



# Restraining liberty before a verdict is in sight

The US Department of Justice’s antitrust division is unforgiving in its fight against international cartels. **Jason Brown, Mark S Popofsky** and **Anthony Biagioli** of Ropes & Gray LLP, take an in-depth look at *United States v AU Optronics Corp* and the DOJ’s broader policy of imposing travel restrictions in international cartel cases.

**C**OMBATING international cartels remains the top priority for the US Department of Justice’s antitrust division. Courtroom challenges contesting these criminal prosecutions are rare. Indeed, since 2001, no company and only a handful of individuals have taken the DOJ to a jury in an international cartel case. Recently, however, AU Optronics Corp (AUO) – a Taiwanese display maker – and its executives have elected to fight where others have pleaded. Although these executives voluntarily submitted to the jurisdiction of the United States courts, the antitrust division contested their requests to travel abroad pending trial. The antitrust division fought to impose travel restrictions even in the face of financial commitments from family members to secure the defendants’ return to the United States. *United States v AU Optronics Corp* stands as a stark reminder for companies and executives who elect to fight the antitrust division that prosecutors may move aggressively to restrict defendants’ freedom well before a verdict is in sight.

### An aggressive enforcement climate

The antitrust division owes much of its success in prosecuting international cartels to the 1993 revision of DOJ’s amnesty programme, pursuant to which the first alleged cartel member to report to and cooperate with the government is rewarded with:

- no criminal charges filed against the company or cooperating employees;
- no criminal fine;

- a promise of confidentiality; and
- in certain circumstances “de-trebling” of civil damages.

The fines collected and the jail sentences imposed demonstrate the amnesty programme’s success. From 2000 to 2009, the government collected US\$4.2 billion in criminal antitrust corporate fines compared to US\$1.6 billion in the 1990s and US\$188 million in the 1980s. In 2010, 78 per cent of criminal antitrust defendants were sentenced to jail with an average sentence of 30 months, compared with merely 38 per cent and 10 months in 2000. Perhaps the greatest tribute to the amnesty policy is its emulation: today, over 50 jurisdictions offer similar amnesty or leniency programmes, compared to just one jurisdiction in 1990.

To focus agency resources on cases involving larger volumes of commerce, the antitrust division increasingly has targeted international cartel cases, which often involve foreign defendants. In 1991, foreign-located corporate defendants accounted for only one per cent of cases brought by the division. By 2005, that figure stood at roughly 50 per cent. Since 1999, more than 40 foreign individuals have served, or are serving, prison sentences in the United States arising out of cartel conduct. The antitrust division’s success in *United States v Nippon Paper Co* – a case successfully argued by one of the authors of this article and which held that the Sherman Act could apply extraterritorially in criminal cases

– helped pave the way for this seemingly unending parade of large international cartel cases.

As a practical matter, and in significant part because of the amnesty programme, almost all defendants in international cartel cases plead guilty, even though the division loses approximately 50 per cent of its criminal jury trials. Aside from the successful obstruction of justice prosecution of Ian Norris, the last defendants to challenge a cartel prosecution – and successfully at that – did so three years ago. In 2008, two executives of an Italian manufacturing company were charged with conspiring in meetings, e-mails and phone calls to fix prices of rubber marine hose used to transport oil and other fluids from tankers to onshore storage facilities. The defendants sought to discredit the testimony of the antitrust division's witnesses – alleged co-conspirators who cooperated with the government – as false. After a four-week trial, the jury took only two hours to acquit. Prior to 2008, the last corporate defendant to contest an international cartel prosecution was Mitsubishi. In 2001, after a two-week trial, a jury convicted Mitsubishi of aiding and abetting a conspiracy to fix prices of graphite electrodes (large, heat-generating columns in electric air furnaces used to produce steel) and was fined US\$134 million.

#### **AUO and its executives elect to fight – and confront travel restrictions**

AUO and its executives are the latest defendants to contest criminal liability for an international cartel. The antitrust division charged AUO and other companies with participating in a cartel to fix prices of thin film transistor liquid crystal displays (TFT-LCDs), which are the screen panels used in television sets, computer monitors, and other consumer electronic devices. The indictment alleges that from 2001 to 2006, four Taiwanese TFT-LCD manufacturers (including AUO) and two later-joining Korean manufacturers secretly met in hotel rooms in Taipei, Taiwan in what have been dubbed the “crystal meetings.” Since 2007, according to the antitrust division, eight companies and 22 executives have been charged in connection with the TFT-LCD cartel. Most pleaded guilty. Chi Mei Innolux, for example, paid a US\$220 million fine and four of its executives were sentenced to between nine and 14 months in prison and fined US\$25,000 to US\$50,000 each. All four served or are currently serving their sentences.

But AUO and several executives refused to plead even though the company faces significant corporate fines and each executive – according to the antitrust division – faces years in prison and potentially tens of millions in fines.

With the trial not scheduled until late 2011, a verdict in *United States v AU Optronics Corp*, much less the imposition of a sentence, is months away. Long before the first opening statement, however, each defendant executive has already had his liberty significantly restrained. This is despite the fact that each defendant voluntarily travelled to the United States to appear in court (Taiwan lacks an extradition agreement with the United States), while other indicted co-defendants remain fugitives abroad. From the outset, the antitrust division requested, and the court ordered, that the defendants surrender their visas and not travel outside of the Northern District of California. Each defendant requested and then renewed a request to travel internationally, in some cases multiple times. The government continued to oppose these requests. On a very limited basis, the court ultimately permitted each of four AUO executives to travel to

Taiwan, but only for a few weeks and only to fulfil pressing family obligations.

Hsuan Bin Chen, an AUO director and former president, requested to travel abroad. Three of his daughters who lived in the United States – a Mayo Clinic physician, a Harvard-trained architect, and a PhD candidate at the University of Michigan – offered to act as sureties to ensure their father's return. The antitrust division successfully opposed his request on the grounds that the United States did not have an extradition treaty with Taiwan, the evidence against Chen was substantial, and the possible penalty significant, all

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of which increased the risk of flight. Chen then requested to travel to Taiwan to visit his gravely ill parents; his mother had stage-three liver cancer, and his father had recently suffered a stroke and was confined to a wheelchair after suffering a spinal injury. The antitrust division again opposed his request, arguing that Chen remained a flight risk, that his parents appeared well taken care of, and that nothing suggested he was critical to his parents' medical care. In September 2010, nearly two months after Chen's initial request, the court permitted him to travel to Taiwan to visit his parents, which the court subsequently permitted on two other occasions.

Tsannrong Lee, an AUO manager, made a similar request to travel to Taiwan that the court initially denied. He later renewed his request, citing the hardship on his eight-year-old son caused by their separation. The antitrust division opposed his request, arguing that the evidence against him was strong and that the hardship on Lee's family was not unique and provided even more of an incentive to remain in Taiwan. Ultimately, six months after his initial request to travel, the court granted Lee's motion, but it only allowed him to return home for three weeks. Lee has since filed an unopposed application for further travel to Taiwan.

Lai-Juh Chen, the CEO of AUO, made two similar requests that were originally denied. Notably, in his second request, Chen argued that he had already received his passport three times to travel within the United States and had not fled to Taiwan. He asserted that his presence was required at a critical six-day conference in Japan (with which the United States has an extradition treaty) to meet with manufacturers, customers and suppliers. The antitrust division opposed the request and argued that there was no guarantee that Japan could ensure Chen remained in the country; even if Japan could, extradition might take years. The court agreed with the division and denied the request. Chen later sought permission to travel to Taiwan, this time to visit his ailing father and observe the Chinese New Year. The division again opposed the request, arguing that Chen's desire to visit his family had no bearing on the government's claim that he was a flight risk. The court ultimately granted Chen three weeks in Taiwan, some five plus months after Chen's initial request. Chen has since applied for further travel.

Hui Hsiung, an AUO executive, also requested that his travel restrictions be lifted. Among other things, he cited that his wife and

children lived in the United States, were US citizens and were open to being subject to travel restrictions. Hsiung further stressed that he voluntarily travelled to the United States for arraignment, fully aware of the possibility of detention. The antitrust division successfully opposed his request using arguments similarly employed against other AUO defendants. Hsiung subsequently made another request, this time to travel to Taiwan to celebrate the Chinese New Year with his family. Once again, the division opposed and argued that, unlike the other defendants, Hsiung did not have family members in Taiwan who were suffering significant hardship. Some six months after Hsiung's request to travel abroad, the court granted him two weeks in Taiwan.

#### **The international cartel defendant's dilemma**

A clear lesson from *United States v AU Optronics Corp* is that, when executives challenge the antitrust division in an international cartel case, the division may attempt to significantly restrict their freedom from early stages of litigation. Absent compelling family obligations (or, depending on the court, maybe even in spite of them), the antitrust division's position may well prevail. Even in *AU Optronics*, it took the defendant executives as long as six months to convince the court to permit them to travel abroad for relatively short family visits. This was not anomalous. In the 2008 rubber marine hose prosecutions against defendant foreign executives, the government successfully argued for travel restrictions and that the defendants should wear ankle monitors to track their movements. *AU Optronics* is a real-life reminder about the very significant risk of pre-trial restraint in international cartel prosecutions.

Ironically, in an international cartel prosecution, the duration of a travel restriction may easily exceed the length of a jail sentence that might have been imposed had the executive pleaded. For example, in connection with the antitrust division's prosecution of participants in an alleged international air cargo cartel, four executives pleaded guilty and were each sentenced to six to eight months in prison. A trial, by contrast, may not occur for up to two years after a defendant's initial appearance. While most defendants would very likely opt for two years freely moving within the Northern District of California over six months in prison, alleged cartel participants may see their freedom of movement severely restricted whether they challenge the antitrust division or not.

The antitrust division's stance in *AU Optronics* may have unintended, adverse consequences for the division's prosecutions. Although many foreign executives have voluntarily submitted to the jurisdiction of United States courts in international cartel cases, business persons facing cartel prosecutions may react to the positions the government took on travel restrictions by staying outside the United States, especially if the defendant's home country lacks an extradition treaty with the United States. Even if a defendant in an alleged international cartel elects to brave the risks of restrictions and appear before a US court, that defendant may request a speedier trial to truncate the period of restrictions, thereby limiting the government's time in which to secure cooperating witnesses or prepare for trial. Time will tell whether the antitrust division's decision to contest permission for voluntarily-appearing defendants to travel abroad proves detrimental to the division's broader campaign to deter international cartels.

First published: May 2011 (Vol. 14 Iss. 5)