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ECJ Decision in LCD Cartel Case Affirms Potential for Higher Fines to be Imposed on Vertically Integrated Companies

Decision allows Commission to consider sales of products incorporating cartelized goods when calculating cartel fines for a vertically integrated group selling the "transformed product" in Europe.

On 9 July 2015, the Court of Justice of the European Union (ECJ) dismissed InnoLux's appeal seeking to reduce a €288 million fine for its involvement in the liquid crystal display (LCD) cartel.[1] The judgment confirms the Commission's ability to take into account for fining purposes intra-group/company sales of products subject to collusion where such sales occurred *outside* the European Economic Area (EEA), if these products are subsequently incorporated into finished goods by a vertically integrated undertaking and sold to third parties in the EEA. The ECJ judgment did not follow the recommendations of the Advocate General delivered in April this year which had argued — on jurisdictional grounds — that the Commission should not have taken the sale of transformed products into account when setting InnoLux's fine. By ignoring the jurisdictional analysis, however, the judgment expressly does not address the significant issue of the limits of the territorial application of EU competition rules and is limited to the narrow issue of fine calculations.

Background

In December 2010, the Commission fined InnoLux €300 million for its participation in the LCD cartel. When determining the level of the fine, the Commission identified three categories of sales made by the participants in the cartel:

- "*Direct EEA sales*" – sales of LCD panels to another company in the EEA
- "*Direct EEA sales through transformed products*" – sales to a third party within the EEA of LCD panels incorporated into finished products by a vertically integrated company that has assembled the finished products outside the EEA
- "*Indirect sales*" – sales of LCD panels to a third party outside the EEA, which then incorporates the panels into finished products and sells these within the EEA.

When determining the fine imposed on InnoLux, the Commission took into account *both* direct EEA sales and direct EEA sales through transformed products, but excluded the "indirect sales". InnoLux appealed the Commission's decision to the General Court which reduced the fine to €288 million, although the General Court rejected pleas related to the Commission's use of direct EEA sales through transformed products when calculating the fine. InnoLux appealed the ruling to the ECJ. Advocate General Wathelet (AG Wathelet) issued an Opinion in April this year proposing to grant InnoLux's appeal in part. The ECJ disagreed and dismissed the appeal in its entirety.

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Issues of Interest

Including "direct sales through transformed products" in calculating the fine

When determining the fine to be imposed on a company for an infringement of EU competition rules, the Commission generally starts its analysis from the value of the undertaking's sales of goods to which the infringement directly or indirectly relates in the EEA.[2] One of the main points of contention in this case was whether the Commission could in this context take into account the value of LCD panel sales in the EEA that were *not* made on the product market concerned by the infringement (*i.e.* LCD panels) but on the downstream market (*i.e.* finished products incorporating the LCD panels).[3] The ECJ found that these sales *could* be taken into account when a vertically integrated undertaking incorporates cartelized goods into finished products outside the EEA, since the subsequent sale of those finished products to independent third parties in the EEA is liable to affect competition on the market for those products in the EEA. Even if the cartel related to a separate market from that concerned by the infringement, there was the clear possibility of repercussions in the EEA. In this case the General Court made a finding of fact that could not be challenged before the ECJ that 1) the internal sales were made at prices affected by the cartel and 2) the cartel participants were aware that the price of the cartelized LCD panels affected the price of the finished products into which they were incorporated (paras 55-61).

According to the court, excluding these sales from the fine calculation would lead to artificially minimizing the economic significance of the infringement and would minimize the relative weight or significance of the participation in the infringement by a vertically integrated company with production units outside the EEA.

It is worth noting that the judgment does not take a position on pure "indirect sales" since these type of sales, which have been the subject of significant discussion in recent and pending cases, were not within the scope of the Commission decision and therefore the pleas before the court.

Corporate and sales structure can make a difference

In reaching its findings on what may be included in the sales that are the basis for the fine calculation, the ECJ rejected the argument that the Commission's approach to calculating the fine led to discrimination against InnoLux as compared to other cartel participants that were not vertically integrated. The Commission was entitled to consider different types of sales when determining the fine, depending on whether or not cartel participants were vertically integrated. An objective difference in the corporate and sales structure justified differential treatment here — in one case, sales were merely internal and therefore the benefits of the cartel from the downstream sales would redound to the cartel participant, whereas this was not the case when an independent third party made the downstream sale.

Jurisdictional issues

The ECJ rejected as irrelevant InnoLux's argument that the Commission did not have jurisdiction to impose a fine based on non-EEA sales of LCD panels. The ECJ commented that the Commission's jurisdiction over the cartel was not disputed because InnoLux also sold LCD panels *directly* into the EEA. According to the ECJ, the issue of what sales should be taken into account for the purposes of the fine was a distinct question: what mattered was to determine the value of sales to be taken into account so that the amount of the fine reflects the economic importance of the infringement as well as the relative weight of InnoLux in the infringement.

The ECJ also dismissed arguments on *non bis in idem* (double jeopardy) and in particular the risk that InnoLux could face additional penalties by competition authorities of non-EU Member States calculated on the basis of the same LCD components. For example, the same sales transactions could be included

in the fine calculations of the authority in the country of original sale and those of the Commission if the component was subsequently sold in the EEA as part of finished products (the Commission could include the price of the original input or, as in the LCD case, the value of the component in the price of the subsequent transformed product sold to a third party). According to the ECJ, the Commission was not obliged to take account of proceedings and penalties imposed in non-EU countries. However, when reaching this conclusion the court cited case law concerning fact patterns that were different, or where the cartelized products sold in non-EU countries were not subsequently sold (through finished products) in the EEA. Thus, the judgment has potentially narrowed the scope of the notion of double jeopardy under EU antitrust law.

Comment

When determining the fine for cartels in input products, the ECJ confirmed that the Commission is in specific circumstances permitted to take into account non-EEA sales of cartelized inputs if these inputs have been built into transformed products and subsequently sold to a third party in the EEA by a vertically integrated company. This approach, combined with the ECJ's dismissal of the *non bis in idem* principle could encourage the Commission to try to include more non-EEA turnover in its fine calculations in future cases. Such an approach may cause friction with other international regulators, and result in excessive fines, particularly if the downstream effects in the EEA of a cartel related to components were limited.

A careful reading of the judgment would, however, point against an expansion of the powers of the Commission to include pure "indirect sales" in its fine calculation. The ruling is very specific as to its application to EEA sales of transformed products incorporating cartelized goods when made by a vertically integrated undertaking based outside the EEA. Indeed, the language in the ruling appears to be carefully tailored to the facts at hand, so that the ruling could not be applied to situations where the initial sale of components outside the EEA is made to a third party, which in turn incorporates such components into finished products sold in the EEA, *i.e.* to pure "indirect sales".

Finally, the ruling is surprisingly limited in its analysis of jurisdictional issues and provides little guidance on the limits of the territorial reach of EU competition rules — expressly noting that the appeal did not concern the concept of territorial jurisdiction but rather the "separate question, namely the calculation of the amount of the fine" (para. 74). The question of the extraterritorial application of the EU's competition rules therefore remains to be clarified — and, given the different approach AG Wathelet adopted in his Opinion, it would appear to be a question that remains unresolved within the ECJ itself.

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Endnotes

1 Case C-231/14 P *InnoLux Corp. v. European Commission*

2 Point 13, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) Regulation 1/2003* (OJ 2006 C210, p.2)

3 The Commission took into account the proportion of the value of the finished products that corresponded to the value of the incorporated LCD panels when these were sold to third parties in the EEA.