



# Red Notice

A Monthly Update on Global Investigations and Prosecutions

MARCH 2011

## INTRODUCTION

Thanks for joining us for the March issue of *Red Notice*, a publication of Akin Gump Strauss Hauer & Feld LLP. We discuss below an interesting FCPA case developing in Los Angeles that may provide clarity to what the term "foreign official" means under the Act. In other antibribery news, Kraft and Philips are reportedly subjects of separate FCPA investigations. In competition news, Google continues to be the subject of antitrust investigations in Europe. Also in the spotlight in Europe, the U.K.'s Office of Fair Trading recently made its first fast-track reference to the Competition Commission.

## ANTI-CORRUPTION DEVELOPMENTS

### FCPA May Address the Scope of "Foreign Official"

Defendants in a case out of the Central District of California are challenging the Department of Justice's ("DOJ's") broad interpretation of "foreign official" under the Foreign Corrupt Practices Act ("FCPA"); they are trying to show that employees of state-owned companies are beyond the scope of "foreign officials." Federal courts have never squarely addressed the issue but defense attorneys have tried to ensure that it will be decided in here by paring the case down to a single legal question: are state-owned companies instrumentalities of foreign governments? Find the [story](#) in *The Wall Street Journal* and stay tuned.

### SEC Investigates Kraft for Potential Anti-Bribery Violations

Kraft foods is reportedly being investigated by the Securities and Exchange Commission ("SEC") for potential violations of foreign bribery law. The investigation apparently focuses on dealings with Indian officials related to a facility in India that Kraft acquired in its recent deal with Cadbury PLC. Get the [scoop](#) from *The Wall Street Journal*.

### Philips Investigating Bribery by Ex-Employees

Dutch company Philips Electronics is reportedly investigating potential violations of the FCPA by former employees. The Philips inquiry follows indictments by Polish authorities against three ex-Philips employees and numerous others related to the sale of medical equipment to hospitals in Poland. Phillips has reported its investigation to the SEC and DOJ. Read the [article](#) in *Reuters*.

## ANTITRUST ENFORCEMENT DEVELOPMENTS

### U.S. Appellate Court Upholds Dismissal of Price-Fixing Lawsuits Against OPEC-Affiliated Companies

The U.S. Court of Appeals for the Fifth Circuit upheld a lower court decision dismissing



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The U.S. Court of Appeals for the Fifth Circuit upheld a lower court decision dismissing class-action lawsuits by U.S. gasoline retailers against companies owned by OPEC member nations and a privately owned Russian oil company (Lukoil) for allegedly conspiring to fix oil prices in the U.S. The appellate court dismissed the lawsuits based on the political question doctrine, finding that the cases involved issues of foreign and defense policy that should be resolved by the executive or legislative branch. The court alternatively held that the lawsuits were barred by the act of state doctrine, which prohibits judicial review of acts of a foreign government such as how it exploits its natural resources. Attempts at passing legislation to allow the DOJ to sue OPEC for petroleum price-fixing have not been successful. Find the [story](#) in *Business Spectator*. (Akin Gump represented the Lukoil defendants.)

### **Google Faces Another Antitrust Case From France's 1PlusV**

French search engine company 1PlusV is suing Google for allegedly preventing companies that use vertical search engine technologies from using Google's AdSense for targeted advertising. This recent suit is just one more in a series of antitrust matters involving Google in Europe. The E.U. is also currently investigating Google regarding competitive search engine listings in Google search results. Read [more](#) about these cases from *Bloomberg*.

### **OFT Tests its Fast-Track Procedure in Travel Agency Joint Venture**

The Office of Fair Trading ("OFT") made its first fast-track reference to the Competition Commission ("CC") in the case of a travel business joint venture that includes two of the three largest travel agents on the UK high street. The fast-track reference provides for a streamlined Phase 1 of the merger process in cases where mergers clearly meet the test for reference to the CC or involve complex issues. Read the [press release](#) from the OFT.

### **E.U. Scrutinizing Code-Sharing Among Airlines**

E.U. regulators are reportedly investigating whether a code-sharing agreement between Deutsche Lufthansa and Turkish Airlines and another between TAP Portugal and Brussels Airlines run afoul of E.U. competition laws. The code-sharing agreements in question are deals between the airlines to sell each others' tickets on certain routes that both airlines fly. The European Commission believes that code-sharing agreements on routes traveled by both airlines may distort competition and lead to higher prices. Read the [story](#) from *Financial Times*.

### **Asia Set to Get Tough on Bribery and Anti-Competitive Practices**

Analysts predict that regulators in Asia will continue to toughen their stance against anti-competitive practices and corruption. The recent Temasek case out of Indonesia in which Temasek paid a 15 billion rupia (\$1.7 million) fine for breaching competition laws in Indonesia's telecom sector serves as an example of Asian authorities' declining tolerance for anticompetitive practices and desire to step up enforcement. Find the [story](#) on *channelnewsasia*.

## **RECENT SETTLEMENTS**

### **M.W. Kellog Ltd. Settles Bribery Case for £7 million**

The U.K. High Court recently approved a £7 million agreement between the Serious Fraud Office ("SFO") and M.W. Kellog Ltd. to settle charges related to a bribery and corruption scheme orchestrated by M.W. Kellog Ltd.'s parent company. M.W. Kellog Ltd. initially brought its concerns to the SFO under the SFO's newly implemented self-referral scheme and fully cooperated with the investigation. In return for self-reporting, and because M.W. Kellog Ltd. was not a willing participant in the corruption, the SFO agreed to limit the penalty to the value of the profits M.W. Kellog Ltd. gained from the unlawful conduct. This

settlement, resulting from one of the SFO's first self-referral cases, demonstrates that companies will benefit from taking advantage of the SFO's self-referral program and cooperating with the SFO. Read the SFO [press release](#).

### **Texas Hospital Barred from Entering Anticompetitive Contracts with Health Insurers Under DOJ Settlement**

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## INSURERS UNDER DOJ SETTLEMENT

In its first case since 1999 against a monopolist based on traditional anticompetitive unilateral conduct, the DOJ recently reached a settlement with United Regional Health System of Texas ("United Regional") prohibiting United Regional from entering contracts with health insurers that improperly constrain the insurers from contracting with United Regional's competitors. The case presents important insight into DOJ's stance on what constitutes anticompetitive foreclosure in general and especially in the health care arena. Read the DOJ [press release](#).

## AKIN GUMP PUBLICATIONS AND SPEAKING ENGAGEMENTS

### Court Approves First Profit Disgorgement Remedy in Federal Antitrust Case

On February 2, 2011, U.S. District Judge William H. Pauley III approved a settlement entered into last year between the DOJ and KeySpan Corporation, whereby KeySpan agreed to disgorge \$12 million in profits in response to DOJ claims that KeySpan violated the antitrust laws by entering into an agreement restraining competition in the New York City electricity market. The court's approval of the settlement is significant in that it is the first time that a court has sanctioned DOJ's requirement of disgorgement of profits as a remedy for a federal antitrust violation. The district court decision now strengthens the case for future DOJ use of disgorgement as a viable antitrust remedy. Read the full [client alert](#) from Akin Gump.

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