

## A 'Trial Penalty' For AU Optronics

*Law360, New York (September 26, 2012, 1:16 PM ET)* -- On Sept. 20, 2012, a federal judge imposed a \$500 million fine on AU Optronics Corp., a Taiwanese manufacturer of thin-film transistor liquid crystal display (TFT-LCD) panels, for its role in a price-fixing conspiracy. The amount of the fine equals that of the largest criminal antitrust fine in history and is roughly equal to the entire amount of fines collected by the Antitrust Division of the U.S. Department of Justice in fiscal year 2011. Two senior executives of AU, former AU president Hsuan Bin Chen and former vice president Hui Hsiung, were sentenced to three years in prison for their role in the conspiracy, the second-longest terms ever ordered in an antitrust case. The Antitrust Division had sought a fine of \$1 billion and 10-year prison terms for each executive, all of which would have set records.

The sentencing hearing was the latest step in a long-running and closely watched antitrust investigation that culminated in an eight-week jury trial in the Northern District of California at which AU and the two executives were found guilty of price-fixing. Two other executives were found not guilty, and the jury was unable to reach a verdict with respect to a fifth executive. AU has vowed to appeal its conviction and sentence.

The investigation focused on allegations that several of the world's largest manufacturers of TFT-LCD panels, which are used in products such as flat-screen televisions and computer monitors, were part of a cartel that conspired over a period of at least five years to fix the prices of their products, which then were sold into the United States. The investigation appears to have been triggered by a leniency application by another manufacturer, Samsung Electronics Co. Ltd.. In exchange for providing information about the conspiracy, Samsung was accepted into the DOJ's leniency program. As a result, Samsung and its employees have avoided criminal prosecution for participating in the cartel.

Other cartel participants opted to plead guilty in advance of trial. Seven other TFT-LCD manufacturers agreed to pay a total of more than \$890 million in fines. In addition, 10 executives have pleaded guilty and have been sentenced to serve prison terms ranging from six to 14 months. If the sentence stands, AU will pay \$100 million more than any of its co-conspirators, and the convicted executives will each serve prison sentences more than twice as long as the lengthiest of those served by their peers.

## **Criminal Antitrust Trials Remain High-Risk, High-Reward**

AU and its executives took the rare step of proceeding to a criminal trial rather than negotiating a plea agreement with the DOJ. The result of their decision provides a stark example of what is known as the “trial penalty” — the notion that sentences for those who go to trial are harsher than for those who negotiate a plea. Data shows that legislation involving mandatory sentences and harsher penalties for certain crimes, combined with increased prosecutorial discretion, has resulted in a steep drop in the number of cases that go to trial, but also a sharp increase in sentences for those that do.

Indeed, DOJ’s sentencing memorandum argued that AU and its executives deserved harsher sentences because, “unlike their coconspirators, defendants have refused to cooperate, assist the investigation, or accept responsibility after the government discovered the cartel or even after the jury convicted them.”

In this case, the DOJ argued for the use of the alternative fine calculation contained in 18 U.S.C. § 3571(d), which allowed it to seek fines multiple orders of magnitude higher than those imposed on the defendants who pleaded guilty. Section 3571(d) is a general sentencing statute that provides that, if a defendant “derives pecuniary gain from the offense,” then it may be “fined not more than the greater of twice the gross gain or twice the gross loss[.]” While there is little guidance on the definition of “gain” in an antitrust cartel case, the DOJ used the total amount of gross proceeds realized by all of the members of the conspiracy, which the jury found to be \$500 million.

Even though the judge did not agree with the DOJ’s position that AU’s fine should have been equivalent to twice the gross proceeds of the entire conspiracy, the fact that the DOJ convinced a jury to agree with its calculation of the ill-gotten gains will likely strengthen its bargaining position in future criminal antitrust investigations, at least pending an appellate decision. A corporation or individual will not want to be the lone remaining conspirator who has not pleaded guilty, lest it should be saddled with the total value of the conspiracy.

Assessing the risk for individual executives is more difficult. As evidenced by the two not-guilty verdicts in the AU trial — and the jury’s inability to reach a verdict as to the other executive — the risk of trial may be worth bearing, especially if the individuals were not central to the conspiracy. Indeed, the AU executives who were not found guilty either did not attend the central meetings or acted merely as lieutenants to Chen and Hsiung when they did attend. And while the three-year sentences received by Chen and Hsiung are severe, they amount to 30 percent of what the DOJ had been seeking and are within the guidelines range for the offense. The penalty for going to trial, in the case of the two executives who were found guilty, amounts to the loss of credit for cooperation and acceptance of responsibility under the guidelines.

## **Winning the Race for Amnesty**

The threat of punishments as severe as those imposed on AU and its executives also creates even greater incentives for cartel members to turn in their co-conspirators. Under the DOJ’s leniency program, if a self-reporting cartel member meets certain criteria, such as being the first to report and not being the ringleader, that member will receive full amnesty from prosecution. As Deputy Assistant Attorney General Scott Hammond has stated, “The dynamic literally creates a race to be the first to the prosecutor’s office.” While other benefits are available to those who cooperate, even if they are not first, only the winner is eligible for full amnesty. In the TFT-LCD investigation, Samsung apparently won, suffering no criminal consequences for its involvement in the conspiracy.

In short, the harsh sentences received by AU and its executives in this case will bolster the various tools used by the Antitrust Division in pursuing cartel investigations. Corporations are advised to maintain strong compliance programs and, if faced with criminal antitrust investigations, to examine closely the risks and rewards of cooperating with the government.

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