Convictions, $500 Million Fine Upheld in Price Fixing Case Against AU Optronics; Foreign Trade Antitrust Improvements Act No Bar

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The U.S. Court of Appeals in San Francisco last week upheld the price fixing convictions of Taiwanese electronics manufacturer AU Optronics (AUO), its U.S. subsidiary, and two company executives. The appellate court also affirmed a $500 million fine against AUO, the only defendant to challenge the sentence. The case is *U.S. v. Hsiung*, No. 12-10492.

In March 2012, following an eight-week trial, a jury found AUO, AU Optronics Corporation America (AUOA), and AUO's former president and former executive vice president guilty of conspiring to fix prices of thin-film transistor-liquid crystal display (TFT-LCD) panels. The display panels are used in flat panel computer monitors, notebook computers, flat panel televisions, and other devices.

The federal district court in San Francisco refused to disturb the convictions (2012-1 Trade Cases ¶77,924) and later imposed a record-tying $500 million fine on AUO. The company and its U.S. subsidiary also were placed on probation for

three years and ordered to implement antitrust compliance programs. The two convicted executives, Hsuan Bin Chen and Hui Hsiung, were sentenced to three-year prison terms and each fined $200,000. All four appealed their convictions, and AUO appealed its sentence.

The defendants took issue with the application of the Sherman Act to what they described as foreign conduct. The appellate court rejected the defendants' efforts to challenge a jury instruction on the issue and held that the defendants waived their argument that an extraterritoriality defense bars their convictions.

An argument that the district court should have applied rule of reason analysis as the standard for judging liability instead of a *per se* approach also was rejected. The defendants unsuccessfully contended that the rule of reason applied to the challenged conduct because of its foreign character. U.S. Supreme Court precedent compelled application of the *per se* rule to this "classic horizontal price fixing scheme," the appellate court explained.

Foreign Trade Antitrust Improvements Act.

The Foreign Trade Antitrust Improvements Act (FTAIA) did not bar the prosecution because the government sufficiently proved that the defendants engaged in "import trade," which falls outside the scope of the FTAIA, the appellate court ruled. Describing the FTAIA as a "web of words," the court pointed out that the statute boiled down to two principles: (1) the Sherman Act applies to "import trade or import commerce" with foreign nations; and (2) the Sherman Act does not apply to nonimport trade or commerce with foreign nations, unless the "domestic effects" exception is met.

Trial testimony established that the AUO imported over one million price-fixed panels per month into the United States and that the cartel participants earned over $600 million from the importation of TFT-LCDs into the United States. Because the evidence in support of the import trade theory alone was sufficient to convict the defendants of price fixing in violation of the Sherman Act, it was not necessary to consider the sufficiency of the evidence supporting the alternate theory under the FTAIA relating to the domestic effects of the transactions, which the government pursued. It was noted, however, that the indictment sufficiently alleged such conduct.

Further, the defendants' argument that the indictment was flawed for failing to

mention the FTAIA by name or statutory citation was rejected. The indictment contained the factual allegations necessary to establish that the FTAIA either did not apply or that its requirements were satisfied.

The appellate court also clarified that the FTAIA was not a subject-matter jurisdiction limitation on the power of the federal courts but a component of the merits of a Sherman Act claim involving nonimport trade or commerce with foreign nations. The determination that the FTAIA provides substantive elements under the Sherman Act follows decisions of the Second, Third, and Seventh Circuits.

Venue.

In addition, the appellate court rejected the defendants' argument that venue was not appropriate in the Northern District of California. The government proved that venue was proper by a preponderance of the evidence.

In addition to evidence that the AUO's employees negotiated prices for TFT-LCDs with a customer in Cupertino, California, the government introduced evidence that AUOA representatives negotiated sales of price-fixed TFT-LCDs with another firm in the Northern District and that AUOA maintained offices there from which it conducted price negotiations by e-mail and phone. The appellate court found unavailing the defendants' arguments that the proper standard of proof for venue was beyond a reasonable doubt or that government engaged in prosecutorial misconduct in its rebuttal when arguing that venue was proper.

Fine.

The $500 million fine imposed pursuant to the Alternative Fine Statute, 18 U.S.C. § 3571(d) on AUO was upheld. The Alternative Fine Statute permits a fine of up to twice the gross gain derived from the crime, which would be significantly more than the Sherman Act statutory maximum of $100 million.

The jury found $500 million in gross gains from that offense. The unambiguous language of the statute permitted the district court to impose the $500 million fine based on the gross gains to all the co-conspirators. It did not require that the gain derive from the defendant's "own individual conduct," as AUO argued.

The court also rejected AUO's interpretation of the Alternative Fine Statute as requiring joint and several liability and imposing a "one recovery" rule. AUO's position would have required a reduction from the fine amount of the portion

already paid by AUO’s co-conspirators.