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EU Judgment Confirms Potential of High Cartel Fines for Vertically Integrated Multinational Companies

Peter Citron (Hogan Lovells) · Thursday, July 23rd, 2015

On 9 July 2015, the Court of Justice of the European Union ("ECJ") issued an important judgment[1] concerning the basis on which cartel fines by the European Commission should be calculated for vertically integrated companies.

The judgment endorses the power of the European Commission to impose large fines on multinational companies operating at various levels of the manufacturing and supply chain. It confirms that, for the purposes of cartel fine calculation, the Commission may take into account non-EEA sales of cartelized inputs if these inputs have been built into finished products and subsequently sold to a third party in the EEA by a vertically integrated company.

The judgment stands as a striking example of the extra-territorial application of the EU competition rules to the calculation of fines. It is of particular interest to vertically integrated multinational companies which operate some parts of the manufacturing chain outside the EU, but sell finished products within the EU.

What happened?

On 8 December 2010, the Commission fined InnoLux Corp. ("InnoLux") EUR 300 million for participating in a cartel on IT and TV liquid crystal display (LCD) panels. InnoLux challenged the Commission's decision before the EU General Court which reduced the fine to EUR 288 million. InnoLux appealed the ruling to the ECJ. In April 2015, Advocate General Wathelet issued an Opinion recommending that InnoLux's appeal be upheld in part. The ECJ disagreed and dismissed the appeal in its entirety.

The European Commission's fining methodology

The Commission distinguished three categories of sales made by the participants in the cartel:

- ***"Direct EEA sales"*** – sales of cartelised LCD panels to another undertaking within the EEA;
- ***"Direct EEA sales through transformed products"*** – sales of cartelised LCD panels incorporated, within the group to which the cartel participant belongs, into finished products which are then sold to another undertaking within the EEA; and
- "***Indirect sales"*** – sales of cartelised LCD panels to another undertaking outside the EEA, which then incorporates the panels into finished products which it sells within the EEA.

In determining the basic amount of the fine, Point 13 of the Commission's guidelines on the method of setting fines establishes that the Commission will take into account the value of sales of "*goods or services to which the infringement directly or indirectly relates"* in the EEA.

In relation to LCD panels, the Commission took into account "direct EEA sales" and, for the first time, "direct EEA sales through transformed products". The Commission chose not to include the third category of "indirect sales", as it considered that the inclusion of the first two categories had achieved a sufficient level of deterrence.

The sales of finished products incorporating the cartelised LCD panels were not taken into account up to their full value, but only up to the proportion of that value which corresponded to the value of the cartelised LCD panels that were incorporated into the finished products.

Key points

What sales to take into account when calculating fines?

One of the key points argued was whether the Commission could take into account the value of LCD panel sales in the EEA that were not made on the product market concerned by the infringement (LCD panels) but on the downstream market (finished products incorporating the LCD panels).

The Court 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 market for the finished products in question constitutes a separate market from that concerned by the infringement, the Court considered that an infringement on the upstream market "*may be considered to have had repercussions in the EEA".*

The Court held that: "*it would be contrary to the goal pursued by Article 23(2) of Regulation 1/2003 if the vertically-integrated participants in a cartel could, solely because they incorporated the goods subject of the infringement into the finished products outside the EEA, expect to have excluded from the calculation of the fine the proportion of the value of their sales of those finished products in the EEA that are capable of being regarded as corresponding to the value of the goods the subject of the infringement*".

The General Court made findings of fact which could not be challenged before the ECJ (i) that internal sales of cartelised LCD panels to undertakings participating in the cartel were made at prices affected by the cartel, and (ii) that the cartel participants were aware that the price of cartelised LCD panels affected the price of the finished products into which they were incorporated.

The ECJ rejected InnoLux's argument that the Commission's approach to fine calculation led to discrimination against InnoLux as compared to other cartel participants that were not vertically integrated. The Court held that InnoLux was in an objectively different situation from the other cartel participants, and this objective difference justified treating sales differently in the fine calculations.

Jurisdictional issues

InnoLux argued that the Commission did not have jurisdiction to impose a fine based on non-EEA sales of LCD panels. Advocate General Wathalet supported this argument and found that the Commission exceeded the territorial scope of the EU rules by using the concept of "direct EEA sales through transformed products". He considered that taking into account these sales extended the Commission's territorial competence for the sole reason that it "assumed" that the cartel had an impact on the EU as a result of the sale of finished products incorporating LCD panels to independent third parties within the EU.

The Court did not follow the recommendations of Advocate General Wathalet's opinion and rejected InnoLux's argument as irrelevant. It commented that the cartel participants, including InnoLux, had implemented the cartel in the EEA by making sales in the EEA of the goods concerned by the infringement to independent third parties. It held that the issue of what sales should be taken into account for the purposes of fine calculation was a "*separate question*". "*In that regard, it is important…to determine the value of sales to be taken into account, so that the amount of that fine reflects the economic importance of the infringement as well as the relative weight of InnoLux in the infringement"*.

InnoLux raised arguments of double jeopardy, in particular the risk that it could face additional penalties by competition authorities of non-EU Member States calculated on the basis of the same LCD components. The Court held that the Commission was not obliged to take account of proceedings and penalties to which the undertaking has been subject in non-Member Sates.

Impact

This judgment has important consequences for vertically integrated multinational companies, which now face the risk of European Commission fines which have been set on the basis of non-EEA sales of cartelized inputs. These companies potentially face the imposition of very large fines, with different national regulators across the world effectively fining multiple times for the same cartel behaviour.

The judgment, however, rules on a very specific question, namely when it is permissible in the fine calculation 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. The judgment does not deal with how to treat "indirect sales", namely where the initial sale of components outside the EEA is made to a third party, which in turn incorporates the components into finished products for sale in the EEA.

This post originally appeared on the Kluwer Competition Law Blog.

1. 1.Case C-231/14P – InnoLux v European Commission, judgment of 9 July 2015.

This entry was posted on Thursday, July 23rd, 2015 at 9:26 pm and is filed under International Competition Law, Price Fixing
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