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Increased liability for parent companies for joint venture's competition law infringements

The Court of Justice of the European Union ('CJEU') issued two judgments 26 September 2013 in which the parent companies of a joint venture were found liable for the anti-competitive conduct of the joint venture. The judgments highlight the need for an efficient compliance organisation and competition law policy across all subsidiaries and group companies, regardless of ownership structure. Elisabeth Eklund, partner, and Oscar Jansson, associate, comment on the rulings below.

Background

The European Commission ('the Commission') fined six companies in 2007 that had engaged in price fixing and market sharing for chloroprene rubber within the entire EEA from 1993 to 2002. Among the companies fined were El du Pont de Nemours and Company ('El DuPont') and The Dow Chemical Company ('Dow Chemical'). These companies were held jointly and severable liable for the actions of DuPont Dow Elastomers LLV ('DDE'), which they owned half of each.

The joint venture was established in 1996 and the parent companies could only exercised negative control through veto votes (i.e. powers to block). The creation of the joint venture had been approved by a Commission decision where the Commission concluded joint control of a long-lasting full functioning joint venture.

The rules on parent liability for subsidiaries' action – the principle of a single economic entity

The parent liability rules in EU competition law revolve around the concept of a single economic entity. A parent and a subsidiary are considered part of a single economic entity when the parents exercises decisive influence over the conduct of the subsidiary. The decisive influence (that is control) can either be exercised through ownership or through contractual control. Typically it is a questions of a hundred percent ownership for control to be in place but control can also be at hand in cases of minority holding following veto rights. As a consequence for companies being considered as part of the same economic entity the fines are not only calculated based on the companies' turnover but also companies controlling it. That the parent company's turnover and not the joint venture's turnover alone is taken into account can in certain cases entail a considerable increase of the maximum level of the fine.

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In joint ventures, control can either be exercised by one of the parents or jointly by the parent companies depending on the circumstances in each case. Joint control has however not until these judgments were handed down resulted in that the parent companies are considered part of the same economic entity through their joint ownership of the joint venture under EU competition law and thus jointly liable for the conduct of the joint venture.

The Commission's decision

In the Commission's decision concerning DDE the Commission fined both parent companies for the actions of the joint venture. In its decision the Commission noted that the parent companies acted on equal footing through a Members Committee which had control over *inter alia* strategic decisions. Both companies had representatives in the Committee (the representatives were employed by the parent companies). The Member Committee could also receive delegation from the parent companies to make all the decisions in order to run the joint venture. The Commission noted that "[t]he decisions of the Members Committee were taken unanimously, with each shareholder having an absolute right of veto. Accordingly, neither shareholder was individually able to exercise decisive influence over DDE". Further the Commission supported itself on that the Membership Committee appointed company officers in charge of day-to-day operations.

The Member Committee had also approved both the selling of a production facility and initiated an investigation of possible involvement in cartel activities.

The Commission considered that the two parent companies had through the Membership Committee exercised such joint control which had in effect curtailed the joint venture from acting independently on the market. Thus, the parent companies were fined.

The General Court's judgments

The Commission's decision was appealed to the General Court. The parties did not dispute that DDE had been part of a cartel but claimed that the actions of the subsidiary could not be imputed to the parents. They referred to a variety of grounds why liability should not be attributed to the parents. One of these was that the Commission had not substantiated that control was exercised. Further, it was claimed that the parties had relied on earlier Commission case-law that stated that joint ventures did not impute their parents.

The General Court concluded that the Commission had not erred in its assessment as there were numerous circumstances that showed that the parties held joint control over the joint venture through the Member Committee. The joint control had also been

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exercised in reality. The General Court also stated that the failure of a parent to supervise the subsidiary cannot be used as an excuse not to be held liable. It stated that “since any gains resulting from illegal activities accrue to the shareholders, it is only fair that those who have the power of supervision should assume liability for the illegal business activities of their subsidiaries.”

The European Court of Justice’s judgment

The parties appealed the General Court’s judgment to the CJEU. They argued along the same lines as in the General Court with the addition that the General Court had misinterpreted the concept of a single economic entity.

The CJEU however dismissed their appeals. The CJEU confirmed a number of points of law that has earlier been established in case-law, *inter alia* that a parent can be liable if a ‘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.’ The CJEU also confirmed that the Commission does not have to establish the personal involvement of the parent in the infringement. The Commission cannot however only find that the parent company is in a position to exercise decisive influence, except for a situation when a parent owns 100% of the capital of the subsidiary when it is a rebuttable presumption of decisive influence. In other cases the parent company must actually have exercised the control.

The Court stated that the two parent companies each had a 50% shareholding in the joint venture which committed the infringement. The Court then conclude 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 81 EC [now Article 101 Treaty of the Functioning of the European Union]”.

The CJEU held that although a joint venture is deemed as a long lasting, full-functioning and autonomous economic entity under the EU Merger Regulation and is autonomous from an operational point of view, that autonomy does not mean that the joint venture enjoys autonomy as regards the adoption of its strategic decisions. This means that parent companies may be jointly liable under Article 101 TFEU for the actions of the joint venture.

The CJEU found that from the evidence that had been presented it was conclusive that the parent companies had exercised control over the joint venture and thus both the companies should be fined for the infringement of the joint venture.

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What does the Court of Justice's judgment mean for companies participating in joint ventures?

The fine levels for competition law infringements have steadily increased, the Commission has on several occasions fined cartels more than EUR 1 billion which has had as an effect that companies in general take possible competition law problems seriously. However, it is not always that actions of joint ventures are in focus for this work. Competition law problems in joint ventures are usually in focus for the parent companies during the establishment phase but not during the continuous operations of the company. As a result of the current judgments, companies that are owners of joint ventures must be more diligent than before. It is of particular importance when the parent companies exercises control over the strategic issues of the joint venture. The assessment whether a joint venture is considered as a single economic entity with its parents must however still be made in each case.

Competition fines are in certain cases very high and the badwill implications already in relation to with a suspicion of an alleged infringement is great. Therefore we recommend all companies regardless of ownership structure to ensure that they have an effective compliance organisation with a thorough competition law policy that is complemented by training so the management and the employees know what to relate to. If the company also is an owner to a joint venture a separate compliance function should be created for the joint venture. To be able to identify sensitive competition law situations are key for a company in order to avoid actions that infringe the competition rules, but also to be able to turn competition law to its advantage.



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