AUO Case Could Have Major Impact On Cartel Investigations


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Appellate briefs were recently filed in the case of U.S. v. AU Optronics Corporation[1] pending before the United States Court of Appeals for the Ninth Circuit, which raise issues of critical importance in the prosecution of foreign cartel cases in the U.S.: (1) whether Section 1 of the Sherman Act[2] applies extraterritorially to price-fixing meetings that occurred outside of the United States; and, if so, under what circumstances; and (2) in criminal cases involving foreign price-fixing activities, should the "rule of reason" apply, or should the per se rule apply? The resolution of these issues could have a major impact on a number of current U.S. Department of Justice investigations and in civil cases involving international cartels.

Background of the Case

AU Optronics Corporation ("AUO") is a Taiwanese manufacturer of TFT-LCD ("LCDs") panels, which are incorporated in computer notebooks, monitors and flat-panel TVs. AUO executives participated in a series of meetings in Taiwan with other Korean and Taiwanese manufacturers of LCDs over a five-year time span, at which the participants exchanged future price information and discussed ways to stabilize prices.

As a result of a leniency application by one of the participants in these meetings, which because know as the "crystal meetings," the Antitrust Division of the Department of Justice brought criminal charges against the meeting participants. Other participants in the "crystal meetings" pled guilty, and AUO and several of its executives were the only participants who elected to go to trial. After an eight-week trial in San Francisco, a federal jury convicted AUO, its U.S. subsidiary, and two former senior executives of a Section 1 conspiracy. The district court imposed a fine on AUO of $500 million, and sentenced the convicted executives to three years in jail.

In the district court, AUO vigorously contested the legal standards under which its foreign conduct was to be judged. The DOJ contended that a foreign agreement to set prices, no matter how reasonable, is a per se violation of the Sherman Act, requiring proof of neither an intent to curb competition nor an anti-competitive effect. AUO and the other defendants disagreed, contending: first, that the Sherman Act reaches only foreign conduct that was intended to substantially affect American commerce and did so affect it; and second, that foreign conduct cannot be presumed to have the same anti-competitive impact as domestic conduct, and thus the "rule of reason" always applies in foreign conduct cases. The district court rejected the defendants' arguments and permitted the government to try its case on a per se theory.

The Extraterritorial Reach of the Sherman Act and the Limitations of the FTAIA

The defendants argued in the district court that the Foreign Trade Antitrust Improvement Act[3] limits the extraterritorial reach of the Sherman Act. According to defendants, the FTAIA provides that the Sherman Act does not apply to foreign conduct unless that conduct comes within one of two statutory exceptions: (1) the import commerce exception, or (2) the domestic effects exception.

The FTAIA and these exceptions have been the subject of several recent appellate decision reaching somewhat different interpretations.[4] With respect to the "import commerce" exception, one key unresolved issue is whether price-fixing on components made overseas and incorporated in finished products overseas falls within the "import commerce" exception. With respect to the "domestic effects" exception, one key question is how to interpret the requirement in the FTAIA that the overseas conduct has a "direct substantial, and reasonably foreseeable effect" on domestic commerce.

On appeal, AUO has argued that its conviction must be reversed because the indictment in this case failed to mention the FTAIA or specifically include the essential elements necessary to establish the exceptions to the FTAIA. AUO has also argued that the evidence at trial failed to satisfy the FTAIA exceptions.

AUO argued on appeal that the "import commerce" exception should be construed narrowly, and should only apply where the defendant manufactures the actual good which is directly imported into the U.S. AUO argues that it only manufactured a component (the LCD glass panel) that was incorporated in a finished product made overseas, and it was the finished product which was imported into the U.S. Citing the recent Seventh Circuit decision in Minn-Chem, AUO argues that the "import commerce" exception should be narrowly construed to apply only to foreign corporations who engage in "direct import sales" to U.S. customers.

Pointing to the recent Third Circuit decision in Animal Science, the defendants also argue that the indictment and proof of trial was deficient, even under a somewhat broader interpretation of the "import commerce" exception that applies where the defendant's conduct was "directed at an import market" or "targeted" the U.S. market. Thus, AUO argues that the trial court's jury instruction, allowing the defendants to be convicted if they were engaged in either "fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States" or "fixing the price of TFT-LCD panels that were incorporated into finished products, such as notebook computer, desktop computers and televisions; and that this conduct had a direct, substantial and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States, or for delivery to the United States," is erroneous.

AUO also argues on appeal that the government failed to prove the elements of the "domestic effects" exception to the FTAIA because the government failed to prove that AUO's conduct had a "direct" effect on domestic commerce. AUO asserts that this exception does not apply because AUO did not import any products or manufacture any finished products; it only produced overseas a component that was incorporated into finished products by others. Under AUO's interpretation, restraints in foreign markets for inputs that are used abroad to manufacture downstream products that may later be imported into the U.S. do not satisfy the requirement under the FTAIA for a "direct, substantial and reasonably foreseeable" effect on domestic commerce. Further, AUO argues that the government failed to prove that it had the intent to negatively affect U.S. commerce, a required element to extend the Sherman Act to foreign conduct under the U.S. Supreme Court case of Hartford Fire Ins. Co. v. California[5].

Not surprisingly, the DOJ argues on appeal that its Indictment and the proof of trial satisfied the requirements of the FTAIA. The DOJ argues that the key term "involving" import trade or import commerce in the FTAIA should be interpreted to reach "fixing the price of panels made abroad and sold as raw panels in, or for delivery to, the United States."[6] According to the DOJ, the FTAIA leaves the Sherman Act applicable, not just to the conduct of the direct importers of a product, but to any conduct that involves import commerce. The DOJ asserts that the narrow interpretation of the import commerce exception urged by defendants would be contrary to the FTAIA's purpose to ensure that purchasers in the United States remain fully protected by the Federal antitrust laws.[7]

Since there are many pending DOJ investigations and civil cases involving alleged price fixing of components made abroad but incorporated into finished products imported into the U.S., the resolution of the issues framed in AU Optronics case will be closely watched by antitrust practitioners.

Is Foreign Price-Fixing Subject the "Rule of Reason" or Per Se Treatment?

On appeal, AUO also raises a novel argument based on the prior Ninth Circuit decision in Metro Industries Inc. v. Sammi Corp.[8] Metro Industries is a civil antitrust case where the Ninth Circuit

stated in broad terms: "[W]here a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation." [9] Relying on this language, AUO argued in the district court and on appeal that Metro Industries creates a bright-line rule that foreign antitrust cases must be analyzed under the rule of reason. Because the district court rejected AUO's argument, it precluded AUO from presenting evidence that that coordination among LCD manufacturers actually benefited American consumers.

The DOJ argued in the district court and on appeal that Metro Industries did not involve a price-fixing conspiracy, and therefore is inapplicable.

The DOJ's position in this regard was recently adopted by another district judge in San Francisco in another international price-fixing case, U.S. v. Eagle Eyes Traffic Industrial Co. Ltd.[10] In the Eagle Eyes case, a Taiwanese corporation was indicted for participating in a price-fixing conspiracy for aftermarket auto lights. The district court rejected the defense argument that the "rule of reason" should be applied, distinguishing Metro Industries. The district court noted that the Metro Industries case involved a Korean design registration system that gave manufacturers an exclusive right to export a registered product design for three years. The Ninth Circuit in Metro Industries declined to apply per se analysis in that case, rejecting the plaintiff's analogy to a per se illegal horizontal market division agreement; The district court in Eagle Eyes ruled that Metro Industries does not stand for the proposition that all Sherman Act cases based on foreign conduct are rule of reason cases.[11]

Clarification of which rule applies will be important in a number of pending cases and government investigations.

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[1] Case No. 12-10550 (9th Cir.), (AUO Brief on 02/24/2013) DKT entry 19-1 and (DOJ Brief of 04/05/2013) 36-1.

[2] 15 U.S.C. §1.

[3] 15 U.S.C. §6a.

[4] See Minn-Chem, Inc. v. Agrium, Inc., 683 F.3rd 845 (7th Cir. 2012); (en banc); Animal Science Prod. Inc. v. China Minmetals, 654 F3rd 462 (3rd Cir. 2011).

[5] 509 U.S. 764, 796 (1993). ("[I]t is well established ... that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.")

[6] DOJ Brief at p. 47.

[7] DOJ Brief at p. 48.

[8] 82 F.3d 839 (9Th Cir. 1996).

[9] 82 F.3d at 845.

[10] Case No. CR-11-00488 (N.D.Cal.).

[11] Order Denying Motion to Dismiss Indictment or, in the Alternative, for a Ruling as a Matter of Law re: Rule of Reason, In U.S. v. Eagle Eyes Traffic Industrial Co., Ltd., Case No. CR-1100488 (N.D.Cal Sept. 11, 2012). After the motion to dismiss was denied, the corporate defendant pled guilty.