Some Insights Into the Recent Plea Agreement Between the Antitrust Division and Hitachi Chemical (Capacitors)

AntitrustConnect Blog
June 6, 2016

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Please refer to this post as: Robert E. Connolly, 'Some Insights Into the Recent Plea Agreement Between the Antitrust Division and Hitachi Chemical (Capacitors)', AntitrustConnect Blog, June 6 2016, http://antitrustconnect.com/2016/06/06/some-insights-into-the-recent-plea-agreement-between-the-antitrust-division-and-hitachi-chemical-capacitors/

On April 27, 2016 Hitachi Chemical Co., Ltd. was charged by the Antitrust Division in a one-count Information alleging that the company (through predecessor companies) engaged in a conspiracy to "fix prices and rig bids of certain electrolytic capacitors in the United States and elsewhere beginning at least as early as August 2002 and continuing until at least as late as March 2010." On May 13, 2016, the government filed a "*Sentencing Memorandum, Motion for Departure and Request for Expedited Sentencing.*" The plea agreement with Hitachi Chemical was filed as an attachment. There are several interesting features of the Information and the plea agreement. The plea agreement calls for a fine of $3.8 million, which was based on a downward departure for substantial assistance. Hitachi's guidelines range fine was between $3.96 million and $7.92 based on a volume of commerce $16.5 million. Without the downward departure for substantial assistance, the parties agreed that Hitachi's fine should have been $5.1 million.

The most noteworthy provision of the agreement is that the parties will jointly recommend to the Court that Hitachi's sentence include a three-year term of probation that requires the company to continue to develop and implement a corporate compliance program, and submit an annual report on the

implementation of the program. The Antitrust Division does not normally recommend probation where a company has agreed to plead guilty. But, the sentencing memorandum noted "the parties have considered the Court's remarks about corporate probation when it sentenced NEC Tokin and jointly recommend that the Court sentence Hitachi Chemical to a three-year term of probation." NEC Tokin was the first company to plead guilty in the capacitors investigation and paid a fine of $13.8 million. While Judge Donato ultimately approved the plea agreement, he called the fine a "drop in the bucket" and stated "I have serious heartburn over this." Also, at the NEC sentencing hearing, Judge Donato first indicated that he was going to impose probation and a compliance monitor on NEC Tokin, but he backed off after pleas by the government and NEC Tokin regarding the defendant's cooperation. Responding to the Court's displeasure, the Hitachi Chemical Plea agreement does include a term of probation.

One condition of Hitachi's probation is that "the company continues to work toward the implementation of a compliance culture." The plea agreement states that Hitachi will be required to continue to develop and implement "an effective compliance program." The plea agreement does not lay out specifics of the compliance program but states "[t]he compliance program must be consistent with the goals and methods described in [the sentencing] guidelines section 8B2.1." The plea agreement further states at Paragraph 9(c) "as a condition of probation, that Hitachi Chemical conduct periodic trainings, have high-level personnel communicate the company's commitment to the compliance program, and submit annual written reports to the Department of Justice Antitrust Division and the Probation Office describing its implementation progress."

The plea agreement does not call for a compliance monitor. In fact, the parties actively attempt to dissuade the Court from imposing one. The "government and the defendant agree that a compliance monitor is not an appropriate condition of probation in this case. Further, the government urges the Court not to impose a monitor. Monitors are not routine in antitrust cases; a monitor has been imposed only once before on a criminal antitrust defendant." AU Optronics had a compliance monitor imposed upon it as part of its sentence after it went to trial and lost and otherwise failed to show remorse or implement a bona fide compliance program. The government urged that compliance monitors should be reserved for the worst offenders, which is how the government characterizes AU Optronics. Hitachi Chemical, however, cannot back out of the plea agreement if

Judge Donato does impose a compliance monitor as a term of the probation.

The Antitrust Division recently has had a number of "firsts" in relation to compliance programs. As noted, AU Optronics was the only time the Division has requested and had granted, a sentence that included the imposition of a compliance monitor. Also, in two recent cases, the Division has granted credit and accepted a reduced fine for "forward looking" compliance programs. In the Barclays (Forex investigation) and in KYB Corp (auto parts) plea agreements the Division gave credit where the company took substantial steps to implement a robust compliance program and changed the culture of the organization. The Division refers to this as "forward looking" compliance program credit. See Cartel Capers, Brent Snyder Explains Antitrust Division Approach to Credit for Compliance Programs. Lastly, in the Hitachi Chemical plea agreement, the Division has now entered into a plea agreement calling for enhancement of a compliance program as a condition of probation.

I would expect future corporate plea agreements in capacitors to contain a similar condition of probation because all corporate pleas in this investigation will go before Judge Donato. My guess, however, is that the inclusion of probation will be limited to the cases before Judge Donato, and not be an ongoing policy of the Division [unless more judges indicate that a term of probation is appropriate]. Of more interest is whether Judge Donato will accept the recommendation of the government that no compliance monitor be imposed. The government's rationale is that monitors should be reserved for the worst antitrust offenders and Hitachi by contrast had "agreed to plead guilty, accepted responsibility, recognized its wrongdoing, improved its compliance program, and cooperated against its co-conspirators." On the other hand, in other areas of corporate crime, compliance monitors are not as rare as they are in price-fixing cases. And Hitachi is pleading guilty to almost 8 years of participating in an international cartel. The parties have asked for an expedited sentence on June 9, 2016. A $3.8 million fine will hardly be noteworthy but other aspects of the sentencing may be.

There are a couple of other provisions of the plea agreement that are worth noting. Electrolytic capacitors can be subdivided into tantalum and aluminum electrolytic capacitors. Major electronics companies such as Apple, Dell, Intel, Sony, Canon, Foxconn, Nintendo, and Philips purchase them. Hitachi will plead guilty to participating in a conspiracy "from at least as early as August 2002 to at least as late as March 2010, to suppress and eliminate competition by fixing prices and

rigging bids of certain electrolytic capacitors in the United States and elsewhere." The word "certain" has great significance. There are many kinds of electrolytic capacitors, but under the plea agreement, Hitachi only fixed the price on "certain" of these capacitors. The government's sentencing memorandum states, "The volume of commerce calculation excludes certain sales which, based on the evidence, were not subject to the conspiracy." Hitachi's guilty plea is prima facie evidence that the company participated in the cartel. This gives the plaintiffs in the civil litigation a strong position. But Hitachi was able to negotiate some wiggle room with the Antitrust Division by inserting the word "certain." The plaintiffs will still bear a burden of proving what types/dollar value of capacitors were subject to the agreement, a critical component of damage calculations.

The plea agreement has another interesting feature. Hitachi Chemical's participation in the cartel is described as being, "from as early as August 2002 to at least as late as March 2010." That means Hitachi's participation in the offense ended outside the five year Sherman Act statute of limitations. Hitachi Chemical must have agreed to a statute of limitation waiver in order for the Antitrust Division to bring this charge, but a waiver would be in Hitachi's interest to either: a) allow time for continued negotiations or b) convince the government to use March 2010 as an ending date of the company's participation, or c) both. Also, the Information charges that the capacitor cartel began "at least as early as September 1997 and continu[ed] until in or about January 2014." So Hitachi Chemical was charged with joining the cartel well after it began and withdrawing before it ended. Again, in terms of civil litigation, while the guilty plea hurts, Hitachi Chemical has limited the time period of its participation in the conspiracy.

The last item of note is that the Information that Hitachi Chemical is pleading to contained language indicated that the FTAIA covered commerce in this cartel. The Information states: "During the time period identified in 9 paragraph 2, the charged combination and conspiracy had a substantial and intended effect in the United States, including on trade or commerce within the United States and U.S. import trade or commerce in electrolytic capacitors and products containing electrolytic capacitors."

The government's sentencing memorandum reflects the inclusion of FTAIA component commerce:

> *The first upward adjustment accounts for the value of electrolytic capacitors sold*

> *outside the United States, but incorporated into personal desktop and laptop computers sold in the United States under major U.S. brands. By taking into account sales of capacitors made overseas, but incorporated into a major category of finished goods sold by U.S. companies, this adjustment further reflects the seriousness of the offense and its harm in the United States. U.S.S.G. §8C2.8(a)(1).*

This is interesting because, as I understand it, capacitors while ubiquitous in electronic products, are very cheap, generally less than a penny each. So while there may be many capacitors in an electronics product assembled overseas and shipped into the Untied States, it seems like the percentage cost of the capacitors relative to the finished product will be extremely small. This stands in contrast to the TFT-LCD case where items like cell phone screens and computer screens were significant costs in the end product. Since this is a plea, the issues of whether the FTAIA covers a component as inexpensive as a capacitor will not be contested but it will be interesting to watch as the civil litigation proceeds.

The plea agreement also continues Antitrust Division practice (started under Bill Baer), of naming carved out executives in an attachment filed under seal instead of in the plea agreement itself. Under the plea agreement Hitachi Chemical executives, except those "carved out "in the attachment filed under seal, will receive non-prosecution protection as long as they cooperate in the investigation.

Overall, the plea agreement looks like both sides achieved some objectives, which is how agreements are reached. The Antitrust Division got its second corporate plea in the capacitors investigation. And while the fine is quite small, the government does get the cooperation of non-carved out Hitachi Chemical executives. And Hitachi Chemical may have made the best of a bad situation by insertion of the word "certain" into the charging language and limiting the relevant period to one much shorter than the length of the overall conspiracy.

The capacitor investigation is being handled the San Francisco office of the Antitrust Division. Mark Rosman, of Wilson Sonsini, represents Hitachi Chemical. The case is *US v. Hitachi Chemical Co., Ltd.,* 4:16-cr-00180-JD (N.D. Cal.)(sentencing memorandum filed 5/13/16).The sentencing hearing is scheduled for June 8, 2106 before Judge Donato.