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"Stretched" calculation method may produce higher fine for vertically-integrated companies

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Vertically-integrated companies may face higher fines as a result of a recent ruling by the European Court of Justice. In setting the amount of a cartel fine, the European Commission may take into account the internal sales by the companies of cartelised products outside the EEA if these are incorporated into downstream finished products destined for sale to independent third parties within the EEA. This ruling seemingly "stretches" the European Commission's fine calculation method to include not only non-EEA sales, but also sales on markets not related to the cartel infringement. Companies should therefore be aware they do not automatically go "scot-free" if their direct sales are outside the EEA.

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. In calculating the fine for LCD producer 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 EEA. On appeal, InnoLux argued that the Commission wrongly included its EEA sales of finished products in the cartel fine calculation. The sales of finished products to independent third parties within the EEA were not made in the product market to which the infringement related – in this case the market for cartelised LCD panels – but in a different product market, namely the downstream market for finished products incorporating the cartelised LCD panels. Those panels had been the subject of internal sales outside the EEA between InnoLux and its vertically-integrated subsidiaries.

The European Court of Justice (ECJ) first reiterated that 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 the value corresponding with the value of the cartelised LCD panels incorporated into the finished products sold by InnoLux to independent third parties established in the EEA. Even though the ECJ admitted that the concept of the "value of sales" referred to in the Commission's Fining Guidelines cannot extend to encompassing sales made by the undertaking in question, which in no way fall within the scope of the alleged cartel, it considered that the sale of the finished products in the EEA to independent third parties was likely to affect competition on the market for those products. Therefore, such an infringement may have had repercussions in the EEA, even if the market for the finished products constitutes a separate market from that concerned by the infringement. According to the ECJ, excluding those sales would have the effect of artificially minimising the economic significance of the infringement committed by a particular undertaking. And it would inevitably give an unjustified advantage to vertically-integrated companies which, like InnoLux, incorporate a significant part of the infringing goods in their production units established outside the EEA. This would enable them to avoid the imposition of a fine proportionate to their importance on the market for those goods, and the harm which their conduct does to normal competition in the EEA.

Companies should therefore be aware they do not automatically go "scot-free" if their direct sales take place outside the EEA.