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Private Wealth Newsletter

SECOND QUARTER ISSUE

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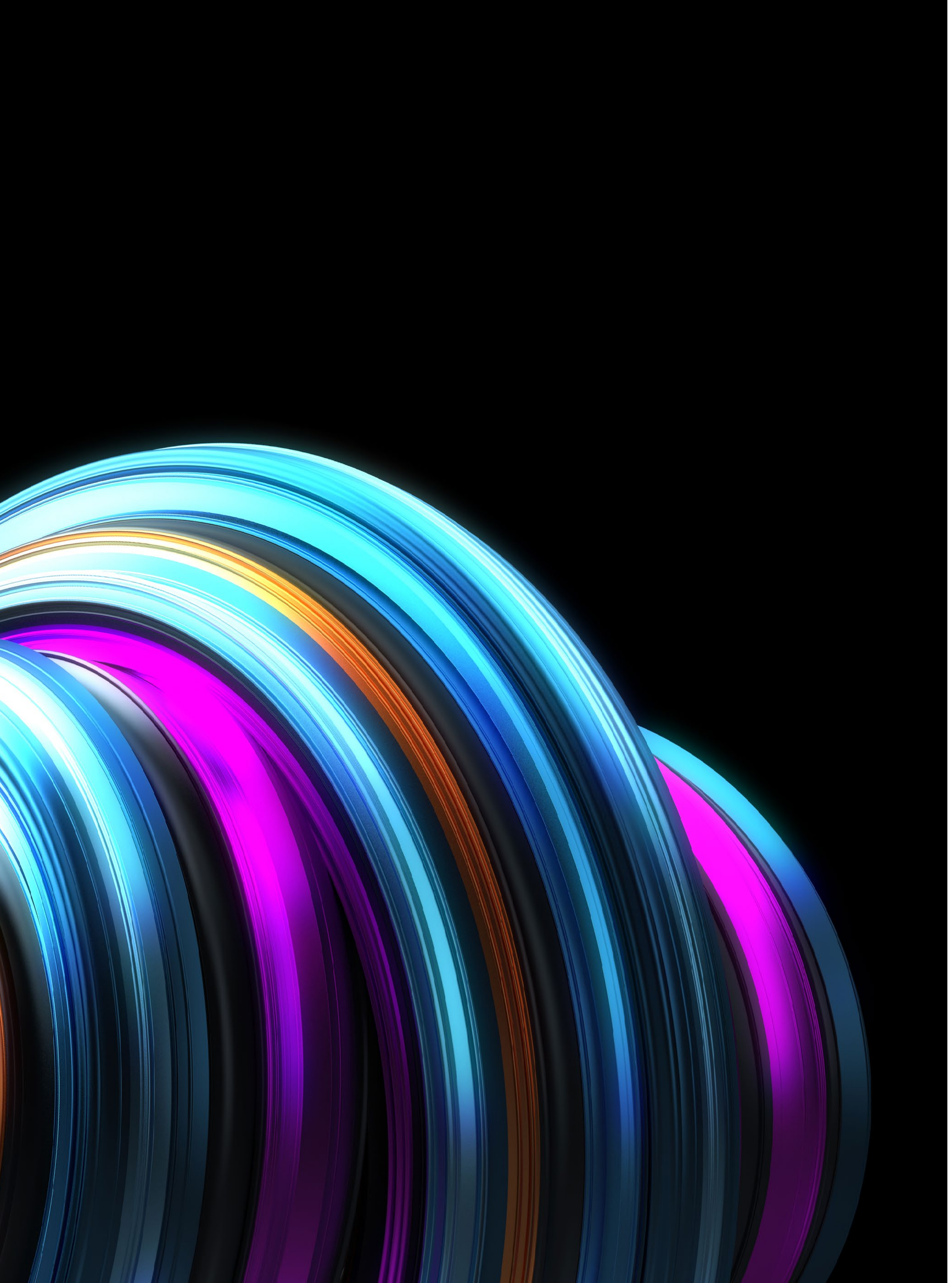
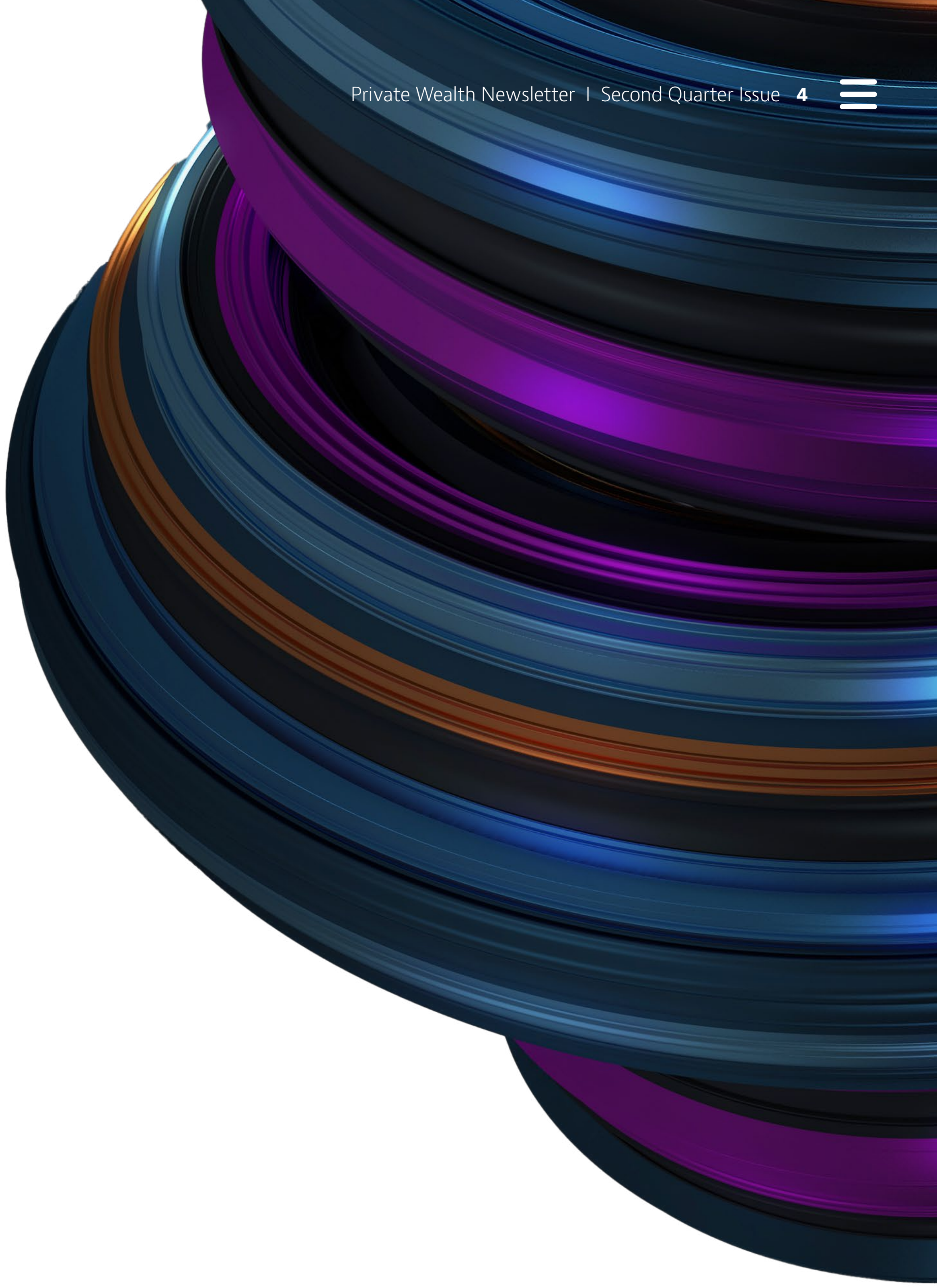


Editor’s note

On behalf of Baker McKenzie’s Global Wealth Management Practice Group, it is our pleasure to share with our clients, friends, colleagues and readers across the globe the Second Quarter 2022 issue of the Private Wealth Newsletter.

It is also with pleasure that we introduce and welcome our newsletter’s new co-editor, Phyllis Townsend. Phyllis is a member of our London Wealth Management team with extensive experience in advising high net-worth individuals, trustees and family offices on a broad range of wealth management matters.

This edition features articles on a variety of relevant recent developments in the private wealth space. With a particular focus on succession, this edition sheds light on running one of the world’s largest ever private wealth disputes with an entirely virtual trial and delves into the spectre of forced heirship claims. Not to miss also are our regional updates on current legislative changes and proposals throughout the EU, UK and the Middle East.



As we prepare to publish this edition, we witness continued uncertainty and turmoil that continue to impact families, private wealth and the institutions that serve them. Countries across the globe continue to alter their COVID-19 responses to adapt to latest developments, with many seemingly veering towards reverting to pre-pandemic status quo, where possible.

Please do reach out to our editors Elliott Murray and Phyllis Townsend, as well as any of the authors mentioned throughout this edition, with any questions or comments.

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WONG v. GRAND VIEW & ORS: Running one of the world's largest-ever private wealth disputes trials virtually

In 2021, a long-running trusts dispute went to an 80-day trial in the Supreme Court of Bermuda. We at Baker McKenzie are acting for the claimant.

Background: the Wang family

We have been instructed for several years by Dr. Winston Wong, a very successful Taiwanese entrepreneur, academic and philanthropist, in relation to litigation arising from the death of his father, Wang Yung-Ching (aka YC Wang), the founder of the Formosa Plastics Group (FPG) headquartered in Taipei.

YC Wang and his younger brother, Wang Yung-Tsai (aka YT Wang), spent half a century transforming FPG into the multinational, multibillion-dollar conglomerate it is today, before their respective deaths in 2008 and 2014.

At the time of their deaths, they were two of the richest men in Taiwan. In addition to their Taiwanese estates, they had accumulated an enormous fortune offshore, managed in secret by a devoted employee. In family terms, the brothers each fathered numerous children with multiple women. Of these children, seventeen are officially acknowledged as heirs.

Given these complex business and family arrangements, the vast wealth created and the fact that one of the brothers died without any valid will, it is perhaps unsurprising that litigation has ensued.

What points are under dispute?

The Bermudian case concerns the ownership of shares and other assets worth now more than USD 20 billion, which are held in a network of offshore purpose trusts set up between 2001 and 2013 (the last of which was created after YC's death) to hold various BVI companies.

Dr. Wong, who is the administrator of YC's intestate estate, sued five trustee companies controlled by two of the daughters from his third family and two of YT's sons, as well as the employee who once managed the assets (and who died before trial). Two of YT's other children also joined the proceedings, one of them supporting Dr. Wong's case and bringing parallel claims of his own on behalf of YT's estate.

Among other things, Dr. Wong alleges that his father, who never learned to read, write or speak English and who never spoke to a lawyer about the trusts, did not understand that, in approving the creation of these structures, he was giving up control of his wealth forever and that his heirs could never benefit from the fortune he spent his life creating. He maintains that this mistake is sufficiently serious to justify setting the trusts aside.

The defendants, however, contend that the trusts were intended to preserve family control of FPG's listed companies through an ever increasing offshore stake in the shareholdings of FPG so that the companies could be maintained in perpetuity and could provide employment and financial support for external projects in line with YC and YT's long-term strategic vision for "giving back to society".

The trusts in question have no beneficiaries but were created for the fulfilment of specified non-charitable purposes, under the auspices of Bermuda's Trusts (Special Provisions) Act 1989 (as amended). Dr. Wong alleges that the purposes as drafted are insufficiently certain to allow the trusts to be carried out,[1] and that the trusts are void as a result. He also contends that the trusts' purposes are, impermissibly, a mixture of charitable and non-charitable purposes, which also renders them void under Bermudian law.

Neither of these arguments is known to have been considered by a court before, in relation to the widely used — yet still relatively new — concept of a statutory, non-charitable purpose trust.

Dr. Wong also alleges that the transfers of certain BVI companies to the trusts were ineffective because the assignment of YC and YT's equitable interest was not evidenced in writing,[2] as required by the English Statute of Frauds of 1677. This led to fascinating arguments at trial about whether this ancient English Parliamentary enactment forms part of the law of the British Virgin Islands. Experts in Caribbean colonial history gave rival opinions on whether the BVI was acquired by settlement or conquest and — if settled — when the date of settlement was and thus when the cut-off date was for the reception of English law into the colony. Again, no court appears to have considered such questions in such detail before.

1. Contrary to s.12A of the 1989 Act (as inserted by legislation in 1998).
2. Students of equity will remember the Vandervell litigation: [1967] 2 AC 291.

Why is the matter significant?

The case is the largest in value ever to come before the Bermudian courts and is believed to be one of the most valuable private wealth cases ever tried anywhere in the world. The litigation has spanned well over a decade and has been pursued in Taiwan, Hong Kong, various US states, Bermuda and the British Virgin Islands. It has involved a number of Baker McKenzie offices and other legal and professional teams.

The Bermudian trial was due to be held in person on the island between April and September 2021, in a specially constructed courtroom large enough to accommodate more than 50 lawyers from London, the US, Taiwan and Hong Kong who were actively involved in this aspect of the case.

However, only two weeks before the trial started, the island suffered a spike in COVID cases and the judge (Assistant Justice Kawaley, former Chief Justice of Bermuda) made a last-minute decision to order a virtual trial. Four associates who had already travelled to Bermuda were soon sent home. The trial then took place entirely on Zoom, with most of the legal teams based in London.

The judge dialled in from his home in Bermuda, often starting his working day at 6 am to accommodate the various time zones involved, and the witnesses and experts gave evidence via video link from an arbitration centre in Taipei (often being cross-examined until after 10:30 pm local time).

Perhaps surprisingly, the trial concluded precisely on schedule and without any major technological hitches.

What's next for virtual trials?

The trial took place at a time when courts around the world were suddenly shifting from in-person, paper-based hearings to bespoke online solutions in response to the pandemic. For the first time, answers had to be found urgently to questions that have rumbled along in the legal community for many years: whether 'virtual' or 'remote' trials are a good thing and, if so, precisely how and for what types of matters they should operate. In our case, the parties attempted as much as possible to replicate the majesty of a traditional courtroom, but this will not be straightforward in every case.

The question now is whether and to what extent court hearings should revert to type. The considerations vary from case to case, but given the climate emergency, more thought will surely be given to the environmental impact of traditional, paper-based trials. The Baker McKenzie London team estimates that they avoided printing over 840,000 pages of hearing bundles and saved 137 tonnes of carbon by not flying to and from Bermuda. Solicitors, advocates and judges have all had to embrace electronic working, many of them enthusiastically so. Necessity is the mother of invention, as the saying goes, and the circumstances required rapid adaptations and innovations by all involved. There were, consequently, many learnings and unexpected advantages to conducting a trial in this manner. We hope the example of this trial will encourage others to seek to emulate those advantages in the future.

Conclusion

Judgment in the Wong case is expected in the spring of 2022. Given the value of the dispute and the number of novel legal issues it raises, the outcome is very likely to be appealed to the Bermudian Court of Appeal and then the Privy Council in London, whichever way the decision goes at first instance. A separate case, also on appeal from Bermuda, was heard by the Privy Council in early March 2022,[3] and related cases are ongoing in Hong Kong and the US District of Columbia.

For more information

Click here to see our infographic on the trial, with details of the scale and the sustainability-related benefits of holding a virtual trial.

You may access our thought leadership pieces on virtual hearings and mediations, some of which are in partnership with KPMG UK, on our Future of Disputes hub.

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3. Grand View Private Trust Company and another (Respondents) v Wong and others (Appellant) No 2 (Bermuda) - Judicial Committee of the Privy Council (jcpc.uk)

Details of the Wong v Grand View trial

Took place entirely on Zoom

80
Court days

31
Witnesses (expert and factual)

55
Lawyers

11
Law firms in London, Bermuda and Taipei

8 QCs,
11 Juniors

Evidence given via Zoom from 3 continents

US $20bn
of assets at stake

Sustainability of trial

40
Long haul flights saved

1126
Nights in a hotel not needed

137
Tonnes of carbon saved through not flying

438
Kg CO2 saved in cabs to and from airports

1900
Kg CO2 saved in hotel laundry

840,000
Pages not printed

Articles

Can you ever really walk away? The spectre of forced heirship claims

It is a common fact pattern where international families are concerned: the generator of the family wealth, perhaps at an early stage in their career, marries and bears children; later, the marriage ends (through divorce or death), and the richer party moves on and eventually starts another family, perhaps in another country, all the while continuing to build a fortune. A will is made, or trusts are set up. Years later, the patriarch/matriarch dies, and it is discovered that the first family has been completely disinherited. Or has it? Concepts such as forced heirship and community property are well known to private-client practitioners but, as the court reports demonstrate, many wealthy families continue to be caught out by the reach of such claims.

Forced heirship has its roots in civil-law systems and generally provides that a certain portion of a person's estate must be distributed to particular heirs upon death.

The rules vary by jurisdiction but can be found in one form or another in countries such as Germany, France and Spain, as well as in Sharia legal systems and certain Asian and Latin American countries. They are in contrast with common-law jurisdictions, which tend to favour testamentary freedom.[4] Many of these legal systems also provide for community of property, whereby assets acquired during the marriage are subject to specific rules for division upon the end of the marriage.

> If an individual who is subject to the succession rules of a forced heirship jurisdiction seeks to transfer their assets (before or after their death) outside the scope of the forced heirship rules, a spouse and/or other heirs who are thereby deprived of their compulsory shares may be able to bring claims seeking to set aside the individual's purported transfer of assets — whether by attacking the validity of any will or seeking to undo their lifetime transfers of property to third parties.

Of course, in response to this, many offshore financial centres have passed 'firewall' legislation to try to protect assets transferred to structures in their jurisdictions from falling within the scope of such succession claims. However, there are many situations in which individuals wish to transfer assets (before or after their death) into jurisdictions with no protective firewalls, such as the UK (a popular destination for international families with sizable property portfolios). If those individuals could be subject to the succession rules of a forced heirship country, advanced planning is critical to reduce the risk of the transfers being set aside by future forced heirship claims.

In particular, clients should be advised that they may find it difficult to favour the children or spouse of a later marriage at the expense of children from an earlier one. A recent high-profile example concerns the famous singer Johnny Hallyday (the 'French Elvis') who passed away near Paris in 2017. According to media reports, the four-times-wed performer's two adult children from prior marriages challenged a will, drafted in California, which purported to leave the entirety of Hallyday's EUR 38 million estate to his final wife, with whom he adopted two young children. The adult children succeeded in establishing that their father was habitually resident in France before his death, overcoming the widow's case that he had made his primary home with her in Los Angeles since 2007 (which would have enabled him to dispose of his estate free of restrictions, in accordance with Californian law). While the case caused outrage in France at the suggestion that their beloved entertainer was more American than French, the court more soberly undertook an analysis of the singer's Instagram posts to calculate how much time he spent in his birth country during his final years.

The elder children's success meant French succession laws applied to Hallyday's worldwide assets and that they each qualified for an 18.75% share of his multimillion-dollar estate.[2] His widow said she would appeal, but the case ultimately settled on undisclosed terms.[5]

Similar claims feature in a case pending in the US District Court in the District of Columbia,[6] the latest chapter of the long-running dispute over the estate of Wang Yung-Ching, a plastics tycoon and one of Taiwan's richest men ever. The plaintiffs, who are the joint executors of Mr. Wang's widow's estate, assert an entitlement under Taiwanese law to 50% of the couple's marital estate[7] and a claim to recover assets transferred to third parties without the widow's consent during the last five years of Mr. Wang's life,[8] plus restitution.

4. Such as the UK, subject to the Inheritance (Provision for Family Dependents) Act 1975, which sets out a general expectation that testators should make reasonable provision for their dependents.
5. Under French law, if a person has three or more children, the children are entitled to an equal share of three quarters of the net estate.
6. https://www.france24.com/en/20200703-children-of-french-rocker-hallyday-bury-hatchet-with-widow-over-inheritance
4. Civil Action No 1:10-cv-01743-JEB, Hsu and Ors v. New Mighty U.S. Trust and Ors.
7. Article 1030-1 of the Civil Code of Taiwan ("Civil Code").
8. Article 1030-3 of the Civil Code.

Mr. Wang and his wife were never divorced during their 72-year union, although Mr. Wang purported to marry various other women, and had at least three other families and at least 12 children by those companions, before dying intestate at the age of 91. While he spent most of his life in his native Taiwan, Mr. Wang — like the French Elvis — travelled regularly to the US and died there in the home of one of his 'wives'. This complex fact pattern has led to an ongoing legal battle worth billions of dollars about the relevance of Taiwanese forced heirship rules to the family's overseas assets. The US proceedings are expected to go to trial next year.

Both of these cases highlight the potential dangers and substantial implications of forced heirship claims and, therefore, the importance of careful succession planning for international families. As another Valentine's Day comes and goes, high-net-worth individuals would do well to pay attention not only to their current paramours but also to those relationships that they might feel are in the past but which — depending on the legal systems involved — may give rise to inviolable claims.

> Gemma Willingham is a partner and Luke Richardson is a senior associate in the dispute resolution department of Baker McKenzie's London office. Their practices focus on private wealth disputes and they regularly advise professional trustees and international families on the issues raised in this article.

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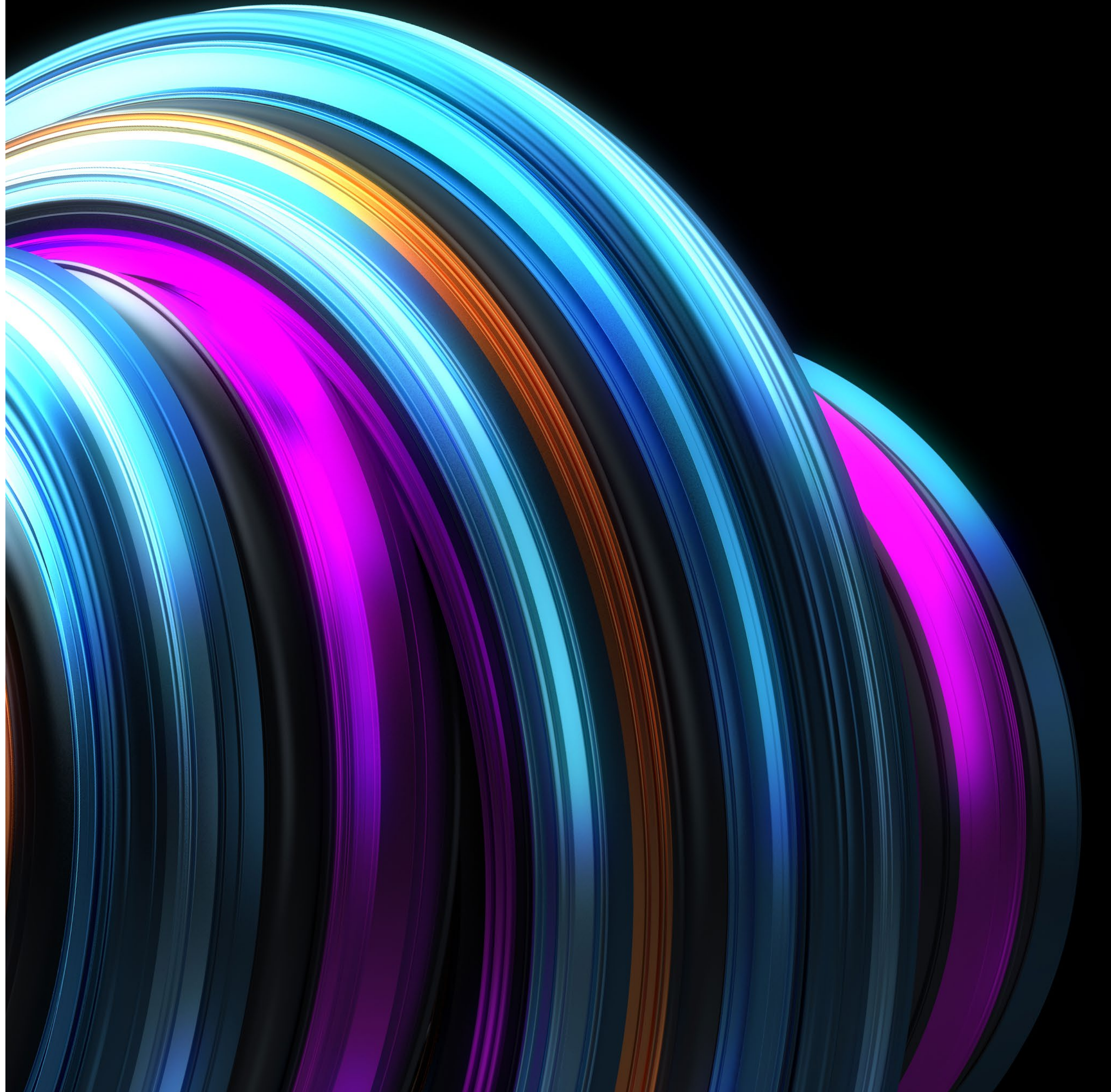
The Spanish Supreme Court allows the consideration of financial assets as held for the purpose of family business activity

On 10 January 2022, the Spanish Supreme Court issued a judgment with regard to the application of the Inheritance and Gift Tax benefits provided for family businesses in cases where financial investments are among the assets owned by the company. The issue was to determine if financial assets could be considered as assets related to the economic activity of the family business.



Family business tax benefits

The Spanish Inheritance and Gift Tax provides for a reduction in the taxable base covering 95%[9] of the family business's value if certain requirements are met. Among such requirements, the company must have been exempt for the purposes of Spanish Wealth Tax. Therefore, the tax benefit for Inheritance and Gift Tax purposes requires prior exemption under Wealth Tax provisions, which is established by reference to Spanish Personal Income Tax. The Spanish Personal Income Tax Act specifically refers to assets held for the purposes of a business activity in order to be considered exempt in the Wealth Tax.

Therefore, to apply the exemption in the Wealth Tax and the reduction in the Inheritance and Gift Tax, the taxpayers have to prove the need for cash or financial assets for the purposes of the business activity and, in that regard, they need to prove whether such assets were held for the purpose of the activity carried out.

Precedents of the case

In that case, the tax audit considered that the 95% reduction in the Inheritance and Gift Tax Law was not applicable to the value of the family business referred to financial investments due to the fact that, in the opinion of the tax auditor, financial assets cannot be considered as held for the purpose of the activity of the family business.

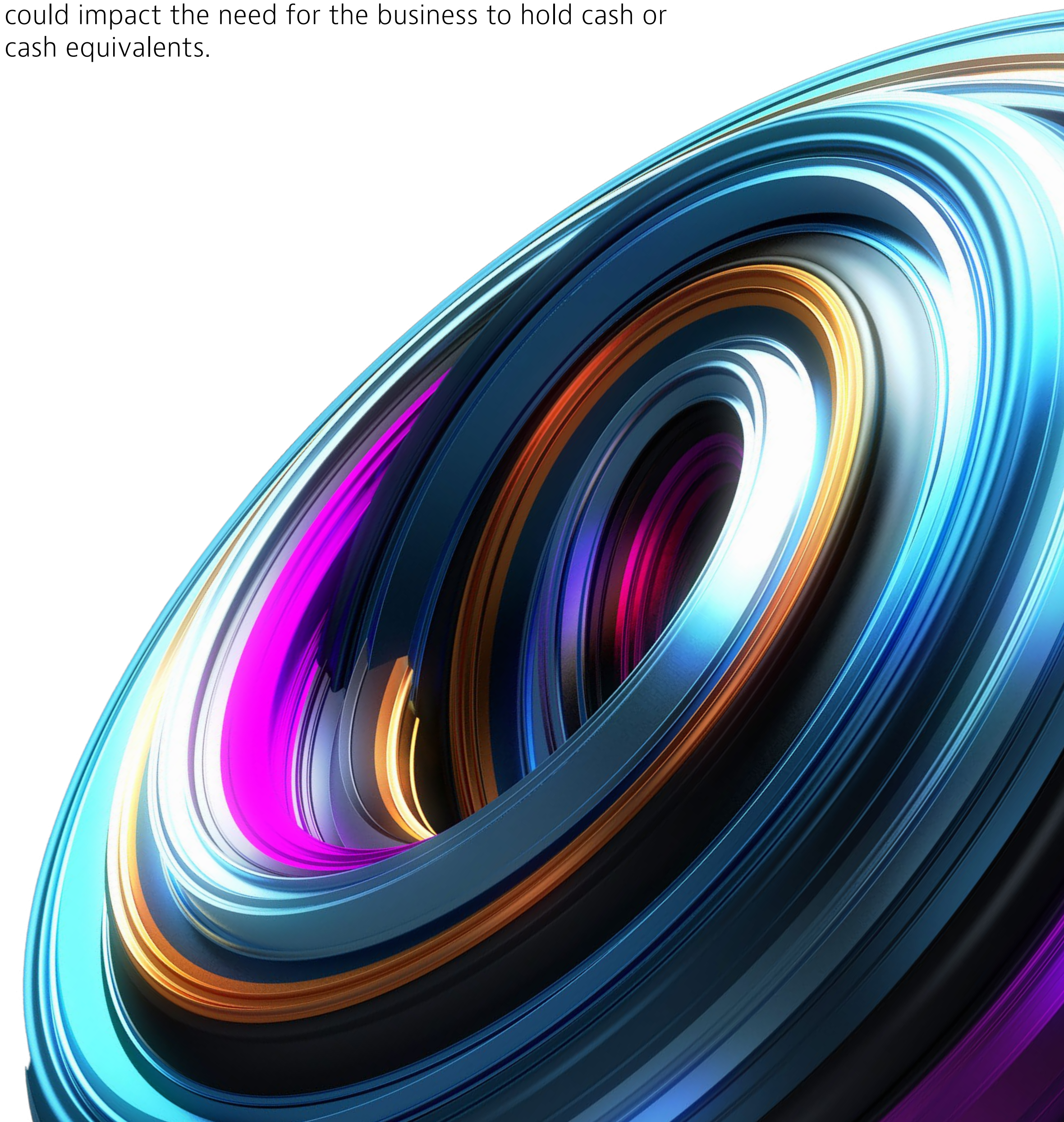
The Economic-Administrative Court and the High Court of Aragon (the family business was located in the Autonomous Region of Aragon) ruled in favor of the taxpayer on the ground that the conclusion reached by the tax authorities regarding the lack of involvement with the economic activity of the financial assets had not been sufficiently verified by the tax auditor, and due to the fact that, in this case, there were indications that the financial investments responded to the needs derived from the company's activity.

Judgment of the Supreme Court

The main conclusions of the Supreme Court can be summarized as follows:

- The fact that part of the family business's value is made up of cash or financial assets should not be an obstacle, per se, for the application of the Inheritance and Gift Tax reduction, provided that the requirement of the involvement of these assets to the company's business activity is accredited.

- The following indicators could contribute to prove that assets were held for the purposes of the business activity, and therefore these indicators could be considered relevant: the economic context and sector in which the entity carries out its activity; the average payment terms for both clients and suppliers; working capital ratios, business investment plans and any other circumstance, depending on each particular case, which could impact the need for the business to hold cash or cash equivalents.



9. The percentage of reduction depends on the autonomous regions. At state level and most autonomous regions, the reduction in the taxable base of the Inheritance and Gift Tax is 95%.

The Supreme Court states that it is absolutely reasonable that the cash generated by the company's activity could be invested in financial assets within the scope of a reasonable financial management. In that regard, the burden of proof of the involvement of these assets to the economic activity of the family business could not be attributed to the taxpayer, because the tax authorities are the ones that required proof that there is no such involvement and that it is not total in case the cash equivalents or financial assets are higher than the needs of working capital or unnecessary for the development of the activity.

In conclusion, the Supreme Court reiterates the necessary final interpretation of the family business tax benefits intended precisely for its protection and continuity, and admits the effectiveness and involvement of financial assets in the company's activity. In particular, the Supreme Court affirms that "the necessity of capitalization, solvency, liquidity or access to credit, among others, are not opposed by themselves to this idea of involvement" of this type of assets to the economic activity of the family business.

This judgment will help the defense of the interests of taxpayers affected by numerous adjustments carried out by the Spanish tax authorities that restrict the scope of the tax benefits provided for the family business.

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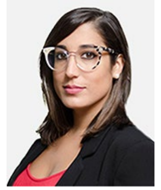

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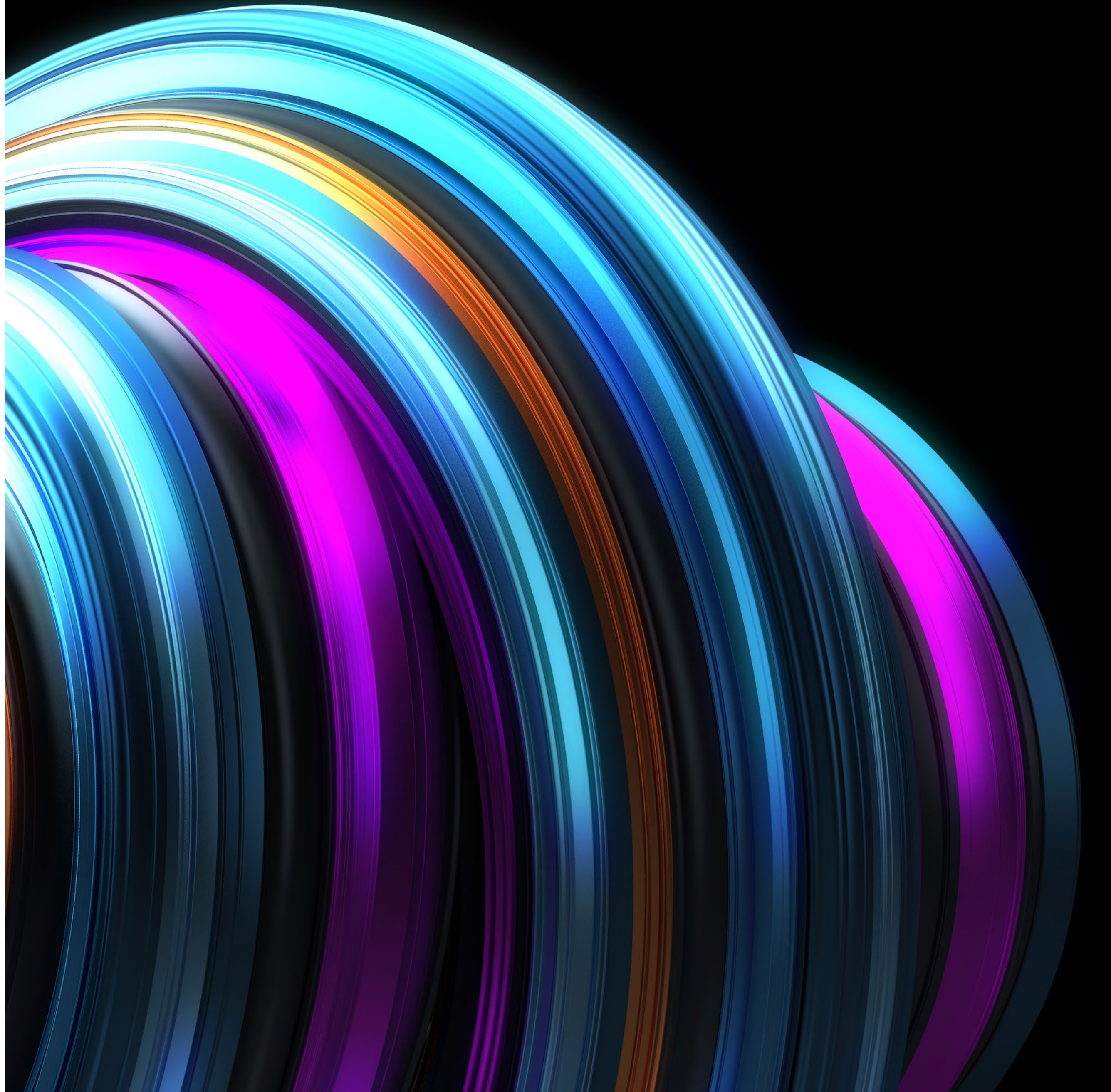
Recap of Personal Tax Reforms from the French Finance Act for 2022

The taxation of digital asset gains of individuals is evolving - Finance Act for 2022, Articles 70 and 79.

As a reminder, digital assets are defined by Article L.54-10-1 of the French Monetary and Financial Code as tokens that do not meet the characteristics of financial instruments, cash vouchers or:

Any digital representation of a value that is not issued or guaranteed by a central bank or by a public authority, that is not necessarily associated with a legal currency and that does not have the legal status of a currency, but that is accepted by natural or legal persons as a method of payment and that can be transferred, stored or electronically exchanged.

- The applicable regime for capital gain derived from the sale of digital assets on an occasional basis is provided for in Article 150 VH bis of the FTC. Gains are subject to income tax at a flat rate of 12.8%, plus 17.2% of social surtaxes.



1. Classification as noncommercial profits (bénéfices non commerciaux) of digital asset gains on a quasi-professional basis (Art. 70)

- Currently, this regime is applicable depending on the rules relating to professional profits, allowing taxation of those gains in the category of industrial and commercial profits if generated in a "professional" capacity, instead of the flat taxation (FTC, Art. 34).

- However, provisions of Article 150 VH bis of the FTC do not provide for any criteria to classify an activity as professional or nonprofessional. Consequently, the French administrative guidelines use the "usual" or "occasional" criterion of the exercise of the operations according to a case-by-case assessment of the circumstances in which the purchase and resale operations are carried out. This criterion was a source of uncertainty for taxpayers.

- The Finance Act for 2022 clarifies the regime. Thus, as of 1 January 2023, the proceeds from the operations of purchase, sale and exchange of digital assets carried out under similar circumstances to those characterizing an activity carried out on a professional basis by an individual will be taxed in the category of noncommercial profits, as for stock market transactions carried out on a professional basis (FTC, Art. 92,1-1 bis new).

- This new regime should allow in the future the application of criteria provided by the French administrative guidelines regarding the noncommercial profits regime. It gives more importance to the qualitative criteria (such as the higher overall annual amount of capital gains from this activity compared to other income derived from a professional activity or the use of specialized information and technology within the framework of the management of one's assets) rather than the criteria of the usual exercise of the operations and thus of their frequency.

2. Option for the taxation under the progressive income tax scale in case of occasional sale of digital assets (Art. 79)

- In order to be consistent with the capital gain tax regime, as of 1 January 2023, capital gains derived from the sale of digital assets may be taxed according to the progressive income tax scale, upon the taxpayer's express and irrevocable option rather than the flat taxation. This option will be global and exercised when filing the tax return, at the latest before the expiration of the deadline for filing. This option will not affect the possibility to opt or not for a taxation of dividends and capital gains at the progressive tax rates.

3. Article 123 bis and Trust: presumption of 10% ownership - Finance Act for 2022, Article 133

- As a reminder, the provisions of Article 123 bis of the FTC allow the taxing of an individual taxpayer, in the category of income from movable property, on the profits made by a structure, whether or not they are distributed, if (i) this entity mainly owns financial assets and is subject to privileged taxation; and (ii) if this individual tax resident in France holds, directly or indirectly, at least 10% of the financial or voting rights.

- According to the Tax Court of Appeal of Paris case law of 24 June 2020 (that we commented on previously), this anti-abuse mechanism is applicable to trusts. However, in this case, the judges deemed that it could not be considered that the taxpayers held 10% of the financial or voting rights in the trusts because the latter were irrevocable and, above all, discretionary.

- In order to bypass this issue, the Finance Act for 2022 provides that, as of 1 January 2022, the 10% holding condition is presumed to be met by the settlor or the beneficiary deemed to be the settlor of a trust within the meaning of Article 792-0 bis of the FTC.

- However, the taxpayer will be able to prove the contrary, even if the text specifies that this proof cannot be based only on the irrevocable nature of the trust and the discretionary management power of the trustee. Therefore, the burden of proof is reversed and the taxpayer now has to prove that they do not meet the 10% holding condition.

- In case of failure to prove it, the taxpayer will still be able to invoke the safeguard clause provided for by Article 123 bis of the FTC by proving that the holding of the assets in the trust does not constitute an artificial scheme whose purpose would be to bypass French tax rules. In this regard, it will be interesting to take into account the comments of the Tax Court of Appeal of Paris case law of 24 June 2020.

In particular, clients should be advised that they may find it difficultome with her in Los Angeles since 2007 (which would have enabled him to dispose of his estate free of restrictions, in accordance with Californian law). While the case caused outrage in France at the suggestion that their beloved entertainer was more American than French, the court more soberly undertook an analysis of the singer's Instagram posts to calculate how much time he spent in his birth country during his final years. The elder children's success meant French succession laws applied to Hallyday's worldwide assets and that they each qualified for an 18.75% share of his multimillion-dollar estate.[2] His widow said she would appeal, but the case ultimately settled on undisclosed terms.[10]

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4. Possibility for self-employed individuals to opt for corporate income tax and social security contributions on dividends exceeding 10% of profits liability - Finance Act for 2022, Article 13

- Article 13 of the Finance Act for 2022 will allow the self-employed individual to opt for the taxation of his business profits to corporate income tax (25% rate) rather than to the progressive rates of personal income tax (0% to 49%), without having to create and transfer the individual business to a company.

- Indeed, within the context of the law in favor of independent professional activity, Article L. 526-22 of the French Commercial Code will establish the new status of self-employed individual, which will enable the protection of personal assets from potential professional creditors by creating a separate professional estate. At the same time, the "EIRL" status, which allowed the option for corporate income tax, has been removed.

- Self-employed individuals will be able to opt for being assimilated for tax purposes to an EURL (entreprise unipersonnel à responsabilité limitée)[8] or to an EARL in the case of agricultural activity. This option may be exercised by individuals exercising an independent professional activity, whatever its nature (commercial, artisanal, agricultural or liberal), as long as they are automatically or by option subject to the actual tax regime, i.e., tax regime based on actual expenses.

- This option will be irrevocable and should trigger the same consequences as a cessation of business. The professional capital gains derived from this operation and the capital gains triggered by the transfer of assets from the private estate to the distinct professional estate will benefit from various allowances, exemptions and tax deferrals, which will have to be analyzed where appropriate.

- The option for the assimilation to an EURL will automatically lead to an option for corporate income tax. Therefore, the profits will be subject to the reduced 15% rate up to EUR 38,120 and to the 25% rate beyond that threshold. Nondistributed profits reinvested through the professional estate will not be subject to personal income tax.

- The self-employed individuals will be able to pay themselves (i) salaries, which will be deductible for corporate income tax purposes and subject to the progressive rates of personal income tax, and/or (ii) dividends that will not be deductible but subject to the flat rate of 12.8%.[9] Please note that dividends will also be subject to social surtaxes at the global rate of 17.2% and that the portion of dividends exceeding 10% of the net taxable profit will be subject to social security contributions for self-employed individuals.

10. Limited liability company with a unique shareholder.
11. And, if applicable, exceptional contribution on high-level income from 3% to 4%.

- Therefore, self-employed individuals should consider the pros and cons in opting for the corporate income tax regime on a case-by-case basis, knowing that this will be of particular interest in the event of reinvestment of profits through the professional estate.

5. Extension and reform of the fixed rebate applicable to capital gains realized by a director selling SME shares and retiring - Finance Act for 2022, Article 19

- The EUR 500,000 fixed rebate applicable to capital gains realized by directors of small and medium-size enterprises (SME) who are retiring is extended by Article 19 of the Finance Act for 2022 from 31 December 2022 to 31 December 2024.

- In addition, according to Article 150-0 D ter of the FTC, the seller has to cease any functions in the company whose shares are sold and apply for retirement within the two years following or preceding the sale. However, the Finance Act for 2022 extended the period to three years for SME directors who applied for retirement between 1 January 2019 and 31 December 2021, provided that retirement precedes transfer.

6. Amendment of the conditions for the exemption of professional capital gains - Finance Act for 2022, Article 19

- Article 19 of the Finance Act for 2022 provides for several flexibility measures for the exemptions applicable to professional capital gains realized upon sale of a business.

- Indeed, according to Article 151 septies A of the FTC, capital gains realized on the sale of a business by the owner/manager who is retiring can benefit from an exemption if certain conditions are met (European SME, activity carried out for at least 5 five years, etc.).

- Moreover, Article 238 quindecies of the FTC provides for a total or partial exemption of professional capital gains realized upon the sale or gift of an individual business or a full branch of activity if certain conditions are met (activity carried out for at least 5 five years, value of the assets not exceeding €EUR 500,000, etc.)

The flexibility measures provided for by the Finance Act for 2022 are the following ones:

- Both exemptions are applicable in case of transfer / sale of a business under a lease-management contract to a third party (if the transaction concerns all the assets contributing to the exploitation of the business which that were covered by the lease-management contract or a comparable contract). It is no longer required that the transfer is made to the lessee-manager.

- The upper limits provided by Article 238 quindecies of the FTC are raised to (i) €EUR 500,000 for a total exemption (instead of €EUR 300,000) and (ii) €EUR 1,000,000 million for a partial exemption (instead of €EUR 500,000).

- These upper limits are now assessed based on "the stipulated price of the transferred items or their market value, to which are added the capital expenses and the indemnities stipulated for the benefit of the seller for whatever reason."

- Sellers who applied for retirement between 1 January 2019 and 31 December 2021 have 3 three years (instead of 2 two years) to transfer their business, to the extent the retirement occurred before the transfer.

- Withdrawal of tax benefits in case of non-reporting of foreign assets - Finance Act for 2022, Article 140

- Article 140 of the Finance Act for 2022 extends the restrictions contained in Article 1731 bis of the FTC, which deprives taxpayers of the possibility to use tax benefits in the event of serious tax infringements.

- Indeed, Article 1731 bis of the FTC provides that categorical losses and tax reductions cannot be offset against income tax or real estate wealth tax (IFI) reassessments resulting from serious tax infringements and triggering application of penalties equal to 40%, 80% or 100% of the reassessed taxes (e.g., failure to file a tax return, concealed activity, abuse of law, etc.).

- As from 2021 income tax and 2022 real estate wealth tax, the provisions of Article 1731 bis of the FTC also apply for the 80% penalty provided by Article 1729-0 A of the FTC, i.e. ., in the event of tax reassessments related to assets held through undeclared foreign bank accounts, capitalization contracts or trusts. In that case, the taxpayers will no longer be able to offset categorical losses and tax reductions against the tax reassessments resulting to in the application of the 80% penalties.

7. Electronic transmission of inheritance tax returns - Finance Act for 2022, Article 136

- New Article 802 bis of the FTC provides the conditions under which inheritance tax returns can be electronically transmitted to the tax authorities. Indeed,

> “When the notary mandated by the heirs, legatees, their legal guardians or curators, sends a copy of the tax return provided by Article 800, I with an online service of the tax authority, he/she adds on this copy the mentions certifying the parties' identity and the conformity to the original.

- Therefore, an obligation is introduced for the notary to certify the reliability of the digital copy transmitted to the tax authorities.
- This measure is part of the general trend towards toward the dematerialization of tax returns.

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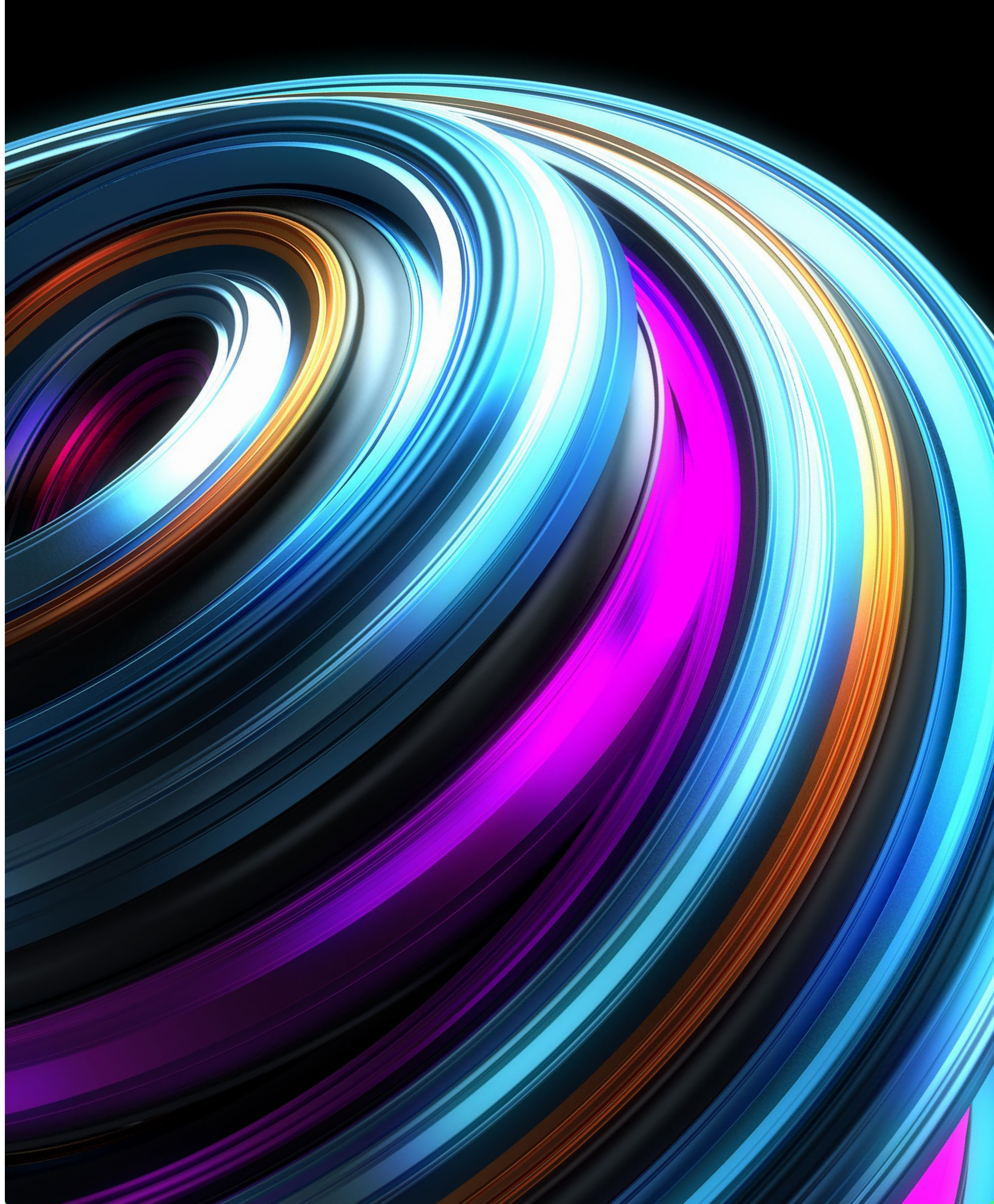
ATAD3: The EU Commission's Corporate 'Unshell' Proposal and its impact on private clients and holding structures

The pressure on holding companies, trust and investment structures, any other vehicle with little economic substance, as well as on family offices has been steadily increasing over the last years with the introduction of several anti-avoidance measures such as the general anti-abuse measure, CFC rules, principal purpose test under the MLI, and case law developments such as the Danish cases of the ECJ. Recently, the European Commission issued a proposal for a new Directive ("Proposal") specifically aimed at curtailing the use of legal entities in the EU with no or minimal substance and no real economic activity (so-called "shell" entities). The Proposal includes an annual reporting requirement for entities at risk of being considered a shell, and determines adverse tax consequences in case an entity is effectively considered to be a shell.



The EU Commission has announced in a press release that it will present a similar initiative this year to respond to the challenges linked to non-EU shell entities.

Although the Proposal is targeted at the use of shell entities for tax evasion and avoidance purposes, it goes beyond the improper tax use of shell entities so that vehicles (including companies, partnerships, trusts) with little substance may enter into scope even if set up with valid holding and/or investment purposes. The relevant criteria of the Proposal to determine whether a vehicle is at risk of being considered a shell include the receipt of passive income (broadly determined), the outsourcing of administrative activities and the cross-border nature of the activity. It is hence clear that a private client's holding and trust structures and family offices should be held against the light of the Proposal to determine the consequences and consider how the structures can be made more robust, especially considering that the current proposal provides for a lookback period of two years.

Which entities are in scope?

The Proposal targets any legal entity (irrespective of its legal form, including companies, partnerships, trusts…) that is a tax resident in an EU member state and that is at a risk of qualifying as a shell.

Three cumulative 'gateways' determine whether an entity is at risk of being considered a shell: (i) more than 75% of the entity's income is passive income (broadly defined, e.g., interest or other income from financial assets (including crypto assets), royalties, dividend income, capital gains, income from real estate, income derived from intragroup administration services); (ii) the entity is engaged in cross-border activity; and (iii) the entity outsources the administration of day-to-day operations and the decision-making on significant functions. The latter, under the current text of the Proposal, probably also includes the situation where some directors are "professional directors" provided by trust or administration services companies.

A long list of entities that are out of scope is provided in the Proposal, which includes, amongst others (i) regulated and supervised entities (such as credit institutions, pension funds, (re)insurance undertakings, regulated investment funds such as UCITS, AIFS, AIFMS, securitisation vehicles if they meet certain conditions, etc.); (ii) companies with listed securities, (iii) holding companies with shareholders in the same EU member state; and (iv) companies with at least five own FTEs or members of staff exclusively carrying out the activities generating the relevant income.

Annual reporting requirement

If all gateways are met, the entity is at risk of being considered a shell and will need to comply with an annual reporting obligation in its member state of residence through which it should demonstrate, with documentary evidence, that all indicators of minimum substance are met in order not to be qualified as a shell. The reported information will be automatically exchanged between member states through the Common Communication Network (CCN).

These indicators of minimum substance are (i) the availability of premises in the EU member state for exclusive use; (ii) the availability of at least one active bank account in the Union; (iii) qualifying directors or personnel.

Today, all these indicators still raise questions (e.g., what qualifies as exclusive use of premises, when is a bank account considered active), but the main question will be whether the entity has qualifying directors or personnel available. In this context, the Proposal requires at least one director who (i) is tax resident in the member state of the entity or at a distance that is "compatible with the proper performance of his/her duties"; (ii) is qualified and authorised to take decisions; (iii) is actively and independently using such authorization; and (iv) is not performing a function as director or employee in a nonassociated enterprise (i.e., not a "professional director"). Alternatively, the Proposal requires that the majority of the entity's FTEs are (i) tax resident in the member state of the undertaking or at a distance compatible with the performance of their duties; and (ii) is qualified to carry out the activities.

Note that the entity can request its member state of residence to be exempt from the reporting obligation if it is able to demonstrate that the interposition of the structure does not lead to a tax benefit for its beneficial owner(s) or of the group as a whole. Such exemption may be granted for one year with a possible extension for five years.

Qualification as a shell and adverse tax consequences

The entity that does not meet all of the above-mentioned indicators will be presumed to be a shell. Such presumption can only be rebutted by providing additional supporting evidence demonstrating that the entity has performed, had control over, and bore the risk of the business activities by providing evidence regarding (i) the commercial rationale behind the undertaking's establishment; (ii) information about employee profiles; (iii) evidence that decision-making is taking place in the entity's member state of residence.

If such additional supporting evidence is not provided, the finding of the entity being considered a shell will lead to the following adverse tax consequences:

(i) The source country may apply (higher) withholding tax, as the benefits under the Parent-subsidiary Directive and the Interest and Royalty Directive, as well as under the tax treaties between EU member states, are no longer available;

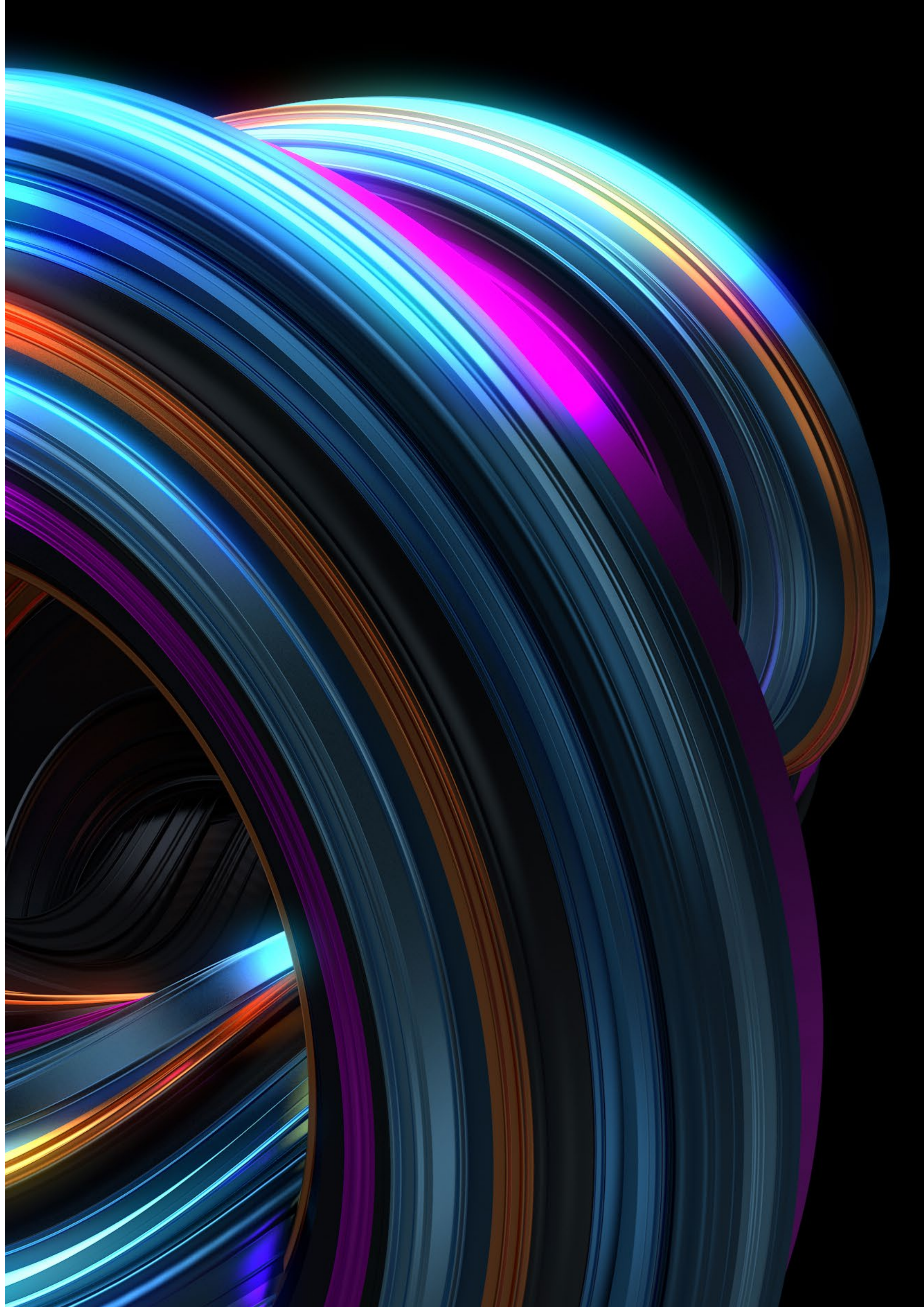
(ii) The entity will no longer receive a certificate of tax residence from its member state of residence or will obtain a certificate that states that it is no longer entitled to the benefits of the EU Directives and the tax treaties with other EU member states.

(iii) The shell's shareholder's country may tax the relevant income as if it had accrued directly to the shareholder (in other words, apply a look-through approach) and deduct the tax paid on such income at the level of the shell.

Many questions arise on the exact tax consequences and implications of a shell finding, both in EU situations and in situations involving a third country. As mentioned, the Proposal currently suggests the application of a look-through approach, but is unclear how this will be applied in practice. For example it is unclear, in an EU situation, whether the source country may take into account the EU Directives and/or tax treaties with the member state of the shell's shareholder when determining the applicable withholding tax rate.

Penalties

The Proposal determines that the member states will lay down rules on penalties, which are effective, proportionate and dissuasive. This wording is quite standard and gives member states some discretion on determining the appropriate level penalties (that can lead to some considerable differences between member states, as we have seen with DAC 6, for example). However, the Proposal also states that the penalties should include an administrative pecuniary sanction of at least 5% of the undertaking's turnover in the relevant year in case of non- or late compliance with the reporting obligation.



Concluding remarks

A consultation period is currently open with the EU Commission until March 16, and it is expected that many parties will submit comments as the current Proposal triggers many question marks (such as its compatibility with primary EU law). In addition to the many uncertainties that remain in terms of application of the rules under the Proposal, it is also currently unclear if and when the Proposal will actually make it into law.

The negotiations have started at the level of the EU Council, where the unanimous consent of all EU member states will be required to adopt the Proposal. The EU member states then need to implement the Directive into their domestic law. The current envisaged time line indicates that the Directive should be implemented by 30 June 2023 and take effect as of 1 January 2024.

Even if this seems like an ambitious time line, it is nevertheless time to act, considering that the Proposal provides for a lookback period of two years to determine whether an entity is at risk of being a shell. Indeed, under the Proposal's current time line, this would mean that the assessment of whether an entity is at risk of being a shell will be based on the facts and figures of 2022 and 2023.

Mindful of DAC 6, where a lookback period was also introduced, action should hence be taken as soon as possible with respect to EU holding, investment and trust structures and family offices, amongst others, to determine whether entities in the structure are at risk of being considered a shell. Relevant actions include holding the client's trust, holding and investment structures against the light of the Proposal, determining how one will establish and demonstrate towards the tax authorities (with documentary evidence) that the relevant entities are not shells at risk of tax abuse, by establishing the adverse tax consequences in case this cannot be demonstrated, as well as appropriate restructuring in the latter case.

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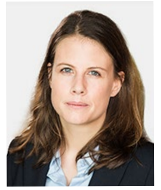

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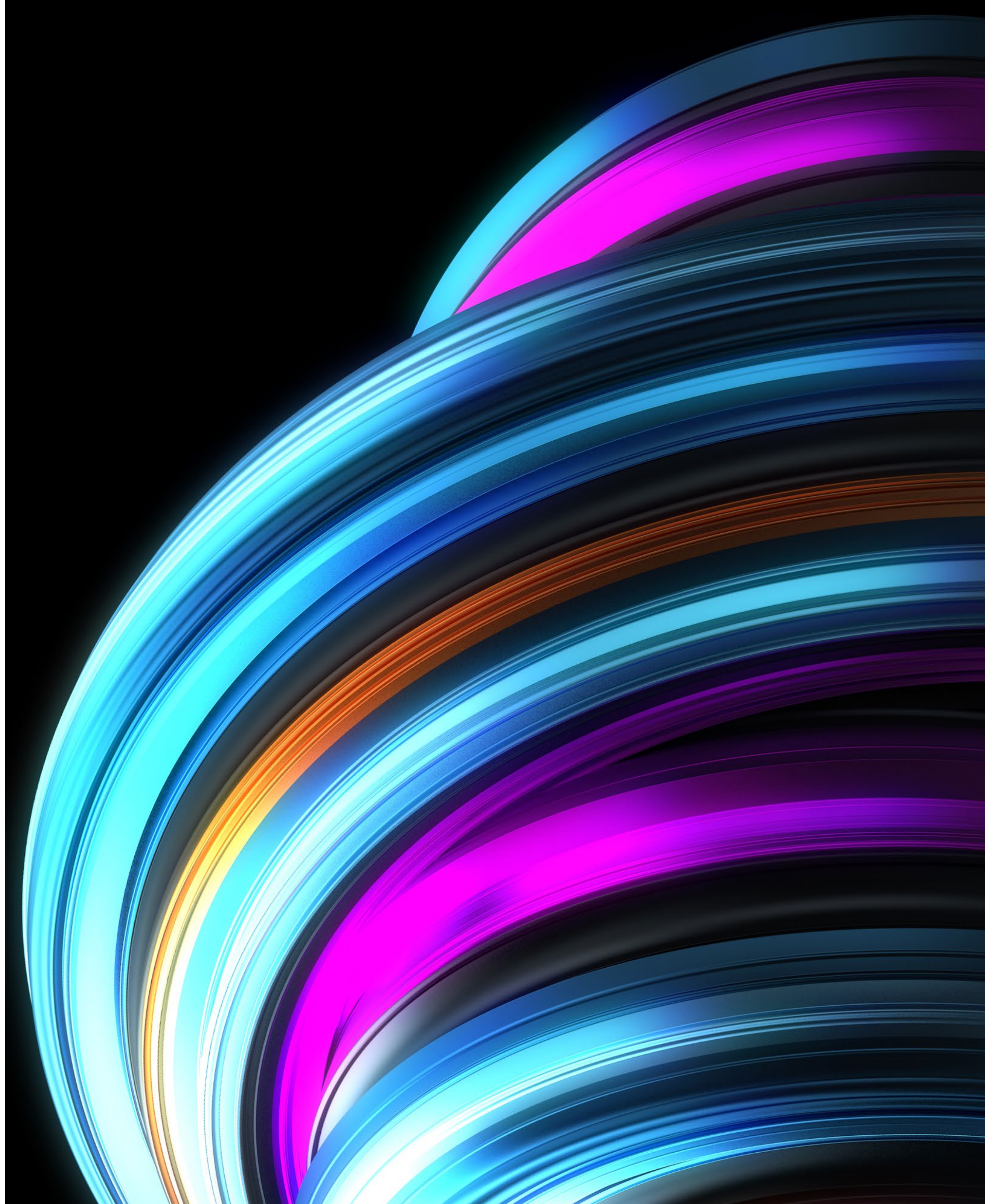
Public disclosure of the beneficial owners of overseas entities owning UK property

The invasion of Ukraine by Russia has put an increased focus on the beneficial ownership of property in the UK. The government has published draft legislation that will implement a public register detailing the ultimate beneficial ownership of UK property.

This represents a significant development and will impact clients holding UK property through an overseas company, trust, partnership or similar structure. Such clients should seek immediate advice to ascertain their reporting obligations and the impact of the legislation on their structures.



Background

The government has been discussing the possibility of a public register of overseas entities owning UK property since 2016. The idea was this would extend the "persons with significant control" (PSC) register that was introduced for UK companies in April 2016. It was anticipated that the register would be implemented by 2021, but this had stalled (possibly as a result of Brexit, general elections, COVID-19 etc.). Following the invasion of Ukraine by Russia, this matter has been brought to the top of the political agenda and is now a priority for the government.

What is proposed?

The measures are included in the Economic Crime (Transparency and Enforcement) Bill, currently before Parliament. The bill will create a publically available register identifying the ultimate beneficial owner(s) (i.e., natural persons) of overseas entities that hold land in the UK. Various sources cite that there are more than 90,000 properties in England owned by overseas companies. Of those, approximately 85,000 are owned by companies located in jurisdictions where the names of the company's ultimate beneficial owners are not publically ascertainable.

The new register will be administered by the Registrar of Companies for England and Wales. The rules are closely aligned with those that apply under the existing PSC regime and broadly require public disclosure of the following:

- A person who holds (directly or indirectly) more than 25% of the shares in the overseas entity;
- A person who holds (directly or indirectly) more than 25% of the voting rights in the overseas entity;
- A person who holds the right (directly or indirectly) to appoint or remove a majority of the board of directors of the overseas entity;
- A person who has the right to exercise, or actually exercises, significant influence or control over the overseas entity; and
- A person who has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or entity where (where the trustees of a the trust, — or the members of a partnership, unincorporated association or other entity, that is not a legal person under the law by which it is governed governed — meet any of the conditions specified above (in their capacity as such))

Whilst cases (a) to (c) may be considered more straightforward, there is likely to be complexity around cases (d) and (e), especially where an overseas entity is held within a wider trust structure. Depending on the facts and terms of the trust, it may be that the protector, settlor, trustees, and in some cases, a beneficiary could be the person regarded as the ultimate beneficial owner. The bill provides little detail on this issue and one would expect this to be expanded in official guidance on similar terms to that currently in existence for the PSC rules.

For example, under the current PSC statutory guidance, a person would exercise "significant influence or control" over a company if (i) they are significantly involved in the management and direction of the company, or (ii) their recommendations are always or almost always followed by shareholders who hold the majority of the voting rights in the company. In relation to a trust, a person has the right to exercise "significant influence or control" if they have the right to (i) appoint or remove any of the trustees, (ii) direct the distribution of funds or assets, (iii) direct investment decisions of the trust, (iv) amend the trust deed, or (v) revoke the trust.

The information that must be provided about the beneficial owner will include their name, date of birth, nationality, usual residential address, service address and the date on which the individual became a registrable beneficial owner. There are obligations to update this information as it changes. For existing owners, there will be a transitional period of 18 months for the overseas entity to register.

If an overseas entity has no reasonable cause to believe that it has any registrable beneficial owners, then information about each managing officer of the entity must be provided instead. There currently appears no definition of what is “reasonable” so further guidance on this point may be given.

Restrictions will be placed on persons who do not comply with the registration requirement to make it difficult to transfer the property, and those who provide false information could be jailed for up to five years. The law will apply retrospectively to property bought by overseas owners. Overseas entities that wish to purchase land in the UK will be required to have satisfied the registration requirement before they are able to register their title. Once registered, an entity will be allocated an overseas entity ID by the Registrar of Companies.

There are specific provisions relating to limited partnerships. The draft bill states that a person does not meet the definition of a beneficial owner of an overseas entity by virtue of only being a limited partner, or by holding (directly or indirectly) shares or a right in a limited partner.

The legislation also addresses the nominee position, noting that a share held by a person as nominee for another is to be treated as held by the other (and not by the nominee). It should be noted that the nominee itself may have the requirement to register on the existing UK Trust Register.

> The new rules will also impact banks and other mortgage lenders. Banks may wish to review existing documents to ensure that noncompliance with the registration requirements is an event of default (to allow a lender to take action to protect their position), and evidence of compliance with the registration requirements is a condition precedent to any loan. Where arrangements are already in place, banks should ensure that borrowers comply with the registration requirements. This may involve relying on the further assurance provisions to request appropriate evidence of compliance.

Other points to note regarding Unexplained Wealth Orders

The draft legislation also seeks to increases the UK National Crime Agency’s powers to seek unexplained wealth orders (UWOs).

UWOs are an investigatory tool that can be used to require an individual to prove that a particular asset was obtained through legitimate means or face civil recovery and/or criminal proceedings. Law enforcement agencies will be given more time to review material provided in response to a UWO (this can be extended from 60 days, provided the enforcement authority is working diligently and expeditiously, further time is needed by the authority, and it is reasonable in all the circumstances for the time limits to be extended).

The bill also gives such agencies protection from the substantial legal costs that can result from an unsuccessful UWO application. This was previously regarded as a factor discouraging applications for UWOs. Under the draft legislation, costs are only to be awarded where the relevant authority acted “unreasonably”, “dishonestly” or “improperly”. These terms are not defined within the legislation so one would expect this to be open to judicial interpretation.

It is expected that the UK authorities will increase their use of UWOs over the coming months.

Conclusion

Beneficial ownership and transparency will be a key focus in the coming years and the balance of when and how these measures will be introduced (which was more uncertain after Brexit) has changed. In the context of complex wealth management structures (such as discretionary trusts with multiple beneficiaries, private trust companies, limited partnerships, foundations, etc.) the application of the rules will be complex and require careful navigation.

It is essential that clients are ahead of the curve in anticipation for what will be significant compliance obligations with potential criminal penalties for noncompliance.

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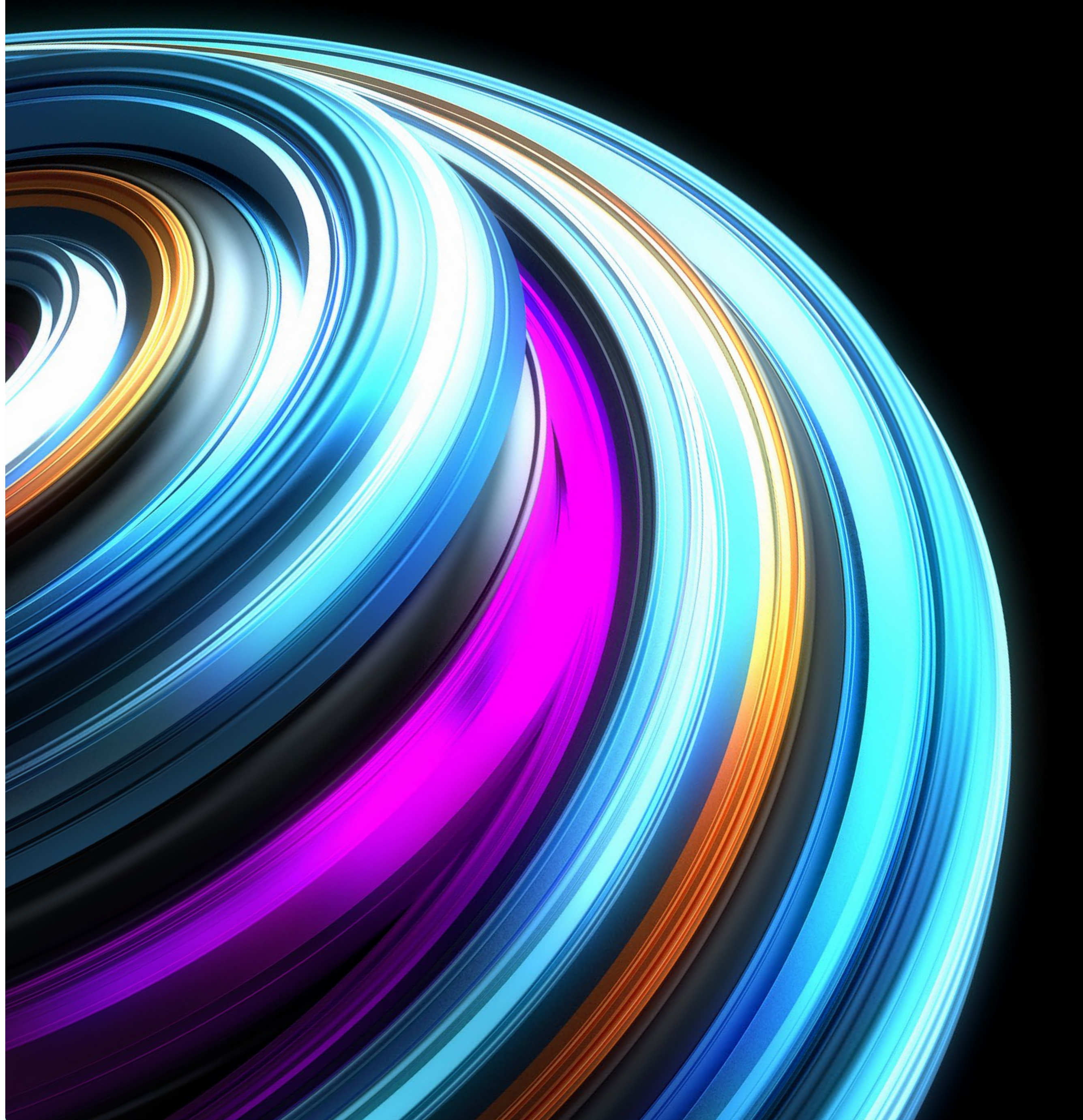
Update: Russia Sanctions and disclosure of beneficial ownership

The Economic Crime (Transparency and Enforcement) Bill (the “Bill”) passed its final stage in the House of Commons on 7 March. It will now head to the House of Lords for approval, after which it will receive Royal Assent and become law.

There were a number of amendments made to the original bill which are significant and should be considered carefully. We provide a summary of these below. Persons likely to be impacted should seek immediate advice to ascertain their reporting obligations and the impact of the legislation on their structures.



Background

For a detailed analysis of the provisions of the Bill relating to the public disclosure of those holding UK real estate through an overseas entity, please see our client alert dated 2 March 2022. For a detailed analysis of the sanctions imposed by the UK on Russian individuals and how this impacts trustees, banks and other advisors, please see our client alert dated 4 March 2022.

In summary, the objectives of the Bill are to (i) create a publicly available register identifying the ultimate beneficial owner(s) (i.e. natural persons) of overseas entities that hold UK real estate; (ii) reform the use of unexplained wealth orders ("UWOs"); (iii) amend penalties imposed as a result of breaches of financial sanctions under the Policing and Crime Act 2017; and (iv) amend the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA") (enabling legislation pursuant to which sanctions regulations are created). Therefore, the Bill provides an opportune forum for urgent changes to be made to existing legislative regimes without requiring separate legislation to be enacted for this purpose.

In total 95 amendments to the Bill were tabled by Members of Parliament, of which 28 were approved during the debate. The approved amendments focus on bolstering the effectiveness of the property ownership register and amending SAMLA to intensify sanctions enforcement. In addition, administrative (reporting) obligations were introduced for the Secretary of State, as outlined below, in order to monitor the effectiveness of the UWO regime. In this alert we outline the key amendments approved to the extent that they relate to England and Wales.

What amendments have been made

Amendments relating to disclosure of beneficial ownership of UK real estate

The key amendments to parts of the Bill relating to the public disclosure of UK real estate being held through an overseas entity are as follows:

- To amend clause 8 of the Bill to raise the maximum daily default fine for non-compliance with the requirement to provide an updated statement to the Registrar of Companies (the "Registrar") in respect of an overseas entity's beneficial ownership within 14 days of the end of each 12 month period following its registration. The Bill was initially drafted to provide for a "daily default fine not exceeding the greater of £500 and one-tenth of level 4 on the standard scale" (currently £250), however, this has been amended to an amount "not exceeding the greater of £2,500 and one half of level 4 on the standard scale" (currently £1,250). The legislation provides that failure to comply could result in an offence being committed by the entity and "every officer of the entity who is in default" and will continue until the overseas entity has delivered the statements and information required by the Registrar. An offence is also committed by every officer who was not involved in the initial failure to comply but who was subsequently in default in relation to a continued contravention. The legislation appears to provide for a (un-capped) cumulative fine for non-compliance, however, the precise application of such penalties should become clearer in the near future. We recommend obtaining detailed advice in relation to the various penalties which may accrue pursuant to the amended Bill.
- Similar to the amendment above, clause 26 of the Bill was amended to raise the maximum daily default fine for non-compliance with the requirement to deliver relevant documents to the Registrar where the Registrar has identified inconsistencies in the register. In relation to this clause, the Bill has also been amended to increase the daily default fine from an amount "not exceeding the greater of £500 and one-tenth of level 4 on the standard scale" to an amount "not exceeding the greater of £2,500 and one half of level 4 on the standard scale". In respect of this clause, an offence could be committed by the overseas entity and "every officer of the entity who is in default" and will be committed if the relevant documents are not delivered to the Registrar within 14 days after the date on which the Registrar issues notice to the entity that it requires such documents.
- To amend clause 16 of the Bill to require the Secretary of State to issue (initial) regulations prior to any applications being made for registration in the register of overseas entities. It is intended that these regulations should provide further details regarding the information that must be verified to the Registrar upon registration, the person by whom the information must be verified and the statement, evidence or other information which must be delivered to the Registrar. There is currently no timeline provided as to when these regulations would be issued, however, we will be monitoring this on an ongoing basis.

- To amend Schedule 3 of the Bill to reduce the transitional period within which overseas entities are required to register from 18 months to six months. As a result, within six months of the enactment of the Bill, an overseas entity owning UK real estate will be required to register with the Registrar (provided it is not exempt). Failure to comply with this requirement will result in an offence being committed by the entity and every officer of the entity who does not comply. Failure to comply could result in imprisonment of up to two years and/or a fine in addition to a restriction being placed on the Land Registry prohibiting certain dealings with the land by the unregistered overseas entity.

Amendments relating to the sanctions regime

The key amendments applying to SAMLA are as set out below. It should be noted that these are very detailed and so appropriate advice should be obtained.

- Streamlining the process of making sanctions regulations by amending the application of SAMLA to minimise the requirements with which ministers must comply when introducing new sanctions regulations. The Bill provides that a minister may make sanctions regulations where they consider that it is appropriate for the purposes of compliance with a UN obligation, any other international obligation or for various other discretionary purposes (specified in section 1(2) of SAMLA), including where this is in the interests of national security. Where a minister proposes to issue sanctions regulations for purposes under section 1(2), section 2 previously required that the minister demonstrate that there are good reasons to pursue that purpose and that the imposition of sanctions is a reasonable course of action for that purpose. However, the Bill removes section 2, therefore, minimising the requirements to be complied with when issuing new sanctions regulations. It is intended that this amendment to the Bill will "simplify the procedural requirements that can delay the implementation of sanctions".

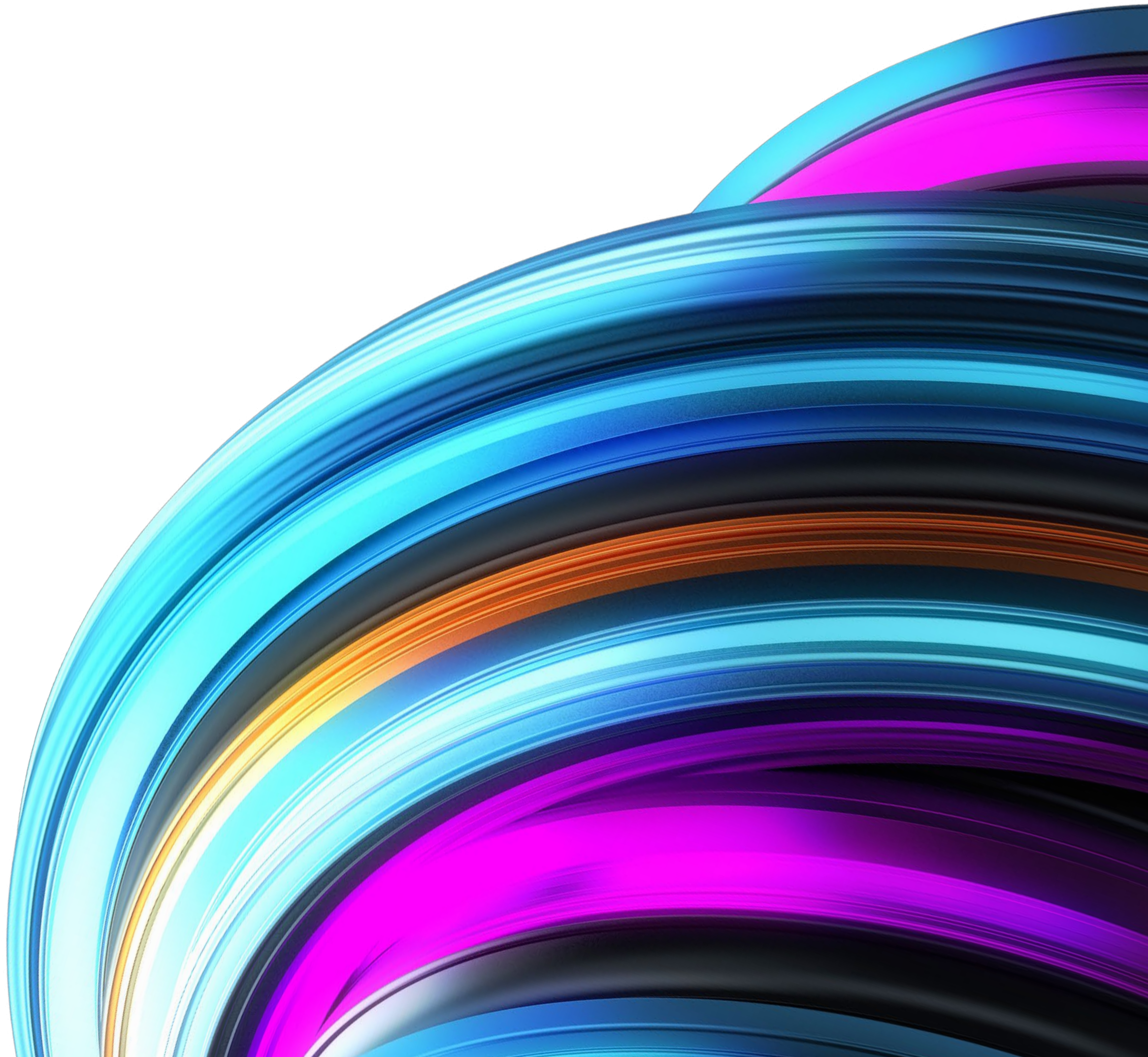
- Introducing a procedure for urgent designation of a person by name (and by description, for example in respect of an organisation) such that they become subject to relevant sanctions regulations. Currently, a minister may only designate a person where they have reason to believe that they are an "involved person". An involved person is a person who is or has been involved in an activity specified in the relevant sanctions regulations or a person owned or controlled (directly or indirectly) by, acting on behalf of or a member off or associated with such a person. However, pursuant to the amendments, this requirement will not need to be satisfied under the new "urgent procedure". Under the urgent procedure, only the following will be required to be satisfied:

  - Similar sanctions (whenever made) apply to a person under the law of the United States of America, the European Union, Australia, Canada or any other country specified by an appropriate minister; and

  - It is in the public interest to designate a person under the urgent procedure.

Amendment relating to UWOs

To introduce a new clause 31 to the Bill which in turn introduces in to the Proceeds of Crime Act 2002 a requirement for the Secretary of State to prepare reports for each 12 month period setting out how many UWOs have been made and applied for in England and Wales.



Conclusion

The scope and interpretation of these amendments will become clearer in the coming weeks as guidance is released and ministers exercise their powers to issue further regulations (in particular in relation to the new register of beneficial ownership). Therefore, the precise impact of the Bill will need to be reviewed on an ongoing basis.

It is critical for trustees, banks and other providers who have any structures connected to Russia (whether via settlors, beneficiaries, protectors or trust assets) to consider urgently if any of the sanctions regimes may impact them. Failure to comply could result in significant criminal and/or financial penalties being imposed. Similarly, persons likely to be impacted by the new register of beneficial ownership of overseas entities holding UK real estate should urgently consider their reporting obligations ahead of incoming deadlines.

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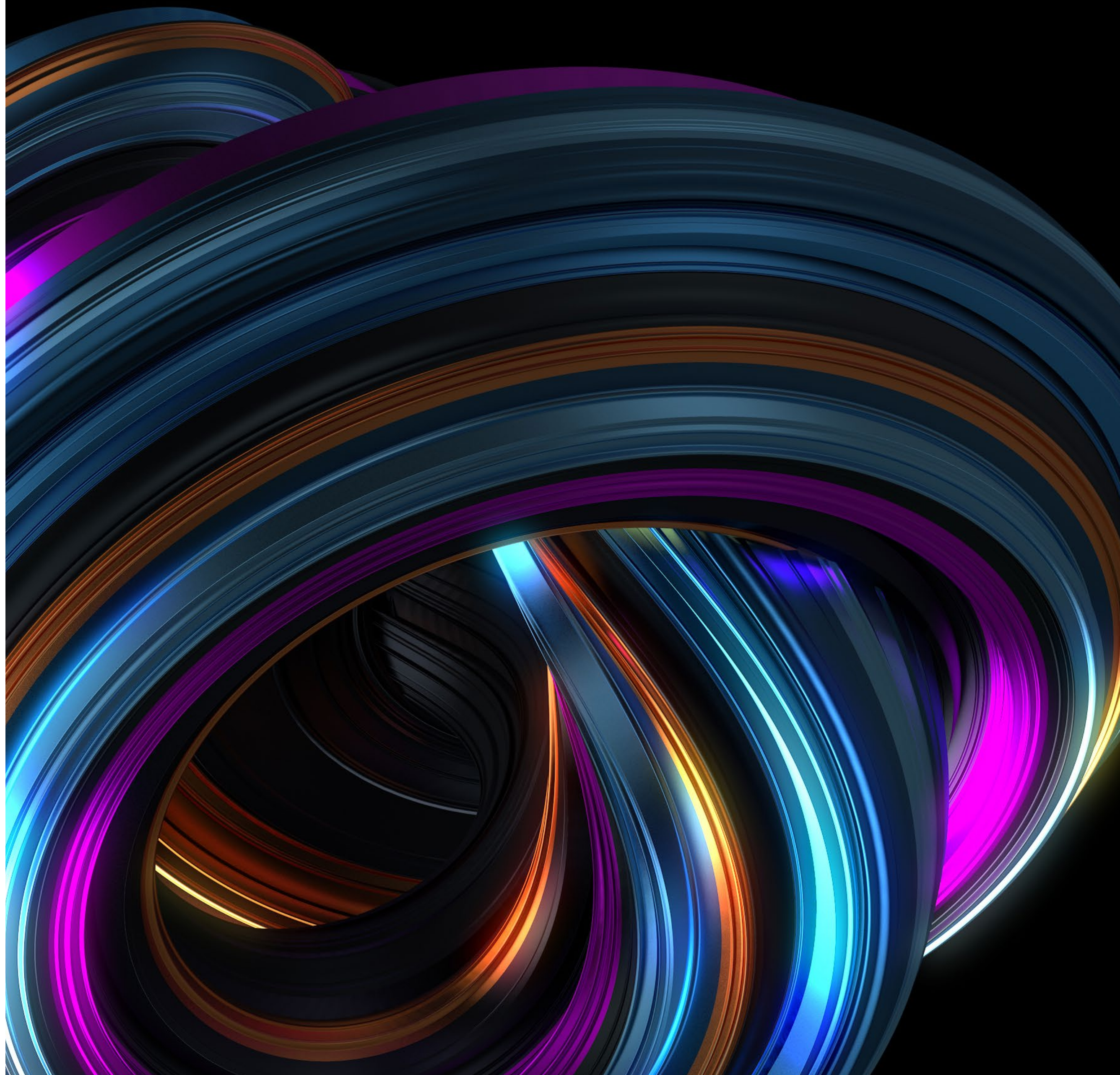
UAE announces the introduction of a federal corporate tax system

The UAE Ministry of Finance (MoF) announced on 31 January 2022 the introduction of a federal corporate tax (CT) regime that will apply to all UAE businesses except for those operating in the extraction of natural resources (which will remain subject to Emirate-level corporate taxation). The UAE CT regime will apply, in certain circumstances, to individuals who hold a commercial registration to perform such activity in the UAE.



The federal CT system will become effective for financial years starting on or after 1 June 2023. The applicable tax rate will be 0% for taxable income up to AED 375,000 (approx. USD 100,000) and 9% on taxable income above that threshold. Large businesses, defined as those with global consolidated group revenue above EUR 750 million, may be subject to a different tax rate (expected to be 15%), which will be in line with the Pillar Two OECD BEPS project.

The starting basis of determining taxable income will be the accounting net profit (in line with internationally acceptable accounting standards). The specific CT adjustments that can be made will be announced in due course although the expectation is that ordinary and necessary business expenses incurred in the production of taxable income should be deductible. Income from (i) dividends, (ii) capital gains and (iii) qualifying intragroup transactions and reorganisations will not be included within taxable income, subject to satisfaction of certain conditions (which are likely to include an ownership threshold and a minimum holding period).

Entities that solely operate in free zones (and in compliance with the regulatory requirements) are expected to retain the existing tax holidays (which could be for a period between 15 to 50 years), although there will still remain a filing obligation for free zone entities. Banking operations will be subject to the tax, but further details on the current Emirate-level corporate taxation will be provided in due course.

There will be no withholding taxes on payments made to nonresidents.

The filing date for the tax return has not been confirmed, however, only one CT return is required per financial period (i.e., a year) and this is to be filed electronically. No detail has been provided regarding the due date for the payment of any CT, however it has been confirmed that there will be no advanced payment regime.

Key takeaway

The UAE MoF confirmed that there will be no introduction of personal income tax in the UAE. As such, income generated by individuals should not be subject to UAE CT, unless an individual holds a UAE commercial license in respect of that UAE sourced income. Therefore, individuals who hold a commercial license and generate income from this will need to understand if their activities fall within the remit of the UAE CT framework.

Businesses, such as family offices and/or asset holding companies, are expected to fall within the UAE CT framework. To the extent that these entities are established and operate solely within a UAE free zone then they should not be subject to UAE CT, although there will remain a CT registration and annual filing obligation. Where entities are set up outside of a UAE free zone, however the business activities are outside of the UAE/conducted solely within a UAE free zone, then it may be worth considering restructuring the existing UAE operations to house those within a UAE free zone such that the income generated is not subject to UAE CT.

As an overall observation, the current drafting of the UAE CT framework should remain attractive for investment entities that are established in the UAE as a result of the inclusion of (i) dividend exemption and (ii) participation exemption for capital gains on disposal of investments.

Next steps

We expect that the UAE MoF will release further details on the expected UAE CT framework by mid-2022, which should include the issuance of a draft law and the issuance of executive guidelines in due course.

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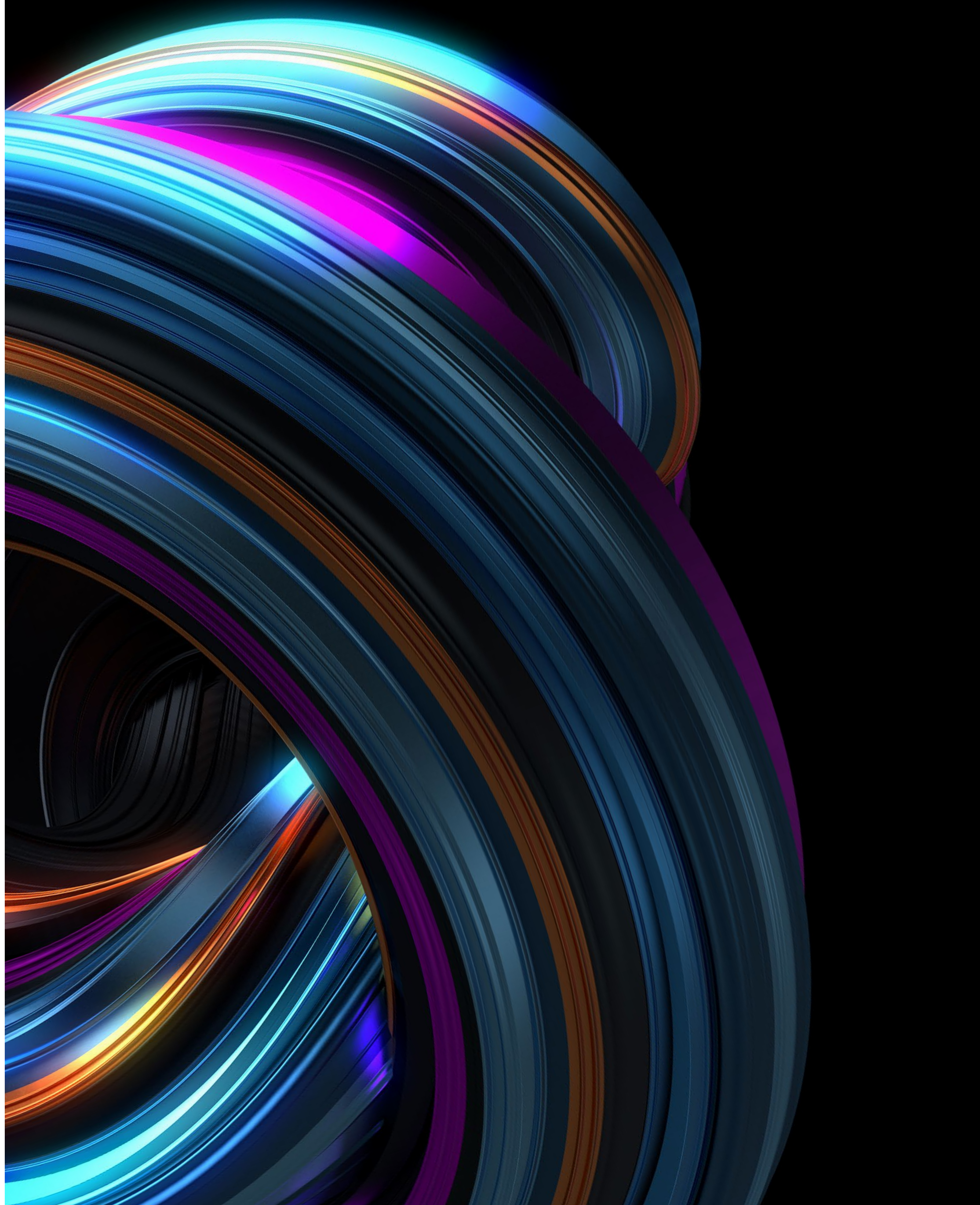

Swiss Trusts: Soon a Reality?

Switzerland launches consultation to introduce trust legislation

Foreign trusts have been recognized in Switzerland under the Hague Trust Convention since 2007. Despite several attempts to introduce a Swiss trust legislation, Swiss law has not provided for specific trust rules and thus, it was not possible to establish a trust under Swiss law. The draft bill published on 12 January 2022 by the Swiss Federal Council intends to change that and to introduce trusts into Swiss law. This news alert contains the key takeaways from a legal and tax perspective.

Highlights of the intended Swiss Trust

The draft bill aims at introducing the trust as a new legal institution into Swiss law. The main features of the Swiss trust shall be the following:

- The trust will be a specific legal instrument. It will hence not be considered as a contract nor a legal entity endowed with enjoyment or exercise of civil rights.
- The maximum duration of a trust shall be 100 years.
- The creation of charitable trusts and other purpose trusts shall be expressly excluded. According to the Federal Council the trust shall not compete with the legal form of the foundation, which enjoys a high reputation in Switzerland and seems to meet the needs of the various actors in this field.
- Otherwise, the draft bill does not provide for any limitation as to the purpose of the trust. In particular, the establishment of commercial trusts shall be allowed. Therefore, the Federal Council deems possible that the trust may become an alternative legal structure to partnerships or commercial companies (stock companies, limited liability companies and further).
- The draft bill does not provide for any modification or derogation from the rules of the Civil Code in matters of ownership rights. The trustee will hold full ownership rights to the assets of the trust. Beneficiaries will only have personal rights, reinforced by a bankruptcy privilege in the event of forced execution against the trustee and a tracing right where trust property has been disposed of in breach of the trustee's obligations.

Swiss trusts will have to meet international reporting and documentation requirements; trustees will in particular have to identify the beneficiaries for anti-money laundering and tax transparency purposes. In order to ensure the effective implementation of transparency rules, the draft bill provides for a new criminal provision which punishes the breach of identification and documentation duties by the trustee.

Taxation of Trusts under the draft bill

The measures are included in the Economic Crime So far, there have been no specific Swiss tax provisions on the taxation of (foreign) trusts. The principles governing the taxation of trusts were laid down in a non-binding Circular Letter of the Swiss Tax Conference (which was later adopted by the Swiss Federal Tax Administration). In principle, the trust itself and the trustees have not been subject to taxation in respect of the trust, but rather its beneficiaries and/or its settlor, if resident in Switzerland. Thus, obtaining an advance tax ruling for the Swiss-resident individuals related to the trust has been and will remain a must.

The draft bill aims to introduce detailed provisions on the taxation of trusts. As already the Circular Letter did, the draft bill distinguishes between revocable and irrevocable fixed interest as well as irrevocable discretionary trusts. The taxation of the first two shall remain the same as it has been under the Circular Letter. However, the draft bill introduces the following new rules on the taxation of irrevocable discretionary trusts:

- When establishing such a trust, cantonal inheritance or donation taxes (where applicable) will be due. It is to be seen whether cantons will apply the tax rate for non-related persons which can be as high as 55%.
- Henceforth, provided that the trust has a Swiss-resident beneficiary, it shall be taxed as if it were a foundation (i.e. a legal entity). The portion of trust's assets and income attributable to its Swiss-resident beneficiary will be subject to corporate income tax at a reduced rate and the capital tax respectively.
- Distributions to Swiss-resident beneficiaries will be further subject to income tax. This seems to apply as well for the distribution of the trust's initial capital which under the current regulations is not subject to income taxation.
- Should it not be possible to determine the (Swiss-resident) beneficiaries, such trust will be liable to tax in Switzerland, if the settlor is a Swiss-resident at the time of settlement. If the trust is deemed to be resident abroad pursuant to a tax treaty, its assets and income shall still be taxed at the level of its Swiss-resident settlor (if any).

These rules shall apply to foreign trusts with a Swiss nexus (settlor or beneficiaries) as well as to Swiss trusts. In view of the new treatment of irrevocable discretionary trusts, the draft bill aims to create a generous transitional period regarding the application of the new rules. However, the duration of such period is not known yet.

Next steps

The consultation process on the draft bill lasts until 30 April 2022. Depending on the outcome of the consultation, a final draft will be prepared and discussed in the Swiss Parliament. It remains to be seen whether the attempt to introduce Swiss trust law will be successful this time. In any event, the Federal Council has indicated to be open to the idea that Swiss private (family) foundations with broad purposes for flexible private wealth and succession planning could also be allowed in future.

Should the taxation of trusts remain unchanged in the final draft, trustees, their settlors and beneficiaries are well advised to carefully examine the tax implications for their trust structures. While the taxation of revocable and irrevocable fixed trusts should not be affected by the draft bill, irrevocable discretionary trusts will most likely face a higher overall tax burden as their income and assets will now be taxed twice: at the level of the trust itself and once the income is distributed, again at the level of the Swiss-resident beneficiary.

Being treated as a foundation for tax purposes, it seems that at least the irrevocable discretionary trust shall be "somehow" fitted into the Swiss civil law system after all. At current stage it is not yet clear whether the draft bill will affect the taxation of Liechtenstein foundations (which are taxed according to the guidelines of the same Circular Letter).

Wealth owners and providers in the wealth management industry should contact their advisers to follow any further developments and plan ahead the best course of action for the structuring of succession planning. So far Swiss trustees and fiduciaries have served settlors and their intended beneficiaries by using foreign trusts and foundations. Potentially in the near future Swiss trusts can also be offered in the proper circumstances, taking into account the risks of uncertainties of implementation and interpretation of the Swiss trust law if and when it is enacted in final form.

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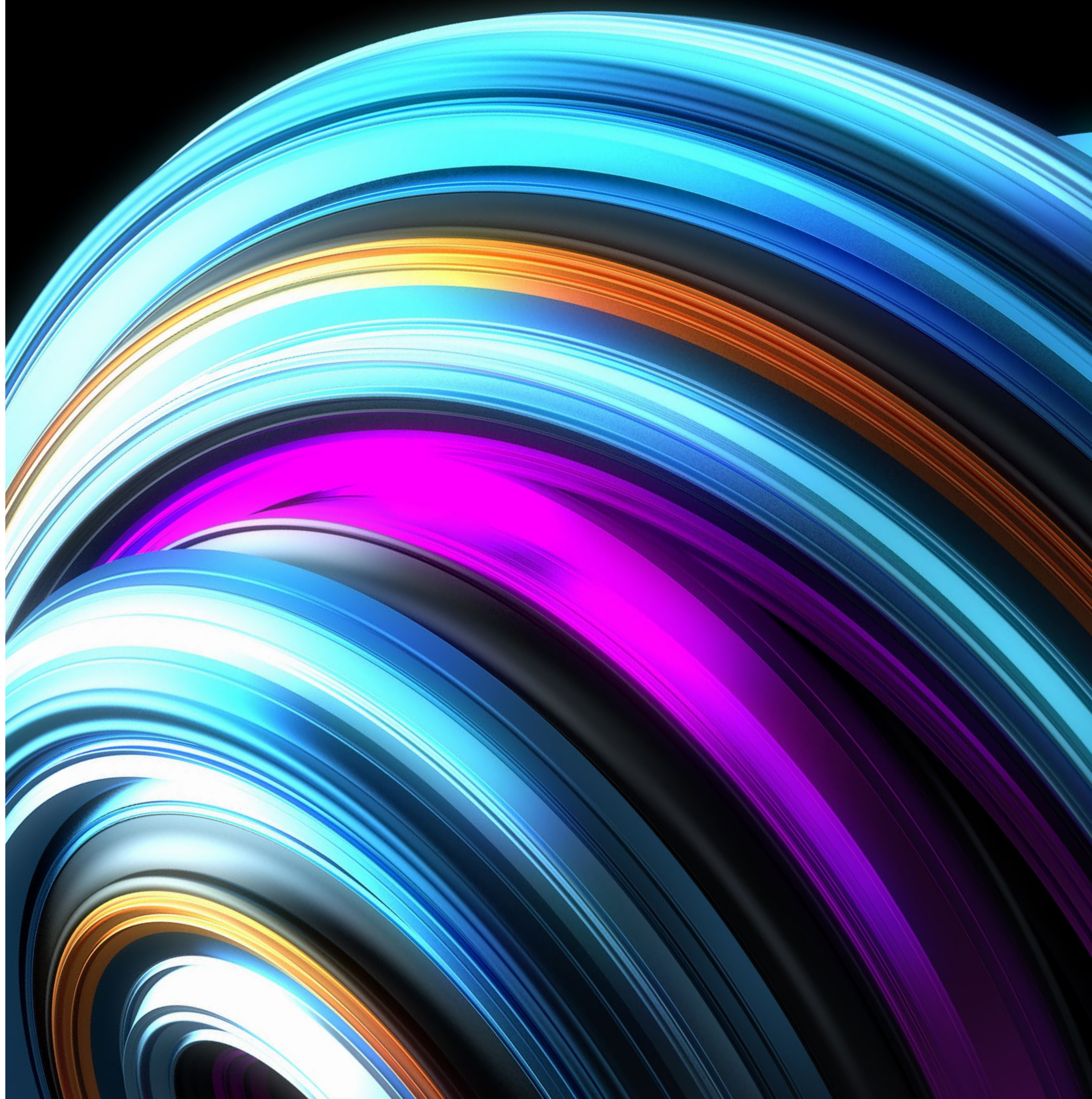
Argentina: Integrated System for Monitoring Foreign Payments of Services — the Argentine tax authority establishes an authorization system on payments of services to foreign parties

The Federal Tax Authority (FTA) has established an Integrated System for Monitoring Foreign Payments of Services (SIMPES) through which the FTA will analyze compliance with tax obligations and the financial-economic capacity of the taxpayers who intend to make foreign payments for contracted services.

The SIMPES is established to complement the current control system integrated by the System of Financial Economic Capacity ("System CEF") and the Integrated System for Monitoring Imports (SIMI).



On 7 January 2022, General Resolution No. 5,135/2022 was published in the Official Gazette, through it the FTA established the SIMPES. The main points are detailed below.

1. Subjects obliged

The SIMPES will be applicable to: (i) Individuals; (ii) undivided estates; and (iii) the following legal entities: (a) Corporations, companies, trusts, condominiums, associations or entities of any kind, incorporated in the country; and (b) establishments organized in the form of stable companies domiciled or located in Argentina, belonging to a real person or a legal person from abroad. These subjects will be covered by SIMPES when they make payments abroad on their own or on behalf of third parties, or when they order payments to cancel their own or third-parties' obligations as consideration for any of the services covered by SIMPES.

2. Services covered

The SIMPES will be applicable when the payments abroad made by the obliged subjects are made in consideration of the following services: (i) maintenance and repairs; (ii) other transport services; (iii) postal and courier services; (iv) construction services; (v) insurance premiums; (vi) claims; (vii) auxiliary insurance services; (viii) financial services; (ix) telecommunication services; (x) information services; (xi) computer services; (xii) charges for the use of intellectual property; (xiii) investigation and development services; (xiv) legal, accounting and managerial services; (xv) advertising, market research and public opinion polling services; (xvi) architectural, engineering and other technical services; (xvii) operating leasing services; (xviii) trade-related services; (xix) other business services; (xx) audiovisual and related services; and (xxi) other personal, cultural and recreational services.

3. Excluded concepts

The following concepts are expressly excluded from the SIMPES: (i) payments for services made through the use of cards; and (ii) payments linked to the provision of the following services regardless of the means of payment used: (a) freight services; (b) passenger transportation services; (c) travel services; (d) government services; (e) health services by travel assistance companies; and (f) other health services.

4. Filing of affidavit: information to submit

The obliged subjects must provide, through the SIMPES, information related to the covered transactions, which will be considered as a sworn statement and will be sent to the Central Bank of the Argentine Republic (BCRA) for verification. The information to be provided refers to the following:

- Tax Identification Number (CUIT) of the subjects obligated to report
- Tax Identification Number (CUIT) of the payer
- Type and amount of foreign currency to be wired
- Intervening financial entities
- Information related to the foreign beneficiary of the payment
- The affidavit will be valid during the calendar month in which it was made.

5. Validity

The provisions of General Resolution No. 5,135 are effective from 7 January 2022, and will be applicable even to service contracts entered into prior to that date for which there are monetary considerations pending cancellation.

Click here to access the Spanish version.

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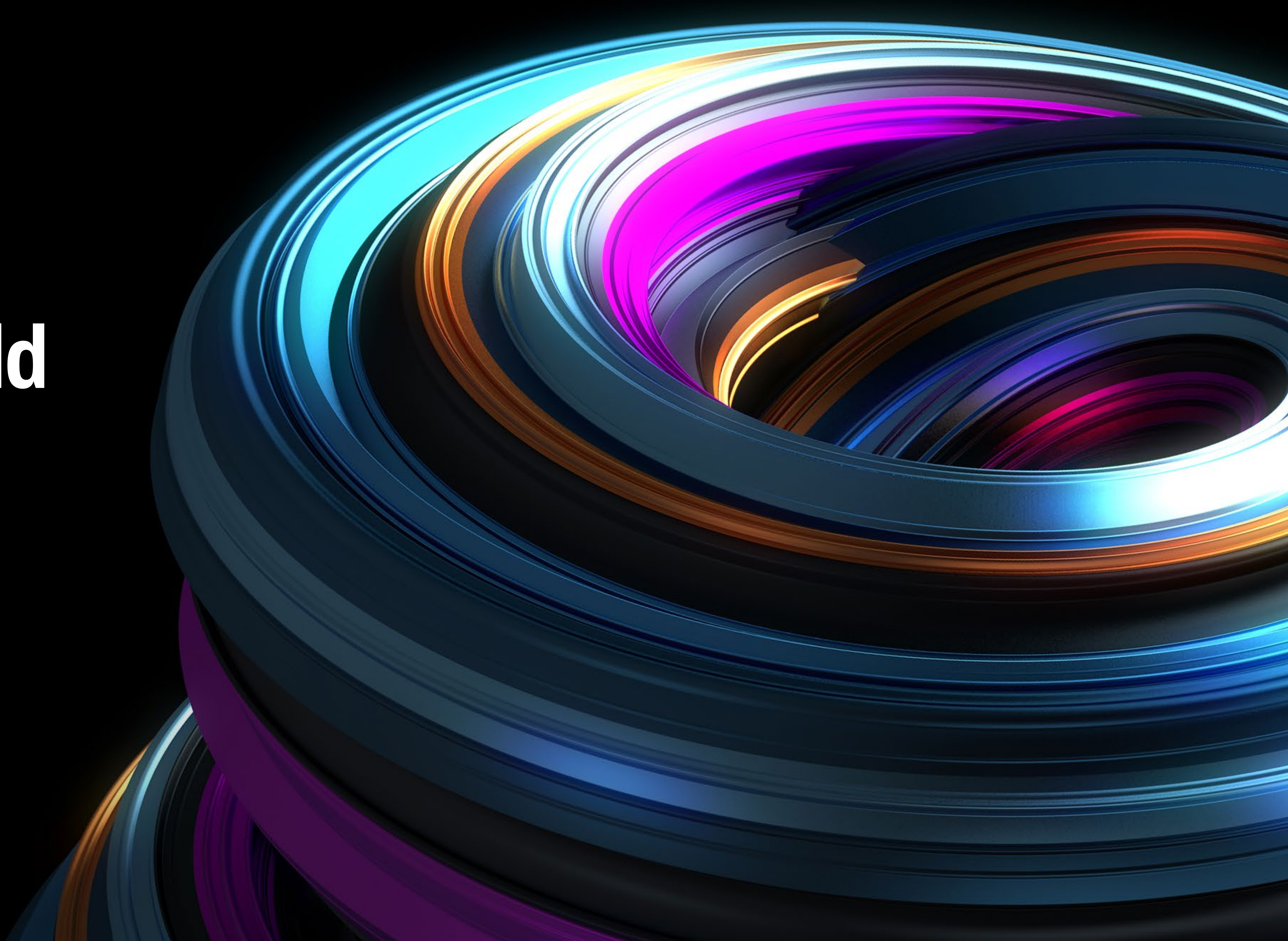

Asia Pacific

Australia

Australia: New property tax in Victoria
The Victorian Government proposes to introduce a new tax known as the Social and Affordable Housing Contribution (SAHC) from 1 July 2024. This is to be done through amendments to the Planning and Environment Act 1987. The tax will be payable on eligible planning permits from 1 July 2024 onwards.

Author: Simone Bridges

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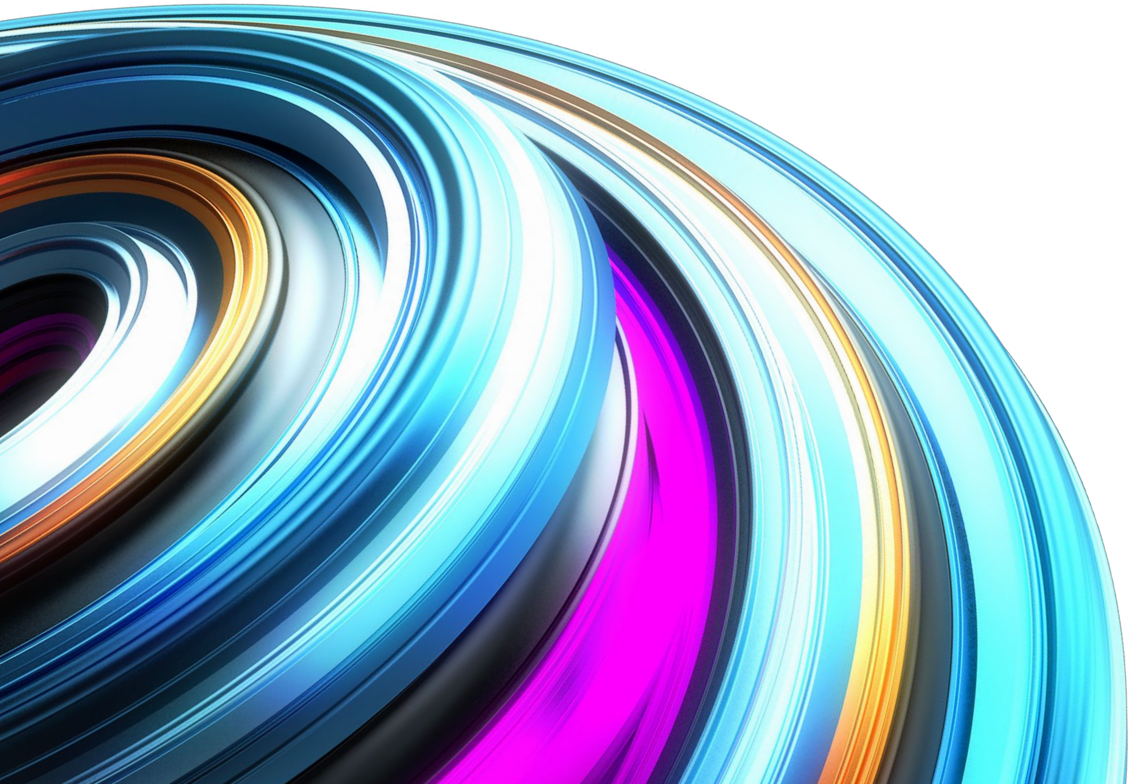

Malaysia

Malaysia: The refined Labuan tax regime
The introduction of the economic substance requirements under the Labuan tax regime in 2019 came hand in hand with a myriad of ambiguities and uncertainties, which subsequent legislation and guidelines aimed to clarify.

Authors: Istee Cheah, Tanya Chantal Hsing Yi Tan, Lisa Yeoh

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Malaysia: Updates regarding taxation of foreign-sourced income
The Malaysian Ministry of Finance (MOF) announced at the end of December 2021 the exemption of certain foreign-sourced income (FSI) received in Malaysia.

In the latest development, the Malaysian Inland Revenue Board (IRB) announced in a media statement on 11 March 2022 ("Media Statement") that it would be abolishing the Special Income Remittance Programme (PKPP) with effect from 11 March 2022 in light of the exemption announced by the MOF. We summarise the latest developments on the taxation of FSI and implications for taxpayers in this alert.

Authors: Yvonne Beh, Irene Khor

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EMEA

Russia

Russian Federation: New reporting - Requires that foreign companies to disclose direct and indirect shareholders
The annual report must reflect the shareholding information as of the end of the calendar year and should be filed with the local Russian tax inspectorate in electronic form or in a hard copy. Failure to timely provide the report may trigger a penalty of RUB 50,000.

Authors: Sergei Zhestkov, Kirill Vikulov, Maxim Kalinin

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Spain

Spain: The CJEU declares the Spanish regime for foreign assets that are not declared within the tax deadline to be illegal under EU Law
On January 27, 2022, the Court of Justice of the European Union (CJEU) has confirmed that some of the essential elements of the treatment given by Spanish law to assets located abroad and the obligation to report them in Form 720 violate European Union law. Specifically, the CJEU concluded that said legal regime infringes the principle of free movement of capital due to its specific penalty regime and due to the fact that there would be no limitation period for prosecuting a mere infringement of a formal obligation.

Authors: Tona Azpeitia, Bruno Dominguez

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Americas

Argentina

Argentina: Changes to personal assets tax act
Law No. 27,667 **("Law")** amended the Personal Assets Tax Act as from FY2021.

According to the Law, changes apply to FY2021 tax returns (considering assets as of 31 December 2021).

Author: Martín Barreiro, Juan Pablo Menna

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Brazil

Brazil: News and deadlines for submitting Declaration of Foreign Assets and Individual Income Tax Return 2022
Brazilian taxpayers can submit their Declaration of Foreign Assets (DCBE) to the Brazilian Central Bank until 6 pm on 5 April 2022. Meanwhile, the Individual Income Tax Return 2022 (for calendar year 2021) must be submitted by Brazilian tax residents by 29 April 2022.

Authors: Clarissa Machado, Flavia Gerola, Marcella Albanez

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United States

United States: Application of treasury's new 'reasonably similar' source rule requirement to claim foreign tax credits for royalty withholding taxes
On 4 January, the Treasury published in the Federal Register new foreign tax credit regulations determining when a foreign income tax would be regarded, in the words of the preamble, as "an income tax in the US sense" for purposes of both §901 and §903. On 7 January 2022, Gary Sprague published, Application of Treasury's New "Reasonably Similar" Source Rule Requirement to Claim Foreign Tax Credits for Royalty Withholding Taxes, in Bloomberg Tax's January edition of the Tax Management International Journal.

Authors: Gary Sprague

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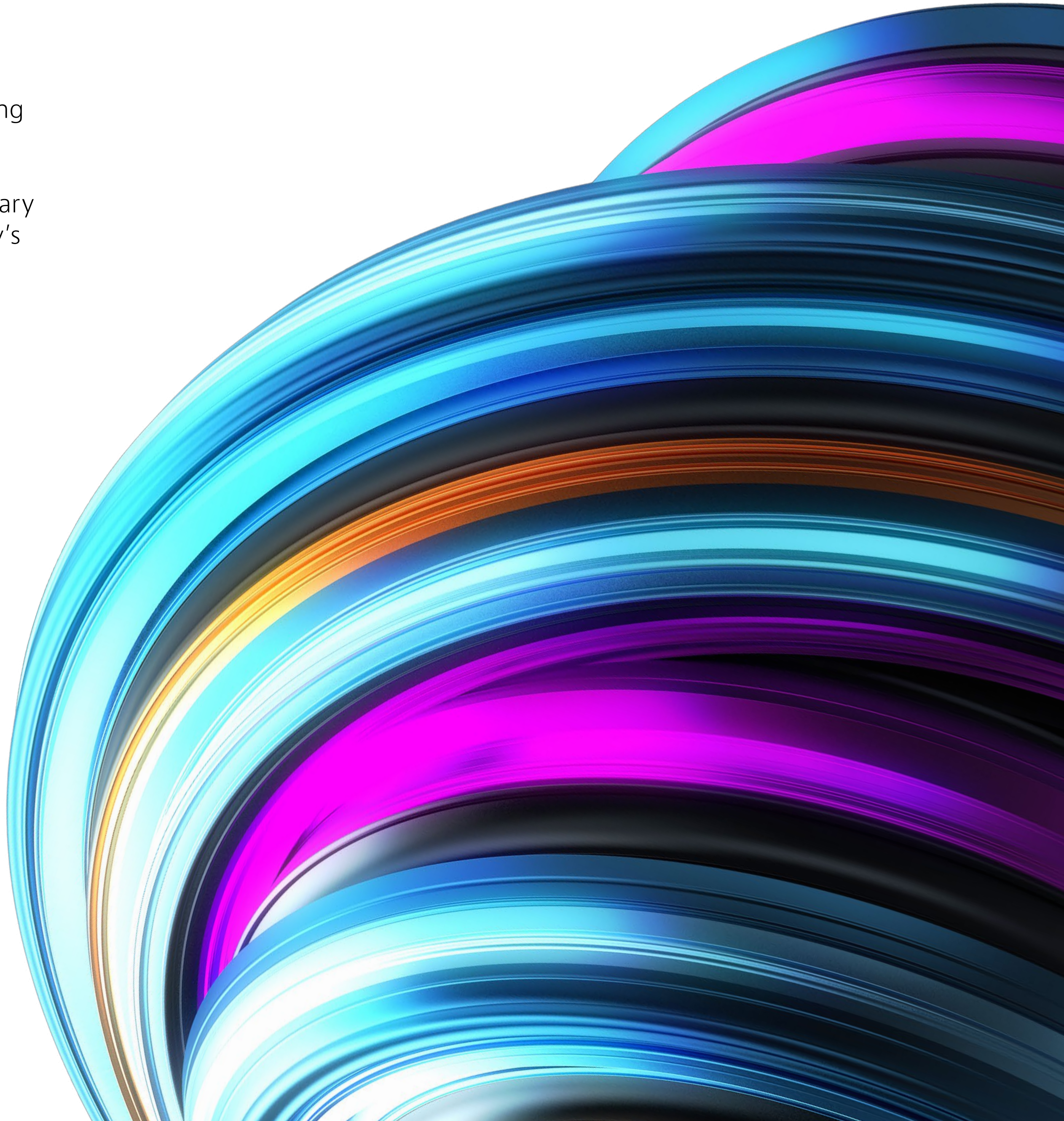

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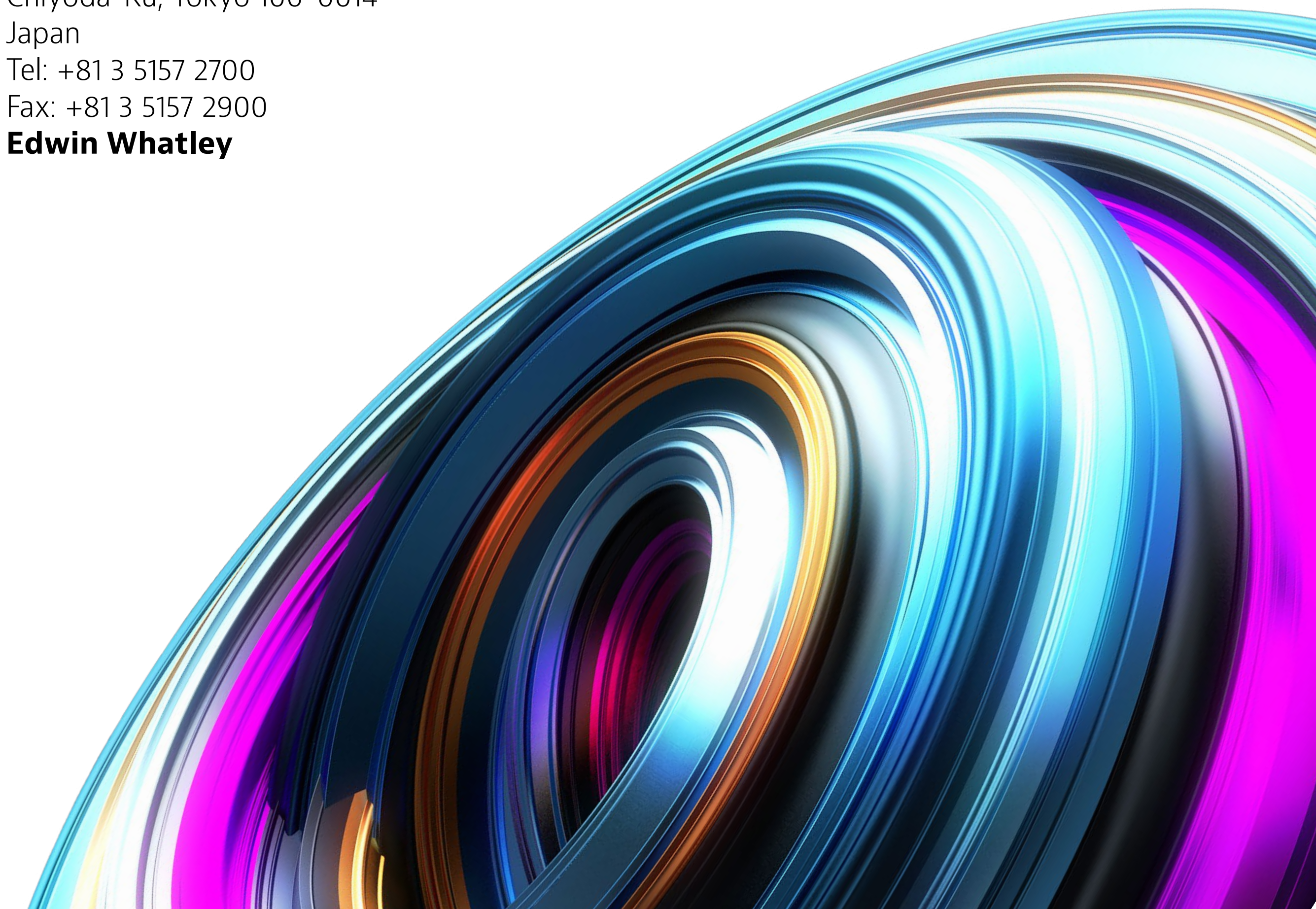

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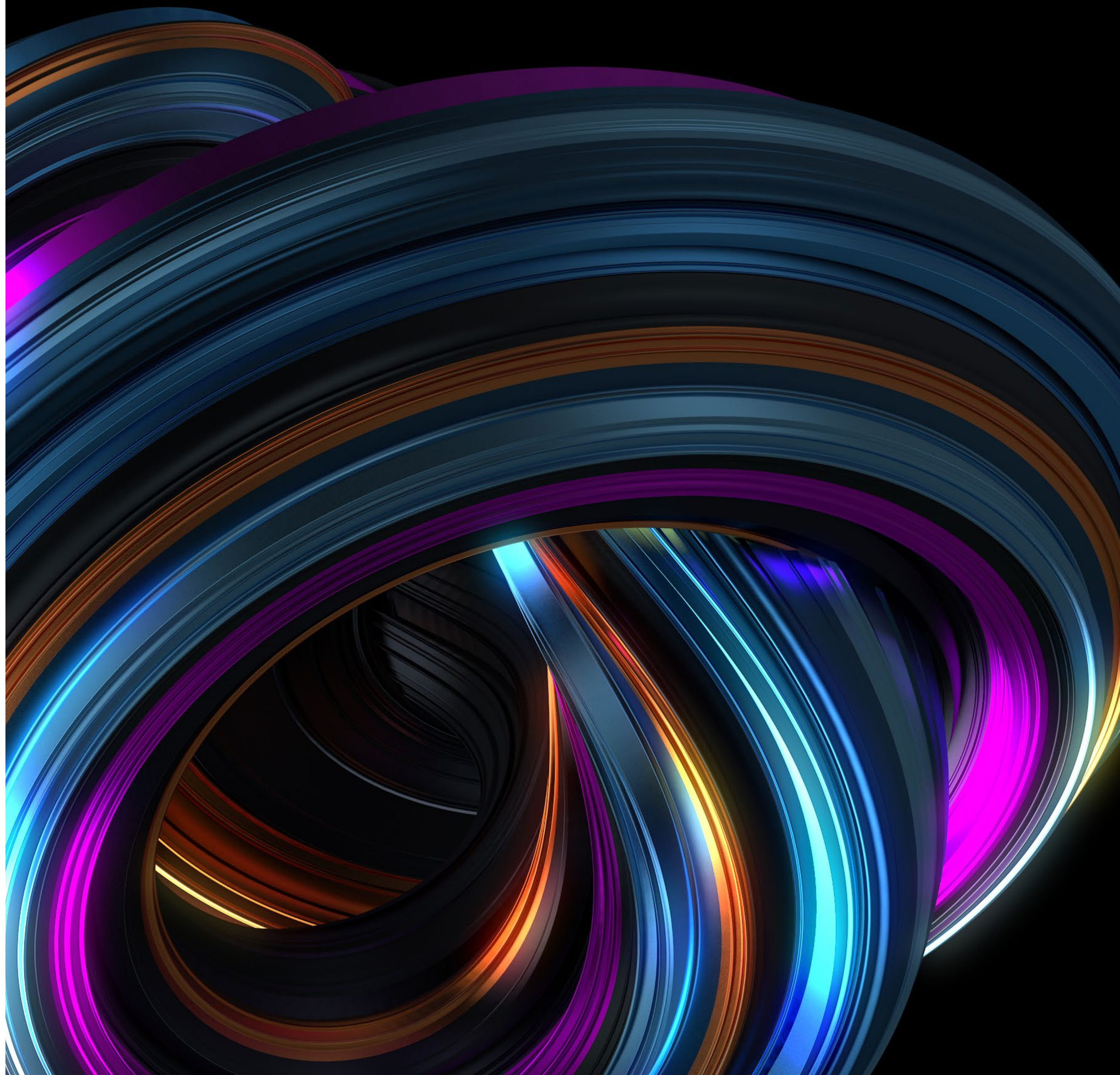

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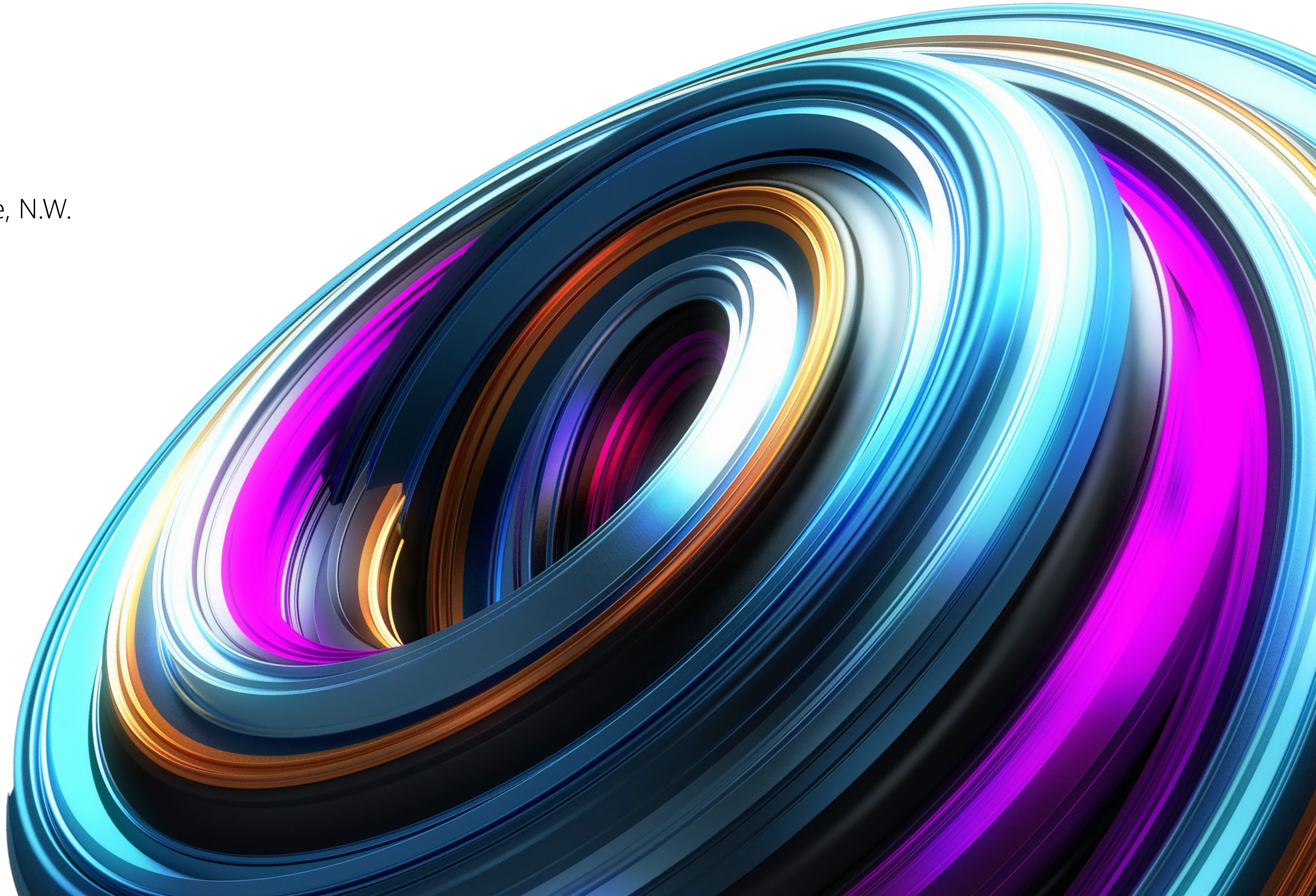

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