



JONES DAY  
**COMMENTARY**

## FEDERAL JURY RETURNS VERDICTS IN RARE PRICE-FIXING TRIAL OF GLOBAL LIQUID-CRYSTAL DISPLAYS CONSPIRACY

Companies and individuals that are accused of price-fixing rarely go to trial. Indeed, in the last 10 years, no corporate defendant (and only a handful of individuals) has elected to litigate an international criminal cartel case in a U.S. court. The vast majority of cases are resolved through negotiated plea agreements. A few cases, usually involving foreign nationals, are never concluded because the indicted individuals choose not to submit to the jurisdictional reach of U.S. courts.

On March 13, 2012, a federal jury in San Francisco returned split verdicts in a landmark trial against a foreign company (AU Optronics), its U.S. subsidiary, and five foreign nationals for their participation in an international conspiracy to fix the prices of thin-film transistor liquid-crystal display panels (TFT-LCDs).<sup>1</sup>

This case is a true outlier because the foreign parent corporation and the foreign nationals appeared for trial. The verdicts provide a number of important

lessons about the risks and rewards of forcing the government to prove its case in court. We begin by providing general background regarding the U.S. Department of Justice's ("DOJ") investigation and the jury's verdicts. We then focus on several lessons this case teaches for companies and their employees who are, or may be, caught up in a U.S. criminal anti-trust investigation:

- The DOJ's leniency program remains robust and continues to trigger many cartel investigations.
- Although rare, going to trial in a criminal price-fixing case remains an option defendants should consider.
- The jury's verdicts in *AU Optronics* continue the government's mixed conviction record and highlight the challenges the DOJ faces when prosecuting individuals, especially lower-level participants in the conspiracy.

- The DOJ's success in *AU Optronics* in proving the amount of unlawful conspiracy overcharge beyond a reasonable doubt will embolden the government in fine negotiations in future matters.
- AU Optronics potentially faces a record-breaking fine of \$1 billion, and the convicted individuals may end up being sentenced to pay record fines and serve record jail terms—reinforcing the maxim that violating U.S. antitrust laws can result in very serious consequences.
- The dispute during the *AU Optronics* trial over the appropriate application of the U.S. antitrust laws to foreign companies and foreign conduct will be heard on appeal, potentially providing guidance in this area that could shape future DOJ enforcement efforts.

## THE *AU OPTRONICS* TRIAL AND THE TFT-LCD INVESTIGATION

In 2006, the DOJ accepted Samsung Electronics Co., Ltd., Samsung Electronics America, Inc. and Samsung Semiconductor, Inc. (Samsung) into its leniency program in exchange for informing the government about a conspiracy to fix prices of TFT-LCDs used in computer monitors and notebooks, televisions, mobile phones, and other electronic devices. In the ensuing years, a number of other TFT-LCD suppliers and several of their executives pled guilty for their participation in the conspiracy.

In June 2010, a federal grand jury returned a one-count superseding indictment against Taiwan-based AU Optronics, its Houston-based U.S. subsidiary, and five current and former executives for violating Section 1 of the Sherman Act, which prohibits agreements among competitors that harm competition. The DOJ alleged that the defendants conspired with other leading TFT-LCD producers at more than 60 so-called “Crystal Meetings” to fix prices and to monitor and enforce agreements between 2001 and 2006. The superseding indictment also charged that senior-level executives of AU Optronics instructed employees of the U.S. subsidiary to contact their counterparts at other manufacturers to discuss pricing to major customers in the United States. The executives attempted to conceal the “Crystal Meetings”

and, when confronted with the DOJ investigation, allegedly took steps to destroy evidence. These are the only TFT-LCD defendants to date that have chosen to defend themselves in court.

Following an eight-week criminal trial, the jury returned split verdicts. Jurors convicted AU Optronics, its U.S. subsidiary, and two senior company officials—the former president (current chairman) and the former executive vice president (current director). But the jury also found two former lower-level employees not guilty.<sup>2</sup> In addition, a mistrial was declared against another employee because the jury failed to reach a unanimous verdict.

In addition to these convictions, seven companies have pled guilty and agreed to pay more than \$890 million in U.S. criminal fines. One company, LG Display Co., Ltd. and its U.S. subsidiary, LG Display America, agreed to pay \$400 million—the third-largest criminal fine ever imposed for an antitrust violation.<sup>3</sup>

Further, in addition to the individuals convicted, the DOJ has charged 17 executives for their roles in the conspiracy. Ten—all foreign nationals, based abroad—agreed to plead guilty and serve prison sentences ranging from six to 14 months.<sup>4</sup> All told, this is one of the DOJ's largest and most far-reaching global cartel investigations on record. By the end of the conspiracy period, the worldwide market for TFT-LCD panels was valued at \$70 billion annually.

The jury verdicts in this case are instructive on several fronts. International corporations and their foreign nationals that could become ensnared in the DOJ's vigorous cartel enforcement program should pay particular attention.

## THE DOJ'S LENIENCY PROGRAM IS ALIVE AND WELL

At the outset, the long-running TFT-LCD investigation—at least six years and counting—confirms that the DOJ's “race to the prosecutor” leniency program continues to thrive. The program commits the DOJ to the lenient prosecution of companies and individuals that self-report anticompetitive conduct and meet certain specified conditions. In particular,

it guarantees a complete “free pass” from federal prosecution of antitrust offenses to the first confessor from each cartel, provided that the DOJ is not already investigating the conspiracy. Successful applicants are rewarded with no criminal convictions, no criminal fines, and no jail sentences. The DOJ also offers leniency under certain conditions when an applicant confesses to a conspiracy about which the DOJ is already aware.

The impact of the DOJ's leniency program has been magnified by its “amnesty plus” policy, under which a company prosecuted for participating in one cartel can reduce its fines by initially reporting a different conspiracy. At any given time, many of the government's active grand jury investigations began as a result of evidence uncovered during an investigation of a completely separate industry. This often occurs as companies with multiple product lines report new instances of collusion to secure fine reductions in an ongoing investigation and to obtain leniency in a newly disclosed amnesty-plus cartel.

Samsung started the dominoes falling in the TFT-LCD cartel with its leniency application six years ago. The company and its employees have escaped all criminal exposure for their participation in that cartel. In addition, perhaps as a result of amnesty-plus, the DOJ has since prosecuted a number of other conspiracies. Samsung, for example, has pled guilty and agreed to pay a \$32 million criminal fine for its role in a related cartel to fix prices of cathode ray tubes (“CRT”),<sup>5</sup> the principal technology used in televisions and computer monitors before companies adopted TFT-LCD and other flat-panel technologies. The DOJ's CRT investigation began in November 2007 when a company implicated in the TFT-LCD investigation applied for amnesty-plus. Similarly, evidence discovered in the dynamic random access memory (“DRAM”) investigation, in which Samsung paid a \$300 million fine,<sup>6</sup> prompted the DOJ to review pricing practices in the TFT-LCD industry. The interlocking nature of the TFT-LCD, CRT, and DRAM conspiracies is not unique to these industries. Companies and individuals who are involved in price discussions with their competitors need to be mindful that one of their peers could become a government leniency or amnesty-plus “whistleblower” at any time.

## **GOING TO TRIAL REMAINS A VIABLE OPTION IN A CRIMINAL PRICE-FIXING CASE**

By going to trial, AU Optronics and the individual defendants did something most do not. The vast majority (>90%) of defendants charged with price-fixing choose to settle and enter plea agreements with the DOJ rather than take their chances in court. Most of the pleas are “Type C” agreements that present a court with a “take it or leave it” joint recommendation from the DOJ and the defendant on the appropriateness of a specific sentence or range under the Sentencing Guidelines. If the court rejects the parties' recommended sentence, the agreement is void and the defendant can withdraw the guilty plea. As in other criminal matters, agreeing to enter a plea agreement in an antitrust case brings with it significant consequences, but certainly less than the possible exposure resulting from a trial loss. This, together with the measure of finality that comes with a negotiated settlement, explains why most defendants accused of price-fixing forgo their right to defend themselves in court, despite, in some cases, having viable defenses. Of course, going to trial remains a high-risk, but potentially high-reward, strategy for defendants. The results in this case represent both sides of that coin.

## **THE DOJ'S MIXED CONVICTION RECORD CONTINUES**

The DOJ's track record in international cartel prosecutions is mixed. The DOJ's own statistics indicate that between 2000 and 2009, 16 individuals contested price-fixing charges at trial. Eight were convicted, while eight others were acquitted.<sup>7</sup> This case continues the government's mixed record. On the one hand, the DOJ scored a very significant win by obtaining convictions over AU Optronics and two top executives. The guilty verdicts mark the first time the DOJ has ever convicted a foreign national at trial for a Sherman Act offense. On the other hand, the jury acquitted two other executives and could not reach a decision on a third, resulting in a mistrial.

The split verdict here follows other high-profile losses for the DOJ, for example in the DRAM and marine hose investigations. In March 2008, Judge Phyllis Hamilton of the United

States District Court for the Northern District of California declared a mistrial in the criminal case against a former Hynix Semiconductor, Inc. executive, Gary Swanson. The jury returned hung 10–2 in favor of acquitting Mr. Swanson for his participation in the DRAM conspiracy.<sup>8</sup> The DOJ later dismissed the charges against Mr. Swanson, the only defendant to go to trial in the DRAM investigation. Six months later, in November 2008, a federal jury in Florida acquitted Francesco Scaglia and Val Northcutt, two sales managers from Manuli's Oil & Marine Division, of fixing prices on the flexible rubber hoses used to transport oil between tankers and oil storage facilities.<sup>9</sup>

The government's case against the AU Optronics employees shows some continuing weaknesses in the DOJ's efforts to prosecute individuals, even though it obtained some convictions. The government's losses against individuals here and in other matters demonstrate that it often has difficulty building a compelling criminal case against the actors. This may be simply a function of bad facts for the government, limited persuasiveness of testimony from co-conspirators who have been granted leniency, or perhaps jurors' unwillingness to send individuals to jail for antitrust offenses, particularly if the individual is one of the lower-level "troops" as opposed to a more senior executive.

## THE DOJ PROVED THE OVERCHARGE, PAVING THE WAY FOR A RECORD FINE

The maximum fine for any conviction under the Sherman Act is \$100 million. The DOJ maintained that this statutorily capped penalty would not sufficiently reflect the gravity of the harm caused by the TFT-LCD conspiracy, and so the government proceeded under the alternative fine provision of the Sentencing Reform Act, 18 U.S.C. § 3571(d). That statute permits a maximum fine of twice the gross gain (unlawful overcharge) or twice the gross loss from the offense. In the past, the DOJ has successfully obtained 19 fines greater than the Sherman Act statutory maximum, but only as part of negotiated plea agreements, never at trial.<sup>10</sup>

In this case, a critical issue concerned the applicability of the Supreme Court's decision in *Apprendi v. New Jersey*<sup>11</sup> to the alternative sentencing provision. In *Apprendi*, the

Court held that any fact that increases the penalty for a crime beyond the statutory maximum (other than the fact of a prior conviction) must be submitted to a jury and proved beyond a reasonable doubt. Judge Susan Illston found nothing unique about Sherman Act offenses to warrant ignoring *Apprendi*'s mandate. As a result, instead of having only to satisfy the lower preponderance of the evidence standard the government had requested,<sup>12</sup> the DOJ was required to prove the amount of any gross gains to the jury beyond a reasonable doubt. The jury had to weigh complex testimony from the parties' economic experts to determine the total pecuniary gain or loss suffered from the defendants' collusion. Similar to testimony on damages in civil price-fixing cases, the dispute centered on the appropriate baseline, or "but-for," price. The defendants' expert claimed that TFT-LCD prices were lower than the prices discussed, and allegedly agreed upon, at the Crystal Meetings. The DOJ's expert countered that AU Optronics's prices were higher than they otherwise would have been because of the conspiracy. The jury agreed with the government. For the first time in an antitrust case, the DOJ was able to prove the unlawful overcharge beyond a reasonable doubt when the jury concluded that the ill-gotten gain to the conspirators in the United States exceeded \$500 million.

## THE DOJ MAY OBTAIN A RECORD CORPORATE FINE AND RECORD JAIL TERMS

The case now enters the sentencing phase, which is slated for mid-June 2012. AU Optronics could incur a criminal fine as high as \$1 billion, twice the estimated \$500 million of ill-gotten gain. If realized, this would be a record (twice as large as the fine levied against F. Hoffmann-La Roche in 1999 for its role in the vitamins conspiracy).

This potentially record-setting fine is a result of Judge Illston's approach to measure pecuniary gain under the alternative sentencing guidelines. The court ruled that "gross gain" included sales of TFT-LCDs, as well as sales of any finished electronic devices containing those panels.<sup>13</sup> Further, gross gain included the profits flowing to all participants in the conspiracy jointly, not just to AU Optronics. The ruling reaffirms the need in all cases to understand the scope of the entire conspiracy, not just a particular

defendant's role in it. Companies need to appreciate their full potential monetary exposure when considering whether to cooperate with the government or to litigate. Typically, the recommended fines in plea agreements relate only to the volume of commerce of the particular defendant, rather than the group of conspirators.

In addition to obtaining a potential record corporate fine against AU Optronics, the DOJ could obtain record-setting fines and jail terms against the convicted individuals. Individuals face fines of up to \$1 million and up to 10 years in prison for violating the Sherman Act. To date, the record jail sentence for an antitrust violation is 48 months, and it has been imposed twice. First, in January 2009, Peter Baci, a former shipping executive, agreed to plead guilty to participating in a conspiracy to suppress and eliminate competition in the U.S.-Puerto Rico shipping lane.<sup>14</sup> Then, in May 2010, Steven VandeBrake, the former sales manager of a ready-mix concrete company, was sentenced to serve 48 months in prison and to pay a criminal fine for his participation in three separate conspiracies involving agreements to fix prices and rig bids for ready-mix concrete sold in Iowa.<sup>15</sup> The second-longest prison sentence was the 30 months handed to Peter Whittle, the owner of PW Consulting (Oil & Marine) Ltd., in connection with the marine hose cartel.<sup>16</sup> By way of comparison, the average prison sentence for antitrust defendants in FY 2011 was 17 months.<sup>17</sup>

## STAY TUNED FOR MORE ON APPLICATION OF THE SHERMAN ACT TO FOREIGN CONDUCT

Early in the case, AU Optronics and the individual defendants tried to dismiss the indictment on jurisdictional grounds, claiming that the allegations lacked the requisite impact on domestic commerce. Their arguments implicated the Foreign Trade Antitrust Improvements Act ("FTAIA"), which provides that the Sherman Act does not reach commerce outside the United States, with limited exceptions. Specifically, the statute bars challenges to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless the conduct has a "direct, substantial, and reasonably foreseeable" effect on U.S. domestic commerce or on import commerce and that effect "gives rise to" a Sherman Act claim.

The court sided with the government and held that there was a sufficient connection to U.S. commerce to establish jurisdiction. According to the court, the government's charges did not relate, as the defendants claimed, to "wholly foreign conduct." The indictment alleged overt acts by conspirators both inside and outside the United States, including, for example, regular instructions by the foreign parent company to employees of its U.S. subsidiary to contact other TFT-LCD manufacturers to discuss and agree upon pricing for U.S. customers. As the DOJ argued in its opposition to the defendants' motion to dismiss the indictment, although the conspiracy involved some foreign anticompetitive conduct, the indictment "alleges that Defendants entered into a conspiracy that violated U.S. law on U.S. soil." The court agreed, finding the alleged conduct to be in furtherance of a domestic conspiracy that was not barred by the FTAIA.<sup>18</sup>

AU Optronics has stated that it will appeal the verdict. The Ninth Circuit's consideration of this appeal should provide useful guidance on the scope of the FTAIA, with which other courts have been wrestling recently in the civil context. For a brief discussion of these decisions, see the following two Jones Day *Antitrust Alerts* at <http://www.jonesday.com/antitrust-alert--recent-us-cases-may-allow-new-antitrust-challenges-to-foreign-conduct-10-13-2011/> and <http://www.jonesday.com/supreme-court-leaves-in-place-third-circuit-rule-welcoming-challenges-to-foreign-conduct-into-us-courts-03-23-2012/>.

## CONCLUSION

This case is a clear win for the DOJ, despite its not having secured convictions across the board. The government prevailed against the marquee defendants—the two companies (foreign parent and U.S. subsidiary) and the two individuals who were top-level executives during the conspiracy period. These verdicts demonstrated that the DOJ can successfully prosecute non-U.S. corporate and individual members of a global cartel. In addition, the DOJ established that it can prove a conspiracy overcharge beyond a reasonable doubt, dispelling questions about whether jurors could be convinced by complicated economic testimony over a lengthy trial.

The implications of this case will not be fully understood until after sentencing and all appeals have been exhausted. If not overturned, the convictions will give the DOJ another “stick” to use on investigated parties, particularly in plea negotiations against defense counsel who resist fines (for companies) or jail terms (for individuals). For companies and their employees—particularly senior executives—implicated in cartel conduct, the DOJ may become even more aggressive in the relief it demands as part of a negotiated resolution. For lower-level employees accused of participating in conspiracies, the results are less clear. The government has struggled more here, as evidenced by the two not-guilty verdicts and the one mistrial in *AU Optronics*. Individuals and their counsel should take a hard look at the record in this case to determine whether, given their own factual situation, it makes sense to put the government to its burden of proof. Finally, the appeal in this case means that Ninth Circuit jurisprudence on the FTIA and the extraterritorial reach of the Sherman Act has the potential to shape future DOJ enforcement efforts against international cartels and foreign collusion.

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## ENDNOTES

- 1 *United States v. AU Optronics Corp.*, No. CR 09-0110-SI (N.D. Cal. Mar. 13, 2012). The DOJ’s press release announcing the verdict is available at [http://www.justice.gov/atr/public/press\\_releases/2012/281032.htm](http://www.justice.gov/atr/public/press_releases/2012/281032.htm).
- 2 Although lower-level employees during the conspiracy, one defendant ascended to become chief executive and the other was elected to a directorship before the trial started.
- 3 Plea Agreement, *United States v. LG Display Co., Ltd.*, No. 08-cr-803-SI (N.D. Cal. 2008), available at <http://www.justice.gov/atr/cases/f278500/278568.pdf>.
- 4 Four charged individuals from various companies have not yet submitted to jurisdiction in the United States.
- 5 Press Release, U.S. Dep’t of Justice, “Samsung SDI Agrees to Plead Guilty in Color Display Tube Price-Fixing Conspiracy” (Mar. 18, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/268592.htm](http://www.justice.gov/atr/public/press_releases/2011/268592.htm).
- 6 Press Release, U.S. Dep’t of Justice, “Samsung Agrees to Plead Guilty and to Pay \$300 million Criminal Fine in for Role in Price Fixing Conspiracy” (Oct. 13, 2005), available at [http://www.justice.gov/atr/public/press\\_releases/2005/212002.htm](http://www.justice.gov/atr/public/press_releases/2005/212002.htm).
- 7 See John M. Connor, “Problems with Prison in International Cartel Cases,” 56 Antitrust Bulletin 311, Table 3 (2011).
- 8 *United States v. Swanson*, No. 06-cr-0692-PJH (N.D. Cal. 2008).
- 9 *United States v. Northcutt & Scaglia*, No. 07-cr-60220 (S.D. Fla. 2008).
- 10 “Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More,” available at <http://www.justice.gov/atr/public/criminal/sherman10.html>.
- 11 530 U.S. 466 (2000).
- 12 *United States v. AU Optronics Corp.*, No. 09-cr-00110-SI, slip op. at 5–6 (N.D. Cal. July 18, 2011).
- 13 *United States v. AU Optronics Corp.*, No. 09-cr-00110-SI, slip op. at 2-3 (N.D. Cal. Dec. 23, 2011).
- 14 Plea Agreement, *United States v. Baci*, No. 08-cr-350-J-32 TEM (M.D. Fla. 2008), available at <http://www.usdoj.gov/atr/cases/f238800/238829.htm>.
- 15 Plea Agreement, *United States v. VandeBrake*, No. 10-cr-4025-MWB (N.D. Iowa 2010), available at <http://www.justice.gov/atr/cases/f260100/260124.htm>.
- 16 Plea Agreement, *United States v. Whittle*, No. 07-487-03 (S.D. Tx. 2007), available at <http://www.justice.gov/atr/cases/f228500/228582.htm>.
- 17 Sharis A. Pozen, U.S. Dep’t of Justice, Antitrust Div., “Oversight Hearing on the Federal Trade Commission’s Bureau of Competition and the U.S. Department of Justice’s Antitrust Division” 14 (Dec. 7, 2011).
- 18 *United States v. AU Optronics Corp.*, No. 09-cr-00110-SI, slip op. at 8 (N.D. Cal. Apr. 18, 2011).

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