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Calculation of fines and attenuating circumstances

In its ruling dated September 15, 2011, the General Court of the European Union dismissed the action brought by Lucite International Ltd and its subsidiary Lucite International UK Ltd and refused to consider certain circumstances as attenuating[1]. These companies challenged the amount of the fine that had been imposed on them by the European Commission in its decision of May 31, 2006 for their participation in the so-called Methacrylates cartel.

In this case, the Lucite group purchased from the ICI group the ICI Acrylics business unit that was responsible for the manufacture and sale of the concerned products and that actually participated in the infringement. The business transfer was completed in November 1999, i.e. during the infringement.

Considering that the property of the business unit involved in the cartel had been transferred during the infringement, the acquiring party tried to explain that it "*inherited*" an undisclosed cartel in which the acquired entity had been participating for several years and that it adopted after the business transfer a commercial strategy standing undermining the cartel. For them, this particular situation should have been taken into account in the calculation of the fine.

As a reminder, the European Commission's method of calculation consists in determining a basic amount reflecting the gravity and the duration of the infringement, and then in increasing or reducing this amount according to aggravating or attenuating circumstances, if any.

Precisely, for the applicants 1/ the lack of involvement by shareholders, senior management and newly recruited employees (Lucite's participation in the infringement was limited to participation by former ICI

employees in the business unit or at a lower level) and 2/ the role of its commercial policy in undermining the cartel should have been considered by the Commission at the stage of determining the basic amount of the fine or, at the very least, at the stage of assessing the existence of attenuating circumstances.

Basic amount

Pursuant to the European Commission's guidelines, the basic amount is determined according to the gravity and duration of the infringement. This "gravity" element is assessed in light of three criteria: the nature of the infringement, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

According to the applicants, the European Commission should have taken into consideration the two above mentioned circumstances to differentiate Lucite's conduct.

This first line of argument did not raise any particular difficulties. The General Court only had to refocus on the European Commission's guidelines relying on the purpose assigned to each stage in the fine's calculation. At the stage of determining the basic amount, the European Commission takes into consideration the effects resulting from **the whole of the infringement** and not the effects resulting from the **actual conduct** of the relevant company(ies). The underlying idea is to assess, from a pure objective perspective, the gravity of the infringement and not the relative gravity of the participation of each of the companies concerned. The following stage, which consists in increasing or reducing this basic amount, is precisely intended to individualize this amount according to the personal conduct of the relevant company(ies).

Since, in this case, the circumstances on which the applicants relied all related to their own conduct, it is at the stage of assessing potential attenuating circumstances that they should have be taken into consideration:

Attenuating circumstances

Failing to impact on the basic amount, the applicants had whished that the absence of involvement of shareholders, senior management and newly recruited employees in the cartel and their new commercial strategy following the acquisition of the business unit could be taken into consideration as attenuating circumstances.

As a reminder, circumstances regarding a company's own conduct can be taken into consideration in order to reduce the basic amount of the fine, including but not limited to the following circumstances set forth in a non-exhaustive list incorporated into the European Commission's guidelines:

- *"an exclusively passive or 'follow-my-leader` role in the infringement,*
- ***non-implementation in practice of the offending agreements or practices**,*
- *termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks),*
- *existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does*

indeed constitute an infringement,

- *infringements committed as a result of negligence or unintentionally,*
- *effective cooperation by the undertaking in the proceedings, outside the scope of the Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases,*
- *other*"

With regards to the first circumstance related to the persons involved, the applicants argued that such persons were "*merely individuals at the business level formerly employed by ICI*".

The judge did not follow this approach, since action or knowledge on the part of the owners or principal managers of the concerned company(ies) has never been required by law. Action by a person who is authorized to act on behalf of the relevant company(ies) is sufficient.

With regards to the second circumstance related to the commercial strategy implemented after the business acquisition, it was subject to a longer judicial review. It could indeed be identified as a "*non-implementation in practice of the offending agreements or practices*"**.** Such argument may be successful if, as the case law states, the company "*actually avoided implementing (the offending agreements) by adopting competitive conduct on the market or, at least, that it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation*".

The issue in this case is that the Commission did not provide in the challenged decision a specific response to this argument. As the General Court emphasized, "*the wording of the contested decision does not enable it to be understood, with certainty, why the applicants' line of argument was not accepted as providing proof of attenuating circumstances*". It has to be noted that once again the gaps in the Commission's reasoning are stigmatized by the judge, this time on its duty to state reasons when refusing to consider a circumstance as attenuating.[2]

However, notwithstanding the fact that it admitted that the applicants were correct in criticizing the European Commission's failure to provide explanations on this specific point, the General Court considered that such omission was not in itself a basis for annulling the challenged decision or reducing the fine.

There was then an opportunity for the General Court to use its unlimited jurisdiction and to substitute its appraisal to the European Commission's.

Such appraisal led the Court to deny the existence of an attenuating circumstance, in particular because:

- the commercial strategy only covered pricing policy. Since the cartel did not only consist in fixing prices but also in sharing information, the strategy did not cover all of its scope;
- the strategy was not accompanied by Lucite's complete waiver to apply previously announced price increases;
- the strategy did not, moreover, cover the three products concerned by the cartel.

In conclusion, the applicants did not succeed in demonstrating that they had adopted a competitive conduct.

They could not, as a consequence, benefit from a reduction of the fine on the ground of either of these circumstances.

The application for a reduction of the fine was then rejected, since the Commission did not make any mistake in its assessment of attenuating circumstances and since the General Court did not deem it necessary to modify the amount of the fine imposed on the applicants in the exercise of its unlimited jurisdiction.

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[1] GCEU, September 15, 2011, *Lucite International Ltd et Lucite International UK Ltd v European Commission*, case T-216/06.

[2] In its Air Liquide case dated June 16, 2011, the Court condemned the Commission on the basis of its duty to state reasons when rejecting the elements of proof produced by the parent company to rebut the presumption of decisive influence on its wholly owned subsidiary. See our article entitled “Parental liability presumption rebuttal” published in our July-August 2011 e-newsletter.