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## How high (and far) can you go? On setting fines in cartel cases involving vertically-integrated undertakings and foreign sales.\*

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Fine-setting in cartel cases is a hotly-debated issue in EU competition law. In the last year and a half, the Court of Justice (CoJ) issued some important judgments dealing with the methodology of setting fines. This article analyses the key cases which focused, in particular, on vertically-integrated undertakings and their sales, also in the transnational setting.

In that context one of the contentious issues is the Commission's treatment of internal sales in the process of setting fines. Internal sales (or else intra-group or captive sales) are sales of components between entities within the same undertaking typically for incorporation into finished products. These should be distinguished from external sales, which are sales to independent third parties. Inclusion of the internal sales in the process of calculating fines can lead to much higher fines, especially in case of companies active on various levels of the supply chain. Further, specific questions arise when some of the cartelists are foreign and the supply chains are transnational.

In the analysed cases—*Guardian Industries*,<sup>1</sup> *LG Display*<sup>2</sup> and *InnoLux*<sup>3</sup>—the CoJ recognised the European Commission's right to take into account internal sales, also in the transnational setting, and impose fines which more accurately reflect the scale and significance of the investigated infringements, and hence the caused harm and the business reality. The Court several times underlined the issue of comparative advantages which some violators would be able to secure under a narrower approach to fines calculation (excluding internal sales), thanks to relying on particular business structures. In essence, the Court held that internal sales of infringement-affected goods or services can be taken into account in the calculation of a fine, regardless of whether such sales are actually made at prices affected by the infringement. The same applies to sales made at preferential prices due to structural links between the entities and to internal sales of infringement-affected components, concluded outside the European Economic Area (EEA), so long as the finished products incorporating the said components are sold by the cartelists in the EEA. This holds even if the finished products are sold on a downstream market, hence a market different from the one directly affected by the infringement.

These new developments bring back some clarity in relation to the Commission's treatment of internal sales following the adoption of the new Fining Guidelines, in 2006. In general, they increase the exposure to fines of the vertically-integrated violators, both domestic and foreign. In cases involving foreign sales some commentators consider that the approach endorsed and developed by the CoJ further extends the extraterritorial reach of EU competition law. Indeed

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<sup>1</sup> *Case C-580/12 P, Guardian Industries and Guardian Europe v. Commission.*

<sup>2</sup> *Case C-227/14 P, LG Display and LG Display Taiwan v. Commission.*

<sup>3</sup> *Case C-231/14 P, InnoLux v. Commission.*

that was the view presented by the Advocate General (AG) Wathelet in *InnoLux*.<sup>4</sup> In that case, the Court expressly rejected conflating these two issues. This article sheds some light on this matter, commenting also on possible future developments in cases in which the issue of extraterritoriality may be unavoidable.

Part I of this article outlines the basics of the Commission's fine-setting procedure. Part II looks into the issue of calculating fines for vertically-integrated undertakings in light of the recent case law. The next part analyses whether the developments in the fining methodology carry any implications for the extraterritorial reach of EU competition law. Part IV deals with a somewhat related issue of concurring penalties. The conclusions identify the key implications and the logic underlying the recent developments. The Court of Justice should be applauded for exposing vertically-integrated cartellists, foreign or not, to fines which better reflect the economic significance of individual infringements and the roles played in them by respective partakers. Sophisticated corporate structures should not be used to evade fines for harming consumers.

### **Fine-setting: the Basics**

The Commission's fine-setting procedure is outlined in its 2006 Fining Guidelines.<sup>5</sup> In essence, this is a two-step process. First the basic amount of the fine is calculated. It can be then adjusted, in both directions, in light of the circumstances. Afterwards, the fine may still be reduced in case of a successful leniency application, an agreed settlement, or—in exceptional cases—if the undertaking demonstrates the inability to pay.

In order to determine the basic amount of the fine, as outlined in point 13 of the Fining Guidelines, the Commission needs to compute 'the value of the undertaking's sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area which the EEA'. The adjective 'indirectly' is accompanied by a clarification that this would be the case, for instance, in relation to horizontal price-fixing, where the price of the infringement-affected product serves as a basis for the price of lower or higher quality products.<sup>6</sup> When a scope of an infringement extends beyond the EEA, the Commission may calculate the value of sales differently.<sup>7</sup> Noteworthy, the Guidelines are mute on the issue of the treatment of internal sales.

The basic amount of the fine is based on certain proportion (up to 30 per cent) of the value of sales, depending on the gravity of the infringement.<sup>8</sup> The horizontal price-fixing, market-sharing and output restrictions are to be set on the higher end of the scale.<sup>9</sup> This is then multiplied by the infringement's duration (that is, by the number of years and months, rounded down).<sup>10</sup> To such a computed number the Commission may add further 15-25 per cent of the earlier calculated value of sales—often referred to as an 'entry fee'. This should be added, in

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<sup>4</sup> *Case C-231/14 P, Opinion of Advocate General Wathelet in case InnoLux v. Commission.*

<sup>5</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, JC C 210, 2-5, 1 September 2006.

<sup>6</sup> *Ibid.*, at pt 13, n 1.

<sup>7</sup> In particular, the Commission may assess the total value of sales of goods or services related to the infringement on the relevant market. Then, it should determine the market share of each involved undertaking and apply that share to the aggregate sales of the said undertakings within the EEA. 2006 Fining Guidelines, n 5, at pt 18.

<sup>8</sup> *Ibid.*, at pt 21.

<sup>9</sup> *Ibid.*, at pt 23.

<sup>10</sup> *Ibid.*, at pt 19.

particular, in cases involving horizontal price-fixing, market-sharing or output-restrictions arrangements.<sup>11</sup>

the basic fine =  $P \times$  the value of sales  $\times$  duration +  $E \times$  the value of sales

the basic fine = the value of sales  $\times$  ( $P \times$  duration +  $E$ )

P – a proportion of the value of sales from the range of 0-30 per cent

E – a possible entry fee in the range of 15- 25 per cent (always applied in cartel cases)

The basic fine is then adjusted in light of the aggravating and mitigating factors. In particular, it may be increased in cases involving repeat offenders (by up to 100 per cent), a refusal to cooperate with or obstruction of the Commission's investigation, or when an undertaking acted as a leader or instigator of the infringement.<sup>12</sup> The fine may be decreased, for example, when the undertaking shows that the infringement has been committed as a result of negligence, when its involvement was substantially limited, or where it effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so.<sup>13</sup> Finally, the fine may be further increased<sup>14</sup> in order to ensure its deterrent effect. This would apply especially when the undertaking has a large turnover beyond the infringement-affected goods or services.<sup>14</sup>

On top of that, the calculated fine is subject to the overall cap of 10 per cent of the total turnover of the undertaking in the preceding business year.<sup>15</sup> After the fine is computed, it may be decreased under the Leniency Notice, the Settlement Notice (a 10 per cent reduction), or—in rare cases—reduced on the grounds of an inability to pay.<sup>16</sup>

Although a number of multipliers comes to play, the core benchmark used in the process of setting a fine is the value of sales. Its calculation is of paramount importance. The more transactions fall into its 'net', the exponentially larger the fine. Therefore, in any given case the undertaking's counsel is most likely to work hard on promoting a narrow approach to its understanding. At the same time, as explained in the point 6 of the Guidelines, the value of sales (alongside the duration of the infringement) is meant to be only a proxy reflecting the economic importance of the infringement and the part played in it by each undertaking.<sup>17</sup> The value of sales should not, therefore, be considered an accurate determination of, for example, the infringement-affected sales.

### **Fining Vertically-Integrated Undertakings and the Question 'How High?'**

Setting of fines for violations of EU competition law in the case of vertically-integrated infringers raises some specific questions as to what types of sales should be taken into account in that process. The broader, the more inclusive is the notion of the value of sales, the higher will be the ultimate fine. Hence, this issue is of great practical relevance from the perspective of firms operating on different levels of the supply chain, which participate in the EU's

<sup>11</sup> Ibid, at pt 25.

<sup>12</sup> Ibid, at pt 28.

<sup>13</sup> Ibid, at pt 29.

<sup>14</sup> Ibid, at pt 30.

<sup>15</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 1-25, (2003), Art. 23(2).

<sup>16</sup> 2006 Fining Guidelines, n 5, pt 35.

<sup>17</sup> Ibid, at pt 6.

marketplace. This is also an important question from the perspective of deterrence. If the imposed fines are too low, not reflecting the real significance of the infringements, they will not be able to deter future violations.

Prior to the adoption of the 2006 Fining Guidelines, the Commission generally included internal sales in the value of sales when determining fines, even when such sales did not feature among issues discussed by the cartelists.<sup>18</sup> That approach was recognised by the General Court (GC) in *Europa Carton*. Siding with the Commission's arguments, the GC held that ignoring internal sales would inevitably give an unjustified advantage to vertically integrated firms as they would be able to avoid the imposition of a fine proportionate to their importance on the infringement-related market.<sup>19</sup> The Court also noted that when the internal sales were not made at the infringement-affected prices, a cartelist—unlike its competitors—did not have to 'bear the cost increases' caused by the concerted price increases', pointing to an unjustified advantage on the downstream market.<sup>20</sup> This methodology was subsequently endorsed by the CoJ.<sup>21</sup>

The 2006 Fining Guidelines created some uncertainty as to whether internal sales should be taken into account in the process of setting fines. They could, potentially, be read as allowing the inclusion of internal sales in the fine's calculation only when the infringement explicitly covered internal sales (for example, when such sales were subject of the cartelists' discussions). Indeed, in the aftermath of the adoption of the new Guidelines the decisional practice of the Commission in relation to treatment of internal sales started to differ, beginning with the Commission's Decision relating to the price-fixing on the flat-glass market.<sup>22</sup> In 2010 Torre, from the Commission's Legal Service writing in his personal capacity, observed that there was no 'consolidated practice', indicating that the Commission was taking a case-by-case approach when deciding whether to include or exclude such sales in its calculations.<sup>23</sup> Advocate General Wathelet in his recent Opinion in *Guardian Industries* (a case, relating to the Commission's Decision in *Flat Glass*—discussed below) observed that the Commission's practice began to vary, oscillating between excluding and including internal sales, therefore running the risk of being uncertain.<sup>24</sup>

The Commission applied such a different approach for the first time in *Flat Glass*. In November 2007 it fined a number of firms for fixing prices in the flat-glass sector in 2004 and 2005.<sup>25</sup> Most of the cartelists were vertically-integrated undertakings. When calculating fines the Commission did not take into consideration their internal sales.<sup>26</sup> *Guardian*, the only cartelist

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<sup>18</sup> European Commission, Decision of 13 July 1994, Relating to a Proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, IV/C/33.833, *Cartonboard*, OJ L 243, 1 (1994); European Commission, Decision of 3 December 2003, Relating to a Proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, C.38.359, *Electrical and mechanical carbon and graphite products*, OJ L 243, 1 (2003), para 292

<sup>19</sup> *Case T-304/94, Europa Carton v. Commission*, [1998] ECR II-869, para 128.

<sup>20</sup> *Ibid*, at para 127.

<sup>21</sup> *Case C-248/98 P, KNP BT v. Commission*, [2000] ECR I-9641, para 62. See also *Case C-564/08 P, SGL Carbon AG v. Commission*, [2009] ECR I-191, 29-30; *Case T-16/99, Lögstör Rör v. Commission*, [2002] ECR II-1633, para 360.

<sup>22</sup> European Commission, Decision of 28 November 2007 Relating to a Proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, COMP/39.165- *Flat Glass*, OJ C127, 9-11 (2007).

<sup>23</sup> Fernando Castillo de la Torre, 'The 2006 Guidelines on Fines: Reflections on the Commission's Practice', 33(3) *World Competition* 359 (2010), at 370.

<sup>24</sup> *Case C -580/12 P, Opinion of Mr Advocate General Wathelet in case Guardian Industries and Guardian Europe v. Commission*, para 36.

<sup>25</sup> Commission's Decision in *Flat Glass*, n 22.

<sup>26</sup> *Ibid*, at para 377.

not vertically-integrated, argued that such exclusion of internal sales in case of vertically-integrated undertakings constituted violation of the principle of equal treatment. It claimed that vertically-integrated undertakings may derive a competitive advantage from both the cartelised products as well as finished product which incorporate them. Guardian argued that internal and external sales should be treated the same way. By failing to take into account the internal sales, the Commission imposed on Guardian a relatively larger fine as compared to fines imposed on vertically-integrated cartel participants.

The Guardian's appeal to the GC was unsuccessful. The Court upheld the Commission's decision.<sup>27</sup> Guardian brought an appeal before the CoJ. AG Wathelet in his Advisory Opinion sided with Guardian, noting that in relation to dealing with internal sales the Commission 'not only departed ... from its own guidelines and from its own interpretation of those guidelines but ... it completely reversed its line of argument!'<sup>28</sup> In November 2014 the CoJ upheld the appeal.<sup>29</sup>

The CoJ recalled that the calculation of a fine begins with identification of an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it. In that regard, the Fining Guidelines, in point 13, rely on the concept of the value of sales. The Court recalled, citing *Team Relocations*, that while the concept cannot extend to encompassing sales which do not fall within the scope of the alleged cartel, it would be contrary to the goal pursued by that provision if it was understood as applying only to turnover which could be proven to have been actually affected by the cartel.<sup>30</sup> That would artificially minimise the economic significance of the infringement committed by a particular undertaking. It would be a reward for being secretive.<sup>31</sup>

The CoJ underscored that a distinction must not be drawn between internal and external sales. By ignoring the former, vertically-integrated undertakings would *inevitably* receive an unjustified advantage by avoiding the imposition of a fine proportionate to their importance on the product market to which the infringement relates.<sup>32</sup> Besides the direct benefits from a horizontal price-fixing, vertically-integrated undertakings may benefit from it also on the downstream market when the cartelised good is a component of the finished product. First, they may pass on the price increases of the inputs (resulting from the price-fixing) in the price of the finished product. Second, if they do not pass on the increase, they will effectively benefit from a cost advantage in comparison to their competitors on the market for the finished products, who also need to acquire such components which are subject of the infringement.<sup>33</sup> The CoJ underlined that for such reasons the EU Courts have always rejected pleas of vertically-integrated firms to have their internal sales excluded from the fine's calculation.<sup>34</sup>

The Court noted that when determining a fine, there cannot be—by the application of different methods of calculation—any discrimination between the undertakings which have participated

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<sup>27</sup> *Case T-82/08, Guardian Industries and Guardian Europe v. Commission.*

<sup>28</sup> *AG Wathelet's Opinion in Guardian Industries*, n 24, at para 65.

<sup>29</sup> *Case C-580/12 P, Guardian Industries*, n 1.

<sup>30</sup> *Ibid*, at para 57, citing *Case C-444/11 P, Team Relocations NV and Others v. Commission*, para 76.

<sup>31</sup> *Case C-580/12 P, Guardian Industries*, n 1, at para 58, citing *Case C-444/11 P, Team Relocations*, n 30, at para 77.

<sup>32</sup> *Case C-580/12 P, Guardian Industries*, n 1, at para 59.

<sup>33</sup> *Ibid*, at para 60.

<sup>34</sup> *Ibid*, at para 61, citations omitted.

in the same infringement.<sup>35</sup> In the case in question, the CoJ found that the GC erred in law by finding that vertically integrated-undertakings were not in a comparable position to non-vertically integrated firms, such as Guardian. In other words, the Court found that the Commission favoured the vertically-integrated undertakings by downplaying their role in the infringement. Instead of sending the case back to the GC, the CoJ exercised its unlimited jurisdiction in relation to the amount of fine to be imposed on Guardian by reducing it by 30 per cent.<sup>36</sup>

In *Guardian Industries* the CoJ underlined the importance of the principle of equal treatment in the process of calculating fines. In particular, internal and external sales should not be treated differently. Yet, the CoJ did not oblige the Commission to revert to its old decisional practice of taking internal sales into account as a matter of course. The Commission was left with considerable discretion. Should it decide not to include internal sales, comparable fine reductions need to be granted to non-vertically integrated undertakings involved in the infringement at stake so as to avoid unequal treatment.

Soon after *Guardian Industries*, the CoJ was asked to again deal with internal sales, albeit in a more complicated, transnational context in *LG Display* and *InnoLux*. Both cases relate to the same price-fixing agreement among six major producers of liquid crystal display (LCD) panels, components of such finished products like laptop and tablet computers and televisions. The cartelists were vertically-integrated Korean and Taiwanese firms. Between 2001 and 2006 they took part in a series of ‘crystal meetings’ during which they fixed minimum prices and discussed future pricing strategies.

In December 2010 the Commission imposed substantial fines on the LCD cartel participants.<sup>37</sup> In order to calculate them, the Commission established the value of sales of the LCD panels either directly or indirectly concerned by the infringement, by analysing three categories of sales:

- 1) direct EEA sales—sales of the cartelised panels to another undertaking within the EEA,
- 2) direct EEA sales through transformed products—internal sales of the cartelised panels, taking place outside the EEA, for incorporation into finished products which are subsequently sold to another undertaking in the EEA,
- 3) indirect sales—sales of the cartelised panels to another undertaking outside the EEA, which are incorporated into finished products which are subsequently sold in the EEA.

Ultimately, when calculating fines the Commission relied upon the first two categories of sales. In case of the second category, the Commission took into account only a proportion of such sales, corresponding to the value of the incorporated infringement-affected panels.

*LG Display* and *InnoLux* each essentially focused on one of these two categories of sales. *LG Display* concerned the first category of sales. When determining the fine the Commission took into consideration LG’s sales of LCD panels to its parent companies (LGE and Philips) in the

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<sup>35</sup> Ibid, at para 62, citations omitted.

<sup>36</sup> Ibid, at paras 73-80.

<sup>37</sup> European Commission, Decision of 8 December 2010 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, COMP/39.309- LCD-Liquid Crystal Displays (2010).

EEA. LG challenged their inclusion. It argued that these sales were not affected by the infringement, and therefore they should not be taken into account. In particular, LG had some special structural links with its parents in the EEA due to which the sales were made at preferential prices and therefore not on the free market. In that regard LG relied on a reasoning used in the Commission's Decision in *Flat Glass*.<sup>38</sup> The GC rejected LG's argument in relation to fine-setting methodology.<sup>39</sup> The CoJ dismissed the appeal.<sup>40</sup>

It was undisputed that LG did not form a single undertaking with its parent companies. Therefore, the Commission correctly included sales between LG and its parents within the first category of sales.<sup>41</sup> They did not constitute internal sales.

Referring to *Guardian Industries* and *Team Relocations*, the CoJ noted that it would be contrary to the goal pursued by the point 13 of the Fining Guidelines if the concept of the value of sales was to encompass only the sales in relation to which it was established that they were actually affected by the cartel.<sup>42</sup> It would downplay the economic significance of the infringement and the part played in it by the undertaking.<sup>43</sup> Moreover, in the CoJ's view ignoring external sales on the grounds that the undertaking has some particular structural links with the third parties would give the undertaking an unjustified advantage by allowing it to avoid a fine proportionate to its importance on the relevant market.<sup>44</sup> Such an undertaking would be able not only to profit from the price-fixing, but also from the growth in its sales to undertakings with which it has certain links. This would allow the undertaking to obtain an advantage over its competitors who offer those increased prices on the relevant market.<sup>45</sup>

Therefore, even when a cartel does not relate to the sales of the cartelised product to an undertaking linked to a cartel member, competition on the relevant market is distorted. Such sales may be taken into account in the calculation of the fine, provided they were made on the market affected by the infringement.<sup>46</sup>

In *LG Display* the CoJ provided some useful clarifications in respect of which sales can be included in the process of setting a fine. In the second case relating to the same LCD cartel—*InnoLux*—the Court went further and importantly developed the approach towards fine-setting in the case of vertically-integrated undertakings.

*InnoLux*<sup>47</sup> was the cartel member which faced the heftiest fine. Apart from selling the infringement-affected panels directly to undertakings in the EEA, *InnoLux* also sold some of

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<sup>38</sup> See above notes 25-26 and accompanying text.

<sup>39</sup> *Case T-128/11, LG Display and LG Display Taiwan v. Commission*.

<sup>40</sup> *Case C-227/14 P, LG Display*, n 2. The second ground of the appeal to the General Court and to the Court of Justice concerned the extent to which LG should be granted partial immunity under the Leniency Notice.

<sup>41</sup> *Ibid*, at para 46.

<sup>42</sup> *Ibid*, at para 53, referring to *Case C-580/12 P, Guardian Industries*, n 1, at para 57. and *Case C-444/11 P, Team Relocations*, n 30, at paras 76 and 88.

<sup>43</sup> *Case C-227/14 P, LG Display*, n 2, at para 54, referring to *Case C-580/12 P, Guardian Industries*, n 1, at para 58 and *Case C-444/11 P, Team Relocations*, n 30, at para 77.

<sup>44</sup> *Case C-227/14 P, LG Display*, n 2, at para 60, referring to *Case C-580/12 P, Guardian Industries*, n 1, at paras 59 and 63.

<sup>45</sup> *Case C-227/14 P, LG Display*, n 2, at para 61.

<sup>46</sup> *Ibid*, at paras 63-64.

<sup>47</sup> More precisely Chi Mei Optoelectronics (CMO) an entity which legally preceded *InnoLux*. CMO later merged with *InnoLux Display* and TPO Displays and following two name changes *InnoLux* emerged as the surviving legal entity.

the panels to its subsidiaries in Asia. These were internal sales which took place outside the EEA. The subsidiaries incorporated the panels into finished products (TVs and computers). The finished products were then sold in the EEA to other undertakings. When determining the fine for InnoLux's involvement in the LCD cartel, the Commission included in its calculation not only direct sales of panels, but also the proportion of the sales of finished products incorporating the panels (specifically, it was the amount corresponding to the value of the incorporated panels). InnoLux challenged that approach arguing that the second category of sales (direct sales through transformed products) should not have been taken into account.

InnoLux underlined that the sales of finished products did not relate to the infringement, which focused only on the LCD panels. It argued that the only relevant sales were the EEA sales of LCD panels, be it to independent third parties or these supplied internally. The sales of the finished products were made on a different, downstream market, hence they could not affect competition on the market for LCD panels in the EEA. In InnoLux's view, since these sales did not relate to the infringement, their inclusion in the fine calculation was in breach of the Fining Guidelines. InnoLux rather cleverly argued, per *Europa Carton*<sup>48</sup> as confirmed in *Guardian Industries*, that internal sales should not be treated differently from the external sales, alleging that the Commission applied different criteria to different cartelists when determining the location of their internal sales. It also argued that the Commission exceeded its territorial jurisdiction (this point is addressed in the following section of this article). The GC dismissed the appeal.<sup>49</sup> InnoLux appealed to the CoJ, which confirmed the Commission's Decision.<sup>50</sup>

While recognising its earlier holdings that the concept of the value of sales cannot extend to sales which in no way fall within the scope of the alleged cartel, the CoJ held that it would be contrary to the goal pursued by Article 23(2) of Regulation 1/2003 if a vertically-integrated cartelist could have the relevant proportion of its EEA sales excluded from the calculation of the fine solely because these were sales of finished products, which were manufactured by the cartelist outside the EEA and which incorporated the infringement-concerned components.<sup>51</sup> In other words, if a foreign cartelist sells the infringement-concerned products within its group and these are then incorporated into finished products and subsequently sold by the cartelist in the EEA; then the sales of such finished products (up to the value of the cartel-affected components) should not be excluded from the calculation of the fine.

The CoJ underlined, referring to its holding in *Guardian Industries*,<sup>52</sup> that a vertically-integrated undertaking may benefit from a horizontal price-fixing not only thanks to sales to independent third parties on the relevant market, but also on the downstream market in processed goods which incorporate the infringement-concerned component.<sup>53</sup> The Court found that the sale by the vertically-integrated undertaking of the finished products to other undertaking (independent third parties) in the EEA is liable to affect competition on the market for those products and, therefore, the infringement on the upstream market may be considered to have had repercussions in the EEA. That is so even if both markets (the upstream market

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<sup>48</sup> See above n 19 and accompanying text.

<sup>49</sup> The GC also lowered the fine imposed on InnoLux but only because originally InnoLux provided inaccurate data for its calculation. *Case T-91/11, InnoLux v. Commission*.

<sup>50</sup> *Case C-231/14 P, InnoLux*, n 3.

<sup>51</sup> *Ibid*, at para 55.

<sup>52</sup> See above notes 32-34 and accompanying text.

<sup>53</sup> *Case C-231/14 P, InnoLux*, n 3, at para 56.

concerned by the infringement and the downstream market for the finished products) are separate.<sup>54</sup> The CoJ reiterated that an exclusion of such sales would have the effect of artificially downplaying the significance of the infringement committed by such an undertaking, as it would lead to imposition of a fine which bore no actual relation to the scope of the application of the cartel in the EEA.<sup>55</sup> The Court's holding in *InnoLux* stands as an application of its findings in *Guardian Industries*, albeit in a more complicated, transnational context. While the Court might have departed from the ordinary reading of the Fining Guidelines, its holdings are consistent with and foster the goal of Article 23(2) of Regulation 1/2003.

Such developed methodology, taking into account in the fine-setting process also direct sales through transformed products, was more recently applied by the Commission in its Decision in *Cathode Ray Tubes*,<sup>56</sup> concerning a cartel among producers of certain components used in computer monitors and televisions. On appeal, in September 2015, the GC followed *InnoLux* and held that the Commission was entitled to take account of such sales when setting fines and that such an approach is non-discriminatory.<sup>57</sup>

### ***InnoLux* and the Question 'How Far?'**

In *InnoLux* the appellant also argued that EU's jurisdiction extends 'not to every and any sale made in the EEA, but merely to sales made in the EEA of relevant goods to which the concerted action giving rise to the finding of an infringement relates'.<sup>58</sup> In *InnoLux*'s view, since the EEA sales of finished products (which incorporated the infringement-affected LCD panels) were not made on the EEA market concerned by the infringement they could not restrict competition on that market.<sup>59</sup>

The AG Wathelet in his Advisory Opinion sided with *InnoLux*.<sup>60</sup> He considered that consideration of foreign internal sales in the process of calculation of a fine constitutes an extraterritorial assertion of jurisdiction based only on the assumption that such sales would have an impact in the EEA following a sale of finished products to independent third parties in the EEA.<sup>61</sup> In the AG Wathelet's view such sales would not pass the implementation test formulated by the Court in *Woodpulp*.<sup>62</sup> Such foreign sales could, perhaps, meet the qualified effects tests (requiring immediate, substantive and foreseeable effect on the EEA market),

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<sup>54</sup> *Ibid*, at para 57.

<sup>55</sup> *Ibid*, at para 62, referring to *Case C-444/11 P, Team Relocations*, n 30, at para 77; *Case C-580/12 P, Guardian Industries*, n 1, at para 58; *Case C-227/14 P, LG Display*, n 2, at para 54.

<sup>56</sup> European Commission, Decision of 5 December 2012 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, Case COMP/39.437- Cathode Ray Tubes (2012), paras 1020-21.

<sup>57</sup> *Case T-82/13, Panasonic Corp. and MT Picture Display v. Commission*, para 150; *Case T- 92/13, Koninklijke Philips Electronics NV v. Commission*, para 187; *Case T- 91/13, LG Electronics Inc. v. Commission* para 159. Panasonic and LG Electronics recently brought appeals before the CoJ.

<sup>58</sup> *Case C-231/14 P, InnoLux*, n 2, at 39.

<sup>59</sup> *Ibid*, at at para 40.

<sup>60</sup> *Case C-231/14 P, Opinion of Advocate General Wathelet in case InnoLux v. Commission*, n 4.

<sup>61</sup> *Ibid*, at para 30.

<sup>62</sup> *Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Ahlström Osakeyhtiö and others v. Commission (Wood Pulp)*, [1988] ECR 5193.

relied upon the GC in *Gencor*,<sup>63</sup> yet in the present case, in the view of the AG Wathelet the Commission did not demonstrate that the required effects met such a threshold.<sup>64</sup>

The CoJ did not examine this issue of jurisdiction in depth. Referring to *Woodpulp*,<sup>65</sup> it recalled that foreign cartelists who sell to EU customers at coordinated prices fall within the jurisdiction of EU law.<sup>66</sup> It noted that it was undisputed that cartel participants, including InnoLux, implemented the infringement in the EEA by means of making direct sales to independent third parties.<sup>67</sup>

One needs to distinguish between asserting jurisdiction over foreign conduct of a foreign entity and the methodology of the calculation of fines. These are two separate questions and indeed the CoJ recognised it.<sup>68</sup> Both questions are interrelated in so far as if there is no jurisdiction, no fine should be imposed. If jurisdiction over the entity can be asserted—like in case of InnoLux—then the question of appropriate sanction arises and, in the EU context, that is a matter of imposition of an appropriate fine.

It is worth recalling that some regimes, like the EU, impose only corporate fines for competition law violations. Other regimes, for example the US or the UK, operate also penal sanctions, including incarceration. Adoption of competition law and a particular system of sanctions for its violation (including any methodologies for setting fines or determining the length of prison sentences) is a sovereign choice. Public international law does not regulate it and hence it is fundamentally different from the question of jurisdiction, which is governed by international law. Different regimes provide for and apply different sanctions. That said, a report of the International Competition Network points out that in regimes relying only on fines, these may need to be, in general, higher than in jurisdictions where fines are used alongside other sanctions.<sup>69</sup> In the EU context, the fines are calculated on the basis of relevant value of sales, but that concept is used explicitly only as a proxy reflecting the economic importance of the infringement and the role played in it by the undertaking, not any accurate determination of the harm caused by the cartelists.

Given that in the LCD cartel the cartelists were indeed selling directly to customers in the EEA, the issue of jurisdiction was not problematic. Would the answer be different had the cartelists not sold their infringement-affected products directly on the EU market and the only direct sales were the sales of finished products (incorporating the infringement-components) by the cartelist? Most likely not. It was established (and it has not been challenged) that InnoLux and its production units formed a single undertaking for the purposes of the application of EU competition law. In such a case even if InnoLux did not sell the LCD panels to customers in the EU, it could be found in breach of EU competition law on the basis of the sale of finished products incorporating the infringement-affected panels, produced by an entity within the same undertaking. The formal recognition that EU jurisdiction extends to such foreign conduct

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<sup>63</sup> *Case T-102/96, Gencor Ltd v. Commission*, [1999] ECR II-753.

<sup>64</sup> *Case C-231/14 P, Opinion of Advocate General Wathelet in case InnoLux v. Commission*, n 4, at paras 49-53.

<sup>65</sup> *Wood Pulp*, n 62, at paras 13-14.

<sup>66</sup> *Case C-231/14 P, InnoLux*, n 3, at 72.

<sup>67</sup> *Ibid*, at para 73.

<sup>68</sup> *Ibid*, at para 74.

<sup>69</sup> International Competition Network, *Setting of Fines for Cartels in ICN Jurisdictions*. Report to the 7th ICN Annual Conference (April 2008), 9, available at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf>>.

would not be striking given the earlier case law and the recognition of some form of the effects doctrine (providing for jurisdiction over foreign entities on the basis of the effects their foreign conduct caused in the forum) arguably allowing for much wider jurisdictional assertions. It is noteworthy that in *Intel* the GC recognised that a direct sale is only one means of implementing a prohibited practice in the EEA. In that case the GC found that certain restrictions were implemented in the EU by a foreign dominant firm by means of incentivising its customers to refrain from selling certain products worldwide, including in the EU.<sup>70</sup> *Intel* is currently pending before the CoJ and hopefully, the Court will avail itself of this opportunity to clarify this issue.

In *InnoLux* the CoJ was not asked and did not offer a view on whether EU jurisdiction extends to foreign undertakings which fix prices of components and sell them to third parties outside the EU, which then incorporate them into finished products, subsequently sold in the EU. Until now the Commission did not attempt to apply EU competition law in such a context. In light of EU case law dealing with extraterritoriality and the GC's holding in *Intel* in particular, it can be argued—*de lege ferenda*—that when it is established that a foreign cartel, albeit effectively, in a clearly foreseeable manner, catering for the EEA markets, structures its dealings so as not to sell directly to the EEA (even taking the broad notion of an undertaking into account), that cartel should not be permitted to avoid the rules applicable to all undertakings operating on the EEA markets, such as those contained in Article 101 of the Treaty. Some such cases are likely to be considered controversial, but so long as there is no mechanism addressing transnational anticompetitive conduct at the multilateral level, the competition agencies and local courts should be advised not to err in favour of cartels.

### **The Potential of Concurrent Penalties**

In *InnoLux* the applicant argued that the test used by the Commission and the GC to identify the place of internal deliveries gives rise to a risk of concurrent penalties and jurisdictional conflict as the same transaction may be sanctioned in multiple regimes.<sup>71</sup> In particular, the undertaking may be sanctioned for the sale of the component in the jurisdiction where the sale was concluded and then in the EU, when the finished product reaches the downstream EEA market.

This argument was rejected. Referring to earlier case law, the CoJ underlined that neither the principle *non bis in idem* (double jeopardy) nor any other principle of law obliged the Commission to take account of proceedings or penalties to which the undertaking has been subject in non-member States.<sup>72</sup> This does not mean the Commission cannot take any foreign fines imposed on cartels for the same infringement into consideration. It does retain a level of discretion in relation to setting fines so there is no reason why it should not, on a case-by-case basis, consult on fines with foreign counterparts. This should be done on grounds of comity, not a strict legal obligation, with a view of making sure that the sufficient level of deterrence has been attained, also in light of different sanctions available in different regimes. In fact, that may be already the case. For example, in *Wire Harnesses* the Commission did not

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<sup>70</sup> *Case T-286/09, Intel Corp v. Commission*, at paras 302-09. See further Marek Martyniszyn, 'On extraterritoriality and the Gazprom case', 37(6) *European Competition Law Review* 291 (2015), at 292-93.

<sup>71</sup> *Case C-231/14 P, InnoLux*, n 3, at 42.

<sup>72</sup> *Ibid*, at 75, citing *Case C-289/04 P, Showa Denko v. Commission*, [2006] ECR I-5859, paras 52-58; *Case C-308/04 P, SGL Carbon AG v. Commission*, [2006] ECR I-5977, paras 28-34; *Case C-328/05 P, SGL Carbon AG v. Commission*, [2007] ECR I-3921, paras 24-35.

take into account internal sales of the cartelists.<sup>73</sup> It is believed that the Commission did not do so, having been convinced that the sufficient level of deterrence was achieved, and by taking into consideration the fact that the cartel had already been sanctioned in the United States and Japan.

InnoLux's argument could be also analysed in a more 'systemic' way. The CoJ recognised that a vertically-integrated firm may benefit from passing on the price increase of inputs in the price of the finished product. If that is the case and the finished products are sold abroad, then the internal sales of infringement-affected components will not lead to any competitive harm on the domestic market and may be of no concern to any domestic competition agency. On the contrary, the arrangement may lead to an inward transfer of wealth from a foreign jurisdiction affected by the price increase of the finished products. If the price increase of infringement-affected components is not passed on in the price of the finished products, then the undertaking, as the CoJ pointed out, may still benefit from having a cost advantage in comparison to its competitors on the market for the finished products. This may, but need not, cause any domestic harm. If the domestic downstream market is controlled by the cartel, then such an undertaking will not be gaining any competitive advantage domestically vis-à-vis other cartel participants. If the downstream market is outward-focused, manufacturing predominantly for exports then, again, the competitive harm is likely to lie predominantly abroad and domestic competition agencies are unlikely to be concerned about it.

Last, but not least, it would be contrary to the goal of Regulation 1/2003 if a potential of concurring penalties would be recognised as a mitigating factor in the process of fines' calculation. The threat of sanctions is there to deter infringements. It should not be weakened.

## Conclusions

In light of the recent case law, the vertically-integrated infringers are now more exposed to fines. The fine-setting methodology, as clarified and developed by the Court of Justice, strives to better recognise the economic significance of an infringement and the role played in it by individual undertakings, regardless of the business structures they adopt. This is a welcome development, especially in light of the more general criticisms of the EU system of sanctions for competition law violations- suggesting that the fines imposed by the Commission are, inter alia, too low to deter infringements. The Commissioner Vestager is correct in underlying that 'we need to make sure that forming a cartel is never a risk worth taking. Big fines are a central part of that.'<sup>74</sup>

When calculating the key benchmark in the fine-setting process—the value of sales, the Commission can take into account all sales of the infringement-affected products, not only where there is evidence that sales were actually affected by the infringement (there are no rewards for being secretive). Per point 13 of the Fining Guidelines all sales to which the infringement 'directly or indirectly' relates can to be taken into account. This applies also to internal sales (per *Guardian Industries*) as well as to sales to other entities with which the

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<sup>73</sup> European Commission, Decision of 10 July 2013 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, Case AT.39748- Automotive wire harnesses (2013).

<sup>74</sup> Margrethe Vestager, 'Perspectives on Europe' (Speech at the London School of Economics, 20 November 2015), available at <[https://ec.europa.eu/commission/2014-2019/vestager/announcements/perspectives-europe\\_en](https://ec.europa.eu/commission/2014-2019/vestager/announcements/perspectives-europe_en)>.

undertaking has some special links thanks to which the sales of the infringement-concerned products are made at preferential prices (per *LG Display*). This is so also in the case of vertically-integrated foreign undertakings. Moreover, when a foreign violator incorporates infringement-concerned components into finished products outside the EEA and then sells the finished products in the EEA, the proportion of these sales (up to the value of the infringement-concerned components) may be included in the fine calculation (per *InnoLux*). In that regard, the CoJ might have departed from the ordinary reading of the Fining Guidelines, but its holdings are in line with the goal and the spirit of Regulation 1/2003. The violators should not be able to avoid fines properly reflecting the significance of the infringement and the role played in it by individual partakers.

These important recent developments seem focused on the concepts of an undertaking and the first 'real' sale, that is the first sale to an independent third party. A vertically-integrated undertaking is not to avoid adequate fines just because it sells to itself (that is, it sells to another entity within its group) the infringement-concerned products, which are then incorporated into finished products and sold on the EEA market to other undertakings. Whenever the first real sale is on the EEA market, the related turnover can be taken into account by the Commission when it sets the fine. This approach is in line with the overall focus of EU competition law on the harm in the EU. If the harm falls elsewhere, for example, on foreign markets, then the underlying conduct is not proscribed. It is, unfortunately, perfectly legal under EU law as well as under competition laws of most jurisdictions.<sup>75</sup>

The above explains why, in case of the LCD cartel and Samsung, the Commission did not take into account Samsung's sales of the infringement-concerned components to its EEA subsidiaries, when these products were incorporated into finished products, subsequently sold outside the EEA. In such a case, the first real sale was outside the EEA. Therefore, the competitive harm fell outside the EEA, where EU law's protection against anticompetitive conduct does not extend. In fact, the GC in *InnoLux* observed that the Commission was 'entitled, or even obliged, to confine itself to taking into account only sales of cartelised LCD panels which had been incorporated into finished products sold in the EEA [emphasis added].'<sup>76</sup>

To many observers *InnoLux* raised also the question of the extraterritorial application of EU competition law. On the facts, given that *InnoLux* sold directly to customers in the EEA the CoJ did not see the issue of jurisdiction problematic. Given the General Court's holding in *Intel* that direct sale is just one means of implementation of a prohibited practice in the EU, then even if there were no direct sales of infringement-affected components the Court should assert jurisdiction on the basis of direct sales of transformed products by the cartelists, even though such sales would not be made on the market affected by the infringement. In light of *Intel* this would not constitute an extension of the jurisdictional reach of EU law as already recognised. In future, the Commission may face the challenge of dealing with a foreign cartel which structures its operations in a way eliminating any direct sales of any kind to the EU, albeit clearly catering for and harming the EU markets. Given the lack of any instrument allowing to

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<sup>75</sup> Hence the problem of export cartels, that is cartels which only affect foreign markets. Such agreements are perfectly legal in the vast majority of jurisdictions, including in the EU. See further Marek Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', 15(1) *Journal of International Economic Law* 181 (2012).

<sup>76</sup> *Case T-91/11, InnoLux v. Commission*, at para 86.

address such transnational anticompetitive conduct at the multilateral level, the Commission should read the case law expansively and challenge such illegal practices which would clearly and unambiguously harm consumers in the EU. The EU Courts should endorse such expansive jurisdiction in appropriate cases.