



Parental Liability in Joint Venture Cases

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Introduction

Question:

- Can several shareholders jointly exercise decisive influence over a joint venture company and therefore form a single economic unit with the consequence that parent companies are held liable for infringements of the joint venture?

Overview of presentation:

- Legal concepts involved
- Commission practice
- General Court precedents
- Criticism

Legal concepts involved

- *Akzo* judgment of Court of Justice (September 10, 2009) only deals with situations of sole control, no decision of ECJ on joint venture situation yet
- Parent company can be held liable for conduct of a subsidiary if both legal entities form a single economic unit and are therefore considered as a single undertaking
- Whether this is the case depends on decisive influence test
 - Parent company was able to exercise decisive influence over the subsidiary's conduct and
 - did actually exercise decisive influence over the subsidiary's conduct.
- The criterion of decisive influence is whether the subsidiary “does not decide independently upon its own market conduct, but carries out in all material respects the instructions given to it by the parent company, having regard in particular to the economic, organizational and legal links between the legal entities concerned” (*Akzo* judgment, paragraph 58)
- 100% presumption does not apply in joint venture cases, but the General Court has applied presumption once analogously to 50/50 joint venture in the *Avebe* judgment (September 2, 2006), paragraph 139

The European Commission's approach to joint venture cases

- Former approach:

"[i]n the case of a joint venture, jointly owned by its parents (and over which none of the parents has de facto or de jure sole control) the joint venture can be presumed to be autonomous from its parent companies (i.e. can be presumed to constitute a separate undertaking with respect to its parents)." (Commission decision of December 21, 2005 in Case COMP/F/38.443 – *Rubber Chemicals*, para 263)

- Current approach:

"... it is possible to find that the joint venture and parents together form an economic unit for the purposes of the application of Article 81 of the Treaty [now Article 101 TFEU] if the joint venture has not decided independently upon its own conduct on the market. Whether or not the joint venture is to be regarded as a full-function joint venture in the sense of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation) is irrelevant in this context as there is [...] factual evidence demonstrating decisive influence." (Commission decision of October 1, 2008 in Case COMP/39181 – *Candle Waxes*, para 481; see also Commission decisions in *Chloroprene Rubber* and *Gas Insulated Switchgear*)

General Court (1)

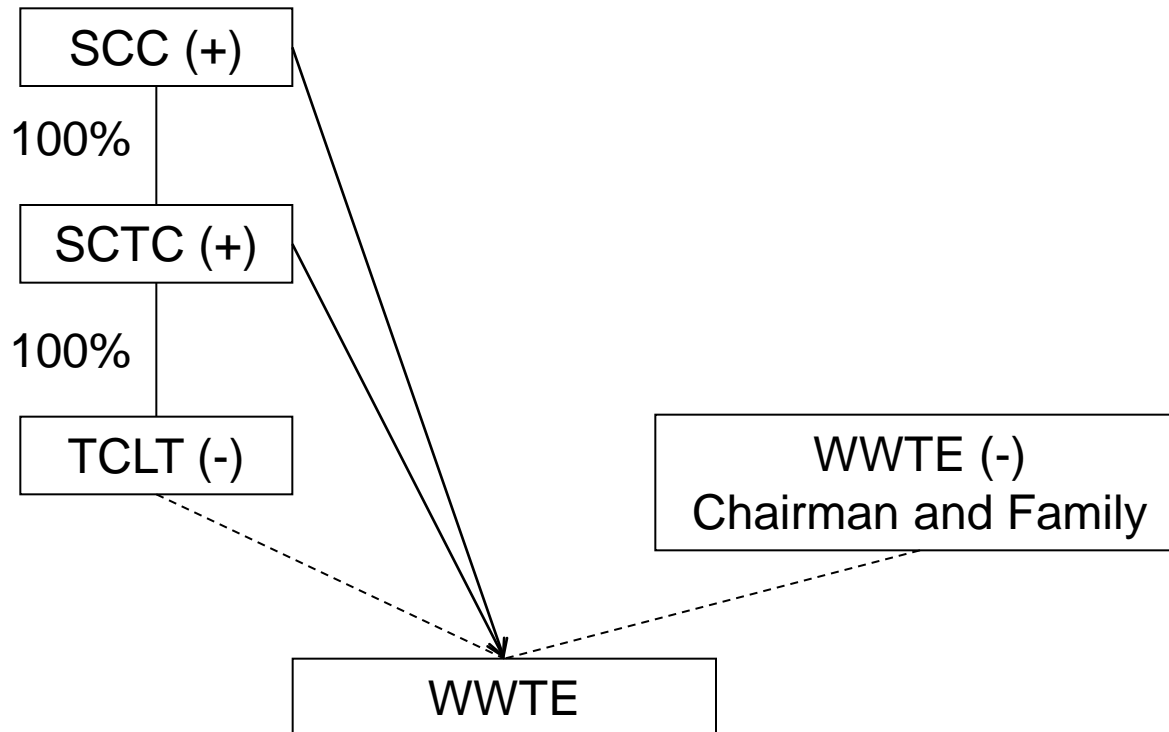
- *Avebe* judgment of General Court of September 27, 2006 (Case T-132/07):

„ in light of the close economic and legal links between Glucona, on the one hand, and Akzo and Avebe on the other, which exercised actual joint control over Glucona, the Commission did not commit an error in finding that Avebe could be held liable for Glucona’s unlawful conduct. It also follows therefrom that, contrary to the applicant’s contentions, Glucona, on the one hand, and Akzo and Avebe, on the other, do form an economic unit ..., in the context of which the unlawful conduct of the subsidiary may be imputed to the parent companies, who become liable by virtue of the fact that they in reality control its marketing policy”. (para 141)

- Fact pattern: 50/50 joint venture without own legal personality
- Criteria taken into account by General Court for finding decisive influence:
 - Lack of legal personality of joint venture company
 - Equal shareholdings by both controlling shareholders
 - Joint right to act and sign on behalf of joint venture for both shareholders
 - Equal representation of both shareholders in board and day-to-day management
 - Joint liability for joint venture's conduct
 - Knowledge of cartel conduct

General Court (2)

Alliance One International vs. Commission, judgment of General Court of October 27, 2010 (Case T-24/05)



General Court (3)

- *Alliance One International Inc. vs. European Commission*, judgment of General Court of October 27, 2010 (Case T-24/05):

"Where an undertaking is under the joint control of two or more other undertakings or persons, those undertakings or persons are by definition able to exercise decisive influence over it. That is not enough, however, to enable them to be held liable for the infringement of the competition rules committed by the undertaking which they control jointly, because such liability also requires the fulfillment of the condition concerning the actual exercise of decisive influence. ...

If it transpired that in reality only one of the undertakings or persons holding joint control in fact exercises decisive influence over the conduct of their subsidiary, or if other circumstances were able to justify it, the Commission would be able to hold only that undertaking or person jointly and severally liable, with its subsidiary, for the infringement committed by the subsidiary." (paragraph 165)

General Court (4)

- Criteria taken into account by General Court in *Alliance One International vs. Commission*:
 - Parent company representative in joint venture's board
 - Minutes of Board Meeting referred to lack of independence of WWTE from parent company
 - Shareholder veto rights on strategic decisions, e.g. investments
 - Knowledge of cartel activity by shareholder representatives and information flow on details of cartel
- No decisive influence of jointly controlling shareholder in joint venture with 25% share, because evidence showed that decisive influence was actually exercised only by 75% shareholder
- No decisive influence for direct majority shareholder TCLT
 - because lack of actual business activities of its own and
 - a purely financial interest in the company,
 - formally a customer of the joint venture, but only for accounting purposes and fiscal reasons.

General Court (5)

- *Fuji Electric Co. Limited vs. Commission*, judgment of General Court of July 12, 2011 (Case T-132/07):

"... a minority interest may enable a parent company actually to exercise a decisive influence on its subsidiary's market conduct, if it is allied to rights greater than those normally granted to minority shareholders in order to protect their financial interests and which, when considered in light of a set of consistent legal or economic indicia are such as to show that the decisive influence is exercised over the subsidiary's market conduct." (paragraph 183)

- Fact pattern: Joint venture with three parent companies (Hitachi 50%, Fuji (two entities FEH and FES) 30%, and Meidensha Corporation 20%). Hitachi and the Fuji companies held liable whereas the third shareholder did not incur a fine.
- Criteria taken into account by General Court in *Fuji*:
 - Need for shareholders to agree on important decisions under Master Agreement
 - Overlapping management posts
 - Supply relationship between parent company and subsidiary

General Court (6)

- *The Dow Chemical Company v. Commission*, judgment of the General Court of February 2, 2012 (Case T-77/08):

"The fact that the shareholders held equal shares in DDE's share capital and in the associated voting rights, as described above, meant that each of DDE's parent companies could block the strategic business decision of the joint venture. In order to ensure that the strategic business decisions of their joint venture were not thus blocked, EI Dupont and Dow were therefore required to cooperate permanently. (paragraph 81)

- Criteria taken into account by General Court:
 - Equal shareholdings of the two shareholders
 - Parent company representatives in Members Committee responsible for appointment of board members and operational management
 - Veto rights over strategic business decisions
 - Parent company presence in CR market only via joint venture
 - Joint control confirmed in merger review
 - Members Committee approval of plant closure
 - Internal investigation after inspections ordered by parent companies

General Court (7)

- *FLS Plast vs. Commission*, judgment of General Court of March 6, 2012 (Case T-64/06)

„The applicant rightly observes, however, that the exercise of such control cannot be presumed since, with a 40% shareholding, the former owner was also able to exercise influence over the conduct of Trioplast Wittenheim [the joint venture]. In those circumstances, it was for the Commission to show (i) that Trioplast Wittenheim did not determine its commercial conduct independently and ii) that that lack of independence, supposing it to be established, was explained by the decisive influence unilaterally exerted by the applicant over its subsidiary.“ (paragraph 39)

- Fact pattern: Temporary shareholdings of 60/40, later 100%, day-to-day management was in the hands of 40% shareholder
- General Court rejected Commission's finding of decisive influence for 60% shareholder
- Parent company board representation not enough in the absence of analysis of powers associated with it
- Majority shareholder's knowledge of cartel conduct not established
- Day-to-day management in the hands of minority shareholder

General Court (8)


- No consistent application of decisive influence test in the joint venture context
 - According to *Avebe*, *Fuji*, *Alliance One*, *Dow* judgments joint control is enough, but *FLS Plast* suggests that de facto sole control is required for decisive influence
- Gradual lowering of the threshold for finding decisive influence
 - While in *Avebe* direct involvement of shareholders in management and business policy of joint venture was key consideration, in *Alliance One*, *Fuji*, *Dow* the parent company representation in joint venture's management and veto rights were considered sufficient
 - In *Avebe*, *Alliance One* and *FLS Plast*, shareholder knowledge of the cartel conduct was an important factor, whereas in *Fuji* the General Court did not take the shareholders' knowledge into account, and in *Chloroprene Rubber* liability was attributed although shareholder knowledge was not clear
 - In *Raw Tobacco*, lack of interference by shareholders aware of cartel conduct was viewed as tacit approval and as evidence for actual exercise of decisive influence; in *Dow* the supervisory duty was assumed without shareholder knowledge, but derived from alleged possibility to implement compliance policy

Criticism (1)

- No single economic unit between several shareholders and joint venture company
- Decisive influence test requires sole control, because joint control does not empower to impose any measures, but only to block decisions; independent conduct in the market is only made impossible by parent instructions that are imposed on the joint venture
- The General Court's assumed need for shareholders to cooperate permanently because of risk of deadlock situation is not proven; joint venture can exist for years in deadlock situation because daily business goes on; on the contrary, deadlock situation makes operational management even more independent
- Decisive influence test requires some level of influence over daily business as cartel conduct relates to operational activity
- Incompatibility with EUMR under which the creation of a full-function joint venture is a structural change in the market and the creation of a separate undertaking

Criticism (2)

- Conflict with longstanding practice of application of Article 101 TFEU to relationship between parent and joint venture company
- Taking the pure exercise of shareholder veto rights as reason for attribution of liability is in conflict with the presumption of innocence
- No satisfactory explanation for 100% policy shift apart from obvious intention to jack up fines; failure to explain how concept of single undertaking under Article 101 TFEU, the Merger Regulation and for the purposes of attribution of liability can be maintained
- Little distinction between ability to exercise decisive influence and actual exercise of decisive influence
- No supervisory duty over joint venture company; joint venture has own obligation to comply with applicable laws; separation of legal entities to be respected
- Accrual of gains and liabilities from unlawful conduct not to parent companies, but to joint venture



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