PACIFIC RIM
ADVISORY COUNCIL

Pacific Rim Advisory Council
February 2020 e-Bulletin

MEMBER NEWS

►ARIFA Promotes Two to Partner
►ARIAS Expands Labor Department with Expert Partner Hire
►BAKER BOTTS Welcomes Prominent TMT & M&A Partner
►BRIGARD URRUTIA Promotes Two to Partner
►CLAYTON UTZ Welcomes Leading Public Law Litigator
►NAUTADUTILH Adds Investment Funds Partner
►RICHARDS BUELL Expands into Surrey, British Columbia
►SIMPSON GRIERSON Three Rising Talents Promoted to Partner

COUNTRY ALERTS

►ARGENTINA Antitrust Authority Updates Merger Control Thresholds and Monetary Penalties ALLENDE BREA
►AUSTRALIA Referring Disputes to "a Court of Competent Jurisdiction" – Not Always a Viable Option in Cultural Heritage Context CLAYTON UTZ
►BRAZIL Courts Dispute Facial Recognition TOZZINIFREIRE
►CANADA CFIUS' Jurisdiction to Review Foreign Investments Expands Effective February 13, 2020 BENNETT JONES
►CANADA Covenants to Insure: A Beneficiary's Fireproof Protection from Liability RICHARDS BUELL SUTTON
►CHILE New Urban Wetlands Protection Law CAREY
►CHINA Latest Opinions on Resuming Work and Production Issued on February 7 HAN KUN
►COLOMBIA Statute of Limitations for the Insured Action in Liability Insurances BRIGARD URRUTIA
►COSTA RICA Joins OECD Competition Committee ARIAS LAW
►EU BREXIT— UK Trade Defense Update GIDE
►INDIA 2020-2021 Union Budget KOCHHAR & CO.
►MALAYSIA SEC Issues AGM CG Checklist to Enhance Shareholder Activism SKRINE
►MEXICO Tax Administration Service Criteria Applicable to VAT Withholding SANTAMARINA y STETA
►NETHERLANDS New Company Law Legislation NAUTADUTILH
►NEW ZEALAND Telcos Fined for Billing Blunders SIMPSON GRIERSON
►SINGAPORE New Exemption for Developers with Substantial Connection Singapore DENTONS RODYK
►TAIWAN Regulations Regarding Protective Order in Criminal Investigation Newly Added to Trade Secret Act LEE AND LI
►UNITED STATES Indictment of Alleged Bid Rigger Shortly After Announcing Formation of Strike Force Focusing on Government Procurement Conspiracies BAKER BOTTS
►UNITED STATES Mandatory CFIUS Filing Requirement for Certain Foreign Investments Takes Effect; Exceptions for Canadian, Australian, and U.K. Investors DAVIS WRIGHT TREMAINE
►UNITED STATES NHTSA Grants Nuro Electric Vehicle Petition for Temporary Exemption HOGAN LOVELLS

CONFERENCES & EVENTS

67th International Conference - New Delhi
Hosted by KOCHHAR & Co.— October/November 2020 TBC

68th International Conference - New Zealand
Hosted by Simpson Grierson - March/April 2021

69th International Conference - Mexico City
Hosted by Santamarina y Steta - November, 2021

70th International Conference - Paris
Hosted by GIDE - Spring, 2022

Visit www.prac.org for details

MEMBER DEALS MAKING NEWS

►ARIAS Assists with largest ever LNG plant project financing in El Salvador

►Brigard Urrutia Assists Opain in Bogotá airport loan

►Carey Assists on two financing transactions by Chilean state-owned mining company Codelco worth more than US$2 billion.

►Clayton Utz High Court ruling : Vitamins and weight-loss gummies classified as duty-free medicaments

►Gide Advises Unibail Rodamco Westfield on Creation of Strategic Partnership for EUR 2.5 Billion Acquisition of Five French Shopping Centres Portfolio

►Hogan Lovells Closes US$2.45 Billion Term and Revolving Facilities for Tencent

►NautaDutilh Assists SAF-HOLLAND SA with its Conversion to a European Company (SE)

►Santamarina Assists with Mexican fintech equity investment and loan

►TozziniFreire Assists Faro Energy in Landmark Sustainable Bonds Issuance in Brazil

PRAC TOOLS TO USE

PRAC Contacts PRAC Member Directory Events
Visit us online at www.prac.org

ARIFA PROMOTES TWO TO PARTNER

PANAMA CITY – 03 February, 2020: The firm is pleased to announce that it has invited junior partners ***Claudio De Castro*** and ***Pilar Castillo*** to join partner level.

Pilar Castillo (l)
Claudio De Castro (r)

Claudio De Castro will co-head the Litigation and Arbitration practice group with partner Fernando A. Arias. Claudio has a PgD in International Commercial Litigation from Universite Paris Est; a Master in International Commercial Law from Universite Paris 1 Pantheon-Sorbonne and an LLB from Santa Maria la Antigua University. He has worked in Sherman & Sterling in Paris and Wilmer Cutler Pickering Hale and Dorr in London.

Pilar Castillo has established herself as a key member of our legal team with a broad range of experience in shipping, aviation and commodities finance, as well as corporation law where she represents clients in complex local and cross-border finance transactions. She has an LLM from Fordham University and an LLB from Santa Maria la Antigua University.

Both lawyers became junior partners in 2017. Their promotion reflects ARIFA's commitment to recognize the professionalism and excellence of its legal team.

For additional information visit www.arifa.com

ARIAS EXPANDS LABOR DEPARTMENT WITH EXPERT PARTNER HIRE

SAN JOSE, 17 February 2020: Labor and social security law attorney, ***Carolina Soto***, is joining as partner to our firm, Arias, starting today, February 17th.

Carolina will become the head leader of the labor law department, after 18 years of experience in company shutdowns, merger and acquisition processes, labor disputes and representation of multinational companies before government entities.

In addition, the lawyer has a law degree from the University of Costa Rica, and a master's degree in Labor Law and Social Security from the Distance State University (UNED).

"Joining Arias means for me a fundamental and necessary step in my professional career, this new challenge will allow me to not only grow in work experience and knowledge, but also learn from the operation of an integrated firm, which is innovating constantly", Soto said.

During the last year, we have been strengthening our practice areas with the acquisition of new human talent and offering more specialized services. "To our firm it is extremely significant to be able to rely on Carolina's experience, trajectory, maturity and leadership to design more sophisticated and innovative services, which, without a doubt, will give us competitive advantages and value to our specialization in labor law, now with five lawyers dedicated exclusively to solve problems related to this area", added Carolina Flores, partner at the firm. Carlos Ubico, also partner of Arias, added that the decision is based on the impression that Carolina Soto has generated by the way she manages the business needs of his clients, in addition to her ability to apply technical knowledge for problem solving.

This acquisition also represents the strengthening of the firm's commitment to female participation in leadership and decision-making positions.

For additional information visit www.ariaslaw.com

BAKER BOTTS WELCOMES PROMINENT TMT & M&A PARTNER

LONDON, January 15, 2020: Baker Botts L.L.P., a leading international technology and energy law firm, today announced that Stuart Blythe has joined the firm's Corporate Department as a partner. Mr. Blythe will be based in the firm's London office.

"We continue to add scale to our firm-wide Corporate Department and invest in our TMT offering. Stuart's practice is a perfect fit with the firm's sector strategy, our cross-border Corporate priorities and the London office's growth plans. His skill-set sharpens our differentiation in the market even further," said John Martin, Managing Partner of Baker Botts.

"Stuart has an excellent cross-border client base, which will enhance our Corporate Department in London and help to grow our TMT capabilities as well. As we add further scale in London, we continue to look for high-quality lawyers with complementary skills to support our clients," said Mark Rowley, Partner-in-Charge of London and the Middle East at Baker Botts.

Mr. Blythe is dual U.S. (New York) and UK-qualified and advises corporations and financial institutions on a wide range of global corporate and commercial transactions in the TMT sector, including M&A, joint ventures, restructurings, debt financings and infrastructure projects. He also has specific experience in the deployment and commercial operation of digital communications networks, including with respect to optical fibre networks, data centres and subsea cable systems. Recent experience in this regard includes advising on the transatlantic EllaLink subsea cable system.

Previously, Stuart spent nearly 10 years in general counsel roles at telecom multinationals, including as general counsel for MCI WorldCom (now Verizon).

"Baker Botts has world-class clientele across the technology sector more broadly, and the firm is at a very exciting growth stage in London. This is a superb opportunity for me to help further diversify the firm's Corporate Department in London and expand the work being carried out for its TMT sector clients," said Stuart Blythe.

Baker Botts recently announced the promotion of London senior associate, Rob Butler, to partner effective 1 January 2020. In January 2019, the firm also promoted Dorine Farah to partner in London.

The firm has additionally made several lateral partner hires in London during 2019, including:

Project Finance partner Nick Collins (January 2019) from Jones Day

Corporate/ECM partner Richard Brown (January 2019) from Latham & Watkins

Litigation/Disputes partner Poupak Anjomshoaa (February 2019) from Norton Rose

Additional recent London and international hires include EU Antitrust partner Matthew Levitt (November 2018) in Brussels; Corporate and Technology partner David Ramm (September 2018) in London; Global Projects partner Euan Pinkerton (October 2018) in Riyadh; and Energy partner Lewis Jones (March 2018) in London.

For additional information visit www.bakerbotts.com

BRIGARD URRUTIA PROMOTES TWO TO PARTNER

BOGOTA – 23 January, 2020: Brigard Urrutia is proud to announce the strengthening of its Corporate / M&A team with the appointment of ***Fernando Castillo*** and ***Tomas Holguín*** as new Partners of the Firm, effective as of January 1, 2020.

The new partners are lawyers who have stood out for their personal qualities and for their professional skills, demonstrating exceptional leadership in the legal services market and achieving an important trajectory in the Firm.

Carlos Umaña, managing partner said: "Colombia has been and continues to be a highly attractive market for foreign and local investors; and we are sure that Fernando and Tomás will play a very important role in the growth of the team and the Firm in the interest of our clients".

Fernando Castillo Mayorga

Lawyer from Colegio Mayor de Nuestra Señora del Rosario. He has a postgraduate degree in Contract Law and Financial Law from the same university. Fernando obtained the Master 2 (Finalité Recherche) on General Private Law at Université Paris 2 (Panthéon-Assas) with a scholarship from the Corporation pour les Études en France (CEF) and obtained an LLM from New York University (NYU) as Dean's Scholar.

He has been a member of the Firm since 2007, where he advises national and international companies on local and cross-border M&A transactions. In addition to this, he also provides advice on corporate governance matters.

Admitted to practice Law in Colombia (2005) and in the State of New York (2014). He has international experience and is currently a professor of Civil Responsibility in the master's program at Colegio Mayor de Nuestra Señora del Rosario, professor of the Seminar on Civil and Commercial Contracts, at the same faculty and professor of Contracts in the Commercial Law postgraduate program of the Pontificia Universidad Javeriana in Cali, Colombia.

Tomás Holguín

Lawyer from Universidad del Rosario designated as Senior Collegiate, the highest recognition for any student of the University. He has a postgraduate degree in Financial Law from the same institution and obtained an LLM from Columbia University. He has been a professor at Universidad del Rosario and Pontificia Universidad Javeriana de Cali.

He has been a member of the Firm since 2006, where he advises national and international clients in matters relating to the incorporation and operation of companies in Colombia; the negotiation of mercantile agreements, as well as the definition of structures for the investment in companies and vehicles across several sectors of the economy.

He has experience in international firms, having worked as a foreign lawyer at Pinheiro Neto Advogados in Sao Paulo, Brazil and Simpson Thacher & Barlett LLP in New York, representing Latin American clients in capital market operations, operations of credit and transnational M&A operations.

For additional information visit www.bu.com.co

CLAYTON UTZ WELCOMES LEADING PULIC LAW LITIGATOR

CANBERRA – 07 February 2020: Respected public law litigator ***Ian Temby*** will join Clayton Utz as a partner in the firm's Public Sector practice in Canberra.

Clayton Utz Public Sector National Practice Group Leader Jamie Doran said Ian's appointment reinforced the firm's continued investment in being the leading private-sector provider of legal services to the Commonwealth government.

"Ian will join our team of leading public law litigators in Canberra in Caroline Bush, Cain Sibley and John Carroll. Ian's experience and expertise complements our existing team and we are delighted Ian has decided to join Clayton Utz," said Jamie.

Ian has a diverse public law litigation practice, with a focus on commercial and administrative law litigation and dispute resolution. He acts for both government and commercial clients, with a particular expertise in Commonwealth dispute resolution including merits and judicial review matters. Clayton Utz Canberra Partner-in-Charge Caroline Bush said Ian's appointment adds further depth to the public law
litigation practice. "Ian has built a reputation as a lawyer who understands government and who has a highly pragmatic approach to resolving disputes. His clients know him as approachable, easy to deal with, and not only an excellent technical lawyer but also a true collaborator - exactly the kind of lawyer we welcome in our team," said Caroline.

Ian's appointment will take effect on 17 March 2020.

For additional information visit www.claytonutz.com

NAUTADUTILH ADDS INVESTMENT FUNDS PARTNE

LUXEMBOURG – 03 February, 2020: NautaDutilh strengthened its Luxembourg Funds practice with the arrival of investment funds partner ***Luc Courtois***. Prominent in his field, Luc has more than 25 years' experience on the Luxembourg legal market, with a strong focus on investment management. His practice covers the full range of Luxembourg-based UCITS and alternative funds as well as all legal aspects of investment funds, management companies and their activities.

Josée Weydert, managing partner of NautaDutilh Luxembourg: "We are delighted that Luc is joining NautaDutilh to head the Luxembourg funds practice. As a renowned investment funds expert with extensive experience on the Luxembourg legal market, Luc is a welcome addition to our Investment Funds team. We wish him much success in his new role at NautaDutilh."

Commenting on his appointment, Luc Courtois adds: "I am pleased to join NautaDutilh's funds practice, which gives me the opportunity to serve a large international clientele in my area of expertise. I very much look forward to working together with my new colleagues in the other Benelux offices and at our representation desks in London and New York."

About Luc Courtois: Luc started his career as a lawyer in 1993. Prior to joining NautaDutilh's Luxembourg office as a partner, Luc was a partner at another reputable law firm in Luxembourg. He received his law degree from the Université Catholique de Louvain (UCL) in 1993. Luc is a member of the Association of the Luxembourg Funds Industry (ALFI) and the International Bar Association (IBA) and a board member of various investment funds and management companies. Luc also holds an LL.M. from Georgetown University Law Center (1995) and was admitted to the Luxembourg Bar in 1994. He is fluent in English and French.

For additional information visit www.nautadutilh.com

RICHARDS BUELL EXPANDS INTO SURREY, BRITISH COLUMBIA

VANCOUVER, 01 January, 2020: On January 1st, 2020, Manthorpe Law Offices (MLO) merged with Richards Buell Sutton LLP expanding our wide range of legal services to the Lower Mainland. Located in the Guildford area of Surrey, BC, MLO was established in 1992 and practices Wills, Estates, Trusts, Business, and Real Estate Law. The Surrey office remains, and the MLO team joins the RBS team with Rosalyn D. Manthorpe, founder of MLO, staying on to practice as Associate Counsel.

RBS Surrey will continue to grow through the leadership of Angela Spanjers who was appointed Managing Partner of RBS Surrey. Legal operations and services will be conducted under the firm name of Richards Buell Sutton LLP.

For additional information visit www.rbs.ca

SIMPSON GRIERSON PROMOTES THREE RISING TALENTS

We're proud to announce that **Shanti Frater** (Construction, Auckland), **Donna Hurley** (Commercial Property, Wellington) and **Rebecca Rendle** (Employment, Auckland) have been promoted to partner, as of 1 January 2020.

(L-R) Shanti Frater; Donna Hurley; Rebecca Rendle

All three have risen through our ranks to take up leadership positions within their teams, cultivating strong client relationships and earning the respect of colleagues

Chair, Anne Callinan, says the firm is delighted to appoint three new partners from within and reward Shanti, Donna and Rebecca for their outstanding achievements and dedication to client service.

Donna, Shanti and Rebecca are also exceptional role models for of our firm's values - Putting People First, At Our Best and Energetic for Change - setting a great example for our younger team members.

For additional information visit www.simpsongrierson.com

ARIAS

ASSISTS WITH LARGEST EVER LNG PLAN PROJECT FINANCING IN EL SALVADOR

EL SALVADOR 11 February 2020: Several White & Case LLP offices and Arias (El Salvador) have helped Salvadorian Energía del Pacifico obtain El Salvador's largest ever project financing, inking a US$657 million deal to fund the construction of a liquified national gas (LNG) plant.

Norton Rose Fulbright in Washington, DC, and Romero Pineda & Asociados in San Salvador advised the lenders, International Development Finance Corporation (formerly OPIC), the International Finance Corporation, the Inter-American Development Bank, Finnish state-owned financial institution Finnvera and German development bank KfW.

Energía del Pacifico and its owner, US energy company Invenergy, will use the funding to build a 378-megawatt LNG plant in the port city of Acajutla in western El Salvador. The development also includes the construction of a marine terminal with a floating storage and regasification unit as well as a gas pipeline and a 44-kilometre transmission line to connect the plant to the national power grid. The project is estimated to cost US$1 billion and marks the largest ever foreign direct investment to date in El Salvador. Once complete, the plant is expected to increase the country's power-generating capacity by 23% and help the country reduce carbon emissions and its reliance on imported diesel and heavy fuel oil. Set to be operational in 2021, the plan has a power purchase agreement with seven of the country's electricity distributors. Energía del Pacifico also has a long-term agreement with energy company Shell for the supply of LNG to the plant.

The financing closed on 23 December.

Counsel to Invenergy and Energia del Pacifico
- White & Case LLP;
- **Arias (El Salvador)** Partners Lilian Arias, Luisa Rivas, Carolina Lazo and Luis Barahona, and associate Adán Araujo in San Salvador

For additional information visit www.ariaslaw.com

BRIGARD URRUTIA

ASSISTS OPAIN IN BOGOTA AIRPORT LOAN

BOGOTA 02 February, 2020: Colombian firm Brigard Urrutia has helped Opaín, the concessionaire that operates Bogotá airport, obtain a loan worth 315 billion pesos (US$90 million).

Bancolombia was the lender and turned to Garrigues (Colombia) for the transaction, which closed on 11 December.

Opaín will use the funds to refinance existing debt.

Counsel to Sociedad Concesionaria Operadora Aeroportuaria Internacional (Opaín) Brigard Urrutia Partner Manuel Quinche and associates Natalia Arango and Sofía Esguerr.

For additional information visit www.bu.com.co

CLAYTON UTZ

HIGH COURT RULING VITAMINS AND WEIGHT-LOSS GUMMIES CLASSIFIED AS DUTY-FREE MEDICAMENTS

Clayton Utz's IP/Life Sciences team wins in the High Court (Again!): Vitamins and weight-loss gummies classified as duty-free medicaments

SYDNEY, 03 February, 2020: Sponsors of complementary medicines and importers of goods with therapeutic or prophylactic purposes that are put up in "food-like" dosage forms should consider the impact on their business of the High Court's decision in Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd [2020] HCA 2 (Clayton Utz acted for the successful respondent, Pharm-A-Care).

In unanimously dismissing the Comptroller-General's appeal from the Full Federal Court, the High Court's judgment calls into question the appropriate classification of similar goods.

The sticky situation for vitamin and weight loss gummies under the Customs Tariff Act
Schedule 3 of the Customs Tariff Act 1995 details the rates of duty on goods imported into Australia. Goods are classified to a heading within the Schedule and that classification determines the applicable rate of duty for the import of those goods.

PharmaCare imports into Australia a number of different types of pastilles containing active ingredients: either vitamins or *garcinia cambogia,* plus a number of excipients including sucrose, glucose syrup, gelatin, and flavours. PharmaCare applied to the Administrative Appeals Tribunal for a review of the Comptroller's decision to classify the subject goods to a heading which attracted duty, and not as medicaments for therapeutic or prophylactic purposes (3004), which does not attract duty. The Tribunal found that the subject goods were classifiable under heading 3004 and were therefore duty-free.

The Comptroller appealed to the Full Court of the Federal Court of Australia, contending that the Tribunal had erred and that subject goods ought to have been classified as either confectionery (1704) or food preparations (2106), which attract rates of duty of 5% and 4% respectively. Heading 3004, the Comptroller argued, excluded the subject goods because they were alleged to be "food supplements" within the ambit of Note 1(a) of Chapter 30 which says Chapter 30 does not cover:

> "Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters), other than nutritional preparations for intravenous administration (Section IV)"

The Full Court endorsed the Tribunal's reasoning but also went one step further, finding that the parenthetical reference to "Section IV" at the end of the Note also had the effect of importing a further limitation on the coverage of the Note. That is, the Note only excludes foods or beverages that were otherwise within Section IV of the Schedule.

The Comptroller sought and was granted special leave to appeal to the High Court.

The High Court appears to narrow exclusions from Heading 3004: medicaments
The High Court found that both the Tribunal and the Full Federal Court had erred in their understanding of the Note. However, the finding by the Tribunal that the subject goods were not "food supplements" was determinative and disclosed no error, such that the exclusionary note on which the Comptroller relied, did not apply. The High Court also accepted the AAT's findings as regards the applicability of the relevant medicaments heading (3004).

As the Australian tariff is part of an international approach to tariff classification that is intended to be harmonized, the treaty from which the Schedule derives has been reproduced in English and French, with both texts regarded as "equally authentic". The difficulty in this case is that the French text to the relevant Note does not include the words "Foods or beverages (such as…".

The High Court held that because the English text is presumed to have the same meaning as the French, "a meaning that gives simultaneous effect to all of the terms of the English text and of the French text is to be preferred to a meaning that does not".

CONTINUES NEXT PAGE ....

CLAYTON UTZ

HIGH COURT RULING VITAMINS AND WEIGHT-LOSS GUMMIES CLASSIFIED AS DUTY-FREE MEDICAMENTS

...continues from previous page

The High Court held that this could be achieved by reading the words "such as" to mean "of the following kind", so that Note 1(a) does not exclude foods or beverages, but only those goods that meet the description of "dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters". The High Court also added that goods that meet any of those descriptions are excluded from Chapter 30 and there is no requirement that they also be regarded as foods or beverages in some wider classification.

This approach to the coverage of Note 1(a) is significant as, contrary to conventional approaches, it does not exclude food or beverages generally as might have been the case from a strict reading of the Schedule as enacted in Australia. The High Court's approach appears to considerably narrow the scope of the exclusion.

Also notable is the High Court's interpretation of the use of the words "Section IV" at the end of Note 1(a). The High Court held that these words were nothing more than an "ease of reference" indicating where goods excluded by Chapter Notes might otherwise be classified. They did not limit the scope of the Note to exclude only foods or beverages of a kind that fell within Section IV of the Schedule.

The High Court otherwise endorsed the generally accepted two-stage approach to classification, but left the door open as regards the scope and meaning of heading 3004, declining to make any findings as regards the construction or application of the words "products for therapeutic or prophylactic uses". However, in accepting the AAT's reasoning that the essential character of the garcinia preparations was cosmetic and that they could fall to be classified as medicaments in heading 3004, it appears to have allowed for the possibility of a broader interpretation of the heading than might otherwise previously have been considered.

Importers: check if your products are food and beverage or medicament

Given the High Court's findings, sponsors of complementary medicines and importers of goods with therapeutic or prophylactic purposes, (particularly those that are put up in "food-like" dosage forms) are encouraged to review their portfolio and consider whether they might be entitled to:

- recover duty paid for goods classified as foodstuffs that should otherwise have been classified as medicaments;
- have future imports classified as medicaments so as to be duty free.

For additional information visit www.claytonutz.com

GIDE

ADVISES UNIBAIL RODAMCO WESTFIELD ON CREATION OF STRATEGIC PARTNERSHIP FOR EUR 2.5 BILLION ACQUISITION OF FIVE FRENCH SHOPPING CENTRES' PORTFOLIO

PARIS 17 February, 2020: Gide has advised Unibail-Rodamco-Westfield (URW) on setting up a partnership of major French investors including Crédit Agricole Assurances and La Française (the Consortium) with a view to acquiring shares in the new joint venture, of which the Consortium will own 54.2% and URW 45.8%.

The joint venture's portfolio will comprise five shopping centres transferred by URW: Aéroville, So Ouest, Rennes Alma, Toison d'Or and Confluence. These five assets represent a gross leasing area of 320,800 sq.m. and totalled 42.5 million visits in 2019.

Gide Partners Frédéric Nouel, Didier G. Martin and Rémi Tabbagh, working with counsel Cléopha Thomann and associates Faten Anis, Clémence Monteil, Julia Michorczyk and Clémence Dubreuil assisted Unibail Rodamco Westfield on this transaction and its financing.

Unibail Rodamco Westfield was also advised on financial aspects by Lacourte Raquin Tatar and by notarial study Ginisty & Associés. Predica and La Française were advised by BDGS Associés and White & Case, and by notarial study Allez & Associés. The banking consortium comprising BNP Paribas, ING Bank n.v., Natixis and Société Générale was assisted by De Pardieu Brocas Maffei, working with notarial study Wargny Katz.

For additional information visit www.gide.com

HOGAN LOVELLS

CLOSES US$2.45 BILLION TERM AND REVOLVING FACILITIES FOR TENCENT

HONG KONG, 06 January 2016: Hogan Lovells has advised the syndicate of lenders on US$2.45 billion five-year term and revolving facilities to Tencent in its major syndicated loan, which involved 19 lenders.

The syndicate of lenders we advised as senior mandated lead arrangers, bookrunners and underwriters includes Australia and New Zealand Banking Group Limited, Bank of China (Hong Kong) Limited, China Merchants Bank, Off-Shore Banking Center, Citibank N.A., Hong Kong Branch, Citigroup Global Markets Asia Limited, The Hong Kong and Shanghai Banking Corporation Limited and Mizuho Bank Limited. The firm also advised Citicorp International Limited as facility agent. Three other banks joined as senior mandated lead arrangers and ten more banks joined as mandated lead arrangers.

The facility was split into a US$1.225 billion term loan and a US$1.225 billion revolver, offering an all-in pricing of 125 basis points based on a margin of 110 basis points over LIBOR and a 20 basis points commitment fee.

Founded in 1998, Tencent is a leading provider of Internet value added services in China and is rated A2/A/A+ (Moody's/S&P/Fitch).

The Hogan Lovells team was led by Hong Kong banking partner Owen Chan and supported by counsel Salam Bassili.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTS SAF-HOLLAND SA WITH ITS CONVERSION TO A EUROPEAN COMPANY (SE)

LUXEMBOURG, 17 February, 2020: NautaDutilh Luxembourg assisted SAF-HOLLAND S.A., a Luxembourg SA listed on the Frankfurt stock exchange, with its conversion into a European Company (SE).

The company considers the legal form of an SE to be particularly suitable for its international orientation. In May 2020, SAF -Holland SE intends to transfer its registered office and migrate to Germany, in order to reduce the complexity of its group structure and the associated costs.

SAF-HOLLAND is one of the world's leading manufacturers and suppliers of chassis-related systems and components, primarily for trailers, trucks, buses and recreational vehicles.

The NautaDutilh corporate team consisted of Margaretha Wilkenhuysen, Caroline Notté, Linus Fohr, Jenny Conrath, Guillaume Thomann and Anke Geppert while tax aspects were handled by Jean-Marc Groelly and Ilhami Karamemis.

For additional information visit www.nautadutilh.com

SANTAMARINA Y STETA

ASSISTS WITH MEXICAN FINTECH EQUITY INVESTMENT AND LOAN

MEXICO CITY - 14 February 2020: Mexican fintech company Resuelve tu Deuda (RTD) obtain an equity investment from a private equity investor and take out a loan, with both transactions worth a combined 453 million pesos (US$24 million).

RTD relied on González Calvillo to sign a 93 million pesos (US$4.9 million) investment from Mexican private equity firm DILA Capital. The investor relied on Santamarina y Steta for the deal.

In return for the investment, DILA obtains a minority stake in RTD. Another RTD shareholder, financial services company Crédito Real, relied on in-house counsel for the transaction. Crédito Real holds a minority interest in the company, while RTD's founders remain as the largest shareholder.

In the second transaction, the same González Calvillo team helped RTD get a loan worth 360 million pesos (US$19 million) from US-Mexican cross-border finance provider Alloy Merchant Partners. The lender enlisted Mayer Brown LLP's office in Mexico City, while Santamarina y Steta advised DILA in its role as shareholder. As part of the agreement, Alloy subscribed to a possible future equity investment in RTD. RTD will use the financings to pay for existing debt and fund further expansion of the company in Latin America and Europe.

Both transactions closed on 23 December.

In the equity transaction:
Counsel to DILA Capital Santamarina y Steta Partner Pablo Laresgoiti and associate Gabriela Lomelí in Mexico City
Counsel to Resuelve tu Deuda González Calvillo, SC
Counsel to Crédito Real In-house counsel

In the financing:
Counsel to DILA Capital Santamarina y Steta Partner Pablo Laresgoiti and associate Gabriela Lomelí in Mexico City
Counsel to Resuelve tu Deuda González Calvillo, SC
Counsel to Alloy Merchant Partners Mayer Brown LLP

For additional information visit www.s-s.mx

NAUTADUTILH

ASSISTS IN RAISING UP TO USD $627.6 MILLION FOR THREE BIOTECH COMPANMIES WITHIN 48 HOURS

AMSTERDAM, 07 November 2019: On November 5 and 6, NautaDutilh assisted argenx and Merus in their follow-on offerings and Centogene in its Nasdaq IPO, raising a total of up to USD 627.6 million for these companies within 48 hours.

On November 5 and 6, NautaDutilh assisted argenx and Merus in their follow-on offerings and Centogene in its Nasdaq IPO, raising a total of up to USD 627.6 million for these companies within 48 hours. Antonia Netiv and her team acted as underwriters' counsel in the up to USD 484 million argenx global follow-on offering. Paul van der Bijl and his team acted as issuer's counsel to Merus and Centogene on their up to USD 79.2 million follow-on offering and up to USD 64.4 million Nasdaq IPO, respectively.

With these transactions, NautaDutilh demonstrates its position as market leader in these types of deals, having been Dutch counsel in 65% of initial public offerings of all current Nasdaq-listed Dutch companies and more of their follow-on offerings than any other Dutch law firm.

For additional information visit www.nautadutilh.com

SANTAMARINA Y STETA

ASSISTS CONGLOMERATE GRUPO INDUSTRIAL SALTILO OBTAIN US$245 MILLION LOAN FROM A GROUP OF LENDERS LED BY HSBC

MONTERREY October, 2019: Thompson & Knight LLP in New York, Santamarina y Steta in Monterrey and Cuatrecasas in Barcelona have helped Mexican conglomerate Grupo Industrial Saltillo obtain a US$245 million loan from a group of lenders led by HSBC.

Santamarina y Steta acted as lead counsel for Grupo Industrial Saltillo.

The deal closed on 11 September and includes a six-year US$195 secured term facility and a US$50 million revolving credit facility. The loan also involved collateral governed under Spanish law.

Saltito will use the proceeds to refinance the company's existing debt and for general corporate purposes.

Counsel to Grupo Industrial Saltillo Thompson & Knight LLP (New York); Cuatrecasas (Barcelona); and Santamarina y Steta Partner Carlos Argüelles and associate Bárbara Asiain in Monterrey.

For additional information visit www.s-s.mx

TOZZINIFREIRE

ASSISTS FARO ENERGY IN LANDMARK SUSTAINABLE BONDS ISSUANCE IN BRAZIL

SAO PAULO – 14 February, 2020: TozziniFreire has helped Faro Energy issue the first ever sustainable bonds (combining green and social aspects) in Brazil The firm also advised the underwriters BTG Pactual and Gaia Securitizadora. The 15 million reais (US$3.4 million) transaction closed on 1 January.

Faro Energy will use the proceeds to fund investments in renewable projects in Minas Gerais and Rio de Janeiro and to finance schools in the state of São Paulo, which provide education to children in deprived communities. The bonds were structured to comply with the Climate Bond Standards version 2.1 and Social Bonds Principles certifications, provided respectively by London-based organisation Climate Bond Initiative and the International Capital Market Association, two institutions recognised for certifying these types of bonds.

TozziniFreire was also involved in Brazil's first social bond issuance, in 2018. The firm worked pro bono for securitisation company Gaia, raising money to renovate 8,000 homes in some of the poorest areas of São Paulo, which benefitted more than 32,000 people.

Counel to Faro Energia, BTG Pactual and Gaia Securitizadora: TozziniFreire Advogados Partners Alexei Bonamin and Luiz Rafael de Vargas Maluf, and associates Marcus Fonseca, Leonardo Medeiros Braghetto and Ligia Pereira Schlittler

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS

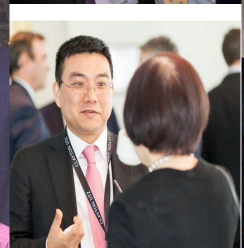
PRAC @ SAO PAULO


PRAC @ Taipei 2014


PRAC @ Brisbane


PRAC @ INTA


PRAC @ Vancouver




PRAC @ PDAC


PRAC @ IPBA

The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 28 top tier independent member law firms.

Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region.

With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Asia, Africa and North America, these prominent member firms provide independent legal representation and local market knowledge.

www.prac.org

Argentinean Antitrust Authority Updates Merger Control Thresholds and Monetary Penalties

On January 27, 2020, the Secretary of Domestic Trade -Argentina's current Antitrust Authority- published Resolution No. 13/2020 (1) whereby the value of the administrative unit created as a reference by the Antitrust Law No. 27,442 (the "Antitrust Law"), was increased from 26.4 pesos to 40.61 pesos, thereby updating both the merger control notification thresholds and the monetary penalties set forth in the Antitrust Law.

Pursuant to the Antitrust Law, both the merger control notification thresholds and the monetary penalties are expressed in administrative units, unlike the previous antitrust regime where these were expressed in fixed local currency amounts and thus quickly became outdated as a consequence of inflation.

The administrative unit's value, according to the Antitrust Law, is to be updated on a yearly basis by the Antitrust Authority following the evolution of the official consumer price index.

The increase of the administrative unit's value has an impact in the merger control thresholds as well as in the monetary penalties provided in the Antitrust Law. The main resulting modifications are summarized below:

• Merger control

Economic concentrations must be notified to the Antitrust Authority if the combined Argentine annual net sales of the acquiring group and the target group exceed AR$4,061 million during the preceding year (approx. US$64.46 million taking in consideration the current exchange rate).

Additionally, the de minimis exemption was updated, and now otherwise mandatory economic concentrations are exempted from notification if both the amount of the Argentine portion of the transaction and the value of the assets to be transferred in Argentina are below AR$812.2 million (approx. US$12.89 million at the current exchange rate), unless where the acquiring group was involved in an economic concentration in the same market in Argentina valued in AR$812.2 million during the preceding 12 month period or AR$2,436.6 million (approx. US$38.67 million) during the preceding 36 month period.

• Monetary penalties

Fines for anticompetitive conducts, when these cannot be calculated using the turnover or the illicit gain tests provided in the Antitrust Law, cannot exceed AR$8,122 million (approx. US$ 128.92 million at the current exchange rate).

Daily fines for breach of cease and desist orders, late filing and gun-jumping practices, when these cannot be calculated by means of using the turnover test set forth in the Antitrust Law, can now amount to AR$30.46 million (approx. US$483,450).

The new merger control thresholds and monetary penalties referred to above shall be in force as from January 28, 2020 until a new value for the administrative unit is adopted by the Antitrust Authority.

(1) The complete resolution is available at https://www.boletinoficial.gob.ar/detalleAviso/primera/224859/20200127 .

This briefing does not contain a full analysis of the law nor shall it be deemed as a legal or any other type of advice by Allende & Brea. For additional information please contact:
Julián Peña E: jpena@allende.com - or Federico Rossi E: frossi@allende.com.

CLAYTON UTZ

06 FEB 2020

Referring disputes to "a Court of competent jurisdiction" – not always a viable option in the cultural heritage context

BY MARK GERITZ, TOSIN ARO AND GEORGIA DAVIS

Project proponents and other parties to cultural heritage agreements (whether current or proposed) should be wary of clauses that provide for referral of disputes to the Land Court or to another "Court of competent jurisdiction".

The Land Court of Queensland has shed light on the difficulties parties can face in trying to have the Courts resolve disputes arising under agreements made under the Aboriginal Cultural Heritage Act 2003 (Qld) (**ACHA**) (and has reinforced a long-standing position we have taken in negotiating cultural heritage agreements on behalf of clients).

In Conlon v QGC Pty Ltd [2020] QLC 3, the Land Court dismissed an application brought in relation to a dispute about the interpretation of a cultural heritage agreement due to a lack of jurisdiction.

The Barunggam, Cobble Cobble, Jarowair, Western Wakka Wakka and Yiman native title party (**BCJWY party**) and QGC Pty Ltd are parties to an Indigenous Land Use Agreement (**ILUA**). The ILUA, which relates to QGC's Qld Curtis Liquefied Natural Gas Project, was registered with the National Native Title Tribunal in 2010. The ILUA annexes a Cultural Heritage Management Strategy, which provides a process for investigating cultural heritage prior to the carrying out of project works, and establishes a Cultural Heritage Coordinating Committee.

The BCJWY party and QGC disagreed about the process for investigating cultural heritage under the Management Strategy. The BCJWY party contended that the process allowed for the Committee to conduct a physical assessment and archival research, and then prepare an assessment report, before an archaeologist carries out a formal cultural heritage survey. The BCJWY party argued that this input from the Committee is a critical aspect of the cultural heritage survey process, and applied for an injunction and other orders to require QGC to honour this process under sections 32H or 32G of the Land Court Act 2000 (Qld).

The cultural heritage duty of care

Section 23 of the ACHA imposes a positive duty on all persons carrying out an activity to take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage.

A person will be taken to have complied with this duty of care if, among other things, that person is acting under a "native title agreement" or "another agreement with an Aboriginal party", unless cultural heritage is expressly excluded from being subject to the agreement.

It was common ground that the ILUA, together with the annexed Management Strategy, constituted a "native title agreement" for the purposes of the ACHA.

Land Court jurisdiction in cultural heritage matters

Part 2, Division 6B of the Land Court Act deals with the jurisdiction of the Land Court, sitting in its cultural heritage division:

- section 32H allows the Land Court to hear and decide an application for an injunction to stop the doing of a “relevant act”; and
- section 32G allows the Land Court to enforce, decide a matter in relation to, or make a declaration about the interpretation of, a “negotiated agreement”.

We also note that section 32F confers jurisdiction on the Land Court to deal with matters arising under ILUAs, including making decisions in relation to disputes, where parties have agreed that such matters can be referred to the Land Court. These circumstances did not arise here, however, as section 32F only applies where the State is a party to the ILUA.

The Court considered that there was no other source of jurisdiction for it to hear and determine a dispute of this nature.

Was there a "relevant act"?

A relevant act is relevantly defined under the Land Court Act to mean an act in contravention of an Aboriginal cultural heritage protection provision (**CHPP**).

The CHPPs referred to in the Land Court Act are sections 24(1), 25(1) or 26(1) of the ACHA, which provide that it is an offence for a person to:

- harm Aboriginal cultural heritage;
- excavate, relocate or take away Aboriginal cultural heritage; and
- possess an object that is Aboriginal cultural heritage,

which the person knows or ought reasonably to know is cultural heritage.

It is not an offence, however, if the person does any of the above acts under a native title agreement. That is, an act done under a native title agreement will not be done “in contravention of” any CHPP.

The BCJWY party argued that, as the Management Strategy was the agreed way for QGC to fulfil its obligations under the ACHA, breach of the Management Strategy should be seen as a breach of the CHPPs and, therefore, as a relevant act.

The Court disagreed that a breach of the Management Strategy comprised a relevant act. The Court:

- recognised that acting in accordance with a native title agreement protects against prosecution for an act that would otherwise contravene the CHPPs; but
- held that it did not follow that a breach of the native title agreement would be an offence under the ACHA, given that compliance with the duty of care and CHPPs could be achieved through other mechanisms.

As the asserted breach of the Management Strategy – even if made out – could not be a relevant act, the Court found that it did not have jurisdiction under section 32H to restrain QGC from denying the Committee’s role (as asserted by the BCJWY party) in investigating cultural heritage that might be affected by the Project.

Is the Cultural Heritage Management Strategy a "negotiated agreement"?

The BCJWY party argued, in the alternative, that the Land Court should be able to interpret and make orders enforcing the Management Strategy (and restraining QGC from breaching it) because it was a negotiated agreement. A negotiated agreement is defined under the Land Court Act to mean an agreement obtained under section 31(1)(b) of the Native Title Act 1993 (Cth) (**NTA**).

“Section 31 agreements” are sought and obtained pursuant to the “right to negotiate” procedure in part 2, division 3, subdivision P of the NTA, which applies to “future acts” (as defined under the NTA) that comprise the creation of a right to mine; these include the grant under petroleum legislation of the rights to explore for and produce petroleum. Where subdivision P applies, section 31(1)(b) of the NTA requires the State, each native title party and the grantee party to negotiate in good faith with a view to obtaining the agreement of the native title parties to the grant of the project rights.

The BCJWY party sought to argue that the ILUA is in effect a section 31 agreement, and therefore that it and the annexed Management Strategy constitute a “negotiated agreement” for the purposes of section 32G of the Land Court Act.

In dismissing this argument, the Court noted that section 24EB of the NTA lists the effects of registration of an ILUA. In short, a registered ILUA will generally validate future acts to which the parties consent. However, this will only be the case, in relation to acts to which subdivision P apply, where the ILUA contains a statement confirming that subdivision P is not intended to apply. The BCJWY ILUA contained a clause stipulating that subdivision P is not intended to apply.

This being the case, the ILUA could not be a negotiated agreement for the purposes of section 32G of the Land Court Act, and the Court ruled that it does not have jurisdiction under that section to restrain QGC from acting in a way that the BCJWY party asserted would amount to a breach of the ILUA (and annexed Management Strategy).

Moving from stalemate to good mate

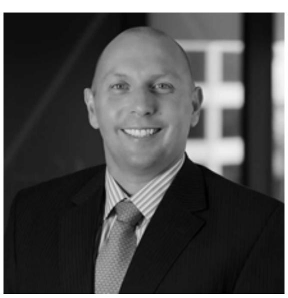
Where a project proponent or other land user acts under any of the various types of agreement mentioned in the CHPPs, the person will comply with the cultural heritage duty of care, and will have a defence with respect to the offences prescribed by the ACHA, and against the grant of a stop order under the ACHA or an injunction under the Land Court Act.

It is common for these agreements to include provision for the resolution of disputes that might arise either with respect to the interpretation of the agreement or in the performance of the agreement. In carrying out due diligence on projects and transactions, we have seen many of these agreements containing provisions that create an obligation to try to resolve such disputes by negotiation, and also by mediation. Where neither of these succeeds, the remedy often provided in these agreements is to seek recourse from the Land Court or another “Court of competent jurisdiction” without any alternative to take into account that Courts may not have jurisdiction to resolve all (or any) disputes under the agreement.

Reinforcing the position that we always agitate for in advising clients on the making of cultural heritage agreements, this case must serve as a warning that the Land Court will often not (and may never) be that Court. Similarly other Courts may not have jurisdiction to resolve all (or any) disputes under the relevant agreement. Parties proposing to enter into these agreements should consider whether there is a mechanism other than referral to a Court for which they could make provision, in circumstances where a negotiated outcome cannot be reached. Such alternative mechanisms could include referral to expert determination or binding arbitration.

While, in this case, it was the BCJWY party that sought and was refused relief, it should not be assumed that it will always be the Aboriginal party that is aggrieved by a Court’s lack of jurisdiction to determine a dispute. It is in the interests of all parties to cultural heritage agreements for disputes to be able to resolved or determined, rather than be stuck in stalemate.

GET IN TOUCH



Mark Geritz

PARTNER, BRISBANE

+61 7 3292 7221

mgeritz@claytonutz.com

Tosin Aro

SPECIAL COUNSEL, BRISBANE
+61 7 3292 7583
taro@claytonutz.com

CONTACT US

Sydney	+61 2 9353 4000	**Melbourne**	+61 3 9286 6000
Brisbane	+61 7 3292 7000	**Perth**	+61 8 9426 8000
Canberra	+61 2 6279 4000	**Darwin**	+61 8 8943 2555

TOZZINI FREIRE
ADVOGADOS

February 14, 2020

Facial recognition is disputed in Court

Cybersecurity & Data Privacy

The electronic monitoring system with facial recognition that will be installed in the subways of São Paulo City, and it is the object of a bidding process in the amount of BRL 59 million, is being challenged in Court. The Judge of the 1st Public Court of São Paulo issued a decision, in a lawsuit of anticipated production of evidence proposed by six entities that represent consumer protection, ordering the company operating the majority of the city's subway network, Companhia Metropolitana de São Paulo (Metro), to provide clarifications on risk and impact assessment expected with the implementation of the new technology, on how personal data will be processed by Metro, technical databases and security systems issues, and actions to mitigate the potential risk of a data breach.

The claim is grounded on the Federal Constitution, the Consumer Protection Code and the Brazilian Data Protection Law (LGPD), even though is not yet effective. The purpose is to investigate possible violation of privacy rights and informational self-determination of users of the São Paulo subway system, if such system is effectively installed. This is because, although LGPD brings exceptions from its application to personal data processed under the scope of public security, national defense, state security or activities of investigation and prosecution of criminal offenses, there are no current indications of what user information will be captured and used by Metro nor how the children and teenagers' right to image will be safeguarded, rights ensured not only in the Brazilian Statute of Children and Adolescents, but also by LGPD itself, which expressly brings in its content the need for the express consent of one of the parents or legal representative for the usage of the personal data.

The use of facial recognition technology and its legal and ethical implications have been discussed in the foreign scenario for some time. In Brazil, this lawsuit against Metro is not unprecedented. In 2018, the company “Via Quatro”, operating the 4-Yellow Line of the São Paulo subway, was forced by the Judiciary to discontinue a facial recognition project that involved the collection of the passengers’ images, which is a personal data. The cameras were designed to identify passengers’ "emotions" (how they responded to advertising) and to recognize the gender and age group of public transport users.

At the time, Metro complied with the court decision and defended itself by arguing that the technology used was not related to facial recognition, but to the detection of faces classifiable in categories of expressions, gender and biotypes. The process is in the phase of producing evidence.

Last year, the Federal Consumer Authority opened an administrative investigation against a clothing company about its facial detection system, through which it estimates the gender, age group and mood of consumers during the act of purchase. The administrative proceeding has not yet been judged.

It is also worth noting that there are already judicial decisions considering that reports of impacts on the personal data protection, as established by LGPD, cannot yet be demanded, since the law itself is not yet in force, nor is there any regulation by the competent body to do so, the Brazilian National Data Protection Authority (ANPD).

Our Technology, Privacy and Data Protection practice area has an extensive experience in the subject and is available for any further clarification.

Partners

- Isabela Braga Pompilio
- Carla do Couto Hellu Battilana
- Celso de Faria Monteiro
- Patricia Bandouk Carvalho
- Marcela Waksman Ejnisman

Associados

- Bruna Borghi

CFIUS' Jurisdiction to Review Foreign Investments Expands Effective February 13, 2020

February 10, 2020

Written by Adam Kalbfleisch and Alysha Pannu

The U.S. Treasury Department, on behalf of the Committee on Foreign Investment in the United States (CFIUS) issued two final regulations implementing the *Foreign Investment Risk Review Modernization Act of 2018* (FIRRMA), which have the effect of expanding CFIUS' ability to review transactions for national security threats. These rules, which will come into effect on February 13, expand CFIUS' jurisdiction to review: (i) non-controlling investments, whether direct or indirect, by foreign persons in U.S. businesses that involve critical technologies, critical infrastructure or sensitive personal data (TID business) of U.S. persons; and (ii) real estate transactions that do not involve the acquisition of a U.S. business.

Notably, Canadian investors may be exempt from CFIUS' expanded jurisdiction over these non-controlling and real estate investments owing to the new "excepted investor" exemption provided they can demonstrate a substantial connection to Canada.

However, investors should note that the new rules do not alter or affect CFIUS' existing ability to review transactions that do result in foreign control of a U.S. business.

Non-controlling Investments

Effective February 13th, CFIUS will have jurisdiction to review non-controlling investments by foreign persons in TID businesses that provide the foreign person with access to or influence over the U.S. business or its products, technologies, critical infrastructure or sensitive personal data (referred to as covered investments).[1]

The CFIUS review process will continue to remain largely voluntary once the rules come into effect, except that parties must file a declaration in two scenarios. First, the rules require filings where a foreign investor acquires a substantial interest in a TID business. A "substantial interest" means 25% or more of the voting interests in the TID business where a single foreign government holds 49% or more in the foreign investor.[2] Second, the rules require filings for investments in U.S. critical technology businesses in one or more of 27 industries specified in the rules. CFIUS did indicate that it intends to issue a revised rule replacing the 27 industries rule with one that is based on export control license requirements.

A failure to make a mandatory filing could result in a fine of up to $250,000 for an investor or the value of the transaction at issue, whichever is greater.

Real Estate Transactions

The rules also expand CFIUS' existing jurisdiction to cover the purchase, lease by, or concession to a foreign person of certain covered real estate (i.e., real estate located near sensitive, national security sites) or changes to the rights a foreign person has with respect to covered real estate. In order for a transaction to be considered a "covered real estate transaction" under the rules, it must provide foreign persons with three or more of the following property rights: (i) to physically access, (ii) to exclude, (iii) to improve or develop or (iv) to affix structures or objects. To assist investors in understanding the geographic coverage of its real estate rules, CFIUS will be developing a web-based tool.

There is no mandatory filing requirement for covered real estate transactions. Parties involved in covered real estate transactions may submit a voluntary declaration or a full notification to CFIUS.[3]

The new rules do not affect CFIUS' existing jurisdiction over transactions resulting in foreign control or certain non-controlling investments by a foreign person in an entity engaged in interstate commerce that also owns or leases real estate.

Exemptions to CFIUS' Expanded Jurisdiction

The rules exempt the following transactions from CFIUS' expanded jurisdiction:

1. Transactions in which the foreign investors qualify as "excepted investors";
2. Transactions in which the U.S. business' sole "critical technology" is encryption commodities, software and technology eligible for an export license exception under the U.S. Export Administration Regulations; and
3. Investments by funds managed and controlled exclusively by U.S. nationals.

Excepted Investors

Under the new rules, investors with a substantial connection to Canada, the United Kingdom or Australia (the excepted foreign states) are exempt from scrutiny under CFIUS' expanded jurisdiction (excepted investors).

Investors from excepted foreign states qualify as an excepted investor if they are (a) a national of an excepted foreign state (and for dual nationals, no non-excepted states); (b) a government of an excepted foreign state; and (c) foreign entities that meet five conditions for itself and its parent entities. The five conditions that foreign entities must meet in order to be considered excepted investors are:

1. The entity is organized under the laws of an "excepted foreign state" or the United States;
2. The entity's principal place of business is in an "excepted foreign state" or the United States;
3. 75% of the directors of the board or equivalent body are citizens of the excepted foreign states or U.S. citizens;
4. Shareholders holding a 10% or greater shareholding interest or other significant rights are from an excepted foreign state; and
5. The "minimum excepted ownership" of the foreign entity must be held by shareholders from an "excepted foreign state" or the United States. For publicly traded entities, the "minimum excepted ownership" is a majority of the voting interests, right to profits, and assets in the event of a dissolution. For private entities, the "minimum excepted ownership" is 80% of the voting interests, right to profits and assets in the event of a dissolution.

While excepted investors are exempt from CFIUS' expanded jurisdiction for non-controlling investments and covered real estate transactions as well as from the new mandatory filing requirements, they are not exempt from CFIUS' traditional jurisdiction for transactions resulting in foreign control of a U.S. business. As such, excepted investors acquiring control of a U.S. business, including Canadian excepted investors, will want to consider whether to make a voluntary filing, particularly if the transaction may give rise to national security concerns.

What Canadian Investors Need to Know

- CFIUS' jurisdiction to review foreign investments in U.S. businesses will expand as of February 13th to include non-controlling investments by foreign persons in U.S. businesses involving critical technologies, critical infrastructure or sensitive personal data and real estate transactions that do not involve the acquisition of a U.S. business.
- Under the new rules, mandatory pre-closing filings are required to be made to CFIUS if a foreign person acquires a substantial interest in a U.S. business involved in critical technology, critical infrastructure or sensitive personal data or if a foreign person acquires a non-controlling interest in a U.S. business that produces, designs, tests, manufactures, fabricates or develops certain critical technologies.
- A failure to make a mandatory filing will result in a fine of up to $250,000 or the value of the transaction at issue, whichever is greater.
- Canadian companies may be exempt from CFIUS' expanded jurisdiction provided they meet the five criteria set out in the rules to demonstrate a substantial connection with Canada, the United Kingdom, Australia or the United States.

Notes

1. Specifically, the investment must provide the foreign person:
   - access to any material nonpublic technical information in the possession of the U.S. business;
   - membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the U.S. business; or
   - any involvement, other than through voting of shares, in substantive decision-making of the U.S. business regarding: (i) the use, development, acquisition, safekeeping, or release of sensitive personal data of U.S. citizens maintained or collected by the U.S. business; (ii) the use, development, acquisition, or release of critical technologies; or (iii) the management, operation, manufacture, or supply of critical infrastructure.
2. If the non-U.S. investor is a limited partnership, the 49% foreign government interest threshold applies to the general partner's ownership. The limited partnership interests will not be counted.
3. Please note that certain real estate transactions are excluded from CFIUS' jurisdiction.

Authors

- 
  Adam Kalbfleisch, *Partner*
- 
  Alysha Pannu, *Associate*

Posted on: January 22, 2020

COVENANTS TO INSURE: A BENEFICIARY'S FIREPROOF PROTECTION FROM LIABILITY

By: Ola N. Stoklosa

In the early hours of February 13, 2008, a Vancouver restaurant exploded causing damage through the building's entire ground floor and parking garage and even shattering windows across the street. It was apparent that the fire leading to the explosion was deliberately set and as it turned out, it was done so at the request of the tenant restaurant's operator.

The restaurant operator had conspired with her friend to set fire to the restaurant in order to rid herself of the responsibility of managing it. The insurer of the landlord's property paid $3 million to repair damages caused by the arson and looked to the operator and the company through which she owned the restaurant to recover the amount that it paid.

Austeville Properties Ltd. v. Josan, 2019 BCCA 416 demonstrates the limits under which a company can be found liable for a director's actions and the powerful liability protection created by a contractual covenant to insure.

THE FACTS

Mr. and Ms. Nandha were a married couple who owned Nandha Enterprises Ltd. ("the "**Tenant**") which in turn owned two restaurant franchises, one in Delta and one in Vancouver. The Nandhas were the only owners and directors of the Tenant, and each had equal shareholdings in that company, although Ms. Nandha was primarily responsible for the day-to-day operations of the two restaurants.

The Tenant entered into a lease agreement with Austeville Properties Ltd. (the "**Landlord**") to lease premises for the Vancouver restaurant. Mr. Nandha and Ms. Nandha signed the lease as authorized signatories of the Tenant and personally as indemnifiers.

The lease contained a landlord's covenant to insure and a tenant's obligation to reimburse. The lease also permitted either party to terminate the lease in the event that damage by fire could not be repaired within 120 days.

As required by the covenant to insure, the Landlord insured the premises.

Over time, the Tenant's financial position declined and Ms. Nandha wanted to rid herself of the responsibility of managing the Vancouver restaurant in order to spend more time with her children. After unsuccessfully trying to sell the restaurant, she took the extreme step of engaging Mr. Josan, a family friend, to set it on fire.

The fire that Mr. Josan set to the Vancouver restaurant caused extensive damage to the building. Mr. Josan was criminally charged. Ms. Nandha was found deceased two days later, having taken her own life.

Crucially, there was no evidence that Mr. Nandha knew about or was in any way involved with the scheme.

THE RULING

The insurer for the Landlord brought a subrogated claim against Mr. Josan, the estate of Ms. Nandha, Mr. Nandha and the Tenant, seeking recovery of $3 million paid for loss and damage resulting from the arson.

The Landlord argued that the Tenant was liable for Ms. Nandha's criminal act based on the corporate identification doctrine. If the arson was attributable to the Tenant, the Landlord contended that it was a breach of the Tenant's obligation to reimburse the Landlord for property damage and that the covenant to insure did not relieve the Tenant of this obligation.

The corporate identification doctrine operates to attribute to a corporation the actions of its directing mind where: the action taken by the directing mind of a corporation was within the field of operation assigned to him or her; and was by design or result partly for the benefit of the corporation. In applying these criteria, the court accepted that Ms. Nandha could be considered one of the directing minds of the Tenant but held that her actions could not be considered to be within the scope of her authority.

The trial judge concluded that Ms. Nandha's primary motive for acting as she did was personal: she wanted to rid herself of the responsibility of managing the restaurant. He also found that the evidence did not establish Ms. Nandha's actions were designed to benefit the company, nor did they result in any proven benefit to it. Accordingly, the corporate identification doctrine did not apply to attribute Ms. Nandha's actions to the Tenant and she was therefore not a beneficiary of the covenant to insure. The Court of Appeal agreed.

Given his conclusion that the corporate identification doctrine did not apply, the trial judge did not need to decide whether, in any event, the covenant to insure in the lease barred a subrogated claim against the Tenant. Nevertheless, he expressed the view that even if the corporate identification doctrine did apply, the covenant to insure would protect the Tenant from a subrogated claim regardless of whether the fire was caused by negligence or an intentional tort.

The Court of Appeal agreed that as a beneficiary of the covenant to insure, the Tenant was protected from liability for the fire damage caused by a criminal act by a non-beneficiary.

In the result, the trial judge dismissed the Landlord's claims against the Tenant and Mr. Nandha and held Mr. Josan and the estate of Ms. Nandha jointly and severally liable for damages of $3 million resulting from the fire based on the tort of conspiracy. The Court of Appeal upheld the trial judge's decision and dismissed the Landlord's appeal.

PRACTICAL CONSIDERATIONS FOR INSURERS

Covenants to insure have powerful implications. A covenant to insure precludes the party obligating itself to obtain insurance from successfully suing the other party to the contract for losses arising from risks covered by such insurance. It further operates to override an indemnity provision in a contract.

Because the Court of Appeal affirmed that Ms. Nandha was not acting in the scope of her corporate authority and was therefore not a beneficiary of the covenant to insure, the court did not consider whether a covenant to insure could extend to a loss intentionally caused by a beneficiary of it. While the courts have held that covenants to insure will relieve the beneficiary of the covenant from liability caused by negligence, whether a covenant to insure could extend to a loss intentionally caused by the beneficiary of the covenant is an unresolved question in the law.

As this case demonstrates, in assessing risks, underwriters are well advised to consider the very strong, special immunity created by covenants to insure.

If you have any questions related to this article, please reach out to any member of the Insurance Group, or contact Ola directly at 604.661.9245 *or at ostoklosa@rbs.ca.*

NEW URBAN WETLANDS LAW

February, 2020

On January 23, 2020 Law No. 21,202, which modifies various legal bodies in order to protect urban wetlands, entered into force with its publication in the Official Gazette.

Object

The Law seeks to protect urban wetlands declared by the Ministry of the Environment, either ex officio or at the request of the respective municipality. Wetlands are understood to be all those extensions of marshes, swamps and peat bogs, or surfaces covered with water, whether natural or artificial, permanent or temporary, stagnant or flowing, fresh, brackish or salty, including extensions of sea water, whose depth at low tide does not exceed six meters and which are totally or partially within the urban boundary.

Wetlands can also be defined as an area of land, usually flat, whose surface is permanently or intermittently flooded. When regularly covered with water, the soil becomes saturated, deprived of oxygen and giving rise to a hybrid ecosystem between purely aquatic and terrestrial.

Target group

1. Owners of projects that could potentially affect urban wetlands.

2. Owners of real estate on whose land an urban wetland is totally or partially located.

Procedure

The Ministry of the Environment must issue a regulation (also signed by the Ministry of Public Works) which will define the minimum criteria for the sustainability of urban wetlands, in order to protect them and maintain their hydrological regime, both surface and underground. This must be done within six months of the publication of this law in the Official Gazette.

Deadlines

The text stipulates that in the event that a municipality asks the Ministry of the Environment to declare the protection of an urban wetland, the latter must give its opinion within six months.

If you have any questions regarding the matters discussed in this news alert, please contact the following attorneys or call your regular Carey contact.

Rafael Vergara
Partner
+56 2 2928 2210
rvergara@carey.cl

Manuel José Barros
Associate
+56 2 2928 2211
mjbarros@carey.cl

Julio Recordon
Associate
+56 2 2928 2381
jrecordon@carey.cl

Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor.
Las Condes, Santiago, Chile.
www.carey.cl

Practical relevance

The law incorporates into the catalogue of projects or activities susceptible to cause environmental impact in any of its phases and, therefore, required to be submitted to the Environmental Impact Assessment System (Art. 10, Law No. 19,300) the execution of works or activities that may mean a physical or chemical alteration to the biotic components, to their interactions or to the ecosystemic flows of wetlands that are totally or partially within the urban limit; the execution of works, programs or activities in urban wetlands and the massive application of chemical products in urban areas or rural zones near wetlands.

Likewise, regarding the General Law of Urbanism and Construction, the new law adds that any instrument of territorial planning must include the existing urban wetlands. This is for the purposes of conditions under which urbanization or construction permits will be granted. In addition, in urban areas, national public use assets corresponding to riverine wetland lands, will be used in accordance with the provisions of the Regulatory Plan and its Local Ordinance.

Legal Commentary

February 14, 2020

Detailed Explanation of the Latest Opinions on Resuming Work and Production Issued on February 7 by the Ministry of Human Resources and Social Security

Author: Will HUANG | Xiu PEI

Enterprises in most regions of China resumed work and production on February 10, 2020. On February 7, the Ministry of Human Resources and Social Security, together with the All-China Federation of Trade Union, the China Enterprise Confederation, and the National Federation of Industry and Commerce issued the "*Opinions on Stabilizing Employment Relationships and Supporting the Work and Production Resumption of Enterprises During the Period of COVID-19 Epidemic Prevention and Control*" (the "**Opinions**").

The Opinions were issued by bodies including governmental departments, trade unions and enterprises associations, and are notable as they may fully and accurately reflect the central government's determination and plan to stabilize employment relationships during the period of epidemic prevention and control. We have summarized the main points for your reference below.

Policy orientation: safeguarding enterprises, employment, and stability

The normal production and operation of enterprises (especially small- and medium-sized enterprises) have been deeply impacted during the period of epidemic prevention and control. Employees face challenges along with enterprises, so their income and job positions will inevitably also be impacted.

For the purpose of avoiding the external pressure brought by the epidemic, which may result in increased employment relationship conflicts and even social instability, the central government is aiming to resolve problems surrounding the stability of employment relationships.

The basic policy orientation for resolving such problems is policies "without bias"—to aid enterprises and protect employees at the same time by "safeguarding enterprises, employment, and stability". Employees' interests cannot be sacrificed to save the market, nor can the pressure of protecting employees be wholly transferred to enterprises which would lead to further adverse consequences.

Policy instruments: categorized interpretation of specific measures

Based on the policy orientation of "safeguarding enterprises, employment, and stability", we have divided the policy instruments contained in the Opinions into the following three categories and summarized their respective contents:

I. Category I: protection of employees' rights and interests

1. Enterprises are encouraged to arrange for employees to work from home. In the absence of conditions for working from home, employees can be arranged to take statutory and additional annual leave.
2. Employees are encouraged to commute on a flexible schedule in order to reduce the scale of gatherings and to control the risk of infection.
3. Enterprises cannot terminate employment relationships with employees that are under quarantine, and should regard such employees as providing regular labor services and pay salaries in accordance with normal working standards.
4. After the end of quarantine, employees who continue to receive medical treatment and cannot provide labor services are entitled to the benefits of medical treatment period.
5. For employees that worked overtime during the extended Spring Festival holiday (from January 31 to February 2), enterprises should first arrange compensatory time-off or pay overtime salaries if such compensatory time-off is not feasible.

II. Category II: enterprise employment management rights

1. Enterprises that meet the conditions to resume work can request their employees to return to work, provided that necessary epidemic prevention and labor protection measures are provided. Enterprises can handle in accordance with law those employees who are refuse to return to work after exhortation or who refuse to return to work without proper reasons.
2. During the work postponement period or pending returning to work, if employees have fully utilized all types of leave, the payment of salaries should be handled in accordance with the regulations on the enterprise's shutdown or production halt: the enterprise will pay the full amount of salaries based on the standard stipulated in the employment contracts for the first month, and pay "living allowances" starting from the second month (for example, Beijing Municipality regulations stipulate the standard for "living allowances" is 70% of the local minimum salary standard.)
3. Enterprises that have difficulty in production and operation due to the impact of the epidemic can take measures on stabilizing job positions, including adjusting salaries, rotating holidays, shortening working hours, etc., through democratic consultation processes with the employees.
4. Enterprises that are not able to pay salaries timely can be directed to consult with the labor union or employee representatives on postponing payment.
5. Enterprises can conduct layoffs if the operation difficulties still cannot be relieved by the above

measures.

III. Category III: support funds provided by government departments and trade unions

1. Unemployment insurance funds (human resources and social security bureaus): expand the scope of job stability subsidies enjoyed by small and micro enterprises.

2. Training fee subsidies (human resources and social security bureaus): online and offline employee trainings arranged during the shutdown and recovery period are included in the scope of subsidized training.

3. Trade union funds (trade union organizations): trade union funds contributed by qualifying small and micro enterprises impacted by the epidemic are to be fully refunded.

4. Special trade union funds for epidemic prevention (trade union organizations): enhance solicitude for employees working on the frontline of epidemic prevention.

5. Enterprise association membership dues (trade unions and enterprises associations): a certain percentage of the membership dues contributed will be refunded to qualifying enterprises with difficulties due to the impact of the epidemic.

Please note that the Opinions are policies issued at the central government level, and mainly concern guidance and encouragement measures. During their implementation, enterprises should continue to monitor for the epidemic prevention and control measures published locally and policy updates.

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.

If you have any questions regarding this publication, please contact:

Wei (Will) HUANG

Tel: +86 21 6080 0967
Email: will.huang@hankunlaw.com

Brigard Urrutia

Statute of limitations for the insured action in liability insurances

In the liability insurances, the statute of limitations for the insured counts since the claim was made and not since the occurrence of the loss.

February, 2020: The Supreme Court of Justice reiterated that the statute of limitations of the action of the insured under a liability insurance is counted from the moment the victim claims against the insured, whether judicial or non-judicial, and not from the moment in which the incident occurs.

By judgment STC13948-2019 dated October 11, 2019, the Supreme Court of Justice resolved a constitutional writ of protection (acción de tutela) filed by a transport company (insured) against the ruling of the Superior Court of the District of Antioquia for incorrectly applying the statute of limitations for the insured against the insurer.

In this case, the victims' successors sued the insured for the damages caused by the victims' death in a traffic accident. Subsequently, the insurer was linked to the process as a third-party defendant under the liability policy that covered the transporter.

The insurer filed an objection by arguing that the statute of limitations had elapsed, since more than five years had passed since the date of loss, in accordance with article 1081 of the Commercial Code. This thesis was accepted by the Superior Court of the District of Antioquia.

Thereinafter, the Supreme Court of Justice indicated that the Superior Court of the District of Antioquia ignored the judicial precedent in the matter, as it failed to apply the special norm for liability insurance provided for in article 1131 of the Commercial Code.

Under this rule, the date to be considered for the purpose of calculating the statute of limitations applicable to the insured's action is that when the victim or its successors filed the petition, whether judicial or extrajudicial, and not since the incident´s date.

In this case, as the successors of the victims did not exercise the direct action against the insurer but against the insured, the statute of limitations of the insured's action had to be counted since the date when the lawsuit was served to the insured.

For more information contact our team info@bu.com.co

www.bu.com.co

PRESS ROOM

COSTA RICA IS NOW PART OF THE OECD COMPETITION COMMITTEE

February, 2020

On February 12th, the Organization for Economic Co-operation and Development (OECD) approved Costa Rica into the OECD Competition Committee, as a result of the country's competition policies assessment, and due to the accomplishment of the recommendations regarding the standards in this subject.

The strengthening of the legal and institutional framework of the Commission for Promoting Competition (Coprocom) and the Telecommunications Superintendency (SUTEL), through the approval of the Law for the Strengthening of Competition Authorities in Costa Rica, was the main recommendation on competition policies, and it allowed consumers to acquire a greater variety of goods and services with better quality, at better prices.

Costa Rica has completed 19 out of 22 evaluations to become an OECD member. This organization works in the promotion and development of public policies to improve economic and social welfare of citizens around the world.

If you have any questions or concerns regarding this update, or advice on competition matters, please contact our experts Andrey Dorado or Tracy Varela, or call (+506) 4036 - 2800.

Andrey Dorado

Partner

andrey.dorado@ariaslaw.com

Tracy Varela

Associate

tracey.varel@ariaslaw.com

BREXIT | UK | UK TRADE DEFENCE UPDATE 31 JANUARY 2020

INTRODUCTION

Once the UK has left the European Union on 31 January 2020, it will operate its own independent trade policy including with regards to trade defence, a sector in which the UK has traditionally been reluctant to act. The UK will have to decide which of the 113 EU trade remedies currently in place (95 anti-dumping measures, 15 countervailing measures and 3 safeguard measures) will be maintained or varied and which will be revoked.[1]

During the implementation period, currently set to last until 31 December 2020, all EU trade remedies, including those adopted by the Commission during the implementation period, will continue to apply to imports into the UK.

MEASURES "OF INTEREST TO THE UK"

Following a consultation to examine the relevance of the EU trade remedies for the UK economy, in February 2019 the UK government identified 44 EU measures that were "of interest to the UK".

There were 63 measures that did not meet the pre-requisites (i.e. UK producers accounting for a defined market share expressing an interest in the measures continuing) and these measures will no longer apply at the end of the implementation period.[2]

The 44 measures identified as "being of interest to the UK" will be subject to a transition review by the Trade Remedies Investigations Directorate (TRID) (until the establishment of the Trade Remedies Authority (TRA)) to determine whether they should continue and at what level. Until the completion of this review, measures will be maintained at the level initially set by the EU Commission.

EU measures adopted before the end of the implementation period which are not reviewed by the TRID during the initial consultations will be subject to the same test to determine whether they are of interest to the UK.

UPDATE ON THE ESTABLISHMENT OF THE TRADE REMEDIES AUTHORITY

The creation of the TRA is one of the elements of the government's proposed 2019-2020 Trade Bill, announced in the Queen's Speech on 19 December 2019. The TRA was supposed to be created by enacting the 2017-2019 Trade Bill but it failed to pass through the legislative process before the end of the last parliamentary session. The date for the second reading of the new Bill is not yet defined and it may be some time before it is enacted. In the meantime, the functions of the TRA continue to be carried out by the TRID within the Department for International Trade (DIT) and it will be the TRID which will handle the transition reviews until such time as the TRA is formally established.

.

[1] DG Trade, 2019 Report on Trade defense instruments.
[2] There are a number of measures that have been adopted by the EU Commission since August 2018 but not yet assessed by the UK authorities.

TRANSITION REVIEWS

The UK transition reviews are a hybrid of the EU expiry and interim reviews through which EU measures, potentially of interest to the UK, will either become distinct UK-specific measures or will no longer apply in the UK. In the same way as the EU Commission would in the context of an expiry review, the TRA will assess whether the termination or expiry of a measure would be likely to result in a continuation or recurrence of the unfair trade practice and injury to UK industry. The TRID will also conduct the "economic interest" test, essentially a balance of the benefit of protecting UK business by imposing the relevant measure against the additional costs to downstream UK actors.

The notable difference compared to EU expiry reviews is that during the UK transition review, the TRA will assess not only whether the measures should be maintained or not, but also the appropriate level of the UK measure. If the authority concludes that the measures are necessary but is not able to calculate their appropriate level (e.g. in the absence of cooperation by exporters / relevant exports) it should propose to maintain the level of the EU measures.

PROCEDURE: SIMILAR BUT DIFFERENT

UK and EU businesses already familiar with EU trade defence proceedings will not be overly surprised by the procedure the UK has adopted for the transition reviews. They may however be pleased to know that the TRID is in the latter stages of developing a digital interface which should significantly ease the formalities of the proceedings and allow for the efficient exchange of information between parties.

To initiate a review, the TRID will publish a notice calling interested parties to register and complete questionnaires (possibly after a sampling process), the response to which will be subject to on-site verification by the TRID. Interested parties will also be able to request hearings and, before issuing its final determination and recommendation to the Secretary of State, the TRID will release a statement of essential facts on which interested parties will be given a period of time to comment.

Once the investigation is completed, the TRID will make a recommendation to maintain, vary or revoke the measure to the Secretary of State who will decide whether to accept or reject the recommendation. It is at this stage that the Secretary of State will carry out the UK-specific "public interest test" which goes beyond the more technical economic interest test.[3]

Unless determined otherwise, the measures adopted at the end of the transition should remain in place for 5 years and will be subject to the normal regime of UK trade measures.

TRAFFIC JAM

With over 40 transition reviews to manage, the TRID will review in priority the EU measures which are due to expire during the implementation period or shortly thereafter. If an EU measure expires before initiation of a transition review, the measure will also expire in the UK. However, as for EU expiry reviews, once the investigation is initiated, the measures should continue to apply at least until the conclusion of the investigation. The transition reviews are set to last between 12 to 15 months. The activity of the TRID / TRA may also be impacted by (potentially numerous) requests for interim review lodged by exporters, challenging aspects of

[3] Gide, Client Alert, "UK Trade defence update", July 2019.

the measures not covered by the transition review. There is also the possibility that exporters will try to challenge the conversion of EU measures into UK measures without full reinvestigations in accordance with WTO rules. This could be one of the first issues that the Upper Tribunal is required to deal with in its role as the judicial body charged with hearing appeals against decisions of the TRID / TRA and Security of State.

CONFIDENTIALITY

Transparency has been a watchword from the beginning of the development of the UK's trade defence procedures. In the 2017 White Paper, "Preparing for our future UK trade policy", the DIT placed particular emphasis on accessibility of information and accountability for decision-making:

> "**Transparency** - balancing the need to protect commercially confidential data whilst ensuring that relevant information about cases is accessible to interested parties, and that there is accountability for decision-making"[4]

In the EU system, non-confidential information is accessible only to the parties to the investigation and solely for the purpose of the investigation. However, the UK rules provide for a wider access to the investigation file as the TRID / TRA will be required to establish and maintain a file "*open to the public (a "public file") containing information, other than confidential information, which the TRA considers material to the investigation*".[5]

The Regulations provide that information should be kept confidential only when parties demonstrate to the TRA good cause as to why the TRA must treat such information as confidential[6] and it may be that parties will seek to rely on the definition of "information that is by its nature confidential".[7] However, even if information is considered confidential, interested parties will be required to submit a non-confidential summary of the information for the public file (or, in exceptional circumstances, a statement of reasons why it is not possible to summarise the information).

EU industry may initially be alarmed by the UK's approach. However the TRID has issued guidance that suggests that in the first instance, the TRID / TRA will contact the interested party if they think the information has been incorrectly identified as confidential.[8] Ultimately, if the interested party and the TRID cannot agree on an acceptable non-confidential summary, the TRID may disregard the information submitted and the information will not be disclosed in the public file. It remains to be seen how the TRID will apply the Regulations and its own Guidance in practice.

---

[4] DIT, "Preparing for our future UK trade policy", October 2017.
[5] Regulation 44 of The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019.
[6] Regulation 45(1)(c) of The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019.
[7] See Regulation 45(2) of The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019:

"For the purpose of paragraph (1)(b)(i), information that is by its nature confidential includes information which, if disclosed, would—

(a) be of significant competitive advantage to a competitor of the person supplying the information;

(b) have a significant adverse effect on—

(i) the person supplying the information; or

(ii) any person from whom the person supplying the information had acquired it."

[8] TRID Guidance, "Trade remedies: investigating dumped or subsidised goods" published on 15 March 2019, updated 24 April 2019.

NEXT STEPS

The priority for the TRID, and interested parties, is to prepare for the transition reviews of the EU measures that are set to expire during the implementation period. The table included in Annex 1 shows the 44 EU measures that will be transitioned into the UK in the order that they will expire.[9]

Beyond transitioning existing EU measures, the TRID will also be responsible for conducting independent investigations requested by UK industry in respect of unfair trade practices causing injury in the UK.

The authors are available to EU and UK industry actors planning to engage in UK trade remedies investigations.

CONTACTS

OLIVIER PROST
prost@gide.com

ANNA DIAS
anna.dias@gide.com

CLEMENT BOUVAREL
clement.bouvarel@gide.com

JAMES CASEY
james.casey@gide.com

GERALD MONTAGU
gerald.montagu@gide.com

[9] The Bioethanol (AD580) and Ironing boards (AD506) measures were identified as "of interest to the UK" but have since expired. It is unclear if and how these measures will be transitioned into the UK.

ANNEX 1

EU MEASURES SET TO BE TRANSITIONED BY THE UK GOVERNMENT

Product	Case ID	Countries investigated	Status
Bioethanol	AD580	USA	Expired
Ironing boards	AD506	China	Expired
Ammonium nitrate	AD330	Russia	Ongoing expiry review
Continuous filament glass fibres	AS603	China	Ongoing expiry review
Welded tubes and pipes of iron or non-alloy steel	AD523	Belarus	Ongoing expiry review
Welded tubes and pipes of iron or non-alloy steel	AD523	China	Ongoing expiry review
Welded tubes and pipes of iron or non-alloy steel	AD523	Russia	Ongoing expiry review
Rainbow trout	AS606	Turkey	Expiring in Feb. 2020
PSC wires and strands	AD529	China	Expiring in June 2020
Biodiesel	AD531	USA (extended to Canada)	Expiring in Sept. 2020
Biodiesel	AS532	USA (extended to Canada)	Expiring in Sept. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	China	Expiring in Oct. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	Japan	Expiring in Oct. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	Korea	Expiring in Oct. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	Russia	Expiring in Oct. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	USA	Expiring in Oct. 2020
Wire rod	AD530	China	Expiring in Oct. 2020
Rebar (high fatigue performance steel reinforcing bars)	AD619	China	Expiring in July 2021
Cold rolled flat steel products	AD620	China	Expiring in Aug. 2021
Cold rolled flat steel products	AD620	Russia	Expiring in Aug. 2021
Aluminium road wheels	AD541	China	Expiring in Jan. 2022
Heavy (quarto) plate	AD631	China	Expiring in Feb. 2022
Continuous filament glass fibres	AD549	China	Expiring in April 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AD630	China	Expiring in April 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AS634	China	Expiring in June 2022
Stainless steel bars and rods	AS556	India	Expiring in June 2022

Hot-rolled flat products of iron, non-alloy or other alloy steel	AD635	Brazil	Expiring in Oct. 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AD635	Iran	Expiring in Oct. 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AD635	Russia	Expiring in Oct. 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AD635	Ukraine	Expiring in Oct. 2022
Ceramic tiles	AD560	China	Expiring in Nov. 2022
Cast iron articles	AD637	China	Expiring in Jan. 2023
Corrosion resistant steel	AD639	China	Expiring in Feb. 2023
Steel (wire) ropes and cables	AD384	China (extended to Korea and Morocco)	Expiring in April 2023
Tyres	AD640	China	Expiring in Oct. 2023
Tyres	AS641	China	Expiring in Nov. 2023
Biodiesel	AS644	Argentina	Expiring in Feb. 2024
Chamois leather	AD496	China	Expiring in Feb. 2024
Ceramic tableware / Kitchenware	AD586	China	Expiring in May 2024
Organic coated steel	AD584	China	Expiring in May 2024
Organic coated steel	AS587	China	Expiring in May 2024
Aluminium foil in small rolls	AD582	China	Expiring in June 2024
Polyethylene terephthalate	AS426	India	Expiring in July 2024
Ironing boards	AD548	China	Expiring in Oct. 2024

NEW MEASURES ADOPTED BY THE EU, NOT ASSESSED BY THE UK

Product	Case ID	Countries investigated	In force since
New and retreaded tyres for buses or lorries	AD640	China	October 2018
New and retreaded tyres for buses or lorries	AS641	China	November 2018
Bicycles (electric)	AD643	China	January 2019
Bicycles (electric)	AS646	China	January 2019
Biodiesel	AS644	Argentina	February 2019
Urea and ammonium nitrate	AD649	Russia, Trinidad and Tobago, USA	October 2019
Steel road wheels	AD652 (prov.)	China	October 2019
Biodiesel	AS650	Indonesia	December 2019

GIDE LOYRETTE NOUEL LLP
125 Old Broad Street, London EC2N 1AR | tel. +44 (0)20 7382 5500 | uk@gide.com - gide.com

KOCHHAR & CO.
ADVOCATES & LEGAL CONSULTANTS

India Releases: 2020-21 Union Budget

Glimpses of Budget 2020

Dear All,

Hon'ble Finance Minister, Government of India, while presenting the Union Budget 2020 today stated that her proposals are structured around the themes of '**Aspirational India**', '**Economic Development**', and a '**Caring Society**'. As we start decoding the fine print of her tax proposals please find herein below key tax highlights of the Finance Bill, 2020.

PROPOSALS REGARDING CHANGES IN DIRECT TAXES

- ***Corporate Tax***
  - Dividend Distribution Tax of 15% payable by companies will not be payable for dividends declared after 31st March 2020
  - Reduced tax rate of 15% provided earlier for new manufacturing companies will now also be available to companies engaged in electricity generation
  - Companies availing the reduced tax rate of 15% will also be eligible for deduction in respect of any profits from processing of biodegradable waste
  - Start-ups having turnover of up to INR 1000 million will now be eligible for 100% tax concessions in any three of ten years since commencement of business
  - Relief available to real estate companies engaged in construction of 'affordable housing' will be extended to projects approved up to 31.03.2021
  - Special tax regime applicable to listed Infrastructure Investment Trusts (InvITs) and Real Estate Investment Trusts (REITs) is proposed to be made available to unlisted Infrastructure Investment Trusts also
  - Income of Sovereign Wealth Funds fulfilling certain conditions from interest dividends and capital gains from investments in Infrastructure facilities in India will be exempt

- ***International Tax Issues***
  - Definition of 'Resident' is being modified to treat Indian citizens who are not liable to tax in any other country by reason of domicile or residence or any other such criteria, as resident in India for tax purposes

- Definition of ‘significant economic presence’ introduced last year for determining ‘business connection’ of a non-resident in India is proposed to be modified
- An amendment is proposed to empower Government to enter into tax treaties with other countries to implement the Multilateral Convention signed by India under the BEPS program of OECD and G-20 countries. This will enable modification of existing treaties to plug opportunities of double non taxation, treaty shopping etc.
- Tax Board is proposed to be empowered to lay down Rules relating to profit attribution in respect of cases covered by Safe Harbour Rules and Advance Pricing Agreements
- A new provision is being introduced in respect of e-commerce transactions. Under this ‘e-commerce operators’ will be required to deduct tax at source @1% of gross amount of sales and services facilitated or provided by them through their digital or electronic platform. This will however not apply to receipts from hosting advertisements and certain other services
- Concessional rate of Withholding tax of 5% on interest payable to non-residents on long term borrowings for infrastructure bonds and to FIIs, QFIs on Government securities, is being extended to borrowings made up to 1st July 2023
- Non-residents not having a Permanent Establishment (PE) in India who are in receipt of income from interest or dividend or Royalty or Fee for Technical services and in whose cases the due tax has been deducted at source, will not be required to file their returns of income in India

- ***Income Tax***
  - A special optional tax regime is being introduced for Individuals and HUFs under which they will be taxed at slab rates which are lower than the normal slab rates but will have to forego various deductions and exemptions otherwise available to them
  - Cooperative Societies are also being given an option to be assessed at lower tax rate applicable to companies without availing special exemptions
  - Individuals earning ESOPs from Start-up companies will now be eligible to pay tax on the value of ESOPs at any time up to 48 months after the relevant year, or on leaving the employment, or on sale of the shares whichever is earlier
  - Contribution by employers towards Pension fund, etc. in excess of Rs. 7.50 lakh will now be taxable as salary in the case of the employee
  - Dividend income will now be taxable in the hands of shareholders at applicable slab rates
  - Special deduction for interest up to Rs. 1.50 lakh on loans taken to acquire affordable housing is being extended to loans taken up to 31.03.2021
  - Non-corporate businesses with turnover up to Rs 50 million will not be required to have their accounts audited
  - Rate of TDS on provision of technical services (other than professional services) applicable under section 194J is being reduced from 10% to 2%
  - Tax Collected at Source (TCS) regime is being extended to Overseas remittances and sale of overseas tour package
  - For computing capital gains on sale of immovable property difference of up to 10% between the sale price and stamp duty value of the property will be ignored

- ***Other matters***
  - Commodity Transaction Tax (CTT) is proposed to be imposed on trading of commodity derivatives products
  - Tax Board will be authorised to develop a Charter of statutory rights of taxpayers
  - Power of Tax Tribunal to grant stay of disputed tax demands is proposed to be circumscribed by requirement of payment of 20% of disputed tax for grant of stay of the balance amount

- Facilities of e-appeals for disposal of first appeals will be introduced
- Charities will be required to furnish statement of donors above a specified amount and deduction to donees will be subject to verification from such statements
- A scheme for reduction of litigation is proposed under which direct tax disputes pending before authorities up to Supreme Court will get abated on the taxpayer paying the disputed tax and the tax department foregoing the interest and penalty

PROPOSALS REGARDING CHANGES IN INDIRECT TAXES

Customs

- ***Rate movement in Basic Customs Duty ('BCD')***

Increase in BCD

- Vibrator motor / Ringer for use in manufacture of cellular mobile phones increased from NIL to 10% w.e.f. 1 April 2020
- Display assembly, touch panel / cover glass assemble for use in manufacture of cellular mobile phones increased from NIL to 10% w.e.f. 1 October 2020
- Naptha imported for generation of electric energy by a generating company now subject to BCD @ 4%
- Electric motor vehicles to attract higher BCD for Completely Knocked Down ('CKD'), Semi Knocked Down ('SKD') and Completely Built Unit ('CBUs') w.e.f. 1 April 2020
- Toys from 20% to 60%
- Furniture from 20% to 25%
- Exemption withdrawn on import of copper goods used as raw materials for manufacturing of ITA goods, leading to levy of BCD

Reduction in BCD

- Newsprints and uncoated paper used for printing newspapers and magazines reduced from 10% to 5%
- Bunker fuel from 10 % to NIL
- Calcined petroleum reduced from 10% to 7.5%

- ***Defence imports***
  - Specified military goods imported by Defence Public Sector Units or other Public Sector Units in addition to Ministry of Defence / Defence forces into India exempt from the whole of the customs duty
- ***Social Welfare Surcharge ('SWS')***
  - SWS exemption on commercial vehicles including electrical vehicles if imported as CBUs w.e.f. 1 April 2020
- ***Incentivising 'Make in India'***
  - Imposition of Health cess ('HC') w.e.f. 2 February 2020 on medical equipment imported under chapter heading 9018 to 9022

- Exemption from HC on those goods which are exempt from BCD, imported under Free Trade Agreement ('FTA') and on inputs or parts used for manufacture of medical devices
- HC to be computed on the same value on which customs duty is computed

- ***Legislative changes***
  - Power to prohibit import / export of goods for controlling prevention of injury to economy now extended to all goods in addition to gold and silver
  - Detailed process introduced under FTA / Preferential Trade Agreement with new Rules of Origin. Trade benefits may be denied in case importer fails to furnish requisite information for verification
  - Facility of electronic duty credit ledger to be introduced in lieu of remission of duty / tax in lieu of exports. Duty credit could be utilised for offsetting customs duty payment
- ***Anti-dumping duty ('ADD')***
  - ADD revoked on Purified Terephthalic Acid ('PTA') including certain variants imported from China, Iran, Indonesia, Korea, Malaysia, Taiwan and Thailand
  - ADD rules made more comprehensive and wider to strengthen domestic market and introduce anti - circumvention measures
  - Amendments made in safeguard provisions relating to protection against surge in quantity of imports

Excise duty

- Excise duty on Tobacco products increased with an increase in National Calamity Contingent Duty ('NCCD')

GST

- ***GST compliances***
  - Introduction of new simplified returns w.e.f. 1 April 2020
  - E - invoicing proposed in a phased manner
- ***Retrospective amendments***
  - Refund of compensation cess due to inverted duty structure on tobacco products is withdrawn for the period 1 July 2017- 30 September 2019
  - Provision for transition of input tax credit under existing law amended w.e.f. 1 July 2017
- ***Other amendments***
  - Penalty provisions reinforced for persons causing and benefitting fraudulent availment of input tax credit

Our perspective on the aforesaid and detailed analysis of the tax proposals will follow shortly.

For additional information or queries, please feel free to reach out to our tax partners:
Mr. Shahid Khan (Senior Partner - Direct Tax) at shahid.khan@kochhar.com and
Ms. Shampa Bhattacharya (Partner - Indirect Tax) at shampa.bhattacharya@kochhar.com

We trust that you will find our newsletter informative and useful.

Best regards,
Corporate Relations Desk
Kochhar & Co.

DISCLAIMER: The material has been prepared for general information purpose only and is not intended to be relied upon as accounting, tax or other professional advice. Please refer to the appropriate advisor for any specific matter.

New Delhi Office - 11th Floor, Tower A, DLF Towers Jasola, Jasola District Center, New Delhi – 110025
Tel: +91 11 41115222, Fax: +91 11 40563813 email: info@kochhar.com

Gurgaon Office - 3rd Floor, Tower-B, Ocus Technopolis Building, Sector-54 DLF Golf Course Road
Gurgaon-122002, Haryana, Tel.: +91-124-4545222, Fax: +91-124-4375596 email: info@kochhar.com

---

New Delhi | Gurgaon | Mumbai | Bangalore | Hyderabad | Chennai
Dubai | Singapore | Atlanta | Jeddah (affiliate office)

SKRINE

SEC Issues AGM CG Checklist to Enhance Shareholder Activism

06 February 2020

The Securities Commission Malaysia ('SC') issued the Annual General Meeting Corporate Governance Checklist for Shareholders ('AGM CG Checklist') on 5 February 2020 with the aim of promoting meaningful dialogue between shareholders and the board of directors at annual general meetings ('AGM') of companies.

According to the Chairman of the SC, the AGM CG Checklist is meant to guide shareholders on key issues they may need to consider or raise at an AGM before exercising their voting rights. Among these issues are the matters pertaining to the appointment of directors, approval of directors' fees, appointment of auditors, contents of the annual report, and the adequacy of sustainability and anti-corruption measures adopted by a company.

The AGM CG Checklist also provides guidance on matters to be considered by shareholders before and after an AGM.

Although the AGM CG Checklist was developed for shareholders, the SC encouraged other stakeholders, such as consumers and potential investors, to use the checklist to understand and evaluate the performance, policies and practices of companies.

The AGM CG Checklist was developed by the SC in collaboration with the Institutional Investors Council Malaysia and the Minority Shareholders Watch Group and its publication is one of the deliverables under the SC's Corporate Governance Strategic Priorities (2017-2020).

www.skrine.com

February, 2020

Tax Administration Service criteria applicable to VAT withholding

As we previously informed you, as of January 1, 2020, Section IV of Article 1-A of the Value Added Tax Law ("VAT Law") entered into force. This provision establishes the obligation to withhold 6% of VAT on certain services. However, on such date no Rules were issued to narrow down its scope. This has created confusion among the taxpayers.

On January 31, 2020, the Tax Administration Service (as per its acronym in Spanish “SAT”) published an anticipated version of Annex 7 (legal criterion) of the Tax Administrative Rules with the purpose of clarifying in which cases the VAT should be withheld. The legal criterion is pending to be published in the Federal Official Gazette.

The legal criterion *"46/VAT/N VAT 6% withholding referred to in Article 1-A (IV) of the VAT Law"*, establishes in general terms the following:

+ That the bill issued by the Mexican Federal Executive Power referred to outsourcing, however, it was later modified by the Chamber of Deputies.

+ It establishes that the withholding is applicable as follows:

    - When a legal entity or an individual with business activity, as a contractor, receives services in which personnel is made available to it, it should be understood that the withholding is applicable when the functions of the personnel are used directly by the contracting party or a related party of the same.
    - On the other hand, no withholding shall be made to services where personnel perform functions which are used directly by the contractor.

In this regard, it is considered that one of the elements that may be used to determine whether or not VAT withholding is applicable is related to whom uses the functions of the personnel, whether the contractor, a related party or the contractor. We suggest reviewing each contract to determine if VAT withholding is applicable.

It is not the purpose of this communication to advice or counsel on any situation nor is intended to not pay in whole or in part any contribution or not to withhold any contribution against the Mexican tax provisions nor should it be used for such purposes.

In case you require additional information, please contact the partner responsible of your account or any of the following attorneys:

Mexico City Office: **Mr. Mariano Calderón V., mcalderon@s-s.mx (Partner)**
Phone: +52 (55) 5279-5400

Monterrey Office: **Mr. César Cruz A., ccruz@s-s.mx (Partner)**
Phone: +52 (81) 8133-6000

Queretaro Office: **Mr. José Ramón Ayala A., jayala@s-s.mx (Partner)**
Phone: +52 (442) 290-0290

NautaDutilh

Corporate

Netherlands | EU

Status update 2020: new company law legislation

Friday 31 January 2020

Last year closed with the entry into force of an important bill implementing the Shareholder Rights Directive II (SRD II). However, most of the associated legislative processes are still ongoing. This newsletter provides an overview of the status of the most important legislative proposals in the field of company law and concludes with a review of the implementation of SRD II.

Bill on the management and supervision of legal entities

On 20 January 2020, a proposal for an act on the management and supervision of legal entities was adopted by the Lower House of Parliament. The bill clarifies the existing rules on the management and supervision of associations, cooperatives, mutual insurance companies and foundations and aligns these rules to those applicable to the public limited company (NV) and the private limited-liability company (BV), found in the Civil Code. It will henceforth be possible for associations and foundations to establish a supervisory board, and all types of legal entities will be able to opt for a one-tier governance system. For associations, cooperatives, mutual insurance companies and foundations, the bill provides greater clarity on:

- the principles that directors and supervisory board members must observe in the performance of their duties;
- the position of directors and supervisory board members with a conflict of interest; and
- the rules on the liability of directors and supervisory board members.

For foundations, the rules on the court-ordered removal of a director are clarified.

The Lower House also adopted three amendments and a motion (request to the government):

- an amendment to make uniform for all legal entities the rules on absences and inability to attend (meetings);
- an amendment to prohibit a director or supervisory board member from being able to cast more votes than the other directors or supervisory board members combined, applicable to all legal entities;
- an amendment introducing an evaluation provision so that the law is evaluated five years after its entry into effect;
- a motion requesting the proactive communication of information on the consequence of the law for existing associations and foundations.

On 11 February 2020, the bill will be discussed by the Upper House. If the committee members have no further input, the Upper House can call for a vote fairly quickly. It is not yet clear when this will take place, but given the current state of affairs, entry into force on 1 July 2020 is feasible.

Bill on introduction of a cooling-off period for the management of listed companies

On 18 December 2019, a bill to introduce a cooling off period for the management of listed companies was submitted to the Lower House of Parliament. A listed company faced with shareholder activism or a hostile takeover will be able to benefit from a

cooling-off period of up to 250 days, with the approval of the supervisory board, if there is one. During this period, the board of directors shall gather all information necessary to make a careful policy determination and must, in any case, consult with shareholders representing at least 3% of the subscribed capital as well as with the works council. In addition, the power of the general meeting to appoint, suspend or remove the directors and supervisory board members (or amend the relevant provisions of the articles) is suspended during the cooling-off period. Upon expiry of this period, the board must account to the shareholders for the policy pursued. Shareholders representing at least 3% of the subscribed capital may petition the court to put an end to the cooling-off period.

Compared to the 180-day response time provided for by the Corporate Governance Code, the statutory cooling-off period offers greater legal certainty, according to the legislator. The duration of the cooling-off period is longer, and this possibility can also be used in the context of a public offer. There is thus some overlap between the two options, with the statutory cooling-off period taking precedence over the rules on response time. It will be up to the court to reconcile use of the cooling-off period with other protective measures relating to the appointment, suspension or removal of directors or supervisory board members and takeovers. For more information on this subject, please refer to our December 2018 newsletter. The date of entry into force is not currently known. However, it is feasible to enter into force at the end of this year or early next.

Bill on undesirable control in the telecommunications sector

On 4 March 2019, a bill on undesirable control in the telecommunications sector was submitted to the Lower House of Parliament. For more information on this subject, please refer to our newsletter of 14 March 2019. On 20 December 2019, a number of amendments were made to the bill, notably:

- introduction of an exemption from the notification obligation for protective foundations (*beschermingsstichtingen*);
- introduction of the possibility for the minister of economic affairs to impose mitigating measures on the undertakings concerned, resulting in suspension of a ban subject to compliance with these conditions;
- raising of the threshold value in the case of a combination of services where "relevant influence" is exceeded, even if no service individually exceeds the threshold value;
- introduction of the possibility to investigate the identity of a shareholder prior to the establishment of undesirable control.

The definition of "relevant influence" will be clarified in an order in council (AMvB). For this purpose, the Decree on undesirable control in the telecommunications sector was submitted on 19 December 2019 for consultation, which runs until 21 February 2020. A plenary discussion of the bill is scheduled for 4 February. If the bill is adopted at that time, discussions will be pursued in the Upper House. Given the current status, it is feasible to enter into force at the end of this year.

Bill implementing the European Regulation establishing a general framework for the screening of foreign direct investment in the EU

Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investment in the European Union (the "Regulation") entered into force on 10 April 2019. The Regulation will be applicable as from 11 October 2020. Although a regulation has direct effect, a bill to implement the Regulation was nonetheless submitted at the end of 2019 as the Regulation merely provides for the *possibility* for Member States to maintain, change or establish mechanisms to screen foreign direct investment for reasons of security or public policy on their territory. The bill does not introduce any new Dutch investment tests or screening mechanisms and does not change the existing screening mechanisms. It governs:

(i) enforcement in the event of non-compliance with the aforementioned obligation;
(ii) establishment of a contact point;
(iii) authority to process, collect and provide information.

These measures are deemed necessary to guarantee the effectiveness of the Regulation and to ensure that the Netherlands meets its obligations thereunder.

The bill also contains an amendment to the bill for an act on undesirable control in the telecommunications sector, namely a proposal to extend the notification period if the notification falls within the scope of the Regulation.

The consultation period ran until 14 January 2020, and the legislation is expected to enter into effect no later than 11 October 2020. For more information, please see our December 2019 blog post.

Finally, the investment review system will be further elaborated on in a separate legislative proposal, with reference to the guidelines provided for by the Regulation for the establishment of investment tests (for example with regard to the assessment criteria). According to the minister of economic affairs, this legislation could enter into force in 2021.

Draft bill for modernisation of partnerships

In early 2019, a bill to modernise partnerships was submitted for consultation. According to the Ministry of Justice and Security's 2019 schedule, the bill was supposed to have been filed in the last quarter of 2019. This did not happen, perhaps due to the 34 responses to the proposal with quite a few questions and comments (including ours). The 2020 schedule does not contain a proposed timetable for this legislation. However, we expect the bill to be submitted later this year.

Draft bill amending the shareholder dispute resolution procedure and clarifying the eligibility requirements for the survey procedure

A draft bill to amend the shareholder dispute resolution procedure and to clarify the requirements to access the survey procedure was subject to consultation through November 2019. The amendments are in short:

1. Changes to the dispute resolution procedure
   The grounds for the expulsion and exit of shareholders are extended. For example, according to the bill, the court can take into account the behaviour of a shareholder acting in another capacity (such as that of director) when balancing the interests in a claim for expulsion. The exit criteria are simplified, with reference to reasonableness and fairness standards. The bill provides that such a claim cannot be granted if the company or another shareholder has made an irrevocable, unconditional and reasonable offer to acquire the shares which is covered by sufficient guarantees.
2. Clarification of the requirements to access the survey procedure
   A separate eligibility requirement for access to the survey procedure is introduced for shareholders (and the holders of depositary receipts) of listed companies with subscribed capital of less than €22.5 million. As a result, access cannot be denied through the use of low nominal share capital. Shareholders representing at least 1% of the subscribed capital or whose shares have a market value of at least €20 million can also request a survey. For shareholders of listed companies with subscribed capital of more than €22.5 million, the access requirements remain unchanged.

It is not yet known when the bill will be submitted to the Lower House. While the bill could reach the finish line by the end of this year, it is more likely that this will occur in 2021.

Bill implementing the UBO register

On 10 December 2019, the Lower House of Parliament adopted a bill introducing an obligation for companies and other legal entities to register their ultimate beneficial owners. The UBO Act follows from the fourth and fifth Anti-money Laundering Directives and introduces an obligation to establish, maintain and centrally register information about the ultimate beneficial owners (UBOs) of companies and other legal entities established in the Netherlands. Two amendments and three motions were also adopted by the Lower House:

1. An amendment on expiry of the exemption for religious denominations (churches);
2. An amendment to the registration obligation (prior identification) for every person who is granted access and the provision of information to UBOs about how often they are searched for;
3. A motion to monitor the privacy implications of the introduction of the UBO register for charitable institutions (anbi's) and to inform the Lower House on this point one year after introduction of the UBO register;
4. A motion to require the directors of charitable institutions to include all board members in the UBO register, as is already the case with the trade register;

5. A motion to conduct an evaluation of the privacy impact of the UBO register one year after its introduction and again after four years.

The bill has been submitted to the Upper House for consideration. On 28 January 2020, the Upper House Parliamentary Committee conducted a preliminary investigation, pursuant to which it was determined that a number of MPs will submit further questions in writing. It is unclear when these questions will be submitted and answered but, at present, we expect the UBO register to become operational in the first quarter of 2020.

Binding gender quata for listed companies

On 3 December 2019, a motion was carried asking the government to require listed companies to have at least 30% female members on their supervisory board. The proposed binding quota is based on earlier recommendations of the SER.
The government is not obliged to implement the motion. However, it was the government which asked the SER for its opinion on this subject, and the final report is the result of extensive consultation between trade unions, employers and independent experts. There appears to be support for the quota, although voices have also been raised against it. The government has been asked to explain in a letter how it intends to implement the motion. If the government decides to introduce the quota, a bill will be prepared. It is expected that the bill will first be published for consultation. Afterwards, it can be submitted to the Lower House. After being passed by the Lower House, it will be sent to the Upper House for adoption. This will obviously be a lengthy process. Entry into force is not expected before the end of 2020, at the earliest.

Review of implementation of SRD II

On 1 December 2019, the bill implementing the Shareholder Rights Directive II (EU 2017/828) entered into force, with the exception of a number of provisions. The following new rules will enter into effect on 3 September 2020:

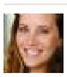
- the provision (by an NV) of an electronic acknowledgment of receipt for a vote cast electronically;
- the provision (by a listed company) of confirmation of the valid registration and counting of the votes cast by a shareholder at a meeting;
- new rules on shareholder identification (changes to the Company Code).

The new law has consequences for ordinary NVs, structure NVs, listed NVs and BVs, life insurers, pension funds, asset managers, proxy advisors and parties in the custody chain. Please see our newsletter of 5 November 2019 for an overview of all changes.

Contact me


Geert Raaijmakers | Amsterdam | +31 20 71 71 992


Maarten Buma | Amsterdam | +31 20 71 71 197


Suzanne Rutten | Amsterdam | +31 20 71 71 954

Commerce Commission fines telcos over billing blunders

February 17, 2020 | 2 min read

Contacts


Sarah Lee
Senior Associate
+64 9 977 5279
sarah.lee@simpsongrierson.com


Richard Watts
Partner
+64 9 977 5182
richard.watts@simpsongrierson.com

The Commerce Commission has issued fines to multiple telcos following billing errors that resulted in consumers being misled and overcharged. While innocent, these errors could result in significant penalties and embarrassment for the business.

Key takeaways - what you need to consider

1. The importance of robust internal processes: the Commerce Commission noted that these businesses had failed to implement and ensure proper processes were in place to ensure invoice accuracy, and compliance with not only the law but also with their own terms and conditions. Quite often we see these sorts of internal errors and while they are generally unintentional, they are swiftly acted on by the regulator as consumers are left out of pocket.

2. Remembering the entire consumer lifecycle: it is common to think that Fair Trading Act breaches primarily happen at the beginning of a consumer journey with your business (ie misleading advertising resulting in consumers signing up with you on false pretences). This case is a good reminder that even at the end of a consumer's journey with you, there is the potential for misleading conduct.

What happened?

Slingshot, Flip Services Limited and Orcon Limited have been fined $121,500 after it was discovered they continued to invoice customers who had terminated their contracts. The terms and conditions stated that charges would stop after customers had given one months' termination notice. However, customers received invoices that included charges beyond the one-month period, resulting in over-payments of around $132,000.

What's the law?

The Fair Trading Act is one of New Zealand's key pieces of consumer protection legislation. While the Act has general provisions regarding the prohibition of misleading and deceptive conduct, it also provides a list of specific areas in which representations must not be false or misleading. These include the making of misleading representations with respect to the price of goods and services and the existence of any rights or conditions.

In this case, the businesses concerned were found to have misled consumers as to their right to payment. In other words, by issuing incorrect invoices, they represented to consumers that they were entitled to payments that they were not.

Useful tips

We have a number of tips that will help your organisation ensure you do not fall foul of your legal obligations:

<table>
<tr><td>Get rid of manual processes</td><td>Manual processes generally leave businesses open to a variety of risks. These processes are often unwritten and/or reliant on key people within the organisation. They are also often inconsistently applied and prone to interpretation issues.

We recommend reviewing any manual processes that your business may have and identifying ways in which those processes can be either automated or formalised. While the thought of converting a manual process to an automated one may seem daunting, it can often create long-run efficiencies and, most importantly, significantly reduce the chance of inadvertent human errors resulting in legal breaches.</td></tr>
<tr><td>Keep stakeholders engaged</td><td>Regular training and/or workshops across your business can increase stakeholder awareness of compliance requirements. Updates on current regulator enforcement actions in your industry can also be an effective way of reminding stakeholders of the importance of compliance and the consequences of failing to do so.</td></tr>
<tr><td>Implement sign off strategies</td><td>There are a number of sign off strategies that can boost compliance and help to identify areas of risk to your business:
<u>Marketing material sign off</u>: a process that involves the approval of all relevant business units prior to any mass-marketing materials being released.
<u>Customer communications sign off</u>: a process similar to the above, but more focussed on issues that may crop up for particular customers (ie any relevant terms and conditions that might be relevant to the customer)
For smaller businesses, compliance checklists are an alternative to sign off processes. These can be tailored to your business and provide you with trigger points that indicate where further advice may be needed.</td></tr>
<tr><td>Regular reviews</td><td>Any processes and strategies you have in place should be reviewed and updated at least once a year. This should include a refresh of key legal documentation as well as any critical IT systems (such as those used for invoicing and mass email sending).</td></tr>
</table>

Get in touch

Please contact our team if you would like further information or assistance on how you can better protect your business.

Contributors nicole.ashby@simpsongrierson.com (mailto:nicole.ashby@simpsongrierson.com)

Qualifying Certificate – New Exemption for Singapore Listed Housing Developers with Substantial Connection to Singapore

DENTONS RODYK

February 10, 2020

On 6 February 2020, the Ministry of Law and Singapore Land Authority (LDAU) jointly announced that they are prepared to grant exemption to Singapore listed housing developers with a substantial connection to Singapore from the requirements of the Qualifying Certificate (QC) regime.

The acquisition of residential properties (including vacant lands) in Singapore is regulated by the provisions of the Residential Property Act (the Act).

Section 25 of the Act requires all foreign persons (including all companies) to seek the prior approval of LDAU to acquire and retain restricted residential properties in Singapore. While individuals who are foreign persons may be able to obtain approval with conditions to acquire one restricted residential property for their own stay, approval under Section 25 is very rarely granted to any company to acquire and retain any restricted residential property.

As a distinct exception to Section 25, Singapore companies (meaning those incorporated in Singapore with all their respective shareholders and directors being citizens of Singapore) which have been issued a Clearance Certificate pursuant to Section 10 of the Act may acquire, retain and/or develop residential properties at such times as they deem appropriate

Prior to the aforesaid announcement on 6 February 2020, all other companies (including but not limited to all listed housing developers) who wish to acquire restricted residential properties (including vacant lands) were required to and could apply to LDAU for approval to purchase or acquire restricted residential properties only as housing developers under Section 31 of the Act. Such approval, given in the form of a QC backed by a banker's guarantee or insurance guarantee for 10% of the land price, required the housing developer to complete building the housing project within 5 years after purchase, and to sell all residential units within 2 years after the issuance of TOP for the housing project.

In the announcement, the Ministry of Law and LDAU noted that the existing framework meant that listed housing developers which are substantially Singapore companies are considered as foreign companies even if they have just one non-Singaporean shareholder. They are now prepared to exempt listed housing developers with a substantial connection to Singapore from the requirements of the QC regime prescribed by Section 31 of the Act. According to Ministry of Law and LDAU, this change will "better align the QC regime and the objectives of the RPA".

Listed housing developers may apply for such exemption and will be assessed by reference to the following criteria:

i. Incorporation in Singapore;
ii. Primary listing is on the Singapore Exchange Limited (SGX) and principal place of business is Singapore;
iii. The chairperson of the company is a Singapore citizen;
iv. The majority of the Board of Directors are Singapore citizens;
v. "A significantly Singaporean substantial shareholding interest in the company", which means – either **(a)** substantial shareholders who are Singapore citizens, Singapore companies or Singapore Government entities hold at least 50% interest in the voting rights and issued shares in the company; or **(b)** the largest single substantial

shareholder is a Singapore citizen, Singapore company or a Singapore Government entity and holding at least 25% interest in the total voting rights and issued shares in the company.

** “Substantial shareholders” refer to persons or companies who have an interest in at least 5% of the votes attached to all the voting shares in the company or class of shares.

vi. Track record of development projects in Singapore

As part of the application, the Developer-applicant would also need to provide the following documents/information as discerned from the application form:

a) Applicant’s organisation chart/corporate structure;

b) Information on applicant’s directors – including their citizenship and legal basis of stay in Singapore;

c) Information (including share type, voting rights (%), issued shares (%)) on the applicant’s substantial shareholders (i.e. shareholders who hold “at least 5%” of the votes attached to all the voting shares in the company or class of shares. In addition,

- For **individuals** who are shareholders, information on their citizenship and legal basis of stay in Singapore would have to be provided; and
- For **entities** which are shareholders, the list of directors and shareholders of each entity would have to be provided, and, if the shareholder is an entity, the list of its shareholders would also have to be stated until all shareholders listed are individuals.

d) Applicant’s track record. To provide information on the following:

- Number of years of activity in Singapore as a housing developer;
- Number of employees in Singapore in the last 3 years;
- Development project(s) in Singapore – including status of each development (e.g. redeveloped, completed, under construction), date of TOP/CSC, development type, number of units, land area, GFA);
  While this is unclear in the application form, it should include the track record of related corporations (within the meaning of Section 6 of the Companies Act). It would also appear from the form that notwithstanding the definition of “housing developer” in Section 31 of the Act, the track record provided in the form is not limited to residential projects and includes commercial (and mixed) developments.

e) Statutory Declaration – essentially to confirm that (a) the particulars, statements, and declarations in the application are true and correct, and (b) the company has a significantly Singaporean substantial shareholding interest (as detailed in item (v) above);

f) Supporting documents (including ACRA records); and

g) Application Fee of S$500.

Unlike an application for a QC pursuant to Section 31 of the Act which is specific to the acquisition/intended acquisition of a particular residential property, this application for exemption from the QC regime appears to be an application for an exemption status that is tied to the applicant-developer. The application for exemption therefore appears to be more akin to an application for a Clearance Certificate under Section 10 of the Act, without need to specify details of any restricted residential property to be acquired or retained.

It is usual and likely that the listed housing developer will set up a wholly-owned subsidiary or special-purpose vehicle

(SPV) to acquire the restricted residential property and to undertake the development on it. The question then arises whether such SPV would be required to make a separate application for an exemption status to allow the SPV to acquire the restricted residential property free from the usual QC regime.

It is also fairly common for housing developers to come together to set up a joint venture company (JV Co.) to acquire and redevelop restricted residential property. In such event, the status of each of these entities would need to be separately assessed for compliance with the requirements of the Act. If possible, such JV Co. will need to apply for its own exemption status from the QC regime. It is fair to assume that the LDAU will not grant the exemption status to a JV Co. established by a Singapore listed housing developer and a foreign company, even if the former is a company with a "substantial connection to Singapore" and would have been in a position to obtain the exemption status on its own.

It is unclear whether LDAU will expect strict compliance with all the stated criteria for the application for exemption. For instance, it is not clear if exemption status would be granted to a listed housing developer whose substantial shareholders holding 49% of its shares are Singapore citizens, Singapore companies or Singapore Government entities if this listed housing developer is able to meet all the other criteria. The specific number of development projects which will fulfil the track record requirement, is also unclear – this may well depend on the frequency of the development business and the size (in terms of units) of each of the projects.

In view of the sanctity of the Act that protects ownership of restricted residential properties in Singapore, one can expect that the approval for exemption from the QC regime may come with certain conditions. After all, the target beneficiaries for this exemption appear to be listed housing developers, which are in the business of housing development, that is to construct flats or dwelling houses on the relevant residential land for sale. We should expect more details on this in the months ahead.

Impact on the residential property market

While listed housing developers with a substantial connection to Singapore will welcome this proposed exemption from QC regime, we believe that the positive impact on the residential property market will be limited. The distinctly separate Additional Buyer's Stamp Duty (ABSD) tax regime operates to require housing developers to build and sell all residential units within 5 years as part of their undertaking to IRAS in exchange for upfront remission of ABSD. Housing developers who fail to meet the requirements of the undertaking will have to pay the remitted ABSD plus interest thereon.

Housing developers do not need to be reminded that since July 2018, the remittable part of ABSD has been increased from rate of 15% to 25%, in addition to a non-remittable ABSD of 5%. As such, housing developers should still be motivated to push ahead with sales of residential units built on residential lands, albeit most of these may be under the 15% ABSD era.

Conclusion

We anticipate a flood of applications for exemption from QC from listed housing developers who believe that they are essentially Singapore developers with a substantial connection here. It will be interesting to see the extent of flexibility to be adopted by LDAU in assessing whether these applications have met the relevant criteria. Perhaps what is most interesting are the terms which may be stipulated by LDAU in any approval of exemption granted by LDAU.

Dentons Rodyk thanks and acknowledges Senior Associate Yi Rong Ang for her contributions to this article.

Your Key Contacts

Liat Yeang Lee
Senior Partner, Singapore
D +65 6885 3676
liatyeang.lee@dentons.com

Regulations Regarding Protective Order in Criminal Investigation Newly Added to Trade Secret Act

01/31/2020
Winona Chen

In response to the industry's demand and attention for the legal protection of trade secrets, and in compliance with the trend of imposing or increasing criminal liabilities under the international legal system for the protection of trade secrets, Taiwan's Trade Secrets Act, having been implemented since 1996, added the provisions on criminal liability for violation of Trade Secrets Act, and enhanced penalties for the purpose of using the trade secrets in foreign jurisdictions in the 2013 Trade Secrets Act Amendment. However, with the implementation of the 2013 Trade Secrets Act Amendment, difficulties on the practice of criminal investigation emerge when prosecutors are investigating trade secrets cases. It is the limitation of Article 245 of the Code of Criminal Procedure, "A prosecutorial investigation shall not be made public," that makes it difficult to provide the investigation materials to the relevant persons for reviewing and defending sufficiently to discover facts. Besides, there is no legal basis for ordering the relevant persons who may have access to the investigation materials to fulfill the obligation of confidentiality. Thus, the trade secrets owners face the risk of the further leakage of their trade secrets, which affects the efficiency and correctness of the criminal investigation.

In order to maintain the principle of secret investigation, discover facts and meanwhile retain the confidentiality of the evidence materials of trade secrets, the Legislative Yuan passed the amendment to some provisions of the Trade Secrets Act on December 31, 2019, adding the regulations regarding "Protective Order in Criminal Investigation," with the key points as follows:

1. The prosecutors may issue a "Protective Order in Criminal Investigation" to the relevant persons (such as suspects, defendants, victims, complainants, agents ad litem, defense attorneys, expert witnesses, witnesses or other relevant persons) who have access to the investigation content when necessary (Paragraph 1, Article 14-1).

2. The person subject to the "Protective Order in Criminal Investigation" shall not use said investigation content for purposes other than investigation procedures and shall not disclose it to the person not subject to the "Protective Order in Criminal Investigation" (Paragraph 2, Article 14-1).

3. The "Protective Order in Criminal Investigation" shall be made in written form or verbally. The trade secrets owner is entitled to present their opinions (Article 14-2).

4. The "Protective Order in Criminal Investigation" may be changed or revoked in the course of investigation (such as the circumstances where the grounds for maintaining secrecy become extinguished, or it is necessary to change the content of the "Protective Order in Criminal Investigation") and after the end of investigation (such as the circumstance where a final decision to defer the prosecution, or a final and irrevocable decision not to prosecute has been rendered to a case; the effect of the prosecution does not extend to the scope of

"Protective Order in Criminal Investigation"). Also, the "Protective Order in Criminal Investigation" may be linked up with the "Confidentiality Preservation Order" issued by the court after the action of the case has been initiated (Article 14-3).

5. Criminal liability for acts in violation of the "Protective Order in Criminal Investigation" shall be subject to a sentence of imprisonment not more than three years, detention, or in lieu thereof or in addition thereto, a fine of not more than NT$1 million. Criminal liability for acts in violation of the "Protective Order in Criminal Investigation" in foreign jurisdictions shall also be subject to punishment (Article 14-4).

Regulations regarding "Protective Order in Criminal Investigation" newly added to the 2019 Trade Secrets Act Amendment (hereinafter referred to as the "2019 Trade Secrets Act Amendment") is to be implemented on the date of its promulgation by the President.

It is quite a good idea to introduce the system of "Protective Order in Criminal Investigation" in the "2019 Trade Secrets Act Amendment." This amendment intends to balance the principle of secret investigation, the discovery of facts, and the confidentiality of evidence materials of the trade secrets owner. Nevertheless, several points on future operating practices are still worth observing:

1. At present, the 2019 Trade Secrets Act Amendment only grants prosecutors the right that they may ex officio issue the "Protective Order in Criminal Investigation," and disclose relevant investigation materials to relevant persons (parties, victims, agents ad litem, defense attorneys, expert witnesses, witnesses or other relevant persons) under the "Protective Order in Criminal Investigation." It does not grant prosecutors the right that they may issue the "Protective Order in Criminal Investigation" upon the application of relevant persons. As a result, the 2019 Trade Secrets Act Amendment does not provide relevant mechanism to initiate the issuance the "Protective Order in Criminal Investigation" even if relevant persons need to review investigation materials for assisting in prosecutorial investigation or defense. While the amendment seeks to improve the efficiency and correctness of investigation, it takes further observations whether such a goal can be achieved.

2. The implementation of the system of "Protective Order in Criminal Investigation" in the 2019 Trade Secrets Act Amendment grants prosecutors the right that they may disclose investigation materials to relevant persons under the "Protective Order in Criminal Investigation." The "Protective Order in Criminal Investigation" is an exception clause which breaks through the principle of secret investigation stipulated in Article 245 of the Code of Criminal Procedure, and has a far-reaching impact on the rights and interests of trade secret owners. It is true that the 2019 Trade Secrets Act Amendment empowers the trade secrets owners to have the opportunity to express their opinions on the issuance of the "Protective Order in Criminal Investigation" by the prosecutor under specific circumstances. However, even if the trade secrets owners do not agree with the scope of the "Protective Order in Criminal Investigation" (regardless of whether it relates to the persons subject to the said protective order, or the investigation content that should be kept confidential, or the prohibited or restricted acts), the prosecutors may still refuse to adopt the opinions of the trade secrets owners, directly issue the "Protective Order in Criminal Investigation," and disclose the investigation materials of trade secrets to the persons subject to the "Protective Order in Criminal Investigation" if necessary during the investigation proceeding. As the 2019 Trade Secrets Act Amendment does not provide a mechanism for a trade secrets owner to challenge against the ruling of the "Protective Order in Criminal Investigation" issued by the prosecutor, it is worth noting whether the protection of the rights and interests of the trade secrets owners is comprehensive.

3. Although the newly-added "Protective Order in Criminal Investigation" in the 2019 Trade Secrets Act Amendment and the "Confidentiality Preservation Order" stipulated in the Intellectual Property Case Adjudication Act are both for those who have access to the trade secrets to fulfill their obligation of confidentiality over the trade secrets content, and those who violate them shall be held criminally liable, the following differences still exist between them:

3.1.The newly-added "Protective Order in Criminal Investigation" in the 2019 Trade Secrets Act Amendment is applicable to criminal investigation for trade secrets cases, which is ex officio issued by a prosecutor. However, the "Confidentiality Preservation Order" stipulated in the Intellectual Property Case Adjudication Act is applicable to trial stages of a court, and is not limited to trade secrets cases. As long as litigation materials involve trade secrets held by the parties or the third party, the trade secrets holders may motion for "Confidentiality Preservation Order" to the court upon meeting certain legal requirements.

3.2 During the trial stage of the court, both parties may in principle review the evidence materials in the court files, with the exception of restricting their reviewing authority upon trade secrets holder's motion for a "Confidentiality Preservation Order," and approval of the court. However, during the criminal investigation, the related parties are not allowed to review the evidence materials in the investigation files based on the principle of secret investigation. Exceptions may be made upon the issuance of the "Protective Order in Criminal Investigation" by a prosecutor.

According to Paragraph 2, Article 11 of the Intellectual Property Case Adjudication Act, if the person subject to the "Confidentiality Preservation Order" has obtained or possessed such trade secrets before trade secrets holder's motion for a "Confidentiality Preservation Order," the motion filed by the trade secrets holder is therefore not in compliance with the requirements of motioning a "Confidentiality Preservation Order." It is true that the "Protective Order in Criminal Investigation" in the 2019 Trade Secrets Act Amendment may be linked up with the "Confidentiality Preservation Order" issued by the court after the action of the case has been initiated (Article 14-3). However, it is very likely that the person subject to the "Protective Order in Criminal Investigation" is also the person subject to the "Confidentiality Preservation Order." If the person subject to the "Protective Order in Criminal Investigation" has obtained or held the trade secrets during the criminal investigation, the trade secrets holder may not legally obtain a "Confidentiality Preservation Order" in accordance with the aforesaid provision of the Intellectual Property Case Adjudication Act. At this time, doubts may arise about how the "Protective Order in Criminal Investigation" in the 2019 Trade Secrets Act Amendment should be legally linked up with the "Confidentiality Preservation Order" under the Intellectual Property Case Adjudication Act.

The newly-added "Protective Order in Criminal Investigation" in the 2019 Trade Secrets Act Amendment has an impact on criminal investigation practice, the rights and interests of trade secret owners/holders, and the trial practice of trade secrets litigation court. In the future, the Judicial Yuan and the Executive Yuan should consider whether to formulate relevant operational measures for the issuance of "Protective Order in Criminal Investigation" by prosecutors in order to refine the relevant provisions of "Protective Order in Criminal Investigation." Further amendments of the "Confidentiality Preservation Order" under the Intellectual Property Case Adjudication Act should also be taken into consideration. By doing so, doubts about the applicability of both the Trade Secrets Act and the Intellectual Property Case Adjudication Act can then be avoided.

www.leeandli.com

BAKER BOTTS

Insights

Antitrust Division Obtains Indictment of Alleged Bid Rigger Shortly After Announcing Formation of Strike Force Focusing On Government Procurement Conspiracies

11 February 2020

Firm Thought Leadership

On February 5, 2020, the Antitrust Division of the U.S. Department of Justice ("DOJ") announced the indictment of a Missouri man – the third individual to be charged – for participation in a conspiracy to rig bids submitted to the General Services Administration ("GSA") at online auctions for surplus government equipment. The indictment and DOJ's ongoing investigation into GSA auctions reflect the Antitrust Division's increased scrutiny on the government contracting space in recent years, culminating in the launch of the Procurement Collusion Strike Force ("Strike Force") in November of last year.

Background

The indictment alleges that Alan Gaines conspired to suppress and eliminate competition by fixing prices, rigging bids, and allocating markets for sale-lots of excessed equipment offered for sale by GSA Auctions. Gains is the third individual charged in the DOJ and GSA Office of Inspector General's ongoing joint investigation into bid rigging at GSA auctions. Last year, two other individuals—Marshall Holland and Igor Yurkovetsky—pleaded guilty to criminal violations of the Sherman Act for their role in the bid rigging scheme. DOJ alleges that the co-conspirators agreed who would submit bids for certain lots offered at GSA auctions and who would ultimately win certain lots.

In November 2019, the Antitrust Division announced the creation of a new nationwide "Strike Force" designed to combat criminal antitrust violations in the government procurement process. The Strike Force includes prosecutors from the DOJ's Antitrust Division and 13 U.S. Attorneys' Offices, as well as investigators from various partner agencies such as the Federal Bureau of Investigation, the Department of Defense Office of Inspector General, and the U.S. Postal Service Office of Inspector General. As part of his remarks on the launch of the newly-formed Strike Force, Assistant Attorney General Makan Delrahim stated, "[A]ny amount of overcharge caused by illegal bid rigging or other anticompetitive criminal conduct inflicts significant economic harm on the government and the taxpayers."

DOJ will continue to be active in the government procurement space going forward. Remarking on the state of criminal antitrust enforcement on Friday, February 7, 2020, Deputy Assistant Attorney General Richard Powers stated that the Antitrust Division will remain focused on prosecuting crimes that affect the government. He also noted that more than 30 federal, state, and local government agencies have contacted the Strike Force about participating in its initiatives. According to Powers, more than one third of the Antitrust Division's open investigations relate to government procurement or other criminal conduct harming the government.

Takeaways

All companies that serve as vendors to the U.S. government should be aware: DOJ is on the hunt for antitrust violations committed by government contractors and has devoted significant internal resources to the effort and forged relationships with state and local enforcement personnel. We strongly recommend that any client doing business with the federal government assess compliance with the antitrust laws now, before DOJ steps in to investigate – or worse, prosecute criminally. Corporate fines are regularly in the tens of millions of dollars and, often, exceed $100 million, and the average individual prison sentence for convicted executives is now almost two years. The formation of the Strike Force also underscores the need for a robust antitrust compliance program, which can prevent serious antitrust programs and also lessen the impact if problems are discovered. As a result, all companies that do business with the government should consider updating and revising their compliance programs to reflect DOJ guidance.

ABOUT BAKER BOTTS L.L.P.
Baker Botts is an international law firm of approximately 725 lawyers practicing throughout a network of 14 offices around the globe. Based on our experience and knowledge of our clients' industries, we are recognized as a leading firm in the energy and technology sectors. Since 1840, we have provided creative and effective legal solutions for our clients while demonstrating an unrelenting commitment to excellence. For more information, please visit ***bakerbotts.com***.

Related Professionals

Alex J. Bourelly

Partner

Heather Souder Choi

Partner

Joseph Ostoyich

Partner

Caroline L. Jones

Associate

ADVISORIES

Antitrust

Mandatory CFIUS Filing Requirement for Certain Foreign Investments Takes Effect; Exceptions for Canadian, Australian, and U.K. Investors

By Kelly M. Gorton, Allison A. Davis, and Burt Braverman

02.14.20

Department of Treasury Issues Final FIRRMA Regulations

The U.S. Treasury Department has issued final rules (the Regulations) implementing changes to the foreign investment review process administered by the Committee on Foreign Investment in the United States (CFIUS). The rules, which became effective on February 13, 2020, implement changes introduced by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) and govern CFIUS' review of the national security implications of certain foreign investments and real estate transactions.

Highlights

- The Regulations require a CFIUS notification for certain investments in U.S. critical technology businesses (including some non-passive minority investments), similar to the filings necessary under the CFIUS Pilot Program that took effect in November 2018.

- The Regulations require a CFIUS notification by most foreign-government-related investors making investments in U.S. businesses involved in (1) critical technology, (2) critical infrastructure, or (3) sensitive personal data (so-called "TID" U.S. businesses).

- The Regulations create an exemption for the United Kingdom, Australia, and Canada as excepted foreign states on a so-called "white list." Foreign investors with sufficient ties to these countries may be exempt from CFIUS review of *non-controlling* investments in certain U.S. businesses. Surprisingly, Japan was expected to be, but was not, included on the white list.

- The Regulations refine FIRRMA's application to investment funds to help ensure that investment funds managed and controlled by U.S. persons are not discouraged from investing in other U.S. businesses due to CFIUS' expanded oversight of foreign transactions.

- The Regulations implement an interim rule to test a new definition for "principal place of business," which was previously not defined. The definition for principal place of business relates to the definition of foreign entity and helps determine if a foreign investor may be exempt from CFIUS review. **The Treasury Department is accepting public comment on the interim definition through February 18, 2020**.

- The Regulations provide for CFIUS review of the purchase or lease by, or concession to, a foreign person of real estate located in proximity to sensitive U.S. government facilities, but do not create a mandatory filing requirement for covered real estate transactions.

Although the Regulations do not depart significantly from the Proposed Rules issued in September 2019, there are some important changes, particularly insofar as they operate to expand CFIUS' jurisdiction to review certain *non-controlling* investments in U.S. businesses and certain real estate transactions. This Alert describes the new Regulations and highlights the important changes from the Proposed Rules.

I. COVERED NON-CONTROLLING INVESTMENTS

The Regulations expand CFIUS' authority to review certain non-controlling, or minority, investments by foreign persons in U.S. businesses involving critical technology, critical infrastructure, or sensitive personal data. Prior to FIRRMA, CFIUS had authority to review only foreign transactions that resulted in "control" of a U.S. business by a foreign person (such as through ownership of a majority or dominant minority of outstanding voting interests, board representation, or otherwise) and that posed a risk to national security.

CFIUS now has jurisdiction over minority investments when:

(1) A foreign person makes an investment in (2) certain types of Technology, Infrastructure and Data U.S. Businesses, called "**TID U.S. Businesses,**" that (3) affords the foreign person:

(a) Access to material non-public information in the possession of the TID U.S. Business;
(b) Membership or observer rights on the board of directors or equivalent body; and/or
(c) Involvement in the substantive decision-making of the TID U.S. Business regarding certain actions related to the critical technologies, critical infrastructure or sensitive personal data.

Thus, the size of the investment is not determinative, but rather the rights acquired through the investment.

A. Foreign Persons and Excepted Investors

FIRRMA requires that CFIUS limit application of its expanded jurisdiction over non-controlling investments to certain categories of foreign persons. To do so, the Proposed Rules provided a framework for identifying "**excepted foreign states**" and "**excepted foreign investors**" eligible for exclusion from FIRRMA's coverage of *non-controlling* investments. To be eligible for the exception, the investment must be made by an excepted foreign investor based on its ties to an excepted foreign state. The Proposed Rules did not go so far as to identify any foreign states to be included on its so-called "white list."

1. Excepted Foreign States

CFIUS has "initially" selected Australia, Canada, and the United Kingdom of Great Britain and Northern Ireland as excepted foreign states. CFIUS selected these countries due to their "robust intelligence-sharing" and "defense industrial base integration mechanisms" with the U.S.

These selections may only be temporary, and additional states may be added to the white list over time, but likely not until 2022. The Regulations modify the definition of excepted foreign state to clarify that it will take effect in two stages, giving these initially selected foreign states a trial period to satisfy the requirements.

The definition provides a two-part test for determining qualifying states: (1) CFIUS identifies it as an eligible foreign state; and (2) CFIUS determines that the foreign state has established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to coordinate with the U.S. on the same. The second prong of this test will not take effect until February 13, 2022, giving the three foreign states initially selected two years to ensure that their national security-based foreign investment review process meets the criterion.

Somewhat surprisingly, CFIUS did not select Japan as one of the initially excepted foreign states. In November 2019, Japan tightened its foreign investment rules to require foreign investors to report plans to acquire more than 1 percent of shares in companies important to Japan's national security; previously, the limit was 10 percent. This revision to its Foreign Exchange and Foreign Trade Control Law was made to coordinate with the U.S. in an apparent effort to make the white list. CFIUS may still add Japan to its white list, but perhaps not until the second prong of the excepted foreign state test takes effect.

2. Excepted Foreign Investors

The Regulations also broadened the definition of "excepted foreign investor" to accommodate more exceptions. An excepted foreign investor is defined as a foreign national of one or more excepted foreign states that is *not also* a national of any non-excepted foreign states; a foreign government of an excepted foreign state; or a foreign entity that meets certain conditions regarding its ties to non-excepted foreign states (including as applied to its parent). The Regulations made the following changes to the conditions:

- A foreign entity may still qualify for exception even if up to 25 percent of its board members are *not* nationals of an excepted foreign state;
- A foreign entity may still qualify even if one or more foreign persons holding 10 percent or less of its ownership interest is not from an excepted foreign state (previously, they had to hold less than 5 percent);
- A foreign entity may still qualify even if its minimum excepted ownership is 80 percent (previously, 90 percent), meaning the majority of its ownership interests are held by excepted foreign persons or non-foreign persons.

The Regulations also add a new interim rule defining the term "**principal place of business**." In addition to the conditions outlined above, a foreign entity must be organized under the laws of, and have its principal place of business in, the excepted foreign state or the U.S. Principal place of business has been defined to help clarify FIRRMA's application to investment funds managed or controlled in the U.S.

Principal place of business is now defined as, "the primary location where an entity's management directs, controls, or coordinates the entity's activities, *or, in the case of an investment fund*, where the fund's activities and investments are primarily directed, controlled, or coordinated by or on behalf of the general partner, managing member, or equivalent." The location or nationality of the limited partners is therefore not factored into this condition, but may be considered as part of the other conditions listed above.

B. TID U.S. Businesses

There are three categories of TID U.S. Businesses, some of which are still not clearly defined under the Regulations.

Critical Technologies

The definition of critical technologies refers to several other regulatory regimes. While the term primarily applies to defense items, "dual use items" (goods and technology) that are controlled for reasons related to national security, missile technology, nuclear technology, agents and toxins, and chemical, biological and nuclear nonproliferation, it also includes a broad, not yet defined category of "emerging and foundational technologies" that are controlled under section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

The Bureau of Industry (BIS) is still working on proposed rules to define "emerging and foundational technologies" that will be subject to future export controls. BIS is considering technologies such as: (a) artificial intelligence and machine learning technology; (b) Position, Navigation, and Timing (PNT) technology; (c) logistics technology; (d) quantum information and sensing technology; (e) robotics; (f) hypersonics; (g) advanced surveillance technologies, such as faceprint and voiceprint technologies; and (h) advanced materials, such functional textiles.

As part of their analysis, BIS officials are assessing the foreign availability of the technology at issue. On January 6, 2020, BIS issued an interim final rule adopting its first such classification, covering certain geospatial imagery software technology.

Critical Infrastructure

The Regulations' definition of critical infrastructure only applies to *non-controlling* investments in U.S. businesses that own, operate, manufacture, supply or service critical infrastructure; for traditional control transactions, the term is defined more broadly. The term is defined through a list of *types* of infrastructure and the specific *functions* they must play with the U.S. business.

For example, any internet exchange point that supports public peering is critical infrastructure *if* "owned and operated" by the U.S. business. Any industrial control system utilized by certain interstate oil or natural gas pipelines is critical infrastructure *if* "manufactured or serviced" by the U.S. business.

Appendix A (to 31 C.F.R part 800) contains the full list of types and functions of critical infrastructure, and may be updated from time to time. It includes the following categories:

- IP networks, internet exchange points, and telecommunications and information systems, including fiber optics cables and submarine cable systems
- Satellite or satellite systems providing services directly to the DoD
- Industrial resources and manufacturing facilities manufacturing or operating for certain defense purposes
- Systems, facilities and storage resources comprising or servicing the bulk-power system
- High capacity oil and gas refineries and crude oil storage facilities
- LNG terminals or storage facilities
- High capacity interstate oil pipelines and control systems
- Financial market utilities and securities exchanges
- Rail lines and connector lines designated part of the DOD's Strategic Railroad Corridor Network
- Airports and maritime ports
- Public water systems and their industrial control systems

Sensitive Personal Data

FIRRMA also covers non-controlling investments in U.S. businesses that maintain or collect sensitive personal data of U.S. citizens that "may be exploited in a manner that threatens to harm national security."

There are nine categories of sensitive personal data:

- Financial
- Consumer report data
- Geolocational
- Health data
- Non-public electronic communications, including emails and chats
- Biometric enrollment data
- Federal ID card data
- U.S. government personnel security clearance data
- Genetic testing data

The categories are covered under FIRRMA only if the U.S. business: (a) targets or tailors its products or services to sensitive U.S. Government personnel or contractors, (b) maintains or collects such data on greater than one million individuals, or (c) has a demonstrated business objective to maintain or collect such data on greater than one million individuals and such data is an integrated part of the U.S. business's primary products or services.

The definition excludes anonymized data and encrypted data, so long as the data cannot be de-anonymized or de-encrypted.

Importantly, the Regulations narrowed the definition of "**genetic data**" to focus on "genetic testing," as defined in the Genetic Information Non Discrimination Act of 2008, and limit its coverage to identifiable data. The revised definition also carves out genetic testing data from databases maintained by the U.S. government and routinely provided to private parties for research, so as not to capture U.S. businesses using common datasets for research purposes.

Genetic data is given a heightened degree of protection and is covered even if the U.S. business does not meet the criteria above, and does not collect or maintain large amounts of data or does not target or tailor its products to government personnel.

C. Mandatory Filings and the FIRRMA Pilot program

Certain covered non-controlling investments require the filing of a mandatory five-page declaration. First, mandatory declarations are required for transactions that were covered by the FIRRMA pilot program. Although the pilot program was set to expire on February 13, 2020, the Regulations were revised to incorporate the requirements of the pilot program so that it remains in effect. That means non-controlling investments in Critical Technology U.S. Businesses in certain sensitive industries (listed by NAICS code) will still be subject to the mandatory filing requirement.

Second, mandatory declarations are required for covered non-controlling investments where a foreign government has a "**substantial interest**," which is determined based on a certain voting interest threshold (foreign government's voting interest in the foreign investor is 49 percent or more, and the voting interest that the foreign person is acquiring in a TID U.S. Business is 25 percent or more).

The Regulations revised the definition of "substantial interest" to clarify that it applies to only a single foreign government (not aggregated), including both national and subnational governments and their respective departments, agencies, and instrumentalities. The definition also clarifies that, as to investment funds, the substantial interest definition applies only to the general partner.

Failure to file a mandatory declaration can result in a civil penalty ranging from $250,000 up to the value of the transaction.

All other CFIUS notice filings remain *voluntary*. Of course, CFIUS maintains the right to review any covered transactions on its own accord, even if the parties elect not to make a voluntary filing. Parties elect to file notices voluntarily to obtain a safe harbor from CFIUS' review. Failure to obtain a safe harbor for transactions can have serious financial consequences for the parties because CFIUS can require a review even after a deal closes and, if determined necessary to protect national security, order divesture, unwinding, or other mitigation measures.

II. COVERED REAL ESTATE TRANSACTIONS

Prior to FIRRMA, real estate was only covered to the extent it was part of a "control" transaction that posed a risk to national security. Now, under the Regulations, CFIUS has jurisdiction over (a) purchases, leases and concessions (b) through which a foreign person is afforded certain "**property rights**" (c) with respect to "**covered real estate**".

A. Covered Real Estate

Covered real estate is defined in terms of proximity to certain sensitive sites—primarily airports, maritime points, and military installations.

First, it includes real estate that is, is located within, or will function as part of an airport or maritime port. The Regulations create a new, single definition for "**covered port**," which includes both airports and maritime ports. The new definition identifies relevant lists of ports covered by FIRRMA that the Department of Transportation maintains and lists on its website. It also clarifies that there is a 30-day delayed effectiveness for any additions to the listed ports because changes will *not* be published in the Federal Register (whereas the removal of ports from the list will take effect immediately).

Second, the term also includes real estate that is located within: (i) close proximity (1 mile) to certain military installations or other government facilities or properties identified in parts 1 or 2 of Appendix A; (ii) extended range (99 miles) of other more sensitive military installations identified in part 2 of Appendix A; (iii) any county or other geographic area identified in connection with any military installation identified in part 3 of Appendix A; or (iv) any part of a military installation identified in part 4 of Appendix A.

Appendix A (to 31 C.F.R part 802) currently only lists military installations, but CFIUS plans to add other sensitive government facilities through notices published in the Federal Register. The Regulations revised Appendix A as it appeared in the Proposed Rules, removing one site and refining certain geographic areas relating to listed sites.

B. Property Rights

Property rights covered by FIRRMA exist when *at least three* of the following rights are afforded the foreign person: (i) to have physical access to the property; (ii) to exclude others from physical access to the property; (iii) to improve or develop the property; and (iv) to attach fixed or immovable structures to the real estate. Changes to existing property rights that result in the procurement of at least three of these rights can also trigger CFIUS' review.

C. Exceptions

Covered real estate transactions, like covered minority investments, also provide certain exceptions through use of the terms "**excepted real estate investor**," "**excepted real estate foreign state**" and "**excepted real estate transactions**." The definitions for excepted real estate investor and excepted real estate foreign state track the definitions used for minority investments.

Therefore, Australia, Canada, and the United Kingdom are also excepted real estate foreign states, and the definition of excepted real estate investor was revised, as explained above, based on its ties to non-excepted foreign states.

"Excepted real estate transaction" is defined through a list of *types* of transactions that are not covered. Those include the following:

- Transactions by an excepted real estate investor.
- Transactions that are already covered in part 800 that include the purchase, lease, or concession of covered real estate.
- Covered real estate within an urbanized area or urban cluster (except those relating to relevant ports and those in "close proximity" to certain military installations).
- Covered real estate that is a single housing unit, including fixtures and adjacent land incidental to its use as a single housing unit.
- Commercial real estate in a multi-unit building if the foreign person and its

affiliates do not hold more than 10 percent of the total square footage and don't represent more than 10 percent of the total number of tenants.

- Covered real estate owned by an Alaska Native village, group or Corporation or held in trust for American Indians, Indian Tribes, or Alaska Natives.
- Leased or conceded covered real estate that is located within or will function as part of a covered port, *if* the real estate may be used *only* for the purpose of engaging in the retail sale of consumer goods or services to the public, OR *if* the foreign person is a foreign air carrier (covered by the Department of Homeland Security).

The Regulations add an exception for foreign carriers leasing or receiving conceded real estate in airports sand maritime ports because the Department of Homeland Security already oversees those transactions.

The Regulations also clarify that the exception relating to commercial space in a multi-unit building is based on the number of parties that own, lease, or have a concession to the commercial space in the building, and not, for example, by the number of employee occupants.

D. Filing Requirement

There are no mandatory filing requirements for covered real estate transactions.

The Regulations are not the last word on the subject, as the Department of Treasury has indicated that amendments and additional rules will be forthcoming in 2020. Therefore, parties to foreign investment transactions will need to be sure to consider updates to the Regulations as well as interpretive guidance that is made available by CFIUS in assessing the applicability of CFIUS notification requirements.

NHTSA grants Nuro petition for temporary exemption

12 February 2020

For the first time, the U.S. National Highway Traffic Safety Administration (NHTSA) grants petition for temporary exemption for an electric vehicle with an automated driving system – the Nuro R2X.

On 11 February 2020 NHTSA granted a petition for exemption from three requirements of the Federal Motor Vehicle Safety Standards (FMVSS) applicable to low-speed vehicles for Nuro's R2X. The R2X is a low-speed autonomous delivery vehicle, which will not carry passengers. NHTSA's granting of Nuro's petition marks the first grant of a petition for exemption allowing for commercial deployment for a vehicle of this type – "a highly automated (SAE Level 4 or L4), low-speed (25 mph maximum), electric-powered delivery vehicle." Nuro first applied for the exemption on 23 October 2018.

According to Nuro, the R2X vehicle will not be equipped with rearview mirrors, a backup camera, or a compliant windshield, as such features are either unnecessary for, or detrimental to, pedestrian and cyclist safety. Nuro requested the exemption on the basis that it will facilitate development or field evaluation of a low-emission vehicle (LEV) without unreasonably lowering the vehicle's safety performance (the LEV exemption basis). NHTSA considered and granted Nuro's petition under both the LEV exemption basis and on the basis that the vehicle provides an equivalent overall level of safety (EOS) to a nonexempt vehicle (the EOS basis).

NHTSA granted Nuro's petition in part because the R2X does not carry passengers and NHTSA agreed with Nuro that certain FMVSS regulations do not serve their intended functions in the R2X. Specifically, NHTSA found that the exempt R2X would be at least as safe as an FMVSS-compliant version and that the exemption would further development of innovative technologies and business models: "Given that both an exempted and [FMVSS] compliant R2X would have no occupants and would operate without a human driver, compliance with the three requirements from which Nuro seeks an exemption would not provide a safety benefit." Requests for exemptions from the backup camera "Deactivation" requirement (FMVSS No. 111, S6.2.5) and portions of test procedures for "Field of View" and "Size" requirements (FMVSS Nos. 111, S6.2.1 and S6.2.2) were deemed moot. The R2X will still be subject to all other FMVSS requirements for low-speed vehicles.

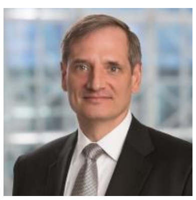
Pursuant to the general exemptions provisions of the Motor Vehicle Safety Act, NHTSA may grant an exemption for production of a maximum of 2,500 vehicles during any 12-month period and may grant an exemption for up to two years, pursuant to the LEV exemption basis or the EOS basis. As such, Nuro is permitted to produce up to 2,500 R2X vehicles per year and up to 5,000 exempted vehicles over the full two-year exemption period.

The granting of Nuro's exemption is a significant development in federal action toward automated vehicles (AV) proliferation, and further action from NHTSA is expected. Importantly, another exemption petition presented to NHTSA prior to the Nuro petition is still pending at the agency. That petition is more complicated, requests exemption from more FMVSS regulations, and would apply to a passenger-carrying AV. NHTSA's future action on this pending petition will clarify whether the agency intends to continue expanding AV usage, particularly where passengers are involved.

Contacts

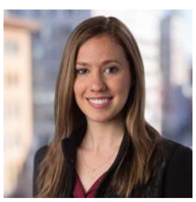
Joanne Rotondi
Partner, Washington, D.C.
T +1 202 637 6470
joanne.rotondi@hoganlovells.com

R. Latane Montague
Partner, Washington, D.C.
T +1 202 637 6567
latane.montague@hoganlovells.com

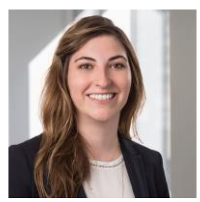


Lance D. Bultena
Senior Counsel, Washington, D.C.
T +1 202 637 5587
lance.bultena@hoganlovells.com

Susan R. McAuliffe
Counsel, Washington, D.C.
T +1 202 637 5747
susan.mcauliffe@hoganlovells.com



Hannah M. Graae
Senior Associate, Washington, D.C.
T +1 202 637 3664
hannah.graae@hoganlovells.com



Hillary Neger
Associate, Washington, D.C.
T +1 202 637 8835
hillary.neger@hoganlovells.com

Katherine Sheriff
Knowledge Lawyer, Washington, D.C.
T +1 202 637 3635
katherine.sheriff@hoganlovells.com