of companies have reduced their issued share capital to extinguish the accumulated losses and 'clean' their balance sheet. One of the key hurdles faced by all companies that were considering reducing their capital was the obligation to submit an undertaking that must be signed by the majority of board members confirming that the company in question can pay its debts despite the capital reduction and that the board members are jointly liable vis-à-vis the creditors of the company (in their personal capacity) if the company fails to pay its debts. Such undertaking was a turn-off to all companies that were considering reducing their share capital to extinguish their losses and 'clean' their balance sheet and has been replaced with slightly more relaxed requirements.

Article 222 – Financial assistance: The New Law amends Article 222 by explicitly excluding any indemnities, guarantees or compensation that a company pays to the company's underwriters from the application of Article 222. Under the old provision, underwriters had to rely on a 'back-up' indemnity from the shareholders of the company to protect themselves if the indemnity provided by the company to the underwriters is found to be in breach of Article 222. Now, this practice comes to an end after the explicit exclusion of indemnities, guarantees or compensation that a company makes to the company's underwriters from the application of Article 222.

Article 224 – Strategic investor: The requirements for an investor to qualify for 'strategic investor' status is relaxed under the New Law, whereby all the pre-requisite conditions have been abolished. Previously, a strategic investor must be carrying out similar or complementary activities to the company and had to have at least two financial statements issued. All of these requirements have been abolished. This means that a strategic investor can be an individual and not necessarily a corporate entity as was provided for under the repealed article. However, it remains to be seen if the SCA will still prohibit a strategic investor from being an existing shareholder in the company.

Article 243 – Appointment of auditors: Now auditors may stay auditing the same company for six years, provided that the partner in charge must be replaced after a maximum period of three years. Under the old provisions, auditors may not audit a company for a period of more than three years. This is good news to auditors and companies and provides a degree of stability between companies and their auditors.

New rules applicable to private joint stock companies:

Article 255 – Incorporation of private joint stock companies: Under the old provisions, the shareholders of private joint stock companies may not exceed 200 shareholders. This cap on the number of shareholders has been abolished, and there is now no maximum number of shareholders.

Notwithstanding this, it is to be noted that the founders of private joint stock companies are still subject to a lockup period of one year, which is something that is not in line with the new amendments to the lockup periods explained below.

Article 279 – Sell-down in IPOs: The New Law allows the shareholders to sell up to 70% of the issued share capital of the company in an IPO and may exceed this percentage subject to the approval of the board of directors of the SCA.

Technically, the drafting of this article is incorrect. The article indicates that the "company" has the right to sell up to 70% of the issued share capital in an IPO, while from a technical standpoint, it is the shareholders/founders who would be selling, not the company. The reference to the company's ability to sell shares should technically be a primary offering, i.e. offering by way of a capital increase.

Article 279 – Lockup period: This is a landmark development, whereby founders will only be subject to a lockup period of six months. This comes in line with the international best practice, where there is always a contractual six-month lockup period on founders. Again, this is one of the recurring provisions from which many companies have sought exemption.

Article 292 – Acquisition: There has been a lot of discussions around the amendment of this article. The underlying rational can be summarised as follows: Under merger and acquisition rules of the SCA, there is a provision that allows an acquirer who owns 90% or more to 'squeeze-out' the minority shareholders. Similarly, the minority shareholders may oblige the majority shareholder who own 90% or more to buy them out. The concept of 'squeeze-out' is perceived to be conflicting with a constitutional right that protects individual property from being confiscated. Article 292 has been amended to relay a legislative foundation for the 'squeeze-out' right. However, this article is, as it stands, too vague and ambiguous. It is hoped that the SCA will issue executive regulations quickly to add more colour to the article in question.

Article 292 – Acquisition by way of issuing new shares: Article 292 introduces a new concept whereby a public joint stock company may acquire a new company and pay the consideration for the acquisition in a form of new shares. In this case, the issuance of new shares does not trigger pre-emption rights of existing shareholders.

Concluding provisions

Article 357 – Reconciliation: Companies are required to be in compliance with the provisions of the Companies Law as amended by the New Law within one year, the failure of which will trigger a penalty of AED 100 (approximately $27) per each day of delay in complying with the provisions of the New Law.

Revocation of Article 329: The New Law revokes Article 329 of the Companies Law, which requires all branches of foreign companies to have a UAE service agent. Thus, branches of foreign companies need not appoint a UAE service agent. This article will come into force after six months from the issuance of the New Law.

The new amendments come in line with the ongoing legislative reform in the UAE since 2016, particularly after the promulgation of the Bankruptcy Law. Since then, a lot of dynamic and vigorous changes in the UAE legal infrastructure has been witnessed, with the aim to create a more friendly and graceful investment environment to foreign investors. It will take time to see the full impact of these changes on the UAE economy and ease of doing business.

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Pay transparency can help close gender gap

This year, Equal Pay Day falls on March 24. It marks how far into the year an average woman needs to work in order to earn what an average man does the previous year. According to the World Economic Forum's Global Gender Gap Report 2020, it will take an estimated 99.5 years to close the global gender gap in wages.

In order to address the issue of pay parity, efforts such as negotiation training may help to encourage women to advocate for higher pay. Increased pay transparency is a better step.

For companies, doing an audit of pay and promotion processes is first and foremost. This can help to identify areas where unconscious bias or discriminatory practices may exist. Once these issues are identified, proper training can help address problems during hiring and employee review processes.

At the regulatory level, a number of jurisdictions have passed laws to help fight against pay inequality. For instance, California passed a law in 2019 that prohibits employers from asking applicants for salary history. The logic is that without knowing the prior salaries of job applicants, everyone doing the same job should receive the same pay.

In the EU, Scandinavian countries, as well as Austria, Belgium, France and Italy have implemented some of the first measures requiring companies to disclose information about employee pay. The move follows the European Commission's non-binding recommendation on pay transparency in 2014 to encourage member states to introduce measures. Germany, Lithuania and the UK passed have already passed legislation that require companies to produce pay reports.

Fighting back imposter syndrome

One of the biggest barriers to career development is imposter syndrome – when people feel that they do not belong or deserve to be in a role and doubt their skills and accomplishments. Even when the outside world has full confidence in these individuals and what they do, it is the individuals themselves who have self-doubt. While men certainly get this feeling, studies suggest that women are more inclined toward the phenomenon.

So what are some tips to overcome imposter syndrome?

Recognise the feeling

Knowing when you feel fraudulent is an important first step in understanding why you might be experiencing imposter syndrome. Recognising these thoughts can allow you to reflect on how you can tackle the uncomfortable feeling.

Focus on the positive

It's important to look on the positive side and not over analyse when a mistake happens. Dwelling on the past won't help. Learn from the mistake and move on.

Visualise success

Picturing yourself doing well can help to reduce panic and stress when you're about to embark on a difficult task. Tracking successes will let you know how far you have come.

Say yes to opportunities

Courage comes from taking risks and putting yourself out there. If it doesn't happen the first time, give it a second try. You never know what will happen unless you take your first step.

Know you are not alone

Joining a support group or finding a mentor to talk to can help alleviate the feelings of imposter syndrome. When you know that other people can relate and overcome the challenge, you know that you can too.

Gender inequality in numbers

7.4%	percentage of Fortune 500 corporations with women chief executive officers
4.2	number of hours women globally spent on unpaid domestic and care work per day during Covid-19, compared to 1.7 for men
35%	percentage of women STEM (science, technology, engineering and mathematics) graduates globally
$0.81	amount women made globally for every dollar a man made in 2020
18%	percentage of women globally who have experienced physical and/or sexual violence by an intimate partner during Covid-19 lockdown
99.5	estimated number of years it will take to reach gender wage parity

Heard something that deserves a mention in Closing Conditions? Let us know at john.crabb@euromoneyny.com

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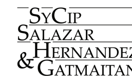

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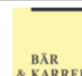

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