



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 30 April 2015¹

Case C-231/14 P

**InnoLux Corp., formerly Chimei InnoLux Corp.,
v**

European Commission

(Appeal — Competition — Agreements, decisions and concerted practices — Worldwide market for liquid crystal display (LCD) panels — Fines — Guidelines for calculating the amount of fines — Calculation of the value of sales to which the infringement relates — Extra-territorial application of European Union competition rules — Internal sales of the product concerned outside the European Economic Area ('the EEA') — Inclusion of sales to third parties in the EEA of finished products incorporating the product concerned)

1. By the present appeal, InnoLux Corp. ('InnoLux' or 'the appellant'), formerly Chimei InnoLux Corp., seeks to have set aside in part the judgment of the General Court of the European Union of 24 February 2014 in *InnoLux v Commission*,² by which the General Court varied Commission Decision C(2010) 8767 final in Case COMP/39.309 — LCD — Liquid Crystal Displays,³ setting the fine imposed on the appellant in Article 2 of that decision at EUR 288 million, and dismissed the remainder of the appellant's action for partial annulment of the decision, in so far as it concerned it, and for a reduction in the amount of its fine.

2. This appeal raises an important point of competition law, namely, the question of the extra-territorial application of European Union competition rules (in this case, in the context of the determination of the sales which the European Commission may take into account when calculating the fine).⁴ The Commission's extra-territorial application of the competition rules is also the subject of a legal challenge in several other cases currently pending before both the General Court and the Court of Justice.⁵

I – Background to the dispute

3. The facts which gave rise to the dispute and the contested decision, as set out in paragraphs 1 to 27 of the judgment under appeal, may be summarised as follows.

1 — Original language: French.

2 — T-91/11, EU:T:2014:92 ('the judgment under appeal'). The present case may be read in parallel with Case C-227/14 P, *LG Display and LG Display Taiwan v Commission*, which concerns the same cartel, although the two cases raise questions of a different nature.

3 — Decision of 8 December 2010 relating to a proceeding under Article 101 [TFEU] and Article 53 of the Agreement on the European Economic Area ('EEA') (Case COMP/39.309 — LCD — Liquid Crystal Displays; 'the contested decision'), a summary of which was published in the *Official Journal of the European Union* of 7 October 2011 (OJ 2011 C 295, p. 8).

4 — For the method used by the Commission, see, inter alia, points 8 and 24 of this Opinion.

5 — Before the Court of Justice, *Intel v Commission* (Case C-413/14 P; see footnote 10 to this Opinion). Before the General Court, the 'Air Freight' cartel (inter alia, Case T-36/11 *Japan Airlines International v Commission*) and the 'Cathode Ray Tubes' cartel (inter alia, Case T-84/13 *Samsung SDI v Commission*).

4. Chi Mei Optoelectronics Corp. ('CMO'), a company governed by Taiwanese law, controlled a group of companies established and operating worldwide in the production of liquid crystal display panels ('LCD panels'). Following a merger agreement between CMO, InnoLux Display Corp. and TPO Displays Corp., the surviving legal entity became InnoLux, a company also governed by Taiwanese law, the appellant in the present case.

5. Samsung Electronics Co. Ltd ('Samsung'), a company governed by Korean Law, disclosed to the Commission the existence of a cartel on the market for LCD panels, whereupon the Commission initiated an administrative procedure and addressed a statement of objections to 16 companies, including two subsidiaries wholly owned by the appellant. The statement of objections explained, *inter alia*, the reasons for which CMO's two subsidiaries were to be held jointly and severally liable for the infringements committed by CMO.

6. On 8 December 2010, the Commission adopted the contested decision, which was addressed to six of the 16 companies to which the statement of objections had been addressed, including the appellant, LG Display Co. Ltd ('LGD') and AU Optronics Corp. ('AUO'). However, the appellant's subsidiaries were not included as addressees.

7. In the contested decision, the Commission found there to be a cartel among six major international manufacturers of LCD panels, including the appellant, LGD and AUO, relating to the following two categories of products equal to or greater than 12 inches in size, namely: LCD panels for information technology ('IT'), such as those to be incorporated in notebooks and PC monitors, and LCD panels for televisions (referred to collectively as 'cartelised LCD panels').

8. In fixing the fines imposed by the contested decision, the Commission followed its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines'). In accordance therewith, the Commission established the value of sales of the cartelised LCD panels to which the infringement related directly or indirectly. To that end, it established the following three categories of sales made by the participants in the cartel:

- 'direct EEA sales', being sales of cartelised LCD panels to another undertaking within the European Economic Area;
- 'direct EEA sales through transformed products', being sales of cartelised LCD panels incorporated, within the group to which the producer belongs, into finished products which are then sold to another undertaking within the EEA, and
- 'indirect sales', being sales of cartelised LCD panels to another undertaking outside the EEA, which then incorporates the panels into finished products which it sells within the EEA, such other undertakings being undertakings not belonging to the vendor's group.

9. The Commission took the view that it was necessary to take into account only the first two categories mentioned above, the inclusion of the third category not being necessary for the fines imposed to achieve a sufficient level of deterrence. On that basis, the Commission ordered the appellant to pay a fine of EUR 300 million.

II – The judgment under appeal

10. By application dated 21 February 2011, the appellant brought an action for the annulment in part of the contested decision and a reduction in the amount of its fine. In support of its action, the applicant put forward three pleas in law. By the first, it alleged that the Commission had applied a legally flawed concept, namely, that of 'direct EEA sales through transformed products', by the second

it alleged that the Commission had infringed Article 101 TFEU in finding that the infringement extended to LCD panels for televisions and, by the third, it alleged that the value of relevant sales used by the Commission with regard to it wrongly included sales other than sales relating to cartelised LCD panels.

11. In the judgment under appeal, the General Court upheld this last plea, consequently reduced the fine imposed on the appellant to EUR 288 million⁶ and dismissed the remainder of the action.

III – The appeal

A – The first ground of appeal, relating to the inclusion of ‘direct EEA sales through transformed products’

1. Summary of the arguments of the parties

12. By the first part of its first plea, concerning the concept of ‘sales to which the infringement relates’, the appellant complains that the General Court included within the value of sales taken into account for the purpose of calculating the fine its sales of finished products in the EEA as ‘direct EEA sales through transformed products’, despite the fact that the infringement did not relate to such sales, within the meaning of point 13 of the 2006 Guidelines.

13. The Commission submits that the appellant’s line of argument was rejected by the General Court after proper reasoning. According to the Commission, the appellant’s position ignores the fact that the price of cartelised LCD panels affected the price of finished products and that the collusive practices related both to LCD panels to be sold to third parties and to LCD panels destined for intra-group delivery. Those were findings of fact reached by the General Court and they may not be re-examined in an appeal. The Commission submits that it is incorrect to say that there is no difference between a sale to a third party and an intra-group delivery. The real entry into the market — that is to say, the first ‘real sale’ — occurs when and where the undertaking sells the finished product.

14. By the second part of the first plea, concerning the judgment in *Europa Carton v Commission* (T-304/94, EU:T:1998:89), the appellant submits that the Commission misinterpreted that judgment, in that, rather than treating intra-group sales in the same way as sales to third parties, the Commission applied, in the case of certain addressees of the contested decision, a different criterion for establishing where their intra-group sales occurred.

15. The Commission submits that the judgment in *Europa Carton v Commission* (T-304/94, EU:T:1998:89) confirms that it may take account of the value of a product to which a cartel relates, irrespective of whether a participant in that cartel sells the product in question directly on the market or first incorporates it into a different finished product. On the other hand, that judgment does not mean that the Commission is required to regard the place of internal delivery as the place of sale of the cartelised product, for the purposes of assessing the connection with the territory of the EEA.

⁶ — See paragraphs 155 to 174 of the contested decision. There is no overlap between the reduction in the fine decided on by the General Court on the basis of that error and the separate category of ‘direct EEA sales through transformed products’, which is the subject of the present appeal.

16. By the third part of the first ground of appeal, concerning the judgment in *Ahlström Osakeyhtiö and Others v Commission* (89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, '*Woodpulp I*'), the appellant argues that it follows from that judgment that the European Union's jurisdiction extends, not to every and any sale made in the EEA, but merely to sales made in the EEA of relevant products to which the concerted action giving rise to the finding of an infringement relates.

17. According to the Commission, the General Court was right to conclude that *Woodpulp I* did not prevent the Commission taking into account the appellant's 'direct EEA sales through transformed products' in its calculation of the fine.

18. By the fourth part of the first ground of appeal, which relates to the judgment in *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* (6/73 and 7/73, EU:C:1974:18), the appellant submits that it is inconsistent with that judgment to take the view that intra-group deliveries of LCD panels to manufacturing facilities in the EEA, as in Samsung's case, are not sales in the EEA when the finished products into which the LCD panels are incorporated are sold outside the EEA.

19. The Commission submits that the appellant has misread that judgment. Indeed, in that case, the Court examined the effect of the scope *ratione materiae* of Article 102 TFEU, but did not address the calculation of fines in cartel cases and the judgment does not, therefore, assist the appellant in its principal argument that the Commission was obliged to disregard its EEA sales of LCD panels through finished products when calculating the fine.

20. By the fifth part of the first ground of appeal, which concerns the extra-territorial application of EU competition rules, the appellant maintains that the criterion adopted by the Commission and the General Court for identifying the place where its intra-group deliveries occurred entails a risk of concurrent penalties and jurisdictional conflict with other competition authorities.

21. The Commission submits that this part of the first plea is inadmissible, given that the argument was raised for the first time in the appeal. At all events, the argument is purely hypothetical and unfounded. Logically, there can be only one first 'real sale'.

2. Analysis

22. In my opinion, all these arguments are interconnected and overlap to such an extent that they must necessarily be considered together.

a) The lack of any distinction, in the taking into account of sales, between sales to independent third parties and sales to entities within the same group

23. According to point 13 of the 2006 Guidelines, '[i]n determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area *within the EEA*' (emphasis added).

24. In the present case, in calculating the fine to be imposed on the appellant, the Commission took into account, by applying, for the first time (see point 2 of this Opinion in so far as later cases are concerned), the concept of 'direct EEA sales through transformed products', the proportion of the value of the appellant's internal sales of LCD panels that corresponded to the value of LCD panels incorporated into finished products sold by the appellant to third-party undertakings established in the

EEA. Indeed, all the appellant's internal sales of LCD panels to which the infringement relates were made *outside the EEA* to entities within the same group which then incorporated them into finished products (computers and televisions) which they subsequently sold in the EEA to independent third-party undertakings.

25. As the Court recently confirmed in its judgment in *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraphs 57 to 59; see also my Opinion in that case, C-580/12 P, EU:C:2014:272, point 21 et seq.), 'point 13 of the 2006 Guidelines pursues the objective of adopting, as the starting point for the calculation of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it'. The Court held that it is important for the fine to bear an 'actual relation to the scope of application of the cartel in question' and that 'the proportion of the overall turnover *deriving from the sale of products in respect of which the infringement was committed is best able to reflect the economic importance of that infringement. A distinction must not therefore be drawn between those sales depending on whether they are to independent third parties or to entities belonging to the same undertaking*. To ignore the value of the sales belonging to that latter category would inevitably give an unjustified advantage to vertically integrated companies by allowing them to avoid the imposition of a fine *proportionate* to their importance on the *product market to which the infringement relates*' (my emphasis).

26. In the same judgment, the Court held (in paragraph 57) that, although the concept of the 'value of sales' referred to in point 13 of the 2006 Guidelines cannot be understood as referring only to turnover from sales in respect of which it has been established that they were actually affected by the cartel, it 'cannot ... extend to encompassing sales made by the undertaking in question which do not fall within the scope of the alleged cartel'.⁷

27. I would add, in this context, that, as the General Court rightly held in paragraph 66 of its judgment in *Team Relocations and Others v Commission* (T-204/08 and T-212/08, EU:T:2011:286), 'it is settled case-law that the proportion of the turnover *accounted for by the goods in respect of which the infringement was committed* gives a proper indication of the scale of the infringement on the relevant market ... In particular, the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition ... That principle was reproduced in the 2006 Guidelines'. That judgment was upheld by the Court of Justice on appeal in *Team Relocations and Others v Commission* (C-444/11 P, EU:C:2013:464).

28. However, in the present case, it is common ground that the sales of finished products made by entities in the appellant's group to independent third parties in the EEA, which were taken into account in the calculation of the fine to be imposed on the appellant, were not made on the market to which the infringement found in the contested decision related. If the Court confirmed, once and for all, in *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363) that the Commission is not entitled to draw a distinction between internal and external sales, it is not, in principle, entitled either to treat only external sales as 'real sales'.⁸

7 — See, also, my Opinion in *Guardian Industries and Guardian Europe v Commission*, point 44. Also see *Team Relocations and Others v Commission* (C-444/11 P, EU:C:2013:464, paragraph 76) and *Putters International v Commission* (T-211/08, EU:T:2011:289, paragraph 59), against which no appeal has been brought.

8 — It is for this reason that the alleged necessity of 'not affording more favourable treatment to vertically-integrated undertakings which have taken part in a cartel', referred to in paragraph 74 of the judgment under appeal, does not, in principle constitute a valid reason for the taking into account, in the present case, of 'direct EEA sales through transformed products' (see also point 29 of this Opinion).

29. When the General Court itself admitted, in paragraph 74 of the judgment under appeal, that it was difficult to reconcile the approach taken by the Commission in this case with the case-law, the question then arises whether, and if so to what extent, the General Court, failing pure and simple transposition of the case-law,⁹ was entitled, (using its own words), to ‘adapt’ that case-law ‘to the circumstances of the ... case’, chief among which is that the appellant is a vertically-integrated undertaking that incorporated, outside the EEA, cartelised LCD panels into finished products sold in the EEA, ‘in order to achieve the aim, to which that case-law refers, of not affording more favourable treatment to vertically-integrated undertakings which have taken part in a cartel’ (paragraph 74 of the judgment under appeal).

30. Notwithstanding, the fact remains that the methodology adopted by the Commission in this case entailed its taking account of (internal) sales of the product concerned that were made entirely outside the EEA. Consequently, that methodology must, in my view, be regarded as an extension of the Commission’s territorial competence with regard to a cartel formed and implemented in third countries for the sole reason that it ‘assumed’ that the cartel had an impact in the EEA as a result of the sale within the EEA to independent third-party undertakings of finished products incorporating the product in question.¹⁰

31. Indeed, given that the appellant’s (internal) sales of the product which are the subject of the infringement did not take place in the EEA and that the final products incorporating the cartelised LCD panels that were sold in the EEA by entities within the appellant’s group are not the subject of the infringement, it is difficult, not to say impossible, to argue that the cartel was ‘implemented’ in the EEA, within the meaning of *Woodpulp I* (paragraphs 13, 16 and 17 of that judgment).

32. The efforts which the Commission made in the contested decision (in recitals 9 and 381) to draw a distinction between ‘real’ intra-group sales (which were to be taken into account as such in the calculation of the fine) and intra-group sales which were not ‘real’ sales as such (and could be ignored and replaced by ‘real’ sales to third parties of LCD panels incorporated in final products, the so-called ‘transformed products’), are not, it must be said, above criticism: InnoLux could, in this case, be prosecuted by a competition authority in Asia on account of precisely the same sales as are here in issue.

33. Moreover, the Commission seems to have forgotten that the General Court has already quite rightly dismissed a similar argument, put forward by the applicant in *Europa Carton v Commission* (T-304/94, EU:T:1998:89; see paragraphs 113 and 121 to 123), that is to say, the argument that internal deliveries should not be taken into account since they are not ‘real’ sales. As I have mentioned, that position has recently been confirmed by the Court in *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363).

34. In conclusion, I believe that internal sales must be taken into account in the same way as sales to third parties, but excluded if they are made outside the European Union, which leads me to consider the case from the point of view of the territorial scope of application of EU law.

9 — It is important to point out that case-law on this point already existed, as I explained in my Opinion in *Guardian Industries and Guardian Europe v Commission* (point 21 et seq.) Therefore, the fact that the Court of Justice’s ruling in *Guardian Industries and Guardian Europe v Commission* was given after the judgment under appeal is of no consequence.

10 — The same question, in substance, is raised in *Intel v Commission* (C-413/14 P), currently pending before the Court. The appellant’s fifth ground of appeal in that case concerns precisely the Commission’s jurisdiction to apply Article 102 TFEU to sale contracts between Intel, a company established in the United States of America, and Lenovo, a Chinese undertaking, relating to components, namely microprocessors, to be delivered in China for incorporation into computers assembled by Lenovo in China and potentially sold in the EEA. In principle, in addressing this particular issue, the same approach should be taken to the territorial application of EU law in so far as concerns the calculation of the fines at issue in the present case as to the Commission’s jurisdiction to apply Articles 101 TFEU and 102 TFEU.

b) The territorial scope of EU law

35. It may be of interest at this juncture to draw a parallel between the rules at issue in this case and those which apply in the United States of America. By contrast with section 1 of the Sherman Act, the US law that lays down a general prohibition of any combination in restraint of trade among the several States or with foreign nations, and which *stipulates no geographical limitations*, Article 101 TFEU prohibits, expressly, ‘all agreements between undertakings ... and concerted practices which *may affect trade between Member States* and which have as their object or effect the prevention, restriction or distortion of *competition within the internal market*’ (my emphasis). Article 102 TFEU contains the same rule, *mutatis mutandis* (in the case of ‘abuse of a dominant position within the internal market’).

36. Indeed, it was after considering the very wording of Article 101 TFEU (at the time, Article 85 EC), that the Court of Justice held, in *Woodpulp I* (paragraph 11 et seq.), in substance, that a concerted practice was capable of restricting competition within the common market and thus falling within the territorial scope of application of Article 85 EC only if it related to *direct sales* of the relevant products *to purchasers established in the Community* and if vendors engaged in price competition in order to win orders from those customers.

37. The Court reached this conclusion after analysing the provisions of Article 85 EC and added, ‘accordingly the Community’s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law’ (paragraph 18 of the judgment). Article 101 TFEU (or indeed Article 102 TFEU) thus raises no issue of territorial jurisdiction from the point of view of public international law precisely because, given the way in which it is worded, it is quite simply not intended to be applied in any extra-territorial manner.

38. That is why it was unnecessary for the European Union to adopt any law like the American Foreign Trade Antitrust Improvements Act, which introduced into the legislation the so-called ‘qualified effects’ test, with the aim of excluding from section 1 of the Sherman Act conduct adopted abroad which has no ‘direct, substantial, and reasonably foreseeable effect on [American] trade ...’. Indeed, unlike the Sherman Act, the wording of Articles 101 TFEU and 102 TFEU clearly states that those articles exclusively relate to practices which restrict competition within the European Union, rather than outside it.

39. I would, in this context, refer to the recent case of *Motorola Mobility v. AU Optronics* (No 14-8003) before the United States Court of Appeals (7th Circuit), which concerned the same worldwide cartel as gave rise to the present appeal. The facts and questions raised in that case were similar to those at issue in the present case and included, in particular, the question of the extra-territorial application of American antitrust law. Motorola, a company established in the United States, accused an international cartel (the same cartel as in this appeal) of infringing the Sherman Act through the cartelisation of the prices of LCD panels sold to certain of its subsidiaries established outside the United States which incorporated the panels into finished products that were subsequently delivered to their parent company in the United States.

40. In an *amicus curiae* brief submitted to the United States Court of Appeals, the Belgian competition authority¹¹ pleaded in favour of a restrictive interpretation of the territorial application of American antitrust law, in accordance with the principle of international comity (*comitas gentium*), pointing out that a wide-ranging application of American law would have the effect of undermining (the effectiveness) of the application of Belgian and European competition law and of the competition law of other countries. Similar *amicus curiae* briefs were submitted in that case by, inter alia, Taiwan and Japan.

41. In the judgment given a few months after the judgment under appeal, the United States Court of Appeals dismissed Motorola's claim and held that the Sherman Act did not apply, on the ground that the effects of the cartel on the American market — if substantial and reasonably foreseeable — were 'indirect', in that the cartel participants were not selling LCD panels in the United States and the panels were being sold abroad to undertakings (subsidiaries of Motorola) which incorporated them into products which were then exported to and sold in the United States. The Appeals Court also pointed to the risk of 'enormously increasing the global reach of the Sherman Act'.

42. The foregoing demonstrates that, in the present case too, a broad interpretation of the territorial scope of EU competition law would entail the risk of conflicts of jurisdiction with foreign competition authorities and of double penalties for undertakings.

43. Moreover, the Courts of the European Union have always recognised the importance of strict respect for territorial jurisdiction¹² in order to avoid infringement of the principle *ne bis in idem*¹³ affirmed in Article 50 of the Charter of Fundamental Rights of the European Union. It is apparent from the judgment in *SGL Carbon v Commission* (C-308/04 P, EU:C:2006:433, in particular, paragraphs 29 and 32) that the Court concluded that, were a competition authority to exceed its territorial jurisdiction, that would entail a risk of concurrent penalties being imposed on the undertakings under investigation. In the present case, if the Commission were to impose a fine in respect of a transaction relating to a component delivered in a country that is not a contracting party to the EEA on the ground that finished products incorporating that component were sold in the EEA, then the same transaction would be liable to be sanctioned twice. The first time in the country that is not a contracting party to the EEA, where the component was delivered, then a second time in the EEA (if the Commission's approach, which is that the component is incorporated into a finished product that is finally sold in the EEA, were to be followed).

44. It seems to me that, unless further evidence can be furnished that the cartel creates qualified effects in the EEA, the Commission goes too far if it fines cartels relating to products manufactured and sold outside the EEA for the sole reason that those products are subsequently 'transformed' or incorporated into other products which (either wholly or in part) arrive in the EEA.

11 — See the Brief of the Belgian Competition Authority in *Motorola Mobility LLC v AU Optronics Corp.* of 10 October 2014. The BCA cited a judgment of a Belgian Court of Appeal of 12 March 2014 in Case 2013/MR/6 'Brabomills', in which that Court of Appeal annulled the fine imposed on Brabomills because it had not been calculated by reference to sales or turnover in Belgium. That Court of Appeal was unable to determine whether the fine punished Brabomills only for the infringement committed in Belgium or also related to the infringement committed in the Netherlands, in respect of which the company had already been fined and, accordingly, it wished to avoid any breach of the principle *ne bis in idem*.

12 — If foreign competition authorities were to impose fines in respect of the application or effects of a cartel in the EEA, that would encroach on the territorial jurisdiction of the Commission. See *Tokai Carbon and Others v Commission* (T-236/01, T-244/01 to T-246/01, T-251/01 and T-252/01, EU:T:2004:118, paragraph 143) and *Hoechst v Commission* (T-410/03, EU:T:2008:211, paragraph 603). Likewise, if the Commission were to impose fines that do not relate to the application of a cartel or its qualified effects in the EEA, it would be exceeding its jurisdiction.

13 — See, inter alia, *Tokai Carbon and Others v Commission* (T-236/01, T-244/01 to T-246/01, T-251/01 and T-252/01, EU:T:2004:118, paragraph 143) and *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* (T-224/00, EU:T:2003:195, paragraph 103) (the appeal was rejected in *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* (C-397/03 P, EU:C:2006:328). See also *Showa Denko v Commission* (C-289/04 P, EU:C:2006:431, paragraph 50).

c) The effects of the cartel in the EEA produced through the intermediary of the finished products: the criteria of ‘qualified effects’ and ‘implementation’

45. I would point out that, initially, at the beginning of the infringement proceedings, the Commission had described the sales at issue in this case as ‘indirect EEA sales’ (see recital 391 et seq. of the contested decision). It was only later that it decided to describe them instead as ‘direct EEA sales through transformed products’.¹⁴ Was this an attempt by the Commission to give better justification of its use of a new concept?

46. It is at all events impossible, in my view, to regard the sale in the EEA of finished products incorporating LCD panels made by entities within the InnoLux group established outside the EEA as constituting, within the meaning of *Woodpulp I*, the implementation in the EEA of the price cartel relating to the sale of LCD panels. Such sales are not comparable to sales in the EEA of LCD panels at cartel prices. First, the sale of the finished products themselves cannot be described as the implementation in the EEA of the LCD panel cartel, sales of the finished products incorporating the LCD panels not falling within the scope of the infringement of Article 101 TFEU established by the Commission. Secondly, the LCD panels incorporated were not themselves sold at coordinated prices in the EEA. In the present case ‘implementation’ occurred outside the EEA, at the point when the LCD panels were delivered to the entities that incorporated them into the finished products.

47. Any different treatment, from the point of view of the application of Article 101 TFEU, of indirect sales of LCD panels in the EEA according to whether the ‘transformed products’ are placed on the market by third-party undertakings which purchased the panels from cartel members or by subsidiaries of cartel members which purchased the panels after delivery within the vertically integrated group would result in placing the latter undertakings at a disadvantage by comparison with manufacturers of LCD panels that are not integrated downstream.¹⁵

48. It is therefore clear that the only justification for the Commission’s having jurisdiction with regard to the sales at issue must arise in this case from application of the ‘qualified effects’ test.

i) The ‘qualified effects’ test in general

49. Several Advocates General have recommended that the Court should recognise this test, which would enable EU competition law to be applied to anti-competitive conduct or agreements adopted or concluded outside the EEA but having repercussions within the territory of the EEA. The test was recommended by, inter alia, Advocate General Mayras in his Opinion in *Imperial Chemical Industries v Commission* (48/69, EU:C:1972:32) (in which case the cartel had direct, immediate, substantial and foreseeable affects within the Community) and by Advocate General Darmon in his Opinion in *Ahlström Osakeyhtiö and Others v Commission* (*‘Woodpulp I’*) (89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:258).¹⁶

14 — The description is somewhat self-contradictory, in that the sales are both direct and ‘through’ something else. In any event, they are in no way direct in the sense of the first category of sales (‘direct EEA sales’).

15 — See also the opinion of Professor P. Demaret: ‘Note relative à l’arrêt du Tribunal InnoLux (T-91/11)’, appended at Annex ECJ.A.6 to InnoLux’s appeal.

16 — ‘Surely the Commission would be disarmed if, faced with a concerted practice, the initiative for which was taken and the responsibility for which was assumed exclusively by undertakings outside the common market, it was deprived of the power to take any decision against them? This would also mean giving up a way of defending the common market and one necessary for bringing about the major objectives of the European Economic Community’ (point 53).

50. The Commission itself has long asserted that the ‘qualified effects’ test defines the outer limit of its jurisdiction.¹⁷

51. In *Gencor v Commission* (T-102/96, EU:T:1999:65, paragraph 92), the General Court also had recourse to this test, holding, in the context of a dispute concerning the Commission’s power to apply the regulation on the control of concentrations between undertakings to undertakings established outside the Community,¹⁸ that it was necessary for the concentration to have an ‘immediate, substantial and foreseeable effect’. I see no reason, moreover, why the application of this test should be restricted to concentrations.¹⁹

52. The General Court also pointed out in *Haladjian Frères v Commission*²⁰ that, ‘in order to justify the application of the competition rules to an agreement concerning products purchased in the United States for sale in the [European Union] ... [t]he mere fact that conduct produces certain effects, no matter what they may be, on the [EU] economy does not in itself constitute a sufficiently close link to be able to found [EU] competence. In order to be capable of being taken into account, that effect must be substantial, that is to say, appreciable and not negligible’.

53. Admittedly, the Court of Justice has never rejected the ‘qualified effects’ test, but it has never expressly held that it may be applied either.²¹ Whilst I am in favour of it, the problem does not arise in the present appeal, since the Commission’s demonstration of the qualified effects of the cartel on competition within the EEA is, in my view, woefully inadequate.

ii) The evidence of ‘qualified effects’ in the present case

54. The EEA being the market protected by the rules applicable in this case, it is *prima facie* difficult to link the sales in Asia here at issue with the EEA competition rules, or with the structure of competition in the EEA relating to the *products to which the infringement relates*, unless it is concluded, after analysis of the market for the finished products in the EEA, that the cartel in the Asian market relating to LCD panels equal to or greater than 12 inches in size destined for television and IT applications also led to the distortion of competition in the *market for the finished products in the EEA*. However the Commission did not take that approach in the contested decision, nor has it

17 — As early as in Decision 69/243/EEC of 24 July 1969 relating to a proceeding under Article 85 of the EEC Treaty (IV/26.267 ‘Dyestuffs’) (OJ 1969 L 195, p. 11), the Commission stated that ‘[t]he competition rules of the Treaty are ... applicable to all restrictions of competition which produce within the Common Market effects set out in Article 85(1)’. In Decision 85/202/EEC of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.725 — Woodpulp) (OJ 1985 L 85, p. 1), the Commission stated, in recital 79, that ‘[t]he effect of the agreements ... on prices announced and/or charged to customers and on resale of pulp with the EEC was ... not only substantial but intended, and was the primary and direct result of the agreements’ (the English is the only authentic text). Commission Decision 85/206/EEC of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/26.870 — Aluminium exports from eastern Europe) (OJ 1985 L 92, p. 1) was also expressly based on the criterion of effects. See also the Commission’s Eleventh Report on Competition Policy of 1981, Brussels, 1982, paragraph 34, and its Fourteenth Report on Competition Policy of 1984, Brussels, 1985, paragraph 60.

18 — See also the Opinion of Advocate-General Kokott in *The Air Transport Association of America* (C-366/10, EU:C:2011:637, point 148).

19 — See also, to that effect, *Intel v Commission* (T-286/09, EU:T:2014:547, paragraph 231). The High Court of England and Wales reached the same conclusion in *Adidas -v- The Lawn Tennis Association and Others* [2006] EWHC 1318 (Ch), paragraph 47 et seq. See also, for example, Broberg, M. P., ‘The European Commission’s Extraterritorial Powers in Merger Control’, *International and Comparative Law Quarterly*, 49, 2000, p. 180, and Albors-Llorens, A., ‘Collective dominance: A mechanism for the control of oligopolistic markets?’, *The Cambridge Law Journal*, Vol. 59, Number 2, June 2000, p. 256. Interestingly, the criterion of implementation and that of ‘qualified effects’ do not always lead to the same result. See, in particular, Griffin J. P., ‘EC and U.S. Extraterritoriality: Activism and Cooperation’, 17, *Fordham International Law Journal*, 1994, pp. 353 and 360 et seq., Schwartz, I. and Basedow, J., ‘Restrictions on Competition’, III-35 *International Encyclopedia of Comparative Law* 1, 1995, pp. 134 to 139, and Baudenbacher, C., ‘The CFI’s Gencor Judgment — Some remarks on its global implications’, *Liber Amicorum en l’honneur de Bo Vesterdorf*, Bruylant, 2007, p. 557.

20 — T-204/03, EU:T:2006:273, paragraph 167. There was no appeal against the judgment.

21 — This was the case, notably, in *Woodpulp I*, in which — by contrast with the present case — the Court was able, by reference to the criterion of the ‘implementation’ of the cartel at issue, to justify the Community’s competence in light of the principle of territoriality.

asserted or demonstrated to the requisite legal standard that the free play of competition in the EEA in the market for the finished products has been distorted, or even that the infringement extended to fixing the price of, or to the sale of the finished products into which the cartelised LCD panels had been incorporated.

55. The Commission went no further in the contested decision than finding an infringement of Article 101 TFEU²² in relation solely to LCD panels (see recitals 1 and 377 of the contested decision), merely observing that '[t]he sales of LCD panels to intra-group customers were part of the cartel discussions in this case' and that 'it [could] be *reasonably assumed* that an implemented cartel had effects on direct sales through transformed products' (recital 394 of the contested decision; emphasis added), which certainly does not equate to a demonstration of the cartel's qualified effects in the EEA market.

56. First of all, it is clear that the infringement, as established by the Commission, did not relate *directly* to the finished products. Secondly, it is clear from the documents in the case-file that it did not relate to them *indirectly* either. The 2006 Guidelines clearly state that the word 'indirectly' appearing in point 13 is intended as a reference to cases involving, 'for instance, ... price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products'.²³ That is not the situation in the present case: it is not apparent from the case file that the cartelised prices of LCD panels provided a point of reference for LCD panels of lower or higher quality. Nor does the case file show that they served as a point of reference for the prices of the finished products incorporating them.

57. The General Court held, in paragraphs 48 and 49 of the judgment under appeal, that the choice made by the Commission to take into account 'direct EEA sales through transformed products' was 'all the more justified in the present case given that it [was] clear from the evidence presented in the contested decision (... recital 394 ...), which [was] not called in question by the applicant, that internal sales of cartelised LCD panels to undertakings participating in the cartel were made at prices affected by the cartel' and that 'the cartel participants were aware that the price of cartelised LCD panels affected the price of the finished products into which they were incorporated' (see recitals 92 and 93 of the contested decision). While that may well be true, the possibility of prices being 'affected' is not sufficient to prove the existence of 'qualified effects' in the EEA. Moreover, it appears that the Court's findings relate to all the cartel participants, with no distinction being made between 'real' intra-group sales, which could be taken into account as such in the calculation of the fine where they occurred in the EEA and intra-group sales which could not be taken into account but could, according to the Commission, be replaced by 'real' sales to third parties of LCD panels incorporated into finished products.²⁴

58. The General Court emphasised, in paragraph 70 of the judgment under appeal, that the Commission must be able to take proceedings in respect of the 'repercussions' which a cartel conceived outside the EEA has 'on competition within the internal market and to impose a fine ... that is proportionate to the harm which the cartel represents for competition in that market'. It added that, '[a]ccordingly, when the cartelised LCD panels made by the applicant were incorporated into finished products by companies belonging to the same undertaking as the applicant and those finished products were sold in the EEA by that undertaking, the cartel must be considered to have affected the

22 — And of Article 53 EEA (although, for the purposes of this Opinion, I shall restrict myself to the reference to Article 101 TFEU).

23 — Footnote to point 13 of the 2006 Guidelines. Moreover, it is questionable whether the concept of 'direct sales through transformed products' is itself appropriate in this case, since the finished products in question (laptops, PC monitors and LCD televisions) are not really 'transformed' LCD panels, just as, for example, a smartphone cannot be described as a 'transformed' screen or even as a 'transformed' microprocessor: they are all distinct products into which an LCD panel has been incorporated as one component among many. The 2006 Guidelines refer instead to lower or higher quality products the price of which is based on cartelised prices and which are, therefore, the same products only of different quality.

24 — While recital 394 of the contested decision admittedly refers specifically to the three vertically-integrated addressees of the contested decision, to which the notion of 'direct EEA sales through transformed products' was applied, recital 396 relies on exactly the same items of evidence in so far as concerns LGD and AUO, to which the Commission applied the notion of 'direct EEA sales' alone.

transactions which took place up to and including the moment of that sale'. That conclusion seems hasty, to say the least, since the Commission has not established that an infringement relating to the fixing of LCD panel prices will necessarily have an effect on the fixing of the prices of the finished products. Moreover, numerous manufacturers of the finished products were not involved in the procedure which culminated in the contested decision. The Commission's assertion in recital 394 of the contested decision (recital 389 in the French version) that '*it can reasonably be assumed that an implemented cartel had effects on direct sales through transformed products*' is, as the Commission itself recognises, mere supposition, in that it failed to set out in the contested decision any evidence that the sale of the finished products was affected to the requisite legal standard for it to be maintained that the cartel produced 'qualified effects' in the EEA, such 'qualified effects' being, at least, immediate, substantial and foreseeable, rather than merely possible or assumed.

59. If the Commission wishes to include the sales at issue in its calculation of the fine, it 'cannot just put forward a mere presumption but ... must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market' (see *Prym and Prym Consumer v Commission*, C-534/07 P, EU:C:2009:505, paragraph 82). It is therefore not sufficient for the Commission to rely on a presumption that there would be such effects and one may indeed wonder whether the Commission attempted to verify and measure the cartel's impact on the market for the finished products in the EEA.

60. For the applicant another problem arises from the fact that the concept of 'direct EEA sales through transformed products' artificially changes the location of the transaction at issue from the place where the LCD panels were actually delivered and used to the place where the finished products in which those panels were incorporated were sold. The LCD panels were actually sold in Asia, not in the EEA, and consequently, by treating sales of the finished products as if they were sales of the LCD panels incorporated within them, the Commission is treating internal deliveries of panels within InnoLux in Taiwan or China as deliveries made within the EEA, whereas it treated Samsung's intra-group deliveries of panels from South Korea to its factories in the EEA as deliveries outside the EEA, for the sole reason that Samsung sold the finished products in which those LCD panels were incorporated outside the EEA.²⁵

61. Admittedly, as the Commission stated in recital 383 of the contested decision, '[b]y using the criterion of delivery [to establish the value of sales], a strong nexus with the EEA is established'. However, as the General Court held in paragraph 59 of its judgment in *Brouwerij Haacht v Commission* (T-48/02, EU:T:2005:436, against which no appeal was brought), 'the assessment, for the purpose of calculating the fine imposed for the infringement, of the effective economic capacity of the offenders to cause damage to other operators, in particular consumers, cannot be made by reference to products other than those to which the cartel related'.

62. As is moreover stipulated in the 2006 Guidelines, from which the Commission may not depart without specific justification compatible with the principle of equal treatment²⁶ (which has not been offered in this case), fines must be based on sales to which the infringement relates. The Commission may not take into account sales of downstream products, that is to say, products that are not the subject of the infringement, even if infringing products have been incorporated into them as components.

25 — Recital 238 of the contested decision clearly states that '[i]ntra-group sales of LCD panels — in so far as they ended up [in] transformed products sold in the EEA — are therefore to be taken into account'. See also recital 395 of the contested decision: 'For the calculation of the value of sales, the value of the relevant panels is included in so far as the transformed product is sold by the cartelists in the EEA to an unrelated company.'

26 — *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, C-397/03 P, EU:C:2006:328, paragraph 91. In this context, see also *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 55).

iii) What, at all events, of the criterion of the ‘implementation’ of a cartel?

63. In its judgment in *Woodpulp I* (at paragraphs 16 and 17), the Court held that the ‘decisive factor’ determining whether the Commission had jurisdiction to apply prohibitions laid down under EU competition law was not the place where the cartel was formed but the place where it is implemented.²⁷ In paragraph 18 of the judgment, the Court observed that the European Union’s jurisdiction was ‘covered by the territoriality principle as universally recognised in public international law’. In paragraph 12 of the judgment, the Court noted that ‘the main sources of supply of wood pulp [were] outside the Community ... and that the market therefore had global dimensions. Where wood pulp producers established in those countries [outside the EU] *sell directly to purchasers established in the Community* and engage in price competition in order to win orders from those customers, that constitutes competition within the common market’ (my emphasis). It is only ‘where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated [that] they are taking part in concertation which has the object and *effect* of restricting competition within the common market within the meaning of Article 85 of the Treaty’ (paragraph 13 of *Woodpulp I*; emphasis added). The Court concluded that ‘[t]he producers in this case [had] implemented their pricing agreement within the common market’ (paragraph 17 of the judgment).

64. In assessing whether EU competition law applies, the starting point is therefore to identify the place where competition relating to the product in question occurs.

65. What triggers the EU’s jurisdiction, in accordance with the criterion of implementation developed in *Woodpulp I*, is the *sale in the EEA of the products which are the subject of the concerted action*, being, in this case, LCD panels.²⁸ Significantly, there is no finding in the contested decision of any concerted action relating to the finished products that incorporate the LCD panels manufactured by the cartel participants. Equally, the General Court failed to have regard to the criterion expressed in *Woodpulp I* when it stated, in paragraph 46 of the judgment under appeal, that sales of the finished products incorporating the LCD panels ‘were harmful to competition within the EEA’. Suffice it to recall that the sales of the finished products were not made on the market within the EEA to which the infringement related, that is to say, the market for LCD panels. Finally, contrary to the General Court’s assertion in paragraph 47 of the judgment under appeal, *it is not sufficient* to identify the sales ‘having [any] link [whatsoever] with the EEA’ in order to establish the territorial applicability of EU competition law, in accordance with the criterion laid down in *Woodpulp I*. What needs to be shown is the sale, within the EEA, of *the product in respect of which the infringement was committed*, in this case, LCD panels. The sale of a different product, one which incorporates an LCD panel as a component that is not itself the subject-matter of the sale, does not fulfil that requirement.

66. Finally, I think that, in the context of the question of territorial jurisdiction which arises in the present case, the Commission had to interpret the 2006 Guidelines restrictively, especially when I recall that ‘the procedure whereby a fine is imposed [by the Commission] for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC falls under the “criminal head” of Article 6 [of the European Convention on Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950], as progressively defined by the European Court of Human Rights’.²⁹

27 — See also *Atlantic Container Line and Others v Commission* (T-395/94, EU:T:2002:49, paragraph 72), which follows the judgment in *Woodpulp I*.

28 — As Demaret, P. rightly pointed out in ‘L’application du droit communautaire de la concurrence dans une économie mondiale globalisée — La problématique de l’extraterritorialité’, in *La politique communautaire de la concurrence face à la mondialisation et à l’élargissement de l’Union européenne*, Nomos Verlagsgesellschaft, 1999, p. 49, ‘[t]he *Woodpulp I* test did not simply involve sales, in terms of a certain turnover, but the adoption of conduct within the Community, in the form of sales made at concerted prices’.

29 — See the Opinion of Advocate General Sharpston in *KME Germany and Others v Commission* (C-272/09 P, EU:C:2011:63, point 64) and the Opinion of Advocate General Bot in *ThyssenKrupp Nirosta v Commission* (C-352/09 P, EU:C:2010:635, points 48 to 52 and the case-law cited).

67. It follows from all the foregoing that the first ground of appeal must be upheld.

68. The judgment under appeal has, therefore, to be set aside in that the General Court erred in law by concluding that intra-group deliveries of LCD panels to the appellant's factories in China and Taiwan fell within the scope of Article 101 TFEU and Article 53 EEA for the sole reasons that the finished products into which the LCD panels were incorporated in those factories as components were sold by the appellant in the EEA.

B – The second ground of appeal, relating to alleged discrimination by comparison with other participants in the cartel

69. By the first part of the second ground of appeal, relating to the use of the concept of a 'single undertaking' as a distinguishing criterion, the appellant argues that the distinction drawn by the General Court between vertically-integrated undertakings according to whether or not they formed a single undertaking with their related purchasers is not based on any relevant difference. In its judgment in *LG Display and LG Display Taiwan v Commission* (T-128/11, EU:T:2014:88), the General Court, in order to reject LGD's argument that sales of LCD panels to its parent companies should be excluded, did not rely on the fact that the sales in question were made within a single undertaking. The appellant also refers to paragraph 140 of that judgment and argues that there is no logic in distinguishing between vertically-integrated companies according to whether their relevant sales were made to related subsidiaries or to related parent companies.

70. The Commission claims that the appellant's argument is unfounded.

71. It should be observed first of all that, the appellant's second ground of appeal being incapable of leading to the judgment under appeal's being set aside to any greater extent, there would ordinarily be no need for it to be considered.³⁰ It is only for the sake of completeness and in the alternative (if the Court should decide not to follow my opinion regarding the first ground of appeal) that I shall consider the second ground of appeal.

72. It must, at all events, be observed that the distinction drawn by the General Court between the cartel participants by reference to the concept of an 'undertaking', within the meaning of Article 101 TFEU, in order to determine which of them were undertakings that were vertically integrated undertakings with their purchasers and which of them were independent from their purchasers, has a solid basis in the case-law.³¹

73. Leaving aside the issues relating, in particular, to the Commission's extra-territorial jurisdiction and the case-law relating to that question, to which I have given detailed consideration in my analysis of the first ground of appeal, I believe that neither the Commission nor the General Court made any arbitrary distinction in their separation of intra-group deliveries from sales to third parties. Indeed, they simply distinguished undertakings that were vertically integrated from those that were not and, in order to make that distinction, by contrast with American competition law, the (objective) concept of a 'single undertaking' is quite relevant in EU law. This part of the second ground of appeal should, in my view, be dismissed for that reason alone.

30 — See, for example, *Chronopost and Others v Ufex and Others* (C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388, paragraph 43).

31 — See, in particular, *Imperial Chemical Industries v Commission* (48/69, EU:C:1972:70, paragraphs 134, 135 and 140), *Hydrotherm Gerätebau* (170/83, EU:C:1984:271, paragraph 11) and *Arkema v Commission* (C-520/09 P, EU:C:2011:619, paragraph 37 and the case-law cited).

74. Moreover, contrary to what the appellant asserts, the situation of LGD was different from that of the vertically-integrated undertakings, such as InnoLux. LGD in fact was a separate undertaking from its parent companies. In the absence of vertical integration, all LGD's sales of LCD panels to its parent companies in the EEA were taken into consideration in the calculation of the fine as 'direct EEA sales'. The concept of a single undertaking therefore enabled an objective distinction to be drawn between different situations.

75. It follows that the first part of the second ground of appeal should be rejected as unfounded.

76. By the second part of the second ground of appeal, which concerns alleged errors in the method applied to internal deliveries of LCD panels by LGD and AUO, the appellant submits that the General Court erred in law by relying, in paragraphs 93 and 94 of the judgment under appeal, on the principle of legality in order to dismiss its arguments based on the principle of equal treatment. According to the applicant, it is clear from the judgment in *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others* (C-628/10 P and C-14/11 P, EU:C:2012:479) that it is only where a party claims the benefit of an illegal method of calculation of the fine that the principle of legality may be relied on to deny it that benefit. In the present case, however, the appellant was denied the benefit of a perfectly legal method of calculating the fine. The method applied to intra-group deliveries of LCD panels by LGD and AUO is that which the General Court and the Court of Justice upheld in *Europa Carton v Commission* (T-304/94, EU:T:1998:89) and *KNP BT v Commission* (C-248/98 P, EU:C:2000:625). In its judgment in *LG Display and LG Display Taiwan v Commission* (T-128/11, EU:T:2014:88), the General Court itself upheld the legality of that method and, according to the appellant, it is therefore contradicting itself.

77. The Commission maintains that the appellant's argument is unfounded.

78. In my view, this part of the second ground of appeal concerns grounds included in the contested judgment merely for the sake of completeness and it must, therefore, be dismissed as ineffective. Indeed, even if the Commission had been wrong to conclude that neither LGD, LG Electronics and Philips, nor AUO and BenQ, formed a single undertaking, that could not benefit the appellant.

79. At all events, as the Commission rightly points out, by contrast with the situation in the case giving rise to the judgment in *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others* (C-628/10 P and C-14/11 P, EU:C:2012:479), it did in the present case apply the same method (of the single undertaking) to all the cartel participants. Suffice it to observe that nothing in that judgment suggests that the General Court ought also to have assessed, in the context of InnoLux's action for annulment, whether the Commission had applied its method correctly to LGD and AUO.

80. It follows that the second part of the second ground of appeal must be dismissed as ineffective and, at all events, unfounded. The second plea must therefore be dismissed.

IV – The consequences of the setting aside of the judgment under appeal and costs

81. In accordance with Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court may, after setting aside the decision of the General Court, give final judgment in the matter, where the state of the proceedings so permits. That is the position in the present case, since the Court has available to it all the elements necessary to rule on the action.

82. The reduced fine set by the General Court (before rounding down) was EUR 288 437 850 (paragraph 163 of the judgment under appeal; see, in this connection, point 6 of this Opinion). It is therefore appropriate to deduct from that sum the part of the fine that is attributable to 'direct EEA sales through transformed products', which is EUR 114 681 174. The basic amount of the fine (before

rounding down) thus becomes EUR 173 756 676, which must then be rounded down³² giving a final sum of EUR 173 000 000. I would add that the Commission has not disputed the figures provided by the applicant in its appeal.

83. As regards costs, in that Innolux's appeal is upheld in part, the Commission should, in addition to bearing its own costs in respect of both the proceedings at first instance and the appeal, be ordered to pay one half of the costs incurred by InnoLux relating to those two sets of proceedings. InnoLux should bear one half of its own costs relating to those proceedings.

V – Conclusion

84. In the light of the foregoing considerations, I propose that the Court should:

- set aside the judgment of the General Court of the European Union in *InnoLux v Commission* (T-91/11, EU:T:2014:92) in that it confirmed that the fine imposed on InnoLux Corp. could legally take into account the value of intra-group deliveries of active matrix liquid crystal display panels to Innolux Corp's factories in China and Taiwan and incorporated there into finished products sold in the European Economic Area, and thereby erred in law;
- annul Commission Decision C(2010) 8767 final of 8 December 2010 relating to a proceeding under Article 101 [TFEU] and Article 53 of the Agreement on the European Economic Area (Case COMP/39.309 — LCD), in that the fine which it imposed on InnoLux Corp. took into account the value of intra-group deliveries of active matrix liquid crystal display panels to Innolux Corp's factories in China and Taiwan subsequently incorporated there into finished products sold in the European Economic Area;
- set the amount of the fine imposed on InnoLux Corp. at EUR 173 000 000;
- dismiss the remainder of the appeal; and
- order the European Commission, in addition to bearing its own costs in respect of both the proceedings at first instance and the appeal, to pay one half of the costs incurred by InnoLux Corp. relating to those two sets of proceedings and order InnoLux Corp. to bear one half of its own costs relating to those proceedings.

85. In the alternative, if the Court should decide not to follow my Opinion on the first ground of appeal and decide to reject it, I propose that the Court should then dismiss the appeal in its entirety and order InnoLux Corp. to bear the costs of this appeal.

32 — In accordance with the rounding method upheld by the General Court (in paragraph 160 of the judgment under appeal), where rounding down to the first two digits leads to a reduction of more than 2% of the amount before rounding (3 756 676 being, in this case, 2.16% of 173 756 676), the reduced amount of the fine must be rounded down to the first three digits.