LAW FIRM "MOST FEARED" GLOBALLY BY LARGE BUSINESSES
BTI Consulting Group Survey

January 2020

quinn emanuel

quinn emanuel urquhart & sullivan, llp | business litigation report

los angeles | new york | san francisco | silicon valley | chicago | washington, d.c. | houston | seattle | boston | salt lake city
tokyo | london | mannheim | hamburg | munich | paris | hong kong | sydney | brussels | zurich | shanghai | perth | stuttgart

What CFIUS Final Regulations Mean for Businesses

Background

On January 13, 2020, the U.S. Department of Treasury, on behalf of the Committee on Foreign Investment in the United States (CFIUS), issued final rules expanding CFIUS's authority to review foreign investments in U.S. businesses for national security concerns as mandated by the Foreign Investment Risk Review Modernization Act (FIRRMA). These regulations, which go into effect February 13, 2020, have immediate and acute implications for U.S. and foreign foreign businesses seeking their investment capital. Whereas CFIUS jurisdiction was previously limited to foreign acquisitions of controlling interests in U.S. companies, FIRRMA now arms CFIUS with the ability to review acquisitions of even non-controlling interests. Moreover, these regulations now require parties to obtain clearance from CFIUS before consummating certain deals or face the risk of civil penalties. The elaborate regulations make it essential for foreign businesses to have a comprehensive understanding of potential buyers' ownership structures and to structure funds to mitigate potential CFIUS risk down the line.

What Is CFIUS?

CFIUS is an interagency committee that conducts national security reviews of certain transactions involving foreign investments in the United States, so-called "covered transactions." CFIUS has the power to retroactively terminate deals, implement fines, and recommend corporate changes for covered transactions generally. CFIUS's authority has grown since it was created by executive order in 1975 to monitor foreign investment trends. Most notably, in 1988, Congress authorized the President to review and

(continued on page 2)

INSIDE

Complete Victory in Defamation Jury Trial

Page 11

Application of Attorney-Client Privilege and Work-Product Doctrine to Documents Created in Connection with Litigation Finance

Page 5

Quinn Emanuel Elects Nine New Partners

Page 10

New Partner Dennis Hranitzky Joins New York Office

Dennis Hranitzky has joined the firm as a partner and Head of Quinn Emanuel's Sovereign Litigation in the New York and London offices. He is an expert in multinational litigation, particularly matters involving sovereign states, sovereign wealth funds and government-owned entities. Hranitzky has deep experience in cross-border insolvency matters, creditors' rights litigation and multinational enforcement of judgments and arbitral awards—having overseen matters spanning more than 15 countries on four continents. Q block transactions resulting in foreign "control" of a U.S. business that posed a threat to national security, and the President delegated the review of these transactions to CFIUS. In 2007, Congress codified CFIUS processes and established formal congressional oversight of CFIUS.

FIRRMA, which was signed into law in 2018 with bipartisan support, dramatically expanded the powers of CFIUS due to concerns over foreign countries obtaining highly sensitive or national security-related U.S. technology or data. Prior to FIRRMA, CFIUS's jurisdiction was limited to transactions that could result in "control" of a U.S. business by a foreign person. For purposes of CFIUS review, "control," continues to mean the "power . . . to determine, direct, or decide important matters affecting an entity." The 2018 law was motivated "to address growing national security concerns over foreign exploitation of certain investment structures which traditionally have fallen outside of CFIUS jurisdiction," and specifically by limitations in CFIUS's jurisdiction that allowed foreign *non-controlling* investments that presented national security concerns to evade review. (U.S. TREASURY DEP'T, Summary of the Foreign Investment Risk Review Modernization Act of 2018, *available at* https://home.treasury.gov/system/files/206/Summary-of-FIRRMA.pdf). To close this loophole, FIRRMA expands the definition of a CFIUS "covered transaction" to include review of certain non-controlling investments by foreign persons, including U.S. funds with foreign investors, as well as a change that results in foreign control of a U.S. business and "any other transaction, transfer, agreement, or arrangement designed to circumvent CFIUS jurisdiction." (*Id*. This article does not include a discussion of FIRRMA's addition of certain real estate transactions as a "covered transaction."). In addition, FIRRMA's "mandatory declaration" provision requires pre-transaction filing for certain transactions.

Non-Controlling Investments Subject to CFIUS Review

Under FIRRMA, CFIUS gained jurisdiction over certain transactions that give a foreign person a non-controlling interest in an unaffiliated U.S. business. There are two key limitations: (1) the U.S. business must involve critical technology, critical infrastructure, or sensitive personal data of U.S. citizens; and (2) the investment must afford the foreign person board membership, access to nonpublic material information, or involvement in decision-making over activities that may implicate national security interests. FIRRMA also requires CFIUS to implement regulations that define "foreign person" in the context of non-controlling investments.

1. TID Businesses

To qualify as a "covered transaction," the foreign person must invest in a U.S. business that involves critical **t**echnology, critical **i**nfrastructure, or sensitive personal **d**ata of U.S. citizens. These are referred to as "TID" businesses for short.

Critical Technology. FIRRMA applies if the U.S. business produces, designs, tests, manufactures, fabricates, or develops one or more *critical technologies*. The final rule, like the proposed rule, uses FIRRMA's definition of critical technologies. Examples of critical technologies include defense articles and defense services in the U.S. Munitions List, and items controlled pursuant to international regimes on chemical and biological weapons proliferation, nuclear technology, and "emerging and foundational technologies" controlled pursuant to section 1758 of the Export Control Reform Act of 2018.

Critical Infrastructure. FIRRMA also applies if the U.S. business owns, operates, manufactures, supplies, or services *critical infrastructure*. Under the rule, a U.S. business qualifies as a TID business if it performs functions for one of the 28 types of "covered investments" for critical infrastructure that are listed in Appendix A to the final rule. (These functions relating to critical infrastructure are listed in Appendix A to the final rule, *available at* https://home.treasury.gov/system/files/206/Part-800-Final-Rule-Jan-17-2020.pdf). The final rule provides the following examples of U.S. businesses that would qualify as performing functions related to critical infrastructure: a corporation that operates a crude oil storage facility with the capacity to hold 50 million barrels of crude oil; a corporation that provides third-party physical security for stated crude oil storage facility; and a corporation that runs third-party cyber security for stated crude oil storage facility.

Sensitive Personal Data. FIRRMA applies if the U.S. business maintains or collects the *sensitive personal data* of U.S. citizens. Under the final rule, sensitive personal data includes defined "identifiable data" and genetic data.

Data constitutes "identifiable data" if it (1) is maintained or collected by a U.S. business that targets or tailors products or services to sensitive U.S. government personnel or contractors, or maintains or collects such data, or has the objective to do so, for more than one million individuals, (2) the data comprises one or more of ten categories listed in the rule (*e.g.*, financial data that could reveal an individual's financial distress or hardship; data relating to an individual's health condition; non-public electronic communications; data concerning U.S. Government personnel security clearance status); and (3) the data does not fall within a limited exception, such as data on a company's own employees or public records.

In response to comments that the proposed rule's treatment of genetic data was too broad, the final rule limits sensitive personal data to the results of an individual's genetic tests as defined by the Genetic Information Non-Discrimination Act of 2008. The final rule also adds an exception for genetic testing data derived from databases maintained by the U.S. Government and routinely provided to private parties for the purposes of research.

2. Rights the Investment Affords to the Foreign Person

The non-controlling investment by a foreign person in a TID business is covered under CFIUS if it affords the foreign person: access to material nonpublic technical information possessed by the U.S. business; membership or observer rights on the board of directors or the right to nominate an individual to the board; or involvement in substantive decision making of the U.S. business regarding any of the TID activities (*i.e.*, critical technologies, critical infrastructure, or sensitive personal data).

3. What Constitutes a "Foreign Person" and Key Exceptions

The fundamental issue for CFIUS review comes down to whether an investment vehicle is considered a foreign person. The rule maintains the pre-FIRRMA definition of "foreign person," which includes any foreign government, foreign person, or foreign entity, while adding that any U.S. entity controlled by a foreign person is considered a foreign person. The final rule limits CFIUS review of non-controlling foreign investments in U.S. entities in three important ways. *First*, the rule introduces an interim rule defining "principal place of business," for purposes of determining what constitutes a "foreign entity," which shields entities organized offshore for tax purposes, but that are managed and operated from the United States. *Second*, the rule provides an explicit carve-out for certain investment funds. *Third*, the rule exempts "foreign excepted investors," based on the entity's connection to an excepted foreign state.

Principal Place of Business. The CFIUS regulation defines a "foreign entity" any entity organized under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on a foreign exchange; however, the proposed rule left "principal place of business" undefined. In direct response to comments about CFIUS's jurisdiction over transactions by investment funds, the final rule adopts a definition of "principal place of business" as an interim rule, which will go into effect on February 13, 2020, but may be revised in response to public comments. The rule defines principal place of business 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."

But, if the entity represented in its most recent filing to the U.S. government (or a state government or any foreign government) that its principal place of business (as opposed to its place of incorporation) was outside the United States, then this location will be deemed to be the entity's principal place of business (unless the entity can demonstrate that its principal place of business has changed since the time of the submission or filing).

This interim definition clarifies that in many cases, U.S.-based investment fund managers that form offshore investment funds for tax, legal, or any other reason, will not be considered foreign for purposes of CFIUS as long as it is managed and controlled by U.S. persons in the United States.

Investment Fund Carve-Out. Separate and apart from the exception for off-shore funds with a principal place of business in the U.S., the rule implements an exception for indirect investments by foreign persons made through an investment fund. Such a transaction will not be subject to CFIUS review if certain conditions are met, including where: (1) the fund is managed exclusively by a U.S. general partner, managing member, or equivalent; (2) the advisory board does not control the fund's investment decisions or the investment decisions of the general partner, managing member, or equivalent; and (3) the foreign person does not otherwise have the ability to control the fund or access to material nonpublic technical information as a result of its participation on the advisory board or committee.

Excepted Investor Status. Finally, the final rule makes Australia, Canada, and the United Kingdom exempt from CFIUS's expanded jurisdiction by affording them status as "*excepted foreign states*." The proposed rules introduced the concept of excepted foreign states, but had not yet decided which states would make the list. An investor connected to one of these three countries may qualify as an "*excepted investor*." An excepted investor can be a (1) foreign national of an excepted state (but not also a national of a non-excepted state), (2) a foreign government of an excepted foreign state, or (3) a foreign entity that is organized under the laws of, and has its principal place of business in an excepted foreign state or the United States.

To qualify as excepted investor, a foreign entity must also meet several other conditions. Several commenters lobbied for a less restrictive definition of excepted investor than what had been put forward in the proposed rule. In response, the final rule made three modifications to the excepted investor definition. First, the final rule permits up to 25% of an entity's board of directors to be foreign nationals from states other than the three excepted foreign states, whereas the proposed rule did not allow any entities with even one board member from a non-excepted foreign state to be a excepted investor. Second, the final rule relaxed the percentage ownership interest an individual foreign investor may have to be considered a excepted investor. The percentage ownership limit was increased from 5 percent to 10 percent. Third, the final rule decreased the "*minimum excepted ownership*" from 90 percent to 80 percent, meaning that 80 percent of the entity must be must owned by a person or entity falling under the definition of an "excepted investor."

Mandatory and Voluntary Filings

Since CFIUS has authority to review transactions even long after they are finalized, parties may make a voluntary filing for CFIUS clearance prior to consummating a transaction, which gives the deal a "safe harbor" against later review that could result in forced divestment. FIRRMA creates a streamlined submission process that allows parties to covered transactions to submit short-form filings called declarations in lieu of a full notice. After receiving the declaration, CFIUS will have 30 days to either approve the transaction or launch a full CFIUS review. FIRRMA, however, also makes the filing of such declarations mandatory in certain circumstances. Parties that fail to submit a mandatory declaration may be liable for civil penalties up to $250,000 per violation or the value of the transaction, whichever is greater.

The mandatory declaration requirement and the prospect of civil monetary penalties for failure to comply with mandatory filing requirement has, according to one commenter, already had "ripple effects" throughout the investment and M&A markets. Although FIRRMA instructs CFIUS to implement regulations requiring mandatory declarations for investments by non-U.S. governments and investments targeting certain U.S. businesses, there are substantial carve-outs for investment funds that do fall under CFIUS' jurisdiction (*i.e.*, do not fall within one of the exceptions to CFIUS' expanded jurisdiction as described above).

1. Mandatory Declaration Requirement for Substantial Government Investment in TID Business

Investments in TID businesses by non-U.S. persons in which a foreign government has a "substantial interest," including sovereign wealth funds, must file a declaration with CFIUS prior to closing the deal. FIRRMA instructs CFIUS to determine what constitutes a "substantial interest" by a foreign government. The rule's implementation of this provision requires a declaration for a covered transaction that results in a foreign entity in which a foreign government holds 49% or more voting interest obtaining a 25% or more voting interest in a TID U.S. business.

Importantly, in the investment fund context, the final rule clarifies that "substantial interest" applies to a foreign government's interest in the general partner only and not limited partner interests. This means that U.S. based businesses need not worry about CFIUS review simply because they hold sovereign wealth money as one of their limited partners.

The requirement for mandatory declarations for transactions resulting in a substantial government interest in a TID business also provides an explicit exception for investment fund transactions that meet the following criteria: (1) the fund is managed exclusively by a general partner or equivalent who is not a foreign person; and (2) if any foreign person has membership as a limited partner on an advisory board or committee of the fund: (i) the advisory board or committee does not have the ability to approve, disapprove, or otherwise control (a) investment decisions of the investment fund or (b) decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested; and (ii) the foreign person does not otherwise have the ability to control the investment fund.

2. Implementation of Pilot Program's Mandatory Declaration Requirement for Critical Technology

FIRRMA authorizes, but does not require, CFIUS to mandate filings for transactions involving critical technology. In November 2018, CFIUS implemented certain FIRRMA provisions via a "pilot program" that imposed mandatory reporting for certain foreign non-controlling investments in U.S. businesses that develop a "critical technology" that the business designs for, or uses in one of 27 targeted industries. (These target industries are listed in Appendix B to the final rule, *available at* https://home.treasury.gov/system/files/206/Part-800-Final-Rule-Jan-17-2020.pdf). The final rule integrates the pilot program's mandatory declaration for critical technology.

In the final rule, Treasury rejected public comments asking to remove certain industries from the list of sectors for which a mandatory declaration is required. For example, a proposal by a U.S. subsidiary of a Japanese-based biopharmaceutical firm to remove "biotechnology research and development" from the list of industries that must submit a mandatory declaration was rejected. According to the comment, the company conducted a survey that shows CFIUS's effect of deterring investment in U.S. firms. More than 50% of survey respondents indicated that CFIUS would likely impact their decision to do business with the company and 32% responded that they would forego future business transactions with the company due to the CFIUS requirement.

***

In light of the final rules, it is essential that businesses formulate investment strategies that build in CFIUS risk, implement processes to enable the rapid identification of which potential deals implicate CFIUS review, and to consider whether current and future investment funds can be structured to minimize the rights accorded to foreign investors. Q

NOTED WITH INTEREST

Application of Attorney-Client Privilege and Work-Product Doctrine to Documents Created in Connection with Litigation Finance

Litigation finance is a solution to the problem of economic inequality in lawsuits. It is a process whereby litigants can finance their legal costs using a third-party litigation financing company, which provides money for legal fees and expenses incurred in the lawsuit in exchange for a share of the judgment or settlement if the litigant prevails. Although litigation financing is not new, it has only recently become popular in the United States, and it has raised issues for courts to grapple with, one of them being whether communications and documents exchanged between a litigant—usually the plaintiff—and a litigation financer are discoverable in the litigation.

Plaintiffs have argued that such documents are not discoverable for two reasons: relevance and privilege. With respect to relevance, courts have taken different approaches. In the Seventh Circuit, for instance, the court in *Miller UK Ltd. v. Caterpillar, Inc.* held that deal documents created between the plaintiff and the financer, including the actual funding agreement, were not relevant, because they do not actually relate to the claims and defenses in the action. 17 F. Supp. 3d 711, 721 (N.D. Ill. 2014); *see also Benitez v. Lopez*, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019); *MLC Intellectual Property, LLC v. Micron Tech., Inc.*, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019); *Space Data Corp. v. Google LLC*, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018); *Kaplan v. S.A.C. Capital Advisors, L.P.*, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015); *Yousefi v. Delta Electric Motors, Inc.*, 2015 WL 11217257, at *2 (W.D. Wash. May 11, 2015). Non-deal documents, that is, documents provided to a financer that do not relate to the actual terms of the agreement, were deemed to be "clearly" related to plaintiff's claims and relevant. *Id.* at 730. The court noted, however, that these are fact-specific inquiries. *Id.* at 722. Even though deal documents were not relevant in that particular action for misappropriation of trade secrets, the holding in *Miller* does not mean that they might not be relevant in other actions asserting different claims. *Id.* at 722-23.

Other courts have also found that determining whether documents provided to a litigation financer are relevant, and thus discoverable, is a case-by-case inquiry. For example, in *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation*, the court denied the discovery of documents shared by plaintiff with a litigation financer in a mass tort case. The court held that such discovery was irrelevant unless there is a showing that "something untoward occurred," such as that the financer made the ultimate litigation or settlement decisions, the interests of plaintiffs or the class were not being protected, or conflicts of interest existed. 2019 WL 4485702, at *3 (D.N.J. Sept. 18, 2019). The court also distinguished the case from other types of cases where these types of documents may be relevant, such as a case involving a dispute over patent ownership; a case where the documents may have been relevant to central issues such as patent validity and infringement, valuation, damages, royalty rates, pre-suit investigative diligence, and whether plaintiff is an operating company; a case where documents were relevant to the credibility and bias of a witness; and a case where the litigation financer arranged and funded plaintiffs' treatments relating to the

International Arbitration Update

Investor-State Dispute Settlement and Renewable Energy. Investment in renewable energy is currently an important topic for investors, States, and energy companies. In Australia, a country which is typically associated with fossil fuels, an innovative solar project in the Northern Territory is making headlines. The Sun Cable project involves a 15,000 hectare solar photovoltaic ("PV") array near Tennant Creek exporting clean energy to Singapore via a subsea high voltage direct current cable. The project has the support of the Northern Territory government, Singapore's largest independent electricity retailer, and a number of Australia's richest citizens.

Renewable energy is also an important topic for the arbitration community, particularly in the context of the tension between those that are supportive of investor-state dispute settlement to facilitate and encourage investment in renewable energy, and the proliferation of arbitrations in the sector brought by investors against states that, for good reasons and bad, change their renewable energy policies.

This update discusses the suitability of existing foreign investment protection regimes, specifically the Energy Charter Treaty, for disputes involving renewable energy.

The Energy Charter Treaty and Investor Protections

The Energy Charter Treaty ("Treaty"), which entered into force in 1998, has over 50 member states, including the European Union (except Italy, which recently withdrew in 2016), Japan, Russia, Turkey, and Australia (although Russia and Australia never ratified the Treaty).

Key to the Treaty's success in promoting foreign investment in the energy section is its foreign investment protection regime. By this regime, the Treaty affords protection to "Investors" (being a natural citizen or resident or company incorporated in a signatory country) in "Investments" (broadly defined as every kind of asset owned or controlled by an Investor) in other signatory countries (Articles 1 and 10). These protections include the Investor's right to "fair and equitable treatment" ("FET"), "full protection and security", a prohibition on a signatory country imposing "unreasonable and discriminatory measures," and "unlawful expropriation" (Article 10). The FET standard, which primarily involves the protection of an Investor's legitimate expectations, is the most commonly invoked Investor protection in the Treaty.

Policies Around Renewable Energy Projects

As governments implement new policies to incentivize investment in renewable energy and discourage the use of traditional fossil fuels, they often run into difficulties with foreign investment protection regimes in their international investment agreements, such as the Treaty and the FET standard. The economics of renewable energy projects have historically been dependent on incentive schemes (although this is changing as renewable energy becomes more cost-effective). Owing to the relative novelty of renewable energy projects, as compared with conventional fossil-fuels projects, incentive schemes which encourage these projects are often difficult to effectively design and implement.

The Spanish Experience

The recent experience of Spain illustrates these policy problems. In 2007, Spain introduced new incentives to encourage investment in renewable energy, specifically solar PV energy. One incentive that Spain offered was a feed-in-tariff which principally permitted solar PV investors to sell electricity at a higher rate for the first 25 years, which reduced thereafter for the remainder of the project's life. The policies were a great success to encouraging renewable investment.

Due to a ballooning tariff deficit, which occurred because the costs of generating and distributing power exceeded what utilities could lawfully recover from ratepayers, and the fallout of the 2008 financial crisis, Spain wound back the incentives in the original regulation. Initially, the regulatory amendments applied only to new solar PV projects, but as the magnitude of the issue became apparent, Spain acted to apply new and amended regulations retroactively on existing projects. These regulations took effect over a period commencing 2008 through 2013 with increasing severity.

Unsurprisingly, the new and amended regulations were not met favorably by solar PV investors who had made their investment decision based an expectation that the incentives would continue for the life of their project. The key issue for determination by the Tribunal in each of the published decisions is the FET standard and the legitimate expectations of the solar PV investors. As of March 2019, investors had filed over 30 arbitration claims against Spain under the Treaty. Spain has had mixed success, winning some cases but having to pay out more than €350 million to investors on the cases it lost. Most recently, in December 2019, two decisions were handed down with Spain winning one and the other resulting in a stalemate.

Spain is not alone in defending investor-state disputes arising from foreign investments in renewable energy. Italy, the Czech Republic, and Slovakia have all been the subject of Treaty claims in relation to renewable energy investments.

Investor-State Dispute Resolution and Fitness for Purpose

Given the commitments that states have made to renewable energy, the question as to whether the investor-state dispute settlement regime is still fit for purpose is a question that many are considering. To meet climate reduction targets, states are required to act swiftly in both incentivizing investment in renewable energy and discouraging the use of traditional fossil fuels.

In late 2018, the Treaty's member states gave the green light to a process of modernizing the Treaty. That process is underway with certain members pushing reforms in relation to renewable energy. To remain relevant, it would be desirable if the modernization process amended the Treaty to allow states to implement policy to address climate change without falling afoul of the investor protection regime. This does not necessarily need to come at a significant cost to investors in fossil fuels as the amendments could allow for some fair level of compensation. An amendment along these lines would go some way towards resolving the tension discussed in the introduction to this note.

Antitrust & Competition Update

Cartel Damages Claims: England's Court of Appeal Hands Down First (Very Small) Damages Award Judgment. On October 31, 2019, the Court of Appeal handed down judgment in *BritNed v ABB*, the appeal against the first English cartel damages award. It reduced the damages awarded from €15 million / $16.6 million (plus simple interest) to just under €10 million / $11.5 million (plus simple interest)—a fraction of the approximately €200 million originally claimed. In doing so, the Court of Appeal clarified the key principles applicable to cartel damages claims under English law, namely that: (i) it is for claimants to prove damage and its amount; (ii) pre-Damages Directive, there is no presumption of harm and that presumption is unlikely in any event to assist; and (iii) claimants must give credit in the calculation of damages for any benefits they received by reason of the cartel ("*netting-off*").

Background Facts

In 2014, the European Commission found that ABB and other European, Japanese, and South Korean power cable manufacturers had participated in a global, market-sharing cartel for high-voltage submarine and underground cable projects between 1999 and 2009 (the "Cartel") in breach of EU competition law (Article 101 of the Treaty of the Functioning of the EU ("TFEU")).

BritNed owns and operates the BritNed "Interconnector," a 1000 MW submarine electricity cable system connecting the UK and Dutch electricity grids, which was supplied by ABB in 2009. It, accordingly, brought a follow-on cartel damages claim seeking over €200 million / $220 million in damages against ABB in the English High Court. The claim was not only for damages for an overcharge on the price paid plus compound interest, but for loss of profits (alleging that absent cartel-inflated prices, it would have opted for a higher capacity cable thereby generating additional profit).

First Instance Ruling

After detailed consideration of the evidence, the trial judge rejected the pleaded overcharge claim because the ABB employee negotiating the BritNed contract had no knowledge of the cartel and "*acted competitively*." However, he awarded BritNed €7.5 million / $8.3 million in respect of "*baked-in inefficiencies*" resulting from the cartel, *in casu* the excess use of copper in ABB cables compared to other suppliers, which, in a competitive market, would have led ABB either to lose the project or absorb the cost of its less efficient cables. These damages were then reduced by 10% to take account of a regulatory cap on BritNed's profits. The trial judge also awarded €5.5 million ($6 million) in damages to reflect a portion of the "*cartel savings*" ABB enjoyed as a result of not having to compete during the cartel. BritNed's loss of profits claim was dismissed in its entirety.

The Appeal: Grounds and Outcome

BritNed appealed with respect to the findings on overcharge, the reduction of damage with respect to the regulatory cap on profits, and the dismissal of its lost profit claim (this was rejected on the evidence, so is not addressed further here). ABB cross-appealed against the damages award relating to "cartel savings," essentially on the basis that BritNed had sought compensatory damages and had not sought, and was not entitled to seek, an account of profits or restitution.

Compensatory Nature of Cartel Damages

The Court of Appeal's judgment confirmed that cartel damages are compensatory, rejecting arguments that EU law principles of effectiveness and equivalence require restitutionary damages, or the relaxation of rules on causation and remoteness of damage. The English rules on quantifying damages do not, as the claimants had sought to argue, make their recovery impossible in practice because the "broad axe" wielded by the court in assessing loss reflects a recognition that quantification exercises are invariably estimation exercises. The "broad axe" does not require a court to err on the side of either under- or over-compensation but its quantification of loss must be based on the evidence before it.

The upshot of the Court of Appeal's analysis for BritNed was that while it found that the trial judge had properly applied the compensatory approach in relation to the overcharge claim, the award of damages on the basis of ABB's "cartel savings" was held to have been based on an error of law. In the absence of evidence before the judge on how cartel savings might correlate with the price paid by BritNed, it was not open to the judge to assume such correlation and to make a compensatory award on that basis.

No Presumption of Harm

The claimants also failed to persuade the Court of Appeal that the presumption that cartels cause harm, which was introduced by the 2014 Damages Directive, was part of the pre-existing EU law applicable in relation to these proceedings. Significantly, as far as future claims are concerned, it also agreed with the trial judge that it was hard to see how a presumption of harm could assist in claims in England at least, given the need to quantify losses. This conclusion was hardly surprising but it provides a useful warning to future claimants that the Directive will not be a game-changer in England (in this respect at least).

Netting of Losses

Consistent with the compensatory principle, the Court of Appeal confirmed that a claimant is only entitled to recover net losses and so must give credit for any benefits it enjoyed by reason of the cartel. Only where the benefit is collateral, in the sense that it arises independently of the circumstances giving rise to the loss, should it be disregarded. The benefit, in this case, concerned the level of profits the claimants could enjoy before the regulatory cap bit. As the effect of the regulatory cap was an immediate result of the overcharge, the Court of Appeal held that it was not a collateral benefit. Consequently, the 10% reduction in the award of damages for "*baked in inefficiencies*" was upheld.

Conclusion

The Court of Appeal's judgment in BritNed will be claimed by claimants and defendants alike. For claimants, the emphasis on the "broad axe" approach and the recognition of the difficulties in proving and estimating loss will provide comfort. For defendants, the recognition that damages are based on the compensatory principle, and the reminder that it is for claimants to prove their loss, will give reassurance. The parts of the judgment addressing netting-off will have significance for most claims brought in the future.

It is not yet clear whether BritNed will seek permission to appeal to the Supreme Court, although one of BritNed's joint owners, National Grid, has a claim pending in relation to the power cables cartel so an application for permission would not be surprising. What is clear is that the judgment in BritNed will shape the English courts' consideration of cartel damages awards for many years to come. Q

tort at issue. *Id*. at *6.

Even if the documents are deemed relevant, a party may withhold them from discovery if they are subject to the attorney work-product doctrine or attorney-client privilege. The work-product doctrine protects materials prepared in anticipation of litigation from production. However, it can be waived if the information is disclosed to a third party, and that disclosure substantially increases the opportunity for potential adversaries to obtain the information. The attorney-client privilege protects confidential communications between an attorney and client in connection with obtaining legal advice. It is also generally waived when the communications are disclosed to a third party, unless the third party shares an identical, legal interest in the communications with the litigant (the common interest doctrine).

In *Acceleration Bay LLC v. Activision Blizzard, Inc.*, a Delaware federal court recently held that neither the work-product nor the common interest doctrine can shield communications between a plaintiff and its litigation financer from discovery. The court held that the documents were not protected by the work-product doctrine, because they were not prepared in anticipation of litigation but for the primary purpose of obtaining a loan from the financer. 2018 WL 798731, at *2 (D. Del. Feb. 9, 2018). They did not fall within the common interest doctrine, because at the time they were made, there was no written agreement between the plaintiff and financer, and litigation was not yet filed, so the plaintiff and financer could not have held identical, legal interests. *Id.*, at *3. In light of *Acceleration Bay*, there has been concern that the litigation strategy a plaintiff shares with financers, which financers need to evaluate the merits of a case, would have to be turned over to the opposing party. However, other court decisions on the subject have shown that *Acceleration Bay* may not apply in all cases. *See, e.g., Miller*, 17 F. Supp. 3d at 735 (non-deal documents shared with litigation funders are protected by attorney work-product as they consist of documents containing the lawyers "mental impressions, theories and strategies about [Defendant's] claimed misappropriation of trade secrets" and were thus "only prepared 'because of' the litigation"); *see also Viamedia, Inc. v. Comcast Corp.*, 2017 WL 2834535, at *3 (N.D. Ill. June 30, 2017); *In re Int'l Oil Trading Co., LLC*, 548 B.R. 825, 837 (Bankr. S.D. Fla. 2016); *United States v. Homeward Residential, Inc.*, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016); *United States v. Ocwen Loan Svcg., LLC*, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016); *Doe v. Society of Missionaries of Sacred Heart*, 2014 WL 1715376, at *3 (N.D. Ill. May 1, 2014); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011).

There are measures that litigants may take to protect information they disclose to litigation financers from discovery. For example, the *Acceleration Bay* court used the "primary purpose" test in determining whether communications were covered by the work-product doctrine—whether the "primary purpose" of the documents was litigation. *Id.*, at *1. Other courts have used the "because of" test, which is broader. For example, the court in *Carlyle Investment Management L.L.C. v. Moonmouth Company S.A.* held that the work-product doctrine shielded discovery of information shared with litigation financers, because negotiations between litigants and financers would almost certainly involve the lawyers' mental impressions, theories, and strategies about the case, in order to show the financer the case's merits. 2015 WL 778846, at *8-9 (Del. Ch. Ct. Feb. 24, 2015); *see also* Miller, 17 F. Supp. 3d at 735 (documents containing plaintiff's lawyers' mental impressions, theories, and strategies about defendant's purported misappropriation of trade secrets that were provided to the prospective litigation funders were prepared *because* of the litigation, and are therefore, covered under the work-product doctrine).

Although the *Acceleration Bay* Court never reached the issue of waiver of the work-product doctrine, other courts have held that the existence of a non-disclosure agreement between a plaintiff and potential financers is sufficient to shield documents from discovery, because a non-disclosure agreement would reduce the likelihood that a third party would disclose the information to a potential adversary. *See, e.g., Sacred Heart*, 2014 WL 1715376, at *4, *Devon IT, Inc. v. IMB Corp.*, 2012 WL 4748160, at *3 (E.D. Pa. Sept. 27, 2012); *Mondis*, 2011 WL 1714304, at *3.

As to the common interest doctrine, courts in other cases have agreed with the holding in *Acceleration Bay*. In *Leader Technologies, Inc. v. Facebook, Inc.*, the same court eight years earlier also held that there exists no common interest privilege as to documents shared with a litigation financer because no deal was consummated between plaintiff and the financer. 719 F. Supp. 2d 373, 374-76 (D. Del. 2010). The *Miller* court also concluded that documents shared with a financer are not protected by the common interest doctrine, because a shared interest in the successful outcome of a case is not a common legal interest. 17 F. Supp. at 732. The *Miller* Court reasoned that the purpose of the common interest doctrine is to encourage parties with a shared legal interest to seek legal assistance in order to meet legal requirements and plan their conduct accordingly. *Id.*, at 732-33. The court held that this serves the public interest by advancing compliance with the law, facilitating the administration of justice, and averting litigation, and these objectives are not met with respect to litigation financers, where the objective is not to seek legal advice but to seek money. *Id. But see Int'l Oil Trading*, 548 B.R. at 832 (finding common interest does apply to litigation funding documents); *Rembrandt Techs., L.P. v. Harris Corp.*, 2009 WL 402332, at *7 (Del. Super. Ct. Feb. 12, 2009) (same). Because of the nature of the documents disclosed to litigation financers and when they are generally shared with litigation financers, most courts decide the issue of whether they are discoverable under the attorney work-product privilege, not the attorney-client privilege/common interest doctrine. *See, e.g., Mondis*, 2011 WL 1714304 at *3 (not reaching the issue whether documents are covered by attorney-client privilege).

Quinn Emanuel Elects Nine New Partners

Quinn Emanuel Urquhart & Sullivan, LLP announced that nine new partners have been elected to the partnership, effective January 1, 2020.

The newly elected partners are as follows:

Michael Bonanno – Mike is based in the firm's Washington, D.C. office. He is a trial lawyer who represents both plaintiffs and defendants in antitrust cases and other complex commercial disputes. He received a B.S., cum laude, from Virginia Tech and a J.D., magna cum laude, from the Georgetown University Law Center. Before joining the firm, Mike was a trial attorney in the Antitrust Division of the U.S. Department of Justice.

Frank Calvosa – Frank is based in the firm's New York office. He specializes in complex patent litigation, with an emphasis on pharmaceutical patent-infringement litigation and post-grant proceedings. Frank graduated Phi Beta Kappa with a B.S. and M.S. in Chemistry from Villanova University and received his J.D. from Columbia University.

Yasseen Gailani – Yasseen is based in the firm's London office. He is a solicitor advocate specializing in complex commercial litigation, with an emphasis on disputes relating to finance, financial services, restructuring and insolvency, and security enforcement. Yasseen was named as a "Rising Star" in the 2019 Legal 500, and he has degrees in law from the University of Cambridge and NYU.

Mark Grasso – Mark is based in the firm's London office, but he has a practice spanning the globe and spends a significant part of his time in the Persian Gulf region. He is a specialist construction and energy litigation and arbitration lawyer, and advises on disputes arising out of large engineering and construction projects and oil and gas developments around the world. Mark has an L.L.B. (1st class honors) from the University of Melbourne, and he is admitted to practice in England and Wales and Victoria, Australia.

Nicholas Hoy – Nick is based in the firm's New York office. Nick is a trial lawyer who has represented both defendants and plaintiffs in a variety of complex commercial disputes. A particular focus of his practice is defending corporations, private equity and hedge funds, and officers and directors in high-stakes securities, bankruptcy, financial services, and employment matters. Nick is a graduate of Stanford University and Yale Law School, where he was an editor of the *Yale Law Journal*.

David Myre – David is based in the firm's Silicon Valley office. He is a trial lawyer whose practice focuses on high-stakes commercial and intellectual property disputes. He has tried trade secret, securities fraud, contract, constitutional, and employment cases to verdict in state and federal courts across the country. David received a B.A. with distinction from the University of Washington and a J.D. from New York University School of Law.

Jesko Preuß – Jesko is based in the firm's Stuttgart office. He is a German-qualified attorney (Rechtsanwalt) who's practice focuses on national and cross-border commercial and IP litigation, with a particular emphasis on technology and patent litigation. He has served as trial counsel for international clients in litigation involving a wide range of technologies, including mechanical engineering, automotive, biotech, and life science products. Jesko obtained a doctorate degree in law from Albert-Ludwigs-Universität Freiburg (Chair for Business Law / Intellectual Property Law) and an LL.M. in European Law from Paris II (Université Panthéon-Assas).

Elan Sasson – Elan is based in the firm's Sydney office. His practice has a dual-focus in representing funds and financial services clients in legal disputes and in driving or advising on strategic workouts and corporate insolvencies (with a focus on back-end disputes, and formal and informal restructures). Elan received a Bachelor of Commerce from the University of New South Wales, and an L.L.B. from the University of Technology Sydney. Prior to commencing practice, Elan was appointed associate on the New Court of Appeal to the Hon. Justice Beazley AO (now Governor of New South Wales).

Kate Kaufmann Shih – Kate is based in the firm's Houston office. She specializes in complex, high-stakes energy and infrastructure litigation and arbitration, with an emphasis on matters arising out of distressed assets and bankruptcies. Kate received her B.A. from Stanford University, with honors and distinction, and her J.D. from Columbia Law School, where she was a James Kent Scholar and a member of the *Columbia Law Review*. Q

VICTORIES

Complete Victory in Defamation Jury Trial

On December 6, 2019, a team of Quinn Emanuel attorneys secured a complete defense jury verdict for Elon Musk, the CEO of Tesla and SpaceX, in a high-profile defamation claim brought against him by British caver Vernon Unsworth. Mr. Unsworth claimed that Mr. Musk defamed him when he sent a series of tweets referring to Mr. Unsworth as a "pedo-guy," which were followed by an email from Mr. Musk to a reporter in which he called Mr. Unsworth a "child rapist." Mr. Unsworth sought $190 million in damages.

The action, which experts and the press deemed the most significant social media-based defamation case to ever go to trial, arose from a dispute between Mr. Musk and Mr. Unsworth regarding Mr. Musk's efforts to rescue twelve Thai boys and their soccer coach trapped in a flooded cave system in Northern Thailand. In July 2018, Mr. Musk and a team of SpaceX engineers built and delivered a mini-rescue pod to the Chiang Rai Province in Northern Thailand to help with the rescue. The Thai government and an international team of volunteers (including elite cave divers from the United Kingdom) rescued all twelve boys and their coach. Mr. Musk's pod was not ultimately needed.

After the rescue was completed, Mr. Unsworth, a cave explorer who had assisted in the efforts to find the team, gave an interview to CNN criticizing Mr. Musk's efforts and claiming that Mr. Musk engaged in a "PR stunt." Mr. Unsworth also commented that Mr. Musk could "stick his submarine where it hurts." On July 15, 2018, in response to the interview, Mr. Musk published a series of tweets defending his efforts which were punctuated by insults calling Mr. Unsworth "sus" and a "pedoguy." Mr. Musk later tweeted "Bet ya a signed dollar its true" in response to a tweet claiming that he called Mr. Unsworth a "pedo." Mr. Musk deleted the tweets the same day.

Six weeks after sending the tweets, Mr. Musk accused Mr. Unsworth of being a "child rapist" who married twelve-year-old child bride in an "off-the-record" email to a reporter from BuzzFeed News. Mr. Musk made these statements based on reports he received from a private investigator he hired to investigate Mr. Unsworth in preparation for the litigation that Mr. Unsworth had already threatened. Unbeknownst to Mr. Musk, the investigator's reports were fabricated, and the investigator himself turned out to be a convicted felon who had gone to prison for fraud. BuzzFeed published Mr. Musk's email in full.

Shortly thereafter, Mr. Unsworth, represented by well-known defamation and media lawyers, sued Mr. Musk for defamation in the United States District Court for the Central District of California. Quinn Emanuel took over Mr. Musk's defense after the Court denied his motion to dismiss. At trial, Quinn Emanuel's defense focused on the theme that Mr. Musk's tweet was a "JDART" (Joking Deleted Apologized-for Responsive Tweet). Mr. Musk's tweet was the culmination of an argument between two people that was punctuated by insults—not a factual accusation of the crime of pedophilia. The firm also demonstrated that Mr. Unsworth had not suffered any injury. Instead, Mr. Unsworth had consistently sought to monetize his role in the cave rescue, and had received a number awards, including being named a Member of the British Empire by the Queen of England, even after Mr. Musk's statement.

The downtown Los Angeles federal court jury returned a defense verdict for Mr. Musk after deliberating for less than half an hour. Q

quinn emanuel
865 South Figueroa Street, 10th Floor, Los Angeles, California 90017

PRESORTED
STANDARD
U.S. POSTAGE
PAID
PERMIT NO. 2399
VAN NUYS, CA

business litigation report

quinn emanuel urquhart & sullivan, llp

Published by Quinn Emanuel Urquhart & Sullivan, LLP as a service to clients and friends of the firm. It is written by the firm's attorneys. The Noted with Interest section is a digest of articles and other published material. If you would like a copy of anything summarized here, please contact Elizabeth Urquhart at +44 20 7653 2311.

- We are a business litigation firm of more than 800 lawyers — the largest in the world devoted solely to business litigation and arbitration.
- As of December 2019, we have tried over 2,300 cases, winning 88% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over $70 billion in judgments and settlements.
- We have won five 9-figure jury verdicts and one 10-figure jury verdict.
- We have also obtained forty-three 9-figure settlements and nineteen 10-figure settlements.

Prior results do not guarantee a similar outcome.

LOS ANGELES
865 S. Figueroa St.,
10th Floor
Los Angeles, CA 90017
+1 213-443-3000

NEW YORK
51 Madison Ave.,
22nd Floor
New York, NY 10010
+1 212-849-7000

SAN FRANCISCO
50 California St.,
22nd Floor
San Francisco, CA 94111
+1 415-875-6600

SILICON VALLEY
555 Twin Dolphin Dr.,
5th Floor
Redwood Shores, CA 94065
+1 650-801-5000

CHICAGO
191 North Wacker Dr.,
Suite 2700
Chicago, IL 60606
+1 312-705-7400

WASHINGTON, D.C.
1300 I St. NW,
Suite 900
Washington, DC 20005
+1 202-538-8000

HOUSTON
Pennzoil Place
711 Louisiana St.,
Suite 500
Houston, TX 77002
+1 713-221-7000

SEATTLE
600 University St.,
Suite 2800
Seattle, WA 98101
+1 206-905-7000

BOSTON
111 Huntington Ave.,
Suite 520
Boston, MA 02199
+1 617-712-7100

SALT LAKE CITY
60 E. South Temple,
Suite 500
Salt Lake City, UT 84111
+1 801-515-7300

TOKYO
Hibiya U-1 Bldg., 25F
1-1-7, Uchisaiwai-cho,
Chiyoda-ku
Tokyo 100-0011
Japan
+81 3 5510 1711

LONDON
90 High Holborn
London WC1V 6LJ
United Kingdom
+44 20 7653 2000

MANNHEIM
Mollstraße 42
68165 Mannheim
Germany
+49 621 43298 6000

HAMBURG
An der Alster 3
20099 Hamburg
Germany
+49 40 89728 7000

MUNICH
Hermann-Sack-Straße 3
80331 Munich
Germany
+49 89 20608 3000

PARIS
6 rue Lamennais
75008 Paris
France
+33 1 73 44 60 00

HONG KONG
4501-03 Lippo Centre, Tower One
89 Queensway, Admiralty
Hong Kong
+852 3464 5600

SYDNEY
Level 15
111 Elizabeth St.,
Sydney, NSW 2000
Australia
+61 2 9146 3500

BRUSSELS
Blue Tower
Avenue Louise 326
5th floor
1050 Brussels
Belgium
+32 2 416 50 00

ZURICH
Dufourstrasse 29
8008 Zürich
Switzerland
+41 44 253 80 00

SHANGHAI
Unit 502-503, 5th Floor, Nordic House
3 Fenyang Road, Xuhui District
Shanghai 200031
China
+86 21 3401 8600

PERTH
Level 41
108 St Georges Terrace
Perth, WA 6000
Australia
+61 8 6382 3000

STUTTGART
Büchsenstraße 10, 4th Floor
70173 Stuttgart
Germany
+49 711 1856 9000