February 11, 2019

Q4 UPDATE: OVERVIEW OF CARTEL INVESTIGATIONS

Although 2018 saw guilty pleas and new indictments in several ongoing Department of Justice ("DOJ") investigations, 2018 finished by continuing a downward trend in antitrust enforcement. DOJ's criminal and civil fines in 2018 ended around $400 million—well short of the billion-dollar plus highs in 2014 and 2015, during the height of the auto parts and foreign exchange investigations. EU fines ended at €800 million, which was less than in 2017 and less than one fourth of the amount of fines imposed in 2016.

US DEVELOPMENTS

- The DOJ has intervened in three federal class actions in the Eastern District of Washington to express its view over the proper standard of scrutiny to apply to no-poach agreements that are at the heart of several civil suits across the country. While a longer, more formal statement from the DOJ is expected soon, it appears that the DOJ will argue that the rule of reason should apply to most if not all of these lawsuits.
- The DOJ revealed a new investigation into the bid rigging of fuel-supply contracts for US armed forces abroad. Three South Korea-based companies agreed to plead guilty to criminal charges and to pay $82 million in criminal fines for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to United States Army, Navy, Marine Corps, and Air Force bases in South Korea.
- Two former Deutsche Bank traders urged a Manhattan federal judge in December 2018 to reverse their convictions for rigging the London Interbank Offered Rate (Libor) and to dismiss the charges against them. Prosecutors obtained the convictions in October 2018 by arguing that the two traders had conspired with the bank's Libor submitters to skew the lending benchmark to benefit their derivative trades. In December, the pair argued that prosecutors obtained that conviction by lying to the court and the jury and by hiding evidence from defense attorneys throughout the case.
- Two executives pleaded guilty and agreed to cooperate with the DOJ's investigation into price fixing in the freight-forwarding industry.

- While the DOJ's investigation into price-fixing of online promotional products appeared to slow, in November 2018, the DOJ announced new charges against another online promotional products company and its executive for conspiring to fix prices for customized promotional products, including wristbands, lanyards, temporary tattoos, and buttons between May 2014 and June 2016.
- The DOJ's investigation into bid rigging of public real estate foreclosure auctions continues, as additional charges and guilty pleas continue to roll in.
- Following up on an indictment from 2015, the DOJ obtained a plea agreement from an art dealer in the UK for agreeing with its competitors on Amazon Marketplace and elsewhere to fix the price of art posters sold online to customers in the US. The defendant agreed to pay a criminal fine of $50,000, plus fees, and agreed to a recommended sentence between 12 and 60 months.

EU DEVELOPMENTS

- In November 2018, the Commission opened an investigation to determine whether agreements between booking system providers and airlines and travel agents distorts competition.
- In December 2018, the Commission sent Statement of Objections to banks involved in trading US Dollar supra-sovereign, sovereign, and agency bonds.

US DOJ CARTEL INVESTIGATIONS

Real Estate Foreclosure Auctions

- The DOJ has charged over 130 individuals with 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 operated similarly, which 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.
- Q4 Update:
  - » In November 2018, the DOJ announced that two more Mississippi real estate investors pleaded guilty for their roles in a conspiracy to rig bids at public real estate foreclosure auctions in Mississippi from as early as June 2011 through as least February 2017, bringing the total number of guilty pleas obtained by the DOJ in this conspiracy to nine.

» In our Q3 Update, we noted that not all bid-rigging schemes operated on the courthouse steps—some operated online. In November, the DOJ announced that a third real estate investor in Florida pleaded guilty to rigging public foreclosure auctions online.

Electrolytic Capacitors

- This investigation involves price fixing of electrolytic capacitors, which regulate electrical current in electronic products, such as computers, televisions, car engines, airbag systems, and home appliances.
- Eight companies have pled guilty and have been ordered to pay criminal fines of $150 million. Ten individual executives have been charged: three have pled guilty and seven remain under indictment.
- 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.
- Follow-on civil litigation: *In re Capacitors Antitrust Litigation*, No. 14-cv-03264 (N.D. Cal.).
- Q4 Update:
  - » In October 2018, a former executive of a Japanese capacitor manufacturer pleaded guilty in a US federal court and agreed to serve one year in prison stemming from the executive's role in the electrolytic capacitors price-fixing cartel.

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 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. These individuals could face 30 months in prison or more.
- Bumble Bee Foods pled guilty and was ordered to pay a $25 million criminal fine, which 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. In our Q3 Update, we noted that 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 discovery 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.
- Follow-on civil litigation: *In re Packaged Seafood Products Antitrust Litigation*, No. 15-md-02670 (S.D. Cal.).
- Q4 Update:
  - » The DOJ announced that StarKist Co. has agreed to plead guilty to a one-count felony charge for its role in a conspiracy to fix prices of canned tuna. StarKist has agreed to cooperate with the government's investigation.

Foreign Currency Benchmarks

- This investigation relates to global price fixing and bid rigging of financial benchmarks in the broader foreign currency market (Forex or FX), specifically the London Interbank Offered Rates (LIBOR), US Dollar International Swaps and Derivatives Association Fix (ISDAFIX), Euro Interbank Offered Rate (EURIBOR), Singapor Interbank Offered Rate (SIBOR) and Swap Offer Rate (SOR), and the Australian Bank Bill Sweep Rate (BBSW).
- The 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.
- In October 2018, two former traders were convicted in Manhattan federal court of conspiring to skew the London Interbank Offered Rate (Libor) to benefit their own derivative trades. In December, the ex-traders asked the court to reverse their convictions and to dismiss the charges against them, because the prosecutors lied to their attorneys and the court and failed to hand over favorable evidence.

- Also in October 2018, three former London-based traders were acquitted by a federal jury in Manhattan on charges of manipulating the Forex market. During the two-week trial, the DOJ argued 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. All three traders were acquitted by a federal jury. *United States v. Usher et al*, No. 17-cr-00019 (S.D.N.Y.).
- Follow-on civil litigation: *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 13-cv-07789 (S.D.N.Y.).
- Q4 Update:
  - » In December 2018, two former Deutsche Bank traders who were convicted in October asked a federal judge to reverse their convictions for rigging the Libor and to dismiss the charges against them. The pair argued that prosecutors obtained their convictions by lying to the court and hiding evidence throughout the case.

Generic Drugs

- This investigation involves allegations of price fixing and customer allocation in the generic pharmaceutical industry.
- In December, 2016, the DOJ charged two former executives of Heritage Pharmaceuticals, Inc., for their role in the fixing of prices of Doxycycline Hyclate, 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. The two executives pleaded guilty and are awaiting sentencing. To date, DOJ has not announced any further charges.
- Beginning in 2016, several putative class actions were filed on behalf of direct purchasers, end-payors, and indirect resellers. The class actions were consolidated into a multi-district litigation in the Eastern District of Pennsylvania. In August 2017, the class plaintiffs filed complaints alleging various generic pharmaceutical manufactures participated in individual conspiracies to fix prices for 18 drugs. Later in 2018, class plaintiffs filed additional complaints asserting that numerous defendants engaged in a larger conspiracy to fix prices and allocate markets across the industry. To date, over 30 defendants are involved in the multi-district litigation.
- Attorneys general for 47 states, D.C., and Puerto Rico also filed a civil suit alleging 18 companies and 2 individuals participated in a conspiracy to fix prices and divide markets for 15 generic pharmaceutical drugs. The attorneys general suit was consolidated into the multidistrict litigation.
- Follow-on civil litigation: *In re Generic Pharmaceutical Drugs Pricing Antitrust Litig.*, No. 16-cv-2724 (E.D. Pa.).

International Shipping

- These cases relate to price fixing of international roll-on / roll-off ocean shipping of cars, trucks, and other vehicles.
- 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.
- 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. Korea's Fair Trade Commission and South Africa's Competition Commission have imposed fines in this matter totalling $19 million and $14.5 million, respectively. Australia filed its criminal charge against a corporation under the criminal cartel provision of its competition law, and the Australia Federal Court ordered NYK Line to pay $17.5 million.
- 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

- In 2016, a federal grand jury indicted Kemp & Associates and its Vice President and COO, Daniel J. Mannix, for allocating customers and dividing the market for heir-location services sold in the United States. During probate proceedings, companies research unknown claimants to a 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. One company and its executive pleaded guilty, while the other company and its executive proceeded to trial.
- Prior to trial, the district court made two important holdings: First, the rule of reason would apply to the heir-location agreement, not the per se rule. The court reasoned that per se treatment was inappropriate for an agreement "structured in an unusual way" that affected only a small number of estates in a "relatively obscure industry." The court added that the agreement may have contained "efficiency-enhancing potential." Second, the court held that the statute of limitations barred prosecution; the agreement ended in July 2008, and mere ministerial tasks like distributing payments did not extend the conspiracy beyond the agreement's stated termination date. *United States v. Kemp & Assocs., Inc.*, No. 16-cr-00403 (D. Utah Aug. 28, 2017). The government appealed both rulings to the Tenth Circuit Court of Appeals.

- Q4 Update:
  - » The Tenth Circuit reversed the district court's second ruling—that the statute of limitations barred prosecution—but found that it lacked jurisdiction to review the district court's rule of reason decision. However, the appeals court suggested that the district court might want to revisit its rule of reason order on remand, since additional briefing at the appellate stage added important information that might be helpful in determining whether the rule of reason or the per se rule applied. *United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264 (10th Cir. 2018).
  - » On remand, the government has asked the district court for a hearing on whether it should revisit its rule of reason decision, which the defendant opposed. The district court has yet to rule on the government's request.

Freight Forwarding

- In Q3 2018, the DOJ announced the arrest of the owner and a high-level manager of a freight-forwarding company 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. The DOJ's Press Release claimed that the conspirators met at several locations in Honduras and the United States and conspired to raise prices charged to U.S. customers through "commissions" in port cities throughout the US. According to the DOJ's filings, the two executives also instructed their co-conspirators not to leave a document trail for fear of US antitrust liability.
- Q4 Update
  - » The two executives have since pleaded guilty to the DOJ's charges and have agreed to cooperate with its investigation. The owner could face a sentence between 18 and 24 months, and the manager 12 to 21 months. Sentencing is set for February 2019 in the Southern District of Florida. *United States v. Dip et al.*, No. 18-cr-20877 (S.D. Fla.).

No-Poach Agreements

- In 2016, the FTC and DOJ released joint guidance arguing that anti-poaching agreements are per se illegal. Such "no-poach" or "no-hire" clauses in employment contracts prohibit companies from soliciting one another's employees. The guidance also stated that certain no-poach agreements that are ancillary to otherwise pro-competitive conduct will be subject to a "quick look" or "rule of reason" level of scrutiny. While the recent activity has been confined to the franchise setting, there is no reason to believe it will remain so confined.

- In early 2018, DOJ Assistant Attorney General Makan Delrahim stated that the DOJ will criminally investigate and prosecute so-called "no-poach" agreements. 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, eleven 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.
  - » Several civil class actions have since been filed by employees of certain franchise-based companies that have come under scrutiny.
- Q4 Update:
  - » In three civil suits in the Eastern District of Washington, the DOJ filed motions to inform the court of the DOJ's view as to what standard the court should apply to individual no-poach agreements—per se or rule of reason.
  - » The DOJ maintains its view that strictly horizontal no-poach agreements between competitors should be governed by the per se rule. However, it argued to the court that vertical no-poach agreements between franchisors and franchisees that limit competing franchisees from hiring the others' employees should be governed by the rule of reason—those agreements are vertical in one sense and horizontal in another, but they are reasonably related to a legitimate business goal.
  - » The district judge overseeing the cases in which the DOJ intervened has rescheduled hearings on defendants' motions to dismiss for March 2019, so as to allow the DOJ additional time to formally express its view over the relevant standards of scrutiny to apply in the civil suits.

Polyurethane Industry

- 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.

Promotional Products

- These cases relate to an investigation over price fixing of customized promotional products, such as wristbands and lanyards, sold online. Two companies and two executives have pleaded guilty, and the companies have been ordered to pay nearly $2.5 million dollars in criminal fines. The DOJ alleged that the individuals met in person and used encrypted messaging apps to reach and implement the price-fixing agreements
- Q4 Update:
  - » In November 2018, the DOJ announced new charges against another online promotional products company and its executive for conspiring to fix prices for customized promotional products, including wristbands, lanyards, temporary tattoos, and buttons between May 2014 and June 2016.

Fuel-Supply Contracts—New for Q4

- In November 2018, the DOJ revealed a new investigation into bid rigging of fuel-supply contracts for US armed forces abroad. From approximately March 2005 to 2016, South Korean petroleum and refinery companies conspired to suppress competition during the bidding process for US government fuel supply contracts. Three South Korea-based companies have agreed to plead guilty to criminal charges and pay approximately $82 million in criminal fines and have agreed to pay $154 million in civil fines relating to the antitrust and False Claims Act violations.

- These guilty pleas are the first insight into the government's investigation into bid rigging that targeted contracts to supply fuel to United States Army, Navy, Marine Corps, and Air Force bases in South Korea.
- The companies also entered civil settlements with the DOJ, in which they agreed to pay $154 million collectively to resolve claims under both civil antitrust laws and the False Claims Act.

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, 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 Abengoa and Alcogroup 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).

Supra-Sovereign, Sovereign, and Agency (SSA) Bonds

- On December 20, 2018, the Commission sent Statement of Objections to banks involved in trading supra-sovereign, sovereign, and agency bonds denominated in US dollars.
- The Commission will determine whether the banks exchanged commercially sensitive information and coordinated prices concerning "SSA bonds" through traders that allegedly communicated principally via online chatrooms.
- Bonds are debt securities that are used by entities to raise funds in international financial markets. Supra-sovereign bonds are issued by supranational institutions or agencies, sovereign bonds are issued by central governments under another law and in another currency than their own, and agency bonds are issued by government-related agencies.

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