Funds Insider

JULY 2021

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Contents

Foreword

We are delighted to introduce the second edition of Funds Insider, our quarterly publication focusing on hot topics in a range of practice areas which are likely to be of interest to our private capital clients.

This edition will cover:

- The modernisation of the Irish ILP
- What we need to know about Crypto M&A now
- ESG litigation risks
- Key issues for investors in technology
- A look back one year on from CIGA
- The increasing popularity of Warranty & Indemnity insurance in the Spanish M&A market

Over the last quarter our offices around the world have been increasingly busy supporting our private capital clients in a number of areas. M&A activity has remained strong across Europe, with an increasing focus on technology and interest in cryptocurrency. In addition we have seen an increasing interest in ESG within all aspects of funds, as well as opportunity arising from the new Irish IPL regulations. We are grateful to continue supporting our clients in all of these areas across a number of jurisdictions.

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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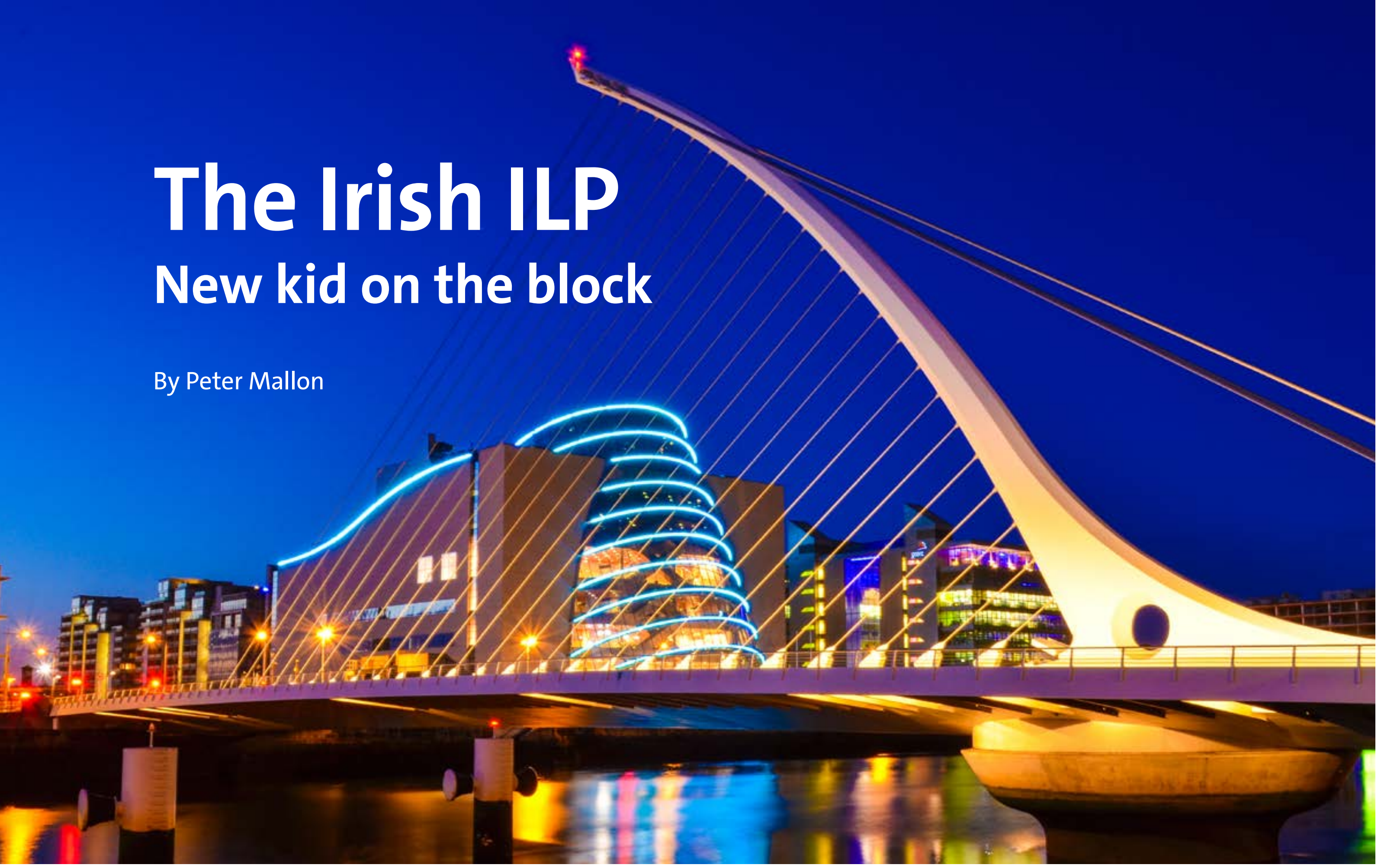

The Irish ILP

New kid on the block

By Peter Mallon

The long-awaited overhaul of the Irish Investment Limited Partnership (ILP) finally came into force earlier this year. This legislation set about modernising the existing Investment Limited Partnership legislation to bring it in line with private funds structures in key funds jurisdictions, principally Luxembourg, and England and Wales.

On the face of it, the ILP is now well placed to achieve what it set out to do, which is to gain a foothold in the private funds market currently dominated by Luxembourg. The ILP looks and feels very much like an English LP, with the key differences being that it is a regulated vehicle and that it can act as an umbrella fund, with segregated liability between sub-funds. The regulated badge should not slow down speed to market, with the Irish regulator, the Irish Central Bank, typically authorising an ILP within 24 hours of the application being submitted. Ireland is also within the EU so, like Luxembourg, the ILP can offer UK managers a post-Brexit work-around. And in addition, Ireland is an English-speaking common law jurisdiction that is closely modelled on the English legal system, so in many respects it is a more familiar jurisdiction to UK fund managers than Luxembourg.

So what are the downsides? The short answer is that it is hard to say. On paper the ILP meets and in some cases exceeds what is on offer in other jurisdictions. In reality, however, the fact that it is a new product means that some fund managers will be nervous about taking the plunge and structuring their fund in a relatively untested jurisdiction for the private funds asset class. Other fund managers will be nervous about the ILP being a regulated vehicle, with regulation typically resulting in more administration work (and costs) for the manager operating the fund. And others will be concerned that getting the Central Bank up to speed on typical private fund terms may require additional work that might not be required in other jurisdictions.

Inevitably some fund managers will lead the market on this. Assuming this confirms that the ILP is a workable product from a practicable perspective, the ILP may well become a popular product which can compete with current structures and thereby benefit the fund sector as a whole. We have set out a high-level comparison of some of the key features of the ILP compared against the English LP and the Luxembourg SCSp. Like all things, the devil is in the detail, and members of the Ashurst funds practice would be happy to discuss the nuances between these competing structures, if helpful.

Feature	English LP	Luxembourg SCSp	Irish ILP
Partnership type	Limited Partnership (ELP). No legal personality and so acts and contracts by its general partner.	Special Limited Partnership (SCSp). No legal personality and so acts and contracts by its general partner.	Investment Limited Partnership (ILP). No legal personality and so acts and contracts by its general partner.
Regulator	Financial Conduct Authority (FCA)	Commission de Surveillance Du Secteur Financier (CSSF)	Central Bank of Ireland (Central Bank)
Regulatory Burdens	Unregulated fund vehicle and therefore subject to light touch regulation through the AIFM.	Unregulated fund vehicle and therefore subject to light touch regulation through the AIFM. Options to upscale to a regulated vehicle (RAIF) and a regulated and supervised vehicle (SIF/SICAR).	Regulated and supervised by the Central Bank as a Qualifying Investor AIF (QIAIF). Authorisation typically granted within 24 hours. Pre-authorisation can be sought in advance of closing. Additional reporting requirements to the Central Bank.
Umbrella/ Sub-Funds	Umbrella/Sub-Funds structure is not possible in an ELP.	Umbrella/Sub-Funds structure is not possible in an unregulated SCSp - unless is regulated as a RAIF/SIF/ SICAR by the CSSF.	Umbrella/Sub-Funds structure is possible. Segregated liability between the sub-funds (protected by statute).
General Partner	May be any entity (English or non-English) with legal personality. The GP has unlimited liability for the debts and obligations of the ELP.	Strongly recommended to have a Lux GP for corporate law and substance purposes. The GP has unlimited liability for the debts and obligations of the SCSp.	May be any entity (Irish or non-Irish). The GP has unlimited liability for the debts and obligations of the ILP. GP Board of Directors subject to advance Central Bank approval.
AIFM	FCA approval required. Third party AIFMs are permitted.	CSSF approval required. Third party AIFMs are permitted.	Central Bank approval required. Third party AIFMs are permitted.
Portfolio Manager	Portfolio managers not subject to approval by FCA.	Appointment of portfolio managers by unregulated SCSp in a sub-threshold AIFM context not subject to approval by the CSSF, but appointment of portfolio manager by full scope Lux AIFM subject to approval by the CSSF.	Portfolio managers subject to approval by the Central Bank.
Depositary	Required if the ELP is an AIF (rather than a non-AIF CIS) and is managed by a full scope AIFM.	Yes, required if the SCSp is managed by a full scope AIFM.	Required.
Administrator	Not required.	Not required.	Irish administrator required.
Carried Interest Partner	Can be any entity selected in light of legal/tax considerations.	Can be any entity selected in light of legal/tax considerations.	Can be any entity selected in light of legal/tax considerations.
Governing Document	LPA	LPA	LPA
PPM/Offering Memorandum	Not strictly required.	Not strictly required *(unless structured as a SIF/SICAR/RAIF)*.	Required.
Limited Partner Liability	Limited to the amount of its investment/commitment.	Limited to the amount of its investment/commitment.	Limited to the amount of its investment/commitment.
Limited Partner Whitelist	Such a whitelist exists under an ELP structure (provided it is a PFLP).	Such a whitelist exists under a Lux SCSp structure.	Such a whitelist exists under an ILP structure.
Investment Restrictions	Can be freely determined in the LPA.	No restriction on unregulated SCSps.	QIAIF classification imposes certain investment restrictions on the ILP, which will require derogation from the Central Bank on a case-by-case basis.
Leverage Restrictions	None	None	None
Public Accounts Filings	Yes, unless qualifying partnership exemption applies.	None required for SCSp.	None required.

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Crypto M&A

What you need to know now

by Tara Waters

What started out as a craze, grew into a bubble, then weathered a chilly winter before dominating the headlines again is now starting to settle into business as usual. With deal values in the crypto market more than doubling to an aggregate US$1.1 billion in 2020 (and deal size increasing 175 per cent year-on-year), transactional lawyers and deal makers may no longer claim ignorance of crypto trends and considerations. So what do you need to know to be in the know? Read on to find out.

The “what is crypto?” speedread

Crypto has become something of a catch-all term covering businesses that leverage distributed ledger technology (DLT) for a range of activities. DLT uses cryptographic methods to securely record and store data digitally. It operates in a similar way to old quill-and-ink ledgers, in that records of data (once made) cannot be amended without requiring every single subsequent record to also be amended. Therefore, the ledger can only be added to in sequence and prior records can be trusted to be “true”. To increase the trustworthiness of the ledger, it is kept not by a single person but by a network of participants (i.e. it is distributed), thereby exponentially increasing the difficulty of tampering with the records.

The particular way in which the underlying cryptographic methods are used in DLT makes it a highly attractive technology for, among other things:

- Recording transactions of all kinds, particularly payments and asset transfers
- Recording and evidencing ownership of assets (whether digital or non-digital)
- Documenting provenance and movement of goods through supply chains
- Creating and distributing fungible and non-fungible digital assets (including digital payment/currency assets)
- Recording and evidencing the occurrence of events or facts
- Providing an immutable audit trail of all of the above

Why you should care more about crypto

Putting the inflammatory news headlines and tweets aside, the crypto market is no longer the wild west of anonymous (or sometimes non-existent) persons launching get-rich-quick schemes. Yes, there are still some of those, but institutional interest and participation in the crypto market is accelerating at pace.

Why? Put simply, there is money to be made and DLT is proving to be more than just a fad.

Indeed, DLT is the future of many industries – particularly finance – and a transition from current technology infrastructure to DLT-based technology infrastructure is already in progress. It is no longer enough for incumbents to watch the crypto market from a distance: they need to become participants if they are to have any chance of staying relevant.

This survival impetus is in turn driving crypto transaction volumes. Institutions are investing in and buying start-ups to acquire in-house knowledge of DLT and existing DLT applications and infrastructure, to enable them to more quickly participate in the crypto market and related activities, and to generally gain exposure to the financial upside of a growing industry segment.

This is in turn driving further creativity and innovation as institutions get more comfortable with this new technology and discover ways to leverage DLT to create new value for their businesses and new propositions for their customers.

Watercooler-worthy deals

Although overall deal activity has been slowly shifting away from the more mature US market towards Europe, the US continues to dominate the league tables particularly in terms of deal value. Below is a list of recent M&A deal highlights.

- Binance's US$400 million acquisition of CoinMarketCap brought together the largest crypto exchange with a significant crypto asset data provider and is tied for the largest crypto M&A transaction of all time; this acquisition evidences the importance of data in the crypto market.
- Paypal's acquisition of Israeli digital asset security firm Curv further bolstered its capability in accepting crypto-based payments; this acquisition evidences increased focus on digital asset security and storage, which will be essential to increased crypto adoption.
- Highly acquisitive Coinbase paid US$90 million for prime brokerage platform Tagomi; this acquisition evidences increased focus on improving institutional adoption of DLT by launching familiar offerings with a DLT-based flavour.
- Publicly listed CleanSpark's acquisition of ATL Data Centers gave it access to the real estate needed to introduce renewable energy sources into its bitcoin mining activities; this acquisition evidences how some businesses are addressing the growing concerns around the sustainability and ESG impact of DLT-based activities.

Investments in the crypto market have also increased in value, although the majority of deals relate to earlier-stage companies. This is not unexpected given that the crypto market remains somewhat nascent with many new businesses seeking to fill market gaps. Series A and B rounds are raising anywhere between US$50 million and US$375 million, showing healthy investor interest in the crypto market.

Avoiding crypto M&A pitfalls

Like all industry segments, when considering a crypto M&A transaction, there are specific areas of risk that require particular attention.

Regulatory risk tops the list, as the global regulatory landscape remains fragmented and in a state of constant change, and there is no common taxonomy or treatment. A crypto business's activities need to be looked at carefully, jurisdiction by jurisdiction, and the approach to regulatory compliance will have been well considered by experienced legal advisers.

Two particular areas of concern that fall within the regulatory risk perimeter are token-based fundraisings and anti-money laundering compliance. While most crypto businesses these days often seek out reputable legal advisers, this is not always the case and any small misstep in raising funds or marketing of crypto offerings to a globally distributed customer base without robust KYC/AML processes may open up the business to future risk. The SEC's enforcement actions against the likes of Ripple show that even presumed "safe" historical transactions can easily come under active scrutiny and throw asset value into a tailspin.

Naturally, it is also important that the buyer or investor understands the underlying technology and how it is being used. Expertise in DLT is growing, but the list of true experts remains relatively small.

Finally, tax treatment of crypto assets varies across jurisdictions. This, combined with volatility in the valuing of certain crypto assets, means that whether a business is using or holding crypto assets could have a significant impact on its value and liabilities.

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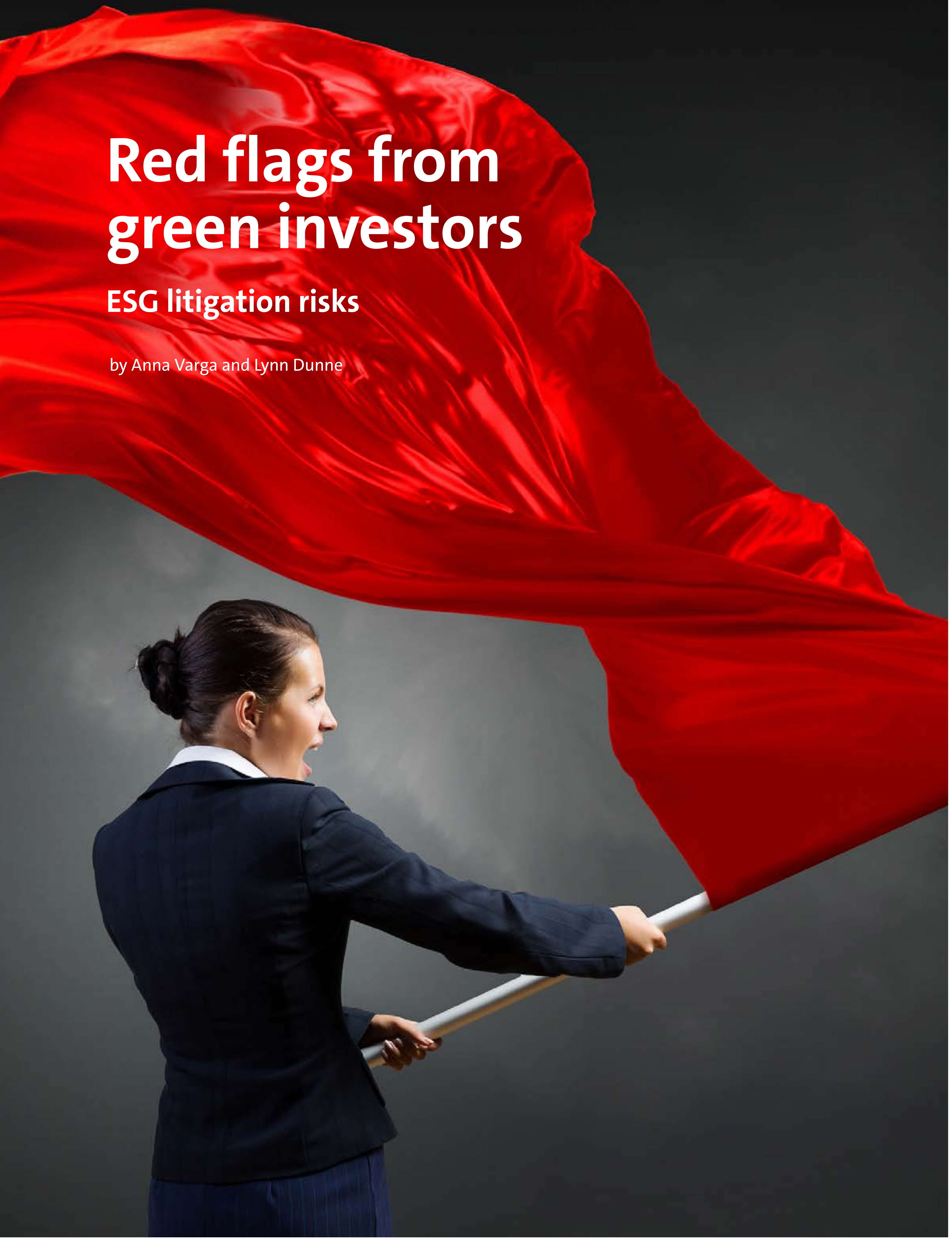
Red flags from green investors

ESG litigation risks

by Anna Varga and Lynn Dunne



ESG is an increasingly prominent feature of investment decisions across the investor gamut. As ESG-related disclosures come under scrutiny, there is a risk of investor and activist claims if those disclosures are inaccurate.

Once upon a time ESG matters were considered a niche interest. That is no longer the case. Alongside other strategic and financial information, investors routinely analyse information through an ESG lens to better understand the future prospects of companies. That is equally true for private capital and publicly listed securities. Understanding the headwind that is ESG has never been more important, not least because long term it will be the driver for what generates and depreciates value.

New opportunities and emerging risks

At the core of this rapidly maturing space is the ability to identify new opportunities and manage emerging risks. According to the Pitchbook 2020 Sustainable Investment Survey,[1] 95 per cent of limited partners are either already evaluating ESG risk factors or will be increasing their focus on ESG risk factors in the coming year. Climate change and climate change action, as well as enhanced human rights and good governance practices that respect and uphold the former two, are becoming an ever-present feature of good investment decisions. That should not come as a surprise if one agrees with the views expressed by the US Securities and Exchange Commission that "climate change, unlike other types of risk, is potentially irreversible in terms of the damage it can cause".[2]

As previous sectorial developments have shown, areas of growth and opportunity are but one side of the coin. On the flip side, there is risk. Investor scrutiny of ESG performance should be accompanied by equal (if not greater) scrutiny of the entity making those representations, public statements or filings. Such an approach is of equal relevance to asset owners, asset managers, banks, brokers and investment consultants.

1 Pitchbook's Sustainable Investment Survey 2020

2 US SEC - Playing the Long Game: The Intersection of Climate Change Risk

ESG & securities litigation

ESG risk can manifest itself in many guises. We do not explore here the multifaceted incarnations of ESG risks/disputes. Instead, we look at the risk of securities litigation in the UK. For further information, please refer to our more detailed separate briefing available here and our ESG litigation risk webinar.

As the flood of regulation, guidance and investor/stakeholder pressure to provide ESG information voluntarily shows no sign of abating, there is a corresponding risk of liability for damages in respect of any misstatement or misrepresentation. That risk is on the rise. Litigation following alleged misstatements or misrepresentations often derives from a distinction between what a company says it does and what it actually does and potential claimants will be alert to that distinction. As such, the need for carefully managed, accurate and precise disclosure is a key mitigator. The degree of vigilance afforded to public statements, and/or company filings generally, is of equal importance for ESG matters.

That is particularly relevant for issuers (but the same approach should be applied for all ESG-related representations). Where a company's disclosures are proven to be inaccurate, it may cause a subsequent fall in share price. Consequently, the shareholders may seek to recover their losses. This type of ligation, commonly referred to as "securities litigation", is well developed in the US but its foothold remains to be tested in the UK – even if, as the signs suggest, it is a developing trend in the UK.

Two obvious candidates emerge for this securities litigation 'foothold': sections 90 and 90A of the Financial Services and Markets Act 2000 (FSMA). Both are deceit-based statutory remedies for shareholders who acquire securities and suffer loss as a result of statements or omissions made either (i) in prospectuses or listing particulars (section 90 FSMA), or (ii) in published information such as annual reports or accounts (section 90A FSMA).

Section 90 FSMA – prospectus and listing liability

A shareholder who:

- Acquires securities or any interest in securities offered by the prospectus or listing particulars, and
- Suffers loss as a result of any untrue or misleading statement, or omission of any matter required to be included,

may be able to claim compensation for those losses.

Claims can be brought by those who contract to acquire any interest in the relevant securities or purchasers of the securities.

There are two notable elements:

- First, the net is cast wide over the pool of possible defendants. Claims can be brought against: (i) any person responsible for the relevant document, (ii) those stated as accepting responsibility for the document, and (iii) any other person who has authorised its content. That will always include the issuer of the relevant securities but may also extend to directors and sponsors.
- Second, there is no need to prove that the claimant relied on the said misleading statement or omission. That circumvents some of the substantial hurdles faced by other similar common law claims.

Both these aspects may explain why it is viewed in some sectors as the paradigm example of a group litigation case. As a result, it is likely to be a point of interest for both claims management companies and the ever-increasing pool of those looking to fund, in particular, group litigation claims.

Section 90A FSMA – published information

The second of these 'footholds' relates to published information:

- Where an issuer makes an untrue or misleading statement or omission, or dishonestly delays publishing that information, those that acquired, continued to hold or disposed of shares "in reliance" on the published information and suffer loss as a consequence, may bring a claim for compensation.
- Relevant publications include annual reports and accounts and interim results but could also include interim management statements, any preliminary statement published in advance of a report, and information published through a recognised information service.
- The issuer is liable if a person discharging managerial responsibility knew or was reckless as to such statements, omissions or delay.

Unlike section 90 FSMA, to successfully bring a section 90A FSMA claim, an investor needs to demonstrate it was reasonable to place reliance on the published information when it acquired, disposed of or continued to hold the shares in question. That is an important point of difference, which makes the prospect of a group litigation more complicated: each claimant would need to evidence that it relied on the published information, which is no small feat. It also raises the spectre of materiality: was the published information sufficiently material for the investor to rely on it in that manner? That is a point of law that, for now, remains unanswered, making the prospects of any such claim more speculative (and perhaps less attractive).

ESG-related shareholder litigation is very much in its infancy in the UK but lessons can be learnt from previous cases and other jurisdictions. The main tenets of these types of claims are also available to shareholders in Europe, the US and Australia and they illustrate the tightrope between aspirational forward-looking statements and representations that impact investor assessment of the financial position and prospects of a company. As the US experience demonstrates, where ESG credentials are inaccurately represented, investors are willing to pursue group claims, for example, ExxonMobil Corporation, in which the state regulator filed a suit and separately a shareholder class filed a securities class action with the US District Court for the Northern District of Texas, making similar allegations to the state regulator.

In the UK, both these causes of action are largely untested since the handful of cases brought on those bases, thus far, have settled. That cannot be a coincidence when you consider the reputational risk, unhelpful precedents and potential for large payouts from the defendant's perspective.

Given the almost fledgling stage of both group litigation and ESG claims in the UK to date, it remains to be seen whether ESG-related claims will shift that approach. However, with the rise of the 'activist' and/or 'ethical' investor, monetary compensation may no longer be the sole aim. As with most activist-driven litigation, a desire for change may influence how these disputes play out and may reduce the impetus for settlement (at least from a claimant perspective). How this will interplay with the wish for a return on investment from any funder of such litigation will be an interesting dynamic and something to watch.

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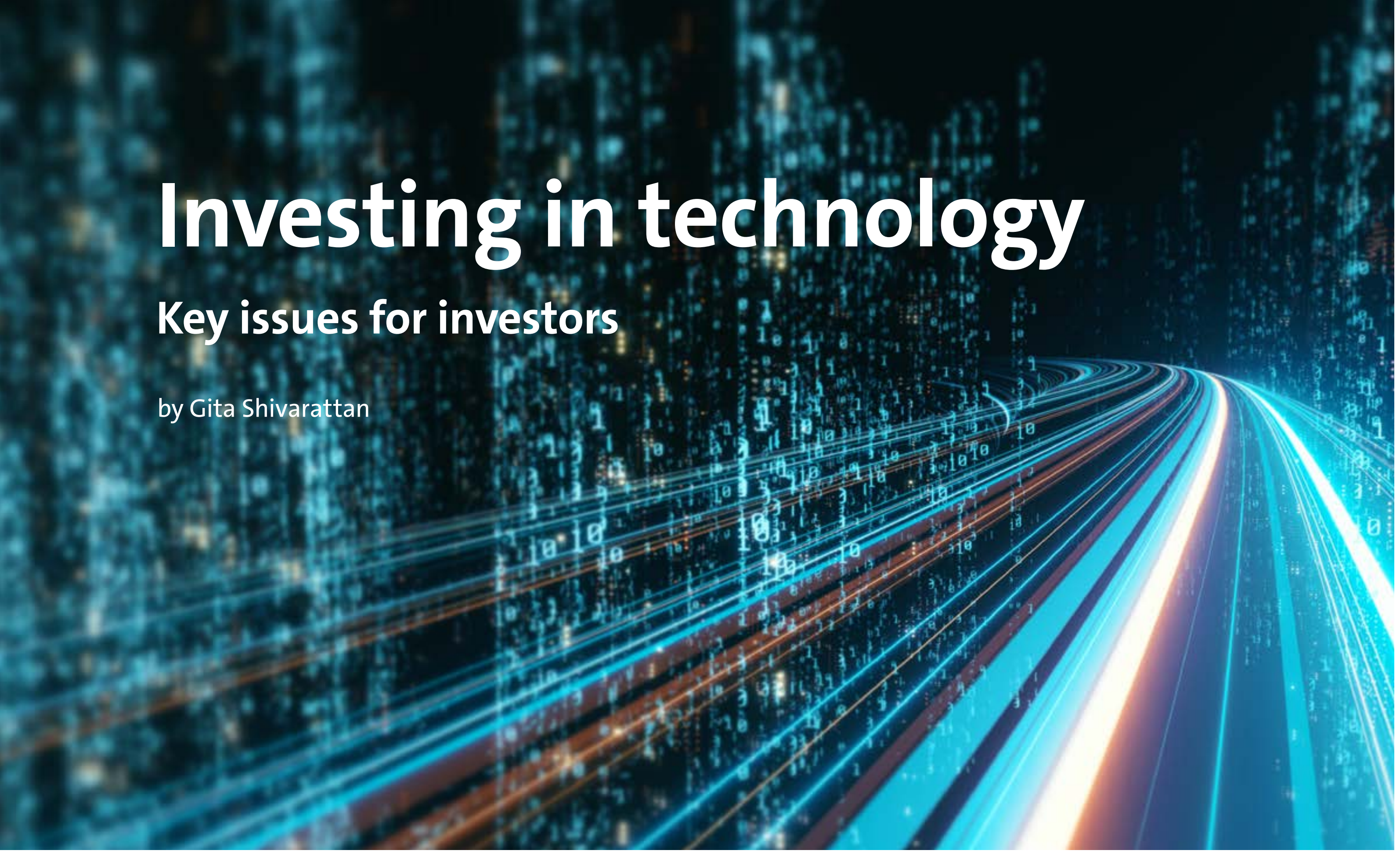

Investing in technology

Key issues for investors

by Gita Shivarattan

Businesses are increasingly seeking to gain a competitive edge through digital innovation and the use of technology. As we emerge from the COVID-19 pandemic, M&A activity in the UK tech sector continues to perform strongly. By all indications, this level of activity is set to continue over the next 18 months.

Over the last quarter, the UK tech sector has benefited from increased confidence in investment, coupled with high levels of cash being held by private equity and tech funds. Digital transformation is now a key focus across all sectors and continues to drive interest in the UK tech sector from both UK and international investors. According to Private Equity Wire, deals were up by 28 per cent in Q1 2021, with 268 deals announced.[1]

Investing in tech can be complicated and high risk. Appropriate due diligence is key to the success of any investment, in particular when investing in tech start-ups or businesses relying on emerging technologies, such as AI, IoT and blockchain. In this article we discuss some of the key legal issues for consideration by private equity and tech funds seeking to invest in tech.

1 Private Equity Wire - Tech sector M&A activity hit record high in Q1

Due diligence – key issues

Intellectual Property

Emerging technologies such as AI, blockchain and IoT are often based on complex, layered licensing arrangements, and typically businesses which develop or utilise these technologies rely on multiple software products.

Investors should carefully review the ownership and licensing of IP rights to confirm these are properly protected and allocated to the target business, for example through registered trade marks, patents, etc.

Customer and partner relationships

In addition to the supply chain relationships and licensing, investors should carry out due diligence on customer and partner arrangements. Both standard term and bespoke agreements should be reviewed to ensure there are appropriate licences and contractual protections in place. In particular, investors will be interested in any exclusivity arrangements which may impact business plans.

Key employees

Tech businesses are often the focus of investment due to certain key employees and their knowhow. It follows that employment contracts for these key employees should also be reviewed, in particular in respect of any tie-ins and incentivisation schemes. An emerging issue in this regard is how investors will address any significant employee disputes. Whether there is a way to ring-fence potential liabilities should be considered.

Cybersecurity

Investors in tech, in particular data-driven technologies like AI, IoT and blockchain, will also need to consider IT infrastructure and IT resilience. Specialist review of cybersecurity practices and processes is critical for investors to gain a full understanding of the potential gaps or risks the target business may face. Cybersecurity issues connected with personal data breaches may expose investors to liability under the UK data protection framework (see below). Stress-testing infrastructure through ethical hacks is becoming a staple of tech due diligence exercises.

Investors should also include in-depth warranties on these subjects in the purchase agreement to support findings in their due diligence exercise and, where problems have been identified, indemnities and holdbacks may also be considered as suitable protections.

Data protection

Over the last five years the data protection regulatory framework has increased in complexity, and in the UK and Europe significant fines for non-compliance were introduced. Under the UK data protection framework, organisations are held to a high standard in connection with data security practices, and penalties for non-compliance are severe – the higher of £17.5 million or 4 per cent of the organisation's worldwide turnover. Investors can be held liable for past breaches or non-compliance under the UK data protection legal framework.

In addition, it appears likely that EU and UK data protection regulators will adopt a similar approach to competition law enforcement, resulting in parental and/or investor/shareholder liability. The data protection frameworks adopt the EU competition law definitions of "undertaking" and "decisive influence" in reference to calculating the potential size of regulatory fines, which has proven to incentivise competition regulators to pursue the largest company that can be said to form part of the same undertaking.

While enforcement under both the UK and EU GDPR regimes has yet to fully consider this concept, investors should be mindful that, following competition law precedents, the distinct legal status of each company within a group structure, or the distinction between a business and its investor/shareholder, may not play a determining factor in a regulator's assessment of a party's liability. Under competition law, group companies and/or shareholders can be treated as being part of the same "undertaking" where they form a single economic unit. This means there is a risk that closely connected companies within the group, and potentially investors, will be held jointly and severally liable for regulatory fines and private damages claims arising from an offence caused by another company within the group.

Data protection compliance will be an important feature of many transactions, not only because of the hefty fines but due also to reputational damage and impact on consumer confidence in products (which is sometimes irreparable) which may arise from a data breach or failure to adhere to data protection laws.

Investors should focus on a target's compliance history, including details of any breaches, complaints and regulatory actions. It will be particularly important to show that any technology developed by a target has been developed with cybersecurity and data protection in mind, and that measures are in place to protect users' personal data.

Investment in the UK tech sector and technology-driven businesses undoubtedly offers exciting market opportunities with potential for high growth. However, as the regulatory landscape becomes increasingly complex in the areas of IP, data protection and cybersecurity, investors should ensure that they are aware of the risks and potential financial exposure associated with technology transactions.

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One year on from the Corporate Insolvency and Governance Act 2020

A look back on the UK's restructuring and insolvency reforms

by Rebecca James

What a difference a year makes. In June 2020, Covid infection rates were falling and the UK was slowly reopening after the first lockdown, with a sense of relief that, with hindsight, now feels premature. In the restructuring and insolvency world, the Corporate Insolvency and Governance Act 2020 (CIGA) was concluding its expedited 5½-week passage through Parliament, giving distressed companies breathing space through restrictions on winding-up petitions and two new restructuring procedures to help them work through the challenges ahead. In this article, we look back over the key developments under CIGA one year on.

But first, how have the new tools introduced by CIGA fared during their first year? The restrictions on winding-up petitions – initially in place to the end of September 2020, but recently extended for the fourth time to 30 September 2021 – have arguably had the largest impact. Together with the other government Covid-support measures, these restrictions have caused a very significant suppression of normal insolvency levels. The Insolvency Service statistics for Q4 2020 showed that the total number of company insolvencies in 2020 dropped to the lowest annual level since 1989. Perhaps as a consequence, there has not been much need for the new moratorium process, which has barely been used.

The restructuring market generally has been quieter than expected during this period, but a handful of companies have so far taken advantage of the new restructuring plan process, establishing a helpful initial body of case law. Further details of what we've learned about restructuring plans are below. We expect the use of the restructuring plan to accelerate over the next year as the economy emerges from lockdown and begins to recover. This will enable corporates to assess the financial impact of the pandemic and analyse their restructuring needs.

Much will depend on how the government deals with the expiry of the winding-up petition restrictions in September 2021, and the related restrictions on business evictions and Commercial Rent Arrears Recovery (CRAR), which are now expected to expire on 25 March 2022 (in order to allow the government time to introduce a new binding arbitration scheme to deal with outstanding rent arrears linked to business closures). An update on the recent extensions is here.

Please see a timeline of key events on the next page.

CIGA in force

26 June 2020

CIGA became law and introduced two new restructuring procedures - the restructuring plan under part 26A of the Companies Act 2006 and a new standalone moratorium procedure under part A1 of the Insolvency Act 1986 - as well as an ipso facto provision (which prohibits the termination of supply contracts on the grounds of insolvency).

It also introduced **various temporary COVID-19 measures**, including restricting the use of winding-up petitions between 27 April 2020 and 30 September 2020 (later extended to 30 September 2021) and suspending personal liability for wrongful training between 1 March 2020 and 30 September 2020 (later revived from 26 November 2020 to 30 June 2021). Read our suite of briefings here.

As CIGA progressed through Parliament, an amendment was adopted to revive the (recently expired) sunset provision allowing the government to make regulations regarding pre-pack sales to connected parties, which have now been introduced (see Pre-pack sale regulation).

Crown preference reinstated

1 December 2020

The start of December saw **the return of Crown preference**. For insolvency proceedings opened from 1 December 2020, HMRC now ranks as a secondary preferential creditor ahead of floating charge holders and unsecured creditors for VAT and certain other withholding taxes. See our briefing here.

While this measure is not technically connected to CIGA, the market had been hoping that the measure would be delayed given the financial impact of COVID-19 and the £33.5bn[2] of VAT deferrals agreed as part of the government's COVID-19 support measures. Given the suppressed insolvency rates that we have seen since the start of the pandemic, it's likely that the full economic impact of this measure has not yet been felt.

Virgin Atlantic Airways

14 July 2020

Virgin Atlantic Airways announced that it had launched its first restructuring plan under part 26A of the Companies Act 2006 in order to implement a solvent recapitalisation. Ashurst acted on this plan; see our client briefing here.

The plan was subsequently sanctioned on 2 September 2020. As all four creditor classes voted in favour of the plan, the court applied the 'tried and tested approach' to the exercise of discretion established for schemes of arrangement.

Pizza Express

November 2020

Pizza Express became the second company to use the new restructuring plan. The sanctioned plan effected a debt-for-equity swap and an old-debt-for-new-debt swap, as part of a wider operational restructuring, which included a CVA to deal with the group's rental liabilities.

gategroup

30 December 2020

The **'gategroup' restructuring plan was launched**. The timing of this was very significant. As the plan was launched prior to the end of the Brexit transition period (11 pm on 31 December 2020), the Lugano Convention still applied to the UK and the court was required to consider whether the Lugano Convention applied to the plan.

In a clear departure from the case law on schemes of arrangement, **the court found that restructuring plans are insolvency proceedings falling outside the scope of the Lugano Convention**. This may change how restructuring plans are recognised in some foreign jurisdictions going forward. See our briefing here.

DeepOcean

13 January 2021

The High Court sanctioned the **DeepOcean restructuring plans by exercising its discretion to apply cross-class cramdown for the first time**. The case is also notable as it established that it is not essential for a restructuring plan to seek to rescue a company as a going concern. See our briefing here.

2 HMRC Coronavirus COVID-19 statistics - VAT payments deferral scheme

Smile Telecoms

30 March 2021

The **fifth restructuring plan was sanctioned for Smile Telecoms**. Here, a telecoms group operating in Africa used the court's cross-class cramdown power to facilitate further super-senior borrowings (as a bridge to an expedited sales strategy), notwithstanding that the senior lender class did not approve the plan by the requisite 75%: only 71% by value voted in favour.

Virgin Active

12 May 2021

In the **first fully opposed cross-class cramdown judgment, the Virgin Active restructuring plan was sanctioned**. The main take-away from the judgment is that where 'out of the money' creditors vote against a plan or raise objections at sanction, this will carry very little weight. Rather, the key principle is that "it is for the company and the creditors who are in the money to decide, as against a dissenting class that is out of the money, how the value of the business and assets of the company should be divided".

The use of the plan alone enabled Virgin Active to conclude a financial and operational restructuring, in a way previously done by combining a scheme (or plan) with a CVA. See our briefing here.

Pre-pack sale regulation

30 April 2021

Regulations were made under the government's power (revived by CIGA) to regulate pre-pack sales to connected parties. As a result, for administrations opened on or after 30 April 2021, **connected persons buying all or a substantial part of a company's business or assets within the first 8 weeks of the administration will now be required to obtain an independent written opinion on the sale**. See our briefing here.

The regulations followed a report published by the Insolvency Service in October 2020, highlighting continuing concerns about the potential for abuse of the pre-pack process and the need for further creditor protection, particularly if the rush of insolvencies predicted to arise as a result of the COVID-19 pandemic materialises. So far, it has not.

Hurricane Energy

28 June 2021

The High Court declined to sanction the restructuring plan of Hurricane Energy, after objections raised by the existing dissenting shareholders who would have seen their shareholding diluted to 5% under the plan. This is the first restructuring plan which has not been sanctioned. The court found that there was a realistic prospect that the shareholders would be better off if the plan wasn't sanctioned, and therefore the conditions for the use of cross-class cram down were not satisfied. It was central to the judge's findings that the evidence showed that the insolvency of the company wasn't imminent and that the company could continue trading profitably for at least 12 months, if the plan wasn't sanctioned. The case shows that it may be more challenging for a company to use a restructuring plan to cram-down a whole class of dissenting creditors or members where the most likely alternative to the plan is not an imminent insolvency.

Looking forward to the next year of CIGA, the key question is whether the restrictions on winding-up petitions will be lifted in September 2021, and the government will face some difficult choices here. The jury is out as to whether we will see the perpetually forecast tsunami of insolvencies materialise or whether this will keep on being kicked down the road. Only time will tell.

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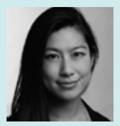

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Warranty & Indemnity insurance

Increasing popularity in the Spanish M&A market

by Francisco Vázquez Oteo

Following the established trend in the UK market, where at present practically all deals are closed with a Warranty & Indemnity insurance, this product has significantly increased in popularity in the Spanish M&A market over the last five years.

Thus, in our experience at Ashurst Madrid, W&I insurance has been used in almost 40 per cent of the M&A transactions in which we have provided advice in Spain during the last year (when five years ago it barely represented 10 per cent of the total) and their subscription has been taken into account in practically all the transactions, and it is a particularly relevant tool in complex deals.

Of course this is not a phenomenon that affects only the UK or Spain: over 30 per cent of all private M&A transactions in Europe which Ashurst was involved in were executed with W&I.

Reasons for the growth in use of W&I insurance in Spain

In our experience, some of the main reasons for the increase in popularity of W&I insurance in the Spanish M&A market are the following:

- For the last few years, we have lived in a pro-seller market, where the enormous liquidity available to private equity funds and the relatively few investment opportunities have increased the negotiation power of sellers, who are quite concerned about having a "clean exit".
- Insurers have greatly improved this product in terms of:
  - Coverage:
    - exclusions are limited and already known in the industry. Insurers no longer compete only on price, but also on coverage. Therefore, they are now offering separate tailor-made policies to cover specific risks which were not considered insurable in the past (transfer pricing, environmental and disputes); and
    - improved coverage limits with respect to an ordinary SPA regime, both in terms of time (e.g. usual time limitation of 18 months for general warranties in SPAs vs 2-3 years under a W&I insurance) and liability cap (around 15-30 per cent of the price in SPAs vs 10-30 per cent of enterprise value under a W&I insurance).
  - Process and timing: the policy negotiation process with insurers (where specialist brokers have been of great help) has been significantly speeded up, with an average underwriting time of three weeks from first contact and simpler policies.
  - Price: around 2-3 per cent of the liability limit and we are seeing a consistent downward trend.

Not only have insurers significantly improved the coverage of W&I policies, their price and the process for their execution, but the large number of claims paid by the insurers is also notable (around 84 per cent of claims under W&I policies have been paid during the last year as informed by Howden Iberia (broker).

The section of the SPA that entails more discussions and disagreements and takes up the most time during negotiations is that relating to the liability regime of the sellers (if it is the case that the seller is willing to face the uncertainty of being liable for 18-24 months for the granting of general representations & warranties on the situation of its former company or business).
In this regard, the improved commercial attractiveness of W&I insurance in Spain and the faster underwriting process have made it possible not only to speed up and unblock negotiations, but also to ensure that the purchaser obtains a broader coverage of risks that it would not otherwise have obtained (e.g. in terms of length of coverage).

Recent developments

The greater use of W&I insurance in M&A deals in Spain, as well as in the UK, over the last few years has led to a more sophisticated product, which is now capable of being adapted with a certain degree of flexibility to the particularities of each transaction.

In this regard, we have seen the following developments and trends in the W&I policy market in the last two years:

- Some insurers are starting to look favourably on new bridge insurance for very short interim periods. New bridge insurance will completely cover the gap between signing and closing.
- Some previously rejected policy enhancements are slowly becoming popular (although they usually involve increases in the premium). We are referring here to the exclusion of the seller's knowledge qualifier and no disclosure of the due diligence reports and/or virtual data rooms:
    - As for the first, if a blanket knowledge qualifier is applied to the warranties under the SPA, it is possible to remove this in the W&I policy. This is typically subject to an additional premium of 10-20 per cent.
    - As regards no disclosure of the due diligence reports and/or virtual data room, certain insurers may be willing to offer one (but not both) as an enhancement of the policy. Non-disclosure of the virtual data room is probably preferable, but as yet is only offered in simple deals and subject to significant additional premiums.
    - Premiums are, in general terms, decreasing (particularly on small deals, e.g. less than a billion euros) given the strong competition in the sector and that international insurance players have gained advanced knowledge of the Spanish market and are now willing to offer broader coverage of risks at a reasonable cost.
- Increased appetite for synthetic R&Ws (i.e. those directly granted by the insurer), especially in deals involving a seller that is a public administration.
- Hard staple vs soft staple:
    - In large deals (over a billion euros), the hard staple is gaining ground. With a hard staple, the seller approaches the insurance market in the initial phase of the deal. The selected insurer will proceed on the basis of the virtual data room (or vendor due diligence) and will produce an advanced draft of the W&I policy form, which will be disclosed to bidders. Normally, the draft will be negotiated by the insurer with the preferred bidder only, but we have seen highly competitive processes in which insurers agreed to engage with multiple bidders.
    - Given that hard staple is time-consuming for the seller and involves a generous amount of resources, some sellers opt for a softer method of stapling. In the soft staple, the seller provides bidders with a broker report drafted after an initial survey of the insurance market. Under this scenario, access to the broker and insurance companies is given only when exclusivity is granted to a preferred bidder and the underwriting will proceed on the basis of the buyer's due diligence reports.
- In relation to the Covid-19 exclusion, after an initial phase in which insurers considered it essential, it has become relatively easy to eliminate such general exclusion, even for sensitive business, provided that due diligence is thorough on certain key issues (e.g. employment matters).

Role of the legal adviser

It might seem that, in a scenario in which the most critical part of a SPA is covered by taking out a W&I insurance policy, the role of lawyers would be less relevant. However, and despite the intermediation work of brokers, legal advice is essential in terms of the analysis and explanation to the various parties involved (buyer, seller and insurer) of the legal risks of the transaction and the articulation of the coverage of the same between the W&I policy and the SPA (in such a way that, jointly, through the negotiation and amendment of the wording of the W&I policy, and the regulation included in the SPA, the objective of risk coverage that is sought is reached).

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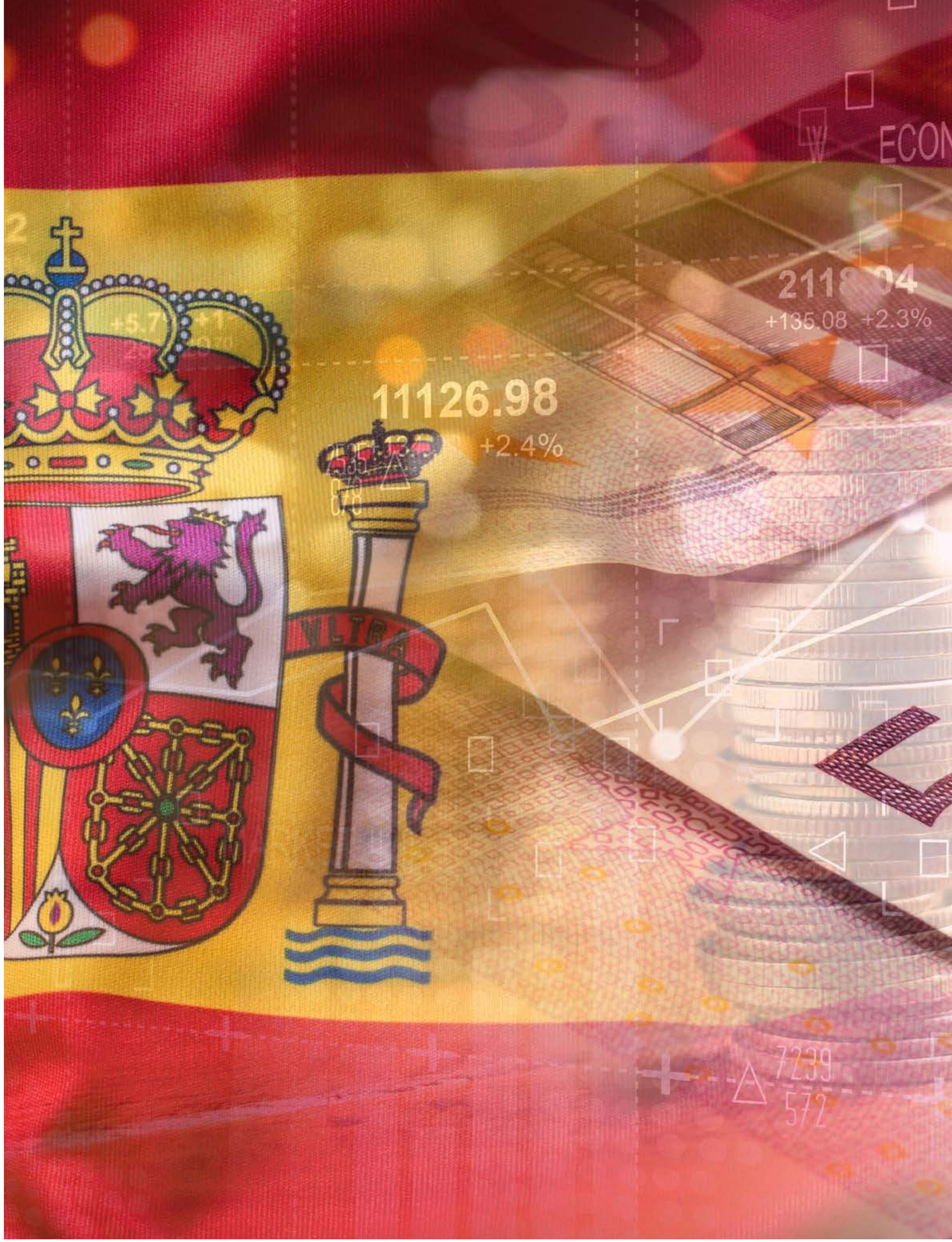

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