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Cartel Watch

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In this issue of ***Cartel Watch***, we continue our U.S. and international coverage of the latest developments in cartel enforcement and follow-on civil antitrust class action lawsuits.

U.S. Criminal

Department of Justice Emphasizes Importance of Compliance Culture

Deputy Assistant Attorney General Brent Snyder discussed effective compliance programs at a workshop organized by the International Chamber of Commerce and the United States Council of International Business on September 9, 2014.[1] Snyder began by noting that compliance is important because the risks of detection and punishment for antitrust violations is currently extremely high, as more and more countries have aggressive cartel enforcement programs. Therefore, even if a compliance program is not perfect in preventing antitrust violations, it may still benefit the company by leading to the detection of cartel activity, which increases a company's chances of obtaining leniency from the DOJ.

Snyder next addressed the factors that make a compliance program effective and noted that there is no "one size fits all" program. Snyder emphasized that senior executives must actively support and cultivate a culture of compliance and make clear to employees that compliance is important and mandatory. Additionally, companies should ensure that all employees, including subsidiaries, distributors, agents, and contractors, are committed to compliance and participate in these efforts, particularly those with sales and pricing responsibilities. Companies must also be willing to discipline employees who commit antitrust crimes or do not take reasonable steps to stop such criminal conduct. Snyder expressed suspicion about a company's retention of culpable employees in positions in which they can repeat their conduct and noted that such action may indicate the ineffectiveness of a compliance program.

According to Snyder, the existence of a compliance program in companies other than leniency applicants almost never allows a company to avoid criminal fines because a truly effective compliance program would have prevented the crime in the first place, or would have resulted in early detection and a leniency application. However, having a compliance program is still advantageous because it allows companies to avoid additional oversight by the DOJ and courts after sentencing, and the DOJ is currently considering how to credit companies that proactively adopt and strengthen compliance programs after being subject to investigation.

Department of Justice Antitrust Head Bill Baer Discusses Leniency

In a speech at Georgetown Law's Global Antitrust Enforcement Symposium on September 10, 2014, Assistant Attorney General Bill Baer emphasized the importance of the DOJ's leniency policy as an investigatory tool.[2] According to Baer, the policy calls for complete and continuing cooperation throughout the investigation, and requires that applicants, both corporations and individuals, act speedily and invest time and resources into conducting a thorough internal investigation, providing detailed proffers to DOJ, producing foreign documents, and making witnesses available for interviews. Baer also clarified that individual leniency applicants cannot pick and choose their areas of cooperation, and must be truthful and forthcoming about the full scope of their wrongdoing, rather than select certain conduct, products, or markets to discuss with the DOJ.

Baer also addressed cooperation efforts by co-conspirators who are not leniency applicants. Even if a company is too late to qualify for leniency, acceptance of responsibility and valuable cooperation, as opposed to mere promises to cooperate, are important factors that the DOJ considers when it determines criminal penalties.

Finally, in remarks similar to those made by Deputy Assistant Attorney General Brent Snyder the day before, Baer highlighted the importance of compliance programs, noting that the DOJ expects companies to take compliance seriously after they have pled guilty or have been convicted. This means an institutional commitment to change, a fostering of a culture of ethical conduct, and a commitment to compliance with the law.

Auto Parts

NGK Spark Plug Co. Pleads Guilty to Price-Fixing and Bid-Rigging – *Spark Plugs, Standard Oxygen Sensors, and Air Fuel Ratio Sensors*

In the ongoing auto parts cartel investigations, the Department of Justice recently charged NGK Spark Plug Co., Ltd. with price-fixing and bid-rigging. In the information filed on August 13, 2014, the DOJ alleged that from around January 2000 to July 2011, NGK and its co-conspirators fixed prices and rigged bids for spark plugs, standard oxygen sensors, and air fuel ratio sensors sold to car manufacturers such as Ford, Honda, General Motors, and Nissan. NGK has pled guilty and agreed to pay a $52 million fine. This was the DOJ's first charge in the auto parts investigation related to these products. *United States v. NGK Spark Plug Co., Ltd*., No. 2:14-cr-20494 (E.D. Mich.).

Foam Manufacturers Plead Guilty to Price-Fixing – Polyurethane Foam Slab Stock

On June 27, 2014, three manufacturers of polyurethane foam pled guilty to price-fixing charges and agreed to pay a total of $6.1 million in criminal fines. The three defendants, Riverside Seat Co., Woodbridge Foam Fabricating Inc., and SW Foam LLC, manufacture foam for use in automotive interior parts, such as seats, headliners, headrests, door panels, and armrests. These guilty pleas are part of an investigation into foam price-fixing that has also resulted in fines in Europe and Canada. *United States v. Riverside Seat Co., et al*., No. 1:14-cr-00263 (E.D. N.Y.).

LIBOR

Lloyds Pleads Guilty and Pays $370 Million Fine

Lloyds Banking Group PLC became the fifth major financial institution to plead guilty to LIBOR manipulation and to pay a criminal fine. In addition to a DOJ fine of $86 million, Lloyds will also pay $105 million to the Commodity Futures Trading Commission and $178 million to the U.K. Financial Conduct Authority, for a total of about $370 million. As part of its deferred prosecution agreement with the DOJ, Lloyds will also continue to cooperate with the DOJ in its ongoing investigation of the manipulation of benchmark interest rates by other institutions and individuals.

U.S. Civil

Ninth Circuit Opines on FTAIA and Alternative Fines Statute

On July 10, 2014, the Ninth Circuit affirmed a $500 million fine for AU Optronics, related to the liquid crystal display panel cartel case. In its opinion, the

Ninth Circuit addressed both the Foreign Trade Antitrust Improvements Act and the Alternative Fines Statute. With respect to the FTAIA, the Ninth Circuit agreed with the Second, Third, and Seventh Circuits in holding that the statute deals with the merits of the underlying antitrust case, not with the court's subject matter jurisdiction. The court held that for purposes of the import trade exception to the FTAIA, "import trade" refers to transactions between U.S. purchasers and cartel members and to goods made abroad and sold in the United States. Because AU Optronics employees reached agreements with competitors about prices for U.S. customers, imported price-fixed products into the United States, and sold panels to U.S. customers that were subject to price-fixing, the court held that the import trade exception applied and AU Optronics was within the Sherman Act's reach.

With respect to the Alternative Fine Statute, the issue before the Ninth Circuit was the interpretation of the language that the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss of a conspiracy. The Ninth Circuit held that "gross gain" in this statute refers to gains to the entire conspiracy, not to any single participant. For more information, please see an in-depth look at this ruling on our blog, available at http://antitrust.weil.com/articles/ninth-circuit-weighs-in-on-ftaia-and-alternative-fine-statute/. *United States v. Hsiung*, No. 12-10492, 2014 WL 3361084 (9th Cir. July 10, 2014).

Court Refuses to Dismiss Direct Purchaser Plaintiffs' Case Against Auto Parts Makers

A district court in the Eastern District of Michigan denied motions to dismiss filed by ball bearings and occupant safety restraint manufacturers on August 29, 2014. With regard to the safety restraints case, Judge Marianne Battani held that the court's job is not to "nitpick" a complaint line by line, and that the plaintiffs had sufficiently alleged price-fixing claims against the defendants. The court pointed to the defendants' guilty pleas with DOJ, and held that although those pleas and the civil complaint have some differences, they do not render the plaintiffs' allegations implausible.

With respect to the ball bearings case, the judge was not convinced that the fact that only two defendants had entered very limited pleas justified dismissal. Instead, she held that guilty pleas are only one factor to be considered, and the fact that the plaintiffs and the European Commission have both alleged a broad industry-wide conspiracy is sufficient reason to allow the suit to continue. Multidistrict Litigation: I*n re: Automotive Parts Antitrust Litig*., No. 2:12-md-02311 (E.D. Mich.); Underlying Cases: *In re: Bearings*, No. 2:12-cv-00501 (E.D. Mich. Aug. 29, 2014); *In re: Occupant Safety Restraints*, No. 2:12-cv-00601 (E.D. Mich. Aug. 29, 2014).

International

Antitrust Enforcement in China

China's National Development and Reform Commission (NDRC) has aggressively pursued cartel activity recently, doling out fines in investigations related to auto parts, cement, and insurance.

On August 20, 2014, the NDRC announced that it had fined 12 Japanese auto parts manufacturers a total of about $202 million (CNY$1.24 billion) for price-fixing in violation of China's Antimonopoly Law. The NDRC alleges that the companies held bilateral and multilateral meetings to negotiate prices, and reach and implement bidding agreements. The fined companies include Denso, Yazaki, Sumitomo, and Mitsubishi Electric, and the relevant products include, among others, wire harnesses, alternators, throttles, and bearings.

On September 2, 2014, the NDRC announced that it had fined 23 insurance companies and an industry group $18 million (CNY$110 million) for violating the Antimonopoly Law by agreeing to standardize insurance discounts on new car purchase premiums and commission fees. According to the NDRC, nine other insurers were investigated, but not fined because they did not agree to participate in the scheme.

In another development related to automobiles announced on September 11, 2014, the NDRC fined Volkswagen and Chrysler a total of approximately $46 million (CNY$281 million) for price-fixing conduct.

Volkswagen was fined about $40.5 million (CNY$249 million) and Chrysler was fined about $5.2 million (CNY$32 million). The companies allegedly had agreements with car dealers between 2012 and 2014 to set prices for car sales and repairs in violation of China's antitrust law.

Lastly, the NDRC announced on September 9, 2014 that it had fined three domestic cement manufacturers approximately $18.6 million (CNY$114 million) for price-fixing activity. The three companies, Jilin Yatai Group Co. Ltd., North Cement Co. Ltd., and Tangshan Jidong Cement Co. Ltd., allegedly met and entered into agreements to control cement sales prices in certain areas, thereby restricting competition and harming downstream industries and customers.

EC Fines Samsung, Philips, and Infineon $177 Million for Smart Chip Cartel

The European Commission has fined Samsung, Philips, and Infineon a total of $177 million (€138 million) for conspiring over prices and exchanging sensitive information about chips used in cell phone cards and identity and payment cards. The investigation is based on a leniency application by another co-conspirator, Renesas Electronic Corp., a former joint venture by Hitachi Ltd. and Mitsubishi Electric Corp. The EC alleges that from late 2003 through September 2005, the co-conspirators engaged in bilateral discussions about how they would respond to requests from customers to lower prices, and also exchanged commercially sensitive data about pricing, customers, and production capacity.

Infineon received the largest fine, totaling more than $106 million (about €82.8 million), while Samsung was fined more than $45 million (€35.1 million) after receiving a 30 percent discount for cooperation and Philips was fined more than $25 million (€20.1 million).

LG and Samsung Pay$19 Million to Settle LCD Cartel Probe in Brazil (Aug. 21, 2014)

On August 20, 2014, Brazil's Administrative Counsel for Economic Defense (CADE) announced that Samsung and LG had entered into cease and desist agreements related to their participation in liquid crystal display (TFT-LCD) cartel activity. The agreements required LG to pay about $15 million (BRL$33.9 million) and Samsung to pay about $3.9 million (BRL$8.9 million). Additionally, Samsung and LG had to confess their participation in the activity, promise to stop, and provide continuing cooperation to CADE.

1. Brent Snyder, Deputy Assistant Attorney General, U.S. Dep't of Justice, Antitrust Division, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop: "Compliance is a Culture, Not Just a Policy" (Sept. 9, 2014), *available at* http://www.justice.gov/atr/public/speeches/308494.pdf.
2. Bill Baer, Assistant Attorney General, U.S. Dep't of Justice, Antitrust Division, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium: "Prosecuting Antitrust Crimes" (Sept. 10, 2014), available at http://www.justice.gov/atr/public/speeches/308499.pdf.

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