

ECJ confirms parent companies may be held liable for JV competition infringements

INTRODUCTION

On 26 September 2013, the European Court of Justice (“ECJ”) dismissed appeals in the chloroprene rubber case and confirmed that parent companies may be held liable for infringements of the European competition rules committed by their full function joint ventures.¹

ECJ JUDGMENT

It is established case law that liability for the conduct of a subsidiary may be imputed to a parent company where that subsidiary, despite having a separate legal personality, 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. In other words, as a result of the economic, organisational and legal links between the two legal entities, the parent company and its subsidiary form a single undertaking for the purposes of Article 101 TFEU. In these circumstances, the Commission may address a decision imposing fines to the parent company, without having to establish its personal involvement in the infringement. A rebuttable presumption to this effect applies in respect of wholly owned subsidiaries.

In its judgment on 26 September, the ECJ held that, in the case of a 50/50 JV breaching the competition rules, that JV and both its parent companies form a single undertaking for the purposes of Article 101 TFEU but (a) only where the Commission is able to demonstrate that decisive influence has in fact been exercised; and (b) only for the purposes of establishing liability for participation in an infringement.

The ECJ dismissed arguments by the appellants that they could not have exercised decisive influence since the JV had a separate legal personality and they only had a negative power to block its strategic decisions. The ECJ also dismissed arguments that this approach is incompatible with the treatment of JVs under the EUMR. The ECJ noted that the autonomy in respect of day-to-day operations which a full-function JV enjoys within the meaning of Article 3(4) EUMR does not necessarily mean that a JV also enjoys autonomy in relation to adopting strategic decisions.

¹ Case C-172/12P - El du Pont de Nemours and Company v European Commission and Case C-179/12P - The Dow Chemical Company v European Commission.

CONCLUSIONS

It has now been confirmed by the highest court in Europe that parent companies can be held liable for competition law infringements committed by their JVs in circumstances where they have, in fact, exercised decisive influence over the JV. Based on the analysis in the chloroprene rubber case, this is likely to apply to many JV structures (irrespective of whether they are treated as full-function for EUMR purposes). Companies should therefore ensure that antitrust compliance procedures are implemented across all JVs as well as majority/wholly-owned subsidiaries.

Although confirming that parent companies may be held liable for the purposes of imposing fines, the ECJ's judgment provides no comfort for arguments that parties should receive the corresponding benefit and be treated as a single undertaking in respect of agreements between shareholders and JVs. It is therefore prudent to assume that Article 101 TFEU will apply to arrangements between parent companies and their JVs. Parties should therefore continue to "self assess" whether any restrictions in such arrangements are potentially problematic from a competition law perspective.

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