PACIFIC RIM ADVISORY COUNCIL


## Pacific Rim Advisory Council
# JUNE 2024 e-Bulletin

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## CONFERENCES & EVENTS

### PRAC Conferences

**VANCOUVER, CANADA - September 21 - September 24, 2024**
Hosted by RICHARDS BUELL SUTTON LLP
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**PERU - April 26—29, 2025**
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►GIDE | Advises S2FIT1 on the acquisition of Technicampus in Le Mans

►HAN KUN | Advises Joint Bookrunners on JD.com, Inc.'s US$ 2.0 billion convertible senior notes offering

►HOGAN LOVELLS | Wins unanimous Supreme Court victory in widely watched case concerning access to mifepristone

►KOCHHAR | Advises Spectris Group on its Strategic Divestiture

►NAUTADUTILH | Advises Acomo on their acquisition of nuts and dried food business from Caldic

►SANTAMARINA | Advised SEEK HOLDINGS in Red Arbor Holding S.L. acquisition of OCCMundial.com

## DENTONS RODYK PROMOTES 19 LAWYERS TO SENIOR ASSOCIATE

**SINGAPORE 01 July, 2024:** Dentons Rodyk is delighted to announce the promotions of nineteen new senior associates, with effect from 1 July 2024. The promotions are awarded across the firm's key practice areas, reflecting the growing bench of talent within Dentons Rodyk as well as the firm's ambitious pursuit of being one of the best in Singapore and ASEAN.

Managing Partner Gerald Singham extended his congratulations to the newly promoted senior associates, saying: *"These talented junior lawyers have all worked hard and dedicated a great deal of time and effort in achieving this meritorious promotion. Within our firm, their commitment to legal excellence sets a very high bar and I am confident that they will continue to excel in their new roles."*

The newly promoted senior associates are:

Corporate Practice
- Lester Yam
- Rebecca Goh

Finance Practice
- Cher Han Tan

Intellectual Property & Technology
- Jun Rong Lim
- Mavis Tan
- Sean Lee

Litigation & Dispute Resolution
- Astrid Teo
- Chloe Chen
- Isaac Hoe
- Joie Tan
- Jin Yin Kuan
- Kavitha Ganesan
- Lydia Yeow
- Paul Singh
- Philip The
- Physilia Lim
- Tharanii Thiyagarajan
- Tricia Ong

Real Estate
- Rachel Lim

For additional information visit us at [www.dentons.rodyk.com](www.dentons.rodyk.com)

## BRIGARD URRUTIA

HELPS BANCOLOMBIA CARRY OUT DEBT TAB AND TENDER OFFER

**BOGOTA - 02 July 2024**: Brigard Urrutia in Bogotá assisted Bancolombia carry out a US$800 million notes issuance and complete a concurrent tender offer. The issuance closed on 24 June.

The notes are set to mature in 2034 and have a coupon of 8.63%.

Bancolombia will use the proceeds of the issuance to repurchase its 6.09% notes due in 2027 and the remaining proceeds will be used for general corporate purposes. At the same time, the Colombian bank also made a tender offer to repurchase its 3% notes due in 2025 and up to US$400 million of its 6.9% notes which will mature in 2027.

Counsel to Bancolombia Sullivan & Cromwell LLP;Local Counsel Brigard Urrutia Partners Carlos Fradique-Méndez and Luis Gabriel Morcillo and associates Viviana Araújo and Valentina Bocanegra in Bogotá.

Counsel to BofA Securities, Citigroup Global Markets and JP Morgan Securities Cleary Gottlieb Steen & Hamilton LLP and local counsel Philippi Prietocarrizosa Ferrero DU & Uría

For additional information visit www.bu.com.co

## CAREY

ASSISTS CODELCO WITH PPP FOR LITHIUM PRODUCTION IN ATACAMA

**SANTIAGO - 17 June 2024:** Carey and Deloitte Legal (Chile) have helped Chile's state-run copper producer Codelco enter a public-private partnership (PPP) with local miner Sociedad Química y Minera (SQM) to increase lithium production in the country's Salar de Atacama salt flat. SQM relied on Claro y Cía in the deal, which was signed on 31 May.

The PPP takes the shape of a joint venture for which Codelco's subsidiary Minera Tarar and SQM's SQM Salar will join forces. Codelco will hold a majority stake in the joint venture.

The closing of the agreement is subject to the passing of certain legal, regulatory, technical and environmental requirements as well as consultation with local indigenous communities, expected to be completed in the first quarter of 2025.

Once complete, the agreement will replace an existing contract between SQM and Chilean economic development agency Corfo, which was signed in 2018 and set to expire in 2030.

The joint operations will run from 2025 through to 2060 with Codelco overseeing general management from 203 onwards. Codelco aims to apply new technologies and improve extraction processes to produce 300,000 tonnes of lithium carbonate equivalent between 2025 and 2030 in the Atacama salt flats, with an additional 300,000 tonnes expected annually between 2031 and 2060.

Counsel to Codelco Deloitte Legal (Chile); Local counsel Carey Partners Rafael Vergara, Alberto Cardemil, Cristián Eyzaguirre, Francisco Carey, Cristián Figueroa, Francisca Corti, Manuel José Garcés, José Tomás Hurley, José Pardo, Julio Recordon and Camilo Lledó, counsel José Ignacio Mercado and associates Sebastián Melero, Borja Coz, Enzo Devoto and José Pablo Sáez

Counsel to Sociedad Química y Minera de Chile (SQM) Claro y Cía.

For additional information visit www.carey.cl

## GIDE

### COUNSEL TO S2FIT1 ON ACQUISITION OF TECHNICAMPUS IN LE MANS

**PARIS - 21 June 2024**: Gide has advised the company S2FIT1, a real estate subsidiary of the SNCF group, in the acquisition, in a future state of completion, of a building intended for use as a training center (Technicampus) located in Le Mans, spanning 9,900 square meters, for an amount exceeding 33 million euros.

The transaction was accompanied by the conclusion of a lease agreement in a future state of completion between S2FIT1 and SNCF.

The Gide team was composed of partner Alexandre Gauthier and associate Thomas Brusq on public law aspects, and partner Nicolas Planchot and associate Paul Cheysson on real estate law aspects.

For additional info visit us at www.gide.com

## HAN KUN

### ADVISES JOINT BOOKRUNNERS ON JD.COMN, INC.'S USD $2.0 BILLION CONVERTIBLE SENIOR NOTES OFFERING

**BEIJING - 29 May, 2024**

Han Kun has provided legal services in connection with JD.com, Inc.'s ("JD", Stock Code: 9618.HK (HKD counter) / 89618.HK (RMB counter) / NASDAQ: JD) US$ 2.0 billion convertible senior notes offering as PRC counsel for the joint bookrunners.

JD is a leading supply chain-based technology and service provider.

For additional information visit www.hankunlaw.com

## HOGAN LOVELLS

WINS UNANIMOUS SUPREME COURT VICTORY IN WIDELY WATCHED CASE CONCERNING ACCESS TO MIFEPRISTONE

**WASHINGTON, D.C., 13 June, 2024** – A Hogan Lovells team led by Appellate partner Jessica Ellsworth secured a unanimous Supreme Court victory in a case of national importance on behalf of Danco Laboratories, maker and distributor of Mifeprex® (mifepristone), the first and only brand name drug approved to terminate early pregnancy.

In a 9-0 decision, the Court ruled the plaintiffs, who were associations and individual doctors opposed to abortion, did not have Article III standing to bring their case. The decision overturns an April 2023 decision by the U.S. District Court for the Northern District of Texas blocking the distribution of the drug. That decision by Judge Matthew Kacsmaryk suspended the U.S. Food and Drug Administration's (FDA) 2000 approval of the drug and subsequent FDA guidelines regulating its use.

Ellsworth presented oral arguments before the Court in March 2024, alongside United States Solicitor General Elizabeth Prelogar, who is a former member of the Hogan Lovells Appellate practice. Ellsworth, aided by the firm's FDA regulatory team, including partners Philip Katz and Lynn Mehler, delivered an all-encompassing defense of FDA policies surrounding their two-decade-old approval of mifepristone.

The Court held that the plaintiffs did not have standing to bring their case under Article III of the Constitution, which is a "bedrock constitutional requirement" that limits federal courts' jurisdiction to "cases" and "controversies."
Justice Kavanaugh delivered the opinion of the Court, which concluded that the plaintiffs did not demonstrate that they had suffered an "injury in fact" caused by the FDA.

As the Court explained, the plaintiffs' "sincere legal, moral, ideological, and policy objections to mifepristone being prescribed and used by others" do not suffice to confer Article III standing, and neither did any of the "several complicated causation theories" the plaintiffs' advanced seeking "to connect FDA's actions to the plaintiffs' alleged injuries in fact." The Court emphasized that "citizens and doctors do not have standing to sue simply because others are allowed to engage in certain activities—at least without the plaintiffs demonstrating how they would be injured by the government's alleged under-regulation of others." Instead, "[c]itizens and doctors who object to what the law allows others to do may always take their concerns to the Executive and Legislative Branches and seek greater regulatory or legislative restrictions on certain activities."

Hogan Lovells has represented Danco Laboratories, a longstanding client, in this matter since the original decision by Judge Kacsmaryk. In April 2023, Ellsworth and her team won a stay from the Supreme Court under substantial time constraints.

Speaking after the decision was made public, Ellsworth said: "This case is extremely important to our client, and has widespread implications for the pharmaceutical sector. The lower court's decision threatened to upend the industry by unilaterally overruling the FDA and its ability to independently assess and approve drugs."

Ellsworth was supported in the case by Appellate partners Cate Stetson, co-head of the Appellate practice, and
o-Ann Sagar. In addition to Katz and Mehler (head of the Pharmaceuticals & Biotechnology practice), the team
also included senior associates Danielle Stempel and Marlan Golden, and associates Dana Raphael (all Washington, D.C.), and
Eva Schifini (Los Angeles).

For additional information visit us at [www.hoganlovells.com](http://www.hoganlovells.com)

## KOCHAR AND CO.

ADVISES SPECTRIS GROUP IN ITS STRATEGIC DIVESTITURE

**NEW DELHI - 05 April, 202**4: Kochhar & Co. is pleased to announce its role as a legal advisor to the Spectris Group, a global leader in high-tech precision instrumentation and controls, in the Indian leg of its strategic divestiture of the Red Lion Controls business to HMS Networks.

The transaction involved the transfer of the Red Lion Controls division from Spectris Technologies Private Limited to HMS Industrial Networks India Private Limited.

Kochhar Delhi Partner Nishant Arora led the transaction, with support from Associate Akhil Verma. The team advised the Spectris Group on all legal aspects of the transaction, including reviewing, drafting, negotiating, and finalizing transaction documents and other legal formalities requisite for the successful closure of the transaction.

Additional information on this transaction is available here: https://www.spectris.com/newsroom/completion-of-portfolio-rationalisation-with-divestment-of-red-lion-controls/

https://www.hms-networks.com/news-and-insights/news-from-hms/2024/04/02/hms-networks-and-red-lion-controls-join-forces-for-a-stronger-offering-within-industrial-information-and-communication-technology

Visit us at www.kochhar.com

## NAUTADUTILH

ADVISES ACOMO ON THEIR ACQUISITION OF NUTS AND DRIED FOOD BUSINESS FROM CALDIC

**AMSTERDAM - 01 July, 2024**

NautaDutilh advised Acomo, the Euronext Amsterdam-listed diversified, plant-based ingredients group, on their intended acquisition of the Caldic Food Service and Retail nuts and dried fruit business in Northern Europe.

Through this acquisition, Acomo will further strengthen the group’s spices and nuts segment and establish a stepping-stone in the European Nordic markets.

*“Congratulations to Acomo on this strategic bolt-on acquisition to establish local presence in the Nordic markets. Deal making doesn't stop at the border and we're happy to guide and assist our clients wherever they do business.” Willem Bijveld, lead partner*

The intended acquisition is subject to customary closing conditions, including Swedish Foreign Direct Investment ("FDI") approval, and is expected to close in Q3 of 2024.

For additional information visit us at www.nautadutilh.com

## SANTAMARINA

ADVISES SEEK LIMITED IN RED ARBOR HOLDING S.L. ACQUISITIONJ OF OCCMUNDIAL

**MEXICO CITY 24 June, 2024**

Red Arbor Holding S.L. acquired OCCMundial.com, one of the main employment marketplaces in Mexico from SEEK Limited (SEEK). SEEK is a market leader in online employment marketplaces headquartered in Melbourne. Outside of Australia, the company operates in New Zealand, China, Hong Kong, Singapore, Indonesia, Philippines, Malaysia, Thailand, Nigeria, and South Africa.

This strategic acquisition will allow Red Arbor Holding S.L. to continue strengthening its presence in the online career management market and its expansion and consolidation in the sector, leveraging synergies and growth opportunities in the technology and human resources fields.

The legal advisor responsible for carrying out this transaction on behalf of SEEK in Mexico was Santamarina + Steta, supported by a team led by Jorge León Orantes, Pablo Laresgoiti, Belén Gómez, Sarahi López and Raquel Ortiz. These legal experts provided invaluable guidance and representation to SEEK, to execute the stock purchase agreement and other ancillary agreements which allowed to close the operation definitively on June 20, 2024.

For additional information visit www.santamarinasteta.mx

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September 21—24, 2024
Vancouver, Canada

Hosted by Richards Buell Sutton LLP

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www.prac.org

Open to member firms only
Registration deadline 19 August

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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.**

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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
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Robin Chang
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Jaime Carey
Sarika Raichur
Aaron Zhou
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Lisa Bai


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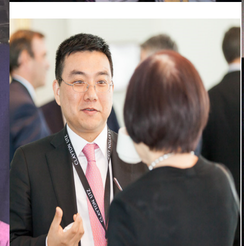


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理律法律事務所
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ADVOGADOS

# Tax Reform Enacted: Income Tax and Personal Assets Tax.


1 July 2024(https://allende.com/en/2024/07/01/)
Argentine Reform 2024 (https://allende.com/en/argentine-reform-2024/), Tax (https://allende.com/en/tax/), Tax measures & moratorium (https://allende.com/en/argentine-reform-2024/tax-measures-and-moratorium/)

On June 27, 2024, the process of approval of the Palliative and Relevant Tax Measures Law (hereinafter, the "Law") finally culminated in the Chamber of Deputies, with the reiteration of the titles specifically dedicated to Personal Assets Tax and Income Tax. Said titles had been subject to controversy in the Senate, where they were eliminated from the bill, for which reason it had to be sent back to the House of origin to receive treatment again, ratifying its elimination or reiterating its approval as originally proposed.

The following is a summary of the main aspects of the Law recently approved by the Chamber of Deputies in connection with: (i) the reinstatement of the Income Tax regime; and (ii) the amendments to the Personal Assets Tax.

1. **Income Tax**

The main changes to the Income Tax with respect to the current regime, called "Cedular Tax", are related to the application of the tax to salary concepts. Among the reforms are modifications to the tables of taxable amounts, a regime for updating the tables for inflation, and new deductions.

The Law reestablishes the previous scheme and therefore eliminates the minimum taxable amount of 15 Minimum Vital and Mobile Wage and establishes that the new minimum non-taxable amounts for dependent employees, including those salaried employees with gross salaries, will be $ 1,800,000, in the case of single workers, and $ 2,360,000, in the case of married workers with two children under 18 years of age.

These amounts will be updated in September 2024, considering the inflation rates reported by National Institute of Statistics and Census (hereinafter "INDEC", for its Spanish acronym) for the previous three months. This presents a difference with the current regime, which, instead of being tied to inflation, links the increases to the Minimum Vital and Mobile Wage published by the Government.

Finally, it should be noted that the amounts will be adjusted semiannually starting in 2025, to reflect the annual variation of the Consumer Price Index ("*CPI*"), provided by *INDEC.* This adjustment will be made in the months of January and July of each year.

The Law provides that the amendments introduced will not be retroactive to the beginning of this year, even though they cover the same fiscal period. Thus, the new scales will apply only from the effective date.

**i) Exemptions and Deductions**

On the one hand, the Law introduces new deductions not foreseen in the current regime, such as expenses for spouse and children, rents and more. The maximum amounts deductible from taxable income by individuals may not exceed the aforementioned amounts:

- Non-Taxable Income: $ 3.091.035
- Spouse spending: $ 2.911.135
- Children spending: $ 1.468.096

However, it also implies the elimination of several tax exemptions, such as mobility expenses, in addition to eliminating the differentiations previously made by the tax regarding the value of overtime, work on weekends and holidays, as well as productivity bonuses.

2. **<u>Personal Assets Tax</u>**

The Law includes substantial changes to the Personal Assets Tax Law, modifying the applicable rates for the tax periods from 2023 to 2027, and establishing a special income regime to advance the tax for future years.

**i) Modification of the applicable Personal Assets Tax rates**

A gradual modification of the scale of progressive reductions in the tax rates for the fiscal years from 2023 to 2027 is established, progressively reducing the maximum tax rate from 1.50% in 2023 to a unified rate of 0.25% for 2027.

Additionally, those taxpayers who have complied with all their tax obligations with respect to Personal Assets Tax for the tax periods 2020 to 2022, inclusive, will have a reduction of 0.50% of the respective rate of such tax for the tax periods 2023, 2024, 2025.

In order to qualify as a compliant taxpayer, the taxpayer (i) must not have regularized assets under the rules of Title II of this law and (ii) must have filed and cancelled before December 31, 2023, if required to do so, the Personal Assets Tax returns for the tax periods 2020, 2021 and 2022.

**ii) Special Regime for Payment of Personal Assets Tax**

The Law introduces a new Special Regime for Payment of Personal Assets Tax (hereinafter, "REIBP" for its Spanish acronym) of voluntary and individual adhesion for individuals and undivided estates that were tax residents in the country as of December 31, 2023. The regime also covers foreign residents who, as of December 31, 2023, are not considered tax residents for personal income tax purposes, but had been tax residents in the country before that date.

The taxpayers may adhere to the regime until July 31, 2024, inclusive. The National Executive Power may extend such date up to September 30, 2024, inclusive. Those who choose to adhere to the asset regularization regime may exercise the option to adhere to the special income tax regime until the time of filing the sworn statement of the asset regularization regime (November 30, 2024, January 31 or April 30, 2025, as the case may be).

**iii) Taxable base**

- In the case of individuals and undivided estates residing in Argentina, the tax will consider the assets existing in the taxpayer's net worth as of December 31, 2023 inclusive, with all the rules in force at that time for their valuation, considering exemptions, deductions and non-taxable minimums. The resulting amount will be multiplied by five and will constitute the taxable base of the tax to be paid under the regime.

- In the case of taxpayers who have externalized assets under the asset regularization regime, the taxable base will be determined by taking the total amount of the assets regularized in the 3 stages, valued according to the Regularization Regime, for which the value is determined in dollars and then converted into pesos according to the official exchange rate corresponding to the date of filing of the respective affidavits of the regularization regime. The resulting amount will be multiplied by four.

**iv) Applicable Rates and Payment Mechanism**

In the event that the taxpayers choose to adhere to the REIBP, the Personal Assets Tax will be paid by applying a tax rate of:

- 0.45% on the taxable base determined in the case of individuals and undivided estates residing in the country.

- 0.50% on the taxable base determined in the case of taxpayers who have regularized assets under the asset regularization regime.

The payment of the tax would consist of an initial payment of 75% of the total tax determined in accordance with the provisions of the regime following the date, method and other requirements established in the regulation The regulation will establish the mechanism for the presentation of the corresponding affidavit. If no amount is paid for the initial payment of the regime within the established legal term, this will deprive the taxpayer in full of the benefits of this regime.

If after the presentation of the affidavit of the Regime, it is noticed that the initial payment was less than 75% of the total payment, the taxpayer may choose between:

1. To remain within the regime, paying the outstanding balance of income, increased by 100%.
2. To renounce to the benefits of the regime, in which case the taxpayer may apply the amount already paid as tax credit compensable against any other tax whose collection is in charge of the Tax Authority (AFIP).

**v) Benefits**

Taxpayers who adhere to the regime and comply with its conditions will enjoy the following benefits:

- Exclusion from Personal Assets Tax and any other personal property tax for the tax periods 2023 to 2027, reaching all aspects of Personal Assets Tax (i.e., advance payments, payments on account, filing of affidavits, etc.).

- They will enjoy tax stability until the year 2038 with respect to the Personal Assets Tax and any other national tax that may be created and whose purpose is to tax all or any assets of the taxpayer, expressly prohibiting an increase in the tax burden due to property taxes beyond certain limits established in the Project.

- The tax stability is determined according to the rules of the Personal Assets Tax in force at the time of adhering to the regime, with a rate of 0.45% until 2027 (of 0.50% for those taxpayers for the assets they regularize) and thereafter of 0.25% until 2038.

*This report cannot be considered as legal or any other kind of advice by Allende & Brea. For any questions, do not hesitate to contact us.*

 (https://allende.com/en/lawyers/raul-fratantoni/)

Raúl Fratantoni (https://allende.com/en/lawyers/raul-fratantoni/)

 (https://allende.com/en/lawyers/nicolas-o-procopio/)

Nicolás O. Procopio (https://allende.com/en/lawyers/nicolas-o-procopio/)

Tozzini Freire.
ADVOGADOS

# Sports betting upcoming regulation

April 12, 2024

On April 10th, 2024, the Brazilian Ministry of Finance published Ordinance no. 561/2024 (available here in Portuguese), establishing the Regulatory Policy of the Secretariat of Prizes and Betting ("SPB" – or "SPA," acronym in Portuguese) and the Regulatory Agenda for 2024.

The new ordinance aligns with the Ministry of Finance's efforts to regulate the "blurry lines" of Federal Law no. 14,790/2023, enacted by President Lula on December 30th, 2023. This law provided especially for the taxation, compliance, advertising, and inspection aspects that will be applicable to sports betting operators.

SPB proposes a four-phase schedule, following an order of priorities, and intends to fully implement it by the end of July 2024.

TozziniFreire's Gaming & E-sports team prepared the chart below with the agenda of the following Ordinances to be issued by SPB and a few comments on the key aspects of the long-awaited regulation:

## Phase 1 - Until April 2024

**Subject matter of the next ordinances**

- **Qualification of certification entities**
  - **Provision -** Requirements and procedures for recognizing the operational capacity of entities when certifying betting systems used by sports betting operators, live gaming studios and games.
  - **TozziniFreire comments -** *Ordinance no. 300/2024 – already published here*.
- **Payments methods**
  - **Provision -** General rules for payment transactions carried out by the companies authorized to operate sports betting in Brazil.
  - **TozziniFreire comments -** The Ordinance may clarify the use of *Bank as a Service* (BaaS) and the intermediation of payment institutions ("IPs") authorized by the Brazilian Central Bank (Bacen).
- **Betting System**
  - **Provision -** Technical and security requirements for betting systems used by sports betting companies.
  - **TozziniFreire comments -** The Ordinance may define the requirements that the systems must comply with, including obtaining the certification in compliance with the law.
- **Authorization**
  - **Provision -** Rules, conditions, and procedure for sports betting operators to apply for authorization.
  - **TozziniFreire comments -** In addition to the procedures for requesting, analyzing, and granting the authorization, the Ordinance may clarify open issues, such as the minimum holding of a Brazilian partner in the capital stock of the authorized company and the deadlines for interested parties to comply with the requirements for the issuance of the authorization. It is even possible that the Ministry of Finance should consider granting a temporary authorization, granting a period for all requirements to be complied with as a condition for permanent authorization.

## Phase 2 - Until May 2024

#### Subject matter of the next ordinances

- **Anti-money laundering and fraud prevention policies**
  - **Provision -** Policy, procedures, and controls aimed at preventing money laundering, terrorist financing, proliferation of weapons of mass destruction, and other frauds related to the commercial exploitation of sports betting.
  - **TozziniFreire comments -** In addition to the provisions on the obligations, it is essential to define the form of interaction with the other monitoring bodies and entities – Bacen, Financial Activities Control Council ("COAF"), Brazilian Federal Revenue O
    etc.

- **Rights and obligations**
  - **Provision -** Set of rules to be observed by authorized operators to comply with legal provisions and safeguard the rights of bettors.
  - **TozziniFreire comments -** An essential aspect of this future Ordinance is the definition of the elements of mandatory internal policies provided in the norms. Besides, this Ordinance must define the prerogatives of sports betting operators to block accounts/users and other issues that could lead to conflict between regulation and consumer protection.

## Phase 3 - Until June 2024

#### Subject matter of the next ordinances

- **Online gaming**
  - **Provision -** Technical and security requirements for online gaming that may be made available to bettors by the authorized sports betting operators.
  - **TozziniFreire comments -** Considering the recent inclusion of online games in authorized activities, their regulation is even more open than that of sports betting. It is essential that this Ordinance provide the details of online gaming and, besides that, give a solid legal definition, specifying what practices can or cannot be considered online gaming for the regulation to be enforced.
- **Inspection**
  - **Provision -** Rules and procedures for monitoring and inspecting the commercial exploitation of sports betting.
  - **TozziniFreire comments -** Setting limits to the Ministry of Finance's prerogatives and defining the operators' processes and obligations is essential to ensure an efficient inspection. It is also vital to establish how other bodies and entities of the Government can participate and collaborate on this.
- **Penalties**
  - **Provision -** Procedure for enforcing administrative penalties against sports betting operators.
  - **TozziniFreire comments -** Regulating the Federal Law of Administrative Procedure (Law no. 9,784/1999) for sports betting/online gaming is crucial. It is desirable to have proper rules adapted to the specificities of the operation and that ensure due process.

## Phase 4 - Until July 2024

#### Subject matter of the next ordinances

- **Guidelines for responsible gaming**
  - **Provision -** Regulation of actions to promote responsible gambling, regarding measures,

guidelines, and practices to prevent pathological gambling disorder in the scope of fixed-odds betting, rules for monitoring and preventing players from falling into debt and additional rules concerning responsible advertising.
    - **TozziniFreire comments -** Limiting operators' responsibilities—as a preventive approach—is essential to ensure legal security, preventing them from being forced to adopt measures outside their competence. Correctly delimiting the operators' obligations is relevant to avoid having them liable for acts that cannot be imputed to them.
- **Social allocations**
    - **Provision -** Procedures to effectively allocate funds to legal recipients as provided for in paragraph 1-A of Section 30 of Federal Law No. 13,756/2018.
    - **TozziniFreire comments -** It is essential to define the transfer procedures and to establish the obligations of operators and those in charge of the financial aspects of transfer operations.

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# PUBLIC INTEREST – RARE CASES WHERE PATENT INJUNCTIONS DECLINED

By: Jonathan Woolley

In patent litigation, when a defendant is found to have infringed a plaintiff's patent, the court typically awards a monetary remedy, either in the form of damages or an account of profits. Damages are measured by the plaintiff's loss, while profits are measured by the defendant's gain. The court will also usually issue an injunction by which the infringing defendant is ordered to stop the infringing activity. The court's authority for issuing an injunction is found in Section 57 of the *Patent Act*:

> *57*(1) In any action for infringement of a patent, the court, or any judge thereof, may, on the application of the plaintiff or defendant, make such order as the court or judge sees fit,
>
> *(a)* restraining or enjoining the opposite party from further use, manufacture or sale of the subject-matter of the patent, and for his punishment in the event of disobedience of that order, or
>
> …
>
> *and generally, respecting the proceedings in the action.*

The language of Section 57 is permissive, not mandatory. So, when would a court decline to issue an injunction, and allow the defendant to carry on the activity that was found to be infringing? In a recent decision, *Abbvie Corp. v. Jamp Pharma Corp.[1]*, the Federal Court of Canada declined to issue an injunction against an infringing defendant when it found it would be against the public interest to do so.

The case concerned the defendant, Jamp's pharmaceutical product known as SIMLANDI. It was alleged to have infringed certain patents pertaining to the plaintiff AbbVie's drug HUMIRA, which was used to treat a range of autoimmune disorders. Jamp was found to have infringed one of the patents, and AbbVie sought an injunction that would have barred Jamp from making, using, promoting, or selling SIMLANDI in Canada until the relevant patent expired in 2028. AbbVie also sought an order requiring existing SIMLANDI patients to transition to an appropriate alternative within a 6-month period, and for Jamp to deliver up or destroy its inventory of infringing products.

The Federal Court confirmed that Section 57 of the *Patent Act* gives the Court the discretion to grant an injunction, meaning that the Court could decline to grant an injunction even where infringement is found. However, that discretionary power is usually granted unless there is an equitable reason not to, such as delay, a lack of clean hands, unconscionability, and triviality.

The Court found that this was one of the rare cases in which an injunction would be inappropriate in view of the public interest. Among the relevant considerations was that Jamp's SIMLANDI product was the only 80 mg formulation among biosimilar products that was available in Canada, and removing it from the market would force all SIMLANDI patients to switch to an alternative drug with a higher injection volume and possibly containing citrate, a buffer thought to cause injection site pain. The Court accepted Jamp's argument that it was not in the public interest to force SIMLANDI patients to switch to another product. The Court observed that AbbVie could be compensated by a reasonable running royalty, and this was preferable to taking SIMLANDI off the market.

AbbVie's royalty was to be determined in the next phase of the bifurcated trial. However, the Court noted that the royalty rate should be easily determined by reference to licensing agreements that AbbVie had negotiated with seven other biopharmaceutical companies.

AbbVie has appealed the Federal Court's decision. The anticipated decision of the Federal Court of Appeal will likely provide further guidance on the extent to which a court can consider the public interest in exercising its discretion to grant an injunction. In the meantime, the Federal Court's decision stands as a useful illustration of the discretionary nature of the Court's jurisdiction under Section 57 of the *Patent Act*, and the type of considerations that may be brought to bear.

## NEWS ALERT

# New Substitute Tax on Final Taxes Enters into Force

July 1, 2024

Effective July 1, 2024, the Law creating the Transitory Emergency Fund for fires and other reconstruction measures for Valparaíso ("Law") came into effect. This law introduces a new Tax on Final Taxes ("ISFUT"), which replaces the payment of final taxes (i.e., Personal Tax and Withholding Tax) with a single, fixed-rate tax, featuring special characteristics distinguishing it from previous versions.

The new ISFUT applies to Corporate Tax taxpayers under both the general and Pro-SME regimes, with the following general features:

### I General Regime

1. Taxpayers with accumulated taxable profits in the RAI register at the end of the 2023 tax year (including those generated before 2017 in the STUT register) may benefit from the new ISFUT at a 12% rate, without credit rights, on part or all of this profits.
2. The corporate income credit associated with profits subject to the ISFUT is lost.

### II SME Regime

1. Companies under the SME regime can opt for the ISFUT at a 30% rate, with the right to a corporate tax credit proportional to the amounts covered, capped at the balance recorded in the SAC register as of December 31, 2023.
2. If the credit is applied, such amount must be deducted from the SAC register.

For both regimes, profits subject to the ISFUT will not be taxed again at the final taxpayer level and can be distributed with preference, without being subject to the current imputation order under the Income Tax Law.

The option to opt for this new ISFUT can be exercised until the last banking business day of January 2025.

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# 1. Top 10 Traps to Avoid: Navigating China's HGR Applications[1]

**Authors: Aaron GU | Pengfei YOU | Duzhiyun ZHENG | Matt ZHANG | Franky YU | Leyi WANG[2]**

In recent years, the regulatory framework for human genetic resources ("**HGR**") in China has become increasingly mature. Regulatory authorities have issued and updated a series of laws and regulations, including the *Regulations on the Administration of Human Genetic Resources* (the "***HGR Regulations***"), the *Implementation Rules on the Administrative Regulations on Human Genetic Resources* (the "***Implementation Rules***"), the corresponding administrative guidelines, as well as the *Answers for Frequently Asked Questions on Human Genetic Resource Administration.* The regulatory system for HGR in China has been thereby established and refined (For our insights on the regulations of HGR in China, please refer to: *Highlights on HGR Regulation Implementation Rules*; *Key Takeaways of the New HGR Guidelines*; *Key Takeaways on the New HGR FAQs issued by the MOST of China*).

Meanwhile, significant progresses have been made for the review and approval process of HGR applications. According to the approval results for HGR projects publicly disclosed on the HGR Management System, 105 collection projects and 704 international scientific research collaboration projects have obtained approval to date this year. The rate of approval is high, and the average time for approval ranges between 16 to 20 working days[3].

Since May 1, 2024, the regulatory authority of HGR in China has been transferred from the Ministry of Science and Technology (the "**MOST**") to the National Health Commission (the "**NHC**"). (For our insights on the changes of HGR regulatory authority, please refer to: *汉坤 • 快评 | 《人类遗传资源管理条例》再次修订*). On April 25, 2024, the MOST issued an announcement that the application process and management system for HGR projects will remain unchanged. Furthermore, there are reports indicating that the NHC has thereafter commenced the revision of the *Implementation Rules*, where the NHC may consider further widening the scope of the "Chinese entities" and streamlining the application process for HGR projects to reduce the burden on industry in the future[4]. Such relaxation of the future standards and requirements for the applications of HGR projects may facilitate the ongoing and future research projects. However, we have also observed that due to a lack of understanding of compliance requirements, a number of common traps in HGR applications have emerged across various projects in recent years, resulting in failure to obtain the approval. Regardless of any future revision, foreseeably China's current regulatory system for HGR will not undergo any fundamental changes unless any amendments to the *Biosecurity Law of the PRC*. Therefore, failure to avoid these traps may still pose significant obstacles to the process of HGR projects, whether there will be any relaxation to the specific requirements. In light of

[1] For the Chinese version, please click *十大雷区：中国人类遗传资源项目申报避坑指南*.

[2] Shuwen Sun have contributions to this article.

[3] HGR Management System: https://apply.hgrg.net/.

[4] Moting Jiang, Xiaotian Cui (2024, May 13), 独家 | "人类遗传资源管理条例实施细则"修订提上日程, *Caixin*, https://m.caixin.com/red/2024-05-13/102195539.html?s=6d1d82d074b45ff0376cf93f789cba1b813014478d3b719ab1fc919d78206db00c0be4674434d5b0.

this, in accordance with the latest regulations, policies and regulatory practices, this article specifies ten common traps in the application of HGR projects in China. We also hope that this article could help the industry better understand regulatory requirements, mitigate risks, improve efficiency in obtaining approvals and facilitate smooth process of HGR projects.

### Trap one: inappropriate pathway for the application

Choosing an appropriate application pathway is the initial step for a compliant and smooth HGR application. Current HGR pathways include procedures of the collection approval, the biobanking approval, the material exportation approval and the international scientific research collaboration approval of HGR, as well as the international clinical trial collaboration filing and data sharing reporting of HGRs. Based on the specific characteristics of the projects, applicants shall select the right pathway and complete the application process in accordance with the laws and regulations. Failure to choose the right pathway may lead to the failure to obtain approvals for the projects or result in potential legal risks for the projects.

For instance, if a foreign entity plans to utilize Chinese HGR information for scientific research, the procedures of the international scientific research collaboration approval, the international clinical trial collaboration filing, or the data sharing reporting may be applied based on the project's collaboration arrangements and specific circumstances. If the foreign entity merely intends to provide investigational drugs or funding for such HGR-related scientific research without any substantial involvement in the research, no application procedures are required. However, if the foreign entity intends to substantially participate in the project, obtain the HGR and the related research data, share the project's intellectual property rights ("**IPR**"), or share or jointly publish research findings, it is necessary to complete the applicable application procedures.

### Trap two: safety risks and inadequate risk mitigation methods in the projects

The safety risks associated with the projects have always been a significant concern in the regulation of HGR in China. The legislative intent of the *HGR Regulations* is the effective protection and reasonable utilization of the HGR, as well as to safeguard public health, national security and public interests[5].

Therefore, whether a project poses potential safety risks, including risks to public health, national security, or public interests, is a key focus of the regulatory authority in the review. To manage such safety risks, applicants shall make proper arrangements for the biobanking, use, and mitigation measures of the involved HGR in the project and provide specific explanations of such arrangements in the application materials. For instance, it shall be provided that no personally identifiable information of subjects/patients shall be uploaded to public platforms. Key data generated in the project, such as raw data from whole-exome sequencing or whole-genome sequencing, shall be stored on domestic platforms. If no reasonable and effective risk mitigation measures is implemented in the project, it is highly likely that the application will not be approved.

[5] Article 1 of the *HGR Regulations*.

## Trap three: insufficient research capabilities of the collaborating parties

Another key focus during the review and approval of HGR projects is the foundation and capability of the collaborating parties to conduct relevant research. If the necessity and reasons for the collaboration are not sufficient, or if the collaborating parties do not have sufficient personnel, technologies, equipment, or HGR materials and information related to the proposed research project, it may be difficult for the corresponding project to obtain an approval.

For example, if a Chinese research institution wants to collaborate with a foreign pharmaceutical company specializing in cardiovascular drugs to conduct a study on mental illness, but the Chinese institution fails to provide sufficient explanation of the foreign partner's research capabilities in the field of mental illness, the regulatory authority is likely to consider whether the collaboration is unreasonable. Therefore, the research capabilities of the collaborating parties and the provision of relevant basic information are crucial for the project to be approved. The collaborating parties shall be able to demonstrate their research strength and resources in the relevant field to increase the chances of the project being approved smoothly.

## Trap four: questionable source of the HGR

The legitimacy of the source of the HGR is also an important consideration in the review of HGR projects. If the source of the HGR to be used in the project is not legal, it is likely that the project will fail the review.

The applicant shall provide an explanation of the source of the HGR involved and the administrative procedures already completed (if applicable). If the applicant cannot prove the legitimacy of the source of the HGR, the project is likely to be denied by the regulatory authority.

## Trap five: unreasonable HGR utilization plan, or the mismatch between the proposed utilization plan and the types and quantities of the HGR applied

During the review process of HGR projects, the regulatory authority will review the proposed utilization plans of the HGR involved, such as the international collaboration research plans, HGR collection plans, and HGR material export plans, to ensure that the utilization of the HGR is both reasonable and legitimate. The applicants must ensure the legitimacy, reasonableness, and consistency of the proposed plans to smoothly pass the review. Meanwhile, the applicants shall also ensure that the types and quantities of the HGR applied are consistent with the proposed plans when submitting their applications.

Specifically, the following issues regarding the utilization plans of HGR are likely to result in the project application being denied:

- Unclear or unreasonable description in the HGR utilization plan, or the inconsistency between the utilization plan and other project materials (such as the collaboration agreements).
- Unreasonable specifications, quantities, etc., of the HGR materials or information involved.
- Unclear, unreasonable, or even illegal research purposes reflected in the plan.
- Failure of the plan/solution to adhere to the established standards and guidelines set forth by the relevant professional field or industry.

In addition, the types and quantities of the HGR applied shall match the research plan. Otherwise, it may raise doubts from the regulatory authority regarding the scientificalness, reasonableness, and even the authenticity of the research plan. If the types of the HGR applied do not match the research plan, or if the quantities of the HGR applied are excessive or insufficient, it may lead to delays in the review process or even the rejection of the applications.

### Trap six: unclear or unreasonable disposal arrangements for the remaining HGR

The regulatory authority pays special attention to the entire lifecycle of HGR utilization to maximize the safety of the HGR, ensuring the implementation of research ethics, subject rights, and social responsibility.

Therefore, the proper arrangement and disposal of the remaining HGR is crucial. If the disposal arrangements for the remaining HGR are not clearly and reasonably outlined in the plan, or if there are inconsistencies in the disposal arrangements for the remaining HGR in the application materials, the project may fail to get an approval. For the applicants, it is crucial to develop a clear and reasonable plan for the disposal of the remaining HGR in advance, and to clearly describe such plan in the application materials for the smooth approval of the project.

### Trap seven: unclear or incomplete arrangements in the collaboration agreements

The application materials also include the agreements between the collaborating parties, which may include international collaboration agreements as well as agreements related to the collection, transportation, testing, and disposal of the HGR. In the collaboration agreements, the clarity of the relationship between the collaborating parties and their division of work, and the completeness of the agreement are all key points of the review.

In practice, if there are disagreements between the collaborating parties regarding their division of work, the parties need to reach a consensus on the solution to such disagreements before the final submission of the application, and such consensus shall be clearly reflected in the submitted agreements. For example, a university biotechnology research institute plans to collaborate with a US pharmaceutical company on an international scientific research project involving Chinese HGR. During the drafting of the collaboration agreement, the two parties disagreed on the selection of the sample transportation provider and testing site. After negotiation, the two parties reached an agreement on the specific division of work for sample transportation and testing, and this agreement was clearly recorded in the collaboration agreement, providing a solid foundation for the smooth application and approval of the project.

### Trap eight: failure to obtain compliant informed consent according to law

According to Chinese laws and regulations, a written informed consent of the individual shall be obtained for the collection, biobanking, utilization, and external provision of HGR of China to protect the individual's legal rights and interests[6]. Applicants shall ensure that the informed consent form, a common and important document in project ethics review and regulatory procedures, fully complies with the relevant

[6] Article 9 of the *HGR Regulations*, Article 9 of the *Implementation Rules*.

regulations. If necessary, the informed consent forms may need to be modified and the informed consent of the individual shall be obtained again.

In practice, the utilization of an informed consent form (ICF) that does not fully comply with the relevant regulations poses significant risks to the overall application process. In certain projects, for example, the individuals are simply informed that their genetic resources will be used for clinical diagnosis, yet not informed that the same may be used for research activities other than clinical diagnosis. Similarly, some informed consent forms fail to disclose that the genetic materials or data may be sent abroad for testing or research, resulting in failure for the project to pass ethics review and regulatory procedures.

### Trap nine: lack of legal and valid ethics review approval, or inconsistency between application materials and ethics review approval

The collection, biobanking, utilization, and external provision of HGR shall comply with ethical principles and undergo ethics review[7]. Ethics review is usually conducted by the ethics (review) committee of the medical institution involved in the project. Obtaining an ethics review approval is a prerequisite "checkpoint" for HGR projects and is also an important document to be reviewed by regulatory authority.

In practice, there are situations where the project may be rejected in obtaining ethics review approvals, causing delays in the progress of HGR project. For example, the ethics review approval may be expired or invalid at the time of application; the composition and number of the ethics committee may fail to meet the required standards; the information in the ethics review approval may be inconsistent with that of other project materials such as protocols or informed consent forms; the version of the ethics review approval submitted is not be the final version.

### Trap ten: incompliance with legal requirements regarding IP ownership

In terms of HGR international scientific research collaboration projects, the ownership of IPR have always drawn close attention from and have been scrutinized by the regulatory authority. The laws and regulations clearly stipulate that, the corresponding patent rights shall be jointly owned by the collaborating parties if any Chinese HGR is used in the international scientific research collaboration; and the right to use, transfer rights, and arrangements for sharing the benefits of other scientific and technological outcomes shall be agreed upon by the collaborating parties through a collaboration agreement[8]. Furthermore, provincial regulatory authorities are specifically required to supervise and inspect the arrangements of IPR and benefit-sharing of these projects[9].

Therefore, it is necessary to stipulate that any patent right generated from HGR international scientific research collaboration projects shall be jointly owned by the collaborating parties; otherwise, the projects may not be approved. However, in practice, there are different approaches regarding the specific distribution of benefits of patent rights and other project outcomes. Based on our experience, many projects that consider multiple factors and make separate arrangements for economic benefits have also

[7] Article 9 of the *HGR Regulations*.

[8] Article 24 of the *HGR Regulations*.

[9] Article 56 of the *Implementation Rules*.

been approved by the regulatory authorities. During the application process, it is important to pay special attention to the rationality of the allocation plan of IPR and ensure consistency between the provisions in the collaboration agreement and the application materials regarding IPR ownership and distribution.

## Conclusion

In terms of HGR regulation, the companies always find it of challenges as well as opportunities, and it is crucial to understand and address various issues concerning the review procedures. This article aims to summarize common issues the companies may encounter in the regulatory authorities' review procedures of HGR projects, facilitating practitioners better comply with regulatory requirements. In addition, with shift in HGR regulatory authorities and the buildup of regulatory experience, regulatory requirements may also be adapted through amending HGR rules such as the *Implementation Rules*. We will closely monitor the latest regulatory trends and share our latest insights with the industry to facilitate the review progress of HGR projects in China and promote the development of life sciences.

Brigard Urrutia

# Decree draft by which Decree 1080 of 2015 is amended

**27 June 2024**

The Ministry of Culture, Arts, and Knowledge has published for comments the draft Decree intended to replace Part VI of Decree 1080 of 2015 (recently modified by Decree 138 of 2019) to protect the country's archaeological heritage by including new types of archaeological interventions, expediting the response of the Colombian Institute of Archaeology and History (hereinafter "ICANH") to requests for approval of Preventive Archaeology Programs, regulating the declaration of Protected Archaeological Areas, and adopting a technological platform to identify sites and Protected Archaeological Areas.

According to the draft Decree, the definition of archaeological heritage includes all "vestiges of human activity and those organic and inorganic remains that, through the methods and techniques of archaeology and related sciences, allow the reconstruction and dissemination of past sociocultural origins and trajectories and ensure their conservation and restoration," which complements the traditional definition included in Decree 1080 of 2015.

The draft Decree establishes that ICANH is the only entity authorized by legal provisions to apply the archaeological heritage management regime, being the entity responsible for authorizing the intervention of archaeological heritage, declaring Protected Archaeological Areas, approving Archaeological Management Plans, and applying the sanctions derived from the sanctioning regime contemplated in Law 397 of 1997 as amended by Law 1185 of 2008.

In addition to provisions related to the obligations of notifying and possessing archaeological heritage and obligations regarding the fortuitous discovery of Archaeological Heritage, the draft Decree includes provisions on the declaration of Protected Archaeological Areas and the intervention of archaeological heritage, which had been added by Decree 138 of 2019.
Regarding Protected Archaeological Areas, the draft Decree expands the definition, establishing that they are special areas declared by ICANH, which may establish special protection measures to regulate, delimit, and define permitted and prohibited activities to ensure long-term preservation and to carry out actions for the research, dissemination, and conservation of archaeological heritage.

It is important to note that the draft Decree establishes that Protected Archaeological Areas will be considered third-level determinants when preparing or modifying land use planning instruments for municipalities, districts, or departments, which is a significant change from Decree 138 of 2019.

In cases where there is an overlap of Protected Archaeological Areas with SINAP Protected Areas, areas of special ecological importance, or strategic ecosystems, the draft Decree states that the Archaeological Management Plan of the respective Protected Archaeological Area must harmonize its content with these environmental management categories to ensure that both instruments (archaeological and environmental) function complementarily to guarantee the protection of natural resources as well as archaeological heritage.

Regarding interventions on archaeological heritage, the draft Decree includes different types of intervention, modifying and adding to those contemplated in Decree 138 of 2019, specifically considering:

- Archaeological Intervention for academic research
- Archaeological Intervention for the Implementation of Management Measures
- Interventions of fortuitous findings
- Scientific Interventions in disciplines other than archaeology

According to the draft Decree, it will be ICANH's responsibility to regulate, through terms of reference, the procedures applicable to each type of intervention contemplated in the draft Decree. The draft regulation indicates that no procedure may exceed 30 days.

Finally, regarding Preventive Archaeology Programs, the draft Decree states that the administrative act approving the registration of a Preventive Archaeology Program, or the technical opinion issued by ICANH indicating the non-necessity of carrying out the program, are the only documents that comply with numeral 8 of Article 2.2.2.3.6.2 of Decree 1076 of 2015 in relation to the requirements for applying for an environmental license.

The draft Decree fully replaces Part VI of Decree 1080 of 2015 (which had been modified by Decree 138 of 2019) by including provisions aimed at clarifying some aspects regarding the preventive archaeology program and its scope of application, specifically for projects, works, or activities that require an environmental license or are subject to Environmental Management Plans, specifying that it will be required in cases of modification of these environmental management instruments.
The draft Decree is open for comments until June 28, 2024.

If you have any questions regarding the draft Decree, its impact on your project, work, or activity, or require assistance in formulating comments, do not hesitate to contact the Environment and Sustainable Business team at Brigard Urrutia.

**FOR MORE INFORMATION CONTACT OUR TEAM**

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# 2023, a year of contrasts for foreign investments in France

7 June 2024

## News

### Publication of the 2023 annual report

The long-awaited 2023 annual report on the control of foreign investment in France (FDI) was published on 4 June by the French Treasury, providing an interesting retrospective of the past year.

The lessons are many: a slowdown in investment operations, tighter controls, an increase in the number of authorizations, a reduction in the conditions attached to authorizations, etc. For FDI, 2023 was a year of contrasts, reflecting the global political and economic climate.

**Number of applications down, authorizations up**

Against a backdrop of unstable geopolitical, energy and economic conditions, the number of projects filed because of their sensitivity to national strategic interests has fallen: 309[1] projects were filed in 2023, compared with 325 in 2022. The decline is still slight, but more pronounced than in the previous year (328 applications submitted in 2021).

The decline is sharper in the number of requests for advance ruling: 27 cases in 2023 compared with 42 in 2022. This mechanism, which enables an investor or a target to confirm, usually prior to a transaction, whether the target's activities fall within the scope of FDI control, has long suffered from its lack of clarity, its limited contribution and the considerable time it entails (two months to obtain a response, to which must be added, as the case may be, the time required to apply for authorization if the Ministry deems the activities to be sensitive). The use of this mechanism is therefore limited to cases - rare in practice - in which the target company wishes to eliminate any risk, however small (70% of requests for prior examination concluded that activities were ineligible, 81% in 2022) and sufficiently in advance of a transaction so as not to impact its timetable.

In terms of applications for authorization, of the 255 submitted in 2023, 135 were authorized, representing around 53% of applications. This represents a significant increase compared to 2022, when only 49% of applications were authorized. It should be noted, however, that the majority of "unauthorized" cases are not synonymous with refusal by the Ministry: these files are generally the subject of a decision of ineligibility for control (the operation and/or activities are outside the scope of IEF control) or withdrawn by the investor.

Finally, "only" 60 authorizations were subject to conditions, i.e. 44% of the authorizations issued last year. While the Treasury justifies this by paying particular attention to the "*proportionality of its decisions*", it is difficult not to see the pressure from other EU Member States, for whom France had become the champion of conditions imposed on investors (including European investors). By comparison, most of the other Member States that have introduced a filtering system do not use these conditions, or do so only in exceptional cases where their most strategic interests are directly affected.

**Source of investment and industries concerned**

As in 2022, the share of non-European investors remains largely dominant in 2023 (67.3% of investors, led by the United States, the United Kingdom and Canada), while the share of European investors (EU/EEA, in particular Germany, Luxembourg and the Netherlands) falls from 34.2% in 2022 to 32.7% in 2023.

Similarly, while the majority of investors will continue to be financial investors (43%), their proportion, like that of industrial investors, has fallen, to the benefit of...physical investors (almost 25% of investors in 2023 compared with 13.6% in 2022).

Finally, the trend that began a few years ago seems to be continuing on a sectoral perspective: the share of investments in strategic infrastructures (energy, water, health, etc.) and new technologies (AI, biotechnology, cybersecurity, semi-conductors, etc.) continues to grow (63.7% of applications submitted in 2023), to the detriment of traditional sectors (defense, security, dual-use goods, etc.).

## Reminder of the main changes implemented on 1st January 2024

These statistics provide an opportunity to outline the reform of the French FDI regulations, which came into force on 1er January 2024.

In addition to a few procedural changes, this reform introduces four major changes.

**The control on the crossing of 10% ownership threshold was made permanent**

Introduced on a temporary basis during the Covid-19 pandemic and then renewed every year since, the lowering of the threshold for triggering control from 25% to 10% of the voting rights of a company listed on a regulated market has been made permanent, encouraged by the "*assessment of the three years of implementation*".

The simplified and accelerated procedure for these operations remains unchanged:

- fully European investors exempted ;
- limited list of information and documents to be provided in support of the application ;
- investment deemed authorized in the absence of any objection from the Minister within 10 working days;
- in the event of an objection, the investor must submit a full application for authorization.

On the other hand, whereas an investor authorized to cross the 10% threshold was also deemed to be authorized to cross the 25% voting rights threshold, this exemption disappears: a non-European investor authorized to cross the 10% threshold of the voting rights of a listed company will have to obtain a new authorization, this time by means of a full application for authorization, if he intends to cross the 25% threshold of the voting rights of the said listed company.

**Extension of control to French branches of foreign companies**

In order to "*prevent the risk of circumvention of the regulations*", FDI control has been extended to cases where there is a change of control not only of a French entity, but also of a French branch of a foreign company[2].

This will therefore cover the case of a change of control of a foreign company which would automatically result in a 'change of control' of its French branch, as long as the latter carries out a sensitive activity in France.

Investors will therefore need to be particularly vigilant in their operations outside France, which may now be caught by FDI regulations even if their presence in France does not involve a legal entity.

**Extension of the scope of sensitive activities**

The scope of sensitive activities has been extended once again, with the addition of four categories of activity:

- activities relating to the security of prisons (art. R. 151-3 II 6° of the Monetary and Financial Code);
- activities relating to the extraction, processing and recycling of critical raw materials (art. R. 151-3 II 11°). While these critical raw materials are not listed, use can be made of the relevant European regulations, which list 34 critical raw materials, including 17 strategic raw materials. Unsurprisingly, these include the key minerals for current and future technologies: aluminum, lithium, manganese, cobalt, copper and nickel;
- R&D activities relating to low-carbon energy production technologies (formerly "renewable energy") (art. R. 151-3 III 1° and Order of 28 December 2023); and
- R&D activities relating to photonic (art. R. 151-3 III 1° and Order of 28 December 2023).

**Simplification (and reduction) of exemptions from FDI control**

The cases in which authorization may be waived have been greatly simplified to cover just one general case: "*The investor is exempt from the authorization requirement provided for in this chapter where the investor of last resort in the chain of control, within the meaning of II of Article R.151-1, had, prior to the investment, already acquired control, within the meaning of Article L. 233-3 of the French Commercial Code, of the entity that is the subject of the investment*".

Even if the wording remains somewhat vague, the aim is to simplify matters: by deleting the reference to a single shareholder holding more than 50% of the capital and retaining only the broader concept of “control”, this amendment aims to broaden the scope of intra-group transactions exempt from prior authorization.

However, the other cases of exemption or presumption of exemption have been removed.

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All in all, although 2023 may have been a year of contrasts, French FDI control has shown its resilience and France remains, for the fifth year running, the most attractive country in Europe for foreign investment.

The publication of updated guidelines should participate in the important work of making the French filtering system clearer and more predictable, which undoubtedly contributes to its attractiveness.

The introduction of the latest reform and the expected upturn in M&A activity should significantly increase the activity of FDI in 2024, as should the potential adoption of the new European regulation on screening, the ambitious aims of which are to continue to introduce a screening regime in all Member States (to date, 22 States have adopted a regime, and the last 5 States have initiated a legislative process), to harmonize supervision at European level and to improve coordination between the competent authorities.

While we await the Ministry's statistical data for 2024, the impact of these various projects is already strong on our activities in this area.

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[1] This includes applications for authorisations (255 in 2023), applications for prior review (27 in 2023) and notifications that the threshold of 10% of the voting rights in a listed company has been crossed (also 27) (see *below*).

[2] These are establishments registered in the French Trade and Companies Register.

# GUATEMALA: THE OCEAN CLEANUP x COLDPLAY

July 2024 | Guatemala

We are pleased to announce that our pro bono client, The Ocean Cleanup, https://theoceancleanup.com/ has announced an exciting partnership with the band Coldplay for the production of vinyl records.

The mission of The Ocean Cleanup is to remove plastic from the oceans by intercepting it in the most polluting rivers. Alongside Coldplay and other recycling partners, they have found an innovative solution: transforming intercepted plastic into useful materials and then into music.

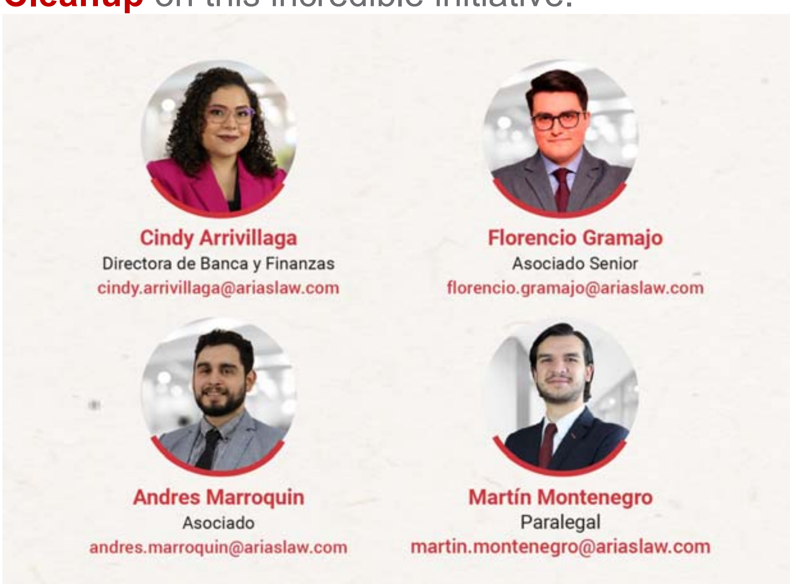
This innovative project involves the creation of a limited edition of the band's new album "Moon Music" using plastic intercepted from the Las Vacas River in Guatemala.

After extensive research, it was determined that the ideal plastic for producing the vinyl records comes from Interceptor 006 in Guatemala. It was ultimately established that this limited edition of Coldplay's new album, "Moon Music," will contain 70% PET plastic from the Las Vacas River, with the remaining 30% being recycled PET from other sources.


*Las Vacas River in Guatemala - Photo provided by The Ocean Cleanup.*

To learn more about The Ocean Cleanup's efforts in Guatemala, we invite you to listen to our podcast with the Director of Legal and Public Affairs, Letícia Passos, on Spotify by clicking here (Spanish only).

At **ARIAS**, we are proud of the team of expert lawyers who advised **The Ocean Cleanup** on this incredible initiative.

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Hogan Lovells

# Preserving fairness in arbitration: The challenge of reviewing procedural decisions for apparent bias

26 June 2024

**A Hong Kong court has reiterated that an arbitral tribunal enjoys a wide discretion as to the procedure it adopts, and repeatedly deciding matters, such as whether to hold an oral hearing, in one party's perceived "favour" does not indicate that the tribunal is biased. The court also noted that the "fair-minded and informed observer" (through whose eyes the court looks to determine apparent bias) would understand that arbitrators can say and do things in the heat of the moment which should not be taken to indicate bias on their part.**

In *P v D* [2024] HKCFI 1132, the Hong Kong Court of First Instance dismissed an application under section 26 of the Arbitration Ordinance Cap 609 (the Ordinance) to remove two impugned arbitrators from a UNCITRAL arbitration, following allegations of alleged bias arising from a variety of procedural decisions, behaviour and comments made by the arbitrators.

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## Background

P and D were companies incorporated under the laws of Taiwan and Hong Kong respectively, which had submitted a contractual payment dispute to HKIAC for arbitration. The case concerned the plaintiff's application for an order removing two current arbitrators on the grounds of bias.

The application to court followed an earlier unsuccessful challenge against the tribunal under the applicable rules of arbitration which, although eventually dismissed by HKIAC, prompted the third arbitrator to resign from his appointment to avoid further dispute.

The application against the remaining two arbitrators

The challenging party then applied for an order removing the presiding arbitrator (who had been appointed by the HKIAC) and the other party's appointee, who were described by the court as "arbitrators of standing and experience".

The grounds advanced in the Notice of Challenge encompassed a variety of procedural decisions as well as certain comments and behaviour from the tribunal members, which were alleged to constitute apparent bias:

- The tribunal had refused to hold a hearing in respect of an evidential application in breach of Article 17(3) of the UNICTRAL Rules and did not keep an open mind in its handling of procedural matters;

- The tribunal made decisions on matters which were not contested between the parties and went beyond the contentions of the parties;
- P had been treated unequally, for example, concerning the granting of extensions of time and sanctions;
- The tribunal demonstrated apparent bias by using unjust and argumentative language; and
- The tribunal attacked P's lawyers by insinuation in its concluding marks.

The additional grounds of challenge and the court's jurisdiction to hear them

The challenging party also sought to rely on two additional grounds which had not been put before the tribunal as part of the earlier challenge. Deputy Judge Wong dealt with whether he could consider these additional grounds as a preliminary point.

After considering the language of  Section 26(1) of the Ordinance, which governs the process of bringing an challenge to an arbitrator before the court, the judge noted under that section the role of the court is to "decide afresh" a challenge that has already been "previously determined" as agreed by the parties or under Article 13(3) of the UNCITRAL Model Law.

To that extent, to admit new arguments by the parties would mean the court was not hearing a "previously determined" challenge, but rather a different matter altogether. Furthermore, to hold otherwise would be to render the time limits meaningless, and potentially open arbitrators to stale complaints under the rules. The general principle in this area is: "*a party who knowingly refrains from challenging an arbitrator on … his alleged lack of independence or impartiality within the time limit provided by the applicable arbitration rules is deemed to have waived the right to raise such circumstances in a challenge to arbitrators before the Hong Kong Courts*".

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# The other grounds

When considering the other grounds and overarching claims of apparent bias, the court used the established test of the "objective fair-minded and informed observer", and whether they, having considered the relevant facts, would conclude there was a real possibility of bias.

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## Oral hearing

P's challenged the tribunal's failure to hold an oral hearing on the basis that the tribunal had misinterpreted Article 17(3) of the UNCITRAL Rules. P contested that the proper interpretation of this provisions is that the tribunal has no discretion to refuse an oral hearing when so requested by a party.

Wong DJ noted he was not required to reach a conclusive verdict on the correctness of either P or the tribunal's interpretation of the rule. Instead, he found that there were "respectable arguments" in favour of the interpretation adopted by the arbitrators, and therefore concluded that the fair-minded and informed observer would not perceive the tribunal's refusal to hold the hearing as biased.

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## Decisions made by the tribunal beyond the matters disputed by the parties

Wong DJ noted that the disputed decisions were not decisions on the merits but procedural decisions. To that end, the judge viewed the tribunal's decisions (including the matter of which submissions they relied upon to reach them) as a legitimate exercise of the tribunal's case management powers.

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## Unequal treatment

P took issue with a number of decisions taken by the tribunal, which it alleged constituted unequal treatment. This included allowing extended time limits for D to produce documents without costs sanctions (having found this did not impact on the progress of the arbitral proceedings), but dismissing evidential applications by P on the grounds they would cause delay and making P bear the costs consequences thereof. Wong DJ found that these decisions were a legitimate exercise by the tribunal of their discretion. It was not suggestive of bias that such decisions were made repeatedly "against" a particular party.

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## "Unjust and argumentative language"

Wong DJ first noted the tribunal's defence, that although such language had been used to criticise P's conduct, the comments were based on P's behaviour, such as P's delay in submitting applications, and submitting documents of unapproved scope.

Relying on certain attributes of the fair-minded observer, the judge concluded there was no real possibility of bias: "*(1) the bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers and (2) acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context*".

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## Attack by insinuation

Wong DJ found that the fair-minded and informed observer is not "unduly sensitive or suspicious", and therefore would agree with the tribunal's request made (roughly translated, to "adhere to professionalism") which was aimed at both parties in the hope that the parties could try to reach an agreement on the procedural matters. It was not an attack on P's lawyers by insinuation.

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# Takeaways

The court's words on additional arguments are a strong reminder that it is essential to bring forward all challenges to an arbitration or tribunal in a timely manner as agreed upon by the parties or under general law. Waiting to introduce new arguments can lead to their inclusion being barred.

This case also highlights the importance of the objective fair-minded observer test and clarifies its application. It recognises the level of understanding attributed to such an observer, emphasising that arbitrators may express regrettable words and actions in heated moments. The test also cautions against hasty judgments and advises parties to carefully evaluate their evidence from a neutral perspective when raising bias challenges.

Authored by Bethan Savage and Nigel Sharman.

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# Significance of Beneficial Ownership under PMLA

## INTRODUCTION

The Prevention of Money-Laundering Act, 2002 ("**PMLA Act**") and the rules thereunder govern the activities relating to money laundering in India. In the year 2023, the Ministry of Finance notified the amendments to the Prevention of Money Laundering (Maintenance of Records) Rules, 2005, on 07 March 2023, 04 September 2023 and 17 October 2023 ("**PMLA Rules**"). One of the key provisions of the PMLA Rules relates to identifying and verifying the identity of clients of the reporting entities (*please refer to the meaning of 'reporting entities' below*), understanding the ownership and control of the client entity and tracing the beneficial owner of such entity.

In this Article, we have discussed the increasing compliance requirements relating to beneficial ownership, recent amendments to the PMLA Rules in this regard and the impact of the amendments to the PMLA Rules on Indian entities and foreign shareholders.

## REPORTING ENTITIES

The PMLA Act provides a list of the entities which fall under the purview of the definition of reporting entities. It means a banking company, financial institution, intermediary or a person carrying on a designated business or profession.

In March 2023, the Ministry of Finance clarified that the definition of 'person carrying on designated business or profession' now includes such persons who carry out activities for or on behalf of another natural or legal person in the course of business as an activity, in relation to exchanges between virtual digital assets ("**VDAs**") and fiat currencies, exchange between one or more forms of VDAs, transfer of VDAs, safekeeping or administration of VDAs or instruments enabling control over VDAs, and participation in and provision of financial services related to an issuer's offer and sale of VDA.

## BENEFICIAL OWNERSHIP

The PMLA Rules lay significant emphasis on identification of a beneficial owner. Beneficial owner is determined to be a person who individually or together, or through one or more juridical persons has a controlling ownership interest or exercises control through other means.

*What is control and controlling ownership interest?*

Any individual who is entitled to appoint majority of the directors of a company or control the management or policy decisions in any manner including due to his shareholding, management rights, shareholders agreement or voting agreement, is said to control a company. The concept of beneficial ownership also extends to various other entities such as a partnership firm, an unincorporated association or body of individuals and a trust.

Controlling ownership interest would mean ownership of or entitlement to more than 10% of the shares, capital or profits of a company. Prior to the 04 September 2023 amendment to the PMLA Rules, the threshold for ascertaining controlling ownership interest was 15%.

What is a lesser-known fact is that there is a maximum threshold of 25% for determining controlling ownership, which is recommended by the Financial Action Task Force ("**FATF**") to its 39 member countries based on a particular jurisdiction's assessment of risk. India being one of the member nations, has adopted the threshold well within the recommended threshold of the FATF.

*Client due diligence*

One of the significant amendments to the PMLA Rules relates to the conduct of due diligence of its clients by a reporting entity using 'reliable and independent sources of identification'. Although the PMLA Rules previously contained provisions for undertaking client due diligence, including on the client's beneficial owner, the amendments to the PMLA Rules emphasize that additional actions should be undertaken by the reporting entities to understand the nature of their clients' business, ownership and control. The PMLA Rules, including the amendments thereto, draw direct inference from the FATF recommendations on 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation' in relation to identification of the beneficial owner.

The earlier PMLA Rules provide for conducting client due diligence of its existing clients (i) considering the materiality and risk aspects, and (ii) at appropriate times or as may be specified by the relevant regulating authority. Further, reporting entities, at the time of conducting due diligence, should check whether client due diligence measures were undertaken previously and whether sufficient data was obtained at that time. The amendments to the PMLA Rules clarify that reporting entities should ensure that the information or data relating to all its existing clients is updated and relevant, especially where there appears to be a high risk.

It is obligatory for all the reporting entities to maintain an updated client information database. Accordingly, the reporting entities will now need to conduct client due diligence in multiple instances, such as, at the time of commencement of an account-based relationship, or at the time of undertaking an occasional transaction of an amount equal to or exceeding INR 50,000/- (whether conducted as a single transaction or several transactions that appear to be connected), or any international money transfer operations.

*Client beneficial owner exemption for certain listed entities*

Rule 9(3)(f) of the extant PMLA Rules provides for certain exemptions for identifying a beneficial owner. According to Rule 9(3)(f) of the PMLA Rules,

"*(f) where the client or the owner of the controlling interest is an entity listed on a stock exchange in India, or it is an entity resident in jurisdictions notified by the Central Government and listed on stock exchanges in such jurisdictions notified by the Central Government, or it is a subsidiary of such listed entities; it is not necessary to identify and verify the identity of any shareholder or beneficial owner of such entities."*

The Ministry of Finance, on 28 November 2019 notified the following jurisdictions to whom the above sub-rule would apply: (i) United States of America, (ii) Japan, (iii) South Korea, (iv) United Kingdom excluding British Overseas Territories, (v) France, (vi) Germany, (vii) Canada, (viii) International Financial Services Centre in India. Accordingly, one of the few instances where the reporting entities could refrain from identifying or verifying the identity of shareholder or beneficial owner of the client would occur if such shareholder or beneficial owner of the client is a resident entity and listed in any of the above 8 jurisdictions.

*Information and documentation*

Reporting entities are required to verify the details of each new client, to their satisfaction, whether regular or occasional, to determine the purpose of the intended banking relationship. This would mean that the documentation and information available with the reporting entities must be sufficient to ultimately satisfy the competent authorities that necessary diligence was undertaken by the reporting entities and that owing to the background checks conducted by them, such reporting entities are fully aware of the beneficial owner and the transactions undertaken by their clients under the directions of the beneficial owner. Moreover, reporting entities will need to inform the relevant authorities of any illicit activities which are being undertaken under the guise of beneficial ownership.

All the data provided by clients is required to be maintained by the reporting entities with the Central KYC Records Registry set up by the Central Registry of Securitisation Asset Reconstruction and Security Interest of India ("**CERSAI**"). Further, RBI has the powers to inspect such data maintained with the Central KYC Records Registry.

The PMLA Rules provide that based on its constitution, client of a reporting entity will need to submit certain prescribed documents to the reporting entities for its identification and verification such as (i) Permanent Account Number (PAN) card, aadhaar card, photograph (in case of an individual), (ii) incorporation documents, board resolutions and powers of attorney in relation to authorization granted to officers to transact on its behalf, PAN card, names of the persons holding senior management position, documents relating to registered office and the principal place of business (if different), documents relating to the beneficial owners, managers, officers or employees (all in case of a company), or (iii) registration certificate, trust deed, the names of the beneficiaries, trustees, settlor, protector, if any and authors of the trust and the address of the registered office of the trust and PAN card (in case of a trust). Additionally, the PMLA Rules also prescribe documents which will need to be submitted by partnership firm, unincorporated association and a body of individuals. However, reporting entities could apply their prudence for completion of the diligence process and request for additional documents from its client, on a case-to-case basis and as it may deem necessary.

*Provisions relating to beneficial ownership under various regulations*

The concept of beneficial ownership is under the radar of various regulators in India. Authorities are introducing more stringent regulations for instances where beneficial ownership could come into play. Prior to the 07 March 2023 amendment, the PMLA Rules provided 25% as the threshold to identify beneficial ownership. However, the above percentage of 25% has been significantly reduced to 10%, which is now in alignment with the existing rules under Companies Act, 2013 prescribed for determining a significant beneficial owner ("**SBO**"). With the reduction in the threshold for identifying a beneficial owner, the Indian authorities have considerably broadened their horizon to investigate a wider base of controlling persons. Further, in addition to reporting under the PMLA Rules where the information of the beneficial owner needs to be reported, the Ministry of Corporate Affairs ("**MCA**"), also requires the significant beneficial owner to provide declarations of his ownership, subsequent to which the Indian entity will need to report the same with the MCA in form BEN-2.

Further, the Companies (Significant Beneficial Owners) Rules, 2018, lay down extensive provisions governing significant beneficial ownership. It provides a clear mechanism for Indian entities to identify an SBO and mandates such entities to duly report details of such SBO and any subsequent change to such details.

Further, pursuant to the notification dated 22 April 2020, the regulations have been amended to prohibit any initial or subsequent investment by a beneficial owner who is situated or a citizen of a country sharing land border with India without prior government approval. It is important to note that the regulations do not prescribe any specific threshold with respect to such investment by beneficial owner. However, various authorised dealer banks seem to take a view that government approval will be required to be obtained prior to the investment, if the total beneficial ownership interest will be 10% or more post such investment.

## IMPACT ON INDIAN ENTITIES AND FOREIGN SHAREHOLDERS

Although the earlier PMLA Rules provide for conducting client due diligence, reporting entities are now undertaking client due diligence (for new clients) or additional checks in relation thereto (for existing clients) rigorously, pursuant to the amendments to the PMLA Rules. Accordingly, clients will need to provide all the data and documentation requested by the reporting entities. This could include identity proof of the beneficial owners, details of the latest and relevant shareholding or capital table of not only the immediate parent entity, but also of the ultimate holding entity of the client, in India or abroad.

The practical implementation of the client due diligence process by reporting entities, pursuant to the amendment to the PMLA Rules, has created a lot of confusion amongst clients. One of the possible reasons for such confusion is that many reporting entities are randomly sending checklists to their clients requesting for additional data and providing limited or no background of the statutory requirement. Due to the unstructured process, it is highly possible for clients or the beneficial owners to be uncertain of the requests from the reporting entity for the personal information and documents.

## CONCLUSION

The stringent checks prescribed under the amended PMLA Rules for the reporting entities are fairly new. With the reporting entities having commenced the due diligence and KYC procedures, there is a lot of ambiguity from the perspective of the clients of such reporting entities. Reporting entities are demanding certain information and documentation from their clients which was never provided by the clients prior to the amendments to the PMLA Rules. It is vital that the reporting entities provide some background to their clients at the time of calling for any details and ensure protection of the data provided by such clients.

It is pertinent to note that countries globally are incorporating mechanisms to identify the beneficial owner at the controlling end of the corporate chain. Recently, in January 2024, the United States of America (USA) has launched a beneficial ownership registry where certain companies are required to report information pertaining to beneficial ownership. Such report, *akin* to Indian requirements, is not an annual requirement and the information needs to be updated as and when there is any change in the data submitted to the registry. However, on 01 March 2024, it appears that a federal judge in Alabama issued a ruling that the existing Corporate Transparency Act ("**CTA**") is unconstitutional and that the reporting requirement under the CTA is unnecessary. While the impact of the ruling on the other entities is unclear, the reporting requirements by the plaintiffs are on hold.

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## ABOUT KOCHHAR & CO

Kochhar & Co is a leading full service commercial law firm with a national presence in India. The firm mostly represents international companies doing business in India and offers a high quality, business-oriented service to its clients. The firm takes great pride in its client servicing approach which is focused on clarity, accessibility and providing business solutions. The firm has a large national presence in India with offices at Delhi, Gurgaon, Mumbai, Bangalore, Chennai, Hyderabad and Chandigarh as well as overseas offices in Dubai, Singapore, Chicago and Toronto.

## CORPORATE LAW PRACTICE

The Firm has a robust corporate and transactions' advisory practice and advises client across the broad spectrum of corporate work including private equity and venture capital investments, public takeovers, private M&A, complex joint ventures, buyouts & disposals and corporate restructurings, as well as general commercial, regulatory, anti-trust and corporate governance issues.

The Firm has built a formidable Corporate Transactions' practice that is supported by pan-India teams of market leading experts in real estate, tax, employment, anti-trust/ competition, intellectual property, regulatory and litigation as well as teams offering the full range of finance support including all aspects of banking and finance and restructuring transactions.

The Firm advises on a broad spectrum of issues and procedures involved in funding transactions and the firm's solution-oriented approach combined with its expertise in managing multi-disciplinary teams of lawyers, accountants, financial advisers often minimizes roadblocks and transactional time and maximizes efficiency.

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NautaDutilh

# New draft law aiming to amend the minimum net wealth tax, clarify the partial liquidation treatment on classes of shares and modify the participation exemption regime

Update

30.05.2024 3 min read

On 23 May 2024, the bill n°8388 (the ‘Bill’) and a draft of the Grand Ducal Regulation (the ‘Draft GDR’) were brought before Parliament.

The main objectives of the Bill are to amend the minimum net wealth tax (‘NWT’) provisions further to the recent decision by the Luxembourg constitutional court (Decision No. 185/23 dated 10 November 2023), to provide a formal legal basis for the so-called ‘partial liquidation regime’ in accordance with constant administrative practice and recent case law, to introduce the option to renounce the participation exemption regime under certain conditions and to continue generalising electronic filings.

**Annual minimum NWT substantially amended**

With effect from 1 January 2025, if the Bill is approved, the minimum NWT will no longer depend on the composition of the taxpayer’s balance sheet. Instead, it will range between EUR 535 and EUR 4,815, irrespective of the proportion of financial assets held by the relevant taxpayer. In addition, the aim is to remove the last four brackets. This will be particularly beneficial for non-financial types of companies with a total balance sheet value exceeding EUR 2 million, as it will lead to a significant decrease of their annual minimum NWT.

**Partial liquidation regime clarified**

If the current version of the Bill passes, it will also clarify the tax treatment applicable to the repurchase and cancellation of shares (the so-called ‘partial liquidation treatment’). The goal is to ensure clarification through an amendment of article 101 of the Luxembourg income tax law (the ‘LITL’), resulting in greater legal certainty in cases of repurchase of an entire class of shares followed by cancellation of those shares. In terms of clarifications, the Bill aims in particular to require that such classes of shares be cancelled within a maximum period of six months, for there to be a differentiation in the economic rights attached to the different classes of shares issued by the company upon incorporation or a share capital increase (which was already largely recommended in practice due to specific case law and to be on the safe side) and for the repurchase price be determined in accordance with the articles of the company and corresponding to the fair market value (‘*valeur estimée de réalisation*’) of the relevant shares.

**Renouncing the participation exemption**

As from tax year 2025, the Bill and the Draft GDR aim to allow taxpayers to renounce the corporate tax exemption laid down in article 166 LITL and the related Grand Ducal Regulation (the so-called 'Luxembourg participation exemption') in cases where this results from a qualifying participation with an acquisition price exceeding EUR 1.2 million (for dividends and liquidation proceeds) or EUR 6 million (for capital gains) (i.e., as opposed to income deriving from a qualifying subsidiary representing 10% or more and for which renunciation is not possible). Opting out of the partial income tax exemption set out in article 115(15a) LITL (the so-called 'half exemption' for dividends) is also now allowed under the Bill.

**Continue to generalise electronic filings**

Finally, the government wishes to continue modernising processes such as electronic tax filings, for which it will request the filing of certain other tax forms in electronic form only, including in particular filings relating to withholding tax on directors' fees, starting from 1 January 2025.

If you have any questions, please contact our Tax team.

# LABOR EXPLOITATION EXCESSIVE WORK SHIFTS

JUNE 2024

**Executive Summary:**

- On June 7, 2024, a reform to the General Law to Prevent, Sanction and Eradicate Crimes in Matters of Human Trafficking and Protection and Assistance to the Victims of these Crimes was published, effective since June 8. This reform adds excessive work hours beyond the legal limit as a form of labor exploitation.

- Sanctions include 3 to 10 years of imprisonment and significant fines, with harsher penalties for indigenous and Afro-Mexican communities. The investigation and prosecution of these crimes fall to criminal authorities, with additional potential sanctions from labor authorities.

On Friday, June 7th, 2024, a Decree was published in the Official Gazette of the Federation amending and adding various provisions to the General Law to Prevent, Sanction and Eradicate Crimes in Matters of Human Trafficking and Protection and Assistance to the Victims of these Crimes, which has a **high impact** on employers in Mexico and requires immediate attention. The reform came into force on Saturday, June 8th, 2024.

Since its enactment in 2012, said General Law included a definition of **labor exploitation**, which occurs when a person obtains an unjustifiable benefit, through the work of others, directly or indirectly, economic or otherwise, in an unlawful manner, subjecting them to practices that violate their dignity, and expressly considered three scenarios that constitute labor exploitation:

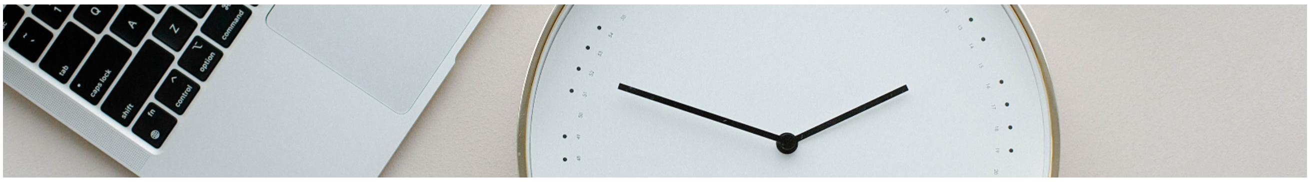
- Dangerous or unhealthy conditions, without the necessary protections in accordance with labor legislation or existing standards for the development of an activity or industry.
- Existence of a notorious disproportion between the amount of work performed and the payment made for it.
- Salary below what is legally established.

It is worth noting we are not aware of actual criminal prosecution against labor exploitation before this reform.

Now, as a result of the aforementioned reform, <u>a fourth express scenario of labor exploitation was added:</u> **work shifts in excess of what is stipulated by law**.

Among the reasons stated in the legislative process, it was argued that excessive work shifts violate the dignity of workers, perpetuating economic and social inequality, damaging their health.

It will be necessary to remain vigilant and act to remedy any possible violation that may occur with respect to the length of the work shift, given that it already constitutes positive law, as well as the criteria



as to what shall be considered “in excess of what is stipulated by the Law”, since even today we have different interpretations between the IMSS and the labor authorities when referring to the limits of the Federal Labor Law. It is important to anticipate that at this time the investigation, prosecution and punishment of such crimes corresponds to the criminal authorities of the federal entities or of the Federation, not to the labor authorities, without prejudice that the latter may apply the penalties provided for in the Federal Labor Law.

As to the possible consequences, the general law described above provides that whoever exploits one or more persons will be punished with a **prison sentence of 3 to 10 years**, and **a fine of 5 thousand to 50 thousand UMAs per day** (2024 - each UMA has a value of $108.57 MXP). In case of persons belonging to indigenous and Afro-Mexican communities, the penalties will be from 4 to 12 years of imprisonment, and from 7 thousand to 70 thousand UMAs.

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# New Express Track scheme in the General Division of the High Court

DENTONS RODYK

June 28, 2024

The Express Track is a new consent-based scheme which applies to originating claim actions in the General Division of the High Court. It was designed to enhance access to justice by facilitating the speedy resolution of matters, and provide a bespoke, fast track solution for certain types of disputes.

The Express Track will be implemented on 1 July 2024, with the introduction of the new Order 46A of the Rules of Court 2021 (ROC).

## Rationale

On 27 June 2024, the Supreme Court and Singapore Academy of Law held an engagement event with the Bar to launch the Express Track. The co-chairs of the Commercial Practice Panel of the Supreme Court, the Honourable Justice Kannan Ramesh and the Honourable Justice Philip Jeyaretnam, shared their insights on the rationale for the new scheme. The Court also discussed various operational aspects of the Express Track.

The scheme was designed to offer parties a way of resolving certain types of disputes, in a relatively quick and cost-effective manner. It was envisaged that suitable matters are those involving limited factual disputes and which may be resolved within 2 to 4 days of trial, involve a limited number of witnesses and are not dependent on extensive interlocutory applications. The Express Track is intended to apply to cases involving disputes of fact which are unsuitable for resolution by originating application or summary judgment.

The opt-in nature of the Express Track reflects the underlying philosophy that party choice is important.

Apart from addressing the importance of achieving quick outcomes, the scheme aims to provide litigants with more certainty as to timing.

## Key features

### a) Application

Where an action in the General Division is commenced by originating claim, the Court may, on a request made by all parties to the action by consent, no later than 2 months after the filing of the last pleading, place the action on the Express Track (Order 46A, rule 1(2)).

There is also provision for the removal of matters from the Express Track by the Court (Order 46A, rule 1(3)).

### b) Document production

A pleading must be accompanied by a list and copies of all documents relied on by that party to prove any allegation contained in that pleading (Order 46A, rule 2(a)).

## c) Affidavits of Evidence-in-Chief (AEICs)

AEICs are to be served before document production. Unless the Court otherwise orders, after pleadings have been filed and served, but before any exchange of documents, the Court must order every party to the action to file and serve the AEICs of that party's witnesses (Order 46A, rule 3(2)).

Unless the Court otherwise orders, the page limit for the AEIC of each witness is 30 pages (excluding exhibits) (Order 46A, rule 3(3)).

## d) Interlocutory applications

The timelines have been shortened in relation to the single application pending trial. For instance, where a party notifies the Court at a case conference that the party wishes to make a single application pending trial mentioned in Order 9, rule 9(2) or an application mentioned in Order 9, rule 9(7)(a) to (o), a party is to file and serve its application and supporting affidavit within 14 days after the date of the case conference (Order 46A, rule 4(2)(a)).

Further, unless the Court otherwise orders, any interlocutory application brought in an action placed on the Express Track will be decided by the Court without hearing oral arguments (Order 46A, rule 4(3)).

## e) Trial

The Court must give directions on the length of the trial of an action placed on the Express Track, which must not exceed 4 days (excluding any time spent on oral closing submissions) (Order 46A, rule 5(1)).

As far as possible, an action placed on the Express Track is to be fixed for trial within 9 months after the action is placed on the Express Track (Order 46A, rule 5(2)).

## f) Closing submissions

If the Court orders the parties to submit written closing submissions, then, unless the Court otherwise orders: (a) there is to be only one round of written closing submissions; and (b) the written closing submissions are to be filed and exchanged within 3 weeks after the last day of the trial (Order 46A, rule 6).

## g) Appeal

Decisions made by a Judge in an Express Track action are not appealable save for decisions which are in the nature of: (a) a judgment by the Judge given after the trial of the action; and, broadly speaking, (b) a judgment / order by the Judge that would bring the action to an end or which would prevent the action from proceeding further (Order 46A, rule 1(5)).

Apart from the new Order 46A of the ROC, there are related amendments to the Fourth Schedule of the Supreme Court Judicature Act 1969 (SCJA) and the Supreme Court Practice Directions 2021 (SCPD).

The restriction on parties' rights of appeal and the exceptions will be implemented via the introduction of a new paragraph 4 in the Fourth Schedule to the SCJA (Annex B).

The scheme will also be implemented via a new Part 24 of the SCPD (Annex C). This sets out requirements as to: the form for parties to request that an action be placed on the Express Track; the form of lists of documents; case management; and the undertaking as to the page limit of AEICs that is to be filed at the same time as the AEICs.

# Conclusion

The Express Track looks to offer parties a speedier resolution and costs savings, as well as more certainty as to the timing of the litigation. The Court shared that whilst there is no provision as to when the Judge's decision will be given, parties can expect that this will be within a reasonable time after trial.

The Court also suggested that the operational implementation of the scheme would entail a collaborative process between parties and the Court. For instance, the Case Conference Assistant Registrar may suggest and discuss with counsel the suitability for matters to be placed on the Express Track.

Given that the Express Track offers a tailor-made solution for disputes involving limited factual disputes, parties engaged in such matters should give serious consideration to the scheme.

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# 2024 Amendment to “Rules for Hearings on Patent Invalidation Cases”

## 05/31/2024

Jason Chuang

In 2018, the Intellectual Property Office (IPO) introduced hearing procedures for patent infringement cases and released the "Rules for Hearings on Patent Invalidation Cases". The IPO has released data showing that as of May 2024, only 32 disclosure hearings have been conducted, indicating low utilization. In order to improve the quality of the hearing process, the IPO revised its hearing operation rules in 2019 and 2021. On May 10, 2024, the IPO once again announced a revised draft, renaming the previous rules as "Guidelines for Hearings on Patent Invalidation Cases" (hereinafter referred to as the "new guidelines"), with the main revisions as follows.

1. Strengthening the function of "pre-hearing preparation" (point 5 of new guidelines)

"Pre-hearing preparation" refers to preparatory procedures before the formal hearing. The current rules specify details of matters that can be handled in the pre-hearing preparation process, including procedures for conducting the hearing, clarifying admissibility of documents and evidence, and others. This amendment further adds regulations pertaining to organization and simplification of the disputed issues, clarifies the post-grant amendments of disputed patents, specifies procedures for agreement on key points of defense and offense during the hearing process, and stipulates that both parties are bound by the agreement.

2. Clearly stipulating that presiding officers may appropriately disclose opinions and judgment (point 8 of new guidelines)

The current rules stipulate that one of the examiners responsible for examining the patent invalidation case is to be designated as the presiding officer for the hearing, and confirms the authority thereof to conduct the process. The amendment further stipulates that the presiding officer may moderately disclose thoughts on factual, legal, and/or evidential disputes, to render the hearing process more transparent. This will allow the parties and participants to have a clearer understanding of the reasoning and basis for the examiner's decision, and further enhance credibility of the hearing process

3. Allow hearings to be conducted via video conferencing (point 9 of new guidelines)

According to data released by the IPO, two scheduled hearings were postponed in 2021 due to the impact of the Covid-19 pandemic. Hearings can now be conducted via video conferencing, enabling participants to join from office or home, avoiding delays from traffic, or other unforeseen circumstances. In addition, video conferencing hearings make it easier for international participants to join, potentially increasing the willingness of international companies to protect their patents in Taiwan.

4. The effects of absence from the hearing are clearly defined (points 6 and 9 of new guidelines)

The hearing procedure is held upon application by the parties involved. If one of the parties applies and the IPO deems it necessary, the procedure will be initiated. However, the current rules do not clearly specify any measures for dealing with a party's absence from the proceeding. This amendment clearly stipulates that if one party fails to attend the hearing on the designated date, the examiner can proceed with a "one-party hearing" based on the application of the other party. However, if any of the following conditions are the cause, the hearing shall be rescheduled:

(1) The absent party did not receive proper notification of the hearing within a reasonable period of time.

(2) The party was unable to attend due to natural disaster or other unavoidable conditions.

(3) The attending party cannot provide necessary evidence for matters to be investigated by the authority of this office.

(4) Matter presented by the attending party were not provided to the other party within a reasonable period of time.

5. The summary of the hearing record shall be recorded and supplemented with audio or video recordings to simplify content (point 12 of new guidelines).

The IPO will gather and consolidate feedback from different sectors before announcing a date for implementing the aforementioned amendments to the new guidelines.

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# Six Key Takeaways on Dietary Supplement Regulation, 30 Years Post-DSHEA

How advertisers, consumers, influencers, and others are changing the industry

By Kristi Wolff

07.01.24

Dietary supplement industry leaders and regulators gathered in Salt Lake City in June to examine the current status of the Dietary Supplement Health and Education Act of 1994 (DSHEA), 30 years after that legal building block became law. For those who may be new to this area, DSHEA is the law that defined "dietary supplements" as a subset of "food" under the federal Food Drug and Cosmetic Act. DSHEA also created categories of dietary ingredients, i.e., "old" and "new," and authorized the Food and Drug Administration (FDA) to regulate dietary supplements, in part by establishing good manufacturing practices, codified in 21

C.F.R. §§ 111, *et seq*. Simply put, the reason that we have a product category called "dietary supplement" is because of the framework established by DSHEA and FDA's implementing regulations.

Panelists expressed gratitude for how well DSHEA has operated to support the industry but also expressed concern about whether the law needs to be updated to keep pace with consumer demands, technology, and the differences in advertising today versus three decades ago.

Here are six key takeaways:

- **Consumers are more informed.** By laying the groundwork for the dietary supplement industry, DSHEA also created a pathway for broader advertising and more informed consumers. As one speaker noted, "no one knew what gingko was in 1994" and now it's easily found at every mass retailer and online.

- **Changes in advertising add to the compliance challenges**. Influencer marketing and self-care messaging have been powerful tools in reaching consumers over social media platforms that were not even contemplated when DSHEA was passed, creating an entirely "different marketplace with new, innovative ingredients, claims, marketing tactics, and an environment that evolves in days, not years," to quote one speaker. Many panelists expressed concern about the difficulty in managing the limitations on claims, both from a substantiation and structure-function compliance standpoint. Panelists also expressed concern that the FDA and the Federal Trade Commission (FTC) have been resistant to allowing industry to feature claims that address clinical research and innovation because of existing structure-function limitations and the FTC's evolving standards for "competent and reliable scientific evidence."

- **There is no consensus on how to improve enforcement.** Panelists discussed the perceived lack of enforcement by the FDA and FTC on "bad actors" but did not agree on whether the solution would be to clarify or increase regulatory jurisdiction, increase involvement by other enforcers such as state attorneys general, or implement a broader self-regulatory program. As many readers may know, the National Advertising Division (NAD), an advertising self-regulatory body, regularly considers dietary supplement cases and provides multiple avenues for companies seeking to help ensure a compliant marketplace.

- **Contract manufacturers may get more scrutiny.** Focusing on product compliance, Dr. Cara Welch, FDA's director of the Office of Dietary Supplement Programs, noted that her office believes inspection and scrutiny of contract manufacturers' compliance is an efficient investment because contract manufacturers regularly produce products for several brands. The agency's challenge, Welch noted, is that FDA does not currently have pre-inspection transparency into which contract manufacturers produce which products. A mandatory product listing is one way to achieve such transparency, but ...

- **Mandatory product listing (MPL) isn't universally favored or opposed.** Building on the potential for contract manufacturers as an avenue for evaluating compliance across brands, the potential use of MPL to achieve such transparency was met with mixed reaction. Welch favored it as a means of more easily identifying the party ultimately responsible for a product and giving the agency a full view of the market. Others noted that MPL would also drive public trust.

  Industry representatives countered that MPL details must be considered, including whether failing to submit materials to the MPL registry would render a product misbranded or ineligible for import or export. Industry also noted the need for a single regulator to help address recent state legislative efforts to restrict sales of certain products to persons under age 18, suggesting that to get industry on board with MPL, express preemption of state sale and labeling laws must be up for discussion. In short, if industry is going to broadly agree to submit to MPL, then there must be greater legal benefit and protection in it for them.

- **Would DSHEA be possible today?** DSHEA was built on legislative compromise. Multiple speakers expressed concern that this kind of compromise probably isn't likely in today's highly partisan political climate and because industry champions from the past are no longer in office.

Despite varying opinions on how best to tackle these challenges, there was optimism that Congress may be open to creating a new framework for functional foods, which would broaden allowable claims, and accept that their risk profile is greater than that of conventional foods or supplements. This optimism was based largely on FDA's position that there is no current pathway for cannabidiol (CBD) and that a new structure is necessary. A new program specific to CBD would be economically inefficient, but if a new program included other functional products, it could bode well for the future of the industry.

GOODSILL

## Why the FTC Ban on Non-Competes Could Be Good for Hawaii Employers

by John Mackey | Jun 10, 2024 | Firm News

The Federal Trade Commission has enacted a rule banning most employment related non-compete agreements. This rule is scheduled to become effective on September 4, 2024, and could be a win for Hawaii employers. Why?

First, the FTC makes a strong case that non-competes are bad for everyone. Not just workers and consumers, but also businesses denied access to workers they need and even businesses that rely on non-competes to ignore consumer needs.

After the FTC issued its Notice of Proposed Rulemaking last year, it received 26,000 comments. Of those, 25,000 were in support of the proposed ban on non-competes.

The 570-page announcement of the FTC's final rule includes some of the comments. Many comments illustrate how non-competes negatively affect workers, as these agreements are often not negotiated and can come as a surprise. New employees frequently sign them to secure a job with little thought to future impacts. They later find their careers derailed or new business opportunities impossible when it is time to move on:

"I was laid off from my company in 2008 due to the economy; not to any fault of my own. However, when I was offered a job at another company, my former company threatened them and my offer was rescinded. I was unable to find gainful employment for months, despite opportunities in my field, and had to utilize unemployment when I otherwise would not have needed it. To find work, I ultimately had to switch fields, start part time somewhere, and just continue to work my way up. All of this because I was laid off to no fault of my own."

Other comments show how non-competes can harm consumers, such as by keeping patients from seeing the health care provider of their choice:

"I was terminated by a large hospital organization suddenly with a thriving, full Pediatric practice. … My lawyer and I believe the non-compete does not apply in my circumstances and that the noncompete is overly broad, restrictive, and harmful to the public (my patients). I started seeing my patients mostly gratuitously in their homes so they would not go without the care they wanted and needed. … The judge awarded the order and I was told I cannot [have any contact with my patients or] provide any pediatric care within my non-compete area. Patients are angry and panicked. I'm worried every day about my patients and how I can continue to care for them. … Patients have a right to choose and keep their doctor. The trust built between a patient and [their] doctor is crucial to keeping a patient healthy. It's not a relationship that can or should be replaced. … Patients should always come first and that is not happening."[1]

Comments also illustrate how non-competes can be bad for industries that rely on skilled workers:

“I am the owner of a small-midsize freight brokerage, and non-competes of large brokerages have time and time again constrained talent from my business. Countless employees of [a] mega brokerage … have left and applied for our company and we must turn them away. These are skilled brokers that are serving the market and their clients well due to their skill sets. … These non-competes affect not just me but the clients they work with, as these skilled brokers are forced out of the entire logistics market for an entire year and possibly a lifetime when they pick up a new career in a different field because of these aggressive non-competes.”

Comments also address how non-competes can be bad for employers that rely on them. When non-competes disable competitive labor markets, businesses stagnate and fail to adapt to the needs of customers and employees alike:

“Non-competes serve little more purpose than to codify and entrench inefficiencies. I have seen this firsthand in the context of a sophisticated management consulting environment where company owners provided ever less support in terms of contributing to projects or even to sales of new business while still feeling secure through agreements that substantially limited anyone from working in the relevant industry for two years on a global basis after leaving. … The reality is that there are innumerable retention mechanisms (such as good working conditions, compensation, culture, management, growth trajectory and/or strategy) that can contribute to loyal employees without the need for non-competes.”

And this can lead employees to recognize opportunities to fairly compete that will become increasingly difficult to prevent as the legal environment shifts away from enforcement of non-competes:

“I currently work in sales for an asphalt company in Michigan. The company had me sign a two year non-compete agreement to not work for any other asphalt company within 50 miles if I decide to resign. After two years with the company I have been disheartened at how poorly customers are being treated and how often product quality is sub-par. I would love to start my own business because I see this as an opportunity to provide a better service at a lower cost. However, the non-compete agreement stands in the way even though there are no trade secrets and too many customers in this market.”

Second, the FTC rule would benefit Hawaii employers by providing certainty. Many businesses may worry that the FTC would be taking away a critical tool in protecting their business — but in Hawaii, the benefits of a non-compete are not well defined and are often illusory.

In the case of *Prudential Locations, LLC vs. Lorna Gagnon (2022)*, an Oahu real estate brokerage tried to enforce a non-compete to stop one of its employees from opening her own competing brokerage. The Hawaii Supreme Court noted the trends toward restricting the enforceability of non-compete agreements and that some states have banned all or specific types of non-competes,[2] but declined to take that step.

Non-competes must be supported by some legitimate business purpose, like protecting trade secrets or customer relationships. Preventing competition is not a legitimate purpose. But every business fears, and would on some level love to eliminate, its competition. And it can be difficult for a business witness to avoid acknowledging this fact, such as in this exchange quoted in the *Gagnon* decision:

“Tabori stated during his deposition that preventing competition from new firms was a purpose of the non-compete agreement:

Q. You said that the rationale for having a noncompete that prevents someone from forming a new entity such as Ms. Gagnon’s restrictive covenant is that you don’t want someone to start up a new competing enterprise against you, essentially with your stuff. Fair?

A. That would be the reason to put that language into the noncompete that Lorna Gagnon signed, fair.”

For the Hawaii Supreme Court, this was enough to invalidate the enforcement attempt, on the basis of an improper purpose: trying to prevent competition. Yet, the question posed to the witness includes the phrase, “…with your stuff,” presumably meaning to prevent unfair competition by competing *with the benefit of the employer’s confidential information*. The Court appears to ignore this important qualification. After nine years of litigation, the employer’s case seems to have been sunk by one misconstrued deposition answer.

And there’s more potential bad news in the *Gagnon* opinion. The Court set a very high bar for non-competes that seek to protect trade secrets and confidential information. Employers will need to be scrupulously consistent in implementing their non-competes. If they are not, they expose themselves to a ruling that the information they sought to protect is not actually confidential:

“. . . the information that Locations asserts constitutes a protectible legitimate purpose was not actually ‘confidential.’ As noted by the circuit court, <u>other Locations employees and managers with similar or more access to the allegedly confidential information were not restricted by non-compete agreements</u>. For example, only some of the 18 sales coaches employed by Locations were subject to non-compete agreements. Further, despite Locations’ purported confidentiality concerns, the non-compete clause only prohibited Gagnon from starting her own firm, but permitted her to work for an existing brokerage firm even within one year of leaving Locations. In addition, Locations did not produce any evidence of and did not dispute that there was no trade secret violation.”

The underlined language above is a Catch-22 for employers. It seemingly requires that all employees with access to confidential information be bound to a non-compete. For example, an executive and their secretary often have access to the same information. Should the secretary have the same non-compete as the executive? Before the *Gagnon* case, most Hawaii employment attorneys would have said that because the secretary is not a competitive threat, a non-disclosure agreement is what’s warranted for the secretary; not a non-compete. Yet, requiring a secretary (or an entire workforce) to enter a non-compete is just the sort of overreach other courts take as an indication the employer is using non-competes for the improper purpose of preventing competition. [3]

Hawaii also has a non-compete-specific attorneys’ fee statute that requires a court to award attorneys’ fees to a former employee who successfully defends an attempt to enforce a non-compete.

In this legal environment, the FTC rule would be doing Hawaii employers a favor by eliminating the legal uncertainty under current case law.

But will the new rule be allowed to take effect?  Not likely. It is already subject to multiple legal challenges, including in Texas, where opponents of federal regulations have had success in challenging them, including in the employment arena.

But Hawaii employers should not wait for the FTC rule to take effect to assess their use of non-compete agreements. Most are worth little more than an opportunity to bully a former employee unable to afford legal counsel out of a job no court would make them give up. If their new employer is willing to hire counsel, that push back will likely be enough to demonstrate the actual weakness of the agreement. The FTC's rule, even if enjoined, will bolster the arguments against non-competes, as well as the general perception of their harmfulness and unenforceability. The more an employer pursues enforcement, the more money is spent on attorneys rather than business improvements and employee retention.

Hawaii employers might be better served to consider non-solicitation agreements. These are typically far more defensible, and do not require an employer to ask a court to put someone out of a job.

Labor is a competitive market. Hawaii businesses compete to keep employees every day. Non-competes may make it difficult for employees to leave, but employees certainly won't be happy if they feel stuck — and employers can't expect workers to do their best for the business if they feel like hostages in the workplace.

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[1] Health care non-competes are particularly harmful in places like Hawaii where there are shortages of health care professionals. *See Non-Compete Clauses in Physician Employment Contracts are Bad for our Health*, Hazel G. Beh and Ramsey Ross, Hawaii Bar Journal, Vol. 14, No. 13 (July, 2011).

[2] Hawaii has already banned non-competes for "technology businesses" (think software developers) to promote market benefits similar to reasons articulated in the FTC rule.

[3] Requiring a secretary to enter a non-compete could also prompt an unfair labor practice charge with the National Labor Relations Board, as the NLRB General Counsel last year opined that most non-competes with non-supervisory employees violate the National Labor Relations Act. https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national

# Supreme Court overturns Chevron: implications for antitrust & the Federal Trade Commission

03 July 2024

**On June 28, 2024, the U.S. Supreme Court issued a highly anticipated decision overturning the 40-year old precedent established in Chevron, U.S.A. v. Natural Resources Defense Council.[1] Under the Chevron doctrine, courts were required to give deference to administrative agencies' interpretations of the statutes they administer when those statutes were ambiguous. The court's 6-3 decision (along party lines) to eliminate "Chevron deference" leaves interpretations of administrative statutes largely to the province of the federal courts. The ruling also shifts power to Congress, with the Court stating that the Legislative Branch is "always free to act by revising the statute" when it disagrees with the Executive Branch about how the courts have performed their job of interpreting a statute in a particular case.[2]**

Below we discuss the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*[3] and explore whether the court's decision to eliminate the *Chevron* doctrine may affect the Federal Trade Commission (FTC)'s recent efforts to expand the definition of what conduct may be considered to be an "unfair method of competition" under Section 5 of the FTC Act.[4]

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## Elimination of the Chevron doctrine removes courts' deference to federal agency interpretation of administrative statutes

The Supreme Court provided itself with the opportunity to overrule *Chevron* when it granted certiorari in two separate cases[5] involving challenges to the implementation of a rule issued by the National Marine Fisheries Service (the NMFS Rule).[6] The NMFS Rule required the herring industry to fund at-sea monitoring programs intended to increase monitoring in certain fisheries. In *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, appellate courts in the First and D.C. Circuits, respectively, each affirmed lower court rulings that had granted summary judgment to the government on the basis that the agency's interpretation of the NMFS Rule was entitled to deference under *Chevron*. The appellate courts applied the two-step *Chevron* framework applicable when Congress has provided a federal agency with the general authority to make rules with the force of law. Under *Chevron*, a court must first use "traditional tools of statutory interpretation" to evaluate whether the intent of Congress is clear as to the question at issue. If the court finds the statute to be ambiguous, then step two of the *Chevron* framework instructs the court to defer to any "permissible construction of the statute" adopted by the agency.[7]

Under the *Chevron* doctrine, such deference required the court to accept any permissible interpretation of the statute offered by the agency, even if such interpretation was not "the reading the court would have reached if the question initially had arisen in a judicial proceeding."[8]

In its decision in *Loper Bright*, the Supreme Court explicitly overruled *Chevron*, holding that "[t]he Administrative Procedure Act [APA] requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous."[9] Writing for the majority, Justice Roberts found that *Chevron* "cannot be reconciled with the APA by presuming that statutory ambiguities are implicit delegations to agencies. That presumption does not approximate reality. A statutory ambiguity does not necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question."[10] The Court also held that *Chevron's* presumption is misguided since the courts, not the agencies, are better suited to resolve statutory ambiguities.

While the Court jettisoned *Chevron* deference, agency interpretations are not irrelevant. In exercising their independent judgment to determine the meaning of statutory provisions, courts may "seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA."[11] In addition, the court held that when "a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[12]

## Implications for the FTC's efforts to target "unfair methods of competition" under Section 5 of the FTC Act

The *Loper Bright* decision comes at a pivotal time for the FTC. Under the stewardship of Chair Lina Khan and operating with a Democratic majority since 2021, the FTC has espoused a broad interpretation of both what it considers to be an "unfair method of competition" under Section 5 of the FTC Act, as well as the extent of the agency's authority to promulgate rules[13] defining unfair methods of competition under Section 6(g) of the same statute. In a 2022 policy statement, the FTC asserted an expansive definition of Section 5, stating that "Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions," and provided guidance as to how the agency intends to pursue such "standalone" unfair methods of competition claims.[14]

In April 2024, the FTC made its first significant effort to animate the theories espoused in its 2022 Section 5 Policy Statement: the FTC voted to publish a final rule banning the use of non-compete clauses nationwide (the Non-Compete Rule), classifying such clauses as an unfair method of competition under Section 5. The Non-Compete Rule is grounded in the FTC majority's expansive understanding of its authority to target unfair methods of competition under Section 5. The rule was also presaged by an announcement in 2021 from then-Acting FTC Chairwoman Rebecca Slaughter concerning the creation of a new rulemaking group within the FTC intended to support the agency in strengthening "existing rules and to undertake new rulemakings to prohibit unfair or deceptive practices and unfair methods of competition."[15]

There has been significant public pushback with respect not only to the Noncompete Rule[16] but also, more generally, to the notion that Section 6(g) of the FTC Act even provides the FTC with rulemaking authority related to unfair methods of competition to begin with.[17] A handful of plaintiffs have already brought lawsuits in federal court challenged the legality of the Non-Compete Rule, seeking, among other things, to permanently enjoin the FTC from enforcing the new rule.[18] For example, in April 2024 the U.S. Chamber of Commerce filed a complaint challenging not only the Non-Compete Rule, but also the FTC's "radical new Policy Statement regarding its authority under Section 5 of the FTC Act – one that would ultimately clear the path for its nationwide regulation of noncompete agreements."[19] Plaintiffs contend that the Policy Statement is unsupported by decades of bipartisan enforcement policy that "had interpreted Section 5 to prohibit only practices that cause actual harm to competition and are not outweighed by procompetitive justifications."[20] In addition, plaintiffs allege that the FTC does not have substantive rulemaking authority under Section 6(g) of the FTC Act.[21]

To-date, the FTC has not utilized the *Chevron* doctrine to support its rulemaking authority with respect to "unfair methods of competition" under Section 5,[22] and it has been the subject of scholarly debate whether *Chevron* deference is applicable to the agency's interpretation of Section 5.[23] For example, some scholars that consider the *Chevron* doctrine to be inapplicable to the FTC's interpretation of its Section 5 argue that, since there are not significant gaps between the scope of Section 5 and the Sherman and Clayton Acts, the requisite statutory ambiguities justifying the application of *Chevron* do not exist.[24]

Notably, however, current FTC Chair Lina Khan has taken the opposite view. In a 2020 article co-authored by then-FTC Commissioner Rohit Chopra, Khan—writing in her capacity as an Academic Fellow at Columbia Law School—made clear her position that the *Chevron* doctrine is applicable to support the FTC's interpretation of its rulemaking authority related to unfair methods of competition under Section 5. In the article, Rohit and Khan argue that [t]he Commission's 'unfair methods of competition' rulemaking authority . . . remains governed by the Administrative Procedure Act, and FTC interpretations of 'unfair methods of competition' are subject to Chevron deference."[25] Given that Chair Khan is on the record with respect to this understanding of *Chevron*, it is not a stretch to assume that, under her stewardship, the FTC very well may have asked the court to apply *Chevron* deference to the FTC's newly-expansive interpretation of Section 5, either in a rule-making or judicial review of an FTC adjudication decision. However, *Loper Bright* is the nail in the coffin, eliminating this significant potential argument that the FTC may have employed to push back against current and future challenges to the FTC's expansive view of Section 5.

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# Looking ahead

Hogan Lovells will continue to monitor and report on significant developments stemming from the *Loper Bright* decision as they occur. Additional views from the Hogan Lovells appellate team about the potential impact of the *Loper Bright* decision are available here and here.

Please do not hesitate to contact us if you have any questions.

Authored by Logan Breed, Chuck Loughlin, Ilana Kattan, and Jill Ottenberg.

References

1 *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), *overruled by Loper Bright Enterprises v. Raimondo,* No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024).

2 Id. at 25.

3 *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024).

4 15 USC 45(a).

5 *See Relentless, Inc. et al. v. Department of Commerce*, et al., No. 22-cv-1219 (1st Cir. 2022) and *Loper Bright Enterprises et al. v. Raimondo*, No. 21-cv-5166 (D.C. Cir. 2022).

6 The NMFS is a division of the National Oceanic and Atmospheric Administration within the U.S. Department of Commerce.

7 If the court finds that the intent of Congress was clear, then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 843

8 *Loper Bright Enterprises v. Raimondo*, 2024 WL 3208360 at 4 (citing *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843, n.11).

9 *See id.* at 7-35.

10 *Id*. at 5.

11 *Id*. at 16 (quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)).

12 *Id*. at 35

13 The FTC's rulemaking authority is governed by Section 6(g) of the FTC Act. 15 U.S.C. Sec. 46(g), "Additional powers of Commission."

14 *See* Federal Trade Commission, "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," Commission File No. P221202 (Nov. 10, 2022) available here.

15 *See* Federal Trade Commission, "FTC Acting Chairwoman Slaughter Announces New Rulemaking Group" (March 25, 2021) available here.

16 *See e.g*. American Hospitals Association press release, "AHA Statement on Final FTC Noncompete Regulation" (April 23, 2024) available here; and Associated Builders and Contractors press release, "ABC Denounces FTC's Blanket Ban on Noncompete Clauses" (April 23, 2024) available here.

17 *See e.g.* Congressional Research Service, "The FTC's Competition Rulemaking Authority" (updated Jan. 11, 2023) at 2, available here.

18 *See e.g*. Complaint, *Ryan, LLC v. FTC,* No. 24-cv-986 (N.D. Tex. April 23, 2024), ECF No. 1; Complaint, *US Chamber of Commerce v. FTC* , No. 6: 24-cv-00148 (E.D. Tex. April 24, 2024), ECF No. 1; Complaint, *ATS Tree Services v. FTC*, No. 24-cv-1743 (E.D. Pa. April 25, 2024), ECF No. 1; and Complaint, *Property of the Villages, Inc. v. FTC*, No. 24-cv-00315 (M.D. Fla. June 21, 2024), ECF No. 1.

19 Complaint, *US Chamber of Commerce v. FTC* , No. 6: 24-cv-00148 at 4.

20 *Id*. at 5.

21 *See Complaint, Ryan, LLC v. FTC*, No. 24-cv-986 at 7-8 ("Section 6(g) of the FTC Act grants the Commission authority only to promulgate procedural rules . . . [t]he absence of any penalty for violating rules promulgated under Section 6(g) confirms that the provision confers no substantive rulemaking authority."); see also Complaint, *US Chamber of Commerce v. FTC* , No. 6: 24-cv-00148 at 42-43 ("The Commission claims that Section 6(g) of the FTC Act gives it the authority to regulate noncompetes through a binding regulation. But the structure and history of the FTC Act, the Commission's own historical understanding of its authority, and Congress's subsequent amendments to the FTC Act demonstrate that Section 6(g) empowers the Commission only to develop internal rules to govern how it conducts investigations and carries out its functions, not to promulgate substantive rules that bind private parties and declare common business practices categorically unlawful.")

22 The FTC has, for example, used the Chevron doctrine to defend its interpretation of its authority to promulgate industry-specific rules pursuant to the Hart-Scott Rodino Act (HSR Act). See e.g. *Pharm. Rsch. & Manufacturers of Am. v. Fed. Trade Comm'n*, 44 F. Supp. 3d 95, 114 (D.D.C. 2014), aff'd sub nom. Pharm. Rsch. & Mfrs. of Am. v. F.T.C., 790 F.3d 198 (D.C. Cir. 2015)

23 *See e.g*. Zeisler, Royce, "Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement," 2014 Colum. Bus. L. Rev. 266 (2014) see also Barthold, Corbin, *No, Chevron Deference Will Not Save the FTC's Noncompete Ban,* Truth on the Market (Feb. 14, 2023) available here; and Hurwitz, Gus, "Chevron and Administrative Antitrust, Redux", Penn Carey Law: Legal Scholarship Repository (2023) available here.

24 Zeisler, Royce, "Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement," 014 Colum. Bus. L. Rev. 266, 287- 288 (2014)

25 Rohit Chopra & Lina M. Khan, "The Case for 'Unfair Methods of Competition' Rulemaking, 87 U. Chi. L. Rev. 357, 378-79 (2020).

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