



## Cartel Snapshot

### Overview of Current Cartel Investigations

Although the third quarter of 2018 saw guilty pleas and new indictments in several current Department of Justice (DOJ) investigations, 2018 continues a downward trend in antitrust enforcement. At its current pace, DOJ's annual 2018 fines will end around \$300 million—well short of the billion-dollar plus highs in 2014 and 2015, during the height of the auto parts and foreign exchange investigations. The same downward trends exists in the EU, where the European Commission did not render any cartel decisions in the third quarter of 2018. Nonetheless, in a sign of things to come, the Commission took significant procedural steps in the ethanol benchmarks and car emissions cases.

### US Developments

- We learned of two new DOJ investigations in the third quarter. First, two executives were arrested on charges of fixing prices of freight forwarding services of containerized goods destined for international shipping. This investigation appears to be distinct from the DOJ's investigation of roll-on/roll-off international shipping services for vehicles. Second, a foam maker stated in its July 2018 complaint against several chemical companies that the DOJ is investigating the polyurethane industry. The DOJ has not announced an investigation in the polyurethane industry, but one defendant in the foam maker's case confirmed the existence of the investigation.
- The DOJ secured two more guilty pleas in its ongoing investigation into bid rigging of public real estate foreclosure auctions, one in Mississippi and one in Florida. Unlike the typical case involving auctions on the courthouse steps, the Florida case involved a real estate investor rigging bids in online public foreclosure auctions.
- Eleven state attorneys general have initiated investigations into the use of "no-poach" clauses in employment contracts. The Washington State Attorney General is most active, obtaining agreements from 30 nationwide franchise chains to eliminate the practice of including no-poach clauses in their franchise contracts. While the Washington AG's investigation first focused on fast-food chains, its investigation has since expanded into other industries.

## EU Developments

- The Commission sent a Statement of Objections to two companies in the biofuels sector for conduct concerning ethanol benchmarks. A third company is in settlement talks with the Commission.
- In July 2018, the General Court of the EU confirmed a fine that the Commission had imposed on an investment bank for the conduct of its subsidiary in the power cables cartel on the basis of the parental liability presumption. This is noteworthy because the investment bank held less than 91% of the subsidiary's shares.
- In September 2018, the Commission opened an in-depth investigation into possible collusion between German car manufacturers on emissions control systems.
- Also in September, the Commission sent a Statement of Objections to a rail company for obstructing its investigation during a dawn raid. The company provided incorrect information and deleted data from a computer. The dawn raid was part of an investigation in the rail passenger transport sector.

## US DOJ Cartel Investigations

### AUTOMOTIVE PARTS (SUMMARY)

- 59 automobile parts at issue
- Conduct involved bid rigging, price fixing, market allocation and other anticompetitive conduct
- 49 companies charged
- 47 companies pled and were sentenced to pay more than \$2.9 billion in criminal fines
- One corporation and its subsidiary were acquitted by jury: Tokai Kogyo Ltd. and Green Tokai Co. Ltd.
- Notable Fines
  - US fines up to \$425 million for a single company
  - European Commission Fines of €1.6 billion (four cartels)

- 65 individuals indicted
- 32 individuals pled guilty; one individual received a fine only, while 31 individuals received prison terms ranging from one year and one day to 24 months: Nine executives received prison terms of one year and one day; two for 13 months; six for 14 months; five for 15 months; three for 16 months; three for 18 months; one for 19 months; and two for 24 months.
- Follow-on civil litigation: *In re Automotive Parts Antitrust Litigation*, No. 12-md-02311 (E.D. Mich.).

#### REAL ESTATE (SUMMARY)

- The DOJ has obtained over 100 convictions of individuals involved in rigging bids in public real estate foreclosure auctions in Alabama, California, Georgia, North Carolina, Florida and Mississippi.
- Before a foreclosure auction on the courthouse steps, the conspirators would agree on a bidding scheme to depress the selling price of foreclosed properties. Across the country, the conspiracies typically involved separate, mini auctions (sometimes called “rounds”) to award the properties to members of the conspiracy and to determine payoffs for the co-conspirators who had agreed not to bid up the selling price. These “rounds” were often held near the courthouse steps.
- Q3 Update:
  - In July 2018, a seventh Mississippi real estate investor pled guilty to conspiring to rig bids at public foreclosure auctions. Felony charges were filed in the Southern District of Mississippi on June 28, 2018, alleging the investor conspired with others not to bid against one another for selected foreclosure properties from as early as August 2009 through at least December 2016.
  - Not all of the conspiracies were executed on the courthouse steps. In August 2018, another real estate investor pled guilty in West Palm Beach, Florida, for rigging public foreclosure auctions online.

#### ELECTROLYTIC CAPACITORS

- Electrolytic capacitors regulate electrical current in electronic products, such as computers, televisions, car engines, airbag systems and home appliances.
- Eight companies have pled guilty and been sentenced to fines totalling approximately \$150 million.
- Ten individual executives have been charged: two have pled guilty and eight remain under indictment.

- Follow-on civil litigation: *In Re Capacitors Antitrust Litigation*, No. 14-cv-03264 (N.D. Cal.).
- Q3 Update:
  - As discussed in the Q2 Update to the *Cartel Snapshot*, Judge Donato in the Northern District of California held a closed-door hearing on Nippon Chemi-Con Corporation's change of plea after the parties filed a joint statement informing the court of a serious conflict. A DOJ attorney who worked on the case had worked in private practice prior to joining the DOJ and actually represented Nippon in the same price-fixing investigation. The parties reached a plea agreement. Since then, the court ordered Nippon Chemi-Con to pay a \$60 million fine and ordered Nippon Chemi-Con to a five-year term of probation that requires annual certifications of its implementation of an antitrust compliance program. The court expressed "significant concern" that the judgment was a "windfall" given Nippon's anticipated \$190 million fine stemming from its \$530 million market effect, and added that Nippon received a "discount" due to the government's conflict that jeopardized its case.

#### PACKAGED SEAFOOD

- These cases relate to the DOJ's investigation into price fixing of packaged seafood products, particularly albacore, skipjack and yellowfin tuna in shelf-stable foil or cans.
- One company, Tri Union Seafoods LLC, acknowledged publicly that it applied for leniency from the DOJ.
- In December 2016, two senior vice presidents of Bumble Bee Foods, LLC, pled guilty to fixing the price of shelf-stable tuna from at least 2011 through 2013. In June 2017, a former senior vice president of StarKist Co. pled guilty to one count of price fixing and agreed to cooperate with the government's investigation into the packaged seafood industry. Based on the US Sentencing Guidelines, these individuals could face 30 months in prison or more.
- In August 2017, Bumble Bee Foods pled guilty and was ordered to pay a \$25 million criminal fine, which was reduced due to the company's financial condition. Under the terms of the agreement, the fine could jump to over \$80 million if the company is sold.
- In May 2018, a federal grand jury indicted the president and CEO of Bumble Bee for his role in the tuna price-fixing scheme. The CEO pled not guilty, and trial is scheduled for November 2019. If convicted, he faces up to 10 years in prison and a \$10 million fine.
- Follow-on civil litigation: *In re Packaged Seafood Products Antitrust Litigation*, No. 15-md-02670 (S.D. Cal.).
- Q3 Update:
  - In September, the DOJ filed a motion in the follow-on civil litigation requesting a stay of discovery until the criminal proceedings conclude against Bumble Bee's CEO. The DOJ argued that the discovery requests in the civil matter could compromise their criminal investigation, since the CEO would be able to obtain discovery from potential government trial witnesses in their criminal case against him.

## FOREIGN CURRENCY EXCHANGE

- These cases relate to alleged price fixing and bid rigging in the foreign currency exchange (forex) market.
- DOJ obtained blockbuster guilty pleas in May 2015 from five major banks, including Citigroup, JPMorgan Chase & Co. and Barclays PLC. The DOJ has collected more than \$2.5 billion in fines to date.
- DOJ has also charged several individual currency dealers with price fixing, including two who pled guilty and are awaiting sentencing. These individuals' plea agreements provide for sentencing reductions in exchange for cooperating with the government.
- Follow-on civil litigation: *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 13-cv-07789 (S.D.N.Y.) (direct purchaser plaintiffs).
- Q3 Update:
  - In October 2018, three former forex traders were acquitted by a federal jury in Manhattan on charges of manipulating the forex market. The DOJ alleged during the two-week trial that the three traders, along with a cooperating witness, frequently agreed not to trade against one another and used an online chat room to coordinate their transactions and manipulate daily benchmark rates, known as fixes, on the forex spot markets. The three former traders waived extradition and appeared in New York to defend against the DOJ's charges. *United States v. Usher et al*, No. 17-cr-00019 (S.D.N.Y.).

## GENERIC DRUGS

- On December 15, 2016, attorneys general for 20 states filed a civil suit against six pharmaceutical companies alleging price-fixing agreements over the drugs Doxycycline Hyclate Delayed Release, a tetracycline-class antimicrobial used as adjunctive therapy for severe acne, and Glyburide, an oral diabetes medication used to control blood sugar levels for Type 2 diabetes. *Connecticut et al v. Aurobindo Pharma USA, Inc. et al*, No. 3:16-cv-02056 (D. Conn.). The suit has been expanded to include 45 states, the District of Columbia and the Commonwealth of Puerto Rico, and there are now over 30 company-defendants and 18 drugs involved.
- The DOJ has pursued criminal charges against two executives formerly with Heritage Pharmaceuticals, Inc., both of whom have pled guilty to offenses involving doxycycline hyclate and glyburide. The two are awaiting sentencing.
- Q3 Update:
  - The DOJ has resisted efforts by private plaintiffs' to obtain certain documents turned over by certain defendants in its criminal investigation over price fixing in the generic pharmaceuticals industry. Private plaintiffs have also sought documents turned over by defendants to states attorneys general in their investigation relating to the same conduct at issue in the civil cases. These motions are pending before the Eastern District of Pennsylvania.

#### INTERNATIONAL SHIPPING

- These cases relate to roll-on / roll-off ocean shipping of cars, trucks, and other vehicles.
- Two Japanese, two Norwegian and one Chilean carrier have pled guilty and agreed to pay fines totalling over \$255 million. One of the carriers, Høegh Autoliners AS, also agreed to serve a three-year term of probation to ensure compliance with the antitrust laws.
- Of note, Korea's Fair Trade Commission and South Africa's Competition Commission have imposed substantial fines in this matter totalling 21.6 billion won and 198 million rand, respectively. Australia's Federal Court ordered NYK Line to pay \$25 million AUD, which was Australia's first criminal charge against a corporation under the criminal cartel provision of its competition law.
- The DOJ has charged at least 11 individuals, including nationals of Germany, Sweden, Japan and Chile. Of these, four have pled guilty and each has been sentenced to imprisonment of 14 months or more.
- Follow-on civil litigation: *F. Ruggiero & Sons, Inc., et al v. NYK Line (North America) Inc. et al*, No. 13-cv-03306 (D.N.J.).

#### HEIR-LOCATION SERVICES

- Two executives and one company pled guilty to allocating customers and dividing the market for heir-location services sold in the United States. During probate proceedings, companies research unknown claimants to the decedent's estate and help them substantiate their claims in exchange for a percentage of the claimant's inheritance. Two companies and two executives agreed to split fees and to not contact the other's clients.
- The grand jury indicted Kemp & Associates and its vice president and COO, Daniel J. Mannix. The court made two important holdings prior to trial. First, it held that the rule of reason would apply. The agreement operated to avoid duplicative and potentially wasteful efforts in servicing the same estate and thus had "efficiency-enhancing potential." Also, *per se* treatment was inappropriate for an agreement that was "structured in an unusual way" in a "relatively obscure industry." Second, the court held that the statute of limitations barred prosecution. The challenged agreement ended in July 2008, and only ministerial tasks occurred after that date.
- The government has appealed both rulings to the Tenth Circuit Court of Appeals. No. 17-4148. Orders appealed from: *United States v. Kemp & Assoc., Inc.*, No. 16-cr-00403 (D. Utah Aug. 28, 2017). Oral argument was held before the Tenth Circuit on May 16, 2018, and a decision has yet to be issued.

### INTERNATIONAL FREIGHT FORWARDING—NEW FOR Q3

- On July 3, the DOJ announced the arrest of two executives in Miami, Florida, on charges of conspiring to fix prices for international freight forwarding services from as early as March 2014 until at least March 2015. Freight forwarders prepare cargo and arrange for its international shipping.
- According to the DOJ's Press Release, which cited to an affidavit filed in support of the criminal complaint in the Eastern District of Louisiana, the conspirators met at several locations in Honduras and the United States and memorialized their agreements in several emails and other documents to raise prices charged to US customers through "commissions" in port cities throughout the US. According to the affidavit, the two executives arrested instructed their co-conspirators not to leave a document trail for fear of US antitrust liability.

### NO-POACH AGREEMENTS—NEW FOR Q3

- In 2016, the FTC and DOJ released joint guidance arguing that anti-poaching agreements are *per se* illegal. Such "no-poach" clauses in employment contracts generally prohibit franchisees or franchisors from hiring one another's employees for up to six months after the end employment. While the recent activity has been confined to the franchise setting, there is no reason to believe it will remain so confined.
- As discussed in the Q2 Update, DOJ Assistant Attorney General Makan Delrahim stated that the DOJ will criminally investigate and prosecute so-called "no-hire" or "no-solicit" agreements among employers. The DOJ brought its first case since the policy was announced, reaching a civil settlement with two firms, Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp., for allegedly agreeing not to recruit and hire each other's employees. In announcing the settlement, DOJ specified that it was handled civilly, rather than criminally, only because the conduct ceased when the guidance was announced in 2016.
- Since then, 11 state attorneys general—for California, Illinois, Massachusetts, Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island and Washington—have initiated antitrust investigations into the use of "no-poach" agreements by franchise-based fast food operations in their states. The Washington Attorney General has led the charge:
  - After initiating its investigation, the Washington AG obtained agreements from 30 nationwide chains to eliminate the practices of including no-poach clauses in their franchise contracts. While the Washington AG's investigation first focused on fast-food chains, its investigation has since expanded to other industries, including: hotels; car repair; gyms; home health care; convenience stores; cleaning; tax preparation; parcel; electronics repair; child care; custom window covering; travel; and insurance adjuster services.
  - According to the Washington AG, only two nationwide fast-food chains in Washington continue to use "no-poach" clauses in their franchise agreements, both of which are sandwich chains, and one of which the AG filed a formal complaint against in October 2018.

### POLYURETHANE INDUSTRY—NEW FOR Q3

- In its July 2018 complaint against seven chemical companies over supply restrictions of polyurethane products, a foam maker stated that in February 2018 the DOJ's Antitrust Division "caused a federal grand jury to issue subpoenas to manufacturers" of polyurethane products methylene diphenyl diisocyanate (MDI) and toluene diisocyanate (TDI).
- The DOJ has not formally announced an investigation into the polyurethane industry, but one defendant in the foam maker's complaint confirmed that it had been contacted by the DOJ in relation to an investigation in the polyurethane industry.
- Any DOJ investigation in the polyurethane industry would be separate from its 2006 investigation into sales of TDI, MDI and polyether polyols products that concluded in 2007 without any charges.

## European Cartel Investigations

### ETHANOL BENCHMARKS

- In December 2015, the Commission opened a formal investigation in the biofuels sector concerning ethanol benchmarks. The companies concerned are Abengoa S.A. of Spain, Alco Group SA of Belgium and Lantmännen ek för of Sweden, which produce, distribute and trade ethanol.
- The Commission is investigating whether these companies had improper contacts aimed at manipulating ethanol benchmarks.
- It has been reported that Abengoa and Alco Group have received a Statement of Objections from the Commission. Lantmännen is engaged in settlement talks with the Commission.

### POWER CABLES

- On July 12, 2018, the General Court of the EU upheld a decision of the Commission imposing a fine on an investment bank for its indirect subsidiary's participation in the power cables cartel.
- In its decision of April 2, 2014, the Commission applied its case law according to which a parent company that exercises "decisive influence" over a subsidiary can be found liable for the competition law infringements of that subsidiary. More specifically, the Commission applied its parental liability presumption



according to which a parent company is presumed to exercise such decisive influence when it wholly owns its subsidiary or holds almost all of the shares of its subsidiary.

- The investment bank appealed the Commission's decision arguing that it held less than 91% of the shares of the subsidiary that had participated in the cartel.
- The General Court rejected this argument and held that the parental liability presumption can be applied even if the parent company holds less than 100% of the shares of its subsidiary but is able to exercise all the voting rights in the subsidiary.
- The investment bank has appealed the General Court's ruling to the European Court of Justice.

#### CAR EMISSIONS

- On September 18, 2018, the Commission opened an in-depth investigation into possible collusion between German car manufacturers.
- The Commission will assess whether the companies colluded to avoid competition on the development and roll-out of technology to clean emissions from petrol and diesel passenger cars.
- The emissions control systems concerned by the investigation are selective catalytic reduction systems (which reduce nitrogen oxide in diesel engines) and "Otto" particulate filters (which reduce particulate matter in petrol engines).

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