

Client Alert

Antitrust Practice Group

March 15, 2012

Jury Convicts AUO and Former Executives for Role in TFT-LCD Price Fixing Conspiracy, Determines Harm Caused by the Conspiracy was More than \$500 Million

On March 13, 2012, following an eight-week trial, a federal jury in San Francisco convicted AU Optronics Corporation (AUO), its U.S. subsidiary and two of former senior executives of conspiring to fix the prices of thin-film transistor liquid crystal display (TFT-LCD) panels. The jury also found that the gain to the conspirators resulting from the price fixing was more than \$500 million. AUO is headquartered in Taiwan. AU Optronics Corporation America, its U.S. subsidiary, is headquartered in Houston, Texas.¹

The two former AUO senior executives convicted were former AUO president Hsuan Bin Chen and former executive vice president Hui Hsiung. The jury found two AUO employees not guilty—Lai-Juh Chen, former director of the Desktop Display Business Group, and Tsannrong Lee, former senior manager of the Notebooks Business Group. The jury could not reach a decision and a mistrial was declared as to Steven Leung, former AUO senior manager of the Desktop Display Business Group.

The convicted executives face up to 10 years in prison. Since the jury found that the ill-gotten gain derived from the conspiracy was at least \$500 million, the maximum fine for both the convicted individuals and corporations is \$1 billion.

Significantly, the case marks the first time that the U.S. Department of Justice Antitrust Division has litigated the alternative fine provision under the Sentencing Reform Act and has proven, beyond a reasonable doubt, the dollar amount alleged to have been gained or lost from an antitrust conspiracy. Under the Sherman Act, the maximum fine for a corporation is \$100 million. The only alternative to this statutorily capped fine is under the “twice the gross gain or twice the gross loss” alternative fine provisions of the Sentencing Reform Act. While the exact amount of the corporations’ fines will be determined by the trial judge, a fine of \$1 billion would mark the largest fine ever imposed for an antitrust offence in the United States. (To date, the largest fine is \$500 million that was imposed on F. Hoffmann-La Roche in the global Vitamins cartel investigation). The guilty verdicts against the two AUO executives also mark the first time the Antitrust Division has convicted a foreign national at trial for a Sherman Act offence.

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Equally important, the jury's determination that the gain from the conspiracy exceeded \$500 million confirms, for the first time, the Antitrust Division's position that it will seek to prove damages in appropriate cases to increase the maximum fine pursuant to the alternative fine provisions and that meeting the "beyond a reasonable doubt" standard applicable in criminal cases will not be an impediment for the government to seek this relief. In addition, the court's ruling, reflected in its instructions to the jury, confirms another position of the Antitrust Division—that the appropriate measure of harm under the alternative fine provision is the harm caused by the sales of affected goods by all conspirators, not just the harm caused by the sales of the defendant to be sentenced. This reaffirms the importance for companies that are potentially targets in a criminal antitrust investigation to quickly understand the scope of the investigation in terms of all relevant industry participants, not just for purposes of obtaining leniency/leniency plus, but also to understand the potential monetary exposure that could be at issue.

This enforcement action and result should educate both corporate and individual subjects of antitrust investigations concerning the risks associated with taking a case to trial. Of course, in addition to the increased fine potentially due to the government, the case result also constitutes a prima facie finding of liability in related civil treble damage actions. This concern, also a consequence of a guilty plea, is magnified in this instance due to the potential effect of the jury finding "beyond a reasonable doubt" that there was at least a \$500 million unlawful gain. If this is deemed a settled issue in related civil cases, the treble damage exposure to the civil defendants approaches \$1.5 billion.

We also believe that the Antitrust Division will be empowered by these convictions and will continue its aggressive enforcement efforts against companies and individuals engaged in international price fixing conspiracies.

King & Spalding's global cartel defense practice is one of the leading practices globally. If you have any further questions, please contact the authors, all of whom are experts in the area.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

ⁱ In addition to the AUO convictions, seven companies have pleaded guilty to date to charges arising out of the Antitrust Division's ongoing investigation in the TFT-LCD industry and have been sentenced to pay criminal fines totaling almost \$900 million. In addition to the individuals convicted, 17 executives have been charged in the conspiracy, and ten of those individuals have pleaded guilty and have been sentenced to serve time in prison.