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Quarterly Cartel Catch-Up: Recent Developments in Criminal Antitrust for Busy Corporate Counsel # Winter 2019

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Client Alert

We summarize below some of the most significant cartel enforcement developments from U.S. and other antitrust enforcers, including policy shifts, investigations, case filings, and court rulings. This report summarizes enforcement efforts from 2018 and discusses emerging issues in the first months of 2019, including: two procedural victories for the U.S. Department of Justice Antitrust Division (DOJ), affirming the application of the per se standard to bid rigging and customer allocation; new commitment procedures taking root in Japan; the largest cartel fine ever levied by the Italian competition authority; a civil settlement between the DOJ and sports marketing companies; a string of indictments and convictions in the promotional products and poster industries; and a U.S. judge's concern that a bank's law firm acted as an arm of the government in an internal investigation.

DOJ Enforcement Down from Prior Years in 2018

Key Point: *Criminal cartel enforcement declined further in 2018 both in the U.S. and globally, but the year was marked by large cases against both individuals and corporations.*

The DOJ's trend of reduced criminal enforcement fines and actions, following several blockbuster years, continued in 2018, mirroring reductions of fines and actions across the globe. The DOJ brought only six criminal antitrust cases against companies and 15 cases against individuals in 2018 and collected less than $400 million in criminal fines. These numbers contrast sharply with those of several recent prior years, when the DOJ brought 40 or more criminal cartel cases, and obtained more than $1 billion in criminal fines.

Despite these comparatively low numbers, the DOJ still brought significant criminal actions in 2018. Corporate enforcement actions included a $90 million criminal fine against BNP Paribas USA Inc., the ninth bank to be charged in the FX investigation; and $82 million in fines against three South Korean companies for rigging bids on fuel-supply contracts (along with $154 million in civil damages). In addition, the DOJ indicted several individual defendants, including the CEO of Bumble Bee Foods, who in May 2018 became the fourth individual defendant charged in the DOJ's investigation into the packaged seafood industry.

Worldwide, cartel fines decreased 17% from 2018, totaling the equivalent of $3.6 billion. Cartel fines in the European Union decreased 31% to $890 million, and Japan dropped from $61 million to $17.6 million. However, Brazil bucked this trend by increasing cartel fines by $100 million from its fines in 2017.

The cause of this global decrease in criminal enforcement is a point of debate. Some say the decrease can be attributed to a lower volume of leniency applications, while others assert that cartel behavior itself has decreased. Regardless, the DOJ and other antitrust enforcers continue to enforce cartel conduct, and corporations and individuals must recognize

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that regulators still impose significant penalties on those involved in cartel conduct. Despite a relatively quiet year in 2018, ongoing investigations into the generic drug industry, no-poach agreements, and other conduct could mean increased activity in 2019.

DOJ Secures Two Procedural Victories: Ninth Circuit and District of Utah Affirm That Per Se Standard Applies to Bid Rigging and Horizontal Customer Allocation Agreements in Separate Cases

Key Point: *Courts can be expected to consistently rule that bid rigging and horizontal customer allocation are per se violations of the antitrust laws. Arguments for the lesser rule of reason standard are unlikely to be successful.*

During the first quarter of 2019, DOJ secured two important procedural victories in two separate cases.

First, on February 21, 2019, a Utah federal court granted DOJ's motion to reconsider its finding that the rule-of-reason standard should apply to an alleged customer allocation agreement between heir-locating firms. As previously reported, in *United States v. Kemp & Associates*, the district court had found that an alleged customer allocation agreement between competing heir locating services should be analyzed under the rule of reason. The Tenth Circuit reversed the district court's decision on unrelated grounds, but also urged the district court to reconsider its decision that the per se rule would not apply.

In December, the DOJ moved the district court to reconsider its ruling. In granting the motion, the court found that "the agreement in the present case is a horizontal customer allocation agreement, and therefore subject to the Per Se approach." According to the charges, the defendant, Kemp & Associates, had an agreement with a competing heir location firm, Blake & Blake, pursuant to which the firms allocated heirs who were contacted by both firms. The district court stated that the "arrangement allowed the heir location service that first contacted a potential client to offer that client whatever price they chose, while being unrestrained by the natural check that the thought of competition places on business. Such an agreement is a clear attempt to minimize competition."

Heir location services identify people who may be entitled to an inheritance from the estate of someone who died without a will. The firms contract with those people to help them secure inheritances in exchange for fees.

Second, the U.S. Court of Appeals for the Ninth Circuit denied three convicted investors' challenge to the use of the per se standard in a criminal antitrust case involving bid rigging. In *United States v. Sanchez*, three investors challenged their convictions arising out of a scheme to rig bids on foreclosed homes at municipal real estate foreclosure auctions. On appeal, the defendants argued that the district court should have instructed the reasonableness of their actions, because they had entered a joint venture and were competing against banks that had more market power. The DOJ argued that the argument rested on "a fundamental misunderstanding of the role of the per se rule in antitrust law" and that certain agreements among competitors, including agreements to rig bids, are per se unreasonable. In an unpublished decision, the Ninth Circuit agreed with the DOJ and found that the defendants' argument that they were not competitors and could not conspire if they were in a joint venture "lacked support in the law [and] in the facts of this case."

The decisions in both cases strengthen the DOJ's policy of prosecuting such agreements as per se offenses of the antitrust laws. The application of the per se standard prevents a company or an individual from arguing their actions were reasonable or had procompetitive justifications. Antitrust counsel should be consulted if companies are considering entering an agreement that could be subject to antitrust scrutiny.

Introduction of the Commitment Procedure in Japan

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Key Point: *Commitment procedure takes effect in Japan, allowing for voluntary resolution of certain antitrust violations.*

On December 30, 2018, a new commitment procedure went into effect in Japan in connection with the effectuation of the TPP11 Treaty. Under the new procedure, a company under investigation for certain types of violations of Japan's Anti-Monopoly Act (AMA) may voluntarily resolve the suspected violation with the Japan Fair Trade Commission (JFTC). The commitment procedure in Japan is equivalent to the commitment decision procedure in EU and the consent order procedure in the United States.

Overview of the Procedure

The commitment procedure is applicable to those cases *other than* the following: (1) hardcore cartels such as those involved in bid rigging and price fixing; (2) cases where the company under investigation has carried out the same infringement of the AMA within 10 years; and (3) cases involving criminal violations.

The JFTC can initiate the commitment procedure at its discretion, from the perspective of promoting fair and free competition, by giving written notification to the company under investigation in the form of an overview of the alleged infringement and the applicable provisions. In policy guidance issued at explanatory sessions, the JFTC stated that it will take into account the following two factors when deciding whether to initiate the commitment procedure: (1) whether it is necessary to eliminate an alleged infringement in a prompt manner; and (2) whether a cease-and-desist order might not sufficiently and effectively resolve JFTC's competition concerns.

Within 60 days of the notification from the JFTC, the company under investigation needs to propose a commitment, including remedies. In the commitment, the company under investigation does not need to acknowledge the existence of an infringement. Upon submission of a proposal from the company under investigation, the JFTC decides whether to approve the commitment, taking into account two factors: (1) whether the remedies are sufficient to eliminate the alleged infringement; and (2) whether the remedies are expected to be implemented with certainty.

The JFTC may conduct a market test and seek public comments on a proposed commitment in order to decide whether the commitment meets the above criteria, but the market test is not mandatory (as it is in the EU). In a case where the JFTC has approved a commitment, the JFTC will not issue a cease-and-desist order or a surcharge payment order. After the approval of a commitment, the JFTC will publicly announce the commitment and the alleged infringement, making it clear that the JFTC has not found the company to be in violation of the AMA.

Impact on Companies

The introduction of the commitment procedure provides flexibility to the JFTC in pursuing cases and will enable it to pursue a wider range of cases more aggressively than before. However, no cases have been resolved through the commitment procedure yet. Thus, it is not yet clear how the JFTC will exercise its discretion based on the guidelines in deciding whether to initiate the commitment procedure or whether to approve the commitment. Companies under investigation will need to closely communicate with the JFTC and carefully weigh the advantages and disadvantages of entering into a commitment discussion with the JFTC.

Italian Competition Authority Imposes Largest-Ever Cartel Fine

Key Point: *The Italian Competition Authority is increasing its cartel enforcement, but appears open to crediting companies with pre-existing competition compliance programs.*

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On December 20, 2018, the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato* – AGCM) imposed a record fine of €678 million ($777.9 million) on 12 banks and eight car manufacturers for participating in a car financing cartel between 2003 and 2017 that directly affected vehicle prices in Italy. The highest individual fine was €179 million ($203.7 million).

AGCM initiated the investigation following the leniency applications by Daimler and Mercedes Benz Financial Services Italia in 2014. It investigated a single, complex, continuous cartel involving the exchange of sensitive information on current and future quantities and prices. Based on the leniency submissions and evidence uncovered during dawn raids in 2017, AGCM found that BMW, Daimler, FCA Italy, Ford, General Motors, Renault, Toyota, and Volkswagen had conspired together with their respective captive banks to fix the terms and conditions of the financing and leasing of new cars. In particular, the captive banks, whose role is to provide financing to customers buying cars, exchanged information on interest rates, car prices, sales volumes, and costs, thereby altering the competitive dynamics in the market of car sales.

This is AGCM's highest cartel fine, representing 4% of the participants' annual turnover in the relevant market, even though its fining guidelines recommend fines of between 15% and 30% of annual revenue for hardcore cartels. The implementation of competition compliance programs enabled the companies to avoid a higher penalty. As whistleblowers, Daimler and Mercedes Benz Financial Services Italia were granted full immunity from sanctions.

Oversight Committee Undertakes "Wide-Ranging" Probe on Drug Prices

Key Point: *Drug industry faces increased scrutiny from legislative branch in broad investigation into pricing practices. This has the potential to be a major investigation, adding more attention to the prescription drug pricing issue, alongside investigations by the Senate, initiatives of the Trump administration, and state and federal antitrust enforcers.*

While the drug industry faces ongoing investigations and lawsuits from both state and federal regulators into generic drug pricing, scrutiny of the industry has recently expanded. In January, Elijah Cummings, Chair of the House Committee on Oversight and Reform, announced what was described as "one of the most wide-ranging investigations in decades into the prescription drug industry's pricing practices." High prescription drug costs have consistently polled as a top voter concern and have been a focus of the Trump administration. They have also spurred multiple investigations into allegations of collusion among certain generic drug manufacturers.

As an initial step in the probe, the Committee sent letters to 12 drug companies seeking information and communications on "price increases, investments in research and development, and corporate strategies to preserve market share and pricing power." The Committee plans to hold several hearings that will include testimony from experts and patients affected by rising drug prices.

Drugs controlled by a limited number of companies seem to be a target of the investigation. The Committee's first hearing, on January 29, focused mainly on the affordability of insulin. Insulin seems to be a high-priority target of the investigation. Ninety-nine percent of the world's insulin supply is controlled by three companies.

The investigation also seems to be focused on (1) rebating and discounting practices provided by insurers and pharmacy benefit managers off of the drug's list price, and (2) grey markets for drugs in limited supply.

Stay tuned for an update on the Committee's work in future editions.

Sports Marketing Firms Settle Antitrust Allegations

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Key Points: *(1) Merger review and the spawning of other DOJ investigations of anticompetitive conduct seem to be increasingly correlated; and (2) in-house counsel must scrutinize joint venture arrangements between horizontal competitors to ensure procompetitive justification.*

The DOJ resolved an investigation into allegations that two sports marketing companies and some smaller rivals agreed to refrain from competing against one another in certain circumstances. On February 14, 2019, DOJ announced that it had filed a complaint in the U.S. District Court for Washington, D.C., alleging that IMG and Learfield, prior to their recently approved merger, "coordinated to limit competition between one another and between themselves and smaller competitors." The companies were accused of agreeing to divvy up colleges and opportunities in sports marketing.

The complaint alleges that the two companies sometimes limited competition by submitting a joint venture proposal to universities, instead of each bidding independently.

In the settlement of the civil complaint, the now-combined entity pledges in a consent decree that it will no longer submit joint bids with remaining competitors in the industry, or agree not to bid on a particular school's media rights. In the press release announcing the settlement, Assistant Attorney General Makan Delrahim noted that "[p]ublic and private universities rely on competition among multimedia rights providers to provide critical resources to athletic programs."

This investigation and settlement represent another example in recent years of DOJ investigating other competitive issues close in time to a merger review. It is a reminder that companies seeking the approval of mergers want to carefully review documents that will be submitted to merger enforcers to identify any surprises that could lead to a broader antitrust investigation and/or that could affect their ability to close the transaction. This settlement also reflects that in-house counsel must carefully scrutinize joint venture arrangements between horizontal competitors, to be sure they are not worded in a way that suggests they are designed to limit competition, and to seek advice from antitrust counsel if there are any questions as to how to best structure the arrangement to withstand any such scrutiny.

Recent Indictments and Guilty Pleas in Promotional Products, Poster Industries Reflect Continued Focus on Collusion in Online Marketplaces

Key Point: *The DOJ remains active in seeking out collusion regardless of how inexpensive the individual products at issue, or the means used to execute the agreement.*

A string of recent indictments and guilty pleas highlights the DOJ's continued focus on prosecuting collusion that takes place in online formats.

On January 17, 2019, Daniel William Aston, a former e-commerce executive of Trod Limited, pleaded guilty for conspiring to fix the prices of posters sold in the United States on Amazon Marketplace. Aston was accused of using a pricing algorithm as a way of enforcing the agreement. Although Aston was indicted in 2015, Aston was a fugitive until 2018, when he was arrested in Spain. Aston was sentenced to a custodial sentence of six months, which included his five months in Spanish custody before he was extradited to the U.S.

On January 24, 2019, Netbrands Media Corporation was indicted for its role in a conspiracy to fix the prices of wristbands, lanyards, temporary tattoos, and buttons sold online in the United States. Netbrands has agreed to pay a criminal fine of over $6 million. Two of Netbrands' top executives, Mashnoon Ahmed and Mueen Akhter, had previously entered guilty pleas for their roles in the conspiracy in early January after being indicted in December 2018. Netbrands, Ahmed,

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and Akhter are cooperating with the investigation into the conspiracy, which allegedly used social media platforms and encrypted messages via Facebook, Skype, and WhatsApp in carrying out their agreements.

Finally, on January 30, 2019, a federal grand jury indicted Taiwan-based G Nova Corporation and its chief executive officer Yeh Fei Chu (AKA Jim Chu) for participating in a conspiracy to fix prices of “Koozies” (sleeves that thermally insulate beverage containers) sold in the United States. These charges are the first that relate to a conspiracy to fix the price of Koozies.

In announcing the guilty pleas, AAG Makan Delrahim noted that the DOJ would continue to prosecute collusion “[w]hether the conspiracy takes place in smoke-filled rooms that are real or virtual.” U.S. Attorney Ryan Patrick similarly commented that “[i]t doesn’t matter if the products are fifty cent Koozies or million dollar pieces of oil field equipment, the U.S. Attorney’s Office is committed to protecting competition in the marketplace and protecting consumers from people who cheat the system.”

Court Suggests Outside Counsel Acted as Arm of Government When Conducting Internal Company Investigation into LIBOR Manipulation

Key Point: *Federal judge suggests that outside counsel may have acted as an arm of the government when conducting internal investigation, rendering interviews inadmissible at criminal trial.*

On December 19, 2018, Southern District of New York Judge Colleen McMahon indicated that federal prosecutors will need to separate their own investigation into a former Deutsche Bank AG trader accused of rigging the London Interbank Offered Rate (LIBOR) from work done by the bank’s outside counsel.

At issue is whether an international law firm was acting as an arm of the federal government when it interviewed former Deutsche Bank trader Gavin Black, who was convicted in October 2018 of conspiring with other bank employees to skew the lending benchmark to benefit his own derivative trades.

In a post-trial motion, Black argued that the U.S. Commodity Future Trading Commission (CFTC) prompted the bank to conduct an internal investigation, oversaw outside counsel’s handling of the internal probe, and induced that firm to interview him. Black also claims that the bank forced him to choose between participating in the interview and being fired. Accordingly, Black argues that any statements he made to the bank’s outside counsel are compelled testimony — which is inadmissible in U.S. criminal proceedings — and the government’s use of his interviews during his criminal trial violated his constitutional rights.

In a December 19 ruling in which the court denied the government’s motion to strike Black’s motion for exceeding the page limits (a motion that the court referred to as “absurd”), Judge McMahon referred to Black’s “outsourced investigation” argument as the “real deal,” and said that it would “likely require the government to offer a great deal of evidence about what it,” not Deutsche Bank or its law firm, “did to investigate this case between 2010 and 2015 . . . .”

Briefing on Black’s motion finished in February, and the motion is currently pending before the court.

European Commission Accuses Eight Banks of Collusion in the European Government Bonds Market

Key Point: *The investigation underlines the EC’s continued scrutiny of financial institutions.*

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On January 31, 2019, the European Commission (EC) sent a Statement of Objections to eight banks informing them of its preliminary view that they had breached EU antitrust rules by conspiring, at different periods between 2007 and 2012, to distort competition when buying and selling euro-denominated sovereign bonds. According to the allegations, traders at the unnamed banks exchanged commercially sensitive information and coordinated their trading strategies using online chat rooms. In a press release, the EC stated that the collusive scheme involved certain traders at individual banks and should not be seen as a general practice in the European government bonds sector.

The banks now have the right to examine the evidence on which the allegations are based, present comments, and request an oral hearing on the case. There is no legal deadline for the EC to complete the investigation, but if the allegations are ultimately confirmed, the EC could impose fines of up to 10% of each bank's annual worldwide turnover.

This is the latest probe in a series of investigations targeting major banks for rigging financial markets. In December 2018, the EC announced a separate investigation accusing Crédit Agricole, Credit Suisse, Deutsche Bank, and another unnamed bank of forming a cartel dealing in secondary trading of U.S.-dollar-denominated supranational, sub-sovereign, and agency bonds. There is also a third ongoing EU investigation into the manipulation of foreign exchanges by eight banks.

DOJ Weighs In on Proper Treatment of No-Poach Agreements in Class Action Lawsuits

Key Point: *The DOJ has sought to influence evolving law on the proper treatment of no-poach agreements through filings in a number of private cases.*

The DOJ recently made appearances in multiple private lawsuits involving alleged no-poach agreements to comment on the proper analysis for examining such agreements. The DOJ has argued for both per se treatment (where the agreement itself violates the antitrust laws) and rule of reason analysis (which balances an agreement's procompetitive and anticompetitive effects), depending on the type of agreements at issue.

Rule of Reason: On March 7, the DOJ filed Statements of Interest in *Stigar v. Dough Dough*, *Richmond v. Bergey Pullman*, and *Harris v. CJ Star*, three related lawsuits that challenge the use of no-poach clauses in the respective franchise agreements for Auntie Anne's, Arby's, and Hardee's. The DOJ emphasized that no-poach agreements between franchisors and franchisees should be analyzed under the rule of reason, absent facts showing the franchisor and franchisee were competing with one another for the same employees and the agreement was not reasonably related to the franchisor-franchisee relationship. The DOJ also focused on the lack of any "rim" between franchisees so as to give rise to a hub-and-spoke conspiracy.

Per Se: On the same day, the DOJ filed a Statement of Interest in *Seaman v. Duke*, a class action involving an alleged no-poach agreement regarding medical school faculty between Duke University and the University of North Carolina. After responding to Duke's arguments regarding the "state action" doctrine, the DOJ criticized Duke's claim that any no-poach agreement between the schools should be subject to rule-of-reason analysis. The DOJ repeatedly emphasized the extent to which no-poach agreements are the same as other market or customer allocation agreements that have long been subject to per se scrutiny and, in some cases, criminal prosecution. The DOJ claimed Duke's arguments regarding the rule of reason "lack[ed] merit" because Duke had failed to identify "any specific collaboration" between it and UNC to which the no-poach agreement would have been ancillary, dismissing Duke's general arguments that the schools routinely collaborated and supported each other.

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The DOJ’s Statement of Interest in *Duke* echoes the DOJ’s earlier statements in its February 8, 2019 Statement of Interest filed in *In re: Railway Industry Employee No-poach Antitrust Litigation*, a class action challenging no-poach agreements between several major rail equipment suppliers. The DOJ, which settled claims against the rail suppliers in April 2018, similarly argued that the agreement at issue there should be analyzed under the per se standard.

While no court has yet ruled on the proper analysis for the above cases, these filings illustrate the DOJ’s attempt to separate agreements that it believes should be subject to per se treatment (and potential criminal prosecution) from others. The filings also represent a growing trend of the DOJ appearing in civil cases to express its position on no-poach agreements and other areas of antitrust law.

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