EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2022

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's *Europe, Middle East and Africa Antitrust Review* 2022 is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, we have added a specific focus on the digital economy and vertical agreements in the European Union, as well as private litigation in France and merger control in Russia, alongside updates from the European Commission, Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Sweden, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel and Mauritius.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

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European Union: Dealing with the Broad Impact of Antitrust on JVs

Catriona Hatton and David Cardwell*
Baker Botts LLP

IN SUMMARY

This article explores key themes and recent developments in the application of EU competition law to joint ventures. It is split into two main sections: one covers the treatment of joint ventures under EU merger control rules, and the other deals with the substantive assessment of joint ventures under EU competition law.

DISCUSSION POINTS

- Recent merger decisions demonstrate importance of spill-over effects in joint venture transactions
- Law on parental liability for competition law infringements by joint ventures has been developing in recent years
- Parental liability confirmed for institutional (minority) investors under certain circumstances

REFERENCED IN THIS ARTICLE

- Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)
- Article 101(3) TFEU
- EU Merger Regulation
- European Commission
- *Dow Chemicals Company v Commission*, Case C-179/12 P, 26 September 2013
- *LG Electronics Inc & Philips v Commission*, Cases C-588/15 P and C-622/15 P, 14 September 2017
- *The Goldman Sachs Group Inc v Commission*, Case T-419/14, 12 July 2018
- *The Goldman Sachs Group v Commission*, Case C-595/18 P, 27 January 2021

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Joint ventures and EU merger control

The EU Merger Regulation (EUMR) applies to the creation of any joint venture (JV) that is considered to be 'concentrative' rather than 'cooperative'. JVs are considered concentrative and may be subject to a filing requirement under the EUMR when they meet each of the following three key criteria:

- joint control: two or more undertakings are in a position to exert decisive influence over the JV;
- full functionality: the JV will perform all the normal sorts of activities carried out by an autonomous economic entity, on a lasting basis; and
- EU dimension: two or more undertakings have sufficient revenues in the European Union to meet one of the two sets of EUMR filing thresholds.

Joint control

When two or more undertakings are able to exert decisive influence over a JV, they are considered to be in a position of joint control under the EUMR. A key indicator of decisive influence in the context of a JV is the right to veto important decisions that affect the strategic commercial behaviour of the JV. Examples of these veto rights include decisions on the adoption of the JV's annual budget, its business plan, and appointment of directors and other senior management of the JV.[1]

A joint control analysis can take on greater complexity in certain situations. For example, joint control may also be found to exist even in situations where no single undertaking has the power to veto strategic decisions, but where two or more minority shareholders have common interests such that they would not exercise their voting rights against each other – giving rise to de facto joint control.[2] Those situations, however, are considered to arise only exceptionally.

The quality of control is not a static concept, meaning that an entity that was previously subject to sole control may become subject to joint control, or the identity of undertakings that were originally in joint control of a JV changes. Notification obligations can arise in either of those situations.

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1 Joint control is also considered to arise when the mutual approval of both or all parent companies is required to make decisions on those sorts of issues. The fact that a permanent stalemate would arise otherwise is taken as an indication that the jointly controlling parent companies must cooperate permanently for the JV to operate.

2 Consolidated Jurisdictional Notice, paragraph 77.

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Joint control can also be acquired passively, meaning that an undertaking may be found to be in joint control despite the absence of any declared intention to take control. Those situations can arise where, for example, there is a change in the pattern of attendance at shareholder meetings, leaving a certain combination of shareholders with the ability to veto key decisions, enabling those shareholders to exercise control over the JV.

Significant time can be taken in analysing joint control situations and assessing whether a JV is actually subject to joint control, with the analyses sometimes being finely balanced.

Full functionality

The full-functionality requirement under the EUMR is designed to ensure that notifications are required only for JVs that lead to a permanent change in market structure, the principle being that a JV must have a sufficient degree of autonomy to conduct itself independently in the market in much the same way as any other autonomous economic entity.

The main criteria for a JV to be considered full-function are:

- a management dedicated to the day-to-day operation of the JV;
- access to sufficient resources (including finance, staff and other assets) to allow it to operate independently;[3] and
- the ability and intention to operate on a lasting basis.

JVs that are created with the intention of taking over a specific function of the parent companies (eg, a distribution function), but without permanent staff or an independent management structure, will not be considered full-function. Likewise, a JV that is largely or entirely dependent on its parent companies for purchases, or where it supplies output mainly to the parent companies, may not be considered to be sufficiently independent to meet the full-function criterion.

3 In Case M.9674, *VODAFONE ITALIA/TIM/INWIT JV*, 6 March 2020, paragraph 12, the Commission found that the fact that a JV would remain a publicly-traded company (in this case, the JV was a pre-existing company, listed on the Italian stock exchange with 25 per cent of its share capital held by the public) can be an indicator of autonomy from parent companies.

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The commercial character of dealings between the parent companies and the JV must always be assessed in those situations: even when the JV mainly supplies the parent companies, if they pay a market price for the products or services provided by the JV, the JV may be considered to have operational autonomy.[4]

JVs that begin life as non-full-function entities may, nevertheless, become full-function at some point in the future, triggering a notification obligation (eg, a JV that started out selling solely to its parents later starts to sell to the market).[5]

Full-function analyses can take significant work, and the Commission regularly engages in detailed discussions with parties on the full-function nature of JVs.[6]

EU dimension

Once it is confirmed that the creation of, or changes to, the ownership, structure or operation of a JV gives rise to a concentration for EUMR purposes, one final revenue-based test is applied to determine whether the JV is actually subject to notification.

There are two sets of alternative revenue-based thresholds set out in the EUMR. If the JV meets the first set (designed to capture large-scale transactions) or the second lower set (intended to catch transactions that have a significant cross-border effect between EU member states), then the JV is notifiable. For the purpose of assessing whether the thresholds are met, the revenues of any jointly controlling entity will be taken into account.[7]

In a staff working paper published in March 2021 as part of its evaluation of procedural and jurisdictional aspects of EU merger control,[8] the Commission specifically considers the possibility of excluding from the application of the EUMR JVs

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4 Reiterated recently in Case M.9674, *VODAFONE ITALIA/TIM/INWIT JV*, 6 March 2020, paragraphs 13 to 23.

5 Consolidated Jurisdictional Notice, paragraph 109. See, for example, the clearance decision from the Commission in Case COMP/M.5241, *American Express/Fortis/Alpha Card JV*, 3 October 2008): Alpha Card was a pre-existing JV that had been in operation for some time. The parent companies decided to give the JV greater autonomy and, by doing so, triggered a notification obligation.

6 See, for example, Case COMP/M.6800, *PRSfM/STIM/GEMA JV*, 16 June 2015, paragraphs 54 to 64 for a typical assessment of joint control and full-function factors in a merger decision.

7 In a situation where joint control is established over a pre-existing business, the revenues of that pre-existing business will also be taken into account; when there is a change in the quality of joint control (eg, a new shareholder with joint control enters a pre-existing JV), the revenues of the JV will also be included in the revenues threshold assessment.

8 Commission staff working document, 'Evaluation of procedural and jurisdictional aspects of EU merger control', 26 March 2021.

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that are based entirely outside the European Economic Area (EEA). The notion of reducing or simply removing notification requirements for ex-EEA JVs is not new, having been considered periodically in recent years. It remains to be seen what changes the Commission may introduce in this regard, and how quickly.

Full functionality and changes in quality of control

In a preliminary ruling in September 2017, the Court of Justice of the European Union (CJEU) held that the full functionality requirement is a prerequisite to the application of the EUMR to JV transactions, not only for jointly controlled undertakings that are newly created, but also for transactions in which an existing undertaking moves from sole to joint control. The case involved an asphalt plant located in Austria, which was previously wholly owned by an Austrian construction company (Teerag-Asdag).

Under the proposed transaction, Teerag-Asdag and another construction company (Austria Asphalt) agreed to establish a 50/50 JV and to transfer ownership of the existing plant to the new JV. Prior to the deal, the plant had not had any meaningful, independent presence on the market, since most of its output was for internal use by the owner.

The parties to the deal agreed that output from the plant would continue to be (mostly) for captive use by the parent companies, meaning that the JV would not be considered full-function for EUMR purposes. The parties, therefore, did not notify the transaction to the Commission but instead notified it in Austria, as Austrian merger control captures non-full-function JVs.

The transaction was referred to a national court, which declined to examine the application on the grounds that the transaction fell under the jurisdiction of the EUMR. The decision was appealed to the Austrian Supreme Court, which in turn sought a preliminary ruling from the CJEU on the point.

In its decision, the CJEU held that it was apparent from the EUMR's general purpose and structure that the regulation was meant to cover joint ventures 'only in so far as their creation provokes a lasting effect on the structure of the market'. That would not be the case when the resulting JV did not qualify as fully functional, regardless of whether the undertaking, now jointly controlled, existed before the transaction; to hold otherwise would lead to an unjustified difference in treatment between, on the one hand, undertakings newly created as a result of the transaction, which would be covered by the EUMR only if they met the criteria, and, on the other, undertakings existing before the transaction, which would be caught, even if they did not qualify as fully functional JVs post-transaction.

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Substantive assessment of JVs under the EUMR

There are two main substantive tests applied to JVs when being assessed under the EUMR:

- whether the JV will lead to a significant impediment to effective competition (known as the SIEC test); and
- whether the JV will facilitate anticompetitive coordination between the parent companies (referred to as spillover effects).

The analysis conducted when applying the SIEC test is the same as would be done for any merger assessed under the EUMR, in which horizontal overlaps and vertical and conglomerate links between the parties (including the JV) are assessed to determine the degree to which the JV might eliminate significant competitive constraints.[9]

For JVs, the Commission also conducts an analysis of the potential for the JV to facilitate coordination between the parent companies. JVs, by their nature, tend to involve some degree of coordination between the parents and, when that is the case, the coordination is assessed under article 101 of the Treaty on the Functioning of the European Union (TFEU).

Issues in relation to coordination may arise (eg, sharing of confidential information) if the parent companies retain activities in the same or related, or vertically linked, markets as the JV. The assessment of the potential for anticompetitive coordination is conducted in line with a normal article 101-type analysis, whereby the Commission determines whether the parents have the ability and incentive to coordinate activities, with the possibility of providing justification for potentially anticompetitive coordination under article 101(3) of the TFEU.

An example of the Commission examining potential spillover or coordination issues is the decision in ASL/Arianespace. In that case, the Commission was concerned that the acquisition of Arianespace by Airbus Safran Launchers (ASL), a JV between Airbus and Safran, might have led to exchanges of confidential information between the JV and Airbus regarding activities of satellite manufacturers competing with Airbus and those of launch service providers competing with Arianespace.

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9 For a recent example, see the Commission decision in *Daimler/BMW* (Case COMP/M.8744) of 7 November 2018, approving with conditions the establishment of a jointly controlled JV comprising the parties' car-sharing services and related mobile phone application for on-demand mobility services.

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As part of the commitments offered and accepted in that case, the parties undertook to implement firewalls between Airbus and Arianespace to prevent information flows that could harm competitors. In particular, the companies committed not to share information about third parties with each other, except for what is normally required for the everyday operation of the business.

The Commission's consideration of potential spillover and coordination effects can go beyond JV transactions: the conditional clearance by the Commission of Spirit's acquisition of sole control of Asco[10] involved in-depth assessment of coordinated effects relating to JV participation. The target in that transaction, Asco, held interests in a JV, Belairbus, with Sonaca and MBT Eurair. Belairbus is active in the development, production and sale of slat systems for Airbus aircraft. One of Asco's JV partners, Sonaca, is the only other existing supplier of slats worldwide, aside from Spirit.

The Commission identified concerns that Spirit's entry into the Belairbus JV as a new JV parent alongside Sonaca would give rise to a serious risk of coordination between the only two competitors active worldwide in the supply of aircraft slats. The parties offered remedies, including discontinuing the role of the Belairbus JV as a platform for negotiations with Airbus, and ensuring that future contract negotiations would be done bilaterally rather than collectively. The parties also offered to set up mechanisms to destroy any commercially sensitive information about Sonaca held by Asco and to prevent any possible future flow of that information.

Non-EUMR JVs

JVs that meet the joint control and full-function requirements of the EUMR – but not the EU dimension test – may still be notifiable in individual EU member states. Most jurisdictions use a similar joint control or full-function analysis and, if the JV or its parent companies meet the relevant filing thresholds in any of the individual EU member states, the JV will be notifiable in those countries.

A JV that does not meet the EUMR full function criteria may, nonetheless, still be potentially reportable in several member states: Austria, Germany and Poland maintain merger filing regimes that do not have full functionality tests. The United Kingdom may also potentially capture JVs that do not meet EU-style full function criteria: following the end of the Brexit transition period in December 2021, the

10 Case COMP/M.8948, *Spirit/Asco*, 20 March 2019.

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United Kingdom is not part of the EU 'one-stop-shop' system, meaning that transactions that meet the thresholds for filing under the EUMR will also need to be assessed under the UK merger filing regime.

Finally, even if a JV does not meet the joint control criterion under the EUMR – for example, because the transaction involves a party acquiring a minority shareholding without 'decisive influence' – this may still be caught in Austria or Germany. Both of those jurisdictions apply variable 'control' tests, based either on the level of shareholding (25 per cent threshold in Austria) or on the acquisition of a 'competitively significant influence' in Germany.[11]

JVs and article 101 of the TFEU

Recent developments in the application of article 101

In addition to the potential application of EU merger control rules to the formation of a JV or changes in its structure, the general competition rules set out in article 101 (prohibition of anticompetitive agreements) and article 102 (abuse of a dominant position) of the TFEU can apply to a range of aspects of the formation of a JV company and its subsequent conduct on the market (see also above in relation to substantive assessment under the EUMR).

The following section focuses on developments in article 101 case law over the past few years that have wide-ranging implications for parent companies of JVs. The section concludes with a note on recent policy developments that may have important implications for the application of article 101 to JVs in the coming years.

The application of the article 101 prohibition of anticompetitive agreements to JVs has given rise to a series of cases focused on liability of a parent company for competition infringements of its JV. The European Commission and the EU courts are taking a tough stance, and a parent company does not need to be involved in, or even be aware of, the JV's infringing conduct to incur liability. Furthermore, the parent can be liable even if it was not involved in the day-to-day management of the JV and even if it holds only a minority shareholding. In a recent case, (Goldman Sachs), parental liability was extended to investment banks in relation to the behaviour of their portfolio companies.

11 The United Kingdom also maintains a standard for 'control' that falls short of the EU-style test, focusing instead on 'material influence'.

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The key to a finding of parental liability is a determination that the parent actually exercised decisive influence more generally over the JV's conduct on the market and not whether the parent was in any way involved in the infringing conduct. In determining whether a parent exercised decisive influence over its JV, the Commission will look at a range of economic, legal and organisational factors (eg, level of shareholding, nature of the voting rights, composition of boards, reporting lines and management instructions relating to the JV's commercial policies).

In circumstances where parent companies actually exercise decisive influence over their JV, the parents and the JV are considered a single economic entity for the purposes of antitrust liability, and the companies are jointly and severally liable for infringements of article 101.

Decisive influence test

The Dow judgment

In September 2013, the CJEU upheld the European Commission's decision finding Dow Chemical Company's (Dow) and El du Pont de Nemours jointly and severally liable for their 50/50 JV's (DuPont Dow Elastomers LLC (DDE)) participation in the chloroprene rubber cartel.[12] To establish that Dow and El du Pont de Nemours actually exercised decisive influence over DDE's commercial conduct, the Commission relied, among other things, on:

- the parent companies' representation (50/50) on the members' committee, which was formed to supervise the business of DDE and could appoint the board members and officers of DDE;
- the fact that the members' committee appointed senior people from the parent companies to top management posts within the JV;
- an internal investigation ordered by the parent companies to examine potential cartel activities of DDE; and
- through the members' committee, the approval by the parents of the closure of a production plant in the United Kingdom.

12 Case C-179/12 P, *Dow Chem Co v Commission*, (Court of Justice of the European Union, 26 September 2013).

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The EU courts also confirmed that when a parent company has only 'negative joint control' (ie, only the ability to veto decisions), this is not sufficient to preclude the exercise of decisive influence.[13] Furthermore, parental liability can be triggered even if the JV is autonomous from an operational point of view, namely it is a full-function JV for the purposes of EU merger control law (EUMR), performing on a lasting basis all the functions of an autonomous economic entity.[14]

Two key points emerge from this case on liability for full function JVs:

- 'decisive influence is not necessarily tied in with the day-to-day running [of a JV]'; and
- 'the autonomy which a [JV] enjoys [under the EUMR] does not mean that that [JV] also enjoys autonomy in relation to adopting strategic decisions, and that it is therefore not under the decisive influence of its parent companies for the purposes of article [101 TFEU]'.[15]

In more recent decisions, such as LG[16] and Fujikura,[17] the EU courts followed a similar approach to that taken in the Dow judgment in reaching the conclusion that the parent companies actually exercised decisive influence over their JV.

The Toshiba judgment

In January 2017, the CJEU upheld the European Commission's decision finding Toshiba Corporation and Panasonic jointly and severally liable for the participation of their 35.5 per cent to 64.5 per cent JV (MTPD) in the cathode ray tube (CRT) cartel.[18] The CJEU confirmed that, where it follows from statutory provisions or contractual stipulations that the commercial policy of a joint subsidiary is determined jointly by two parent companies, it may reasonably be concluded that the policy was indeed determined jointly. This implies that, in the absence of evidence to the contrary, the parent companies must be regarded as having exercised decisive influence over their JV and can, therefore, be held liable for its conduct.

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13 Judgment of the General Court, paragraph 92; *Dow* judgment, paragraphs 60 and 61.

14 In 1996, Dow acquired joint control over DDE with El du Pont de Nemours. As DDE qualified as a concentrative JV, the acquisition was notified and cleared by the Commission under the EUMR.

15 Judgment of the General Court, paragraph 93; *Dow* judgment, paragraphs 64 and 65.

16 Joined Cases C-588/15 P and C-622/15 P, *LG Electronics Inc, Koninklijke Philips Electronics NV v Commission* (Court of Justice of the European Union, 14 September 2017).

17 Case T-451/14, *Fujukura Ltd v Commission* (General Court, 12 July 2018).

18 Case C-623/15 P, *Toshiba Corp v Commission* (Court of Justice of the European Union, 18 January 2017).

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To establish that Toshiba, a minority shareholder, actually exercised decisive influence over MTPD with Panasonic, the CJEU mainly relied on the following factors:

- Toshiba's right of veto over MTPD's business plan for the entire duration of its existence (regardless of the fact that the right was never actually exercised);
- Toshiba's ability to prohibit MTPD from making decisions involving expenditure appearing relatively modest in light of that subsidiary's capital; and
- Toshiba's appointment of one of the two directors entitled to represent MTPD (namely the vice president of that undertaking).

The case confirms that a minority investor may be liable for infringements of the entity in which it holds a stake (in this case Toshiba held a 35.5 per cent shareholding). This will be the case if the minority investor is able to actually exercise decisive influence on that entity through rights that are greater than those normally given to minority shareholders to protect their investment.

The Goldman Sachs decision

The most recent case relating to decisive influence has extended the above-described concepts of liability to institutional investors, such as private equity firms, in relation to their portfolio companies. On 27 January 2021, the CJEU confirmed[19] the General Court ruling[20] upholding a 2014 Commission decision finding Goldman Sachs (GS) jointly and severally liable for the payment of a fine of €37 million for the unlawful participation in the power cables cartel by a group of companies (Prysmian SpA and its subsidiaries) in which GS had an investment.

GS had an indirect controlling interest in Prysmian through a series of affiliated funds (gradually decreasing from 100 per cent to 84 per cent). In May 2007, Prysmian shares were offered to the public in an initial public offering (IPO), which further reduced GS' shareholding to 31.8 per cent. Two years later, on the day that the European Commission carried out a dawn raid at the premises of Prysmian, GS sold all its remaining interests in the company.

In its decision, the CJEU dismissed in full the appeal brought by GS against the General Court's judgment, confirming the Commission's determination that GS had exerted decisive influence over the conduct of Prysmian, both during the period when

19 Case C-595/18 P, *The Goldman Sachs Group, Inc v Commission* (Court of Justice of the European Union, 27 January 2021).

20 Case T-419/14, *The Goldman Sachs Group, Inc v Commission* (General Court, 12 July 2018).

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GS had a majority interest and held all of the voting rights, and in the post-IPO period when GS held only a minority stake and no longer had absolute control of the voting rights. The CJEU found that the General Court had carefully examined the elements on which the Commission relied to assess whether GS had exercised decisive influence over Prysmian's conduct during the entire period. Among the relevant factors, the General Court had specifically considered:

- GS's power to appoint, indirectly through its affiliated funds, the members of the various boards of directors of Prysmian, call shareholders meetings and propose the revocation of directors or entire boards of directors;
- GS's actual level of representation on Prysmian's board of directors (GS had links with at least 50 per cent of the directors of the successive boards of directors of Prysmian throughout the entire infringement period);
- management powers exercised by GS's representatives on the board of directors and the important role played by GS on Prysmian committees, including the compensation committee;
- the fact that GS received regular updates and monthly reports on the commercial strategy of Prysmian (supporting the existence of an economic unit between them, as per the General Court);
- the fact that GS took a series of measures to ensure the continuation of its decisive control over Prysmian after the IPO (ie, after it no longer held the majority of voting rights), including measures enabling it to maintain its control over Prysmian's board of directors; and
- some evidence of behaviour typical of an industrial owner, which GS continued to exhibit after the IPO. In particular, a representative of GS acted as an interlocutor in the pursuit of cross-selling opportunities between Prysmian and other companies held by GS.

Compliance burden on the parent company

In the *Dow* judgment, the General Court outlined the parents' heavy duty of responsibility in respect of ensuring their JV's compliance with competition rules, notwithstanding that the parents may not be involved in the day-to-day management of the JV.

The General Court expressed its view that:

> *the parent company has a responsibility to ensure that its subsidiary complies with the competition rules. An undertaking that has the possibility of exercising decisive influence over the business strategy of its subsidiary may therefore be presumed, in the absence of proof to the*

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> *contrary, to have the possibility of establishing a policy aimed at compliance with competition law and to take all necessary and appropriate measures to supervise the subsidiary's commercial management.*

In the *LG* judgment, the General Court considered that even though the JV had been liquidated, LG Electronics should have ensured proper maintenance of records enabling details of its activities to be retrieved in the event of legal or administrative proceedings, and the parent company should have records that will enable it to defend itself if it is personally implicated as part of a single economic entity with its JV.

Amount of the fines

As the parent is exposed to joint and several liability for infringements of its JV, it faces a high level of exposure, and the Commission, in setting fines, will typically take into account sales in the EEA of the cartelised product and products incorporating the cartelised product by the JV and the parent company concerned.

In the *LG* judgment, for instance, the CJEU upheld the Commission decision finding LG Electronics and Koninklijke Philips Electronics jointly and severally liable for participation of their 50/50 JV in the CRT cartel. In setting the fines on LG Electronics, the Commission, consistent with previous decisions, took into account direct sales of the cartelised products in the EEA (CRTs sold directly to customers in the EEA) and sales of 'transformed products' in the EEA (CRTs incorporated into a final computer monitor or television).

It went a step further and took into account not only sales by the JV of the cartelised products and by LG Electronics itself of transformed products, but it also calculated LG Electronics' fine based on Philips' sales of transformed products. This was upheld on appeal by the General Court, and more recently by the CJEU, on the basis of joint and several liability of the parent companies as part of the same economic unit with their JV.

A company with a shareholding in a JV can, therefore, find itself exposed to significant fines for EU competition law infringements committed by its JV, of which it may not even be aware, and where its level of exposure is based also on the success of an entirely independent company (the other parent company) in a downstream market involving the cartelised product.

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Practical impact of recent approach on parental liability

The Commission's hardened approach towards parental liability, so far upheld by the courts, may have broad commercial implications for parent companies, with potential parental liability arising from transactions involving the acquisition of less than full ownership. Some practical steps that companies may want to consider include the careful scrutiny of post-sale integration of an acquired business into the group; inserting contractual protection (sufficient antitrust warranties, indemnities, etc) in transaction documents; and tailoring due diligence to detect potential anticompetitive behaviour.

However, the Commission's and the EU courts' message on parental liability is stronger than any potential liability risks relating to new transactions: parent companies must carefully assess their potential exposure based on their involvement in their JVs. It may be practically very difficult and may not make business sense, particularly in the case of a 50/50 JV, to structure the business in such a way as to avoid the parent company being considered as exercising decisive influence over the JV for liability purposes. Therefore, the main focus must be on tailored and effective compliance programmes, applicable throughout the group, and assessed for all levels of investment.

Review of horizontal block exemptions and guidelines

The Commission has adopted a number of block exemption regulations (and accompanying guidelines) that lay down the conditions under which the prohibition of anticompetitive agreements under article 101(1) of the TFEU will not apply. Some of the block exemptions and guidelines are relevant to the activities of JVs, in particular research and development and specialisation block exemptions (the Horizontal Block Exemptions), as well as the Commission's Guidelines for the Assessment of Horizontal Agreements (the Horizontal Guidelines).

In 2019, the Commission announced a review of the operation of the Horizontal Block Exemptions and the Horizontal Guidelines. Having published summaries of the initial responses to its consultation in March 2020, the Commission has continued its review throughout 2020 and, at the time of writing, is expected to publish a detailed staff working paper during the second quarter of 2021 in respect of the potential extension and updating of the Horizontal Block Exemptions and the Horizontal Guidelines.

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