

## **The EU's Global Reach**

### **EU Top Court Confirms Innolux / LCD Decision, Allowing the European Commission to Reach Far into Vertically Integrated Conglomerates**

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Antitrust & Competition Law

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On July 9, 2015, the EU's top court, the EU Court of Justice (CJEU), rendered its long-awaited ruling in the *Innolux - LCD cartel* appeal. The *Innolux* case is effectively the EU counterpart of the U.S. *Motorola* litigation in that it concerns fundamental issues of antitrust jurisdiction over foreign commerce. In the *Innolux* ruling, the CJEU affirmed the European Commission's extension of its enforcement powers to impose fines based on foreign sales of cartelized components, where those components were transformed within the same corporate group of companies into finished products that were in turn sold to customers in the EU.

The *Innolux* ruling has far-reaching implications for global vertically-integrated conglomerates: (i) it confirms that they can face significant antitrust exposure in the EU beyond their direct sales; (ii) it increases the possibility of overlapping enforcement and sanctions, raising the risks that firms may end up paying fines to multiple regulators based on the same stream of commerce; and (iii) it raises questions about the extent of vertically integrated conglomerates' exposure in follow-on damage claims in the EU.

#### **Treatment of foreign transformed commerce**

The *Innolux / LCD* cartel judgment is a key precedent as the CJEU was called to examine for the first time the Commission's use of a novel -- and extensive -- approach to punish cartel conduct that took place abroad and concerned components largely manufactured outside of the EU, with limited direct imports of the cartelized components into the EU. The Commission took the view that sales in the EU of finished goods likely reflected some of the cartelized panel overcharge and thus likely harmed the EU market. It imposed fines on LCD panel manufacturers based on two types of commerce:

- panels delivered directly by the LCD panel manufacturers into the EU -- which represented a relatively small volume of commerce; and
- panels that vertically integrated LCD panel manufacturers transformed themselves, intra-group, in Asia into finished products (e.g. TVs, monitors) and then shipped to the EU where they would undertake the first external sale (through the sale of the -- non-cartelized -- finished good).

To back up its inclusion of the latter category of commerce, the Commission relied on the EU concept of what constitutes the relevant "undertaking" for antitrust purposes, which essentially means that all companies that are part of the same corporate group are treated as one single entity. Using this concept, the Commission essentially assimilated sales through intra-group transformed products as direct EU shipments to third parties, taking the view that, in both

scenarios, the first ‘sale’ of a LCD panel to third parties (whether as a standalone component or integrated into a TV or monitor) took place in Europe.

In *Innolux*, the CJEU blessed this approach, stressing that cartelized LCD sales through intra-group transformed products may adversely impact the EU market. This ruling means that manufacturing activities that take place abroad can be subject to the EU’s fining powers, which can increase financial exposure significantly if finished products end up in the EU.

### **Risks of duplicative sanctions**

The *Innolux* ruling adds to a growing body of precedent around the world concerning the jurisdiction of antitrust regulators over foreign-based conduct and foreign commerce. For instance, in *Motorola Mobility v. AU Optronics*, a U.S. LCD case, the Seventh Circuit Court of Appeals drew a distinction between criminal agency enforcement actions based on overseas component sales and private civil actions based on those same sales. The court explained that criminal actions could proceed so long as the overseas component sale resulted in sufficiently direct effects on U.S. trade or commerce. The court did not opine on how direct the effects must be, but suggested that U.S. importation of finished products containing cartelized components may at least in some circumstances be sufficient to support a criminal prosecution. This result was consistent with another court of appeals ruling in *United States v. Hsiung*, which held that a criminal prosecution could be supported by either sales of price-fixed components directly into the U.S., or by the “direct effects” of downstream importation of finished products containing those components.

For global conglomerates, this international trend towards farther-reaching enforcement against foreign commerce also materially increases the risk that they will face financial penalties in multiple jurisdictions based on the same sales revenues.

### **Risks of heightened exposure in EU damages litigation**

While *Innolux* focuses on the exercise of the European Commission’s fining powers, the ruling also raises questions in relation to antitrust damages claims against alleged cartelists. European Law entitles any alleged victim to seek damages through national courts, where they can show they were harmed by an antitrust infringement. Companies that are subject to Commission cartel decisions are frequently the target of civil damage claims brought by downstream (direct or indirect) purchasers of the cartelized goods, or goods that incorporate cartelized products.

With global cartels where at least part of the activities occurred outside of the EU, the national courts must determine how much (if any) of the underlying commerce infringes EU antitrust law. In this context, *Innolux* raises questions about the extent of potential liability of global conglomerates in EU private damage actions. The CJEU’s determination that component sales through transformed products in the EU reflect an EU antitrust infringement -- at least for regulatory enforcement / fining purposes -- raises questions about whether national courts will adopt a similar approach in private damage actions. That said, a number of questions about damage litigation targeting foreign commerce remain unsettled. It is likely that national courts will soon be called upon to rule on some of these issues, particularly given the imminent implementation of the EU Directive on Damages Actions.

Similar uncertainties remain in the U.S. on this front. For example, although *Motorola Mobility v. AU Optronics* held that no U.S. damages action may be brought by a U.S. company that

purchases cartelized products in foreign markets and then later imports them into the United States as components of finished products, it left open the question of whether downstream U.S. purchasers of the products in question would be able to sue for damages under U.S. law. Powerful arguments exist that such claims are too indirect to support U.S. civil liability, but U.S. courts have yet to settle this issue.

### **Navigating global antitrust enforcement and civil litigation challenges**

In the present context of sprawling global cartel enforcement, *Innolux* further increases risks of overlapping regulatory sanctions for conglomerates that trade globally. This decision highlights the importance of having a global regulatory strategy to potentially mitigate or otherwise challenge such exposure. Likewise, the growth of cartel damage claims in the EU, brought by purchasers at various levels of the supply chain and for component purchases made through various channels globally, will make it increasingly important for global companies to identify early on any jurisdictional and other weaknesses in plaintiffs' claims based on foreign purchases.

*Innolux* shows that companies facing international cartel allegations will be well-served to consider upfront a global defense strategy that factors in the various drivers of potential (agency / civil) exposure in all jurisdictions.

Covington was lead counsel to Samsung Electronics concerning all aspects of the European investigation into alleged collusion in TFT-LCD with no fine levied, and in November 2014, Covington secured a landmark ruling from the U.S. Court of Appeals for the Seventh Circuit affirming the dismissal of 99% of Motorola's \$3.5 billion damages claim for alleged price-fixing on liquid crystal displays, because it concerned foreign commerce outside the reach of U.S. antitrust law. This matter was recognized by *Global Competition Review* as a Litigation of the Year (2014).

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