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UNDER EU COMPETITION LAW, PARENT companies will, as a rule, be responsible for the behaviour of their wholly owned subsidiaries. That is not surprising, as the parent has the ability and is presumed to in fact oversee and direct the activities of its subsidiaries, so-called exercise of decisive influence.

Equally, EU competition law does not perceive a parent company and its wholly owned subsidiary as competitors, even if they are active in the same market. The subsidiary is presumed not to act autonomously in the market but to follow its parent's directives. Agreements between the parent and wholly owned subsidiary thus escape Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The above rests on the finding that parent and subsidiary form a single economic entity (SEE) and hence one undertaking.

Where one company holds an interest in another of less than 100%, it may still be liable as a parent for the behaviour of its subsidiary. It may also still be able to defend itself against allegations that it has breached Article 101 TFEU by showing that it forms an SEE with its subsidiary. However, in each case there is, with the exception of an interest just under 100%, no presumption that the parent in fact exercised decisive influence and the assessment will instead depend on the specific facts.

These principles developed from the notion of SEE are not new, but in relation to joint ventures in particular have until recently not been clear. Starting from the judgments in *EI du Pont de Nemours* [2013] and *Dow Chemical* [2013] handed down last year, we discuss the position as regards parent liability. We then review the extent to which those judgments may also clarify the law on the applicability of Article 101 TFEU to relations between parents and joint ventures and we discuss some of the practical considerations these developments give rise to, in particular from a compliance standpoint.

THE NOTION OF A SINGLE ECONOMIC ENTITY

The notion that two or more legal entities may be considered as an SEE for the purpose of applying EU competition law goes back as far as the 1970s.

The judgment in *ICI v Commission (Dyestuffs)* [1972] dealt, among other things, with the question whether the Commission could impute to ICI (which was established in the UK, then not part of the EEA) the behaviour of 100% owned subsidiaries established in the EEA. The Court found that it could:

> '… in particular where the subsidiary, although having 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.'

The Court also acknowledged the principle that Article 101 TFEU does not apply to restrictive agreements between a subsidiary and its parent where that subsidiary 'does not enjoy real autonomy in determining its course of action in the market'.

In *ICI* the Court considered not only the 100% ownership of the subsidiaries which gave ICI the ability to exercise decisive influence, but went on to consider that ICI:

> '… in fact used this power [to exercise decisive influence] upon the occasion of the three price increases in question'.

In a series of later cases, however, the Court clarified that for wholly owned or near wholly owned subsidiaries there is a presumption that decisive influence is exercised.[1] For partially owned entities, the mere ability to exercise decisive influence is, however, not enough; instead, evidence must be adduced to demonstrate that actual use has been made of that power.

RECENT DEVELOPMENTS REGARDING PARENT LIABILITY FOR JOINT VENTURES

There is a vast body of case law establishing parent liability for wholly owned subsidiaries and for subsidiaries in which one parent holds the majority interest. With regard to joint ventures, case law has not excluded parent liability but its exact reach has been disputed.

In September 2013, the Court upheld the Commission's decision holding EI du Pont de Nemours and Dow Chemical jointly and severally liable for cartel conduct of their 50/50 joint venture, DuPont Dow

Elastomers (DDE), on the basis that each of them exercised decisive influence over DDE.

In making this finding, the Court rejected arguments that, since joint control gives only the negative power to reject strategic decisions, it is impossible for the parent of a 50/50 joint venture to exercise 'decisive influence'. Rather, a broader assessment is required of 'all the economic, organisational and legal links between the subsidiary and the parent company'. Dow and El du Pont had set up a 'members committee' to supervise the business of DDE and they each appointed half of the members chosen from within their own ranks.

The Court qualified its ruling, stating that:

> '... 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... 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 TFEU].'

In other words, a finding of parent liability does not necessarily mean that relations between the parent(s) and the joint venture more generally fall outside the scope of Article 101 TFEU.

THE LAW ON THE APPLICATION OF ARTICLE 101 TO RELATIONS BETWEEN PARENTS AND PARTIALLY OWNED SUBSIDIARIES

Where one parent holds the majority interest and has sole control, the framework for assessing whether it may form an SEE with its subsidiary is relatively clear. Indeed, the majority shareholder will have the ability to exercise decisive influence, and case law provides useful guidance on the factors for assessing whether that ability was used or the subsidiary retained sufficient autonomy to determine its own course of action in the market. Those include the level of shareholding, representation of the parent on the board, evidence that instructions were given or that the joint venture had to report on matters relevant to the infringement.

When it comes to entities that are subject to joint control of two or more parents, the case law and decisional practice of the Commission is, however, less clear. Two Commission decisions in the 1990s dealt with the issue in the context of agreements to restrict parallel trade. In both cases, the Commission found that Article 101 TFEU applied.

In *Ijsselcentrale & ors* [1991] the Commission found that restrictive practices between four parents to a joint venture and the joint venture itself could not escape Article 101 TFEU. The four parents were clearly not under common control and could not be said to belong to one SEE. The joint venture, which acted as a vehicle for parents' co-operation, was subject to joint control of the four parents and *therefore* could not form an SEE 'with one or more' of them.

Although the analysis in relation to the joint venture appears to only look at the ability to exercise decisive influence (joint control), the result does not seem surprising. The agreement that the Commission objected to was concluded between the four parent companies, directing the joint venture to behave in a manner that prevented customers from cross-trading between different member states, thereby allowing the parents to maintain artificially high prices. It that sense, the agreement was arguably akin to a horizontal agreement between the parents.

In *Gosmé/Martell-DMP* [1991] the Commission considered that a 50/50 joint venture, DMP, between Martell and Piper-Heidsick did not form part of the same SEE with Martell. The Commission found that each parent appointed half of the members of the supervisory board and that DMP had its own sales force and distributed products not only of its parents but also third parties. DMP also concluded its own conditions of sale. In other words, DMP was a full function entity subject to joint control of the two parents. The Commission does not appear to have looked into whether decisive influence in fact was exercised by Martell.

Although the Commission also explained that neither Martell nor DMP objected to the finding that they were independent undertakings (they had in fact underscored their independence), the decision appears to suggest that a full function jointly controlled entity cannot form part of the same SEE as one of its parents. The apparent absence of any analysis of whether decisive influence was in fact exercised, seems at odds with the case law on what defines an SEE.

In its 2010 draft guidelines on horizontal co-operation agreements, the Commission sought to clarify the position.[2] Paragraph 11 of the draft provided that:

> '... as a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law.'

It was not clear, however, how the Commission understood the notion that parent companies 'jointly exercise decisive influence and effective control over' the joint venture. Reference was made to *Avebe* [2006], which dealt with parent liability in relation to a joint venture but was based on a very specific fact pattern. Reference was also made to the concept of control from the EU merger control regulation. The paragraph was ultimately removed from the final version, and the guidelines instead refer to the actual exercise of decisive influence by one company over another, without distinguishing between joint ventures and other entities. They also confirm, by reference to the judgment in *Viho Europe v Commission (Parker Pen)* [1996], that, in the case of wholly owned subsidiaries, actual exercise of decisive influence can be presumed when applying Article 101 TFEU.

Where does that leave us today? Although parent liability and group-internal arrangements are two very different concepts, the guidance in *El du Pont de Nemours* and *Dow Chemical* suggests a more nuanced view than what may follow from *Gosmé/Martell-DMP*, calling for a case-specific assessment of all economic, organisational and legal links between the subsidiary and the parent company. It does not therefore seem excluded that a restrictive agreement between a parent company and a jointly controlled entity will escape Article 101 TFEU. However, that is likely to be the exception rather than the rule.

PRACTICAL IMPLICATIONS AND COMPLIANCE ISSUES

Parent liability

The body of case law on parent liability already made it clear that escaping joint and several liability for (near) wholly owned subsidiaries would be difficult. The judgments in *EI du Pont de Nemours* and *Dow Chemical* send a clear signal to companies that liability may also very well attach for competition law infringements by their joint venture companies.

As a result, companies are likely to look for ways to ensure sufficient compliance efforts also at the level of their joint ventures. How practically to implement that will likely depend on the specific set-up. Where the parents are competitors, extending their own compliance programs (including audits) to the joint venture may be difficult. It may give rise to issues of information sharing if the joint venture deals with each of the parents. Letting one or both parents conduct compliance audits in the joint venture may also give rise to complex questions if the audit uncovers a competition law infringement potentially exposing both parents' liability, including in the context of a potential leniency application. A more practical route may therefore be that both parents obtain a degree of control over the design and implementation of the joint venture's compliance program, but leave the implementation to the joint venture.

Relations between parent and subsidiary

Where the majority owner of a subsidiary has the ability to exercise decisive influence, it will often be the case that Article 101 TFEU does not apply to relations between them, but that cannot be presumed. It may therefore be prudent to design compliance measures to pick up scenarios which potentially are higher risk, in particular if the affiliate operates independently from its parent or if a minority shareholder enjoys significant influence. Where two or more parents have the ability to exercise decisive influence, the prudent approach from a compliance standpoint remains an assumption that Article 101 TFEU applies, hence treating the joint venture as an independent third party.

What are some of the relevant factors in identifying potentially higher risks? Where the subsidiary or joint venture operates in the same market as the parent company (and its group), potential issues may include information exchange between the parent and the company regarding prices, customers, markets, and competitors, which may facilitate co-ordination. Agreements between the parent and the affiliate or joint venture that affect how they each operate in the market in which they compete may also merit closer review. That includes for example distribution agreements (as noted, a number of cases have dealt with territorial and pricing restrictions in such agreements), supply agreements between parents and a joint venture, in particular if they also regulate terms (eg prices) on which the joint venture will supply third parties, and joint marketing and sales agreements as they may involve joint pricing or sharing of customers.

Non-compete agreements which are concluded in connection with the establishment of or acquisition of a stake in a legitimate joint venture and limit its scope to, for example, a particular territory, would generally seem to be legal as evidenced by the numerous Commission decisions clearing such joint ventures under the merger control rules. In those cases, the limitation often stems from the structure of the joint venture, for example a license limited to a particular territory, but may also be set out in agreements or business plans. The test under the Commission's notice on ancillary restraints[3] is whether the restriction is directly related and necessary to the creation of the joint venture, provided the joint venture itself is not based on an illegal agreement between the parents, such as market sharing, which the non-compete serves to underpin.

Where the parent(s) and the affiliate or joint venture do not compete but are in markets upstream or downstream from each other, co-ordination of their competitive conduct would appear less of a concern. However, issues may arise if the parties enjoy market power and conclude agreements that risk foreclosing competitors, for example supply or purchasing agreements which restrict the parent's competitors' access to a key input.

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NOTES

1) The foundations for this presumption were laid in *Stora Koppenberg v Commission* [2002], and in *Michelin v Commission* [2003]. It was confirmed in *Akzo Nobel & ors v Commission* [2009], para 60. This presumption has been applied to cases involving a 97%-owned subsidiary as well (*Elf Aquitaine v Commission* [2011] and *Arkema France v Commission* [2011]).

2) Commission Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, SEC2010(528)/2.

3) Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005/C 56/03.

Case C-97/08 P *Akzo Nobel & ors v Commission* *[2009] ECR I-8237*

Case T-343/08 *Arkema France v Commission* *[2011] ECR II-2287*

Case T-314/01 *Avebe* *[2006] ECR II-3085*

Case C-179/12 P *Dow Chemical Company v Commission* *OJ 2013/C 344/47*

Case C-172/12 P *EI du Pont de Nemours & ors v Commission* *OJ 2013/C 344/46*

Case T-299/08 *Elf Aquitaine v Commission* *[2011] ECR II-2149*

Gosmé/Martell-DMP *(Commission decision of 15 May 1991) IV32.186*

Cases 49, 49 and 51-57/69 *ICI v Commission (Dyestuffs)* *[1972] ECR 619*

Ijsselcentrale & ors *(Commission decision of 16 January 1991) IV32.732*

Case T-203/01 *Michelin v Commission* *[2003] ECR II-4071*

Case T-354/94 *Stora Koppenberg v Commission* *[2002] ECR II-846*

Case C-73/95P *Viho Europe v Commission (Parker Pen)* *[1996] ECR-I 5457*