THE COURT OF JUSTICE OF THE EUROPEAN UNION CONFIRMS THE COMMISSION'S LONG ARM IN FIGHTING INTERNATIONAL CARTELS

Date: 14 July 2015

Antitrust, Competition & Trade Regulation Alert

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In a landmark victory for the European Commission (**Commission**) before the Court of Justice of the European Union (**CJEU**) on 9 July 2015, the Court upheld the EUR 288 million fine imposed on a Taiwanese producer of liquid crystal display (**LCD**) panels and confirmed the Commission's jurisdiction to rule against vertically integrated companies who are active in a cartel outside of the EU, but who sell finished products incorporating a cartelized component through a subsidiary in Europe.

The CJEU found that the Commission was entitled to take into account, for the purposes of calculating the fines, the sales of the finished products incorporating LCD panels (such as TVs, notebooks and PC monitors), up to the value of those panels.

This judgment further extends the Commission's already far-reaching powers in the fight against international cartels involving companies based outside of Europe and may have significant effects on the Commission's ability to pursue cartels involving transformed products (i.e. products incorporating a cartelized component).

BACKGROUND

In 2010, the Commission imposed fines totalling EUR 649 million on six Korean and Taiwanese producers of LCD panels as a result of their participation in a price fixing cartel between 2001 and 2006. In addition to direct sales of LCD panels to Europe, when calculating the fines the Commission also took into account the value of LCD panels incorporated into finished products by a vertically-integrated company based outside of Europe (in this case Taiwan and China) which were sold in Europe.

A Taiwanese company contended that the Commission had exceeded its jurisdiction by wrongly including the value of finished products sold in Europe when calculating its fine, since the LCD panels incorporated in the finished products had been sold intra-group, outside of Europe, and were not related to the cartel.

THE CJEU JUDGMENT

In his opinion, the Advocate General Wathelet had concluded that internal sales must be excluded if they are made outside of the EU. An overly broad interpretation of the territorial scope of EU competition law would create the risk of conflicts of jurisdiction between the Commission and foreign competition authorities, and of double penalties for companies. In particular, according to the Advocate General, the Commission is not allowed to take

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into account "*sales of downstream products (…) that are not the subject of the infringement, even if infringing products have been incorporated into them as components".*

The CJEU disregarded the opinion of the Advocate General (whilst an Advocate General's opinions are not mandatory, they are often accepted by the CJEU), and confirmed that both the direct EU sales of LCD panels and the EU sales of finished products incorporating the LCD panels had to be taken into consideration.

The CJEU found that the Commission was right to take the input products into account since the Taiwanese LCD panel producer could have benefited from the cartel, either by passing on the higher cartel prices to the end product customers or by not passing on the price increase, but gaining a cost advantage over its competitors who bought the input cartelized products. Excluding these costs from the fine would have artificially minimized the economic significance of the cartel infringement and led to the imposition of a fine that did not appropriately reflect the impact of the cartel on the EU market.

IMPLICATIONS FOR COMPANIES

The CJEU has significantly stretched the basis for the calculation of fines for cartel infringements and extended the territorial competence of the Commission's control over cartels.

On the basis of the ruling, the Commission can, when setting the level of fines, not only sanction conduct that has an impact on the European markets, but can, in addition, scrutinize conduct beyond the borders of the EU by looking within the functioning of a vertically-integrated company in a non-EU country and considering whether the finished products imported into the EU contain cartelized input products.

This has a significant impact on businesses because it increases the amount of fines that can be imposed and expands the number of companies that can fall under the Commission's scrutiny. In theory, any vertically-integrated company that produces finished products sold in Europe which incorporate a cartelized component could potentially be hit twice for the same product: once outside of the EU as regards the sales of the cartelized component and once in the EU in relation to the sales of finished products incorporating the cartelized component.

With cartels becoming increasingly international and often involving producers of components incorporated outside the EU, the CJEU's judgment further reinforces the Commission's ability to impose high fines as a deterrent against cartel infringements.

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