ANTITRUST NEWS & BRIEFS

What Sales to Take into Account when Calculating EU Cartel Fines?

May 29, 2015

Overview

On April 23, 2015, the EU Court of Justice (CoJ) issued its much-awaited ruling on LG Display’s (LGD) appeal against the judgment of the EU General Court (GC) that upheld the fine imposed by the European Commission (EC) for LGD’s participation in the liquid crystal display (LCD) panels cartel. A few days later, Advocate General Wathelet issued his (non-binding) opinion on the appeal lodged by Innolux, also against the GC, for a judgment that upheld the fine imposed by the EC for Innolux’s participation in the same cartel. While we commented on both GC judgments in a previous briefing, we now return to them in order to discuss the key question that the appeals against them raise: what sales may the EC take into account when calculating the fine to be imposed on a company infringing EU anti-cartel rules?

A Quick Recap

The EC’s Guidelines on Fines (Guidelines) provide that, in determining the fine to be imposed on an undertaking, the EC will take a proportion (up to 30%) of “the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.”

In the LCD panels cartel, the EC distinguished three categories of sales in order to establish the value of each undertaking’s sales:

- Sales of LCD panels to independent third parties within the EEA (direct sales)
- Sales of LCD panels to an entity within the group to which the cartel participant belonged, which incorporated them into finished products that were subsequently sold to independent third parties within the EEA (direct sales of transformed products)
- Sales of LCD panels to independent third parties outside the EEA, which then incorporated the LCD panels into finished products and sold them within the EEA (indirect sales)

The EC eventually took into account the first two categories of sales, i.e. the direct sales and the direct sales of transformed products. The EC considered that there was no need to take into account indirect sales because sufficient deterrence had already been achieved. While both LGD and Innolux contested the EC’s approach, each company did so on different grounds.

The EC May Take into Account Sales Made to Structurally Linked Companies

The EC calculated LGD’s fine by treating its sales to its parent companies – LG Electronics (LGE) and Koninklijke Philips Electronics (Philips) – as direct sales, i.e. as sales to independent third parties within the EEA. This is because the EC considered that LGD, LGE and Philips did not form a single undertaking.

LGD claimed that the EC was not entitled to take into account its sales to LGE and Philips when calculating the fine. LGD did not contest the EC’s finding that LGD, LGE and Philips did not form a single undertaking. Rather, LGD argued that its sales to LGE and Philips were made at preferential prices (on account of the contractual terms of the joint venture agreement that had created LGD) and, therefore, could not have been affected by the cartel.
The CoJ rejected LGD’s argument. In line with its ruling in *Guardian* (see our briefing), the CoJ noted that:

- In order to determine the fine to be imposed, the EC is not obliged to take into account only sales for which there is evidence that they were actually affected by the cartel. Rather, the Guidelines cover all sales made on the market concerned by the cartel. As a result, the EC was not obliged to examine whether or not LGE and Philips paid LGD higher prices and/or passed on the overcharging in the prices of the finished products sold to consumers.
- Ignoring the value of sales made by LGD to independent third parties (in this case, LGE and Philips) on the ground that it has structural links with them would allow LGD to avoid a fine that is proportionate to its importance on the market concerned by the cartel.

**The EC May Not Take into Account Sales that Do Not Fall within the Cartel’s Scope**

In contrast to its finding regarding LGD, the EC held that Innolux formed a single undertaking with its two European subsidiaries, Chi Mei Optoelectronics BV and Chi Mei Optoelectronics UK Ltd. (both, Chi Mei). As a result, the EC did not consider sales made by Innolux to Chi Mei to be sales to independent third parties under the category of direct sales. It rather considered them to be direct sales of transformed products.

Innolux claimed before the CoJ that, through the concept of direct sales of transformed products, the EC took into account sales of finished products in the EEA when calculating the fine. However, the infringement did not relate to sales of finished products.

In his opinion, Advocate General Wathelet sided with Innolux. He, too, referred to the *Guardian* ruling in observing that:

- While the EC is not obliged to take into account only sales for which there is evidence that they were actually affected by the cartel, the EC cannot take into account sales that do not fall within the scope of the cartel. In the present case, in calculating the fine, the EC took into account sales of finished products made by entities in Innolux’s group to independent third parties in the EEA. However, such sales were not made on the market to which the infringement related.
- The value of sales should not be subject to distinctions depending on whether the sales were made (i) to independent third parties or (ii) intra-group. In the present case, the EC’s methodology to treat only sales to independent third parties as ‘real’ sales resulted in placing vertically-integrated undertakings at a disadvantage. As a result, intra-group sales must be taken into account in the same way as sales to third parties, but excluded if they are made outside the EEA.

**Hitting the Brakes on the EC’s Extra-Territorial Jurisdiction**

In addition to the above, Advocate General Wathelet found that the EC exceeded the territorial scope of EU anti-cartel rules by using the concept of direct sales of transformed products. Neither of the theories underpinning the jurisdictional reach of EU anti-cartel rules – namely the ‘implementation’ and ‘qualified effects’ doctrines (see our previous publication) – justified the EC’s fining methodology in the LCD panels cartel, according to him.

- **The implementation doctrine:** According to this doctrine, the EC’s jurisdiction would be triggered by the sale in the EEA of the cartelized LCD panels – i.e. the product in respect of which the infringement was found. The sale of the finished products that incorporate the LCD panels is not enough. This is because it is not sufficient to identify sales having any link whatsoever with the EEA in order to establish the territorial applicability of EU anti-cartel rules.
- **The qualified effects doctrine:** According to this doctrine, the EC’s jurisdiction would be triggered if there would be ‘specific, credible and adequate’ evidence on the basis of which to assess the actual influence that the LCD panels cartel in Asia may have had on competition in the EEA. In particular, the EC would need to analyze the market for the finished products in the EEA, in order to show that the LCD panels cartel in Asia also led to the distortion of competition in the market for the finished products in the EEA.

**Where Does This Leave Us?**

The LGD and Innolux appeals provide further insights as to what sales the EC may take into account when calculating the fine to be imposed on a company infringing EU anti-cartel rules.

LGD confirms that all sales made on the market concerned by the cartel – be them to structurally linked companies or not – will be included in the fine calculation. As a result, arguments made by cartel participants that the price at which the cartelized product was sold to structurally linked companies was not actually influenced by the cartel will in principle be dismissed.
As to *Innolux*, Advocate General Wathelet has proposed that sales in the EEA of finished products that incorporate the cartelized components should not be taken into account by the EC when calculating fines, unless the EC provides substantial evidence that the prices of the finished products in the EEA were distorted by the cartel. If the opinion of Advocate General Wathelet is endorsed by the CoJ later this year, it will impose a burden on the EC to establish that EEA sales of finished products incorporating cartelized components were distorted by the cartel. Absent such proof, the EC may not take into account sales of finished products into the EEA when calculating fines – which would limit the EC’s ability to impose higher penalties. At a time when the production and supply of consumer goods are increasingly taking place outside the EU, this evolution is of paramount importance for any business wishing to contest the EC’s jurisdiction.

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