

Cartel Watch

Volume 2, Issue 5

In the final *Cartel Watch* of 2014 we report on new developments in cartel enforcement and follow-on private actions in the US and abroad.

US Civil Litigation Developments

Seventh Circuit Again Dismisses LCD Claims on FTAIA Grounds

The US Court of Appeals for the Seventh Circuit has again ruled, on November 26, 2014, that certain of Motorola's price-fixing claims against LCD panel manufacturers are barred by the Foreign Trade Antitrust Improvements Act (FTAIA). Due to a procedural irregularity, the court vacated its original March 27, 2014 ruling in this matter (see our report in [Cartel Watch Vol. 2, Issue 2](#)), and allowed further briefing and argument. Nonetheless, the three-judge panel's opinion remained largely unchanged. In an opinion authored by the influential Judge Posner, the court held that 99% of the LCD purchases claimed by Motorola were excluded from the reach of the US antitrust laws because the initial purchase was made abroad by Motorola's foreign subsidiaries. The court found the FTAIA to bar these claims even in circumstances where the US Motorola entity later purchased products from its subsidiaries that contained the allegedly price-fixed LCD panels, and where the US Motorola entity claimed to have dictated the terms of the original purchase made by its subsidiaries. The court found that the alleged conduct may have satisfied the FTAIA's requirement of a "direct, substantial and reasonably foreseeable" effect on US commerce, but that any such US effect did not "give rise to" Motorola's claims at issue. Rather, where Motorola's foreign subsidiaries made the initial purchase, the court found that the claim arose in the foreign jurisdiction where the subsidiary operated and, under principles of comity, should be subject to that jurisdiction's law. Notably, several foreign governmental agencies – including from Japan, Korea, Taiwan, and Belgium – submitted amicus curiae briefs in support of limiting the extraterritorial reach of US antitrust law.

Class Certification Denied in Optical Disk Drive Litigation

On October 3, 2014, Judge Richard Seeborg of the US District Court for the Northern District of California denied certification both to proposed direct purchaser and indirect purchaser classes in *In re Optical Disk Drive Antitrust Litigation*. Conducting a "rigorous analysis" under the Supreme Court's decision in *Comcast v. Behrend*, the court found that the plaintiffs' experts failed to demonstrate class-wide antitrust injury could be shown under a methodology of common proof. Although the experts calculated overcharges in the aggregate, the court found the econometric models insufficient

because they did not attempt to show that all or nearly all purchasers were actually overcharged or suffered damages, but rather assumed this. As a separate reason for denying certification, the court also found that the representative direct purchaser plaintiffs were unable to satisfy the “typicality” and “adequacy” requirements for class certification because the named plaintiffs were small purchasers that bought only at list price, whereas the proposed class contained large, powerful purchasers that negotiated purchase prices.

US Criminal Enforcement

More Auto Parts Guilty Pleas and Indictments

In the ongoing auto parts cartel investigations, the DOJ announced multiple new indictments or guilty pleas affecting both corporations and individual executives. As of December 1, 2014, there have been 32 companies that pleaded guilty or agreed to plead guilty, and they have agreed to pay a total of more than \$2.4 billion in fines. Additionally, 48 individuals have been charged in the ongoing investigation into price fixing and bid rigging in the auto parts industry; 28 of those individuals have agreed to or been sentenced to serve time in prison.

Brake Hoses

On October 31, 2014, Hitachi Metals, Ltd. (“Hitachi”) of Japan agreed to plead guilty and pay a \$1.25 million criminal fine for its role in a conspiracy to fix the prices of automotive brake hoses. Automotive brake hoses are flexible hoses that carry brake fluid through the hydraulic brake system of automobiles. Hitachi and its unnamed co-conspirators allegedly held meetings where they agreed on bids and prices to be submitted to Toyota and certain of its subsidiaries in the United States and elsewhere. Its participation in the conspiracy allegedly lasted from November 2005 until at least September 2009. Hitachi is the first company to agree to plead guilty for price-fixing automotive brake hoses.

Variable Valve Timing Devices

On November 13, 2014, Aisin Seiki Co., Ltd. (“Aisin”) of Japan agreed to plead guilty and pay a \$35.8 million criminal fine for its role in a conspiracy to fix

the prices of variable valve timing (“VVT”) devices. Aisin will plead guilty to participating in a conspiracy to rig bids for, and to fix, stabilize and maintain the prices of VVT devices sold to General Motors, Nissan, Volvo, and BMW AG in the United States and elsewhere. Aisin’s involvement in the conspiracy allegedly lasted from September 2000 until at least February 2010.

Bearings

On November 14, 2014, a federal grand jury in Kentucky indicted two executives from two Japanese auto parts companies for their roles in a conspiracy to fix the prices of bearings sold to Toyota in the United States and in Japan. One executive was from NSK, Ltd. (“NSK”) and is alleged to have participated in the conspiracy while serving as a sales manager and later a sales general manager in NSK’s Mid-Japan Toyota Branch from 2006-2011. The other executive was from Jtekt Corp. (Jtekt”) and is alleged to have participated in the conspiracy from as early as 2001 through July 2011, including while serving as a manager and later Vice Branch Manager in Jtekt’s Toyota Branch office from 1999-2009. The indictment alleges that the two executives and unnamed co-conspirators participated in meetings where they agreed on bids and price quotations to submit to Toyota, and directed subordinate employees to engage in competitor contacts.

Previously, NSK pled guilty on October 28, 2013 and was fined \$68.2 million for its role in a conspiracy to bid-rig and fix, stabilize and maintain the prices of bearings sold to Toyota in the United States and elsewhere. Jtekt pled guilty on December 3, 2013 and agreed to pay a \$103.27 million criminal fine for its role in a conspiracy to fix the prices of bearings sold to Toyota and electric powered steering assemblies sold to Nissan, in the United States and elsewhere.

Instrument Panel Clusters

On November 24, 2014, Continental Automotive Electronics LLC and Continental Automotive Korea Ltd. (collectively, “Continental”) both agreed to plead guilty and to pay a single criminal fine of \$4 million for their roles in a conspiracy to rig bids of instrument panel clusters sold to Hyundai Motor Co., Kia Motors Corp. and Kia Motors Manufacturing Georgia in the United States and elsewhere. Both Continental

entities are based in South Korea. The charge alleged that Continental conspired to rig bids for instrument panel clusters. DOJ stated that the charged companies' involvement in the conspiracy began as early as March 2004 and continued until May 2012. Four individual Continental executives were carved-out from the plea agreement, and could be subject to individual prosecution in the future.

Radiators

On December 1, 2014, DOJ announced that a Japanese general manager at T.RAD agreed to plead guilty for engaging in a conspiracy to bid-rig and fix the prices of radiators sold to Honda Motor Co. Ltd. and certain of its subsidiaries in the US. The executive agreed to serve one year and one day in prison, and will pay a \$20,000 fine for his role. The T.RAD executive allegedly participated in the conspiracy from as early as November 2002 until at least February 2010.

Previously, T.RAD pled guilty on November 12, 2013 and was fined \$13.75 million for its role in a conspiracy to bid-rig and fix, stabilize and maintain the prices of radiators sold to Toyota and Honda and automatic transmission fluid ("ATF") warmers sold to Toyota in the United States and elsewhere.

Windshield Wiper Systems & Starter Motors

On December 1, 2014, DOJ also announced that a Japanese former general manager of Mitsuba, also agreed to plead guilty for his role in a conspiracy to bid-rig and fix the prices of windshield wiper systems and starter motors sold to Honda Motor Co. Ltd. and certain of its subsidiaries in the US and elsewhere. The executive agreed to serve 13 months in prison and pay a \$20,000 criminal fine. The Mitsuba executive allegedly participated in the conspiracy from June 2005 until December 2009.

Previously, Mitsuba pled guilty on November 6, 2013 and agreed to pay a \$135 million criminal fine for its role in a conspiracy to fix the prices of windshield wiper systems, windshield washer systems, starter motors, power window motors and fan motors to Honda, FHI, Nissan, Toyota and Chrysler, in the United States and elsewhere. Mitsuba also pled guilty to one count of obstruction of justice based on allegations that an executive ordered the destruction of documents.

International Developments

EU Issues Directive to Increase Private Damages Actions

On November 26, 2014, the European Parliament and the Council of the European Union adopted a directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU. The Directive sets out several procedural and substantive requirements that will make private antitrust enforcement actions more accessible and standardized in all EU Member States. Among many other detailed provisions, the Directive mandates that both direct and indirect purchases shall have claims, but a passing-on defense shall exist; that victims shall be fully compensated with actual damages plus interest (but not multiple damages or punitive damages); that a certain degree of document disclosure occur (i.e., discovery); and that cartel members must be held jointly and severally liable, with certain exceptions for immunity recipients. The Directive does not apply retroactively and EU Member States have until December 27, 2016 to bring their national laws into compliance with the new requirements.

Swiss Franc Derivatives Cartel Charges Settled by EC

On October 21, 2014, the European Commission announced settlements in two investigations involving alleged cartel activity related to Swiss franc-denominated derivatives. Both investigations were triggered by a leniency application to the EC filed by RBS, which received immunity from fines as a result of revealing the cartels.

The EC found that four international banks – RBS, UBS, JP Morgan and Crédit Suisse – operated a cartel on bid-ask spreads of Swiss franc interest rate derivatives in the European Economic Area ("EEA"). The "bid-ask spread" is the difference between the price at which a market maker is willing to sell and to buy a given product. The EC found that between May and September 2007, the four banks agreed to quote to all third parties wider, fixed bid-ask spreads on certain categories of short term over-the-counter

Swiss franc interest rate derivatives, while maintaining narrower spreads for trades amongst themselves. The EC imposed fines worth a total of more than €32 million (approx. \$40 million) on UBS, JP Morgan and Crédit Suisse.

Separately, the EC found that RBS and JP Morgan participated in an illegal bilateral cartel aimed at influencing the Swiss franc Libor benchmark interest rate between March 2008 and July 2009. The EC found that the two banks tried to distort the normal course of the pricing of interest rate derivatives denominated in Swiss francs in the EEA, by discussing the future Swiss Franc Libor rate submissions of one of the banks and exchanging information concerning trading positions and intended prices. JPMorgan was fined more than €61.6 million (approx. \$75.8 million).

As reported previously in [Cartel Watch](#), in December 2013, the EC fined eight financial institutions a total of €1.71 billion (approx. \$2.1 billion) for conspiring to manipulate interest rate derivatives denominated in Euros and Japanese Yen.

Cartel Fine Tracker - Q4 2014

The US DOJ concluded its fiscal year 2014 (October 1, 2013 – September 30, 2014) with over \$861 million in antitrust fines. Although this reflects a decrease from the \$ 1.02 billion in fines obtained in FY2013, this FY2014 figure does not include over \$400 million in additional fines in the LIBOR investigation related to non-antitrust fraud crimes. Meanwhile, European has continued to outstrip the US, with the European Commission imposing fines of nearly €1.7 billion in calendar 2014 to date, keeping close to the total fines imposed in both of the prior calendar years. In Japan, the JFTC began its fiscal year 2014 (April 1, 2014 – March 31, 2015) with a substantial ¥13.3 billion fine on corrugated cardboard manufacturers, but has since been relatively quiet.

| Jurisdiction | Fines in 2013 | Fines in 2014 | Notable Fines by Investigation in 2014 |
|----------------------------------|---------------------------------------|---------------------------------------|--|
| United States¹ | USD 1.02 Billion | USD 861 Million | <ul style="list-style-type: none"> ■ USD 120 Million – Auto Parts (Anti-Vibration Rubber and Drive Shafts) – Nov. 26, 2013 ■ USD 425 Million – Auto Parts (Anti-Vibration Rubber) – Feb. 13, 2014 ■ USD 67.7 Million – Auto Shipping – Sept. 26, 2014 |
| EU² | EUR 1.88 Billion (USD 2.3 Billion) | EUR 1.69 Billion (USD 2.1 Billion) | <ul style="list-style-type: none"> ■ EUR 953 Million – Bearings – Mar.19, 2014 ■ EUR 302 Million – High Voltage Power Cables – Apr. 2, 2014 ■ EUR 138 Million – Smart Card Chips – Sept. 3, 2014 |
| JFTC³ | JPY 28.9 Billion (USD 243 Million) | JPY 14.6 Billion (USD 123 Million) | <ul style="list-style-type: none"> ■ JPY 13.29 Billion – Corrugated Cardboard – June 19, 2014 |

1. For US DOJ, using fiscal year of October 1 through September 30 with complete FY2103 and FY2014.

2. For European Commission, using calendar years with 2014 to date through December 11, 2014.

3. For Japan Fair Trade Commission, using fiscal year of April 1 through March 31 with complete FY2013 and FY2014 to date through December 11, 2014.

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