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European Court of Justice Underlines Importance of Non-Discrimination Principle in EU Cartel Fines

EU High Court reduces cartel fine by 30 percent on appeal and stresses need for timely resolution of cases by the General Court.

Summary

On 12 November 2014, the Court of Justice of the European Union (ECJ) issued its judgment in *Guardian Industries*, an important ruling stressing the need for the European Commission to respect the principle of non-discrimination when calculating fines for competition-law infringements.[1] The judgment concerned the Commission's treatment of "captive sales," *i.e.* sales within the same corporate group that were affected by cartel conduct, a recurring issue in the Commission's fining practice. In the future, if the Commission decides to exclude such sales for purposes of calculating fines, it will also have to grant proportionate reductions to companies that do not have such captive sales, and may generally have to be more mindful of avoiding fines that may not reflect a companies' relative weight in the market and role in the infringement. Moreover, the ECJ found that the General Court (GC) had taken too long to rule on the defendant's appeal at first instance, paving the way for a possible damage action against the European Union.

Background

In 2007, the Commission issued a decision fining four flat glass manufacturers, including Guardian Industries, for an alleged cartel infringement. Even though Guardian was the smallest producer of the four, Guardian received the highest fine (EUR 148 million). Guardian appealed the decision to the General Court, asking for an annulment based on insufficient evidence of its participation in the infringement and, in the alternative, a reduction of the fine to remedy the discrimination it had suffered vis-à-vis the other producers. The GC rejected all of Guardian's pleas.[2] Guardian appealed to the ECJ on the discrimination issue, and also argued that the GC had taken an excessive amount of time (almost five years) in dealing with the case at first instance. In April 2014, Advocate General Wathelet issued his Opinion recommending that the ECJ should partially annul Guardian's fine.[3] Latham & Watkins partner Sven Völcker was co-counsel to Guardian before the GC and on appeal to the ECJ.

The Judgment's Main Findings

The ECJ's judgment is one of the rare cases in which the ECJ overturned a GC judgment in a competition case, particularly on issues of fine calculation. The ECJ typically accepts that the Commission has broad discretion in setting and applying its fining policy and defers to the GC in overseeing the Commission's assessment. However, in the present case the ECJ identified particularly serious legal flaws in the GC's treatment of the case.

The Need to Consider Captive Sales

In earlier judgments,[4] the ECJ had already rejected arguments by vertically integrated producers that sought to have their captive sales excluded from the Commission's calculation of fines, arguing that such captive sales benefit "in one way or the other" from (assumed) higher cartel prices – either their own downstream subsidiaries (in the case of flat glass, the producers of insulated glass used for windows) could raise prices on the downstream market, or they could seek to gain market share from independent producers that had to pay the higher cartel prices. The *Guardian* judgment develops the case law in two respects: First, the ECJ clarified that the need to consider captive sales is a general legal principle that also informs the interpretation of the Commission's 2006 Fining Guidelines. Second, the ECJ ruled that the Commission does not have discretion to simply disregard those captive sales, even if this were to lead to lower fines for most companies. If the Commission choses to exclude captive sales from the fine calculation, it must grant corresponding reductions to non-vertically integrated companies such as Guardian.

One could question whether the judgment will lead to higher fines in the future. In our view, that is not necessarily so. If the ECJ had meant to spell out a strict requirement for the Commission to include captive sales in each and every case, the ECJ would not have granted a fine reduction to Guardian, but would have held that Guardian had been treated correctly, and should not benefit from the Commission's inappropriately generous treatment of the vertically integrated companies. But the ECJ did not do so, effectively leaving the Commission a degree of discretion as to how to account for captive sales based on the facts of the individual case. In the present case, the Commission simply excluded captive sales at a late stage of its administrative procedure without including any reasoning whatsoever in its decision.

Unreasonably Long Proceedings Before the General Court

The Court of Justice also found that the length of proceedings before the GC (almost five years) infringed Guardian's right to have its case adjudicated "within a reasonable time" (Article 47 of the Charter of Fundamental Rights of the European Union). This finding is noteworthy in light of the ECJ's recent *Gascogne* judgment,[5] in which the ECJ held that even if the length of the GC's procedure was excessive, a company could not seek to have that violation remedied by requesting a fine reduction from the ECJ on appeal. Rather, a company has to bring a separate action for damages before the GC. The *Gascogne* judgment has been criticized, including by Advocate General Wathelet in his Opinion in *Guardian*, as not providing for effective relief. One of the open questions after *Gascogne* was whether the ECJ would now simply dismiss any pleas of excessive duration on appeal as inadmissible, leaving applicants in the unenviable position of persuading the GC that the GC's own procedure was deficient without any guidance from the higher court.

In *Guardian*, the ECJ indeed decided to opine explicitly on the excessive length of the GC's procedure, thus issuing binding guidance to the lower court. Whether the ECJ will do so in future cases is an open question – the ECJ found that it "may note" a breach where "it is clear in the case before it, without there being any need for the parties to adduce evidence" that the GC breached the its obligation to decide the case in a reasonable time "in a sufficiently serious manner."

The delicate interplay between the ECJ and GC on the question of excessive duration of proceedings before the GC is all the more interesting given the current discussion over how the persistent backlog of cases before the GC and resulting delays should be addressed. The ECJ's President has proposed to add a substantial number of judges to the GC, which has met resistance by EU Member States, at least in part for budgetary reasons. The prospect that companies may be able to obtain material damages for unreasonable delays as a direct result of the Member States' failure to equip the GC with the needed

resources may put the budget needed for additional judges in perspective (a figure of EUR 30 million per annum has been mentioned for doubling the currently 28 judges at the GC).

Conclusion

Companies caught up in cartel investigations and facing fines should carefully consider how the Court's emphasis on non-discrimination may help or hurt their case, and adapt their advocacy accordingly. As indicated, the judgment does not impose a strict obligation on the Commission to treat captive sales on par with external sales in calculating fines. However, companies requesting the Commission discount such sales will have to advance compelling arguments based on the facts of the individual case, (*e.g.* the percentage of external sales is small, or the value added by the companies' downstream operations is substantial enough not to affect downstream prices). For companies litigating before the GC, the prospect of obtaining meaningful damages for excessive delays remains distant. Thus, a preferable strategy would focus on maximizing the chances of quick resolution of the matter before the GC, highlighting a few key arguments that have the greatest chance of success.

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Endnotes

[1] Case C-580/12 P, Guardian Industries and Guardian Europe v Commission [2014], ECLI:EU:C:2014:2363.

[2] Case T-82/08, *Guardian Industries and Guardian Europe v Commission* [2012], ECLI:EU:T:2012:494,

[3] Opinion of AG Wathelet in Case C-580/12 P, ECLI:EU:C:2014:272

[4] Case C-248/98 P, KNP BT v Commission, EU:C:2000:625, paragraph 62; Case T-304/94, Europa Carton v Commission, EU:T:1998:89, paragraph 128; KNP BT v Commission, EU:T:1998:91, paragraph 112; Case T-309/94, Lögstör Rör v Commission, EU:T:2002:72, paragraphs 360 to 363; and joined Cases T-71/03 et al., Tokai Carbon and Others v Commission, EU:T:2005:220, paragraph 260.

[5] Case C-58/12 P, *Groupe Gascogne v Commission*, ECLI:EU:C:2013:770.