

## Pacific Rim Advisory Council May 2019 e-Bulletin

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66th International Conference  
Seattle - Hosted by DAVIS WRIGHT TREMAINE  
October 5 - 8, 2019

67th International Conference  
New Delhi - Hosted by KOCHHAR & Co.  
Spring 2020

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**BAKER BOTTS ADDS AWARD WINNING TAX PARTNER IN HOUSTON**

**HOUSTON, 01 May 2019:** Baker Botts L.L.P., a leading international law firm, today announced that Barbara Spudis de Marigny has joined the firm's Houston office as a partner.

"Barbara is an outstanding lawyer with a depth of tax experience. Her joining is another sign of the firm's positive momentum. Since January of 2018, we have added 27 new partners to our ranks and promoted 23," said John Martin, Managing Partner of Baker Botts.

"Barbara's experience and depth of understanding of complex tax structures, especially in the energy sector, will add significant value for our clients across the United States," added Mr. Martin.

"We are thrilled that Barbara will be joining our industry-leading Tax Practice. Barbara's practice focuses on tax structuring in M&A transactions, IPOs, joint ventures, partnerships, alternative investment structures and strategic acquisitions. In addition, she works with downstream, midstream, and upstream field service companies as well as alternative energy, wind, energy, solar and biomass enterprises," said Richard Hussein, a Houston-based partner and Chair of the firm's Tax Practice.

"Baker Botts is known worldwide as one of the top Tax law firms and I am very happy to join this outstanding team," said Barbara de Marigny.

Ms. de Marigny graduated magna cum laude with a Bachelor of Arts from Duke University and earned her J.D. from the University of Virginia Law School. She is the second Tax partner to join Baker Botts in recent months. Partner Jon Feldhammer joined the firm's San Francisco office in late January.

For more information, please visit [www.bakerbotts.com](http://www.bakerbotts.com)



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October 5 - 8, 2019



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## **CLAYTON UTZ EXPANDS FORENSIC & TECHNOLOGY SERVICES PRACTICE WITH DEDICATED CYBER INCIDENT RESPONSE TEAM**

**SYDNEY, 09 May 2019:** Clayton Utz has recruited two leading cyber and forensics specialists to our Forensic and Technology Services (FTS) practice, providing clients with access to a dedicated in-house cyber protection, detection and response service.

Lex Burke and Chris Courtis join Clayton Utz from the Cyber and Forensics practice at Big 4 accounting firm, PwC.

Lex, who has been recruited as a senior manager, is experienced in end-to-end digital forensic and incident response services and has led multiple response and fraud investigations for clients in a range of sectors. He has over 20 years' experience in a range of aspects of information technology and multimedia.

Chris has many years' experience in running data breach and forensic IT investigations for both public and private sector companies, including co-ordinating responses to data breach and cyber incidents. He has a background in computer science, cyber forensics, information security and management, and security and terrorism/counter-terrorism, and joins as a manager.

Clayton Utz's national practice group leader for FTS, Paul Fontanot, said that adding a cyber incident response capability to the existing FTS offering was a natural next step.

"Cybercrime and cyber security is a major concern for organisations worldwide. It's a serious issue both from a legal/regulatory and reputational perspective," said Paul. "We're now able to provide our clients with a comprehensive service where they can access both front-end strategic advice on how to protect against cyber breaches as well as helping them to detect and respond to an incident if it occurs."

He added: "This cyber incident response service nicely complements our existing offering to clients in forensic investigation, accounting and technology services. There's enormous benefit to clients in being able to access these services within a law firm. FTS is not an adjunct to, but is embedded in, our legal teams on client matters. This is extremely valuable in terms of both matter and cost management, as well as helping the client to be proactive in identifying and managing issues."

For additional information visit [www.claytonutz.com](http://www.claytonutz.com)

## HAN KUN ADDS PARTNER TO COMMERCIAL DISPUTE RESOLUTION PRACTICE

**BEIJING, 06 May 2019:** Han Kun Law Offices is pleased to announce that Ms. Sun Qiunan has joined the firm as a partner.

Ms. Sun practises in dispute resolution and has extensive experience in representing clients in major and complex litigation cases.

Before joining Han Kun, Ms. Sun worked at another distinguished law firm in Beijing, as a senior partner and a member of the firm's management. Prior to private practice, Ms. Sun worked for the Legislative Affairs Office of the State Council of the People's Republic of China, and served as a member of Professional Banking Committee and Bad Debt Legal Affairs Committee of the Beijing Lawyers Association.

For additional information visit [www.hankunlaw.com](http://www.hankunlaw.com)

## HOGAN LOVELLS APPOINTS NEW BOARD MEMBERS

Hogan Lovells has elected four partners to serve on its Board – Owen Chan, Karen Hughes, Richard Lorenzo, and Phoebe Wilkinson.

**Owen Chan** has been elected to the Asia Pacific Middle East seat

**Karen Hughes** has been re-elected to one of the "At Large" seats

**Richard Lorenzo** has been re-elected to the U.S. (except D.C.) seat

**Phoebe Wilkinson** has been re-elected to one of the "At Large" seats

All begin or continue their roles as of 1 May.

The Hogan Lovells Board comprises 12 members and supervises the affairs of the firm and its management on behalf of the partners. Most partner related matters, such as partner compensation, opening of offices, appointment of new partners and a number of financial decisions require the approval by the Board. The Board does not, however, have executive responsibility for strategy, management or operating decisions which are vested with the CEO and the IMC. Membership of the Board is designed to reflect the broad scope of the business, with members representing a combination of geographic and other backgrounds. Board members can serve up to two terms, each lasting three years.

Biographical details on the new Board member Owen Chan: Owen is the Managing Partner of the firm's Hong Kong office and heads its China Banking practice. He acts for Chinese as well as international clients in cross-border transactions with a focus on structured acquisition finance and real estate finance. He also has extensive experience in regulatory and insolvency matters. Owen joined the firm in 2008 and he has built a strong bilingual team based in the firm's China offices which assists clients on complex financing deals and provides advice under Chinese, English, and Hong Kong law.

From 1 May the Board will comprise:

Chair (and "At Large"):	Leopold von Gerlach	CEO:	Steve Immelt
Asia Pacific Middle East:	Owen Chan	Continental Europe:	Joaquín Ruiz Echaury
Washington, D.C. area:	Cate Stetson	London:	Adrian Walker
The Americas:	Bruce Oakley	U.S. (except D.C.):	Richard Lorenzo
45 and under:	Ben Higson	"At Large" representatives:	Karen Hughes, Clay James, Phoebe Wilkinson

Chair Leo von Gerlach said: "I'd like to welcome Owen as a new member of the Board and congratulate Karen, Richard and Phoebe on their re-election. I also offer my thanks and gratitude to Andrew McGinty whose term on the Board has now come to an end."

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



**ARIAS**

ASSISTS EUROFARMA IN ITS GROWTH IN LATIN AMERICA

**GUATEMALA, March, 2019:** In recent days, Eurofarma Laboratórios S.A. (originally from Brazil) made public the acquisition of a part of Stein S.A Laboratories in Costa Rica, in a deal whose value was not disclosed.

The Brazilian Multinational acquired various important trademark portfolio and products from Laboratorios Stein, S.A., adding significant products to the Eurofarma offer. The deal was multijurisdictional since it involved Guatemala, El Salvador, Nicaragua, Honduras, Costa Rica, Panamá, Dominican Republic and Ecuador. Arias Guatemala coordinated all the legal work in these jurisdictions, which included issues of corporate law, competition, regulation, intellectual property, taxes, and foreign trade. The acquisition of several products and brands represented a meticulous work in which Arias sought to protect the best interests of Eurofarma.

Eurofarma's objective with the acquisition is to position itself with greater strength in the Latin American market, and in this way support its internationalization plan begun in 2009. Through this expansion, the increase in the catalog of products is sought maintaining the production on the side of Stein Laboratories. Thereafter, an increase in Eurofarma's production at the Guatemala plant is expected.

Arias team involved in the transaction: Guatemala Partners: Jorge Luis Arenales (Lead of transaction), Ximena Tercero; Costa Rica Partners: Andrey Dorado, Carolina Flores, Melania Dittel; Guatemala Associates: Cindy Arrivillaga, Ivón Hernández; Costa Rica Associates: Ligia Alfaro, Tracy Varela

For additional information visit [www.ariaslaw.com](http://www.ariaslaw.com)

**BAKER BOTTS**

REPRESENTS IFM INVESTORS FOR \$41.50 PER COMMON UNIT ACQUISITION OF BUCKEYE PARTNERS LP

**HOUSTON, 13 May 2019:** Deal Description: IFM Investors and Buckeye Partners, L.P. (NYSE: BPL) today announced a definitive agreement ("Agreement") under which the IFM Global Infrastructure Fund will acquire all of the outstanding public common units of Buckeye for \$41.50 per common unit. The all-cash transaction is valued at \$10.3 billion enterprise value and \$6.5 billion equity value. The acquisition price represents a 27.5% premium to Buckeye's closing unit price on May 9, 2019 and a 31.9% premium to Buckeye's volume-weighted average unit price since November 1, 2018, which is the last trading day prior to Buckeye's announcement of certain strategic actions. Buckeye's Board of Directors unanimously approved the proposed transaction with IFM.

Buckeye owns and operates one of the largest diversified networks of integrated midstream assets, including 6,000 miles of pipeline with over 100 delivery locations and 115 liquid petroleum products terminals with aggregate tank capacity of over 118 million barrels. Its network of marine terminals is located primarily in the East Coast and Gulf Coast regions of the United States, as well as in the Caribbean.

IFM is a pioneer and leader in infrastructure investing on behalf of institutional investors globally, with a 23-year track record of success. IFM has \$90 billion of assets under management, including \$39.1 billion in infrastructure, which it manages on behalf of more than 370 institutional investors, and takes a long-term approach to investing, with no pre-determined time divestiture horizon. IFM targets core infrastructure in developed markets and currently has interests in 32 investments across North America, Australia and Europe, including several midstream assets.

Baker Botts L.L.P. and White & Case LLP acted as legal advisors to IFM. Evercore Group LLC acted as lead financial advisor to IFM, and Credit Suisse, Goldman, Sachs & Co, LLC and BofA Merrill Lynch acted as financial advisors to IFM.

Cravath, Swaine & Moore LLP acted as legal advisor to Buckeye, and Intrepid Partners, LLC and Wells Fargo Securities, LLC acted as financial advisors to Buckeye.

For additional information visit [www.bakerbotts.com](http://www.bakerbotts.com)

**BENNETT JONES**

ASSISTS BSM TECHNOLOGIES INC'S \$117.3 MILLION SALE TO GEOTAB INC BY PLAN OF ARRANGEMENT

Date Announced: April 08, 2019  
Deal Value: \$117,300,000  
Client Name: BSM Technologies Inc.

BSM Technologies Inc., a leading provider of Internet of Things (IoT) enabled telematics and asset management solutions, on its approximately \$117.3 million agreement to be acquired by Geotab Inc., a provider of open platform fleet management solutions.

The transaction was completed by way of a statutory plan of arrangement under the Business Corporations Act (Ontario). Bennett Jones LLP acted as BSM Technologies Inc.'s legal advisor.

For additional information visit [www.bennettjones.com](http://www.bennettjones.com)

**CLAYTON UTZ**

ADVISES ON SIGNIFICANT GOVERNMENT COLLABORATION TO DELIVER REAL-TIME WEATHER DATA IN REGIONAL NSW

**Sydney, 23 April 2019:** Clayton Utz has advised the NSW Department of Industry on a joint initiative with the Bureau of Meteorology (BOM) to deliver new radar weather stations in western NSW.

Through a unique collaboration with funding from the Department of Industry, BOM will appoint a contractor to build, maintain and operate Doppler radar weather stations at Parkes, Brewarrina and Hillston-Ivanhoe.

The Doppler radar weather stations will help deliver real-time rainfall data and wind observations across 321,000 square kilometres of western NSW, assisting emergency services to better anticipate and respond to fires in the region and helping farmers and graziers who need to make business decisions about when to sow, harvest or move stock.

Clayton Utz advised the NSW Department of Industry around the procurement, delivery and operation of the three Doppler radar weather stations.

Partners Andrew Steele and Ken Saurajen led the transaction, with support from senior associate Max Bryant and lawyer Nicola Bevitt.

The Doppler radar stations are expected to be operational in 2022, with a lifespan of at least 20 years.

For additional information visit [www.claytonutz.com](http://www.claytonutz.com)

**GIDE**

ADVISES AIR LIQUIDE ON ITS JOINT VENTURE WITH HOUPU

**PARIS, May 2019:** Gide has advised Air Liquide, a world leader in gases, technologies and services for industry and health, on the creation of a joint venture with Chengdu Huaqi Houpu Holding Co., Ltd. ("Houpu") to develop hydrogen refilling stations for fuel cell electric vehicles.

The joint venture, Air Liquide Houpu Hydrogen Equipment Co., Ltd., will enable the companies to develop projects together with a view to promote the development of a network of hydrogen stations in China. The collaboration will combine Air Liquide's global technological expertise in clean hydrogen mobility solutions with Houpu's leadership in the production and construction of natural gas refilling stations in the Chinese market.

It is also aligned with the Chinese government's 13th Five-Year Plan, which aims to support clean transportation, including through the development and sale of fuel cell electric vehicles.

The Gide team was led by partner David Boitout, with the assistance of associate Li Jing.

For additional information visit [www.gide.com](http://www.gide.com)

**DAVIS WRIGHT TREMAINE**

PARTNERS WITH AMAZON FOR A LARGE-SCALE PROJECT TO AID IMMIGRANT KIDS

In July 2017, Ajay Patel, associate general counsel at Amazon Studios in Los Angeles, contacted Kids in Need of Defense (KIND) and Bet Tzedek about providing legal services to unaccompanied immigrant and refugee children on a large scale in partnership with DWT. Ajay and Amazon Studios corporate counsel Archana Lannin, together with DWT's Julie Orr, Jonathan Segal, and Jill Cohen, organized planning calls with KIND and Bet Tzedek to create an innovative, multicity pro bono project with substantial impact. KIND proposed a Special Immigrant Juvenile Status (SIJS) project, where case teams of Amazon and DWT attorneys would represent children on SIJS cases. The teams launched their cases with multicity kickoff events.

Both Amazon and DWT employees disseminated information about the project, recruiting 134 associate general counsel, corporate counsel, partners, associates, contract managers, paralegals, and legal assistants in Arlington, Va.; Los Angeles; New York; Newark, N.J.; San Francisco; Seattle; Sunnyvale, Calif.; and Washington, D.C. Lawyers and non-lawyers from across Amazon's legal department, Amazon Studios, Audible, Twitch TV, and Lab126, signed up to help.

In October 2017, KIND broadcast a national webinar from Amazon Studios in Los Angeles to the participating cities. The next month, KIND and Bet Tzedek conducted in-depth trainings with the teams at six Amazon locations across the country. A month later, the teams met their clients for the first time to kick off their cases in a clinic-type setting. The kickoff events were held at DWT offices in the five cities and at Audible's offices in Newark, N.J. The following year, the San Francisco office met with additional clients who had not been screened earlier.

The 26 teams include 52 DWT lawyers and 75 Amazon lawyers and staff. Over a year into the project, the teams are representing 28 unaccompanied migrant children who left their homes in Mexico, Guatemala, El Salvador, and Honduras to come to the United States to escape gangs and other dangerous conditions. These kids were picked up by immigration officials and placed into foster homes or with relatives or into government facilities. They hope to obtain Special Immigrant Juvenile Status which will allow them to stay in the United States. Some of them may also have claims for asylum.

So far, the teams have already obtained SIJS status for two of the children and are getting very close to obtaining that status for several more.

For additional information visit [www.dwt.com](http://www.dwt.com)

**SKRINE**

ASSISTS LAFARGEHOLCIM LTD IN DISPOSITION OF SHARES IN LAFARGE MALAYSIA

**KUALA LUMPUR 02 May 2019:** Associated International Cement Limited, an indirect subsidiary of LafargeHolcim Ltd, had on 2 May 2019 entered into an agreement with YTL Cement Berhad, a subsidiary of YTL Corporation Berhad, to dispose of its entire 51 percent shareholding, comprising 433,344,693 ordinary shares, in Lafarge Malaysia Berhad for a cash consideration of RM1,625,042,598.75 (USD 396 million) or RM3.75 per share.

LafargeHolcim Ltd was advised on the transaction by our Firm. The Skrine team was led by partner, To' Puan Janet Looi and supported by senior associate Boo Hsiu Ting and associate Aaron Yong Tze Ken.

For additional information visit [www.skrine.com](http://www.skrine.com)

**DENTONS RODYK**

REPRESENTS OXLEY HOLDINGS IN THE LARGEST COMMERCIAL BUILDING SALE IN SINGAPORE

**SINGAPORE, 02 May 2019:** Dentons Rodyk is acting for listed real estate company Oxley Holdings in their sale of Chevron House for a deal size worth S\$1.025 billion, making this the largest commercial building sale in Singapore this year.

Chevron House is situated at 30 Raffles Place, within the prime Central Business District in Singapore. Chevron House is a 32- storey office and retail development of about 261,280 sq feet of net lettable area.

The deal is structured by way of sale of Oxley Holding's 100% share interest, subject to conditions, in Oxley Beryl, the company which owns Chevron House.

Corporate Senior Partner Jacqueline Loke and Partner Sarah Chan are leading on the Corporate aspects of this deal.

Corporate Real Estate Senior Partner Lee Liat Yeang and Partner Chua Shang Chai are leading the Real Estate aspects of this deal, including advising the client on the strata subdivision and project development sales issues for Chevron House.

For additional information visit [www.dentons.rodyk.com](http://www.dentons.rodyk.com)

**HAN KUN**

ADVISES TRANSCENTA HOLDING ON ITS NEW JCT205 DRUG PROJECT

**BEIJING 09 April, 2019:** The Center for Drug Evaluation under the National Medical Products Administration has recently accepted the investigational new drug application for a new death receptor 5 agonist antibody (JCT205) jointly developed by Transcenta Holding and U.S.-based InhibRx. JCT205 is intended for use as a monotherapy for treating various tumors, such as digestive tract tumors and mesothelioma. Previously, JCT205 was also entered into a Phase I clinical study in the United States in December 2018.

Transcenta Holding is a world-class biotherapeutics company with fully-integrated capabilities in research, development and manufacturing of biologics, established through the merger of HJB (Hangzhou) Co., Ltd. (HJB) and MabSpace Biosciences Co., Ltd., (MabSpace).

Han Kun provided full legal support to Transcenta Holding as PRC counsel during its collaboration with InhibRx in the JCT205 project.

For additional information visit [www.hankunlaw.com](http://www.hankunlaw.com)

**HOGAN LOVELLS**

ADVISES GILEAD SCIENCES ON ITS COLLABORATION WITH GOLDFINCH BIO TO DEVELOP NOVEL THERAPIES FOR KIDNEY DISEASE

**NEW YORK, 08 May 2019:** A team from Hogan Lovells has advised Gilead Sciences on a partnership with Goldfinch Bio, a biotechnology company focused on developing precision therapies for patients with kidney diseases.

The strategic collaboration will help to discover, develop and commercialize a pipeline of innovative therapeutics for diabetic kidney disease (DKD) and certain orphan kidney diseases.

The Hogan Lovells team advising Gilead Sciences was led by Adam Golden (partner) and Anishiya Abrol (counsel), with support from Katherine McGuigan (associate) and Katherine Jeffrey (associate).

For more information, see [www.hoganlovells.com](http://www.hoganlovells.com)

**MUNIZ**

ADVISES CHINA THREE GORGES CORPORATION CONSORTIUM IN US\$1.4 BILLION CHAGLLA PROJECT HYDROELECTRIC PLANT ACQUISITION

**LIMA, 07 May 2019:** Muñiz, Olaya, Melendez, Castro, Ono & Herrera has advised a consortium led by China Three Gorges Corporation (CTG) composed of Hubei Energy Group Co., Ltd. ("Hubei Energy"), Ace Investment Fund II LP ("ACE"), and CNIC Corporation Limited ("CNIC" and, together with ACE and Hubei Energy, the "Consortium") in a US\$ 1.4 billion the acquisition of Empresa de Generación Huallaga S.A. (EGH) holder of the Chaglla project, the third largest hydroelectric plant in Peru with installed capacity of 456 MW. EGH was acquired through Huallaga Holding Company Limited, a company created by the consortium and organized under the laws of the Hong Kong Special Administrative Region and the People's Republic of China. The acquisition closed on April 25.

A US\$ 850 million loan granted by Bank of China (BoC) to Chaglla Holdings Limited (a Hong Kong SPV incorporated by the Consortium led by China Three Gorges Corporation) in favour of EGH was disbursed in order to pay off liabilities of EGH with a bank syndicate that financed the hydroelectric plant during the greenfield stage of the project.

Lawyers acting in the transaction: Jorge Muñiz (Name Partner), Andrés Kuan-Veng (senior partner) and Guillermo Flores (partner) for the financing. Jorge Otoyá (senior partner) for tax advice on the financing.

For additional information visit [www.munizlaw.com](http://www.munizlaw.com)



PRAC EVENTS







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The Legislature of the City of Buenos Aires reformed the Contraventional Code to incorporate the digital impersonation of identity among other faults and contraventions.

On January 4th 2019, the Legislature of the City of Buenos Aires enacted law No. 6.128 amending the Contraventional Code, by means of which, among other things, Chapter V on infraction to the digital identity of the Internet is incorporated.

Chapter V incorporates article 71 fifth, which impose sanction to any digital identity misappropriation. It provides fines from one hundred sixty to four hundred fixed units, one to five days of public utility work, or one to five days of arrest, to anyone who uses the image and / or a persons personal data or creates a false identity with the image and / or a persons filiatory data through the use of any type of electronic communication, data transmission, web pages and / or any other means, and has been made without the consent of the victim, provided that the facts involved do not constitute a crime.

At the same time, the same article provides for the aggravating factors of the behavior described. All penalties will be doubled if (i) the behavior was performed for the purpose of making a data bank with the information obtained; (ii) the victim was under 18 years of age, over 70 years old or has a disability; (iii) the contravention was committed by the spouse, ex-spouse, or the person with whom he or she maintains or has maintained a relationship of couple, mediate or not cohabitation and (iv) the contravention is committed in order to make sexual services offer through any means of communication.

Moreover, Chapter V sanctions are included for unauthorized dissemination of images or intimate recordings (aka revenge porn), digital harassment and the aggravating facts of both described behaviors.

For more information visit [www.allendebrea.com.ar](http://www.allendebrea.com.ar)

18 APR 2019

# What's copyright worth? ACCC's final Copyright Guidelines assist in valuing creative content

BY TIMOTHY WEBB, BRUCE LLOYD AND FRANCESCA TENG

The Australian Competition and Consumer Commission has published final Copyright Guidelines to assist the Copyright Tribunal in the determination of reasonable copyright remuneration under voluntary copyright licences and licence schemes.

On 11 April 2019, following a public consultation on a draft version of the Copyright Guidelines in late 2018, the ACCC published final Copyright Guidelines which will form a key consideration of the Copyright Tribunal when presented with the challenge of determining the reasonableness of pricing terms under certain licences and licence schemes.

## **When will the Copyright Guidelines be used?**

The Copyright Tribunal must, if requested by a party to a proceeding, have regard to any relevant ACCC guidelines, including the Copyright Guidelines, when considering an application in relation to the reasonable remuneration for copyright materials pursuant to a voluntary licence or licence scheme.

While the guidelines have primarily been developed to assist the Copyright Tribunal with those proceedings, they may also assist collecting societies, copyright owners and end users when negotiating reasonable copyright remuneration in circumstances outside of Copyright Tribunal proceedings.

## **What key matters do the Copyright Guidelines address?**

The Copyright Guidelines set out various economic principles that the ACCC considers relevant to determining an appropriate methodology for pricing copyright materials and focus on countering market power held by collecting societies in the provision of blanket licences. They are not intended to provide guidance on non-price terms of copyright licences.

## **What changes were made to the draft Copyright Guidelines following public consultation?**

Having reviewed submissions from ten stakeholders as part of the public consultation, the ACCC made a number of changes to the draft Copyright Guidelines. These include:

### ***Market power***

- **Incentives to create:** the ACCC clarified its stance regarding the economics of copyright by explaining that because copyright materials tend to be differentiated products, each producer possesses a degree of market power as each can raise prices without losing all of their demand. It also clarifies that the mere grant of exclusive rights rarely raises competition concerns because while for some individual works there are few alternatives for consumers, for most works substitutes are readily available.
- **Bargaining power of licensees:** the Copyright Guidelines were amended to address the potential lack of bargaining power by all relevant parties including licensees in negotiations with licensors. In this regard, the ACCC states that the hypothetical bargain approach or using an existing market rate are possible solutions to determining a reasonable remuneration for certain materials in the absence of feasible cost-based approaches. Those methods are designed to counter the market power of collecting societies and lead to better pricing outcomes by balancing the bargaining power of the negotiating parties.

### ***Pricing of copyright materials***

- **Surveys:** several stakeholders submitted that a number of difficulties may arise in conducting useful surveys to estimate willingness to pay for copyright materials. The ACCC has addressed this concern by providing that the hypothetical bargain approach is a pragmatic response to the difficulties of applying cost-based approaches and, where it is too costly or difficult to carry out a survey, the Copyright Tribunal should consider what information is available and/or other approaches which may be more viable.
- **Incentives:** although the draft Copyright Guidelines identified issues regarding the effect of pricing on incentives to create new works, they did not sufficiently identify the impact that pricing may have on decisions to invest in new distribution methods or innovative applications (for example Netflix). Accordingly, the Copyright Guidelines were amended to include an explanation regarding the way in which pricing can affect social welfare by developing new applications such as applications that assist consumers to identify copyright work and recognise how it can be accessed.
- **Benchmarking approach:** discussion in the Copyright Guidelines on the benchmarking approach has been updated to reflect that benchmarking is about finding price indications that are more reflective of competition than may be the case for blanket licences.
- **Construction of the hypothetical bargain:** in response to a concern regarding the practical application of this approach, the ACCC explains that the marginal user's willingness to pay does not imply that the price of that material ends up being equal to marginal cost. Rather the division of surplus means that price will exceed marginal cost, and prices that exceed marginal cost contribute to the recovery of fixed costs and are part of the incentive for the creation of new works.

### ***Are the Copyright Guidelines determinative?***

The Copyright Guidelines explicitly acknowledge that the frameworks and methodologies set out in it may not be feasible or appropriate in certain situations. To this end, while the principles will no doubt form a key consideration for the Copyright Tribunal when determining the reasonableness of any pricing terms under an

existing or proposed licence or licence scheme, the Guidelines make clear that they are not determinative and should not restrain the discretion of the Tribunal to adopt other pricing methodologies.

## What next?

The Copyright Tribunal's approach to the Copyright Guidelines is yet to be tested in any proceeding before the Tribunal. However, it is likely that the principles set out in the guidelines will form a significant consideration of the Copyright Tribunal when determining the reasonableness of licence fee terms that are considered by it.

Copyright licensors/licensees should review the Copyright Guidelines having regard to the reasonableness of pricing terms under any existing licence or during negotiations of any future arrangements for the licensing of copyright materials.

## RELATED KNOWLEDGE

- Want to value your copyright? ACCC releases draft Copyright Guidelines for public consultation

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## Disclaimer

Clayton Utz communications are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this communication. Persons listed may not be admitted in all States and Territories.

May 15, 2019

## Transfer of Rights Surplus Auction - Winners shall compensate Petrobras

### Oil & Gas

In 2010, the Brazilian Government and Petrobras entered into an agreement by means of which Petrobras earned the right to produce up to five (5) billion barrels of oil equivalent (boe) within the Pre-Salt Area. The deal was part of a capitalization of the company.

As Petrobras operations progressed, though, it was found that there were way more than those 5 billion boe negotiated. After reaching an agreement with Petrobras to review the original terms of 2010, the government started preparations for the so-called Transfer of Rights Surplus Auction, in order to offer that substantial excess capacity of the reserves to the market. The auction is expected to be held on October 28.

Under the production-sharing agreement (PSA) system, the auction will offer the areas known as Búzios, Atapu, Itapu, and Sépia. The largest field on offer, Búzios, has a subscription bonus of BRL 68,194 billion and a minimum profit oil of 23.24%. For Sépia, the bonus is BRL 22,859 billion and minimum profit oil of 27.88%. For Atapu, bonus of BRL 13,742 billion and minimum profit oil of 26.23%. And the smallest area, Itapu, will be tendered with bonus of BRL 1,766 billion and profit oil of 18.15%.

In addition to the above features, there are other terms specifically for such coming auction, summarized. Ordinance No. 213 issued by the Ministry of Mines and Energy establishes parameters for the financial compensation owed to Petrobras for the investments made by the company in those areas that will be offered to the market. The rationale is to compensate Petrobras for the investments in the development of the area, vis-à-vis the fact that the production outcomes tend to diminish for Petrobras with the entry of new partners.

The compensation shall be negotiated directly between Petrobras and its future partners – a co-participation agreement will be executed between Petrobras and the new partners. There are estimates around US\$ 20 billion.

The reference price of oil and gas shall be US\$ 72 and US\$ 5, respectively. And the volumes considered as contracted as Transfer of Rights are distributed as follows: Atapu, 550 MM boe; Búzios, 3,150 MM boe; Itapu, 350 MM boe; and Sépia, 500 MM boe. The new partners will be allowed to recover (pro rata to their participation) as cost oil those amounts paid to Petrobras as compensation.

The government also informed that any taxes to be levied upon such compensation shall be borne by Petrobras' future partners.

In addition to the economic compensation, Petrobras will receive another almost US\$ 10 billion from the Federal Government for the revision of its Transfer of Rights agreement.

Our Oil & Gas team has industry expertise and it is constantly mapping potential business opportunities, studying and getting involved on legal and regulatory discussions. We have broad experience in Oil & Gas matters and transactions and in complementary areas of law, as well as on the liaison with the relevant authorities.

Please do not hesitate to contact us should you want to discuss and/or should you have any questions on this or any other matters within the Oil & Gas industry in Brazil.

Partner - Leonardo Miranda

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Bennett  
Jones

# A New Government in Alberta

## What it means for businesses and investors

A new provincial government was elected in Alberta on April 16, 2019. The United Conservative Party (UCP) won a strong majority led by Jason Kenney, Alberta's new Premier. The new government has declared Alberta to be open for business. Here are the new government's most important policy initiatives for investors interested in doing business in Alberta.

### Focus on the Energy Market

The new government plans to re-energize Alberta's oil and gas industry, with a sharp focus on the development of increased pipeline capacity to get resources to tidewater. The newly appointed Associate Minister for Natural Gas will support LNG developments and enhanced domestic processing, and may take steps to increase access to transportation capacity by providing credit support for long-term pipeline commitments. The government also proposes to lock in place royalties on oil and gas wells once a well has been drilled, exempting them from royalty reviews following completion. Abandonment processes are to be streamlined to reduce the number and liability of abandoned wells.



### Carbon Tax Repeal Act

The \$1.4-billion carbon tax imposed by the former government is slated for repeal, to be replaced by the new Technology Innovation and Emissions Reductions (TIER) program for large industrial emitters. TIER is anticipated to incentivize greenhouse reductions by large emitters and help create efficiencies in the transition to lower carbon emissions. TIER takes effect January 1, 2020, reducing the initial cap by 10%, and 1% annually. The compliance price is to be reduced from \$30/tonne to \$20/tonne.

### Red Tape Reduction Act

The incoming government will work to reduce costs for business, speed up approvals and lessen the regulatory burden faced by all industries in Alberta. New legislated timelines have been proposed. An Associate Minister for Red Tape Reduction has been appointed. Industry panels are to be formed to help identify unnecessary red tape.

### Job Creation Tax Cut

The government proposes to lower the tax burden on employers from 12% to 8% over four years. This will make Alberta's general corporate tax rate well below the national average.

### Continued Support for Petrochemical Industry

Alberta plans to continue expanding the incentives to growth in the petrochemical industry in the province. The former government earmarked \$2.6 billion in royalty credits through the Petrochemical Diversification Program and the Petrochemicals Feedstock Infrastructure Program. The province will look into establishing stronger municipal tax incentives to bring petrochemical business to the province.



## Challenges and Next Steps

Alberta's new government will continue to promote increasing access to international energy markets. It will pursue this agenda by leveraging national partnerships to advance Alberta's energy interests with other provinces and the federal government. Some of these initiatives include:

- funding for Indigenous communities to participate in and benefit from energy developments;
- establishing measures to promote investor certainty and counter misleading special interest messaging adverse to oil and gas development; and
- challenging federal legislation that may hinder ongoing development of Alberta's world-class energy reserves.

Alberta has publicly pledged to work alongside other provinces to challenge two high-profile federal bills: Bill C-48 proposing to prohibit large tankers off British Columbia's north coast, and Bill C-69 proposing to change the federal environmental assessment process and to establish a new federal energy regulator. Premier Kenney, premiers from across the country and industry organizations are working to have these bills amended by the federal government, to better support energy projects in Canada.

These steps are intended to promote and foster new growth and investment in Alberta's oil and gas industry, recognizing the province's world-class production operations and energy and environmental regulations.

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“Jason Kenney is experienced and will hit the ground running. He's a thoughtful and intelligent leader who will do what it takes to advance market and pro-free enterprise policies to boost economic growth and job creation.”

*Hon. John Baird P.C., Senior Business Advisor at Bennett Jones and Former Minister of Foreign Affairs*

“The UCP government will bring dramatically lower taxes, shrinking government, a lighter regulatory burden, investor certainty, and balanced budgets. Most important though, is the UCP's unapologetic recognition that oil and gas are what allow Canadians to enjoy one of the world's highest standards of living. The UCP will get Alberta's fundamentals right.”

*The Honourable Christy Clark, Senior Advisor at Bennett Jones and former Premier of British Columbia*

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To discuss what these developments mean for your business, please contact:

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**Posted on: April 26, 2019**

## **SIGNIFICANT CHANGES TO THE *TRADEMARKS ACT OF CANADA***

Bill C-31 received Royal Assent in June, 2014 and will finally come into force June 17, 2019 which will result in substantial changes to the *Trademarks Act of Canada*. The following documents provide key updates on what these changes mean for you.

1. Overview of changes to the *Trademarks Act of Canada*
2. Canadian Government filing fees comparison
3. Canadian Government renewal fees comparison

*For more information on these changes or other trademark issues, please contact any member of our Trademark team:*

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## **SIGNIFICANT CHANGES TO THE TRADEMARKS ACT OF CANADA**

Bill C-31 received Royal Assent in June, 2014 and will finally come into force June 17, 2019 which will result in substantial changes to the *Trademarks Act* of Canada. Some of the noteworthy changes include:

1. The "use" requirement in Canada will be eliminated. Stating a date of first use in an application, claiming registration and use abroad, and the filing of a Declaration of Use prior to registration will no longer be required.
2. Canada will join the Singapore Treaty and Nice Agreement and adopt the Nice classification system. Goods and services still will need to be described in "ordinary commercial terms" (greater specificity compared to most other countries).
3. Canada will join the Madrid Protocol.
4. Government filing fees will now be \$330 Cdn Funds for the first class and \$100 Cdn funds for each additional class.
5. The renewal period will be reduced to 10 yrs from 15 years. The government fees will change based on the number of classes - \$400 Cdn Funds for the first class and \$125Cdn Funds for each additional class thereafter.
6. Trademark applications can be divided to separate goods and services.
7. The Registrar may require goods and services in existing trademark applications or registrations to be grouped according to the Nice classification system.
8. Section 14 Declarations showing that a mark is "not without distinctive character" will no longer be a valid claim to registration. New Section 12(3) of the Act will provide the ability to claim that a mark is *distinctive*. However, treatment of this new section is not yet known.
9. Section 45 cancellation proceedings may be restricted to certain goods or services in a registration (there still will be a three year waiting period from the date of registration before such proceedings can be initiated).
10. The term "trade-mark(s)" will be referred to as "trademark(s)", the term "wares" will be referred to as "goods" and the term "trade-name" will be referred to as "trade name".
11. Trademarks will include non-traditional marks, such as a colour or combination of colours, 3D shapes, holograms, moving images, sound, scent, taste, texture, etc. (however, *distinctiveness* will need to be shown).

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## Canada Government fees comparison

### Canadian Government filing fees comparison

<u>Prior to June 2019</u> <u>Old Regime:</u>	<u>After June 17, 2019:</u>	
<u>**Not based on classes**</u>	<u>**implementation of Classification**</u>	
\$250 Cdn Government Filing Fee	\$330 Cdn	Government Filing Fee Cdn for first Class;
	\$100 Cdn	Each additional class of goods/services;
	One class of goods/services Example: \$330.00 Cdn	
	Two Classes of goods/services Example: \$330.00 Cdn <u>\$100.00 Cdn (second class)</u> <b>\$430.00 Cdn total</b>	
	Three Classes of goods/services Example: \$330.00 Cdn <u>\$200.00 Cdn (2nd and 3rd class)</u> <b>\$530.00 Cdn total</b>	
	Four Classes of goods/services Example: \$330.00 Cdn <u>\$300.00 Cdn (2nd, 3rd and 4th class)</u> <b>\$630.00 Cdn total</b>	
	Five Classes of goods/services Example: \$330.00 Cdn <u>\$400.00 Cdn (2nd, 3rd, 4th and 5th class)</u> <b>\$730.00 Cdn total</b>	
\$200 Cdn Registration Fee	0.00	
<b>NOTE:</b> all applications filed prior to June 17, 2019 will be subject to paying the final government registration fee of \$200 Cdn	<b>NOTE:</b> Final registration fee removed - no longer applicable after June 2019	



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## Canada Government Fees for renewal

As of June 2019

### Canadian Government Renewal fees comparison

<u>Prior to June 2019</u> <u>Old Regime:</u>	<u>After June 17, 2019:</u>	
<u>**Not based on classes**</u>	<u>**implementation of Classification**</u>	
\$350 Cdn Government Fee with <u>no changes</u> to owner info  \$400 Cdn Government Fee with <u>changes</u> to owner info	\$400 Cdn  \$125 Cdn	Government renewal Fee for first Class;  Each additional class of goods/services;
	One class of goods/services Example: \$400.00 Cdn	
	Two Classes of goods/services Example: \$400.00 Cdn \$125.00 Cdn (second class) <b>\$525.00 Cdn total</b>	
	Three Classes of goods/services Example: \$400.00 Cdn \$250.00 Cdn (2nd and 3rd class) <b>\$650.00 Cdn total</b>	
	Four Classes of goods/services Example: \$400.00 Cdn \$375.00 Cdn (2nd, 3rd and 4th class) <b>\$775.00 Cdn total</b>	
	Five Classes of goods/services Example: \$400.00 Cdn \$500.00 Cdn (2nd, 3rd, 4th and 5th class) <b>\$900.00 Cdn total</b>	
	<b><u>NOTE:</u></b> Services fees are billed at an hourly rate to classify goods/services for renewal purposes and will depend upon the complexity and number of classes.	

## Law No. 21,131 sets forth a thirty-day term for payment of invoices

May 9, 2019

On May 16<sup>th</sup>, 2019 the law commonly known as the “Thirty-day payment law” (herein, the “Law”) will enter into force. This Law stipulates, among other matters, that invoices –issued by any type of entity– must be paid, as a general rule, within a maximum term of 30 days after being received.

Although the original bill was intended only to amend the “Small Businesses Statute”, the law ended up as a rule of general application, affecting all entities that issue and/or receive invoices in Chile, regardless of their size.

Below, you will find a brief summary of the main aspects of Law No. 21,131:

### **I. Legal term for payment of invoices:**

The Law sets forth a maximum payment term of **30 days** from when the invoice is received. Nevertheless, **the parties may agree on a longer term**, insofar as they comply with the following requirements and formalities:

1. The agreement that sets a longer term must be in writing;
2. The agreement must be executed by all parties;
3. The agreement will not constitute abuse against the creditor; and
4. The agreement must be registered before the Ministry of Economy within five business days, from its date of execution.

Regarding this last requirement, **the regulation that rules this registry was enacted on May 2, 2019**. This regulation provides that the registration will have to be made through an online form, which will state the main aspects of the agreement. The one obligated to perform the registration is the corresponding buyer or beneficiary of the services who, in addition to completing the form, must sign certain affidavits, including one in which the buyer or beneficiary declares that the agreement does not contain “abusive clauses” as defined by the Law (detailed below).

Those agreements that do not comply with one or more of the aforementioned requirements will be deemed as unwritten, and the general legal payment term will apply (30 or 60 days, depending on the stage of entry into force of the Law).

As to the application of the legal payment term, in cases in which the parties have not agreed on a longer term, the maximum payment term will be **60 days**, for the first 24 months from the publication of the Law, i.e. **until May 17, 2021**, on which date the term will be reduced to **30 days**.

## **II. Forbidden clauses:**

The Law provides that clauses in agreements that unnecessarily delay the payment of invoices will have no effect. Moreover, the Law states that, regarding this type of clause, the following will be considered:

1. Provisions that grant the buyer or beneficiary of the service the ability to terminate or modify the agreement, at his sole discretion, without requiring the prior and express consent of the seller or provider of the service, notwithstanding exceptions that might be established by law;
2. Clauses that contain absolute liability limitations that could deprive the seller or provider of the service of his right of reparation before contractual breaches;
3. Those that set forth interest rates that are lower than the ones established by the Law; and
4. Those that provide that the payment term will be counted from a date different from the reception of the invoice.

## **III Interest rates established by law**

The Law provides a legal interest rate for cases in which the debtor of an invoice does not comply with the legal payment terms. This interest rate will be the current interest rate set forth for **non index-linked operations over 90 days in Chilean pesos**, for amounts that exceed the equivalent of 200 *Unidades de Fomento*<sup>[1]</sup> and are lower than or equivalent to 5,000 *Unidades de Fomento*<sup>[2][3]</sup>. The interest will be accrued as of the **first day of delay of the payment** (day 31 or 61 depending on the stage of entry into force of the Law) until the invoice is paid in full.

Additionally, the Law sets forth the payment of a fixed recovery commission of 1% of the amount due in case of non-compliance with the legal terms of payment.

## **IV Special regulation for the Government**

The Law establishes an exception in the payment term of invoices for public agencies subject to Law No. 19,886 –Public Acquisitions Law–. These agencies may set a term of up to sixty days for payment on the corresponding bidding bases or contracts –in cases of direct contracting–, which will be duly grounded.

Further, the Law provides that, for said public agencies to make payments under supply or service agreements, it will be necessary for the corresponding entity to previously certify the due reception of the goods or services (within the eight days established for the rejection of invoices).



The Law also sets forth that, in procurements for amounts under a certain limit, that are conducted through electronic means, the corresponding public agency may make the payment before the reception of the product, retaining its right of withdrawal, and other rights and duties as a consumer.

On the other hand, the Health Services, the Procurement Central – CENABAST and the Municipalities, will be subject to the maximum payment term stated in the Law, according to the following schedule:

1. 29 months after the publication of the Law, this is as of May 2021, regarding small businesses<sup>[4]</sup>; and
2. 41 months after the publication of the Law for any other company, this is, as of May 2022.

## **V Unfair competition**

Finally, the Law amends Law No. 20,169 on unfair competition, qualifying non-compliance with the legal payment term for invoices as an unfair competition conduct.

Hence, the entry into force of the Law entails a series of challenges and will require certain adjustments in the contractual strategy of companies, particularly in connection with service agreements.

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<sup>1</sup> Approximately USD 8,000.

<sup>2</sup> Approximately USD 200,000.

<sup>3</sup> These interest rates are set forth by the Superintendence of Banks and Financial Institutions, and are available <https://www.sbif.cl/sbifweb/servlet/InfoFinanciera?indice=4.1&idCategoria=555&tipocont=556> here.

<sup>4</sup> Companies with annual incomes of 100,000 *Unidades de Fomento* (approx. USD 4,000,000) or less



## Strengthening Protection of Corporate Trade Secrets to Create a Favorable Environment for Innovation — Introduction of Revisions to Anti-Unfair Competition Law

Authors: Lili WU | Faye WANG

It has been less than two years since the last revisions in 2017 to the *Law of the People's Republic of China Against Unfair Competition* (the “**Anti-Unfair Competition Law**”), but Chinese legislators have adopted on April 23, 2019 a decision again revising the Anti-Unfair Competition Law<sup>1</sup>. The revisions to the Anti-Unfair Competition Law took effect from the date of adoption.

These revisions only involve content related to trade secrets, and show China's ambition to strengthen protections and provide legal safeguards for innovators. The following is a brief introduction to the revisions.

### I. Adding means considered as trade secrets infringement and expansion of persons subject to infringement

Current “Anti-Unfair Competition Law”	Revised “Anti-Unfair Competition Law”
<p>Article 9 A business operator shall not use any of the following means to infringe upon trade secrets:</p> <p>(1) obtaining an obligee's trade secrets by theft, bribery, fraud, intimidation or any other unfair means;</p> <p>(2) disclosing, using or allowing others to use an obligee's trade secrets obtained by the means mentioned in the preceding paragraph; or</p>	<p>Article 9 A business operator shall not use any of the following means to infringe upon trade secrets:</p> <p>(1) obtaining an obligee's trade secrets by theft, bribery, fraud, intimidation, <b>electronic intrusion</b> or any other unfair means;</p> <p>(2) disclosing, using or allowing others to use the trade secrets obtained from an obligee by the means mentioned in the preceding paragraph; or</p>

<sup>1</sup> 《全国人民代表大会常务委员会关于修改《中华人民共和国建筑法》等八部法律的决定》[Decision of the Standing Committee of the National People's Congress on Revising the Construction Law of the People's Republic of China and Eight Other Laws] (adopted by Standing Comm. Nat'l People's Cong. on April 23, 2019).

Current “Anti-Unfair Competition Law”	Revised “Anti-Unfair Competition Law”
<p>(3) disclosing, using or allowing others to use an obligee’s trade secrets in violation of <b>an agreement</b> or the obligee's requirements on keeping such trade secrets confidential.</p> <p>Where a third party knows or should know of the fact that an employee or former employee of the obligee of trade secrets or any other entity or individual conducts any of the illegal acts specified in the preceding paragraph, but still obtains, discloses, uses or allows others to use such secrets, such practice shall be deemed as infringement of trade secrets.</p> <p>For the purpose of this Law, trade secrets refer to <b>any technical information or operational information</b> which is not known to the public and has commercial value, and for which its obligee has adopted measures to ensure its confidentiality.</p>	<p>(3) disclosing, using or allowing others to use an obligee’s trade secrets in violation of <b>confidentiality obligations</b> or the obligee's requirements on keeping such trade secrets confidential.</p> <p><b>(4) Instigating, tempting, aiding others in violation of confidentiality obligations or the obligee’s requirements to keep trade secrets confidential, to obtain, disclose, use, or allow others to use the obligee's trade secrets.</b></p> <p><b>Any natural person, legal person or unincorporated organization other than the operator who conducts the illegal acts stated in the preceding paragraph shall be deemed to have infringed upon trade secrets.</b></p> <p>Where a third party knows or should know of the fact that an employee or former employee of the obligee of trade secrets or any other entity or individual conducts any of the illegal acts specified in the preceding paragraph, but still obtains, discloses, uses or allows others to use such secrets, such practice shall be deemed as infringement of trade secrets.</p> <p>For the purpose of this Law, trade secrets refer to <b>any commercial information including technology information, business operation information and the like</b> which is not known to the public and has commercial value, and for which its obligee has adopted measures to ensure its confidentiality.</p>

#### A. New means considered as trade secrets infringement

According to Article 9, the act of obtaining trade secrets of the obligee by means of electronic intrusion is regarded as trade secrets infringement. Also, instigating, inducing, or help others to obtain, disclose, use or allow others to use trade secrets by means of the above is considered infringement.

The above revisions clarify that, based on current technological developments, obtaining information illegitimately by electronic means is considered infringement of trade secrets, and they further provide a clear legal basis for enterprises to exercise their rights.

## B. Expansion of persons subject to infringement

According to Article 9, persons subject to infringement is also expanded from only business operators to natural, legal persons or unincorporated organizations other than business operators.

This expansion of persons subject to infringement also directly combats a sore spot in modern trade secrets infringement—there is now a clear legal basis for determining eligible defendants, especially where trade secrets disputes arise due to employee departures.

# II. Supplementing punitive damage provisions, increasing administrative penalties

## A. Supplementing punitive damage provisions

Current “Anti-Unfair Competition Law”	Revised “Anti-Unfair Competition Law”
Article 17 A business operator that violates this Law and thus causes damage to others shall bear civil liability for such damage in accordance with the law.	Article 17 A business operator that violates this Law and thus causes damage to others shall bear civil liability for such damage in accordance with the law.
A business operator whose lawful rights and interests are infringed by an unfair competition act may file a lawsuit with a people's court.	A business operator whose lawful rights and interests are infringed by an unfair competition act may file a lawsuit with a people's court.
The amount of compensation for damage caused by any unfair competition act to a business operator shall be determined depending on the actual losses suffered by such operator as a result of the infringement; where it is truly difficult to work out the actual losses, such amount shall be determined in accordance with the benefits obtained by the infringer from the infringement. The amount of compensation shall also include the reasonable expenses paid by the damaged business operator to stop the infringement.	The amount of compensation for damage caused by any unfair competition act to a business operator shall be determined depending on the actual losses suffered by such operator as a result of the infringement; where it is truly difficult to work out the actual losses, such amount shall be determined in accordance with the benefits obtained by the infringer from the infringement. <b>Where the business operator maliciously conducts an infringement upon trade secrets, and where the circumstances are serious, the amount of compensation may be determined as more than one time and less than five times the amount determined according to the above</b>
Where a business operator violates the provisions stipulated in Article 6 or Article 9 herein, and it is truly difficult to determine the	

actual losses suffered by the obligee as a result of the infringement or the benefits obtained by the infringer from the infringement, the people's court shall award the obligee less than <b>RMB 3 million</b> in damages, depending on the seriousness of the infringement.	<p><b>method.</b> The amount of compensation shall also include the reasonable expenses paid by the damaged business operator to stop the infringement.</p> <p>Where a business operator violates the provisions stipulated in Article 6 or Article 9 herein, and it is truly difficult to determine the actual losses suffered by the obligee as a result of the infringement or the benefits obtained by the infringer from the infringement, the people's court shall award the obligee less than <b>RMB 5 million</b> in damages, depending on the seriousness of the infringement.</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

In the past, the amount of compensation for trade secrets infringement was determined based on the actual loss to the infringed party or the benefit to the infringer. Now, if a business operator is found to have committed serious malicious infringement, the amount of compensation may be determined to be more than one time but less than five times the amount mentioned above. Further, in the past, if the loss to the infringed party was difficult to determine, the court could decide to award the infringed party less than RMB 3 million in damages. This discretionary amount has now been increased from RMB 3 million to 5 million.

Following the 2017 revision to the Anti-Unfair Competition Law, which increased the maximum amount of compensation for trade secrets infringement to RMB 3 million from an amount which may be determined by referring to provisions on patent infringement (the maximum amount of compensation for patent infringement is RMB 1 million), the statutory maximum amount of compensation for trade secrets infringement is now raised again to RMB 5 million, which greatly strengthens the protection of trade secrets.

## B. Increasing administrative penalties

Current "Anti-Unfair Competition Law"	Revised "Anti-Unfair Competition Law"
Article 21 Where a business operator infringes any trade secret in violation of Article 9 herein, the supervision and inspection authority shall order it to cease the illegal act and impose on it a fine of <b>between RMB 100, 000 and RMB 500, 000</b> ; where the circumstance is serious, the fine shall be <b>between RMB 500, 000 and RMB 3 million</b> .	Article 21 Where a business operator and <b>other natural person, legal person and unincorporated organization</b> infringes any trade secret set forth in violation of Article 9 herein, the supervision and inspection authority shall order it to cease the illegal act, <b>confiscate the illegal income</b> and impose on it a fine of <b>between RMB 100,000 and RMB 1,00,000</b> ; where the circumstance is serious, the fine shall be <b>between RMB 500, 000 and RMB 5 million</b> .

First, for trade secrets infringement, persons subject to penalties has been expanded from “business operator[s]” to “business operator[s] and other natural person[s], legal person[s] and unincorporated organization[s]”.

Second, the amount of penalties has been increased. Confiscation of illegal gains has been added as a penalty for trade secrets infringement. Fines have been increased from between RMB 100,000 and RMB 500,000 to between RMB 100,000 and RMB 1 million. For serious circumstances, the fines have been increased from between RMB 500,000 and RMB 3 million to between RMB 100,000 and RMB 5 million. Punishments have been greatly increased.

### III. Relaxing the burden of proof of obligees and shifting the burden of proof to defendants after the initial production of evidence.

Current “Anti-Unfair Competition Law”	Revised “Anti-Unfair Competition Law”
	<p>Article 32 <b>(New)</b> In civil trial procedures for infringing trade secrets, where the obligee of trade secrets provides primary evidence proving he has taken confidential measures against the claimed trade secrets and reasonably indicates that the trade secrets have been infringed, the alleged infringer shall prove that the trade secrets claimed by the obligee do not constitute trade secrets as set forth in this Law.</p> <p>Where the obligee of the trade secrets provides primary evidence reasonably indicating that the trade secrets are being infringed and provides one of the following as evidence, the alleged infringer shall prove that he has not infringed upon the trade secrets:</p> <p>(1) There is evidence indicating that the alleged infringer had access to the trade secrets or had an opportunity to obtain the trade secrets and that the information used is substantially the same as the trade secrets;</p> <p>(2) There is evidence indicating that the trade secrets have been disclosed, used or</p>

	<p>are at risk of being disclosed, used by the alleged infringer;</p> <p>(3) There is other evidence indicating that the trade secrets have been infringed by the alleged infringer.</p>
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#### **A. Trade secrets constitute a shifting of the burden of proof**

According to the new Article 32, where the trade secrets obligee initially proves that the claimed trade secrets are confidential and reasonably indicates that the trade secrets have been infringed, the alleged infringer must prove that the trade secrets claimed by the obligee do not constitute trade secrets under the Anti-Unfair Competition Law.

#### **B. Trade secrets infringement shifts the burden of proof**

According to the new Article 32, under certain circumstances, as long as the obligee provides primary evidence that his trade secrets have been infringed, the alleged infringer must prove that he has not infringed the trade secrets.

The production of evidence has long been a barrier and difficulty for trade secrets obligees to safeguard their legitimate rights and interests. In past cases of trade secrets infringement, obligees have borne the full burden of proof. Obligees had to prove that the information was secret, valuable, and confidential, and constituted trade secrets in a legal sense, and that the obligee was the owner of the trade secrets. The obligee also had to prove that the alleged infringer met the conditions for and used illegitimate means to obtain the trade secrets, and finally the obligee had to prove the losses caused by the disclosure of the trade secrets.

According to this new article, after an initial production of evidence by the trade secrets obligee, the burden of proof can be partially shifted to the alleged infringer. Thus, the burden of proof of the obligee can be greatly reduced. This will help obligees to effectively protect their legitimate rights and interests.

In summary, the foregoing revisions to the Anti-Unfair Competition Law increase punishments for trade secrets infringement, while also alleviating the burden on obligees to prove their claims. These are positive developments for the protection of trade secrets, which reflect the ambition and intensity of the government to strengthen the intellectual property rights protections for innovators.



### ***Important Announcement***

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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# HOW CAN LAW COPE WITH INNOVATION?

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A case study of France and its reform  
of crypto-assets

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March 2019

## HOW CAN LAW COPE WITH INNOVATION?

*A case study of France and its reform of crypto-assets*

Reconciling law with innovation is often a challenge for legislators since, by definition, innovation departs from existing standards and frameworks. Some may therefore question the ability of the law to address innovative trends.

However, the reform about to be finalised in France, known as the PACTE draft bill<sup>1</sup>, includes provisions on crypto-assets and the token economy, which go against this common statement. Quite the contrary. This bill illustrates how regulators can innovate through law to support innovation.

### ◆ In what way is this reform innovative for the crypto economy?

The objective of the PACTE draft bill is to establish in France a regulatory framework for the crypto economy that is both attractive and comprehensive.

#### ATTRACTIVE

Because it strikes an original balance between

- (i) maintaining enough flexibility to support innovation,
- (ii) defining credible rules to facilitate interaction of this new economy with incumbent players (such as banks and institutional investors).

The new regime would indeed mainly provide for optional regulatory requirements, leaving it up to the market players to decide whether to opt for the regime.

#### COMPREHENSIVE

Because it addresses the entire crypto-ecosystem, based on the conviction that regulating both the primary and secondary markets of utility tokens is key in the efficiency of the future regime.

It includes regulatory provisions for (i) issuers of utility tokens, (ii) service providers on these utility tokens, (iii) investment funds likely to invest in utility tokens, and lastly (iv) credit institutions to ensure that the said issuers and service providers have access to banking services.

<sup>1</sup> Projet de loi relatif à la croissance et la transformation des entreprises

## ◆◆ What will change for utility token issuers?

The PACTE draft bill aims to introduce into French law **the possibility for utility token issuers to obtain a visa** for their tokens' issuance.

For the purpose of this reform, utility tokens shall be understood as digital goods giving rise to one or more rights and which may be issued, registered, stored or transferred via distributed ledger technology<sup>2</sup>. The tokens, which qualify as financial instruments pursuant to MiFID II, are excluded from the scope of this regime.

This visa would be delivered by the French public authority supervising financial markets (the *Autorité des marchés financiers*, or AMF), if the offer and its issuer comply with a number of requirements, including the following:

- ◆ The issuer must provide token subscribers with a **document containing all information** relevant for the public and regarding the offer and the issuer. Such information, together with the information in the relevant marketing documents, shall be clear, fair and not misleading.
- ◆ The issuer must be a legal person **incorporated or established in France**.
- ◆ The issuer must put in place the appropriate means to **monitor and safeguard the funds** raised following the tokens' issuance.
- ◆ The issuer must comply with the obligations provided under French law on preventing the use of the financial system for the purposes of money laundering or terrorist financing (**AML/CTF**).

The General Regulation of the AMF will specify how these requirements must be implemented. These specifications should be finalised by the end of the first semester 2019, with the first visas potentially delivered by the AMF in September 2019.

**Obtaining such a visa will be optional:** issuers may decide whether they seek the visa from the AMF. There will be no regulatory obligation compelling the issuer to do so. However, if an issuer does decide to obtain a visa, the requirements conditioning such visa become binding. The AMF would hence be granted the power to monitor and supervise compliance by said issuer with said obligations.

With this reform, the visa is intended as an incentive to facilitate issuers' approach of potential subscribers and other stakeholders. The legal framework is meant as a marketing tool for innovative players. The same approach is also used for service providers.

## ◆◆ What will change for crypto-asset service providers?

Pursuant to the reform, **crypto-asset service providers established in France may opt into an optional regime**. If they decide not to opt in, service providers established in France will still be able to run their activities without being suspected of unlawful conduct in France.

However, **if they decide to opt in, they will have to comply with all the requirements applicable under the optional regime and will be put under the authority of the AMF as licensed crypto-asset service providers** (just like utility token issuers).

In other words, as soon as a crypto-asset service provider established in France decides to opt in, all the applicable requirements pursuant to the optional regime become binding.

<sup>2</sup> The PACTE draft bill refers to « *tout bien incorporel représentant, sous forme numérique, un ou plusieurs droits pouvant être émis, inscrits, conservés ou transférés au moyen d'un dispositif d'enregistrement électronique partagé permettant d'identifier, directement ou indirectement, le propriétaire dudit bien.* » - see Article 26 of the draft bill.

At this stage, crypto-assets-related services covered by the optional regime are the following (where the services are provided in relation to crypto-assets that do not qualify as financial instruments under MiFID II):

- ◆ custodian wallet provider;
- ◆ crypto/fiat exchange provider;
- ◆ crypto/crypto exchange provider;
- ◆ crypto trading platform;
- ◆ execution of orders on crypto-assets on behalf of clients;
- ◆ crypto-asset portfolio management;
- ◆ investment advice on crypto-assets;
- ◆ underwriting of crypto-assets on a firm commitment basis;
- ◆ placing crypto-assets on a firm commitment basis; and
- ◆ placing crypto-assets without a firm commitment basis.

A decree will further define each of the services mentioned above. This decree is likely to be published by the end of 2019.

To seek a license from the AMF, crypto-asset service providers established in France must permanently fulfil the following requirements:



Maintain a professional liability insurance coverage or own funds (the amount of which will be set in the AMF General Regulation).



Have in place adequate safety and internal control mechanisms.



Have in place a resilient IT system.



Maintain a professional liability insurance coverage or own funds (the amount of which will be set in the AMF General Regulation).

The PACTE draft bill defines further requirements that must be fulfilled on an ongoing basis by licensed crypto-asset service providers, such as the obligation to communicate to their clients clear, accurate and not misleading information (including in marketing communications); the obligation to disclose the fee policy; the obligation to put in place an effective policy for handling complaints; etc. The PACTE draft bill also lays down specific requirements for each of the services listed above. The details of the applicable requirements will be listed in the decree.

One specific exception to the optional nature of the regime is that **certain service providers** (i.e. custodian wallet providers and crypto/fiat exchange providers) **must “register” with the AMF** and will be subject to AML/CFT requirements. In this context, registration means “declaration” and is different from licensing (which refers to the licence given by the AMF to those providers that opt-in). On this basis, the AMF will regularly publish a list of registered crypto-asset service providers. **The provision of such services will be prohibited if the providers of such services are not registered with the AMF.**

This exception on the optional nature of the regime emphasises the significance of AML/CFT for France. It follows on from the implementation in France of the 5th Directive<sup>3</sup> on the prevention of money laundering or terrorist financing to address the specific issues of the token economy in this field.

## ◆◆ What are the other key provisions on the crypto-economy in this reform?

Two set of provisions must be highlighted.

First, **the PACTE draft bill will allow certain professional investment funds to invest in crypto-assets**, which was not possible until now in France. This proposal recognises that the development of this new economy may depend on the existence of appropriate investment vehicles capable of channelling the investments into it. Taking nevertheless into account the risks that this new category of assets may bear, the reform intends to rely on the skills and expertise of professional asset managers to manage these vehicles, the marketing of which shall be restricted to professional investors and high-net-worth individuals.

Second, the reform should address the difficulties that members of the crypto-ecosystem have encountered to date when dealing with banks. **The proposal intends to require from credit institutions that they set up objective, non-discriminatory and proportionate internal rules governing access to banking services for utility token issuers having obtained a visa, and licensed Crypto-Asset Service Providers.** The legislator thus creates a new incentive to seek the regulatory authorisations described above.



**The PACTE draft bill has been under discussion at the French Parliament since June 2018. In February 2019, the French National Assembly started its second review of the last version of the proposal, for a possible enactment of the reform by the end of the first semester of 2019. It should hopefully provide interesting prospects for crypto-players throughout the world.**

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<sup>3</sup> European directive 2018/843



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## About Gide 255

Gide has put in place a team dedicated to offering strategic, legal and regulatory advice on all matters related to its clients' digital transformation. Headed by Franck Guiader, with Jennifer D'hoir and Matthieu Lucchesi, this team of experts in the fields of regulation, innovation and strategy aims to offer "augmented" advice on changing business models and new behaviours that are deeply affected by the development of advanced technologies. The team will also offer high-end support to help advance the changing legal and regulatory framework both in France and abroad, whether ongoing or to come

Gide 255 covers in particular the growing stakes of blockchain, ICOs, artificial intelligence, automation and various aspects of data processing.

The recognised know-how of all Gide teams as regards business law, combined with the comprehensive experience of this new team on all challenges pertaining to digital transformation, together enable the firm to offer its clients a unique tool to help decision-making processes in a context that is disrupted by the advent of breakthrough technologies.

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As the debates on the PACTE draft law are still ongoing, this article was prepared on the basis of the French Parliament's working documents, not the final law text. The information contained herein is therefore liable to change.

You can find this article on our website in the News & Insights section: [gide.com](https://www.gide.com).

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## ZEDE WILL SOON START OPERATIONS IN HONDURAS

**Z**EDE, is the Spanish acronym for Special Zones of Development and Employment which are defined by the Law of Employment Zones and Economic Development, as: "They are territorial spaces highly attractive to national and foreign investment which are an inalienable part of the State of Honduras, subject to the Constitution of the Republic and the national government on issues related to sovereignty, application of justice, territory, national defense, foreign relations, electoral issues, issuance of identity documents and passports, as established in Article 329, in its seventh paragraph of the Constitution of the Republic.", in its article 1. The creation of several of these zones is projected with the intention of attracting investment and generating employment in uninhabited areas of the country or in the municipalities that request their conversion to ZEDE through referendum.

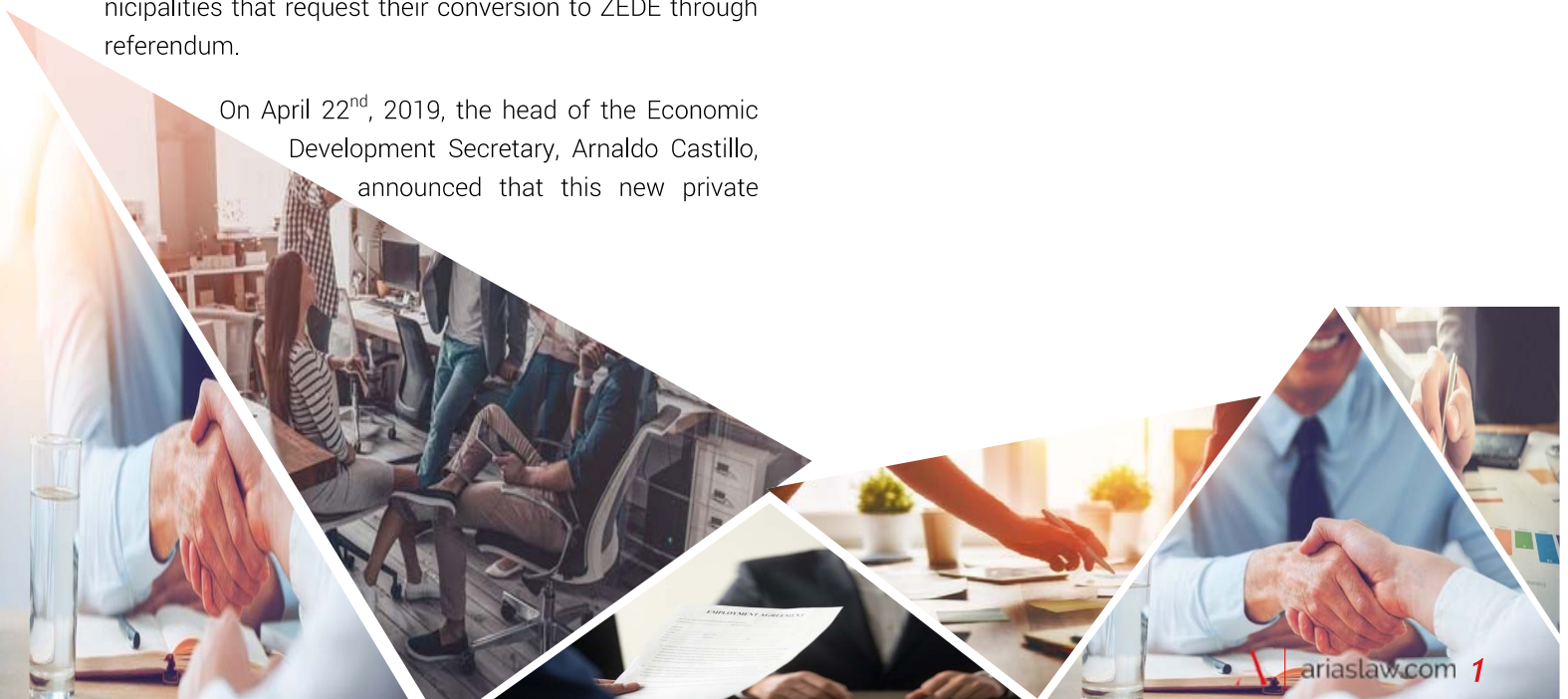
investment system will start operations soon.

If you want more information about these new investment opportunities, do not hesitate to contact us:



[Contact.honduras@ariaslaw.com](mailto:Contact.honduras@ariaslaw.com)

On April 22<sup>nd</sup>, 2019, the head of the Economic Development Secretary, Arnaldo Castillo, announced that this new private





Luxembourg

## The Luxembourg Bill Implementing Srd II as Regards the Encouragement of Long-Term Shareholder Engagement

Wednesday 8 May 2019

*On 25 January 2019, Bill No 7402 (the "**Bill**") implementing Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement (the Shareholder Rights Directive II or SRD II) was introduced. The Bill amends the Act of 24 May 2011 on the exercise of shareholder rights and is intended to enhance the long-term sustainability of Luxembourg-based companies whose shares are listed on a regulated market in an EU Member State or, in the event of an opt-in, on a third-country regulated market.*

*The Bill introduces the following measures.*

### **Right of companies to identify their shareholders**

Intermediaries are required to provide the company, at the latter's request, with information regarding the identity of its shareholders. Certain provisions designed to ensure the protection of personal data are being considered in this regard.

### **Obligation of companies and intermediaries to facilitate the exercise of shareholder rights**

Companies shall provide intermediaries with information relating to the exercise of shareholder rights in a timely and standardised manner. Intermediaries shall provide shareholders with information enabling them to exercise their rights, unless the company sends the information directly to its shareholders.

Intermediaries shall provide the company in a timely manner with all information received regarding the proposed exercise by shareholders of their rights.

Intermediaries shall facilitate the exercise of shareholder rights, in particular the right to attend and vote at general meetings, by taking appropriate measures to enable shareholders or their representatives to exercise the rights directly or through the intermediary.

### **Remuneration policy and report**

Companies shall prepare a management remuneration policy describing all components, criteria, methods and modalities applied to determine the fixed and variable remuneration of directors. The remuneration policy must contribute to the commercial strategy, interests and long-term sustainability of the company and indicate how it does so.

Shareholders have an advisory vote on the remuneration policy, unless the company's articles of association

provide otherwise. The remuneration policy must be submitted to the general meeting of shareholders for approval every time there is a significant change thereto and at least every four years.

In addition, companies must prepare a report on the remuneration and benefits granted to directors for presentation to the annual general meeting.

Both the remuneration policy and report shall be made available on the company's website.

### **Transparency and approval of related-party transactions**

Companies shall publicly disclose material transactions (excluding "*transactions taking place as part of the company's ordinary activity and concluded under normal market conditions*") with related parties no later than conclusion of the transaction. The notice shall include all information necessary to assess whether the transaction is fair and reasonable from the perspective of the company and shareholders who are not related parties, including minority shareholders.

### **Obligations of institutional investors and asset managers regarding the engagement policy and investment strategy**

Institutional investors and asset managers shall prepare and publicly disclose an engagement policy that describes how they integrate shareholder engagement into their investment strategy. They shall also publicly disclose, each year, information on implementation of their engagement policy.

Institutional investors shall publicly disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets.

Where an asset manager invests on behalf of an institutional investor, the institutional investor shall also publicly disclose certain information regarding its arrangement with the asset manager.

### **Greater transparency by asset managers**

Certain annual disclosure obligations are imposed on institutional investor asset managers regarding how their investment strategy and the implementation thereof comply with the arrangement with the institutional investor and contribute to the medium to long-term performance of the institutional investor's assets or the fund.

### **Greater transparency by proxy advisors**

Proxy advisors shall publicly disclose a reference to the code of conduct they apply and report on application of the code. They shall also publicly disclose on an annual basis certain information relating to the preparation of their research, advice and voting recommendations.

Proxy advisors shall identify and disclose without delay to their clients any actual or potential conflicts of interest or business relationships that could influence the preparation of their research, advice or voting recommendations and the actions they have taken to mitigate such conflicts.

### **Sanctions**

Directors are personally and jointly liable for any damage resulting from breach of any of their obligations under the Bill.





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## Investment Funds



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## **Better late than never? Climate Change Response (Zero Carbon) Amendment Bill introduced to Parliament**

May 09, 2019

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Government reform and public policy (</resources/government-reform-and-public-policy>)

Climate Change Minister James Shaw introduced the Climate Change Response (Zero Carbon) Amendment Bill (the Bill) to Parliament yesterday. It arrived later than expected, requiring extensive behind the scenes work to get a high level of cross-party consensus essential for the longevity of legislation of this nature.

It proposes to set legally binding emissions targets in place, and was described by Prime Minister Jacinda Ardern as a “landmark” piece of legislation. There has already been political and sector comment.

In this FYI, we briefly summarise the key points and early reaction to its proposals. Our follow up FYI, next week, will look at specific sector impacts.

### **What the Bill does**

1. Implements a framework for actions for New Zealand's contribution to ensuring no more than 1.5 degrees Celsius of global warming above pre-industrial levels.
2. Commits the Government to reducing New Zealand's long-lived greenhouse gas emissions to net zero by 2050 (which will likely involve offsets such as forestry), and biogenic methane (ie agricultural) emissions by 10% of 2017 levels by 2030. There will be a further reduction range of between 24% and 47% of 2017 levels by 2050. However, this range is subject to a review by the Climate Change Commission in 2024 that will consider any future scientific developments.
3. Establishes an Independent Climate Change Commission, which will be made up of seven members. It will give independent advice on what action needs to be taken and when.
4. Legally binds the Government into planning for adaption to the increasingly severe weather events that New Zealand is experiencing due to climate change.

### **How it will enforce targets**

The main enforcement mechanism is envisioned to be the Emissions Trading Scheme. However, clause 5ZJ(2) of the Bill states that “[i]f the 2050 target or an emissions budget is not met, a court may make a declaration to that effect, together with an award of costs.”

## **Effect on New Zealand Industries**

The biogenic methane reduction targets are significant, as New Zealand’s agriculture industry contributes 48.1% of damaging emissions, 35% of which is biogenic methane. Agriculture is "incredibly important to New Zealand", Ms Ardern said, but also must be "part of the solution".

A Beef and Lamb New Zealand spokesperson said that the methane reduction targets make unfair demands on farmers. “It’s unreasonable to ask farmers to be cooling the climate, as the Government’s proposed targets would do, without expecting the rest of the economy to also do the same.”.

## **Other Party support**

National Party leader Simon Bridges said his party supports the structure of the Bill, but has reservations about the methane targets. "While we have found common ground on the Commission's form and function, the net-zero target for long lived gases, and the separate treatment of methane, we have serious reservations about the expected rate of reduction for methane".

NZ First leader Winston Peters has welcomed the Bill. He said, "[w]e will listen very closely to, and work with, the agriculture sector about their preferences... [i]n negotiations, New Zealand First sought to balance the interests of the agricultural sector and the need for the Government to take strong action and show leadership on climate change. We paid careful attention to, and respected, the weight of officials' advice around a methane target.”

ACT will oppose the Zero Carbon Bill.

## **The Future of the Bill**

Ministry for the Environment expects the Bill to go to the Select Committee in the second half of 2019, and the amended Act to come into force in late 2019.

Given there has already been significant cross-party consultation, any movement in the policy of the Bill may be limited. No doubt there will be strong pressure from the agriculture industry however. That pressure will be met by opposition from the environmental lobby, who will want to hold the government to account and likely push for stronger accountability provisions.

We suspect that the Emissions Trading Scheme reforms yet to be seen in detail will be an essential part of the picture when evaluating this Bill for agriculture in particular, to see how the Zero Carbon Bill targets translate into obligations to surrender emission units and whether there will be some level of transitional subsidisation put in place immediately.

The Bill can be accessed here (<http://www.legislation.govt.nz/bill/government/2019/0136/latest/LMS183848.html>).

Please get in touch with any of our contacts to discuss how the Bill could affect your sector or for assistance with preparing a submission.

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## **SyCipLaw Tax Bulletin:**

### **Revenue Regulations No. 4-2019: Implementing Rules and Regulations of Republic Act No. 11213, Otherwise Known as the “Tax Amnesty Act,” Providing for the Guidelines on the Processing of Tax Amnesty Application on Tax Delinquencies**

April 22, 2019

On April 5, 2019, Finance Secretary Carlos G. Dominguez issued Revenue Regulations (“RR”) No. 4-2019 to implement the provisions on tax amnesty on delinquencies under Republic Act No. 11213 (“**Tax Amnesty Act**”). RR No. 4-2019 was published in Malaya on April 9, 2019 and took effect fifteen (15) days after its publication, or on April 24, 2019.

The Tax Amnesty Act submitted by Congress originally provided a general tax amnesty in addition to an amnesty for estate taxes and an amnesty for delinquent taxes. President Rodrigo Duterte vetoed the entire section on the general tax amnesty for all unpaid internal revenue taxes and asked Congress to pass another general tax amnesty bill that includes additional safeguards and measures against tax evasion. RR No. 4-2019 covers the tax amnesty for delinquencies. The provisions on estate tax amnesty will be covered by separate revenue regulations.

#### **Who May Avail of Tax Amnesty**

Natural and juridical taxpayers with internal revenue tax liabilities covering taxable year 2017 and prior years may avail themselves of the tax amnesty on delinquencies within one year from the effectivity of the rules, or until April 24, 2020.

#### **What Tax Liabilities Are Covered**

The tax amnesty on delinquencies cover internal revenue tax liabilities for taxable year 2017 and prior years under the following circumstances:

1. Delinquent accounts including (a) those with an application for compromise settlement, whether the same was denied or still pending on or before April 24, 2019, (b) delinquent withholding tax liabilities arising from non-withholding of tax, and (c) delinquent estate tax liabilities;

A **delinquent account** pertains to a tax due from a taxpayer arising from the audit of the Bureau of Internal Revenue (“**BIR**”) where an assessment notice (a final assessment notice or “**FAN**”/Formal Letter of Demand or “**FLD**”) has become final and executory because of the following:

- (i) failure to file a valid protest within thirty (30) days from receipt of the FAN/FLD,

- (ii) failure to file an appeal to the Court of Tax Appeals (“**CTA**”) or an administrative appeal before the Commissioner of Internal Revenue (“**CIR**”) within thirty (30) days from receipt of the decision denying the protest, or
  - (iii) failure to file an appeal to the CTA within thirty (30) days from receipt of the decision of the CIR denying the appeal to the Final Decision on Disputed Assessment (“**FDDA**”).
2. With pending criminal cases with the Department of Justice (“**DOJ**”)/Prosecutor’s Office or the courts for tax evasion and other criminal offenses under the Tax Code, with or without assessments duly issued;
  3. With final and executory judgment by the courts on or before April 24, 2019; and
  4. Withholding tax liabilities of withholding agents arising from their failure to remit withheld taxes.

### **Tax Amnesty Rates and Computation of Tax Amnesty Payments**

The tax amnesty rates are:

1. 40% for delinquent accounts which have become final and executory;
2. 50% for tax cases subject of final and executory judgement by the courts;
3. 60% for criminal cases pending before the DOJ or the Prosecutor’s Office; and
4. 100% for withholding agents who failed to remit withheld taxes to the BIR.

To calculate the tax amnesty payment, the tax amnesty rate is applied to the basic tax assessed less any basic tax paid prior to April 24, 2019. The basic tax assessed is the tax due shown on the assessment notice exclusive of penalties, or the basic tax liabilities shown in the criminal complaint filed with the DOJ or the Prosecutor’s Office or in the information filed with the courts, or the basic tax liabilities as per the court’s final and executory decision.

RR No. 4-2019 provides two examples to illustrate the calculation of the amount of tax amnesty payment:

#### **Illustration 1:**

#### **With denied/pending application for compromise settlement:**

Basic Tax per FAN	P 1,000,000.00
Basic Tax paid per Compromise Settlement application	400,000.00
Net Basic Tax prior to April 24, 2019	P 600,000.00
Multiply by Tax Amnesty Rate	40%
Amount of Tax Amnesty to be paid	P 240,000.00

**Illustration 2:**  
**With partial/installment payments:**

Basic Tax per FAN	P 1,000,000.00
Partial payment/s made prior to April 24, 2019 (net of payment applied to penalties)	<u>200,000.00</u>
Net Basic Tax	P 800,000.00
Multiply by Tax Amnesty Rate	<u>40%</u>
Amount of Tax Amnesty to be paid	<u>P 320,000.00</u>

In case the delinquent account consists only of unpaid penalties due to either late filing or payment and there is no basic tax assessed, the taxpayer may avail of the tax amnesty by submitting the documentary requirements without making any payment.

**Manner and Place of Filing of Tax Amnesty**

Applicants for the tax amnesty must first secure a Certificate of Delinquencies/Tax Liabilities from the BIR Office concerned as follows:

1. For delinquent tax cases – Revenue District Office (“**RDO**”) where the taxpayer-applicant is registered, or the Regional Collection Division for taxpayer-applicants under the jurisdiction of Revenue Region Nos. 5, 6, 7, or 8 (Caloocan, Manila, Quezon City and Makati, respectively), or the Large Taxpayers Division (Cebu or Davao) or Large Taxpayers Collection Enforcement Division, as the case may be;
2. For tax cases subject of final and executory judgment by the courts – Legal Division of the Regional Office or Litigation/Prosecution Division in the National Office which handled the case; and
3. For tax liabilities covered by a pending criminal case filed with the DOJ/Prosecutor’s Office/Courts - Legal Division of the Regional Office or Revenue Region (for Caloocan, Manila, Quezon City and Makati) or the Prosecution Division of the National Office which handled the case.

Applicants for the tax amnesty on delinquencies shall then submit the following documents to the RDO or Large Taxpayers Division Office where the applicant-taxpayer is registered:

- Tax Amnesty Return (BIR Form No. 2118-DA);
- Duly-validated Acceptance Payment Form (BIR Form No. 0621-DA);
- Certificate of Tax Delinquencies/Tax Liabilities issued by the concerned BIR offices; and
- In the case of delinquent withholding tax liabilities arising from non-withholding of tax, a copy of the assessment found in the FAN/FDDA;

- In the case of withholding tax liabilities of withholding agents arising from failure to remit withheld taxes, the Preliminary Assessment Notice/Notice for Informal Conference or equivalent document, is sufficient.

The completion of all steps under Section 5(C) of RR No. 4-2019 (which includes the filing of all required documents and payment of the taxes and penalties (if applicable)) has to be done within the one-year availment period which is until April 24, 2020.

### **Cancellation of Assessment**

The BIR shall issue a Notice of Issuance of Authority to Cancel Assessment to the applicant taxpayer within fifteen (15) calendar days from submission of the Tax Amnesty Return and the Acceptance Payment Form. Otherwise, the stamped “received” duplicate copies of these documents shall be deemed as sufficient proof of availment.

### **Effect of Tax Amnesty**

Delinquencies for which taxpayers have availed themselves of the amnesty are considered settled, and the criminal case in connection therewith and its corresponding civil or administrative case, if applicable, are terminated.

The availment of the tax amnesty on delinquencies and the issuance of the corresponding Acceptance Payment Form do not imply any admission of criminal, civil or administrative liability on the part of the availing taxpayer.

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April 30, 2019

## Introduction

A shareholder does not have an automatic right to be a director of a company, unless otherwise provided in a shareholders' agreement or the company's constitution. Even if there is a right to directorship, a further issue arises as to its temporal scope.

The case of *Debotosh* highlights this temporal issue by distinguishing between a one-off right to directorship and a continuing right. Beneficiaries of the one-off right are entitled to be appointed directors of a company upon the agreed time or event, but there is no obligation to keep them there, unlike a continuing right extending into the future. Thus, if a continuing right to directorship is intended, clear and express words should be used to that effect, bearing in mind that the language of the clause would be the first port of call for the court in an exercise of contractual interpretation.

## Background

In *Debotosh*, the plaintiff applied for an injunction to restrain a threatened breach of his alleged right to be a director of the second defendant so long as he remained its shareholder (Directorship Right). According to the plaintiff, the Directorship Right was a continuing right expressly conferred upon him by cl 4.1.3.2 of the agreement formed between the defendants and the management team including himself (Agreement). To support his argument, the plaintiff also relied on other provisions of the Agreement and the parties' subsequent conduct.

In contrast, the defendants argued that cl 4.1.3.2 of the Agreement was static and only gave the plaintiff a one-off right to be appointed as a director of the second defendant upon completion of the Agreement (defined as 21 April 2003). Since that right did not extend into the future, the defendants are entitled to remove the plaintiff pursuant to the second defendant's constitution and his application must fail.

Clause 4 of the Agreement read as follows:

### “4. COMPLETION

#### 4.1 On Completion Date:

...

#### 4.1.3 [The first defendant] shall procure [the second defendant] to:

4.1.3.1 increase the issued and paid up capital of [the second defendant] to \$1,000,000 divided into 1,000,000 shares of \$1.00 each.

4.1.3.2 appoint 5 directors to its board comprising 3 persons nominated by [the first defendant] namely: ... and two

persons from the [management team], namely: [the plaintiff] and ... [The plaintiff] shall be the Managing Director.

4.1.3.3 appoint a director nominated by [the first defendant] as the Chairman of [the second defendant]. The Chairman shall have a casting vote at meetings.

4.1.3.4 open a current account with a Singapore bank.

4.1.3.5 In relation to the said bank account, it is hereby agreed that [the first defendant] shall have the right to appoint 4 authorised signatories under Group A and the [management team] shall be entitled to appoint 3 authorised signatories, one of whom shall be a Group A signatory.

4.1.3.6 Each of the parties hereto shall be entitled at any time and from time to time to remove their appointees and appoint other persons in their place as signatories.

4.1.3.7 Unless superseded by a later board resolution, the said bank account shall be operated in the same manner as that of the C&E Business.”

## Holding of the Singapore High Court

The Court dismissed the application because the plaintiff failed to establish his case.

First, the language of cl 4.1.3.2 did not support the plaintiff’s case. As “the text of a contract ought always to be the first port of call”, the Court started its analysis by making two observations from the language of cl 4:

- a. cl 4 bore the prominent heading: “COMPLETION”, which was an indicator (though perhaps not very weighty) of the importance which the parties attached to the heading; and
- b. all of cl 4 was subject to the introductory words of cl 4.1: “On Completion Date”.

Thus, the natural construction of cl 4 was that its purpose was to govern completion and to set out the rights and obligations of the parties on the completion date (and not thereafter). On that reading, cl 4.1.3.2 did not provide for a continuing right to directorship. The plaintiff argued otherwise, pointing particularly to cl 4.1.3.6 which governed the parties’ rights post-completion.

The Court rejected the plaintiff’s argument for failing to recognise a critical distinction between the language used in the first four limbs of cl 4.1.3 (i.e. cll 4.1.3.1 to 4.1.3.4) and its last three limbs (i.e. cll 4.1.3.5 to 4.1.3.7). The Court pointed out that:

- a. unlike the self-contained language of the last three limbs, each of the first four limbs of cl 4.1.3 was drafted as a sentence fragment to be read with the introductory words of “On Completion Date” in cl 4.1;
- b. further, unlike the last three limbs, each of the first four limbs also specified a one-off act that the first defendant was obliged to procure the second defendant to carry out upon completion of the Agreement;
- c. there was nothing in the language of cll 4.1.3.1 to 4.1.3.4 that evinced an intention by the parties that these limbs were to govern their rights for the future, i.e. post-completion; and
- d. in contrast, cll 4.1.3.5 to 4.1.3.7 did evince such an intention from their language used. Indeed, their sole purpose was to deal with the post-completion operation of the second defendant’s bank account, which would explain why they were inserted immediately below cl 4.1.3.4 governing the parties’ obligations regarding the opening of that bank account.

Second, apart from cl 4.1.3.2, the other terms of the Agreement also fell short of supporting the plaintiff’s case.

The Court rejected the plaintiff’s reliance on Recital C. Recital C recorded the management team’s desire of participating as shareholders of the second defendant. This had no bearing on the existence, let alone the enduring

nature, of any other rights, which the parties might enjoy under the Agreement. In that regard, the concept of participation in ownership (as a shareholder) was quite distinct from the concept of participation in management (as a director). The Court also rejected the plaintiff's argument on commercial absurdity: namely, if cl 4.1.3.2 only conferred upon him a right to be a director of the second defendant upon completion, that would undermine the entire commercial purpose of the Agreement as manifested in Recital C, since he could be removed in an instant after completion without breaching the Agreement. The Court found on the evidence that the risk of removal was either a risk which did not occur to the plaintiff to guard against in the Agreement or one which the plaintiff was willing to take when he entered into the Agreement. Accordingly, that risk of removal was not a basis for conjuring the Directorship Right out of cl 4.1.3.2 when it had no basis in the language of that clause.

Contrary to the plaintiff's argument, the Court held that cl 16.2 could not extend the temporal scope of cl 4.1.3.2. Cl 16.2 stated: "As to any of the provisions of this Agreement remaining to be performed or capable of having effect after the Completion Date this Agreement shall remain in full force and effect notwithstanding Completion". Cl 4.1.3.2 was not an obligation that remained to be performed, as it was done a year before completion, on 1 April 2002. Further, cl 4.1.3.2 did not regulate the parties' rights post-completion. Hence, cl 16.2 did not operate on cl 4.1.3.2.

Third, the subsequent conduct of the parties was incapable of assisting the plaintiff. This is because subsequent conduct is generally not a legitimate aid when construing a contract, even under the contextual approach. In any case, the Court did not find the subsequent conduct to be inconsistent with the defendants' position.

The Court therefore dismissed the plaintiff's application with costs.

## Conclusion

The case of *Debotosh* serves as a timely reminder that, if a continuing right is intended by the parties to extend into the future, clear and express words should be used to that effect. To that end, the decisions of *Paillart Philippe Marcel Etienne and another v Eban Stuart Ashley and another* [2007] 1 SLR(R) 132 and *Cosmic Insurance Corp Ltd v Khoo Chiang Poh* [1979-1980] SLR(R) 703 provide successful examples of providing for a continuing right to directorship.

Parties are advised to seek professional advice on the scope and effect of their existing right to directorship and/or the drafting of such a right. If you require such advice or would like to know how this decision might affect your business, please approach the key contact(s) listed in this article.

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Dentons Rodyk acknowledges and thanks senior associate See Kwang Guan (Martin) for his contributions to this article.

## Your Key Contacts



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## Korean D-8 Visa Quota Relaxed

### ANALYSIS: Relaxed Korean D-8 Visa Quota Rule

Effective May 1, 2019, the Korea Immigration Service relaxed the D-8 visa quota that strictly controlled the number of D-8 visas a foreign-invested company (FIC) may sponsor. The number in the past was strictly tied to the amount of foreign-invested capital an FIC had received (generally, 1 D-8 for every 100 million Won invested in the FIC-about US\$87,000).

Now, the relaxed rule permits an FIC to sponsor D-8s based on other factors in addition to the number of D-8s tied to the amount of foreign-invested capital, as follows:

- a) 1 D-8 per every 100 million Won (about US\$87,000) in taxes paid annually by the FIC;
- b) 1 D-8 per every 1 billion Won (about US\$870,000) in revenue earned annually by the FIC; and
- c) 1 D-8 per every 3 Koreans employed for at least 6 months by the FIC.

Other factors may be considered.

The application of the relaxed D-8 quota rule is not formulaic but discretionary (and can yield additional D8 visa quota space that is not necessarily proportional to the above formula), and thus requires a case-by-case assessment.

This signifies that Korean immigration has moved beyond rigidly applying a formulaic rule to the number of D-8s it will permit, and will now look at the totality of circumstances of an FIC.

Kim Chang Lee is at the forefront of the legal services industry in Korea in helping clients navigate the complex immigration regulatory landscape in Korea. Please visit us at [www.kimchanglee.co.kr](http://www.kimchanglee.co.kr)



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# Amendments to Securities and Exchange Act

05/09/2019

Odin Hsu/Andrea Wu

On March 26, 2019, the Legislative Yuan passed amendments to Securities and Exchange Act (the "SEA") to retain talented employees, implement good corporate governance, and strengthen legal compliance.

Main points of the amendments are as follows:

## 1. Increase flexibility of employee incentives

In order to motivate employees as well as retain talented employees of companies whose stocks are listed on the Taiwan Stock Exchange or the Taipei Exchange, the time limit of reserving the treasury shares is extended from three years to five years. The shares a listing company bought back for transfer to its employees, or for equity conversion in coordination with the issuance of corporate bonds with warrants, preferred shares with warrants, convertible corporate bonds, convertible preferred shares, or share subscription warrants, can be transferred within five years from the date of buyback after the amendment.

## 2. Implement good corporate governance

a. In view of the fact that major shareholders also have considerable influence on the company's operations, the shares held by shareholders holding more than ten percent of the total shares of the listing company, their spouse, minor children, or shares held in the name of other persons are not permitted be sold during the period of the listing company buys back its shares.

b. In order to effectively implement the management of the shareholding of the major shares and the changes of their shareholding, in addition to filing a statement with the competent authority, any person who acquires shares exceeding a certain percentage of total issued shares of a listing company should also publicly disclose such fact.

c. The provision in the SEA that (i) a listing company may not impede, refuse, or evade the actions of the independent directors in the performance of their duties, and (ii) as the independent directors deem necessary for the performance of their duties, they may request the board of directors to appoint relevant personnel, or may at their own discretion hire professionals to provide assistance,

and the related expenses will be borne by the company shall apply *mutatis mutandis* to the foreign issuers, including the foreign issuers listed on the Taiwan Stock Exchange and the Taipei Exchange or traded on the Emerging Stock Market. Furthermore, a foreign issuer is also required to establish a remuneration committee.

d. The maximum administrative fine imposed on a person who commits offenses stipulated by the SEA is raised from NT\$2.4 million to NT\$4.8 million.

3. Give the competent authority more flexible punishment measures

a. The competent authority may order issuer or securities firm that violates the SEA to take corrective action within a specified time period.

b. With respect to the offence violating Article 178 of the SEA, the following punishment alternatives are added: (i) fine for an offence may be remitted if the offence was committed in a trivial circumstance for which it is considered appropriate not to punish; and (ii) the competent authority may order the offender to take corrective action within a specified period of time and if the offender completes the corrective action within such period of time, the competent authority may exempt the offender from punishment.

4. Only second quarter financial report that is required to be audited and attested by a certified public accountant shall be reviewed and approved by audit committee.

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# Insights

## REMIT Enforcement Intensifies

14 May 2019

Firm Thought Leadership

### Summary:

- REMIT is an EU-level framework for identifying and penalising insider trading and market manipulation in wholesale electricity and gas markets in the EU.
- REMIT applies to any person/entity whose conduct affects these markets, irrespective of where the person/entity is based.
- There has been an increase in the number of investigations into violations of REMIT, as well as the scale of sanctions for non-compliance. Indeed, regulators have issued six decisions regarding market manipulations in violation of REMIT in the past twelve months, and dawn raids for suspected violations have become more common.
- To date, regulators have investigated and fined a variety of market participants, including energy exchanges, gas and electricity suppliers, and traders. Regulators have issued fines to both companies and individuals.
- Despite the uptick in enforcement, there remains considerable uncertainty over, for example, the scope of certain provisions of REMIT, and the boundaries between REMIT and competition law.
- To mitigate risk, companies can implement comprehensive, tailored compliance programs.
- These programs ensure that companies respect their reporting and registration obligations, and handle inside information properly.
- In designing a compliance program, companies should bear in mind that REMIT operates in parallel with other European regulatory regimes, including competition law, and companies can draw from experience in the competition law field.

### I. Introduction

The EU Regulation on Wholesale Energy Market Integrity and Transparency ("REMIT") introduced a sector-specific legal framework for identifying and penalising insider trading and market manipulation in wholesale electricity and gas markets in the EU. This broad framework applies to any person/entity that participates in, or whose conduct affects, EU wholesale energy markets, irrespective of whether the person/entity resides or is based in the EU.

In recent months, there has been a clear increase in the number of investigations into violations of REMIT, as well as the scale of sanctions for non-compliance. However, there remains significant uncertainty regarding the precise scope and application of certain key provisions. This note summarises the latest developments in the REMIT sphere and shares best practices, as notably discussed at the recent intensive training session by the Florence School of Regulation\*, which brought together representatives from the energy industry and from EU and national energy agencies, as well as lawyers, economists, and academics.

### II. Background

REMIT prohibits abusive practices in wholesale energy markets. Specifically, REMIT prohibits insider trading, and requires market participants ("MPs") to publicly disclose inside information. REMIT also prohibits "market manipulation," which includes false/misleading transactions,

price positioning, transactions involving fictitious devices/deception, and disseminating false or misleading information.

MPs are required - under pain of fines - to register with the relevant national agency.<sup>1</sup> The requirement applies to all MPs who participate in wholesale energy markets within the EU, or whose conduct has an effect on these markets, and includes MPs residing outside the EU. To date, over 14,000 MPs have registered.

MPs are also required to report suspected violations of REMIT to the relevant national authority. All wholesale energy market transactions, including orders to trade, must be reported at EU-level to the Agency for the Cooperation of Energy Regulators ("ACER"). ACER then screens this information to identify possible market abuses, and where necessary alerts and coordinates with national agencies, which are responsible for enforcing compliance and imposing sanctions.

### III. Latest developments

2018 represented the first full year of market monitoring by ACER, during which it received approximately 3 million data records per day. ACER has cited improving the quality of this data as a key priority. ACER has now also been given legal powers to introduce registration fees for MPs, to ensure that it has sufficient resources to undertake its market monitoring role. National agencies, including the Spanish Commission for Markets and Competition (*Comisión Nacional de los Mercados y la Competencia*), and the German energy regulator (*Bundesnetzagentur*), have issued six decisions regarding market manipulations in violation of REMIT in the past twelve months. This demonstrates a clear trend towards more active enforcement by national agencies. The German regulator notably fined two individual traders €1,500 and €2,000 respectively for gas market manipulation. To date, the highest fine issued to a company for non-compliance is €25 million, although sanctions are typically more modest.<sup>2</sup> REMIT violations are also widely publicised.

This enforcement trend includes investigating certain practices, particularly those involving high prices and unusual price spikes, as violations of REMIT, rather than as violations of competition law (as was traditionally the case). That said, there are no clear redlines between the two regimes, and abuses such as capacity withholding may violate both competition law and REMIT. Dawn raids under REMIT have also become more common, but it is not always clear to what extent the rights of defence under REMIT are the same as the rights of defence under competition law.

Given the lack of precedents, the boundaries between legitimate and illegitimate market behaviour may also be unclear. An example is legitimate arbitrage between markets, which in certain circumstances may be captured by REMIT's broad prohibition of "manipulation" (Article 5).

The broad and arguably vague definition of "inside information" is also problematic, as it can be unclear to MPs when the obligation to disclose such information comes into play. To facilitate compliance, there is debate regarding the introduction of thresholds for the disclosure of inside information (e.g., information concerning greater than 50,000 m<sup>3</sup> of LNG or 100MW of electricity would have to be disclosed). However, there are significant practical difficulties to introducing a threshold, such as determining the territorial scope of the threshold (e.g., per country or per bidding zone), and its legal effect (e.g., whether a soft law guideline or a strict legal safe harbour would be more effective).

ACER advises companies to report transactions even in cases where there is doubt that the transaction is reportable under REMIT<sup>3</sup>. MPs have noted that companies are also erring on the side of caution regarding the publication of insider information, and are arguably over-publishing, with the effect that the utility of such information is greatly diminished. Processing the sheer volume of information available, be it inside information or reported transactions, is likely to be a continuous challenge for both regulators and those they regulate.

The recent increase in enforcement by national regulators may also pave the way for private actions for damages before national courts for breaches of REMIT. Both ACER and national agencies collect large amounts of data from MPs, which would be very useful to a party bringing a private action. However, these agencies are generally bound by strict confidentiality provisions

which prevent them from releasing certain information to third parties. As further described in this article, the European courts have set out criteria for determining whether the regulator can disclose information to a third party. However, the case-law and relevant regulations have not been harmonised, with the effect that different European agencies may be subject to different EU rules. Baker Botts advises clients in their interactions with EU regulators across different sectors, and has an experienced EU litigation team.

ACER is also expressly authorized to share information with other national and European regulators, including financial regulators and competition authorities. MPs should be aware that the information ACER collects may therefore open the door to liability under these other bodies of law.

#### **IV. Practical implications**

The most effective way for a company to limit the risk of REMIT infringement is through a comprehensive, tailored compliance program. Companies may also look to competition law compliance and enforcement for guidance, in light of the similarities between the two regimes described above. With in-depth experience in energy regulation and competition law, Baker Botts is perfectly placed to assist companies with their compliance programs and REMIT enforcement issues.

In designing the right compliance program, companies may wish to consider the following points. First, the market for wholesale energy products is a multilevel environment in which European and national legal rules interact. REMIT notably operates in parallel with other European regulatory regimes, including competition law, financial regulations, and the EU market abuse regulation ("MAR"), each of which carries sanctions for non-compliance. The impact of these parallel European regimes should be included in any REMIT compliance program. Second, although certain technologies can generate alerts regarding suspicious market activity, it is key to have an internal operative manual on how to deal with these alerts. This can simplify compliance with REMIT's reporting obligations under EU law, and (for example) market monitoring under the MAR. Third, it is important to designate clear internal procedures and communication channels to ensure inside information is acted upon rapidly and handled appropriately.

Finally, given the extensive market monitoring under REMIT, there is a risk of investigations of both "false positives" (market activity that appears suspicious but is in fact legitimate), as well as investigations of actual violations. In light of this risk, it is important that companies proactively train their staff to increase the culture of compliance, and to ensure staff are prepared in the event of a dawn raid.

\*Baker Botts LLP is a sponsor of the Florence School of Regulation.

*Ella Adler, a Legal Intern at Baker Botts, assisted in the writing of this article.*

<sup>1</sup> The relevant agency is typically the national energy regulator, such as the Office of Gas and Electricity Markets (Ofgem) in the United Kingdom. However, in certain Member States, a single agency is responsible for both competition law and REMIT. Examples include Estonia, the Netherlands, and Spain.

<sup>2</sup> In 2015, Iberdrola was fined €25 million by the Spanish Competition and Markets Authority for raising the prices for its hydroelectric plants by reducing the quantity it dispatched in the day-ahead market. Iberdrola has appealed this decision.

<sup>3</sup> For advice regarding LNG contracts, see ACER FAQ II.3.1.49: <https://kb.acer-remit.eu/faqs-on-transaction-reporting-question-ii-3-1-49/>

## Governor Signs Expanded Washington State Data Breach Law

by Christopher W. Savage

**SEATTLE, 05 May 2019:** On May 7, Washington Governor Jay Inslee signed new legislation that updates and expands the breach notification obligations of businesses that maintain the personal information of Washington citizens. The new provisions had been requested by Washington Attorney General Ferguson and unanimously passed both chambers of the Washington legislature. The new provisions will take effect on March 1, 2020.

The new law covers two main topics: (a) the scope of “personal information” that, if subject to unauthorized disclosure, triggers notice obligations; and (b) the timing and content of the required notices.

### **Expanded definition of “personal information”**

Prior to the new legislation, Washington’s data breach law (Wash. Rev. Code §§ 19.255.010, et seq.: § 42.56.590) defined “personal information” for purposes of breach notification as a consumer’s name, along with her Social Security number, driver’s license number, state ID number and/or financial account information. The revised law expands this list to include the following additional information in combination with a consumer’s name:

Full birth date

Health insurance ID numbers

Medical history

Student ID numbers

Military ID numbers

Passport ID numbers

Online login credentials, such as usernames, passwords, and security questions

Biometric data, such as DNA profiles or fingerprints

Private encryption keys used for electronic signature

Policymakers justify these new elements on the grounds that unauthorized access to or disclosure of them could reasonably enable identity theft or other bad acts by an unauthorized person who had access to them in combination with the consumer's name. The inclusion of biometric data and private encryption keys are both notable, however, in that – at least as of now – most data breach laws do not call out these specific items as “personal information” subject to protection.

**Addressing re-identification.** The new definition also addresses the risk that “de-identified” information could be re-identified, i.e., used to identify a specific person even though the data itself does not contain the person's name or other information that directly identifies the person to whom the data relates. To address this issue, the revised definition of “personal information” includes any of the specified data elements (or combinations of them) without the consumer's name if: (a) the data is not encrypted, and (b) it would “enable a person to commit identity theft against a consumer.”

The law does not explain how an entity should decide whether exfiltrated data that does not include names would “enable a person to commit identity theft.” The issue can be complex because re-identification often depends on combining de-identified data with data from another, outside source of information. It will obviously be challenging for an affected entity to know what third-party, outside data sources might be available which, when combined with the hacked data, would permit identity theft to occur. For that reason, companies may wish to look at what outside data sources are reasonably available to third parties to help assess the likelihood that third parties could re-identify the data. At least for now, it appears that this issue will have to be addressed on a case-by-case basis. That said, by excluding encrypted information from this specific provision, the new law provides a strong incentive for businesses to encrypt any dataset that includes the elements identified above as personal information, even if it does not include consumers' names.

### **Modified Notice requirements**

The new law modifies and expands the notice obligations of entities subject to a data breach in several ways:

First, the required notice – to affected consumers and to the Attorney General – must occur within 30 days (rather than 45 days) from discovery of the breach. Note, however, that the new legislation did not affect the exception in existing law that permits delayed notification to consumers (but not the Attorney General) if law enforcement has been notified of the breach and requests that notification to the public be withheld while a criminal investigation is ongoing.

Second, the notice must now include the “time frame of exposure, if known, including the date of the breach and the date of the discovery of the breach.” This addresses the common situation in which an entity whose data has been compromised may discover the problem only long after the breach began and, in some cases, only after active exfiltration of data has ceased.

Third, the contents of a company's notice to the Attorney General is expanded to include the timing-related data noted above, as well as a list of the types of personal information affected by the breach (which previously was only required for the consumer notice); a summary of the steps taken to contain the breach; and a sample of the notice to be provided to consumers. In addition, the law expressly obliges an entity reporting a breach to provide updates if any of the required information is not known at the time of the original report.

Fourth—and sensibly enough—the new law requires that if the breach involves a compromise of consumers' login credentials (username, password, security questions) of an email account provided by the breached entity itself, the entity cannot use consumers' compromised email accounts to provide them with notice.

### **Implementation**

As noted above, the new law does not take effect until March 1, 2020. This reasonably long delay gives affected businesses at least some time to adjust their practices and procedures—such as the use of encryption for consumer data, and breach response protocols—to conform to the new requirements.

For additional information visit [www.dwt.com](http://www.dwt.com)

# Sunset on ACPERA draws the antitrust bar to DOJ's roundtable

15 May 2019

The Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) incentivizes companies to self-report criminal antitrust conduct under the Antitrust Division's (the Division) leniency program by reducing civil liability for successful leniency applicants that also cooperate with plaintiffs in related civil litigation. ACPERA, however, will expire in 2020 unless Congress reauthorizes it. As part of the reauthorization process, the Division is considering proposing revisions to Congress. Last month, the Division hosted a roundtable to gather comments and insight into whether – and if so, how best – to revise ACPERA. The Division invites additional comment on its forthcoming revisions to Congress before 31 May.

## **What is ACPERA?**

Cartelists face both criminal and civil liability. The Division's leniency program exempts successful leniency applicants from all criminal penalties; however, a cartel's liability does not end with the criminal case. The cartel may still have to pay restitution as well as damages from "follow-on" civil lawsuits. Civil damages can be substantial due to the potential for treble damages and joint and several liability. These civil damages can even exceed the related criminal fines. ACPERA was designed to enhance incentives for self-reporting cartel conduct by limiting damages for the leniency applicant to single damages and eliminating joint and several liability in return for "timely" and "satisfactory cooperation" with civil plaintiffs. ACPERA, however, may not be working as planned.

## **Leniency's applications appear to be down**

Leniency applications are a critical source of antitrust investigations and prosecutions. The recent drop in antitrust enforcement suggests that leniency applications must be down. From 2011 to 2015, the Division secured an average of US\$1 billion in total corporate criminal fines each year, while last year, the total in criminal fines was only US\$172 million. The number of criminal cases filed also fell from 90 in 2011 to 18 in 2018, the lowest since 1972. Likewise, 27 corporations were charged in 2011 compared to five in 2018. Although there may be several explanations for this drop in enforcement, many antitrust practitioners believe that a drop in leniency applications is a core cause.

## **ACPERA may not be living up to its promise**

ACPERA's purpose is to incentivize and therefore increase leniency applications. The antitrust defense bar, however, has expressed growing concern that ACPERA is not fulfilling that purpose.



There are two main criticisms of ACPERA: first, that key provisions of ACPERA are unclear; and second, that ACPERA does not sufficiently reduce civil damages.

#### **ACPERA: What is satisfactory and timely cooperation?**

The standard for "satisfactory" and "timely" cooperation is undefined and unpredictable. ACPERA gives no guidance on what constitutes "satisfactory cooperation" or when such cooperation should be considered "timely." In addition, the statute does not instruct courts when, in the course of the follow-on civil litigation, to assess an applicant's cooperation and grant ACPERA's protections.

ACPERA's "satisfactory cooperation" provision requires that the applicant provide a complete and truthful account of all relevant facts, furnish all potentially relevant documents, and agree to be available for interviews, depositions, or testimony. In practice, this standard gives companies little-to-no guidance regarding how much cooperation is enough, with plaintiffs and the leniency applicant often at odds as to how much cooperation ACPERA requires.

ACPERA also does not define "timeliness," or when a leniency applicant must cooperate with plaintiffs. Plaintiffs ask leniency applicants to cooperate immediately and provide documents on an expedited and nearly instantaneous basis. Leniency applicants must either acquiesce to plaintiffs' demands or risk a judicial determination that cooperation is untimely, thereby disqualifying the leniency applicant from ACPERA's benefits.

Finally, there is also uncertainty as to when the leniency applicant will realize the benefits of cooperation. ACPERA contains no guidance as to when the judge must decide the leniency applicant has fulfilled the requirements of the statute. So, a leniency applicant has no certainty that it has qualified for ACPERA benefits and faces constant risk that it will be found not to have qualified for ACPERA benefits.

#### **Is the single damages limit a sufficient incentive?**

The defense bar views ACPERA's single damages limit as ineffective when paired with the statute's uncertainty over the amount of cooperation required. A cooperative leniency applicant may evade treble damages, yet still significantly raise the cost of single damages by helping the plaintiffs uncover evidence they would not have had access to otherwise. Indeed, an overzealous applicant may inadvertently increase single damages beyond the initial treble damages exposure faced in the civil litigation. This outcome renders the single damage incentive obsolete.

#### **Possible improvements to ACPERA**

There were several suggestions at the roundtable for improving ACPERA, including:

- **Clarify ACPERA's "timeliness" language:** At the roundtable, plaintiffs' lawyers argued that cooperation should start very early in the litigation, perhaps even before an amended complaint is due, while defense lawyers suggested that cooperation should occur later in the litigation. Regardless, both sides agreed that a time-certain, whatever it may be, would be beneficial to leniency applicants.
- **Clarify ACPERA's "satisfactory cooperation" language:** At the roundtable, the defense bar argued that ACPERA's "satisfactory cooperation" requirement should be deemed satisfied if the leniency applicant provides plaintiffs with the same information as provided to the Division. Conversely, panelists from the plaintiffs' bar argued for a broader definition of "satisfactory cooperation," expecting complete cooperation with every request, even though plaintiffs' claims may be significantly broader than the Division's investigation. One defense practitioner proposed a compromise: a rebuttable presumption of satisfactory cooperation if

the company provides to civil plaintiffs' counsel all documents and information that the company provided to the Division, which could be rebutted if the company failed to meet any of the other statutory obligations, including providing a full account of all known facts relevant to the civil action, furnishing all documents or other items potentially relevant to the civil action, and using best efforts to secure and facilitate interviews, depositions, and trial testimony of individuals covered under the leniency agreement.

- **Earlier determination for granting ACPERA protections:** Panelists agreed that the determination of whether a company or individual has fulfilled ACPERA's requirements should be made in the early stages of litigation, and certainly before trial.
- **Reduced damages under ACPERA:** There was no consensus regarding the single damage calculation, but suggested approaches included:
  - Incentivizing the leniency applicant further by offering zero liability in exchange for full cooperation.
  - Limiting the applicants' damages based on a predetermined number, which would be paid into a restitution fund for the plaintiffs.
  - Calculating damages proven by coextensive cooperation with the Division as single damages, while removing ACPERA's detrebling benefit for damages that the plaintiffs' counsel could prove through its own investigation.

The Division is accepting comments on ACPERA until 31 May. If your organization is interested in submitting comments to the Antitrust Division please contact counsel at Hogan Lovells.

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