

# Cartel Watch

## Volume 3, Issue 4

In this issue of *Cartel Watch*, we continue our coverage of notable developments in U.S. and international cartel enforcement and provide our Cartel Fine Tracker for Q3 2015.

## Global Cartel Enforcement

### European Commission Updates Guidance on Conduct of Dawn Raids<sup>1</sup>

On September 16, 2015, the European Commission published a revised version of its [explanatory note](#) on the conduct of surprise inspections—also known as “dawn raids”—for breach of EU antitrust rules.<sup>2</sup> The Commission’s explanatory note provides brief guidance on the Commission’s powers of inspection and the conduct of inspections, with particular emphasis on practical issues such as waiting for outside counsel, treatment of on-site oral explanations, IT searches, treatment of privileged material, and protection of personal data. The revised guidance clarifies a small number of points relating to the scope of IT searches, continuation of incomplete searches, procedures for listing data and providing copies to undertakings, and the application of EU data protection rules.

In particular, the revised guidance provides clarification on the following matters:

- Searches of the IT environment can also include searches of servers, external hard disks, back-up tapes cloud services, and private devices and media used for professional reasons (*i.e.*, BYOD – bring your own device) found on the premises. These devices and media were not explicitly listed in the previous guidance.
- There is a further option for the continuation of searches where the process of selecting documents has not been completed at the end of the inspection. The previous guidance provided that a copy of data yet to be searched would be placed in a sealed envelope, and the search could be continued at the Commission’s premises in the presence of representatives of the undertaking. The revised guidance clarifies that the Commission may instead request the undertaking to retain the sealed envelope in a safe place to allow the Commission to continue the search at the undertaking’s premises.
- Files comprising multiple items (*e.g.*, an email and attachments) may be listed as a single item during the on-site collection, but each item subsequently may be listed separately within the Commission’s files.

- Copies of the final data selected by inspectors will be provided to undertakings on a data carrier such as a DVD, and the undertaking will be requested to sign the printed list of data items. Inspectors will take two identical copies of the data selected.
- The Commission clarifies the application of EU data protection rules, noting that while personal data of individuals is not the target of the inspection (as EU antitrust rules apply only to undertakings), personal data contained in business documents may be copied and become part of the Commission's file to be used for purposes of applying the EU antitrust rules.

Overall, there are relatively few changes to the explanatory note, as the revised guidance aims to clarify the Commission's current practice with respect to a small number of matters that have arisen since date of the last revision in 2013. The most significant changes appears to be updating the scope of IT searches to reflect the current IT environment, and permitting data to remain sealed at the undertaking's premises (rather than going off-site) until the search can be completed at a later date. Companies under investigation have an obligation to cooperate fully and actively, including by providing a general explanation of the IT environment as well as providing more specific cooperation such as blocking email accounts, disconnecting computers, removing and re-installing hard drives, and providing administer access rights support.

### **DOJ, FTC, and KFTC Sign Antitrust Memorandum of Understanding**

The U.S. antitrust agencies entered into a [memorandum of understanding](#) (MOU) with the Korea Fair Trade Commission (KFTC) on September 8, 2015. The DOJ and FTC described the MOU as reflecting both the working relationship already enjoyed with the KFTC and the agencies' interest in continuing their cooperative efforts both in exchanging views on policy as well as cooperating in investigations. Specifically, the MOU acknowledges the intention to continue coordinating when pursuing enforcement actions, describes the framework for communications, and articulates the importance of

protecting the confidentiality of information provided and honoring prohibitions on sharing information when not permitted by law. The DOJ and FTC also have cooperation arrangements with Japan (1999) and China (2011).

### **DOJ Says It Will Continue to Pursue Foreign Cartels**

Following the Supreme Court's decision to decline review of two circuit court decisions addressing the reach of the Foreign Trade Antitrust Improvements Act (FTAIA), DOJ criminal antitrust chief Brent Snyder said the agency has no reason to change its approach to targeting cartels involving components made and price-fixed abroad, but sold to U.S. customers. As covered in the last issue of Cartel Watch, the Supreme Court declined to hear appeals from the Seventh Circuit's decision in *Motorola Mobility LLC v. AU Optronics et al*, No. 14-8003 and the Ninth Circuit's decision in *United States v. AU Optronics Corporation of America*, No. 14-1121, leaving the two circuit court decisions as the final word on the reach of U.S. antitrust law in criminal and civil disputes arising from the liquid crystal display panel cartel. While the DOJ considers the FTAIA from the start of any investigation involving foreign-manufactured products, Snyder said it has rarely presented an issue for the agency. The majority of the DOJ's investigations involve at least some direct imports – not just components of finished products – so the agency, according to Snyder, can demonstrate the requisite proximate causal nexus. Snyder said there is “no reason to think that [the DOJ is] going to take any different approach to investigations in the future as a result of the opinions.”

### **U.S. Criminal Enforcement**

#### **First Guilty Plea and Criminal Fine in DOJ Capacitors Investigation**

On September 2, 2015, the DOJ announced the first guilty plea in its investigation of price-fixing and bid-rigging for electrolytic capacitors sold to customers in the United States and abroad. NEC Tokin Corporation will plead guilty to a one-count felony charge and pay a \$13.8 million criminal fine for its role in the

conspiracy, which the charging document describes as beginning in September 1997 and continuing to January 2014. The charges refer to conspiratorial meetings and communications in China, Germany, Japan, Singapore, Taiwan, and the United States. Electrolytic capacitors are used in, among other things, DVD players, car engines, airbag systems, and computers. The DOJ described its criminal investigation as ongoing. A multi-district class action litigation alleging price-fixing in the capacitors market is ongoing in the U.S. District Court for the Northern District of California.

### **KYB Corp Will Plead Guilty and Pay \$62M Criminal Fine for Price-Fixing Shock Absorbers**

On September 16, 2015, the DOJ announced that Kayaba Industry Co. (KYB Corporation) agreed to plead guilty and to pay a \$62 million criminal fine in connection with its role in a conspiracy to fix the price of shock absorbers installed in cars and motorcycles sold to U.S. consumers. According to the DOJ, KYB and two co-conspirators agreed to allocate the supply among and set the prices to targeted vehicle manufacturer customers Fuji Heavy Industries Ltd, Honda Motor Co. Ltd, Kawasaki Heavy Industries Ltd., Nissan Motor Company Ltd., Suzuki Motor Corporation, and Toyota Motor Company, including their U.S. subsidiaries, for a period lasting from the mid-1990s until 2012. This is the 37th company charged in the DOJ's auto parts investigation and brings total criminal fines to \$2.6 billion.

### **DOJ Issues New Policies Focused on Individuals Involved in Corporate Wrongdoing**

As covered in greater detail in [Weil's White Collar Defense & Investigations Alert](#) dated September 15, 2015, U.S. Deputy Attorney General Sally Quillan Yates issued a memorandum in early September outlining the DOJ's new policies designed to provide prosecutors with greater leverage in pursuing individuals involved in corporate misconduct. The new rules require that companies "disclose all relevant facts about the individuals involved in corporate misconduct" if they seek cooperation credit, and companies risk receiving no credit at all if prosecutors believe a company declined to learn relevant facts or failed to provide complete disclosures. The rules apply

regardless of the individual employees' "position, status, or seniority." Notably, Yates' memorandum states that "absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy," DOJ lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual employees. This exception preserves the Antitrust Division's policy and reflects the Department's faith in the leniency program. Indeed, on September 29, 2015, Brent Snyder, the DOJ's deputy assistance attorney general for criminal antitrust enforcement, was reported as confirming that the new policy will not lead to changes in antitrust enforcement.

## **U.S. Civil Litigation Developments**

### **Ninth Circuit Ruled Plaintiffs May Access Possible Grand Jury Evidence**

In a September 10, 2015 decision, the Ninth Circuit ruled that transcripts and secret recordings of calls made by an informant under the direction of the Federal Bureau of Investigation during an antitrust investigation must be turned over to private plaintiffs in the follow-on civil case. One of the individuals on the recordings – an employee of a target of the investigation – objected to their release saying that disclosure violated grand jury secrecy rules. The Ninth Circuit rejected his arguments and, splitting with other circuit courts, declined to follow the "effects test" to determine whether the recordings are "matters that occurred before the grand jury," and thus protected from disclosure under the Federal Rule of Civil Procedure 6(e). The "effects test" requires an item-by-item assessment of whether disclosure of a particular document will reveal some aspect of the inner workings of the grand jury. The Ninth Circuit instead focused on the "pre-existing" nature of the recordings, which had been made before the grand jury issued a subpoena and possibly before a grand jury was even empaneled. "The mere fact that the ... recordings were created as part of a criminal investigation using a cooperating witness acting under the FBI's supervision does not automatically trigger Rule 6(e) protection," the Ninth Circuit ruled. The case may encourage parties to seek disclosure of

investigatory material typically regarded as protected from disclosure in civil cases, provided that material could have pre-existed a grand jury investigation and does not definitely betray the substance of grand jury activity.

*In re: Optical Disk Drive Antitrust Litig.*, No. 14-17502, 2015 WL 5255105 (9th Cir. 2015).

### **Third Circuit Affirmed Dismissal of Chocolate Price-Fixing Class Action Dependent on Evidence of Canadian Conspiracy**

Affirming a 2014 district court decision dismissing an antitrust class action against Hershey, Nestle, and Mars, the Third Circuit ruled on September 14, 2015 that evidence of a conspiracy outside the U.S. does not – without more – tend to prove a domestic conspiracy. In 2008, U.S. direct and individual purchasers filed a class action against the U.S. units of chocolate companies Hershey Company, Nestle, Mars, and Cadbury after news of a Canadian investigation became public. The plaintiffs alleged that the defendants conspired to raise prices on chocolate candy products in the United States three times between 2002 and 2007.

The Third Circuit ruled that the plaintiffs' claims could not be supported because the people involved in the Canadian conspiracy are different from those alleged in the U.S. conspiracy, the only evidence the chocolate manufacturers in the U.S. knew of the conduct alleged in the Canadian conspiracy related to Hershey only, and other traditional conspiracy evidence (in this case, three parallel price increases) was insufficient to create a reasonable inference of conspiracy because it was also consistent with lawful conduct. "A conspiracy elsewhere, without more, generally does not tend to prove a domestic conspiracy, especially when the conduct observed domestically is just as consistent with lawful interdependence as with an antitrust conspiracy." To successfully rely on evidence of a conspiracy outside the United States, the Third Circuit noted that the plaintiffs would have needed to "show that the unlawful Canadian *conduct* actuated, facilitated, or informed the U.S. *conduct*." Even after what the Court called "exhaustive" discovery, the plaintiffs

were unable to articulate how the alleged conspiracy in the U.S. worked. Though a win for the defendants here where the plaintiffs could not articulate a link between the Canadian conduct and the alleged U.S. conspiracy, the Court did caution that where two markets are sufficiently similar or adjacent, and the relevant activities are sufficiently linked, evidence of a foreign conspiracy may reasonably support an inference of a domestic conspiracy.

Notably, days before the Third Circuit issued its opinion, Canadian prosecutors dropped a case against Mars.

*In re: Chocolate Confectionary Antitrust Litig.*, No. 14-2790, 2015 WL 5332604 (3d Cir. 2015).

### **Claims That DHL Participated in Freight Forwarding Conspiracy after Making Leniency Application Dismissed**

In 2008, plaintiffs filed suit claiming injury from multiple alleged conspiracies to fix prices of certain charges for certain routes in the international commercial freight forwarding industry and alleging a class period ending in January 2011. Despite the fact that multiple companies entered plea agreements referring to conduct continuing until only October 2007, plaintiffs claimed that the conspiracies were ongoing and open-ended in nature. Earlier this year, DHL moved to dismiss the suit on the grounds that plaintiffs did not allege specific conspiratorial conduct occurring after 2007, nor was participation in a conspiracy plausible after the company applied for leniency in the EU and U.S. and press reports broke news of an international investigation. Judge Gleeson of the U.S. District Court for the Eastern District of New York found that plaintiffs' allegation that DHL continued to actively participate in the conspiracy after turning itself in to regulators was implausible (and in fact, the allegations tended to support DHL's withdrawal from the conspiracy), and further, plaintiffs failed to offer any non-conclusory evidence of conspiratorial conduct after that time. The court dismissed all claims as they relate to any acts after DHL applied for leniency on October 10, 2007.

*Precision Assocs., Inc. v. Panalpina World*

*Transport (Holding) Ltd.*, No. 08-CV-00042,  
2015 WL 4987751 (E.D.N.Y. Aug. 19, 2015).

### Jury Trial in Air Cargo Case Set for January 2016

A jury trial against Polar Air Cargo and its parent Atlas Air Worldwide Holdings is set to begin in late January in the first of what may be several trials from *In re: Air Cargo Shipping Services Antitrust Litigation*. The date was set following the district court’s denial of all remaining defendants’ summary judgment motions. The court’s decision was read into the record without a written opinion after a three-hour hearing. “It’s pretty clear that there are facts with respect to all four of the remaining defendants from which a rational juror could conclude participation in a worldwide conspiracy.” Among other things, Judge Gleeson rejected Polar’s argument that the filed-rate doctrine – which treats state-approved rates as unassailable in the antitrust context – extends to rates approved by foreign regulators. A plaintiff class was certified earlier this year and includes all persons or entities who purchased air-cargo shipping services to or from the U.S. directly from any defendant between January 1, 2000 and September 30, 2006. Polar is one of 21 airlines that pled guilty to price-fixing charges and paid fines in the U.S. and Korea. With just four defendants continuing to litigate the claims that were first filed in 2006, the case illustrates that after an unsuccessful motion to dismiss stage and grant of class certification, defendants in follow-on civil antitrust cases routinely settle claims long before trial.

*In re: Air Cargo Shipping Servs. Antitrust Litig.*,  
No. 06-MD-1175 (E.D.N.Y. Aug. 31, 2015).

### Five More Banks Settled Claims in FOREX Case

On August 13, 2015, Barclays, Goldman Sachs, RBS, HSBC, and BNP Paribas reached settlements with plaintiffs in the Foreign Exchange Benchmark Rates Antitrust Litigation. The class action settlements require court approval. With these agreements, the total settlements amount to more than \$2 billion and are a reminder of the large potential class action exposure associated with treble damages and joint and several liability with no right of contribution. Of the originally-named defendants, Morgan Stanley, Credit Suisse AG, and Deutsche Bank AG continue to

litigate, but the case has grown since plaintiffs added Tokyo-Mitsubishi, RBC Capital Markets LLC, Societe Generale SA, and Standard Chartered PLC in July.

### Cartel Fine Tracker - Q3 2015 (July-September)

Jurisdiction	Fines Imposed
U.S. Department of Justice	\$141.1 million
JFTC	¥--
European Commission	€49 million

1. Contributed by Neil Rigby, Associate in Weil’s London Antitrust/Competition group.
2. See *Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003*, available at [http://ec.europa.eu/competition/antitrust/legislation/explanatory\\_note.pdf](http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf).

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If you have questions concerning the contents of this issue of *Cartel Watch*, or would like more information about Weil's Antitrust/Competition practice, please speak to your regular contact at Weil, to the editorial board, or to the contributing authors:

**Editorial Board:**

Steven Reiss (NY)	<a href="#">Bio Page</a>	<a href="mailto:steven.reiss@weil.com">steven.reiss@weil.com</a>	+1 212 310 8174
Adam Hemlock (NY)	<a href="#">Bio Page</a>	<a href="mailto:adam.hemlock@weil.com">adam.hemlock@weil.com</a>	+1 212 310 8281
Eric Hochstadt (NY)	<a href="#">Bio Page</a>	<a href="mailto:eric.hochstadt@weil.com">eric.hochstadt@weil.com</a>	+1 212 310 8538

**Author:**

Meaghan Thomas-Kennedy (SV)	<a href="#">Bio Page</a>	<a href="mailto:meaghan.thomas-kennedy@weil.com">meaghan.thomas-kennedy@weil.com</a>	+1 650 802 3275
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