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Parents' liability for EU antitrust breaches of joint ventures confirmed

The European Court of Justice has confirmed, in two recent judgments, that parents can be held liable for infringements of the EU antitrust rules committed by joint ventures over which they exercise decisive influence. Such influence may exist even if the parent did not participate in the breach, knew nothing about the joint venture's infringing conduct, and could only veto - but not determine - strategic business decisions of the joint venture.

All in it together

In recent years, the European Commission has taken an expansive approach to attributing liability to parent companies for breaches of the EU competition rules that are committed by companies within their corporate group.

Where subsidiaries are wholly-owned, parents can be (and usually are) held liable even if they did not participate in the infringement, were not aware of their subsidiary's conduct, and did not facilitate it in any way. That is the case even if a rogue employee carried out the breach, and a rigorous compliance programme was in place.

The only way a parent can escape such liability is by proving that it did not exercise any decisive influence over the strategic business decisions of the subsidiary. Proving a negative in this way is almost impossible, and no company has succeeded in doing so to date (although some have successfully argued that the Commission did not properly consider their arguments in this respect). An Advocate General to the EU Court of Justice (ECJ) has said that, in his view, parental liability for wholly-owned subsidiaries should now be treated as a legal rule, not just a presumption.

However, where an infringer is jointly controlled by two or more parents, the position is different. There is no presumption that each parent exercises decisive influence over the joint venture (JV), so the Commission must prove that this is the case. In two judgments of 26 September 2013 - *Dow Chemical Company* (Dow) and *EI du Pont de Nemours and Company* (DuPont) – the ECJ confirmed just how easy it is for the Commission to do so.

The judgments

In 2007, the Commission held Dow and DuPont jointly and severably liable for a €44.25 million fine, in respect of the participation in a chloroprene rubber cartel of a JV in which each had a 50% interest. This was a breach of the EU prohibition on anticompetitive agreements – Article 101 of the Treaty on the Functioning of the EU (Article 101). Dow was fined a further €4.25 million so that its total fine reflected the size of its corporate group. Both companies appealed.

The ECJ upheld the Commission's decision, as had the General Court of the EU, previously. It held that the fact that Dow and DuPont were found to have the ability to exercise decisive influence over the JV for the purpose of the EU Merger Regulation (EUMR) was relevant for determining whether they could be liable for the JV's actions. In this respect, negative control is enough, ie rights to veto strategic commercial decisions, even in the absence of any ability to determine positively the outcome of those decisions. Moreover, parents may be found to have such control

Key issues

- When can a parent be held liable for competition breaches of a JV?
- How can the risk of such liability be mitigated?
- If parents are liable for a JV's conduct, does that mean they are allowed to coordinate its conduct with their own?

even if the JV has a degree of operational autonomy, as is the case for "full-function" JVs that are notifiable under the EUMR. The parents need only to control broadly-defined strategic business decisions, such as approval of the JV's budget and business plan and appointment of senior management.

The ECJ also upheld the finding that Dow and DuPont had actually *exercised* their decisive influence over their JV, notwithstanding the relatively limited evidence of this. It sufficed that they had appointed some senior managers of the JV (not even particularly senior, according to Dow), had participated in a committee that had various powers to manage the JV and had, through that committee, approved the closure of a production plant. The fact that the parents had carried out an internal investigation into the JV's cartel activities was also seen as evidence that they had the power to direct its conduct on the market.

Finally, the ECJ ruled that for the purposes of establishing liability (and only for these purposes), Dow, DuPont and the economic successors of the infringing JV could be treated as all forming part of one and the same "undertaking" for competition law purposes, and could therefore be held jointly and severably liable for the infringement.

Comment

If a parent has the ability to veto strategic business decisions of a JV for the purposes of the EUMR, it seems that the Commission will have little difficulty in establishing that it is liable for the JV's antitrust breaches. This may be the case even if the parent has no day-to-day involvement, and limited information on the JV's activities. Accordingly, group compliance programmes and policies should always cover such JVs, as well as certain types of agent whose actions can also attract liability for principals.

In addition, the judgments create a distinction between the corporate group that is treated as a single "undertaking" for the purposes of attributing joint liability and that which is treated as an undertaking for determining whether the Article 101 prohibition applies (intra-group arrangements being excluded from its scope). This legal inconsistency is unwelcome. Given that the Commission could have attributed parental liability for the JV without employing the fiction that Dow and DuPont are the same economic entity, it was also unnecessary.

By doing so, the ECJ ducked the important question of whether agreements between a parent and JV fall outside the scope of Article 101, on the basis that they form part of the same corporate group. One Advocate General to the ECJ has expressed the sensible view that application of this "group privilege" is the natural corollary of a parent being liable for the conduct of a group company. Unfortunately, however, the ECJ's rulings in *Dow* and *DuPont* mean that this issue remains open with regard to joint ventures.

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