Overview
In a landmark ruling on July 9, 2015, the EU Court of Justice (CoJ) dismissed the appeal lodged by InnoLux against the judgment of the EU General Court (GC) that upheld the fine imposed by the European Commission (EC) for InnoLux’s participation in the liquid crystal display (LCD) panels cartel. Contrary to the recommendation of Advocate General Wathelet (see our briefing), the CoJ confirmed that, where the cartel participant sells cartelized components to an entity within its group, and that entity incorporates the cartelized components into finished products which it subsequently sells to independent third parties within the European Economic Area (EEA), such sales of finished products may be taken into account by the EC for fine calculation purposes.

The Key Point of Contention
InnoLux sold LCD panels to its wholly-owned subsidiaries located outside the EEA. Those subsidiaries incorporated the LCD panels into finished products, which they then sold to independent third parties within the EEA. When the EC calculated InnoLux’s fine, it took into account such sales of finished products under the concept of “direct sales of transformed products” (for a more complete account of the EC’s fine calculation methodology, see our briefing). Specifically, the EC took into account the proportion of the value of the finished products that corresponded to the value of the cartelized LCD panels.

InnoLux contested the EC’s approach, – among others, on the basis of point 13 of the EC’s Guidelines on Fines (Guidelines) which states that the EC will take “...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...” when calculating the fine to be imposed. InnoLux contended that the infringement did not relate to sales of finished products, but rather to sales of LCD panels (i.e. sales of components of the finished products).
The CoJ rejected InnoLux’s argumentation and found that the EC was entitled to take into account sales of finished products into the EEA. According to the CoJ, where a vertically-integrated undertaking incorporates cartelized components into finished products outside the EEA, the sale of the finished products by the vertically-integrated undertaking to independent third parties into the EEA is liable to affect competition on the EEA market. Specifically, the vertically-integrated undertaking may benefit from the cartel by either: (i) passing on downstream the price increases of the cartelized components, which in turn raises the prices of the finished products; or (ii) not passing on downstream the price increases of the cartelized components, which in turn secures cost advantages vis-à-vis competitors who obtain cartelized (and, therefore, more expensive) components.

The CoJ noted that it would be against the goal of EU competition rules not to take into account a proportion of the sales of finished products into the EEA solely because the vertically-integrated undertakings incorporated the cartelized components into the finished products outside the EEA. Excluding sales of finished products from the fine calculation would lead to a fine which bore no relation to the scope of application of the cartel in the EEA and, therefore, have the effect of artificially minimising the economic significance of the infringement committed by a particular undertaking.

No Extra-Territorial Jurisdiction

As explained in our previous briefing, Advocate General Wathelet took the view that the EC exceeded the territorial scope of EU anti-cartel rules by using the concept of direct sales of transformed products. He found that 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.

However, the CoJ took a different stance and rejected jurisdictional arguments as irrelevant. It found that the cartel participants (including Innolux) had implemented their cartel in the EEA by selling cartelized LCD panels to independent third parties into the EEA. The EC’s jurisdiction to go after the cartel was therefore not disputed. For the CoJ, the method used to calculate the fine imposed is a separate question. The EC was entitled to take into account Innolux’s sales of finished products to independent third parties in the EEA, so that the fine would reflect both (i) the economic importance of the infringement as well as (ii) Innolux’s relative weight in it.

Concluding Remarks

The CoJ’s judgment has important consequences for vertically-integrated companies with assembly units outside the EEA. It opens up the possibility for high fines to be imposed on them, as not only may the EC take into account their direct sales of cartelized components to independent third parties in the EEA, but also their sales of finished products which incorporate the cartelized components to independent third parties in the EEA.

As regards extra-territoriality, the CoJ’s stance raises questions. The CoJ draws a line between the EC’s jurisdiction to go after a cartel on the one hand and the EC’s fine calculation methods on the other hand. Once jurisdiction is established on the basis of either the implementation and/or effect doctrines, the EC enjoys wide discretion to determine what sales should be taken into account. This approach is rather artificial, as the issue of jurisdiction is closely linked to how cartel conduct that arose outside of the EEA actually impacted customers in the EEA. Answering the latter question requires to look into whether the cartel – taken as a whole – was in one way or another engaged in commerce in the EEA, i.e. through sales of products or services affected by the cartel. Yet, by separating the territorial jurisdiction question from the question of the value of sales to take into account for fining purposes, the CoJ eludes the problem of whether, and if so how, to place limits to the EC’s enforcement powers.