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Foreword

Welcome to the summer edition of Funds Insider, our quarterly publication focusing on hot topics across a wide range of practice areas of particular interest to private capital clients.

This edition will cover:

- The ESG opportunity in Europe
- Implications for the European energy policies as a result of the Ukraine conflict
- Opportunities and considerations for funds looking to invest in energy beyond the 'net zero' agenda
- The awaited amendment to pre-insolvency restructurings in Spain
- Funds and their investors claiming damages for competition law infringements
- Immigration and employment considerations for a mobile workforce
- Basic housekeeping on data privacy and disclosure requirements for private equity firms

As 2022 unfolds we continue to see growing uncertainty. The global economy is facing increasing inflationary pressures, rising interest rates, ongoing COVID disruption, supply chain issues and fears of recession. To add to that we also have increased political uncertainty, especially in the UK and, with mid-term elections due in November in the United States.

However, opportunities remain across the spectrum of private capital investing. There may have been a slowdown in M&A activity from record levels in 2021, but private equity funds still have significant dry capital to deploy. Similarly a slowdown in public debt markets has created opportunities for private debt funds to provide solutions for larger and larger transactions as 2022 progresses.

We hope you enjoy reading this edition of Funds Insider and please do get in touch if you have any feedback or if there are any topics that you would like us to cover in future editions.

Funds Insider

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The ESG opportunity in Europe

By Eleanor Reeves, Andrea Caputo, Cristina Calvo and Liane Muschter

The European Union launched a serious bid in December 2019 to become the world's first climate-neutral continent by 2050. The European Green Deal was introduced as a bold initiative that promised to "provide a roadmap with actions to boost the efficient use of resources by moving to a clean, circular economy and stop climate change, revert biodiversity loss and cut pollution."

It was – and still is – a serious statement of intent. It establishes practical steps and a legislative framework, focuses on the investments needed, and also bolsters the financing tools available. Underpinning it is a commitment to ensuring "a just and inclusive transition".

Two and a half years later, the EU Green Deal remains a major focus of the EU, but awareness in the business community appears to be low. According to PWC's European Green Deal Survey conducted late last year across 13 EU countries, a majority of businesses in the region are unfamiliar with the detail of the EU Green Deal (60%), and fewer than half (49%) say that they are prepared for it.

However, green shoots exist: two thirds of the businesses surveyed said that they had allocated funds to invest in becoming more sustainable in the next three to five years, and the survey also found that companies were taking the challenge seriously of consuming "more clean energy (78%), reducing energy consumption (60%), reducing waste and plastic use (59%) and cutting carbon emissions (59%)".

At Ashurst, this is a trend we're seeing repeated across the region. Among the institutional investors we work with, for example, there is an appetite for ESG principles, with policies embraced that enshrine ESG commitments and ESG-related investment funds. Europe is leading the way, with 81% of the $2.7 trillion invested in global exchange-traded 'sustainable' funds residing in the region, according to a recent study by Harvard Business Review.

Much of the focus of these 'sustainable' funds is around climate-related activities, although the social impact of ESG investments is also on the rise. A recent survey of pension funds in the UK by Pensions for Purpose, a social impact investment consultancy, found that at least half hold investments that have some form of social impact – representing almost 5% of the £150bn assets they manage. The survey highlighted that the majority of social impact investments (78%) fall firmly in the social infrastructure space – hospitals, schools, student accommodation, for example – closely followed by social and affordable housing (44%). This is a trend being repeated across the region.

These are no longer "lip service" topics. In fact, very real progress is being made – both at a national and a European level – towards taking serious steps to reduce carbon footprints, to make ethical investments, and to proactively prepare for the time in the not-too-distant future when carbon neutrality will be a mandated requirement, rather than a nice-to-have.

According to Eleanor Reeves, a partner in Ashurst's London office, the ESG investment umbrella doesn't just help set a critical pathway to net zero emissions, but it also ensures a just transition through environmental and social improvements. "Although there has been a rise in social impact funds under management over the last decade, 5% is still relatively small, and one of the barriers to

expanding social impact funds under management is that metrics for real estate-focused social impact are underdeveloped," she says. "However, it's clear that prioritising people and places can be profitable and market-led, as we see from initiatives to scale up institutional investments such as the UK place-based impact investing project led by The Good Economy, the Impact Investing Institute and Pensions for Purpose."

Andrea Caputo, a partner in Ashurst's Italian practice, says: "When I speak to my colleagues in countries like Spain, Germany and France, there is definitely a European view of these themes that emerges. Absolutely, every country has its particular legislation and its own way to develop, to improve these trends. But in the end, there is a drive within the European Union to create a new real estate market, with greater attention being paid to the green economy and to ESG themes."

Progress will require a partnership, however, between the public and private sectors. Cristina Calvo, who is a Partner in Ashurst's Spanish business, has seen first-hand how important this partnership is. "In Spain, there are lots of empty words being spoken about the government's 2030 sustainability agenda, which is very ambitious but largely unachievable", says Cristina. "Politicians need to move beyond empty words and actually embrace green and sustainable policies." Change will actually be driven by the private sector, from large corporations and from their commitment to sustainability. "Large corporations recognise that it's necessary and that it is a 'good thing', because we want to leave our children with a better world. They also recognise that they can't afford to be left behind and not be seen to be doing this. This 'carrot and stick' approach is what is driving forward change," says Cristina.

There's another major driver for continued change, namely the need to stimulate national economies in the aftermath of the COVID-19 pandemic. Italy's linking of its tax credit system to building renovations that significantly improve the energy efficiency and performance of buildings is a case in point, where tax credits of 110% can be applied against the cost of such building improvements. In France, the new climate resilience law (Le Loi Climat), established a framework for a zero carbon future adopted in August 2021. But it is initiatives such as the 'Decret Tertiaire' which may provide the biggest stimulus for change. This gives notice to France's services sector that it must reduce energy consumption by 40% by 2030, by a further 50% by 2040, and a further 60% by 2050.

This is a significant challenge, and it is one that will be replicated across most of Europe's capitals. In London, for example, the availability of commercial energy-efficient real estate is lacking, with demand far outstripping supply. Given that as much as 80% of the commercial real estate that exists today in London will still be in use by 2050 – the deadline by which net zero targets are being set – upgrading the energy performance of today's building stock is a major priority.

The industry will need to wrestle with some significant challenges to meet these targets. As a whole, the European Region is lacking information on the costs of meeting such targets – and agreeing who pays for them. The resulting tensions between landlords and tenants are having an increasing impact on lease negotiations, with green lease provisions being increasingly used. Investment funds are also increasingly insisting on KPIs being set in the contract stage, and are appointing independent third parties to ensure that those KPIs are being met.

It's important that this new level of scrutiny does not hinder innovation or introduce unnecessary bureaucracy for those looking to make progress in ESG investments. But it is also perhaps a sign that the market is beginning to take social impact investments seriously. If you invest in ESG, you are probably going to be more competitive in the marketplace. You will attract finance, buyers, and tenants for your developments. And you are far less likely to run the risk of having a stranded or distressed asset, once energy efficiency performance becomes mandatory. ESG and social impact investing should definitely lead to an increase in value, and create more appetite for investing in the building stock of the future.

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The Ukraine conflict

An energy reset?

By Andrés Alfonso, Anthony Johnson, Carloandrea Meacci, Christophe Lemaire, Maximilian Uibeleisen and Michael Burns

Beyond the clear humanitarian crisis, Russia's invasion of Ukraine has led to significant economic volatility, with the energy sector in particular experiencing a period of uncertainty. The immediate impact of high oil and gas prices is set to be heightened as a number of countries look to phase out oil and gas imports from Russia. Indeed, the decision to halt oil and gas imports may be taken out of Europe's hands, if Russia acts on its threats to cut supplies. As European governments start to reappraise their energy supplies and reformulate their energy policies, one question is gaining momentum: Will this set us back on our path to Net Zero, or will it accelerate it?

Until February 2022, the plan for the UK and Europe, in particular, has been clear: a decarbonisation strategy with increasing investment in renewables but with gas playing a key role as a transition fuel. The Ukrainian crisis has cast a dark shadow over that strategy literally overnight, as governments have been forced to divert their attention from the longer-term Net Zero imperative to more immediate concerns about energy security and addressing the deficit left if Russia's oil and gas supplies are taken out of the energy equation. It is clear that renewables will play a leading role in this, with some governments formulating ambitious plans to bring forward large-scale deployment of tried and tested technologies such as solar and wind. What has changed, however, is that the new focus on domestic energy supplies requires, by implication, a shift in policy direction.

For private capital, net zero investments have been an increasing trend. Do these potential changes mean less opportunities for investment? Private investors will need to decide if they continue betting on renewable energy or invest more in LNG, nuclear or other traditional sources of energy, that are now being reconsidered by many countries. So far, there does not seem to be a major shift in investment sentiments, as renewable energy continues to be a viable investment option from both sustainability and energy security perspectives.

What does the shift in policy direction mean in practice? In the short-term it means that some

Oil and gas prices have seen record highs, and in many instances spot prices remain significantly above the fixed prices provided for in long term supply agreements.

European countries are looking at previously unacceptable options such as coal to address the immediate imperative of keeping the lights on and providing heating. While deals are also being made to secure gas supplies from elsewhere, the UK and Europe are facing up to the reality of the risks posed by international gas markets and looking at alternatives for the medium and longer term. While it is early days, it seems likely that in terms of Net Zero goals, this is not so much a step backward but a step towards a slightly different path. In this article we consider what that path may entail for a number of different countries, as well as some of the general themes we are seeing.

General themes

LNG

Importing more LNG to Europe where there is existing terminal capacity available, such as in France, Spain and the UK, is seen by many as a viable and immediate solution. However, it is unclear at this stage whether LNG could completely replace gas from Russia, particularly on a more ongoing basis rather than just a stop-gap measure. Moreover, LNG carries with it a cost premium, particularly in the current squeezed LNG market. Although LNG is acknowledged to be an expedient option when transitioning from fossil fuel-based energy supply to low-carbon energy, it may divert the funds otherwise spent on renewable projects towards prolonging the transitional period, especially in countries where new regasification terminals would have to be built, such as Germany and Italy.

Energy pricing concerns

Oil and gas prices have seen record highs, and in many instances spot prices remain significantly above the fixed prices provided for in long term supply agreements. This presents problems

for both sellers and buyers. Sellers tied to long term fixed prices (which remain prevalent for LNG sales in Asia-Pac) are looking for ways out of their contractual commitments, thus freeing up volumes for sale at higher market prices. Consideration is being given to legal concepts such as force majeure, and frustration and civil law concepts such as hardship. Spot market purchasers, on the other hand, are seeking to reduce their exposure to current price hikes. A period of contractual review and adjustment has likely already begun. Could it be that we will see a deprioritisation of pricing competition and a transition back to historic natural gas pricing models such as that under Groningen model contracts, with longer term commitments and period price review? Could we see a return of the 1970s North Sea practice of contractual hardship clauses in common law governed gas supply agreements?

Renewables

Renewable projects have a starring role, supporting the energy transition, but equally supporting countries' energy security concerns. The UK, France and Germany have explicitly stated they will accelerate renewable project deployments to be able to rely on domestically produced energy, in addition to the obvious sustainability benefits of deploying more clean energy projects. There is clearly a positive trend towards renewable projects across the continent with all governments looking to remove red tape and administrative bottlenecks attached to greenfield renewable energy project development. It may well be that subsidies are offered to attract further investment in the renewables sector (or that existing incentive mechanisms are revamped). However, governments face a fine balancing act between offering effective subsidies but not introducing a system that is too "successful" – history has shown that subsidy regimes which become oversubscribed and in turn are scaled back or removed altogether can and will lead to domestic litigation as well as investment treaty disputes.

The scaling up of renewables deployment may also face some supply chain pressures. In particular, there are continued constraints on the supply of solar panels – most recently stemming from further Covid lockdowns in China, as well as direct impacts from the Ukraine conflict, with constraints on the availability of steel from Ukrainian factories as well as aluminium from Russia, all necessary for construction of renewable projects. Scaling up existing technologies will also bring with it disputes risk, in that technologies may not end up performing as well in new and more challenging environments.

Heating

In the heating sector, existing strategies to replace gas boilers with alternatives, such as electric heat pumps, are now even more relevant. However the demand for such pumps has increased to a point that bottlenecks are arising due to lack of supply. Potential regulatory challenges around Fgas, insulation and upskilling of the workers, mean it will take some time before Europe can wean itself off gas boilers. The UK is currently leading the charge with France and Germany equally ramping up the replacement efforts.

Country analysis

Outlined below is a snapshot of how some Western European countries are responding to the conflict from an energy perspective.

FRANCE

Current dependence on Russian oil and gas:

oil	gas	Plans to end imports
9%	24%	2027 oil and gas

Degree of impact:

France is severely affected by the high prices of oil and gas due to shortages, especially from a consumer perspective and in the transport sector. The oil and gas storage capacity in France is extensive, and as such there are no immediate concerns around oil and gas shortages before the end of this winter even if Russian supply should cease. Longer term concerns surround energy security and the import of critical resources from outside the country in general.

Immediate response to high energy prices:

1. Tariff protection, limiting the increase of the final electricity and gas price for the customer. The Government will compensate the supplier if they limit the prices to consumer – estimated cost is EUR 20bn.
2. State aid to be granted to undertakings in specific sectors particularly sensitive to energy consumption. A new framework has been adopted and France is currently working on the regimes they will adopt on that basis.
3. An exceptional increase of ARENH (regulated access to historic nuclear energy) of 20% for year 2022, allowing other energy suppliers aside from EDF access to generated nuclear power on a supplier only basis. There is currently a debate around a possible permanent increase of the capacity for the future.

Changes in strategy:

Nuclear: At the moment, 70% of France's energy comes from nuclear plants in the country. Emmanuel Macron announced the construction of 14 new reactors by 2025 just before the war started, pledging to extend the life of all reactors if safe to do so. In 2015, Francoise Holland's Government aimed to reduce this share to 50% by 2025, with this goal being postponed to 2035 in 2019. With the presidential election upcoming, these targets may change depending on the result, although given the further intensification of energy security concerns, this policy is likely to stand. There are also talks around full state ownership of EDF % again.

Renewables: In addition to further nuclear power capacity, greater focus on renewable energy has been announced, specifically in the biogas and offshore wind sectors. As a reaction to the war, France is aiming to accelerate new offshore wind tenders and simplify the launch of new projects by increasing the level of subsidies in biogas and offshore wind.

Hydrogen: Nuclear energy is to be used to increase production of hydrogen and there is anticipated increase in hydrogen projects in the gas sector as well.

LNG: Although it has LNG terminals, France was known to view LNG as "too dirty". Even so, France will likely look into increasing LNG imports, however, it is unlikely any further LNG terminals will be built as part of the measures resulting from the conflict.

Storage: The Government is currently looking at different possibilities to adapt oil and gas storage units to be able to store more and be in a more secure position next winter, in line with EU measures.

Conclusion: Energy transition in France is likely to accelerate as a result of the war with further nuclear reactors built, red tape for renewable projects simplified, new tenders for offshore wind and biogas projects launched with increase in the supporting subsidy regime to match the goals.

Germany

Current dependence on Russian oil and gas:

oil	gas	Plans to end imports
9%	24%	mid-2024 gas end 2022 oil

Degree of impact:

Aside from gas pricing affecting the whole continent, trading companies, utilities and suppliers are running into problems for gas deliveries as they can't cover its supply at the current price. Energy security is critical as Germany is one of the most energy-dependent countries on Russia.

Immediate response to high energy prices:

1. The ministry will legally oblige power suppliers to reduce bills for consumers after the levy for renewables on the power price is scrapped in July 2022.
2. Obstacles to massive onshore wind expansion to be removed with law this summer (conflicts between wind and nature conservation and the species protection law, planning law or insufficient land use designations).

Changes in strategy:

LNG: Germany's attitude towards LNG has changed significantly as a result of the conflict. The construction of two terminals have been announced (with one further being under consideration), citing the need to reduce reliance on Russian imports. At least one of the terminals should be completed by 2026 and will have the capacity to take in 10% of Germany's gas requirements. As Germany does not have sufficient LNG import and regasification capability and needs to turn to construction of terminals, this will be a costly endeavour and is likely to set energy transition back in the country, or, at minimum, prolong the transition period. The chancellor is aiming to secure LNG supplies from Qatar. The Government stipulated the terminals will be built to be able to handle green hydrogen imports with a climatefriendly twist on LNG.

Renewables: As in other European countries, pace of wind and solar projects is set to triple as Germany brings forward its goals, supported at an EU level. Equally, there is focus on electric heat pumps replacing gas boilers.

Coal: Germany announced the resurgence of coal production, specifically, higher outputs of lignite – the worst-polluting form of coal – to compensate for an expected shortage of Russian gas in the coming months. This is likely to set Germany back in its race to Net Zero.

Nuclear: Although there is nothing yet official, there is understood to be talks around prolonging the operation of existing nuclear power plants, which goes strongly against the historical Government policy. Whether this will be feasible remains a question though, as it is uncertain whether it will be possible to secure sufficient plutonium. The phase out of nuclear is due to happen at the end of this year.

Conclusion: In Germany, a complete change of attitude can be observed. Germany is one of the countries most dependent on Russian gas and facing coal production extension and construction of new LNG terminals. With its current position on nuclear, it is likely to struggle to reach its original Net Zero goals. With more LNG terminals being built, it is also questionable whether, given the significant investment, there will be enough funds left for renewable projects. With Germany's renewable energy mix being at more than 50% and legislative reforms in place to enable more projects faster, the strategy may offset the measures they are currently having to put in place, which could also be an expensive endeavour.

Italy

Current dependence on Russian oil and gas:

gas	oil	Plans to end imports
46%	0%	2024 gas N/A oil

Degree of impact:

In the short term, gas prices are likely to be of most significant concern, consistent with elsewhere in Europe. Although Italy is significantly dependent on Russian gas supplies, this is not an imminent threat thanks to its good storage capacity.

Immediate response to high energy prices:

1. Reduction in the price of fuel duty by 25 cents per litre for everyone until the end of April.
2. 500 million euros of state funding will be allocated to tackle the critical situation of road transport.

Changes in strategy:

LNG: At the moment, Italy does not have sufficient LNG import terminals to replace Russian gas supply, however its gas pipelines from the south are underutilised. Potential issues may arise as the supplies are restricted due to instability in Libya and limited production in Algeria. In most recent developments, Snam and CdP were mandated to procure a floating LNG regasification vessel to quickly increase LNG import capacity. The long-term plan is to stabilise and expand existing alternatives to Russian gas, such as that sourced through Azerbaijan's Trans Adriatic Pipeline and Libya's GreenStream Pipeline. The Trans Mediterranean Pipeline, which transports gas from Algeria via Tunisia to Sicily, will also play a key role in this. Equally, there is talk of expansion of

the TPA gas pipeline coming from Turkey. There are currently three LNG terminals in Italy (in addition to the LNG regasification vessel in the pipeline) and to bring in more LNG, significant investment in infrastructure will have to be considered.

Renewables: Renewable energy is due to pick up in line with the EUR 59.47bn that Italy was assigned from the NextGenerationEU funds for green initiatives. The Government acknowledged there are permitting issues for renewable projects at the moment but is considering how to remedy the situation.

Interconnectors: In the longer term, Italy may have to look into building new interconnector pipelines across the continent in order to boost internal flexibility to redistribute new LNG supplies as well as piped gas.

Oil: The government is considering using more of its (limited and underutilised) oil & gas extraction capacity.

Conclusion: Currently, there are no major shifts in Italy's policies regarding the supply of oil & gas, and the streamlining of permitting processes for renewable projects suggest Italy will remain on the right trajectory for its energy transition. If gas pipelines are fully utilised, there will likely not be a need for further infrastructure, such as LNG terminals, to be built and as such, Italy's energy security needs should be covered without going backwards on its Net Zero pledges.

Spain

Current dependence on Russian oil and gas:

gas	Plans to end imports:
-10%	N/A Russia not main provider

Degree of impact:

The most significant impacts in Spain at the moment, similarly to other European countries, are around gas and electricity prices. Major gas companies are moving away from contracts based on Brent pricing, preferring to pay penalties for breach of contract, as the pricing is now much lower than the spot price in Europe (linked to TPF and Medgaz pipelines). This is changing the dynamics for industrials as they have to pay much more for oil, with many ceasing production as they cannot manage the price risk, without knowing if they will be able to pass it through. Truck drivers are also on strike due to high fuel prices which is causing a shortage of goods in parts of the country.

Immediate response to high energy prices:

1. EUR 16bn in direct aid and soft loans to help companies and households with the pricing crisis, including subsidised loans, limits on house rent increases and caps on energy prices as well as fuel subsidies. The plan is due to come to effect on 1 April and is a result of an exception being granted to the Iberian peninsula from European Union.

Changes in strategy:

LNG: As gas will play an increasingly important role in the whole of Europe, everyone will turn to countries like Spain which has several LNG terminals and the highest regasification capacity in Europe. It is not expected that additional infrastructure will be needed at this stage as there is sufficient terminal capacity to bring in more gas from Libya and Algeria, subject to any concerns with these countries' ability to increase production.

Interconnectors: The historical issue with gas in Spain has been the limited interconnectedness of gas pipelines with France. It can be expected that this
issue will become a priority at the European level with investments likely to flow from infrastructure funds to fix this issue.

Renewables: There are likely to be measures removing administrative bottlenecks from renewable projects development, in line with the EU priorities and policies, however, nothing specific has been announced as of yet.

Nuclear: Last year, the plan in Spain was not to extend the lifespan of nuclear plants. Today, the attitudes are shifting and extending the lifespan of nuclear plants is currently under consideration.

Oil: All E&P activities were suspended some time ago and fracking was forbidden too. It is unlikely any of this will change due to the current war.

Conclusion: Spain, as one of the most important LNG importers in Europe, will play a significant role in energy supply for Europe, if its interconnectedness with France can be improved. This can slightly assist prolonging the use of gas as a transition fuel across Europe, however, it should not change Spain's favourable trajectory towards its Net Zero goals.

UK

Current dependence on Russian oil and gas:

oil	gas	Plans to end imports:
8%	4%	Pledge to phase out imports of oil by end of 2022, and further reduce the already minimal gas imports.

Degree of impact:

The UK is less exposed to any direct energy impact from the Ukraine crisis as it only imports a small proportion of its oil and gas from Russia, in contrast to a number of its European neighbours. However, the UK is not immune to the impact of high oil and gas prices and possible constraints on supply in global markets, such as may arise if there is greater competition for LNG. The longer term strategy to tackle this issue is to become less dependent on imports and produce more power in the UK.

Immediate response to high energy prices:

1. A "default tariff cap", introduced in 2019 to protect domestic customers on a variable rate tariff, has acted as a buffer to protect domestic customers from recent gas and electricity prices spikes. However, the cap is periodically reviewed and takes into account wholesale prices and therefore does not fully insulate domestic customers from energy price rises. The price cap has risen to historically high levels and is due to rise further later this year in response to the escalating gas prices.
2. In response to high transport fuel prices, the Government has cut fuel duty for petrol and diesel by 5 pence per litre, which is the biggest cut overall (in cash terms) that has ever been applied across all fuel duty rates at once.

Changes in strategy:

The UK Government has announced a new Energy Security Strategy directly in response to the energy security challenges brought to the fore by the Ukraine conflict.

Nuclear: The Government has committed to a significant acceleration of nuclear, with an ambition of up to 24GW by 2050. This would represent up to around 25% of the UK's projected electricity demand. Small Modular Reactors are expected to form a key part of the nuclear project pipeline. A new government body, Great British Nuclear, will be set up to bring forward new projects, backed by substantial funding, and the Government will launch the £120 million Future Nuclear Enabling Fund this month.

Renewables: The Government previously confirmed its commitment to renewables in the Energy White Paper of 2020 but has now set a new, even more ambition target to deliver up to 50GW of offshore wind by 2030, including up to 5GW of floating offshore wind. The Government has also committed to reforms to reduce the time taken to complete the consenting process for offshore wind. No new targets have been set for solar PV and onshore wind, although the Government has said it will consult on planning reforms for ground-mounted solar PV projects. A budget of £285 million has previously been confirmed for the fourth allocation round of the Contracts for Difference (CfD) scheme currently underway to support renewables and the Government has previously committed to further annual rounds.

New build gas-fired generation: As gas prices reach record highs, the Government is not looking to subsidise gas use but is looking at gas-fired generation (including CCUS-enabled gas-fired generation, see discussion on CCUS below below) as a whole and considering what price it needs to be to make it economically viable.

Hydrogen and CCUS: The Government is pushing ahead with the design and implementation of the Low Carbon Hydrogen Business Model, Net Zero Hydrogen Fund and other hydrogen-related consultations to subsidise the construction of new 'blue' (CCUS-enabled methane reformation) and 'green' (electrolytic) hydrogen production facilities, including to offset further effects of the Ukrainian war on the energy transition and overall gas import dependency (even though not Russia-related). The aim outlined in the Energy Security Strategy is to double up the ambition to up to 10GW of low carbon hydrogen production capacity by 2030. Viability of blue hydrogen may be a concern due to the high price of gas. The Government's ongoing CCUS programme currently has two CCUS clusters on the path towards FID.

Oil and gas: The Government has once again emphasised the important role of North Sea oil and gas exploration and production in conjunction with decarbonisation. The North Sea Transition Authority is scheduled to launch a new licensing round in the autumn. Although onshore shale gas "fracking" had been previously ruled out by the UK Government, the Government has now commissioned a technical review on shale gas by the British Geological Society to consider

any further scientific updates on seismicity (as concerns about seismic activity were one of the major reasons for the halting of shale gas exploration). This clearly opens the door to possible future shale gas development in the UK.

Conclusion: As the UK is one of the least affected countries in Europe when it comes to supply of Russian gas, its support for nuclear, renewable energy as well as hydrogen and CCUS is likely to allow the UK to remain on track for its Net Zero goals.

Although the assessment above can only give us a glimpse of what is a constantly evolving situation, it is clear the overarching impact on each country's Net Zero goals will be determined by a fine balance between imminent gas supply and energy security needs, which is best addressed by increased imports of LNG, and simplification of the administrative processes to make construction of greenfield renewable projects truly helpful in the crisis in the midterm rather than long term.

This situation continues to evolve rapidly so the content within this article may not be the most up to date as it was written in April 2022.

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Energy crisis

Headwinds of opportunity

By Maria Staiano-Kolaitis and Adi Jain

In what has been the toughest year in decades for energy retailers, 2021 saw over a third of all UK energy supply companies **(ESCs)** pushed into insolvency. Conditions have worsened since Russia's invasion of Ukraine which has increased volatility in an already strained market. Wholesale gas prices have now reached over ten times their normal level – a once in a generation event not seen since the 1970s oil crisis. In this article, we discuss government's and industry's response to the crisis and analyse investment opportunities and considerations for funds looking to invest in this sector beyond the 'net zero' agenda.

Market stabilisation mechanisms

The legal and regulatory framework equips Ofgem with two tools to deal with failing suppliers:

a. the Supplier of Last Resort regime (SoLR); and

b. Energy Supply Company Special Administration (ESC SAR).

The energy crisis has provided an unprecedented test of how these regimes work in practice – gaps in legislation and the regulatory environment have been revealed and some distressed opportunities discovered.

The SoLR regime allows Ofgem to direct another ESC to be appointed as supplier of last resort to the customers of a failing supplier.

Although Ofgem can direct any existing retailer to take up the role, it must be satisfied that the SoLR could supply the additional customers without significantly prejudicing its ability to continue supplying its existing customers (an increasingly tall order given the consolidation of the market as a result of the sheer number of failures).

The ESC SAR, a modified version of the administration process, was introduced as an alternative to the SoLR process for dealing with high impact supplier failures where a SoLR transfer would not be practicable. A failing supplier can be placed into special administration only through an application to court by either the Secretary of State or by Ofgem (with the Secretary of State's consent). Once appointed, the special administrator's objective is to continue to contract to supply gas and electricity to customers at the lowest practicable cost until the company is rescued or its business transferred. There has only been one example of this so far: Bulb.

New investment opportunities

Ofgem has clearly stated that its preferred option for dealing with failing suppliers is a SoLR transfer to another supplier. Ofgem would only use the ESC SAR if a SoLR cannot be appointed. As capacity in the market for suppliers to absorb consumers of failed suppliers is waning, we expect to see increased use of this procedure particularly for large supplier failures. ESC SARs come at a heavy cost, evidenced by the c.£2.2bn bill to the taxpayer for the Bulb special administration given the considerable strain that existing suppliers were already under, having absorbed customers of the 20+ energy suppliers that had failed prior to Bulb.

Around 2.7m domestic customers have already been absorbed by existing suppliers through SoLR transfers in the last year, with the largest such transfer[1] involving the transfer of 580,000 customers. If there are more ESC failures, it remains to be seen what the appetite and ability of the surviving ESCs will be to take on additional customers through a SoLR transfer. Octopus Energy and Shell Energy in particular have picked up a lot of customers, with several smaller challenger suppliers taking advantage of the SOLR process to consolidate their business. Recently, Octopus received an investment of $600m to increase their sustainable energy platform, and we foresee more investment of this nature as investors increasingly focus on the 'E' in ESG.

Industry levy financing

The SoLR regime allows for suppliers acting as SoLRs to make a claim for any reasonable costs they incur as a result of the transfer – such claims, made against an industry levy, are mutualised and ultimately borne by customers as a constituent part of the "network costs" which form part of the default tariff cap. Prior to the recent spate of failures, Ofgem's guidance encouraged SoLRs to waive their rights to claim on the levy on the basis that efficient suppliers should be able to minimise their exposure to these costs. Recent SoLRs have not had this luxury and as at January 2022, Ofgem processed over £1.8bn in claims on the levy.

Apart from the quantum, timing has also been a major problem – the earliest SoLRs have received levy payments is 15 months post transfer, with full repayment only occurring a further 12-15 months later. Recognising the reluctance of suppliers to volunteer as SoLRs and to foot the bill for protracted periods from their already dwindling reserves, Ofgem introduced measures in December 2021 to speed up the determination and recovery of such levy claims in a marked departure from their previous position of discouraging such claims.

Around 2.7m domestic customers have already been absorbed by existing suppliers through SoLR transfers in the last year, with the largest such transfer involving the transfer of 580,000 customers.

In order to encourage smaller suppliers to accept SoLR transfers, and to mitigate the impact on consumers of the (now effective) default tariff cap increase, in December 2021 Ofgem launched a consultation regarding potential third party financing for the costs of a SoLR transfer. Under the mechanism proposed, a third-party financier would "buy" any and all rights the SoLR has to future levy payments (once a valid claim has been submitted), providing the equivalent amount to the SoLR much earlier than it would have been able to recover from Ofgem directly. It is hoped that this will allow more suppliers to be able to fund additional supply costs and therefore, take up SoLR appointments. It may also mean that the costs to the consumer (through mutualisation of the levy claims) would be spread out over a longer period. The consultation has now closed and on 11 March 2022, Ofgem published its decision to modify the supply licences to allow for a third party assignee to take on the benefit of the levy claims, but only with Ofgem consent. Although this door has now been opened, it remains to be seen what the appetite is amongst credit providers to provide such third party funding and how these structures will work in practice.

Further areas of Ofgem reform to watch out for are:

a. ring-fencing customer credit balances and renewables levies, preventing them being used as working capital, and significantly reducing the risk of this money being lost if a supplier fails;

b. improving governance and risk management; and

c. adapting the price cap to allow it more flexibility for volatile market pressures.

1 Avro Energy in September 2021

Investment considerations – taxes on shareholder profits and NSIA regulatory concerns

The market that had emerged by 2021 did not prove resilient in the face of an unprecedented rise in wholesale energy prices, exacerbated by the ability of owners of ESCs to extract in-the-money financial derivatives (or other assets), and then declare the supplier insolvent, with the downside borne by the SoLR and, through the levy claims, ultimately the taxpayer. The collapse of energy retailer Pure Planet in October 2021[2] provides a good illustration. BP and other shareholders in the failed supplier's parent[3] company are expected to receive a dividend from the administrators as a result of valuable "in the money" wholesale energy pre-purchase contracts held at the parent company level.

On 28 January 2022, the Government announced that it was introducing the so-called "Public Interest Business Protection Tax" (by way of the Finance Act 2022) to counter this sort of arrangement. In particular focus is the ability for persons that hold derivative contracts and other valuable assets (such as forward purchase agreements) on which energy supply businesses rely to receive profits from those assets, while the supply businesses themselves go into special measures (such as special administration or SoLR transfers) or suffer increased costs. The aim of the new tax is to ensure that energy supply businesses do not transfer valuable assets to shareholders/investors at the expense of the energy business which would then become insolvent, with the costs of maintaining energy supply passing to the state. The new tax will have effect where steps are taken to obtain value from assets which materially contribute to an energy supply business which enters into special measures on or after 28 January 2022 and before 28 January 2023.

The tax will be charged at 75% of the adjusted value of the assets, and a £100m asset value threshold will apply below which the tax will not apply.

On 26 May 2022, with the cost of living crisis continuing without relent and a further 40% hike in the default tariff cap expected in October 2022, the Chancellor announced a further "windfall" tax targeting the "excess" profits made by electricity generators, which means UK energy generators will pay an additional 25% tax for the next 12 months. Investment decisions will need to consider the impact of this and shareholder distributions may look less certain than they did before.

2 Customers transferred to Shell as the appointed SoLR
3 Blue Marble Holdings (in administration)

Another regulatory consideration for investors is whether a notification is required under the National Security and Investment Act 2021, which came into force on 4 January 2022. Given the national importance of the energy sector, investors may be required to give notice of, and obtain UK government clearance for, transactions involving the acquisition of more than 25% shares or voting rights in an energy company. There are a wide range of powers that the Act equips the authorities with and given the energy crisis and both market and geopolitical volatility, it is likely that investment activity in the energy sector will be examined more closely than it has been in the past. On the plus side, the government recognises there is a need for building resilience into the sector in order to ensure continuity of supply, and investment is likely to be welcomed. Whether bridge funding SOLRs for the deferred levy payments or the working capital deficits caused by ringfencing credit balances, there is a potential new home for the dry powder in the current market.

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Pre-insolvency restructurings in Spain

The awaited amendment

By Jose Christian Bertram

State of play

When some years ago Spain enacted its pre-insolvency restructuring, widely known as "homologation", it was well received by the market as a flexible and well thought through regime to carry out restructurings in Spain, although there were still some aspects where the regulation stuck to a more conservative approach such as in the structuring of classes of claims, with only secured and unsecured classes being available. The homologation has been widely used and the only negative reaction in the market has come from the time is takes courts to resolve on a challenge of the homologation if one of the dissenting creditors argues that it has suffered a disproportionate sacrifice.

In this context Spain has to adapt its restructuring regime to EU Directive 2019/1023, dated 20 June 2019, on preventive restructurings (the "Directive"), and there is a very much advanced draft bill of law with the Parliament that is expected to be enacted next month with little change to the draft that has been disclosed (the "Draft Restructuring Law").

Main guidelines of the Draft Restructuring Law

In order to be able to be backed by all EU Member States, the Directive caters for a flexible regime where each EU Member State needs to make a number of choices within the room of manoeuvring allowed by the Directive. In this sense, the following elements can be highlighted:

(i) The restructuring plans can now not be limited to just financial claims but encompass other types of liabilities of the debtor;

(ii) The Draft Restructuring Law clarifies something that was not clear in the current regime and that had been backed by the court in several cases, namely that the parties can choose not to restructure the aggregate liabilities of the debtor but freely establish a perimeter (encompassed by the claims that will be "affected" by the intended restructuring to the extent such perimeter is homogeneous);

(iii) In order to avoid the delays embedded in challenges to the plan, the parties can obtain from the court a pre-approval of the structure of classes they have designed so that the court signs off on the fact that they are compliant with the applicable regime;

(iv) As regards classes, the Spanish regime departs from the traditional split between secured and unsecured classes as the only rationale for setting up the classes and allows the parties a substantial degree of freedom when designing the classes subject to the following general principles:

a. Classes need to respond to a common interest of those included in a specific class;

b. The initial principle is for classes to be based on insolvency rankings of creditors, but that can be amended setting up different classes for example (A) for different types of claims (ie financial claims vis-à-vis non-financial claims), (B) on the basis of conflicts of interests (practice will determine for example how this can be used in case of cross-holdings in different bond issuances), (C) how the claims will be affected by the plan;

c. In terms of secured claims the Draft Restructuring Law clearly provides that secured and unsecured claims can never form part of the same class. On this basis, it goes further by stating that in principle all secured claims will form part of the same class unless the heterogeneous condition of the assets underlying the security (ie not of the financial claims!) justifies the creation of sub-classes: therefore, on the face of it and unless secured by completely different security packages, a secured bond and a secured facility would in principle form part of the same class).

(v) In terms of contingent claims, which have been a consistent point of friction in Spanish restructurings in the past (in terms of sureties and guarantee lines), the Draft Restructuring Law takes the view: contingent claims are included for their aggregate amount unless the restructuring plan includes a lower amount and they will only be impacted in respect of the amount crystallised; and

(vi) Lastly, as regards credit facilities, the Draft Restructuring Law clearly foresees that only amounts drawn will be considered (and hence entitled to vote and affected by the plan), which is an important element for RCF lines.

In summary, flexibility when designing classes is significantly enhanced although there are some issues where courts (when deciding to sign-off on the proposal made by the parties) will have to confirm how far that flexibility can be taken.

Majorities and cross-class cramdown

A class will be deemed to approve the plan that has been put forward to voting if (i) 2/3 (by value) of a class that is not made up of secured claims or privileged claims under Spanish insolvency law votes in favour of the plan; and (ii) 75% of classes made up of secured claims or privileged claims under Spanish insolvency law votes in favour of the plan.

It is important to note that the specific rule applicable to syndicated facilities whereby a 75% favourable vote in the syndicated facility will mean that the entire facility is deemed to vote in favour of the plan stays, and is further clarified in the sense that if such percentage is not achieved the plan will not be deemed to be rejected by the

syndicate but rather that each vote will be taken into account separately, which enhances the likelihood of a favourable vote.

In terms of cross-class cramdown, ie the ability of some classes to drag dissenting classes of claims, this was not available under the current regime and is expressly foreseen in the Draft Restructuring Law as follows: if a restructuring plan has been approved by a majority of classes, it can be imposed on dissenting classes if and to the extent that (i) at least one of the classes backing the plan is a secured class; and (ii) at least one of the classes is in the money (which needs to be backed by a valuation report when requesting the cramdown).

Shareholders as a class

One of the key elements of the Directive is the treatment of the shareholders (specially if they are "out of the money"). Spain has taken a balanced approach, moving away from the conservative approach we have had in the past which made imposing a debt for equity swap difficult against a dissenting shareholder.

Pursuant to the Draft Restructuring Law, in the event of an actual or imminent insolvency only a cramdown can be imposed on the shareholders if and only if the equity is out of the money, the logic behind it being that in such scenario the shareholders shouldn't be able to impair a restructuring from happening. In summary, the new regime will treat the shareholders as a class and voting within such class will primarily be governed by the majority regime of a general shareholders' meeting (without any enhanced majorities being applicable). If the general shareholders' meeting does not approve the plan and the aforesaid conditions are met the plan can be imposed on the shareholders.

By way of summary, the Draft Restructuring Law will provide for a significantly more flexible regime in Spanish restructurings than what we had to date, although some aspects will have to be defined in more detail by practice and case law.

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Who can claim damages for competition law infringements – funds or their investors?

By Steven Vaz and Hayden Dunnett

A recent UK Court of Appeal decision has confirmed that where a managed fund (whether structured as company, trust or partnership) suffers loss, its investors do not have a separate cause of action to the funds themselves. This judgment will make it easier for funds themselves to bring claims but may mean that investors who have redeemed their investment from a fund prior to the fund recovering a loss are left without a remedy. The remaining investors in the fund may therefore benefit from a windfall "gain".

The funds' damages claim against several banks for forex manipulation

On 23 March 2022, the UK Court of Appeal handed down its decision in *Allianz Global Investors GMBH & Others v Barclays Bank & Others* [2022] EWCA Civ 353. Approximately 170 claimants (mostly investment funds) have brought an action for damages against a number of banks arising from alleged manipulation of the foreign exchange markets between 2003 and 2013. The European Commission had issued two decisions finding that certain aspects of the alleged conduct infringed competition law.

Defendant banks claim that the funds avoided their losses when investors made redemptions

The banks have denied liability (except in relation to the findings of infringement made by the European Commission) and further claim that the funds will have avoided losses or passed the losses on to investors who have withdrawn or redeemed their investment.

The banks' argument was that during the claim period, each time an investor exited one of the affected funds, the redemption payment (valued at the "net asset value" of the fund) reflected any losses suffered by the fund as a result of the infringing conduct. As the NAV redemption value reflected the loss, the exiting, or redeeming investor in the fund effectively took on the losses suffered by the fund. In that sense, the fund itself avoided the loss because it was passed to its investors. This seems to be a recognition of raison d'être of investment funds; to be a passive or pass-through vehicle through which both gains and losses are, ultimately, borne by the participating investors.

The implication of the banks' argument is that the Court would need to take account of each and every time an investor sought to redeem funds from one of the claimant funds to assess whether the funds themselves (which were structured either as companies, trusts or partnerships) suffered any loss. This would have required extensive disclosure from each of the funds going as far back as 2003.

The claimants argued the fund is the proper claimant and that investors into the funds do not have standing to sue for any losses they may have suffered.

The UK High Court concluded that investors who had made redemptions from the claimant funds would have standing to commence their own proceedings against the banks for losses suffered as a result of the infringing conduct, meaning the Court would need to take account of losses passed on to them when assessing the losses suffered by the claimant funds. This judgment was appealed to the Court of Appeal.

Court of Appeal confirms investors do not have a separate claim to the funds

Redemptions do not result in funds having avoided their losses

The Court of Appeal noted that the basis for an award of damages is to compensate for losses naturally flowing from the breach. For any subsequent transaction (ie the redemptions) to be relevant to reduce the loss flowing from a breach (avoiding the loss), it must arise out of the consequence of the breach and in the ordinary course of business.

The Court of Appeal considered that redemptions occur through pre-existing contractual arrangements between investors and are independent from the losses suffered by the fund due to any infringement. The Court of Appeal also noted that redemptions, which are capital in nature, have no bearing on a fund's profit and loss and are therefore not undertaken in the funds ordinary course of business.

On that basis, the Court of Appeal concluded that:

- **Funds structured as trusts:** only the fund trustees on behalf of the trust had a cause for action and not the beneficiaries (investors);
- **Funds structured as companies:** the reflective loss principle means that investors do not accrue a separate right of action once they redeem their investments. Only the company itself could bring a claim against the defendant banks; and
- **Funds structured as limited partnerships:** it was common ground that only the general partner can commence proceedings as causes of actions are partnership assets. The Court of Appeal rejected the banks' argument that limited partners suffered a distinct loss on redemption to that suffered by the partnership.

English Courts are not required to create new rights to ensure investors have a separate cause of actions

The banks also argued that because duties under Article 101 are owed to all individuals (including redeeming investors), as a matter of EU law the Court must allow investors to claim losses they have suffered on redeeming their investment at an amount lower than if an infringement had not taken place.

The Court of Appeal rejected this argument, noting that English law determines how the rights of shareholders, beneficiaries and limited partners are to be protected. This is done by protecting those rights by action through the entity who suffers the loss rather than the individuals.

Conclusion

As redeeming investors from funds structured as trusts, companies or partnerships do not suffer a separate or distinct loss from that suffered by the funds, the banks' contention that redemptions resulted in the funds avoiding or passing on their losses to redeeming investors was struck out. Consequently, the case will proceed without the need for (i) detailed disclosure of every redemption in relation to each of the funds covering a period from 2003 onwards and (ii) each redemption does not require a separate assessment of whether the funds avoided losses through redemptions.

The decision provides clarification on the necessary requirements for defendants to plead an avoided loss or pass-on allegations:

- In order for pass-on and avoided loss claims to be pleaded, the subsequent conduct or action of the claimant resulting in the alleged avoidance of loss must arise as a consequence of the alleged breach and as part of a claimants' ordinary course of business.
- Redemptions from investments funds arise separately and independently from any losses suffered by a fund as a result of anticompetitive conduct and therefore do not need to be accounted for when the fund commences proceedings to recover any damages.
- In contrast, investors who have redeemed their investment from a fund which has suffered a loss as a result of anticompetitive conduct are unable to separately recover any reduction in the value of their investment as a result of any infringements.

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Immigration and employment considerations for a mobile workforce

By Liz Parkin and Crowley Woodford

The last two years have without a doubt transformed how, when and where people work. With the world opening up, the impact of the UK's exit from the EU is becoming more apparent for our clients, who are now feeling the effects of the end of freedom of movement.

Our clients are grappling with what this means for both attracting talent from abroad and also for sending their staff to work elsewhere in the world.

Coupled with an increase in staff asking to work remotely or in a hybrid manner, quite often from another country, the issue of cross border working and immigration is in fact becoming a daily discussion.

In this article, we consider the key employment and immigration issues for our private capital clients.

Surely things haven't changed that much?

These issues are not wholly new. However as a result of our exit from the EU, the considerations that once applied to recruiting a foreign candidate from the US or Japan for example, or sending staff to work outside Europe, now also apply to EEA nationals and countries. In practice this means that businesses are facing extra costs and time in ensuring that the various factors, such as immigration, employment, tax and regulatory requirements have been adequately addressed.

Is a visa necessary?

It depends!

The end of freedom of movement means that immigration restrictions apply when UK businesses recruit EEA nationals (who weren't in the UK pre-Brexit) to fill a UK role and when UK nationals are sent to work in Europe. These restrictions can also catch business visitors travelling between the UK and Europe.

In many instances a candidate coming from France or Spain for example, will need to be sponsored by the UK business where they want to live and work for that business in the UK. This process requires that the business holds a licence to sponsor and then the individual must obtain a visa linked to that licence. There are a variety of routes into the UK, but nearly all of these are tied to this process of licence and sponsorship, neither of which can be done quickly (the average licence application takes 8 weeks and out of country visa applications as at publication should take 3 weeks). The process is prescriptive, with salary thresholds, skills requirements and in many instances English language skills having to be evidenced.

Sponsorship comes at a cost; there are application fees (sponsor licence costs and standard visa application fees), the immigration skills charge (payable by the business) for most Skilled Workers and the NHS surcharge (payable by the candidate per year of the visa).

Although the system is designed to allow businesses to run this process without legal assistance, getting it wrong can expose the business to refusals, penalties and delays. It also requires the business to keep up with the changes which are often implemented with little to no prior notice.

Equally, arranging for a UK national to work in a European country (for example on secondment or as part of a hybrid working arrangement) will trigger local immigration law considerations, which (depending on the country) can be just as prescriptive, if not more so, than the UK regime.

For those looking to simply visit the UK (or for UK nationals to travel to Europe) on business, there is an equally rigid regime in place, with time limits, strict restrictions on permitted activities and receipt of payments imposed by the immigration authorities – sometimes requiring a visa to be applied for in advance. Ensuring that an individual is aware of these restrictions (as well as the business) and is prepared to provide evidence and answer questions at a country's border is an area that many of our clients are now focusing on as travel opens up.

For more information on the routes for global mobility, please see our client briefing here.

It isn't just immigration...

The immigration considerations for a mobile workforce are part of a much bigger puzzle which we are helping our clients navigate. Other areas include:

- **Employment law:** Depending on where the individual works, local employment laws may apply (notwithstanding that their employment contract may contain a governing law provision under English law). The question of which local employment laws may apply are jurisdictionally specific and are often linked to the length of time spent in that country. However, they could impact issues such as minimum pay, working hours and family leave rights. In addition, if it is not possible for certain benefits to continue (such as pension entitlements, permanent health insurance and private medical insurance), the contractual implications must be considered

and, if necessary, the business may need to consult with the individual about any changes to their employment contract.

- **Tax:** This is likely to be a key issue for both the business and the individual. Will remote working in Italy for example, create an establishment if there isn't an Italian office already? Have income tax and social security arrangements been addressed? What notifications may need to be made to the relevant tax authorities?
- **Practical implications:** Businesses will also need to consider who will pick up the cost of the individual's visa (and likely dependants who come with the candidate); whether the individual needs to take detailed accounting advice to protect their underlying benefits (such as social security) built up in their home nation; and whether that individual will want to work remotely from their home nation for extended periods (for example when visiting family during the summer). There are other ancillary considerations, such as data privacy and regulatory requirements that will also come into play.

Planning is key

Now that the UK has left Europe, immigration and employment issues will need to be considered every time a business plans to recruit or to move talent cross border. Businesses should ensure that they are aware of the above considerations and have the correct processes in place so that they are able to move quickly to implement and support their mobile workforce needs.

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Navigating the data privacy conundrum

Amid heightened scrutiny over data privacy and disclosure requirements, private equity firms should know the basic housekeeping on compliance

By Rhiannon Webster

Private equity firms may not consider themselves data-heavy organisations and so data protection compliance may not seem a priority. Nevertheless, there are growing quantities of investor data held within the fund structure, often comprising the personal data of individual directors, which are subject to privacy laws.

Data breaches and non-compliance with privacy laws have resulted in costly penalties, with the maximum fine in the EU and UK being 4 percent of annual worldwide turnover. Moreover, individual claims for data breaches are increasingly being brought to the courts.

The applicability of privacy laws will depend on where the funds are established and where they are targeting their operations. For UK and EU organisations, there is some basic housekeeping that can assist in complying with data protection laws. Similar concepts exist around the world where there is an established privacy legal framework.

Identify the controller

Responsibilities for compliance with UK and EU data protections laws under the General Data Protection Regulation predominantly rest with the "controller", which is defined as a "body which, alone or jointly with others, determines the purposes and means of the processing of personal data".

Typically, General Partners ("GPs") will be controllers of personal data through the fund itself, but the manager may also be a controller or a joint controller. Moreover, while it is useful to document roles in the fund structure documentation, the analysis of the role of controller is one based on fact, rather than contract.

Understand your data

Accountability requirements in the GDPR oblige controllers to understand the data they have, the lawful basis on which they process it and the disclosures that are made. A controller GP will need to document records of processing, as well as policies and procedures on how data protection laws are complied with in practice.

Be transparent

The GDPR prescribes that data subjects must be informed about how their data is processed and about any third-party disclosures. This covers any director information obtained from investors or personal data processed by the fund in connection with a target. GPs therefore need to think about how to communicate this information with the data subjects.

Keep the minimum data as is necessary with appropriate security

The more headline-grabbing fines from regulators are from breaches of security that have resulted in losses of data. The GDPR obliges controllers to hold personal data only where necessary, delete it when it is no longer needed and ensure appropriate security is in place to mitigate the risk of security breaches.

Funds may also incorporate contractual provisions relation to the protection of confidential information and personal data in the limited partnership agreement and subscriptions agreement between the investor and the fund.

In storage, where possible, personal data may be irreversibly anonymised which will render it no longer "personal data" and no longer subject to the GDPR.

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