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SUMMARY

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THE EUROPEAN COMMISSION PUBLISHES FINAL IMPLEMENTING REGULATION ON PROCEEDINGS PURSUANT TO THE FOREIGN SUBSIDIES REGULATION

On July 10, 2023, the European Commission (the "Commission") published its final regulation for implementing the Foreign Subsidies Regulation (FSR). The Implementing Regulation (the "IR") clarifies practical and procedural aspects related to the application of the new EU rules to address distortions caused by foreign subsidies in the EU internal market. This much-awaited text provides businesses and their advisors with guidance on how the new regime will work in practice. On July 12, 2023, just a few days after the release of the IR, the Commission released a new Communication with further details concerning the conduct of proceedings under the FSR, including the submission of documents.

IN DEPTH

BACKGROUND ON FSR

As a short reminder, on December 23, 2022, the Regulation (EU) 2022/2560 of December 14, 2022, on foreign subsidies distorting the internal market (FSR) was published in the *Official Journal of the European Union*. The FSR tackles foreign subsidies granted by non-EU governments to companies active in the EU and which distort the internal market.

The new FSR rules which took effect on July 12, 2023, apply to M&A transactions as of October 12, 2023, in which (i)

a buyer and/or a target that received combined aggregate foreign financial contributions exceeding EUR 50 million in the last three years prior to the conclusion of the transaction agreement, and (ii) at least one of the merging companies, target, or joint-venture is established in the EU and has EU turnover of at least EUR 500 million. Transactions that meet these two cumulative thresholds will need to be notified and approved by the Commission prior to implementation.

For a more detailed discussion of the key principles of the FSR, please see our previous article: EU Foreign Subsidies Regulation Enters into Force in 2023.

BACKGROUND ON THE IMPLEMENTING REGULATION

On February 6, 2023, the Commission published a draft regulation for implementing the FSR (the "Draft Implementing Regulation") and invited stakeholders to give feedback by March 6, 2023.

Various comments were submitted to the Commission by different stakeholders, including companies, associations, and law firms. Generally, the comments criticized the administrative burden imposed on companies related to the information collection and disclosures required by the regulation. The Commission appears to have largely considered some of this feedback. Consequently, the IR provides that the level of information required in the notification form varies based on the potential distortive effect on the internal market of the foreign financial contribution.

Although some concessions were made by the Commission in the IR, it is critical to stress that all *financial contributions* received from non-EU governments (including member States of the European Economic Area like Norway, or the United Kingdom as former member State of the EU), foreign public authorities, and even private companies whose actions can be attributed to the foreign country, still count towards the EUR 50 million jurisdictional threshold. It is disappointing that although stakeholders requested clarification of the definition of "financial contribution," the IR remains silent and does not provide a more precise definition of foreign financial contributions.

NEW EXEMPTIONS FROM DISCLOSURE IN THE FORM FS-CO

The original scope of the required information to be collected for the notification was a source of major concern for stakeholders. Many felt that the administrative burden imposed on the notifying parties was disproportionate to achieving the aims of the FSR. Therefore, stakeholders asked the Commission to narrow the scope of the information required to what is available and necessary to assess the existence of distortive foreign subsidies.

A welcomed major improvement to the FSR notification form (the "Form FS-CO"), annexed to the IR, is that the

following foreign financial contributions are exempt from disclosure – but still count for the jurisdictional threshold:

- Foreign financial contributions below a *de minimis* threshold of EUR 1 million.
- All foreign financial contributions awarded in the same country in the three years prior to the signing of the transaction agreement if the expected aggregate value is less than EUR 45 million.
- The supply/purchase of goods/services at market terms in the ordinary course of business (*e.g.*, outcome of public bids), except ordinary course financial services agreements with public authorities must still be disclosed.
- Deferrals of payment of taxes or of social security contributions, tax amnesties, and tax holidays as well as normal depreciation and loss-carry forward rules that are of general application (if such measures are "selective" or "specific", they need to be disclosed); and
- Applications of tax reliefs for avoidance of double taxation.

Notably, private equity funds are subject to a specific disclosure regime. On the Form FS-CO, only foreign financial contributions received by the fund involved in the transaction and its controlled portfolio companies must be reported. Foreign financial contributions made to other funds managed by the same investment firm (or by portfolio companies controlled by those funds), but with a majority of distinct investors, are not required to be reported and will not be factored into the total amount for the jurisdictional threshold. These exemptions are only available to investment firms that meet specific requirements.

MANDATORY DISCLOSURE UNDER THE FORM FS-CO

Foreign financial contributions that fall into one of the categories considered "most likely to distort" competition in the EU internal market must be reported if the individual amount of the contribution is EUR 1 million or more. This EUR 1 million reporting threshold applies to five specified categories of foreign subsidies in the FSR of "most likely" to distort the EU internal market (listed under article 5(1) of the FSR).

Based on the IR, notifying parties will be well advised to seek a waiver from the Commission during pre-notification discussions to alleviate the quantity of data to be collected. However, this will be on ad hoc basis, and we expect guidance from the Commission early next year to give potential acquirers more predictability and transparency regarding the scope of financial contributions that need to be reported.

TAKEAWAYS & NEXT STEPS

The final text of the Implementing Regulation was the last legal instrument that needed to be adopted before the FSR took effect on July 12, 2023. Transactions that sign on or after this date, but have not closed by October 12,

2023, and which meet the applicable thresholds, must be notified to the Commission.

Although the Commission alleviated some of the administrative burden on companies contemplating M&A transactions in terms of the exemptions from disclosure in the Form FS-CO, the initial data and information collection of all foreign financial contributions remains an obligation for companies to determine if the jurisdictional thresholds are met, thus triggering a notification obligation. In addition to this collection exercise, companies will need to make their own assessment on whether certain financial contributions received are foreign subsidies that are likely to be distortive and thereby need to be reported. This quasi-shifting of the burden of proof will constitute an additional obligation to be undertaken by the acquirers and may lead to frequent substantive discussions between the Commission and the notifying party[ies].

The impact of the FSR on deal risk and timing should be considered by merging parties during negotiations. The risks inherent to a Commission investigation pursuant to the FSR must be considered in the usual contractual provisions (such as conditions precedent, cooperation obligations, long-stop date, and representations and warranties). Due diligence of a target must also include a review of foreign financial contributions, particularly those that are reportable. Companies now contemplating M&A transactions must factor in and closely coordinate all regulatory processes entailed by merger control, foreign direct investment screening, and FSR review.

**Trainee Francesca Casalone also contributed to this article.*

VERTICAL AGREEMENTS & RESTRICTION OF COMPETITION BY OBJECT: WHAT'S NEW IN EUROPE?

On June 29, 2023, the Court of Justice of the European Union (CJEU) delivered a preliminary ruling in the *Super Bock Bebidas vs. Autoridade da Concorrência* case (C-211/22) on the questions referred by the *Tribunal da Relaçao de Lisboa* (Lisbon Court of Appeal). To some extent, the recent judgement is not particularly noteworthy or innovative, as it mainly applies well-established EU competition law principles prevalent through existing case law. However, the Super Bock case marks a significant step forward by introducing these principles for the first time in the context of vertical price-fixing agreements.

IN DEPTH

BACKGROUND

Super Bock Bebidas is a well-known Portuguese company that primarily produces bottled waters and beers. For the purpose of distributing beverages in hotels, restaurants and cafés, Super Bock concluded exclusive distribution

agreements with independent distributors. Those distributors sell beverages purchased from Super Bock in almost the entirety of the Portuguese territory. In July 2019, Super Bock Bebidas S.A., along with one of its board members and a company director, were fined EUR 24 million by the *Autoridade da Concorrência* (AdC- the Portuguese Competition Authority) for fixing minimum resale prices and other resale conditions.

Resale price maintenance (RPM) is a vertical agreement or concerted practice that occurs when a supplier and its distributors agree on the price to be charged by the retailer for the resale of the supplier's products. In this specific case, the AdC found that Super Bock and its sales department had consistently established and enforced, over a period exceeding 10 years, the terms of business that all distributors were required to follow when reselling the products in Portugal. More specifically, the sales department of Super Bock regularly approved a list of minimum resale prices which were then communicated to the distributors either verbally or through written means such as email. The distributors usually adhered to these prices, and Super Bock monitored their compliance through a tracking system. When distributors deviated from the prescribed resale prices, Super Bock enforced retaliatory measures like removal of financial incentives, such as trade discounts on the purchase of products and the refusal to supply and replenish stocks. To mitigate the risk of facing these measures, distributors frequently sought guidance from Super Bock regarding the resale prices they should apply.

The Competition, Regulation and Supervision Court in Portugal upheld the AdC decision. Super Bock brought an appeal against that judgment before the *Tribunal da Relação de Lisboa* which subsequently submitted 6 questions to the CJEU. In particular, the referring court sought clarification on the interpretation of Article 101 on the Treaty of the Functioning of the European Union (TFEU) within the context of vertical price-fixing agreement. In its June 2023 judgement, the CJEU grouped the questions around the following 4 issues.

A MINIMUM RESALE PRICE-FIXING AGREEMENT DOES NOT INHERENTLY BREACH COMPETITION LAW

The key issue in the Super Bock judgment is whether a vertical price-fixing agreement could be considered as a restriction of competition by object under Article 101 TFEU.

As a reminder, Article 101 of the TFEU prohibits both horizontal and vertical agreements that have as their object (or alternatively, effect) the restriction of competition. Restrictions of competition by object are restrictions that by their very nature have the potential to restrict competition[1]. This means two things:

- Once an agreement is classified as a restriction by object, the actual effects of the agreement do not need to be assessed;
- The parties to the illicit agreement have to demonstrate efficiencies as outlined in Article 101(3) of the TFEU to be exempted from the prohibition set out in Article 101 – which is rather challenging. Another way for a vertical agreement to be exempted is to satisfy one of the EC block exemptions. However, it should be noted

> that some practices that generally constitute restrictions of competition by object are identified by the Commission in its notices, guidelines and block exemptions as '*hardcore*' restraints. Such restraints are assumed to infringe Article 101(1) and presumed not to satisfy the criteria in Article 101(3). Once it has been established that a particular agreement contains a hardcore restriction, the agreement automatically cannot benefit from any of the Commission's block exemption regulations.

Article 4(a) of the Block Exemption Regulation on Vertical Restrain (VBER) provides that minimum RPM arrangements are hardcore restrictions and are thereby presumed to infringe Article 101(1) TFEU by object. Therefore, minimum RPM arrangements are presumed anticompetitive, and the block exemption does not apply. It is important to note that while there is a possibility for minimum RPM to be exempted from Article 101(1) through an efficiency defense under Article 101(3) on a case-by-case basis, RPM faces challenges in fulfilling the conditions of Article 101(3). For instance, in the case of *SA Binon & Cie v. SA Agence et Messageries de la Presse*, which dealt with the legality of a clause in a selective distribution system allowing the distributor to set prices and enforce them on retailers, the CJEU ruled that "*any price-fixing agreement constitutes, in itself, a restriction on competition and is therefore prohibited by [Article 101(1) TFEU]*.[2] Consequently, RPM arrangements are unlikely to qualify for exemption under the VBER Regulation and the efficiency defense under Article 101(3), making them susceptible to being deemed void and unenforceable under Article 101 TFEU.

Over time, the interchangeable use of the concept "*hardcore restriction"* under the VBER regulation and "*by object restriction"* under 101 TFEU has caused confusion. In the *Coty*[3] judgment, the CJEU first set out the distinction assessing whether a manufacturer's restriction on its retailers, which forbids them from selling through third-party platforms to preserve the luxury image of the products, qualifies as a competition restriction "*by object*" under Article 101 TFEU. Furthermore, the CJEU examined whether such a restriction falls within the scope of passive sales restrictions as defined in Article 4(b) of the VBER. In its analysis of these two inquiries as distinct issues, the Coty case appears to have implicitly acknowledged that the equivalence between these two concepts is no longer justified without explicitly stating this conclusion.

This distinction is now confirmed by the CJEU. In the Super Bock case, the Court upheld this approach by affirming that the classification of RPM as a "*hardcore restriction"* under the VBER Regulation does not inherently imply that it constitutes a "*restriction by object*." More precisely, the CJEU ruled that it requires a contextual analysis of the "*degree of harmfulness to competition"*. The Court made it clear that a restriction by object may only be established after considering the content of the agreement, the economic and legal context of the case, as well as the nature of the goods and services affected. With this decision, the CJEU has simply applied long-established EU law principles[4] to vertical price-fixing agreements for the first time.

THE UNSPOKEN AGREEMENT IN SUPPLIER-DISTRIBUTOR RELATIONSHIPS

In its second question, the referring court requested clarification on the notion of '*agreement*' as defined in Article 101 TFEU to ascertain whether, in the specific circumstances of the main proceedings, an agreement exists between Super Bock and its distributors.

To answer this question, the CJEU unsurprisingly relied on previous case law by restating that an agreement requires a concurrence of wills between both parties[5]. More precisely, in the context of vertical price-fixing, the CJEU affirmed that for agreement to be characterized, it is necessary to establish whether the distributors have either implicitly or explicitly agreed to comply with the supplier's request to maintain resale prices. The mere act of transmitting minimum prices and distribution margins to distributors, along with requests for compliance under the threat of retaliation or negative distribution margins, does not automatically imply the existence of an agreement.

Thus, although it would seem that it is unilateral conduct for a supplier to send distributors lists with minimum prices and to ask these distributors to follow those prices, which it monitors under threat of retaliatory measures, the distributors' acceptance and adherence to the suggested prices, without raising any objections to the supplier may imply a tacit agreement or acceptance of the supplier's practice. The rest is in the hands of the referring court, who will have to provide final assessment on the facts in a subsequent ruling.

UNCOVERING THE CONNECTION BETWEEN SUPPLIER AND DISTRIBUTOR THROUGH INDIRECT EVIDENCE

Thirdly, the referring court asked if the existence of an agreement between a supplier and its distributors may be established solely on the basis of direct evidence.

On the basis of a well-established case law[6], the CJEU reaffirmed that the principle of effectiveness is sufficient to establish the existence of an agreement on minimum resale prices not only through direct evidence, but also through coincidences and indicia (being objective and consistent). In the present case, an agreement could be inferred when a supplier invited its distributors to apply recommended minimum prices and that the distributors, in practice, followed the prices communicated by the supplier.

LOCAL AGREEMENTS MAY STILL AFFECT TRADE BETWEEN MEMBER STATES AND BE SUBJECT TO EU COMPETITION LAW

Finally, the referring court raised concerns regarding the scope of the agreement, as Super Bock's direct sales did not cover the entirety of Portugal's territory. They were confined to specific local areas until 2013, and subsequently expanded to include other territories in Portugal from 2014 onwards.

The CJEU simply applied the applicable case law on this point. To determine if an arrangement has a significant

impact on trade between Member States, it is essential to examine its economic and legal context. The Court, quoting *Ziegler v Commission*[7], reiterated that impact on cross-border trade usually results from a combination of multiple factors that, when assessed individually, may not be decisive. It is therefore necessary to ascertain, with a "*sufficient degree of probability"*, whether the agreement possesses a significant "*direct or indirect, actual or potential influence"* on trade between Member States, even if it covers only part of the territory of a Member State[8].

Thus, according to the CJEU, a vertical price-fixing agreement which applies to most, but not all, of a Member State's territory, can still impact trade between Member States within the meaning of Article 101 TFEU.

CONCLUSION & KEY TAKEAWAYS

The *Super Bock* judgment confirms that while a vertical price-fixing agreement could be considered as a *by object* restriction, it does not inherently constitute a violation of competition law. Rather, a case-by-case analysis must be conducted to determine the extent of harm the agreement poses to competition, *i.e.*, by assessing the content of the agreement, its objectives and the economic and legal context of which it forms part – the three legal pillars necessary to establish a restriction of competition by object.

The responsibility now lies with the Portuguese court to ascertain whether, based on the specific factual evidence, the agreements in question are likely to violate competition law.

In EU law, the relevance of this judgment will have to be considered in the context of the updated Guidelines on Vertical Restraints, which reaffirms that "*the Court of Justice of the European Union has held on several occasions that RPM is a restriction of competition by object within the meaning of Article 101(1) of the Treaty*"[9]. Despite being effective only from June 1, 2022, the new Guidelines appear to have quickly lost their relevance on this specific subject.

On a broader scope, the approach adopted by the CJEU is also noteworthy as it seems to align with its US counterpart. In the United States, minimum RPM was traditionally seen as a per se violation (*i.e.* a category of agreements that are presumed to violate antitrust laws) for almost a century. However, in 2007, the US Supreme Court Leegin case shifted the approach to a rule of reason analysis, abandoning the automatic prohibition of minimum RPM. Sixteen years later, the Super Bock case has paved the way for EU law to adopt a more flexible and informal approach towards RPM, close to the one applied in the United States.

**Trainee Mathilde Cosperec also contributed to this article.*

[1] See for example judgement of the Court of 11 September 2014 in Case C-67/13 P, Groupement des Cartes Bancaires (CB) v Commission, para 50.

Judgement of the Court of 3 July 1985 in Case 243/83, SA Binon & Cie v SA Agence et messageries de la presse, para 43.

[3] Judgement of the Court of 6 December 2017 in Case C-230/16, Coty Germany GmbH v Parfümerie Akzente GmbH.

[4] See for example judgment of the Court of 14 March 2013 in Case C-32/11, Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal, para 36.

[5] See for example judgment of the Court of 18 November 2021 in Case C-306/20, Visma Enterprise, para. 94.

[6] See for example judgment of the Court of 21 January 2016 in Case C-74/14, Eturas and Others, paras. 36 and 37.

[7] See for example Judgment of the Court of 11 July 2013 in Case C-439/11, Ziegler v Commission, para 92.

[8] for example judgment of the Court of 3 December 1987 in Case 136/86, BNIC v Aubert, para 18.

[10] Communication from the European commission, Guidelines on vertical restraints (2022/C 248/01), para 195.

EURO VISION ON CORRUPTION: ALL SINGING FROM THE SAME SONG-SHEET? PROPOSALS FOR A NEW ANTI-CORRUPTION LEGAL FRAMEWORK IN THE EU: FIVE KEY TAKEAWAYS

On 14 September 2022, the President of the European Commission, Ursula Von Der Leyen, announced the Commission's commitment to "update the EU's legislative framework on anti-corruption to better prevent and fight corruption across the European Union in the future".[1]

Following this, on 3 May 2023, the European Commission proposed a draft set of measures to strengthen the legal anti-corruption framework across all EU Member States. These measures consist of the following:

(i) a proposed directive on combatting corruption[2] (the "Proposed Directive"); and

(ii) a dedicated sanctions regime "to fight serious acts of corruption worldwide,"[3] to complement the EU's Common Foreign and Security Policy (CFSP).

This article summarises the new measures, examines key aspects of anti-corruption law in France and Italy in light of the Proposed Directive, and considers its potential impact on the anti-corruption landscape in the United

Kingdom.

THE PROPOSED DIRECTIVE

The Proposed Directive aims to update and harmonise EU anti-corruption frameworks, definitions and penalties for breaches, which currently vary across Member States. It covers several aspects, including:

(i) comprehensive and up-to-date preventive anti-corruption measures for the public and private sectors, "*adapted to the specific risks of an area of activity"* (Art. 3)[4];

(ii) specialised bodies dedicated to the prevention[5] and repression of corruption, which are functionally independent from the government and adequately resourced (Art. 4);

(iii) definitions of public, private, passive and active bribery. These offences must be "punishable as a criminal offence when committed intentionally" (Arts. 7 and 8);

(iv) definitions of related offences, such as misappropriation, trading in influence, abuse of functions, obstruction of justice and illicit enrichment from corruption (Art. 9 to 13);

(v) harmonised minimum penalties and specific measures for natural persons, with terms to range from at least four to a maximum of six years imprisonment depending on the offence (Art. 15);[6]

(vi) liability and penalties for legal entities under specific conditions, with maximum fines imposed being not less than 5% of the total worldwide turnover of the entity and related entities in the previous financial year (Arts. 16 and 17); and

(vii) harmonised minimum limitation periods for corruption offences (Art. 21).

The Proposed Directive contains a dual focus on *preventing* corruption before it occurs (for example, through education and research programmes) and *repressing* corrupt acts (for example, through criminal investigation and enforcement).

In the context of recent EU legislative development regarding the protection of whistleblowers, the Proposed Directive reiterates the importance of protecting those who report corruption offences and assist relevant investigations. It is also in line with broader efforts by the EU to harmonise the enforcement of serious crime across Member States. For example, in November 2022, the Council of the EU adopted[7] a decision to add the violation of EU sanctions to the list of "EU crimes", which include corruption, amongst others. This decision was soon followed

by the proposal of a directive[8] setting out the criminal offences and penalties applicable to breaches of EU sanctions laws.

While the Proposed Directive may be subject to change as it goes through the EU's legislative process, the latest draft (as at the time of writing) states that Member States will have 18 months to transpose the final Directive into their domestic law.

A POTENTIAL DEDICATED EU SANCTIONS REGIME FOCUSING ON CORRUPTION

On 3 May 2023, the Commission and the High Representative stated[9] that a coherent approach "between internal and external [EU] anti-corruption policies" is essential for the credibility of the EU's anti-corruption framework.

To add "more flexibility to the Union's sanctions toolbox," a Council decision and a Council regulation are being considered to establish a thematic framework (*i.e.*, not limited to a specific geographic context) targeting corruption under the EU's sanctions regime. This proposal, which is still in its infancy, would enable the EU to impose sanctions on persons or entities involved in "serious acts of corruption" which "seriously affect or risk affecting the fundamental interests of the Union and the objectives of the CFSP".[10] This would not be the first thematic framework available to the EU when imposing sanctions; the EU currently has powers to impose restrictive measures in response to matters such as serious human rights violations, terrorism, the proliferation and use of chemical weapons, and cyberattacks.

COMMENTARY

France

France has made significant progress in the fight against corruption by introducing ground-breaking preventive legislation. The law of 9 December 2016, known as the "Sapin II Law", imposes an obligation to establish and maintain a global anti-corruption compliance programme on (i) companies incorporated in France and (ii) foreign companies not headquartered in France, falling within specific criteria.[11] A failure to enact such a programme may lead to companies facing administrative sanctions and criminal penalties even where no corrupt activity is identified on the part of that company.

The Sapin II Law also created the French Anti-Corruption Agency (AFA). The AFA oversees public and private entities and, with its sanctions commission, engages in enforcement action in France and abroad against entities that do not meet their preventive obligations.[12] The AFA has already investigated more than 150 entities, with an average duration of 18 months for each investigation.[13]

In addition to the creation of the AFA, which focuses on preventive requirements, the National Financial Prosecutor's Office (PNF) prosecutes offences such as corruption, trading in influence, favoritism and misappropriation of public funds (thus focusing on "repressing" corruption). Since 2016 and the implementation of the French Judicial Public Interest Agreement (*Convention judiciaire d'intérêt public, or CJIP*) – a form of deferred prosecution agreement – enforcement relating to these offences has increased significantly.

In accordance with the Proposed Directive, the French criminal code already distinguishes between bribery in the public sector and the private sector, as well as active and passive bribery. The French criminal code also contains several related offences, as listed in the Proposed Directive, such as trading in influence.

Overall, the French anti-corruption legal framework, both in its preventive and repressive components, aligns with the objectives of the European Commission. The Proposed Directive's requirement on Member States to enact "up-to-date measures to prevent corruption"[14] may even cause other Member States to follow France's lead by penalising corporates for not having an adequate compliance programme

Italy

In recent years, Italy has expanded the set of rules targeting corruption, with significant results. Among the most impactful reforms, Law No. 190/2012 established the Italian Anti-Corruption Authority (ANAC), a financially and politically independent authority for the prevention of corruption, with regulatory and supervisory powers over public procurement and administration, monitoring powers in relation to the anti-corruption system generally, and sanctioning powers. More recently, Law No. 3/2019 (the so-called "Sweep-the-Corrupt" law) further amended the Criminal Code, with the aim of strengthening the prevention, detection and repression of corruption. On 30 March 2023, the Legislative Decree No. 24/2023 implementing the Directive (EU) 2019/1937 on whistleblowing, finally entered into force with effect from 15 July 2023 and strengthened the existing legislation relating to the protection of whistleblowers.

In the last 12 years, Italy has consistently improved its scoring in Transparency International's Corruption Perception Index and, in 2022, scored 56 out of 100 (where 0 is "highly corrupt" and 100 is "very clean"). This is an important improvement considering that Italy scored 42 out of 100 in 2012; however, the latest rank is still below the EU-Western European average score of 66 out of 100).

Thus, the fight against corruption is still essential, especially in connection with the major investments and projects expected to be realised with the funds made available by the EU to Member States, in the context of the Next Generation EU Plan. Italy is planning to use such funds (approximately €191 billion) and a further €30.6 billion of national funds to realise the National Recovery and Resilience Plan, including, amongst other initiatives, (i) investments to complete the digital transformation, (ii) the transition to sustainable energy sources and (iii) the

creation of new infrastructures to support the economic growth. Corruption risk may occur in the selection of suppliers and contractors, and criminal organizations may be tempted to influence the selection process in favour of companies linked to them. Therefore, the President of the ANAC welcomed the Proposed Directive emphasising the importance of the measures aimed at preventing corruption and the role given to independent authorities.

The set of rules targeting corruption currently in place are already along the lines of the Proposed Directive, even if some differences in the definition of offences may exist and further adjustments may be made to the Proposed Directive before it is enacted. The outcome of the mapping of the high-risk areas by the Commission (expected for 2024) remains to be seen, as well as the possible subsequent implementation of the preventive measures set by Article 3 of the Proposed Directive (*e.g.*, awareness-raising actions, plans to address the risk in the identified sectors).

United Kingdom

The Proposed Directive does not go so far as to mandate that Member States enact a "strict liability" corporate offence of failure to prevent bribery by persons associated with the company, which exists under Section 7 of the UK Bribery Act 2010 (although it is open to Member States to take such a step). However, it does require Member States to impose corporate liability where there has been a lack of supervision or control by senior management (as defined under Article 16(1) of the Proposed Directive), which "has made possible the commission of any of the criminal offences" listed in the Proposed Directive.[15]

It is noteworthy that the Proposed Directive refers to corruption in both the public and private sectors and includes provisions for corporate criminal liability where there have been compliance failings, which tracks the approach taken in the UK. Additionally, certain steps that Member States may be required to take under Article 3 of the Proposed Directive (such as rules "for the disclosure and verification of assets of public officials") may go further than those currently provided for in the UK's anti-corruption laws, depending on how they are implemented.

It is also of interest that, at Article 16, the Proposed Directive provides that a corporate entity can be liable for any of the offences listed, when committed for its benefit by natural persons having a "leading position" within the entity. A leading position within the entity is based on "(a) the power of representation of the legal person; (b) the authority to take decisions on behalf of the legal person; or (c) the authority to exercise control within the legal person." This differs in some respects from the position in English law, where a person's seniority in the company does not necessarily mean they are acting as the "directing mind and will" of the company (thus making the entity liable for their misconduct).

Naturally, while the Proposed Directive would not have any direct application to the UK, as it is no longer part of the EU, it does suggest the potential for greater cooperation between the UK, its European counterparts and other third-country jurisdictions. In particular, the authorities in the UK will no doubt be carefully monitoring how any new

"specialised bodies" put in place by Member States will be resourced and how they approach requests for mutual legal assistance made by their international counterparts.

Separate from the Proposed Directive, the potential new EU anti-corruption sanctions regime is yet another indicator of increasingly harmonised standards internationally. The UK enacted a dedicated global anti-corruption sanctions regime in 2021.[16] Under this regime, the UK government can sanction those who are involved in "serious corruption". At the time of writing, 35 individuals have been designated under this regime.

FIVE KEY TAKEAWAYS

The following are key takeaways from the publication of the Proposed Directive:

(i) the Proposed Directive has been published at a time when there have been a number of significant developments in the white-collar space globally, including in particular (i) the recent development of new corporate "failure to prevent" offences in the UK (covering *inter alia* fraud, false accounting and money laundering), (ii) the memorandum released in September 2022 by US Deputy Attorney General Lisa Monaco on Corporate Crime and Enforcement[17] and (iii) the March 2023 updates to the US Department of Justice guidance on the Evaluation of Corporate Compliance Programs.[18] The Proposed Directive is part of the efforts of the European Commission to maintain focus on the fight against corruption and participate further in the increasing international alignment on these issues;

(ii) while the Proposed Directive indicates increasing harmonisation of anti-corruption requirements across the EU, it only prescribes *minimum* standards. Member States will, therefore, be able to implement or maintain stricter obligations. Additionally, as the proposal takes the form of a directive, Member States will be afforded a degree of freedom as to how they choose to implement its provisions. It will therefore be important for companies with operations across several Member States to consider any differences or nuances that apply under local law. To the extent that such differences exist, companies may need to adopt a "highest common denominator" approach of designing policies and procedures that meet the requirements of those jurisdictions with the strictest obligations;

(iii) in terms of enforcement, harmonisation across the EU, which seems broadly to align with the UK and the United States, will make it easier for law enforcement agencies around the world to cooperate in the investigation and prosecution of multinational companies that engage in corrupt activities in or from the EU; it also sends a clear message to jurisdictions with high levels of corruption that the EU will not tolerate misconduct that is damaging to EU interests;

(iv) the Proposed Directive also reflects the recent initiatives of Member States that focus on the *prevention* of corruption as opposed to focusing solely on prosecuting corrupt acts (*i.e.*, "repressing" them). The harmonised

concept of prevention is stated to be “the detection and elimination of the causes of and conditions for corruption, through development and implementation of a system of appropriate measures, as well as deterrence against corruption-related acts”. In that regard, special reference is made to the creation of bodies 2specialised in the prevention of corruption,” in addition to those “specialised in the repression of corruption”; and

(v) companies within the scope of the Proposed Directive and relevant national laws may benefit from adopting the harmonised definitions of public, private, active and passive bribery, and related offences within the Proposed Directive.[19] This may become even more important if the Proposed Directive is enacted and companies find themselves subject to the supervision of newly established bodies (or under increased scrutiny from existing agencies with a renewed focus on anti-corruption).[20]

In short, it appears that similar approaches to anti-corruption prevention and enforcement are being adopted in a number of advanced jurisdictions around the world. This is not considered to be mere coincidence. There is also evidence of increased co-operation between law enforcement agencies around the world, plus increased sharing of data, intelligence and investigation techniques. Multinational companies should therefore seek to harmonise their own approach to compliance and prevention in the various countries in which they operate, whilst at the same time taking account of key differences where they exist. This requires a fairly constant cycle of risk assessment, monitoring and review, but is one that need not be overly burdensome once the basic processes are in place.

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[1] https://home-affairs.ec.europa.eu/policies/internal-security/corruption/eu-legislation-anti-corruption_en

[2] Proposal for a Directive of the European Parliament and of the Council on combatting corruption, n°2023/0135: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0234

[3] https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_2517

[4] Measures that Member States may be required to take under Article 3 include providing for “open access to information of public interest, effective rules for the disclosure and management of conflicts of interests in the public sector, effective rules for the disclosure and verification of assets of public officials and effective rules regulating the interaction between the private and the public sector are in place”.

[5] The “prevention of corruption” is defined as “the detection and elimination of the causes of and conditions for corruption, through development and implementation of a system of appropriate measures, as well as deterrence against corruption-related acts”. (Art. 2)

[6] Article 15 provides that “Member States shall take the necessary measures to ensure that the criminal offences” of bribery in the public sector and obstruction of justice are punishable by “a maximum term of imprisonment of at

least six years." Other "minimum" penalties are detailed in Article 15 for other offences (such as at least five years for bribery in the private sector). Furthermore, persons who have already been convicted may be subject to additional measures such as disqualification from the exercise of commercial activities in the context of which the offence was committed, or exclusion from access to public funding, including tender procedures, grants and concessions.

[7] https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/sanctions-council-adds-the-violation-of-restrictive-measures-to-the-list-of-eu-crimes/

[8] https://commission.europa.eu/document/2a578063-d2e8-4e06-8f40-95b16fc92c20_en

[9] https://commission.europa.eu/system/files/2023-05/JOIN_2023_12_1_EN.pdf

[10] *Ibid*

[11] Article 17 (I) of the Sapin II Law

[12] Article 1 of the Sapin II Law

[13] Activity report of the French Anti-Corruption Agency for 2021, p. 37

[14] Article 3(4) of the Proposed Directive

[15] Article 16(2) of the Proposed Directive

[16] The Global Anti-Corruption Sanctions Regulations 2021

[17] https://www.justice.gov/opa/speech/file/1535301/download

[18] https://www.justice.gov/criminal-fraud/page/file/937501/download

[19] Articles 7 to 14 of the Proposed Directive

[20] Article 4(1) of the Proposed Directive

KNOW YOUR TERMINOLOGY: NUANCES OF CROSS-BORDER M&A, UNITED STATES

As you consider acquiring a US private company or completing a US-style transaction, it is critical to understand key deal terms and market practices that could give you tactical advantages during the process. The governing law of a cross-border or multi-jurisdictional M&A transaction is not always dictated simply by the jurisdiction of the entities involved. Where there is a sufficient nexus, tactical advantages may exist for a seller to select a particular governing law for the sale agreement. In the United States, there are widely accepted market practices and a well-developed body of legal precedent and judicial determinations that provide both guidance and enhanced certainty for commonly negotiated legal and economic points in M&A transactions.

In the United States, the general principle of freedom of contract is firmly established, and whether a particular M&A transaction is more favorable to a seller or buyer is a function of relative leverage and general economic conditions. As a result, many cross-border and multi-jurisdictional M&A transactions are carried out under a master agreement governed by US law (often the substantive laws of the State of Delaware), with bespoke ancillary agreements to address nuances under the laws of other jurisdictions implicated in the overall transaction.

All transactions will have their own unique set of circumstances that might impact the terms of the transaction. However, there are a number of key deal terms and market practices that are worth understanding when contemplating the acquisition of a US private company or a US-style transaction.

IN DEPTH

GENERAL LEGAL PRINCIPLES

Many jurisdictions around the globe have implied duties of good faith. In the United States, implied covenants of good faith and fair dealing are very limited in comprehensively negotiated deals among sophisticated parties.

The transaction documentation will usually address some of the risk allocation between parties by way of negotiation, but the starting position is that the onus is on the buyer to carry out adequate due diligence to inform themselves of the risks they will inherit on the closing of a transaction.

DOCUMENTATION

In the United States, the structure of an M&A transaction can take many forms, including but not limited to stock purchase, equity interests purchase (*e.g.*, purchase of LLC membership interests), asset purchase and merger (including different types of mergers such as forward mergers, reverse triangular mergers, *etc.*). The form of documentation used will vary based on the structure of the transaction.

SALE PROCESS

In the United States, a competitive auction process is very common, and negotiations typically are based upon a non-binding letter of intent, which does not impose liability for its non-binding provisions.

Where the sale process will be marketed in a competitive auction process, it is not uncommon for a seller to carry out significant upfront preparation. This preparation often is done to help increase the pool of potential bidders and accelerate the sale process. In the United States, it is uncommon for sellers to provide a comprehensive sell-side (or vendor) diligence report. Instead, a buyer will engage its own legal counsel and specialized third-party advisors (insurance, IT, tax, financial, environmental, *etc*.) to conduct a thorough diligence review and prepare buyer-side due diligence reports. The buyer-side due diligence reports are then shared on a non-reliance basis with third parties such as lenders and representation and warranty insurance providers.

In contrast to the UK, for example, it is uncommon for sellers to obtain a sell-side or stapled representation and warranty insurance (RWI) policy in advance of a transaction. Instead, bidders are responsible for determining if they want to procure RWI, the implications of RWI (or absence of it) on the terms of their offers, and the allocation of costs. Buyers are also typically responsible for completing the RWI underwriting process. RWI policies in US transactions are discussed in more depth later in this article. In a competitive auction process, a potential buyer often will be required to submit a non-binding indication of interest on the basis of an initial diligence review; the seller will then select a smaller group of potential bidders to invite to management meetings and will conduct more fulsome diligence on the basis of those initial indications. While it is not uncommon for a buyer to obtain exclusivity on the basis of a term sheet, competitive processes often request that bidders complete diligence and submit a proposed purchase agreement before considering exclusivity. In very competitive processes, a seller might not grant exclusivity until the fully negotiated purchase agreement is signed (and then only on the basis of limited, negotiated closing conditions).

Where the sale process involves management that are looking to continue with the business following the transaction, it is prudent to consider management terms of rollover and management incentive packages as part of the process.

PRICING MECHANISMS

Locked box

While a locked-box price mechanism is routinely adopted in European markets (such as the UK market), in the US, the locked-box mechanism is used only in a small minority of deals and usually only where a European buyer is involved.

Purchase-price adjustment

In the United States, a purchase-price adjustment mechanism is far more common practice. A typical US M&A transaction is structured with an agreed purchase price on a cash-free, debt-free basis, a baseline or "target" working capital level (which is a negotiated amount that typically is based on "normalized" working capital requirements) and a post-closing adjustment mechanism. Unlike the locked-box mechanism, when using a typical purchase-price adjustment mechanism, the seller retains economic risk for the period between signing and closing, and the purchase price is adjusted downward for any debt at closing, upward for any cash, and upward or downward for any excess or shortfall in working capital levels from the negotiated target level.

The adjustment process itself typically provides a buyer the opportunity to prepare its own financial statements within a short period after closing, reflecting the buyer's determination of the applicable levels of debt, cash and working capital at closing. Disputes between sellers and buyers (that they cannot first resolve among themselves) as to the calculations of these items typically are referred to mutually agreed upon accounting firms for resolution.

A buyer will also typically place a portion of the overall purchase price in an escrow account at closing to provide security for any downward adjustments to the purchase price.

DEAL CERTAINTY

In a US transaction that is structured to have a bifurcated signing and closing, closing conditions (commonly referenced as "conditions precedent" in other jurisdictions) are quite common, and a US transaction will typically include the following types of closing conditions: (i) receipt of required regulatory approvals (*e.g.*, antitrust, CFIUS) or the expiration of applicable waiting periods, (ii) the transaction is not then enjoined or prohibited by law, (iii) the representations and warranties are accurate (as of the closing date) to a negotiated standard, (iv) the parties have performed applicable covenants in all material respects, (v) there has not been a material adverse effect and (vi) the transaction closes before a specified end date.

In a competitive process where a buyer otherwise desires to provide additional certainty as to closing, a purchase agreement may include the following additional types of provisions: (i) a "hell or high water" obligation to obtain necessary regulatory approvals (including agreeing in advance to accept structural remedies, including divestiture obligations), (ii) an "MAE bringdown standard," where the buyer agrees to close unless a breach of the representations and warranties would reasonably be expected to result in a material adverse effect, and (iii) reverse termination fees and expense reimbursement obligations.

In a US transaction that is structured to have a bifurcated signing and closing, a buyer would have the benefit of a full suite of interim operating covenants (including obligations to take reasonable efforts to consummate the transactions, obtain any necessary consents and otherwise satisfy conditions to closing) and would have traditional remedies available for breaches of those covenants (including the ability to seek specific performance).

Financing

Financing in a customary private equity transaction comprises debt and equity components, with assurance as to the adequacy of funds to be delivered to the seller at closing (and associated recourse for non-delivery of funds) structured with the following documents required to be delivered by the buyer at the signing of the purchase agreement: (i) equity commitment letter, (ii) debt commitment letter and (iii) limited guaranty. Private equity transactions are then typically structured such that if all closing conditions are satisfied and the debt financing is available, a seller has the right to force a buyer to close and obligate the private equity sponsor to draw down on its debt financing commitment; if the debt financing is not available, however, the seller receives a reverse termination fee as its exclusive remedy.

REPRESENTATIONS AND WARRANTIES; DISCLOSURE

Representations and warranties generally

Regardless of transaction type (share purchase, equity interest purchase, asset purchase, merger, *etc*.), in a US transaction, the definitive purchase agreement will contain comprehensive representations and warranties (terms that are used interchangeably in US transactions) regarding the target business and the seller, which serve a basis for overall risk allocation. These representations and warranties are then typically divided into two categories (with differing survival periods and risk allocation, as discussed in more detail later in this article): (i) fundamental representations (*e.g*., those representations regarding title to shares/equity, authorization, corporate status and capitalization) and (ii) general representations (e.g., those regarding financials, employment matters, material contracts and insurance).

It is increasingly common in US transactions for a purchase agreement to contain express exclusions of any representations or warranties not specifically included in the purchase agreement itself (including in any financial projections or any information provided in data rooms) and to limit a buyer's recourse for so-called extracontractual remedies.

The negotiated representations and warranties, as qualified by the disclosure schedules, are often the subject of RWI. The RWI market in the United States is very well developed, and insurers will cover fairly extensive representations and warranties. With RWI insurance products, the buyer has recourse against an insurer for breaches of representations and warranties (either in addition to, or substitution of, recourse against the seller). Where RWI is utilized, it is not uncommon for a buyer to have zero or limited recourse against the seller (excluding fraud). Conversely, it also is not uncommon for a buyer to have recourse against a seller for items not covered by the RWI policy, for a portion of the deductible and/or for other "special" indemnities. It is worth noting that RWI products have customary exclusions and do not extend to purchase-price adjustments. The share of the insurance

premium and overall risk allocation is the subject of negotiation and both macro and transaction-specific market dynamics.

In transactions with a bifurcated signing and closing, it is common to "bring down" (or make again as of the closing date) the representations and warranties at closing and to the negotiated standard (as discussed in the Deal Certainty section above).

Disclosure

The representations and warranties provided in the purchase agreement for a US transaction will be qualified by disclosures made by the seller in the disclosure schedules (which is a separate document prepared by the seller, negotiated by the parties and delivered at signing). Qualifications and exceptions to representations and warranties are either included in the representations and warranties themselves (*e.g.*, materiality or knowledge qualifications) or the disclosure schedules. General data room disclosures are exceedingly rare.

In the United States, it is common for a disclosure (listed in the disclosure schedules) to be agreed to qualify all representations and warranties and not just the specific disclosure that it is made against, provided that the relevance of a particular disclosure to another representation is apparent from such disclosure.

Sandbagging/Knowledge

"Sandbagging" refers to the right of a buyer to obtain indemnification coverage for breaches of representations that the buyer knows about before the signing of the purchase agreement, and often is the subject of a specifically negotiated provision in a US transaction. Pro-sandbagging provisions (*i.e.*, granting a buyer the express right to pursue recourse for breaches or inaccuracies of representations known to the buyer prior to closing) are not uncommon in US transactions, but the majority of transactions are silent on the topic of sandbagging. In the absence of a specific provision to address the matter, US courts will permit varying degrees of sandbagging.

RECOURSE; INDEMNIFICATION

Remedies generally

Recourse and remedies for breaches of representations and warranties ultimately derive from contractual claim for breach of contract and equitable principles under common law. Where a buyer suffers damages in reliance on representations or warranties made in a purchase agreement (or for failure to perform a covenant), a buyer has the right to pursue the seller to recover such damages to the extent available under common law.

However, the buyer and seller in a typical US M&A transaction will negotiate contractual remedies (indemnification), specific parameters regarding any such available remedies, the procedures and deadlines for submitting claims, and individual and aggregate monetary limitations.

Remedies for breaches of representations and warranties; indemnities

Traditionally, a seller was expected to provide a contractual obligation to indemnify the buyer for a seller's breach of its representations and warranties, breach of its covenants, and for known risks allocated to the seller in the negotiation of the transaction documents (so-called "special indemnities"), subject—in each case—to negotiated parameters discussed above and below. At least one or more of these concepts is included in the vast majority of transactions.

However, in a competitive auction or for a particularly good asset, sellers often are able to obtain a "no indemnity" or "walk-away" deal where a buyer's recourse is limited only to available coverage under an RWI policy. In the majority of US transactions utilizing an RWI policy, however, there will still be some available recourse against the seller, including for breaches of covenants and items excluded from RWI coverage. A typical recourse allocation in these types of transactions will provide the financial thresholds as discussed below.

Materiality scrapes

Another provision typically included in a US transaction that relates to representations and warranties is the materiality "scrape." The materiality scrape is a separate provision that disregards materiality qualifications in the representations and warranties for the purpose of indemnification or RWI coverage. These types of provisions are very common. A "single scrape" disregards materiality qualifications for the purposes of determining damages, whereas a "double scrape" disregards materiality qualifications both for the purposes of determining damages and whether a representation was breached in the first instance.

Financial limits

As noted above, representations and warranties are typically divided into two categories (with differing financial limits on the amount a buyer can recover for breaches or inaccuracies): (i) fundamental representations and (ii) general representations.

A typical recourse allocation in US transactions (assuming the use of RWI) will provide the following financial thresholds:

- Damages from "dollar one" for fundamental representations, with a cap at the RWI retention amount

(typically 1% of enterprise value).
- Damages in excess of a deductible (typically 0.5% of enterprise value) for general representations, with a cap at the RWI retention amount.
- No deductible and no cap for fraud.

In the absence of RWI coverage, a typical US transaction would provide the following financial thresholds:

- Damages from "dollar one" for fundamental representations, with a cap at the purchase price.
- Damages in excess of a deductible (typically 0.5% to 1% of purchase price) for general representations, with a cap between 10% and 15% of the purchase price.
- No deductible and no cap for fraud.

It is also not uncommon for a seller to advocate for a minimum or *de minimis* claim threshold to limit "nuisance" claims and/or to serve as a proxy for a materiality threshold where a double scrape is used.

In addition, in all cases there will be an exclusion on any caps for claims of fraud.

Survival periods

In a typical US transaction, the purchase agreement also will set out the survival periods within which the buyer is able to make a claim for a breach of a representation and warranty.

The following are typical survival periods:

- Fundamental representations can survive indefinitely or for a negotiated period (six years or the statute of limitations are common).
- General representations typically survive for between 12 to 18 months.

In an RWI transaction that provides recourse against the seller, both the fundamental representations and general representations typically survive for 12 months.

Escrow amounts

The use of escrow amounts in US transactions is common. There are typically two types of escrows that can be used: (i) an amount deducted from the purchase price and set aside as security for indemnification obligations and (ii) an amount deducted from the purchase price and set aside for any purchase-price adjustments.

A typical indemnity escrow for a transaction involving the use of RWI is equal to 0.5% of the purchase price, and a typical indemnity escrow for a transaction without RWI is equal to 10% of the purchase price.

The amount of an adjustment escrow is more transaction-specific, often negotiated to cover reasonably anticipated fluctuations in working capital and some additional coverage for potential inaccuracies in the financial statements supporting the estimated working capital.

TRANSFER TAXES

In the United States, there is no transfer (or stamp) tax on transfers of shares of stock or transfers of limited liability company interests.

NON-COMPETE

Post-closing restrictions (*e.g.*, non-compete and non-solicit) often are provided by sellers.

Under US law, unreasonable restraints of trade are void, and what is reasonable depends on the length, operational scope and geographic breadth of the relevant restriction. Unlike other jurisdictions, post-closing restrictions cannot therefore be excessive and are usually set between three to seven years.

ESG TRENDS UPDATE: SOUTHEAST ASIA AND INDIA

The ESG regulatory and transactional environment in Southeast Asia and India continues to evolve quickly. Sustainability standards are being incorporated into corporate and financial reporting, social and labor standards are being enhanced across the region, and green and sustainable financing flows remain strong.

Investors are increasingly showing themselves to be willing to challenge board directors on their companies' climate performance, including scrutinizing climate risk management disclosures or emissions-reduction plans. Key governmental policy initiatives include supporting energy transition, reducing environmental barriers to trade, and strengthening environmental risk management.

CLIMATE AND SUSTAINABILITY REPORTING IN ASIA

The UK government Task Force on Climate-Related Financial Disclosures (TCFD's) recommendations are recognised as the leading standard of climate reporting. Following the announcement of TCFD's reporting mandate in October 2021, there has been a surge in global regulatory activity.

In the US, for example, the Securities and Exchange Commission (SEC) recently proposed a new rule based on the TCFD framework that will govern and mandate emissions and climate risk disclosures.

The global regulatory movement comes as a result of significant voluntary uptake by companies – around 3,400 pledged TCFD supporters worldwide. Of these, at least 1,120 companies in Asia have voluntarily adopted TCFD. Asian governments have followed suit to adopt and implement their own mandatory disclosure regimes and reporting requirements based on the TCFD framework.

- **Hong Kong** – The Hong Kong Exchanges and Clearing Limited (HKEX) published an update to the Environmental, Social and Governance Reporting Guide (the "ESG Reporting Guide [2021 Version]"), which requires listed companies to publish ESG reports alongside annual reports, and the Singapore Exchange (SGX) announced climate disclosure rules in December 2021. These new ESG reporting requirements for Hong Kong and Singapore will impact across Asia. Japan's Financial Services Agency is also working on a proposal for mandatory climate risk disclosure and updated disclosure guidelines.The Hong Kong Monetary Authority (HKMA) released the supervisory policy manual for climate risk management, which aims to guide authorised financial institutions (AIs) to integrate climate considerations into their governance, strategy, risk management, and disclosures. The hope is that this approach will afford AIs better resilience against climate risks.
- **India** – The Securities and Exchange Board of India has issued a requirement for the top 1,000 listed companies in India to prepare Business Responsibility and Sustainability Reports (BRSRs). BRSRs are not mandatory for companies outside of the top 1,000 listed, and there is a 'Comprehensive' and 'Lite' version, for listed and unlisted companies, respectively. The BRSRs aims to consolidate India's decade-old reporting framework, under which reports have lacked detail and quality. BRSRs require far more detail – 20 reported data points across three sections and nine principles. The new framework adopts the United Nations Sustainable Development Goals (UN-SDGs) and is benchmarked to other global ESG reporting frameworks, including TCFD.
- **Indonesia** – The Indonesian financial services authority (OJK) now requires publicly listed companies to prepare a sustainability report, made either separately or as part of their annual report.
- **Malaysia** – The Malaysian Joint Committee on Climate Change is developing an ESG Disclosure Guide for SMEs to help them improve the quality of and access to information on business resilience to ESG-related risks.
- **Philippines** – The Philippines securities regulator has issued requirements for publicly listed companies to submit an annual sustainability report under a 'comply or explain' approach. This is expected to be extended to other types of corporations, following the improved coverage and quality of reporting.
- **Singapore** – SGX has introduced a phased approach to mandatory reporting based on the TCFD recommendations. At present, climate reporting is mandatory for issuers in the financial industry, as well as the agriculture, food, and forest products industry and the energy industry. Other issuers must report in a

‘comply or explain’ basis. From 2024 mandatory climate reporting will also extend to the materials and buildings industry and the transportation industry.
- **Thailand** – Since 2022, it has been mandatory for all publicly listed companies to report their ESG performance via a separate filing within three months of the publication of the company’s financial report.
- **Vietnam** – Vietnam has signed the One Strategic Framework for Sustainable Development Cooperation with the United Nations. This agreement outlines how the United Nations and the Government of Vietnam will coordinate in Vietnam’s sustainable development, and focusses on social development, responding to climate change, disaster resilience, and ensuring environmental sustainability.

The inclusion of enhanced disclosure standards in different jurisdictions is in the interest of investors, as this could mean better-informed decisions. But it could also lead to the emergence of a multitude of disconnected regional standards for ESG-fund classifications, a challenge for investors in pursuit of a common ESG objective across jurisdictions. There needs to be a harmonized approach as disclosure standards are implemented across Asia.

GREEN FINANCE UPDATE

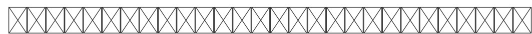
Sustainable finance is gaining traction in Southeast Asia and India, and there is increased interest in green bonds across the region. Many governments have established frameworks to deepen sustainable finance and have launched or are in the process of developing sustainable financing products to incentivize green investment by businesses. This type of activity is helping countries in the region to establish themselves as sustainable investment partners.

- **Hong Kong** – Hong Kong is an innovator in green bonds, having recently raised $5.8 billion in Asia’s largest ever green bond issuance, the proceeds of which will be used to finance or refinance projects that provide environmental benefits and support the sustainable development of Hong Kong, as set out under the city’s green bond framework. The government has also launched a subsidised green finance training scheme, to encourage local participation and build the sustainable finance talent pool.
- **India** – India has issued its first sovereign green bonds in the amount of $1 billion), split equally between two tranches for the current financial year, with the proceeds used to finance or refinance green projects.
- **Indonesia** – OJK has developed a Sustainable Finance Roadmap Phase II (2021-2025) with the aim of enhancing sustainability in the financial services sector. In 2022 President Joko Widodo launched the Green Taxonomy, one of Indonesia’s first policy efforts to incentivize businesses to prioritize green investment.
- **Malaysia** – The Securities Commission Malaysia has introduced an updated SRI-linked Sukuk Framework. The proceeds from an SRI-linked sukuk are now available for general purposes and financial and structural characteristics may differ depending on whether the issuer meets sustainability specifications and KPIs.
- **Philippines** – The International Finance Corporation (IFC) and the World Bank have jointly developed the

’30 by 30 zero’ program, a new initiative that will help mobilize private financing for more climate-friendly projects in the Philippines. The program is funded by the International Climate Initiative, the government of Germany, and brings together key stakeholders—government and regulators, international finance institutions and commercial banks, and real sector partners—to mobilize support for the shift toward a low carbon economy. Currently, the program is also active in Egypt, South Africa, and Mexico.

- **Singapore** – Singapore has noted that green finance is one of the fastest-growing segments and Singapore now accounts for close to half of the ASEAN green bond and loan market. The Singapore government is keen to fuel the growth of this market and will take the lead by issuing up to $35 billion in green bonds by 2030 to fund public sector green infrastructure projects.
- **Thailand** – Thailand is developing a sustainable finance taxonomy, the first draft of which was published at the end of 2022.
- **Vietnam** – Vietnam is the second largest issuer of green bonds among ASEAN member states but does not yet have a green bond taxonomy or national index of green bonds.

ESG considerations will continue to become increasingly prominent in the Southeast Asia and India business environment. Companies will need to make further efforts to identify and address relevant ESG considerations for their businesses and boards will need to scrutinize ESG implementation closely. Increased attention also will need to be paid to enhancing human capital management in light of Asia’s young and growing workforce. That said, companies and investors should continue to see new ESG-driven business opportunities in Southeast Asia and India in the Asia energy transition, electric transportation and sustainable manufacturing and construction sectors in particular.



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Trainee Francesca Casalone also contributed to this article.

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**Trainee Mathilde Cosperec also contributed to this article.*

[1] See for example judgement of the Court of 11 September 2014 in Case C-67/13 P, Groupement des Cartes Bancaires (CB) v Commission, para 50.

[2] Judgement of the Court of 3 July 1985 in Case 243/83, SA Binon & Cie v SA Agence et messageries de la presse, para 43.

[3] Judgement of the Court of 6 December 2017 in Case C-230/16, Coty Germany GmbH v Parfümerie Akzente GmbH.

[4] See for example Judgment of the Court of 11 July 2013 in Case C-439/11, Ziegler v Commission, para 92.

[5] [illegible] for example judgment of the Court of 3 December 1987 in Case 136/86, BNIC v Aubert, para 18.

[6] Communication from the European commission, Guidelines on vertical restraints (2022/C 248/01), para 195.

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[1] https://home-affairs.ec.europa.eu/policies/internal-security/corruption/eu-legislation-anti-corruption_en

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0234

[3] https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_2517

4 [illegible]

[5] [illegible]

6 [illegible]

[7] https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/sanctions-council-adds-the-violation-of-restrictive-measures-to-the-list-of-eu-crimes

[8] https://commission.europa.eu/document/2a578063-d2e8-4e06-8f40-95b16fc92c20_en

9 https://commission.europa.eu/system/files/2023-05/JOIN_2023_12_1_EN.pdf

10 [illegible]

11 Activity report of the French Anti-Corruption Agency for 2021, p. 37

12 [illegible]

13 [illegible]

[14] The Global Anti-Corruption Sanctions Regulations 2021

15 https://www.justice.gov/opa/speech/file/1535301/download

[16] https://www.justice.gov/criminal-fraud/page/file/937501/download

17 [illegible]

18 [illegible]

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