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Joint Venture…Subsidiary… What's the Difference for Cartel Liability and Fines?

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Joint Venture…Subsidiary…What's the Difference for Cartel Liability and Fines?

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I. INTRODUCTION

Parent liability in cartel infringement proceedings has been the focus of quite a number of our commentaries.[2] Starting with the *Akzo* ruling,[3] the EU Courts have tightened the noose around each and every parent company's financial neck. When a parent company has a 100 percent shareholding in a subsidiary it is presumed (although it can in theory be rebutted) that: (i) the parent company has decisive influence over the subsidiary and (ii) the parent company in fact exercises this decisive influence over the subsidiary's conduct.[4] The Commission has expanded the presumption to include shareholdings that are something less than 100 percent, although it is unclear how elastic the presumption will ultimately be.

Why is this "decisive influence" test so important? It means that the two companies are part of the same "undertaking" and that, in turn, means *inter alia* that the base amount of the fine for infringing Article 101 of the Treaty on the Functioning of the European Union ("TFEU") includes both the parent's and subsidiary's turnovers and that both can be held jointly and severally liable for any fine the European Commission (the "Commission") imposes.

Having been so successful with wholly-owned subsidiaries, the Commission has recently decided to try its luck with joint ventures. Based on *Dow*[5]and *DuPont,*[6] it currently appears that parent companies will also be held liable for their joint ventures' transgressions.

II. JOINT VENTURES IN YEARS PASSED

In years past, joint ventures were generally classified as separate undertakings; they were not lumped together with the undertakings of their controlling parents, particularly for the purpose of attributing liability and collecting fines.[7] In *Sodium Gluconate*,[8] which led to the

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[2] *See* for example: *EU Competition Briefing—An Update on the Parent Liability for Antitrust Violations of Subsidiaries* (December 2009); *Severing Parent Liability For Cartel Infringements By Employees Of Subsidiaries*, COMPETITION LAW INT'L (April 16, 2010); *You Can't Beat the Percentage—The Parental Liability Presumption in EU Cartel Enforcement EU: Cartels and Leniency*, in A Global Competition Review Special Report, EUR. ANTITRUST REV. (2012).

[3] Case C-97/08 P *Akzo Nobel NV v Commission* [2009] ECR I-08237.

[4] *Id.*, ¶s 60-61.

[5] Case T-77/08 *The Dow Chemical Company v Commission* [2012] ECR not yet published.

[6] Case T-76/08 *EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC, DuPont Performance Elastomers SA v Commission* [2012] ECR not yet published.

[7] *See* for example, Case COMP/IV/32.732 – Ijsselcentrale and others, [1991] O.J. L28/32, ¶s 23-24; Case COMP/IV/32186 Gosme/Martell – DMP, [1991] O.J. L185/32, ¶ 30.

[8] Commission decision C(2001)2931 final October 2, 2001 relating to a proceeding under Article [101 TFEU] and 53 of the EEA Agreement (Case COMP/E-1/36.756—Sodium Gluconate).

landmark case *Avebe*,[9] however, the Commission and, later, the General Court held two parent companies liable for the wrongdoings of their joint venture. Scholars and practitioners alike concluded that *Avebe* was an outlier. The joint venture was unincorporated; it was only a contractual entity (*i.e.*, without legal personality), and it was jointly managed by the parent companies. Moreover, one of the parent companies was kept constantly informed about the collusion, and employees of the second parent were directly involved in the cartel.[10]

There was a short-lived sigh of relief after the Commission issued its decision the same year in *Rubber Chemicals.*[11] In *Rubber Chemicals*, the Commission held that in the case of a subsidiary jointly owned by its parent companies (and over which neither parent company had *de facto* or *de jure* sole control) the joint venture could be presumed to be autonomous from its parent companies.[12] This meant that the joint venture could be presumed—in principle—to constitute a separate undertaking with respect to its parent companies. This would particularly be the case when the subsidiary was formed as a full-function joint venture and approved by the Commission under its merger control rules.[13]

Both the Court and the Commission subsequently forgot about the specifics of *Avebe* and what one could argue to be a reasonable presumption in *Rubber Chemicals*. The outlier slowly became the standard. In *Cementbouw*,[14] issued the same year as both *Avebe* and *Rubber Chemicals*, the General Court in effect held that simply because a joint venture is classified as a full-function joint venture under merger control rules does not mean that it is autonomous from its parent companies. The following year, with *Avebe* and *Cementbouw* in its pocket, the Commission stepped over the body of *Rubber Chemicals* and charged full-speed ahead in *Chloroprene Rubber.*[15] In that decision, the Commission held that the joint venture and its parent companies together formed an undertaking and were therefore jointly and severally liable for the joint venture's behavior.

On February 2, 2012, the *Dow* and *DuPont* judgments,[16] which concern appeals against *Chloroprene Rubber*, were rendered. Based on the judgments, the anomaly is now *Rubber Chemicals*. *Avebe*, *Cementbouw*, *Dow,* and *DuPont* have destroyed any presumption that a joint venture is autonomous from its parent companies.

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[9] Case T-314/01 *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission* [2006] ECR II-3085.

[10] *Id.*, ¶s 32-36.

[11] Case COMP/F/38.443 – Rubber Chemicals), [2006] O.J. L 353/50.

[12] Commission decision of 21 December 2005 relating to a proceeding under Article [101 TFEU] and 53 of the EEA Agreement (Case COMP/F/38.443 – Rubber Chemicals), ¶ 263.

[13] *Id.*, ¶ 12.

[14] Case T-282/02 *Cementbouw Handel & Industrie v Commission* [2006] ECR II-319.

[15] Commission decision C (2007) 5910 final relating to a proceeding under Article [101] and Article 53 of EEA Agreement (Case COMP/38629 – Chloroprene Rubber).

[16] The two judgments contain similar, sometimes identical language on certain points. For simplicity, we only reference the paragraphs in Case T-77/08 *The Dow Chemical Company v Commission*.

III. *DOW AND DUPONT*

A. Background

From April 1, 1996 until June 30, 2005 the Dow Chemical Company ("Dow") and EI du Pont de Nemours and Company ("DuPont") were equal shareholders in a full-function joint venture called DuPont Dow Elastomers LLC ("DDE"). The joint venture later became a wholly-owned subsidiary of the DuPont group.[17]

In 2007, the Commission found that *inter alia* DDE had infringed Article 101 TFEU from April 1, 1996 until May 13, 2002. DuPont also separately took part in the cartel for a limited period of time. For DDE's participation in the cartel, the Commission found Dow, DuPont, and DDE's successors, subsidiaries of DuPont, liable for DDE's conduct. DuPont's total fine was EUR 59.25 million. Out of this total, DDE's successors and Dow were jointly and severally liable for EUR 44.25 million. Interestingly, Dow was also individually fined an additional EUR 4.425 million for deterrence.

Dow and DuPont appealed the Commission's decision. As one would anticipate, the crux of the applications was whether Dow and DuPont exercised decisive influence over DDE and were therefore jointly and severally liable for the (previous) joint venture's EUR 44.25 million fine. As a curious aside, as for the EUR 4.425 million thrown in for good measure—which Dow also appealed—the Court acknowledged that this was rather odd but that the Commission had not manifestly exceeded its discretion in relation to setting fines.[18]

B. DDE's Set Up

DDE was a full-function joint venture that had been notified and cleared by the Commission.

As summarized by the Court, pursuant to the Limited Liability Company Agreement ("LLCA")—one of the two agreements governing the joint venture—DuPont and Dow had set up a Members' Committee (the "Committee"). Each parent company had the right to appoint an equal number of representatives to the Members' Committee, who were not employees of DDE but of Dow and DuPont. The Committee had the typical types of powers parent companies allocate to such committees, such as the ability to:

- appoint and dismiss DDE's board members and officers (these individuals were responsible for the day-to-day business affairs);
- set DDE's overall policy and vision;
- approve DDE's business and strategic plans and the annual operating plans; and
- approve all of DDE's capital expenditure and borrowing above certain levels.

The Committee's decisions were taken unanimously, with each shareholder having veto rights. As a result, either parent company could block a strategic business decision of the joint

[17] Case T-77/08 *The Dow Chemical Company v Commission* [2012] ECR not yet published, ¶ 2.
[18] *Id.*, ¶ 180.

venture.[19] Finally, as a result of the LLCA, the parent companies were only present on the chloroprene rubber market through their joint venture.[20]

C. Decisive Influence

1. The parent company has decisive influence over the "subsidiary"

Unsurprisingly, when looking at decisive influence, the General Court made no attempt to distinguish between wholly-owned subsidiaries and joint ventures—this should have been the first hint that things were not going to turn out well for Dow or DuPont. In trying to describe what decisive influence is, the General Court appeared to adopt an "I know it when I see it" test:[21]

> A parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy. [...] [T]he decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit [undertaking].[22]

Having laid out the test for decisive influence, which includes not doing much of anything, the General Court remembered that a joint venture was at issue. Dow and DuPont had notified their joint venture to the Commission, which in turn formally concluded that the two parent companies had acquired joint control of DDE.[23] *Cementbouw* made it easy for the Commission to prove that the parent companies had decisive influence over the joint venture.[24] Simply by setting up a joint venture and having joint control over it the parent companies had decisive influence over it. Thus, the first prong of the test was satisfied: the parent company had decisive influence over the "subsidiary."

Since arguing that a jointly controlled joint venture fails the first prong was a losing battle, parent companies' defense should have boiled down to showing that the second prong was not met: the parent company *in fact* exercises this decisive influence over the "subsidiary's" conduct. This too, as we will see below, was a lost cause.

2. The parent company in fact exercises its decisive influence over the "subsidiary's" conduct

The Commission provided a number of examples where it considered Dow and DuPont actually exercised decisive influence over DDE's conduct on the chloroprene rubber market. The General Court highlighted *inter alia* the following from which it concluded that the second prong had been met:

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[19] *Id.*, ¶ 81.

[20] *Id.*, ¶ 82; all discovery, development, design, manufacture, distribution, marketing and sale of elastomers, including chloroprene rubber on a global basis, were conducted by DDE.

[21] This phrase became popular in judicial circles as a result of United States Supreme Court Justice Potter Stewart's concurring opinion in *Jacobellis* v. *Ohio* 378 U.S. 184 (1964) regarding obscenity.

[22] *Id.*, ¶ 77.

[23] *Id.*, ¶ 83.

[24] *Id.*, ¶ 84.

- The LLCA, which reserved to the parent companies through the Members' Committee, significant managerial powers, was implemented in accordance with its provisions. Therefore, the parent companies had exercised their management power over DDE.[25]
- The parent companies carried out an internal investigation in 2003 to examine whether the joint venture might have participated in the cartel. The fact that the parent companies held such an investigation meant "they believed that they had the means of requiring their joint venture to conduct itself in accordance with the competition rules."[26]

These points are worthy of a brief pause. On the first point, it seems rather strange that the General Court pointed out that the parent companies had implemented the agreement that they had gone to the trouble of drafting and signing. Most joint ventures are operated under the conditions under which they are founded.

As for the second point, this leaves parent companies in an awkward position. If a parent company suspects that its joint venture is up to no good and investigates the matter this can ultimately be used against it. The Commission's response to this predicament may be that if something untoward is unearthed then the joint venture and parent company should come forward and apply for leniency/immunity. But what if another undertaking or undertakings have already come forward? The disadvantages may outweigh the advantages at that point and the parent company has just made a case against itself.

D. Playing Defense

Dow argued that the Commission had ignored the precedent it set in *Rubber Chemicals*, above. It reminded the General Court that the Commission had previously concluded that a joint venture could be presumed—in principle—to constitute a separate undertaking with respect to its parent companies. This would particularly be the case when the subsidiary was formed as a full-function joint venture and approved by the Commission under its merger control rules. With a somewhat patronizing proverbial pat on the hand, the General Court reminded Dow that *Rubber Chemicals* was only a decision and that there was no legitimate expectation that it would be applied again since the Commission had a wide berth of discretion and it was "just one previous case."[27]

As for scholars' and practitioners' pontificating that *Avebe* was an outlier in light of the fact that the joint venture was unincorporated; that it was only a contractual entity and was jointly managed by the parent companies, the General Court put an end to that argument. The absence of legal personality on the part of the subsidiary in *Avebe* was **not** the specific reason why its conduct was imputed to its parent companies.[28]

Dow raised several defenses, which were logical, but ultimately unsuccessful. Among others, it argued about the "negative" nature of the joint control; its inability to force the joint

[25] *Id.*, ¶ 87.
[26] *Id.*, ¶ 88.
[27] *Id.*, ¶ 91.
[28] *Id.*, ¶ 94.

venture to do something. The General Court held that even if a parent company was unable to impose decisions on its joint venture, but it could prevent the joint venture from taking certain decisions, the parent company was exercising decisive influence over the joint venture's business strategy.[29]

Dow pointed out that DDE was a full-function joint venture under EU merger legislation and "was deemed to perform on a lasting basis all the functions of an autonomous economic entity."[30] The General Court held that just because a joint venture had "autonomy" as a full-function joint venture, this did not mean that it enjoyed autonomy when making strategic decisions "and that it is not therefore under the decisive influence exercised by its parent companies for the purpose of [Article 101 TFEU]."[31]

Finally, as would be expected, Dow argued that the Commission had interpreted the concept of exercising decisive influence in an extremely broad manner. In response, General Court held that it was sufficient for the Commission to show: (i) the parents had the possibility of exercising decisive influence over their joint venture's conduct and (ii) the exercise of that decisive influence had been shown to the requisite level.[32] To add insult to injury, the General Court pointed out that "as a result of the parent company's power of supervision, the parent company has a responsibility to ensure that its subsidiary complies with competition rules."[33]

IV. CRYSTAL CLEAR

Rubber Chemicals has been tossed aside. As far as the General Court and the Commission are concerned, *Avebe*, *Cementbouw* and now *Dow/DuPont* reign. Joint ventures are treated very much like 100 percent subsidiaries. The only possible defense left for a parent company is to try to convince the Commission that it does not, in fact, exercise the decisive influence attributed to it—good luck. According to the Court, a parent company can be found to have exercised its decisive influence by doing practically nothing.

Parent companies are liable for (+/-) 100 percent subsidiaries' and 50/50 joint ventures' cartel infringements. What is next? The elasticity of the decisive influence test just might allow the Commission to start looking at shareholders with equity interests falling well below 50 percent.

Furthermore, DG Competition is currently examining whether the EU Merger Regulation contains a gap in that it fails to capture acquisitions of minority stakes[34] in a competitor. Since the Commission and the EU Courts have imported from the EU Merger Regulation the "control" and "decisive influence" concepts and applied them in the same way to parent liability for cartel infringements, any extension of the EU Merger Regulation to minority

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[29] *Id.*, ¶ 92.

[30] *Id.*, ¶ 93.

[31] *Id.*

[32] *Id.*, ¶ 100.

[33] *Id.*, ¶ 101.

[34] According to DG Competition's invitation to tender COM/2011/016—Study on the importance of minority shareholdings in the EU, "minority shareholdings arise where a party has an interest in the financial performance of a firm through participation in its share capital that is insufficient to attribute any sort of control in the sense of the Merger Regulation."

shareholdings may have knock-on effects. As conscientious investors, minority shareholders seek to protect their financial investments. In order to do so, the shareholders' agreement often provides such a shareholder with certain rights to prevent the joint venture from taking decisions that may adversely affect its investment. Surely, a minority shareholder may also insist that an internal investigation be conducted if it suspects illegal activity.

Parent companies need comprehensive competition compliance programs. These programs must be top-down and bottom-up. The company culture must become compliance, compliance, compliance. This goes for every subsidiary within the group. As for joint ventures, this is now also the case for them. There does not seem to be anything stopping the Commission from also including shareholders with participations well below 50 percent so long as they meet the "decisive influence" test. One day, even minority shareholders might be unable to dodge the antitrust liability bullet.