Winter 2020

IFLR

The Biden era dawns

The sun is setting on the Trump presidency's final days. As the Biden team prepares for 2021 and beyond, we look at what the world can expect in the financial regulatory space

SPACs reach Europe

Africa and Middle East awards

Mifid II impact assessment

UK climate risk disclosures

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"I hope that we will be able to work productively while building a good framework within which our post Covid-19 economy can recover"

SEC commissioner Hester Peirce has high hopes for the Biden administration

EDITORIAL

All change

This is my last issue as editor of IFLR, so I hope you'll indulge me in some reminiscing. Five years doesn't sound like that long in the grand scheme of things, but I think most can agree that the past five years have been really quite exceptional. When I started as a trainee reporter in April 2015, the UK was a member of the European Union, Barack Obama was president of the United States, Mifid II hadn't yet been implemented, and Libor was just a slightly problematic number that wasn't going anywhere fast. The scars of the financial crisis were still very much healing – they arguably still are – and it was difficult to have a convesation without someone, at some point, mentioning Lehman.

As John Crabb – who will take over from me as managing editor – writes in this issue's cover story – and as readers know all too well – the past four years in the US were quite the political aberration. The election of Donald Trump was a shock for most – the IFLR team included – but the day-to-day impact on business and finance has been mixed. Headline-grabbing tax cuts and subsequent stock market rallies may have been delivered, but the promise of a regulatory bonfire, with Dodd-Frank first on the pile, largely failed to materialise. The election of Democrat Joe Biden with a more-than-likely Republican Senate might mean things don't change too fast. But for financial markets, would that be the worst thing? All I can promise is that at IFLR, the transfer of power is going to be a more peaceful, cooperative one!

Meanwhile across the Atlantic, the UK edges ever closer to the end of the Brexit transition period with, arguably, more questions raised than answered. And as the world begins to heal from a devastating pandemic that dominated the news throughout 2020, for lawyers – restructuring specialists in particular – there's plenty of work to yet to be done.

For one last time – enjoy the issue,

Lizzie Meager
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GLOBAL

Work needed to ease sovereign debt concerns globally

Despite the pandemic, the world economy has so far been able to avoid a systemic global crisis. Key architectural changes must be made to sovereign debt to keep it that way. The pandemic may well be the final straw for some countries

AMERICAS

Companies looking to go public have more choices than ever

Those looking to list on an exchange can now choose between traditional IPOs, direct listings and special purpose acquisition companies. Now more than ever, this choice must be made clearly to ensure the most lucrative path is followed

ASIA

China targets 'too big to fail' companies with new regulation

The People's Bank of China is doubling down on nonbank businesses expanding in the financial sector. Corporate lawyers and rating companies believe that the regulation will help to improve the governance and stability of businesses across the economy

EMEA

Covid-19 highlights need for stronger African markets

While Covid-19 has had a devastating impact on all economies around the world, Africa remains particularly vulnerable. Governments must invest in financial infrastructure to deepen capital market activity and engagement

AMERICAS

Market is flush with corporate finance options

Syndicated finance and direct lending are two particularly attractive financing methods, but market participants in the US are having a tough time choosing between capital raising options. This year has been testing in many ways

ASIA

Asian firms face down US & UK anti-corruption laws

Companies operating in Asia need to be wary of the extraterritorial nature of European and north American anti-corruption and anti-money laundering laws, especially when operating in high-risk jurisdictions. In-house counsel at BHP and UPL and private practice lawyers share practical tips on global strategies

QUOTES OF THE MONTH

"A Biden presidency with a Republican Senate is not a bad scenario for financial markets…this is the opposite of what the market has been pricing in for the last month and a half"

Nomura cross-asset strategy head Charlie McElligott assesses the US election result in the days that followed

"Ironically the outcome of the trade negotiations isn't directly relevant to us, in that we think we already know what the outcome for our industry will be"

MarketAxess regulatory affairs head Jason Waight says his firm isn't holding its breath for the government's Brexit negotiations

"As the pandemic raged throughout the world, debt turned out to be a very serious pre-existing condition"

IMF's first deputy managing director Geoffrey Okamoto speaking at a Peterson Institute event in October

"The scars of the financial crisis that triggered the great recession are still present in our economy and our society. Banks should never be too big to fail"

US president-elect Joe Biden indicates his stance in a policy document from July

"A large part of risk comes from chasing shiny objects of innovation, and not really focusing on the most important areas of real business"

IBM vice president Mark Foster opines on the benefits and drawbacks of new technologies at SIFMA's annual meeting in October

ASIA

Reining in the colony queen

In an unexpected move in early November, Alibaba affiliate Ant Group had to postpone its proposed IPO on the Shanghai and Hong Kong Stock Exchanges, just two days before the company was planning to announce its $34 billion dual listing. It would have been the largest IPO in history.

The Shanghai Stock Exchange told the company that its proposed offering no longer met its listing requirements. This came a day after the China Securities Regulatory Commission met with the company's executives, including Jack Ma, Ant Group's controlling shareholder and co-founder of Alibaba.

It transpired that Ma had made comments criticising financial regulation in China at the Bund Summit in Shanghai at the end of October, claiming that the regulatory system needed to change to fuel growth. The series of events shows that however big a Chinese company can become, it still falls under the control of the Chinese financial regulators.

However, it does seem that the regulators are playing catch up with rule changes, especially in the rapidly changing area of fintech.

Over the past few years, Ant Group has radically changed the world of mobile payments through its Alipay platform, and has rapidly added to its product offerings that range from consumer loans to wealth management and insurance.

An important part of the company's success is its focus on democratising asset management and lending. In a financial market dominated by traditional Chinese banks that lag when it comes to diversity in consumer wealth management products and can easily shrug off small businesses looking for loans, Ant Group has filled a significant gap in the market.

But until now, there has been little regulation or scrutiny of the ballooning success of fintech companies like Ant Group. In the same week that Ant Group pulled its IPO, the People's Bank of China and the China Banking and Insurance Regulatory Commission launched draft rules to tighten the microlending market. The rules indicate that the central regulators will be taking on supervisory roles in monitoring microlending companies, and will cap the size of microloans.

These rules were followed by another set of draft rules on November 10 that propose to clamp down on anti-competitive practices of internet companies in order to maintain market fairness.

While China's relatively loose financial regulatory framework might have prompted the innovative success of Ant Group, the Chinese regulators are evidently keen to show that they are not afraid to take a stronger stance to rein in companies that they believe pose a threat to financial stability.

AMERICAS

Could we not just have fixed Libor?

A couple of weeks before this magazine went to press, Libor's administrator ICE Benchmark Administration (IBA) announced intentions to extend the date of cessation for USD contracts with the most widely used Libor term rates.

The announcement caused a stir in the industry and prompted a flurry of analysis. Some have claimed the delay will offer a welcome reprieve, while others are concerned that deviating from course will likely cause more problems than it fixes.

Having covered the transition for a number of years, one thing that has become apparent to me is that while banks are toeing the line and pressing ahead with the move towards SOFR, not everybody is entirely happy with how things are going. The lack of a forward-looking term SOFR, for one thing, has caused much consternation and appears no closer to resolution as time ticks away.

Whether the 18-month delay does enough to allay fears, and whether stakeholders will use the additional time to ensure that SOFR is a robust and liquid enough rate to replace the trillion-dollar USD Libor market, remains to be seen.

The rise of the American interbank offered rate – or Ameribor – among smaller and community banks in the last year or so is a stark indication that SOFR does not fill the needs of the entire US banking community. The recent announcement from Ameribor's administrator AFX of a tie-up with Citibank also shows that the entire industry is yet to commit to SOFR.

As one source told IFLR confidentially in response to news of the delay: "Citibank, the Bank of America and others, they don't like SOFR at all. They are just going along with it because the Fed wants them to."

If banks are questioning new rates and – with just under a year to go until the end-2021 deadline – are still unsure about touted replacements, why are administrators and regulators forcing such a momentous transition on them against their will?

There is a feeling among larger participants that if they could roll back the clocks, they would probably have tried to convince the Bank of England to fix Libor, rather than going through the process of replacing it entirely. Across the world, the finance industry is searching for a robust substitute, but why not just make Libor itself more robust?

For example, SOFR does not have a flexible credit element, or crucially – a forward-looking term rate. ARRC workshops have attempted to fill these gaps, as have alternative rates, but with the deadline looming both remain glaringly absent.

Libor, on the other hand, already performs this function. The issue with Libor is that corrupt actors were able to manipulate it for personal gain, causing a widespread loss of trust in the rate. Reforming Libor to remove this option would surely not have been as technically difficult as the mammoth task of rebuilding the entire process.

Yet when it comes to the Libor transition, the genie is well and truly out of the bottle. The time for choosing reform over replace is long gone, but when the time comes to reflect on the transition, the question of whether the entire approach was necessary will undoubtedly be asked.

EUROPE

The UK's precarious balancing act

The UK recently jumped on the global bandwagon of blocking Chinese expansion through its newly announced security regime; but the country is in no position to be taking such a hardline approach with one of its largest trade partners.

With the creation of the National Security and Investment Bill (NSI) on November 11 2020, the UK moved its foreign investment regime in line with that of other western powers, namely the United States with its Committee on Foreign Investment in the United States (Cfius).

However, unlike its friend across the pond, the UK should not take such a strong stance when it comes to foreign businesses.

The entire global economy has been negatively impacted by the Covid-19 pandemic; but with the prospects of a no-deal Brexit looming the UK has a second major economic event on its hands. According to the Office of National Statistics, in September the UK's GDP remained 8.2% below pre-pandemic levels.

Since the Brexit referendum in 2016, it is estimated that about one in five overseas investors have either cancelled plans or placed them on hold. Additionally, numerous multinational companies such as Panasonic and Sony have announced plans to move their European headquarters from the UK to the Netherlands, and the exodus away from the City of London is gaining steam as banks look to avoid losing passporting access to the single market.

The crisis that the UK economy finds itself in only accentuates its need for healthy volumes of inward investment. This partly explains why the government rhetoric surrounding the NSI bill has been that the UK remains open for business; and why the UK is unlikely to take as hardline an approach to China as Cfius in the US.

Nevertheless, the UK is performing a tricky balancing act: appeasing the desires of its closest ally while continuing to attract foreign investment – even if that investment stems from China. Of course, neither the UK nor the US would go as far as to suggest that either respective security regime singularly targets China, but it is widely accepted that these preventative measures have been introduced with the Asian country in mind.

In July, under mounting pressure from the US, the UK government reversed its stance on Chinese telecommunications company Huawei; announcing that all existing Huawei equipment will be removed from existing 5G networks by 2027. Insisting that Huawei's technology was the most advanced and cost-effective, the UK had resisted the US government's earlier requests.

The NSI bill threads a thin line as China brings both political concern but potentially large economic rewards for the UK. Billions of pounds have flowed into the UK from many high-profile acquisitions by Chinese companies. A notable example is the Jingye Group's takeover of British Steel in March 2020. The acquisition reportedly saved over 3,000 jobs as the Chinese company promised to invest heavily in the flagging sector.

The US, however, is in a much less perilous position economically. Despite a tumultuous 2020 the country continues to thrive economically and has been able to distance itself from China without suffering too much of a financial blow. The UK does not have the same luxury.

While the final draft of the NSI bill is yet to be released and the details of its implementation remain somewhat of a mystery, it is clear that the UK is in no position to block inward investment from any source, especially one the size and prominence of China. Outside of the EU and the US, China is the UK's largest trading partner. As the UK leaves the European Union and faces an uncertain future with the trading bloc, China is an economic partnership that it cannot afford to lose.

With the NSI bill, the UK will need to tread carefully to find the middle ground between achieving its foreign policy objectives and protecting its economy post-pandemic and Brexit.

OFF THE

RECORD

"The impact of coronavirus on businesses is similar to its impact on people, in that it's polishing off the old and the sick first"

A UK-based private practice lawyer makes an astute observation

" All sorts of traditions resisted London; covered bonds from Frankfurt, the Kroner market, or even the various specific Italian rules…we have always had different markets, and Brexit will only turbocharge that"

A banker argues that Brexit won't change things that much

"We understand the difficulties Covid-19 has created, and we understand that reporting requirements could be paused temporarily, but to wind back an entire ruleset because of a temporary crisis is dangerous"

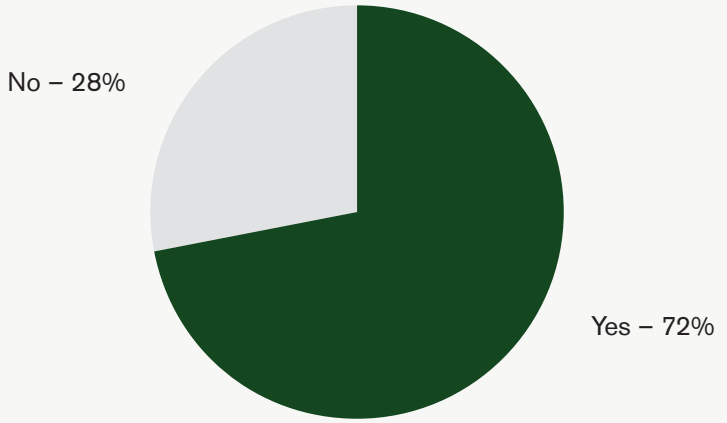
A European regulator warns against rash decision-making in light of the Mifid II quickfix

Leading by example

The UK is the first country in the world to propose forcing companies to disclose any climate-related risks that affect their business. IFLR readers believe others should do the same

By Lizzie Meager

Should other governments follow the UK's lead and force all companies to make climate-related financial disclosures?



In mid-November, UK chancellor Rishi Sunak began to set out the government's post-Brexit plan for financial services. As part of this, Sunak announced plans to sell the first ever green gilt in 2021, along with a number of legislative changes for UK-domiciled companies.

Perhaps most notably, from 2025, the UK will become the first country in the world to force companies across the economy to disclose any climate-related threats to their business.

In any conversation on environmental finance or ESG [environmental, social & governance] more broadly, one thing is clear: disclosure is key. So arguably, by forcing the hand of all UK companies, this move is undoubtedly positive. Critics could – and often do – argue that excessive regulation in the space can stifle innovation and, of course, hit returns. At the same time, 2025 is a long way away. Is it too little, too late?

With this in mind, IFLR polled readers on whether other governments should follow the UK's lead and force companies to disclose climate-related risks to their business. The result was largely in line with expectations, with 72% of respondents answering yes and 28% no.

"We hear all the time that investors need this level of detail for reporting to their own ESG council – it's incredibly important to them," says one respondent. "Today, environment-focused questions [in an investment decision] are along the lines of 'has your company ever caused damage to the environment?' rather than specifics on carbon footprint, or active steps taken towards lowering emissions. Voluntary action has been slow, so this can only be a good thing."

For some it may be too little too late, but Sunak's plan is undoubtedly a step in the right direction from a government that so far has been relatively silent on the risks of climate change – though it has, along with a host of other nations, pledged to reach net zero by 2050.

Nonetheless, the UK is ahead of others. Although the push to enhance climate risk disclosure is a key recommendation of the Financial Stability Board's Task Force on Climate-Related Financial Disclosures (TCFD), no other country has put forward a plan that goes this far.

In October, New Zealand proposed similar measures, but will give companies the option to explain if they choose not to comply. The UK's report acknowledges this as an option but argues it is not going far enough, 'given the urgency of the climate threat'.

It's also worth noting that from January 2021, companies listed on the London Stock Exchange will have to disclose climate risks in line with TCFD recommendations – on a comply-or-explain basis – so it naturally follows that similar measures will be imposed on the rest of the UK economy in four years' time.

"The UK seems to be some way ahead on this point, so I'd definitely agree that other governments should follow the example set here," says another respondent, an in-house lawyer at a UK bank.

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

In any conversation on ESG, one thing is clear: disclosure is key

Unsurprisingly, though, this is not as easy as it sounds. The disclosure has to fit for each company and sector, which may seem obvious until you also consider that the lack of standardisation in ESG reporting is a major blocker for investment firms. This makes comparisons between companies and risks difficult.

One respondent, who voted 'no', says that these ideas are of course good in principle – but challenges around reporting and standardisation make implementation too difficult in practice. "As almost every conversation on this subject goes, the aim is to standardise," they say. "We're constantly trying to bring consistency to drafting and language, so tailoring the approach to different types of companies seems counterintuitive."

They add: "Other countries following in the UK's footsteps may sound positive, but the reality is the approach would end up slightly different, which would be a major headache for companies with bases in multiple jurisdictions. The reality is a massive compliance burden to add to the pile."

Government intervention, however, may make it easier for legal teams to secure the support of boards and management when it comes to climate risks, which is a key challenge. A recent report by the UK Financial Reporting Council found that while some companies have set their own strategic goals for transitioning to a net zero carbon economy, most have provided little evidence of how those goals can or will be achieved.

"Also, how far does the disclosure go – are they considering just their own emissions, or also supply chains? That's thorny, but unless companies are legally required to do this, then change will not occur – or it will take time we don't have," adds the in-house lawyer. It is abundantly clear that further clarity from the government on exactly what is required is necessary.

"We're constantly trying to bring consistency to drafting and language, so tailoring the approach to different types of companies seems counterintuitive"

Meanwhile a November 2020 KPMG survey found that while 78% of executives worry that risks relating to climate change could lose them their job in the next five years, just 25% said that their company offered remunerative incentives for achieving decarbonisation targets. Twenty-seven percent said their company does not yet have decarbonisation targets.

Sunak's plan is clearly a step in the right direction, but it is apparent that more action needs to be taken by every single stakeholder to ensure that these policies – and similar ventures elsewhere – do not simply become empty promises.

IFLR AWARDS 2020 AFRICA

All the winners from IFLR's Africa awards 2020

IFLR is delighted to announce the winning deals, teams, firms and individuals for its inaugural 2020 IFLR Sub-Saharan Africa awards.

The awards recognise legal innovation in cross-border transactions. To be considered, all deals must have closed between May 31 2019 and May 31 2020. The deals must meet the specific criteria to be categorised as cross-border and as Sub-Saharan African.

Given the enormously difficult environment due to Covid-19 we were unable to host a physical awards event this year to celebrate the awards. We do however believe that it is important to recognise the achievements, the legal ingenuity and potential for innovation across the market.

Firms of the year

International law firm of the year
Linklaters

Sub-Saharan Africa network of the year
Africa Legal Network (ALN)

Individual awards

Lifetime achievement award
Kojo Bentsi-Enchill – Bentsi-Enchill Letsa & Ankomah

Women in Business Law award
Kofo Dosekun – Aluko & Oyebode

Deals of the year

Capital markets
Airtel Africa IPO
Abdullahi Ibrahim & Co
ALN Tanzania
Anjarwalla & Khanna
AZB & Partners
BLC Robert & Associates
Cabinet Gomes
Djunga & Risasi
Freshfields Bruckhaus Deringer
K-Solutions & Partners
Katende Ssempebwa & Co
Kreich Avocats
Linklaters
Madagascar Law Offices
Marc Le Bihan et collaborateurs
Musa Dudhia & Co
Olaniwun Ajayi
Project Lawyers
Savjani & Co

Domestic
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Bowmans
Bowmans Tanzania
Bowmans Uganda (AF Mpanga)
Bowmans Kenya (Coulson Harney)
IKM Advocates
IMMMA Advocates
Sebalu & Lule

Loans
African Finance Corporation Samurai loan
Ashurst
Jackson Etti & Edu
Norton Rose Fulbright

M&A
American Tower Corporation / Eaton Towers Africa
Allen & Overy
Bowmans Uganda (AF Mpanga)
Bowmans Kenya (Coulson Harney)
Debevoise & Plimpton
ENSafrica Uganda
Kaplan & Stratton
Katende Ssempebwa & Company
Paul Weiss
Reindorf Chambers
Slaughter and May

Project finance: energy, infrastructure, and natural resources
Genser Captive Power Project
Bentsi-Enchill Letsa & Ankomah
Clifford Chance
Hogan Lovells
Kimathi & Partners
Senet Corporate Solicitors
Trinity International

Project finance: renewables and social infrastructure
Gigawatt Burundi Solar Project
Legal Solution Chambers
Trinity International

Restructuring
Savannah Petroleum / Seven Energy restructuring
Allen & Overy
Banwo & Ighodalo
BLC Robert & Associates
Bracewell
Burness Paull
Clifford Chance
Dentons
DLA Piper
Latham & Watkins
The Law Crest LLP
Linklaters
Maples Group
Mourant Ozannes
Olaniwun Ajayi
Udo Udoma & Belo-Osagie

Teams of the year

Capital markets
Linklaters

Loans
Allen & Overy

M&A
Bowmans

Project finance: energy, infrastructure, natural resources
Clifford Chance

Project finance: renewables and social infrastructure
Trinity International

Restructuring
Latham & Watkins

National law firms of the year

Angola
ALC Advogados

Burundi
Legal Solution Chambers

Ethiopia
Mehrteab Leul & Associates

Ghana
Bentsi-Enchill Letsa & Ankomah

Kenya
Anjarwalla & Khanna

Mauritius
BLC Robert & Associates

Mozambique
Couto Graça e Associados

Namibia
ENSafrica Namibia

Nigeria
Olaniwun Ajayi

Nigeria – capital markets
Olaniwun Ajayi

Nigeria – loans
Olaniwun Ajayi

Nigeria – M&A
Banwo & Ighodalo

Nigeria – project finance
Aluko & Oyebode

OHADA
BAO & Fils

Rwanda
K-Solutions & Partners

South Africa
ENSafrica

South Africa – capital markets
ENSafrica

South Africa – loans
Webber Wentzel

South Africa – M&A
Bowmans

South Africa – project finance
ENSafrica

Tanzania
Bowmans Tanzania

Uganda
Bowmans Uganda (AF Mpanga)

Zambia
Musa Dudhia & Co

Zimbabwe
Manokore Attorneys

Olaniwun Ajayi – Nigeria Law Firm of the Year

Olaniwun Ajayi won IFLR's inaugural Nigeria Law Firm of the Year award for its work on many of the market's most innovative cross-border transactions of 2019-2020. The award was presented at the virtual winner's ceremony for the IFLR Africa Awards 2020, held in September.

The firm also picked up awards for Nigeria's capital markets team of the year and loans team of the year, as well as being recognised for its roles on the region's winning equity capital markets deal – Africa Airtel IPO, and the winning restructuring project – Seven Energy. Both transactions set new legal benchmarks in Nigeria.

Highlights saw a team, led by Yewande Senbare, advise the joint global coordinators on Africa Airtel's IPO on the Nigerian Stock Exchange. This milestone transaction marked the first ever foreign inbound listing in Nigeria and required sophisticated structuring to accommodate a full simultaneous dual listing on the London and Nigeria stock exchanges. The IPO was also executed alongside a capital raise, another market first.

A team led by Wolemi Esan represented the syndicate of lenders on the restructuring of a $371 million loan to Accugas, a Seven Energy subsidiary. It was a unique and high stakes project that had to be tightly choreographed with Savannah's acquisition of a restructured Seven Energy. The firm's loan team broke new legal ground on several other shortlisted projects, with novel financings for Seplat Petroleum Development Company, Teleology/9Mobile and Bank of Industry.

The firm also had a lead role on some of Nigeria's most defining M&A transactions, such as Cement Company of Northern Nigeria's merger with Bua Group, and project financings.

These examples of innovative legal work in demanding cross-border transactions made Olaniwun Ajayi a deserving winner.

Ensafrica – South African Firm of the Year

ENSafrica appeared on eight shortlist deals in IFLR's first ever Sub-Saharan Africa Awards and wins this year's South African Law Firm of the Year award.

The South African offices led mandates that were shortlisted across the awards categories and across the corporate finance practices. One of the highlights was the firm's role advising Ninety One and Investec Group on the demerger of its global asset management business and dual-IPO of Ninety One. This was one of the market's most demanding transactions for years, requiring a highly regulated demerger across several jurisdictions and the creation of a bespoke dual-listed company structure (DLC).

Another highlight was the firm's various roles on Milco's acquisition of Clover. The acquisition, which took several years to execute, raised many novel legal questions under public M&A and takeover rules as well as in terms of deal management, consortium structuring and competition law. It is the first time in South Africa that a major company in the industry is based outside the country and housed in a private entity.

A third highlight saw the firm advise Edcon group on a critical group-wide restructuring, a deal covering cross-border issues, 14 financial institutions, a development finance institution and over 50 landlords. The firm's role advising the creditors on the Omnia group's debt restructuring was also notable.

Other deals that backed ENSafrica's win were FirstRand Bank's Tier 1 issuance, the first of its kind by a South African bank in the local market, DBSA's financing to the Société nationale d'électricité and Tokio Marine's acquisition of Hollard. The firm also won significant mandates from lenders including OPIC, FMO, DEG and IDC.

Bowmans – M&A Team of the Year

The Bowmans M&A practice proved its capacity for innovative deal structuring on cross-border deals, whether focused on South Africa, its home market and one of the region's key hubs, or across the other jurisdictions. The team's ability to leverage an impressive regional network of integrated and relationship firms was a key ingredient.

A good examplezd another team on a landmark South African transaction, advising PepsiCo on its acquisition of Pioneer Foods. The deal took a novel approach to black economic empowerment (BEE) issues and national interest commitments. It also raised complex legal questions due to both the target and its largest shareholder, Zeder Investments, being listed on the Johannesburg Stock Exchange.

Another highlight saw the firm represent the Commercial Bank of Africa on its merger with NIC Bank, which won the Domestic Deal of the Year award. The deal team was led out of Kenya by Richard Harney.

Couto Graça E Associados – Mozambique Firm of the Year

Couto Graça e Associados (CGA) impressed with the breadth of its innovative work.

One of its highlights was advising Moza Banco on its restructuring, following a bailout by the Bank of Mozambique, and subsequent acquisition of and merger with Banco Terra de Moçambique (BTM). The firm, led by Telmo Ferreira, acted as lead counsel to Moza Banco in the structuring and implementation of the transaction. The deal comprised three steps: an investment by fund management firm Arise into Moza Banco, Moza Banco's acquisition of the entire capital stock of BTM, and BTM's merger into Moza Banco. The combination of the three pieces into a single transaction was innovative, especially against the uncertain economic backdrop, and raised complex governance, competition and regulatory issues.

Another significant deal saw the firm, led by Pedro Couto, play a pivotal role on the financing of the 40MW Metoro photovoltaic power plant. The project develops the country's renewables practice. It balanced the requirements of foreign developers and multilateral funding agencies and offered a bankable structure. The team's

scope was broad and included handling the debt and equity financing aspects, the PPA, government agreements, EPC contracts, and environmental licences.

Th firm's work on the Metoro project reflects an innovative approach to power, with the team working on alternative industrial electricity supply options for Maputo Province.

The Law Crest – Restructuring Deal of the Year – Savannah Petroleum/Seven Energy Group Restructuring

The Law Crest acted for Savannah Petroleum on the restructuring and acquisition of Seven Energy Group. This was an unprecedented transaction that tested Nigeria's legal frameworks and practice to the limits.

Counsel advised Savannah Petroleum on behalf of Seven Energy, while the takeover was pending, on key aspects of Seven's restructuring. One of these elements was a first-of-its-kind joint operating arrangement with Seven's local partner Frontier that allowed Savannah to remain as a joint licensee of the Uquo Block while splitting the oil and gas operations between itself and Frontier. This was a completely bespoke arrangement.

There were several layers of debt in the Seven group spread across different entities and involving a variety of creditor groups, creating a complex cashflow governed by highly bespoke intercreditor arrangements. Savannah, alongside the other Seven stakeholders, had to negotiate with the creditors. There were also significant local law issues, especially relating to regulatory approvals, currency conversion and commercial agreements.

The Law Crest conducted due diligence for Savannah on the acquisition and prepared documentation for the transfer of Seven's properties and pipeline rights of way to Savannah. The restructuring sets a benchmark in the Nigerian market and beyond.

Senet Corporate Solicitors – Project Finance: Energy, Infrastructure, and Natural Resources Deal of the Year – Senet Corporate Solicitors

Senet Corporate Solicitors advised the senior lenders on a $366 million financing package for the Genser Captive Power Project. Reflecting Genser's novel commercial approach, the financing took a bespoke form, mixing elements of traditional project financing with corporate lending. The key innovation of the deal was successfully completing such a novel financing.

Genser's business model is to provide power to industrial and mining companies, among them Gold Fields Ghana, Kinross Gold Corporation and Perseus Mining, by offering an alternative power source to the state grid. The financing will fund the expansion of Genser's existing plants and the construction of gas pipelines to connect Genser's plants with Ghana National Gas Corporation's facilities.

The transaction amended the existing facilities and brought in the new senior and mezzanine debt with new and existing security. Key to the success was managing the risk between the project agreements with the multiple offtakers, where each EPC and PPA contract was different, and overcoming the lack of government support that would usually back a national offtaker.

As local counsel to the senior lenders, Senet also had to balance the requirements of development finance institutions and commercial banks through a complex intercreditor agreement. The Genser financing represents a young and developing type of financing in the region.

IMMMA Advocates – Domestic Deal of the Year – Commercial Bank of Africa – NIC Bank

Commercial Bank of Africa's (CBA) merger with NIC Bank was a landmark deal for East Africa, leading to the creation of East Africa's third-largest banking group by assets and the bank with the largest customer base in Africa. The merger of NIC Bank Tanzania (NIC) and CBA Tanzania was a key pillar of the overall transaction and a first-of-its-kind deal in Tanzania.

NIC Bank was listed on the Nairobi Securities Exchange (NSE) and the resulting merged bank, NCBA Bank, was also to be listed. The merger was followed by the amalgamation of all the banks' respective businesses, including commercial banking, investment banking, stock brokerage and bancassurance businesses operated by the subsidiaries of the merging entities. All of these features meant the transaction was highly regulated and had to fit within a complex cross-border timetable, which IMMMA Advocates worked to coordinate with other DLA Piper Africa member firms.

Furthermore, the deal sets the precedent for bank mergers in Tanzania and how they are treated by the regulators, including the Central Bank of Tanzania (Bank of Tanzania (BoT)). The heavily scrutinised process required close engagement with the BoT to find the most efficient way of merging and to establish a new bank merger route.

IMMMA Advocates, led by Madina Chenge, was pivotal to the deal's success. The firm conducted in-depth due diligence on CBA Tanzania in preparation of the merger, advised on the merger plan and regulatory compliance, deal timelines and public announcements, competition filings and hearings, and labour law aspects.

TLC

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AREAS OF EXPERTISE/PRACTICE

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- Infrastructure Finance and PPP
- Employment & Industrial Relations
- Mergers & Acquisitions
- Private Equity
- Public Sector, Privatization and Procurement
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- Corporate Finance
- Debt Recovery & Insolvency
- Capital Markets, Investment & Securities
- Information & Communications Technology
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- Intellectual Property
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IFLR AWARDS 2020 MIDDLE EAST

All the winners from IFLR's Middle East awards 2020

IFLR is delighted to announce the winners of the 2020 Middle East Awards, recognising the most innovative cross-border work from across the region over 2019-2020.

The awards caps off months of research, using direct written entries and interviews with counsel and their clients across the region, as well as having recourse to the IFLR1000 submissions. All deals had to have closed between July 2019 and July 2020.

This year, White & Case won international law firm of the year, the first ever non-magic circle firm to win the award. It was in many ways an exceptional year, capturing transactions including Saudi Aramco's IPO and $69 billion acquisition of Saudi Basic Industries Corporation. Allen & Overy was the most often shortlisted firm. The Islamic Development Bank's Dr Hamza Kunna was the recipient of the Lifetime Achievement award, while Allen & Overy's Judith Kim received the Women in Business Law award and Faraj Ahnish of Hadef & Partners was named managing partner of the year.

International law firm of the year

International law firm of the year

White & Case

White & Case was behind some of the most consequential legally innovative work. Its two most significant projects were arguably the Saudi Aramco IPO and Saudi Aramco's acquisition of Saudi Basic Industries Corporation. In both transactions, the firm mobilised its Saudi office and a vast network of lawyers globally to structure deals of global value. Both deals represent a step-change in the Saudi market. The team played a central role in drawing up new project development and financing dynamics in the UAE and Saudi Arabia. Its pro bono practice also leant off its debt capital markets expertise to produce a unique instrument for social funding.

Individual awards

Lifetime achievement award

Dr Hamza Kunna – Islamic Development Bank

Since 2018, Dr Hamza Kunna has served the Islamic Development Bank (IsDB) as an advisor to the president for legal and shariah matters. Prior to this, Kunna, who graduated in law from the University of Khartoum in 1969, was the bank's general counsel. He has worked as the bank's most senior legal strategist for almost 34 years, having joined in 1987.

Kunna has an impeccable standing in the market as an operator and scholar, with vast influence. "Dr Kunna has been critical to the development of IsDB for the last three decades," says a peer, outlining the pivotal role he played on the IsDB's first sukuk issuance in 2004 and first sukuk programme, shortly thereafter. Kunna's has also played an important role in developing the bank's portfolio of Islamic project finance deals.

The IsDB's green and sustainable sukuk issuances of 2019, along with its work with the International Federation of Red Cross & Red Crescent Societies (IFRC) in conceptualising its Islamic fund and impact sukuk, make it a suitable year to recognise Kunna's achievements.

Managing partner of the year

Faraj Ahnish – Hadef & Partners

Faraj Ahnish is the managing partner of Hadef & Partners, which has secured its position as one of the UAE's go-to law firms. He has been responsible for the firm's day-to-day management since 1990, overseeing its substantial growth over this period. His key achievement over a challenging 12 months in the UAE was to keep the firm's profile high. A fluent Arabic and English speaker, Ahnish was repeatedly recommended during the research, with one peer describing him as an "extremely impressive operator". The firm has undertaken significant legislative work for the UAE federal government as well as some recent high impact contentious work. Notably, the firm was also the official legal supporter of the Special Olympics World Games Abu Dhabi 2019.

IFLR Women in Business Law

Judith Kim – Allen & Overy

Judith Kim is a more-than-deserving winner of the WIBL 2020 award. Kim, a Dubai-based projects partner in Allen & Overy, has a long record of promoting women in law. She has been shortlisted for the WIBL award several times off the back off consistent market praise. She has been in the region for almost 20 years and is one of its highest rated energy and projects lawyers. She is second to none in the oil & gas sector – a remarkable achievement given the image of the male-dominated oil & gas sector – and a go-to advisor for pathfinder projects; for example, she advised on the multi-award winning Duqm Refinery Project. Her mentorship of female lawyers at A&O and beyond, which includes launching several regional initiatives, has also been pioneering.

Deals of the year

Debt and equity-linked

GEMS Education high yield

GEMS's high yield bond of August 2019 was part of a transformative bank/bond financing (term loan B and pari passu high yield bond) in connection with the acquisition by a CVC Capital Partners-led consortium of a 30% stake in GEMS Education. It is the first time that any Middle Eastern issuer has tapped the HY bond market and the TLB markets in the US and Europe. This raised myriad first-of-their-kind issues, exposing the UAE's legal framework to the scrutiny of a new and large pool of investors and opening new channels between markets. The structure had no precedent and the legal backdrop was uncertain. One highlight was testing whether the UAE's nominee arrangements regime would pass muster with the US market.

Law firms

Al Tamimi & Company – Underwriters
Linklaters – GEMS Education
Maples Group – GEMS Education
Milbank – Underwriters (including Goldman Sachs and Credit Suisse)
Walkers – Underwriters
White & Case – Trustee

Equity

Saudi Aramco IPO

Saudi Aramco's December 2019 IPO was the world's largest ever IPO. The $25.6 billion offering (excluding the over-allotment option) comprised three billion shares, representing 1.5% of Saudi Aramco's share capital. The listing was unique, with a first-of-its-kind domestic offering structure and process, making Saudi Aramco the largest company on any exchange globally and opening a new chapter in the history of the Saudi capital markets. Many of the Capital Markets Authority's rules did not cater for an issuer of Saudi Aramco's size and reach. It required a vast effort over several years to create a new legal framework for the IPO and reconcile local and cross-border aspects, which included concurrent offerings in 15 jurisdictions.

Law firms

Abuhimed Alsheikh Alhagbani Law Firm – NCB Capital
Clifford Chance – NCB Capital
Khoshaim & Associates – Saudi Aramco
Latham & Watkins – Underwriters (syndicate consisted of 25 underwriters, led by Citi, Credit Suisse, Goldman Sachs, HSBC, JP Morgan, Bank of America, Morgan Stanley, NCB Capital and Samba Capital as joint global coordinators)
Law Office of Megren M Al-Shaalan – Saudi Aramco
Law Office of Salman M Al-Sudairi – Underwriters
White & Case – Saudi Aramco

M&A

Uber / Careem

Uber's acquisition of Careem closed in January 2020 and represents a milestone in the development of the region's tech and venture capital ecosystem. The acquisition adopted an innovative structure for a deal of this scale and complexity. Various strategies were floated before settling on a series of asset acquisitions at a local level. The size of the parties, Uber's impending listing and the swathes of untested regulation surrounding the deal, especially in terms of antitrust and the treatment of tech companies, raised novel legal questions. Among the deal's highlights were the need to coordinate intricate domestic issues across so many jurisdictions, reconcile a US deal approach with local practice and resolve the many regulatory uncertainties. The deal will stand as a region-wide precedent for competition law.

Law firms

Abousleiman Law – Uber
AF & R Shehadeh Law Firm – Uber
Abuhimed Alsheikh Alhagbani Law Firm – Careem
Al-Ansari & Associates – Uber
Al Tamimi & Company – Uber / Careem
ASAR – Al Ruwayeh & Partners – Uber
Bennani & Associés – Uber
Clifford Chance – Careem
Confluent Law – Uber
DLA Piper – Careem
Ferchiou & Associes – Uber
Freshfields Bruckhaus Deringer – STC
Haya Rashed Al Khalifa – Uber
Hajji & Associes – Uber
Herbert Smith Freehills – Uber
Khalifeh & Partners – Uber
Kolcuoğlu Demirkan Koçaklı – Uber
Latham & Watkins – Certain Careem shareholders
Maples Group – Careem
Matouk Bassiouny & Hennawy – Uber
Morrison & Foerster – Uber
Orr Dignam & Co – Uber
RIAA Barker Gillette – Uber
Sharq Law Firm – Uber
Slaughter and May – Careem
Wilson Sonsini Goodrich & Rosati – Careem

Project finance

Taweelah Reverse Osmosis Independent Water Plant Project

Abu Dhabi's Taweelah project closed its $868 million financing in October 2019. It is the largest reverse osmosis (RO) desalination plant in the world, 44% bigger than largest existing RO plant. The project rewrote the project finance framework, adopting new project terms and tendering and procurement processes which have since been built upon, setting a precedent template for the Emirates going forward. Departing from market practice, EWEC prepared the EPC and O&M subcontracts and debt and equity financing documentation and, with the developer, negotiated the terms with subcontractors and lenders. The approach gives EWEC stronger oversight of its projects. The Taweelah IWP also obtained the first sustainable loan qualification for a water desalination project globally.

Law firms

Al Tamimi & Company – ACWA Power (sponsor)
Clifford Chance – UAE sovereign wealth fund
Hogan Lovells – ACWA Power (sponsor)
Norton Rose Fulbright – Lenders
White & Case – Emirates Water and Electricity Company (EWEC) (procurer)

Restructuring

Saudi Arabian Mining Company (Ma'aden)

This project concerns Ma'aden and the Ma'aden Rolling Company (MRC) joint-venture, which Ma'aden held with Alcoa Corporation. The restructuring involved several processes at different levels of the structure which required parallel negotiations with Alcoa, Ma'aden and MRC's commercial and public creditors and the Capital Markets Authority. Ma'aden took over MRC's $796 million debt to the Public Investment Fund (PIF) in exchange for an equivalent loan from the PIF. Alcoa exited MRC, transferring its 25% stake to Ma'aden. MRC's other commercial bank debt, Saudi Industrial Development Fund (SIDF) financing and various project documents were restructured. Ma'aden also issued new shares to PIF, using a capital increase and debt conversion to improve its liquidity and support growth plans.

Law firms

Allen & Overy – Lenders
Baker McKenzie – Saudi Arabian Mining Company (Ma'aden)
Freshfields Bruckhaus Deringer – Alcoa Corporation
Latham & Watkins – Public Investment Fund
White & Case – Saudi Arabian Mining Company (Ma'aden)

Domestic

Saudi Aramco / Saudi Basic Industries Corporation

Saudi Aramco's $69 billion acquisition of Saudi Basic Industries Corporation (SABIC) was the world's largest M&A deal of 2019/2020. Detailed negotiations were undertaken with the Capital Markets Authority to structure what was a public takeover of a Tadawul-listed company without triggering mandatory offer rules and to retain SABIC's listing post acquisition. The deal raised unprecedented related party and conflict of interest issues (with some unique solutions) that had to be carefully unpicked and navigated, especially in relation to information disclosure and post-acquisition integration. The cross-border and multi-disciplinary considerations were vast for a domestic deal in the region, covering US national interest (Committee on Foreign Investment in the United States – Cfius) considerations and global antitrust concerns. The structure also included innovative seller-financing and pre-payment arrangements.

Law firms

Abuhimed Alsheikh Alhagbani Law Firm – Public Investment Fund (PIF)
Clifford Chance – PIF
Khoshaim & Associates – Saudi Basic Industries Corporation (SABIC)
Law Office of Megren M Al-Shaalan – Saudi Arabian Oil Company (Saudi Aramco)
White & Case – Saudi Aramco

Teams of the year

Debt and equity-linked

Linklaters

Linklaters's debt and equity-linked team had a fantastic year in terms of establishing significant precedents in the region's markets. Led by Jonathan Fried and supported by associates Dalia Nammari, Ross Whibley, Peter Cullen, Nicola Minervini and David Hayward, five of the team's transactions are recognised across the shortlists. Highlights include advising GEMS Education on its high yield, the underwriters on Qatar National Bank's SOFR-based issuance, Riyad Bank's Tier 2 certificates and Qatar Islamic Bank on its

Formosa sukuk bond. The transactions include the first-ever Formosa sukuk bond, the first time SOFR mechanics have been incorporated into a Eurobond EMTN programme and the Middle East's first TLB-high yield financing. The team also advised the arrangers on Oman's first domestic sukuk programme and issuance.

Equity

White & Case

The equity team at White & Case had an interesting 12 months with several legally innovative mandates, including a proposed first-of-its-kind delisting from the Nasdaq Dubai. However, the clear highlight was Saudi Aramco's IPO. A large team, led on the capital markets front by Sami Al-Louzi in Dubai, Colin Diamond and Gary Kashar in New York and Inigo Esteve in London worked with Megren Al-Shaalan and Doug Peel from Saudi partner firm The Law Office of Megren M Al-Shaalan to advise Saudi Aramco on its listing. It was an unprecedented project by all counts, involving three years of preparations and nearly 400 lawyers across 20 White & Case offices.

M&A

Clifford Chance

Under a new managing partner in corporate specialist Mohammed Al-Shukairy, the Clifford Chance M&A team closed several market-rattling deals. One of these was Saudi Aramco's acquisition of SABIC, where the firm worked closely with Saudi partner firm AS&H to advise the Public Investment Fund on the sale of its 70% holding in SABIC. Another highlight was the firm's role advising Port and Free Zone World on the DP World take-private, the UAE's first take-private and the first M&A transaction implemented by way of a scheme of arrangement under DIFC law. The team also closed AD Power's acquisition of TAQA and DP World's acquisition of Topaz Energy and Marine JAFZA. Mike Taylor, James McCarthy and Omar Rashid all had impressive roles.

Project finance

White & Case

The White & Case projects team had roles on five project financings recognised in the deal shortlist. Its most impressive impact was on shifting the goal posts and the frameworks for project financings, predominantly with mandates advising the procuring party. The teams, led by Michael Watson, Yasser Riad, Mark Castillo-Bernaus, Alexander Malahias, Antoine Cousin and Adam Pierson, advised Emirates Water and Electricity Company (EWEC) on both the Fujairah F3 power project and Taweelah Reverse Osmosis Independent Water Plant Project on setting a new template and standard for projects in the UAE. The team also advised Saudi Water Partnership Company (SWPC) on the first-of-its-kind Dammam West Independent Sewage Treatment Plant.

Restructuring

Allen & Overy

Allen & Overy proved its mettle for complex and sensitive restructurings with four of its projects shortlisted for restructuring deal of the year. Above all, the firm has been pivotal in defining and developing the practice for restructurings in the region. Among its most innovative recent work, a team led by Christian Saunders, Joe Clinton and James Roe advised Gulf Marine on the financial restructuring of its Islamic and conventional debt, which included capex, term and working capital (funded and unfunded) facilities. Notably against significant practical challenges, the team finalised the restructuring terms during the Covid-19 lockdown. In Amlak's case, the firm represented a diverse international and local creditor group and again included complex conventional and Islamic financing solutions.

Rising star lawyers of the year

International firms

Afsha Karim – Allen & Overy

Afsha Karim comes from a group of highly talented Allen & Overy senior associates and earns the rising star accolade primarily for her impressive work some complex and critical restructuring projects. Karim was the lead associate advising the 27 creditors on all aspects of the debt restructuring of UAE mortgage company Amlak Finance, where, among other things, she took the lead on negotiating the debt restructuring agreement. She also led the negotiations and structuring analysis on behalf of the Islamic participants in the restructuring of London-listed Gulf Marine Services.

Macky O'Sullivan – King & Spalding

Macky O'Sullivan is a senior associate in King & Spalding's private funds and capital markets practices. His work on and off deals (for instance in championing diversity) is characterised by innovation. He structured the first investment fund regulated by the Dubai Financial Services Authority (DFSA) permitted to directly own and trade Tadawul-listed equities (Quencia Saudi Equity Fund), African Infrastructure Finance Fund's first $1 billion fund, and the first ADGM-domiciled fund to have an external manager approved by Canada's FSRA (McKinley Capital MEASA Fund). More recently he advised the International Islamic Trade Finance Corporation on the launch of its flagship trade finance fund, which had a first-of-its-kind legal structure.

National firms

Muhammad Mitha – Al Tamimi & Company

Muhammad Mitha is a rising star in the Qatar banking market. His key piece of work over the last 12 months was an integral role in Qatar's first-ever bank merger, between Barwa Bank and IBQ. Mitha provided critical advice and analysis on the merger, guiding the parties through issues such as the conversion of conventional financing products to Islamic financing. Mitha also supervised the firm's work on the sukuk update by Masraf Al Rayan, one of the largest Islamic banks in Qatar, which set the stage for international issuances and required nuanced regulatory analysis. He has also retained key regional and local banking clients for the firm, including Qatar National Bank, Qatar Islamic Bank, Qatar Rail, Abu Dhabi Islamic Bank and others.

Mostafa El Zeky – Shalakany Law Firm

Mostafa El Zeky is a senior associate with Shalakany Law Firm, which he joined in 2011. He has represented several consortia in renewable energy feed-in tariff projects and recently advised the ECAs and commercial banks in the project financing of the landmark 250MW West Bakr Wind Farm BOO project. His involvement covered negotiating all project and financing agreements and finding innovative solutions to bankability and regulatory matters. El Zeky has also acted for the IFC on the structuring of sovereign guarantees for the project

financing of future power producing IPP projects. He has an impressive M&A record, recently acting as lead associate on United Energy Group's acquisition of Kuwait Energy.

In-house teams and firm awards

In-house team of the year – investment banks

Standard Chartered Bank

Standard Chartered Bank's 30-strong MENA-focused legal team handled pioneering issuances across the region by issuers including the Islamic Development Bank, Qatar Islamic Bank, QIIB, Riyad Bank, GFH Financial Group and QNB. It played a key role in the Emirates Strategic Investments Company sukuk, which offers the market a new option for raising capital and has important implications for ADGM dispute resolution enforcement in Abu Dhabi. The team continued to influence the development of regulatory frameworks – for crypto assets, economic substance regulations and ISDA rules – and market practice for sukuk offerings. The bank has set a benchmark in its Covid-19 response and sustainability policies.

In-house team of the year – corporate

Saudi Aramco

There is little doubt that Saudi Aramco had a transformational year. In a 12 month period, the in-house team of lawyers, led by general counsel Nabeel Mansour and boasting expertise in M&A, capital markets, project finance, corporate commercial, regulatory and antitrust, concluded the company's IPO, closed its acquisition of SABIC and arranged the project financing for the Petronas-Saudi Aramco joint venture to fund Project RAPID. For the IPO alone, over the four years running up to the listing, the team implemented innovations that defined legal developments relating to regulations for hydrocarbons, capital markets, shareholders, company and corporate law, public concession agreements and tax rules. The acquisition of SABIC also contained many innovative structures.

Islamic bank of the year

Dubai Islamic Bank

Dubai Islamic Bank wins this year Islamic bank of the year. The bank won roles on some of the most interesting and high-profile capital markets transactions in the region. One example of this was acting as a joint lead manager on the Emirates Strategic Investments Company sukuk, which offers an innovative approach for a certain type of issuer in the region. One of the bank's most notable pieces of work was its acquisition of Noor Bank. This deal, as well as its complexity and significance for DIB, will likely serve as a template for market practice in the sector in the UAE going forward.

Pro bono firm of the year

White & Case

White & Case's pro bono highlight has been supporting the International Federation of Red Cross & Red Crescent Societies (IFRC in developing national legal frameworks in response to Covid-19. In one innovative project, a team advised the IFRC on an entirely novel Islamic fund and impact sukuk to seed-finance the Red Cross' global One WASH programme, a new initiative to fight cholera and other diarrheal diseases across the Organisation of Islamic Cooperation. Sukuk investors are repaid when donations, contingent upon pre-defined results, are reported. The innovative project sought to combine Islamic philanthropy and private capital with traditional donor financing and new private philanthropy. The work was crucial to the One Wash programme and has wider implications for the Islamic Development Bank (a partner in the project), Islamic social funding and the humanitarian sector.

Rising star law firm of the year

BonelliErede

Top tier Italian law firm BonelliErede launched its Middle East office in Dubai in 2017. The office is led by partner Catia Tomasetti, and Middle East managing partner Marco De Leo, supported by a team of local partners and associates. The team, in turn, is supported by the Milan office and covers work across the Middle East region. In one of its highlight deals, the team represented ENI in its acquisition of 20% equity interest in ADNOC Refining from ADNOC. It has also supported other key Italian clients including Prysmian Cables & Systems, Moncler and Luxottica on their corporate commercial activities.

National law firms of the year

Bahrain

Zu'bi & Partners

Zu'bi & Partners advised on Bahrain's defining transactions of 2019/2020, with Qays Zu'bi at the helm and partner Naveen Thakur in several prominent roles. In one of the notable regional bank mergers of the last 12 months, the firm advised Bahrain Islamic Bank (BISB) as the target in the first acquisition of an Islamic bank by a conventional bank (National Bank of Bahrain) in Bahrain under the Takeovers, Mergers and Acquisition Module. The team broke new ground in the capital markets, advising GFH Financial Group on its inaugural high yield sukuk, Bahrain Mumtalakat on one of the market's very few tender offer transactions and Bahrain's Ministry of Finance and National Economy on its first-ever GMTN and Trust Certificate programmes.

Egypt

Matouk Bassiouny & Hennawy

Matouk Bassiouny & Hennawy continued to innovate in its business approach, among other things creating 16 sector-focused groups that cut across its practice areas and helped drive the Matouk Bassiouny brand into new markets. The approach seems to have paid off. The firm helped Abu Dhabi's national oil company (ADNOC) structure an innovative multi-jurisdictional joint venture (Fertiglobe) with Egypt's OCI. The firm worked on several notable sector specific innovations, in education the firm worked on Thebes's sale of Taaleem Group and a series of notable private equity and healthcare deals. The project finance team set new standards in renewables with the Lekela Egypt Wind Power BOO and advised on the financing of Egyptian National Railways' (ENR) landmark procurement project with General Electric.

Iraq

Confluent Law Group

Confluent Law Group is this year's Iraq firm of the year. The team balances international counsel pedigree with deep local law experience, and an understandable focus on energy. Two of its projects are shortlisted in the awards: Uber's acquisition of Careem, acting as local Iraqi counsel to Uber, and the Maisan IPP, acting as local counsel to China

Eximbank. The Maisan IPP, a landmark project for Iraq and in the context of the Belt and Road Initiative, has multiple innovative or first-of-their-kind components, including a bespoke documentation framework and complex lender security and enforcement issues. These set a new benchmark for Iraqi projects.

Jordan

Ali Sharif Zu'bi Advocates & Legal Consultants

A long-established top tier Jordanian firm, Ali Sharif Zu'bi Advocates & Legal Consultants steered several innovative transactions to close during the research period. The firm advised Mediterrania Capital Partners on its acquisition of Medray in a deal that included three target companies in the medical scanning and diagnostics laboratories sector. The uncertain regulatory environment, complex licensing regime, restrictions on foreign (and non-medical) ownership and the gulf between the requirements of the shareholders (individual local doctors) and of a global PE house set a series of deal templates. In the renewables sector, the team advised Adenium Energy Capital on a simultaneous sale of four solar power companies, each to different buyers and impacting different international lenders.

Kuwait

ASAR – Al Ruwayeh & Partners

Kuwait is proving a highly competitive market and ASAR stands out for its transactional expertise. The firm leant its weight to the wave of bank M&A across the region, advising Alghanim Trading Company on its the acquisition of a minority stake in Boursa Kuwait-listed Gulf Bank from the Kuwait Investment Authority. Among the novel legal aspects, the deal was structured as a block trade under newly enacted Capital Markets Authority and Boursa Kuwait rules. The firm closed deals for Arab Petroleum Investments Corporation (Apicorp), Kuwait Life Sciences Company and Global Investment House, Americana and banks including HSBC which all tackled new legal questions.

Lebanon

Abousleiman & Partners

Abousleiman & Partners is this year's Lebanese firm of the year. The firm has been working closely with Banque du Liban to implement capital ratio rules and assisting various banks in their efforts to raise Tier 1 Capital. In one case, it advised the EBRD on Banque Audi SAL's convertible share issue to meet regulatory capital requirements. The firm's consequential banking work also included advising the Association of Banks and Lebanon's large banks to address legal issues surrounding capital control measures. The firm has also developed practice in the insurance sector, in relation to swaps and derivatives rules and in public-private partnership projects.

Oman

Al Busaidy Mansoor Jamal & Co

Al Busaidy Mansoor Jamal & Co's unrivalled depth and breadth secures the award this year. The firm advised on three shortlisted transactions as well as a slate of other legally ground-breaking deals. The firm acted as sole legal counsel to the issuer and underwriters on the Government of Oman's local sukuk, which included a slew of firsts and novel Omani law issues. It helped structure the Rakiza Master Fund, a first of its kind infrastructure fund of the Government of Oman. The project required a full revision of all applicable Omani laws. A team also worked on the landmark privatisation of the Oman Electricity Transmission Company to State Grid International Development.

Qatar

Al Tamimi & Company

Al Tamimi & Company wins this year's Qatar firm of the year. The team handled several innovative projects of precedential value. Ahmed Jaafir and Frank Lucente led teams that advised both Careem and Uber on various aspects of Careem's corporate reorganisation in Qatar and its sale to Uber. The duo also advised Barwa Bank on its merger with IBQ, the first ever merger between two banks in Qatar. Lucente worked with senior associate Zeina Al Nabih to advise Msheireb in relation to the creation of an entirely new city: Msheireb Downtown Doha. Alongside notable debt capital markets transactions, the firm's work for Norway's Jotun raised novel questions under Qatar's new foreign investment law.

Saudi Arabia

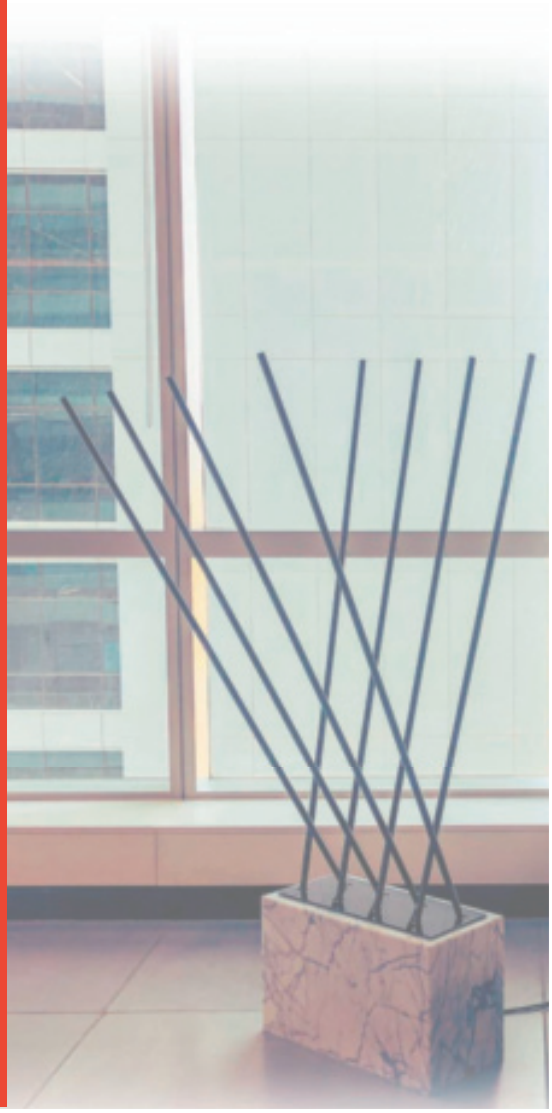
Khoshaim & Associates

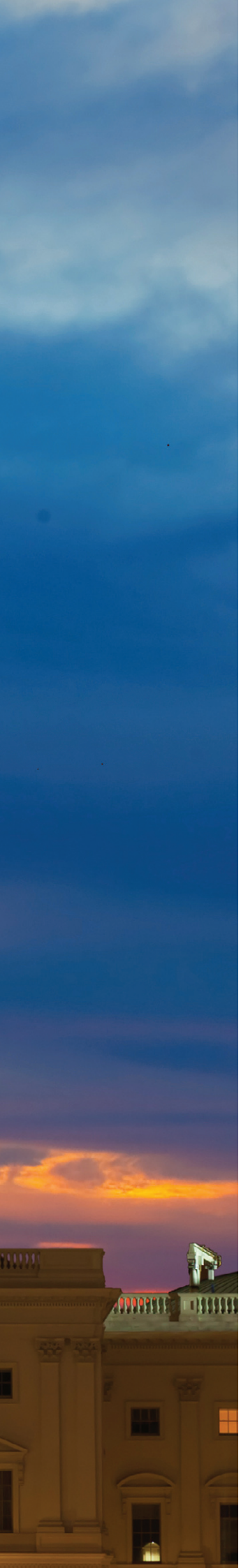
Khoshaim & Associates had an interesting year. The firm added two to its partner ranks, Leen Zaza and Nasser AlRubayyi, deepened its bench in capital markets and project finance, and moved quickly to adjust to the dynamics of the pandemic. Its transactional imprint on the legal landscape was second to none. The firm acted for Saudi Aramco on the regulatory questions and negotiations with the Saudi CMA, including working on corporate governance, bylaws and compliance, in relation to its IPO. It advised Saudi Basic Industries Corporation (SABIC) on its acquisition by Saudi Aramco, where it was primarily tasked with negotiations with the CMA. The firm also advised Riyad Bank on its Tier 2 certificates.

UAE

Al Tamimi & Company

Al Tamimi & Company once again clinches the UAE law firm of the year award. Away from the transactional arena the firm impresses with its consistent investment into innovation, tech and other future-looking developments. This ethos is reflected by its pioneering deal work. The team advised the sponsors on the Taweelah Reverse Osmosis Independent Water Plant Project, the lenders to the Fujairah F3 power project, the underwriters on GEMS Education's high yield bond, Apparel Group on the joint-venture and sale to Gateway Fund and Dubai Islamic Bank (DIB) on its acquisition of Noor Bank. All these transactions have set benchmarks for future deals.





COVER STORY

The Biden era dawns

The sun is setting on four years of the Trump administration. For this edition of IFLR we look at what the Biden presidency will mean for financial regulation, and what the US and the world can expect in 2021

By John Crabb

At 11.24 a.m on Saturday November 7, New York City erupted into a cacophony of noise. Car horns and sirens were blaring and people took to the streets in spontaneous celebration in a way that would have made onlookers think Covid-19 had never even happened.

The reason? US television networks had finally called the 2020 US president election for Democratic candidate Joe Biden. Four years of Donald Trump's presidency were over, and the people of New York were happy about it. Similar scenes were erupting across the country, and reportedly the world, as one of the most polarising presidents in history was defeated in what has been undoubtedly the most important election for generations.

But the scenes were not indicative of the entire population's mood. While a convincing victory for Biden, the popular vote shows a divided country, with more than 70 million votes for the incumbent. The US Senate, too, remains perilously close and looks likely to remain in Republican hands.

The people and the representatives share very differing opinions on how policy should look. One of the most contested political ideologues is how the economy should be treated, a point heightened somewhat by the impact of the Covid-19 pandemic over the course of this year.

Everywhere you look it is Republicans vs Democrats: red vs blue, right vs left, liberalism vs capitalism.

Here at IFLR we focus on insight into three core practice areas: capital markets, corporate, and banking. The impact of this moment (while perhaps not as stark as an Elizabeth Warren presidency might have ended up being) on the markets and our overall analysis is going to be huge over the next four years. So, for the cover story of our last magazine in the most remarkable of years, what better way to bring us into this new dawn than a deep dive into the key regulatory changes a Biden presidency is likely to bring.

Personnel is policy

While the importance of the presidency is not to be undermined, the US system is based on three branches; executive, legislative and

"A Biden presidency with a Republican Senate is not a bad scenario for the financial markets. It means stocks go up and the US dollar actually stabilises"

judicial, and the Democrats are set to control the House of Representatives and the White House. Barring an unlikely series of events in the Georgia runoffs this coming January, the Republicans will, crucially, hold the Senate majority. Following the death of Ruth Bader Ginsburg and the appointment of Amy Coney Barrett, the Supreme Court too is stacked in the favour of the Republican Party.

While a blue wave was set to have a huge impact on the financial industry, the possible lack of a Democratic Senate means that the new government is likely to face opposition at every turn. Much of the regulatory change that can be enacted by regulatory bodies like the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) however does not need Senate approval, and can therefore be enacted following a change in personnel.

"A Biden presidency with a Republican Senate is not a bad scenario for the financial markets. It means stocks go up, the US dollar actually stabilises because you are avoiding the capital outflows scenario of the loss of the US corporate tax haven status, and US Treasuries will flatten," says Charlie McElligott, managing director for cross-asset strategy at Nomura Global Markets.

"This is the opposite of what the market had been pricing in October. Qualitatively we have just avoided the sudden shock policy change with regards to implications of unchecked deficit spending impact as ultimately what would potentially be an inflation catalyst," he adds. "That would be a paradigm shift that the market frankly hasn't operated under for well over a decade."

This is because the Republican Senate will be able to push back on a Democratic House and the White House.

It is for this reason too that Elizabeth Warren will not be able to leave her post as Senator of Massachusetts. On October 8 2019, Senator Elizabeth Warren was the frontrunner to be Democratic nominee for the upcoming US election. By March, she had dropped out of the race. In May, she endorsed nominee Joe Biden.

She played a central role in Biden's campaign, working closely with him to ensure that the Democratic Party unites behind his bid for the White House and even providing some of his policies. Since March, there have been regular discussions about what role the most vocally anti-Wall Street Senator would be given – or would want – within a Biden administration.

Although Senator Harris got the nod as Vice President ahead of Senator Warren, it remains highly likely that Warren will play an important role in a potential Biden administration – even if only from the Senate floor. Biden has stated adamantly that he intends to unite all Americans, which includes Elizabeth Warren's progressive left.

One consideration was that Warren would be nominated as Treasury Secretary; a position that will be vacated by Steven Mnuchin. However, given the precarious state of the US Senate, it will not be possible for Warren to vacate her position – even temporarily – during the crucial first period of Biden's presidency.

Instead, Biden has announced his intention to nominate Janet Yellen, who served as chair of the Federal Reserve during the Obama administration. If confirmed, Yellen would be the first female to serve as Treasury Secretary.

Reaction to the proposed appointment has been positive so far. Yellen is broadly respected by Republicans and within the fractured Democratic Party, following a successful term at the Fed where she was able to keep those on both sides of the debate happy.

As head of the Treasury, Yellen would have a significant influence on the US' financial regulatory approach. The Treasury Secretary is automatically designated as chair of the Financial Stability Oversight Council (FSOC) by the Dodd-Frank Act, which would allow Yellen the additional ability to monitor excessive risk to the US financial system, and work closely with other regulators such as the SEC and the CFTC.

FSOC can do a number of things. It can designate systemically important financial institutions (SIFIs), investigate activities, and make recommendations about the regulation of activities to the primary regulators.

"There are certainly activities where the FSOC may be quite interested in regulation, particularly in view of the pressures on the economy and financial system from Covid-19," says Arthur Long, partner at Gibson Dunn. "Yellen will be interested in looking at those markets that were dislocated earlier in the year as a result of the pandemic."

At the other US agencies there will also be turnover. Jay Clayton at the SEC and Heath Tarbert at the CFTC have already announced that they will stand down early next year, and more will follow. "It is likely that these new heads will share the new Treasury Secretary's approach to risk, and be more regulatory-minded in nature. Yellen is likely to want to use the tools that Dodd-Frank gives the council to see exactly who is appointed for those positions," adds Long.

Unless the runoff elections in Georgia both fall for the Democrats, or Senate majority leader Mitch McConnell agrees to work with the new administration, Biden will have limited influence on policy in the first period of his administration.

Business as usual?

It may be likely that Biden chooses not to ruffle too many feathers, and maintains some form of the status quo in his economic theory. His choices for key economic positions would also indicate this preference, having so far chosen an extensively diverse and female driven team. Neera Tanden is his choice to lead his Office of Management and Budget; Cecilia Rouse will be chair of the Council of Economic Advisers; Gary Gensler and Adewale Adeyemo are both being considered for deputy Treasury Secretary; and Jared Bernstein and Heather Boushey will be members of the White House Council of Economic Advisers.

Biden has not specified who he intends to appoint to replace Jay Clayton at the SEC, the key regulator in the US capital markets. The agency has however been very active in weeks and months since the election began and has pushed through a number of key regulatory changes.

"Chairman Clayton has been very public about setting an agenda using the regulatory

flexibility available to him to tell the industry what is coming, and then following through on that," SEC commissioner Hester Peirce tells IFLR. "We've been very busy all year. We've been very busy during his entire tenure, and I think it's appropriate to continue moving forward with things."

"A lot of the things that we've been doing have been long overdue, like the framework for short term derivatives for mutual funds, and changes to equity market structure," she adds.

Peirce expects the agency to continue to move forward with policymaking in key areas, no matter who the new chairman is. "That person will set the agenda and their priorities will take some of the agency's time, but whoever comes in will share a commitment to capital formation and the belief that the capital markets are one of the US' greatest treasures, and need to be preserved and modernised in a number of areas."

"I hope that we will be able to work productively on some of those things while building a good framework within which our post Covid-19 economy can recover."

Rollbacks

While Biden did not run his campaign with particularly strong economic policies, it still seems likely that he will look to undo many of the deregulatory actions taken by Trump over his term, where possible.

"Containing the pandemic won't be enough to repair the damage President Trump has done to our economy and to the American people," wrote Biden in the Biden-Sanders Unity Task Force document this July.

"The scars of the financial crisis that triggered the great recession are still present in our economy and our society. Banks should never be 'too big to fail'. Democrats will work to reverse the over-financialisation of the American economy by maintaining and expanding safeguards that separate retail banking institutions from more risky investment operations," he continues.

"We will strengthen and enforce the Obama-Biden administration's Dodd-Frank financial reform law to protect American workers from the impacts of future financial crises. And when justified by the law, we will back criminal penalties for reckless executives who illegally gamble with the savings and economic security of their clients and American communities."

A lot of the regulatory changes that have been made by the Trump administration over his term, at least within the banking sector, tended to be smaller changes at the margins of larger regulations. A new regulatory framework was installed in the aftermath of the financial crisis – mostly under the Dodd-Frank Wall Street Reform and Consumer Protection Act – and Trump has done his best to deconstruct this.

"Now we are actually going to see the reverse – you will see a rollback of the rollback. Right now the Biden transition team, in addition to sketching out what priorities they may have in the first 100 days on the legislative side, is also looking at what regulatory changes the Trump administration advanced," says Paul Thornell, principal at DC lobbying firm Mehlman Castagnetti Rosen & Thomas.

Whether this be Dodd Frank or in other areas like the environment, healthcare or energy, US legislation will – where possible – be dialed back to where it was four years ago where possible.

The Obama administration made a lot of changes during its early years; passing Dodd-Frank, implementing the Volcker Rule, introducing a whole new system for the stress testing of large banks, and a new set of capital rules. In comparison, over the last three or four years, there have only been relatively small, more targeted changes.

"The Trump administration didn't do that much in financial regulation, and certainly not in terms of legislation. Even in regulation, it's not been as active as maybe some people expected it to be, and it's likely to be similar with Biden," says Nicolas Véron, senior fellow at the Peterson Institute for International Economics. "When you look at the Biden platforms there isn't much about financial regulation at all."

Time to put politics aside?

In its essence, the point of financial regulation is to maintain the stability and integrity of the financial system. The current political system in the US is far from stable, and the detrimental impact of this on the economy can be seen across the country. As the United States emerges from the Covid-19 pandemic it is crucial that the economy is positioned in such a way as to be able to reclaim its position as the strongest and most stable financial system in the world.

"I'm hopeful, like everybody is. We need to get some things done," says Scott Shay, chairman of Signature Bank. "It is no secret that the Democrats want to regulate us more, but I'm hoping that they recognise that there is not really an urgent need for more regulation. We are pretty well regulated already."

In an open letter to President-Elect Biden, Thomas Vartanian, professor of law at Antonin Scalia Law School, stresses that political infighting must be put to one side for this to happen. Instead, both sides should work together and regulation should be modernised in such a way as to allow the financial system to thrive. "Some will tell you that sound financial regulation is just a matter of rolling back the regulatory policies of the last four years, and writing more and harsher rules. Nothing could be farther from reality," he wrote.

Speaking to IFLR, Vartanian warns that every time during the last 200 years the US has seen politics played out as a social agenda, or some other impact on financial services, it has backfired and led to a financial crisis.

"Let us not focus on the small issues and the political issues that are fun to deal with. Let us focus on the major significant issues facing the financial services business in the economy, so that we can prevent the next set of financial crises," he adds. "We need regulation geared towards the types of risks that are being created, not just writing rules for the sake of writing rules, because those have proven to be counterproductive."

This all might be easier said than done. Regardless of who is appointed chair of the SEC, or what policies Janet Yellen might introduce, a new dawn is rising on the US financial regulatory system, and it's going to bring significant changes. How far those changes go will very much depend on the two remaining Senate seats in Georgia.

"Some will tell you that sound financial regulation is just a matter of rolling back the regulatory policies of the last four years, and writing more and harsher rules. Nothing could be farther from reality"

Is corporate purpose the answer?

New York-based Goodwin counsel David Bernstein considers

A recent article discussed the Enacting Purpose Initiative (EPI), which it described as a multi-institution partnership between Oxford University and several UK and north American institutions to develop guidance for boards of directors, senior management and investors for how companies can articulate, implement and report on their purpose.

The article said that purpose has to be more than a marketing slogan or a vague set of values. It has to become an organising principle. It is the reason for an organisation to exist. According to the article, there is an emerging awareness of purpose as strategy, rather than the more common purpose as culture.

This is essentially the same theme that was expounded by Larry Fink, the CEO of Blackrock Group, the world's largest asset manager, in his 2018 and 2019 annual letters to the CEOs of companies in which Blackrock invests.

The emphasis on purpose initially seems a very helpful refinement of the position taken in a widely publicised August 2019 statement by the Business Roundtable that rejected the concept that the principal purpose of a corporation is to do what is in the best interests of its shareholders, and said that a business enterprise has at least five groups of stakeholders: customers, employees, suppliers, the communities in which it exists, and shareholders. And with regard to shareholders, it identified the goal as delivering long term value, not simply maximising short term gain.

The problem with the multiple stakeholder approach is that often, what is good for one stakeholder group is bad for other stakeholder groups. A wage increase is good for employees but may be bad for customers (forcing prices to rise), and bad for shareholders. A decision not to exploit temporary supplier weaknesses is good for suppliers, but once again, bad for customers and shareholders, and possibly bad for employees as well.

1 MINUTE READ

There is increasing support for the concept that a corporation must be operated for the benefit of multiple stakeholder groups, not just its shareholders. However, what is good for some stakeholder groups is often bad for others – therefore there is a need to prioritise among stakeholder groups. Focusing on corporate purpose helps identify priorities. Specific corporate purpose is not always easy to identify with regard to complex enterprises. However, almost every business enterprise is formed for the purpose of providing products or services to customers. While the products or services a company provides may change over time, the need to satisfy customers applies to almost all products and services – so the issue of how to prioritise among stakeholder groups may be resolved by the old adage: the customer always comes first.

Facebook provides a means by which millions of people can communicate with one another – but is providing a means of communications Facebook's purpose?

If a business enterprise has multiple stakeholders with sometimes conflicting interests, it must have a basis for prioritising among the stakeholder groups. An organisation's purpose seems to provide a basis for assigning priorities. Unfortunately, an organisation's purpose is not always easy to identify, and does not always provide the clear strategic guidance EPI seems to think it does.

If a corporation or other business organisation is formed to find a cure for a particular medical condition, its purpose is relatively easy to identify. It is to find the cure and distribute it on a basis that will make it available to the people who need it, while generating at least a reasonable return on the investment needed to find the cure and bring it to market. If an organisation is formed to invest other people's money, its purpose is probably to maximise the investors' returns on their investments, subject to the need to generate enough fee income to satisfy the investment managers, the senior executives, and the equity holders of the organisation.

But as the activities of an organisation become more diverse, it becomes increasingly difficult to identify a single overriding purpose. Suppose the company that was formed to find a cure for a particular medical condition finds that cure, and then expands into a variety of pharmaceutical endeavours. Presumably its purpose would expand to providing cures for diseases and medical conditions – but what if it then acquired a hospital network? Its purpose might now be providing superior healthcare, but that is not much guidance. And what if several of the hospitals were unprofitable: would it be inconsistent with the organisation's purpose to convert them into residential apartment buildings?

Further, an organisation does not always have a single purpose. Facebook provides a means by which millions of people can communicate with one another – but is providing a means of communications Facebook's purpose? Or is its purpose to induce people to put huge amounts of information into a gigantic database, which can be sold to advertisers and others? Or is it both? Perhaps its original purpose was to provide a way for people to communicate, but over time its purpose has evolved into creating a database it can market. Or perhaps providing a means by which millions of people can communicate is still the most important part of its raison d'etre, and marketing its database is the way it provides financial support for that.

Virtually every business enterprise is formed for a purpose, but over time, a successful company may no longer have an easily identifiable purpose other than to do whatever will be best for some or all of its multiple stakeholder groups.

The following are some thoughts about how corporate purpose affects various stakeholder groups, and a suggestion that it leads to a clear priority among the stakeholder groups.

Customers

If there is one thing that virtually every business enterprise has in common, it is that the enterprise was formed to provide products or services to customers. That was its initial purpose. Its founders may look forward to providing jobs to people who need them or helping suppliers distribute their products, but without customers, even an initially very well-funded new enterprise will eventually not be able to pay either employees or suppliers. And without customers, there will not be money to distribute to shareholders or other investors, and there will not be money with which to do things that will benefit the communities in which the company is located.

Purpose is easy to understand in the context of a relatively new company or a company that is engaged in a single type of business, but customer satisfaction can be the overriding purpose of even the most complex companies. The company described above that was formed to find a cure for a medical condition and expanded into multiple pharmaceutical products and acquired a hospital might determine its purpose to be providing high quality pharmaceuticals at reasonable prices and providing outstanding, or affordable, hospital care. And if it converts some hospitals into apartment buildings, its purpose could include providing a superior living environment, or a comfortable living environment at affordable prices.

In each of those alternatives, the company is providing customers with a product they want at a reasonable price. That is a purpose. And it gives guidance whenever a decision that will affect current or future customers has to be made. A principal element of the decision will be how it will affect what the customers will receive.

Employees

While it is possible to think of reasons a company would be formed for the purpose of creating employment (a parent forms a company because a child cannot get a suitable job at an existing company; a company is formed to create jobs for people who cannot get jobs because they have criminal records, etc.), the frequency with which that happens is probably very small. Accordingly, job creation is usually a peripheral benefit of deciding to provide products or services to customers. It is not, by itself, a purpose for which a company is formed.

But the effect on employees may be a factor in shaping the purpose of the company. A desire not to underpay employees may cause a company to decide not to try to produce the lowest priced products. If a company's purpose is to provide customers with products or services

The problem with the multiple stakeholder approach is that often, what is good for one stakeholder group is bad for other stakeholder groups

at reasonable prices, the decision as to what are reasonable prices might have as an implicit, or explicit, element, enabling the company to pay above market wages and provide superior working conditions.

In other words, providing good jobs is not likely to be a purpose for which a company is formed. But whatever the purpose may be, it can be qualified by a requirement that it be achieved in the context of a good working environment. And, of course, happy employees are likely to be more productive, which can enable companies to reduce prices, and therefore support the company's efforts to provide customers products or services at reasonable prices.

Suppliers

Some companies actually are formed with the purpose of working with a supplier. An example would be a company formed to act as a distributor of products manufactured by a particular supplier. In that instance, the purpose of the company would be to market products manufactured by the supplier to customers of the company. In the end, this still involves providing customers what they need or want at reasonable prices. However, the company is almost totally dependent on the quality of the products manufactured by the single supplier, the prices charged by it and, in many instances, the marketing done by it.

In other instances, the ability of a company to provide products to its customers may be highly dependent on suppliers, but not on a single supplier. In these instances, relations with suppliers can have a major effect on what the company can offer its customers. Relationships that make a company a preferred customer of a supplier can sometimes give a company access to products that are not made available to its competitors, enable the company to obtain preferential pricing and priority delivery schedules, and enable the company to continue meeting customer needs in time of shortages.

Whether it is appropriate to view suppliers as stakeholders is not always clear. There often is a tension between a company and its suppliers over the prices the suppliers charge, and sometimes the quality of the suppliers' products or services and the promptness with which they are made available. Certainly, viewing suppliers as stakeholders should not cause a company to overpay or to accept inferior products or service. However, if the purpose of a company is to provide products or services to its customers at reasonable prices, maintaining good relationships with suppliers can substantially enhance the company's ability to do that.

The ultimate result of focusing on the purpose for which a business exists is, in most instances, to reject the concept of shareholder primacy

Communities

The importance of the relationship between a company and the communities in which it conducts its businesses is affected by a number of factors. A company that is by far the largest employer in a community wants the community to be a place in which people want to live. Otherwise, it may have difficulty hiring and retaining employees - and in a community that has two or three dominant employers, community relations may be very important to giving one or another of the employers access to the most sought-after potential employees.

On the other hand, it is unlikely that local community relations are important to the ability of a company located in New York or Chicago or Los Angeles or any other major city to recruit and retain employees. And unless the company operates a local business (such as a grocery store or a neighborhood restaurant), local community relations are probably not very important to the ability to attract customers. What is important, however, is a widespread reputation for delivering value to customers, being a good citizen (e.g., supporting important charitable and cultural organisations), and being a good place to work.

Shareholders

The extent to which shareholders are given priority among stakeholders is at the heart of the recent debate about shareholder primacy versus corporate obligations to multiple stakeholder groups. The starting point in this debate is to define the role of shareholders with regard to a corporation. For many years it was widely accepted that shareholders own a corporation, and that everything a corporation does should be focused on the benefit to the owners.

However, questions have recently been raised about whether, particularly in the context of publicly-held corporations, shareholders really are owners. Respected corporate commentators have argued that common shareholders are only investors who have the right to receive whatever is left when all other levels of investors have received everything to which they are entitled. If this is the case, it is important to give shareholders a sufficient potential return to induce them to invest the funds the corporation requires, but there is no reason to give them a priority claim on more than that return.

Here purpose becomes very important. It is rare that a business is formed to maximise return to shareholders. A business is usually formed to fill a perceived need in the market, with the hope that that can be done on a basis that will provide a reasonable return to its founders and to those who invest in the business. However, over time, that may change. In the first place, as described above, a business often outgrows its original purpose. And secondly, companies are sometimes confronted with opportunities to provide their shareholders with outsized returns, but often at the cost of impairing their future ability to innovate and grow.

The Business Roundtable addressed this by saying that a corporation should deliver to its shareholders long-term value, not simply maximise their short-term gains. Implicit in that is either that (a) a long-term focus will generate greater returns for shareholders than maximising short-term gain, or (b) a corporation has a purpose other than maximising return to its shareholders. The first of these possibilities may be true if you assume that stockholders will retain their stock for the long term. However, chances are that the most profitable strategy for an active shareholder is to maximise its short-term profit from Corporation A and invest what it receives from Corporation A in another corporation that provides the potential for another outsized short-term gain.

That leaves the focus on long-term value as a judgment that a corporation has a purpose, and priority should be given to shareholders only to the extent that doing so is consistent with that corporate purpose. And the one purpose that almost every business organisation has that will maximise long-term value for its equity owners is to offer products or services on terms that will make them attractive to potential customers. This purpose supports the efforts to innovate, to operate efficiently, and to do all the other things that will maximise long-term value enhancement.

The Delaware courts are often pointed to as a bastion of stockholder primacy. However, what the Delaware courts have actually done is to say repeatedly that directors owe fiduciary duties to the corporation and its stockholders. That recognises that a corporation may have objectives that are different from those of its stockholders. Other states similarly recognise directors having an obligation at least to the corporation, and in many instances, to multiple stakeholders similar to those identified by the Business Roundtable.

Virtually every corporation, or other business entity, has a purpose other than simply maximising the profit to its equity holders. The specific purpose of a particular business organisation may sometimes be difficult to define, but in the vast majority of instances, it will involve providing products or services to customers on terms they find attractive. Fulfilling this purpose provides jobs for employees, uses products or services provided by suppliers, and provides the resources with which the business can participate in civic affairs and provide a reasonable return to its equity holders.

The ultimate result of focusing on the purpose for which a business exists is, in most instances, to reject the concept of shareholder primacy and subordinate the focus on various other stakeholder groups to what almost every successful businessperson knows: the customer always comes first.

David Bernstein
Counsel
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The UK FDI regime compared

Akin Gump lawyers discuss how the UK's proposed national security and investment review proposals match up against those already deployed by other countries

The UK vies consistently for the top spot on the annual global rankings for attracting foreign direct investment. It is a source of pride for every incumbent of 10 Downing Street: a tangible metric that supports the attestation that the UK economy is the most open and business-friendly country, globally.

It is therefore perhaps no surprise that the UK has for so long resisted calls to follow its allies such as the US, Australia and Germany in introducing legislation designed to weed out investors with potentially nefarious intentions from sensitive aspects of the economy.

Such governments have sought to both strengthen their powers to scrutinise and intervene in transactions where it is necessary to protect national security, while providing investors with both certainty and transparency. This is a delicate balance, especially when threats to national security manifest themselves in evolving and novel ways, which can soon make a mockery of any legislation designed to protect a nation's economy from harm. In addition, in a world that is increasingly suspicious of globalisation, governments open themselves up to criticism for using national security screening powers as a veil for protectionist intervention.

In light of the trial and error that is the implementation of an effective investment screening regime, the UK's perceived tardiness may have benefits. When considering how best to design an effective yet proportionate investment screening mechanism, UK lawmakers have been able to look overseas to see what works.

The result is the National Security and Investment Bill (NSI Bill or Bill), which was laid before the UK Parliament on November 11 2020. Some four years in the pipeline and having been dragged along by successive Conservative governments, when implemented it will see the UK introduce one of the most comprehensive and detailed investment screening mechanisms globally. The Bill contains

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In 2021, the UK will introduce one of the most comprehensive investment review mechanisms in the world. The legislation will include a mandatory notification regime for investments in 17 core sectors, and a voluntary regime for the wider economy (including assets). The UK government will enjoy wide discretion on how to manage national security concerns, including the power to block deals and unwind investments retrospectively. Investors should therefore consider the impact of this legislation on their deal pipeline going forward, as relevant investments completed while the legislation passes through Parliament will be in scope of the UK government's retrospective call-in powers.

In light of the trial and error that is the implementation of an effective investment screening regime, the UK's perceived tardiness may have benefits

many of the legislative controls adopted in overseas regimes, while at the same time introducing several new, untested, features.

Mandatory notification volte-face

To date, the UK's existing intervention powers have nestled within its merger control regime, and have been deployed sparingly. The government has blocked just 12 transactions on national security grounds since 2002, with those vocal for legislative improvements calling for a standalone regime decoupled from merger control considerations.

As such, prior to the NSI Bill's publication, all material government publications pointed towards a standalone regime, premised upon a voluntary notification mechanism. At the time, the government felt that a voluntary regime, rather than a system requiring notification, would strike the right balance between protecting the country's sensitive assets without being too burdensome.

It therefore caused a shock when the NSI Bill included a mandatory notification regime for acquisitions of 'qualifying entities of a specified description' operating within 17 industry sectors (referred to as 'notifiable acquisitions'). The ringfenced sectors being: civil nuclear, communications, data infrastructure, defence, energy, transport, artificial intelligence, advanced robotics, computing, hardware, cryptographic authentication, advanced materials, quantum technologies, engineering, biology, critical suppliers to government, critical suppliers to the emergency services, military or dual-use technologies, and satellite and space technologies.

The government intends to detail in secondary legislation the specific 'trigger events' within the aforementioned sectors that will prompt a mandatory filing. This is deliberate, as the government hopes to futureproof the law to guard against the ever-changing risks to national security, without needing new primary legislation every time.

The government has been candid on its reasoning for introducing a mandatory regime: it does not trust the economy to flush out national security concerns when left to its own accord. The government will, no doubt, have also observed that this year the US Committee on Foreign Investment in the United States (Cfius) introduced the mandatory notification of investments in critical technologies, as well as by foreign governments in US technology, infrastructure, and data businesses.

Moreover, Germany's screening legislation, the *Außenwirtschaftsgesetz* (AWG), has mandated the notification of foreign investments in specific sectors (such as those in telecommunications, media and healthcare industries) and critical infrastructure for some time. As such, the UK's volte-face is perhaps representative of changing global policy concerns regarding the mechanics of national security and investment screening.

Entering the 'black box'

The onus to notify the government rests with the acquirer under the NSI Bill. The requirement can be triggered by various forms of deal activity including full share acquisitions, material increases in shareholding or voting rights (e.g. crossing 15 percent, 25 percent, 50 percent and 75 percent), as well as material influence over corporate policy.

In reality, the NSI Bill provides for most material changes, in shareholding or voting rights in a qualifying entity, to trigger notification. Once the government receives a notification, it has an initial 30 working days to screen the transaction. During this initial screening period, the government must determine whether to either call in the transaction for a full assessment, or give the acquirer the green light. The government anticipates that it will receive approximately 2,000 notifications per year, calling in just under 100. To put this in context, in 2019 the CFIUS regime called in 113 from a notification pool of 231.

Investors should take heed of the potential delay a government call-in could have on the deal timetable. The NSI Bill proposes a statutory minimum of 75 working days (an initial 30 days plus an additional 45 days) to conduct a full national security assessment. We note that this timeline is the same as the original CFIUS review period. However, the US extended the initial review stage from 30 days to 45 days, to enable more transactions to be cleared (i.e. so that fewer transactions fall into the additional 45 day period – saving parties up to 30 days). It remains to be seen whether the NSI Bill keeps the 30+45 day structure, or whether this is amended as the Bill travels through Parliament.

If the government requires longer than 75 working days, then the NSI Bill permits the government and acquirer to agree a further 'voluntary' period. Australia's screening mechanism also enables the government and investors to voluntarily extend review deadlines. That said, in practice, parties have little choice but to agree to such an extension, making it difficult to predict how long the review process will take. We therefore question how voluntary this further period under the NSI Bill will be for any acquirer, assuming that it wishes the deal to go through.

The most difficult aspect for investors to consider in any investment screening regime that turns on national security concerns, is understanding what constitutes a national security concern. The NSI Bill requires the government to publish a statement every five years indicating how it seeks to conduct its national security assessment (referred to as the Statutory Statement of Intent). The government proposes applying a three-pronged approach for the assessment of

The government has not been shy about giving itself considerable powers to intervene in any trigger events that could cause national security concerns

national security risks represented by: the relevant transaction, the target of the transaction, and the acquirer/investor.

The NSI Bill suggests an approach more closely aligned with CFIUS for the time being, insofar as the assessment of national security risks is uniform across transactions that fall within scope. In time, the UK could choose to follow Germany in adopting a tiered approach to review criteria, with stricter conditions applied to higher-risk investments.

Nowhere to hide

One of the UK government's main concerns is the risk that hostile acquirers could deploy contrived legal structures to obtain control of sensitive UK entities without triggering a mandatory notification regime. In addition, as the requirement to submit a mandatory notification rests with the acquirer, the government is still reliant on purchasers both knowing their obligations under the NSI Bill, and wishing to comply with them.

Step forward the Bill's voluntary notification regime, which mirrors the mandatory regime in terms of timing and process, but casts a significantly wider net.

Unlike the mandatory regime, a voluntary notification can be submitted by any 'relevant party' that has a nexus to a trigger event. This means, for example, that a company's board has the power to notify the government where it is subject to hostile investment. In addition, the voluntary regime applies to trigger events occurring within the UK economy as whole, i.e. parties do not need to demonstrate that the trigger event occurs within one of the 17 sensitive sectors.

The voluntary aspects of Germany's regime also do not specify industry sectors, as it does with transactions subject to mandatory notification. In addition, while the US has introduced mandatory filings for the CFIUS regime this year, it is anticipated that the majority of notifications will continue to be on a voluntary basis due to the risk of retrospective call-in.

The NSI Bill includes the provision for a voluntary notification to be made in relation to a trigger event concerning a qualifying asset, which is defined as an asset of any of the following types (i) land (including land located outside of the UK if used in connection with activities conducted in the UK); (ii) tangible movable property; or (iii) ideas, information or techniques which have industrial, commercial or other economic value (for example, trade secrets, databases, intellectual property rights and software).

The trigger event occurs when a person gains control of the qualifying asset and is thus able to use it or direct its use (including prior to acquisition). Germany also explicitly captures both share and asset deals in its review process. While the US does not capture asset deals explicitly, other factors may mean an asset deal will fall within the jurisdiction of CFIUS. For example, where the acquisition of a corporate entity would also result in gaining asset(s) with a national security sensitivity (e.g. a building opposite a military facility).

A long and (un)winding road

The government has not been shy about giving itself considerable powers to intervene in any trigger events that could cause national security concerns, as well as significant enforcement powers to help ensure compliance.

If the government decides that a particular transaction raises material national security concerns, then it can impose any steps necessary to protect, remedy, or mitigate the national security risks. In practice, this is likely to result in one of three outcomes detailed within a final order (i) imposing conditions of approval for the deal to proceed (ii) blocking the deal or (iii) unwinding the deal in situations where the relevant trigger event has already occurred.

Offences under the Bill include the completion of a transaction subject to mandatory filing without approval, failing to comply with an order (both interim and final), and offences relating to the failure to comply with an information notice or attendance notice. Penalties for noncompliance include fines of up to five percent of worldwide turnover or £10 million ($13.4 million) (whichever is the greater), and imprisonment of up to five years. The proposed approach by the NSI Bill to penalties differs from the US and Australia, which both choose to tie penalties to the value of the transaction, rather than the investor's turnover.

To investors, perhaps the most concerning weapon that the government has is its retrospective power to call in transactions

To investors, perhaps the most concerning weapon that the government has is its retrospective power to call in transactions that were not notified but may raise national security concerns. This power has no retrospective time limit for acquisitions that should have been notified under the mandatory regime (i.e. 'notifiable acquisitions'). For all other trigger events, the government has a five year window from the point at which the trigger event occurred to call it in for assessment, provided that it does so within six months of becoming aware of the transaction. As a transitional measure, all transactions that occur from November 12 2020 and onwards will be in scope of a five-year look back. However, if the government becomes aware of it prior to the NSI Bill coming into force (e.g. a transaction press release is issued), then the government will again only have six months to call in the transaction.

Arguably, the NSI Bill goes further than other regimes with retrospective look-back provisions. For example, the German government has a five-year window following completion to initiate an investment review for all relevant transactions (i.e. including those subject to mandatory notification). In addition, if the Cfius regime wishes to review a transaction that completed more than three years earlier, it needs to obtain approval. To date, the Australian government has not had the ability to call in transactions retrospectively, but will have this power from 1st January 2021 onwards.

The gating issue for 2021

The NSI Bill will be the subject of intense cross-party discussions as it makes its way through Parliament. However, we do not anticipate that its key features, such as the new mandatory regime, or the ability to

conduct a retrospective look-back, will be removed or watered down substantially.

What is likely to be shaped in the upcoming months are the specific trigger events occurring within the 17 industry sectors that will require notification, which will be detailed within the Bill's secondary legislation. It is also possible that the government will decide to exempt certain acquirers from the need to conduct a mandatory filing, as well as escalate the acquisition of highly sensitive assets to the mandatory regime.

We expect the NSI Bill to become law towards the middle of 2021. Once in place, the legislation is likely to affect a wide range of investment activity and could impact a range of corporates and funds that count foreign nationals and foreign governmental entities among their investors.

Practically speaking, investors should expect questions and disclosure requests regarding proposed investment structures, the involvement of foreign investors, and the overall aims of the investment. It will therefore be critical for these operators to treat the NSI Bill as a gating issue when planning investment activity within sensitive areas of the UK economy going forward. This is particularly the case for any investment activity that could be at an increased risk of call-in due to the government's retrospective call-in powers, which apply now.

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CORPORATE
SWISS CROSS-BORDER FUNDS

Cross border funds cause controversy

Jürg Frick of Homburger takes a closer look at whether a cross-border fund offering can be classified as a financial service as per the Swiss FinSA, and considers the regulatory aspects of compliance

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Cross-border distribution of funds to investors in Switzerland continues to be subject to debate and, unfortunately, uncertainty. Even though for the time being, it remains unclear whether every fund offering automatically qualifies as a financial service under Swiss law or not, the latest decision of the Swiss Parliament to introduce alleviations to the strict requirement for financial service providers to be affiliated with an ombudsman (the Ombudsman) shows a tendency into the right direction, which is to avoid unnecessary overregulation.

The aim of this article is to address the following two questions: first, is a cross-border fund offering in any case a financial service in the sense of the new Swiss Financial Services Act (FinSA), and, second, should this be the case, what Swiss law regulatory requirements would such an offering have to comply with.

For the purpose of this article, there is a focus on fund offerings to professional or institutional clients in Switzerland and offerings to retail clients will not be considered.

Is a cross-border fund offering a financial service?

Genesis of Swiss fund offering regulation

Until the end of last year, a party distributing foreign funds to qualified investors in Switzerland had to be adequately supervised either in Switzerland or in its home-jurisdiction. Therefore, the Swiss Collective Investment Schemes Act (CISA) required that distributors in Switzerland needed to be licensed by the Swiss Financial Market Supervisory Authority (FINMA).

It was questioned as of the introduction of this licensing requirement for distributors under the old Swiss Federal Fund Act whether it made sense and whether for investor protection purposes it was in fact needed at all.

As a general rule, financial service providers are subject to the new conduct rules set out in FinSA

In 2003, the Swiss Federal Banking Commission (FBC), the Swiss financial market regulatory authority preceding FINMA, explained that it did not see a need to regulate distributors and considered a licensing requirement for fund distributors as an overregulation because already the fund, the custodian and the asset manager were all subject to approval or licensing requirements and supervision. Furthermore, FBC noticed that fund distribution was sufficiently regulated since fund distributors were already obliged to comply with the guidelines on fund distribution issued by the Swiss Funds & Asset Management Association (SFAMA).

In 2006, when the Swiss Parliament debated the replacement of the old Swiss Federal Fund Act with the Swiss Federal Collective Investment Schemes Act, the discussion came up again. The Swiss National Council (*Nationalrat*) supported the licensing requirement for fund distributors, whereas the Swiss Council of States (*Ständerat*) was opposed. Only in a formalised proceeding to settle this disagreement, did the Swiss Council of States give in and agree to the licensing requirement.

Swiss fund offering regulation under FinSA

Fund offering as a financial service?

Since the regulation of fund distribution in Switzerland was always subject to debate and since the rationale of such regulation was always questioned, it is not surprising that with the enactment of FinSA, the Swiss Parliament decided to abolish the licensing requirement for distributors after all. One of the key arguments was that the licensing requirement was going to be replaced by the regulation of financial services under FinSA.

On January 1 2020, FinSA entered into force. This act not only introduced rules and regulations for persons or entities rendering financial services on a commercial basis to clients in Switzerland, it also had a knock-on effect on Swiss fund and, in particular, Swiss fund distribution regulations.

FinSA provides for a definition of financial services. Financial services are activities carried out for clients such as, for instance, the purchase or sale of financial instruments, the management of financial instruments (asset management), or the issuing of personal recommendations relating to transactions in financial instruments (investment advice). As a matter of FinSA, financial instruments also include interests or units in domestic or foreign collective investment schemes.

As a general rule, financial service providers are subject to the new conduct rules set out in FinSA. In addition, they need to take certain organisational measures and, subject to certain exceptions, they are obliged to register with an Ombudsman, and to register their client advisors in a client advisor register (*Beraterregister*).

Against this background, it needs to be assessed whether a cross-border offering of a foreign fund to investors in Switzerland qualifies as a financial service or not. Should such an offering be combined with investment advice or investment recommendations, then, for Swiss regulatory purposes, it would clearly be in scope of financial service regulations. However, should the offer be extended to clients in Switzerland without any such recommendations, then the situation is less clear.

The Swiss Financial Services Ordinance (FinSO), which contains FinSA's implementing provisions, further defines the meaning of the term 'financial service', including, in particular, in relation to the "the purchase or sale of financial instruments". According to FinSO, a financial service relating to the purchase or sale of financial instruments includes "any activity directly aimed at certain clients and specifically aimed at the purchase or sale of a financial instrument".

The Federal Department of Finance commented on this provision as follows:

> "This provision specifies the type of financial service described in Article 3(c)(1) of FinSA, i.e. the purchase or sale of financial instruments for a client. Pursuant to the meaning and purpose of this provision, it particularly also includes activities *vis-à-vis* a particular client which are identifiable and specifically aimed at the acquisition or sale of a financial instrument prior to the formal acquisition or sale of financial instruments, but for transaction-related advice has not yet been provided. The clarification of the concept of this type of financial service makes it clear that market participants – in particular, for example, when marketing foreign collective investment schemes through sales representatives in Switzerland at so-called road shows – must, as is already the case today and in accordance with the intentions of the law (cf. Message [BBl 2015 8901, p. 8953, 9008 and 9050] on Art. 9 para. 2 FinSA and on Art. 3 and in particular Art. 13 CISA), comply with duties of conduct and register with the client advisor register. […] Finally, no financial service can be provided if financial instruments are purchased or sold between financial intermediaries, e.g., fund units are offered or sold to a bank which the bank clearly does not want to hold for its own account but which the bank intends to resell to (as yet unidentified) customers of the bank. The law aims to protect the end customer and not the financial service provider under prudential supervision".

Fund offerings as arm's-length counterparty transactions

The Federal Department of Finance also explained:

> "It also becomes evident that an offer as such cannot be a financial service. For the additional qualification as financial service, other elements need to be given such as, for instance, rending of investment advice related to the respective financial instrument."

Accordingly, cross-border fund offerings to investors in Switzerland should not qualify as financial services if, first, the addressee of the offer is a financial intermediary and not the end-client, or, second, if an activity directly aimed at certain clients and specifically aimed at the purchase or sale of a financial instrument is not an activity carried out "for a client".

In its definition of the term 'financial service', FinSA lists certain activities qualifying as financial service if carried out "for a client".

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The definition implies that the financial service provider and the party for which the service is provided are in a client relationship. Such a client relationship could be a mandate or another principal-agent-relationship pursuant to which the service provider is mandated or authorised by the client to carry out certain activities on behalf of the client.

However, in case of a cross-border fund offering, an offer could well be extended to an investor who is independent from the fund as well as the fund distributor and who is not in a pre-existing client relationship with neither the fund nor the distributor. Should such an offer be devised and presented on arm's-length terms as an offer made between independent counterparties, and should this be clear and evident to both parties, then such an offer should not qualify as a financial service rendered for a client and, therefore, should also not trigger respective obligations under FinSA. As a minimum, such an offer should not be qualified as a financial service if extended to a professional or institutional client and if it was clearly described and presented as an arm's-length counterparty offer.

This view is supported by other authors in the Swiss market who concur and explain that "it should be noted that even in cases of direct contractual relationship, a client in terms of FinSA does not necessarily have to be involved. Especially in the area of the purchase or sale of financial instruments, an actual counterparty transaction may exist instead of a customer relationship. In such a counterparty transaction, the foreign financial service provider recognisably pursues its own interests and carries out the transaction for its own account and risk. Such counterparty transactions are also not financial services within the meaning of FinSA, because these services are not currently being provided for a client." (See Schleiffer|Schärli, Cross-border Provision of Financial Services, GesKR 2020, 24 et seq., p. 27).

A question comparable to the distinction between financial services and counterparty transactions already arose under the old Swiss Federal Securities Dealer and Stock Exchange Act (SESTA). The rules of conduct set out therein were generally applicable to all securities trading transactions with clients, irrespective of their classification under private law. The distinction between customer transactions and market transactions largely reflected the distinction between the scope of application of the law on orders and that of the law on sales, insofar as the service aspect, which is at the heart of customer transactions, is missing from the sales transaction.

FINMA's predecessor authority, the Swiss Federal Banking Commission, declared that in case of doubt, a mandate or commission relationship rather than a purchase relationship should be assumed:

> "It should be noted that in securities trading with clients, the order or commission business is the rule. A purchase relationship between a securities dealer and an end client can only be assumed to exist if elements of the origination of the contract make this particularly clear. It must be obvious to the client at all times that the securities dealer is acting in his own interest and therefore should not provide a service to the client."

It can be assumed that the practice of the former Swiss Federal Banking Commission, according to which a mandate or commission relationship must be assumed as a rule of thumb for private clients, must continue to be taken into account. Therefore, it makes sense from the point of view of the financial services provider to draw the attention of clients or counterparties to the different regulatory treatment of client orders and counterparty transactions. In addition, no brokerage or other commission fee should be paid. Business experience and specialist knowledge of the counterparty should also be considered and be relevant.

In sum, we would conclude that cross-border offerings of funds to professional or institutional clients in Switzerland should not be qualified as a financial services if:

- An offer has been devised and presented on arm's-length terms as an offer made between independent counterparties; and
- It is at all times obvious to the client or, for these purposes, the investor that the distributor or the party extending the offer is acting in its own interest and therefore will not provide a service to the investor.

Regulatory requirements if a cross-border fund offering qualifies as a financial service

Should a cross-border offering of funds to professional or institutional clients nevertheless qualify as a financial service in the sense of FinSA, then, in principle, the distributor of the fund or the party extending the offer would have to comply with the conduct rules under FinSA, In addition, it would have to take certain organisational measures and, subject to certain exceptions, it would be obliged to register with an Ombudsman and to register their client advisors in a client advisor register (*Beraterregister*).

Registration of client advisors with client advisor register (*Beraterregister*)

Pursuant to Article 28, para. 1 FinSA, client advisors of foreign financial service providers may carry out their activity in Switzerland only if they are entered in a register of client advisors. However, client adviser of foreign financial service providers which are prudentially supervised abroad are exempted from the duty to register if the services they provide in Switzerland are exclusively for professional or institutional clients.

Therefore, should a foreign distributor offering funds on a cross-border basis in Switzerland exclusively to professional or institutional clients prudentially supervised in its home-jurisdiction, then it would not

Not every cross-border offering of a fund to professional or institutional clients in Switzerland should be qualified as a financial service in the eyes of FinSA

have to register client advisers active in Switzerland in a client adviser register.

Affiliation with Ombudsman

After the enactment of FinSA at the beginning of this year, it was unclear whether the exceptions to the obligation to register client advisers in a client adviser register would also apply to the obligation to be affiliated with an Ombudsman. In principle, and as it stands today, FinSA requires all financial service providers to be affiliated with an Ombudsman. Such affiliation should be completed by the end of the transitional period ending on December 25 2020.

Since such an absolute obligation was unsatisfactory, the Swiss Parliament decided to alleviate the Ombudsman affiliation requirement. Henceforth, it should only apply to financial service providers that serve retail clients, and it should not apply to financial service providers serving solely professional or institutional clients. By professional clients, it seems, that only such professional clients should be meant which qualify as such without having to opt to be treated as professional clients, i.e. the exception should only apply to so-called *per se* professional clients.

These are, among, others, financial institutions licensed by FINMA, such as: banks; fund management companies; asset managers or insurance companies or foreign financial institutions being subject to prudential supervision; central banks; public entities with professional treasury operations; occupational pension funds with professional treasury operations; companies with professional treasury operations; certain large companies as well as private investment structures with professional treasury operations created for high-net-worth retail clients. However, high-net-worth retail clients or private investment structures without professional treasury operations would be allowed to declare that they wish to be treated as professional clients (opting-out), but they would still not be considered to be *per se* professional clients.

Even though the alleviation of the requirement to be affiliated with an Ombudsman would only be relevant for financial service providers serving *per se* professional clients or institutional clients, it is still very much a step in the right direction. It is a clear and important signal that the Swiss Parliament wants to avoid overregulation, including overregulation of cross-border fund offerings to *per se* professional clients and institutional clients in Switzerland.

Since the transitional period to get affiliated with an Ombudsman expires on December 25 2020, and since the alleviation of the requirement to be affiliated with an Ombudsman for financial service providers exclusively serving *per se* professional clients or institutional clients in Switzerland will only be enacted after the referendum deadline for the respective amendment to FinSA expires on February 1 2021, FINMA agreed that it will not enforce the affiliation requirement in the period from December 26 2020 to January 31 2021. The Swiss Federal Council will only take its decision to enact the amendments to FinSA in mid-December 2020, in order to give the fund market greater planning security and to avoid that certain financial service providers would have to affiliate with an Ombudsman only to deregister again early next year. In this regard, on November 13 2020, the Federal Department of Finance communicated to the market FINMA's agreement not to enforce the Ombudsman affiliation requirement.

Conclusion

Not every cross-border offering of a fund to professional or institutional clients in Switzerland should be qualified as a financial service in the eyes of FinSA. In particular, an exception should be made with regard to fund offerings to professional or institutional clients (i) having been devised and presented on arm's-length terms as an offer between independent counterparties; and (ii) in relation to which it is at all times obvious to the client or, for these purposes, the investor that the distributor or the party extending the offer is acting in its own interest and therefore will not provide a service to the investor.

This view is supported not only by representative authors in the Swiss literature, it is also in line with previous published practice by FINMA or its predecessor FBC.

It becomes more and more obvious that the Swiss legislator did not intend to overregulate cross-border fund offerings to professional or institutional clients in Switzerland and exceptions are justified to the narrow-minded view that every offer at the same time is a financial service.

The latest development giving evidence of this tendency are the alleviations of the strict requirement for financial service providers to get affiliated with an Ombudsman and FINMA's agreement not to enforce this strict requirement for as long as the alleviation has not been enacted. This tendency can be welcomed because should cross-border fund offerings to professional or institutional clients in Switzerland in any case qualify as financial service, then at least the regulatory consequences should not be too burdensome.

CORPORATE
ELTIF REVIEW

ELTIFs for everyone?

Luxembourg-based Arendt & Medernach lawyer Stefan Staedter discusses the success of the European long-term investment fund and its upcoming review

With the launch of a recent public consultation on the EU rules governing European long-term investment funds (ELTIFs), the European Commission has stoked discussions about the current features and the framework for ELTIFs under statute.

These are: Regulation (EU) 2015/760 of the European Parliament and of the Council of April 2015 on European long-term investment funds, and Commission Delegated Regulation (EU) 2018/480 of December 2017 supplementing Regulation (EU) 2015/760 of the European Parliament and of the Council. The latter refers to regulatory technical standards on financial derivative instruments solely serving hedging purposes, sufficient length of the life of the European long-term investment funds, assessment criteria for the market for potential buyers and valuation of the assets to be divested, and the types and characteristics of the facilities available to retail investors.

This discussion has become more important as the number of ELTIFs in EU member states has risen (and will continue to rise, given that there are several authorisations pending).

From the central public register for ELTIFs maintained by the European Securities and Market Authority (Esma), we know that as of October 15 2020, 28 ELTIFs had been set up in the EU. The ELTIF register shows France, Italy, Spain and Luxembourg to be the most active jurisdictions for ELTIFs, with the most vehicles and the greatest development of relevant expertise on the part of supervisory authorities. Based on discussions with several asset managers, the number of Luxembourg ELTIFs (nine) is soon expected to double, with 10 new funds currently in the pipeline. It is expected that this trend will also continue in France, Italy and Spain.

The ELTIF register lists the largest asset managers down to medium-sized from the EU and the US, including,

1 MINUTE READ

Although the trend shows that the number of ELTIFs continues to rise, take-up by retail investors remains below expectations. The asset management industry has expressed its need for flexibility with respect to the investment universe and investor distribution. The European Commission's recent consultation paper offers the opportunity to make concrete amendment suggestions which may be reflected in a future amendment, and ultimately will help to improve investor perceptions of the ELTIF label as a pan-European quality label.

This discussion has become more important as the number of ELTIFs in EU member states has risen

inter alia, (in alphabetical order) Amundi, BlackRock, Eurizon, Kairos, Intesa, Partners Group, and Tikehau. While the first generation of ELTIFs seems to have focused on equity investments, the pool is now more diversified, and also includes real assets (real estate and infrastructure), debt/loan strategies, and private equity strategies.

In Luxembourg, ELTIFs are typically structured as alternative investment funds (or sub-funds thereof) subject to Part II of the Luxembourg law of December 2010 on undertakings for collective investment where true retail distribution of the shares/units is desired. Where intended for marketing to well-informed investors alone, ELTIFs are typically structured as specialised investment funds subject to the Luxembourg law of February 2007 relating to specialised investment funds, or as reserved alternative investment funds subject to the Luxembourg law of July 2016 on reserved alternative investment funds.

Key features of ELTIFs

In a nutshell, ELTIFs are designed to attract investors seeking opportunities for long-term investments in companies and ventures. Only EU alternative investment funds (AIFs) or sub-funds thereof are eligible to be authorised as ELTIFs. ELTIFs have a hybrid nature combining features of undertakings for collective investment in transferable securities (UCITS), such as the risk diversification rules, applicable investment limits, and the option to market to retail investors, with features of AIFs, such as the appointment of an AIFM and a depositary, diversity of asset classes, and structural flexibility.

An ELTIF must invest at least 70% of its capital in eligible investment assets, and no more than 30% of the capital of an ELTIF may be invested in assets which are deemed eligible under Article 50(1) of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

Article 10 of the ELTIF Regulation qualifies the following assets as ELTIF-eligible: (i) equity or quasi-equity instruments, (ii) debt instruments, (iii) loans granted by the ELTIF, (iv) units/shares of one or more other ELTIFs, EuVECAs and EuSEFs and/or (v) real assets of a certain size. The relevant asset class must be linked to (i.e., invested in, issued by, granted to or held via) a qualifying portfolio undertaking. The features of a qualifying portfolio undertaking are set out in Article 11 of the ELTIF regulation. Inter alia, such undertakings are required (i) not to qualify as collective investment undertakings, (ii) not to be financial undertakings (such as credit institutions or insurance companies) and (iii) either not to be admitted to trading on a regulated market or multilateral trading facility, or where they are, not to have a market capitalisation exceeding €500 million ($587 million). The qualifying portfolio undertaking may be established either in a member state or in a third country, provided the third country complies with Article 11(1)(c) of the ELTIF Regulation.

As indicated above, ELTIFs must diversify their risks. Article 13 of the ELTIF Regulation provides detailed diversification rules with respect to eligible investments. In the event of a passive breach of these diversification requirements, the AIFM of the ELTIF must take the measures necessary to rectify the position, taking due account of the interests of the ELTIF's investors. Note that Article 17 of the ELTIF Regulation allows for derogation from the portfolio composition rules during the ramp-up period.

Due to its long-term nature, an ELTIF must not, *inter alia*, short-sell its assets or take any direct or indirect exposure to commodities; furthermore, ELTIFs may make use of derivative instruments only to hedge risks inherent to their other investments. The ELTIF Regulation also sets out conditions and limits for cash borrowing: *inter alia*, Article 16 of the ELTIF Regulation restricts borrowing and the encumbrance of assets to 30% of the ELTIF's capital, and provides that borrowing must be contracted in the same currency as the assets to be acquired with the borrowed cash.

If ELTIF shares or units are to be marketed to retail investors under the marketing passport of the AIFM, additional requirements apply. For the purposes of the ELTIF Regulation, retail investors are nonprofessional investors with substantial financial assets (of at least €100,000) including both cash deposits and financial instruments not given as collateral.

Note that a retail investor must not invest an aggregate amount exceeding 10% of their financial instrument portfolio, and that the initial amount they invest in one or more ELTIFs must be at least €10,000. Articles 26 et seq. of the ELTIF Regulation set out retail protection provisions, such as the retail assessment process, the equal treatment of investors, or the special withdrawal right for a period of two weeks from the date of subscriptions for ELTIF shares/units. A typical ELTIF life cycle begins with an investment period, including a certain ramp-up period in which the portfolio is built up. This is followed by a holding period.

Finally, the date of the end of the life of the ELTIF kicks off with the exit strategy and culminates in the liquidation of the ELTIF. As ELTIFs are closed-end funds, their investors must not be allowed to request the redemption of their shares/units before the end of the ELTIF's life. By way of derogation, however, redemptions prior to the end of the life of the ELTIF may be permitted under the conditions of Article 18 of the ELTIF Regulation.

Retail marketing is, by the testimony of a number of asset management industry representatives, the key driver for setting up an ELTIF

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Optimisation suggestions for the ELTIF framework

As recently highlighted by the high-level forum on the Capital Markets Union, initial take-up of the ELTIF has been slow, with only a limited number launched to date due to their stringent legal requirements. For this reason, the High-Level Forum has recommended (i) that the European Commission propose targeted amendments to the ELTIF framework and (ii) that member states simplify the tax rules applicable to ELTIFs and/or grant them preferential tax treatment.

Further to the High-Level Forum's recommendations, the European Commission has commenced a review of the ELTIF framework by running an inception impact assessment. The inception impact assessment focuses on (i) the investment horizon (including broadening the category of eligible investment assets and modifying the borrowing limits) and (ii) reducing barriers for investors.

On October 19 2020, the European Commission launched a public consultation until January 19 2021. The public consultation questionnaire is available as a short version with six questions or a full version with 42 detailed questions, dealing with several aspects of the ELTIF framework and addressing the recommendations of the High-Level Forum and the different points raised by stakeholders (including asset managers and investment associations). The below analysis of the public consultation focuses on a few discussion points that several asset managers have characterised as posing a particular challenge when setting up an ELTIF. These items concern both the investment universe and the investor side.

With respect to the investment universe, a number of asset managers wish for more flexibility when it comes to fund-of-fund strategies. Under Article 11 of the ELTIF Regulation, a qualifying portfolio undertaking must not be a collective investment undertaking. This essentially excludes fund-of-fund strategies (except for EuVECAs, EuSEFs and other ELTIFs for the illiquid pocket and UCITS for the liquid pocket). Particularly in the context of fully paid-in capital structures, granting accessibility to fund-of-fund strategies would mean that asset managers could invest on a broader basis in other funds, allowing for faster deployment of capital.

Fund-of-fund strategies are also a common and effective way of rapidly obtaining exposure to illiquid assets (especially real assets). The public consultation addresses this discussion point, requesting feedback (i) on whether there is a need to expand the scope of eligible investment assets and the ELTIF investment universe to other areas and asset classes, and (ii) on the limitation of eligible investment assets to shares/units in EuVECAs, EuSEFs and other ELTIFs versus other potential fund categories.

With respect to real assets, the public consultation requests feedback (i) on real estate assets, including commercial and residential real estate without a perceived economic or social benefit under the EU's energy, regional and cohesion policies and (ii) on the need for clarification and practical guidance on eligibility requirements, particularly in relation to investments in real assets.

Several asset managers in the real estate industry have mentioned that when it comes to real assets, and particularly real estate strategies in the ELTIF context, there is a perceived lack of clarity and guidance, notably for investments which serve the purpose of contributing to smart, sustainable and inclusive growth or to the union's energy, regional and cohesion policies. They assert that these uncertainties make it difficult to design and pursue a real (estate) asset strategy.

Another key topic for asset managers is the features of qualifying portfolio undertakings which impact the options for portfolio structuring and the use of co-investment strategies. The public consultation requests feedback on each feature, including inter alia (i) the inability to invest in a financial undertaking, (ii) the push to raise the maximum market capitalisation threshold of €500 million when investing in listed companies, and (iii) the rules for investments in third-country undertakings. Based on discussions with several asset managers, (i) raising the maximum market capitalisation threshold to €1 billion may grant more flexibility for portfolio composition and (ii) pruning the list of entities considered as financial undertakings in Article 2 of the ELTIF Regulation will promote investments in the fintech sector.

The practical modus operandi of funds set up in the ELTIF context has also raised questions about the borrowing conditions and limitations under Article 16 of the ELTIF Regulation and the compliance with the specific conflict of interest provision in Article 12 of the ELTIF Regulation. With respect to the borrowing limitations, the European Commission requests stakeholder feedback on, inter alia, the optimal maximum allowed net leverage, and the appropriateness of the legal mechanisms differentiating marketing to retail versus professional investors. In this section of the public consultation, several asset managers will have the opportunity to elaborate on their demand for flexibility in the currency of borrowed cash, which must currently be the same as that of the assets to be acquired, and to request a derogation from the cash borrowing rules during the ramp-up period.

The conflict of interest provision is typically discussed in the context of parallel fund setups and co-investment strategies.

The review will only be truly successful if the ELTIF framework strengthens product flexibility based on retail versus professional

Because Article 12 of the ELTIF Regulation can be interpreted in different ways, some uncertainty remains with respect to the scope of prohibited investments, making actors reluctant to implement these fund setups and strategies. Now stakeholders can suggest amendments, including the addition of a mitigation mechanism for when a potential conflict of interest is identified. On the investment universe side, stakeholders can also recommend amending the current rules on portfolio composition, diversification and redemption, and the life of ELTIFs.

As for the investor side, the consultation paper kicks off the discussion by asking which limitations imposed by the ELTIF framework reduce the attractiveness of the ELTIF fund structure or of cross-border marketing and distribution across the European Union. This broad opening question helps address several concerns of the asset management industry. On the one hand, stakeholders can expand on their experiences with the reportedly cumbersome mechanisms for assessment and control that must be applied when marketing to retail investors; in particular, this concerns Articles 26 et seq. of the ELTIF Regulation. On the other, stakeholders can give feedback on the need for reform with respect to distribution to employees of the initiator, who are technically considered retail investors.

The investor side also collects stakeholder feedback (i) on the application of the principle of equal treatment (including a potential clarification that equal treatment applies at share/unit class level) and (ii) on whether the ELTIF framework is rendered less effective by national legislation or existing market practices. This includes national tax regimes which may reduce the attractiveness of ELTIFs, such as gold-plating or misapplication of the EU acquis. Although the potential use of gold-plating practices has been pointed out by several asset managers in the past, it will be interesting to find out to what extent stakeholders will disclose these practices to the European Commission.

Under miscellaneous, the European Commission notably invites stakeholders to make additional comments and to consent to a direct follow-up request from the European Commission. As the public consultation indicates, it will also take into account parallel consultations and review processes of the other EU financial acquis, such as that of the AIFMD and of Mifid II/Mifir, irrespective of timing.

ELTIFs in the context of the European Green Deal and Covid-19

The public consultation also makes it clear that the ELTIF label can serve as an important conduit for investments to support the European Green Deal. A preliminary roadmap detailed in European Commission communication COM(2019) 640 final, the European Green Deal reaffirms the Commission's commitment to tackling climate and environment-related challenges. ELTIFs could contribute to the long-term financing needs of the green transition in both the public and the private sectors, and such financing opportunities for green projects could even be leveraged if the European Investment Bank or the European Investment Fund were to support the ELTIF label by investing systematically in ELTIFs.

The public consultation highlights the importance of the ELTIF in implementing the European Green Deal, requesting feedback on sustainability and the EU taxonomy for sustainable activities in the ELTIF context. As the ELTIF framework aims to develop alternative financing streams alongside the traditional banking market in order to close the financial gap for the real economy and, in particular, for small and medium-sized companies, the public consultation also polls stakeholders on the extent to which they feel ELTIFs will invest in recovery projects post-Covid-19. The pandemic has had a severe impact, creating demand for financing. As ELTIFs may invest in equity/debt instruments or grant loans to the real economy, they may prove to be a suitable alternative financing tool to help the European economy recover by investing in distressed assets or alongside European Guarantee Funds.

What it means for retail

As highlighted by the High-Level Forum, the ELTIF was created as a suitable investment vehicle for bringing alternative investments to a sophisticated segment of Europe's retail investor base. Retail marketing is, by the testimony of a number of asset management industry representatives, the key driver for setting up an ELTIF. Therefore, the retail appetite for ELTIFs will further increase when coupled with national tax incentives, or when national pension plan criteria are aligned with the ELTIF framework (as is the case in Italy with the PIR regime, for instance). Diversity of asset classes and flexibility in structuring make the ELTIF a promising vehicle that, according to the High-Level Forum, "could encourage the growth of market-based lending entities analogous to US Business Development Companies (BDCs), which play a notable role in real economy financing in the US, especially to many SMEs".

Where the asset management industry is able to make strong arguments in response to the public consultation, it is highly likely that the European Commission will suggest amendments to the ELTIF Regulation. This initiative could, in turn, accelerate the takeup by retail investors, and thus increase the total number of ELTIFs and the net assets under management. However, the review will only be truly successful if the ELTIF framework strengthens product flexibility based on retail versus professional distribution. This is because a wider institutional takeup will help (i) to promote investor perception of the ELTIF label as pan-European quality label for AIFs and (ii) to sufficiently leverage the considerable size of these funds.

CORPORATE
SWISS CROSS-BORDER FUNDS

A guide to cross-border financing in Switzerland

Daniel Hayek and Mark Meili of Prager Dreifuss look at the rules, practicalities and latest developments in a friendly, but recently more challenging environment for cross-border financing

www.prager-dreifuss.com

Switzerland is home to approximately 250 banks with an aggregate balance sheet of about CHF3.32 trillion ($3.64 trillion). Consequently, the Swiss cross-border financing market is mature and well-developed. Local banks such as Credit Suisse, UBS and the Zurich Cantonal Bank (ZKB) are the dominant lenders when it comes to cross-border financing, but international banks are also active in the Swiss market. This is because the headquarters of large international groups are located in Switzerland, and also because borrowers frequently have Swiss affiliates that grant security.

Since the global financial crisis, banks in Switzerland have become stricter with regard to providing loans to companies. This trend is reinforced by Basel III legislation, which requires banks to hold more equity. Notably, it is becoming harder for small and medium-sized companies that do not have an investment grade rating to refinance and renegotiate existing debt structures. As a result, many companies are turning to alternative lenders such as funds, pension funds, insurance companies and family offices which are willing to take more risk. To support the additional financing needs created by the negative impacts of Covid-19, the Swiss government established a liquidity support scheme for small and medium-sized Swiss companies between March 26 and July 31 2020. Under this scheme, Swiss banks granted loans in a total volume of CHF16.91 billion which were guaranteed by the federal government.

Over the last decade, the ratio of Swiss bank non-performing loans (NPLs) to total gross loans has continuously fallen from 1.3% in 2005 to 0.6% in 2019, which is low in comparison to other jurisdictions and equals the all-time low for Switzerland from 2017 (which was also 0.6%). As a result of the negative effects of the Covid-19 crisis, the number may get worse. However, under usual circumstances NPLs are not a very topical issue. A reason

The new regime is likely to increase the ability of Swiss groups to raise funds outside Switzerland

for the typically low ratio may be that NPLs suggest that obligors are facing liquidity problems.

A liquidity problem is a major issue for Swiss directors. The board of a Swiss obligor has to convene an extraordinary shareholder's meeting and propose restructuring measures if half of the company's share capital and legal reserves are no longer covered by its assets. In the event that the balance sheet of a Swiss obligor shows negative equity, the board of directors must notify the court. This usually leads to bankruptcy. If the board fails to observe its obligations, the individual directors may incur personal liability. It goes without saying that the board will try to find a commercial solution with the existing lenders or try to raise additional capital from alternative sources to avoid such a situation.

Switzerland provides the legal certainty to resolve any disputes relating to large-scale financial transactions. However, borrowers and lenders tend to find amicable solutions rather than resorting to litigation.

In regard to trends in the market, the negative impacts of Covid-19 on the financial situation of many companies has created additional financing needs. Furthermore, Brexit may have a profound impact on the mechanics of cross-border financing. In particular, it seems that cross-border financing transactions in Europe are no longer solely managed by UK law firms. Local law firms across other European jurisdictions have become more powerful and sometimes take the lead in such transactions.

Financing structures

Recent notable transactions in the market include a multi-billion euro financing of a large-scale infrastructure project. The most interesting aspect of this transaction was that the lenders were European energy companies that did not have a banking licence. There were no bank lenders involved, even though banks may provide financing at a later stage of the project.

This raises some difficult questions in relation to the '10/20 non-bank rule', which limits the number of potential non-bank lenders in a financing transaction (further details below). Finding a solution to the allocation of 'slots' for lenders that do not have a banking licence, thereby allowing them to provide mezzanine, bridge or funding gap capital, as well as to the transfer of loan shares to non-banks, is challenging. The composition of the lenders made this transaction quite unique. It is not expected that its structure will influence the Swiss market standard.

Syndicated secured loan facilities are probably the most frequent type of cross-border financing transaction in the market and it appears that this will not change in the near future.

Legislation and policy

There is no specific legislation and there are no specific regulatory bodies that exclusively or predominantly govern cross-border financing in Switzerland. However, it goes without saying that the Swiss Financial Market Supervisory Authority (FINMA) is relevant when it comes to the regulation of domestic (bank) lenders and that the Swiss Federal Tax Administration (SFTA) is relevant in relation to ancillary tax issues.

Swiss headquartered groups looking to raise capital via the international debt capital or bank debt markets may face Swiss withholding tax (WHT) if the issuer or borrower is a non-Swiss group member and where the structure requires guarantee support from the Swiss parent company. If there is backflow to Switzerland, a 35% WHT rate applies on the interest payments, unless the maximum backflow is capped at the equity amount of the non-Swiss issuer. On February 5 2019, the SFTA published an important clarification that introduced two exceptions to the backflow rule, which may also be combined.

Under the equity exception, it is possible for a non-Swiss issuer with a parent guarantee from its Swiss headquarters to grant a loan back to the Swiss company sourced from the funds raised on the international capital market, whereby the up-stream loan will not exceed the aggregate equity of all non-Swiss subsidiaries. In case the shareholding is less than 100% in the non-Swiss subsidiary, the equity amount is reduced accordingly. Under the intra-group funding exception, it is possible for a non-Swiss issuer, which holds a parent guarantee from the Swiss headquarters, to grant a loan back to the Swiss company sourced from the funds raised on the international capital market whereby the up-stream loan shall not exceed the aggregate amount of all intragroup loans granted by Swiss group members to non-Swiss group companies.

The SFTA requires an upfront tax ruling if a Swiss headquartered group wants to benefit from the new exceptions. The new regime is likely to increase the ability of Swiss groups to raise funds outside Switzerland and to use such funds in Switzerland.

Meanwhile, the abolishment of the 10/20 non-bank rule has been widely discussed and may be achieved by a tax reform initiated by the Swiss Federal Council aimed at strengthening the debt market in Switzerland. The consultation period regarding the corresponding consultation draft bill to change the Swiss law on WHT on interest income has ended in July 2020 and the dispatch by the Swiss Federal Council on the reform of the withholding tax is expected for spring 2021. It is envisaged that interest paid to investors outside of Switzerland will no longer be subject to Swiss WHT. For the 10/20 non-bank rule, this means that re-characterising a loan as a bond (which is dependent on the number of creditors involved that are not banks) will no longer have any implications for Swiss WHT on interest.

In a nutshell, the 10/20 non-bank rule states that interest payments are subject to 35% WHT rate, if the number of lenders without a banking licence exceeds 10, under a single debt instrument, or 20, under all debt instruments of the Swiss borrower taken together. Under certain circumstances, interest payments guaranteed by a Swiss guarantor may be subject to WHT as well. The limitation of syndication to non-bank lenders due to the 10/20 non-bank rule is a viable solution to avoid or mitigate the consequences of this rule. However, such an approach may not be satisfying in larger syndicated finance transactions or if the involvement of lenders without banking licence is a necessity. In such cases, funds are often raised by a foreign parent company, with the Swiss entity acting solely as guarantor and security provider.

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If this structure is properly planned and implemented, the applicable upstream and cross-stream limitations (see below) could be reduced to minimum; but it would be preferable if the lenders had unlimited claims against the Swiss entity and the transfer of loan shares to non-banks was not restricted. Therefore, the abolishment of the 10/20 non-bank rule would be most welcomed by borrowers and lenders. As a positive side effect, the volume of loans made available to Swiss borrowers could increase substantially.

Market norms

As mentioned above, the 10/20 non-bank rule and the applicable up- and cross-stream limitations on guarantees (see below) may have a significant impact on the structuring of a deal. This is frequently underestimated by foreign lenders who are not familiar with the Swiss market. Indeed, the most frequently asked questions about the market concern the potential structure of the transaction in the light of the 10/20 non-bank rule, the applicable up- and cross-stream limitations and the resulting tax consequences. Not all foreign lenders are aware of the significance of these issues.

To a lesser extent, lenders also want to know which asset classes can be taken as security and what documentation or formalities are required to create, perfect and maintain such security.

As for the security regime, security can be taken over all classes of assets a lender would usually expect, such as shares, bank accounts, receivables, insurance policies, real property and intellectual property.

In order to perfect and maintain a pledge over shares (or other movable objects), the security trustee needs to be in physical possession of the pledged movable objects during the security period (*Faustpfandprinzip*). As a consequence of this requirement, security over plants, machinery, equipment or inventory is possible, but is usually not taken. There are also some limitations to security taken over real estate that serves primarily as living accommodation, and there are certain formalities that must be observed. However, the quality and value of the security is usually worth the extra effort.

In principle, floating charges are not available in Switzerland. However, there is the option to grant security over a value quota of an intermediated securities account. Therefore, it is possible to create Swiss security over intermediated securities that is, to a certain extent, similar to a floating charge. It should be noted that there are several ways to create a security interest over intermediated securities.

Solutions exist to avoid or at least mitigate the impact of any the particular demands that the Swiss market places on lenders and borrowers. The best approach for a lender that is not familiar with the Swiss jurisdiction is to engage a specialised Swiss law firm before agreeing to a financing structure that could be either difficult or impossible to implement.

Practical considerations

A key consideration for most cross-border financings should be downstream, upstream and cross-stream guarantees. In Switzerland, downstream guarantees are not subject to restrictions or limitations, but upstream and cross-stream guarantee payments are considered to be constructive dividends and are, as a result, limited to the profits and reserves freely available for distribution in the guarantor's balance sheet. Consequently, the respective rules for distribution of dividends must be observed. This includes the preparation of an up-to-date balance sheet by the guarantor and the approval of the resulting distribution by a shareholders' meeting.

In order to maximise the assets available for distribution, the finance documents should contain Swiss guarantor limitation language to that effect. It is also standard to

combine a guarantee with a pledge over the shares in the Swiss guarantor.

It should also be noted that the proceeds from upstream and cross-stream guarantees are subject to a 35% WHT. In recent years, it has become standard practice for the SFTA to request that any Swiss company providing a guarantee to its parent company receive appropriate remuneration for the guarantee: a guarantee fee.

In the context of a bankruptcy or restructuring, the enforceability of any contract may be limited under the rules of the Swiss Debt Enforcement and Bankruptcy Act. In particular, the following transactions may be fully or partially voidable:

- Transactions carried out during the year prior to the bankruptcy or insolvency decree, in which the Swiss security grantor accepted to receive no consideration at all or a consideration out of proportion to its own performance;
- Certain financially inadequate transactions, if carried out during the year prior to the bankruptcy or insolvency decree and if the Swiss security grantor was at the time of the transaction already over-indebted. However, the transaction is not voided if the recipient proves to have been unaware of the security grantor's over-indebtedness;
- All transactions which the Swiss security grantor carried out during the five years prior to the bankruptcy or insolvency decree with the apparent intention of disadvantaging its creditors, or of favouring certain creditors to the disadvantage of others.

The 10/20 non-bank rule has been identified as an obstacle for cross-border financings connected to Switzerland

Another major insolvency related issue that should be addressed in the finance documents is the allocation of proceeds between the different classes of lenders. Frequently, there is a foreign law-governed inter-creditor agreement that provides for a certain waterfall, but that does not necessarily take into account Swiss insolvency law. In particular, subordination of claims can lead to issues and delays in relation to the enforcement of security in Swiss insolvency proceedings, if it has not been properly addressed in the inter-creditor agreement, the security documents and other ancillary documentation.

As for other practical considerations, there are no foreign debt quotas which would have to be observed in connection with a cross-border financing. There are also no rules that would require any specific monitoring of offshore financing to domestic entities, subject to the applicable money laundering legislation and sanction regimes.

Looking ahead

The 10/20 non-bank rule has been identified as an obstacle for cross-border financings connected to Switzerland. The rule may soon no longer be relevant as the withholding tax on interest on bonds and bond-like instruments will likely be abolished. However, this change of the Swiss withholding tax regime is not expected to become effective before January 1 2022.

Furthermore, the negative financial effects of Covid-19 on many businesses in Switzerland continue and create additional financing needs. Large companies with solid prospects should be able to obtain new financing from banks or alternative lenders. However, for smaller companies the situation may be more difficult and it may prove challenging for them to access liquidity in the current market situation and they may have to rely on additional public financial support.

CAPITAL MARKETS
SPACS BRANCH OUT

SPACs cross the Atlantic

The announcement that UK electric vehicle maker Arrival Group is to merge with Nasdaq-listed CIIG could herald a new wave of SPACs looking at European acquisition targets in the coming years

Much has been made of the rise of the special purpose acquisition company (SPAC) market in the US this year – the records keep falling. Gross proceeds raised by these blank-cheque companies this year alone now amount to well over $50 billion (compared with a seemingly paltry $13.5 billion in 2019 – at the time, a bumper year). We have seen the largest ever SPAC IPO, with Bill Ackman's Pershing Square vehicle raising $4 billion in May.

SPACs in the US have only tended to search for national targets – until, that is, the announcement that UK electric vehicle maker Arrival Group is to merge with Nasdaq-listed CIIG – heralding a new wave of SPACs looking at European acquisition targets in the coming years.

A wide variety of sponsors are raising funds through SPACs in 2020, from large private equity houses to tech entrepreneurs and even ex-NBA stars – with Shaquille O'Neal teaming up with Walt Disney executives and one of Martin Luther King Jr's sons to raise funds to make media and technology acquisitions. It has also recently been reported that Softbank is considering raising a SPAC vehicle.

However, despite the wide variety of SPAC sponsors, one key theme that has emerged in 2020 is that sophisticated players such as large private equity houses and hedge funds have been attracted to the market, including Centerview Capital, TPG and The Gores Group. In addition, mainstream institutional investors are also participating as shareholders – the CIIG Arrival Group deal was backed by blue chip investors including Blackrock, Wellington Management and a BNP Paribas fund.

Therefore – in contrast to previous SPAC booms – there is now a maturity about these vehicles, in terms of the sponsors backing them, the amount money that they are raising and the quality and value of the assets they are looking to acquire.

1 MINUTE READ

2020 has seen the rise of the special purpose acquisition company (or SPAC) in the US. SPACs have tended to search for national targets but in this article Baker McKenzie partners look at the issues European boards and investors should consider as this asset class looks to Europe to satisfy its insatiable appetite. The recent announcement that UK electric vehicle maker Arrival Group is to merge with Nasdaq-listed CIIG could herald a new wave of SPACs looking at European acquisition targets in the coming years.

Key US SPAC statistics since 2009

- 369 SPAC IPOs since 2009
- 43 currently filed for IPO
- 131 currently looking for an acquisition
- 39 currently announced acquisition targets
- 63 completed acquisition (2017-present)
- 25 liquidated (2009-present)

Source: SPAC Insider; 17 September 2020

SPACs, with their significant war chests, are likely to become a part of the European M&A landscape as we head into 2021

Inevitably, market participants are innovating constantly, devising new structures, honing existing structures or introducing new features – all with a view to making SPACs more attractive to investors and potential acquisition targets. This means they are now serious players with a large amount of capital to make acquisitions – and money, it seems, will be no object. In September, for example, we saw the largest ever SPAC acquisition, which valued United Wholesale Mortgage at $16.1 billion.

Why are SPACs looking to Europe?

To date, many SPAC acquisitions have been focused on US targets. However, it is unlikely that this will remain solely the case for long and SPACs, with their significant war chests, are likely to become a part of the European M&A landscape as we head into 2021. There are a number of reasons for this:

Large and attractive privately held businesses Over the last 10 years or so, a number of start-up and growth-stage businesses have reached maturity, but are still privately held. Some of these companies now have very high valuations. This new dynamic means that there is an opportunity for SPACs that raise significant funds to acquire businesses at high valuations. In addition, with the perceived execution risk that arises from the traditional IPO structure, SPAC sponsors believe they will now offer an attractive exit route for these businesses. European companies that would otherwise wish to seek a listing on a US exchange (the Nasdaq in particular) may prefer to achieve this outcome through a sale to a SPAC.

Competition for assets With the large number of SPACs that have raised capital in the US this year, competition for quality US targets is likely to heat up. SPAC sponsors may therefore begin to look beyond the US for targets. In addition, a number of European sponsors are considering listing SPACs in the US, where there is an abundance of capital, specifically with a view to acquiring European targets. Therefore, businesses in Europe are likely to become increasingly attractive as US SPACs look to deploy their capital in 2021.

Lack of a European SPAC market Although there have been rumours of a London-based SPAC sponsored by Mariposa Capital founder Martin Franklin and Viking Global Investors executive Brian Kaufmann to make acquisitions in the consumer space, so far in Europe the SPAC market is yet to take off.

The principal reason for this lack of appetite has been that investors are not afforded the same flexibility as in the US. A SPAC with a standard London listing is not required to obtain shareholder approval ahead of any acquisition (although shareholder approval is required for an AIM listed SPAC). Also, in the UK, acquisitions by SPACs are usually classed as reverse takeovers, which give rise to the suspension of the SPAC's shares from trading until the SPAC is able to issue a prospectus (or other relevant offering document) or make available sufficient information (including financial information) about the target to meet what is quite a high regulatory hurdle. There is talk of possible rule changes from regulators in European markets, but there is no immediate prospect of a dramatic increase in SPACs coming to the market in major markets like London any time soon.

Covid-19 pandemic The Covid-19 pandemic has hit some sectors hard while others have flourished. This has led sponsors to seek opportunities either to acquire fundamentally sound businesses at a discounted price, or to invest now in those sectors where they perceive there to be the most exciting growth opportunities. Accordingly, industries going through significant and fast-paced change such as emerging technologies, media and healthcare, have been the focus of many SPAC acquisitions.

For these reasons, the SPAC sale is now a viable exit option for a number of European companies and their shareholders, and one that was not really considered viable a year ago. It now sits alongside the traditional IPO, trade sale and PE buy-out as a fourth exit option. An understanding of this fast-moving and highly innovative market will therefore be important as we move into 2021.

The SPAC as an exit option

The sale to a SPAC is often seen as a way for a company to get to an IPO faster and more efficiently than through the traditional route. The timetable for a SPAC acquisition is typically three to six months as opposed to the 12 to 18 months to prepare for and execute an IPO. A SPAC will negotiate the purchase price directly with the target and its shareholders and, since the SPAC is already listed and has already raised much of the cash to fund the acquisition, market volatility and investor sentiment are largely taken out of the equation. These are the key attractions of a SPAC exit, providing more certainty around valuation and deal execution.

However, for all of the positive news-flow and commentary on the virtues of SPACs, it is important to remember that a number of these vehicles have achieved notoriety for the wrong reasons and returns have not always been strong. Furthermore, certain features of a SPAC can present significant execution risk for companies looking to achieve an exit through a sale to a SPAC. When planning an exit strategy, companies will need to understand these features and look for ways to mitigate the risks.

Shareholder optionality

One of the largest risks associated with the de-SPAC transaction centres around the optionality that a SPAC provides to its shareholders in relation to any proposed acquisition. US SPACs will obtain prior shareholder approval for any acquisition and the shareholders will have the right to redeem their shares if they do not wish to participate in the proposed acquisition.

Alternatively, a SPAC may offer shareholders the right to tender shares to the SPAC at the IPO price, in which case, shareholder approval for the acquisition is not required. The ability for shareholders either to tender their shares to the SPAC or redeem them means that the SPAC may have difficulty predicting the aggregate amount of cash outflow associated with redemptions.

Potential SPAC targets should therefore look carefully at the ways in which both they and the SPAC sponsors can mitigate these risks:

Shareholder approval The SPAC sponsors will typically undertake to vote their shares (usually totalling around 20%) in favour of the acquisition, thus reducing the number of votes required. Sponsors may also purchase shares in the market and vote those shares in favour of the deal. In addition, other stakeholders in the SPAC, such as directors or major shareholders, may provide support agreements under which they commit to vote in favour of the de-SPAC transaction. Potential SPAC targets should look to ensure that some or all of these actions are taken.

Right of redemption/right to tender shares SPAC sponsors are aware that this represents a risk to the de-SPACing process. To mitigate this risk, SPACs sometimes raise further funds at the time of the acquisition through a PIPE (private investment in public equity), whereby existing or new investors subscribe for further shares to replace the funds anticipated to be dissipated through redemptions. A SPAC may also enter into forward purchase agreements at the time of listing, whereby investors agree to purchase shares (usually at a discounted price) at the time of the closing of the acquisition. These forward purchase agreements represent a firm commitment to fund, and these shares purchased are not redeemable.

There has also been a recent tendency for SPACs to utilise structures that provide economic incentives to those shareholders who do not redeem their shares or even dis-incentives to those who do. For example, Bill Ackman's Pershing Square vehicle issued warrants to investors that had certain rights and obligations enshrined in them so that they were forfeited by investors that chose to redeem and were re-distributed to those that did not (and thereby inviting the name "tontine warrants" – a nod to the 17th century investment plans whereby investors paid into a common pool and the returns were shared with the surviving investor(s) at the end of the investment period).

In the UK, acquisitions by SPACs are usually classed as reverse takeovers, which give rise to the suspension of the SPAC's shares from trading until the SPAC is able to issue a prospectus

Targets that are planning a SPAC exit should look carefully at the certainty of funding of the SPAC and fully understand any forward purchase agreements, associated PIPE transactions and other structures that have been put in place to mitigate the risk of redemptions.

Alignment of strategic interests It will be important to ensure that the interests and goals of the SPAC are aligned with the interests and goals of the target and its shareholders. The acquisition should tie in closely with the stated investment strategy of the SPAC and its sponsors. The target board will want to quiz the SPAC sponsors carefully on their long-term goals for the target and their understanding of the investment case. The closer the alignment, the more likely it is that the acquisition will make sense to the SPAC shareholders – thereby increasing the likelihood of obtaining shareholder approval and reducing the risk of redemptions.

Understand the sponsors' remuneration structure Traditionally, sponsors will be remunerated though the ability to acquire shares in the SPAC at nominal value or close to nominal value. This can result in the sponsors obtaining a return in circumstances where the other shareholders will not. However, some SPAC sponsors (for example Bill Ackman's Pershing Square vehicle) have developed remuneration structures which mean that SPAC sponsors will only make a return where the SPAC's share price has exceeded a certain level. This incentivises sponsors to seek targets that are likely to be successful and, accordingly, acquisitions proposed to shareholders are more likely to obtain approval.

How close is the SPAC to its outside date? A SPAC will have an outside date; a deadline by which it must make an acquisition or return funds to investors. Typically, this is 18-24 months following the SPAC's listing. As the outside date approaches, SPAC sponsors may become increasingly keen to do a deal, creating tensions between the competing interests of the sponsors and their investors. The closer to the deadline the SPAC comes before agreeing the terms of a deal, the more a target should question the sponsors on the valuation of the target and its long-term prospects. Conversely, the closer the outside date, the greater the risk that shareholders will decide that they would rather have their money back than vote through the deal.

Finally, deals done in a rush close to the SPAC's deadline can be more open to post-acquisition litigation from shareholders.

IPO readiness

While the timeline to an IPO through a SPAC is typically quicker than a traditional IPO, companies should not underestimate the size of the task in becoming IPO ready. It is a common misconception that a backdoor listing through a SPAC is easier than a traditional IPO. The shortened timetable for a SPAC deal versus an IPO is an advantage, but it does not reduce the amount of work that will need to be done to become IPO ready. Historical financial information, audited to Public Company Accounting Oversight Board (PCAOB) standards, will need to be included in the Form S-4 or proxy statement shortly after entering into the acquisition, and many targets will need to commence preparing that information well in advance of any business combination with the SPAC. This challenge will be greater still for non-US targets and so European targets may need to begin preparing earlier. Furthermore, due diligence done to a standard necessary for adequate public disclosure in the Form S-4/proxy will also be required.

In addition, all of the other IPO-ready tasks will need to be performed, including determining the post-IPO board

composition. This includes taking into account the imperative for boards to be diverse and, among other things, conducting reviews of internal controls and financial reporting procedures appropriate for a public company, as well as putting in place the right governance and other legal and regulatory policies – such as those relating to the disclosure and control of non-public information. The size of this task should not be underestimated.

What does this mean for European boards and investors?

With the vast amounts of capital raised by SPACs in the US this year, it seems inevitable that more of it will wash onto European shores. The underlying fundamentals that make US targets in certain sectors attractive to SPACs apply equally to potential European targets.

With the vast amounts of capital raised by SPACs in the US this year, it seems inevitable that more of it will wash onto European shores

Therefore, boards and investors of European targets will need to understand the risks and rewards of a SPAC transaction when set against other possible exit routes. They will need to factor a possible SPAC transaction into their planning and ensure that they are well prepared in order to mitigate some of the risks associated with the de-SPACing process. They will also need to consider carefully the track record and strategic plans of the SPAC sponsors to ensure the right strategic fit. Taking these steps will help to ensure that the transaction will be one of the SPAC success stories.

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CAPITAL MARKETS
IMPACT ASSESSMENT

Mifid II in Austria: an example of unintended consequences

Markus Fellner and Martin Wallner of Fellner Wratzfeld & Partners review how clients have been responding to the regulatory requirements imposed by Mifid II

Mifid II was passed in response to the global financial crisis a decade ago, with the aim to improve the integrity and transparency of financial markets and strengthen investor protection. Mifid II marked the peak stage of regulatory density of European capital markets law, and its numerous legal requirements framed a constitution for financial markets of sorts, built on the basic principle of 'the greater the transparency, the greater the investor protection'.

Initially, many of the directive's complex legal amendments were a challenge for both the development of appropriate technical systems and the timely implementation of the necessary legal regulations. In Austria, Mifid II was implemented through the Austrian Securities Supervision Act 2018 (*Wertpapieraufsichtsgesetz 2018, SSA 2018*) and the Austrian Stock Exchange Act 2018 (*Börsegesetz 2018, SEA 2018*), which entered into force on January 3 2018. Moreover, the implementation of Mifid II enabled the revision of over 40 acts of legislation.

Mifid II has affected Austria's entire investment services market by prompting changes across four different areas: distribution and advisory, trading and execution, reporting and transparency, and risk management. Mifid II tightened transparency regulations for shares and covered considerably more financial instruments than before. The introduction of Mifid II also led to fundamental changes for markets where equity-like instruments, bonds, structured finance products and over-the-counter (OTC) derivatives are traded. The modifications by Mifid II profoundly affected investment firms (including banks active in the securities business) and the entire structure of the European securities market. As a result, investment firms were forced to reassess their strategic direction, optimise existing processes, develop new ones and make extensive adjustments to their IT systems.

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The impact of the regulation's heightened investor protection has been felt throughout the financial industry

The impact of the regulation's heightened investor protection has been felt throughout the financial industry. Strict regulation of third party benefits for financial advisors have forced some market participants to review and revise their entire costing structure and product portfolio. The product governance regime covering the defined target market pushed distributors of financial products to make time-consuming and costly additional assessments in respect of certain customers. Compliance with new record-keeping obligations and investor protection rules required market participants to scrutinise their customer communication and to retrain their staff. Some market participants even had to review their agreements with customers and to modify their general terms and conditions to ensure compliance.

In the wake of the implementation of Mifid II, the Austrian Financial Market Authority (*Finanzmarktaufsicht, FMA*) proved to be cooperative on implementation matters, issued clarifications on the draft laws of the SSA 2018 and SEA 2018, and offered guidance on the interpretation of the various legal requirements. Furthermore, the FMA worked with the Austrian Chamber of Commerce to answer questions that the latter had collected from the Austrian financial sector regarding the implementation of Mifid II. Both questions and answers are a valuable resource that are freely accessible online.

The post-implementation market

In practice, several of Mifid II's requirements went well beyond the legitimate objective of reasonable investor protection.

Mifid II imposed excessive disclosure requirements, without including any option for clients to opt out of receiving certain kinds of recurring information, such as quarterly deposit reports, *ex-ante* cost information, and declarations of suitability for multiple transactions of a similar nature executed within a short period. Similarly, according to Article 63, paragraph 1 of the Delegated Regulation (EU) 2017/565, each quarter, investment firms must provide their clients with physical records of financial instruments held, adding considerable cost with questionable add-on value for clients, who can access their report online or request an extract from their consultant at any time. Even if clients wanted to, Mifid II would not allow them to opt out of this disclosure and information regime.

Furthermore, extensive information obligations regarding *ex-ante* costs has led to considerable problems, with few financial services providers' sales staff and clients willing to accept the information. Mifid II allowed financial services providers to disclose *ex-ante* cost information just once for each product group with an almost identical cost structure, eliminating any incremental benefit for clients from retrieving the same information again. Certainly, *ex-ante* cost disclosure requirements have failed to improve cost transparency and homogeneity of how costs are broken down and presented. Most market actors break down and present their *ex-ante* cost information in a different manner, relying on different terms and definitions, making direct comparison of cost structures between actors confusing and difficult.

The information obligations under Mifid II apply to professional clients and suitable counterparties as well. For the most part, both transact with financial services providers by telephone and under high time pressure, which makes the *ex-ante* cost delivery requirement impractical. As prices fluctuate as *ex-ante* cost information is being transmitted, reliance on such outdated *ex-ante* cost information can have an adverse financial impact on clients. Lastly, each time a bank withdraws an offer, any difference in price would require a new offer to be accompanied by new *ex-ante* cost information.

According to an European Securities and Markets Authority (ESMA) Q&A update, annual *ex-post* cost and charges disclosure requirements under Article 50(9) of the Mifid II Delegated Regulation must be aggregated at least at the portfolio level, unless clients request an itemisation. Per Article 60 of the Delegated Regulation, these *ex-post* disclosures may be sent together with other periodic reports to clients, such as quarterly (or monthly) cost statements. ESMA further clarified that even if clients (opt to) receive more frequent cost information, they nevertheless must receive *ex-post* cost information on an annualised basis to be able to have a clear picture of costs incurred for the whole year. This increases the administrative burden for firms.

The most burdensome and costliest requirement Mifid II has imposed was to keep records of telephone conversations with clients. Substantial compliance costs aside, following implementation into Austrian law phone consultations were reported to have declined considerably. Against this backdrop and from an investor protection perspective, the usefulness of phone records is not quite clear and prompted calls for less arduous alternatives. Incidentally, the Covid-19 pandemic may pave the way for a relaxation of these rules. In March 2020, ESMA issued a statement on the requirement to record telephone conversations during the Covid-19 pandemic, allowing firms to adopt alternative arrangements to ensure compliance with regulatory requirements such as the use of recordable electronic communications or written minutes of

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phone conversations in the event that phone conversations cannot be recorded due to working from home arrangements.

Finally, despite its aim, Mifid II does not relax compliance requirements in the event national competent authorities take different product intervention measures that apply in and from their respective member state. ESMA has clarified in its Q&A that in such cases investment firms active across borders must comply with the measures in both states: those of the member state in which the investment firm is authorised, and those where the client it provides cross-border services to, is located.

Mifid II/Mifir review process

Given Mifid II's extensive and costly documentation requirements and the unbundling of research services, it became clear that without changes many financial services providers would exit less liquid markets – such as Austria – to avoid compliance costs. In addition, larger players seeking to expand their market share would increasingly price out smaller competitors. The likely result: less market transparency, less market liquidity and a weakened financial system.

During ESMA's Mifid II/Mifir-review process in Q2 of 2020, the Austrian government relayed many of the concerns illustrated above. Building on a joint proposal developed by the Austrian Chamber of Commerce and the FMA, the Austrian government's position for Mifid II reform centred on three pillars:

- The introduction of a dynamic deadline regime for the national application and implementation of level 2 measures;
- A relaxation of information obligations; and
- Exempting small and medium-sized enterprises (SME) issuers from Mifid II's research regime.

The implementation deadline for Mifid II has been criticised as being too short and insufficient, resulting in undue and burdensome pressures for market participants. Under an affixed application and implementation schedule, a delayed European Commission request to ESMA for level 2 technical advice – which takes up to 12 months – ultimately cuts short the period that national legislators and market participants have to ensure timely application and implementation at the national level. To avoid a repetition of past mistakes, the Austrian government advocated instituting a dynamic deadline regime, under which the 12-month application and implementation period is only triggered once all level 1 and level 2 legislation and technical standards have been adopted.

Austria advocated for the relaxation of information obligations, particular *vis-à-vis* eligible and professional counterparties: expanding on the opt-in model for eligible counterparties pursuant to Article 30, the Austrian government proposed an opt-out for eligible counterparties from information obligations pursuant to Article 24, paragraphs 4 and 5; and Article 25, paragraph 6 of Mifid II, respectively.

In addition, any time an investment firm acts on behalf of a professional counterparty or its own account, such a professional counterparty should be able to opt out of any information obligations optional for eligible counterparties. To avoid inundating customers with information, the proposition calls for information obligations to be re-evaluated and dropped. In particular, this refers to recurring orders at similar conditions within a short time frame, provided that customers agree to such opt-out and that the documentation of such orders by investment firms is ensured.

Lastly, financial sector stakeholders proposed an exemption of SME issuers from Mifid II's research unbundling. The directive's research regime resulted in a market failure that the regulation had sought to avoid. The unbundling of research services resulted in the loss of coverage of most SME issuers, as research focuses on blue chip issuers. Furthermore, smaller market participants are priced out of increasingly expensive high quality research products.

As a result, rather than increased transparency and protection, Mifid II's outcome was the exact opposite: less investor clarity particularly on SME issuers, less market transparency and less liquidity of SME issuances. In this respect, the directive proved particularly harmful to less liquid markets such as the Austrian Traded Index (ATX).

European Commission's proposal for a Mifid II 'quick fix'

The European Commission (EC) was receptive of critical feedback during the consultation process and acknowledged that some of its regulation imposed burdens that had unintended and negative effects, particularly on small and medium sized firms. It agreed that the removal of such obstacles was key to strengthening European financial markets, especially in light of the challenges posed by the Covid-19 pandemic.

In its July 2020 proposal for a Mifid II 'quick fix', the EC offered a more finely balanced system of transparency, investor protection and compliance by moving to eliminate documentation and disclosure requirements, not counterbalanced by corresponding increases in investor protection. Among the things that the EC proposes are phasing out paper-based communications, relaxing *ex-ante* cost and reporting requirements and exempting issuers with a market cap of up to €1 billion from the research regime.

Even though Mifid II has been in effect for a mere three years, its impact is felt throughout the financial industry. In some areas, the directive's impact certainly overshot regulatory intent and resulted not just in unintended consequences, but incidentally those that Mifid II had sought to avoid. Having said this, our view from the previous year holds that the strict regulations regarding investor protections will lead to fewer investor litigation cases. To date, however, many legal questions surrounding implementation and application remain, which the Supreme Court has yet to address.

CHINA

JunHe

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New R/QFII regulations indicate further opening up of capital markets

On September 25 2020, the China Securities Regulatory Commission (CSRC), the People's Bank of China (PBOC), and the State Administration of Foreign Exchange (SAFE) jointly released the Measures for Administration of Domestic Securities and Futures Investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors (《合格境外机构投资者和人民币合格境外机构投资者境内证券期货投资管理办法》) which will take effect on November 1 2020 (R/QFII measures). Along with the R/QFII measures, CSRC also published corresponding implementing provisions (together with the R/QFII measures and the R/QFII regulations). Such R/QFII regulations have unified the originally separated regulations on the QFII and RQFII for the first time.

There are multiple changes in the R/QFII regulations. These are substantial and show the further opening up of China's capital markets. The biggest spotlight is on the extension of investment scope. Compared to the investment currently allowed by the QFII and RQFII which generally includes shares, bonds, fixed income products traded in the inter-bank bond market, public securities investment funds and stock index futures, investment scope is further opened up to the QFII and RQFII mainly in the following aspects including but not limited to (i) shares traded on the National Equities Exchange and Quotations; (ii) financial futures; (iii) commodity futures; (iv) options; (v) private investment funds; and (vi) margin trading and securities lending on the exchanges, and securities lending to the securities finance company. The types and trading methods of financial futures, commodity futures and options that QFII and RQFII can participate in shall be separately approved by the CSRC.

In addition to the investment scope, other provisions in the R/QFII regulations will also make it more convenient for the QFII and RQFII to invest in China's capital markets, i.e. lowering the entry threshold by cancelling the requirements on operation years and asset size of the QFII and RQFII, simplifying application procedures by reducing application documents and shortening the approval time of the authority, and removing limits on the number of onshore service providers of the QFII and RQFII.

Apart from the recently promulgated R/QFII regulations, authorities have also removed restrictions on the quotas of the QFII and RQII this May. These are optimistic signals that China's capital markets will become further opened up to the world. Considering its great potential, we anticipate more incentives in China to stimulate the liquidity and vitality of the markets and attract more participation from foreign investors.

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Cyprus introduces new law on sub-threshold AIFMs

The provisions of the EU Directive 2011/61/EU on alternative investment fund managers (AIFMD) have been transposed into the Law on Alternative Investment Fund Managers L. 8(I)/2015, as in force (the Cyprus AIFM Law). On a Cyprus-specific level, the Law on Alternative Investment Funds L. 124(I)/2018 (the Cyprus AIF Law) put in place a regime applicable to the authorisation, operation and regulation of such collective investment vehicles that operate as alternative investment funds (AIFs) in various legal forms recognised by the Cyprus AIF Law. Against this legal background, the EU level 2 framework on AIFMD, together with the secondary legislation of the Cyprus Securities and Exchange Commission (CySEC) under the Cyprus AIFM Law and the AIF Law, further supplement and detail the sound framework for the establishment and operation of these regulated structures in and from Cyprus. From a commercial perspective, this regime at the disposal of managers of AIFs (AIFMs) has been utilised with great success so far.

Preamble 17 and Article 3(2) of the AIFMD provides to EU member states the option to apply a lighter regime for AIFMs that fall below the thresholds set out it in the AIFMD and the Cyprus AIFM Law, as their assets under management (AuM), in total, either do not exceed €100 million ($119 million) for leveraged AIFs, or €500 million for unleveraged AIFs that do not grant to investors redemption rights for a five-year lock up period. These thresholds are replicated in Section 4(2) of the Cyprus AIFM Law.

Exercising the above option under the AIFMD, Cyprus enacted relevant legislation this summer, namely the Cyprus Law on Sub-Threshold AIFMs L. 81(I)2020 (Cyprus Sub-Threshold AIFMs Law).

The Cyprus Sub-Threshold AIFMs Law applies to sub-threshold AIFMs in Cyprus, authorised by CySEC, or by the competent authority of another EU country as home member state, and Cypriot investment firms (CIFs) which have been licensed by CySEC for the provision of AIF management functions under the Cyprus Investment Services Law L. 87(I)/2017, transposing Mifid II.

A sub-threshold AIFM is the legal person acting as an external manager of the following:

- an AIF based in Cyprus, in another EU member state or in a third country;
- an AIF with limited number of persons (AIFLNP) under the Cyprus AIF Law; or
- a registered AIF (RAIF) under the Cyprus AIF Law.

The person may provide the following management services:

- AIF investment management services, which includes portfolio management and risk management;

There is hope that this sub-threshold AIFM regime will simplify procedures and will improve market accessibility

- AIF administration, including the following:

(i) Services for dealing with legal issues and accounting management services;

(ii) customer service information;

(iii) AIF portfolio valuation services and determination of the value of shares, including any tax issues, regulatory compliance, issuance and redemption of units, distribution of proceeds from units to investors and record-keeping activities;

- the offering or placement of units of AIFs to investors;
- activities relevant to assets of the AIF (such as services necessary for the fulfilment of the fiduciary duty of the sub-threshold AIFM).

To be authorised by CySEC, a sub-threshold AIFM must have a capital of at least €50,000. Additional own fund obligations arise if the value of the managed portfolios exceeds €125 million; in such an instance, an additional equity requirement would be triggered, equal to 0.02% of the amount by which the value of its portfolios exceeds the stated amount.

The application for authorisation to CySEC is detailed and should, inter alia, be accompanied by the following information:

- the members of the board and senior management staff;
- the identity and the shareholding percentage of direct, or indirect, shareholders with a special participation in the sub-threshold AIFM;
- business plan and detail of internal operations manual;
- outsourcing arrangements;
- investment strategies, the risk profile, and the use of leverage.

From a corporate governance perspective, at least four natural persons should comprise the board of the sub-threshold AIFM, at least two required to have executive duties, with the remaining responsible for non-executive roles. Adequate and suitable administrative and other procedures for information data, actions to minimise risk of losses due to conflicts of interests, liquidity management and other requirements for AIFMs are also adopted to ensure investor protection.

There is hope that this sub-threshold AIFM regime will simplify procedures and will improve market accessibility for AIFMs looking to Cyprus as a headquartering option. This initiative, in the European framework reinforcing investor trust and mitigating systemic risks, could provide an interesting option for collective investments in the post-Covid reconstruction era.

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EGYPT

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Taking a bird's-eye-view of the new banking law

Egypt's usually very quiet (and very conservatively managed) banking industry has been in the headlines since the early days of the Covid-19 pandemic as a wave of M&A activity has swept the sector.

Egypt has 38 active banks today, and the Central Bank of Egypt (CBE) is adamant there will not be a 39th anytime soon. Instead, 20 years after leading a clean-up and consolidation of the sector in the wake of the non-performing loans scandal of the 1990s, Egypt's regulator has held the line: "You want into the sector? Buy a new bank. There are no new licences coming."

As recently as early February, the notion of an Egyptian bank being sold was rare enough to prompt headlines declaring that "with profits hitting record highs, Egypt's banks are ripe M&A targets — but nobody really wants to sell."

The pandemic and a new twist in Lebanon's economic crisis changed everything. Gulf Cooperation Council (GCC) lenders are facing the prospect of low domestic vying for the Egyptian arms of Lebanese banks, which in turn are looking for liquidity as they grapple with changes in their home markets. At least four GCC-based banks are interested in kicking the tyres of Blom Bank and Bank Audi's Egyptian operations. Meanwhile, there is ongoing bidding for state-owned Arab Investment Bank in partnership with Egypt's new sovereign wealth fund.

It's against this backdrop that the new Central Bank and Banking Act (law 194 of 2020, replacing the 2003 act) just became law — setting up what we think will remain a consistently conservative approach to regulation of the sector.

But perhaps the most exciting development? The law allows the Central Bank to accelerate its financial inclusion drive (this in a nation in which perhaps one third of citizens are banked) while catching up with global trends and norms in both e-payments and fintech.

Below is a quick rundown.

A new capital requirement could result in even more M&A activity

Article 64 of the new law requires any local bank to maintain a minimum EGP 5 billion ($320 million) in capital instead of EGP 500 million under the former banking law — the idea is to bring capital requirements in line with the modern size of Egyptian banks 20 years after the CBE's last reform wave. Some in the industry think this could see the merger of as many as 10 domestic banks, and the new law makes mergers easier under Article 97 while at the same time outlining requirements to safeguard the interests of employees and customers in the event of a merger.

The CBE as economic actor

Beyond setting policy, Article 8 clearly authorises the CBE to provide payment

solutions and related services — this is alongside the standard authorisation to participate in international institutions and entities and to establish joint-stock companies on its own or in partnership with third parties. The payment network aspect is key to financial inclusion as the CBE and other arms of the state push ahead with Meeza, a domestic payments network owned by the CBE-led Egyptian Banking Corporation (EBC) that aims to bring more low-income consumers into the banking system (EBC is jointly owned by the CBE alongside the Finance Ministry and a number of Egyptian banks).

Access to foreign lenders and banks

Under the former banking law, it was unclear whether a foreign bank or international institution was authorised to register a real estate mortgage under its name as collateral. In practice, the foreign lender would typically entrust a bank licensed to operate in Egypt to act as a security agent. Article 108 of the new law provides explicitly that foreign banks and international financial institutions may register real estate mortgages as collateral. A foreign bank or a global financial institution may also offer commercial mortgages as a security to other parties subject to the CBE's approval (Article 106).

The new law introduced a new chapter (Chapter 7) in Book 2 (Egyptian Central Bank) on the collaboration between the CBE and corresponding foreign entities. According to Article 52, the CBE may execute cooperation protocols, memorandums of understanding or agreements with corresponding foreign entities for the following reasons:

- to exchange information relating to the shared supervision of the foreign bank's branch by the foreign entity, stepping in procedures and settlement of distressed banks;
- to authorise the corresponding foreign entity to inspect the operations of the foreign bank's branch falling under the jurisdiction of the foreign entity; and
- to coordinate with the corresponding foreign entity before taking any action that may affect the branch of the foreign bank's operations.

This is a big development for Egyptian arms of foreign banks as it sets the foundation for the joint supervision of the foreign bank's operations by the corresponding central bank in that bank's home country.

International trends to minimise the use of cash and fintech initiatives

Article 50 of the new law sets out the framework for the newly established National Payments Council, which will be chaired by the Egyptian president. The council will have one goal – stamp out the use of cash and move the nation to electronic payments.

Unlike the former banking law, the new law provides some prerequisites on licensing payment systems operators and payment service providers, their respective operating rules and their obligation to protect the e-systems utilised, their final settlements, and the supervision and control of the CBE.

It is worth highlighting the growing role of the Financial Regulatory Authority (FRA) being the regulator of non-banking financial activities (i.e. insurance, factoring, financial lease, micro finance, consumer finance). The act, however, confirms that the CBE is the competent authority to licence and regulate the e-payment and e-system solutions and the CBE will set the minimum capital requirements and other prerequisites for such activities.

Tighter oversight of the sector

The new law requires the governor's prior approval on the appointment of senior executives including chairmen, board members and executive managers of both domestic banks and branches of foreign banks. The act allows the CBE to set requirements for office and requires it to make clear why it rejects any individual candidate (Articles 120 & 68).

New teeth for auditors

Notably, Article 125 of the law restricts banks from holding their annual general assembly before the CBE offers them feedback on the report of the bank's auditors, who are now required to report any deficiencies in a bank's internal audit systems directly to the CBE.

We also think it notable that while Article 7 provides that the CBE will be the entity competent to set monetary, exchange rate and risk management policies, it also includes reference to the CBE's role in protecting the customers of banks and to settle related disputes, ensure competition in the sector, and maintain the security of payment solutions and services.

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Key points concerning the exercise of voting rights by foreign investors

The enforcement of the amendment to the Foreign Exchange and Foreign Trade Act (hereinafter the act) on May 8 2020 made it necessary for a "foreign investor" (defined in the act) to file a prior notification in circumstances in which the foreign investor approves a proposal where the foreign investor itself or its "closely related person" (defined in the act – a "related person") assumes office as a director or statutory auditor of a domestic company which operates a business, the type of which falls under business types prescribed by the government ("business types").

To confirm the need for such filing, it is necessary to consider the following: (i) whether the investor is a foreign investor; (ii) whether the type of business operated by such a domestic company falls under any of the business types; and (iii) whether the candidate for a director or statutory auditor is a related person of the foreign investor.

Regarding (i), it is noted that investors with residences or head offices in Japan may have fallen under foreign investors even before the applicability of the above amendment (e.g. subsidiaries and sub-subsidiaries of foreign corporations with head offices in Japan have also fallen under

The Secretary for Economy and Finance stressed the importance of this memorandum for the stability and development of cross-border cooperation

foreign investors). However, the above amendment has enabled the act to expand the scope of foreign investors with head offices in Japan.

Regarding (ii), 155 out of a total of 1,465 business types fall under the business types, including the manufacturing of pharmaceuticals and medical devices.

Regarding (iii), the scope of related persons differs from the scope in cases where a proposal is submitted by a foreign investor itself or through a third party, and cases where a proposal is submitted by a third party. In the former, the scope of related persons is more extensive. If the foreign investor is a corporation, the related persons include officers, employees, and members of the decision-making body on investment belonging to subsidiaries, sub-subsidiaries, sister companies, the parent company, the parent company of the parent company of the foreign investor, the primary clients of the foreign investor, and companies that obtain large amounts of money or other property from the foreign investor. In the latter, the scope of related persons is narrower. However, it is essential to carefully consider whether each proposal falls under the former or the latter, based on the actual situation in individual cases.

Such prior notification may not be required in exceptional cases, which are very limited. For instance, when the domestic company is a listed company, if the foreign investor and persons specified by the government ordinance hold less than 1% of the total voting rights of the domestic company, no prior notification is required. However, this exception does not apply to cases where the domestic company is not a listed company.

Based on the points stated above, it may not be uncommon for a foreign investor to file such prior notification. The increase in administrative workload for business activities of foreign investors is an area of concern.

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Bruno Almeida and João Nuno Riquito

Speeding up the financial diversification

On November 16 2020, Macau SAR's chief executive (CE) Ho Iat Seng delivered the Policy Address for the Fiscal Year of 2021 to the Legislative Assembly. In the speech, he stressed the importance of adequately diversifying the economy – and the business sector – of Macau SAR, a matter that has been put into the agenda in recent years with the aim of progressively decreasing its gaming-related dependency.

As part of such policy, the Macau SAR CE highlighted speeding the modernisation of the financial sector as an objective for 2021. Steps to achieve this include preparing a new legal regime for the financial system, creating the required (physical and digital) infrastructures, developing the bond market, promoting wealth management activities, and promoting the cross-border renminbi real time gross settlement system (RMB RTGS).

A general background note of the policy is to continue efforts to strengthen the Guangdong-Hong Kong SAR-Macau SAR Greater Bay Area (GBA) and to cooperate further with the Portuguese-speaking countries (PSC), and thus, the financial sector would not be an exception to that goal. Hence, the CE announced that Macau SAR will assist in promoting business by Chinese-based financial and insurance companies in the PSC, which shall establish its regional headquarters in Macau SAR, stimulate the issuance of bonds in Macau SAR by GBA companies, and promote the communication of the financial markets between Macau SAR and mainland China, *inter alia*.

In this respect, on October 15 2020, the Monetary Authority of Macao announced it had signed a memorandum with the China Securities Regulatory Commission (CSRC) to strengthen cross-border financial cooperation in terms of supervision, exchange of information, staff training, and technical assistance, amongst other areas. The Secretary for Economy and Finance, Lei Wai Nong, stressed the importance of this memorandum for the stability and development of cross-border cooperation in the securities and bonds market.

It is worth mentioning, in respect of the RMB RTGS, that it first came into play back in March 2016 as a platform to enhance and facilitate the cooperation and the transactions between China and the PSC, between financial institutions and with clients as well. It requires Macau SAR to make use of its strategic location and play its role as a connecting point between China and several countries in Europe, America, Africa, and even in Asia (East Timor).

The RMB RTGS is one of the platforms available to procure the internationalisation of the Chinese currency, as may also be the Chinese central bank-backed digital currency (the DCEP), which is in the pipeline and may further contribute to the economic integration of the GBA. Should this sovereign digital currency be officially launched and become a regular currency in trading at a regional level, it may make it to international markets, in particular the PSC.

Also in the agenda of the Macau SAR CE is to promote electronic commerce at a cross-border level. This will be achieved by implementing policies to incentivise renowned e-commerce companies to establish themselves in Macau SAR, and to incentivise local companies to strengthen their online business, while also stressing out the importance of such a tool in establishing business with companies based in the PSC.

As the creation of a modern financial

industry requires reliable sophisticated infrastructure, as well as capable and well trained manpower, the CE also announced that Macau SAR will actively participate in the development of the International Technology Innovation Centre of the GBA. Moreover, it has outlined a series of goals and guidelines for the improvement of education, scientific research, innovation and entrepreneurship.

The legal regime of tax benefits for technological and scientific innovation-related activities is already in the pipeline of the Legislative Assembly, the first draft of which provides for the exemption of stamp duty in the acquisition of real estate, the exemption of complimentary income tax for three years, and the exemption of income tax regarding dividend distribution to the stakeholders.

Macau SAR may not be the traditional market for investors to look for financial products, but is certainly deploying efforts to create the infrastructure required to become one. Taking the benefit of its strategic location and historical background, Macau SAR may play a significant role in boosting the financial cooperation between the GBA and the PSC.

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PANAMA

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Economic substance requirements for international financial centres

To address concerns raised by the EU Code of Conduct Group for business taxation (the Code Group), and under the OECD's base erosion and profit shifting (BEPS) action plan, in 2017, EU member states began a push for economic substance regulations in the tax policies of both EU member states and third countries. Following its assessment, the EU revealed a list of 13 jurisdictions that needed to deal with their findings regarding the demonstration of economic substance, or be placed on an EU blacklist. In June 2018, the EU issued a scoping paper detailing the economic substance requisites that the subject jurisdictions should adopt before 2019 regarding entities based in those jurisdictions. It's currently anticipated that these economic substance conditions will become a worldwide OECD standard, as they were recently supported by its Forum on Harmful Tax Practices.

The EU Code of Conduct Group reviewed the tax regimes applicable in over 90 jurisdictions. While it found that most international money centres were largely compliant with EU principles regarding tax guidelines, considerations were raised concerning the absence of a legal substance requisite for conducting business in, and through, some jurisdictions.

The Channel Islands, British Virgin Islands (BVI) and other jurisdictions that include Bermuda, the Cayman Islands, and the Isle of Man, were mentioned in a list of jurisdictions that should address the Code Group's 'economic substance' considerations. The governments of these jurisdictions actively engaged with the Code Group to introduce appropriate legislative responses to these issues.

In order to meet the EU's December 31 2018 deadline, a number of British Overseas Territories (including the Cayman Islands, BVI and Bermudas) and Crown Dependencies (including Jersey, Guernsey and the Isle of Man) adopted legislations regulating the economic substance of companies (and in some cases, other types of entities).

Subject to each jurisdiction's legislation, entities carrying out the following relevant activities will require an 'adequate' level of economic substance: (a) banking; (b) insurance; (c) fund management; (d) finance; (e) leasing; (f) headquarters; (g) shipping; (h) intellectual property; (i) distribution and service centres; and (j) holding entities.

The purpose of these pieces of legislation is to confirm that entities incorporated in offshore jurisdictions have the required substance (either within the jurisdiction in which they are incorporated, or another jurisdiction where they're tax resident).

An entity in an applicable jurisdiction that is carrying out one or more relevant activities will be required to comply with the substance requirements, unless it proves its tax residency in another jurisdiction. Noncompliance with these requirements will result in substantial fines and/or the company being struck off. The substance required will depend on the relevant activity being executed (in attention to the nature and scale of the relevant activity) but it will be important whether, from that jurisdiction: (a) activities are being directed and managed; (b) there are adequate numbers of employees; (c) there is adequate expenditure; and (d) appropriate physical offices or premises are maintained.

Special attention should be given to confirm if a company or other entity incorporated in one of these jurisdictions is carrying out a relevant activity and is required to comply with economic substance requirements. If this is the case, and it is determined that the company does not maintain sufficient economic substance, in most instances the entity will have two possible courses of action: either it must develop more local substance, or it must become a tax resident in another jurisdiction.

An entity's response to economic substance regulations will require a global perspective. Many affected entities will have to review their tax residency position globally. In addition, actions taken to address the economic substance rules may also impact the entity's position under the Common Reporting Standard (CRS) and FATCA.

For individual jurisdictions, the impact of the new economic substance regulations is probably going to stay unclear for some time. Notwithstanding, international financial centres have an extended history of adapting to change, given the vital role they play within the world economy. They offer efficient, helpful platforms for facilitating cross-border activities and permit important investment to flow around the globe, supporting economic growth, jobs and tax revenues. International financial centres are geared to meet the needs of international commerce and investments, with specialised and efficient regulatory regimes for specific types of financial sector activity.

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PORTUGAL

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New funding opportunities for private equity managers

The Portuguese investment residence permit programme (commonly called the golden visa programme) is providing interesting new opportunities for fund managers and promoters to raise capital from high net worth individuals with nationalities in countries outside of the European Economic Area (EEA).

Changes to the Portuguese Immigration Act

In 2017, changes have been adopted to the Portuguese Immigration Act (Law no. 23/2007, of July 4) to allow individuals residing outside of the EEA to obtain an investment residence permit if they invest an amount of €350,000 ($414,375) in participation units representative of investment funds or private equity funds geared towards the capitalisation of companies, incorporated under Portuguese law, provided that said participation units are held during a period of at least five years and at least 60% of the investments are made in companies located in Portugal.

Given that private equity funds are typically the types of collective investment schemes which are better geared towards the capitalisation of companies, most of the projects in this area have been focused on alternative investment in companies via private equity funds.

Changes to the Portuguese Immigration Act were regulated by, and therefore became fully operational on September 1 2018, with the enactment of Regulatory Decree no. 9/2018.

This new investment route, granting investors the eligibility to participate in the golden visa programme, has gained traction as of late with investors, given its attractiveness *vis-à-vis* other European residence programmes and the lower investment amount required for programme eligibility compared to other alternatives granted by Portuguese law (notably investment in real estate properties, capital transfers). Residents in countries with strict controls on capital outflows, such as the People's Republic of China, have been particularly interested in obtaining golden visas via subscription of units in funds for these reasons.

Repercussions in private equity investing

This change in the law is giving way to an innovative investment product which has sparked considerable interest from private equity fund managers, promoters (immigration companies, non-EU asset managers and financial institutions, etc., working with fund managers to canvass interest for the funds) and investors.

The chance for investors to be granted eligibility to obtain a residence permit in Portugal (and therefore be given access to the Schengen Area) and the attractiveness of the product for would-be expats in Portugal (explained above) allow fund managers to raise capital from abundant sources and in more favourable conditions relative to other traditional fundraising routes.

Already we are seeing multiple private equity funds being set up to take advantage of this new product. The following restrictions related to immigration rules should, however, be taken into account. Firstly, investors' preferences will likely dictate that the investment horizon will traditionally be linked to the duration of the residence permit (of five years, added of one year to obtain the permit before the immigration authorities), a perhaps short timeframe to pursue such strategies as growth or venture funding. Secondly, the requirement that 60% of the investments are made in companies with head offices in Portugal limits the ability of these funds to broaden their geographical reach.

Next steps for regulation

The appetite for this fundraising structure in private equity shown by market participants is also drawing the attention of market regulators and immigration authorities. This is a welcome prospect, as there are various solutions being explored to which administrative authorities would do well to give guidance, in particular:

- by immigration authorities, with regards to the exact criteria for golden visa eligibility and how this criteria should be reflected in fund regulations and investment policies of fund managers;
- by the securities regulator, in what concerns certain governance provisions of fund regulations aiming to protect promoters' interests.

In relation to the latter issue, it should also be noted that the European Securities and Markets Authority has, in a recent letter addressed to the European Commission, discussed 'white-label' fund managers (i.e. those which have close relationships with promoters/originators), prompting more regulation of these entities and arrangements, mostly on the basis of conflicts of interest concerns. Legislative and regulatory innovations in the medium term for these structures are therefore to be expected.

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SLOVAK REPUBLIC

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Daniel Grigel

Tax rules for controlled foreign companies

Tax rules for controlled foreign companies (CFCs) were introduced into Slovak law as of January 1 2019 with the implementation of the EU's Anti-Tax Avoidance Directive (ATAD). For the time being, the CFC rules only apply to Slovak controlling companies. Beginning on January 1 2021, an expected expansion of the CFC rules will include individuals who control CFCs pursuant to the government's bill that is slated to be passed by parliament before year's end.

By definition, a Slovak controlling company of a CFC is a company whose registered office,

as indicated in the commercial register, or place of effective management is in the Slovak Republic. The law stipulates that the place of effective management is in Slovakia if it is the place where management and business decisions are taken by the directors and supervisory bodies of the company, even if the company's registered office is not entered in the commercial register.

A controlled foreign company is a company with a registered office abroad where the following two conditions are met: i) the Slovak company, by itself or together with its related persons, owns directly or indirectly more than 50% of the capital of the CFC, holds a direct or indirect participation of more than 50% of the voting rights or is entitled to more than 50% of the profits of the CFC; and ii) the corporate income tax paid by the CFC abroad is less than half of the corporate income tax it would pay in the Slovak Republic.

The effect of the new rules is that the income of the low-taxed CFC is automatically re-attributed to the controlling Slovak company, which is required to include that income once yearly in its tax returns as though it had earned that income itself. However, when implementing the ATAD, Slovakia chose not to apply the CFC rules to all foreign income of a CFC company, but the rules are instead limited to the income not actually earned by the CFC – that is, where the income of the Slovak company was artificially diverted to the low-taxed CFC.

This artificial income of the CFC will be included in the tax base of the domestic controlling company in the same tax period in which it was formally accounted for by the CFC. However, to avoid double taxation, the Slovak CFC rules allow the Slovak company to deduct the actual amount of tax paid by the CFC on the artificial income abroad from its domestic tax amount. At the same time, if the CFC pays dividends to the Slovak controlling company, the tax base of the Slovak company calculated according to the CFC rules will be reduced by the amount received in dividends from the CFC. However, that will only apply where the CFC has its registered office in a non-cooperative jurisdiction; the law defines a non-cooperative jurisdiction as a jurisdiction that has not entered into a double taxation avoidance agreement or a tax information exchange agreement with the Slovak Republic, because in that case the dividends are automatically taxed at 35% domestically.

The CFC rules do not refer to any specific rate for corporations, and therefore tax will be calculated using the general domestic corporate tax rates. Taxes are always calculated on the tax base reduced by tax loss; the rate is 15% for companies earning up to €100,000 in the calendar year, including income from CFC companies reallocated under CFC rules to the Slovak company. All other Slovak companies are subject to the corporate income tax rate of 21%.

Failure to include the foreign income of a CFC in the income of a Slovak company is subject to general tax penalties, including up to €32,000 for not filing a tax return by the lawful deadline, or penalty interest of three times the base interest rate of the European Central Bank on the tax amount incorrectly calculated by the Slovak entity as the amount due. In certain circumstances, where the actions were deliberate, the Slovak controlling entity may be liable for the criminal offence of tax evasion.

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SWITZERLAND

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New prospectus requirements in full effect

On January 1 2020, the new Swiss Financial Services Act (FinSA) and Financial Services Ordinance (FinSO) on November 6 2019, implementing the provisions of the FinSA, have entered into force. These laws are part of an entirely new regulatory framework governing the Swiss financial markets.

While the majority of the rules entered into force immediately, certain obligations were or still are subject to transition periods. In particular, until December 1 2020, prospectuses could still be established in accordance with the previous, arcane rules of the Swiss Code of Obligations and, as far as SIX Swiss Exchange-listed companies were concerned, in accordance with the former listing rules of the SIX Swiss Exchange. However, since December 1, all new offerings and admissions to a Swiss trading venue must comply with the new prospectus rules.

The new prospectus rules entail a radical change for securities offerings in Switzerland, departing from the outdated rules of the Swiss Code of Obligations and converging to the model of the EU Prospectus Regulation. This article provides an overview of the new prospectus requirements that are generally relevant for corporate issuers.

New duty to prepare and obtain approval of prospectuses

The new framework introduces a regulatory obligation to prepare a prospectus in connection with any public offering of securities or, independently, the admission of securities to trading on a Swiss trading venue.

The term 'public offering' is construed broadly. The obligation applies indistinctly to primary and secondary offerings, and any offer to an undetermined circle of persons is deemed to be a public offering. In contrast, offerings outside of Switzerland are not subject to this obligation, even if they relate to securities issued by Swiss companies. Furthermore, in our view (albeit not addressed in the law with clarity), only offerings to issue or dispose of, and not offerings to acquire, securities are subject to the new requirements.

The obligation to prepare a prospectus is subject to various exemptions. They include public offers:

- to professional investors;
- to fewer than 500 investors;
- to investors who acquire securities for a consideration in excess of CHF 100,000 ($110,000);
- for securities with a denomination of more than CHF 100,000; or
- raising less than CHF 8 million in total over a period of 12 months.

Similarly, various types of transactions with securities are exempt from the obligation to issue a prospectus, including offerings made in connection with employee participation plans and various corporate

transactions. Furthermore, the FinSA provides for exemptions relating to the admission of trading for securities that are already admitted to trading on a Swiss or recognised foreign trading venue, including securities of the same type as already admitted securities amounting to less than 20% of the originally admitted securities during 12 months.

Content

The prospectus must broadly include material information in respect of the issuer, the offered securities and the offering, as well as a summary. The minimal contents of a prospectus are specified in Annex 1 of the FinSO.

The FinSA provides that the prospectus may be drawn up in an official Swiss language or in English. It also officially allows for incorporation by reference to a variety of publicly available documents, including, as specified in the FinSO, financial statements, Swiss and foreign prospectuses, and press releases.

Review and approval

The FinSA requires that a review board (*Prüfstelle*) reviews prospectuses to ensure that they are complete, coherent, and understandable.

The review board is not a governmental body but a private institution licensed by the Swiss Financial Market Supervisory Authority (FINMA), acting, however, as an administrative authority under the Administrative Procedure Act. Two such review boards – Swiss Exchange Regulation AG(affiliated with SIX Swiss Exchange) and Regservices AG(affiliated with BX Swiss) – have been licensed since June 1 2020. Issuers can freely choose their review body. The fact that there are two is expected to lead to competition in terms of service and costs, even if the FinSO provides for a tight cost framework.

Furthermore, to ensure a short time to market, the FinSA allows certain debt securities to be offered before the prospectus is approved if a bank or a securities house confirms that the essential information regarding the issuer and the securities is available.

To facilitate cross-border securities offerings, the FinSA authorises a review board to recognise foreign prospectuses as equivalent. It also provides for a passporting mechanism that includes automatic recognition of foreign prospectuses. Both review boards have published lists of jurisdictions and authorities eligible for passporting, which include EU jurisdictions, the UK, the US, and Australia.

Validity

Once it is approved, the prospectus needs to be filed with a review board and published. It is sufficient to publish it in electronic form and offer it free of charge in print form upon request. A prospectus is then generally valid for 12 months (subject to certain exemptions).

However, if a new development occurs before the end of the offering or the admission to trading that would influence an investment decision, a supplement will need to be prepared, reviewed and approved. Furthermore, if such a new development occurs before the end of the offering, investors will have withdrawal rights until the end of the subscription or offering period.

Prospectus liability

Prospectus liability rules of the FinSA are based on the existing Swiss corporate law rules. Notably, the act does not provide for a specific rule on the burden of proof and, consequently, the plaintiff will in principle need to prove that the defendant acted intentionally or negligently. The FinSA further limits liability for the summary and for forward-looking statements.

Beyond civil liability, the FinSA also provides for administrative criminal liability sanctioned by a fine of up to CHF 500,000 for willfully making false statements, omitting material facts, or failing to publish a prospectus in a timely fashion.

Outlook

As applicable transition periods have now expired, all new offerings and admissions to a Swiss trading venue must now comply with the new prospectus regulations, which result in substantial changes to the way securities are offered in Switzerland. The regulatory burden is likely to increase, but the exemptions provided for by the law and the ordinance ensure, to a large extent, that this burden remains commensurate. It remains to be noted positively that outdated prospectus requirements have been abolished and that the new regime is largely compatible with the EU prospectus regime and international standards.

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Reaping the rewards

According to research conducted by investment advice website Invezz, lawyers in Switzerland are taking home the highest pay of any of their European colleagues. Germany and the UK rank second and third. The average annual salary of a Swiss lawyer is upwards of $150,000, almost twice what lawyers in the UK earn on average in the same time frame, at £63,951 ($85,868). But UK lawyers should not feel undervalued: legal professionals in both countries are among the highest paid in the country across the entire workforce. In fact, Swiss lawyers earn 75% more than the country's average annual salary, while UK lawyers make 91% more.

In contrast, lawyers in Turkey (€9,708) and Greece (€10,728) are some of the lowest paid in Europe. Interestingly, lawyers in Greece make 39% less than the average salary in the country. Greek lawyers may need to reconsider their choice of profession, if these numbers are anything to go by.

Invezz analysed the data from employer feedback website Glassdoor to produce these stats. It's important to note that these are of course average salaries; lawyers in certain practice areas make much more than others.

Ghosn drama still haunts Japan

It has been two years since Carlos Ghosn, the former CEO of Nissan, was arrested in Japan. The arrest came after allegations of misuse of company assets for personal gain, for breaching trust and violating Japanese securities law when under-reporting earnings. Ghosn broke his bail conditions and fled from Japan to Lebanon in December 2019, and the following month publicly suggested he had fled the country due to political persecution.

Siding with Ghosn, the UN's Working Group on Arbitrary Detention released a report in November 2020 that found his arrest in Japan in 2018 was not only arbitrary, but committed an "extrajudicial abuse of process". It went on to say that the Japanese government should "take the necessary steps to remedy the situation without delay". While the opinions of the UN's working group aren't binding on states, they can hold them up to human rights violations.

The UN's report has once again put Japan in the limelight: more specifically, its criminal conviction rate of 99.9%. A power imbalance between a strong prosecution and weak defence has long been entrenched in the Japanese justice system.

While ordinary Japanese citizens might see little reason to side with a fugitive on the run and would rather see him prosecuted, the Ghosn saga has raised serious questions for multinational companies about Japan's regulatory culture and the future of the country as a financial centre. The scandal has also generated much-needed discussions about the lack of accountability and transparency in a country that probably has countless Ghosn-like characters hidden under the corporate veil.

Q4 in numbers

$3 trillion	total retail investor bids for Ant Group's failed IPO
35	number of companies identified as being owned or controlled by China's military which are off limits to US investors
66.7%	voter turnout in the US election
33	global M&A transactions valued higher than $5 billion in the Q3 of 2020
165	number of IPOs in the US in the third quarter of 2020
$19,857	value of one bitcoin on November 30, an all-time high

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

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Paul Marmor, Sherrards Solicitors LLP, London

Membership has allowed us to connect to peers in different jurisdictions, and so better serve our client's needs. Businesses are increasingly international, and so it is vital to have the ability to connect with others and maintain the growth of our firm.
Anne-Helene Le Trocquer, De Gaulle Fleurance & Associés, Paris

First, I would say that I have met wonderful people, and that's the most important thing. You also obtain work. It's not that you look for business – you look for people, for friendships and then the business follows.
Jonas Bergstein,
Bergstein, Montevideo

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