

Cartels: parents pay for conduct of their joint ventures

October 12, 2015

Companies should not forget to include subsidiaries and joint ventures in their compliance programmes. This is important because parent companies are normally liable for cartel conduct by their subsidiaries and joint ventures. Fines imposed by the European Commission are normally calculated on the basis of sales made by the cartelists in Europe. But where the cartel concerns intermediate products sold outside Europe by a joint venture or subsidiary to its parent companies and the parent companies sell the end products in Europe, these sales of intermediate products may also be taken into account. The rulings also clarify that if a parent itself is not involved in the cartel and its liability is based entirely on the subsidiary's conduct, the parent's liability cannot exceed that of its subsidiary. Accordingly, any fine reduction granted to the subsidiary should also be granted to the parent company.

According to settled case law, the conduct of a subsidiary may be imputed to a parent company. This applies where that subsidiary is a separate legal entity that does not independently decide on its own market conduct and carries out the instructions given to it by the parent. The reason for this approach is that the parent and its subsidiary form a single economic unit and therefore constitute a single undertaking within the meaning of the cartel prohibition laid down in Article 101 TFEU. For wholly owned subsidiaries, the European Court of Justice has taken this one step further by establishing a [rebuttable presumption](#) that the parent exercises a decisive influence over the subsidiary.

It seems hard to argue that joint ventures set up and functioning as undertakings independent from their shareholders constitute a single economic unit with the shareholders. But that is exactly what the ECJ has done in a [subsequent ruling](#). The ECJ ruled that where two parent companies each have a 50% shareholding in a full-function joint venture that committed a competition law infringement, the three entities may be regarded as a single economic unit for the purpose of establishing liability for the cartel participation. This is conditional on the Commission demonstrating with factual evidence that both parents did in fact exercise decisive influence over the joint venture.

The Commission looked to this case law in holding [LG Electronics](#) and [Koninklijke Philips Electronics](#) jointly and severally liable for the participation by their 50/50 full-function joint venture LPD in the [cathode ray tubes cartel](#). The General Court considered that the Commission had provided sufficient evidence to prove that both parents exercised decisive influence over the LPD joint venture. LPD and its parent companies therefore belonged to the same economic unit the time of the infringement. As a result, the Commission could hold the parent companies jointly and severally liable for the entire fine in relation to LPD's cartel activities. As regards setting the cartel fine amount, the General Court

considered that:

- the European Commission may take the internal sales by the companies of cartelised products outside the EEA into account if these are incorporated into downstream finished products destined for sale to independent third parties within the EEA (as follows from the recent [Innolux ruling](#) by the EU Court of Justice; see also our earlier [In Context article](#));
- the Commission could include these direct sales through finished products made by the economic unit formed by the LPD group and its parent companies; that is, those made by LG Electronics as well as those made by Philips.

On the upside, the EU Court of Justice [reiterated](#) in an appeal by Total (against a fine imposed for participation in the candle wax cartel) that a parent company whose liability is entirely derivative of its subsidiary's liability must, in principle, benefit from any reduction in the liability of its subsidiary. Consequently, a fine imposed on a parent company should be brought in line with a subsidiary's fine, provided certain procedural requirements are fulfilled. These include the subsidiary and its parent bringing parallel applications with the same object.

To prevent parent companies from paying for the wrongs of subsidiaries and joint ventures, it is advisable to double-check whether these entities are included in their competition compliance programmes.