PACIFIC RIM ADVISORY COUNCIL

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Pacific Rim Advisory Council
January, 2024 e-Bulletin

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CONFERENCES & EVENTS

PRAC Let's Talk!

PRAC 2024 Conferences

PARIS, FRANCE - May 25 - 28, 2024
Hosted by GIDE LOYRETTE NOUEL
Early Confirm and Hotel Booking Now OPEN

VANCOUVER, CANADA - September 21 - September 24, 2024
Hosted by RICHARDS BUELL SUTTON LLP
Early Confirm and Hotel Booking Opens Soon

PRAC 2024 Event Connect

Get On The List!

Let us know your plans to attend upcoming industry events and connect with other attending PRAC Delegates.

PDAC Annual Meeting March 03 – 06 Toronto, Canada
IBA Mergers & Acquisitions in Latin America March 12 – 15, Quito, Ecuador
ABAAntitrust Spring Meeting April 10 – 12, Washington, D.C.
IPBA Annual Conference April 24 – 27, Tokyo

Full Details
www.prac.org/events

Visit us online for the latest up-to-date, country specific information
www.prac.org/member_publications.php

MEMBER DEALS MAKING NEWS

►BRIGARD URRUTIA | Assists French Retailer Casino in exit from Grupo Éxito

►CAREY | Assists NotCo overturn unfair competition ruling

►GIDE | Advises Artémis on the acquisition of Royalement Vôtre Editions

►HAN KUN | Rpresents JDP in establishing its first RMB warehousing and logistics investment fund

►HOGAN LOVELLS | Guides Fenway Sports Group and Strategic Investors

►KOCHHAR | Advise Commercial Bank of Dubai PSC to Kiran Gems

►LEE and LI |Sunny Rich Fishery-Electricity Symbiosis Syndicated Loans Project

►NAUTA DUTILH | advised Dutch insurer a.s.r. on its EUR 510 million sale

PRAC TOOLS TO USE
COVID-19 SITE FOR ALL UPDATES

PRAC CONTACTS MEMBER DIRECTORY EVENTS

PRAC APPOINTS NEW BOARD CHAIR AND VICE CHAIR FOR TWO YEAR TERM

01 January 2024: The Pacific Rim Advisory Council is pleased to announce its newly elected Board Chair and Vice Chair for the two-year term 2024 thru 2025.

Sarah Tune

Chair: Sarah English Tune, Partner, Davis Wright Tremaine LLP.

Sarah is a skilled business transactions attorney that thrives on balancing high-level strategy with meticulous organization to achieve success in complex transactions for her clients. Sarah brings to the table her substantive expertise, a practical mindset and a desire to help her clients achieve their broader business goals. She is a valued advisor to her clients both in the heat of a transaction and in strategic planning and structuring of their organization and important contractual arrangements.

Owen Chan

Vice Chair: . Owen Chan, Managing Partner, Hogan Lovells (Hong Kong)

Owen leads a bilingual team of international banking and finance lawyers based in Hong Kong and Mainland China, working with international financial institutions, PE funds, and multinational companies on their most complex and structured cross-border transactions.

The Pacific Rim Advisory Council ("PRAC") is a unique strategic alliance within the global legal community, with unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region. PRAC members are top-tier, independent law firms, each of which provides legal services to major international companies conducting substantial business across the Pacific Rim region.

With over 11,000 lawyers practicing in key business centers around the world, these prominent member firms provide in dependent legal representation and local market knowledge. Whether you are an institutional client or an emerging business our member firms are leaders in their fields and understand your business needs and the complexities of your industry.

Beyond the prominent standing that PRAC members already enjoy in their respective countries, member firms demand from each other that our unique alliance remains at the forefront of global and regional issues and trends. We remain committed and look forward to the challenge of ensuring that these objectives are met.

For more information and to view our directory of member firms visit www.prac.org

CAREY STRENGTHENS ITS PUBLIC LAW PRACTICE

Prominent administrative law expert, Camilo Lledó, returns to Carey as a new partner

SANTIAGO, 06 January, 2024: Amid the backdrop of Chile's constitutional debate and intense discussions surrounding reforms to important regulated sectors, Carey has announced that Camilo Lledó returned to the firm as a new partner in the Public Law area.

Camilo, who officially joined the firm on January 1st, focuses his practice on public law, regulated markets, and conflict resolution. He has extensive experience in administrative, constitutional, and antitrust litigation, as well as in consulting related to relations with the State, consistently resolving disputes and contingencies in a wide variety of regulated markets.

Camilo Lledó's expertise in administrative law along with Senior Counsel, Patricio Zapata's experience in constitutional matters will allow the firm's Public Law group to provide strategic and specialized advice to its clients.

Carey has extensive experience in highly complex constitutional and administrative law issues and has represented clients before public organizations such as the Comptroller General of the Republic, the Constitutional Court, and before ordinary courts of justice in sanctioning procedures. The firm also represents clients before international organizations governed by the ICSID and provides legislative advice to public and private organizations.

Camilo is a renowned administrative lawyer and has been recognized by numerous rankings as leading the new generation of specialists in this matter. He received his law degree from the Universidad de Chile, where he graduated with maximum distinction. He has a master's degree in Regulation, with a concentration in Government and Law, from the London School of Economics and Political Science (2016), and another master's degree in Public Policy from University College London (2017), as well as a diploma in Economic Administrative Law from the Universidad Católica de Chile (2011). He is a university professor, and frequently collaborates with various public organizations and international institutions on the planning and development of public policies.

Camilo spent his formative years as an associate lawyer at Carey, and as he returns to the firm, now as a partner, he emphasized his intention to, "strengthen the advice given to clients in the face of the constant regulatory changes that are occurring in Chile. Every day, new spaces are created for collaboration between public and private entities, which presents new challenges for our legal system. Carey has the capabilities to address those challenges comprehensively."

Camilo will be joined by associate Rodrigo Domínguez, who received his law degree from the Universidad de Chile and has developed his career in public law.

Jaime Carey emphasized that, "Chile has been in intense constitutional debate for three years and despite the result of the plebiscite, we believe that these matters and sectoral regulation will continue to be a relevant challenge and cause of interest for local companies and foreign investors present in the country."

Carey is the largest law firm in Chile with more than 270 professionals in the legal area.

For additional information visit us at www.carey.cl

CITY-YUWA APPOINTMENT

TOKYO, 11 January, 2024: City Yuwa is pleased to announce the following appointments:

Naosuke Fujita, Yohei Shibuya and Takaaki Tanioka have been promoted to Partners of the Firm.

Akihiro Tsubosaka and Saki Nagai have been promoted to counsel of the Firm.

Yugo Yamaguchi, admitted in 2022, has joined the Firm.

Thirteen attorneys newly admitted, Toshihiro Aikoh, Natsuki Akazawa, Haruki Ichino, Jiei Ueda, Kaede Uchiyama, Tomoki Kotani, Tomo Tsuyuzaki, Takanari Namiki, Koki Fujimoto, Rino Mieno, Yosuke Motooka, Kento Mori, and Takumi Yaoita have joined the Firm.

For additional information visit us online at www.city-yuwa.com

HAN KUN LLP OPENS IN NEW YORK CITY

On December 18, 2023, Han Kun Law Offices ("**Han Kun**" or the "**Firm**") announced the official opening and operation in New York City of Han Kun LLP ("**Han Kun NY**"), a New York limited liability partnership established in collaboration with US-based professionals.

In the wake of Han Kun Singapore office which went into operation in April, 2023, Han Kun NY is another strategically important step of the Firm to further expand our global footprint. The new office represents the Firm's commitment to strengthen our capabilities to serve our clients' interest worldwide. Not only is Han Kun NY a critical mix in the expansion of our global network, but also a requisite platform to better serve the needs of our clients operating overseas.

Han Kun NY is located on the 2nd Floor of the Rockefeller Center, 620 Fifth Avenue, New York City, the United States of America. The new office will work closely with other US-based professional service providers as well as the Firm's other offices to meet our clients' needs in the United States. We will continue to follow the philosophy of "**China Practice, Global Vision**" and provide pragmatic, efficient, integrated and quality legal services to our corporate and individual clients and help them implement their global strategies and development in the United States and elsewhere in the world.

About Han Kun Han Kun is a leading full-service law firm in China. Over the years, Han Kun has been widely and consistently recognized as a leader in complex cross-border and domestic transactions and compliance matters. Our main practice areas include private equity, mergers and acquisitions, international and domestic capital markets, investment funds, asset management, compliance, banking and finance, aviation finance, foreign direct investment, antitrust/competition, data protection, private client/wealth management, intellectual property, bankruptcy and restructuring and dispute resolution. We have over 800 professionals located in Beijing, Shanghai, Shenzhen, Hong Kong, Haikou, Wuhan, Singapore and New York City.

For more information about Han Kun and Han Kun NY, please visit:

Han Kun Official Website: www.hankunlaw.com
Official WeChat Account: 汉坤律师事务所 (WeChat ID: hankunlaw)
Email: public@hankunlaw.com

Han Kun NY
Email: newyork@us.hankunlaw.com
New York-based Partner: Mike Chiang (蒋尚仁)
Telephone: +1 646 849 2888 Mobile: +1 415 269 5589 Email: mike.chiang@us.hankunlaw.com

DAVIS WRIGHT TREMAINE ADDS SEASONED SEC LITIGATOR AND FORMER FEDERAL PROSECUTOR TO ITS FINANCIAL SERVICES TEAM

30 JANUARY, 2024 – Building on its national reputation for excellence in securities enforcement defense, Davis Wright Tremaine LLP has added Barry O'Connell as a partner in the firm's New York office. O'Connell brings to the firm more than a decade of experience at the U.S. Securities and Exchange Commission, including as senior enforcement counsel in the Market Abuse Unit. He was most recently a federal prosecutor.

"Barry is going to be an extraordinary asset for clients facing white-collar investigations, prosecutions, and enforcement actions," said Elizabeth Davis, co-chair of the financial services practice at Davis Wright. "He has in-depth knowledge of how high-stakes investigations are conducted, both civil and criminal, and outstanding expertise in the handling of securities law matters in particular. He will significantly strengthen our regulatory enforcement bench."

"Barry brings a rich cross-section of experiences to a white-collar defense practice and will provide our clients with exceptional advocacy and insight," said financial services co-chair Bradford Hardin. "His collaborative outlook also makes him a perfect fit for our team culture. We're delighted to have him on board."

O'Connell has led numerous trials involving investment adviser fraud, securities-offering fraud, and broker-dealer audit failures. He's also handled many high-profile insider trading and market manipulation settlements. Over his career at the SEC, O'Connell charged one of the agency's largest-ever actions under the Foreign Corrupt Practices Act, charged one of the first federal prosecutions of a manipulation tactic known as "layering," and represented the agency in several heavily litigated matters, including summary judgment motions, trials, and appeals.

Prior to joining the SEC's Market Abuse Unit, O'Connell served in the Enforcement Division's Asset Management Unit and in the agency's policy section, the Division of Trading and Markets, where he helped draft the most closely watched Dodd-Frank regulation of the time, concerning conflicts of interest in asset-backed securities.

During his final year with the SEC, O'Connell served as Special Assistant U.S. Attorney in the Eastern District of New York, handling insider trading, conspiracy, and money laundering cases as a member of the Business and Securities Fraud Section. He later joined the U.S. Attorney's Office in New Jersey, prosecuting a variety of violent crime and drug offenses.

"I'm thrilled to bring my years of government experience to work on behalf of Davis Wright's top-of-market financial services practice," said O'Connell. "The current regulatory climate indicates that the need for enforcement defense will only continue to ramp up, and I can't imagine a better opportunity for me to deploy my skills than with the extraordinary clients and unparalleled team at Davis Wright."

O'Connell added: "The firm's commitment to DEI and social impact has remained rock-solid throughout this time of tumult and challenge, and that too has made a big impression on me. I look forward to playing an active role with Davis Wright's affinity group for LGBTQ+ attorneys and fusing a cutting-edge white collar practice with a purposeful pro bono practice, to the mutual benefit of both."

O'Connell received his B.S. from Cornell University and his J.D. from Cornell Law School. He began his legal career as an associate at Goodwin Procter LLP in Boston.

Learn more about the financial services practice at www.dwt.com

GIDE PROMOTES TWENTY-FIVE LAWYERS TO COUNSELS AND ONE LAWYER TO OF COUNSEL

PARIS, 30 January 2024: Gide is pleased to announce the promotion to Counsel and to Of Counsel of twenty six promising young lawyers in several practice groups. These appointments are effective as of 1 January 2024 :

Counsels:

- Margaux Allilaire, Structured Finance (Paris)
- Faten Anis, Structured Finance (Paris)
- Eric Bolis, Structured Finance (Paris)
- Edouard Bourguet, Projects (Finance & Infrastructure) (Paris)
- Thomas Brusq, Public Law, Energy & Environment (Paris)
- Corentin Charlès, Mergers & Acquisitions/Corporate (Paris)
- Lucas Chevallier, Intellectual Property (Paris)
- Marc-Antoine de Chillaz, Competition & International Trade (Brussels)
- Wojciech Czyzewski, Mergers & Acquisitions/Corporate Law (Warsaw)
- Donald Davy, Mergers & Acquisitions/Corporate (Paris)
- Foulques Delaporte, Tax (Paris)
- Bertrand Garrandaux, Real Estate Transactions & Financing (Paris)
- Sophie Gillard, Real Estate Transactions & Financing (Paris)
- Marie-Hélène Gryparis, Capital Markets (Paris)
- Barthélemy Littot, Projects (Finance & Infrastructure) (New York)
- Pauline Manet, Employment Law (Paris)
- Johanna de Mortillet, Competition & International Trade (Paris)
- Julien Negroni, Mergers & Acquisitions/Corporate (Paris)
- Aurélie Pacaud, Telecommunications, Media & Technology (Paris)
- Rafal Osetek, Real Estate Operations & Financing (Warsaw)
- Bénédicte Perrier-Walckenaer, Employment Law (Paris)
- Louis Ravaud, Capital Markets (Paris)
- Alexandre Renesson, Public Law, Energy & Environment (Paris)
- Harold Turot, Tax (Paris)
- Salim Zobiri, Mergers & Acquisitions/Corporate (Casablanca)

Of Counsels:
Joanna Jasiewicz, Employment Law (Warsaw)

KOCHHAR STRENGTHENS DISPUTES, ARBITRATION AND INSOLVENCY PRACTICE

NEW DELHI, 02 January 2024: Kochhar & Co. (the "Firm") is delighted to welcome ***Shiv Sapra*** as a Partner in our New Delhi office, bolstering the Firm's Commercial Disputes, Arbitration, and Insolvency Practices.

A seasoned litigator with over 17 years of rich and versatile experience, Shiv's expertise covers advising multinational and prominent domestic clients on contentious matters, including pre-litigation advisory, contractual disputes, corporate restructurings, and strategic matters involving general commercial law.

Shiv's clients include top-tier international banks and financial institutions whom he advises on recovery strategies, asset enforcement, and appropriations, criminal law, and writs. He actively advises clients in Engineering, Procurement, and Construction (EPC), Infrastructure, and in the Maritime/Mercantile sectors on commercial disputes and settlements.

Commenting on the recent appointment, Mr. Rohit Kochhar, Founding Member & Managing Partner of the Firm, expressed, "We are pleased to welcome Shiv Sapra to Kochhar & Co. His extensive experience and nuanced understanding of complex legal matters will undoubtedly complement our strong capabilities in Disputes, Arbitration, and Insolvency. Shiv's induction is in keeping with our commitment to continue delivering exceptional legal services to our clients."

Shiv conveyed that he is excited to be a part of the Firm and contributing to its legacy of providing an excellent client service experience. He stated, "I am thrilled to join Kochhar & Co. and contribute to the Firm's capabilities in Disputes, Arbitration, and Insolvency."

For additional information visit us at www.kochhar.com

PRAC 69th International Conference

May 25—28, 2024

Paris
Hosted by Gide Loyrette Nouel

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Early Indication and Hotel Booking NOW Open

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BRIGARD URRUTIA

ASSISTS FRENCH RETAILER CASINO IN EXIT FROM GRUPO EXITO

BOGOTA , 02 February 2024: French retailer Casino called on four White & Case LLP offices and Brigard Urrutia in Bogotá in retail company Grupo Calleja acquisition of a stake in Colombian retailer Grupo Éxito from France's Casino for US$550 million.

The deal closed on 25 January.

Casino's exit from Grupo Éxito forms part of the French company's divestment programme, through which it is selling several of its assets in Latin America to reduce its existing debt pile.

The deal marks one of the first dual tender offers for equity securities by a publicly traded company in Colombia.

It was also the first time that a buyer launched a multijurisdictional tender offer for the shares of a publicly listed Colombian company.

Its French parent company Casino manages 11,000 shops in France and Latin America, where it operates in Brazil and Colombia.

Counsel to Casino White & Case LLP; Brigard Urrutia Partners Sergio Michelsen, Fernando Castillo, Jaime Robledo, Luis Gabriel Morcillo, Adrián Rodríguez and Andrés Hernández, and associates Paola Ordóñez, Viviana Araújo, Daniel Estrada, Daniel Duque and Germán García in Bogotá

For additional information visit us at www.bu.com.co

CAREY

HELPS NOTCO OVERTURN UNFAIR COMPETITION RULING

SANTIAGO, 30 January 2024: Chilean plant-based alternative food unicorn NotCo has enlisted Carey to overturn a prior court ruling that previously barred the use of the trademark NotMilk trademark.

The initial lawsuit was filed by the Los Ríos Region Milk Producers Association (APROVAL), which called on Coz & Blavi Abogados. The Court of Appeals of Valdivia in the southern Chilean province of Los Ríos reversed the initial judgement and dismissed the lawsuit on 16 January.

The dispute began in 2020 when APROVAL alleged acts of unfair competition committed by NotCo through the use and advertising of its "NotMilk" product. The First Civil Court of Valdivia ruled against NotCo on 23 May, resulting in the ban on the commercialisation of the dairy-free milk product along with restrictions on the use of the trademark.

Carey took over the defence of NotCo after the first verdict, redesigning the strategy. As part of this new strategy, NotCo created a study with Casdem, Chile's leading market research company, during the appeal. The study revealed that 99% of consumers understood that NotMilk is not dairy milk, despite the use of the word milk on its packaging.

In the recent ruling in favour of NotCo, the court of appeals emphasised that NotCo's advertising clarifies that the product is not traditional milk.

Matias Muchnick, the founder and CEO of NotCo, announced the outcome on social media, stating: "We're officially NotGuilty."

Founded in 2015, NotCo produces a range of plant-based food products. It secured unicorn status in 2021 when it raised US$235 million in a funding round led by US private equity fund L Catterton. More recently, it entered into a joint venture with US food giant Kraft Heinz that will focus on sustainable products.

Counsel to NotCo Carey y Cia, Santiago Partners Juan Carlos Riesco and Francisco Carey

For additional information visit www.carey.cl

GIDE

ADVISES ARTEMIS ON ACQUISITION OF ROYALEMENT VOTRE EDITIONS, PUBLISHER OF THE MAGAZINE POINT DE VUE

PARIS, 25 January 2024

Gide assisted Artémis, the Pinault family's asset management company founded in 1992, on its acquisition of Royalement Vôtre Editions through the purchase of the interests held by IDI and Audacia and certain minority shareholders, including Stéphane Bern.

The magazine, which will celebrate its 80th anniversary in 2025, has established itself as a leading source of news about top celebrities. Between 2022 and 2023, the number of visitors to its website rose by 117% to 10 million.

Gide's team was headed by partners **Frédéric Mion**, **Paul Guillemin** and **Caroline Lan**, with associates **Elise Bernard** and **Apolline Couderc**, on Corporate/M&A aspects and partner **Paul de France**, on Tax aspects.

For additional information visit www.gide.com

HAN KUN

REPRESENTS JDP IN ESTABLISHING ITS FIRST RMB WAREHOUSING AND LOGISTICS INVESTMENT FUND

BEIJING, 21 December, 2023: JINGDONG Property, Inc. ("JDP") recently completed the establishment and filing of its Core Fund IV with Chinese regulatory authorities. Core Fund IV is the first RMB warehousing and logistics investment fund initiated by JDP, with JDP serving as the asset manager and executive partner. The investors include four (4) leading domestic insurance companies and institutional investors.

Han Kun, as the legal advisor for JDP, provided comprehensive legal services for the establishment of the fund, the merger filing, and transaction-related matters.

About JDP: Positioned as the sole subsidiary within JD Group specializing in the development, operation, and management of warehousing and logistics facilities, JDP possesses all of the group's self-constructed warehousing and logistics projects. Through strategic investments, asset management acumen, and the provision of diversified value-added services, JDP is dedicated to furnishing industry partners with innovative solutions comprising modern, high-standard warehouses, and integrated intelligent industrial parks. The overarching objective is to emerge as the foremost global service provider rooted in the construction and operation of intelligent industrial parks.

For more information visit www.hankunlaw.com

HOGAN LOVELLS

GUIDES FENWAY SPORTS GROUP AND STRATEGIC INVESTORS IN GROUNDBREAKING MULTI-BILLION DOLLAR INVESTMENT IN PGA TOUR ENTERPRISES

New York, Denver, 2 February 2024 – Global law firm Hogan Lovells has advised Fenway Sports Group (FSG) and a consortium of American Sports team owners – the Strategic Sports Group (SSG), in a major financial and strategic collaboration with PGA TOUR Enterprises, a new subsidiary of the PGA TOUR that includes the assets of the PGA TOUR.

The SSG includes individuals with over 200 years of combined sports team stewardship across several major global sports leagues, including the NFL, NBA, MLB, NHL, and EPL. As part of this transaction, SSG would invest up to US$3b in PGA TOUR Enterprises, and over 150 current PGA TOUR players would ultimately become equity owners of this new company.

The Hogan Lovells team was led by Matthew Eisler, partner and Global Head of the Hogan Lovells Sports practice, and partners Russell Hedman, Steve Argeris, and Mark Weinstein.

For additional information visit www.hoganlovells.com

KOCHHAR & CO.

ADVISED COMMERCIAL BANK OF DUBAI PSC TO KIRAN GEMS DMCC

January 2024

Kochhar & Co. (the "Firm") advised Commercial Bank of Dubai PSC in relation to providing working capital facilities involving advance trade receipts, trade receipts, and invoice discounting aggregating to USD 25 million to Kiran Gems DMCC ("Facilities"). The Facilities, inter alia, are secured by a corporate guarantee issued by the parent company, Kiran Gems Private Limited in India.

The Firm offered comprehensive support throughout the transaction, covering due diligence, drafting, negotiation, and the finalization of transaction documents. This included meticulous work in creating and perfecting securities, providing regulatory guidance, and ensuring compliance before and after disbursement. Additionally, the Firm played a pivotal role in overseeing the closing process and successfully completing a range of associated activities.

The transaction was led by Kochhar & Co., Banking & Finance Partner Ms. Sharmil Bhushan, Kochhar Dubai Partner Mr. Carlyn Lobo, and supported by Senior Associates Ms. Jyoti Punjabi, Mr. Prarit Sharma, and Associate Ms. Avantika Rai.

For any queries, please feel free to contact: info@kochhar.com

LEE AND LI

HONORED TO ONTRIBUTE TO THE SUNNY RICH FISHER-ELECTRICITY SYMBIOSIS SYNDICATED LOANS PROJECT

TAIPEI, 11 January 2024: The signing of the NT$15.8 billion syndicated loan project was held on January 10, 2024. A total of 17 banks responded enthusiastically to this project, with oversubscription by nearly 200%, setting a new record high for Taiwan's fishery-electricity symbiosis syndicated loan.

The funds will be invested in building a 242MW greenhouse technical aquaculture power plant in Chiayi County. We are honored to serve as the legal advisor to the financing bank, providing comprehensive legal services to assist the team in creating another milestone in Taiwan's green energy history.

For additional information visit www.leeandli.com

NAUTADUTILH

ADVISED DUTCH INSURER A.S.R. ON ITS EUR 510 MILLION SALE OF AEGON BANK N.V. (KNAB) TO BAWAG GROUP AG (THE P.S.K. BANK FÜR ARBEIT UND WIRTSCHAFT UND ÖSTERREICHISCHE POSTSPARKASSE AKTIENGESELLSCHAFT, BAWAG

AMSTERDAM, 02 February 2024: "It's a great thing to be able to contribute to the strategic goals of our clients, and even better to do so with such a dedicated and ambitious team", says lead partner Lieke van der Velden. "Navigating complexities and challenges together, while being able to draw on our broad expertise and experience in the financial sector, is what makes this work both fun and fulfilling."

“It was a true pleasure to work together again with the a.s.r. team", says Willem Bijveld, partner in NautaDutilh's Corporate M&A team. "We are committed to continue to support a.s.r. in reaching their ambitious strategic objectives."

About the transaction: a.s.r. acquired Knab as an integral part of the Aegon Nederland transaction which closed in July 2023. a.s.r. believes that the future of Knab and the service proposition to its customers is better served by being part of BAWAG following a thorough strategic review of Knab’s activities and assessment of the proposal put forward by BAWAG. The transaction is subject to customary closing conditions, such as regulatory clearance and works council advice. The closing of the transaction is expected in the second half of 2024.

In addition to the sale of Knab, an agreement was reached to transfer the management of the servicing of mortgages on Knab’s balance sheet in due time after closing, for an additional consideration of € 80 million to be paid to a.s.r.

NautaDutilh deal team. The core NautaDutilh team was led by partners Lieke van der Velden, Michaëla Ulrici and Willem Bijveld, and further consists of Jacqueline Clement, Sophie Umans, Jafar Alhashime, Twan Hamers, Mees Veeger (Corporate/ M&A), Mauricette Schaufeli, Victorine Dijkstra, Fleur Terlouw (Competition), Paul van der Bijl, Koen Biesma (Corporate Advisory), Homme ten Have, Daniël Kuiper (Employment), Joris Willems, Marlous Schrijvers (Tech/IT), Larissa Silverentand, Roderick Watson (Financial Law), Sascha van Gerrevink (Structured Finance), and Nina Kielman (Tax).

For additional information visit www.nautadutilh.com

PRAC EVENTS
BULLETIN BOARD

Like millions around the globe, the COVID-19 pandemic impacted our members and how we work.
Our industry follows others with a mix of restart and pause.
We meet in person where and when we can
while continuing to also meet and talk virtually face to face
Across the miles, oceans and regions
In varying places and at all hours of the day and night.
We pivot. We adapt.
What remains the same is our commitment to continue forming new bonds
and strengthening our long-standing ties with our friends and colleagues around the world.

Together, we will see it through.

PRAC 2024 Conferences

PARIS, FRANCE - May 25 - 28, 2024
Hosted by GIDE LOYRETTE NOUEL
Early Confirm and Hotel Booking Now OPEN

VANCOUVER, CANADA - September 21 - September 24, 2024
Hosted by RICHARDS BUELL SUTTON LLP
Early Confirm and Hotel Booking Opens Soon

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Let us know your plans to attend upcoming industry events and we will put you in touch
with other attending PRAC Delegates prior to event start
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geared to NexGen lawyers across jurisdictions

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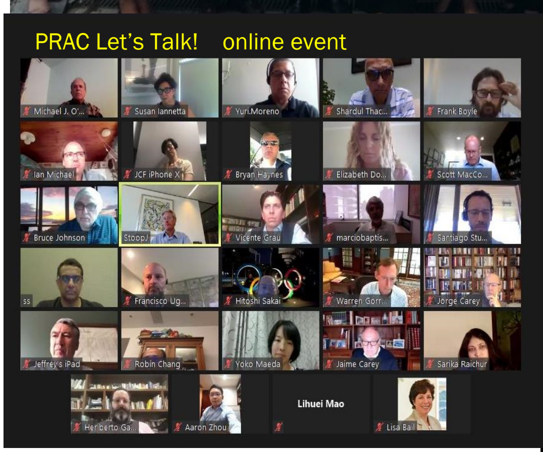
PRAC EVENTS


2019
PRAC
COSTA RICA


PACIFIC RIM
ADVISORY COUNCIL


PRAC @ SAO PAULO
PACIFIC RIM
ADVISORY COUNCIL


PRAC @ Taipei 2014


PRAC Let's Talk! online event
Michael J. O'...
Susan Iannetta
Yuri.Moreno
Shardul Thac...
Frank Boyle
Ian Michael
JCF iPhone X
Bryan Haynes
Elizabeth Do...
Scott MacCo...
Bruce Johnson
Vicente Grau
marciobaptis...
Santiago Stu...
Francisco Ug...
Hitoshi Sakai
Warren Gorr...
Jorge Carey
Jeffrey's iPad
Robin Chang
Yoko Maeda
Jaime Carey
Sarika Raichur
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The Office of Companies of the City of Buenos Aires repealed the 30-year limit for the duration of local companies

January 30, 2024

The Office of Companies ("IGJ" after its Spanish acronym) -under the direction of Inspector General, Mr. Daniel R. Vítolo- issued General Resolution 1/2024 (effective as of January 30, 2024) by which General Resolution 1/2022 was repealed.

General Resolution 1/2022 established that commercial companies whose articles of incorporation, articles of organization or by-laws had to be registered before the IGJ, could not contain a term of duration exceeding 30 years as from their registration.

In this way, the IGJ reinstates the regime that was in force prior to the implementation of General Resolution 1/2022. Under this regime, the "specified" duration period required by the Argentine Company Law (No. 19,550) or the Entrepreneurial Capital Support Law (No. 27,349) was interpreted to be up to a maximum of 99 years.

NautaDutilh

Privacy & data in the Benelux

5 things you need to know in 2024

Intro

In 2024, we believe that as in-house counsel you will have to deal with five main developments in the area of privacy and data. By anticipating these changes, you can use them to your advantage and prepare for their impact.

#1 Privacy litigation: higher fines, corrective measures, debate on class actions and cookie control

#2 Data sovereignty: data transfers outside the EU will be subject to an increasing number of regulatory requirements

#3 Advertising tech: user consent provides the legal basis for personalised advertising

#4 EU Data Act and DGA application: a new era of data economy, open data and data sharing

#5 The notion of 'personal data': anonymisation remains difficult

In its annual plan for 2024, the Dutch Data Protection Authority (AP) has announced five central themes on which it will focus: Algorithms & Artificial Intelligence (AI), Big Tech, Freedom & Security, Data Trade and Digital Government. These themes come as no surprise, as the AP has been working on them for some time. For some of these themes, particularly the fifth, this is reflected in the published enforcement actions. AI, BigTech (with actors such as Amazon and PayPal having their EMEA headquarters in Luxembourg) and Digital Government (with the introduction of the 'Once Only Principle') are high on the agenda of Luxembourg's National Commission for Data Protection (LDPA). The Belgian DPA (BDPA) has kept its promise to work on GDPR-compliant cookies and kicked off 2024 with a landmark decision on data brokerage.

#1

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The updated Guidelines 04/2022 emphasise the importance of companies taking appropriate measures to reduce the likelihood of facing high fines.

Privacy litigation: higher fines, corrective measures, debate on class actions and cookie control

The European Data Protection Board (EDPB) has updated its Guidelines 04/2022 on the calculation of administrative fines under the GDPR. It is widely expected that the overall level of fines will increase as a result. We have seen the Dutch AP become bolder, imposing a EUR 10 million fine on a sharing economy platform in January 2024, while the LDPA is still defending the EUR 746 million fine imposed on Amazon. But fines are not everything: while the BDPA's fines remain moderate, it has imposed some significant corrective measures, such as in its already landmark data brokerage case in January 2024. And in May 2023, it prohibited the transfer of personal data of Belgian 'accidental Americans' by the Belgian Federal Public Service Finance (FPS Finance) to the US tax authorities under the FATCA agreement.

Class actions in the Netherlands
The GDPR class action debate in the Netherlands will continue. A notable aspect is the discussion on whether - under article 80 GDPR - an interest group can exercise certain rights without the consent of the data subject ('opt-out'). In our view, the legislative history of Article 80 GDPR provides a strong argument for the conclusion that a collective compensation claim cannot be based on the GDPR without the consent of those concerned. This is relevant to the ongoing case in the Netherlands involving claims by interest groups against TikTok, as well as other pending claims under the Settling of Large-scale Losses or Damage Act (*Wet Afwikkeling Massaschade in Collectieve Actie* or WAMCA) for GDPR breaches.

In this context, the judgment of the District Court of Amsterdam of 25 October 2023 is relevant, where it relied exclusively on the Dutch version of Recital 142 GDPR, which states that for collective organisations, EU member states may provide that they do not have the right to claim damages on behalf of a data subject without the data subject's authorisation. In our view, the Dutch version of Recital 142 GDPR must contain a translation error, as the EU legislator wanted to prevent a culture of litigation, which is why the right to compensation was not included in Article 80(2) GDPR. With the class action proceedings still ongoing, this will remain an important topic. You can read more about our research and opinions in our article on class actions under the GDPR.

Settlement decisions in Belgium on the use of cookies
An interesting procedural trend developing in Belgium is that of settlement decisions. The first set emerged in October and November of 2022, where the BDPA settled cases against press groups for alleged infringements related to the use of cookies on their websites through payment of EUR 10.000 per case, without imposing any further obligations under the GDPR. The cases were closed and no violation was found under the GDPR. Some have criticised these decisions, saying they give the wrong impression that organisations can avoid GDPR compliance by paying a fee.

In December 2023, the BDPA took a different approach. After five complaints filed by the NYOB against Belgian media companies for their use of cookies, it again offered settlement proposals. In these cases, the settlements were subject to the compliance with obligations instead of the payment of a sum of money. Such obligations included:

- Provide a 'Refuse all' button' next to the 'Accept all' button
- Not to make the 'Accept all' button more visually prominent than other options
- Not to make the 'Refuse all' button visually less attractive than other options
- Ensure that the procedure for withdrawing consent does not require more clicks than giving consent

These companies were given one month from the date of the settlement decision to implement the changes on their websites. In return, no infringement of the GDPR was found. We believe that this approach of the BDPA is more constructive. It will be interesting to see how this plays out in 2024.

#2

Data sovereignty: data transfers outside the EU will be subject to an increasing number of regulatory requirements

Data sovereignty in the EU, which encompasses all requirements regarding the control, access and location of data within the EU, will remain an important issue in 2024, as data transfers outside the EU will be subject to an increasing number of regulatory requirements.

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The EU-US Data Privacy Framework (DPF) may mark a trend for adequacy decisions adopted under the GDPR to have a more specific scope rather than a general recognition that a third country provides an equivalent level of data protection.

The EU-US Data Privacy Framework (DPF) has come into force, with only transfers of personal data to US entities that self-certify on the DPF list benefiting from the EU Commission's adequacy decision for the purposes of GDPR compliance. This may mark a trend for adequacy decisions adopted under the GDPR to have a more specific scope rather than a general recognition that a third country provides an equivalent level of data protection, as was the case with the adequacy decisions under Directive 95/46/EC which was repealed by the GDPR. The Commission also re-validated the 11 adequacy decisions adopted under the former directive on 15 January 2024, and continues to monitor the arrangements in place, in particular with the UK and the US.

Other regulatory hurdles include increased requirements for certain entities to rely on service providers located outside the EU, such as requirements for financial sector entities to have system resiliency within the EU, as well as obligations to take measures to prevent international and third country governmental access and transfer of data, such as the supplementary measures to be adopted in certain international transfers of personal data under the GDPR, and the obligations of data processing service providers in relation to non-personal data under the Data Act.

One response to the above trends has been the increased availability of products promising EU data sovereignty, such as offerings from cloud service providers that guarantee that no data will be transferred outside the EU, with the intention of avoiding regulatory hurdles and meeting the expectations that certain European customers may have. Examples include Microsoft's EU Data Boundaries programme, which went live in 2023, and the Clarence project between telecom group Proximus and Google. The Dutch government has also been quite active and successful in negotiating data sovereignty guarantees in its dealings with players such as Amazon Web Services, Microsoft and Zoom.

#3

Advertising tech: user consent provides the legal basis for personalised advertising

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From 9 March 2024, the DMA requires gatekeepers to obtain the consent (opt-in) of end users for the processing of their personal data for personalised advertising, prohibiting reliance on the gatekeeper's legitimate interests.

The digital advertising sector, one of the most prominent data-driven industries, has seen a significant number of regulatory developments and high-profile cases in the recent years. This trend is set to continue in 2024. In its recitals, the Digital Markets Act (DMA) explicitly links the processing of personal data by so-called gatekeepers and the resulting barriers to competition. From 9 March 2024, the DMA requires gatekeepers to obtain the consent (opt-in) of end users for the processing of their personal data for personalised advertising, prohibiting reliance on the gatekeeper's legitimate interests. The DMA also requires that the less personalised alternative should not be different or of inferior quality compared to users who have opted in. The gatekeeper is also bound to disclose certain data to advertisers and publishers in order to assess the performance of ads on the gatekeeper's platform.

Developments are also expected in relation to the IAB Europe's Transparency and Consent Framework (TCF). In 2022, the BDPA ruled that the original TCF did not comply with GDPR. IAB Europe appealed to the Belgian Market Court, which referred two questions to the EU Court of Justice regarding the qualification of the TC string (the digital signals created to capture data subjects' choices with respect to how personal data can be processed) as personal data and IAB Europe's role as data controller. A judgement is expected in late 2024/early 2025, which may result in changes to the TCF. A ruling on Amazon's appeal against the EUR 746 million fine imposed by the LDPA in relation to targeted advertising is also expected during 2024.

Regulators and civil society organisations are showing increasing interest in the 'pay-or-consent' mechanism used by a growing number of websites, where users who refuse to consent are asked to subscribe or pay a fee to access the website's content. On 26 January 2024, supervisory authorities in Norway, the Netherlands and Germany have asked the EDPB to issue a formal opinion on the matter, indicating that such consent may not be freely given, as required by the GDPR.

#4

EU Data Act and DGA application: a new era of data economy, open data and data sharing

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The DGA provides a series of data intermediation services designed to provide a secure environment for organisations or individuals to access information. These services will help organisations meet their legal obligations regarding data sharing.

The European Data Strategy aims to make the EU a leader in a data-driven society. The resulting Data Governance Act (DGA) and the Data Act have entered into force in 2023, with the first applications in member states to be expected in 2024.

The DGA is aimed at public sector bodies and sets out conditions for the re-use of certain categories of data subject to certain protections (such as personal data and intellectual property) held by said bodies, as well as rules for providing data intermediation services. It also introduces a framework to facilitate data altruism for general interest purposes. The DGA includes harmonised principles such as the prohibition of exclusive arrangements between a public sector body and a given actor, and the obligation for published non-discriminatory conditions when requesting the re-use of data. The DGA aims to complement the broader Open Data Directive, which excludes such protected data from its scope.

The Data Act applies to private and public entities, including both B2B and B2C relationships, and aims to make all data generated by the use of a connected product or service (product and service data) easily, securely, free of charge, in a comprehensive, structured, commonly used and machine-readable format, and, where relevant and technically feasible, directly accessible to the user by default.

#5

The notion of 'personal data': anonymisation remains difficult

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The line between anonymity and pseudonymity, and therefore when data protection frameworks such as the GDPR apply, remains unclear.

Most privacy compliance frameworks such as the GDPR do not protect anonymised data, as it can no longer lead to an identified or identifiable person. However, these frameworks do apply to pseudonymised data when such data can still lead to an identified or identifiable person with additional information. The line between anonymity and pseudonymity, and therefore when such privacy frameworks apply, remains however unclear.

There is some debate as to whether the SRB case (before the EU General Court, currently under appeal before the CJEU) concluded on a new risk-based approach to define anonymisation from the perspective of the recipient of such data. In our view, this was already the conclusion reached in the Breyer case and the 2023 Scania case before the CJEU. If a data recipient does not have additional information to re-identify the data subjects and/or does not have legal means to access such information, the transferred data can be considered anonymised. However, the SRB case highlights that a supervisory authority must assess whether data is anonymised or not from the perspective of the recipient, and cannot assume by default that there is no anonymisation and expect the parties to prove otherwise.

The issue of anonymisation remains key, not only in data sharing initiatives at the European level such as the Data Governance Act and the European Health Data Space. It is fundamental in data-driven industries and, in particular, in the development of AI products. Aggregated data relied upon in such cases may still be considered personal data and subject to the above privacy frameworks (and their limits on international transfers). However, it should be examined if there are means to de-identify the data.

About the team

NautaDutilh's Technology & Privacy team combines in-depth knowledge and understanding of its clients, their technologies and sectors with a pragmatic approach to solving legal issues. The team operates at the intersection of technological innovation and the law, focusing on finding creative solutions to technology-driven challenges. Our team members are skilled in advising on fast-growing and emerging new technologies, including cloud computing, cybersecurity, data monetisation, open source software, AI, OTT, fintech and distributed ledger technology. In addition, the team has extensive experience in advising clients on a wide range of data protection issues. This includes conducting GDPR gap analyses, drafting and reviewing privacy policies, advising on international data transfers, data protection provisions in contracts and employee monitoring, and liaising with data protection authorities.

Contact

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Tozzini Freire. ADVOGADOS

Brazil incorporates Mercosur rules on Special Customs Regimes

February 02, 2024

Decision No. 10/21 of the Mercosur Common Market Council – which authorizes the application of the special import regimes of Drawback and temporary admission for intra-zone trade, i.e. trade between Argentina, Brazil, Paraguay, and Uruguay, until the end of 2030 – was incorporated into the Economic Complementation Agreement N° 18 (ACE 18), which is the free trade agreement that underpins Mercosur in the scope of ALADI.

The incorporation of this Decision was already the subject of the 215th Additional Protocol to ACE 18, but it had not yet been ratified by the Brazilian Executive Branch, which did so by means of Decree No. 11,896/2024, of January 23, 2024.

In the specific cases of Paraguay and Uruguay, if they do not use such special regimes, they may apply a 0% tax rate to the import of agricultural inputs, in accordance with the list of tariff items to be notified to the Mercosur Trade Commission.

In addition, Paraguay's differentiated regime for the import of raw materials with a tax rate of 2% was also extended until December 31, 2030.

Posted on: July 26, 2023

DUTY TO DEFEND: ONCE AGAIN, PLEADINGS ARE PARAMOUNT

By: Alexander Bogdan

In the recent case of *Surrey (City) v. Co-Operators General Insurance Company,* 2023 BCSC 955, the Supreme Court of British Columbia found that an insurer had a duty to defend an additional named insured after ruling that extrinsic evidence tendered by the insurer could not be used to trigger an exclusion clause.

Factual Background:

In the underlying action, Mr. Lanki claimed that, among other things, the City of Surrey had improperly maintained a leg press machine (the "Machine") at the Surrey Recreation and Leisure Centre causing an injury to Mr. Lanki (the "Underlying Action"). In particular, Mr. Lanki alleged that an incorrect pin was placed in the Machine which had fallen out and led to his injury.

In regards to the Machine, Surrey had contracted with Roland Cerf, Dorothy Cerf, and Elk Fitness Repair (collectively, "Elk") to provide the maintenance and repair of its fitness machines and, as part of the agreement, for Elk to obtain general commercial liability insurance that included Surrey as an additional insured.

Elk took out an insurance policy with the insurer (the "Policy") which contained an Additional Insured Endorsement noting that the additional insured, i.e. Surrey, would not be covered by the Policy where there was

> "Bodily Injury" or "Property Damage" arising out of any act or omission of [Surrey] or any of its employees (the "Exclusion Clause").

Surrey brought an action to compel the insurer to defend it with respect to the allegations made by Mr. Lanki. In particular, Surrey alleged that the pleadings in the Underlying Action allege negligence in the maintenance and condition of the Machine, for which Elk was at least partly responsible.

In response, the insurer brought a separate action to summarily dismiss the claims made against it in the Underlying Action on the basis that Elk was not negligent with respect to Mr. Lanki's injury. The insurer then opposed Surrey's action by claiming its summary dismissal application should be heard first, as a finding that Elk was not negligent will allow it to rely on the Exclusion Clause and thereby oust its duty to defend

Surrey under the Policy. The insurer also sought to tender extrinsic evidence that would indicate Elk had not placed the problematic pin.

The Ruling:

The court started its analysis with the test for triggering a duty to defend, otherwise known as the “pleadings rule”, as described in the Supreme Court of Canada decision *Monenco Ltd. v. Commonwealth Insurance Co.,* 2001 SCC 49 [*Monenco*]. First, the court had to determine whether the pleadings alleged facts which, if true, would require the insurer to defend Surrey in the Underlying Action. The court clarified by stating that this principle will apply even when the actual facts may differ from the allegations pleaded.

Based on the allegations contained in the pleadings of the Underlying Action, the court found that the insurer would be obligated to defend Surrey.

In addressing the Exclusion Clause, and whether it would oust the insurer’s duty to defend, the court relied on the ruling in *Co-operators General Insurance Company v. Kane*, 2017 BCSC 1720 stating that unless all occurrences which potentially caused or contributed to the loss or damage are clearly and unambiguously excluded in the Policy, coverage for the duty to defend will not be ousted. Here, the court found that:

> …based on the pleadings, it cannot be said that all claims against Surrey are divisible from those which are covered within the insurance policy thus the exclusion clause does not oust the [insurer’s] duty to defend.

Of important note, and in reference to the extrinsic evidence submitted by the insurer, the court stated that to review and make findings on said evidence would amount to a trial within a trial. At this stage of the Underlying Action, it did not matter whether Elk would ultimately be found liable in their placement of the pin, as the analysis related to the duty to defend is based primarily on the pleadings alleged. Furthermore, in referencing *Monenco*, the court stated that only extrinsic evidence which has been expressly referred to in the pleadings and which may assist in determining the substance and true nature of the allegations may be considered.

Ultimately, the court refused to consider the extrinsic evidence submitted by the insurer in support of its claim and held that the insurer had a duty to defend Surrey based on the allegations in the pleadings alone.

Practical Implications for Insurers and Insured:

This case is a good reminder of the fact that an insurer’s duty to defend is triggered by the allegations contained in the pleadings of an underlying action which, if true, could establish liability on the part of the insured. While extrinsic evidence *may* be considered, this is limited only to its effect on the courts' ability to determine the substance and nature of the allegations in the pleadings. Furthermore, any extrinsic evidence will only be considered where it is expressly referred to in the pleadings of the Underlying Action.

Practically speaking, it is important to remember that an insurer may have a duty to defend an insured regardless of whether the insured is ultimately liable. Further, it will indeed be a rarity where an insurer can take steps to trigger an exclusion clause by advancing a parallel procedure to obtain a supportive factual determination; courts are unlikely to accede to such procedural endeavours, particularly when prejudice to an insured's coverage position may be the natural outcome of the procedure.

For more information about this article, contact the author, Alexander Bogdan here.

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NEWS ALERT

CORFO defines priority strategic sectors for venture capital investment

January 31, 2024

Recently, the Chilean Economic Development Agency ("CORFO") published Resolutions No. 122 and 123, which define the strategic segments or sectors that will be classified as "priority" in the framework of its financing programs for venture capital funds - Early-Stage Technology Funds (FET), Early Stage Funds (FT) and Development and Growth Funds (FC).

Venture capital funds investing in these sectors will be qualified by the Venture Capital Committee of CORFO as Priority Funds and will be eligible for the benefits indicated below.

I.*Segments/Sectors classified as priority*

The sectors/segments classified as priority are the following:

1. **Companies led by women**, meaning legal entities, incorporated in Chile, with profit-making purposes, in which:
   a. One or more women own at least 50% of the capital; or
   b. One or more women hold at least 30% of the capital, and that, in addition, one or more women are the legal representatives of the company.
2. Those destined to the so-called "**Decarbonization of the Productive Matrix**", understood as those whose purpose is the development of actions aimed at the reduction of carbon emissions to the environment, through the substitution or replacement of the use of energy sources based on coal or hydrocarbons such as oil or gas, for alternative sources such as green hydrogen, solar, wind or other non-conventional renewable energies.

II.Benefit

The benefit for funds whose purpose is to invest in any of the priority segments consists of the following:

- For those funds subject to the FET program: the fund is exempted from paying additional interest by applying a 10-year BCU rate on the amounts effectively disbursed to the Fund (without this benefit it would instead be applicable a 10-year BCU rate plus 5% per annum).
- For those funds subject to the TF and HF programs: These funds are exempt from paying interest on the amounts effectively disbursed to the Fund (without this benefit, it would instead be applicable a 10-year BCU rate plus 2% per annum).

The 10-year BCU rate is an internal rate of return of the 10-year bonds issued by the Central Bank of Chile, which are adjustable in UF. It is a risk-free rate since it is a long-term instrument issued by the government.

III. Beneficiaries

The funds that may access the benefits are those financed through the FET, FT and FC programs, which contemplate in their investment policy, to invest in companies that are part of the sectors indicated in letter A and that comply with the requirements therein contemplated, circumstance that will be qualified by CORFO's Venture Capital Committee, without prejudice of the verification made by the Investment and Financing Management when approving the respective disbursement. The Funds may establish additional requirements in their Investment Policy, but they may not be contradictory or provide exceptions to the provisions of letter A.

IV. Validity of the benefits

The benefits indicated shall remain in force for the funds as long as they maintain, in the investment policy of their respective internal regulations, the investment in the sectors defined as priority sectors.

V. Context

The faculty of CORFO to qualify as "priority" certain sectors or segments defined as strategic, in geographic territories or in a group of legal or natural persons, and the associated benefit, was first introduced by the consolidated text of each of the FET, FT and FC Programs, agreed by the Venture Capital Committee in 2022.

In the case of the FT Program, those funds whose purpose is to generate social impact in their investments will also be beneficiaries of the interest exemption indicated. Said social impact must be accredited at the time of applying to the Program and be consistent with their Business Plan and Investment Policy. This is in accordance with the consolidated text of the FT Program (Corfo Resolution No. 35).

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Legal Commentary

January 15, 2024

Reform of Capital Contribution Rules in the 2023 Company Law – What Companies and Shareholders Need to Know

Authors: Aaron ZHOU | Han LIAO | Yumeng HE | Jiajie ZHANG

China's Company Law was enacted in 1993 and underwent certain amendments in 1999, 2004, 2005, 2013 and 2018. In response to the latest trends and demands in economic development, China adopted a comprehensive amendment to the Company Law on December 29, 2023 (the "**2023 Company Law**"), which will take effect on July 1, 2024.

The rules concerning capital contribution are of great importance to companies and their shareholders and creditors. This article will focus on the amendments related to the capital contribution rules with respect to limited liability companies in the 2023 Company Law, and will try to provide some insights and practical advice in relation to such amendments.

Capital contribution timeline

Paragraph 1 of Article 47 of the 2023 Company Law
The registered capital of a limited liability company is the total amount of capital contributions subscribed by all shareholders as registered with the company registration authority. The subscribed capital shall be fully paid by the shareholders within five years from the date of the company's establishment as stipulated in the company's articles of association.

I. Evolution of capital contribution timeline requirement for limited liability companies

The capital contribution timeline requirement for limited liability companies has undergone numerous discussions and amendments in light of the changing economic and social development since the first enactment of the Company Law in 1993 (as illustrated in the following table).

	Company Law of 1993	Amendment to Company Law in 2005	Amendment to Company Law in 2013	2023 Company Law
Capital contribution timeline for limited liability companies	One-time paid-in capital	The registered capital is required to be fully paid within 2 years (5 years for investment companies)	No specific requirement	The registered capital contributions are required to be fully paid within 5 years

The amendment to Company Law in 2013 removed the statutory time limit for making capital contributions and lifted the minimum registered capital requirements. This amendment raised considerable concerns, as shareholders can indefinitely postpone the capital contribution deadline, and the registered capital amount of a company may not accurately reflect such company's financial strength.

Article 47 of the 2023 Company Law provides that the capital contribution of a limited liability company shall be fully paid within five years of its incorporation, which will strengthen shareholders' commitments on capital contribution, better protect creditors' interests, and encourage a more rational approach in determining the registered capital amounts of limited liability companies.

II. Commentary on Article 47 of the 2023 Company Law

What impacts will Article 47 of the 2023 Company Law have on existing companies and their shareholders, and what are the key takeaways for companies to be incorporated and shareholders who may subscribe for increased registered capital in the future?

1. Impact on existing companies

■ Transition period

Existing companies and their shareholders may be concerned about the application of capital contribution timeline under the 2023 Company Law, including whether they are supposed to reduce the registered capital amounts or make capital contributions as soon as possible, and whether the company's article of association needs to be amended to adjust the timeline to make capital contributions. To clarify these points, paragraph 2 of Article 266 of the 2023 Company Law provides that "*For companies incorporated before this law comes into force, if their capital contribution timeline exceeds the timeline stipulated herein, they shall gradually adjust to meet the timeline provided herein, unless otherwise provided by any laws, administrative regulations, or the State Council; in the scenario where the capital contribution timeline or amounts are clearly abnormal, the company registration authority may require timely adjustments in accordance with the law. The specific implementation measures shall be prescribed by the State Council.*" The representative of the Legislative Affairs Commission of the Standing Committee of the National People's Congress also stated in the response to media inquiries on the 2023 Company Law that: "*The State Council is tasked to issue implementation measures for the 2023 Company Law, including setting a transition period for companies incorporated prior to the effectiveness of this law with capital contribution timeline exceeding the required timeline under this law, and such companies will be required to gradually adjust their capital contribution periods to be in line with this law.*"

The above regulations and statements have dispelled the previous speculation of "existing rules for existing companies, and new rules for new companies". In other words, there is no grandfathering for existing companies in this respect. The five-year capital contribution timeline will apply to all companies, including those incorporated before the promulgation and implementation of the 2023 Company Law. Therefore, it is suggested that the existing companies and their shareholders keep a close eye on the implementation measures to be promulgated by the State Council.

Registered capital reduction

Although the State Council has not promulgated implementation measures for the 2023 Company Law, it is anticipated that some companies may need to reduce their registered capital to lower capital contribution requirements to mitigate the potential impact on the cash flow of their shareholders.

Article 225 of the 2023 Company Law introduces a simplified capital reduction procedure, which applies to companies that have incurred losses and whose asset value is significantly lower than their registered capital. Under this simplified procedure, such companies may reduce their registered capital and announce capital reduction through the National Enterprise Credit Information Publicity System, without the need to notify creditors or publish an announcement in newspapers, which are typically required for normal capital reduction procedures. Such simplified capital reduction procedure aims to ensure such companies' registered capital aligns with their actual operational and financial strength, while keeping such companies' solvency and avoiding the companies' assets flowing back to their shareholders.

2. Key takeaways for companies to be incorporated

Article 50 of the 2023 Company Law generally follows the current Company Law on the capital contribution obligations of founding shareholders, and provides that: "*When a limited liability company is incorporated, if a shareholder fails to make an actual payment of capital contributions as stipulated in the company's articles of association, or if the actual value of non-monetary assets contributed falls significantly below the subscribed capital amount, the other shareholders at the time of establishment shall bear joint and several liability with that shareholder for such shortfall in capital contributions.*" However, compared with the current Company Law, the 2023 Company Law provides that founding shareholders shall bear joint and several liability only for the shortfall in capital contributions of the defaulting shareholder.

Therefore, for companies to be incorporated, it is suggested that founding shareholders set the amount of registered capital properly, monitor the progress of capital contributions made by other founding shareholders, conduct necessary due diligence and understand the financial strength of other founding shareholders.

3. Key takeaways for shareholders subscribing for increased share capital

Article 228 of the 2023 Company Law says that "*When a limited liability company increases its registered capital, the contribution of its shareholders to the new capital shall be made in accordance with the relevant provisions of this Law regarding the payment of capital contributions for the establishment of a limited liability company*", which means that the five-year capital contribution timeline also applies to capital increases. Consequently, shareholders subscribing for increased capital shall pay the increased registered capital within five years (or a shorter period provided for in the articles of association).

Written payment demand and forfeiture of shares

Article 51 of the 2023 Company Law
After the establishment of a limited liability company, the board of directors shall verify the shareholders' capital contributions. If it is found that a shareholder has not timely and fully made capital contributions as stipulated in the articles of association, the company shall serve a written notice to the shareholder to demand payment of capital contributions. Directors who fail to fulfill the obligations stipulated in the preceding paragraph in a timely manner, resulting in losses to the company, shall be liable for compensation.
Article 52 of the 2023 Company Law
If a shareholder fails to make capital contributions by the date specified in the company's articles of association, and the company issues a written payment demand in accordance with the first paragraph of the preceding article, the company may specify a grace period for the capital contribution in the written payment demand, which grace period shall not be less than 60 days from the date the company issues the payment demand. If, upon the expiration of the grace period, the shareholder still fails to fulfill the capital contribution obligation, the company may, with a resolution of the board of directors, issue a notice of forfeiture to the shareholder, and such notice shall be in writing. From the date of the notice, the shareholder loses the rights to the unpaid share capital. The shares forfeited according to the preceding paragraph shall be transferred in accordance with the law or the registered capital shall be reduced accordingly with the cancellation of those shares; if the transfer or cancellation is not completed within six months, other shareholders of the company shall make corresponding capital contributions in full in proportion to their respective contributions. If the shareholder has objections to the forfeiture, it shall file a lawsuit with the people's court within 30 days of the receipt of the notice of forfeiture.

I. Comparison between Articles 51 and 52 of the 2023 Company Law and Article 17 of Judicial Interpretation III of the Company Law

Before the 2023 Company Law, Article 17 of the *Provisions of the Supreme People's Court on Several Issues Relating to Application of Company Law of the People's Republic of China (III)* ("**Judicial Interpretation III of the Company Law**") already provided mechanisms similar to the written payment demand and share forfeiture. The 2023 Company Law goes one step further and allows both the company and its shareholders to seek remedies against capital contribution defaults of other shareholders.

	Judicial interpretation III of the Company Law	2023 Company Law
Applicable scenarios	Failure to fulfil capital contribution obligations or withdrawal of all capital contributions, and such failure is not cured within a reasonable period after being demanded by the company.	Failure to pay capital contributions by the date specified in the company's articles of association, and still failure to fulfill the capital contribution obligations within the grace period.
	Comments: The share forfeiture mechanism stipulated in Judicial Interpretation III of the Company Law is not applicable if the shareholders have partially paid capital contributions or only partially withdrawn capital contributions, which makes it	

<table>
<tr><td></td><td colspan="2">challenging to effectively achieve the intended purposes.</td></tr>
<tr><td rowspan="2">Legal effect</td><td>The forfeited shareholder is disqualified from being a shareholder.</td><td>From the date of the demand, the defaulting shareholder loses the rights to the unpaid registered capital.</td></tr>
<tr><td colspan="2">Comments: The application of the Judicial Interpretation III of the Company Law will result in the defaulting shareholder losing the entire share capital and their shareholder status, although in practice judicial authorities have already started to support partial forfeiture of share capital in some cases. The 2023 Company Law has paved the way to overcome such a predicament.</td></tr>
<tr><td rowspan="2">Procedural requirements</td><td>■ Failure to make the payment or return the withdrawn capital contribution within a reasonable period after being demanded by the company.
■ The company passes a shareholders' resolution to disqualify the shareholder.</td><td>■ Failure to pay the capital contribution within the grace period after being demanded by the company.
■ Issuance of a notice of forfeiture to the shareholder pursuant to a resolution of the board of directors.</td></tr>
<tr><td colspan="2">Comments: According to the 2023 Company Law, the right to confirm the issuance of a notice of forfeiture shifts from shareholders to directors, which is in line with the board of directors' duties to supervise capital contributions.</td></tr>
<tr><td rowspan="2">Subsequent process</td><td>Prompt completion of capital reduction procedures, or other shareholders or a third party paying such capital contribution.</td><td>Reduction or transfer of share capital within six months.</td></tr>
<tr><td colspan="2">Comments: The 2023 Company Law specifies the timeframe for the disposal of the forfeited share capital, which enhances the stability and clarity of the company's capital structure.</td></tr>
</table>

II. Commentary on Articles 51 and 52 of the 2023 Company Law

1. Verification of capital contributions and issuance of written payment demand

Article 51 of the 2023 Company Law provides that the board of directors shall verify the capital contribution, and if a director fails to perform such obligations in a timely manner and causes losses to the company, such responsible director shall be liable for the compensation.

■ **Board of directors' right to verify capital contributions**

The 2023 Company Law tends to give the board of directors more supervisory rights, given that the supervisors/board of supervisors have not been proven to be very effective in supervising corporate governance in practice. For example, the 2023 Company Law introduces the concept of an audit committee (consisting of directors), which is expected to exercise the powers and functions of the supervisors/board of supervisors.

Although the 2023 Company Law provides that the board of directors shall verify and supervise the payment of capital contributions, it does not expressly grant the directors access to the company's accounting books or other materials. It is advisable for companies to specify in the articles of association or other corporate documents the rights and authorities of directors to review the register of shareholders, capital contribution certificates and necessary accounting records. This will help the board of directors exercise their rights to verify capital contributions, especially in light of the 2023 Company Law's emphasis on the supervisory functions of the board of directors. On the other hand, for confidentiality considerations, some companies may wish to limit directors' access to information that is necessary to perform their duties.

- **Compensation liability of directors**

The 2023 Company Law imposes compensation obligations on directors who fail to fulfill the obligations to verify capital contributions and cause the company to demand payment. Therefore, it is advisable for directors to keep records of their efforts to verify shareholders' capital contributions and cause the company to demand payment of capital contributions from the defaulting shareholders, which could help directors defend against compensation claims.

Meanwhile, for investors in private equity and venture capital deals that are entitled to appoint directors, it is suggested that the transaction documents contain clauses granting the appointed directors the specific rights of verification and supervision. This will help the directors perform their statutory duties of verification and demanding payment of capital contributions. Director liability insurance is also a good option to protect the appointed directors.

2. Forfeiture of share capital

According to Article 52 of the 2023 Company Law, the company shall dispose of the forfeited share capital within 6 months by transferring such share capital or canceling such share capital through registered capital reduction. If the forfeited share capital is not transferred or canceled within such 6 months, the other shareholders shall pay such outstanding capital contributions in proportion to their respective shareholding ratio.

Given the time limit for the disposal of the forfeited share capital, the company may wish to start to find a transferee or start to prepare for capital reduction concurrently with or shortly after issuing the notice of forfeiture. Furthermore, to streamline the disposal process, it is advisable to specify in the articles of association and other corporate documents (such as the shareholders' agreement) that the shareholders whose share capital has been forfeited are obligated to cooperate with the disposal process, including the possible share transfer and registered capital reduction.

Additionally, since the 2023 Company Law imposes obligations on other shareholders to make capital contributions in proportion to their shareholding percentages for forfeited share capital not disposed of within the 6-month timeline, it is suggested that shareholders monitor the capital contribution progress of other shareholders and the register of members, and cause the directors and the company to promptly demand the relevant shareholders to rectify any default in capital contributions, thereby avoiding the risks of being asked to make capital contributions for forfeited share capital of other shareholders.

Meanwhile, companies may consider to address in the articles of association and other corporate documents (such as the shareholders' agreement) issues not specifically addressed in the 2023

Company Law, such as revoking the voting rights of directors appointed by the defaulting shareholders and/or allowing defaulting shareholders or their representatives to attend board meetings and present their cases.

Acceleration of capital contribution timeline

Article 54 of the 2023 Company Law
If a company is unable to pay off the due debts, the company or the creditors of the due debts shall have the right to demand early capital contributions from shareholders whose subscribed capital contributions are not yet due for payment.

The rationale behind the capital contribution acceleration rules is that, under certain circumstances, the interests of shareholders with respect to the capital contribution timeline shall give way to the interests of creditors, and the company's registered capital shall be used to facilitate the enforcement of creditors' rights.

Under the current rules, if a company is unable to pay its due debts, the creditors are generally unable to demand the shareholders of the company to pay capital contributions not due for payment, unless under limited circumstances such as the company already in the bankruptcy or dissolution process or intentional extension of capital contribution timeline to avoid debts.

Article 54 of the 2023 Company Law aims to expand the scenarios where acceleration of capital contribution timeline is applicable, pursuant to which, as long as a company is unable to pay off its due debts, the creditors may require early capital contributions from shareholders, even if such shareholders' subscribed capital contributions are not yet due for payment. This provision also shows that the 2023 Company Law puts more weight on creditor protection.

Meanwhile, further guidance is needed on how to determine whether a company "is unable to pay off its due debts" under Article 54 of the 2023 Company Law. For instance, it remains unclear whether creditors can demand to accelerate capital contributions when a company has sufficient assets or funds but refuses to pay off its due debts.

In addition, Article 54 of the Company Law does not elaborate on the nature and extent of shareholders' liability. Shareholders may want to specify in the articles of association and/or shareholders' agreement that the shareholders who are required to expedite their capital contributions only need to contribute an amount necessary to settle the company's outstanding due debts, and the timeline for the remaining capital contributions shall be unaffected, although such provisions (as an agreement between the shareholders and the company) may not be used as a defense against creditors. Some shareholders may want to go one step further to require to state in the articles of association and/or shareholders' agreement that the company shall, after paying off the creditors, reimburse the shareholders for any losses (such as the loss of benefits of the original capital contribution timeline) caused by such capital contribution acceleration.

Conclusion

Capital contribution rules form the bedrock of a company's financial strength and play a vital role in companies' operations. The 2023 Company Law introduces a series of reformative measures, including the capital contribution timeline, written payment demand and share capital forfeiture. It is advisable for shareholders, directors and management of limited liability companies to pay close attention to these new rules related to capital contribution, and implement appropriate measures to protect the companies' and their shareholders' interests.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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Brigard Urrutia

New Regulation for Mineral Traceability

15 of January

The Ministry of Mines and Energy published Decree 2234 of 2023, which adds a new section to the Decree 1073 of 2015 ("DUR"), with the purpose of regulating the procedures to determine the origin and traceability of minerals, record mining transactions, and implement necessary control tools.

This addition is made to regulate and control mining activity in Colombia, ensuring the lawful origin of minerals to prevent informal production and commercialization of minerals, and simultaneously promoting transparent transactions in the mineral supply chain in Colombia.

Among the provisions added to the DUR, we highlight the following:

- An online registration of mineral commercialization transactions is established as a traceability mechanism for operations, in order to validate their lawful origin and control their commercialization. This registration will be carried out through a technological platform designated by the mining authority.

- **To determine the lawful origin of traded minerals, differential requirements are established considering the condition of those who commercialize, as follows:**

1. For beneficiaries of formalization mechanisms and mining titleholders in the exploitation stage: The mining authority will verify the production volumes declared by producers trough a system that will be implemented to verify the installed capacity of all mining production units.

   Additionally, the authority will consult the information available in existing instruments such as Anna Mineria or equivalent platforms, validated work and development programs, environmental instruments, the Unique Registry of Mineral Traders ("RUCOM"), mining supervision tools, origin certificates, production control systems, online transaction records, production declaration forms, royalty payment records, as well as the Basic Mining Format.

2. For subsistence mining: Authorized traders must validate that minerals come from subsistence activities through the RUCOM and the production declaration certificate. Additionally, a technological platform will be structured for traceability and to carry out the corresponding verifications.

- **The mining authority is instructed to implement mechanisms to ensure the origin and traceability of minerals, for which it must:**

1. Integrate internal information systems.
2. Implement tools to verify and control the production volumes of Authorized Mining producers.
3. Establish parameters to validate the identity of said producers.
4. Create tools to identify the quantity of commercialized minerals and the actors involved in the commercialization chain.
5. Ensure the proper functioning of the online commercial transaction recording system.
6. Allow interoperability and information exchange with other entities related to control and surveillance in the mining chain.

- **The mining authority must strengthen collaborations with control and surveillance entities in mining activity to exchange information. This will be done through the following alternatives:**

1. Allowing the Ministry of Mines and Energy and other relevant entities to access to the platform.
2. Ensuring that the platform complies with legal standards of transparency and access to information.
3. Guaranteeing the reliability and updating of information.
4. Implementing measures for information security.
5. Having the necessary technical tools and infrastructure for information exchange.
6. Conducting proper advertising and dissemination of the system to the involved actors in the mining chain.

- **The mining authority will coordinate with the Colombian tax authority ("DIAN") to obtain lists of artisanal miners with suspension or cancellation of the Unique Tax Registry.**

  This information will be sent to the local mayor's office to verify the renewal of the artisanal miner's registration on the Genesis platform and in the RUCOM. If DIAN suspends individuals or legal entities engaged in mineral exports, the mining authority will suspend their listing in the RUCOM.

  Finally, when the mining authority detects excesses in the permitted production volumes in the RUCOM, it will suspend listing in the registry and notify DIAN to take the corresponding measures within its scope.

- Mining producers who are not obligated to issue invoices may request from the mineral trader a document supporting purchases made from individuals who are also not obliged to provide invoices, provided that this document is validated by DIAN according to the regulations established in Resolution 42 of 2020 and other related norms.

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Arias

COSTA RICA

TAX OBLIGATIONS FOR DORMANT ENTITIES

January 2024 | Costa Rica

A new year has begun and, thus, a new series of tax obligations. All legal entities should comply with most of these obligations, even though they do not generate income within the country.

Owners of an entity commonly called “dormant entity”, should keep in mind the calendar of annual tax obligations. Additionally, most of the reports and payments should be complied with during the first semester of the year.

Below, we list the tax obligations that must be fulfilled during this year 2024:

Obligation	Who must comply?	Due date
Solidarity tax for housing	Any person who owns real estate properties for residential or recreational use that exceeds the reference construction value.	January 15
Corporate Tax	Any legal entity, branch of a foreign company or its representative, and individual limited liability companies registered in the National Registry.	January 31
Education and Culture Stamp Tax	All legal entities and branches of foreign companies registered in the National Registry.	March 30
Ultimate Beneficial Ownership Report (ordinary)	i) Legal entities registered in the National Registry with a valid corporate term or those to which a legal identification number has been assigned. ii) Trusts.	April 30
Informative Statement for inactive entities	Legal entities incorporated in Costa Rica registered as “inactive” in the Tax Registry (RUT) of the Tax Authorities.	April 30
Property Tax	Any person who owns property with title registered or not in the Public Registry of Property, including concessionaires of the border or the maritime zone.	March 31 June 30 September 30 December 31

In addition, owners should not overlook that an inactive company that obtains income from passive activities outside Costa Rican territory may be subject to income tax, as an exception to the territoriality principle. This tax will apply when the legal entity belongs to a multinational group (being a parent or subsidiary of a legal entity abroad) and is considered a non-qualified entity (does not have adequate economic substance in Costa Rican territory).

Therefore, if the Costa Rican legal entity receives passive income abroad and belongs to a multinational group, it will be necessary to analyze the economic substance to confirm if the entity should pay taxes in Costa Rica.

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THE EUROPEAN UNION ADVANCES ITS ECONOMIC SECURITY STRATEGY: FOCUS ON FOREIGN INVESTMENT SCREENING

THE EUROPEAN ECONOMIC SECURITY STRATEGY

In recent years, rising geopolitical tensions have raised the risk profile of economic security for Europe. In response, a Joint Communication on a European Economic Security Strategy (the "**Strategy**") was adopted by the European Commission and the High Representative for Foreign and Security Policy in June 2023.

Today, the European Union ("**EU**") writes a new chapter of this Strategy, with the publication of a set of five new initiatives: the harmonisation of foreign direct investment ("**FDI**") regimes; increased coordination of export controls of dual-use technologies; further control of outbound investment; the promotion of research and development on dual-use technologies; and proposals to enhance research security. In addition, the European Commission is currently assessing the need for tools to control outbound investment in key technologies such as advanced semiconductor technologies, artificial intelligence technologies, quantum technologies and biotechnologies. We focus below on the measure proposed to harmonise FDI regimes.

On 24 January 2024, the Commission unveiled a proposal for a Regulation on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 (the "**Proposal**"). The Proposal mandates Member States to set up and maintain a mechanism to screen certain foreign investment on the basis of specified criteria. The primary objective is to enhance legal certainty by ensuring consistency between national screening mechanisms and to foster more effective cooperation between Member States and the European Commission.

With the Proposal, the European Commission seeks to address issues identified in the existing Regulation 2019/452 (the "**2019 FDI Regulation**”), which was adopted on 19 March 2019. Reviews of the 2019 Regulation revealed the adverse impact of the regulatory fragmentation resulting from divergent national regimes, leading to compliance costs for investors and hindering investment in the European economy. Consequently, the Proposal provides for minimum harmonisation of the essential features of foreign investment screening, including (i) defining the scope of covered investments, (ii) establishing the principal procedural features of the screening mechanism, and (iii) setting out a framework for effective cooperation between the Member States and the EU.

SCOPE OF THE PROPOSAL

The European Commission's proposed screening mechanism marks a departure from the approach to what constitutes foreign investment. Notably, it broadens the scope of review to encompass both direct investments in the EU by non-EU investors and indirect investments within the EU by EU entities controlled by non-EU investors. In other words, both direct and indirect foreign investment are covered, as is already the case in certain Member States.

Under the Proposal, foreign investment encompasses a broad range of investments that establish or maintain lasting and direct links between investors from non-EU countries and undertakings conducting economic activities in a Member State. This means that the Proposal also applies to investments in EU targets, where the EU target is a subsidiary of the foreign target in which the investment is made.

Nonetheless, the Proposal is consistent with the 2019 FDI Regulation with respect to portfolio investments, which remain outside its scope, provided they are purely for financial investment without any intention to influence the management or control of the target. Similarly, the proposal clarifies that restructuring operations within a group do not constitute a foreign investment, provided there is no change in the effective participation of one or more foreign investors in the management or control of the target.

MANDATORY SCREENING MECHANISM

Another key difference with the 2019 FDI Regulation is the shift from a voluntary to a mandatory approach, compelling Member States to set up and maintain screening mechanisms for foreign investment. While Member States retain sole responsibility for national security, the proposal mandates a compulsory screening mechanism for investments impacting EU security or public order interests.

The Proposal outlines a two-tier approach to mandatory screening and notification of specific foreign investments:

- **Projects or programmes of EU interest**: Member States must screen and notify foreign investments in projects or programmes of EU interest listed in Annex I. These are projects or programmes covered by EU law which provide for the development, maintenance or acquisition of critical infrastructure, critical technologies or critical inputs which are essential for security or public order. Examples include the Euratom Research and Training Programme, the Trans-European Networks for Transport, and the European Defence Fund.

- **Areas of particular importance**: Member States must screen any investment in an area of particular importance for the security or public order interests of the EU listed in Annex II. The areas listed include dual-use items, military equipment, critical technologies (e.g., semi-conductors and artificial intelligence) as well as entities and activities which are critical to the EU's financial system.

In the second scenario, the foreign investment must also be notified to the cooperation mechanism if one of the pre-defined risk-based conditions are met. In particular, the Proposal outlines two high-risk situations that require notification of the investment: first, when the foreign investor or its EU subsidiary is under the direct or indirect control of a third-country government, and second, when the foreign investor or any associated entity or individual is subjected to EU sanctions.

SCREENING CRITERIA

The Proposal maintains the concept of "likely to negatively affect security or public order" of the 2019 FDI Regulation, but now offers some additional clarifications and specifications with regards to the criteria that must be taken into account. Under the Proposal, the Member States or the European Commission must in particular consider whether the investment is likely to negatively affect:

- the security, integrity and functioning of critical infrastructure, whether physical or virtual;
- the availability of critical technologies;
- the continuity of supply of critical inputs;
- the protection of sensitive information, including personal data, or
- the freedom and pluralism of the media, including online platforms that can be used for large scale disinformation or criminal activities.

Moreover, the Member States and European Commission must consider various factors related to the investor or related entities (i.e., any entity or person controlling the investor, the beneficial owner of the investor, subsidiaries of the investor and any other entity or person controlled by the investor), including: previous transaction approval history, sanctions status, previous involvement in activities negatively affecting security or public order, engagement in criminal or illegal activities, and alignment with third-country policy objectives or military capabilities.

THE COOPERATION MECHANISM

The Proposal provides for an enhanced cooperation mechanism, requiring Member States to notify certain investments, as outlined above:

- any investment subject to in-depth investigation under their national procedure and any investment prohibited or subject to mitigating measures without an in-depth investigation must be notified within 30 calendar days.
- any investment relating to areas of particular importance where the investor is controlled by a third-country government or subject to sanctions must be notified within 15 calendar days.

Member States have the option to notify investments considered to be of potential interest to other Member States or the European Commission within 15 calendar days. Notification under the cooperation mechanism is done using a standardised form in accordance with an implementing regulation of the European Commission.

Member States can provide comments through a secure system if they believe an investment may affect their security or public order, or they possess relevant information. Similarly, the European Commission can issue a motivated opinion in instances where there is a potential negative impact on the security or public order of multiple Member States or Union interest projects, or if it has relevant information. The European Commission may issue an opinion addressed to all Member States where it considers that several foreign investments, if taken together, could negatively impact security and public order in the EU.

The Proposal establishes a framework for discussion between the Member States and the European Commission in relation to notified investments:

- following the receipt of a comment or opinion, the relevant Member State must set up a meeting to discuss how to best address the risks identified;
- the relevant Member State must notify screening decisions to the commenting Member States and the European Commission no later than 3 calendar days after its notification to the parties to the transaction; and
- the relevant Member State must provide written explanations of its decision, the extent to which the input of other Member States and of the European Commission was taken into account and the reason for disagreement, no later than 7 calendar days from notification.

For multi-country transactions requiring screening by several Member States, the Proposal provides for a dedicated procedure with aligned deadlines and coordination by Member States on the final decision. Applicants must file a request for authorisation in all relevant Member States on the same day, referencing each other. The relevant Member States must then coordinate the notification of the transaction under the cooperation mechanism on the same day (for investments subject to in-depth investigation) or within 15 calendar days (for investments relating to areas of particular importance where the investor is controlled by a third-country government or subject to sanctions).

KEY FEATURES OF THE PROPOSAL

Some of the essential features of the Proposal include:

- **Authorisation Requirement**: Relevant investments are subject an authorisation requirement prior to completion and a two-stage review process at Member State level (initial review followed by in-depth analysis where required).

- **Own-Initiative Reviews**: Other investments are susceptible of own-initiative review by Member States or the European Commission for at least 15 months following completion if it is considered that they may affect security or public order. The European Commission and Member States may also introduce own-initiative procedures with respect to investments occurring in the territory of another Member State if it has not been notified under the cooperation mechanism.

- **Compliance with Cooperation Mechanism**: Member States' screening mechanisms must be compliant with the cooperation mechanism. Amongst other, this requires the designation of a national contact point, ensuring national laws allow for compliance with the regulation, e.g. by granting the relevant screening authority the necessary investigatory powers, and the allocation of sufficient resources for effective participation in the exchanges with the other Member States and the European Commission.

- **Decision on Negative Effects**: Where potential negative effects of an investment on security or public order are identified, Member States must issue a decision prohibiting the investment or authorising it subject to mitigating measures.

- **Secure Database**: The European Commission will establish a secure database accessible to all Member States, containing details on foreign investments evaluated through the cooperation mechanism and the results of assessments conducted by national screening mechanisms.

- **Consistency with EU Law**: The FDI regime is interpreted consistently with other sources of EU law, such as the principles of freedom of establishment and free movement of capital and the EU Merger Regulation. Indeed, if other measures of EU law were to address an investment's effect on security and public order, Member States must approve the investment without conditions.

The proposed regulation would start applying 15 months after its entry into force. By then, all Member States must have taken the relevant legislative action and/or implemented the required procedures.

INTERACTION WITH UNION POLICIES

The Proposal seeks to strike the correct balance between two core objectives of the Strategy: on the one hand, promoting investment into the internal market and, on the other, protecting EU economic security. Although it broadens the scope of FDI review, the proposal should contribute to increased legal certainty and reduced compliance costs. Nonetheless, certain key concerns remain unaddressed. For instance, the Proposal falls short of a full harmonisation of the time-frame of the two-stage assessment of FDI by Member States, despite the fact that the divergence in procedural timelines has been flagged as a key issue by stakeholders.

More generally speaking, this proposal will raise questions regarding the coherence with the EU industrial policy and other EU instruments. The Commission is adding tools to the EU's legislative arsenal with the aim of fostering innovation and fortifying the resilience of value chains in strategic industries, as well as to react to practices which, in some shape or form, leverage economic dependencies. Among these, the Foreign Subsidies Regulation holds a particular place as does the Anti-Coercion Instrument, which entered into effect on 27 December 2023. Alongside these, traditional tools like trade defence instruments and export control rules on dual-use items, are also gaining prominence as instruments the EU can deploy in an increasingly tense global economy.

Effectively employed, these instruments can address legitimate concerns about leveraging dependencies in strategic industries. However, it remains to be seen how this legislative arsenal, in particular in cases of overlap and interaction between different instruments, will impact the attraction of investment in the EU, which is crucial for developing industries identified as strategic in EU policies adopted over the course of the present mandate. The Council and the European Parliament's responsiveness to these concerns will determine whether the new FDI Regulation can strike an effective balance between economic security and the objective of promoting investments in the internal market.

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Late disclosure prompts a CPA disciplinary recommendation by the Hong Kong MMT to the AFRC

05 February 2024

The Market Misconduct Tribunal (MMT) has recommended that the accountants' regulator, the Accounting and Financial Reporting Council (AFRC) take disciplinary action against a listed company secretary for neglecting his duties. The MMT sanctioned nine former senior executives including the company secretary for failure to disclose inside information as soon as reasonably practicable. Separately, the AFRC has emphasised the importance of continuing professional development after a report found failings in general practice.

Hong Kong's Market Misconduct Tribunal (MMT) has sanctioned Mayer Holdings Limited (Mayer) and nine of its former senior executives who were found to have failed to disclose inside information as soon as reasonably practicable under the Securities and Futures Ordinance (SFO).

The MMT found that Mayer had no written guidelines and/or internal control policies on the statutory requirements to disclose inside information in a timely fashion, which meant it was in breach of the disclosure requirement. The MMT also found that the nine former executives had not taken all reasonable measures to ensure proper safeguards were put in place to prevent the breach and that their intentional, reckless or negligent conduct had resulted in the breach.

The MMT found that one of the former senior executives, Tommy Chan Lai Yin, a member of the Hong Kong institute of Certified Public Accountants, had "completely ignored his duties as Mayer's company secretary to ensure the company's compliance with the disclosure requirement and that his conduct reflected a reckless indifference to his responsibilities".

The Securities and Futures Commission's (SFC) Acting Executive Director of Enforcement, Kenneth Luk commented that:

"company secretaries of listed corporations also bear the primary burden to ensure that the listed corporations are in compliance with relevant disclosure requirements under the SFO. Together with company directors, they play a critical role in upholding transparency and adhering to regulation obligations".

Mr Luk said that the SFC was "committed to holding senior management accountable when their actions compromise the interests of the company and its shareholders."

The MMT ordered that Mayer and the nine former senior executives should pay a total fine of HK$4.65 million and that the nine should be disqualified from being a director or being involved in the management of a listed corporation for a period ranging from 20 to 50 months. The MMT recommended that the AFRC should take disciplinary action against Mr Chan.

The action goes to show the increasing willingness of Hong Kong regulators to work together, something which was highlighted in their first joint statement last July.[1] That statement addressed "an observable increase in cases of listed issuers channelling a company's funds to third parties in dubious circumstances under the pretext of loans", loans which were "often approved or granted without sufficient commercial rationale and appropriate documentation, and in some cases without adequate risk assessments, due diligence or internal controls".

The statement set out the conduct, standards and practices that listed issuers, their directors, audit committees and auditors should adhere to in relation to loans and similar arrangements.

Need for training

Separately, the AFRC has published an article highlighting the importance of continuous professional development (CPD) in ensuring audit quality and managing talent.[2]The move follows the publication in November 2023 of the regulator's oversight report which highlighted significant failings in this area (see Hogan Lovells alert Ticking the boxes - Hong Kong accountants regulator highlights failings in professional training compliance).

The article highlights the link between CPD and audit quality "in the context of the need for auditors to acquire new skills and the ongoing transformation of the audit profession."

Some 64 per cent of firms under review were identified as "having insufficient internal training and / or insufficient monitoring of external training attended by professional staff". Tracy Wong, Acting Head of Policy, Registration and Oversight said that "such deficiencies adversely impact firms' ability to deliver quality audits and negatively affect staff morale".

The note said that firms should take five actions to ensure effective CPD management:

- Regularly assess the upskilling needs of staff;
- Promote professional qualifications and offer training sponsorships;
- Focus on outcomes both at the individual and firm level;
- Prioritise efforts to expand the talent pool of the audit profession by attracting and developing audit staff; and
- Encourage staff to broaden their skills, embrace innovation and adopt a mindset of continuous and lifelong learning.

Authored by Yolanda Lau and Nigel Sharman.

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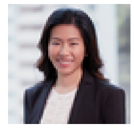

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SyCipLaw TIPS

Tax Issues and Practical Solutions

OCTOBER 2023 | VOL. 28

1. In cases of real property taxes ("*RPT*") on land covered by the Torrens system, can treasurers of local governments rely on the certificates of title to determine the owner of the land for purposes of sending notices of deficiency RPT?

Yes. In *The City Government of Antipolo and The City Treasurer of Antipolo v. Transmix Builders & Constructions, Inc.* (G.R. No. 235484, August 9, 2023, "***Transmix***"), the Supreme Court ("***SC***") held that local treasurers must rely on the Transfer Certificate of Title ("***TCT***") or other certificate of title under the Torrens system for purposes of sending notices of deficiency RPT.

In *Transmix*, the TCTs over three (3) sold lots were updated to reflect the buyer as the new owner, however, the corresponding tax declarations were not updated and remained in the name of the seller. In sending notices to the owner relating to deficiency RPT (*e.g.*, notices of a public auction or sale of the lots), the City Treasurer of Antipolo relied on the information in the tax declarations. The SC held that treasurers of local governments must send the warrant of levy and other notices relating to RPT to the owner as reflected in the TCT and not in the tax declaration. Failure to do so is a violation of a taxpayer's right to due process and will render void the levy and any consequent public auction, sale, or forfeiture of the real property.

The SC discussed Section 258 of the Local Government Code ("***LGC***") and its legislative history as the basis for the requirement to send notices to the owner reflected in the TCT. Prior to Section 258 of the LGC, Section 73 of Presidential Decree No. 464 ("***PD 464***") mandated treasurers of local governments to send notices to the "delinquent taxpayer" at their addresses "as shown in the tax rolls or property tax record cards of the municipality or city" or at their residence. When PD 464 was repealed by the LGC, the above-quoted portions on whom to send the notice and to which address/es were deleted and replaced with "delinquent owner." The SC applied the statutory construction principle of *casus omissus pro omisso habendus est*, which means a person, object, or thing omitted from an enumeration is held to have been omitted intentionally. Further, requiring sole reliance on the TCT is consistent with the principle of indefeasibility of title under the Torrens system. Under this principle, a person dealing with registered land has a right to rely on the Torrens certificate of title and to dispense with the need of inquiring further. A Torrens certificate of title is evidence of ownership of the real property and protects those who rely on what appears on the face of said title.

Due to the violation of the taxpayer's right to due process, the SC held that the City Government of Antipolo's levy, sale, and forfeiture of the three (3) lots with deficiency RPT were void. ■

SyCipLaw Tip No. 1

A local government treasurer is not excused by the failure of the new owner of real property to update the tax declaration and pay RPT from complying with its duty to check and rely on the TCT for purposes of sending notices concerning deficiency RPT. Under Section 204 of the LGC, local governments have the duty to declare properties for RPT in the name of defaulting owners (*i.e.*, owners that fail to update tax declarations themselves). In determining the owner, the local government may request for a copy of the TCT from the Registry of Deeds ("**RD**") where the property is located. This duty of the local government is an integral part of procedural due process in collecting real property taxes.

2. Is the 60-day period to submit supporting documents for a request for reinvestigation under a protest to a Final Assessment Notice/Final Letter of Demand ("*FAN/FLD*") for deficiency taxes counted from the date of the filing of said protest?

Yes. Under Section 228 of the National Internal Revenue Code, as amended, ("**Tax Code**") and Revenue Regulation No. 12-99, a taxpayer may protest a FAN/FLD either by a request for reconsideration or for reinvestigation, the latter of which would require the protesting taxpayer to submit newly discovered or additional evidence within 60 days from the filing of the protest to the FAN/FLD.

In *Commissioner of Internal Revenue* ("***CIR***") *v. Maxicare Healthcare Corporation* ("***Maxicare***") (G.R. No. 261065, July 10, 2003), the SC corrected the previously issued Minute Resolution of *CIR v. Roca Security and Investigation Agency, Inc.* (G.R. No. 241338, April 10, 2019) where it erroneously stated that the 60-day period was counted from the filing of the protest to the Preliminary Assessment Notice ("***PAN***") (*i.e.*, response or reply to the PAN) and not the protest to the FAN/FLD. This is clearly in conflict with Section 228 of the NIRC, which when read in its entirety reckons the 60-day period to submit additional evidence from the filing of a protest to the FAN/FLD and not from the response or reply to the PAN.

In *CIR v. Maxicare*, the CIR issued a Final Decision on Disputed Assessment before the lapse of the 60-day period for Maxicare to submit additional evidence to support its request for reinvestigation under a protest to the FAN/FLD. The CIR then argued that despite this, Maxicare was not deprived of due process since it nonetheless had the opportunity to be heard through its protest. The SC disagreed and held that revenue officers must strictly comply with requirements of law and regulations and thus, any assessment rendered by a revenue officer that has failed to do so will be declared void. ■

SyCipLaw Tip No. 2

A taxpayer who files a protest that is a request for reinvestigation to a FAN/FLD has 60 days from the date of the filing of the protest to submit newly discovered or additional evidence.

3. May the Court of Tax Appeals declare, as void and inoperative, the provision of a local government unit's revenue code – which requires the prior payment of local business taxes before entertaining a protest – even if the taxpayer did not follow the procedure for nullifying the provision in accordance with Section 187 of the Local Government Code?

Yes. In *City of Makati and Jesusa E. Cuneta v. DMCI Holdings, Inc.* (CTA EB No. 2634, September 18, 2023), the Court of Tax Appeals ("***CTA***") En Banc ruled that the CTA Third Division did not err in setting aside a provision of the Revised Makati Revenue Code ("***RMRC***") even if the taxpayer did not follow the procedure under Section 187 of the LGC for nullifying tax ordinances and revenue measures. In setting aside the RMRC provision, the CTA was "simply guided by the well-established doctrine that ordinances, which are inferior in status, should not contravene and should remain consistent with the law. Otherwise, the ordinance is void."

In this case, the City of Makati argued that the CTA had no jurisdiction to rule on the validity of the RMRC provision, which required the payment under protest of local business taxes before entertaining a protest. The City of Makati argued that the taxpayer should have questioned the constitutionality of the provision pursuant to Section 187 of the LGC, which provides the following procedure for questioning the constitutionality of tax ordinances or revenue measures:

1. Any question on the constitutionality or legality of tax ordinances or revenue measures may be raised on appeal within 30 days from the effectivity thereof to the Secretary of the Department of Justice ("***DOJ***");

2. The Secretary of the DOJ shall render a decision within 60 days from the date of receipt of the appeal, but such appeal shall not have the effect of suspending the effectivity of the ordinance and the accrual and payment of the tax, fee, or charge levied;

3. Within 30 days after receipt of the decision or the lapse of the 60-day period without the Secretary of the DOJ acting upon the appeal, the aggrieved party may file appropriate proceedings with a court of competent jurisdiction.

On the other hand, the taxpayer argued that the CTA has exclusive jurisdiction to resolve all tax problems, including the validity or constitutionality of the provisions of a local tax ordinance. The taxpayer said that the City of Makati's reliance on Section 187 of the LGC is misplaced as this case seeks to nullify the City of Makati's deficiency assessments under Section 195 of the LGC, not the declaration of nullity of the City of Makati's tax ordinance. Hence, the rule on exhaustion of administrative remedy before the Secretary of the DOJ under Section 187 of the LGC should not apply.

The CTA En Banc ruled that "[a]s the case emanated from petitioner's issuance of the Notice of Assessment, which respondent formally protested and appealed to the RTC, the petition was filed in accordance with Section 195… and so, Section 187 of the LGC, which outlines the procedure for questioning the constitutionality or legality of a tax ordinance, does not apply." In any case, the CTA En Banc ruled that "the Supreme Court, in several cases, has previously relaxed the rule on exhaustion of administrative remedies due to non-compliance with Section 187 of the LGC given the more substantive matters, such as when the issue involved is purely a legal question."

On the constitutionality or legality of the provision requiring prior payment of the local business tax assessment for a protest to be valid, the CTA En Banc ruled that Section 195 of the LGC does not require prior payment to validly protest an assessment. A taxpayer may protest an assessment under Section 195 of the LGC, even without making a payment under protest, because the LGC does not require "payment under protest" prior to instituting the protest. ■

SyCipLaw Tip No. 3

While the general rule is that the legality of a tax ordinance or revenue measure may be questioned under Section 187 of the LGC within 30 days from effectivity of the tax ordinance or revenue measure, the CTA may still rule on the validity of a provision of a tax ordinance or revenue measure if the issue is raised in a protest against a deficiency tax assessment. Thus, in protesting tax assessments, taxpayers may still raise the constitutionality or legality of provisions of a tax ordinance.

Under the LGC, payment under protest is required only in protesting real property tax assessments. Section 252 of the LGC provides that "[n]o protest [of a real property tax assessment] shall be entertained unless the taxpayer first pays the tax." Thus, in protesting a local business tax assessment, prior payment of the tax before filing the protest is not required.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become part of the law of the land, unlike decisions of the Supreme Court.

4. When is prior notice and hearing required for a revenue issuance to be valid?

It depends on the nature of the revenue issuance. In *San Miguel Brewery Inc. v. Commissioner of Internal Revenue* (CTA Case No. 8955, September 14, 2023), the CTA Third Division ruled that the requirement of prior notice and hearing would depend on the classification of the revenue issuance. Generally, only revenue issuances which are classified as legislative rules require prior notice and hearing to be valid. Revenue issuances which are classified as interpretative rules, or those which merely clarify or explain existing regulations, do not require prior notice and hearing. However, as an exception, "prior notice and hearing are required if the regulation substantially increases the burden of those governed, notwithstanding its nomenclature – despite the regulation being called or designated as interpretative."

In this case, the taxpayer argued that the PhP20.57 excise tax per liter of its product under Revenue Memorandum Circular ("***RMC***") No. 90-2012 is void for being violative of Section 143 of the Tax Code. The taxpayer also argued that RMC No. 90-2012 is void for being issued without prior notice to it, in violation of its right to due process. On the other hand, the CIR argued that a collateral attack on a presumably valid administrative issuance is not allowed. It also argued that the taxpayer is not entitled to a tax refund because there was no erroneous or illegal collection of excise taxes.

In ruling whether prior notice and hearing is required for the validity of a revenue measure, the CTA Third Division differentiated "legislative rules" from "interpretative rules." Legislative rules are in the nature of subordinate legislation and are designed to implement a primary legislation by providing details thereof. They usually implement existing law, imposing general, extra-statutory obligations pursuant to authority properly delegated by Congress. They usually effect a change in existing law or policy, which affects individual rights and obligations. On the other hand, interpretative rules are intended to interpret, clarify, or explain existing statutory regulations under which the administrative body operates. Their purpose is merely to construe the statute being administered and purport to do no more than interpret the statute. Interpretative rules are generally exempted from the requirement of public participation (*i.e.*, no need for notice and hearing). However, if interpretative rules substantially increase the burden of those governed, public participation and publication are required for the interpretative rule to be valid.

The CTA Third Division found that RMC No. 90-2012 should be treated as a legislative rule since it was issued to provide initial classifications of alcohol and tobacco products according to the tax rates under Republic Act No. 10351, or the Sin Tax Reform Law, and the 2010 price survey of these products by the Bureau of Internal Revenue ("***BIR***"). In prescribing the applicable excise tax rate per liter of the taxpayer's product, the BIR acted in a legislative capacity and has supplemented the Sin Tax Reform Law by imposing additional obligations on the part of the taxpayer. Here, the excise tax of PhP20.57 per liter of the taxpayer's product expanded what was provided under the Sin Tax Reform Law. Considering that RMC No. 90-2012 is a legislative rule, there should have been prior notice and hearing to the taxpayer for it to be valid.

Apart from the lack of prior notice and hearing, the CTA Third Division also declared RMC No. 90-2012 as void for being contrary to Section 143 of the Tax Code. Section 143 of the Tax Code provides that excise tax on fermented liquors should be PhP15.00 per liter in case the net retail price per liter of volume capacity of the fermented liquor is PhP50.60 or less. If the net retail price per liter of volume capacity of the fermented liquor is more than PhP50.60, the excise tax should be PhP20.00 per liter. Here, RMC No. 90-2012 imposed an excise tax on the taxpayer's product in the fixed amount of PhP20.57, regardless of whether the net retail price per liter is less or more than PhP50.60. In other words, RMC No. 90-2012 illegally expanded Section 143 of the Tax Code insofar as the imposition of excise tax on the taxpayer's product is concerned.

Thus, the CTA En Banc struck down RMC No. 90-2012 and declared it as having no force and effect.■

SyCipLaw Tip No. 4

In questioning the validity of revenue issuances, a taxpayer should examine whether the revenue issuance is a legislative rule or an interpretative rule. In this regard, even though the revenue issuance may seem to just interpret or clarify existing statutory regulations, it will still be considered a legislative rule if it substantially increases the burden on the taxpayer than that provided under the law. casein this case, public participation and publication will be required.

Even assuming that there were public participation and publication, if a revenue issuance contravenes the law, it would still be considered invalid.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become part of the law of the land, unlike decisions of the Supreme Court.

5. What taxes are due on transactions involving real properties considered as ordinary assets?

The sale of real property considered as an ordinary asset is subject to ordinary income tax, value added tax ("***VAT***"), and documentary stamp tax ("***DST***"). In this connection, RMC No. 99-2023 clarifies the internal revenue taxes applicable on the sale of real property considered as an ordinary asset of the seller and other related matters. Thus:

1. In determining whether real property is an "ordinary asset" of the seller, the taxpayer should refer to Section 39(A)(1) of the Tax Code, as implemented by Revenue Regulations No. 7-2003.

2. Real properties seized by the government in the exercise of its regulatory functions are not considered "ordinary assets" even if they are eventually sold through public auction.

3. Only sellers of real properties classified as ordinary assets are required to issue a Sales Invoice pursuant to Section 237 of the Tax Code. In the case of a VAT-registered taxpayer engaged solely in the sale of service and thus has an Authority to Print an Official Receipt only, the issuance of an Official Receipt covering the sale of its real property used in trade or business is permitted as the sale is merely incidental to its regular business operations.

4. In relation to number 3 above, if the seller's registered business is "real estate business", the sale of the real property will form part of the seller's gross sales. If the seller is not registered as engaged in the real estate business, the sale will not form part of the seller's gross sales notwithstanding the issuance of a sales invoice. The gain on the sale (selling price less book value) will instead be declared as other taxable income and disclosed in the seller's income tax return.

5. If the real property sold or transferred is considered an ordinary asset in the hands of the seller or transferor, the following tax returns must be filed: (a) BIR Form No. 1606 for the remittance of expanded withholding tax on the purchase of real property; and BIR Form No. 2000-OT for the payment of the DST.

6. The 12% VAT is based on the highest among the following values: (a) the consideration stated in the sales document; (b) the fair market value as determined by the CIR and (c) the fair market value as shown in the Real Property Tax Declaration.

7. If real property classified as an ordinary asset is transferred not in the course of business of a VAT-registered taxpayer (e.g., the taxpayer donated the real property), the same is considered a deemed sale transaction pursuant to Section 106(B)(1) of the Tax Code, and is, therefore, subject to VAT at the rate of 12%. ■

SyCipLaw Tip No. 5

The parties in a sale, donation, or any disposition of real property should be mindful of whether the real property being transferred is a capital asset or an ordinary asset in the hands of the seller as the applicable taxes payable (and the tax returns required to be filed) on the transfer will depend on the classification of the real property.

6. What are the modes of service for warrants of garnishment against the bank deposits of a delinquent taxpayer?

A warrant of garnishment is usually issued and served to the concerned depositary banks physically or through constructive/substituted means. With the issuance of Revenue Regulation ("RR") No. 11-2023, which took into account Republic Act No. 8792 or the Electronic Commerce Act of 2000, the Rules on Electronic Evidence and the 2019 Amendments to the 1997 Rules of Civil Procedure, a warrant of garnishment may now be issued and served upon the bank through electronic mail ("***email***"). RR No. 11-2023 allows the BIR to sign the warrant electronically and send it to the concerned depositary bank using the official email address of the appropriate BIR office as well as that of the concerned bank head offices and branches. The head office and branches of banks are thus required to provide their official email address to the BIR office where they are registered.

Service of the warrant of garnishment via email is considered complete at the time the email was made, or, if available, at the time that the electric notification of the service of the warrant is sent. The BIR may also request an acknowledgment receipt of the warrant from the authorized officer of the concerned bank. As proof of service, the concerned BIR official or employee who sent the email is required to execute an Affidavit of Service with a printed proof of transmittal. These will be attached to the records of the case, along with the copy of the signed warrant sent via email. A copy of the warrant of garnishment served upon the bank, together with the acknowledgment receipt, will be sent to the taxpayer involved through his email address, if applicable, and through registered mail. The BIR will send a claim letter for the garnished amount through email addressed to the concerned bank and issue an authorization letter to the handling Revenue Officer to collect the garnishable amount and claim the manager's check corresponding to the deposit of the taxpayer that is under garnishment.■

SyCipLaw Tip No. 6

It must be emphasized that RR No. 11-2023 specifically requires the BIR to serve to the delinquent taxpayer a copy of the warrant of garnishment that it previously served upon the concerned bank, together with the acknowledgment receipt issued by the latter. A delinquent taxpayer who receives a warrant of garnishment previously served by electronic means to the bank concerned should confirm (1) that the same contains an acknowledgment receipt from the bank and (2) that the same is likewise served to him/her through registered mail in his/her registered address in addition to service of the warrant to his email address.

Based on RR No. 11-2023, it appears that the BIR will use all means, including technological means, in order to collect assets of delinquent taxpayers more efficiently. Given the BIR's drive to resort to digitalization, taxpayers should make sure that their contact details (especially their official email address) registered with the BIR are fully updated and functional to ensure that they do not miss receiving important notices (such as the warrants) from the BIR. The taxpayer should also ask its bank to inform the taxpayer as soon as the bank receives a warrant of garnishment from the BIR.

For more information regarding the issuances discussed in this briefing, please contact:

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理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

Announcement of National Core Key Technologies

01/31/2024

Gloria Lu

The Taiwan National Security Act (NSA) was amended in 2022 to strengthen the protection of trade secrets related to national core key technologies and to ensure national security and an industrial competitive advantage. According to Article 3, Paragraph 1 of the NSA, "[A] person may not engage in the following acts for a foreign country, Mainland China, Hong Kong, Macau, foreign hostile forces, or various organizations, institutions, or groups established or substantially controlled by them or the persons dispatched by such organizations, institutions or groups: 1. Obtaining trade secrets of national core key technologies by way of theft, embezzlement, fraud, duress, unauthorized reproduction, or other improper methods, or using and disclosing them after obtaining them. 2. Without authorization or beyond the scope of authorization, reproducing, using or disclosing the trade secrets of national core key technologies that are known to or held by him. 3. Failing to delete, destroy or conceal the trade secrets of national core key technologies that are held by him, after the owner of the trade secrets has informed him that such trade secrets should be deleted or destroyed. 4. Obtaining, using or disclosing the trade secrets of national core key technologies with the knowledge that such trade secrets known to or held by others have the circumstances under the preceding three paragraphs." Moreover, Article 3, Paragraph 2 of the NSA stipulates that "[A] person may not intend to engage in any of the acts under various subparagraphs of the preceding paragraph by using trade secrets of national core key technologies in a foreign country, Mainland China, Hong Kong or Macau."

The aforementioned national core key technologies are determined by the National Science and Technology Council, with the participation of experts from industry, government, academia, and research in accordance with Article 3, Paragraph 3 of the NSA, with the aim of preventing significant harm to national security, industrial competitiveness, or economic development caused by the outflow of important technologies to foreign countries, Mainland China, Hong Kong, Macau, or hostile forces overseas. Such technologies shall also meet at least one of the following criteria: 1. Controlled technologies based on international conventions, defense needs, or considerations for the security of national critical infrastructure; 2. Technologies that can promote the development of leading technologies domestically or can significantly enhance the competitiveness of important industries.

The Executive Yuan announced the first list of National Core Key Technologies on December 5, 2023, focusing on defense technology, space, agriculture, semiconductors, and information security, and totaling 22 items:

1.Military carbon fiber composite material technology;

2.Military Carbon/Carbon High Temperature and Ablation Resistant Material Technology;

3.Military New Anti-Interference Identification of Friend or Foe Technology;

4.Military microwave/infrared/multimode calibration technology;

5.Military active phased array (phased array) detection technology;

6.Dynamic pressure engine technology;

7.Satellite control technology;

8.Space specification X-Band image download technology;

9.Space specification image compression electronic unit (EU) technology;

10. Space specification CMOS image sensor technology;

11. Design, manufacturing, and integration technology of space specification optical payload systems;

12. Space specification active phase array antenna technology;

13. Space specification passive reflector antenna technology;

14. Space specification radar image processing technology;

15. Agricultural variety cultivation and reproduction, aquaculture technology - liquid state bacterial culture technology, aquaculture parthenogenesis technology;

16. Agricultural biochip technology - Agricultural drug residue detection technology, animal and plant pathogen detection biochip technology;

17. Expert System Technology for Agricultural Facilities - Design, Operation, and Maintenance Management of Water Environment in Crop Greenhouses, Aquaculture and Fisheries Expert System Technology;

18. Manufacturing technology for chips (ICs) with processes of 14nm and below, as well as key gas, chemical, and equipment technologies;

19. Heterogeneous Integrated Packaging Technology - Wafer Level Packaging Technology, Silicon Photon Integrated Packaging Technology, and Its Special Necessary Materials and Equipment Technology;

20. Chip security technology;

21. Post quantum cryptography protection technology; and

22. Network Active Defense Technology.

The National Science and Technology Council and relevant ministries will continue to solicit opinions and review the list of National Core Key Technologies in response to changes in technological development. It is possible that a further list of the National Core Key Technologies will be announced in March 2024. The Ministry of Economic Affairs (MOEA) will also conduct a check on the projects commissioned or subsidized by the MOEA by more than 50%, and the personnel involved in core key technologies must apply for review and obtain approval before going to Mainland China.

According to the authorities, the determination of national core key technologies is to prevent the illegal outflow of important technologies and avoid harm to national and industrial interests, and is not intended to affect normal and legitimate business activities or technology exchanges, or to impact the business operations of industries in China. Nonetheless, it is advisable for industries and relevant personnel to pay special attention to the relevant provisions of the NSA and further developments in determination of National Core Key Technologies to avoid legal violations and criminal liability.

Reform in Remedies Following Dismissal of Reconsideration for
Non-Prosecution

ADVISORIES

Food + Beverage

Where Does Your Food Come From?The FDA Really Wants to Know

An intro to the FDA's Food Traceability Rule, the compliance deadline, and the list of foods covered – from fruits and vegetables to dairy and seafood

By Allison B. Condra

02.02.24

In November 2022, the U.S. Food and Drug Administration ("FDA") finalized a rule imposing additional recordkeeping requirements for certain foods to "help the Agency rapidly and effectively identify recipients of foods to prevent or mitigate foodborne illness outbreaks and address credible threats of serious adverse health consequences or death resulting from foods being adulterated or misbranded" (the "**Food Traceability Rule**"). 21 C.F.R. §§ 1.1300 et seq. It is an important set of requirements to become familiar with, and each entity in the supply chain of one of the foods (or an ingredient in one of the foods) on the list below needs to be aware of whether these requirements apply to them and how.

The regulations are a bit confusing and use a lot of new acronyms and terms; this advisory is intended to provide a high-level overview to introduce folks to the rule. Please reach out to a food regulatory attorney or consultant if you have questions about whether (and how) the rule applies to you.

When Do I Need to Come Into Compliance?

The compliance date for all persons subject to the Food Traceability Rule is Tuesday, January 20, 2026. Although that date is just under two years away, putting all of these procedures into place will take time, and we recommend starting to work on this sooner than later.

What Foods Fall Within the Rule?

The Food Traceability Rule applies to foods on the FDA's Food Traceability List ("**FTL**"), including both the foods specifically listed and foods that contain the listed foods as ingredients (provided that the listed food that is used as an ingredient remains in the same form (*e.g.*, fresh) in which it appears on the list). The FTL may be amended from time to time. The current FTL is as follows (referred to herein as "**Covered Food**"):

- Cheeses, other than hard cheeses (see FTL for more specifics)
- Shell eggs

- Nut butters
- Cucumbers (fresh)
- Herbs (fresh)
- Leafy greens (fresh)
- Leafy greens (fresh-cut)
- Melons (fresh)
- Peppers (fresh)
- Sprouts (fresh)
- Tomatoes (fresh)
- Tropical tree fruits (fresh)
- Fruits (fresh-cut)
- Vegetables other than leafy greens (fresh-cut)
- Finfish (fresh and frozen) (see FTL for more specifics)
- Smoked finfish (refrigerated and frozen)
- Crustaceans (fresh and frozen)
- Molluscan shellfish, bivalves (fresh and frozen)
- Ready-to-eat deli salads (refrigerated)

Who Is Subject to the Rule?

The Food Traceability Rule's requirements apply to persons who manufacture, process, pack, or hold foods that appear on the FTL, and although that language may remind you of FDA Food Facility Registration requirements (as it should), the requirements of the Food Traceability Rule require participation from entities that ***may not*** qualify as "food facilities" (*e.g.*, a farm). There are numerous exemptions from this rule – if your supply chain involves one of the foods on the FTL, it is worth reviewing the list of exemptions to determine if one applies.

What Activities Are Covered by the Rule?

Certain records are required to be kept upon harvesting a Covered Food, cooling before initial packing, initial packing of a raw agricultural commodity other than a food obtained from a fishing vessel, first land-based receiving of a food obtained from a fishing vessel, shipping, receiving, and transforming food. These are referred to in the rule as "critical tracking events."

What General Records Must I Keep if I'm Subject to the Rule?

Anyone who manufactures, processes, packs, or holds food that appears on the FTL must establish a "traceability plan" that includes, among other things, a description of the procedures you use to maintain the required records (including the format and location of the records); a description of the procedures you use to identify foods on the FTL that you manufacture, process, pack, or hold; a description of how you assign "traceability lot codes" to foods on the FTL; and a statement identifying a contact person for questions regarding the traceability plan and records.

What Specific Information Must I Gather and Keep?

The specific information that must be gathered and kept depends on the particular activity being conducted on the food at that time. For example:

- when a food that is or will go into a Covered Food is **harvested**, information such as the following must be kept (this is not an exhaustive list): the commodity and, if applicable, the variety of the food; the quantity and unit of measure; the location description for where the food was harvested; for produce, the name of the field or other growing area from which the food was harvested; the date of harvesting; and, the reference document type and reference document number (defined in the regulations); and,
- when food is **transformed** into a Covered Food, the final Covered Food must have the following information kept about it: the quantity and unit of measure; the new traceability lot code (defined in the regulations); the product description for the food; the date transformation was completed; the location description for where you transformed the food (i.e., the traceability lot code source) and (if applicable) the traceability lot code source reference; and, the reference document type and reference document number for the transformation event.

The FDA's webpage on the Food Traceability Rule contains a number of resources, including a Small Entity Compliance Guide to assist in understanding the rule.

Hogan Lovells

FTC focused on competition and dominance in generative AI space

05 February 2024

On January 25, 2024 the Federal Trade Commission (FTC) hosted a Technology Summit focused on generative artificial intelligence (AI) and other innovative technologies to address how control over key inputs—like data, chips, and cloud computing resources—could undermine competition.[1] The summit coincided with an announcement that the FTC is launching a study regarding recent investments and partnerships involving generative AI companies and major cloud service providers to "shed light" on whether these investments and partnerships "risk distorting innovation and undermining fair competition."[2]

In her remarks at the summit, Chair Lina Khan stressed that there is "no AI exemption for laws on the books," and expressed concern about strategies that could "threaten" competition. Chair Khan also described how market power could lead to violations of consumer protection laws and warned that claims of innovation should not be used as a "cover for breaking the law."

FTC summit focused on "three layers" of AI: chips and cloud computing, data and models, and consumer applications

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Chips and cloud computing

Panelists at the FTC summit discussed concentration in both the cloud computing and chip manufacturing industries. Panelist Daven Rauchwerk, a technologist and engineer, discussed vertical integration in the chip production market. According to Rauchwerk, some large tech companies have begun producing their own processor chips required to operate generative AI technologies, making it difficult for new entrants to come to market. Corey Quinn, Chief Economist at the Duckbill Group, stated that given the high level of concentration in the industry, the largest chip producer has created a supply chain bottleneck with minimal transparency concerning how, and to whom, the chips are being distributed.

Quinn also described the risk of centralization in the cloud computing industry, which can make it expensive for customers to move data between providers. He also pointed to an inherent tension that results from the fact that the federal government is "critically dependent" on the three main "hyperscalers" in the cloud computing industry, which he thinks could affect its enforcement priorities. Tania Van den Brande, Director of Economics at Ofcom, discussed the UK Competition and Markets

Authority's recent cloud services market investigation, during which the agency identified potential harms to competition in the cloud computing industry. These include barriers to switching such as egress fees that make it expensive to move data between clouds, and discounting structures that create incentives for large customers to maintain all or most of their cloud computing business with one provider. Ganesh Sitaraman, Professor of Law at Vanderbilt University, highlighted the risk that vertical integration in the cloud computing industry may lead to less innovation in the model or application layers over time, asserting that dominant companies can copy the ideas of smaller startups and integrate them into their own systems.

Data and models

Panelists also discussed the accumulation of data as a barrier to entry with respect to the development of large language models. Stephanie Palazzo, a reporter covering AI at The Information, explained that a handful of companies receive large amounts of venture capital funding while other, smaller startups struggle to acquire the capital required to pay for the expensive processor chips and highly skilled talent required to run these models. Amba Kak, Executive Director of the AI Now Institute, explained that without sufficient funding, smaller companies will not be able to strike deals with third parties for valuable high quality data used to train models, and will be unable to compete with well-funded firms that are able to maximize access to publishers and the media industry and push for exclusivity with respect to data access. Krisha Cerilli, Deputy Assistant Director of the FTC's Technology Enforcement Division, expressed concern that access to the large quantities of data required to build large language models and other innovations will steer AI development in a way that concentrates market power even further.

Consumer applications

The third panel addressed consumer protection issues. Panelist Karen Hao, a journalist and contributing writer for the Atlantic, identified transparency as the biggest risk that AI models pose for consumers, pointing specifically to (1) ambiguous or deceptive marketing, and (2) a lack of clarity for consumers concerning the underlying model embedded in the consumer-facing product with which they are interfacing. Conrad Kramer, co-founder and CTO of Software Applications Incorporated, discussed how the quality of consumer-facing products depends on what data the underlying model is trained on, and explained that closed-source models do not provide the transparency necessary to allow for informed consumer decision-making. Andy Hasty, attorney at the FTC, highlighted the risk to consumers of companies marketing their applications with labels like "privacy enhancing" or "AI safety," when in fact the company's practices may not align with consumers' understanding of those terms.

FTC Inquiry into Generative AI Investments and Partnerships

Section 6(b) of the FTC Act authorizes the agency to conduct studies to gain a deeper understanding of market trends and business practices and require the production of information in furtherance of the study. In its inquiry into generative AI investments and partnerships, the FTC has issued orders to two generative AI companies and three major cloud services providers regarding their recent investments and partnerships. The FTC has asked for information and documents concerning:

- Strategic rationale behind the investment/partnership;
- Practical implications of a specific partnership or investment, including decisions around new product releases, governance or oversight rights, and the topic of regular meetings;
- Analysis of the transactions' competitive impact, including information related to market share, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets;
- Competition for AI inputs and resources, including the competitive dynamics regarding key products and services

needed for generative AI; and

- Information provided to any other government entity, including foreign government entities, in connection with any investigation, request for information, or other inquiry related to these topics.

Looking ahead

The concerns expressed by FTC officials and panelists regarding competition in the generative AI arena and adjacent markets are in line with those the agency has previously expressed.[3] Competition and consumer protection issues are likely to continue to be top of mind for the FTC as it considers future developments with respect to advanced AI.

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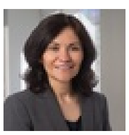
References

1 Federal Trade Commission, FTC Tech Summit event page (Jan. 25, 2024) available here.

2 Federal Trade Commission press release, “FTC Launches Inquiry into Generative AI Investments and Partnerships” (Jan. 25, 2024) available here.

3 See Federal Trade Commission Technology Blog, “Generative AI Raises Competition Concerns” (June 29, 2023) available here.

Contacts



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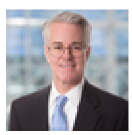

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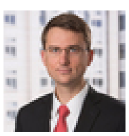

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