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Do the maths: cartel fine calculations for joint ventures and foreign sales

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Companies are well-advised to keep track of the methods used by a competition authority to determine their cartel fine. The European Commission's maths recently received scrutiny in two LCD panels cartel cases where fines were imposed. The European Court of Justice confirmed that the Commission can take the cartel sales made by a joint venture to its parent companies into account when calculating the fine, regardless of whether the parent companies actually paid higher prices to the joint venture as a result of the cartel. In addition, Advocate General Wathelet argued that internal sales should be excluded from the fine calculation if they are made outside the European Union, even if the finished products incorporating cartelised LCD panels are subsequently sold within the European Union.

In 2010, the Commission imposed fines on six Korean and Taiwanese LCD panel producers for having participated in a cartel. LCD panels are the main component of flat screens used in televisions and computers. LG Display, one of the LCD producers, argued before the European Court of Justice that the Commission should not have included the sales of cartelised LCD panels made to its parent companies in the fine calculation, because those sales were made at preferential prices and consequently could not be considered to have been made "on the free market".

The ECJ ruled that the Commission's Fining Guidelines use as a starting point the value of a company's sales within the European Union to which the infringement directly or indirectly relates. This ensures that the cartel fine is set at an amount reflecting the economic significance of an infringement and the relative size of the company's contribution to it. Ignoring the value of sales made to independent third parties on the ground that the company participating in the cartel has particular structural links with those third parties would therefore give an unjustified advantage to the company. That advantage would consist of the company avoiding a fine proportional to its significance to the product market to which the cartel relates. The ECJ confirmed the fine imposed on LG Display for its participation in the LCD panels cartel.

LCD producer InnoLux may have more success in reducing the fine imposed for its participation in the LCD panels cartel, provided that the ECJ follows Advocate General Whatelet's opinion. In calculating the fine for InnoLux, the Commission took into account the value of InnoLux's internal sales of LCD panels that corresponded to the value of LCD panels incorporated into finished products sold by InnoLux to third parties established in the EU. The AG agreed with InnoLux that the Commission wrongly included its EU sales of finished products in its fine calculation, because the sales of finished products to independent third parties within the EU were not made in the market to which the infringement related. The AG referred to earlier case law that the "value of sales" cannot extend to sales which do not fall within the scope of the alleged cartel. He added that the Commission took account of internal sales of LCD panels that were made entirely outside the EU. This results in an extension of the Commission's territorial competence based on the sole reason that it "assumed" the cartel had an impact on the EU as a result of the sale of finished products incorporating LCD panels to independent third party companies within the EU. The AG therefore concluded that internal sales must be taken into account in the same way as sales to third parties, but excluded if they are made outside the EU.

Based on these two cases mentioned above, companies are well-advised to carefully check the methods adopted by a competition authority in calculating the cartel fine.