HERBERT SMITH FREEHILLS

GENERAL COUNSEL UPDATE

A MULTIJURISDICTIONAL GUIDE

30 NOVEMBER 2021

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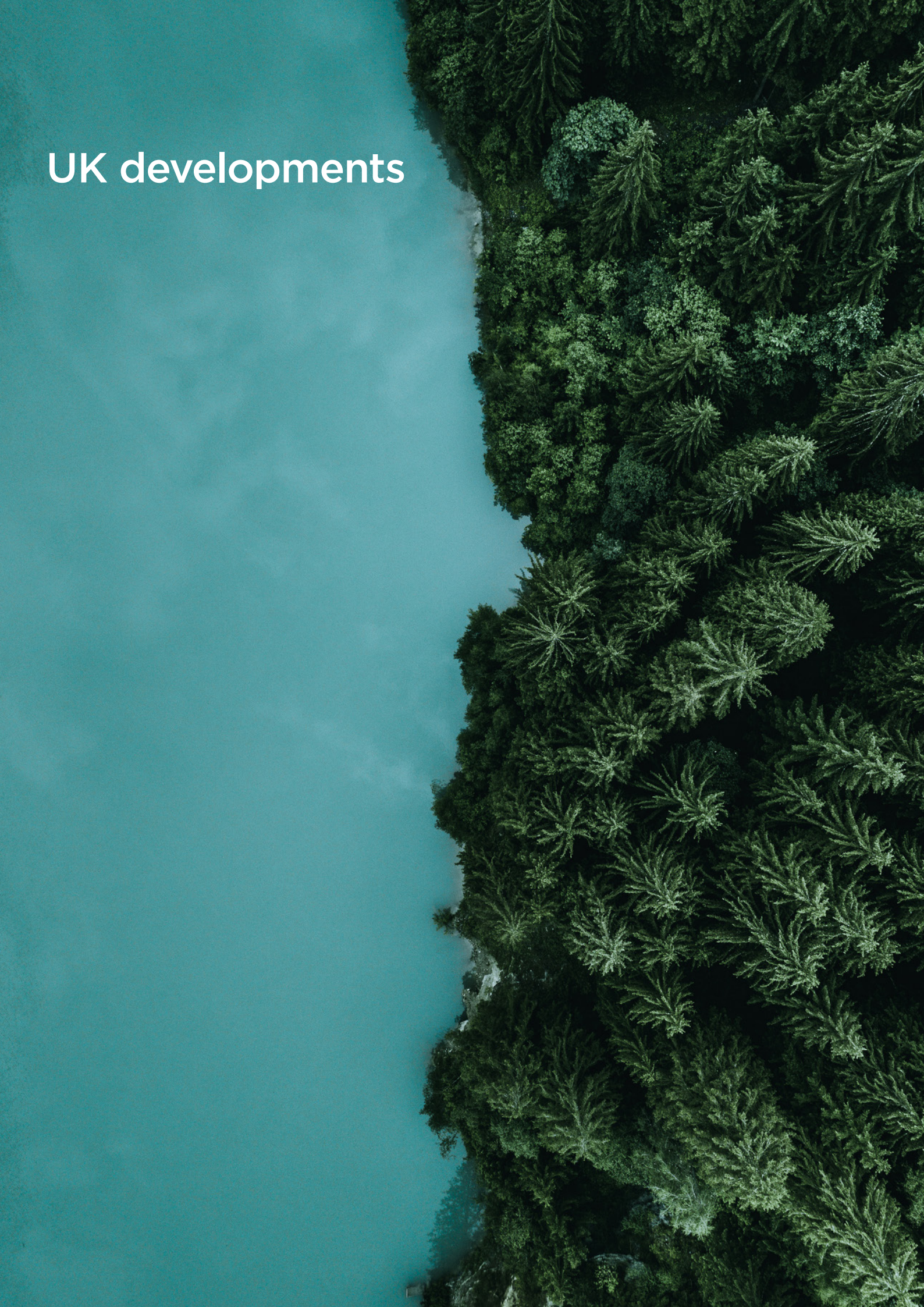
Please do not hesitate to contact any of the named people for further information on the items set out below. We would also like to hear whether you wish to receive this update more regularly or have other suggestions for its improvement. Please e mail your comments to Alex Wood or your relationship partner.

UK developments



1. Covid-19

1.1 What has happened since the last edition?

On 19 July 2021, the UK Government lifted almost all Covid-19 restrictions in England, including guidance to work from home and the closure of nightclubs. Social distancing rules remain in place in hospitals and passport control. Face coverings are no longer required by law, but the Government recommends to continue wearing them in crowded and enclosed areas. Some transport operators and retailers have decided to continue requiring face coverings at their premises, such as Transport for London, Sainsbury's and Tesco, unless a customer is exempt. People are required to get a PCR-test and self-isolate if they have Covid-19 symptoms and if they test positive, to remain in isolation for 10 days since they first developed symptoms or since they took the PCR test. Regular rapid flow tests are encouraged to help contain spread of the virus and some venues may ask for negative Covid-19 tests, proof of vaccination or proof of Covid-19 recovery (ie if one tested positive on a PCR test more than 10 days ago in the past 180 days) in order to allow entry.

The devolved administrations in Scotland, Wales and Northern Ireland have also left lockdown, albeit later – on 9, 7 and 16 August 2021, respectively. However, some measures still remain in place such as people working from home wherever possible in Wales and Northern Ireland and businesses being encouraged to continue to support staff working from home in Scotland, as well as mandatory wearing of face coverings on public transport and in indoor public settings in all three nations. Scotland and Wales have introduced vaccine passports for entry into certain premises, including nightclubs and large unseated indoor events.

1.2 Plan A and Plan B

In September 2021, the Government set out its plans on how to cope throughout the autumn and winter season with the aim to control infection rates and to avoid unsustainable pressure on the NHS. Plan A envisages focus on vaccines, antivirals and therapeutics, where the Government will offer booster jabs to about 30 million people, provide single doses of the vaccine to 12-15 year olds, ask unvaccinated people to get immunisation and encourage uptake of the flu jab. It also sees continued use of test and trace, sustained free testing capacity, additional funding for the NHS and social care, advising people and businesses how to protect themselves and others, preventing spread of the virus across the border and contributing to efforts to increase access to vaccines globally.

If data suggests that the NHS is likely to come under unsustainable pressure, the Government will implement Plan B. Under the contingency plan, the Government will communicate to the public clearly and urgently that the level of risk has increased and that it needs to behave more cautiously; reintroduce mandatory wearing of face covering in certain settings; introduce Covid passports for entry in certain settings and advise people to work from home.

1.3 Foreign travel

From 4 October 2021, the traffic light system for foreign travel was abolished and England moved to a regime where countries were split between those on a red list and all other countries. All people entering England need to fill in a passenger locator form 48 hours before arrival. Passengers returning from a country on the red list, whether vaccinated or not, need to quarantine in a hotel for 10 days and follow the testing rules applicable to unvaccinated travellers outlined below. However, they cannot use the Test to Release scheme.

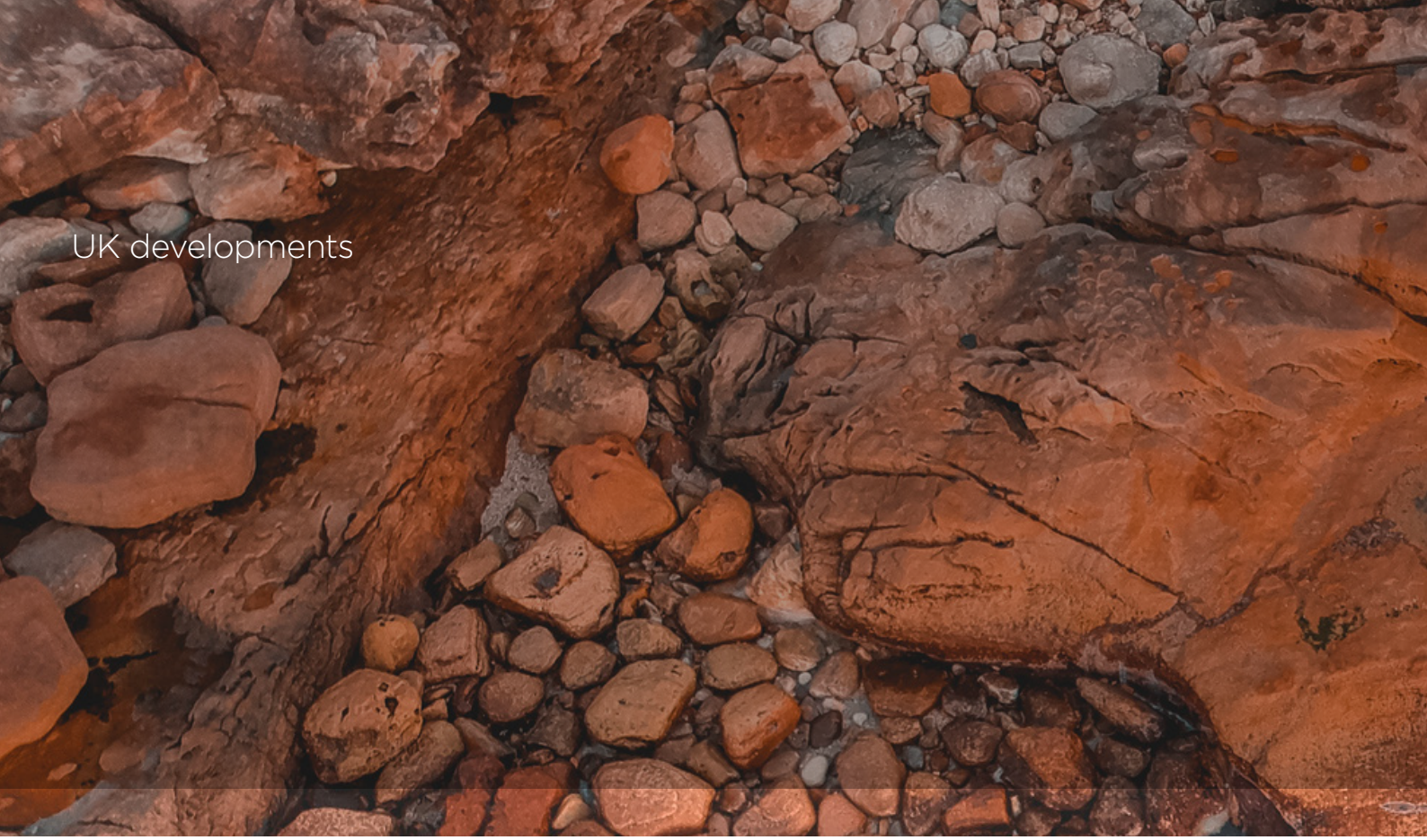
Vaccinated passengers arriving from a country not on the red list only need to take a Covid-19 test (a lateral flow test or PCR test) before the end of day two of their arrival. Unvaccinated passengers need to present a negative Covid-19 test taken three days before arrival in England, quarantine for 10 days and take PCR tests on or before day two and after day eight of isolation. The Test to Release scheme allows such passengers to take a Covid-19 test after five full days in England and to end their quarantine early, if they test negative (although they still need to have a test on or after day eight).

On 1 November 2021, all remaining seven countries, namely Ecuador, the Dominican Republic, Colombia, Peru, Panama, Haiti and Venezuela, were removed from the red list, but the system remained in place. As of 26 November 2021, following the discovery of a new Covid-19 variant (the B.1.1.529 variant), six African countries were put on the red list, including South Africa and Zimbabwe. As of 30 November 2021, 10 countries are on the red list.

1.4 UK vaccines roll-out programme

From 20 September 2021, the Government extended the vaccination programme to 12 to 17 year olds. At present, 16 to 17 year olds are being offered both the first and second vaccine doses. Children aged 12 to 16 who are considered at high risk of Covid-19 are also eligible for two doses. Pfizer/BioNTec is the only vaccine provided for use at this age group, although Moderna has also been approved. 80% of the UK population aged 12 and over have had both doses of the vaccine (and the single dose for 12-17 year olds). This puts the UK among the highest vaccination rates globally.

As Covid-19 vaccine protection diminishes over time, the UK started offering a booster third jab to people most at risk from Covid-19 who have had their second dose more than six months ago. The groups eligible for a third jab include people aged 40 and over; those working and/or living in care homes; frontline health and social care workers; those who are aged 16 and over and are at high risk of getting seriously ill from Covid-19; and those who are the main carer for someone at high risk from Covid-19, and/or live



with someone who is more likely to get infections (for example, someone who has HIV or is having certain treatments for cancer, lupus or rheumatoid arthritis). At present, the third dose is either from the Pfizer/BioNTec or Moderna vaccine (regardless of the vaccine previously used).

1.5 Government support

The Autumn Budget 2021, delivered on 27 October 2021, provided for another relief to business rates, where eligible retail, hospitality and leisure properties will receive 50% reduction in rates up to a maximum of £110,000 for 2022-23. However, lower VAT rates for the hospitality sector have not been extended further and will return to their pre-pandemic levels at 20 % from 1 April 2022. The Recovery Loan Scheme, which was launched on 6 April 2021 and due to end on 31 December 2021, has been extended until 30 June 2022, but the maximum financing per business has been reduced to £2 million and the Government will guarantee 70% of the loan rather than 80%.

Separately, the job retention scheme (also known as the "furlough" scheme) ended on 30 September 2021 and employers had until 14 October 2021 to submit claims for September 2021.

For further information, please contact your usual Herbert Smith Freehills' contact.

2. Beyond Brexit – the UK/EU relationship

2.1 The dispute over the Protocol on Ireland/ Northern Ireland

The Protocol on Ireland/Northern Ireland to the UK Withdrawal Agreement is proving hard to implement: the European Parliament Research Service has produced a useful summary. The UK Government has even suggested reneging on it, but pulled back following strong objections, not least from within the UK itself. It has since proposed changing or replacing the Protocol and there has been an intensive debate (see here for an account). The UK Chief Negotiator on Brexit, Lord Frost, has proposed, in a speech in Lisbon, a complete rewriting of the Protocol. The EU, for its part, has steadfastly refused to reopen the text, but the Commission has finally recognised that there are issues to be addressed with a suite of proposals published on 13 October 2021.

The Protocol is an extraordinary document and, as we pointed out in a previous View from Brussels, is arguably illegal under EU law since it was concluded on the legal basis of Article 50 TEU rather than on the legal basis appropriate for an association or trade agreement (as was the Trade and Cooperation Agreement). It was also negotiated in haste and without adequate scrutiny. It contains conflicting principles such as the EU Common Customs Code being applicable in Northern Ireland which is also stated to be an integral part of the UK customs territory as well as Northern Ireland being both within the Single Market and the UK internal market.

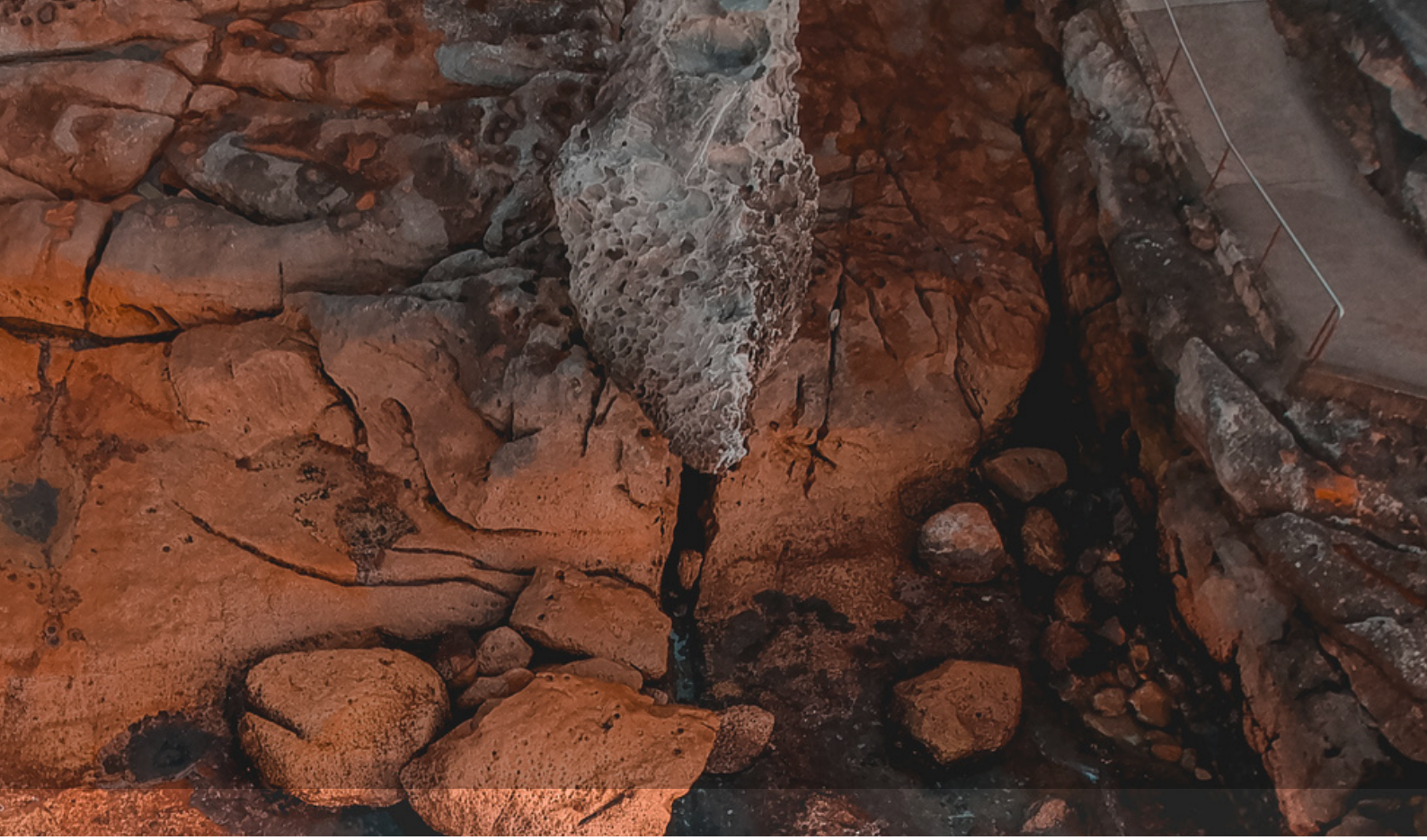
It is clear that some kind of negotiation will occur. However, negotiations normally require some kind of *quid pro quo* for each side and it is not at all what the UK is offering the EU.

The UK believes, however, that it has a powerful legal weapon to bring about change: the right, provided for in Article 16(1) of the Protocol to take unilateral "safeguard measures" where "the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade". The EU has reacted by warning that invoking this safeguard clause would provoke retaliation and possibly a trade war. The whole agreement can be terminated on 12 months' notice and the trade part on only nine months' notice.

In our latest View from Brussels briefing, we look in further detail into the key issues related to the Protocol and how events might unfold.

To keep up to date with the latest developments Beyond Brexit, subscribe to our blog here.

For further information, please contact Lode Van Den Hende or Eric White.



3. ESG

3.1 Climate change and COP26

Climate change has taken centre-stage in the fall of 2021. From 1-14 November 2021, the 26th Conference of the Parties (**COP26**), the UN-backed forum for tackling climate change, took place in Glasgow. Originally scheduled to take place five years after the Paris Agreement was concluded at COP21, and having been delayed by a year due to the Covid-19 pandemic, the conference was much anticipated. Public expectations on governments to address climate change had reached previously unseen highs. Politicians and the media coined the phrase "humanity's best last chance" to address climate change ahead of COP26.

While COP26 did not manage to deliver on the high expectations the world at large had, some progress was made and the ultimate aim of keeping a 1.5°C warming limit alive was arguably kept within reach. One positive development was the global recognition that 1.5°C should be the target, rather than merely "well below 2°C".

For a more detailed summary on the COP26 outcomes, please see our client briefing and our wider COP26 related materials on our COP26 Hub.

Key outcomes

- Parties agreed to the Glasgow Climate Pact, recognising a need for more ambitious emission reductions.
- The outstanding elements of the Paris Rulebook were finalised.
- Parties agreed on a "phasedown" of coal and phase-out of inefficient fossil fuel subsidies.
- Developed countries have been urged to at least double their 2019 climate finance contributions by 2025.
- A number of pledges, such as the Methane and the Deforestation pledges, were supported by a large group of states.

Shortcomings

- Current emission reduction pledges for 2030 if fully implemented are projected to lead to a 2.4°C of warming, well above of the 1.5°C aim of the Paris Agreement.
- The US$100 billion 2020 target for finance supporting developing countries' climate change adaptation and mitigation was missed.
- No notable progress was made on loss and damage, a mechanism designed as the main vehicle under the UNFCCC process to avert, minimise and address loss and damage associated with climate change impacts, including extreme weather events and slow onset events.

Why is this important?

While COP26 has not delivered on the high expectations placed on it, the outcomes of the conference will nevertheless have a noticeable impact on businesses. Whilst many countries increased their nationally determined contributions (**NDC**), the vehicle through which the UN counts countries' efforts against climate change, these NDC will, in many cases, still need to be translated into regulatory action. It is this regulatory action which will impact the way companies can do business in various jurisdictions around the world.

At the same time, it is clear that more ambitious emission reduction targets are needed to meet the objectives of the Paris Agreement. This may result in more regular revisions and increases of national emission reduction targets coupled with follow-on legislative and regulatory changes. It will therefore be essential for businesses to maintain an awareness of wider legislative, regulatory and market developments to ensure they do not fall behind. In light of the US lead methane pledge, immediate regulatory consequences are expected in relation to methane emissions.

For further information, please contact Silke Goldberg or Jannis Bille.

UK developments

3.2 Making your processes and products more "circular" – how the circular economy is impacting business and the legal issues involved

We have been looking at circularity - efforts to make products and processes more circular using models such as sharing models, circular supply models, product life extension models, product service systems and resource recovery (as suggested by the Organisation for Economic Co-operation and Development (**OECD**) as suitable circular models). These involve recycling, reuse, repair, but also innovation in product design and service provisions. The end result should be not only the production of less waste, but also the reduction of use of virgin raw materials (and associated destruction of the environment) and a reduction in energy use.

The transition towards a circular economy is central to global sustainability objectives. These objectives include the United Nations sustainable development goals, with its target to substantially reduce waste generation by 2030 through prevention, reduction, recycling and reuse, and the European green deal, which sets out a strategy to transform the EU economy in line with its ambitions to achieve net-zero carbon emissions, in particular by mobilising industry efforts for a clean and circular economy. National governments are also increasingly looking to regulate production processes in order to encourage the private sector to design out waste within their value chains.

While related policy objectives and regulatory developments are abundant, the legal implications of this fundamental shift within production and consumption processes have faced little scrutiny to date.

Our feature article in PLC Magazine, *Integrating Circular Policies: Closing the Loop,* sets out key legal considerations for businesses in the private sector that are engaged in the journey towards circularity, and examines, in particular:

- The concept of the circular economy, the various business models that can help to achieve circularity and current industry practices in the field.
- The legal risks and consequences associated with the adoption of circular business models.
- The regulatory landscape relating to the circular economy, both in the EU and the UK.

For further information, please contact Susan Black, Rachel Montagnon or Julie Vaughan.

4. Competition, regulation and trade

4.1 UK Government proposes wide ranging reforms to its competition and consumer protection regimes

On 20 July 2021 the UK Government launched a consultation on a wide range of far-reaching changes it is proposing to the UK competition and consumer protection regimes. As a result of Brexit the UK is now in a position to decide, independently from the EU Commission, how it promotes and enforces competition law affecting UK markets. The Competition and Markets Authority (**CMA**) can be expected to conduct more investigations, many of which will be strategically significant to the UK's economy and more complex than those previously undertaken by the CMA. The Government is therefore keen to ensure that the CMA has the resources, powers and procedures to deal with these cases as effectively and efficiently as possible.

The proposed changes to the UK's competition and merger control regimes include:

- Clearer and more regular steers from government to the CMA in order to ensure that competition policy is used to support the UK's plan for growth and for its wider economic policy.
- A more efficient, flexible and proportionate market investigation regime.
- Changes to the merger control regime, including revised turnover thresholds to reduce the burden of merger control for small businesses and a new jurisdictional threshold to deal with so-called "killer acquisitions" in fast moving markets.
- Stronger and faster enforcement against anti-competitive conduct, by adjusting the territorial scope of the Competition Act 1998 prohibitions, reducing thresholds for immunity from fines, introducing possible immunity from liability for damages for whistle blowers, stronger interim measures powers for the CMA, a more streamlined settlement process, enhanced evidence gathering powers, greater flexibility for internal decision-making and potential reforms to the appeals process and the Competition Tribunal's rules.
- Stronger investigative and enforcement powers across competition tools, including tougher penalties for failure to comply with an investigation, personal accountability for directors for the provision of evidence, stronger penalties for failure to comply with remedies or commitments and stronger powers and tools for more effective international cooperation.

For further information, please see our full briefing here or contact Stephen Wisking or Kristien Geeurickx.

4.2 EU Commission publishes draft revised VBER and Vertical Guidelines

On 9 July 2021, following a comprehensive consultation process, the EU Commission published its proposals for a revised Vertical Block Exemption Regulation (**Draft VBER**) and Draft Vertical Guidelines, due to replace the current regime which expires on 31 May 2022. The previous evaluation steps identified a number of areas where the current rules are potentially not functioning well, due to a lack of clarity, the existence of a number of gaps, but in particular because the current rules are not adapted to the strong growth of online sales and the emergence of new market players such as online platforms. The proposed changes seek to address these concerns. Of particular note are:

- The treatment of dual distribution, which is both more generous (now includes wholesalers and importers in addition to manufacturers) and more restrictive (with the introduction of a 10% aggregate market share level on the relevant market at retail level).
- The revised Article 4 Draft VBER setting out the hardcore restrictions, which is now more clearly structured, listing the permitted territorial/customer restrictions for each type of distribution agreement and allowing greater flexibility in the design of distribution models.
- The approach to online sales restrictions, which recognises that significant developments in e-commerce have taken place since the original VBER and Vertical Guidelines were adopted in 2010, and no longer treats the majority of online sales restrictions as passive sales restrictions and recognises that online sales and brick-and-mortar shops are inherently different in nature.
- The Commission proposes to treat providers of online intermediation services as "suppliers" within the meaning of the VBER, irrespective of whether the provider is a party to the transaction it facilitates.
- So called "wide" most favoured nations (**MFNs**) requiring a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services, are now listed as excluded restrictions in Article 5 Draft VBER, for which the exemption of the VBER will not be available.
- Resale price maintenance (**RPM**) remains a hardcore restriction and the Draft Vertical Guidelines provide little additional guidance on possible efficiency defences.

See our full briefing here.

For more information, please contact Kyriakos Fountoukakos or Daniel Vowden.

4.3 UK National Security and Investment Act 2021 enters into force on 4 January 2022

On 4 January 2022, the UK National Security and Investment (**NSI**) Act enters into force, introducing a new foreign direct investment (**FDI**) regime with standalone powers for the review of FDI in the UK. The new regime represents an important new execution risk factor, with a similar risk profile to merger control rules. Broadly speaking, it will apply to any acquisition of "material influence" in a company (which may be deemed to exist in relation to a low shareholding, potentially even below 15%), as well as the acquisition of control over assets (including land and intellectual property), which potentially gives rise to national security concerns in the UK.

A mandatory notification obligation (and a corresponding prohibition on completion prior to clearance) will apply to certain transactions involving target entities that carry out specified activities in the UK in 17 sectors (including energy, transport, communications, defence, artificial intelligence and other technology-related sectors). This mandatory notification obligation will be combined with an extensive call-in power enabling the Government to call-in qualifying transactions for review, which extends to any sector and is not subject to any materiality thresholds in terms of target turnover or transaction value. Acquirers will also have a corresponding option to voluntarily notify a qualifying transaction to obtain clearance, which may be advisable in the interests of legal certainty where potential national security concerns arise.

For a full overview of the regime with practical focus on what investors need to know, see our detailed briefing here.

For further information, please contact Veronica Roberts or Tim Briggs.

5. Construction

5.1 The abolition of retentions?

The Construction (Retentions Abolition) Bill seeks to abolish the practice of holding cash retentions in the construction sector. This Bill goes beyond the 2019 Construction (Retention Deposit Schemes) Bill, which provided for a mandatory scheme to place retention monies on deposit with a third party.

Under the latest Bill, which would apply in England and Wales from 1 January 2025, an amendment would be made to Section 113A of the Housing Grants, Construction and Regeneration Act 1996 to the effect that:

1. any clause in a construction contract entered into after the Bill becomes law, which enables a payer to withhold retentions, will be of no effect; and
2. any retentions withheld at that point must be paid in full, no later than seven working days after the date on which they were due.

UK developments

The Bill defines "construction contract" by reference to Section 104 of the Housing Grants, Construction and Regeneration Act 1996, and adds "any additional contract created to have a similar effect for the purposes of withholding monies which would otherwise be due under the primary contract…".

The Bill has passed its First Reading in the House of Lords. At the Second Reading it will receive proper scrutiny and amendments may be proposed.

It is also worth noting that the 2019 Bill (which wished to retain retentions) was supported by bodies representing over half a million construction companies and self-employed construction professionals.

It remains to be seen how the latest proposal will be received.

For further information, please contact Nick Downing.

6. Corporate

6.1 Corporate governance

6.1.1 New climate-related disclosure obligations

In November 2021, the Department for Business, Energy and Industrial Strategy (**BEIS**) published draft legislation which will require publicly quoted companies, large private companies and limited liability partnerships to include climate-related disclosures in their strategic reports.

The draft Companies (Strategic Report) (Climate-related Financial Disclosures) Regulations 2021 follow a consultation by BEIS earlier this year. Please see our blog post here.

The new disclosure requirements will apply to:

- UK companies that are currently required to produce a non-financial information statement (that is, companies with more than 500 employees which are listed, or are banking or insurance companies);
- AIM companies with more than 500 employees; and
- other companies and LLPs which have more than 500 employees and a turnover of more than £500 million.

The Regulations will require entities to disclose climate-related financial information broadly in line with the Task Force on Climate-related Financial Disclosure (**TCFD**) Recommendations (which cover governance, strategy, risk management, and metrics and targets) and the TCFD Recommended Disclosures.

Subject to parliamentary approval, the Regulations will come into force on 6 April 2022 and will apply to accounting periods starting on or after that date.

This new requirement will be in addition to the Listing Rule requirement that companies with a premium listing report, for financial periods starting on or after 1 January 2021, against the TCFD Recommendations and Recommended Disclosures on a "comply or explain" basis (see our briefing here). The Financial Conduct Authority (**FCA**) also launched a consultation on extending this requirement to companies with a standard listing in June 2021. Please see our blog post here. The consultation closed on 10 September 2021 and the FCA aims to publish the final rules (which will form part of LR 14) by the end of 2021.

For further information, please contact Jannis Bille, Sarah Hawes or Gareth Sykes.

6.1.2 FCA consultation on diversity-related disclosures

The FCA launched a consultation on mandatory gender and ethnic diversity disclosures at board and executive management level by premium and standard listed companies in July 2021.

The consultation follows the publication earlier this year of the five year summary report of the Hampton-Alexander Review on improving gender balance in FTSE companies (see our blog post here) and the 2021 update from the Parker Review on ethnic diversity on FTSE 100 boards. Please see our blog post here.

The proposed changes to the Listing Rules would require premium and standard listed companies to include in their annual report and accounts a statement confirming whether they have met the following specified board diversity targets as at a date during the financial year of their choosing:

- the board comprises at least 40% women;
- at least one of the positions of Chair, CEO, CFO or Senior Independent Director is occupied by a woman; and
- at least one member of the board is from a non-white ethnic minority background.

Companies not meeting the specified targets would be required to explain the reasons why they have not been met.

Premium and standard listed companies would also be required to include data on the gender and ethnic diversity of members of their board and executive management. There would be prescribed tabular forms for all of the proposed new disclosures.

The consultation closed on 20 October 2021 and the FCA aims to publish final rules by the end of 2021. Any new disclosure requirements would apply to financial years starting on or after 1 January 2022.

For further information, please contact Caroline Hagg, Sarah Hawes or Gareth Sykes.

6.2 Capital markets

6.2.1 HMT reviews of prospectus regime and secondary capital raisings

In July 2021, HM Treasury (**HMT**) published a wide-ranging review of the UK prospectus regime. The key proposals are:

- Prospectuses will remain a key feature of an IPO in the UK, however, the FCA will be given discretion to determine when a prospectus is required on a further issue. For a listed issuer, a public offer to existing shareholders may no longer require a prospectus.
- The overarching requirement for necessary information will be retained, but the FCA will be given power to make the rules on the detailed disclosure requirements. The FCA will also have discretion to decide which types of prospectuses to review.
- Liability for forward-looking information in a prospectus will only be incurred where those involved are reckless, in line with liability for other listed company published information.

The consultation closed on 24 September 2021. HMT expects that further consultations will be needed to overhaul the regime. For more information, please see our briefing.

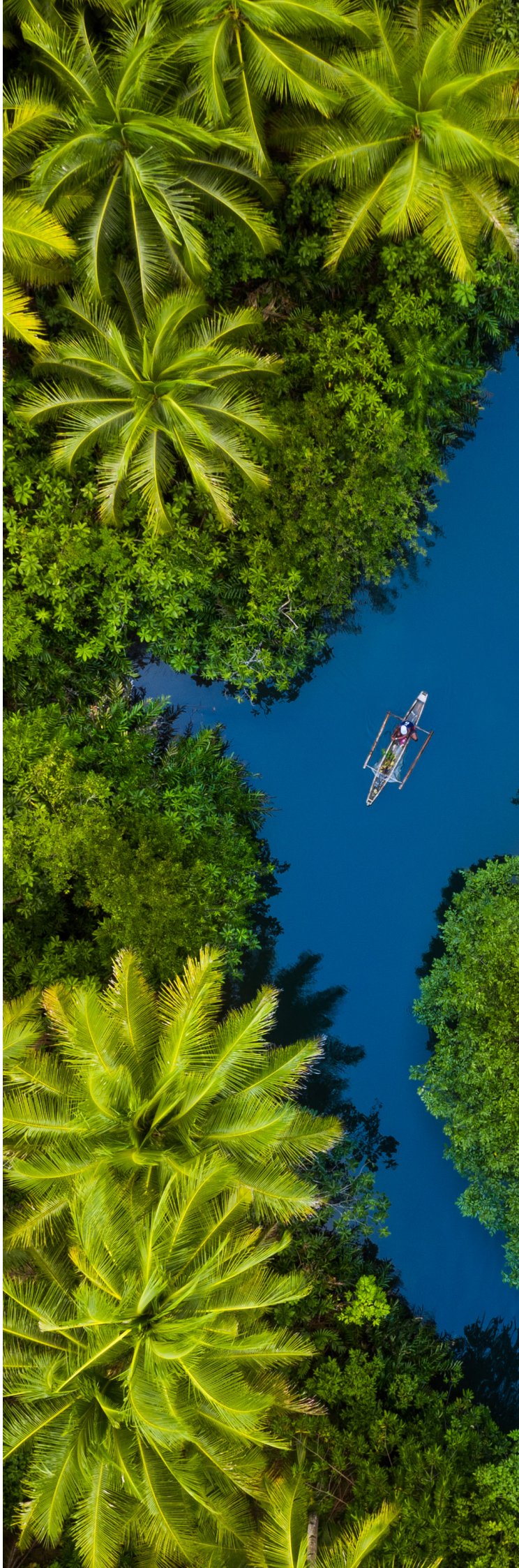
In October 2021, HMT also launched a UK Secondary Capital Raising Review to look into improving the capital raising process for UK publicly traded companies. The Review will look at various issues, including:

- whether the overall duration of the secondary capital raising process can be reduced (for example, by reducing the period during which shareholders can trade nil-paid rights);
- whether new technology can be used to ensure shareholders receive relevant information and exercise their rights more rapidly; and
- whether other fund-raising mechanisms are worth considering in the UK, including structures to facilitate retail investor participation in capital raisings.

The Review closed on 16 November 2021 and will report to HMT on its findings in spring 2022.

Both reviews follow the conclusions of the Hill Review of the UK listing regime published in March 2021 – see our summary of the recommendations and progress to date here.

For further information, please contact Mike Flockhart, Michael Jacobs or Erica MacDonald.



UK developments

6.3 M&A

6.3.1 New pensions offences and regulatory sanctions

On 1 October 2021, the Pension Schemes Act (**PSA**) 2021 entered into force. The PSA 2021 introduces new criminal offences and financial penalties, and two new contribution notice triggers, where a company or group has a defined benefit occupational pension scheme and conducts M&A, pays a dividend or repays a loan early, among other corporate actions.

For more information, please see the employment and pensions section below.

7. Dispute resolution

7.1 Arbitration

7.1.1 Supreme Court hands down much anticipated decision in Kabab-JI SAL (Lebanon) v Kout Food Group (Kuwait)

In October 2021, the UK Supreme Court handed down its decision in *Kabab-JI SAL (Lebanon) v Kout Food Group (Kuwait)*. The Supreme Court refused the enforcement of a Paris-seated ICC award against Kout Foot Group (**KFG**) under s103 Arbitration Act 1996 on the grounds that KFG was not a party to the arbitration agreement as a matter of English law.

Like the decision of the Supreme Court last year in *Enka v Chubb*, the *Kabab* case focused on the English law approach to determining the governing law of the arbitration agreement. While in *Enka* the Supreme Court looked at this at the pre-award stage, in *Kabab* the question arose the enforcement stage.

The court confirmed that the approach to determining the governing law of the arbitration agreement is the same at both the enforcement stage and pre-award stage. The principles laid down in *Enka* applied here, meaning that the parties' choice of English law in the main contract extended to the law governing the arbitration agreement.

The court considered that the "no oral modification" clauses in the contract were an "insuperable obstacle" to KFG being a party to the contract and that the Court of Appeal was entitled to find there was no real prospect that a court might find that KFG became a party to the arbitration agreement.

Finally, the court also confirmed that English courts could determine an enforcement application under s103 by way of summary judgment where this was appropriate and proportionate.

You can read more about the decision and the inconsistent judgments issued by the English and French courts in this case in our blog post here.

For more information, please contact Craig Tevendale or Elizabeth Kantor.

7.2 Banking litigation

7.2.1 Supreme Court clarifies proper approach to SAAMCO and to determining scope of duty of care owed by professional advisers

In what is now the leading authority on the application of the decision in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 (*SAAMCO*), the Supreme Court allowed an appeal by a mutual building society in the context of its claim for damages for economic loss against an auditor for (admitted) negligent advice regarding the accounting treatment of interest rate swaps: *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20. In doing so, the Supreme Court found unanimously that the mutual building society had suffered loss which fell within the scope of the duty of care assumed by the auditor, but that its damages should be reduced by 50% on the basis of its contributory negligence.

The outcome and reasoning of this decision will be significant for financial institutions faced with claims for economic loss due to alleged negligent advice. The Supreme Court held that the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given. In practice, this means that, when looking at the case of negligent advice given by a professional adviser, one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk.

The Supreme Court also confirmed that the descriptions of "information" case and "advice" case should be dispensed with as terms of art in this area. Cases should not be shoe-horned into one or other of these categories, but rather the focus should be on identifying the purpose to be served by the duty of care assumed by the defendant.

See our banking litigation blog post for more details.

For further information, please contact Simon Clarke or Ceri Morgan.

7.2.2 Court of Appeal considers tests for "blind-eye" knowledge and vicarious liability in the context of a dishonest assistance claim

The Court of Appeal ordered the re-trial of a dishonest assistance claim by insolvent companies and their respective liquidators against a bank and its indirect subsidiary on the basis that the High Court failed to consider key evidence in reaching its findings, which were thrown into further doubt by the 19 months delay in the

handing down of the lower court's judgment: *Natwest Markets plc & Anor v Bilta (UK) Ltd & Ors* [2021] EWCA Civ 680.

The Court of Appeal underlined that:

- When considering whether there has been dishonesty in the test for blind-eye knowledge, it was not enough that a defendant merely suspects something to be the case, or that he negligently refrains from making further inquiries.
- The tests for vicarious and dual liability are a highly fact sensitive exercise – such liability was usually imposed for policy reasons and was not concerned with fault or contractual liability.

This decision is noteworthy for financial institutions faced with claims alleging blind-eye knowledge on the part of a bank's employees and/or vicarious liability in relation to a fraud.

See our banking litigation blog post for more details.

For further information, please contact John Corrie or Ceri Morgan.

7.2.3 Court of Appeal clarifies proper approach to assessing damages for fraudulent misrepresentation

The Court of Appeal allowed an appeal by a purchaser in the context of its claim for damages for fraudulent misrepresentation against the sellers of certain business assets that it had acquired. In doing so, the Court of Appeal held that damages for fraudulent misrepresentation should, as a general rule, be assessed by ascertaining the actual value of the assets bought at the relevant date and deducting that figure from the price paid: *Glossop Cartons and Print Ltd and others v Contact (Print & Packaging) Ltd and others* [2021] EWCA Civ 639.

The Court of Appeal said that the calculation of direct loss for fraudulent misrepresentation usually requires the court to ascertain the actual value of the assets bought at the relevant date and to deduct that figure from the price paid (as per *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254). In *Smith New Court Securities*, the House of Lords emphasised that the general rule for the measure of damages in deceit claims should not be "mechanistically applied". However, the Court of Appeal's decision in the present case suggests that these general principles will be the norm and that there is a threshold question as to when an alternative measure of damages may be applied.

The decision is noteworthy for financial institutions faced with claims founded in the tort of deceit, particularly in the context of mis-selling disputes and shareholder claims. In securities litigation, the judgment is relevant to claims based on alleged fraudulent misrepresentation at common law. It may also be relevant to claims brought under section 90A of the Financial Services and Markets Act 2000.

See our banking litigation blog post for more details.

For further information, please contact Harry Edwards or Ceri Morgan.

7.3 General Litigation

7.3.1 Supreme Court rejects bid to bring data protection class action on "opt-out basis"

In its recent high profile decision in *Lloyd v Google* [2021] UKSC 50, the Supreme Court has unanimously overturned the Court of Appeal's decision, which would have opened the floodgates for class actions for compensation for loss of control of personal data to be brought on behalf of very large numbers of individuals without identifying class members.

The Supreme Court held that a claim for compensation for the unlawful processing of data under section 13 of the Data Protection Act 1998 could not succeed without proof of individual circumstances, including the damage suffered and the extent of the unlawful processing.

That meant that the claimant could not use the representative action procedure under CPR 19.6 to bring an action for compensation on behalf of all those whose data was processed, seeking damages on a uniform or tariff basis. That procedure requires the represented class to share the "same interest" in the claim, a requirement that will not be satisfied if proof of individual circumstances is required.

Importantly, however, the Supreme Court's decision suggests that mass claims of this sort could be brought using a "bifurcated process" in which the representative action procedure is used to determine common issues, leaving any individual issues to be dealt with subsequently. That could, in effect, introduce a half-way house between a fully "opt-out" claim and an "opt-in" procedure such as the Group Litigation Order, with individual claimants only being identified once the common issues had been determined. The question for claimants, and their funders, will be whether it is economically viable for claims to be brought on that basis.

For further information, please see our blog post here or contact Julian Copeman or Maura McIntosh.

7.3.2 Civil Justice Council endorses compulsory ADR in civil proceedings

In a report requested by the Master of the Rolls and delivered in July 2021, the Civil Justice Council concluded that it would be both lawful and desirable in some circumstances for the civil courts and tribunals to compel litigants to engage in an alternative dispute resolution (**ADR**) process. In particular, it set out an argument for departing from the reasoning of the Court of Appeal in the leading

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authority against compulsion of ADR, *Halsey v Milton Keynes* NHS *Trust* [2004] 1 WLR 3002.

The Master of the Rolls has endorsed the report's conclusions in the context of the ongoing court reform programme.

The report recommended further work to identify the types of cases where some degree of compulsion may be desirable. The Ministry of Justice subsequently issued a public Call for Evidence designed to inform future policy regarding the role of out-of-court resolution in civil litigation, including the possibility of compulsion. The Government's response to the evidence collected is awaited.

For further information, please see our blog post here or contact Alexander Oddy or Jan O'Neill.

7.3.3 Disclosure Pilot extended to end of 2022 and procedures streamlined

The Disclosure Pilot has been running in the Business and Property Courts since the beginning of 2019. Initially intended as a two-year pilot, it has been extended twice and is now due to finish at the end of 2022.

Amendments to the pilot rules were published by the Disclosure Working Group in July this year and came into force on 1 November. These amendments streamline the pilot rules, in particular as to the process for agreeing lists of issues for disclosure and associated disclosure models, as well as introducing new flexibility for multi-party cases and a new regime for less complex claims.

We expect this is likely to be the last extension to the pilot, with a decision being taken before the end of next year as to the final version of the disclosure rules. In advance of that decision, we understand that there will be further consultation with the judiciary and with court users, including in order to assess whether and to what extent the pilot saves costs.

For further information, please see our blog post here or contact Anna Pertoldi or Maura McIntosh.

7.3.4 Our new legal privilege client tool

Herbert Smith Freehills has developed a new web-based app, which can be accessed on both mobile phones and desktops, to help in-house counsel quickly navigate the complexities in determining which documents are likely to be privileged, or not.

The tool guides users through a short series of questions and then uses the answers to analyse whether a document is likely to be covered by legal advice privilege and/or litigation privilege under English law.

Notes providing guidance and interpretation of relevant case law are accessible directly from the question screens. Once all the necessary questions have been answered, an on-screen report provides a summary of the answers given and the likely privilege status of the document.

For further information, please click here or contact Anna Pertoldi or Maura McIntosh.

7.4 Technology disputes

In an increasingly digital business world, technology disputes are increasing. Organisations are accelerating their digital transformation to stay competitive, which in turn is giving rise to complex, high-value technology disputes.

Our Tech Disputes team leads the way in helping clients to navigate these multifaceted disputes and can assist businesses to minimise their exposure to risk. Our new series of Tech Disputes podcasts, webinars and commentary identifies the key trends. We explore the rise of technology disputes, the areas in which they most commonly arise, the changing dispute resolution landscape, and what this means for our clients across all industry sectors.

Topics covered in our podcast series include: disputes involving IT contracts; trade secrets disputes; software audit disputes and data licensing disputes; and collaboration disputes, with more to come.

Our webinar series also covers topics such as: licensing in a world of new standards (SEPs and FRAND); the evolution of copyright in a digital world; and class actions and other disputes following cyber and data security incidents. We have also published articles on these issues in PLC Magazine on technology disputes in general, and on data class actions.

All the above are accessible from the Tech Disputes web page.

For further information, please contact Andrew Moir or Rachel Lidgate.

8. Employment and pensions

8.1 Employment

8.1.1 Covid-19, the return to work and flexible/hybrid working

Following the end of "work-from-home" guidance and the closure of the Coronavirus Job Retention Scheme, the focus for many employers has been on a safe, gradual return to the workplace. Updated Working Safely guidance applicable to England has a greater emphasis on the need to ensure adequate ventilation, while Guidance on Test and Trace in the Workplace has been updated to reflect changed self-isolation rules for vaccinated individuals. The

Government has confirmed that its Plan B for Autumn/Winter would involve a return to the "work-from-home" guidance.

A key issue for employers will be determining their approach to vaccination status for those returning to the workplace. Our blog post discusses this issue. Our global employment team has created a tracker looking at the legal status of Covid Health Passes across 33 jurisdictions; a copy can be requested here.

Employers are increasingly likely to face formal or informal requests to work more flexibly, and in any event should now be seeking to formalise their arrangements going forward. Flexible work requests need careful consideration, not least because of the scope for claims of indirect sex discrimination (in light of judicial notice of a gender-based "childcare disparity" - see here) or disability discrimination. A first instance tribunal decision recently ruled for the first time that UK law should be read as prohibiting a policy which indirectly discriminates against an employee who cares for a disabled person, for example due to a lack of flexibility over hours or location of work – see here for more details.

For further information, please contact Tim Leaver or Nick Wright.

8.1.2 Employment law reform proposals

Further details of the Government's plans for reform have been published, to be implemented "when parliamentary time allows".

- In July the Government published its response to its 2019 consultation on sexual harassment in the workplace, confirming that it will introduce a positive duty on employers to take all reasonable steps to prevent harassment in the workplace (the scope of which is to be clarified by a statutory code of practice). It will also introduce employer liability for third-party harassment subject to a reasonable steps defence, and look at extending the three-month time limit for bringing (all types of) discrimination and harassment claims to six months. See here for further details.
- The Government also confirmed that it is not going to proceed with a suggested "right to request workplace modifications" on health grounds. A consultation on workforce disability reporting (including voluntary and mandatory reporting of disability status, but not the disability pay gap) by businesses with at least 250 employees is expected by the end of 2021. See here for further details.
- In September the Government launched a new consultation on changes to flexible work requests. The key proposal is to make the existing right available from day one of employment (currently employees must have 26 weeks' service). It also published a consultation response confirming it still intends to introduce carer's unpaid leave. Our blog post here discusses the details.

For further information, please contact Christine Young or Anna Henderson.

8.1.3 Belief discrimination

In *Maya Forstater v CGD Europe* UKEAT/0105/20 the Employment Appeal Tribunal ruled that a philosophical belief will only lose protection under discrimination law if it is the kind of belief akin to espousing Nazism or totalitarianism. The fact that a belief is offensive, shocking or even disturbing to others will not prevent it from being a protected belief. Treating the holder of a protected belief less favourably, simply because they have that belief, is unlawful. However, if an individual chooses to manifest their belief in a way that amounts to discrimination or harassment of others, this remains unlawful and an employer should continue to take reasonable steps to prevent such behaviour. The case highlights the need for sensitivity and nuance in staff training and policies; the practical implications of the ruling for employers are discussed further in our blog post here.

For further details, please contact Andrew Taggart or Anna Henderson.

8.1.4 Unionised employers and direct offers of new terms to workers

In *Kostal UK Ltd v Dunkley* [2021] UKSC 47 the Supreme Court ruled that a unionised employer's direct offer of new terms to workers will not be an unlawful inducement to opt out of collective bargaining, provided the collective bargaining process has been exhausted. The decision highlights the importance of collective bargaining agreements making crystal clear when the collective bargaining process will be treated as exhausted. Where this is not the case, employers would be well advised to seek to negotiate inclusion of

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such provisions at the earliest opportunity. It will also be prudent to keep a record evidencing the procedural steps completed and of the reasoning behind a conclusion that the process has been exhausted.

For further details, see our blog or contact Andrew Taggart or Christine Young.

8.2 Pensions

8.2.1 New transfer conditions pose risks for occupational pension schemes

New statutory transfer conditions will apply from 30 November 2021, one of which must be satisfied before a pension scheme can make a statutory transfer on behalf of a member. Trustees, providers and administrators must ensure they are ready by the end of this month to carry out the new checks. Failure to do so could expose them to potential liability should a transfer be allowed to take place to what turns out to be a scam arrangement.

The new conditions are designed to help reduce incidences of scams, which are costing people their life savings and have devastating financial and emotional consequences for the victims. The onus will be on trustees and pension providers (and their administrators) to ensure one of the conditions is met before a transfer is allowed to proceed. In some cases, difficult judgments may need to be made about whether, for example, a red or amber flag is present and schemes will need to have processes in place for the trustees or provider to determine whether the transfer can and should proceed in these situations. Clear and comprehensive records will also need to be maintained.

Immediate actions

To ensure their scheme is ready to apply the new transfer conditions from 30 November 2021, trustees should:

- contact their scheme's administrator immediately to find out what steps it is taking to implement the new checks; and
- ensure processes are in place for the trustees to review complex and higher risk transfers.

Please see our blog for more detail.

For further information, please contact Samantha Brown, Michael Aherne or Rachel Pinto.

8.2.2 Government planning significant extension to UK's pensions notifiable events regime for corporates

Proposed changes to the pension notifiable events regime will mean corporates are required to give the UK Pensions Regulator and trustees of their defined benefit (**DB**) pension schemes much earlier notice of material corporate transactions and finance arrangements. Multiple notifications may need to be made in respect of the same transaction. Failure to comply could result in a fine of up to £1 million for companies and directors.

The key changes, expected to come into force in April 2022, include:

- two new notifiable events, namely, a decision in principle to:
  - sell a material part of the business or assets of a DB sponsor; or
  - grant or extend relevant security which ranks ahead of a DB scheme; and
- a new requirement to notify the Pensions Regulator and a DB scheme's trustees when the main terms are proposed in relation to a material corporate transaction (including the change of control of a DB sponsor) or the granting of relevant security.

The latter will need to include information about the transaction, including details of any potential detriment to the DB scheme and any mitigation that will be provided to alleviate this.

Navigating the uncertainty

The proposed triggers for these new notifications are subjective and imprecise. This means, in some circumstances, difficult judgment calls will need to be made about whether a duty to notify arises. This is causing concern as any failure to notify could attract a significant fine.

See our blog for more details.

For further information, please contact Samantha Brown, Michael Aherne or Rachel Pinto.

8.2.3 New pensions criminal offences and regulatory sanctions for directors now in force

New pensions criminal offences and regulatory sanctions came into force on 1 October 2021. Directors of companies and groups with DB pension schemes need to ensure they consider their impact on any corporate activity which may negatively impact their DB scheme. Lenders, investors and advisers also need to be alive to these new sanctions.

An offence will be committed where a person is party to an act or failure to act (without a reasonable excuse) which, broadly:

- causes a material detriment to a DB scheme; or
- avoids or reduces a section 75 employer debt to a DB scheme.

The Pensions Regulator also has power to impose fines of up to £1 million on directors and other parties in these and other circumstances and extended powers to issue contribution notices on DB sponsors, their directors and other "connected" and "associated" parties.

Get out of jail card – good governance

Going forwards, it is critical directors of companies or groups with DB schemes assess the potential impact of any corporate activity on the scheme and consider:

- the extent to which any material detriment to the scheme can be avoided or mitigated;
- whether they have a reasonable excuse for their actions; and
- when and how to engage with the scheme's trustees and the Pensions Regulator (where necessary).

They should maintain records of these matters, together with any decisions taken, the reasons for them and any advice received.

More details can be found in our blog.

For further information, please contact Samantha Brown, Michael Aherne or Rachel Pinto.

9. Finance: banking, insolvency and restructuring

9.1 LIBOR transition

Work on RFR-based loans continues at a pace, across products and jurisdictions with the looming deadline of 31 December for the end of all but certain settings of USD LIBOR. For further details, please see our recent publication on amending legacy loan agreements, and please see the other information on our IBOR Transition Hub for the latest updates.

Please do contact one of the team to discuss any questions you may have about the use of RFRs in the loans market, and its application to your new and legacy transactions, including in relation to the use of synthetic LIBOR for sterling and yen in 2022.

For further information, please contact Nick May, Emily Barry, Simon Chadney, Will Breeze, Will Nevin or Kristen Roberts.

9.2 ESG

Sustainability-linked loans and green loans have continued to gain traction in the market in 2021. For further analysis on ESG in Finance, please see the Global Bank Review 2021, which was published earlier this month.

We also looked in more detail at the use of sustainable lending in the real estate market in this briefing and podcast, and in the oil and gas sector in transition finance in this briefing and podcast, as well as at developments in the bond and derivative markets.

For further information, please contact Will Breeze, Kristen Roberts, Gary Hommel or Emily Barry.

9.3 National Security and Investment Act 2021

The National Security and Investment (**NSI**) Act 2021 introduces significant legislative reforms which will overhaul the ability of the UK Government to review transactions on national security grounds, and potentially prohibit their completion or require remedies to allow them to proceed. For more information, please refer to the competition, regulation and trade section above.

Whilst the majority of commercial lending arrangements are not expected to raise national security concerns, the Government has made clear that loans are not exempt from scrutiny under the new regime. The regime is likely to apply to financing arrangements principally in the following two scenarios:

- where acquisition financing is provided to an underlying transaction to which the NSI regime applies; and
- where lenders acquire control over qualifying entities or assets in connection with a restructuring.

We consider each of these, focusing on the key considerations for lenders and practical guidance on how to address potential risks here.

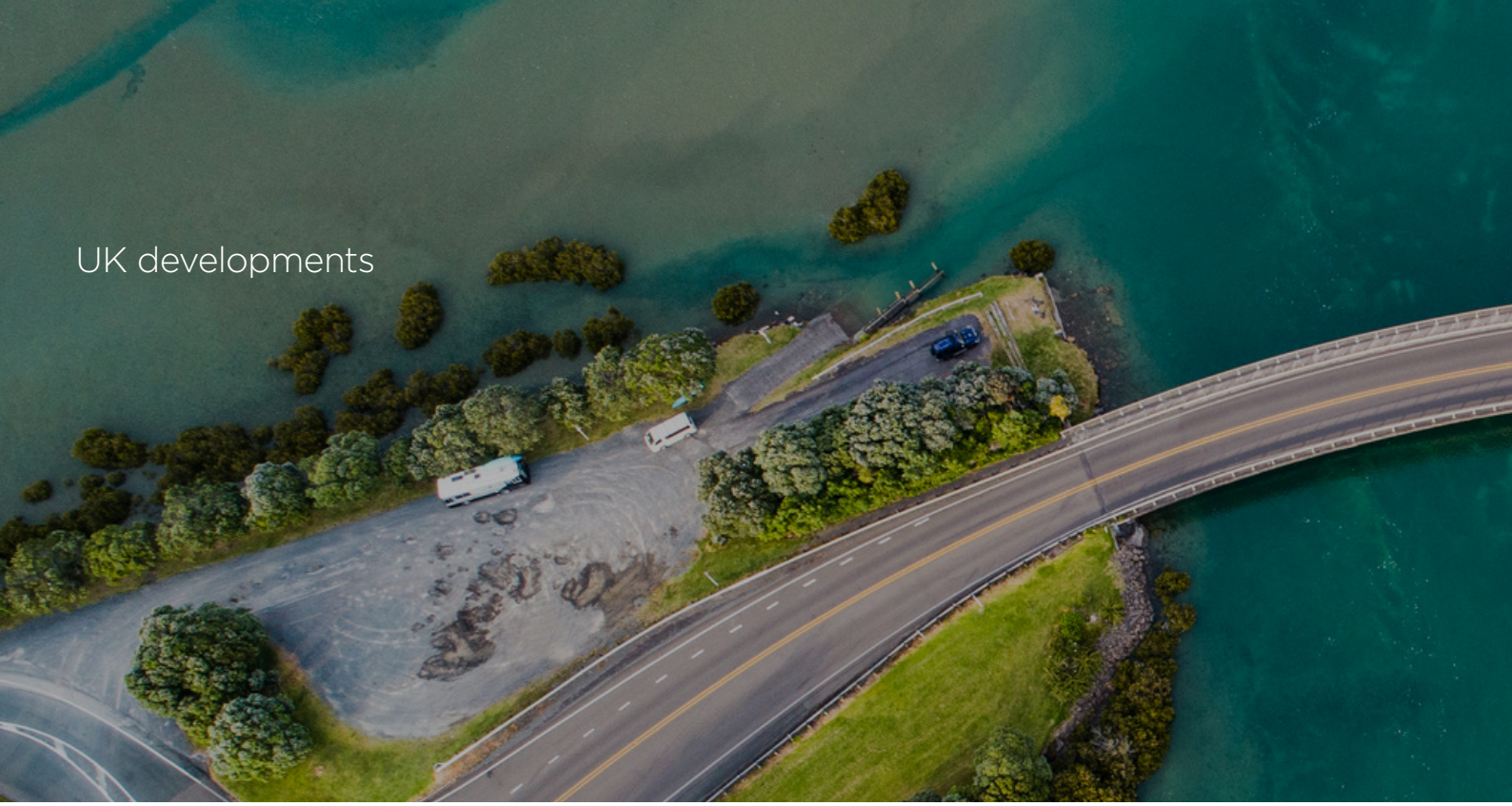
For further information, please contact Helen Beatty, Veronica Roberts, John Chetwood or Emily Barry.

9.4 UK schemes and restructuring plans for businesses in Asia Pacific

Jurisdictions across the globe have sought to expand their restructuring toolkits – spurred on by governments seeking to support business during the pandemic. This has had a significant impact on the options available when restructuring business in Asia Pacific and an effective restructuring process will need to apply in all relevant jurisdictions where creditors may seek to enforce their debts against the company.

There are often choices for the best implementation mechanism for a cross-border restructuring, which will need to take into account the global footprint and capital structure of each business. Frequently a bespoke solution involving procedures under multiple jurisdictions may be required.

We have produced an article explaining how flexible English law restructuring processes, principally Part 26 schemes of arrangement and recently introduced Part 26A restructuring plans, continue to provide reliable and effective tools to assist restructuring and recapitalisation of businesses in the Asia Pacific region. We also explain why English processes are particularly important where a company has English law governed debt obligations that may not be effectively compromised under local procedures.



You may also be interested to watch our recent webinar about the subject presented by the HSF restructuring teams in the UK and APAC which can be accessed via this link.

If you would like to learn more please contact Kevin Pullen, Gareth Thomas, Jamie McLaren, Paul Apathy or Debby Sulaiman.

10. Finance: debt capital markets

10.1 LIBOR transition

Whilst significant volumes of new SOFR and SONIA-linked floating rate notes continue to be issued in 2021, the focus in the Debt Capital Markets (**DCM**) has been on how to address the issue of tough legacy bonds.

There has been a steady flow of consent solicitations coming to market in 2021, however, some bonds have been too difficult to convert due to high consent thresholds and the fact that the consent solicitation process is a time-consuming and costly exercise. It is therefore likely that at the end of 2021, a significant population of GBP LIBOR-linked bonds will still remain outstanding. The UK's legislative solution, which introduces legislation under the Financial Services Act to amend the UK Benchmarks Regulation and gives the FCA new powers to require continued publication of LIBOR by IBA on a different basis has therefore been welcomed by DCM market participants. The FCA's latest consultation (CP21/29) confirms its proposal to permit legacy use of the seven LIBOR versions in all in scope contracts (including bonds) for at least the duration of 2022.

Please see our Banking Litigation team's blog post which covers the latest updates on the UK legislative solution.

For further information, please contact Amy Geddes or Minolee Shah.

10.2 ESG

10.2.1 The European green bond standard

The European Commission (the **Commission**) published a draft legislative proposal for the long-awaited European Green Bond Standard (**EU GBS**) which was published alongside the Strategy for Financing the Transition to a Sustainable Economy on 6 July 2021.

The EU GBS is intended to be a voluntary "gold standard" for green bonds and will provide a framework for issuers to issue bonds that can be designated as "European green bonds" or "EU GBS" provided that the proceeds of the bond are allocated to assets and expenditure in full compliance with the requirements of the EU Taxonomy Regulation (the **EU Taxonomy)**. The EU GBS will be open to all EU and non-EU issuers, including corporates, sovereigns, financial institutions, governments and other public bodies and is intended for a broad range of securities, including covered bonds and asset-backed securities.

One of the key features of the EU GBS is that issuers must allocate 100% of the proceeds raised by the bonds to economic activities that meet the EU Taxonomy requirements by the time the bonds mature. Please see our blog post on the topic for further details.

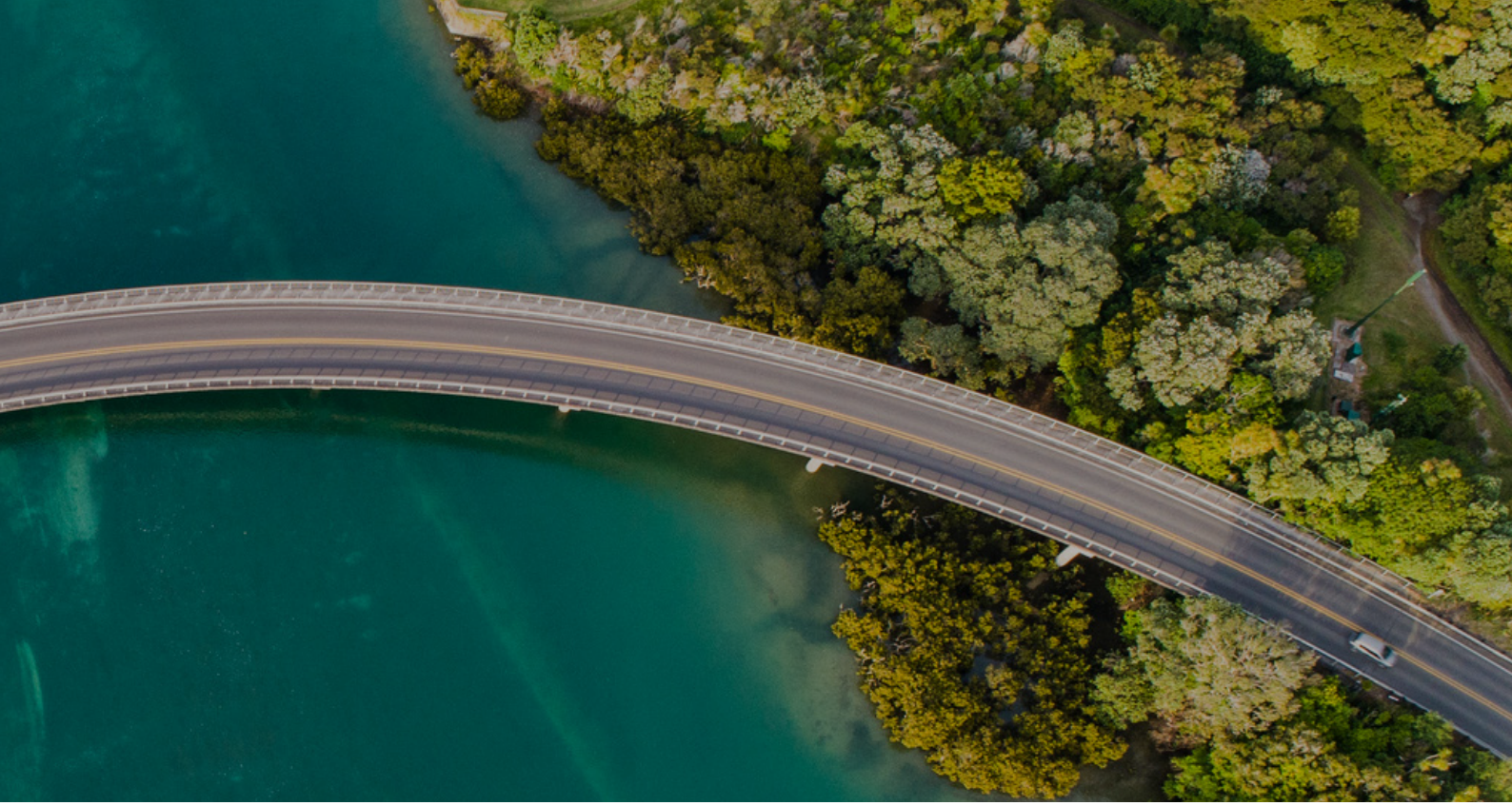
For further information, please contact Amy Geddes or Minolee Shah.

10.2.2 FCA consultation on ESG capital markets

In June 2021, the FCA published a consultation paper (CP21/18) on enhancing climate-related disclosures by standard listed companies and seeking views on ESG topics in capital markets. Of particular interest for DCM participants, the FCA is seeking input on whether to apply Taskforce on Climate-related Financial Disclosures-aligned disclosure rules to issuers of standard listed debt (and debt-like) securities, and what climate related information from issuers of these securities would be useful. The FCA is also seeking views on whether minimum ESG disclosure requirements should be considered in the context of the UK Prospectus Regime.

Mirroring some of the Commission proposals discussed above, the paper also seeks views on whether:

1. the FCA, alongside the Treasury, should consider the development and creation of a UK bond standard, starting with green bonds; and
2. if there is a case for closer regulatory oversight of ESG data and



rating providers given that the use of second-party opinions providers and external reviewers has become a key requirement of the ESG debt markets.

For further information, please contact Amy Geddes or Minolee Shah.

10.3 UK prospectus regime review

In July 2021, HMT published its review of the UK Prospectus Regime following Lord Hill's UK Listing Review in which it proposes fundamental, structural changes to the Prospectus Regime in the UK. The Treasury proposes a departure from the current UK Prospectus Regulation regime (which is broadly aligned with the EU Prospectus Regulation) under which prospectuses for public offers and admission to trading are subject to the same overall regime and instead proposes that the regulation of public offers and the regulation of admission to trading are dealt with separately. For the (largely wholesale) international DCM, the proposed new admission to trading regime will be very important. An interesting shift is the proposal to grant the FCA powers to develop and alter rules for the admission to trading regime in order to preserve flexibility.

For further information, please contact Amy Geddes or Minolee Shah.

11. Financial services regulation

11.1 Second HMT consultation paper on the Financial Services Future Regulatory Framework Review

HMT has published its second consultation paper on the Future Regulatory Framework Review for financial services. The consultation closes on 9 February 2022. Please see our blog post here.

The consultation include the following proposals:

- Retained EU law with direct effect in the UK (eg Regulations and Delegated Regulations) will be deleted from statute books and replaced with rules in the FCA and PRA rulebooks.
- A new Designated Activities Regime (**DAR**) will sit alongside the current Regulated Activities Order (**RAO**) regime to cover retained EU law activities that are not FSMA regulated (eg short selling or margin requirements for uncleared derivatives requirements). The DAR will be a more limited regime than the RAO, and will focus on specific designated activities only and not the wider activities of those undertaking the designated activities.
- PRA and FCA will be given growth and international competitiveness objectives, subject to climate change considerations.
- Proposals to ensure accountability, scrutiny and engagement by the regulators with parliament, government and stakeholders.
- An accountability mechanism for the FCA and PRA to consider the potential impacts on deference arrangements afforded to the UK by overseas jurisdictions and assess compliance with relevant trade agreements when making rules and setting general approaches on supervision.
- General rule-making powers over central counterparties and central securities depositories will be granted to the Bank of England (**BoE**).

Please contact Clive Cunningham, Marina Reason or Karen Anderson for more information.

11.2 Central Bank Digital Currency (CBDC) – UK and EU developments

CBDCs are new forms of digital money issued by central banks for use by households and businesses for their everyday payments needs, existing alongside cash and bank deposits. In the UK, no decision has yet been made to develop a UK CBDC but HMT and BoE have announced a potential timeline for its development. In 2022, HMT and the BoE will publish a consultation on the merits of a UK CBDC. Depending on consultation outcome, this may lead to a "development" phase lasting several years. The earliest date for launch of a UK CBDC is likely to be the second half of the decade. This follows the BoE's discussion paper on UK CBDC (March 2020) and launch of the UK CBDC Taskforce (April 2021).

The "digital euro" is also at early stages of development. The European Central Bank (**ECB**) launched the 24 month investigation phase of the "digital euro" project in July to consider functional

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design, legislative and privacy issues. This follows the ECB's initial report on the merits of a digital euro (October 2020).

As to broader regulation of crypto-business, the proposed Markets in Crypto-Assets Regulation is being considered in the EU; in the UK, the outcome of the HMT consultation on regulatory approaches to cryptoassets and stablecoins is expected shortly.

For further information, please contact Clive Cunningham, Andrew Procter or Marina Reason.

12. Insurance

12.1 Driving meaningful change in D&I in the financial sector

The FCA, PRA and BoE have published a discussion paper (DP21/2) which aims to kick-start discussion on how the financial services sector, with the help of the regulators, can "accelerate the pace of meaningful change" in improving Diversity & Inclusion (**D&I**) within financial services firms. DP21/2 is relevant to all regulated firms, including insurers, reinsurers and (re)insurance intermediaries.

The policy options being considered in DP21/2 include:

- regular reporting of diversity data to the regulators;
- the use of targets for representation;
- measures to make senior leaders directly accountable for D&I in their firms;
- linking remuneration to D&I metrics;
- having a D&I policy, training on D&I and undertaking a diversity audit; and
- the regulators' approach to non-financial misconduct.

Irrespective of where the specifics of this discussion end up, the direction of travel is clear: firms will need to be prepared for significantly increased scrutiny from regulators. The regulators' engagement on D&I is critical to their work on culture and governance, particularly with regard to Boards and senior management, and is an important part of their wider engagement with the ESG agenda.

A more detailed discussion of DP21/2 can be found here.

For further information, please contact Hywel Jenkins, Alison Matthews or Benedicte Perowne.

12.2 The insurance implications of the Supreme Court's latest decision on class actions

The recent judgment of the Supreme Court in *Lloyd v Google* [2021] UKSC 50 did not open the floodgates for representative "opt-out" class actions for compensation for loss of control of personal data brought on behalf of very large numbers of individuals without identifying class members. However, while insurers and policyholders alike will no doubt be relieved by the Supreme Court's decision, this is not the end of the story. We examine the implications of the decision from an insurance perspective in our article here including its potential impact on the currently difficult cyber insurance market and how the ATE insurance market might be affected going forward.

For further information, please contact Greig Anderson.

13. Intellectual property

13.1 The Unified Patent Court (UPC) - a new patent litigation system for European Patents is likely to start mid-2022 and will impact on any business operating in the EU– prepare now!

A new UPC patent litigation system for European patents is coming, with a likely arrival date in mid-2022, according to the UPC Preparatory Committee. Patent owners will be able to benefit from pan-EU enforcement but could also have all their European patents revoked in one go by an action at the same court.

This development will impact any business operating in the EU; this includes those with patents in Europe but also those without, as businesses may be pulled into the new system as defendants. So-called "patent trolls" may be encouraged to bring actions using the new system which allows for pan-EU injunctions to be granted in the new one-stop-shop court.

There are good reasons for all businesses to seek to understand the implications for their business models and strategies to employ, including considering whether to opt any of their European patents (and applications) out from the new system and examining their licensed-out and licensed-in technology litigation control provisions.

Please see our dedicated UPC Hub.

For further information, or if you are interested in further materials and training available for clients, please contact Sebastian Moore, Andrew Wells or Rachel Montagnon.

13.2 The Court of Appeal considers whether an AI can be the inventor of a patent

In *Thaler v Comptroller-General* [2021] EWCA Civ 1374, the latest round of the Thaler/DABUS AI patent applications story, the Court of Appeal dismissed Dr Thaler's appeal that a patent should be granted with his AI (DABUS) listed as the inventor, with one dissenting judgment. Similar applications for AI invented patents have been made by Dr Thaler around the world and have all so far failed (including at the US and EU intellectual property offices) except those made in Australia (see our blog post here) and South Africa.

The dissenting judgment may encourage an appeal to the Supreme Court by Dr Thaler, but while such an appeal would allow him to continue to test the courts' interpretation of existing legislation, it may be overtaken by a further UK Government consultation. The day after the Court of Appeal's judgment was handed down, the UK Government published its National AI Strategy, billed as "A new ten-year plan to make the UK a global AI superpower". As part of this AI "push", the UK IPO will be launching a consultation on the use of copyright and patent law to protect AI within the next three months. This may therefore provide a legislative solution to this particular debate.

For further information and discussion on the Court of Appeal decision, please see our IP blog post here. We will also be reporting further on the National AI strategy and the AI IP consultation on our IP blog. Please subscribe for further updates.

For further information, please contact Andrew Moir, Peter Dalton or Rachel Montagnon.

14. Public and administrative law

14.1 Judicial Review and Courts Bill

On 21 July 2021, the Government introduced the Judicial Review and Courts Bill into Parliament as part of the Government's aim to "restore the balance of power between the executive, legislature and the courts".

The main proposal of note is the provision for suspended and prospective quashing orders. Suspended quashing orders would delay the quashing of a decision or measure so that it would not take effect until a specified date, giving the defendant public authority time to remedy the defect or make new arrangements. Prospective quashing orders would remove or limit any retrospective effect of the quashing so that it may take effect only from the judgment date onwards. The Bill creates a presumption that courts will use suspended or prospective quashing orders, unless this would not provide "adequate redress" in relation to the relevant defect, or there is otherwise "good reason" not to do so. Another key proposal of the Bill is excluding so-called "*Cart*" judicial reviews by the use of an ouster clause, subject to limited exceptions.

The Bill has passed its first and second reading, and is currently at the Committee Stage in the House of Commons.

For further information, please see our blog post and our response to the Government's Consultation on Judicial Review Reform, or contact Andrew Lidbetter, Nusrat Zar or Jasveer Randhawa.

15. Real estate and planning

15.1 Real estate

15.1.1 New arbitration scheme, code of practice and ring-fencing of Covid-19 related commercial rent arrears

The Commercial Rent (Coronavirus) Bill has been published, which establishes a binding arbitration process to settle commercial rent arrears. The Bill specifically applies to arrears incurred during periods of enforced closure of tenant businesses between March 2020 and July 2021, and is supplemented by a revised Code of Practice, to apply with effect from 9 November 2021. The Code provides guidance on the specific periods of time (sector and geographically dependent) which will cause the Bill to apply, the arbitration process itself and any negotiations between landlords and tenants still seeking to settle debts.

Under the Bill, expected to take effect from 25 March 2022, either party will be able to refer a protected rent debt to arbitration, where an arbitrator will make a binding award for repayment, whilst considering the viability of the tenant's business and preserving the landlord's solvency. The arbitration process will involve evidence of the detriment suffered by tenants and the impact payment would have. Whilst the arbitration process is on foot, or during the period in which a claim could still be referred to arbitration, landlords will not be able to issue a debt claim in court, use the Commercial Rent Arrears Recovery scheme, forfeit, draw down on a rent deposit or issue winding up proceedings in relation to the debt. Debt proceedings already on foot can be stayed. Debt claims where judgment has already been given but not yet enforced can be made a part of the arbitration process.

For further information, please contact Matthew Bonye.

15.1.2 Residential Property Developer Tax

Having previously consulted on the introduction of a time-limited tax intended to raise at least £2 billion to assist with the funding of remediation work to unsafe cladding on high-rise residential buildings, the Autumn Budget and the subsequent Finance Bill 2022 confirmed that the Residential Property Developer Tax (**RPDT**) will come into force with effect from 1 April 2022.

The tax will be charged at a rate of 4% on profits exceeding an annual group-wide allowance of £25 million arising in accounting periods beginning on or after 1 April 2022. The profits made must derive from UK residential property development activities, which are fairly broadly defined, and include dealing in residential property, seeking planning permission in relation to it, constructing it, managing it, and any activities ancillary to the aforementioned.

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The calculation of profits charged to the tax will be based on the existing rules for corporation tax (with certain adjustments, most notably, there will be no deduction for finance costs), and the tax will be reported and paid using the corporation tax return and administrative framework. The rules relating to joint ventures will mean that it is not possible to take the benefit of multiple annual allowances through investing in joint ventures; a joint venture company would have its own annual allowance, with material interest holders in that joint venture company (effectively 10% plus shareholders) being allocated a proportion of the JV profits when determining (and in effect reducing) their own annual allowance.

Interestingly, although the Government's initial consultation suggested that the RPDT will be time-limited (to 10 years), the Finance Bill does not contain a "sunset clause", which would repeal the tax at a fixed point.

For further information, please contact Matthew White, Will Arrenberg or Casey Dalton.

15.2 Planning

15.2.1 Ministerial announcements and planning reform

Following the cabinet reshuffle on 15 September 2021, the Government renamed the Ministry for Housing, Communities and Local Government as the Department for Levelling Up, Housing and Communities (**DLUHC**). Michael Gove is the new Secretary of State, the seventh since July 2016. He is also the Minister for Intergovernmental Relations. Christopher Pincher remains as Minister for State for Housing. Neil O'Brien, former director of Policy Exchange, has been appointed as a Parliamentary Under-Secretary of State for Levelling Up, the Union and Constitution.

It is not clear yet how these changes will impact the future of the Planning White Paper planning reforms. Whilst a Planning Bill was announced with the Queen's Speech, which Eddie Hughes, Parliamentary Under-Secretary of State for Housing and Rough Sleeping, has said will come forward in the "relatively near future", Michael Gove "paused" the reforms to "rethink" the proposals. This was confirmed by Conservative party chairman Oliver Dowden in his keynote speech to the Conservative Party Conference. Other reports indicate that the Planning White Paper proposals will be watered down, to become more of a "tidying up exercise" to make "the current system we have work better". The DLUHC has also confirmed that national planning policy will be reviewed in full. Further announcements are keenly awaited, but it is not clear when we might hear more.

For further information, please contact Matthew White.

15.2.2 Revised NPPF, new NMDC and the office for place

On 20 July 2021, the revised National Planning Policy Framework (**NPPF**) and the National Model Design Code (**NMDC**) were published, and the Office for Place (**OFP**) was launched.

We commented on the proposed changes to the NPPF and the new NMDC in our blog post here. Despite concerns raised in response to a consultation in January 2021, there were minimal differences between the consultation draft and the revised NPPF as published. Revisions include:

- The concept of "beautiful" places has been introduced, although "beautiful" is not defined.
- Plans should now "promote a sustainable pattern of development".
- Strategic policies for plans which include larger scale developments should look ahead at least 30 years.
- The use of Article 4 directions to restrict residential permitted development rights has been tightened.
- Local planning authorities, neighbourhood planning groups and developers should engage in the production of design policy, guidance and codes, in the absence of which the National Design Guide and NMDC should guide decision-making.
- New streets should be tree-lined.
- National policy now incorporates the new "retain and explain" policy regarding heritage assets.

The OFP sits within the DLUHC and is advised by a team of experts, known as the Advisory Board, led by Nicholas Boys-Smith. The aim of the OFP is to support communities and industry to create "attractive, popular places", and improve understanding of what makes places popular and "how this relates to public health, well-being and sustainability". The Government is considering whether to establish the OFP as an independent body.

For further information, please contact Matthew White.

15.2.3 Environment Act 2021

Having first been introduced to Parliament in October 2019 (see our blog posts here and here), the Environment Bill received Royal Assent on 9 November 2021 and is now the Environment Act 2021. The Act introduces many measures including:

- long-term targets to improve air quality, biodiversity, water and waste reduction and resource efficiency;
- mandatory biodiversity net gain, requiring that developments deliver at least 10% increase in biodiversity. This requirement will apply to all development, including nationally significant infrastructure projects;

- conservation covenants, which must be entered into as a deed;
- Local Nature Recovery Networks; and
- Protected Site Strategies and Species Conservation Strategies.

The new environmental targets will be enforced by the Office for Environmental Protection (**OEP**). The House of Lords accepted a verbal assurance by the Government that the OEP will have operational independence.

Some changes to the Environment Bill which were requested by the Lords, such as strengthened protection of ancient woodland, were removed by agreement between the Houses of Parliament on the basis of assurances by the Government that policy and/or legislation will be strengthened in those areas outside the scope of the Bill itself.

As at the date of writing, the text of the Act is awaited. See here for the full press release announcing the passing of the Bill into law.

For further information, please contact Matthew White.

16. Tax

16.1 Autumn Budget and Finance Bill 2022

The Government's second Budget of 2021 was delivered on 27 October, and the Finance Bill 2022 was subsequently published on 4 November. Some of the most notable announcements and new measures included:

- Confirmation of the introduction of a new regime, from April 2022, requiring large businesses (those with annual turnover above £200 million and/or a balance sheet total over £2 billion) to notify HMRC when they adopt "uncertain tax treatment" resulting in a tax advantage in excess of £5 million in their returns for VAT, corporation tax or income tax (including PAYE). In a welcome move, the previously proposed but controversial third "trigger", obliging businesses to notify HMRC if, were the relevant tax treatment considered by a court, there would be a substantial possibility that it would be found to be materially incorrect, has been omitted from the draft legislation in the Finance Bill 2022.
- The rate and annual group-wide allowance in respect of the new residential property developer tax – 4% and £25 million respectively. The tax will apply to the profits that certain companies and corporate groups derive from UK residential property development, with effect from 1 April 2022. Further details of the tax are provided in the real estate section above.
- Confirmation of the reform of income tax basis periods, such that the profit or loss of a business for a tax year will be the profit or loss arising in the tax year itself, regardless of its accounting date. Following a one-year delay, the new measures will come into force from 6 April 2024, with a transition period in the 2023/24 tax year.
- Confirmation of the introduction of a new regime for "Qualifying Asset Holding Companies" (**QAHCs**), taking effect from 1 April 2022. The stated purpose of the regime is to deliver an internationally competitive tax regime for QAHCs that will remove barriers to their establishment in the UK, including rules for UK investors to ensure that they are taxed, so far as possible, as if they had invested in the underlying assets directly.
- Consultation on a proposed new re-domiciliation regime, making it possible for a foreign company to change its place of incorporation to the UK, retaining its legal identity as a corporate body, without the need to transfer assets or shares to a new UK entity.

Further detail of the Budget announcements can be found in our Tax Briefing here.

For further information, please contact Will Arrenberg or Isaac Zailer.

16.2 OECD announces agreement on global tax reform

The OECD announced in October 2021 final agreement, by 136 of the 140 base erosion and profit shifting (**BEPS**) Inclusive Framework countries (including the UK, US and China), of a landmark global tax reform package, aimed at addressing the tax challenges arising from the digitalisation of the economy. Participating jurisdictions have committed to fundamental reform of the international tax rules, consisting of two "pillars":

- **Pillar One**: reallocation of taxing rights – around 100 of the world's largest and most profitable multinational enterprises, with global turnover above US$20 billion and at least a 10% profit margin, will have 25% of their profits in excess of the 10% margin reallocated to and taxed in market jurisdictions from which they derive at least €1 million in revenue, without the requirement for a physical presence in that taxing jurisdiction;
- **Pillar Two**: minimum tax rate – a global minimum effective corporate tax rate of 15% on a country-by-country basis. The minimum rate is aimed at removing any advantage that multinational groups have enjoyed by establishing subsidiaries in low tax jurisdictions, and will operate principally by imposing a "top-up" tax on the ultimate parent entity of a group if any subsidiaries pay an effective corporate tax rate of less than the agreed minimum.

Participating jurisdictions have also agreed to abolish existing domestic Digital Services Taxes and to not introduce any new digital taxes.

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The ambitious aim is for the new rules under both Pillars to be effective from 2023.

For further information, please contact Will Arrenberg or Isaac Zailer.

17. Technology, media and telecommunications, sourcing and data

17.1 Government and CMA respond to Digital, Culture, Media and Sport Committee report on reform of music streaming industry

On 22 September 2021, the UK Government and the CMA published their response to the Digital, Culture, Media and Sport Committee (**DCMS**) report on the economics of music streaming. The Committee's report was published in July 2021 and set out a number of recommendations to address issues identified following the Committee's related inquiry.

The Government acknowledged the invaluable insights into the streaming environment gained from the Committee's inquiry and accepted the need for reform of aspects of the industry. However, it suggested that further research is required to fully understand the complexity of issues faced by music creators/rights holders and, in turn, the impact of the Committee's recommendations on the wider music sector. There is therefore unlikely to be further clarity on any proposed action the Government intends to take (including whether to take forward legislation in the key areas considered) until spring 2022, at the earliest.

The Government also supported the Committee's recommendation for the CMA to undertake a market study into competition-related concerns raised in the inquiry, including "the possible market dominance of the major music groups and the potential for contractual agreements between them and the streaming services to stifle innovation in the streaming market". The CMA has indicated that it intends to launch the market study as soon as possible.

On the whole, those industry stakeholders campaigning for changes to the current music streaming model (including greater protections for music creators/rights holders) will welcome the joint Government and CMA response as a step in the right direction.

However, in the meantime, potential remains for disparity between the protections afforded to music creators/rights holders in the UK versus more robust provisions in other jurisdictions (particularly the EU Member States under the EU Copyright Directive).

Our full blog post is available here.

For further information, please contact Hayley Brady.

17.2 UK data adequacy recognition revealed as DCMS publishes post-Brexit data plans

On 26 August 2021, the DCMS announced the UK Global Data Plans, including priority data adequacy partnerships and a UK approach to adequacy assessments. This is the second big data protection step in a post-Brexit world, hot on the heels of the UK Information Commissioner's Office publishing its own data transfer agreement and methodology for conducting international risk assessments.

Whilst it is clear that UK growth, trade and innovation (plus a practical, workable regime) are top priorities when considering reform of the UK data regime, the true extent and impact of any UK divergence from the EU data regime remains to be seen in a forthcoming consultation on the reform.

The UK Government will prioritise "data adequacy" partnerships with: US, Australia, Republic of Korea, Singapore, Dubai International Finance Centre and Colombia, with India, Brazil, Kenya and Indonesia subsequently prioritised in a future tranche, to enable UK organisations to more easily exchange data with "important and fast moving economies".

The European Commission has re-confirmed that it will closely monitor the developments of the UK Global Data Plans and the extent to which the UK diverges from the EU regime. It may be that an element of divergence is possible whilst retaining the GDPR as a framework (and in turn UK adequacy status) if the UK continues to also keep one eye on secure and trustworthy privacy standards.

Our full blog post is available here.

For further information, please contact Miriam Everett.

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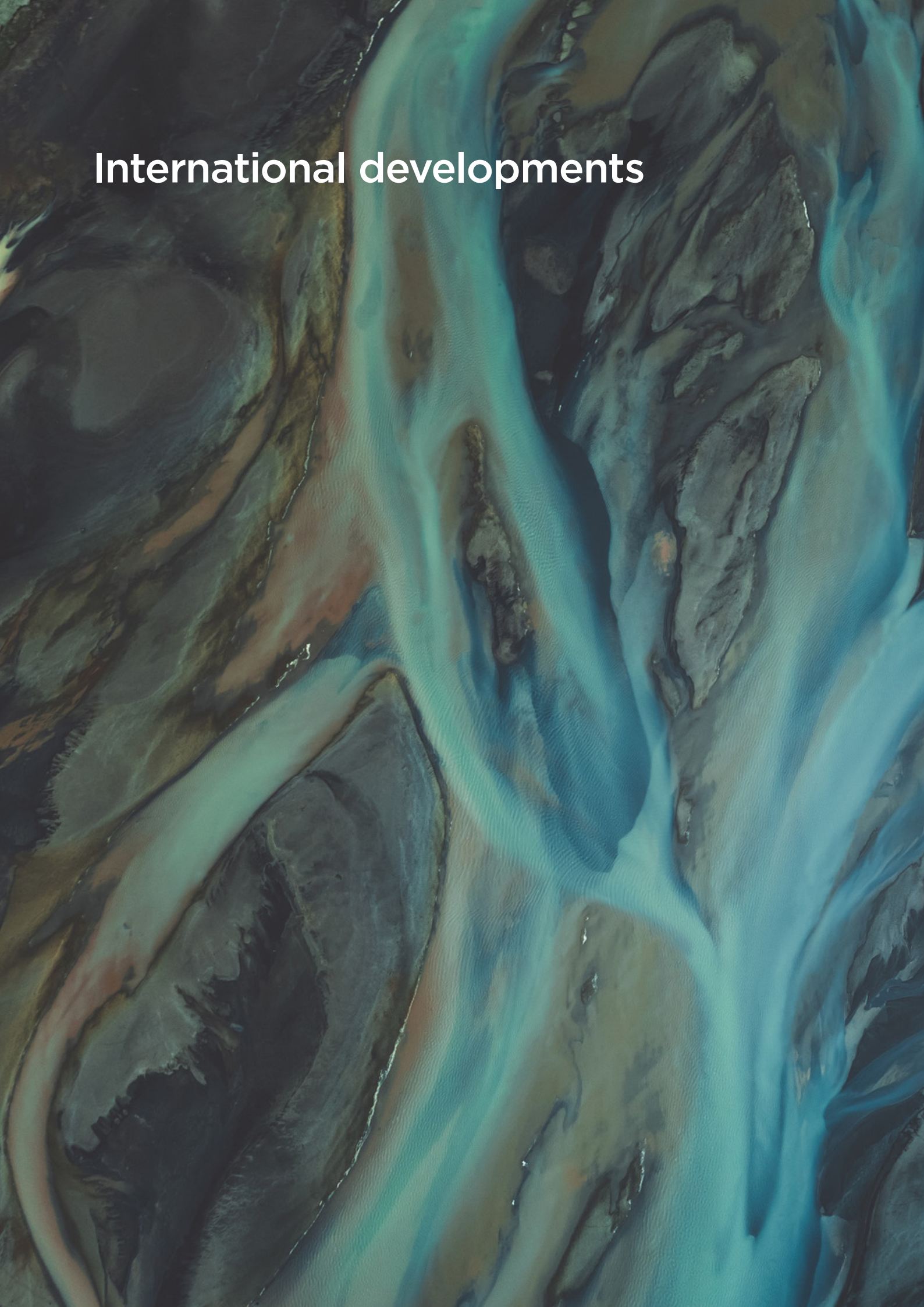

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18. Hong Kong

18.1 SFC provides guidance to intermediaries on operational resilience and remote working

On 4 October 2021, the Securities and Futures Commission (**SFC**) released a circular to provide guidance on operational resilience and remote working. While the guidance on cybersecurity, business continuity plans, internal controls and risk management in codes, guidelines and circulars previously issued by the SFC has assisted licensed corporations in maintaining resilience during the pandemic, the SFC considers it important to ensure continued strength against operational disruptions by adopting a comprehensive approach.

In this circular, the SFC has set out operational resilience standards and required implementation measures which supplement the SFC's existing guidance, including standards on:

- governance;
- operational risk management;
- information and communication technology including cybersecurity;
- third-party dependency risk management; and
- business continuity plan and incident management.

The SFC has also set out expected regulatory standards for managing and mitigating some major risks of remote working, including on:

- governance;
- off-premises trading;
- outsourcing and third-party arrangements;
- information security;
- cybersecurity;
- record keeping;
- the obligation to notify the SFC (and the HKMA where applicable) of the implementation of remote working arrangements which constitute significant changes to business plans (and any significant changes to such arrangements); and
- working-from-home arrangements.

The SFC encourages intermediaries to read its Report on Operational Resilience and Remote Working Arrangements which accompanies the circular. The report aims to provide intermediaries with a better understanding of the regulatory standards set out in the circular, including providing suggested techniques and procedures as well as case examples and lessons learned drawn from the SFC's review of licensed corporations' measures during the pandemic and other disruptive events.

For further information, please contact Hannah Cassidy, Natalie Curtis or Vicky Man.

18.2 SFC takes first disciplinary action against manager-in-charge

On 1 November 2021, the SFC announced a disciplinary action against a licensed corporation and its manager-in-charge (**MIC**) for internal control failures relating to its placing activities and recording of client order instructions.

This marks the SFC's first disciplinary action against an MIC since the implementation of its MIC regime in 2017. For an overview of the regime and its requirements, please refer to our briefing of December 2016.

The SFC imposed a fine of HK$3.3 million on Fulbright Securities Limited (**FSL**) and a 6-month suspension on Eric Liu Chi Ming. At the time of the breaches, Mr Liu was FSL's MIC (Overall Management Oversight) and MIC (Key Business Line), as well as FSL's responsible officer (**RO**), director and deputy general manager.

The SFC's investigation found that Mr Liu was responsible for managing and supervising FSL's business operations in regulated activities at the material time, and that the firm's failures were attributable to Mr Liu's failure to discharge his duties as an RO and a member of FSL's senior management.

Under section 193(2)(a) of the Securities and Futures Ordinance, where an intermediary is (or was at any time) guilty of misconduct as a result of the commission of any conduct occurring with the consent or connivance of, or attributable to any neglect on the part of: (i) an RO of a licensed corporation; or (ii) a person involved in the management of the business of a licensed corporation, the conduct shall also be regarded as misconduct on the part of that other person. A "person involved in the management of the business of a licensed corporation" includes an MIC.

Our recent briefing provides further details of the disciplinary action and the key takeaways.

For further information, please contact Hannah Cassidy, Natalie Curtis or Isabelle Lamberton.

18.3 New conduct requirements for bookbuilding and placing activities and sponsor coupling to come into effect on 5 August 2022

The SFC has released the conclusions to its consultation on conduct requirements for capital market transactions in Hong Kong.

The SFC proposed amendments to its main code of conduct to:

- clarify the roles of intermediaries and set out the standards expected of them in bookbuilding, pricing, allocation and placing activities in equity and debt capital market transactions; and
- couple the roles of a head of underwriting syndicate and the sponsor for an initial public offering.

Consequential changes were also proposed to the Guideline to sponsors, underwriters and placing agents involved in the listing and placing of Growth Enterprise Market stocks (**GEM Placing Guideline**). The respondents were generally supportive of the proposals.

The final form of the revisions to SFC's main code of conduct and the GEM Placing Guideline are included in Appendix B and Appendix C of the conclusions paper respectively. The revisions to the SFC's main code of conduct and the GEM Placing Guideline have been gazetted and will become effective on 5 August 2022. This is to allow reasonable time to implement the necessary operational and system changes to comply with the new requirements.

The SFC will also work with the Stock Exchange of Hong Kong Limited to introduce appropriate amendments to the listing rules which would dovetail with the requirements of the SFC's main code of conduct in relation to the conduct of issuers and intermediaries involved in bookbuilding and placing activities.

Further details of the new requirements are set out in our briefing of 9 November 2021.

For further information, please contact Matt Emsley, Hannah Cassidy, Tom Chau, Isaac Chen, William Ku, Jeremy Shen, Jason Sung, Tommy Tong, Stanley Xie, Zhong Wang or Nicky Cardno.

19. Russia

19.1 Trends in the Russian private equity landscape

In the chapter on Russia, our lawyers discuss global and local market conditions affecting private equity deals in the Russian market during the past year. Currently, the local deal market is characterised by three key trends. One is a sectoral shift in private equity deals with a greater focus on the TMT, healthcare, and e-commerce sectors. The other key trends are the increased activity levels of major Russian state-backed players and substantial inbound investments driven by Asian and Middle Eastern sovereign funds, despite a general drop in foreign investments into Russia.

The article provides a useful guidance on some of the practical challenges for counsel working on cross-border transactions involving Russian private equity interests, including the complexities of navigating Russian taxation and general regulatory landscape, international sanctions affecting certain Russian businesses as well as local constraints relating to investor remedies and dispute resolution options.

For further information, please contact Alexei Roudiak, Sergei Eremin or Stefan Kecman.

19.2 Russia makes further steps towards GHG emission reduction

In a recent blog post, Danila Logofet (Hong Kong), Evgeny Yuriev (Moscow), Elvira Vanieva and Victoria Korotkova (Moscow) explore Russia's stance on climate change and focus on an important legislative action recently taken by the Russian legislature aimed at curbing greenhouse gas (**GHG**) emissions.

Russia's first law relating to GHG emissions will come into effect at the end of December. Under the new law, a new GHG emissions' accounting system will be put in place with a view to forming a national register of GHG emissions. Initially, large GHG emitters with emission levels over the specified threshold will be subject to mandatory annual reporting system, with a gradual expansion of the reporting requirements to capture other, less significant GHG emission sources. The law itself does not impose any limits or targets, however, the Russian Government can adopt national targets and put in place additional measures if these targets are not achieved.

For further information, please contact Danila Logofet, Evgeny Yuriev or Elvira Vanieva.

19.3 Overview of the latest court practice on the Russian sanctions-related amendments – is winter coming?

This analysis was first published on Lexis®PSL on 29 October 2021 and can be found here (subscription required).

In June 2020, the Russian Arbitrazh Procedure Code was amended to provide the Russian courts with a) exclusive jurisdiction over any disputes with individuals and entities subject to international sanctions against Russia (in case there is no dispute resolution clause to the contrary, or if this clause is unenforceable due to "obstacles to access to justice" caused by sanctions); and b) issue anti-suit injunctions with respect to such disputes (the **Sanctions-Related Amendments**). We discussed the details of these amendments in our Arbitration Notes post here.

The Sanctions-Related Amendments have caused much controversy among the business community in Russia and abroad. In particular, there was no consensus as to what "obstacles" would be sufficient for the Russian courts to render the dispute resolution clause in the contract unenforceable and accept jurisdiction to consider the

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dispute. The business community therefore has been waiting for the first reaction of the Russian courts to the amendments.

However, the development of the court practice has not been rapid. To date the Sanctions-Related Amendments have been directly applied only in four cases. Nevertheless, even these few reveal that the courts are yet to find common ground in the application of the amendments.

For further information, please contact Ivan Teselkin, Maria Dolotova, Alexander Gridasov or Sergei Eremin.

20. Singapore

20.1 MAS proposes further revisions to its Guidelines on Business Continuity Management

The Monetary Authority of Singapore (**MAS**) issued a second consultation on 15 October 2021 on proposed revisions to its Guidelines on Business Continuity Management (**BCM**). This second consultation includes revisions to address feedback received from a consultation published in 2019 and incorporates key learnings from the Covid-19 pandemic. Comments were required to be submitted by 15 November 2021.

MAS has said that the second consultation builds on the policy intent from the 2019 consultation to further emphasise the need for financial institutions to take an end-to-end view in ensuring the continuous delivery of critical business services, and introduce principles and practices that financial institutions can implement to strengthen operational resilience.

Key proposed changes to the Guidelines on BCM as outlined in the second consultation include:

- identification and prioritisation of critical business services in addition to critical business functions;
- establishment of Service Recovery Time Objectives for each critical business service, and the implementation of recovery strategies to meet such objectives;
- development of an end-to-end dependency mapping on people, processes, and technology, including those involving third parties, for each critical business service; and
- BCM audits to be conducted that are commensurate with the criticality of the business services and functions.

Respondents to the 2019 consultation had provided feedback that implementation of the new expectations in the Guidelines on BCM would entail changes in their BCM programs and significant efforts. MAS has asked financial institutions to review the new guidance in the second consultation and provide feedback on the adequacy of a 12-month transition period.

For further information, please contact Natalie Curtis or Kenneth Lo.

20.2 MAS consults on enhancing investigative and other powers

On 2 July 2021, MAS launched a consultation on proposals to strengthen its investigative powers under MAS-administered Acts. Feedback was required to be submitted by 1 August 2021.

The proposals involve amendments under a Financial Institutions (Miscellaneous Amendments) Bill, to:

- empower MAS to enter premises without prior notice or a court warrant in connection with investigations under the Securities and Futures Act (**SFA**) or the Financial Advisers Act (**FAA**) where MAS assesses that there is a risk of evidence being destroyed;
- extend the above power, along with other investigative powers that are currently available under the SFA and the FAA, to other MAS-administered Acts, namely the Banking Act, the Insurance Act, the Trust Companies Act, the Payment Services Act and the new omnibus Act for the financial sector;
- clarify that MAS may reprimand a person for misconduct even after the person has left a financial institution or the financial industry; and
- introduce powers to enable MAS to impose requirements on certain financial institutions to manage risks arising from the conduct of unregulated businesses.

For further information, please contact Natalie Curtis or Kenneth Lo.

20.3 Singapore poised to allow conditional fee arrangements

A Bill to permit conditional fee arrangements (**CFAs**) has had its first reading in the Singapore Parliament. The Bill contains a framework for the enforcement of CFAs and for relevant courts to determine the validity and effect of a CFA.

If the Bill becomes law, law firms and lawyers in Singapore will be able to enter into CFAs with clients for certain types of disputes (whether relating to proceedings in Singapore or any other foreign state) with related advice and legal services. It is likely that, as a minimum, CFAs will be permitted for disputes subject to resolution by international arbitration and mediation, or by the Singapore International Commercial Court.

The potential introduction of CFAs in Singapore may be of interest to sophisticated commercial parties interested in exploring risk-sharing with their lawyers and also to parties who have meritorious claims but temporary liquidity or cash flow issues.

You can find out more about the Bill in our blog post here.

For further information, please contact Alastair Henderson, Gitta Satryani, Elaine Wong, Tomas Furlong, Daniel Waldek, or Christine Sim.

21. United Arab Emirates

21.1 Dubai government issues decree abolishing the Arbitration Institute in the DIFC

On 20 September 2021, Decree 34 of 2021 Concerning the Dubai International Arbitration Centre (**DIAC**) was enacted in Dubai, by virtue of which the Arbitration Institute in the DIFC (**DAI**) was abolished and its assets transferred to DIAC. The DAI was the counterparty of the London Court of International Arbitration (**LCIA**) in an Operating Agreement that established the DIFC-LCIA.

Amongst other things, the decree provided for the DAI's assets to be transferred to the DIAC (which will also see some restructuring under the decree).

Under the decree, all agreements providing for DIFC-LCIA arbitration will remain valid. All ongoing arbitrations, mediations and other ADR proceedings commenced prior to the decree will be administered by the DIFC-LCIA Registrar and Secretariat for and on behalf of the LCIA until such proceedings are concluded. However, unless the parties agree otherwise, all arbitrations, mediations and other ADR proceedings arising out of agreements referencing the DIFC-LCIA and referred for resolution after the date of the enactment of the decree will be administered by the DIAC in accordance with the DIAC Rules.

The LCIA is currently in discussion with the authorities in Dubai regarding transitional arrangements for cases where the parties have agreed to arbitration or mediation pursuant to the DIFC-LCIA Rules.

For further information and guidance on the impact of this decree on your existing and future dispute resolution provisions relating to the Middle East, please contact Stuart Paterson or Nick Oury.

22. United States

22.1 OFAC issues virtual currency industry guidance

The US Department of the Treasury's Office of Foreign Assets Control (**OFAC**) issued a virtual currency industry-specific brochure outlining sanctions compliance best practices (**Guidance**). It cautions that OFAC sanctions have increasingly targeted individuals and entities that have used virtual currency in connection with malign activity, including ransomware payments, and strongly encourages a risk-based approach to sanctions compliance because there is no single compliance program or solution suitable to every circumstance or business. It notes that components of an effective sanctions compliance policy for a company in the industry may include: senior management commitment/taking steps to demonstrate their support for sanctions compliance; risk assessment to identify potential areas in which the company may, directly or indirectly, engage with OFAC sanctioned persons, countries, or regions; implementing internal controls depending on, among other things, the products and services the company offers, where it operates, locations of its users, and sanction-specific risks the company identifies; testing and auditing; and periodic OFAC training to appropriate employees. The Guidance recommends tools for companies in the industry, including, for example, geolocation tools to identify and prevent IP addresses that originate in sanctioned jurisdictions from accessing a company's website and services for certain activity.

The growing prevalence of virtual currency as a payment method brings greater exposure to sanctions risks, including the risk that a sanctioned person or a person in a sanctioned jurisdiction might be involved in such transactions. Both US and non-US companies should consider incorporating OFAC's recommendations for compliance best practices for companies in this industry to mitigate the risk of violating US sanctions.

See our Sanctions Note for more details.

For further information, please contact Jonathan Cross, Brittany Crosby-Banyai or Christopher Boyd.

22.2 Impact of cryptocurrency on US sanctions and anti-money laundering laws

Our "Designated"/"The Bettor's Verdict" crossover podcast discussed the significant impact that the rise of cryptocurrency has had, and is likely to have going forward, on sanctions and anti-money laundering laws in the US. Among the points made:

- US regulators are very interested in the regulation of cryptocurrencies and other digital assets.
- An important question is whether cryptocurrencies are to be regulated as a commodity, or as property, or as currency, or as a security, and the designation applied has implications.
- For example, if classified as a security, there would be significant implications for issuers, brokers, traders and other investors of such digital assets. In particular, an issuer would have to comply with the extensive registration/reporting/disclosure and other provisions of the Federal Securities Act of 1933 relating to the asset. The test (set forth in 1946) for whether something is a

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security looks to: (1) whether the contract involves an investment of money; (2) whether that investment is in a common enterprise; and – most importantly; (3) whether there is an expectation of profit to be derived from the efforts of other people.

- The challenge is determining how laws/tools/standards designed many years ago to regulate traditional assets can be applied to dramatically new/not previously contemplated contexts and technologies.
- Cryptocurrencies have the potential to upend existing regulatory, sanctions, anti-money laundering and other regimes, particularly to the extent that such digital assets impact the dominance of the US dollar in global commerce/transactions.
- It is anticipated that the Securities Exchange Commission is actively looking for and may ultimately bring a test case in this space.

See our Designated/The Bettor's Verdict Crossover Podcast for more details.

For further information, please contact John O'Donnell, Jonathan Cross or Steven Jacobs.

For a full list of our global offices visit **HERBERTSMITHFREEHILLS.COM**