

Vertically integrated companies may face higher cartel fines

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Captive sales should be included in the turnover figure used as a basis for calculating cartel fines. Advocate General Wathelet stated this in a recent court opinion. If followed by the European Court of Justice, this may not only end the European Commission's varying approach to internal sales when calculating cartel fines. Vertically integrated groups may also be faced with a sharp increase in fines imposed for participating in cartels.

In its 2007 [decision](#) imposing a fine of EUR 148 million on glass maker Guardian Industries (Guardian) for cartel involvement, the European Commission took no account of captive sales, i.e., the sales made internally within vertically integrated companies, when calculating the fines to be imposed on the cartel members. Despite being the smallest of the four cartel members, Guardian received the heaviest penalty because it was the only cartel member which was not vertically integrated. The Advocate General [agreed](#) with Guardian that this method of calculating fines discriminates against Guardian as a non-vertically integrated company. He therefore recommended that the European Court of Justice reduce Guardian's fine by an amount equivalent to the proportion of internal sales in the relevant market, which would mean a fine of EUR 93.24 million instead of EUR 148 million.

According to the Advocate General, the European Commission departed from its previous decision-making practice as well as earlier case law of the EU courts when it excluded captive sales from the turnover figure used as a basis for calculating the fine, without providing "the least statement of reasons" for doing so. The Advocate General was not convinced by the Commission's argument that being obliged to always take captive sales into account when calculating fines would result in a sharp increase in the amounts of fines imposed on vertically integrated groups participating in cartels. The AG finds that the effect of increasing fines for vertically integrated groups is a consequence of the EU legislature's choosing to refer to turnover, rather than operating profit or net profit, when calculating fines.

If the European Court of Justice follows the AG's opinion, this may not only end the European Commission's varying approach to internal sales when calculating cartel fines. Vertically integrated groups may also be faced with a sharp increase in fines imposed for participating in cartels.
