50:50 joint ventures – Possibility of parental liability for EU antitrust infringements confirmed

Peter Citron (Editor)
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On 26 September 2013, the Court of Justice of the European Union (“CJEU”) issued two important judgments (C-362/12 and C-363/12) in the El DuPont-Dow and C-363/12 Dow and C-364/12 E. Doux cases (El DuPont and Dow were held jointly responsible for joint venture’s anti-competitive conduct). The judgments restate the CJEU’s current approach about attributing antitrust liability, whenever possible, to parent companies. This approach maximizes the level of the harm by making the European Commission to assess if at a higher level the link (based on the factors set out in the Merger Regulation, e.g., the existence of a “Members Committee” on which high level executives of the parent companies sat). The judgments also highlight the importance for companies to consider competition law issues at the outset when they structure joint ventures arrangements and make acquisitions of less than full control.

The law in dispute

In 2007, the European Commission imposed fines totalling Euros243.2 million on 6 different companies, including a number of joint ventures, for participating in an illegal price-fixing and market-sharing cartel in relation to the manufacture and sale of a food additive known as DDE. DDE was owned by a 50:50 joint venture, DDE, which was controlled by El DuPont and Dow. Both El DuPont and Dow challenged the European Commission’s fining decisions before the General Court, arguing that they could not be held liable for the joint venture’s conduct. The General Court, however, agreed with the European Commission’s assessment that the economic, legal and organisational factors that tied the joint venture in this case to its parent companies were sufficiently strong to establish joint control, but on the economic, organisational and legal factors which tied the joint venture in this case to its parent companies. The CJEU held that the General Court had correctly applied the rules above. It did not find the same conclusion established where the subsidiary, despite having a separate legal personality, does not decide independently in its own market conduct but rather is subject to significant control from the parent company.

The General Court judgments

El DuPont and Dow challenged the European Commission’s findings. The General Court, however, disagreed with the European Commission’s approach. The General Court agreed that both El DuPont and Dow exercised decisive influence over DDE’s conduct and thus found El DuPont and Dow jointly liable for DDE’s anti-competitive conduct. In particular, the General Court noted that the parent companies both had the power to influence the general market behaviour of DDE due to the fact that El DuPont and Dow’s supervisory boards had vetted the day-to-day running of a subsidiary.

The CJEU judgments

The CJEU added: “In doing so, the CJEU confirmed: “The decisive influence of one or more parent companies is not necessarily tied in economic, legal or organisational factors. Although a joint venture is deemed, for the purposes of the EU Merger Regulation, to be an entity in its own right, that does not mean that the joint venture is independent in all respects.” The CJEU added: “The decisive influence of one or more parent companies is not necessarily linked to the joint venture’s economic autonomy from the parent company. The decisive influence of one or more parent companies is not necessarily tied in economic, legal or organisational factors.” The CJEU confirmed: “The decisive influence of one or more parent companies is not necessarily tied in economic, legal or organisational factors.” The CJEU confirmed: “The decisive influence of one or more parent companies is not necessarily tied in economic, legal or organisational factors.”

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The CJEU held that the General Court correctly applied the rules on parental liability and rejected both appeals. The CJEU added: “The decisive influence of one or more parent companies is not necessarily tied in economic, legal or organisational factors. Although a joint venture is deemed, for the purposes of the EU Merger Regulation, to be an entity in its own right, that does not mean that the joint venture is independent in all respects.” The CJEU confirmed: “The decisive influence of one or more parent companies is not necessarily tied in economic, legal or organisational factors.”

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

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