



Cartel Snapshot

Overview of Current Cartel Investigations

Several active US Department of Justice (DOJ) investigations resulted in criminal charges against individual executives in the second quarter of 2018. The DOJ's total criminal fines collected continued to run significantly below the pace that had generated billion-dollar plus annual highs in 2014 and 2015, as DOJ put the massive auto parts and large foreign exchange fines further into its rear view mirror. At the current pace, DOJ's annual fines for 2018 will likely end around \$300 million. In the EU, the European Commission rendered one cartel decision in the second quarter of 2018, imposing fines on eight Japanese manufacturers of capacitors.

US Developments

- In the Packaged Seafood investigation, a federal grand jury in May indicted the president and CEO of Bumble Bee Foods, LLC, for his alleged role in price-fixing of shelf-stable tuna from 2011 to 2013.
- In the Foreign Currency Exchange investigation:
 - On May 10, 2018, a federal grand jury in the Southern District of New York indicted a former JPMorgan Chase currency trader for conspiring to fix prices and rig bids and offers for Central and Eastern European, Middle Eastern and African currencies (CEEMEA) from October 2010 through at least July 2013.
 - In a separate case in the Southern District of New York, on May 4, 2018, the DOJ defeated a defense motion to dismiss on jurisdictional grounds. The defendants had argued unsuccessfully that their conduct in bid-rigging the Euro/US dollar foreign exchange spot market was “wholly foreign” and outside the reach of the US antitrust laws, but the court disagreed.
- DOJ Assistant Attorney General Makan Delrahim reiterated that the DOJ will criminally investigate and prosecute so-called naked wage-fixing and no-hire / no-solicit agreements among employers. AAG Delrahim's statement underlined an Obama-era policy informing human resources professionals that such

agreements would be treated as analogues to criminal price-fixing and market allocation. The DOJ brought its first case since the policy had been 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 the matter had been handled civilly, rather than criminally, only because the conduct had ceased at the time the 2016 policy guidance was announced.

- On April 9, 2018, the DOJ held a public roundtable on criminal antitrust compliance in Washington, DC. The panels consisted of in-house counsel, private counsel and representatives from agencies from other jurisdictions. The panelists expressed a broad consensus in favor of the DOJ's changing its current policy and granting credit at sentencing to defendants who maintained robust compliance programs before the violation occurred. In response, Principal Deputy Assistant Attorney General Andrew Finch has indicated that the Division is re-examining its policy against such credit, and that changes will likely be made. Those in favor of granting compliance credit argue that it would increase deterrence.

EU Developments

- On March 21, 2018, the European Commission imposed fines on eight manufacturers of capacitors.
- On March 22, 2018, the Commission published updated cartel statistics. In 2017, the Commission imposed a total amount of cartel fines close to €2 billion. In 2018, the Commission has so far imposed cartel fines of approximately €801 million.
- On April 24, 2018, the Commission conducted unannounced inspections in the metal packaging sector.
- On May 30, 2018, the European Parliament and the European Council reached a provisional agreement on a directive that would harmonize powers of national competition authorities in the EU, notably concerning dawn raids, fines and leniency.
- The Commission is believed to be close to sending a statement of objections to companies in the biofuels sector for conduct concerning ethanol benchmarks.

Active DOJ Cartel Investigations

AUTOMOTIVE PARTS (SUMMARY)

1. Products at Issue
 - a. 59 automobile parts at issue
2. Type of Conduct

- b. Bid-rigging
 - c. Price-fixing
 - d. Market allocation
 - e. Other anticompetitive conduct
3. Total companies charged
 - a. 49 companies
 4. Total companies pled
 - a. 47 companies
 5. Total companies sentenced
 - a. 47 corporations were convicted and sentenced to pay more than \$2.9 billion in criminal fines.
 - i. One corporation and its subsidiary were acquitted by jury: Tokai Kogyo Ltd. and Green Tokai Co. Ltd.
 - b. Large Fines
 - i. US fines up to \$425 million for a single company
 - ii. European Commission Fines
 - 1. Four cartels, total fines of €1.6 billion
 6. Total individuals indicted
 - a. 65 individuals
 7. Total individuals pled
 - a. 32 individuals
 8. Total individuals sentenced
 - a. 30 executives have received prison terms ranging from one year and one day to 24 months.

- b. Of these 30 executives, the sentences break down as follows: Nine executives received prison terms of one year and one day; three for 13 months; five for 14 months; five for 15 months; three for 16 months; two for 18 months; one for 19 months; and two for 24 months.

9. Q2 Update:

- a. On May 31, 2018, Maruyasu Industries Co. Ltd. was ordered to pay a \$12 million fine pursuant to a guilty plea for its role in fixing the price of automotive steel tubes. As part of Maruyasu's agreement with the government, the DOJ moved to dismiss its indictment of Maruyasu's US subsidiary and three executives who agreed to cooperate with the government's investigation.

10. Follow-on civil litigation

- a. *In re Automotive Parts Antitrust Litigation*, 2:12-md-02311 (E.D. Mich. 2012).

REAL ESTATE (SUMMARY)

- Over 100 individuals have either pled guilty or have been convicted for bid-rigging 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.
- Q2 Update:
 - On April 10, 2018, three individuals pleaded guilty for their roles in a conspiracy to rig bids at public real estate foreclosure auctions in Mississippi.
 - On May 9, 2018, five individuals were sentenced for bid-rigging foreclosure auctions in San Mateo County and/or San Francisco County, California. The five were ordered to pay criminal fines totalling \$6.41 million, with the highest at \$2 million, and the lowest at \$500k. Three obtained prison sentences ranging from 6–15 months, with 3 years of supervised release. More sentences and fines are expected soon.

ELECTROLYTIC CAPACITORS

- Electrolytic capacitors are components that store and regulate electrical current in electronic products, such as televisions, engines and computers.
- Seven Japanese and one Samoan company have pled guilty and have agreed to fines totalling approximately \$90 million, plus the under-seal plea of Nippon Chemi-Con discussed below.

- Ten individual executives have been charged, of whom one has pled guilty and been sentenced to a year and a day in prison.
- There is related follow-on civil litigation pending in the United States District Court for the Northern District of California - *In Re Capacitors Antitrust Litigation*, 14-CV-03264-JD (N.D. Cal. 2014).
- Q2 Update:
 - In the Northern District of California, Judge Donato rejected a plea by Nichicon Corporation that would have stipulated a fine of \$42 million and five years' probation. When the parties returned with an open ended plea that gave the court sentencing discretion, the court rejected the government's recommended \$42 million fine and instead imposed a fine of \$54.6 million and five years' probation.
 - In a separate case, Judge Donato 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 government and actually represented Nippon in the same price-fixing investigation. The government was not aware of the conflict and disagreed that the attorney's work prejudiced Nippon. Nonetheless, the parties reached a plea agreement. Nippon's guilty plea is under seal, but likely involves a \$40–60 million fine and a term of probation and must be approved by the court. If the court does not accept the terms of the plea, Nippon will seek dismissal of the indictment and will seek discovery on the DOJ's knowledge of the conflict and its internal procedures.

PACKAGED SEAFOOD

- These cases relate to an investigation into price-fixing of packaged seafood products, including shelf-stable tuna.
- One company, Bumble Bee Foods, LLC, has pled guilty and was ordered to pay a \$25 million criminal fine, which could more than triple if Bumble Bee is sold under the terms of the agreement.
- Another firm, Tri Union Seafoods LLC, has acknowledged publicly that it applied for leniency from DOJ in the case.
- Three individuals have pled guilty and are awaiting sentencing in the Northern District of California. Based on the applicable United States Federal Sentencing Guidelines, these individuals could face as much as 30 months imprisonment or more.
- Related follow-on civil litigation is pending in the United States District Court for the Southern District of California. *In re Packaged Seafood Products Antitrust Litigation*, 3:15-md-02670 (S.D. Cal. 2015).
- Q2 Update:
 - On May 16, 2018, a federal grand jury indicted the president and CEO of Bumble Bee Foods, LLC, for his role in a scheme to fix the price of packaged seafood products.

- A status conference is set for Sept. 2018 to schedule sentencing for the other individuals who have pleaded guilty.

FOREIGN CURRENCY EXCHANGE

- These cases relate to alleged price-fixing and bid-rigging in the foreign currency exchange market.
- DOJ obtained blockbuster guilty pleas in May 2015 from five major banks, including Citicorp, 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.
- There is related follow-on civil litigation pending in the United States District Court for the Southern District of New York – *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 1:13-cv-07789 (S.D.N.Y. 2013) [direct purchaser plaintiffs].
- Q2 Update:
 - On May 10, 2018, a grand jury indicted a former currency trader with JPMorgan Chase for conspiring to fix prices and rig bids and offers for Central and Eastern European, Middle Eastern and African currencies (CEEMEA) from October 2010 through at least July 2013. The trader allegedly shared trading positions and competitively sensitive information with other New York-based CEEMEA traders through private chat rooms, calls and text messages, and the conspirators allegedly used this information to coordinate live trading, sometimes by refraining from trading. Two individuals and one bank have already pleaded guilty for their roles in a CEEMEA-related conspiracy, and the bank has been ordered to pay a \$90M fine.
 - On May 4, 2018, a federal judge upheld a January 2017 indictment of three British individuals allegedly involved in the euro-dollar exchange benchmark conspiracy. The UK's Serious Fraud Office investigated the matter and decided not to bring charges. As such, the defendants sought to dismiss the DOJ's indictment, arguing that the US government cannot pursue charges against British individuals for "wholly foreign" conduct. The judge sided with the DOJ and upheld the indictment.

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.

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, Höegh 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 is *F. Ruggiero & Sons, Inc., et al v. NYK Line (North America) Inc. et al*, 2:13-cv-03306, District of New Jersey.

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 to substantiate their claims in exchange for a percentage fee of the claimant's inheritance. Two companies and two executives agreed with each other 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. *United States v. Kemp & Assoc., Inc.*, No. 16-cr-00403-DS (D. Utah Aug. 28, 2017).

- The government has appealed both rulings to the Tenth Circuit Court of Appeals. No. 17-4148. Oral argument was held on May 16, 2018.

European Cartel Investigations

CAPACITORS

- On March 21, 2018, the European Commission imposed fines on eight Japanese producers of capacitors, including Elna, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con and Rubycon. Sanyo was the immunity applicant. The total amount of fines imposed is €254 million. The highest fine was imposed on Nippon Chemi-Con and amounted to approximately €98 million.
- The Commission found that the companies had exchanged pricing information and agreed on prices via multilateral meetings but also bilateral or trilateral contacts.
- This case is noteworthy in that (1) the Commission did not enter into a settlement with the companies (among the last ten cartel decisions, seven of them were cartel settlements) and (2) four of the eight companies obtained fine reductions (ranging from 15% to 35%) for cooperating with the Commission under the Leniency Notice.

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, Alcogroup 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 settlement talks between the companies and the Commission have broken down and that the Commission will soon issue a statement of objections.

METAL PACKAGING

- On May 3, 2018, the Commission confirmed it conducted unannounced inspections in the metal packaging sector on April 24, 2018.

- The German Competition Authority had initially investigated this sector but the Commission took over after the German Competition Authority found that the conduct may have extended to countries outside of Germany.
- Crown Holdings and Silgan Holdings have indicated that their premises were raided by the Commission.

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