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InnoLux: A Charter for the European Commission to Impose Even Higher Fines?

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Captive sales, i.e., products sold by one entity to another within the same corporate group for incorporation into another (downstream) product, are in the cartel fining spotlight. Captive sales arise where vertically integrated firms wish to own and control their supply chain for, amongst others, reasons of security of supply and consistency in quality. The treatment of captive sales for fining purposes was previously discussed by the European Court of Justice in *Guardian*[1] in an intra EEA context. In *InnoLux*[2], the Court of Justice has now addressed the matter in a context where the captive sales occured outside the EEA. Innolux was one of six LCD panel producers fined by the European Commission in 2010 for operating a price fixing cartel. The judgment increases exposure for vertically integrated groups which produce components, sell them internally and incorporate them into transformed products outside the EEA for sales to third party companies in the EEA.

The "Value of Sales" Concept in Determining Fines

As a basic rule of thumb, when determining the amount of the fine to be imposed, the Commission takes into account the value of the firm's "*sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA*."[3] This amount is used as a proxy to reflect the economic significance of the infringement and the relative size of the infringing firm's contribution to it.[4]

1 C-580/12 P *Guardian Industries and Guardian Europe v Commission*, EU:C:2014:2363.

2 C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451.

3 Guidelines on the method of setting fines, point 13. The Commission will normally take the sales made by the firm during the last full business year of its participation in the infringement. In *LCD*, however, it deviated from normal practice and took the average annual value of sales as the basis for the calculation of the fine (see COMP/39.309 *LCD*, decision of 8 December 2010, para. 384).

4 See, e.g., C-444/11 P *Team Relocations et al. v Commission*, judgment of 11 July 2013, EU:C:2013:464, para. 76.

Parameters Used in *LCD*

In its *LCD* decision, the Commission found a cartel among major international manufacturers, including InnoLux, of liquid crystal displays (LCD) panels for incorporation into televisions and IT products, such as notebooks and PC monitors.

In setting the fines, the Commission categorized the sales made by the cartel participants as follows:

- Direct EEA sales, namely sales of cartelized LCD panels to independent third parties within the EEA;
- Direct EEA sales through transformed products, namely sales of cartelized LCD panels incorporated, within the group to which the LCD panel producer belongs, into finished products (e.g., TVs) which are then sold to independent third parties within the EEA; and
- Indirect sales, namely sales of cartelized LCD panels to independent third parties situated outside the EEA, which then incorporate the panels into finished products (e.g., TVs) subsequently sold within the EEA.[5]

The Commission considered that the relevant turnover for fining purposes consisted of those sales where the first "real" sale of the LCD panel – as such or integrated in a final TV or IT product – was made into the EEA during the cartel period by one of the cartel participants. This referred only to the first two categories of sales.[6]

Transformed Products: Approved Basis for Calculating Cartel Fines

Some of InnoLux's LCD panels are sold within the InnoLux group of companies outside the EEA. InnoLux's production units situated outside the EEA then incorporate these LCD panels into TVs and IT products, which are ultimately sold in the EEA to third party companies. On appeal, InnoLux challenged the Commission's reliance on the second category of sales ("direct EEA sales through transformed products") for calculating the fine imposed on it. The company claimed that the sales in the EEA of finished TVs and IT products by its subsidiary situated outside the EEA were wrongly included in the relevant value of sales as these sales did not relate to the infringement at stake.[7]

In its judgment, the Court of Justice accepts that the concept of the value of sales cannot extend to sales which in no way fall within the scope of the alleged cartel.[8] It also acknowledges that InnoLux's sales used for fining purposes were not made on the market concerned by the cartel (i.e., the market for LCD panels), but rather on the downstream market.[9] Nevertheless, the Court of Justice approved the Commission's approach.

Treatment of Captive Sales

The Court of Justice distinguishes *InnoLux* from *Guardian*. In the latter, in an intra EEA context, the Court of Justice held that the value of sales to be taken into account for the purposes of calculating the fine imposed on a vertically integrated firm must generally encompass all the sales relating to the cartelized products, and could include captive sales.[10] This is because vertically integrated firms may benefit from a cartel not only when sales are made to third

5 COMP/39.309 *LCD*, decision of 8 December 2010, para. 380.

6 COMP/39.309 *LCD*, decision of 8 December 2010, para. 381.

7 C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 44.

8 C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 55.

9 C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 52.

10 C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 69. See also C-580/12 P *Guardian Industries and Guardian Europe v Commission*, EU:C:2014:2363, para. 59: "*A distinction must not* […] *be drawn between those sales depending on whether they are to independent third parties or to entities belonging to the same undertaking. To ignore the value of the sales belonging to*

party companies but also on the downstream markets in processed goods made up of, *inter alia*, the cartelized products.[11]

In *InnoLux*, the Court of Justice clarifies that it does not follow from *Guardian* that captive sales should always be treated in the same manner as sales to independent third parties. Therefore, where a cartel participant sells its cartelized products to an independent third party, only sales in the EEA will be taken into account for the purposes of calculating the fine and it is not necessary to examine where the transformed product was sold. However, where a cartel participant sells its cartelized products internally, only if the transformed product is sold within the EEA would the sale be taken into account for the purposes of calculating the fine. It is irrelevant whether the captive sale is made to an entity within or outside the EEA.[12]

According to the Court of Justice, ignoring the value of the captive sales of cartelized LCD panels outside the EEA would inevitably favor vertically integrated firms such as InnoLux, which incorporate a significant portion of the cartelized products (as a component) in their production units established outside the EEA and then sell the transformed products within the EEA, enabling them to avoid a fine proportionate to their importance on the market.[13] Further, the cartelization of LCD panels could have repercussions on the market(s) for TVs and IT products in the EEA, even if the market(s) for those finished products constituted a separate market(s) from that covered by the cartel.[14]

The Court of Justice concludes that nothing in EU competition law precludes account being taken, for fining purposes, of the sales in the EEA of finished products to third party companies by a firm established outside the EEA and participating in a cartel related to a given input which is subsequently incorporated outside the EEA by the same firm into those finished products. This is particularly the case as the sales of TVs and IT products were only taken into account up to the value of the cartelized LCD panels that were incorporated into these products, when the latter were sold to third party companies established in the EEA.

An Extension of the Commission's Jurisdiction?

On appeal, InnoLux also contested the territorial jurisdiction of the Commission. The Court of Justice does not examine the issue in detail, but rather simply observes that the Commission had jurisdiction to apply Article 101 TFEU to the cartel at issue as the participating companies implemented the worldwide cartel in the EEA by making sales in the EEA of cartelized products to third party companies.[15]

that latter category would inevitably give an unjustified advantage to vertically integrated companies by allowing them to avoid the imposition of a fine proportionate to their importance on the product market to which the infringement relates."

11 C-580/12 P *Guardian Industries and Guardian Europe v Commission*, EU:C:2014:2363, para. 60: "*This is so for two different reasons: either those undertakings pass on the price increases in the inputs as a result of the infringement in the price of the processed goods, or they do not pass those increases on, which thus effectively grants them a cost advantage in relation to their competitors which obtain those same inputs on the market for the goods which are the subject of the infringement.*"

12 C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 68.

13 C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 63.

14 C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 57.

15 C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 73.

The Court of Justice also holds that InnoLux's ground of appeal did not relate to the Commission's jurisdiction but to a separate question pertaining to the determination of the relevant value of the sales for the calculation of the fine.[16] In this context, the Court of Justice reiterates that, for fining purposes, the Commission may, in cases where the sales of the cartelized products are made within a group outside the EEA, take into account the sales of the finished products by this group in the EEA to third party companies.

Carte Blanche for Higher Fines?

Finally, the Court of Justice is seemingly unconcerned by the potentially significant negative impact of its judgment. In response to InnoLux's argument that taking those non-EEA captive sales into account would likely result in the same conduct giving rise to concurrent penalties imposed by the antitrust authorities outside the EEA, the Court of Justice referred to the established case law that neither the principle *non bis in idem* (essentially, the principle of double jeopardy) nor any other principle of law obliges the Commission to take account of penalties imposed on the company by competition authorities outside the EEA.[17]

[16] C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 74.

[17] C-231/14 P *InnoLux Corp. v Commission*, judgment of 9 July 2015, EU:C:2015:451, para. 75.