

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

*In the Matter of Robert Bosch GmbH
File No. 121-0081, Docket No. C-4377*

I. INTRODUCTION

The Federal Trade Commission (“Commission”) has accepted from Robert Bosch GmbH (“Bosch”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects resulting from Bosch’s acquisition of SPX Service Solutions U.S. LLC (“SPX Service Solutions”) from SPX Corporation (“SPX”) and to remedy anticompetitive conduct by SPX in violation of Section 5 of the FTC Act.

Under the terms of the Consent Agreement, Bosch is required to (1) divest its air conditioning recycling, recovery, and recharge (“ACRRR”) business, including RTI Technologies, Inc. (“RTI”), to Mahle Clevite, Inc. (“Mahle”) by December 31, 2012; (2) terminate agreements with any persons that limit the ability of SPX’s competitors, including Bosch, from advertising, servicing, distributing, or selling any ACRRR product in the U.S. market; and (3) make available for licensing certain patents which may be used in the implementation of two industry standards established by SAE International, an industry association responsible for setting standards for products so that they comply with regulations of the U.S. Environmental Agency (“EPA”). The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

On January 23, 2012, Bosch entered into an agreement to acquire the SPX Service Solutions business from SPX. The Commission’s complaint alleges the facts described below and that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for ACRRR devices.

II. THE PARTIES

Bosch, headquartered in Stuttgart, Germany and with U.S. operations based in Broadview, Illinois, is a global supplier of automotive and industrial technology, consumer goods, and building technology. North American sales represent 18% of Bosch’s revenues, and Automotive Technology is Bosch’s largest business sector in North America. Bosch is the second leading U.S. supplier of ACRRR equipment. It acquired RTI in 2010, and sells ACRRR equipment under both the Bosch and RTI brand, which account for approximately 10% of the U.S. ACRRR market.

Headquartered in Warren, Michigan, SPX is a diversified global supplier of highly engineered products for the following industries: power and energy, food and beverage, vehicle and transit, infrastructure and industrial processes. SPX's Service Solutions business is a global supplier of automotive tools, equipment and services, for both original equipment manufacturers ("OEMs") and aftermarket repair shops and technicians. SPX's Robinair brand is the leading supplier of ACRRR equipment in the United States, accounting for over 80% of sales in that market.

III. THE PRODUCT AND STRUCTURE OF THE MARKET

Bosch's proposed acquisition of SPX Service Solutions would create a virtual monopoly in the ACRRR market. ACRRR devices are stand-alone pieces of equipment used by automotive technicians to remove refrigerant from a vehicle's on-board air conditioning system, store the refrigerant while the air conditioning system is being serviced, and recycle the refrigerant back into the system, adding more as necessary. These tools are required to repair or service motor vehicle air conditioning systems because no other equipment performs the removal, recycling, and recharging functions while staying compliant with EPA regulations prohibiting refrigerant from escaping into the atmosphere. Devices that only extract refrigerant from air conditioning systems but do not recycle or recharge them are not cost-effective alternatives because they do not store or dispose of extracted refrigerant as required. As a result, if the price of ACRRR equipment were to increase 5-10%, customers would not switch to extraction-only equipment or to equipment that flushes other fluids from vehicles, which cannot be used in its place.

The relevant geographic area in which to evaluate the market for ACRRR equipment is the United States. Environmental regulations vary by country, so ACRRR machines designed to adhere to the regulations of one country are not necessarily compatible with those of other countries. In addition, differing electrical power specifications across the world necessitate that the internal pumps and motors vary to meet differing specification. As a result, purchasers in the United States could not turn to suppliers in other countries for ACRRR equipment.

SPX's Robinair brand holds a dominant position in the ACRRR market, with a share of over 80%. Bosch's RTI and Bosch brands comprise approximately 10% of the market and are Robinair's most significant competition. Four other firms selling ACRRR equipment in the U.S. together account for the balance of ACRRR sales. Thus, the combination of Bosch and SPX would confer a virtual monopoly position on Bosch. The elimination of the direct competition between Robinair and Bosch would allow the combined entity to exercise market power by unilaterally increasing price, slowing innovation, or lowering its levels of service.

IV. ENTRY

Entry into the ACRRR market sufficient to deter the anticompetitive effects of this transaction is unlikely to occur in the next two years. While designing and engineering a system to work effectively and meet industry standards may be possible within a relatively short time frame, other barriers, including the challenges of obtaining effective distribution and developing

a service network, make successful entry very difficult. Advertising through leading automotive wholesale distributors is the most effective means of promoting ACRRR to independent auto repair shops and rapid-turnaround repair of ACRRR equipment is critical because repair shops cannot provide air conditioning service without this equipment. Obtaining effective distribution and service networks has been especially challenging for competitors of SPX because of limitations SPX puts on distributors and service centers that sell and service Robinair-brand ACRRR. Another factor affecting the likelihood of significant new entry or expansion is the costs associated with meeting industry standards, which are established by SAE International, formerly the Society of Automotive Engineers.

IV. EFFECTS OF THE ACQUISITION

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. ACRRR device market. The transaction would combine SPX's Robinair brand ACRRR, that already commands over 80% of the market with its leading competitor, Bosch, with its Bosch- and RTI ACRRR brands, with approximately 10% of the market, creating a near-monopolist with a share of over 90%. The impact of eliminating the competition between Bosch and SPX in the ACRRR market is highly likely to result in consumers, who are automotive repair shops and technicians, paying higher prices for ACRRR devices.

V. THE CONSENT AGREEMENT

A. The Merger Remedy

The proposed Consent Agreement eliminates the competitive concerns raised by Bosch's proposed acquisition of SPX Service Solutions by requiring the divestiture of Bosch's assets relating to the manufacture and sale of ACRRR devices in the United States, including the RTI business. Bosch and SPX have agreed to sell the U.S. ACRRR assets to Mahle Clevite, Inc. ("Mahle") before December 31, 2012.

Mahle possesses the resources, industry experience, and financial viability to successfully purchase and manage the divestiture assets and continue as an effective competitor in the ACRRR market. Mahle, headquartered in Stuttgart, Germany with U.S. operations based in Farmington, Michigan, is a supplier and development partner to the automotive and engine industry. Mahle's diverse product lines include aftermarket parts and automotive equipment sold a similar customer base as RTI. Mahle's significant size and global presence will allow it to quickly support additional expansion in the ACRRR market and replace the loss of competition presented by Bosch's acquisition of SPX SS.

Pursuant to the Consent Agreement, Mahle would receive all the assets necessary to operate Bosch's current U.S. ACRRR business, including RTI's operations in York, Pennsylvania which include the RTI manufacturing plant, current inventory, and relevant intellectual property. In addition to ensuring that current RTI employees will continue their employment with Mahle, the Consent Agreement requires Bosch to provide access to certain key employees who may be necessary to help facilitate the transition and fully establish the Bosch

ACRRR business within Mahle. The Consent Agreement also requires Bosch to transfer all relevant intellectual property and all contracts and confidential business information associated with the ACRRR business. In addition, the Consent Agreement requires Bosch to license, royalty-free, certain SPX patents that may be essential to the practice of two industry standards to Mahle.

B. The Conduct Remedy

In addition, the Consent Agreement includes a provision that requires Bosch to make certain patents available to its competitors in the ACRRR market. During its merger investigation, the Commission uncovered evidence that SPX holds certain potentially standard-essential patents necessary for implementing two SAE International ACRRR industry standards, J-2788 and J-2843, which govern the operation of ACRRR machines that handle the two most common types of air conditioning refrigerant in vehicles today. SAE International adopted J-2788 and J-2843 while SPX was a member of the SAE Interior Climate Control Committee, the committee responsible for developing the standards. SAE International's rules include an obligation by working group members to disclose any patents or patent applications that would be essential to the practice of a standard being developed, and to offer a license to such patents on either royalty-free or fair, reasonable, and non-discriminatory ("FRAND") terms. After the standards were adopted, SPX issued a letter of assurance to SAE International acknowledging that it held patents that were potentially essential to both standards and committing to license them under FRAND terms. Following this letter of assurance, however, SPX continued to seek previously initiated injunction actions against competitors using those patents to implement the SAE International standards.

SPX's suit for injunctive relief against implementers of its standard essential patents constitutes a failure to license its standard-essential patents under the FRAND terms it agreed to while participating in the standard setting process, and is an unfair method of competition actionable under Section 5 of the FTC Act. Standard setting is "widely acknowledged to be one of the engines driving the modern economy."¹ Participants in the standard setting process rely on the licensing commitments made by patent holders during the standard setting process to protect them against patent hold-up. Patent hold-up can occur when, after an entire industry has become "locked in" to practicing a standard, a patent holder reneges on a licensing obligation and seeks to exercise the market power that accrues to a patent by virtue of being incorporated in the standard. FRAND commitments and licensing obligations, such as those at issue here, are an important way to mitigate the risk of patent hold-up, and are common in the standard setting process. Seeking injunctions against willing licensees of FRAND-encumbered standard essential patents, as SPX is alleged to have done here, is a form of FRAND evasion and can reinstate the risk of patent hold-up that FRAND commitments are intended to ameliorate. As the Commission has previously explained, "negotiation that occurs under threat of an

¹ U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 33, *available at* <http://www.ftc.gov/reports/innovation/P040101PromotinginnovationandCompetitionrpt0704.pdf>

[injunction] may be weighted heavily in favor of the patentee in a way that is in tension with the [F]RAND commitment. High switching costs combined with the threat of an [injunction] could allow a patentee to obtain unreasonable licensing terms despite its [F]RAND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard.”²

Bosch has agreed in the Consent Order to resolve the violations committed by SPX. The Consent Order requires Bosch to offer a royalty-free license to all potential implementers for certain enumerated patents for the purpose of manufacturing ACRRR devices in the United States. While a royalty-free license may not be an appropriate remedy in every case involving evasion of a FRAND commitment, in this matter Bosch has chosen to license these patents to the buyer of its ACRRR business, Mahle, royalty-free, and a license to other market place participants on the same terms is necessary to ensure that the merger remedy is not inequitable in application. The Consent Order further requires Bosch to deliver to the SAE a letter of assurance that makes a binding, irrevocable commitment to license any additional patents that Bosch may acquire in the future that are essential to practicing the J-2788 or J-2843 standards on FRAND terms to any third party that wishes to use such patents to produce an ACRRR device for sale in the United States. Pursuant to its FRAND obligations, Bosch has agreed not to seek injunctive relief against such third parties, unless the third party refuses in writing to license the patent consistent with the letter of assurance, or otherwise refuses to license the patent on terms that comply with the letter of assurance as determined by a process agreed upon by both parties (e.g., arbitration) or a court.

The Consent Agreement also requires that Bosch discontinue its restrictive arrangements with wholesale distributors and independent service technicians. Bosch will be prevented from enforcing any agreement that restricts a distributor or repair service provider from advertising, servicing, distributing, or selling any ACRRR product from any third party in the United States. Bosch will be prevented from entering into such agreements for ten years after the date of the Order. This provision allows entry by other competitors, and will allow the existing competitors in the ACRRR market, including Mahle, to more easily have access to leading wholesale distributors and service providers to assemble repair networks to which customers can turn after they have purchased ACRRRs.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or to modify its terms in any way.

² Third Party United States Federal Trade Commission’s Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, available at www.ftc.gov/os/2012/06/1206ftewirelesscom.pdf and in *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, available at <http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf>.