On 26 September 2013, the Court of Justice of the European Union (“CJEU”) issued two important judgments (Case C-172/12 P, El Du Pont de Nemours and Others v Commission and Case C-179/12 P, Dow Chemical v Commission) in which it confirmed that a parent company can be held liable and fined by the European Commission for the antitrust infringements of its 50:50 joint venture in the EU.

The judgments endorse the European Commission’s current hardened approach of attributing antitrust liability, wherever possible, to parent companies. This approach insures the best of both by enabling the European Commission to act swiftly and, at times, impose fines well above the turnover of the subsidiary itself but of the entire corporate group. It also enhances the risk of a finding of recidivism if different parts of the same corporate group have been found in competition law infringements in the past.

Global companies have now received a wake-up call to ensure that they have in place an effective antitrust compliance programme throughout their entire group, including their joint ventures and other socially owned subsidiaries. These judgments also highlight the importance of companies to consider competition law issues at the outset when they structure joint venture arrangements and make acquisitions of less than full ownership.

The First Judgment

In 2007, the European Commission imposed fines totalling €243.2 million on 6 different companies, including El DuPont and Dow, for participating in an oligopoly retro-ferment market sharing cartel in relation to chloroprene rubber. El DuPont and Dow were held to have jointly and severally taken decisions to maintain the price of chloroprene rubber. El DuPont and Dow were held jointly and severally liable for the infringement that occurred.

The General Court judgments

El DuPont and Dow challenged the European Commission’s fining decisions before the General Court, arguing that they could not be held liable for their joint venture’s infringements. The General Court, however, agreed with the European Commission’s assessment: that the economic, legal and organisational facts in the case strongly supported a finding of an “undertaking” formed by El DuPont and Dow, whose parent companies (DuPont and Dow) exercised “decisive influence” over the joint venture. The parent companies thus remained jointly liable for the infringement.

What are the rules on parental liability in the EU?

Under EU competition law, liability is imposed on an “undertaking.” An “undertaking” is an entity that is able to exercise decisive influence over another entity by virtue of its ownership or control. Both parent companies must exercise “decisive influence” over the joint venture to be found jointly liable.

The CJEU judgments

In its two judgments, the CJEU confirmed that:

1. The behaviour of a subsidiary can be imputed to the parent company even where the subsidiary is independently capable of adopting the strategic decisions to which the parent company does not have direct influence. Where two parent companies each have a 50% shareholding in the joint venture which committed an antitrust infringement, the Commission can establish, on the basis of factual evidence, that both parent companies did in fact exercise influence over the joint venture, and impute the fine to both parents. Although a parent company need not have control over the joint venture in order to have a right to impose a fine, the same is not true regarding the measure of liability.

2. The Commission must demonstrate that the parent company exercises “decisive influence” over the joint venture. The Commission need not demonstrate that the parent company influences the subsidiary or that the subsidiary is controlled by the parent company, as the latter principles are not required by the Competition Act. The Commission must however be able to demonstrate that the parent company exercises “decisive influence” over the joint venture.

3. The fines imposed on the parent company must be sufficient to deter the parent company from further infringements and to offset the gain the parent company has made. The fines must be such as to create a deterrent to the parent company in cases in which it may have exercised “decisive influence” over the conduct of the subsidiary.

Impact

The judgments send a clear message to global companies seeking to expand their presence in the EU. It is now very difficult for parents to avoid liability for their joint ventures even where the joint venture is fully autonomous and the parent itself is engaged in no wrongdoing. Companies should ensure that they have an effective compliance programme, which is implemented throughout the corporate group, including joint ventures and controlling minority shareholdings.

The judgments only address the issue of which group companies form part of the same “undertaking” for the purposes of antitrust liability. The determination of which group companies form part of the same “undertaking” can be different when considering whether articles 101 and 102 TFEU apply to agreements between a parent and its subsidiary. The CJEU in this judgment seems to have resolved the possibility of having a different test for this.