

European General Court Confirms Parental Liability For Competition Law Infringements by 50:50 Joint Ventures

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The European General Court (GC) has confirmed a European Commission decision to hold chemical companies El du Pont de Nemours and Dow Chemical jointly and severally liable for a fine imposed on their 50:50 joint venture (JV) for an infringement of European competition law (*El du Pont de Nemours and Company v Commission* T-76/08 and *The Dow Chemical Company v Commission* T-77/08). In light of this judgment, parent companies would be well advised to check that their 50:50 JVs are compliant with EU competition rules.

Parental Liability Under EU Competition Law

According to EU competition law, the anti-competitive behaviour of a subsidiary may be imputed to the parent company where the subsidiary does not decide independently on its own market conduct but carries out, in all material respects, instructions given to it by its parent company. Thus, a subsidiary that is a legal entity separate from its parent company could be considered as part of the parent company's group, if the parent company exercises a decisive influence on it. In cases of wholly-owned subsidiaries, there is a rebuttable presumption not only that the parent company is able to, but that it does exercise a decisive influence.

In cases where the subsidiary is not wholly-owned, it is, however, for the Commission to show that the parent company is able to, and does, exercise a decisive influence. Until now, it was not clear how the Commission would deal with full-function JVs, in particular 50:50 JVs that were controlled jointly by their parent companies, bearing in mind that "full function" means that the JV operates independently on the market.

Application of EU Rules on Horizontal Agreements Involving 50:50 Full-Function JVs

Dow and Dupont were 50:50 JV partners in DDE. In proceedings relating to the chloroprene rubber cartel, the Commission imposed a fine of EUR 44.25 million on DDE and held Dow and Dupont jointly and severally liable for the fine. In the appeal proceedings, both Dow and Dupont challenged the finding that they were liable for the behaviour of the joint venture. Their appeal was rejected and the Commission's decision was upheld by the GC on 2 February 2012.

It should be noted that in a 2005 decision the Commission had considered that there existed a presumption that a jointly controlled, full-function joint venture is autonomous (case COMP/F/38.443 – Rubber Chemicals, paragraph 263). The GC stated that the Commission could reverse this previous assessment without prejudice to the parties.

The GC confirmed that in order to establish parental liability for a JV, the Commission needs to show that the parent companies were able to exercise decisive influence and that they did in fact exercise a decisive influence. As to the appreciation of influence, the GC ruled that the Commission could rely on the following elements as evidencing the exercise by these two parent companies of a decisive influence over a full-function, equally owned joint venture:

- The strategic decisions (appointment and dismissal of directors, business and strategic plans, annual operating plans, banking policy, capital expenditure, and borrowing) were taken by a Members Committee appointed by Dupont and Dow. As both parties had a *de facto veto* right, they were required to cooperate permanently
- The Members Committee appointed the top management posts of the JV
- The Members Committee agreed on the closure of a plant in the United Kingdom
- The parent companies exercised their management power over the JV
- After the cartel had ended, the parent companies ordered an internal investigation into whether the JV might have participated in the cartel, thus confirming that the parent companies had the power to require the JV to adopt a specific line of conduct on the market
- The parent companies appointed a chief legal adviser who had been a member of Dupont's legal department and who applied a competition law compliance programme at the JV that was based on the model applied previously at Dupont

The GC made clear that the range of elements (whether legal or factual) that the Commission may rely on to establish the exercise of a decisive influence is wide, increasing substantially the scope of the parents' liability for their subsidiaries

The Autonomy of The JV Under Merger Control Rules: Parental Liability Not Excluded

These cases also recall the difference between the operational autonomy of a full-function joint-venture and its economic autonomy.

Full-function joint ventures must be notified under the European Community Merger Regulation because they are autonomous from an operational point of view, i.e., they have sufficient resources to operate independently on the market. However, this autonomy does not mean that it can be assumed that the JV will decide independently on its own market conduct in a way that would exclude parental liability in the case of an infringement by the JV of EU competition law. Indeed, the parent companies may still take a decisive *economic* influence on the joint venture in taking strategic decisions and may still be liable for the JV's behaviour under EU competition rules.

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