

Automotive Webinar 2016 - Kartellrechtliche Entwicklungen

Antitrust Developments in the Automotive Sector

Dr. Jens Peter Schmidt

Partner

T +32 2 551 5969/ T + 49 211 862 240
jpschmidt@mayerbrown.com

20 July 2016

Agenda

- Status of investigations in EU, North America, Asia and Brazil
- Draft Anti-Monopoly Guidelines in China
- Online Trade

Fines remain high

- In 2016 EU Commission issued fines of €3.7 billion
- Record fine of €2.93 billion in July 2016 (trucks cartel)
 - Daimler to pay €1.008 billion
 - Reduction in fine - leniency (30%) and settlement (10%)
- In 2015 fines EU Commission issued fines of €364.5 million
 - 2010-2014: average fine per undertaking: €45.76 million
 - 1990-1994: average fine per undertaking: €2.92 million
 - Increased percentage of companies entering into settlement agreements with the Commission
- US agencies issued fines of \$3.6 billion in 2015. In comparison, the fine amounts in 2014 and 2013 were \$1.27 billion and \$1.02 billion respectively

European Union

European Commission's fines for cartels in the broader automotive sector (2015-16)

| Case Number | Title | Product market | Fine | Undertakings involved | Form of collusion | Duration of collusion | Leniency | Settlement |
|-------------|--------------------------|---|------------------------|-----------------------|--|-----------------------|---|---|
| 39824 | Trucks | Manufacture of trucks | € 2.93 billion | 5 | Coordination of prices and timing of introduction of new emission technology | 14 years | MAN (100%) Volvo/Renault (40%) Daimler (30%) Iveco (10%) | MAN, Volvo, Daimler, Iveco, DAF (all 10%) |
| 40055 | Parking heaters | fuel-operated parking heaters and auxiliary heaters | €68,175 million | 2 | Coordination of prices and allocation of customers | 10 years | Webasto (100%) Eberspächer (45%) | Webasto (10%) Eberspächer (10%) |
| 40028 | Alternators and starters | Alternators and starters for passenger cars | €137,7 million | 3 | | 5 years | Denso (100%) Hitachi (30%) Melco (28%) | Denso (10%) Hitachi (10%) Melco (10%) |
| 40018 | car battery recycling | car battery recycling | NA SO on 24.6. 2015 | 5 | Price fixing | 4 years | NA | NA |

European Union

European Commission's fines for cartels in the broader automotive sector (2013/14)

| Case Number | Title | Product market | Fine | Undertakings involved | Form of collusion | Duration of collusion | Leniency | Settlement |
|-------------|---------------------------|--|--------------|-----------------------|---|--------------------------|--|---|
| 39922 | Bearings | Car and truck bearings | €953 million | 6 | Price fixing Exchange of information | 7 years | JTEKT (100%) NSK (40%) NFC (30%) SKF (20%) Schaeffler (20%) | JTEKT (10%) NSK (10%) NFC (10%) SKF (10%) Schaeffler (10%) NTN (10%) |
| 39801 | Poly-urethane Foam | Foam for mattresses, sofas and car seats | €114 million | 4 | Price fixing | 5 years | Vita (100%) Recticel (50%) Eurofoam (50%) | Vita (10%) Carpenter (10%) Recticel (10%) Eurofoam (10%) |
| 39748 | Automotive wire harnesses | Wire harnesses | €141 million | 4 | Price fixing Allocation of supplies Bid rigging | From 2 months to 9 years | Sumitomo (100%) Yazaki (30% and 50%) Furukawa (40%) SYS (40%, 45%) Leoni (20%) | Sumitomo (10%) Yazaki (10%) Furukawa (10%) SYS (10%) Leoni (10%) |

European Union

- Trucks (COMP 39922 – 19 July 2016)
 - The Commission fined trucks manufacturers €2.93 billion (settlement) - record fine
 - MAN, Volvo/Renault, Daimler, Iveco and DAF
 - Standard procedure (non-settlement) will apply against Scania
 - Allegation of coordination of prices at gross list level (factory price of trucks), the timing for the introduction of emission technologies and passing on to customers costs for the emissions technologies
 - 14 years of collusion
 - No fine on leniency applicant MAN

European Union

- Alternators and starters (COMP 40028 – 27 January 2016)
 - The Commission fined producers of alternators and starters - €137.7 million (settlement)
 - Three Japanese companies of automotive parts, Melco, Hitachi, Denso
 - Allegation of exchange of commercially sensitive information (elements of price, market strategy) for coordination of prices and allocation of customers with regard to alternators and starters

European Union

- Parking heaters (COMP 40055 – 17 June 2015)
 - The Commission fined producers of parking heaters – €68 million (settlement)
 - Two German companies involved Eberspächer and Webasto
 - No fine imposed on Webasto – leniency applicant
 - Allegation of coordination of prices and allocation of customers with regard to fuel-operated parking heaters and auxiliary heaters
 - 10 years of collusion (2001 to 2011)

Germany

- On 23 June 2016 the *Bundeskartellamt* conducted unannounced inspections over suspicions of illegal steel-buying arrangements
 - Daimler
 - Volkswagen
 - BMW
 - ZF Friedrichshafen
 - Bosch
 - Other company

USA

- As of 15 June 2016, the U.S. Department of Justice have charged a total of 64 individuals and 44 companies and more than \$2.7 billion in criminal fines.
- More than 30 separate auto parts cases have been consolidated into the *In re: Automotive Parts Antitrust Litigation in the Eastern District Court of Michigan*
- In September 2015 Kayaba Industry (KYB) agreed to plead guilty and pay a \$62 million criminal fine for fixing prices for shock absorbers used in cars and motorcycles
 - KYB received a reduction in fine on the basis is that it provided substantial assistance and also developed and implemented a comprehensive and innovative compliance policy

USA – Criminal Fines since October 2014

| Company | Investigation | Criminal Fine |
|--|--|---------------|
| Corning International Kabushiki Kaisha | ceramic substrates in catalytic converters | \$66,500,000 |
| NGK Insulators Ltd. | ceramic substrates | \$65,300,000 |
| Kayaba Industry Co. Ltd., dba KYB Corporation (KYB) | shock absorbers | \$62,000,000 |
| Robert Bosch GmbH | spark plugs, oxygen sensors and starter motors | \$57,800,000 |
| Aisin Seiki Co. Ltd. | variable valve timing devices | \$35,800,000 |
| Espar Inc. | parking heaters | \$14,900,000 |
| Omron Automotive Electronics Co. Ltd. | power window switches | \$4,550,000 |
| Continental Automotive Electronics LLC and Continental Automotive Korea Ltd. | instrument panel clusters | \$4,000,000 |
| Sanden Corp. | air conditioning compressor) | \$3,200,000 |
| Yamada Manufacturing Co. | manual steering columns | \$2,500,000 |
| INOAC Corp. | interior trim | \$2,350,000 |
| Hitachi Metals Ltd. | brake hoses | \$1,250,000 |

USA

- Action was taken not only against companies but also against individuals
- DOJ charged 64 individuals with 29 individuals having pled guilty to sentences ranging from a year to two years
 - April 2016: the former president of an automotive body sealing products supplier based in Japan and former president of its U.S. joint venture pled guilty to bid rigging and price fixing and agreed to serve a 18-month prison sentence

USA

- Action against individuals (cont`d)
 - December 2015: three German executives indicted for allegedly meeting to discuss prices and agreeing to set a price floor and coordinate price increases for parking heaters
 - October 2015: three executives indicted for allegedly participating in a conspiracy to fix prices and rig bids regarding automotive body sealing products

Canada

- Since April 2013 the Canadian Competition Bureau's investigation involving auto components has resulted in nine guilty pleas and over \$70 million in fines
 - April 2016: Showa Corporation pled guilty to bid rigging in electric power steering gears and accepted a \$13 million fine
 - April 2015: Toyo Tire & Rubber Co., Ltd pled guilty to bid rigging in anti-vibration components supplied to Toyota and accepted a \$1.7 million fine
 - December 2014: Yamashita Rubber Co., Ltd pled guilty to bid rigging and accepted a \$3.6 million fine

Brazil

- Several new administrative process opened by CADE in the automotive sector
 - March 2016: against JTEKT, Yamada, NSK alleging a cartel for electric power steering systems – process ongoing
 - December 2015: against Corning Incorporated, NGK Insulators alleging a cartel for ceramic substrates used in automotive catalysts, including small size honeycombs and large size honeycombs – process ongoing
 - November 2015: against Delphi, Denso, Leoni, Yazaki alleging a cartel for wire harnesses and electric components such as electronic control units, junction boxes - process ongoing - but one defendant (Yazaki) has already entered into a settlement agreement with CADE

Brazil

- Brazil new investigations (cont'd)
 - September 2015: against Magneti Marelli, Affinia, Tenneco alleging a cartel for shock absorbers – process ongoing
 - July 2015: against Takata, Autoliv alleging a cartel for automobile safety devices such as seat belts, airbags – process ongoing
 - February 2015: against Denso, Valeo alleging a cartel for automobile thermal systems – process ongoing - but one of the defendants (Behr Brasil) has entered into a settlement agreement with CADE
 - February 2015: against Valeo, Elecromecanica Dyna alleging a cartel for windshield wipers – process ongoing
 - October 2014: against JTEKT, Schaeffler alleging a cartel for anti-friction bearings – process ongoing

China

- Agreements between Mercedes and dealers investigated by Jiangsu Provincial Price Bureau in April 2015
 - Mercedes fixed minimum resale prices of certain models and spare parts through telephone/verbal communications and dealer meetings
 - Mercedes implemented the minimum price through warnings and reduction of support for example, by halting the supply of bestselling cars and prohibiting the opening of new stores if they failed to co-operate with price-fixing policies
 - Fine of CNY 350 million (approx. €47 million) imposed on Mercedes and CNY 7.8 million (approx. €1.07 million) on dealers

China

- Agreements between DongFeng Nissan and its dealers investigated by Guangdong Development and Reform Commission in September 2015
 - From April 2012 to July 2014 DongFeng Nissan's distributors held multiple meetings to discuss issues relevant to sales price, and reached and implemented a horizontal monopoly agreement
 - DongFeng Nissan imposed restriction on distributors ability to determine resale price of certain models
 - Fine of CNY 123.3 million (€16.8 million) imposed on DongFeng Nissan and CNY (€2.6 million) on dealers

China

- Agreements between several automobile manufacturers and dealers investigated by Shanghai Consumer Council (SCC)
 - Investigation was in relation to tying/bundling practices
 - Bundling of car sales with other services, e.g., inspection, maintenance etc.
 - Information on fines imposed is not available but SCC announced that between April and May 2016 it had inspected around 70 dealers and around 25 automobile manufacturers such as BMW, Volvo and Kia

China

- Agreement between Hankook and local dealers investigated by National Development & Reform Commission (NDRC)
 - Investigation related to sale of tyres between 2012 and 2013
 - Hankook was alleged to have required dealers not to sell below a minimum price
 - Fine of RMB 2.1 million imposed (USD 336,500) on Hankook

China

- Cartel between vehicle inspection stations investigated by NDRC along with its local agency in Shaanxi province
 - Allegation that the operators of vehicle inspection stations were involved in a cartel to fix and raise prices for inspection services
 - Fine of RMB 5.77 million (USD 863,000) imposed on 31 companies
 - Fine of RMB 250,000 (USD 37,000) imposed on the Shaanxi Motor Vehicle Inspection Association
 - No fines imposed on the first leniency applicant
 - The investigation was on the basis of information provided by the Shaanxi Provincial People's Congress and Chinese People's Political Consultative Conference (CPPCC)

China

- Bundling practice at the time of sale of automobiles investigated by China's Anhui Administration for Industry and Commerce (Anhui AIC)
 - Investigation initiated following a customer complaint
 - Dealer imposed a "decoration service package fee" as a tie-in on customer at the time of purchase of an Audi
 - Anhui AIC directed a refund of RMB 50,000 (USD 7,662) by the dealer

China NDRC Draft Anti-Monopoly Guidelines

- Active enforcement in the automotive industry
- Car manufacturers allegedly impose restrictions on spare parts suppliers, distributors *et al.*
- On 23 March 2016 China's NDRC published draft "*Guidelines on Anti-Monopoly in the Automobile Industry*"
- Period for public comments ended on 12 April 2016
- Guidelines identify typical restrictions and list circumstances eligible for exemption
- Publication of final version is expected soon

China Draft Guidelines - Relevant Market

- Product market definition
 - Demand and supply substitutability
 - Wholesale vs. retail
 - Automobile aftermarket could be divided into
 - Aftermarket for distribution of spare parts
 - Repairs and maintenance
 - Automobile brand is a significant factor for defining the market
- National vs. regional geographic market

China Draft Guidelines - Horizontal Effects

- Certain agreements may be exempt
 - Research and development
 - Specialization
 - Technology standardization
 - Joint production
 - Joint purchasing
- Example: R&D in relation to alternative fuel vehicles
 - Electric vehicles
 - Plug-in hybrid electric vehicles and
 - Fuel-cell vehicles

China Draft Guidelines - RPM

- Direct or indirect resale price maintenance is prohibited (Article 14 AML)
- RPM could benefit from exemption under certain circumstances
 - Sales during promotion period (nine months) of alternative fuel vehicles
 - Sales through intermediaries (agents)
 - Sales within Government procurement
 - Sales through e-commerce platforms

China Draft Guidelines - Territory/Customer Restrictions

- Serious antitrust infringements likely where restrictions relate to:
 - Passive ("indirect") sales by distributors
 - Cross-supply between distributors
 - Sales of spare parts by distributors and maintenance suppliers to end-customers
 - Sales of spare parts/other equipment by such suppliers to distributors, maintenance suppliers and end-customers (except in cases of sub-contracting)

China Draft Guidelines - Territory/Customer Restrictions

- Certain territory/customer restrictions set by operators without "market force" are permitted:
 - Sales by distributor within a designated territory without restriction of passive ("indirect") sales and cross-supplies
 - Active ("direct") sales into the exclusive territory or to an exclusive customer group reserved to another distributor
 - Sales by wholesalers to end-customers
 - Sales of spare parts to customers who use such spare parts to manufacture the same products as the automobile supplier
- Safe harbour: companies with less than 25-30% market share may not have a significant "market force"

China Draft Guidelines - Indirect Restrictions

- "Unreasonable" restrictions by car manufacturers
 - Rejecting warranty obligation
 - End-customer does not give maintenance beyond warranty to authorized maintenance station
 - End-customer does not agree to use original spare parts for replacement of spare parts outside the scope of warranty
 - Prohibiting maintenance stations from after-sales services to parallel imported cars
- Other anti-competitive restrictions are *inter alia*:
 - Forcing unreasonable sales targets, categories and volume quantities in stock

China Draft Guidelines - Abuse of Dominance

- Car manufacturers in a dominant position (in the aftermarket) should not restrict:
 - Spare part manufacturers from producing double-labelled spare parts
 - Distributors and maintenance suppliers from freely sourcing after-sales spare parts (exclusivity)
 - Suppliers of spare parts, distributors and maintenance suppliers from selling after-sales spare parts
 - Availability of technological information for maintenance, test instruments and maintenance tools

Online Trade Germany

- In March 2015 Bundeskartellamt initiated Article 101 TFEU proceedings against Ford, Opel and Peugeot Citroën
- Restrictions of cooperation between brand retailers and independent internet-based customer agencies, i.e. online portals ("autohaus24", "meinauto.de")

The screenshot shows the website 'meinauto.de' with a browser window. The page features a navigation bar at the top with links like 'Neuwagenrat', 'Zahlungsarten', 'Fests & News', 'Beratung', and 'Über uns'. Below the navigation, there's a main heading 'Skoda Neuwagen: Günstige Preise durch Top-Rabatte'. A text block explains that various Skoda models like the Rapid, Fabia, Van Roomster, Yeti, Octavia, and Superb are available with discounts. A 'Jetzt starten' button is visible. On the left, two car models are highlighted: 'Skoda Citigo' with a 21.30% discount (max 24.49%) and 'Skoda Fabia' with a 23.02% discount (max 27.75%). A 'Top Marken' section lists various car brands like VW, Skoda, SEAT, Opel, Ford, Audi, Nissan, Fiat, Kia, Renault, Mazda, and Citroën. A Google AdWords advertisement on the right promotes 'Kermia Beach Apartment' with the text 'Durch Werbung mit Google AdWords gefunden werden!' and 'Mit 75 € Guthaben'.

Online Trade Germany

- Functioning of online portals
 - On online portals end customers configure car and receive price indication from portal (based on own research and indication of retailers)
 - Upon mandate by end customer online portal identifies potential retailer prepared to sell the car to customer
 - If customer purchases car from retailer, the online portal receives a commission fee from the retailer
 - OEMs implemented "internet standards" for the introduction of end customers to brand retailers through online portals for new cars

Online Trade Germany

- Restrictions relate to "internet standards" for the introduction/facilitation of end customers to brand retailers that implicitly (but essentially) blocked retailers from cooperating with online portals
 - No anonymous sale: retailer had to reveal its identity for all vehicles offered via online portal
 - Retailer had to offer all vehicles on its own website
 - Retailer had to offer any end customer financial, leasing or insurance services made available by OEM
- Non-compliance lead to withdrawal of incentives

Online Trade Germany

- Online portals create market transparency to the benefit of the end customer
- "Internet standards" significantly reduced mediated sales transactions via online portals
- Bundeskartellamt: hard core restriction pursuant to Article 4 lit. c) Vertical Block Exemption Regulation
 - "restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade"
- OEM changes standards, and Bundeskartellamt closed case without formal decision

Any questions are welcome!



Dr. Jens Peter Schmidt

Partner

ipschmidt@mayerbrown.com

T +32 2 551 59 69

+49 221 8622 4114

M +32 497 44 9794

<http://www.mayerbrown.com/people/Dr-Jens-Peter-Schmidt/>