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

Peter Citron (Editor) (White & Case, Belgium) · Friday, September 27th, 2013

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 confirms 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 maximises the level of fines by enabling 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 entire corporate group. It also enhances the risk of a finding of recidivism (if different parts of the same corporate group have been involved in competition law infringements in the past) and claims for civil damages in the EU.

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 non-wholly owned subsidiaries. These judgments also highlight the importance for companies to consider competition law issues at the outset when they structure joint venture arrangements and make acquisitions of less than full ownership.

The fines in dispute

In 2007, the European Commission imposed fines totalling Euro 243.2 million on 6 different companies, including El DuPont and Dow, for participating in an illegal price-fixing and market-sharing cartel in relation to chloroprene rubber. El DuPont and Dow were held to be jointly and severally liable for the conduct of their 50:50 joint venture, DDE. The Commission concluded that Dow and EI DuPont exercised "decisive influence" on the commercial conduct and policies of the joint venture, and therefore could be held jointly liable for DDE's anti-competitive conduct. In particular, the Commission noted that the parent companies had the power to influence the general market behaviour of DDE due to the role and composition of DDE's supervisory "Members Committee", on which high level executives of the parent companies sat.

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.

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 factors that tied the companies together demonstrated that both El DuPont and Dow exercised decisive influence over DDE’s conduct on the relevant market. As such, DDE formed a part of each of the El Dupont and Dow undertakings, and each parent company could be held jointly liable for DDE’s conduct.

Both parties appealed the General Court judgments before the CJEU.

The CJEU judgments

The CJEU held that the General Court correctly applied the rules on parental liability and rejected both appeals.

In doing so, the CJEU confirmed:

- The behaviour of a subsidiary can be imputed to the parent company where “that subsidiary does not decide independently upon its own conduct on the market, 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 those two legal entities.”
- In order to impose a fine on a parent company, the Commission does not have to establish the personal involvement of the parent in the infringement.
- The Commission must check that the parent exercised decisive influence over the conduct of the subsidiary. The Commission cannot merely find that the parent company is in a position to exercise decisive influence.
- The requirement to check whether the parent company actually exercised decisive influence over its subsidiary applies only where the subsidiary is not wholly owned by its parent company. Where a parent owns 100% of the capital of the subsidiary, there is a rebuttable presumption of decisive influence.

The CJEU added:

- “Where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in the infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those three entities can be considered to form a single economic unit and therefore form a single undertaking for the purposes of Article [101].”
- Although a full function joint venture 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. “The decisive influence of one or more parent companies is not necessarily tied in with the day-to-day running of a subsidiary”.

The CJEU held that in this case the General Court had correctly applies the rules above. It did not find the existence of decisive influence solely on the basis of the possibility that the parent companies could exercise joint control, but on the economic, organisation and legal factors which tied the joint venture in this case to its two parent companies.

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 when the joint venture is full function and the parent itself 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 fining liability. The determination of which group companies form part of the same “undertaking”, or which are in fact separate “undertakings”, may be different when considering whether Article 101 TFEU applies to agreements between a parent and its subsidiary. The CJEU in this judgment seems to have reserved itself the possibility of having a different test for this.

This entry was posted on Friday, September 27th, 2013 at 4:06 pm and is filed under Source: OECD“>Antitrust, Source: OECD“>Competition
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