

Holding parents liable for 50/50 joint ventures

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On 2 February 2012, the EU's General Court issued two important judgments concerning the issue of whether joint venture parents can be held liable for the cartel behaviour of their 50-50 joint venture. In T-77/08 (Dow Chemical v Commission) and T-76/08 (El du Pont de Nemours and Others v Commission), the General Court held that Dow Chemical and El DuPont could be held jointly and severally liable for the conduct of their jointly owned subsidiary, DDE, in which each parent had a 50% shareholding. This was despite the fact that each parent did not individually have the power to impose decisions on DDE, but could only prevent DDE from taking certain decisions, and that DDE was a "full function" joint venture under the EU Merger Regulation.

The judgments support the European Commission's hardened approach in holding parent companies liable for the EU competition law infringements of their subsidiaries. The reality is that companies must now have in place an effective competition law programme throughout their entire group, even for their joint ventures and other non-wholly owned subsidiaries. Companies must also consider competition law issues at the outset when they structure joint venture arrangements and make acquisitions of less than complete control.

What are the rules on parental liability in the EU?

Under EU competition law, liability is imposed on "undertakings". An "undertaking" is an entity or group of entities which effectively function as a single economic unit. A parent and its subsidiaries will form such a unit when the parent exercises "decisive influence" over the conduct of the subsidiary. Decisive influence may be established where the subsidiary, despite having a separate legal personality, does not decide independently its own market conduct but rather is considered to operate in accordance with the will of its parent company.

Parental liability can have a dramatic impact on the amount of fine imposed on a group, since making the parents joint and severally liable enables the European Commission to avail itself of a higher maximum fine limit - based not just on the turnover of the subsidiary itself but of the group.

The judgments

The Court concluded that the European Commission did not err in finding both El DuPont and Dow jointly and severally liable.

The Court noted the following points of principle regarding the "decisive influence" test:

- The conduct of a subsidiary may be imputed to the parent company where that company does not decide independently upon its own conduct, but "carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between the two undertakings".
- The Commission cannot merely find that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary, but must also check whether the influence was actually exercised. It is for the Commission to demonstrate such decisive influence on the basis of factual evidence.
- A parent company may exercise decisive influence over its subsidiaries "even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy". A single commercial policy within a group may be inferred "indirectly from the totality of the economic and legal links between the parent company and its subsidiaries. For example, the parent company's influence over its subsidiaries as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters may have indirect effects on the market conduct of the subsidiaries and of the whole group".
- Parent companies have a specific responsibility to ensure that all subsidiaries over which they hold decisive influence comply with competition law.

The Court looked closely at the facts of the case and concluded that the Commission did not err in finding that decisive influence was exercised over DDE's conduct on the relevant market and that the parents and DDE formed a single undertaking for these purposes.

The Court rejected a number of arguments raised by the parties. Three arguments are of particular interest:

- The Court held that it was not relevant that DDE was a full function joint venture for the purposes of the EU Merger Regulation. Although a full function joint is deemed, for the purposes of the EU Merger Regulation, to perform on a lasting basis all the functions of an autonomous economic entity and is, therefore, economically autonomous from an operational viewpoint, that autonomy does not mean that the joint venture enjoys autonomy as regards the adoption of its strategic decisions such that there cannot be decisive influence for the purposes of the application of Article 101.
- The "negative" nature of joint control in this case was not sufficient to preclude the exercise of decisive influence over DDE. According to the Court, even if parent companies are not able to impose decisions on their joint venture, they are able to prevent their joint venture from taking certain decisions and so are able to exercise decisive influence over its business strategy.
- The conclusion that DDE and its parents formed a single undertaking was not invalidated by the Commission's previous case law applying Article 101 to the relationship between a joint venture and its parents.

Impact

The judgments send a clear warning call 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 when the joint venture is full function and the parent itself engaged in no wrongdoing and where it has only "negative" control.

There may, however, be greater scope for coordination and information exchange between a joint venture and its parents, and the compliance policies on these issues should be reviewed in light of the judgments. That said, questions remain over the extent to which Article 101 may continue to apply to interactions between the joint venture and its parents which do not derive from the exercise of decisive influence by the parents, and to relations between the parents themselves.